PRINCIPLED LEGAL PRAGMATISM: RECONCILING POSNER AND DEWEY ON LAW AND DEMOCRACY

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Pragmatism helps us see that the dream of using theory to guide and constrain political, including juridical, action is just that – a dream. If political action is to be constrained, it must be by psychological, career, and institutional factors rather than by conversation leading to a moral or political consensus. We must accept the irreducible plurality of goals and preferences within a morally heterogeneous society such as that of the United States, and proceed from there.[1]

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1. RICHARD POSNER, LAW, PRAGMATISM, AND DEMOCRACY 56 (2003).

I. INTRODUCTION

In *Law, Pragmatism and Democracy*, Richard Posner defends a political theory that he calls "pragmatic liberalism."[2] Like all liberal theories, according to Posner, pragmatic liberalism rests on a particular understanding of both law and democracy: "representative democracy constrained by legality is what 'liberal state' *means*."[3] Posner opposes his conception of pragmatic liberalism to what he terms "deliberative liberalism," a form of liberalism sometimes associated with John Dewey. Deliberative liberalism, according to Posner, offers a view of judges as restrained by rules (its understanding of law) and elected officials as guided by reason (its understanding of democracy).[4] Deliberative liberalism is deeply aspirational, according to Posner; while it may be in some measure descriptively accurate, it is primarily a normative account, an argument for the kind of state we *should* have, and *could* have, under appropriate conditions (including suitable effort by citizens to meet their political responsibilities).

Posner is deeply skeptical of this project because he has what he calls an "unillusioned understanding of human nature."[5] Invoking Darwin, Posner states that "human beings are merely clever animals," that "our intelligence is primarily instrumental rather than contemplative," and that "Darwin's picture of nature is bleak; it is dog eat dog in virtually a literal sense; the adaptionist process that produced us is genocidal."[6] "*The problem* of democracy," as Posner sees it, "is to manage conflict among persons who, often arguing from incompatible premises, cannot overcome their differences by discussion."[7] Pragmatic liberalism, therefore, sees voting and the action of elected officials as a matter of competitive interest. Skeptical of normative theory, particularly its ability to constrain elected officials through deliberation, it "emphasizes instead the institutional and material constraints on decisionmaking by officials in a democracy."[8]

Both of these two pillars of Posner's liberal state – his view of legal pragmatism in law and his account of pragmatic liberalism – have been severely attacked.[9] Posner has made few converts and, if anything, has

2. *Id.* at ix.
3. *Id.*
4. *Id.* at 11–12.
5. *Id.* at ix.
6. POSNER, *supra* note 1, at 4, 45.
7. *Id.* at 112 (emphasis added).
8. *Id.* at ix.
9. See MICHAEL SULLIVAN, LEGAL PRAGMATISM: COMMUNITY, RIGHTS AND DEMOCRACY (2007), for sustained criticism of Posner's pragmatic liberalism. *See also* Michael

only further entrenched opposition to his "unillusioned" account. Unfortunately, Posner's style is often polemical, confrontational, and draws opponents away from appreciating his insights or incorporating his contribution into their accounts. Rather than opposing Posner in this article, I present both a thorough defense of his legal pragmatism against his strongest critics (who favor a more Deweyan approach) and seek to supplement it with principles drawn from the pragmatism of William James and John Dewey. To do so, I advance the following claims. First, Posner is correct to argue that there is no "logical argument" to support deliberative, or what is sometimes called *deep*, democracy insofar as this argument might apply to elected officials.

One of Posner's central and most important insights is that American government, though perhaps (always) in need of adjustment, is a generally desirable and effective one. Arguments for what is often called, "epistemic democracy" are in some circumstances compelling – Posner accepts this view and argues for a diverse judiciary on its basis, for example – but there are limits imposed by institutional facts, that is, the cost of *deep* democracy in many contexts is too high, it is not feasible, or is simply undesirable (in light of other values). Defending Posner's claim requires taking on difficult philosophical arguments by leading contemporary pragmatists (including one of the preeminent philosophers of the 20th century, Hilary Putnam) and showing how these arguments fail. To accomplish this, I draw not only on resources in classical American pragmatism (on which Posner's opponents purport to rely), but also on very recent studies by Edward L. Glaeser and Cass R. Sunstein, thus providing Posner's position with both theoretical and empirical support.

Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687 (2003) (book review). The literature on pragmatism and law is large. For a fairly recent canvass of positions held by pragmatists, see Susan Haack, *On Legal Pragmatism: Where does "The Path of the Law" Lead Us?*, 50 AM. J. JURIS. 71 (2005). None of these contributions suggest the syncretic approach offered here. For other important contributions to law and pragmatism not cited elsewhere in this article, see Thomas C. Grey, *Freestanding Legal Pragmatism* 254–74, *in* THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW AND CULTURE (Morris Dickstein ed., 1998); RICHARD RORTY, PHILOSOPHY AND SOCIAL HOPE 93–113 (1999); James Bohman, *Democracy as Inquiry, Inquiry as Democratic Pragmatism, Social Science, and the Cognitive Division of Labor*, 43 AM. J. OF POL. SCI. 590 (1999); Justin Desautels-Stein, *At War with the Eclectics: Mapping Pragmatism in Contemporary Legal Analysis*, 2007 MICH. ST. L. REV. 565 (2007); David Luban, *What's Pragmatic About Legal Pragmatism?*, 18 CARDOZO L. REV. 43 (1996); Eric A. MacGilvray, *Five Myths about Pragmatism, Or, Against a Second Pragmatic Acquiescence*, 28 POL. THEORY 480 (2000); Ira L. Strauber, *Framing Pragmatic Aspirations*, 35 POLITY 491 (2003); Catherine Pierce Wells, *Why Pragmatism Works for Me*, 74 S. CAL. L. REV. 347 (2000); Michel Rosenfeld, *Pragmatism, Pluralism and Legal Interpretation: Posner's and Rorty's Justice without Metaphysics Meets Hate Speech*, 18 CARDOZO L. REV. 97 (1996).

Second, Dewey's own view of political democracy (as opposed to "everyday" democracy) is much closer to Posner's account than Posner – and many self-described "Deweyans"– suppose. At the level that concerns Posner, (i.e. elected officials of large government) Dewey's view is hardly distinguishable from Posner's. The difference between Posner and Dewey is that Dewey used the term "democracy" to also propose social reform that goes well beyond government functions to a "way of life," one substantially described by his "renascent liberalism."[10] This is a moral account drawn from William James's pragmatic, pluralistic proposal for associated living that not only recognizes deep pluralism, but seeks to support it. "Democracy," in Dewey's view, is the striving collective struggle to realize as many personal and variously shared ideals as possible.[11] Dewey saw this ideal as reciprocally related with a democratically functioning state. Such liberalism requires government committed to the freedom and empowerment of individuals, and in turn depends on a liberal society to restrain and guide it by their demands. Dewey's proposal, far more modest than deliberative democrats propose, is both useful for purposes of encouraging pluralism and consistent with Posner's view of democracy as a political institution.

Retaining a modest form of Dewey's view of everyday democracy allows one to see Posner's account and Dewey's as *complementary*, rather than incommensurable.[12] Posner provides precisely the kind of institutional insight needed to revise and refine a Deweyan understanding of Democracy as a way of life and as a criticism of current forms of democracy. Failure to incorporate Posner's insights, however, leaves a

10. *See* Robin L. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673, 694 (1985).

11. *See* POSNER, *supra* note 1, at 99–101.

12. The view I argue for in this article most closely resembles the very recent work of Jane Mansbridge, et. al., who argue for "a complementary rather than antagonistic relation of deliberation to many democratic mechanisms that are not themselves deliberative." Jane Mansbridge et. al., *The Place of Self-Interest and the Role of Power in Deliberative Democracy*, 18 J. OF POL. PHIL. 64 (2010). There are two crucial differences. One is that Mansbridge, et. al. argue that non-deliberative mechanisms can and must be legitimated and constrained through deliberative practices that include mutual respect, equality, reciprocity, fairness and mutual justification. *Id.* at 76. Posner's realistic approach dismisses this requirement as hopelessly utopian and perhaps not even desirable, but sees deliberation as having some role is preserving pluralism. The second difference is that the Mansbridge, et. al. model sees pluralism as a fact presenting problems for which non-deliberative methods (such as competitive voting) are a second-best solution. *Id.* at 84. My Posnerian view sees these mechanisms as a highly desirable means of recognizing and maintaining genuine pluralism that are second to none. For a description of pluralism as presenting problems to be resolved (rather than a fact to preserve), see James Bohman & Henry S. Richardson, *Liberalism, Deliberative Democracy, and "Reasons that All Can Accept"*, 17.3 J. OF POL. PHIL. 253 (2009).

