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AN APPLICATION OF PRAGMATISM: LEGAL PRAGMATISM

INTRODUCTION

Alexander Kremer

Editor in Chief

University of Szeged

alexanderkremer2000@yahoo.com

kremeralexander5@gmail.com

If we look at pragmatism from the point of view of continental philosophy, we are able to realize their basic differences immediately. The rational tradition may be regarded as dominant in the twenty-five century long tradition of Western philosophy, which means that theory has got a central role contrary to practice. Pragmatism, on the contrary, has preferred practice to theory. According to both the old and the new pragmatism, life is basically practice, and theory is only one of the tools (philosophy included) we use in this practice to improve our own life and society. Needless to say, any kind of condemnation of theory is not inferred from this standpoint, only the denial of a theory-centered philosophical standpoint.

Pragmatism has never been a canonized philosophical movement. In leaving out of consideration the particular differences, we can claim now that both the old and the new pragmatism's representatives agree in some common principles (priority of practice to theory, anti-essentialism, panrelationism, meliorism, etc.), and they draw – among others – also the conclusion that the only ultimate criterion of theory's trueness is its practical usefulness. This is the case in the legal field, too. The pragmatist approach is applicable in every dimension of life, and if we apply it to law then we call it legal pragmatism. Legal pragmatism had a different meaning in some sense at the time of its birth, than it has nowadays, but there are some obvious continuities primarily in respect of the rejection of legal formalism, secondly in connection with the holistic approach of the particular legal cases, and thirdly regarding the consideration of the judicial application of law as making law. Within the latter theme Thomas C. Grey emphasizes

in his article, *Judicial Review and Legal Pragmatism* (2003) that the constitutional judicial review has become a common practice in democratic countries after World War II, which has a pragmatic nature:

„Over the last half-century, judicial review has gone from rare to almost universal in democratic regimes around the world. The judges who review legislation for constitutionality seem generally to do so in a style that is relatively informal or pragmatic, compared to what is usual in the rest of their legal system. This less formal juristic style seems to be contagious, spreading out to influence the way judges, lawyers, law teachers and legal scholars look at law more generally in the systems that have adopted active judicial review. Partly as a result of this, civil law systems are moving away from their traditional conceptualist notion of law as a gapless and determinate system of general principles controlling subordinate rules.”

(Social Science Research Network Electronic Paper Collection,
<http://papers.ssrn.com/abstract=390460>)

Richard Rorty sets off his view regarding legal pragmatism on a general level, when he emphasizes, first of all on the basis of Thomas C. Grey's article, *Holmes and Legal Pragmatism*, that:

„I think it is true that *by now pragmatism is banal in its application to law*. I also suspect that Grey is right when he claims that *'pragmatism is the implicit working theory of most good lawyers'*. *To that extent, at least, everybody seems now to be a legal realist*. Nobody wants to talk about a 'science of law' any longer. Nobody doubts that what Morton White called 'the revolt against formalism' was a real advance, both in legal theory and in American intellectual life generally.” (PSH, 93. – Emphasis added: A. K.)

Rorty has obviously ceased from continuing the pragmatist tradition in some respects. It is out of question however, that his neopragmatism not only originally renewed the traditional pragmatism (incorporating even the latest European philosophical development: Wittgenstein, Heidegger, Sartre, Gadamer, Foucault, Derrida, etc. left out of consideration by the classic pragmatists), but his views are also in eminent harmony with some of Dewey's philosophical intentions:

„Dewey preferred to skip talk of 'authority', 'legitimacy' and 'obligation' and to talk instead about 'applied intelligence' and 'democracy'. He

hoped we would stop using the juridical vocabulary which Kant made fashionable among philosophers, and start using metaphors drawn from town meetings rather than from tribunals. He wanted the first question of both politics and philosophy to be not, 'What is legitimate?' or, 'What is authoritative?' but, 'What can we get together and agree on?' This is the strand in Dewey's thought which Rawls, especially in his later writings, has picked up and developed.

*Posner's vision of the function of American judges – his vision of their ability to travel back and forth between the present and the future and to try to fashion a moral unity out of our national history – fits nicely into Dewey's way of thinking. Nor is Posner's vision very different, I suspect, from that of most Americans who take an interest in what the courts, and especially the Supreme Court, are up to – at least those who are grateful for the Court's decision in *Brown v. Board of Education*. For those who believe that the Civil Rights Movement, the movement which *Brown* initiated, was an enormous boost to our national self-respect and a reassuring instance of our continuing capacity for moral progress, the thought that the courts do not just apply rules, but make them, is no longer frightening."* (PSH, 111. – Emphasis added: A. K.)

On a more general, philosophical level Rorty makes his standpoint even more unequivocal, when he writes that:

"I agree with Grey when he says: 'Pragmatism rejects the maxim that you can only beat a theory with a better theory... No rational God guarantees in advance that important areas of practical activity will be governed by elegant theories.'

Further, I think that pragmatism's *philosophical* force is pretty well exhausted once this point about theories has been absorbed. *But, in American intellectual life, 'pragmatism' has stood for more than just a set of controversial philosophical arguments about truth, knowledge, and theory. It has also stood for a visionary tradition* to which, as it happened, a few philosophy professors once made particularly important contributions – a tradition to which some judges, lawyers, and law professors still make important contributions. These are the ones who, in their opinions, or briefs, or articles, enter into what Unger calls 'open-ended disputes about the basic terms of social life'." (PSH, 99-100. – Emphasis added: A. K.)

The present issue of *Pragmatism Today* has three main parts. Our readers will find in the first part the thoroughly elaborated writings about legal pragmatism.

These analyses undertake clearly the defence of legal pragmatism, and two excellent treatises of them, that of Susan Haack and Frederick Kellogg, rehabilitate Oliver Wendell Holmes' views. They interpret him in different ways, but one of their final results is the same: the early views of Holmes show the features of legal pragmatism.

The second main part offers a fantastic collection of the (into English translated) best papers of a pragmatist conference 2011. The participants of the II. International Pragmatist Conference of Córdoba (II Coloquio Internacional Pragmatista: Filosofía, Psicología, Política (28, 29 y 30 de septiembre del 2011, Villa General Belgrano, Córdoba, Argentina)) have analysed both the views of the traditional pragmatists, and that of the neopragmatists, so the reader may get an interesting panorama of the South American interpretations of the topic.

In our final main part, titled „Miscellanies” we offer a treatise from Janos Boros („Truth in philosophy after Rorty and Dewey”) and a book review from Roman Madzia (Richard Rorty, *An Ethics for Today: Finding Common Ground Between Philosophy and Religion*).

Literature

- Grey, Thomas C., „Holmes and Legal Pragmatism”, 41 *Stanford Law Review* 787-870 (1989)
- Grey, Thomas C., „Judicial Review and Legal Pragmatism”, 38 *Wake Forest Law Review* 473-511 (2003) and Social Science Research Network Electronic Paper Collection, <http://papers.ssrn.com/abstract=390460>
- Rorty, Richard, „The Banality of Pragmatism and the Poetry of Justice”. In: Rorty, *Philosophy and Social Hope* (Penguin Books, 1999, PSH)
- Rorty, Richard, „Pragmatism and Law: A Response to David Luban”. In: Rorty, *Philosophy and Social Hope* (Penguin Books, 1999, PSH)

I. LEGAL PRAGMATISM

ON LEGAL PRAGMATISM:

WHERE DOES "THE PATH OF THE LAW" LEAD US?¹

Susan Haack

University of Miami

shaack@law.miami.edu

When I think ... of the law, I see a princess mightier than she who once wrought at Bayeux, eternally weaving into her web dim figures of the ever-lengthening past,—figures too dim to be noticed by the idle, too symbolic to be interpreted except by her pupils, but to the discerning eye disclosing every painful step and every world-shaking contest by which mankind has worked and fought its way from savage isolation to organic social life.²

This all started with a deceptively simple-sounding pair of questions: "What is legal pragmatism, and is there anything worthwhile in it?" It will end, however, with some not-so-simple answers: "What is called 'legal pragmatism' today is very different from the older style of legal pragmatism traditionally associated with Oliver Wendell Holmes; and there is much that is worthwhile in the conception of law revealed by reading Holmes's 'The Path of the Law' in the light of the philosophy of the classical pragmatist tradition, though less in contemporary legal neo-pragmatism." As I articulate and defend these answers, my reflections on the varieties of pragmatism—philosophical and legal, old and new—will be wrapped around my exploration of the meaning of "The Path of the Law" and the strengths and weaknesses of its arguments.

1. Legal Pragmatism Today

Of late, the word "pragmatism" appears in the titles of books, chapters, and articles on legal philosophy often enough to convey the impression that there must be

¹ © 2005 Susan Haack. All rights reserved. (This paper first appeared in the *American Journal of Jurisprudence*, 50, 2005: 71-105. The footnotes have been updated, where appropriate, for this publication.)

² Holmes, "The Law," address delivered to the Suffolk Bar Association Dinner, February 5th, 1885; reprinted in Julius J. Marke, ed., *The Holmes Reader* (Dobbs Ferry, NY: Oceana, Docket Series, 1955; second edition, 1964), 62-3, p.63.

some kind of renaissance of pragmatism going on among legal scholars.³ When you look at the contents of those books and articles, though, you are likely to find yourself more than a little confused about just what this apparent renaissance is a renaissance of.

Pragmatism, you will read, is simply a "general aversion to theory" (Atiyah, 1987);⁴ it is "solving legal problems using every tool that comes to hand, including precedent, tradition, legal text, and social policy—[and] renounc[ing] the entire project of providing a theoretical foundation for constitutional law" (Farber, 1988);⁵ an "understand[ing] that what we see always depends upon our viewpoint, and that understanding others is frequently a matter of attempting to recreate the standpoint from which they view events" (Hantzis, 1988);⁶ "a realistic expression of the recognition that metatheoretical claims to truth are philosophically indefensible" (Patterson, 1990);⁷ "freedom from theory-guilt" (Grey, 1990);⁸ "a kind of exhortation about theorizing ... not say[ing] things that lawyers and judges do not know, but rather remind[ing] lawyers and judges of what they already believe but often fail to practice" (Smith, 1990);⁹ "looking at problems concretely, without illusions, with a full awareness of the limitations of human reason, with a sense of the "localness" of human knowledge, the difficulty of translations between

³ Indeed, a symposium in *Southern California Law Review*, 63, 1990, was entitled "The Renaissance of Pragmatism in American Legal Thought."

⁴ P. S. Atiyah, *Pragmatism and Theory in English Law* (London: Stevens and Sons, 1987), p.5.

⁵ Daniel A. Farber, "Legal Pragmatism and the Constitution," *Minnesota Law Review* 72, 1988: 1331-78, p.1332.

⁶ Catharine Wells Hantzis, "Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.," *Northwestern University Law Review*, 82, 1988: 541-95, p.595.

⁷ Dennis Patterson, "Law's Pragmatism: Law as Practice and Narrative," *Virginia Law Review*, 76, 1990: 937-98, p.996.

⁸ Thomas C. Grey, "Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory," 63 *Southern California Law Review*, 63, 1990: 1569-95, p.1569.

⁹ Steven D. Smith, "The Pursuit of Pragmatism," *Yale Law Journal*, 100, 1990: 409-49, p.411. (Smith acknowledges that his is a non-standard interpretation of legal pragmatism.)

cultures, the unattainability of 'truth'" (Posner, 1990);¹⁰ the view that "practice is not undergirded by an overarching [*sic*] set of immutable principles, or by an infallible or impersonal method" (Fish, 1990);¹¹ "a synthesis of contextualism and instrumentalism" (Grey, 1991);¹² "antifoundationalism, and ... social optimism" (Hoy, 1991);¹³ "the distinctly American philosophical movement begun by C. S. Peirce and William James, developed by John Dewey, and recently espoused by Richard Rorty ... a substantive position ... [which] yields relativism about truth and justice" (Warner, 1993);¹⁴ "an eclectic, result-oriented, historically-minded antiformalis[m]" (Luban, 1996);¹⁵ "a critique of essentialist-/conceptualist formalism, and an admonition to avoid excessive theorizing or abstractions," urging "more dialogue, traditionalism, attention to context, and the middle way" (Tamanaha, 1997);¹⁶ the idea that "a satisfactory theory of adjudication for lawyers must enable lawyers to predict what courts will do" (Leiter, 1997-8);¹⁷ "a philosophical discourse that is general, hysteric, external, practical, and progressive, and beside it a legal antecedent discourse (that of Holmes) that is

professional, obsessive, internal, theoretical, and conservative" (Alberstein, 2002);¹⁸ "a disposition to base action on facts and consequences rather than on conceptualisms, generalities, pieties, and slogans ... reject[ing] moral, legal and political theory when offered to guide legal ... decisionmaking" (Posner, 2003);¹⁹ "an extension of skepticism, ultimately rooted in Greek sophism" (Leaf, 2003);²⁰ an acknowledgment that "devotion to theory may be just as damaging and unfruitful as devotion to traditional legal formalism" (Weaver, 2003);²¹ "an eclectic and self-reflective stance about both theory and methods; a recognition of a plurality of contingent 'truths' and 'meanings' that are grounded in concrete experience rather than absolute or fundamental truths; and avoidance of dichotomies and uni-dimensional approaches and an explicit incorporation of democratic ideals in both the outcomes (goals) of public policy and in the way that policy analysis is itself conducted" (Schneider and Ingram, 2003);²² the view that "the validity of consensus building depends not on its theoretical possibility of achieving 'win-win' solutions, but on the efficacy of consensus building in its application" (Coglianese, 2003).²³

¹⁰ Richard A. Posner, "A Pragmatist Manifesto," *Problems of Jurisprudence* (Cambridge: Harvard University Press, 1990), chapter 15; the quotation is from p.465.

¹¹ Stanley Fish, "Almost Pragmatism: Richard Posner's Jurisprudence," *University of Chicago Law Review*, 57, 1990: 1447-75, p.1464.

¹² Thomas C. Grey, "What Good is Legal Pragmatism?," in *Pragmatism in Law and Society*, eds. Michael Brint and William Weaver (Boulder, CO: Westview Press, 1991), 9-27, p.15.

¹³ David Hoy, "Is Legal Originalism Compatible with Philosophical Pragmatism?," in Brint and Weaver, *Pragmatism in Law and Society* [note 12], 343-58, p.344.

¹⁴ Richard Warner, "Why Pragmatism? The Puzzling Place of Pragmatism in Critical Theory," *University of Illinois Law Review*, 1993: 535-63, p.537. Later he adds, rather confusingly, that

¹⁵ "[t]he views of legal pragmatists are generally inconsistent with Peircean pragmatism." *Id.*, p.543.

¹⁶ David Luban, "What's Pragmatic About Legal Pragmatism?," *Cardozo Law Review* (18, 1996: 43-73, p.44.

¹⁷ Brian Z. Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (Oxford: Clarendon Press, 1997), p.35.

¹⁸ Brian Leiter, "Naturalism and Pragmatism in Legal Theory," section III of "Rethinking Legal Realism: Toward a Naturalized Jurisprudence," *Virginia Law Review*, 76.2, 1997-8: 267-315, pp.285-6.

What we have here is not simply—as perhaps we do with "realism" and "positivism"²⁴—a divergence of the

¹⁸ Michal Alberstein, *Pragmatism and Law: From Philosophy to Dispute Resolution* (Dartmouth: Ashgate, 2002), p.2.

¹⁹ Richard A. Posner, *Law, Pragmatism, and Democracy* (Cambridge: Harvard University Press, 2003), p.3.

²⁰ Murray J. Leaf, "Pragmatic Legal Norms," in Alfonso Morales, ed., *Renasant Pragmatism: Studies in Law and Social Science* (Aldershot, Hants: Ashgate, 2003), 72-89, p.73.

²¹ William G. Weaver, "The 'Democracy of Self-Devotion': Oliver Wendell Holmes, Jr., and Pragmatism," in Morales, *Renasant Pragmatism* [note 20], 3-30, p.4.

²² Anne Larson Schneider and Helen Ingram, "The Pragmatic Policy Analyst," in Morales, *Renasant Pragmatism* [note 20], 156-79, p.157.

²³ Gary Coglianese, "Does Consensus Work? A Pragmatic Approach to Public Participation in the Regulatory Process," in Morales, *Renasant Pragmatism* [note 20], 180-95, p.189.

²⁴ "Realism" has not one but umpteen philosophical meanings (see Susan Haack, "Realisms and Their Rivals: Recovering Our Innocence," *Facta Philosophica*, 4.1, 2002:

legal meaning(s) of a word from its philosophical meaning(s); it is a desperately confusing scholarly mare's nest. Rather than tackling it directly, I shall first sketch the origins of the classical pragmatist tradition in philosophy, and Oliver Wendell Holmes's place in this story; and then articulate the complex argument of "The Path of the Law," and explore what this famous lecture of Holmes's might have to teach us now. With this work in hand, it should be possible to dispel at least some of the current confusions.

2. The Pragmatist Tradition in Philosophy

Besides its use(s) in legal theory, the word "pragmatism" has, of course, both an everyday and a technical philosophical use—well, I say "of course": but (of course!) the two are often run together, and the philosophical use is ambiguous to say the least.

In the eighteenth century, to describe someone as a pragmatist was to say that he was a practical, busy person. By the late nineteenth century, and apparently for much of the twentieth, the word had acquired a pejorative tone, as "pragmatic" came to mean "officious, opinionated," and "pragmatism," correspondingly, "officious meddlesomeness." By now, the meaning of these words has shifted once again: in ordinary speech today, "pragmatism" usually connotes concern with expediency rather than principle, with "matters of fact, often to the exclusion of intellectual or artistic matters; practical as opposed to idealistic."²⁵

67-88); but they share the idea that something—truth, reality, moral or epistemic or etc., values, or whatever—is, in some sense, independent of us. And "positivism," as used philosophically, is understood sometimes in more and sometimes in less expansive ways.

²⁵ I am relying on the *Oxford English Dictionary Online* (2005)—which offers as an example of the nineteenth-century usage this, from Charles Cowden Clarke, *Shakespeare's Characters: Chiefly Those Subordinate* (1863; New York: AMS Press, 1974), p.209: "[Malvolio] is a moral teetotaller, a formalist, a pragmatist ..."; *Dictionary of the English Language* (Philadelphia: David Mackay, 1885); *A Standard Dictionary of the English Language* (London: Funk and Wagnalls, 1897); *The Concise Oxford Dictionary of*

In philosophy, "classical pragmatism" refers to the late nineteenth-century movement in American philosophy of which the first moment was Charles Sanders Peirce's pragmatic maxim, which characterized meaning in terms of the "pragmatic" (practical, experiential) consequences of a concept's applying; and by extension to later work in the spirit of this tradition. "Neo-pragmatism" refers to the late twentieth-century development associated with Richard Rorty's attacks on foundationalism, essentialism, and scientism.

It was William James who, in 1898, first put the word "pragmatism" into philosophical currency, and who made this style of philosophy famous.²⁶ But James acknowledged that the key idea had arisen in discussions with Peirce at the Metaphysical Club in Cambridge, Mass., in the very early 1870s. Indeed, some seeds of pragmatism are already discernable in Peirce's 1868 series of anti-Cartesian papers and his 1871 review of Fraser's edition of the works of George Berkeley;²⁷ and Peirce had articulated the pragmatist conception of meaning, quite unmistakably, in a paper published in 1878: "How to Make Our Ideas Clear,"²⁸ which he would later describe as "a little paper expressing some of the opinions I had been urging [at the Metaphysical Club] under the name of pragmatism." However, he explained, when he published this paper he had deliberately

Current English (Oxford: Clarendon Press, revised fourth edition, 1959); and *Webster's Ninth New Collegiate Dictionary* (Springfield, MA: Merriam-Webster's, 1991), from which the current meaning quoted in the text is taken.

²⁶ William James, "Philosophical Conceptions and Practical Results," *University Chronicle* (University of California, Berkeley), 1, September 1898: 287-310; reprinted in James, *Pragmatism*, eds. Frederick Burkhardt and Fredson Bowers (Cambridge: Harvard University Press, 1975), 255-70.

²⁷ Charles Sanders Peirce, *Collected Papers*, eds. Charles Hartshorne, Paul Weiss, and (vols 7 and 8) Arthur Burks (Cambridge: Harvard University Press, 1931-58), 5.213-357 (1868) and 8.7-38 (1871). **[References to the *Collected Papers* are by volume and paragraph number. With published papers, the date given in parentheses is the year of publication; with unpublished papers, it is the year the paper was written.]**

²⁸ Peirce, *Collected Papers* [note 27], 5.388-410 (1878).

avoided the word "pragmatism," because "in those medieval times, I dared not in type use an English word to express an idea unrelated to its received meaning"²⁹—i.e., presumably, its *then* received meaning, "officious meddlesomeness."³⁰ Peirce took his bows as founder of pragmatism in a lecture at Harvard in 1903; though the dove he had sent forth in 1878 had never returned to him, he wrote, "of late quite a brood of young ones have been fluttering about, from the feathers of which I might fancy that mine had found a brood."³¹

Both Peirce and James wrote that they saw pragmatism as a method, an approach to philosophical questions focused on pragmatic consequences, not as a body of philosophical doctrine; and pragmatist philosophy was from the beginning extraordinarily various. It encompassed a vast range of interests, areas, and angles—as the young Italian philosopher Giovanni Papini emphasized when he likened pragmatism to a great hotel, where all the guests pass through the same corridor, but each works alone in his own room on the questions that especially interest him. But a second and less benign kind of variousness was also present from the beginning, in differences between Peirce's understanding of the Pragmatic Maxim and James' construal: Peirce stressed the connection between "pragmatic" and Kant's "*pragmatische*," meaning, roughly, "experiential," as contrasted with "*a priori*"; James stressed the connec-

tion between "pragmatic" and the Greek "*praxis*," "action," as contrasted with theory.

These differences became more marked as Peirce moved towards a realist, subjunctive formulation of the maxim (according to which to say, for example, that a diamond is hard, means not just that if it *is* rubbed against other substances it *will* scratch them, but that if it *were* rubbed against them it *would* scratch them);³² and as James developed his doctrine of the Will to Believe, and then found himself struggling, not entirely successfully, to distinguish this doctrine from the pragmatism-as-method he took himself to share with Peirce. By 1905—though writing warmly of James and even of the radical British pragmatist F. C. S. Schiller—Peirce was complaining about the "merciless abuse" to which his word had been subjected in the literary journals, abuse so egregious that he was ready "to kiss his child good-by," and "to announce the birth of the word 'pragmaticism,' which is ugly enough to be safe from kidnappers."³³

In view of the potential for fissure already present in the differences between Peirce's and James's elaborations of the pragmatic method, and the potential for confusion with this or that specific philosophical doctrine, not to mention the shifting meaning of the word in ordinary usage, the subsequent fragmentation of philosophical pragmatisms is hardly surprising. And once Rorty got hold of James, pragmatism took a sharply radical turn: what could be further from Peirce's observations that the truth "is SO, whether you, or I, or anybody believes it is so or not," and that "every man is fully convinced that there is such a thing as truth, or he would not ask any question"³⁴ than Rorty's cheerful boast that he "does not

²⁹ Peirce, *Collected Papers* [note 27], 5.13 (c.1906). (It was the editors of the *Collected Papers*, and not Peirce himself, who supplied "The Pragmatic Maxim" and "Applications of the Pragmatic Maxim" as subtitles of the relevant sections of "How to Make Our Ideas Clear.")

³⁰ So far as I have been able to determine, Peirce first used the word "pragmatism" in print in his August 1899 review of John Fiske, *Through Nature to God* (reprinted in *Charles Sanders Peirce: Contributions to the Nation*, eds Kenneth Laine Ketner and James Edward Cook (Lubbock: Texas Tech Press, 1975-79), 2: 210-211); he used the word again in his January 1901 review of two books by Anthony, Earl of Shaftesbury (*ibid*, 3: 261); and, finally, describes his own view as "pragmatism" in his entry under "Pragmatic and Pragmatism" in J. M. Baldwin, *Dictionary of Philosophy and Psychology* (New York: MacMillan, 1902) 2: 321-2, reprinted in *Collected Papers* [note 27], 5.1-5.

³¹ Peirce, *Collected Papers* [note 27], 5.17 (1903).

³² Peirce, *Collected Papers* [note 27], 5.453 (1905): "the question is, not what *did* happen, but ... whether that diamond *would* resist an attempt to scratch it." In 1878, Peirce admits, he had "endeavored to gloze over this point," or had perhaps been unclear in his own mind. ("Realist," as used here, contrasts with "nominalist"; Haack, "Realisms and Their Rivals" [note 24], pp.78-80.)

³³ Peirce, *Collected Papers* [note 27], 5.414 (1905).

³⁴ Peirce, *Collected Papers* [note 27], 2.135 (1902), 5.211 (1903).

have much use for the notion of 'objective truth'," or his breezy assurance that truth is "entirely a matter of solidarity"?³⁵

Wide-ranging as their philosophical interests were—Peirce's in logic, semiotic, metaphysics, cosmology, theory of inquiry, philosophy of science, and so on, James's in metaphysics, philosophy of religion, philosophy of mind, ethics, and so forth—neither had much to say about the philosophy of law. Though recently it seems to have been Rorty's style of neo-pragmatism that has been most warmly welcomed by legal commentators, traditionally it is Oliver Wendell Holmes who has been seen as the originator of the pragmatist tradition in legal theory. Elsewhere, I have traced the evolution of philosophical pragmatism from Peirce to Rorty and beyond;³⁶ here, I shall begin with Holmes's place in the classical-pragmatist chapter of this story.

Holmes, we know, attended some of Peirce's lectures at the Lowell Institute in 1866;³⁷ and he seems to have been involved in the Metaphysical Club even before the beginning. In 1868 James had written to him from Berlin, proposing "[w]hen I get home let's establish a philosophical society to have regular meetings and discuss none but the very tallest and broadest questions—to be

composed of none but the very topmost of Boston manhood," and predicting that this might "grow into something very important after a sufficient number of years."³⁸ The evidence suggests, however, that though Holmes participated early on, he was rarely present at meetings of the club after the winter of 1871-2; at any rate, in 1927—at which point he was the only surviving member—he told Charles Hartshorne (one of the young editors of Peirce's *Collected Papers*) that he "soon dropped out of the band."³⁹

In 1906, reminiscing in print about the origins of pragmatism, Peirce testifies to the influence of two other attorneys who also participated: Nicholas St. John Green, "a skillful lawyer, ... a disciple of Jeremy Bentham," who urged the importance of applying Alexander Bain's definition of belief as "that upon which a man is prepared to act"—from which, Peirce continues, "pragmatism is scarce more than a corollary"; and Chauncey Wright, "something of a philosophical celebrity in those days ... our boxing-master whom we ... used to face to be severely pummeled." While he also writes warmly of Holmes—"Mr. Justice Holmes will not, I believe, take it ill that we are proud to remember his membership"⁴⁰—Peirce says nothing specific about his influence. Holmes himself would later write that he thought he "learned more from Chauncey Wright and St. John Green" than from Peirce; and express reservations about Hartshorne's prediction that the publication of

³⁵ Richard Rorty, "Trotsky and the Wild Orchids," *Common Knowledge*, 1.3, 1992: 140-53, p.141; *Objectivity, Relativism and Truth* (Cambridge: Cambridge University Press, 1991), p.32.

³⁶ Susan Haack, "Pragmatism, Old and New," *Contemporary Pragmatism*, 1.1. 2004: 1-41; reprinted in Susan Haack and Robert Lane, eds., *Pragmatism, Old and New* (Amherst, NY: Prometheus Books, 2006), 15-57. Page references here are to *Pragmatism, Old and New*.

³⁷ Mark DeWolfe Howe, *Justice Oliver Wendell Holmes: The Shaping Years* (Cambridge: Belknap Press of Harvard University Press, 1957), p.251, citing Philip P. Wiener, *Evolution and the Founders of Pragmatism* (Cambridge: Harvard University Press, 1949; Philadelphia: University of Pennsylvania Press, 1972), p.75. Peirce's lectures, entitled "The Logic of Science: Or, Induction and Hypothesis," appear in *Writings of Charles S. Peirce: A Chronological Edition* (Bloomington, IN: 1982), 1.358-504.

³⁸ Quoted by Max Fisch, "Was There a Metaphysical Club in Cambridge?", in Edward G. Moore and Richard Robin, eds., *Studies in the Philosophy of Charles Sanders Peirce* (Amherst, MA: University of Massachusetts Press, 1964), 5-32, p.4, citing Ralph Barton Perry, *The Thought and Character of William James* (Boston: Little, Brown, and Company, 1935), I, p.508; also found in Liva Baker, *The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes* (New York: HarperCollins, 1991), pp.214-5.

³⁹ Max Fisch, "Was There a Metaphysical Club in Cambridge?" [note 38], p.22.

⁴⁰ Peirce, *Collected Papers* [note 27], 5.12 (c.1906).

Peirce's papers would be an important philosophical event.⁴¹

And—not surprisingly, given that the then-common meaning of "pragmatism" was so off-putting, and that *The Common Law* and "The Path of the Law" were both published before James had put the word into circulation in its special philosophical sense—Holmes never officially allied himself with pragmatism. Indeed, when James introduced his pragmatism to the philosophical world Holmes, like many readers, had trouble distinguishing it from the Will to Believe—which he described in a letter to Frederick Pollock as "an amusing humbug."⁴² So when, much later, he read an early anthology of Peirce's work,⁴³ what struck him was that Peirce's "reasoning in the direction of religion &c., seems ... to reflect what he wants to believe—despite his devotion to logic."⁴⁴ He was, however, apparently much impressed by Dewey, of whose *Experience and Nature*⁴⁵ he wrote in 1931 that "although [it] is incredibly ill written ... [s]o methought God would have spoken had He been inarticulate but keenly desirous to tell you how [the cosmos] was."⁴⁶

⁴¹ Holmes to Charles Hartshorne, August 25th, 1927; my source is Fisch, "Was There a Metaphysical Club in Cambridge?" [note 38], pp.10-11.

⁴² *Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1932*, ed. Mark DeWolfe Howe (Cambridge: Harvard University Press, 1941), 1:139 (June 17, 1908).

⁴³ *Chance, Love, and Logic*, ed. Morris R. Cohen (1923; Lincoln, NE: University of Nebraska Press, 1998). Peirce, however, apparently didn't like the "Will to Believe" doctrine much more than Holmes did; at any rate, the year after *The Will to Believe*, dedicated "to my old friend, Charles Sanders Peirce," was published, he is found writing rather pointedly of the "Will to Learn" (*Collected Papers* [note 27], 5.583 (1898)). Holmes may have been misled by the title of Peirce's paper, "The Doctrine of Evolutionary Love," included in this early anthology: a paper which in fact articulates the cosmological theory Peirce calls "agapism," positing the evolution of order from chaos by "affectability."

⁴⁴ "The Holmes-Cohen Correspondence," ed. F. M. Cohen, *Journal of the History of Ideas*, IX, 1948: 3-52, p.34.

⁴⁵ John Dewey, *Experience and Nature* (New York: W. W. Norton, 1929).

⁴⁶ *Holmes-Pollock Letters* [note 42], 2:287 (May 15, 1931).

In 1942, Max Fisch described Holmes's *The Common Law* as "full of the spirit of pragmatism from the ringing sentences in which its theme is announced—'the life of the law has not been logic; it has been experience'—on to the end";⁴⁷ in 1949 Philip Weiner entitled chapter 8 of his *Evolution and the Founders of Pragmatism*, "Evolutionary Pragmatism in Holmes's Theory of the Law";⁴⁸ and many commentators have noted the apparent parallel between Holmes's presentation of the "prediction theory" in "The Path of the Law" (1896), and Peirce's statement of the pragmatic maxim in "How to Make Our Ideas Clear":

Consider what effects, that 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. [Peirce]⁴⁹

... a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court;—and so of a legal right. [Holmes]⁵⁰

⁴⁷ Max Fisch, "Justice Holmes, the Prediction Theory of the Law, and Pragmatism" (1942), in Kenneth Laine Ketner and Christian J. W. Kloesel, eds, *Peirce, Semeiotic, and Pragmatism: Essays by Max Fisch* (Bloomington, IN: Indiana University Press, 1986), 6-18, p.8. This observation of Fisch's should not be taken as suggesting that the pragmatists were hostile to logic. James, to be sure, was no logician; but (as Fisch would have been well aware) Peirce was a major figure in the history of modern logic, developing a unified propositional and predicate calculus by 1883. See Peirce, "On the Algebra of Logic" (1880), and "The Logic of Relatives" (1883), *Collected Papers* [note 27], 3.154-251 and 3.328-58; and O. H. Mitchell, "On a New Algebra of Logic," in *Studies in Logic by Members of the Johns Hopkins University* (Boston, MA: Little, Brown, 1883), 72-106 (Mitchell was Peirce's student, and Peirce the editor of this volume). Gottlob Frege had also arrived at a unified propositional and predicate calculus, a few years earlier, in his *Begriffsschrift* (1879; English translation by Terrell Ward Bynum, *Conceptual Notation and Related Articles*, Oxford: Clarendon Press, 1972).

⁴⁸ Wiener, *Evolution and the Founders of Pragmatism* [note 37].

⁴⁹ Peirce, *Collected Papers* [note 27], 5.401 (1878).

⁵⁰ Holmes, "The Path of the Law," *Harvard Law Review*, 10, 1897: 457-78; in Sheldon M. Novick, ed., *The Collected Works of Justice Holmes* (Chicago: Chicago University Press, 1995), vol.3, 391-406. The quotation is from p.391. Page references in what follows are to the *Collected Works*.

Indeed, Fisch once suggested that, rather than Holmes's idea being a special case of Peirce's, Peirce's pragmatic maxim may have been a kind of extrapolation of this strand in Holmes's thinking⁵¹ (as, it seems, J. L. Austin's theory of performative utterances was a kind of extrapolation of H. L. A. Hart's concept of operative speech).⁵² For Holmes had expressed something like this idea as early as 1872, in a note in the *American Law Review* in which, summarizing and endorsing Pollock's critique of John Austin's *Lectures on Jurisprudence*, he had written:

[A]s is clear from numerous instances of judicial interpretation of statutes and of constitutions in this country, ... in a civilized state it is not the will of the sovereign that makes lawyers' law, even when that is its source, but what a body of subjects, namely the judges, by whom it is enforced, say is his will. ... The only question for lawyers is, how will the judges act?⁵³

Fisch's conjecture oversimplifies, however. As I noted earlier, some proto-pragmatist ideas were already apparent in Peirce's work before this note of Holmes's; moreover, the philosophy of law Holmes had developed by the time of "The Path of the Law" turns out to be far subtler and more sophisticated than the label "prediction theory" suggests. So we need to look more closely.

3. The Path of the Law: Or, You Take the Low Road and I'll Take the High Road

Holmes's elegantly aphoristic style has tempted many readers to assume that this or that memorable phrase in "The Path of the Law" encapsulates the whole; but summary descriptions like "the prediction theory," "the Bad Man theory," or "the revolt against formalism," and one-dimensional pictures of Holmes simply as early

precursor of the legal-realist movement or of the law-and-economics approach, as anti-theoretical, etc., aren't really adequate to the depth, or the inner complexities, of his jurisprudence.

Inner complexities — or inner contradictions? The opening lines of "The Path of the Law" seem eminently down-to-earth and practical: "When we study law we are not studying a mystery but a well-known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. ... The object of our study ... is ... the prediction of the incidence of the public force through the instrumentality of the courts" ("The Path of the Law," p.391). But Holmes's closing lines take us very far from mundane practical concerns about when the bailiff may be expected at the door: "happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food besides success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you ... connect your subject with the universe, and catch an echo of the whole, a glimpse of its unfathomable process, a hint of the universal law" (405-6). Some may be inclined simply to ignore these concluding sentences, or to write them off as nothing more than an embarrassing effusion of late-nineteenth-century purple prose; but this would be a mistake. There is a larger picture here, a larger picture in which Holmes's briskly practical opening and his visionary closing are seamlessly integrated.

As he climbs the steep path from the mundane specificities that concern the working attorney to the intellectual aspirations of the legal theorist, Holmes's arguments begin negatively. His concern is to dispel some common illusions: Law, he argues, cannot be identified with Morality; does not transcend the specific practices of the many and various legal systems; and

⁵¹ Fisch, "Justice Holmes, the Prediction Theory of the Law, and Pragmatism" [note 47], p.12.

⁵² J. L. Austin, *How to Do Things With Words* (Cambridge: Harvard University Press, 1962), p.7, n.1. My thanks to William Widen for drawing this footnote to my attention.

⁵³ Oliver Wendell Holmes, *American Law Review* 6:723, 1872; reprinted in Novick, *The Collected Works of Justice Holmes* [note 50], vol. 1, 294-7; the quotation is from p.295.

bears little resemblance to a set of first principles or axioms from which correct decisions may be deduced.

Unjust laws have been enforced; and though terms like "duty," "right," "malice," "intent," etc., play a role both in moral and in legal discourse, their meanings diverge in the two contexts (nor are all legitimate moral demands legally enforced, or legally enforceable). So, to begin to get a clear view of the law as distinct from morality, we need to set ethical considerations firmly aside: Holmes advises taking the perspective of a working attorney advising a hypothetical client who doesn't give a damn what's right, but just wants to know what's legal. Thus: "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, and not as a good one, who finds his reasons for conduct, whether inside the law or out of it, in the vaguer sanctions of conscience" (392).

When "our friend the bad man" (393) consults an attorney, he isn't interested in The Law in the abstract: he wants to know what the current law in Massachusetts (or wherever) is. Moreover, since statutes, rules, and precedents are to some degree open-textured and, where they are, may be construed in more than one way, the bad man wants to know, not just what the statutes, etc., say, but how judges can be expected to interpret them. Thus: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law" (393). It is this strand of the argument, of course, that is captured in the description of Holmes's approach as "the prediction theory," and—along with the focus on the Bad Man—in the classification of Holmes as proto-legal-realist.

Judges tend to present their rulings and opinions as if they were deductions from general principles—in "logical form," as Holmes says; and often suppose that judicial dissent must be a sign that someone has made a mistake in logic. This, however, is another illusion. To be

sure, logic has a place in law; still, a legal system is very different from a set of axioms from which correct decisions may be deduced.⁵⁴ Judicial dissent is unavoidable; for disagreements among judges really turn, not on the formal validity or invalidity of their arguments, but on their substantively different ideas about questions of policy. Thus: "The language of judicial decision is mainly the language of logic. ... [But b]ehind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment" (397). It is this strand of the argument, of course, that is captured by classifying Holmes's approach under the rubric "the revolt against formalism."⁵⁵

Now Holmes can move to higher jurisprudential ground, and present a positive account of the growth and evolution of the law going far beyond the-law-in-England-in-1215 or the-law-in-Massachusetts-in-1897.⁵⁶ The first side of this positive account is historical: the intelligent study of its history illuminates the forces that made present law thus and so. This will sometimes reveal, however, that the source of a legal distinction or rule, etc., is to be found in circumstances or procedures which no longer obtain, or that there is no better warrant for a rule we still confidently enforce than that things have always been done this way.

Holmes gives as example the doctrine in English law that "a material alteration of a written contract by a party avoids it as against him" (402); i.e., not only can you not use the writing, but the contract itself is cancelled—a

⁵⁴ See Scott Brewer, "Traversing Holmes's Path toward a Jurisprudence of Logical Form," in Steven J. Burton, ed., *The Path of the Law and Its Influence: The Legacy of Oliver Wendell Holmes, Jr.* (Cambridge: Cambridge University Press, 2000), 94-132; Susan Haack, "On Logic in the Law: 'Something, but not All,'" *Ratio Juris*, 20.1, 2007: 1-31.

⁵⁵ Morton G. White, *Social Thought in America: The Revolt Against Formalism* (1947; New York: Viking Press, 1949).

⁵⁶ I chose 1215 because this was the date of Magna Carta, and of the fourth Lateran Council, which prohibited priests from participating in in-court tests by ordeal; and 1897 because this was the date of "The Path of the Law."

doctrine, Holmes argues, explicable only historically. Once upon a time, in the case of a bond specifically, the contract was inseparable from the actual parchment on which it was written; if the document was destroyed or the seal torn off, the obligee could not recover because the bond no longer existed.⁵⁷ Then, contrary to the general tendency of the law, this doctrine was extended to contracts generally.

However, Holmes insists, "this is how we have always done it" is no reason for continuing to do things that way: "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds on which it was laid down have vanished long since ... " (399).⁵⁸ And so the other part of Holmes's positive account is forward-looking: the intelligent study of "the ends which [legal] rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether those ends are worth the price" (404) can illuminate how the law might best adapt itself to new circumstances.

In considering how well this or that interpretation of a law forwards the ends that justified having the law in the first place, Holmes urges that judges look to the social and economic consequences of their rulings: "I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. ... I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the law they

lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable ... questions" (398). Hence Holmes's dictum that "[f]or the rational study of the law the blackletter man may be the man of the present; but the man of the future is the man of statistics and the master of economics" (399)—which, of course, is the strand of his argument that is captured by enlisting him as precursor of the "law and economics" movement.

However, it isn't only economics Holmes has in mind, but the social sciences generally. He also illustrates the role of considerations of "social advantage" when he asks: "[w]hat better have we than a blind guess to show that the criminal law in its present form does more good than harm?", and urges that judges look to the work of social scientists who are beginning to investigate whether the criminal "is a degenerate, bound to swindle or murder by as deep seated an organic necessity as that which makes the rattlesnake bite," or whether "crime, like normal human conduct, is mainly a matter of imitation" (400).⁵⁹

Now the path from the rocky foothills of Holmes's opening words to the Olympian heights of his final peroration comes into full view; and what looked at first like a passing dismissal of Sir James Stephen's legal analyses—"striving for a useless quintessence of all systems, instead of an accurate analysis of one" (403)—stands as a clear signpost. All legal systems are local, specific to a place and time; the idea of "Law-in-Itself" is an illusion. As Holmes would write much later, dissenting

⁵⁷ As, today, there is no obligation to pay if the actual physical check is destroyed (an analogy I owe to Jonnette Watson-Hamilton).

⁵⁸ Compare this, from *Javins v. First National Realty Corporation*, 428 F.2d 1071, 1 (1970): "The assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural agrarian society But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. ... Some courts have realized that certain of the old rules of property law governing leases are inappropriate for today's transactions." My thanks to Terence Anderson for drawing this case to my attention.

⁵⁹ Though Peirce doesn't refer to Holmes explicitly, this passage from the *Minute Logic* of 1902 suggests that he might have been taking notice of Holmes's thinking: "[A]s for public force, let it be restricted to doing what is necessary to the welfare of society. ... [T]he barbaric punishment of a prison cell ... is not in the least conducive to public or private welfare. As for the criminal classes, I would extirpate them ... by keeping the criminals confined in relative luxury, making them useful, and preventing reproduction ... [making them] self-supporting harmless wards of the state. The only expense would be that of losing our darling revenge upon them." *Collected Papers* [note 27], 2.164 (1902).

in *Southern Pacific v. Jensen*, "[t]he common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified ... it is always the law of some state."⁶⁰ Moreover, every legal system is an artifact of history; all have evolved, grown, adapted (and many have died away) in response to changing social circumstances, pressures, and needs.

And this means that from the very broadest perspective the law—now understood as referring to the whole accumulated history and ongoing evolution of the myriad legal systems of the world—encompasses both the past and the future of the social organization of humanity; in short, of civilization. Holmes returns to this theme over and over:

If your subject is law, the roads are plain to anthropology, the science of man, to political economy, the theory of legislation, ethics, and thus by several paths to your final view of life.⁶¹

What a subject is this in which we are united,—this abstraction called the Law, wherein, as in a magic mirror, we see reflected not only our own lives, but the lives of all men that have been! ... to the lover of the law ... no less a history will suffice than that of the moral life of his race.⁶²

I venerate the law ... as one of the vastest products of the human mind. ... It has the final title to respect in that it exists, that it is not a Hegelian dream. (402)

This is how the study of the law "connect[s] with the universe" and may even vouchsafe "a hint of the universal law" (406).

Holmes begins with a down-to-earth, practical view of the law; and, commenting that "a good deal of pretty poor stuff" goes under the name of jurisprudence (403),

scoffs at the idea of a "quintessence of all law." Still, we can't classify him as "pragmatic," in the now-current everyday sense of focusing on the practical at the expense of the theoretical; for this would make it impossible to accommodate his emphatic declarations that "theory is my subject, not practical details" (405) and that "[w]e have too little theory in the law rather than too much" (404).⁶³ It would be more accurate to say that, while he eschews uselessly free-floating abstractions, and respects the practical concerns of the working attorney, Holmes aspires to nothing less than a comprehensive theoretical conception of the law *qua* ever-evolving human institution.

Holmes urges the tonic effect of looking at the law from the perspective of the Bad Man. Acknowledging that this will "stink[] in the nostrils of those who are anxious to get as much ethics into the law as they can" (394), he insists that questions of law not be confused with questions of morals; he believes that judges are often mistaken or self-deceived about the real reasons for their rulings; and he recommends that they look clear-eyed (hard-nosed?), at considerations of "social advantage." So it is no wonder he is seen as "one of the most important forerunners" of the legal realist movement⁶⁴—or that the realists were later to cite him over and over. In 1930, Karl Llewellyn wrote that "*rules* ... are important so far as they help you see or predict what judges will do or so far as they help you get judges to do something. ... That is all their importance except as pretty playthings;⁶⁵ and, acknowledging Holmes's influence, that "th[e] concept of 'real rule' has been gaining favor since it was first put into clarity by

⁶⁰ *Southern Pacific v. Jensen*, 244 U.S. 205, 222 (1917), Holmes, J., dissenting. (The passage in which this occurs isn't entirely clear on this point, but as I read him Holmes must be contrasting "the law of some state" with Law-in-General, not with federal law.)

⁶¹ Holmes, "The Profession of the Law," conclusion of a lecture delivered to undergraduates at Harvard, February 17th, 1886, in Marke, *The Holmes Reader* [note 2], 67-8, p.67.

⁶² Holmes, "The Law" [note 2], p.62.

⁶³ Compare "Justice Holmes does not succumb to the fashionable but foolish glorification of the practical over the theoretic or contemplative life": Morris R. Cohen, "Justice Holmes" in *Mr Justice Holmes*, ed. Felix Frankfurter (New York: Coward McCann, 1921), 21-32, p.23.

⁶⁴ I quote from the editors' introduction to the first chapter, "Antecedents," of William W. Fisher III, Morton J. Horwitz, and Thomas A. Reed, eds., *American Legal Realism* (New York: Oxford University Press, 1993), 3.

⁶⁵ Karl Llewellyn, *The Bramble Bush: Our Law and Its Study* (New York: Oceana, 1930), p.5.

Holmes." In this context—in a phrase startlingly reminiscent of Peirce's criticisms of Descartes' "paper doubts"—Llewellyn contrasts "real" with merely "paper" rules;⁶⁶ and in the same article, reflecting on the interconnections of law and the social sciences, he observes that "Holmes' mind had travelled most of the road two generations back."⁶⁷ The same year, Jerome Frank described Holmes as "the Completely Adult Jurist."⁶⁸

So perhaps it would be fair to classify the realists as "post-Holmesians." Still, it is important not to forget that Holmes had caught, at the end of what Llewellyn thinks of as his proto-realist path, a glimpse of that "comprehensive theoretical vision of the law *qua* ever-evolving human institution" stressed in my reading.

4. Filling Some Potholes in the Path of the Law

Even if it is plausible to think that a working attorney advising his client the Bad Man is trying to predict what a judge would decide, it seems ludicrous to suppose that this is what the judge himself is doing (though, to be sure, he may try to predict what a higher court might decide were the case to be appealed). This was the objection that came first to my mind; and, as I subsequently discovered, it had been made long before by Hart,⁶⁹ and, decades before that, by Fisch.⁷⁰ But now I see it can be avoided by reading Holmes with a little charity.⁷¹ Taking the perspective of working attorney and

his client the Bad Man is a heuristic device,⁷² a way of highlighting two key contrasts: between law and morality, and between The Law in the abstract and Massachusetts-law-in-1897 or EC-law-in-2005 in the particular. It highlights a perspective, the Bad Man's, from which what matters isn't what's right, or what "the Will of the Sovereign" is, or even simply what the statutes, etc., say, but what the courts, which are the instruments of the public force, will determine the law to be.

An attorney may well be able to predict that if the Bad Man drives at 39 miles an hour in a 30-mile-an-hour zone he won't be subject to any penalty; but of course this doesn't mean that the speed limit *is* (say) 40 miles an hour, not 30. So, Luban argues, Holmes's account is "preposterous," missing the obvious fact that a rational Bad Man's risk-benefit analysis would take into account how likely it is that a law will be enforced.⁷³ But this objection also misfires. Holmes asks his audience to imagine an attorney advising a client what conduct is legal, not what illegal conduct might go undetected or unpunished—for his purpose is, precisely, to highlight the distinction between *law* and morality. (Perhaps he would have made this clearer had he written the relevant lines, in the manner of Peirce's revised, more realist, subjunctive version of the pragmatic maxim, in the subjunctive mood, in terms of what courts *would* decide *were* the case to come before them.)

More importantly, perhaps, criticisms like these focus on Holmes's first steps; while what is most valuable about "The Path of the Law," as I see it, is the much broader view to which those steps ultimately lead: a view which

⁶⁶ Karl Llewellyn, "A Realistic Jurisprudence —the Next Step," *Columbia Law Review*, XXX.4, 1930: 431-65, p.448. Peirce, *Collected Papers* [note 27], 5.264 (1868); 5.376 (1877).

⁶⁷ *Id.*, p.454.

⁶⁸ Jerome Frank, *Law and the Modern Mind* (1930; Gloucester, MA: Peter Smith, 1970), 270.

⁶⁹ H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), p.143.

⁷⁰ Fisch, "Justice Holmes, the Prediction Theory of Law, and Pragmatism" [note 47], p.8: "[i]t is inconceivable that in his work as a judge [Holmes] should have thought of law as prediction except with reference to a possible appeal"

⁷¹ As, in effect, Fisch does when he acknowledges that Holmes is here thinking of the law from the point of view of the practicing lawyer.

⁷² After I had written this clause, I found that Brewer had also used the phrase "heuristic device" in this context; see "Traversing Holmes's Path toward a Jurisprudence of Logical Form" [note 54], p.96. (Earlier, David Luban had considered this interpretation but rejected it—but for what seem to me bad reasons; see Luban, "The Bad Man and the Good Lawyer," *New York University Law Review*, 75, 1997: 1547-83, p. 1573.)

⁷³ David Luban, "The Bad Man and the Good Lawyer" [note 72], 1571.

is all-encompassing, yet not unhelpfully abstract; firmly anchored in real-world institutions and practices — realistic in the ordinary-language sense of the word — yet not cynical; anti-essentialist in eschewing the search for a mythical "quintessence of all law," yet not anti-theoretical. Legal systems are local⁷⁴—one might almost say (but not without appreciating the irony) essentially so; they are, as the jargon of our day would have it, "socially constructed," marked by the contingencies and curiosities of the circumstances in which they originally arose, and by each of the many Pushmepullyou mechanisms at work as they continue to grow and adapt to new circumstances. And yet; ... and yet, the continuing history of the evolution of legal systems is the history of humanity's long, ragged struggle towards civilized social life.

To be sure, Holmes's integration of the specific and the general, the local and the global, the humdrum and the inspiring, is a long way from perfect. But it is good enough to repay the effort of trying to improve it, to fill some gaps where he seems to have "too little theory rather than too much"—especially where his argument seems, as it stands, covertly to presuppose the kind of purely abstract and essentialist philosophy of law that he officially, and in my opinion rightly, eschews.

Holmes steers clear of questions like "What is Law?," and the pretentiously unhelpful answers they are apt to prompt. It might be objected, however, that when he refers to "the incidence of the public force through the instrumentality of the courts" (391), and assumes that what's relevant is what penalty a judge will impose on the Bad Man, and not, say, what penance his priest will demand or what the boss of the local Mafia family will

⁷⁴ Arthur R. Hogue writes that "the common law, properly so called, is not local custom. It is not ordinarily spoken of as the usage of a locality ... such as the shire of Kent, ... which was permitted to enjoy until 1926 its own peculiar rules of inheritance by gavelkind," but rather "applies throughout the realm" (*Origins of the Common Law* (Bloomington, IN: Indiana University Press, 1966; Indianapolis, IN: Liberty Fund, 1986), 187-8). But "throughout the realm" is local, in the sense I intend.

have his goons do to him, Holmes implicitly takes for granted an answer to this question in terms of—well, of legal institutions. But there is another way of looking at this, more in harmony with the general tenor of Holmes's jurisprudence, that does not invite the essentialist kind of answer he is anxious to avoid.

In the spirit of Holmes's observation that "most differences" are merely differences of degree, "when nicely analyzed,"⁷⁵ and of the regulative principle Peirce called "synechism"—that hypotheses that posit continuities are to be preferred over hypotheses that rely on sharp dichotomies⁷⁶—I suggest looking at the continuum of systems of social norms from tribal and religious customs, taboos, rules, and penalties through the "illegal legal orders" of the favelas of which Boaventura de Sousa Santos writes,⁷⁷ to the most central, paradigmatic cases of legal systems past and present and the complex, overlapping, and sometimes conflicting meshes of federal and state or provincial legal orders, of national and international law, ... and so forth and so on; and, rather than fussing over which qualify as really, genuinely *legal*, exploring the respects in which

⁷⁵ *Rideout v. Knox*, 148 Mass. 368, 19 N.E. 390 (1889). Holmes's opinion is reprinted in Harry C. Shriver, *The Judicial Opinions of Oliver Wendell Holmes: Constitutional Opinions, Selected Excerpts and Epigrams as Given in the Supreme Judicial Court of Massachusetts (1883-1902)* (Buffalo, NY: Dennis and Co., 1940), 162-6.

⁷⁶ Peirce, *Collected Papers* [note 27], 6.102-163 (1892); see also Susan Haack, "Not Cynicism but Synechism: Lessons from Classical Pragmatism," XLI.2 *Transactions of the Charles S. Peirce Society*, XLI.2, 2005: 239-52; in Joseph Margolis and John Shook, eds., *A Companion to Pragmatism* (Oxford: Blackwell, 2006), 141-53; and in Susan Haack, *Putting Philosophy to Work: Inquiry and Its Place in Culture* (Amherst, NY: Prometheus Books, 2008), 79-94.

⁷⁷ Boaventura de Sousa Santos, *Toward a New Common Sense* (New York: Routledge, 1995), especially 158-249. According to my Brazilian informants, however, it is the drug dealers who keep order in the favelas; so perhaps this case is further from the centrally legal, and closer to my example of penalties imposed by the Mafia, than Santos's descriptions might suggest. (There is no entry in the index of Santos's book under "drugs" or "drug dealers"; whether this is because things were different in 1970, the year of Santos' study of the quasi-legal role of the Residents' Association in the favela he calls "Pasargada," I have been unable to determine.)

they are like each other, and those in which they are unlike.⁷⁸ To be sure, this would be a tough job; still, I believe it could tell us everything we really need to know, without trapping us in a metaphysical impasse as the old essentialist question, "What is Law?" is apt to do.⁷⁹

Holmes urges that judges look to considerations of "social advantage," and specifically to the economic consequences of their rulings; but he doesn't seem to tell us where such considerations legitimately apply, or how they are to be weighed against considerations of other kinds. I can find nothing explicit in "The Path of the Law" that distinguishes, say, framing an innocent man to prevent public panic because there's a serial killer on the loose or re-incarcerating a sexual predator beyond his sentence to prevent him committing further crimes, from relying on considerations about incentives and such to hold all manufacturers of a certain type of drug partly liable when it is impossible to determine which of them actually made the drug that harmed these plaintiffs⁸⁰ (or

to hold a manufacturer partly liable even when we know they didn't sell the drug that injured this plaintiff);⁸¹ nor, more generally, anything that indicates how Holmes sees considerations of economics or social policy interacting with considerations of liberty, fairness, equity.

This is in effect the lacuna Benjamin Cardozo noticed when he asked:

Shall we think of liberty as a constant, or, better, as a variable that may shift from age to age? Is its content given us by deduction from unalterable procedures, or by a toilsome process of induction from circumstances of time and place? Shall we say that restraints and experiments will be permitted if all that is affected is the liberty to act, when experiment or restraint will be forbidden if the result is an encroachment upon liberty of thought or speech? ... I do not dare say how Holmes would make answer to these queries or others like them ...⁸²

Like Cardozo, I would elect the less abstract option; and my guess (and I suspect Cardozo's) is that, if pressed, Holmes would, too. Holmes's preference for the vague term "public force" over Austin's "sovereignty" points in this direction. He alludes to "the customs of the Salian Franks ... the German forests, ... the needs of the Norman kings" (399); which reminds us that, while "the Will of the Sovereign" could once be construed as literally referring to the fiat of tribal chieftains or feudal

⁷⁸ Compare the strategy adopted in my *Defending Science—Within Reason: Between Scientism and Cynicism* (Amherst, NY: Prometheus Books, 2003), chapter 6: rather than asking whether the social sciences are *really* sciences, exploring and trying to articulate the ways in which they are like the natural sciences, and the ways in which they are unlike.

⁷⁹ The approach I am recommending has much in common with some ideas expressed in Llewellyn, who writes: "I am not going to attempt a definition of law. ... A focus, a core, a center—with the bearings and boundaries outward unlimited." Karl Llewellyn, "A Realistic Jurisprudence—the Next Step" [note 66], 432. More recently, arguing against "legal centralism" and urging a "centrifugal" over a "centripetal" approach, Galanter has suggested looking at the many and various non-legal means of settling disputes as operating "in the shadow of" the legal system narrowly conceived, which sets a framework for party negotiation by providing "bargaining chips." Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law," *Journal of Legal Pluralism*, 19, 1981: 1-47; citing M. Damaska, "A Foreign Perspective on the American Judicial System," in T. J. Fetter, ed., *State Courts: A Blueprint for the Future* (National Center for State Courts, 1978), 237-42.

⁸⁰ For example, in DES (diethylstilbestrol) cases, where the injury—cancers that developed in the daughters of women who had taken the drug during pregnancy—was not apparent until decades after the women's exposure. *Sindell v. Abbott Laboratories*, 26 Cal.3d 588, 612, 607 P.2d 924,

937, 163 Cal.Reptr. 132, 145 (1980) (holding that "[e]ach defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries"). *Bichler v. Eli Lilly & Co.*, 79 A.D.2d 317, 329, 436 N.Y.S.2d 625, 632 (1981) (holding that "[i]t does not strain one's sense of fairness to allow a limited expansion of the doctrine of concerted action to cover the type of circumstance faced in a DES case where the traditional evidentiary requirements of tort law may be insurmountable").

⁸¹ *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 512, 539 N.E.2d 1069, 1078, 541 N.Y.S.2d 941, 950 (1989) (holding that "there should be no exculpation of a defendant who, although a member of the market producing DES for pregnancy use, appears not to have caused a particular plaintiff's injury").

⁸² Benjamin Cardozo, "Mr. Justice Holmes," introduction to *Mr. Justice Holmes*, ed. Felix Frankfurter [note 63], 1-20, pp.6-7.

kings, in complex modern societies there is only that diffused, delegated "public force" expressed in the decisions of federal, state, military, and administrative courts, of international tribunals, ... and so on.

Peirce is again helpful; this time, though, it is his conception of the growth of meaning on which we can draw. Thinking about how, as our knowledge grows, scientific concepts become deeper and thicker (and sometimes shed old connotations), the young Peirce had observed "[h]ow much more the word *electricity* means now than it did in the days of Franklin; how much more the term *planet* means now than it did in the time of Hipparchus. These words have acquired information."⁸³ Later he makes a similar point using a different and more immediately relevant kind of concept as example: "Symbols grow Such words as *force*, *law*, *wealth*, *marriage*, bear for us very different meanings than those they bore to our barbarous ancestors."⁸⁴ Yes; and concepts like *liberty*, *right*, etc., are deepened, thickened, made more specific (and sometimes stripped of old accretions) in the long, ongoing struggle of legal disputes and challenges, interpretations and reinterpretations. They are not Platonically fixed and uncontested, but initially thin, schematic concepts inherently open to more and less expansive readings, to finer specification, to broader extrapolation.⁸⁵

Holmes conceives of the law as encompassing all the many and various legal systems, past and present: remember that description of the history of the evolution of the law as disclosing "every painful step and world-shaking contest by which mankind has fought and worked its way from savage isolation to organic social life";⁸⁶ and he observes that "[a] man may live greatly in

the law as well as elsewhere; there as well as elsewhere his mind may find its unity in an infinite perspective"⁸⁷ This is a grand vision reminiscent of Peirce's conception of science as the long, ongoing struggle of the community of inquirers—the notional community of all those, past, present, and future, who have "storm[ed] the stronghold of truth," each new wave climbing clambering over those who went before.⁸⁸ In a speech the year before "The Path of the Law" Holmes had written:

The eternal procession [of generation after generation of lawyers, judges and legal thinkers] moves on, we in the front for the moment; and stretching away against the unattainable sky, the black spearheads of the army that has been passing in unbroken line already for over a thousand years."⁸⁹

This has more than a military metaphor in common with Peirce's conception of the human struggle to understand the world.

However, while Peirce makes an intimate connection between truth and inquiry by means of his pragmatist conception of truth as the hypothetical Final Opinion that would be reached were inquiry to continue indefinitely, and reality as the object of that Final Opinion,⁹⁰ Holmes leaves one wondering how, exactly, he sees the evolution of legal systems as connected with "the moral life of the race."

⁸³ Peirce, *Collected Papers* [note.27], 7.587 (c.1867). The second italics are mine.

⁸⁴ *Id.*, 2.302 (c.1895).

⁸⁵ From *Hymowitz v. Eli Lilly* [note 81], 507: "*the ever-evolving dictates of justice and fairness*, which are the heart of our common-law system, require formation of a remedy for injuries caused by DES" (emphasis added).

⁸⁶ Holmes, "The Law" [note 2], p.63.

⁸⁷ Cited in John Dewey, "Justice Holmes and the Liberal Mind" [note 63], 33-45, p.35.

⁸⁸ Peirce, *Collected Papers* [note 27], 7.51 (undated). The "fortress of knowledge" metaphor is borrowed and adapted from John Locke.

⁸⁹ Holmes, "Learning and Science," speech given at a dinner of the Harvard Law School Association in honor of Prof. C. C. Langdell, June 25th, 1895; in Marke, *The Holmes Reader* [note 2], 72-3, p.73.

⁹⁰ So the true and the real, as Peirce defines them, are independent of what you, or I, or any individual think them to be; not, however, of what the hypothetical community of inquirers would think them to be at the end of inquiry. It is also worth noting that Peirce's definitions are not intended to provide any guarantee of steady progress towards or convergence on the truth, or even any guarantee that the truth will actually ultimately be attained.

Some critics have suggested that Holmes's attitude to the relation of law and morality is just inconsistent.⁹¹ It is, however, entirely consistent to maintain (as Holmes does) that law and morality cannot be identified—that the two are conceptually distinct, that "morally bad, unjust law" is not an oxymoron; and at the same time to hold (as Holmes also does) that there may be greater or lesser overlap in extension between law and morality, and that the evolution of law may constitute progress in a moral sense. But perhaps the critics have in mind, rather, the apparent difficulty of reconciling Holmes's insistence that he "take[s] for granted that no hearer of mine will misrepresent what I have to say as the language of cynicism," his description of the law as "the witness and external deposit of our moral life" (392), and the indications that, by "considerations of social advantage" he means something more like "promoting the good of society" than "favoring the interests of a given social class," with passages that suggest that he thinks might makes right. As I understand him, however, when Holmes writes of (legal) "battle grounds where ... the decision can do no more than embody the preference of a given body in a given place and time" (397), or of the more powerful interests' winning the struggle, what he means is that a legal system is a forum for competing social groups to sort out their conflicts *without resorting to brute force*. So it might be more accurate to see Holmes's conception of the evolution of the law as fumbling steps on the road to more civilized social life as manifesting a kind of meliorism.

⁹¹ See Lon Fuller, *The Law in Quest of Itself* (1940; Boston: Beacon Press, 1966), p.118; Morton White, *Social Thought in America* [note 55], 69-70; Henry M. Hart, "Holmes's Positivism—An Addendum," *Harvard Law Review*, 64, 1951: 929-37, p.923. For earlier responses to this criticism see Mark DeWolfe Howe, "Holmes's Positivism—A Brief Rejoinder," *Harvard Law Review*, 64, 1951: 937-939, p.939, and Frederic Rogers Kellog, *The Formative Essays of Justice Holmes: The Making of an American Legal Philosophy* (Westport, CT: Greenwood Press, 1984), pp.58-74.

But now it begins to appear that the problem with Holmes's view of the relation of law and morality is not an inconsistency but—ironically enough, given that he is sometimes accused of moral skepticism—a tendency to elide the weak, plausible thesis that the growth of legal systems mirrors the evolution of human social life, tracking moral steps forward *and backward*, into the much stronger and much less plausible thesis that the history of law is a history of moral *progress*.

In early papers on "Primitive Notions in Modern Law,"⁹² as well as in the first chapter of *The Common Law*, Holmes points to the ways in which a primitive desire for vengeance, which he takes to be the original basis of law, has gradually been modified and adapted with the growth of civilization. As "an instructive example of the mode in which the law has grown ... from barbarism to civilization," Holmes refers to laws requiring that a slave or an ox that injures someone be stoned or surrendered by the current owner to the victim or his family, and to the provision in the Twelve Tables of Roman Law that an insolvent debtor may be cut up and his body divided among his creditors;⁹³ and then describes the ways in which such laws gradually changed and became more rational: "when ancient rules maintain themselves ..., new reasons more fitted to the time have been found for them, and ... they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted. ... [I]f truth were not often suggested by error, if old implements could not be

⁹² Holmes, "Primitive Notions in Modern Law," *American Law Review*, X, 1876: 422-39; "Primitive Notions in Modern Law II," *American Law Review*, XI, 1877: 641-660. These lectures are reprinted in Kellog, *The Formative Essays of Justice Holmes* [note 91], 129-46 and 147-66.

