JOHN DEWEY AND OLIVER WENDELL HOLMES, JR.:

(The pragmatic approach to jurisprudence)

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Pragmatism is the distinctive contribution of the United States to modern philosphy and, in the movement of "legal realism", to jurisprudence.

Like legal realism, pragmatism is not really an "ism" or a doctrine; it is really a method –a method of analysis. In this respect it has an affinity to "logical positivism" as both of them exalt the method of empirical science, requiring actual empirical verification as the test of the soundness of an idea.

Dewey called his version of pragmatism "instrumentalism" or "experimentalism" because he wanted to bring out the role of ideas as tools of action –as hypotheses. Their worth is established by their success in transforming a troubled real-life problem into a settled solution. Pragmatism does not start with universal doubt, like Descartes. Pragmatism starts from where we are, with the beliefs we have, and it is only when a frustration arouses doubt that we come up with some idea to resolve the critical doubt. It is a life-situation which stymies us and it is only when our thinking has satisfactority altered the *actual* situation that our thinking can stop. Thinking is not an arm-chair passivity. It is active reconstruction proceeding not by chance or drift or inertia but through the operations of our creative intelligence. It is only after the engineer has built the bridge that his thinking may properly be said to have stopped. He has divised the bridge because we need to get across the river.

Holmes was one of the founders of the pragmatic movement. He was a charter member of the Harvard-related club which James founded and which number three lawyers as well as three empirical scientists among its members.

Let us state the pragmatic key quite simply:

Conceive the consequences of an idea (concept, principle, rule) in order to test its soundness. As Pierce, the logician of the movement, put it: these conceived consequences are the *whole* meaning of the concept. It is a view akin what the phisicist Bridgman called the logic of modern physics; viz operationalism. The whole meaning lies in the operations performed. Holmes applied this simple criterion to legal analysis in his magnum opus *The Common Law.* This year we are celebrating the one-hundredth anniversary of the publication of that influential book; and it is in celebration of tha anniversary that I submit this paper. In *The Common Law* Holmes advanced the "external standard" as the criterion of a tort. If does not matter what was in the tortfeasor's mind or what his inner intention was; what matters is the external effect or consequence of his act. It is futile to tray to peer into his mind. As the old medieval saying has it: the devil himself knoweth not the mind of man.

Some scholars profess to find in the "external standard" not merely an application to law of the pragmatic approach, but the actual germ out of which the pragmatic movement grew. The lawyers in that "Metaphysical Club" (cronically so named) at Cambridge, Massachusets may have been even more influentia than the scientists in bringing forth the generic pragmatic attitude. Certainly a case could be made for that explanation of the origins. (It is of incidental interest that Locke's *Essay on Human Understanding* originated from discussions in a similar club. Who can tell what sparks of fruitful insight will be given off at any philosophic conclave such as our own?)

Dewey and Holmes had a symbiotic relationship. Holmes greatly admired Dewey's magnum opus *Experience and Nature,* for Holmes, licke Dewey, was convinced that, after these succesful centuries science had brought about the correct way to test all our ideas. Expressing his praise and concurrence, as well as alluding to the well-known density of Dewey'style of writing, Holmes remarked that he thought God would have spoken as Dewey did had God been inarticulate. The frequent involutions of Dewey's Style has doubtless discouraged those who might otherwise have dwelt on the influence of Dewey on contemporary jurisprudence in the United States.

Proffesor Ayre, the Oxford Analyst, told me that his book on pragmatism did not include Dewey because he found Dewey too dense. Of course, Ayre, a pure logical positivist, has no use for any kind of metaphysics anyway; he finds Whitehead's later writings also dense. Dewey is like Picasso. He did not bother to prettify one innovative idea after another, leaving it to others to extrait the ore of his original thinking. It is too much to expect a pathfinder to be pellucid.

