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From Plato's Preconceptions to Dewey's Instrumentalism: The Philosophical Bases of Legal Empiricism

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FROM PLATO'S PRECONCEPTIONS TO DEWEY'S INSTRUMENTALISM: THE PHILOSOPHICAL BASES OF LEGAL EMPIRICISM

"To understand the Supreme Court of the United States is a theme that forces lawyers to become philosophers."  

It is perhaps a truism to state that philosophy has been a catalyst of legal development, but the relation between the two evades precise conceptualization. The relationship becomes more understandable, however, if the legal task is viewed as a microcosm of the total human endeavor, in terms of its goals and methodology. The initial proposition of this paper is that as philosophical developments modify the theoretical construct of human existence, a correlative change occurs within the law.  

The connection between philosophy and law may best be demonstrated by an analysis of the transition from classical philosophy (e.g., that of Plato) to contemporary theory (e.g., that of Dewey) and the concomitant changes that have occurred in the law. While it may be of value to trace the major schools of development between these milestones in human reflection, such a detailed survey is not relevant to the goal of this paper. As Hegel maintained, the particular philosophy of any one period of history

* The author wishes to express his gratitude to Professor Robert Johann of Fordham University, whose intellectual stimulation contributed significantly to the creation of this paper.


2. It is not the author's intention to posit a "one-way" cause and effect relationship. Undoubtedly, the relationship between law and philosophy can be accurately described as one of reciprocal influence. It is the author's opinion, however, that general reflection precedes specific application. For example, the ancient Greeks are credited with an unusual gift of philosophical penetration. See E. Bodenheimer, *Jurisprudence* 3 (1962). Their development of philosophy, as a general mode of analysis, affected the theory and discussion of many more specific topics—science, art, friendship, government, law, etc. Classical Greek legal theory would not have been born if there had been no classical Greek philosophy, but Greek philosophy could have developed, leaving its application to the specific field of law for subsequent ages. “[J]urisprudence . . . is best understood as a conversation that began with Plato and continues to this day, and it is common knowledge that breaking into a conversation without knowing what was previously said can be rather awkward.” J. Hall, *Foundations of Jurisprudence* 9 (1973). “Like many other sciences, the science of law has its roots in Greek philosophy. More specifically, one of its beginnings is in Greek philosophical theories of justice and the social order.” R. Pound, *Jurisprudence* 27 (1959). In any event, it is not crucial that the reader agree with this premise. Much is to be gained by simply comparing the traditional mode of inquiry, as manifested in classical law and philosophy with the approach to problems that is becoming more prevalent in modern law and philosophy.

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is merely one portion of the overall progression of human thought. Eras, diametrically opposed in their theoretical bases, often synthesize and procreate a more enlightened period that is somewhat eclectic in its use of the best insights of its progenitors. A comparison of Greek and contemporary theory, then, will suffice as a preliminary undertaking. Naturally, this first section primarily is concerned with philosophy. The second and third sections are an attempt to determine how this transition affects jurisprudence and the adjudicatory process, respectively. The fourth section is perhaps the “heart” of the article. There the author will consider the effects of this transition on various substantive areas of the law.

I. FROM PLATO’S PRECONCEPTIONS TO DEWEY’S INSTRUMENTALISM

Gross experience is loaded with the tangled and complex; hence philosophy hurries away from it to search out something so simple that the mind can rest trustfully in it, knowing that it has no surprises in store, that it will not spring anything to make trouble, that it will stay put, having no potentialities in reserve.

Dewey’s characterization of traditional philosophy focuses on a prevalent tendency of that genre: the reverence for stability and permanence. Even a cursory exposure to Plato verifies this proclivity. Plato postulated a realm of ideas, as opposed to the realm of experience, wherein was found the immutable, the stable, the good. In the notion of the philosopher-king, for example, it is posited that only he, because of his trenchant insight, can partake of this realm of eternal forms. This a priori conception bore fruit, (1) in the actual institutions of divine right monarchies from the time of the Roman Empire until the late Middle Ages, and (2) in Roman Catholic Church government, which allowed a pontiff to speak ex cathedra because of his infallible participation in the Divine.

The raison d’etre of this tendency toward abstraction is said to be found in the social structure of the Greek community. A sharp separation was maintained between servile workers and free men of leisure. This bifurcation resulted in a division between “unintelligent practice and unpractical intelligence, be-

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5. Id. at 93. Cf. Gouldner, Enter Plato 90 (1965) for a discussion of the Greek division of labor.
tween affairs of change and efficiency—or instrumentality—and of rest and enclosure—finality.”

Through the ages, this craving for absolute, external standards has taken many forms. As Dewey has pointed out, metaphysical systems, considered to be quite unlike each other, often evidence a basic dichotomy between a superior realm of being and a lower, illusory or experiential realm. Other systems simply persist in a glorification of idealistic notions. Kant, for example, described the dichotomy as being between noumena and phenomena or reality and appearance. Spinoza assumed that a true idea “carries truth intrinsic within its bosom;” Locke formulated his “simple idea;” scholasticism equated the True and the Good with “marks of Being”; Aristotle, divided existence into form which is actual and matter which is potential. These idealistic philosophies, especially those of Plato, Aristotle and Spinoza have found the “good” in a life of reason, not in external achievement.

