

JOHN DEWEY  
AND  
THE DEMOCRATIC LIFE OF THE LAW

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ABSTRACT  
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The animating goal of this dissertation is to reclaim John Dewey's philosophy to present a case against the minimalist and elite assumptions that I identify in both legal theory and democratic theories today. The aim is to present a framework for rethinking the relationship between the normative value of legal processes and the nature of law itself, and to defend Dewey's turn to a robust participatory democracy as a moral ideal and "a way of life."

The specific goals are twofold. Firstly, I offer a critical reading of core concepts in jurisprudence on the concept of law and the source of law's normativity, especially in the works of John Austin and H.L.A. Hart. I argue that a basic thread links the works of John Austin and H.L. A Hart, as well as Richard Posner today, and champions of elite democracy generally: a descriptive and normative claim that the general public does not have the capacity to understand and actively participate in complex legal processes. As these accounts argue, our general treatment of laws – and, for Austin and Posner, our commitment to democracy and popular sovereignty – should not assume a constitutive role for the public. I present this reading by reconstructing and expanding on arguments from Dewey's critique of Austin and the prevailing legal theories in his day, in Chapter 1, and through a pragmatic reading of Lon Fuller's critique of Hart, in Chapter 4. I argue that Austin and Hart's theories have themselves been buttressed by anti-democratic claims about the epistemic competence of the public and their (lack of) ability and desire to engage in the complex processes of will formation. These understandings of law have, in turn, led to the mainstreaming of critiques – like that of Henry Maine – that robust participatory democracies are modern chimeras. The best we can hope for in a democracy is a

check on the activities of officials. In short, the cycle is vicious: conceptions of law and critiques of democracy have been developed in lockstep based on a basic questioning of the public's willingness and ability to shape and understand legal and political processes. The aim of this dissertation is to suggest, with a re-reading of Dewey's philosophy, how we may begin to break this cycle, by rethinking core concepts of law, and of democracy's relationship to law. To that end, I offer a reconstruction of a Deweyan philosophy of law to reconsider questions of the social sources of law and its relationship to robust participatory democracy.

The second overarching aim of the dissertation is a reading and defense of Dewey's ethical conception of democracy. This reading of Dewey is grounded in Dewey's commitment to providing the framework for securing values and "the full development of human beings as individuals" on equal and collaborative terms. Dewey developed his account in part against critics of participatory democracy, like Henry Maine and Walter Lippmann, who sought to deflate the definition of democracy as one form of government among others, differentiated only by the majoritarian principle in determining who rules. As I will demonstrate, Posner's selective reading of features of Dewey's theory of knowledge and inquiry, and his pragmatic philosophy more generally, allows him to see epistemological justifications of democracy as indefensible against empirical findings of low IQs and the demands and dreariness of political participation. Dewey's experimentalism and 'methods of intelligence', which I discuss in Chapter 2 and 3 of this dissertation, provided philosophical warrant for a much more robust defense of democracy than Posner acknowledges.

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## ABBREVIATIONS

The writings of John Dewey are cited in text in the dissertation. The following format will be used: title abbreviation, volume abbreviation and number, followed by the page number (e.g., ATS, EW4, 80).

### VOLUME ABBREVIATIONS

- EW            John Dewey. *The Early Works: 1882-1898*. Edited by Jo Ann Boydston. 5 vols. Carbondale, IL: Southern Illinois University Press, 1969-1972.
- MW            John Dewey. *The Middle Works: 1899-1924*. Edited by Jo Ann Boydston. 15 vols. Carbondale, IL: Southern Illinois University Press, 1976-1983.
- LW            John Dewey. *The Later Works: 1925-1953*. Edited by Jo Ann Boydston. 17 vols. Carbondale, IL: Southern Illinois University Press, 1981-1992.

### TITLE ABBREVIATIONS

- AE            “From Absolutism to Experimentalism” (1930)
- AL            “Anthropology and the Law” (1893)
- ASC           “Authority and Social Change” (1936)
- ATS           “Austin’s Theory of Sovereignty” (1894)
- CD1           “Christianity and Democracy” (1893)
- CD2           “Creative Democracy—The Task Before Us” (1939)
- CLP           “The Historic Background of Corporate Legal Personality” (1926)
- DEA           “Democracy and Educational Administration” (1937)
- DR            “Democracy is Radical” (1937)
- E1            “Outlines of a Critical Theory of Ethics” (1891)
- E2            *Ethics* (1932)
- ED            “The Ethics of Democracy” (1888)
- EE            *Education and Experience* (1938)
- EN            *Experience and Nature* (1925)
- FC            *Freedom and Culture* (1939)
- FC2           “Force and Coercion” (1916)

FVL	“Force, Violence, and Law” (1916)
GMM	“Green’s Theory of the Moral Motive” (1892)
HNC	<i>Human Nature and Conduct</i> (1922)
IDP	“The Influence of Darwin on Philosophy” (1910)
ION	<i>Individualism, Old and New</i> (1929)
L	<i>Logic: The Theory of Inquiry</i> (1938)
LE	“Liberalism and Equality” (1936)
LML	“Logical Method and the Law” (1924)
LSA	<i>Liberalism and Social Action</i> (1935)
LSC	“Liberty and Social Control” (1935)
MPL	“My Philosophy of Law” (1941)
NP	“The New Psychology” (1884)
NRL	“Nature and Reason in Law” (1914)
NRP	“Need for Recovery of Philosophy” (1917)
PD	“Philosophy and Democracy” (1919)
PTG	“The Philosophy of Thomas Hill Green” (1889)
PTJ	“Presenting Thomas Jefferson” (1940)
POF	“Philosophies of Freedom” (1928)
PP	<i>The Public and Its Problems</i> (1927)
QC	<i>The Quest for Certainty</i> (1929)
RAC	“The Reflex Arc Conception in Psychology” (1896)
RIP	<i>Reconstruction in Philosophy</i> (1920)
RJB	“Review of <i>Mr. Justice Brandeis</i> , edited by Felix Frankfurter” (1933)
RLM	“Review of <i>Law in the Making</i> by Carleton Kemp Allen” (1928)
RPP	“Review of <i>Phantom Public</i> ” (1927)
TOV	“Theory of Valuation” (1939)

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## INTRODUCTION

### Reclaiming John Dewey's Legacy for a Radical Theory of Law and Democracy

“The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.”

— Oliver Wendell Holmes, Jr., *The Common Law* (1881)

Democracy is much broader than a special political form, a method of conducting government, of making laws and carrying on governmental administration by means of popular suffrage and elected officers. It is that, of course. But it is something broader and deeper than that [...] It is, as we often say, though perhaps without appreciating all that is involved in the saying, a way of life, social and individual. The keynote of democracy as a way of life may be expressed, it seems to me, as the necessity for the participation of every mature human being in formation of the values that regulate the living of men together: which is necessary from the standpoint of both the general social welfare and the full development of human beings as individuals.

— John Dewey, *Democracy and Educational Administration*<sup>1</sup>

Consider the following claim from Richard Posner, the most influential appellate judge of his generation and the “bulldog” of legal pragmatism<sup>2</sup>:

... the problem that gave rise to Dewey's pessimism about our actual existing democracy, is that deliberative democracy, at least as conceived of by Dewey, is as purely aspiration and unrealistic as rule by Platonic guardians. With half the population having an IQ below 100 (not a point that Dewey himself, a liberal, a ‘wet,’ would have been comfortable making, however), with the issues confronting modern government highly complex, with ordinary people having as little interest in complex policy issues as they have aptitude for them, and with the officials whom the people elect buffeted by interest groups and the pressures of competitive elections, it would be unrealistic to expect good

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<sup>1</sup> DEA, LW14, 217.

<sup>2</sup> Ronald Dworkin, “Darwin's New Bulldog,” *Harvard Law Review* 111, no. 7 (1998), 1718 and *Law's Empire* (Cambridge: Belknap Press, 1986).

ideas and sensible policies to emerge from the intellectual disorder that is democratic politics by a process aptly termed deliberative.<sup>3</sup>

Posner sees himself as an appropriator of a pared down “everyday” pragmatism derived from the thought of John Dewey, which provides guidance for the common sense legal reasoning of judges.<sup>4</sup> That pragmatism, Posner explains, “is merely a disposition to base action on facts and consequences rather than on conceptualisms.”<sup>5</sup> Posner finds that what one can glean from Dewey’s writings on matters of law are “freestanding”<sup>6</sup> from Dewey’s broader philosophy, as well as Dewey’s (questionable) liberal democratic commitments.<sup>7</sup> With this view, Posner has become a dominant voice in the general understanding of what “pragmatism” means within legal scholarship today.<sup>8</sup>

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<sup>3</sup> Richard Posner, *Law, Pragmatism, and Democracy* (Cambridge: Harvard University Press, 2003), 107.

<sup>4</sup> Ibid.

<sup>5</sup> Posner, *LPD*, 3.

<sup>6</sup> See also Thomas Grey, “Freestanding Legal Pragmatism,” *Cardozo Law Review* 18, no. 1 (1996), 21.

<sup>7</sup> Posner, *LPD*, 113-118.

<sup>8</sup> This is particularly true of those critical of legal pragmatism, who see themselves outside of the tradition of pragmatism. See, e.g., Dworkin, fn. 2. and “Pragmatism, Right Answers, and True Banality,” in *Pragmatism in Law and Society*, eds. Michael Brint and William Weavers, (Boulder, CO: Westview Press, 1991), 1001. Lynn A. Baker, “‘Just Do it’: Pragmatism and Progressive Social Change,” *Virginia Law Review* 78, no. 3 (1992): 697. David Luban, “What’s Pragmatic about Legal Pragmatism?” in *The Revival of Pragmatism*, ed. Morrison Dickstein (Durham: Duke University Press, 1998). Steven Smith, “The Pursuit of Pragmatism,” *Yale Law Journal* 100, no. 2 (1990), Brian Tamanaha, “Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction,” *American Journal of Jurisprudence* 41, no. 1 (1996) and Edward Cantu, “Posner’s Pragmatism and the Turn Toward Fidelity,” *Lewis & Clark Law Review* 16, no.1. (2012). Jed Rubenfeld, “The First Amendment’s Purpose,” *Stanford Law Review* 53, no. 4 (2000).

To be sure, there are distinctions *within* the legal pragmatist revival since the 1980s, which I discuss in the dissertation. The most prominent legal pragmatists include Thomas Grey, “Freestanding Legal Pragmatism” and “Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory,” *Southern California Law Review* 63, no. 6 (1990). Richard Rorty has also been a seminal figure in pragmatism more generally. His legal writings including “Pragmatism and Law: A Response to David Luban,” *Cardozo Law Review* 18, no. 1 (1996) and “The Banality of Pragmatism and the Poetry of Justice,” *Southern California Law Review* 63, no. 6 (1990). Contemporary legal pragmatists who have turned to Peirce, James and Dewey, in addition to Holmes, include Susan Haack, Catherine Wells, Daniel Faber, Margaret Jane Radin, and Michael Sullivan. See, e.g., Susan Haack, “The Pluralistic Universe of Law: Towards a Neo-Classical Legal Pragmatism” *Ratio Juris* 21, no 4 (2008): 453-80 and Catharine Pierce Wells, “Legal Innovation within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.,” *Northwestern Law Review* 82, no. 3 (1988), “Old-Fashioned Postmodernism and the Legal Theories of Oliver Wendell Holmes, Jr.” *Brooklyn Law Review* 63, no. 1 (1997); Michael Sullivan and Daniel Solove, “Can Pragmatism be Radical? Richard Posner and Legal Pragmatism,” *Yale Law Journal* 113, no. 3 (2003); Brian Butler, “Democracy and Law: Situating Law within John Dewey’s Democratic Vision,” *Ethics and Politics* 12, no. 1 (2010): 256-280, and “Dews, Dworks, and Poses Decide Lochner,” *Contemporary Pragmatism* 7, no. 3 (2010). Among Legal Pragmatists, there is also a notable strand of feminist interpretations. See Margaret J. Radin, “The

In linking his legal pragmatism to his treatment of democracy, Posner advocates a Schumpeterian style minimalist democracy, which takes a realistic attitude towards people as they are (and not what they might never be), and actively discourages citizens from devoting time to the issues of political life. Equal participation is both too taxing for the general public, which should be free to pursue individual private interests, and too complex given fundamental epistemic limitations. Posner suggests that leaders should be drawn from those “who are far above average in ambition, courage, energy, toughness, ambition, personal magnetism, and intelligence (or cunning). In other words, society is composed of wolves and sheep. The wolves are the natural leaders. They rise to the top in every society.”<sup>9</sup> As for the courts, they can themselves render more epistemically valuable judgments if they diversify among their ranks. Moreover, they might uphold democratic values by restricting judicial review so that experimentation can take place within the legislative branch – two views Posner suggests would be congenial to Dewey’s thinking, and a more ‘pragmatic’ application of his thought to matters of law and democracy.<sup>10</sup>

How has the legacy of John Dewey – America’s radical “Philosopher of Democracy” – become an inspiration for Posner’s minimalist theory of pragmatism, law and democracy? Is

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Pragmatist and the Feminist,” and Martha Minow and Elizabeth V. Spelman, “In Context,” in *Pragmatism in Law and Society*, eds. Michael Brint and William Weavers (Boulder, CO: Westview Press, 1991).

This sampling does not include the extraordinarily voluminous scholarship on the legacy and works of Oliver Wendell Holmes, Jr., whose relationship to the pragmatic tradition and membership in the Metaphysical Club is now well documented, perhaps most famously in Louis Menand’s *The Metaphysical Club* (New York: Farrar, Straus & Giroux, 2001). Max Fisch’s writings in the 1940s may have been the first explicit recognition of the pragmatic overtones of Holmes’ predictive model. “Justice Holmes, The Prediction Theory of Law, and Pragmatism,” *Journal of Philosophy* 39 (1942). See also Frederic Kellogg, “The Making of an American Legal Philosophy,” in *The Formative Essays of Justice Holmes*, ed. F. Kellogg (Westport, CT: The Greenwood Press, 1984), Catharine Wells, “Holmes on Legal Method: The Predictive Theory of Law as an Instance of Scientific Method,” *Southern Illinois University Law Journal* 18 (1994), 329-345, and Susan Haack, “Pragmatism, Law, and Morality: The Lessons of Buck v. Bell,” *European Journal of Pragmatism and American Philosophy* (2011), 4. The most influential recent statement of Holmes’ pragmatism has been Thomas Grey’s, “Holmes and Legal Pragmatism,” *Stanford Law Review* 41, no. 4 (1989).

<sup>9</sup> Posner, *LPD*, 183.

<sup>10</sup> *Ibid*, 118-130

Posner right in his deflationary reading of Dewey? And, more pressingly, should we be pessimistic about the possibility and value of participatory democracy today? What lessons does Dewey's pragmatism hold for us on how to think about laws, the role of judges and lawmakers, and whether we can expect 'sensible policies to emerge' from the plural voices and sometimes messy processes that constitute participation in a complex liberal democracy?

John Dewey's philosophical career spanned nearly seven decades, from the post-Civil War era to the thick of the Cold War. His philosophical contributions and public political activity never waned – nor did the criticisms he faced in advancing those philosophical contributions, including his ethical and participatory ideal of democracy. The animating goal of this dissertation is to reclaim John Dewey's philosophy to present a case against the minimalist and elite assumptions that I identify in both legal theory today and the type of democratic theory championed by Posner.<sup>11</sup> The aim is to present a framework for rethinking the relationship between the normative value of legal processes and the nature of law itself, and to defend Dewey's turn to a robust participatory democracy as a moral ideal and "a way of life."

The specific goals are twofold. I offer, firstly, a critical reading of core concepts in jurisprudence on the concept of law and the source of law's normativity, especially in the works of John Austin and H.L.A. Hart. As I seek to demonstrate, a basic thread links the works of Austin, Hart, and Richard Posner today, and champions of elite democracy generally: a descriptive and normative claim that the general public does not have the capacity to understand and actively participate in complex legal processes. As these accounts argue, our general treatment of laws – and, for Austin and Posner, our commitment to democracy and popular

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<sup>11</sup> Posner, however, does not identify his theory of democracy as 'elite'. Instead, he believes it to be populist insofar as it does not demand of the public what intellectuals desire and demand of robust participatory democracy. It allows individuals to pursue their private interests, and accepts them and their private pursuits as they are. Posner, *LPD*, 14, and 155-158.

sovereignty – should not assume a constitutive role for the public. I present this reading by reconstructing and expanding on arguments from Dewey’s critique of Austin and the prevailing legal theories in his day, and through a pragmatic reading of Lon Fuller’s critique of Hart. I argue that Austin and Hart’s theories have themselves been buttressed by anti-democratic claims about the epistemic competence of the public and their (lack of) ability and desire to engage in the complex processes of will formation. These understandings of law have, in turn, led to the mainstreaming of critiques – like that of Henry Maine – that robust participatory democracies are modern chimeras. The best we can hope for in a democracy is a check on the activities of officials. In short, the cycle is vicious: conceptions of law and critiques of democracy have been developed in lockstep based on a basic questioning of the public’s willingness and ability to shape and understand legal and political processes. The aim of this dissertation is to suggest, with a re-reading of Dewey’s philosophy, how we may begin to break this cycle, by rethinking core concepts of law, and of democracy’s relationship to law. To that end, I offer a reconstruction of a Deweyan philosophy of law to reconsider questions of the social sources of law and its relationship to robust participatory democracy.

The second overarching aim of the dissertation is a reading and defense of Dewey’s ethical conception of democracy. This reading of Dewey is grounded in Dewey’s commitment to providing the framework for securing values and “the full development of human beings as individuals” on equal and collaborative terms. Dewey developed his account in part against critics of participatory democracy, like Henry Maine and Walter Lippmann, who sought to deflate the definition of democracy as one form of government among others, differentiated only by the majoritarian principle in determining who rules.<sup>12</sup> As I will demonstrate, Posner’s

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<sup>12</sup> Their works are of a piece with the tradition of elite democracy generally attributed to Robert Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1963), Joseph Schumpeter, *Capitalism*,

selective reading of features of Dewey's theory of knowledge and inquiry, and his pragmatic philosophy more generally, allows him to see epistemological justifications of democracy as indefensible against empirical findings of low IQs and the demands and dreariness of political participation. Dewey's experimentalism and 'methods of intelligence', which I discuss in Chapter 2 and 3 of this dissertation, provided philosophical warrant for a much more robust defense of democracy than Posner acknowledges.

A turn to Dewey's defense of public intelligence offers a salutary re-thinking of the increasingly inflammatory public discourse on the epistemic capacities of the public today. The public's ill-informed voting, and their threat to a well-functioning government and individual rights, appear as warrants to question anew our liberal democratic commitments.<sup>13</sup> As the philosopher Jason Brennan wrote in *Foreign Policy* days after the 2016 U.S. presidential election, "There is no real solution to the problem of political ignorance, unless we are willing to break with democratic politics."<sup>14</sup> Dewey's championing of methods of intelligence in navigating social, political, and moral life, based on the scientific method, thus warrants a patient reading and justification. Claims that we cannot intelligently deliberate about our subjective, non-cognitive values, desires, and interests, or, more foundationally, expand our capacities or very willingness to do so, are systematically rejected by Dewey. As I argue, Dewey's pragmatic philosophy provides both descriptive and normative resources for defending the possibility and desirability of intelligent public deliberation in complex societies.

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*Socialism and Democracy* (New York: Harper and Row, 1942) and public choice theorists like William Riker, *Liberalism Against Populism* (San Francisco: W.H. Freeman, 1982).

<sup>13</sup> For a small sampling of this recent literature see, e.g., Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government is Smarter* (Stanford: Stanford University Press, 2013); Jason Brennan, *Against Democracy* (Princeton: Princeton University Press, 2016).

<sup>14</sup> Jason Brennan, "Trump Won Because Voters Are Ignorant, Literally," *Foreign Policy*, November 10, 2016.

Moreover, one can surmise what Dewey might have said to the wholesale rejection of scientific findings in debates on evolution and climate change, and the “fake news” phenomena and consolidation of media power – variations on concerns that Walter Lippmann identified in his retreat from progressive politics and commitment to democracy. Dewey argued then that these social phenomena are not reasons to despair of democracy’s potential: they present an ever-growing case for its necessity, and the application of methods of intelligence in all domains of life. Democracy as an ideal, for Dewey, was the precondition for the cultivation and deployment of intelligence. It demands the creation of an open and scientific ethos open to plural opinions and revising one’s beliefs, and the development of each individual’s capacities to evaluate and act on critical reflection on social problems. Most urgently, Dewey heeded the call to the public to reclaim itself and the social relationships that are both a source of conflict and problems, but of culture and civilization, and ultimately, of values and moral meaning in everyday life. Dewey certainly recognized the difficulty of the democratic enterprise, and engaging critically with existing educational, economic, political and legal institutions. But to simply retreat from the best resources at our disposal to improve our ability to deal with social problems was itself an unintelligent and stubbornly dogmatic refusal to do the hard work that democracy – and basic improvement within social life – demand. Pace Posner’s claims to the contrary, Dewey possessed perhaps a single-minded faith in the capacity of all individuals to cultivate intelligence and to contribute to the normative goals of democracy.

In the remainder of this introduction, I seek to place a finer point on these broad claims and their relevance for issues in legal theory and democratic theory today. I clarify the status of two core debates addressed within the dissertation – on the inadequacies of general jurisprudence in dealing with issues pertaining to democracy, and the justification of participatory versus elite

and epistemic conceptions of democracies – and what I argue are the distinctive contributions that a turn to Dewey’s works can offer. I then offer an outline of the chapters to follow.

### **On the “Dirty Little Secret” of Jurisprudence**

In his *What Should Legal Analysis Become?* Roberto Unger announced provocatively that jurisprudence has a ‘dirty little secret’: “its discomfort with democracy.”<sup>15</sup> This is the claim also that animated Jeremy Waldron’s *Law and Disagreement*, and his challenge to the dominant focus on appellate courts and decisions as the locus of scholarly inquiry on matters of law.<sup>16</sup> The discomfort, Waldron and Unger argue, is pervasive: “in the ceaseless identification of restraints upon majority rule as the overriding responsibility of judges and jurists; in the consequent hypertrophy of countermajoritarian practices and arrangements;...and in the single-minded focus upon the higher judges and their selection as the most important part of democratic politics’, but also in the failure to develop and generalize ways of thinking in jurisprudence that are appropriate to law understood as the creation and property of a free and democratic people.”<sup>17</sup> Unger in particular focuses on the rationalization process in legal analysis, which claims a unitary reason behind legal systems. His call is to retool the education of lawyers away from the

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<sup>15</sup> Roberto Unger, *What Should Legal Analysis Become?* (London: Verso, 1996). See also Scott Hershovitz, “Legitimacy, Democracy and Razian Authority,” *Legal Theory* 9, no. 3. (2003): 209.

<sup>16</sup> Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999). See also, Waldron’s review of Unger, “Dirty Little Secret,” *Columbia Law Review* 98 (1998), and “Can There be a Democratic Jurisprudence?” *Emory Law Journal* 58, no. 3 (2009), 675.

<sup>17</sup> Waldron, *Law and Disagreement*, 8, citing Unger, *What Should Legal Analysis Become?* 72-73, 115.



singular focus on methods of appellate adjudication and reasoning towards issues of social significance. Waldron, on the other hand, develops a philosophy of law that highlights the specific role and implications that flow from a jurisprudence specific to democratic legislation.

The need to develop a general jurisprudence that comports with a democratic framework motivates this dissertation's investigation into concepts of law, especially as they have developed historically, and the role of legal officials in understanding the authority of laws. General jurisprudence offers a study of law not specific to any type of institutional setting or political framework; its aim is to draw on the commonalities among all types of legal systems to distill core, generalizable concepts related to law. As Waldron argues, rightly, this attempt "is largely misguided," in part because general assessments are not neutral. Waldron takes up "the modern positivist notion of source-of-law" in its move from sources in custom to "law as typically the expression of a legislator's sovereign will."<sup>18</sup> Waldron's project attempts a study of law beyond the non-neutral model of the single legislator, by turning to the democratic and plural processes of legislation and "the law-generating activity of a large-scale representative assembly."<sup>19</sup>

Legal scholar Scott Hershovitz frames this issue well – of the fit between general jurisprudence and democratic institutions – in his critique of Joseph Raz's theory of legitimate authority. In addressing how legitimate authority may be claimed in legal systems generally, Raz grounds the issue on the assertion that "Governments decide what is best for their subjects and present them with the results as binding conclusions that they are bound to follow."<sup>20</sup> Democracy features here only as one way to define the variable "government", and does not account for the qualitative distinctions that must be considered in the nature of law and authority. As Hershovitz

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<sup>18</sup> Waldron, *Law and Disagreement*, 46. See also, Waldron, *Dignity of Legislation* (Cambridge: Cambridge University Press, 1999).

<sup>19</sup> *Ibid*, 47

<sup>20</sup> Hershovitz, "Legitimacy, Democracy, and Razian Authority," 209. Citing Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994), 356.

notes, Raz's formulation seems insufficient to account for how law works in a democracy, in which the people have a say in the formation of laws. As Herskovitz writes, "law in a democracy does not merely tell us what we may or may not do – though it does that; law is how *we* decide what we may and may not do."<sup>21</sup> Herskovitz's point more generally identifies the necessary – and yet still underdeveloped – task in contemporary legal (and democratic) theory to understand concepts of laws and authority that take into account the distinctive features of democracy.

Taking our cue from these scholars, I suggest a need to understand firstly the analytical move performed by John Austin – in turning the study of the concept of law to sovereign will as a determinate commander – in its historical context. Dewey's early works on democracy identified the relationship between Austin's definition of sovereignty and the claims against democracy advanced by Henry Maine. As we see this early history of jurisprudence and democratic theory unfold, there is a borrowing of concepts and definitions of law, democracy, and sovereignty between the 'neutral' jurisprudential concepts from Austin and the anti-democratic arguments advanced by Maine. Together, these thinkers shared a critical stance towards the possibility of public will formation, given its apparent indeterminacy and the disagreement and plurality inherent in turning to a diverse public. As Dewey argued, much in the vein of Waldron a century later, these accounts failed to note that democracy is an altogether distinctive enterprise, which cannot be reduced, as Austin and Maine suggest, to a relationship between rulers and ruled, of sovereign lawgivers and subjects.

My aim is to investigate what concepts of law might be challenged if we look at democracy not only beyond the model of a single legislative will, but beyond legislative activities, in pre-institutional social processes. Firstly, I draw on Dewey's writings on law, as well as resources from his philosophy and ethics, to sketch a Deweyan conception of law as

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<sup>21</sup> Ibid, 210. Itl added.

grounded in social customs and reciprocal intersubjective relationships. In following this thread of Dewey's ideas, I believe we can find also that resources for rethinking the nature of law and the rule of law in line with Dewey's critique of Austin that have already been developed by one of H.L.A. Hart's central interlocutors – Lon Fuller. Fuller, as recent scholars have recognized with a turn to archival research, was deeply influenced by pragmatist thought, and by Dewey specifically.<sup>22</sup> Lon Fuller's work has been traditionally viewed as a rather unsophisticated form of natural law theory.<sup>23</sup> Fuller is said to have mischaracterized what he identified as the eight principles of legality – generality, publicity, prospectivity, minimal intelligibility and clarity, non-contradiction, relative constancy, feasibility in obeying, and congruence between enactment and application – and its constituting an 'internal morality' of law.<sup>24</sup> In fact, his critics charge, those principles are merely an efficient instrumentality to achieve certain fixed – and sometimes deeply immoral – ends.<sup>25</sup> In recent years, renewed interest in his work – perhaps not surprisingly, among scholars including Waldron – has turned anew to the Hart-Fuller debate to question whether Hart's status as the decided victor in that debate is warranted.<sup>26</sup>

What I aim to contribute to this ongoing debate is a framework for understanding Hart's analytical claims along the lines presented by Dewey's reading of Austin, paired with an understanding of officialdom like that of Walter Lippmann (and influenced by Max Weber). In

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<sup>22</sup> Kenneth I. Winston, introduction to *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Oxford: Hart Pub., 2001), "The Ideal Element in a Definition of Law," *Law and Philosophy* 5, no. 1 (1986), 89-111, and "Is/Ought Redux: The Pragmatist Context of Lon Fuller's Conception of Law," *Oxford Journal of Legal Studies* 8, no. 3 (1988); Kristen Rundle, *Forms Liberate* (Oxford: Bloomsbury Publishing, 2012).

<sup>23</sup> See, e.g. Brian Leiter, "The Radicalism of Legal Positivism," *National Law Guild Review* 66, no. 3 (2009).

<sup>24</sup> Lon Fuller, *Morality of Law* (New Haven: Yale University Press, 1969)

<sup>25</sup> Ronald Dworkin, "Philosophy, Morality, and Law. Observations Prompted by Professor Fuller's Novel Claim," *University of Pennsylvania Law Review*, 113 no. 5 (1965) and Joseph Raz, *Authority of Law* (Oxford: Oxford University Press, 2009). H. L. A. Hart, "Book Review: *The Morality of Law*," *Harvard Law Review* 78 (1965).

<sup>26</sup> Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon Fuller* (Oxford: Bloomsbury Publishing, 2012), Peter Cane, ed. *The Hart-Fuller Debate in the Twenty-First Century* (Oxford: Oxford University Press, 2010), and Jeremy Waldron, "Positivism and Legality: Hart's Equivocal Response to Fuller," *New York University Law Review*, 83 no. 113 (2008), 1135-1169. Dan Priel, "Reconstructing Fuller's Argument Against Legal Positivism," *Canadian Journal of Law and Jurisprudence* 26, no. 2 (2013).

addition, I offer a re-reading of Fuller by applying Dewey's conceptual vocabulary to clarify Fuller's frequently misunderstood claims about the nature of law and the rule of law. Like Dewey, Fuller argued that legal systems cannot be understood by looking only to sovereign lawgivers and officials, nor can laws be understood as fixed ends guiding social life. My aim is to show how Fuller's concepts of law and the rule of law provide still important resources for general jurisprudence, and question the non-neutral institutional framework in which alternatives like Hart's are grounded.

### **Legal Pragmatism and the Challenge from Richard Posner**

A second feature of the 'dirty little secret' that both Waldron and Unger underscore – the obsession with appellate adjudication and judges – merits discussion here. To be clear, the issues that face general jurisprudence are not coterminous with issues of adjudication.<sup>27</sup> My interest in this dissertation is not to defend or elaborate a new theory of adjudication based on Dewey's works. To that end, I do not discuss in depth Dewey's essay, "Logical Method and the Law" (1924), which may seem anathema to a study of Dewey's works and its relationships to legal issues, given the essay's profound influence on Legal Realism and adjudication more generally. I forgo extended discussion in part because existing scholarship has already patiently analyzed Dewey's essay.<sup>28</sup> But what I do find is that the location of Dewey's contribution to law in this limited framework of the work of judges, has distorted understanding his overall philosophy. For example, in writings on Dewey's influence on the Legal Process school, scholars have taken

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<sup>27</sup> See Brian Leiter, "Legal Realism and Legal Positivism Reconsidered," *Ethics* 111, no. 2 (2001): 278-301. on this distinction, and ways in which they are related. I do not explore those issues in depth in this dissertation.

<sup>28</sup> See, e.g., the excellent essay by Mark Mendell, "Dewey and the Logic of Legal Reasoning," *Transactions of the Charles S. Peirce Society* 30, no. 3 (1994): 575-635.

Dewey as an arch-positivist who advanced a ‘relativist’ and minimalist conception of democracy like that of Robert Dahl.<sup>29</sup> Dewey’s view of adjudication is reduced to a matter of means-end instrumentalism, as Dewey is seen as a strong proponent of the fact/value distinction. As I aim to show, even a basic reading of Dewey’s philosophy demonstrates the thoroughly misguided interpretation of his thought on this score: his was a thick ethical conception of democracy, and one of his most pointed and thoroughgoing commitments was in rejecting the strict separation between facts and values, and the non-cognitive or irrational basis of the latter. What I argue in this dissertation is that we might do well to look at Dewey’s general philosophy to better understand his legal writings, and not distort his general philosophy by suggesting his legal writings are representative of the entire thrust of his works.

In fact, given Dewey’s critique of rigid dichotomies throughout his works and of the fact/value distinction in particular, his skepticism towards tenets of legal positivism – a philosophical school founded on strict dualisms of law and morality, is and ‘ought’, human institutions and moral meaning – should not be surprising. His pragmatic naturalism rejected the presupposition that ‘nature’ broadly understood had no qualitative valence which could be neatly separated from the purposive activity of humans interacting with their environment. Thus, the characterization of Dewey as an arch-positivist or proto-legal pragmatist in the vein of Posner, as well as the more sophisticated takes on Dewey’s ostensibly ‘anomalous’ rejection of legal

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<sup>29</sup> This view of Dewey as advancing the fact/value dichotomy in support of an instrumentalist, amoral conception of democracy reappears again in, e.g., Charles Bazan, “The Forgotten Foundations of Hart and Sacks,” *Virginia Law Review* 99, no 1 (2013), 16; William N. Eskridge, Jr. and Gary Peller, “The New Public Law Movement: Moderation as a Postmodern Cultural Form,” *Michigan Law Review* 89 (1991); Gary Peller “Neutral Principles in the 1950’s,” *University of Michigan Journal of Law Reform* 21 (1988); Brian Tamanaha, “Pragmatism in U.S. Legal Theory.” To be sure, this interpretation of Dewey is not unique among legal scholars. Perhaps most famously, Morton White and Louis Hartz characterized Dewey’s work as advancing as a type of non-ethical fixation on method and technique. White, *Science and Sentiment in America* (Oxford: Oxford University Press, 1972); Hartz, *The Liberal Tradition in America* (New York: Harcourt Brace and World). For additional discussion of historical critics in this vein, and the appropriation of this reading of Dewey from political scientists like Harold Lasswell, see Matthew Festenstein, *Pragmatism and Political Theory* (Chicago: The University of Chicago Press, 1997), 18-20.

positivism, thoroughly disregard Dewey's persistent philosophical commitment to overcoming that dualism of the natural and the human or 'posited'.

Posner and perhaps the other most influential legal pragmatist of the past three decades, Thomas Grey, do not offer such distorted readings of Dewey. Instead, in their particular reading of Dewey's works, they find his philosophy irrelevant (or normatively undesirable) in describing or aiding the work of the judge. Dewey's treatment of logical method and law can be separated from the issues of philosophical pragmatism, insofar as the arguments of legal reasoning presented by Dewey do not offer anything aside from what is already undertaken by judges if and when they refuse to guide their decisions by formulaic application of precedents. As such, pragmatism is essentially "banal." Moreover, Dewey's political and ethical commitments have no necessary relationship to the type of pragmatic or instrumental logic he championed in this essay.<sup>30</sup> Posner is equally skeptical about one of Dewey's core philosophical commitments – that values, including moral values – can be subject to intelligent and cognitive inquiry. Dewey's works, as I will show, offer a clear defense of the possibility to deliberate intelligently about values. This was, in fact, a cornerstone of his philosophy as a whole. This concern with values, as recent scholars have identified, has significant implications for Posner's approach to adjudication.<sup>31</sup> As I argue with these scholars, Posner's justification of the social interests advanced in judicial decision-making, becomes a reflection of the dominant values in society.

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<sup>30</sup> The claim that Dewey's philosophy can and should be separated from his democratic commitments – as well as his turn to inquiry and ethical framework as a whole – was perhaps most influentially advanced by Richard Rorty. A long line of criticism against Rorty's appropriation of Dewey's works include Richard Shusterman, "Pragmatism and Liberalism: Between Dewey and Rorty," *Political Theory* 22, no. 3 (1994): 391-413; James Kloppenberg, "Pragmatism: An Old Name for Some New Ways of Thinking?," *The Journal of American History* 83, no. 1 (1996); Richard Bernstein, "One Step Forward, Two Steps Backward: Richard Rorty on Liberal Democracy and Philosophy," *Political Theory* 15, no. 4 (1987): 538-563. I do not address Rorty explicitly in this dissertation, though the criticism of Posner along these lines is generally analogous to these critiques.

<sup>31</sup> Michael Sullivan and Daniel Solove, "Can Pragmatism be Radical? Richard Posner and Legal Pragmatism," *Yale Law Journal* 113, no. 3 (2003); Robert Westbrook, *Democratic Hope* (Ithaca: Cornell University Press, 2005); Jack Knight and James Johnson, "Political Consequences of Pragmatism," *Political Theory* 24, no.1 (1996), 68-96.

Much as Dewey suggested, the unwillingness to extend an open ethos of inquiry into our interest and desires leaves us with the possibility of irrational competitions “blind desire upon action” in lieu of “holding up another and better way as the alternative to follow in the future” (FC, LW13, 162). What I seek to contribute in this line of criticism against Posner’s thought is a clear line between this assumption and Posner’s commitments to a minimalist conception of democracy. A more patient reading of Dewey’s broader philosophical texts and his value theory and ethics lead directly to Dewey’s normative commitment to democracy as he defined it, and provides a critical vocabulary against the deflationary reading of Dewey advanced by Posner.

### **A Defense of Deweyan Ethical Democracy: Beyond Elite and Epistemic Democracy**

Posner is correct in viewing Dewey as an important forerunner to contemporary theories of deliberative democracy – and it is this deliberative and robust participatory strand in Dewey’s democratic theory, which I defend in this dissertation.<sup>32</sup> As Kristen Kadlec has argued, “the field of deliberative democracy is characterized by commitments that resonate powerfully with Dewey’s unwavering faith that democracy should not be judged according to its institutions but rather by reference to the intersubjectively constituted habits of inquiry and communication skills it encourages in its citizens.”<sup>33</sup> Indeed, against champions of elite democracy, Dewey made a twofold claim. Firstly, that the public’s epistemic capacities are not themselves hopelessly subject to elite capture. Moreover, the basic epistemological and philosophical assumptions that

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<sup>32</sup> See Richard Bernstein, *Philosophical Profiles: Essays in a Pragmatic Mode* (Philadelphia: University of Pennsylvania Press, 1986) and *The Pragmatic Turn* (Cambridge: Polity Press, 2010): 70-88. Westbrook, *John Dewey and American Democracy*; Matthew Festenstein, *Pragmatism and Political Theory* (Chicago: University of Chicago Press, 1997); John Shook, “Dewey’s Ethical Justification for Public Deliberation Democracy,” *Education and Culture* 29, no. 1 (2013): 3-26; Axel Honneth, “Democracy as Reflexive Cooperation,” *Political Theory* 26, no. 6 (1998), 768-783. Posner attributes this robust participatory democracy, which he describes as “Concept 1” democracy, to others like Jurgen Habermas, Amy Gutmann and Dennis Thompson.

<sup>33</sup> Kristen Kadlec, *Dewey’s Critical Pragmatism* (Lanham, MD : Lexington Books, 2007), 119.

underwrite these theories of elite democracy – especially the understanding of the individual as atomized and the difficulties of both motivating and cultivating among the public the methods of intelligence for deliberating on issues of moral significance – were themselves based on questionable psychological and philosophical claims. Dewey’s philosophy, which I explore at length in Chapter 2 and 3 of this dissertation, attempt to dismantle these claims from the ground up, especially in rethinking the relationship between individuals and society, the source of knowledge and intelligence, and the capacity for intelligent deliberation and transformation of our interests and values, including our moral values. His turn to public participation was motivated by the cultivation of habits and inquiry, and the fact that our problems and capacity to resolve them were irreducibly social and intersubjective.

Despite Dewey’s championing of scientific methods and of human intelligence in shaping his ideal of democracy, I do not intend to apply Dewey’s works to endorse a justification of democracy on purely epistemic grounds.<sup>34</sup> This has become a renewed focus in recent scholarly work on Dewey. Perhaps most notably, Hilary Putnam has advanced a convincing reading of Dewey’s works as providing an epistemic justification for democracy, as democracy as Dewey understood it provides, in Putnam’s words, “the precondition for the full application of intelligence to the solution of social problems.”<sup>35</sup> As I argue in Chapter 2 of this dissertation, Putnam’s treatment of Dewey offers an important and cogent vocabulary and philosophical foundation for rebuffing claims against robust democratic participation on epistemic grounds.

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<sup>34</sup> For representative examples, see Joshua Cohen, “An Epistemic Conception of Democracy,” *Ethics* 97 (1986): 26-38; David Estlund, *Democratic Authority* (Princeton: Princeton University Press, 2008); Allen Buchanan, “Political Liberalism and Social Epistemology,” *Philosophy and Public Affairs* 32 (2004): 95-130. Epistemic accounts of democracy inspired by Dewey include Elisabeth Anderson, “The Epistemology of Democracy,” *Episteme* 3 (2006); James Johnson and Jack Knight, *The Priority of Democracy: Political Consequences of Pragmatism* (Princeton: Princeton University Press, 2011); Hilary Putnam, “A Reconsideration of Deweyan Democracy,” in *Pragmatism in Law and Society*, eds. Michael Brint and William Weaver (Boulder: Westview Press, 1991), 217- 243. To be sure, there are significant distinctions among these epistemic accounts of democracy, especially from those inspired by Dewey’s works. I discuss them in Chapter 3 of the dissertation.

<sup>35</sup> Putnam, “A Reconsideration of Deweyan Democracy”



But, as I argue as well, the epistemological case for democracy is only a partial takeaway of democracy's value that we can glean from Dewey's works.<sup>36</sup> One task of this dissertation is to distinguish the epistemic value of democracy that scholars like Putnam identify in his work, and the trend in contemporary democratic theories that seeks to ground the authority of democracy in its epistemic value.

A sketch of the basic distinctions and issues at play is in order. As scholars like Nadia Urbinati and Jeremy Waldron have argued, many of the current justifications of democracy based on its epistemic value have been advanced by squeezing democratic politics into the mold of juristic thinking. As Urbinati argues, the issue that seems to motivate epistemic accounts of democracy seems to be a desire to turn individual citizens into judges, and to turn political life into a juristic enterprise oriented towards truth.<sup>37</sup> As the dissertation seeks to suggest, we need to re-think the "juristic mode" itself and consider its own genealogy of anti-democratic bias. But, as I see the critique from Urbinati and Waldron, there is still something wanting in an account that finds the justification of democracy – and, for that matter, of the authority of laws as well – on the quality of electoral decisions and laws. Such a defense may be waging the war on the conceptual terrain of democracy's historical critics (critics who have sharpened their rhetoric with language borrowed from general jurisprudence). That is, a defense of decisions and epistemic competence as such may risk advancing a deflationary definition of democracy as solely decisions (or, for that matter, epistemically valuable laws) that Dewey criticized from his earliest work.

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<sup>36</sup> Putnam, for example, has argued that Dewey provides us with precisely those justifications, insofar as Dewey's theory of experimental inquiry. I believe these reading presents a correct and convincing reading of Dewey's works, and an important rebuttal to deep skepticism surfacing today surrounding democracy's epistemic viability.

<sup>37</sup> Nadia Urbinati, *Democracy Disfigured* (Cambridge: Harvard University Press, 2014). See also, Jeremy Waldron, *Dignity of Legislation*, also cited in Urbinati.

The claim that epistemic conceptions of democracy may be modeled on traditional jurisprudential language speaks to a second distinction between a Deweyan conception of democracy and a rationalist epistemic theory. Those theories rely on a conception of “truth” that is anathema to one of the most profound legacy of classical pragmatism. Truth itself, as Dewey and the pragmatist tradition suggests, is fallible, contestable, and a social and practical tool for making sense of everyday problems. Truth is not solely a good-in-itself or something to be discovered, but always tied up with social action. As I argue with this turn to Dewey’s thought, and one which grounds the epistemic turn to Dewey from scholars like Putnam, is a stronger connection between the social processes of inquiry into ‘truth’ and participatory democracy itself.

To be sure, the general thrust of deliberative democracy today recognizes the significance and value of participation itself outside of voting and institutional decision-making procedures. But as critics of deliberative democracy also suggest – and a criticism often leveled against Dewey – is that it cannot adequately account for the fact of power in its reduction of politics to rational processes. Moreover, as Posner argues in defending his minimalist account from accusations of ‘elitism’ – the deliberative model itself presents elitist presumptions, insofar as it allows those with better skills of persuasion and intelligence to dominate the discursive agenda.<sup>38</sup> But many of the criticisms leveled against deliberative democracy are those which, I argue, Dewey’s theory can address. In staking this position on Dewey’s thought, I defend Dewey’s democratic theory from critics who suggest that his turn to scientific method as a model for social inquiry was colored by excessive scientism and an elision between political and scientific

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<sup>38</sup> See also, e.g. Lynn Sanders, “Against Deliberation,” *Political Theory* 25, no. 3 (1997); Iris Marion Young, *Justice and the Politics of Difference* (Princeton, Princeton University Press, 1990) and “Activist Challenges to Deliberative Democracy,” in *Debating Deliberative Democracy*, eds. James S. Fishkin and Peter Laslett (Oxford: Blackwell Publishing, 2003); and Bernard Yack, “Rhetoric and Public Reasoning: An Aristotelian Understanding of Political Deliberation,” *Political Theory* 34, no. 4 (2006).

or cognitive authority.<sup>39</sup> As I will argue, Dewey shows us how participation is necessary precisely because it forestalls the installation and entrenchment of an epistemic elite. In reading Dewey's early works on Austin and his conception of sovereignty in particular, we will see how his concern had always rested in resisting determinate hierarchies, and the usurpation of power by virtue of an institutional or claimed capacity to command. Dewey's understanding of political and social action does not separate thinking and judgment, on the one hand, and active force and social interaction on the other. As Dewey argues, intelligent and interpersonal participation in our daily lives is the first necessary step in addressing conflicts and social problems without resort to decisionism and elitism. Participation is the best method whereby we secure and cultivate equal freedom, understood by Dewey as the very capacity to navigate social problems – not, again, merely discerning and expounding truths.

Finally, as I argue in my turn to Dewey, truth or epistemically valuable decisions or laws, in themselves, cannot provide the basis of moral authority. As I suggest in my reading of Walter Lippmann's intellectual trajectory, this was a realization Lippmann himself alighted upon, which explains his otherwise surprising turn to natural law outside of empirical reality to provide moral meaning which expertise – and truths about facts – could not adequately furnish. Instead, as Dewey's ethical conception of democracy suggests, and as I argue in my exposition of his philosophy, moral meaning derives from our social relationships and, in William James' felicitous phrasing, the "great blooming, buzzing confusion" of experience, which is made meaningful in and through our collaborative activities that comprise democracy as a way of life.

## **The Democratic Life of the Law: An Outline of the Dissertation**

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<sup>39</sup> For similar readings of Dewey, see Melvin Rogers, *The Undiscovered Dewey* (New York: Columbia University Press, 2012); R. W. Hildreth, "Reconstructing Dewey on Power," *Political Theory* 37, no. 6 (2009); Kadlec, *Dewey's Critical Pragmatism*.

The dissertation begins by exploring a connection Dewey makes – almost in passing – in two of his early essays: the first, “The Ethics of Democracy” (1888), which he develops against Henry Maine and the second, “Austin’s Theory of Sovereignty” (1894). What we find through a reading of these two texts in tandem – and by investigating Maine and Austin’s works beyond Dewey’s initial reading – is the extensive borrowing of conceptions between Austin’s work on sovereignty and the command theory of law, and Maine’s critique of democracy. Few commentators on Dewey’s essay on Austin, even those interested in his legal philosophy, discuss in depth his essay on Austin – his most sustained engagement with legal positivism. Those who do tend to disregard it as an insignificant or unsatisfactory work, or puzzle as to where the essay fits into Dewey’s broader philosophical writings or his motivation in turning to Austin in the first place. The recovery of Dewey’s critique of Austin presented in this chapter clarifies our understanding of Dewey’s early ethical conception of democracy and its relationship to his understanding of law and sovereignty. Through a close reading of Dewey’s essay on Austin and Maine, as well as his early lectures and essays on ethics, logic, and democracy, I suggest that Dewey’s concern with the law rested in understanding the processes through which conflicts within society could be mediated without recourse to violence or permanent relations of domination between rulers and ruled. I also situate Dewey’s shift from his early Christian, neo-Hegelian idealism to his pragmatic naturalism discussed in the following chapter in debates on Austin, determinate command, and sovereignty cited by Dewey and in general circulation at the time.

In looking to the value of democracy in particular, Dewey understood it as more than a mechanism for the aggregation of individual wills or the protection of pre-existing rights or

liberties, but promoting individual ‘personality’ – a term of art for Dewey at this early stage. The necessary emergence of a singular decision or constitutional form is not the end of democracy, but only one part of a broader process, or way of life, which permits all individuals to participate in addressing and shaping the common good. The plurality of social relationships and institutions and the value of individual development present an alternative normative foundation of a legal order that can comport with – and not merely minimize the tension between – the formation and enforcement of law and legal orders on the one hand and a “strong” (or non-elite or non-minimalist) ethical democracy of the kind Dewey championed throughout in his political writings. As demonstrated in the following chapters, Dewey moves beyond these early Hegelian formulations by offering an account that redefines democracy, the state and civil society, in his development of an experimental method of inquiry and a thoroughgoing pragmatic naturalism. But we see already in these early works how the precepts of Hegel are deployed in service of democracy and its concrete realization.

In Chapter 2, I turn to the development of Dewey’s thought in the 1920s and 1930s years and the core of his pragmatic philosophy and his account of thinking and acting, knowing, valuing, and democracy as an ideal of ethical life. The exposition of Dewey’s philosophy in this chapter is extensive, and serves also to situate the discussion for the remainder of the dissertation. With this philosophical framework, I sketch in this chapter a Deweyan theory of law and democracy. Firstly, I take Dewey’s philosophy to reorient what it means for law to originate in social sources – the core thesis of legal positivism. As Dewey suggests, the ‘social’ origins of law in *habit*, and its corollary *custom*, can help explain the basic claims of rule of law proponents like Lon Fuller, who, I argue, share in this basic conception of law as a purposive, social interactivity. While all these terms of art assume specific meaning for Dewey, the core principle,

already present in his earliest works, is simple. Regularized social activity can be disrupted, rechanneled, and reasserted in different forms, but ‘society’ – and the laws and institutions within it – are constituted by a constant activity, or intersubjective social interactions all the way down. The animating aim of the chapter is to demonstrate, pace interpreters like Richard Posner, how such an understanding of law and legal processes is linked to Dewey’s normative commitment to democracy.

In this chapter, we also see how social interactivity can only be assessed and reformed through intelligent practical judgment modeled on scientific methods. Dewey’s philosophy asserts that the inherited philosophical tradition has been premised by the *explicit* denial of the validity of experience, and the doubt of the existence of features of external reality. And this denial of experience, Dewey argues, presents anti-democratic implications. If we cannot trust experience or even the reality of the contingent natural world, then who can guide us towards truth, absolute knowledge, and understanding of the good? We need only be the only judge – the philosopher-king, the general will, or the manufacturers of consent – who can dictate truth so long as the insuperable gulf between everyday experience and truth is maintained. Dewey rejects this association with knowledge as having access to a higher reality, and equally that reality can be arrived at through non-cognitive sensory experience alone. As I will show, Dewey’s return to experience and experimentation provides a method for making practical judgments and objective valuations – or deliberating on our interests and values. This core treatment of values, I suggest, distinguishes sharply a Deweyan understanding of adjudication from Posner’s, as well as a core feature of Posner’s critique of deliberative democracy: that it relies on a utopian claim that values and interests can be intelligently modified or tested in experience. I draw also from Dewey’s ethical theory resources in re-thinking how individuals can be oriented towards

common goods instead of private self-interest. A core claim from this reading is that the cultivation of social relationships, which are valuable in themselves, and the reinforcement of social practices and institutions, can lead us to identify more clearly the ways in which our interests are inextricably bound up with those of others. In short, the chapter defends a view of Dewey's philosophy that undermines the scientific and philosophical bases for critique of participatory democracy. The atomic individual and the defective nature of publicly-created knowledge and values are shown as fictions. In their stead, Dewey provides what may seem like an oxymoron today: a scientifically-warranted account of democracy as a moral ideal.

In Chapter 3, I look explicitly to the issues of authority, and of experts and officials in particular, with a focus on Dewey's *The Public and Its Problems* (1927). The question that animates this study in particular is on what grounds the authority of officials can be justified. Scholars have long questioned whether Dewey provides an adequate account of authority, or a fair treatment of the fact of power and irreducible conflict in political life. In short, in his rejection Austin's conception of sovereignty as a determinate superior, as well as absolute epistemological and moral foundations, Dewey seems to reject altogether the necessity and possibility of meaningful authority. In its stead, Dewey seems too readily to accept the authority of scientific inquiry and rationalist processes in his faith in intelligence and democratic participation. As I demonstrate, one of Dewey's central concerns was precisely in recovering the place of authority within political life. His concern with classical liberalism's suspicion towards political authority was precisely in its turn to individualism and capitalism and its threat to the possibility of freedom, understood as those capacities that allow us to navigate the problems we invariably face. These were the stakes at play, I argue, in the interwar period, taken up in the debates between Dewey and Walter Lippmann. Despite his early progressive and pragmatic

commitments before the World War I era, Lippmann tuned to a minimalist liberal democratic epistemically valuable laws and expert officials, as he came to see rampant subjectivism as fatal to the values of participatory democracies. No individual is ‘omnicompetent’ in his grasp of complex policy matters, and therefore popular sovereignty writ large is no longer a viable option for modern liberal democratic societies. But, equally revealing, the contrast between Lippmann and Dewey’s thought, is Lippmann’s on their treatment of *moral* truths and authority. In his *Preface to Morals* (1929), Lippmann asserted that science and factual truths alone could not provide moral meaning for our actions and our values. As such, Lippmann turned to judges as models for political life, who not only protected natural rights, but could find satisfaction in contemplation of moral truths embodied by natural laws.

Dewey, in deploying his pragmatic philosophy to understand political life and democracy, offered a still radical account of political institutions, and a functional conception of the state as grounded in the problems and practical judgments of the public. Dewey preserves also a role for experts in the state, but for Dewey expertise cannot replace participation, though it may facilitate it. In fact, experts can provide epistemic value only insofar as they are checked by an active and engaged public, which itself can articulate its problems. In short, one of the values of participation is precisely in checking the power of experts, and well as framing their work according to the agenda set by the public itself. I supplement this reading by turning to Dewey’s treatment of authority in a rarely discussed chapter of his work on *Ethics* (1932). In that text, Dewey turns to the notion of faithfulness and duty, in understanding the role of authority. The importance of Dewey’s account, which I apply also in understanding Fuller’s claim that legal officials have an obligation towards the ‘fidelity’ of law, is not to see the duty of officials as correlated with individual rights, but grounded in reciprocal social relationships. Whatever



instrumental value may be provided by authorities and officials must be anchored to this relationship, which in turn, can only be secured by the co-equal cooperation of both parties. As for addressing Dewey's treatment of truth and authority, I return to philosophical resources sketched in Chapter 2. Here, we return again to the nature of 'truth' as presenting value in the ways in which we navigate our social *action*, in our social relationships and the problems that arise from those relationships. As I argue, democracy becomes the very process through which values and moral meaning can be secured in associated life.

In the final chapter, I look to the "afterlife" of Dewey's thought in the works of Lon Fuller and his debate with H.L.A. Hart. As I seek to outline in this chapter, Dewey's influence on Fuller was more extensive than has been previously recognized, and can in fact help elucidate features of Fuller's jurisprudence. Between H.L.A. Hart and Lon Fuller is a debate on the nature of what law is and why we might say they are normative or distinct from moral norms – and a return to issues that animated Austin's command theory and his conception of sovereignty. As I read H.L.A. Hart's concept of law, we see that he locates the normativity of laws in the rule following of legal officials. His concept of law preserves explicitly the relationship between sovereign commander and subject from Austin that Dewey argued was anathema to a cogent conception of popular sovereignty. Austin embraced the strong utilitarian state and the consolidation of its legislative function, but warned against its subsumption under the democratic will. Hart modernizes Austin and Maine's anti-democratic logic and epistemic critique of the public. In Hart's account, the fate of democracy and law is no longer conditioned by the practical and epistemic limitations of the indeterminate public in will formation or by inefficient enforcement mechanisms that renders it at odds with orderly legal systems. Instead, it is the inner complexity and specialized demands of the modern state and legal system (or its technically

complex secondary rules), which operate beyond the epistemic grasp of the general public, and threaten the viability of a participatory model of democratic lawmaking processes and administration. In other words, the complexity of the modern bureaucratic state itself requires a determinate and rule-governed official class, which in turn justifies the otherwise unjustifiable circumscription of normativity to that sovereign class. The account, or so I will argue, presupposes and perpetuates, in Lippmann's damning terms, a phantom public.

Within this framework, we can understand why Fuller found Hart's concept inadequate, and modeled on a bureaucratic system of management. As I argue, we should read Fuller as presenting an account of normativity and the morality of laws as created through purposive and social interactions in and through the law. The rule of law is a moral instrumentality in associated life, because it makes our social interactions more secure, meaningful and free. When we look to legal subjects as co-equal participants in the legal process, we see that legal processes are collaborative and irreducibly social, and create the framework for social life and the possibility of individual freedom and flourishing. In this reading, we can see how Fuller's concern was to reorient the concept of law with its purposive functions, much in the manner defined by Dewey. Fuller's works outside of the much-debated *Morality of Law*, in fact, provide an indelible image of the life of the law in a democracy: as paved step by step through the collective contributions of free citizens as they make their way in everyday life.

## I.

### DEWEY AND THE ANTI-DEMOCRATIC SOVEREIGN

#### Austin, Maine, and the Laws of Progress

In his reflection on the evolution of legal positivism, Ronald Dworkin argued that the tradition has drifted in the past half century from its early democratic and Benthamite affinities. “Positivism had a democratic flavor then,” Dworkin writes, “and as democracy became supposedly more progressive, positivism became part of the anthem of that progress.”<sup>1</sup> But Dworkin’s association of early legal positivism through the early 20<sup>th</sup> century with progressive democracy is a faulty one. The version of positivism that came to foreground contemporary legal positivism most explicitly was that of John Austin, a critic of democracy whose break with his friend and mentor Jeremy Bentham was in fact precipitated by his increasingly strident anti-democratic turn.<sup>2</sup> In this chapter, I trace this early moment in legal thought with a turn to Dewey’s critique of Austin and the anti-democratic thinkers in circulation at the time, especially the late Victorian critic of democracy and ambivalent appropriator of the Austinian sovereign, Sir Henry Maine. Dewey makes clear the historical and philosophical affinity between Austinian

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<sup>1</sup> Ronald Dworkin, “Thirty Years On,” *Harvard Law Review* 115, no 6, 1677. For a critique of Dworkin’s association of ‘democracy’ and rights, and the view that legal positivism’s denial of the primacy of rights amounts to a retreat from its democratic origins, see Jeremy Waldron, “Can There be a Democratic Jurisprudence?” *Emory Law Journal* 58, no. 3 (2009), 682-683.

<sup>2</sup> As Austin wrote in his *A Plea for the Constitution*, his strongest and most concise critique of democracy and the extension of the franchise: “By my reverence for Mr. Bentham as a writer on law and legislation, I was naturally led (being then young) to accept his political opinions without sufficient examination. I have since dissented from many of his views of law and of the various subjects immediately connected with it. . . . Even before the Reform of 1832, I had rejected his *radical* politics; and had returned to the opinion (Whiggism, Liberal Conservatism, or whatever else it may be called) which is held, with shades of difference, by the generality of instructed men.” *A Plea for the Constitution* (London: John Murray, Albemarle Street, 1859), vi. See also, Wilfred Rumble, *The Thought of John Austin*. Dover, NH: Athlone Press, 1985. Much of the biographical details and background on Austin’s life presented in this chapter are owed to Rumble’s work.

sovereignty and historical and conceptual critiques of the participatory social democracy Dewey championed. As Dewey argues in stark terms, “if Austin’s theory is correct, the theory of popular sovereignty is obviously wrong, not only in the crude form in which it is ordinarily stated, but in any possible development of it.” (ATS, EW1, 76)

Dewey also highlights Austin’s sovereign as the inversion of Rousseau’s – a feature often overlooked even today in studies of Austin – insofar as the latter finds the essence of sovereignty to be indivisible, un-representable, inalienable, and at its core, a feature of society as a whole. Austin locates sovereignty in a portion of necessarily divided society, united only by command and force, as articulated and enforced by a determinate will. And like most critical inversions, Austin’s remains squarely within the paradigm of his stated target – in this case, a theory of law and sovereignty based on will, which collapses Rousseau’s core distinction between sovereignty and government. But, where Dewey finds Austin’s conception of popular sovereignty incoherent and incompatible with the precepts of democratic government, Maine takes the inconsistency as opportunity to reject altogether the coherence of popular sovereignty and robust democratic self-rule. This is the legacy of Austin’s confusion that Austin himself and Maine take to be foundational to an understanding of positive legal validity in modern societies, and critics of democracy assume in explaining democracy’s conceptual and practical limitations.

Scholars, even those interested in Dewey’s legal writings, have largely foregone study of Dewey’s critique of Austin, and puzzle as to where it fits into his broader philosophical works or his motivation in turning to Austin in the first place.<sup>3</sup> But in this chapter, we can see how this

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<sup>3</sup> As to the puzzle of why Dewey turned to Austin, see Anton Donoso, “John Dewey’s Philosophy of Law,” fn31 and Edwin Patterson, *Jurisprudence: Man and Ideas of the Law*. Foundation Press, 1953. For critical assessments of Dewey’s essay, also Susan Minot Woody, “The Theory of Sovereignty: Dewey Versus Austin,” *Ethics* 78, no. 4 (1968): 313-318, who finds Dewey may overemphasize the centrality of the determinacy requirement in Austin’s account (though, as I will argue, its role and the elision of government and sovereignty do not seem incidental or accidental to Austin’s account, given his explicit rejection of the general will; Dan Geber, “A Note on Woody on Dewey on Austin,” (1969) *Ethics* 79, no. 4: 303-308; Ralph Sleeper, who finds that Dewey “is

critical turn to Austin fits into the broader framework implicated in his early works on ethics and democracy. Dewey's early works remained largely within a Hegelian paradigm, and presented weaknesses, especially in its turn to conceptions of organic unity, well documented by even his most sympathetic readers. But these works also offer a still fruitful framework for understanding how democracy's critics found and continue to find support for their claims. Moreover, we can see also how core features of his ethical democracy already developed which continue be developed in his later political writings. Dewey attempted to overcome the dualisms between the individual and society, the moral self and the bad man, which underwrote positive legal theories and the understanding of duties and obligation.

I turn firstly in Section 1 to an extended exposition of Dewey's critique of Austin, as well as the core features of the latter's conception of sovereignty and command theory of law, to draw out its troubling implications for popular sovereignty. In this discussion, we see also how the turn to Austin by late 19<sup>th</sup> century legal thinkers in America were motivated by understanding and identifying supreme authority amidst a fractured federal state, riven with conflict and uncertainty. In Section 2, I turn to the accounts of Herbert Spencer and Henry Maine, who buttressed the accounts of Austin with the science of Social Darwinism and a linear anthropology that identified progress with the transition from status to contract. This progress was asserted against the view of democracy as a progressive achievement, and the value of liberty, equality, and fraternity as anything other than warrants for lawlessness. With Maine, we see also an explicit use of Austin's conception of sovereignty in his own critique of democracy, as a form of government uniquely ill-suited in legislating and enforcing a cogent will. I map out Dewey's

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quarreling less with Austin's definition than with an application of the definition" in Introduction, John Dewey, *Later Works* 14, Xvi.

early response to these critiques in Section 3, and his turn to individual personality and the ethical dimension of democracy, which continue to animate his works for the next half century.

### 1.1. DEWEY'S CRITIQUE OF AUSTIN

Dewey's treatment of Austin, though influential among his peers, has been largely forgotten in recent writings among legal positivists.<sup>4</sup> The few contemporary legal and political commentators who discuss Dewey's critique present partial –and telling – misreadings of Dewey's contribution, and broader philosophical project.<sup>5</sup> Despite some similarities with Hart's and Kelsen's critique of Austin's command theory of law, Dewey's critique applies, or so I will argue, even to Austin's critics among contemporary legal positivists.<sup>6</sup> Dewey's treatment is brief and more suggestive than comprehensive in exposing the weaknesses of Austin's thought. I flesh out some of his suggestions here by turning directly to Austin's works. Dewey does not offer,

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<sup>4</sup> Especially John Chipman Gray, who was widely cited by Austin scholars. See Wilfrid E. Rumble, "Austin in America: The Case of John Chipman Gray," *American Journal of Legal History* 53, no. 3 (2013). Hart and Fuller, among others, cite Gray as an early exemplar of the Legal Realist tradition. See Hart, *COL*.

<sup>5</sup> One curious exception is Gerald Postema, who captures well Dewey's critique of the Austinian myths, yet claims, "This important clarification of the Austinian doctrine left untouched the question of the necessity of the unity and illimitability of sovereignty." However, the unity of the sovereign and the conceptual impossibility of a legally unified and universal determinate sovereign are central preoccupations of Dewey's essay. In a passing comment, Postema seems to misread Dewey's criticism of Austin's application of the determinacy requirement as his own claims. For example, he writes, "And surely, Dewey argued, "the people" do not meet the conditions of determinacy that Austin stipulated for sovereignty", despite Dewey's explicit critique of Austin's claim that the public cannot be determinate and cannot issue explicit commands backed by coercive force, and more generally, Dewey's fundamental call for the people to achieve determinacy through democratic processes of self-conscious self-realization. Gerald Postema, *A Treatise of Legal Philosophy and General Jurisprudence: Volume 11: Legal Philosophy in the Twentieth Century: The Common Law World*. Vol. 11. Berlin: Springer Science & Business Media, 2011, 10.

<sup>6</sup> See chapter 4 for an extended discussion of Hart, Austin, and the persistent anti-democratic legacy of legal positivism. Dewey's treatment of Austin has also been largely ignored by Dewey scholars, even those who study his work on law. Aside from a brief exchange between Susan Minot Woody, "The Theory of Sovereignty: Dewey Versus Austin," *Ethics* 78, no. 4 (1968): 313-318 and Dan Geber, "A Note on Woody on Dewey on Austin," (1969) *Ethics* 79, no. 4: 303-308, extended examinations of the work are surprisingly limited. See Chapter 2 for discussion. There are, however, critiques of Austin since Dewey's time, in addition to Maine's, and before Hart's that share some of Dewey's concerns. Most prominent are those, which are argued definitively in Hart's *COL*, that laws come in variegated shapes and forms – permissive, declaratory, secondary, etc. – and are not reducible to commands, appropriate primarily to criminal codes. See Postema, *Common Law World*, for an overview.

either, a satisfactory alternative to Austin's conception of sovereignty in this essay. But the essay offers clues to a still trenchant *democratic* critique of Austin, which Dewey developed with his reading of Henry Maine, discussed below. Moreover, a close reading of the essay and its source reveal also the intellectual climate in which Dewey embarked on his treatment of democracy, and the ongoing debates in the Civil War and Reconstruction-era on the meaning of sovereignty, and the possibility of a legitimate democratic order.

### **Determinacy and Sovereignty**

In his 1894 essay, Dewey looks firstly to how scholars in his era had assessed Austin's work, and rejects misreadings and elaborates on their key insights. Dewey identifies firstly persistent 'myths' surrounding Austin's work and his famous definition of sovereignty as "a power not in the habit of obedience to a determinate superior."<sup>7</sup> The most common myth of Austin's sovereign, Dewey claims, is that Austin defined it as "irresistible" or absolute force. On that reading, which Dewey attributes to Maine in his *Early History of Institutions*, "that which all the forms of sovereignty have in common is the power (the power, but not necessarily the will) to put compulsion without limits on subjects or fellow-subjects."<sup>8</sup> The defining trait of the sovereign in these readings is "absolute force"; the sovereign himself never rendered occasional

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<sup>7</sup> Dewey traces the origin of these myths to Henry Maine and their 'completion' in the philosophy of T. H. Green, one of Dewey's intellectual influences (though Dewey begins to critique features of his ethical theory by the 1890s, as discussed below). Whether Maine in fact viewed Austin's conception of sovereignty as absolute force, or saw the importance of reintroducing the centrality of force into an understanding of habitual obedience, is itself questionable, as an exegetical point. In some passages Maine seemed to embrace Austin's acknowledgement of the centrality of force in conceptions of law, though elsewhere he seemed to critique the view that force underwrote this conception of law. In Dewey's account, however, Austin's emphasis on will as the cornerstone of sovereignty becomes clearer, though perhaps the core of Dewey's claim is the relevance of Maine's historical impact on the reception of Austin's definitions. The relationship between Maine and Austin's conception of sovereignty is discussed in Section II below. On Maine's ambivalent turn to force see, Wilfrid Rumble, "John Austin and His Nineteenth Century Critics: The Case of Sir Henry Sumner Maine," *North Ireland Legal Quarterly*, 39, no. 2 (1988), 119.

<sup>8</sup> Maine, cited in Dewey, *ATS*, EW4, 7. Emphasis in Dewey's original, not in Maine's.

or even habitual obedience to other governments or entities. As Austin writes (and Dewey cites to disclaim this myth): “Every government, let it be ever so powerful, renders occasional obedience to the commands of other governments... and every government defers habitually to the opinions and sentiments of its own subjects.” (ATS, EW4, 71). As such, Dewey explains, Austin admitted moral, if not legal, limits on the sovereign and his non-absolute “absolute force.”<sup>9</sup> Austin writes, explicitly, “to an indefinite though limited extent the monarch is superior to the governed, his power being commonly sufficient to secure compliance with his will. But the governed, collectively or in mass, are also the superior of the monarch, who is checked in the abuse of his might by fear of exciting their anger, and of arousing to active resistance the might which slumbers in the multitude” (ATS, EW4, 71).<sup>10</sup> As Dewey adds, “Austin admits that, in one sense, the opinions and sentiments of the mass are supreme in power; the sovereign ‘habitually defers’ to them. From this point of view, then moral law improperly so-called is above positive law: it controls, in ultimate analysis, the latter” (ATS, EW4, 75). Austin’s is not a conception that conflates absolute power with right, or efficacy with authority tout court.<sup>11</sup>

What, then, is the defining feature of the sovereign that can explain its normative authority, if not its superior force? Dewey’s finds that for Austin, it is the “*determinateness* of the authority which issues the commands” (ACS, EW4, 75). In Austin’s typology, moral law is

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<sup>9</sup> Dewey’s reading of Austin on this point was not wholly original. Philemon Bliss in 1885, like Dewey, espoused a Hegelian view of sovereignty and law, as founded on the moral reason and practice of the people. Bliss advanced a view of common law as deriving its validity not from sovereign authorization. Philemon Bliss, *Of Sovereignty* (Boston: Little, Brown, and Company, 1885). This rejection of the legalist reading of Austin figured again in the critique of Austin by figures like James Bryce, who saw Austin’s sovereign as collapsing sovereignty into a conception of effective coercive control. See Bryce, “The Nature of Sovereignty,” in *Studies in History and Jurisprudence* Vol. 2. (New York: Oxford University Press, 1901). See also, David G. Ritchie, “On the Conception of Sovereignty,” *The ANNALS of the American Academy of Political and Social Science* 1, 3 (1891): 385-411.

<sup>10</sup> This interpretation of Austin is commonplace in contemporary literature. See Rumble, *The Thought of John Austin*.

<sup>11</sup> In this regard, we can, with Dewey, rightly include Austin into a lineage of legal philosophers since at least Spinoza who claimed that sovereigns “rarely impose irrational commands, ‘for they are bound to consult their own interests, and retain their power by consulting the public good and acting according to the dictates of reason’.” See Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2012), 104.



divided into two categories: (1) moral law properly so-called, which has certain bearings of positive law (a command from an authority or determinate body that can issue sanctions and garner habitual obedience) and (2) Moral law improperly so-called which emanates from an indeterminate public as opinion and sentiment. What distinguishes (1) from sovereign law is that those commanders of moral law are still habitually obedient to the sovereign's hierarchically superior command. But, given that Austin acknowledges that the public may have supreme power over the sovereign, the distinguishing factor between sovereign law and (2) is only the latter's indeterminateness.<sup>12</sup> In short, this determinacy distinguishes, by definition, the opinion and voice of the masses from posited law, as the former is defined by its inability to achieve that unification of will necessary to command. This distinction, as Austin later tellingly insisted, was the limitation of those acting in "corporate or 'collegiate' capacities" to legislate for themselves.<sup>13</sup>

But, as Dewey shows, determinacy itself seems insufficient in distinguishing sovereignty from public opinion. Firstly, it is unclear why public opinion is necessarily indeterminate. Given the sociological fact that 'popular' institutions in mass meetings, newspaper writings and other 'agencies of clamor' can articulate their desire or will, Austin has to assert more nuance to the definition. "Austin himself admits that it is 'not the style in which the desire is signified' that makes it a command," Dewey notes. "Willingness to inflict harm in case of disobedience, is the essence of command." (ATS, EW4, 77) But even still, this willingness to inflict harm can be found in the willingness of the public to punish those who disagree or disobey. Austin must then conjure yet another distinction: "the person who will enforce the so-called law against any future

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<sup>12</sup> John Austin, *Province of Jurisprudence Determined*, rev ed. (Cambridge: Cambridge University Press, 1995), Lecture 2-5.

