Law as a Democratic *Means*:
The Pragmatic Jurisprudence of Democratic Experimentalism

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Abstract

In this paper I investigate law in relationship to Dewey's demand that within a truly democratic society the means, as well of the ends, of society need to be democratic as well. The standard conception of law is that of a system that gives final decision making and antimajoritarian authority to an unaccountable and oligarchic judiciary, a judiciary following rules set down by the "dead hand" of the past in order to rule democratic governance. This seems to reinforce the idea that democracy ultimately necessarily rests upon the use of undemocratic means. In this paper I will attempt to outline a conception of law that is democratic in both means and end, and that therefore is true to Dewey's demand. First, a conception of Deweyan democracy will be offered in combination with an ideal conception of "democratic law" found in Dewey's works. Then, an attempt to live up to the aims of a truly democratic legal procedure will be made by using Dorf and Sabel's article "A Constitution of Democratic Experimentalism." From this conception of law a decision making model for the Deweyan judge will be analyzed. Finally, the picture of jurisprudence constructed in the first part of the paper will be used to notice how much of legal philosophy is attached to a conception of law and legal reasoning that could be seen as an arbitrary product of historical contingencies and tools developed for specific times that have only limited relevance for the contemporary world. If successful, the construction of a conception of law as a democratic *means* will have both strong implications for the philosophy of law in general as well as for the possibility of actualizing a democratic form of governance as demanding as Dewey's.

Introduction

In this paper I investigate law in relationship to Dewey's demand that within a truly democratic society the means, as well of the ends, of society need to be democratic as well. This, of course, goes against a standard conception of the rule of law, especially when attached to the idea of a constitutional government, where law is seen as a framework which is outside of the democratic process, indeed is the foundation that sets the game rules for the democratic procedures it delimits. The standard conception of law is that of a system that gives final decision making and antimajoritarian authority to an unaccountable and oligarchic judiciary, a judiciary following rules set down by the "dead hand" of the past in order to rule democratic

governance. This seems to reinforce the idea that democracy ultimately rests necessarily upon the use of undemocratic means. If correct, such a result is damning to Dewey's demand for democratic means as well as ends. In this paper I will attempt to outline a conception of law that is democratic in both means and end, and that therefore is true to Dewey's demand. In order to do so the following steps will be followed. First, a conception of Deweyan democracy will be offered in combination with an ideal conception of "democratic law" found in Dewey's works. Then, an attempt to live up to the aims of a truly democratic legal procedure, one that satisfies Dewey's demanding requirement that democratic ends can be furthered ultimately only through democratic means, will be made by using Dorf and Sabel's article "A Constitution of Democratic Experimentalism," an article that offers a Dewey-inspired picture of law as a democracy enhancing and experiment encouraging institution.[1] From this conception of law a decision making model for the Deweyan judge will be analyzed. Finally, the picture of jurisprudence constructed in the first part of the paper will be used to notice how much of legal philosophy, including that under the aegis of legal pragmatism, is attached to an a-historical, essentialist and static conception of law, a conception of law and legal reasoning that could better be seen as an arbitrary product of historical contingencies and tools developed for specific times that have only limited relevance for the contemporary world. If successful, the construction of a conception of law as a democratic *means* will have both strong implications for the philosophy of law in general as well as for the possibility of actualizing a democratic form of governance as demanding as Dewey's.

[1] Democratic Experimentalism is one of a number of theories that often go under the bland umbrella term of "new governance." Even a partial list of these theories would include, in addition to Democratic Experimentalism, reflexive law, soft law, collaborative governance, responsive regulation, outsourcing regulation, reconstitutive law, communicative governance, negotiated governance, cooperative implementation, interactive compliance, deepened democracy, empowered participatory governance and the renew deal. See Orly Lobel, "The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought," *Minnesota Law Review* 89 (2004): 342-470, at 346.