A study of Dewey's writings specifically dealing with law (as distinguished from the implications for law in his voluminous writings on politics, psychology, ethics and society) reveals that his first article on law was an essay review of Holmes's *The Common Law* and one of Dewey's last writings on law was a review of Holmes's later writings in *The New Republic.*

Dewey liked to write in popular journals of opinion. He used to say that all he wrote was for the general public as well as for his peers and, though he succeeded in this aim only sporadically, his aim was in keeping with his faith in democracy as the only form of government which made freely creative thinking possible —without which we stagnate and may perish. The method of pragmatism and the opposition to authoritarian government are integral.

Dewey's early piece on Holmes appeared in a student publication of Michigan University at which Dewey was then teaching. It is noteworthy for the great interest Dewey displayed for the anthropological material in Holmes's book *The Common Law.* Dewey was not trained in law and it is remarkable that he would try to read the book at all. As Holmes' biographer, Mark de Wolf Howe observes, it is a book wich many start but few finish. It is a tightly-wrought and difficult book which often presupposes much legal erudition. But a main thrust of the book is clear enough. Holmes traces the early beginnings of a legal principle, like liability, for example, and shows how our present legal rules have evolved out of earlier developments. The implicit positive suggestion for critical philosophic thinking emerges clearly in Holmes's later essay *The Path of the Law:* that it is monstrous to retain today a rule of law which has become outmoded and which is invoked only because it survived from earlier beginnings pertinent to social conditions which have since changed. Holmes showed the peculiar way legal principles evolved. Dewey was very receptive to the enlightenment afforded by such an anthropological and evolutionary approach. It served to make clear the need for comparable changes today which would bring law up to date in confluence with contemporary needs.

The law is a conservative institution, especially in view of the precedent theory of the common law. Both Holmes and Dewey sought to emancipate the law from its shackles to formal and mechanical modes of deductive thinking. They sought to freshen it up to keep abreast of the times by applying to it continously the pragmatic test of concrete social consequences. Rebecca West has remarked that the law consits of philosophic concepts which non-lawyers have found valid. Philosophers of law —and both Holmes and Dewey were parttime philoso-

phers of law— expose those concepts to the broader kind pof analysis which we associate with philosophic criticism.

In *The Path of the Law* this approach becomes crystal clear in Holmes's eloquent way of applying the "pragmatic maxim" (as Pierce called it) though Holmes does not explicitly refer to pragmatism. The law is nothing but a prediction of what a judge will do. The reference is prospective. There is a release of immersion in cumulative legal "dogma" as the sole preoccupation of legal thought for practitioners of law when he has a hard case in a rapidly changing society. Elbow room is available to the judge who may decide to reinterpret, or revise or redirect the law. He may resort to what Cardozo —who was influenced by Dewey—, called the "method of sociology" by which to bring the law into accord with current trends. There is, of course, much to be said about the limitations of this approach, as of any approach, and philosophers well know how to drown it in squid-black verbiage, but if we focus on the positive side, the emancipative character of the emphasis remains clear and became the inspiration for the liberations of legal realism in the late writings of Llewellyn and Frank. As Felix Cohen liked to say, philosophers may be deemed right in what they affirm and wrong in what they deny.

In one notable essay on the "corporate personality" Dewey tackles the legal materials themselves and he delve else into the history of the concept of the corporate person as well as into the orotund theories of corporate personality the legal historians, Maitland and Gierke. Dewey apologizes for the entrance into the legal discussion of a philosopher but he seeks to excuse it on the ground that the courts have gotten confused about the legal concept of the "corporate person" because it was developed over the centuries through the influence of philosophic theories, so that the purely legal effect has been obscured. Dewey demonstrate that the concept of a corporate personality is one that can be used and has been used at various times in history to justify diverse social ends. Hence it really has no truly significant legal meaning except insofar as the "corporation" is made by court decisions to do this or that thing, to be required to perform these or those consequences. As long as the courts perceive that this imposition of consequences is what they are really doing, the courts can continue to use the concept of a "legal person" for we can't easily get rid of it. But the implication is that if we were to sweep with a clean brush we should really get rid of it eventually because it does not help to get involved in the antecedent meanings of what a group having the "nature" of a person can do. A purely legal approach

to corporations would simply see what the corporation is doing and how the court decision would modify what is being done.