<sup>13</sup> Austin, as described by Hart, *COL*, 289.

offender is never determinate and assignable”<sup>14</sup> in the context of public opinion. This, Dewey rightly claims, is “somewhat slight support... upon which to base the whole difference between law and moral sentiment, between real sovereignty and mere opinion.” (ATS, EW4, 77)<sup>15</sup>

Dewey readily acknowledges the self-evident existence of determinate governments that issue and enforce laws. This is in fact part of the seduction of turning to their determinacy as the conceptual and sociological essence of sovereignty. But even if we were to take Austin’s turn to determinacy at face value, his treatment of popular sovereignty, especially in the American context, Dewey argues, illustrates its conceptual shortcomings. Austin identified popular sovereignty in America in the aggregate of electors or “body of citizens” that elect each state’s legislature; these state legislatures, in turn, are able to amend the constitution under Article V. But this ‘popular sovereign’ could not be confused with “the people” en masse but had to be a portion of it, otherwise Austin’s determinacy requirement (and command theory) would collapse into incoherence. Still, as Dewey points out: 1. It is unclear whether the electorate is sovereign as particular members or as an institutional class 2. Whether those who enacted the Constitution or particular constitutional amendments and their particular wishes (enforced by sanction) are the basis of sovereignty or the latent ability to express and enforce such wishes. And if the latter, 3. whether it is any member of the electorate or the legislative majority that passes a particular

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<sup>14</sup> One might claim that determinacy and assignability are the functional values attributed by Hart to the officials of a legal system who accept the rule of recognition as a guide for their conduct. If so, this critique would apply in general terms to Hart as well. This argument is advanced in Chapter 4.

<sup>15</sup> Ironically, Hart argues in his critique of Austin’s sovereign that its apparent inability to designate who will enforce the law against future defenders signifies one of its chief deficiencies. That is, Austin appears to rest his distinction between public opinion and sovereignty on the clarity of continuity – between current enforcers and future assignment of the enforcement power, which ironically, H.L.A Hart would argue is a task Austin’s sovereign cannot satisfy by definition, insofar as habits of obedience do not guarantee continuity in normative authority against future offenders. Austin does seem to emphasize generic traits and offices of sovereignty, though this as Hart points out, may appear logically inconsistent with the requirement of habitual obedience. However, as Jeremy Waldron has more recently pointed out, Austin fairly clearly envisioned a distinction between offices of sovereignty and living sovereigns, and therefore had an implicit account of secondary rules, even if left inchoate. For extended discussion, see Chapter 4 and Jeremy Waldron, “Are Constitutional Norms Legal Norms?” *Fordham Law Review* 75, no. 3 (2006).

amendment or command. This promises the untenable situation in which a particular sovereign command is opposed by (minority) members of the sovereign body purportedly willing that very command. The question then is whether, by virtue of failing to be in the majority, that member then revokes his claim to sovereignty. In this situation, if the minority that did not issue the command is considered sovereign by virtue of some latent power or right-claim, then sovereignty is no longer defined as issuing a command or receiving habitual obedience.

In other words, the sociological fact of sovereignty as determinate bodies commanding habitual obedience cannot itself answer the question of how the sovereign or any source of law can be identified: the sovereign as the source of law can only be identified after they already are identified as the source of law. In Hartian critical language, the sovereign is defined as a prediction of who will be identified as sovereign.<sup>16</sup> Anticipating Hart's critique, Dewey argues that such ex post facto explanations of the fact of sovereignty determined by habitual obedience (like a prediction of what the courts will likely do) is insufficient in explaining – not merely describing, tautologically – validity and normativity. And as Hart argues, this command theory requires also, in the context of a democracy, that the bulk of the population command itself to obey itself (unless they are legislating in the capacity as officers, so designated by a rule).<sup>17</sup>

Dewey writes, “when careful students of constitutional law cannot agree as to the body of persons in whom sovereignty resides, what becomes of determinateness as the essential feature of sovereignty?” Not unlike Ronald Dworkin's and Lon Fuller's reasoning in rejecting the rule of recognition as a tenable guide to legal validity, Dewey points out that the very existence of continued disagreement on how to interpret and identify the sovereign as source of legal validity

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<sup>16</sup> In Hart's parallel critique, there must be a rule slipped in implicitly to tell us who the sovereign is a fortiori. *COL*, 73-77.

<sup>17</sup> Hart, *COL*, 75. And if they these electors are to be considered as officials, there still needs to be a rule identify them as such — the foundation of his alternative conception of the rule-based concept of law.

suggests the contradictory purpose and promise of the determinacy requirement (and corresponding conception of sovereignty) itself.<sup>18</sup> Thus, if one were to follow through on the logic of Austin's definition, any formulation of popular sovereignty that relies on a majoritarian logic appears to lack determinacy, thus fatally undermining Austin's own central requirement. Or, otherwise put, if Austin's concept of sovereignty is correct, then no coherent conception of popular sovereignty is possible.

Dewey's critique is most pointed in highlighting the source of conceptual inconsistency in Austin's treatment of sovereignty. Austin's account was based on a confusion between sovereignty and government, or the organ of its articulation as the residence of sovereignty. Here, Dewey's critique makes explicit Austin's direct opposition to Rousseau's general will. As Richard Tuck has recently argued, this distinction between sovereignty and government was a core feature of Rousseau's thought – and one which makes a modern theory of democracy possible.<sup>19</sup> And it was this distinction that Austin attempted to dismantle: for Austin the sovereign was simply the figurehead of a determinate government. As Dewey writes, "Austin's theory is thus the complete antithesis of Rousseau's. According to Rousseau, it is of the essence of sovereignty to belong to the whole as a whole, i.e., to the general will. According to Austin, it is of its essence to be partial." (ATS, EW4, 76fn12) Again, the distinction between Rousseau and Austin is not, as T.H. Green suggested, between force and will, but "one conceives of this will as necessarily inhering in a part, the other as inhering in the whole of society." (ATS, EW4, 76fn12) Austin defines sovereignty as indivisible but deriving from a division between those who are subject to law and those who can command it. And that hierarchical division must be

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<sup>18</sup> Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986).

<sup>19</sup> Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge: Cambridge University Press, 2016), 1-9, 121-180.

presupposed and formally entrenched for the conceptual possibility of sovereignty, and ultimately of the existence of legal systems. The represented class of officials is itself sovereign by virtue of being determinate entities separated from the pre-legal mass of society. In Austin's words, "an independent political society is divisible into two portions: namely, the portion of its members which is sovereign or supreme, and the portion of its members which is merely subject... even in the actual societies whose governments are esteemed popular, the sovereign number is a slender portion of the entire political community." (Austin, *PJR*, I, 243, cited in *ATS*, EW4, 75-76)<sup>20</sup> As such, we can see the non-neutral basis of sovereignty emerge: the source of its normative authority is tied to the determinate division between governments and subjects. And in rejecting Rousseau's distinction between sovereign and government, Austin's account, as Dewey points out, renders popular sovereignty an incoherent enterprise.

Not surprisingly, a long line of philosophers after Austin would come to question the 'determinacy' of sovereignty. Perhaps most memorably in Dewey's era, the Realist lawyer and sympathetic critic of Austin, John Chipman Gray, declared in his oft-cited remark that the "real rulers of a political society are undiscoverable."<sup>21</sup> Philosophers of popular sovereignty like Raymond Carre de Malberg were able to discard that concern for determinacy in attributing

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<sup>20</sup> Whether the determinate divisions were in fact a motivating feature in Austin's conception of sovereignty as Dewey presents it, has been questioned. See for example, Susan Woody, note 4. But, as I link Austin and Maine with their critique of Rousseau, as does Dewey, the generality of the sovereign will seems to be a distinctive issue with Austin as well as the possibility of aggregation of individual wills. As readers of Austin like Burgess argued, the aggregation of individual wills is precisely the source of the confusion of sovereignty and government; it is the sovereign state not the government or individual wills that is at the source of its authority, which encompassing the people as a whole (for Burgess, this meant the unified, ethnic nation).

<sup>21</sup> John Chipman Gray, *Nature and Source of the Law* (New York: Columbia University Press, 1909), 77. Perhaps finding affinity in the second and third faces of power... influence on; see also, Dewey's own treatment of Judge Jameson, "Natural Sovereignty," *Political Science Quarterly* 5 (1890), 193, cited in Dewey: "the correctness of this definition on account of the actual facts, and has the important fact that the electorate (always of course a mere majority, not a whole) makes its decisions, not as a separate whole, but within the process of the nation itself, and controlled in a multitude of ways by this larger whole, of which it is in reality simply an organ." This is of course the conception of sovereignty and law and government that Dewey is to endorse as an ideal and resonates also with Pierre Rosanvallon, *Le Peuple Introuvable* (Paris: Gallimard, 1998).

sovereign power to amorphously defined masses and public opinion.<sup>22</sup> Henry Maine's critique of Austinian sovereignty, discussed below, also noted the historical bias of Austin's account, as attempting to universalize the status of sovereignty and legal systems despite historical and anthropological evidence suggesting that determinate sovereignty did not necessarily underwrite all legal or independent political systems.<sup>23</sup> In his *Principles of Political Obligation*, T.H. Green would argue, specifically against this conception of a determinate superior as sovereign, that "the general fabric of rights in any society... does not depend on the existence of a definite and ascertained sovereignty." This fact applied, especially during moments of conflict, where "there was nothing amounting to a right on either side."<sup>24</sup> And a half century later, Lon Fuller, in mounting an attack against the postwar resurgence of legal positivism, would declare that even if "there is a difference in the effectiveness with which rules impose themselves on men, and that there is also a difference to the degree to which particular rules are backed by an organized machinery of enforcement" – there is still a logical gap in determining from that difference an absolute criterion distinguishing 'law' from other rules.<sup>25</sup>

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<sup>22</sup> One see also an affinity between Dewey's critique and Malberg's critique of organ sovereignty, and the conception of 'national sovereignty' as distinct from the organ of articulation. Similarly, Dewey and other progressives like Lippmann (in his early writings) would reject claims in the vein of Sieyes, that the popular source of constitutional authority provided an adequate account of national sovereignty. For an overview of Malberg's critique of organ sovereignty, see Andrew Arato, *Post Sovereign Constitutional Making: Learning and Legitimacy* (Oxford: Oxford University Press, 2016), 50-52.

<sup>23</sup> Despite Maine's critique of Austin on the latter's failure to incorporate historical and sociological data to question the universality of his conceptual definitions, Maine did find Austin's conception of sovereignty and government to best describe modern civilized political and legal systems. Their overlaps, I argue below, are in fact more pronounced than their differences.

<sup>24</sup> T. H. Green, *Lectures on the Principles of Political Obligation and Other Writings*, eds. Paul Harris and John Morro (Cambridge: Cambridge University Press, 1986), 82-83. See also, Irving B. Richman, "From John Austin to John C. Hurd," *Harvard Law Review* 14, no. 5 (1901), 355.

<sup>25</sup> This fact comes into stark relief with the fact of laws born of customs and non-explicit social laws, or moral laws properly so called, in Fuller's and Dewey's critique, and discussed at greater length below. This critique becomes relevant also in Hart's concept of law and attempt to distinguish moral and legal rules without replicating Austin's deficiencies.

Dewey does not criticize the importance of determinacy in understanding the formation of law and its relationship to governments and the state, or as a key normative value within legal and political systems. On the contrary, his persistent calls for “the Great Community” to become self-conscious and organize to realize a determinate form underscores the importance of both this notion of determinacy, as an antecedent for authoritative institutions.<sup>26</sup> In fact, Dewey’s rejection of Rousseau’s general will, though grounded perhaps in a superficial reading of Rousseau, is based on his belief in the importance of determinacy and concrete political institutions.<sup>27</sup> His rejection of the determinacy requirement did not support, either, the natural law alternative of an a priori inscription of moral authority discernable in the world, independent of individual, determinate actors.

Dewey instead targeted the *normative* and political implications of Austin’s determinacy requirement as defined by virtue of social and hierarchical division and linked again by command. Dewey writes, “given this radical split, sovereignty must be exercised by way of commands merely. There is no common interest which holds together the two sides; there being two separate parts, one can act upon the other only by way of command, while this other can react only by more or less complete obedience from fear of punishment.” (ATS, EW4, 89) In short, the determinate sovereign requires one partial body to act over and against another as a precondition for positive law. The implications of this concept of sovereignty could not be

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<sup>26</sup> Dewey, *The Public and Its Problems*, discussed in Chapter 3. Dewey’s treatment of the public and determinacy is discussed at greater length in Chapters 2 onward, but it is important to note here what I take to be Dewey’s incorporation of Austin’s conception of determinacy for non-anti-democratic results. Dewey writes, “Austin’s identification of the determinate factor with a specified group of individuals seems indefensible, yet in insisting that sovereignty requires determinate forms of exercise he is guarding us against the error which would make generality equivalent to vagueness.” (ATS, EW4, 90)

<sup>27</sup> At times, it appears Dewey believed Rousseau to have thought the sovereign completely un-representable in any government, thus collapsing government into sovereign. Elsewhere, Dewey claims, for example, that Rousseau longed for a return to the state of nature, given the difficulties present in modern complex societies. But Dewey’s critique of Rousseau, as failing to specify how sovereignty is best translated in a determinate government applied to even a more nuanced reading of Rousseau.

remedied by acknowledging other types of non-command-oriented or private laws within a society, which Hart proposes in his critique of Austin. Instead, it implicated not only the nature of law as command, but the nature of authority itself, whether legal or moral, which required hierarchy and division.

This concern with determinate division as a feature of morality and normativity was becoming an important theme in Dewey's growing skepticism of T.H. Green's idealism (discussed below). Dewey also saw this as a methodological failure. Both Rousseau and Austin forced an unnecessary antinomy between "the universal and the particular, between organism and its various organs! The dilemma is a self-made one, not arising in the nature of the case, but in setting the particular against the whole."<sup>28</sup> Both Austin and Rousseau attempt to distinguish between the will and force, and identify it in different bodies: the will is general for Rousseau and force in the government, while for Austin, the will was particular in the determinate government and force was held in common with the public who could refuse obedience. For Rousseau, the general will and its legislation — its legislative power and moral will as an 'ethical ideal' or 'popular aspiration' — was inherently separated from "the power that executes it."<sup>29</sup> But Rousseau did not sufficiently specify or give due credence to the methods necessary for making that "unrepresentable" will articulate. For Dewey, the universality of the general will seemed to be positioned, by Rousseau, in opposition to concrete mechanisms for reconciling conflicts between individuals and associations beyond a divining of the true antecedent general good, or popular referendum or plebiscitarian democracy.

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<sup>28</sup> John Dewey, ed. Donald Koch. *Principles of Instrumental Logic: John Dewey's Lectures in Ethics and Political Ethics, 1895-1896* (Carbondale: SIU Press, 1998), 108.

<sup>29</sup> J.J. Rousseau, *The Social Contract*, III.I, 173.



## Yankee Leviathan

Central to Dewey's argument is a now familiar and long-pedigreed critique leveled against Austin's conception of sovereignty: a basic inability to account coherently for the moral or legal status of constitutional law. Austin describes constitutional law as "that which determines the character of the person or persons in whom, for the time being, the sovereign shall reside" or the form and character of the government. From this, Dewey argues, "it seems logical to conclude that this force be sovereign" and its constituent power the "primary and radical exercise of sovereignty." (ATS, EW4, 81) But, because the sovereign cannot be subject to limitations under positive law, Austin must argue that constitutional law and any limitations on sovereign power are 'positive morality' – instituted and enforced by morality and moral sanctions, not positive law.<sup>30</sup> If we were to view the social forces that create the constitution as sovereign themselves – or the power of the public to garner habitual obedience from the constituted government – then *they* would be sovereign and legally illimitable and without legal duties. But this would deny the very purpose and possibility of positive laws as having authority over its presumptive subjects and of enforceable commands. Again, even if we were to view that indeterminate social force as distinct collectivity from the subjects of law who are subjected to the sovereign command, the

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<sup>30</sup> The most prominent defense of Austin may be found in viewing the legal legislative sovereign as limited by the political sovereign, which can modify the government – or by denying that Austin's is an account of legal sovereignty at all. Most notably – and influentially – in A.V. Dicey's Austinian treatment of sovereignty, constitutional law is distinguished from convention, bifurcated between a legal and political side. The organization and distribution of governmental powers authorized by conventions were "constitutional morality" not law that can be enforced. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1915). While the parliamentary sovereign is legally illimitable, political morality may still intervene in influencing the behavior of officials and the public's willingness to obey. See Postema, *Common Law World*, 11. For Dicey, officials may still adhere to these conventions not because of public opinion per Austin and Bentham, but because it had the force behind them of common laws.

determinacy requirement would be undermined by a view of indeterminate social forces holding the seat of sovereign power in announcing Constitutional law as positive or sovereign law.<sup>31</sup>

Though Dewey tends to agree that the basis of the state and the constitution is moral not legal, it is patently absurd, in Dewey's view, to label Constitutional law as purely morality and not positive law – a view which Dewey points out, Austin himself contradicts in a slip in his own words.<sup>32</sup> The very basis of sovereignty – or the ability of government to achieve determinacy and effective control – is a function of the constitution or some fundamental rule, which would imply under Austin's scheme that all constitutional amendment and the escape from anarchy into political society can only be attributed to morality. But this morality was defined specifically as indeterminate force, incapable of sanctioning transgressions, “the mere expression of wishes on the part of individuals as individuals.”<sup>33</sup> As Dewey, and others like Hart note as well, this slippage between sovereignty, state, and government, and the untenable division between law and positive morality impedes Austin from accounting for governments in which lawmaking authority is divided among several bodies, or the supreme legislative power is by law subject to restrictions to its authority – of course, the very issues Hobbes set out explicitly to eliminate in his parallel construction of the social covenant and sovereign state. Moreover, Austin cannot account for changes or continuities in government or the constitutional state: Government-as-sovereign, in possessing the absolute will to command, cannot transfer its sovereign will from

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<sup>31</sup> Roger B. M. Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (Philadelphia: University of Pennsylvania Press, 1989). A similar critique of Austin has been advanced by Pavlos Eleftheriadis, “Law and Sovereignty,” *Law and Philosophy* 29, no. 5 (2010): 535. Almost a century later, which points out the fundamental conceptual incoherence of the sovereign electors and the possibility of popular sovereignty, and Lars Vinx, “The Incoherence of Strong Popular Sovereignty,” *International Journal of Constitutional Law* 11, no.1 (2013), 101.

<sup>32</sup> On the Roman Empire, Austin writes “there was no mode of acquiring office which could be called constitution; which was susceptible of generic description and which has been predetermined by positive law or morality” (ATS, EW4, 83). Itl. in original.

<sup>33</sup> Though Austin does argue in favor of clear constitutional secession and amendment rules in the *PJD*.

one governmental entity to the next without, logically, constituting revolutionary disruption. Austin's theory must deny that the constitutional state-as-sovereign has been modified with any legal force. Instead, the state must be seen as the same as it was at the moment of its founding and any constitutional changes must be seen as moments of sovereign usurpation and revolution.

As had become apparent among scholars in the Civil War and Reconstruction era America, Austin's conception of sovereignty left no meaningful conceptual vocabulary for understanding where sovereignty resides during constitutional crises and revolution, especially in a federal state.<sup>34</sup> Indeed, the conceptual problems Dewey identified in Austin's popular sovereign reflected the longstanding ambiguities of sovereignty in American political thought. The most pressing ambiguity was where to locate sovereignty within a federal, constitutional republic that had always struggled to define the scope of its sovereign authority vis-à-vis the states, over a range of issues from central banking to, of course, slavery.<sup>35</sup> Sovereign supremacy in the Parliament had never taken root and, with the early acceptance of judicial review, no clear locus of authority or justification emerged. Sovereignty might be divided as the Federalists claimed, or unified in the people, the Constitution and the founding social contract, or in the sovereign states per John Calhoun.<sup>36</sup> But these analyses seemed to elicit more questions than

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<sup>34</sup> The literature on Austinian sovereignty, in both England and the United States in the last two decades of the 19<sup>th</sup> century coincided also with the publication of widely disseminated *Elements* by Holland – Austin's disciple and proselytizer – which Dewey cites. But the interest in Austin in America predates 1881, especially in the issues of codification and common law. See Peter King, *Utilitarian Jurisprudence in America: the Influence of Bentham and Austin on American Legal Thought in the Nineteenth Century* (Garland Pub., 1986) on the earlier appeal of Austin in the US than in his later posthumous recovery in England. Woodrow Wilson too would publish his own essay on Austinian sovereignty a year before Dewey's, which while rejecting sovereign legal illimitability and the view of a view of popular sovereignty in state electors, maintained Austin's focus on the determinacy of law and force of in government and retained a definition of sovereignty as eliciting habitual obedience as a superior over and against subjects. See Woodrow Wilson, "Political Sovereignty," in *An Old Master and Other Political Essays* (New York: Charles Scribner's Sons, 1893). See King, *Utilitarianism in US*, also for discussion of influence of Austin on Wilson.

<sup>35</sup> See, for example, William S. Carpenter, *The Development of American Political Thought* (Princeton: Princeton University Press, 1930), 167. King, *Utilitarianism*, 429.

<sup>36</sup> John Patrick Diggins, *The Lost Soul of American Politics: Virtue, Self-interest, and the Foundations of Liberalism* (Chicago: University of Chicago Press, 1986), 133.

solutions: how could the fact of plural sources of legal authority – from states, the federal government, the constitution, electors under Article V, and the people, in their individual and corporate capacity – be reconciled into a directive on how to settle the moral question of who *should* have legislative and constitutional supremacy? What could underwrite popular sovereignty over and against the collapse of a shared faith in a federal and constitutional government?

As for Austin's account, the deflation of sovereignty into government offered no principled or authoritative rule for adjudicating among competing claims from determinate governments (or, for that matter, state electors) to supreme sovereignty. What remained in the Civil War context were precisely the stakes laid by Austin's incomplete concept of sovereignty: the exercise of superior force of one side divided diametrically to another, bound not by common interest, but command. The particularities of American federal and state constitutional design, and the enforcement of Article V – the location of sovereignty in state electors – exacerbated the very attempt to understand and adjudicate among claims for moral, political and legal authority, as legal hierarchies themselves were the subject of contestation. It seems that if there are no other principled means to adjudicate among conflicting and plural claims among determinate governments, then the true sovereign could be found only by recourse to arms. This too, seems to be the logic of Austin that Dewey makes explicit in his later writings. Dewey writes, "Sooner or later, however, the question arises as to the justification of the will which issues commands. Why should the will of the rulers have more authority than that of others? Why should the latter submit? The logical conclusion is that the ground of obedience lies ultimately in superior force. But this conclusion is an obvious invitation to trial of forces to see where superior force lies. In fact, the idea of authority is abolished, and that of force substituted." (PP, LW2, 269). What

buttresses this account is only a non-normative justification, or what ultimately becomes the sheer fact of superior force and the basic facticity of its existence or ‘determinacy’.

One of the most prominent 19<sup>th</sup> century Austinian legal thinkers in America, John Hurd, concluded that popular sovereignty was located in the popular electors. But Hurd suggested that states could revoke any claim to national sovereignty by removing representatives from the activity of the federal government, and could relinquish claims to sovereignty and assume the status of natural subject.<sup>37</sup> Like Herbert Spencer, Hurd saw the sovereign state as analogous to a ‘joint-stock operation’ in which each individual member could relinquish claims to corporate personhood and revert to natural subject status.<sup>38</sup> This view of the source of sovereignty in the constitution writ large, for Hurd, was grounded in the claim that the US had “got rid of the relation of sovereign and subject, and were to be like a perpetual-motion machine going on forever, without the effort of personal will supported by force.”<sup>39</sup> This fiction, in turn, found sovereignty in the belief that “writing fairly engrossed on parchment, tagged with lump of seal-wax and called the Constitution, would govern in spite of their wills ... those who by whose wills it was to continue as law.”<sup>40</sup> In short, this was the metaphysical fiction of constitutionalism and legalism. Any conception of sovereignty that did not recognize the wills of the sovereign over and against subject ignored the fact that only actual force made law possible.

The American constitutional interpretation of sovereignty against which Austinians like Hurd and Dicey in England rallied was premised on a spirit of legalism that de Tocqueville most famously claimed as the trademark of American political thought. That very view of the supremacy of rule of law and the constitution over any determinate political superior, was itself

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<sup>37</sup> Richman, “From John Austin to John C. Hurd.”

<sup>38</sup> Ibid.

<sup>39</sup> Hurd, cited in Richman, “From John Austin to John C. Hurd.”

<sup>40</sup> Ibid, 360.

made legal in *Chisholm v. Georgia*, a famous early Supreme Court decision from Justice Salmon Chase, in which the majority found that each state was not itself sovereign and that “Under the Constitution there are citizens, but no subjects.”<sup>41</sup> In the postwar period, the Supreme Court before Holmes’ ascension also took on this nexus of issues in ruling explicitly that the sovereign and government were distinct entities – and that the American state as an embodiment of popular sovereignty was not to be undermined by the upheavals and attempted usurpation by Confederate governments. The “state”, Justice Chase wrote, is “people or political community, as distinguished from a government [...] The state itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative; but outside of that, it is a lawless usurpation.”<sup>42</sup> These decisions underscored also the preeminent national character of the popular sovereign as a corporate entity, which could not be dissolved or overridden through the secession of a government, even if popularly demanded by citizens of an individual State, even if determinate.<sup>43</sup>

In line with the rise of interest in Austin’s works and the intellectual and legal climate that sought to rend meaning and unity from deep divide, were Hegel and Kant reading clubs

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<sup>41</sup> 2 U.S. 419 (1793)

<sup>42</sup> *Pollock v. Greenhow*, 114 U.S. 270 (1885). The decision reads, “In the discussion of such questions, the distinction between the government of a state and the state itself is important, and should be observed. In common speech and common apprehension, they are usually regarded as identical, and as ordinarily the acts of the government are the acts of the state, because within the limits of its delegation of power, the government of the state is generally confounded with the state itself, and often the former is meant when the latter is mentioned. The state itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative; but outside of that, it is a lawless usurpation. The constitution of the state is the limit of the authority of its government, and both government and state are subject to the supremacy of the Constitution of the United States and of the laws made in pursuance thereof.”

<sup>43</sup> See also *Texas v. White* 74 U.S. 700 (1869), cited in John G. Gunnell, *Imagining the American Polity: Political Science and the Discourse of Democracy* (University Park, PA: Penn State Press, 2010), 71fn 25. See Gunnell also for historical overview. Chase is often associated as a natural law theorist of judicial review, though there is a case to be made as an early progressive and pragmatist justice. See also the discussion of his other seminal decision, *Calder v. Bull*, discussed in brief below, and in Paul Kahn, “Reason and Will in the Origins of American Constitutionalism,” *Yale Law Journal* 3 (1989): 474-479

sprouting up throughout the country.<sup>44</sup> Recent scholars, most famously Louis Menand, have argued that the morally and politically fraught backdrop laid the groundwork for American Pragmatism and its hope for melioration via its moral and epistemic fallibilism.<sup>45</sup> For Dewey, the issue at hand wasn't only the tragic consequences of each side's absolute certainty in its moral authority. The dangers of this moral certitude had motivated Oliver Wendell Holmes, Jr.'s intellectual trajectory after his near fatal turn at Ball's Bluff and his subsequent championing of the still inchoate school of fallibilist pragmatic thought.<sup>46</sup> Dewey's concern was also with the source of moral unity and the means of reconciliation, in law and ethics, as it had been throughout these early work, which sounded in the language of Volk and organic unity, of "the

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<sup>44</sup> See, e.g., Loyd D. Easton, *Hegel's First American Followers* (Athens: Ohio University Press, 1966), cited in Menand, *Metaphysical Club* (New York: Farrar, Straus and Giroux, 2001) and Richard Bernstein, *Praxis and Action* (Philadelphia: University of Pennsylvania Press, 2011), 169fn 4.

<sup>45</sup> Menand, *Metaphysical Club*.

<sup>46</sup> Among the chief biographers of Dewey, little evidence aside from informed speculation, links Dewey's early philosophical trainings to the legacy of the Civil War. Dewey's father was a veteran of the war, and his biographers note the profound impact that his absence during Dewey's childhood, and the deep rift within the Dewey family created when Dewey's brothers voted for Cleveland. Steven Rockefeller, *John Dewey: Religious Faith and Democratic Humanism* (New York: Columbia University Press, 1991), 34-35. Menand, *Metaphysical Club*. According to Rockefeller, "Dewey had a vivid memory of the Civil War as a terrible conflict with far-reaching destructive consequences of the nation's social and economic life, and he believed that it could and should have been avoided." 291. Westbrook, *John Dewey and American Democracy*, 2-5, citing Sidney Hook, *Education and the Taming of Power* (LaSalle, Ill.: Open Court, 1973), 141. See, for example Alan Ryan, *John Dewey and the High Tide of American Liberalism* (New York: WW Norton & Company, 1997), 96. ("My guess is that Hegel was 'Americanized' – that is to say, that his discussions of rights was emphasized and his admiring noises about the hussars and their sabers were buried – but this may do an injustice to Morris's combative spirit and his ability to pass on to Dewey something of his Civil War experience in the Union army"). I would speculate, given Dewey's wading into issues of Austinian sovereignty and the Reconstruction-era secondary literature influenced by Austin, his study of Hegel and T. H. Green may have induced him to consider early on the relative role of violence and conflict presented in Hegel versus Green's more irenic vision of liberal and cooperative progress. The claim, in general, is that Dewey was interested with violence, domination, processes and conflict, pace some interpreters who claim that Dewey too easily elided the issue. To be sure, Dewey's faith in the unity of a social organism, as discussed below, lead to weaknesses in his early treatment of these issues, as discussed below, but the very critique of Austin suggests Dewey's refusal to view civil war and the other side of the coin – the state of domination of one group by another – as a constructive means of understanding an historical precondition of progress and unity. Dewey did not abandon a basic faith in the Hegelian dialect until after World War I, but continued his attempt to think through the problems posed by this nexus of issues. See, Dewey's "From Absolutism to Experimentalism." The literature on Dewey's transition (or break) from idealism to experimentalism (or pragmatic naturalism) is voluminous. See, for example, Elizabeth Flower and Murray Murphey, *A History of Philosophy in America* (New York: G. P. Putnam's Sons, 1977), though the motivation for his break is left somewhat ambiguous. Unlike his friend and intellectual interlocutor Jane Addams, Dewey always maintained that war and violent conflict was much more sanguine on the possibility of eliminating violence as a pathology of human nature. See Richard Bernstein, *The Pragmatic Turn* (Cambridge, UK: Polity Press, 2010), 84.

life of society, of the nation in the *ethos* and *nomos*” (NP, EW1, 49). Dewey himself cites in his essay writers like Cornwell Lewis and John Burgess, who argued explicitly that the confusion of sovereignty and government led to the deterioration of national unity and civil war.<sup>47</sup>

Curiously, Dewey omitted from consideration the centrality of Austin’s other qualifier of sovereignty – that it be both determinate and *common* – however “fragile” as Austin writes, that shared sovereign may be, especially in internal wars.<sup>48</sup>

Dewey himself cites approvingly the judge John Jameson, who, like other analysts of the time, grouped Austin, Maine, Bentham, and Hobbes together as “analytical jurists” – however anomalous the inclusion of Maine may appear – and together foes of popular sovereignty.<sup>49</sup> Like fellow commentators on sovereignty, Jameson questions Austin’s determinacy requirement and the bracketing of the political force that directs sovereignty, its limitations, and, specifically its relationship to the public as a source of its authority.<sup>50</sup> Like Maine and Jonathan Chipman Gray, Jameson argued the figure of sovereignty was unidentifiable, and that the electors were merely representatives, not themselves sovereign.<sup>51</sup> But Dewey took Jameson’s critique further in

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<sup>47</sup> John Burgess, in his *Political Science and Comparative Constitutional Law*, cited by Dewey, makes the link between the concerns of sovereignty to the Civil War and revolution. Burgess reverts to a crude nationalist and racialized identity as the source of unity; it is unclear the extent to which Dewey, who at the time was mixing the *Volk* conceptions compatible with his Hegelianism absorbed or rejected Burgess’s claims. It is noteworthy, however, the extent to which Dewey in his popular writings does, even after his pragmatist turn in the WWI era, still identify in an unreconstructed tone a national cultural identity that unifies the American state. Soon thereafter he would reject explicitly the ‘melting pot’ paradigm for a version of the ‘conducted symphony’ to understand cultural pluralism. Burgess, *Political Science and Comparative Constitutional Law* (Boston: Ginn & Co., 1890).

<sup>48</sup> Austin, *PJD*.

<sup>49</sup> Jameson also authored a highly influential treatise on the nature of constitutional conventions, perhaps best known for distinguishing between revolutionary and constitutional conventions — the former was only a creation of a revolutionary government, whereas the latter had the markings of a sovereign and fundamental law. John A. Jameson, *The Constitutional Convention; its history, powers, and modes of proceeding* (Chicago: Callaghan and Company, 1873).

<sup>50</sup> Jameson, “National Sovereignty.”

<sup>51</sup> King, *Utilitarianism*, 458. See Tuck, *Sleeping Sovereign*, 241-246. Tuck cites Jameson: “judging from the visible operations of government, the electors seem to be the basis of the entire system, they are usually denominated [by] *the people*. From this circumstance has arisen a common misapprehension, to the effect, that the electors are the source and possessors of all sovereign rights – the real sovereign. When it is considered, however, that this body is a variable one, the number and qualifications of those who compose it depending on the determinations from time to time of that power lying still further back, by whom the Constitution itself is enacted,



pointing out the complete conceptual and practical impossibility of the Austinian sovereign. As will become clear in the following chapters, the question of state sovereignty and democratic legitimation for Dewey reflected a persistent concern with institutional loci of political power versus popular action – which became all the more pressing by the time of the Wilson administration and the fracturing among the Progressive intellectuals in their support of the emergent bureaucratic state apparatus after World War I.<sup>52</sup>

### **State Concession to the Social Sources of Motivation**

The problem Dewey identifies with Austin’s account here can be seen as an instantiation of “the normativity paradox” in contemporary jurisprudence, in defining the relationship or co-originality of validity and legitimacy.<sup>53</sup> The normative dimension of determinateness remains unexplained, except as a necessary feature of defining law as command emanating from will. As such, the normative distinction between constitutional law as positive morality, and of posited

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the position of electoral sovereignty is seen to be untenable. The electors merely represent the sovereign, and are under the all the conditions of responsibility and of limitation of power which attach to the departments at the next remove from the source of sovereignty, generally denominated the government.” *The Constitutional Convention* at 214-215, cited in Tuck, 243.

<sup>52</sup> See Chapter 3 of this dissertation.

<sup>53</sup> The question of why we should or do follow the law has been addressed by contemporary legal positivists under the umbrella of law’s normativity (or the “ought” obligations, duty, claim-right, and associated dimension of the law) and its legitimacy or legitimate authority (or the conditions that justify or explain law’s normativity and its imposition of obligations). An issue in explaining law’s normativity, which claims much of the attention of general positivist theories of law, is how the “is” of law as a social phenomenon creates an “ought” associated with law as constituting obligations or practical reasons for action. That puzzle can be reformulated as the need to reconcile two key theses formulated by legal positivists, describing law as valid normative systems: 1: the social thesis, which states that law’s sources and validity as a legal system are found in social facts, not moral norms and 2: the normativity thesis, which states that laws “give members of a community, officials and law-subjects alike, reasons for acting.” 2 A variant of this puzzle has been formulated also in terms of the ‘possibility puzzle’ or chicken-and-egg problem of authority and legal norms: how does legal authority arise if there are no legal norms authorizing that authority? 3 And how can legal norms arise if there are no legal authorities to create, then recognize and adhere to such norms? This particular formulation of the puzzle of normativity can date back at least to Hans Kelsen’s attempt to seek out the origins of the normativity of legal systems, without recourse to social or moral facts of sovereign power. For a clear explication of this paradox see Scott Shapiro, “On Hart’s Way Out,” in *Hart’s Postscript: Essays on the Postscript to ‘The Concept of Law’*, ed. Jules L. Coleman (Oxford: Oxford University Press, 2001).

law and constitutional amendment also remains unjustified. This creates, in turn, a temporal circularity underwriting the ‘chicken-and-egg’ paradox of legal normativity. That is, it is unclear which comes first and justifies the other: the instantiation of the normative-political sovereign or the habitually obeyed legal sovereign-as-government. In fact, the disagreement between Austin and Austin’s disciple Holland underscores the more basic issue as to whether the central feature of sovereignty is the determinate commander who creates laws or the sovereign enforcer of habitual obedience as a governmental body with supreme force. As Dewey’s critique and dismantling of the “Austinian myth” attempts to show, there is no necessary connection between the two.<sup>54</sup>

The point is made more clearly as Austin’s apparent confusions over sovereign legitimacy, validity, and inducement of motivations to obey among the public. At the heart of Austin’s conception of sovereignty — and the fact that it was not defined as irrepressible force, per the “Austinian myth” — was the condition of acceptance by legal subjects who have the power to disobey. This fact seemed to implicate in turn some constitutive relationship between validity and substantive morality as a baseline standard or causal factor in explaining obedience. But Austin’s positivism and rejection of social contracts and natural rights talk required that the utility of the law be one thing; its acceptance by the public, another.<sup>55</sup> Moreover, it is unclear whether utility versus fear of sanction as the key to understanding law as command was an account of subjective motivation or of external legitimation, or simply the markers of a valid sovereign. Bentham wanted utility to play two roles: as a metric of law’s legitimacy and a

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<sup>54</sup> This distinction is laid out by Joseph Raz, *The Concept of a Legal System* 2nd ed. (Oxford: Clarendon Press, 1980), 190, in his discussion of Holland.

<sup>55</sup> In his early lectures on Ethics, Dewey identifies the basic disconnect between the general good and individual hedonism that underwrites utilitarianism, and notes that even Bentham and Mill found that it “in governmental law, with its punishments, we have an express instrument for making the pleasures of one harmonize with (or at least not conflict with) the pleasures of others” (E1, EW3, 278)

motivating source among the public to obey. As Dewey points out, and critics from Maine to Salmand emphasized, the actual motivation for following law are often independent of the existence of a positive law itself. By tying command and habitual obedience with the definition sovereignty, Austin's definition of sovereignty confuses motivation — whether fear of sanction or enlightened moral ascent to social utility— and legal validity. In turn, Austin must claim that both valid laws and the motive to habitually obey are supplied by the sovereign government.

What Dewey rejects are Austin's claims regarding both validity and motivation. Dewey argues three points: (1) the government is neither the sole source of the content or *validity* of law, nor is it (2) the sole source behind the effective force of the law. (3) From these points, it follows that fear or utility do not offer a sufficient account of why legal subjects obey.<sup>56</sup> In arguing the first claim, Dewey noted the functional purpose that the denial of custom as source of law serviced: the unity of law necessitated by positivism can only be achieved by this rejection of custom as a (non-determinate) source of law and of legal sovereignty. The Austinian conception of sovereignty cannot satisfactorily account for the fact that “ancient and reasonable custom” law is law, and must promote the fiction that “any principle which is found by the courts to-day to be involved in past decisions of the court, not only is now law, but always has been law.” The claim is twofold, and relevant to contemporary debates among legal positivists and interpretivists: that the use of particular interpretive principles among courts must be given fictive non-legal validity until recognized as law, though it does not change the actual legal validity of any decision recognized by it. And this same fiction animates the understanding of customary law. Even if we view customs or common laws as properly positive laws because they have at some time been so codified by statute or by the state, or what Holland would call, as an evasion of the issue, tacit

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<sup>56</sup> These claims, of course, may be the most contrary to the assumptions and core claims of contemporary legal positivism and are discussed briefly here before further elaboration and defense in subsequent chapters.

law claims only that “custom is law in virtue of custom. And even if the law is statutory, it is always declaratory of what has previously been the case, rather than constructive of future practice. It simply takes note of the fact in such a way as to remove from it the doubt that might attach to it in complicated cases, or that might be thrown upon it by captious persons.” (ATS, EW4, 86). In short, the act is clearly retrospective, and not a source of actual legal content *or* its validity. Dewey notes to that end the practice, known popularly as desuetude, or the abolition of law due to disuse not from any statutory or judicial act points explicitly to the continued influence of practice on validity.<sup>57</sup>

Dewey argues against (2) by pointing to the illogical and sociologically implausible claim that the government-as-sovereign is behind the normative force of the non-explicit laws that comprise the totality of social life, or that the normativity of the former can be explained by the (questionable) fact of legal validity or processes of legal validation. To explain why citizens actually follow the law requires more than mere assertion of a determinate government that may have no actual or normative relationship to the fact of general conformity to the law. As Dewey writes, this fiction implies that the operation of sovereignty in the social institutions of family, work, schools, church, “the regulations which control most effectively the lives of most men,” is dictated by the will of a particular segment of society and fear of its sanctions: “the whole of social activity, the entire play of social life, has to be conceived as carried on in obedience to the commands of a certain particular group of persons, and in fear of penalties to be imposed by this

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<sup>57</sup> Dewey here does not defend the distinction of codification sufficiently here, as it is this very fact of ‘removing doubt to complicated cases, or that might be thrown upon it by captious persons’ which underwrites the motivation for much legal positivism today: to create clear, unquestioned distinctions and eliminate doubt between what is mere morality and what is law from the state. Dewey at times seems to suggest nothing is added through recognition by the courts or in statutes, but he makes this distinction clearer in a later review in the 1920s, on the nature of legal custom. See Chapter 2 for discussion.

group in case of disobedience. Surely this differs little, if at all, from a *reductio ad absurdum* of the doctrine.” (ATS, EW4, 88)

Thirdly, it is claimed logically, as a matter of temporal coherence, that those pre-existing relationships and the laws governing them are *motivated* by the ex post fact of potential sanction by a state authority. Even if we view the relationship between explicit laws and positive morality not as the sovereign commanding the father to exercise control over his children at risk of sanction, for example, but only as sanctioning the power to so exercise his authority legitimately, this proposed relationship between sanctioned authority and positive morality cannot explain anything about subjective motivations. Nor can it explain why one is subordinate to the other.

This claim to sanctioning of authority is akin to the “concession theory” explicated most notably by Maitland, and discussed at greater length by Dewey in the context of the corporation as legal fiction. In the concession theory, the state authorizes or delegates legal authority to subsidiary institutions; that is, those institutions have legal authority insofar as that authority was explicitly granted (or not forbidden) by the sovereign state: “whatsoever the sovereign does not forbid, it enjoins.” (ATS, EW4, 88) That theory as developed, in the context of corporate personality and of the state, is of course for Dewey a fiction posited for the purpose of furthering a particular political end – for Maitland, not unlike Austin and Bentham, and before them, Hobbes and Bodin, the fiction of a strong sovereign state.<sup>58</sup> The fictive element itself becomes part of the weakness of the theory, no less than the problematic political implications of such a strong sovereign state which motivated a generation of critics among the British and American pluralists. What’s more, this component of the theory of sovereignty becomes a persistent

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<sup>58</sup> Here, Dewey’s critique of legal sovereignty appears most aligned with the corporatist critique advanced by Laski, *Studies in the Problem and Sovereignty*. New Haven: Yale University, 1917.

sticking point in figuring out where adjudication and common law fit into these accounts of legal positivism.

An additional distinction should be made explicit here between the normativity of the sovereign state and the normativity of particular rules issuing from the state. This relationship in Hartian language between primary and secondary rules is understood as given via hierarchical or derivative normativity: if the sovereign state has authority to issue laws as supreme commander, then the normativity of each respective law is derived from that sovereign source of authoritative command. However, in turning to the normativity of non-explicit laws, Dewey underscores an important conceptual point: normativity of any law – explicit, social, or moral, etc. – requires some pre-existing institution that can embody and execute the law and make effective that norm, lest it remain only in a metaphysical substratum. The particular laws do not automatically carry actual normative force in the absence of actual institutions that can guarantee they are understood, accepted, and obeyed. If the institutions of a sovereign state are to conflict with non-governmental institutions, whatever their explicit legal status, there is no guarantee that the authority of the state would – or should – trump that of those pre-existing institutions or the normativity of non-explicit laws. In short, there is no principled argument presented by the legal positivist for the normatively *superior* position of explicit laws over the obligations of social life that are more strongly felt and exist independent of the acts of state. The historical responses to this issue marks much of the jurisprudential debates of the first half of the 20th century.<sup>59</sup> What makes positive law and legal systems hierarchically superior norms if they cannot explain or in fact motivate social behavior? One can only assume problematically – as is the font of the

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<sup>59</sup> See Postema, *Common Law*, for a schematic overview. To be sure, the issue has been a feature of 21<sup>st</sup> century scholarship and debates as well, especially as they pertain to the claims of legal pluralism and the international legal order. For an overview of legal pluralism and federalism in the international order, see Jean Cohen, *Globalization and Sovereignty* (Cambridge: Cambridge University Press, 2012), esp. 58-66, 80-158.

conceptual understanding of normativity and efficacy in contemporary legal positivism – that law’s normativity is one thing, its efficacy or force — and actual effect on social behavior — more generally, another.<sup>60</sup>

### Utilitarianism and Divine Law

In contemporary jurisprudence, scholars like Jeremy Waldron and Gerald Postema have argued that legal positivism itself must be understood as making or underwritten by a *normative* claim: there is a positive good to be claimed in distinguishing morality from positive law which motivates these accounts.<sup>61</sup> As Hart explains in his writing on the utilitarians, their positivism was motivated by the desire to advance necessary reforms of the state, and the need to overcome the “obsequious quietism” that can result from the conflation of morality of law, of assuming the moral basis of the latter and the acceptance of patently legal but unjust laws.<sup>62</sup> Austin’s position was motivated against the customary law or historical Volk as a source of law per the German jurist and historicist Friedrich von Savigny and the dominant common law tradition of his time

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<sup>60</sup> This claim, of course, requires further elaboration and justification, and will be discussed at length in Chapter 2, and in the context of Dewey’s means-end continuum and alternative framework for normativity and ethics.

<sup>61</sup> Waldron, “Normative (or Ethical) Positivism” in *Hart’s Postscript: Essays on the Postscript to ‘the Concept of Law’*, ed. Jules L. Coleman (Oxford: Oxford University Press, 2001). An early argument in this vein, from a critical standpoint, is offered by Lon Fuller in *Law in Quest of Itself* (Boston: The Beacon Press, 1966). Waldron, however, suggests that within legal positivism, the stronger normative claims made on behalf of positivism are not universally advanced.

<sup>62</sup> H.L.A. Hart, “Positivism and the Separation of Law and Morals,” in *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983).

typified by William Blackstone and his followers.<sup>63</sup> The codification movement underwriting legal positivism and analytical jurisprudence, perhaps more strongly advanced by Bentham's reformism, attempted to turn authority and validity of law away from the disparate and unruly sources towards reason and a unified will, from custom to command, from public opinion to determinate sovereign.<sup>64</sup> Austin, following Bentham, championed elaborate, clear rules as the core weapon against the "sham law" and chaotic system of common law fueled by the dissemination of discretionary power in judicial decision-making versus a unified sovereign will. As both their political and legal writings demonstrated, the peril at hand was anarchy. For Austin who broke with Bentham as he grew more skeptical and embittered against democracy, this type of anarchy was on full display in the Revolutions of 1848.<sup>65</sup>

In fact, the inextricable link between Austin's utilitarian ethics and his rejection of legalism sheds light on its conceptual tensions – and explains the relevance of Austin's enterprise on Dewey's broader philosophical enterprise. Implicit in Austin's conception of sovereignty and positive law is the need to separate out the functions that are conflated under sovereignty (creating a constitution versus governing, legislating versus enforcing laws) while attempting to locate some source of normativity that can satisfy both. But Austin's ethical utilitarianism was a *constitutive* component of his analytical positivism in a paradoxical – and conceptually untenable – formulation. As Wilfred Rumble writes, "This common nature [of legal systems] explains the similar grounds of utility which extend through all communities, which are applicable 'in all

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<sup>63</sup> However, in Maine's assessment, Austin could be distinguished from Bentham, insofar as the former was motivated by "law as it might be and ought to be" whereas Austin was "chiefly concerned with law as it is." Henry Maine, *Early History of Institutions* (London: John Murray, Albemarle Street, 1875), 344.

<sup>64</sup> And Savigny's rejection of the codification movement came against German reunification efforts, as did his rejection of the common law movement that saw law deriving from unchanging ancient wisdom and Ancient Constitution. The rejection of positivism thus resembles features of Savigny's view of law as grounded in social life or the Volk.

<sup>65</sup> Austin, *Plea for the Constitution*.



refined communities', and which are the immediate basis of the conceptual uniformities of different legal systems. Nothing indicates more unmistakably than this analysis the dependence of Austin's very conception of jurisprudence upon his utilitarianism. The one provides the foundation without which the other could not stand."<sup>66</sup> Utility distinguishes most clearly the existence of a positive legal systems versus merely customary or non-legal systems.<sup>67</sup> In other words, determinacy is defined, albeit circuitously, by its constitutive role in advancing utility; legal systems are defined as determinate systems that can advance this utility. Through this circular construction, Austin's positivism, ultimately, asserts a moral claim: the indeterminacy of public opinion by definition cannot advance the social end of advancing the greatest utility. Purely moral orders, constitutionalism without force, primitive or common law systems were indeterminate and identifiable as such by their inability to achieve this basic end of law.

Dewey himself was critical but somewhat unclear on the role of utility in Austin's work. But Austin's turn to divine law in his conception of utility is, I believe, significant in understanding how he advances his critique of democracy, described at length below — and a feature he would share with another of one of Dewey's interlocutors, Walter Lippmann.<sup>68</sup> Austin's utilitarianism is premised on the notion of utility as the 'earthly' touchstone or

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<sup>66</sup> Rumble, *John Austin*, 73.

<sup>67</sup> That is, Austin does acknowledge the distinctions between such systems but slips into his account of legal systems his own civilization story that universalizes the determinate sovereign as the unique source of law as its defining feature. This proposed interpretation of Austin comports with his own decidedly ethnocentric view of his enterprise. As Rumble cites from his course descriptions for his lectures, Austin writes, "The principles and distinctions which the mere begin of Law suppose, are the matter of Universal Jurisprudence. Taken in its literal import, it lies within a narrow compass. So different is Law amongst barbarians from Law amongst civilized men [...] that Jurisprudence would be confined to the definitions of a few leading terms, supposing it confined to the matter which is common to all systems. But in the positive systems of Law which are worthy of accurate examination (in the positive systems, that is, of the civilized European Nations), common distinctions and principles, though they take very various forms, are sufficiently numerous to constitute the subject of a science." Rumble, *John Austin*, 75, citing, "Second Statement by the Council of the University of London Explanatory of the Plan of Instruction" (1828).

<sup>68</sup> See chapter 3 for Lippmann's turn to divine law and its relationship to his critique of democracy.

interpretation of divine law.<sup>69</sup> The determination of valid positive law (not simply moral laws, properly or improperly understood), in turn, requires some understanding of principles of utility; this presupposition relies, in turn, on some causal relationship between the legislative process and the legislator's understanding of utility. Austin's rule-utilitarianism is itself premised on the albeit hazy relationship between understanding the purposive utilitarian nature (or absence) of posited law, and being able to be guided by it. But the inscription of divine law in utility does not, in turn, require that the layperson interpret that law and assess its utility; in fact, that very possibility, of conflicting interpretations of utility in a legislative act, as Hobbes declared, would undermine the very purposes of a strong utilitarian state. Recognition and application of utility offers the possibility of positive law and distinguishing it from indeterminate morality; and that task of distinguishing real from sham law is required only of the legislator.

As Rumble writes, "Austin's use of Divine law also clearly differentiates his ethical theories from either Bentham's or J. S. Mill's. On their interpretations, the principle of utility is logically, and explicitly, independent of the law of God."<sup>70</sup> And this distinction among these thinkers fits logically, also, with the source of ultimate legitimacy, especially in the leeway afforded to the public's epistemic capacity versus the discerners of truth — and ultimately their respective faith (or rejection) in democracy. For Austin, cognition of divine law and utility — and the determinate power to command — relied on a fundamentally theological premise: the power to command and to interpret the determinate source of one's command in divine law constitutes

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<sup>69</sup> It is worth noting also that the very voluntarist conception of normativity that underwrites the theories of law from Grotius, Hobbes, Pufendorf, Locke, and later Austin, as Christine Korsgaard points out, still ultimately derive obligation from divine law, as an adaptation of the modern scientific worldview. That is, because the natural world needed obligation and morality superimposed, the normativity of divine law could fund that absence. See Christine Korsgaard, *Sources of Normativity* (Cambridge: Cambridge University Press, 1996), 26-27.

<sup>70</sup> Rumble, *John Austin*, 65.

a right to obedience. The question then is what trait the intervening commander possesses, necessary to persuade the public to recognize the utility of and habitually obey the law.

The relationship between subject and sovereign appears as a relationship of epistemic authority: insofar as the public can recognize and interpret utility, there is no need for force or sanction and a determinate superior. But, of course, the entire public has never been unified or consistent in its pursuit of absolute truth. The justification of the sovereignty of determinate legislators, versus the general public, seems to hinge on their superior access to divine law, and ability to interpret and apply the standard of utility in positive law. For Savigny, it was precisely this claim implicit in codification – of the epistemic and normative superiority of the codifier over and above accumulated customs – that had to be rejected.<sup>71</sup>

## **1.2. THE SCIENCE OF SOVEREIGNTY: DEWEY & THE VICTORIAN CRITICS OF DEMOCRACY**

If Dewey's reading of Austin does not offer a complete alternative to the problems he identified in the latter's account, it guides us towards a more critical reading of the potential anti-democratic implications of Austin's conception of sovereignty. Dewey's early works turn in fact to two additional figures — Herbert Spencer and Henry Maine — who together contributed scientific and anthropological claims to buttress their shared critique of democracy. By piecing

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<sup>71</sup> This normative dimension of Austin's enterprise had direct bearing on readings of Austin in America. The first review of his *PJD* praised Austin's theory as distinguishing between the enlightened sovereign and unenlightened public opinion. The review reads in part, "the all-important distinction between positive law and positive morality, which is there clearly and ably marked, needs to be constantly held up and enforced among us. For the confusion of these two distinct conceptions is one of the greatest dangers to which a democracy is liable. [...] The work of legislation is, moreover, abandoned by us to inferior men, who are for the most part incapable of understanding, much less of framing, a law. The people thus tend to separate into two classes, one of which urges and applauds the violation of any law in favor of their ideas of morality, the other of which looks upon all past laws with stupid reverence, and obstinately opposes all change, however loudly called for by voice of reason and humanity." "Austin's Lectures on Jurisprudence," *North American Review* 1, no. 1 (1865), 253.

together Dewey's critical readings of these authors, we can see more precisely how these critiques built on top of seemingly neutral findings about laws, science, and the nature of progress. We can also begin to appreciate the multiple methodological and normative claims that need to be refuted if we can cogently claim that self-rule is both possible and morally valuable.

Implicit in Austin's positivism was a normative claim about determinacy as advancing utility, and an account of moral progress towards that utilitarian state. But it was an incomplete account; it was descriptive (at best) but couldn't explain how such progress was achieved. That explanatory datum, however, would be provided by Spencer's Social Darwinism, as well as the linear progressivism advanced in the works of Maine. Their evolutionary science was asserted directly as a bulwark against the 18<sup>th</sup> and 19<sup>th</sup> century vision of democracy, best captured by Tocqueville in *Democracy in America*, as the provenance of progressive history. Progress from status to contract and the achievement of laissez-faire Victorian economics – and a reduction of human motivation to a singular will to survive – would provide both a social scientific and moral justification for the type of determinate sovereign championed by Austin and a robust critique of participatory democracy. A version of Austin's view of the public's deficiencies in discharging the tasks of sovereignty would animate Maine as well, and his denial that democracy reflected moral progress. Austin and Maine both deflate popular sovereignty by defining democracy as solely a form of government, and base their critical accounts of democracy-as-government on its failure to achieve the markings of sovereignty as determinate source of legal and political will and command.

Despite the critical differences between Maine and Austin, Dewey's critical pairing of Austin and Maine illustrates how the very understanding of 'science' and the methodologies of social scientific inquiry and their claimed separation from moral and ethical inquiry, shaped the

definitions and justifications of democracy and law, and its possibility as a *moral* ideal. Dewey's work during this early period began to probe the emergent issue of the *processes* of determinacy — with and against Hegel's and T. H. Green's logic and dialectical method, and the Social Darwinists. With these queries, we can see how Dewey sought alternatives for understanding how science could make normative claims on the potential for progress and how we *should* order and define our legal and political associations.

### **Spencer, Scientism and Anti-Democratic Convergence**

With the turn towards questions of sovereignty and government in the second half of the 19<sup>th</sup> century came a parallel intellectual movement galvanized by Darwin. The intellectual trends by the 1880s were moving towards the assertion of total objectivity and theories of evolution championed by the Spencer, William Graham Sumner and evolutionary naturalists of the era like the American lawyer and anthropologist Lewis Henry Morgan – a major influence on Marx and Engel's theory of the historical dialectic. These thinkers together embraced evolutionary laws and their social Darwinian counterparts as determinate, and as fatalistic, as Newtonian laws of physics.<sup>72</sup> Edward Purcell described this turn of the century scientism in “the linear universalism of the evolutionists who had dominated the field [of anthropology] during the last thirty years of the nineteenth century.”<sup>73</sup> For Dewey, as social scientist, the “quest for certainty” that marked both philosophy and strands of the scientific method brought also the circular evisceration of

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<sup>72</sup> Despite his significant overlap with Marxian critiques of capitalism and alienation, Dewey's total antipathy towards these types of evolutionary dogmas – and his identification of Marx's philosophy as history as reproducing them in toto – was at the core of his vocal rejection of assuming the label of Marxist, especially in his own parallel democratically-grounded critique of capitalism. See, James Campbell, “Dewey's Understanding of Marx and Marxism,” in *Context Over Foundation*, ed. William Gavin (Dordrecht: Springer Netherlands, 1988), 119-145.

<sup>73</sup> Edward Purcell, *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington, KY: University of Kentucky Press, 1973), 67. Loren Goldman, “Dewey's Pragmatism from an Anthropological Point of View,” *Transactions of the Charles S. Peirce Society* 48, no. 1 (2012).

ethics and morality altogether from the terms of the political debate. Moreover, this insistence on certainty asserted ‘mere facts’ as the basis of shared life, without any mechanisms for *understanding* or making meaning out of experience itself. It was, in short, the social scientific counterpart to legal positivism. These theories were circular, insofar as ethics, epistemology, and science were mutually perverted in a logical legerdemain. As Dewey argued in his lecture on Spencer:

he unites a theory of knowledge which makes science impossible with a theory of the construction of the universe built up at every point upon science. Spencer denies all constructive, all synthetic function to intelligence; he makes intelligence a product of events and forces which are not intelligent. All knowledge is thus a product, an effect of something wholly unrelated to intelligence, hence unknowable. Between knowledge and reality there is thus a great gap fixed. And yet Spencer tells what the laws and forces of the universe are, and how they have produced life and mind. Science, as a body of facts, is to be implicitly relied upon; science, as the process and product of human intelligence, has no objective value. On this contradiction the philosophy of Spencer is based. (PTG, EW3, 21)

Here Dewey points out the “contradiction” or circularity at the heart of Spencer’s claims: knowledge is created from unintelligent forces; and this claim is based on knowledge derived from unintelligible forces. Yet this science “as a body of facts” not only grounds Spencer’s epistemology, it serves as the basis for an ethics and moral theory, which itself claims a normative basis from this anti-empirical science.

In these early works, Dewey was attempting, as he did throughout his career, to wrestle Darwin’s legacy away from Social Darwinists. Dewey’s turn was towards a theory that understood contingency as the core legacy of Darwinism for philosophy, against claims to objective, immutable social scientific laws, utilitarian ethics, and methodological and normative individualism.<sup>74</sup> Dewey’s Hegelianism was mediated by the latter’s late 19<sup>th</sup> century Anglo-American interpreters, most notably T. H. Green, who explicitly critiqued Spencer’s attempts at

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<sup>74</sup> See Dewey’s “Importance of Darwin for Philosophy” (1910).

linking an empiricist natural science of evolution with an ethical teleology grounded in survival amid social and economic conflict. Pace Spencer's empiricism, Green and other neo-Hegelian (and neo-Kantian) critics sought answers for the constructive intervention of consciousness in understanding scientific facts and sensations. In short, the claims of an unmediated (and uncritical) study of nature as providing a normative ethics demonstrated the disastrous implications of a primitive empiricism masked as true science.<sup>75</sup>

Indeed, with the language of science, the banner of "progress" could be taken over from those heralding the progressive spirit of democracy, and replaced by scientific evidence of natural selection and the struggle for existence. As Richard Hofstadter writes, "Spencer's was a system conceived in and dedicated to an age of steel and steam engines, competition, exploitation and struggle," situated in the scientific and social-scientific 'discoveries' of Lyell, Lamarck, Von Baer, Coleridge, Hodgkin, and Malthus, and "the laissez-faire principles of the Anti-Corn Law League."<sup>76</sup> Spencer's notion of "equilibration" and the attainment, after evolutionary processes, "in the establishment of the greatest perfection and the most complete happiness,"<sup>77</sup> was a blending of utilitarian ethics and evolutionary theory. It combined the worst components of the intuitionism and natural law tradition of Locke, with the hedonism and positivism of the utilitarians. In his lectures on "the utilitarian theory combined with the doctrine of evolution," Dewey identifies "three decided advantages" that this combination performed by Spencer and Leslie Stephen, over "ordinary utilitarianism": "it transforms 'empirical rules' into 'rational laws' (whereas utilitarianism recognizes pain and pleasure, it cannot "show how or why

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<sup>75</sup> Dewey's treatment of Spencer extended also to the subjective idealism of Spencer's thought that underwrote his ethics. Spencer was a foil to Dewey's working out of the logical inconsistencies in claims on the absolute as existing beyond knowledge and experience, in the same type of logical circularities that still rely on the evisceration of knowledge and experience itself for making claims about the nature of the world. John Shook, *Dewey's Empirical Theory of Knowledge and Reality* (Nashville: Vanderbilt University Press, 2000), 27.

<sup>76</sup> Richard Hofstadter, *Social Darwinism in American Thought*. rev. ed. (Boston: Beacon, 1944/1959), 35.

<sup>77</sup> *Ibid.*, 18.

they so result”, the evolutionary model “can demonstrate that certain acts must be beneficial because furthering evolution” – thus eliding a major explanatory deficiency in accounts like Austin’s (E1, EW3, 283); (2) it “reconciles ‘intuitionism’ with ‘Empiricism’, combining the incoherence of intuitionism in explaining knowledge as mere aggregation of sensory data, while lending a moral basis for an empiricism no longer based on observation but derivative laws); and (3) “it reconciles ‘egoism’ with ‘altruism’ – again, taking the meaning of individuality that most explicitly pits it against any social good, and deriving an altruistic end for it based on the evolutionary human imperatives.

But one of the curiosities of Spencer’s appropriation of the hedonistic utilitarian model is its inversion vis-à-vis the relationship between obligations of state and desires of individual. In Spencer’s ideal evolutionary end, “the things now done with dislike, through sense of obligation, will be done then with immediate liking” – which, in Dewey’s words “are simply so many recognitions that pleasure and pain as such are not tests of morality, but that they become so when morality is independently realized... what is this but to admit... that activity itself is what man wants; not mere activity, but the activity which belongs to man as man, and which therefore has for its realized content all man’s practical relationships.” (E1, EW3, 289) Yet, Spencer’s account was noteworthy in the scope of its ambition, comparable to the efforts of Plato, Aristotle, Locke, and Hegel. His was an attempt to lend scientific and moral credence to the legitimacy of a particular state and social order through a comprehensive epistemology and ethical system. Spencer too would recognize the ideal ethical code: “to make the ideal man serve as a standard, he has to be defined in terms of the conditions which his nature fulfill – in terms of the objective requisite which must be met before conduct can be right... hence it is manifest that we must consider the ideal man as existing in the ideal social state” (E1, EW3, 287).



It would be a short few decades until Holmes' celebrated *Lochner* dissent, in which he argued that the purpose of the courts was not to instantiate Spencer's social statics. But the logic underwriting the decision served only to confirm the longstanding reformulation of legitimation and authority, which blended justifications epistemic, economic, democratic, constitutional, and social scientific. In the context of Dewey's critique of the positivist claims of Austin is the question of Spencerian models of progress – which saw codification as progressive end of law and the state. For the Victorian liberals fearful of the democratic legislative state and suspicious of the language of natural rights, the new end of law could be repurposed again via the social evolutionary claims of progress and the atomistic individual. The natural rights tradition would be turned on its head while remaining within the same basic paradigm: instead of finding a home in the social contract tradition, which premised the emergence of individual property rights as given by nature, these rights were instead claimed to be the product of evolutionary development and progress. The advancement of complex industry was itself a sign of historical progress, as industry too served as a bulwark for individual property rights, in securing the end of peaceful industrial relations among rights-bearing individuals. Thus, in tandem with this view of scientific progress and the ethical ends of the state was the very logic that would re-write the limits of state authority and its new source – natural evolution.

The paradox of state authority and constitutionalism thus was built into the evolutionary model. The source of normativity could no longer be the state itself or a constitution, but the very evolutionary logic that underwrote its development – which was, of course, no logic or intelligent intervention at all. If there was in Spencer's logic a move from militarism after civil war towards some measure of pacifism and equilibrium, it would not be through the realization of some underlying ethical unity or purpose underwriting social life, but through the expansion

of territory made possible by imperialism and capitalist, laissez-faire industry. A militant despotic state and personality would “[impose] a vast amount of compulsory cooperation” detrimental to peace. Evolution could only be made to a broader, federated state with an industrial society with “a regime of contract rather than status, which unlike the older form is pacific, respectful of the individual, more heterogeneous and plastic, more inclined to abandon economic autonomy in favor of industrial cooperation with other states ... industrial society requires security for life, liberty, and property.”<sup>78</sup>

### **Maine and Austin: The Critique of Democracy**

In this contested aftermath of the Darwinian revolution, Dewey witnessed a curious convergence among analytical jurists, Kantian rationalists, Victorian liberals and Utilitarians, and newly-minted social ‘scientists’. This apparently motley assortment of thinkers shared and propagated a deep pessimism over the future of democracy, which seemed aligned against the ‘organic idealism’ positing unity. Democracy’s prestige was being undermined directly by the claim that majoritarian politics were insufficient in achieving epistemically valuable, utilitarian ends, that no unification of will was possible, and that the sheer facticity of a government capable of command should supersede claims to the normative value of democracy and shared ethical life, riven as it was with deep conflict.

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<sup>78</sup> Spencer, cited in Hofstadter, 42.

Dewey's first extended treatment of his ethical conception of democracy was then not surprisingly a turn, four years prior to his essay on Austin, to Sir Henry Maine, who adopted Austin's conception of sovereignty, as "situated in whatever portions of the state have the power to make, alter and enforce laws without appeal [and] is simply power to do this or that." (ED, EW1, 236). Though Dewey moves quickly in his exposition of Maine's critique of democracy, it is worth fleshing out the implications of Maine's adoption of Austin's conception of sovereignty on his understanding of legislation as the proper end of the state. Maine's sociological and historical jurisprudence offers a systematic account of this transition to modernity, embodied in his most famous theoretical claim of the evolution or "linear universalism" from status to contract as the marker of legal modernity – towards the increased individualism and atomization of legal subjects as autonomous and rights-bearing agents. Though the influence of Spencer (and Darwin) on Maine's evolutionary jurisprudence remains contested, Spencer himself seamlessly integrated Maine's language of status/contract into his militarism/industry language, pointing to a compatible approach and language (if one-sided) marking the inexorable move to modernity manifested in laissez-faire liberalism, imperial expansion, and the protection of robust property rights.<sup>79</sup>

Maine, no doubt, played a role in Dewey's interrogation of "science" within the emergent fields of sociology and anthropology and his general search for a social scientific methodology that could explain social institutions like law and legal change. In a brief essay from the same period, entitled "Anthropology and the Law" (1893), Dewey bases his analysis of legal evolution, from an early anthropological point of view, on Oliver Wendell Holmes, Jr.'s *The Common Law*. Dewey praises that work as "worthy in all respects to be put side by side with

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<sup>79</sup> J.W. Burrow, *Evolution and Society: A Study in Victorian Social Theory* (Cambridge: Cambridge University Press, 1966).

anything in the way of historic interpretation produced by Sir Henry Maine, having, in spite of its technical aim, equal comprehensiveness of generalization, while its mastery of detail is, if possible, more complete and accurate.” (AL, EW4, 38) But critical engagement turned to rejection, evinced also in his intellectual affinities and friendship with Franz Boas and Malinowski who explicitly reject Maine’s methodology while staying within the anthropological paradigm.<sup>80</sup>

Dewey’s claim that Maine shared Austin’s conception of sovereignty might seem today counterintuitive, as Maine is perhaps best known as promoting a historicist jurisprudence that explicitly critiqued Austin’s methodology. The two figures are often pitted as two opposed poles of 19<sup>th</sup> century English jurisprudence – analytical and historical. Indeed, much of Maine’s work – especially his critique of social contract theory – seems to comport with Dewey’s own thought (but with crucial, overriding caveats). Maine too critiques Austin’s sovereign as failing to be a source that can explain the precise difference between existing custom and positive law – a recurrent theme in Dewey’s critique and later legal thought.<sup>81</sup> He finds Austin’s conception of law and its relationship to the sovereign too abstract and his universalization of concepts unjustified, given that they are historically contingent and represent only the more civilized, and for Austin as a utilitarian, the normatively appealing, modern state system. Maine finds also that ‘law’ defined by Austin does not encompass the kind of non-Western legal systems Maine documented in earlier works. Maine’s celebrated counterexample to Austin’s sovereign is the despotic ruler Runjeet Singh in the Punjab, whose total monopoly of force and power presented a paradigmatic embodiment of the Austinian sovereign, but in fact presided over a political domain

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<sup>80</sup> Goldman, “Dewey from an Anthropological Point of View.”

<sup>81</sup> Maine, *Early Institutions*, Lecture 12.

governed by informal customary rules, not distinct positive laws backed by enforceable sanctions.<sup>82</sup>

But Maine's critique of Austin was often in a deeply ambivalent mood.<sup>83</sup> Maine was certainly an admirer of Austin's intellectual achievements, which he described as "the only existing attempt to construct a system of jurisprudence by strict scientific process and to found it, not on a priori assumption, but on the observation, comparison, and analysis of the various legal conceptions."<sup>84</sup> Despite Maine's own complex jurisprudential views, and the view of some scholars that Maine rejects altogether a conception of will or sovereignty as a source of law, Dewey rightly finds that Maine adopts Austin's conception of (modern) sovereignty defined as an entity possessing a will and ability to command. Maine's first published work, "The Conception of Sovereignty, and its Importance in International Law" (1855) presented a complete acceptance of Austin's conception of sovereignty.<sup>85</sup> In fact, what Maine identifies as lacking in his account, is itself telling. He writes, "If the Analytical Jurists failed to see a great deal which can only be explained by the help of history, they saw a great deal which even in our day [1874] is imperfectly seen by those who... let themselves drift with history"<sup>86</sup> — a deficit he filled with his own linear anthropology.

The clearest declaration of Maine's indebtedness to Austin is in the former's conception of democracy. The second essay of his *Popular Government* begins with the declaration of a name: "John Austin, a name honoured in the annals of English jurisprudence, [who] published shortly before his death a pamphlet called a *Plea for the Constitution*" — Austin's strongest

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<sup>82</sup> Ibid, 380-382.

<sup>83</sup> The sketch of similarities between Maine and Austin I offer here is owed to the extensive treatment by Rumble in his "John Austin and his Nineteenth Century Critics: The Case of Sir Henry Maine."

<sup>84</sup> Maine, *Early Institutions*, Lecture 12, "Sovereignty", 343.

<sup>85</sup> see also his lectures, State sovereignty, Rumble, "Austin and Maine," 125.

<sup>86</sup> Maine, cited in Rumble, 126.

condemnation of democracy as a form of rule. Maine writes plainly: “the simple truth stated by Austin, that democracy means properly a particular form of government. ... there is no word about which a denser mist of vague language, and a larger heap of loose metaphors, has collected. ... it is simply and solely a form of government.”<sup>87</sup> As Dewey writes, “the view of Hobbes, as worked out by the analytic school of Bentham and Austin, is virtually adopted. Government is simply that which has to do with the relation of subject to sovereign of political superior to inferior.” (ED, EW1, 229).<sup>88</sup> This entity assumes the characteristics attributable to an individual commander, and is valid, by definition, to the extent to which it is determinate and that will identifiable and enforceable. Both Austin and Maine shared an understanding and subsequent critique of democracy against its Rousseauian variants by reducing its features to its exclusively institutional form and shedding any relationship to the moral and ethical dimension of social interactions embedded in and engendering these concrete institutions (despite, Maine’s own seemingly ambivalent acceptance of this trend away from the socially embedded forms of normative social guidance).

Not surprisingly, the target of some of Maine’s most savage attacks in both *Popular Government* and *Ancient Law* was Rousseau, and his natural law premises and perversion of legislation. As Maine writes in the former with a dramatic flourish worthy of Hobbes, “A vastly more formidable conception bequeathed to us by Rousseau is that of the omnipotent democratic State rooted in natural right; the State which has at its absolute disposal everything which individual men value, their property, their persons, and their independence; the State which is bound to respect neither precedent nor prescription; the State which may make laws for its

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<sup>87</sup> Henry Maine, *Popular Government* (New York: Henry Holt & Company, 1886), 59.

<sup>88</sup> Maine explicitly defines government and Austinian sovereign as synonymous, when he writes of “government, or (as the jurists say) of the relation of sovereign to subject, of political superior to political inferior.” *ibid*, 6

subjects ordaining what they shall drink or eat, and in what ways they shall spend their earnings; the State which can confiscate all the land of the community, and which, if the effect on human motives is what it may be expected to be, may force us to labour on it when the older incentives to toil have disappeared.”<sup>89</sup> As with most critical liberal reactions from Constant to Berlin against Rousseau, Maine’s like Austin’s is grounded in the perceived subordination of individual freedom and autonomy to the absolute democratic will. The alternative conception of popular sovereignty advanced by Austin and Maine emphasizes the will of the individual, which in a democracy can only be aggregated, and only unsuccessfully or through manipulation of the public. Repeating the familiar refrain from Plato, these critics of democracy underscore its fickle, chaotic tendency toward tyrannical ends, which undermine the state’s purpose in announcing and enforcing an enlightened will in law.

