THE BANALITY OF PRAGMATISM AND THE POETRY OF JUSTICE

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Thomas Grey, in his *Holmes and Legal Pragmatism*, says: "From a certain philosophical perspective, Holmes' pragmatist theory of law is . . . essentially banal. At its most abstract level it concludes in truisms: Law is more a matter of experience than of logic, and experience is tradition interpreted with one eye on coherence and another on policy."[1]

I think it is true that by now pragmatism is banal in its application to law. I also suspect that Grey is right when he claims that "pragmatism is the implicit working theory of most good lawyers."[2] To that extent, at least, everybody seems to now be a legal realist. Nobody wants to talk about a "science of law" any longer. Nobody doubts that what Morton White called "the revolt against formalism"[3] was a real advance, both in legal theory and in American intellectual life generally.

It is true that Ronald Dworkin still bad-mouths pragmatism and insists that there is "one right answer" to hard legal questions. On the other hand, Dworkin says that he does not want to talk about "objectivity" any more. Further, Dworkin's description of "law as integrity" in *Law's Empire*[4] seems to differ only in degree of elaboration from Cardozo's account of "the judge as legislator" in *The Nature of the Judicial Process*.[5] So I find it hard to see what the force of the phrase "one right answer" is supposed to be. Dworkin's polemics against legal realism appear as no more than an attempt to sound a note of Kantian moral rigorism as he continues to do exactly the sort of thing the legal realists

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1. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 814 (1989).

2. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1590 (1990).

3. M. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM (1949).

4. R. DWORKIN, LAW'S EMPIRE 176-275 (1986).

5. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

wanted done.[6] I think Margaret Radin is right when she says that Dworkin's criticism of pragmatism amounts to little more than "gerrymandering the word 'pragmatism' to mean crass instrumentalism."[7]

Since neither Dworkin nor Richard Posner nor Roberto Unger has any use for what Posner calls "formalism"—namely "the idea that legal questions can be answered by inquiry into the relation between concepts"[8]—it seems plausible to claim that the battles that the legal realists fought in alliance with Dewey have essentially been won.[9] The interesting issues now seem to cluster around formalism in a wider sense, one that Unger defines as "a commitment to . . . a method of legal justification that contrasts with open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary."[10]

Even under this broader definition of formalism, however, it is not so easy to find a good example of a formalist among legal theorists. Dworkin sometimes suggests that judges are prevented by their office from being open ended in this way, although theorists are not. Dworkin proposes that helping the law work itself pure by means of an ever more radical egalitarianism is a matter not for "the princes of law's empire"—the judges—but rather for philosophers, the "seers and prophets of that empire."[11] But Dworkin is ambiguous on the question of whether Hercules, in his official capacity, can take heed of open-ended disputes of the

6. *See* Woozley, *No Right Answer*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 173 (M. Cohen ed. 1983). In a reply to Woozley, Dworkin echoes Dewey by saying that "a concept of truth that somehow escapes the fact that all our concepts, including our philosophical concepts, take the only meaning they have from the function they play in our reasoning, argument, and conviction" is a "mirage." Dworkin, *A Reply by Ronald Dworkin*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 247, 277 (M. Cohen ed. 1983). Dworkin's reply ends by saying that he is content with the statement that "in hard cases at law one answer might be the most reasonable of all, even though competent lawyers will disagree about which answer is the most reasonable." *Id.* at 278. This gloss neutralizes whatever anti-pragmatist and anti-legal realist force there might have been in the "one right answer" slogan.

On Dworkin's view (with which pragmatists heartily agree) that "objectivity" (in a sense interestingly different from "intersubjectivity") is an unnecessary notion for an accurate description of the decisionmaking process, see R. DWORKIN, *supra* note 4, at 267.

7. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1722 (1990).

8. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1663 (1990).

9. The battles have been won among theorists, if not among the more recently appointed members of the Supreme Court. The latter have not garnered much supporting theory for their views; E.D. Hirsch, Jr., the leading representative of intentionalism in the theory of interpretation, was quick to disassociate himself from their use of the concept of "the Framers' intention." *See* E.D. Hirsch, Jr., *Counterfactuals in Interpretation*, in INTERPRETING LAW AND LITERATURE 55-68 (S. Levinson & S. Mailloux eds. 1988).

