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# JOHN DEWEY—A PHILOSOPHY OF LAW FOR DEMOCRACY

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On what bases can a philosophy of law be founded which is equal to the task of the democratization of man in the world today? The purpose of this article is to present some suggestions concerning the fuller use of John Dewey's philosophy in this important regard. In addition to an examination of Dewey's theory of justice, it will be suggested that the richness of Dewey's thought and the variety of its uses in legal scholarship and legal education have yet to be felt.

Two observations should be made before attempting to describe John Dewey's philosophy of law. In the first place, this phase of Dewey's thought must itself be sought in the context of his attitude toward morals, democracy, experience, logic, scientific method and education<sup>1</sup>—and this for the reason that Dewey's thinking about

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*Acknowledgments*—I wish to acknowledge gratefulness to the University of Alabama Research Committee for a research grant which enabled me to work full time during the summer of 1958 on John Dewey and to duplicate many of his materials. My deep appreciation also goes to Dr. James E. Wheeler of Rutgers University, a great Deweyan and philosopher, and to the students in many experimental philosophy of law seminars which used John Dewey's materials.

Dewey has such a diverse audience that ideally his own words should be used for more accurate evaluation—wise advice given by Professor Edmond Cahn of New York University School of Law (together with many references) to the writer in another context but which, within space limitations, I have followed here. None of the above have examined this paper or its hypotheses. I, of course, assume all responsibility for its shortcomings.

*Biographic and Bibliographic*.—The most complete listings of biographic references (to 1939—Dewey lived 1859-1952) and bibliographic references (to 1951) are in SCHILPP, *THE PHILOSOPHY OF JOHN DEWEY* (2d ed. 1951). This work consists of critical essays written about Dewey's philosophy by other philosophers and Dewey's replies to the essays: an excellent source of insight to Dewey. RATNER, *INTELLIGENCE IN THE MODERN WORLD: JOHN DEWEY'S PHILOSOPHY* (1939) is the most complete single collection of Dewey's writings, and includes Ratner's 239 page introduction to Dewey's philosophy. A recent series of articles, 20 *J. OF THE HISTORY OF IDEAS* 515-76 (1959) has new biographic materials, as also does EASTMAN, *GREAT COMPANIONS* (1959). GEIGER, *JOHN DEWEY IN PERSPECTIVE* (1958) is valuable for recent evaluation of Dewey's philosophy. The John Dewey Centennial celebrated throughout the world in 1959 has produced many works about him. Rutgers University is considering cataloguing Dewey materials (see *Saturday Review*, Nov. 21, 1959, p. 26) and I acknowledge with gratitude receipt from Professor Sidney Ratner of Rutgers valuable citations in response to my inquiry. See DEWEY & BENTLEY, *KNOWING AND THE KNOWN* (1949) for a recent emphasis upon the "transactional" as opposed to the "interactional" in the knowledge process. Lastly, the works of Professor Sidney Hook and Professor Ernest Nagel are necessary in any consideration of Dewey's philosophy—and I have drawn on them freely here.

1. See the valuable tract by Professor Sidney Hook, eminent Dewey scholar, *John Dewey—His Philosophy of Education and Its Critics* in *The New Leader*, November 2, 1959, § 2, p. 3.

law is enmeshed in his whole philosophy. Dewey's orientation is well illustrated by this typical discussion of standards of judgment in law:

On the view here presented, the standard is found in consequences, in the *function* of what goes on socially. If this view were generally held, there would be assurance of introduction on a large scale of the rational factor into concrete evaluations of legal arrangements. For it demands that intelligence, employing the best scientific methods and materials available, be used, to investigate, in terms of the context of actual situations, the consequences of legal rules and of proposed legal decisions and acts of legislation. The present tendency, hardly more as yet than in a state of inception, to discuss legal matters in their concrete social setting, and not in the comparative vacuum of their relations to one another, would get the reinforcement of a consistent legal theory. Moreover, when it is systematically acknowledged in practice that social facts are going concerns and that all legal matters have their place *within* these ongoing concerns, there will be a much stronger likelihood than at present that new knowledge will be acquired of a kind which can be brought to bear upon the never-ending process of improving standards of judgment.<sup>2</sup>

In the second place, it is a fundamental thesis of this paper that Dewey's philosophy cannot be adequately described in "once for all" terms. Philosophy to Dewey was not a closed system of thought but an intellectual process—an instrument for the continuous assessment and reassessment of the phenomenon under investigation—here, law. The job undertaken by Dewey, therefore, has no predetermined ending. He has fashioned a process, a spirit, a set of intellectual tools which can be used now, but which may produce their own destruction or modification as intelligence in their use unfolds.

It would be erroneous to deduce that Dewey's significance to law is commensurate with his own scanty writings about law, or with the paucity of writing about his legal thought. Since the man widely recognized as "The Philosopher of American Democracy"<sup>3</sup> has been a part of the dominant intellectual tradition and has contributed greatly to its making during the last three quarters of a century,<sup>4</sup> it is strange that so little has been written about his views on law. To be sure, the area is far from being unexplored—Patterson, Frank, Cook and Holmes, for example, have all dealt with Dewey.<sup>5</sup>

2. MY PHILOSOPHY OF LAW—CREDOS OF SIXTEEN AMERICAN SCHOLARS 84-85 (1941). Dewey's statement appears on pages 73-85.

3. HOOK, JOHN DEWEY: AN INTELLECTUAL PORTRAIT (1939).

4. "Nevertheless, there has been a change in the intellectual atmosphere since the turn of the century, and only the ignorant would maintain that Dewey has had no influence in effecting it." Nagel, *Dewey's Reconstruction of Logical Theory* in THE PHILOSOPHER OF THE COMMON MAN 56, 57 (1940). Unlimited other citations of this fact could be given.

5. See PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW, 486-500 (1953); the sections on John Dewey, in the chapter *Pragmatism in Legal Philosophy*, constitute a concise statement by Professor Patterson of Dewey's

Professor Edwin W. Patterson has pioneered in the field for over a quarter of a century, and all writings about Dewey and law owe him a great debt. Patterson and Dewey conducted a seminar in legal philosophy at Columbia University Law School from 1924 to 1929 and attracted "an able group of graduate students in law and in philosophy."<sup>6</sup> Professor Patterson doubtless worked closer with Dewey than any other legal scholar, and we are fortunate in having his materials on Dewey. Professor Patterson has indicated that "Dewey has not put forth a systematic or comprehensive philosophy of law,"<sup>7</sup> but that he of course has influenced law and legal scholarship. The latter observation points the direction of search for Dewey's philosophy of law since he wrote no treatises so entitled (nor did Holmes, Cardozo or Frank), although in the fullness of his thought he provided tools for assessment for all philosophies of law, and for the reconstruction of them.

The late Judge Jerome Frank has also written on Dewey. Frank eulogized Dewey's study on *Logical Method and Law*,<sup>8</sup> stating that "it is of interest that the best available description of the logical method employed by judges is from the pen, not of a lawyer, but of a psychologist."<sup>9</sup> Judge Frank, however, felt that Dewey oversystematized. "Unfortunately, Dewey imported into his legal writ-

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logic and ethics as they relate to law. See also Professor Patterson's *John Dewey and the Law: Theories of Legal Reasoning and Valuation*, 36 A.B.A.J. 619 (1950); Patterson, *Pragmatism as a Philosophy of Law* in *THE PHILOSOPHER OF THE COMMON MAN*, 172 (1940). Mr. Justice Frankfurter acknowledges the indebtedness of legal scholarship to Dewey in *FRANKFURTER, OF LAW AND MEN* 284-87 (1956). The late Judge Jerome Frank wrote on Dewey, and of the extensive influence of Dewey; see his *Modern and Ancient Legal Pragmatism—John Dewey & Co. vs. Aristotle* (pts. 1-2), 25 *NOTRE DAME LAW.* 207, 460 (1950). Professor Anton Donoso's valuable article *John Dewey's Philosophy of Law*, 36 *U. DET. L.J.* 579 (1959) discusses Dewey's influence among legal scholars, as well as being an excellent critique on Dewey's legal philosophy. Professor Beutel acknowledges Dewey's influence in *BEUTEL, SOME POTENTIALITIES OF EXPERIMENTAL JURISPRUDENCE AS A NEW BRANCH OF SOCIAL SCIENCE* (1957). Excerpts from Dewey appear in *HALL, READINGS IN JURISPRUDENCE* (1938), in *MORRIS, THE GREAT LEGAL PHILOSOPHERS* (1959), and references are found in *COWAN, THE AMERICAN JURISPRUDENCE READER* (1956). Dewey reviewed *ALLEN, LAW IN THE MAKING*, at 28 *COLUM. L. REV.* 832-33 (1928). Professor Allen's response, at page 145 of *LAW IN THE MAKING* (5th ed. 1957), raises the question sharply of Dewey's conception of custom. See also Donoso, *supra*, for a note on Dewey and custom.

6. Patterson, *John Dewey and the Law: Theories of Legal Reasoning and Valuation*, 36 A.B.A.J. 619, 620 (1950).

7. *Id.* at 619.