Maine’s rejection of democracy on its practical limitations and of morality as the constitutive feature of sovereignty is coupled also with a rejection of external normative values attribute to democracy – specifically, the value of numerical superiority on grounds of equality, freedom, and moral progress. The framework of the argument is an apparent upshot of the positivist presuppositions that separate the moral authority of sovereignty, the state and of law from its normativity or its descriptive features. Democracy for Maine is one form of government distinguished from other forms only by numerical considerations of who rules – as one, few, or the multitude (ED, EW1, 229). Shed of the moral or normative dimensions of sovereignty, democracy retains those functional features of sovereignty that are conflated with the organs of its articulation. Maine writes in *Popular Government*, “democracy, the government of the commonwealth by a numerous but indeterminate portion of the community taking the place of

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<sup>89</sup> Ibid, 158.

the Monarch, has exactly the same conditions to satisfy as Monarchy.”<sup>90</sup> The two functions of government are those commonly referred to as markers of internal and external sovereignty: Outwardly, government must protect against foreign invasion and threats to its existence and domestically, the primary function of government, Maine writes, is to “compel obedience to the law, criminal and civil.”<sup>91</sup> The thrust of Maine’s critical argument relies on the claim that democracy fails to discharge the functions of sovereignty in remaining ‘numerous but indeterminate.’ By his lights the public were already indeterminate: in their class and self-organization and in their articulation of will. Notably, the definition of democracy as government turns to Austin’s language of indeterminacy, prefiguring its deficiency in discharging its sovereign duties. Maine’s critique, in his words, is not “sentimental but practical.”<sup>92</sup>

Of course, Maine and Austin’s institutional understanding of democracy, as defined solely by majoritarian institutions and broad inclusion in legislative will formation (via representatives or plebiscitarian procedures) – to be measured through external and often epistemic calculi, seem to dominate the very landscape of contemporary understandings of democracy – and its “disfigurement.”<sup>93</sup> The anti-democratic argument is seductive: The normativity of democracy based on numerical superiority of wills can be dispensed if democracy is seen as a means of aggregating atomized individuals. The mere fact that a body has the support of superior numbers – without some normative relationship to the minority as presupposed in democratic processes – is normatively empty. In such contexts, the benefit of this superior number seems to simply to rest “for their final support on the fact that after all the numerical majority would have, in case of

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<sup>90</sup> Maine, *Popular Government*, 61.

<sup>91</sup> *Ibid*, 63.

<sup>92</sup> *Ibid*, 64.

<sup>93</sup> See Nadia Urbinati, *Democracy Disfigured* (Cambridge: Harvard University Press, 2014), on the epistemic, plebiscitarian and populist trends in contemporary thought.



an appeal to arms, the brute force to coerce the minority.” (ED, EW1, 233). In this context, the potential justification of an aristocracy comes more readily: “where not mere stress of numbers, but superiority in wisdom, elevation in goodness, enable the few having these qualities to guide the mass without them,” we can argue that epistemic benefits and other qualitative values can be asserted in lieu of sheer numbers. (ED, EW1, 233). Here, the presupposition that the sovereign can bear its authority only through force undermines the idea that there is something intrinsically normatively appealing about democracy; instead, the external appeal must come from the quality of its external results and its practical ability, in the long run, to discharge of its institutional functions. Again, the claim of the public’s epistemic inferiority is advanced as an inevitability when the end is in synthesizing disparate and conflicting wills.

As for the legislative function of the sovereign state, Maine cites as a mistaken reason for supporting democracy, the faulty claim from Rousseau that popular sovereignty consists in active contribution to legislation—or again, the misunderstanding of Rousseau and the separation of the popular sovereign and the responsibilities of the government as the organ behind everyday legislation.<sup>94</sup> The Austinian sovereign will is reflected in particular commands, but that link between sovereign and particular command in a democratic system is permanently degenerate, according to Maine, insofar as “the legislative infertility of democracy springs from permanent causes. The prejudices of the people are far stronger than those of the privileged classes; they are far more vulgar; and they are far more dangerous, because they are apt to run counter to scientific conclusions.”<sup>95</sup> The people not only present a numerical proliferation of wills to accommodate, but cannot unify them into particular commands given their vulgar prejudices and

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<sup>94</sup> Though this too rests on a faulty reading of Rousseau, who did not attribute such contributions to sovereignty, but instead to government.

<sup>95</sup> Maine, *Popular Government*, 67.

epistemic limitations. Moreover, Maine claims that that process of aggregation and increased determinacy — as Austin assumed in his foundational distinction between sovereign command and moral laws issuing from an indeterminate public — is a sociological process mired in difficulty, if not practical impossibility: such a will can in practice be ‘unified’ only through corruption, or manipulation to conjure a majority, or sinking to the lowest intellectual denominator of the masses. Without the stability of a fixed and stable commander, democracy threatens to undermine the very purpose of the sovereign state: guaranteeing habits of obedience to the law.<sup>96</sup>

Here it is clear also that Maine was reorienting the definition of sovereignty away from the legislation or the legislative will as its exclusive purview, and asserted the supremacy of *enforcement* of command — the purview of *government* in the formulations of Rousseau and Pufendorf, among others. Legislation and the power to enact law, and ultimately legalism bound up with the notion of popular sovereignty as the ultimate authority, was nothing without the true sovereign enforcer. As Maine writes, “The great difficulty of the modern Analytical Jurists, Bentham and Austin, has been to recover from its hiding-place the force which gives its sanction to law. They had to show that it had not disappeared and could not disappear; but that it was only latent because it had been transformed into law-abiding habit. Even now their assertion, that it is everywhere present where there are Courts of Justice administering law, has to many the idea of a paradox—which it loses, I think, when their analysis is aided by history.”<sup>97</sup> Perhaps Maine’s propagation of the Austinian ‘myth’ focusing on the centrality of force to Austin’s account can

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<sup>96</sup> As Maine rightly notes, Rousseau himself, more so than his utilitarian critics like Bentham, seemed to forecast the sociological difficulties facing his own project in his dim view of the epistemic capacity of the general public. Rousseau referred to the difficulty of participatory democratic government (not popular sovereignty) but in Maine’s deflation of sovereignty into government, he uses the rejection of the direct democracy as synonymous to rejection of popular sovereignty, but with a distinct normative justification.

<sup>97</sup> Maine, cited in Rumble, *John Austin*.

be explained not as a misreading, but as an attempt to move Austin towards this conclusion. It appears, in fact, to be a logical upshot of deflating government and sovereignty, and the eliminating moral authority as a distinguishing feature of sovereignty.

The government must enforce obedience, and as the complex modern state evolves, via irrepressible force over and against the public. That is, because the modern state could no longer rely on premodern notions of common goods or tribal and familial relations as the basis of enforcement of norms, the modern state by definition needed access to other means to enforce these norms. As with Webers's definition of the modern state, the definitive feature of the state was in fact its monopoly over violence (though the source of its legitimacy was another question among these thinkers). But we are here, well situated to see afresh, reading Austin's anti-democratic motivations into his definition sovereignty, what Dewey's critique lays bare: Austin finds that the public itself wields significant force and power. Thus force cannot determine in itself the quality of sovereignty. Though the will of the sovereign is not distinguished by a *moral* quality, per se, it can be distinguished by determinacy achieved through hierarchical differentiation between ruler and ruled. And the more precise or limited its determinate number among epistemic elite, then the more value it provides in discharging its functions as government.

Finally, Maine's most famous account of legal development — from status to contract — from which Spencer freely borrowed, underwrote his rejection of democratic progress and his championing of individual rights. Like Dewey, Maine rejects the contractual story of natural rights tradition as failing to offer a sociologically plausible account. Instead, his account inverts the relationship, and justification for contract and individual liberties: they were not *natural* and ahistorical, but progressive achievements, confirmed as such by the findings of the nascent social

science of anthropology. Ultimately, Maine and Austin came to reject democracy with a competing account of modern progress: the utilitarian values Austin sought against the state were seen as the product of progressive development, not simply ethical goods in themselves. Democracy, on the other hand, itself had “no historical meaning, no realization of any idea. It is but the ‘product of a whole series of accidents.’” “Democracies,” Maine writes, “which had risen and perished, or had fallen into extreme insignificant, seemed to show that this form of government was of rare occurrence in political history, and was characterized by an extreme fragility.”<sup>98</sup> It was thus not likely fit for survival, as one competing form of government among others.

As for the development of law and legal systems, Maine was faced with a normative and political conundrum. As Karuna Mantena’s recent study has documented, the projects of ‘liberal empire’ of which Maine played a central role, provided a major push behind England’s codification of common law model, which could not be imported abroad for purposes of social and political reform. As Mantena writes, “empire was the curious route through which English common law could be transmuted into a “scientific and more modern form.”<sup>99</sup> But this movement towards codification and its relationship to legislation, established most explicitly by Bentham, created a tension in Maine’s thought — between support for the codification and the threat played by an unchecked legislative state to liberal property rights. But Maine found an appealing solution in the American constitutional system, which he described as “the bulwark of

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<sup>98</sup> Maine, *Popular Government*, 70.

<sup>99</sup> Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton: Princeton University Press, 2010), 93. Mantena writes, “[Maine’s] innovative defense of codification in India, one that is uniquely situated against both a purely rationalist argument for scientific codification and a conservative, historicist critique of legislation, allows one to gain leverage on the practical implications and normative underpinnings of Maine’s more methodological writings. In this light, Maine’s jurisprudence emerges as a complicated, conservative defense of liberal reform, one that seeks to preserve the historical achievements of the precarious, progressive logic of modernity.” at 92.

American individualism against democratic impatience and Socialist fantasy.”<sup>100</sup> Maine shows that delegation within institutions makes possible a functioning government and legislative apparatus; significant institutional barriers diminish the influence of the unfettered masses as well as the potential corruption and manipulation of their opinions. In short, the way out of the predicament of legislation would be minimal interference and intelligent formulation by a select few. Maine’s own equivocation over the inevitable consolidation of state power thus turned direction towards the sovereign duty in protecting external imperial projects, and inward in the assertion of economic and individual rights against legislation that suggested a false unity of will.

### **1.3. DEWEY’S EARLY CONCEPTION OF SOVEREIGNTY AND ETHICAL DEMOCRACY**

The “practical, as well as theoretical” task that Dewey sets out at the end of his essay on Austin, for a theory of sovereignty is “[t]o unite the three elements [...] force, or effectiveness; universality, or reference to interests and activities of society as a whole; and determinateness, or specific modes of operations-definite organs of expressions.” (ATS, EW4, 90) The effort requires uniting *force* and *will*, government and sovereign, such that one is not subordinate to the other, or one part taken as the essential meaning of the whole. In his lectures, he asks, “Can we eliminate the content of enforcing, itself, from a decision of the will? If we can, what becomes of our will? The fallacy of explaining sovereignty as force per se arises there. All will is forceful. Will means the struggle to realize one’s own ideals. As society, it was found advisable to

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<sup>100</sup> Maine, *Popular Government*, 243, cited in Rumble, “Austin and Maine,” 124.

regulate this force, that is, just as end is defined, the force must be defined. This process of the regulation of force, which is intrinsic part [sic] of every voluntary association, comes to be abstracted.”<sup>101</sup> In short, the isolation of any feature distorts understanding of social ends and means to the point of futile abstraction.

Dewey never develops a systematic conception of sovereignty and, aside from occasional comments in later works, his discussion remains limited to his earlier essays and lectures on ethics. Though his commitment to a Hegelian-inflected interactive model of social life persists throughout his career, it is also likely that Dewey abandoned the term ‘sovereignty’ by his post-Hegelian phase – as he did ‘social sensorium’ – given his recognition of its fictive metaphysical residue and his attempt to think through more rigorously the implications of social conflicts and concrete democratic processes and solutions.<sup>102</sup> But as recent scholars have noted, with increased attention on this early essay on democracy as well as his early lectures on ethics and logic, the basic features of Dewey’s early treatment of democracy, sovereignty, and the social organism provide the foundation of an original alternative to traditional conceptions of sovereignty and a guide to his later conceptions of social inquiry, ethics, and democracy.<sup>103</sup> Democracy for Dewey is defined precisely as the inversion of the sovereign state envisioned by Austin and Maine: there

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<sup>101</sup> Dewey, *Principles of Instrumental Logic*. 150-151.

<sup>102</sup> Perhaps also, Dewey also took to heart Harold Laski’s entreaty in his excoriating critique of the concept of sovereignty throughout the 1920s. Indeed, much of Laski’s critical works on sovereignty and the mystical monism posited behind the Leviathan state resonate with these early Deweyan theme, as will be illustrated further below. Dewey’s direct influence on Laski, however, is likely minimal. As Laski wrote to Oliver Wendell Holmes, Jr., Dewey was to him “the most involved word-twister I ever tried to understand; and as a rule when I have sweated blood over Dewey it has been to no effective purpose.” Laski, cited in Charles F. Howlett and Audrey Cohan, *John Dewey, America’s Peace-Minded Educator* (Carbondale, IL: Southern Illinois University Press, 2016), 10. In turn, in echoing Laski’s own persistent emphasis on the irreducible fact of social conflict, Dewey traded in his early fascination with the Hegelian dialectic for a more rigorous functional and (modified) pluralist state theory in *The Public and its Problems*, discussed in Chapter 3.

<sup>103</sup> Melvin Rogers, *The Undiscovered Dewey* (New York: Columbia University Press, 2012). Axel Honneth, “Democracy as Reflexive Cooperation,” *Political Theory* 26, no. 6 (1998). As Honneth argues, Dewey at this stage placed undue faith in pre-political solidarity. As discussed in the next two chapters, it is the precise nature of these interactions – which Honneth rightly identifies as the twofold investigation in the 1910s through the 1930s—in scientific methodology and social psychology, which round out Dewey’s thicker conception of *interactions*.

can be no permanent, determinate divisions or disintegration of society into hierarchical parts, as this would be tantamount to civil war – or constant suppression via force. In democracy, this means both that the majority and the minority, and the governors and governed are not distinct classes or sovereign legally or morally.

This requires, in turn, a rethinking of morality itself for Dewey, which does not reproduce these divisions between will and force. Dewey writes, “the relationship between the quest for power that governs political life and the self-interest that governs economic life is not clear. Meanwhile, the moral theorist informs everyone that they should ignore power and self-interest, and instead act morally. But once we grant that power and self-interest are the principal motivating forces in social life, it appears that morality has no means to carry out its goals.”<sup>104</sup> The project then is understanding the role positive political power, the drive of economic and social interests, and morality, with each contributing to a meaningfully understanding both of humans as they are, and how they might be in their associated life.

### **The Social Organism and Social Sensorium**

The first critical step in recovering an ethical conception of democracy is replacing Maine’s and Austin’s faulty presuppositions of democracy as merely an unstable government form differing from other institutional forms based on a numerical distinction. Dewey too would redefine the understandings of liberty, equality, and progress that underwrite these critiques. As outlined above, the very definitional presuppositions built into Austin and Maine’s account of

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<sup>104</sup> Dewey, *Principles of Instrumental Logic*, 106.

sovereignty and democracy presuppose anti-democratic conclusions about the value of democracy itself. Dewey's project then is not in defending democracy on Austin and Maine's terms, but in offering different conceptions altogether of democracy: the undivided 'social organism' that defines democratic life, the normative value of the individual, and sovereignty as arising from the interactions and customs within the social organism. So long as either definition of law or democracy, or those constituent features of Austinian sovereignty, are retained, there must necessarily be an antagonism between democracy and the value of law and well-ordered legal systems.

The normative claim in favor of greater liberty is susceptible to an anti-democratic impulse, Dewey argues, if liberty is defined as "thinking and acting as one has a mind to." That view of freedom in democracy as limitless and tending towards chaos and lawlessness from Plato and endorsed by the 'anti-democratic school.' "It is the loss of reverence and of order. It is the denial of moderation, of the principle of limit. Democratic liberty is the following of individual wills, of particular desires, to the utmost degree. It has no order or law (Republic viii. 557-563). In a word, it is the extreme assertion of individualism, resulting in anarchy." (ED, EW1, 244). The core definition of democratic liberty is lawlessness. The tensions Maine and Austin felt between a desire for a strong state and the preservation of individual liberty, was founded in this same negative view of the negative value of liberty, which in democracy yields anarchy.

Likewise, if we take the notion of equality as one simply of numerical equality, or "bald individuality", as referring to equal allocations of goods, virtues, and merits for each atomized individual, democracy can easily be critiqued as rendering equal the worst, best, wisest and most ignorant, for wealth, happiness, and material possessions without regard to qualitative differences. If we again borrow from Plato's anti-democratic vocabulary, equality becomes



“dispensing a sort of equality for unequals and equals alike.”<sup>105</sup> For Maine, this view to democracy in the industrial context could only diminish the striving and struggle for existence and superiority that have been “strings to action” and motivation for progress.

Dewey takes on Maine’s claim that democracy’s historical record suggested its fragility with a thoroughly critical response: “[Maine’s] forebodings for its future rest upon an irrelevant basis; and that the supposed destructiveness is due to the occasional necessity of doing away with the evils engendered of aristocracy.” (ED, EW1, 228). That is, Maine’s identification of its context-specific failures was translated into a sweeping historical claim denying its identification with human progress. At root in the apparent flimsiness of the normative justification of democracy, is also a series of historical confusions as to whether chaos and anarchy are symptoms of democracy or merely a deeply impoverished view of it. Dewey inverts Maine’s logic and suggests that democracy’s fragility must be understood in the context of the historic difficulties it has faced and its incomplete realization, insofar as societies have always been marked by social, economic and political inequalities.

Finally, and perhaps most centrally to the view of democracy as a mere numerical aggregate, “it follows, of course, that in it sovereignty or political power is minced into morsels and each man’s portion is almost infinitesimally small.” (ED, EW1, 229). As such, democracy is the process of reducing sovereignty into ever smaller portions for each individual, which so reduced, lacks any effective power—and each additional member of society only further dilutes and divides that power as a zero-sum quantity. The only possibility for a functional government under democracy is delegation or alienation of power, as the multitude cannot exercise its own sovereign power in any workable practice. As such, “democracy simply as the rule of the many,

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<sup>105</sup> Plato, *Republic*, Book 8.

as sovereignty chopped up into mince meat, is to define it as abrogation of society, as society dissolved, annihilated. When so defined, it may be easily shown to be instable to the last degree, and so difficult that a common will must be manufactured – if not by means of a contract, then by means of a combined action of the form of Party and Corruption.” (ED, EW1, 231). In short, Maine’s conclusions again are presupposed by his normative definitional premises.

Dewey states bluntly, “all views which attribute to [democracy] any significance or functions not based upon the clear insight that it is only one among various forms of government are to be ruled out.” (ED, EW1, 229). Defining democracy as a form of government yields at least three basic confusions: firstly, the bare institutionalization of sovereignty as government — and any claim to its essential form or pre-given aim, like the base Spencerian reduction of moral life to the singular end of survival, is a holdover of anti-empirical social science. As Dewey writes:

the conception that democracy and aristocracy are expedients for reaching certain jural ends, for exercising certain police powers, for compelling obedience, and that the sole question is as to what piece of machinery can accomplish this most efficiently, and with the greatest stability and economy, is one which has no justification outside of abstract theory. It is the relic of the time when governmental polities were regarded as articles of clothing, to be cut and sewed by any acute political tailor, and fitted to any nation. It belongs to a time when it was thought that a constitution could be made ad hoc, and established on a tabula rasa of past history, also manufactured with express reference to the given case. (ED, EW1, 240).

The points of critique are many, but here the emphasis rests on any conceptual definition of a government as defined by a fixed end, or disembedded from the situated ethical life from which it emerges. Any such theory advances a normative claim, and is not grounded in sociological fact. As Dewey would argue, no constitution can be imposed independent of its relation to the particular values, participation or, in short, to the social life of its purported subjects, and no

government could be understood by claiming its universal traits — whether it be as anarchic democracy, or determinate sovereign commander.

Instead, Dewey writes, “Democracy, in a word, is a society, that is to say, an ethical conception, and upon its ethical significance is based its significance as governmental. Democracy is a form of government only because it is a form of moral and spiritual association.” As he writes of Plato, as with his own enterprise, democracy “seizes upon the heart of the ethical problem, the relation of the individual to the universal, and states a solution. The question of the *Republic* is as to the ideal of men’s conduct; the answer is such a development of man’s nature as brings him into complete harmony with the universe of spiritual relations, or, in Platonic language, the state.” (ED, EW1, 230). Dewey, in the early stages of his thinking on democracy, ethics, and law— and the ethical state of Plato and Hegel— links sovereignty to the notion of a “social organism” that is not inherently conflicted or divided. In explicitly political terms, the social organism attempts to capture an undivided society or a unified people against that image of absolute legal sovereignty and the fragmented parts in need of artificial unification in a determinate will.<sup>106</sup> It is defined explicitly against the social contractarian model, and atomized individual, in which non-social atoms must find some way to escape their condition as warring, disconnected mass into political society — “a heap of grains of sand needing some factitious mortar to put them into semblance of order” (ED, EW1, 230) in Dewey’s words, or pure abstraction.

It is also on the basis of this thick ethical and organic conception of democracy and the state that Dewey distinguishes Maine from Aristotle’s treatment of laws and constitutions. As

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<sup>106</sup> And by the turn of the twentieth century, Dewey abandons the metaphor altogether as a theoretical tool to describe society. In a 1939 biographical sketch, he explains that his earlier commitment to Hegelian unity required a transformation far more attentive to the ways conflict empirically defies the dialectical movement toward social harmony. See Dewey’s “From Absolutism to Experimentalism.”

Dewey notes, for Aristotle “it is not a matter of indifference whether few or many rule; but the essential characteristic of each state is found, after all, in its form of constitution and organic law” (ED, EW1, 230). The comparison invokes the constitution of Montesquieu, and to an extent, the historicist jurisprudence of the Montesquieuean Savigny – or, more recognizably, of Hegel. But Dewey does not suggest that the constitution or its acceptance itself creates *sui generis*, the character of the people or its essential personality. Sovereignty is not merely legal or political-moral, pure power, facticity or normativity, but must reflect an interaction or process that pre-exists, but still requires, its articulation in any legal or institutional form. To that end, Dewey writes:

But that there are such determinate governments, is a matter lying quite outside the range of Austin’s theory; they exist precisely because large social forces, working through extensive periods of time, have fixed upon these governments as organs of expression. It is these forces, gradually crystallizing, which have determined governments and given them all the specific (determinate) character which they now possess. Take away the forces which are behind governments – which have made them what they are, and the existence and character of these governments is an accident, likely to be changed at any moment. Admit these forces, and, since they determine the government, they are sovereign. (ATS, EW4, 80).

The sovereign is not simply a latent power to constitute a determinate government, or a fixed force behind an institution. In Dewey’s strongest formulation: “*Sovereignty is in the interaction. It manifests itself in various institutions or habits.*”<sup>107</sup> A determinate government emerges from social forces over time and in and between associations, which fix the government as a form for expression and an organ to address problems of associated life. For Dewey, the sovereign assumes a unique function – not hierarchically superior or temporally prior position as source – vis-à-vis other institutions.

As he writes:

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<sup>107</sup> Dewey, *Principles of Instrumental Logic*, 149. Itl. Added.

the organism manifests itself as what it truly is, an ideal or spiritual life, a unity of *will*. If then, society and the individual are really organic to each other, then the individual is society concentrated...and if, as actually happens, society be not yet possessed of one will, but partially is one and partially has a number of fragmentary and warring wills, it yet follows that *so far* as society has a common purpose and spirit, *so far* each individual is not representative of a certain proportionate share of the sum total of will, but is its vital moment. And this is the theory, often crudely expressed, but none the less true in substance, that every citizen is a sovereign, the American theory, a doctrine which in grandeur has but one equal in history, and that its fellow, namely, that every man is a priest of God. (ED, EW1, 237. Itl in original)

The revolutionary and quintessentially American thesis asserted by Justice Salmon, that each individual is citizen under the constitution, not subject to some external commanding sovereign, finds its idealism in the Lutheran language of ‘priests under God’. This is the precondition for a constitution and government not founded on domination or command backed by superior force. Tested in the Civil War context of “fragmentary and warring wills”, there still remained for Dewey a persistent faith in a common purpose and spirit and each individual as embodying that spirit. The language of wills and its aggregation is seen as partial to the “common purpose and spirit” and the “vital moment” of each individual as sovereign citizen.

As for the existence of conflicts among those associations and institutions, Dewey writes in the late 1880s of the American context with typical understatement that “great changes have been going on in the last hundred years. We have here a physical unity over the whole country but there is no psychological end as comprehensive as the physical. Where customs can’t be relied on, then some particular institution must make the bridge over from custom to conscious recognition. Then we have extension of the function of government. Government is no more an organ of sovereignty than the family or business corporation; but it is as an organ of the organ[ism] that has as its work the adaptation of its function depending upon the things to be adapted.”<sup>108</sup> Government serves as an umpire or coordinator of existing organs and functions; it

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<sup>108</sup> Dewey, *Principles of Instrumental Logic*, 154.

must organize those conflicting and competing organs and make conscious, in the absence of shared customs, a basic unity of purpose. Though Dewey, to be sure, was too sanguine as a whole about the intrinsic relationship between individual and social organism, he nonetheless was aware of the persistence of conflict. As he writes, “no one can claim that any society is wholly organized, or possessed of one interest and will to the exclusion of all struggle and opposition and hostility. There are still classes within society, circles within the classes and cliques within the circles.” (ED, EW1, 232). There cannot be a permanent cohesive entity per Rousseau, through the imposition of an artificial, determinate will or by legal designation.

But Dewey was concerned even at this early stage in the *processes* that allowed for majorities to be formed:

the heart of the matter is found not in the voting nor in the counting the votes to see where the majority lies. It is in the process by which the majority is formed. The minority are represented in the policy which they force the majority to accept in order to be a majority; the majority have the right to ‘rule’ because their majority is not the mere remerge sign of a surplus in numbers, but is the manifestation of the purpose of the social organism. Were this not so, every election would be followed by a civil war; there would be no need of writing concerning the weakness of popular government; it would be the only striking fact about government. (ED, EW1, 234)

Dewey explains that the determination of the majoritarian decision often moves between concessions and shifting and reconsidering the terms or “wavering tide of battle” between minority and majority – which, historically, have generally been closely tied together numerically. Dewey here notes also that the process itself is significant not simply because it yields a final result but because it educates all participants in the process of governance: “in trying to acquire the means to govern, the majority becomes qualified to govern” (ED, EW1, 235). If the process were merely one of imposing the majoritarian will, there would be an inclination towards civil war and the type of instability that Maine and Austin find intrinsic to it. Only through a stable *process* in which majority and minority continue to reciprocally determine

their decisions and laws, and consciousness of that contribution in a shared enterprise, can there be some stability against the warring of wills, or an alternative to the view of human progress as founded on the false science of competition. To deny that possibility, for a portion of society to find itself “not participating in the formation or expression of the common will, [means] they do not embody it in themselves. Having no share in society, society has none in them. Such is the origin of that body of irreconcilables which Maine, with inverted logic, attributes to democracy.” (ED, EW1, 238)

### **Freedom, Consciousness and Individual Personality**

As commentators like Axel Honneth argue, and as noted above, Dewey’s writings at this time were still inchoate vis-à-vis the specific mechanisms – or the sovereign processes – by which such solidarity could be intelligently shepherded if not guaranteed. The pressing question that Dewey leaves underdeveloped is where precisely this solidarity and consciousness of unity comes from to engage in these processes without recourse to violence. In part, participation itself fosters such consciousness, but Dewey’s thick ethical conception of democracy requires more. Nonetheless, Dewey’s short lectures on ethics suggest at this early stage an initial framework for guiding the next decades of work, especially in specifying such social mechanisms and the industrial relations and division of labor, which Honneth identifies as central in these early texts as source of solidarity. As the historian James Kloppenberg writes, Dewey in his early ethics found “that economic and industrial life is in itself ethical,” and it must be ‘made contributory to the realization of personality through the formation of a higher and more complete unity among

men.”<sup>109</sup> The economic realm was not of unmediated private interests or rights, but a domain for ethical democracy, because of its constitutive influence on human development through labor processes. At this early stage Dewey identifies the issue of maintaining supply and demand, and writes, “Spencer assumes that competition will do it. The reason the lungs, heart, etc., don’t get all [i.e., everything] for themselves, respectively, is because there is the nervous system which acts as umpire. That is the reason there is working equilibrium established. Why doesn’t man make too many plows, or too few, for the community? Because of the social sensorium, that is, the individual controls his manufacture by *feeling the demand* of community.”<sup>110</sup> The nature of this relationship within the division of labor treads on a notion of social consciousness or “sensorium”, and unreconstructed sentimentalist and Hegelian-inflected account of mutual social adjustment based on reciprocal recognition of ‘feeling the demand’. As Dewey writes, “if you have any division of labor, you have to have some principle of division, that is, the activity of each one in the community has got to be controlled by demands made by the community as a whole and by the demands of others. This means there must be a social sensorium.”<sup>111</sup>

Dewey’s move is to shift from Spencer’s notion of competition as the motor of progress, again back to consciousness, as providing “the ability to anticipate, and so the ability to interpret symbols ... the change of conditions into stimuli is an activity by symbols.”<sup>112</sup> In this shorthand, Dewey suggests that within the division of labor is an inscription of consciousness that allows for the interpretation of symbols that stimulate responses from others’ demands, in a shared social language. The presupposition of division of labor is the social consciousness of the

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<sup>109</sup> Kloppenberg, *Uncertain Victory*, 351.

<sup>110</sup> Dewey, *Principles of Instrumental Logic*, 151. Itl added.

<sup>111</sup> Ibid, 113.

<sup>112</sup> Ibid, 131.



individual adapted to his environment.<sup>113</sup> Dewey finds not only that division of labor creates a social consciousness, but suggests that an inchoate social consciousness is a precondition for its possibility.<sup>114</sup> Spencer's claim is that "in biological organism the parts are all subservient to another part. The nervous system alone has final value, that is, has feeling. While society as a whole has no consciousness and the units have the feeling. That is, society has no social consciousness."<sup>115</sup> Spencer's hierarchical model divides will and force – the perennial distinction underwriting a basic understanding of law – with the former supervening on the latter; consciousness is attributed to a singular organ because it doesn't have a physical location. But as Dewey writes, it is "*interpretation* of that activity by and through its social interaction or relationships. The individual is not conscious simply because he acts, but because he recognizes the place of the activity in the whole. While the consciousness is always the interpretation of impulse through its mediation, if we take the content of the mediation it is always social."<sup>116</sup> In this formulation, Dewey's aphoristic claim, "it is impossible to identify sovereignty with force. It is a forceful idea"<sup>117</sup> has greater resonance.

Turning to consciousness allows Dewey to critique anew the atomized individual of Spencerian economics and of democracy as reducible to majority rule or an aggregative principle. In linking Spencerian economics with utilitarian, Dewey identifies the two sides of an impoverished conception of human nature. He writes, "In economics, against altruism as motive, we have egoism... This is connected on the ethical side with hedonism."<sup>118</sup> Underwriting these

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<sup>113</sup> Ibid, 133.

<sup>114</sup> See Honneth, "Reflexive Cooperation," 7, for a brief discussion of the Durkheim-Dewey link, and the curious absence of scholarly discussion on the link, despite the rich potential triangulation between the two figures and Hegel.

<sup>115</sup> Herbert Spencer. *The Principles of Sociology, Vol I.* (1879), 448-480, cited in Dewey, *Principles of Instrumental Logic*, 143.

<sup>116</sup> Dewey, *Principles of Instrumental Logic*, 146. Itl added.

<sup>117</sup> Ibid, 150.

<sup>118</sup> Ibid, 123.

conceptions is the claim that the “economic self has a very definite content, whereas the metaphysical self is empty of content” – both abstraction and “not in process of construction or appreciation but already there.” (ED, EW1, 243). And this metaphysical emptying of the self, and the impoverished motivation of economic man, is further mirrored in the distorted logic of obligation and normativity as Dewey lays out elsewhere.

In turn, to distinguish between aristocracy and democracy on numerical grounds fails thirdly to see the chief difference is in democracy’s turn to the individual himself, and the interests pursued not be “put forward into man from without” or “if necessary, thrust by force into their proper positions in the social organism” as in an aristocracy but to “begin in the man himself, however much the good and the wise of society contribute.” (ED, EW1, 243). To begin with a state and to see the individual “thrust by force” undermines that same individual claimed to be the locus of value and freedom among liberals. It confuses the utility of the state in his being thrust, by law, into his proper place. In short, it claims sovereignty and law find its moral justification through claiming antecedently the goods that need protection for the individual. The core of the normative case for democracy — the value vis-a-vis liberty, equality, and modern progress — emerges from that redefinition of the role of the individual and his relationship to society as a whole. Dewey writes, “there is an individualism in democracy which there is not in aristocracy; but it is an ethical, not a numerical individualism; it is an individualism of freedom, of responsibility, of initiative to and for the ethical ideal, not an individualism of lawlessness.” (ED, EW1, 244). Instead, the value of the individual is not his abstract rights against others and the state, or in a maximization of personal utility under a hedonistic model, or even a contribution to a social utility or general good over and above each individual.

His commitment to the relationship between the individual and the broader social whole turned to a concept of ‘self-conscious personality’ that becomes the determinate realization of “spiritual progress of mankind”. Here, Dewey’s Hegelianism was interpreted with an insistence on individual moral will as “the law of personality.” As he writes:

it must be remembered that the individual is something more than the individual, namely, a personality. His freedom is not mere self-assertion, not unregulated desire. You cannot say that he knows no law; you must say that he knows no law but his own, the law of personality; no law, in other words, externally imposed, however splendid the authority and undoubted the goodness of those that impose it. Law is the objective expression of personality. It is not a limitation upon individual freedom; it is correlative with it. Liberty is not a numerical notion of isolation; is it the ethical idea that personality is the supreme and only law, that every man is an absolute end in himself. The democratic ideal includes liberty, because democracy without initiation from within, without an ideal chosen from within and freely followed within, is nothing. (ED, EW1, 244-245. Itl added).

The liberty to develop this personality is not restricted by law; law in Dewey’s early formulation, becomes the “objective expression of personality” in its ideal form as morality objectified, or an expression of the individual’s ability to realize his unique personality. The formulation is more suggestive, I believe than revealing: namely how to understand personality in terms of ‘law’ and how Dewey imagines it as distinct, if at all, from a Kantian moral law, and whether democracy might be best equated as a kingdom of personalities realized.

What is clear is that personality must be initiated by the individual without any antecedent claim as to the social utility of action, or for the express purpose of any division of labor, as value cannot be determined until that ‘personality’ is actually initiated in action undertaken by the individual herself. This reciprocal relationship between moral law and individual personality underwrites Dewey’s conception of power and freedom. Freedom is entailed by the active realization of personality through contingently-determined individual actions in a social environment. It cannot be an obligation or duty imposed from without, and “every action which is not in the line of performance of functions must necessarily result in self-enslavement.” (E1,

EW3, 313). This foundational insistence on autonomy is correlative to democratic equality – no longer defined as the reduction on dead level of all the diverse qualities and merits of individuals into unit of value, but the emergence of equal opportunity to develop that personality.

Democratic equality then is the essence of that “form of society in which every man has a chance and knows that he has it – and we may add, a chance to which no possible limits can be put, a chance which is truly infinite, the chance to become a person. Equality, in short, is the ideal of humanity; an ideal in the consciousness of which democracy lives and moves.” (ED, EW1, 246).

The potential disconnect with the moorings of the system is not merely an ideological basis open to manipulation — though one that Dewey, rightly, is vigilant towards — but one that in fact realizes and makes known the participation of each in the process of individual development.

This, ultimately, forms also the normative core of law itself both moral and positive — the feeling, and reality, that legal subject and legal official are reciprocally responsible for the determinate institutions that concretize these processes such that each person has “the chance to become a person.” They are and know they are all equally participants in the legal game in its administration and in constituting its authority and meaning.

### **The Moral Motive**

Of course, the question then in its familiar Rousseauian formulation is how laws may be imposed such that it does not impinge upon but facilitates each individual ‘expression of personality’ and freedom? Or, more simply put, how can the mutuality of freedom and obligation be worked out in practice? For Dewey, the specter of the authoritarian state or the imposition of the absolute on the individual was parried with this specific conception of freedom as realized only through the free development of individual personality. As with the issue of command, this

freedom was not to be directed from above and limiting the potential of the free play of action. As became clear even in his early works, there could be no legitimate authority wholly and permanently outside of the self, in a determinate superior. Legitimate domination itself is an oxymoron. This is a commitment Dewey began to forge beyond Rousseau, Austin, Kant, and Hegel, while still preserving freedom and the possibility of unity in political and moral life.

Consciousness of one's equal share and value within the democratic system itself is a foundational feature, but Dewey identifies a break between consciousness of an ideal and its realization. The sticking point for him was in understanding the *motivation* of the free individual will in making concrete the unity of purpose underwriting the social organism — itself of a piece of the consciousness underwriting social solidarity. The hedonism of utilitarianism couldn't explain satisfactorily the motivation to obey in the name of the general happiness of society, or coercive obligation more broadly. As in the division of labor, motivation might be a feeling of others' demands, and to work in tandem with them for the satisfaction of all. But the problem identified by Dewey in both Rousseau and Austin's conception of sovereignty, and his interest in these early works – between the relationship between the universal and particular – was explicitly replicated in the 'metaphysics of ethics' that underwrote these theories.

Dewey's 1890s lectures also explored the importance of moral motivation and components of subjective right – of virtue and character, which contribute to the realization of this obligation. Dewey made explicit that freedom could be realized only via a holistic conception of the moral self and character as a whole. His critique of T.H. Green's ethics on these grounds seemed to signal at least some break from his early idealism. Dewey writes, "Green takes the bare fact that there is unity in moral experience, abstracts that unity from experience (although its sole function is to be the unity of experience) and then, *setting this unity*

*over against the experience robbed of its significance*, makes of the unity an unrealized and unreliable ideal and *condemns the experience*, shorn of its unity, to continual dissatisfaction.” (GMM, EW3, 169, itl added.) Green’s claim that the individual must suppress individual lower desires so as to give rise to these higher commitments to the social organism, which will reciprocally reward his pursuit of his unique personality. The simple positing of a universal ideal that must be realized in a concrete form itself suggests a partiality against actual experience and human action insofar as it can never fully realize the ideal and unify the ideal with the actual. As suggested above, the very fact of this division between a moral self and a moral ideal left room for the locus of sovereignty or moral authority as determinate and hierarchical division to return: whether between the lower and higher selves, or between the self and the state, which could embody a higher ethical good to which the individual could find freedom and morality through obedience.

Rousseau, and Kant, and no less Spencer, Austin, Bentham, and Green, saw the basis of moral motivation to be a presupposition of moral agents acting together, each splintered in how that motivation could be cultivated in practice. Each turned to moral education and the creation of a kind of fellow feeling, or a necessary presupposition and faith for the very performance of moral actions. In the latter formulation, ethics and obligation posited a moral self that needed to realize itself through adherence to what was objectively right, for a greater good, and failure to so align subjective motivations with this objective right was a moral failure of the self. It is the bare presupposition that unity in the absolute, and the reconciliation of the partial self with that ideal was the meaning of ethics and the end of the moral agent. But, Dewey warned, it could tell us nothing about how that reconciliation could actually guide in actual problematic situations. He writes, “This unconditioned law not simply fails to carry with itself any way of getting concrete,

but it stands in negative relation to any transfer into particular actions. It declares: ‘what you do, you will come short of the law which demands a complete realization; and you can give only inadequate obedience, since your action is limited through your want at the moment of action.’” (GMM, EW3, 165) Even the conception of a “better” versus an absolute duty or obligation Dewey rejects as failing to explain how “the general consciousness of a better [can] be brought into such relation with the existing lines of action that it will serve as an organ of criticism, pointing out their defects and the direction in which advance is to be looked for?” Dewey writes, “the negation must be with respect to an identity involved in both the compared terms before it assists in judgment; that is, the ideal must be in the actual which it condemns, if it is to really criticize; an external standard, just because it is external, is no standard at all. There is no common ground, and hence no basis for comparison.” (GMM, EW3, 167) That is, the standard of morality must be immanent in action, so as to presuppose by definition the partiality of moral self vis-à-vis morality.

Austin, Spencer, and Green could not adequately account for the gap between motivation and obligation, moral good and the actual experiences underwriting individual moral action.<sup>119</sup> The ability to make sense of the natural world and human activity was through the intervention of *intelligence*. But this was precisely what Spencer eviscerated from science and ethics in claiming that evolutionary laws explained and justified both. For Dewey, intelligence, ethics, science, and the natural world itself had to be understood on the grounds of basic experience, if it was to evade the metaphysical leaps and philosophical problems of these accounts.

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<sup>119</sup> Jennifer Welchman, *Dewey's Ethical Thought* (Ithaca, NY: Cornell University Press, 1997) offers the most comprehensive examination of Dewey's early ethical thought and his move from absolutism to his early experimentalism (up to his 1922 *Human Nature and Conduct*, with primary focus on the first Ethics lectures of 1908). However, Welchman's text does not link Dewey's work to his political writings, and leaves unexamined the concrete implications that appear to motivate Dewey's transition: the possibility of domination implied by the Hegelian dialectic and State, and its implications for human flourishing and spontaneous growth — and freedom — outside of the state.

Westbrook characterizes Dewey's critique as a neo-Hegelian reading of Green's neo-Kantian interpretation of ethics or the attempt to shape an 'experimental idealism' from "merging absolute idealism, functional psychology, and instrumental logic."<sup>120</sup> But Dewey's dissatisfaction with the assertion of an ideal unity that "condemns the experience, shorn of its unity" could be applicable as clearly to the moral law as to the Ideal State, even if it embodied a universal and not hierarchical and divided society on the basis of domination. While self-realization and social unity were mutually reinforcing, the assertion of the relationship required more than the bare assertion of its value. Moreover, that assertion required more than the mere positing of an absolute state that could brandish an absolute will that did not take into account or actual provide the mechanism whereby individual desires and actions could come into alignment with that will, outside of fear of sanction or as a partial will vis-à-vis a totality or unity over and against it. As Dewey would come to argue, that ideal and unity could not be presupposed either, but must be understood via the touchstone of actual experience.

The implicit suggestion of this chapter has been that the Civil War context foregrounded Dewey engagement with Hegel's dialectic and his decisive rejection of Austin, as well as Dewey's attempt to salvage the possibility of political unity amidst deep conflict.<sup>121</sup> This motivation from biography, at least, remains speculative, but the corresponding intellectual transition has been thoroughly documented: in the following three decades Dewey would turn to social psychology, scientific method through experimentation, and an interactive model of experience with a thoroughly naturalized 'metaphysics' to better understand issues of freedom, will, force, and ethics and democracy. Understanding processes of "consciousness" shift to

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<sup>120</sup> Westbrook, *John Dewey and American Democracy*, 60.

<sup>121</sup> Though perhaps this may indicate Dewey's turn less from the *Logic* studies most carefully by the British and American Hegelians, to the latter study of the *Phenomenology*, as it pertains to the question of domination and freedom.



psychological studies of how we think, beyond Hegel's logical system or a metaphysics of absolute spirit or divine unity. Between the *Rechtsstaat* and experience, as I attempt to show in the following chapter, Dewey would come to develop an alternative to transcendental logic and method of absolute idealism, with his shift towards historical and psychological studies of social phenomena, will, progress and action. His pragmatic understanding of thinking and knowing – and how we judge, value, and act – would come to ground his mature account of democracy and the public as the touchstone of associated life.

## II.

### BEYOND POSITIVISM AND EVERYDAY PRAGMATISM

#### Towards A Deweyan Theory of Law and Democracy

The previous chapter left off at a critical turning point in Dewey's philosophy. Three tasks remain in our turn to Dewey: (1) to find an alternative to Austin's model of sovereignty and law which presumed determinate divisions between lawgivers and subjects, and force and will (2) to move beyond the non-empirical moniker of "science" and "anthropology" from Maine and Spencer that united "a theory of knowledge which makes science impossible" and "intelligence a product of events and forces which are not intelligent"; (3) to develop and defend an account of ethical democracy, which preserved a place for individual freedom and development.

The primary goal in this chapter is to present a framework for a Deweyan theory of law and democracy, which addresses the tasks laid out from his critique of Austin and Maine. In addition, I aim in this chapter to distinguish this Deweyan theory from Richard Posner's theory of law and democracy. As discussed in the introduction, Posner is most well-known for his efforts to apply his minimal 'everyday pragmatism' to law, shed of Dewey's radical liberal democratic commitments. Posner claims that there is no necessary continuity between the basic pragmatic takeaways from Dewey's thought applicable to understanding laws and his democratic theory. Posner is not alone in arguing that Dewey's pragmatism has no "political valence." Perhaps most famously, Richard Rorty has argued that there is no need to see the components of Dewey's philosophy as continuous with his championing of democracy. A parallel argument has been made by the legal scholar Thomas Grey, that legal pragmatism is "freestanding" and can be

separated from Dewey's philosophy more generally.<sup>1</sup> Legal pragmatism, therefore, is "banal" insofar as it simply reflects what most judges already do – think about social consequences, attempt the best decisions given the facts and laws in play – and does not require an understanding of Dewey's pragmatic philosophy beyond this basic "everyday" sense.

I argue in this chapter that this interpretation of Dewey does not take into account the democratic implications of his philosophy for a general account of law. As Robert Westbrook rightly notes, "[Dewey's] more technical philosophical work during the twenties comprised his most concerted effort to date to strengthen the case for [democracy as a moral ideal] by providing metaphysical warrants on its behalf."<sup>2</sup> By understanding the democratic implications of his philosophy, we can also see how Dewey's thought provides normative resources for understanding the nature of law that comports with democratic societies and institutions. While his brief essay on law, as Posner points out, does not explicitly mention "democracy" within it, in this chapter, I sketch ways in which Dewey establishes an understanding of laws that comports with a particular normative commitment to his robust conception of ethical democracy. As this chapter argues, the normative value of laws and the legal processes process requires top-down *democratization*, not only of the state and its laws, or in processes of adjudication or legislation, but among the associations and the individuals within it.

Though Dewey's legal writings are limited, his influence on lawyers and judges, as many have noted, far outstrips his output on issues pertaining to the law.<sup>3</sup> In reconstructing a Deweyan theory of law and democracy, I aim to offer a supplement to existing treatments of Dewey's legal

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<sup>1</sup> Grey, "Freestanding Legal Pragmatism."

<sup>2</sup> Westbrook, *John Dewey and American Democracy*, 320.

<sup>3</sup> Edwin Patterson, "Dewey's Theories of Legal Reasoning and Valuation," in *John Dewey: Philosopher of Science and Freedom*, ed. Sidney Hook (New York: The Dial Press, 1950), 118-133, traces some of this influence. Posner notes in the decade prior to the publication of his work (2003) over 600 law review articles in the Lexis database cite Dewey. Posner, *LPD*, 97fn1.

influence, which have almost exclusively dealt with Dewey's essay on adjudication, "Logical Method and the Law" (1924). Few attempts have been made to systematically draw together features of his philosophy to elucidate the claims he makes in the context of law.<sup>4</sup> Among those works, scholars have not tied his legal essays to his theory of human conduct, and the relationship between customs and law – a proposition Dewey said space and time did not allow him to take on explicitly in his brief essay, "My Philosophy of Law" (1941). Nor have they linked his legal works to Dewey's broader philosophy, especially his treatment of inquiry and ethics, despite the deeply ethical valence we can find in Dewey's treatment of laws and social institutions more generally.

I aim in this chapter also to provide a basic overview of Dewey's philosophy, which will help orient the reader in subsequent chapters. As such, I provide here detailed exposition of his philosophical texts, which will ground the discussion of Dewey's treatment of the public and the state, in the following chapter. We will see also how Lon Fuller develops features of Dewey's philosophy in his critique of Hart and in his legal philosophy more generally, in Chapter 4.

The chapter is organized as follows: I turn firstly in Section 1 to Dewey's essay, "My Philosophy of Law" to provide a general framework for a Deweyan theory of law and democracy. I begin to supplement this account next with a reading of his early essay, "The Reflex Arc Conception in Psychology" (1896) and his *Human Nature and Conduct* (1922). In these works, Dewey develops an interactive model of thinking and action, and account of habits and customs, which provide important lessons for his understanding of laws as a type of social custom. I discuss the implications of this understanding of laws, especially as they offer an

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<sup>4</sup> The works that have attempted to tie together Dewey's works here include, Gail Paulus Sorenson, "John Dewey's Philosophy of Law: A Democratic Vision," *Educational Theory* 30, no. 1 (1980), 53-65; Anton Donoso, "John Dewey's Philosophy of Law," *University of Detroit Law Journal*, 36 (1958); Brian Butler, "Democracy and Law: Situating Law within John Dewey's Democratic Vision," *Ethics and Politics* 12, no. 1 (2010): 256-280; Jay Wesley Murphy, "John Dewey – A Philosophy of Law for Democracy," *Vanderbilt Law Review*, 14 (2013): 1-27.

alternative to assumptions underwriting Austin's command theory. In Section 2, I explain the basic features of Dewey's pragmatic philosophy, with a specific assessment of concepts of experience and experimental inquiry. We see how his turn to experimental scientific methods "democratizes" metaphysics and epistemology, by placing everyday experience as the touchstone for knowledge. In this exposition, I argue also that Posner advances a deflationary view of Dewey's philosophy, which in turn has bearings on the relationship between the relationship between that philosophy and Dewey's democratic theory. The full moral and democratic import of Dewey's turn to experience will be shown in this chapter and the next. In Section 3, I turn to Dewey's theory of valuation, which provides an empirical method for determining and securing values and interests based on his experimental method of inquiry. I show how Dewey, unlike Posner, believed that values do not reflect purely subjective preferences or absolute goods or ends derived from a priori claims outside of experience. And they can and must be secured and evaluated through intelligent reflection. This, in turn, paves the way for a thoroughly social method for determining and expanding on values that address concrete social problems key to Dewey's democratic theory, as well as a theory of democratic adjudication. In Section 4, I provide a selective account of Dewey's ethics and moral theory, so that we can begin to understand how reflection and deliberation, as well as the role of social relationships and empathy create the necessary tools for evaluation and reforming our basic social institutions. I conclude by tying together the aspects of the foregoing discussion to see how Dewey's account of democracy as a moral ideal of associated life shapes at every turn the normative implications of his philosophy. I will argue that Dewey's ideal of democracy should be understood as a precondition for the cultivation of habits of intelligence and empathetic moral deliberation. As such, democracy is necessary for the development of intelligent laws and

institutions which secure equal freedom for the individual, and the capacity to deploy intelligence to address shared social problems.

## 2.1. CUSTOMS, INTERACTIONS, AND LAW

In this section I offer a schematic treatment of Dewey's understanding of law, as outlined firstly in his "My Philosophy of Law", while also turning to his early and pioneering essay on the "Reflex Arc Conception in Psychology" and his *Human Nature and Conduct*. These works provide a view of social activity as interactive, functional, and adaptive to natural and social imperatives. In these works, we can see also how Dewey provides additional tools for understanding the psychological bases on which Austin's command theory is advanced and hence why Austin's conception as a whole is misinformed. Moreover, we begin to see a distinctive dimension to 'pragmatist jurisprudence' as currently articulated by scholars like Thomas Grey, who sees it as "follow[ing] from the jointly instrumental account of inquiry characteristic of American philosophical pragmatism."<sup>5</sup> To be sure, the contextual and instrumentalist accounts are features to be gleaned from a turn to Dewey's thought. But Dewey's is not quite, *pace* Grey, "a synthesis of the Historical Jurists' descriptive emphasis on law as custom and practice with the Analytical Utilitarians' instrumentalist approach to legal criticism and reform."<sup>6</sup> What I highlight here is the extent to which Dewey's conception of custom and the 'instrumental' nature of law is informed by an intersubjective and social interactive model of action. Throughout this chapter, we can see how Dewey's philosophy moves beyond both the historical jurists' conceptions of custom and the instrumentalism of the Utilitarians.

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<sup>5</sup> Grey, "Freestanding Legal Pragmatism," 25.

<sup>6</sup> Grey explicitly links his conception of pragmatist jurisprudence to Dewey's "My Philosophy of Law" essay. *Ibid.*

In turning to the decline of the Austinian concept of sovereignty, nearly sixty years after his early essay on Austin, Dewey writes:

The doctrine has lost much of its original appeal because development of the social sciences, viz., history, anthropology, sociology, and psychology, has tended to make sovereignty at best an expression of the working of a vast multitude of social forces, and at worst a pure abstraction. The sovereignty doctrine of the source of law thus represents a transition from acceptance of ‘sources’ outside of social actions into one within them, but a transition which fastened on only one social factor and froze that one in isolation. When it was discovered that social customs, and to some extent social interests, lord it over any specific set of persons who can be picked out and called ‘sovereign,’ the doctrine declined. (MPL, LW14, 120)

Dewey’s heralding of the decline of the Austinian concept of sovereignty, at least for the reasons he cites, was premature. His essay on law was part of a collection with contributions by the likes of Lon Fuller, Walter Wheeler Cook and Karl Llewellyn, who were directly influenced by his philosophy. But, as I will argue more fully in Chapter 4, it is the tendency to see the source of law as fastening “on only one social factor” or a “specific set of persons” and freezing it “in isolation” – and not of social customs and interests or even “a vast multitude of social forces” – which continues to animate legal positivism today.

In his competing account, Dewey argues that “social processes have conditions which are stable and enduring as compared with the multitude of special actions composing the process. Human beings form habits as surely as they perform special deeds, and habits, when embodied in interactivities, are customs. These customs are, upon the view here taken, the *source* of law.” (MPL, LW14, 118). Dewey takes as an extended metaphor of social and legal processes:

[...] a river valley, a stream, and banks. The valley in its relation to surrounding country, or as the ‘lie of the land,’ is the primary fact. The stream may be compared to the social process, and its various waves, wavelets, eddies, etc., to the special acts which make up a social process. The banks are stable, enduring conditions, which limit and also direct the course taken by the stream, comparable to customs. But the permanence and fixity of the banks, as compared with the elements of the passing stream, is relative, not absolute. Given the lie of the land, the stream is an energy which carves its way from higher to lower levels and thereby, when viewed as a long run (in time as well as in space) process,

it forms and reforms its own banks. Social customs, including traditions, institutions, etc., are stable and enduring as compared with special deeds and with the serial arrangements of these acts which forms a process. But they, and therefore the legal regulations which are their precipitated formulations, are only relatively fixed. They undergo, sooner or later, more slowly or more rapidly, the attribution of ongoing processes. For while they constitute the structure of the processes that go on, they are the structure of the processes in the sense that they arise and take shape within the processes, and are not forced upon the processes from without. (MPL, LW14, 118)

Dewey's Lyellian imagery situates those human institutions as ongoing customs, modes of interaction that orient human activity and have become regularized and accepted over time. They, along with "the legal regulations which are their precipitated formulations" are part of ongoing social processes. Customs structure social interactions, and constitute them at the same time.

The energy or 'stream' of human activity can disrupt a state of equilibrium (pre-existing environment or custom) and lead to the development of altogether new customs, activities, habits, means, ends and desires that are orienting action. But that process is not *sui generis*; it is born of the very customs and activities it will come to alter, which are "the structure of the processes" themselves. As Dewey writes, "law must be viewed both as intervening in the complex of other activities, and as itself a social process, not something that can be said to be done or to happen at a certain date.... 'law' cannot be set up as if it were a separate entity, but can be discussed only in terms of the social conditions in which it arises and of what it concretely does there." (MPL, LW14, 118) As he continues, "what is called *application* is not something that happens *after* a rule or law or statute is laid down but is a necessary part of them; such a necessary part indeed that in given cases we can judge what the law is as a matter of fact only by telling how it operates, and what are its effects in and upon the human activities that are going on... A given legal arrangement is what it does, and what it does lies in the field of modifying



and/or maintaining human activities as going concerns. Without application there are scraps of paper or voices in the air but nothing that can be called law.” (MPL, LW14, 118)

In turning to Dewey’s theory of habits and law at some length, we can draw a finer point in how Dewey actually sees how laws as a type of ‘precipitated’ custom as it operates in its stable condition. Secondly, we can extract from that account Dewey’s normative claim on behalf of what laws ought to do, and begin to show its links to his democratic theory. As for the first aim, Dewey simply did not develop an account of law extensive enough to warrant finer-grained comparison and distinctions with theorists and jurists with whom he certainly shares affinities, like Eugen Ehrlich and Roscoe Pound. But Dewey’s conception of law, as I will argue, is clearly continuous with the ‘functionalist’ style of law associated with thinkers like Leon Duguit, Laski, Ehrlich, and judges like Cardozo.<sup>7</sup> As Martin Loughlin argues, this “practical, reformist approach” has been tied historically “to the broader political movement encompassed under the broad heads of new liberalism, social democracy, progressivism, or democratic socialism” and a philosophical basis. Those bases include: the belief in law’s function in promoting human improvement; law as evolutionary; its social dimension; promoting social solidarity; the subjection of government to duties, not sovereign right; the purposiveness of public law; a functional promotion of freedom; a relation between rights and common goods. It included, too, in Loughlin’s words, a “broader, sociological conception of public law – one that extends beyond positive law to embrace a particular way of living.”<sup>8</sup> Loughlin also identifies classical pragmatism as a direct influence on the development of the functionalist style of law that

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<sup>7</sup> Martin Loughlin, “The Functionalist Style in Public Law,” *The University of Toronto Law Journal* 55, no. 3. (2005). He writes, “as it emerged in the early decades of the twentieth century, the functionalist style in public law presented itself in direct opposition to the prevailing orthodoxy of analytical legal positivism, underpinned by the political values of classical liberalism and exemplified in the work of A.V. Dicey.” On Cardozo’s functionalism, see Edwin Patterson, “Cardozo’s Philosophy of Law: Part II,” *University of Pennsylvania Law Review* 88, no. 2 (1939).

<sup>8</sup> Loughlin, “The Functionalist Style,” 363-364.

emerged in the early 20th century. However, his depiction of the classical pragmatism of Dewey turns exclusively to his early works and assimilates it to a Hegelian idealism and British empiricism. Here, I sketch the distinctive aspects of Dewey's thought that extend beyond the influence of idealist philosophy that Loughlin traces.<sup>9</sup>

Dewey never shared with pluralists like Ehrlich (or more explicitly, Laski and Cole) a belief that the state, even as developed out of complex societies with multiple normative orders, lacked a distinctive normative authority or function.<sup>10</sup> Dewey does not offer a detailed account of what is added by the 'formulation' of customs into laws in his short essay on law.<sup>11</sup> But, for Dewey, there is clearly something qualitatively and normatively distinct when something is given the official imprimatur of the state. As he wrote in a brief book review, "customs themselves conflict, and the source of law may be in the need of adjudicating such conflicts rather than in the bare fact of customs themselves. In this case, a rule of law cannot be conceived as the mere reduplication in formal statement of antecedent custom, for it involves an element which is additive and in a sense, as viewed from the standpoint of prior custom, creative. To recognize a custom as authoritative and obligatory is to give that custom a new status; in a way it represents the beginning of a new custom. I do not think it paradoxical to say that while there

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<sup>9</sup> Ibid, 388-391.

<sup>10</sup> See Chapter 3 for discussion.

<sup>11</sup> Moreover, Dewey's account of customs does not provide a complete response to the work of on the relationship between conventions and legal norms undertaken today in current legal scholarship. Perhaps the most influential works on conventions and laws recently have been from Andrei Marmor and David Lewis. Marmor's *Social Conventions: From Language to Law* (Princeton: Princeton University Press, 2009), for example offers an investigation into the nature of conventions that highlight their social facticity and their 'arbitrariness' insofar as they are largely path-dependent and do not themselves provide complete reasons for compliance. Marmor also distinguishes between coordination conventions, which David Lewis's account highlights as the basis of legal norms, and constitutive conventions, which roughly present the rationales for participating in conventional systems in the first place. Marmor applies his framework in understanding H.L.A. Hart's rule of recognition as a deep convention, in which judges and officials apply a plurality of reasons, including moral reasons, for adhering to their practices. This extremely rough account of Marmor's work is offered only to suggest that the particularities of conventional or customs themselves continue to be worked out in contemporary scholarship. However, my concern, as addressed in Chapter 4, rests primarily in the social nature of law and the type of hierarchical divisions that Marmor himself see as necessary in legal systems more generally.

would not be laws unless there were social customs, yet neither would there be laws if all customs were mutually consistent and were universally adhered to.” (RLM, LW3, 327) What is ‘additive’, especially vis-à-vis the state, will be addressed in the discussion of the state offered in the following chapter. What Dewey did appear to share with pluralists was their *empirical* claim that actual normative authority was diffuse among plural associations, especially within the economic domain.

But *how* that ‘additive’ fact originating in the state *should* create a ‘new’ custom intelligently and effectively in social life became the central preoccupation of Pound’s jurisprudence. This was Dewey’s interest as well, but his concern was more radical: because he understood law as constituted by its application and effect in social practices and normative orders, that meant too that *all* social practices had to be considered and improved to improve law. The methods for implementing and proposing better laws becomes clearer in the study of Dewey’s experimental method, and his theory of valuation, discussed below. Dewey’s radical proposals for democracy as a way of life, and in all domains, reflects the scope of this claim. Secondly, Dewey’s aims, which I note here and discuss through the course of this chapter and the next, is not directed only towards improving individuals as they are. As Marc Stears writes, Dewey claimed, “although it was important to recognize that ‘social arrangements, laws, institutions are made for man’, as the British pluralists always insisted, it was just as important to note that ‘they are not means for obtaining something for individuals’ as Cole and Laski had claimed. Rather, and most crucially, Dewey insisted, they are really ‘means of *creating* individuals’ ... Institutional reorganization should not, then, be intended better to satisfy the desires, demands, and preferences of given individuals but rather to forge different sorts of

characters, or to ‘educate every individual into the full stature of his possibility.’”<sup>12</sup> Though the claim may seem cryptic and overtly idealist, turning explicitly to Dewey’s account of habits, customs, and character show an initial basis for this claim from the nature of social interactions themselves.

### **Beyond Austin: The Reflex Arc Concept in Psychology**

The first step towards an alternative conception of law and social activity was in dismantling the psychological assumptions underwriting Austin’s command theory of law. Dewey’s celebrated 1896 essay on the ‘reflex arc’ conception marked a watershed in the nascent field of psychology and experimental science.<sup>13</sup> The essay, written two years after his work on Austin, provides also a crucial move beyond Dewey’s inadequate conception of the social organism and the organic relationship between individual and society. In its stead, Dewey begins to develop an action-theoretic account of the transactional relationship between environment and individual actor, which he continued to flesh out in his *Human Nature and Conduct*.<sup>14</sup> The functionalist psychology also sets the groundwork for moving past the mind-body dualisms and view of philosophy as a study of “a separate and isolated mental world in and of itself” versus “physical objects as correspondingly complete and self-enclosed” (EN, LW1, 23-24). This

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<sup>12</sup> Stears, 150. Citing Dewey, *Reconstruction in Philosophy* 194; 186. Pound himself had read Laski, but it is fair to say his sympathies remained squarely within the Progressive state paradigm.

<sup>13</sup> Dewey developed the essay during his graduate studies at Hopkins under G. Stanley Hall, and most famously, in Dewey’s later association with William James and others at the University of Chicago in the 1890s hammering out the fundamentals of a functionalist psychology as an alternative to structuralist models of mind and action. Dewey’s essay is generally considered a mark of the growing influence of James and James’ works on psychology in his thought, and a departure from Hegelian idealism. On the distinction between Dewey’s circuit conception (and its Hegelian residues) and James’ treatment of consciousness as a ‘field’, and their shared turn to experience and search for new ‘radical’ empiricism, see Kloppenborg, *Uncertain Victory*, 64-73. Richard Bernstein, *John Dewey* (New York: Washington Square Press, 1966), 14-15.

<sup>14</sup> As Hofstadter argues, “the focus of the logical and historical opposition between pragmatism and Spencerian evolutionism was in their approach to the relationship between organism and environment.” Hofstadter, *Social Darwinism*, 123.

dualism, we shall see, still pervades understandings of liberalism, jurisprudence, and democratic theory.<sup>15</sup> While the essay itself does not address laws or sovereignty, it provides us still with an important analytical tool – and support from psychological findings – to buttress Dewey’s critiques of Austin presented in the last chapter.<sup>16</sup> Dewey’s psychological findings are still widely accepted today<sup>17</sup>; the normative claims we can draw from them remain relevant as well.<sup>18</sup>

The traditional reflex arc conception that Dewey criticizes explains human behavior in three steps: a moment of external stimulation; a cognitive or internal response or ‘central process’; followed by an external motor response. The three moments come in temporal sequence – as a flame is seen by a child, who is drawn to the light, and then reaches out to grasp it. In the next sequence, the child’s burn results in pain and the withdrawing of the hand. In short,

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<sup>15</sup> Dewey’s functionalist psychology should also be distinguished from the start from the behaviorism that emerged in the first decades of the 20<sup>th</sup> century and took root shortly thereafter. As Edward Purcell recounts, between 1913 and 1919, John Watson started forging the behaviorist position that announced “psychologists should abandon the method of introspection, abjure the concept of consciousness, study only overt behavior guided by the stimulus-response relationship between the individual and his environment, and reduce all mental phenomena to observable physical processes” and became systematized by the 1930s in works by B.F. Skinner and his colleagues. Purcell, *The Crisis of Democratic Theory*, 18. Though Dewey and the pragmatist tradition – and most strands of Legal Realism – are often collapsed into this behaviorist strand of psychology (and the latter, often rightly so), Dewey’s functionalism explicitly resisted the quest for absolute objectivity in the science and its rejection of mental phenomena as variables in understanding behavior; in fact, Dewey’s remains an exemplary critique and alternative to those very attempts to bifurcate and isolate stimulus and response, internal and external human functions. On the behaviorist strand in the Legal Realist Tradition, see Purcell, “American Jurisprudence between the Wars: Legal Realism and the Crisis of Democratic Theory,” *The American Historical Review* 75, no. 2 (1969).

<sup>16</sup> Though perhaps a side note of interest until we reach chapter 4, Dewey’s account may have been under the influence of Wundt, as well as William James. See John Shook, *Dewey’s Empirical Theory*, 71-121. Wundt and Wittgenstein, in turn, were major influences on H.L.A. Hart’s own understanding of rule following and the development of his ‘internal point of view’ discussed at length in Chapter 4. As I argue there, the distinction rests in what law does within a society, not simply by the rule-guided behavior of legal officials. In short, while Hart’s ‘internal view’ guidance for legal officials is adapted from Wundt and Wittgenstein, the move Hart makes, following Austin, is suggesting that such an internal point view for rule-following does not apply to the public. These claims will come to fruition in Chapter 4.1-4.2.

<sup>17</sup> On the continued viability and influence of Dewey’s psychological theories in contemporary cognitive studies, see Mark Johnson, “Cognitive Science,” in *A Companion to Pragmatism*, ed. John R. Shook and Joseph Margolis (Malden, Mass.: Blackwell, 2006), 374. David F. Barone, James E. Maddux, C. R. Snyder, *Social Cognitive Psychology: History and Current Domains* (New York: Springer Science & Business Media, 2012), 85. See also Svend Brinkmann, “Dewey’s Neglected Psychology: Rediscovering his Transactional Approach,” *Theory & Psychology* 21, no. 3 (2011), on Dewey and ecological psychology today.

<sup>18</sup> My summary of this essay is informed by interpretation and context from Shook, *Dewey’s Empirical Theory* 71-121 and Bernstein, *John Dewey*, 16-21.

the reflex-arc represents a mechanistic worldview of action and reaction, and an early attempt to ground psychology in Newtonian physical sciences. That mechanistic worldview is perhaps most closely associated historically with Hobbes, whose account of action – shared with contemporaries like Descartes – was built on the basic understanding of matter in motion moved by external stimuli and responses. The stimulus-response model itself finds a direct progenitor in Hume’s belief-desire model, and as will be shown below, grounds also the premises of a strong fact/value distinction. In this model the stimulus prompts an initially inert will to action, and the nature of the action will be determined internally to the will (by their psychological setup). This relationship was fundamental to Austin’s conception of commanding – of a determinate will that commands, as the source of lawful behavior that prompts obedience from the legal subject. Dewey shows that this account mis-describes how human activity and thinking, and responding from outside stimuli, *actually* works. As such, a conception of sovereignty, or a theory of law, grounded on these same antiquated notions of norm or law-guided behavior rests on a dubious psychological premise.

The reflex arc does not anticipate the prior state of the subject. In response to a loud noise, “if one is reading a book, if one is hunting, if one is watching in a dark place on a lonely night, if one is performing a chemical experiment, in each case, the noise has a very different psychical value; it is a different experience.” (RAC, EW5, 100) Sounds do not simply impress themselves on us passively; we must be listening and receptive to that noise. There is no absolute or fixed reality that can be imputed to a noise, which exists independently of the person’s actual reaction. Nor can the context in which that noise occurs be seen as irrelevant to both the person’s reactions *or* the nature of the noise itself.

Dewey’s alternative to the reflex-arc view of isolated stimuli is of organic coordination –

a circuit in lieu of an arc – which rejects the dualisms between subject and object, psychological and physical functions. According to Dewey, activity and action is the default state for individuals, not the fundamentally static and passive psyche imagined by psychologists at the time.<sup>19</sup> Human conduct is better described as a continuous circuit of activity: there may be a state of equilibrium in the environment, then disruption, to which the subject responds so that equilibrium – the preexisting state – can be restored. In short, activity does not begin or cease with the disruption, but is redirected. The agent is not a passive or discrete entity independent of the external stimulus; what distinguishes various temporal moments is the quality of the “sensor-motor coordination” or roughly speaking, the equilibrium state which is altered by the ‘stimulus’. One can look to the entire experience as integrated and performing those “functional phases” – stimulating, responding, processing, etc. – according to the moment or stage within the coordinated activity. Dewey does not deny that there is a temporal sequence of events occurring with differing qualitative features. However, the discrete separation of these activities posited by the reflex arc is replaced with their view as functional moments within a continuous process of maintaining and coordinating activity.

The implication of this view of activity and the relationship between stimulus and response is to rethink the very nature of the stimulus itself. A ‘stimulus’ like law only becomes a ‘law’ for activity because the agent is moved to respond, finds, identifies and thereby *constitutes* the stimulus with his response. The law itself is not the singular cause or source which elicits the reaction; the effect is constituted “as its matrix” by the ‘sensor-motor co-ordination’ of the subject and environment. The re-directed activity is, Dewey writes, *toward* a stimulus to *interpret* it: “The so-called response is not merely to the stimulus; it is into it.” (RAC, EW5, 98)

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<sup>19</sup> See Barone, et. al, *Social Cognitive Psychology*, 85.

Something with the legal form of a law becomes such only through the actual activity or interpretive act of the agent with this law. This sensory-motor coordination depends on context: Thunder is not a “stimulus” for jumping if one is in a loud room and doesn’t hear it; each ‘stimulus’ does not uniformly affect the mind of all subjects by emitting an objective essence, which is then subjectively interpreted, which in turn provokes a physical response. The psychologist’s fallacy, as William James described it, is the assumption that a subject’s experience is confused or aberrant if it doesn’t conform to the expected suppositions or reactions: in this fallacy, the habituated response to a particular stimulus is mistakenly taken as a defining essence of the stimulus itself.

From this rough outline of the central features of the essay, we can locate preliminary tools for a critique of Austin’s command theory. Firstly, a stimulus – whether noise, flame or law – is not a *source* of activity; it re-directs existing activity. The claim finds its parallel in Dewey’s critique of Austin’s conceptions of laws and sovereignty: that the mass of social activity can be explained by the actions of a lawgiver when it is in fact only one element that may modify it. And whether it does in fact modify behavior depends on how people (collectively) interpret it in their actions. As such, to understand what any stimulus does requires looking to the preexisting activity and context in which it intervenes. It takes on different significance based on situated actors and social contexts, and is in turn, constituted by those the action that takes places in those contexts. In the study of laws, we cannot claim that a law presents a context-independent unified meaning. Nor does a law act over and against a passive person. In fact, that agent’s activity and environment is constitutive of the law’s meaning.

As one contemporary psychologist writes of Dewey’s findings, “A probable reason why much psychology in Dewey’s time, just as today, focused on the elements instead of the activity



as a whole was that if the activity was conceived as basic, it would have to mean that psychology was fundamentally qualitative and interpretative. In Dewey's eyes, psychology had to be interpretative [...]. Psychology as a science must include what the events of the world mean to the subjects. It is not a science of passive objects in interaction, but a science of human beings that constantly interpret and reconstruct the world in which they live."<sup>20</sup> So with psychology, as with political and legal studies – not only in understanding what things are, but in normative prescriptions based on this interpretive and reconstructive activity of each individual within society.

### **Habits, Custom, and the Source of Law**

The critical framework for studying behavior continued to be developed in Dewey's philosophy, especially his *Human Nature and Conduct*. Law, as we saw, is for Dewey a type of formalized custom. But custom –as well as its corollary, habit – itself is a complex concept that needs fleshing out. In fact, reading Dewey's conceptions of habit too selectively, as a purely conservative tendency that impedes growth, as does Posner, leads to additional distortions as to the radical implications of Dewey's account. As I explicate the concept, we will see that Dewey's account of human activity and customs requires re-definitions of the basic concepts of thinking, willing, self, and character. Dewey here also dismantles more fully two claims also central to the anti-democratic arsenal: (1) the conception of the individual as 'atomized' and passive, whose selfhood is distinct from social activity (or the individual/society dualism) (2) that thinking and acting are two separate acts from different parts or organs of a single person (the mind/body dualism). Without these dualisms – between individual and society, thinking and

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<sup>20</sup> Brinkmann, "Dewey's Neglected Psychology," 10.

acting – the assumptions on which accounts like Austin’s and Maine’s are based lose critical support: The sovereign law does not command passive subjects; its acts are not justified because atomized individuals cannot act or think together. In fact, the inverse is found to be true. In the following section, I apply this extended exposition explicitly to conceptions of law, and the normative claims introduced above, that customs and social institutions, like language and law, are the backdrop and precondition for individual and social progressive growth.

