



USING JOHN DEWEY'S PRAGMATISM EPISTEMOLOGY TO TEACH LEGAL ANALYSIS AND COMMUNICATION

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INTRODUCTION

There are many conceptual structures and analytical paradigms that legal educators use to show students how to engage in both legal analysis and communication.¹ Most of us have our pet theories about the best way to teach these things. That is as it should be I suppose. We all bring our own predispositions and backgrounds to our teaching. It is a good thing, too, as students need to be exposed to as many different approaches as possible in order for them to find their way. There are, as they say, many roads to Mecca.

I have my own predispositions, and my background is as much a hold on my thinking as it is anyone else's. I have for some time studied American pragmatism, and its intersection with legal

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1. There are numerous different structures and paradigms suggested in the literature. *See generally* CHARLEY F. ABERNATHY, *LAW IN THE UNITED STATES* (2006); STEVEN J. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* (1995); DAVID HRICIK, *LAW SCHOOL BASICS: A PREVIEW OF LAW SCHOOL AND LEGAL REASONING* (1998); HOWELL E. JACKSON ET AL., *ANALYTICAL METHODS FOR LAWYERS* (2003); HARRY W. JONES ET AL., *LEGAL METHOD: CASES AND TEXT MATERIALS* (1980); JOHN MAKDISI & MICHAEL MAKDISI, *INTRODUCTION TO THE STUDY OF LAW* (3d ed. 2009); SHELDON MARGULIES & KENNETH LASSON, *LEARNING LAW: THE MASTERY OF LEGAL LOGIC* (1993); JAMES E. MOLITERNO, *AN INTRODUCTION TO LAW, LAW STUDY, AND THE LAWYER'S ROLE* (1991); SARAH E. REDFIELD, *THINKING LIKE A LAWYER* (2002); DAVID T. RITCHIE, *MASTERING LEGAL ANALYSIS AND COMMUNICATION* (2008); DAVID S. ROMANTZ & KATHLEEN ELLIOTT VINSON, *LEGAL ANALYSIS: THE FUNDAMENTAL SKILL* (1998); MARJORIE DICK ROMBAUER, *LEGAL PROBLEM SOLVING: ANALYSIS, RESEARCH, AND WRITING* (1983); PIERRE SCHLAG & DAVID SKOVER, *TACTICS OF LEGAL REASONING* (1986); PETER L. STRAUSS, *LEGAL METHODS: UNDERSTANDING AND USING CASES AND STATUTES* (2005); ARTHUR T. VANDERBILT, II, *AN INTRODUCTION TO THE STUDY OF LAW* (1979).



reasoning.² In particular, I have read most of the works of John Dewey with an eye toward his theory of knowledge.³ While I am not what might be accurately described as an acolyte of either John Dewey or pragmatism, I do appreciate Dewey's account of human cognition and I find the basic disposition of pragmatism to be especially relevant to discussions regarding legal reasoning.⁴ Dewey's theory of human cognition did not deny the relevance of other competing accounts,⁵ but rather he attempted to integrate those accounts into his own theory.⁶ In fact, Dewey rejected the notion that his account was a real and distinct alternative to traditional accounts of logic or epistemology.⁷ For him, his theory of inquiry was an application of abstract logic to real world problems.⁸ Dewey called this application, experimental logic.⁹ In a seldom noted essay, from the 1924 *Cornell Law Quarterly*, Dewey made the case that this sort of process is present in the domain of legal reasoning.¹⁰

In what follows, I will discuss in some depth the epistemology that Dewey outlines. I will lay out Dewey's experimental logic in general, and in the particular context of legal reasoning. I believe this account gives us a compelling picture of not only how human beings think through problems in general, but of how actors in the legal domain think through and solve legal problems. Finally, I will discuss the applicability of this theory in the law school classroom, especially in classes devoted to practical skills. It is my considered opinion that this pragmatist account of experimental logic can be a useful way of teaching and illustrating legal reasoning to novices. In the last section of this paper, then, I will explain how I use the theory in my legal analysis and legal communication¹¹ classes. In the end, it is my hope that this discussion will

2. Many commentators on legal theory have attempted to incorporate Dewey's views on human cognition into accounts of legal reasoning. One recent contribution is particularly notable: MICHAEL SULLIVAN, *LEGAL PRAGMATISM: COMMUNITY, RIGHTS, AND DEMOCRACY* (2007).

3. Primarily, I am relying on three texts: JOHN DEWEY, *HOW WE THINK* (1910); JOHN DEWEY, *THE QUEST FOR CERTAINTY* (1929); JOHN DEWEY, *LOGIC: THE THEORY OF INQUIRY* (1938).

4. For an excellent discussion of this see SULLIVAN, *supra* note 2, at ch. 4.

5. The principle contesting account is logical positivism or what is sometimes referred to as analytic epistemology. Theorists such as A. J. Ayer, Alfred North Whitehead, Bertrand Russell, Gottlob Frege, Ludwig Wittgenstein, and Rudolf Carnap are associated with this school of thought. Essentially, Logical positivists hold that the world (including what is empirically observable) can be reduced to a series of logical propositions. These propositions can then be related to each other in either mathematical or deductive fashion to derive the truth value of any set of beliefs or phenomena. See A. J. AYER, *LOGICAL POSITIVISM* (1959) (for a series of essays that set out this position and defend its relevance to human cognition in all spheres).

6. See, e.g., JOHN J. STUHR, *PRAGMATISM, POSTMODERNISM, AND THE FUTURE OF PHILOSOPHY* 154–65 (2003).

7. *Id.* at 155.

8. *Id.* at 157.

9. See JOHN DEWEY, *ESSAYS IN EXPERIMENTAL LOGIC* (1916).

10. John Dewey, *Logical Method and the Law*, 10 *CORNELL L. Q.* 17 (1924).

11. In particular, I refer to my use of this pattern of reasoning in my legal writing and advocacy classes. I do not use that terminology in the text because I believe that the designation "legal writing" is unduly restrictive and, at a certain level, inaccurate. Nonetheless, for clarity sake, when I use the term legal communication here I generally mean legal writing.



give others a useful and convenient way to discuss the complexities of legal reasoning in an understandable and easily digestible way. I begin by looking at the general theory of experimental logic that Dewey's pragmatism provides.

I. PRAGMATIC LEGAL REASONING

I suggested above that pragmatic legal reasoning is helpful because it gives us a flexible yet sophisticated approach to thinking about legal problems. This sort of analysis gives lawyers and others in the legal domain the perspective and the tools to select most effectively from amongst a variety of reasoning and communication skills as we address complex legal problems. Instead of mechanically selecting and employing the same formal paradigms of reasoning (or logic) whenever one confronts a legal problem, thinking pragmatically enables us to be more flexible and nimble in selecting those skills and strategies that will best assist us in accomplishing our tasks with subtlety and precision. In order to move beyond the sort of "one size fits all" thinking that law school tends to convey, actors in the legal domain need to develop more mental and practical agility. Understanding and using the kind of "logic" that the philosopher John Dewey wrote about is a way of gaining this agility.

John Dewey was an American philosopher in the late nineteenth and early twentieth centuries.¹² He wrote on a wide variety of topics, including democracy, education, [epistemology (theories of knowledge)],¹³ legal theory,¹⁴ and moral reasoning.¹⁵ During this time period, Dewey was one of several philosophers in the United States who reevaluated the theoretical underpinnings of modern thought.¹⁶ This was a time when the grand European theories of the Enlightenment¹⁷ were being tested and critiqued.¹⁸ These U.S. philosophers—in addition to Dewey, William James,¹⁹ Charles Sanders Peirce,²⁰ George Santayana,²¹ and Ralph Barton

12 See, e.g., JAMES CAMPBELL, UNDERSTANDING JOHN DEWEY: NATURE AND COOPERATIVE INTELLIGENCE (1995); SIDNEY HOOK & JOHN DEWEY: AN INTELLECTUAL PORTRAIT (2008); JAY MARTIN, THE EDUCATION OF JOHN DEWEY (2003).

13. See JOHN DEWEY, HOW WE THINK (1910); JOHN DEWEY, THE QUEST FOR CERTAINTY (1929); JOHN DEWEY, LOGIC: THE THEORY OF INQUIRY (1938).

14. Dewey, *surpa* note 10.

15. See JOHN DEWEY AND JAMES H. TUFTS, ETHICS (1908).

16. GORDON H. CLARK, THALES TO DEWEY: A HISTORY OF PHILOSOPHY 518 (1957).

17. In particular, the grand epistemological theories of Immanuel Kant and Georg Wilhelm Friedrich Hegel were being critiqued. See *id.*; you also might refer to IMMANUEL KANT, CRITIQUE OF PURE REASON (trans. Norman Kemp Smith 1929); GEORG WILHELM FRIEDRICH HEGEL, PHENOMENOLOGY OF SPIRIT (trans. A.V. Miller 1977).

18. See Introduction to PAUL KURTZ, AMERICAN PHILOSOPHY IN THE TWENTIETH CENTURY: A SOURCEBOOK (FROM PRAGMATISM TO PHILOSOPHICAL ANALYSIS) (1966); WALTER G. MUELDER & LAURENCE SEARS, THE DEVELOPMENT OF AMERICAN PHILOSOPHY pt. VI (1940).