Dewey is quick to add that even philosophers of flux indicate the intensity of the need for the sure and fixed. They divinize change by making it universal and regular. Hegel viewed evolution as a rational process which manifests Spirit. Spencer saw change as “the transitional process of attaining a fixed and universal equilibrium of harmonious adjustment.” For Bergson, evolution was the “creative operation of God.”

Modern or empirical philosophers, notably John Dewey, eschew the premise as well as the results of the classical format of reflection. Dewey maintains that philosophy has allowed itself to create “wholesale generalizations” by isolating that which seems permanent for a period and transforming it into an absolute. For Dewey, man can be viewed as a process of inquiry intermediating between two qualitative states — one problematic and the other

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6. J. Dewey, supra note 4, at 93.
7. See generally I. Kant, Critique of Pure Reason (1781).
9. Id. at 27.
10. Id. at 26.
15. Id. at 51. See also H. Bergson, Creative Evolution (1911).
16. J. Dewey, supra note 4, at 27.
stable or settled. Hopefully, the result of the inquiry, knowledge, bridges the chasm between these two states of affairs. This is what Dewey means when he refers to the instrumental nature of knowing. Knowledge unlocks the door through which we can move from the precarious to the stable. Truth, then, is not as the Platonists thought, a matter of the mind's conformity with the antecedently real, but of the mind's "at-homeness" (correspondence) with consequent reality, i.e., with what is had as a result of its own transforming activity. This experimental inquiry has three main characteristics:17

The first is the obvious one, that all experimentation involves overt doing, the making of definite changes in the environment or in our relation to it. The second is that experience is not a random activity but is directed by ideas which have to meet the conditions set by the need of the problem inducing the active inquiry. The third and concluding feature, in which the other two receive their full measure of meaning, is that the outcome of the directed activity is the construction of a new empirical situation in which objects are differently related to one another, and such that the consequences of directed operations form the objects that have the property of being known.

The truth of a proposition, then, is in its functional correspondence to an otherwise problematic situation. It is true when it is seen as a "key" — as being in a functional role of making sense of what would otherwise remain unsettled. The proposition is true and correct when one can say, "[a]t the moment everything is in order."18

The inquiry is "the controlled or directed transformation of an indeterminate situation into one that is so determinate in its constituent distinctions and relations as to convert the elements of the original situation into a unified whole."19 Judgment about a situation is an ongoing process until a final one is reached. A final judgment is a ratification, as a result of inquiry, of a situation newly perceived as determinate or unquestionable and therefore giving rise to no further questions. The ratification means that the situation makes sense, that it is commensurate with

18. J. Rawls, A Theory of Justice 20 (1971). Rawls uses the term reflective equilibrium to convey a similar notion: "It is an equilibrium because at last our principles and judgments coincide; and it is reflective since we know to what principles our judgments conform and the premises of their derivation." Id.
intelligence, that the problematic is erased and the goal is reached. It is important to note that the situation may be "settled" through oversight, *i.e.*, lack of awareness of all the germane factors. This is exactly what occurs when a poor legal precedent lingers because no case is brought to challenge its wisdom.

Dewey proffered the following test by which to judge the utility of any philosophy which, this author suggests, can be employed as well to scrutinize the adequacy of a law or system of laws:

Does it [the law] end in conclusions which, when they are referred back to ordinary life-experiences and their predicaments, render them more significant, more luminous to us, and make our dealings with them more fruitful? Or does it terminate in rendering the things of ordinary experience more opaque . . . ?

II. THE INSTRUMENTAL PROCESS OF THE LAW

If man's endeavor is, as Dewey described it, "[t]he striving to make stability of meaning prevail over the instability of events . . . ," then the task can be compartmentalized. Dewey's method of acquiring understanding of human events is essentially the method of science. The physical sciences may be viewed as part of man's attempt to bring stability and order to his physical environment. The social sciences may be characterized as an attempt to stabilize relations among men. Both the physical and the social sciences, in seeking to render the human situation less precarious, proceed on the premise "that more or less 'correct' answers to human problems are discoverable." Indeed, from the point of view of determinism, the social sciences are identical to the physical sciences in every respect — subject matter, mode of inquiry and the type of knowledge derived therefrom. According to those who attribute a basic freedom to the nature of man, however, the social sciences are quite different from the physical sciences in that man's behavior cannot be predicted on the basis of prior events, *i.e.*, that there is no cause and effect relationship. The determinism-freedom issue, however, does not deter-

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20. As an instrumentality, a law is neither good nor bad, for that refers to external standards; it is rather more or less adequate or comprehensive in its eradication of the disagreeables.
22. *Id.* at 50.
24. *Id.* at 619. *See also* J. Hall, *Theft, Law, and Society* chs. 6-7 (2d ed. 1962).
mine the validity or utility of the social sciences, for even if human conduct cannot be confined to strict cause and effect analysis, "it is possible to discover significant recurrent patterns among inter-personal relations." Whatever the resolution of this theoretical conflict, the products of social science, i.e., the empirical data, are ultimately useful in attempting to stabilize relations among men.