In his account of customs and habits, Dewey points out simply the fact that we are never outside some kind of social environment, replete with social relationships, institutions and existing laws and languages. The first building block in understanding social conduct within those thick networks of human interactivity is individual habit. Though Dewey ultimately stretches the conventional meaning of *habit*, he finds the term still captures best the nature of conduct within this matrix of exiting of future interactions and transactions: “Habit is human activity which is influenced by prior activity and in that sense acquired; which contains within itself a certain ordering or systematization of minor elements of action; which is projective, dynamic in quality, ready for overt manifestation; and which is operative in some subdued subordinate form even when not obviously dominating activity.” (HNC, MW14, 31). Habits are “an acquired predisposition to ways or modes of response,” and are not merely “bare recurrence of specific acts.” (HNC, MW14, 32). They are ways of functioning with and against the social and natural environment. And insofar as they do not actively conflict or are jolted by some problem in that environment, they constitute the equilibrium state of an active agent.

The most important environmental factors that shape individual habits are social customs. Take, for example, language, Dewey’s paradigmatic example of social custom. When a baby starts to learn a language, he does not simply absorb all meanings as a *tabula rasa*. He first may

cry simply because he has a native impulse or instinct to cry. The infant's cries are met with the language of parents or the accumulation of habitual sounds and responses to particular stimuli that are directed to communicate certain meanings. The crying turns into crying-for-attention or crying-to-be-fed. Social interactions channel human impulses and instincts, and all activity, into meaningful adaptations (habits), based on the responses they engender. Because groups of individuals face the same environment and issues, customs develop and individual habits, in turn, are influenced by and shape preexisting customs. Customs, in turn, need not be entrenched permanently without possibility of adaptation, so long as they remain adaptable to the influence of individual habits and environmental problems. Language itself adapts to usage; new words must be developed to denote new phenomena. Each individual's usage contributes to the shape and development of a shared language.

As individual habits are a way of responding, with and against the natural and social cues, they shape that environment as well.<sup>21</sup> They require, no less than breathing and walking require air and ground, "the cooperation of organism and environment [...] they are things done by the environment by means of organic structures or acquired dispositions...[and] are ways of using and incorporating the environment in which the latter has its say as surely as the former." (HNC, MW14, 15) They shape and pattern the environment itself in ways in which are activities take place. When we breathe and walk, we do something to air and ground. Nothing is ever static. Likewise, habits, like all social 'facts', are never complete in themselves, because they indicate interactive processes or activities between actors, environments, and the dispositions that are shaped and sharpened between that interplay.

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<sup>21</sup> This claim is advanced by anthropologist Franz Boas as well, in his discussions of cultures. Goldman, "Dewey from an Anthropological Point of View." Dewey shares this finding of the social and intersubjective nature of self-formation with findings from George Herbert Mead's *Mind, Self and Society*. See Rogers, *Undiscovered Dewey* at 146- 158, 279-280, and Kadlec, *Dewey's Critical Pragmatism*, 19-20, on the Mead-Dewey relationship.

Here we come to a first core claim from Dewey's account of habits, customs, and social interactivity: that the 'self' is an irreducibly social entity. This carving and shaping of meaning from the mass of ongoing activity into language and the arsenal and 'interpenetration' of ways of adapting to others and the environment, is another word for "self" in Dewey's account. As habits are not static reactions to fixed conditions, they reveal something of a person's fundamental relationship to problems presented in the external world and implicit and future *directive* in responses. It indicates both the ways in which someone has acted and adapted, and the direction in which he might continue to develop his conduct and character. Otherwise put, since being a person requires acting and doing in response to a social and natural environment, our habits defines who we are. As Dewey writes, "All habits are demands for certain kinds of activity; and they constitute the self. In any intelligible sense of the word will, they are will." (HNC, MW14, 21). As such the 'individual' is a thin fiction if it is seen as disconnected, either in his subjective and cognitive processes, or from the external world itself. This total encapsulation of the bodily and the mental deployed through directed actions – habits and thinking –is what we refer to when we see a person's character, which is only intelligible when understood through those actions and interactions within an environment, and not as a free-standing thing with a discrete and fixed ontology.<sup>22</sup> By these lights, we can also begin to see why the self is never fully formed, nor are social customs. They face new challenges and problems, and must either adapt and grow, or remain stagnant and insufficient to the task.

A second takeaway from Dewey's account of habits, and related to the first, is the

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<sup>22</sup> That nexus of meaningful and directed activity, and the thinking that emerges in its interstices, indicates and shapes what that person *values* as well, as the expression of the *moral* self, as discussed at length below. Character becomes a core concept, insofar as the interpenetration and realization of habits within a given agent – a dispositions or ways in which the problems of the world can be adjudged, and acted – and the activity that is *necessarily constitutive* of moral agency. As Dewey would make explicit by the time of his 1932 *Ethics*, the intelligent habits which comprise our character are the cornerstone of our ethical life.

rejection of the old dualism between thinking and acting, will and force. While habits reflect an equilibrium state, when they are disrupted we must adaptively respond by thinking and deliberating about the situation. For Dewey, all habits and customs more broadly are simultaneously means and ends for thinking or the exercise of intelligence: they provide the context from which thinking can emerge, and new thoughts, ideas, and meanings can be developed. Dewey writes, “The influence of habit is decisive because all distinctively human action has to be learned, and the very heart, blood and sinews of learning is creation of habitudes. Habits bind us to orderly and established ways of action because they generate ease, skill and interest in things to which we have grown used and because they instigate fear to walk in different ways, and leave us incapacitated for the trial of them. Habit does not preclude the use of thought, but it determines the channels within which it operates. *Thinking is secreted in the interstices of habits.*” (PP, LW2, 225, ital added). Habits unburden us from overthinking each movement and each task – and may instill fear or complacency vis-a-vis the new– but they foreground and channel all human activity, including thinking, which may, in turn, adapt those habits as well. Though I offer a more detailed account of the thinking process below, Dewey tells us that we adapt our habits specifically when new situations in our environment – a lightning crash or a sharp pain from a burn – forces us to figure out what’s happening, and to interpret features of our environment. But that very capacity is set up and comes out of our habitual behavior. Learning, in turn, is the formation of habits that are more adaptive.

Thinking is active and situated, and allows for our habits (and our ‘selves’) to become more adaptive and intelligent as well. The thinking self is simply an active “interpenetration” of habits, including our thinking and ability to adapt to problems. Dewey writes, “The dynamic force of habit taken in connection with the continuity of habits with one another explains the

unity of character and conduct, or speaking more concretely of motive and act, will and deed.” As such, “neither external materials nor bodily and mental organs are in themselves means. They have to be employed in coordinated conjunction with one another to be actual means, or habits” (HNC, MW14, 22). While it may seem a commonplace that habits implicate physical and mental organs together, human activity is often separated out as guided by two steps or discrete entities: thought and its execution, a good will and a useful act. But thinking emerges from the “interstices” of habits, and is not asserted over and against them, or as a function of an independent rational will or mind paired with a passive physical body that enacts that will. Thinking is *for* something and it is as physically and socially embodied as any human activity as a basic component of experience.

By these lights, we cannot separate out the function of a determinate will from a passive body in explaining a person’s behavior. Dewey’s extended example of physical posture illustrates some of these basic claims. The assumption may be that if a person wants to develop a habit of good posture, all that is needed is the will and motivation to stand straight. Dewey writes, “it is implied that the means or effective conditions of the realization of a purpose exist independently of established habit and even that they may be set in motion in opposition to habit. It is assumed that means are there, so that the failure to stand erect is wholly a matter of failure of purpose and desire” (HNC, MW14, 24). But these assumptions distort and assume a great deal: that the person can stand properly, as no ‘fiats of will’ can overcome that physical limitation, which in turn reveals a certain reordering of the relationship between will and act. A person must have already performed that act of standing straight to know it is constituted by good posture, having experienced its consequences. Hence he needs to have a physical sense to be accessed when the idea of executing that posture comes to mind. In short “the act must come

before the thought” and not vice versa, as might be the assumption of the thought or will dictating the subsequent act. Slouching for someone with bad posture is a habit whose ‘intermediary steps’ work imperceptibly without any active intervention. As Dewey writes, “We cannot change habit directly: that notion is magic. But we can change it indirectly by modifying conditions, by an intelligent selecting and weighting of the objects which engage attention and which influence the fulfilment of desires.” (HNC, MW14, 18) And as contemporary psychology has affirmed, changing habits requires changes in the *environment*; concentrating in the midst of ringing phones and colorful visual screens is just about impossible, however much one may want to. It requires intermediary physical and environmental adaptations first and foremost. It is not a failure of individual will.

A third takeaway from Dewey’s turn to habit and custom is its implications for individual and social growth. Habits and customs change because we are constantly faced with new issues and problems, and are never fixed entities. This, as discussed below, was a fundamental finding from Darwin’s revolution: we are constantly evolving, and adapting to contingent and unforeseen circumstances beyond our control. But, unlike the fatalistic theories of Spencer and Maine, the fact of change from natural forces was not in itself any kind of ethical mandate to replicate such evolutionary processes in social life. Instead, humans had the capacity to adapt to and intelligently respond to the imperatives that arose from change, contingency, and evolution. We can do so blindly, or we can develop habits and social customs that are themselves more adaptive, which allow for us to better respond to new phenomena. We may need new words to describe new technologies, for example, or may need new habits and ways of dealing with say, a job, or relationship, or environmental disaster. Likewise, our social customs may of their own accord impose new problems, they may conflict or develop new imperatives, because they too

must respond to various disruptions and changes. But this is also the fundamental basis of growth and the possibility of progress.

## **Lessons for Law**

What implications follow from this perspective on the nature of human habits and customs, for a study of law? If we begin with the notion of habit as Dewey proposed, the account *begins* with *both* the situated agent and her habits, which are active and adaptive for future action. In thinking of legal subject's habitual behavior in response to a law, we need to understand the *active meaning* imputed to the law, and how the law actually has shaped those habits. Austin's account of the habits of obedience were, and have been, maligned for mixing in subjective motivation into what should be an account of behaviors pure and simple. But understanding behavior and habits as purely physical regularity (whatever the contingent subjective motivation) obfuscates our understanding of what law is and how it is in fact interpreted and realized in the habits of legal subjects. The behaviorist model of law implicit in later positivist accounts also disregards reasons or motivations behind obedience as purely contingent or subjective. And as we shall see in sociological accounts like H.L.A. Hart's, such claims are made possible only by bifurcating the normative realm of rule-following among officials, and the acceptance and behavioral obedience of subjects. Insofar as laws as norms, rules or conventions and their validity have been posited as existing independent of any constitutive relationship with the way they are actively accepted and interpreted, except insofar as a majority must generally conform to such laws for whatever reason.

Dewey's reorientation of law into social activities of custom and habits also shows more



clearly that we cannot separate the *activity* or *experience* of a custom like law versus its origins as fixed norm, rule, or sovereign will. As Dewey writes, “To say that [habit] will be obeyed, that custom makes law, that *nomos* is lord of all, is after all only to say that habit is habit.” (HNC, MW14, 54) If the response to a particular law is what ultimately constitutes the very meaning and features of that law itself, then law as a norm must necessarily be defined by and assessed within the specific social context in which it is deployed and what it concretely does. As Dewey writes of constitutions (and democracy itself), they are not ready-made and can be understood independent of the social context in which they intervene. Or, as he puts the point most forcefully in his discussion of classical liberalism, and the claims of formal legalism:

The notion that men are equally free to act if only the same legal arrangements apply equally to all irrespective of differences in education, in command of capital, and that control of the social environment which is furnished by the institution of property is a pure absurdity, as facts have demonstrated. Since actual, that is effective, rights and demands are products of interactions, and are not found in the original and isolated constitution of human nature, whether moral or psychological, mere elimination is not enough... The only possible conclusion, both intellectually and practically, is that the attainment of freedom conceived as power to act in accord with choice depends upon positive and constructive changes in social arrangements. (POF, LW3, 100)

The establishment of laws and guarantees of rights does not have a predetermined effect, based on fixed human nature, or the elimination of constraints and guarantees of rights. Rights and laws may shape social arrangements themselves and habits of individuals such that future freedom, understood as “power to act in accord with choice” can be secured. But how they do so is context specific – and requires consideration and changes in education, distribution of wealth, and the social environment writ large.

For new laws to be imposed, then, they cannot be asserted merely by will or fiat, even the desires of the subjects are inclined to obey. An identity between edict or mandate and behavior can only be maintained through constant supervision and coercion – just as excellent posture

cannot be commanded without constant active intervention. Now, this can be interpreted in one of two ways: that laws can be imposed by fiat, but good laws, especially if we understand them through the regulative ideal of the rule of law, should not be merely imposed. And this can be on “pragmatic” grounds as H.L.A Hart himself suggests (it would be impossible to enforce fiats constantly in complex societies). But, the stronger implication is of a piece of what Fuller, and the Legal Process writings of Henry Hart and Albert Sacks, as well as Waldron today attribute to the “self application” of laws.<sup>23</sup> As Waldron describes this feature of law, it looks “to people’s capacities for practical understanding, for self-control, and for the self-monitoring and modulation of their own behavior, in relation to norms that they can grasp and understand.”<sup>24</sup> Waldron suggests that this self-application of laws speaks to the need for generality and publicity of laws. But I take the implication to require more broadly that laws are *constituted* by their self-application. The possibility of self-application then is a constitutive feature of the very existence of laws, not merely good or practical laws.<sup>25</sup> In Dewey’s terms, without this application – and not merely from the active enforcement by legal officials – laws are merely “scraps of paper or voices in the air.” In turn, this becomes a dividing line between the types of systems or laws that are at least plausibly applicable in practice or are merely rules of terror or brute violence and coercion (or simply those that cannot be applied by the public itself). This relationship, however, is not to suggest that legal systems do not require force (or, for that matter sanctions) to be legal systems.<sup>26</sup> As Dewey writes, law requires force, and its *effective* realization: it is what makes possible the actualization of law in activity. But when it is used inefficiently, and “a wasteful and

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<sup>23</sup> Hart and Sacks, cited in Jeremy Waldron, “The Concept and the Rule of Law,” *Georgia Law Review* 43, no. 1 (2013), 26.

<sup>24</sup> Ibid.

<sup>25</sup> As I will argue in Chapter 4, I believe this claim underwrites Lon Fuller’s treatment of the “inner morality of law.”

<sup>26</sup> The fact of force, understood largely as coercion, has also been seen as secondary to the nature and concept of laws. For assessment, see, e.g., David Dyzenhaus, “The Ambiguity of Force,” *Ratio Juris* 29, no. 3 (2016).

destructive means of accomplishing results” it becomes violence (FC, MW10, 251). Though the dividing line is imprecise, the point as I take it, is that the division is not between good laws and ineffective laws, but laws and enforced violence.

Here we get to the stronger normative claims that can be derived from looking to Dewey’s interactive account of customs and habits, as they apply to laws. Firstly, we see the *reciprocal* relationship between laws and legal subjects. Dewey highlights the basic fact that, “while it is convenient to view some humans as agents and others as patients (recipients), the distinction is purely relative; there is no receptivity that is not also a *re-action* or response, and there is no agency that does not also involve an element of receptivity.” (MPL, LW14, 118) As with all customs, the very existence of laws is predicated on a cooperative and interactive enterprise, and cannot be understood by isolating one agent and their behavior social agent or source within it. Our individual activity takes on meaning precisely because it is mediated by the responses of others.<sup>27</sup>

This social and interactive dimension has stronger implications as well. Firstly, if laws, like all customs or norms, shape our conduct and our habituated response to the world, then to the extent that they are ingrained in our habits and shape our ways of acting and thinking, they play into who we are as active selves. And we shape them in turn. This is not simply a return to the ethos or spirit of the law as capturing *Volk*; our behaviors and responses in and with the laws and institutions have reflexive shaping effects. This in itself is not a normative claim about the value either of our habits or our customs. As Dewey writes, “the choice is not between a moral authority outside custom and one within it. It is between adopting more or less intelligent and

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<sup>27</sup> This basic reciprocity is what Lon Fuller finds wanting in accounts of law like H.L.A. Hart’s. For the latter, the social activities in which legal systems, including the legal subject and his thinking activity and cooperative participation, were somehow secondary to the formal rule-following of officials/ See Chapter 4 of this dissertation for extended discussion.

significant customs.” (HNC, MW14, 58) But the ways in which they are mutually constituted does set the stage for Dewey’s claim that you cannot simply reform individuals or institutions without reforming both.

Secondly, habits and laws, are also instrumentalities and adaptive measures for navigating future activity. They are not merely passive restrictions, but set the ground for dealing with the future and for thinking itself. As Dewey writes, “When we use the law to foresee consequence and to consider how they may be averted or secured, then freedom begins. Employing knowledge of law to enforce desire in execution gives power to the engineer. Employing knowledge of law in order to submit to it without further action constitute fatalism, no matter how it be dressed up.” (HNC, MW14, 214-215) Though the utilitarians, of course, also saw law as a social instrumentality for securing greater utility – and the idea of law as an instrumentality is itself not in any way revelatory<sup>28</sup> – Dewey’s conception is distinct on two grounds. The instrumentalism of law is a product of the self-directed application of the law among its citizens, as discussed above. It is not from adherence to commands from superiors. The freedom it affords is a matter of organizing or ‘canalizing’ social processes in orderly ways. To be sure, socially useful laws that offer reasons or solutions to social problems, especially coordination problems, that we couldn’t have come up to on our own are important instrumentalities in themselves. Dewey himself recognized the value of such laws, as well as those that ‘embodied reason’ and served as a check on immediate desire. But whatever value such laws promise, they placed an ex ante limitation on reflection if they are to be accepted uncritically. This in turn is a ‘fatalism’ that undermines the very function that Dewey claims for laws: that it affords greater effective freedom to each individual in her thinking and her

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<sup>28</sup> Leslie Green rightly notes that every theory of law asserts that the law is some kind of instrument for promoting some end. Green, “Law as a Means” in *The Hart-Fuller Debate in the Twenty-First Century*, ed. Peter Cane (Oxford: Hart Publishing, 2010), 169.

activity.<sup>29</sup> Moreover, as discussed below, the means-end rationality advanced by the utilitarians, which suggested that fixed ends could be aimed at through an instrumentality like law, was flawed in at least two respects. It presented a reductive account of human ‘ends’ as fixed. Secondly, such reasoning was premised on a view of institutional means as pliable to the imperatives of fixed ends. However, as we shall see, Dewey saw a reciprocal relationship at play between means and ends, beyond that of a pure instrumentalism.<sup>30</sup>

Secondly, this very capacity for growth – both of the individual and of institutions themselves – underwrites the very instrumental and normative purpose of laws. If we did not have this capacity we would not be, in Dewey’s understanding of the term, free. To the extent that rocks and objects cannot change through purposive action, we do not attribute to them either capacities for purposive growth nor any sense of moral responsibility. This emphasis on growth is of a piece of Dewey’s critique of the pluralists for the understanding of laws as dealing with individuals and social institutions as they are, and not facilitating or shaping their growth. In part, this idea is backed by the notion that humans are constantly adapting, and by changing their habits through the introduction of new laws, we should be not interested solely in regulating existing behaviors, but in opening up new ways for those habits to be productively shepherded and developed.

Dewey, in fact, makes a strong claim along these lines in his writings on ethics, that “*the function of law in general [is] the institution of those relations among men which conduce to the welfare and freedom of all.*” (E2, LW7, 227). The claim may be jarring to the minimalist

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<sup>29</sup> To this end, Dewey’s is not far from Raz’s construction, and the claim that the law facilitates – or at least claims to facilitate – the practical reasoning of legal subjects. I discuss some divergence from the stronger pragmatic formulation of Fuller (and Dewey) and Raz’s service conception of authority in Chapter 4.

<sup>30</sup> This instrumentalism, which Tamanaha suggests is characteristic of the instrumentalism of some strands of Legal Realism and Pragmatism, thus presents a reductive conception of the type of law described here. Tamanaha, *The Perils of Pervasive Legal Instrumentalism* (Nijmegen: Wolf Legal Publishers, 2006), and *Law as a Means to an End: The Threat to the Rule of Law* (Cambridge: Cambridge University Press, 2006).

conceptions of law's function advanced today. Generally, the function of the law is seen as providing a bare social ordering with the imposition of rules, or similar formulations, which certainly do not suggest that universality is a presupposition of law's function. Though Dewey's claim requires further fleshing out in the chapter, the basic idea is that law conceived as a social instrumentality, which affects all individuals in their social interactions. Because the source of law is in these relations, and is shaped by them, their function is to shape them constructively.

Finally, in Dewey's account, the laws and legal systems themselves continue to develop and grow, and they continue to introduce new complications, standards, and adaptations. The claim is of a piece with the "evolutionary constitution" discussed in the following chapter, and the adaptive conception of law of Holmes and contemporary legal pragmatists like Susan Haack.<sup>31</sup> But from Dewey's treatment, we see that both that such adaptations are a descriptive fact of social institutions, but also present us with normative implications for associated life more generally:

Family life, property, legal forms, churches and schools, academies of art and science did not originate to serve conscious ends nor was their generation regulated by consciousness of principles of reason and right. Yet each institution has brought with its development demands, expectations, rules and standards. These are not mere embellishments of the forces which produced them, idle decorations of the scene. They are additional forces. They reconstruct. They open new avenues of endeavor and impose new labors. In short they are civilization, culture, morality. (HNC, MW14, 57)

Social customs and institutions – including laws, language, churches and schools – continue to bring with them new "demands, expectations, rules and standards". They are "additional forces" for reconstruction and the fact of constant change is as part and parcel of human activity. The issue is not whether we can ever reject these institutions altogether because of the ways in which they continue to make demands and develop. Instead, the core question was whether those

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<sup>31</sup> Susan Haack, "The Pluralistic Universe of Law: Towards a Neo-Classical Legal Pragmatism," *Ratio Juris* 21, no. 4 (2008).

changes could be intelligently rendered, by individuals and states, or whether they would be passively and unreflectively accepted as fate. To understand this claim more fully, I turn next to Dewey's account of inquiry and experience – and the “methods of intelligence” that can better secure good laws, adaptive habits, and the conditions of democratic life.

## **2.2. KNOWLEDGE, EXPERIENCE, AND INQUIRY**

The question at hand is how to modify our habits and customs intelligently, if not by fiat. Dewey does not dispute the fact that lawgivers impose legislation, judgments, and mandates, etc. But how do we introduce more intelligent ones that can actually serve the function that all habits and customs should: to allow for channeling conduct so as to better navigate our social and natural interactions? As we saw in the previous chapter, Austin and Maine's claim that democracies are particularly ill-suited for establishing good laws was because of the difficulty of aggregating individual knowledge and preferences in legislation. Their accounts, and their justification of particular legal systems, were built on the theories of knowledge and buttressed historically by Spencer's normative ethics. Their conclusions were decidedly anti-democratic: the forces of progress toward contract, property rights, and codification were undermined by the meddling of individuals whose unscientific knowledge-claims could be subject to capture. The task was set then, for Dewey: he had to untangle the “contradiction” at the core of Spencer's account of knowledge and intelligence in justifying the value of democracy. It was not the unintelligible causal forces of nature that produced mind, and therefore knowledge. Nor was knowledge a subjective and isolated affair.

In this section, I provide the basic philosophical claims of Dewey's turn to experience

and experimental inquiry to reorient this basic understanding of knowledge and intelligence. The exposition offered here will provide a background to an alternative understanding of laws and Dewey's treatment of democracy more generally, as developed in this chapter and the next. Dewey's alternative account redefines the knowledge relationship between the individual and nature, such that the individual is not a passive receptor but a situated and active agent. Action and thinking, as discussed above, is irreducibly social. *Knowing* and knowledge processes too are by nature social, and therefore have implications for any justifications for or against the epistemic value of democracy. As I argue, Dewey's account provides philosophical warrant for his theory of democracy, which is not vulnerable to Posner's deflationary reading of his philosophy. We can also see in Dewey's account a normative value to knowledge and intelligence that extends far beyond discerning 'truth' in itself, but points towards its role in social action.<sup>32</sup> Dewey understood intelligence and methods of inquiry as ways of navigating the world and providing the tools for enhancing experience – understood, as I explicate below, in a rich, multivalent framework. Finally, by reorienting knowledge in an active agent and back in experience, Dewey identified what these processes of inquiring and knowledge ultimately provide: the growth of each individual, or, roughly, her freedom. The claim is the same as that introduced in the previous section: those tools or habits, customs, or knowledge, which allow the individual to better navigate in her activity within experience, expand her powers and freedom. In turn she can enable the further development of social knowledge, laws, and cultures, or “civilization, culture, morality” more generally.

## **Experience and Inquiry**

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<sup>32</sup> I discuss these claims at length in the following chapter.



By the 1920s, Dewey would move beyond both the idealism of his earliest works and the non-empirical empiricism that had always motivated his philosophical attacks.<sup>33</sup> His critique had sharpened against the empiricism and idealism of his day. As he saw it, the two schools in philosophy provided two inadequate accounts to the problem of how knowledge is possible. For idealists, knowledge and consciousness of an object made that object determinate and real; the reality of the object was dependent upon consciousness or cognitive forms. Experience must be transcended, then, for knowledge of nature to emerge, via a supra-empirical mechanism like reason or intuition. Empiricists argued that an object's truth exists independently of consciousness and was not affected by it, and could be understood via aggregation of sensory data without transformation of that data from our thinking process. Nature was "something wholly material and mechanistic." Neither account seemed to give serious credence to the actual processes and method required for intelligible understanding of experience.

Pragmatism and the new 'consciousness', from Peirce, James, and Dewey, was a reorientation of the problem of experience towards these processes which can warrant a certain 'truth' as claimed in experience, not in antecedent or a priori claims or ideal reality. Human experience itself then had to be understood as more than physical sense experience. As Dewey

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<sup>33</sup> The legacy and extent to which realism and idealism persist in Dewey's thought and the relationship between Dewey's epistemology and metaphysics has been subject to extensive scholarly debate.<sup>#</sup> As John Shook describes the transition in his thought over these years, he moved from an absolute idealism to a "naive" realism "which "stated that things are what they are experienced to be" to a post-1925 "thoroughgoing naturalism" that "described experience as the product of environment-organism transactions." Shook, 263. As Thomas Alexander summarizes the scope of these debates, "again and again certain issues were raised which have their origin in a basic tension in Dewey's philosophy. These problems come out in a variety of topics: the nature of immediate experience; whether Dewey is a realist; a naturalist, a materialist, or an idealist; the issue of how experience is related to nature; the dualism of quality and relation, and the consistency of Dewey's aesthetics with his instrumentalism itself." Thomas Alexander, *John Dewey's Theory of Art, Experience, and Nature: The Horizon of Feeling* (Albany: SUNY Press, 1987), 62. I certainly agree that features of Dewey's account, especially his turn to 'situations' and his incomplete rendering of the 'generic traits' of nature make for an incomplete naturalistic metaphysics with a pointedly idealist residue. Though these claims have bearing on the issue of valuations and their objective quality and 'consummatory' nature, these details of Dewey's naturalistic metaphysics are beyond the general scope of this chapter. In general, I simplify, albeit without justification, with a reading of Dewey that sees him attuned to irreducible conflict and contingency, in spite of the ambiguities of his metaphysics. See Rogers, *Undiscovered Dewey*, for a defense of this reading.

argued, our experience clearly entails things like desires, values, happiness, fear, joy. It encapsulates what we do, feel, suffer, and how we act and are acted upon – “in short, processes of *experiencing*,” (EN, LW1, 18) as well as that material and environment in which experience takes place and reacts against. As Dewey reiterates throughout his work, experience is born of interactions with nature and is part of nature. Experience is not a subjective possession of an experiencing subject; “experiences” are not an occult phenomenon constituted by cognitive or sense-perception, internal to the shadowy inner life of the experienter. In this view of experience as subjective phenomenon, by definition, was walled off in a basic way from the external world. Tellingly, Dewey considered shifting his use of ‘experience’ to ‘culture’, so as to capture the workings of social institutions, language, and the networks of interrelationships that constitute experience.<sup>34</sup> By re-situating his method of knowing in qualitative experience itself, Dewey preserves “the obscure and vague”, “the distinct and evident”, aesthetic and the fearful – the full panoply of experience itself – as data for knowledge (EN, LW1, 27).

Dewey distinguishes primary experience and refined or reflective experience on the other. Primary or immediate experience is of the “gross, macroscopic, crude subject-matters”, largely unmediated and unreflective. Reflective experience, on the other hand, is a product of thoughtful, systematic inquiry (EN, LW1, 15). Secondary experiences “*explain* the primary objects, they enable us to graph them with *understanding*, instead of just having sense-contact with them.” (EN, LW1, 16) In divorcing the latter secondary experience and looking only to the methods of understanding and thinking, or the cognitive material of reflective experience without

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<sup>34</sup> The consideration was motivated by the anthropological studies of his colleagues Boas and Malinowski, who had turned anthropology toward the study of human relationships in culture. The significance here is also in seeing experience already as socially laden, and embedded in transactions. The move, however, signaled also a twofold methodological critique: Spencer’s and Maine’s anthropology, in lieu of his own treatment of scientific method and experimental inquiry, and the anthropology of his colleagues. See Westbrook, *John Dewey and American Democracy*, 345-346. James Kloppenberg, “An Old Name for Some New Ways of Thinking?” *The Journal of American History* 83, no. 1 (1996), 106.

recognition of that unmediated qualitative experience, tends to misunderstand how that cognitive material is situated in nature as it is experienced. But secondary experience is able to yield understanding of the primary materials of experience *only* by referring back systematically to the materials of primary experience for verification and testing. The point of reflection and inquiry is to enrich primary experience.<sup>35</sup>

Dewey turned to scientific method – not the non-empirical science of Spencer – as the best method yet devised for understanding experience. As Dewey writes, “scientific inquiry always starts from things of the environment experienced in our everyday life, with things we see, handle, use, enjoy and suffer from. This is the ordinary qualitative world. But instead of accepting the qualities and values—the ends and forms—of this world as providing the objects of knowledge, subject to their being given a certain logical arrangement, experimental inquiry treats them as offering a challenge to thought. They are the materials of problems not of solutions. They are to be known, rather than objects of knowledge.” (QC, LW4, 83) The method of science is an active one. As soon as we attempt to understand and describe those experiences – or *nature* as it is experienced and the objects within it as they are experienced – we *do* something to it; we change, repattern and interpret it through an active intervening through the thinking processes. As Dewey writes, “All experimentation involves *overt* doing, the making of definite changes in

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<sup>35</sup> Dewey identifies at least three problems with philosophies (or any modes of inquiry) that fail to link the findings of secondary experience back to primary experience. Firstly, there is no effort to verify those findings; secondly, primary experience does not benefit from the enrichment of those findings of secondary experience; and thirdly, the materials of secondary experience are seen as having their own independent reality and become totally arbitrary and abstract in the pejorative sense, and those of primary experience are seen as contingent and in some fashion, unreal by comparison to the logical or rational stability of these ideas. Though the upshot of what Dewey terms *the* philosophical fallacy of turning the materials of reflection (or sense experience alone) as the entire domain of critical reflection or the *real* substance of philosophic inquiry explains the impotence of philosophy as offering no practical means of dealing with our workaday lives or the problems that we encounter therein, and the reason why most people look askance upon the internally motivated questions and puzzles that occupy philosophers (and political and legal theorists). The issue and critique of philosophic method was persistent throughout Dewey’s career, and will be referred to throughout the dissertation, as anchoring critiques of several dominant contemporary philosophical traditions and theories. Of the most pernicious upshots of these philosophic fallacies, was the insistence on a strong demarcation between facts and values, and the inability to think critically and with principled, intelligent methods in evaluating the values, goods, and moral life itself.

the environment or in our relation to it.” (QC, LW4, 70) As such, “experiment is not a random activity but is directed by ideas which have to meet the conditions set by the need of the problem inducing the active inquiry.” Experimentation or “the method of physical inquiry” induces a change to see what consequences result; we compile the data, introduce some hypotheses of the correlation and causes of changes, and test out our hypotheses further trials and inquiry. (QC, LW4, 68). This method of inquiry was a part of everyday life – we figure out what a loud noise is through seeing whether someone’s knocking at the door, checking the weather report for thunderstorms, seeing if there’s rain and lightning. We gather info and we see what makes sense given what we already know about thunder or whether we’re likely to have a visitor. We may gather enough support for a claim that it was in fact thunder. But that conclusion cannot be reached independently of some activity; we do not find out what a noise is by reasoning from concepts or truths.

In his 1938 *Logic*, Dewey turned explicitly to legal inquiry as offering a model for this method in social contexts, and the various steps of inquiry that can lead to knowledge claims more generally. Inquiry in general takes the form of our finding ourselves in a concrete situation (not a simply a state of mind) in which there is something amiss or, in Dewey’s terms, “indeterminate.” We begin inquiry by recognizing there is problem at hand. The problematic situation is “equivalent” to “a trial-at-law... which requires settlement. There is uncertainty and dispute about what shall be done because there is conflict about the significance of what has taken place, even if there is agreement about what has taken place as a matter of fact – which of course, is not always the case.” (L, LW12, 123) Lawyers may present certain legal propositions or arguments for a specific case, but which relate to other precedents and legal rules or an existing structure of legal meanings and judgments. The legal context highlights the general

claim Dewey makes on behalf of facts: that they do not in themselves have meaning. They are relevant to legal arguments and propositions, but “the significance of factual material is fixed by the rules of the existing juridical system; it is not carried by the facts independent of the conceptual structure which interprets them.” (L, LW12, 124) That is, their meaning is assimilated and directed by existing interpretations and standards. The legal rules we choose to apply relate to what the legal issues at play – whether civil or criminal, trespass or breach of contract, in Dewey’s examples (L, LW12, 124). The process of reasoning here requires “a series of partial settlements” – on various propositions, or rulings on evidentiary admissibility, etc. Then a judicial settlement is issued. The settlement, however, is “not an end in itself but a decisive directive of future activities... [a] man is set free, sent to prison, pays a fine” (L, LW12, 124) – and it is “this changed situation” – not simply a state of mind. Finally, as Dewey notes, the process is never permanently fixed. As he writes, “The ‘settlement’ of a particular situation by a particular inquiry is no guarantee that that settled conclusion will always remain settled. The attainment of settled beliefs is a progressive matter; there is no belief so settled as not to be exposed to further inquiry. It is the convergent and cumulative effect of continued inquiry that defines knowledge in its general meaning. In scientific inquiry, the criterion of what is taken to be settled, or to be knowledge, is being so settled that it is available as a resource in further inquiry; not being settled in such a way as not to be subject to revision in further inquiry.” (L, LW12, 16)

This schematic overview of legal inquiry and indeterminate situations provides also a framework for understanding, Holmes’ predictive theory of law.<sup>36</sup> In his *Path of the Law*,

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<sup>36</sup> To be sure, this rather simplistic comparison does not claim to capture the totality or nuance of Holmes’ account or the differences in their thought. However, we can see their basic shared ‘pragmatic’ thrust. Max Fisch’s writings in the 1940s may have been the first explicit recognition of the pragmatic overtones of Holmes’ predictive model. See also Frederic Kellogg, “The Making of an American Legal Philosophy,” in *The Formative Essays of*

Holmes famously wrote “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, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”<sup>37</sup> The conception is thoroughly pragmatic: it locates what law is in its consequences, and requires observing and formulating hypotheses of what the judge will decide based on the best evidence at hand. As Dewey himself writes, “When it is said, as it sometimes is, that science is prediction, the anticipation that constitutes every idea as idea is grounded in a set of controlled observations of regulated conceptual ways of interpreting them.” (L, LW12, 113). Within Dewey’s account of inquiry, we can, along with Holmes, see laws, like science, as a “prediction” or an “anticipation” based on regularized methods of judicial interpretation. The pragmatic interpretation would claim that the law on the books does not issue in any fixed or pre-given answers. What law is is what is concretely does in experience; and knowledge of what law is requires purposive interventions and assessments. Laws are studied and predicted because we have a vested interest that sets off our inquiry. As Benjamin Cardozo writes of the prediction model, “It concerns primarily our future interest; people do not study cases for pleasure, but generally with a view to anticipating what the courts will do when future cases arise.”<sup>38</sup>

For Dewey, we can continue to refine its procedures and standards over time, and with a

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*Justice Holmes*, ed. F. Kellogg (Westport, CT: The Greenwood Press, 1984), and more recently, Catharine Wells, “Holmes on Legal Method: The Predictive Theory of Law as an Instance of Scientific Method,” *Southern Illinois University Law Journal* 18 (1994), 329-345, and Susan Haack, “Pragmatism, Law, and Morality: The Lessons of *Buck v. Bell*,” *European Journal of Pragmatism and American Philosophy* (2011), 4. A classic treatment of the issue of Holmes’ general pragmatism is found in Thomas Grey’s “Holmes and Legal Pragmatism.” Grey, as noted above, reads Holmes – and the pragmatist tradition as a whole – as largely congenial to the utilitarianism of Bentham and Austin. His suggestion is that the distinctively ‘pragmatic’ dimension of pragmatism, and Holmes’ legal pragmatism in particular, was in combining features of utilitarianism together with historicism of Savigny.

<sup>37</sup> Oliver Wendell Holmes, “The Path of the Law,” *Harvard Law Review* 10 (1897).

<sup>38</sup> Benjamin Cardozo, *The Growth of the Law* (New Haven: Yale University Press, 1963 (1924)), 43.

sense to what specific methods of inquiry are effective within specific fields.<sup>39</sup> And as we continue this process of inquiry (and inquiry into inquiry), we are better positioned to understand and make truth claims, or “warranted assertions”.<sup>40</sup> Perhaps a central contribution of pragmatism which bears emphasis here – in its relevance for both understandings of both legal and political processes – is the rethinking of the notion of ‘truth’. The truth of a proposition lies in understanding something of the environment that would accord with that continual purposive activity and interaction between organism and environment, individuals and society. It was a matter of whether, in William James’ terms, “it worked in experience” – investigated “through the process by which it was verified” – through and in experience. In James’ classic formulation:

Truth *happens* to an idea. It *becomes* true, is *made* true by events. Its verity *is* in fact an event, a process, the process namely of verifying itself, its *verification*. Its validity is the process of its validation....*The true*, to put it very briefly, *is only the expedient in the way of our thinking, just as the right is only the expedient in the way of our behaving*. Expedient in almost any fashion, and expedient in the long run and on the whole, of course; for what meets expediently all the experience in sight won’t necessarily meet all further experiences equally satisfactory. Experience, as we know, has ways of *boiling over*, and making us correct our present formulas. *True ideas are those that we can assimilate, validate, corroborate, and verify. False ideas are those we cannot*. That is the practical difference it makes to us to have true ideas; that therefore is the meaning of truth, for it is all that truth is known as.<sup>41</sup>

Key here also is ‘assimilation’; we seek coherence in our ideas to make sense of what we already know. We do not radically recreate our system of beliefs and knowledge each time we set out to figure something out. Instead, we corroborate a new claim to see whether it can be coherently assimilated into our existing understandings of the world. As Hilary Putnam has argued, the radical contribution of pragmatism has been precisely in its insistence on both fallibilism and

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<sup>39</sup> This was the focus of his famous essay, “Logical Method and the Law,” in which Dewey applied his theory of logic – or inquiry into inquiry into methods of adjudication, discussed below.

<sup>40</sup> Dewey is sometimes slipper in his usage of terms ‘truth’ and ‘warranted assertability’. Knowledge more precisely was a ‘warranted assertion’ while ‘truth’ was a something more like the ideal limit of warranted assertions verified over time. See Ruth Anna Putnam, “Dewey’s Epistemology,” in *The Cambridge Companion to Dewey*, ed. Molly Cochran (Cambridge: Cambridge University Press, 2010).

<sup>41</sup> William James, *Pragmatism: A New Name for Some Old Ways of Thinking*, Lecture 6.

anti-skepticism.<sup>42</sup> We do not constantly hold all of our beliefs and knowledge in doubt; nor is it reasonable to do so. But, since ‘experience’ boils over, our beliefs are constantly open to potential challenge. As such, truth is never permanently stable, but always subject to revision, like any common law decision. Knowledge, moreover, cannot eliminate the illiminable contingency and constant change that are simply parts of life. We can be systematically deceived and our beliefs may be exposed as distortions perpetuated by custom, bad education, laziness, or simple lack of technology and methods. In other words, there can always be pathologies or prejudices in perception, no less in the very processes of reflection and evaluation. But this does not suggest that those perceptions should be ruled out *ex ante*, or that we should drop this method of inquiry altogether. The core imperative is in intelligently improving and navigating these limitations, through continued investigations into whether our ideas and claims hold up.

But central to Dewey’s claims also is that scientific method requires a basic ethos among its inquirers. As Dewey writes, this scientific ethos includes “willingness to hold belief in suspense, ability to doubt until evidence is obtained; willingness to go where evidence points instead of putting first a personally preferred conclusion; ability to hold ideas in solution and use them as hypotheses to be tested instead of as dogmas to be asserted; (and possibly the most distinctive of all), enjoyment of new fields for inquiry and of new problems.” (FC, LW13, 165). Like Holmes’s bad man, we need to be motivated to undertake these inquiries, though with greater impartiality in how we want our findings to go. Dewey readily acknowledged that cultivating this ethos does not come easily; we dislike uncertainty, indulge in “wishful thinking”, and resent having our beliefs and opinions questioned (FC, LW13, 166). Just as obviously, those difficulties have been overcome by the very fact that we have changed our beliefs over time, as

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<sup>42</sup> Hilary Putnam, “Are Moral and Legal Values Made or Discovered?” *Legal Theory* 1, no. 1 (1995), 16 and *passim*.



we have incorporated the findings of science, and of new discovers. Moreover, “[t]he existence of the scientific attitude and spirit, even upon a limited scale, is proof that science is capable of developing a distinctive type of disposition and purpose.” (FC, LW13, 167) The necessity of the cultivation of the “scientific attitude” is necessary for democracy, because “it is the only assurance of the possibility of a public opinion intelligent enough to meet present social problems.” (FC, LW13, 168) This marked an important realization – an “emancipation” (EN, LW1, 23) – because we know that we cannot find nor coerce truths from above. We begin with problems and opinion, and we can either make the latter more intelligent to deal with those problems, or we can submit to a ‘fatalism’ and retreat to outmoded epistemologies and dogmas. As such, Dewey continues, “[it] is not becoming, to put it moderately, for those who are themselves animated by the scientific morale to assert that other persons are incapable of coming into possession of it and being moved by it.” (FC, LW13, 168) Such elitism, Dewey claims, in fact, betrays a basic anti-scientific claim: that there is nothing science can do to change or “affect desires and ends,” despite the fact that science is important precisely because it can adjust our beliefs and our knowledge claims. Dewey asserts simply that this is a cultural issue, not an inflexible and permanent one.

One more central feature of Dewey’s account is worth emphasizing here. Dewey, throughout his works, was explicit that thinking was not simply a good-in-itself – though we can of course, and often do, delight in figuring things out, because we are generally curious. We saw this insight play out in the issue of legal inquiry and Holmes’ predictive model. For Dewey, the proximate end of our inquiries is that we figure out or clarify a problematic situation. We may figure out that the loud noise was in fact thunder, or receive a judicial settlement for a case we brought to court. But this also opens up for us greater control over our future activity. Moreover,

we cultivate the very habits of intelligence more generally, which are necessary for criticizing and reforming our existing practices, customs, and laws. As such, inquiry and understanding itself provides us the most reliable method for understanding and resolving our problems, and secures concrete ways of navigating within them. Through this process, in short, we can have a method for explaining and thereby enhancing all the qualitative features of our primary experience: if we know, say, that water isn't poisoned, our experience of drinking it is also improved. The same principle goes with listening to an opera: when we understand and know more about the structures and tonality, the meaning of the libretto, we have a deepened appreciation and qualitative enjoyment when we listen. As Dewey writes:

Knowledge or science, as a work of art, like any other work of art, confers upon things traits and potentialities which did not *previously* belong to them. Objection from the alleged side of realism to this statement springs from a confusion of tenses. Knowledge is not a distortion or perversion which confers upon *its* subject matter traits which *do* not belong to it, but is an act which confers upon non-cognitive material traits which *did* not belong to it. It marks a change by which physical events exhibiting properties of mechanical energy.. realize characters, connections, meanings and relations of meanings *hitherto* not possessed by them. Architecture does not add to stone and wood something which does not belong to them, but it does add to them properties and efficacies which they did not possess in their earlier state. It adds them by means of engaging them in new modes of interaction, having a new order of consequences. Neither engineering nor fine art limits itself to imitative reproduction or copying of antecedent conditions. Their products may nevertheless be more effectively natural, more 'life like' than were antecedent states of natural existence. So it is with the art of knowing and its works. (EN, LW1, 285-286).

Knowledge itself transforms and adds meaningfulness to things, orders the raw data of experience so that new connections and possibilities open up for future activity. That is, the end product of inquiry is not simply the acquisition of a truth, whose value and meaning is inherent in itself outside of what it does concretely in experience. Inquiry is much better understood as part and parcel with all of those transformative processes whereby we shape cultures and institutions. When we know what the law is, our basic conduct and our understanding of other

social relationships will change. Though engineering and architecture are offered up only by way of analogy, they show us what arises from these process: not just a truth that's good in itself, but an edifice or a bridge, which in turn makes us see their inputs in new ways. As for "the art of knowing and its works", or even in the context of decision-making, we are actively and constantly shaping all of the input – stones, rocks, data, claims, and how we see and understand others – in turning them into something that becomes meaningful. There is a qualitative meaning that we gain from participating in these processes. In his early essay on the ethics of democracy, Dewey writes aptly of democracy that to think of it as merely a government "is like saying a home is more or less geometrical arrangement of bricks and mortar [...] they certainly are so much. But it is false; they are certainly infinitely more." (ED, EW1, 240) There is a qualitative meaning that we gain from participating in these processes, which cannot be reduced to an end product or its various components.

### **Inquiry and Plurality**

As contemporary scholars, perhaps most notably Hilary Putnam, have argued in a reading of Dewey's philosophy, the process is best secured through joint enterprise among diverse inquirers – and thus has important democratic implications.<sup>43</sup> As Dewey writes explicitly, "It is of the nature of science not so much to tolerate as to welcome diversity of opinion, while it insists that inquiry brings the evidence of observed facts to bear to effect a consensus of conclusions– and even then to hold the conclusion subject to what is ascertained and made public in further inquiries." (FC, LW13, 168). We cannot simply seek out people who know more or

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<sup>43</sup> See Putnam, "Reconsideration of Deweyan Democracy"; Westbrook, *Democratic Hope*; and Anderson, "Epistemology of Democracy."

who are somehow smarter than the rest of us to get at knowledge. The scientific method – and the understanding of democracy that Dewey grounds in this method – is open to diverse opinions, and committed to each individual inquirer as collaborative participant. As for the initial issue set out at the start of this section, of how we can adapt our habits and institutions so that they become more intelligent, we can then see also how the reciprocal relationship and social constitution of customs and laws leads to a normative claim: each member within a society and her capacity and commitment to deploy methods of intelligence affects the quality of laws and social institutions generally.

In short, Dewey's metaphysics and experimentalism invert the very claims on which anti-democratic position is founded: knowledge and truth is best secured through collective activity among individuals who are never atomized in their thinking, acting, or knowing. Here we can see the epistemological biases underwriting claims like Maine's – that getting to epistemically valuable laws is made worse by trying to aggregate individual knowledge (or worse yet, their subjective biases). We are far better off to see what is true through collective processes of verification in *experience* and the consequences that flow from particular claims. It is important to highlight here another sense in which knowledge is collective enterprise: we have to assimilate our ideas to the existing store; and that knowledge is part of the massive collective and historical enterprise. To that end, Dewey evokes the example of how we have developed "ships that ply the ocean with a velocity of five or six hundred miles a day." He writes, citing and remarking on the words of Henry George:

'There is nothing whatever to show that the men who to-day build and navigate and use such ships are one whit superior in any physical or mental quality to their ancestors, whose best vessel was a oracle of wicker and hide. The enormous improvement which these ships show is not an improvement of human nature; it is an improvement of society – it is due to a wider and fuller union of individual efforts in accomplishment of common ends.'" The analogy suggests "the development of the power of guiding ships across

trackless wastes from the day when they hugged the shore, steering by visible sun and stars, to the appliances that now enable a sure course to be taken. It would require a heavy tome to describe the advances in science, in mathematics, astronomy, physics, chemistry, that have made these two things possible. The record would be an account of a vast multitude of cooperative efforts, in which one individual uses the results provided for him by a countless number of other individuals, and uses them so as to add to the common and public store. A survey of such facts brings home the actual social character of intelligence as it actually develops and makes its way. (LSA, LW11, 49)

Our knowledge is a product of our cultures and social relationships – all of our experience and thinking could contribute to *collective* knowledge. That is, all of our experience and thinking could contribute to *collective* knowledge: each new finding, from Copernicus to Darwin (and beyond just the scientists), have shaped the very context by which we understand the world. Moreover, such developments have little to do with having physical or mental superiority over individual ancestors, improvements in society, and directing individual efforts towards common ends. Here we can see the epistemological biases underwriting claims like Maine's – that getting to epistemically valuable laws was made worse by trying to aggregate individual knowledge (or worse yet, their subjective biases). We are far better situated to see what is true through collaborative processes of testing in experience and the consequences that flow from particular claims. As becomes clearer also in Dewey's discussion of the state, examined below and in the following chapter, diverse and plural inquiry of this sort in social contexts is absolutely necessary insofar as it requires an understanding of the actual social problems – as they are concretely experienced – to which laws may be fruitfully addressed.

We can also begin to see how the account of inquiry offered by Dewey begins to diverge from Posner's and his elite democratic commitments. Posner's assessment of Dewey's epistemological claims itself elides some of Dewey's more radical claims. Posner suggests that the scientific method is understood broadly as an 'ethos' to be applied in everyday inquiry. To be sure, this ethos is central to Dewey's account, but his treatment of method is much more

capacious. What's more, the value of diverse inputs is understood by Posner as important insofar as it "distributed intelligence," or an epistemic division of labor "like computers [which] perform different tasks in such a way that their combined work can contribute to a larger goal."<sup>44</sup> The claim amounts to an aggregation of diverse inputs, which can contribute to some synthesis. Posner, in turn, suggests that the basic quality of the inputs from a public with a generally low IQs, and their willingness to cultivate the scientific ethos do not translate into a cogent defense of robust participatory democracy. The scientific method of diverse inquirers is at best a *metaphor* for the processes of political and legal activity, according to Posner. But, as Posner writes, Dewey's argument that "knowledge is democratic, and so should politics be... is an argument by analogy – a procedure full of pitfalls."<sup>45</sup> Dewey's turn to education, to cultivate the scientific ethos among the general public, could not overcome the utopian nature of his aims, according to Posner. We would do better by limiting that input from inquirers into those motivated to engage – ie, officials and judges – with an already high baseline of intelligence. As Posner continues, "the democratic character of knowledge creates merely a rebuttable presumption in favor of political democracy; no reason is given to suppose that the democratic character of knowledge is the only precondition of successful political democracy."<sup>46</sup>

What Dewey's broader account of knowledge claims firstly, however, is that social intelligence is not simply a matter of distributing and aggregating diverse data inputs. As the previous section emphasized, everything from institutions to the shaping of impulses and desires to thinking itself is an intersubjective and social process. As Putnam argues of Dewey's treatment of inquiry, almost anticipating Posner's later claims: "the model of an *algorithm*, like a computer program, is rejected. [What] we have are maxims and not algorithms; and maxims

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<sup>44</sup> Posner, *LPD*, 102fn14.

<sup>45</sup> *Ibid*, 105.

<sup>46</sup> *Ibid*.

themselves require contextual interpretation. Not only that, the problem of subjectivity and intersubjectivity was in the minds of the pragmatists from the beginning. They insisted that when one human being in isolation tries to interpret even the best maxims for himself or herself and does not allow others to criticize the way in which he or she interprets those maxims, or the way in which he or she applies them, then the kind of ‘certainty’ that results is always fatally tainted with subjectivity.’<sup>47</sup> In short, not only the verification of ideas, but their creation – the entire process – must be cooperative and is so as a matter of social scientific fact.<sup>48</sup> Especially in the context of laws, the issue has more basic implications: their source, application, and the problems that require new laws, arise out of the plural intersubjective activities of the public. How we interpret, apply, and shape even our shared institutions and laws is not an aggregation of inputs, but constant reaction and interactions. The basic claim that Dewey’s turn to experience and knowledge advances is that experience is itself always fashioned by cultures and customs, and knowledge itself cannot be parsed out and collated from individual inputs. What Posner seems to introduce into Dewey’s account is the assumption of atomic individualism and knowledge aggregation that Dewey stridently rejected. That claim, for both Maine and Posner, suggest that we would do well to eliminate defective inputs; but in Dewey’s view, this is tantamount to simply stifling the capacities of those who invariably contribute to our baseline for knowledge, culture, and experience itself.

This claim is related also to the epistemic value of democracies that Posner does accept: the ability to understand and provide input in the concrete application of laws – and the

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<sup>47</sup> Hilary Putnam, “Pragmatism and Moral Objectivity” in *Women, Culture, and Development: A Study of Human Capabilities*, eds. Martha C. Nussbaum and Jonathan Glover (Oxford: Clarendon Press, 1995), 220.

<sup>48</sup> As Putnam continues, “The introduction of new ideas for testing likewise depends on co-operation, for any human being who rejects inputs from other human beings runs out of ideas sooner rather than later, and begins to consider only ideas which in one way or another reflect the prejudices he has formed. Co-operation is necessary both for the formation of ideas and for their rational testing.” Ibid, 220 (footnote omitted).

possibility of a feedback mechanism which is necessary in refining and improving those laws – is a non-reducible feature of democratic participation. Whatever basic intelligence may be attributed to lawmakers and judges is by definition cut off from this feedback loop.<sup>49</sup> But what Posner does not acknowledge, however, is the very capacity for public opinion to be concretely and intelligently shaped – not just “reliably determined” by representatives – requires a much more radical turn to the public in the first place, through their own processes of inquiry into their problems, and sensitiveness to their situations. The participation in inquiry provided the means for cultivating habits of intelligence. That is, like professional scientists – or judges – who cultivated that ethos in their work, participation in the process itself is a method for developing a commitment to that very ethos.

Moreover, the process allows for the airing out problems, and by their very participation stake a claim in the outcome, even if the ultimate decision is not one with which they agreed. The situated context of these inquiries should also provide a clue as to their irreducible normative import. When we engage in specific inquiries about specific problems, we already make a normative endorsement that figuring out a solution is important in some way that directly implicates our interests, or what Philip Kitcher calls “significant truths” – truths worth pursuing or found valuable in some way.<sup>50</sup> The very decision to engage in a particular inquiry is already value-laden. Its significance cannot be claimed singularly from above, but requires that those affected by able to understand and defend its significance. *That* examination, given as propositions and judgments grounded in situational and therefore contingent experience, offer guidance in further activity and can itself be refined and subject to improvement based on

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<sup>49</sup> Elizabeth Anderson highlights this “feedback” feature of Dewey’s theory as one of its core virtues in “Epistemology of Democracy,” 13. Posner too acknowledges the importance of recognizing “public opinion” in *LPD*, 108.

<sup>50</sup> Philip Kitcher, *Science in a Democratic Society* (New York: Prometheus Books, 2011).



whether its guidance proves useful. Our inquiries are valuable, Dewey writes, insofar as “[t]hey define or lay out a path by which return to experienced things is of such a sort that the meaning, the significant content, of what is experienced gains an enriched and expanded force because of the path or method by which it was reached.” (EN, LW1, 16)

Finally, despite the concern of conflict that may arise from plural opinions and experiences among a diverse public, Dewey’s was also an account that valued the plurality and dissent that contributed to the deliberative processes of inquiry, not only in scientific inquiry, but political processes. He was not, as Posner and other more sympathetic critics suggest, blind to the possibility of disagreement and the need to “manage conflict among persons.”<sup>51</sup> Dewey’s treatment of inquiry – despite its faith in human intelligence – was constituted throughout by the fundamental belief that our truths may be fallible and must be revisable, as “experience boils over”. Whatever solution to an inquiry worked for a particular problem may not work for another, and may cause more problems than it solved. The process may be messy, contested, and riven with conflict. Posner argues that epistemological processes differ from political processes precisely because the latter are domains of conflict, interest, preference and contested values, whereas the former attempt to arrive at disinterested truths (or epistemically valuable decisions among judges). The radical claim from Dewey is that this in fact what epistemological and political processes share: inevitable fallibility and need for revision, individual desires and interests that motivate the search for solutions, and a need to do so without resort to coercion or dogmatism – or disavowal of our shared need and responsibility to engage. We can simply do so more intelligently on the basis of our existing limitations and our potential to cultivate such methods of intelligence. So with knowledge and truth, as with democracy.

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<sup>51</sup> Posner, *LPD*, 112.

### 2.3. THEORY OF VALUATION AND LEGAL REASONING

Dewey's account provides basis for a democratic understanding of intelligence, in interpreting what laws the laws are – and what they do – through inquiry, and a framework for shaping laws that takes into account concretely the contributions of each inquirer. But perhaps the most pressing issue for the resolution of conflicts surrounding laws and democratic decisions is what their purpose or “end” is– or what function or social interests they should serve. Is it the promotion of justice or utility? A democratic order? Or the maximization of private activity, especially in commercial markets? The quest for absolute and external standards or values on which to decide cases was based, Dewey claimed, on the belief that “social facts are not taken as going concerns”; “but if they are ongoing, they have consequences; and consideration of consequences may provide ground upon which it is decided whether they be maintained intact or be changed.” (MPL, LW14, 121) Dewey suggests all too briefly in the essay that “[t]he standard is found in consequences, in the *function* of what goes on socially.” (MPL, LW14, 122). Perhaps the most important legacy of Dewey's thought and his theory of valuation was precisely in disclaiming that standards for interpreting and evaluating laws had to be found outside of ‘any possible empirical field’.<sup>52</sup> In fact, for Dewey, evaluation of ends and values – including moral values – are of a piece with practical judgments and scientific inquiry more generally. However, it appears also to be the source of some of the most persistent misinterpretations of Dewey's work: as advancing a strict fact/value distinction, as motivated by a “relativist” conception of democracy, and somewhat more plausibly, but still incorrectly, as advancing an instrumentalism motivated in finding standards and methods for adjudication that do not question the basic ‘ends’

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<sup>52</sup> Edwin Patterson, “Dewey's Theories of Legal Reasoning and Valuation,” writes, “taken together Dewey's theory of legal reasoning and his theory of valuation’ serve to explain the most important aspects of the changes in legal method and in legal substance of the last fifty years.” at 133.

or values that justify a certain decision.<sup>53</sup>

This assessment of Dewey's pragmatism appears, in fact, to confuse his own philosophical commitments with those of contemporary pragmatists like Posner. Posner's own moral theory is a species of non-cognitive moral skepticism, which he describes as "pragmatic."<sup>54</sup> Posner extends moral sentiments into culturally specific rules based on general approbation and disapproval. He shares with Rorty the basic rejection of universalizing projections of morality, and instead turns the issues back to community standards.<sup>55</sup> Like Dewey, Posner suggests judges need to look to potential social consequences of their decisions in the

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<sup>53</sup> The following is typical of the extensive distortions of Dewey's thought. It appears that the misreading rests largely in Peller's interpretation, though it seems that each of the sources cited has understood Dewey in this misinformed interpretation as a "relativist" who believed that "one could only reason 'instrumentally' about the best means to achieve already-given ends": "Drawing upon Edward Purcell's influential book, *The Crisis of Democratic Theory*, Peller argued that Hart and Sacks were part of a generation of scholars and social scientists who, in the wake of Nazism and Fascism, sought to broker a sort of compromise between a scientifically- oriented modernism that was skeptical of values and a traditionalism that sought to justify democratic institutions on philosophical foundations. These intellectuals, influenced by John Dewey's "relativist" theory of democracy, drew a distinction between facts and values and argued that democracy ought to be understood as premised on an underlying skepticism about values. While recognizing that all inquiry was necessarily "framed" by values, they denied that values themselves could be reasoned about, insisting instead that one could only reason "instrumentally" about the best means to achieve already-given ends. Thus, what democracy called for was not philosophical justification but empirical inquiry into the sociological conditions necessary to sustain it. Peller argued that in the legal domain, Hart and Sacks sought to forge a similar compromise by drawing a distinction between procedure and substance analogous to the one Dewey had drawn between facts and values." Charles Bazan, "The Forgotten Foundations of Hart and Sacks," *Virginia Law Review* 99, no 1 (2013), 16. This portrait of Dewey as advancing a "relativist" conception of democracy is advanced also in William N. Eskridge, Jr. and Gary Peller, "The New Public Law Movement: Moderation as a Postmodern Cultural Form," *Michigan Law Review* 89 (1991) and Gary Peller "Neutral Principles in the 1950's," *University of Michigan Journal of Law Reform* 21 (1988). Additionally, the view of Dewey as advancing the fact/value dichotomy in support of an instrumentalist, amoral conception of democracy reappears in pragmatist interpretations like Brian Tamanaha, "Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociological Studies, and the Fact-Value Distinction," *American Journal of Jurisprudence* 41, no 1 (1996).

<sup>54</sup> Richard Rorty, "Dewey and Posner on Pragmatism and Moral Progress," *University of Chicago Law Review* 74 (2007): 915-927.

<sup>55</sup> His pragmatist critics have noted that the turn to 'community standards' invites democratic implications that he is unwilling to accept. That is, to assess such standards invites participation from the community itself. See Westbrook, *Democratic Hope* (Ithaca: Cornell University Press, 2005) and Knight and Johnson, "Political Consequences of Pragmatism," *Political Theory* 24, no.1 (1996), 68-96. Westbrook helpfully notes also the transition from Posner's turn to the need to turn to social 'consensus' in his earlier works, to his more robust critique of deliberative democracy in *Law, Pragmatism and Democracy*. In the latter, Posner appears to concede the merits of epistemological democracy as Dewey conceives it, and the democratic implications of inquiry in determining social consensus. However, in the latter work, he dismisses the turn to the public as utopian. See the Introduction of the dissertation for additional description of Posner's arguments favoring his elite Schumpeterian style democracy. Westbrook, 191.

course of their reasoning – and he believes that they do so as a matter of course (and do not need to read and understand Dewey’s pragmatic philosophy to do so). But Posner argues that there is no way of a principled moral evaluation of social consequences, whether they are good or bad, and that “different judges, each with his own idea of the community’s needs and interests, will weigh consequences differently.”<sup>56</sup> Posner rejects claims that any type of moral reasoning is possible, or can be subject to the type of inquiry that he believes can be applied to physical and social facts.<sup>57</sup> Instead, he claims that principles evaluation of ends is unreasonable. Ends and values in political and moral life are a matter of power and personal desire, not topics open to inquiry.<sup>58</sup> That is, while we may look to consequences of certain rules and rulings, or applying certain legal principles, in the course of our reasoning, pragmatism offers us no substantive guidance on evaluating those consequences. As Solove and Sullivan have rightly noted, Posner’s approach to adjudication – and his rejection of Dewey’s philosophy as a guide in everyday pragmatism – amounts to an uncritical acquiescence towards fixed ends and values. For Posner, our assessment of consequences is in a sense predetermined by our preferred values and ends – or whatever we think should be the function of law. As they write, “Because it rejects any way to discuss the selection of ends, Posnerian pragmatism has little choice but to accept uncritically the dominant ends of society.”<sup>59</sup> Their critique is of a piece with Dewey’s own, of the persistent

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<sup>56</sup> Posner, *LPD*, 71.

<sup>57</sup> Rorty, “Dewey and Posner on Pragmatism and Moral Progress.”

<sup>58</sup> Michael Sullivan, *Legal Pragmatism: Community, Rights, and Democracy* (Bloomington, IN: Indiana University Press, 2007), 62.

<sup>59</sup> Michael Sullivan and Daniel Solove, “Can Pragmatism be Radical? Richard Posner and Legal Pragmatism,” *Yale Law Journal* 113, no. 3 (2003), 702. In their prescriptions for an assessment of ends, Solove and Sullivan suggest that we evaluate ideals, and asks of such concepts like “justice”: “Where did they come from? What conditions were they responding to? What have been the results? Who has benefited from their adoption? Who has suffered? Have they been democratically selected?” 704-705. They draw also on the works of Daniel Farber, “Legal Pragmatism and the Constitution,” *Minnesota Law Review* 72 (1988), to examine issues like constitutional adjudication through the framework of “text history, and traditions.” I diverge with their prescriptions, as I emphasize here that instead of assessing ideals as such, valuations and assessments of ends require situated and contextual reference, and in the legal context, context-specific inquiries. In this way, it appears that each situation-

refusal to apply intelligent methods of inquiry to our values and ends. As Dewey writes, “Denial that [“what is of value and what is not”] can be influenced by knowledge points emphatically to the non-rational and anti-rational forces that will form them.” (FC, LW13, 162) As such, Posner’s legal pragmatism becomes a largely instrumental project of selecting efficient methods of legal reasoning for arriving at selected ends.<sup>60</sup>

Posner’s own preferred ‘end’ is in assuring the smooth functioning of markets and the private domains of commercial activity. According to Posner, these are the domains traditionally favored as values within American polity, and allow valuable social ends on the whole to be realized, insofar as it “reinforces their positive effect on wealth and happiness.”<sup>61</sup> The ‘pragmatic’ feature that Posner allows lies in turning to empirical research to assessing whether the ends have been efficiently realized, and to assess the consequences of decisions in advancing these particular ends. Moreover, he turns to the promise of a diverse judiciary which might represent different types of values or interests, even if no principled discussion on those interests is possible.<sup>62</sup>

Posner’s denial that judgments on ends can be intelligently made is of a piece with his rejection of deliberative democracy as a whole. Deliberative democracy requires deliberating about conflicting ends and values or the type of reasoning he explicitly denies is possible.<sup>63</sup>

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specific inquiry, which can take into account various ends and standards, must be attuned precisely to the adaptiveness of interests and ends as new factual situations arise.

<sup>60</sup> To be clear, Posner distinguishes his account from a purely utilitarian one, as he sees that there is flexibility in choosing ends, and that pleasure or utility is too rigid. However, there is no intelligent or principled way of choosing or adjudicating among them. Posner, *LPD*, 55.

<sup>61</sup> Posner, *LPD*, 173. Butler, 271.

<sup>62</sup> Posner, *LPD*, 71. See also, *The Problems of Jurisprudence* (Cambridge: Harvard University Press, 1990). There Posner argues that judges may switch their values or “visions” as a matter of persuasion. However, he does seem to betray a certain ambivalence as to whether it is possible versus simply unrealistic to be relied upon. He writes, “if two social visions clash, which prevails? Equivalently, how does a judge choose between competing social visions? Often the choice will be made on the basis of deeply held personal values, and often these values will be impervious to argument. Persuasion will figure in some cases but it will be persuasion by rhetoric rather than by the coolest forms of reasoned exposition.” 148-149.

<sup>63</sup> Westbrook, *Democratic Hope*, 192.

While judges and courts may be occupied with more epistemically capable inquirers, ultimately their ‘ends’ too are not subject to intelligent evaluation. Common law judges can find constraints, and a modicum of objectivity, by turning to existing precedents and standards, and by investigating what ends, like advancing commercial activity, have stood the test of time. This minimal objectivity is attained by looking to what has been deemed within society to have value, as a matter of their continued existence. Judges can thus assess empirically in this manner the nature of social convergence and social consequences.<sup>64</sup> But any normative assessment or method of adjudicating among basic findings of ends will quickly elide into assertion of preferences over social values. This is the realm of politics, he suggests, as one of power and conflict, and the assertion of bare preferences. This is also the realm of politics that he thought the Legal Realists – unlike his own chastened and apolitical Legal Pragmatism – recklessly merged into the domains of law and adjudication: a bare playing out of politics and values to be asserted in judicial opinion.<sup>65</sup>

One of Dewey’s most persistent philosophical claims is that outmoded epistemologies and metaphysics blind us to the fact that values are part of every fiber of experience. He writes, “Our constant and inescapable concern is with prosperity and adversity, success and failure, achievement and frustration, good and bad. Since we are creatures with lives to live, and find ourselves within an uncertain environment, we are constructed to note and judge in terms of bearing upon weal and woe—upon value.” (EN, LW1, 33) And yet, there seems to be general skepticism both that those values are anything more than a species of non-cognitive preference, or that there is in fact an intelligent method for evaluating them, or affirming or modifying them. What Dewey’s theory of valuation suggests, however, is that in the process of deliberation (or

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<sup>64</sup> Posner, *The Problems of Jurisprudence*, esp. Chapters 3-4.

<sup>65</sup> Posner, *LPD*, 84.

valuation), we test and secure our values by looking at what it takes to act on them (our means) and what attaining them would concretely do – whether it would lead to more problems, improve whatever situation motivated us to seek out and secure these values in the first place. And what his moral theory provides, in turn, is precisely what Posner suggests is impossible: guidance – though not absolute – in the assessment of consequences.

In this section, I discuss the nature of Dewey’s treatment of legal reasoning and practical judgment. For Dewey, judgments on values were a species of practical judgments. And legal reasoning was a form particular form of practical reasoning more generally.<sup>66</sup> I highlight one claim of particular interest in the legal field: his ‘means-end continuum’ and development of legal standards for assessing cases (like the “reasonable man” standard from Holmes). From this assessment, we can see how the broader sense of standards or ‘ends’ are embodied and advanced by laws. In each of these cases Dewey suggested that no fixed ends or standards exist. We need to look instead to concrete ways or ‘means’ that serve the function of laws, and whether these ends in fact solve the problems that gave rise to them in the first place. As for Posner’s argument that we cannot substantively choose among conflicting ends, I suggest that the issue again takes on an explicitly democratic valence. I take from Dewey’s account that the “idea of the community’s needs and interests” simply become clearer not from any turn to the judge’s private assessment of ends. It requires, perhaps all too self-evidently, that the community itself be equipped to articulate its needs and interests, and itself come to better deliberate on moral values and ends. Even if we “weigh consequences differently,” as Posner argues, we can still do so more intelligently and reflectively, with careful consideration and participation from the community as a whole. I discuss the nature of moral standards and judgments in particular below, or the broader sense in which laws and decisions may be considered legitimate or

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<sup>66</sup> Posner makes this claim too, *LPD*, 117.

justified. For now, I highlight features of Dewey's account that have been otherwise obscured or rejected by his followers in the legal domain, in the specific and limited context of the activity of judges, and where alternatives hold out promise in shaping and securing democratic values.

### **Legal Reasoning and Valuations**

Dewey's basic claim about practical judgments or questions of what we ought to do, is that they follow from the same type of inquiry into what already exists. When we are to make a practical judgment on the basis of our values of any stripe (how *ought* I decide this case to promote private wealth among the general public), we think about (or should think about) what it would mean to realize them (the sacrifices needed to accumulate it, the institutional changes necessary, etc.). Dewey writes of these practical judgments, or "valuations" as a process: we begin with some felt trouble, locate a problem, consider what would follow from these provisional objectives, which themselves become means in resolving the problem at hand. We can imagine what it would take to realize these objectives concretely and whether we are actually capable, given our circumstances, to do so. Then we consider what consequences might follow from acting on and pursuing what he calls those ends-in-view: would it actually fix or improve the situation that has us thinking about our action in the first place? Are there better alternatives? How would it affect everyone and everything implicated by the problem and potential solution? Already we are in the process of valuation. As Dewey writes, "There is no a priori standard for determining the value of a proposed solution in concrete cases. A hypothetical possible solution, as an end-in view, is used as a methodological means to direct further observations and experiments." (TOV, LW13, 232) There might be better or worse options, and we might decide



that our original problem was actually altogether frivolous upon further reflection. But once we do act, we can then evaluate whether our initial problem was actually resolved, what impact our actions had, whether we'd do anything differently in the future. In this very process, our original values, or desires and interests, may be called into question, and we may change them. If we see, for example, that the promotion of private market wealth in practice led to the immiseration of broad swaths of the public, we may change our initial value or interest in promoting private markets. That is, we critically evaluate our proposed ends or values through "a great number of definite, empirical inquiries." (TOV, LW13, 232) But we may also see that the results lead to a concrete solution or consummation of our initial problem. New problems will continue to arise, and may result directly from our actions. But in the process of reflecting critically on what has happened, and what our actions led to and why, we will likely make better-informed decisions in the future – we go from "shall" to "should" – we secure values.

This is, in fact, the very method of judicial reasoning that Dewey advocates in "Logical Method and the Law," and one which Posner suggests does not have any implications for democratic theory, or for the assessment of values, more generally. The article suggests legal reasoning – and inquiry in general, as discussed above – in fact guides us with how we *ought* to make legal decisions, and the methods that garner better judgments. In that article, Dewey explicitly criticizes the syllogistic reasoning that Holmes had been so prominent in rejecting, which offers "rigid demonstration" of an antecedent truth and "fixed forms" that do not in fact exist, as well as the resort to 'hunches' or untested intuitions in making decisions. The basic method that aligns with Dewey's scientific method and experimentalism was to understand that judges in general, like lawyers and everyday people, engage with the type of inquiry described above: of "comparison of alternatives, weighing of facts; deliberation or thinking has intervened.

Considerations which have weight in reaching the conclusion as to what is to be done, or which are employed to justify it when it is questioned, are called ‘reasons.’ If they are stated in sufficiently general terms they are ‘principles.’ When the operation is formulated in a compact way, the decision is called a conclusion, and the considerations which led up to it are called premises.” (LML, MW15, 65) As he writes, the issue is not applying pre-existing formal logic, but “to find statements, of general principles of particular fact, which are worthy to serve as premises.” Judicial decisions “are reasoned or rational, increasingly so, in the degree of care and thoroughness with which inquiry has been conducted and the order in which the connections have been established between the considerations dealt with.” (LML, MW15, 66).