⁹³ "Lecture I: Early Forms of Liability," *The Common Law*, [1881], in Novick, *Collected Works* [note.50], vol.3, 109-324, 115-34. The relevant provision of the Twelve Tables is III.2; see <http://www.fordham.edu/halsall/ancient/12tables.asp>. (At first glance these "Tables" might look a lot like a set of legal "axioms"; but on second thoughts the idea that every specific legal decision could be deduced from them seems implausible to say the least.)

adjusted to new uses, human progress would be slow."⁹⁴ This last observation, like that phrase "from barbarism to civilization," strongly suggests that Holmes was assuming that the evolution of law is a progressive process.

Perhaps he is thinking, in part, that any peaceful means of settling disputes is better than the alternative and, in part, that some sort of stable and predictable legal order is necessary for any kind of civilized life; but obviously neither of these propositions is sufficient to establish a progressivist thesis. In a speech of 1913 Holmes observes that "[i]t is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to be first principles are believed by half his fellow men to be wrong."⁹⁵ Holmes repudiates the idea of moral axioms or first principles discoverable a priori; but, as I read him, he is no moral skeptic, but a moral fallibilist who thinks of ethics in an empirical, experimental way. So one might think of looking to James's moral philosophy—perhaps noting its affinity with Holmes's conception of "weighing of considerations of social advantage" in terms of accommodating the competing demands of different groups in society—for a more articulate theoretical account that might supply the missing argument.

For in "The Moral Philosopher and the Moral Life," James had argued that, since every desire makes some moral claim, one task of moral philosophy is, so far as possible, to reconcile competing desires: "The actually possible in this world is vastly narrower than all that is demanded; and there is always a *pinch* between the ideal and the actual, which can only be got through by leaving part of the ideal behind."⁹⁶ And Dewey, in effect,

amplifies and refines James's account when he shifts the focus from what is actually desired to what is really desirable, genuinely conducive to human flourishing; and, not entirely by the way, argues that economic conditions are not to be despised as "mere" means, but must be taken seriously as important elements in "the construction of good."⁹⁷

But even assuming that an empirical, experimental style of moral philosophy such as James's or Dewey's is defensible—which certainly isn't something I can hope to settle here, but a whole other question for a whole other lifetime—there could still be no theoretical guarantee that the evolution of legal systems is bound to be morally progressive; not at every step, and not even by and large and on the whole and in the long run. Outside of those Hegelian dreams to which Holmes dismissively alludes, there *can be no* guarantee that some class or classes of people will not, in principle or in practice, be denied access to the justice system, or denied any voice in the process by which laws are made; there *can be no* guarantee against the evolution of oppressive, totalitarian societies and oppressive, totalitarian laws; and there *can be no* guarantee against the stagnation, or the decline, of civilized social life.

In 1924, in the course of his first attempt, with the help of a German-English dictionary, to read the first volume of Oswald Spengler's extraordinary, visionary, over-reaching, infuriating rhetorical *tour de force*, *The Decline of the West*,⁹⁸ Holmes wrote to Pollock: "when one

Bowers, eds., Cambridge, MA: Harvard University Press, 1979), 141-62; and Graham Bird, ed., *Selected Writings: William James* (London: Dent; Rutland, VT: Everyman, 1995), 298-319, pp.310-311. Page references here are to Bird's anthology.

⁹⁷ Dewey, "The Construction of Good," *The Quest for Certainty* (1929; New York: Capricorn Books, G. P. Putnam's Sons, 1960), 254-86, especially pp.282-3.

⁹⁸ Oswald Spengler, *Der Untergang des Abendlandes*, 2 vols. (Vienna: Braumiller, 1918-22); English translation by Charles Francis Atkinson, under the title *The Decline of the West* (New York: Knopf, 1926-8). Among the many infuriating charms of this work is the fold-out chronology of the History of Almost Everything at the end of the second volume—which predicts, among other things, the year in which science will come to an end: 2000 (!).

⁹⁴ *The Common Law* [note 93], p.135.

⁹⁵ Holmes, "Law and the Court," speech at a dinner of the Harvard Law School Association of New York, February 15th, 1913, in Marke, *The Holmes Reader* [note 2], 64-6, p.65.

⁹⁶ William James, "The Moral Philosopher and the Moral Life" (1891), in *The Will to Believe and Other Essays in Popular Philosophy* (1897; Frederick Burkhardt and Fredson

suspects that a man knows something about life that one hasn't heard before one is uneasy It is long since I have got so much from a book as this, and if I heard that the swine were dead I should thank God."⁹⁹ In 1932, after reading both volumes in translation, he wrote again: "the accursed Spengler ... has as swelled a head as man can have and live, but the beast has ideas, many of which I don't know enough to criticize. I wish he were dead."¹⁰⁰ The "beast's" central and essential ideas, of course, were that all civilizations rise and fall, and that Western civilization was then in decline. For all its intellectual failings, for all its rhetorical excesses, Spengler's book must have been deeply unsettling to Holmes's hope that the evolution of the law tracks, not just the "moral life of the race," but the advance of civilization, of moral progress. Perhaps this explains Holmes's startlingly ambivalent reaction, his grudging acknowledgement that he had learned something from the "accursed Spengler"—the swine.

5. Theory and Practice: Mr. Justice Holmes

I don't believe Holmes was trying to provide a decision-procedure for judges. Since his philosophy of law is anchored in the insight that legal systems are local, it would hardly be appropriate that it aspire to say how a judge here and now (or there and then) should decide (or should have decided) an issue; for judicial decisions are apt to be focused on questions specific to a place, a time, a legal history, and a social context. So while some may take its failure to supply such a decision-procedure as an objection to Holmes's philosophy of law, I do not. Skimming through the list of Holmes's own thousand-odd opinions, what strikes me is, first, the sheer variety and the narrow specificity of the issues involved—the power of the Massachusetts legislature to grant woman suffrage;¹⁰¹ the restoration of remedies extinguished by

lapse of time;¹⁰² the right of the legislature to limit the height of boundary fences;¹⁰³ the right of the state to kill diseased horses;¹⁰⁴ the doctrine of "attractive nuisance";¹⁰⁵ the constitutionality of laws restricting hours of work,¹⁰⁶ etc., etc., etc.—and then the near-impossibility of understanding Holmes's arguments without reference to the legal setting and the social circumstances in which they arose.

However, two themes that recur in Holmes's constitutional opinions may have an indirect bearing on my interpretation of "The Path of the Law." The first is that, while the Constitution has its roots in the past, it is intended for an unknown future. As Holmes wrote in *Gompers*:

... the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and their line of growth.¹⁰⁷

And in *Missouri v. Holland*:

[W]hen we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us

Shriver, ed., *The Judicial Opinions of Oliver Wendell Holmes* [note 75], 6-9.

¹⁰² *Dunbar v. Boston and Providence R. R. Corp.*, 181 Mass. 383, 63 N.E. 916 (1902); reprinted in Shriver [note 75], 44-47.

¹⁰³ *Rideout v. Knox*, 148 Mass. 368 (1889); *Smith v. Moore*, 148 Mass. 407, 19 N.E. 393 (1889); reprinted in Shriver [note 75], 167-8.

¹⁰⁴ *Miller v. Horton*, 152 Mass. 540, 26 N.E. 100 (1891); reprinted in Shriver [note 75], 171-80.

¹⁰⁵ *United Zinc and Chemical Co. v. Britt*, 258 U.S. 268 (1922). On the concept of "attractive nuisance," compare *Sioux City & Pac. R.R. Co. v. Stout*, 84 U.S. 657 (1873); *Union Pac. Ry. Co. v. McDonald*, 152 U.S. 262, (1894); *Erie R.Co. v. Hilt*, 247 U.S. 97, (1918).

¹⁰⁶ *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁰⁷ *Gompers v. United States*, 233 U.S. 604, 610 (1914).

⁹⁹ Holmes to Pollock, July 18th, 1924, in Howe, *Holmes-Pollock Letters* [note 42], p.139.

¹⁰⁰ Holmes to Pollock, May 15th, 1932, *id.*, p.309.

¹⁰¹ *In re Municipal Suffrage to Women*, 160 Mass. 586, 36 N.E. 488 (1894); Holmes's opinion is reprinted in Harry C.

must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.¹⁰⁸

The second theme is that the Constitution leaves open the possibility of experiment, of trial and error.¹⁰⁹ This theme is expressed particularly clearly in Holmes's dissent in a 1921 picketing-law case, *Truax v. Corrigan*:

There is nothing I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me ...¹¹⁰

Of course, the same theme was heard, many years before, in one of Holmes's most celebrated opinions, his dissent in *Lochner* (1905). The majority had ruled legislation that limited bakers' working hours to no more than 10 a day or 60 a week unconstitutional: it "necessarily interferes with the right of contract between the employer and the employee."¹¹¹ In dissent Justice Harlan, with Justices White and Day, argued that "the liberty of contract may ... be subjected to regulations ... [to] guard the public health," and that bakery work was so strenuous, hot, and dusty that the restriction of hours was justifiable on public-health grounds. But Holmes's dissent not only observes that "[a] reasonable man might think it a proper measure on the score of health," but also stresses states' freedom to experiment.¹¹²

¹⁰⁸ *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

¹⁰⁹ One might wish that Holmes had said more about how it is to be determined whether states' experiments have succeeded or failed, and what should be done after we have learned from them.

¹¹⁰ *Truax v. Corrigan*, 257 U.S. 312, 344 (1921). In the same dissenting opinion, Holmes writes that "[d]elusive exactness is a source of fallacy throughout the law." *Id.* at 342.

¹¹¹ *Lochner* [note 106], 541.

¹¹² It may be worth noting, however, that in *Missouri v. Holland* Holmes had written that while "no doubt the great body of private relations usually fall within the control of the State, ... a treaty may override its power." *Missouri v. Holland* [note 108], 434.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. ...[A] constitution is not intended to embody a particular economic theory [I]t is made for people of fundamentally differing views¹¹³

I don't believe it is too fanciful to see this theme as having some connection with (though it is obviously not entailed by) Holmes's conception of the law as a forum for resolving the inevitable struggles between social groups in a peaceful way—nor, probably, as also having something to do with his personal experience of the horrors of the Civil War.¹¹⁴

By the end of his long life, Mr. Justice Holmes, the "Yankee from Olympus,"¹¹⁵ stood high in the public esteem. A volume celebrating his ninetieth birthday (the volume in which Cardozo raised his important question about the fixity or flexibility of legal concepts) included a

¹¹³ *Lochner* [note106], 546. I note that here Holmes does *not*, as one might have expected—and as his fellow-dissenters do—rely on his assessment of the social and economic consequences of ruling one way or the other. I also note the observation, later in his dissent, that "general propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." *Id.* at 547.

¹¹⁴ Holmes served for three years in the Union army. In the first two years, as a Lieutenant in the Twentieth Massachusetts Volunteer Infantry, he "was wounded three times [at Ball's Bluff, Antietam, and Fredericksburg], twice near fatally, and suffered from dysentery" (Sheldon Novick, "A Brief Biography of Justice Holmes," in *Collected Works of Justice Holmes* [note 50], 8-17, p.9). It may also be worth noting that in *Buck v. Bell*, 274 U.S. 200, 207, (1927), his most notorious opinion, Holmes writes that the sacrifice asked of Carrie Buck, the retarded woman whom the State of Virginia wished to have sterilized, is not so great compared with that asked of those who are required to die for their country. See also Susan Haack, "Pragmatism, Law, and Society: The Morals of *Buck v. Bell*," *European Journal of Pragmatism and American Philosophy* (forthcoming).

¹¹⁵ I allude, of course, to Catharine Drinker Bowen's fictionalized life of Holmes, *Yankee from Olympus* (Boston: Atlantic/Little Brown, 1944). The play by Emmett Lavery based on the novel, and the subsequent motion picture, are entitled *The Magnificent Yankee*.

notable tribute from Dewey entitled "Justice Holmes and the Liberal Mind." Though Holmes had "no social panacea to dole out, no fixed social program, no code of fixed ends," Dewey wrote, he was profoundly committed to "[l]iberalism as a method ... the adoption of the scientific habit of mind in application to social affairs"; that he adopted this scientific habit of mind as a judge, in restricted legal contexts, in no way lowered the value of his work "as a pattern of the liberal mind in operation."¹¹⁶ And on Holmes's death, in 1935, the *New York Times* described him as "the chief liberal of [the] supreme bench for 29 years."¹¹⁷

Since then, however, many have come to believe Holmes's reputation undeserved—a triumph of magnificent literary style over miserable judicial substance—and to criticize his judicial opinions as conservative, narrow-minded, benighted, or worse.¹¹⁸ Between 1941 and 1943, a series of articles linked Holmes's philosophy with totalitarianism;¹¹⁹ in 1945, Ben Palmer popularized these criticisms in the *American Bar Association Journal* under the title, "Hobbes, Holmes, and Hitler."¹²⁰ In 1950, an article in the *Boston American* described Holmes as a "cynical and senile brutalitarian."¹²¹ More recently, in 1997, Louise Weinberg

¹¹⁶ John Dewey, "Justice Holmes and the Liberal Mind," in Frankfurter, *Mr. Justice Holmes* [supra, n.87], pp.34-5. See also James Tufts, "The Legal and Social Philosophy of Mr. Justice Holmes," *American Bar Association Journal*, 7, 1921: 359; and Roscoe Pound, "Judge Holmes's Contributions to the Science of Law," *Harvard Law Review*, 34, 1921: 449-453.

¹¹⁷ *New York Times* (March 6, 1935), section 1, p.1, columns 2-3.

¹¹⁸ The story is well told in G. Edward White, "The Rise and Fall of Justice Holmes," *The University of Chicago Law Review*, 39, 1971: 51-77, which is my source for some of the information in this and the previous paragraph.

¹¹⁹ Francis Lucey, "Jurisprudence and the Future Social Order," *Social Science*, 16, 1941: 211-217; John Ford, "The Fundamentals of Holmes's Juristic Philosophy," *Fordham Law Review*, 11, 1942: 255-278; Paul Gregg, "The Pragmatism of Mr. Justice Holmes," *Georgetown Law Journal*, 31, 1943: 262-295.

¹²⁰ Ben W. Palmer, "Hobbes, Holmes, and Hitler," 31 *American Bar Association Journal*, 31, 1945: 569-73.

¹²¹ Westbrook Pegler, "Fair Enough," *Boston Evening American* (December 18, 1950), 34, 35 and 45. (On p.34

wrote of the "littleness" of Holmes's judicial work;¹²² and when, in 2000, Albert Alschuler asked, "Would you have wanted Holmes for a friend?"¹²³ it was obviously a question-expecting-the-answer-"absolutely not!"

Whom one would have wanted as a friend really isn't the point. Still, it's an intriguing question. Reflecting on it, I suspect I might well have found Holmes *too* Olympian for my taste; as, it seems, James eventually came to find him¹²⁴—not surprisingly, for James manifests a sympathetic understanding of human foibles, and of the suffering caused to some individuals by even the most benign social institutions, nowhere to be found in Holmes's; for example this, from "The Moral Philosopher and the Moral Life":

Pegler writes that "The *Harvard Law Review* has inquired for the date of the essay in which I referred to the late Oliver Wendell Holmes as a cynical and senile brutalitarian. Let them look it up. I don't think I like them." I don't know whether the *Harvard Law Review* succeeded, but I have not been able to locate the essay to which he refers.) On the first page of his biography, entitled *Pegler, Angry Man of the Press* (c.1963: Westport, Conn: Greenwood Press, 1973), after reporting that Pegler was awarded a Pulitzer prize and had "an income exceeding that of the President of the United States," Oliver Pilat reassures readers that "[d]espite frequent insinuations that he must be unbalanced, [Pegler] was sane by ordinary medical and legal standards."

¹²² Louise Weinberg, "Holmes's Failure," *Michigan Law Review*, 96, 1997: 691-723, p.691. Not so incidentally, Weinberg reads "The Path of the Law" simply as "a manifesto of American legal realism" (p.696).

¹²³ Albert W. Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* (Chicago: University of Chicago Press, 2000); the question is the title of his chapter 3.

¹²⁴ Though they were at one time close friends, only a few months after James had written to Holmes as "my Wendly boy," he was complaining that Holmes's "logical and orderly mode of thinking" made him uncomfortable to be with; and a year or so later, he wrote to his brother Henry of Holmes's "cold-blooded, conscious egotism and conceit." The first quotation is from a letter from James to Holmes dated January 3rd, 1868, in Ralph Barton Perry, *The Thought and Character of William James*, 1 (Boston: Little, Brown, 1935), p.508; the second from a letter from James to Holmes dated May 15th, 1868, in Perry, *id.*, p.514; and the third from a letter from William to Henry James dated October 2nd, 1869, in Perry, *id.*, p.307. My source is Alschuler, *Law Without Values* [note 123], pp.36 and 216-7.

The pinch is always here. Pent in under every system of moral rules are innumerable people whom it weighs upon, and goods which it represses; and these are always rumbling and grumbling in the background See the abuses which the institution of private property covers ... the unnamed and unnameable sorrows which the tyranny, on the whole so beneficent, of the marriage institution brings to so many ... the wholesale loss of opportunity under our regime of so-called equality and industrialism See our kindness for the humble and the outcast, how it wars with the stern weeding-out which until now has been the condition of every perfection in the breed. See everywhere the struggle and the squeeze.¹²⁵

"Detachment": this is Rosal Yogat's word for what he finds disturbing about Holmes the man;¹²⁶ and perhaps it is the *mot juste*.

When one turns to the controversies over Holmes's judicial practice, the first conjecture that comes to mind is that his admirers are simply focusing on different opinions from those that draw his detractors' attention: the admirers, probably, focus on his dissenting opinions in cases like *Lochner* and *Abrams* (where, in a memorable defense of the right to free speech, Holmes protested the imposition of a twenty-year sentence for the publication of "two leaflets that I believe the defendants had as much right to publish as the Government had to publish the Constitution ... now vainly invoked by them");¹²⁷ while the detractors focus on his rulings in cases like *Britt*¹²⁸ and, invariably, *Buck v. Bell*, with that memorably grim line: "[t]hree generations of imbeciles are enough."¹²⁹ Still, given that Frankfurter quotes from *Buck v. Bell*, including this very line, in the course of his admiring essay on "Justice Holmes and the

Constitution,"¹³⁰ this can't be the whole story. Holmes's defenders argue that critics unfairly ignore the vast differences between the circumstances of his day and of ours;¹³¹ his critics point out, in reply, that Holmes was sometimes at odds with more progressive colleagues on the Court.

I'm not going to get embroiled in these controversies; but I will suggest that part of the problem, probably, is that since Dewey wrote his tribute there has been a significant shift not only in the extension but apparently also in the meaning of the word "liberal." What Dewey had in mind in calling Holmes a great liberal was, evidently, his willingness to allow the states to make social experiments. Nowadays, however, while the upshot Holmes favored in *Lochner* would be thought of as liberal, his reasoning would likely be perceived as conservative, as *il*liberal.¹³² I suspect there is a fascinating historico-socio-legal-linguistic-story to be told about when and how this shift took place,¹³³ and about the

¹³⁰ Felix Frankfurter, "Justice Holmes and the Constitution," in Frankfurter, ed., *Mr. Justice Holmes* [note 63], 46-119, p.99.

¹³¹ It may be worthy of note that the ruling in *Buck v. Bell* is less than three pages long, and that only one Justice dissented. On sterilization laws across the U.S., see Paul A. Lombardo, *Three Generations, No Imbeciles: Eugenics, the Supreme Court, and Buck v. Bell* (Baltimore, MD: Johns Hopkins University Press, 2008), p. 294. On eugenics laws more generally, see Stephen Trombley, *The Right to Reproduce: A History of Coercive Sterilization* (London: Weidenfeld and Nicholson, 1988).

¹³² Dissenting from the majority in a 2005 Supreme Court case on the medical use of marijuana, Justice Thomas—hardly regarded as a liberal—writes:

[T]he majority prevents states like California from devising drug policies that they have concluded provide much needed respite to the seriously ill. ... Our federalist system, properly understood, allows California and a growing number of other states to decide for themselves how to safeguard the health and welfare of their citizens. *Gonzalez v. Raich*, 125 S.Ct. 2195, 2238 (2005).

¹³³ I take it that "liberal" does not, like "progressive" and "conservative," have any inherently indexical character; which is why I think there may be a shift in meaning, not only in reference. To judge by the interesting discussion in Palmer, "Hobbes, Holmes, and Hitler" [note 120], some elements of the shift seem already to have been on the way

¹²⁵ James, "The Moral Philosopher and the Moral Life" [note 96], 313-4. (I say that this is "nowhere" found in Holmes; but of course it would have been more accurate to say, "to my knowledge, nowhere")

¹²⁶ Rosal Yogat, "Mr. Justice Holmes: Some Modern Views," *University of Chicago Law Review*, 31.2, 1964: 213-56.

¹²⁷ *Abrams v. United States*, 250 U.S. 616, 629. (1919).

¹²⁸ *Britt* [note 105], 268.

¹²⁹ *Buck v. Bell*, 274 U.S. 200, 207 (1927).

much larger process of which it is probably part, a larger process in which older understandings of *right*, *liberty*, etc., have been contested and expanded over and over (and doubtless, also, a fascinating psycho-philosophical story about why Holmes didn't, like Cardozo, see any of this coming). Telling these stories, however, is beyond my present powers; and it is time, anyway, to return to the issues about the meaning of "pragmatism" with which I began.

6. Concluding Thoughts on the Old Legal Pragmatism and the New

"Was Holmes *really* a pragmatist?"¹³⁴—bad question. We know that Holmes didn't officially ally himself with pragmatism, and that he had reservations about some of Peirce's and, especially, James's ideas; we know that there were many other influences on his thinking—among them Mill, Bentham, Austin, etc., etc.. But we should also be aware of the many affinities of Holmes's thinking with ideas from the classical pragmatist tradition in philosophy—affinities which, as we can now see, go far beyond the similarity between his articulation of the working attorney's conception of what it means to say that the current law in Massachusetts is thus and so, and Peirce's of what it means to say that this diamond is

by 1945. Robin L. West, "Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision," *University of Pittsburgh Law Review*, 46, 1985: 673-738; and Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996) are focused on more recent developments.

¹³⁴ Student Note, "Holmes, Peirce, and Legal Pragmatism," *Yale Law Journal*, 84, 1975: 1123-1140, and Hantzis [note 6] argue affinities between Holmes and Peirce. Thomas Grey, "Holmes and Legal Pragmatism," *Stanford Law Review*, 41, 1989: 787-870 argues affinities between Holmes and Rorty. H. Pohlman, *Justice Oliver Wendell Holmes and Utilitarian Jurisprudence* (Cambridge: Harvard University Press, 1984) and Patrick J. Kelley, "Was Holmes a Pragmatist? Reflections on a New Twist to an Old Argument," *Southern Illinois Law Journal*, 14, 1990: 427-67 argue Holmes's affinities with utilitarian positivism. (It may be worth noting that Peirce describes pragmatism as a kind of "prope-positivism," i.e., as broadly akin to Comte's ideas, though far more tolerant of metaphysics than classical positivism. See *Collected Papers* [note 27], 5.423 (1905).)

hard, that this proposition is true, or that this thing or kind or natural law is real.¹³⁵

Peirce criticizes the Cartesian notion of intuitive certainty, and describes himself as a "contrite fallibilist, ready to dump the whole cartload of his beliefs the moment experience is against them";¹³⁶ Dewey mounts a sustained attack on the Platonic, as well as the Cartesian, "quest for certainty";¹³⁷ Holmes observes that "certainty generally is an illusion ... no concrete proposition is self-evident" (397). Peirce objects that Descartes' epistemology, which makes the individual the judge of truth, is "viciously individualistic," and contrasts it with the method of science, which relies on interpersonal, objective standards; Holmes contrasts the objective, external legal use of terms like "malice" or "intent" with their subjective, moral use.¹³⁸ Peirce complains about the arguments of moral philosophers and theologians: "it is not the reasoning that determines what the conclusion shall be, but the conclusion that determines what the reasoning shall be. This is sham reasoning";¹³⁹ Holmes writes that judges think they are calculating legally-correct answers when really they are relying on perhaps unconscious policy preferences. Peirce writes to James that "it is of the very essence of [pragmatism] that belief is expectation of the future in all cases,"¹⁴⁰ and Dewey observes that pragmatism "does not insist upon antecedent phenomena, but upon consequent phenomena, ... the possibilities of action";¹⁴¹ Holmes's philosophy of law is forward-looking, calling for judges to "consider and weigh the ends of legislation, the means

¹³⁵ Peirce, "How to Make Our Ideas Clear," *Collected Papers* [note 27], 5.388-410 (1878).

¹³⁶ Peirce, *Collected Papers* [note 27] 1.11 (c.1897).

¹³⁷ John Dewey, *The Quest for Certainty* [note 97].

¹³⁸ Cf. Note, "Holmes, Peirce, and Legal Pragmatism" [note 134], pp.1126-1134. What Holmes means when he writes of morality as "subjective," I believe, is not that what is right depends on what a person thinks is right, but that moral appraisal must refer to inner, mental states such as intentions and the like.

¹³⁹ Peirce, *Collected Papers* [note 27], 1.57 (c.1896).

¹⁴⁰ *Id.*, 8.294 (1904).

¹⁴¹ John Dewey, "The Development of American Pragmatism," in *Philosophy and Civilization* (New York: Putnam, 1931; Capricorn edition, 1963), 13-35, p.24.

of attaining them, and the cost" (403). In the context of his agapism, a cosmological theory of how order might evolve from chaos, Peirce writes of "the law of mind": "ideas tend to spread continuously and to affect certain others that stand to them in a peculiar relation of affectibility";¹⁴² Holmes writes that "[t]he development of our law has gone on for nearly a thousand years, like the development of a plant, each generation taking the next step, mind, like matter, simply obeying a law of spontaneous growth" (398). In short: Holmes may not be officially on the team, but there is certainly much of the spirit of classical pragmatism in his thinking.¹⁴³

"Is contemporary legal neo-'pragmatism' really pragmatism?"—another pretty fruitless question. Despite the Foucauldian fogginess, Alberstein is undeniably correct on one point: the discourse of legal pragmatism from Holmes to the present has hardly been univocal. Holmes's philosophy of law eschews free-floating abstractions, and disavows the search for necessary and sufficient conditions that specify the essence of all law; but, like the philosophy of the classical pragmatist tradition, it is deeply theoretical. So it is far removed from the anti-theoretical stance of many contemporary legal neo-pragmatists.

And by now we can discern, in the mix of overlapping and competing recent conceptions of legal pragmatism, elements of pragmatism in its (present) ordinary-language sense; elements derived from the classical pragmatist tradition in philosophy; and elements from Rortyesque neo-pragmatism—which is in virtually every important respect diametrically opposed to Peircean pragmatism.¹⁴⁴ Moreover, the philosophical elements from classical pragmatism include, at least as often as

pragmatism-as-method, specific philosophical doctrines such as James's or Dewey's conception of truth,¹⁴⁵ or Dewey's political philosophy,¹⁴⁶ as well as elements of Holmes's jurisprudence¹⁴⁷—often, however, in simplified, and sometimes in distorted, forms. Nor is it a simple matter of each writer taking one or another of these elements as key; most, apparently, have drawn on several.

Things are further complicated because those who appeal to Peirce's or James's or Dewey's conceptions of truth don't always seem to realize that their concerns were far removed from legal propositions (and because those who appeal to Rorty's cynicism about truth—or, as he prefers to say, holding the concept at arms' length, "truth"—don't always seem to realize how thoroughly this cynicism undermines the very idea of justice),¹⁴⁸ by the wretchedly ambiguous use of "foundationalism" and "anti-foundationalism" encouraged by Rorty in epistemology,¹⁴⁹ and extrapolated by legal scholars to jurisprudence; and by a persistent false equation of "anti-essentialist" and "anti-abstraction" with "anti-theoretical."

The conceptual trap set by "foundationalism" and "anti-foundationalism" is, in brief, this. In epistemology, "foundationalism" has at least three senses; in the first, it refers to a family of theories of epistemic justification characterized by their reliance on a distinction between

¹⁴² Peirce, *Collected Papers* [note 27], 6.103 (1902).

¹⁴³ In this regard Kellogg's approach in *The Formative Essays of Justice Holmes* [note 91], seems to be somewhat in the same spirit as mine.

¹⁴⁴ See Susan Haack, "'We pragmatists ...'; Peirce and Rorty in Conversation" (1997), reprinted in Haack, *Manifesto of a Passionate Moderate: Unfashionable Essays* (Chicago: University of Chicago Press, 1998), 31-47, and in *Pragmatism, Old and New* [note36], 675-96.

¹⁴⁵ See, for example, Tamanaha, *Realistic Socio-Legal Theory* [note 16], and "A Pragmatic Response to the Embarrassing Problems of Ideology Critique in Socio-Legal Studies," in Morales, *Renascent Pragmatism* [note 20], 49-71.

¹⁴⁶ See, for example, Posner, *Law, Pragmatism, and Democracy* [note19], 99-115.

¹⁴⁷ See, for example, William G. Weaver, "The 'Democracy of Self Devotion': Oliver Wendell Holmes, Jr., and Pragmatism," in Morales, *Renascent Pragmatism* [note 20], 3-30.

¹⁴⁸ See Susan Haack, "Epistemology Legalized: Or, Truth, Justice, and the American Way," 49 *American Journal of Jurisprudence*, 49, 2004: 43-61.

¹⁴⁹ See Susan Haack, *Evidence and Inquiry: A Pragmatist Reconstruction of Epistemology* (1993; 2nd, expanded ed., Amherst, NY: Prometheus Books, 2009), chapter 9, for disambiguation.

basic ("foundational") and derived beliefs; in the second, to a conception of epistemology as an a priori discipline the task of which is to provide the foundation of all legitimate claims to knowledge; and in the third, to the idea that our standards of better and worse evidence, more and less justified beliefs, must be, not merely conventional, but grounded in some relation of justification and truth. Only the third has an analogue in legal theory: the idea that legal rules, to be (in a non-epistemic sense) justified, must be grounded in some relation to (presumably, moral) values. But Holmes's account is not clearly anti-foundationalist in this sense: while it repudiates the idea that what the law is may be deduced from some overriding set of moral principles, it also urges that judges look to the social benefits and disadvantages of their rulings, and it is if anything *over*-optimistic about the connection between the evolution of law and moral progress.

The false equation of "anti-essentialist" and "anti-theoretical" has been compounded by some unhappy developments in the use of the word "theory": a too-ready assumption that "theory" must mean "moral, social or political theory" (which are really only a couple of sub-classes of the vast variety of types of theory); and, relatedly, the specialized sense recently taken on by "Theory"—now with that imposing upper-case "T"—to connote this or that (feminist, postcolonialist, etc.) principle for "reading" literary or legal texts.

Returning to my opening quotations, we see that, like Atiyah, Schneider and Ingram are apparently using "pragmatism" in its ordinary-language rather than its philosophical sense; that Leiter has apparently misconstrued the purport of Holmes's description of the law as involving "prophecies" of what judges will decide;¹⁵⁰ and that Grey, Posner, and Tamanaha

apparently assume that legal pragmatism must be anti-theoretical because it is anti-essentialist. But Luban's formula, "result-oriented, historically-minded antiformalism," briefly captures some key elements of Holmes's jurisprudence quite well; and Tamanaha's reference to the "middle way" captures something important to the tenor of the old-pragmatist tradition.

In 2004, concluding my brief history of the fragmentation of philosophical pragmatism, I wrote that:

[i]t is easy to get hung up on the question of which variants qualify as authentic pragmatism; but probably it is better—potentially more fruitful, and appropriately forward-looking—to ask, rather, what we can borrow from the riches of classical pragmatism, and what we can salvage from the intellectual shipwreck of the new.¹⁵¹

Here, exploring the fragmentation of legal pragmatism, I have suggested a reading of Holmes's conception of law informed by ideas from the classical pragmatist tradition in philosophy: an interpretation in which "The Path of the Law" leads us to a comprehensive theoretical vision of the law as a vast congeries of legal systems, each local to its place and time, and all responding, some more and some less successfully, to human needs and to the conflicts that inevitably arise in any society.¹⁵²

substantial accounts of pragmatism, with affinities to my own." Leiter, "Rethinking Legal Realism" [note 17], 303, n.156. Leiter's "more substantial" is apparently intended in contradistinction to the idea that pragmatism is trivial or banal, as suggested by Richard Rorty in "The Banality of Pragmatism and the Poetry of Justice," *Southern California Law Review*, 63, 1990: 1811-1820, and Thomas Grey in "Holmes and Legal Pragmatism" [note 134]. But while it is true that neither I nor Warner interpret pragmatism as empty or banal, Leiter's suggestion that our conceptions of pragmatism are akin to his is mistaken: Warner's understanding of pragmatism is quite different from mine; and neither his nor my understanding of pragmatism is even close to Leiter's.

¹⁵¹ Haack, "Pragmatism, Old and New" [note 36], p.58.

¹⁵² My thanks to Mark Migotti for helpful comments on more than one draft, and to John Finniss for helpful suggestions on a near-final version; to David Hollander, in the University of Miami Law Library, for his help in tracking

¹⁵⁰ Leiter refers readers to my "Pragmatism," in Jonathan Dancy and Ernest Sosa, eds., *A Companion to Epistemology* (Oxford: Blackwell, 1992), 351-6, and to Richard Warner, "Why Pragmatism? The Puzzling Place of Pragmatism in Critical Theory" [note 14] "for sturdier and more

down relevant materials; to Robert Lane, for his help in finding Peirce's earliest uses of the word "pragmatism" and of the phrase "paper doubts"; and to audience members when this paper was presented in the Law Schools at the University of Miami, the Jagiellonian University, Kraków, the University of Oslo, and the University of Pennsylvania, and in the Department of Economics at the University of Missouri, Kansas City.

ANOTHER FORM OF FALLIBILISM:

LAW (LIKE SCIENCE) AS SOCIAL INQUIRY

Frederic R. Kellogg

George Washington University

frederickellogg@cs.com

I am grateful for the opportunity to explore with you an aspect of pragmatism that I believe to be underappreciated: its philosophy of law. In the brief time available I would like to elucidate legal fallibilism as a distinctive theory of law, focusing on its roots in the early essays of Oliver Wendell Holmes Jr. Then I will address its contribution to a more general social theory of inquiry (as a sociology of *legal* knowledge), and finally touch on the merits of this as a research program for philosophy.

Legal inquiry connects everyday problems with professional and expert knowledge. It explores the function and interaction of discrete communities of inquiry, both expert and lay. Moreover, it provides insight into the relation of natural and normative inquiry. For a joint understanding of these two traditionally distinct areas of knowledge, we may look to Charles Peirce and Oliver Wendell Holmes Jr., respectively. As my time is limited I will discuss Holmes, and then make a comparison with Peirce that would surely have horrified both of them. Both presumptive members of the Metaphysical Club of Cambridge, the two men were as distant in their personal relations as they were close in their philosophical radicalism.

First, this requires a break with conventional Holmes scholarship. To borrow a phrase from Peirce, Holmes has been kidnapped—by the conventional paradigm of analytical legal positivism, long dominant in western legal philosophy. He is commonly associated with twentieth century legal realism, and you are surely aware of the Scandinavian legal realists. Early twentieth century legal realism was influenced by then contemporary social and behavioral science. It

emphasized legal reform, motivated by a reaction against the false certainty of “formalist” and “mechanical” jurisprudence. In the previous century, Holmes had (1872a, 92) defined law as prediction of what courts will enforce, which was later interpreted as judicial behaviorism or instrumentalism. In essence, it was entirely different.

The evidence is found in two formative papers that Holmes wrote in the 1870s. In the first (1870), he notes that Anglo-American common law “decides the case first and determines the principle afterwards,” in a process of gradual cumulative classification and generalization that he called “successive approximation.” He cautions against judges giving premature reasons in deciding unfamiliar cases, and advocates highly particularized decisions in the early stage of inquiry into new classes of dispute. The judge, assisted by the jury, should simply apply a standard of prudence, or the foreseeability of harm under novel conditions.

Holmes drew on John Stuart Mill’s criticism of the syllogism, which Mill saw as reasoning not from general to particular but from “particulars to particulars.” In his famous *System of Logic* (1843), which Holmes read in 1867, Mill declared that the general is simply used as a guide. But for Holmes in his 1870 essay, the relevant general cannot be used as a guide for new particulars, because *it does not yet exist*. How does it come to be? As new problems arise and new disputes are decided, gradually a pattern emerges. “It is only after a series of determinations on the same subject-matter, that it becomes necessary to ‘reconcile the cases,’ as it is called, that is, by a true induction to state the principle which has until then been obscurely felt. And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape. A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step.” (1870, 77). He would later

emphasize that such generalization is influenced by feedback and adjustment within society.

I. Normative inquiry, and normative knowledge, begins in law with disturbances in the social fabric channeled into systematized and participatory dispute resolution.

To illustrate, let's take an imaginary visit to Copenhagen harbor back in the days of sail. With the vagaries of wind and tide there must have been constant collisions bringing ship owners into the courts claiming money for loss of cargo and damage. Imagine a detailed account unfolding in the courtroom of how two ships collided, perhaps at night. When did one crew see the other ship, what did the crew do then? Sailing is tricky and complicated, and in the absence of a clear error, we'll assume a fair hearing so that the judgment goes against the vessel that was least prudent under the circumstances. Can we fairly say the case was decided by a rule of law?

Over time similar collisions occur and prudent practices develop to the point where the courts can and will say, yes, this ship or that was burdened and failed to display a certain light or post a lookout or douse a certain sail to avoid the collision. An illustration of this might be the display of all those colored lights on ships at night, identifying sailboats, anchored boats, tugboats, barges. Their first introduction led to cautionary rules and thence to decisions and legal standards and rules. Thus does the class of "collision cases" develop into general standards and rules, over time.

II. Legal normativity is a web or network of standards emerging from disparate practices and woven together by professionals whose mission it is to impose coherence, predictability, and consistency.

This is not, I hasten to say, a precise historical account. It is a loose simulation drawn from the 1870 essay by Holmes, which in turn is the product of several influences: a close study of 19th century English and

American cases, broad reading in philosophy as well as law, an attitude toward knowledge shared with his friends of the Metaphysical Club, and the influences on them from the Scottish Enlightenment, applied to their readings of Kant, Hegel, and Darwin (Kellogg, 2007). This mix of influences has been said to have led pragmatism toward a radically naturalized reading of Kant and Hegel." (Margolis, 2010)

You may see elements of a Darwinized Hegel in Holmes's approach to rule-making, perhaps influenced by his only admitted mentor Chauncey Wright, who in 1873 published an influential essay "The Evolution of Self-Consciousness," written at the encouragement of no less than Charles Darwin himself. Holmes appears to have absorbed Wright's attitude, and he took it in a different direction, toward the development (he avoids the term "evolution") of *legal intelligence*, as part of a socialized ordering process. And now you see what he implied in defining law as prediction of what courts will do. Law is not a set system of rules with a preexisting answer for every new case. It is a constantly developing system of *classification*.

Two years later Holmes writes another important essay (1872b). Here he addresses a more difficult issue. Most legal cases do not really match the simulation I just gave. They come into a context of preexisting law. Difficult cases often seem to be enmeshed between two (or more) opposing precedents or generals. The example he uses is the conflict of nuisance with property rights, like the battle between neighboring landowners over the placement and height of a wall. Upon repeated instances, in the absence of legislation, the courts will eventually work out a formula for placement and height. Thus are opposing generals reconciled over time, again through fallibilist inquiry.

However, this is hardly the conventional view. The dominant analytical approach to jurisprudence views law as an authoritative and comprehensive body of doctrine.

The assumption that it always contains an answer fails to explain the persistence of difficulty and uncertainty—dare I say *novelty*. This attitude gives rise to skepticism, and many legal realists went to the opposite extreme in seeing uncertain cases as “legally indeterminate.” This opens the door to judicial behaviorism or instrumentalism—law is the sum of subjective influences on judges, or their immediate sense of the “best” consequences.

*III. In the problem of the doubtful case we find the advantage of pragmatism as a theory of law. The analytical model leads to an all-or-nothing dualism. The putative certainty of analytical fundamentalism is opposed by a cynical subjectivism, even relativism. Pragmatism sees the doubtful case as a stage of inquiry and classification.*¹

In his 1873 essay, Holmes proposes an alternative to the analytical model. In the doubtful case, opposing generals are not reconciled either by analytical logic or judicial behaviorism or instrumentalism, but again by a *social* process of experimental, successive approximation. He applies the earlier cumulative model of 1870 to the problem of resolution of conflicts among rules and precedents. Again, his approach is, “particularize first, generalize later.” Here is the key passage:

The growth of the law is very apt to take place in this way: Two widely different cases suggest a general distinction, which is a clear one when stated broadly. But as new cases cluster around the opposite poles, and begin to approach each other, the distinction becomes more difficult to trace; the determinations are made one way or the other on a very slight preponderance of feeling, rather than on articulate reason; and at last a mathematical line is arrived at by the contact of contrary

decisions, which is so far arbitrary that it might equally well have been drawn a little further to the one side or the other. (1872b, 119)

Holmes suggests a process whereby new experience falls into a grey area between existing generals, eventually revealing a new pattern which first appears as a “line,” ultimately redefining the generals themselves.

In a moment I will ask whether this *normative* model has any parallels to *natural* inquiry. Can the two learn from each other? The influential “Edinburgh School” of the sociology of scientific knowledge (SSK) has advanced a remarkably similar *classification* model of scientific inquiry, emphasizing that scientific knowledge proceeds from particulars to particulars, and that “every act of classification has the form of a judgement, every act changes the basis for the next act, every act is defeasible and revisable. . . .” (Barnes et al., 1996, ix). I have found that there is much to be learned from a comparison here of the interaction between particulars and generals, and the role of communities of inquiry, in the cumulative growth of both legal and scientific knowledge.

But first I should address whether Holmes’s model is relevant for contemporary law. Does law really follow patterned judgments by communities of inquiry, as Holmes suggested 140 years ago, or is everything handled by legislation and administrative rulemaking?

There is a danger today of being kidnapped by the dominant analytical model of law dating at least from Jean Radin and Thomas Hobbes and reinforced by Hans Kelsen and John Austin (not to mention Napoleon Bonaparte!) Law is the creation of the sovereign, or a code, or a set of texts or other authorities—and embodied in a static analytical matrix. This view is so entrenched that Holmes is conventionally viewed as within the analytical positivist tradition. I have argued for 30 years that he rejected the analytical model. I have to concede that he made comments that may *sound*

¹ Both untenable positions stem from the positivist, analytical model of law, viewed as having a fixed boundary with definable contents. See Kellogg, 2009.

sympathetic to the analytical model—he was, after all, a judge. But careful examination reveals that he consistently returned to the 1873 line-drawing analogy—the classification model of law—throughout 50 years on the bench, applying it even to legislation and constitutional law (Kellogg 2007).

Can we find a classification model in contemporary law? How about a new problem like assisted suicide? This class of dispute started out as a series of criminal prosecutions of doctors for murder, until the opposing claim of personal autonomy got some traction, from constitutional language, applied to changing medical circumstances. The problem soon found its way to the appellate courts. In 1999 Professor Cass Sunstein wrote a book called *A Case at a time: Judicial Minimalism on the Supreme Court*, in which he cautioned the same thing as Holmes did in 1870—decide the cases one at a time, it's often premature to lay down a sweeping general rule. Ultimately, we may need legislation, but even that can't come too soon, before the experimental stage, which includes a process of feedback and adjustment. Legislation is *part* of the process of inquiry.

One implication of this is to undermine the classical model of democratic social choice, famously criticized by Kenneth Arrow. Social choice is constantly ongoing outside the ballot box, for good or ill, in the process of conflict resolution, influenced by feedback from various relevant communities. As with assisted suicide, each successive decision responds to feedback from diverse communities of interest, which may include medical, legal, and academic professionals, senior citizens, lobbying groups, and so on—even philosophers! Every decision is influenced by social adjustment and the adoption of new practices, like new medical procedures and living wills. The classical democratic model falls short in ignoring this continuing process of conflict and adjustment.

What are the key elements here? 1. We are looking at cases not singly, as raising a question of existing law against a synchronic analytical background, but as stages of inquiry into social *problems*, and against a *diachronic* background. 2. Notwithstanding the role of “great judges,” the guiding intelligence is not individual but social—hence it implies a *socialized epistemology*. 3. Inquiry itself is generated not by dispassionate curiosity but by conflict, and is far messier than any ideal model of dialogue. 4. Inquiry takes place in a context of preexisting generals to which we look backwards even while plotting new cases in relation to them. 5. The judicial role of comparing and contrasting is best understood as an incremental and cumulative line-drawing. 6. Judges are best seen as members of a distinct professional community of inquiry, but acting within a network of other communities, both expert and lay. 7. The interaction between disparate communities operates as a “feedback loop” from judicial decisions to their effects, which feed new experience back into the judicial system.

IV. Pragmatism replaces the analytical problem of “legal indeterminacy” with a study of inquiry into uncertainty, leading to classification, as an aspect of the sociology of (legal) knowledge.

These are some of the principal insights of legal fallibilism for the pragmatist theory of inquiry. Can this *normative* study of law enlighten our understanding of *natural* inquiry, or of inquiry in general?

Peirce and Holmes: the Real and the Right as Ordering Concepts

Kenneth Stickers puts Peirce in the forefront of the history of sociology of knowledge (2009). He notes that Peirce had already suggested, prior to Dilthey and Durkheim and without any apparent benefit from the insights of Marx, that the forms of human knowing are fundamentally forms of social life, without reducing the

latter to the forms of economic life. It is unfortunate that Holmes and Peirce were not more compatible. If they had been more inclined to engage each other, perhaps the combination of Peirce's breadth with Holmes's empirical and historical focus might have illuminated parallels between natural and normative inquiry and the role of "umbrella concepts" such as the "real" and the "right."

Let us examine a famous passage in which Peirce addresses the role of inquiry in constituting what we understand as the "real":

The real, then, is that which, sooner or later, information and reasoning would finally result in, and which is therefore independent of the vagaries of me and you. Thus the very origin of the conception involves the notion of a COMMUNITY, without definite limits, and capable of complete information, so that reality depends on the ultimate decision of the community. . . . Reality consists in the agreement that the whole community would eventually come to. (Peirce 1984, 239, 241, 252)

Peirce held that the social impulse, the desire to reconcile our personal habits with those of our neighbors, leads us to believe in the "independently Real." The real, then, is for Peirce an *ordering concept*. Inevitably we find that others hold views different from ours, and sooner or later the strength of our tenacity is worn away. Unless we make ourselves hermits, we shall necessarily influence each other's opinion, so that the problem becomes how to fixate belief, not in the individual merely, but in the community as a whole. (Peirce 1986, 250)

Peirce's model of knowledge as inquiry is radically naturalist. It is rooted in the doubt-belief formula, which Dewey later elucidated as a theory of social inference.²

² For Ralph Sleeper, the key to Dewey's logic was understanding inference "as a real event of transformational force and power, causally real in the

Peirce extends this naturalist formula all the way up, to metaphysical questions concerning the "real." It also famously implies the element of "construction" of the real as a social phenomenon. But it takes naturalism only so far, and leaves the discussion of inquiry and social construction still uncomfortably abstract.

We should be wary of assuming that "inquiry" is a natural or endemic condition. It is certainly not rooted in pure curiosity or always done in the antiseptic context of a library or a laboratory. Peirce emphasizes that inquiry is prompted by doubt. What is doubt? How does it arise and operate? How does inquiry then occur? The doubt-belief formula needs to acknowledge that doubt must have its own history and physiology. Legal doubt is driven by the problem of disputes flowing into the courts. This doubt is rooted, then, in *conflict*. Holmes, who fought in the American Civil War, was acutely aware that conflictual doubt could take many forms, including the desire for revenge, and be resolved in other ways, including by violence.

Since Peirce and Dewey, the cutting edge of fallibilism studies has been in the history and philosophy of science, influenced by more recent texts such as those by Thomas Kuhn, Imre Lakatos, Paul Feyerabend, Larry Laudan, and many others. Empirical studies of fallibilism are to be found in the burgeoning studies of actual research programs, including the "strong programme" of the University of Edinburgh, where I held a MacCormick Fellowship in 2009.

I was struck there by the remarkable similarities of the "strong programme" of science studies to the Holmes model of legal inquiry. I have already quoted passages from the signal Edinburgh text, *Scientific Knowledge: A Sociological Analysis* (Barnes et al., 1996). There also, the model of inquiry is reasoning from particulars to

emergence of new features of things 'entering the inferential function.' It takes inference as action, as behavior that causes changes in reality through interaction with things." (1986, 83).

particulars, a social and interactive process of classification, with an emphasis on conceptual transformation. Comparing the Holmes model of law with the Edinburgh model of science opens up the connection of two hitherto separate areas of knowledge, and heralds an expanded relevance of sociology of knowledge for philosophy.

Turning to normative inquiry, even more apparent is the role of the “right” as an ordering concept. The notion of right directly influences action, even as the notion of the real does so less directly. The literature on the right is distinctly structured in a hierarchical manner, indeed governed by the concept of *justice*, itself a highly structural idea. But there are two separate bodies of literature on the “right,” the legal and the moral. Differentiating the legal from the moral right is a vast body of literature addressing such notions as legitimacy, authority and procedure. In contrast to the analytical approach, which has dominated this body of work at least since Hobbes, Holmes shows how the *legal* right is in constant transformation.

V. Analytical positivism maps legal knowledge as a fixed matrix. While a formalist positivism has been robustly challenged in science, it remains dominant in law. Holmes’s early research is the first distinct model of law in transition as a system of social classification.

What is missing from the contemporary body of legal literature is found in the literature of science studies: a detailed critique of the social system of inquiry and classification itself. Analytical jurisprudence is blind to this, because it is rooted in an individualist and static epistemology. John Austin focused on the nature of legal rights as fixed commands. H.L.A. Hart turned instead to the nature of law as a body of rules, revealed in a close study of legal language. Ronald Dworkin took exception to the model of rules, making the case for the operation of “principles.” Rather than undermining the positivist model, Dworkin effectively preserved the

notion that there is always an *a priori* correct answer to any doubtful case.

Missing from the analytical model is any detailed concern with methods of research, the interaction of professional and lay communities of inquiry, actor-network theory, the social nature of research traditions, and many other aspects commonly found in contemporary science studies. Here lies rich potential for a new generation of legal research.

There are other important aspects of Holmes’s early research that have been widely ignored and deserve more extended attention than I have time for. Soon after the two essays just quoted, he delved into legal history and anthropology, leading to his 1881 treatise *The Common Law*, incorporating further insights.

For example, contemporary normative ideas and practices, even the modern rules of liability for the ships colliding in Copenhagen Harbor, have roots in the distant past, in primitive notions, which are given new reasons even while the original practices remain. For example, the limitation of liability in admiralty law is a product of the ancient desire for vengeance, which was mitigated by the “primitive” practice of surrender of the offending instrument of harm. For Holmes, legal inquiry into personal injury was a historical replacement of the ancient blood feud, retaining survivals of its ancient past. The process of replacement of primitive notions with putatively “rational” models has been messy, chaotic, uneven, utterly incompatible with Rawlsian or Habermasian ideal conditions of dialogue. Unlike abstract and idealized models of inquiry, its actual nature can be examined in historical detail, warts and all.

Having reached the limit of my time, I will end with a provocative late comment by Holmes in 1899, suggesting that his diachronic map is applicable to the moral realm, indeed to the realm of ideas in general:

It is perfectly proper to regard and study the law simply as a great anthropological document. It is proper to resort to it to discover what ideals of society have been strong enough to reach that final form of expression, or what have been the changes in dominant ideals from century to century. It is proper to study it as an exercise in the morphology and transformation of human ideas. (1899, 212)

Holmes brings to the pragmatic theory of inquiry a more distinct focus on history and morphology. He suggests in this passage that the bones of human metaphysics lie barely concealed in the historical record, and that their connection with human conduct and social change is palpable.

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LAW, PRAGMATISM AND CONSTITUTIONAL

INTERPRETATION: FROM INFORMATION EXCLUSION TO

INFORMATION PRODUCTION

Brian E. Butler

University of North Carolina at Asheville

bbutler@unca.edu

I. Introduction

In this paper I argue that through an analysis of Richard Posner's *How Judges Think* as well as Michael Dorf and Charles Sabel's "A Constitution of Democratic Experimentalism," a conception of the legal process, and the judge's position within it, as an information production system is offered that is true to the tradition of philosophical pragmatism (especially that of John Dewey). This is in contrast to Antonin Scalia's jurisprudential theory, "public meaning originalism," that offers an explicitly information excluding conception of the status of the judge. Through an examination of a defining opinion for Scalia's interpretive philosophy, *Heller*, a United States Supreme Court opinion that interprets the Second Amendment's "right to bear arms" clause, and the expressed aims of the jurisprudential theories of Scalia, Posner, Dorf and Sabel, I claim that a pragmatic conception of law as an information producing device is attractive and compatible with both rule of law virtues and democratic governance. This conclusion becomes quite apparent from an analysis of the features of democratic experimentalism. While this analysis is somewhat parochial, being attached to cases and theorists writing within the United States legal tradition and a somewhat peculiar American fixation on guns, it is hoped that the move from a picture of law from purposive information exclusion to a more active position in social experimentation might be translatable to other contexts.

II. *District of Columbia v. Heller*, 554 U.S. 570 (2008)

Heller is as of this moment the defining opinion for Scalia's jurisprudential philosophy, and therefore, it seems for the contemporary Supreme Court.¹ The facts were, indeed, close to perfect for implementation of his theory. There was a clear Constitutional text; the "bear arms" clause of the Second Amendment ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed"), and very few (if any) precedents to worry about. Further, the facts were quite simple: the District of Columbia had a set of codes that made it extremely difficult to legally possess a handgun. A one-year license was possible but rare and only allowed via being issued by the chief of police. *Heller*, a D.C. special police officer applied for a permit and was refused. He filed suit under the Second Amendment. The District Court dismissed, the Court of Appeals for the D.C. Circuit reversed and the Supreme Court granted certiorari.

The majority opinion, written by Scalia, reads as if the Court has officially adopted his originalist methodology. As it states, "In interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" Of course for him this is the normal meaning of the founding generation. Through investigation of the textual structure of the amendment as well as the normal meaning of the text at the time of the founding the majority opinion finds that the Second Amendment "protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home."²

¹ *District of Columbia v. Heller*, 554 U.S. 570 (2008) Note: *Heller* is only available as a "slip" opinion; its pagination will change when the opinion is officially published. In the slip opinion the opinion and each dissent starts at page 1.

² *Ibid*, p. 3.

The Court does this by offering a reading of the text based upon the following analysis. First, the Court divides the text into a “prefatory clause” and an “operative clause.” Then it explains that, “apart from the clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.”³ Therefore, it seems, if the original meaning of the operative clause is reasonably and fairly clear, reference to the prefatory clause becomes unnecessary. The Court’s analysis of the “operative clause” is a tortured wonder. First, the “right of the people” is found to be unambiguously a right of individuals, not of collective or any type of corporate rights. Therefore the Court finds a strong presumption that the Second Amendment Right is exercised individually and belongs to all Americans. Next, “to keep and bear Arms” it is found that the meaning of “arms” in the 18th century was no different than today’s meaning. In addition, “to bear” is found by the Court’s majority to mean to “carry” for the purpose of “confrontation.”⁴ From this it is concluded that “bear arms” was unambiguously used to refer to the carrying of weapons outside of an organized militia.”

To bolster such an analysis a public meaning originalism points to public historical sources. Scalia claims that these sources show that the Second Amendment codified a pre-existing right that had “nothing whatever to do with service in a militia.”⁵ Further, the Court finds that the phrase “security of a free state,” the word “state” means “the people composing a particular nation or community.” To support this reading the opinion then switches away from Constitutional text and surveys post-ratification summaries and treatises, pre-Civil War case law, post Civil War legislation and constitutional commentators and earlier Supreme Court precedents. From this Scalia concludes, “nothing in our precedents forecloses our adoption of the original understanding of

the Second Amendment.”⁶ Therefore, the Court holds “the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home ‘the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family’ would fail constitutional muster.”⁷ The Court affirmed the judgment of the Court of Appeals and the D.C. handgun “ban” was found unconstitutional. Importantly, the opinion also noted that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” Not only this, but the Court also accepts that the holding should be limited to the types of weapons in common use at the time.

Both Stevens and Breyer wrote dissents. Stevens starts his by defining the issue as whether the Second amendment protects any gun rights for nonmilitary purposes. He also states that, “The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a standing army posed an intolerable threat to the sovereignty of the several States.”⁸ Further, Stevens argues that *Miller*, the Court’s only relevant precedent, also situated the right to bear arms in the context of a “reasonable relationship” to

³ *Ibid*, p. 4.

⁴ *Ibid*, p. 10.

⁵ *Ibid*, p. 20.

⁶ *Ibid*, p. 53.

⁷ *Ibid*, p. 56-57, citations omitted.

⁸ *Ibid*, p. 2.

militia activity. As to the first part of the constitutional text in question, instead of “prefatory clause,” he labels it a “preamble” and finds that it shows the purpose of the Amendment was the preservation of militias, that militias were thought necessary to the security of a free state, and that such militias must be well-regulated.⁹ Stevens notes that the majority opinion ignores the preamble so it can pretend to “find” its preferred reading but that only through ignoring the preamble’s content the majority can make such a reading compatible with the shortened text. Stevens further notes that even this truncated compatibility is questionable given the majority’s inconsistent reading of such terms as “the people.”¹⁰

Breyer starts his dissent by accepting that the majority’s opinion is incorrect on its own originalist grounds and claims that it was incorrect because it ignored constitutionally legitimate limitations to Second Amendment rights. Breyer rejects originalist methodology and advocates instead an explicit “interest balancing inquiry.”¹¹ Given this interpretive methodology, a methodology that encourages the use of social data, he then offers a detailed statistical survey of gun related social issues and argues that because of the importance of the issues and the amount of uncertainty in the results of various legislative policies judges should defer to legislators. Breyer notes that, deference to legislative judgment is appropriate where the judgment has been made by a local legislature with particular knowledge of local problems and workable solutions. Further, Breyer argues that room should be made for local experiments when solutions are not clearly apparent.

Reaction to *Heller* was overwhelmingly negative, except from within the guns rights crowd (and, as will become apparent from a close reading it was not much of a

victory for them either). Some found that its version of “law office history” smelled of partialist advocacy and yet ultimately and of necessity the final result rested upon non-originalist indeed pragmatist and consequentialist grounds.¹² Others noted how naïve the picture of history and meaning must be for an originalist to come up with a determinate meaning, with Mark Tushnet describing such history as based on a “simulacrum of historical inquiry” that results in “history-in-law” that ignores contested truths. Tushnet notes that because Scalia has to ignore these contested truths and come up with a single determinant meaning he has to dismiss much actual historical evidence that would make his purported objective and certain conclusions more tentative.¹³ This claim is especially true if, as seems plausible, Samuel Issacharaoff is correct in stating that, “there is every reason to believe that constitutional terms were deliberately vague so as to garner agreement when the specifics could not be worked out.” This was a situation where “The Framers were embarking on a bold venture into representative democracy, with few historical milestones to guide how the various pieces would hold together” therefore, “They were specific when they could be and aspirational when they reached the limits of their understandings or their ability to agree.”¹⁴ Another damning claim, made by Reva Siegal, was that, though the rhetoric was of judicial humility in the face of a clear textual mandate the actuality of the matter was that originalism was “a

¹² See Rory K. Little, “*Heller* and Constitutional Interpretation: Originalism’s Last Gasp,” *Hastings Law Journal* 60 (2009): 1415-1430. 1417-1419, and Saul Cornell, “Originalism on Trial: The Use and Abuse of History in *District of Columbia v. Heller*,” *Ohio State Law Journal* 69 (2008): 625-640. Cornell claims that the *Heller* decision actually demonstrates that “plain meaning originalism has no coherent, historical methodology. It is little more than the old law-office history dressed up in the latest legal-academy fashions (p. 626).”

¹³ Mark Tushnet, “*Heller* and the New Originalism,” *Ohio State Law Journal* 69 (2008): 609-624, at 610, 619.

¹⁴ Samuel Issacharaoff, “Pragmatic Originalism?” *New York University Journal of Law & Liberty* 4 (2009): 517-534, at 530-531.

⁹ *Ibid*, p. 5.

¹⁰ *Ibid*, p. 9.

¹¹ *Ibid*, p. 10.

species of popular constitutionalism” and actually functions “as conservatives’ living constitution” because it “gave jurisprudential expression to the coalition politics of the New Right.”¹⁵ Finally, multiple commentators have noted that the real “operative” aspects of the majority’s opinion (to use their own preferred wording) are “pragmatic” or “functionalist” and fail to be grounded in accepted originalist tools. Indeed, lower courts will pretty much only need to look at the pragmatic exceptions in order to decide later cases (though *Heller* offers virtually no guidance for lower courts in figuring out what they should do).¹⁶ As it stands, the case represents a bright-line and universal rule that stand for the minimal content that virtual “bans” of handguns are unconstitutional and then just offers a laundry list of exceptions with no explanation as to why they pass constitutional muster. There is no guidance as to how to move from this minimal baseline to the exceptions in a reasoned or principled manner.

Of great interest for this paper is Posner’s *New Republic* critique.¹⁷ In this piece Posner is, as always, admirable for his candor. He finds that *Heller* is “questionable in both method and result” and is evidence of a Supreme Court that “exercises a freewheeling discretion strongly flavored with ideology.” He sees the textual decoupling strategy used by the majority as textual evasion, argues that the context of the Second Amendment’s ratification gives strong support to the accuracy of Stevens’ dissent, and notes that at the time of the constitution’s ratification the reigning conception of textual

construction was that of Blackstone which was “loose,” “flexible” and “nonliteral.” He also points out the fact that the Constitution’s great expositor, John Marshall, was also a “loose constructionist.” Further, Posner notes that at the time of ratification “arms” meant “muskets” but the Court properly ignores this detail because “using that detail in a modern interpretation would be ‘preposterous.’”

Ultimately Posner is at a loss to explain *Heller* (as well as *Citizens United*) as anything but a version of “payback” or “turnabout is fair play” in response to earlier liberal courts using loose interpretation. But Posner also offers other reasons to worry about the *Heller* opinion rather than just its factual inaccuracy and unexplained looseness. First, Posner allows that it might be important to use a loose construction of the Constitution when the group seeking the enlargement “does not have good access to the political process to protect its interests.” But, he observes, gun advocates are not without such access. Second, “*Heller* gives short shrift to the values of federalism, and to the related values of cultural diversity, local preference, and social experimentation.” Posner’s final verdict on the opinion; It was all “fig-leaving” and a snow job.

Addendum: One would think that in the light of this criticism, indeed criticism coming from figures even to the right of the Court’s political preferences, that the Court would back off of its conclusions.¹⁸ That was not the case. In fact two years later in *McDonald v. City of Chicago* 561 U.S. 3025 (2010)(Alito Opinion) the Court doubled down and extended the *Heller* holding to states under the Due Process clause (thereby further supporting Posner’s “turnabout” analysis). Scalia’s concurrence reiterated his originalist interpretation in *Heller* and, though noting the imperfection of originalist

¹⁵ Reva B. Siegal, “*Heller* and Originalism’s Dead Hand – In Theory and Practice.” *UCLA Law Review* 56 (2009): 1399-1424, at 1399-1402.

¹⁶ See, for example, Josh Blackman, “The Constitutionality of Social Cost,” *Harvard Journal of Law & Public Policy* 34 (2011): 951-1042 at 956; “the most significant portions of *Heller* for the lower courts are based on the same pragmatic-and not originalist-consideration of asserted social costs that may stem from gun ownership.”

¹⁷ Richard A. Posner, “In Defense of Looseness” *The New Republic*, August 27, 2008, (<http://www.tnr.com>), last accessed 10/24/2011.

¹⁸ See, for example, Richard A. Epstein, “A Structural Interpretation of the Second Amendment: Why *Heller* is (Probably) Wrong on Originalist Grounds,” *Syracuse Law Review* 59 (2008): 171-183.

methodology, argued that it was still the “best means available” to constrain judicial excess.¹⁹ Stevens in dissent noted the irony that the Second Amendment was “directed at preserving the autonomy of the sovereign States and its logic therefore ‘resists’ incorporation by a federal court *against* the States” and critiqued Scalia’s purportedly “objective” and “neutral” method as one that just ignores all the important and ultimately determining threshold questions that need to be answered in order to start, including for instance what level of generality the analysis should be framed and what “vision of democracy” Scalia holds.²⁰

III. Scalia: Excluding Information in order to Constrain

In order to see why Scalia doesn’t think Stevens, but especially Breyer and Posner are wrongheaded in their critiques it is important to understand that Scalia’s legal formalism rests upon an ideology that might be summed up as “exclude in order to bind.” Indeed, the chief claimed virtue of Scalia’s own interpretive scheme is that it excludes so many other factors from what the judge can legitimately notice when interpreting a statute or constitutional text. In contrast to this virtuous exclusion and hemmed in quality of his interpretive stance, Scalia argues that the legal profession has an unfortunate idea of the “great judge” that encourages a picture of the judge as “the man (or woman) who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose the rule.”²¹ This ideal exacerbates what he sees as a grave danger in Constitutional interpretation, which is that a judge will mistake his or her own preferences for official Constitutional doctrine. Scalia sees a problem with this in relationship to democratic governance. This is because the common law judge’s “attitude” is wrong for

an “age of legislation” where “most new law is statutory law.”²² Indeed, he claims that when it comes to statutory interpretation “attacking the enterprise with the Mr. Fix-it mentality of the common-law judge is a sure recipe for incompetence and usurpation.”²³

More troubling, Scalia’s description of the American legal profession is that it has “no intelligible theory” of its most common activity, that of statutory interpretation. Once the question is set, though, Scalia finds encouraging evidence that when interpreting a statute most practitioners “look for a sort of ‘objectified’ intent – the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”²⁴ This is as it should be because a broader version “is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.”²⁵ These, of course, are the basic tenants of his “public meaning” originalism. And this is because in a government of laws, not of men, “It is the *law* that governs, not the intent of the lawgiver.”²⁶ As Scalia sees it, “It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is.”²⁷

As Scalia puts it, “one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed to serve; or too hide-bound to realize that new times require new laws. One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws.”²⁸ For Scalia, “A text should not be construed strictly, and it should

¹⁹ *McDonald* at 14.