Deweyan account vulnerable to a danger Dewey railed against: fashioning ideals unconnected with the realities of existent conditions. Conversely, Dewey's account tempers Posner's view by providing a broader, more sanguine account of democratic participants. The reconstruction of personal habits and social customs through institutional reform suggest possibilities for improving everyday life in a pluralistic society.

The pressing practical question is how to cultivate democratic reconstruction? And here again, Posner's insights are both helpful and continuous with the pragmatism of James and Dewey. Both James and Dewey sought reform not primarily through deliberation, but through institutional reform. As Posner insists, "[w]e must accept the irreducible plurality of goals and preferences within a morally heterogeneous society such as that of the United States, and proceed from there."[13] And proceeding from there—successfully, not just aspirationally—means discarding idealistic notions of democracy in favor of institutional and social arrangements that support a morally diverse community, the members of which are free (and empowered) to pursue their various forms of preferred living. James and Dewey were perhaps more sanguine about the potential of such reform than is Posner, and here perhaps James and Dewey provide a needed correction to Posner's excessive pessimism.

II. POSNER'S PRAGMATIC LIBERALISM

Posner identifies law and democracy as the "twin pillars" of any theory of the liberal state, but the bulk of his attention is devoted to criticism of deliberative liberalism and defense of his own pragmatic version of the liberal state (both theories are theories of democracy).[14] Posner argues that the relationship between "pragmatism" understood as a set of philosophical arguments about the nature of truth, knowledge, and abstract theory, on one hand, and as a left-leaning political vision associated with John Dewey, is merely an historical artifact of coincidence.[15] Posner provocatively states that pragmatism no more stands for a particular politics than the fact that Charles Lindberg, who came to stand for the "American First" movement, implies "there is something in flying a plane well that makes a person an isolationist."[16] And while Posner endorses a view that he describes as "everyday pragmatism," he dismisses the notion of deliberative liberalism ("political democracy

13. POSNER, *supra* note 1, at 56.
14. *Id.* at ix–xi.
15. *Id.* at 46.
16. *Id.* at 47.

conceived of as the pooling of different ideas and approaches and the selection of the best through debate and discussion") as hopelessly and perniciously utopian.[17] According to Posner:

> With half the population having an IQ below 100 . . . with the issues confronting modern government highly complex, with ordinary people having as little interest in complex policy issues as they have aptitude for them, and with . . . the pressures of competitive elections, it would be unrealistic to expect good ideas and sensible policies to emerge from the intellectual disorder that is democratic politics by a process aptly termed deliberative.[18]

Posner therefore advocates a form of "elite" or "competitive" democracy, which he describes as "a method by which members of a self-interested political elite compete for the votes of a basically ignorant and apathetic, as well as determinedly self-interested, electorate."[19] The virtue of this method is that it is realistic. It begins with democracy as it has been actually practiced, from its beginning in ancient Athens to the present day,[20] and it takes people as they really are: self-interested, politically indifferent, and largely uninformed.[21] Whereas deliberative democrats deplore the lack of political participation in modern American democracy, Posner sees that trend as a social gain, defusing disagreement and increasing time for other sorts of social activity, activity citizens actually seek and enjoy.[22] Posner's epigraph for chapter five, "Democracy Defended," in which he cites Aldous Huxley – "What a comfort to live in a world where one can delegate everything tiresome, from governing to making sausages, to somebody else" – is thus a ringing endorsement of American democracy, as *currently* practiced.[23]

17. *Id.* at 49–50, 107, 164.