8. Dewey, *Logical Method and Law*, 10 *CORNELL L.Q.* 17 (1924). See also Patterson, *John Dewey and the Law: Theories of Legal Reasoning and Valuation*, 36 A.B.A.J. 619, 620 (1950), and the section, *John Dewey: Instrumental Reasoning*, in *PATTERSON, JURISPRUDENCE* 486 (1953) which is a more complete description of Dewey's logic.

9. Dewey's first major work was his *Psychology* published in 1887 by Harper Brothers—this and Dewey's continuous interest in psychology must account for Judge Frank's identification. *FRANK, LAW AND THE MODERN MIND* 337 (1930).

ings his tendency to overemphasize the systematic,"<sup>10</sup> and neglected to recognize the uniqueness of legal facts.<sup>11</sup> In this regard, Judge Frank praised William James. "Dewey devoted much attention to legal thought . . . [but] he neglected those factors in the judicial process which are unique and which thus cannot be caged in any generalization . . . . Had James dealt with legal thinking, he would not have allowed the 'unruly' legal facts to be ignored. For listen to him: 'The great field for new discoveries is always the unclassified residuum . . . .'"<sup>12</sup> Later, however, Judge Frank utilized Dewey for theoretical support for his fact and trial approach to the judicial process—contrasting Dewey and Aristotle and showing support from each,<sup>13</sup> but it seemed that it was the ancient Aristotle whom Judge

10. Professor Ratner has said: "The construction of one great big key is, in more philosophic language, the construction of a formal set or system of principles. In this sense Dewey has no system and, as far as I know, has never aimed to have one. But when we take the outline of the field of philosophic activity presented in *Studies in Logical Theory* as being of the nature of a rough sketch of a philosophic project, we can see that all of Dewey's work is the systematic fulfilling, expanding, revising, deepening, realizing of that project. All his works together comprehend a 'system' but it is a system in a new sense, created in a new way. It was created by working back and forth between one field of experience and another, interweaving the threads of continuity as the creative process of reconstruction proceeded." Ratner, *Dewey's Conception of Philosophy* in SCHILPP, *THE PHILOSOPHY OF JOHN DEWEY* 49, 73 (2d ed. 1951). For Dewey's thought on "systems" see DEWEY, *RECONSTRUCTION IN PHILOSOPHY* 145 (enlarged ed. with new intro. 1957); Dewey, *From Absolutism to Experimentalism* in 2 ADAMS & MONTAGUE, *CONTEMPORARY AMERICAN PHILOSOPHY* 21-22 (1930), also in *The Saturday Review of Literature*, Oct. 22, 1949, p. 9.

11. Frank, *Some Tame Reflections on Some Wild Facts* in RATNER, *VISION AND ACTION* 56 (1953).

12. *Id.* at 57, quoting from JAMES, *THE WILL TO BELIEVE* 299-302 (1897).

13. Jerome Frank's essay on *Some Tame Reflections On Some Wild Facts* in RATNER, *VISION AND ACTION* 57 (1953). To Professor William R. Andersen of Vanderbilt University School of Law I wish to extend thanks for permitting me to read a most valuable unpublished paper which he prepared as a critique of the late Judge Jerome Frank's application of John Dewey's philosophy. Judge Frank was quite aware of Dewey's presence. This, Judge Frank imaginatively demonstrated in his *Modern and Ancient Legal Pragmatism—John Dewey & Co. vs. Aristotle*, 25 *NOTRE DAME LAW* (pts. 1-2), 207, 460 (1950). In these articles Judge Frank illustrated that both Dewey and Aristotle furnished actual and theoretical support for his fact approach. His thesis is that rules, principles, policies and doctrines of the law do not make sense unless they are seen through the trial process in which they are given application, and that you cannot see them unless you look at what happens at the trial. Judge Frank indicated that Aristotle knew this better than Dewey and that the former knew more about trials than Dewey—the latter, according to Judge Frank, having been influenced by his associations to see law more from the appellate level. (This, of course, may be the source of Judge Frank's criticism in the text, above, of Dewey as a "systematizer".) Judge Frank's article opens a vast unexplored area for the application of Dewey's logic and his contextualism to the trial area of the judicial process. Moreover, it significantly points to the possibility of the two great leaders of two opposing philosophies finding a large area in which they might cooperate in the study and operation of the judicial process, and so laying down the challenge for contemporaries who battle for the superiority of the one system or the other. But in order to present Dewey's position wherein his method differs from that of Aristotle's (and although cooperation on the lower level,

Frank had in mind and not the catholicized Aristotle who would always be remote from Dewey. Judge Frank felt there was something too systematic among those whom he called the "Deweyites,"<sup>14</sup> and in making this statement he may have explained why the full impact of Dewey's conceptions of democracy, morals, the problematic and experience has not become the subject of vigorous pursuit among law students and that, as well, the full weight of Dewey's thought has not been emphasized even by many of those who revered Dewey. Judge Frank also noted that, in his judgment, many of Dewey's disciples in the law ignored some of his most insistent teachings, and that Dewey himself was influenced (presumably in his legal writings) largely by appellate oriented legal scholars.<sup>15</sup>

The late Walter Wheeler Cook was among the first to sense and understand the impact of Dewey upon law:

It is the thesis of the present writer—a thesis developed most fully in the writings of John Dewey—that an application of scientific methods of inquiry to the field of "values" (ethics and politics, including law) will make our choices of "ends" "more intelligent, better grounded, less subject to caprice."<sup>16</sup>

The key to Dewey's empirical theory of the evaluation of values may be found in his emphasis on the fact that we do not really understand our "ends" until we have considered the probable consequences of carrying them out in practice, and this we can not do without knowing the means available for this purpose. Now, as noted in the earlier paper referred to, the problem of what means will lead to a given end is essentially a

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as Judge Frank suggests, is possible) one, of course, must be aware of the basic differences between the philosophies represented by these two philosophers. See Dewey, *Antinaturalism in Extremis in NATURALISM AND THE HUMAN SPIRIT* 1 (Krikorian ed. 1944), and Dewey's *Survey of Empiricisms* in 3 *STUDIES IN THE HISTORY OF IDEAS* (1935) (edited by Department of Philosophy of Columbia University). For a quite excellent statement of philosophic Naturalism see Hook, *Naturalism and First Principles* in *AMERICAN PHILOSOPHERS AT WORK* 236, 237 (1956). Understanding the tenets of Naturalism is, of course, necessary in seeking an understanding of Dewey. See also NAGEL, *SOVEREIGN REASON* (1954), particularly *Philosophy and the American Temper* at 50, and his *LOGIC WITHOUT METAPHYSICS* (1956), notably the chapter "Naturalism Reconsidered" at 3-18.

14. See note 10 *supra*.

15. "Ironically, Dewey's own acquaintance with our judicial system was obtained from men who had little or no knowledge of trial court activities, or who, in their writings, disregarded these activities. It is equally ironic that most (not all) of the legal thinkers whom Dewey has influenced have similarly lacked knowledge of or interest in trial court doings. As a consequence, among legal thinkers, Dewey's pragmatic counsels have been acclaimed chiefly by those who, for the most part, have not heeded those counsels, and who, accordingly, have been guilty of the very kind of errors—resulting from a snobbish shunning of much of the practical—which in other fields, Dewey has tirelessly exposed." Frank, *Modern and Ancient Legal Pragmatism*, *supra* note 13, at 208.

16. From Walter Wheeler Cook's statement of his philosophy of law in *MY PHILOSOPHY OF LAW—CREDO OF SIXTEEN AMERICAN SCHOLARS* 51, 59 (1941). From reading his materials I have the feeling that this fine scholar got as close to the heart of Dewey's general purpose as perhaps any student of the law has done.

scientific problem of cause and effect: so we are still in the field of science, even though in many instances adequate data may be lacking for accurate prophecy.<sup>17</sup>

Mr. Justice Holmes and Dewey had sought each other's spirit.<sup>18</sup> On the question whether either caught the other's spirit I should incline to believe that Dewey caught more of Holmes' than vice versa. Holmes found Dewey's *Experience and Nature* to be "incredibly ill written,"<sup>19</sup> and Professor Hook reports that "the late Justice

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17. *Id.* at 60.