Deweyan Democracy and the Concept of Law

Dewey's works that discuss law map quite directly on to the demands of his democratic theory. First, for Dewey, famously, democracy "must affect all modes of human association."[2] Indeed, Dewey holds that, "democracy can be served only by the slow day to day adoption and contagious diffusion in every phase of our common life of methods that are identical with the ends to be reached and that recourse to monistic, wholesale, absolutist procedures is a betrayal of human freedom no matter in what guise it presents itself."[3] If this requirement is taken seriously, then the U.S. legal system would have to be democratic in means as well as ends. Aspects of the actual system present problems for this view. Indeed, a system that combines final decision making and antimajoritarian authority to an unaccountable and oligarchic judiciary following rules set down by the "dead hand" of the past (as does the U.S. federal system in relationship to the Constitution) seems to exemplify undemocratic means even if directed towards democratic ends.[4] Of course Dewey's theoretical description of democracy has been critiqued as both too procedural and as too substantive or comprehensive (as well as both too radical and too conservative).[5] In this paper, though, the challenge is to see if such a "democracy all the way down" conception of law is plausible and offers a workable jurisprudential stance. If such a conception of law is not available, this presents a great challenge to not only a Deweyan jurisprudence, but also to Dewey's requirements for democracy. So, this demand sets the major question of this paper.

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[2] John Dewey, *The Public and Its Problems*, in *The Later Works of John Dewey*, vol. 2, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1984), p. 325.
[3] John Dewey, *Freedom and Culture*, in *The Later Works of John Dewey*, vol. 13, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1988), p. 187.
[4] Michael Sullivan in *Legal Pragmatism: Community, Rights and Democracy* (Bloomington: Indiana University Press, 2007), gives an excellent overview of legal theories constructed to show how all of these seemingly anti-democratic means can be used to protect and further democratic ends.
[5] Phillip Deen, "A Call for Inclusion in the Pragmatic Justification of Democracy," *Contemporary Pragmatism* 6 (2009): 131-151, offers a clear analysis of both sides of this critique.

Second, for Dewey democracy entails pluralistic values and a decentered conception of social institutions. Dewey claims that by having plural and decentered institutions as well as a form of life that practices democratic social habits there are opened up multiple avenues that allow for information to be communicated and alternate solutions to be proposed or tried out. There are multiple examples in Dewey's works where he applies this same demand of decentered pluralism to law as well. For example, in a writing where he critiques Austin's legal positivism, Dewey emphasizes a less centralized and hierarchical view of sovereignty and lawmaking. He claims that Austin's legal positivism leads to an overly intellectualized conception of the law being created by a specific learned class. He instead advocates for "decentralization of law-making bodies and the development of quite new organs of law-making."[6] This alternate pluralist description of law does not look for proper legal pedigree, but instead finds law emanating from "the minor laws of subordinate institutions-institutions like the family, the school, the business partnership, the trade-union or fraternal organization," as well as the factory and the church.[7] This allows for a disaggregated, pluralistic and "bottom-up" conception of law.

Third, Dewey defines the public in functional terms. A public is created when social consequences that affect people beyond the immediate group are noted and found to be in need of social control. Political democracy, therefore, comes into being where there is a recognized need to control the externalities produced by social activity. But these externalities are often unique to specific activities at specific times and places. Because such problems are in constant change, states need to be continuously "re-made," and publics (whether plural or unitary) need to

[6] John Dewey, "Review of H. Krabb's *The Modern Idea of the State*," in *The Later Works of John Dewey*, vol. 17, ed Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1990), p. 102.
[7] John Dewey, "Austin's Theory of Sovereignty," in *The Early Works of John Dewey*, vol. 4, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1971), p. 87.

be continuously formed and re-formed.[8] Once the democratic state is defined by the consequences it is constructed in response to, "The only statement which can be made is a purely formal one: the state is the organization of the public effected through officials for the protection of the interests shared by its members."[9] There are no universal or *a priori* rules or procedures that suffice once and for all to define democratic governance. Dewey offers as an example of the naïve and mistaken hope for such a solution the impositions of constitutions "ready-made" upon governments.[10] This argument is largely paralleled in Dewey's characterization of law. Indeed, law "cannot be set up as if it were a separate entity, but can be discussed only in terms of the social conditions in which it arises and of what it concretely does there."[11] This understanding, though, leads Dewey to note that using the word "law" to mean something with a unified core or general meaning is "rather dangerous."[12] Just as there might be various publics it seems that there might be plural and evolving law-like systems with vastly differing rules and procedures.