19. See KURTZ, *supra* note 18, at 102-159; MUELDER & SEARS, *supra* note 18, at 349-375; see also, WILLIAM JAMES, ESSAYS IN PRAGMATISM (1948); WILLIAM JAMES, THE MEANING OF TRUTH (1997); WILLIAM JAMES, A PLURALISTIC UNIVERSE (1996); WILLIAM JAMES, PRAGMATISM (1960).

20. See KURTZ, *supra* note 18, at 45-101; MUELDER & SEARS, *supra* note 18, at 330-347; see also, CHARLES



Perry²²—are often grouped together in a school called American pragmatism.²³ Pragmatists developed “a method clarifying ideas and concepts by clearing away metaphysical and other confusions.”²⁴ One commentator has noted that the “net effect of pragmatism was that it contributed to the destruction of traditional conceptions of metaphysics and to the reconstruction of philosophy.”²⁵ In the last two decades, there has been a resurgence of interest in pragmatism.²⁶ While pragmatism was never a theory focused primarily on law, there are several notable legal theorists who have dabbled in pragmatist theory.²⁷ For me, pragmatism—and John Dewey’s contributions in particular—give us a unique way of conceptualizing how lawyers and others trained in the law think through and solve problems.²⁸

In this discussion, I will be looking at the intersection between Dewey’s epistemological views and his conception of legal reasoning. Dewey’s legal epistemology has gained some notable popularity in recent years.²⁹ In fact, Steven Smith has gone so far as to say that we (in the

SANDERS PEIRCE, REASONING AND THE LOGIC OF THINGS (1992).

21. See KURTZ, *supra* note 18, at 219-262; see also, GEORGE SANTAYANA, THE LIFE OF REASON, OR THE PHASES OF HUMAN PROGRESS (2009).

22. See KURTZ, *supra* note 18, at 338-352; see also, RALPH BARTON PERRY, THE THOUGHT AND CHARACTER OF WILLIAM JAMES (1935); and RALPH BARTON PERRY AND WILLIAM JAMES, ESSAYS IN RADICAL EMPIRICISM (2010).

23. See KURTZ, *supra* note 18. You might also refer to CLARK, *supra* note 16, at 498-522; MUELDER & SEARS, *supra* note 18, at pt. VI.

24. KURTZ, *supra* note 18, at 19.

25. *Id.* at 21. In the context of the effect this had on legal reasoning, see Scott Brewer, *On the Possibility of Necessity in Legal Arguments: A Dilemma for Holmes and Dewey*, 34 J. MARSHALL L. REV. 9 (2000).

26. See STUHR, *supra* note 6; MORRIS DICKSTEIN, ED., THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE (1999); see also SUSAN HAACK, EVIDENCE AND INQUIRY: A PRAGMATIST RECONSTRUCTION OF EPISTEMOLOGY (2009); ROBERTO MANGABEIRA UNGER, THE SELF AWAKENED: PRAGMATISM UNBOUND (2009); 3 RICHARD RORTY, TRUTH AND PROGRESS: PHILOSOPHICAL PAPERS (1998); 2 RICHARD RORTY, ESSAYS ON HEIDEGGER AND OTHERS: PHILOSOPHICAL PAPERS (1991); 1 RICHARD RORTY, OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS (1991); RICHARD RORTY, CONSEQUENCES OF PRAGMATISM (1982).

27. Oliver Wendell Holmes, Jr., Roscoe Pound, and Richard Posner have all been explicitly associated with pragmatism. See, BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 245 - 247 (3d ed. 2004). The work of American legal realists is also associated with pragmatist ideas. See *id.*, at ch. 17; and Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L.R. 809 (1935).

²⁸ I took up this theme in: DAVID T. RITCHIE, MASTERING LEGAL ANALYSIS AND COMMUNICATION ch. 5 (2008).

²⁹ See, e.g., RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003). See also, Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. L.J. 2071 (1996); Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-first Century*, 1995 U. ILL. L. REV. 163 (1995); Thomas G. Grey, *Freestanding Legal Pragmatism*, 18 CARDOZO L. REV. 21 (1996); Richard Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1 (1996); William Andrew Shutkin, *Pragmatism and the Promise of Adjudication*, 18 VT. L. REV. 57 (1993); Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409 (1990); Michael Sullivan & Daniel J. Solove, *Can Pragmatism be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687 (2003) (discussing Posner’s views on Dewey); Brian Z. Tamantha, *Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction*, 41 AM. J. JURIS. 315 (1996); Richard Warner, *Why Pragmatism? The Puzzling Place of Pragmatism in Critical Theory*, 1993 U. ILL. L. REV. 535 (1993). Also



legal academy at least) are all pragmatists now.³⁰ This popularity is not just a fad in my estimation. Pragmatic legal reasoning provides something that other theories of legal reasoning do not. It more closely approximates the actual practice of expert legal reasoning, and better explains the way creativity and subjectivity fit into the process. Most accounts of legal reasoning attempt to weed out subjectivity and curtail creativity in the name of objective analysis.³¹ Objectivity is, of course, the stated goal of logical positivism and its legal counterpart, Anglo-American legal positivism.³² I am convinced, however, that the existence of subjectivity and creativity within the legal system is not a bad thing. In fact, I would go so far as to say that it is impossible to have a complex institutional system without creativity and subjectivity.

Many systems of legal reasoning and jurisprudence attempt to eliminate these aspects, thus constructing a “scientific” system of legal theory.³³ This is in my opinion, and in the view of many other commentators, an impossibility.³⁴ Complex human reasoning, in any domain, is multifaceted and pragmatic (in the fullest conception of that word).³⁵ As Richard Posner puts it, pragmatism:

“is not a single analytical method or even a set of related methods but a grab bag of methods, both of investigation and persuasion. It includes anecdote, introspection, imagination, common sense, intuition (due apparently to how the brain structures perceptions, so that, for example, we ascribe causal significance to acts without being able to observe—we never do observe—causality), empathy, imputation of motives, speaker’s authority, metaphor, analogy, precedent, custom, memory, “induction” (the expectation of regularities, related both to intuition and to analogy), [and] “experience.”³⁶

Experts in the legal domain display this trait all the time. So let us look at the theory behind pragmatic legal epistemology.

notable in this regard is SUSAN HAACK, EVIDENCE AND INQUIRY: A PRAGMATIST RECONSTRUCTION OF EPISTEMOLOGY 261-81 (2009). For the view that legal pragmatism cannot be free standing, see David Luban, *What’s Pragmatic about Legal Pragmatism?*, in THE REVIVAL OF PRAGMATISM 275 (Morris Dickstein ed., 1998)

³⁰ Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 423 (1990).

³¹ See Bix, *supra* note 27, at 33-52. See also ANALYTIC JURISPRUDENCE ANTHOLOGY chs. 2 and 4 (Anthony D’Amato, ed., 1996); and NICOS STAVROPOULOS, OBJECTIVITY IN LAW (1996); OBJECTIVITY IN LAW AND MORALS (Brian Leiter ed., 2001).

³² See Bix, *supra* note 27, at 33-52.

³³ See *id.* at 35.

³⁴ *Id.*, at 59-60.

³⁵ See Peirce, *supra* note 20, at ch. 5. For opposing views about the pragmatic nature of human reasoning (while nonetheless recognizing the multifaceted nature of reasoning), see, e.g., THE NATURE OF MIND (David M. Rosenthal ed., 1991); MICHAEL POLANYI, PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY (1962).

³⁶ Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 838 (1988).



A. Dewey's Experimental Logic and the Law

In his short essay entitled “Logical Method and Law” John Dewey presented a theory which was designed to give those involved in legal decision-making “a single way of treating cases for certain purposes or consequences in spite of their diversity.”³⁷ Dewey explained what he called an experimental logic whose “meaning and worth are subject to inquiry and revision in view of what happens, what the consequences are, when it is used as a method of treatment.”³⁸ According to Dewey, when administrative officers, judges, or lawyers are involved in legal reasoning they should trust this experimental logic to guide them to general principles which emerge as “statements of generic ways in which it has been found helpful to treat concrete cases.”³⁹ In other words, by looking at the consequences of legal reasoning in other cases, we can formulate better decisions in the cases we work on. This is a convenient definition of the common law method of legal reasoning.⁴⁰

Dewey believed that the analytical system behind the common law is consequentialist in nature.⁴¹ This means that legal analysis and communication in our system are designed to address the end products, not the process that leads to those ends. At one obvious level this seems correct. For all the grand talk about universal principles of justice and fairness that other legal theories pronounce,⁴² the day to day operation of our legal system seems to turn more on the practical aspects of how we deal with particular cases in specific factual situations.⁴³ This is as true in transactional work as it is in litigation settings.⁴⁴ For Dewey (and other pragmatists as well), human reasoning is a system of trial and error.⁴⁵

We work best, according to this pragmatic theory, when we are flexible enough to try ideas, to test them, in a fluid and flexible way.⁴⁶ By doing so, we are drawing from a wide variety of conceptual schemes, using those that best fit the situations we face. In some circumstances we might find that one particular analytical skill is useful. In another situation we might find that an entirely different skill is most useful (even if the two situations are not dramatically different). For Dewey, and others who think like him, this kind of intellectual dexterity will lead us to the most rational and useful outcomes.⁴⁷ Our thinking is best when it accomplishes the goals we

³⁷ John Dewey, *Logical Method and the Law*, 10 CORNELL L. Q. 17, 22 (1924).