18. It was in writing about his experiences in reading Dewey's *Experience and Nature* in 2 HOLMES-POLLOCK LETTERS 287 (Howe ed. 1941) that Mr. Justice Holmes said to Sir Frederick Pollock that "it seemed to me after several rereadings to have a feeling of intimacy with the inside of the cosmos that I found unequalled. So methought God would have spoken had He been inarticulate but keenly desirous to tell you how it was." Earlier, Holmes had written about Dewey to the effect that "Dewey begins his cosmos without any conscious ego. . . [and] his view of the universe came home to me closer than any other that I know." *Id.* at 272. Dewey had said of Holmes: "The field which Justice Holmes has tilled is a limited one, but since he has 'lived greatly in it,' his legal and social philosophy is great, not limited. It is an expression of the processes and issues of law seen in an infinite perspective; that of a universe in which all action is so experimental that it must needs be directed by a thought which is free, growing, ever learning, never giving up the battle for truth, or coming to rest in alleged certainties or reposing on a formula in a slumber that means death." Dewey, *Oliver Wendell Holmes* in 1 CHARACTER AND EVENTS 100, 101 (1929), originally printed in *The New Republic*, January 11, 1928, under the title of *Justice Holmes and the Liberal Mind*. And for the critics of Holmes' realism Dewey could say: "At times, his realism seems almost to amount to a belief that whatever wins out in fair combat, in the struggle for existence, is therefore the fit, the good and the true. . . . But all such remarks have to be understood in the light of his abiding faith that, when all is said and done, intelligence and ideas are the supreme force in the settlement of social issues." 1 DEWEY, CHARACTER AND EVENTS 100, 105 (1929). This "explanatory" statement by Dewey of Holmes' method of determining the "good" is expressly set out here in order that the critic of Holmes' "relativism" may see how Dewey viewed it, and in order that critics of Dewey will have to deal with what Dewey says about law and experience, and not what Holmes said about it. In other words, the critic cannot "get at" Dewey through Holmes and be complete and accurate. He must go to Dewey.

19. Dewey's style grows from his problem. Most adverse critical commentators may not see this. I have never seen a critic of Dewey's style come to grips with the problem which Dewey felt affected his style. The quotation in note 18 *supra* is clear enough. Let Dewey comment on his own style: "I imagine that my development has been controlled largely by a struggle between a native inclination toward the schematic and formally logical, and those incidents of personal experience that compelled me to take account of actual material. . . . The marks, the stigmata, of the struggle to weld together the characteristics of a formal theoretic interest and the material of a maturing experience of contacts with realities also showed themselves, naturally, in style of writing and manner of presentation. . . . It is hardly necessary to say that I have not been among those to whom the union of abilities to satisfy these two opposed requirements, the formal and the material, came easily. For that very reason I have been acutely aware, too much so, doubtless, of a tendency of other thinkers and writers to achieve a specious lucidity and simplicity by the mere process of ignoring considerations which a greater respect for concrete materials of experiences would have forced upon them." Dewey, *From Absolutism to Experimentalism* in 2 ADAMS & MONTAGUE, CONTEMPORARY AMERICAN PHILOSOPHY 13, 16-17 (1930).

Oliver W. Holmes would remark about Dewey's *Experience and Nature* that in reading its every page he had the overwhelming conviction that he was reading a great book even though he could not always say why.<sup>20</sup> I would hesitate to say that Justice Holmes felt the full impact of Dewey's moral theory, his special sense of the problematic, and his feeling for democracy—I have not seen these emphasized in Holmes' writings.<sup>21</sup>

In addition to the work of these eminent men, it must be said that many legal scholars have directly utilized Dewey, and all students of the law in the past few generations have indirectly come under his influence. Despite this, I have no doubt but that Dewey's philosophy, revolutionary in conception, scope and consequences, has yet to be systematically used in law. Dewey's life long task was "to reintegrate human knowledge and activity in the general framework of reality and natural processes."<sup>22</sup> Dewey said that two issues have controlled the main course of modern thought, namely:

"The problem of restoring integration and cooperation between man's beliefs about the world in which he lives and his beliefs about values and purposes that should direct his conduct is the deepest problem of any philosophy that is not isolated from that life. . . . Its [philosophy's] central problem is the relation that exists between the beliefs about the nature of things *due to natural science* to beliefs about *values*—using that word to designate whatever is taken to have rightful authority in the direction of conduct." The other main problem . . . is "the problem of the relation of physical science to the things of ordinary experience."<sup>23</sup>

Dewey believed that startling results would ensue when man employed the same method in arriving at his values that he employs in learning about the natural processes:

I do not know when knowledge will become naturalized in the life of society. But when it is fully acclimatized, its instrumental, as distinct from its monopolistic, role in approach to things of nature and society will be taken for granted without need for such arguments as I have been engaging in. Meantime, the development of the experimental method stands as a prophecy of the possibility of the accomplishment of this Copernican Revolution.<sup>24</sup>

I do not know of any similar movement in law which has as its

20. HOOK, JOHN DEWEY: AN INTELLECTUAL PORTRAIT 22 (1939).

21. See Northrop, *The Comparative Philosophy of Comparative Law*, 45 CORNELL L.Q. 617, 621 (1960) where Professor Northrop indicates that while Holmes and some other legal realists "noted only the instrumentalism in the pragmatism of Pierce, James and Dewey, Sturges caught the ethical spirit and the practical legal consequences of Dewey's emphasis upon the primacy of the problematic situation." See also Northrop, *The Mediatational Approval Theory of Law in American Legal Realism*, 44 VA. L. REV. 347, 356 (1958).

22. Dewey's statement in SCHILPP, *THE PHILOSOPHY OF JOHN DEWEY* 523 (2d ed. 1951).

23. *Ibid.* (Italics in original.)

24. DEWEY, *THE QUEST FOR CERTAINTY* 298 (1929).



mission a Copernican revolution. Accordingly my belief is that the full fruit of Dewey's thought is yet to be felt in the law—which, of course, is based on the further belief that such an intellectual and institutional revolution in law is a possible achievement if the Dewey pattern is pursued. Professor Sidney Hook has written that:

Dewey is the philosopher of human freedom in this our revolutionary age of modern science, whose faith in man is rooted in faith in the arts of intelligence. Alfred North Whitehead in assessing Dewey's influence once said that the magnitude of his achievement "is to be estimated by reference to the future."<sup>25</sup>

Indeed, Professor Hook reports that Dewey only "a few months after his 90th birthday had been celebrated . . . remarked: 'Only in the last two years have I come to see the real drift and hang of the various positions I have taken.'"<sup>26</sup> This and other biographic references concerning Dewey's long-lived creativity, including his enthusiastic urge to young scholars that the time was ripe for "new and creative hypothesis" and for "some bold and imaginative venture in thought,"<sup>27</sup> leads one to believe that Dewey saw, better than any, that his insights were barely tried out in his lifetime, and that he spoke for the future—a future with bright promise if man would venture to create the conditions necessary for the trying out. Accordingly, I do not think it is surprising that the spirit of Dewey has been neglected in legal scholarship. I believe we have not got the "hang" of him as yet, either in law, legal philosophy or legal education. The emphasis upon William James as the philosophical father of American sociological jurisprudence, the lack of use of Dewey materials in philosophy of law courses, the dearth of writings about

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25. Professor Hook in his article *John Dewey—Philosopher of Growth*, 56 J. OF PHILOSOPHY 1010, 1018 (1959).

26. *Id.* at 1010.

27. Writing in the *New York Times Magazine* section on Dewey's ninetieth birthday, the late Professor Irwin Edman reported as follows: "A year or two ago he [Dewey] came back to Columbia to address a group of post-graduate students in philosophy on his present hopes and fears for philosophy. Looking at the contemporary world, he developed somewhat sadly the theme that too many philosophers had retreated to purely technical and trivial questions and that, meanwhile, the great world was given over to violence and dogmatism of the political extremists. The cultivation of socially responsible individuals through the development of creative thinking is becoming rarer and rarer. It is, he pointed out, a discouraging time to be a philosopher. Then, after he had sat down, the venerable teacher and sage rose again and said, as nearly as I can remember the words, 'But now I am talking to the young and I am afraid I have sounded discouraging. In a very important sense it is a wonderful time to be a philosopher. The old slogans, the old formulas are obviously not working. It is a challenge to new and creative hypothesis, some bold and imaginative venture in thought.' Then he added, 'All it requires is some ideas, imagination and, I warn you, guts.'" Professor Edman added: "I have rarely seen an academic audience more deeply moved, for this was a call to intellectual adventure and experiment by a man nearly 90." *N.Y. Times*, October 16, 1949, (*Magazine*) p. 17 at 74, 75.

Dewey and law and the apparent lack of the pervasive Dewey-type enthusiasm for the reconstruction of law, and the resurgence of an active and vocal natural law forum, would appear to indicate that Dewey has been under-emphasized.

#### JUSTICE

While the ultimate significance of Dewey for law is a problem for later generations, the question is appropriate: What are the basic elements of his theory of law in a democratic society? To answer this question is, essentially, to arrive at an estimate of his theory of justice.

Can a pragmatist have a theory of justice that is not dissipated by an "evil" "ethical relativism?" This question is answered negatively by most idealists, and particularly by those disposed toward natural law who demand an ultimate or final or unchangeable value. Dewey has an "ultimate" in his system, but it differs from the ultimate of natural law. He said:

I have carried on a polemic against ultimates and finalities because I found them presented as things that are inherently absolute, like "ends-in-themselves" instead of ends-in-relationships. The reason they have been proffered as absolutes is that they have been taken out of any and all *temporal* context. A thing may be ultimate in the sense of coming last in a given temporal series, so that it is ultimate *for that series*. There are things that come last in reflective valuations and, as terminal, they are ultimate. Now Dr. Geiger is quite right in saying that for me the method of intelligent action is precisely such an ultimate value. It is the last, the final or closing, thing we come upon in inquiry into inquiry. But the place it occupies in the *temporal* manifestation of inquiry is what makes it such a value, not some property it possesses in and of itself, in the isolation of non-relatedness. It is ultimate in use and function; it does not claim to be ultimate because of an absolute "inherent nature" making it sacrosanct, a transcendent object of worship.<sup>28</sup>

Ultimates are placed in the context of inquiry, as is Dewey's idea of "truth."

