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LAW, CHINA AND JOHN DEWEY

Walter J. Kendall III[†]

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INTRODUCTION

John Dewey was America's premier public intellectual for almost 50 years. He was born in the atypical small New England industrial town of Burlington, Vermont on October 20, 1859,¹ and died in New York at the age of 92 on June 1, 1952.²

Dewey studied at the University of Vermont and upon graduation taught high school for three years.³ He published his first philosophic essay during these years.⁴ He received his Ph.D. from Johns Hopkins and began his academic career at the University of Michigan.⁵

After a brief period at Minnesota, and several additional years at Michigan, in 1894 he began his connection with the University of

† Professor of Law, The John Marshall Law School, Chicago, Illinois. Thanks to Harriet Simon of the Center for Dewey Studies and Sally Drake of the University of Hawaii Library for help in getting started in Dewey's papers. A special thanks to Professor Barry Keenan for his early comments which encouraged me to persist with this project. Professors Allen Kamp, Sandy Olken, John Scheid, Mike Seng and Julie Spanbauer read drafts of the essay and made helpful comments. I thank them also. The Appendix is reproduced with the permission of the Law School Library of Columbia University.

1. ROBERT B. WESTBROOK, *JOHN DEWEY AND AMERICAN DEMOCRACY* 1 (1991).
2. *Id.* at ix.
3. *Id.* at 5-8.
4. *Id.* at 8.
5. *Id.* at 8-9.

Chicago.⁶ It was there he made his reputation as a progressive educator through his work at the Laboratory School.⁷

As a result of a dispute about the direction of the Laboratory School, Dewey left Chicago in 1905 and joined the Columbia University faculty.⁸ There he formalized the pragmatic philosophy and assumed a leadership position as a public intellectual.⁹ He engaged in titanic philosophic and political clashes with, among others, Bertrand Russell over the nature of truth,¹⁰ Randolph Bourne over America's entry into World War I,¹¹ Walter Lippman over the nature of and possibilities for democracy,¹² Lewis Mumford over culture and aesthetics,¹³ Franklin D. Roosevelt over economic reform,¹⁴ and Reinhold Niebuhr over the role of ideals in human society.¹⁵

John Dewey played a significant role in founding the American Association of University Professors, the New School for Social Research, and the American Civil Liberties Union.¹⁶ In other words, not too much happened in the first half of the 20th century in American intellectual life that Dewey did not influence. His influence continues to this day.

Dewey said that law is the "most nearly central idea" of his political philosophy and that his two years in China were the "most interesting and intellectually the most profitable thing" he ever did.¹⁷ Yet little has been written about either. Despite the interest in legal pragmatism, almost no attention has been paid to Dewey's views on the law and legal institutions, and none at all to the significance of his China experience to his legal views. This essay is intended to open a discussion on these matters. They are important to both jurisprudence and Dewey studies.

Dewey was a prolific writer. His collected works number in the hundreds. If that is not daunting enough, his style adds to the challenge of comprehending and summarizing his thought. Oliver Wendell

6. WESTBROOK, *supra* note 1, at 59.

7. WESTBROOK, *supra* note 1, at 96-97.

8. WESTBROOK, *supra* note 1, at 111-13.

9. WESTBROOK, *supra* note 1, at 120-22.

10. WESTBROOK, *supra* note 1, at 136-37.

11. WESTBROOK, *supra* note 1, at 196-97.

12. WESTBROOK, *supra* note 1, at 294-300.

13. WESTBROOK, *supra* note 1, at 380-87.

14. WESTBROOK, *supra* note 1, at 449-51.

15. WESTBROOK, *supra* note 1, at 523-32.

16. WESTBROOK, *supra* note 1, at 278.

17. GEORGE DYKHUIZEN, *THE LIFE AND MIND OF JOHN DEWEY* 205 (1973).

Holmes described *Experience and Nature*, perhaps Dewey's most important book, as "incredibly ill written."¹⁸ He thought Dewey wrote as "God would have spoken had He been inarticulate but keenly desirous to tell you how it was."¹⁹

The difficulty of understanding Dewey's writing may be a function of the fact that he was "perhaps the most cheerfully eclectic thinker ever to be taken seriously as a philosopher. Dewey borrowed from Emersonian transcendentalism, evolutionary Darwinism, Marxian socialism, fundamentalism, and Christian Capitalism with a fine and even exciting disregard of logic and consequences."²⁰

Due to the resulting density, if not opacity, of his writing I've tried to both present extensive quotes and clarifying summaries. I may not have succeeded in the latter but I'm sure this essay foregrounds Dewey's most central idea in the context of his most intellectually important experience. It should, therefore, be a resource to others studying Dewey and legal pragmatism.

The period from the failure of the Boxer Rebellion to the end of the 1930's was one of great ferment in China, especially intellectual ferment; so much so that the period has been called "the Chinese Enlightenment."²¹ Much of that ferment revolved around the debate about the relevance of western views to Chinese modernization. Several western political-economic classics had been translated and many Chinese scholars had been to the west for advanced education, emerging as "new intellectuals."²²

During this period, many western writers and scholars visited China.²³ The most significant visitor for American law was John Dewey.²⁴ John Dewey spent over two years in China, from May 1,

18. WESTBROOK, *supra* note 1, at 341.

19. WESTBROOK, *supra* note 1, at ii.

20. WILLIAM APPLEMAN WILLIAMS, *THE CONTOURS OF AMERICAN HISTORY* 402 (1966) (paper ed. 1988).

21. VERA SCHWARZ, *THE CHINESE ENLIGHTENMENT: INTELLECTUALS AND THE LEGACY OF THE MAY FOURTH MOVEMENT OF 1919* (paper ed. 1986).

22. *Id.* at 55-93.

23. These included Teilhard de Chardin and Bertrand Russell. *See id.* at 8.

24. Frank J. Goodnow, an administrative law expert, and W.W. Willoughby, a constitutional scholar, had advised the Chinese government earlier in the century. *See* ANDREW NATHAN, *PEKING POLITICS 1918-1923—FACTIONALISM AND THE FAILURE OF CONSTITUTIONALISM 19-20* (1976).

1919, to July 11, 1921.²⁵ During this time, his views on law as an element of democratic praxis germinated. They bloomed later.

Dewey's time in China is a period of reflection and renewal. He was recovering from the coming of the First World War, the failure of the Wilson administration, and the criticisms to his basic views—especially by Randolph Bourne.²⁶ During this period of recovery, he formulated his first fleshed-out statements of what was to become his democratic-socialism.²⁷

As a result of its significance to Dewey's thought, and in light of the current revival of interest in his views and pragmatism generally within the law,²⁸ it seems useful to present Dewey's views on law during this period. While others have written of this period, no one has focused specifically on Dewey's views of the law,²⁹ and as Robert Westbrook noted, "virtually no one interested principally in Dewey's social philosophy and political activism pays much attention to these texts."³⁰

25. These are the usual dates given to Dewey's visit. See JOHN DEWEY LECTURES IN CHINA, 1919-1920, at 3 (Robert W. Clopton & Tsuin-Chen eds., 1973). However, George Dykhuizen, in his biography, puts Dewey's arrival in China on April 30. See DYKHUIZEN, *supra* note 17, at 195.