²⁰ *Ibid*, p. 51, 56

²¹ Antonin Scalia, *A Matter of Interpretation* (Princeton: Princeton University Press, 1997), at p. 9.

²² *Ibid*, p.13.

²³ *Ibid*, p. 14.

²⁴ *Ibid*, p. 17.

²⁵ *Ibid*, p. 17.

²⁶ *Ibid*, p. 17.

²⁷ *Ibid*, p. 22.

²⁸ *Ibid*, p. 23.

not be construed leniently; it should be construed reasonably, to contain all that it fairly means.”²⁹ This is an admittedly formalist doctrine – and Scalia proudly accepts that description for his theory of interpretation because in his opinion, “The rule of law is *about* form.”³⁰ Once this simple theory is accepted, Scalia thinks that some of the great tricks of the legal trade can be eliminated. Most importantly, there is legislative history. Scalia is adamant that legislative history should not be used as dispositive in statutory interpretation because legislative history is easily manipulated and therefore a likely source of false information.

Scalia thinks the same interpretive doctrine is even more appropriate for Constitutional issues. And this is, in his view, contrary to standard practice. Scalia notes that in a standard constitutional law class the text of the actual text of the Constitution will take a back seat to Supreme Court cases, and that “the new issue will presumptively be decided according to the logic that those cases expressed, with no regard for how far that logic, thus extended, has distanced us from the original text and understanding. Worse still, however, it is known and understood that if that logic fails to produce what in the view of the current Supreme Court is the *desirable* result for the case at hand, then like good common-law judges, the Court will distinguish its precedents, or narrow them, or if all else fails overrule them, in order that the Constitution might mean what it *ought* to mean.”³¹ And this is wrong because it is “not the way of construing a democratically adopted text.”³² One great worry that Scalia expresses here is that any such constructed constitutional interpretation is, once promulgated virtually irreparable. One of the most egregious types of such a stance is that of “the living constitution” where it is held that the Constitution needs to be interpreted in a flexible and evolutionary manner so it can “provide the

‘flexibility’ that a changing society requires.”³³ Ironically, Scalia sees the result of such a stance towards the Constitution as resulting in the creation of less flexibility through a promulgation of multiple restrictions upon democratic government. For example, there is the exclusion of prayer at public school graduations.³⁴ Or, more importantly for Scalia, there are various Court-created (in his view) erosions on property rights or the fact that gun laws are limiting our right to bear arms in contradistinction to the Founders expressed wishes.³⁵

Ultimately, the great virtue of textualism for Scalia is that “the originalist at least knows what he is looking for: the original meaning of the text.”³⁶ Of course Scalia also acknowledges that there are problems with originalism. But Scalia thinks that even when meaning might be somewhat difficult to discern, “the difficulties and uncertainties of determining original meaning and applying it to modern circumstances are negligible compared with the difficulties and uncertainties of the philosophy which says that the Constitution *changes*; that the very act which it once prohibited it now permits, and which it once permitted it now forbids; and that the key to the change is unknown and unknowable. The originalist, if he does not have all the answers, has many of them.”³⁷

But Scalia’s textualist originalism does not exhaust his jurisprudential philosophy. It is supplemented with a conception of “the rule of law as a law of rules.” As Scalia puts it, “Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact

²⁹ *Ibid*, p. 23.

³⁰ *Ibid*, p. 25.

³¹ *Ibid*, p. 39.

³² *Ibid*, p. 40.

³³ *Ibid*, p. 41.

³⁴ *Ibid*, p. 41.

³⁵ *Ibid*, p. 43.

³⁶ *Ibid*, p. 45.

³⁷ *Ibid*, p. 45-46.

pronouncement.”³⁸ As in the originalist stance that Scalia adopts, this conception of law of rules is justified by its link to democratic values; “In a democratic system, of course, the general rule of law has a special claim to preference, since it is the normal product of that branch of government most responsive to the people.”³⁹ Best, according to him, is to follow the law as written. But as Scalia noted above, originalist meanings can often be quite difficult or impossible to determine. This is not fatal to Scalia’s originalism, though, because, “the value of perfection in judicial decisions should not be overrated,” indeed, “it is just one of a number of competing values. And one of the most substantial of those competing values, which often contradicts the search for perfection, is the appearance of equal treatment.”⁴⁰ So, in cases where original meaning is indeterminate or contested, the judge should work towards an appearance of equal protection because, “The Equal Protection Clause epitomizes justice more than any other provision of the Constitution. And the trouble with the discretion-conferring approach to judicial law making is that it does not satisfy this sense of justice very well.”⁴¹ Therefore, it is “Much better, even at the expense of the mild substantive distortion that any generalization introduces, to have a clear, previously enunciated rule that one can point to in explanation of the decision.”⁴²

Further, rules have another great virtue, predictability. Indeed, for Scalia, because having rules that have the appearance of equal protection is so central a value to the rule of law, “There are times when even a bad rule is better than no rule at all.”⁴³ This is, once again, attached to his picture of judicial humility, “Only by announcing

rules do we hedge ourselves in.”⁴⁴ But, somewhat paradoxically, “While announcing a firm rule of decision can thus inhibit courts, strangely enough it can embolden them as well. Judges are sometimes called upon to be courageous, because they must sometimes stand up to what is generally supreme in a democracy: the popular will. Their most significant roles, in our system, are to protect the individual criminal defendant against the occasional excesses of that popular will, and to preserve the checks and balances within our constitutional system that are precisely designed to inhibit swift and complete accomplishment of that popular will.”⁴⁵ Indeed, for Scalia the conception of the “rule of law as the law of rules” is so central to a properly functioning legal system that, “we should recognize that, at the point where an appellate judge says that the remaining issue must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law” and “To reach such a stage is, in a way, a regrettable concession of defeat ...the unfortunate practical consequences ... equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.”⁴⁶ But this point is not arrived at very often because, “It is rare, however, that even the most vague and general text cannot be given some precise, principled content – and that is indeed the essence of the judicial craft.”⁴⁷

Importantly, Scalia allows for a little post-originalist contamination in his methodology in the use of *stare decisis*, but, as he puts it, “*stare decisis* is not part of my originalist philosophy; it is a pragmatic *exception* to it.”⁴⁸ This is because a more pure use of textual originalism is too strong a medicine to swallow, and therefore he

³⁸ Scalia, “The Rule of Law as a Law of Rules, *The University of Chicago Law Review* 56 (1989): 1175-1188: p. 1176.

³⁹ *Ibid*, p. 1176.

⁴⁰ *Ibid*, p. 1178.

⁴¹ *Ibid*, p. 1178.

⁴² *Ibid*, p. 1178.

⁴³ *Ibid*, p. 1179.

⁴⁴ *Ibid*, p. 1180.

⁴⁵ *Ibid*, p. 1180.

⁴⁶ *Ibid*, p. 1182.

⁴⁷ *Ibid*, p. 1183.

⁴⁸ Scalia, *A Matter of Interpretation*, p. 140.

admits when it comes to originalism he is often “faint-hearted.” But, to return to his textual originalism, Scalia notes that, “Of course, the extent to which one can elaborate general rules from a statutory or constitutional command depends considerably upon how clear and categorical one understands the command to be, which in turn depends considerably upon one’s method of textual exegesis. For example, it is perhaps easier for me than it is for some judges to develop general rules, because I am more inclined to adhere closely to the plain meaning of a text.”⁴⁹

In a nutshell, this can be thought of as the “Scalia two-step.” First, use the original text and common understandings of the time in which statute or constitution was ratified to determine the meaning of the language in question. Second, if the meaning cannot be made determinate create a clear rule of law in order to facilitate both predictability and clarity, therefore limiting the possibility of future judicial interference with democratic governance. If this rule is problematic, expect that the legislative branch will fashion a proper, democratic, remedy. His interpretive method is ultimately, therefore, justified by an appeal to its democratic virtues. This is because:

A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect ‘current values.’ Elections take care of that quite well. The purpose of constitutional guarantees – and in particular those constitutional guarantees of individual rights that are at the center of this controversy – is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable. Or, more precisely, to require the society to devote to the subject the long and hard consideration required for a

constitutional amendment before those particular values can be cast aside.⁵⁰

IV. Posner: Including Information in Interpretation

If for Scalia the whole point of an interpretive legal philosophy is to constrain the judge through a drastic limitation of the legally cognizable facts and policies choices, for Posner such a theory is both descriptively inaccurate and functionally unworkable as an ideal. Indeed, he advocates for a more informationally rich description of judicial decision-making both because he thinks it more descriptively accurate and because it would bring about more predictable, informed and desirable judicial decisions. Richard Posner’s *How Judges Think* is a sustained argument for the conclusion that American judges, especially federal judges, necessarily are “constrained pragmatists” who utilize a much broader set of information in order to arrive at their legal decision. This conflicts with what he sees as the official party line of the legal profession, one that Scalia clearly advocates for, which he labels “legalism.” He argues that given the personal, professional and institutional constraints that American judges face, legalism is unworkable, indeed irresponsible and a type of “professional mystification” adopted in a way that exaggerates the disinterested and professional aspects of legal practice, and that, therefore, judges have to be (conscious or not) constrained pragmatists.⁵¹ Posner claims that as “the judiciary’s ‘official’ theory of judicial behavior” legalism, though false as a description of what judges actually do, determines much in the way of judicial opinion writing, legal education and appellate advocacy.

⁵⁰ Scalia, “Originalism: The Lesser Evil, *The University of Cincinnati Law Review* 57 (1989): 849-865, p. 862.

⁵¹ Richard A. Posner, *How Judges Think* (Cambridge: Harvard University Press, 2008), p. 3. Posner is aware that his critique might not work in civil law jurisdiction where codified law and a professionalized and careerist judiciary is involved.

⁴⁹ Scalia, “The Rule of Law,” p. 1184.

Posner gives multiple conceptions of “legalism.” Because of this it seems best to treat it in a “family resemblance” manner as encompassing a group of factors that combined tend towards a specific legalist stance. One instantiation of the legalist idea that Posner highlights is Scalia’s originalism. Another comes from the confirmation hearings for Chief Justice John Roberts where Roberts described the judge’s role, even the Supreme Court justice’s, as that of “merely an umpire calling balls and strikes.”⁵² Legalism starts with such a picture of judicial neutrality but also includes slogans such as “a government of laws not men” and “the rule of law,” which Posner derides as standard “Law Day” rhetoric. Legalists further claim that judicial decisions “are determined by ‘the law’ conceived of as a body of preexisting rules found stated in canonical legal materials” or, if not preexisting then, “derivable from those materials by logical operations.”⁵³ Such a decision making process does not rely on any traits personal to the judge or extrinsic to the legal materials and therefore treats law as an “autonomous discipline” running on rules specific to its own internal legal logic.⁵⁴ Because of this doctrine, and “Since the rules are given and have only to be applied, requiring only (besides fact-finding) reading legal materials and performing logical operations, the legalist judge is uninterested professionally in the social sciences, philosophy, or any other possible sources of guidance for making policy judgments.”⁵⁵ For the legalist, the orthodox tools such as reasoning from precedent, adopting deterministic rules, including canons of construction of such rules (such as originalism), and argument from analogy are enough to decide, that is fully determine, even the most difficult case. Further, explicitly using any other facts or

tools to help decide is to allow extra-legal issues to improperly intrude. At its most extreme, Posner thinks that legalism encourages a position where lawyers “are like mathematicians in wanting to manipulate symbols” and attempt to “think words not things.”⁵⁶

Posner admits that legalism does do a lot of the mundane work of the courts, but notes that as one reaches the appellate level legalist tools become less and less useful because, “There are too many vague statutes and even vaguer constitutional provisions, statutory gaps and inconsistencies, professedly discretionary domains, obsolete and conflicting precedents, and factual aporias.”⁵⁷ In such cases the orthodox legalist tools are inadequate to properly “determine” and outcome. And because the cases that reach appellate levels are more often the cases that legalist tools cannot decide, and are also the cases that are most determinative of the further development of the law, legalist tools give out right where the most difficult and important cases begin. Here is where an “open area” of what Posner describes, importantly as “*involuntary freedom*” is identified where judges have “decisional discretion.”⁵⁸ Once again, right where the most difficult and influential decisions are required, judges not having the ability to refuse to decide, the legalist tools offer the least amount of guidance. Returning to Roberts’ claim to be merely calling balls and strikes, Posner writes, “Roberts knows that when legalist methods of judicial decision making fall short, judges draw on beliefs and intuitions that may have a political hue” and this is because, “the judicial imperative is to decide cases, with reasonable dispatch, as best one can. The judge cannot throw up his hands, or stew indefinitely, just because he is confronted with a case in which the orthodox materials of judicial decision making, honestly deployed, will not produce an acceptable result.”⁵⁹ For Posner this

⁵² Hearing on the Nomination of John Roberts to Be Chief Justice of the Supreme Court before the Senate Judiciary Committee, 109 Cong., 1st Sess. 56 (Sept. 12, 2005). Posner states that no judge really believes this and therefore that this statement is “a blow to Roberts’ reputation for candor.” *Ibid*, p. 81.

⁵³ *Ibid*, p. 41.

⁵⁴ *Ibid*, p. 42.

⁵⁵ *Ibid*, p. 42.

⁵⁶ *Ibid*, p. 248, 244.

⁵⁷ *Ibid*, p. 47.

⁵⁸ *Ibid*, p. 9.

⁵⁹ *Ibid*, p. 79.

conclusion shows that judges cannot, because of their professional role and responsibilities, rest in legalist materials. Further, by following legalist ideology and focusing exclusively on orthodox legalist materials, the legal profession is left with a situation where “nothing in their training equips them to deal with the nonroutine case.”⁶⁰

Once again, the argument is that legalist tools do not handle the toughest cases and therefore the orthodox tools are too limited to do all of the work that they are expected to do. This is not to argue that they should be ignored or rejected, just that these tools have severe limitations that, when ignored, get in the way of the development of better and more effective legal decision-making right where it is most desperately needed. This limitation has been noted by other legal theorists, one being Scalia, and various tools of a legalist quality have been offered. The most notable are those Posner describes as comprehensive judicial philosophies such as Scalia’s “originalism.” Such philosophies are meant to patch up the open areas of involuntary judicial freedom through a sort of meta-rule that constrains the judge and, once again, determines a correct decision based upon purely orthodox legal materials. Posner is not convinced that such strategies work. In fact he sees such stances as being in all actuality either rationalizations or rhetorical weapons.⁶¹

As rationalizations, such philosophies both allow the judge greater ability to “fig-leaf” decisions that match personal preferences. This is seen, for example in how the search for a constraining authentic and foundational “Ur text” meaning for a statute or constitutional clause actually allows for greater “manipulation of meaning in the name of historical reconstruction or intellectual archeology.”⁶² (Posner finds this to be best thought of

as a form of Sartrean bad faith where legalists “seek to deflect blame for any resulting cruelties or absurdities by pleading that the law made them do it.”⁶³ As rhetorical weapons, such comprehensive theories help bolster the legalist ideals behind the “Law Day” banner so as to help judges avoid scrutiny for their uninformed policy choices. More directly, Posner notes that there are various competitors for such a meta-rule, for instance his own “law and economics” option (which he properly notes is controversial as a normative stance), Scalia’s originalism, Dworkin’s “law as integrity,” or Stephen Breyer’s “active liberty,”⁶⁴ and that all of these are unable to command the substantive agreement necessary (short of the use of coercive force) for the legalist’s required systemic closure.

Posner finds originalism, as a variant of the “strict construction school” of constitutional and statutory interpretation, an especially absurd version of legalist ideology. First, he sees it as an ideology purportedly based upon democratic ideals but in reality based upon hostility to big government, indeed a non-democratic hostility at that.⁶⁵ Originalism as a form of strict construction, that is, because it cramps the manner of judicial interpretation, creates both overbroad and overnarrow results, ignores changes in context and blinkers the judge from the realities of the legislative process or any other helpful facts outside of its quite narrow allowed data-set, generates often

Reasoning (Chicago: University of Chicago Press, 1949), where he notes in relationship to the British unwritten constitution that “the influence of constitution worship” combined with a written constitution can give “great freedom to a court” so much so that through going back to the text the court can give itself “a freedom greater than it would have had if no such document existed,” p. 59.

⁶³ Posner, *How Judges Think*, p. 104, 252-253.

⁶⁴ Breyer’s “active liberty” is, of course, exemplified in his *Heller* dissent, is critiqued by Posner as ideology posing as pragmatism in *How Judges Think*, and is detailed in various legal realms in Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Vintage Books, 2005).

⁶⁵ Posner, *How Judges Think*, p. 202.

⁶⁰ *Ibid*, p. 77.

⁶¹ *Ibid*, p. 13.

⁶² *Ibid*, p. 104. This claim was made quite forcefully by Edward H. Levi in his classic *An Introduction to Legal*

insurmountable roadblocks for government by placing “an unbearable information load on our legislatures.”⁶⁶ Such an interpretive strategy would, because of its severely constricting the information a judge can legitimately utilize, seem to impose a requirement of virtual omniscience on the legislative branch requiring the anticipation of all ambiguities and future changes in society. If such omniscience is lacking (as it clearly is) adoption of this type of interpretive strategy would require constant legislative and constitutional amendment. But, of course, “The legislative process is inertial, legislative capacity limited, the legislative agenda crowded, and as a result amending legislation is difficult and time-consuming.”⁶⁷ These problems are further compounded when strict constructionist methodologies such as originalism are used to interpret the “220-year-old Constitution” where legislative correction would have to proceed through the elaborate process of constitutional amendment. To make his point Posner lists a parade of absurdities that seem likely to be required by such a method:

A strict construction of the equal protection clause of the Fourteenth Amendment is that it forbids affirmative action (unequal benefits) but not the racial segregation of public schools (mere separation); of the Sixth Amendment that it requires jury trials in courts-martial; of the First Amendment that it abolishes the tort of defamation and forbids the criminalizing of criminal solicitations, the legal protection of trade secrets, and the censorship of military secrets; of the Second Amendment that it entitles Americans to carry any weapon that one person can operate, including shoulder-launched surface-to-air missiles; of the Fifth Amendment that it permits evidence obtained by torture to be introduced in federal criminal trials provided the

⁶⁶ *Ibid*, 198, 202.

⁶⁷ *Ibid*, p. 201. Posner makes the further point that if it is found that legislative amendment is feasible then it may be used to fix mistakes following from other interpretive strategies, such as loose construction, as well as the results of strict construction.

torture was not conducted in the courtroom itself; of the Eleventh Amendment that it permits a person to sue in the federal court of the state of which he is a citizen though no other state; and of Article I, section 8, that Congress cannot establish the Air Force as a separate branch of the armed forces or regulate military aviation at all.⁶⁸

Cases deciding along these lines would, indeed, create a lot of extra work for a legislative branch that seems less than omniscient and as overburdened as it is.

Therefore, because of the limits of legalism and the absurd consequences and implausibility of the adoption of any of the possible comprehensive judicial philosophies Posner argues that American judges are necessarily pragmatists. That is, the American judge, because he or she is confronted with a demanding caseload that must be decided and a set of legalist tools that are incomplete at best and obstructionist at worst, must have recourse to purpose and consequences, two tools outside of the orthodox legalist toolkit, in order to decide cases in a reasonable and effective manner. Of course the legalist regards this as allowing extra-legal materials into the mix, therefore diluting the purity of the law and allowing “politics” to taint the legal process. Posner, in response, first notes that multiple descriptive theories of law (he references nine) in contemporary academia find that politics, as well as many other factors, influence legal decisions.⁶⁹ This is a scandalous finding for the legalist.

But, importantly, this is not a problem for the pragmatist judge because Posner rejects the law versus politics dualism. Indeed, Posner embraces the fact that law, especially appellate and constitutional law, is inextricably political. But the accusation of “political” must be analyzed. As he puts it, “partisan politics is not

⁶⁸ *Ibid*, p. 202.

⁶⁹ *Ibid*, p. 19.

the only politics.⁷⁰ Judges, that is, may use political ideas to help decide tough cases but not be following some local or partisan political agenda. For instance, a judge might believe that American law rests upon Lockean property rights, and therefore have a strong “political” interpretation of the Constitution that does indeed influence his or her vote, without being a devoted and party-following Republican. Further, as Posner notes, it is highly unlikely that any judge makes a decision by thinking “what would George Bush (or Ronald Reagan, Barack Obama, etc.) want me to decide?” Indeed, it seems correct to say, as Posner does, that “Virtually all judges would be distressed to be regarded as politicians in robes, because if they thought of themselves in that light they could not regard themselves as being good judges.”⁷¹ Further, the pejorative accusation of political judging rests upon the legalist belief that the autonomous and unique tools of law are sufficient to decide the tough cases – and this is now taken as patently absurd and resting upon a mistaken picture of law and the judges’ role. Indeed, the main problem with the accusation of political judging once legalism is rejected is not that political factors should be excluded, or that it is descriptively inaccurate, but that it ignores all the other supposedly non-legal factors that also are involved in determining a judges’ decision.

For Posner, “‘Law’ in a judicial setting is simply the material, in the broadest sense, out of which judges fashion their decisions.”⁷² This material includes legalist tools, but also must include vast materials foreign to the legalist view. For instance, there are market incentives and institutional norms. Some of these norms are professional. Judges are socialized through their law school training and their membership in the legal profession and therefore have institutionalized norms and limits attached to the role of judge that they inhabit

- a judge cannot take bribes decide cases by flipping a coin, appeal to partisan political affiliation, etc. - that create powerful constraints upon what is allowable.⁷³ Therefore, the desire to have the reputation of being a “good judge” is a powerful limit on reasons that a judge will think acceptable to offer.⁷⁴ Many limits also come from broader social norms; indeed, Posner argues that the pragmatist judge’s chosen consequences are determined by “the prevailing norms of particular societies.”⁷⁵

This suffices to overcome the legalist claim that if the limits of legalism are relaxed and consequentialist reasons are allowed into judicial decision-making, “everything is permitted.”⁷⁶ For Posner, therefore American judges are not properly seen as willful legislators, they are in fact *involuntary* and occasional legislators, reluctantly legislating in the open area where and when legalist tools give out. The pragmatist judge is not engaged in an ad hoc anything goes process of willfully imposing unconstrained and possibly idiosyncratic consequentialist ideals on otherwise clear areas (where the legal equivalent of balls and strikes are defined in advance). The pragmatist judge is reluctantly but necessarily a pragmatist because the other options are false and result in absurd and costly decisions that ultimately force the legislative branch into a position that requires virtual omniscience to function. In contrast to this, the pragmatist judge, by looking to context, purpose and consequences, “shares out the information burden between legislators and judges.”⁷⁷

⁷³ Ibid, p. 61.

⁷⁴ Ibid, p. 61. Mark Tushnet makes this point in his article “*Heller* and the Critique of Judgment,” *The Supreme Court Review*, Vol. 2009 (2008): 61-87, p. 82. Therein he makes the argument that legal training develops an implicit “legal judgment” that is very much habitual. Therefore “Put simply, training socializes people into understanding what it means to be a good lawyer. Some possibilities, conceptually available, are taken off the table through socialization.”

⁷⁵ Posner, *How Judges Think*, p. 241.

⁷⁶ Ibid, p. 1.

⁷⁷ Ibid, p. 198.

⁷⁰ Ibid, p. 73.

⁷¹ Ibid, p. 61.

⁷² Ibid, p. 7-9.

Ultimately, the pragmatist judge is not lawless, but the conception of a legally correct decision under legal pragmatism is indeed more flexible, less determinate, and attached to the idea of a “zone of reasonableness” within which decision-making is constrained.⁷⁸ This is best seen in the following passage where Posner describes what might be thought of as a pragmatist, non-correspondence theory of legal decision making; “when we say that a judge’s decisions are in conformity with ‘the law,’ we do not mean that we can put his decision next to something called ‘law’ and see whether they are the same. We mean that the determinants of the decisions were things that it is lawful for judges to take into account consciously and unconsciously.”⁷⁹ Therefore, American judges are “constrained pragmatists” because they are “boxed in...by norms that require of judges impartiality, awareness of the importance of the law’s being predictable enough to guide behavior of those subject to it (including judges!), and a due regard for the integrity of the written word in contracts and statutes.”⁸⁰ They are also boxed in by systemic functions and limits as well as professional, institutional and social norms.

**V. Dorf and Sabel:
Law as an Information Producing Machine**

Posner’s argument that American judges are necessarily constrained pragmatists is founded upon the judge’s need for more information than that allowed for within a legalist framework such as Scalia’s. In this sense if Scalia’s system is premised upon the idea of “exclude information in order to bind,” then Posner’s pragmatism slogan might be thought of as “include information for the sake of effectivity and efficiency.” This is a huge distinction. But what if a court system could be part of a system that aims for information production? Michael Dorf and Charles Sabel, in “A Constitution of Democratic Experimentalism,” construct a conception of

⁷⁸ Ibid, p. 86.

⁷⁹ Ibid, p. 44.

⁸⁰ Ibid, p. 13.

“democratic experimentalism” using Deweyan pragmatism that while compatible with traditional United States governmental organization would dramatically change the understanding of how government, and therefore the court system, ought to function.⁸¹ Further, it is seen as an information and knowledge producing system.

The system offered is explicitly constructed on ideas taken from Deweyan pragmatism. First, they note that the “reciprocal determination of means and ends” is inevitable due to the “pervasiveness of unintended consequences” that makes it impossible to come up with “first principles that survive the effort to realize them.”⁸² Second, as with the pragmatists, they also note that doubt properly understood and utilized is a spur towards creative solution. Third, Dorf and Sabel also accept that the inquiry following from doubt is “irreducibly social,” indeed our understanding of our individual projects “depends on how others interpret and react to them.”⁸³ Fourth, Dorf and Sabel adopt ideals from classical pragmatism because “As a theory of thought and action through problem solving by collaborative, continuous reelaboration of means and ends, pragmatism suggests that advances in accommodating change in one area often have extensive implications for problem solving in others.”⁸⁴ One of the most important implications is that it questions a clear-cut distinctions and essentialist understandings of political branch functions and fixed conceptions of the line between public and private.

Because of the flexible nature of pragmatism and a questioning of essentialist ideas of democracy, law and the public/private split, “Democratic Experimentalism” as a program can look to private firms for possible solutions to problems of democratic governance. And

⁸¹ Michael Dorf and Charles Sabel, “A Constitution of Democratic Experimentalism,” *Columbia Law Review* 98 (1998): 267-473.

⁸² Ibid, p. 284-285.

⁸³ Ibid, p. 285.

⁸⁴ Ibid, p. 286.

this is exactly what Dorf and Sabel do. They argue that because markets have become “so differentiated and fast changing that prices can serve as only a general framework and limit on decisionmaking,” innovative private firms have had to “resort to a collaborative exploration of disruptive possibilities that has more in common with pragmatist ideas of social inquiry than familiar ideas of market exchange.”⁸⁵ Specifically, these firms have adopted “federated” and open strategies of benchmarking, simultaneous engineering and learning by monitoring.⁸⁶ Benchmarking entails “An exacting survey of current or promising products and processes which identifies those products and processes superior to those the company presently uses, yet are within its capacity to emulate and eventually surpass.”⁸⁷ Simultaneous engineering on its part entails “Continuous adjustment of means and ends and vice versa, as in pragmatism, the means and end of collaboration among the producers.” Further, because “the exchanges of information required to engage in benchmarking, simultaneous engineering, and error correction also allow the independent collaborators to monitor one another’s activities closely enough to detect performance failures and deception before these latter have disastrous consequences” this type of collaboration encourages “learning by monitoring.”⁸⁸ Group discussion becomes central in pooling plans, problems and perspectives.⁸⁹ Further, this type of organization yields flexibility in purpose and output as well as creates self-reinforcing habits of inquiry and transparency. Dorf and Sabel term a political system built along the same lines as the new firm a “directly deliberative polyarchy.”⁹⁰

In this system of democratic experimentalism the roles of various branches remain somewhat distinct, but their

functions are partially reconceived. Governmental activity would be presumptively local.⁹¹ Congress would encourage and allow subunits to experiment as to means and, to a lesser extent to ends, “on condition that those who engage in the experiment publicly declare their goals and propose measures of their progress, periodically refining those measures through exchanges among themselves and with the help of correspondingly reorganized administrative agencies.” Congress would also ensure that information, such as the results of various experiments in governance, would be made generally available, therefore create an information resource of successful and unsuccessful regulatory choices. Administrative agencies would be chiefly charged with assisting subunits in experimentation as well. More specifically, with congressional authorization they could set regulatory standards (most likely following “rolling best-practice rules”) and encourage effective benchmarking.⁹²

Most significant for this paper, the conceptualization of the role of the courts also changes in democratic experimentalism. Courts function to make sure that the experiments fall within the broad aims authorized in Congress’ legislation, respect the rights of citizens and are performed in a properly systematic and transparent manner. Communities would get freedom and support for their experiments, but in return for this liberty they must develop a record of options and choices considered (which would be virtually automatic given the benchmarking, simultaneous engineering and learning by monitoring). A court would look at the possibilities revealed by the process in order to decide whether or not any rights or policies are unlawfully thwarted. A party challenges governmental choices in court by pointing out better choices revealed in other experiments in governance, “In this way the vindication of individual rights encourages mutual learning and vice

⁸⁵ Ibid, p. 286.

⁸⁶ Ibid, p. 297.

⁸⁷ Ibid, p. 287.

⁸⁸ Ibid, p. 287.

⁸⁹ Ibid, p. 302.

⁹⁰ Ibid, p. 288.

⁹¹ Ibid, p. 343.

⁹² Ibid, p. 345.

versa, and judges' discretion in applying broad principles is schooled and disciplined by actual experimentation with possibilities they could have never imagined."⁹³ Courts would not eliminate traditional doctrines but would have to embrace two ideals in order to function properly within democratic experimentalism. First, courts would have to combine a sense of "fundamental legal norms" with an understanding that these norms can properly be exposed to experimental elaboration. This "does away with the spurious precision of once-and-for-all decisions."⁹⁴ Second, "experimentalist courts defer to the political actors' exploration of means and ends only on the condition that the actors have in fact created the kind of record that makes possible an assessment of their linking of principle and practice."⁹⁵

Therefore "Judicial review by experimentalist courts accordingly becomes a review of the admissibility of the reasons private and political actors themselves give for their decisions, and the respect they actually accord those reasons: a review, that is, of whether the protagonists have themselves been sufficiently attentive to the legal factors that constrain the framing of alternatives and the process of choosing among them."⁹⁶ This type of review would, therefore, function at a "metalevel."⁹⁷ The virtue of this is that the process creates data so, as opposed to courts currently that have to act as if empirical questions are questions of pure reasoning, the court within democratic experimentalism will have data to work from. So, for example, under a statute authorizing experimentalist administration, the courts do not themselves supply authoritative meaning; the agencies and other actors jointly provide the baseline through rolling best-practice standards."⁹⁸ Judges therefore function less as a referee and more as

part of an active problem-solving process.⁹⁹ Ultimately, "as a matter of substance, experimentalist judging focuses on the permissibility of reasons, and responses to threats to fundamental legal norms. As a matter of procedure, experimentalist judging focuses on participation; but where traditional procedural jurisprudence seeks the eternal requisites of fair process, experimentalist courts ask whether the parties whose actions are challenged have satisfied their obligation to grant those rights of participation revealed to be most effective by comparison with rolling best practices elsewhere."¹⁰⁰

Citizens continue to evaluate their representatives through voting in general elections, but elections can be informed through the use of the benchmarking information from their district as well as those similar that the full process of democratic experimentalism produces. The same governmental process that encourages the development of benchmark information in furtherance of solutions to current political issues creates a record that can help inform votes. Further, citizens serve a more active stakeholder role on various governance councils in more directly democratic venues. Importantly, this change in election and local citizenship activities undercuts abstract ideological debate and the polarization of two-party elections by having most decisions rooted in local problem-solving procedures. Therefore, "Experimentalism links benchmarking, rulemaking, and revision so closely with operating experience that rulemakers and operating-world actors work literally side by side-but, to repeat, in plain view of the public-and thus, largely overcome the distinction between the detached staff of honest but imperfectly informed experts and the knowledgeable but devious insiders the regulate."¹⁰¹

⁹³ *Ibid.*, p. 288.

⁹⁴ *Ibid.*, p. 395.

⁹⁵ *Ibid.*, p. 389.

⁹⁶ *Ibid.*, p. 390.

⁹⁷ *Ibid.*, p. 400.

⁹⁸ *Ibid.*, p. 397.

⁹⁹ *Ibid.*, p. 401.

¹⁰⁰ *Ibid.*, p. 403.

¹⁰¹ *Ibid.*, p. 355.

One fear that Dorf and Sabel anticipate is that it will be claimed that democratic experimentalism as outlined above improperly trivializes rights and therefore will not offer proper protection for them. This is, of course a standard critique of any remotely consequentialist theory of rights, and one that has been deployed against pragmatism repeatedly. Dorf and Sabel embrace the fact that under democratic experimentalism rights are a product of history, context and social understandings. Indeed, “our rights do not lose their majestic and independent authority when we come to acknowledge that in some sense we chose them. Because our rights are part of who we are, they shape, explicitly or not, all the manifold projects by which we determine the future of our polities.”¹⁰² First, and correctly, they claim “this conception of political rights and personhood as mutually defining is a variant of the pragmatist idea of the joint determination of individuality and sociability.”¹⁰³ Further, “Thus understood, rights, far from estranging us from one another, are a crucial part of the common ground of mutual recognition upon which we raise our individuality.”¹⁰⁴ In response to the demand that rights be more certain, more founded upon something undoubtable, Dorf and Sabel respond that such a demand is an unsatisfiable and that ultimately, “however characterized...rights are inevitably experimentalist.”¹⁰⁵ Indeed, “Experimentalism does not name an alternative to the identification of Platonic rights. It names an organized, considered alternative to a haphazard mixture of metaphysical nonsense and ungrounded speculation about empirical matters.”¹⁰⁶ So, “we do not face a choice between experimentation or no experimentation. The status quo is an ongoing, albeit haphazard, experiment. Between that kind of experiment and a more democratically and

systematically organized one, we think the choice is easy.”¹⁰⁷

VI. From Information Exclusion to Information Production

Heller as decided starkly shows the result of Scalia’s information exclusion-based jurisprudence. First, it excludes the prefatory clause, then any broader context, then any legislative record to find intent, and finally rests upon the ability to identify an independently existing identifiable discrete meaning locatable in historical records. This meaning is then used to derive a decision without any recourse to social facts, changing circumstances, or consequences in general. Further, as he notes, this first part of the two-step is often difficult so he follows this with a strong presumption in favor of rules even if the rule chosen is not fully attached to an identifiable original meaning and therefore potentially causes substantive distortion. This is because Scalia believes rules hedge judicial discretion in and therefore keep the judge in role, that is applying democratically produced rules in neutral fashion to specific cases. It is interesting to note in this regard the information excluding aspects of this stance not only allow the judge to not notice the effects of a decision (good or bad), but also explains Scalia’s blinkered analysis of what he means by democracy. As a judge, and given his conception of his role, that is none of his business.

It must be admitted that this conception of the law and the judge’s role within it is attractive. First, if accurate, it can explain and justify the everyday picture of American law, and give a real clear meaning to such slogans as “the rule of law as the law of rules” and to the often heard critique of decisions as evidence of judicial activism. Second, given the institutional position of a judge, and the purported institutional limits of the court system, it explains how justified decisions can be made

¹⁰² *Ibid*, p. 448.

¹⁰³ *Ibid*, p. 448.

¹⁰⁴ *Ibid*, p. 449.

¹⁰⁵ *Ibid*, p. 452.

¹⁰⁶ *Ibid*, p. 457.

¹⁰⁷ *Ibid*, p. 469.

without the societal information that other branches of government can more easily make effective use of.

Unfortunately for Scalia's picture, though, the identification of original meaning is probably a pipe dream. First, in the case of the United States Constitution, the context would rather point to a document meant to be loosely understood, full of aspirational and vague terminology that would have to be filled in later with meaning. Indeed, given the nature of the document it would be fully reasonable to expect that the founder's expected future generations to fill in the general words with content that functioned best for the later times. Further, of course, the historical data available is radically incomplete. Finally, from a pragmatist point of view, Scalia's originalism rests upon a sort of "myth of the given" in the sense that he appears to believe that a specific univocal original meaning can often be identified outside of the specific inquiry, the specific controversy, in question.

Beyond the problems with originalism there is the assumption that rules are better at constraining a judge and that these are also better for democratic government. As Posner notes, this seems to be an empirical claim, but claims like this are always offered without any empirical support, and are therefore really unsupported legalist dogma.¹⁰⁸ Indeed, again from a pragmatist point of view this fixation upon rules looks a lot like the misguided and pathological quest for certainly that Dewey so effectively critiqued. Finally, when the two-step originalism and rule picture Scalia offered got its seemingly perfect moment in *Heller*, the actual legal traction of the decision rested largely upon the "pragmatic" exceptions to the legally determined rule. In other words, for all the purported virtues of the information excluding picture of law he offers, it seems that more information than legally proper under his

jurisprudential philosophy was necessary even in the ideal case.

Of course this is all as Posner would predict. He sees legal ideals such as Scalia's to be too trapped in legalist ideology and full of rhetorical, "Law Day" flourishes that are better explained as professional mystification than descriptive or even in best-case scenarios such as *Heller*, normative accuracy. Posner offers instead a conception of the judge as constrained pragmatist forced into an open area of involuntary freedom due to the fact that legalist materials and legalist comprehensive judicial philosophies such as Scalia's are inherently unable to function as demanded. Instead of the willful discretion of the common-law Mr. Fix-it judge that Scalia fears, Posner highlights the inherent insufficiency of the materials that Scalia thinks are determinative. A judge has to "affix" a decision in the sense that controversies must be settled and therefore if legalist materials are insufficient then other materials, and other information, must do the job. Further, of course, Posner highlights the absurdly naïve picture of legislative process that Scalia's jurisprudence requires. The constrained pragmatist judge, to the contrary, is expected to utilize as accurate a conception of legislative ability as possible.

Posner argues that the legally necessary materials are multiple and diverse, but that this isn't really the problem that Scalia and legalist in general think it is once a more descriptively accurate picture of judicial decision-making is accepted. Here is where another aspect of Scalia's philosophy appears to a pragmatist to be fatal in fact. Through developing what I noted as a "non-correspondence" conception of law where multiple factors determine a legal decision and not the process of holding a decision up against something called "law" in order to test the accuracy of the correspondence, Posner highlights how often much of the legalist system relies upon an intuitive acceptance of something very close to a correspondence picture of legal decision-making.

¹⁰⁸ *Ibid*, p. 179.

Ultimately, Posner's constrained pragmatist is constrained not only by the need to decide a heavy caseload in a timely fashion without certain guarantees, but the judge is also hemmed in by professional norms and general social values and beliefs. Therefore, even in an "information including" system of law only a small set of possible reasons and possible decisions will be actually possible. These decisions fall within a "zone of reasonableness." Posner thinks it actually a virtue that a judge has to admit that the zone of reasonableness does not determine a specific result but only a family of acceptable possibilities. In this case the judge cannot fully hide behind "the law" and therefore must admit to personal responsibility for the actual decision. This would, he thinks, properly give the judge a feeling of skating on thin ice and, therefore, tend to move judges in general toward a more modest position.¹⁰⁹ It would also, it seems, encourage the judge to want to know more about facts and specific policy options. So, instead of beating judges over the head with legalist materials, lawyers would be moved towards emphasizing the consequentialist stakes (both short and long term) of possible decisions.

As to *Heller*, certainly Breyer's dissent has more in common with Posner's constrained pragmatist judge than either the majority opinion or the Stevens dissent (which serves largely as a *reductio ad absurdum* to Scalia's claims to meaning, truth, knowledge, certainty, constraint, etc). Breyer emphasizes social statistics relating to gun use, the difficulty of knowing what policies are more effective in specific situations and the need to allow for as large an area of social experimentation as possible so as to let local governments try various options in the face of serious social problems. This seems fully compatible with Posner's constrained pragmatist judge. Further, Breyer argues that there are conflicting aims in the Constitution and that, therefore, the Court's opinion is overly

absolutist in its picture of just one of the enumerated rights, and maybe not even the most important of the rights (especially given the changed circumstances from the royal tyranny of revolutionary times to the crimes of the modern inner city – aspects Scalia's system cannot notice). This, of course, is an argument for looking to purpose over a more literalist reading (a strategy which is plainly true of the Court's jurisprudence in relationship to other rights such as, for example, free speech and equal protection). On the other hand, it is not so clear that Posner's judge would immediately turn to balancing tests to decide. All-in-all, though, Breyer's dissent would almost assuredly fit within the constrained pragmatist judge's zone of reasonableness.

Would the same be true of the majority's decision? Certainly the methodology would be seen as a sham – as it should be from a pragmatist's point of view. What about the result? In all actuality the result was not much of note. First a relatively miniscule bright-line rule is announced to the effect that a virtual ban of hand guns for personal protection is unconstitutional. Beyond that, the Court offers a set of exceptions that seem completely ad hoc and founded upon nothing but previous general legislative enactment. Posner's constrained pragmatist would want a more developed argument here. But, of course, the Court's legalist tools have no argument to offer here, and so the Court goes silent right where the real need for even the most basic legal guidance begins. Therefore, the constrained pragmatist would have a difficult time seeing any virtue to the *Heller* decision, and would wonder how the Court thought that this offered any but the most minimal constraint to lower court judges. The most predictable result seems to be more litigation in the lower court with less guidance as to what short of an absolute ban is allowed.

But the constrained pragmatist judge would be constrained in another way less than ideal – that is, constrained in the type of information offered the court

¹⁰⁹ *Ibid*, p. 249-253.

even if the attorney's on either side decided to use facts instead of more legalist arguments in their cases. This is because, just as the originalist judge ends up with a result pre-packaged on both sides, and therefore a type of "history in law," the constrained pragmatist would get a type of "nothing but the facts of the case" in that each side would be willing to only offer those options that clearly favored their side. The virtue of Dorf and Sabel's democratic experimentalism is that it would, if effective, solve this problem and actually enlist the court system in the production of a more thorough set of information in regards to the policies and rights at issue.

In the case of *Heller*, it is difficult to know from the Court's opinion what options were considered. Under the governance scheme offered in democratic experimentalism a record of options considered (benchmarking), and why specific policies were chosen would be most likely the largest part of the Court's data. Upon a challenging of the law, the lower court would use normal legalist tools to decide an easy case. But given a more difficult case, the record developed by the local government through the use of benchmarking, data collection and policy options generated, as well as results from the locality and others dealing with the same issues, would be available in order to ensure that principle and practice were sufficiently linked. The role of the judge here is not to solve controversial problems through the somewhat arbitrary settling via a clear rule (this didn't work so well in *Dred Scott*), but rather to encourage democratically transparent and accountable problem solving where the rules of law come from democratic processes and not a judicial oligarchy with their own less than fully informed preconceptions. This offers a democratic and experiment-encouraging rule of law that discounts judicial rules in favor of greater information production and policy testing. There isn't

the certainty purportedly offered by Scalia's jurisprudential theory, but this is a virtue given the dogmatic hubris so apparent in Scalia's purported modesty. Of course one might see exclusion of information (judicial ignorance?) to be a doubtful virtue to begin with. But as to what a judge under the democratic experimentalist system would decide we have no idea – because as it stands, the court system did not produce the information necessary to make such a choice. Of course if Dorf and Sable are correct, that information would be produced if the court were seen as an active participant in the process of producing informed democratic decision-making.

VII. Conclusion

In this paper I have argued that through an analysis of Richard Posner's *How Judges Think*, as well as Michael Dorf and Charles Sabel's "A Constitution of Democratic Experimentalism," a conception of the legal process, and the judge's position within it as an information production system is offered that is true to the tradition of philosophical pragmatism and compatible with both rule of law virtues and democratic governance. Instead of a picture of virtuous judicial ignorance through knowledge exclusion, a conception of law premised upon knowledge production offers a better hope for a just and democratically responsive legal system in a complex and interconnected world. While this analysis is somewhat parochial, being attached to cases and theorists writing within the United States legal tradition, as well as the somewhat ridiculous position of guns within American social ideology, it is hoped that the move from a picture of law from purposive information exclusion to a more active position in social experimentation might be usefully translatable to other contexts.

RECONSTRUCTING THE LEGACY OF PRAGMATIST

JURISPRUDENCE

Shane J. Ralston

Penn State University

sjr21@psu.edu

Richard Posner has spent several decades on a quest for his Holy Grail, that is, a less controversial and more persuasive account of an earlier doctrine that economic efficiency ought to dictate how judges decide legal cases.¹ In one of his scholarly adventures, a book entitled *Law, Pragmatism and Democracy*, the Justice of the U.S. Seventh Circuit Court of Appeals wrestles with the ghost of John Dewey for the mantle of pragmatist jurisprudence, or the coveted title “steward of pragmatism in the law.”² Most commentators have seen this work as pitting Posner against Dewey in a contest of pragmatisms, the stakes for which are no less than their respective legacies for legal and democratic theory.³ Some have sided with Posner and others with Dewey. I contend that the commentaries have misidentified the target of Posner’s critique. Posner had another legal

¹ See, for instance, Richard Posner, “Utilitarianism, Economics and Legal Theory,” *The Journal of Legal Studies*, vol. 8 (1979): 101-22. Id., *Economic Analysis of Law*, 3rd ed. (Boston: Little, Brown and Co., 1986). For critiques of Posner’s economic analysis of law, see Ronald Dworkin, “Why Efficiency? A Response to Professors Calabresi and Posner,” *Hofstra Law Review*, vol. 8, no. 563 (1980); Arthur Allen Leff, “Economic Analysis of Law: Some Realism about Nominalism,” *Virginia Law Review*, vol. 60, no. 451 (1974); James Boyd White, “Economics and Law: Two Cultures in Tension,” *Tennessee Law Review*, vol. 54, no. 161 (1987); Robert C. Ellickson, “Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics,” *Symposium on Post-Chicago Law and Economics*, *Chicago-Kent Law Review* vol. 65, no. 23 (1989).

² Richard A. Posner, *Law, Pragmatism and Democracy* (Cambridge, MA: Harvard University Press, 2003), hereafter LPD. Michael Sullivan and Daniel J. Solove, “Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism, Review of *Law, Pragmatism and Democracy* by Richard Posner,” *Yale Law Journal*, vol. 113, no. 3 (Dec. 2003):687-741.

³ See Ilya Somin, “Posner’s Pragmatism,” *Critical Review*, vol. 16, no. 1 (Summer 2004): 1-22.

theorist in mind and he was disingenuous in naming Dewey.

A careful reconstruction of Posner’s argument shows that Dewey’s pragmatism provides a genuine middle way between Posner’s position and that of his intended rival. So, two theses about this debate punctuate the two major sections of this paper. In the first, the negative or critical thesis states that the commentators have mistakenly taken Posner at his word, trusting that the intended target of his criticism is in fact Dewey. I then locate Posner’s quarry and offer an explanation for why he fails to specify the actual prey in his hunt. In the second section, the positive or analytical thesis is articulated: Dewey’s pragmatic logic of judgment and exposition effectively mediates the two entrenched accounts of judicial decision-making and their implications for democratic governance. Not only does this reconstruction help clarify Dewey’s legacy for legal and democratic theory, but as suggested in section three, it also demonstrates how the activity of reconstruction has political connotations in that it endorses particular values or ends over others. Thus, Posner’s project to reconstruct Dewey in the image of his intended adversary is not value-neutral; but in fact belongs solidly within the domain of the political.

Dewey, Hand and Posner’s Critique

Posner’s writings have been duly acknowledged by his supporters and critics for their impressive quality, their sheer quantity, their breadth and depth of interdisciplinary research and an aggressive writing style unique among sitting judges.⁴ Besides adjudicating appeals cases, Posner also serves on the University of

⁴ For instance, Posner’s long-time rival, Ronald Dworkin, has characterized Posner as “the wonder of the legal world.” In an unsympathetic review of *Law, Pragmatism and Democracy*, the reviewer begins: “Richard Posner is a prodigy. A law school professor and full-time federal judge, he is also one of the most prolific writers on legal and political issues in America.” “Sense and Nonsense,” *The Economist* (June 21, 2003): 77-8.

Chicago law school faculty. If this does not demonstrate his thorough commitment to bridging the theory-practice divide, then perhaps the point is further obviated by his ceaseless attempts to resolve the conflict between the perceived arbitrariness of judicial decision-making (particularly as it relates to different judges' distinct value schemes) and the sanctity of democratic governance. Should unelected judges be allowed to override the will of democratic majorities by invalidating statutes their representatives legislate? According to Posner, what is required in order to harmonize judicial practice and the sanctity of the democratic principle—namely, that majorities or their representatives should dictate the content of public policy—is to create a more diverse judiciary, one that “command[s] greater acceptance in a diverse society.”⁵ If Posner has hit on the right answer to this longstanding problem, then he has not only discovered his Holy Grail; he has also secured a coveted place alongside Joseph Schumpeter, the elite democratic theorist whom he holds in high regard, and opposite Ronald Dworkin, the renowned critic of legal pragmatism and Posner's perennial adversary.⁶

Although Posner doesn't “think it leads anywhere interesting,” he acknowledges that Charles S. Peirce, William James and John Dewey developed an ideational thread tracing back to the ancient Greeks (indeed, to Homer's *Odyssey*) and forward to modern-day American culture (as attested to by Tocqueville) into a robust American philosophy.⁷ America's unique homegrown philosophical movement, pragmatism, has in the past two decades been the beneficiary of a spectacular resurgence of interest. Whether Quine, Sellars, Putnam, West or the many others who have taken up the banner of pragmatism, each owes an intellectual debt to the

classical pragmatists. Other than the name, though, pragmatic philosophy has little more in common with Posner's brand of pragmatism. According to Posner, classical pragmatists sought to shake the traditional structure of philosophy, beginning with Plato, from its comfortable foundations. Thus philosophical pragmatism, for Posner, is just another kind of anti-foundationalism that eschews formalism in exchange for “what works,” or a method “to judge issues on the basis of their concrete consequences for a person's happiness and prosperity.”⁸ While this anti-foundationalism is central to what Posner calls “everyday pragmatism,” which he believes “has much to contribute to the law,” it shares more in common with the American ethos than it does with a seventy-year old philosophical movement. So, he concludes, there is “little in classical American pragmatism . . . that law can use.”⁹

Rooted in this everyday pragmatism, pragmatic jurisprudence strikes at not only the firm foundations of philosophical system-building, but also at an antiquated account of legal reasoning. According to this account, exemplified by the formalist model of judicial reasoning, judges apply a legal principle, as the first premise of a syllogism, to the facts of the case, as the second premise, in order to impersonally derive a valid legal conclusion.¹⁰ In addition, the judge, reasoning according to the principle of *stare decisis*, attempts to maintain continuity between his legal decisions and those of the past, thereby preserving sound legal precedents and

⁸ *Ibid.*, p. 28.

⁹ *Ibid.*, p. 49.

¹⁰ See, for instance, Joseph H. Beale, *A Treatise on the Conflict of Laws* (New York: Baker, Voorhis, and Company, 1935) and Christopher C. Langdell, *Cases on the Law of Contracts* (Boston: Little, Brown and Company, 1871). Jerome Frank characterizes the Formalists' method of legal reasoning in the following manner: “They picture the judge applying rules and principles to the facts, that is, taking some principle (usually derived from opinions in earlier cases) as his minor premise, employing the facts of the case as the minor premise, and then coming to his judgment by processes of pure reasoning.” *Law and the Modern Mind* (New York: Anchor Book, 1963), pp. 10-12.

⁵ LPD, p. 120.

⁶ He even models the book's name after Joseph Schumpeter's *Capitalism, Socialism and Democracy* (New York: Harper and Row, 1948).

⁷ LPD, p. 25-6.

doctrine from one generation to the next. So, a court's judgment is a combination of strict deductive logic and tradition. Also known as the myth of the mechanical jurist, Blackstone's account neutralizes the threat of arbitrarily exercised judicial power, unbounded legal discretion and the interjection of a judge's tastes, values and morals, so as to convert the science of judging into a woeful art. Yet with the advent of the legal realist movement, the myth of the mechanical jurist and with it the formalist account of legal reasoning had reached their respective limits. Legal realism's advocates dispelled the myth by demonstrating that subjective and psychological preferences of judges do influence the selection of facts in an indeterminate case, such that those facts would count as relevant (or as legal facts) for the sake of rendering a court's judgment.¹¹ The legal realists' endorsement of fact indeterminacy and critique of deductive formalism reflect a pragmatic logic of judgment and exposition elaborated by John Dewey, both in the classroom and in his writings.¹² So, as a movement, legal realism gained much of its inspiration from the kind of philosophical pragmatism Posner rejects. Posner contends that everyday pragmatism, in contrast to Dewey's brand of philosophical pragmatism, "lacks the [liberal] political

commitments of the realists" so much so that it indeed has "no inherent political valence."¹³

Posner's partisan attacks on Dewey in chapter three of *Law, Pragmatism and Democracy* (even resorting to use of the codeword and epithet for liberal, "wet") would then appear as evidence of a view that the American pragmatist was a close ally to the liberal-minded legal realists. Yet upon further examination of Posner's account, it is discovered that the legal realists and Dewey part ways on judicial politics. First, Posner distinguishes Dewey's populist democratic theory from his own elitist view of a democracy, in which the best, or "hoi aristoi," rule. Then, to show that Dewey does not merit the praise he has received as a philosopher of freedom and democracy, he casts Dewey as a deliberative democrat with a complementary epistemology, and even worse, as an advocate of a democracy governed by the irresponsible masses.¹⁴ Posner portrays Dewey's epistemology as analogous to a computer networking or "distributed intelligence" system. In this interconnected system of citizen communities, member-inquirers dedicate their combined intellectual capital to discovering truth that is "local," "perspectival" and "shaped by historical and other conditions in which it is produced."¹⁵ Next, Posner contends that an "implication for law of Dewey's epistemology is that courts should either have no power to invalidate legislation or exercise it only in extreme circumstances, when faced by a law patently unconstitutional or utterly appalling."¹⁶ So, Dewey, at

¹¹ See Morton J. Horowitz, *The Transformation of American Law 1870-1960* (Oxford: Oxford university Press, 1992), pp. 198-202.

¹² According to Horowitz, the "demonstration that deductive logic could not provide a self-executing way to move from the general to the particular was the most important contribution of Felix Cohen [early legal realist] and the great philosopher John Dewey to the Realist critique." *Ibid*, p. 200. Dewey gave a course at Columbia University Law School titled "Logical and Ethical Problems of the Law," which was well attended by American law teachers, during the summer of 1922. In addition, from 1924 to 1929, he gave seminars in Legal Philosophy at Columbia University. In these courses, he was extremely critical of the early formalism in legal reasoning (particularly Blackstone) and sought a more functionalist approach to such reasoning ("a logic relative to consequences rather than to antecedents"). So, as Horowitz and the historical record confirm, Dewey's teachings were a seminal influence on the Legal Realist Movement.

¹³ The only legal realist that Posner seems to respect is Oliver Wendell Holmes, Jr., author of the famous essay read by almost every first year law school student, "The Path of the Law," and of many landmark Supreme court opinions and dissents.

¹⁴ For instance, when attending one of Dewey's events, most likely his ninetieth birthday party in 1949, General Dwight D. Eisenhower, then president of Columbia University and future president of the United States, declared: "Professor Dewey, you are the philosopher of freedom, and I am the soldier of freedom." Paul Kurtz, *Free Inquiry* vol. 23, no. 4 (October/November 2003): 5.

¹⁵ *LPD*, p. 52.

¹⁶ *Ibid.*, p. 53.

least on Posner's reading, is a defender of majoritarianism and judicial restraint. Accordingly, he would counsel against judicial review of legislation enacted by popularly elected representatives of democratic majorities. Without exception, the striking down of statutes that reflect the popular will and sentiment of those majorities would offend Dewey's restraintist sensibilities. Not only would liberal-minded legal realists recoil from most restraintist conclusions (such that, for instance, democratic majorities would be better equipped to decide about whether to protect individual rights), but Dewey himself would likewise be the first to quit such a path. Taking an absolutist position on the issue, i.e. that a court can *never* justifiably exercise judicial review, or invalidate a piece of legislation on constitutional grounds, is incompatible with Dewey's scientific and experimentalist approach to problem solving. Thus, Posner must have someone other than Dewey in mind, and the American pragmatist has only served as a convenient proxy, a stand-in, for the genuine object of his critique.

One well-known jurist who did take a stronger, though not absolutist, stand on the issue of judicial review was the American jurist Learned Hand. In the Holmes Lectures given at Harvard, Hand declares that,

For myself it would be irksome to be ruled by a bevy of Platonic Guardians, even if I know how to choose them, which I assuredly do not. If they were in charge I should miss the stimulus of living in a society where I have, at least theoretically, some part in public affairs.¹⁷

The "bevy Platonic Guardians" Hand refers to are those judges who would override the democratic principle and impose their supposedly enlightened judgments on the will of the majority, such that the average citizen would lose "the stimulus of living in a [democratic] society."

¹⁷ Learned Hand, *The Bill of Rights* (Cambridge: Harvard University Press, 1958), p. 73.

Threatening such an outcome are activist judges who adopt excessively interventionist judicial policies. By striking down fashionable laws, these judges undermine the majority's will and subvert democratic choice, for both majority rule and democratic decision-making are tied, at least indirectly, to acts of legislation through the popular election of those who legislate.¹⁸ As a result, statute after statute falls to the judge's gavel, as does the democratic principle.

Yet it might be objected that in Judge Hand's many legal opinions, especially in the area of First Amendment law, he defends the rights of citizens as trumps against majorities. For instance, in the *Masses Publishing Co. v. United States* decision, he argues that the government has no right to interfere with a citizen in freely discussing and deciding what government policies and practices should be tolerated, on the ground that "public opinion . . . is the final source of government in a democratic state."¹⁹ However, Hand defends the right of individuals to participate in associated activity only in virtue of the protected right's majoritarian consequences, namely, that it safeguards the majority's prerogative to

¹⁸ This of course assumes that the democratic process has not been hijacked by interest groups, which unduly influence the legislator's decisions so that they are not responsive to the majority will, and that voters are able to keep popularly elected legislators accountable through the threat of retrospective voting, or non-election as punishment for legislating in ways inconsistent with the majority's needs and interests. For an argument to the effect that majorities rarely engage in effective retrospective voting due to daunting epistemic barriers, see Ilya Somin, "Political Ignorance and the Counter-majoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory," *Iowa Law Review*, vol. 89, no. 1287 (April 2004).

¹⁹ In full, Hand states, "Words are not only the keys of persuasion, but the triggers of action, and those which have no purport to counsel the violation of law cannot by any latitude of interpretation be a part of the public opinion which is the final source of government in a democratic state." *Masses Publishing Co. v. Patten*, 244 Fed. 535 (S.D.N.Y. 1917). See Vincent Blasi, "Learned Hand and the Self-Government Theory of the First Amendment: *Masses Publishing Co. v. Patten*," *University of Colorado Law Review*, vol. 61, no. 1 (1989): 1-37.

determine the society's collective destiny through discussion and debate.

But why would Posner not criticize Hand outright, rather than recruit Dewey as a poor proxy? Hand cuts a striking figure in legal circles, not only because he has been eulogized as the Supreme Court's tenth justice (thrillingly close, yet unsuccessful, in two bids for nomination) but also for his extensive legacy of public addresses and oft-cited court opinions. More revealing for our present concerns though, and particularly for the purpose of explaining why Posner would fail to name Hand, is the fact that Hand is still widely respected among jurists and legal scholars as a judicial conservative. According to Kathryn Griffith, one of Hand's biographers,

Learned Hand's personal predilection would have placed him alongside the judicial protectors of individual liberties, but his understanding of the American democratic system caused him to assume what by modern standards is a very conservative view of the court's role in this effort.²⁰

Posner does not wish to steal the mantle of judicial conservatism from Hand, though, since Posner is already the proud owner of it. His wealth-maximization principle coupled with the corollary that wealth should go to those who can use it most productively supports a conservative, market-based view of legal institutions and processes. Instead of seizing the title of judicial conservative, Posner's agenda is to claim that of pragmatism, a title that Hand never had, wished to have nor would have accepted; but one which Dewey gladly

assumed and, subsequent to his death, students of his work would have a difficult time bestowing on a judicial and political philosophy as un-Deweyan as Posner's.²¹

Pragmatism and Legal Reasoning

In Dewey's paper, "Logical Method and the Law," he demonstrates that despite the inapplicability of Blackstone's deductive method to legal reasoning, logic still informs the process by which judges deliver judgments and expositions of the law. According to Dewey, logical method applied to legal subject matter is sufficiently similar to logical method applied to logical subject matter. "Such cases," he states, "at least are similar in general type to decisions made by engineers, merchants, physicians, bankers, etc., in the pursuit of their callings."²² The role and function of the judge is therefore no different in kind than the role and function of his or her fellow citizens in a shared democratic society.

In responding to Justice Oliver Wendell Holmes' statement that the law does not emulate logic, Dewey attempts to correct for the jurist's assumption that all logic is syllogistic on Blackstone's model. Although logic in its orthodox Aristotelian sense is modeled after the syllogism, logic in a more expansive sense includes inductive generalization, scientific reasoning and practical problem-solving activity. So, Dewey declares "the need of another kind of logic which shall reduce the

²⁰ Kathryn Griffith, *Judge Learned Hand and the Role of the Federal Judiciary* (Norman: University of Oklahoma Press, 1973), p. 41. Although far from Hand in his approach and understanding of the relation between law and democracy, Ronald Dworkin, who served as one of Hand's law clerks, has written a glowing account of the jurist's personality, character and legacy. Ronald Dworkin, "Learned Hand" in *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1996), pp. 332-47.

²¹ Citations of John Dewey's works are to *The Collected Works of John Dewey: Electronic Edition*, edited by L.A. Hickman (Charlottesville, VA: Intelelex Corp., 1996), following the conventional method, LW (Later Works) or MW (Middle Works) or Early Works (EW), volume: page number. Dewey quips in the preface to *Logic: The Theory of Inquiry* that perhaps "the word [pragmatism] lends itself to misconception." LW 12:4. But he still preserves the term to describe the school of philosophy to which he belongs and even clarifies its meaning and the course of its growth in the writings of Peirce and James in his paper, "The Development of American Pragmatism," LW 2:3-21.

²² Dewey, "Logical Method and the Law," MW 15:66.

influence of habit, and shall facilitate the use of good sense regarding matters of social consequence.”²³ General principles cannot by themselves dictate the judgments that shall be rendered in particular cases. Similar to the legal realist Jerome Frank, Dewey concedes that often the jurist finds his conclusion before his reasons and then searches for the vindicating premises, as if they were an afterthought.²⁴ While this method is not identical with the scientific method, since the conclusion is settled before the inquiry, it is according to Dewey, a kind of “exposition,” an extension of the logic of judgment: “Courts not only reach decisions; they expound them, and the exposition must state justifying reasons.”²⁵ This “logic of exposition” is both forward-looking and backward-looking, that is, aiming to “reshape old rules of law to make them applicable to new conditions” and respecting the principle of *stare decisis*, or treating like cases alike based on authoritative and controlling precedent.²⁶

There is no mistaking the fact that Dewey’s logical theory encompasses all problem-solving activity, including and especially that undertaken by citizens of a democracy in their efforts to solve public problems.²⁷ The legal system assists individual citizens in addressing public issues through a procedurally fair process; one that, according to one commentator, “provides a uniquely democratic . . . mechanism for individual citizens to invoke public authority on their own and for their benefit.”²⁸ Judges have no less a role to play as critical inquirers or problem solvers in democratic society, working side by side with their fellow citizens. In

class action lawsuits, for example, counsel provides proof to the judge and jury that a large number of individuals with legally relevant characteristics were harmed. This demonstration of large numbers resembles the principle of majority rule in democratic electoral politics. In both cases, the count justifies the outcome, whether in the choice of a legal remedy or in the election of a government official. Since logic provides a method both for the activities of democratic and judicial decision making, judges serve a dual role in a democratic society: (i) as public problem solvers and (ii) as experts adjudicating controversies between fellow citizens. The two roles are not mutually exclusive.²⁹ Choosing one role, whether democratic inquirer or expert judge (even jury member), remains a matter of emphasis; and so it is a choice compatible with the simultaneous adoption of the other role. Thus the conflict between perceived abuses of judicial discretion and democratic principle arises only in a mitigated form, i.e. in cases where the judge assumes that her role *qua* expert judge supersedes her role *qua* democratic citizen. However, in most instances, a judge will strike down a piece of legislation as unconstitutional when it offends both judicial and democratic principles.³⁰ In other words, the practice of judicial review *is* consistent with democratic governance. Yet to assert that the two are consistent is not to offend judicial impartiality, or to make judges the willing pawns of politicians; for, as the economist F. Andrew Hanssen has confirmed in testing simple economic models of judicial discretion, “independent judges may themselves make policy in

²³ MW 15:70.

²⁴ Frank, *Law and the Modern Mind*, pp. 3035.

²⁵ MW 15:72.

²⁶ MW 15:75.

²⁷ According to Dewey, “logic is really a theory about empirical phenomena, subject to growth and improvement like any other empirical discipline.” MW 15:76.

²⁸ Frances Kahn Zemans, “Legal Mobilization: The Neglected Role of Law in the Political System,” *American Political Science Review* 77 (1983): 690-703; cited in Deborah Stone, *Public Policy Paradox*, 3rd edition (New York: W.W. Norton, 2002), p. 344.

²⁹ To claim otherwise would set up a false dichotomy or Hobson’s choice, a fallacious strategy that belies the admissibility of a third option: viz., the integration of both.

³⁰ A clear case of this would be the Warren Court’s unanimous decision in *Brown vs. Board of Education of Topeka Kansas*, 347 U.S. 483 (1954) that the practice of segregation in Southern schools was patently unconstitutional because it violated the 14th Amendment’s equal protection clause.

directions that [political] incumbents do not like.”³¹ Therefore, Dewey provides a genuine middle way between Learned Hand’s position, judicial restraint mixed with democratic majoritarianism, and Posner’s position, a fusion of purportedly value-free legal pragmatism and democratic elitism.