10. R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 1 (1986).

11. *See* R. DWORKIN, *supra* note 4, at 407.

sort Unger has in mind. On the one hand, Dworkin says that the work of CLS theorists is "useful to Hercules," but on the other, he warns that CLS may be merely "an anachronistic attempt" to make legal realism—"that dated movement"—reflower.[12] Yet surely CLS adherents like Allan Hutchinson and Peter Gabel are not interested in formulating a general theory of the sort exemplified by legal realism. Instead, they are, if you like, interested in being useful to Hercules. They want to open up the discourse of the legal profession to issues that Hercules will eventually find raised in half of the briefs he must read.

For myself, I find it hard to discern any interesting *philosophical* differences between Unger, Dworkin, and Posner; their differences strike me as entirely political, as differences about how much change and what sort of change American institutions need. All three have visionary notions, but their visions are different. I do not think that one has to broaden the sense of "pragmatist" very far to include all three men under this accommodating rubric.

The very ease by which these three men are accommodated under this rubric illustrates the banality of pragmatism. Pragmatism was reasonably shocking seventy years ago, but in the ensuing decades it has gradually been absorbed into American common sense. Nowadays, Allan Bloom and Michael Moore seem to be the only people who still think pragmatism is dangerous to the moral health of our society.[13] Posner, therefore, raises a good question when he asks whether the so-called "new" pragmatists have anything to contribute—anything that we have not already internalized as a result of being taught by people who were raised on Dewey.[14]

My own answer to this question is that the new pragmatism differs from the old in just two respects, only one of which is of much interest to people who are not philosophy professors. The first is that we new pragmatists talk about language instead of experience or mind or consciousness, as the old pragmatists did. The second respect is that we have all read Kuhn, Hanson, Toulmin, and Feyerabend, and have thereby become suspicious of the term "scientific method."[15] New

12. *Id.* at 272-73.

13. *See* A. BLOOM, THE CLOSING OF THE AMERICAN MIND (1986); Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985).

14. Posner, *supra* note 8, at 1658-59.

15. The two respects in which the new pragmatism differs from the old are connected, in that without the so-called "linguistic turn," the topic of "theory-neutral observation language" would not have been posed. Without Carnap's and Hempel's attempts to develop logics of confirmation and explanation by treating theories as (potentially axiomatizable) sets of propositions whose deductive

pragmatists wish that Dewey, Sidney Hook, and Ernest Nagel had not insisted on using this term as a catchphrase, since we are unable to provide anything distinctive for it to denote.[16]

As far as I can determine, it is only these doubts about scientific method, and thus about method in general, that might matter for legal theory. The first respect in which the new pragmatism is new—its switch from experience to language—has offered philosophy professors some fruitful new ways to pose old issues of atomism-vs.-holism and representationalism-vs.-anti-representationalism (as in the controversies between Hilary Putnam and David Lewis, Donald Davidson and Michael Dummett, Daniel Dennett and Jerry Fodor). But these issues are pretty remote from the concerns of non-philosophers.[17] By contrast, as Judge Posner's article shows,[18] *method* can still seem important.

Posner says that "lack of method" was "a great weakness" of legal realism.[19] He distinguishes between "scientistic philosophy" and "social science . . . the application of scientific method to social behavior" and says that his own economic approach to law is "rooted in and inspired by a belief in the intellectual power and pertinence of economics."[20] My own Kuhnian-Feyerabendian doubts about scientific method make me wish that Posner had been content with this last remark and not added the sentences about method. Social scientists, like novelists, poets, and politicians, occasionally come up with good ideas that judges can use. For all I know, the brand of economics that centers on considerations of efficiency may provide Hercules with some very useful ideas. But I am

consequences could be phrased in such an observation language, this topic would not have seemed urgent. Also, without Quine's attack on the analytic-synthetic distinction (an attack that is less easily mounted against the pre-linguistic-turn necessary-vs.-contingent distinction), and Sellars's attack on the notion of "pure sense-datum report," Kuhn's reception would have been colder than it was.