³⁸ *Id.* at 22-23.

³⁹ *Id.* at 22.

⁴⁰ As expressed, for example, in KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1996); and BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

⁴¹ Dewey, *supra* note 10, at 26. See also, Neil MacCormick, *On Legal Decisions and Their Consequences: From Dewey to Dworkin*, 58 N.Y.U. L. REV. 239, 242 (1983).

⁴² For example, see JOHN RAWLS, *A THEORY OF JUSTICE* (1980).

⁴³ See generally Cardozo, *supra* note 40.

⁴⁴ See generally Llewellyn, *supra* note 40.

⁴⁵ Dewey, *supra* note 10, at 26-27.

⁴⁶ *Id.*

⁴⁷ *Id.*



have set, when we have addressed the concerns we face, and when we have gained some practical consequences from our thinking. After all, our mental abilities are most directly designed to do this, right? According to Dewey, using “experimental logic” is the best way to accomplish these things. Before we can assess whether Dewey’s predictions of the effect of his theory are correct, however, we must first determine the process involved in his articulation of experimental logic.

i. Experimental Logic in the Process of Human Reasoning

Dewey believed that legal reasoning displays what he called the “common structure or pattern of human inquiry.”⁴⁸ In fact, he seemed to believe that legal reasoning was a paradigm example of how humans think.⁴⁹ According to Dewey, we utilize our reasoning abilities in similar ways no matter what human endeavor we are engaged in.⁵⁰ The structure of reason is not, as some may assume, fixed and abstract.⁵¹ Dewey parted ways with the rationalist philosophical tradition represented by the well-known philosophers Rene Descartes and Immanuel Kant, and adopted a more fluid and practical form of thinking.⁵² This more pragmatic form was designed to deal with the practical outcomes of thinking, not the abstract notions of mind or cognition that other epistemologists and logicians had developed.⁵³ Thinking is good if it works. It works if it accomplishes what it is meant to accomplish. This was the foundation of Dewey’s pragmatist project.⁵⁴

This “common structure or pattern of reasoning” involves several steps which yield a shifting pattern of data that humans can use to determine whether a course of action (or thought) will serve as useful or not.⁵⁵ This was Dewey’s most obvious disagreement with the rationalist tradition.⁵⁶ Theories related to that tradition insist that there are closed, constant, and true forms of intuition and logic that the human mind understands.⁵⁷ For Dewey, human reasoning is an experimental process of inquiry and reflection.⁵⁸ Instead of looking into the philosophy of mind as these rationalist philosophers had done, Dewey wanted to bring human reason into the light of

⁴⁸ DEWEY, LOGIC: THE THEORY OF INQUIRY 101 (1938).

⁴⁹ *See id.* He uses legal reasoning as an example in all of his epistemological works.

⁵⁰ *Id.* at 105.

⁵¹ DEWEY, THE QUEST FOR CERTAINTY, ch. 1, (1929).

⁵² DEWEY, LOGIC: THE THEORY OF INQUIRY, ch. 1 (1938); *See* RICHARD RORTY, CONSEQUENCES OF PRAGMATISM 161 (1982).

⁵³ Rorty, *supra* note 52, at 160-66.

⁵⁴ *Id.*

⁵⁵ DEWEY, LOGIC: THE THEORY OF INQUIRY 108 (1938).

⁵⁶ RORTY, CONSEQUENCES OF PRAGMATISM, *supra* note 26, at 160-166.

⁵⁷ *See, e.g.*, HANS KELSEN, GENERAL THEORY OF NORMS (1991). *See* BIX, *supra* note 29, at ch. 4, for a good discussion of Kelsen’s theory.

⁵⁸ DEWEY, LOGIC: THE THEORY OF INQUIRY, *supra* note 3, at ch. 6; DEWEY, HOW WE THINK, *supra* note 3, at ch. 6.



everyday experience.⁵⁹ He says, for instance, that “[t]he search for the pattern of inquiry is . . . not one instituted in the dark or at large. It is checked and controlled by knowledge of the kinds of inquiry that have and that have not worked; methods which . . . can be so compared as to yield reasoned or rational conclusions.”⁶⁰ Human knowledge, then, is ends or consequences oriented.⁶¹

This yields a more contingent and mutable form of reasoning. As the philosopher Richard Rorty put it, “[t]he natural approach to sentences [which concern the way we reason], Dewey tells us, is not ‘Do they get it right?’, but more like ‘What would it be like to believe that? What would happen if I did? What would I be committing myself to?’ ”⁶² The search, then, is not for universal truths, but for “methods which experience up to the present time shows to be the best methods available for achieving certain results.” This is a significant departure in the field of epistemology.⁶³ Where traditional epistemologists sought logical constants, Dewey’s quest is more properly characterized as a way to categorize experience in a useful and practical way.⁶⁴

According to Dewey, human reasoning follows several steps through reflection and inquiry.⁶⁵ He identifies these steps in the process of inquiry as: (I) The Antecedent Conditions of Inquiry: Recognizing the Indeterminate Situation; (II) The Institution of a Problem; (III) The Determination of a Problem-Solution; (IV) Reasoning About the Solution; and (V) The Operational Character of Facts-Meanings in the Resolution of the Problem.⁶⁶ This process might seem abstract as it is stated, but it is really quite intuitive and easy to grasp. The steps in this process follow quite closely the natural and practical way we tend to think about problems. The fascinating and important aspect of Dewey’s philosophy is that he is not asking us to learn a new way of thinking, but is instead attempting to describe the way we *do* think. In other words, he is drawing our attention to what we do analytically, and describing how we do it.⁶⁷ This is meant to make us think more critically about our analytical habits, which in turn will make us more skilled at using our analysis and more precise in the use of these abilities.⁶⁸ Now let us look at how all this is applied to legal reasoning in particular.

⁵⁹ DEWEY, LOGIC: THE THEORY OF INQUIRY, *supra* note 3, at 108.

⁶⁰ *Id.*

⁶¹ *Id.*, at 425-27.

⁶² RORTY, CONSEQUENCES OF PRAGMATISM, *supra* note 26, at 163.

⁶³ STUHR, *supra* note 6, at 154-57.

⁶⁴ *Id.*

⁶⁵ DEWEY, LOGIC: THE THEORY OF INQUIRY, *supra* note 3, at 108-120.

⁶⁶ *Id.*, at 108-116; Dewey gives a more truncated description of this process elsewhere:

Upon examination, each instance reveals, more or less clearly, five logically distinct steps: (i) a felt difficulty; (ii) its location and definition; (iii) suggestion of [a] possible solution; (iv) development by reasoning of the bearings of the suggestion; (v) further observation and experiment leading to its acceptance or rejection.

DEWEY, HOW WE THINK, *supra* note 3, at 72.

⁶⁷ DEWEY, LOGIC: THE THEORY OF INQUIRY, *supra* note 3, at 105-122.

⁶⁸ *Id.*



ii. Legal Reasoning as an Example of Experimental Logic

According to John Dewey, legal reasoning is just the application of the “common pattern or structure” of human reasoning to a particular intellectual domain.⁶⁹ Actors in the legal system employ their analytical abilities using the same pattern of inquiry; they simply do so in the context of addressing legal questions within the U.S. legal system.⁷⁰ This contextual application is just another aspect of the pragmatic nature of human reasoning.⁷¹ The cultural and professional expectations of others within the domain help to mold and structure the pattern of inquiry.⁷² But the pattern of inquiry remains largely the same.

As a result, reasoning about legal matters—like reasoning about other areas of human intellectual concern such as science and industry—requires people in the domain to begin the process by acknowledging the existence of an indeterminate situation.⁷³ This should not seem strange. Legal analysis begins when we are initially presented with an indeterminate situation, some “complicated and confused case” which needs to be addressed.⁷⁴ In our legal system this indeterminacy is a legal problem of some sort, a dispute that needs to be mediated or a transgression that must be addressed.⁷⁵ It is the recognition that there is an indeterminate situation, says Dewey, that is the first step in the inquiry.⁷⁶ There is much more to this initial step than meets the eye, however. In the context of our legal system, even indeterminate situations are shaped (perhaps it is best to say pre-shaped) by the fact that they must be recognized as situations that the legal system can address.⁷⁷ This means that this cognitive process is dependent on recognizing a problem as a legal problem as opposed to a political problem, a scientific problem, a social problem, or a technical problem.⁷⁸ Once an indeterminate situation is recognized as a legal problem, and thus placed within the appropriate field of reference (what I have been calling the proper domain), the process can continue to be employed in the domain.⁷⁹

Within the domain, we do not begin this process of inquiry completely devoid of any and all preconceptions.⁸⁰ As Dewey says explicitly, “We generally begin with some vague anticipation of a conclusion (or at least of alternative conclusions), and then we look around for principles and data which will substantiate it or which will enable us to choose between rival

69. Dewey, *supra* note 37, at 21-23.

70. *Id.*

71. *Id.*

72. *Id.* at 25-27.