What then is the relationship between science and the law? As collectors of legal evidence, indeed as the very eyes of the law, the sciences, especially the social sciences, are the bases of the law. Should not the law itself then be empirical? Should not the law be primarily concerned with action and not with ideas?

Several schools of legal thought have answered this question in the affirmative: Utilitarianism (Bentham and von Ihering), So-

25. J. HALL, supra note 24, at 619.
26. Hall does not perceive the issue as irresolvable:
There may seem to be a theoretical incompatibility between causal explanation proceeding on premises of universal determinism and that derived from sympathetic participation in the dynamic functioning of the human personality, motivated and end-seeking. Actually, however, these two types of explanation supplement each other, and both are regularly relied upon unless one of them is barred arbitrarily.

Id. at 620.

27. The author does not intend to unduly de-emphasize the contribution of the physical sciences, for the law certainly defines and regulates the man-object relationship, and thus is concerned with the subject matter of the physical sciences, but ultimately these man-object relationships are only important insofar as man encounters other men. Title to land or personal property and other similar legal relationships form a referential context for human activity and interaction. A man in isolation, however, has no use for ownership.

28. The thought-action dichotomy has plagued philosophy since the time of the Greeks. The glorification of the "idea" perhaps reached its quintessence with Descartes' Cogito ergo sum. Dewey and other empirical philosophers have in effect countered with "I do therefore I am." MacMurray, in a cogent argument, maintains that action is primary but is necessarily constituted by thought and reflection. Action without thought is mere random activity and thought without action is useless. Action is the goal of thought; thought renders action purposive. See generally J. MACMURRAY, PERSONS IN RELATIONS (1961) and J. MACMURRAY, SELF AS AGENT (1957).

29. John Rawls takes strong issue with utilitarianism stating that, "[s]ince each desires to protect his interests, his capacity to advance his conception of the good, no one has reason to acquiesce in an enduring loss for himself in order to bring about a greater net balance of satisfaction." J. RAWLS, A THEORY OF JUSTICE 14 (1971). If it be true that an individual cannot, due to the desire for self-aggrandizement, accept utilitarianism, it remains to be shown that a selfless institution (the law) cannot dispense justice impartially with an aim to the greatest net gain, unless one is prepared to argue that justice and maximum net satisfaction are not necessarily the same. See J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789); R. VON IHERING, DER ZWECK IM RECHT (2 vols. 1877-1883) (Vol. I trans. by I. Husik as LAW AS A MEANS TO AN END (1913)). See also J. STONE, THE PROVINCE AND FUNCTION OF LAW ch. XI (1961) for an analysis of von Ihering's work.
ciological Jurisprudence\textsuperscript{30} (Ehrlich, Pound) and Legal Realism\textsuperscript{31} (Holmes, Llewellyn and Frank). Detailed examination of the contributions made by these jurisprudents is quite beyond the scope of this paper. Each to a varying degree, however, enhanced the development of an empirical concept of the law. Holmes, for example, was reacting to the considerable influence of Platonic Idealism on the law when he stated that the law "is not a brooding omnipresence in the sky . . . ."\textsuperscript{32} And Pound was describing legal history in much the same manner that Dewey was describing human development in general, when he stated:\textsuperscript{33}

\begin{quote}
[T]he record of a continually wider recognizing and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and precluding of friction in human enjoyment of the goods of existence — in short, a continually more efficacious social engineering.
\end{quote}

Law as an empirical process is something quite apart from a system of law burdened with a priori formulations. Perhaps the earliest example of the latter is the \textit{jus gentium}, considered to be the application by Roman legal administrators of the Greek theory of a law of nature.\textsuperscript{34} When Roman lawyers were confronted with a case involving a foreign litigant, they neither applied the law of Roman citizens (\textit{jus civile}) nor the law of the litigant's state, but rather the \textit{jus gentium}, \textit{i.e.}, the law common to all nations.\textsuperscript{35} Reliance upon such idealism continued, and examples can be found throughout the reported cases of England and the United States. In \textit{Calvin's Case}, it is stated:\textsuperscript{36}

The law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is \textit{lex aeterna}, the moral law, called also

\begin{itemize}
\item \textsuperscript{31} See Holmes, The Path of the Law, 10 Harv. L. Rev. 457 (1897); Llewellyn, A Realistic Jurisprudence: The Next Step, 30 Colum. L. Rev. 431 (1930); J. Frank, COURTS ON TRIAL (1949).
\item \textsuperscript{32} South Pacific Co. v. Jensen, 244 U.S. 205, 222 (1901).
\item \textsuperscript{33} R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 47 (1922) (paperback ed. 1959), as quoted in E. SCHUR, LAW AND SOCIETY 39 (1968).
\item \textsuperscript{34} H. MAINE, ANCIENT LAW 52 (1861); 1 R. POUND, JURISPRUDENCE 34 (1959).
\item \textsuperscript{35} H. MAINE, ANCIENT LAW 45-49 (1861).
\item \textsuperscript{36} 77 Eng. Rep. 377, 391-93 (K.B. 1610).
\end{itemize}
the law of nature, and by this law, written with the finger of God in the heart of man, were the people of God a long time governed, before the law was written by Moses, who was the first reporter or writer of laws in the world. . . .