The "truth" of any present proposition is, by the definition, subject to the outcome of continued inquiries; *its* "truth," if the word must be used, is provisional; as *near* the truth as inquiry has *as yet* come, a matter determined not by a guess at some future belief but by the care and pains with which inquiry has been conducted up to the present time. Admission of the necessary subjection of every present proposition to the results to be obtained in future inquiry is the meaning of Peirce's reference to "confession of inaccuracy and one-sidedness" as an ingredient of the truth of a present proposition. In other words, a person who makes this admission is nearer the truth than any person is who dogmatically

28. Dewey, *Experience, Knowledge and Value: A Rejoinder* in SCHILPP, *THE PHILOSOPHY OF JOHN DEWEY* 594 (2d ed. 1951). (Italics in original.)

claims infallibility for the conclusion he entertains here and now.<sup>29</sup>

In his insistence that any standard of judgment is to be evaluated in terms of the consequences of that standard when acted upon, Dewey uses the term "consequences" in a special sense. He means those consequences which are recognized to follow as revealed by the operations of an experimental situation. He said:

Similarly, when I read that I eschew discussion of a certain problem because "my *purpose* is practical," I am quite sure that all I have said—amounting first and last to a good deal—to the effect that my pragmatism affirms that action is involved in *knowledge*, not that knowledge is subordinated to action or "practice," has gone for naught—as it could hardly do if the emphasis upon experimental method were taken seriously. And I should not be obliged to devote to the topic of *truth* the space later given to it, if what I have said about *consequences* were put in the context of experiment. The outcome of the operations that are guided by a hypothesis is the only context in which consequences in my theory have anything to do with truth.<sup>30</sup>

This statement is a full denial of an ethical relativism which functions on whim and caprice. Dewey's position conditions the just or good in law by a rigorous application of the experimental method.

It is within this context that Dewey's world of values exists—a world consisting of a plurality of goods and ends in which laws and principles are only valuable "as intellectual instruments for analyzing individual or unique situations."<sup>31</sup> The following quotation underscores this:

Let us, however, follow the pragmatic rule, and in order to discover the meaning of the idea ask for its consequences. Then it surprisingly turns out that the primary significance of the unique and morally ultimate character of the concrete situation is to transfer the weight and burden of morality to intelligence. It does not destroy responsibility; it only locates it. A moral situation is one in which judgment and choice are required antecedently to overt action. The practical meaning of the situation—that is to say the action needed to satisfy it—is not self-evident. It has to be searched for. There are conflicting desires and alternative apparent goods. What is needed is to find the right course of action, the right good. Hence, inquiry is exacted: observation of the detailed make-up of the situation; analysis into its diverse factors; clarification of what is obscure; discounting of the more insistent and vivid traits; tracing the consequences of the various modes of action that suggest themselves; regarding the decision reached as hypothetical and tentative until the anticipated or supposed consequences which led to its adoption have been squared with actual consequences. This inquiry is intelligence. Our moral failures go back to some weakness of disposition, some absence of sympathy, some onesided bias that makes us perform the judgment

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29. *Id.* at 573. (Italics in original.)

30. *Id.* at 528. (Italics in original.)

31. DEWEY, RECONSTRUCTION IN PHILOSOPHY, in the chapter on *Reconstruction in Moral Conceptions* 162-63 (enlarged ed. 1948).

of the concrete case carelessly or perversely. Wide sympathy, keen sensitiveness, persistence in the face of the disagreeable, balance of interests enabling us to undertake the work of analysis and decision intelligently are the distinctively moral traits—the virtues or moral excellencies.<sup>32</sup>

The contemporary significance to law of Dewey's moral theory is sharply revealed in the following:

The vanity and irresponsibility of values that are merely final and not also in turn means to the enrichment of other occupations of life ought to be obvious. But now the doctrine of "higher" ends gives aid, comfort and support to every socially isolated and socially irresponsible scholar, specialist, esthete and religionist. It protects the vanity and irresponsibility of his calling from observation by others and by himself. The moral deficiency of the calling is transformed into a cause of admiration and gratulation.<sup>33</sup>

Dewey's naturalistic moral theory explicitly provides a way to establish "justice," and "good," without resort to transcendentalism and mysticism.

Nor was the relativistic idea that anyone's belief, or feeling, or desire about or for a law is good or true merely because a human being entertains it acceptable to Dewey. Such belief would be a factor in the search for truth but truth is to be searched for in problematic situations. Dewey said: "I have even explicitly stated that a personal doubt is pathological unless it is a reflection of a *situation* which is problematic."<sup>34</sup> Mere enjoyment itself is no more a final source of value than an eternally fixed value. He said:

As long as the only theories of value placed before us for intellectual assent alternate between sending us to a realm of eternal and fixed values and sending us to enjoyments such as actually obtain, the formulation, even as only a theory, of an experimental empiricism which finds values to be identical with goods that are the fruit of intelligently directed activity has its measure of practical significance.<sup>35</sup>

Such a system opens the whole of law to inspection within the functional context of the unique, the problematic, the hypothetical and the experimental. It is, of course, intellectually demanding—so much so that, except in small areas, man is not too well equipped to put it into full operation. One reason for the difficulty of using the method of intelligent action is that other principles—external

32. *Id.* at 163-64. It is of interest to note how the above method fits in with Dewey's process of inquiry or logic. Indeed, it was in order to find a way to apply the process of thinking about nature to the making of judgments about morals that led Dewey to develop his theory of inquiry. See Professor Nagel's essay, *Dewey's Reconstruction of Logical Theory* in *THE PHILOSOPHER OF THE COMMON MAN* 56 (1940).

33. DEWEY, *op. cit. supra* note 31, at 172.

34. SCHILPP, *op. cit. supra* note 22, at 572. (Italics in original.)

35. DEWEY, *op. cit. supra* note 24, at 285-86.

authority and absolute standards—have contributed to the making of the present situation.<sup>36</sup> But, of course, this system itself is not above revision.

Dewey observed that "it is astonishing and depressing that so much of the energy of mankind has gone into fighting for (with weapons of the flesh as well as of the spirit) the truth of creeds, religious, moral and political, as distinct from what has gone into effort to try creeds by putting them to the test of acting upon them."<sup>37</sup> A system whereby all tenets, goods, creeds, formulas, methods were hypotheses and actively recognized and used with full recognition of this fact would mean that they (tenets, creeds) cease to be final and men would be insistent to put creeds to this test of action. The belief in any part of law—whether a code of laws, a principle of consideration in contracts, the doctrine of judicial supremacy, or the efficacy of the prevailing litigious processes—must be, according to the above, tentative and hypothetical and the belief must be framed with reference to its function, use or office as a guide to action. And it is imperative that the experiences to be had when the belief is exercised be considered vital when the belief is so

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36. Dewey, of course, recognized that the problem of the application of his method was "one of degree" and obviously could not all of a sudden be instituted. He said in response to a question of this sort: "Is the disproportion between the application of the scientific experimental method to the physical conditions of human associations and its lack of application in direct social affairs such that, in the present state of the world, it is hopeless to expect a change? I know of no sweeping answer to this question. But the problem is one of degree, not of all or none. It cannot be denied that in our social life a great imbalance has resulted because the method of intelligent action has been used in determining the physical conditions that are causes of social effects, whereas it has hardly been tried in determination of social ends and values. One might point out that the use of other principles, custom, external authority, force, so-called absolute ideals and standards—out of the range of empirical adjudication because absolute—in lieu of intelligent action, has played the chief part in the production of the situation which makes it so extremely difficult to use the method of intelligent action." SCHILPP, *THE PHILOSOPHY OF JOHN DEWEY* 591-592 (2d ed. 1951).