18. POSNER, *supra* note 1, at 107; *see also* Francois-Marie Arouet de Voltaire, *Fatherland, in* THE PORTABLE ENLIGHTENMENT READER 420, 421 (Isaac Kramnick ed., 1995) ("How then is it that nearly the whole world is governed by monarchs? Ask the rats who proposed to hang a bell round the cat's neck. But in truth, the real reason is, as has been said, that men are very rarely worthy of governing themselves.").

19. POSNER, *supra* note 1, at 16. *See generally id.* at 147–50, 193–94.

20. *See id.* at 143.

21. *See id.* at 151.

22. *See id.* at 172.

23. *Id.* at 158.

Posner's view of elite democracy is controversial and Robert Westbrook, a Harvard historian and a leading scholar in Dewey studies, draws on contemporary pragmatism to powerfully argue that pragmatism *does* justify democracy as Dewey conceived it.[24] If Westbrook is right, then Posner is gravely mistaken; he cannot sever pragmatism from politics, and cannot embrace Dewey's epistemic pragmatism without also accepting its demand for deliberative democracy. The sections below focus on Westbrook's effort to span pragmatism and deliberative democracy using logical arguments drawn from Hilary Putnam and Cheryl Misak. To anticipate, these arguments fail for both theoretical and empirical reasons. Posner is correct to claim that pragmatism does not *require* deliberative democracy, at least not at the level that concerns him. Seeing how this is so requires visiting what Posner describes as the "arid and overgrazed" uplands of philosophical theory,[25] but the peripatetic journey is worth the effort. The stakes are high, not only for how we understand and promote democratic institutions in the United States, but also for how we should go about building democratic societies in regions of the world that currently lack these institutions.

III. THE LOGICAL ARGUMENT FOR "DEEP" DEMOCRACY

In his influential essay, *Democratic Logic*, Robert Westbrook concedes that although Dewey implied that his logic of inquiry was related to his view of democracy, Dewey never provided an adequate argument.[26] Hilary Putnam, however, has claimed that a logical argument can be "found" in Dewey's writing, one with which Dewey would have agreed.[27] That argument consists of three steps, the first of which sees Dewey drawing explicitly on Charles Peirce's views in *The Fixation of Belief.* According to Westbrook, Dewey "held that the best way that human beings had found to fix beliefs – or, as Dewey preferred to call them, 'warranted assertions' – was by means of the methods, practices, and values of a community of competent inquirers, the best exemplification of which was

24. This article relies primarily on ROBERT B. WESTBROOK, *Democratic Logic, in* DEMOCRATIC HOPE: PRAGMATISM AND THE POLITICS OF TRUTH 175 (2005) [hereinafter WESTBROOK, *Democratic Logic*]. Earlier versions of the essay appeared in 1998 and 2000, and the essay is substantially reproduced as Robert B. Westbrook, *Liberal Democracy, in* A COMPANION TO PRAGMATISM, (John R. Shook & Joseph Margolis eds., 2006). The essay has been well received, but for criticism, see Robert Talisse, *Two Democratic Hopes*, 4 CONTEMP. PRAGMATISM 19–28 (2007).

25. POSNER, *supra* note 1, at 3.

26. WESTBROOK, *Democratic Logic*, *supra* note 24, at 179.

27. *See id.* at 180.

the community of modern science."[28] Modern scientific communities are exemplary in their practices because scientists are stimulated by particular doubts arising within the context of warranted assertions and they resolve those doubts with fallible assertions that are also warranted by evidence.[29]

The second step is that "Dewey extended the range of inquiry to include judgments of practice and moral judgments."[30] According to Putnam, Dewey thought that the methods of science have taught us important lessons about inquiry *in general* and that these lessons may be applied to moral inquiry *in particular*.[31] This is crucial, Westbrook argues, because it allows application of the method of inquiry to problematic situations that are "value laden" – and so to the sorts of issues that rile social and political disagreement in a diverse society.[32]

The third step is that a community of inquiry should itself be democratic, not on *ethical*, but rather on *cognitive* grounds.[33] As Westbrook puts it, "the quality of inquiry is affected by the degree to which that community is inclusive or exclusive of all the potential, competent participants in that inquiry and by the democratic or undemocratic character of the norms that guide its practice."[34] Thus Dewey's denial in *The Public and Its Problems* that democracy could be fully realized if it consisted of elite representation and administration by experts. Dewey there insisted that "a class of experts would become a class with private interests and private knowledge, which in social matters is not knowledge at all."[35]