Fourth, Dewey claims that a truly democratic society rests on experimental intelligence. This use of experimental intelligence, though, eliminates some options that have been very influential in law. For example, because natural law searches for an antecedently given, it rejects the constructive and forward-looking aspects of inquiry and intelligence. Law, as social inquiry in general, therefore, "demands that intelligence, employing the best scientific methods and materials available, be used, to investigate, in terms of the context of actual situations, the

[8] For good discussions of Dewey's idea of public see Eric MacGilvray, "Dewey's Public," *Contemporary Pragmatism* 7 (2010): 31-47 at 33, and James Bohman, "Participation through Publics: Did Dewey answer Lippmann?," *Contemporary Pragmatism* 7 (2010): 49-68, at 50, 61. *See* also William H. Simon, "New Governance and the Transformation of Law: Symposium Afterward," *Wisconsin Law Review* 2010 (2010): 727-736, at 727-729 for a discussion of Dewey's conception of publics in relationship to new governance.
[9] Dewey, "*The Public*," p. 255-256.
[10] Ibid., p. 264.
[11] Ibid., p. 117.
[12] Ibid., p. 117.

consequences of legal rules and of proposed legal decisions and acts of legislation.[13] The use of best scientific methods includes the historical investigation necessary to inform an evolutionary conception of law. For example Dewey investigated the concept of corporate personality, noting the strange fact, a fact that could only be understood through knowledge of legal history, that ships were conceptualized as persons.[14] He concludes that the best way to utilize the concept of person in law would be a consequentialist conception avoiding any recourse to intrinsic essence or metaphysical content.[15] Along the same lines, Dewey critiqued the formalist picture of legal reasoning and legal logic as exemplified in judicial opinions. As opposed to the active inquiry required of legal practitioners. Judicial opinions often substitute false forms "rigorous in appearance and which give an illusion of certitude."[16] Of course it is important to emphasize here that Dewey, though he critiques the overly formalist style of analysis exemplified in judicial opinions, is not advocating antiformalism, but rather a careful attachment of experimental method to empirical results.

As can be seen, this is a demanding set of requirements that must be realized in order to satisfy the relationship to democracy that Dewey requires of law (or any social means). It is also quite abstract in this form. What exactly needs to be done in order to construct a legal system that would meet these requirements? Here Richard Posner's critique seems to be most damning. He argues that Dewey's emphasis on forward-looking results and his skepticism towards rule-of-law rhetoric is welcome, but also that Dewey's analysis ultimately exemplifies "top-down reasoning" and shows "a paradoxical lack of engagement with concrete problems and real

[13] Ibid., p. 122. Of course placement of experts in this must be democratic as well. See Melvin L. Rogers, "Dewey and His Vision of Democracy," *Contemporary Pragmatism* 7 (2010): 69-91, at 80-81.
[14] John Dewey, "Anthropology and Law," in *The Early Works of John Dewey*, vol. 4, ed. Jo Ann Boydston (Carbondale: Southern Illinois University, 1971), p. 40.
[15] Ibid., p. 38.
[16] John Dewey, "Logical Method and the Law," in *The Middle Works of John Dewey*, vol. 15, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1979), p. 73.

institutions."[17] One result of this abstractness is the lack of guidance necessary for a judge. Posner therefore argues that a Deweyan judge would be an ineffectual judge because the implications and demands of Dewey's philosophical stance are vague, indeterminate and unable to offer a useable set of ideas from which to come to an acceptable legal decision. If this is true, and it certainly seems plausible in light of the above outline of Deweyan ideas, it is an especially damning criticism. My claim is that using the jurisprudence of Democratic Experimentalism is one way to fill in the institutional and conceptual details of Dewey's concept of law, and also give content that would allow a Deweyan judge to make effective legal decisions (albeit decisions with a different legal character than commonly expected).

The Jurisprudence of Democratic Experimentalism

Michael Dorf and Charles Sabel, in "A Constitution of Democratic Experimentalism," construct a conception of "Democratic Experimentalism" inspired by Deweyan pragmatism that while compatible with traditional United States governmental organization would dramatically change the understanding of how government, and therefore the court system, ought to function.[18] As for pragmatist insights (in addition to those above) they highlight four. First, they note that the "reciprocal determination of means and ends" is inevitable due to the "pervasiveness of unintended consequences" that makes it impossible to come up with "first principles that survive the effort to realize them."[19] Second, they note that doubt properly understood and utilized is a spur towards creative solution. Third, Dorf and Sabel also accept that the inquiry following from doubt is "irreducibly social," indeed our understanding of our