16. For reasons why Dewey's use of that phrase was misleading and unhelpful, see Rorty, *Introduction*, in 8 JOHN DEWEY: THE LATER WORKS ix-xviii (J. Boydston ed. 1986) and Rorty, *Pragmatism Without Method*, in SIDNEY HOOK: PHILOSOPHER OF DEMOCRACY AND HUMANISM 259 (P. Kurtz ed. 1983).

17. Insofar as concern with language as such has entered into legal theory, it has done so in the form of the "deconstructionist" wing of the CLS movement. For some powerfully argued criticisms of the claim that deconstructionism has something to contribute to legal theory, see Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429 (1987). Whereas Radin suggests that with Dewey you do not need Derrida, *see* Radin, *supra* note 7, at 1719, Williams's point is that if you have Wittgenstein, you do not need Derrida. I think the latter claim is slightly more accurate, since the later Wittgenstein updates Dewey by working out a non-representationalist approach to *language*, as opposed to a non-representationalist approach to inquiry. Wittgenstein thus lets one meet the deconstructionists on their own turf.

18. Posner, *supra* note 8.

19. *Id.* at 1659.

20. *Id.* at 1668-69.

fairly certain that it would be hard for Posner to explain what was especially scientific about either the genesis or the application of these ideas.[21] My assurance on this point is the result of watching many philosophers try and fail to find an epistemic or methodological, as opposed to a sociological or moral, distinction between science and non-science.[22]

I agree with Grey that one advantage of pragmatism is freedom from theory-guilt.[23] Another advantage is freedom from anxiety about one's scientificity. So I think it is in the spirit of Dewey to say that the test of the power and pertinence of a given social science is how it works when you try to apply it. The test of law and economics is whether judges agree in finding Posner's ideas useful when, as Grey puts it, "interpreting tradition with one eye on coherence and the other on policy."[24]

On the other hand, I agree with Posner that judges will probably not find pragmatist philosophers—either old or new—useful. Posner is right in saying that pragmatism clears the underbrush and leaves it to others to plant the forest.[25] I would add that the underbrush in question is mostly specifically philosophical underbrush. The "new" pragmatism should, I think, be viewed merely as an effort to clear away some alder and sumac, which sprang up during a thirty-year spell of wet philosophical weather—the period that we now look back on as "positivistic analytic philosophy." This clearance will restore the appearance of the terrain that Dewey landscaped, but it will not do more than that.

To accomplish more, and in particular to avoid the complacency that Radin rightly sees as the danger of coherence theories of knowledge,[26] we have to turn to Dewey the prophet rather than Dewey the pragmatist philosopher. We have to read the Emersonian visionary rather than the contributor to *The Journal of Philosophy* who spent forty years haggling over definitions of "true" with McGilvary, Lovejoy, Russell, Lewis, Nagel, and the rest. This is the Dewey whom Cornel West describes as calling for "an Emersonian culture of radical democracy,"[27]

21. For some skepticism about the scientificity of economics, see D. MCCLOSKEY, THE RHETORIC OF ECONOMICS (1985).

22. *See* Rorty, *Is Natural Science a Natural Kind?*, in CONSTRUCTION AND CONSTRAINT: THE SHAPING OF SCIENTIFIC RATIONALITY 49 (E. McMullin ed. 1988).

23. *See* Grey, *supra* note 2, at 1569.