Final Thoughts

While Dewey and Posner’s legal theories are not complementary, their legal views do agree in at least one respect. Both believe that a vitally important characteristic of the judiciary is abundant diversity. While Dewey never explicitly argued for courts composed of judges with diverse ethnic, socio-economic and cultural backgrounds, he did obliquely refer to institutionalizing cultural diversity in a paper entitled “The Principle of Nationality.” Dewey declares that, Variety is the spice of life, and the richness and the attractiveness of social institutions depend upon cultural diversity among separate units. In so far as people are all alike, there is no give and take among them. And it is better to give and take.³²

Likewise, “give and take” deliberations among members of a diverse judiciary are more likely to lend themselves to the creation of equitable and just results than easy consensus and passive acquiescence among members of a homogenous court. Variety in the ethnic and cultural background of the judiciary’s membership is also more compatible with a heterogeneous citizenry.³³ In all likelihood, citizens would resist a mandarin court that privileges its special judgment over the will of a

democratic majority. On this matter, at least, Posner and Dewey would agree.³⁴

Posner is wrong in asserting that pragmatism, whether his or Dewey’s, lacks a political valence. What he means by “without political valence” could be neutral between competing political ideologies or neutral between legal methodologies. Either way, the assumption of neutrality is naively positivistic, much as his earlier claim that economic efficiency constitutes a value-free criterion for adjudicating legal cases.³⁵ Hard cases more often demand hard choices about social values than cold calculations of efficiency. So, the maintenance of a strict fact-value distinction is untenable in most, if not all, legal cases. Moreover, to assert the contrary view is comparable to affirming Blackstone’s myth of the mechanical jurist. Posner reconstructs legal pragmatism as a politically sterile position resembling Blackstone’s myth more than Dewey’s reformist legal and political philosophy. As Jack Knight and James Johnson observe, “Posner’s effort to simultaneously defend legal pragmatism and repudiate legal realism is,

³¹ F. Andrew Hanssen, “Is There a Politically Optimal Level of Judicial Independence?” *The American Economic Review*, vol. 94, no. 3 (June 2004): 712-29, 727.

³² MW 10:288.

³³ On the compatibility of Dewey’s social-political philosophy with pluralism, see my “In Defense of Democracy as a Way of Life: A Reply to Talisse’s Pluralist Objection,” *Transactions of the Charles S. Peirce Society*, vol. 44, no. 4 (fall 2008): 629-660.

³⁴ In the 2004 Presidential Campaign, democratic candidate John Kerry, speaking on the topic of appointing justices to the Federal bench, appears to express a contrary view about promoting diversity in the judiciary, one in line with Supreme Court Justice Potter Stewart’s position on the issue. Paraphrasing Justice Stewart, Kerry states: “A good justice is somebody that when you read their decisions you can’t tell if they are Republican or Democratic or liberal or conservative, a Christian or a Jew, a Muslim, male or female. You just know you’re reading a good judicial opinion.” Perry Bacon Jr. “What about the Supremes?” *Time Magazine* (Tuesday, September 7, 2004). Despite the apparent contrariety of the Potter-Kerry’s view to the Dewey-Posner view, they can complement each other in endorsing diversity on the bench, so long as the quality of judging is not negatively impacted by promoting diversity, so that each appointee is capable of producing good judicial opinions.

³⁵ By naively positivistic, I mean the caricature of positivism made by some writers—for instance, members of the movement known as Critical Legal Studies, such as Robert Unger and Duncan Kennedy. See Brian Leiter’s “The Radicalism of Legal Positivism,” *Guild Practitioner*, forthcoming, draft available at <<http://ssrn.com/abstract=1568333>>, accessed December 12, 2011.

among other things, a sustained attempt to purge the pragmatist legacy of its radical political implications.”³⁶ Since all legal pragmatisms endorse suitable methods for achieving given objectives, they must also espouse particular ends or values associated with those objectives—whether the preservation of the status quo (often associated with judicial restraint) or the pursuit of a transformed future (often indicating judicial activism). On the same rationale, Posner’s project in *Law, Pragmatism and Democracy* aims to reconstitute the ends of John Dewey’s legal pragmatism so that they are susceptible to objections more felicitously leveled at Learned Hand’s legal theory. While the preponderance of evidence indicates this maneuver, Posner’s motivations for the sleight-of-hand can only be conjectured at.

In closing, I would like to offer one such conjecture. I believe that Posner’s intentions are, first, to obtain the Holy Grail of legitimacy for his conservative legal theory, particularly its efficiency criterion of justice, thereby attracting a broader audience of supporters; and, second, to steal the mantle of pragmatist jurisprudence from a philosophical giant, John Dewey, for the purposes of giving pragmatism a distinctly elitist gloss in the twin domains of legal and political theory. In both respects, Posner’s everyday pragmatism fails. Thus, Posner’s project is unsuccessful by its own lights and his reconstruction of Dewey’s theories of law and democracy does in fact have a political valence—indeed, it belongs squarely within the realm of the political.

³⁶ Jack Knight and James Johnson, “Political Consequences of Pragmatism,” *Political Theory*, vol. 24, no. 1 (Feb. 1996): 68-96, 69.

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**II. THE SECOND INTERNATIONAL
PRAGMATIST CONFERENCE OF CÓRDOBA**

WILLIAM JAMES'S PSYCHOLOGY AND PHILOSOPHY:

EMOTIONS AND BELIEFS

Laura I. Garcia

UNC/CONICET

laurainesg@gmail.com

William James has been a leading thinker of his century, as well as for his contributions to Psychology and Philosophical work. However, it is rare to find studies that trace bridges of communication between the author's developments in both disciplines, as some of them are focused on his contributions to experimental psychology and others in his pragmatist philosophy. In this paper, our overall purpose is to show what could be one of the possible lines of connection between Psychology and Philosophy of William James. We purpose to consider, in particular, to address one of the areas that we believe may serve as an interface between these disciplines, namely, the conception of the human mind that has formulated this author.

In *The Varieties of Religious Experience* (1987) James argued that the human mind was made up of three elements: ideas, emotional tendencies and impulsive and inhibitory tendencies. From this framework, we focus on the conception of the emotions that developed this author. Thus, in this paper we want to begin an analysis of the pragmatist conception of emotion. We will show why traditionally held that the Jamesian emotion theory is a physiological theory. While we will not ignore this point, we will defend that the theory of the emotions of James has some elements that allow to interpret it like evaluative theory of the emotions¹. In this sense, we consider that some of the contemporary criticisms this author has received seems to consider only a partial reading of the *James's work*. Once established which is the Jamesian conception of the emotion, we will risk in what way this may relate with the acquisition of beliefs, as conceived by the author. At this point, even though, James says in *The Principles of Psychology* "will" and "belief" are two names for

¹ For a brief introduction to the different kinds of theories about emotion, see the introduction of Calhoun & Solomon (*¿Qué es una emoción? Lecturas clásicas de psicología filosófica*, 1989).

the same psychological phenomenon, we will defend the thesis that for James is no possible to believe in anything that the will dictate to us.

1. The mind

W. James does not address the question of the human mind from a metaphysically point of view, but rather from a psychological and physiological perspective. This approach is new to the philosophical tradition of the nineteenth century because, as a result of the thought of Descartes, many philosophers such as Malebranche, Spinoza, Leibniz, tried to reconcile in the metaphysics context the ontological dualism with the physiological explanations of the mind-body. However, when W. James studies the mind he gets rid of the ontological problem as understood only as a psychological phenomenon (Wozniak, 1995)² and affirms that, as a universally accepted method, the study of psychological phenomena includes or presupposes the study of brain physiology (James, *The Principles of Psychology*, 1952, p. 3).

In *The Varieties of Religious Experience* (hereinafter *The varieties*) James summarizes which is his conception of the human mind saying that "A mind is a system of ideas, each with the excitement it arouses, and with tendencies impulsive and inhibitive, which mutually check or reinforce one another" (James, *The Varieties of Religious Experience*, 1987, p. 184). That is, the human mind as it, would be made up by three elements:

1. A system of ideas. James uses the term "Idea" as a synonym for abstract idea, pure idea, intellectual idea, thought, reasons or concepts. Each of these terms have similar meanings, but not identical³.

² In this sense says R. B. Perry "Referring to his *Principles of Psychology* as a work that prevented the explanatory theories spiritualist, associationist or other metaphysical hypothesis, James wrote: "In this strictly positivistic point of view is the only trait for which... I claim originality" [translation mine] (Perry, 1973, p. 200).

³ In several James's texts is possible to detect the use of these terms as equivalent because they share the general meaning. This undifferentiated and ambiguous use is explicitly recognized by the author in a footnote quote in *Problems of Philosophy*: "In what follow I shall freely use synonyms for these two terms. 'Idea', 'thought', and 'intellection' are synonymous with 'concept'" (James, *Some*

2. An emotional excitement, understanding by this term the passionate nature, feelings and emotions.

3. Trends, which can be of two types or impulsive/explosive, which are the forces that commits us to go sideways, or obstructive/inhibitory, which are the forces that hold us.

The passionate nature: the emotions

James understands that emotions are linked to the instincts⁴ and both are impossible to isolate from the experience since they are body movements that occur at the same time when an object excites the individual. Despite this strong relationship in the experience in conceptually possible to differentiate them because the instinctive reaction can lead to practical relations with the object, while emotions always lead in the body of the individual (James, *The Principles of Psychology*, 1952, p. 738). James, from Lange's description of sadness, distinguishes two ways in which emotions end up in the body of the individual:

1. With voluntary movements. Lange argues that sadness has as main feature to paralyze voluntary movements. The sad man is easily recognized by his exterior, for example: he walks slowly, hesitates, drags his feet, drops his arms. The tonicity of his muscles decreases considerably: the neck bends, the head is bended, the face gets longer. With the weakness of the nervous and voluntary muscles apparatus, it occurs a subjective feeling of fatigue and heaviness, the individual feels depressed, dejected.

2. With organic involuntary movements. These muscles, particularly those found in the issues of the blood vessels are constricted, so that causes paleness and anemia. The anemia of the skin is detected by the sensations of cold and chills; the sad

Problems of Philosophy, 1987, p. 1007). Because of this ambiguity in the use of concepts W. James has been heavily criticized, however, some philosophers have also seen how enormously enlightening and productive these ambiguities can result. See the Ramon Del Castillo preface to the translation of (James, *Pragmatismo*, 2007, p. 7-8).

⁴ Taking into account the influence that the thought of W. James has received from the work of Darwin, it is easy to understand why this author has linked emotions with instinct. In this sense, says Perry, R: "There were two general influences that led him in that direction. One was Darwin's, who leaned to link emotions with the instincts, and emphasize the biological aspect of emotional expression. The other was the influence of British empiricism, which led him to accentuate the sensorial aspect of the mental content" [translation mine] (Perry, 1973, p. 202).

man hardly gets warm. The anemia of the brain is manifested by intellectual inertia, boredom, a felling of intellectual fatigue, discouragement, displeasure for the work and insomnia (James, *The Principles of Psychology*, 1952, p. 738-740).

Having shown the difference between instincts and emotions lies in the relationship established with the objects and the body, and having shown what movements can cause emotions, we will focus on the characterization of these. In *The Principles of Psychology* James argues that:

Each emotion is the *resultant* of a sum of elements, and each element is caused by a *physiological process* of a sort already well known. The elements are all organics changes, and each of them is the reflex effect of the exciting object [emphasis added] (James, *The Principles of Psychology*, 1952, p. 745)

That is, emotions are result of physiological processes through a reflex effect produce organic changes. For this reason, James's work can be found physiological explanations of the emotions of the following type:

An object falls on a sense-organ and is apperceived by the appropriate cortical center; or else the latter, excited in some other way, gives rise to an idea of the same object. Quick as a flash, the reflex currents pass down through their pre-ordained channels, alter the condition of muscle, skin and viscus; and these alterations, apperceived like the original object, in as many specific portions of the cortex, combine with it in consciousness and transform it from an object-simply-apprehended into an object-emotionally-felt. No new principles have to be invoked, nothing is postulated beyond the ordinary reflex circuit, and the topical center (James, *What is an Emotion?*, 1884, p. 203).

The body movement of emotions are explained in this way and led to the consideration of W. James as one of the leading representatives of the physiological theories of emotions. James says that the physiological changes occur when an object excites an individual are constitutive of emotion or, put another way, it is impossible for the author to imagine that is an emotion without the body changes that it generates⁵. In this regard he said:

⁵ James says: "Can one fancy the state of rage and picture no ebullition in the chest, no flushing of the face, no dilatation of the nostrils, no clenching of the teeth, no impulse to vigorous action, but in their stead limp muscles, calm breathing, and a placid face? The present writer, for one, certainly cannot... if I were to become corporeally anæsthetic, I should be excluded from the life of the

*If we fancy some strong emotion, and then try to abstract from our consciousness of it all the feelings of its bodily symptoms, we find we have nothing left behind, no 'mind-stuff' out of which the emotion can be constituted, and that a cold and neutral state of intellectual perception is all that remains (James, *The Principles of Psychology*, 1952, p. 744).*

These constitutive body changes of emotions are conceived by James as preorganized mechanisms (or reflex effects) that all human beings have as an adapted answer to the world. Being prearranged mechanisms arise before the individual has thought about how to react to a particular situation. For example, James says, "If we abruptly see a dark moving form in the woods, our heart stops beating, and we catch our breath instantly and before any articulate idea of danger can arise" (James, *What is an Emotion?*, 1884, p. 196).

As several thinkers have said, conceiving the emotion in this way, to James implies to change the common point of view of his time. This point of view supported the idea that the causal relationship between emotions and bodily changes had the following order: the mental perception of a fact (to see a person) causes a mental condition (joy) and this results in bodily expressions (smile). James argues that this order is wrong because "the bodily changes follow directly the PERCEPTION of the exciting fact, and that our feeling of the same changes as they occur IS the emotion" (James, *What is an Emotion?*, 1884, p. 189-190). In this James would say that seeing a person (perception of the fact) causes a series of bodily changes such as smiling and being aware of this bodily change, we feel the emotion of joy.

LeDoux explains that the James's theory of emotions supposes, on the one hand, that emotions are accompanied by physical responses, and on the other hand, we can perceive these physical responses inside the body (as we see what happens outside the body)⁶. The individual perceives,

*affections, harsh and tender alike, and drag out an existence of merely cognitive or intellectual form" (James, *The Principles of Psychology*, 1952, p. 744-745).*

⁶ Against those who say that they feel no bodily changes which are raised by an emotion, James says: "The next thing to be noticed is this, that every one of the bodily changes, whatsoever it be, is FELT, acutely or obscurely, the moment it occurs. If the reader has never paid attention to this matter, he will be both interested and astonished to learn how many different local bodily feelings he can detect in himself as

for example, that their hands perspire, their heart rates, their muscles are contracted in certain way, their vision blurs, etc. These physiological responses return to the brain in form of physical sensations and this particular sensory pattern gives each emotion its unique color, that is, every emotion triggers some physiological responses in the body, such as, the smile and rapid heart rate, these responses go to the brain in form of internal sensory patterns and whenever the individual perceives these patterns feels the emotion (LeDoux, 1999, p. 49-50).

James specifies that emotions are responses that occur before the formation of the articulated ideas, allow us to perceive situations as positive or negative, for it says:

Conceive yourself, if possible, suddenly stripped of all the emotion with which your world now inspired you, and try to imagine it as it exists purely by itself, without your favorable or unfavorable, hopeful or apprehensive comment. It will be almost impossible for you to realize such a condition of negativity and deadness. No one portion of the universe would then have importance beyond another; and the whole collection of its things and series of its events would be without significance, character, expression, or perspective (James, *The Varieties of Religious Experience*, 1987, p. 140-141).

That is, the emotion allows to appraise (favorably or unfavorably) external stimuli. So James says that emotions changes our way of seeing the objects, "the passion of love is the most familiar and extreme example of this fact... Yet it transforms the value of the creature loved as utterly as the sunrise transforms Mont Blanc from a corpse-like gray to a rosy enchantment" (James, *The Varieties of Religious Experience*, 1987, p. 141). Based on this point we argue that the Jamesian theory of emotion can be described also as an evaluative theory of emotion. These theories argue, in general, when we feel fear, aversion or rejection for an object or a particular person, these emotions are indicating what the appraisal (negative in this case) that we give. However, the evaluative theories of emotions are several

*characteristic of his various emotional mood. It would be perhaps too much to expect him to arrest the tide of any strong gust of passion for the sake of any such curious analysis as this; but he can observe more tranquil states, and that may be assumed here to be true of the greater which is shown to be true of the less" [emphasis added] (James, *The Principles of Psychology*, 1952, p. 743-744).*

because the term "evaluation" was understood in different ways. This concept can be interpreted as "perceived of value", i.e., the emotions were considered as analogous perceptions, in some sense to, the true sensory perceptions. This analogy was supported by the fact that both phenomena are constituted by and object in its origin and an internal construction that the brain makes the object⁷. If this argument is correct and the theory of James indeed may be considered also as an evaluative theory of emotions as "perceptions of value", then it is possible to argue that James's theory may account for one of the most common objections that were done, namely, that did not take into account that a cognitive understanding of the average situation between stimulus perception and emotion. This objection holds that:

Based on experimental studies,... A state of physiological excitement and a consciousness and interpretation of the situation itself are crucial for the emotion. The fact that we suddenly see a man with a gun in a dark alley, it can induce physiological excitement (as in the theory of James), but the experience of fear depends on a cognitive interpretation of the implications of the situations [translation mine] (Calhoun & Solomon, 1989, p. 28).

If James's theory is an evaluation theory of external objects, it is necessary to accept that some kind of cognitive interpretation (even if not an articulated thought) that enables the qualification of objects as favorable, unfavorable, dangerous, harmless, threatening, nice, etc. therefore we consider that the objection referred to, would not take place.

So far we have argued that James said that the mind is a system of ideas with emotive trends and impulsive and

⁷ Is possible to find some arguments in favor of the consideration of the Jamesian theory of emotions as an evaluative theory, meanwhile, appraised perceptions of external objects. From the posing of A. Damasio (*En busca de Spinoza. Neurobiología de la emoción y los sentimientos.*, 2006), arguments in favor of the analogy of emotions as perceptions of value because the theory of the emotions of James meets the three criteria suggested by Damasio: a) the perceptions of value the perceived object is internal, it is the collecting body, b) perceptions of value besides having a real object at the origin (the body) have a emotionally competent object (the external object that initiated the body changes) and c) perceptions of value not only the actual object can alter the brain, but the latter may act directly on the real object, modifying or altering it.

inhibitory tendencies. In turn, we have shown that James conceives emotions as preorganized physiological mechanism that allow the body to give adapted responses according to the environments and its objects, and we have specified that these physiological responses are at the same time *evaluations* because these responses can value external objects. We have also shown what kind of physiological explanation James gives of these mental phenomena. It said so far it would be possible to do a materialistic reading (reductionist) of theory of the mind and Jamesian emotions, since we have only mentioned phenomena that ultimately refer to natural processes and atomistic; let's remember, for example, James explains the thrill of sadness through the reflex circuits of the nervous system and physiological responses of the muscles, skin and viscera. However, we believe that this would be a misreading it would ignore an important dimension to the author, a region that does not fall within the natural explanation⁸. James says:

There are forces within us that naturalism with its legal and factual virtues never takes into account possibilities that insufflate forces [*take our breath away*] possibilities of another kind of happiness and power, possibilities that arise when we put aside our will and letting something higher work for us [*letting something higher work for us*], forces that seem to reveal a wider world than physics and philistine ethics can ever imagine... These experiments show that our natural experience, our experience strictly moral and prudential, it is only a fragment of human experience. These experiences mitigate the designs of nature and open unknown possibilities and prospects [translation mine] (*A Pluralistic Universe*, Lecture VII, quoted by Del Castillo, November 2006, p. 72).

In the line of reasoning that we are developing, R. Perry says that:

⁸ In *Pragmatism* is possible to find additional arguments in favor of a non-reductionist reading of James. In these lectures, James argues against two extreme tendencies in the history of philosophy: crude empiricism and rationalism, and gives reasons for his pragmatic method, which turns out to be a mediation between both tendencies. The crude empiricism is characterized by the author as a stand materialist (reductionist), scientist, leaving aside the romantic spontaneity and courage, where ideals become mere inert products of physiology. James says that in this materialistic world just a "rough spirit" can it encounters at home, but a pragmatic spirit will be more comfortable in a pluralistic universe (James, *Pragmatism*, 1987, p. 492-493).

James had a hypothesis in which vindicated a "dramatic likelihood" that "there is a continuum of cosmic consciousness in which our individuality builds only occidental fences, and where our diverse minds plunge as into a mother-sea or reservoir" [translation mine] (Perry, 1973, p. 212).

Taking into account these quotes its necessary relocates the emotional trends and, in general, everything said so far on the mind of the individual within a larger region that, for James, escapes to the legal and factual explanations. James refers to this region with the unorthodox concepts of "subliminal consciousness", "subconscious region" or "extraliminal region", concepts that the pragmatist uses such as in *The Principles Psychology* and *The Varieties* (Perry, 1973, p. 265). In *The Varieties* he says that the discovery of this region was one of the most important steps given by psychology (In the year 1886) because of him we know that exists a field in which the ordinary consciousness (with their feelings, thoughts and memories) finds itself in an extraliminal consciousness (James, *The Varieties of Religious Experience*, 1987, p. 215). The author argues that, thanks to this region, the individual may have experiences of voices, visions, premonitions, hallucinations, revelations, etc. James says, the subliminal region:

Is the abode of everything that is latent and the reservoir of everything that passes unrecorded or unobserved. It contains, for example, such things as all our momentarily inactive memories, and it harbors the springs of all our obscurely motive passion, impulses, likes, dislikes, and prejudices. Our intuition, hypotheses, fancies, superstitions, persuasions, convictions, and in general all our non-rational operations, come from it. It is source of our dreams, and apparently they may return to it. In it arise whatever mystical experiences we may have (James, *The Varieties of Religious Experience*, 1987, p. 433).

In this sense, to be faithful to the conception of mind of W. James is necessary to resize he region of consciousness in relation to the subliminal region. This region will allow James to explain of conversions (which may be religious or not, for example, may be a falling out of love) (James, *The Varieties of Religious Experience*, 1987, p. 165-166). According to James, this region is where are produced the subconscious maturation of the decisions that intrude into consciousness when an individual evaluates that his forces are not enough to leave the state of upset and chooses to abandon

themselves. Just then, the subconscious forces take the lead and get the unification that the individual aspires. One of the many examples of subconscious maturation which James makes reference is the following one:

You know how it is when try to recollect a forgotten name. Usually you help the recall by working for it... But sometimes this effort fails: you feel then as if the harder you tried the less hope there would be, as though the name were *jammed*, and pressure in its direction only kept it all the more from rising. And then the opposite expedient often succeeds. Give up the effort entirely; think of sometimes altogether different, and in half an hour the lost name comes sauntering into your mind, as Emerson says, as carelessly as if it had never been invited (James, *The Varieties of Religious Experience*, 1987, p. 191).

Taking into account that the conception of the mind of James implies not only the ideas, emotive trends and inhibitory and driving trends but also the subconscious region, next we will consider in what way this philosophy is related to the acquisition of beliefs.

2. The Beliefs.

In *The Principles of Psychology*, James says that a belief is an emotional reaction over an object (James, *The Principles of Psychology*, 1952, p. 661). In what sense a belief is an emotional reaction? Recalling that emotional reactions are characterized by this author as reflex adaptive responses that the organism produces whenever an object exists it (James, *The Principles of Psychology*, 1952, p. 745), and taking into account the main objective of this paper, we argue that the conceptual bridge that James proposes between the belief and emotional reactions may be based that both are understood as responses of the individual to act functionally in their environment. In this sense, this section, it is necessary to show what the conception of the acquisition of belief that James holds.

The pragmatist says the beliefs can be acquired in a similar way to the emotions, it is clear that for James the emotional reactions may be reproduced performing voluntary external movements for emotional tendencies that the individual

wants to activate⁹. If the beliefs can be acquired in a similar manner to the emotions, then we must ask whether beliefs can be acquired at will. James holds:

Truly enough, a man cannot believe at will abruptly... But *gradually* our will can lead us to the same results by a very simple method: *we need only in cold blood ACT as if the thing in question were real, and keep acting as if it were real, and it will infallibly end by growing into such a connection with our life that it will become real.* It will become so knit with habit and emotion that our interests in it will be those which characterize belief (James, *The Principles of Psychology*, 1952, p. 661).

According to this quotation beliefs can be acquired according to the will of the individual if he acts as if it already was part of their belief system, because the act in this way facilitates the incorporation of the belief to the emotional and daily life. Both *The Principle of Psychology* (1952) and *The Varieties of Religious Experience* (1987) James exposes several cases of beliefs that are acquired in a *voluntary* way, for example, who intends to believe in God and makes certain daily sacrifices, ends up believing in his existence¹⁰. Thus, the will, as a psychological phenomenon,

⁹ For example, James poses that: *"Whistling to keep up courage is no mere figure of speech. On the other hand, sit all day in a moping posture, sigh, and reply to everything with a dismal voice, and your melancholy lingers. There is no more valuable precept in moral education than this, as all who have experience know: if we wish to conquer undesirable emotional tendencies in ourselves, we must assiduously, and in the first instance cold-bloodedly, go through the outward movements of those contrary dispositions which we prefer to cultivate. The reward of persistency will infallibly come, in the fading out of the sullenness or depression... Smooth the brow, brighten the eye, contract the dorsal rather..., pass the genial compliment, and your heart must be frigid indeed if it does not gradually thaw!"* (James, *The Principles of Psychology*, 1952, p. 751-752). That is, to reproduce external body movements corresponding to an emotion it may result in the individual desired emotion.

¹⁰ In *The Will to Believe* (1897) James offers another kind of example that seems to expand the reach of the voluntary acquisition of beliefs, it also holds that an individual can make another person acquires a belief: *"How many women's hearts are vanquished by the mere sanguine insistence of some man that they must love him! He will not consent to the hypothesis that they cannot. The desire for a certain kind of truth here brings about that special truth's existence; and so it is in innumerable cases of other sorts"* (James, *The Will to Believe*, 1897, p. 24). In this case, even James, the insistence of the lover ends up generating in the heart of the beloved the corresponding feeling and beliefs. At this point include a restriction that James sets for the voluntary

takes a different meaning in the acquiring beliefs process because it is not only limited to the acceptance or rejection of what the understanding presents, but takes a greater role as basis for the acquisition of all our convictions.

In the philosophical literature such positions has received significant criticism, because whether if possible acquire beliefs as the will dictates, then the cases of self deception are clear examples of the paradoxical that these position may be. In these cases the people "cannot believe" something despite the strong evidence in favor of that belief and rationalize their behavior by hiding their real reasons. For example, in the case of a wife who discovers that her husband reliably deceive her and despite this, she still relies on the fidelity of her husband because she argues that the husband did not "really" wanted to cheat on her, but he was "forced to do that". Thus, the deceived woman finds a reason that justifies the husband conduct and she continues to believe in his faithfulness.

Due to the importance that James gave to the will in the acquisition of beliefs, some critics argued that his position was foolish because from his texts is possible to infer that this author defends the following thesis: "it is possible to arbitrarily believe in anything, regardless of whether the beliefs is true or false" and that "to believe in it, the belief becomes true", i.e. critics argued that the Jamesian beliefs acquisition process was a self-indulgence exercise. Faced with these accusations, James wrote a letter:

I cry out to heaven to tell me what maddening root have eaten my "main contemporary" to be so blind to the meaning of the printed text. Or simple are we not able to clearly state what we mean? [translation mine] (letter of August 12, 1904 to Hobhouse, quoted by Perry, 1973, p. 221)

Since this is a letter to a friend, James does not develop any argument to answer his objector. However, he makes clear

acquisition of beliefs. According to the psychological theory which this author adds the passionate and volitional nature that beats in the root of our convictions as beliefs that are presented as options to be acquired must be "living options". Because James's says about "Pascal wager" that: *"It is evident that unless there be some pre-existing tendency to believe in masses and holy water, the option offered to the will by Pascal is not a living option"* (James, *The Will to Believe*, 1897, p. 6).

that it is not a good way to interpret his philosophical texts. In this paper, we will show what the arguments are, presented in an unsystematic way in James's work, which provide a philosophical justification for the assertion of the letter quoted above. Despite the importance the will acquired in the acquisition of beliefs, in *Pragmatism* (1987) the author presents what are the reasons why it should not believe in anything. James says:

Yet in the choice of these man-made formulas we can not be capricious with impunity any more than we can be capricious on the common-sense practical level. We must find a theory that will *work*; and that means something extremely difficult; for our theory must mediate between all previous truths and certain new experiences. It must derange common sense and previous belief as little as possible, and it must lead to some sensible terminus or other that can be verified exactly (James, *Pragmatism*, 1987, p. 580-581).

That is, the beliefs acquired voluntarily must respect the following three restrictions:

- a) adopting beliefs that *work* in the world or, in others words, that they help to achieve satisfactory modes of action, taking into account the prior knowledge and new experiences;
- b) not to adopt beliefs that require major restructuring of the knowledge already acquired, and
- c) adopt beliefs that can be verified in experience.

Especially at the first imposed restriction on the acquisition of beliefs, we believe it is clear that the conceptual bridge establish between beliefs and emotions is based on two phenomena are (and must be) functional to the individual's environment. James says in *The Principles of Psychology* that the reasoning are adaptive responses to the environment, i.e. the individual reasons considering the fact in which they want to work successfully, with the aim that the chances of failure are reduced. In this sense, James hold both *Pragmatism* and in his last work *Some Problems of Philosophy* that the adopted beliefs by an individual cannot have an arbitrary content because at stake is their ability to perform successful actions or satisfactory to themselves.

Hence, James highlights the functional role that has the ideas¹¹:

Now however beautiful or otherwise worthy of stationary contemplation the substantive part of a concept may be, the more important part of its significance may naturally be held to be the *consequences to which it leads*. These may lie either in the way if making us think, or in the way of making us act. Whoever has a clear idea of these knows effectively what the concept what the concept practically signifies, whether its substantive content be interesting in its own right or not (James, *Some Problems of Philosophy*, 1987, p. 1013).

Even to do without a substantial definition of them:

This consideration has led to a method of interpreting concepts to which I shall give the name of *the Pragmatic Rule*... In obeying this rule we neglect the substantive content of the concept, and *follow its function only* [emphasis added] (James, *Some Problems of Philosophy*, 1987, p. 1013-1014).

The author's pragmatic interest, already present in his first psychological written took shape throughout his philosophical writings. James was refining even more how to value the new or old beliefs, focusing on its *a posteriori* content, that is, content given by the alignment with the intended porpoise and downplaying the content determination *a priori* of concepts¹².

If the beliefs are evaluated according to the situation and the desires or needs that manage to satisfy, then it is clear that this is a major constraint to the beliefs that are wished to adopt¹³. In this sense A. Faerna says:

¹¹ Remember that the term "idea" is used by James interchangeably with the following terms: *concept, abstract idea, thought, pure idea, reason or intellectual idea*. See p. 2.

¹² One of the obvious consequences of this approach is that the evaluative content of beliefs is determined in relation to the circumstances in which the individual is. This difference between *a priori* and *a posteriori* content of beliefs was taken Ramon Del Castillo, who developed in the field of ethical pluralism W. James. See (Del Castillo, Una serena desesperación. La ética individualista de William James., Nov 2006).

¹³ With the objective of reinforcing the idea that the individual can not adopt any belief they like because they risk to suffer consequences (concrete) undesired I quote James one more time: "*If the probabilities that our partner is a villain are one to two, how to act based on this probability? By treating him as a villain one day, and confiding your money and your secrets to him the next? That would be the worst of all solutions. In all such cases we must act wholly for*

James does NOT invite us to an exercise of self-satisfaction by which we should feel authorized to wallow in our favorite belief. On the contrary, he reminds us that knowledge is a risky business, and sooner or later, for better or for worse, we will suffer in our own flesh the consequences of our own certainties [translation mine] (Faerna, 2005, p. 60).

“The consequences that we will suffer” will be those actions that do not lead to desired ending, such as proposing a theory that is not appropriate to explain some phenomenon, choosing a counterproductive medication for an illness, taking the opposite way to get home, etc. (Del Castillo, 2002, p. 116).

Concluding Remarks

In this paper, we have shown one possible conceptual bridges between Psychology and Philosophy of William James, based on what the theory of mind developed by this author. In particular we have shown that the mind is conceived as a system of ideas, emotive tendencies and inhibitory and impulsive tendencies. In turn we have highlighted what is the place that James has given to the subliminal region in his own thinking, putting him away from this kind of reductionist materialist philosophical trends. The subliminal region has been understood psychologically as “the source” of all our ideas, assumptions, hypotheses, etc. and as the home of all subconscious maturities.

With the purpose of showing how to build a bridge between the Philosophy and Psychology of W. James, we show what can be the relationship between emotions and beliefs. In this regard, on the one hand, about the emotions we have shown that they were conceived as reactions of the organism to environmental stimuli. These reactions occur

one or the other horn of the dilemma. We must go in for the more probable alternative as if the other one did not exist, and suffer the full penalty if the event belie our faith... We have but this one life in which to take up our attitude towards them, no insurance company is there to cover us, and if we are wrong, our error, even though it be not as great as the old hell-fire theology pretended, may yet be momentous” (James, *Some Problems of Philosophy*, 1987, p. 1098-1099). Thus, James restricts the individual to adopt only those beliefs that enable it to achieve satisfactory ways of acting because he knows that the cognitive company does not have an “insurance company” that covers you for damage because of a bad adoption of beliefs.

before the individual may have an articulated idea about the external objects, there are considered as preorganized mechanisms that allow to react quickly and adapted to the environment. We have shown that W. James offers physiological explanations of the emotional reactions, but conceive closely linked with the physiological changes, we have defended in this paper, that James also conceives emotions as appraisable phenomena while allowing them to perceive objects as favorable or unfavorable, positive or negative.

On the other hand, we have shown that beliefs can be acquired as the individual will dictate, although, we have shown that James conceives the acquisition of beliefs respects (or should respect) three conditions, namely that new beliefs are functional to the environment, that do not require major restructuring of the existing belief system and can be verified. Based on the first condition to be met to be acquired beliefs, we argue that the conceptual bridge that can be established between these two phenomena is that both are (or should be) functional for the individual's adaptation to the environment.

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DEWEY, SELLARS AND THE GIVEN

Daniel Enrique Kalpokas

UNC/CONICET

dkalpokas@gmail.com

1. Introduction

In “Empiricism and the Philosophy of Mind”, Sellars attacks –with the characteristic tools of an analytic philosopher- what he calls “the Myth of the Given”. Some decades before, Dewey presented his own criticism to traditional empiricism on the base of an empirical conception of experience. I think that Sellars’ and Dewey’s criticisms can be understood as pointing at the same target; thus my purpose in this article consists of reconstructing Dewey’s criticism of classic empiricism as a criticism of the Myth of the Given. My aim here is *not* exegetical, but reconstructive: I think that a reading of Dewey’s criticism of classic empiricism as a criticism to the Myth of the Given can shed light on a) the relevance of Dewey’s philosophy for philosophy of mind and epistemology¹; and b) some advantages of Dewey’s position over Sellars’. In section 2, I briefly reconstruct the Myth of the Given such as it is characterized by Sellars in “Empiricism and the Philosophy of Mind”. In section 3, I present Dewey’s experimental conception of experience and his main criticisms to traditional empiricism. In section 4, I show how Dewey’s notion of experience can be understood as involving a rejection and criticism of the Myth of the Given. Finally, section 5 summarizes the results of the previous sections.

¹ Rorty, who has done a lot to show the importance of Dewey’s work nowadays, considers, however, that the Deweyan notion of experience should be put aside. See Richard Rorty, “Overcoming the Tradition: Heidegger and Dewey”, and “Dewey’s Metaphysics”, in Richard Rorty, *Consequences of Pragmatism* (Minneapolis: University of Minnesota Press, 1982); and “Dewey Between Hegel and Darwin”, in Richard Rorty, *Truth and Progress* (Cambridge: Cambridge University Press, 1998). As Bernstein says, Rorty’s pragmatism is “pragmatism without experience”. See Richard Bernstein, *The Pragmatic Turn* (Cambridge: Polity Press, 2010). In contrast, I think that Dewey’s notion of experience can be useful for some contemporary debates in epistemology and philosophy of mind.

2. Sellars and the Myth of the Given

Although his attack mainly concerns the theory of sense data as the paradigm of the given, Sellars says that the framework of the given also includes material objects, universals, propositions and first principles². According to Sellars, the category of “the given” has been introduced into epistemology in order to explain how empirical knowledge can be based, ultimately, in a certain kind of non-inferential knowledge. The Myth of the Given is the idea according to which a certain sort of non-epistemic facts about the epistemic subjects could imply epistemic facts about them (an error –Sellars says- which is similar to the so called “naturalistic fallacy” in ethics)³. The expression “non-epistemic facts” refers here to the immediate appearance of objects to the mind, objects about which the mind can be directly conscious. Thus, for instance, according to the theory of sense data (which is one of those theories that makes the emergence of the Myth possible), the apprehension of mental contents can take place without the mediation of language. Mind is the realm of the immediately known. In this way, *to perceive sensory contents* (a characteristic that we share with pre-linguistic creatures) and *to be conscious* (something which is an item of

² Sellars’ criticism has had a great influence on analytic philosophy and new pragmatism. See Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1979); Robert Brandom, *Making it Explicit* (Cambridge: Harvard University Press, 1994); and John McDowell, *Mind and World* (Cambridge: Harvard University Press, 1994) and *Having the World in View* (Cambridge: Harvard University Press, 1999). For a criticism of Sellars’ article, see William Alston, “What’s Wrong with Immediate Knowledge?”, *Synthese*, 55, 1983; and Daniel Bonevac, “Sellars vs the Given”, *Philosophy and Phenomenological Research*, vol. LXIV, n 1, 2002. Peirce’s criticism to Cartesianism can be considered as an earlier criticism to the Given. See Peirce “Some Consequences of Four Incapacities” and “Questions concerning Certain Faculties Claimed for Man”, in James Hoopes, (ed) *Peirce on Signs* (Chapel Hill: The University of North Carolina Press, 1991).

³ In “Sellars on Perceptual Experience”, McDowell interprets “epistemic” as equivalent to “that involves concepts”; thus, he thinks that, according to Sellars, we should not assume that we can understand epistemic episodes in terms of the actualization of mere natural capacities. See John McDowell, *Having the World in View*, p. 5.

knowledge and, in consequence, presupposes the capacity of justifying assertions) are made equivalent.

Now, if we take the case of the theory of sense data as a paradigmatic example, it is possible to characterize the Myth of the Given in virtue of the following elements:

- a) The idea that there are certain inner episodes (i.e. sensations of red), which are necessary for having experiences (i.e. that a physical thing is red), and which can occur in the mind without having concepts;
- b) the thesis according to which those episodes constitute a case of non-inferential knowledge; and
- c) the foundationalist thesis according to which such episodes provide the ultimate foundation of all our empirical knowledge.

Now, Sellars' criticism is not directed at the very idea of non-inferential knowledge (for he claims that observational reports, such as "This is red", are legitimate examples of non-inferential knowledge), but to the spurious assumption that there is non-inferential knowledge which is independent from conceptual capacities (acquired by using language) and that, besides, could ultimately justify all our empirical beliefs. His criticism aims to show not only that the notion of non-conceptual knowledge is incoherent, but also that the foundationalist thesis according to which there is non-inferential knowledge that does not presuppose any sort of knowledge about other factual issues, is unattainable.

Against the Given, Sellars opposes his psychological nominalism, which affirms that:

All awareness of sorts, resemblances, facts, etc., in short, all awareness of abstract entities – indeed, all awareness even of particulars- is a linguistic affair. According to it, not even the awareness of such sorts, resemblances, and facts as pertain to so-called immediate experience is

*presupposed by the process of acquiring the use of a language*⁴.

There is not any kind of knowledge that does not involve the mastery for using concepts; and, since Sellars identifies the possession of a concept with the mastery of the use of a word, there cannot be knowledge without the capacity to use language. For Sellars, knowledge is propositional in character, and propositions come with the mastery for using language. In Rorty's words: "there is no such thing as a justified belief which is non-propositional and no such thing as justification which is not a relation between propositions".⁵

Against traditional empirical foundationalism, Sellars claims that the pretended authority of the "ultimate" knowledge rests, actually, on the knowledge of other factual issues (singular and general)⁶. The authority of a report such as "This is green" comes, not only from the fact that the report must be a symptom of the presence of a green object in standard conditions, but also from the fact that the perceiver must know that tokens of "This is green" are symptoms of the presence of green objects in appropriate conditions. Thus, observational knowledge presupposes that one knows general facts, such as "The report 'This is green' is a reliable symptom of the presence of a green object in standard conditions".

It is not important here to reconstruct in detail Sellars' arguments against the Myth, nor what exactly the theoretical alternative that he proposes is. The purpose of this brief presentation of the epistemological core of "Empiricism and the Philosophy of Mind" has been to characterize the target of his criticism and to indicate, roughly, the way to avoid, according to him, the Myth. Let's see now how Dewey criticizes traditional empiricism.

⁴ Wilfrid Sellars, *Empiricism and the Philosophy of Mind* (Cambridge: Harvard University Press, 1997), p. 63.

⁵ Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1979), p. 183

⁶ Wilfrid Sellars, *Empiricism and the Philosophy of Mind*, # 35 y ss.

3. Dewey's criticism of traditional empiricism and the experimental conception of experience.

The philosophy of John Dewey can be understood as a new form of empiricism⁷. Dewey's reconstruction of the notion of experience takes into account two factors: (1) the emergence of experimental sciences, and (2) the development of psychology based on biology⁸. Although Dewey recognizes the importance of the traditional empiricist notion of experience (as the final court of all pretensions of empirical knowledge), he states, notwithstanding, that empiricists have failed in developing a conception of experience that is in tune with the experimental spirit of science. In particular, they have failed in their aim of presenting a notion of experience that is fitted to the experience, for, according to Dewey, they have introduced an insurmountable divorce between reason and experience which is not faithful to the facts⁹. In contrast, attention paid to the methods and results of experimental sciences, together with the biological orientation of psychology, help us realize –Dewey points out– the intimate continuity that exists between experience and reason.

In the traditional conception, experience is described as:

- (1) Primarily a matter of knowledge;
- (2) Something psychic and subjective;
- (3) Linked to what has happened in the past;
- (4) Composed of particular entities (simple ideas), which implies that connections and continuities come from outside of the experience; and

⁷ See Richard Bernstein, *John Dewey* (Atascadero: Ridgeview Letterpress & Offset Inc., 1966), p. 45. I think that Dewey's empiricism is close to McDowell's empiricism on this point: both authors try to rehabilitate the epistemic character of experience without falling into the Myth of the Given. See John McDowell, *Mind and World* (Cambridge: Harvard University Press, 1994).

⁸ John Dewey, *Reconstruction in Philosophy*, in *The Middle Works of John Dewey, 1899-1924*, vol 12, 1920, Ed by Jo Ann Boydston, (Carbondale: Southern Illinois University Press, 1982), p. 127.

⁹ On this point, see also William James, *Essays in Radical Empiricism* (New York: Dover Publications, 2003).

- (5) An antithetical instance of thought, which means that inferences –alien to the experience– involve a jump outside of it¹⁰.

On the contrary, the reconstructed notion of experience states:

- (1') Instead of a knowledge-affair, experience is "an affair of the intercourse of a living being with its physical and social environment";
- (2') Experience involves "a genuinely objective world which enters into the actions and sufferings of men, and that "undergoes modifications through their responses";
- (3') Experience "in its vital form is experimental, an effort to change the given; it is characterized by projection, by reaching forward into the unknown; connection with a future is its salient trait";
- (4') Experience, "that is an undergoing of an environment and a striving for its control in new directions", instead of being a collection of atoms articulated by an external reason, "is pregnant with connections"; and
- (5') Experience "is full of inference. There is, apparently, no conscious experience without inference"¹¹.

Let me consider each point briefly.

- (1') Experience is primarily a process in virtue of which we are affected by the environment as a consequence of our actions in it. The organism is never a mere spectator, but an agent who tries to change her medium to reach her purposes¹². We distort our experience if we conceive it as directed exclusively to knowledge. Experience

¹⁰ John Dewey, "The Need for a Recovery of Philosophy", McDermott, J. (ed), *The Philosophy of John Dewey* (Chicago: The University of Chicago Press, 1973), p. 61.

¹¹ John Dewey, "The Need for a Recovery of Philosophy", p. 61.

¹² John Dewey, "The Need for a Recovery of Philosophy", p. 78. In p. 84-85 he says: "The thing to be known does not present itself primarily as a matter of knowledge-and-ignorance at all. It occurs as a stimulus to action and as the source of certain undergoings. It is something to react to (...) and also something that reacts unexpectedly to our reactions."

serves primarily to the coordination of action, to adaptation¹³. When the relationship between the organism and its environment is fluid and its activity is developed without obstacles, experience provides stimuli for the automatic adjustment of behavior. In this case, attention is paid to the very activity, not to what experience reveals to us. It is what we could call “experience in action”, because in those cases experience only provides stimuli to do the activity we are doing¹⁴.

However, experience can acquire a cognitive value¹⁵. This takes place when the object of experience is considered consciously as such. Attention to a certain stimulus arises when the situation becomes indeterminate¹⁶. Because of indetermination, the

organism does not know how to react¹⁷. Reflective thought begins when the organism needs to know what the nature of the stimulus is and what the appropriate reaction to it is. Attention is not on the activity, but on the qualities of objects of the experience. In this case, action is at the service of experience, for the only way of determining the stimulus consists of taking note of what is revealed in the consequences of our actions referred to the object considered. It is what we could call, in contrast to the former attitude, “action in experience” because now the activity is at the service of the discovery of the qualities in the environment that prevent a fluid relationship with it.

(2') Dewey's starting point is the organism in its natural and social environment. It is there where experience should be examined empirically. The traditional conception, in contrast, begins by considering experience speculatively as a certain sort of mental state that pertains to an epistemic subject who is “outside of the real world of nature”¹⁸. In such circumstances, experience is thought of as an inner and private state of the subject, with a privileged epistemic status, and which can be characterized independently of the external world. For Dewey, in contrast, the doctrine of biological continuity has showed the empirical irrelevance of the traditional empiricist notion of experience. From his perspective, the subject of experience is an organism situated in the world. The content of experience is given by the same world with which the subject interacts. There is no problem about the external world. Experience is not “subjective”. The subject of experience is the entire organism in its interactions with the natural

¹³ When Dewey says that experience is non-cognitive, he is only pointing out that the primary aim of it is not knowing. See Richard Bernstein, *John Dewey* (Atascadero, Ridgeview Letterpress & Offset Inc., 1966), p. 62

¹⁴ In my opinion, there is here space to conceive this primary form of non-cognitive experience, and the abilities involved in it, as conceptual in a similar sense to that emphasized by Noë and McDowell. See Alva Noë, *Action in Perception* (Cambridge: The MIT Press, 2004), chap. 6, and John McDowell, “What Myth?”, in John McDowell, *The Engaged Intellect* (Cambridge: Harvard University Press, 2009). As I interpret this point in Dewey's philosophy, when we are involved in certain activity, the sensations and objects which are experienced allow us to adjust our movements to the environment because they have certain meaning for us. Their meaning come from the fact that they are in a whole that is the activity we are doing. Consider Dewey's example: the visual and tactile sensations that we have when we use a pencil. Certainly, they allow us to adjust our movements; but the adjustment requires that we note what a pencil is, what a piece of paper is, and some properties of each object (for instance, that the pencil can be taken by our hand, etc.). I think that this point is not incompatible with the ontological thesis according to which there is an “absolute, final, irreducible, and inexpugnable concrete *quale*” in every experience. See John Dewey, “The Postulate of Immediate Empiricism”, in *The Influence of Darwin on Philosophy and Other Essays* (New York: Prometheus Books, 1965), p. 234

¹⁵ On the distinction between the experience as adaptation or adjustment, and the experience as something cognitive, see John Dewey, “The Need...”, p. 85.

¹⁶ “As a *conscious* element, a sensation marks an interruption in a course of action previously entered

upon”, John Dewey, *Reconstruction in Philosophy*, in *The Middle Works of John Dewey*, p.130.

¹⁷ “The response is not only uncertain, but the stimulus is equally uncertain; one is uncertain only in so far as the other is”. John Dewey, “The Reflex Arc Concept in Psychology”, p. 106, *The Early Works of John Dewey, 1882-1889*, vol. 5, (Carbondale: Southern Illinois University Press, 1972).

¹⁸ John Dewey, “The Need for a Recovery of Philosophy”, p. 71.

and social environment¹⁹. When we consider that the subject is situated in the world from the beginning, and we realize that it is primarily a practical subject, who should cope with the environment, knowing becomes a derivate mode of interacting with reality²⁰.

(3') Experience is not a mere affection, a passive reception of stimuli. In contrast to "the spectator model"²¹, according to which the subject of experience passively and without any interest contemplates the world, experience is –Dewey says– "a matter of *simultaneous* doings and sufferings"²². This is the so-called "experimental conception of experience"²³: there is no experience without action, because the environment reveals its properties to us only when we act on it. Since the organism should introduce certain changes in its environment in order to adapt to it, since experience is a manner of interact with the medium, and since there is no control of the medium without anticipation and expectations, experience is indissolubly connected to action and, as a consequence, to the future: "Anticipation is therefore more primary than

recollection; projection than summoning of the past; the prospective than retrospective"²⁴.

Points (4') and (5') emphasize the organic character of experience. In contrast to classic empiricism, which holds that experience is constituted by a collection of simple ideas or sensory qualities that must be integrated by laws of association, experience is –for Dewey– an organic totality inferentially articulated. The doctrine according to which ideas and sensations are separate existences has not been derived –Dewey notes– from observation or experimentation²⁵. As soon as we pay attention to what experience in fact is, it is clear that experience is, by itself, organized. This point of view makes unnecessary the intervention of a supra-empirical reason that, as in the Kantian system, synthesizes the sensory diversity. For Dewey, "experience carries principles of connection and organization within itself"²⁶. Action is stimulated and controlled by sensations; and they acquire their meaning in virtue of the consequences of action. It is in this point where the role of inference arises. When an organism is able to take a sensation or a fact as a *sign* of another thing, of something that is not given in the present, of something that will be revealed in the consequences of action, it is able to infer that future fact from its actual experience. In that way, the organism acquires the capacity of controlling the future²⁷.

4. Dewey and the Myth of the Given

In what sense does Dewey's conception of the experience imply a criticism of the Myth of the Given?

¹⁹ For a close version of this notion of experience, see James Gibson, *The Ecological Approach to Visual Experience* (New Jersey: Laurence Earlbaum Associates Publishers, 1979); and Alva Noë, *Action in Perception* (Cambridge: The MIT Press, 2004).

²⁰ See John Dewey, "The Need for a Recovery of Philosophy", p. 91.

²¹ John Dewey, *The Quest for Certainty*, in *The Later Works, 1925-1953*, vol. 4: 1929, ed by Jo Ann Boydston, (Carbondale: Southern Illinois University Press, 1991).

²² John Dewey, "The Need for a Recovery of Philosophy", p. 63.

²³ See John Dewey, *Reconstruction in Philosophy*, chap. IV. On p. 129 he says: "The organism does not stand about (...) waiting for something to turn up. It does not wait passive and inert for something to impress itself upon it from without. The organism acts in accordance with its own structure, simple or complex, upon its surroundings. As a consequence, the changed produced in the environment react upon the organism and its activities. The living creature undergoes, suffers, the consequences of its own behavior. This close connection between doing and suffering or undergoing forms what we call experience".

²⁴ John Dewey, "The Need for a Recovery of Philosophy", p. 64.

²⁵ John Dewey, "The Need for a Recovery of Philosophy", p. 67.

²⁶ John Dewey, *Reconstruction in Philosophy, The Middle Works*, p. 132.

²⁷ "The extent of an agent's capacity for inference, its power to use a given fact as a sign of something not yet given, measures the extent of its ability systematically to enlarge its control of the future". John Dewey, "The Need for a Recovery of Philosophy", p. 69.

Remember that the core of the Myth is constituted by the idea according to which inner episodes that do not involve concepts would be, notwithstanding, items of knowledge and, consequently, could be used for ultimately justifying states with contents conceptually articulated such as beliefs.

Now, if we pay attention to Dewey's conception of experience, we will see that the idea of something merely given in the experience, which does not presuppose any relation with other sensations, ideas or sentiments, cannot be knowledge at all. Plus, because there is not immediacy or something merely given in cognitive experience, experience cannot be the ultimate foundation of empirical knowledge such as traditional empiricism had in mind²⁸. It is in virtue of these two points –I claim– that the Deweyan notion of experience involves a criticism and rejection of the Myth of the Given.

Although Dewey rejects the Kantian idea of an *a priori* conceptual synthesis of the sensory diversity, he thinks that sensations are mute if they are not connected to each other; or if objects of the experience are not linked to the possible consequences that would take place if we interacted with them. There is, then, a Kantian element in Dewey's theory of experience, though naturalized: the idea that experience is a "synthesized", interpreted, organized totality. This "synthesis" is not produced by a non-empirical reason, as in Kant's philosophy, but by the very actions of the organism that interacts with its environment²⁹. In a similar way to Kant, though without

the idea of a transcendental sphere, Dewey recognizes, then, that experience supposes thought³⁰. However, in his case, the organization provided by thought consists of connecting present experiences with future ones which would take place if we interacted with the world in certain ways. We have here two linked thesis: the thesis according to which experience consists of *acting* and *undergoing* the consequences of actions; and the idea according to which the sense of what is experienced comes from its connection with other objects which could be experienced as well. The agent's action and undergoing is what makes that connection possible. Without acting there would not be sufficient materials in experience to understand; and, at the same time, without the connections between what is experienced in the present and what could be experienced in the future, action would be blind, would lack of what Dewey calls "intelligence"³¹.

Action opens a web of meanings³²; it gives meaning to what is experienced only when we realize what sorts of consequences are associated to our actions:

Experience (...) is primarily what is undergone in connection with activities whose import lies in their objective consequences –their bearing upon future experiences (...) What is just "there", is of concern only in the potentialities which it may indicate. As ended, as wholly given, it is of no account. But as a sign of what may come, it becomes an indispensable factor in behavior dealing with changes, the outcome of which is not yet determined³³.

Here is the reason why the idea of something merely given is alien to Dewey's notion of experience³⁴. Any object, event, sensation or property that is experienced

²⁸ The Given is only a Myth when it is understood as a type of knowledge. When we speak about non-cognitive experience, there is no problem –according to Dewey– with the given (understood in some phenomenological lived sense).

²⁹ See John Dewey, "Experience and Objective Idealism", in John Dewey, *The Influence of Darwin on Philosophy and Other Essays* (New York: Prometheus Books, 1965), p. 211. There he says: "The constructive or organizing activity of 'thought' does not inhere in thought as a transcendental function, a form or mode of some supra-empirical ego, mind, or consciousness, but in thought as itself vital activity".

³⁰ John Dewey, "The Need...", p. 70

³¹ John Dewey, "The Need...", p. 69.

³² See John Dewey, "The Reflex Arc Concept in Psychology", J. McDermott, (ed), *The Philosophy of John Dewey* (Chicago: The University of Chicago Press, 1973), p. 141 and 146.

³³ John Dewey, "The Need for a Recovery of Philosophy", p. 68-9.

³⁴ See also John Dewey, "The Experimental Theory of Knowledge", in John Dewey, *The Influence of Darwin on Philosophy and Other Essays* (New York: Prometheus Books, 1965), pp. 82-83 and 90.

has a sense (or meaning) –for the organism- only when it indicates or is a sign of another object, event, sensation or property that could be experienced in the future³⁵. The sensation, alone and isolated, which is simply there, without any connection to another thing, has no meaning at all. It is, at best, a stimulus. Perceptual knowledge involves constitutively a collection of references that connect what is experienced with what could be experienced if we acted in certain ways. In fact, the contents of experience could be specified –as a cognitive experience- by appealing to conditionals that connected, in their antecedents, the actions or operations to be made on an object and, in their consequents, the results of those operations³⁶. Every perceptual experience, when its content has a meaning to the agent, presupposes a web, more or less extensive, composed by that kind of conditionals which link possible actions on an object to possible consequences as their result³⁷. The content of experience outstrips what is merely given because it involves certain expectations about the behavior of the experienced objects, expectations about the different ways in which those objects could affect us and each other if we made certain operations. The connections between what is experienced and what could be experienced make inferences (from what we experience in the present) about what could happen in the future possible. This is

³⁵ The Deweyan thesis according to which the objects, properties and events, when they are experienced, can be signs of other objects, properties and events, is present in many places in Dewey's works. See "The Experimental Theory of Knowledge"; "The Need for a Recovery of Philosophy"; and *The Quest for Certainty*.

³⁶ This idea is explicit in Lewis, Clarence I., *Mind and the World Order* (New York: Dover Publications, 1929), chap. V.

³⁷ It could be objected here that the mentioned conditionals are not constitutive of the content of experience; rather that they reveal a causal interdependence between experience and action. However, Dewey's point –such as I interpret it- is that we would not know what we experience if we did not know some (at least) of such conditionals. For instance, who knows none of conditionals involved in the experience of an apple (such as, "if I bite the apple, I will feel such and such savor", etc.), she cannot know what object she is experiencing.

of crucial importance to cope with things in an intelligent way and to know the world as well³⁸.

Holism is a point stressed, though in a different way, by both Sellars and Dewey. Sellars says, for instance,

One couldn't have observational knowledge of *any* fact unless one knew many *other* things as well (...) Observational knowledge of any particular fact, e.g. that this is green, presupposes that one knows general facts of the form *X is a reliable symptom of Y*. And to admit this requires an abandonment of the traditional empiricist idea that observational knowledge "stands on its own feet"³⁹.

And Dewey claims

There is no apprehension without some (...) context; no acquaintance which is not either recognition or expectation (...) Acquaintance always implies a little friendliness; a trace of re-knowing, of anticipatory welcome or dread of the trait to follow⁴⁰.

One can bring both positions closer if one underlines the fact that all recognition or re-knowing, all anticipatory attitude, presupposes that one knows some regularities which connect what is experienced in the present with what will be experienced in the future if one behaved in certain ways. Notwithstanding, there are important differences between Dewey's and Sellars' positions as well. Perhaps, one of the most striking is due to the different role that language plays in each theory. As it was remarked in section 2, Sellars considers that all awareness is a linguistic affair. Accordingly, he claims that experiences involve sensations and propositional claims⁴¹. This motivates the following question: how do sensations and propositions relate to each other in order to make the experiences of physical objects possible?⁴²

³⁸ See John Dewey, "The Need for a Recovery of Philosophy", p. 69-70.

³⁹ Wilfrid Sellars, *Empiricism and the Philosophy of Mind*, pp. 75-76.

⁴⁰ John Dewey, "The Experimental Theory of Knowledge", p. 79-80.

⁴¹ See Wilfrid Sellars, *Empiricism and the Philosophy of Mind*, pp. 39 and ss.

⁴² See Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1979); and Robert

Interpreters disagree on this point. For example, Rorty and Brandom think that, for Sellars, sensations only cause observational reports. McDowell, in contrast, thinks that, for Sellars, experience presents the world to us⁴³. Notwithstanding, whatever the correct interpretation is, the question remains: how do inner episodes such as sensations, combined with propositional claims, produce experiences of physical objects?

In contrast, Dewey can be plausibly understood as a direct realist in theory of perception⁴⁴. It can be said that, according to him, experience opens the world to us; in the cognitive experience we are not immediately aware of sensations, but of the objects and events of the environment with which we interact. The content of experience does not necessarily require of language, but of our capacity to take certain objects, properties and events as signs of other objects, properties and events. This means that the objects themselves can acquire the status of a sign for the experiencing organism: an odor can be recognized as a sign of the presence of certain meal; the heat felt in the hand can be recognized as the fire that we will see, etc. In that way, language is not necessary to have perceptual experiences. This, however, does not mean that experience does not have, for Dewey, propositional content. Certainly, if the term "proposition" is understood as the content or meaning of a declarative sentence, then it can be said that, for Dewey, the content of experience does not involve –as in the case of Sellars– a propositional content. However, if the term "proposition" is understood as what is able to grasp a state of affair –whether it is expressed by a sentence or by another sort of sign– it could say that, for Dewey, there is no impediment to conceive of the

experience as having propositional content. In that sense, the heat felt in one hand can be a sign of certain state of affair: the presence of fire in the surroundings.

Another example of Dewey's holism and anti-foundationalism can be found in his paper "Propositions, Warranted Assertibility, and Truth". There, in response to certain objections presented by Russell to his conception of inquiry⁴⁵, Dewey objects to the thesis according to which "there are propositions known in virtue of their own immediate direct presence"⁴⁶, such as "Redness-here". In opposition to Russell's atomist and foundationalist aims, Dewey objects: (i) that "here" has an autonomous (or self-contained) meaning, completely independent from the meaning of "there". The distinction between "here" and "there" involves determinations that exceed anything given directly; (ii) If, as Russell claims, the foundational character of the so called "basic propositions" rests in the idea that objects such as "Redness-here" are direct sensible presences, then –Dewey argues– it seems that the certainty about the truth of a proposition such as "Redness-here" depends on knowing that the alleged sensible presences which justify it are, in fact, sensible presences. But this – the argument goes on– presupposes an elaborate psychological theory which must explain a) what the processes that connect causally the basic proposition to the direct sensory presences are; and b) what the connection between a *sensum* and the sensory apparatus in virtue of which the given quality is determined as a *sensum* is. Since a) and b) presuppose inferential processes, the thesis according to which there is something such as "knowledge by acquaintance" of certain sensible qualities, and basic propositions which are the base of the edifice of empirical knowledge, becomes untenable.

Brandom, *Tales of the Mighty Dead* (Cambridge: Harvard University Press, 2002).

⁴³ See John McDowell, *Having the World in View* (Cambridge: Harvard University Press, 2009), and *Perception as a Capacity for Knowledge* (Milwaukee: Marquette University Press, 2011).

⁴⁴ See J. Smith, *America's Philosophical Vision* (Chicago: University of Chicago Press, 1992), p. 31.

⁴⁵ Bertrand Russell, *An Inquiry into Meaning and Truth* (New York: Routledge, 1992).

⁴⁶ John Dewey, "Propositions, Warranted Assertibility, and Truth", *Later Works of John Dewey*, Jo Ann Boydston (ed), (Carbondale y Edwardsville: Southern Illinois University Press, 1991), vol. 14, p. 170.

5. Conclusion

To sum up, from Dewey's point of view, what is merely given in experience has no value or meaning at all. If something experienced is not taken as a sign of another thing, if it does not indicate another thing that could be experienced, it cannot be part of the cognitive life of the organism. To be conscious –in the experience- of something is to realize that it will behave in such and such way if the opportunity takes place, that the present trait of a thing is associated to others that will be revealed in the future if certain operations are executed. Since experience always refers to other experiences, since it is full of expectations and inferences, there is nothing in itself that guarantees the ultimate certainty of empirical knowledge.

Nonetheless, Dewey's theory differs from Sellars' in, at least, the following points:

1) The meaning of what is experienced does not necessarily require language. The experiential consciousness of the world presupposes, rather, the understanding of non-linguistic signs that make the identification of something as such possible.

2) In the context of the inquiry, experience has a clear epistemic connotation. Although not all experience is cognitive, it can be cognitive in reflective contexts, when inquiry takes place. In contrast, in Sellars' works it is not clear at all whether experience is *per se* cognitive or not. As it was remarked, interpreters of Sellars disagree about this point. But even if it were conceded that, for Sellars, experience is in itself cognitive (and not the mere cause of a belief, as some think), this difference would persist: for Dewey, we directly experience the objects of our environment; Sellars, in contrast, should explain how sensations, combined with propositional claims, make experience of external objects possible.

If the main thesis of this article is correct –that Dewey's criticism to classic empiricism can be understood as a criticism of the Myth of the Given- then we have, not only a powerful and current line of criticism of foundationalism in the work of one of the most important pragmatists, but also a theory of experience which could illuminate some recent debates in epistemology and philosophy of mind.

NOISES YET TO KNOW -

POST-IRONICAL CONSEQUENCES OF RORTIAN

METAPHORIZING

Nicolás Lavagnino

UBA/CONICET

nicolaslavagnino@gmail.com

In 1913 Ezra Pound wrote a beautiful and brief poem entitled “*In a Station of the Metro*”. Those brief and epigrammatic lines, almost in the form of a *haiku*, went:

*“The apparition of these faces in the crowd /
petals on a wet, black bough”.*

I will take this poem as an excuse to discuss the role of metaphor in a given space of linguistic practices. In particular, I am interested in following the relations established by Richard Rorty between metaphor and irony, in the context of the characterization of his version of pragmatism. Those relations should be of use to enlighten aspects of the fourteen words that conforms Pound’s small worldview and, at the same time, show some of the slides in meaning that must take place for the Rortian metaphorical-ironical compound to be of service to the general vision of the verbal practice in which such compound is inserted. Those slides, at the same time, will allow me to show some tensions regarding the Davidsonian approach to metaphor, to which Rorty is expressly affiliated, and will lead me towards a strictly tropological interpretation of the Rortian experiment. In that interpretation, two things will stand out. On the one hand, that Rorty’s pragmatism has plenty to offer to tropology as a study of ordinary linguistic practices but, on the other hand, that tropology in the sense of a study of the interrelations between tropes can help overcome some of the limitations which, I assert, surround and threaten the Rortian interpretation of metaphor.

I - Pragmatism, irony, metaphor

In “*Solidarity or objectivity?*”¹ Richard Rorty mentions two of the fundamental contributions of pragmatism to the work of mining, obstructing and eventually overcoming the realistic and representational conception in philosophy which is yet nodal in our intellectual tradition. These contributions are part of a broad comparison between realistic-representational-“metaphysical” styles and those which are pragmatic-anti-representational, a comparison articulated with the purpose of revealing the enchantment of certain images which have held us captive and from which we had better now free ourselves.² In “*Solidarity...*” the contrast is established between the realist who yearns for a correspondence with reality and the pragmatist, who “do not require a metaphysic or an epistemology”.³ “For pragmatists, the desire for objectivity is not the desire to escape the limitations of one’s community, but simply the desire for as much intersubjective agreement as possible”.⁴ That desire then proceeds within the framework of a complex dialectic signed on the one hand by *ethnocentrism* (as an awareness of the limitations of any attempt to adopt a universal self-styled point of view) and on the other hand by *ironism* (as a questioning of the very idea of a “common sense” and as an inclination to novelty and experimentation, tolerance and self-doubt).⁵ Ethnocentrism points to the fact that the pragmatist wishes to take their own community seriously (in that sense it is not compatible with relativism or ironist aestheticism which could be awarded to a decadent feeling towards one’s own culture, such as Pound’s). Ironism points to the awareness of the contingency of the spaces of

¹ In Richard Rorty, *Objectivity, relativism and truth* (Cambridge: Cambridge University Press, 1991), pp.21-33; from now on referred to as ORT. Other titles by the same author will be referred to as follows: CIS for *Contingency, irony and solidarity* (Cambridge: Cambridge University Press, 1989); EOH for *Essays on Heidegger and others* (Cambridge: Cambridge University Press, 1991).