26. See, e.g., BARRY KEENAN, THE DEWEY EXPERIMENT IN CHINA—EDUCATIONAL REFORM AND POLITICAL POWER IN THE EARLY REPUBLIC 132-35 (1977); WESTBROOK, *supra* note 1, at 231-40.

27. See WESTBROOK, *supra* note 1, at 429-30. Alan Ryan, in his biography, of Dewey disputes Westbrook's characterization and considers Dewey what, in Britain, is called an advanced liberal. ALAN RYAN, JOHN DEWEY AND THE HIGH TIDE OF AMERICAN LIBERALISM 88 (1995).

28. See generally Symposium, *The Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990); Richard Warner, *Why Pragmatism? The Puzzling Place of Pragmatism in Critical Theory*, 1993 U. ILL. L. REV. 535; MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY (1992), which has been called a "return to legal history of the richer, more nuanced Deweyan conception of social change . . ." James T. Kloppenberg, *The Theory and Practice of American Legal History*, 106 HARV. L. REV. 1332, 1339 (1993) (book review).

29. See generally KEENAN, *supra* note 26, which has been called "the best account of Dewey's visit to China." WESTBROOK, *supra* note 1, at 244 n.22; Wayne A.R. Leys, *Dewey's Social, Political, and Legal Philosophy*, in GUIDE TO THE WORKS OF JOHN DEWEY 131 (Jo Ann Boydston ed., paper ed. 1970). Aside from noting Dewey's "persistent prejudice" against "adversary procedures," the article focuses on Dewey's social and political views. *Id.* at 145.

30. WESTBROOK, *supra* note 1, at 320 n.2.

I. DEWEY'S THEORY OF LAW

Dewey recognized the importance of theory; but he insisted that humans

do not construct theories—about our customs and habits and institutions until some sort of difficulty or obstruction raises questions in our minds about the ways in which we have been carrying on our group activities. It is always the social institution which precedes the theory; not the theory which precedes the institution.³¹

He asks which effects theory has after it has been formulated. “The extreme idealist emphasizes the ideal, holding everything results from theory. . . . The extreme materialist, on the other hand, holds that a theory is an effect, not a cause.”³²

But what about his view? According to Dewey, it is incomplete to say that

hypotheses and theories are, in their initial stages, the results rather than the causes of practice. [Because]—and this is the essential difference from the two points of view discussed earlier—as soon as an hypothesis is formed, or a theory begins to take shape, no matter how crude, it becomes sort of the practice which produced it.³³

It is all well and good to describe theory and practice as elliptically related, but can the function or effect of theory be more precisely identified? Dewey, admitting some oversimplification, finds all social and political theories reducible to two functions. “The first function of theory is to give permanence to that which is initially temporary or accidental, to provide stability for ways of thinking and doing which are wavering and shaky.”³⁴ The other function, “particularly in those cases in which theory constitutes an ideal, is that in time of crisis it can

31. John Dewey, *The Function of Theory*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 45.

32. John Dewey, *The Function of Theory*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 48.

33. John Dewey, *The Function of Theory*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 49.

34. John Dewey, *The Function of Theory*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 50.

generate facts and cause people to sacrifice their property, and even their lives, for something in which they believe deeply."³⁵

Thus, theory is not a verbal formulation of some truth; rather, it is functional as both means and end. This view means there must be an emphasis in all thinking, whether as theory or action, on experimentation, on individual events, and on social change.³⁶

To clarify his view, Dewey distinguishes between pure science, which can be studied only with the attitude of a spectator, and applied science, where the observer is "one of [the] components" of that which is observed.³⁷ Dewey says "all social sciences are applied sciences."³⁸

The reason for dwelling on Dewey's view of theory is because it seems that if one substitutes the word "law" for "theory" the statements become accurate descriptions of his views of law.³⁹ This is not as surprising as it might otherwise seem because, in Dewey's view, legal codes or rules are 'tools' for analyzing a special situation, the right or wrong being determined by the situation in its entirety, and not by the rule as such.⁴⁰ To see this more clearly, we must first elaborate Dewey's views of life in society. "[P]eople with common interests naturally form themselves into groups No group is independent and isolated, and no person is ever a member of only one group. . . . Society is in a state of imbalance because these many groups do not and cannot develop equably."⁴¹ In other words, "society is composed of many groups of people, not merely of individuals in the aggregate. From this definition follows the definition of social conflict as disparity

35. John Dewey, *The Function of Theory*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 50.

36. John Dewey, *Science and Social Philosophy*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 58.

37. John Dewey, *Science and Social Philosophy*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 59.

38. John Dewey, *Science and Social Philosophy*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 59.

39. Compare Gail Kennedy, *Dewey's Logic and Theory of Knowledge*, in GUIDE TO THE WORKS OF JOHN DEWEY, *supra* note 29, at 61 ("For Dewey the paradigms of all inquiry would be the way we deal with a case in law.") with DYKHUIZEN, *supra* note 17, at 50 (emphasizing that Dewey does not rely upon precedent, but upon consequences).

40. John Dewey, *Political Liberalism*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 141.

41. John Dewey, *Social Conflict*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 65-66.

among the interests sought by groups of people.”⁴² This does not mean that one group will not dominate others; but as was said above, individuals are members of more than one group so there is the possibility of an escape from the domination. Both within each group and in relations between groups, some kind or form of organization, some rules and regulations, some governance of behavior, is necessary to deal with this inevitable conflict. Dewey believed “only in a democracy can collective ethical estimates be effectively translated into positive legal codes.”⁴³ This makes law “the most nearly central” idea of political and social philosophy.⁴⁴ And “the function of law . . . [becomes] to direct the use of force into channels such that, when translated into physical manifestations, the possibility of conflict is reduced and the danger of wasted energy is obviated.”⁴⁵

Dewey sees the quest for law in human nature. “[B]ecause human beings require justice . . . [w]hen two [people] come into conflict, they must find a third person to decide who is right. . . . for it is difficult for people to be fair in their judgments when they are themselves involved in dispute.”⁴⁶ Obviously, if one of the disputants is able to choose, and to impose its views through force, then there is no law.⁴⁷

In another lecture discussing the rights of individuals, Dewey says there “are two main functions of law: first, people are granted a number of rights by law; and second, law imposes upon people a

42. John Dewey, *Social Reform*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 73. These views are not to be confused with interest group liberalism. Even a critic acknowledges that Dewey drew “distinctions” and had “reservations” about what is usually understood by that term. See DONALD R. BRAND, *CORPORATION AND THE RULE OF LAW—A STUDY OF THE NATIONAL RECOVERY ADMINISTRATION 49-52* (paper ed. 1988). Dewey may be understood to distinguish between groups defined by social-political goals pursued (e.g., NOW, NAACP, NAM) and groups defined by political-economic functions (e.g., farmers, bankers). See Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. (forthcoming 1996).