37. DEWEY, *THE QUEST FOR CERTAINTY* 277 (1929). Dewey would, of course, be the last to claim "infallibility" for his or anyone's method. In evaluating Dewey's logical theory, Professor Nagel states, and Dewey would agree, that Dewey "identifies knowledge, which he calls warranted assertibility, as that which is achieved by an inquiry whose features conform to a determinate logical pattern—a pattern exhibited in those inquiries in the history of man which have shown themselves effective in obtaining solutions for the problems generating them. However, anything identified as knowledge on the basis of being the product of such inquiries will embody the character of the logic employed. We must not expect that an assertion warranted by scientific method is above revision, for the method of science is not infallible. That method is, however, progressively self-corrective, and provides for the revision of its products in the light of further controlled inquiry. The degree of confidence we are entitled to have in an assertion is therefore a function of the thoroughness with which we have tested it with the best methods available. We must, accordingly, rely on the integrity of the logical method we employ to secure dependable conclusions and to identify and distinguish the true from the false." Nagel, *Dewey's Reconstruction of Logical Theory* in *THE PHILOSOPHER OF THE COMMON MAN* 72 (1940).

framed. The application of this to law would infuse law with an intelligence which law has never had—and the revolutionary consequences of Dewey's moral theory would become apparent.<sup>38</sup> A belief, Dewey said,

should be the last thing in the world to be picked up casually and then clung to rigidly. When it is apprehended as a tool and only a tool, an instrumentality of direction, the same scrupulous attention will go to its formation as now goes into the making of instruments of precision in technical fields. Men, instead of being proud of accepting and asserting beliefs and "principles" on the ground of loyalty, will be as ashamed of that procedure as they would now be to confess their assent to a scientific theory out of reverence for Newton or Helmholtz or whomever, without regard to evidence.<sup>39</sup>

Any standard or end in Dewey's moral theory must be justified in action—there can be no justification divorced from action, so there is no place in Dewey for the validation of natural law. Means and ends are united. The end is the means necessary for its fulfillment. The means is measured by what it leads to. Professor Hook has said that "whenever action is intelligent and responsible, the means are part of the end."<sup>40</sup>

It would be a characteristic of Dewey's method in the balancing or weighing of conflicting interests in law, I believe, that each particular, specific, separate situation be considered in its own context—that theoretically each situation presenting a problem of making, interpreting or administering law is unique. For Dewey, the experiences of the past, the accumulated tradition of learning, the history of an institution, are of profound importance as instruments for the testing of beliefs. They are known for what they are, and they are used for discovery, and they are followed if they pass the test of present intelligence. But while the system of rules and precedents and policies of the past are used they are never their own complete

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38. "But it is in his moral theory that the revolutionary consequences of his philosophy appear in their most vital impact upon everyday affairs. He does not moralize, or exhort, or paint a picture of the good life for the professionally virtuous. Nor does he offer a recipe book of ethical precepts to be used as a guide in settling human troubles. Instead he sketches a method of approach which enables those who adopt it to get an insight into the way moral judgments function and therewith to test their moral judgments scientifically . . ." HOOK, JOHN DEWEY: AN INTELLECTUAL PORTRAIT 127 (1939), in chapter entitled *Standards, Ends, and Means*. See Dewey, *Theory of Valuation*, INTERNATIONAL ENCYCLOPEDIA OF UNIFIED SCIENCE No. 4 (1939). This is Dewey's latest and most complete statement of his value theory and is available in reprint form. Dewey could aid greatly in the discussion and concern which has increased recently in legal education and in the profession for the teaching of "values" and "professional responsibility." See also DEWEY & TUFTS, *ETHICS* (rev. ed. 1938). See the account of a recent extensive conference on this matter in STONE, *LEGAL EDUCATION AND PUBLIC RESPONSIBILITY* (1959).

39. DEWEY, *op. cit. supra* note 37, at 277-78.

40. HOOK, *op. cit. supra* note 38, at 132.

justification. They are necessary, but not sufficient. Something more is needed: this is the continuous evaluation of the rule or precedent in terms of the consequences of its use in the present and the future. In his celebrated study, *The Historic Background of Corporate Legal Personality*, Dewey demonstrated unimpeachable skill and insight into the legal conception of corporate personality. After a prodigious amount of historical research, Dewey demonstrated how the historic conception of corporate personality was "needlessly encumbered with a mass of traditional doctrines and remnants of old issues."<sup>41</sup> Conceptions made for old issues are not always useful in handling new issues.

The conception of "state"<sup>42</sup> gives way to the concrete situation of people living in a state and affected by each other in multiple ways. The state is a consequence of the need for people to have their actions and desires adjusted, regulated, balanced and furthered. The state is one of the means for the realization of ends which persons cannot achieve by themselves, and Dewey's conception of a state comes from the general notion of the public which itself arises to deal with conditions which people in their private capacities cannot control satisfactorily—or where the results of private action extend out and beyond the actor to a wide area of persons. The fluidity of the concepts of "state," "public," "private," makes urgent a systematic familiarization with the nature and specific consequences of human behavior. Such familiarity is a necessary prerequisite if the organs of the law are fully to recognize the character of the values conflicting and requiring adjustment, if the decision makers are to become sensitive to the unique and the problematic in the decisional

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41. 35 YALE L.J. 655, 673 (1926). See this same idea developed in *Nature and Reason in Law* in DEWEY, *PHILOSOPHY AND CIVILIZATION* 166 (1931). For penetrating grasp of due process and "fictions" see Dewey's essay on *Social Realities vs. Police Court Fictions* in DEWEY & KALLEN, *THE BERTRAND RUSSELL CASE* 55 (1941), and Dewey's critical evaluation of the Sacco and Vanzetti case in Dewey, *Psychology and Justice*, 2 CHARACTER AND EVENTS 526 (1929) also in *The New Republic*, November 23, 1927. Dewey's insights into the decision making process appear in COMMISSION OF INQUIRY INTO THE CHARGES MADE AGAINST LEON TROTSKY IN THE MOSCOW TRIALS (1937). Also see NOT GUILTY: REPORT OF THE COMMISSION OF INQUIRY INTO THE CHARGES MADE AGAINST LEON TROTSKY IN THE MOSCOW TRIALS (1938). See Agnes E. Meyer's interview with John Dewey, *Significance of the Trotsky Trial* 337 INTERNATIONAL CONCILIATION 53 (February, 1938) originally appearing in *The Washington Post*, December 19, 1937. Dewey's grasp of the problems of international law appear in numerous essays, such as 2 DEWEY, CHARACTER AND EVENTS (1929): *Force, Violence and Law* at 636 (also in *The New Republic*, Jan. 22, 1916); *Which World Court Shall We Join?* at 650 (also in *The Christian Century*, Oct. 18, 1923); *Why Not Outlaw War?* at 666 (also in *The New Republic*, March 21, 1923); *War And A Code of Law*, at 685 (also in *The New Republic*, Oct. 24, 1923).

42. See DEWEY, *THE PUBLIC AND ITS PROBLEMS* (1946). Also see Geiger, *Dewey's Social and Political Philosophy* in SCHILPP, *THE PHILOSOPHY OF JOHN DEWEY* 337 (2d ed. 1951). See DEWEY, ch. 8, *Reconstruction as Affecting Social Philosophy*, in *RECONSTRUCTION IN PHILOSOPHY* (1920), (enlarged ed. 1948).

environment, and if they are to develop facility in the recognition and evaluation of the consequences of their decisions. This would appear to go much further than sociological jurisprudence with its emphasis upon "demands" and their consequent jural postulates would carry a law maker or decider.<sup>43</sup>

#### DEMOCRACY

Any attempt to state Dewey's theory of justice must include the profound and ubiquitous roles which the concepts of "democracy" and "experience" play in his philosophy. Dewey said:

[D]emocracy is belief in the ability of human experience to generate the aims and methods by which further experience will grow in ordered richness. Every other form of moral and social faith rests upon the idea that experience must be subjected at some point or other to some form of external control; to some "authority" alleged to exist outside the processes of experience. Democracy is the faith that the process of experience is more important than any special result attained, so that special results achieved are of ultimate value only as they are used to enrich and order the ongoing process. Since the process of experience is capable of being educative, faith in democracy is all one with faith in experience and education. All ends and values that are cut off from the ongoing process become arrests, fixations. They strive to fixate what has been gained instead of using it to open the road and point the way to new and better experiences.

If one asks what is meant by experience in this connection, my reply is that it is that free interaction of individual human beings with surrounding conditions, especially the human surroundings, which develops and satisfies need and desire by increasing knowledge of things as they are. Knowledge of conditions as they are is the only solid ground for communication and sharing; all other communication means the subjection of some persons to the personal opinion of other persons. Need and desire—out of which grow purpose and direction of energy—go be-

43. See Professor Thomas A. Cowan's creative article in which he stated that his purpose was to "lay the philosophical foundation for legal experimental science" and expressed the hope that his postulate sets "will set the stage for the continuation of sociological jurisprudence which in this country rests mainly on the philosophical doctrine of pragmatism. Pragmatism, he [Professor Cowan] believes, leads to relativism, relativism leads to scepticism, and scepticism leads to frustration. These postulates or 'demands' attempt to take pragmatism safely past the pitfalls of scepticism into the territory of scientific experimentalism. They also aim to avoid the snares of scientism. Perhaps the term scientific humanism best fits the attempt here made. The extent to which the effort is successful remains to be seen." COWAN, *Postulates for Experimental Jurisprudence*, 9 RUTGERS L. REV. 404, 409 (1954), in THE AMERICAN JURISPRUDENCE READER 210, 217 (1956). I do not hesitate to surmise that Professor Cowan's creative formulation would have an even greater impact upon legal scholarship through the assistance of a law student and professional body which had tested the spirit of Dewey's philosophical system. See also Cowan, *Legal Pragmatism And Beyond*, in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 130 (Sayre ed. 1947); Cowan, *Law, Morality and Scientific Method: A Review Article*, 38 NEB. L. REV. 1039 (1959); *Symposium, Group Interests And The Law*, 13 RUTGERS L. REV. 429 (1959); Cowan, *Group Interests*, 44 VA. L. REV. 331 (1958).



yond what exists, and hence beyond knowledge, beyond science. They continually open the way into the unexplored and unattained future.