24. Grey, *supra* note 1.

25. Posner, *supra* note 8, at 1670.

26. Radin, *supra* note 7, at 1710.

27. C. WEST, THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM 104 (1989).

the Dewey who is grist for CLS mills. Like the "prophetic pragmatism" for which West calls, this Dewey is "a child of Protestant Christianity wedded to left romanticism."[28]

No argument leads from a coherence view of truth, an anti-representationalist view of knowledge, and an anti-formalist view of law and morals, to Dewey's left-looking social prophecies. The Heidegger of *Being and Time* shared all those views, but Heidegger looked rightward and dreamed different dreams.[29] These were anti-egalitarian, nostalgic dreams, which resembled those of T.S. Eliot and Allen Tate rather than the one that Dewey embodied in a quote from Keats:[30]

> [M]an should not dispute or assert, but whisper results to his neighbor, and thus, by every germ of spirit sucking the sap from mold etherial, every human being might become great, and Humanity instead of being a wide heath of Furze and briars with here and there a remote Pine or Oak, would become a grand democracy of Forest Trees![31]

This romantic side of Dewey is not banal. When one comes across such passages as this, one wakes out of the slumber induced by what Grey calls "the good gray liberal expounds the mild virtues of the theoretic middle way."[32] But this side of Dewey is not distinctively *pragmatist* either. These passages do not let one know, as Grey rightly says Wallace Stevens does, what it *feels like* to be a pragmatist—what it feels like to have overcome the dualisms of fiction and reality, imagination and reason. The pragmatists provided good philosophical arguments against some of the philosophical presuppositions of formalism. Yet the success of the revolt against formalism that Morton White describes, the revolt whose success lets us find much of Dewey platitudinous, owed as much to visionary carrots as to argumentative sticks.

Dewey's Keatsian vision was shared by many social democrats in many countries at the turn of the century.[33] As Putnam rightly says, it is not a vision that can be successfully backed up by a Habermas-Apel style argument about the presuppositions of rational discourse.[34] But visions do not really need backup. To put forth a vision is always one of

28. *Id.* at 227.

29. *See* M. HEIDEGGER, AUF DER ERFAHRUNG DES DENKENS (1954).

30. On the overlap between Dewey and Heidegger, see M. OKRENT, HEIDEGGER'S PRAGMATISM 3-10, 280-81 (1988).

31. J. DEWEY, ART AS EXPERIENCE 347 (1934).

32. Grey, *supra* note 2, at 1592.

33. *See* J. KLOPPENBERG, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT 1870-1920 26-27 (1986).

34. Putnam, *A Reconsideration of Deweyan Democracy*, 63 S. CAL. L. REV. 1671, 1687-88 (1990).

Fitzjames Stephen's "leaps in the dark."[35] Thus, insofar as we late comers can get more than platitudes from Dewey, it will be because we are able to read our own specific egalitarian hopes into his generic ones, not because we can still use his anti-formalist arguments as weapons.

As examples of attempts to actualize specific hopes, consider such debatable decisions as *Brown v. Board of Education*,[36] *Roe v. Wade*,[37] Judge Sand's recent decision that begging is a first amendment right,[38] various state supreme court decisions holding that all school districts within the state must have the same per-pupil expenditure, and some future Supreme Court decision that will strike down anti-sodomy laws. These are cases in which the courts have done, or might do, what Posner claims "the pragmatic counsel . . . to the legal system" would warn them against.[39] They have "roil[ed] needlessly the political waters."[40] They have "prematurely nationalized an issue [that many thought] best left to simmer longer at the state and local level until a consensus based on experience with a variety of approaches . . . emerged."[41]

Undoubtably, an ideally unromantic and bland pragmatist would offer such advice, but Dewey the visionary would not. Dewey the romantic would have been delighted that the courts sometimes tell the politicians and the voters to start noticing that there are people who have been told to wait forever until a consensus emerges—a consensus within a political community from which these people are effectively excluded.[42] Dewey the pragmatist would not, I think, have accepted Dworkin's quasi-Kantian claim that in these cases the courts were simply "taking rights seriously" rather than being visionary—for he would have thought "rights" a good example of what Posner calls "the law's metaphysical balloons."[43] Unlike Dworkin, Dewey would not have attempted to formulate a general legal theory that justified the practice of making leaps in

35. *Id.* at 1693-94.

36. 347 U.S. 483 (1954).

37. 410 U.S. 113 (1973).

38. Young v. New York City Transit Auth., 729 F. Supp. 341 (S.D.N.Y. 1990), *rev'd in part, vacated in part*, 903 F.2d 146 (2d Cir. 1990).