43. John Dewey, *Social Reform*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 73.

44. John Dewey, *The State*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 125.

45. John Dewey, *The State*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 128.

46. John Dewey, *The State*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 130.

47. John Dewey, *Nationalism and Internationalism*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 158. See also John Dewey, *Justice and Law in China*, in CHARACTERS AND EVENTS: POPULAR ESSAYS IN SOCIAL AND POLITICAL PHILOSOPHY 244, 246-48 (1929).

number of obligations.”⁴⁸ In other words, “the law prescribes the scope or range of behavior—the things a person may do, those he must do, and those he must not do.”⁴⁹ Both formulations obviously sound like a denial of natural rights, but that would be an incorrect understanding of Dewey’s view. He identifies three categories of rights: personal or natural, civil, and political.⁵⁰

“Personal rights are those which belong to an individual as a person.”⁵¹ The four fundamental personal rights are: the right to life, the right of movement, the right of property ownership, and the right to make contracts. These rights precede the state and are, in a sense, those powers that are constitutive of society.

Civil rights “define relations which exist among people in a given society, but they also define the relationship between the people and their government.”⁵² In a sense, these are process rights and they “are derived from personal rights.”⁵³

“Political rights are the most basic of all rights.”⁵⁴ “It is only when people are granted their political rights that their enjoyment of [personal and civil rights] can be guaranteed.”⁵⁵ Furthermore, “the most important single one of [the] political rights is the right of suffrage.”⁵⁶

48. John Dewey, *The Rights of Individuals*, in *JOHN DEWEY LECTURES IN CHINA*, 1919-1920, *supra* note 25, at 148.

49. John Dewey, *The Rights of Individuals*, in *JOHN DEWEY LECTURES IN CHINA*, 1919-1920, *supra* note 25, at 148.

50. Alan Bloom’s criticism of Dewey fails to acknowledge Dewey’s triad of rights. Bloom says:

Liberalism without natural rights, the kind that we knew from [John Stewart Mill] and John Dewey, taught us that the only danger confronting us is being closed to the emergent, the new, the manifestations of progress. No attention had to be paid to the fundamental principles or the moral virtues that inclined men to live according to them. To use language now popular, civic culture was neglected.

ALAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 29-30 (1987).

51. John Dewey, *The Rights of Individuals*, in *JOHN DEWEY LECTURES IN CHINA*, 1919-1920, *supra* note 25, at 150.

52. John Dewey, *The Rights of Individuals*, in *JOHN DEWEY LECTURES IN CHINA*, 1919-1920, *supra* note 25, at 150.

53. John Dewey, *The Rights of Individuals*, in *JOHN DEWEY LECTURES IN CHINA*, 1919-1920, *supra* note 25, at 149.

54. John Dewey, *The Rights of Individuals*, in *JOHN DEWEY LECTURES IN CHINA*, 1919-1920, *supra* note 25, at 150.

55. John Dewey, *The Rights of Individuals*, in *JOHN DEWEY LECTURES IN CHINA*, 1919-1920, *supra* note 25, at 150.

56. John Dewey, *The Rights of Individuals*, in *JOHN DEWEY LECTURES IN CHINA*, 1919-1920, *supra* note 25, at 151.

Dewey then emphasizes

that the rights and powers we are discussing have no meaning if we choose to consider the individual apart from the society and the state It is absolutely fundamental that the concept of individual rights be considered with reference to the society which grants them and to the state, which, through the agency of law, enforces them.⁵⁷

Dewey does not limit rights to "negative liberty."⁵⁸ It should be clear from the above that this is so. If not, he makes it clear.

Another way of saying the same thing is that the problem has changed from that of seeking individual rights themselves to one of seeking the opportunity to exercise these rights; the goal is no longer stated as "a person should have such and such a right," but rather, "he should be provided with such and such an opportunity to exercise his rights."⁵⁹

In talking about the 'agency of law' which enforces these rights, Dewey has in mind both procedural and substantive dimensions. Procedurally, he sees the law as an expression of the general will of the majority. He sees the legal standard coming into being through "public investigation, discussion, and amendments."⁶⁰ Dewey sees the law as rational or "scientific,"⁶¹ rather than tradition, custom or habit.

This notion is made even clearer in another lecture where Dewey explains what he means by democracy. He identifies and then elaborates on four types:

(1) *political democracy*: The power of government is restricted and regulated by the constitution, and the common will of the people is expressed through their elected representatives.

(2) *democracy of rights*: All the people are guaranteed certain rights, such as freedom of speech, freedom of publication, freedom of religion, freedom of movement, and others.

57. John Dewey, *The Rights of Individuals*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 151.

58. See ISAIAH BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 118 (1969).

59. John Dewey, *The Rights of Individuals*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 152.

60. John Dewey, *The Rights of Individuals*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 147.

61. John Dewey, *The Authority of Science*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 167.

(3) *social democracy*: Democracy implies equality and demands the abolition of unequal social distinctions; it calls for equality of persons before the law and in personal relationships.

(4) *economic democracy*: Democracy demands the right of every [person] to a decent standard of living, and aims at the progressive elimination of marked differences in the enjoyment of resources by the rich and the poor.⁶²

Dewey recognized the Jeffersonian ideal about the least and best government, but argued that with the exhaustion of “free land” and “the emergence of unequal social classes,” “the American people have learned that the true function of government is to serve people [and] that the ideal of equality can be achieved only through the instrumentality of government.”⁶³

Dewey was quite explicit that “a little reflection will enable us to see that the roots of the problem we face today and the fact that it becomes ever more pressing, lie in the development of factories.”⁶⁴ Dewey was not rejecting modern industrialism; rather, he was emphasizing that fundamental change in economic circumstances requires reassessment of previous certitudes.⁶⁵

Thus, the political-economic changes and the resulting ideological changes required that the questions of “how can there be public order without there being a monarch or some other form of coercive government” and “by what means can we promote the loyalty of individuals to society” had to be addressed.⁶⁶ In other words, how can society and government be structured so that the natural or essential fellow-feeling of individuals is able to function fully?

Dewey saw transportation and communication, nationalism, voluntary organizations, and education as “the methods by which the American people have approached—and are still approaching” this question.⁶⁷

62. John Dewey, *Backgrounds and General Characteristics of American Democracy*, Lecture Delivered in Peking 3 (June 1919) (transcript on file with author).

63. John Dewey, *Freedom, Equality, Individualism and Education in American Democracy*, Lecture Delivered in Peking 18-19 (June 1919) (transcript on file with author).

64. John Dewey, *Vocational Education and The Labor Problem* 47 (Apr. 30, 1920) (transcript on file with author).

65. John Dewey, *The Scientific Spirit and Morality*, Lecture Delivered at the Kwangtung Provincial Education Association 53 (July 1921) (transcript on file with author).

66. John Dewey, *The Social Aspects of American Democracy*, Lecture Delivered in Peking 25 (June 1919) (transcript on file with author).