Democracy as compared with other ways of life is the sole way of living which believes wholeheartedly in the process of experience as end and as means; as that which is capable of generating the science which is the sole dependable authority for the direction of further experience and which releases emotions, needs, and desires so as to call into being the things that have not existed in the past. For every way of life that fails in its democracy limits the contracts, the exchanges, the communications, the interactions by which experience is steadied while it is also enlarged and enriched. The task of this release and enrichment is one that has to be carried on day by day. Since it is one that can have no end till experience itself comes to an end, the task of democracy is forever that of creation of a freer and more humane experience in which all share and to which all contribute.<sup>44</sup>

A concept of democracy which requires that each person refer his action to others and be alert to the actions of others to give direction to his own "is equivalent to the breaking down of those barriers of class, race, and national territory which kept men from perceiving the full import of their activity."<sup>45</sup> People cannot be exclusive in a democracy. Dewey's democracy is not limited by any institutional forms, but there is behind the doctrine a faith that free intelligence—with its necessary accompaniments of freedom of belief, discussion, and consultation in an atmosphere of respect for the significance of the experiences, capacities, feelings and attitudes of others—will lead to the maximum intelligent guidance for man. There is a recognition of the significance of unique experiences and of shared intelligence which can enlarge man's insights, make possible more fruitful hypotheses, encourage the pursuit of the consequences of beliefs through problematic situations, and thus lead onward and outward to enlarging and improving experience itself. The educative quality in the above process is apparent—men are forming "fundamental dispositions, intellectual and emotional, toward nature and fellow men," and so Dewey says in this context "philosophy may even be defined

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44. Dewey, *Creative Democracy—The Task Before Us*, in *THE PHILOSOPHER OF THE COMMON MAN*, 227-28 (1940).

45. DEWEY, *DEMOCRACY AND EDUCATION* 101 (1916). It should be pointed out that Dewey's *Democracy and Education* is a prolific source of his philosophy. Of this work, Dewey said: "Although a book called *Democracy and Education* was for many years that in which my philosophy, such as it is, was most fully expounded, I do not know that philosophic critics, as distinct from teachers, have ever had recourse to it. I have wondered whether such facts signified that philosophers in general, although they are themselves usually teachers, have not taken education with sufficient seriousness for it to occur to them that any rational person could actually think it possible that philosophizing should focus about education as the supreme human interest in which, moreover, other problems, cosmological, moral, logical, come to a head." Dewey, *From Absolutism to Experimentalism*, in 2 ADAMS & MONTAGUE, *CONTEMPORARY AMERICAN PHILOSOPHY* 22-23 (1930).

as the general theory of education."<sup>46</sup>

Democracy being "conjoint communicated experience,"<sup>47</sup> Dewey specifically relates the institution of law to the imperative of experience enlarging and improving: "[I]t may be said, without exaggeration, that the measure of the worth of any social institution, economic, domestic, political, *legal*, religious, is its effect in enlarging and improving experience."<sup>48</sup> In a democracy thus defined no one class, race, religion, cult, profession, color, or nationality of man is exempt from the open flow of the cross currents of experience; nor can it monopolize human qualities and potentialities; nor can it claim a privilege of non-participation in the value forming processes of experience.

Accordingly, it would seem that law must enlarge and improve man's experience and its own utilization. Law must therefore be democracy promoting in the pervasive, non-institutionalized sense in which Dewey uses the term democracy. To the extent that law approximates this end there will be more justice under law—law will be better.<sup>49</sup> This would make the idea of the law of democracy

46. DEWEY, *DEMOCRACY AND EDUCATION* 383 (1916).

47. *Id.* at 101.

48. *Id.* at 7-8. (Emphasis added.) Dewey continued: "[Y]et this effect is not a part of its original motive, which is limited and more immediately practical. . . . Only gradually was the by-product of the institution, its effect upon the quality and extent of conscious life, noted, and only more gradually still was this effect considered as a directive factor in the conduct of the institution. Even to-day, in our industrial life, apart from certain values of industriousness and thrift, the intellectual and emotional reaction of the forms of human association under which the world's work is carried on receives little attention as compared with physical output. . . . If humanity has made some headway in realizing that the ultimate value of every institution is its distinctively human effect—its effect upon conscious experience—we may well believe that this lesson has been learned largely through dealings with the young."

49. The democratic element is widely apparent in the history of law—wherever law liberates men to share their experience it becomes democratic (e.g., women's voting and use of property, labor's freedom to unite and organize). But it is not just the having and sharing of experience; it is the use of experience and the recognition of its worth as raw materials for problem solving using the most objective method for doing so which is the critical demand made upon law by Dewey's philosophy. Thus law must verify and continuously test. It cannot just accept. This imposes such demands upon law, laws, lawyers, the legally trained and the legal system that the equipment for making a significant effort to fulfill the demand does not presently seem to be available. Thus helping to create the conditions for making itself available and usable would appear to be a major concern of a naturalistic philosophy of law. This gets legal philosophy involved inextricably in life and problems of men. It cannot sit on the sidelines and wrestle. Indeed, there appears to be no way to test the application of an experience oriented philosophy of law unless one can see what happens when it is applied, and one cannot apply it unless one becomes involved in the application, and one cannot evaluate the involvement in the application unless one gets his hands in the situation—this transfers a large domain of legal philosophy to the law teacher in property, torts, labor law, trade regulations, etc., and to politics, economics and world affairs; so it would appear that Dewey *democratizes* the philosophy of law.

more viable than it has ever been in the history of man—and it is an idea commensurate in size for intelligent world group living as the hydrogen bomb is for world group destruction. For a society such as the United States with its many traditions of democracy a philosophy of law with this objective as its base could well be the key to survival through provision of the means for the distribution of democracy at home, and throughout the world, and the offer of proof of the superiority of a system “of conjoint communicated experience.” Dewey said:

A democracy is more than a form of government; it is primarily a mode of associated living, of conjoint communicated experience. The extension in space of the number of individuals who participate in an interest so that each has to refer his own action to that of others, and to consider the action of others to give point and direction to his own, is equivalent to the breaking down of those barriers of class, race, and national territory which kept men from perceiving the full import of their activity. These more numerous and more varied points of contact denote a greater diversity of stimuli to which an individual has to respond; they consequently put a premium on variation in his action. They secure a liberation of powers which remain suppressed as long as the incitations to action are partial, as they must be in a group which in its exclusiveness shuts out many interests.<sup>50</sup>

The theory of justice of sociological jurisprudence, as often stated, is: “such an adjustment of relations and ordering of conduct as will make the goods of existence . . . go round as far as possible with the least friction and waste.”<sup>51</sup> Basic to the theory of justice within Dewey’s philosophy, on the other hand, would be the quest for *such a promotion of the conditions for the sharing of those experiences as will lead to the ever enrichment of man’s experiences and to their fullest use as instruments of defining, understanding and solving man’s problems of existence*. This, of course, permits the “adjustment of relations and ordering of conduct,” but in the context of man’s maximum opportunity (the sharing of intelligence through the utilization of experiences) to make “the goods of existence go round as far as possible with the least friction and waste.” Such a naturalistic theory of justice focuses on *experience* and *experience sharing* as *instruments of problem solving* in the context of democracy. The assumption is that if this is done the problem of justice is placed in the best possible hands.

Sociological jurisprudence, as a theory, does not necessarily require a democratic culture or atmosphere for its acceptance and functioning. If I am correct in my evaluation of Dewey, what has been

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50. DEWEY, *op. cit. supra* note 46 at 101.

51. POUND, *SOCIAL CONTROL THROUGH LAW* 65 (1942) cited in *STONE, PROVINCE AND FUNCTION OF LAW* 356 (1946).

suggested as a component of his theory of justice could exist only in an atmosphere where the democratic was pursued. I believe, moreover, that a Dewey oriented philosophy of law must persistently and daily concern itself with the examination of the extent to which law is helping achieve the conditions for "democracy."<sup>52</sup> For Dewey's philosophy not to impose this demand would be to admit (contrary to its premises) the existence in society of a social instrumentality (law) divorced from the objective of achieving the fulfillment of the maximum conditions for the use of intelligence in directing man's progress; it would be to acquiesce in the use of a social tool for the adjustment of man's relations which existed solely for itself as an "ultimate." True, it might well be that law as presently conceived could not do much to promote this end, but the Deweyan would insist on knowing why this was so and would diligently explore the available alternatives to law-as-it-is.

A corollary of Dewey's theory of justice would be that the student of the philosophy of law must become intensely involved in the problems of men and society. And a corollary of this would be that the burden of the philosophy of law should shift, from the protected sanctuary, to the classroom, to the courtroom, and to the community of men in the world involved in adjusting their relations and furthering their welfare through an instrumentality whether like or unlike any image of present law.