[17] Richard A. Posner, *Law, Pragmatism, and Democracy* (Cambridge: Harvard University Press, 2003), at 118.
[18] Michael Dorf and Charles Sabel, "A Constitution of Democratic Experimentalism," *Columbia Law Review* 98 (1998): 267-473. Also see William H. Simon, "Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes," in Grianne De Burca and Joanne Scott, *Law and New Governance in the EU and the US* (Oxford: Hart Publishing, 2006): 37-64.
[19] Dorf and Sabel, "A Constitution" at 284-285.

individual projects "depends on how others interpret and react to them."[20] Fourth, Dorf and Sabel adopt ideals from classical pragmatism because "As a theory of thought and action through problem solving by collaborative, continuous reelaboration of means and ends, pragmatism suggests that advances in accommodating change in one area often have extensive implications for problem solving in others."[21] One of the most important implications is that a pragmatic understanding of constitutional law questions clear-cut distinctions and essentialist understandings of political branch functions and fixed conceptions of the line between public and private.

Because of the flexible nature of pragmatism and a questioning of essentialist ideas of democracy, law and the public/private split, "Democratic Experimentalism" as a program can look to private firms for possible solutions to problems of democratic governance. And this is exactly what Dorf and Sabel do. They argue that because markets have become "so differentiated and fast changing that prices can serve as only a general framework and limit on decisionmaking," innovative private firms have had to "resort to a collaborative exploration of disruptive possibilities that has more in common with pragmatist ideas of social inquiry than familiar ideas of market exchange."[22] Specifically, these firms have adopted "federated" and open strategies of benchmarking, simultaneous engineering and learning by monitoring. Benchmarking entails "An exacting survey of current or promising products and processes which identifies those products and processes superior to those the company presently uses, yet are within its capacity to emulate and eventually surpass."[23] Simultaneous engineering on its part entails "Continuous adjustment of means and ends and vice versa, as in pragmatism, the means

[20] Ibid., p. 285.
[21] Ibid., p. 286.
[22] Ibid., p. 286.
[23] Ibid., p. 287.

and end of collaboration among the producers." Further, because "the exchanges of information required to engage in benchmarking, simultaneous engineering, and error correction also allow the independent collaborators to monitor one another's activities closely enough to detect performance failures and deception before these latter have disastrous consequences" this type of collaboration encourages "learning by monitoring."[24] Indeed, group discussion becomes central in pooling plans, problems and perspectives. Further, this type of organization yields flexibility in purpose and output as well as creates self-reinforcing habits of inquiry and transparency.

Dorf and Sabel argue that a political system built along the same lines could actually be democracy enhancing. In this system of Democratic Experimentalism the roles of various branches remain somewhat distinct, but their functions are partially reconceived. Governmental activity would be presumptively local. Congress would encourage and allow subunits to experiment as to means and, to a lesser extent to ends, "on condition that those who engage in the experiment publicly declare their goals and propose measures of their progress, periodically refining those measures through exchanges among themselves and with the help of correspondingly reorganized administrative agencies." Congress would also ensure that information, such as the results of various experiments in governance, would be made generally available, therefore creating an information resource of successful and unsuccessful regulatory choices. Administrative agencies would be chiefly charged with assisting subunits in experimentation as well. More specifically, with congressional authorization they could set regulatory standards (most likely following "rolling best-practice rules") and encourage effective benchmarking.[25]

[24] Ibid., p. 287.
[25] Ibid., p. 345.

Citizens continue to evaluate their representatives through voting in general elections, but elections can be informed through the use of the benchmarking information from their district as well as those similar that the full process of Democratic Experimentalism produces. Therefore the same governmental process that encourages the development of benchmark information in furtherance of solutions to current political issues creates a record that can help inform votes. Further, citizens serve a more active stakeholder role on various governance councils in more directly democratic venues focused on bringing together members of a specific public centered upon pressing current governance issues. Therefore, "Experimentalism links benchmarking, rulemaking, and revision so closely with operating experience that rulemakers and operating-world actors work literally side by side-but, to repeat, in plain view of the public-and thus, largely overcome the distinction between the detached staff of honest but imperfectly informed experts and the knowledgeable but devious insiders they regulate."[26]