In place of an elite model, in which experts decide *for* people, Dewey advocated ongoing collaboration *between* experts and those enmeshed in a problematic situation and in need of a solution. Knowledge is widely socially distributed, and persons at all levels must work together to pool facts, test potential solutions and provide feedback on implemented strategies. As Dewey stated, "[t]he man who wears the shoe knows best that it pinches and where it pinches, even if the expert shoemaker is the best judge of how the trouble is to be remedied."[36]

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28. *See id.*
29. *See id.*
30. *Id.*
31. *Id.* at 181.
32. WESTBROOK, *Democratic Logic*, *supra* note 24, at 180–81.
33. *Id.*
34. *Id.*
35. JOHN DEWEY, *The Public and Its Problems*, *in* 2 JOHN DEWEY: THE LATER WORKS 1925-1953, at 364 (Jo Ann Boydston et al. eds., 1988).
36. *Id.*; *see also* Elizabeth Anderson, *The Epistemology of Democracy*, 3 EPISTEME 8, 1314

The proposed logical argument links Dewey's pragmatism to deliberative democracy because effective inquiry must be inclusive and therefore requires democratic practices. Scientific procedures, in general, require freedom of thought and freedom of speech.[37] Science also requires opportunities for communal criticism (of evidence, of method, of hypotheses, etc.) and to the extent this is prevented, "the scientific enterprise always suffers."[38] Such communities of inquiry must therefore be democratically organized, according to Putnam, for "[w]hen relations among scientists become relations of hierarchy and dependence, or when scientists instrumentalize other scientists, again the scientific enterprise suffers."[39] And just as science—our best method of generating warranted assertions—would appear to require certain features of democracy for scientists, moral and political communities, in order to garner the best possible understanding of, and solutions for, moral and political problems, must be democratically organized and must engage in public debate and shared inquiry to reach correct solutions.

Westbrook agrees that Putnam's argument is one Dewey might have embraced and praises Putnam for clarifying Dewey's view in three ways. First, Putnam makes it clear that, in moral disagreements, not all values and prior evaluations are in doubt. Parties to disagreement inevitably "share a large number of both factual assumptions and value assumptions that are not in question" and many moral disagreements may be resolved "by appeal to values which are not in question in *that* dispute."[40] Second, the resolution of moral problems need not be agreement on values.[41] Ethical objectivity does not require the idea of a universal way of life, that every disagreement have one, correct solution. If value disagreements concern only individual lives, then judgment may be relativized, thus retaining Dewey's belief that different, but still satisfactory ways of life are possible across different persons and across different communities.[42] And third, Putnam shows us that ethical objectivity does not entail the belief that there

(2006) (stating Dewey stressed individuals from different walks of life should come together to discuss their different views of what the problems of public interest are and what the potential solutions are).

37. WESTBROOK, *Democratic Logic*, *supra* note 24, at 181.

38. *Id.* (citing HILARY PUTNAM, *Pragmatism and Moral Objectivity*, *in* WORDS AND LIFE 151, 172 (James Conant ed., 1994)).

39. *Id.* (citing PUTNAM, *Pragmatism and Moral Objectivity*, *supra* note 38, at 172).

40. *Id.* at 183 (citing PUTNAM, *Pragmatism and Moral Objectivity*, *supra* note 38, at 175–76).

41. *See id.* at 183–84.