73. *Id.* at 23.

74. John Dewey, *Logical Method and the Law*, 10 CORNELL L.Q. 17 (1924).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. Dewey, *supra* note 74.



conclusions.”⁸¹ Within the context of legal reasoning the skills are formed by the particular problem we are being faced with, and the stance we have vis-a-vis our relation to that problem.⁸² So, the legal problem (indeterminate situation) is important, but so is the role we play in the examination of the problem (advocate, judge, etc.).⁸³ Let us assume that we are examining a problem from the context of a lawyer representing the interests of her client.⁸⁴ This is, after all, the paradigm example of the lawyer’s role in the U.S. legal system.⁸⁵ According to Dewey:

[A lawyer] begins with a conclusion which he intends to reach, favorable to his client of course, and then analyzes the facts of the situation to find material out of which to construct a favorable statement of facts, and to form a minor premise. At the same time he goes over recorded cases to find rules of law employed in cases which can be presented as similar, rules which will substantiate a certain way of looking at and interpreting the facts.⁸⁶

The entire system is set up for an advocate to play the role of making determinant that which is not.⁸⁷ This process of “making determinant” is not “objective,”⁸⁸ however, as the possible successful outcomes will all be formed in light of what is best for the client.⁸⁹ This pattern of inquiry is modeled on the more general pattern of human knowledge.⁹⁰ It is not directly analogous to the scientific method, however.⁹¹ Remember, legal reasoning is not a science. The consequentialism of this process means that the possible successful outcomes are all tied to who we represent or what role we play in the system.⁹²

For lawyers in the Anglo-American tradition there is a heavy element of partisanship built in here.⁹³ The process of reasoning employed by actors in the legal system “is . . . pre-committed to the establishment of a particular and partisan conclusion”⁹⁴ The vague conclusion that Dewey talks about is largely determined by the outcome which will be most favorable to the

81. *Id.*

82. *See*, RITCHIE, *supra* note 1, at Chapter 4.

83. Dewey, *Logical Method and Law*, *supra* note 37, at 23.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *See*, David T. Ritchie, “Objectively Speaking,” *There is No Such thing in the Law!*, 5 *DISABILITY MEDICINE* 68 (2005). There are, of course, alternative views. *See* the essays in BRIAN LEITER, ED., *OBJECTIVITY IN LAW AND MORALS* (2001).

89. Dewey, *Logical Method and Law*, *supra* note 35, at 23.

90. Dewey, *LOGIC: THE THEORY OF INQUIRY*, *supra* note 3, at 105.

91. Dewey, *Logical Method and Law*, *supra* note 35, at 23. For a discussion of this in a related scientific context, *see generally* THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3d ed. 1996).

92. Dewey, *Logical Method and Law*, *supra* note 35, at 23.

93. *Id.*

94. *Id.*



particular lawyer's client in the context of the legal problem faced.⁹⁵ For judicial decision-makers, though, partisanship is to play no role, at least not officially.⁹⁶ Nonetheless, all participants in the process front load their analysis.⁹⁷ That is to say, once a legal problem has been conceived and begins to be formed in to a determinate legal issue, the immediate first step on the part of anyone engaged in legal reasoning is to light upon a likely conclusion or conclusions that will address the situation.⁹⁸ Even judges predetermine answers to their inquiries.⁹⁹ These answers will not be related to the form of advocacy mentioned above (or at least should not be), but will relate more closely to what the judge believes is the correct answer.¹⁰⁰

Largely based on the preconceptions as to probable (or at least possible) outcomes mentioned above, legal decision-makers begin to grapple further with the indeterminacy by framing the legal issue or issues involved into a category that they recognize, and which is at the same time favorable to the vague conclusions originally embraced.¹⁰¹ As Dewey says, the "way in which a problem is conceived decides what specific suggestions are entertained and which are dismissed"¹⁰² The way in which a legal issue is initially drawn, then, very often determines that outcome of the case, as this framing will likely decide which law controls.¹⁰³ Statutes and cases apply to facts, and the way in which the facts in any given case are arranged (some might say massaged)¹⁰⁴ will determine the statutory provisions and precedents that will apply.¹⁰⁵ More often than not the party which prevails is the one that arranged their facts in the most finely tuned fashion, thus availing themselves of the most favorable law.¹⁰⁶

The working through the experimental logic, which Dewey describes involves a trial and error process that will change depending on the circumstances faced, and even who is engaging in the process of inquiry.¹⁰⁷ As actors in the legal system engage in the process of experimental inquiry, they will explore, assess, and evaluate the data they have at their disposal, using things that work and discarding those that do not.¹⁰⁸ In effect, lawyers and judges consult theories of the case and precedents that relate to their legal problem, assess the connection of those theories and precedents to the proposed outcomes, and evaluate whether the theories and precedents are likely

95. *Id.*

96. *Id.* at 24.

97. *Id.*

98. *Id.*

99. Dewey, *Logical Method and Law*, *supra* note 35.

100. *Id.*

101. *Id.*

102. Dewey, *LOGIC: THE THEORY OF INQUIRY*, *supra* note 3, at 112.

103. See, e.g., Dewey, *Logical Method and Law*, *supra* note 35, at 23.

104. BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 150 (2006)

105. Dewey, *Logical Method and Law*, *supra* note 37, at 23-26.

106. *Id.*

107. *Id.*

108. *Id.*



to lead to the desired outcome.¹⁰⁹ If they do lead, or are likely to lead, to the desired outcomes, then these analytical tools are used. If they do not, they are rejected in light of better case or precedent theories that are more helpful.¹¹⁰

Where several intermediate issues must be resolved before the ultimate issue can be adequately addressed, this process of framing issues in recognized categories and applying relevant determinate provisions will take place serially until the ultimate issue is sufficiently resolved.¹¹¹ Dewey's experimental logic is a progressive inquiry that concludes in a judgment that has "direct existential import."¹¹² The rendering of a judicial decision is perhaps the paradigmatic example of just such a culmination.¹¹³ The deliberations and procedures followed at trial (concerning, for example, what evidence will be admitted, whose version of the applicable law will be adopted, and so on) are the intermediate steps in the progression of partial determinacies.¹¹⁴ This process ends, as we might expect, in the disposition of the case through final judgment.

Dewey went into detail about the particular aspects of experimental logic and its application to legal reasoning, not because he thought it necessary to persuade legal decision-makers to change their reasoning, but because he believed that they already act in this way.¹¹⁵ But if this is the case, why are we not taught about this process early on in law school? Why do we not discuss pragmatic reasoning explicitly as an aspect of our legal system? Dewey believed that the answers to these questions related to the fact that legal decision-makers maintain a fiction in order to conceal the actual process from the public at large.¹¹⁶ This fiction is expressed in the idea that legal decisions must be made according to strictly formal rules of logic, which are syllogistic in form.¹¹⁷ Dewey says, for example, "the [logic] which has had greatest historic currency and exercised greatest influence on legal decisions, is that of the syllogism."¹¹⁸ He further says that this logic "claims to be a logic of fixed forms, rather than of methods of reaching intelligent decisions in concrete situations, or of methods employed in adjusting disputed issues in behalf of the public and enduring interest."¹¹⁹

Those who wish to attribute formal arguments to logically "correct" decisions advocate the kind of syllogistic logic that Dewey criticizes.¹²⁰ This view of how legal reasoning should work

109. *Id.*

110. *Id.*

111. Dewey, *supra* note 37, at 23.

112. DEWEY, LOGIC, THE THEORY OF INQUIRY, *supra* note 3, at 108, 123.

113. Dewey, *supra* note 37, at 24.

114. *Id.*, at 23-26.

115. *Id.*

116. *See generally id.*

117. *Id.* at 21.

118. *Id.*

119. Dewey, *supra* note 37, at 21.

120. *Id.* (Dewey discusses Oliver Wendell Holmes, Jr.'s critique of this extensively. See, OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1991) (like Dewey, Holmes (and other legal realists) believe that attempts to turn



leads to a “mechanical jurisprudence,”¹²¹ whereby antecedent legal rules are automatically applied to factual situations in such a way as to determine with absolute logical certainty the proper decision.¹²² According to Dewey, however, this sort of syllogistic reasoning in the law is neither possible nor desirable.¹²³ In Dewey’s view, the way the Anglo-American legal system works, with specific reference to its common law heritage, is much closer to the experimental process he champions.¹²⁴ In short, he says, there is a “disparity which exists between actual legal development and the strict requirements of logical theory [based on the syllogism].”¹²⁵ But what is the cause of this disparity?

The answer to this question is found in what might be aptly described as the innate human need for security.¹²⁶ Dewey equated the desire for logical formality with the aspiration to consistency.¹²⁷ “The use of prior ready-made and familiar concepts . . . give[s] rise to a sense of stability, of guarantee against sudden and arbitrary changes of the rules which determine the consequences which attend acts.”¹²⁸ But Dewey believed this to be a “specious sense of protection,” one that is self-perpetuating through habit once established.¹²⁹ The requirement of explaining formal logical consistency (based on syllogistic reasoning) in legal decision-making is propelled by the intrinsic inertia of habit.¹³⁰ But habit alone does not adequately explain the preference for accounts of legal reasoning that privilege the formal logical consistency made by most legal theorists in the Anglo-American tradition.¹³¹ It is my belief that a further answer lies in the need to maintain the authority of the law as a social institution.¹³² Many accounts of legal reasoning attempt to describe the legal system as one that employs formal logic because, it is

legal reasoning into formal syllogistic logic were both fruitless and dangerously misguided). For a good discussion of this, see BIX, *supra* note 27, at 80–81.)