#### LOGIC

According to Dewey, problems of values—moral problems—must be approached with the objective method of idea verification which has become indispensable to science. Legal problems are predominantly problems of valuation. "John Dewey's moral theory is continuous with his theory of inquiry and human behavior."<sup>53</sup> Dewey was stimulated to develop a logic of inquiry which could be applied

52. Professor Cowan has stated: "The problem of legal teleology stated in its broadest term is the problem of freedom. The task of legal philosophy is to make the legal mechanism (order) consistent with freedom. The ideals of order and freedom are encompassed in the term justice." Cowan, *Postulates for Experimental Jurisprudence*, 9 RUTGERS L. REV. 404, 415 (1954). See *Liberty And Social Control* in DEWEY, PROBLEMS OF MEN 111-125 (1946) for the discussion of institutional changes, "economic" and "political," necessary to attain what he classifies as "human liberty." Thus law's task in helping achieve the conditions for democracy obviously involves law in basic institutional reconstruction as required.

53. HOOK, JOHN DEWEY: AN INTELLECTUAL PORTRAIT 127 (1939). For the connection between Dewey's logic and his theory of morals see how the "Five Phases, or Aspects, of Reflective Thought" go along with the steps involved in Dewey's search of the moral situation in the text of DEWEY, HOW WE THINK 107 (1933). These steps are likewise found in the more technical and elaborate DEWEY, LOGIC: THE THEORY OF INQUIRY (1938).

both to morals and to science—to the moral world and to the natural world. Accordingly, any full consideration of his theory of morals, of justice, of law, democracy or education necessarily should be in the context of his logic. Professor Nagel has said:

Since the turn of the present century Dewey's thought has been steadily preoccupied with the character and conditions of controlled inquiry; and he has no less insistently claimed that the elimination of many of the contemporary confusions in morals, the sciences of man, and social policy, calls for a reconstruction of logical theory. He himself records that his early interest in logic was stimulated by the intellectual scandal involved in the common separation of science from morals; and he attributes his development of instrumentalism to his conviction that "the construction of a logic, that is, a method of effective inquiry, which would apply without abrupt breach of continuity to the field designated by both of these words, is at once our needed theoretical solvent and the supply of our greatest practical want."<sup>54</sup>

Unless this methodological dualism were extirpated, the resolution of moral problems would lack the advantages which the method of intelligence of science could provide. Thus in matters of "ought," "just," "good," "ideal," "fair," in law Dewey would insist that the meaning of these ideas or beliefs must not be predetermined by an antecedent ultimate. Likewise the meaning must not be fore-ordained by a method of logic which would preclude the search for "good" through the steps from the recognition of confused situation and careful attempt at definition of the problem to the final overt or imaginative action upon the last hypothesis exemplified in the method of science.<sup>55</sup>

Implicit in Dewey's logic is the idea that logical forms themselves do not exist ready-made in some heaven of conceptions, in consciousness, or in an eternal order of things; instead, the forms appear, develop, occur in the process of searching for the solution to the problem and potentially every phase of the search is useful as an instrument of search. As inquiry proceeds one constructs the logical forms which are unique to the situation, context and problem which is the subject-matter of inquiry. In speaking of logic of law, Dewey said:

To claim that old forms are ready at hand that cover every case and that may be applied by formal syllogizing is to pretend to a certainty and regularity which cannot exist in fact. The effect of the pretension is to increase practical uncertainty and social instability . . . either that logic must be abandoned or . . . must be a logic *relative to con-*

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54. NAGEL, *Dewey's Reconstruction of Logical Theory*, in *THE PHILOSOPHER OF THE COMMON MAN* 56 (1940).

55. See the extensive analysis of Dewey's logic in Professor Hook's chapter *Logic and Action* in *JOHN DEWEY: AN INTELLECTUAL PORTRAIT* (1939). See ch. 6, *The Significance of Logical Reconstruction* in *DEWEY, RECONSTRUCTION IN PHILOSOPHY* (enlarged ed. 1948).

*sequences rather than to antecedents* [italics in original], a logic of prediction of probabilities rather than one of deduction of certainties. For the purposes of a logic of inquiry into probable consequences, general principles can only be tools justified by the work they do. They are means of intellectual survey, analysis, and insight into the factors of the situation to be dealt with. Like other tools they must be modified when they are applied to new conditions and new results have to be achieved. Here is where the great practical evil of the doctrine of immutable and necessary antecedent rules comes in. It sanctifies the old; adherence to it in practice constantly widens the gap between current social conditions and the principles used by the courts. . . .

Failure to recognize that general legal rules and principles are working hypotheses, needing to be constantly tested by the way in which they work out in application to concrete situations, explains the otherwise paradoxical fact that the slogans of the liberalism of one period often become the bulwarks of reaction in a subsequent era. . . .

If we recur then to our introductory conception that logic is really a theory about empirical phenomena, subject to growth and improvement like any other empirical discipline, we recur to it with an added conviction: namely, that the issue is not a purely speculative one, but implies consequences vastly significant for practice. I should indeed not hesitate to assert that the sanctification of ready-made antecedent universal principles as methods of thinking is the chief obstacle to the kind of thinking which is the indispensable prerequisite of steady, secure and intelligent social reforms in general and social advance by means of law in particular. If this be so infiltration into law of a more experimental and flexible logic is a social as well as an intellectual need.<sup>56</sup>

It will be noted that Dewey was not only concerned to describe the logic of the judicial process but also the logic of social reform through law.

Professor Patterson has written that Dewey's description of legal reasoning had been substantially stated by Holmes, Pound and Cardozo.<sup>57</sup> My wonder is what the contributions of Dewey would have been in other areas of law had he been as familiar as these great legal scholars with such areas. The full measure of application of Dewey's logic to law requires the legal specialist sensitive to his discipline and to Dewey's logic. What Dewey described he described with scholarly impeccable insight. The eminent sociologist Lundberg has pointed out that the pattern of value formation widely found in the legal profession in America favors the method of an ante-

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56. *Logical Method and Law*, 10 CORNELL L.Q. 17, 26-27 (1924). A system which uniformly demanded that beliefs justify themselves in the course of inquiry before they could be used as instruments of inquiry or action would certainly, if widely adopted, work changes in the legal process. See *Logical Conditions of a Scientific Treatment of Morality* in DEWEY, PROBLEMS OF MEN 211 (1946).

57. Patterson, *John Dewey and the Law: Theories of Legal Reasoning and Valuation*, 36 A.B.A.J. 619, 620 (1950). Also see the section on *John Dewey: Instrumental Reasoning* in PATTERSON, JURISPRUDENCE 486 (1953) which is a more complete description of Dewey's logic.

cedent absolute in its logic of social reform. I am not disposed to challenge this conclusion. The indication is that the study of the systematic application of Dewey's logic to law would provide a basic contribution to legal science, and the wider use of it in the training of the profession could only have favorable consequences.<sup>58</sup>

#### CONTEXT

Dewey's contribution to the notion of context ("contextualism") furnishes the legally trained with a familiar and valuable means of entering the Dewey theory of inquiry and of morals and the spirit of his theory of justice.<sup>59</sup> The merit of placing a legal decision, rule, policy, statute or problem in its context is familiar to lawyers. An act or event assumes legal relevance from its context—the context includes the whole environmental world in which the event or act exists. If context is relevant then decisions must take care that the distinctive features of the act or event are noted and are seen relative to others, and are given whatever effect the logic of the situation demands. Since it is recognized by the profession that decisions, rulings, occurrences, assume legal import based on time, place and circumstances, this recognition could be useful in a similar professional recognition that moral problems in law involve elements of the unique, the plural and the relative; and accordingly that the search for intelligent recognition and adjustment of moral problems should be through discriminating choices which admit their uniqueness, plurality and relativity and demand knowledge of the consequences of the adoption of the available alternatives—all as opposed to a search for some final precept.

Concerning contextualism, Professor Nagel has said:

[E]very quality and event is a genuine occurrence in some complex process or context, and possesses ascertainable relations and functions in that context. There is however, no one context which is relevant to the occurrence of everything, there is no absolutely privileged context. It is this emphasis upon the contextual conditions for the occurrence and

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58. Lundberg's discussion on the pattern of value formation in the legal profession of America is in his *Conflicting Orientation in Law and National Policy* printed in TAYLOR, LIFE, LANGUAGE, LAW 168 (1957). Lundberg describes the pattern as being "moralistic-legalistic." See the six principles of modern logic in Loevinger, *An Introduction to Legal Logic*, 27 IND. L.J. 471-522 (1952) which Lundberg describes as likely to be revolutionary in legal theory—note how these principles have the spirit of Dewey's logic. Loevinger states that "The forms of modern logic are, by and large, developed in connection with specific subject matter, and most of the work of adaptation to the legal process remains to be done." *Id.* at 521. See also STONE, PROVINCE AND FUNCTION OF LAW 205 (1946) for a brief discussion of Dewey's logic and its application, and also see LEVI, AN INTRODUCTION TO LEGAL REASONING 3 (1949).