67. *Id.*

As Dewey developed his larger democratic notions of the relationship between the state, government, law, and rights, he identified “public opinion [as] the supreme power by which the government of a democratic country rules; it plays the ultimate role.”⁶⁸ This view is not a naive one. Dewey, even at this point, before *Lippman's Public Opinion* (1922) and his own *The Public and Its Problems* (1927), recognized both that opinions were not exogenous, and that there was no automatic transmission of opinions into public policy. In fact, he labeled the governmental law-making bodies as “of secondary importance.”⁶⁹ It was education which was of primary importance.⁷⁰

Dewey recognized that “it is impossible for the government to know the needs of all the people.”⁷¹ He saw, as an essential of democratic politics, that “rights exist only where people are willing to struggle for them.”⁷² In other words, he saw democracy as essentially a struggle.⁷³ His sense was that “democratic politics, in any full sense of the term, is still in its beginning stages.”⁷⁴

This sense of infancy and uncertain development caused Dewey to see many difficulties, especially with the “state”—even a democratic one. He saw law as central to good government, but he also saw it as

68. John Dewey, *The University and Public Opinion in a Democracy*, Lecture Delivered at National Peking University on the twenty-second anniversary of its founding 34 (Dec. 1919) (transcript on file with author).

69. *Id.*

70. *Id.*

71. John Dewey, *The Meaning of Democracy*, Lecture Delivered at the Fukien Shang-yu Club 64 (July 1921) (transcript on file with author).

72. John Dewey, *The Essentials of Democratic Politics*, Lecture Delivered at the Private Fukien College of Law and Administration 68 (Spring 1921) (transcript on file with author).

73. This statement is similar to a core view of Justice Holmes. Dewey and Holmes are regularly characterized as pragmatists (for such a characterization of Holmes, despite acknowledging serious difficulties, see Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 *STAN. L. REV.* 787 (1989)). Assuming Dewey was a pragmatist, it is only by reducing pragmatism (Dewey) to a mere methodology, by ignoring Dewey's specific rejection of Holmes' “bad man” notion (see JOHN DEWEY, *THEORY OF THE MORAL LIFE* 139 (paper ed. 1980)), by finding no significance in the fundamental difference as to the locus of authority between Holmes (the state) and Dewey (the demos), and by ignoring their differences on the relationship between law and morals (Holmes—separation; Dewey—intrinsic) (for Holmes, see HORWITZ, *supra* note 28, at 109-43; for Dewey, see WESTBROOK, *supra* note 1, at 415) that Holmes and Dewey can be lumped under the same label. This, despite Dewey's enthusiastic embrace of Holmes' experimentalism. Dewey, *Justice and Law in China*, *supra* note 47, at 100-06; see also Yosai Rogat, *The Judge as Spectator*, 31 *U. CHI. L. REV.* 213, 251 r.194 (1964) (I want to thank Prof. Grey for this additional reference).

74. Dewey, *The Essentials of Democratic Politics*, *supra* note 72, at 69.

“always a means, never an end in itself.”⁷⁵ He saw law as “viable and effective only when people understand and accept the spirit and purpose of the enactments.”⁷⁶ Dewey clearly distinguished the rule of men from the rule of law.⁷⁷ He saw the risk of the rule of men as capricious. He saw the risk of the rule of law, which otherwise is better (in part because “obviously any sort of social organization can function effectively only when certain rules or laws are observed”⁷⁸), as greater because it tended toward authoritarianism.⁷⁹

“A sine qua non for government of law is public opinion.”⁸⁰ A proper rule of law recognizes “the necessity for public consensus.”⁸¹ Dewey, however, recognizes that consensus is not unanimity and posits struggle and conflict as the norm. He looks to majority rule. The rule of law developed must meet the procedural and substantive criteria mentioned earlier.⁸²

The ideals of consensus and discussion that Dewey praises are not the descent into discourse to which much modern theory leads.⁸³ Dewey’s idealism was Platonic, but activist. “Plato was saying that we must not only have ideals, but that we must put them into practice. Aristotle differed from his teacher on this, as on other points. For him the activity of contemplation was the ultimate good of life.”⁸⁴ While Dewey acknowledged “that Aristotelian logic, with its emphasis on systematization and classification, is the most important single development in the history of thought,”⁸⁵ thought alone could not find truth; action was a necessary dimension of truth seeking.

Thus, while he was an idealist, Dewey emphasized the empiricist dimensions of these problems. “In Locke’s philosophy only the individual person has the status of real existence; society and the state are merely convenient abstractions created by the operations of human

75. John Dewey, Student Government 71 (July 1920) (transcript on file with author).

76. *Id.*

77. *Id.* at 72.

78. *Id.* at 71.

79. *Id.* at 72.

80. Dewey, Student Government, *supra* note 75, at 73.

81. Dewey, Student Government, *supra* note 75, at 73.

82. John Dewey, The Real Meaning of Democratic Education 92 (June 1920) (transcript on file with author).

83. See generally BRYAN D. PALMER, DESCENT INTO DISCOURSE—THE REIFICATION OF LANGUAGE AND THE WRITING OF SOCIAL HISTORY (1990).

84. John Dewey, Aristotle and the Modern World, Lecture Delivered at Nanking Teachers College 123 (1920) (transcript on file with author).

85. *Id.*

intellect; law, morality and other concepts are likewise artificial generalities or universals brought into being by mind through its function of abstraction.”⁸⁶ Again, action is ultimately the key. “There is [a] grave fault in empiricism, which is its view of experience as being passive rather than active.”⁸⁷ Clearly then, Dewey recognizes an essential role for theory: “the use of a general principle or *law* is to organize chaotic masses of facts, to systematize them, to connect them, and to make it possible for meanings to be derived from them,”⁸⁸ but in the end, “action is the test of the truth or validity of observation and inference.”⁸⁹

Fundamental to the Deweyan scheme is the conviction that human nature is malleable, “that human nature is modified by institutions.”⁹⁰ What this means is that the law modifies human nature, i.e., that it is educative.⁹¹ For Dewey, “the role of democratic institutions [including law] is to link freedom and fraternity.”⁹²

Law does that—links freedom and fraternity—by performing all of the functions discussed:

- gives permanence to that which is initially temporary or accidental; provides stability for ways of thinking and doing which are wavering and shaking;
- generates faith in times of crises and causes people to sacrifice their property and even their lives for something in which they believe deeply;
- directs the use of force into channels such that, when translated into physical manifestations, the possibility of conflict is reduced and the danger of wasted energy is obviated;
- grants rights and imposes obligations—in other words prescribes the scope or range of behavior—the things a person may do, those he must do, and those he must not do;
- serves as the agency of the state for the enforcement of rights.

86. John Dewey, *Characteristics of Locke's Thought*, Lecture Delivered at National Peking University 175 (1919) (transcript on file with author).

87. *Id.*

88. John Dewey, *Experimentalism, Answer to the Conflict Between Empiricism and Rationalism*, Lecture Delivered at National Peking University 191 (1919) (transcript on file with author) (emphasis added).