39. Posner, *supra* note 8, at 1668.

40. *Id.*

41. *Id.*

42. It might be objected that this phrase is inapplicable to *Roe v. Wade*, since women are included in the relevant community. I am not sure they are, both on Ely-like grounds of underrepresentation and on the vaguer but more powerful ground that (as banners at a pro-choice demonstration recently put it) "if men got preguant, they would have made abortion a sacrament."

43. *See* Posner, *supra* note 8, at 1663.

the constitutional dark.[44] Rather, I imagine Dewey would say that to suddenly notice previously existing but hitherto invisible constitutional rights is just the quaint way in which our courts are required to express a conviction that the political waters badly need roiling.

In the terms Radin uses, this conviction can be restated as the claim that a paradigm shift is needed in order to break up "bad coherence."[45] Such a shift can be initiated when visionary judges conspire to prevent their brother Hercules, the "complacent pragmatist judge" whom Radin describes, from perpetuating such coherence. The cheer we egalitarians raise at such breakthroughs into romance—at such examples of the poetry of justice—is, I think, what justifies Posner's statement that although it was "not . . . a good judicial opinion," Holmes' *Lochner* dissent was "the greatest judicial opinion of the last hundred years."[46] I read that dissent as saying, in part, "Like it or not, gentlemen, trade unions are part of our country too." I think of *Brown* as saying that, like it or not, black children are children too. I think of *Roe* as saying that, like it or not, women get to make hard decisions too, and of some hypothetical future reversal of *Bowers v. Hardwick*[47] as saying that, like it or not, gays are grown-ups too.

I can share Dworkin's and Ely's concerns over the "unprincipled" character of such decisions—their concern at the possibility that equally romantic and visionary, yet morally appalling, decisions may be made by pragmatist judges whose dreams are Eliotic or Heideggerian rather than Emersonian or Keatsian. But as a pragmatist, I do not believe that legal theory offers us a defense against such judges—that it can do much to prevent another *Dred Scott* decision. In particular, I do not see that such judges will have more or less "integrity" than those who decided *Brown*

44. *See* Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988). I agree with Farber that we do not need "a unified principle that would provide the basis for judicial decisions," *id.* at 1334, and with Farber's criticism of Dworkin's attacks on pragmatism, *id.* at 1343-49. But I think that Farber concedes too much to the opposition when he says that a "principled pragmatism is far from being an oxymoron," *id.* at 1377, and also when he contests John Hart Ely's claim that "when a majority has chosen to invade an arguably fundamental right, courts have no principled way of determining whether the right should be considered fundamental," *id.* at 1355. Farber is right, of course, if what he means by "principled" in these contexts is simply susceptible to being supported by a reasonable argument—but this is not what Dworkin and Ely mean. Dworkin and Ely want a distinction between principle and policy, which pragmatists must refuse them.

45. Radin, *supra* note 7, at 1710.

46. R. POSNER, LAW AND LITERATURE 285 (1988). I am grateful to my colleague George Rutherglen for helping me see that Harlan's dissent in *Lochner* was, romance apart, a far better example of what one expects judicial opinions to look like. I am also grateful to him for looking over a draft of this article and saving me from some howlers.

47. 478 U.S. 186 (1986).

or *Roe*. I agree with Grey when he says: "Pragmatism rejects the maxim that you can only beat a theory with a better theory . . . . No rational God guarantees in advance that important areas of practical activity will be governed by elegant theories."[48]

Further, I think that pragmatism's *philosophical* force is pretty well exhausted once this point about theories has been absorbed. But, in American intellectual life, "pragmatism" has stood for more than just a set of controversial philosophical arguments about truth, knowledge, and theory. It has also stood for a visionary tradition to which, as it happened, a few philosophy professors once made particularly important contributions—a tradition to which some judges, lawyers, and law professors still make important contributions. These are the ones who, in their opinions, or briefs, or articles, enter into what Unger calls "open-ended disputes about the basic terms of social life."[49]

48. Grey, *supra* note 1, at 814-15.

49. R. UNGER, *supra* note 10.