121. *See, e.g.*, *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (1916). (Ruggero J. Aldisert, a Judge on the U.S. Court of Appeals for the Third Circuit, discusses the logic embedded in *MacPherson* in his treatise on logic for lawyers. *See* RUGGERO J. ALDISERT, *Deductive Reasoning*, in *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* 53–88 (3d ed. 1997)).

122. Dewey, *supra* note 37, at 21–22.

123. *Id.* at 27. (Dewey does not deny that the spirit of Aristotelian logic is relevant to his theory of experimental logic. It is the formal and strict application of the syllogistic form which Dewey takes issue with. *See, e.g.*, DEWEY: *LOGIC, THE THEORY OF INQUIRY*, *supra* note 37, at ch. 5. (Insofar as legal decision-makers attempt to apply this strictly formal logic to legal decisions, Dewey denies the possibility.))

124. *See generally*, Dewey, *supra* note 37.

125. *Id.*, at 20.

126. *Id.*

127. *Id.*

128. *Id.* (Dewey discussed this in detail in *LOGIC: THE THEORY OF INQUIRY*, *supra* note 3, at 134–35.).

129. *Id.*

130. *See* E.M. Wise, *The Doctrine of Stare Decisis*, 21 *WAYNE L. Rev.* 1043, 1047 (1975).

131. *See generally* Dewey, *supra* note 37.

132. *See, e.g.*, Michael Gentithes, *In Defense of Stare Decisis*, 45 *WILLAMETTE L.R.* 799, 799–803 (2009). *But see* Amy E. Sloan, *The Dog that Didn’t Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 *FORDHAM L.R.* 713 (2009), and Goutam U. Jois, *Stare Decisis is Cognitive Error*, 75 *BROOKLYN L.R.* 63 (2009).



believed, such accounts would give a sense of objective legitimacy to the system.¹³³ For Dewey, and for me, this sense is an illusion (and a potentially dangerous one as well).

As noted above, it is not that Dewey believed that there is no logic to the way legal decisions are made; he simply believed that there is another type of logic at work.¹³⁴ This is a logic of consequences rather than one of antecedents.¹³⁵ Dewey argued for “a logic of prediction of probabilities rather than one of deduction of certainties.”¹³⁶ While Dewey himself never actually explicated precisely what the open adoption of a fully consequentialist logic might entail,¹³⁷ he did sketch—in broad terms—what he held to be the fundamental tenets of such a view.¹³⁸

In an attempt to explain his alternative view, Dewey began his essay on *Logical Method and Law* by defining logical theory as “the procedures followed in reaching decisions in those cases...in which subsequent experience shows that they were the best which could have been used under the conditions.”¹³⁹ This seems a troubling place in which to begin this discussion of applying experimental logic to legal reasoning¹⁴⁰ because such a definition appears to allow for the post hoc rationalization of previous decisions based on the excuse that a judicial decision-maker “did the best that she could.”¹⁴¹ Here, the issue of consistency mentioned above seems quiet patent. Certainly a legal system needs more precise procedures than this—procedures of general application which maintain a sense of consistency and fairness.¹⁴²

But logical consistency can, and does, mean more than one thing.¹⁴³ Consistency in the Aristotelian (or syllogistic) sense means the presence of a major and a minor premise (at a minimum), with a conclusion that necessarily follows from these premises.¹⁴⁴ There are other types of consistency, however, like those derived from dialectical logic¹⁴⁵ or the application of the same principle in like situations.¹⁴⁶ I believe that it is this latter form of consistency—the use

133. See ALDISERT, *supra* note 121, at 9–12.

134. Dewey, *Logical Method and Law*, *supra* note 37, at 26.

135. *Id.* (Professor Neil MacCormick has a good discussion of this in his article *On Legal Decisions and Their Consequences: From Dewey to Dworkin*, *supra* note 41.)

136. *Id.*

137. Professor MacCormick attempts to do this in his essay *On Legal Decisions and Their Consequences*, *supra* note 41.

138. See, generally, Dewey, *Logical Method and Law*, *supra* note 37.

139. *Id.*, at 17-18.

140. *Id.*

141. See *Id.*

142. See Gentithes, *supra* note 132.

143. See, PATRICK J. HURLEY, *A CONCISE INTRODUCTION TO LOGIC* 338 - 339 (6th ed. 1997); and GEOFFREY HUNTER, *METALOGIC: AN INTRODUCTION TO THE METATHEORY OF STANDARD FIRST ORDER LOGIC* 78 - 83 (1st ed. 1973).

144. Dewey, *Logical Method and Law*, *supra* note 35, at 21-22.

145. See, J.F.A.K. Van Benthem, *What is Dialectical Logic?* 14 *HUMANITIES, SOCIAL SCIENCES, AND LAW* 333 (2004).

146. Dewey, *Logical Method and Law*, *supra* note 35, at 21.



of “general principles” in similar circumstances—that Dewey advocated.¹⁴⁷ This is, in fact, a central feature of the U.S. common law system, as any law student could tell you. Analogical reasoning is an obvious example of how this plays itself out in our legal discourse.¹⁴⁸

It seems obvious that Dewey recognized the existence of these other types of consistency as he attempted to further delineate the way his experimental logic can be (and is) applied to the law.¹⁴⁹ For example, Dewey said that “[i]t is most important that rules of law should form as coherent generalized logical systems as possible.”¹⁵⁰ So consistency in application (as opposed to formal syllogistic consistency) is important. Dewey was not denying that there are situations in which formal logic can be employed in legal reasoning.¹⁵¹ He did maintain, however, that formal logical consistency should not be the principle goal of the legal system.¹⁵² He suggested that “these logical systematizations of law . . . with their reduction of a multitude of decisions to a few general principles that are logically consistent . . . is clearly in last resort subservient to the economical and effective reaching of decisions in particular cases.”¹⁵³ In other words, formal logic can be used to the extent that it is used in the service of sound, pragmatic decision-making.¹⁵⁴ That is to say that traditional formal logic can be, and often is, a tool to be used in pragmatic problem solving.¹⁵⁵ In effect, Dewey argued that while consistency is indeed important, and that formal logic can be useful in legal reasoning, the primary locus of concern for legal decision-makers must be that they arrive at a proper decision in any particular instance regardless of consistency or formal logical coherence (and sometimes in spite of either).¹⁵⁶

Another way of looking at this is to say that general legal principles are only useful as tools in attempting to resolve concrete cases.¹⁵⁷ “They are means of intellectual survey, analysis, and insight into the factors of the situation to be dealt with. Like other tools they must be modified when they are applied to new conditions and new results have to be achieved.”¹⁵⁸ These principles as tools are never to become absolutely static, but must maintain a measure of usefulness in order to justify their continued use.¹⁵⁹ Turning legal principles into abstract

147. *Id.*

¹⁴⁸ See, PETER GOODRICH, *LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC, AND LEGAL ANALYSIS* (1987).

¹⁴⁹ Dewey, *Logical Method and Law*, *supra* note 35, at 19.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Dewey, *Logical Method and Law*, *supra* note 35, at 26.

¹⁵⁷ As far as I can tell, these general principles are not formally consistent in any syllogistic way. Dewey had denied that Aristotelian logic has any application to the law. See *supra* note 123.

¹⁵⁸ Dewey, *Logical Method and Law*, *supra* note 35, at 26. This supports my interpretation in note 123, since arguments or principles which are logically consistent in the Aristotelian sense cannot change over time.

¹⁵⁹ *Id.*



“systems” or trying to compile a catalogue of “black letter rules” is counter-productive.¹⁶⁰ Doing these things—or attempting to do so—renders law a mechanical abstraction that disconnects it from the important social role it must play (since law is a progressive—in the sense of evolving—social institution).¹⁶¹ If the principles that legal decision-makers use as tools today do become static, continued adherence to them will widen “the gap between current social conditions and the principles used by the courts.”¹⁶² The effect of this will be to “breed irritation, disrespect for law, together with virtual alliance between the judiciary and entrenched interests that correspond most nearly to the conditions under which the rules of law were previously laid down.”¹⁶³

We see in Dewey’s theoretical framework several ideas which seem intuitively correct. His notion that legal decision-makers attempt to turn indeterminacies (legal problems) into partial determinacies by framing the issue to fit the problem into a recognized (and favorable) category seems spot on.¹⁶⁴ Similarly, the notion of inquiry leading to ultimate judgment appears to conform with the process we expect from legal reasoning.¹⁶⁵ Over all, it seems that Dewey’s account does indeed mirror the sorts of analysis we as actors in the legal domain engage in.¹⁶⁶ In particular, his account clearly tracks the kind of analysis expert legal decision-makers engage in.¹⁶⁷ One does not need to be a philosopher or logician in order to engage in good legal reasoning. Indeed, many good lawyers and judges know next to nothing about traditional systemic formal logic. They do, however, reason through legal problems systematically, and with a goal in mind. Understanding the intricacies of Dewey’s account of pragmatic legal reasoning, then, can help us see how to make our thinking more clear and precise. Perhaps looking at the implications of his theory will assist us as we consider how this whole theoretical apparatus can be communicated to our students.