Most significant for this paper, the conceptualization of the role of the courts also changes in Democratic Experimentalism. Courts function to make sure that the experiments fall within the broad aims authorized in Congress' legislation, respect the rights of citizens and are performed in a properly systematic and transparent manner. Communities would get freedom and support for their experiments, but in return for this liberty they must develop a record of options and choices considered (which would be virtually automatic given the requirements of benchmarking, simultaneous engineering and learning by monitoring). A court would look at the possibilities revealed by the process in order to decide whether or not any rights or policies are unlawfully thwarted. A party challenges governmental choices in court by pointing out better choices revealed in other experiments in governance, "In this way the vindication of individual rights encourages mutual learning and vice versa, and judges' discretion in applying broad

[26] Ibid., p. 355.

principles is schooled and disciplined by actual experimentation with possibilities they could have never imagined."[27] Courts would not eliminate traditional doctrines but would have to embrace two ideals in order to function properly within Democratic Experimentalism. First, courts would have to combine a sense of "fundamental legal norms" with an understanding that these norms can properly be exposed to experimental elaboration. Second, "experimentalist courts defer to the political actors' exploration of means and ends only on the condition that the actors have in fact created the kind of record that makes possible an assessment of their linking of principle and practice."[28]

Therefore "Judicial review by experimentalist courts accordingly becomes a review of the admissibility of the reasons private and political actors themselves give for their decisions, and the respect they actually accord those reasons: a review, that is, of whether the protagonists have themselves been sufficiently attentive to the legal factors that constrain the framing of alternatives and the process of choosing among them."[29] The virtue of this is that the process creates data so, as opposed to courts currently that have to act as if empirical questions are questions of pure reasoning, the court within Democratic Experimentalism will have an experimentally informed record to work from. For example, under a statute authorizing experimentalist administration, the courts do not themselves supply authoritative meaning; the agencies and other actors jointly provide the baseline through rolling best-practice standards."[30] Judges therefore function less as a referee and more as part of an active problem-solving process.[31]

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[27] Ibid., p. 288.
[28] Ibid., p. 389.
[29] Ibid., p. 389.
[30] Ibid., p. 397.
[31] Ibid., p. 401. For an investigation of courts already functioning in this manner see Michael C. Dorf and Charles F. Sabel, "Drug Treatment Courts and Emergent Experimentalist Government,: *Vanderbilt Law Review* 53 (2000): 831-883. See also Michael C. Dorf, "Legal Inderminancy and Institutional Design," *New York University Law*

One fear that Dorf and Sabel anticipate is that it will be claimed that Democratic Experimentalism improperly trivializes rights. This is, of course a standard critique of any remotely consequentialist theory of rights. Dorf and Sabel embrace the fact that under democratic experimentalism rights are seen as a product of history, context and social understandings. But for them, "Thus understood, rights, far from estranging us from one another, are a crucial part of the common ground of mutual recognition upon which we raise our individuality."[32] So rights become an important part of the active constructive process of democratic governance. Indeed, "this conception of political rights and personhood as mutually defining is a variant of the pragmatist idea of the joint determination of individuality and sociability."[33] Further, Dorf and Sabel respond that a demand for greater certainty and a more secure foundation than this is unsatisfiable because, "rights are inevitably experimentalist."[34] That is, "we do not face a choice between experimentation and no experimentation," but only between conscious, systematic and democratically based experimentation and that consisting of "a haphazard mixture of metaphysical nonsense and ungrounded speculation about empirical matters."[35] In other words, "an ongoing, albeit haphazard, experiment" as opposed to the "more democratically and systematically organized one" offered by Democratic Experimentalism.[36]

Review 78 (2003): 875-981, at 945-946. Of course the role of the lawyer would have to be reconceptualized as well, changing, possibly, from traditional litigator to another type of "problem solving" agent. For a discussion of this see Douglas NeJaime, "When New Governance Fails," *Ohio State Law Journal* 70 (2009): 323-401, at 337, 348.

[32] Dorf and Sabel, "A Constitution of" at 449.

[33] Ibid., p. 448.

[34] Ibid., p. 452.

[35] Ibid., p. 457.