[Yet the very law of nature itself never was nor could be altered or changed.

Indeed, as recently as 1905 a state court in discussing the right of privacy proclaimed: 37

It may be said to arise out of those laws sometimes characterized as immutable, "because they are natural, and so just at all times and in all places that no authority can either change or abolish them [citations omitted].

The difficulty with such an approach to law, whether it is termed a "natural law" theory or not, is aptly presented by Bentham, in language that would appropriately describe Plato's philosopher-king: 38

The fairest and openest of them all is that sort of man who speaks out and says, I am of the number of the elect; now God himself takes care to inform the elect what is right, and that with so good effect . . . they cannot help . . . knowing it. . . . If, therefore, a man wants to know what is right, he has nothing to do but come to me.

Absolute theories are effective only when all agree on the fundamentals. Where diverse views on fundamental points prevail, "natural law . . . would mean that every man would be a law to himself." 39

The source of law was crucial for eighteenth-century natural law theorists and others of similar inclination. 40

What lies back of this identification of source . . . is the belief that unless a source higher and more fixed than that of experience can be found, there is no sure ground for any genuinely philosophic valuation of law as it actually exists.

The law, conceived this way, is derived from the realm of perfection, quintessence and pure logic. For empiricists, the source of

law is not significant: if there is a *source*, it is merely the purposive activity of intelligent agents in a troublesome world. The source is actually integrated with the end of law. What is the *end* of law? For empiricists, legal ends are “ends-in-view;” they are not permanent fixtures, but temporary goals which give way to newly discovered problems and their solutions:

> [A]ll ends are ends-in-view; they are no longer ideal as characters of Being, as they were when they were in Greek theory, but are the objects of conscious intent.

Dewey maintains that even non-empiricists are constrained to agree with this proposition. On the other hand, standardization, principles and universals have a function within the empirical method of the law, but it is an instrumental function. As Dewey says, “men do not begin thinking with premises,” but rather with a “complicated and confused case, . . . admitting of alternative modes of treatment and solution.” The premises or what traditional theorists might call the “sources” or “higher standards” of the law only begin to emerge as an analysis of the total situation progresses. Science, as Dewey viewed it, “is an affair of *making* sure, not grasping antecedently given sureties.” This author suggests that law is a scientific endeavor in this respect.

The Uniform Commercial Code is illustrative of an empirical approach to the law. As a product of an empirical age, it relies heavily on the prevalent customs and practices of businessmen. The Code takes a problematic situation and, through observation and analysis, renders it more stable. To use Dewey’s test, one need only compare the resultant fluidity of commercial transactions to the previous situation. The adequacy of the law is found

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41. J. DEWEY, * supra* note 4, at 112.
42. “Adherents of the idea that betterment, growth in goodness, consists in approximation to an exhaustive, stable, immutable end or good, have been compelled to recognize the truth that in fact we envisage the good in specific terms that are relative to existing needs, and that the attainment of every specific good merges insensibly into a new condition of mal-adjustment with its need of a new end and a renewed effort.” Dewey, * supra* note 12, at 455.
44. J. DEWEY, * supra* note 4, at 154.
45. See F. NORTHROP, *The Complexity of Legal and Ethical Experience* chs. III and V (1959) for a discussion of the assiduity with which Underhill Moore examined the actual habits of people in various fields, including parking violations in New Haven, Connecticut, as well as certain commercial transactions.
46. See text accompanying note 21 * supra*. 

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in this comparison. Dewey’s empirical method demands that in philosophy “conclusions be brought back to the things of ordinary experience, in all their coarseness and crudity, for verification,” an observation which applies with equal force to the law. There is no way, under the inherently subjective classical approach, to test the appropriateness of the law.

Holmes defined law as being “prophecies of what the courts will do in fact.” In his work, The Path of the Law, which is considered a forerunner of the functional approach to law, he stated:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience . . .

. . . .

Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact, . . . and nothing more pretentious [is] what I mean by the law.

The difference between the traditional and instrumental theories of the law has its practical effects. Classical theory begins and ends with opinion; the knowledge of modern law only begins with opinion and this beginning is the opinion of the advocate. The advocate has the duty of persuasion; he must demonstrate more or less conclusively the need for a given result. Nicely spun theories will not suffice. More and more, the task of counsel warrants the use of the “Brandeis type” brief. For example, the Supreme Court’s decision in Brown v. Board of Education relied

47. J. Dewey, supra note 4, at 36.
49. Brandeis’ Brief for State of Oregon as Amicus Curiae, Muller v. Oregon, 208 U.S. 412 (1908) became famous overnight for it contained no citation of legal precedent, but did present empirical data of sociological and economic nature.
extensively on proffered empirical data of a psychological and sociological nature. Similarly, recent attacks on the financing of public school systems have utilized this type of data.\textsuperscript{51} As one commentator described the contemporary advocate’s task:\textsuperscript{52}

Recognizing the circularity of conceptual argument, the realistic advocate will contrive to bring before the court the human values that favor his cause, and since the rules of evidence often stand in the way, he will perforce bring his materials to judicial attention by sleight-of-hand—through the appeal of a “sociological brief” to “judicial notice,” through discussion of the background and consequences of past cases cited as precedents, through elaboration and exegesis upon admissible evidence, or even through a political speech or a lecture on economics in the summation of his case or argument.