² *Ibid.*, p.22.

³ *Ibidem.*

⁴ *Ibid.* p.23.

⁵ In CIS, pp.73-74.

experience and the horizons of interaction. Being it so, pragmatism “it takes away two sorts of metaphysical comfort (...) One is the thought that membership in our biological species carries with certain «rights»”.⁶ This idea is so fundamental that “we are troubled by any suggestion that «human nature» is not a useful moral concept”.⁷

The second relief to be eliminated is the idea that “our community cannot wholly die” within a common drift which “leads all members of the species to converge to the same point (...and...) assures us that even if the Persians had won, the arts and sciences of the Greeks would sooner or later have appeared elsewhere”.⁸ The solace this image provides is that it assures us “not simply that there is a place prepared for our race in our advance, but also that we know quite a bit about what that place looks like”.⁹

Pragmatism is then established as a vision oriented towards dissolving the idea that a “theory of the nature of man”, which frees us from contingency and fate, might still come about. At this point Rortian argument gives the floor to Nietzsche and his famous *dictum* about truth as “a mobile army of metaphors, metonyms and antromorphisms –in short a sum of human relations, which have been enhanced, transposed and embellished poetically and rhetorically and which after long seem firm, canonical, and obligatory to a people”.¹⁰

Early on we then observe the connection that Rorty builds between pragmatism, ironism and metaphor, in his attack to the remainders of the conception of *philosophy as-metaphysics-and-epistemology* and to the dubious practical and political consequences of such conception. Ironism turns out to be a meta-critical posture that allows us to conceive the outlines of reality

as a reality, a peculiar self-distancing which reveals the contingency of the outgrowths and objectifications that configure our social and natural world. Metaphor is a type of practice exercised in the limit of those objectifications and which penetrates the wild continent of experimentation and overcoming of the fear to the lack of “convergence” of the practices, whichever they are. Metaphor is, then, “a call to change one’s language and one’s life, rather than a proposal about how to systematize either”.¹¹ Pragmatism includes ironism and metaphoricity in the projection of its peculiar theoretical horizon about social world, language, political practices and the very place of philosophy.

In this sense Pound’s verses come magnificently handy. Preliminarily we can appreciate a type of verbal practice oriented towards reflectively thematizing the act of *merely* riding the subway. The ordinary consciousness of the contemporary urban experience is questioned by means of a distancing mechanism, which allows for a double movement. On the one hand, it enables a view of reality as a putatively articulated outline, as *one* reality, yet emergent and disputed. On the other hand, it allows to relate the values assigned to certain elements of that reality with new (and unexpected) valences, with the purpose of generating -by the mere act of relating them- an effect of meaning which can recursively bring forward an alteration in that articulated reality. The reality of the metro stations, Pound tells us, is not given beforehand; it is not a natural cloak that covers our existence, but it refers to the dark side of a Modernity which eliminates other forms of life’s pregnancy. Once we have seen our counterparts as “petals on a wet, black bough”, it should be difficult for us to ride the metro as if it were nothing. Once we have appreciated our society as a “black dying nature” such a distance has been created that we should alert us about any common sense that swirls around it.

⁶ In ORT, p.31.

⁷ *Ibidem*.

⁸ *Ibidem*.

⁹ *Ibidem*.

¹⁰ *Ibid*. p.32.

¹¹ EOH, p.13.

This connection between ironical distancing and metaphorical practice is relevant even when there is not an ounce of pragmatism in Pound. It shows us in any case some of the conditions that must occur for such practice to come about. At the same time Pound himself exemplifies some of the dangers that cross the consequences of that metaphorizing and show the difficulty of sticking to the metaphor-irony scheme in the Rortian sense: Pound's "unfamiliar noises" appear as a form of distancing regarding a given reality, but their epigrammatic form is nothing but the announcement of the ramifications necessary to structure a commitment which is not very pragmatic towards *another* reality. In which case the practice of metaphor is no more than the advance of an ontological commitment regarding which other practices will come to represent degrees of progress and development on the bases established preliminarily by metaphor. The black nature and the dark side of Modernity do not represent, in these lines by Pound, more than the prologue to an attitude that asserts the rising costs of mass society and the inauthentic forms of sociability that it offers. Although elided in the argument, we easily find what it is that Pound could commit to: the control of mass society and the ideal which aspires to the overcoming of the modern perversion of nature. About this, Pound would not be ironic nor would he continue to express a desire for experimentation in the signification process. At this point, the metaphorical-ironical compound also allows us to show in what sense Pound was not fully a pragmatist in the Rortian sense, which is of fundamental interest for what follows. The ironist consciousness of the boundaries of Modernity's "common sense and metaphysics" does not turn one into a pragmatist. Something else is required for such thing to occur.

II – Historicism, romanticism and the repudiation of teleology

In *Contingency, Irony and Solidarity*, and like in most of his work, Rorty exposes us to a lengthy path built on a

conflict signed by a fatal contradiction. In this case the polemic mode is exercised in regards to the intention of combining the public and the private, the fact that there is an attempt to show that "the springs of private fulfillment and of human solidarity are the same".¹² The desire for private perfection as a power of self-transfiguration into a form of independent life and the wish for a fairer, freer human community are shown as *opposites* when a perspective attempts to link one with the other, postulating an unlikely convergence between self-creation and justice, private perfection and human solidarity, between *Trotsky and the wild orchids*. But neither philosophy, nor any other theoretical discipline will ever allow for that, in the form of the articulation of an "all-encompassing vocabulary" or "ultimate lexicon"¹³ that incorporates both yearnings. Ironism is related to the ability to recognize such impossibility. Ironists are "sufficiently historicist and nominalist to have abandoned the idea that those central beliefs and desires refer back to something beyond the reach of time and chance".¹⁴ *Historicism* presumes that at seizing that at different times various lexicons are enforced "it becomes hard to think that that vocabulary is somehow already out there in the world"¹⁵, and we rather proceed to see lexicons as such, not as paths that lead to the final delimitation of reality's outlines.

This "non-teleological conception of intellectual history" is the one Rorty expands in "*The contingency of language*",¹⁶ on mainly Davidsonian basis. The development and imposition of new lexicons does not refer to two discontinuous signification universes (the literal *versus* the metaphorical, the convergent and "rational" *versus* the divergent and irrational), but to two opposite points in the continuous spectrum of

¹² CIS, p.xiii.

¹³ *Ibid.*, p.73.

¹⁴ *Ibid.*, p.xv.

¹⁵ *Ibid.*, p. 6.

¹⁶ *Ibid.*, pp.3-22.

linguistic practices, those from which the habitual and unusual use of marks and sounds are drawn.¹⁷

This non-teleological conception is no other but the “romantic history of culture”,¹⁸ that in which on the ground of a drama of Darwinian discontinuities and ruptures, the achievement of imagination, divergence and experiment is consummated. Pragmatism then rides between a futurism of experimentation, trial and fallibilist consciousness of the possibility of error on the one hand, and the historicist consciousness, full of discontinuities in the contingent development of a culture, on the other hand. It is because we surreptitiously tend to “generate meaning” by eliminating contingency and fallibilism by dint of “necessary guidelines” and “profound ways of catchment” that pragmatism as a perspective is so necessary to frame even the most radical of the practices of ironical distancing and metaphoric self-absorption. Teleology as a metaphysical aftertaste is what pragmatism allows to approach, and it is for this reason that the metaphorical phenomenon is where the contrast between the teleological vision and the pragmatist vision of culture is most expressed. The former is reductionist and considers metaphor to be potentially derivative and paraphrasable, as a device oriented towards an end specifiable *a priori*. The latter is expansionistic and considers metaphor as a fundamental vehicle to arbitrate between lexicons for reasons which are purely practical, situated, interpretable *a posteriori*. Facing the idea that a lexicon is a “more adequate” representation of the world, stands the idea that a lexicon is a constellation of devices that respond to various and changing purposes.¹⁹

An *ultimate lexicon* is defined by Rorty as the set of words we use to frame our projects, doubts, hopes and desires, and in front of which no other set rises unless it

is in a recursive and circular manner. “Those words are as far as he can go with language; beyond them there is only helpless passivity or a resort to force”.²⁰ Ironism is defined facing such lexicons: ironists have radical, permanent doubts about those lexicons; they notice that the arguments they can provide do not consolidate or eliminate those doubts; and they replace those lexicons not for reasons related to their adequacy or teleology, but because they aspire to “playing the new off against the old”.²¹ The opposite of ironism is “common sense”, the “metaphysical” strategy that does not aim to re-describe reality but which “rather analyzes the old descriptions with the help of other old descriptions”. Once more we find an ambiguous path in Pound, if we are to follow this cultural map proposed by Rorty: surely poetry clashes with common sense, probably also presenting it as a confrontation of the old and the new, but rarely remains in the ironic horizon. Rather, it uses metaphor as a springboard to try to outline and influence the common sense of the future. The poetic imagination of the present is meant to be the vector which *reflects* the outlines of the upcoming reality, of a world still to be made. In this sense, it does not necessarily reach the point in which the very idea of “reflection” is abandoned.

In this concatenation we perceive that in the heart of the ironist practice there is the metaphorical strategy, but not any one. It is not, as Aristotle would say, about knowing the unusual and strange thanks to the natural and known, but rather about doing the opposite.²² This entails exceeding the cognitivist horizon of the theoretical tradition surrounding metaphor, and inserting it under the problem of *romanticism*. Romanticism appears as a criticism of the inauthenticity

¹⁷ *Ibid.*, p.17.

¹⁸ *Ibid.*, p.19.

¹⁹ *Ibid.*, p.21.

²⁰ *Ibid.*, p.73.

²¹ *Ibidem*.

²² The cognitivist core of Aristotle’s conception is expressed in the famous *dictum*: “Now we do not know the meaning of strange words, and proper terms we know already. It is metaphor, therefore, that above all produces this effect” (*Rhetoric*; 1410b).

of relationships and as a growing conscience of subjective alienation. A very limited (but useful) definition of romanticism considers it the postulation of a qualitative individualism as part of a regenerated sociability (which matches the map of “*Trotsky and wild orchids*” Rorty permanently makes us work with). How much regeneration and how much subjective “quality” are required and how far away we stand from all this is part of what leads in the answer to outline the vast spectrum of possible romanticisms, from that conservative one that intends to return to the Middle Ages, to the romantic aftertastes in Marxist criticism of the subjective and objective destruction entailed by capitalism. In the meantime, a vast stretch of romanticism is presented as a space of “self-creation” and self-affirmation, as *self-identification by exteriorization*, that is, as catchment of the self by means of an object where what is regarded as most personal is placed. This process of self-development and self-awareness is nothing but a *bildung*, a developmental account in which we get to know ourselves in the process of *losing-and-finding ourselves*.²³ The Rortian narration of the “romantic history of culture” is no other thing than having got lost in the marasmus of the “mirror of nature” and of the longing for a metaphysics and an epistemology which respond to the permanent form of things, and having found ourselves in the consciousness of the puerility of such longings. Once more we can ask ourselves how much teleology is there confined in the articulation of a *bildung* (and pitifully, the answer should be plenty), but even so we can now reconsider the type of metaphorical practice presumed in romanticism (and in *this* romanticism in particular): metaphor is a process of self-identification opposed to the consciousness of knowing oneself to be estranged,

²³ On the problem of romanticism and its definition there is an endemic disagreement. For my purposes, it is enough to follow Michael Löwy and Robert Sayre in their classic *Romanticism Against the Tide of Modernity* (Durham: Duke University Press, 2001). There I find a useful classification and delimitation of the problem. On *bildung* I naturally resort to Hans Georg Gadamer, *Truth and Method* (New York: Continuum, 1975).

lost. It is a gesture of *agency* opposed to the mere passivity of things and which therefore constitutes an answer to the ironical conscience of knowing oneself to be living a reality that is not such, and to the ironical gesture which dissolves that conscience into a pluralistic tolerance of the massive spectrum of realities that might be the case.

The existential complexity involved in this process of self-identification by means of a violent (and unpredictable) history of exteriorizations and wanderings helps to understand why metaphor cannot be for Rorty what cognitivists such as Max Black say it is. Metaphor is not a “method of knowledge by scaffolding” which helps us understand the strange through what we know. In fact what is implied and questioned in the process is ourselves, any sense of what is ours, any idea of a reality we can respond to and on which we can intervene somehow. The importance of this *romantic* element is crucial: it helps to understand why the history of culture is discontinuous, why it does not *converge* in an ideal or ultimate goal, why it entails the disavowal (professed, at least) of teleology and why along the way there is a constant attempt to recreate a sense of unity - which cannot be such- between Trotsky and the wild orchids, between the sense of belonging to an accomplished and consummated sociability and the feeling of plenitude in the form of an individuality qualitatively different from the existing one. These romantic credentials can help understand some of the virtues of Rortian pragmatism, but they also make some of its disadvantages predictable. But in order to clarify this, we must further examine the conception of language required to support this *romantic-a-teleological horizon* of culture.

III – Language, traffic and general economy of the exchange of marks and sounds

The non-teleological horizon of culture unfolds within a vision of language as a sphere of traffics and exchanges

valid in context, which delimit a variety of instantiation spectra for those exchanges in which both the most trivial continuity and the most radical rupture are possible. Those spectra allow us to deal with the grasp of the impossibility of matching private perfection and collective emancipation, and make room for the idea that culture is the renovated and frustrated struggle of trying to bind both dimensions. Now, for this permanent glides from culture in a broad sense to metaphorical practices in a strict sense to be legitimate, it must be noted that they happen within a unified orientation of verbal and non-verbal behavior. The fact that this spectral dynamic of non-teleologically oriented continuities and ruptures takes place within a single sphere is emphasized by the utterly Davidsonian inscription of this vision of language and, more specifically, of what the metaphoric transit entails.

The starting point rests on the fact that Davidson's conception of language

ask us to think of human beings trading marks and noises to accomplish purposes. We are to see this linguistic behavior as continuous with nonlinguistic behavior and to see both sorts of behavior as making sense just insofar as we can describe them as attempts to fulfill given desires in the light of given beliefs.²⁴

The aim of presenting this vision consists of avoiding the *reification* of language, the belief that it is something which has extremes, which forms a limited whole or which can become a differentiated object of study. Language is not an object, but a space we inhabit or an organ "with which we come into direct contact with our environment",²⁵ and it has become a form of "propositional perception".²⁶ "There is no such thing as a

²⁴ EOH, p.58.

²⁵ Donald Davidson, *Truth, language and history* (Oxford: Clarendon Press, 2007), p.131; from now on referred to as TLH. Other works by the same author will be referred to as follows: ITI for *Essays into Truth and Interpretation* (Oxford: Clarendon Press, 2001); SIO for *Subjective, Intersubjective, Objective* (Oxford: Clarendon Press, 2001).

²⁶ *Ibid.*, p.135.

language apart from the sounds and marks people make and the habits and expectations that go with them".²⁷ Language is, then, a space of social behavior stabilized around certain practices, practices which conform networks lacking cores or determination structures, and which can always be redescribed, recontextualized and relocated inside another network of social practices.

That language does not mediate or "represent" as an epistemic intermediation is evident from this Davidsonian filiation of Rortian criticism to the idea of a "language-object". But some alterations begin to take place with the attempt to inscribe Davidsonian metaphor within a historicist, romantic, non-teleological vision of the ironist cultural *praxis* in a broad sense.

Rorty begins his discussion on metaphor by presenting the virtues and limitations of a cognitivist *a la* Hesse scheme of metaphor. The problem with cognitivism is that it is not sufficiently radical²⁸ and, as we saw, it does not help to understand *but only a part* of what we do through metaphor (or *what metaphor does for us*). The use of Davidson is explained here since it is of service to eliminate the reference to secondary meaning, metaphorical meaning, or meaning derived by opposition to the idea of primary meanings that the metaphoric "torsion" would come to parasitize. The explanatory uselessness of such "metaphorical meanings" manifests with respect to the non-cognitive components of metaphor and to its non-sentence aspects -in the form of "non sentential phrases (...which...) change ourselves and our patterns of action, without ever coming to express belief or desires"²⁹-. And all together they conform a perspective in which metaphor lies beyond the reach of semantics and of the "reticulated" conceptions of language. As part of the "study of the use of language", semantics covers the regularities in which "the explanatory force of standard

²⁷ *Ibid.*, p.131.

²⁸ ORT, p.163.

²⁹ *Ibid.*, p.164.

sense” is expressed. Where the regularities give way to the massive disturbances, neither semantics nor the very notion of meaning makes a relevant contribution.³⁰ What pleases Rorty is the Davidsonian restraint to “discovering the sort of behavioral regularities in which a radical interpreter would be interested”,³¹ without venturing hypotheses about the underlying forces at work. At this point is where Rorty has suspicions about the models *a la* Black, which understand metaphor as a process of interaction between “systems of associated commonplaces”, process whose workings can be described. By placing the irregular and unpredictable uses of language -the violent self-exteriorizations as romantic identifications of the previous section- under a regulatory framework of rules or conventions, the most relevant aspect of the metaphorical phenomenon is lost, which is the act of blowing up those frameworks.

The Rortian-Davidsonian dogma reads: “nothing in existence prior to the metaphor’s occurrence is sufficient to understand the metaphorical use. That is just why we call it «metaphorical»”.³² Understanding a metaphor cannot mean “placing it under a preceding scheme”, because the very idea of metaphor works on the impossibility of a reduction to antecedence. This incomprehensibility does not prevent the generation of knowledge from the metaphor; it only makes it impossible to elaborate the implausible notion of “metaphorical cognitive content”. The metaphor does not generate knowledge *per se*, but it can do so, and it is part of the course of action not as an elusive object which carries a precious content, but as an event which has effects on the agents. Metaphor then constitutes a type of action which is non-predictable in virtue of a preceding theory, which can cause beliefs but hardly work sufficiently as reasons for them. When metaphors, in this conception, are imbricated in the network of beliefs in relations of justification, they are no longer, in

spite of Hesse, Lakoff, Black or Searle, live metaphors, but lifeless, and their *status* is not more relevant to the analysis of metaphoricity in general than any other statement is.³³ “The process of becoming stale, familiar, unparadoxical and platitudinous is the process by which such noises cross the line from «mere» causes of belief to reasons for belief”.³⁴ When the noise of metaphor becomes familiar, we are not strictly facing a metaphor any more. Metaphor pays for its success with its life. When we do not see it but as part of “the” reality, the metaphor has achieved its mission, but it is no longer a metaphor. This is extremely important, because it shows us the tension inherent to this concept of metaphor: from the mottled ensemble of discontinuous practices always breaks off a small body which recursively manages to affect the delimitation of a given sense of reality. Such a thing occurs permanently and it is part of what we witness daily in the great traffic of meanings of ordinary speech. The general economy of the exchange of marks and sounds exposes us to these metaphorizations as new proposals which can affect the rest of our modes of action. The life and death of metaphors shows us, again, the resurgence of teleology in a bounded version: practices are carried out *for* and *as an embodiment* of a certain inherence. It is inherent in metaphor to shake our ontology, dream the language, but this is a functional characterization which allows to understand metaphor as a form of the recurrent linguistic practice, and therefore although the “non-teleological horizon of culture” encourages us to describe retrospectively the past emergencies of unfamiliar noises, the generic understanding of the phenomenon encourages us to characterize its recurrence in projective terms, in particular as “noises yet to know”.

But curiously, this can only be done as long as we see such characterization less as an internal element of cultural *praxis* and more as the type of interpretative

³⁰ *Ibidem*.

³¹ *Ibid.*, p.165.

³² *Ibid.*, p.166.

³³ *Ibid.*, p.169n,

³⁴ *Ibid.*, p.172.

maneuver which we perform *ethnographically* to make others intelligible. This entails casting a new light on the Davidsonian filiation of Rortian metaphorizing in order to reconsider it: we interpret metaphorically within a radical hermeneutics, when as a result of an ongoing triangulation and by virtue of the *principle of charity* we assign metaphoricity to certain statements if we are to make others and their verbal practices understandable, under the common belonging to a “society of minds” that share one same world.

It is not for Pound to appraise himself as a “metaphorizer”. Rather it is us, attempting to comprehend his verbal practice, who *attribute “metaphor”* to Pound’s behaviour. With this, we analytically place in a more precise place the spectrum of the metaphorical as part of the range of the attributions of interpretation: a metaphor is not a “thing”, but a way to designate a certain verbal behaviour, a certain form of intervention in the linguistic practice, but this results in a criticism of the broad role that metaphor is supposed to have when seen in a “historicist, romantic”, that is to say, Rortian, way. In the end, because metaphor operates Davidsonianly, as Rorty says, then it cannot do everything that is preached about it Rortianly.

IV – Metaphor, interpretation and the tropological horizon

What did we want metaphor for? The place of the problem of metaphor in Davidson’s philosophy of language -philosophy to which Rorty expressly subscribes- is the following: since what Davidson is interested in is showing how it is possible to interpret starting from a unified theory of meaning and action, the resulting indetermination of Davidsonian interpretation, like its Quinean counterpart,³⁵ will then forward to an

open process, in which the “translation” will be fixed in relation to the common aspects shared between speaker and interpreter. “Indeterminacy of meaning or translation”, Davidson says, “does not represent a failure to capture significant distinctions; it marks the fact that certain apparent distinctions are not significant. If there is indeterminacy, it is because when all the evidence is in, alternative ways of stating the facts remain open”.³⁶ This settles a very different starting point for what we have been dealing with: the consideration of “metaphorical” linguistic events will be less in relation to its alleged intrinsic metaphoricity -by the fact that “something” “is” a metaphor in a more or less permanent manner- than as a result of an undetermined, recursive process through which an understanding of the generic behavior of the speakers is attempted. The fact that it is an “open” process should encourage us to distance ourselves from the consequences attributed to this or that linguistic practice, if the intention is to isolate them from the permanent reset of the interpretive process.

In this framework, “the meaning (interpretation) of a sentence is given by assigning the sentence a semantic location in the pattern of sentences that comprise the language”.³⁷ Now, what can be the meaning of sentences and expressions whose function consists precisely in breaking the sentence pattern and its system of semantic locations? As it has been stated, Davidson’s motto consists of avoiding the appeal to “secondary or properly metaphoric meanings”, in the belief of the explanatory nullity of such notions.

The purpose of such types of “metaphorical or secondary” signification seems to be operating as containers or vehicles to “conduct ideas, although unusual”. Their defect is that they fall on the argument which divides between schemes and contents, what Davidson called “third dogma of empiricism”, that

35 Willard van Orman Quine, *Word and Object* (Cambridge: Cambridge University Press, 1975), p.26 and pp. 73-79; from now on referred to as WO.

³⁶ ITI, p.154. cf. WO, p.78.

³⁷ ITI, p.225.

situation where a common ground is recognized, in front of which different alternative schemes are built; there is, then, the given in an uninterpreted manner, “the uncategorized contents of experience”,³⁸ the registry or observation, on the one hand, and the theory, schema and worldview, on the other hand. Metaphor and its paraphrase share, supposedly, the uncategorized contents, before which they stand as mutually replaceable “visions”.

But additionally, according to Davidson, there is a misunderstanding of the place of metaphor within the linguistic practice, in the framework of that unified theory of meaning and action. Metaphor “is something brought off by the imaginative employment of words and sentences and depends entirely on the ordinary meanings of those words and hence on the ordinary meanings of the sentences they comprise”.³⁹ In the position of the radical interpreter, and facing a metaphorical practice, the postulation of secondary meanings will not result in a better interpretation. “*What metaphors mean*” proceeds, then, to the *destruction* of several canonical ways of interpreting the metaphorical *praxis*: the implied simile or explicit similarity model is rejected,⁴⁰ and so is the idea of an “extended” meaning, a “properly metaphorical ambiguity” or the general conception that inside metaphor coexist or are involved two uses (hence the ambiguity) or two types of meanings (one literal, immediate, and another figurative). Also questioned is the notion that metaphor rests on novelty or on the ability to cause surprise in the use of terms.⁴¹

Hence, we are forced to arrive at the paradoxical conclusion that the meaning of metaphors depends on the literal, ordinary meanings of the words. “The ordinary meaning in the context of use is odd enough to

prompt us to disregard the question of literal truth”,⁴² which refers less to the meaning of the words than to the way in which they are used. The theories of “metaphoric meaning” or “metaphoric truth” cannot help to understand metaphor as long as they focus on alleged hidden meanings and not on the extraordinary uses of ordinary meanings: “what distinguishes metaphor is not meaning but use”.⁴³ The criticism of the notion of metaphoric paraphrase that Black can subscribe to is lost when metaphor is considered a cognitive vehicle (of metaphorical meanings, but meanings nonetheless). “If a metaphor has a special cognitive content, why should it be so difficult or impossible to discover it?” Here we reach Davidson’s key point: “the usual view wants to hold that a metaphor does something no plain prose can possibly do and, on the other hand, it wants to explain what a metaphor does by appealing to a cognitive content”, precisely what the common prose is meant to do.⁴⁴ If metaphor is cognitive, it cannot be as mysterious as it is claimed to be. Recreating the feeling of a metaphorical *extra* demands going further. For that to open, “we must give up the idea that a metaphor carries a message, that it has a content or meaning (except, of course, its literal meaning)”.⁴⁵

The understanding of the metaphorical phenomenon begins, rather, when we appreciate that a way of using words leads to certain effects.⁴⁶ A metaphor does its job by means of other intermediaries, and it makes it clear that it is not enough to cast on it a certain “interpreted content”, but rather grasp that “there is no limit to what a metaphor calls to our attention, and much of what we are caused to notice is not propositional in character. When we try to say what a metaphor «means», we soon realize there is no end to what we want to mention”.⁴⁷

³⁸ SIO, p.40.

³⁹ ITI, p.247.

⁴⁰ *Ibid.*, p.249, p.252.

⁴¹ *Ibid.*, p.251.

⁴² *Ibid.*, p.258.

⁴³ *Ibid.*, p.259.

⁴⁴ *Ibid.*, p.260.

⁴⁵ *Ibidem.*

⁴⁶ *Ibid.*, p.261.

⁴⁷ *Ibid.*, p.262.

We then see metaphor as an event, and we insert it interpretatively in a map of events, with the precaution to know that there are no maps of events as fixed locations, but rather as global hypotheses that face a recurring process of triangulations, spontaneous hypotheses, partial modifications and various reconsiderations. What Pound's verses mean will depend of the diverse geographies where one intends to include the worlds delimited "in a station of the metro". Pound's infinite contexts -the defying experience of mass society, decadence, the elite's fear of the crowds, the ghost of Marxism, the full development of industrial capitalism, symbolism, the impact of romanticism, the crisis of late 19th century realisms, the myth of oracular poetry and many other elements- appear as resources at the time of an interpretation which tries to characterize a verbal practice in the shape of the writing of a poem about the metro in 1913.

Here the various Davidsonian filiations are linked: his interest in articulating a unified theory of meaning and action and his repudiation of the idea of language as a discrete object within a human behavior split between the verbal and the non-verbal. "When we look at the natural world we share with others, we do not lose contact with ourselves, but rather acknowledge membership in a society of minds".⁴⁸ The metaphorical practice is a way of acting inside that society of minds, a particular way which brings about certain problems of interpretation, which the model of *cognitive contents encrypted in the metaphor* does not contribute to understand at all.

But what helps us gain distance from the cognitivism of a Black or of Mary Hesse, also works to distance ourselves from the crypto-teleological, romantic and historicist horizon a Rorty interested in erecting metaphor as the model for the cultural practice oriented towards rupture, self-creation and self-exteriorization. Once Davidson

allows us to conceptually locate the *status* of the metaphorical device, it is also plausible that such thing enables a more integrate view of the tropological phenomenon in general, of which both metaphor and irony (two old companions of the Rortian project) are a part.

Tropology consists of the analysis of tropes (figures of speech or "turns") such as metaphor, irony, synecdoche and metonymy. In fact tropology has operated in general as a discipline endemically faced against itself regarding the reductive impulses which intend to configure it, or rather inside a polarity around metaphor and metonymy (Roman Jakobson is a paradigmatic example of this), or following a classic quaternary mold (in a long lineage which goes back to Giambattista Vico and continues in the XX century in authors such as Erich Auerbach, Northrop Frye and Hayden White).⁴⁹

The dangers for the "tropologist" -as an analyst of what is elided and trafficked in the ordinary linguistic use- begin when he thinks that his vocabulary is more than that, when he estimate that it is an ultimate context of signification, a *grapholect* or the type of ultimate lexicon from which he cannot allow himself to take distance, to contextualize or narrow it in its use, power and extensions. And he carries on when he exercise a sort of analysis which consists of merely pointing out where there is metaphor and where there is irony, as if qualifying and assigning attributes to objects and linguistic practices were a lasting achievement. Taken as great cultural units ("ascent and downfall of metaphor") or as mega-procedures on the basis of an entire

49 Two classical examples of the use of tropology can be found in Hayden White, *Metahistory* (Baltimore: Johns Hopkins University Press, 1973) and in Northrop Frye, *Anatomy of criticism* (Princeton: Princeton University Press, 1957), although in the latter the implications of this tropological adoption are more explicit in *The Great Code* (New York: Harcourt Brace Jovanovich Inc., 1982) and in *Words with Power* (New York: Harcourt Brace Jovanovich Inc., 1990).

⁴⁸ SIO, p.219.

tradition, the tropological operators begin to lose some of their richness. To a certain extent such thing is inevitable, but when semantic domains subject to operational intersection because of metaphor (for example) are as vast as “capitalism” or “industrialization” we are at risk of thinking that we have found the *ultimate context* which allows us to describe and place each “verbal artifact” in a “map tropological locations”. Without a doubt we can place Pound in the anti-industrial and anti-capitalist hindrances of proto-fascist conservatism, so that “black nature” and “progress” appear as two macro semantic fields that refer without further ado to *the dark side of the Revolution Era*; such has been the interpretation of “In a Station of the Metro” I played with in this text. But as White himself has noted, “tropological location” is contextual and barely the beginning -not the end- of the analytical labor, which must then proceed to carefully clear and survey the set of operations carried out through the tropes, that are far from referring to a unitary context, a univocal direction, a clear and outlined commitment with this or that point of the range in question.

The understanding of tropes unilaterally as differentiated instances (metaphor versus metonymy or irony against metaphysics) usually comes hand by hand with the inability to perceive their interrelated aspect. In fact, the further we appreciate the interrelated aspect of tropes as a vocabulary of analysis of the verbal practice, the more we realize that it is impossible to “stop” the course, or proceed into a “purely ironist” or “metaphorical” type of reading. In this sense tropological vocabulary proves itself especially refined at the time of dealing with these compromises with divergent realities, such as the ones that might emerge in the attempt to question the progressive aspect of subways and the very notion of *progress*.

As a vocabulary to follow the a-teleological exchange of marks and sounds, topology unfolds as a tool which is

entirely compatible with a pragmatist vision of language. However, it collides with the Rortian “Romantic” elements which, to make matters worse, resuscitate teleology while compromising metaphor with a limited type of self-identification, emancipation and existential affirmation task. Although it is true that metaphor *can* do that, it is not so that it *must* do it within Rortian bounded ironism. Like Pound’s case makes patent, it rather occurs that the metaphorical affirmation expresses a sort of rejection of the ironic, passive, distance state of relative grasp of the given sense of reality, even when the rejection requires the precedence of that state that is rejected.

That said, *Rorty’s paradox* lies in the following idea: while it is true that a crystallized metaphor which has been incorporated into common sense is no longer a metaphor, it is still true that a tolerant, pluralistic and liberal worldview that ironically encourages metaphorization permanently renders us to state of identifications which end with ironism. *When we metaphorize we are no longer ironists*. The complexity of the tropological transit frames a process marked by the permanent reintroduction of disputed mobiles and trafficked valences, which do not have a necessary conceptual link with the ironist’s horizon. The danger that the new metaphorization might forward us into a new “metaphysical” stage is not solved by encouraging a generic ironism impossible to sustain, but by monitoring the interrelations between the tropes in question. The economy and flexibility of the metaphoric statements - for example in the form of a criticism of modernity sustained in just fourteen words- is often followed by “metaphysical” stages which explicit what was merely suggested in the metaphor. When making something explicit, in general, the metaphorical economy and polysemy are lost, but the alleged idea that it constitutes a realistic way of characterizing the environment is enriched. For example, when Pound makes his anti-modernism explicit, becoming blatantly proto-fascist and committing to a glaringly conservative projection of

social reality. In this context, ironism is exercised anti-economically when applied to the metaphoric protocol, being much luckier when its dissolving action is performed on rivets, epicycles and *ad hoc* hypotheses metonymically and synecdochically conformed. Ironism, then, is not a generic virtue, a designator of a specific cultural defect or the north of a form of interaction. Rather, it is a disarticulating device for the teleologies where the metaphoric identifications send us when they are developed in weaves of epicycles.

The ungrateful task of the radical interpreter is to look at the great bazaar of verbal and non-verbal culture and rebuild the global intelligibility of those acts without

assuming comfortingly (metaphysically?) that that great bazaar is to converge in its metaphorical practices with what one values most. Or, in other words, far from committing substantially to certain elements brought up in the past by unfamiliar noises, asserting the formal relevance of the fact that the tropological and pragmatist linguistic horizon invariably predicts the promise of infinite noises yet to know, that we will somehow make our own. And this will be so whether language is projected in the direction of reverie and the realization of the best of the species, or verbal imagination enters us in a geography where it is ourselves who are dreamt by our own nightmares.

**THE IDEA OF EPISTEMIC COMMUNITY FROM THE
STANDPOINT OF RORTIAN CONVERSATIONALISM**

Federico Penelas
UBA/CONICET
fpenelas@hotmail.com

In *Knowledge in a Social World*¹ Alvin Goldman distinguishes between two complementary areas of epistemology: individualistic epistemology and social epistemology. The former focuses on the conditions under which an individual is capable of acquiring knowledge by himself, with no need of interacting with others. The latter examines the conditions of cognitive exchange between individuals, along with the epistemic undertakings carried on by social groups. Meanwhile, in *Knowledge by Agreement*², Martin Kusch claims that the first of these areas is a dead philosophical goal, since all knowledge must be understood in communitarian terms.

I want to emphasize that, even when these perspectives show a significant difference in focus, both are in need of an account of the concept of *epistemic community*. It is usually pointed out that the lack of conceptual accuracy regarding it is a characteristic deficit of perspectives that merge epistemology into sociology or politics. Goldman's acknowledgment of the need of a social epistemology, even when it is located within a general frame that keeps positioning perception (object of study of an individualistic epistemology) as the basis of the cognitive undertaking, accounts for the unavoidability in contemporary epistemology of the urge of answering the question of "what is an epistemic community?"

Now, certainly epistemologies of a clearly communitarian kind are particularly forced to provide an answer to that question. Catherin Elgin construes the

works of Ludwig Wittgenstein, Thomas Kuhn and Richard Rorty as three communitarian approaches to knowledge; three ways of tackling the epistemological questions which emerge from the assumption that knowledge is a social phenomenon, and that consequently what should be analyzed are the social relations constituting the object and practice of inquiry. In her words, "Wittgenstein takes the culture as a whole to constitute the community of inquirers; Kuhn takes each scientific community to fix its own context; Rorty's community is rather harder to identify".³

In this paper, hence, I will aim to provide Rorty's conversationalism with some precision, by coming up with a clear notion of *epistemic community* that could serve to his purposes.

I will point out that the approach to the question must take into consideration the distinction between cooperation and mere coordination,⁴ rejecting the idea that community only exists if the word enters as one of the cooperative terms.⁵ An argument will be provided claiming that in the very foundation of an answer transcending merely coordinative perspectives it must be defended the insolubility between the concepts of community and normativity.⁶

Once these conceptual links are stressed, I will look at the kind of consensus required to classify something as an epistemic community in greater depth. The key will lay in the coordination of the notion of *epistemic*

³ C. Elgin (1996), *Considered Judgement*, Princeton, Princeton U.P., p. 60.

⁴ See C. Tollefsen (2002), "Cooperative, Coordinative and Coercive Epistemology", in W. Alston (ed.) (2002), *Realism and Antirealism*, Ithaca/London, Cornell U.P.

⁵ See C. Tollefsen, *op. cit.*; J. McDowell (1994), *Mind and World*, Cambridge, Harvard U. P.; J. McDowell (2000), "Toward Rehabilitating Objectivity", in R. Brandom (2000), *Rorty and His Critics*, Massachusetts, Blackwell.

⁶ This last point is the key to the following texts: L. Wittgenstein (1958), *Philosophical Investigations*, Londres, Blackwell; S. Kripke (1982), *Wittgenstein on Rules and Private Language*, Oxford, Blackwell; M. Lance y J. Hawthorne (2004); *The Grammar of Meaning. Normativity and Semantic Discourse*, Cambridge, Cambridge U.P.; M. Kusch, *op. cit.*

¹ A. Goldman (1999), *Knowledge in a Social World*, Oxford, Oxford U.P.

² M. Kusch (2002), *Knowledge by Agreement*, Oxford, Oxford U.P.

community with the Rortian concept of *final vocabulary*, providing a basis for the idea of *shared final epistemic vocabulary* from two theoretical developments: (1) Brandom's grasp of the Hegelian idealist thesis claiming that the normative-conceptual dimension is shaped as the dimension of the constitution of subjectivity, which is no more than the social dimension of parallel constitution of the self and of the community; (2) Kusch's clarification of the doxastic architecture that holds justificatory practices in communitarian terms.

I

Susan Haack coined the expression "conversationalism" to refer to Rorty's pragmatism.⁷ For Haack, conversationalism results from combining a contextualist explanation of the justification criteria and a conventionalist ratification of such criteria. The theses are articulated as follows:

Contextualism: "A is justified in believing *p* if regarding *p* A follows the epistemic guidelines of the epistemic community to which A belongs."

Conventionalism: the justification criteria are conventional; it is pointless to ask which the correct justification criteria are, which are really indicative of the probability of the truth of a sentence.

Haack's depiction of Rorty's perspective deserves to be corrected and widened. First, the perspective is completed with a deflationist/expressivist conception of truth. Presenting thus the Rortian understanding of truth conveys two things: on one side, the expressive usefulness of a series of uses of the truth-predicate (which Rorty calls "endorsing", "cautionary" and "disquotational") is recognized; on the other side, though, it is rejected either that such predicate has

explanatory uses and that it is possible to provide an explanation, in terms of some property, of what the true sentences have in common.⁸ Second, it is important to clear up that the best way to shape Rorty's contextualism is through the conjunction of the idea, launched by Peirce and recently articulated by Robert Brandom and Michael Williams, that epistemic justification has a default/challenge structure.⁹ Such idea involves taking a theoretical standpoint that gives no space for the foundationalist need of appealing to effective justificatory procedures for justifying beliefs. According to this standpoint, the lack of challenge allows to keep the epistemic status of beliefs, since the double demand of the traditional philosopher (which leads to skepticism) ceases to make sense; the demand that beliefs should show from the beginning their cognitive credentials and that it is not necessary to offer any reason in favor of the epistemic challenge. Third and last, it is better to jettison the conventionalist thesis (more suited to a non-Rortian relativism) and present the strictly conversationalist way of approaching the task of ratify the epistemic criteria, that is, what has been dubbed ethnocentric perspective, according to which "the correct justification criteria are *our own*". An ethnocentrism advocate would launch from admitting a contextualist position and, therefore, from agreeing on the fact that there is no way of providing a correction canon outside the different communitarian frames, since there is no being outside of community, outside of a frame. But the ethnocentrism adds that, once this is assumed, it cannot be concluded that the different correction canons stand at the same level. Accepting this would be hypocritical and would deny one's belonging to a certain frame, pretending to locate oneself instead in an impossibly neutral field in order to assert that

⁸ See. R. Rorty (1991), "Pragmatism, Davidson and Truth", in R. Rorty (1991), *Objectivity, Relativism and Truth*, Cambridge, Cambridge University Press.

⁹ See concretely R. Brandom (1995), *Making It Explicit*, Cambridge/London, Harvard U.P., cap. 4; and M. Williams (2001), *Problems of Knowledge*, Oxford, Oxford U.P., chapters. 13, 14 y 16.

⁷ See S. Haack (1993), *Evidence and Inquiry Towards Reconstruction in Epistemology*, Oxford, Blackwell, chapter 9.

judgment of epistemic parity of different paradigms. I stand within a frame and I can acknowledge other frames. But my only resource is my own way of making assessments and, consequently, I cannot put myself outside any frame and from that Non-Place claim that there are merely different ways of assessment. Recognizing alterity, qua contextualist, is not incompatible with claiming that this other community holds to incorrect canons from my perspective, and to try to communicate somehow with it in order to transfer my points of view to it. Moreover, for a consistent, non-hypocritical contextualist, ethnocentrism is the only coherent standpoint.¹⁰

It is clear, then, how important it is to a conversationalist perspective to provide an account of what it is understood as “community”, if it means something more than the mere agreement in certain epistemic canons.

II

Recently, Christopher Tollefsen¹¹ has distinguished three kinds of relations among agents: coercion, coordination and cooperation. Coercion implies some degree of violence or the use of strength, in such a way that, ultimately, the agent on which the force is applied loses responsibility. Coercive action does not respect the freedom of the agent on which it is operated and, in turn, the subject of it must not share the wish of the coercive agent. It is even noted that in an action carried on conjunctly by two agents, one of them the subject of coercion and the other its agent, there is only one genuine agent.

¹⁰ I have developed this characterization of Rortian ethnocentrism in several papers. See F. Penelas (2005), “Universalismo, relativismo, etnocentrismo”, in E. Carrió y D. Maffía (eds.) (2005), *Búsquedas de sentido para una nueva política*, Buenos Aires, Paidós, pp. 151-174; and F. Penelas (2007), “Kalpokas ironista: falibilismo, neofundacionismo y pragmatismo”, in P. Brunsteins y A. Testa (eds.) (2007), **Conocimiento, normatividad y acción**, FFyH-UNC, Córdoba, pp. 597-604.

¹¹ C. Tollefsen, *op. cit.*

Coordination of an action by two agents, in turn, requires that:

(1) both agents differ in their aims

but that

(2) those aims are such that they can be more efficiently attained if each agent understands the way in which the other plans to act and both expect to mutually benefit from this mutual recognition of aims and means.

Cooperative action replaces clause (1) above by:

(1*) both agents aim at the same goal

Tollefsen points out that no any goal can be the aim of a cooperative aim. Clause (1*) demands for objective goals. According to Tollefsen, a genuine community can only be possible under cooperative conditions, that is, if there are shared objective goals.

On the basis of these distinctions, Tollefsen posits a critique to Rortian conversationalism (but also to Bonjour’s coherentism and to all kinds of naturalist externism) on the basis that such a model is associated to a coordinative and, hence, anticommunitarian perspective. His description of Rorty’s position is the following:

“For Rorty, truth is not to be construed in a realist fashion but is simply a term of commendations for beliefs approved by one’s linguistic community. For members of such community, the space of reasons is normative, a space of asking for and giving reasons for beliefs, and is guided by community norms. The world, by contrast, exerts only a causal agency over speakers.”¹²

The description is adequate, even when it doesn’t show from it that Rorty cannot make room in his conception of epistemic community to the idea of shared goals. In fact, a nice part of the discussion between Rorty and Kuhn is articulated in terms of replacing incommensurabilist

¹² C. Tollefsen, *op. cit.*, p. 153.

versions of the distinction between normal discourse/revolutionary discourse for versions in terms of discourse about means/ discourse about goals. It is true that the objective aspect of the goals, demanded without an argumentative basis by Tollefsen, demanded of an inter-subjective adjustment in Rorty's layout, but, as we shall see ahead, such an adjustment is within reach. However, Tollefsen adds:

"A linguistic community can be glossed in similar fashion around the notion of norms. A linguistic community just is a group of language users who share a set of norms for what counts as appropriate and inappropriate, justified and unjustified language use. And the extension of a community, for Rorty, just is the extension of intersubjective agreement as to which norms are in play. The question is, What force can be given to the notion of "agreement" here sufficient to ground genuine community? Can the norms of the linguistic community be shared, possess the same concept, be accepted for the same reasons from agent to agent within the community?"¹³

Tollefsen answers that norms could do all this "if the point of accepting the norms was that they enabled the members of a linguistic community to grasp and communicate aspects of non-human reality".¹⁴ Curiously, Tollefsen defends the need of thinking the rational responsibility shared by the members of a community as requiring, from the community itself, the location of its members in a cognitive relation towards the world from which a common content would emerge, and from this one, a shared –not merely convergent– acceptance of the norms in question, along with a certain flair of circularity. And it is defended by Tollefsen standing on a McDowellian model consisting in thinking the world itself as involved in cooperative relations with the members of the community. Evidently McDowell's and Tollefsen's way out, both launching from the assuming a normative dimension in knowledge along with a representationalist frame, should endorse the idea that the world itself is the provider of concepts and reasons, if it doesn't want to open an insuperable

epistemic gap between mind and world. But if the price to pay is the adoption of what Kusch calls *panpsychism*, maybe it is more reasonable to abandon representationalism and explore the way in which conversationalism can provide an adequate characterization of the concept of epistemic community. The idea of the world as a "communitarian peer" to which we are responsible is the focus of Rorty's critique to McDowell and, maybe, the core of the Rortian opposition to all forms of representationalism. Indeed, to Rorty, every hint, in the explanation either of normativity in general or of our epistemic responsibilities in particular, of relations towards something non-human instead of relations between other humans is a conservative trace in the midst of the secularization process. Placing a non-human instance as a source of authority is a way of remaining in a theological (and deeply authoritarian) stage in which, when facing the non-human, all we have left is ignorance, error, respect or obedience, but never the modification of authority by means of our own intervention. A good part of modern philosophy, according to Rorty, merely replaced God by something extra-human serving as the source of authority: Reason, Reality, World.

Located inside this matrix, McDowell, with his idea of openness to the world, of being responsible to the world, takes the most unexpected turn: he assumes the intersubjective model and places the world as the privileged interlocutor. Kusch has been particularly caustic in his emphasis of the theological hue of the proposal, noting that both the foundationalist and the McDowellian direct realist participate of this anti-secularism but with a substantial divergence:

"Is not McDowell's world as expert witness remarkably similar to the foundationalist's priestly apparitions? The only difference is that McDowell has got rid of the priest as an intermediary. In his scenario God (or the world) speaks to all beliefs directly and without any mediation. (The theology of direct realism is

¹³ *Ibid.*, p. 155.

¹⁴ *Ibid.*

Protestant, whereas the theology of foundationalism is Catholic.”¹⁵

Rorty’s conversationalism is launched basically as an anti-authoritarian bet, resisting one and again the attempt to entrench non-human authorities.¹⁶ In this undertaking, conversationalism takes the McDowellian “need for world-directedness as a relic of the need for authoritative guidance”.¹⁷

III

The notion of *epistemic community* should be articulated in Rorty within his concept of *final vocabulary*, which is presented by him as “a set of words which [human beings] employ to justify their actions, their beliefs and their lives”.¹⁸ Such a vocabulary is ultimate in two senses: on the one hand, its user cannot argue in favor of the use of those words in a non-circular way; on the other hand, these are the words that posit a limit in communication, “beyond them there is only helpless

passivity or a resort to force”¹⁹ or, as Rorty defends in his political writings, the sentimental “manipulation”.

Following this line of thought, we should say that an epistemic community is nothing else than a set of individuals which coincide in an final vocabulary related to certain epistemic values. However, the characterization of this coincidence should be made carefully. Kusch appeals to a distinction between two types of consensus which he calls “external consensus” and “internal consensus”. External consensus is a mere coincidence of beliefs held by several individuals. Internal consensus, in turn, involves a collective commitment. Kusch compares the case of a bus in which all of the passengers coincide to believe -even without conveying or communicating it- that it will stop in a number of places along the ride, and a committee where, after a long deliberation, a final decision is taken in accordance to the final decision of the assembly. The example of the bus is a case of external consensus, while the committee case exemplifies the internal one. Interaction is central in the latter, and leads to a consensus that implies a collective commitment.

The epistemic community considered as a coincidence in epistemic final vocabulary, must be seen in terms of internal consensus to constitute an acceptable conception of knowledge. However, it would be absurd to think of the coincidence in the adoption of a final vocabulary under the model of the committee. In Rorty’s perspective there is nothing such as a deliberation leading to an explicit commitment. It is for this reason that, in my own view, it is necessary to think the epistemic community, understood as an agreement in a certain final epistemic vocabulary, under the Brandomian model of agreements and implicit commitments in the very justificatory practices. Brandom’s model is forced to revise and appropriate a series of elements of Hegel’s philosophy, in order to

¹⁵ M. Kusch, *ob. cit.*, p. 111.

¹⁶ It is worth to note here that, in his famous “The Fixation of Belief”, Peirce assesses this appeal to a non-human authority in the scientific method as the method for the fixation of belief. This is the greater gap between Rorty and Peirce, the point from where all the rest of their divergences emerge. The Peircean text is, regarding this point, revealing, and it is strange that Rorty hasn’t made most of it in transforming in order to favor his secularist perspective. Indeed, Peirce’s values from the scientific method that, in contrast to the authority method, doomed since there is no human institution capable of maintain lasting consensus, it proposes as an heuristic hypothesis a non-human authority, reality, to which humans must bow. Here lays the authoritarian roots of the Peircean assessment. The theological root is even more explicit, since Peirce desestimates the mystic demand of appealing to the method of revelation, where the authority is also external and non-human. The mystic problem is, merely, that it cannot escape the dimension of the individual. See C. S. Peirce (1931-1958), *Collected Papers*, Cambridge, Harvard U. P., Vol. 5 §384

¹⁷ R. Rorty (1998), “John McDowell’s Version of Empiricism”, in R. Rorty (1998), *Truth and Progress*, Cambridge, Cambridge U. P., p. 143.

¹⁸ R. Rorty (1988), *Contingency, Irony and Solidarity*, Cambridge, Cambridge U.P., p. 73.

¹⁹ *Ibid.*

avoid thinking on those implicit commitments under the bus model. Given the already quoted question of Tollefsen of the already asked question of Tollefsen – “can the norms of a linguistic community be shared, possess the same content, be accepted by the same reasons from agent to agent within the community?”- Brandom’s layout will allow providing an answer to the first two aspects of it from within the conversationalist frame. Regarding the third aspect, whether norms are accepted by the same reasons or not, their ultimate character in the Rortian perspective makes this worry superfluous.

The Brandomian argument to which I would like to appeal starts by presenting the Hegelian conception of a self as an “I”. Its source is the Kantian idea, reintroduced by Hegel, that claims that treating something as an “I” is to take an essential normative attitude towards it, taking it as the subject of commitments and the potential bearer of responsibilities. Brandom’s point is that one of the basic Hegelian ideas is that normative states such as “being committed to” and “being responsible of” –and henceforth, knowledge and agency- should be construed as social results. In to Brandom’s words:

“The practical attitude of taking or treating something as able to undertake commitments and be responsible for its doings –in the sense articulated by *concepts*, that is, the sense in which at least part of what one is committed to or responsible for is being able to give *reasons*-Hegel calls “recognition” [*Anerkennung*]. The core idea structuring Hegel’s social understanding of selves is that they are synthesized by *mutual recognition*. That is, to be a self –a locus of conceptual commitment and responsibility- is to be taken or treated as one by those one takes or treats as one: to be recognized by those one recognizes. [...] At the same time and by the same means that *selves*, in this normative sense, are synthesized, so are *communities*, as structural wholes of selves all of whom recognize and are recognized by one another. Both selves and communities are normative structures instituted by reciprocal recognition”²⁰

²⁰ R. Brandom (2003), *Tales of the Mighty Dead*, Cambridge, Harvard U. P., pp. 216-217

This instance of mutual recognition as constitutive of the self and of the community offers the context for the assumption of concept content, following the pragmatist maxim which claims that every content is instituted in the very same process in which it is applied:

“The actual *content* of the commitment one undertakes by applying a concept (paradigmatically, by using a word) is the product of a process of *negotiation* involving the reciprocal attitudes, and the reciprocal authority, of those who *attribute* the commitment and those who acknowledge it. What the content of one’s claim or action is *in* itself results both *for* what it is for others and what it is *for* oneself”.²¹

This process of negotiation of demands of commitments in competence is what Hegel calls “experience” [*Erfahrung*].

But such an “experience” does not only officiate as context, but also serves as a model for the explanation of the structure and unity of concepts. Hegel’s idea, according to Brandom, is that every norm is conceptual and that every time there is a norm in play several centers of reciprocal authority and a process of negotiation among them should be distinguished. In his words:

“the commitment one undertakes by applying a concept in judgement and action can be construed as determinately contentful only if it is to be administered by others distinct from the one whose commitment it is. So in acknowledging such a commitment, one is at least implicitly recognizing the authority of others over the content to which one has committed oneself.”²²

In this way, it is noticeable the way in which Brandom takes from Hegel, in order to make room to a pragmatist semantic theory, the idealist thesis according to which the normative-conceptual dimension is modeled under the dimension of the constitution of subjectivity, which is no more than the social dimension of the parallel constitution of the self and the community. But,

²¹ *Ibid.*, p. 221.

²² *Ibid.*, p. 223

inasmuch every norm is conceptual, and inasmuch the “self” of the community are normative states, the conjunctive constitution of individual subjects and of community is constructed in the very same process of “experience”, of conceptual negotiation. Hence, it would be a mistake to think that there is a first stage in which subjects are constituted on which, afterwards, semantic contents are built up. The point is, instead, that the process of the constitution of the self and of the community through the mutual recognition of authority is unfolded in the negotiation of the semantic normative characteristic of the application of concepts. It is for this reason that, besides thinking the constitution of the “self” as a model for conceptual constitution, it is the unfolding of such a constitution what shapes the constitution of the self and the community.

I think that these Brandomian developments are essential for making it even more plausible certain Rortian insights, clearing out thus the critiques that tend to show his perspective as a “choreographic” conception of knowledge, as McDowell puts it²³. The imbrications between the notions of *community*, *commitment* and *normativity* seem to make this simplifying construal of conversationalism a not very happy one.

Nevertheless, resting on the Brandomian appropriation of the Hegelian analysis of recognition is not enough to a complete account of an epistemic community. The Brandom/Hegel contribution is essential for approaching the configuration of every kind of community. In order to complete the depiction, and to articulate more precisely the Rortian-conversationalist configuration of the notion of *epistemic* community in terms of consensus in a final vocabulary of epistemic character, I

²³ “Without this difference [the difference between the question “to whom?” and the question “in the light of what?”], there would be no ground for conceiving one’s activity as making claims about, say, whether or not cold fusion has occurred, as opposed to achieving unison with one’s fellows in some perhaps purely decorative activity on a level with a kind of dancing” (J. McDowell (2000), “Toward Rehabilitating Objectivity”, p. 118).

find particularly useful to appeal to the communitarian treatment of the notion of justification developed by Kusch.

IV

The first step in Kusch’s argument is to establish a taxonomy of the beliefs that determine, with different functions, the empirical discourse. The taxonomy is based in two distinctions: the empirical/performative difference and the individual/communitarian difference.

The communitarian beliefs are those whose subject is a plural believer, in the sense that the attribution of the propositional attitude in question has to be expressed in a sentence with a grammatical subject in a person of the plural (paradigmatically, the first person of the plural, particularly, as we shall see, in cases of performative beliefs), in contrast with the attribution of individual beliefs, expressible in sentences whose grammatical subject is a person of the singular (paradigmatically, the first person of the singular).²⁴

Regarding the first distinction, it is presented by Kusch in the following way: “empirical beliefs aim to fit some aspect of the empirical world; performative beliefs create a psychological or social reality that accords with them.”²⁵

These two distinctions constitute, in consequence, four kinds of beliefs: communal performative beliefs, communal empirical beliefs, individual performative beliefs and individual empirical beliefs. The most important distinction in this instance is that between communal performative and communal empirical beliefs:

²⁴ Kusch is a bit confusing at this point, since he doesn’t distinguish between sentences expressing the ascription of propositional attitudes from sentences expressing the attributed content.

²⁵ M. Kusch, *ob. cit.*, p. 141.

The general form of communal performative beliefs is 'we believe in, and thereby constitute, the social fact that *p*'. The general form of communal empirical beliefs is 'we believe, on the basis of experience, that *p*'.²⁶

Examples of one and the other can be helpful to understand the distinction:

- i) We (the members of the Astronomic International Association (AIA)) believe that to count as a "major planet" of our solar system, a planet must have a diameter of at least 2000 kms.
- ii) We (the members of the Astronomic International Association (AIA)) believe that the object dubbed TO66 is not a major planet of our solar system.²⁷

The distinction between individual empirical and individual performative beliefs is hard to trace, particularly because it is not clear what kind of belief would be an individual performative one –Kusch tries to throw some light by means of examples like "I believe that I am holding a belief" or "I think that I think", but he doesn't develop enough their performative character. Individual empirical beliefs are of the same kind of communitarian empirical beliefs, differing only in the singular grammatical subject.

In turn, individual empirical beliefs are divided in two classes: the purely individual empirical ones, that is, those without any direct reference whatsoever to the community of "believers"; and the group-involving individual beliefs, that is, those in which the subject in

first person of the singular places his/her belonging to a community a constitutive part of the belief. The "logic form" of both kinds of individual beliefs differs: the purely ones has a form as "I believe that *p*", those containing the community within them have a form as "I (being one of us) believe that *p*". Distinguishing both kinds of individual beliefs is important, according to Kusch, for achieving an understanding of the existence of communal beliefs, inasmuch these cannot be thought of as beliefs held by something like a "group mind" or "the mind of a community". Groups, for Kusch, cannot be thought of as holding mental states above and independently of the individuals constituting them. Thus, only individual beliefs count as mental phenomena, while communitarian beliefs have to be thought of as social phenomena constituted by group-involving individual beliefs. Kusch's core thesis is that the relation between communitarian and individual beliefs has to be construed under the following general formula: A communal belief 'that *p*' exists if and only if there exists a group of individuals such that each one of them believes 'that *p*' in a group-involving way.

What follows in Kusch's presentation is the analysis of the nature of the relation between communal and individual empirical beliefs. On the one side, the analysis involves taking into account how is the passage from individual to communal beliefs, and how it is that an individual is capable of adopting the communal beliefs of a certain group. It is clear that a purely individual belief can become a communal one and thus an individual belief involving the community as a constituent (which happens whenever a certain content is believed first by an individual and afterwards it is adopted by an entire group). In contrast, the adoption by an individual of a belief held by the community can happen in two different ways: either the individual enters the community and hence acquires an individual belief with the community as a constituent, or the individual remains alien to the community and the adopted belief is purely individual.

²⁶ *Ibid.*

²⁷ These are Kusch examples. Maybe the possibility of undermine the proposal by appealing to the fact all of what Kusch shows is reduced to terminological differences could be dissolved if the examples appealed go performative beliefs revolving around what defines, for example, clinical death. The epistemological relevance of the distinction between communitarian beliefs, performative and empirical, would be much clearer. I thank Agustin Rayo and Sergio Martinez for the combination of objection and counter-objection that motivated this point.

The next point to consider regarding the relation between individual and communal empirical beliefs is one of major epistemological relevance. For Kusch the very notions of *knowledge* and *justification* must be considered on the basis of the relations between these two kinds of beliefs. According to him:

“It seems that challenges to, and justifications of, empirical beliefs usually involve communal empirical beliefs. We typically challenge new beliefs on the grounds that they do not mesh with beliefs that we all subscribe to. And usually we defend beliefs by showing that they follow from, or fit with, beliefs that we all share. To a considerable degree communal empirical beliefs thus are the touchstone for whether or not purely individual empirical beliefs rise to the status of communal beliefs”.²⁸

Thus, the structure of justification itself, the structure of challenge and defense, rests in communal beliefs. Besides, in order for a belief to reach the status of knowledge, it is a necessary (though not sufficient)²⁹ condition that it is transformed into a communal belief. This necessity is explained, in Kusch’s considerations, by noting that *knowledge* is a social status in the same way in which “married” or “divorced” are such. Given that only the communities and their representatives can impose on someone or something the status of “social”, a social status presuppose communities. Namely, regarding knowledge, and in order to acquire such status, it is a necessary condition of any of my beliefs to be shared by others and, because of this, it implies the constitution of an epistemic community.

In the same way, according to Kusch, beliefs cannot be individually justified since justification is also a social status. The fact that my peers accept the beliefs I offer them as justification of some other belief implies that they share those beliefs with me. But, and with this Kusch takes a crucial leap, cannot I, in solitude, without consulting no one, assess that I know that *p*? Kusch

answer: of course I can, but to assess that I know that *p* doesn’t equal knowing that *p*. Knowing that *p* requires social interaction. But, even more, the social aspect of justification and knowledge is shown in turn if I wonder: what is it what I do when I assess myself in solitude as knowing that *p*? What I do is to predict a successful exchange in which my belief survives challenges. In Kusch’s words:

“I am, however, free to anticipate their success in such a forum and think of them as knowledge even prior to such testing. In thinking of my beliefs as knowledge I am making a prediction as to how they will fare. [...] Clearly the rational way to convince myself is to have a ‘pretend challenge–defence discussion’ with people I am familiar with. [...] In other words, coming to convince myself is actually to form a pretend communal belief with pretend others. And this is clearly parasitic on the case where the others and their objections are real rather than imagined.”³⁰

As a consequence of these considerations it follows that individual beliefs cannot be justified, given that justification is a social status and, besides this, in order for something to be knowledge it must be the object of a communal belief. In this way the Rortian analysis is articulated better in terms of the social character of justification.

However, Kusch’s analysis has just started, since in it they will be the communal performative beliefs the ones playing the main role in the epistemological structure. This is thus because, according to Kusch’s communitarianism, the empirical beliefs, both communal and individual, bear as a possibility condition some communal performative beliefs. Let’s examine the case of communal empirical beliefs. Take the sentence

m) The AIA believes that there are nine major planets in our solar system.

²⁸ M. Kusch, *ob. cit.*, p. 146.

²⁹ The no-sufficiency is explained by an appeal to the fact that a community cannot hold a belief and at the same time believe that they lack enough evidence for it.

³⁰ M. Kusch, *ob. cit.*, p. 148.

Articulated thus, (m) can be read as a communitarian belief empirical as much as performative

m') The AIA believes (in the basis of experience) that there are nine major planets in our solar system.

m'') The AIA believe (and consequently constitutes a classification criteria that makes it such) that there are nine major planets in our solar system.

This double reading shows that communal beliefs presuppose performative ones. The last ones constitute classification criteria that afterwards are used by the first ones.

But there is a different sense in which communal empirical beliefs presuppose performative ones. Inasmuch communities are in turn social institutions, they have to be constituted by performative communitarian beliefs. Thus, in the example, the empirical belief (m') is based not only in (m'') but, also, in other implicit communal performative belief, that has the particular trait of being *community-introducing* or *community-constitutive*:

M) "We (the members of the AIA) believe that we have a system of obligations and commitments that define us as AIA and that authorizes us to adopt in community certain empirical beliefs."

The implicit character of (M) presupposes the idea that every communal performative belief is at the same time a communal performative belief of the community-constitutive kind. Thus, ultimately, every communal empirical belief needs of all this structure of communal performative beliefs. Precisely these communal beliefs constitutive of communities account, regarding the case of epistemic communities, for the phenomenon of recognition analyzed by Brandom in a Hegelian key.

Let's turn now to the case of the individual empirical beliefs. These also involve classifications and, hence,

social institutions. Thus, on the one side, the individual beliefs involving communities as constituents such "I, as a member of AIA, believe that TO66 is not a major planet of our solar system" are fragments, according to Kusch, of communal performative beliefs constituting classification. Moreover, for an individual to achieve the status of "knower", she must be able to convince others of conforming with her a communitarian belief. This will presuppose the constitution of a new minimal community, but necessarily it will have to presuppose some previous communities, provided that without the existence of previous communities no new belief can be justified.

This is the core point of Kusch's frame. To unfold it we need to make a terminological clarification. "Rule" is distinguished from "norm" considering the explicitness and the implicitness in practice. Rules are standards and prescriptions explicitly articulated, while norms are standards and prescriptions not explicitly established but involved in concrete practices. The point is which norms constitute the justificatory practice, and how do we apprehend those norms.

The answer of Kusch has an explicitly Kuhnean inspiration: we know norms inasmuch as we know exemplars shared by the community. Exemplars are cases of actions and beliefs adopted to comply with norms. Thus, Kusch introduces a new kind of beliefs, that is, the norm-constituting communal performative beliefs. These are beliefs about the exemplarity-role of cases of a certain kind. The general form of norm-constituting communal performative beliefs for the justificatory practice is

J) "We believe that beliefs of the kind X are justified if they comply with criteria Y; and the following are EJEMPLARES cases in which instantiations of X fulfill criteria Y: (and a list of cases follows)"

or

J') "We believe that beliefs of the kind X are justified if they are so in the same way in which the following beliefs are justified (and a list of cases follows)".

In consequence, for Kusch, inasmuch each exemplar is constituted by a belief/evidence pair, the justification of a belief on the basis of particular evidence involves showing that the relation between belief and its evidence is *similar or analogous* to that of the exemplars accepted by the community. Every justification implies judgments on similitude or analogy and as judgments, they are apt of being tested, for no justification can be accepted once and forever. Justifications, for Kusch, is relative not only to the exemplars adopted by a community but also to the similitude judgments linking a determinate belief-evidence pair with one or more of those exemplars.

Along with this "synchronic" relativity of justification, there is obviously a "diachronic" relativity. The meaning of "justification" can change –as in fact it does- in different communities along with the set of exemplars. This proves that justificatory norms are at the same time of the result of justification acts and the determinants of justificatory acts. Norm-constituting communal performative beliefs change, in more or less degree, with each interaction.