89. John Dewey, *Characteristics of Experimentalist Thought*, Lecture Delivered at National Peking University 201 (1919) (transcript on file with author).

90. John Dewey, *The Essence of a Democratic Institution*, Lecture Delivered in Peking 226 (1919-1920) (transcript on file with author).

91. *Id.* at 227.

92. *Id.* at 228.

In another lecture, Dewey discusses the concept of justice and elaborates his view of rights. It is in this lecture that Dewey is most clear about the creative or affirmative function of the law. While it is difficult to formulate a precise definition of right, it is clear enough that "it refers to something not susceptible to interference or abrogation; it is something which everyone is entitled to have by virtue of his being human."⁹³

As regards justice, Dewey links it to rights by law. "The purpose of the law is to insure justice; we might say that justice is embodied in the law. . . . [J]ustice means the maintenance of and respect for others rights."⁹⁴

Rights become the law before they

gain universal acquiescence to the fact that the right actually is a right and that it pertains to all It is this second step which replaces inequality with equality [and] the equality of which we speak is equality before the law; and this implies the necessity of using the law to compensate for the inequalities of natural endowment, so that these inequalities are not accentuated and multiplied. Our law must provide safeguards against the suppression of the weak by those who are strong, the domination of the ignorant by those who [are] endowed with high intelligence.⁹⁵

So we have arrived at the ideal of "associated living . . . the highest ideal of social development."⁹⁶ Its foundation is the "free participation by each member of the society in setting its goals and purposes, full and willing contribution by each person toward the fulfillment of those goals."⁹⁷

Thus, it seems clear that a democratic, equalitarian and participatory system in which law is the central idea, is Dewey's ideal.

II. CHINA—INFLUENCED AND INFLUENCES

As indicated, China has long debated what use, if any, to make of western ideas.

93. John Dewey, *The Concept of 'Right' in Western Thought*, Lecture Delivered at Chinese University, Peking 39 (Jan. 20, 1920) (transcript on file with author).

94. *Id.* at 40.

95. *Id.* at 42-43.

96. John Dewey, *Criteria for Judging Systems of Thought*, in JOHN DEWEY LECTURES IN CHINA 1919-1920, *supra* note 25, at 89.

97. John Dewey, *Communication and Associated Living*, in JOHN DEWEY LECTURES IN CHINA 1919-1920, *supra* note 25, at 98.

When “the first country to be gripped by the industrial revolution [Britain] and the most brilliant of all civilizations rooted in custom [China]”⁹⁸ encountered each other at the end of the 18th century, Britain was seeking an exchange of technologies, normalization and extension of trade, improved living circumstances for Europeans resident in China, and a permanent British embassy in the capital. China’s formal response was set forth in an edict of the Emperor that has been described as “the single most remarkable and important document in Chinese-Western relations from Marco Polo to Deng Xiaoping.”⁹⁹

The entire document, because of its singularity and significance, should be read. I hope the following excerpts convey its imperiousness.

We, by the Grace of Heaven, Emperor, instruct the King of England to take note of our charge.

Although your country, O King, lies in the far oceans, yet inclining your heart towards civilization, you have specially sent an envoy respectfully to present a state message, and sailing the seas, he has come to our Court to kowtow and to present congratulations for the imperial birthday, and also to present local products, thereby showing your sincerity.

We have perused the text of your state message and the wording expresses your earnestness. From it your sincere humility and obedience can clearly be seen. It is admirable and we fully approve. . . .

The Celestial Empire, ruling all within the four seas, simply concentrates on carrying out the affairs of government properly, and does not value rare and precious things. Now you, O King, have presented various objects to the throne, and mindful of your loyalty in presenting offerings from afar, we have specifically ordered the Department of Foreign Tribute to receive them. In fact, the virtue and power of the Celestial Dynasty has penetrated afar to the myriad kingdoms, which have come to render homage, and so all kinds of precious things from over mountain and sea have been collected here, things which your chief envoy and others have seen for themselves. Nevertheless we have never valued ingenious articles, nor do we have the slightest need of your country’s manufacturers. Therefore, O King, as regards your request to send someone to remain at the capital, while it is not in harmony with the regulations of the Celestial Empire, we also feel very much that it is of no advantage to your country. Hence we have issued these detailed

98. ALAIN PEYREFITTE, *THE IMMOBILE EMPIRE*, at xvii (1992).

99. *Id.* at 292.

instructions and have commanded your tribute envoys to return safely home. You, O King should simply act in conformity with our wishes by strengthening your loyalty and swearing perpetual obedience so as to ensure that your country may share the blessings of peace. . . .

Let the King reverently receive them and know our kind regard for him.¹⁰⁰

By the end of the next century, after the defeats in the Opium Wars and the Boxer Rebellion, much of the Chinese elite had come to believe that the west had something that accounted for its strength—something China might be able to adapt and use. The view of the western thought was that it was evolutionary, pluralist, and constitutional. This perception was based in large measure on the availability in Chinese translation of Huxley's *Evolution and Ethics*, Smith's *Wealth of Nations*, Mills' *On Liberty*, Montesquieu's, *Spirit of the Laws*, Jenks' *History of Politics*, and Mills' *Logic*.¹⁰¹

In 1906, the Imperial Court issued an edict directing concrete review of western views.

That other countries are wealthy and strong is primarily due to the adoption of a constitution, by which all people are united in one body and in constant communication, sane and sound opinions are extensively sought after and adopted, powers are well divided and well defined, and financial matters and legislation are discussed and decided upon by the people.¹⁰²

It was too late. In 1911, a Republic was proclaimed. It faced, however, serious and violent challenges externally as well as internally. Relations with Japan continued to be violent. Internally "between 1915 and 1922 there were ten major civil wars."¹⁰³ Despite all the violence and attendant uncertainty, China's elite pursued the Emperor's opening to the west. It was into these circumstances at the end of World War I that Dewey arrived in China.

The originality and significance of Dewey's lectures and letters while in China has been diminished. Barry Keenan states more than

100. *Id.* at 289-92.

101. See generally BENJAMIN I. SCHWARTZ, IN SEARCH OF WEALTH AND POWER: YEN FU AND THE WEST (paper ed. 1964). Byron, Shelley, Pushkin, Gogol and Mickiewicz were also translated at that time. See JONATHAN D. SPENCE, THE GATE OF HEAVENLY PEACE: THE CHINESE AND THEIR REVOLUTION, 1895-1980, at 102 (paper ed. 1981).