A crucial element of this process of persuasion is language. As Dewey states:\textsuperscript{53}

The heart of language is not “expression” of something antecedent, much less expression of antecedent thought. It is communication; the establishment of cooperation in an activity in which there are partners, and in which the activity of each is modified and regulated by partnership.

Language, however, is most significant in the legal context as it is used by judges in rendering final decisions.

\textbf{III. THE ROLE OF THE JUDGE}

As an element of the instrumental process of the law, the work of deciding cases is different, and indeed more difficult, than that which was encountered by judges predisposed to natural law or classical preconceptions. Stare decisis, the rule of precedent conformity, is most compelling within a traditional or absolutist system of law. There is slight need for change since the practical effects of a law are of little or no consequence. The priority rests with the law’s conformity with preconceived universals. No doubt this “sentiment is powerfully reinforced by what is often nothing but an intellectual passion for \textit{elegantia juris}, for symmetry of form and substance.”\textsuperscript{54} Taken to its logical extrem-

\textsuperscript{53} J. \textsc{Dewey}, \textit{supra} note 4, at 179.
\textsuperscript{54} B. \textsc{Cardozo}, \textit{The Nature of the Judicial Process}, in \textit{Selected Writings of Benjamin Nathan Cardozo} 118 (1947).
ity, such a view of law would deem the man who had the best card index of prior cases to be the wisest judge.\footnote{Id. at 113.} If prior rules, by definition, are derived from the realm of eternal forms, the role of present adjudication is to be likewise aligned with said universals. "But, of course, no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly."\footnote{Id.}

In a practical sense, the principles embodied in the prior decisions are merely tools used to accommodate and coordinate the relations of that period. The "longevity" of such a rule is determined by its utility in a contemporary context, \textit{i.e.}, by the similarity of the situation which gave rise to the rule with the instant circumstance that ostensibly calls for its application. Construed as such, the decisional process is not susceptible to definition. Justice Cardozo aptly described the somewhat amorphous task confronting the contemporary judge:\footnote{Id. at 108-09.}

\begin{quote}
What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportion do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions.

Deciding when a rule has outlived its usefulness or when its logic has been forced to "irrational" extremes is essentially a matter of judgment. A new rule prematurely imposed is as unjust as an obsolete rule retained as a matter of form or habit. "The expert in thought [and law!] is one who has skill in making experiments to introduce an old meaning into different situations and who has a sensitive ear for detecting resultant harmonies and discords."\footnote{J. Dewey, supra note 4, at 194-95.} The complexity of factors which affect the outcome

55. Id. at 113.
56. Id.
57. Id. at 108-09.
58. J. Dewey, supra note 4, at 194-95.
in a particular case lends credence to Holmes’ theory\(^\text{59}\) that one’s real concern should lie with the positive behavior of judges, \(i.e.,\) “what the courts will do in fact.” Consider the factors, devoid of principled formulation, that go into the “caldron of the courts”\(^\text{60}\).

What forces will tend to compel judicial conformity to the precedents that appear to be in point (e.g., inertia, conservatism, knowledge of the past, or intelligence sufficient to acquire such knowledge, respect for predecessors, superiors or brothers on the bench, a habit of deference to the established expectations of the bar or the public) and how strong are these forces? What factors will tend to evoke new judicial treatment for the transaction in question (e.g., changing public opinion, judicial idiosyncrasies and prejudices, newly accepted theories of law, society or economics, or the changing social context of the case) and how powerful are these factors?

The language of the judge’s decision, as a form of communication, is uniquely final and uniquely instrumental in its nature.\(^\text{61}\) It is final as giving meaning and a defined significance to certain activities of men; it is instrumental as liberating men from the confusion and conflict of an unresolved, problematic situation. It is, however, a liberation of indefinite duration. The law as a liberation of relational tension, is only potential or proleptic until the judge’s opinion is rendered, thereby concretizing the stabilizing effect of the legal process. This communication objectifies the otherwise nebulous entanglements that characterize human relations. They now have meaning — they make sense.

Every day, judges currently on the bench are, by way of their involvement in cases, answering, either consciously or unconsciously, the crucial question: “\(\text{s}\)hould the judge merely sit passively or should he be an agent for court reform?” Cardozo answered the question in this manner:\(^\text{62}\)

\[
\text{[L]logic, and history, and custom, and utility, and the accepted standard of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these shall}
\]

\(^{59}\text{See text accompanying note 48 supra.}\)
\(^{60}\text{Cohen, supra note 52, at 839.}\)
\(^{61}\text{Dewey considers that all communication has the dual properties of finality and instrumentality. J. Dewey, supra note 4, at 204-05.}\)
\(^{62}\text{Address by Judge Bertram Harnett, Justice of the Supreme Court, New York State, to the Nassau County Bar Association, April 28, 1972, in commemoration of Law Day.}\)
\(^{63}\text{B. Cardozo, supra note 54 at 112-113.}\)
dominate in any case must depend largely upon the comparative importance or value of the social interests that will thereby be promoted or impaired . . . . [The ability to weigh these elements comes] from experience and study and reflection; in brief from life itself.