[36] Ibid., p. 469. See also Jackson Nyamuya Maogoto, "The 'Good Governance' Crusade in the Third World: A Rich, Complex Narrative – Magic Wand or Smoke Screen?" *International Community Law Review* 9 (2007): 375-385, at 383; "Democratic experimentalism acknowledges that rights are not based on first principles; that inevitably they are socially constructed and historically contingent, and that they are closely connected with both individual and group identity." Another aspect of rights practice as opposed to standard foundational rights talk that Democratic experimentalism can utilize and explain is the phenomenon of "destabilization rights" or the use of rights litigation to de-entrench habits and practices that are obstructive. See Charles F. Sabel and William H. Simon, "Destabilization Rights: How Public Law Litigation Succeeds," *Harvard Law Review* 117 (2004): 1015-1101, at 1021-1022.

Does the jurisprudence of Democratic Experimentalism satisfy Dewey's requirements for a properly democratic conception of law? How about the first and most demanding requirement that the means be as democratic as the ends? The jurisprudence of Democratic Experimentalism does not avoid hierarchical decision making. But avoiding this cannot be what Dewey meant by democratic means. What it does do, though, is create a system that avoids putting the unelected and oligarchic judge in charge of rule meaning in all but the most simple or, at the opposite extreme, most intractable of situations. As opposed to being thought of as a rule interpreting and applying "umpire," the judge is a fellow inquirer in something closer to the role of project supervisor. In this sense at the very least much more of the interpretive process, as well as the decisions as to relevant content and necessary inquiry, are decided via the more democratic means of community organized stakeholders. Certainly the second aspect of Dewey's picture is largely satisfied. Under Democratic Experimentalism plural and decentered experiments in governance are explicitly encouraged. Government is presumptively local and context specific solutions are encouraged. Further, the whole system is conceptualized so as to encourage bottom-up learning. While governance is presumptively local, knowledge is consciously pooled for use between locales. Third, Democratic Experimentalism reconceptualizes the court system so as to make it much more experimental and therefore more explicitly empirical as related to the functions demanded of legal institutions. As for Dewey's fear that static and non-experimental conceptions of democracy and law tends to create overly essentialist pictures of the function and characteristic of such concepts and the institutions they demand, once redescribed as Dorf and Sabel do, ideas of constitutions as static foundational game rules and law as encompassing specific types of reasoning become more difficult to hold uncritically. This, in turn, brings us to the fourth requirement that a democratic society, and therefore law within such a society, must

rest upon experimental intelligence. In this case, it is difficult to imagine a description of law that could better satisfy the "demand" that law employ the best scientific methods and materials available in order to face the consequences of legal rules, decisions and acts legislation. Further, democratic experimentalism, with its explicit engagement with the reciprocal determination of means and ends, allows the court to be part of a democratic and evolutionary system, a system that uses the past as a vast repository of funded knowledge, but not a dead hand of moral obligation. Indeed, law is reconceptualized as a evolutionary learning system.

So, Dorf and Sabel offer a conception of law that largely satisfies Dewey's demanding requirements for democratic governance.[37] This is a significant result in itself in that the concept of law as a democratic means might seem like a logical contradiction when it is thought of as the antimajoritarian framework for majoritarian procedures. But there is another important question that needs to be answered if it is to be a real jurisprudential possibility: Does a Deweyan judge, after adopting the details of Democratic Experimentalism, have the necessary tools to effectively adjudicate? I think the answer here is not only yes, but further, the tools and content offered by Democratic Experimentalism promise to greatly enhance the reliability and informed nature of judicial decisions. That is, a Deweyan judge will be utilizing the information gathered in the process of benchmarking and learning by monitoring will therefore have a record that allows the court to face an empirically informed set of options considered, reasons for specific choices, and description of stakeholders included. As opposed to the traditional case which is framed and

[37] This is not to give Democratic Experimentalism a free ride. Critics have found multiple worries. For a strong and comprehensive critique see David A. Super, "Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law," *University of Pennsylvania Law Review* 157 (2009): 541-616. A few other articles with a critical bent are Lisa T. Alexander, "Stakeholder Participation in New Governance: Lessons from Chicago's Public Housing Reform Movement," *Emory International Law Review* 16 (2009): 117-185, Benjamin J. Beaton, "Walking the Federalist Tightrope: A National Policy of State Experimentation for Health Information Technology," *Columbia Law Review* 108 (2008): 1670-1717, Christie Ford, "New Governance in the Teeth of Human Frailty: Lessons from Financial Regulation," *Wisconsin Law* Review 2010 (2010): 441-487, and Alana Klein, "Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights." *Columbia Human Rights Law Review* 39 (2008): 351-422.