The basic fact of our adaptability and testing of ends and values is of a piece of what Dewey called the means-end continuum. If we follow Dewey’s treatment of values and valuation, we can see also why we can meaningfully examine ‘ends’ or goals, and the ‘interests’ or values that motivated them, by evaluating them and seeing how they develop out of activity – or how “[t]he standard is found in consequences, in the *function* of what goes on socially” (MPL, LW14, 122). To illustrate this insight, we can turn to Dewey’s explication of this principle in his example of shooting and affixing a target. One may have an instinct to shoot and throw, say a ball. That activity may serve some function or be thought valuable for exercising the arm or demonstrating strength and accuracy. But that function may be heightened by fixing a target instead of throwing at random. The origin and purpose of the target itself or the “goal” of action did not exist independent of the activity that gave rise to our creating a target. But the introduction of the target enriches and defines the meaning of the activity. Throwing is now throwing-at-the-target. The target is not as an end-in-itself or a remote end external to activity, but as a “means in present action” for honing and directing that action in meaningful ways. As

Dewey writes, “Men do not shoot because targets exist, but they set up targets in order that throwing and shooting may be more effective and significant.” (HNC, MW14, 156) We can then evaluate the target based on whether it’s too far or too close to be reasonable hit, but that evaluation is made based on the pre-existing activity and function it served.

This insight became a core feature in the type of adjudication undertaken by judges like Holmes, in which standards and principles like assumption of risk were developed by the courts. In developing legal standards for dealing with concrete situations, we do not start with major premises and make deductions; we are faced with a problematic social situation and select and consider relevant facts, general principles, adjust and consider their meaning or reject them, such that we can come to some sort of acceptable resolution to the problem at hand. This, as Dewey points out, is also the actual practice of a lawyer, tasked with helping a client solve his case. Dewey offers Holmes’ “reasonable man” standard as example for this type of valuation that considers more concretely the social conditions that they must address, which replaced the previous doctrines based on ideal standards of conduct. Dewey writes:

No Kantian philosopher ever went further in ascribing a ready-made antecedent faculty of reason to man than the courts, in endowing the laborers of this country with unbounded foresight of the consequences implied in taking a job; and no transcendentalist ever went further in assuming that this antecedently possessed reason was in a position to make itself effective in action. As far as the workmen were concerned the courts were committed to the idealistic assumption: *Mens agitat molem*. In its application, this meant, that risks which the laborer ran as a matter of fact in the performance of his habitual duties were assumed to have been deliberately or intentionally undertaken by him. The whole doctrine of the assumption of risk was, in pragmatic effect, a rendering of brute physical situations in terms of purpose or reason.” (NRL, MW7, 60).

Holmes, instead, suggested that we must consider what actual people would do in comparable situations – a ‘reasonable man’ – and from there develop standards for evaluating behavior and assign risk and obligations. In short, the logic of the tort laws that derived a standard of assumption of risk by positing ideal standard of rationality and deliberate intentionality, worked

to confuse and hinder any workable method for actually allocating risk and responsibility. Moreover, the faulty attribution of purpose or reason in the facts of physical labor, or assumptions of risk that are undertaken as a matter of particular labor conditions. One must look realistically at the actual work that laborers had to undertake – those practices or ‘habitual duties’ and activity of workmen that actually gave rise for the need of regulation in the first place – and create ‘targets’ that would improve those practices. From there, we can begin to develop standards and assign responsibility, which are ‘reasonable’. The specific application of those standards can in turn be tested by whether they do in fact improve allocation of risks, etc.

At least two additional points can be derived from this point in the legal context, and illuminated with a basic legal claim: whatever laws or legal standards arise do not derive antecedently from fixing some ‘target’ like utility. For example, we may find that driving on the road causes accidents, or that a breach of contract may have deleterious effects for the wealth of its litigants.<sup>67</sup> Something in our social practices, existing laws, or customary ways of doing things is lacking. The original interest in ‘reducing traffic accidents’ and ‘enhancement of private commercial activity’ may be achieved by banning cars altogether, or by forgoing all laws limiting contractual obligations so long as they enhance wealth. Surely that interest would be realized in some manner. But valuations require looking at the particular means that make sense of those interests and ends: we want driving at the speed limit that we develop through testing or considering carefully what speed limit is reasonable on a given road, by considering a host of different scenarios. Or we may consider that reducing traffic accidents is not actually an important value for a particular area given their rarity and the other costs of implementing such regulations. We give concrete meaning to an interest or end through an assessment and creation of ‘means’ that actually solve existing problems and meet concrete social needs and interests. In

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<sup>67</sup> Similar examples are offered in Sorenson, “John Dewey’s Philosophy of Law,” at 58.

short, the assessment of ‘ends’ is simply a testing of the ‘means’; means are not instrumental towards a fixed end, but on a continuum and must be assessed accordingly. To assess those means and the ends-in-view, we have to look at how that activity – whether it is driving, or facilitation of market transactions – fits into a larger pattern of social interactions. As Dewey writes, “the doctrine of fixed ends not only diverts attention from examination of consequences and the intelligent creation of purpose, but, since means and ends are two ways of regarding the same actuality, it also renders men careless in their inspection of existing conditions.” (HNC, MW14, 160)

As Dewey writes, “Observation of results obtained, of actual consequences in their agreement with and difference from ends anticipated or held in view, thus provides the conditions by which desires and interests (and hence valuations) are matured and tested.” (TOV, LW13, 218) We can learn from the past, think about consequences, and thus change or re-direct desires and interests. This is a method of intelligent valuation that is part of everyday life, whether it be with regards to eating ice cream, buying a suit, joining a labor strike, or going to war. To that end, “Every person in the degree in which he is capable of learning from experience draws a distinction between what is desired and what is desirable whenever he engages in formation and choice of competing desires and interests.” (TOV, LW13, 219) This as I take it, is the suggestion that Posner rejects as possible: we can be flexible in assessing the initial interests we had (like promoting wealth or social justice or reducing traffic accidents), especially when they are challenged or conflict with other values and interests – and abandoning or affirming our commitment to them – given what they do in the broader scope of social life and the means necessary to realize them. These are not a matter of pure preference and changed only as a matter of persuasion – they too can be evaluated and adjusted according to consideration of their

consequences. The assessment is of a piece of Dewey's basic claim that laws cannot be understood unless we take into account what they concretely do in social life, the situations from which they arise, and the functions they satisfy within them. What's more, fixing future ends makes us inclined to fetishize a distorted evaluation of values as ends-in-themselves, without attention to consequences or the nature of the means constitutive of achieving that end. There may be posited ends in a given society, as Dewey writes, "so standardized by custom that they are taken for granted without examination, so that the only problems arising concern the best means for attaining them. In one group money-making would be such an end; in another group, possession of political power; in another group, advancement of scientific knowledge." (TOV, LW13, 229) These ends are "blank frameworks" that only set ex ante limits on potential ends, which should only be limited by consideration of means. Even in political life, there are no means or end that cannot be subject to intelligent adaptation. And with fixed ends as an expression only of habits and conventions, this understanding of ends leaves theories without a critical vocabulary for valuation.

Two additional features of Dewey's account are worth noting in particular. Dewey rejects traditional notions of usefulness, which do not touch on the consequences of certain activity in expanding and enriching immediate experience. Valuation is not purely a useful or, again, an instrumental endeavor. In purely instrumental thinking, we turn to:

*efficacy* in bringing into existence certain commodities; *we do not ask for their effect upon the quality of life and experience*[...] What they also make by way of narrowed, embittered, and crippled life, of congested, hurried, confused and extravagant life, is left in oblivion. *But to be useful is to fulfill need.* The characteristic human need is for possession and appreciation of the meaning of things, and this need is ignored in the traditional notion of the useful. We identify utility with the external relationship that some events and acts bear to other things that are their products, and thus leave out the only thing that is essential to the idea of utility, inherent place and bearing in experience. (TOV, LW13, 235)

Scientific and instrumental procedures that bring about ‘useful’ ends are not valuable in themselves, unless we consider what it means to be useful or better as ends. As we think about the usefulness of laws, this requires in turn looking at how those laws are used in shaping further activity, not just in their immediate regulation of people as they are, but how they may continue to use laws in navigating social life. And this suggests in turn, that valuations on the whole must look beyond “certain commodities” but on a much more qualitative assessment “of life and experience” – of the type that requires turning directly to the public beyond existing metrics of wealth and commodities, but, as Brandeis would write, one must “feel ‘in his bones’ the fact to which [laws] apply”.<sup>68</sup>

Secondly, the fact that our values can be tested through consideration of consequences, does not amount, for Dewey, to a suggestion that our rational judgments may *overcome* our initial desires and subjective values. Dewey’s account, in so assessing values and valuations in this manner, reinforces the central – and self-evident – fact that desires and interests, which already have a cognitive basis, when subject to critical evaluation, can change when subject to critical evaluation. This dualism too, as discussed in the context of habits, has no psychological warrant: when we act and think, we do so as a whole person. We do not have inner cognitive or subjective selves; we project those distinctions back on to action to explain what occurred. As such, the persistent claimed tension between reason and passions, norms and motivation, particular interests and critical reflection is foregone. As James Gouinlock writes, “On Dewey’s view, human behavior is not governed by a rational faculty which transcends nature or commands the will, nor is it necessarily governed by mere desire. Rather, it can be a function of the intelligent formation of desires. And the intelligent formation of desires implies the discovery

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<sup>68</sup> Louis Brandeis, “Letter to William H. Dunbar, Feb 2, 1893” in Brandeis on Democracy, ed. Philippa Strum (Lawrence, KS: University Press of Kansas, 1995), 47. Brandeis is famous also for his *Mueller v. Oregon* brief. See, “Brandeis’ Facts,” David P Bryden, *Constitutional Commentary*, 281, no. 1 (1984).

and construction of meanings of conduct with the environment.”<sup>69</sup> No intelligent valuation can take place without taking into account these desires and interests, and refining and redirecting them through reflection on their consequences, whether they are practical, what it takes to realize them in action. The relationship is self-reflexive and expansive. As thinking about and evaluating different objects shape and expand our very desire, initiates an evaluation of the things we desire and therefore our conscious action, and our conduct.

## **Growth of the Law**

Posner suggests in his earlier works that the democratic legitimacy of decision-making requires that the social interests represented in adjudication consider both basic rule of law considerations towards consistency and precedents and secondly, an objective determination of those interests. As such, he turns to traditional social interests that have stood the test of time – namely, the facilitation of private enterprise and wealth maximization.<sup>70</sup> But as Posner’s critics have rightly noted, such a conception does not adequately account for the decidedly anti-democratic fashion that existing interests may have been advanced over time.<sup>71</sup> Dewey, perhaps not surprisingly, sharply rejected the very attribution of reason to the forces of nature of the Spencerian stripe, to offer up principles for adjudication. He writes:

the central feature of the laissez faire doctrine is that human reason is confined to discovering what antecedently exists, the pre-existent system of advantages and disadvantages, resources and obstacles, and then to conforming action strictly to the given scheme. It is the abnegation of human intelligence save as a bare reporter of things as they are and as a power of conforming to them. It is a kind of epistemological realism in politics. That such a doctrine should work out, no matter how personally benevolent its holders, in the direction of *Beati possidentes*, is inevitable. (NRL, MW7, 58-59).

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<sup>69</sup> James Gouinlock, *John Dewey’s Philosophy of Value* (New York: Humanities Press, 1972), 287.

<sup>70</sup> Posner, *LPD*, 173.

<sup>71</sup> Knight and Johnson, “Political Consequences of Pragmatism,” 87-88.



In his lectures on the *Growth of Law*, Benjamin Cardozo explicitly linked his works to Dewey's theory of valuation to considering how judges could 'grow' the law in such cases where there no clear cut correct decisions and the legitimacy of the judge's interpretation is at stake, in such a way that intelligently advanced the very function of law itself. Posner himself sees his enterprise as of a piece with Cardozo's "pragmatic jurisprudence" and his assessment that "[t]he final cause of law is the welfare of society."<sup>72</sup> In this, Posner rightly identifies basic similarities between his enterprise and Cardozo's. Like Posner, Cardozo notes there are always limitations and precedents that can fix the limits in which judges— all but a few cases involved fairly clear answers, directly applicable legal precedents, interpretive principles, political and administrative values, etc. – but there are also 'doubtful cases', and decisions must be made that are based on some judgment of value – whether of justice, social good, or placing a particular interpretation on equality.<sup>73</sup> As Cardozo writes, "In the present state of our knowledge, the estimate of the comparative value of one social interest and another, when they come, two or more of them, into collision, will be shaped for the judge, as it is for the legislator, in accordance with an act of judgment in which many elements cooperate."<sup>74</sup> Cardozo continues: "When we find a situation of this kind, the choice that will approve itself to this judge or to that, will be determined largely by his conception of the end of the law, the function of legal liability; and this question of ends and functions is a question of philosophy."<sup>75</sup> For Cardozo, the criticism of ends and functions is

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<sup>72</sup> Cardozo, *The Nature of the Judicial Process* at 66, cited in Posner, *The Problems of Jurisprudence* at 28.

<sup>73</sup> Cardozo, *Growth of the Law*, 84. See also, John C. P. Goldberg, "Community and the Common Law Judge: Reconstructing Cardozo's Theoretical Writings," *N.Y.U. Law Review*, 65 (1990), for an overview of Cardozo's judicial method as articulated in his cases and *The Nature of the Judicial Process* (1921) and *The Paradoxes of Legal Science* (1928).

<sup>74</sup> *Ibid*, 85.

<sup>75</sup> *Ibid*, 101. Cf. Posner, "Although these methods [of legal reasoning, "embracing intuition, analogy, deliberation, interpretation, tacit knowing, subjecting propositions to the test of time, and much else"] that people often generate determinate results in law, there are occasions – and these the cruces of legal evolution—when they do not, and then judicial decision is based perforce on policy, politics, social vision, 'values,' even 'prejudice' (in

precisely the purview of (pragmatic) philosophy – of critically engaging with assessments of the law’s very function and its aim. As he writes,

This power of creation, if it is to be exercised with vision and understanding, exacts a philosophy of law, a theory of its genesis and growth and aim. Only thus shall we be saved from the empiricism which finds in an opinion, not a prophecy to inspire, but a command to be obeyed. The true point of view has been admirably stated by Mr. Justice Brandeis in his dissenting opinion in *State of Washington v. Dawson & Co.*. Arguing for the restriction of a rule which had proved itself unworkable, he says: “Such limitations of principles previously announced and such express disapproval of dicta are often necessary. It is an unavoidable incident of the search by courts of last resort for the true rule. The process of inclusion and exclusion, so often applied in developing a rule, cannot end with its first enunciation. The rule as announced must be deemed tentative. For the many and varying facts to which it will be applied cannot be foreseen. Modification implies growth. It is the life of the law.”<sup>76</sup>

In turning explicitly to Dewey’s pragmatism, Cardozo finds that the resources for thinking through the ways in which we critically examine its “genesis and growth and aim.”<sup>77</sup> It bears emphasizing also the notion of “philosophy” behind Cardozo versus Posner’s is that for the latter, philosophy – including Dewey’s if not pared down to its “everyday” reasonableness – does not have bearing on what we actually do. But Dewey’s conception of philosophy was, to that end, in fact a reject of abstract theorizing that Posner attributes to philosophy writ large. For Cardozo, as with Dewey, philosophy needed to re-direct its attention to the “problem of men” not of abstract dialectical conceptual issues – and that philosophies are borne out of moral convictions as to how we should live. It was, for Dewey, a criticism of criticism – a way to not

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Gadamer’s sense of prejudgment). Decisions so based are not easily determined to be ‘right’ or ‘wrong’; the vocabulary of apodictic certainty is misplaced. Perhaps the highest aspiration of the judge is reasonableness in adjudication.” *The Problems of Jurisprudence*, 30.

<sup>76</sup> Cardozo, *Growth of the Law*, 137, citation omitted. 264 U. S. 219, 236. Brandeis writes in his famous *New State Ice* decision, “To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment... But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.” *New State Ice*, 285 U.S. at 280-311, cited in Farber, “Brandeis.”

<sup>77</sup> Ibid, 127.

only accept the existing law as it is (which, again Posner sees as assisting in wealth maximization) but how those ends themselves can be subject to criticism and growth. The very function of law is, as discussed above, not the acquiescence to existing customs that have stood the test of time, as Posner suggests must facilitate in the creation and habits of intelligence that can conduce to better problem-solving, more informed criticism, and as such, to freedom of each individual. The law, in this formulation, if it is to have settled end or function, is to facilitate in the intelligent formulation and criticism of its ends, and existing customs. As Cardozo writes, citing Dewey in part, “the generalizations that result from the study of social phenomena are ‘not fixed rules for deciding doubtful cases, but instrumentalities for their investigation, methods by which the value of past experience is rendered available for present scrutiny of new perplexities.’ Sociology would petrify with a rigidity more fatal than that of logic, or rather, perhaps, with a logic of its own, if its hypotheses were treated as finalities. ‘The problem,’ in the words of Dewey, ‘is one of continuous, vital readaptation.’”<sup>78</sup>

Of course, this does not eliminate the ‘pain of choosing at every step’<sup>79</sup> in making such decisions, as Cardozo wrote. But this also means that the judge shouldn’t retreat to given ends and interests to guide decision-making, nor to sociological facts themselves as revealing normative prescriptions. Nor is it that decision-making is wholly unprincipled. As Brian Tamanaha has recently argued, the contribution of Legal Realism was not in suggesting a total indeterminacy and amorality behind decision-making. It was in acknowledging that difficult decisions had to be made as best as possible, with no guarantees of right answers.<sup>80</sup> As I see it,

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<sup>78</sup> Ibid, 85.

<sup>79</sup> Cardozo writes, “what Professor Dewey says of problems of morals is true, not in like degree, but none the less, in large measure, of the deepest problems of the law; the situations which they present, so far as they are real problems, are almost always unique. There is nothing that can relieve us of ‘the pain of choosing at every step.’” Ibid, 67.

<sup>80</sup> Brian Tamanaha, “Understanding Legal Realism,” *Texas Law Review* 87, no. 4 (2009). One might argue, however, that Tamanaha is simply reading a pragmatic vein into the realist tradition. Posner’s competing view of

this is precisely the claim of pragmatism: of fallibilism and anti-skepticism, of the possibility of principled valuations, but the need for a chastened and non-dogmatic approach towards the decisions that must be made.

At this point, Posner might still argue that we can conduct such valuations, and critically assess our proposed decisions according to the means necessary to realize them. We can adapt our ends-in-view accordingly, and perhaps as intelligently and deliberately as we are capable of doing, by looking to the broadest swath of consequences possible, with a judicious assessment of values as we attribute them to the community. But who is to say that we get that our assessment (and even our criticism) of ‘community needs and interests’ and our decisions are any better than anyone else’s? As noted above, for Dewey, we secure and affirm values insofar as they resolve the problems that give rise to valuations in the first place. And consonant with Dewey’s model of inquiry, such valuations are made effective precisely by making each of the inquirers capable of identifying what problems need resolutions, their assessment of whether the decisions of the court fixed those problems. The implication that follows from Dewey’s account, and why it has a distinctively democratic valence, versus Posner’s, is the need to turn to the public itself to assess their ‘needs and interests’ and whether decisions have concretely resolved problems that give rise to legal disputes. Moreover, we see the imperative for the public itself to be capable of deploying methods of intelligence, and criticizing and reforming its ‘needs and interests’. We need to turn to the public to assess what those problems are in the first place, because legal inquiry on the whole is more effective insofar as those problems are better articulated and recognized. Though there may in turn be conflict as to how well those problems have been

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Realism is in highlighting its anti-formal and skeptical valence, and its apparent collapsing of political and legal values altogether. Tamanaha’s interpretation, on this view, reads much like aspects of Posner’s pragmatic jurisprudence. Perhaps not surprisingly both Tamanaha and Posner take Cardozo as a central figure in their respective accounts.

resolved and interests fairly represented, the issue requires firstly turning to the public itself, and how they understand their problems and the consequences of decisions.

To that end, the question of how adjudication can best account for the effects of decisions and the problems that give rise to them cannot begin and end with the judge – even if he is attuned to the social consequences of his decisions. This basic fact may explain why judges like Louis Brandeis – and today, thinkers like Roberto Unger – were concerned with the training of lawyers in their direct work with the public and its problems.<sup>81</sup> In a speech to lawyers, Brandeis, in fact, put the issue precisely in terms of the role of the law, at least as it had been conceived in the American democratic system.<sup>82</sup> As Brandeis argued, turning to de Tocqueville, lawyers became something of democracy’s aristocracy in America, because the central belief that citizens are not subjects but equal citizens under the law. Lawyers had traditionally been public servants tasked with aiding the public in navigating the legal system, not only their expert knowledge of the laws, but, as Brandeis emphasizes, in a commitment instilled in them through their education that their work was explicitly public-oriented. The very function of a legal system and of lawyers was not primarily in courtrooms or legislatures, but to help individuals understand the social problems they faced, in the “position of the adviser of men.”<sup>83</sup> As such, as Brandeis wrote to a young lawyer, “Your law may be perfect, your knowledge of human affairs may be such as to enable you to apply it with wisdom and skill, and yet without individual acquaintance with men,

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<sup>81</sup> Unger, *What Should Legal Analysis Become?* This emphasis is also shared, notably, by Lon Fuller, who was active in the curricular review at Harvard Law School, as well as the ethics of lawyering. Fuller, too was concerned with legal and curricular review and the ethics of lawyer. See, for example, his “The Lawyer as Architect of Social Structure,” in *The Principles of Social Order*, ed. Kenneth Winston. and David Luban, “Rediscovering Fuller’s Legal Ethics,” *Georgetown Journal of Legal Ethics* 801, no. 11 (1998).

<sup>82</sup> On Brandeis’s pragmatism and his legal ethics, see Daniel Farber, “Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century,” *University of Illinois Law Review*, 163 (1995), who writes, “[Brandeis] had the odd notion that the lawyer’s duty is not to act as a hired gun but to advance the public interest as well as that of his client.” at 172 and Philippa Strum, *Louis D. Brandeis: Justice For the People* (Cambridge: Harvard University Press, 1984), 15. William H. Simon, “Babbitt v. Brandeis: The Decline of the Professional Ideal,” *Stanford Law Review* 37, no. 2 (1985), cited in Farber.

<sup>83</sup> Brandeis, “Opportunity in the Law,” in *Brandeis on Democracy*, 55.

their haunts and habits, the pursuit of the profession becomes difficult, slow and expensive.”<sup>84</sup> This, too, was what Dewey had found most admirable in Brandeis’ work as judge: this “close and intimate contact in practice with the problems of trade unions, public utilities in electric lighting and street traction, railways, insurance, conservation of natural resources, etc.: his method in each case was only to master the factual detail but to proffer a plan for constructive action often fruitful of thought and endeavor along new lines.”<sup>85</sup> (RJB, LW9, 237-238)

The greatest problem facing the public and the legal process, as Brandeis saw it, was the usurpation of the legal process away from the public and in the service of business interests: the strict bifurcation of public interest law and private corporate law resulted in the pouring of resources into hiring lawyers who would then direct their attention to the matters of enriching corporations, relegating the problems of the public to be resolved through ill-equipped and ill-funded lawyers. Their work had less prestige, and brought to the courts, if at all, ill-formed arguments and cases for their clients. The legal process itself required a return to the public and the education of all citizens in tandem to recognize and commit to solving these problems. Brandeis was, not surprisingly, the first to advocate *pro bono* litigation, as a first step towards improvement of these processes.<sup>86</sup> And as he understood it, the courts and the legislature could not be the *source* of shared ends, but useful only in aiding the public in solving their problems, and testing those ends in their consequences. The task of lawyers – no less of judges – was to know the problems they faced and familiarize themselves with their experiences. This was, of course, the type of participation and consultation with the public itself, which Dewey saw as absolutely necessary for the resolution of those problems. For the legal process to operate for the purpose it was set up, it had to broaden the public’s understanding of the social problems and the

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<sup>84</sup> Brandeis, “Letter to William H. Dunbar,” in *Brandeis on Democracy*, 58.

<sup>85</sup> Philippa Strum, *Brandeis: Beyond Progressivism*, on Dewey and Brandeis, 6.

<sup>86</sup> *Ibid.*, 50-51 on his *pro bono* work.

lawyer's task should be guided by their purposive stewardship of law for public ends.

## 2.4. MORAL LIFE AND ETHICAL DEMOCRACY

As we saw in the previous section, jurists like Cardozo were keenly aware of the need to extend and expand on legal values and the need to make value judgments in doing so. But the question left open in the previous section is what happens when we are confronted with conflicts as to whether a particular valuation by a judge has been decided well? It is possible for individuals to intelligently claim their interests and desires – and to deliberate on them and change them – in a manner that is not simply self-serving? How can they be motivated to do so? And what implications follow for a defense of robust participatory democracy, and the values Dewey associated with it: democratic liberty, equality, and progress? Perhaps the most persistent claim leveled against participatory democracy – and the shrinking of the domain of intelligent democratic deliberation proposed by contemporary scholars – is a belief in the inability of the public to move past its self-interest and biases. Here Posner is not alone in suggesting that rational deliberation on ends should be realistically restricted given social realities on the ground.<sup>87</sup> In short, a persistent barrier is the belief in the limitations of moral judgment on social issues – of whether we can deliberate intelligently on the good and value of institutions – can move beyond bias and irrationality.

The basic argument Dewey lends to valuations and values, including moral values, is that they can themselves be subject to intelligent inquiry. In this section, I draw resources from Dewey's ethics to understand how he linked inquiry to 'the common good' and to understand the question of moral evaluation of laws, beyond the work of the judge. Taken with Dewey's claims

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<sup>87</sup> See, e.g., Philip Pettit, "Depoliticizing Democracy," *Ratio Juris* 17, no. 1. (2004).

regarding inquiry and intelligence, we can see how, as Hilary Putnam states, “an ethical community – a community which wants to know what is right and good– *should* organize itself in accordance with democratic standards and ideals, not only because they are good in themselves (and they are), but because they are the prerequisites for the application of intelligence to the inquiry.”<sup>88</sup> The type of ethical inquiry that Dewey proposes has a deeper democratic valence, I believe, which comes to fruition in his appeal to the Great Community and to local relationships, as I discuss in the following chapter. What bears emphasis here is the role of character, conduct, and specifically, the creation and maintenance of social relations, as key features of moral life and judgment. It is through the cultivation of social relationships, that we can be motivated in our judgments towards shared ends. Ethical inquiry should not only take on democratic standards, but robust participatory democracies provide the best fora for the cultivation of characters and relationships necessary for us to engage in moral and ethical inquiry. In short, this is the ideal of a robust participatory democracy, wherein individuals have a forum to discuss the issues of the day, develop critical intelligence to evaluate social problems, and to assume moral responsibility and engage in deliberation that steer and shape shared laws and social institutions.

In this section, I explicate the particular ways in which Dewey understands (1) the relationship between critical inquiry and moral deliberation versus blind acceptance of laws, rules, and standards. This distinction is the core of Dewey’s understanding of morality, which, as I will argue, speak directly to his theory of liberal democracy as an ideal of moral life. Secondly (2) *who* the deliberating moral agent is and what moral deliberation implies for growth and freedom (3) how *we* can be motivated to deliberate with an eye to the common welfare and good.

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<sup>88</sup> Putnam, “Pragmatism and Moral Objectivity,” 223.



Here, Dewey turns to a refashioned notion of sympathy. Again, pace Spencer and the utilitarians, we do not need education to teach us what is good for others. We need to see the good we naturally find in our relationships with others and make this a factor in our moral deliberations. Finally, (4) I suggest how to understand moral justification and its relationship to democracy. I explicate these claims by turning to Dewey directly, before concluding with a summation of the chapter's core goal: to see how Dewey's treatment of law and legal philosophy is linked in lockstep with important normative commitment to democracy. Dewey's championing of robust liberal democratic participation – and radical democratization as a way of life, beyond institutional and legal forms – is necessary because how we live, our social relationships, and the laws and institutions that arise from them cannot be pried apart.

### **Freedom, Growth and Moral Judgment**

A central claim in Dewey's ethics is that the purview of moral theory is not the issuance of standards, rules or fixed procedures, whatever their provenance, for arriving at moral ends. "If our ethical ideas like the rest of our knowledge," as James Kloppenberg writes, "cannot conform to prescribed standards but derive instead from reason reflecting imperfectly on experience, then right and good, like truth, must be unhitched from certainty and made historical."<sup>89</sup> Moral theory provides "a more conscious and systematic raising of question" that anyone facing a true moral conflict or doubt, when values conflict, and must consider what to do through reflection (E2, LW7, 164). To that end, Dewey divides morality, and each agent's moral deliberation, between two types: customary and reflective. The former grounds action on entrenched habits, rules, or principles that are not reflected upon in action; we blindly defer to what tradition tells us to do,

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<sup>89</sup> Kloppenberg, *Uncertain Victory*, 4.

or fail to think at all. Reflection, on the other hand, is creative, particular, and requires intelligent inquiry and experimental methods for tackling new problems when definitive injunctions prove inadequate for the task. It requires identifying relevant data, considering consequences in their broadest reach, and making decisions and acting in ways that can best realize intelligible and desirable – not merely desired – ends. As Dewey writes, the “[d]ifference between customary and reflective morality is precisely that definite precepts, rules, definitive injunctions and prohibitions issue from the former, while they cannot proceed from the latter.” (E2, LW7, 165)

In this account, the deliberating agent – of habits and shaped by customs – returns as the locus of morality. Because the self is inextricably linked to conduct, moral deliberation, according to Dewey, requires reflection on who we are or what kind of self we aspire or ought to be through our conduct. (E2, LW7, 274). The conduct and character is part of the embodied self of habits, shaped by language and custom. The moral agent is linked in a framework or culture that not only shapes that conduct in concrete situations, but in the net of institutions and associations of which the individual forms a part. In this regard, the type of conduct relevant in shaping the actor itself is of a distinctively moral variety, insofar as it implicates responsibility and freedom. And we are responsible and free because we are capable of engaging in moral deliberation, and of growth and change through our purposive actions. Perhaps most crucially, for Dewey, insofar as reflective morality was a ‘method of intelligence’, it was also a *social* process. As Dewey proclaimed in *Human Nature and Conduct*: “Morality is Social.” It is worth citing Dewey at length:

morals are personal because they spring from personal insight, judgment and choice. Such facts as these, however, are wholly consistent with the fact that what men think and believe is affected by common factors, and that the thought and choice of one individual spread to others. They do not militate against the fact that men have to act together, and that their conjoint action is embodied in institutions and laws; that unified action creates government and legislative policies, forms the family, establishes schools and churches,

manifests itself in business corporations of vast extent and power, in clubs and fraternities for enjoyment and recreation, and in armies which set nation against nation. In other words, it is a fact that a vast network of relations surrounds the individual: indeed, “surrounds” is too external a term, since every individual lives in the network as a part of it. The material of personal reflection and of choice comes to each of us from the customs, traditions, institutions, policies, and plans of these large collective wholes. They are the influences which form his character, evoke and confirm his attitudes, and affect at every turn the quality of his happiness and his aspirations. (E2, LW7, 318)

But with the radical shifts in social life, Dewey continues, “[p]ersonal selves are forced, unless they are merely to drift, to consider their own action with respect to social changes. They are forced, if they engage in reflection at all, to determine what social tendencies they shall favor and which ones they shall oppose; which institutions they will strive to conserve and which they will endeavor to modify or abolish. . . His problem thus takes the form: what attitude shall I adopt towards an issue which concerns many persons whom I do not know personally, but whose action along with mine will determine the conditions under which we all live?” (E2, LW7, 318)

As Dewey frames the issue, there are two interrelated or reflexive relationships implicated by moral reflection: between individual and social modes of thinking – the former tied into personal reflection and the latter in existing social mores and norms. And the second is in the ways in which we think and reflect on these relationships and how they call for modifying or entrenching existing social institutions. The issue then reflects a twofold normative claim: that individuals must tie their moral judgments into an assessment of their social consequences. Secondly, social institutions provide the backdrop for those judgments, and the exercise of intelligence, among all constituent members of a society. As such, they should facilitate the capacity for each individual to engage intelligently on matters of social concern. That is, they should guarantee each individual’s creative capacities, or, more broadly, her freedom. For such deliberation to take place effectively, we need that freedom to be guaranteed to all individuals who constitute social life. And that freedom must be distributed equally: to forestall the growth

of any single individual has irreducibly social implications. Otherwise, both the growth of the individual and social institutions themselves will be stalled.

Because we have this capacity for purposive conduct and growth, we have a responsibility to steer that conduct in ways that take into account our actions on others. Dewey writes, “Moral development, in the training given by others and in the education one secures for oneself, consists in becoming aware that our acts are connected with one another; thereby an ideal of conduct is substituted for the blind and thoughtless performance of isolated events.” (E2, LW7, 169) In effect, we can see here a much more fine-grained understanding of what ‘education’ broadly was supposed to do in the ethical theories of Bentham, Austin, and Spencer, in educating the masses on utility, with the hope that eventually one could learn to transform one behavior in the service of the greatest social utility. Instead, intelligence itself is constitutively a method for reshaping and reframing the meaning of desires, because desires are fundamentally changed by the consideration of consequences of acts and what will happen when existing desires are in fact acted upon. It does not inculcate the merits of an ethical worldview over and against a hedonistic desire: it transforms the very meaning or nature of that desire.

We see also the radical distinction between Dewey’s treatment of moral deliberation and individual growth and that of deflationary accounts of democracy like Posner’s. The normative claim that Dewey advances as our starting point is the fact that we are capable of change and growth, which can be best fostered in a democracy that guarantees the necessary social conditions and institutions for the cultivation of intelligent and adaptive habits. A system of laws and institutions – and democracy – which takes individuals as they are, whether apathetic, unintelligent or unwilling to deliberate unselfishly (or at all), seems to elide this foundational feature of human nature. Again we can turn to Dewey’s claim introduced at the beginning of the

chapter, that laws and institutions are “means of *creating* individuals’ and that laws should not simply regulate existing desires and interests but ‘educate every individual into the full stature of his possibility.’”<sup>90</sup> The circle is virtuous: with democratic institutions that advance and equip individuals with this effective power and capacity for growth, we have individuals better positioned to intelligently deploy their moral judgment in criticizing and reforming social institutions to further advance the growth of each individual.

### **Sympathy and Social Relations**

The question then, is how to direct this freedom and moral deliberation towards ‘common good’. The difficulty facing moral theorists like Dewey was in countering the claims of the ethics of Spencer, who identified in nature a principle of morality that proclaimed individual self-interest as the paramount feature of human nature, which would organize social life. As Posner writes, ““Few citizens have the formidable intellectual and moral capacities (let alone the time) required for the role that Concept 1 assigns to the citizenry, although defenders of the concept believe that participation in democratic political activity strengthens these capacities, enabling a virtuous cycle. This is a theme common both to Tocqueville and to Mill. Even if it is correct, it leaves unanswered how the citizen is to be induced to participate in the first place.”<sup>91</sup> The issue as Dewey saw it, was that these accounts built on fundamentally flawed logic of the relationship between the individual and society. One had to recognize, firstly, that one’s individual good and freedom was inextricably tied up with the social institutions and life in which each individual is ‘surrounded’ and grows out of. But for Dewey, the very question of

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<sup>90</sup> Stears, *Progressives, Pluralists*, 150, citing Dewey, *Reconstruction in Philosophy*, 194, 186.

<sup>91</sup> Posner, *LPD*, 133.

being induced to participate requires looking to values of everyday life, especially those good in our friendships and social relationships. To understand how we can act on something other than self-interest, we need to draw from what actually motivates us – not being told to be good to others, but in building on the good we actually find in these relationships.

From this basic orientation, Dewey finds a role for standards for moral deliberation from the notion of approbation and disapproval as part of our moral (as social) reflection. “There is nothing more spontaneous, more ‘instinctive,’” Dewey writes, “than praise and blame of others” (E2, LW7, 236). The significance of these standards of approbation and approval rest specifically in the type of *situated* morality that Dewey found attractive in Hegel, and expanding the purview of reflection such that they reflect explicitly others’ and the consequence of actions on others. But Dewey must do better than the sentimentalist theories, which have generally attempted to turn spontaneous and unreflective attitudes to something systematized; attitudes of “acclaim and reproof” generally reflect unreconstructed social habits, and can be the “weapons of customary morality” (E2, LW7, 236), which “merely repeat and reflect the scheme of values.” In Dewey’s account, social standards and social relationships themselves are not an end motivating action, or an absolute normative standard for measuring morality. Instead, relationships are a feature of social life, and can shape our interests and desires through the course of valuations. Social standards thus serve as data that can shape our interests and desires through the course of our practical judgments and social valuations. “Regard for self and regard for others should not,” Dewey writes, “be *direct* motives to overt action. They should be forces which lead us to *think* of objects and consequences that would otherwise escape notice. These objects and consequences then constitute the *interest* which is the proper motive of action. Their stuff and material are composed of the relations which men actually sustain to one another in concrete affairs.” (E2,

LW7, 300)

The task is to turn to reflective morality, which finds “the inconsistency and arbitrary variations in popular expressions of esteem and disapproval, and seeks to discover a rational principle by which they will be justified and rendered coherent.” (E2, LW7, 236). The critical intervention, in other words, is in viewing an impartial spectator not as a composite or an aggregation of customs and cultural norms and attitudes, but as itself ideal of critical reflection on those customs and norms before they can be justifiably applied in conduct. “Reflection tries to reverse the order: it wants to discover what should be esteemed so that approbation will follow what is decided to be worth approving, instead of designating virtues on the basis of what happens to be especially looked up to and reward in a particular society.” (E2, LW7, 237) The issue, then, as plagued Smith, is the extent to which morality must remain thus partial as reflected in particular contexts and cultures, or whether it can ultimately have criteria beyond conventionalism. For Dewey, approval and disapproval themselves must be subjected to judgment by a standard instead of being taken as ultimate.” (E2, LW7, 254) That process, in turn, provides the very means by which “approbation and disapprobation” can take on: they become a means for criticizing “habits of valuation” not merely perpetuating them. (E2, LW7, 255) That is, those standards must provide what Philip Kitcher calls “the hall of mirrors”, which allows room for reflection: we can continue to reflect on our own disposition, and the things we reject, think critically of existing social standards, modify our standards and which may in turn modify social standards, and so forth.<sup>92</sup> What’s more it is not only the participation in rational processes that can create this turn toward “rational benevolence”. It can be and should be mediated through consideration of felt need and desire for praise and validation. It is one way in

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<sup>92</sup> Philip Kitcher, *Preludes to Pragmatism: Toward a Reconstruction of Philosophy* (Oxford: Oxford University Press, 2012), 325-343.

which we can assess our own desires concretely against a social standard and link our pleasure and assessment of ends, and our motivations, pleasures, and desires, with an external standard.

We also see the integral role of social relations in the constitutive conduct – the character – of each individual. It was in Mill’s work that “personal disposition, of character” was made central, which could address “the moral problem which confronts every person” of “how regard for general welfare for happiness of others than himself, is to be made a regulative purpose in his conduct.” (E2, LW7, 241) Mill brought back to a sense of the useful features of utilitarianism by looking to a moral *disposition* or consideration of our conduct. Thus, borrowing from Mill, Dewey can claim to find a “principle by which to judge the moral value of social arrangements” grounded in this concern foremost for disposition and character: “Do they tend to lead members of the community to find happiness in the objects and purposes which bring happiness to others? There is also an ideal provided for the processes of education, formal and informal. Education should create an interest in all persons in furthering the general good, so that they will find their own happiness realized in what they can do to improve the conditions of others.” (E2, LW7, 243) That formulation, as we shall see, was to be necessarily part of the institutions of civil society, political life, and most paradigmatically, in the schools, which are “good not only because of their direct contribution to well-being but *even more* because they favor the development of the worthy dispositions from which issue noble enjoyments.” (E2, LW7, 245, itl added).

Dewey’s was not a purely functionalist account of problem-solving as the core of ethical life. It involved dispositions and character that condition us for enjoyment, and were valuable “intrinsically, and by our very make-up, apart from any calculation,” as is self-evident in the value we place in “[f]riendly relations with others”. As Mill recognized, they are “direct sources and ingredients of happiness” not only motivation for inducing good consequences. (E2, LW7,



243-244). It expanded and make meaningful the domain of our immediate experience. As such, “intelligent sympathy widens and deepens considers for consequences. To put ourselves in the place of another, to see things from the standpoint of his aims and values, to humble our estimate of our own pretensions to the level they assume in the eyes of an impartial observer, is the surest way to appreciate what justice demands in concrete cases.” Utilitarianism in this regard, without reduction to the greatest happiness principle suggests “that social conditions should be such that all individuals can exercise their own initiative in a social medium which will develop their personal capacities and reward their efforts. That is, it is concerned with providing the objective political, economic, and social conditions which enable the greatest possible number because of their own endeavors to have a full and generous share in the values of living.” (E2, LW7, 251-252).

The role of sympathy, moreover, was central to moral deliberation because it allows for assessment that is sensitive, particular, and general. For Dewey, sympathy allows for generalized assessment that allows for the kind of sensitive judgment akin to the kind of aesthetic judgment he attributes to Kant: the ability to see the extend and understand consequences beyond the self. Sympathy, in fact, may be best read as an empathic capacity, to put oneself in someone else’s shoes, to engage in what Dewey called “dramatic rehearsals” or imaginative reconstructions of the consequences of one’s actions on others.<sup>93</sup> Recall also that for Dewey, the very capacity for language (and, for that matter, the development of any social custom) is grounded in an empathic capacity. Our relationships and institutions require it, and can cultivate it, insofar as can have these conversations or engage with institutions. More simply put, participation and deliberation reinforces our empathetic capacity. This is also why they are absolutely necessary for moral life

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<sup>93</sup> Steven Fesmire, *John Dewey and Moral Imagination* (Bloomington: Indiana University Press, 2003) argues convincingly for the aesthetic resonances of Dewey’s turn to moral deliberation and reflection. See especially, Chapter 5, 69-91.

(and democracy, as an ideal of moral life). Because sympathy is central to the process of moral deliberation, it then requires that moral education and intelligent moral deliberation be grounded in those very social relations that make sympathy possible, in which those standards of approbation take root. As we shall see in the following chapter, Dewey's turn to the local, and to participation was grounded in a belief that social relationships were foundational for institutions and everyday problems to be better addressed. These social relationships and interactions are also, to be sure, the source of conflicts and problems, but they also are the source of pleasure and in themselves. And without them, our moral judgments, and our ability to solve our social problems intelligently and generously, are forestalled.

### **Moral Judgment**

The issue as now presented addresses the notion of moral deliberation and criticism broadly can be directed towards existing social institutions. Such moral criticism is a collective enterprise, and works as a complex "spiral", in Dewey's terms. by that I suggest we should read Dewey as arguing that our capacity for moral criticism and judgment, implicates our individual habits, customs and institutions, and our recognition of social relationships and the cultivation of empathy, in a constant circuit of interaction. As Dewey writes, "We are not caught in a circle; we traverse a spiral in which social customs generate some consciousness of interdependencies, and this consciousness is embodied in acts which in improving the environment generate new perceptions of fiscal ties, and so on forever. The relationships, the interactions are forever there as fact, but they acquire meaning only in the desires, judgments and purposes they awaken." (HNC, MW14, 225) In this partial statement of the backdrop of moral criticism and deliberation,

Dewey suggests preliminarily the relationships among these social forces, interdependencies, and consciousness of them, and acts that improve the environment, and their *meaning*, ultimately, in the quality of experience that issues from them. As with language and communication, that critical capacity does not spring *sui generis* as a function or natural linguistic or moral or rational endowment, but develops through interaction with an existent body of meanings and customs, laws and duties. That critical capacity for reflection, of moral justification, itself can become a disposition or capacity that shifts and expands and influences other customs, and creates new relationships, problems, obligations and laws.

Now if we understand this in the context of laws, we see they develop out of a complex of social associations, problems, and activity, and function to channel and redirect them. We are already embedded within legal systems, and systems of right and obligations and morality, and in social relations and situations that require right and law, duty and obligation. They are articulated and made determinate by institutions and officials in their representative capacity. These institutions, laws, and customs, in turn, shape social relationships, and the thinking and conduct of each agent in these relationships. In assessing particular laws, and what they concretely do in these situations, we exercise reason and critical thinking which are borne out of the situations and social relationships that give rise to and are shaped by those laws. As with language and communication, that critical capacity does not spring *sui generis* as a function or natural linguistic or moral or rational endowment, but develops through interaction with an existent body of meanings and customs, laws and duties. As such, they pattern and constitute, delimit and potentially expand, the very creative and intellectual capacities of individual agents and their activity of deliberating, justifying and redirecting these institutions. That critical capacity for reflection, of moral criticism, itself can become a disposition or capacity that shifts and expands

and influences other customs, and creates new relationships, problems, obligations and laws. And critical deliberation becomes more efficient and meaningful and adaptive with and through these laws and institutions as they play out in ongoing activity.

Proposals and new data can be suggested to improve rules, laws, institutions, ways of organizing, ourselves. But these must be tested over time and their usefulness can only be assessed by in concrete existential consideration of their effects. And it is best refined, held accountable, discerned, legitimated and improved, when those inquirers are best equipped to identify and formulate their problems and assess whether improvements have been had. But none of these proposals or data or purification of procedure is itself the core of democracy: it is associated activity made richer, more meaningful and intelligent and secure in experience itself. That enrichment comes from reflection on one's own lived experience – of critical thinking about institutions, conduct, through refinement, empathy, cultivation of character, turning to broad data, among other features. And without those methods, embodied and practiced by those involved and situated and affected by these interactions, no 'authority', no less 'truth' can find any justification or firm foundation in the course of social or political life. As Dewey writes, in one of his clearest statements of this process, "Considerations of right are claims originating not outside of life, but within it. They are 'ideal' in precisely the degree in which we intelligently recognize and act upon them, just as colors and canvas become ideal when used in ways that give an added meaning to life." (HNC, MW14, 224)

Otherwise put, the question may be more fruitfully posed, not as what laws or social institutions are morally legitimate or good, but how can moral legitimation be undertaken more intelligently, critically, such that new moral meanings and possibilities, open characters, values, standards, and laws, emerge over time and in the long run? Because laws are not the *source* of

right and cannot be fully justified or evaluated in practices fully external to them, by disembodied agents, the issue itself implicates the practices of concrete, situated agents. That process, in turn, implicates all of these moving parts in tandem – of laws, social institutions, of human capacities, instincts, desires, thinking, valuation, and interrelationships and problems – or experience tout court. And it is only through methods of critical reflection and testing in and through experience, that morally justified laws, or right, may be secured and defended so as to improve moral experience itself.

Ultimately, the nature of moral goods and institutions brings to bear the centrality of *experience* – “in the desires, judgments and purposes they awaken” or its enrichment and expansion, or its contraction and degradation. James, no less than Dewey, did not suggest that there are no objects in the world or objective truth whose very existence was contingent on our verification. The same can be claimed on behalf of moral goods; the participants need not believe and verify that some action was justifiable or moral for it to be so. But that truth and moral goods have no *meaning* – no pragmatic value – independent of human experience, and what it concretely does with and in experience. Both the attempt at verification of truth and justification and criticism of laws and institutions arise from specifically human problems, relationships and interventions. The very attempt to get at moral justification and criticism through conscious deliberation changes, expands, and modifies what we see as good and how we can be critical about our social institutions. And, as with the scientific method of inquiry, there are simply no better ways in which such claims can be tested, secured, and defended and revised. Through deploying methods of intelligence, such claims can reform laws and assess them concretely.

## **Ethical Democracy Revisited**

We are now at a position to see more clearly how Dewey's theory of valuation, and his epistemologies and psychology come full circle. And as Dewey's moral theory provides the basis for understanding his liberalism and democratic theory, how his philosophical commitments contribute to a 'metaphysics of democracy'. What those philosophies concretely provided, then is an account of the relationship between individuals and societies. Individuals and 'selves' are forged through conduct; and conduct irreducibly social. Their activity – no less their moral activity – cannot be understood as action following from an antecedent thought, or motivated by an external rule. Moreover, knowledge is a social enterprise, and our knowledge is made more secure through the embrace of the scientific method; democracy is the method. Thirdly, the theory of valuation provides a 'concrete method' and framework by which we begin to evaluate and secure values and intelligent practical judgments, in our workaday lives, no less than in complex social situations. What the theory of morality provides, in turn, is to provide normative guidance for how we can turn towards common ends in our deliberation and judge our institutions critically. Finally, we can return to Dewey's claim that "*the function of law in general [is] the institution of those relations among men which conduce to the welfare and freedom of all.*" (E2, LW7, 243). Our 'self' and institutions and laws are irreducibly social. And these laws must function to facilitate our freedom and those relationships from which they arise, and which they assume their significance. While I discuss at length the particulars of Dewey's ethical democracy and liberalism in the following chapter, we are also in a position here, to see how a radical democracy as a way of life, as Dewey championed, is necessary for better laws, and for guaranteeing the basic function of laws – the expansion of freedom and the enrichment of experience tout court.

We are also in a better position, I believe, to reject the basic claim that Posner advances: that there is no connection between Dewey's normative commitment to participatory democracy and a pragmatic conception of law developed from his philosophy. In fact, I believe there is an additional claim to be made against Posner, which will be further developed in the following chapter. Dewey's conception of democracy was even more radical than Posner seems to acknowledge: that beyond participation in political processes, Dewey championed the democratization of all institutions – including the economic and industrial relations – and saw it as a way of life that touched on our social relationships, the cultivation of empathy and the deep social interconnections that constitute everyday life. As Dewey writes, “The end of democracy is a radical end. ... because it requires great change in existing social institutions, economic, legal and cultural. A democratic liberalism that does not recognize these things in thought and action is not awake to its own meaning and to what that meaning demands.” (DR, LW11, 298-299) In Dewey's later conception of democracy, Dewey argues:

democracy signifies, on one side, that every individual is to share in the duties and rights belonging to control of social affairs, and, on the other side, that social arrangements are to eliminate those external arrangements of status, birth, wealth, sex, etc., which restrict the opportunity of each individual for full development of himself. On the individual side, it takes as the criterion of social organization and of law and government release of the potentialities of individuals. On the social side, it demands cooperation in place of coercion, voluntary sharing in a process of mutual give and take, instead of authority imposed from above. As an ideal of social life in its political phase it is much wider than any form of government, although it includes government in its scope. As an ideal, it expresses the need for progress beyond anything yet attained; for nowhere in the world are there institutions which in fact operate equally to secure the full development of each individual, and assure to all individuals a share in both the values they contribute and those they receive. Yet it is not ‘ideal’ in the sense of being visionary and utopian; for it simply projects to their logical and practical limit forces inherent in human nature and already embodied to some extent in human nature. It serves accordingly as basis for criticism of institutions as they exist and of plans of betterment. As we shall see, most criticisms of it are in fact criticisms of the imperfect realization it has so far achieved. Democracy as a moral ideal is thus an endeavor to unite two ideas which have historically often worked antagonistically: liberation of individuals on one hand and promotion of a common good on the other. (E2, LW7, 349)

If freedom is to be correlated with this individual, it must entail the enlargement of the capacity to expand the character – the personality of the Dewey of yore – with adaptive and intelligent habits and conduct. In his later writings, Dewey would define freedom by threefold features. Firstly, “Liberty is not just an idea, an abstract principle. It is power, effective power to do specific things.” It shares with Rousseau and his ‘positive freedom’, and defined practically insofar as it is a matter not of conceptual possibility but concrete realities and consequences. But, again it is not the mere assertion of power as will or reason, as physical power or force. It is a pragmatic power to engage in intelligent practices and valuations on desires, ends and means – and to expand the meaningfulness and options within one’s situation. Recall that Dewey described the realization that one’s knowledge shapes and is shaped by inquiry as an *emancipation*. In the same vein, freedom is measured by our expanded capacity for practical valuation and meaningfulness. Dewey’s conception of freedom was not a negative one, or simply reducible to autonomy. It is progressive to the “degree in which we become aware of possibilities of development and actively concerned to keep the avenues of growth open, in the degree in which we fight against induration and fixity, and thereby realize the possibilities of recreation of ourselves, we are actually free.” (E2, LW7, 306) The expansion of a moral self with characteristics of conscientiousness and courage, seeking out and expanding the very meaning of experience, is the extent to which we are free. As situational, as expanding the meaning of our decisions and their possibility, the same logic of fixed and means in the situation we face ourselves arrests growth and the development of personal identity and the moral self.

Defined as effective power, liberty is always “a matter of the *distribution* of power that exists at the time... There is no such thing as the liberty or effective power of an individual,



group, or class, except in relation to the liberties, the effective powers, of other individuals, groups, and classes.” Nothing and no effective power is shaped without relationships to other powers; this interconnectedness and relativity of effective power thus implicates distribution – and the necessity for *equal* distribution. (LSA, LW11, 363) That “distribution is identical with actual social arrangements, legal and political– and, at the present time, economic, in a peculiarly important way.” (LSA, LW11, 362) But those ‘external impediments’ are of course not absolute restrictions on freedom, but are the outer boundary insofar that shape the possibility of individual growth and freedom, and can pervert it insofar as they perpetuate its unequal distribution. In short, only with an equitable distribution of this power is it possible that it may be possible to “enhance and multiply the effective liberties of the mass of individuals.” (LSA, LW11, 362)

The ideal of democracy could be realized in practice by looking to the ‘radical agenda’ for the public– ‘radical’ because it requires reaching down into the roots of our culture: our habits, beliefs, and desires, institutions, and education that shape it. Education too itself required reevaluation as well, as shaping our habits, not just creating some epistemic capabilities or skill set that could be translated in creating self-sufficient autonomous entities or objective knowledge that might somehow translate automatically into meaningful and intelligent judgment and action. As Dewey writes, “the democratic ideal poses, rather than solves, the great problem: how to harmonize the development of each individual with the maintenance of a social state in which the activities of one will contribute to the good of all the others. It expresses a postulate in the sense of a demand to be realized: That each individual shall have the opportunity for release, expression, fulfillment, of his distinctive capacities, and that the outcome shall further the establishment of a fund of shared values. Like every true ideal, it signifies something to be done rather than something already given, something ready-made.” (E2, LW7, 350) That ideal cannot

be achieved by compartmentalizing the domain of democracy, and folding political life into the pursuit of private interests and periodic elections. In short, democracy is not only the “the precondition for the full application of intelligence to the solution of social problems,” as Putnam writes.<sup>94</sup> It requires also that we cultivate and see the goods in meaningful social relationships themselves and the consequences of our actions within social life. This is the concern that animates Dewey’s treatment of the public and its problems, to which we turn in the following chapter.

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<sup>94</sup> Putnam, “Reconsideration of Deweyan Democracy,” 129.

### III.

#### THE DETERMINATE PUBLIC

##### Truth, Expertise, and Authority in Liberal Democracies

“That the universe has in it more than we understand, that the private soldiers have not been told the plan of campaign, or even that there is one...has no bearing upon our conduct. We still shall fight – all of us because we want to live, some at least, because we want to realize our spontaneity and prove our powers, for the joy of it, and we may leave to the unknown the supposed final valuation of that which in any event has value to us. It is enough for us that the universe has produced us and has within it, as less than it, all that we believe and love.”

– Oliver Wendell Holmes, Jr., “The Activity of Law”<sup>1</sup>

In the previous chapter, we saw the outlines of Dewey’s philosophy and his treatment of laws, institutions, and democracy. In this chapter, I turn specifically to the issue of expertise and officials, and the attendant question of authority. The question that I seek to address in this chapter is what role remains for officials and how their authority can be justified if we no longer rely on the model of sovereignty inherited from Austin, of determinate superiors and subjects? In this query, I turn specifically to Dewey’s most systematic political text, *The Public and Its Problems* (1927), for Dewey’s defense of democratic participation, and the primacy of the public in negotiating the relationship between authority and freedom. While this account moves beyond an explicit discussion of the authority of laws and legal institutions, we shall see also, in the following chapter, how Dewey’s ideas clarify the account offered by Lon Fuller and his critique of Hart’s turn to legal officials as the locus of law’s normativity. As I argue here, Dewey offers a critical vocabulary for a commitment to robust participatory democracy while acknowledging the necessity and value of experts, officials, and institutions – and authority writ large – in navigating complex social problems.

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<sup>1</sup> Cited in Dewey, *Experience and Nature*.

This turn to Dewey for an account of authority may be surprising, given claims among scholars that Dewey did not adequately address the issue of authority in his turn to participatory democracy as an ideal, and given his anti-foundational metaphysics and epistemologies. John Patrick Diggins' critique is emblematic. He writes, "Dewey identified authority with conservatism and assumed that democracy had to be liberal and progressive almost by definition. Obviously he had not learned from Tocqueville [...] when authority disappears, freedom and democracy find their natural expression in capitalism and individualism."<sup>2</sup> As we shall see, Dewey documented and grappled at length with this problem of authority and the turn to 'capitalism and individualism' as an upshot of the suspicion of political authority associated with classical liberalism.

Another, related thread of scholarship on Dewey suggests that his turn to scientific method and inquiry as a model for democratic politics elides issues of genuine moral conflict and unequal power.<sup>3</sup> In his emphasis on collaboration and intelligent inquiry, Dewey appears to have

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<sup>2</sup> John Patrick Diggins, *The Promise of Pragmatism: Modernism and the Crisis of Knowledge and Authority* (Chicago: University of Chicago Press, 1994), 328.

<sup>3</sup> Variations of this argument have a long pedigree, and I smooth over their distinctions here. See, for example, Christopher Lasch, *The New Radicalism in America* (New York: Vintage Press, 1965) and *The True and Only Heaven: Progress and its Critics* (New York: W.W. Norton & Co, 1991) and Thomas Haskell, *The Authority of Experts* (Bloomington: Indiana University Press, 1984). This criticism was advanced also by "The Illinois Revisionists" – whose works are documented in Robert Westbrook, *John Dewey and American Democracy* and James Scott Johnston, *Inquiry and Education: John Dewey And the Quest for Democracy* (Albany: SUNY Press, 2006) and "Authority, Social Change, and Education: A Response to Dewey's Critics," *Education and Culture*, 17, no. 2 (2001), 2-3. Their critique concerned the infiltration of this scientific approach via the mechanisms of the state and Dewey's focus on education. In their reading, Dewey's was an unsuspecting turn to the type of infiltration into habits and thinking in the classroom and the power of the teacher. A related line criticism, which focuses on Dewey's metaphysical commitments, finds that Dewey retained residues of his earlier Hegelian idealism and never gave up his quest for unity and overcoming the contingency of experience through the imposition of rational inquiry. See, e.g., Richard Gale, *John Dewey's Quest for Unity: The Journey of a Promethean Mystic* (New York: Prometheus Books, 2008) and George Santayana in his own day. Sympathetic readers who highlight Dewey's focus on inquiry and the epistemological arguments from his turn to democracy have also suggested that Dewey may not have addressed the issue of moral conflict sufficiently, see Putnam, "A Reconsideration of Deweyan Democracy." Finally, Richard Posner also suggests that the relationship between epistemological democracy and political democracy are founded on a false metaphor that fails to acknowledge the distinctions between the epistemic and the political, namely the infusion of power and preferences that define the latter domain. For an overview of criticisms of Dewey's scientism and a defense of Dewey against these readings, see, generally Melvin Rogers, *The Undiscovered Dewey* (New York: Columbia University Press, 2012).

conflated unreasonably an account of legitimate political authority and scientific authority. As such, Dewey seems to reduce politics to an instrumentalist and epistemic account of democracy, and a vision of political action to a series of scientific inquiries. The risk that Dewey's elision poses, then, is the replacement of political authority with the that of a class of scientists, experts and professional inquirers.

To resist these interpretations, I revisit Dewey's debate with Walter Lippmann in the late 1920s. Dewey published *The Public and Its Problems*, in part to respond to Lippmann's diagnosis that the 'eclipse of the public' was a permanent feature of modernity fatal to robust, ethically-grounded conceptions of democracy like Dewey's. Both thinkers had grown up in the prewar era as progressive pragmatists, but their split after World War I and the famous Dewey-Lippmann debate on the possibility and desirability of participatory democracy has defined their intellectual relationship. Even within this debate, both Dewey and Lippmann sought to find a place for officials and for political authority writ large in complex modern states. Though their thinking through the following decades would continue to diverge, both thinkers were concerned with two dilemmas of authority. Firstly, they both grappled with the suspicion towards the state bequeathed by classical liberalism, which left a vacuum for authority filled by laissez-faire economics. Secondly, both thinkers addressed – and came to diverge pointedly – on the quest for certainty in truths both moral and epistemological, which might justify the authority of experts, as well as of philosopher-kings and religious idols.

In this chapter, I propose to extend the Dewey-Lippmann debate in two ways, which will help understand also Dewey's specific treatment of authority. Firstly, I turn to Lippmann's works after the late 1920s, which present an important coda to their debate on the issue of experts versus public participation in political life. In these works, we see a new query arise for

Lippmann – no less for Dewey – of the place of meaningful moral authority in political life. In his writings on moral philosophy, Lippmann came to realize that factual expertise itself, and empirical truths tout court, could not provide an adequate source of the type of moral guidance we seek in shared life. As discussed in the previous chapter, Dewey saw moral judgment and reflection as arising out of natural relationships, and values secured as we make sense of experience through our purposive actions with others. Here, I suggest that Dewey had not only diagnosed this problem of the limits of facts and truth – as they are traditionally conceived – throughout his philosophical texts, but had been devising his response for nearly half a century, and specifically in his commitment to democracy as an ethical ideal. Faith in democracy and “the common man” was one that replaced blind deference to the philosopher-kings and sovereign superiors, as well as religious idols. While there is a place for determinate institutions and officials in Dewey’s account, moral authority and meaning is forged through social relationships, and participation in debating and formulating shares values – that is, the processes protected and secured in a commitment to the imperatives of democracy.

Secondly, I look to Dewey’s educational writings and his examination of authority and right in his *Ethics*, and the duties and responsibilities of teachers and of officials. Despite the concern of some of his critics, Dewey’s account offers explicit resources for tempering the power of authorities, and addresses the suspicion that authority, including epistemic authority, may be centralized and deployed for private ends. This reading can supplement Dewey’s treatment in his *Public and the Problems*, with a normative vocabulary for understanding the necessary role of the public’s participation in both checking the power of officials and in defining the scope and direction of their responsibilities. Moreover, and more generally, Dewey’s account of the public and private moves beyond the classical liberal conception of the

state and the legitimate scope of its activity. In lieu of a conceptual and fixed dividing line, Dewey allows for a context-specific determination of the scope of public activity based on consequences.

The chapter is organized as follows: In Section 1, I outline briefly the problem of certainty and authority as it develops in Dewey's critique of liberalism and of traditional epistemology and moral philosophies: (1) the suspicion towards political authority that resulted from the project of classical liberalism and (2) the corollary quest for epistemological and moral certainty and truth. In Section 2, I turn to Lippmann and outline the trajectory of his liberalism and epistemological commitments – from a radical pragmatism, disenchantment, and a turn to experts, and ultimately to natural law and transcendental truths to ground political and legal authority. In Section 3, I show Dewey's explicit response to these concerns, and his grounding of his concept of state, public, and political institutions, in his epistemological and axiological framework outlined in Chapter 2. In Section 4, I show how Dewey maps a place for moral meaning and authority with and through experience, and specifically in the realm of contingent, uncertain action and social relationships.

### **3.1. QUESTS FOR AUTHORITY: POLITICAL, EPISTEMOLOGICAL, MORAL**

Dewey's works in the 1920s and 1930s presented two intertwined historical accounts of the concept of authority: the destabilization of political authority with the rise of classical liberalism, and the parallel quests for epistemological and moral authority grounded in absolute truth. Dewey's historical retelling is highly schematic and echoes in much more modest scope the wealth of current scholarship on the issue. Here, I offer only a schematic sketch of his

already selective account. But this backdrop to the question of authority will allow us to see how Dewey situates his broader political rejection of classical liberalism and commitment to public action and participation, and the radical ways in which his intellectual trajectory converged from Lippmann's and his parallel quest for legitimate political and moral authority.

If we turn firstly to the issue of moral and epistemological authority and absolute truths, we find in Dewey's 1929 *Quest for Certainty*, an extended account of the source of our 'quests' for unshakeable and ahistorical foundations in epistemic and moral matters. Dewey describes the search for security and a narrative that makes sense of contingent facts. With the Greeks, typified by Aristotle's "First Philosophy", the dualism between stability and contingency came to define the quest for necessary truths over and above production and action. Aristotle, with Plato, would give "the depreciation of practice... a philosophic, an ontological justification," as "[s]upreme reality" was seen to conform to logic in its necessary features (QC, LW4, 16). As Dewey writes, "Pure contemplation of these forms was man's highest and most divine bliss, a communion with unchangeable truth." (QC, LW4, 13) Logic provided the guide to the forms of empirical reality, and could assert two levels of reality – one contingent and the other fixed and higher as the purview of a true science. What the Greeks recognized and advanced in their philosophies was that the realm of action was a realm of contingency and precarity, which could be tamed through reason and thinking, or self-transcendence. With this turn to the realm of thinking they avoid the tragedy and "the pathos of unfulfilled expectations" (QC, LW4, 6). That is, they put "safety first" – as rational activity so defined did not need to concern the untamable realm of contingent and – which could preserve itself an autonomous domain of certainty and peace (QC, LW4, 6). In short it rationalized and turned philosophy into the methods of escaping experience and activity, and the means for better securing natural conditions themselves. Hence, the degradation of



experience itself – the cornerstone of Dewey’s philosophy – which “cannot deliver us necessary truths; truths completely demonstrated by reason. Its conclusions are particular, not universal” (QC, LW4, 21).

A second key moment in Dewey’s account turns on the scientific revolution, and the bifurcation between epistemological and moral truths. In this new phase, science itself “carried the scheme of demonstrative knowledge over to natural objects” instead of the logic of transcendental truths, which meant, in turn, that a new domain had to be carved for philosophy. As Dewey writes, “Philosophy in maintaining its claim to be a superior form of knowledge was compelled to take an invidious and so to say malicious attitude toward the conclusions of natural science,” and by this time, became “embedded in Christian theology”. The relationship between philosophy and science became transformed into “spiritual values” versus “conclusions of natural knowledge.” The problem of modern philosophy is “the supposed need of reconciling, of somehow adjusting, the findings of scientific knowledge with the validity of ideas concerning value.” (QC, LW4, 40) But modern science and the progression of scientific method made clear that the attributes of knowledge could not have the essential and timeless properties of laws that the Greeks attributed to it. In the sphere of values, there were some found to be “intrinsic to the real” while others were “merely instrumental” as objects of practical activity (QC, LW4, 41). As such, the turn to reason allowed for truths that empirical science itself could not furnish, and “the ultimate and immutable end and law of moral action.” Values become secure in their own domain of spiritual and moral certainty, as a matter of revelation or delivered wholly outside the realm of practical action (QC, LW4, 25). This division between the realm of facts and values achieved certainty in both domains in the philosophy of Kant, who could assert finality in the former by asserting cognitive forms of space and time for perception, and by the application of

mathematics and logical forms to nature. That is, categories of cognition supplied certainty, “permanent substances and uniform relations of sequence – or causation – demanded by the Newtonian theories of atoms and uniform laws.” (QC, LW4, 48) In the moral sphere, the mind could pass beyond experience to “unconditioned and self-sufficient totalities, ‘Ideas’ of the universe, soul and God,” which were “admitted as regulative ideals which directed inquiry and interpretation. Above all, the thought of these trans-phenomenal and super-empirical realities left room that practical reason with its imperative of duty and postulate of free choice could fill.” Righteousness could be justified by rational means; “moral demand for the final and unquestionable authority of duty authorized and necessitated practical certainty as to the reality of objects beyond experience and incapable of cognitive verification. The quest for certainty was fulfilled; cognitive certainty in the region of phenomena, practical certainty in the realm of moral authority.” (QC, LW4, 48-49).

Dewey links the Scientific Revolution to the 18th century political revolutions, but his genealogy is notable in suggesting that the scientific ethos and discoveries were not themselves the source of the modern crisis of authority (ASC, LW11, 131). Instead, it was the incomplete nature of the scientific turn, and the failure to apply its methods to the problems of social life, which exacerbated the problem of political authority and reinforced the search for absolute moral authority outside the realm of practical action. In fact, Dewey saw political authority itself during the Enlightenment as replicating wholesale traditional and theological warrants for authority. As he writes, “the secular state only claimed that it also existed by divine right or authority and that its authority was therefore supreme in all the affairs of this life, as distinct from those of the soul in the life to come. Even when popular government began to flourish, they continued the old idea in a weakened form: the voice of God was now the voice of the people.” (LSA, LW11, 135).

The scientific revolution presaged the political questioning of entrenched beliefs and institutions, but with the political revolutions came the arrival of Dewey's most persistent philosophical targets: laissez-faire capitalism and atomic individualism. Freedom was trumpeted as an end-in-itself, and with the state stripped away, a natural, pre-institutional individual, who possessed what became the battle cry of "inalienable sacred authority" was posited in its place. The logical conclusion of this liberalism was to view the end of nature in the protection of natural individual rights, and the demarcation between two spheres: authority and individual freedom. There was no logical necessity, Dewey argues, for creating the individual as the locus of revolt and justification. Had it not, Dewey writes, "the celebrated modern antithesis of the Individual and Social, and the problem of their reconciliation, would not have arisen." (PP, LW2, 289-290). Nonetheless, "'individualism'" – of the type at the seed of its own, and democracy's, perplexed relationship to legitimate authority– "was born." The accounts that do try explaining the cause of states as separate from their normative authority were left with an entity that can only be distinguished from the brute fact of collectivity and force, which must in turn be seen as contingently related to the individuals over whom it governs. Here the formation of the state must slip in a notion of *legitimation* external to the fact of the state itself. There was no self-evident reason the individual would submit to an external entity at all, which had been formed independent of his judgment.<sup>4</sup>

With freedom intimately associated with restrictions on governmental interference against the individual as autonomous normative unit and natural economic activity, the task of protecting the property of private citizens against that of other private citizens becomes the

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<sup>4</sup> This line of reasoning finds its logical consummation in the works of more recent thinkers like A. John Simmons, *Moral Principles and Political Obligations* (Princeton, Princeton University Press, 1981) and *Justification and Legitimacy* (Cambridge: Cambridge University Press, 2000), and Leslie Green, *Authority of the State* (Oxford: Oxford University Press, 2000).

measure and function of the government. The language of the nascent economic movement was taken up in the name of *nature* by scientists like Spencer: of competition, labor, and its division, set over and against the artificial state. Industry met with preexisting restrictions from feudalism and mercantilism entrenched in legal institutions, and government again became the locus of fear and hostility as an impediment to human agency which was realized instead in economic production. But the very forces claimed as natural and liberating – namely, laissez-faire capitalism – were chief in diminishing the power and place of the individual. Technocratic “pecuniary culture” of the industrial era quantified the qualities that made life meaningful: its method was “mechanization and the tendency of esteeming technique as an end, not as a means, so that organic and intellectual life is also ‘rationalized’; and finally, ‘standardized’” (ION, LW12, 52). Purposive meaningful activity was instrumentalized. The “new scientific movement” and the attendant inventions and machinery populated the daily life of the public with faceless and anonymous forces. The result was not the eradication of social authority but its purported replacement with the “wants and endeavors of private individuals seeking personal gain” (LSC, LW11, 136), and the justification of the concentrated economic power, which, “to state the matter moderately,” Dewey writes, “has consistently and persistently denied effective freedom to the economically underpowered and underprivileged.” (LSC, LW11, 136) In short, the twisted logic of this perceived antagonism between authority and freedom, worked to take away freedom and spur suspicion towards those sources of authority that might make freedom possible again. Liberty became the rallying cry of those interested “in the preservation of the economic status quo; that is to say, in the maintenance of the customary privileges and legal rights they already possess.” (LSC, LW11, 360) The view that authority was itself an unnatural, external and inherently oppressive force vis-à-vis the freedom of individuals and relationships of

production and exchange, ultimately served “to deprive individuals of the direction and support that are universally indispensable both for the organic freedom of individuals and for social stability.” (LSC, LW11, 136)

As Dewey would write in his *The Public and Its Problems*, and the modest yet radical nature of his proposal: “The ‘problem’ of the relation of the concept of authority to that of freedom, of personal rights to social obligations, with only a subsumptive illustrative reference to empirical facts, has been substituted for inquiry into the *consequences* of some particular distribution, under given conditions, of specific freedoms and authorities, and for inquiry into what altered distribution would yield more desirable consequences.” (PP, LW 2, 356) It was a proposal to think of that relationship intelligently and critically, without absolute conceptual distinctions between authority and freedom, rights and obligations. The need was to see the inherent relationship between these factors within social life, and to investigate them with reference to social consequences – and to secure more desirable ones, as we shall see, through the active and intelligent intervention of social action. And it was this insistence that would distinguish Dewey’s commitment to robust participatory democracies and his break with Lippmann, and his turn to expertise and moral truths outside the empirical realm and the consequences of action.

### **3.2. WALTER LIPPMANN AND THE SEARCH FOR MASTERY**

The peculiarity of Dewey’s debate with Lippmann in the post-World War I era may be in its near reduplication of central features of his early critique of Maine and Austin (and Posner today). Lippmann, like Maine, built his critique of participatory democracy on a sociological

account of the epistemic limitations of the individual and the masses given the fact of modern complexity and the impossibility of legislating a scientifically-informed will. The progressives in the pre-World War I era had also positioned their conception of the progressive state against direct democratic understandings of sovereignty from Rousseau, and the use of referenda and direct plebiscites, much in line with what Dewey saw insufficient in Rousseau's account decades prior.<sup>5</sup> Those procedures were certainly not adequate for deciding on issues of complex industrial growth and foreign relations that could lead to total war. Despite his early hopeful, and pragmatic faith in democracy, which he shared with Dewey and their coterie of progressives and social democrats around *The New Republic* during the neutrality years, Lippmann's faith in the public was badly bruised by the WWI experience. In his *Public Opinion* (1922) and *The Phantom Public* (1925), Lippmann sounded a "reflective and somber" tone, in his early works, as Diggins describes his quest for authority in a post-foundational world, "that came closer to despair. Together the vision of the moral and political drift that was to come not only from collapse of traditional foundations and the resonance of Neurath's sailors, adrift on a makeshift, patchwork ship."<sup>6</sup> The work was a rumination of Dewey's very claim that the world had, in Lippmann's words, "lost authority and retained the need of it."<sup>7</sup> Appropriately, the author of *Drift and Mastery* (1914) – which itself played on that image of modernity unmoored from traditional metaphysical and moral foundations – seemed to reflect the private despair Weber expressed in contemplating the future of democracy and meaningful freedom in increasingly complex, bureaucratized and disenchanting societies. But even in this still hopeful text, and its

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<sup>5</sup> Stears, *Progressives, Pluralists*, 48.