IV. IMPLICATIONS OF THE INSTRUMENTAL PROCESS

The changes that have occurred in the mode of human reflection generally, as demonstrated by a comparison of Plato’s pre-conceptional scheme with Dewey’s theory of instrumentalism, have a profound significance for contemporary jurisprudence. The ramifications of an empirical approach may be felt in virtually every field of substantive law either through its application or through the obvious omission of empirical data where such is clearly demanded. Since the subjective, classical approach has by no means been entirely abandoned, a resultant tension is evident in diverse areas of the law.

The corporate entity, for example, has had a static existence despite the economic exigencies that demand its reformation. The original corporate idea solved the commercial problems that prevailed during the last century. Huge conglomerates, however, like General Motors, were not in operation then. The corporate structure, therefore, was not designed with such diversification in mind. John Kenneth Galbraith states the problem as one arising out of our still active proclivity to search for Platonic forms. 64

Few subjects of earnest inquiry have been more unproductive than the study of the modern large corporation. The reasons are clear. A vivid image of what should exist acts as a surrogate for reality. Pursuit of the image prevents pursuit of the reality.

Certainly there is an empirical difference between a corporation of Standard Oil’s size and a local body repair shop. Should not the law reflect the difference conceptually? Does labelling each a “corporation” afford greater insight in resolving relevant legal issues? Can a single concept of the management-shareholder or management-board of directors relationship suffice for all corporations? The law, as one manifestation of the human task, i.e., as one way in which man alleviates discord, must not be

64. J.K. GALBRAITH, THE NEW INDUSTRIAL STATE 72 (1967).
Legal Empiricism

concerned with self-perpetualization or the idolization of its creations. There is nothing sacrosanct about a "corporation," as a concept, its utility is only a function of the degree to which it renders human transactions more fluid. When confronted with a problematic situation, it is not enough to find that the entity in question is a corporation and then proceed to apply the germane rules. Judicial discernment requires that such rules be referred back to the empirical situation to test their validity and judicial integrity demands the fortitude to modify those principles when and where needed. Indeed, the recent cries of "shareholder democracy" and "corporate responsibility" indicate (1) that in more than a few respects the corporate mold fails to fit economic realities, and (2) that the influences of twentieth century philosophy are having an effect on the legal process.

An empirical approach to the law is necessarily experimental. Occasionally, due to impercipience or lack of foresight, an ostensibly correct legal principle will be implemented. Failing to resolve the target problem, such a principle must either be modified or abrogated. Consider the development of the law with respect to libel and the right of privacy. The right of privacy is essentially the product of an industrial society that has developed intricate means of surveillance. Yet, the complexity of modern civilization has also caused a premium to be attached to swift news dissemination. The Supreme Court initially resolved this conflict by diminishing the availability of libel actions. This occurred in three phases: (1) the original decision in New York Times v. Sullivan imposed the New York Times standard only on "public officials"; (2) in a pair of 1967 cases, Curtis Publishing Co. v. Butts and Associated Press v. Walker the standard was modified; and (3) in 1969, the Supreme Court finally addressed the issue, effectively abrogating the New York Times standard.

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68. See generally A. Westin, Privacy and Freedom (1967); Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).


70. The New York Times standard requires that the plaintiff prove actual malice on the part of the defendant, that is, knowledge of the falsity or reckless disregard of the truth. 376 U.S. 254, 279-80 (1964).

71. 388 U.S. 130 (1967).
applied to all “public figures;” (3) in Rosenbloom v. Metromedia, Inc. the class of plaintiffs who had to meet the New York Times standard was further extended to any person who found himself involved in an “event of public interest.” The direction of the Rosenbloom case, the harshest of the three phases, has now been specifically disavowed in a recent Supreme Court case, Gertz v. Robert Welch, Inc.

The Gertz case, as Justice Powell states in his opinion for the 5-4 majority, represents a new attempt to balance the competing interests of press freedom and private rights of recovery for defamation. The decision is a return to the Curtis or pre-Rosenbloom position insofar as only public officials and public figures have to meet the New York Times standard in order to recover on a libel action. This retreat should be commended if it, in fact, is due to a reevaluation of the empirical situation, i.e., of the balance between the right of privacy and the desirability of an informed citizenry. If, on the other hand, the retreat is merely the result of a change in court personnel, it is perhaps an example of judicial fortuity rather than judicial experimentation. “Observational follow-up,” i.e., an objective, empirical evaluation of the efficacy of the law it hands down, would seem to be the responsibility of the judiciary under a functional jurisprudence. Dewey described it as follows:

[T]he standard is found in consequences, in the function of what goes on socially. . . . For it demands that intelligence, employing the best scientific methods and materials available, be used, to investigate, in terms of the context of actual situations, the consequences of legal rules and or proposed legal decisions and acts of legislation. The present tendency, hardly more as yet than in a state of inception, to discuss legal matters in their concrete social setting, and not in the comparative vacuum of their relations to one another, would get the reinforcement of a consistent legal theory.