prepared as litigation between two parties, even when the repurcussions are general throughout society, as is perhaps standard even in administrative law cases, and where the traditional legal tools of statutory interpretation and argument from precedent and analogy are emphasized, a case under Democratic Experimentalism will come to court with its record more fully developed and include information and possible options offered by a broader set of sources. Further, the judge's role as project supervisor is not to come to a determinative and universal once-and-for all decision, but rather make sure that the process of Democratic Experimentalism itself is helping the public or publics in question come to an informed and democratic solution.[38]

Not only is the judge much more empirically and scientifically informed under this conception of the court's role within a democratic government, but also the pressure on the judge to come up with definitive rules and foundational determinations is greatly relieved. This is because the system is not analogized to a self-binding and foundational rule-making conception of constitutional government as that often charcterized through the image of Odysseus bound to the mast, but rather as an evolutionary system that while largely conservative in nature, and that can change incrementally through learning from the local and diverse experiments in governance (instead of Odysseus on his boat think of Neurath).[39] Such judges, therefore, would have more knowledge available to them, including benchmark information on available options for and against as well as the reasoning process used to arrive at specific solutions combined with less pressure on them to come up with definitive rules that can function in multiple, diverse and often

[38] Another positive aspect of this description of the judicial role is that it avoids or at least mitigates some of the standard principal-agent model problems that arise in law and other governance situations such as monitoring issues, problems with clarity of command, isolation of decision making from local knowledge, taking means and ends as given and the inability to react to issues outside the line of command and all the "democracy deficits" that come with these issues. See Charles F. Sabel, "A Quiet Revolution of Democratic Governance: Towards Democratic Experimentalism," in *Governance in the 21st Century* (Paris: OECD Publications, 2001), at 122.

[39] Christopher K. Ansell in *Pragmatist Democracy: Evolutionary Learning as Public Philosophy* (Oxford: Oxford University Press, 2011), argues that pragmatism is characterized by "progressive conservatism" because "meaning is both cumulative and continuously revised (at 13).

unforeseen contexts.[40] This seems a better position to be in than the traditional judge is with his or her legalist tools and general "realist" attitudes.[41] Indeed, it is often noted that these traditional tools can come up with radically different conclusions in almost anything but the easiest cases and that such decisions are often better explained through other than the purported legal reasoning offered. It is important to note here than it is not as if the traditional tools of legal analysis or an appeal to economic analysis are eliminated, just that they are used only in the case where the other more experimentalist and democratic processes fail to decide the issue.

Implications for Philosophical Jurisprudence

Of course one easy response to Democratic Experimentalism, and one made often to Dewey's democratic theory, is that they are both unrealistic because unworkable. This, of course, is partially an analytical claim to the effect that either one or both of these theories are logically inconsistent. It is hoped that this paper's exposition of both theories at least makes an analytical claim like this less plausible through the construction of a plausible alternative that is, at the very least, logically possible. More likely criticisms of Democratic Experimentalism and Deweyan democracy are that while they are not logically contradictory alone or in tandem, they are nonetheless too demanding given real world limitations. This is, of course, an empirical claim that could only be verified by actually trying it as an option. And it has been argued that many aspects of Dorf and Sabel's system are observable in governance activities across the world. The proper response to this latter critique is to question whether or not claims to what is realistic might be due to an "intramundane" perspective and ask for empirical data. At least

[40] See Michael C. Dorf, "The Limits of Socratic Deliberation," *Harvard Law Review* 112 (1998): 4-80: at 5, 38.
[41] Brian Z. Tamanaha in *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton: Princeton University Press, 2009), makes a book-length argument to the effect that because judges profess that their reasoning is "realistic" in various treatises and opinions that the are not, therefore, properly described as formalists. This type of "realism," of course, is nothing but a collective professional claim that "we do what works," reflecting much the same attitude that Rorty accepts as showing that American legal practitioners are, indeed, pragmatists. I take it that such professions of attitude are in any stronger version of pragmatism or realism to be tested empirically and not allowed to rest upon such internalist intuitions.

withing pragmatism an easy waive of the hand towards "realism' should be regarded as not a satisfactory critique without further support. Even better is to admit the possibility as a hypothesis and try to verify it experimentally.[42]