But the importance of the frame lays in the fact that the final standpoint of justification are norm-constituting communal performative beliefs not founded in experience nor in the assessment of their adjustment to the world or to a canon or extra-communitarian rationality, but based instead in historical contingent agreements, revisable and implicit in each justificatory judgment. It is in this way how Kusch depicts the dialectical character of justification, as a case of the dialectical structure of all social institution.

It is precisely this structure the kind of doxastic warp that can be thought as configuring what in Rortian terms

would constitute the *final epistemological vocabulary* shared by an epistemic community, which in turn is configured through implicit *community-constitutive* communal performative beliefs. There are these categories what make possible to understand with a greater depth the kind of characterization of the idea of epistemic community that can be provided from within the frame of Rortian conversationalism.

V

Finally, I would like to refer to certain consequences involving the notion of consensus that follow from Kusch's perspective and that will allow making some final clarifications around Rorty's perspective.

Indeed, Kusch presents a mechanic analogy in order to constitute three different models in which consensus can be characterized. One of these models will allow us to understand the determinant/determined nature of relations between social institutions and particular interactions. Besides, the model is particularly useful to understand how norms rule in groups wide enough as to make it impossible for each individual to be aware of the beliefs and justifications of all the others. The three models of consensus constitution to be presented are: 1) the unique authority model; 2) the unique average model; 3) the multiple but local model. It will be (3) the relevant model to the understanding in question.

The analogy that allows their characterization is presented as follows. A set of clocks are imagined, each one with their own "individuality", that is, its own speed to move their needles. Case (1) assumes that there is a master clock that every now and then adjusts the other ones to its own time setting by means of a periodical reset. Case (2) assumes that all the clocks are connected to one another in a way that the periodical reset adjust all of them to the average time calculated on the basis of information that each provide to the entire set. Case (3) is such that all the clocks are mounted on wheels and

can move freely within a limited space, bumping against each other at random. Every time two clocks collide they carry on the following operation: they estimate the average of their respective hour data and reset mutually to this average. Next the clocks keep on at their own speed and keep on moving in space until they bump into another clock.

The last case is analogous to a social institution in which no member has access to the actions of the rest and where there is convergence in divergence, since only in very extraordinary circumstances could happen that, at some point, all the clocks would tell exactly the same time. Moreover, this is the most relevant case, according to Kusch, to understand how social institutions determine and are determined by interaction: the hour of every clock is adjusted only in bumps between two each time and it would be erroneous to assume that these encounters imply some sort of priority in regards to the relations of each clock to the rest of the clock community. What each clock contributes to the one-to-one encounter is determined by the previous encounters with other clocks of the same community. The frequent and random interaction among clocks makes their hours fluctuate within a limited bandwidth. Kusch claims that communities have this very same characteristic and adds that if this were not the case for communitarian beliefs too, it would be hard to understand how institutions change and why monitoring, correcting and sanctioning the rest of the members of the community is important.

There is, however, a tension that introduces saying that model (3) is the best analogy for what happens in epistemic communities. The point is that (3) renders extraordinary the fact that all the clocks tell the same time, while it doesn't seem extraordinary the fact that all the members of a community share the same belief, particularly in the case of norm-constituting communal performative beliefs. The point Kusch emphasizes is that, indeed, there lays the limit of the analogy, but that to force it allows us to understand the fact that the

commitment to different justificatory canons can be provided with subtle divergences in different cases of particular epistemic evaluations (without making those divergences significant) and, in turn, it allows to explain the communitarian dynamics and with it, the permanent mutability of justificatory canons.

This model of multiple but local consensus establishes the need to make an important clarification to what I said in a previous work regarding the distinction between *partial* and *global consensus*.³¹ There I maintained that Rorty could perfectly distinguish conceptually the notion of *justification* from the notion of *majority consensus*, but that he couldn't defend in the same way the conceptual independence between *justification* and *global consensus*, that is, consensus along an entire community (with the exception maybe of some individuals which are in turn epistemologically disqualified in the community). Besides, a consequence of Kusch's model (3) is to make global consensus appear to be an isolated phenomenon in the epistemic dynamic of communities. Is this a problem for Rorty's conversationalism? I would say it is not. It would be if we construed Rorty as pointing out that the aforementioned conceptual link should be seen as a definition of *justification* in terms of global consensus. However, reading Rorty thus would be incorrect. What I emphasized that follows from Rorty's works (not emphasized in the previous bibliography) is, actually, that global consensus is, at the best case scenario, sufficient condition for justification. This reading is reinforced, in turn, with the consideration of the conception according to which justification carries on a default/challenge structure. Indeed, global consensus, as an instance of lack of challenge to the belief in question, is enough to justify it. That such a consensus is an isolated phenomenon doesn't eschew the relevance of the conceptual link pointed out by Rorty. What Kusch contributes (besides the detailed analysis of the linkages

³¹ F. Penelas (2003), "La justificación como hecho social", *Dianoia*, vol. XLVIII, nº 51, pp. 127-134.

among the different kinds of belief, which sustains the dialectical characterization of justification based on exemplars and similitude judgments) is an explanation of how, in spite of the perennial divergence, it occurs within a range of reasonability that allows the degree of consensus necessary to talk about justification of beliefs in a certain communitarian context.

TRUTH, JUSTIFICATION AND ETHNOCENTRISM

Pablo Quintanilla

Pontificia Universidad Católica del Perú

pquinta@pucp.edu.pe

I

Richard Rorty has developed and defended John Dewey's claim that truth is warranted justification. He has also extracted some consequences of such thesis in regards to ethnocentrism. Rorty's views have been frequently considered relativistic, mainly for problems in their formulations for which Rorty himself is to blame, but also for a wrong understanding of the claims he made. This paper starts by discussing Rorty's conception of truth and justification, in order to show its virtues and flaws especially in confrontation with Putnam's theses. After that, it aims to explore a concept of truth that includes elements of Peirce's and Dewey's views.

I wish to defend four claims:

(i) Rorty is right when he says that criteria for truth and justification are coextensive concepts, that is, that a proposition¹ is true if and only if it is justified on the grounds of certain given criteria.

(ii) Rorty extracts, from this first claim which I regard as correct, a conclusion that I believe is wrong or at least confused. This conclusion presents that a proposition is true if it is properly justified for a certain epistemic community, even if it is not for another. Thus, the truth of a proposition (or its justification) is a conventional and arbitrary property. I claim that a community could believe that a proposition is properly justified and that it is true, whereas another community could believe that the same proposition is not justified and is false. However, any person, as the subject of the enunciation

¹ I won't discuss whether truth makers are propositions, statements or beliefs. For practical reasons I will talk about propositions and I will use the variable p.

and from a historically situated position, could not believe that both communities are justified in their beliefs about such proposition. Therefore, nobody could say at the same time, unless he or she is in a privileged position *sub specie aeternitatis*, that two contradictory propositions could be simultaneously justified and true in two different epistemic communities.

(iii) From the contextual and conventional character of justification, Rorty extracts an ethnocentric claim, for which we can only justify our beliefs, on any given topic, to the members of an epistemic community to which we already belong. I think Rorty is basically right here, although his position has to be qualified, because it is necessary to make clear what an epistemic community is and what its extension is.

(iv) To accept that truth criteria and justification are coextensive is not incompatible with the affirmation of the existence of an objective truth, as well as of our moral obligation to look for it.

According to the usual interpretation of Rorty, his epistemology includes a contextualist and a conventionalist claim. According to the first claim, one is justified in believing p, if his or her belief satisfies the epistemic criteria of the system of beliefs of the community to which he or she belongs. According to the conventionalist claim, these criteria of justification do not have an ulterior justification beyond their very presence in the epistemic community in which they are given. From these claims, Rorty infers the ethnocentric view that he has made famous, and which he defines in the following way:

On my (Davidsonian) view, there is no point in distinguishing between true sentences which are "made true by reality" and true sentences which are "made by us", because the whole idea of "truth-makers" needs to be dropped. So I would hold that there is *no* truth in relativism, but his much truth in ethnocentrism: we cannot justify our beliefs (in physics, ethics, or any other area) to everybody, but only to those whose beliefs overlap ours to some appropriate extent. (This is not a theoretical problem of "untranslatability",

but simply a practical problem about the limitations of argument; it is not that we live in different worlds than the Nazis or the Amazonians, but that conversion from or their points of view, though possible, will not be a matter of inference from previously shared premises.) Rorty (1991, p. 31)

This is a reasonable statement, but it is necessary to make clear what *us* means, who is included in the word and who are the *others* with whom our beliefs do not overlap, and to whom can we not justify them. I lean to think that in this issue Rorty's problems emerge because he is not sufficiently Davidsonian. Perhaps if we address the topic of ethnocentrism we might clarify the questions with which we are now concerned.

According to Rorty, there are two kinds of ethnocentrism: the first one is inevitable, desirable and inclusive, whereas the second one is unacceptable and exclusive. Regarding the first, every society and individual is ethnocentric and can not help being so, because all of them assume that their beliefs are the true ones and that their values are the right ones. In this way, they all assume that all beliefs and values that are incompatible with their own are false or incorrect. Following Ramsey's redundancy principle, to believe in a proposition is to believe that it is true and that its negation is false. It is impossible to believe that one's own beliefs are false. One could claim, in order to avoid being considered ethnocentric, that one doesn't believe that his beliefs are *the* true ones, but just simply true. That formulation is, however, untenable because the concept of truth is normative in the sense that if I believe that *p* is a true proposition, I also believe that all others should believe so. In other words, I believe that they would believe –or at least that they should believe– what I believe, if they had the evidence that I have. The same happens with values which is why we can discuss about beliefs and values in an attempt to show the others something we think they have overlooked, as well as try to learn from others in such a way that they might help us see something we did not see. We are not concerned to do this with matters of taste, or in any case

we do it at a lesser degree, because we assume that taste is not normative. When we start discussing tastes, for instance, concerning a work of art or the quality of good wine, it is because we believe that in regard to these objects, there are some objective criteria and can thus reach some kind of objectivity.² This is not a dogmatic stand but simply expresses the nature of believing and valuing. All community is ethnocentric because it inevitably interprets any other individual or community in the light of his own worldview, regarding it as *another*. Such worldviews can only interpret *another* if it is similar to ours. The idea of a person or community entirely different from us or from ours is unintelligible. You can only be different if you are similar enough.

The undesirable and exclusive sense of ethnocentrism is such that in one community (or person), it considers itself axiological or epistemologically privileged in respect to others because it believes that its representation of the world or of the right values is the closest one to the very nature of things. This kind of undesirable ethnocentrism can go hand in hand with a form of intolerance because if you think that there is a right description of reality and that you are closest to it than anyone else, you might believe you have the right and the duty to impose it.³

The main difference between both kinds of ethnocentrism is in fallibilism. The first one believes that its beliefs are true but that they could be false. It feels epistemologically and morally obliged to revise its justifications and to adopt the beliefs that are best justified according its own criteria of justification. The second one doesn't admit any of those possibilities precisely because it believes that its beliefs are

² As Davidson (2004, 39) says: "In our unguarded moments we all tend to be objectivists about values".

³ Cf. "Noting that the same thing can usefully be described in lots of different ways is the beginning of philosophical sophistication. Insisting that one of these ways has some privilege other than occasional utility is the beginning of metaphysics". Rorty (2000, 88)

fundamentally true, that is, that no kind of evidence could show that they are false. It is clear that Rorty defends the first kind of ethnocentrism, but it is also true that in this topic, as well as in others, he seems to say what he does not mean.

Now, accepting an epistemic notion of truth, for which the truth values of a proposition do not transcend its forms of verification (whatever they may be), as well as the contextualist claim for which a proposition is true only if it is justified within an epistemic community, the obvious question is how should we understand a community of that kind. What characterizes an epistemic community is the existence of implicit social practices that underline the explicit agreements and disagreements. Those implicit practices are also agreements in regards to the justificatory activities, and can be seen as convergences in the level of beliefs, meanings attributed to expressions and actions, and intentional behavior. All these generate normative commitments that, according to Brandom, constitute cultural products shaped from the recognition of other people. The central idea, then, is that an epistemic community is constituted from certain shared social practices that produce the objectivity of concepts through communicative situations of the negotiation of the application of norms to specific circumstances. You can obviously belong simultaneously to several communities, which are always changing in its characteristic practices. On the other hand, both you and your community are changing reciprocally. This idea can be found in classical pragmatism which influences later ideas on intersubjectivity.

Epistemic communities do not have precise limits, but that is not problematic because it also happens with subgroups that belong to wider communities. An important point, however, is that truth is a relational property that relates a proposition, the way the world is and an epistemic community, and, therefore, includes some amount of indeterminacy. That is, if epistemic communities are constituted by shared practices and

they require the convergence of meanings, attributions of mental states and actions, given that those convergences are relational and are subject to some degree of indeterminacy, then belonging to an epistemic community is also a relational property and is subject to an amount of indeterminacy. This, as well, is not free of ideological and power relations. Akeel Bilgrami (1995) has shown how the current cultural presence of the West is so strong in the world that often non-Westerners consider themselves “the others” and adopt a western perspective to view themselves as living in the margins of the epistemic community that, nevertheless, they use to define themselves.

But it is important now to understand what Rorty means when he claims that we cannot justify ourselves to everybody but only to those who share beliefs with us. The relevant question is with whom are those beliefs necessary to share, who are *we* and who can be so different from us that it is not possible to regard them as *us*. Finally, what kind of consequences about truth contain the possible fact that we cannot justify ourselves to such others.

My claim is that in this case, the word *us* involves *all*, with which there are no others to whom we are not obliged to justify ourselves. Thus, I will opt for a kind of universalism with an inclusive ethnocentrism, based on an interpretation in which we assume that the others are similar to us because that is condition for interpretation. I might already have made myself clear in why I said that perhaps Rorty is insufficiently Davidsonian, either in his claims or in the way he expresses them.

The nature of interpretation is such that we can only understand the intentional behavior of the psychic life of another culture or person solely in the lights of ours. We could accept, as Rorty suggests, that both meaning and truth are relative to a system of beliefs, and that to accept it is conventional in regards to an epistemic community. The first claim can be understood in a double sense: the meaning and the truth value of

propositions can be fixed only within a system of beliefs and in regards to the semantic and epistemic criteria of such system. However the second claim is more problematic. What does it mean that the truth of a proposition is conventional in regards to an epistemic community? Does it mean that if the epistemic community had been different, that is, if it had had a different history, would it have a different system of beliefs? This is plainly true.

Here, the conventionalist would say that to accept a system of beliefs for an epistemic community is something arbitrary and irrational (in the sense of being unjustified), and that there are no criteria to prefer *our* system of beliefs on top of any other system, with which the justification as well as the acceptability of the beliefs in a system are equally arbitrary. I reject that view for I claim that the justified election between belief systems is rational, although from the criteria of *our* inevitable system of beliefs. The strength of the argument lies in that different belief systems are always translatable, that is, they are options in front of us with which the justified election of truth criteria is enlightened by our own and inevitable belief system, shared to some extent in our epistemic community.

What happens, then, with Rorty's view that we can only justify ourselves to those who share our beliefs? It is obvious that nobody could share them all and, following Davidson's principle of charity, everybody would have to share some of them. Furthermore, any belief system acknowledged by us as such should be regarded as sharing an important number of beliefs with us. This is, as it is well known, Davidson's (1984) claim, precisely designed to object the very notions of epistemic relativism and incommensurability.

Now, if we are to acknowledge somebody as an intentional agent it is necessary to recognize their massive number of shared beliefs with us. How can it be that we don't feel obliged to justify ourselves to them? Who would be those to whom we are not obliged to

justify ourselves? These questions suggest that an epistemic community is all those that can interpret themselves mutually, that is, all those that we acknowledge as intentional agents or, at least, all human beings. This will lead to a form of universalism with inclusive ethnocentrism, where meaning and truth are fixed within an epistemic community made by all rational agents, using the interpretation that we make from the criteria of our own epistemic community.

II

We will stop now in the details of the relation between justification and truth, for Rorty.⁴ One of the most acute criticisms to this Rortyan view comes from Putnam (1990). For Putnam, Rortyan conception of truth cannot explain the reform of our standards of justification beyond mere consensus. It also doesn't leave room for a notion of progress. Putnam (1990, 20) states his view about justification in the following claims:

In ordinary circumstances, (1) there is usually a fact of the matter as to whether the statements people make are warranted or not. (2) Whether a statement is warranted or not is independent of whether the majority of one's cultural peers would say it is warranted or unwarranted. (3) Our norms and standards of warranted assertibility are historical products; they evolve in time. (4) Our norms and standards always reflect our interests and values. Our picture of intellectual flourishing is part of, and only makes sense as part of, our picture of human flourishing in general. (5) Our norms and standards of anything — including warranted assertibility — are capable of reform. There are better and worse norms and standards.⁵

Rorty (1993, 449) rejects the first two principles and accepts the three last ones, but Putnam (2000) thinks

⁴ There is an interesting debate about this in: *Dianoia*, volume XLVIII, 51, 2003.

⁵ I have only included the five numbers to separate the claims.

that the only way to accept the fifth one is to also accept the first two ones, with which, on Putnam's judgment, Rorty would be contradicting himself. Further, for Putnam, the only way to be a fallibilist is accepting (5), that for him presupposes (1) and (2). Thus, for Putnam, either Rorty accepts (1) and (2) or stops being a fallibilist. Let us analyze this debate more carefully.

For Rorty, if a community C believes that proposition p is justified, then p is justified for C and there is not much to say about it, whereas for Putnam, C could believe erroneously that p is justified, while it is objectively true that the belief p is wrong. For Putnam C could believe that p is justified when p actually is not.

Now, for a Peircean perspective that Putnam once held and then abandoned, what is important is not whether C believes that p is justified, but whether C would believe it, in the scenario in which C had all relevant evidence – in ideal conditions- for and against p. That is, C could believe, wrongly, that p is justified, if Ci doesn't believe that p is justified, where Ci is C plus all the relevant evidence for and against p. In other words, Ci is an ideal community of C, or an idealized version of C, looked at from the criteria of C. If we are part of C, Ci is our ideal version.

If we belong to a different community from C, let's say D, and we ask ourselves if C's belief in p is really justified, what we are actually doing is comparing C's and D's criteria, that is, C's criteria and ours. If C's and D's criteria are different, then we could think that if the members of C had the evidence and information that we have about p, they would believe or should believe what we believe about p. Thus, if we are D, Ci would be equivalent to D. For this somewhat Peircean conception, to say that there is a fact of the matter for which p is justified, cannot mean something different that there is an intersubjective agreement about the truth of p in Ci, if we are C. In other words, there can be a fact, as Putnam says, for which p is justified, if what it means is that p is justified for a given community, that can be either Ci or

D. Rorty says that it will only be a fact in a sociological sense, and that is right if we are not C, but if we are C, we will be talking about what we think is an objective fact.

At some point, both Putnam as well as Rorty were close to a view of this kind. However, they separated from one another as Rorty abandoned it for a more contextualist view and Putnam moved towards a more objectivistic view.

Anyway, for Rorty (1993, 451-2) justifiability for an ideal community (Ci) is only justifiability for us as we would like to be. The question, again, is who is *us*. I hold that we are all those that can interpret each other, *all*, but from the point of view of the individual and community from which he or she makes such an interpretation. And we don't confirm what we think is justified today, but to what we think will be justified if we had all the evidence for and against it. The distinction between the actual *us* and the ideal *us* is the only distinction that we have in order to keep other distinctions that we shouldn't drop: what we think is true and what is true; what we think is justified and what we would believe in ideal conditions. This is the cautionary use of truth: Although p is justified, it could not be true, if we discover better criteria for justification.

The point is that the sentence "p is justified but is false" can only mean that p is justified for C although not for Ci considering that, for the person who says the sentence, is more reliable than C. But if my community is C and not Ci, because *ex hipotesi* Ci doesn't exist yet, how could the Ci's criteria seem more preferable than C to me? Taking as the subject of enunciation my own epistemic community, it would be contradictory to claim that p is justified for me but that it is false. What is acceptable is that I believe that p is justified but that it *could* be false. This means that although I believe that p is true and that it is well justified, I also believe that with new evidence I could eventually believe that it is false. The possibility of such new evidence and the falsehood

of *p* are entailed within the notion of an ideal community to which I could belong in the future, in which *p* would not be justified and, therefore, would be considered false. In such community we could in due course think that our actual criteria of justification are the best and that we could prefer other forms of justification.

But Putnam goes further. He says that it could be an objective fact of the matter that epistemic community *C* is completely wrong in believing that *p* is justified. The relevant question is to whom *C* would be wrong. For Putnam such a question is unnecessary, because truth is not a relational property between propositions, facts and epistemic communities, but a monadic property of propositions that, at least in some cases, transcend to epistemic communities. This, however, requires the existence or at least the intelligibility of a privileged or omniscient interpreter who is not part of any epistemic community. If we don't have such assumptions, or if it is not part of our epistemic considerations, *C*'s error would have to be in relation to *C_i*, which is nothing but *C* with new evidence and new criteria, or in relation to an epistemic community that we might call *D*.

From the point of view of the epistemic conception of truth that I hold, the concepts of truth and justification are always relational. You are right or wrong about certain and individualistic facts of the world, and it would be against the principle of charity, and therefore against the principles of intelligibility of discourse, to believe that a community could be totally wrong for another one who is interpreting it, in view of an objective world that they both share, especially if this other community is nothing but an idealized version that the first community has of itself.

A way to make clear this point is by asking two questions:

- (i) Could a massive number of beliefs of *C* be wrong (for instance about the nature of the Sun or human

sacrifices)? Yes, if this means that those beliefs are wrong in regards to another community *D* (ours), for example, which is the subject of the enunciation. But it wouldn't be possible that all *C*'s beliefs are wrong for *D*, because then it wouldn't be clear which ones are *C*'s beliefs for *D*.

- (ii) If we are *C*, could a massive number of our beliefs be wrong? We couldn't believe that our own beliefs are wrong, but we can (and should) believe that our beliefs *could* be wrong, that is, that in a future time, with more evidence and better reasons, we could modify our beliefs in such a way that we would stop believing what we believe now. That future time would be *C_i*, coming from our present point of view, *C*.

III

Now we must turn our attention more radically to the concept of truth. Although the concept of truth has some elements that are culturally variable, it is most likely that there are certain universal features. But what is universal is not the content of the concept but the normative conditions of use or the requirement of justification. When we say that a proposition is true, we feel obliged to justify it with reasons and we tend to believe that it should be believed (that is, regarded as true) by anyone that had the evidence that we think we have.

I will explore a view that is a combination of Dewey's and Peirce's views. I will hold that to say that "*p* is true" should be interpreted as: *p* is part of a theory, or of a system of beliefs, that is the best justified option on the grounds of the best evidence available, for the shared criteria of our epistemic community, in relation to the object in question, and according to the objectives we collectively have. This is not a reconstruction of how people use the word "true", but a stipulation of how it would be convenient to use it on a theoretical level in order to make it explicative. The common use of truth

tends to be correspondentist. But the problem is not only that it already presupposes some concept of correction, as was noted by Frege and Bradley. (Frege 1977, 3-4) y Bradley (1914). The problem is not, either, that the very concepts of *correspondence* and *fact* are very imprecise. The main problem is that correspondentismo doesn't say anything important. That is, we can be correspondentista without having the slightest idea of what to do in order to determine that a proposition is true. Although definition of truth and criteria of truth is not the same, if you take seriously Peirce's famous maxim (1998, 200-223), you don't understand the meaning of a concept unless you know how to use it.

Now, pragmatists have been insisting that the criteria we actually use (and should use) is justification, and since we need to distinguish, for cautionary reasons, between a true proposition and a well justified proposition, then we have to explain what kind of justification entitles us to say that a proposition is true. This is how the idea that a proposition is true if it is justified under ideal conditions emerged (Peirce 1931, 5. 564, 8. 13).⁶

If you accept this claim, it would be impossible to distinguish between truth and justification from an internal point of view, because if you accept that a proposition is better justified than other available options, you will believe in it and the fact that it is true. It would only be possible to distinguish between truth and justification in two cases: (i) In relation to the cautionary use, or (ii) from an external point of view, as when we say that somebody believes that p is justified but that we think it is false. Can we infer from this that a proposition can be true for an epistemic community while false for another one? Of course, if it is implied

that some people think is true what others think is false or, what amounts to the same, then they disagree with respect to the quality of their justifications. But it could not occur that somebody, from their own context of justification or epistemic community, believed that a proposition is true in one community and false in another because when claiming that a proposition is true they are implicitly assuming that they believe it and accept its criteria for justification.

Thus, from an internal point of view, truth and justification are coextensive concepts, although that is not the case from an external point of view, nor in ideal conditions, which is the cautionary sense. But there is a combination of both points of view. This is the case when you imagine that what you believe now, and what you think is justified in relation to your actual evidence and criteria, might now be justified in the light of new information that you don't know currently but that could very well emerge in the future in ideal conditions. However, we shall admit, with Rorty and other critics of Peirce, that the expressions "all possible evidence" and "the ideal end of research" are not clear at all. Therefore, this might be a better formulation: we call "true" a given proposition that we would be inclined to accept in case we had evidence that, in our eyes, would give us good reasons to prefer such a proposition rather than other possible ones. This permits us to accept that our actual beliefs are not the ones we would have in ideal conditions, which is the cautionary sense of truth. On the other hand, the end of research is just a regulative concept that helps us to conceive an ideal situation in which we would have all the evidence necessary to change our beliefs. Furthermore, to say that a proposition is true is to say that such a proposition is the one in which we would believe in ideal conditions, if we had enough evidence to fix our beliefs. Additionally, following Peirce, what we describe with those propositions we call true, is reality in itself. This is what Peirce says (CP 5.407):

⁶ This is Peirce's classical formulation: "The concordance of (a)...statement with the ideal limit towards which endless investigation would tend to bring scientific beliefs". "...truth more perfect than this destined conclusion, any reality more absolute than what is thought in it, is a fiction of metaphysics" Cf. also Dewey (1941).

The opinion which is fated to be ultimately agreed to by all who investigate is what we mean by the truth, and the object represented in this opinion is the real. That is the way I would explain reality.

Peirce is saying two important things here. On the one hand, he holds that truth is one kind of correspondence between our beliefs and the facts of the matter, although we call “facts of the matter” the events that would be described by the beliefs that we would have in ideal conditions. Another way to put things is by saying that truth is one kind of consensus, although not actual but potential; it is the kind of consensus we would reach in ideal conditions. On the other hand, this consensus does not depend only in the skills and characteristics of researches, but fundamentally in the way reality actually is, although the way to determine what reality is depends on our conditions of justification in regards to available evidence. That is, the facts are those aspects of reality that make our beliefs true or false; they are *truthmakers*, in ideal conditions of justification and evidence. In this topic Peirce (CP 5.444, 5.539) defends common sense, which is correlated with direct realism about objects of perception.⁷

But there is a concept in which this kind of “direct” or “natural” realism is even stronger than transcendental realism, because the latter admits the possibility of global skepticism, whereas the former doesn’t accept as intelligible a gap between our minds or our theories and reality, and it doesn’t admit global skepticism, not even as a logical possibility. We can conceive that in ideal conditions, there could be true propositions that we don’t currently see as justified. This is a way to understand Peirce’s principle of convergence without having to assume that in the long run our beliefs will really converge. It seems that early Peirce did think it, but we don’t have to think so. Christopher Hookway (2004) has shown that although young Peirce, before

⁷ Direct realism is a view closet o “natural realism” coined by Putnam (1999) and that can also be found in James.

1880, was inclined to a strong interpretation of the principle of convergence. In his later papers, convergence is only seen as a regulative ideal or a hope.⁸

The early Peirce thought that reality in itself limits our beliefs, in such a way that sooner or later it will compel us to abandon false beliefs (those which are unsuccessful for action) and will oblige us to accept true beliefs (those which are useful in dealing with the world). But the move from inevitable convergence to pure hope seems too radical. We can accept convergence as a regulative ideal and we can understand “truth” as the name that we give to this ideal agreement compelled to us by reality. We can also call “reality” the object named by such agreement.

In principle, researches working with the same kind of categories and concepts, or with the same goals in mind, could reach the same conclusions if they were exposed to the same or similar evidence. But it is not required that researchers working with different categories or goals will do it. These different descriptions will illuminate different aspects of reality without being incompatible. In this way, the principle of convergence can be compatible with epistemological pluralism.

A proposition is true or false only under a certain description of reality, or under a system of beliefs, because outside of it, it has no meaning and (no comma) therefore cannot be a truth bearer. This is an idea explained by Peirce himself (CP 5.448):

⁸ In conversation with Paul Carus, quoted by Hookway (p. 135) and published in Peirce’s complete works (CP 6.610), when Carus interprets convergence as an inevitable event, Peirce said that it is just a hope “...a hope that such a conclusion may be substantially reached concerning the particular questions with which our inquiries are busied.” In fact, when Peirce prepared in 1903 an other edition of “How to make our ideas clear”, he suggested two changes to W 3, 273. In the new version it says: “...all the followers of science are *animated by the cheerful hope...*” and “This great *hope* is embodied in the conception of truth and reality”. This information comes from Hookway (2004,135).

Although it is true that “Any proposition you please *once you have determined its identity*, is either true or false”, yet *so long as it remains indeterminate and so without identity*, it need neither be true that any proposition you please is true, nor that any proposition you please is false.

But that does not preclude that propositions can be objectively true, if all researchers that share such description have the tendency to converge in such truth value. The principle of converge gives light to the idea that when someone claims that a proposition is true, or when one believes it to be true, they are normatively committing themselves with the belief that if all other people had the evidence that they had and if they assigned the same meanings to the words, they would have to believe what one believes, and vice versa. At the same time, this someone is committing to the idea that if that community of individuals were exposed to the same observational evidence and could interchange opinions, in ideal conditions, they would tend to converge in their beliefs. Thus, what Peirce wants to do is make clear the theoretical commitments that you acquire when you have a belief or, what amounts to the same thing, when you say that some proposition is true.⁹

Upon reaching this point, we shall ask two questions: First, does it make sense to claim the existence of an objective truth? And, second, can the concept of truth be a regulative ideal, and can it work normatively in order to lead our behavior and research? Rorty would answer negatively to both questions, whereas I would answer affirmatively to them. The most justified beliefs in a given moment and given all the available evidence, for a system of beliefs, are objectively true for those who share such a system. If the system is ours, we are just talking about truth. The fact that there are other communities that have different beliefs or different

⁹ Hookway (2004, 147): “Peirce is not offering an account of what it is for a proposition to be true, Instead he is clarifying: (i) What commitments we incur when we take a proposition to be true. (ii) What commitments we incur when we seek truth in some area.

criteria for justification than us only shows that we are obliged to confront our beliefs in comparison to theirs, in order to correct ours or to help them to correct theirs, in the case that they want to. The concept of truth is normative in the sense that you are logically (and also empirically and morally) obliged to believe that the most justified propositions are true. But the concept of truth is also a regulative ideal, in that we are morally (and also empirically and logically) obliged to try to present our world views as most justified as possible. In other words, we are logically, epistemologically and morally obliged to search for the truth.

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PRAGMATIST CONTRIBUTIONS

TO A NEW PHILOSOPHY OF HISTORY

Verónica Tozzi

UBA-UNTREF-CONICET

veronicatozzi@fibertel.com.ar

*“The philosophical value of this position is that it restores stolen goods to the world”
(Mead, 1927a: 154).*

This work is written from the perspective of a New Philosophy of History (NPH), and as such it is interested in promoting what has come to be known as “linguistic self-awareness” for those of us who are interested in the consequences of our linguistic adoptions – whether from the perspective of history, of memory studies or of philosophy of history. NPH as a movement was born in 1973 with the publication of Hayden White's *Metahistory, The Historical Imagination in Nineteenth-Century Europe*,¹ and pursued by Frank Ankersmit, Keith Jenkins and others. During the last forty years it has received criticism on diverse fronts on account of its alleged attack on history. This, in turn, is said to be due to its adoption of linguistic idealism and determinism, which would lead to skepticism regarding historical knowledge. Therefore, it is from the perspective of philosophy of history that I encourage a dialogue with the contributions made by a pragmatist approach to language and knowledge, specifically those born from the reflections on social and historical studies, as is the case with George Mead's Social Behaviorism, and the Strong Programme in the Sociology of Knowledge lead by Barry Barnes, David Bloor and, more recently, Martin Kusch, who have not found a conflict between their sociolinguistic approximation to epistemology and their positive appraisal of history as science. Mead's work has been widely recognized in the sociological research field, and Argentina has been a pioneer at it. *Mind, self and*

¹ Hayden White, *Metahistory, The Historical Imagination in Nineteenth-Century Europe* (Baltimore and London: The Johns Hopkins University Press, 1973)

*society*² was edited in Spanish in 1953 under the supervision of Italian-Argentinean sociologist Gino Germani.³ More recently, it is worth noting the crucial place Jürgen Habermas bestows on Mead in his great work *The Theory of Communicative Action*. Nevertheless, the consequences of his work for philosophy of history remain unexplored to our day, and are worthy not only of a full article, but also of recognizing Mead as a crucial reference in our century's debates on historical knowledge. On the other hand, the Strong Programme, by pursuing and developing Kuhn's Wittgensteinian roots, has been immensely prolific in its sociological and historical studies of science, but has encountered resistance in the field of philosophy of natural sciences. Just like the New Philosophy of History, it has been accused of favoring an attack on science: yet another form of obscurantism. In this paper, I shall try to show that this dialogue between pragmatism and NPH is not an attack on science, but on a certain form of philosophy engaged in a form of dualism between mind-world or language-reality, individual-society, an engagement which, under a pragmatist light, makes no difference in practice. This dialogue is an invitation to reflect on scientific practice with the same resources with which scientific practice carries its task in creative knowledge.

The work is organized into three parts. The first one sets out a state of affairs in New Philosophy of History. The second presents the pragmatist contributions to those dilemmas raised by NPH. The third part suggests a dialogue between pragmatism and a lesser known but crucial text by Hayden White. In it, the author advances his metahistory while applying it to the analysis of a text by Proust, since it is an example of writing which

² George H. Mead, *Mind, Self and Society, from the standpoint of a social behaviorist*, (Chicago and London: University of Chicago Press, 1934)

³ Germani emigrated to Argentina in 1934, running away from Mussolini's Fascist Regime. He was a student and professor in the University of Buenos Aires. He led many books collections on social movements and the main sociological schools in the world. He founded Sociology Studies at the University of Buenos Aires in 1957 and was the head master up to 1966, when he had to flee again due to that year's *military coup*.

combines the use of tropes to talk about reality, with the linguistic reflection on such a use.

I. By virtue of NPH, philosophy of history opens to the linguistic turn, since it seriously considers and takes as an object of inquiry the fact that every reconstruction about what happened in the past carries with it the production in language of a representation which assumes, implicitly or explicitly, ontological, practical-political and aesthetic-expressive commitments. The result of this refinement in the dimensions of historical writing leads to the dissolution of essential separations between history and philosophy of history, or between historical narrative and literary narrative: every discourse on the past tries to make it intelligible through the elaboration of figurations that will allow us to relate synchronically events that have taken place diachronically. In this task, historians and philosophers of history deal with the linguistic resources provided by their culture, in order to produce a “realistic” consideration of the past capable of mediating among other alternative -even conflictive- considerations, the bare record, and the public.⁴

The NPH has not stopped at this claim of the linguistic character of the world. It has also encouraged the undertaking of a research program which introduces metahistorical concepts for the analysis of some historiographic controversies which seem endemic to historiography, since no evidence or agreement in evidence can ease an interpretive consensus about the past. Throughout his academic career, Hayden White has pursued an analysis of the drifts of realistic representations of the past. In it, he has used two fundamental strategic theories. First, the “theory of tropes” or “tropology”, which he takes from classical rhetoric to account for the differences and divergences between alternative, controversial interpretations of the past. Second, Erich Auerbach's “figural realism”, which he would use to track the diverse approaches adopted

throughout the history of Western literature to “realistically” account for reality. In consequence, White provides us with a metahistorical instrument to plot a history of realism in the West. The notions of figure and fulfillment are extremely useful to pinpoint the connections made by a number of authors between the events in order to adequately represent them, as well as those established in such successive attempts to represent. Each representation of the past turns out to be a figural articulation which presents itself as retrospectively fulfilling the promise that previous representations have not attained, but have left for posterity⁵. The contextual nature of realism, as well as its never-achieved account of reality, which leads to a constant motion in search for new representations, must not be taken, in Whitean terms, as a path of progress and coming closer to truth.

This is precisely why White's adoption of tropology makes sense, in order to reconstruct those conceptual drifts⁶. A tropologically informed metahistorical analysis

⁵ Three methodological prescriptions can be derived from this. First, each representation of reality (either literary or historical) is a proposal to look at past events under a different light. We are invited to adopt another perspective, under the promise that under that new light we will see reality better. Secondly, no proposal is ever neutral or aseptic; they are always presented from some context (disciplinary and/or political), and it is this context to determine the achieved meaning. Thirdly, no representation will ever be in itself a consummation of its own proposal to represent. See Hayden White, “Auerbach's Literary Theory. Figural Causation and Modernist Historicism”, in White, *Figural Realism. Studies in the Mimesis Effect* (Baltimore: Johns Hopkins U.P., 1999), pages 87-100

⁶ My aim here is to avoid a consideration of tropes as prefigurations of a text's style (the strong thesis in *Metahistory*), and pursue a line of research somehow suggested in “Narrative, Description, and Tropology in Proust”, which maintains that tropes shed light on conceptual and interpretive shifts. This strategy has been presented by Lavagnino, but I will support it from a different perspective and with another philosophical background. Cfr. Nicolás Lavagnino (2011), “Tropología, agencia y lenguajes históricos. Escepticismo, relativismo y ficción en la filosofía de la historia de Hayden White” [TN: “Tropology, agency and historical languages. Skepticism, relativism and fiction in Hayden White's philosophy of history”], in *Ideas y Valores. Revista Colombiana de Filosofía*, Vol. LX, Nº 145

⁴ White, 1973, Introduction.

will allow us to appreciate that the lack of resolution of historiographic controversies by appeal to documentary evidence is due, on the one hand, to the fact that each interpretation of the past is a contingent articulation of the epistemic (mode of explanation), the aesthetic (mode of emplotment) and the ideological dimensions. On the other hand, it stems from the fact that the attained articulation is not dictated by evidence or reality in itself, but is rather a non-rational, non-logical adoption of one possible way among others of connecting act, action, actor, event, agency, circumstance, condition, plan, purpose, success, error, and failure. Metaphor, metonymy, synecdoche and irony would account for the differences in the connections of these basic elements that cut through the combination of explicative, aesthetic and narrative dimensions. Still, we must not think that each interpretation or historiographic representation can be analyzed independently in terms of its informing trope. Such a reading of tropology, favored by a Kantian interpretation of tropes as different modes of historical consciousness applied to content, leaves the door open, in my view, for a skeptic historical relativism. However, this account of tropological analysis has become canonical, and can be found in any appraisal – whether disapproving or positive – of White's work. In this article, I advocate for a reading of the tropological cycle in conversational terms, in order to avoid the idealism and linguistic determinism that White himself wished to avoid. I believe this can be achieved by thinking this cycle not in terms of structuralist accounts of language and discourse, but of pragmatist ones. In this perspective we could appreciate that tropology is relational, that is, each tropological act implies a drift in relation to some other trope. It is not merely an isolated formation of an content without a form; this is why it is by comparing diverse interpretations that we can capture their motivating trope. Each representation is in itself a contingent articulation of ways of emplotment, explanation and engagement in ideological commitments, which does not respond to reality, but to that tropological shift that answers to or rejects the previous articulation.

White has been – and still is – very much concerned with explicitly detailing the status of the metahistorical instrument used to analyze the representations and conceptualizations of social events or processes. Still, even though there is no doubt that it is metahistorical instruments we are dealing with, White is aware of the need to face the philosophical issues regarding the status of language in general, and of historical and metahistorical language in particular. In other words, appealing to metahistorical categories to analyze historical discourses or the conceptual changes it addresses, does not exempt him from facing possible accusations of determinism in relation to language and what it talks about. Precisely in the case of a science such as history, which takes pride on its empiricism and its fundamental attachment to evidence and facts, any introduction of historical concepts (to account for past events), or metahistorical concepts (to account for its own historiographic production), turns suspicious if said concepts are not derived from “evidence”, or cannot show some kind of connection to past reality.

The New Philosophy of History has been very fruitful in its offer of a powerful metahistorical tool to reveal all that is implied whenever a controversy about the past cannot be solved by merely bringing evidence into play. Nevertheless, my approach aims at showing how it has not been able to develop an effective defense strategy for its metahistorical instruments, as it alternately flirts with some Kantian version of them, or reedits the same language/reality dualism it aimed at dissolving in the first place. I believe this weak front is due to an insufficient emphasis on the social pragmatic nature of our linguistic practices. Specifically, NPH has noted its familiarity with classic pragmatism, neo pragmatism, and Wittgenstenian philosophy – as is the case with Keith Jenkins' and Frank Ankersmit's positive appraisal of Rortian pragmatism, or Martin Jay's recent appreciation of James' and Dewey's notions of experience.⁷ But these

⁷ Keith Jenkins, *On 'What Is History?': From Carr and Elton to Rorty and White* (London, and New York: Routledge, 1995); Frank Ankersmit, *Sublime Historical*

approaches either have not been sufficient to avoid skeptic consequences, or have resulted in a regress to some form of experiential foundationalism. I would venture to attribute this to the fact that little attention has been given to those exponents of pragmatism which are mostly inspired by the reflection on the status of social and historical knowledge. They will allow us to appreciate the controversial pluralism characteristic of social and historical sciences as a sign of research fertility. The pragmatist reflections that I bring to discussion have a twofold origin. On the one hand, the notion of *meaning finitism*, inspired in Wittgenstein's *Philosophical Investigations*, developed by Barnes and Bloor following their research on sociology of knowledge, and more recently pursued by historian and philosopher of science Martin Kusch.⁸ On the other hand, my work draws on classic pragmatism, particularly George H. Mead's *Social Behaviorism*, which gave origin to the sociological research program known as *Symbolic interactionism*.

II. I will follow Martin Kusch's presentation of meaning finitism in *Knowledge by Agreement*.⁹ According to him, in its first and canonical formulation meaning finitism theory is stated, above all, in relation to empirical concepts, but is in fact a general theory of meaning.¹⁰ The opposite of meaning finitism is called by Kusch "linguistic determinism", and its main interest is to explain how previously constituted meaning determines successive applications (extension) and how the term is true of that extension (determination and truth). In contrast, finitism claims that meanings are developed

Experience, (Stanford: Stanford University Press, 2005); Martin Jay, *Songs of Experience: Modern American and European Variations on a Universal Theme* (Berkeley, Los Angeles, London: University of California Press, 2006)

⁸ David Bloor, *Wittgenstein, Rules and Institutions* (London, New York: Routledge, 1997), Martin Kusch, *Knowledge by agreement: The programme of communitarian epistemology* (Oxford: Oxford University Press, 2002), and *A Sceptical Guide to Meaning and Rules: Defending Kripke's Wittgenstein* (Montreal and Kingston, McGill-Queen's University Press, 2006)

⁹ See page 201.

¹⁰ A complete formulation and discussion about the theory can be found in Bloor, 1997, op. cit.

through time, and will never be sufficiently stable or fixed so as to determine extension. Meanings are made and remade by language users; strictly speaking, they are social institutions, which establish the exemplars for correct usage but exist only in those practices where usages are judged, invoked, ascribed, corrected, challenged and agreed upon.¹¹ In order to appreciate this special consideration of the social, contingent and active nature of meaning, Kusch offers the example of a child's ostensive learning of classifications, and a theoretical consideration on the nature of social institutions. Let us now observe this case.

During training, the child acquires a limited set of a given category: that is, not every instance of application carries the status of exemplar. Given the local nature of learning, different children will carry different sets of exemplars. Why do we talk about exemplars, and not simply of the application of the term to a new instance? Because learning involves the ability to establish new and unpredictable applications. This means that every new application is not determined by some norm beyond itself, nor are the application cases identical; rather, every new application is performatively an assessment of similarity.¹² Three brief considerations may clarify this point. Firstly, judgments of similitude are not subjective, but contextual, and in most occasions there is agreement. Secondly, this persistent agreement can be explained both by a common physiology and by a common linguistic training of those taking part in the communicative interaction. Thirdly, even with a common physiology and training, there is still room for difference. That is, controversial interests and objectives will lead to a different appraisal of the similitude in cases. The set of exemplars of a given category changes with time, the child builds a set throughout time adding new exemplars to the old ones, discarding and replacing others, always in view of the interactions he is involved in.¹³

¹¹ See page 206.

¹² See page 203

¹³ See page 204

Let us now turn to social theory. The Wittgensteinian consideration of language games as the following of rules, and of forms of life as shared language games, has allowed philosophers such as Winch, Anscombe and Edimburg sociologists to think of society without falling into the individualism/holism dichotomy. This is because social institutions are also subjected to the logics of finitism; their production and reproduction is determined by rules or norms which are previous to the agents' actions. Furthermore, rules and norms are themselves social institutions, intrinsically woven into the discourse that refers to them. The discourse that creates institutions is self-referential: discourse about money creates money as a referent for it, which is why social actors must make decisions in relation to the use of money.¹⁴

Against those who fear that the linguistic turn will ineluctably fuse word and thing, the finitist version of the turn does not subscribe to the naïve affirmation that community makes of something a cat merely by calling it "cat": it does not equal "making" as "creating", with "making" as "categorizing". It merely points out, firstly, that the grouping of certain animals in order to call them "cat" does not respond to characteristics borne by the animals themselves; and secondly, that no agreement on how to group can guarantee or determine future applications of the term. Applications are not based on identity, but on similarity. This means that the set of exemplars continuously drifts and derives; applications are incessantly being negotiated, so much so that no isolated individual would be able to capture all similar cases: given the continuous deviations, the individual does not have resources to monitor his own performances by appealing to some independent criteria.

¹⁴ See Bloor, 1997, page 29. Kusch says that many social institutions are like local consent models, that is, a certain application is correct rather than incorrect because interlocutors allow or even appreciate the way in which the similarity between a shared exemplar and a found entity has been judged. The environment causes, but does not determine, correctness. See pages 205-6.

The following **five thesis** may be useful to summarize this social consideration of meaning and language, which takes up on their contingency without leading to idealism or linguistic determinism:

1. Future applications of a name remain open;
2. No act of application is unfailingly correct: the relationship among the numerous applications of the "same" refer to similitude or analogy, not to identity;
3. All acts are arguable, in light of the drift in the set of exemplars, or due to interests;
4. Successive applications of a class term are not independent from each other; on the contrary, they influence new applications;
5. Applications of different terms are not independent from each other, as is the example of "duck" and "goose".¹⁵

Meaning finitism is precisely the rejection of the belief in fixed extensions: that is to say, if intention is meaning, and extension is the set of applications, then meaning will determine extension (i.e., fixate it for the future). For meaning finitism, extension has no existence outside of the speakers' decisions; the contents of a class ultimately depend on decisions.¹⁶

Having said that, although Kusch does stress the interested, situated and unpredictable character of stabilizations of meaning, this does not lead him to expel conceptual drifts to the realm of the unrepresentable or unknowable. On the contrary, historians can, retrospectively, reconstruct these drifts. It is as though for Kusch, meaning finitism did not question the common sense consideration regarding the radical

¹⁵ Kusch has taken these five theses from Barry Barnes, David Bloor and John Henry, *Scientific Knowledge. A Sociological Analysis* (Chicago: The University of Chicago Press, 1996)

¹⁶ This does not mean that the terms will necessarily be vague. "The distinction between vague and non-vague stands orthogonal to the distinction between meaning as 'finite' and meaning as 'fixed by extensions'. Take a concept like 'bald' is vague because we are collectivity willing to accept both "x is bald" and "x is not bald" as assertible of the same x at the same time." (page 208)

difference between past (as irrevocable) and future (the uncertain and undetermined). A presentist consideration of history would be a form of skepticism. It is in this precise juncture that I deem vital for all New Philosophy of History concerned with the possible idealist and deterministic consequences of its metahistorical instruments, to include a dialogue with George H. Mead.

The importance of Meadean Social Behaviorism for the development of social studies in communicative terms has met great recognition. By virtue of its behaviorist approach, it overcomes introspection, cartesianism and idealisms. Through its social approach, it surpasses the individualism to which Watsonian behaviorism remained attached. It produced an account based on a social and interactive consideration of meaning, situated or community-based, and according to interests.¹⁷ Together with the members of the so-called “Chicago School” (including Blumer, who coined the term “Symbolic interactionism”), Mead gives shape to a sociological program which acknowledges the previous and constitutive character of society for individuals, while avoiding functionalism’s deterministic and teleological consequences.

His renowned work on the origins of significant communication based on gestural conversation has been crucial for those sociologies that place communicative action and linguistic exchange at the basis of social organization. Signification emerges and resides within the field of the relationship between the gesture of a human organism, and the subsequent conduct of said organism as it is indicated to another human organism by that gesture. If the gesture effectively indicates to another organism the given organism’s subsequent (or resulting) conduct, then it is significant. The matrix

within which signification is born, is a triple relationship between the first organism’s gesture, the gesture with the second organism, and the gesture with the subsequent phases of the given social act.¹⁸ Gesture is not the expression or exteriorization of the organism’s inner sphere: it is gesture in the matrix of social acts.¹⁹

There has been wide recognition of the contribution of this social and systemic consideration of signification for the dissolution of dualisms such as mind and world, nature and conscience. Still, there is a crucial aspect of Meadean philosophy that makes it necessary for us to come back to it today, and bring it into a dialogue with exponents of linguistic turn in NPH: its commitment to the theory of natural selection and to emergentist thesis. As the author explains in *Mind, Self and Society*, the origin of human intelligence is nothing but the mutual adaptation of the acts of human individuals. This social human process is lead, in the lower levels of human evolution, thanks to communication through gestures and, in its higher levels, through significant symbols (gestures with significance are more than mere substitutive stimuli).²⁰ My proposal is to pursue a pragmatic appropriation of emergence as a research program, given that it does not take as a precedent in research the object it must explain.

I wish to make use of emergentism as a historical heuristic given that it allows us to track the emergence of human faculties and processes of extreme complexity, without presupposing an individual or mind apart from the process of emergence itself. The result of this

¹⁸ See Mead, *Mind...*, page 80

¹⁹ See, *ibid.*, pages 7- 8

²⁰ “That which takes place in present organic behavior is always in some sense an emergent from the past, and never could have been precisely predicted in advance—never could have been predicted on the basis of a knowledge, however complete, of the past, and of the conditions in the past which are relevant to its emergence; and in the case of organic behavior which is intelligently controlled, this element of spontaneity is especially prominent by virtue of the present influence exercised over such behavior by the possible future results or consequences which it may have”, *Ibid.*, page 98

¹⁷ See John Baldwin, *George Herbert Mead, A Unifying Theory for Sociology* (Sage: Newbury Park Beverly Hills London New Delhi, 1986); Herber Blumer, *George Herbert Mead, and Human Conduct*, (Altamira: Lanham, 2003); David Miller, *George Herbert Mead, Self, Language, and the World* (University of Texas Press: Austina and London, 1973)

behaviorist and social approach is the acceptance of emergence to account for conscience or mind. Instead of appealing to *a priori* principles, this research program looks into sophisticated products of human society in terms of emergence, as a result of basic and vital social interaction: experience is conduct, and conduct is social.²¹

It is emergentism that makes the active-holistic consideration of significant acts more radical in its disabling of the linguistic idealism and determinism that lurk on every sociolinguistic consideration of knowledge embraced by new philosophers of history in general, and Hayden White in particular. Emergentism allows a dissolution of the dualism between historical knowledge (unfixed, changing and discontinuous) and actual past (fixed and irrevocable), accountable for historical skepticism. In "The present as locus of reality",²² emergentism and active-holistic considerations of significant acts are applied to the study of the nature of the present and experience. Following Whitehead, Mead exposes the notion of instantaneous present as intangible since, strictly speaking, given that instants are infinitely dividable, they cannot be experienced. The present or presents are dense and diverse in its temporal range; they imply a future and a past to which we deny existence.²³ The density of the present is manifested in its own identifying traits: becoming and disappearing, coming to be and ceasing to be. Reality is the reality of our experience in the present, experience being a vital process of self-adjustment between an organism and its environment. It is in this context that, according to Mead, we may ask about the relevance of the existence of a past independent from the present for our experience, and for that of the scientist and the

historian.²⁴ What difference would it make to our research, if we accepted not only the reality of the past, but also its irrevocability, regardless of what happened later on? What would be the importance of the idea that nothing that happened after the occurrence of that past would be able to change its universal or eternal characteristics?²⁵ In relation to our own experience, the past or pasts which we face are both revocable and irrevocable. They are revocable in that even when the historian can reconstruct what happened, and give an authenticated explanation, he will prevent the reconstruction made by historians in the future from differing from ours. But it is also revocable because the world of future historians will not be able to differ from how it is today, unless it rewrites the past that we now see behind us.²⁶ The end or meaning of "what was" belongs to the same present in which that "what was" is explained. That "what was" is so for me or for us now, in our present, and will change for another present. "...against this evident incidence of finality to a present stands a customary assumption that the past that determines us is *there*. The truth is that the past is there, in its certitude or probability, in the same sense that the setting of our problems is there".²⁷

Now, Mead seems to grant some ease for those who believe in the reality of the past, by conceding that irrevocability is never lost: what happened cannot be recovered. However, this does not mean that a real past in which we achieve discoveries will be relevant for our experience, since, again, we need to confront the real past with the present, from the viewpoint of the emergent, the happening of the emergent. The past that we observe from the viewpoint of the emergent is another past, a different one. Why? By definition, the emergent is not a necessary consequence of the past; before it emerged, the past was not a past of that emergent. Nevertheless, once it *has* emerged, the

²¹ "Consciousness, in the widest sense, is not simply an emergent at a certain point, but a set of characters that is dependent upon the relationship of a thing to an organism." *Ibid.*, p. 329

²² En George H. Mead, *The Philosophy of the Present* (Prometheus Books: New York, 2002), page 35

²³ *Ibid.*, page 43

²⁴ See, *Ibid.*, page 36

²⁵ See *Ibid.*, page 39

²⁶ See *Ibid.*, page 43

²⁷ *Ibid.*, page 37

connection with the past it followed *can* be discovered. In other words, the past can be reconstructed, but that reconstruction is a redescription that shows the emergent in the present as following from that past.²⁸ As Mead has shown in “The objective reality of perspectives”,²⁹ the reconstruction of the past in a present is part of that passing, it is an emergent of the process – a self-adjusting process of the organism with its environment. Perspective does not consist of thoughts from God’s viewpoint, or from one external to the process itself. Rather, it is a novel event, undetermined though conditioned by the environment locating those problems which promote a redescription or articulation of the system. There is no idealism (a pure game of ideas) or determinism (reality or past reality determining the ideas of them).

It is now time to tackle the Whitean consideration on the process of historical interpretation, in order to pragmatically embrace his metahistorical proposal, while avoiding idealism or linguistic determinism.

III. In “Narrative, Description and Tropology in Proust”,³⁰ White aims to identify the predescriptive and preexplicative function of interpretation, resulting from the stage he considers preliminary in the grasping of an object through conscience. The modality of discursive articulation cannot be elucidated in logical-deductive terms. Now, not only is White affirming linguistic holism, but he is also moving one step forward by suggesting that the relationship between the elements in an interpretative structure is tropological: that is, they answer to some of the four figurations in classical rhetoric. “Sodome et Gomorre” is, for White, a theory of interpretation applied to the interpretive endeavor itself. The passage in which Marcel contemplates the Hubert Robert fountain describes four perceptions of the falling water, as the character tries to distinguish it while approaching the fountain. The passage has, on the one

hand, a tropological structure and, on the other, a structural similarity with the three previous scenes: the one opening the chapter, an observation of a scene of homosexual seduction; Marcel’s efforts to recognize and identify the taxonomy of noble types and hangers-on; and, finally, an insight on the differences between genuine nobility and its imitations. Each scene shapes a different interpretandum: homosexuality, socially marginalized types, nobility, and a work of art. Each one contains four descriptions of its object in a different figurative mode – each scene has its own tropological structure – and each consists of narrative considerations on the narrator’s effort to recognize and identify the nature and classes of the contemplated objects. Each one, finally, includes a consideration of the narrator’s passage through the dominant forms of figuration: from metaphoric appreciation, to metonymical dispersion of its attributes, to synecdochic understanding of its possible nature, to ironic distancing from the process of interpretation itself.³¹

Interpretation is a discursive articulation carried forth in speech or writing, as a result of unpredictable movements of thought in the form of “turns”. It would not be possible to reconstruct this process logically, but only figurally and tropologically. This means that an interpretation not only presents us with its objects of interest or themes, but also refers us – **not literally, but tropologically** – to the process of figuration itself, which transforms the referent of an object of perception into a possible object of knowledge. That is to say, as discourse it is as much about what it speaks, as it is about the way

³¹ The three scenes serve as main meaning for the scene of the fountain itself, since they allow us to understand the placing of the fountain description within the larger narrative, due to its metanarrational function: the fourth, ironic, description of the fountain as nothing but a fountain allows us to take it as an instruction on the part of Proust to read the events in this story as a story. Between the first and the fourth scenes the connection is not causal or logical, but tropical; this is why White understands it as unpredictable, unnecessary, non deducible, and arbitrary, but also functionally effective and retrospectively sayable as a narrative unit, once its tropical relation is discerned with what precedes it and what follows it (White, p. 132).

²⁸ See, *Ibid.*, pages 36-7

²⁹ En Mead, *The Philosophy of the Present*, page 171

³⁰ En Hayden White, *Figural Realism...*, pages 126-146

it speaks, without it being possible to establish a strict analytical distinction between the metalevel and the object language. Having said this, White affirms in quite dramatic terms that interpretation “wants” to speak the literal truth about its objects of interest, but at the same time it is in itself generated by a fundamental sense of the inadequacy of any literality convention for the representation of those objects.

Laid in these terms, it seems as though White is speaking of discourse as a self-conscious macro subject: a language that wishes, while it knows it cannot fulfill its wish. These expressions seem to leave the door open for all kinds of criticisms of linguistic determinism, reification, and so on. How can we embrace the metahistorical and metalinguistic instrument provided by tropology, while avoiding the slip into cartesianism, or linguistic determinism? How can we avoid a mechanistic reading of the drifts in language? How can we avoid seeing the topological cycle in teleological terms, directed towards an end?

There is a more mundane and less dramatic way of expressing the non logical, non empirical nature of this articulation. Finitism allows us to affirm that every articulation is the result of negotiations carried by active agents according to their interests, and that the relationship between the elements in each interpretation, as well as the different interpretations, can be reconstructed tropologically, instead of logically or rationally. Therefore, inadequacy is essential, not because the referent object is essentially determined and unattainable through language, but because each articulation is the result of a contextual negotiation, contestable by other agents.³²

³² If, as in White, rhetoric is a theory of the topological grounds of speech, discourse and textuality, then that would mean that speaking in discourse can never be done from the perspective of a first-person singular, which would suppose an inner sphere which the critic or historian would have to capture through some kind of empathy process. White’s words on thought or consciousness could wrongly raise suspicions of an opening to introspection. On the contrary, it is my belief

Above all, we must notice that the units studied by intellectual history, history of science, and history of history, are not isolated entities, but ones whose interest lays precisely in their comparison, to observe change and continuity. As with the scenes described by Proust, each articulation and each step from one articulation to another can be topologically reconstructed, thus stressing the unpredictable and contingent nature of a drift which is conversational rather than logical or rational. This is not about structures, nor about objective or subjective relations. Tropology does not face us with an autonomous structure with its own rules – language or discourse – nor with the inner sphere of subjects – thought. Tropology shows us the conversational drifts, possible, contingent, and related to human affairs, in which epistemic, practical-moral and expressive issues come into play controversially and contingently, in a non coherent manner. In other words, it is about accounting for discursive articulation, as though we wished to go beyond the articulation itself, which comes to us at once as closed and coherent, and as not definitively satisfactory. However, this dissatisfaction must not be attributed to an objective inadequacy *vis-à-vis* the independent object. Rather, from a metahistorical perspective we can appreciate it as the result of conflicts of interest between active individuals.

According to White, Proust’s text brings into operation the topological instrument itself. It could be said that the Proustian passage may work as an exemplar of interpretation, which we could apply in the cases that interest us for a reconstruction of the structure of an interpretation, or an interpretive controversy, or the history of interpretations (figurative articulations and rearticulations) of an event or historical-social process.

that it leads to a third-person insofar as it merely analyzes what is visible, and what is visible is that “the structure of the modalities of figuration utilized in the process of transforming the referent from an object of perception into a possible object of cognition” is “among the contents of the specifically interpretative discourse” (White, page 128)

Tropological drift is not a self-directed process from past towards present and future; actually, strictly speaking, it is a retrodictive articulation. There is no need to pass from metaphor to metonymy, and so on. There is no driving force for linguistic change – furthermore, there is no first metaphorical moment from which the other drifts would occur. It is only from the present (or, in other terms, from some specific starting point) that we can articulate the other moments as figures asking for completion, such as the metaphor that will be fragmented into a metonymy, or integrated through synecdoche. We use the future tense, but are operating on our past. All instances allow us to articulate the cycle and reconstruct controversy and agreement. The tropological instrument, by making explicit the practical compromises of each articulation, exposes which interests are in conflict or in agreement whenever a discursive articulation is revised.³³

Specifically, our strategy proposes a pragmatist rereading of White's metahistorical project, as we seek to avoid linguistic determinism and idealism. This will enable, firstly, an appreciation of tropes as significant articulations which are contingent, situated and revocable. Also, it will prevent us from regarding the figural causation (connecting the steps from one trope to another) in terms of a linguistic stream which would be inevitable but unsatisfied by that reality resisting articulation. On the contrary, each tropological articulation is the result of a turn or drift, with which language presents itself as realizing what some previous articulation could not achieve. However, and this is the main point granted by Mead, the inefficacy of the previous articulation and alleged superiority of ours

³³ "...interpretative discourse is governed by the same "configuration" principles... as those used in narration, in order to endow events with the structural coherence of a plot... [Proust's text] ... tells a story in which the individual is both narrator and protagonist, and some themes are the processes of search and recognition, loss and recovery of meaning, recognition and misrecognition, identification and misidentification, naming and misnaming, explanation and obfuscation, illumination and mystification, and so on." (White, 1999, p. 143).

depends on the present situation, and the result is negotiated according to the situation's cooperative interests. If the previous articulation is a forerunner to the present one, this is not a condition that comes from the past, nor does it impel a specific determination from it. This is why the realism of our own tropological articulation depends on the context, and is thus contingent and revocable through further tropological turns. These will measure their superiority not by an effective comparison to the previous articulation, but rather in relation to new situations. This reading from the perspective of social pragmatism captures the contingency and revocability of every conceptual-linguistic articulation (in general, and historiographic ones in particular), without resorting to a reality reluctant to articulations or independent from them. Moreover, it allows us to acknowledge the usefulness of metahistorical instruments when analyzing historiographic controversies.

CONCLUSION

Pragmatist contributions born from reflections on social studies enable us to sidestep structural-functionalist social semiotics of language and metalanguage.³⁴ That is to say: the activities through which members of a society produce and handle situations in everyday organized activities are the same as the methods used to render those contexts explainable. White has shown a relentless

³⁴ In a similar direction, Cecilia Hidalgo describes the Wittgensteinian turn offered by anthropologist C. Geertz, which avoids the heteronormatization of language. The difference in philosophical and theoretical-methodological stands between Lévi-Strauss and Geertz is enormous, and their metaphors are a good illustration of it. It is metaphors of play and drama, and above all that of social action as text, that allow Geertz (1973, 1980, 1983) to distance himself from a structuralist-functionalist social semiotic. (Cfr. Hidalgo, "De las máquinas y los organismos a los juegos y los textos: el valor cognitivo de las metáforas en ciencias sociales" [TN: "From machines and organisms to games and texts: on the cognitive value of metaphors in social sciences"], in Tozzi and Lavagnino (eds.), *Hayden White, la escritura del pasado y el futuro de la historiografía*, [TN: *Hayden White, the writing of the past and the future of historiography*], Buenos Aires, EDUNTREF, in press).

effort to produce a metalinguistic instrument capable of tracking down conceptual or interpretative change, as well as articulations, disarticulations and rearticulations. My thesis is that in order to enter this metahistorical game of metalinguistic nature, it is not necessary to appeal to two separate ontological realms, with different rules – be it thought and language, language and world, concept and event, and the like. Tropes and metahistorical concepts are in themselves linguistic interventions, carried out in view of the interest in reconstructing conceptual change. This interest is situated and will have an impact on the resulting rearticulation which – whether conflictive or agreed upon – will always be contingent and subject to revision according to existing interests. Furthermore, each new metahistorical articulation (such as those made by historians of science or historians of history) is an intervention on the present which answers to an environmental readjustment; it is the emergence of a novelty the validity of which depends not on determining conditions of the past, but on the new negotiation – in this case, for the new community of historians of history or of sciences. There is no such thing as linguistic determinism, but rather active agents making use of their instruments. Nor is there a risk of self-refutation in self-referentiality: metahistorical devices can be applied to metahistorical exercise itself; figurations can be understood figuratively, as can tropes, tropologically.

Finally, it is true that there will be relativism, but this does not imply that metahistorical articulations and rearticulations are arbitrary or idiosyncratic. Rather, they are contextual insofar as they are the active products of the agents' interests negotiations; they are contingent and unpredictable in their revision. With this, we are not merely cautioning on the non-existence of laws or linguistic codes capable of guiding us through our metahistorical games; we are also acknowledging that we must negotiate our interests when it comes to the production of new rearticulations able to retrospectively reconstruct change or drifts.