The development of the right of privacy vis-a-vis criminal

72. 403 U.S. 29 (1971).
73. No. 72-617, 42 U.S.L.W. 5123 (U.S. June 25, 1974).
74. Publishers may be potentially liable to a larger number of plaintiffs under this decision, but their liability is limited financially to a level most publishers are probably willing to accept, i.e., actual damages when there has been no showing of falsity or reckless disregard for the truth. See, id. at 5131.
law is a product of the vigorous inquiries that have been made with respect to the law as an embodiment of religious or moralistic concepts — ideas that for the most part are Platonic in the sense that they are derived from a priori or supernatural notions of what the law should be. The Supreme Court has stated that laws, religious in derivation, will only pass muster under first amendment scrutiny if they are currently wearing secular garb. In McGowan v. Maryland the Court upheld the constitutionality of the Sunday Blue Laws because these laws had lost their religious origins and, instead, served a modern, utilitarian and social purpose. In the future, much of the inquiry into the "religious" nature of the law should focus on the so-called victimless crimes (e.g., sex offenses involving the private acts of consenting adults). The empirical approach to the law governing homosexuality, for example, would disregard the issue of whether such practices are inherently "wrong," and would look rather to available data to determine what harm, if any, is being done to society.

Negligence law is similarly in a process of disengaging itself from preconceived notions of moral culpability. The crucial question is changing from, "Who was wrong and therefore liable?" to "Who is best able to pay?" or "Who is best able to foresee accidents and thereby possibly prevent their occurrence or at least procure insurance?" The gradual implementation of "no fault"

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77. E.g., GREAT BRITAIN HOME OFFICE, REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION § 61 (1957) states:
    Unless . . . society . . . equate[s] the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is in brief and crude terms, not the law’s business.
    See also P. DEVLIN, ENFORCEMENT OF MORALS (1965); H. HART, LAW, LIBERTY AND Morality (1963); Sartorius, The Enforcement of Morality, 81 YALE L.J. 891 (1972).
79. Lower courts have started to address the issue. See In re Labady, 326 F. Supp. 924 (S.D.N.Y. 1971). In Schaefers v. Wilson, Civil No. 1821-71 (D.D.C., filed May 24, 1972) four male homosexuals brought suit for a declaratory judgment against the police commissioner of the District of Columbia. It was stipulated that in light of Griswold v. Connecticut and other prior decisional law, that the sodomy statute could not apply to private consensual acts.
80. The empirical data should be gathered in an attempt to determine issues such as whether children are in danger of being seduced (e.g., whether pedophilia is more prevalent among homosexuals), whether decriminalization will be detrimental to the institution of marriage, and whether criminalization induces those in need to seek psychiatric help or in fact deters them.
automobile insurance\textsuperscript{81} and strict liability in the products field,\textsuperscript{82} as well as the increasing number of commentators espousing theories of risk distribution,\textsuperscript{83} are the first signs of an approach to law which is not concerned with determining who is most at fault, but rather what system of compensation renders human activity most efficient or most fluid.

Psychiatric data have begun to have some influence on basic concepts of criminal law, such as sanity, punishment and rehabilitation, and guilt and responsibility.\textsuperscript{84} Generally, however, penal theory, as a legal inquiry, is sequestered academically and otherwise, from the pursuit of criminology — a branch of either the social sciences or psychiatry.

Thus, the work of criminologists and lawyers sometimes suggests that their disciplines have only casual contacts. A criminologist who never sees a criminal statute may spend a life-time studying the relationship of economic or biological factors to a particular type of criminal conduct, while a lawyer may completely ignore such studies.\textsuperscript{85}

This division is a vestige of the theory-practice or thought-action dichotomy\textsuperscript{86} that has plagued classical philosophy. Legal empiricism however, demands their integration. Certainly, a sound rapport can be established between penal theory and criminology "by recognizing and building upon their reference to a common subject matter."\textsuperscript{87}


\textsuperscript{82} See \textit{RESTATEMENT (SECOND) OF TORTS} § 402A (1965).


\textsuperscript{84} For example, the court in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), formulated a new test for criminal responsibility stating that the old "right-wrong test is inadequate in that (a) it does not take sufficient account of psychic realities and scientific knowledge, and (b) it is based upon one symptom and so cannot validly be applied in all circumstances." \textit{Id.} at 874.

\textsuperscript{85} J. HALL, \textit{supra} note 24, at 601.

\textsuperscript{86} See note 28 supra.

\textsuperscript{87} J. HALL, \textit{supra} note 23, at 608. Elsewhere Hall has stated:

Penal theory and criminology therefore share a common interest in principles, doctrines and rules of penal law as well as in the concomitant criminal conduct. This should not be obscured by the fact that penal theorists concentrate upon the elucidation of legal terms while criminologists study the causes of crime. Knowledge of causes of criminal conduct in the two principal senses discussed
Data of a psychological nature may also be useful in revising some of the "sacred" concepts of family law. For example, a number of states recognize a natural parent presumption in the adjudication of child custody cases. Even where there is no such presumption courts tend to engage in wholesale generalizations about the "best interests" of the child. Commentators point out that empirical data in this area are available and that the problem is one of encouraging its use in the formulation of judicial and legislative policies.