<sup>6</sup> Otto Neurath, "Anti-Spengler," in *Empiricism and Sociology*, rev. ed (Dordrecht: Springer Netherlands, 1973), 199: "We are like sailors who on the open sea must reconstruct their ship but are never able to start afresh from the bottom. Where a beam is taken away a new one must at once be put there, and for this the rest of the ship is used as support. In this way, by using the old beams and driftwood the ship can be shaped entirely anew, but only by gradual reconstruction."

<sup>7</sup> *Drift and Mastery*, cited in Kloppenberg, *Uncertain Victory*, 319.

turn to scientific method in asserting authority anew, Lippmann's quest was tellingly defined by seeking "mastery" over "the nostalgia and traditionalism" of Matthew Arnold's vision of "ignorant armies that clash by night"<sup>8</sup> – not unlike Holmes' "private soldiers" fighting without "the plan of campaign."

Commentators on the Dewey-Lippmann debate have generally brushed aside the extent to which their political differences are fueled by fundamental (or at least, eventual) differences in their epistemology and metaethics. Moreover, few commentators note Lippmann's later turn to natural laws and religious faith and its relationship to the issues presented in their debate on the role of expertise and omniscient citizen-sovereigns. The irony of their debate rests in part in how Lippmann's turn to anti-modern epistemologies and his idealization of religious idols and philosopher-kings as political guides have been championed as the hard-hearted realism needed for contemporary societies' ills.<sup>9</sup> Lippmann ultimately harkened back to epistemologies of Plato and Socrates – the past idols of epistemic and absolute political authority grounded in truth. He followed his teacher Santayana's own Hellenic return to conceptual essences, and a philosophical methodology that asserted that the purview of philosophy must be over and above lived experience, not in willy-nilly adaptations of ideas as our subjective experiences are wont to impose. In following this intellectual trajectory, we see also the quests for authority that Dewey

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<sup>8</sup> David Hollinger, "Science and Anarchy: Walter Lippmann's *Drift and Mastery*," *American Quarterly* 29, no. 5 (1977), 463. Hollinger writes, "Lippmann scorned asceticism and parochialism as marks of weakness and psychological immaturity; he challenged his readers to 'love variety' and 'rejoice in change,' and to thereby provide their own 'strength' and 'health'. Dogmatic religions and non-democratic governments may have provided humanity with a measure of stability, but the inhibited the fulfillment of man's spiritual and social potential; the Catholic Church represented what was most hateful in the past, for it had 'tried to make weakness permanent' by fostering the false virtues of 'poverty, chastity, [and] obedience.'" at 465 (cit. omitted). The extent of Lippmann's about-face on these issues is explored below.

<sup>9</sup> See, for example, the depiction of the Dewey-Lippmann debate in Barry Riccio, *Walter Lippmann: Odyssey of a Liberal* (New Brunswick: Transaction Publishers, 1994). Riccio describes Dewey's as a "somewhat mystical conception of democracy" and a "noble dream," 75. This distinction appears, I believe, more pointedly among Lippmann scholars. See, for example, Wilfred M. McClay, introduction to *Phantom Public*, by Walter Lippmann (New Brunswick: Transaction Publishers, 1993), xxxv: Dewey's response to Lippmann is considered, McClay writes, is "far too abstract, even oddly idealistic in diction, to dispose of the problem."

outlined, come to fruition, and a rejection of democracy that retained a pride of place for action and intelligence in face of contingency and uncertainty.

### **Epistemic Authority and Expertise**

Lippmann presented a distinctive, and often labyrinthine route in shaping his particular liberalism – from his prewar pragmatic progressivism and socialism to a champion of bureaucratic experts and elite democracy, followed by a legalistic turn that would be colored by faith in natural and divine law. But his chastened attitude towards democracy seemed representative of the legacy of World War I. As Purcell writes, “Between the first decade of the twentieth century and the mid-thirties the methods and assumptions of scientific naturalism helped expose major weakness in traditional democratic theory.”<sup>10</sup> It was the era before and after the First World War in which progressives from Lippmann onward had placed their faith in human intelligence and progress and which left them seeking for order beyond meaningless slaughter in the name of progress. Not unlike the scientific skepticism that animated the Victorian critique of democracy in the late 19<sup>th</sup> century and a view that it represented the telos of civilizational progress, the rise of this thread of scientific naturalism:

destroyed rational justifications of ethical ideals, such as a ‘higher law,’ which had provided democratic theory with its moral foundation. [...] scientific naturalists strictly confined induction to observable, concrete phenomena and ruled it out as a method of providing the validity of any moral principles.[...] in empirically examining human behavior and the actual process of American politics, scientific naturalists came to question and often reject three cardinal principles of democratic government: the possibility of a government of laws rather than of men, the rationality of human behavior, and the practical possibility of popular government itself.<sup>11</sup>

By the 1920s, Lippmann appeared convinced that no principled method of intelligence could

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<sup>10</sup> Purcell, *Crisis of Democratic Theory*, 11.

<sup>11</sup> Ibid.



adequately temper the irrationality and subjectivism of human behavior. In acknowledging the role of the inquirer in shaping meaning and nature through the process of inquiry, as he had done in his *A Preface to Politics* (1913) and *Drift and Mastery*, he saw that we had to face the fact that distortions – not truth – could build endlessly upon themselves. In short, Lippmann’s became a pragmatism rinsed of faith in truth emerging ‘in the long run’ and, as such, no justification could be advanced for allowing imperfect and unintelligent reasoners to have equal say in political processes.

Lippmann’s “disenchanted” liberal democracy by the time of his *Public Opinion* and *The Phantom Public* offered a basic repetition of Maine and Austin’s claims. Popular sovereignty could no longer be claimed by the individual, the majority or the legislature in the classic Lockean liberal democratic schema, but was becoming diffused into the power structures of civil society— again as Maine had cautioned would happen in the robust legislative state through distorters or, in Lippmann’s terms, “manufacturers of consent.”<sup>12</sup> Private and isolated consciousness was pitted against external and objective reality – a dualism captured in the title of Lippmann’s first chapter of *Public Opinion*, “The World Outside and the Pictures in Our Heads.” Unreliable subjectivism and sensory data that could betray reliable cognitive assessment and knowledge of objective truth created the possibility of both epistemic and political disorder. Moreover, Lippmann claimed that the nature of *private* subjective thinking could not be reconciled with *public* interests and deliberation on shared goods and ends. The individual, as both Dewey and James agreed, needed basic structures or habits, “old beams” in the ship for navigation. But Lippmann interpreted this fact to suggest a predisposition to cling to subjective interests, desires, and falsehoods, which rendered cognitive valuation processes in and through social interactions, of the type Dewey had meticulously outlined as the method of practical

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<sup>12</sup> Lippmann, *Phantom Public*, “Disenchanted Men.”

judgment and valuation, merely modern chimeras.<sup>13</sup> What would result, Lippmann argued, was the creation of stereotypes – based not on direct experience, but “stored up images, the preconceptions, and prejudices which interpret, fill them out, and in their turn powerfully direct the play of our attention, and our vision itself.”<sup>14</sup> Those who could manipulate and deploy stereotypes for political ends, could thereby manipulate social ends. Absent a pre-cognitive (and pre-modern) identification of individual and common goods within a community, only a subjective pluralism run amok would follow. And that subjective pluralism would only intensify in a liberal democracy, in which representatives aggregate those subjective biases and let them play out without independent consideration of truth.

The masses, Lippmann most famously came to argue, cannot be expected to be ‘sovereign and omniscient’ citizens, because they are ill-equipped to be well-versed in the issues and processes of political life that require a professional, salaried class to take them on full time. “[A]lthough public business is my main interest and I give most of my time to watching it,” Lippmann writes, “I cannot find time to do what is expected of me in the theory of democracy; that is, to know what is going on and to have an opinion worth expressing on every question which confronts a self-governing community.”<sup>15</sup> The very premise of sovereignty requiring its locus in an individual recalls the view Dewey attributed to Maine and Austin, that it became ‘minced’ into epistemic powerlessness among atomized individuals. Lippmann’s recommendations too echoed his predecessors: to assert a liberalism that protected the individual

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<sup>13</sup> James Bohman has recently likened Lippmann’s normative claims and the structure of his reasoning to the projects of current social psychologists like Amos and Kahneman as essentialism ‘glitches’ in reason as imperiling rational politics. He identifies a parallel between cognitive scientists in the vein of Dewey as seeing these irrationalities not as roadblocks but important data in adjusting social and psychological research. See Bohman, “Participation through Publics: Did Dewey answer Lippmann?” *Contemporary Pragmatism* 7, no. 1 (2010): 49-68.

<sup>14</sup> Lippmann, *Phantom Public*, 30.

<sup>15</sup> *Ibid.*, 10.

from the unauthorized encroachment from irrational democratic legislation.<sup>16</sup> Secondly, Lippmann claimed, much in the vein of Posner today, that democracy and political participation does not satisfy our realm of interests “in all kinds of other things, in order, in its rights, in prosperity, in sights and sounds and in not being bored. In so far as spontaneous democracy does not satisfy their other interest, it seems to most men most of the time to be an empty thing.” As Melvin Rogers notes, “his point is it that democracy does not exhaust the realm of what people find meaningful.” Nor, is it a space where they are “most authentically human.”<sup>17</sup>

Lippmann called for an epistemic division of labor which gave pride of place to the objective expert, who could carve out spaces of expertise for small-scale problems to guide political activity. These experts and bureaucrats “brought with them each a jargon of his own” and aggregated objective facts to present to an executive or “man of action” who “decides on matters of policy presented in a form ready for his rejection or approval.”<sup>18</sup> They “translate, simplify, generalize” but they do not have a “policy.”<sup>19</sup> But they are not powerless, as the future suggests that “the relevant facts” will increasingly “elude the voter and the administrator.”<sup>20</sup> And they do so on a piecemeal basis, through particular, cumulative acts, not itself through omniscience, even at the level of the state – a system compatible with his later turn to constitutionalism.

Lippmann saw this incremental purposivism as proof against the fiction of popular sovereignty – that public opinion could be captured in a legislative will. It was in fact the

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<sup>16</sup> Ibid. General opinion, in Lippmann’s reasoning, also lacks determinacy in enforcement and action. He writes, “Since the general opinion of large numbers of persons are almost certain to be a vague and confusing medley, action cannot be taken until these opinions have been factored down, canalized, compressed and made uniform. The making of one general will out of a multitude of general wishes is no an Hegelian mystery, as so many social philosophers have imagined, but an art well known to leaders, politicians and steering committees.” Ibid, 37.

<sup>17</sup> Rogers, *Undiscovered Dewey*, citing Lippman, *Phantom Public* at 196. Cf Posner.

<sup>18</sup> Lippmann, *Public Opinion*, 370.

<sup>19</sup> Ibid, 381.

<sup>20</sup> Ibid, 383.

statesmen and officials who must actually make those particular, determinate acts, to which the public can assent or which they can identify as their will, even if done so as a fiction. Representation was not a divining of the public interest, but simply an identification by the public with what has already been decided by the official. His ‘pluralism’ of interests against the will of a phantom public, then, made way for the realist politics of Harold Lasswell and, a generation after them, figures like Robert Dahl.<sup>21</sup> But Lippmann’s proposition saw this modern tendency not as a problem, as bureaucracies engaged in fact-finding need not assume an autonomous logic that threatened to overtake democratic values or individual liberties. Instead it extended the best possibility for rationalizing irrational democratic decisions and thus preserving freedom.<sup>22</sup> Perhaps most notably, Lippmann elevated the cause of ‘disinterestedness’ as the modus operandi of the expert. But this disinterestedness was championed explicitly against the rallying cry of progressive ‘public interest’; the expert was not to take into account the relationship between facts and any normative claims, either according to personal ideology or public benefit.<sup>23</sup> The normative end for the state was in achieving order and legitimacy over and above the public, which in turn could only be informed by facts not subjective values from experts.

### **The Limits of Facts**

Lippmann’s *A Preface to Morals* (1929), published the same year as Dewey’s *Quest for Certainty*, marked a twofold recognition: firstly, that science itself could offer no more than temporary confirmation of empirical claims that would likely be unsettled in further study. In a

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<sup>21</sup> McClay, introduction, xviii, writes, “Harold Lasswell enthused over its ‘cogent and spirited qualities.’”

<sup>22</sup> Ibid, xxxii.

<sup>23</sup> Ibid, xx-xxi.

recognition of the logic of Weber, he found expertise had to be tempered by the fresh assertion of an ideal of ‘disinterestedness’, as power and its own self-serving logic could begin to motivate its own imperatives. Secondly, and more pointedly, he saw a more basic inadequacy in expertise: facts alone did not satisfy the human need for spiritual and moral meaning. That is, science, as a method that stands independent of values, did not provide a basis for true moral authority.

Borrowing from Peirce and his subjective turn in his model of inquiry, Lippmann saw in science its own internal limitations: it was a process of fact-finding that led only to more searching and dissatisfaction with the store of accepted claims. The “explanations” of “modern science” or what they mean by “truth,” Lippmann writes, “mean only that our own curiosity is satisfied” – and that curiosity, among those who might be more critical “might not be satisfied at all” – because, as he recognized, “there is no formal limit” to our seeking out explanations, and no formal limit to the path to ‘truth’. Truth itself could never be fully attained, nor was it capable of piercing human subjective bias forever. Experience has a way of boiling over, as James wrote, and this made truth itself unstable and never a source of certainty. Peirce’s model of inquiry – as progressive motor for continued investigation among a community seeking ways to move past doubt over beliefs – became for Lippmann, a series of dissatisfactions for “a certain picture of anything which can be taken naively as a representation of reality.”<sup>24</sup>

Lippmann had shared with Dewey the basic quest for reconciling men’s desires and destiny with the world, and of understanding it as situated.<sup>25</sup> For Dewey, scientific method was the model for moral and axiological inquiry itself, for modifying, testing, and expanding desires and interests in our practical and moral judgments. But Lippmann had thoroughly rejected the belief that experience, with its aesthetic and moral qualities, of joy, fear, beauty and meaning,

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<sup>24</sup> Walter Lippmann, *A Preface to Morals* (New Brunswick: Transaction Publishers, 2009), 128-130.

<sup>25</sup> On his early commitment to scientific inquiry, see Hollinger, “Science and Anarchy.”

were “objective” or true features of reality. Facts were one thing; subjective values another. And this led by the end of the decade to a related realization from Lippmann. “Science,” or more precisely, “the gospels of science” had promised “certain knowledge” to quell “the ordinary man’s desire for personal salvation” and “revelation.” But, as Lippmann writes, “even if the conclusions were guaranteed by all investigators now and for all time to come, those conclusions would still fail to provide him with a conception of the world of which the great climax was a prophecy of the fate of creation in terms of his hopes and fears.”<sup>26</sup> That is, even if we had certainty about facts and empirical truths, they could never satisfy us in our need to make a meaningful narrative about the world that made sense of our “hopes and fears.” The ‘disinterested’ value of science in finding factual truths, for Lippmann, reached its limit when confronted with our need for moral meaning. As Dewey wrote in his *Experience and Nature*, “If the proper object of science is a mathematico-mechanical world (as the achievements of science have proved to be the case) and if the object of science defines the true and perfect reality (as the perpetuation of the classic tradition asserted), then how can the objects of love, appreciation – whether sensory or ideal – and devotion be included within true reality?” (EN, LW1, 109-110). This was Lippmann’s quandary, which required looking beyond the empirical methods of science.

This transition in his thought reveals a coherence in Lippmann’s motivating project, which defined even his early pragmatism: a quest for the best method of finding authority grounded in truth so as to preserve an autonomous sphere of freedom for the individual against subjectivism backed by coercive force. If Weber had alighted upon a dead end for freedom in modernity and its “acids”, then Lippmann had to look upward and backwards: to higher laws and the asceticism of religious idols and Hellenic wisdom-lovers and dialecticians. Lippmann’s

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<sup>26</sup> Lippmann, *Preface to Morals*, 127.

solution was to re-think ‘true reality’ once more, and in the quests for certainty that Dewey identified in the two realms of the noumenal and phenomenal. Lippmann, in fact, turned to Kant as the logical apotheosis of this crisis of science and moral meaning: without the demonstration of the existence of God, Kant insisted instead in the “belief in God, freedom, and immortality” without which “there was no valid and true morality. So he insisted that God must exist to justify morality.... For Kant’s proof of the existence of God was nothing but a plea that God ought to exist...”<sup>27</sup> Lippmann too asserted that there were greater moral truths – which he would come to identify with divine and natural laws – and truth beyond empirical realities and experience. As for the quest for that desire “for personal salvation” and meaning for his “hopes and fears”, Lippmann called on the quelling of those human desires, hopes and fears, altogether. He turned to the “Nirvana of the Buddhists”, the Puritans, Jesus, and “the great moral philosophies from Aristotle to Bernard Shaw” that “taught that one of the conditions of happiness is to renounce some of the satisfactions which men normally crave” – a ‘disinterestedness’ elevated to moral piety.<sup>28</sup> What he sought as a model for our spiritual quest was the wisdom and happiness that comes from a non-instrumental contemplation of supra-empirical truths.

“Philosophers have celebrated the method of change in personal ideas,” Dewey wrote in his *Quest for Certainty*, “and religious teachers that of change in the affections of the heart,” so as to elide “transforming the scene of life” by deploying human intelligence in purposive activity. (QC, LW4, 4) It was a perpetuation of the old dualism between thinking and acting, with the “depreciation” of the latter. Science’s value, for Lippmann, if it was to have a place in moral life, was only in promoting this disinterestedness – relegating it again to its purification of thinking and knowing from action and desire. This Hellenic practice, as Dewey wrote, and “[a]s

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<sup>27</sup> Ibid, 136.

<sup>28</sup> Ibid, 156.

Aristotle was given to pointing out,” meant that “an individual is self-sufficient in that kind of thinking which involves no action, the ideal of a cognitive certainty and truth have no connection with practice, and prized because of its lack connection.” (QC, LW4, 32) While Lippmann maintained a place for the expert in practical affairs, moral authority thus had a new lodestar in political life: leaders – and judges – who saw truth itself outside of action and experience. But if we have factual experts on one side, and disinterested moral authorities on the other, we reach the state of modern affairs that Dewey foretold: “the doctrine worked out practically so as to strengthen dependence upon authority and dogma in the things of highest value, while increase of specialized knowledge was relied upon in everyday, especially economic, affairs.” (QC, LW4, 32) Gone from public life is any role for activity, or those purposive processes in which ideas and values can be tested and secured in everyday life. In its stead is warrant for dogmatic obedience to leaders who can claim authority based on their proximity to truth.

### **From Expert to Judge**

Lippmann’s epistemological turns came with a parallel retreat from his faith in a centralized and powerful state, even under the direction of planning committees and central administration. In an embrace of the old liberalism and its logic, as outlined by Dewey, Lippmann would claim that state authority, especially in economic interventions, was a direct and irreconcilable threat to individual liberties. Lippmann’s work on economic freedom in *The Method of Freedom* (1934) postdates his critique of democracy in *Public Opinion* and *The Phantom Public*, but shows the link between these two claims on behalf of freedom. State-directed management of the economy posed a fundamental threat not only to economic liberties,



but political and social liberties as well. Enthusiasm for planning after the World War I experience could not translate into a regime of normal politics: the very priorities for production – or some reference to a ‘common good’ – were no longer clear cut as they were during war. To that end, Lippmann’s *Method of Freedom* has been convincingly interpreted by recent scholars as proto-Hayekian neo-liberal defense of economic freedoms imbricated with a defense of the rule of law and constitutional liberty.<sup>29</sup> Like Hayek, he too would come to claim that the ability to align public opinion with the state’s production goals, without a clear, common external threat – a manufacturing of consent through other means – would require indoctrination through propaganda and curtailment of civil liberties. While Lippmann had always rejected laissez-faire liberalism as an analog of populist democracy run amok,<sup>30</sup> he turned to the epistemic value of the market as an analog to a chastened constitutionalism and the rule of law steered by impartial judges. As Dewey would write specifically with regards to Lippmann’s turn to the judiciary as the locus of governmental authority, the elite and insulated branch of government was duly remote from the workings of the public, which approximated Lippmann’s ideal turn to an objective, ahistorical epistemic authority.

The turn to the rule of law as a bulwark against the lack of legitimate authority in democracy, dovetailed with Lippmann’s epistemological and moral appeal to the disinterested judge as the model for political life. His legalist turn appealed to natural laws and natural rights, as essential metaphysical realities over and above the demands of democratic popular opinion – or totalitarian rule, as became his concern by the mid-1930s. Natural laws were “transcendent”

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<sup>29</sup> The link begins with Lippmann’s 1937 *The Good Society* (New Brunswick, NJ: Transaction Publishers, 1937). See Ben Jackson, “Freedom, The Common Good, and the Rule of Law: Lippmann and Hayek on Economic Planning,” *Journal of the History of Ideas* 73, no.1. (2012), at 51. And Francis Clave, “Comparative Study of Lippmann’s Hayek’s Liberalisms (or Neo-Liberalisms),” *The European Journal of the History of Economic Thought* 22, no. 6 (2015): 978-999.

<sup>30</sup> This seems to have been a source of Lippmann’s refusal to be paired with Hayek or his refusal to publicly recognize any affinities between his work and Hayek’s, despite the latter’s attempts to do so. See Jackson, “Freedom and The Common Good.”

and were not a matter of prejudice wish, or rationalization. As Lippmann wrote in his *Essays in the Public Philosophy*, “It was not someone’s fancy, someone’s prejudice, someone’s wish or rationalization, a psychological experience and no more. It is there objectively, not subjectively. It can be discovered. It has to be obeyed.”<sup>31</sup> Like Austin’s attempt to translate divine law into an objective utilitarian calculus, given the epistemic slipperiness of divine law amongst humans, Lippmann grasped still towards some mode of bridging that gulf between human knowledge and consciousness and the laws of a transcendental reality. He turned to the method of elenchus and dialectic of Socrates and a faith in neo-Catholic and neo-Platonic doctrine that essences could impress upon the mind from a realm of essences above human experience. The emotional and moral satisfaction to be achieved was through the instrumental or practical value from the law, but in pure aesthetic contemplation of truth and its essential forms. As Diggins writes, “Lippmann felt drawn to natural law theory in contrast to the social contract, because he experienced it as true rather than useful.”<sup>32</sup>

Lippmann, during his early progressive phase, was a strident critic of the courts and judicial review,<sup>33</sup> and believed that courts blocked potential reform and progress towards progressive ends in the name of unnatural natural rights. In his early *A Preface to Politics*, Lippmann had already asserted a division between ultimate values and political processes, but criticized what he saw as two fallacies of constitutionalism: the “the democratic fallacy” of looking to the constitution as an expression of popular will, and the source of power via fixed institutions, and ultimately as a source of justification. And secondly, and relatedly, that the constitution would be “a perpetual-motion machine going on forever, without the effort of personal will supported by force”, as early (Austinian) sceptics of American constitutionalism

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<sup>31</sup> Lippmann, *Public Philosophy*, 175.

<sup>32</sup> Ibid.

<sup>33</sup> Stears, *Progressives, Pluralists*, 87-93.

warned. “What determines the quality of civilization,” Lippmann wrote “is the use made of power. And that cannot be controlled at the source.”<sup>34</sup> What Lippmann’s chastened epistemologies recommended then, vis-a-vis the use made of power, was to turn a disinterested attitude towards power and force altogether – and its attendant consequences in social activity – in favor of contemplation of its noumenal truth value, and its epistemologically warranted preservation of individual rights. His return to informed judges who might protect natural rights and restrictions on the public and their governors presented the most cautious solution to his chastened outlook on the possibility of moral authority in political life.

Unlike Austin and Maine, Lippmann turned explicitly to the common law tradition to counter the sovereign prerogative of a central government.<sup>35</sup> He championed a gradualist constitution, which could offer reasoned order and individual liberty to politics, against all forms of irrationality and power, whether from state or public. What Neurath captured in his imagery of post-foundational thinking, of sailors at sea, has been, appropriately, a persistent image in the myth of the ancient constitution and common law.<sup>36</sup> Fittingly, the metaphor of modern constitutionalism, of Ulysses tied to his mast, posits the heroic sailor battling the division of a rational self and the unruly impulses of a future, desire-laden man. Lippmann’s precommitment was twofold: towards absolute truths, and against a subjectively-laden public will in pursuit of a non-existent common good. No individual could never understand the totality of the entire constitution, or be guided by its imperatives and invariably any planning social organizational schemes, as master architect or mythic legislator, would also prove myth. The aggregative

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<sup>34</sup> Lippmann, *Public Opinion*, 196, cited also in Diggins, *Promise of Pragmatism*, 334.

<sup>35</sup> Especially in his treatment in *The Good Society*. He writes of common law, for example, that “[t]his method of social control is, I submit, the appropriate method for a self-governing people to use. The pioneers of liberalism fought successfully to vindicate this method of social control as against the prerogatives of the king. From the early days of the Norman Conquest they stood for the common law as against the commands from the king on high.” at 266.

<sup>36</sup> Martin Loughlin, *Foundations of Public Law*, 100fn50.

principle proposed from Descartes to Burke locating the authority of custom with modest adaptations in the common law paired with the strong commitment to individual rights, offered a piecemeal if makeshift solution to modern drift and the only possibility of legitimate political authority.

### **The Motivation to Obey**

Lippmann's seemingly mystical trajectory toward an embrace of liberal constitutionalism is not offered only to trace one liberal's justification of legalism over and against democracy. Instead, the quests that animated his political thought, I believe, remain suggestive in features of contemporary quests for legitimate authority in politics and law. The desire and need for authority, which, if founded only on truth claims when no such claims can be authoritative made, even through recourse to science and expertise, may seek a compromise in disinterested politics embodied by formal legalism of judges and liberal rights. Judges at least mirror or may aspire to the ascetic quest for truth. If *rational* procedures towards consensus within politics or law must be understood not as offering satisfying explanations for absolute factual truth, desires as such must be withdrawn from the processes of politics. Or, if desires are withdrawn from political judgment, rational procedures based on scientific method must be fatally limited in offering only more facts and fallible and revisable decisions, not the meaning or subjective explanations that we seek from associated life. For Dewey, dating back to his critique of Austin, the terrain of constitutionalism and the legislative will is itself rigged against popular sovereignty, if it presupposes that only determinate decisions and wills constitute the meaning of democracy. It only fixed limits on the active adaptability and creative potential of individual and collective

intelligence, by presupposing the epistemic individualism and irrationality of the masses. What's more, the very attempt to bifurcate the moral or political self, desire and reason, in a tempt to purify and enlighten one side, or assert force or power on the other, led anew to the issues of hierarchies and domination.

The problematic logic underwriting these theories – and their connection to a critique of strong democracy – may be further elucidated by turning to the application of contemporary rational choice theory – which is underwritten by the same atomistic individualism and methodology from Lippmann, Weber, and before them Austin, and Maine. William Riker, for example, has claimed that voting as a method of preference aggregation – and the very preservation of individual choice – will not consistently (if ever) yield results that accurately reflect the true preferences of voters.<sup>37</sup> In fact, “true preference” of voters is not a meaningful concept. The theoretical basis of Riker’s analysis and the asserted difficulty of aggregating preferences is grounded in both empirical and historical examples and the findings of social choice theory, and in particular Arrow’s Theorem. Arrow’s Theorem states, briefly, that methods of preference aggregation that allow any ordering of three or more options cannot satisfy the three “Condorcet criterion” – independence of orderings between pairwise decisions, Pareto efficiency, and the absence of a dictator who determines social rankings. Riker posits that, following Arrow’s Theorem, any number of results can emerge from the same set of individual values depending on the method of aggregation (and empirical evidence from elections<sup>38</sup> and experimentation<sup>39</sup>) – an unjustifiable and incoherent reality that potentially undermines the possibility of advancing substantive values of democracy.

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<sup>37</sup> William Riker, *Liberalism Against Populism* (San Francisco: W.H. Freeman, 1982). An important empirical critique of Riker’s findings is offered in Gerry Mackie, *Democracy Defended* (New York: Cambridge University Press, 2003).

<sup>38</sup> Ibid, 22.

<sup>39</sup> Ibid, 29.

Therefore, as Maine and Austin argued with the same logic, democratic legislation should not be understood as capturing a general will, or in Lippmann's terms, a "mechanism for originating social power." To avoid an incoherent result, democracy must therefore rely on a superior method of preference aggregation that can reliably and meaningfully adjudicate among options while still satisfying the Condorcet criteria. The only plausible method Riker identifies is simple majority decisions (which have only two "pairwise" preferences). Riker finds, however, that simple majority decisions rarely occur naturally, and are instead often manipulated into existence through unfair practices like strategic voting, agenda control, and the creation of political issues by losing political forces to reorient the status quo in their favor. The scope for the positive affirmation of social values is thus radically limited, and only a negative check on gross violations of these values is consistently possible and valuable in a democratic society. Thus, as Maine and Austin saw the value in Madison's aristocratic institutions, democratic constitutions can provide a potential check on existing governments through institutions of representation and periodic elections when violations are sufficiently egregious to prompt a general convergence in opinion against the offending government.

But the question that Riker and these critiques of robust democracy skirt over is how it is that individuals will be satisfied with a system that limits their options to pairwise decisions, which cannot, by definition, represent the panoply of values they actually hold or potential solutions to existing social problems. Why would they submit to such an arrangement too when their will is in fact not represented? In short, there is no reason, as Riker's theory suggests, to accept even a minimalist democracy of the Madisonian stripe, administered at best by efficient administrators reined in by occasional elections, in lieu of a dictatorship. As Dewey wrote presciently about rule by experts:

If the masses are as intellectually irredeemable as its premise implies, they at all events have both too many desires and too much power to permit rule by experts to obtain. The very ignorance, bias, frivolity, jealousy, instability, which are alleged to incapacitate them from share in political affairs, unfit them still more for passive submission to rule by intellectuals. Rule by an economic class may be disguised from the masses; rule by experts could not be covered up. It could be made to work only if the intellectuals became the willing tools of big economic interests. Otherwise they would have to ally themselves with the masses, and that implies, once more, a share in government by the latter. (PP, LW2, 363)

Lippmann, in his final turn to natural law and transcendental truths, proclaimed that it would only be in a *religious* faith and piety in transcendental truths and authority among individual believers, which could commit them to liberty against totalitarian authority. This was the faith Lippmann attributes to the Founders, who believed, as Lippmann praised, that they were “defending these rights against all early powers, against kings or tyrants or popular majorities, they held that they were practicing obedience to God.”<sup>40</sup> It was the kind of faith he attributed to Kant – a belief in the belief of God and morality, because it was a logical necessity to make good on claims against ‘warring gods’. “How will you affirm that freedom is better than tyranny,” Lippmann asks, “if you are not able to affirm that it is the destiny of man’s nature that he should be free?”<sup>41</sup> But this theological schema was a curious bulwark against the alternate logic for re-asserting liberty into political life. It was, in short, an appeal to beliefs without direct empirical foundations – the type of unscientific faith that had motivated the turn away from the public towards disinterestedness and truth in the first place. If that irrationality had been so hopelessly ineradicable, so as to justify the rejection of participatory democracy, how could it be turned to for the sustenance of rational and *true* political ends and freedom in lieu of totalitarianism? Lippmann’s later championing of a stronger executive was motivated in part by his belief that

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<sup>40</sup> Walter Lippmann, “The Bill of Rights,” in *The Essential Lippmann: A Political Philosophy for Liberal Democracy*, eds. Clinton Rossiter and James Lare. Cambridge: Harvard University Press, 1982.

<sup>41</sup> *Ibid*, 133.

such centralization would forestall the installation of a dictator.<sup>42</sup> But it was not hard to see by his 1955 *Essays in the Public Philosophy*, the failures of public piety in evading political catastrophe. An upshot to this logic would be a violation of one of those very Condorcet criteria: a dictator who could determine social rankings and values, who might harness the irrational public through charisma, creating artificial pairwise decisions and the specter of potential existential threats and enemies – who could satisfy, in short, a human need for authority and meaning in shared life.

### 2.3. DEWEY AND THE TURN TO THE PUBLIC

It is appropriate, then, that Dewey begins his study in “political inquiry” and his response to Lippmann’s ‘realist’ attack on participatory democracy with the observation that “if one wishes to realize the distance which may lie between ‘facts’ and the meaning of facts, let one go to the field of social discussion” (PP, LW2, 238), especially in theories of the state on the one hand, and political and social facts on the other. The mere existence of a fact does not “coerce belief”, as the meanings of facts are not inherent in ‘bare phenomena’ – whether it be the fact of disenchanted publics, industrial modernization, or scientific ‘truth’ itself. Instead, *meaning* emerges from “method, the technique of research and calculation” and the procedures of inquiry and deliberation (PP, LW2, 238). So too between political science and political philosophy, which makes all the more poignant the “futile speculation” that defines the latter and the value-free – and therefore meaning- and interpretation-free – nature of the former. The general lesson

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<sup>42</sup> Walter Lippmann, *Essays in the Public Philosophy*. New Brunswick: Transaction Publishers, 2009. As he writes there also, “Politicians rationalize this servitude [to their constituencies] by saying that in a democracy public men are the servants of the people. This devitalization of the governing power is the malady of democratic states. As the malady grows the executive becomes highly susceptible to encroachment and usurpation by elected assemblies.” 27.



from Dewey's claim was that facts in themselves do not generate normative prescriptions. Interpretation, like all intellectual habits, is creative and a distinctively human, value-laden activity. And secondly, facts about political life do not foreclose the possibility of their change; through our purposive interventions, and the very possibility of human growth, we can direct our energy towards their transformation.

Dewey's alternative to Lippmann's elite democracy was grounded in his functionalist state theory, and his view of democracy as an ethical ideal, in which moral meaning emerges from the basis of the relationships and collaborative practices and formation of values we sustain through the course of shared life. Though I refer to Dewey's 'state theory' throughout, Dewey's primary concern in his works was not on particular institutional arrangements or the concept of the state as such, but in the *public* – how it comes to be defined or made determinate, and how institutions can be deployed in its service. The power of his alternative to the classical liberal ideal and Lippmann's retreat from the public in political action rests in locating the purview of the state directly to public action and judgment. Dewey realigns the problems of authority, society, and the individual, not between state authority and individual rights, but turning to the concrete problems that arise and the mechanisms in place to deal with them through methods of social intelligence. The public's practical judgments may never lead to consensus, but can be undertaken more intelligently, or blindly and irrationally – led by a quest for certainties despite the absence of absolute truths – either moral or epistemological. Moreover, we could attempt, like Lippmann, to remove our desires and interests altogether, as a means of constricting the domain of our dissatisfaction, which scientific method and politics itself, may never succeed in satisfying. The unfounded belief that personal interests could not be reconciled with intelligent and authoritative norms tested out over time undermined the best means developed yet for

enriching those human processes and relationships. That process of social intelligence and shared inquiry was, in short, Dewey's conception of democracy as an ideal.

### **The Public and Its Problems**

Dewey shifts from his early language state and sovereignty, by introducing a distinction between state and government, wherein the former includes both the *public* and the government, whereas the latter is marked by officials and public representatives. Dewey grounds his account of the state and public not with causal or logical formulations but with the normatively-laden *and* “objective fact that human acts have consequences upon others, that some of these consequences are perceived, and that their perception leads to subsequent effort to control action so as to secure some consequences and avoid others.” (PP, LW2, 243) The state, in turn, is grounded on the functional distinction between the “public” and the “private” – or “the *extent* and *scope* of the consequences of acts which are so important as to need *control*, whether by *inhibition* or by *promotion*” (PP, LW2, 245. itl added). An act is private when its consequences “confined, or are thought to be confined, mainly to the person directly engaged in it” and public when they “affect others beyond those immediately concerned” (PP, LW2, 243) and cannot be resolved by those immediately concerned. The distinction is not between officials and lay people, the individual and society, or the activity of the butcher and baker and its effects on the community. That is, the public is not the same as the ‘community’ or ‘civil society’, nor are public acts necessarily socially useful; war is Dewey's paradigmatic example. Its purview rests in the far-reaching consequences that cannot be accounted for and managed by purely private efforts.

*A public* emerges firstly from a self-conscious act of identifying ‘public’ problems that

cannot be resolved through existing problem-solving mechanisms. Dewey writes, “the public, qua group, is constituted when some association perceives a common interest in the regulation of some set of indirect consequences. The public is created through *an act of shared practical judgment....*” (PP, LW2, 243. *itl. added*). The processes that create each public grounds its scope in problems that move beyond private affairs or the regulation of superiors and inferiors. The notion links inextricably the *functional* role of publics, not a pre-given entity, with a shared practical judgment undertaken by that public itself, in the name of its own interests. It is a conscious assessment of existing conditions as they arise from a preexisting nexus of relationships and social transactions, and the recognition of a problematic situation that creates a public. As with all deliberative activity, it is not human nature, instinct, or the rallying cry of pre-existing norms or identity, that drives this determination but *conscious* and purposive judgment. That judgment cannot occur in the absence of participation via the very creation of a public, which can recognize the problem that it faces. Participation does not begin after the problem has been recognized; it requires recognition of social problems in the first place.

From this account, Dewey indexes the purview of the government to the context-specific judgment of the public, based on the consequences of their activity and interests. But Dewey’s public/private division itself requires more unpacking.<sup>43</sup> The distinction allows Dewey, firstly, to move beyond clear domains of the private individual versus potentially coercive or illiberal society and subsequent assertion of freedoms to be protected in each domain. Thus, despite

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<sup>43</sup> Scholars have noted the ambiguity in Dewey’s treatment of publics and the public: whether and when a new public is formed, and what distinguishes the public writ large from publics that arise that address particular problems. Robert Westbrook, for example, finds an oddity in the suggestion that a new state is created with the organization of a new public. Matthew Festenstein suggests that the creation of new publics does not mean “the governing institutions of the state should be replaced wholesale, but rather that they are supplemented or take on new functions,” which can federate in a union. As he notes also, “there is an ambiguity in Dewey’s notion in Dewey’s notion of the public interest between a public’s formal interest in some regulation in some specific measure by which these consequences are regulated.” *Pragmatism and Political Theory*, 86. Eric MacGilvray, in turn argues, in “Dewey’s Publics,” *Contemporary Pragmatism* 7, no. 1 (2010), 31-47, that two publics are implicit in Dewey’s account – The Public as a general and common entity and ‘a public’ or something akin to an interest group.

Rorty's claim to the contrary, Dewey's conception of public/private is not and should not be reduced to a variation on John Stuart Mill's – or for that matter, Rorty's own and Shklar's – liberalism, as he does not posit a domain of privacy to be infringed upon by the state only to prevent cruelty and harm from others.<sup>44</sup> The distinction also moved beyond the caricature of efficient private enterprise and slow-moving government.<sup>45</sup> This only reinforced a faulty epistemological backing of private enterprise on the basis of a belief that private self-motivated thinking had a more powerful grip on us than interests in our collective goods. The former division paints the domain of individual thinking itself between reflexively 'individual' or self-directed, versus reasonable or public-regarding. According to this logic, an individual's thinking can only yield private activity or obedience; the state's thinking can yield 'public' activity only through imposing its will (with or) against private individuals' preferences. A division within the individual between private and public selves or ex ante conceptual boundaries, like the ethical versus the moral, reasonable or subjective, fails to understand that the entire person and their desires and interests form a part of associated life. What becomes "public" is the ways in which these interests form consequences that require 'inhibition' or 'promotion' – which in turn requires judgment and contestation.

Like Mill's harm principle, the proper scope of application remains contestable; but Dewey's functional standard can be *deployed* more or less convincingly and intelligently by a deliberating public. As a cognitive valuation, the actual claims that a problem has arisen, or the appropriate scope of public intervention do not become valid merely by because they are

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<sup>44</sup> Rorty, *Contingency, Irony, Solidarity*, 59.

<sup>45</sup> As Dewey glosses Lippmann in his review of *The Phantom Public*, "The contrast often drawn between the efficiency of private action in business and the laxity and inertia of governmental action is not in truth a contrast between public and private enterprises, but between "men doing specific things and men attempting to command general results." As Lippmann would write, in a pointed critique of Dewey, the height of private thinking might be found in the "unconscious and unplanned activities of businessmen [which] are for once more novel and, and more daring and in a sense more revolutionary, than the theories of the progressives."

claimed. Like all practical judgments, they require fallible assertions that must be evaluated in light of their consequences and themselves subject to critical inquiry, made more or less intelligently through reflection and the social judgment in communication. If his distinction remains frustratingly imprecise, as many of his readers bemoan, it is because it cannot, *by its very nature*, be given *a priori*. The state's legitimate scope is tied up with criteria that must be shaped in situated contexts: the very determination requires input by those actors who are affected by the consequences at hand who can articulate convincingly why and how they are affected.

Dewey's distinction rests also on a normative claim that the state's purview distinguishes private market interests and public problems.<sup>46</sup> The mechanisms of a free market may act on and clarify private preferences through changing demands or aggregating consumer choices in prices. But those concerns are not public – or not evidently so, insofar as they do not necessarily affect others or require solutions beyond the immediate participation of actors. Public problems require the articulation of specific consequences, not a mechanism for information aggregation and allocation of private goods. The distinction, as Dewey described, between pure instrumental thinking and valuations, was that the former was a matter of techniques of acquisition; the latter required deliberation on the means and consequences on our interests, and openness to adapting our interests based on the consequences of acting on them. Market mechanisms, for example, presuppose that our private values and interests are fixed, and simply require aggregation or re-ordering of interests.

This does not mean, either, that Dewey endorsed interventions into the everyday lives of citizens, or the subsumption of state into society. What Dewey was trying to dismantle more

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<sup>46</sup> Elizabeth Anderson makes this clarification in the distinction between private and public. Anderson, "Epistemology of Democracy".

broadly in the confused issues pertaining to separation of public and problems may be clarified also by turning to his influential essay, “The Historic Background of Corporate Legal Personality” (1926). As Dewey argued there, legal fictions and external concepts of personhood and rights exported in the study of corporate personhood only confused our understanding of how courts and laws have given corporations the legal status they enjoy. Moreover, such conceptual analyses obfuscated the nature of corporate activity itself and its concrete consequences. The reasoning of the courts and jurists paralleled the state theorists and legal fictions from Maitland, as Dewey pointed out, and tied the fiction of the concession theory of the state to the nature of corporate personhood. This analogy of the state to the corporation, as will be recalled from Chapter 1, was endorsed by Herbert Spencer and the Austinian John Hurd. They saw a determinate ex ante (or a priori) scope of state authority based on free contractual relations akin to those shareholders and boards, subjects and sovereigns, which could be freely entered into and exited such that one regained one’s natural ‘private’ status. Their logic appears only to offer the language of corporations in lieu of social contracts and states of natures. But the ‘personhood’ of both the state and corporation were in fact advanced together as fictions that could create a coherent narrative of authority and origins, in which interests, rights, duties, and liabilities could be appealed to in terms of a priori conceptual distinctions, and ultimately justified under the banner of contractual liberty and rights.

The confused conceptual and legal discussion and theorizing surrounding corporations, which Dewey attempted to dismantle, itself had been tellingly fortified by distinction between private and public grounded not in consequences but as principle of private contract. That reasoning was inherited from the famous 1819 Supreme Court case, *Trustees of Dartmouth*

*College v. Woodward*, which introduced the corporate personhood doctrine in American law.<sup>47</sup>

In the *Dartmouth* decision, the Court ruled that corporations could be deemed public or private based on its founding charter – whether it was private contract and its founding charter advancing a matter of public good or concern, or whether it was for the explicitly private interest of its shareholders and board. The case in its immediate aftermath was heralded as protecting the rights of a private corporation (Dartmouth College) against state intrusion into its constitutionally protected rights. But the legacy of the ruling and its logic was to allow corporations to claim that by their charter their interests were private such that they could be shielded from any state or public oversight. The result was the proliferation of unregulated capitalist activity undertaken under the banner of private interests declared at the founding of the corporation, without due consideration of their far-reaching *public consequences*.

As Dewey writes by 1936, “It is foolish to regard the political state as the only agency now endowed with coercive power. Its exercise of this power is pale in contrast with that exercised by concentrated and organized property interests.” (LSA, LW11, 46) Dewey’s functional distinction thus provided a conceptual vocabulary for critiquing the view of the political state as factually or functionally autonomous from the social and economic realms.<sup>48</sup> His was an inversion of Schmitt’s logic that claimed the weakening of the autonomous political *resulted* from liberalism and pluralist state theories that claimed economic associations as co-equal to the authority of the state. Their shared coercive power was self-evident, for Dewey; the weakening of the political state was due to the unchecked power of markets. The project was to

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<sup>47</sup> 17 U.S. 518 (1819)

<sup>48</sup> Carl Schmitt, *Positionen und Begriffe im Kampf mit Weimar-Genf- Versailles, 1923–1939* (Berlin: Duncker und Humblot, 1988).

regulate public consequences, not adjudicate among private imperatives. If the early critics of laissez-faire liberalism and Social Darwinism like Green were intent to excise economics from the purview of ethics and ethical conceptions of the state, then Dewey's was an attempt to reinstate the fullness of all social facts and its consequences – though on a critical basis – in the study of politics and ethics.

But the first step in checking this power was in the turning to the public itself. While Dewey did not deny the fragility of democracy after the Great War and in the Industrial Age, and the moral and epistemic wanderings of the eclipsed public, he attacked Lippmann's conclusions from the ground up: those facts themselves do not yield dispositive or logically necessary conclusions about the possibility of democracy. To claim the shortcomings of the isolated individual, based on the perceived need of omniscient individual sovereigns to legislate, merely reformulated the atomic liberalism Lippmann had purportedly rejected. This was the double peril of the industrial era that relied on this myth: the isolated individual acquired his own monadic world of knowledge, which could not solve social problems outside of itself. And the state was left toothless in doing anything aside from protecting this private realm. Again, the thoroughgoing rejection of these quests underwrites Dewey's claim that "knowledge is a function of association and communication; it depends upon tradition, upon tools and methods socially transmitted, developed and sanctioned." (PP, LW2, 334) It was not a world of subjectivity potentially run amok, per Lippmann, but a social instrumentality that could be developed and whose shortcomings could not be claimed as its essential feature.

The key to Dewey's theory can be found in the primacy he places in a public that needs to become *self-conscious* of its existent relationships and associations and their consequences. As discussed in the previous chapter, this consciousness is a necessary prerequisite for recognizing



problems in the first place. The disintegration of face-to-face contact and the rise of complex social entities like the corporation whose actions and effects cannot be easily tracked made public-formation and accountability of governments much more difficult. This was the promise of the local in reinvigorating the public – not only in methods of governance and the imperatives of local administrative bodies, but in forging and reaffirming social relationships. The “Great Community” emerges from “immediate contiguity, face to face relationships, [which] have consequences which generate community of interests, a sharing of values, too direct and vital to occasion a need for political organization.” (PP, LW2, 260) But Dewey too was a thoroughgoing modernist who recognizes that the very fact of social pluralism and complexity demanded new methods for dealing with complex issues of war and economic regulation. He states explicitly that the local town hall meeting is not sufficient in guiding discussions on the issues that now permeate and affect everyday life via national and global affairs. Political regression to custom-oriented states or less complexity in social and political life is neither desirable nor possible. But the turn to the local was the start for making known what actual problems are felt, and to direct political institutions to address them.

### **Rights, Institutions, and Constitutions**

As Melvin Rogers has recently argued, Dewey’s democratic theory offers an important defense of representative institutions as more than a necessary evil, or a bulwark against moments of genuine popular sovereignty and self-governance. Rogers is correct in arguing that Dewey’s was not a yearning for an “*a*constitutional conception of democracy,” like Sheldon Wolin’s, which seeks popular sovereignty in ‘fugitive’ sources away from institutional forms and

constitutionalism more broadly.<sup>49</sup> The issue, again, revisits Dewey's claim that we need determinate organs of articulation within an account of popular sovereignty, even if they were not themselves the sole locus of sovereignty and authority. And, as discussed in the previous chapter, the nature of laws, institutions, and constitutions was best understood as social customs: necessary as the basis for social action, but effective to the extent that they remained adaptive to changing circumstances, and fostered such adaptive and intelligent habits among citizens. To be sure, like all social customs, institutions can impede individual freedom insofar as they entrench unreflective habits or block the possibility of intelligent social action. As Dewey writes, "In effect, authority stands for stability of social organization by means of which direction and support are given to individuals; while individual freedom stands for the forces by which change is intentionally brought about. The issue that requires constant attention is the intimate and organic union of the two things: of authority and freedom, of stability and change." (LSC, LW11, 131) What is necessary is the mediation of that relationship, again through the purposive intervention of intelligent and adaptive habits, and the critical attention to institutions – and constitutions – themselves.

Dewey does not deny either that representative government and selection of officials are important advancements in the achievement of democracy. He writes, "The worst government is better than none, for some recognition of law, of universal relationship, is an absolute prerequisite. Freedom is not obtained by mere abolition of law and institutions, but by the progressive saturation of all laws and institutions with greater and greater acknowledgment of the necessary laws governing the constitution of things." (POF, LW3, 103). Civil and individual rights were both the valiant and enduring legacy of the revolutions, and absolutely necessary (if

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<sup>49</sup> Wolin found Dewey's scientific thinking undermined his radical democratic project in general. Rogers, "Democracy, Elites, and Power: John Dewey Reconsidered," *Contemporary Political Theory* 6 (2009), 68-89.

not sufficient) in protecting free participation and democracy writ large. “Freedom of thought in inquiry and in dissemination of the conclusions of inquiry is the vital nerve of democratic institutions.” (LE, LW11, 375) But, Dewey argues, the threat to civil liberties after the World Wars and rights of association, religion, speech, and thought, had to emphasize the role of rights in their relationship to citizenship, not not from nature. Moreover, it had to understand that “social control, especially of economic forces, is necessary to render secure the liberties of the individual, including civil liberties.” (LE, LW11, 375)

The central role of these social and economic forces and Dewey’s basic ethical theory brings us back to the reciprocal role that institutions plays in shaping the culture in which inquiry takes place, and the conduct of individual agents. As Dewey wrote, “Institutions are good not only because of their direct contribution to well-being but even more because they favor the development of the worthy dispositions from which issue noble enjoyments.” (E2, LW7, 245). This issue seems to be distilled ultimately as Dewey suggested, in the question of whether “the intelligence actually existent and potentially available [can] be embodied in that institutional medium in which an individual thinks, desires and acts?” If there are clearly delineated conceptual values associated with constitutionalism generally acknowledged today – distilled broadly in protection of rights, mapping institutional structures, and fixing procedures of constitutional revision – they should become receptive to the “experimental process.”<sup>50</sup> They should be evolutionary – and at its best, an intelligent – process of continual adaptations in response to changing environmental stimuli.<sup>51</sup> In language anticipating James Tully’s

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<sup>50</sup> Recently, scholars like Michael Dorf and Charles Sabel have taken up the attempt to offer flexible and adaptive constitutional forms, as inspired by Dewey’s experimental institutionalism. See Michael C. Dorf and Charles F. Sabel, “A Constitution of Democratic Experimentalism,” *Columbia Law Review* 98, no. 2 (1998), 267-473.

<sup>51</sup> The call for an evolutionary constitution was one Dewey shared with his progressive colleagues, who took part in the Wilson and Roosevelt administrations (and included Wilson and Roosevelt themselves). But this effort, though in the spirit of Dewey’s theory, was incomplete, insofar as it took the purview of the state away from its

“imperialist constitution” and the same thinking that Boas and Malinowski took up against Maine’s linear anthropology, Dewey again insists that with any “morphological type, and the favored device in ranking states in a hierarchical order of value as they approach the defining essence and more than anything else, is responsible for the effort to form constitutions offhand and impose them ready-made on peoples.” (PP, LW2, 264) Institutional laundry lists are devices that *evolved* through practical, situated judgments to address needs – which they may have served in their time, but in many cases overstayed their usefulness to “cumber the political ground, obstructing progress, all the more so because they were uttered and held not as hypotheses with which to direct social experimentation but as final truths, dogmas.” (PP, LW2, 326). The insistence on the sanctity of these institutions was of a piece of the insistence on fixed and certain sources of authority as a fixture of classical liberalism. But this was a remnant of quest for certainty in institutional form, over and above experimentation and action. As Dewey writes, “Men have got used to an experimental method in physical and technical method in physical and technical matters. They are still afraid of it in human concerns. [...] One of its commonest forms is a truly religious idealization of, and reverence for, established institutions; for example in our own politics, the Constitution, the Supreme Court, private property, free contract and so on.” (PP, LW2, 341)

The distinction between Dewey’s state theory and the Progressives’ was sharpened by Dewey’s thoroughgoing insistence that the government or constituted state was not the locus of

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primacy in the public and its problems. The distinction seemed to rest in a philosophical distinction that arose early on in the development of their progressive theories and the philosophical claims that underwrote them, especially in the break or continued acceptance of both Hegel and Austin. Wilson retained his Austinian commitments, while Roosevelt proved to be the Austinian sovereign par excellence. As with rise of Wilsonian liberal internationalism that Dewey came to reject and Roosevelt’s ‘imperial’ constitutional interventions and his “Four Freedoms”, the relationship between conceptions of freedom and their containment by a constitution – not to mention the desirability of such relations, for democratic and liberal purposes – lurked behind these rhetorical pleas. The same rhetoric of liberal internationalism and democratic interventions today, as Dewey seemed to foretell, is maintained as a coherent thesis only with the presupposition of ahistorical consideration of individuals and institutional forms, without meaningful consideration of the both the extant public or “sovereignty” broadly understood.

sovereignty, or itself the sole vehicle of reform and progress. “[W]hat the faithful insist upon,” Dewey writes, echoing his earliest critique of Maine and Austin, “is that the idea and its external organs and structures are not to be identified. We object to the common supposition of the foes of existing democratic government that the accusations against it touch the social and moral aspirations and ideas which underlie the political forms.” (PP, LW2, 325). The function of governmental institutions could only find its purposive function – and its very institutional *form* – through the particular problems that arose from associated life. These public processes of self-consciousness ultimately capture the very moral and ethical ground of democracy. The goal of political democracy must rest in turning to the “interest of the public a more supreme guide and criterion of governmental activity, and to enable the public to form and manifest its purpose still more authoritatively” (PP, LW2, 327).

The limitations of the constitution and existing institutions result from the cultural lag between current conditions and entrenched interests that sustain them. Those centuries-old legal institutions and the moral ideas that underwrite them have since “been appropriated by a relatively small class.” (LSA, LW11, 54). As such “confusion persists” and effective public action remains stunted. To become determinate, “to form itself,” Dewey writes, “the public has to break existing political forms...The public which generated political forms is passing away, but the power and lust of possession remains in the hands of the officers and agencies which the dying public instituted.” This requires a virtuous circle, in which institutional inertia is constantly challenged. In language sympathetic to Jefferson or the Arendt of *On Revolution*, Dewey writes that, “by its very nature, a state is ever something to be scrutinized, investigated, searched for. Almost as soon as its form is stabilized, it needs to be re-made.” (PP, LW2, 255)<sup>52</sup> Dewey’s

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<sup>52</sup> Jefferson was in fact an important influence in Dewey’s thought. As Dewey writes on Jefferson, highlighting their affinities: “The will of the people as the moral basis of government and the happiness of the

account highlights the importance of reflexivity between democratic publics and institutional forms – and the need for willingness to adapt intelligently to new social problems.<sup>53</sup> But this call for constant adaptation in the constitution is not a call for an anarchic state or for perpetual revolution.<sup>54</sup> The focus needed reorientation from existent forms to the more intelligent methods and processes – and above all, the cultivation of intelligent and critical habits among the public – which could remain responsive to new challenges. The issue at hand, in short, is to strengthen a democratic culture that promotes active and intelligent participation with and against its institutional framework. Short of that participation, the public will likely fail to be on guard and equipped with methods for addressing the usurpation of public power.

As discussed in the previous chapter, habits and institutions are reciprocally developed and reinforced. As such, as Kristen Kadlec rightly notes, for Dewey, “institutions and laws can never guarantee our protection from our worst impulses and deepest failures, nor can they alone be blamed for our wills.”<sup>55</sup> As Dewey made clear, the bulwarks against totalitarianism, no less than the pessimism against democracy, could not be imposed by fiat or institutional configurations, but required the attitudes of the public to be reflected and reinforced by an open

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people as its controlling aim were so firmly established with Jefferson that it was axiomatic that the only alternative to the republican position was fear, in lieu of trust, of the people. Given fear of them, it followed, as by mathematical necessity, not only that they must not be given a large share in the conduct of government, but that they must themselves be controlled by force, moral or physical or both, and by appeal to some special interest served by government – an appeal which, according to Jefferson, inevitably meant the use of means to corrupt the people. Jefferson’s trust in the people was a faith in what he sometimes called their common sense and sometimes their reason. They might be fooled and misled for a time, but give them light and in the long run their oscillations this way and that will describe what in effect is a straight course ahead.” (PTJ, LW14, 214)

<sup>53</sup> One can see parallels between Dewey’s account and contemporary democratic constitutionalists like James Tully, Richard Bellamy, and Jurgen Habermas, who highlight the reflexive relationship between institutional frameworks and public participation and contestation. Dewey’s insistence throughout his political writings that constitutions cannot be imposed ready-made on people certainly finds relevance today and resonance in works like Tully’s “Modern Constitutional Democracy and Imperialism,” *Osgood Hall Law Journal* 46 (2008), and *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, Cambridge University Press, 1995). See also, Bellamy, *Political Constitutionalism* (Cambridge: Cambridge University Press, 2007); Habermas, *Between Facts and Norms* (Cambridge: MIT Press, 1996).

<sup>54</sup> The attempt to read Dewey in this light appears misguided. See, e.g., Peter Manicas, “John Dewey: Anarchism and the Political State,” *Transactions of the Charles S. Peirce Society* 18, no. 2 (1982): 133-158.

<sup>55</sup> Kadlec, *Dewey’s Critical Pragmatism*, 127.

democratic culture and ethos. His 1939 *Freedom and Culture* was in fact an analysis the necessity of cultivating such a culture as the true bulwark against totalitarianism and for a protection for freedom. Faith alone, or the “view that love of freedom is so inherent in man,” as Dewey writes, and “will produce and maintain free institutions” through its own logic, pace Lippmann, was “no longer adequate” (FC, LW13, 68). As Lippmann’s intellectual trajectory demonstrated, faith in a form of government that relied on a deference to authority and could not forestall dictatorship in lieu of an expert class.

Dewey did not offer concrete institutional prescriptions, as his focus remained on the public, and the need for the public itself to forge its own institutional prescriptions. Moreover, “it is not,” Dewey writes, “the business of political philosophy and science to determine what the state in general should or must be.” (PP, LW2, 386) What they could do, however, is facilitate in the creation of methods of experimentation with which the public could test and challenge these institutional forms and programs. And even for the public itself, Dewey claimed, institutional reform “is not at present an affair of primary importance. The problem lies deeper; it is in the first instance an intellectual problem: the search for the conditions under which the Great Society may become the Great Community.” The public as a “Great Community” becomes conscious of itself as does the individual in breaking through entrenched habits. For Dewey, “when these conditions are brought into being they will make their own forms. Until they have come about, it is somewhat futile to consider what political machinery will suit them” (PP, LW2, 327). Without the improvements in the relations of social life, and the affirmation of new relationships, no solution could not be imposed externally without undermining the very functional purposes of a state, or justified by turning to standards – legal, epistemic, scientific, or ideal – for that imposition.

### 3.4. RECIPROCITY, ACTION, AND DEMOCRATIC FAITH

In the foregoing, we saw how Dewey preserves a place for the necessity of institutions and sets a scope for their legitimate purview, as indexed to the needs and judgment of the public, and the consequences of their activity. Those institutions are authoritative, and their relationship with individual freedom not necessarily antagonistic, but must be monitored against unnecessary entrenchment. But the question remains as to the issue of authority, and the particular functions that officials and experts should discharge on behalf of the public. Moreover, if the omnicompetent citizen is inadequate as a model of the citizen-sovereign, how can the public still lay claim to self-governance given the complexity of policies issues that extend beyond the competence of any one individual? Dewey still saw a role for experts and bureaucracies in modern governments, and the benefits of specialization. But what Dewey suggests, pace Lippmann, is that the necessity and value of experts does not present a case against the necessity and value of public participation. Interpreters like James Bohman and Axel Honneth, among others, have rightly seen expertise as an issue of *dividing* labor in the course of political inquiry, not *deferring* to expertise.<sup>56</sup> The debunking of the myth of omnicompetent citizenship only reaffirms the value and necessity of plural and diverse inquirers undertaking collaborative and common social inquiry.

Still, other scholars have charged that Dewey's emphasis on collaboration and intelligent inquiry, in which experts play a part, may not adequately address the question of power – and its possible usurpation by officials – or politics, tout court. As these readings charge, Dewey appears to have conflated an account of legitimate political authority and scientific authority. As such, his account seems to reduce politics to an instrumentalist account of the epistemic authority

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<sup>56</sup> See Bohman, "Participation through Publics," for this formulation.



of democracy, and a vision of political action as a series of scientific inquiries. As Matthew Festenstein writes, “The ‘operation of cooperative intelligence as displayed in science’ assimilates cognitive to political authority. It seems to involve just that blurring of the sources and norms of social and political authority which the language of social control risks: for political authority is not epistemic authority, and the relationship of citizens to states is not that of scientists to the scientific community.” Still, Festenstein defends this “weak” analogy, because it is grounded in “the moral assertion that the practices of free communication, diffusion of information and rigorous testing of conjectures are desirable characteristics which are reproduced in democracy.”<sup>57</sup> But the suspicion lingers that, in Michael Wilkinson’s words, “Dewey overlooks [a] form of power that, as a phenomenon, is neither purely ‘scientific’ nor purely ‘violent’: political power.”<sup>58</sup> The suspicion, in general, as articulated also by Posner, is that the epistemic reading of political life fails to understand politics as a distinctive domain of action – and specifically one imbued with power.

In this section, I address two prongs of this issue. Firstly, I suggest that Dewey in fact developed a normative vocabulary for understanding the role and limits of political authority, which helps clarify what Dewey saw as the relationship between officials and citizens, beyond one of ‘cognitive authority’. In turn, I suggest that the reading of Dewey which suggests that scientific inquiry is a domain independent of power and potential perversion misunderstands the necessity on both practical and moral grounds for constant participation from all inquirers. Secondly, I turn to the question of truth and action, which brings us back to the issues that plagued Lippmann – of finding moral meaning and authority beyond empirical knowledge. As I argue, the issue of political action in particular is a continuation of the questions Dewey first

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<sup>57</sup> Festenstein, *Pragmatism and Political Theory*, 78.

<sup>58</sup> Michael Wilkinson, “Dewey’s ‘Democracy Without Politics’: On the Failures of Liberalism and the Frustrations of Experimentalism,” *Contemporary Pragmatism* 9, no. 2 (2012), 117-142, at 132.

addressed in his critique of Austin and Maine. The public is not by nature passive and indeterminate, nor should action, therefore, be limited to determinate political insiders or, for that matter, private economic actors. Moreover, action itself is not merely an exercise of power but requires judgment and force. Truth itself does not tell us how to act, or in itself guide our practical judgments. But active deliberation over consequences and common ends may guide us towards more intelligent activity and the possibility of contributing to the formation values that regulate associated life. This collaboration itself provides the basis of carving moral meaning from a realm of contingency and uncertainty – in both our epistemic and moral inquiries. It is also, for Dewey, the ‘keynote’ of democracy, as the moral ideal of everyday life.

### **Officials, Experts, and Duties**

Dewey’s account of authority in the *Ethics* provides us firstly with an understanding of how his turn to scientific inquiry – and of public deliberation and participation – is underwritten by a critical appeal to normative principles in setting the bounds of authority. In that text, Dewey reaffirmed the naturalness and necessity of relationships of authority and obligation. He writes explicitly that “the exercise of claims is as natural as anything else in a world in which persons are not isolated from one another but live in constant association and interaction.” (E2, LW7, 218). Dewey finds a model for his political authority in particular in the Roman conception of “duties as offices.” Those offices serve “a representative value; that is, it stands for something beyond itself. It is as parent, not just as an isolated individual, that a man or woman imposes obligations on children; these grow out of the office or function the parent sustains, not out of mere personal will. When they express merely one will in opposition to another, instead of proceeding from the tie which binds persons together, they violate their own basis.” (E2, LW7,

228) Duties and right are born of *reciprocity* defined by a particular relationship. Dewey points out that this is especially true of “legislator, judge, assessor, sheriff” who do “not exercise authority as his private possession, but as the representative of relations in which many share. He is an organ of a community of interests and purposes.” (E2, LW7, 228) In defining ‘duty’ in offices – and not as a formal correlative to rights<sup>59</sup> – the emphasis rests on the social relationships themselves from which authority emerges. As such, both officials and citizens have a shared stake and responsibility in upholding those relationships, and making clear their demands and claims.

To be sure, the claim that representatives and officials have a constitutive obligation to the public is not a revolutionary one. But that reciprocity defines relationships of social control like that of the teacher and students, as well as the relationships that develop in social and scientific inquiry. That is, in any collaborative enterprise, we make demands and claims, demand and proffer compliance, which must be grounded in relationships of reciprocity and active participation to maintain those relationships. As such, the view that experts and officials may wield authority because they have greater epistemic powers offers a distorted take on what Dewey appears to suggest in finding authority and freedom linked in collaborative inquiries. As he argued in a late educational tract on the issue of social control, a teacher’s authority does not derive simply from superior knowledge and maturity, but the use he makes of that maturity and knowledge in planning exercises or activities that conduce to the student’s ability to themselves learn and engage in inquiry. That is, the authority of the teacher and the social control he elicits is itself tied explicitly to the framework and opportunities afforded for the student to grow and develop his capacities through participation – i.e., his expanded freedom. This is the reciprocal link that Dewey forges between authority and freedom in the context of reciprocal relationships

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<sup>59</sup> Cf. Wesley Hohfeld, “Fundamental Legal Conceptions,” *Yale Law Journal* 26, no. 8 (1917).

of collaborative enterprises. As Dewey writes, “the primary source of social control resides in the very nature of the work done as a social enterprise in which all individuals have an opportunity to contribute and to which all feel a responsibility.” (EE, LW13, 34). There are clearly instances in which direct personal intervention by a teacher or parent has to be made with a rebellious child. But this does not suggest, either, that social control is a process of dictating the order of the classroom, or telling a student what to think or do, even if it is wiser or more mature course of action. Without the student’s participation, the teacher is then naturally tasked with assuming a greater burden of dictating order and control, as an ‘external boss or dictator’ versus ‘leader of group activities’. And this of course elicits boredom and rebellion, and the curtailment of the student’s ability to learn for himself.

The analogy between the classroom and the state, while incomplete, nonetheless elucidates the dynamics at play in linking the claims of authority with the imperatives of freedom. That control can certainly be wielded absolutely and without concern for this normative relationship or the cultivation of freedom. During broad swaths of history, as Dewey asserts, not unlike Maine, “the state is hardly more than a shadow thrown upon the family and neighborhood by remote personages, swollen to gigantic form by religious beliefs. It *rules but it does not regulate*; for its rules is confined to receipt of tribute and ceremonial deference.” (PP, LW2, 261. itl added). States may not have a normative link to the public, and operate on the basis of brute coercion not obligation. Dewey describes the abuse of office in conduct as “*faithlessness*” (E2, LW7, 229). For authority to regain its foothold and not be reduced and understood exclusive as acts of faithlessness, the reciprocal relationships that ties officials to the public, and the social relationships to which the official must remain ‘faithful’ must assert itself and check against the perversion of official authority. Thoughtless deference to authority can only exacerbate the

possibility of abuse of power, the stifling of freedom, and the entrenched hierarchies and domination necessarily inimical to the possibility of self-governance. Because such domination is pervasive, the general suspicion of authority as non-natural and a threat to individual freedom remains pervasive. But this was the result of the perversion and fraying of natural relationships from which obligations and rights arise, not anything inherent about the need for authority or the obligations and claims we make on each other.

As with the relationship between teacher and student, reciprocity and active engagement is a precondition for the instrumental value that experts are able to provide. In his oft-cited phrase, Dewey writes, “The man who wears the shoe knows best that it pinches and where it pinches, even if the expert shoemaker is the best judge of how the trouble is to be remedied.” (PP, LW2, 207) The public alone can effectively formulate the problems that need to be addressed by the expert, and can assess the consequences of their policies. No amount of expertise is useful without pooling knowledge of conditions and immediate experience of the public itself, or having their work directed by the input of the public itself. In short, the process must be collaborative. This was a basic fact of intelligence – that it is social and never the possession or province of a single mind in isolation. The very process of critical inquiry cannot get off the ground without the self-conscious participation and formation of publics. Moreover, as James Bohman rightly notes, the division of labor presupposed in Dewey’s account would be superior to a society of omniscient citizens. As Bohman writes, “if each of the members of a public had to know everything that the group as a whole knows, they would all then know *less* than the group as characterized by the division of labor between experts and the public. Experts themselves often cannot test the knowledge of other experts.”<sup>60</sup>

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<sup>60</sup> Bohman, “Participation through Publics,” 53.

Here, the role of public deliberation clarifies and extends this relationship of necessary reciprocity. Deliberation is not only a method for arriving at epistemically valuable decisions; it allows for the airing out of particular beliefs and values, the coming together and making known various problems. Deliberation also requires and cultivates the empathic and scientific ethos necessary for moral and political inquiry. The problem of the isolated expert, checked only by periodic elections (if at all), from actual social interests, values, and opinion rests precisely in the potential for experts to use their position for self-serving ends. Dewey couches this language precisely as the proliferation of “private interests and private knowledge” which by its very nature cuts off any ties of duty and faithfulness towards the public to which it is responsible, and therefore, of any meaningful authority. “[I]n social matters,” Dewey writes, “it is no knowledge at all.” (PP, LW2, 365) The claim is twofold: because social interdependence and social intelligence are facts of social life, we need a method of social intelligence in which relationships may be clarified and inquiry itself more effectively channeled. We cannot simply rely on the superior epistemic virtue of one class or person over and against another. Secondly, this type of inquiry and division of labor is not simply an aggregation of epistemic inputs or a model of ‘distributed intelligence’ as advanced by Posner. While divisions of epistemic labor and specialization are useful, such intelligence is neither *sui generis* and nor can specialists work independent of consultation with others. Instead, inquiry is intersubjective and evades problems of subjective bias and ‘stereotyping’ precisely to the extent that interpretations and even the formulation of problems are checked against all participants so as to avoid distortion.

By these lights, we can see that ‘science’ itself or scientific inquiry is not a self-realized tool for collective problem solving. The issue that Dewey stressed specifically with all methods – from law to scientific inquiry – was how it was actually applied and by whom. Collaboration

may be the ideal of science, but Dewey himself was certainly attuned to the ways in which, as a practice, science has been used for “pecuniary ends to profit of a few” and has been historically exploited most profitably by industrial capitalists. As he writes explicitly to this end, the application of scientific method in the affairs of life, and not externally by a few “would signify that science was absorbed and distributed; that it was the instrumentality of that common understanding and thorough community which is the precondition of the existence of a genuine and effective public.” (PP, LW2, 344) In short, Dewey cautions against the suggestion that the application of the methods of science can be effective for a common good unless it is “absorbed and distributed” universally, as a model for the type of communication necessary for the self-conscious formation and action of the public. That universal ‘application’ is the normative and practical precondition for its efficacy and value; otherwise, it too, can be subject to usurpation for private ends. This relationship, at least for matters of public participation, were explicitly linked in Dewey’s thinking. As he writes, “No government by experts in which the masses do not have the chance to inform the experts as to their needs can be anything but an oligarchy managed in the interests of the few.” (PP, LW2, 365)

What was required, then of the public, was not technical expertise, “in the sense that scientific investigators and artists manifest *expertise*.” As Dewey continues, “what is required is that [the many] have the ability to judge of the bearing of the knowledge supplied by others upon common concerns.” (PP, LW2, 365). As for critiques of that very limitation of judgment, Dewey suggests that the issue is not so much of “innate faculty of mind” but “absence of facts,” and the necessity of publicity and open free and open flow of information. Moreover, the issue returns again to the issue of “the education which social conditions effect.” The limitations of judgment are, again, an indictment of existing conditions, not the impossibility of or perpetual limitations

of human nature writ large.

For Dewey, full participation of everyone in all issues of public concern was not his vision of political life, either. But participation generally was needed firstly in the development of habits and an ethos – a general empathic capacity committed to solving those problems and recognizing their irreducibly social dimension. The first step towards reclaiming the public was in making understood that ‘public’ concerns did not by definition impinge on private well-being and rights, but were a prerequisite for all human flourishing and ‘growth’. In some ways, Dewey’s ethical imperative seems both less and more demanding than that outlined by commentators applying this thought to revitalize democratic theory today. The aspect of social inquiry or democracy as ethical inquiry does not require enrichment of social life as the self-conscious and explicit goal of public participation or a standard for judging the legitimacy of institutions. Though of course Dewey envisioned this as an ideal, I believe a much more modest proposal can be gleaned from Dewey – if poignant in its modesty. One need not be conscious of all the consequences from shared public life, but as a first step, in the “local” or the “keynote” to democracy, to forge meaningful relationships with others, from which problems and obligations, conflicts and reconciliations, may arise. But without that first step, we may have no motivation or orientation towards a basic cultivation of empathy and willingness to use intelligence and flexibility to solve and test them. Even if such methods fail, one must make the first step to have the face-to-face conversations with others and resolve to seek out solutions, or to establish basic habits receptive to inquiry. Even this minimal call may today seem a far cry from the possibility of democratic politics; yet, this was the means of forward moving, and avoiding the reification of institutions and the use of expertise and power for private ends.