102. NATHAN, *supra* note 24, at 4.

103. CHOW TSE-TSUNG, THE MAY FOURTH MOVEMENT—INTELLECTUAL REVOLUTION IN MODERN CHINA (1960).

once that Dewey was merely articulating the views of his “sponsors.”¹⁰⁴ Keenan finds Dewey’s ideas in China merely derivative. He says Dewey’s “judgments . . . repeated almost verbatim the evaluation Hu Shih made and published in Chinese at the time.”¹⁰⁵ Ultimately, he dismisses the entire Chinese experience as solipsism, “John Dewey had heard echoes of his own voice in China, and seen refracted images he knew well through his followers.”¹⁰⁶

Even Robert Westbrook, who otherwise recognizes that “the lectures Dewey delivered in China on social and political philosophy are particularly important,”¹⁰⁷ concludes that “[d]espite the warm reception Dewey received in China and the wide circulation his ideas were given by Chinese liberals, the impact of his social theory on China was limited. It was a theory decidedly inappropriate to Chinese conditions, and its weaknesses were quickly apparent to many Chinese radicals.”¹⁰⁸ Westbrook also cites a letter of Dewey’s, written from China, in which Dewey asserts that the China experience was teaching him a lot, even if “Chinese civilization is so thick and self-centered that no foreign influence presented via a foreigner even scratches the surface.”¹⁰⁹

A. *Dewey’s Impact on China*

In my opinion, Keenan, Westbrook, and Dewey himself are wrong on the question of his impact on China. In fact, “his influence on education was original, decisive, lasting. Not only in China . . . Its greatest impact was in China.”¹¹⁰

As to political-economic matters, while it is correct that “[a]n accurate assessment of Dewey’s influence on China is impossible,”¹¹¹ the intensity of both Communist and Nationalist criticisms of Dewey over 30 years after he left China suggests that his influence was

104. KEENAN, *supra* note 26, at 42.

105. KEENAN, *supra* note 26, at 50.

106. KEENAN, *supra* note 26, at 158.

107. WESTBROOK, *supra* note 1, at 244.

108. WESTBROOK, *supra* note 1, at 244.

109. WESTBROOK, *supra* note 1, at 250 n.25. For a description of life in Beijing at this time, see DAVID STRAND, RICKSHAW BEIJING—CITY PEOPLE AND POLITICS IN THE 1920’S (1989).

110. KEENAN, *supra* note 26, at 1.

111. JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 10.

somehow palpable.¹¹² Clopton and Tsuin-Chen assert flatly that “[f]rom 1919 until 1927, Dewey’s influence was dominant in Chinese thought There is no question that Dewey’s philosophy represented the mainstream of Chinese thought during this period.”¹¹³ In fact, “in the early period of the May Fourth Movement, pragmatism, skepticism, and agnosticism were the principle critical approaches found in the reformers’ attack on traditional ethics and ideas.”¹¹⁴ And the May Fourth Movement “which is commemorated at Beida [Bejing University] by a simple stone monument that intertwines the letters D and S—Democracy and Science,”¹¹⁵ has “remained a shining symbol for all later stages of the Chinese democracy movement.”¹¹⁶ Thus, it seems clear that Dewey has had, and continues to have, a real influence in China.¹¹⁷

B. *China’s Influence on Dewey*

China’s influence on Dewey’s ideas has not been given enough attention.¹¹⁸ Keenan suggests the “influence . . . ran in one direction [only]—from Dewey to China.”¹¹⁹ Obviously, spending two years in a foreign land, as different from the U.S. as China is, had to influence Dewey in some significant way. Dewey considered China “the country

112. JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 17-19; DYKHUIZEN, *supra* note 17, at 204.

113. JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 25; RYAN, *supra* note 27, at 30, 206.

114. TSE-TSUNG, *supra* note 103, at 297. *New Youth* which was “the focal point for an all-out assault on the entire system of Confucian values” published a manifesto in late 1919 which asserted “pragmatic philosophy [was] requisite for . . . progress.” See SPENCE, *supra* note 101, at 160.

115. GEORGE BLACK & ROBIN MUNRO, BLACK HANDS OF BEIJING—LIVES OF DEFIANCE IN CHINA’S DEMOCRACY MOVEMENT 140 (1993).

116. *Id.* at 357, n.2.

117. Ryan recognizes that Dewey “became something of an official sage.” RYAN, *supra* note 27, at 222-25.

118. DYKHUIZEN, *supra* note 17, at 205 mentions that the China experience influenced Dewey, but offers no discussion of how. “It was against the background of these international experiences [i.e., trips to China, Japan, Russia, and Turkey], as well as the experience of the First World War, that Dewey achieved something like a systematic theory of politics [i.e., the Public and Its Problems—1927].” LEYS, *supra* note 29, at 139. “Dewey’s theory was remarkable because it was an eloquent plea for an expansion of government beyond the narrow peace-keeping function recognized by nineteenth century liberalism, but yet, at the same time, an even more eloquent plea for the restoration of local community life.” LEYS, *supra* note 29, at 139.

119. KEENAN, *supra* note 26, at 1.

nearest his heart after his own.”¹²⁰ Perhaps a review of his lectures and letters will reveal evidence of influence.

Dewey specifically refers to “the changed aspect of our minds” in a letter from Beijing.¹²¹ He called his stay in China “most interesting and intellectually the most profitable thing I’ve ever done.”¹²² He described it as “a worth while experience not so much for things specifically learned as for the entirely new perspective and horizon in general. Nothing Western looks quite the same anymore”¹²³ Westbrook concludes that the China experience “recharged his political energies . . . [and] sustained his hopes for the progress of international democracy.”¹²⁴

Since *Democracy and Education* (1916) is “the closest attempt Dewey made to sum up [his] entire philosophical position,”¹²⁵ it might be used as a bench mark of what his views on epistemology, ethics, and politics were before his China experience. Due to the enormous significance of the First World War, it cannot, however, be assumed that it is only the China experience that accounts for any changes or changes in emphasis. Dewey himself described the impact of the war as “a decided shock to the earlier period of optimism, in which there prevailed widespread belief in continued progress toward mutual understanding among peoples and classes and hence a pure movement to harmony and peace.”¹²⁶

Perhaps *Reconstruction in Philosophy* (1920), his lectures in Japan just before he arrived in China, could better serve as the benchmark. Even this is not as simple as it may appear. “Dewey emphasized the connection between ethics and politics at every stage of his long career.”¹²⁷ As early as the *Ethics of Democracy* (1888), Dewey “established his own political position, from which he never waivered.”¹²⁸

120. WESTBROOK, *supra* note 1, at 240 n.16.

121. JOHN DEWEY, LETTERS FROM CHINA AND JAPAN 282 (1920).

122. DYKHUIZEN, *supra* note 17, at 205.

123. DYKHUIZEN, *supra* note 17, at 205.

124. WESTBROOK, *supra* note 1, at 240.

125. DYKHUIZEN, *supra* note 17, at 137.

126. JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY, at vi (1920).

127. JAMES T. KLOPPENBERG, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870-1920, at 350 (paper ed. 1986).

128. *Id.* at 351.

Despite these difficulties, one thing is clear enough. In China, and thereafter, Dewey focused more specifically and critically on politics. In fact, Dewey's Chinese lectures on social and political philosophy have been described as his first "coherent statement of a social and political philosophy based in pragmatism."¹²⁹

Dewey's politics at the time of his China experience have been described as "fluctuating wildly between sentimental moral exhortation and hard-boiled defense of the counter-productive violence of war without carefully considering the combinations of idealism and force which might lie between these extremes."¹³⁰ Yet a close reading of his lectures and letters, focusing on law as the central idea of his ideal, suggests a political realism that is a step beyond his views before his China experience.