B. Implications for Legal Analysis and Communication

This notion of pragmatic logic, and the process Dewey identifies as the heart of that logic, is simply a representation of how actors in the legal system can systematically engage in legal reasoning designed to yield effective results. Remember, the attractiveness of this theory is that it is designed to be useful, to give us a way for addressing problems within the domain. We think

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Dewey, *Logical Method and Law*, *supra* note 35, at 26.

¹⁶³ *Id.*

¹⁶⁴ *See, e.g.*, LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION* ch. 2 (4th ed. 2006); RICHARD K. NEUMANN, *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* ch. 2 (5th ed. 2005).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *See*, EDWARDS, *supra* note 164, at chs. 2-6; NEUMANN, *supra* note 164, at chs. 14-17.



like this naturally, but the increased awareness that knowing about and identifying the parts of the process will give us should help us, and ultimately our students, to be more systematic, more deliberate, and more precise in our analytical judgments.

This description may sound like another technical or abstract process, but it is really more intuitive than this description makes it sound. If we think about it, this process pretty closely resembles our reasoning on everyday run-of-the-mill problems. Think about sitting at your desk as you read this article. What if the lamp on your desk went out? You would probably intuitively go through a process much like that described above. First, you would recognize that there was a problem; the light went out! Then, you would almost immediately conclude that it was caused by one of several things: the light bulb burned out, the electricity failed, the wiring in the lamp shorted out, etc. In essence, you categorize the problem into several of the types of problems you have experienced in like or similar situations before. From this array of options, you would undoubtedly choose the most probable, the bulb burned out, and pre-determine this is the most likely cause. You would then probably remove the bulb (and, if you are like me, shake it to see if the filament inside is broken), and perhaps put in a new bulb to see if that rectifies the situation.¹⁶⁸ If it does not, you will quickly go down the list of other possible solutions until one works.

As you can see, this almost exactly follows the process that Dewey describes. The interesting thing is that you do not need to be an expert in any particular kind of logical or philosophical theory to make sense out of this “logic.” It is intuitive and natural. It is also applicable in almost any situation, whether you are trying to determine why the cable television is out or how to argue a complex question of law before the U.S. Supreme Court. The only difference between trying to figure out why the light went out or why your cable will not work, and an argument before the Supreme Court is that the latter is partially determined by one being exposed to, and trained in, the discourse community of the law.¹⁶⁹

According to Dewey, the first step in this experimental or pragmatic reasoning process is the recognition that there is a problem that needs to be solved.¹⁷⁰ This recognition kicks our inchoate reasoning abilities into gear. Once we realize that there is a problem that needs to be addressed, we attempt to categorize this problem into known classes of situations in order to give some context to the problem and possible solutions.¹⁷¹ In other words, once we realize there is a problem that we need to address, we attempt to classify it with other similar problems we have confronted in the past. This helps us determine the kinds of things that might help us resolve the problem. The next step in this process, after recognition of the problem and the classification of that problem, is the determination of a solution.¹⁷² In a way, this is almost a pre-determination of

¹⁶⁸ Hopefully you would change it with a greener more long-lasting alternative.

¹⁶⁹ See, JILL J. RAMSFIELD, *THE LAW AS ARCHITECTURE: BUILDING LEGAL DOCUMENTS* 16-20 (2000). I also discuss this in RITCHIE, *supra* note 1, at Ch. 4.

¹⁷⁰ DEWEY, *HOW WE THINK*, *supra* note 3, at Ch. 6.

¹⁷¹ *Id.*

¹⁷² *Id.*



a solution. It is a pre-determination because this solution is perhaps not a final solution. It is only an initial thought of what might work given the problem presented and the classification of that problem into a recognizable and understandable category.¹⁷³ Once we fix upon this pre-determination of a solution, we then begin to reason more systematically and thoroughly about whether this proposed solution will actually address the problem. At this stage, we will “means test” the pre-determined solution for suitability; often discarding it in favor of more developed and narrowly tailored solutions that address the problem more closely.¹⁷⁴ This is a trial and error process that ultimately leads to accepting one of the proposed solutions as the best one given the circumstances.¹⁷⁵ It is also this trial and error process that compelled Dewey to call this “experimental reasoning.”¹⁷⁶ Finally, near the end of this experimental process, we assess the overall effectiveness of our solution.¹⁷⁷ If it addresses the problem, the process of reasoning is done. If the solution is not sufficient, we move back and evaluate other possible solutions.¹⁷⁸

This is a reiterative process in which we conceptualize based on your pre-determinations, find and assess relevant authorities, evaluate whether they get us to the conclusion we anticipated, and determine whether further conceptualization and research is needed. Very often, these further steps are needed. This is not, like many theories about legal reasoning, a linear process. It is a recurrent loop that requires us to double back on our initial conceptualizations, research available relevant resources, and reconceptualize as we move forward. The following figure is a representation of this:

^{173.} *Id.*

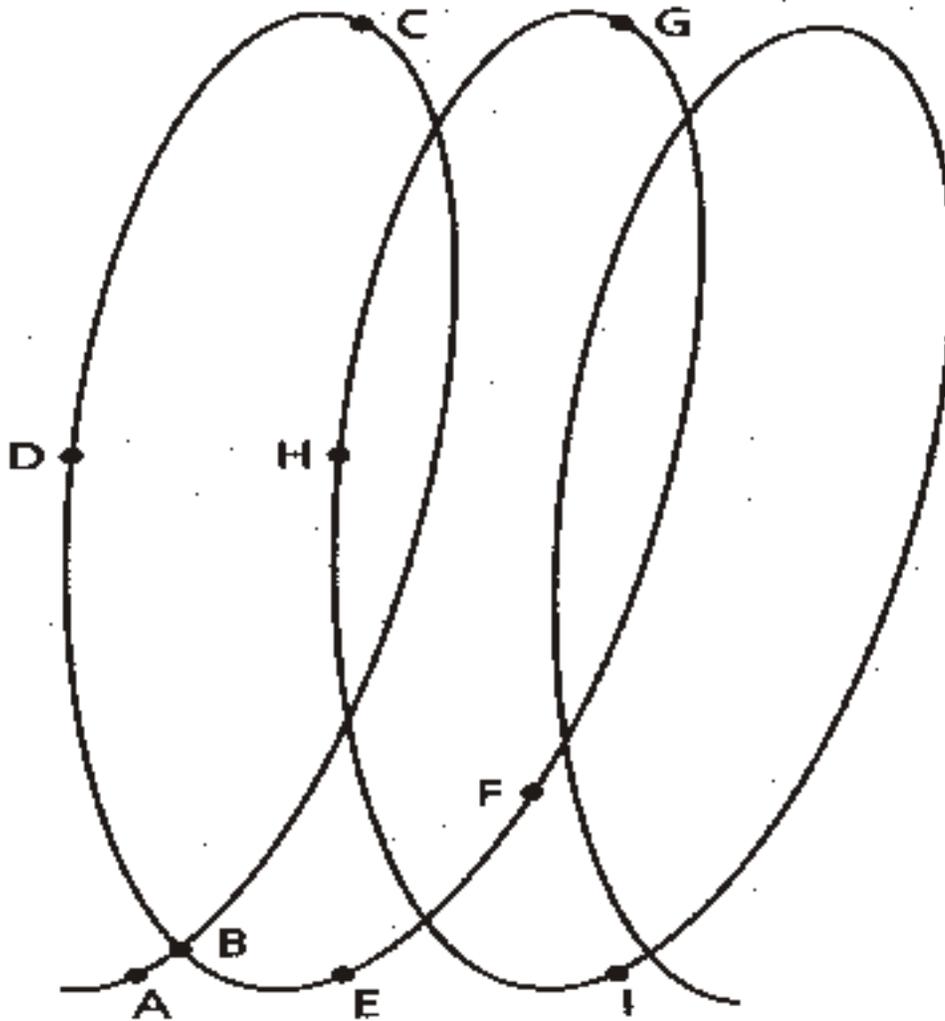
^{174.} *Id.*

^{175.} *Id.*

^{176.} *Id.*

^{177.} *Id.*

^{178.} *Id.*



Point [A] represents the beginning of the inquiry. At this point, we recognize that a legal problem has been presented.¹⁷⁹ This will usually happen when we are given an assignment or when our client has presented his problem to us. Almost immediately, we will do two things: first, we will assess whether it is actually a legal problem; and second, we will categorize the problem into a recognizable kind of legal problem (contracts, criminal law, family law, etc.) if we indeed

¹⁷⁹ See, EDWARDS, *supra* note 164, at Ch. 2; NEUMANN, *supra* note 164, at Ch. 2.



determine that it is something the legal system can address.¹⁸⁰ These are represented by [B] on the figure above.