## Truth, Inquiry, and Action Revisited

The notion that the public can remain passive while political ‘insiders’ think, will, and judge on their behalf, rests on dualisms on the nature of ‘action’ itself that Dewey resisted throughout his works. Tellingly, as Dewey wrote in his review of Lippmann’s *The Phantom Public*, “The argument turns essentially upon a distinction between the few insiders and the many outsiders, the insiders being the active forces, the outsiders being spectators, bystanders.” (RPP, LW2, 214). It seems also that this feature of Dewey’s understanding of action can foreclose the suspicion that he provided an incomplete account of political action as merely epistemic inquiry. We can claim firstly that epistemic inquiry itself requires a constant checking of the problems addressed by each collaborator. Scientific inquiry itself poses issues of power and authority that are comparable to those at play with any system in which collaboration is required. But a stronger claim can be advanced against readings like Wilkinson’s. The criticisms that Dewey did not carve a special place for political action as distinct from scientific inquiry and violence appears to tread on a claim that political action is distinct from scientific inquiry precisely because the former necessitates force and power, if not violence, and not simply intelligent judgment and deliberation. If we recall Dewey’s earliest claims on sovereignty and popular self-governance, Dewey believed that political action must combine will, determinacy, and universality, so that it does not deteriorate into mere commands and fiats of will over and against passive subjects. In fact, the notion of freestanding reflection independent of the force necessary for effective action was an empty formulation. As Dewey writes, “This external and physical side of activity cannot be separated from the internal side of activity; from freedom of thought, desire, and purpose.” (EE, LW13, 40)

The very bifurcation of mind and body, thinking and action, only reinforced the assertion that determinate divisions were natural and necessary. And such divisions between mind and body had historically and continued to justify political and economic hierarchies: of rational philosopher-kings over laborers and the passive and indeterminate many. That is, in the attempts to separate thinking and activity, Dewey writes, there emerges “certain ‘practical’ men who combine thought and habit and who are effectual.... They encourage routine in others, and they also subsidize such thought and learning as are kept remote from affairs. (HNC, MW14, 49-50)

Dewey writes:

The division of men into the thoughtless and the inquiring was taken to be the intrinsic work of nature; in effect it was identical with the division between workers and those enjoying leisure. Philosophers and scientific inquiries became the utmost acme of nature’s perfection, being the least dependent upon outward acts and connections.... The conception that contemplative thought is the end in itself was at once a compensation for inability to make reason effective in practice, and a means for perpetuating a division of social classes.... The ulterior problem of thought is to make thought prevail in experience, not just the results of thought by imposing them upon others, but the active process of thinking. (EN, LW1, 99)

In short, the very claim that political action is separable from inquiry was to both obfuscate the nature of action and advance a myth that justified hierarchical relationships. Scientific inquiry was not merely an epistemic enterprise that is good in itself, but part of an ongoing process that must “prevail in experience” in the *active* and continuous “process of thinking.” The imperative from Dewey’s account of inquiry and democracy is simply to fund political action with intelligence, and not to rely on outmoded methods – whether rigid institutional procedures or violence – without considering and adapting alternatives. As he writes explicitly, “The level of action fixed by *embodied* intelligence is always the important thing.” (PP, LW2, 366, ital in original)

The relationship between this active participation and its necessity is linked again to

Dewey's insistence on the local as the domain of political action and social interaction. The circulation of ideas and inquiry alone and the reflective political judgment cannot be sustained with the "fraternally shared experience [that] is ushered in and sustained" through "immediate intercourse". Dewey writes:

Expansion and reinforcement of personal understanding and judgment by the cumulative and transmitted intellectual wealth of the community which may render nugatory the indictment of democracy drawn on the basis of the ignorance, bias and levity of the masses, can be fulfilled only in the relations of personal intercourse in the local community. The connections of the ear with vital and outgoing thought and emotion are immensely closer and more varied than those of the eye. *Vision is a spectator; hearing is a participator*. Publication is partial and the public which results is partially informed and formed until the meanings it purveys pass from mouth to mouth. There is no limit to the liberal expansion and confirmation of limited personal intellectual endowment which may proceed from the flow of social intelligence when that circulates by word of mouth from one to another in the communications of the local community. That and that only gives reality to public opinion. We lie, as Emerson said, in the lap of immense intelligence. But that intelligence is dormant and its communications are broken, inarticulate and faint until it possesses the local community as its medium. (PP, LW2, 371, itl. added)

Inquiry, in short, and the cultivation of capacities for judgment, are not invitation for the reduction of politics into spectatorship. This division today, seems emblematic among democratic theorists who see judgment and spectatorship as distinct from political action. Democracy, in this conception of action and politics, might be realized if the people are freed from action altogether and allowed to sit in judgment as spectators, while politicians are to act on behalf of the people.<sup>61</sup> But to advance such a claim is only to reconfigure the dualisms that underwrote the turn away from democratic participation in the first place.

It bears emphasizing again that the local was not the domain of policy prescriptions. But it was the physical medium in which the type of empathetic interactions and language take root – not simply as a carrier of ideas or passive spectatorship of actors. Moreover, the concern that

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<sup>61</sup> See, e.g., Jeffrey Green, *The Eyes of the People* (Oxford: Oxford University Press, 2011), who endorses what he describes as a more practical "ocular" spectator-judge vision of democratic participation.

inquiry itself is merely scientific seems to suggest too quickly that Dewey foresaw the arrival of consensus as its determinate end. As Dewey writes, “Differences of opinion in the sense of differences of judgment as to the course which it is best to follow, the policy which it is best to try out, will still exist. But opinion in the sense of beliefs formed and held in the absence of evidence will be reduced in quantity and importance. No longer will views generated in view of special situations be frozen into absolute standards and masquerade as eternal truths.” (PP, LW2, 362) The particular proposals achieved were not in themselves the most valuable end advanced through these processes; if they were, a partial participation could surely be sufficient, so long as we could rationally agree with the outcome.

This reading of Dewey can also take us towards a final response to the issues at play in Lippmann’s quest for moral meaning in transcendental truths. Even if we achieved rational agreement, or had access to unbridled truth, Dewey argued much like Lippmann, we would not find an end to the political process or a good in itself. In his speech, “Philosophy and Democracy,” Dewey spoke explicitly of the limitations of truth, and the need for practical *action* to orient us in our attempt to make sense of experience. He argued:

Perhaps we can now see why it is that philosophers have so often been led astray into making claims for philosophy which when taken literally are practically insane in their inordinate scope, such as the claim that philosophy deals with some supreme and total reality beyond that with which the special sciences and arts have to do. Stated sincerely and moderately, the claim would take the form of pointing out that no knowledge as long as it remains just knowledge, just apprehension of fact and truth, is complete or satisfying. Human nature is such that it is impossible that merely finding out that things are thus and so can long content it. . . . Even if a man had seen the whole existent world and gained insight into its hidden and complicated structure, he would after a few moments of ecstasy at the marvel thus revealed to him become dissatisfied to remain at that point. He would begin to ask himself what of it? What is it all about? What does it all mean? And by these questions he would not signify the absurd search for a knowledge greater than all knowledge, but would indicate the need for projecting even the completest knowledge upon a realm of another dimension—namely, the dimension of action. He would mean: what am I to do about it? What course of activity does this state of things require of me? What possibilities to be achieved by my own thought turned over

into deeds does it open up to me? What new responsibilities does this knowledge impose? To what new adventures does it invite? All knowledge in short makes a difference. (PD, MW11, 47)

In this formulation, we can return again to the distinction made between the quest for certainty versus the distinctly human realm of action and practice and the contingency it opens up. Action is always uncertain, and implicates, in Cardozo phrase, “the pain of deciding at every step.” But we find moral meaning precisely through our investigations and these fallible actions. For Dewey, it is through these processes of inquiry and deliberation, and the development and affirmation of social relationships, that we are able shape and construct a sense of what is meaningful and values that regulate social life. That is, our inquiries do not stand over and against action. If they have any significance, it is precisely in making a difference in “the dimension of action”.

For Dewey, knowledge – and all modes of inquiry – does not exist independent of a social context, as a possession of individual minds. In short, epistemic value is of a piece with moral values: it is *created* through the positive capacity and engagement of each individual in concert with others in processes of critical inquiry. As recent scholars of Aristotle and Rousseau also suggest in their respective study of the ‘epistemic’ arguments for the wisdom of the many, the value of these processes is not through aggregation of knowledge, but the moral virtues shared and enhanced through association.<sup>62</sup> Likewise, while scholars like Hilary Putnam do not distort Dewey’s democratic theory in discussing it within the epistemic domain, it bears emphasizing that Dewey rejected the premises of value based solely on a metric of truth. We would strongly distort the potential and value of democracy if we saw it only in producing more epistemically valuable knowledge, or democratic decisions or laws. What Putnam and other pragmatists rightly emphasize is the value of these inquiries – as guides in “the participation of

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<sup>62</sup> See, e.g. Daniela Cammack, “Aristotle on the Virtue of the Multitude,” *Political Theory* 41, no. 2 (2013).

every mature human being in formation of the values that regulate the living of men together.”

Our reconstructive capacities – in building houses from bricks and steel – was the foundation from which ‘culture, civilization, morality’ emerged. The experimental process provided a model for expanding *meaning* in much broader contexts, and in its impacts on individual agents and, reciprocally, societies and customs writ large. We have greater control over the processes that can transform all every aspect of experience in a more methodical and controlled fashion. That is, it does not just secure knowledge, strictly speaking, but it makes things take on new meanings in a qualitative sense. Recall also for Dewey the nature of experience in its qualitative immediacy encapsulates much more than knowledge or the senses – it includes fear, joy, uncertainty, and satisfaction, aesthetic qualities. The process of valuation is not one that exerts reason and rational deliberation over and against desires and interests; we can never eliminate desires, interests, and values from the plane of experience. But we can evaluate, modify, and expand them fruitfully and openly through our inquiries.

To be sure, this turn to action and collaboration would never satisfy a desire for certainty, especially in a world riven with contingency. In that same speech, “Philosophy and Democracy,” Dewey makes the case that contingency and uncertainty need not be a source of drift and despair, but the opening that has allowed us to shape and test our values through “modern experimental science and of democracy.” As Dewey sees is, “The strivings of men to achieve democracy will construe liberty as meaning a universe in which there is real uncertainty and contingency, a world which is not all in, and never will be, a world which in some respect is incomplete and in the making, and which in these respects may be made this way or that according as men judge, prize, love and labor.” (PD, MW11, 50) That is, “nature itself” insofar as it allows for our experiments and our attempts to understand what to do through our inquiries, is congenial to our

human attempts at constructing meaning. It is not “at odds with our purposes and efforts” and the attempt and possibility for the formation of shared values. Because we do not have access to absolute truths – either epistemology or moral – in a world that was “in the making” means also that we have the opportunity to “judge, prize, love and labor” and shape values and meanings within that space of incompleteness and contingency.

But uncertainty too requires faith – as with officials and in the value of democracy– not in an “supreme and total reality” beyond what our faith may ultimately warrant. Instead, Dewey turned to a faith and commitment to human nature itself, and capacities for intelligence of the ‘common man’. As he writes, “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 the 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.” (CD2, LW14, 229) Faith is necessary because the conditions that exist now are not ideal, and the processes of intelligent require their cultivation, testing out, and improvement over time. But it is neither dogmatic, nor wedded to unattainable truths, which, in any case, cannot direct or motivate us in our actions. Nor is it, most importantly, a faith in sources outside or above experience as an ongoing, interactive and social process.

If rejection of such faith in everyday intelligence and action is to hold any water, it must be assessed after there has been some cultivation of those actual capacities after their systematically enforced suppression. As Dewey writes, “the indictments that are drawn against the intelligence of individuals are in truth indictments of a social order that does not permit the

average individual to have access to the rich store of the accumulated wealth of mankind in knowledge, ideas, and purposes.” (LSA, LW11, 38) Dewey here present a version of the argument of Mary Wollstonecraft offered a century before him, when she claimed there could be no assessment as to the true intelligence and capacities of women if the only data available are evidence of the effects of the suppression of their capacities, not a measure of their potential capacities when made free. The first step in the justification of democracy itself then is not to point to existing inequalities and limitations and define them as the core of democracy. If humans are *still* shown to be fundamentally incapable of enlightened intelligence after a radical reform of our institutions and relationships, then perhaps, Dewey might argue, the point can be conceded to Maine, Austin, and Lippmann, and Posner that democracy has proven an empirically and scientifically unsound ideal.

We can return, also, to Dewey’s metaphor for the use and development of human intelligence, in the context of this political activity of the public – “ships that ply the ocean with a velocity of five or six hundred miles a day.” Dewey turns, like Neurath and Lippmann, to the imagery of oceans and drift that grounded the image of the common law constitution and rule of law, but the image is striking largely in its optimistic and sturdy vision. We are not held afloat by a leaking plank at sea; instead Dewey evokes instead ““The enormous improvement which these ships show is not an improvement of human nature; it is an improvement of society – it is due to a wider and fuller union of individual efforts in accomplishment of common ends.’[...] The record would be an account of a vast multitude of cooperative efforts, in which one individual uses the results provided for him by a countless number of other individuals, and uses them so as to add to the common and public store. A survey of such facts brings home the actual social character of intelligence as it actually develops and makes its way.” (LSA, LW11, 49) Instead of



a metaphor for a chastened constitutionalism, Dewey's is an image turned again to the *public* that has built on collective social intelligence, and evidence that favors his commitment to that social intelligence as the basis of shared life. Moreover, a functional state anchored to the judgments of the public and its intelligent institutional adaptations does not suggest impending chaos if helmed by the ordinary passenger in lieu the Platonic philosopher-kings. Though there is no fixed destination or absolute foundation based on a priori rules or standards, there is still "a heavy tome" of socially generated "advances in science" over generations used "to add to the common and public store" – which guide social action, in and through our democratic commitments.

Authority, within this framework of action and contingency, and social and collaborative intelligence, thus finds its place in the enhancement of ongoing processes of experience itself. And this enrichment of experience itself is the best bulwark at our disposal for accepting the claims others make on us, and assuming duties and responsibilities for common interests. As Dewey writes:

Still the question recurs: what authority have standards and ideas which have originated in this way? What claim have they upon us? In one sense the question is unanswerable. In the same sense, however, the question is unanswerable whatever origin and sanction is ascribed to moral obligations and loyalties. Why attend to metaphysical and transcendental ideal realities even if we concede they are the authors of moral standards? Why do this act if I feel like doing something else? Any moral question may reduce itself to this question if we so choose. But in an empirical sense the answer is simple. The authority is that of life. Why employ language, cultivate literature, acquire and develop science, sustain industry, and submit to the refinements of art? To ask these questions is equivalent to asking: Why live? And the only answer is that if one is going to live one must live a life of which these things form the substance. The only question having sense which can be asked is how we are going to use and be used by these things, not whether we are going to use them. Reason, moral principles, cannot in any case be shoved behind these affairs, for reason and morality grow out of them. But they have grown into them as well as out of them. They are there as part of them. No one can escape them if he wants to. He cannot escape the problem of how to engage in life, since in any case he must engage in it in some way or other – or else quit and get out. In short, the choice is not between a moral authority outside custom and one within it. It is between adopting more or less intelligent and significant customs.

As this chapter's epigraph suggests, Dewey's is a claim that "We still shall fight – all of us because we want to live, some at least, because we want to realize our spontaneity and prove our powers, for the joy of it, and we may leave to the unknown the supposed final valuation of that which in any event has value to us." It is not the turn to brute struggle for existence and fear of painful death that moves us in our action, but life itself and living *well*. We are capable of finding that meaning because we happen to live in a world congenial to our experimentation, and we have the means to understand and create meaning, value, and morality in the world. Those experiments will never achieve absolute certainty, but it is enough for us to find "realize our spontaneity and prove our powers" for the joy of it. There will always be a need for authority, and social customs and norms. The issue at hand is whether we adopt "more or less intelligent and significant customs." Action and realization of our spontaneity is ultimately the best bulwark the most pernicious institutions and threats to freedom that Lippmann, like Dewey, saw in the approach of totalitarianism. And that action was best secured by democracy itself, in the space it secures for spontaneity and experimentation, in the customs and habits of everyday life.

## IV.

### THE NORMATIVE AND LEGAL ECLIPSE OF THE PUBLIC

#### H.L.A Hart, Lon Fuller, and the Morality of Law

Just as philosophers once imputed a substance to qualities and traits in order that the latter might have something to which to inhere and thereby gain a conceptual solidity and consistency which they lacked on their face, so perhaps our political ‘common-sense’ philosophy imputes a public only to support and substantiate the behavior of officials. How can the latter be public officers, we despairingly ask, unless there is a public?

– John Dewey, *The Public and its Problems*<sup>1</sup>

We have to see an institution as an active thing, projecting itself into a field of interacting forces, reshaping those forces in diverse ways and in varying degrees. A social institution makes of human life itself something that it would not otherwise have been. We cannot therefore ask of it simply, Is its end good and does it serve that end well? Instead we have to ask a question at once more vague and more complicated – something like this: Does this institution, in a context of other institutions, create a pattern of living that is satisfying and worthy of man’s capacities?

– Lon Fuller, “Means and Ends”<sup>2</sup>

In this chapter, I look to the legacy of the Austinian conception of sovereignty and its reformulation in post-World War I and World War II legal positivism, exemplified by the works of H.L.A. Hart and his debate with Lon Fuller, whose jurisprudence adapts, as I will argue, the philosophical commitments of Dewey sketched in previous chapters. I turn to Hart, firstly, not only because of his status as the most influential figure in 20<sup>th</sup> Anglo-American century jurisprudence, whose revitalization and agenda-setting of his field of influence is matched only by his student, John Rawls, in Anglo-American political philosophy. The foundations of Hart’s concept of law – and that very quest for finding an analytical concept of law – presents what

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<sup>1</sup> PP, LW2, 308

<sup>2</sup> Fuller, *Principles of Social Order*, ed. Kenneth Winston (Oxford: Hart Publishing, 2001), 68-69.

Fuller described in his early attack on the positivist tradition, as ‘law in quest of itself.’ Like Austin and Maine before him, Hart based his discussions of law on historically circumscribed presuppositions concerning the role of officials within increasingly complex societies and the perceived disconnect between the operations of the law and its normative reach to a passive public. And, like Austin, Hart’s account seems to run into incomplete analytical defenses and evasions, motivated by the apparent need to draw strict distinctions between the moral and the legal in explaining and not merely describing the normativity of law. In so doing, I will argue, Hart reproduces Austin’s anti-democratic presuppositions, and fails to overcome the same critiques Dewey leveled against Austin. This reproduction of Austin’s anti-democratic claims sheds light on what the dissertation argues more broadly is a persistent anti-democratic tendency in contemporary jurisprudence and constitutionalism, and the antinomy between concepts of law and democracy.

Few scholars have paid attention to, let alone questioned, what I call the Austinian residue in Hart’s account. Waldron is among the few who have assessed this feature of Hart’s account, though his focus has been in highlighting the normative implications that flow from that argument.<sup>3</sup> As Waldron suggests, with Hart, we should be on guard against officials’ legal actions, lest we be led like sheep to the slaughterhouse in Hart’s memorable, if largely forgotten, image of a pernicious yet still valid legal system. In the first section of this chapter, I offer an in-depth exploration of the claims that inform Hart’s turn to officials as the locus of legal normativity. Beyond its troubling anti-democratic *implications* for the public as Waldron outlines, Hart’s account pivots on anti-democratic *assumptions* – specifically the claim that the

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<sup>3</sup> Waldron writes, “only a few of us have paid much attention to this aspect of Hart’s presentation.” He cites Leslie Green, “The Concept of Law Revisited,” and Stephen Perry, “Hart’s Methodological Positivism,” in *Hart’s Postscript: Essays on the Postscript to the Concept of Law*, ed. Jules Coleman (Oxford: Oxford University Press, 2001).

public is generally passive and cannot be expected to understand the complexity of the rules that constitute valid legal systems. These assumptions about the public, especially as they underwrite general conceptual claims of state and society are, or so I have argued, foundational to generations of critiques against the viability of robust participatory liberal democracies.

Waldron writes in his own sketch of what such a *democratic* jurisprudence might look like, beyond the positivism of Hart, that one would find “the fact that law presents itself not just as a set of commands by the powerful and not just as a set of rules recognized among an elite, but as a set of norms made publicly and issued in the name of the public, norms that ordinary people can in some sense appropriate as their own, qua members of the public.”<sup>4</sup> As I will argue in the second part of the chapter, this turn to the public was in fact a cornerstone of Fuller’s jurisprudence, and one which was informed by a range of Dewey’s philosophical commitments. Fuller’s core defense of the morality of law against the ‘managerial direction’ of positivist conceptions of law remains largely unanswered by positivist today – or, at least, Hart’s much trumpeted victory appears on reconsideration, in Jeremy Waldron’s persuasive assessment, “equivocal.”<sup>5</sup> Fuller’s critique of Hart, in fact, underscores the Deweyan and pragmatic dimension of his thought and supports a finding of Dewey’s broad-ranging influence.<sup>6</sup> Fuller, not

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<sup>4</sup> Waldron, “Can there be a democratic jurisprudence?” 684.

<sup>5</sup> Fuller’s work, and the seemingly definitive victory of Hart in their famous debate through the 1960s, has become subject to renewed scholarly interest and re-evaluation. See, for example, Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon Fuller* (Oxford, 2012), Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Oxford: Oxford University Press, 2010), and Jeremy Waldron, “Positivism and Legality: Hart’s Equivocal Response to Fuller,” *New York University Law Review*, 83, no. 113 (2008), 1135-1169. That Fuller was not a philosopher by training, like Hart, and lacked the latter’s analytical rigor is regularly asserted in critical discussions of his work. But Hart’s conceptual obfuscations, despite his analytical clarity, are increasingly noted by scholars. See, for example, Jeremy Waldron, “Why Law – Efficacy, Freedom, or Fidelity?” *Law and Philosophy* 13, no. 3 (1994), 259-284 and Dan Priel, “Reconstructing Fuller’s Argument Against Legal Positivists,” *The Canadian Journal of Law and Jurisprudence* 26, no. 2 (2013) at 399-400.

<sup>6</sup> Part of the rediscovery of Fuller’s thought, running in tandem with the renewed interest in Dewey’s and in American Pragmatism more generally, is tracking that relationship between Fuller and the pragmatist tradition. See Kenneth I. Winston, “The Ideal Element in a Definition of Law,” *Law and Philosophy* 5, no. 1 (1986), 89-111, and

his positivist, neo-Realist, or neo-pragmatist counterparts,<sup>7</sup> emerges as the exemplary interpreter of Dewey's ethical and political thought as applied in the legal domain.<sup>8</sup> The parallels are indeed extensive: Fuller's adoption of Dewey's mean-end continuum, their respective rejection of the fact/value distinction, the view of a custom as the core to understanding the concept of law, and the rejection of the normative hierarchy of state-based law over and against the law-type institutions that permeate civil society. I attempt to show, and in drawing on previous chapters of the dissertation, the extent to which Dewey's extensive and more sophisticated philosophic writings, beyond his limited discussions of law, provide a stronger footing for Fuller's oft-misunderstood and occasionally philosophically under-developed claims.

Fuller underscored reciprocity and congruence between valid law and its enactment as core features of what made legal systems, as normative social institutions, possible.<sup>9</sup> Fuller's impassioned defense of reciprocity seemed to channel the discontent with the ethical emptiness – and impossibility – of a moral and axiological division of labor between the state and

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“Is/Ought Redux: The Pragmatist Context of Lon Fuller's Conception of Law,” *Oxford Journal of Legal Studies* 8, no. 3 (1988), 329-349. Winston's work in recovering Fuller has been central in recent scholarship on Fuller. See also Rundle, 2012, for archival work which has uncovered further links between Fuller and Dewey. I rely on this archival work below. According to Rundle's research, “Dewey also forms the subject matter of some of Fuller's correspondence with Philip Selznick, with the latter indicating in that correspondence that he sees Fuller's thought as bringing an “elevated pragmatism” to the study of jurisprudence: see letter from Philip Selznick to Lon Fuller, 7 July 1965, The Papers of Lon L. Fuller, Harvard Law School Library, Box 7, folder 6 (Correspondence).”

<sup>7</sup> The comparison here is admittedly incomplete, as the Legal Realists and Legal Pragmatists were largely concerned with developing theories of adjudication, not general theories of law. Still, the jurisprudential foundations of Realist thought comport directly with Hartian Positivism. See Brian Leiter, “Legal Realism and Legal Positivism Reconsidered,” *Ethics* 111, no. 2 (2001), 278-301. For a more thorough examination of the influence of Dewey's thought on (and affinities with) that of Oliver Wendell Holmes, Jr., Benjamin Cardozo, Louis Brandeis, and Roscoe Pound, as well as neo-Pragmatists like Richard Posner, see Chapter 2 of this dissertation.

<sup>8</sup> Of course, fidelity to Dewey's thought is not here argued as a positive value in itself. However, the extent to which professional philosophical and jurisprudential parrying takes place in reclaiming Dewey's legacy suggests at least some incremental value to an assessment of those claims based foremost on a reading of Dewey. Chapters 2 attempts to make clear the extent to which Dewey's philosophy has been distorted – and usefully adapted – by self-proclaimed legatees of his thought.

<sup>9</sup> Lon Fuller, *Morality of Law* (New Haven: Yale University Press, 1969), 19-27, 81-91. Hereafter, *MOL*.

legitimation, facts and values. Fuller's defense of the inner morality of law advanced an ethical conception of law that gives necessary formal structure to the lived practices engendering its moral claims, especially vis-à-vis the advancement of a kind of freedom that makes possible meaningful activity and development of the law subject as agent.<sup>10</sup> In this ethical vision of what the law does and strives to do, especially vis-a-vis our freedom and ability to realize collectively developed values, Fuller, I believe, offers us a durable vision of laws appropriate for democratic societies.

#### **4.1. H.L.A HART AND THE CONCEPT OF LAW**

Hart's critique of the Austinian sovereign covers similar terrain as Dewey's in its rejection of the command theory of law and the claim of the sovereign's necessary legal illimitability. Hart rejects also 'habits of obedience' as failing to explain the persistence of law and continuity of the sovereign.<sup>11</sup> His critique diverges radically with Dewey's in its discussion of the determinate divisions underwriting Austin's conception of sovereignty, and the meaning and source of normativity of the law. Ultimately, Hart's account too reproduces the issues Dewey puts to Austin that point to the incompatibility of his concept of law with a conception of popular sovereignty and democracy. While recent scholars identifying this apparent incompatibility have claimed the incoherence of popular sovereignty itself as concept, Dewey's critique of Austinian sovereignty, and a view to its reproduction in contemporary jurisprudence, suggests the

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<sup>10</sup> Fuller's concern with the ethical dimensions of law is perhaps best embodied in his somewhat cryptic and unfinished project on 'eunomics'. For discussions of Fuller's 'eunomics', see Dan Priel, "Lon Fuller's Political Jurisprudence of Freedom," *Jerusalem Review of Legal Studies* 10, no. 1 (2014), 18-45, Rundle, *Forms Liberate*, and Winston, "Is/Ought Redux."

<sup>11</sup> *COL*, 60-70.

‘incoherence’ is resolvable – or its root cause identifiable – by understanding the anti-democratic logic otherwise assumed as a necessary feature of the concept of law.<sup>12</sup> But I propose also to read Hart as finding himself ensnared in the difficulty of finding justification for the legal legitimacy, if not the moral legitimacy, of *particular* legal officials. The reasoning behind his argument, or so I will argue, is Austin’s: that they have made themselves determinate, and moreover the public at large is distinguishable because the mass of society cannot understand legal processes, let alone legislate, due to fundamental epistemic limitations.

Hart’s primary claim was that social rules – not habits – were the key to understanding the concept of law. Hart writes, “the root cause of failures is that the elements out of which the theory was constructed, viz. the ideas of orders, obedience, habits, and threats, do not include, and cannot by their combination yield, the idea of a rule, without which we cannot hope to elucidate even the most elementary forms of law.”<sup>13</sup> Habits and rules share a key feature: they point to general, though not invariable, behavior. And from the point of view of an outsider observer watching dispassionately the behavior of members of a community, it is impossible to differentiate between the external behavior of someone acting from habit or in accordance with a rule. Hart distinguishes habits from rules (versus the command and the rule) by the following: 1. For habits, convergence is sufficient, whereas for rules, deviations are regarded as lapses open to criticism, and met with pressure for conformity. 2. The existence of a rule provides a good *reason* (or roughly, legitimacy) for criticizing deviations, as well as demands for compliance; 3. A social rule has what Hart famously terms an “internal aspect” or the “internal point of view” or a “critical reflective attitude to certain patterns of behavior [captured in the rule] as a common

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<sup>12</sup> See, for example, Pavlos Eleftheriadis, “Law and Sovereignty,” *Law and Philosophy* 29, no. 5 (2010), 535-569 and Lars Vinx, “The Incoherence of Strong Popular Sovereignty,” *International Journal of Constitutional Law* 11, no. 1 (2013), 101-124.

<sup>13</sup> *COL*, 78.



standard.”<sup>14</sup> That is, there is critical reflection and acceptance by the individual vis-à-vis the rule as a standard for conduct, and not merely an externally identifiable convergence of behavior vis-à-vis the substantive demands of the rule.

This distinction between habits and rules in turn explains three distinctive features of social systems and legal systems in particular: the superior *determinacy* – of both the behavior required by the rule and the process whereby such a determination is made as constituted by the existence of the rule; the normative-epistemic corollary of a conscious *awareness* generated by the existence of a determinate rule, of the reasons it provides for certain behavior and the normative meaning of behavior; and the possibility, under specified conditions, of giving rise to *obligations*.

In a crucial paragraph, Hart identifies the significance of authority as the elusive component of law that distinguishes it – in addition to the issues of generality<sup>15</sup> – from “the gunman-situation writ large” that described Austin’s command theory: Austin’s ‘command’ is tantamount to this relation between the gunman and his victim – an order backed solely by a threat of force. Hart writes:

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<sup>14</sup> Ibid, 56.

<sup>15</sup> The concern that Austin’s concept of law does not account for its generality again follows Dewey’s critique. In brief, Hart argues that this gunman situation writ large, brings three additional concern: 1. The content of laws 2. their range of application and 3. Their mode of origin. Firstly, there is a variety of types of laws extend beyond simple commands and their source beyond the mere desires of a commander, who can also be bound by laws. Laws are both duty-imposing and power-conferring. 28<sup>#</sup> Hart writes, “the principal functions of the law as a means of social control are not to be seen in private litigation or prosecutions, which represent vital but still ancillary provisions for the failures of the system. It is to be seen in the diverse ways in which the law is used to control, to guide, and to plan life out of court.” *COL*, 39. Thus the emphasis on the sanction and the work of the courts here is limited.” Secondly, on the mode of origin, Hart distinguishes between the source in sovereign will versus other sources like custom. As for the persistence of laws, Hart dispenses with the Hobbesian notion – adapted by Bentham and Austin – of a tacit acceptance of laws by subsequent sovereigns, or the idea that “the legislator is he, not by whose authority the laws were first made, but by whose authority they now continue to be laws.” It is not immediately clear if, we dispense with the notion of a rule in favour of the simpler idea of habit, what the ‘authority’ as distinct from the ‘power’ of a legislator can be.” Ibid, 26-64.

it need not be the case, where a command is given, that there should be a latent threat of harm in the event of disobedience [...] [t]o command is characteristically to exercise authority over men, not power to inflict harm, and though it may be combined with threats of harm a command is primarily an appeal not to fear but to respect for authority. It is obvious that the idea of a command with its very strong connexion with authority is much closer to that of law than our gunman's order backed by threats, though the latter is an instance of what Austin, ignoring the distinctions noticed in the last paragraph, misleadingly calls a command is, however, too close to law for our purpose; for the element of authority involved in law has always been one of the obstacles in the path of any easy explanation of what law is.<sup>16</sup>

Hart's central critique of Austin's command theory of law is that this gunman situation and the habits of obedience fail to explain law's normativity. Hart writes, because "habits are not 'normative'; they cannot confer rights or authority on anyone."<sup>17</sup> The gunman situation cannot explain an obligation or duty of the victim to hand over his money; he may be 'obliged' to do so, but he cannot be said to 'have an obligation' per Hart's well-known disambiguation.<sup>18</sup> While an obligation entails a duty, to be obliged to obey is largely a psychological statement, which involves judgments of perceived harm, beliefs and motives; the victim is obliged insofar as he believes acquiescing is better than refusing the gunman.<sup>19</sup> The distinction Hart draws here can be based on parallel deficiencies in the generality of law and of sovereignty: the victim is 'obliged' only for the duration of the threat and by the calculation of consequences involved in that particular interaction. Being 'obliged', as a calculation of consequences, then can be extrapolated in a general system as a predictive calculation of whether consequences of a certain severity will be inflicted and suffered. With this predictive conception, one can escape one's so-called legal

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<sup>16</sup> *COL*, 20.

<sup>17</sup> *Ibid*, 58.

<sup>18</sup> *Ibid*, 80.

<sup>19</sup> It seems incorrect in Hart's own terms to suggest that only acquiescence is required regardless of beliefs and motives. Instead, Hart's account seems to suggest that there is only one belief or motive that is important: that the advantages of complying outweigh the disadvantages of non-compliance.

“*obligation*” by outmaneuvering, bribing, or escaping from the police. But Hart argues that this is not the correct understanding of obligations: one has an *obligation* or duty under the law even if one knows one will not be caught, and whether or not that obligation is met, and regardless of one’s motivations or beliefs for complying or disobeying.

In his identification of Austin’s deficient account of obligation, Hart must then establish the distinction between legal and moral obligations and rules. The distinguishing mark of rules unlike those governing etiquette or speech that give rise to obligations – legal or moral – is the “general command for conformity” and the seriousness of social pressure that is met with deviation from the rule.<sup>20</sup> Physical sanctions – whether issued by the community at large or by legal officials – suggests the marks of some form of law.<sup>21</sup> Additionally, rules are thought to give rise to obligation when “they are believed to be necessary to the maintenance of social life or some highly prized feature of it” and secondly, when the conduct required by the rule “while benefiting others, conflict with what the person who owes the duty may wish to do.”<sup>22</sup> For Hart, basic morality differs from legal rules by virtue of what are general defects of determinacy and flexibility required for complex social control.

Rules that give rise to obligations involve this ‘internal aspect’ and the type of social pressure thus figures into how a society sees the rule and reacts or forms its response in light of its view of the rule. Within any group, members may view a rule from the external point of view, or as a Holmesian ‘bad man’, as merely a prediction of consequences that may be incurred for breach; or from the *internal point of view*, as a norm that is accepted and maintained. The

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<sup>20</sup> COL, 151-208. See below, in this chapter, for further discussion.

<sup>21</sup> This is largely seen as the Austinian residue in Hart’s thought. See Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), 50-58, and Joseph Raz, *Practical Reasons and Norms* (Princeton: Princeton University Press, 1990).

<sup>22</sup> COL, 85.

internal point of view as a standard should not be seen as giving *moral* reasons or authority for following a rule. Instead, it allows Hart to account for the very existence of normative facts, which provide standards of conduct and reasons for conduct; those who view a rule from the internal point of view not only conform behavior externally to the demands of the rule, but accept the rule as a reason for doing so. The internal point of view thus describes how rules make sense in general – how they exist in fact – though it does not offer a substantive or psychological explanation for why individuals might come to view a rule from the internal perspective. It is simply a requirement for the possibility of obligation.

The most celebrated element of Hart's account is the inclusion of secondary rules as a constitutive feature of modern legal systems. Secondary rules:

provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. Rules of the first type [primary rules] impose duties; rules of the second type confer powers, public or private. Rules of the first type concern actions involving physical movement or changes rules of the second type provide for operations which lead not merely to physical movement or change, but to the creation or variation of duties or obligations.<sup>23</sup>

With the introduction of secondary rules of recognition, change, and adjudication, Hart's account can explain the increased complexity of legal systems in ways Austin cannot.<sup>24</sup> Taken together, the defects remedied by the introduction of a secondary rule can be seen as a defect of general

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<sup>23</sup> Ibid, 79. Primitive legal systems, however, can still lack secondary rules but they face three general defects: 1. Uncertainty as to what the rules are, their scope, or the means of settling uncertainty; 2. Static character, wherein no change can occur deliberately outside of slow accretion over time; 3. Inefficiency of the diffuse social pressure, exacerbated by the lack of any means of adjudicating disputes. This seems to constitute Hart's modernization thesis, or at least a view to the possibility that legal systems are not defined primarily by secondary rules, only modern ones, much like Maine's critique of Austin's ahistorical analytical method.

<sup>24</sup> Austin, it will be remembered, struggled to identify a determinate sovereign at back of legislative directives versus constitutional amendment, which shifted according to various moments of legal activity – from modifying the constitution to everyday legislation. Justifications or the source of constitutional law was misdirected as merely moral laws, and not a general rule. See Chapter 1 of this dissertation for extended discussion.

*indeterminacy* in a system of loosely amalgamated primary rules: of what constitutes a rule, how to modify rules, and how to enforce them and adjudicate – in the rule of recognition, rules of change, and rules of adjudication, respectively. Their instantiation thus moves the pre-modern laws into a determinate legal system.<sup>25</sup> In the Austinian system, what distinguishes positive law and moral laws properly so-called from the moral laws improperly so-called that emanate from the public at large is the distinct or determinate will or unified identity of the sovereign behind the validation of laws, their modification and execution versus the indeterminate will of the public that cannot execute its will in changing its customs or seeing through their modification. Hart's innovation was to posit that secondary *rules* create determinacy; the sovereign does not, by virtue of his determinacy, have authority to create the rules. Moreover, Hart's introduction of rules attempts to remedy the deficiency in Austin's account in the sociological fact of law's normativity – its constitutive feature as creating a generally accepted reason for action – not an outward physical compliance predicated solely on immediate fear of sanction.

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<sup>25</sup> *COL*, 90. One curiosity of Hart's account is his turn to a Hobbesian state of nature as the foil to legal systems, and Hobbes' claim to the residual natural right to self-preservation as the sole limitation on the sovereign. Hart posits initially a distinction between those who accept via the internal aspect social rules, and those only externally. There is always in a society a tension between the former and the latter: "it is plain that the latter cannot be more than a minority, if so loosely organized a society of persons, approximately equal in physical strength, is to endure: for otherwise those who reject the rules would have too little social pressure to fear." But the implication that Hart is able to derive from this turn to the Hobbesian state of nature and its world of disaggregated individuals, is to forget the fact of preexisting group associations and stable modes and inequality of power that exist in even a loosely organized society. In short, Hart seems to derive a sociological claim from the state of nature-type arguments which can only, realistically, be considered a heuristic device. Hart only finds use for this heuristic in then defining the general and necessary features of all legal systems, while denying that his argument makes a strong normative claim in favor of the necessity of those legal systems and his definition of them, ie, the type of normative positivism which Hobbes (like Gerald Postema and Jeremy Waldron, among others today) find implicit and necessary in making any definition of positive law. This seems odd too given Hart's glossing over any account of the genetic origins of officialdom, which wields such absolute power, normative and actual over society. See Gerald Postema, *Bentham and the Common Law* (Oxford: Clarendon Press, 1989) and Jeremy Waldron, "Normative (or Ethical) Legal Positivism," in *Hart's Postscript*, as key examples of this contemporary theory of "normative positivism." See also, Chapter 1 of this dissertation for discussion.

Hart's secondary rules have specific characteristics as something between convention and statute. The rule of recognition, for "its existence, unlike that of a statute, must consist in an actual practice."<sup>26</sup> The key, Hart posits, is that it must be regarded from both the internal and external point of view, from its actual practice and the internal statements of those who use it to identify the law. He writes, "one [side] is expressed in the external statement of fact that the rule exists in the actual practice of the system; the other is expressed in the internal statements of validity made by those who use it in identifying the law."<sup>27</sup> The sociological or external fact of its existence comprises one of its necessary features; its acceptance by practitioners, the other. It is "for the most part... not stated, but its existence is shown in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers." That is, "no such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply accepted as appropriate for use in this way." Because there are no superior rules determining the validity of secondary rules, the existence of the secondary rules depends on its acceptance by practitioners.<sup>28</sup>

The relationship between the internal and external point of view is also characteristic of the way the rule of recognition must be understood. The secondary rules of the system are accepted by officials from the internal point of view when they make statements of the law's validity. Such statements imply, in turn, the acceptance of the rule of recognition. Hart writes, "for the word 'valid' is most frequently, though not always, used in just such an internal statement, applying to a particular rule of a legal system, an unstated but accepted rule of recognition."<sup>29</sup> Thus while 'validity' implies the acceptance of a rule of recognition, 'efficacy'

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<sup>26</sup> Ibid, 108.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid, 106-107.

<sup>29</sup> Ibid, 100.

refers to the external aspect of a rule, or the fact of general convergence of behavior in accordance with the dictates of the rule. Though there is often a conflation of validity and efficacy, the relationship is subtler: when one makes an internal statement about a particular law, this presupposes that the legal system as a whole is generally efficacious. This does not suggest, however, that internal statements regarding the validity of a law ‘means’ that the system is effective. There is no causal or mutually constitutive relationship between the two features of law and legal systems. Hart distinguishes this presupposition of the efficacy of the legal system from the predictive analysis of the realists and the command theory by stipulating “the same important fact”:

that the truth of the external statement of fact, which an observer might record, that the system is generally efficacious and likely to continue so, is normally presupposed by anyone who accepts the rules and makes an internal statement of obligation or validity... in both cases alike the mistake of the theory is the same: it consists in neglecting the special character of the internal statement and treating it as an external statement about official action.<sup>30</sup>

When a judge states a rule is valid in a decision, he is making an internal statement that the “rule satisfies the tests for identifying that is to count as law in his court, and constitutes not a prophecy of but part of the *reason* for his decision.”<sup>31</sup>

The stipulation that officials have a duty of acceptance and application towards secondary rules is not a normative ideal which can fail in practice. Hart writes:

this is not merely a matter of the efficiency or health of the legal system, but is logically a necessary condition of our ability to speak of the existence of a single legal system. If only some judges acted ‘for their part only’ on the footing that what the Queen in Parliament enacts is law, and made no criticisms of those who did not respect this rule of recognition, the characteristic unity and continuity of a legal system would have disappeared. For this depends on the acceptance, at this crucial point, of common standards of legal validity.<sup>32</sup>

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<sup>30</sup> Ibid, 105.

<sup>31</sup> Ibid, 102.

<sup>32</sup> Ibid, 116.

Hart's account of this distinction is not purely sociological or functional; he makes the stronger claim that officials not only accept and apply the rule of recognition but accept a *duty* or normative responsibility vis-à-vis these secondary rules. The duty conferred on and accepted by officials of a legal system maintains the existence of a legal system and generates the source of its normativity.

In some descriptions of Hart's inversion of Austin's project, rules create the sovereign; the sovereign does not make the rules.<sup>33</sup> Once instituted by virtue of its acceptance, the rule then endows a particular entity or group of officials with authority to rule – to the extent that those who accept the rule view it from the internal point of view. Hart writes, “*where such a rule is accepted* Rex will not only in fact specify what is to be done but will have the *right* to do this; and not only will there be general obedience to his orders, but it will be generally accepted that it is right to obey him. Rex will in fact be a legislator with the *authority* to legislate.”<sup>34</sup> The acceptance of the rule allows us to think of Rex as having a right to issue orders, and there will be general obedience but with the acceptance that “it is right to obey him.” But it would be apt in this sense to say that ‘sovereignty’ and rules are mutually constitutive: rules come into existence so far as the sovereign (officials) converge in their acceptance and practice of the rules; the rules then confer legal authority and normativity to the legal officials in their subsequent practice. Unlike the transcendental mysticism of Kelsen's Grundnorm, or the predictive tautology of the Scandinavian Realists or Austin himself, Hart asserts the social fact of the constituted rule of

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<sup>33</sup> Scott Shapiro, “What is the Rule of Recognition (and does it exist)?” in *The Rule of Recognition and the U.S. Constitution*, eds. Matthew Adler and Kenneth Himma (Oxford: Oxford University Press, 2009).

<sup>34</sup> *COL*, 56-57 (first italics added)



recognition. Again, the rule is shown to exist by virtue of its acceptance and practice; that rule, then, confers certain powers and duties on the official.

### **The Austinian Residue: Normativity and the Janus-faced Legal System**

Hart's aim was not to explain the substantive source of law's normativity or authority – a core feature of his positivism – to improve upon Austin's shortcomings. But striking in Hart's treatment of the command theory is his explicit affirmation of what he finds “constitutes one of the strong points of Austin's theory” and what Dewey found at the root of Austin's anti-democratic conception of sovereignty: the view that law derives its normativity from the determinacy of the sovereign as a distinct class over and against a habitually obedient public.<sup>35</sup> Central to Hart's reproduction of Austin's hierarchical model of law is his functional and normative differentiation between officials and the public. The legal system is “Janus-faced,” according to Hart, with a hierarchical social divide predicated on the side of legal subjects by the fact of obedience and, on the other, by officials who accept and apply secondary rules from the internal point of view. Hart writes:

It is the strength of the doctrine [of Austin] which insists that habitual obedience to orders backed by threats is the foundation of a legal system that it forces us to think in *realistic terms of this relatively passive aspect* [represented by the ordinary citizen] of the complex phenomenon which we call the existence of a legal system. The weakness of the doctrine is that it obscures or distorts the other *relatively active aspect*, which is seen primarily, though not explicitly in the law making, law-identifying, and law-applying operations of the officials or experts of the system. Both aspects must be kept in view if we are to see this complex social phenomenon for what it actually is. [...]<sup>36</sup>

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<sup>35</sup> Perhaps, more accurately, Hart does not address this paradox or the original source of legal authority but begins with the social fact of acceptance of secondary rules.

<sup>36</sup> COL, 61. Itl. added.

It is worth pausing here on the presuppositions built into Hart's account, and in particular his language of active and passive components within the legal system. Recall in Dewey's review of *The Phantom Public*, his assessment of Lippmann's claim: "The argument turns essentially upon a distinction between the few insiders and the many outsiders, the insiders being the active forces, the outsiders being spectators, bystanders." (RPP, LW2, 214). Like Austin as well, the will of the sovereign is active and capable of determinacy and force, while the public must be passive. The 'active' component of the legal system, represented by officials, is given greater sophistication by Hart's introduction of secondary rules to the general concept of law. Law is not valid because it emanates from a particular sovereign who can garner habitual obedience, but the acceptance by officials of a rule of recognition. With secondary rules, an official class is self-constituted and the validity of law established.

Secondary rules are comparable to primary rules in primitive legal systems, insofar as the latter also require its active practice and acceptance by practitioners from an internal point of view. According to Hart, in simple societies, primary rules must garner general acceptance from the internal point of view for the rule to exist at all, as there are no secondary rules to validate the rule and thus assure its existence. The introduction of the secondary rules, however, creates a new existential dimension – i.e, the 'legal' – to a system of rules. Whereas a jumble of primary rules without secondary rules exists only insofar as they are practiced, the secondary rules can assure certain basic continuity and criteria for validity stipulating their 'legal' existence in the absence of continuous practice. So long as secondary rules are accepted from the internal point of view of officials, they exist, just as primary rules in primitive legal systems. Primary rules, then, which are valid insofar as they are validated according to the secondary rules of the system,

can be said to exist 'legally' or as laws on the books, even if they are not primary rules that are said to exist by virtue of their day-to-day practice.

The 'active aspect' of the legal system comprised of officials and experts are the sole category within society tasked with accepting the legal system's secondary rules from the internal point of view. From this claim, Hart argues that the public does not need to either *accept* or *apply* the rule of recognition from the internal point of view. Once up and running, the valid system frees the general public from its own duty to know and understand the primary rules of a system, as they exist so long as officials accept the secondary rules of the system. In other words, the introduction of secondary rules delegates normative responsibility to officials alone for maintaining the existence of the legal system in their critical and general adherence to its constitutive or founding secondary rules, because the secondary rules can now secure the existence of the legal system as a whole without the public's continued practice and acceptance of primary rules from the internal point of view. Again, these primary rules have a free-standing criteria for existence outside of their acceptance and practice by subjects, and therefore, the latter is no longer the sole or necessary criteria for existence.<sup>37</sup>

As such, the public's sole necessary contribution to the existence of a legal system is general compliance, not any acceptance *either* the primary or secondary rules of a legal system from the internal point of view. As legal obligations exist only if one accepts such obligations from the internal point of view, the general 'passive' public has no legal obligations insofar as they have no *necessary* connection to rules aside from passive acquiescence or habitual conformity. To put the matter bluntly, the legal system can exist independent of the normative

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<sup>37</sup> This comports with Hart's view that laws versus commands need not be addressed to the subject or promulgated to exist as valid. If this is to be the case then we really cannot move from this account to one of normativity. One cannot logically have an obligation to that which may exist only fictively.

attitude of the public.<sup>38</sup> The public may choose to accept a legal obligation, but this decision has no bearing on the existence of a legal system or its normativity. Those primary rules are reduced to habits of obedience, insofar as they no longer possess that normative dimension (ie, acceptance from the internal point of view) that distinguish them from habits.<sup>39</sup> The public is implicated instead by the obligations held by officials, only to the extent that the legal system as a whole is effective or existent.

This exposition of Hart's thought is not one Hart would have considered damning to his account. He is certainly clear-headed in outlining the implications for this division, as Waldron has pointed out, and captured in Hart's statement<sup>40</sup>:

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<sup>38</sup> Hart argues elsewhere that "unless the officials of the system and above all the courts accept the rule that certain legislative operations, *past or present*, are authoritative, something essential to their status as law will be lacking." *COL*, 64. Hart continues, "but realism of this humdrum sort must not be inflated into the theory sometimes known as Legal Realism... the and which, in some versions, holds no statute to be law until it is actually applied by a court." This is the view Hart attributes to John Chipman Gray. The nature of Hart's critique of Gray underscores the former's conceptual difference from an experience or social practice-based conception of law and legal validity from his formal rule based conception.

<sup>39</sup> There are at least two general problems that may arise in basing the differential normative responsibilities between officials and the public – and the general concept of law – on this logic. Hart does not sufficiently defend the view of secondary rules as existing only insofar as it is accepted and practiced. For example, despite its well-documented defects, the Kelsenian grundnorm presents at minimum the possibility of a system of norms that once posited can exist and direct further normativity within a legal system. This seems no less plausible than the requirement of a rule of recognition that, once accepted and established at some point, the only necessarily prerequisite for its continued existence is general compliance on behalf of officials, not their acceptance of it from an internal point of view.

<sup>40</sup> See, for an extended discussion, Jeremy Waldron, "All We Like Sheep," *Canadian Journal of Law and Jurisprudence* 12, no. 169 (1999). Waldron there writes: "alienation of (newly) changeable rules from the practices that previously embodied them presumably does not mean that the rules have diminished in their effectiveness as a basis for regulating social life. The new changeable rules are not simply '*academic*' in relation to ordinary life. Instead, the introduction of secondary rules seems to betoken a difference in the way that primary rules impact on the lives of ordinary people. Presumably the primary rules can now be *enforced*, in a way that makes up, so far as their effectiveness is concerned, for the loss of their intimate connection with practice. (This accords with the development of secondary rules of enforcement and the specialist executive apparatus associated with the development of law.) The upshot of all this is that primary rules come to have a presence in the lives of those subject to them that is quite different from their role in pre-legal society. On the one hand, ordinary people will not necessarily have the intimate familiarity with the rules that they used to have: they will be, in that sense, alienated from the rules. And the rules will begin to impact on their lives as much through the work of a dedicated apparatus of coercion as through the normative to-and-fro of a shared internal attitude, perhaps even more so."

in the simpler structure, since there are no officials, the rules must be widely accepted as setting critical standards for the behavior of the group. If, there, the internal point of view is not widely disseminated there could not logically be any rules. But where there is a union of primary and secondary rules, which is, as we have argued, the most fruitful way of regarding a legal system, the acceptance of the rules as common standards for the group may be split off from the relatively passive matter of the ordinary individual acquiescing in the rules by obeying them for his part alone. In an extreme case the internal point of view with its characteristic normative use of legal language ('This is a valid rule') might be confined to the official world. In this more complex system, only officials might accept and use the system's criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system.<sup>41</sup>

Here the claim seems broadly to be that a legal system which retains this hierarchical relationship between ruler and ruled does not alter the normative relationship between them and the Janus-face of the legal system; the introduction of secondary rules may, in fact, ultimately serve only to make a ruler's morally corrupt legal system more effective and powerful in suppressing its victims, and the victims themselves all the more 'sheeplike' in their blind acquiescence.

In his "Revisiting The Concept of Law," Leslie Green was perhaps the first to make the important claim that Hart's conception has been wrongly attributed the status of championing a rule of law.<sup>42</sup> Green also corrects Dworkin's (and the prevailing) reading of Hart that suggests that the rule of recognition applies to a population as a whole.<sup>43</sup> Hart finds that there is no reason, aside from definitional fiat, to claim that the sovereign must be legally illimitable; the acceptance of limits on the sovereign are matters of self-imposed criteria in secondary rules, not principles of legality as Fuller would define them, or a necessary feature of law or the linchpin in differentiating legal systems from tyrannical commands. Hart writes, for example, that "the

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<sup>41</sup> *COL*, 114.

<sup>42</sup> Leslie Green, "The Concept of Law Revisited," *Michigan Law Review* 94, no. 6 (1996), 1687-1717.

<sup>43</sup> *Ibid.*

difference between a legal system in which the ordinary legislature is free from legal limitations, and one where the legislature is subject to them, appears merely as a difference between the manner in which the sovereign electorate chooses to exercise its sovereign powers.”<sup>44</sup> As Hart explains, in England, the sovereign delegates absolutely though mitigated by a trust to not abuse the power, as a matter of *moral* sanction, here echoing Austin; in the US, “as in every democracy where the ordinary legislature is legally limited, the electoral body has not confined its exercise of sovereign power to the election of delegates, but has subjected them to legal restrictions.”<sup>45</sup> In the application of law, Hart notes, like Dewey, that laws need not be essentially “other-regarding”; they can bind the legislator. The evasion by positing two capacities for an individual – as an official and a private person – is not necessary and can only work in power-conferring laws, not coercive orders. Instead, self-binding laws can be understood as analogous to promises, which creates an obligation for the promisor. Hart explains that “in order that words should have this kind of effect, rules may exist providing that if words are used by appropriate persons on appropriate occasions [...] those who use those words shall be bound to do the things designated by them. So, when we promise, we make use of specified procedures to change our own moral situation by imposing obligations on ourselves and conferring rights on others; in lawyers’ parlance we exercise ‘a power’ conferred by rules to do this.”<sup>46</sup> Hart here provides the formal conditions via rules as promises allowing self-binding obligations. However, he does not claim here or elsewhere that the substance of rules must constitute self-binding promises and not solely other-regarding impositions of obligation.

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<sup>44</sup> *COL*, 73

<sup>45</sup> *Ibid*, 72. “Here the electorate may be considered an ‘extraordinary and ulterior legislature’ superior to the ordinary legislature which is legally ‘bound’ to observe the constitutional restrictions and, in cases of conflict, the courts will declare the acts of the ordinary legislature invalid. Here, then in the electorate, is the sovereign free from all legal limitations which the theory requires.”

<sup>46</sup> *COL*, 43.

Hart's treatment of rules suggests that officials are firmly obligated under secondary rules, but there is no prima facie obligation to follow primary rules of a legal system, unless such an obligation is stipulated in the secondary rules. And furthermore, secondary rules themselves exist only to the extent to which they are themselves followed from the internal point of view; there is no external pressure or authority stipulated by which officials must abide by these rules, except by their own self-directed actions. The issue, or so I will argue, is not one purely of rule skepticism, but of the bifurcation within the rules of the normative system, between those which proffer and are constituted by their reflexive normative guidance, despite their outwardly directed consequence, and those who are passively subject to directives from above.

But the question that persists is whether Hart's account overcomes the very critiques he levels against Austin, as presenting a non-normative and non-general account of law, as the 'gunman situation writ large.' It appears, in fact that Hart's efforts may run into potential conceptual inconsistencies or circularity, which ultimately reproduces those features of Austin that Dewey found to be antagonistic to a notion of democratic self-rule. The logic of Hart's account of rules define their constitutive features as existing as a condition of their practice and internalized practice as norm.<sup>47</sup> But this suggests in turn that the relationship posited between primary and secondary rules renders the former something other than 'rules' thus defined. That is, insofar as rules exist if and only if they are practiced, then primary rules, whose existence and validity depend on secondary rules, not their practice and acceptance among legal subjects, are no longer rules strictly speaking. This seems to capture, in part, aspects of Dworkin's (and Raz's) critique of this conception of rules, insofar as norms – legal and social – can exist whether or not

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<sup>47</sup> This feature of Hart's account was influenced by Wittgenstein and Peter Winch, who also influenced Dewey's treatment of the reflex arc, as discussed in Chapter 2.

they are widely practiced and accepted within a society.<sup>48</sup> But perhaps more importantly, the status of primary rules within Hart's account appears to be reduced once more to something akin to Austin's non-normative commands: whether or not subjects accept them from an internal point of view, or legal officials have authority to enact them as understood from the perspective of the legal subject, the existence of these rules is conditioned by the secondary rules and the contingent and potentially temporally limited extent of the public's general compliance.

Hart's reintroduction of a distinct domain of public law and of "droit politique", with the account of secondary rules, attempts to move beyond the muddled Hobbesian-cum-Rousseauian logic of Austin, and the untenable claim that primary rules were the only *laws* within a state, which would not include "positive morality" of secondary rules or contracts. But Hart's account of that normative dimension of 'right' in the domain of public law re-injects a Rousseauian contractual logic into the very paradigm of sovereignty and government that Hart inherits from Austin. As Rousseau argued, "there is no fundamental law which could not be revoked, not even the social pact; for if all the Citizens were to assemble to break this pact by common accord, there can be no doubt that it would be legitimately broken."<sup>49</sup> For Hart, the logic or normative power is accorded not to citizens but to officials; if they were to gather and agree to break ranks with the secondary rules of the system, there can be no doubt "it would be legitimately broken". The rule of recognition exists only insofar as such a common accord exists, and only among a state's officials. Only power dictates the mutuality of citizens and officials, and not right.

Thus, Hart's rejection of Austin seems to include features of Rousseau's general will and social contract into the logic of law's normativity, and makes complete the inversion of

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<sup>48</sup> Dworkin, *Taking Rights Seriously*.

<sup>49</sup> Rousseau, *Social Contract* (Cambridge: Cambridge University Press, 1997), 120. The passage is cited also in Martin Loughlin's *Foundations of Public Law*, 107, in his discussion of modern 'constitutional architecture.'



sovereignty and government, wherein the latter becomes the locus of absolute sovereignty. The account of rule-following – as a descriptive feature of legal systems – is stillborn as far as explaining the rule of law beyond that contractarian logic at the core of this account. Despite Hart's elaboration of the distinction between being 'obliged' and 'obligated', the relationship between legal subjects and the rules of a legal system is grounded on the non-normative fact of general compliance.<sup>50</sup> This fact, however, should not be seen as a failure in Hart's own self-selected agenda or understanding of legal normativity. Hart doesn't find this a reduction to the Austinian account of being obliged not obligated; the existence of rules in lieu of commands adds generality, continuity, and variety to the command and the sovereign. However, that generality pertains to the efficiency of laws, and not to any *legal* check on legal officials, or to any apparent relationship to the legal subject's likelihood of compliance, or the broader probability of achieving general voluntary compliance by a majority of the public, for whatever reason. Simply put, in Hart's account, there is simply no change in the *normative relationship between* the victim and the gunman – only a more *efficient* sovereign lawgiver.

Hart, like Austin, instead finds normative import in the (claimed) de facto sociological existence of particular social groups that contribute differentially to the existence of legal systems. And Hart, like Austin, seems to derive a normative fact (the creation of duty) from the functional differentiation of social roles, and the fact of that group's determinacy as guided by adherence to secondary rules. The justification of this normativity attributed to officials, might be akin to describing the duty of parents or teachers, as possessing differentiated social roles with distinct, determinate titles. But that derivation is not sufficiently justified, as it is *incomplete*. As

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<sup>50</sup> Hart, in writing, seems also to equivocate on the minimum necessary for the public to accept its 'legal obligations'. Notably, in attempting to distinguish his account from the predictive model, he suggests social pressure to be dispositive in distinguishing laws from moral rules.

Fuller writes, “if we spoke of [the legal official] performing a role this would imply that his role should be adjusted to the complementary roles of others, including that of the ordinary citizen.”<sup>51</sup>

Unlike the duty of parents or teachers, the duty of officials as described by Hart is not towards another entity, but to officialdom itself and to the legal system that is constitutive of and constitutes that role. This, in fact, would implicate what seems to be a required and necessary and minimal normative core of a legal system: that the duty of the officials is not to the existence of the legal system but a relational one to legal subjects.

The fact of determinate governments, with officials and private persons, is a self-evident fact of modern societies and legal systems. And the definition of an official is minimally their different social functions – which could fairly be understood as dealing with the application and adjudication of law and figuring out what is valid or not. But we can echo Dewey’s concern that there is no normative or descriptive account or justification for why *this* particular group of officials or determinate sovereign became officials and not another group equally capable of accepting their own rule of recognition – and what *function* they serve, aside from their own self-determined rule-following. Without such justification, there is no a priori reason why the creation of normative relations *within* this class and limited to it would then suggest any normative relationship to anyone or thing *outside* that class. Hart, like Austin, gives no antecedent account of who anoints officials as the sovereign class, or how precisely they derive their authority as officials, except by reference to what is a conceptually and temporally circular account of rule-following and obligation.<sup>52</sup> And like Austin, Hart seems to grant legal authority

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<sup>51</sup> *MOL*, 193.

<sup>52</sup> Along with Dworkin’s claim that the social basis of the rule of recognition cannot explain its normativity. Here, I agree with Dworkin’s assessment insofar as the factual or social basis of the rule of recognition is insufficient as grounds for explaining its normativity; the main contention here is the particular nature of this factual claim – the assumptions of hierarchical division in society – is both unsubstantiated as assumption and yields a particular type of ‘normativity’ that can only logically derive from that hierarchical relationship between ruler and

to a group because they have rendered themselves (or for Austin, were by definition) determinate and therefore capable of issuing determinate laws. It is this fact of determinacy that seems – without sufficient justification – a grant of authority, though determinacy is of course merely a descriptive feature, not a sufficient or normatively significant one taken on its own, especially not in explaining a normative relationship between one determinate entity and external groups. In such a case, the only way we can determine which group of officials or determinate group has preeminent authority is by testing whose ‘laws’ can elicit general habits of obedience.<sup>53</sup> And as Dewey (and Hart himself) noted, this is the weakness of Austin’s account: by reducing authority ultimately to the habit of obedience, and a prediction of whose laws will generally be obeyed, the true measure of a legal system is likely nothing more than superior force.

The problem of legal normativity that Hart identifies – and which continues to occupy contemporary jurisprudential thought – is then in identifying what it is that makes the *source* of law’s normativity.<sup>54</sup> Of course, overcoming this ‘naturalistic fallacy’ or the normativity paradox,

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ruled: habitual obedience. Dworkin himself gets wrong this part of Hart’s account, and does not recognize the circumscription of normativity to officials.

<sup>53</sup> Hart himself noted this as a potential case.

<sup>54</sup> Contemporary legal positivists who have noted the deficiencies of Hart’s account, and the non-normative status of rules, have nonetheless reproduced the same problems that Fuller identifies in the failure to account for a normative relationship between subject and legal official. Of course, whether or not these positivists take seriously these problems and need to be addressed for an account of legal normativity is a distinct issue. Still, it is worth noting that this source-based hierarchical emphasis that characterizes most positivists since Hart, reproduces these same basic issues that Fuller identifies. The attempt since Hart has been to posit types of sources that can in themselves be normative in ways that rules are not. Scott Shapiro, for example, finds recourse in an increasingly sophisticated account of social plans – in terms of their purposive aims and therefore normative implications – which sees laws as a type of joint intentional activity characteristic of planning. But again the nature of that relationship remains internal to officials and not to any reciprocal relationship to the public. Others have turned to conventions as having constitutive normativity. Others still, most notably Marmor and his two-level convention conception of law and legal normativity find that the source of legal validity must ultimately be separated from what is believed to be its source of legal authority. All of these accounts are ultimately united also in their solution to that reciprocal relationship to legal subject and to the creation of legal obligations and normativity as these laws are ultimately executed. The normativity derives from instrumental rationality – the *effectiveness* of seeing the laws, already valid and normatively pedigreed, and their proper administration. Again, the norms of substantive rationality or any reconsideration of the normative value of the legal system itself and its constituent normativity as it plays out in the

of finding substantive normativity from the fact of legal validity, constitutes a core conundrum of legal positivism.<sup>55</sup> In addressing one aspect of this paradox, in addition to his central account of self-constituting secondary rules, Hart seems to allude to the existence of other rules that attribute a special status to officials. In analogizing the rule of a ball game to a legal system, Hart finds that general rules define activity, through their use, etc. and also, “the declarations of officials (umpire or scorer) have a special authoritative status attributed to them by *other* rules.”<sup>56</sup> But no further discussion of such a rule is offered, or whether in the legal context these would simply be the power-conferring rules of change and adjudication. The generally accepted answer attributable to Hart is that a group of officials converge in their behavior by accepting and taking to heart a certain social rule, and in so doing constitute themselves as a determinate group, as stipulated by the content of the rule of recognition. That is, the rule and the officials at some point became mutually constituted entities as a matter *of social fact*.

Recent commentators like Scott Shapiro have suggested that this problem in Hart’s account could be remedied by positing a distinct constitutional or tertiary rule or plan of governance that stipulates the method for selecting particular officials and founding the government.<sup>57</sup> But if this were to be imposed on (or attributed to) Hart’s account, we would be confronted with a new series of questions: such a rule could exist only insofar as it is accepted and applied by those to whom it applies and is promulgated. But a constitutional rule may not have a pre-existing determinate group to whom it applies or who, in their convergent behavior,

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process of its enforcement and administration are not seen as constitutive of the concept of law. After Raz, Marmor, and Shapiro’s planning conception of law. However, each of these accounts can be seen as reproducing the same logic. For representative sampling of these thinker’s treatment of legal normativity, see Scott Shapiro, “Planning, Agency, and the Law,” and Andrei Marmor, “The Conventional Foundations of Law,” in *New Essays on the Normativity of Law*, eds. Stefano Bertea and George Pavlakos (Oxford: Hart Publishing, 2011).

<sup>55</sup> See Chapter 1 of this dissertation on the normativity paradox in law.

<sup>56</sup> *COL*, 99. Itl added.

<sup>57</sup> Scott Shapiro, *Legality* (Cambridge: Harvard University Press, 2011), 95.

assure its existence. Is it just the officials once instituted, the population as a whole, or constitutional electors as stipulated in the content of the constitutional rule, potentially all individuals who choose to accept and apply the rule and thereby constitute themselves? If the public as a whole to whom the constitutional rule would authorize a system of legal and political governance were assumed the subjects of the rule, then we already have a different relationship between the rule of recognition and the subject class.

Here in the most rudimentary of accounts, or even if only heuristic, on the origin of the particular authoritative official class, we have to admit some kind of necessary relationship or application of the constitutional law to the society as a whole that accepted the rule designating procedures for choosing officials. Secondary rules would no longer be valid insofar as they are practiced and accepted by officials from the internal point of view, but only insofar as they are validated by the tertiary rules. For the logic of Hart's account of rules to hold, the existence of tertiary rules would release officials from their duty towards the secondary rules, as the tertiary constitutional rules could guarantee the existence of the rule of recognition independent of their actual acceptance and application by officials. Those rules can be valid and said to exist to the extent that officials generally, in their outward behavior comply. The existence of the legal system, under this logic, would require instead that the constitutional rules be generally accepted and applied from an internal point of view by all those to whom it is directed.

The question of legitimate constituent authority – and of what makes the source of law normative beyond its own determinateness – again implicates that persistent difficulty in justifying precisely why, beyond definitional fiat, the rules of legal officials (or government-as-sovereign) have preeminent normative status within society. If, indeed, the constituent power within a society which authorized and accepted tertiary rules of constitution-making and

ratification, the account would logically necessitate the reassertion of that determinate group sovereign, or at least implicated in the direction and exercise of the system's secondary and primary rules. Of course, the general response to this conundrum has been a methodological separation between the task of descriptive sociology or legal science, on the one hand, and moral or political philosophy on the other.

At minimum, as scholars, and perhaps Hart himself recognized, his account never defends satisfactorily why the normativity of rules that need not obligate citizens or presuppose any normative relationship to them, would then be the *supreme* or pre-emptive norms within a society, as necessitated by the legal positivist paradigm. As discussed above, Hart specifies a series of features of morality that distinguish it from legal rules: moral rules cannot be changed or eliminated by fiat or deliberate enactment; "importance"; "voluntary character of moral offences"; and "forms of moral pressure," which usually rise to a willingness to use force.<sup>58</sup> The attempt to distinguish between duty and obligations under the law versus those from etiquette or morality, however, appears to ensnare Hart in the same conceptual circularity of Austin's account. Hart finds that the way to distinguish the obligation to take off one's hat versus observing the speed limit depend on the "importance or seriousness of social pressure behind the rules" which is the "primary factor determining whether they are thought of as giving rise to obligations."<sup>59</sup> This of course reverts back to the Austinian conception of being 'obliged' in which the nature of social pressure determines the existence of an obligation; Hart stipulates only that this distinction based on the gravity of social pressure is not reducible to a psychological question.<sup>60</sup> The gravity or seriousness of social pressure is therefore seen as an objective

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<sup>58</sup> Ibid, 86.

<sup>59</sup> Ibid, 87.

<sup>60</sup> Ibid, 88.

standard, and the mark of an existence of an obligation.<sup>61</sup> Though Hart largely abandoned this project by the time he issued a Postscript to his book in the 1990s, the parallels to Austin's treatment are worth noting. As discussed in the first chapter, Austin's attempt to distinguish the determinacy of positive law from social morality of any stripe fell to "willingness to inflict harm in case of disobedience" as the "essence of command" – a distinction that also marks the legal and moral from other forms of social rules for Hart. But, it is equally obvious that failure to meet moral or social norms will be met with a willingness to inflict harm by others.

It seems, in short, that Hart's critique of Austin was not replaced with any sufficient justification of its two key claims: of the hierarchical superiority from other forms of law and social groups, and its distinction from moral laws, especially given "in the general recognition that, if moral standards were not generally accepted, far-reaching and distasteful changes in the life of individuals would occur."<sup>62</sup> At minimum, Hart seems misguided or at least misrepresenting the achievement of his own conception of law in his critique of Kelsen.<sup>63</sup> Hart finds Kelsen's theory of law as directed only towards officials and their duty to enforce a sanction in the case of a delict to be a reductive account, in part because it is directed solely to the normative responsibility of the officials. However, Kelsen's and Hart's general focus is essentially the same, though Hart's emphasis is on the rule of recognition and its application, while Kelsen's is a hierarchical model focused on norms and the duty to enforce sanctions versus towards the acceptance of the norm (though Kelsen's account is reductive of varieties of laws, the normative architecture comparable). Both turn to the obligations of the official as the sole

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<sup>61</sup> Ibid, 87.

<sup>62</sup> Ibid, 174.

<sup>63</sup> Ibid, 18.

locus of inquiry, and reduce the legal subject's obligations to a sociological corollary to the existence of an official's duty.

Why would this be the case? What is it about the introduction of complexity and secondary rules that releases private individuals from all normative relationship or responsibility to laws? Why would such rules issuing from officials be normatively superior from those of 'positive morality' that have such weighty bearing on everyday life? There is no obvious reason to believe that the increased determinacy, efficiency, clarity and complexity of the legal system would by logical necessity change the minimum normative requirement of the law subject. The primary rules are simply clearer, more determinate, and seen as deliberate enactments. Why would this be causally linked to the newly, normatively inert public?

### **The Eclipsed Legal Public**

Hart's differentiation of officials versus the public, and special focus on the former, is of course not claimed itself to be not a controversial move in legal or political thought. One need look no further than Weber's "Politics as a Vocation" for the view of officialdom as carrying with it weightier moral claims and responsibilities than those demanded of the public at large, or much of the history of political and legal thought as validating the view of institutions, leaders, and judges as the locus of critical attention. Indeed, this conceptual eclipse of the public has been facilitated by an implicit endorsement of an understanding of practical reason as operating independent of deep motivational or psychological contexts of deliberating agents. That is, these accounts view practical reasons as external reasons, thus recourse to the subject's preexisting motivational set is irrelevant in explaining how law creates *effective* reasons for action.



Specifically, vis-à-vis Austin's sanction-based model, the move away from coercion was achieved in part with a corresponding turn away from the view of legal subjects' reasons and motivations for compliance as a necessary explanatory feature of law's essence (one of Hart's arguments against the all-encompassing sanction-based theory of law was, again, that coercion simply does not play a role in accepting legal duties among legal officials). The upshot is that when the public or ruled legal subjects do reenter these accounts of normativity, coercion is replaced with effective compliance, for whatever reason, or as Hans Kelsen would describe it, the "factual contingencies of motivation."<sup>64</sup>

Perhaps most notably, however, is the way in which Hart makes his case regarding the determinacy of the sovereign and the passive public on the basis on conceptual, definitional, and sociological claims that together parallel those of Austin and Maine discussed in chapter 1, and resonate with the turn to experts by Lippmann. It seems Hart's account picks up at the point of Maine's ambivalent critique of the consolidated power of the legislative state – growing more centralized, and bowing to the demands of a chaotic democratic will. But Hart's concept of law is underwritten by Weber's model of legal-rational legitimation and bureaucracy. The classic features of bureaucratization in the twentieth century – greater expertise in administering its increasingly complex functions and the centrality of instrumental rationality in achieving fixed ends – met with critical, and in Weber's own ambivalent mood, the mirror opposite of Maine's before him in his analysis of law and the state, towards a rejection of democracy. Hart's particular treatment of legal normativity – and later his championing of the possibility of democracy within robust constitutional bounds – advances without explicit acknowledgement of its political and moral implications of the state underwriting his account.