First, Dewey acknowledged the daunting population of China. "The longer one stays in China, the more the question of what holds China back impresses itself . . . there is one fact which I am quite sure . . . counts for much . . . an extraordinary and long continued density of population."¹³¹ In evaluating the challenge reform faced because of the enormous population of China, Dewey said: "This is the fate of many proposed reforms. They are not fought, they are only swallowed."¹³²

Dewey, in Japan, referred to "groupings for promoting the diversity of goods that men share have become the real social units."¹³³ It is "to foster and coordinate the activities of [these] voluntary groups" that is the role of the state.¹³⁴ This state is so benign it is analogized as "the conductor of an orchestra."¹³⁵ In China, the state has become the social institution that has the "power" to render decisions that bind all lesser institutions.¹³⁶ More than just adjudicator, the state is the power than can reallocate resources so that there is some semblance of real

129. Hu Shih, *Introductory Note* to JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 43.

130. WESTBROOK, *supra* note 1, at 251.

131. John Dewey, *Justice and Law in China*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 211-13.

132. John Dewey, *Justice and Law in China*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 216.

133. DEWEY, *RECONSTRUCTION IN PHILOSOPHY*, *supra* note 126, at 204.

134. DEWEY, *RECONSTRUCTION IN PHILOSOPHY*, *supra* note 126, at 204.

135. DEWEY, *RECONSTRUCTION IN PHILOSOPHY*, *supra* note 126, at 203.

136. John Dewey, *The State*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 131.

equality.¹³⁷ Dewey identifies the cause of this positive state as the complexity of society.

Before China, Dewey often sounded like he believed that if his methodology were adopted there would be an immediate change for the better. He, early on, offered his “postulate of immediate empiricism” as the uprooting of, “if not . . . all philosophic evil, at least one of its main roots.”¹³⁸ He regularly referred to “a scientific revolution enormous in scope.”¹³⁹ This is more than a reflection of his inherent optimism and the general optimism of progressives before the First World War; it is a core part of his views at the time.

In China, Dewey emphasized the influence and importance of habits, customs, conventions, traditions, and institutions:

A habit is a regulated pattern of individual behavior derived from prior experience. A custom is a habit which is common to the members of a society. When custom becomes regularized, systematized and consciously insisted upon, we call it tradition. When social arrangements reach the degree of systematization which is characterized by delegation of responsibility, division of labor, and the necessity for cooperative endeavor, we have an institution.¹⁴⁰

Rather than almost dismissing these as impediments to scientific progress as he had done earlier,¹⁴¹ Dewey now recognized that “the alternative to revolution as a means [and almost always an expensive and wasteful means] to social progress is a system of habits, customs, conventions, traditions, and institutions flexible enough to permit adjustment to changing environments and conditions.”¹⁴²

Dewey came to emphasize that these cultural situations were exactly that—both cultural and situations. Culture “brought together the too often compartmentalized realms of experience—religion, politics, art, economics, etc—into a human and humanistic unity.” The name culture, Dewey argued, better captured what he meant than the name “experience.”¹⁴³ Situations are the true stuff of experience [contain-

137. John Dewey, *The Rights of Individuals*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 154.

138. WESTBROOK, *supra* note 1, at 126-27.

139. DEWEY, *RECONSTRUCTION IN PHILOSOPHY*, *supra* note 126, at 53.

140. John Dewey, *Criteria for Judging Systems of Thought*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 85.

141. JOHN DEWEY, *RECONSTRUCTION IN PHILOSOPHY*, *supra* note 126, at 161.

142. John Dewey, *Criteria for Judging Systems of Thought*, in JOHN DEWEY LECTURES IN CHINA, 1919-1920, *supra* note 25, at 87.

143. WESTBROOK, *supra* note 1, at 76.

ing] certain patterns—‘principles of connection and organization’—that carried the knowing subject beyond each experience toward the transformation of indeterminate situations into unified wholes.¹⁴⁴

While he didn't get this far in his thinking while in China, his lectures did explicitly refer to religion, politics, art, and economics and asserted a concrete interrelatedness that was not apparent in his earlier writings.¹⁴⁵ After seeing the factional nature of politics in China,¹⁴⁶ Dewey would de-emphasize group struggle and focus more on the individual as political participant.¹⁴⁷

Finally, it seems to me that Dewey confronted for the first time the challenge of heterogeneity. Until his trip to Asia, Dewey had not traveled outside of the U.S., except for two extended vacations in Western Europe. Despite his enthusiasm for America and things American, he early in his stay in China began to emphasize the non-transferability of American values and institutions.¹⁴⁸ Late in his stay, he was urging a hands-off China policy. In the Open Door Policy which dominated American-Chinese relations for decades, Dewey saw great dangers.

The hope of the world's peace as well as of China's freedom lies in adhering to a policy of Hands Off. Give China a chance. Give her time. The danger lies in being in a hurry, in impatience, possibly in the desire of America to show that we are a power in international affairs and that we too have a positive foreign policy.¹⁴⁹

Thus, it can be said that China had a profound impact on Dewey's views and that he meant it when he said his China experience was “intellectually the most profitable” of his life.

CONCLUSION

Dewey, upon returning to the U.S., resumed his teaching duties at Columbia University. He taught a course in the law school with Edwin

144. KLOPPENBERG, *supra* note 127, at 76.

145. *E.g.*, Dewey, *Backgrounds and General Characteristics of American Democracy*, *supra* note 62, at 1, and Dewey, *The Social Aspects of American Democracy*, *supra* note 66, at 23.

146. The times have been described as an era of government by warlords marked by rampant violence. *See* SPENCE, *supra* note 101, at 138-40.

147. *See* R. ALAN LAWSON, *THE FAILURE OF INDEPENDENT LIBERALISM, 1930-1941*, 121-30 (1971).

148. *E.g.*, Dewey, *Backgrounds and General Characteristics of American Democracy*, *supra* note 62, at 1.

149. WESTBROOK, *supra* note 1, at 254.

Patterson entitled *Logical and Ethical Problems of the Law*.¹⁵⁰ The course had three major parts: the formation and application of legal concepts, the relevant data of judicial decisions, and the ethical basics of contract. Each part included excerpted judicial opinions and philosophical and jurisprudential readings. In the first section on legal concepts, the readings included excerpts from such diverse thinkers as Bernadette Croce and Roman Catholic Cardinal Mercier. The section on judicial decisions included readings from Brooks Adams and Morris Cohen. The section on ethics included the views of Hobbes and Savigny. Since it is inherently interesting and only available in the Dewey Papers, the Table of Contents of the course materials is reproduced in the appendix to this essay.¹⁵¹ It indicates the contextual approach Dewey took to the text of the law.