**DEWEY ON THE REFLEX ARC
AND THE DAWN OF THE DYNAMICAL APPROACH
TO THE STUDY OF COGNITION**

A. Nicolás Venturelli

UNC/CONICET

nicolasventurelli@gmail.com

1. Introduction

In this article I assess the relevance that the pragmatist philosopher John Dewey, and particularly his famous 1896 article “The reflex arc concept in psychology”, assume for a historical revision of the group of research programs that here I will conveniently call ‘embodied cognitive science’, with a focus on the related dynamical approach. The specific contribution of my work focus on the shift from Dewey’s conceptual analysis in his article to the way in which during the last years those research programs have developed their methodological profile and put it down to work in the experimental and modeling practices. The hypothesis that I here defend is that, under a certain interpretation, Dewey’s article plays the role of the main intellectual precursor in the development of embodied cognitive science in its particular dynamicist strand.

My contribution builds on the following steps. After a brief introduction to the embodiment movement in the cognitive sciences, I give reasons to justify a degree of continuity between these recent developments and Dewey’s pragmatist philosophy, taken as a whole. I then turn to a thorough analysis of the central ideas in Dewey’s article, following certain precisions regarding its interpretation: I divide my considerations between the critical and positive contributions which can be extracted from the article and which can justifiably be redirected to the lines of work within the dynamical approach in the cognitive sciences. In this way, I specify in what sense Dewey’s contributions establish certain decisive conceptual bases underlying those lines of research.

Finally, it is appropriate to mention some of the existing publications driven by motivations similar to mine here. Firstly, Bredo (1994) draws a connection – although not on the methodological level that interests me here – between Dewey’s proposal and the situated cognition movement of the late 80s, with a special interest in the educational aspect of the problem. Another precedent is Gallagher (2009), who specifically shows the continuity existing between Deweyan philosophy of mind and the so called enactive view, in the particular version developed by philosopher Alva Noë (2004, O’Regan & Noë 2001). The main difference between my approach and that of these authors is that I am interested in the philosopher’s contributions as fully immersed in the philosophy of the special sciences, and accordingly as solutions to problems concerning the establishment and conduction of scientific research.

2. A quick glance at embodied cognitive science and the dynamical approach

Embodied cognitive science (Clark 1999) can be briefly defined as a vast group of research programs from different areas of the cognitive sciences, comprising research based on the idea that cognitive abilities necessarily integrate the complex interplay between the agent’s brain and body as well as relevant features of the proximate environment. Many of these research programs promote an enrichment of abstract models which make possible to approach the abovementioned complex interplay of simple mechanisms encompassing bodily and environmental factors for the emergence of intelligent behavior.

Among the conglomerate of programs that can be included within the general denomination of embodied cognitive science and that in addition resulted in experimental and modeling approximations, the dynamical approach (Beer 2000, Port & van Gelder 1995) has had, probably more than any other, a strong impact on the field. The dynamical approach stands out, on the one hand, for its innovative and radical character vis-à-

vis classical approaches such as the information processing paradigm (for example, Palmer & Kimchi 1986 and Simon 1979) or, more generally, cognitivism (for example, Haugeland 1975) and, on the other hand, for its characteristic brand of cognitive-scientific approach. This last point rests mainly on the application of the mathematical theory of dynamical systems (Strogatz 1994) to the study of cognitive processes. This theory provides a rich mathematical language as well as modeling and graphical tools for the precise description of the behavior of complex systems in their temporal evolution.

A dynamical model consists in a state space defined in terms of dynamic variables that represent the relevant properties of the system and a set of non-linear equations which describe how the state of the system varies in time. The behavior of the system is then generally compared with experimental data about the cognitive performance of real agents. The explanatory focus is set on the structure of the space of the system's possible trajectories (behaviors) and the internal and external forces which shape them; the inputs are thus construed not as specifying an internal state which somehow describes an external state of things but as a source of perturbations in the system's internal dynamics.

Along these lines, the dynamical approach mainly entails understanding an organism's behavior as an exclusive property of the coupled system organism-environment, not ascribable individually to any of its parts. In turn, the relations between the nervous system and the body of the organism constitute in the same way a coupled system (cfr., Beer 2000: 97). Two systems are said to be coupled when the parts that comprise each of them engage in dense interactions of mutual influence, on account of which the alteration of one component by the action of another in turn will affect it and so on. I end here this very brief presentation of embodied cognitive science and its dynamicist strand.

3. Common threads in general epistemology

Before turning to my analysis of the 1896 article and its connection to the dynamical approach, it is important to highlight the general epistemological position defended by Dewey – his stand in Experience and Nature being especially relevant – to the extent that it shows some common threads with embodied cognitive science, conceived as a group of related approaches in the cognitive sciences. At first sight, this affinity is straightforward. One ought to firstly point out that, as a pragmatist philosopher (and as his distinguished predecessors, Charles Peirce and William James), Dewey defends a view of beliefs as tools or guides for action. For example, following Godfrey-Smith (1996a), the question of knowledge according to Dewey is that of explaining how structures and patterns of agent-environment interactions can adapt and evolve to help dealing constructively to changing circumstances that pose new problems, challenges and opportunities to the organism.

However, as Godfrey-Smith (cfr. 1996a: 6) points out, Dewey departs from the preceding pragmatist tradition inasmuch as he explicitly describes intelligent action as a response to problematic situations of the environment where it develops. In particular, he stressed the relevance to psychological research of taking into account the structure of the environment in which cognitive agents operate: along these lines, it can be argued that Dewey defended a strongly interactionist view of cognition and the agent-environment relationship (I will return to this point later on). This places him in the vicinity of the sort of worries that drive embodied cognitive science: a focus on lower level cognitive skills and the structure of an organism's environment.

From the standpoint of contemporary philosophy of cognitive science, this last point is not at all trivial, attending specifically to the methodological solipsism

(Fodor 1980) characteristic of the chomskian tradition, which directed cognitive-scientific inquiry to an internal center of operations responsible for intelligent behavior. A closely associated idea is a particular view of perception understood as the input to those internal structures and a corresponding view of action understood as its output: an idea that is the core target of the critique and the proposal that, as we will see, are put forward in Dewey's article.

The work of Johnson and Rohrer (cfr., 2006: 19) is, as far as I know, the first philosophical attempt to explicitly portray Dewey and, in general, the pragmatist tradition as a predecessor of the recent embodiment movement. It is useful to attend to their reconstruction of five general tenets in the pragmatist view of cognition that have been somehow inherited by embodied cognitive science:

1. Cognition is the result of evolutionary processes.
2. Cognition is situated within a dynamic ongoing organism-environment relationship.
3. Cognition operates relative to the needs, interests, and values of organisms (that is, it is problem-centered).
4. Cognition is concerned with solutions that work well enough relative to the current situation (that is, it is not directed towards perfect solutions).
5. Cognition is often social and carried out cooperatively.

These five tenets offer a global idea of the general notion of cognition shared by the pragmatist tradition and the embodiment movement.

To finalize these considerations regarding the epistemological position of Dewey qua exponent of American pragmatism, I'd like to transcribe some quotations that I find very eloquent in regards to its strong connection with embodied cognitive science as I have depicted it. Consider for example the following

extract from the introduction to *Essays in Experimental Logic*:

Hands and feet, apparatus and appliances of all kinds are as much a part of [thinking] as changes in the brain. Since these physical operations (including the cerebral events) and equipments are a part of thinking, thinking is mental [...] because of what physical acts and appliances do. (Dewey 1916: 14)

This quotation not only manifests roundly the relevance of taking into account the body for a study of the brain's operations and, by extension, the cognitive architecture on an agent, but it also points clearly in the direction ("apparatus and appliances") of the movement behind cognitive extension and the extended mind thesis (Clark & Chalmers 1998), closely aligned with embodied cognitive science.

Consider now the following extract from *Experience and Nature*: "To see the organism in nature, the nervous system in the organism, the brain in the nervous system, the cortex in the brain is the answer to the problems which haunt philosophy" (Dewey 1925: 198). It is impressive to see this idea being put back to work today in the embodied cognition literature in cognitive neuroscience, particularly regarding the recent attack on so-called neurocentrism, i.e. the idea that no factor external to the functioning of the brain is relevant to cognitive-neuroscientific research (see, for example, Chiel & Beer 1997, and Thompson & Varela 2001). It's time to finally move on to "The reflex arc concept..." and, specifically, its relation to the dynamical approach in the cognitive sciences.

4. Dewey and the concept of reflex arc in contemporary cognitive science

4.1. "The reflex arc concept in psychology" and its interpretation

"The reflex arc concept in psychology" is regarded as one of the most important articles in the history of scientific psychology. As Leahey (1998: 348) points out, in 1943

the article was selected as one of the most relevant pieces of work to ever be published in the *Psychological Review* and it remains as well one of the most cited articles in the journal. Now, leaving aside its well-known role as a foundational contribution to American functional psychology, I intend to show in what follows that the conceptual depth of the article goes well beyond its already acknowledged contribution to the history of psychology: the article's conceptual richness is still very alive today and particularly because, as I will here argue, it resonates strongly with the theoretical and methodological profile of the outlined dynamical approach in the cognitive sciences.

A standard interpretation of the article associates it mainly with a critique to certain assumptions, tied to the concept of 'reflex arc', underlying the pre-behaviorist psychology of the historical period when it was written. Dewey starts identifying in the idea of the reflex arc a certain response, at the moment increasingly endorsed, to the need of a general working hypothesis capable of systematizing vast amounts of experimental data that were being collected. Dewey's main objective is to show that the then novel idea of the reflex arc was still insufficient to displace certain prevailing principles of classification and explanation in the psychology of his time. Towards this end, the author approaches specifically the problem of sorting out the consequences of taking the notions of 'stimulus' and 'response' as independent ones, a maneuver which Dewey himself defines as a sort of persisting dualism:

The older dualism between sensation and idea is repeated in the current dualism of peripheral and central structures and functions; the older dualism of body and soul finds a distinct echo in the current dualism of stimulus and response. Instead of interpreting the character of sensation, idea and action from their place and function in the sensory-motor circuit, we still incline to interpret the latter from our preconceived and preformulated ideas of rigid distinctions between sensations, thoughts and acts. (Dewey 1896: 357-8)

It is worth pointing out that the conceptual contributions Dewey is set to develop by elaborating on this strong statement do not stand apart from the possibility of their concrete application to some line of psychological research. What Dewey does at the outset is highlighting a particular analysis of action, already endorsed by the psychology of his time, under certain descriptive resources ('stimulus' and 'response'), which, in his opinion, constitute conceptual abstractions of a continuous and coordinated sequence of events. Specifically, he is going to argue later on that, if the word 'stimulus' is to be applied to the description of agent-environment coordination it should be used to refer not to environmental events (i.e., external events) but to those aspects of the coordination which specify the state of affairs (the stage of organization) that it is trying to maintain.

In a straightforward way, then, our philosopher intends to restrict the semantic scope of the concepts of stimulus / sensation and response / action within the context of psychological theorization and research setting. Given this, I attempt in what follows to retrieve the "methodological sediments" associated with the outlined conceptual contribution by Dewey, or, in other words, to show in what way specific descriptive resources taken as general assumptions impact on the praxis of psychological research – in consonance with this, it is worth mentioning that Dewey concludes his article stating that "[t]he point of this story is in its application" (Dewey 1896: 370), an elaboration that the author postpones to another (vanished) occasion. It will later become clear how the counterpart of Dewey's critical assault is picked up by the recent dynamical approach.

Before moving on to this, however, it's important to define certain lines of interpretation of an article that in this sense has historically turned out to be troublesome. According to Ballantyne (1996), the article has systematically been misinterpreted and underestimated.

For example, it has been read as a defense of the concept of 'reflex arc' by some proto-behaviorists in the sense that Dewey was trying to apply a physiological concept to psychology. More commonly, it has been interpreted as an original proposal surrounding the idea of a reflex circuit (this is the kind of interpretation of great names of functional psychology, and Dewey's fellow colleagues at the University of Chicago, such as James Angell and Harvey Carr) instead of the already outdated concept of reflex arc.

The first interpretation – reconstructed and criticized by Manicas (2002), and attributed to historians like Ernest Hilgard, who saw Dewey as part of an ongoing process that lead to Watson's behaviorism – is patently wrong as far as the object of Dewey's conceptual analysis is the psychological appropriation (and the associated consequences) of a concept originally product of XIX century physiology: that appropriation and its consequences are exposed in the hands of Dewey to a hard critique in the context of psychological theory.

On the other hand, the second interpretation can be undermined by analyzing the text. A view along these lines is offered by Ballantyne (1996), who criticizes the scheme 'reflex arc versus sensorimotor circuit' and subsequently rejects the idea of the sensorimotor circuit as a position forged and defended by Dewey so as to replace another purportedly inadequate position. I tend to adhere to Ballantyne's reflections, particularly with regards to their implications to the kind of Deweyan philosophical contribution which, as I've already stated, would take him not so much as an epistemologist (in the traditional sense) than as a philosopher of the special sciences, in this case, a philosopher of psychology. However, I recognize in the article much more of a substantive proposal (see subsection 3) than Ballantyne would seem to be willing to acknowledge.

As I have already spelled out, besides the considered alternative interpretations, the standard reading of

Dewey's famous article is in terms of a clear-cut critique of behaviorist psychology before it had established in the American academic community. In my opinion, this remains however a poor interpretation of the ideas laid down by Dewey: From a contemporary perspective, a richer interpretation can be fully justified and 'come to life' given the dynamicist background I set here. Specifically, in opposition to the standard reading, I think critical as well as positive aspects can be distinguished in the article regarding the establishment of a certain approach to the study of cognitive phenomena. In what follows I will assume this distinction in order to analyze certain central themes proposed by Dewey and recovered by the dynamical approach in the cognitive sciences.

A final point worth stressing is that the particular interpretation I will propose is a markedly methodological reading of Dewey's critique and proposal, both interpreted as concerning the definition of variables by experimental psychologists, the explanatory style and the object of study in psychology. It can be mentioned that this kind of strategy is explicitly rejected by Jordan (1998). This author, for one part, understands that Dewey's critique must be interpreted on a theoretical, not methodological, level (not, for example, in terms of the manipulation and control of independent variables to study its relation with dependent variables) and, for another part, proposes that Dewey is making use of a specific methodological distinction (between stimulus and response) to theorize about perception. Although Jordan is not interested as I am in projecting relations of continuity with approaches which clearly exhibit a methodological dimension, it will be clear that the proposed interpretation does not misrepresent Dewey's reflections and that, much on the contrary, shades some light on the warnings of an acute critic and his call for a style of psychological research that only very recently has taken on its full form.

4.2. Critical aspects

As anticipated, I start with certain critical aspects that can be extracted from Dewey's article, directed towards the format of psychological research. The various proposals framed within embodied cognitive science take as their starting place some kind of opposition to classical cognitive science, i.e., they developed mainly as a reaction to established models of cognitive research. In this regard, it is worth highlighting that Dewey's main motivation in the article is a discomfort with then active or growing tendencies and the corresponding search for alternatives to the models on offer in psychology (a search which then took shape in the soon to be baptized functional psychology). In the second paragraph, Dewey makes clear:

In criticising this conception [the reflex arc] it is not intended to make a plea for the principles of explanation and classification which the reflex arc idea has replaced; but, on the contrary, to urge that they are not sufficiently displaced, and that in the idea of the sensori-motor circuit, conceptions of the nature of sensation and of action derived from the nominally displaced psychology are still in control. (Dewey 1896: 357)

Besides favoring Ballantyne's critique of the reading 'reflex arc versus sensorimotor circuit', the presence of a reactive impulse behind the philosopher's subsequent elaborations can be appreciated very clearly.

Let's now attend to the core of Dewey's proposal: the critical assessment of the concept of reflex arc taken as a unifying principle in psychology. The critique encloses two central points that are picked up by several lines of work in the dynamical approach, especially in its departure from cognitivism. In the first place, the critique conceals in the already introduced artificiality of the stimulus / response constructs conceived as separate events, an assault on the persistent associationism in the cognitive sciences: this assault has its roots in the input-output scheme reproduced by behaviorists to design and conduct experiments but also to articulate subsequent experimentally informed theorizing. The idea of a

methodology of the imposed stimulus (Reed 1996: 269), which researchers adopted from XIX century neurophysiology, has sometimes been construed along these lines as an inappropriate methodological framework for psychological processes.

In cognitive psychology, for example, the input-output scheme may manifest itself in the practice of directly referring measurements taken from human behavior to causal properties of specialized components of the mind-brain. The case of reaction-time measurement, as popularized by Sternberg (1969), is a prototypical tool underlying this kind of practices, which consists in measuring the time elapsed between the presentation of a stimulus and the onset of the execution of a given task: By measuring the time subjects take to recognize certain relations between perceived objects, carry out logical puzzles, make choices, and so on, inferences are made about the components and mechanism of the underlying cognitive processes. This can be generally seen as an 'atomistic' tendency consisting in isolating elements within the process which goes from perception to motor response.

For another part, as we have seen, the dynamical approach is characteristic in its adoption of a global approximation towards the system under study, in which its inputs are modeled as perturbations of its internal dynamics. Likewise, the output of the system is not conceived as an inert product and in particular dissociable from the system's own dynamics. Recent modeling work on simple behavioral phenomena along these lines, such as the cases of categorical perception in Randall Beer's evolutionary robotics program (Beer 2003) and the task of retrieving a hidden object in Esther Thelen's developmental psychology program (Thelen et al. 2001) clearly answers to the kind of concerns anticipated by Dewey.

The second central point behind the critique of the reflex arc idea, also retrieved by the dynamical approach, is

even stronger from a philosophical point of view. As I have anticipated, Dewey speaks of a dualism – a kind of metaphysical dualism, as he specifies later on (Dewey 1896: 365) – which stems from the idea of the reflex arc and its application to psychology. This has been an oft invoked accusation by dynamicist philosophers and scientists. In spite of the resounding materialism hailed from virtually every area of cognitive science, the critical point here is that in current research practices a kind of dualism, almost certainly not of a metaphysical kind but which impacts at a methodological level, is still at work. A common framing of this accusation is that this kind of dualism underlying cognitivism is a byproduct of the enduring computational metaphor: according to this sort of dualism it would be assumed that the chomskian mind-brain (Chomsky 1989) operates under principles different from those underlying the rest of the body and the natural world.

It is worth mentioning that during the last few years the strength of radical functionalism and the multiple realizability thesis – firm philosophical mainstays of the first cognitivist wave which in different ways authorized the cognitive scientist to leave aside the physical substrate where cognitive processes instantiate – has considerably weakened, partly on account of the recent emergence of cognitive neuroscience. Still, the accusation of a filtered dualism in cognitive-scientific research has undoubtedly been a search engine in the dynamical approach from the first years of the '90s, when it was taking off. But, more importantly, the application of dynamical systems theory inasmuch as it provides a vocabulary with the potential to reconcile different levels of description and explanation (for example, cognitive, behavioral and brain processes) constitutes a promise to sort out the eventual isolation between different levels of theorization in the cognitive sciences.

At a highly general theoretical level, the main idea is that physical interaction with the world is as such part of the

cognitive activity (this, in rigor, is an idea that Dewey develops in detail later on in his *Essays in Experimental Logic*). As much as that what results is still more properly a project still in its infancy, it can be claimed that the dynamical approach sets itself up on a reaction to a kind of dualism, in the end between body and mind, already identified by Dewey in the psychology of his time.

An additional critical aspect of the Deweyan proposal, also picked up by the dynamical approach, hinges on the problem of the object of study of a scientific psychology. As a foundational text of functional psychology, "The reflex arc concept in psychology" reaffirms the idea that cognition manifests generally before the cognitive agent's immediate difficulties and needs: In particular, the idea of adaptation plays a central role in the Deweyan conception of cognition, mainly due to the strong Darwinian influence on the philosopher (Dewey 1910). The associated requirement of ecological validity is one of the main characteristic features not only of the dynamical approach but also more generally of embodied cognitive science, which in turn displays the great intellectual debt towards the gibsonian ecological approach.

Now, the critical side to this – not made explicit by Dewey and strictly a little discordant with later developments such as *Experience and Nature* (on the role of the environment in Dewey, see for example Godfrey-Smith 1996a: 115) – is an objection to the framing of psychological questions in terms of the adjustment of a cognitive system to the demands posed by stimuli and its subsequent generation of an adequate motor response: this kind of framing, in fact, recapitulates the characteristic dynamic of the cognitivist model 'perceptual input-cognitive processes-motor output', typically rehearsed in the context of such activities as planning and problem-solving. Clearly, this last point also stems out from the assumption of a clear-cut division between stimulus and response, heart of Dewey's critical stand.

Finally, and taking up again the first critical point behind the reflex arc idea relative to the stimulus-response scheme, this same scheme has an impact on the kind of explanation aimed at in the cognitive sciences. Several philosophers of cognitive science tried to characterize the cognitivist style of explanation. However, many of the most influential versions (for example, Clark 1997, Bechtel 1998, Haugeland 1978) share the feature under the Deweyan assault. This kind of explanation centrally assumes a strategy of decomposition of the relevant parts of the system in terms of their relative contribution to the information processing necessary to perform a given task. This analytical assumption is a central corollary of the reflex arc critique aimed as it is at unveiling the associationist residues in psychological research: It surfaces as much at the level of research setting as it also does in the style of explanation assumed in the cognitive sciences.

I add two related final remarks. In the text Dewey explicitly refers both to a derived simplification that does not make justice to the object under study and to an undesired staticity in psychological explanation; both features can be associated to the fragmentation and the linear treatment of individual components, typical of cognitivist explanation – a procedure that some moderate critics label ‘boxology’ (Dennett 2001). I quote below two fragments which, respectively, illustrate both points. In the first place, regarding the danger of oversimplification in psychological explanation, and specifically referring to his invitation to think more in terms of what he calls an organic circuit than in terms of the reflex arc, Dewey states: “It is not a question of making the account of the process more complicated, though it is always wise to beware of that false simplicity which is reached by leaving out of account a large part of the problem” (Dewey 1896: 363-364).

Secondly, Dewey later on spells out the known psychological or historical fallacy, in this case directed towards the illegitimacy of abstractions couched upon

the reflex arc concept. We’ll see later on how the dynamical approach can be interpreted mainly as an attempt to avoid this kind of fallacy. Dewey portrays it as follows:

A set of considerations which hold good only because of a completed process, is read into the content of the process which conditions this completed result. A state of things characterizing an outcome is regarded as a true description of the events which led up to this outcome. (Dewey 1896: 367)

When this is understood in the context of a debate on psychological explanation (once again, as philosophers of the special sciences) the core of the critique hinges on its staticity: a focus on the study of psychological or mental states (“state of things”) taken as valid for the study of the (dynamical) processes which lead to them.

4.3 Positive aspects

Let’s turn now to consider some of the positive aspects that can be extracted from Dewey’s article towards the establishment of a specific approach in psychology. To begin with it is convenient to round up the issue of psychological explanation. In his appeal to a more encompassing organizing principle that won’t reduce to rigid distinctions as those of sense, idea (in today’s terminology, cognition) and action, Dewey proposes the idea of coordination: he considers that stimulus, idea and response are phases of a division of labor embedded in a global coordination of action directed towards adaptive ends. This notion of coordination can be defined as a continuous and coordinated sequence of events for the maintenance of a particular state of organization in the agent relative to environmental changes.

In relation to this, it’s worth mentioning that one of the pioneering and most fertile lines of work clearly falling within the dynamical approach in the cognitive sciences is the coordination dynamics program lead by J. A. Scott Kelso (1995). This program constitutes an attempt to

identify, through the tools of dynamical systems theory, the key coordinative variables of a particular system under scrutiny, and to describe its dynamics, conceived as rules which determine the stability and change of coordinative patterns, and the non-linear coupling between the components generating those patterns. I specifically mention Kelso not only for his historical relevance in the recent establishment of the dynamical approach but also because his program is an example of how the idea of coordination in a psychological context has been recovered and put to work in the experimental and modeling practices in the cognitive sciences.

Now, what I want to stress here, with reference to psychological explanation, is specifically the interactive character brought to the fore once the idea of coordination is placed at the basis of psychological and cognitive-scientific inquiry. The already introduced idea of coupling (between agent and environment, and brain and body) in fact promotes a sort of interaction-centered approximation, consisting in the study of cooperative behavior between many interacting elements, at the same time that the language of dynamical systems theory represents the main instrument to enable an approximation of this kind.

A related point is that in this way the unified treatment of interactions between perception and action, conceived as overlapping and cognitive processes, is encouraged – in stark contrast with the already mentioned assumption of the segmentation of cognitive processes, commonplace in cognitive psychology. By and large, moreover, attention is shifted from mental states and their contents towards adaptive processes in its temporal development, in full agreement with Dewey's warning about the psychological fallacy.

In the article there are several theoretical projections that later on have been endorsed as mainstays of the psychological account of perception (especially, of vision) put forward by James J. Gibson, without a doubt

one of the main scientific antecedents of the dynamical approach. For instance, regarding the general preconception of the nature of perception and its function, Gibson's view and the view Dewey develops in "The reflex arc concept in psychology" is almost equivalent. In reference to the Jamesian example of the boy and the candle, through which he illustrates his notion of coordination, Dewey affirms: "...we now have an enlarged and transformed coordination; the act is seeing no less than before, but it is now seeing-for-reaching-purposes" (Dewey 1986: 359). This idea of "seeing-for" is absolutely consonant with the gibsonian stand on the role of vision: Gibson (1979) draws a clear-cut distinction between understanding the purpose of vision as, on the one hand, one of reconstructing from the bottom up a model of the world from primitive stimuli (that is, in the fashion of classical representationalist proposals such as Marr's (1985)) and, on the other hand, one of guiding the actions of the perceiver in a dynamical environment. In line with this second perspective, the immediate methodological upshot for the study of perception is the idea that the active role of the agent in its environment should not be relegated, an idea that has been put down to work by Gibson himself in his experimental settings.

This theoretical line that sketches the intimate relation between perception and action has been vigorously reassessed by Alva Noë (2004; for a cognitive science oriented presentation, see O'Regan & Noë 2001) among other theorists. Here too affinities on a theoretical level are striking. The main Deweyan idea reintroduced in this case is that perception is part of a coordinative sensorimotor process. In Leahey's words, "In developing his own motor theory of mind, Dewey does not take perception to be the passive register of an impression but a behavior in itself, conditioned by other behaviors happening at the same time" (Leahey 1998: 347).

Noë states as his main thesis precisely the idea that perception is a kind of behavior. In a more precise

formulation, Noë's position establishes that the ability to perceive is partially constituted by what he terms 'sensorimotor knowledge', i.e., the practical, implicit grasp of sensorimotor contingencies, which in turn constitutes the way sensory stimulation varies as the perceiver and the perceived object move. With this in mind consider now the following declaration by Dewey, again in the context of the boy and the candle example:

Now if this act, the seeing, stimulates another act, the reaching, it is because both of these acts fall within a larger coordination; because seeing and grasping have been so often bound together to reinforce each other, to help each other out, that each may be considered practically a subordinate member of a bigger coordination. (Dewey 1896: 359)

It does not seem excessive to assert that the roots of the current proposal in terms of the formation of sensorimotor contingencies as a kind of practical and implicit knowledge are to be found in this proposal of a reinforcement generated by the reiterated joint activity of seeing (or perceiving) and acting.

Another positive aspect of Dewey's view, once again inherited by dynamical approach, concerns the problem of defining the object of study in psychological (and cognitive-scientific) research. As I have already mentioned, the most purely functionalist (in the sense of the classical functional psychology) thesis that can be extracted from the article is that behaviour and cognition can be understood not in terms of its constituting parts but in terms of the role they play in the cognitive system's adaptation to its environment. From a methodological point of view, this thesis fundamentally entails a larger unit of analysis, more encompassing than the chomskian mind-brain, exclusive object of study in the cognitivist tradition.

In particular, the importance conferred to the pragmatic context (in which something takes the form of stimulus in relation to another event configured as a response) implies, at the level of research setting, the inclusive

consideration of the agent's actions, their effects on perceptive processes, behavioural subroutines and relevant features of the environment. The importance of taking into account the role of an embodied agent acting in a changing environment for the study of cognitive processes thus affects our take on the object of psychological and cognitive-scientific study.

A last central point I want to highlight is the relevance of temporal considerations for the study of cognition. This is a key aspect of the dynamical approach, especially with regards to the application of dynamical systems theory and by extension its ability to describe the temporal evolution of complex systems' behaviour. Although in the article Dewey is not explicit on this matter, his rejection to understand stimulus, idea and response as separately occurring events goes in this direction. (It is also worth adding that, in his *Essays in Experimental Logic* – originally written in 1903 and hence close to "The reflex arc concept in psychology" in the author's intellectual evolution – Dewey stresses the importance of temporal considerations in psychological research and, in this way, can be considered a prominent philosopher who connected a focus on the temporal dimension of thought processes with a pragmatist view of knowledge.)

5. Conclusion

Building, on the one hand, on general considerations surrounding Dewey's pragmatism and, on the other hand, on considerations elaborated from an analysis of both critical and positive contributions in "The reflex arc concept in psychology", I have justified a strong continuity between the philosopher's elaborations and recent embodied cognitive science, specifically the dynamical approach. The critique of the reflex arc concept and the related proposal hinging on the idea of coordination, both developed in the 1896 article, can thus be regarded as relevant historical contributions for

a study of the intellectual roots of these recent tendencies in contemporary cognitive science.

The hypothesized affinity at a theoretical and methodological level of psychological and, in general, cognitive-scientific research setting is sustained on a series of common themes already present in Dewey's article and elaborated there as conceptual projections; these themes are recovered and refined by current approaches, functioning today as a sort of operational framework put down to work in research contexts. I have thus highlighted Dewey's role as an intellectual precursor in their development, a precursor of broad scope, considering the number of these common themes, and of great depth, considering their high degree of compatibility. Additionally, this historical connection in turn reveals how the critique of the stimulus-response or input-output scheme enshrines much of the theoretical assumptions and methodological profile distinctive of the dynamical approach in the cognitive sciences.

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SACRED/PROFANE

– THE DURKHEIMIAN ASPECT OF

WILLIAM JAMES'S PHILOSOPHY OF RELIGION*

Claudio Marcelo Viale[§]

UNC/CONICET

cmviale@gmail.com

"In a word, the old gods are growing old or already dead, and others are not yet born... but this state of incertitude and confused agitation cannot last forever. A day will come when our societies will know again those hours of creative effervescence, in the course of which new ideas arise and new formulae are found which serve for a while as a guide to humanity; and when these hours shall have been passed through once, men will spontaneously feel the need of reliving them from time to time in thought, that is to say, of keeping alive their memory by means of celebrations which regularly reproduce their fruits" (Durkheim (2008) [1912] 427-8).

Moral mediocrity was the vehement statement used by Émile Durkheim to describe his time. Dead or aged gods and unborn ones constituted the backdrop against which a faint hope rested: that new gods appeared and gave sense to worship rituals. Meanwhile, William James embodied the opposite of the French sociologist's expectant pessimism. Declining rites, ceremonies, and theologies gave James a robust hope: that the shell of

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[§] Centro de Investigaciones Científicas y Tecnológicas (CONICET) Centro de Investigaciones "María Saleme de Bournichon" de la Facultad de Filosofía y Humanidades (CIFYH), Universidad Nacional de Córdoba (Argentina), Pabellón Agustín Tosco, Ciudad Universitaria, Casilla de Correo 801, 5000. Te/fax: 54-0351-4334061. I thank Natalia Lorio and Mauro Cabral for having read preliminary versions of this manuscript, and Larry Hickman and Daniel Kalpokas for their suggestions. The present work was written within the framework of two research projects: "A Comparative Analysis of Josiah Royce's and William James's Philosophies of Religion: Philosophical Context of Production and Influences" "Un análisis comparativo de las filosofías de la religión de Josiah Royce y William James: contexto de producción filosófico e influencias", PIP 2011-2013 (CONICET, Argentina) y "Public Sphere, Conflict of Values and Experience: a Pragmatic Perspective" Esfera pública, conflicto de valores y experiencia: una perspectiva pragmática" FFI2008-03310/FISO 2009-2011 Ministerio de Ciencia e Innovación (España).

religion led to its core, i.e. each individual's acts and feelings before the deity. Faced with a common horizon (i.e. increasingly complex societies, inevitability of answering the dominant scientific speech, academic susceptibility towards religion, decline of traditional creeds, etc.) Durkheim and James have developed two of the most influential twentieth-century conceptualizations on religion.

Two significant similarities between their theories concern methodology: on the one hand, their points of departure when dealing with the religious phenomenon are allegedly scientific –or at least not incompatible with science– conceptions; on the other hand, both leave aside beliefs and representations as the core of religion, and instead regard experience as its axis.

As it is well known, both authors are normally conceived of as representing two opposite theories. The first interpretation which considers both theories as radically opposed is Durkheim's. In *Pragmatism and Sociology* he strongly criticizes pragmatism as a philosophical project, the main target of this attack being the work of William James, whom Durkheim regards as its main representative. Meanwhile, the French school of sociology did not substantially modify the Durkheimian criticism of pragmatism. The inverse relationship was not too fruitful either, since those theoreticians interested in James's work (mainly philosophers and psychologists) did not relate him to Durkheim.¹ In other words, Émile Durkheim is conceived of as one of the most prominent figures of *collectivism* and/or *sociologism*, while William James's work is regarded as one of the paradigms of *individualism* and/or *psychologism*.² Their conceptions of religion, meanwhile, have been interpreted following a

¹ Jack Barbalet (2004) and Hans Joas (1997) stand out among remarkable exceptions.

² Joas (1997) and Sue Stedman Jones (2003) have nuanced the differences between James and Durkheim. The former sustaining that Durkheim as well as James highlight the value of experience over conceptualization regarding religious issues. Meanwhile, Stedman Jones stresses the importance of James's work for the central arguments of *The Elementary Form of Religious Life*.

similar pattern: Durkheim is the sociologist who is interested in the ritualistic and collective aspect of religion; James, on the other hand, is the psychologist who analyzes the individual and personal relationship with the deity, which he conceives as the core of religion.

Without disregarding the differences between both perspectives, my hypothesis in this article is that James's philosophy of religion has a Durkheimian aspect. As it is well known, Durkheim considers the distinction between the sacred and the profane to be the axis of religion. For James, on the other hand, the core of religion seems to be the individual relationship with the deity, as mentioned before. The point of contact between both conceptions lies in the fact that the Jamesian definition implies a clear distinction between the sacred and the profane, which is a prototypically Durkheimian one which helps to tint the canonical version of a James who is irremediably imbued with individual Protestantism. In other words, the sacred/profane distinction is essential for James's philosophy of religion, and this point is best appreciated in his treatment of morality. Besides, this distinction is of vital importance to understand the relationships of James's philosophy with conservative as well as with liberal Protestantism.

My argument unfolds in five parts. In the first one (Durkheim interprets James) I present essential aspects of the French sociologist's criticism of the pragmatist; in the second (Durkheim interprets religion) I characterize the axis of religion according to Durkheim, that is, the distinction between the sacred and the profane; in the third section (James: Durkheimianism and Individualism) I present some of the essential aspects of James's philosophy of religion and I advance my main hypothesis, namely that there is a Durkheimian aspect in James's philosophy of religion; in the fourth section (James and Durkheim: past, present, and future of religion) I briefly examine the importance of the Durkheimian aspect of the Jamesian conception of

religion for its relationship with Protestantism. Finally, I put forward some conclusions.

I. Durkheim interprets James

In the conclusion to *The Elementary Forms of Religious Life* (hereafter called *The Elementary Forms*) Durkheim performs a critical analysis of some of James's paradigmatic positions, calling him "an apologist for faith." As it is well known, the main purpose of this book is to redefine the religious phenomenon on the basis of the developments of ethnography, anthropology, and sociology. Such a purpose is in turn based on an *epistemological rupture*, i.e. the theoretical treatment of religion completely disregards the involved actors' interests, doctrines, etc. to focus exclusively on the *function* of religion. In my view, however, Durkheim repeatedly violates his own principle by using phenomenological evidence as an illustrative example, or, even worse, to prove an argument. For instance, in *The Elementary Forms* he writes:

From this point of view, it is readily seen how group of regularly repeated acts which form the cult get their importance. In fact, whoever has really practiced a religion knows very well that it is the cult which gives rise to these impressions of joy, of interior peace, of serenity, of enthusiasm which are, for the believer, an experimental proof of his beliefs (Durkheim (2008) [1912] 417).

This kind of appeal to ordinary believers' practice and the importance of the knowledge they gain from it is theoretically inconsistent with Durkheim's methodological principles. In this work, however, I do not intend to assess the consistency of the Durkheimian epistemological rupture. What I am interested in highlighting is that from the beginning Durkheim's perspective on religion is, or claims to be, *external*.

Whenever we try to explain something human, viewed at a particular moment in time –whether a religious belief, a legal precept, a moral law, an aesthetic practice or an economic system- we must begin by returning to its simplest and most

primitive form. We must try to discover the qualities that define it at this period of its existence, and then show how it gradually developed, grew more complex, and became what it is at the moment under scrutiny (Durkheim (2008) [1912] 3).

Thus, it can hardly be surprising that Durkheim's conception is radically opposed to James's. The core of his criticism is the Jamesian thesis of the sovereign individual authority in religious matters, which is unacceptable to Durkheim. We can therefore speculate that one of the paragraphs from *The Varieties of Religious Experience* (from now on *The Varieties*) which Durkheim must have found particularly irritating was the following:

The pivot round which the religious life, as we have traced it, revolves, is the interest of the individual in his private personal destiny. Religion, in short, is a monumental chapter in the history of human egotism. The gods believed in—whether by crude savages or by men disciplined intellectually—agree with each other in recognizing personal calls. Religious thought is carried on in terms of personality, this being, in the world of religion, the one fundamental fact. To-day, quite as much as at any previous age, the religious individual tells you that the divine meets him on the basis of his personal concerns. (James (2002) [1902] 472).

Thus, the point to be highlighted is that Durkheim's and James's approaches are, in principle, irreconcilable: an *external* perspective, from Durkheim's point of view, based on a historical investigation method which critically reformulates the religious phenomenon as it is experienced by individuals; an *internal* perspective, for James, where the actors' experience and the theoretician's role is mainly descriptive.³ May it be

³ Stedman Jones maintains that both views are necessary for the treatment of religion and that consequently Durkheim and James complement each other: "Thus, do we not come back to a Jamesian point that knowledge by acquaintance, rather than merely knowledge by description, preserves the *sui generis* nature of religion? The fully adequate methodology of religion needs the testimony for consciousness as much as description about social action. In other words, are not both James and Durkheim necessary for a comprehensive study of religion?" (2003, 118).

possible, then, that there exist relevant similarities between perspectives which, in principle, are opposed? There are two elements which should be considered: in the first place, the salvific component of the religious experience which both make reference to; in the second place, their methodological coincidence.

It is in the final pages of *The Elementary Forms*, where Jamesian echoes undoubtedly resound, that we can find an answer to the first point. Like James, Durkheim highlights the *salvific* component of religion: "The first article in every creed is the belief in salvation by faith." (Durkheim (2008) [1912] 416). In this line of thought the author holds

But the believers, the men who lead the religious life and have a direct sensation of what it really is, object to this way of regarding it, saying that it does not correspond to their daily experience. In fact they feel that the real function of religion is not to make us think, to enrich our knowledge, nor add to the conceptions which we owe to science other origin and another character, but rather, it is to make us act, to aid us to live. *The believer who has communicated with his god is not merely a man who sees new truths of which the unbeliever is ignorant; he is a man who is stronger. He feels within him more force, either to endure the trials of existence, or to conquer them* (Durkheim (2008) [1912] 416, my emphasis).

Meanwhile, in the conclusion to *The Varieties* and with the same purpose as Durkheim, James adheres to the following Leuba's statement:

"... *God is not known, he is not understood; he is used—sometimes as meat-purveyor, sometimes as moral support, sometimes as friend, sometimes as an object of love. If he proves himself useful, the religious consciousness asks for no more than that. Does God really exist? How does he exist? What is he? are so many irrelevant questions. Not God, but life, more life, a larger, richer, more satisfying life, is, in the last analysis, the end of religion. The love of life, at any and every level of development, is the religious impulse*" (Leuba quoted in James (1994) [1902] 489, second emphasis added).

The extent of the agreement between both authors can be appreciated on the basis of these two quotations: the

essence of religion and of the religious experience, independently of the content of beliefs, lies in its vital utility. Besides, this vital utility is independent of the different origin that it has for both authors: a ritual activity (Durkheim), and an individual's pondering in solitude (James).

Meanwhile, it was Hans Joas who most clearly emphasized another similarity between these authors, by holding that for both of them religious experience is the point of departure for formulating a theory of religion (Joas (1997) chap. 3 y 4). If Joas is right, both James and Durkheim –independently of the internal and external perspectives that I mentioned before– agree in pointing out that the religious *experience* is both the essential feature of religion and the starting point for its analysis.⁴ Now what is the religious experience? James explicitly restrains himself from advancing a definition of religion and of religious experience to later defend them tooth and nail. What he holds is a hypothetical or wide definition of religion (religion is what makes reference to the individual's relationship with what he regards as the divinity) to then inductively deal with the various cases of people he regarded as religious geniuses. An important consequence can be inferred from this methodology: what is relevant is experience, not content. Joas has called attention to this point: at first sight James's *vagueness* differs from Durkheim's rigor when defining religious experience.

For our definition of the sacred is that it is something added to and above the real: now the ideal answers to this same definition; we cannot explain one without explaining the other. In fact, we have seen that if collective life awakens religious thought on reaching a certain degree of intensity *it is because it brings about a state of effervescence which changes the conditions of psychic activity*. Vital energies are over-excited, passions more active, sensations stronger; there are even some which are produced only at this moment. A man does not recognize himself; he feels himself transformed and consequently he transforms the environment which surrounds

him. In order to account for the very particular impressions which he receives, he attributes to the things with which he is in more direct contact properties which they have not, exceptional powers and virtues which the objects of everyday experience do not possess. *In a word, above the real world where his profane life passes he has placed another which he attributes a higher sort of dignity than the first*. Thus, from a double point of view it is an ideal world (Durkheim (2008) [1912] 422, my emphasis).

In Joas's words, "Durkheim believes, then, that he has discovered in the elementary forms of religion the secret of religion per se: the dynamic formation of ideals in the experience of collective ecstasy" (Joas 2000 [1997] 60).

On the basis of these elements it can be inferred that the sharp Jamesian feature that is observed in *The Elementary Forms* is the following: what is necessary in religion is not doctrines, but *either an action or a feeling*.

When we survey the whole field of religion, we find a great variety in the thoughts that have prevailed there; but the feelings on the one hand and the conduct on the other are almost always the same, for Stoic, Christian, and Buddhist saints are practically indistinguishable in their lives. The theories which Religion generates, being thus variable, are secondary; *and if you wish to grasp her essence, you must look to the feelings and the conduct as being the more constant elements* (James (2008) [1902] 487, my emphasis).

In other words, representations are secondary to the primary element of religion, i.e. *some kind of religious experience* (feelings for James, rites for Durkheim). The archetypal example provided in *The Varieties* is that of individuals of *healthy mind* (that is, essentially optimistic individuals) who profess creeds with *sinister* theologies, in James's words. Thus, according to James, character or temperament have priority over the doctrinaire component as the core of religion.⁵ In a similar vein, Durkheim rejects the comparison of religion with a system of ideas, emphasizing the constituent role of religious energy.⁶

⁴ Joas (1997, 62).

⁵ See James (1994 [1902]) conferencias 4 y 5.

⁶ See Durkheim (1968 [1912]) 428.

The theorists who have undertaken to explain religion in rational terms have generally seen in it before else a system of ideas, corresponding to some determined object...

But it is hard to see how a mere idea could have this efficacy. An idea is in reality only a part of ourselves; then how could it confer upon us powers superior to those which we have of our own nature? Howsoever rich it might be in affective virtues, it could only release the motive powers which are within us, neither creating them nor increasing them. From the mere fact that we consider an object worthy of being loved and sought after, it does not follow that we feel stronger afterwards; *it is also necessary that this object set free energies superior to these which we ordinarily have at our command and also that we have some means for making these enter into us and unite themselves to our interior lives* (Durkheim (2008) [1912] 416-7, my emphasis).

If we compare *The Varieties* and *The Elementary Forms*, similarities and differences can be found between their authors' proposals. Durkheim, as rightly pointed out by Stedman Jones (2003), explicitly rivals James as a theoretician of religion. His subsequent examination of pragmatism, however, follows a different course. As it is well known, Durkheim taught a course on pragmatism at the Sorbonne in 1913-14. The notes of this course were published as late as 1955 under the title *Pragmatism and Sociology* (from now on *P and S*).⁷ This book brings up interesting and well-founded criticism to James's philosophy, such as the inconsistency between some distinctive features of the religious people presented by the pragmatist and his valuation of action over quietness, contemplation, and speculation. In Durkheim's words:

The great virtues of the saint are devotion, charity, spiritual strength (resignation, contempt of danger), purity of life (a horror of everything bogus or deceitful), asceticism (which can even include a love of suffering) and obedience and poverty. These virtues are usually the opposite of those of the man of action (Durkheim (1983) [1955] 61).

⁷ Armand Cuvillier has written a very good introduction to the book, where he makes reference to how they got the notes the book is based on, as well as to the strong impact that the course seems to have had among Durkheim's students.

It is in this sense that the French sociologist prefigures one of the main contemporary interpreters of James, Richard Gale, who maintains as the core of his interpretation the tension in James's work between a pragmatic Promethean ethics on the one hand, and an antipragmatic mysticism on the other.⁸ However, the *tone* of Durkheim's analysis of pragmatism in general, and of James's work in particular substantially differs from that used in *The Elementary Forms*. Durkheim points out only one coincidence between the criticisms of pragmatism and sociology to old rationalism:

Such is the conception that Schiller, James and Dewey have of rationalism. Traditional rationalism separates thought from existence. Thought is in the mind; existence is outside it. Hence the two forms of reality can no longer meet... the only way to solve the difficulty would be to refuse to admit the existence of this gap between existence and thought. If thought is an element of reality, if it is part of existence and of life, there is no longer any "epistemological abyss" or "perilous leap." We have only to see how these two realities can participate in each other (Durkheim (1983) [1955] 16).

It is the criticism of both to the "old rationalism" what makes them, in Durkheim's words, "children of the same epoch." However, no more parallelisms are drawn, and a fierce criticism of pragmatism is expressed in the rest of the book, whose conclusion states that pragmatism is less an endeavor that highlight the role of action but an attack against theoretical thought (Durkheim (1983) [1955] 64). Thus, Durkheim's major criticism of pragmatism is that it is a movement against reason. At the very beginning of *P and S* he points out three reasons which make pragmatism a subject of interest at different levels. First, its relevant criticism of traditional rationalism; second, the fact that it poses both a challenge and a threat for the French rationalist and Cartesian culture; finally, that it represents a criticism of general philosophical relevance (Durkheim (1983) [1955] 23).

⁸ See Gale (2007).

As rightly pointed out by Joas, Durkheim has always emphasized differences over similarities with pragmatism (Joas (1993) 57-9).⁹ In *The Elementary Forms* he seeks to clearly differentiate himself from James. Now why does he radicalize his criticisms in *P and S* and accuse pragmatism of being anti-speculative? A first answer to this question revolves around the epistemological level: in Durkheim's version, pragmatism as utilitarianism necessarily leaves aside the speculative component typical of the rationalist philosophical tradition. Neil Gross, analyzing the context where *P and S* was produced shrewdly suggests that there is something else: Durkheim sees in Anglo-American pragmatism, with its enormous impact on France, a rehabilitation of religion which does not rescue its cognitive component. In Gross's words:

Durkheim took this to mean that the pragmatists denied that religious ideas and beliefs stem from an intellectual desire on the part of agents to understand their worlds, especially their social worlds. Yet Durkheim's work on the sociology of religion provided proof that religious ideas and myths are indeed speculative and intellectual in nature. If so, and if religious ideas were the evolutionary precursors of the ideas of modern science and philosophy, then the validity of the pragmatic understanding of thought could be called into question (Gross, 1997, 140)

This may be the reason why he has always stressed his differences with pragmatism.

Several conclusions can be drawn from Durkheim's interpretation of James and pragmatism: first, that

⁹ "Joas (1995) suggests that Durkheim and James were among the first scholars to use religious experience as the basis for general theories about religious phenomena. Even more significant is that both Durkheim and the pragmatists were opposed to certain aspects of empiricism and apriorism; they "attempt to take the deduction of... [the a priori conditions for experience] beyond the domain of transcendental philosophy by inquiring how the individual intellect has to be equipped in order for any form of cognition to take place" (Joas 1993:57). Despite these similarities, "what emerges clearly ... is Durkheim's rhetorical strategy of not accentuating the similarities but rather the differences between pragmatism and his own program of sociology" (Joas 1993 [1998 in this work]:59)" Gross (1997) 129.

Durkheim conceives his work as programmatically opposed to pragmatism in *The Elementary Forms* as well as in *P and S*; second, that Durkheimian criticisms differ in their scope, since in *The Elementary Forms* he criticizes James's individualism – though he simultaneously rescues the salvific component of religion, which is common to both and his methodology is similar since its point of departure is religious experience and not a set of beliefs– while in *P and S* he holds much more radically that pragmatism, like all utilitarianisms, is anti-speculative and he only rescues it as a critical instance of old rationalism; finally, these criticisms make it difficult for us to appreciate those aspects common to the works of both authors beyond their noticeable differences. Thus, in the rest of this work I shall try to qualify these criticisms and to show how James's work presents an aspect which could be regarded as Durkheimian.

II. Durkheim as Interpreter of Religion

In *The Elementary Forms* Durkheim draws up an ambitious intellectual program with different objectives. Metatheoretically, those objectives could be understood in at least two ways: in their *minimalist* version they attempt to provide, on the basis of empirical data provided by ethnography and history, new answers to traditional philosophical questions; meanwhile, in their most ambitious version they imply developing a new philosophy based on sociology. Methodologically, however, both versions are indiscernible since their main axis is the decomposition of complex phenomena into their simplest and most primitive component parts. This forms the core of Durkheimian Cartesianism: tracing the simplest component part of the phenomenon to be analyzed (on the basis of ethnographic and historical data) so as to be able to define its basic features. Unlike in traditional Cartesianism, however, that simple phenomenon is not an abstract entity but a concrete historical fact (or concrete historical facts.) By applying this methodological conception to his definition (or

rather, re-definition) of religion, Durkheim explicitly criticizes the conception inherited from traditional philosophy (that is, the dialectical method) which defines religions on the basis of the fundamental beliefs they profess.¹⁰ It is for this reason that religious “ideas,” “beliefs,” or “doctrines” do not suffice to understand how religion fulfils its vital function. In other words, Durkheim does not deny the relevance of a religion’s doctrinal body but he holds that, if separate from the ritualistic aspects, it does not form the core of a religion and also that a doctrinal body does not help to understand the vitality given by a religion to those who profess it.¹¹ Instead, he holds that his conception of religion offers those elements. Such a claim is based first on the thesis that all religion offers some distinction between the sacred and the profane, and in the second place, on the statement that the cult is essential to make intelligible that distinction and its vitality. Thus, these elements make up the very core of religion for Durkheim. Concerning the first distinction, the French sociologist has written:

All known religious beliefs, whether simple or complex, present a common quality: they presuppose a classification of things, --the real or ideal things that men represent for themselves-- into two classes, two opposite kinds, generally designated by two distinct terms effectively translated by the words *profane* and *sacred* (Durkheim (2008) [1912] 37).

Though he presents different aspects (subordination, more sublimity of the sacred against the profane, etc)

¹⁰ In Durkheim’s words: “The theorist who have undertaken to explain religion in rational terms have generally seen in it before all else a system of ideas, corresponding to some determined object. This object has been conceived in a multitude of ways: nature, the infinite, the unknowable, the ideal and so on. But these differences matter but little. In any case, it was the conceptions and beliefs which were considered as the essential elements of religion” (Durkheim (2008) [1912] 416).

¹¹ In this regard he has written: “religious beliefs are the representations which express the nature of sacred things and the relations which they sustain, either with each other or with profane things” (Durkheim (2008) [1912] 41).

Durkheim chooses to point out *heterogeneity* and *temporality* as the essential defining features of the sacred and the profane. In other words, the sacred and the profane are, above all, two heterogeneous (and opposed) realms, which are ruled by two temporalities. The profane is the realm of utility, or of everyday life governed by the logic of survival at the pace of economy and its temporality. The sacred, meanwhile, is the deliberate interruption of secular life and its development by conceiving certain objects, entities, or places as sacred through ritual activities. It is in this sense that religion is for Durkheim essentially *collective* since it involves a rupture of everyday social life in the community where it is professed. Then, cults and rites are for Durkheim the collective ways of religion. In rejection to the idea that the cult is a dull secondary manifestation of a primitive force, the French sociologist has written:

The cult is not simply a system of signs by which faith is expressed outwardly, it is the collection of means by which it is created and periodically recreates itself. Whether it consists in material acts or mental operations it is always this which is efficacious. (Durkheim (2008) [1912] 417).

Put differently, interiority as a feature of religion is only possible if it is preceded by a cult. Meanwhile, rites provide us with moral patterns of behavior before the sacred: “Finally, rites are rule of conduct which prescribe how a man should comport himself in the presence of these sacred things” (Durkheim (2008) [1912] 41). Thus, the Durkheimian definition of religion can be more clearly appreciated on the basis of these two elements:

A religion is a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden –beliefs and practices which unite into a single moral community called a church (Durkheim (2008) [1912] 47) emphasis original

Two aspects of Durkheim’s conception of religion are here of interest due to the objectives of the present work: in the first place, his idea on the genesis of the

distinction between the sacred and the profane¹²; in the second place, the idea of morality brought in by his conception of religion. Concerning the former, Durkheim makes the following point: since sensitive experience tells no self-evident thing on the sacred/profane distinction, we must trace its genesis to its function. In other words, why is the distinction between the sacred and the profane drawn? According to Durkheim there exists a force or energy associated with religion which does not depend on its doctrinal component (as in the Jamesian conception). The genesis of this energy lies in either a *genuinely* religious component (that is, the divinity, for instance) or in other component. The French sociologist's agnosticism prevents him from giving the first answer. According to Durkheim, the genesis of that energy lies in the fact that religion makes our existence as social beings evident *in extremis*.

This is precisely what we have tried to do, and we have seen that this reality which mythologies represented under so many different forms but which is the universal and objective eternal cause of these *sui generis* sensations out of which religious experience is made, is society (Durkheim (2008) [1912] 418).

Thus, the sacred seems to exist as a distinct sensation of our social nature.

The second aspect I have mentioned, meanwhile, is of the utmost importance to both Durkheim's work and James's conception of religion. As it was said before, for Durkheim there is an indissoluble link between religion and the idea of church, on the one hand, and between the church and the moral community, on the other. Ritual interdictions, which Durkheim conceives of as essential, directly govern the sacred realm and indirectly the profane (in so far as the latter is subordinated to the former). Were this the whole religious dimension of the

¹² In Durkheim's words: "for we must ask what has been able to lead men to see in the world two heterogeneous and incompatible worlds, though nothing in palpable experience seems to have suggested the idea of so radical duality to them" (Durkheim (2008) [1912] 42).

Durkheimian conception, this would be the antithesis of James's position, where a categorical distinction is made between religion and morality, the latter being fundamentally restrictive. Yet as Joas has rightly pointed out, the Durkheimian conception is twofold:

Thus, Durkheim builds into morality itself the same tension which James describes as obtaining between religion and morality. Neither thinker defines morality, as Nietzsche does, exclusively in terms of the imperative, so that religion can only be construed as the metaphysical justification of the imperative. The proximity between Durkheim and James is even greater in this respect than the differences in their conceptualization would at first lead one to suspect. However much Durkheim emphasizes the perpetually sacred character of morality, thereby extending his concept of the sacred far beyond the ambit of traditional religions, he also insists on the fact that the imperative is not 'in fact, the religious element in morality. However, one could demonstrate that the more sacred a moral rule becomes, the more the element of obligation tends to recede.' For Durkheim, as for James, the truly religious is not imperative, obligatory and restrictive, but rather attractive, empowering and motivating (Joas, 1997, 66)

In the next section I shall take up again both aspects (the genesis of the sacred/profane distinction and the Durkheimian conception of religion) in relation to James's work.

III. James: Durkheimianism and Individualism

Durkheim read James and rivaled him as a theoretician of religion.¹³ James, on the other hand, did not have the sociologist among his innumerable sources; therefore there is a risk of over interpretation when ascribing a Durkheimian aspect to James's philosophy of religion. In other words, *The Elementary Forms* was written one decade later than *The Varieties* and James makes no reference (at least in his main works) to any other works by Durkheim. Why, then, ascribe a Durkheimian aspect

¹³ Stedman Jones (2003). Joas (1997, cap. 4) goes one step further when holding that James was a decisive influence for Durkheim to take a definitive turn towards experience as the basis of his theory of religion.

to James's philosophy of religion? Simply because it allows us to visualize an essential feature of the Jamesian philosophy of religion, that is, the distinction between the sacred and the profane, that generally goes unnoticed. Put differently: James's philosophy of religion, in spite of differing from Durkheim's positions, fulfils its fundamental dictum: on the one hand, there is a profane domain which tends to be comparable to moral prescriptions; on the other hand, there is a sacred domain which tends to be comparable to a dimension that gives power (or creating power) to individuals. Like *The Elementary Forms, The Varieties* is an ambitious intellectual project which aims to reformulate our way of thinking about religion. James begins his book with a clear methodological reduction: his *corpus* consists mainly of the autobiographies and confessions of "religious geniuses," that is, those who have thought to have (or have had) a direct relationship with the divinity. These are, in James's words, the "extreme" cases that he wants to examine. In such a context, religion is defined as follows:

... religion, therefore, as I now ask you arbitrarily to take it, shall mean for us *the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine*

(James (1994) [1902] 18) *cursiva original*.

This definition has an operative purpose (that is why the word "arbitrarily" is used) which makes sense with the development of *The Varieties*. Now if we just confine ourselves to this stipulation (and besides leave aside all the precautions taken by James) it is very simple to label James as a limited individualist and to contrast him, for instance, with Durkheimian pan-sociologism. However, if we thoroughly consider his point of departure together with the conceptual cores from *The Varieties*, we find a richness which is difficult to classify as limited individualism, since James presents a meticulous *phenomenology of religious souls* based on three ideal types: the experiences of the "healthy-minded", of the "sick souls" and finally, of the "reborn" or "twice-born."

When describing these ideal types James explicitly holds that real individuals do not generally exemplify only one of these categories but are hybrids between them. The healthy-minded are defined as those (pathologically, for James) optimistic individuals who cannot possibly perceive or feel evil in the world. Sick souls, just perceive or feel the world as intrinsically evil.¹⁴ The twice-born, meanwhile, are those sick souls that have recovered, which in James's words are the shrewdest ones, since they have been on both sides of the abyss.

One of the central topics of *The Varieties* undoubtedly revolves around the dialectic between the sick souls and the twice-born, which James called "redemption" process (James (1994) [1902] 76).¹⁵ Mysticism is one of the possible forms of redemption mentioned by James. In other words, mysticism is one of the ways in which sick souls can be reborn and it is a redemptive process in so far as those sick souls overcome their morbidity and stop feeling or perceiving the world as intrinsically evil. A detailed examination of the Jamesian conception of mysticism exceeds the scope of this work. However, the analysis of some of its features (*transiency and passivity*) is the best way of understanding why the distinction between the sacred and the profane is essential for the Jamesian philosophy of religion.

James lists four defining features of mysticism: ineffability, noetic quality, transiency, and passivity

¹⁴ James sustains that this is "Not the conception or intellectual perception of evil, but the grisly blood-freezing heart-palsying sensation of it close upon one, and no other conception or sensation able to live for a moment in its presence. How irrelevantly remote seem all our usual refined optimisms and intellectual and moral consolations in presence of a need of help like this! Here is the real core of the religious problem: Help! help! No prophet can claim to bring a final message unless he says things that will have a sound of reality in the ears of victims such as these" (James (1982) [1902] 162).

¹⁵ In his words: "the process is one of redemption, not of mere reversion to natural health, and the sufferer, when saved, is saved by what seems to him a second birth, a deeper kind of conscious being than he could enjoy before." (James (1994) [1902] 157).

(James (1994) [1902] 179-180). *Transiency* is described as follows:

Mystical states cannot be sustained for long. Except in rare instances, half an hour or at most an hour or two, seems to be the limit beyond which they fade into the light of common day. Often, when faded, their quality can but imperfectly be reproduced in memory; but when they recur it is recognized; and from one recurrence to another it is susceptible of continuous development in what is felt as inner richness and importance. (James (1994) [1902] 180).

Passivity, meanwhile, implies that:

Although the oncoming of mystical states may be facilitated by preliminary voluntary operations, as by fixing the attention, or going through certain bodily performances, or in other ways which manuals of mysticism prescribe; yet when the characteristic sort of consciousness once has set in, the mystic feels as if his own will were in abeyance, and indeed sometimes as if he were grasped by a superior power. (James (1994) [1902] 180).

Put differently: the mystical state in so far as it is sacred leads to the transient interruption of profane life, and in so far as it is passive involves a clear distinction between two spheres (or realms, in Durkheimian terms): a sacred sphere –the union or communication with the divinity – and a profane one— the individual separated from the divinity. Thus, it can be inferred that one of the essential conceptual cores of *The Varieties*, namely mysticism, rests on the sacred/profane distinction. Now how is this related with the hypothesis of the present work? The relationship is as follows: even the most refractory religious phenomenon for Durkheim (mysticism) can be interpreted on the basis of the sacred/profane conceptual pair.

Now for James mysticism is one of the multiple varieties of the religious experience. The question is if it makes sense to attribute the sacred/profane distinction to the rest of religious experiences (that is, the non-mystical ones.) In my view James distinguishes between a profane and a sacred domain in so far as he makes a sharp differentiation between religion and morality:

It was the extremer cases that I had in mind a little while ago when I said that personal religion, even without theology or ritual, would prove to embody some elements that morality pure and simple does not contain. (James (1994) [1902] 22)

The element pointed out by James as essentially religious is the “total attitude” towards the universe. While the religious attitude leads to enthusiastic, unconditional acceptance, the moral attitude can be one of mere resignation.¹⁶ In *The Varieties* he writes, for instance:

And here religion comes to our rescue and takes our fate into her hands. There is a state of mind, known to religious men, but to no others, in which the will to assert ourselves and hold our own has been displaced by a willingness to close our mouths and be as nothing in the floods and waterspouts of God. In this state of mind, what we most dreaded has become the habitation of our safety, and the hour of our moral death has turned into our spiritual birthday. (James (1994) [1902] 25).

As pointed out in the previous section, Joas emphasizes a similarity between James and Durkheim, namely that despite terminological differences both conceptions share a fundamental idea: while morality is essentially a domain of interdiction, religion is an attractive, motivating force which empowers the individual.

One possible objection to this approach would be that there is no coincidence between James and Durkheim since they have radically opposed conceptions of the sacred. For the latter, the sacred is a necessary ideal duplication of the real that serves both a cohesive and an empowering function for the individual; for James, on the other hand, the sacred would be the communication or union of the individual and the deity. This objection has a truthful core, that is, both conceptions diverge in relevant aspects. It is not the aim of the present work to

¹⁶ In this regard he has written in *The Varieties*: “morality pure and simple accepts the law of the whole which it finds reigning, so far as to acknowledge and obey it, but it may obey it with the heaviest and coldest heart” (James (1994) [1902] 41).

deny the obvious differences between James and Durkheim: first, the object they are set to explain: individuals in their solitude (James) versus individuals taking part in rites (Durkheim); second, the Jamesian fideism versus the Durkheimian agnosticism. They agree in a fundamental methodological point, however: the point of departure of the sacred/profane distinction (explicit and systematically developed by Durkheim on the one hand and implicitly supported by James on the other) is not the religious doctrines but the individual's experiences, activities, and feelings.

Not only does this coincidence imply the possibility of a direct Jamesian influence on Durkheim (as held by Joas) but it also gives us a hint to interpret James's philosophy of religion: the sacred/profane dichotomy implies that morality and religion cannot be considered equivalent.

IV. James and Durkheim: Past, Present, and Future of Religion

It is well known that Durkheim has developed his work within the framework of a European tradition where the distinction between the sacred and the profane (and the ecclesiastical mediation) had full significance.¹⁷ That is, until the Protestant Reformation, there was in Catholic Europe a clear-cut distinction between a sacred domain that the church was in charge of, and a profane domain which was essentially political. France may have been the European country where such a framework took less of a pounding from the Reformation.¹⁸ Although Durkheim was a fervent supporter of secularization, the incessant social transformation at the turn of the 20th century augured an individualism that he regarded as

dangerous. In short, for Durkheim the source of danger was that modern societies did not seem to be efficient at generating social cohesion.

James's viewpoint is utterly different. For him, the incessant transformation of the United States (from colony to world power within a century) was not a reason for being pessimistic. The author of *The Varieties* seemed to exemplify in philosophy the vigorous pioneer spirit that was so pervasive in the American social mindset.¹⁹ That mindset, in addition, seemed to be a clear example of the typical association between Protestantism, or more specifically Calvinism, and modernization which normally refers to Weber's classic work "The Protestant Ethic and the Spirit of Capitalism."²⁰

Now how is the sacred/profane distinction (one foundation of Durkheim's conception as well as of James's in my interpretation) related with Protestantism as understood by James? A plausible hypothesis (as presented by Charles Taylor) is to argument that the Durkheimian framework is suitable for explaining certain kind of societies (essentially Catholic ones where there is a clear-cut distinction between the sacred and the profane) but it fails to grasp how Protestantism transformed that framework. In other words, Durkheim seems not to have noticed how the profane disappeared under the spell of Reformation, and how the sacred — hand in hand with morality— became omnipresent.

In Taylor's interpretation, James carried the Reformation individualism to the extreme, by conceiving a post-Durkheimian interpretation of religion (that is, one extricated from its communal aspect) which sounds convincing for vast contemporary groups.²¹ In other words, Taylor regards Durkheim's theory as particularly

¹⁷ Regarding Durkheim's attempt at "assimilating" European culture and tensions with Judaism, see Birbaum (1995).

¹⁸ France, however, took a pounding from the French Revolution, which later led to the fierce fight between laicism and fundamentalism. This topic is, however, outside the scope of the present work. An excellent book describing Durkheim's role in this context is Richman's (2002).

¹⁹ As early as the turn of the 20th century James was analyzed under the figure of the pioneer by Josiah Royce (1912) and George H. Mead (1929).