It seems, then, that in a number of substantive areas one of two patterns is found. Either empirical data are available but courts have not employed them or no significant amount of data has been collected. It is in this latter area particularly that we see the lag between empiricism as a theoretical approach and its application in law.

That the approach heralded by Dewey has had a profound effect, however, is evidenced even in areas where there has been a dearth of empirical data. For example, in the area of securities regulation, commentators are beginning to demand such data. The assumption behind much of the securities laws, that disclosure of all material facts with respect to the issuer is necessary to protect the investing public, has never been tested. Kripke argues that most investors either do not make use of the information contained in prospectuses or they do not comprehend such inform-

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above, is knowledge of the nature of criminal conduct. When the criminologist generalizes descriptively, he does so with regard to the empirical references of certain prescriptions, when the penal theorist elucidates these prescriptions, he does so in reliance upon the knowledge of relevant facts which the empirical discipline provides. Accordingly, the various disciplines concerned with criminal conduct, law and punishment should be viewed as a single inquiry in which naming and the elucidation of the terms proceed coordinately with empirical investigation and ethical criticism. There is an inter-penetration of these branches of knowledge when they are focused upon the solution of practical problems.

Id. at 621.

88. Diernfeld v. People, 137 Colo. 238, 323 P.2d 628 (1958) is an extreme example of natural parent presumption.

89. See Foster and Freed, Child Custody, 39 N.Y.U.L. Rev. 423, 427 (1964):
When one reviews a number of recent cases involving custody awards, the conclusion becomes inescapable that as a group they are marked by question begging, rigid rules, and platitudes which unfortunately tend to inhibit careful inquiry and thorough evaluation. It is a matter of grave concern that in an area of such great human and social importance courts are failing to lay down rules sufficiently precise for meaningful guidance. . . .

mation if they in fact read them at all. Kripke admits, however, that there is no data in support of his hypothesis.91

Finally, the history of the status of women in the law exemplifies a transition from incredibly idealistic and a priori notions to ideas more consonant with objective reality. It was a century ago that the Supreme Court of the United States affirmed an Illinois decision denying a woman's application to practice law. The following language of the Illinois Supreme Court is included in the Supreme Court's decision92:

That God designed the sexes to occupy different spheres of action, and it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth.

And as recently as 1948, the Supreme Court, in *Goesaert v. Cleary*93 upheld a Michigan statute denying females the right to be licensed as bartenders, unless they be "the wife or daughter of the male owner." Yet in 1971, the California Supreme Court, in *Sail'er Inn, Inc. v. Kirby,*94 noted the total lack of factual data to justify the discrimination in a similar statute and proceeded to declare the legislation unconstitutional. It was argued by the state that women are less likely to obey the state liquor laws, but not one iota of empirical evidence was proffered in support of this assertion.

**CONCLUSION**

The influence of classical philosophy has burdened legal analysis and perhaps human thought in general for about two thousand years. Modern philosophers, epitomized by Dewey, have criticized the predispositions of classical philosophy and have sought instead a result-oriented mode of analysis. As could be expected, this transition has affected legal thought and the author has attempted to explicate this influence. Finally, this new jurisprudence can, as shown above, modify various substantive areas of the law.

This latter discussion is by no means exhaustive. An examination of the influence of Dewey's approach on any one substan-

93. 335 U.S. 464 (1948).
94. 5 Cal.3d 1, 485 P.2d 529, 95 Cal. Rptr. 329.
tive field could by itself be material for an article. The empirical process will have its effect on the whole gamut of legal fields, from somewhat esoteric areas like riparian rights to basic concepts like the marriage contract. The ramifications of an empirical approach in law and social policy are indeed pervasive, but more importantly the effects are not static and not predictable. The law is dynamic and malleable. This is true, despite those who would denounce the “inertia” of the legal system.

The work of modification is gradual. It goes inch by inch. Its effects must be measured by decades and even centuries. Thus measured, they are seen to have behind them the power and the pressure of the moving glacier.

Thomas P. Dugan

95. Indeed without specific reference to Dewey, many articles emphasizing the functional, empirical analysis of legal problems have been written. See, e.g., Ellsworth & Levy, Legislative Reform of Child Custody Adjudication: An Effort to Rely on Social Science Data in Formulating Legal Policies, 4 LAW & Soc. Rev. 167 (1969); Comment, The Use of Behavioral Research in Products Liability Litigation, 2 HOFSTRA L. REV. 777 (1974).

96. How should judges apply the mechanical equation of riparian rights? The use of rules, derived from England at a time when a mere handful of boats were affected, is a glaring example of the need for an empirical approach to the law. “In just one bay in modern Long Island there are more boats than in all of medieval England, of kinds and put to uses undreamt of at the origin of the riparian rights rules.” Address by Judge Bertram Harnett, Justice of the Supreme Court, New York State, to the Nassau County Bar Association, April 28, 1972, in commemoration of Law Day.

97. The redefining of the role of women in society may necessitate a modification of the traditional marriage contract, i.e., financial support in return for domestic services.

98. B. CARDOZO, supra note 54, at 115.