Dewey's essay on corporations is in line with another major essay, "Logical Method and Law", in which he calls for a pervasive application in law of his revaluation of logical theory in accordance with the "pragmatic maxim" and model of empirical experimental science (as exemplified in biology or medicine or engineering). I believe that the legal community has not yet fully examined the implications of this scientific analogy in a scientifically oriented society like ours, where enlightened thinking is as a mode which is not confined to scientist in contradistinction to older colloquial modes.

In another essay, "My Philosophy of Law", Dewey stresses that Law is throught-and-through social —in its origins, in its development and purpose, in its meaningful impact and effectiveness. The world "law" appears to be for Dewey, who avoids any definitive definition, a shorthand-expression for not only what judges do (as for Holmes) but what legislators and administrators do. Llewellyn, who was greatly influenced by Dewey, created a sensation in launching the "legal realism" movement by stating that law is simply what officials do. Both Dewey and Llewellyn thought it important to direct attention to legal "behavior" and its consequences in order to get away from immersion in hair-splitting distinctions of a pure theoretical or deductive nature which lose sight of the institutional implications and processes.

They did not mean to suggest that there were no Constitutional restraints on judges. They were thinking in sociological terms. Llewellyn had studied Weber and Sumner; Dewey's approach was that odd a social psychologist influenced by Darwin and by Boas's new anthropology, which help to form his views on law in his role as a social philosopher.

There is a widespread conviction in enlightened legal circles in the United States that their point has been made; that all sophisticated legal scholars today are already "legal realists" and there is really nothing more to be said of an evangelical nature. Indeed, Llewellyn took pains to say that legal realism was not a philosophy at all but indeed a "method" and that its vindication lay in specific studies of concrete legal problems, not in further theorizing about the obsolescence of traditional conceptualism. Th. Arnold thought legal realism had sufficiently ventilated legal scholarship which could go on to other things.

Much Anglo-American theorizing has become analytic-linguistic in recent years and one sometimes has the impression that there has

been a recurrence to the "vice" of "conceptualism" from which Holmes and Dewey tried to rescue us. The present generation of legal philosophers does not seem to be interested in saying anything which will be useful to lawyers or judges, certainly not in any immediately practicable way. There is a tendency to revert to ivory-towered and technically esoteric style of philosophizing concentrating on dialectic and language, from which Dewey sought to emancipate philosophy and Lewellyn and Jerome Frank sought to emancipate law. At this time of renewed interest in legal philosophy it may be salutary and chastening to pause in the midst of such fine-spun distinctions to remind ourselves of our bearings. As Dewey said at mid-century, pragmatism was a "deep, moving cultural current" when America "was full of hope infused with courage". But there ensued a "loss of nerve" and he said, we may wish to recall the "wandering thoughts of American teachers of philosophy to the creative movement to which they belong as Americans, whatever school they belong to professionally". (Foreword to Wiener, *Evolution and the Founders of Pragmatism*.)

It is the fruit and not the roots which count but the pragmatic roots steady us and give us points of reference which we still need so as to avoid the kind of obscure and cloudy thinking which afflicts so much of philosophy and law. Both instrumentalism and legal realism emphasize that they deem their method to be perennially pertinent. It may indeed always be pertinent but we nonetheless need to be reminded of it from time to time.

Whitehead once remarked that there are two kinds of minds: the muddle-headed and the simple-minded. Though I studied Philosophy with Dewey and Law with Llewellyn and neither of then can be called simple-minded, I have tried in this comment on Dewey and Holmes to avoid muddle-headedness. Doubtless I have fallen into the opposite trap.

But there is so much markiness in the writings on both law and philosophy that I prefer to err on the side of simplification in order to reach for a wide response.

It is not chauvinism to suggest that each nation or legal community should work in the light of its own traditions (haw can it help it?) while contributing to the symphony of worldwide need for recognition of law as the principle of economic, political and cultural life in the contemporary world —which is the theme of this Conference.