²⁰ See Weber (1991 [1904]).

²¹ See Taylor (2004) chapter 3.

efficient when it comes to explain the past of religion, while present and future can better be dealt with by James.

This hypothesis contains some truthful cores, mainly concerning Durkheim's myopia before the consequences of the Reformation. It is not completely right, however, in the opposition it points out between Durkheim and James, where the latter prefigures, in Taylor's words, the religion of post-Durkheimian societies. In my view, James —unlike Durkheim, — clearly observes the danger of the profane being absorbed by the sacred and he therefore separates religion and morality. The groundwork for his opposition, which is of great relevance for the present work, consists in what I call his Durkheimian aspect: the distinction between the sacred and the profane.

In other words, the modernizing myth which Protestants find agreeable is that there exists no sacred/profane distinction, and that it is that sacralization of the world (or elimination of the profane domain) on the basis of the Protestant ethic what has made possible our contemporariness.²² A detailed account of this story lies outside the scope of the present work. However, I shall briefly set out two reasons why, in my opinion, the modernizing myth is erroneous: in the first place (the least important in this context), because in pre-reformation Europe two types of morality were clearly distinguished, as rightly pointed out by Ernst Troeltsch: a strict one, which was mainly intended for ecclesiastical authorities, and a laxer one intended for laymen. The process of trying to rule all individuals with an iron fist can hardly be regarded as modernizing, as Calvinism claims. In the second place, (more relevant to this work) that "moral athletes," —as James calls them— and those who regard religion and morality as equivalents fail to grasp an essential element of religion, i.e. the religious sentiment. A great part of the value of *The Varieties* lies in his thorough description of cases that would

necessarily be left outside the religious domain if we accepted to equate religion and morality. As opposed to the sacralising tendencies of Protestantism (in its *progressive* Unitarian variant as well as in its *conservative* Fundamentalist variant) James recognizes a sacred core —the religious sentiment— opposed to the profane and which cannot possibly be equated to morality. In other words, James grasps an element that is essential to religion (and which tends to be overlooked by Protestantism.) One consequence of the Durkheimian aspect of James's philosophy of religion is therefore that it helps us expose the weakness of the modernizing myth based in the tight union between religion and morality, hence the importance of the Durkheimian aspect for James's philosophy of religion.

V. Conclusion

In relation to James's and Durkheim's conceptions of religion current interpretations claim that they are drastically opposed. On the contrary, authors like Hans Joas (1997, 1998), Sue Stedman Jones (2003), and Jack Barbalet (2004) among others, hold that there is a similarity between them in so far as both James and Durkheim depart from experience as the basis for the theory of religion. My hypothesis goes a step further by holding that there is a Durkheimian aspect, namely the distinction between the sacred and the profane, in James's philosophy of religion. What I aim to show in the present work is that such Durkheimian aspect is essential to get full understanding of James's philosophy of religion, importance which I tried to illustrate by briefly alluding to the opposition between certain Protestant conceptions.

²² See Joas (2012).

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RELIGIOUS INSTINCTS AND THE TRANSFORMATION OF INQUIRY IN PEIRCE'S PRAGMATISM

Roger Ward

Georgetown College

Roger_Ward@georgetowncollege.edu

Between Peirce's 1898 lectures known as "Reasoning and the Logic of Things" and his last published essay in 1908 "A Neglected Argument for the Reality of God" he introduces an emphasis on instinct. In the briefest of terms, Peirce collects instinctive beliefs and sentiments, like those of Scottish Common Sense philosophy, in his extended argument for the quality and expansion of knowledge through inquiry. "Reasoning and the Logic of Things" focuses on the necessity of transformation of conceptual forms for the continuing expansion of scientific reasoning. In that exercise Peirce fails to find a suitable content or ground to sustain that transformation. However, in "A Neglected Argument" it appears that a religious instinct, the reality of God, constitutes a central role in grounding Peirce's logic and expansion of knowledge, and making a step toward validating the logic of pragmatism.

The development of Peirce's conception of pragmatism and pragmatism has captured the interest of many scholars, like Phillip Wiener, who tracks Peirce's evolutionary thinking in its Darwinian and Lamarkian forms.¹ Wiener concludes that Peirce's notion of inquiry does not consistently follow an evolutionary model, unlike Spencer. Wiener cites a 1909 letter from Peirce to Arthur Lovejoy because it reveals a "different mainspring to his evolutionism." Peirce writes,

To me there is an additional argument in the favor of objective chance – I say to me because the argument supposes the reality of God, the Absolute, which I think the majority of intellectual men do not very confidently believe. It is that the universe of Nature seems much

grander and more worthy of its creator, when it is conceived of, not as completed at the outset, but as such that from the merest chaos with nothing rational in it, it grows by an inevitable tendency more and more rational. It satisfies my religious instinct far better; and I have faith in the religious instinct. (Wiener, 350)

The consideration of a creator God discovered within the "universe of Nature" through inquiry follows a long trajectory in Peirce's thought, taking into account his early essay "The Place of Our Age in the History of Reason" (1863). The puzzle is fitting this trajectory together with the essays on cognition in 1868 and the logic of science essays such as "The Fixation of Belief" (1877) in which Peirce refines his critique of authority as a means of fixing belief, a method he explicitly associates with Church doctrine and discipline. The tension apparent in the essays from 1863 to 1878 concerns the recognition of a community's standards (belief in God, for example) and the philosophical challenges of avoiding the false closure of beliefs through tenacity, authority, or apriorism, arriving at inquiry modeled on the self-correcting movement of scientific reasoning.

Two questions appear central to Peirce's thinking. One is how our thinking overcomes a previous tradition without merely negating it, as he criticizes Descartes for doing. The other is handling the consequences of adopting Kant's critical philosophy, that all conceptions are in the mind, but taking it more thoroughly than Kant by excluding the noumenal realm as a limit to inquiry. Peirce's pragmatism, which he re-articulates as pragmatism from 1905, moves between scholastic realism and a completely critical philosophy. The move is not an *aufgehoben* producing a new model, but an inquiry into how these two traditions are dually constitutive of inquiry. I claim that occupying this space entails a transformation of inquiry and of the inquirer. Instincts, guiding ideas or principles that emerge in thought apart from desires or wishes, become the objects for inquiry and increasing self-control of thought and practice. Hence self-control, the act of discovering the "real" within one's own practice, is similar to the goal of scientific inquiry. Self-control of reason is

¹ Philip Wiener "The Evolutionism of Peirce" *Journal of the History of Ideas* Vol. 7, no. 3 (June 1946)

possible only with this basis in instinct. Complete knowledge, Peirce says, is the condition of habits of thought in such close correspondence with the real that no further self-control is possible, where there remains no error or occasion for regret.² (EP2, 237) Instinctive beliefs, those ideas "we cannot help but believe" are the content for initiating the movement toward this kind of self-control. While Peirce and James are agreed that any belief, religious or otherwise, can only be described in terms of its potential expression in action, for Peirce this means a movement through inquiry to discover a normative character. James's pragmatism is problematic because its orientation is dependent on where the will arbitrarily locates itself.³ This will not satisfy Peirce because inquiry is only successful if it discovers an orienting teleology, and the only sign of this is the growth of self-controlled action.

In this essay I begin by tracking the transformation of Peirce's notion of inquiry from "The Place of Our Age" to "The Fixation of Belief" which lays the ground for pragmatism. I next trace the movement from pragmatism to pragmaticism via the role of instinct, and then conclude by showing how the content of Peirce's religious faith and his instinctive love for the church and the reality of God shapes the telos of inquiry, a telos that is evident in the transformation of the inquirer, most poignantly described in "A Neglected Argument for the Reality of God."

² References to Peirce's writings use the following convention: *The Essential Peirce Vol. I and II* (Indiana University Press, 1992, 1998) are EP 1 and 2 followed by page. *Writings of C.S. Peirce A Chronological Edition* (Indiana University Press, 1982) is abbreviated CE followed by volume and page. *Reasoning and the Logic of Things*, eds Ketner and Putnam (Harvard, 1992) is shown as RLT and page.

³ See Gail Kennedy "Pragmatism, Pragmaticism, and the Will to Believe - - A Reconsideration" *The Journal of Philosophy*, Vol 55, No. 14 (July 1958). She points out the pre-pragmatic force of "The Will to Believe" and the connection between "the right to believe" and James's conviction of the indeterminate nature of reality. (581)

From "The Place of Our Age in Reasoning" to "The Fixation of Belief"

Peirce's Kantian and Christian convictions constitute the core of an essay he wrote in 1863 for a high school reunion in Cambridge. In this complex speech Peirce outlines his basic convictions as an intellectual and scientist. For later readers the element that is most striking is his recognition that Kant's great accomplishment was his methodic doubt, the key to his *Kritik*, searching for the more insoluble doubt in the questions of "Immortality, Freedom, and God." (CE 1,104) Kant asks the Humean question "how do we know our innate ideas are true?" not in order to dismiss such skepticism, but to extract the greatest possible nourishment from it. Peirce claims that progress in modern thought has stagnated because it has separated itself from "its ancient mother," the church. By rejecting the church, and hence awareness of its place in the larger story of reasoning, modern mind is floundering without real doubt to orient it. Peirce takes his stand: "The only cord which ever bound them, and which belonged to either [modern thought and the dark ages] is Christianity. Since the beginning of Christianity the growth of civilization has had six stages." (CE1.105) Peirce dwells in these stages in order to rehabilitate modern mind in the context of the history of reason, which coalesces into two driving questions:

The first is, is christianity a fact of consciousness merely, or one of the external world? And this shall be answered by the end of our own age. The second is, is this predicate true to the understanding merely, or also to the senses? And this, if we may look forward so far, will be answered by Christ's coming to rule his kingdom in person. And when that occurs, religion will no longer be presented objectively, but we shall receive it by direct communication with him. (CE 1.114)

This overt Christian idealism seems far removed from Peirce's later articles on the logic of science. Until, that is, we focus on the way Peirce portrays science as an exercise principally concerned with exploring the

deepest doubt possible to the modern mind – its own method. That method can be validated as a reliable and coherent means of raising itself to self-critical doubt only in light of its approach to an articulated end or telos. In “The Fixation of Belief” Peirce critiques inquiry that self-deceptively searches into false objects, making a show of unlocking doors it has surreptitiously hidden the keys to in its pocket, or exhibits the false trust that scattering interest like a broadcast sower will generate scientific progress. For science to progress it must engage its most elemental doubt, the doubt of its own method. This entails an overarching frame of reference, a guiding conviction. Bringing this guiding conviction, a vague truth, to further clarity is a goal of inquiry. This process would go some way to answering the first question above by illuminating the difference between inquiry enclosed within “consciousness merely,” and inquiry oriented toward an “external world”.

The concluding section in “Fixation” hones in on common methods of fixing belief and their attendant errors. Tenacity, holding a belief arbitrarily, is undone by the social impulse; authority, promulgating a set of beliefs for the good order of the community, fails when experience loosens the totalizing grip of enforced belief. Peirce writes “the willful adherence to a belief, and the arbitrary forcing of it upon others, must, therefore, both be given up.” (EP1, 118) Peirce associates *apriorism* with intellectual taste, and these beliefs change rapidly demonstrating that “sentiments in their development will be very greatly determined by accidental causes.”(EP1, 119) The arbitrary nature of these sentiments shows their ungrounded character, and he restates his conviction that our thought must be fixed “by some external permanency – by something upon which our thinking has no effect” to overcome such an accidental character. (EP1, 120)

It is important to note that in cataloguing the errors of each method of fixing belief Peirce does not challenge the content of the beliefs. Indeed, the description of

instinctive beliefs developed in his later essays reflect some aspect of each method. Instinctive beliefs guide the lives of most people (authority), carry their own credibility (apriorism), and are evidences of the real if followed out diligently despite the criticism of doubters (tenacity). The difference is that beliefs arising from the erroneous methods are mixed with the doubts of those methods, whereas *no doubts arise* from the method of scientific reasoning. Inquirers cannot pursue this method wrongly, making an essential step in the transformation of inquiry in two ways. First, since the method does not generate doubt it can be used to pursue occasions of doubt that arise from the content of beliefs; second, the framing character of teleological beliefs now becomes a part of the orienting fabric of scientific inquiry. Kant’s questions of God, freedom, and immorality are in the offing, but these must arise as genuine doubts within the process of methodological and self-critical scientific inquiry.

In Peirce’s later essays “instinct” expands on the goods of the three methods he dismisses –fixing upon ideas and holding them despite challenges (tenacity), explicating communally orienting beliefs that change only very slowly (authority), and believing as one is inclined to believe as a guide to truth (apriorism). These virtues are brought within the scientific method by focusing on public criticism, the fallibility of all knowledge claims, and strictly excluding personal preference or willful belief for private (and hence opaque) reasons. This is further evidence that his method of inquiry is discovering an external permanency in thought, because even these errors are now instructive and positive examples for increasing self-controlled inquiry.

Instincts in the Development of Pragmatism

The historical appearance of “pragmatism” in the August 26, 1898 lecture by William James follows the remarkable success of Peirce’s Cambridge lectures,

"Reason and the Logic of Things" in March of that same year. Ketner and Putnam, in their fine introduction to the published version of these lectures, note that the event also was pivotal for Royce. (RLT 36) Although auspicious, the happy birth of pragmatism was short lived if we consider that in the 1905 *Monist* essays Peirce distances himself from the doctrine of pragmatism found in "literary journals."⁴ In published essays, "What Pragmatism Is" and "Issues of Pragmatism", and unpublished work Peirce intended for a third essay, "The Basis of Pragmatism", Peirce expands on the role of instinct as a principle difference between his understanding of pragmatism and that which developed from James's popularizing work.

Instincts are prominent in "Reason and the Logic of Things". For example, in Lecture four, "The First Rule of Logic" Peirce says, "one thing is needful for learning the truth, and that is a hearty and active desire to learn what is true." (RLT 170) This is a sentiment, an acritical orientation to seeking "eternal verities." Science cannot provide this kind of orientation because there is no proposition in science that answers to the conception of belief. "[F]ull belief," Peirce says in the first lecture, "is willingness to act upon the proposition in vital crises . . . and matters of vital importance must be left to sentiment, that is, to instinct." (RLT 112) Reasoning begins with what we already think as the beginning of increasing self-control. Instincts provide the ground for this development since they are beyond the thinking of any individual, and also because they are not static. Peirce writes

Instinct is capable of development and growth, - though by a movement which is slow in the proportion to which it is vital; and this development takes place upon lines which are altogether parallel to those of reasoning. . . . Not only is it of the same nature as the development of cognition; but it chiefly takes place through the instrumentality of cognition. The soul's

⁴ John Dewey, "The Pragmatism of Peirce" *The Journal of Philosophy, Psychology and Scientific Methods*, Vol. 13, No. 26 (Dec. 21, 1916) pg.710.

deeper parts can only be reached through its surface. (RLT 122)

Inquiry into "vital" sentiments and inquiry in science is crucial for logic, which is seen only in its application within the self-critical refining of habits of action and belief. The vitality of instinct lies in its being an object of inquiry without being an arbitrary product of thought. Peirce's main insight in the paragraph above is the continuity between the development of instinct and cognition as the same that operates in scientific inquiry. In the context of both science and instinct inquiry seeks the law-like regularity subtending thought, that is, the real. The force of instinct leads to the desire for self-control as our practice that deviates from "what we cannot but believe" generates regret. Science does not carry this same motive force – we don't regret believing in a wrong hypothesis -- but science does exemplify the success of probabilistic inquiry and recognizing error. Time, the reality that inquiry is always destabilized toward the future, is the nearest corollary to the motivation to self-correction arising from instincts. The reality of time is the basis of all scientific explanation, but scientific inquiry alone cannot explain the impetus discovered in reasoning. Science, as an exercise in the method of cognition, has its place in the approach to "the soul's deeper parts" mentioned above, but science cannot supply the goal of inquiry, which is advancing self-control and discovering the real which is accessible through inquiry into what we cannot help but believe.⁵

Instinct in inquiry takes on a new character in Peirce's 1905 *Monist* essays. For Peirce "What pragmatism Is" is an occasion for the development of pragmatism. Only through the errors of pragmatism is this next level of precision possible. In fact, the undisciplined thought

⁵ See Sandra Rosenthal "On the Epistemological Significance of What Peirce is Not" *Transactions of the C.S. Peirce Society*, Vol. 15, No. 1 (Winter, 1979), especially page 24 where she writes that for Peirce "the objects within our world do not copy the independently real but rather emerge through our modes of grasping the independently real."

appearing in "literary journals" precipitates he says a "sort of cross between a dialogue and a catechism, but a good deal liker the latter". (EP 2, 338)

In response to the third question of this catechism, Peirce pronounces that his doctrine focuses on "a series of problems capable of investigation" by "its retention of a purified philosophy; secondly, its full acceptance of the main body of our instinctive beliefs; and thirdly, its strenuous insistence upon the truth of scholastic realism." (EP 2, 338-9) Readers aware of the role of 2nds in Peirce's triads will note the placement of instinctive beliefs in this description. Preserving philosophy for science turns on the content of instincts! In a crucial sentence he connects the product of instincts in self-controlled practice to the product of scientific inquiry:

Now, just as conduct controlled by ethical reason tends toward fixing certain habits of conduct, the nature of which does not depend upon an accidental circumstances, and in that sense may be said to be destined; so, thought, controlled by a rational experimental logic, tends to the fixation of certain opinions, equally destined, the nature of which will be the same in the end (EP2,342).

The essence of thought is the convergence possible due to the reality of its object, a movement connected to a test of his cosmological theory to the point that it is either "sustained or exploded" by its outcome. The incarnational component in Peirce's inquiry is most evident when he says "thirdness can have no concrete being without action; as a separate object on which to works its government, just as action cannot exist without the immediate being of feeling on which to act." (EP2, 345) The spirit of discipline, self-control over thinking, is the goal of inquiry from the beginning of Peirce's work. This is achieved only in objective thought that aims at an end of thirdness manifested materially in the lives of inquirers. Such concrete being that reflects a "destined" end is, I think for Peirce, immortality.

In the following *Monist* essay, "Issues of Pragmatism", Peirce praises Thomas Reid as a philosopher well

focused on the content of instinctive beliefs.⁶ (EP 2, 349) However, pragmatism has six distinguishing characters from the Philosophy of Common Sense, but it accepts the beginning point that "we have an occult nature of which and of its contents we can only judge by the conduct that it determines, and by phenomena of that conduct". Inquiry touches this hidden character and changes it:

to say that determination affects our occult nature is to say that it is capable of affecting deliberate conduct; and since we are conscious of what we do deliberately, we are conscious *habitualiter* [by approximation] of whatever hides in the depths of our nature; and it is presumable . . . that a sufficiently energetic effort of attention would bring it out.

The object of reasoning resolves into relating all inferences to "one guiding principle." (EP 2, 347-8) Translating acritical inferences (instincts) into products of logical argumentation, therefore, is a work of reasoning that alone manifests the affective influence on our occult nature from which we are able to discover the telos of reason by following the phenomena of self-control.

Transformation of Inquiry and the Reality of God

The third essay Peirce planned for the *Monist* on "The Basis of Pragmatism" was never completed. The six extant drafts show him casting around, at times wildly, for a platform for his logic. I think his effort to ground his logic issued in his last published work, "A Neglected Argument for the Reality of God." This essay tracks, in surprisingly existential terms, the transformation of the instinctive belief in God into a piece of logical argumentation.⁷ God, an "infinitely incomprehensible

⁶ See Christopher Hookway, "Critical Common-Sensism and Rational Self-Control" *Nous*, Vol. 24, No. 3 (June 1990) for the claim that Peirce was an adherent of common-sense from the 1860s.

⁷ See Paul Forster *Peirce and the Threat of Nominalism* (Cambridge, 2011) for an excellent description of abduction. His point can be included to support the

object," provides an orienting character to inquiry by "supplying an ideal for life, and a "thoroughly satisfactory explanation of his whole threefold environment." (EP 2, 439) Telescoping the essay a bit, we read in section V that a "trained man of science" would accept that

an individual soul with its petty agitations and calamities is a zero except as filling its infinitesimal place and accepting its little utility as its entire treasure, . . . and bless God for the law of growth, with all the fighting it imposes upon him – Evil, i.e., what it is man's duty to fight, being one of the major perfections of the Universe. In that fight he will endeavor to perform just the duty laid upon him, and no more. Though his desperate struggles should issue in the horrors of his route, and he should see the innocents who are dearest to his heart exposed to torments, frenzy, and despair, destined to be smirched with filth, and stunted in their intelligence, still he may hope that it be best *for them*, and will tell himself that in any case the secret design of God will be perfected through their agency; and even while still hot from battle, will submit with adoration to His Holy will. He will not worry because the Universes were no constructed to fit the scheme of some silly scold. (EP 2, 445)

I conclude this essay with Peirce's words which, for me, are almost as puzzling as Phillip Wiener found his "faith in the religious instinct." I am convinced that Peirce is the trained man of science he refers to, and so agree with Anderson that the "[NA] is the fullest attempt he made to illustrate the continuity of religion and science, to show that they need not be fundamentally antagonistic tendencies in one's life, despite the tension between their spirits," and that Peirce's "critical common-sensism attempts to bring the full belief of instinct and practice to the provisional belief of critical inquiry; the two are not reduced one to the other but are seen as dimensions of a fuller system of belief – a life."⁸ (SOS 137) Peirce writes in MS L224 "the human intellect is of the kin of the Creative Spirit", and this kinship is discovered only through the transformation of inquiry into a growing, vital image of the reality of God expressed in human action and the obedient service of inquiry.

abductive claim that the instinctive belief in the reality of God is a test for the validity of his logic. 134ff.

⁸ Douglas Anderson *Strands of System* (Purdue University Press, 1995)

III. MISCELLANIES

TRUTH IN PHILOSOPHY AFTER RORTY AND DEWEY

Janos Boros

University of Pecs

borosjanos@t-online.hu

In the title of this paper Dewey should come first, since he lived earlier and influenced Rorty. But in my paper I would like to analyze the relationship of Rorty's thought to Dewey's philosophy, and in that, as a disciple of Rorty, my interpretation of Dewey and also the interpretation of the relationship will be strongly influenced by Rorty's views and interpretations.

Rorty once said to me after long discussion, "You should not read more of my stuff, but read Dewey. Dewey has already said everything what I am saying." I contested this suggestion, and I continue to contest it, because there are significant differences in style, and also in substance between the two thinkers. In this paper I wish to show the main difference between Dewey and Rorty. Whereas Dewey believed in philosophy, in a kind of metaphysics with the method of experience, Rorty refuted this. He showed that even Dewey's radical empiricism as experimentalism remains in philosophy, and that this should be overcome, since the traditional problems of philosophy do nothing good for our culture and democratic society.

The traditional main questions or problems of philosophy are truth, goodness and beauty. Whatever kind of philosopher you want to be, you define it or you show it via your understanding and interpretation of these notions. In the relationship of the two thinkers, I will focus on the similarity and the differences of their concept of truth, metaphysics and epistemology. Before I look at that, let me explain briefly what kind of concept of truth I have in mind here.

Truth in Metaphysics

There are at least two kinds of truth theories. These are the metaphysical and the epistemological theories, and they are frequently mixed up and not really separated in philosophical works. The source of both lies in the origins of philosophy. The metaphysical truth theorist asks: how is the world in itself, what is its origin, what kind of structure does it have? He asks for absolute, timeless givenness, fundamental structures, ever-existing entities. The metaphysician is convinced that the world is somehow. He also maintains that with a kind of strong or methodological thinking, he can discover these structures as they are in themselves. Metaphysical truth theorists have difficulties when they are asked how they can reach the eternal structure, how they can prove that they are "there" and whether it is such as they suppose it to be? Since their thinking happens and their language functions in time, they cannot show when they have reached any atemporal entity. They can only say, "Our words touch reality as such (let us capitalize it: Reality)", or "The meaning of our expressions has immediate contact with Reality".

It can be asserted that our words can touch Reality in two ways.

(1) It can be maintained that words are different from Reality, and they touch Reality in a manner similar to the way a human hand touches an object. In this case something essentially different touches another entity, something of another kind. As hands are loaded by nerve endings and by concepts and theories, so words are loaded by contexts and theories. The touched objects are not loaded by all these in the view of metaphysicians (not quite so in the view of epistemologists). In this case the metaphysician has to convince their adversaries that although the two encountering entities (words-expressions and Reality) are of different kind, words can undoubtedly stand for not-words and somehow touch nonworldly reality. They have to prove that something with grammatical and logical structure can represent,

without residues, something which is not grammatical, and not logical, but of another kind: perhaps causal, perhaps not. And this is what arguably cannot be the case, as Davidson and Rorty have shown. Independent of humans, Reality does not have the grammar of human language, does not have the meaning of language, and has no logical structure. Reality does not speak, Reality does not think as we do. It speaks only if we ourselves are supposed to be embedded in Reality. But in that case there is no question that we ourselves are Reality.

(2) It can also be affirmed, that words are within Reality, they are part of Reality, there is no question of touching or being in contact of words or expressions with Reality, because they are *in it*. Metaphysicians of this school have nothing to explain in the nature of touching in the relationship of words and Reality, but do have to explain why and how they can maintain their supposition that they can speak about eternal metaphysical truths. Our words and expressions in this case are in a Reality which is changing continuously, as do our words and meanings.

The difficulties lead many scholars to the conviction that we can only prove the existence of temporal structures that we can reach via experience, and that all the discovery of truth about the world is the business of natural sciences. Although there is a revival today of metaphysics, it is not clear whether metaphysics can become relevant to urgent questions of the moment.

Truth in Epistemology

Epistemological truth theorists recognize these difficulties, and they think that the question of truth is not metaphysical but epistemological. The truth is not a question of "What is there?" or "What is Reality really like?", but a question of the discovery of the discovering structures of the world, of cognition or language. This approach always remains in a certain sense relativist, since all knowledge about the world depends from the linguistic, logical or psychological structures of discovery. If someone does not want to be relativist, he has to

reject the epistemological paradigm. But, as history shows, in the case of refusing epistemology, one has to reject also the metaphysical paradigm: no metaphysician could show us the eternal Structures of the world, and most metaphysicians change their views from time to time, not to speak about developments in metaphysics. If metaphysics can develop, and if it does develop, then as yet it has never attained absolute and eternal Reality. That means that so-called metaphysics is not yet metaphysics. But if there will be a real and total metaphysical understanding, then we would be at the end of all inquiry, it would be the end, as a matter of fact the dead end of all philosophical inquiry.

Pragmatists developed their concept of truth or their aversion against truth precisely as a reaction to these difficulties. As Rorty emphasizes, "Pragmatists are saying that the best hope for philosophy is not to practise Philosophy. They think it will not help to say something true to think about Truth, nor will it help to act well to think about Goodness, nor will it help to be rational to think about Rationality."¹ This is the neopragmatic view of Rorty. But contrary to Rorty, Dewey still works in metaphysics.

In what follows, as a first step I briefly sketch Dewey's metaphysics in his *Experience and Nature*, I present the critique of Rorty, and then I go over to Rorty's theory. As we will see, whereas Dewey remains in a "naturalized metaphysics", and as such is delivered to all critiques of metaphysics I have mentioned, Rorty makes efforts to escape all philosophy. Rorty tries not to be a metaphysician, and he argues generally against epistemology. This is the fundamental difference between the two thinkers; that is why it is not enough to read Dewey when someone is interested in Rorty's work. Finally I would like to ask the question, "What possibilities and limitations exist in the overcoming of philosophy by Rorty?"

¹ R. Rorty, *Consequences of Pragmatism*, Minneapolis, University of Minnesota Press, 1982. xv.

The main thesis of Dewey in his Experience and Nature²

For Dewey, it is also impossible to get outside of our skins and to build up any theory of truth or metaphysics. For building up knowledge about the world, we have only one way, experience. Experience is not something metaphysical or transcendental, which foregoes any relationship of humans with nature, as their presupposition; it is not only of, but in nature: “experience is *of* as well *in* nature. ... Things interacting in certain ways *are* experience; they are what is experienced”.³ In this view humans as organisms are just one kind of entity in nature which interacts with other natural objects. In that way, “experience ... reaches down into nature”⁴. Experience is in nature, an event of nature, and there is no transcendental or metaphysical mystery around.

Although natural scientists almost never use the notion of experience, experience is the fundament of those sciences. Similarly, they never use the word “causality”, since causality is not a physical or scientific notion, but is the presupposition of all scientific work. They start by experience, and they get back to it, to control the rightness of the theorizing about the experienced objects and relationships. Traditional, pre-Deweyan philosophy had not the possibility of testing the results of its deliberations on the experience. Philosophy could not show the rightness of its method, because there exists no test of the results with the help of the experienced world. Whereas natural sciences can produce real results, a better understanding of and a better dealing with the world, philosophy has not this option. Philosophy does not help to discover the world, but it sometimes blocks it: as Dewey says: “the problems to which non-empirical method gives rise in philosophy are blocks to inquiry, blind alleys; they are puzzles, rather than problems, solved only by calling the original

material of primary experience ‘phenomenal’, mere appearance, mere impressions, or by some other disparaging name.”⁵ Philosophers who do not apply the experience or experimental method, never solve real problems; their problem solutions never have real contact with the world, to the everyday life of the people, to their culture or civilization.

Dewey presents his view with the help of questions about the task and achievements of philosophy. “a first-rate test of what the value of any philosophy which is offered us” is to ask whether philosophy has changed our life, whether it changed our view of the world. “Does it end in conclusions which, when they are referred back to ordinary life experiences and their predicaments, render them more significant, more luminous to us, and make our dealings with them more fruitful? Or does it terminate in rendering the things of ordinary experience more opaque than they were before, and in depriving them of having in ‘reality’ even the significance they had previously seemed to have? Does it yield the enrichment and increase of power of ordinary things which the results of physical science afford when applied in everyday affairs? Or does it become a mystery that these ordinary things should be what they are; and are philosophic concepts left to dwell in separation in some technical realm of their own? It is the fact, I repeat, that so many philosophies terminate in conclusions that make it necessary to disparage and condemn primary experience, leading those who hold them to measure the sublimity of their ‘realities’ as philosophically defined by remoteness from the concerns of daily life, which leads cultivated common sense to look askance at philosophy.”⁶

For Dewey there is no sense in practicing a philosophy which does not care about human life, society and civilization, when there is no return from philosophy to the life of people – as science returns with its results to society and makes the life of people better. Dewey

² J. Dewey, *Experience and Nature*, J. A. Boydston (ed), J. Dewey, *The Later Works*, Vol. 1: 1925.

³ J. Dewey, op. cit. 12.

⁴ J. Dewey, op. cit. 13.

⁵ J. Dewey, op. cit. 17.

⁶ J. Dewey, op. cit. 18.

supports the view common to Aristotle and Kant that philosophy should have consequences on the lives of philosophers, and he enlarges on this, following the Plato of the *Republic*, that the ideas of philosophers should have impact on the life of the society.

Life precedes philosophy: this is the slogan of Dewey, and is also taken over by Rorty. It can be contrasted with the Sellarsian expression that philosophy is finally the broadest possible effort of understanding the nature of the world and objects in the broadest sense. Philosophy is the last bulwark of reason, which itself is the chief bulwark of personhood and of being human. To search for knowledge and understanding without compromises: this is the task of philosophy. Philosophy should not allow even human life to dictate. But then, there can be a clear conflict here, and a conflict which as Dewey sees it exists between life and philosophy. Analytic philosophers answer Dewey, that his intentions may be right, but – as Davidson says -- he does not get the connections right. They say that for the life-philosophy conflict you should first clarify what life is, what society is, and what philosophy is before you decide about their primacy. Adversaries of analytic philosophy and Deweyans say that although we perhaps do not know what life is, and certainly individual life is too short to clarify completely what life is, yet we have to live our life. And since philosophers as individuals all live our individual lives, we should give a primacy to our life. Further, Dewey puts the analysis on the second place: “ ‘life’ and ‘history’ have the same fullness of undivided meaning. Life denotes a function, a comprehensive activity, in which organism and environment are included. Only upon reflective analysis does it break up into external conditions – air breathed, food taken, ground walked upon – and internal structures – lungs respiring, stomach digesting, legs walking”.⁷ First the holistic view of the folk, and only after it the analysis, but the analysis for Dewey has to end by reintegration of the results into the whole picture.

The conceptual conflict between analysts and holists is not to solve: either you make theoretical philosophy, or you are concerned with your life, with the help of philosophical concepts. If you involve yourself with professional philosophy, you analyze concepts and do not care primarily of its relevance to your everyday life. If you make philosophy for individual or social practice, then you search for connections of your concepts with life, culture and history. John Rawls wrote at the beginning of his *A Theory of Justice*: writing about justice does not require strict conceptual analysis as it is practiced in issues of linguistic philosophy, epistemology or metaphysics. On the other hand, it is possible not to view these two as opposite directions, but as complementary modes of doing philosophy. You can have, as a matter of fact, *you do have* a holistic view of your life and society, and you can be engaged in analysis of any conceptual area of your life.

What to do with Dewey's proposition about the empirical method is another question. For Dewey, experience gives us a kind of “integrated unity”, of object and subject, of world and language, without starting with the separation as most of the philosophers do. It is only after we have acquired the data of experience that we can start to distinguish the different components and to analyze them. After that we can see how the analysis leads to new knowledge and to enrichment of our total experience. The non-empirical method on the other hand starts with distinctions, such as subject-object, mind-matter, as if they were different entities. This method, then, involves the problem of how it is possible to recognize the analyzed entities and to test the results of deliberations and arguments. Testing is not possible with the non-empirical method, so we can never decide who is right in a debate about any question, whereas the experimental method offers us the opportunity to jointly check our theories – and this is the common experience. (There exist theories according to which experience is always subjective. Experience becomes common through communication, through the expression of the individual experiences

⁷ J. Dewey, op. cit. 19.

with the help of the common language and through the mutual approval of the partners in communication.)

Rorty refers to the experiment as a philosophical method, stating that “two generations of commentators have been puzzled to say what method might produce ‘a statement of the generic traits manifested by existences of all kinds without regard to their differentiation into mental and physical’⁸ while differing ‘no whit’ from that employed by the laboratory scientist.”⁹ Methods of laboratory scientists are however methods of science and not of philosophy. Rorty states that if we use Dewey’s “experimental” method self referentially on his own work, we would find that “talk of ‘observation and experiment’ is ... irrelevant to the accomplishment of the project”.¹⁰ Dewey as Hegel’s disciple urges an end to philosophy. Whereas he cannot demonstrate the validity and usefulness of the empirical method for philosophy, he tries to show that behind the narrow perspectives of logical empiricism there are no real and solvable problems.

Dewey was severely criticized by Hodgson and Santayana, who said that Dewey gives no useful method for the renewal of philosophy. Rorty agrees with their criticism, and says “Hodgson’s criticism is, I think, entirely justified. It parallels Santayana’s criticism of the possibility of a ‘naturalistic metaphysic’, and neatly singles out a recurrent flaw in Dewey’s work: his habit of announcing a bold new positive program when all he offers, and all he needs to offer, is criticism of the tradition”¹¹. Despite the criticism, Dewey did not change his view fundamentally during his long career. As a naturalized Hegelian, he held uncompromisingly that human beings as entities in nature are fully embedded in nature, and that there is no gap between the epistemological subject and the world, no gap between the ethical subject and

the society. Knowledge is what we experience, there is no further epistemological subject. The full naturalization of human beings was accepted by many philosophers, the main point of criticism being that he did not provide a method of investigation. Rorty remarks, “What exasperated Hodgson in the 1880s was to exasperate another generation of critics in the 1930s. These critics welcomed with enthusiasm Dewey’s suggestions about the cause and cure of traditional empiricisms and rationalisms, but were unable to see much point in Dewey’s own ‘constructive’ attempts to produce a philosophical jargon that was dualism-free, nor in his claim to be more ‘empirical’ in method than his opponents.”¹²

But later Rorty stated that philosophy does not have to have any method, and this idea comes from Dewey. Although Dewey spoke of an empirical method, he could not develop any method that could be followed by anyone. The difficulty with the empirical method in philosophy is that if you are not only empiricist but also wish to carry out empirical research in and with philosophy, you are no longer a philosopher but a natural scientist.

Rorty further criticizes Dewey, repeating Santayana’s criticism that “‘naturalistic metaphysics’ is a contradiction in terms. One can put this point best, perhaps, by saying no man can serve both Locke and Hegel.”¹³ But Dewey’s is not a servitude towards Locke, since Dewey does not want to explain experience, as Locke wanted to, but to make experience the only method of philosophy. For Dewey, there is a continuity between lower biological structures, causal biological processes and human introspection, knowledge and argumentation. But conversely with Dewey there is the problem that these areas are expressed in different languages or vocabularies, where there is no conceptual continuity. Later, Davidson and McDowell would emphasize that the world of logic and the world of

⁸ Rorty’s cit. Dewey, *Experience and Nature*, New York, W. W. Norton, 1929, 412.

⁹ R. Rorty, Dewey’s Metaphysics, *Consequences of Pragmatism*, 73.

¹⁰ R. Rorty, op. cit. 74.

¹¹ R. Rorty, op. cit. 78.

¹² R. Rorty, op. cit. 80.

¹³ R. Rorty, op. cit. 81.

causality are completely different and not reducible on each other.

Finally, Rorty's conclusion is that Dewey did not overcome idealism in his *Experience and Nature*: "its solution to the mind-body problem seemed one more invocation of the transcendental ego, because the level of generality to which Dewey ascends is the same level at which Kant worked, and the model of knowledge is the same – the constitution of the knowable by the cooperation of two unknowables."¹⁴ Rorty thinks that the effort of generalization and general explication of knowledge will lead to the transcendental destiny of Kant. For Rorty, it is not possible to explain knowledge by philosophical means. For him Dewey is a great thinker who has done a lot to free philosophy from the traditional shadows that had caused so much harm for our culture, but that he did not go far enough: rather than trying to abandon philosophy as a mode of thinking, he merely tried to answer philosophical questions with new philosophical methods. Rorty's main criticism of Dewey is that he "never quite brought himself to adopt the Bouwsma-like stance that philosophy's mission, like that of therapy, was to make itself obsolete. He thought, in *Experience and Nature*, to show what the discovery of the *true* 'generic traits' of experience could do."¹⁵ Rorty merely tried to radicalize the work of Dewey, and to show that traditional philosophical questions are obsolete, and so not worth dealing with.

***Consequences from a pragmatist theory about truth:
a metatheory***

Rorty's position is fundamentally different from Dewey's. He wants no metaphysics, not even if naturalistic. He also denies epistemology; his proposition is to abandon traditional questions of philosophy. However, as I shall try to demonstrate below, there is some possible doubt regarding the feasibility or the

¹⁴ R. Rorty, op. cit. 85.

¹⁵ R. Rorty, op. cit. 83.

success of his proposal and there are arguments for showing that even Rorty's argumentation remains in the domain of metaphysics.

Rorty writes at the beginning of his *Consequences of Pragmatism* that the essays in his book "are attempts to draw consequences from a pragmatist theory about truth".¹⁶ This is what he meant by the title of the book. What Rorty wishes to present is obviously a metatheory of pragmatism. If pragmatism and a pragmatist theory of truth itself is a theory about truth (and Peirce and James thought, it was), and about theories which are held to be true, then this book presents a theory about pragmatism, a *metatheory of truth* or the *truth theory of truth*. The initial question is, then, "Is the theory of truth true?". If pragmatists say that truth is a theory, which functions and which has consequences predicted by the theory, then the description of the consequences of pragmatism is itself the description of the pragmatist theory of truth, and as such a metatheory. This is of course not the interpretation that Rorty would give to this, but I would like to follow this line. Rorty says it transpires that there is no sense in debating about the essence of Truth, Representation or Goodness, and that it is better to recommend a change of subject. As expressed by Huw Price, "pragmatism is quietist ... about the representational character of various vocabularies".¹⁷ To be quietist toward representationalism goes hand in hand with being quietist toward such concepts as Truth and Goodness and also being minimalist in those questions.

Roughly speaking, pragmatism and a pragmatist theory of truth state that the proof of the truth of a theory is the praxis. If the theory works in some sense in practice, that means, in space and time, in the "real" world, then it is true. This is the fundamental feature of a completely timely philosophy, of a philosophy which does not

¹⁶ R. Rorty, op. cit. xiii.

¹⁷ D. Macarthur and H. Price, „Pragmatism, Quasi-realism and the Global Challenge“, to appear in H. Price, *Naturalism without Mirrors*, Oxford University Press, 2011.

accept any eternal, no-temporal and no-spatial truth. If you have a theory of physics or chemistry, it is true if it functions in reality, if it predicts in the given context and conditions what will happen next. In this sense natural scientists are pragmatists, and pragmatism is the philosophy of natural scientists. A theory is true if it is a prediction of processes in space and time, in given conditions. In this sense there is nothing more to say about truth. "True" is just a property of sentences which are held to be right, but there is no one single common feature of "truth".

When however Rorty speaks not about the consequences of a given theory, or consequences which in pragmatism give reason to decide about the truth-status of the given theory, but about the consequences of a theory of a theory of truth, that is, about the consequences of a theory of consequences, then these consequences cannot be consequences in time and space, that is, somehow causal consequences, as with natural sciences, but only consequences in theory, consequences in the relationship of ideas. And in addition to it, there is the problem of the ever changing interpretation and understanding of those ideas and of their relationships. The question is whether the theory of pragmatism is pragmatistic itself, whether pragmatism is true in the pragmatic sense of truth. Clearly, here at the meta level, the relationships cannot be any more causal in space and time, but in the space of reason. And then it can be asked what kind of consequences have a metatheory, what are the consequences of the "consequences of pragmatism", if there is no possible space-time proof of the practical success of the theory. Regarding in this way the theory of pragmatism or a theory about pragmatism or about a pragmatist theory of truth cannot be pragmatistic. But then, what can it be? It is a metatheoretical or *metaphysical* approach. This is the case for what Derrida said that if we use philosophical terms it is not possible to get outside of philosophy. I have shown in my

"Representationalism and antirepresentationalism"¹⁸ that if he uses such philosophically laden terms as truth and reality, then it is not even possible for Rorty to get outside the representationalist and relativistic paradigm.

Denial of the concept of Truth

Precisely because of its simplicity, the pragmatic theory is not really interesting for philosophers who like enigmatic puzzles. Rorty emphasizes that "this theory says that truth is not the sort of thing one should expect to have a philosophically interesting theory about. For pragmatists, 'truth' is just the name of a property which all true statements share."¹⁹ Truth is just a word, a compliment, and Rorty denies that there could be a general theory about it. It is a theory of denial of the philosophical concept of Truth. Does this denial function? Can this denial be true?

Rorty distinguishes his position from that of Peirce and James, who thought that pragmatism was the truth theory of the practical consequences of theories. For Rorty this is not an interesting point, since we all try to have theories about reality, and we always wanted our theories to describe the world as it is. Whether "True" or "good", "there is no interesting work to be done in this area".²⁰ The search for truth and its critique is as old as philosophy itself, it makes up the main point of philosophical investigations. Rorty says that we should not replace the Platonic model or tradition of truth, it is just that we should no longer ask the questions of Plato and of his followers, the philosophers. Pragmatists in his understanding "would simply like to change the

¹⁸ J. Boros, „Representationalism and Antirepresentationalism: Kant, Davidson and Rorty“, Randall E. Auxier and Lewis E. Hahn (eds.), *The Philosophy of Richard Rorty*, The Library of Living Philosophers XXXII, Chicago, Open Court, 2010. Carbondale, USA, Southern Illinois University Press, 2010. 249-265. Richard Rorty válaszával: Reply to János Boros, 266-268.

¹⁹ Ibid.

²⁰ Rorty, op. cit. xiv.

subject”.²¹ Pragmatists in his sense do not have any new theory about Nature or God, they “keep trying to find ways of making antiphilosophical points in nonphilosophical language”.²² Rorty is aware of the difficulty of this way of speaking and he knows that Aristotle said, we philosophize always. If you change the language, then the critics of the nonphilosophical attitude say you are changing the subject, and it is not possible to argue with or against you. If you remain within Platonic language, then it is impossible for a Rortyan pragmatist to express what he wants to say. He himself becomes a metaphysician, as I mentioned earlier.

Rorty emphasizes that “the best hope for philosophy is not to practise Philosophy”.²³ We cannot make our statements more true by thinking about Truth and we won’t behave better by investigating the nature of Goodness. Rorty is against Philosophy in its both platonic and empiricist senses, because these directions still maintain the traditional program of philosophy, searching for Truth. Philosophers of both lines think that pragmatism is not a philosophy, but Rorty says, “the pragmatist tries to defend himself by saying that one can be a philosopher precisely by being anti-Philosophical, that the best way to make things hang together is to step back from the issues between Platonists and positivists, and thereby give up the presuppositions of Philosophy”.²⁴ The question is whether this “stepping back” is possible.

Our language and our thinking expressed in language and not detachable from it force us to make philosophy. If you try to express yourself in an understandable, structured way, somehow rationally, you must be able to keep in mind the relationship between your concepts and notions. If you do that, and you reflect on it, then you have to deliberate upon the correct relationship of

your notions and the question of what criteria you have in order to decide about the rightness of their interpretation and use. Then, there is the question of meaning of the different notions, and the question, how you can know, what kind of meaning has a given notion. If you follow this and ask questions in this style, then you have to decide whether you think that meaning is defined exclusively via the relationship of notions, or via empiricism. If you opt for the first alternative, then you are a Platonist, rationalist or expressivist; if you decide for the second, then you are an empiricist.

To be a pragmatist in Rorty’s sense has nothing to do with this distinction. You can be a Platonist pragmatist like Robert Brandom, and you can be an empirical pragmatist, like Huw Price. Because pragmatism is an attitude towards our theories or notions about reality: if it functions, if it predicts correctly what will happen next in the relevant context, then it is acceptable and true. That is why I do not think that pragmatists should struggle for a real or correct or strong anti-Platonist position, as Rorty suggests: “One difficulty the pragmatist has in making his position clear, therefore, is that he must struggle with the positivist for the position of radical anti-Platonist. He wants to attack Plato with different weapons from those of the positivist, but at first glance he looks like just another variety of positivist.”²⁵ If the pragmatist should struggle with the positivist, then he would remain in Philosophy and this is precisely the way Rorty does not want to go. If the pragmatist position is outside of Philosophy, then it is either metaphilosophy or subphilosophy or nothing like either. It can be metaphilosophy in the sense that it investigates all kind of philosophies and asks whether their sentences or truisms make some difference to the practice or to practical life. This would be the attitude that Rorty presents in his *Contingency, irony, and solidarity*, where he writes, reads all kind of philosophies, and takes them into his dialectical mill. He reads Davidson, Heidegger and Derrida, and asks

²¹ Ibid.

²² Ibid.

²³ Op. cit. xv.

²⁴ Op. cit. xvii.

²⁵ Ibid.

whether they are of practical assistance to him in developing new languages, new descriptions of himself and of the world, and in making life in a democracy richer, more interesting and full of imagination and creativity. A subphilosophical perspective would be Rorty's suggestion to leave philosophy, and look only at the consequences of one's own sentences and statements, without caring for philosophical connotations.

Rorty wants to leave traditional „platonistic“ philosophy, because the problems surrounding it are unsolvable, and they lead to aporia: truth as such cannot be found, the relationship of the epistemological subject and object is not discoverable, and the language cannot be analyzed from outside. He says, “it is *the impossible attempt to step outside our skins* – the traditions, linguistic and other, within which we do our thinking and self-criticism – and compare ourselves with something absolute”.²⁶ This means that for him we can never reach an absolute truth, we can never reach reality as such, we always remain within our own skins, language, character, subject and personality. This is of course a Kantian anthropological position: all that we can know from the world depends on the structure of the knowing subject, its capacity and structure of cognition and its language. The only way is to look for success in our language use and in the success of our practice which is governed by our concepts and language.

²⁶ Rorty, op. cit. xix. Italics added J.B.

BOOK REVIEW:

**RICHARD RORTY. AN ETHICS FOR TODAY: FINDING
COMMON GROUND BETWEEN PHILOSOPHY AND RELIGION.
(New York: Columbia University Press, 2011. 76 pp.)**

Roman Madzia

Masaryk University

roman.madzia@mail.muni.cz

In his professional career Richard Rorty stirred up the waters of almost all philosophical disciplines from metaphysics and epistemology through political philosophy, up to philosophy of law and ethics. Indeed, hardly any branch of philosophy remained completely untouched after what Richard Rorty has done to our Western intellectual enterprise called the „love of wisdom.“ However, some areas of philosophical inquiry seem to have been off Rorty’s primary focus during his lifetime; and one of these is philosophy of religion. When we consider Rorty’s philosophical and political stance it is hardly a surprise after all. In his work, a social democrat Rorty, raised in the house where it was „The Case of Leon Trotsky“ (not the Bible) that occupied the most honorable place on his parents’ bookshelves¹, apparently has nothing much interesting to say about religious belief. Apart from a few essays² devoted to the subject of religion, Rorty seems to be more interested in political dimension of religion than in the phenomenon of religion as such. However, not only Rorty’s thoughts concerning the relations of politics and religious belief but also his ideas on the very project of Western metaphysics and epistemology bear a great load of intellectual material that can be (if seen from proper perspective) actually utilized in thinking about religion.

¹ Cf. Rorty, R.: *Philosophy and Social Hope*, Hardmondsworth: Penguin Books, 1999, p. 5.

² See his papers „Religious Faith, Intellectual Responsibility and Romance“ or „Religion as Conversation-stopper“ in: Rorty, R.: *Philosophy and Social Hope*, Hardmondsworth: Penguin Books, 1999, pp. 148-175.

This project has been recently taken up by authors like Gianni Vattimo, G. Elijah Dann or Jeffrey W. Robbins, all of whom contributed to the book called *An Ethics for Today: Finding Common Ground Between Philosophy and Religion*. This book is an outcome of a common project of the abovementioned authors, which started with Rorty’s public lecture in Torino on 21st September 2005. The lecture was held on the occasion of Gianni Vattimo’s invitation of Rorty to the Italian philosopher’s *alma mater*. Symbolically enough, Rorty carried out this speech only a few months after the new Pope Benedict XVI was elected³. In this respect (and as we shall see below) Rorty’s speech „An Ethics for Today“ can be interpreted as a dialogue with some of the Pope’s doctrines and contentions, shared by millions of Catholics and other Christians all over the globe.

The foreword for this concise but none the less immensely thoughtful book is written by a young American scholar Jeffrey W. Robbins. Robbins is currently an associate professor of religion and philosophy at Lebanon Valley College, where he also serves as the director of the college colloquium. He is the author of two books, *Between Faith and Thought: An Essay on the Ontotheological Tradition (2003)* and *In Search of a Non-Dogmatic Theology (2004)*⁴, and numerous article on the subject. From the very first pages of his foreword Robbins leaves little doubt that the hermeneutic activity of both him and G. E. Dann in the conclusion is centered around interpreting Rorty’s work as conducive to their own philosophical enterprises of postmodern Christianity. Whether this endeavour is a successful one I will leave (for now) an open question. The fact is that Robbins depicts the main traces of Rorty’s thought in a clear and quite an insightful way without dragging them to dimensions where Rorty himself would not be happy to find them. As Robbins

³ Joseph Ratzinger was elected the new Pope on 19th April 2005 in a papal conclave, and celebrated his Papal Inauguration Mass on 24th April 2005.

⁴ He also edited, along with Gianni Vattimo and John D. Caputo, the important book of the postmodern christianity’s doctrine named *After the Death of God (2007)*.

correctly points out, the central theme of Rorty's thought, regardless whether we relate it to epistemology, ethics or theology, is a thorough rejection of metaphysical foundationalism in all its forms. It is an ultimate refutation of the idea that at some point in the human history we will find some kind of a proof (either empirical or philosophical) of how things really are.

The project of Western Platonic metaphysics is nothing more than an attempt to escape from time and chance to the godly world of the eternal Truth that will finally tell us who we really are. At this point we notice, that the classical philosophers' endeavour is in fact existential⁵ in nature. We do not look for the truth day and night „just because“ or out of mere curiosity – we long for the Truth to find peace with ourselves. From this perspective we can see that philosophy, despite its explicit proclamation of hanging only upon the process of rational speculation, is at its very core also a religious project. This characteristic of philosophy's search for the immutable and eternal was thoroughly addressed by Heidegger in his critique of ontotheology. The destruction of metaphysics carried out in Europe by thinkers like Nietzsche, Heidegger or Derrida found an analytic echo in the work of Richard Rorty. As Chantal Mouffe⁶ thoughtfully noticed, Rorty as well as Derrida, both rejected the idea that there is some kind of a necessary link between democracy, rationality and universalism which represents the intellectual route of mankind to the ultimate happy-end of human history. On the contrary, what Rorty apparently wants to underline in his texts is that democracy, rationality⁷ and some kind of universalism are to a crucial extend

dependent on our social institutions as well as our abilities to foster them in the future by means of free and open communication. The work of Richard Rorty, Robbins holds, leaves us at the gates of thoroughly contingent world where (in Freud's words) chance is treated as worthy of determining our fate.⁸

Danny Postel once wrote that Richard Rorty can be probably best described as a „boring atheist.“⁹ Now, can we hear anything interesting about religion from a boring atheist? In the case of Rorty, we surely can, at least in two respects: a) by reading his papers on religion we can get a picture of his opinions on the role of religious experience in the lives of human beings that is far from trivial; b) by using „redescription“ as Rorty's most powerful weapon in advancing our intellectual and moral standards, we can reformulate some of his ideas as being able to enter a conversation with the kind of thinking known as postmodern Christianity (or weak theology being its instance). Rorty's atheism definitely does not fall into the same category as the atheism of Richard Dawkins or Daniel Dennett. Rorty seems to perfectly understand the broadness¹⁰ of religious experience and its various contexts, although, for himself, religion is not a live option. His growing willingness to enter into debate with religion, as we saw it in the last several years of his life, is supposedly an inevitable conclusion of contentions published in his earlier papers¹¹ where he called religion a „conversation-stopper.“ It may well be the case that religion sometimes is a conversation-stopper, but as Rorty himself holds, it is

⁵ As already Dewey noticed in: Dewey, J.: *The Quest for Certainty: A Study of the Relation of Knowledge and Action*, Carbondale: Southern Illinois University Press, 1988, pp. 24-25.

⁶ Mouffe, Ch. „Deconstruction, Pragmatism, and the Politics of Democracy“ in *Deconstruction and Pragmatism*, New York: Routledge, 1996, p. 1.

⁷ In the sense presented for instance in his essay „Rationality and Cultural Difference“ in Rorty, R.: *Truth and Progress*, Cambridge: Cambridge University Press, 1998, pp. 186-201.

⁸ Cf. Rorty, R.: *Contingency, Irony and Solidarity*, Cambridge: Cambridge University Press, 1989, p. 22.

⁹ Postel, D.: „High Flyer: Richard Rorty Obituary“ in *New Humanist* 122, no 4, 2007. Available online: <http://newhumanist.org.uk/1440/high-flyer-richard-rorty-obituary> [cited 04. 16. 2011].

¹⁰ Cf. his paper „Religious Faith, Intellectual Responsibility and Romance“ in: Rorty, R.: *Philosophy and Social Hope*, Hardmondsworth: Penguin Books, 1999, pp. 148-168.

¹¹ See his essay „Religion as Conversation-stopper“ in: Rorty, R.: *Philosophy and Social Hope*, Hardmondsworth: Penguin Books, 1999, pp. 168-175.

our (philosophers') responsibility to maintain the discussion even with these sometimes „unwilling” forms of discourse. Since we know that when discussion ceases, other forms of persuasion come into play, we must make sure it will carry on.

The topic of Rorty's speech called „An Ethics for Today“ is spirituality and secularism. From the very beginning of his lecture it is quite clear that Rorty wants to shape it according to the framework of European realia. This is also why he chose to address the words of Papal inauguration homily of Benedict XVI. In this sermon Ratzinger said: *„Having a clear faith, based on the creed of the Church, is often labeled today as a fundamentalism ... Whereas relativism, which is letting oneself be tossed and swept along by every wind of teaching, looks like the only attitude acceptable to today's standards.”* These words make the central points of Rorty's attention and actually the whole lecture revolves around them. What is interesting, in this case Rorty accepts the label of a relativist, although he obviously rejects the definition of relativism presented by Ratzinger. Rorty depicts¹² his relativist stance as openness to new possibilities and willingness to consider all suggestions about what might increase human happiness. On the other hand, he refuses to call Ratzinger a fundamentalist. If we define fundamentalism as an absurdly uncritical invocation of scriptural texts it becomes obvious that no one could possibly accuse a sophisticated theologian Ratzinger of this (p. 11). However, if we define fundamentalism as an opinion

that our moral judgments are valid only insofar as they are grounded in the objective reality, totally independent of us, than Ratzinger apparently falls into this category. We now see that the core issue of the imaginary Rorty-Ratzinger dispute is actually the question of where we are to find the source of our moral judgments. Is it in God? In the idea of natural law or maybe is it not the case that moral judgments are nothing but a matter of our arbitrary emotional decisions? Rorty says that no one of these alternatives is the right one. Fundamentalists clearly try to manipulate us into a false dilemma of Ivan Karamazov that if God (or anything of this transcendent kind) does not exist, everything is permitted. Rorty asserts that all attempts to find some neutral court of appeal for validating our moral opinions must necessarily end up in failure. After all, is it not the case that the fundamentalists' search for absolute certainty might be only a way of dispelling their own doubts on the matter of objectivity of moral values? There seem to be no other means of justification than the conversational ones.

As N. H. Smith correctly points out¹³, in this issue, Rorty draws on the inferentialist philosophy of Robert Brandom to argue that the preoccupation with the existence of some „higher order” standards is simply misplaced within our public debates. According to Brandom, there is nothing outside the argumentative exchanges of human inquirers that could possibly lend authority to our beliefs. Appealing to God is not going to do its work here because the community of inquirers is not likely to share the same religious opinions (the question of the existence of God cannot be authoritatively settled). And this is exactly when there is a danger that the conversation will cease. As mentioned above, Rorty does not act as an enemy of religion; according to him, there are some kinds of religiosity that actually contribute to democratic societies' well-being. So, again, it is not due to metaphysical criteria that Rorty

¹² It should be underlined that the definition of relativism presented here by Rorty is in full accordance with one of the most influential ones, presented earlier in his career – see: „'Relativism' is the view that every belief on a certain topic, or perhaps about any topic, is as good as every other. No one holds this position ... So the real issue is not between people who think one view as good as another and people who do not. It is between those who think our culture, or purpose, or institutions cannot be supported except conversationally, and people who still hope for other sorts of support.” In: Rorty, R.: *Consequences of Pragmatism*, Minneapolis: University of Minnesota Press, 1982, pp. 166-167.

¹³ Cf. Smith, N. H.: „Rorty on Religion and Hope”, *Inquiry*, 48, 2005, p. 80.

wants to challenge religion but rather on the background of their „cultural desirability.“ The existence of certain forms of religion is perfectly justifiable so long as it does not interfere with political life of a society (anticlericalism¹⁴). From Rorty’s perspective, then, religion is to be taken as just another worldview competing for success in the free market of ideas – if it wins out eventually – so much better for it. In this sense, Rorty presents himself as a downright utilitarian. The only political and social ideas worth their salt in the life of society are those that contribute to the increase of total human happiness.

As well as other currents of moral philosophy, also utilitarianism (especially when related to pragmatist philosophy¹⁵) has got some problematic issues. On the other hand, if we try to see Rorty’s utilitarianism in the context of his whole philosophy, it makes a perfectly good sense. If there are no metaphysical groundings for any of our moral judgments then the only reasonable escape from the threat of all-devouring blunt relativism is the contention that in absence of the Absolute the best way of organizing our lives is a mutual and constant effort to make our lives happier than before. The key competence in our strives of achieving this goal is inclusivity; it is the matter of what Peter Singer calls „enlarging the circle of the ‚we‘“ – in other words, enlarging the circle of people whom we think of as „one of us“ (p. 15).

As we saw earlier, Rorty’s main problem with religion is not of the same (at times a little superficial) nature as that of Daniel Dennett or Richard Dawkins, for instance. Rorty, although being religiously unmusical, displays quite an accomplished understanding of many aspects of

religious experience.¹⁶ In his opinion, religion as a phenomenon, constitutes a part of human character that is hardly eliminable. After all, for him, elimination of religious belief is not even desirable – as well as Dewey, he would prefer its transformation and reconstruction. Going back to the difference between Rorty and thinkers like Dawkins we see that it is not religion as such but rather its metaphysical and foundational form that could be seen as a source of trouble in political life of our society. From this point of view, the anti-foundationalist and anti-platonic philosophy of Richard Rorty may well be perceived as a neo-pragmatist perspective out of which a new and fruitful discourse on religion could blossom. I guess that this is the point where the „weak thought“ of religious thinkers like Gabriel Vahanian, Gianni Vattimo or John D. Caputo comes into play.

The crucial question of our post-secular era, according to these intellectuals, is the following: Is religious belief possible after the proclaimed death of God in the work of Nietzsche, Heidegger and others? At first glance we might say that if we take seriously Nietzsche’s critique of religion (Christianity, to be more specific) there seems to be almost no option of how to sincerely restore the notion of belief in God. Thinkers like the ones mentioned above, however, read Nietzsche in a very different manner. From their point of view, through unmasking human, all-too-human foundations of Christian morality and theology, Nietzsche did Christianity an incredibly useful service at least in two ways: a) in showing that a great deal of our moral judgments might be an outcome of bilious resentment rather than of saintly intentions of following God’s word he has challenged Christians towards more authentic and humble picture of their moral lives; b) it is due to Nietzsche’s destructive critique of its metaphysical foundations that Christianity can finally throw off the burden of defending its existence in the dialogue with science and the rest of the culture. By the light of ideas of Nietzsche, Heidegger or Derrida the

¹⁴ Cf. Rorty, R.: „Anticlericalism and Atheism“ in: Zabala, S. (ed.): *The Future of Religion*, New York: Columbia University Press, 2005, p. 33.

¹⁵ To learn more on this subject see for instance: Pappas, G. F.: *John Dewey’s Ethics: Democracy as Experience*, Indianapolis: Indiana University Press, 2008, pp. 99-101.

¹⁶ Cf. Rorty, R.: *Philosophy and Social Hope*, Hardmondsworth: Penguin Books, 1999, pp. 151-153.

strong God of metaphysics seems to be dead for good. We can no longer think of God as an Ultimate Being waiting behind the curtain of history for his „time of revenge“ to come. The representatives of weak theology find such militant conceptions of religion as childish, resentful and what is worse – violent and dangerous forms of discourse.

In contrast to traditional „strong“ notions of religion understanding God as an Ultimate Force scholars like Vattimo or Caputo propose to view God rather as a weak force characterized by compassion, empathy and power of powerlessness. Authentic religiousness does not have much to do with naive escapism and triumphalism of fundamentalist Christianity but on the contrary with a complex moral shift of human community as a whole. What does, after all, have Jesus of Nazareth on the cross (being the central symbol of Christianity) have in common with the notion of God as an all-powerful being? Is it not the case that the crucifixion of God should actually change our perspective on him? In fact, thinkers like Vattimo hold that it should. In this context Vattimo reformulates the key notion of self-emptying of God – *kénōsis* (gr. *κένωσις*) of Paul of Tarsus. Vattimo views the self-emptying and self-abasing of God as a special moment of human history when God assigned all his power to human beings. The death of God on the cross, then, should be rather interpreted as a radical social appeal and also God’s ultimate condemnation of suffering of the innocent. Moreover, it may be viewed as a historical reference to all the victims of an unjust punishment and cruelty challenging us not to remain indifferent to any of them.

According to Richard Rorty, the worst thing we can do to other beings is cruelty¹⁷ or indifference to it: „*In my utopia, human solidarity would be seen nor as a fact to be recognized by clearing away ‚prejudice‘ or burrowing*

down to previously hidden depths but, rather, as a goal to be achieved. It is to be achieved not by inquiry but by imagination, the imaginative ability to see strange people as fellow sufferers. Solidarity is not discovered by reflection but created. It is created by increasing our sensitivity to the particular details of the pain and humiliation of other, unfamiliar sorts of people.“¹⁸ In this respect we can see how close Rorty’s philosophy can find itself to some postmodern conceptions of Christianity. If we stop perceiving God in the metaphysical terms we will discover a new field of experience both social and individual. Actually, if we try to conceive of religious faith in radically existential, non-cognitive terms as a belief without knowledge we are likely to return to the notion of religion characteristic of the biblical and pre-philosophical era.¹⁹

Taking up this form of Rortyan discourse we can start to speak of the movement called „edifying theology.“²⁰ This intellectual enterprise neither tries to prove the existence of God by coming up with irrefutable logical constructions nor does it claim to be the only possessor of the Truth. It does not rebuke other forms of religious discourse as long as their project of increasing human happiness leads to the same goal. However, it realizes that we cannot step outside our own skin and tradition; thus, it builds its stories on the background of the Christian tradition out of which our cultural values stem. In this sense, edifying theology is ethnocentric for it believes that the Christian tradition of faith, love and hope, once freed from metaphysics, provides probably

¹⁸ Rorty, R.: *Contingency, Irony, and Solidarity*, Cambridge: Cambridge University Press, 1989, p. xvi.

¹⁹ „... this lack of a robust metaphysical theology was no impediment to faith and religion; it was a characteristic of biblical faith, both Hebrew and Christian. The metaphysical theology had come later when Christianity, having become the established religion of the Roman Empire, had come to terms with Hellenistic learning, a program that had first gotten off the ground with Philo Judaeus back in first-century CE Alexandria.“ Caputo, J. D.: *On Religion*. New York: Routledge, 2001, pp. 57-58.

²⁰ Cf. Dann, G. E.: *After Rorty: The Possibilities for Ethics and Religious Belief*, New York: Continuum, 2006, pp. 160-163.

¹⁷ For Rorty’s extensive analysis of this issue see: Rorty, R.: *Contingency, Irony, and Solidarity*, Cambridge: Cambridge University Press, 1989, pp. 141-189.

the best democratic tools of improving human condition.

I am convinced that the philosophy of Richard Rorty has shown us new horizons in thinking about religious belief.

It is also owing to him that we can speak about religion in the age that has come after the „death of God.“ Let us never forget to conduct our discussions on religion in the edifying manner.



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