Of course, once one seriously looks at the tradition of law as we know it as a result of history with all its specificity and contingency, it becomes more difficult to see it as a timeless natural type. Within the pragmatist tradition there is good pedigree to see the historical path of the law as worthy of study and as awakening a sense of the contingency and path-dependent quality of the "timeless truths" of the law. Here is where a pragmatist philosophy of law must, it seems, part ways with legal pragmatism as standardly characterized within the academy. Legal pragmatism in the United States at least is often "domesticated" and comfortably working within the given set of institutional ideas and functions as practiced mostly unconsciously and accepted seemingly unawares and uncritically by those working within contemporary philosophy of law.[43] A whole constellation of analysis hinges upon uncritical acceptance of the idea of law as a process of interpreting and applying general rules to specific circumstances (the no motorized vehicles in the park problem), of avoiding judicial willfulness (the activist judge problem), using only legal reason (pedigree, ontology and purity issues), and following the true meaning of the Constitution (Odysseus bound issues). Of course many of the solutions to various parts of the

[42] Advocates of Democratic Experimentalism argue that examples of such a system, beyond the corporate practices which they highlight, are easy to find in contemporary governance. For example, aspects of school reform have been noted. See, James S. Liebman and Charles F. Sabel, "A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform," *New York University Review of Law and Social* Change 28 (2003): 183-304, at 184. Another often-cited example is the Habitat Conservation Plan response to the Endangered Species Act. See, for instance, Bradley C. Karkkainen, "Adaptive Ecosystem Management and Regulatory Penalty Defaults: Toward a Bounded Pragmatism," *Minnesota Law Review* 87 (2003): 943-998. Dorf and Sable list examples from family support services (p. 324), community policing (p. 327), military procurement (p. 332), traffic administration (p. 357), forest service management (p. 364), and nuclear power and environmental regulation (p. 371, 373).

[43] This "domestication" would help explain why legal theorists and practitioners from drastically different political and theoretical stances could describe themselves and others as legal pragmatists. In other words, because a shared internal perspective is adopted, anything within the system that appears to have marginally consequentialist justification can be coded in contemporary jurisprudential thought as a "pragmatist" stance. An extreme case of this is the brief moment of literature on "Scalia's pragmatism."

constellation create countermajoritarian and other antidemocratic issues of justification to be solved as well. And these also create the impression that the idea of a democratic legal means is close to a logical impossibility. If instead inquiry into law is thought of as experimental, constructive and much more like an engineering project than a process of natural kind identification, this paper can be offered as at the very least a thought experiment, an exercise in redescription, where many parts of this constellation become a little more questionable.

For example, the applying a rule problem is at the very least decentered if the judge is reconceived as less of an umpire and more of a project manager. The activist judge problem drastically changes when the matter is less that of arriving at a definitive meaning for a rule and more of a continuing empirical investigation. The pedigree, ontology and purity issues change drastically when the assumption that there are truly legal types of reasoning is questioned. Indeed, to turn this issue back on itself, once law is thought of as possibly being an information creating system it becomes an open question as to why so many legal theories are centered upon limiting information to strictly "legal" information and reasoning to specifically legal types of reason. Might these ideals not have been invented and utilized in times with needs and institutional settings drastically different than those of today? These strategies might have made virtues out of the necessary institutional limitations, the vices, of earlier times, but those virtues might also have evolved into unnecessary limitations on new and real possibilities for developing a more democratic conception of law in the contemporary world (therefore solving or at least undermining some of the issues plaguing the relationship between law and democracy). If this is the case, then philosophy of law, especially a pragmatic philosophy of law that has by its own admission less ability to rest upon analytic truths and *a priori* definitions and prides itself on a

forward looking, historically informed, pluralist and experimentalist methodology, needs to emphasize more comparative analysis, empirical investigation and imaginative redescription.

Conclusion

In this paper I have offered a concept of law that not only aims at enhancing democratic ends, but also embodies democratic means. I argued that this demand, a demand found in Dewey's democratic theory and yet one that is seemingly in conflict with the concept of law, is largely satisfied in Dorf and Sabel's system of Democratic Experimentalism. Further, if noted as an option, this system offers some challenges to traditional conceptual assumptions accepted within contemporary philosophy of law, including those in the area of legal pragmatism. It seems that if one embraces a historicized, evolutionary and experimental methodology in relationship to democratic ends *and* means, there is much work remaining for philosophers of law in the pragmatist tradition.