These first two steps in Dewey's articulation of the pragmatic process of legal reasoning are very important because they will almost immediately lead us to the third step: the (pre)determination of a solution.¹⁸¹ This is represented as [C] above. This (pre)determination does not end the process, however. If it did, this would be a linear process more or less. Instead, once the (pre)determination is made, we will test this (pre)determination against the available data.¹⁸² This data consists of the authority available to us.¹⁸³ In consulting cases and other available authority, we will be assessing whether these resources support or undermine our initial pre-determination.¹⁸⁴ This process of evaluation is represented by [D] above. You will note that [D] is actually a step backward in the representation. This is because very often, when we are engaged in the process of assessing and evaluating data, we realize that we must reconceptualize the problem.¹⁸⁵ This is represented in the illustration by the letter [E].

This reconceptualization, based on a better understanding of the data, leads to a refinement of the issue and further examination of the data ([F]).¹⁸⁶ In turn, another, more informed, determination of a likely conclusion or successful outcome ([G]) is formulated.¹⁸⁷ This new conclusion is then further tested against the authority available ([H]), and evaluated to see whether it will likely lead to the desired outcome ([I]).¹⁸⁸ This process will continue as needed until the data is likely to yield the desired outcome.¹⁸⁹ In effect, there can be as many loops in the experimental process as you need in order for the process to play itself out.

You might be able to see how the various paradigms and other analytical strategies we discuss with our students slot into the representation. For example, points [B] and [F] will draw upon your ability to spot and formulate issues.¹⁹⁰ This, in turn, springs our ability to conceptualize the theory of the case, find relevant authority to address that theory, and formulate a rule or rules that address(es) the theory we are working under ([C] and [G]).¹⁹¹ You might also see how the ability to analogize and counter-analogize is implicated in steps [D] and [H].¹⁹² Once we are in the loop and have a clearer notion of how things fit together, we may synthesize

^{180.} *Id.*

^{181.} *Id.*

^{182.} *Id.*

^{183.} *Id.*

^{184.} *Id.*

^{185.} *Id.*

^{186.} *Id.*

^{187.} *Id.*

^{188.} *Id.*

^{189.} *Id.*

^{190.} *Id.*

^{191.} *Id.*

^{192.} See, EDWARDS, *supra* note **Error! Bookmark not defined.**4, at ch. 2; NEUMANN, *supra* note **Error! Bookmark not defined.**4, at ch. 2.



authority,¹⁹³ and, as we develop our various conclusions, we will have to employ policy-based reasoning to determine whether our proposed conclusion is likely to be viewed as reasonable and supportable.¹⁹⁴

Reducing the process of experimental logic to a visual representation like this is somewhat helpful in that it should give us a better sense of how all this fits together. There are drawbacks to using this kind of representation, however. For example, we might be tempted to think that this process is another analytical paradigm that can just be followed; another grand theory that supposes to capture all aspects of the phenomenon. We should resist this temptation. The one thing that we must see about using pragmatic logic is that it requires us to be flexible and adaptable. To the extent that something works, use it. If it ceases to be useful, discard it. Remember, this is not a formula. This is an articulation of how we think about problems, and how we can use this thinking strategically to get the results we desire. This sort of reasoning is instrumental.¹⁹⁵ Our analysis is a tool that should get us the results we desire. To the extent that our thinking reaches that goal, it is productive.¹⁹⁶ If our thinking does not reach that goal, we need to move back and reassess.¹⁹⁷ In effect, this sort of reasoning process will enable us to use all the tools we learned as we became experts in the domain; the things we unconsciously use as we work through legal problems.¹⁹⁸ Sometimes we will use one or more of these skills extensively. Other times, we will use a different skill set. Yet other times, we may have to employ a version of all the skills we have mastered to address a legal problem. The usefulness of this understanding of legal reasoning is that it allows for this flexibility. Pragmatic logic is designed precisely to account for such flexibility that is the key attractiveness for me. Experimental or pragmatic logic does not give us one uniform or mechanical way of addressing legal problems. Instead, by learning this disposition or skill we can utilize a whole host of tools or processes to get the desired result—a successful resolution of a complex legal problem.

II. USING EXPERIMENTAL LOGIC TO EXPLAIN AND TEACH LEGAL ANALYSIS AND COMMUNICATION

John Dewey's epistemological model can be a useful aide in some law school classrooms in illustrating how experts in the legal domain think through legal problems. In fact, for several years I have explicitly relied upon this model to discuss legal problem-solving and communication skills with my students, especially in my writing classes. When I do so, students seem to get a clearer picture of the steps that they should follow in thinking through, addressing, and communicating their reasoning about complex legal problems. In this section, I will briefly

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*



explain how I use Dewey's model, the extent to which I engage my students explicitly in discussions about the model, and finally what I perceive the usefulness of Dewey's account to be.

In a typical writing or advocacy class in law school, the main point is to walk students through the process of legal problem solving.¹⁹⁹ Invariably this involves using a hypothetical legal problem that the students must think through, research, and communicate either in a memorandum format or a litigation document (principally a trial or appellate brief).²⁰⁰ Far from being distinct skills, these tasks of conceptualizing, researching, and communicating about a legal problem form a sequence of practical judgment. Each step in this sequence utilizes the "common structure or pattern"²⁰¹ of human reasoning that Dewey describes in his experimental logic.

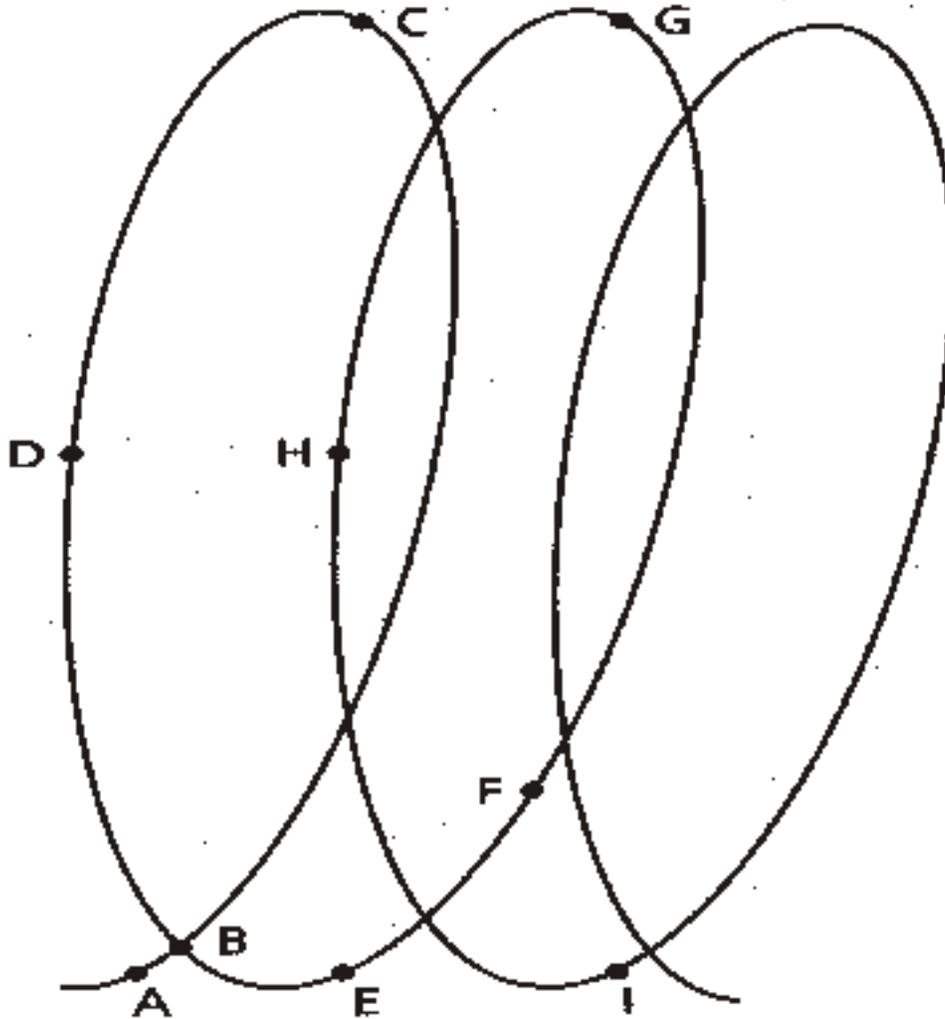
In my law classes I do not explicitly expose students to Dewey's epistemological works. Nor do I lecture about the details of his account of human cognition. There would be little point in doing so. Most students would be bored with such discussions (except, perhaps, for the occasional student who is trained in or interested in philosophy), and there is little time in class to tease out the details of a complex epistemology as I have done here. I do, however, use the recursive loop illustration above to show them how the process of reasoning through a complicated legal problem might require them to refine, revise, and reformulate their analysis or arguments. As a general rule, students understand this idea of recursivity and we frequently discuss it throughout the semester. The main impact of Dewey's work, however, is on how I approach our in-class work. Knowing Dewey's account of human reasoning helps me keep track of where students are in the process. Keeping this in mind gives me a sense of how fully students might understand the problem and its solution. Armed with that knowledge, I can plan each class period to better help them move through the process of understanding; the process of pragmatic problem-solving.