59. See Dewey's basic tract entitled *Context and Thought*, 12 UNIVERSITY OF CALIFORNIA PUBLICATIONS IN PHILOSOPHY, 203-24 (1931).

for the manifested properties of everything whatsoever—upon the fact that a quality is an objective constituent of nature even though its existence depends on the relations in which it stands to other things—which explains the adjective in the label “contextualistic naturalism.”

In any event, it is in the radical plurality of men’s needs and in the limitations which their physical and social environment impose upon their fulfillment, that contextualistic naturalism locates the sources and urgency of moral problems. Accordingly, it does not conceive the primary moral problem to be that of discovering or actually instituting some fixed set of ethical norms valid everywhere and for all time. For basic moral problems are plural in number and specific in character, and are concerned with the adjustment, in the light of causes and consequences, of competing impulses occurring in specific environmental contexts. There can therefore be no general or final solution to the moral predicaments of mankind; the moral problem is the perennial one of finding ways and means for eliminating needless suffering and for organizing in a reasonable manner the energies of man.<sup>60</sup>

There is hardly a more useful or familiar instrument to the legally trained than the notion of context. Dewey would have sharpened its meaning and extended its usefulness.

#### EDUCATION

There remains to comment that Dewey’s philosophy of education presents a substantial synthesis of his entire philosophy.<sup>61</sup> Here one meets his theory of morals, his idea of experience, his conception of democracy, his scientific method and his use of contextualism and the application of his logic—all in rich display. Here is the great philosopher using his philosophical resources to enrichen a discipline—education—to form a new plateau for the meaning of both education and philosophy. All the tools present in his philosophy of law appear in the context of the educational task, and so it would seem that insights into his philosophy of law can sharpen one’s awareness of his philosophy of education and of the application of his philosophy of law in the context of legal education.<sup>62</sup> Reflection upon the function and methods of legal education is inextricably bound with reflection upon any philosophy of law—and it is indispensable if the

60. NAGEL, SOVEREIGN REASON 55-56 (1954).

61. See note 45 *supra*.

62. Apparently philosophic critics of Dewey are not noted for their familiarity with his basic work *Democracy and Education*. Likewise critics of Dewey’s educational ideas are hardly noted for their familiarity with Dewey’s works. Dewey’s theory of education makes of it an intellectual discipline of the highest order. See DEWEY, EXPERIENCE AND EDUCATION 100, 113-15 (1938); DEWEY, PROBLEMS OF MEN 168 (1946), in chapter entitled *Human Nature and Scholarship*.

Dewey has been accused of “dislike of discipline” and as being blind to drifts “toward totalitarianism.” Palmer, *Defense Against Leviathan*, 32 A.B.A.J. 329, at 332 (1946), reprinted in BROWN, THE NATURAL LAW READER 3, 11 (1960). But see Dewey, *Creative Democracy—The Task Before Us* in THE PHILOSOPHER OF THE COMMON MAN 220, 224, 228 (1940).



philosophy of law is Dewey's, because:

The student of philosophy "in itself" is always in danger of taking it as so much nimble or severe intellectual exercise—as something said by philosophers and concerning them alone. But when philosophic issues are approached from the side of the kind of mental disposition to which they correspond, or the differences in educational practice they make when acted upon, the life-situations which they formulate can never be far from view. If a theory makes no difference in educational endeavor, it must be artificial. The educational point of view enables one to envisage the philosophic problems where they arise and thrive, where they are at home, and where acceptance or rejection makes a difference in practice.<sup>63</sup>

Further:

"Philosophy of education" is not an external application of ready-made ideas to a system of practice having a radically different origin and purpose: it is only an explicit formulation of the problems of the formation of right mental and moral habitudes in respect to the difficulties of contemporary social life. The most penetrating definition of philosophy which can be given is, then, that it is the theory of education in its most general phases.<sup>64</sup>

The suggestion made earlier that Dewey's theory of justice would include such a promotion of the conditions for the sharing of those experiences as will lead to the continual enrichment of man's experiences and to their fullest use as instruments of defining, understanding and solving man's problems of existence, now can be seen in the context of Dewey's encompassing philosophy of education. Since Dewey says that "no experience is educative that does not both tend to knowledge of more facts and entertaining of more ideas and to a better, a more orderly, arrangement of them,"<sup>65</sup> it follows that some experiences are not educative.<sup>66</sup> The experiences which law is to strive to promote must accordingly be those which are educative if they are to be *used* as instruments in the solving of man's problems. Whether and to what extent experiences are capable of being educative is a problem of education. To direct law toward the enrichment of experiences has the objective of helping men learn, become "educated," make intellectual distinctions, undertake experiments with, through and because of the enriched experiences in search of their continuing utilization. Accordingly, it is necessary to determine the criteria by which to select experiences. Choices must be made be-

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63. DEWEY, *op. cit. supra* note 46, at 383.

64. *Id.* at 386. Also see *id.* at 383: "If we are willing to conceive education as the process of forming fundamental dispositions, intellectual and emotional, toward nature and fellow men, philosophy may even be defined as *the general theory of education.*" (Italics in original.)

65. DEWEY, *EXPERIENCE AND EDUCATION* 102 (1938).

66. Hook, *John Dewey—His Philosophy of Education and Its Critics* in the *New Leader*, November 2, 1959, p. 6.

tween experiences in order to aid in the selection and use of further experiences and the evaluation of their consequences—including their effects on educational practices, policies, methods and goals. The problem is engulfed in the educative task. Persons making choices concerning law are enmeshed in education. As a result the theories of justice and education are united in a partnership which furthers and utilizes experiences and so both are focused upon the central quest for the highest development of intelligence. This makes both legal education and the philosophy of law united in involvement with the problems of men, with the highest capacity of man and with the best demonstrated means of pursuing intelligence: the scientific method.

#### CONCLUSION.

Among other things, it has been suggested that Dewey provides a continuing vehicle for law's assessment, that democracies lack a theory of law equal to the problems before them and that guides may be had from Dewey to construct one, that the empirical and experimental sociological jurisprudence can be strengthened by the experience, democratic and value orientation of Dewey, that legal education and philosophy of law are joined by Dewey in common purpose. The use of Dewey in philosophy of law courses is the best means that I know of for assisting the student to see and define problems of legal philosophy, to measure, evaluate and weigh the comparative merits of competing philosophic attitudes, and thus to allow the formation by the student himself of his own philosophy of law—a necessary possession if he is to participate intellectually in the search for the significance of his own life in law. I have suggested that Dewey necessarily removes the philosophy of law from a separate sanctuary of the few to the whole law school, to the profession, and, indeed, to the community. I have mentioned but not emphasized the exceeding rigor and discipline which Dewey's philosophy demands in legal analysis and evaluation. Suffice it to say, as his historical and technical studies of law demonstrate, the demand is commensurate with requirements of the most proficient and exacting.

I would like to conclude with the following quotation from Dewey which has the mood of poetry and seems a cogent and poetic statement of what he was after:

Conceptions of possibility, progress, free movement and infinitely diversified opportunity have been suggested by modern science. But until they have displaced from *imagination* [italics in original] the heritage of the immutable and the once-for-all ordered and systematized, the ideas of mechanism and matter will lie like a dead weight upon the emotions, paralyzing religion and distorting art. When the liberation of capacity no longer seems a menace to organization and established institutions,

something that cannot be avoided practically and yet something that is a threat to conservation of the most precious values of the past, when the liberating of human capacity operates as a socially creative force, art will not be a luxury, a stranger to the daily occupations of making a living. Making a living economically speaking, will be at one with making a life that is worth living. And when the emotional force, the mystic force one might say, of communication, of the miracle of shared life and shared experience is spontaneously felt, the hardness and crudeness of contemporary life will be bathed in the light that never was on land or sea.<sup>67</sup>

The point of this paper is that law should have a more prominent role in this than it presently has, and that law can gain it through the process exemplified by John Dewey.

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67. DEWEY, chapter on *Reconstruction as Affecting Social Philosophy* in *RECONSTRUCTION IN PHILOSOPHY* 211 (enlarged ed. 1948). Profound sources of insight into Dewey's conception of experience are his materials on the aesthetic world. DEWEY, *ART AS EXPERIENCE* (1934), one of his latest works, reveals this: "Fortunately a theory of the place of the aesthetic in experience does not have to lose itself in minute details when it starts with experience in its elemental form. Broad outlines suffice. The first great consideration is that life goes on in an environment; not merely *in* (italics in original) it but because of it, through interaction with it. No creature lives merely under its skin; its subcutaneous organs are means of connection with what lies beyond its bodily frame, and to which, in order to live, it must adjust itself, by accommodation and defense but also by conquest." *Id.* at 13. "The difference between the aesthetic and the intellectual is thus one of the place where emphasis falls in the constant rhythm that marks the interaction of the live creature with his surroundings. The ultimate matter of both emphases in experience is the same, as is also their general form." Or: "Expression strikes below the barriers that separate human beings from one another. Since art is the most universal form of language, since it is constituted, even apart from literature, by the common qualities of the public world, it is the most universal and freest form of communication." *Id.* at 270. An experience-democratic-education-oriented theory of law cannot escape profound involvement in the communication process.