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<sup>64</sup> Hans Kelsen, *General Theory of Law and State* (Clark, NJ: Lawbook Exchange, Ltd, 2009), 9.

Hart posits limits on the public's epistemic competence, specifically vis-à-vis its understanding of the complexity of this modern legal state. The implications of this claim for normativity and legitimacy, ultimately pits Hart, much like Lippmann, against Dewey's claim that this eclipse of the public was not an entrenched and necessary feature of the state or of modernity, but a symptom of elitism, corruption, and systematic distortion of epistemic resources. It is Hart's parallel with Weber's account of modern bureaucracy, and his implicit acceptance of its implications for an eclipsed public, that form the core of Fuller's critique of Hart's concept of law as a confused bureaucratic articulation of "managerial direction", discussed below. The decoupling of bureaucracy from its reach to its subject, and its assumption of its own internal logic and rationalization as the source of its own normativity fixed by set ends and instrumental reasoning doom this account of law to align itself against robust acceptance of democracy. More importantly, Hart's account seems to adopt a total collapse between validity and normativity. For the Weberian bureaucratic model, the very necessity of specialized knowledge and mastery of administrative organization created a fundamental bifurcation between democratic and bureaucratic impulses in the modern state. Like Austin before him, Hart integrates hierarchy and determinate or specialized divisions within the state as founding what is otherwise claimed as a universal – and ultimately, anti-democratic – definition of law.

The parallels with Weber's account of legal-rational legitimation in the modern bureaucratic state may be drawn out here for comparison's sake. Both Weber and Hart found that the complexity of rules or procedures of legal validation presaged certain social consequences: the apparently insular and normatively self-directed official class. Both state that the answers to legitimacy might be externally validated through substantive morality; but for the legal system itself, legitimation could be derived on the basis of adherence to those legal-procedural norms set

out by secondary rules (or their equivalent in Weber's account). Insofar as the legal subjects generally believe the legal system itself to be legitimate, at least per Weber's account, there can be a descriptive account of law's normativity. Like Weber, Hart seems to offer both a general descriptive sociology of the concept of law and this secondary historical sociology. But Hart, unlike Weber, was not explaining legitimation, but the general and necessary baseline features of any modern legal system and argues that even the minimal *belief* of legal subjects or a *claim* to legitimacy is not a prerequisite for the concept of law.<sup>65</sup> While Weber may have seen deep normative value in democracy, he nonetheless saw the possibility of its survival pitted against the formidable force of rationalization and bureaucratization: it is no longer the failure of the state as a legislative body tasked with will formation, but with complex administration, which can be coupled with a mass democracy that undermines individual freedoms by its internal rational-bureaucratic logic.

Hart differs from Weber insofar as he explicitly rejects the necessity, even in his descriptive account of law, of a minimal explanation of legitimacy as even a belief or a claim directed to the general public. Voluntary cooperation can thus be the result of fear of sanction, or happenstance, or belief in legitimacy, for whatever reason (its legality, or, in Weberian terms, a source in affective, traditional or charismatic legitimation<sup>66</sup>). But the link to Weber's story of legal-rational legitimacy becomes most pronounced in Hart's adoption of the view of the modern state and legal system as a complex social institution – its normativity defined by an

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<sup>65</sup> For Raz's well-known critique of Hart on these grounds and Raz's incorporation of legitimacy-claims as a key component to general concept of law via his service conception of authority, see *Practical Reason and Norms*, ch 5.

<sup>66</sup> Again, though Hart seems to critique the inefficiency and inadequacy of an account that finds law's normativity in threat of sanctions or the traditional and charismatic forms of legitimation under a primitive rule like Rex's, he his account nonetheless assumes that any form of sociological legitimation, if any, is sufficient (or perhaps, more accurately, contingent to) the existence of a valid legal system.

increasingly specialized class of distinct, pedigreed officials and experts tasked with the duty towards the maintenance legal system. The distinction of this class of officials – without the kind of normative account of authorization given via political legitimation processes or a tertiary rule, as discussed above – is self-propelled, but descriptively distinguished from the general public by its *expertise* and its epistemic access to the complex procedures and processes that govern secondary rules. For Hart, as with Kelsen, law begets its own legal normativity; legality is self-generated and parasitic on its own differentiation from other value domains as the source of its own normativity. That is, Hart's account law is normative the more it is law-like, or efficient and general and rationalized via secondary rules, and dictated by its own legal-instrumental logic. His account explains and justifies the fact of the existence of a determinate division in society between officials and subjects as a feature of modernization and modernity itself – with explicit implications for the normativity of law – via a sociological claim of epistemic limitation and complexity.

Again, in Hart's account officials have duties to adhering to *the secondary rules* themselves and to the official class itself, not to the legal subjects. The logic of normativity then is the same that propels the Weberian bureaucratic class, or what Weber describes in "Politics as a Vocation" as duty to the responsibilities and rules and the officialdom itself. The implication here in part is that for Hart no less than Weber the distinction between the legal and political can be categorized by the nature of the duties inherent in the official. I cite Hart at length:

In referring to our simple society we spoke as if most ordinary people not only obeyed the law but understood and accepted the rule qualifying a succession of lawgivers to legislate. In a simple society this might be the case; but in a modern state it would be absurd to think of the mass of the population, however law-abiding, as having any clear realization of the rules specifying the qualifications of a continually changing body of persons entitled to legislate. To speak of the populace 'accepting' these rules, in the same way as the members of some small tribe might accept the rule giving authority to its

successive chiefs, would involving putting into the heads of ordinary citizens an understanding of constitutional matters which they might not have. We would only require such an understanding of the officials or experts of the system; the courts, which are charged with the responsibility of determining what the law is, and the lawyers whom the ordinary citizen consults when he wants to know what it is.

[...] Here surely the reality of the situation is that a great proportion of ordinary citizens –perhaps a majority – have no general conception of the legal structure or of its criteria of validity. The law which he obeys is something which he knows of only as ‘the law’. He may obey it for a variety of different reasons and among them may often, though not always, be the knowledge that it will be best for him to do so. He will be aware of the general likely consequences of disobedience: that there are officials who may arrest him and others who will try him and send him to prison for breaking the law. *So long as the laws which are valid by the system’s tests of validity are obeyed by the bulk of the population this surely is all the evidence we need in order to establish that a given legal system exists.*<sup>67</sup>

The fact of modern complexity, however, is not simply stated as a sociological observation and descriptive background to Hart’s general concept of law. Hart seems to make a stronger claim: the public is generally passive and cannot be expected to understand and accept the rules of the legal system, and as a result, relinquishes its claim to law’s normativity. That is, because the general public cannot realistically be expected to understand secondary rules, they no longer have any obligations to accept those rules from the internal point of view or to the primary rules themselves, as a defining feature of legal systems, and legal systems are no longer defined by any necessary connection to the legal subjects’ obligations.

Leslie Green, though he recognizes Hart’s turn to officials, nonetheless suggests that the incorrect view that the rule of recognition applies to the public as a whole would indeed pose serious theoretical issues. According to Green, Dworkin would be vindicating in suggesting that there would not be sufficient agreement among the public as to what constituted the rule of recognition. But more generally, Green writes, public acceptance of that rule “is a fantasy: many

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<sup>67</sup> COL, 114.

people ... have no idea what the ‘scheme of authority in the state and national constitutions’ amounts to. Some are not even aware that there is a state constitution, so the sense in which the community ‘accepts’ it is pretty attenuated.’<sup>68</sup>

In his claim about legal normativity as it relates to systemic complexity, Hart seems to engage in a sort of obfuscation in describing epistemic requirements for understanding and accepting secondary rules – one which Green’s reading does not generally question. The issue seems to rest on exactly how robust – or attenuated – an acceptance is necessary by the public for its general acceptance rise above the level of ‘fantasy’. Moreover, it is unclear why varying levels of acceptance and application of secondary laws is central in justifying the locus of normativity in complex societies in officials only and not the public, as in ‘simpler’ societies. Though citizens do not regularly *apply* those secondary rules, in the same manner as officials, they are certainly aware that *some* rule exists distinguishing law from non-law. They are aware that officials apply some law or are operating under some law in order to have the jobs that they have as officials, and the existence of some norm that makes the laws of the state different from etiquette or moral laws. But it is not clear what level of understanding of those rules (ie, knowing there is a constitution, what it says in what detail, how it is applied and has been applied?) is necessary, what is meant by application precisely, other than rule-guided behavior from the internal point of view, and what level of awareness is then necessary for there to be a strong normative claim to obligations to the law, as Hart seems to make out. Again, in Hart’s words, on distinctions in use of these secondary rules:

in the day-to day life of a legal system its rule of recognition is very seldom expressly formulated as a rule [...] there is, of course, a difference in the *use* made by courts of the criteria provided by the rule and the use of them by others: for when courts reach a particular conclusion on the footing that a particular rule has been correctly identified as

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<sup>68</sup> Green, “Concept of Law Revisited,” 1700-1701.

law, what they say has a special authoritative status conferred on it by other rules. In this respect, as in many others, the rule of recognition of a legal system is like the scoring rule of a game. In the course of the game the general rule defining the activities which constitute scoring (runs, goals, &c.) is seldom formulated; instead it is *used* by officials and players in identifying the particular phases which count towards winning. Here too, the declarations of officials (umpire or scorer) have a special authoritative status attributed to them by other rules.<sup>69</sup> Further, in both cases there is the possibility of a conflict between these authoritative applications of the rule and the general understanding of what the rule plainly requires according to its terms... the use of unstated rules of recognition, by courts and others, in identifying particular rules of the system is characteristic of the internal point of view.<sup>70</sup>

Hart writes here in the context of adjudication and the potential conflicts among judicial interpretation and applications of rules. But this analogy to scoring rules and the rule of recognition suggests that both the public and officials can, and must, understand the scoring rules in order to have a basic understanding of which activities have what constitutive meaning to play the game at all. In fact, in order to play the game, players *do* understand the rules, and in playing the rules, *apply* them, even if as a background condition in understanding their activity. That is, players surely know those rules in some capacity, though their application of them and their role in game is differentiated on the basis of their status. But the game itself as a whole would not be operative without the acceptance among players of the scoring rules – and their judgment that the umpires too are in fact enforcing them with some measure of faithfulness. The distinctions based on use seem to be based instead on the authoritative status of those officials and their ‘use’ of the rules. As such, this distinction only begs the question that Hart’s turn to officials based on their differentiated application of rules states as the basis of their distinctive claim in upholding the validity of the legal system.

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<sup>69</sup> What “these other rules” refers to is some kind of rule that grants authority to the officials themselves. But an explanation of this is not forthcoming. In fact, the rule of recognition is given authority simply by fact of social convergence on it and the internalization of it as a rule by officials.

<sup>70</sup> *COL*, 102. Itl added.

Likewise, when Hart writes that the average citizen may “have no general conception of the legal structure or of its criteria of validity” but still obeys what he “knows of only as ‘the law’” – it is unclear to what level of detail the citizen must understand and the nature of their application of the criteria of validity versus that of officials. In a complex legal system, surely not all officials themselves, from the policeman on his beat to federal employees – nor even all members of the judiciary – have detailed understanding of all the secondary rules and criteria of validity within a given system that constitute legal versus non-legal prescriptions, especially at the margins. In other words, they may have domains of expertise, but they too are not omniscient in their expertise of the legal system as a whole, nor necessarily in the application and understanding of secondary rules.<sup>71</sup> At the far end of this epistemic understanding is the complex case which must resolve itself in the courts themselves. If we are to accept this position on the minimal requirement of the acceptance and application of the rule of recognition by all members of society (and there will of course be exceptions among both the officials and of members of society at large), then Hart’s claim about the normative distinction between the two itself is defeated.

Moreover, as Dworkin most famously argued, there is no real consensus as to what the rule of recognition precisely entails within a given legal system. There is no precise agreement as to what the rule of recognition is in the United States, even among legal scholars who seem best positioned to make such an assessment.<sup>72</sup> But, as for the understanding of how laws work, or the

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<sup>71</sup> Waldron presents a critique of Raz’s service conception of authority, and its insufficiency in understanding the authority among plural institutional authorities typical within a democracy. See Waldron, “Authority for Officials,” in *Rights, Culture, and the Law*. eds. Lukas H. Meyer, et. al (Oxford: Oxford University Press, 2003).

<sup>72</sup> See, Scott Shapiro, “What is the Rule of Recognition (And Does It Exist?)” in *The Rule of Recognition and the U.S. Constitution*, eds. Matthew Adler and Kenneth Einar Himma (Oxford: Oxford University Press, 2009); Kent Greenawalt, *Conflicts of Law and Morality* (Oxford: Oxford University Press, 1987), and Dworkin, *Law’s Empire*.



systemic complexity that marks of modern bureaucratic state, there is surely some level of complexity that is restricted to those experts who are devoted to their understanding. But the general thrust of the concept of law presented by Hart is the suggestion that the fact of complexity precludes the passive public from playing a constitutive role in understanding the normativity and validity of legal systems as a whole. And the justification for this normative eclipse of the public remains unclear. But if we take a page from Dewey's role for experts and officials, we might find a more descriptively – and normatively – plausible circumscription of officials' roles: "They are technical experts in the sense that scientific investigators and artists manifest *expertise*. It is not necessary that the many should have the knowledge and skill to carry on the needed investigation; what is required is that they have the ability to judge of the bearing of the knowledge supplied by others upon common concerns." (PP, LW2, 365). In short, the issue seems to rest on the very nature of our concept of law and the passive public. Here Dewey's rhetorical plea seems all the more pressing: "our political 'common-sense' philosophy imputes a public only to support and substantiate the behavior of officials. How can the latter be public officers, we despairingly ask, unless there is a public?"

#### **4.2. LON FULLER'S ETHICAL JURISPRUDENCE**

Lon Fuller's *Morality of Law* has been peculiarly and extensively criticized. Fuller's critics, like Hart, Raz and Dworkin, have charged that his assertion that law possesses an inner morality was simply an issue of law's efficiency, not anything particularly moral.<sup>73</sup> The caricaturing of Fuller as a reductive moralist, legal formalist, or natural law theorist, I believe has

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<sup>73</sup> See Ronald Dworkin, "Philosophy, Morality, and Law. Observations Prompted by Professor Fuller's Novel Claim," *University of Pennsylvania Law Review* 113, no. 5 (1965) and Joseph Raz, *Authority of Law* (Oxford: Oxford University Press, 2009).

a counterpart in views of Dewey as a scientific thinker. Both thinker's works have been reduced to an isolated feature of their thought – the processes behind law, as either instrumental for Dewey or a muddled morality for Fuller. Both were interested in purposive social processes, which they analogized and saw as interlocked with the scientific and moral. Both thinkers were concerned with 'natural law' which could only be understood if 'nature' and the processes that comprise it were further separated from its distinction from mind or the posited, and of law as particular form of morality and the claims of obligation, right and duty which grows out of mutually constituted, *natural* relationships. Fuller, appropriately, described himself as a "technologized natural lawyer," a designation that seems congenial to the social and collective methods of intelligence that Dewey championed. Here, I propose reading Fuller through a specifically Deweyan lens, to draw out continuities with Dewey's pragmatism and ethics.

As noted above, the affinities between Fuller's work and Dewey's has been uncovered with recent archival work. For instance, as Rundle notes, "the means-ends analysis" relies on Dewey, whom he references throughout his working papers for his "Means and Ends" essay and his correspondences with Philip Selznick. Selznick himself wrote to Fuller that he once saw him as a natural lawyer, but soon realized he was simply a pragmatist, and brought an "elevated pragmatism" to jurisprudence.<sup>74</sup> However, with the exception of Winston's articles on ideal conceptions of order, discussed in part and expanded upon below, the pragmatist connection (within the decidedly small scholarship on Fuller) has not been explored. Rundle, for instance, claims that "it is important to exercise caution before interpreting Fuller's jurisprudence through the prism of early American pragmatism. In particular, caution must be exercised against too readily attributing the instrumentalist strains of that tradition, especially as found in Dewey's

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<sup>74</sup> Rundle, *Forms Liberate*, 46.

work, to Fuller's jurisprudential message." That instrumentalism, which Fuller describes as one potential reading of American pragmatism, is taken as "a certain insouciance toward reality" and the belief that "we can shape it" versus a contextualist "respect for the complexity of reality." Moreover, Rundle suggests that the moral dimension of law that are seen in Fuller's thought distinguish him further from that same Deweyan vein of pragmatic instrumentalism.<sup>75</sup>

I hope it is clear by now that Dewey's thought did not embrace the type of crass instrumentalism and an 'insouciance towards reality' often imputed to it, nor did Dewey ever attempt to shed his brand of pragmatism from its deep moral valences. In fact, Dewey's thought sought to understand these relationships between moral and instrumental, especially in the context of the social and political orders that were of primary concern to Fuller. Turning to these connections allows us to better understand the type of jurisprudential vision Fuller attempted to advance. We can also see how Fuller, like Dewey, was concerned with the relationship between social interactions and the law, and the ethical function of law as, in Dewey's words, "the institution of those relations among men which conduce to the welfare and freedom of all." In fact, Fuller identifies the value and function of laws as a collaborative, purposive, and moral enterprise that facilitates our social interactions and makes possible our freedom.

With this reading, I turn first to the Hart-Fuller debate and Fuller's linking of law's normativity to its actual – and constitutive role – in social life. Fuller's critique of Hart amounts to the claim that without an account of why legal subjects should or can plausibly be understood as accepting and applying the rules of the legal system from the internal point of view, Hart fails to offer a general account of legal normativity. I revisit Fuller's claim that the law has an

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<sup>75</sup> Ibid, 46-47.

“internal morality,” then conclude with a summation of his understanding of the social and interactive nature of law and its relationship to freedom.

### **A Reply to Critics**

In his “Reply to Critics,” Fuller identifies the positivist critiques of his works as grounded “in the observation that the positivist recognizes in the functioning of a legal system nothing that can truly be called a social dimension. The positivist sees the law at the point of its dispatch by the lawgiver and gain at the point of its impact on the legal subject. He does not see the lawgiver and the citizen in interaction with one another, and by virtue of that failure he fails to see that the creation of an effective interaction between them is an essential ingredient of the law itself.”<sup>76</sup>

One can note here, as a preliminary matter, the striking pragmatic tonalities – of “effective interactions” within the “social dimensions” – of Fuller’s claim. Fuller’s critique of Hart, and of positivists in general, amounts to an accusation of eliding bureaucratic forms with legal ones, and replacing the social interaction that constituted law as a complex social practice with a managerial top-down relationship.

Fuller enumerates “five articles of faith in the credo of positivism”: law is “a one-way projection of authority, emanating from an authorized source and imposing itself on the citizen” (2) its insistence on sources of law as determining its essential meaning, without thinking about what it entailed in “the law job”, the administering and the work of lawyering, in Karl Llewellyn’s turn (3) its denial that the lawgiver holds a “distinctive office, role or function” of the lawgiver, which must be “adjusted to the complementary roles of others, including that of the

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<sup>76</sup> *MOL*, 193.

ordinary citizen” – or an authority linked always to a duty understood as an ‘office’ understood as a relational term (4) the denial of a general ethical code specific to the job of lawgiver like those set up for a lawyer, or ‘faithfulness’ (in Dewey’s terms) to that reciprocal role of the office holder. Finally, (5) the belief that we must separate between the “purposive effort that goes into the making of law and the law that in fact emerges from that effort.”<sup>77</sup>

What has been lost in the critique of Fuller has been the link he posits between the necessary reciprocity of a legal system to be general at all, to have any claim to normativity or any plausible claim to substantive legitimacy. Recall here Dewey’s claim that, “while it is convenient to view some humans as agents and others as patients (recipients), the distinction is purely relative; there is no receptivity that is not also a re-*action* or response, and there is no agency that does not also involve an element of receptivity.” (MPL, LW14, 118) The actualization of laws by legal subjects is constitutive of the very definition of law, both as a descriptive fact and in the conceptual understanding of law as a normative social institution. In short, law’s normativity and therefore its plausibility as a general concept requires a reciprocal relationship between two agents capable of rule-guided behavior. The linchpin of legal systems, then, is the possibility of rule following by both official and subject and the guarantee of their reciprocal relationship and the purposive ends that law presupposes.

As Fuller argues, like Dewey, no rule or social practice exists *sui generis* or can remain in existence without constant purposive activity directed towards its continued existence. The key principle implicated in legal systems versus managerial directives of superiors ordering in maintaining this purposive activity is “congruence between official action and declared rule.”<sup>78</sup> Congruence is key because it is constitutive of what is meant to use rules to govern behavior.

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<sup>77</sup>        *ibid.*

<sup>78</sup>        *MOL*, 209. *itl. added.*

That is, the existence of rules entails more than their promulgation; rules are constituted by their administration and their maintenance through purposive human activity. Moreover, this is a human *striving*; it requires the conscious and active formulation and application of these rules. Failure to adhere to those rules in official action reduces whatever directives are given to the type of ad hoc and unprincipled directives of primitive non-normative command systems Hart rejected in Austin's account as legal systems. Fuller writes:

Over wide areas of governmental action a still more fundamental question can be raised: whether there is not a damaging and corrosive hypocrisy in pretending to act in accordance with pre-established rules when in reality the functions exercised are essentially managerial and for that reason demand – and on close inspection are seen to exhibit – a rule-free response to changing conditions. What has just been said can offer only a fleeting glimpse of the responsibilities, dilemmas, and temptations that confront those concerned with the making and administering of laws. These problems are shared by legislators, judges, prosecutors, commissioners, probation officers, building inspectors, and a host of other officials, including – above all – the patrolman on his beat. To attempt to reduce these problems to issues of “efficacy” is to trivialize them beyond recognition.<sup>79</sup>

Here Fuller draws our attention to what I believe can be fairly described as Hart's failure to provide an account of why legal systems, governed by primary and secondary rules, remains normative. What Hart does not acknowledge in his emphasis on authoritative sources is the broad range of “making and administering of laws” – or more generally that the activity of law is constant and implicates both officials and subjects. The validity of laws cannot be divorced from its enforcement and administration – and how it affects and becomes situated in the lives of its subjects. That is, the force behind the law is not somehow secondary to the will of the legal official. It bears repeating also Fuller's emphasis that “these problems are shared by legislators, judges, prosecutors, commissioners, probation officers, building inspectors, and a host of other officials, including – above all – the patrolman on his beat.” If a state's police do not enforce any

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<sup>79</sup> *MOL*, 214.

laws, or only selectively based on personal whim, there can scarcely be a legal system in play, governed by *rules*. Without consistent actions congruent to the laws, the very integrity of the laws that they purport to validate and enforce – both primary and secondary – have no meaning and cannot rightly be said to be a valid legal system with any claim to normativity.

It is worth noting also that the first exchange comprising the Hart-Fuller debate begins with Fuller's reorientation of the debate on terms not of legal validity and the rules that make possible legal systems – and separable from morality – but on *fidelity to law* as a precondition for law.<sup>80</sup> It is a return again to the language of faithfulness of duties – a distinctly Roman conception, which Dewey too adapts – which underwrites the normative relationship. Fuller insists here, as he does again in his *Morality of Law*, that effective legal systems must be generally accepted, and rest on a perception that they carry some moral valence. Though Hart does argue that a certain portion of the population must *voluntarily* cooperate with the legal order for it to be effective (because the fear of social pressure of the non-cooperating would be unfeasible), there is no necessary connection to that system's legitimacy or perception of legitimacy. That link Hart seems to reject so thoroughly so as to create the total evisceration of the legal subject and legitimacy – even its most minimal Weberian form of legal-rationality and belief in legitimacy.

Between the earlier 1958 essay, "Positivism and the Separation of Law and Morals" and his 1961 *Concept of Law*, Hart also eliminates entirely any reference to slavery and legal subjects and their relationship to the maintenance and normativity of legal systems.<sup>81</sup> Whether Hart's silence on this matter should be read as underscoring the analytically contingent status of all

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<sup>80</sup> Fuller, "Positivism and Fidelity: A Reply to Professor Hart," *Harvard Law Review* 71, no. 4 (1958).

<sup>81</sup> H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review*, 7, no. 14 (1958). On the issue of slavery and law in Lon Fuller's thinking, and its role in their debate, see Rundle, 111-115.

legal subjects to a general account of valid legal systems, is merely coincidental, or in fact signals an ambivalence on Hart's end is of less importance than the implications that the status of legal subjecthood present to Hart's concept of law. The base *moral* minimum required in the designation of legal subject (versus mere chattel property or slave) may contravene Hart's minimum moral requirement of a legal system to provide basic protections of violence *between* subjects. Moreover, if Hart were to argue that slaves were rightly considered legal subjects under a valid legal system, then there would be no meaningful core to what legal subjecthood entails – as it could be reduced to mere property holdings – and would reduce legal systems to administrative processes, regulating things not social relations. If, on the other hand, Hart were to argue that slaves were not legal subjects under any legal system, then his claim would seem to implicate a moral minimum in defining the legal subject – i.e., some form of basic agency or formal, substantive restrictions to constrain the legal system.

That basic minimal requirement for subjecthood seems to be the conceptual basis for Fuller's arguments for the rule of law and for the basic dignity and respect for the legal subject as autonomous agent that is constitutive of legal systems. As Fuller wrote on Hart's elision of the legal subject, under a Hartian system, in which the officials' conduct alone decides what is valid and legally legitimate, "the plight of the citizen is in some ways worse than that of the gunman's victim."<sup>82</sup> This baseline of agency also implicates the necessary reciprocal relationship between legal officials and legal subjects, and a rejection of that janus-faced hierarchical relationship that defined Hart's, and before him, Austin's conception of sovereignty and command theory. Fuller describes this insistence on the source of law and the relationship between superior commanders and inferiors as reducing to either tyrannical command or 'managerial direction' or "a one-way

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<sup>82</sup> *MOL*, 157.



projection of authority, originating with government and imposing itself on the citizen.”<sup>83</sup>

Fuller’s critique is grounded again in the basic purpose of law and its implications for lawgivers and subjects: “[L]aw is not, like management, a matter of directing other persons how to accomplish tasks set by a superior, but is basically a matter of providing the citizenry with a sound and stable framework for their interactions with one another, the role of government being that of standing as a guardian of the integrity of this system.”<sup>84</sup>

Fuller’s complaints about the conflation of efficient administration of laws and robust moral claim allows us to see also Fuller’s persistent concern with the relationship between legal systems and freedom (and potential domination). Though Fuller’s treatment was not purely an early neo-republican conception, as I discuss more fully below, we can see firstly the relationship he identifies between arbitrary enforcement and the flouting of the rule of law and relationships of domination – and ultimately of un-freedom. If citizens cannot rely either on laws being enforced faithfully and consistently, or even that the laws will recognize some minimum moral baseline of human agency, then there is no qualitative distinction between laws or any rule-free activity. It is both an affront to that dignity, as scholars note, but an active form of domination. Without those guarantees, citizens do not have a stable framework for organizing their lives and interactions. Thus, to consider these as issues of efficiency versus one implicating human freedom and dignity is, in Fuller’s words, to “trivialize them beyond all recognition.”

This critique has been advanced, I believe, in a different fashion by Waldron and his turn to the use of torture and suspension the writ of habeas corpus under the Bush Administration. He argues that there are basic “legal archetypes” underwriting the modern conception of rule of law. The violation must be seen as undermining the very base minimum of what the law has always

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<sup>83</sup>       ibid, 34.

<sup>84</sup>       ibid, 210.

set out to do: to protect legal subjects from wanton cruelty and brutality. The governance by rules implicates core principles – like the basic dignity of the human agent – that sometimes manifest in archetypal prohibitions like that against torture. Waldron argues that to accept the practice of torture would be to “[give] up the linchpin of the modern doctrine that law will not operate savagely or countenance brutality. We would no longer be able to state that doctrine in any categorical form.... In other words, the repudiation of brutality would become a technical matter – ‘Sometimes it is repudiated, sometimes not’ – rather than a shining issue of principle....it is not just one more set of deviations.” For Fuller, the normative core or fundamental principle of the governance through laws is in a system of governance distinct from bureaucratic management from above: it implicates a reciprocal relationship between lawgivers and subjects. A legal system that systematically undermines the constitutive activity of the subject – *pace* the positivist turn away from that subject – cannot ultimately sustain its claim to rule by *law* or anything distinct from an efficient gunman situation writ large.<sup>85</sup>

### **The Internal Morality of Law as ‘Ethos’**

The distinctively pragmatic, and I believe Deweyan, resonance of the centrality of reciprocity and duties of officials is captured in Fuller’s understanding of the ‘internal morality of law’ as an *ethos*. As Rundle notes, in “his correspondence with Philip Selznick [...] he was

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<sup>85</sup> As Waldron writes of these legal ‘archetypes’: “When I use the term “archetype,” I mean a particular provision in a system of norms which has a significance going beyond its immediate normative content, a significance stemming from the fact that it sums up or makes vivid to us the point, purpose, principle, or policy of a whole area of law.... The idea of an archetype, then, is the idea of a rule or positive law provision that operates not just on its own account, and does not just stand simply in a cumulative relation to other provisions, but operates also in a way that expresses or epitomizes the spirit of a whole structured are of doctrine, and does so vividly, effectively, and publicly, establishing the significance of that area for the entire legal enterprise.” at 1723. Waldron, “Torture and Positive Law,” *Columbia Law Review*, 105, no. 6 (2005): 1681-1750.

actually content (if such could generate meaningful exchange with his ideas) to replace the term ‘morality’ with ‘ethos’ or some other term similarly capable of capturing the notion that certain moral responsibilities attend the occupation of certain roles.”<sup>86</sup> In this reading, the eight desiderata of the rule of law which constitutes its internal morality – generality, publicity, prospectivity, minimal intelligibility and clarity, non-contradiction, relative constancy, feasibility in obeying, and congruence between enactment and application – are not efficient instrumentalities. Instead, they are standards that have been developed in which the moral responsibility of officials – in recognizing their duties to the public and the necessary reciprocal relationship to which legal processes commit them – are satisfied. Moreover, this responsibility was not mere fixed rules to be followed. Fuller sets out the distinction between the types of rule-following that legality entails (or aspires to entail) at the very start of his *Morality of Law*: between a morality of duty and of aspiration. The former distilled “laws down [to] the basic rules without which an ordered society is impossible.” In Fuller’s example, following these rules as a matter of legality was akin to following rules of grammar in communicating.<sup>87</sup> The morality of aspiration, on the other hand, is “the morality of the Good Life, of Excellence, of the fullest realization of human powers.”<sup>88</sup> Fuller sees legality as constituting rules and requiring the morality of duty but also creating an ideal towards which we aspire, as something and implicating ‘striving’ embodied by the morality of aspiration. “What appear at the lowest level [of legality] as an indispensable condition for the existence of law at all, become, as we ascend the scale of achievement, increasingly demanding challenges to human capacity.”<sup>89</sup> Of course

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<sup>86</sup> Rundle, *Forms Liberate*, 115.

<sup>87</sup> *MOL*, 5-6.

<sup>88</sup> *Ibid*, 5.

<sup>89</sup> *Ibid*, 41.

legal systems may fail even in this lowest level, but the point for Fuller is that legality itself “presents all of these aspects.”<sup>90</sup>

Fuller’s turn to the ethos of the internal morality of law, while it certainly is committed to the normative values of dignity as scholars have noted, can be linked more explicitly to the functional nature of law as *collaborative* social activity, driven by a morality of aspiration and the creation of framework that allows for the full realization of human capacities and freedom.<sup>91</sup> Perhaps most strikingly, in his shorter essays, Fuller compares this ‘ethos’ to the practice of scientific inquirers. He writes, for example:

With [the scientist] this enterprise is a collaborative one, seeking the institutional forms and practices appropriate to its peculiar aims and problems. Though man of genius may introduce revolutionary turns of theory, they are able to do so only by building on the thought, the findings and the mistakes of their predecessors and contemporaries. Within the scientific community, the freedom of the individual scientist is not simply an opportunity for self-assertion, but an indispensable means for organizing effectively the common search for scientific truth. The calling of the scientist has its distinctive ethos, its internal morality.<sup>92</sup>

Elsewhere, Fuller turns explicitly to the philosophy of science influenced by Dewey. Fuller writes:

Today the prevailing climate of opinion inclines us to assume that many lines of human activity, and many fields of human thought, involve no element of commitment whatever. The most obvious of these is supposed to be the pursuit of scientific truth. Yet as Michael Polanyi and Thomas Kuhn have shown, there is always in any given science, except during periods of radical reorientation, a tacit commitment to certain lines of inquiry as offering the only legitimate outlet for the scientific spirit. Accordingly, in terms of the analysis here presented, a scientific research group illustrates the principle of association by shared commitment. The commitment in this case extends not only to the abstract goal

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<sup>90</sup> Ibid, 42.

<sup>91</sup> On the importance of dignity in Fuller’s account, see Waldron, “How Law Protects Dignity,” *Cambridge Law Journal* 71, no. 1 (2012): 200-222 and Rundle, *Forms Liberate*, 97-102.

<sup>92</sup> *MOL*, 120

of scientific truth, but to a body of doctrine and a set of procedures regarded as the indispensable means for arriving at that end.<sup>93</sup>

If we follow the thread of Fuller's turn to the ethos of scientific inquiry as the parallel to the internal morality of law and its attendant desiderata, we can find also this relationship as elaborated explicitly in Dewey's study of inquiry. As Isaac Levi explains Dewey's theory, "all those who engage in inquiry are *committed* to reason in conformity with logical principles. Adopting these leading hypotheses is not assenting to a priori truths. And although conformity with them has been found to be necessary to the conduct of every successful inquiry, adopting such principles is not assenting to a posteriori truths. Postulation of a logical principle is, as Dewey says, assumption of a responsibility to adhere to the principle."<sup>94</sup> As Dewey writes, "To engage in inquiry is like entering into a contract. It commits the inquirer to observance of certain conditions. A stipulation is a statement of conditions that are agreed to in the conduct of some affair. The stipulations involved are at first implicit in the undertaking of inquiry. (L, LW12, 108)<sup>95</sup> The 'morality' of these standards rests on the "assumption of responsibilities" which Fuller – like Dewey – defined explicitly as implicating both official and legal subject. That is, because laws are not one-way directives of authority from above, they presuppose a responsibility that arises as a matter of undertaking the affair and commitment of standards and conditions that must be met such that such the enterprise can get off the ground in the first place. This is not only rule-following and acceptance, or working towards an 'abstract end'. Precisely because legal systems are normative social orders, they presuppose this commitment to basic

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<sup>93</sup> Fuller, "Two Principles of Human Association," in *Principles of Social Order*, 86.

<sup>94</sup> Isaac Levi, *Pragmatism and Inquiry* (Oxford: Oxford University Press, 2012), 82-83.

<sup>95</sup> Dewey, cited in Levi, *ibid.*

standards in activity, and a responsibility to engage and adhere to standards that lend coherence to the undertaking.<sup>96</sup>

To be sure, as Hart argued in his review of Fuller's work, even a poisoner can follow the desiderata of the 'internal morality' prescribed by Fuller in undertaking his duty to poison: he can do so openly, prospectively, etc., but still be committed to a substantively evil end.<sup>97</sup> The fact that an enterprise like scientific inquiry could be deployed to 'instrumentalize' fixed and pernicious ends was one that Dewey too recognized and documented at length. Likewise, Fuller too recognized that there were evil laws, and that any manner of social activities, from football to law, could develop its own internal ethos. But the distillation of certain standards was not, in itself, a complete understanding or application of the basic ethos underwriting a social activity. A thicker, ethical conception – the 'morality of aspiration' – is captured also in Fuller's inner morality, as with Dewey's turn to scientific ethos and culture. The scientific 'ethos' in general, in Dewey's understanding, is made possible by a certain culture, by its integration into habits and customs – not simply a rigid and legalistic prescription of

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<sup>96</sup> Elsewhere, Fuller writes: "There is today in our prevailing legal and political philosophy a strong tendency to insist on the moral neutrality of law. We need only reinforce this disposition of mind by adding to it something like Hans Kelsen's theory of the identity of law and the state to arrive at the conclusion that the state, and the multitude of activities necessary to sustain it, are morally neutral except as the human actions involved may be judged by moral standards applicable to all forms of human behavior, governmental and nongovernmental alike. What is ruled out by this view is the concept of institutional role – the role of the citizen, the judge, the lawgiver, the cop on the corner. The result of this exclusion is to erect a strong taboo against any recognition that each of these roles requires for its proper discharge a distinctive kind of personal commitment" (in his footnote, "In my book *The Morality of Law* I advanced the view that there is something that may be called, after the analogy of 'political morality,' legal morality – a morality that should constrain the lawgiver from enacting, for example, retrospective or incomprehensible laws, or laws that demand acts beyond the powers of the subject. this view was received with astonishment by a school of juristic thought that has recently been characterized as that of the New Analytical Jurists [...] all of which emphatically reject any notion that an element of moral commitment to the job is essential to keep a legal system in effective operation." (89-90, cit. omitted).

<sup>97</sup> H. L. A. Hart, "Book Review: *The Morality of Law*," *Harvard Law Review* 78 (1965).

standards, which can never prescribe specific action and free us from purposive and morally laden decisions.

Moreover, the particular ethos associated with legal systems cannot be exported to other social activities without eliding the distinctive nature of the legal enterprise. The poisoner is a specious comparison precisely because the social activity that comprise legal processes is not that of single individual imposing his will on others; it only presupposes the type of 'one-way' projection of authority that itself needs to be defended. Fuller's point, as I take it, is that becomes law is an entirely distinctive *social* activity, and the standards and 'ethos' that guide it implicate not just the lawgiver, but the qualitative nature of the legal system as a whole, which includes the legal subject. Law, like science, presupposes a collective and collaborative practice.

The claim that this 'ethos' can only instrumentalize the means fails also to recognize the ways in which methods like the scientific inquiry can become part of a culture. With a culture of legality, and expectations of legality, the 'ethos' itself does not by definition strictly affect only means of enforcement. That is, if an 'ethos' like the law's 'internal morality' has been thoroughly incorporated into the methods (and expectations of legality) of a legal culture, which extends beyond legal officials, that legal culture would not be walled off from the consideration and imposition of certain ends. And to the extent that that ethos is grounded in a respect for the dignity of the autonomous citizen capable of rule-following and guidance, then that ethos could not be credibly applied in promoting ends that contravene that basic dignity. That such a bifurcation between 'means' and 'ends' could be achieved within a distinctive legal culture that respects the 'ethos' of the internal morality of law seems itself both a practical and a conceptual fiction. As Dewey asks rhetorically, "Is it possible for the

scientific attitude to become such a weighty and widespread constituent of culture that, through the medium of culture, it may shape human desires and purposes?” (FC, LW13, 163). Fuller’s point seems to be simply that if legality had been “a weighty and widespread constituent of culture” the likelihood that ‘human desires and purposes’ captured in the substantive aims of the law would contravene the type of rule-abiding and moral recognition of the subject implicit in legality itself.<sup>98</sup>

A related feature of Fuller’s thought may draw out this point more clearly – and one which can explicate more clearly how Fuller formulated his claim that the internal and external morality of law – ie, its means and ends – were related. The conceptual plausibility of a commitment to both law’s internal morality and substantively evil ends seems to rest its plausibility on a basic and fundamental separation between means and ends. In borrowing explicitly from Dewey’s means-end continuum, Fuller makes clear that the foundations of much positivist thought rests on this bifurcation of ends from the means or methods of application, and the view that institution and social arrangements that effectuate certain legal ends are mere instrumentalities. As Fuller writes, “The term ‘reasoning’ seems apt when

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<sup>98</sup> It is in this Fullerian vein of reasoning that David Dyzenhaus has more recently revisited the ‘legality’ of decisions by courts under apartheid South Africa – a context seemingly rife for substantively evil legality. As Dyzenhaus argues, these decisions were in fact prime examples of the inability to maintain the law’s internal morality and those substantively evil ends. As Dyzenhaus writes, “the Fullerian account of the rule of law [makes] sense of the claim that the older order South African judges were in dereliction of their duty. These judges were independent in order that they could uphold the justice of the law – the inner morality of the rule of law – which they failed to do, mainly because they assisted the apartheid governments to avoid declaring their hand fully on the extent to which they were prepared to rule outside of the rule of law.” Those judicial decisions in upholding apartheid statutes, violated longstanding common law principles and failed to disclose explicitly the fundamental inconsistencies between the commitment to those principles – the basic ethos of common law jurisprudence acknowledged by the South African courts – and the goals of the apartheid statutes. To fully and clearly justify and enforce a decision under these statutes would have exposed a contradiction between the principles of the legal system and the statutes in question. Thus, the judges evaded their responsibility to make clear the basis of their decisions and their violation of principles of legality in support of those substantive legislative ends. David Dyzenhaus, “Judicial Independence, Transitional Justice and the Rule of Law,” *Otago Law Review* no 10, 3 (2003).



applied to the process of selecting the most effective means for realizing an accepted end, but inappropriate for describing the process by which, through reflection and contemplation, we make up our minds ‘what we really want,’ though in practice the two processes go forward in interaction.”<sup>99</sup> On the positivist reading, the relationship between law-giving and legal subjects’ actual actions is understood purely from the side of enforcement: the internal morality of law is only a matter of how efficiently the lawgiver enforces that law. This managerial conception of law implicates again the relationship between action and thinking. Its “utilitarian philosophy,” Fuller writes, “encourages us in the intellectually lazy notion that means are a mere matter of expediency and that nothing of general significance can be said of them; it makes us forget that in a legal system, and in the institutional forms of society, generally, what is means from one point of view is ends from another and that means and ends stand in a relation of pervasive interaction.”<sup>100</sup>

For Fuller, the ‘means’ for effectuating a law – from the institutional application to whether the subject can actually obey a (secret or retroactive) law – constitute the ‘means’ or the form that the ‘end’ of law must assume. If law has any distinctive normative features, it is defined by these formal standards or its means. As Fuller writes, of his objection of the means-end rationality that suggests that institutions are mere “modalities”<sup>101</sup> that effectuate certain fixed ends: “To the view that institutions are merely inert conduits directing human energies, with much frictional waste en route, towards certain desirable end-states. Our institutions are a part of the pattern of our lives. The task of perfecting them furnishes an outlet for the most vigorous

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<sup>99</sup> Lon Fuller, “Human Purposes and Natural Law,” *Journal of Philosophy* 53, no. 22 (1956): 701.

<sup>100</sup> *MOL*, 197.

<sup>101</sup> Leslie Green, for example has suggested that law and morality are distinguishable by their means or through their respective modalities, though they often share the same ends, in “Concept of Law Revisited.”

moral impulses.”<sup>102</sup> This, from the perspective of law’s application in concrete social contexts, then demands moving past the idea that a law is a self-realized or realizable datum. The very notion of institutions as instrumentalities is presupposed by a fiction of the omniscient and invisible, enforcer of laws. As Fuller writes, “The assumption that social institutions can always be shaped to any desired end reveals itself in the common notion that implementation is a mere matter of ‘technique.’ Curiously, though the technicians capable of devising the apt means for social ends are never identified, it seems to be assumed that their competence is unlimited. There are signs by which we know a good carpenter, one of the being his knowledge of the limitations of the materials with which he works. But the technician in social implementation seems to remain at once anonymous and omniscient.”<sup>103</sup>

Fuller rejects this view that an end must be posited by a “fiat of the will” and that “any discussion of means is therefore futile” or mere instrumentalization. As Fuller writes, “in moments of crisis consultation with a friend will often help us to understand what we really want. It does not make much difference whether our adviser tells us, in effect, ‘Look carefully to your means,’ or ‘Consider carefully your end.’ The effect of the advice is in either case to initiate a process of reflection and consultation that may change our whole understanding of ourselves.”<sup>104</sup> What this amounts to looking to the “obscure area where means and ends interact” and “to the collaborative articulation of shared purposes” through the “spirit of consultation.” Fuller writes:

The modern rejection of any notion that men may by pooling their intellectual resources come to understand better what their true purposes are is revealed in the scorn that generally greets essays carrying such titles as, “What is Art?” Of course much that is pretentious and empty appears under such titles, but the modern rejection does not rest on

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<sup>102</sup> Fuller, “Means and Ends,” in *Principles of Social Order*, 72.

<sup>103</sup> *Ibid*, 70.

<sup>104</sup> Fuller, “Human Purpose and Natural Law,” 702.

the quality of the offerings, being grounded rather on principle. It is said that any such title invites a confusion of fact and value and serves generally as a cover for a fraudulent intent to pass off the subjective opinion of the author about what art ought to be for a description of what it is in fact, as if it were possible to describe a major area of human striving without participation in that striving and as if that participation could be otherwise than creative! If the objection is more radically phrased so that it could not be removed by changing the title to read, “What I Think Art Ought to Be,” then what is really being rejected is the reality of what I have called the collaborative articulation of shared purposes. That rejection makes itself most tragically felt today, I believe, in our failure to carry on the work of former generations in analysing and discussing what may be called the forms of social order.<sup>105</sup>

This distinction suggests leads Fuller, in turn, to the claim that social orders, of which legal systems are only one, are not something self-defined. As he writes, “order itself is something that must be worked for.”<sup>106</sup> And it is in that working for or *striving* – and that creative and collaborative participation – that constitutes the legal process, which underscores the nature of order as a type of ideal. That striving, in turn, suggests that there is a clear purposive element to the interpretation of order and to that activities that makes it possible. There is with this order or the internal and external moralities of law both a ‘morality of duty’ and ‘morality of aspiration’: of basic order and a striving towards a good or ideal order that makes possible our ethical goods. So understood, the notion of ‘order’ as a datum cannot be separated from an ideal of ‘good order’, because, in Fuller’s words, “in any interpretation of events which treats what is observed as purposive, fact and value merge.”<sup>107</sup> That is, the very ‘facts’ of ‘what law is’ as a social order is not purely descriptive, but “plainly prescribes.”<sup>108</sup> As we saw in Dewey’s treatment of the distinction facts and our purposive turn

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<sup>105</sup> Ibid, 704.

<sup>106</sup> Fuller, “Positivism and Fidelity,” 646.

<sup>107</sup> Fuller, “Human Purpose and Natural Law,” cited in Winston, 332.

<sup>108</sup> Fuller, 632. As Fuller writes elsewhere: “One of the factors shaping the law is the intellectual perception of it, so that the proper view almost inevitably changes the thing viewed; the articulation of the rule changes the rule”

to them: “the difference between facts which are what they are independent of human desire and endeavor and facts which are to some extent what they are because of human interest and purpose, and which alter with alteration in the latter, cannot be got rid of by any methodology. The more sincerely we appeal to facts, the greater is the importance of the distinction between facts which condition human activity and the facts which are conditioned by human activity. In the degree which we ignore this difference, social science becomes pseudo-science.” (PP, LW2, 240). The particular normative valence we attribute to this order turns on standards that give it meaning: standards of coherence embodied by its internal morality.

As Fuller writes, “If laws, even bad laws, have a claim to our respect, then law must represent some general direction of human effort that we can understand and describe, and that we can approve in principle even at the moment when it seems to us to miss its mark.”<sup>109</sup> The concept and rule of law, like that of ‘order’, in short, are not merely fixed facts, but prescriptions for future action and normative appeals that guide that action. We interpret them vis-a-vis our particular purposes and interests, which cannot be neatly separated from sociological descriptions or the ‘is’ of law. For Fuller, the type of social order that legal systems provide is itself of a normative character. As Fuller writes, “When it is said, for example, that law simply represents that public order which obtains under all governments – democratic, Fascist, or communist – the order intended is certainly not that of a morgue or cemetery. We must mean a functioning order, and such an order has to be at least good enough to be considered as functioning by some standard or other.”<sup>110</sup> As Fuller continues, even if a clear-cut distinction could be made between the concept of order and good order, the

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(cited in Winston). Winston’s “Is/Ought Redux” article expands this discussion here in looking to the influence of William James on Fuller’s thought.

<sup>109</sup> Fuller, “Positivism and Fidelity,” 632.

<sup>110</sup> Ibid, 644.

notion of order itself contains a ‘moral element’. The claim generally suggests that the legal system’s order is not one that governs the mortuary, or, for that matter, the slaughterhouse. A normative standard and ideal for what makes an order ‘functioning’ is implicit in our understanding of what the law is.

## **The Path of Freedom**

For Fuller, the forms of order that law makes possible are not the basis of a strict and abstract legalism, nor the reduction of politics into rule-following. Fuller’s turn to legal processes was of a piece of Dewey’s concern with question of method. As Kenneth Winston writes, “Fuller once remarked in a different context, the really enduring part of ethics is found, not in the substantive ends we pursue, but in sustaining the integrity of the forms of order by which we pursue them.”<sup>111</sup> Laws are not instrumentalities for reaching fixed ends, but collaborative processes that make social activity intelligible and make possible the realization of freedom within associated life. In fact, at the base of Fuller’s thought is a deeply ethical conception of law, which shares with Dewey a view to the function of law shaped by human interactions and whose function is to make possible individual freedom in complex societies.

While the ‘managerial direction may proceed by specific orders’, even if formulated as ‘general rules or standing orders’ the “law does not tell a man what he should do to accomplish specific ends set by the lawgiver; it furnishes him with baselines against which to organize his life with his fellows.”<sup>112</sup> This, at least, is the normative framework in which Fuller understands

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<sup>111</sup> Kenneth Winston, “Three Models for the Study of Law,” in *Rediscovering Fuller: Essays on Implicit Law and Institutional Design*, eds. W. J. Witteveen and Wibren van der Burg (Amsterdam: Amsterdam University Press, 1999), 77.

<sup>112</sup> Fuller, “Human Interaction and the Law,” in *Principles of Social Order*, 254.

the nature of law: its “central purpose [is] to furnish baselines for human interaction” which in turn relies on the reciprocal “establishment of stable interactional expectancies between lawgiver and subject on the one hand,” without which the legal system as a whole is incapable of remaining functional. But this facilitation of human interactions was not exclusive to the use of law as means of social control.<sup>113</sup> Both were meaningful purposes pursued through the law, at times “intertwined.” As he writes, “to interact meaningfully men require a social setting in which the move of the participating players will fall generally within some predictable pattern. To engage in effective social behavior men need to the support of intermeshing anticipations that will let them know what their opposite numbers will do, or that will at least enable them to gauge the general scope of the repertory from which responses to their actions will be drawn.”<sup>114</sup> To this end, he compares the nature of these expectations and anticipations to language and, citing Parsons, the finding that language is purposive and “its purpose is *communication*.” People modify and adjust to others’ expectations because “they want to be *understood*.”<sup>115</sup>

The most basic commonality between Fuller’s conception of law and that of Dewey can be traced to Fuller’s emphasis on the role of custom and social relationships as the basis of law. A persistent theme in Fuller’s jurisprudence is the relationship between human *interactions* and

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<sup>113</sup> An additional comparison can be made to Dewey’s treatment of social control in educational contexts, as discussed in the previous chapter. The explicit and direct interventions of teachers and parents in the actions of a child are surely a part of the ‘social control’ in education, but it is not its defining feature. Social control more generally is found in the framework of the classroom, and the authority of the educator as representing the interests of the community as a whole. As Dewey writes, “I do not mean that there are no occasions upon which the authority of, say, the parent does not have to intervene and exercise fairly direct control. But I do say that, in the first place, the number of these occasions is slight in comparison with the number of those in which the control is exercised by situations in which all take part. And what is even more important, the authority in question when exercised in a well-regulated household or other community group is not a manifestation of merely personal will; the parent or teacher exercises it as the representative and agent of the interests of the group as a whole. See, “Social Control,” in *Education and Experience*, LW 13, 33.

<sup>114</sup> Fuller, “Human Interaction and the Law,” 233.

<sup>115</sup> Ibid, 234, citing Parsons and Shils, eds. *Towards a General Theory of Action*.

law.<sup>116</sup> Fuller turns also to the role of ‘customary law’ in understanding more broadly ‘law-like’ organizations – from the of states and ‘in labor unions, professional associations, clubs, churches and universities’ and those non-enacted laws that “owes its force to the fact that it has found direct expression in the conduct of men toward one another.”<sup>117</sup> His claim is that the nature of ‘ordinary’ or declared and enacted laws cannot be understood independent of such human interactions. As he describes that relationship, the “form of law will not only act upon, but be influenced and shaped by, established forms of interaction that constitute its social milieu.”<sup>118</sup> As Winston writes, “in Fuller’s view, the practices of countless interacting individuals that underlie official conduct at any moment are what give the latter its shape and force. If made law is divorced from its context, it may be projected upon a social terrain incapable of supporting it, in which case tacit modifications or outright evasions of the law will ensue.”<sup>119</sup>

Perhaps his best known example of that interaction between law and social custom or ‘customary law’ is his treatment of contracts. The Uniform Commercial Code itself recognizes explicitly “that patterns of interaction may crystallize into firm expectations having the force of law.”<sup>120</sup> Moreover, that code acknowledges and shapes interpretive principles of contracts on the grounds of existing human interactions. Likewise, a legislator writes his statutes with a basic understanding and social expectations of how the courts will interpret it, and enforce it. In turn,

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<sup>116</sup> The titles of his speeches and essays (while substantively similar) are telling: “Human Interaction and the Law”; “Law and Human Interaction”; “Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction.”

<sup>117</sup> Fuller, “Human Interaction and the Law,” 232.

<sup>118</sup> *Ibid*, 257.

<sup>119</sup> *Ibid*, 232.

<sup>120</sup> Fuller, citing the UCC, “a sequence of previous conduct between the parties... which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.” [1975 UCC 1-205(2)] in “Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction,” *BYU Law Review* 89 (1975).

“the living law of judicial procedure” is developed from the continued “patterns of interaction that have developed between judges and the advocates who appear before them in the actual process of trial.”<sup>121</sup> Those interactions are not rule based, but are a development of human interactions with each other and with those rules. This constitutes, in another sense, that “collaborative articulation of shared purposes” through consultation.

The interactive and social nature of the law – its reflection on both means and ends – as collaborative enterprise speaks more broadly to the values attributed to the rule of law by Fuller. By way of clarification we can consider Waldron identification of two general values that seem to be in tension in understandings of the rule of law. Firstly, there are the types of values that Waldron claims that Fuller emphasizes – of the “ideal of formal predictability” – which allows citizens to organize their life according to clear, prospective, constant rules. The other is a “procedural side” that emphasizes due process, and guarantees of contestation of legal norms. Waldron argues that “[t]he procedural side of the Rule of Law presents a mode of governance that allows people a voice, a way of intervening on their own behalf in confrontations with power... But argument can be unsettling, and the procedures we cherish often have the effect of undermining the predictability that is emphasized in the formal side of the ideal.”<sup>122</sup> Pace Waldron, I believe Fuller’s was not a commitment to the formal predictability of law at the expense of the procedural aspect of laws. Instead, those two features of the law were themselves, as Fuller saw it, in constant interaction, and could not be seen as wholly distinctive and separable values. This again was the same relationship between the stability and necessary adaptability of social customs and of change made possible only with and through the very existence of stable habits that we saw in Dewey’s account. What is needed for the very possibility of the procedural

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<sup>121</sup> Ibid, 95.

<sup>122</sup> Waldron, “The Concept and the Rule of Law,” *Georgia Law Review* 43, no. 1 (2008), 8-9.



aspects of law and its contestation is the predictability and a ‘framework of rules and decisions’. The procedural side is marked by a reciprocal relationship of participation – it requires that the problem of the litigant and usually his lawyer be brought before the court – and a framework in which he can effectively do so. The predictability of the law itself guarantees actual effectiveness in that process, and the formal requirements are a baseline for that possibility. Because legal processes never stand still, the issue is not whether they can remain fixed but whether they are adapted through intelligent methods and consultation.

For Fuller, both the formal predictability of laws and the possibility of their contestation were a precondition for freedom generally – not only through the constraint imposed on officials, but in patterning social interactions and relationships. Fuller’s recurring metaphor of language explains well this relationship between the formal and stable limitations created by laws and freedom. As he explains, “language sets us free by imposing limits on how we express what we intend to say. Both a dictionary and a grammar have a finite number of pages. But a language that imposed no limitations at all on what is expressed or how something is said would be unable to function. And though it is subject to pressures to expand and change its limitations and adapt, it needs basic limitations in order to function.” As with Dewey’s turn to habits and customs, Fuller writes, “what we call ‘rules of thumb’ set us free to use our more flexible fingers in the solution of the more subtle kinds of tasks.”<sup>123</sup> And while the rules of grammar present the base minimum, like the “morality of duty”, language itself, presents the possibility for the reality of human striving, culture, civilization, and a “morality of aspiration.”

For Fuller, the legal system, and its patterning of social life and relationships must by its very form, as an effective custom, create the channels by which an agent’s reasoning can be

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<sup>123</sup> Fuller, “Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction,” 91.

better effectuated. This distinction amounts to the difference between giving and imposing reasons that give good results, and providing a legal structure through laws in which the individual can better consider the value of those reasons. Freedom is advanced by the *capacity* of individual to reflect on reasons, not to accept them blindly such that the results of their relationships will be better off. To curtail the very reasoning of the subject on such matters is absolutely antithetical to freedom as both Dewey and Fuller defined it. Moreover, that freedom is irreducibly social for Fuller, as with Dewey. As Fuller writes, “While we must not lose sight of the individual, we must remember that he often gains freedom, in the sense of an opportunity for realizing his own capacities, only by associating himself with his fellows in the form of corporations, labor unions, political parties, churches.”<sup>124</sup>

There is certainly something inherently valuable about laws that provide instrumentalities for people to better realize their basic freedom and live their lives accordingly. But Fuller’s concern too was with that relationship between lawgivers and the potential for domination. Fuller’s turn to freedom and agent constitutes more than respect for dignity and autonomy of the agent, which would be implicated by such relationships. Fuller takes the example of a factory foreman, to elaborate an understanding of freedom not only as an effective power, but as requiring arbitrary restrictions (or absence of direction) – a kind of domination. The foreman has some general discretion to handle his department, but “his effective freedom may be destroyed in one stroke by a single inept order from the head office” or its absence. Moreover, “effective freedom of contract” may have the protection of the state, but “clumsy rules of law” from other domains, can affect what we can concretely do. That is, a legal system that can guarantee this effective requires “a full and sympathetic understanding of the situation to which it is

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<sup>124</sup> Fuller, “Freedom and Planning,” cited in Winston, introduction to *Principles of Social Order*, 21-22.

applied.”<sup>125</sup> And the decisions others make for the foreman, or for any citizen, cannot be effective if they are unilaterally issued. As Fuller writes, “if we want a sure warranty that this condition will obtain, we must draw the man whose freedom is in question into consultation; we must afford him some participation in the decisions that affect the practical significance of his freedom.”<sup>126</sup> In short, much like Dewey’s, Fuller’s account presupposes the necessity of full participation and consultation, for the creation of a workable order and the ‘sure warranty’ for a system of effective freedom. Fuller writes in an important passage:

It is often thought that the increasing complexity of technology and of the forms of human organization requires a restriction on the scope of individual freedom and a reduction in the degree to which there can be democratic participation in decisions that set the direction of human effort. It seems to me that this is the exact opposite of the conclusion that ought to be drawn. The more complex our society becomes, the more urgent is the need for a pooling of our intellectual resources. . . . in combat a soldier must be able to exercise initiative and make intelligent decisions without constant guidance. But if he receives from his commanding officer an order that presents an obvious ‘mismatch’ with the situation toward which it is directed, his morale his capacity for initiative, and his effective freedom of action are all destroyed at once.<sup>127</sup>

This relationship between the pooling of our intellectual resources, of shaping and reacting to the forms of law that both guide and must respond to the imperatives of our pooled input underwrote Fuller’s image of legal systems as a whole. This too was true especially of the interpretation of laws, which “reveals, as no other problem can, the cooperative nature of the task of maintaining legality.”<sup>128</sup> That relationship was between “the interpreting agent” and the “legislature,” which had to “anticipate rational and relatively stable modes of interpretation.” As Fuller argues, “this reciprocal dependence” implicates the legal order as a whole. “No single concentration of

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<sup>125</sup> Fuller, “Freedom – A Suggested Analysis,” *Harvard Law Review* 68, no. 8 (1955), 1315. 1305-1325.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*, 1316.

<sup>128</sup> *MOL*, 186.

intelligence, insight, and good will, however strategically located, can insure the success of the enterprise of subjecting human conduct to the governance of rules.”<sup>129</sup>

It was this reciprocal dependence and cooperative interactivity which Fuller elaborated most clearly in an essay on the nature of freedom. There, Fuller presented an image of the shaping of law as the creation of a path and its constant adaptation and reshaping through the contributions of shared inputs. The ways in which the forms of law take shape with and against the work of experts and officials can only be through such interactions. I conclude with Fuller’s apt imagery:

The great advantage of systems of social order that are built up by the fitting together of many individual decisions is that those decisions have been reached with reference to specific situations of fact. The words of a language, for example, have come into existence because in some particular context people wanted to say something and needed a word to say it with. Words are not created by someone who thinks they might come in handy on some later occasion. Even the unplanned path through the woodland may illustrate this point.

[...] Imagine a newly settled rural community in which it is apparent that sooner or later a path will be worn through a particular woodland. Suppose the community decides to plan the path in advance. There would be definite advantages in this course. Experts could be brought in. A general view of the whole situation could be obtained that would not be available to any individual wayfarer. What would be lacking would be the contribution of countless small decisions by people actually using the path [...]

Through the foresight of the city fathers the Cambridge Common is provided with an elaborate network of paved sidewalks, carefully planned to serve the convenience of any person wishing to traverse the Common from any angle. It was found, however, that at certain points people perversely insisted on walking across the grass. The usual countermeasures were tried, but failed. Now the city is taking down its barriers and its ‘keep-off-the-grass’ signs and is busily engaged in paving the paths cut by trespassing feet. Those who have had experience with the problem of designing forms for the life of the human animal will see, I believe, a pattern of events that has repeated itself many, many times.<sup>130</sup>

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<sup>129</sup> Ibid, 91.

<sup>130</sup> Fuller, “Freedom – A Suggested Analysis,” 1324-1325.

The image is fitting also in its suggestion that the form of law is not imposed from above on the activity of passive or isolated individuals. It presented, instead, a path for their shared, constant activity, paved by those ‘many individual decisions’ and sometimes ‘trespassing feet’ as they make their way in everyday life.

## CONCLUSION

“The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.”

— Oliver Wendell Holmes, Jr., *The Common Law* (1881)

Perhaps the most famous statement by an American lawyer on the nature of law comes from Oliver Wendell Holmes, Jr. and his epigrammatic claim that “the life of the law has not been logic: it has been experience.” As I began the dissertation with this epigraph, I retrace here the arguments presented as an engagement with Holmes’ call to understand the law with and through the prevalent moral and political theories, intuitions of policy, prejudices of judges and fellow-men, which together shape what the law is, its history, and what it tends to become. This study has been traced in and through the works of John Dewey and his decades-long commitment to a robust ethical conception of democracy. Dewey too was at pains to remind us that our moral and political philosophies pattern the ways in which we think about what the law is. As he wrote in 1941, “legal philosophies have reflected and are sure to continue to reflect movements of the period in which they are produced, and hence cannot be separated from what these movements stand for.” (MPL, LW14, 116). This requires, as Dewey suggested, and I have attempted here, an investigation into “actual cultural and social movements of the periods in which they appeared.” (MPL, LW14, 116). The *democratic* life of the law, as I have argued, has yet to be fully theorized let alone realized – no less than Dewey’s ideal of democracy as a way of life. But the particular ideas and “moral and political philosophies” to which I have appealed

provide us with important resources for understanding legal processes as a collaborative, social enterprise that functions to provide a framework that conduces to our freedom.

In Chapter 1, we saw how historically, movements concerned with the study of the law have shared in a general suspicion that the place of the law is over and above the public which it must serve to direct and command. From the origins of analytical positivism in the work of John Austin, we saw how Austin himself was responding to conceptions of democracy and sovereignty that mixed progressive faith in popular self-rule and a general will with a well-functioning government. For Henry Maine, despite his anthropological approach to the law and his rejection of Austin's ahistorical analytical categories, the demystification of democracy – as one form of government among others – allowed for a deflation of the triumphalist narrative of democracy as an ethical and progressive ideal. The real rulers were not the people but had to be determinate and elite commanders who could formulate a cogent 'will' and enforce it through the instrumentalities of the state. Together, with the Social Darwinian logic from Herbert Spencer, ethical claims based on the science of evolution supplied the normative core behind legal processes as they advanced from status to contract. Codification and determinacy allowed for the progressive development of a state to protect private enterprise and the preservation of life, liberty and property.

In turning to how we might understand the relationship between our legal philosophies and theories and social contexts, we saw in the works of Richard Posner, in particular, a powerful counterpoint to Dewey's democratic theory and his treatment of legal issues. As I argued in Chapter 2, pace Posner, there is a fundamental continuity between Dewey's treatment of social customs and institutions – including legal processes – and the normative aims of democracy as a way of life. We also saw that for Dewey, our inquiries require a turn to the

capacities of each individual within the public to contribute to these social processes. Short of this contribution and the guarantee of the capacities to so contribute, we stymie the possibility of law as a social instrumentality to deal effectively with securing our welfare and freedom, addressing shared problems, and offering solutions we can direct and contest in the ongoing processes of social life. Dewey's turn to inquiry and experience was not a rejection of logic tout court, as he defined it – the inquiry into inquiry, and the methods by which we secure our understanding of our experiences. The logic that Dewey did reject, along with Holmes, was that of the syllogism and rational deductions that claimed access to immutable truths outside the contingencies of experience and action. Moreover, democracy requires the cultivation of an open culture and an ethos, and the capacities for empathy – no less among officials than the public itself – to recognize the reciprocal and inescapable social dimension of our experience and interests. There is, to use Lon Fuller's oft-misunderstood term, an inner morality to democracy, which cannot be reduced to its institutional framework.

It was this inner morality and the basis of reciprocal relationships between officials and the public, which provided a normative vocabulary for understanding relationships between political and moral democracy in Dewey's account. Against the quest for absolute authority, in matters epistemological, moral, and political, as traced in the works of Walter Lippmann in Chapter 3, Dewey paved a link between social action and moral meaning. The purview of political institutions must be indexed to the public and its practical judgment, not to ahistorical and immutable principles. Certainly, the rise of complex industry and the eclipse of the public that Lippmann identified needed to be recognized – but not as a permanent condition impeding the possibility of democratic participation. But foremost, the public has to realize itself and the cultivation of methods of intelligence that are imperative for the functioning of democracy and



for the possibility of addressing social problems fruitfully. We need to reject out of hand the claims that such democratization is impossible because the epistemic capacity required for understanding complex social realities is realistically a domain accessible only to experts. Public participation is required to mediate the work of experts and ground a culture of collaboration. As Dewey wrote pointedly in *The Public and Its Problems*, “The notion that intelligence is a personal endowment or personal attainment is the great conceit of the intellectual class, as that of the commercial class is that wealth is something which they personally have wrought and possess.” (PP, LW2, 367) No less faulty is the notion that the establishment of a functioning social order and the rule of law are the singular achievements of governments and officials, who have personally wrought and possess the capacity to create the framework in which our social activities and associations can be channeled and our basic freedom secured. In fact, in Chapter 4, we saw how Lon Fuller developed ideas precisely on these grounds, in an ethical jurisprudence aligned with core features of Dewey’s works.

For Fuller, the question of what the law might tend to become, especially if we are to understand it not as solely an instrumentality for fixed ends or a means of control that issues from officials, was bound inextricably with the issues presented by the public and the need to create a framework for free human interactions. The possibility of creating such a framework required the “shared collaboration” of all citizens and was a ‘striving’ – not merely a collection of rules laid down and applied by an invisible yet omnipotent enforcer. Fuller’s insistent turn to the powers that are shared by the legislator and above all the cop on his beat, makes clear also that a legal system implicates a principled and responsible ethos to apply the law in accordance with standards that have been developed, which reflect the very purpose of a legal system as a collaborative social enterprise. The public, on this understanding, no less than legal officials, has

an inextricable role and responsibility in shaping, sometimes with ‘trespassing feet’, these very processes by which free human interactions can be realized. As Fuller insisted in his works, the value of order is not the order of the mortuary, but of humans who value and act freely, who, in Dewey’s terms, have the capacity for growth. If it is purely a question of individual morality versus legality, then the debate seems to be pitted in the domain of individual preference versus social order, even if a not particularly orderly stripe. To be sure, this notion of the rule of law, like Dewey’s turn to democracy as an ideal of moral life, was still an ideal. But it was not a transcendental ideal; it was a standard by which we understood our own ‘morality of aspiration,’ ever subject to contestation and adaptation.

The central issue presented in the dissertation may be which political or moral theory we should claim as the guiding influence in our understanding of what laws will tend to be. In fact, the question today seems rest squarely on what being a liberal democrat requires of us and why we should champion institutions that are fallible and subject to elite capture, when there is much more to our everyday social lives than the decisions of judges or the passing of dangerously unscientific and pernicious legislation. The millennial generation, as recent studies suggest, which never experienced the hard-won battles for civil rights, the rule of law, majoritarian institutions, a free press, and the rejection of military authority, appears poised to willingly cast away these once seemingly sacred institutions.<sup>1</sup> Is this claimed ‘democratic deconsolidation’ that scholars today argue is currently underway, a symptom of the instability of democracy itself – unfit and unlikely to survive – just as Maine claimed in his early critiques of democracy?

For Dewey, the fragility of democracy was not due to defects of human nature, or the democratic ideal itself. Instead, that fragility was one that grounded our democratic efforts and

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<sup>1</sup> See, e.g., Roberto Foa and Yascha Mounk, “The Signs of Deconsolidation,” *Journal of Democracy* 28, no. 1 (2017), and “Across the Globe, a Growing Disillusionment with Democracy,” *New York Times*, September 15, 2015.

concepts exclusively on democratic political institutions without the attendant attention to our beliefs, social relationships and associations, and way of life. As Dewey wrote in 1937:

The fundamental beliefs and practices of democracy are now challenged as they never have been before. In some nations they are more than challenged. They are ruthlessly and systematically destroyed. Everywhere there are waves of criticism and doubt as to whether democracy can meet pressing problems of order and security. The causes for the destruction of political democracy in countries where it was nominally established are complex. But of one thing I think we may be sure. Wherever it has fallen it was too exclusively political in nature. It had not become part of the bone and blood of the people in daily conduct of its life [...] unless democratic habits of thought and action are part of the fiber of a people, political democracy is insecure. It can not stand in isolation. It must be buttressed by the presence of democratic methods in all social relationships. The relations that exist in educational institutions are second only in importance in this respect to those which exist in industry and business.... (DEA, LW11, 225)

The reciprocal relationship between our institutions and laws, on the one hand, and the public, on the other, suggests that democracy requires a two-pronged commitment. We must turn attention anew to the public – and the equipment of social relationships, education, the social and economic institutions, against class, racial, and intellectual prejudices that stymie the public's basic capacities. This requires a commitment also against facile acquiescence to claims that humans as they are today, as captured in their worst light – apathetic, unintelligent, irrational, unprincipled and unable to make sense of their problems or commit to meaningful solutions – reflect a permanent feature of human nature, like sheep among wolves, as Posner suggests, all too willing to be led to the legal slaughterhouse. The second prong requires our understanding that institutional forms and laws are necessary but not permanent fixtures – that their formulation and authority is a function of the social activity that shape and legitimate them. These institutional forms may change, but the commitment to facilitating the capacity of each individual to shape meaningful solutions, must remain a foundational feature of a democratic faith.

This faith in democracy “may be enacted in statutes,” Dewey writes, “but it is only on paper unless it is put in force in the attitudes which human beings display to one another in all the incidents and relations of daily life.” In short, we pervert the central meaning of democracy “if, in our daily walk and conversation, we are moved by racial, color or other class prejudice; indeed, by anything save a generous belief in their possibilities as human beings, a belief which brings with it the need for providing conditions which will enable these capacities to reach fulfillment.” (CD2, LW14, 227) Certainly, this commitment and the work necessary to achieve it are not always easily realized. As Dewey declared, “the task can be accomplished only by inventive effort and creative activity... in part because the depth of the present crisis is due in considerable part to the fact that for a long period we acted as if our democracy were something that perpetuated itself automatically; as if our ancestors had succeeded in setting up a machine that solved the problem of perpetual motion in politics.” (CD2, LW14, 225) But we cannot, with Lippmann, follow the Founders or, for that matter, any political figurehead or expert as purported arbiters of truth. In short, we cannot expect that a command to embrace liberalism and democracy – like any command or fiat of will – can work long to direct our actions and what we actually value and believe. Despite his rejection of absolutes and transcendental ideals, Dewey confronted the realist charge that his faith in democracy was utopian. But his pragmatism and democratic commitments had its own ‘everyday’ valence: it was simply a faith in “the capacity of the intelligence of the common man” – not exclusively the judge and elite – “to respond with common sense to the free play of facts and ideas which are secured by effective guarantees of free inquiry, free assembly and free communication[.]” (CD2, LW14, 227).

Dewey ended his 1939 address, “Creative Democracy—The Task Before Us,” with the following entreaty: “For every way of life that fails in its democracy limits the contacts, 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.” (CD2, LW14, 230). This is the democratic imperative “to be carried on day by day,” as a way of life, and the basis for realizing the “democratic life of the law,” as I have described it, as one facet of a broader moral ideal. This is still the task before us and, I believe, like Dewey, a task well worth pursuing.

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