Let's take a look again at figure one to see how this process plays itself out in the context of working through a legal problem with students.

¹⁹⁹ ERIC B. EASTON, ET AL., SOURCEBOOK ON LEGAL WRITING PROGRAMS chs. I and II (2d ed. 2006).

²⁰⁰ *Id.* at ch. III.

²⁰¹ See DEWEY *supra* note 48.



At point [A] in the process, I give students a fact pattern or appellate record which presents a simulated legal problem. This is almost always a problem that the students are not familiar with, or only vaguely familiar with because it has been touched upon in one of their other law school classes (or sometimes because they have worked on similar problems in their summer work or clerkships). Once the students have had a chance to read and digest the fact pattern or record, we discuss it thoroughly. This leads us to the next step in the reasoning process.

Almost immediately, the students recognize the problem—the indeterminacy—as one placed within an identifiable doctrinal area (i.e., torts, civil procedure, contracts, etc.) and often even



recognize (in broad terms) the legal issue itself. This is point [B] in the illustration. Doing so starts the process of pre-determination. This classification into doctrinal area and legal issue begins to narrow the range of possible outcomes, and even suggests an answer to the issue. This is especially true when the students are placed in role; that is, when they are told that they represent one of the characters in the problem or one of the parties in the appellate case. Given the fact pattern or record, and being assigned a role within the context of the simulation, leads students very quickly—often within a class period or two—to a preliminary answer to the problem. This is the pre-determination of the problem outcome, and is represented by point [C] in the illustration. The interesting thing is that while students can invariably tell me the likely “answer” to the problem or issue, most of the time they cannot explain “why.”

Armed with this probable outcome—they are invariably very close to the answer even at this early stage of analysis—students begin their research (point [D]). By having a sense of the probable outcome, students begin to test this pre-determination by finding, reading, and evaluating both primary and secondary sources that are related to the problem. So even though they often cannot tell me why the answer or probable outcome makes sense, they have a firm enough grasp of where they are going to quickly gather relevant legal materials to help them understand “why.” I personally never use “closed universe” problems because I believe it short circuits the reasoning process and does more harm than good. In my view, it is always better to force students to research the legal concepts implicated in their problems because the process of researching itself stimulates a better understanding of the problem.

This process of researching and learning about the law related to their problem forces students to go back to the fact pattern or record and further refine their understanding of the problem. This reveals facts that turn out to be relevant which they missed in their initial reading of the materials. The fact that they missed these legally relevant facts is not neglect or inattentiveness on their part (well, not usually anyway!). As any practicing lawyer will tell you, it is not until you know a good bit about the law on any particular issue that certain facts in a legal problem begin to take on significance. This realization that they did not see all the important (or determinative) facts of the problem leads them to point [E], a reformulation of the indeterminate situation. In a very real way, this is actually the process of making the indeterminate more determinate. They are getting closer to understanding the full complexity of the problem. The process itself is compelling this better and more nuanced understanding.

This more textured and thorough understanding, in turn, suggests that their initial formulation of the issue was very likely slightly off (usually too broad). The fruits of their research inevitably reveal that the legal issue students set out to answer is not stated in precisely the right way. Often this is because the students did not initially understand the operative legal terms of art, or did not see that some facts they thought were determinative actually are not (or vice versa). These realizations force students to reformulate their issues into more precisely stated legal questions, questions that resonate with their evolving problem solution and the authorities that they have chosen from the array of sources available to them. This is represented by point [F] in the above illustration.



Once the students have gone through this process of formulating, researching and conceptualizing, and reformulating they are in a better position to determine a likely solution to the problem raised. They have a firmer grasp of what is actually implicated in the problem than their initial (often intuitive) understanding. They have also educated themselves about the legal principles and authorities which are involved. As a result, they are better able to provide an answer to the (reformulated) legal question involved (point [G] above). Sometimes their initial pre-determination to the problem solution (point [C]) turned out to be incorrect. This is surprisingly rare, however. Usually it is the case that their initial pre-determination was correct. It is just that by the time they get to point [G] in the process they can answer the question of “why” the answer will (or should) likely be answered in the way they anticipated. Their analysis (or arguments in an appellate setting) are beginning to take shape. They can explain the legal reasoning in some detail, and can substantiate and support their earlier pre-determinations.

Once they have this more firm appreciation of the probable outcome—we might call this a more well reasoned and fully supported determination of the problem solution—students can then begin to test their analysis and arguments. This testing can be against adverse legal authority that exists, or even perhaps against any possible counter-analysis/counter-arguments that might be raised against their determination(s). This is a useful step in the process because it allows students to situate all the sources they found and read during their research which do not necessarily accord with their evolving determination of the problem solution within the context of the problem and their analysis or argument. This is point [H] in the illustration.

Once all this has been done, with any repeat steps (reiterations) that might be necessary, students are better equipped to communicate the fruits of their work. They more fully understand the complexities raised by the original problem, they have mastered the legal authorities related to the problem and filtered these authorities through the relevant factual scenario, they have developed analysis and arguments in favor of the position they believe will (or should) prevail, and they have tested these positions against any contrary authorities or arguments. The process yields a richer understanding, and gives the students a much firmer grounding in “why” the legal problem they are discussing will or should turn out in a certain way. In the illustration above I have represented this as point [I], but it might take (and very often does take) many more loops or reiterations for students to get there.

There are at least two really interesting things about this process. First, it captures the process that virtually all of the major texts on analysis, writing, and advocacy use. These steps are widely accepted as being a necessary and important part of thinking through and communicating about legal problems. Secondly, and by far most importantly, for the vast majority of students this process is intuitively attractive. When I discuss this process with them it makes sense to them to follow these steps. In fact, I would go so far as to say that I am not actually teaching them a new process, but instead we are together molding their inchoate processes of reasoning through problems to be used in the context of legal problem solving. This suggests that Dewey’s position that pragmatic reasoning is, indeed, natural for us. We intuitively follow the steps in the process of pragmatic reasoning. After working with students as they follow these steps in working



through fairly complex legal problems for more than a decade, I am convinced that Dewey's account is accurate.

So is this *the* way to approach teaching legal analysis and communication? No, not the only way at least. I have found it useful to think about Dewey's account of cognition as I approach the structuring of my classes and the way I approach teaching. It is not necessary for everyone to explicitly acknowledge—either to students or in conversation with other teachers—the strengths of Dewey's epistemological account. In some ways this is the attractiveness of all this: One need not be an expert in John Dewey's work, in pragmatism, nor in epistemology for this account to be useful. As Dewey says, there is a “common structure or pattern”²⁰² to human reason. The longer I teach law the more I realize that we are not, as I once thought,²⁰³ teaching students a new way of thinking (i.e., thinking like a lawyer). Instead, we are helping them refine their innate intellectual skills to be used in the context of the legal domain. It is my hope that by describing Dewey's epistemology I have helped others see this as well.

IV. CONCLUSION

For those of us who teach legal analysis and communication in law schools, we invariably face the challenge of both explaining to our students how to reason through and—principally—write about legal problems, and helping them learn these basic skills. A common sense and practical explanation of human reasoning, such as the one offered by John Dewey, makes both of these challenges easier. We need not become experts in epistemology generally, nor pragmatist epistemology in particular, in order for the account of legal reasoning that I have discussed in this article to aid us in our work with novices. We can, in fact, easily communicate the process of reiterative reasoning to our students by utilizing the problem method that is almost universally used in legal analysis and communication classes. As we work through problems with our students, we can show them how their cognitive processes closely mirror the reiterative loop illustrated above. This helps reinforce to the novices placed within our care how they can—and should—reason through complex legal problems. This also shows them how the linear, deductive processes that many of them learned prior to coming to law school (and that some of our casebook colleagues still teach in other law school classes) actually hinder their ability to think in dynamic, fluid, and practically useful ways.

I do not mean to suggest by all this that Dewey's explanation of human reasoning—as it is employed in the particular context of legal reasoning—ought to be viewed as a new grand theory about how we should think about the law, and make decisions within the context of the legal domain. I certainly do not think that this account is the answer to the question of how everyone ought to think about legal reasoning and decision-making. As I suggested at the outset of this article, there are alternative ways of conceptualizing the processes of human reasoning that are

²⁰² See Dewey, *supra* note 10.

²⁰³ David T. Ritchie, *Situating “Thinking Like a Lawyer” Within Legal Pedagogy*, 49 CLEVE. ST. L. REV. 29 (2003).



implicated in legal analysis and communication. All of them surely contain at least some nuggets of usefulness as students struggle to move from novices to experts within the legal domain. Dewey's account of pragmatic reasoning contains such nuggets, and I think it is particularly useful in the context of legal writing and advocacy classes because it is easy to show students how their process of reasoning through, researching, and finally communicating about problems is very similar to Dewey's account. If we can use it in this way in the classroom, and it assists students in understanding the full complexity that their thinking and communication needs to approximate, then it is—I think—a useful explanation. We are, after all, simply trying to aide our students as they learn, develop, and employ their reasoning and communication skills. Anything that can help us do that—and I believe Dewey's account does help in this regard—should be considered as we try to assist students down the path of the law.