Professor Scogin, in challenging Roberto Ungar's understanding of law in the Han Dynasty, quotes Professor Merryman's description of law matters. This description, I believe, is one that Dewey could accept as his own.

[T]here is a very important sense in which a focus on rules is superficial and misleading: superficial because rules literally lie on the surface of legal systems whose true dimensions are found elsewhere; misleading because we are led to assume that if rules are made to resemble each other something significant by way of rapprochement has been accomplished. . . .

. . . .

A more adequate definition of a legal system, however, would include a number of additional components: legal extension, legal penetration, legal culture, legal structures, legal actors, and legal processes. These are highly interrelated concepts, and each of them is further related to the form and content of the rules of law in the system. Like other social systems, the legal system has boundaries, and its components are interrelated by an internal logic. Legal extension and legal penetration help to define the boundaries of the legal system; the legal culture is its internal logic

. . . .

Thus along two dimensions, the aspects of social life that the law proposes to affect and the extent to which it actually does so,

150. Karl Llewellyn, who "greatly admired John Dewey," blamed Patterson for turning Dewey's attention "too much in the direction of abstract theorists and away from taking a fresh look at actual legal processes." WILLIAM TWining, KARL LLEWELLYN & THE REALIST MOVEMENT, 422-23 n.130 (paper ed. 1985).

151. *See infra*.

the scale of divergence of legal extension and legal penetration between societies can be, and often is, substantial. Both the social reach and the social grasp of the law are important variables.

By legal culture is meant those historically conditioned, deeply rooted attitudes about the nature of law and about the proper structure and operation of a legal system that are at large in the society. Law is, among other things, an expression of the culture; ideas about law are part of the intellectual history of a people. Such ideas are very powerful; they limit and direct thinking about law, and in this way they profoundly affect the composition and operation of the legal system.¹⁵²

Dewey also was active in the efforts to establish an international rule of law to end war. He summarized his view of the what and how of the outlawry of war movement as a four part program:

First, modification of international law to take war out of the category of legitimate means of solving disputes, this change to be effected or attended by national plebiscites to insure the education and registration of public opinion; second, revision and codification of international law to insure harmony of all its parts with the new action; third, the formation of an international court of justice which should have affirmative jurisdiction with respect to disputes likely to lead to war; fourth a provision that, in accord with the tenor of article 1, section 8 the Constitution of the United States, each nation should make offenses against the law of nations crimes under domestic law, so that war breeders be tried and punished in their own country.¹⁵³

Dewey's notions of the moral "legitimatizing" aspect of law can be seen in his recognition of the difference between outlawing war, which he viewed as "either utopian at present or merely sentiment," and depriving war of legal sanction, which was "practical" and meaningful.¹⁵⁴ It is also clear from the quoted passage that for the law to

152. Scogin, *Between Heaven and Man: Contract and the State in Han Dynasty China*, 63 S. CALIF. L. REV. 1326, 1329 n.7 (1990) (citing John H. Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, in NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE 222-25 (Mauro Cappelletti ed., 1978)).

153. WESTBROOK, *supra* note 1, at 268-69.

154. Some of the country's leading lawyers agreed that proper institutional arrangements could be self-enforcing. See Jonathan Zasloff, Note, *Abolishing Coercion: The Jurisprudence of American Foreign Policy in the 1920's*, 102 YALE L. J. 1689 (1993).

have this effect, its author had to be a demos.¹⁵⁵ Moreover, law has to be integrated with other normative standards and societal functions.

Finally, Dewey eventually wrote several law review articles and book reviews in law reviews.¹⁵⁶ As was said earlier, legal pragmatism is undergoing a revival, but the revivalists seem to have overlooked Dewey himself and focused on what might be called "Deweyism," a conservative incrementalist methodology.¹⁵⁷ This article is intended to return Dewey himself, and what he actually wrote, to the foreground. Louis Hartz, in his study of the American liberal tradition, used the term "Jacksonian socialism," a term which I think captures the traditional radicalism that Dewey's thought really represents.¹⁵⁸ Dewey's resistance to American triumphalism, and his commitment to a universal humanism, is also implied in his views on the law.

Morton Horwitz distinguishes between law as scientific or autonomous in the hands of judges, and law as political in the hands of legislatures.¹⁵⁹ Dewey, it seems to me, sees law as both scientific and non-autonomous, in the hands of . . . , who? This is where a full review of Dewey's legal writings subsequent to China, and his elaboration of his thoughts on epistemology, ethics, and politics, is needed. Is the blank filled in by expert administrative agencies or by participatory democracy or other?¹⁶⁰

155. Dewey anticipated the current view that democracies do not go to war with each other. See generally BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE; PRINCIPLES FOR A POST-COLD WAR WORLD* (1993).

156. The publications in law reviews are: John Dewey, *Logical Method and Law*, 33 *CONN. L.Q.* 560 (1924); John Dewey, *The Historical Background of Corporate Legal Personality*, 35 *YALE L.J.* 655 (1926); John Dewey, *Book Review*, 28 *COLUM. L. REV.* 255 (reviewing ROBERT H. LOWIE, *THE ORIGIN OF THE STATE* (1928)); John Dewey, *Book Review*, 28 *COLUM. L. REV.* 832 (reviewing CARLETON K. ALLEN, *LAW IN THE MAKING* (1928)). There is a complete bibliography in Leys, *supra*, note 12.

157. See DAVID M. RICCI, *THE TRAGEDY OF POLITICAL SCIENCE—POLITICS, SCHOLARSHIP AND DEMOCRACY* 102 (paper ed. 1984).

158. LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 245 (paper ed. 1955). This is a view supported by Westbrook's study. See WESTBROOK, *supra* note 1, at xiv-xvii.

159. See HORWITZ, *supra* note 28, at 9.

160. For China, Dewey foresaw decentralized, group-based tribunals:

It is not at all impossible that, in its future evolution, China will depart widely from western constitutional and representative models and strike out a system combining direct expression of popular will by local group-organizations and guilds with a large measure of personal discretion in the hands of administrative officials as long as the latter give general satisfaction. Personal government by decrees, mandates and arbitrary seizures and imprisonments will give way. Its place will be taken by personal administration such as already exists in the railway, post office, customs, salt administration, etc., rather than by formal

Again, this article is very much an introductory essay and has done no more than highlight this very important experience of Dewey's. Certainly, it cannot be said that Dewey's views are "indefensible and incoherent."¹⁶¹ Dewey's views on the law open possibilities that both Americans and Chinese might consider as they struggle with reform. Enough is at stake that turning to Dewey and elaborating his thought on this "most nearly central idea" of social and political philosophy seems desirable, if not necessary.

legislation where the nature of the constructive work to be done furnishes standards and tests.

Dewey, *Justice and Law in China*, *supra* note 47, at 252.

161. See Sotirios A. Barber, *Stanley Fish and the Future of Pragmatism in Legal Theory*, 58 U. CHI. L. REV. 1033, 1042 (1991).

APPENDIX

Taken From: John Dewey, Dewey Papers, Course Outline From
Columbia Law School (1927).

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