42. *Id.* at 184 (citing PUTNAM, *Pragmatism and Moral Objectivity*, *supra* note 38, at 214–15).

are no undecidable cases.[43] Just as science retains a notion of objectivity without insisting that all problems in physics, mathematics, geology or history can be settled, moral inquiry retains objectivity in ethics without presuming that all problems arising in its domain will be resolved.[44]

Although Westbrook thinks Putnam's logical argument is promising, he still considers it vulnerable to criticism. To be ultimately successful, "One must begin with a pragmatic conception of truth as the work of communities of inquiry; then one must contend that political and moral questions are 'truth-apt'; and finally one must demonstrate that democratic communities of inquiry are epistemically superior to nondemocratic ones."[45] To test the argument, Westbrook directly confronts Posner's denial of any connection between pragmatism and deliberative democracy. Posner's primary philosophical objection to Putnam's argument, according to Westbrook, is its second claim, that moral and political beliefs are in fact truth-apt. Deliberative democracy focuses on reasoning about ends and Posner is skeptical of "the very possibility of such reasoning."[46] Posner sees politics not as a forum for resolving moral and political disagreement, but as a venue for advancing "existing, unreflective, presumably selfish preferences."[47] Posner therefore distinguishes himself from pragmatists who insist on linking epistemic to political democracy and instead embraces a form of "everyday pragmatism." The everyday pragmatist, Posner informs us (with some relish), is "practical and business-like, 'no-nonsense,' disdainful of abstract theory and intellectual pretension, contemptuous of moralizers and utopian dreamers."[48]

For everyday pragmatists like Posner, democracy is merely a useful method for self-interested political elites to compete for votes from ignorant, apathetic, and self-interested voters.[49] Because everyday pragmatists are realistic about society and human nature, they accept that "society is composed of wolves and sheep," of two classes, one of which is "far above average in ambition, courage, energy, toughness, personal magnetism, and intelligence (or cunning)."[50] The primary virtue of the

43. WESTBROOK, *Democratic Logic*, *supra* note 24, at 184 (citing PUTNAM, *Pragmatism and Moral Objectivity*, *supra* note 38, at 176).

44. *Id.* (citing PUTNAM, *Pragmatism and Moral Objectivity*, *supra* note 38, at 215).

45. *Id.* at 188.

46. POSNER, *supra* note 1, at 131–32; *see also* WESTBROOK, *Democratic Logic*, *supra* note 24, at 184.

47. POSNER, *supra* note 1, at 131; WESTBROOK, *Democratic Logic*, *supra* note 24, at 192–93.

48. POSNER, *supra* note 1, at 50; WESTBROOK, *Democratic Logic*, *supra* note 24, at 193.

49. POSNER, *supra* note 1, at 16.

50. WESTBROOK, *Democratic Logic*, *supra* note 24, at 193 (citing POSNER, *supra* note 1, at

American political system is that it deflects the ambitious into arenas where they vie for political power "in a chastened, socially unthreatening, in fact socially responsible, form."[51] The process issues in rule by a powerful elite, by those most capable and interested in ruling, in a way that promotes political and social stability – for everyone. Note that all of this occurs among self-interested parties, each promoting its own interest, without even addressing, much less resolving, differences about moral or political ends. Note also that Posner's view is more deeply pluralistic than that of deliberative democrats. For Posner, pluralism leads to a kind of moral relativism in which deep commitments are in principle not resolvable, whereas deliberative democrats tend to be moral realists who grudgingly recognize that only some disagreements will evade deliberative resolution.[52]

Westbrook's response focuses on the claim that moral and political debates are interminable and may in principle be irresolvable – that is, that these kinds of beliefs are not "truth-apt."[53] He believes Putnam's argument is already responsive to Posner's criticism, but instead relies on arguments by Cheryl Misak to show that Posner is mistaken. Drawing on the writings of Charles Peirce, Misak proposes a form of pragmatism that sports a "low-profile" conception of truth, one that is deflationary, rejects correspondence, and is nested in human inquiry.[54] This form of pragmatism "takes experience seriously" and insists that, in order to be adequately tested, beliefs "must be subject[ed] to the widest possible range of experience."[55] In this formulation, "[t]ruth and objectivity," according to Misak, "are matters of what is best for the community of inquirers to believe, 'best' here amounting to that which best fits with the evidence and argument."[56] True beliefs withstand doubt and Truth, as the aim of inquiry, serves as a regulative ideal that keeps inquirers open to new experiences and other reasons.[57]

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51. *Id.* (citing POSNER, *supra* note 1, at 184).

52. *See* RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 23–30 (1999). For a response, see Richard R. Rorty, *Dewey and Posner on Pragmatism and Moral Progress*, 74 U. CHI. L. REV. 915 (2006).

53. *See* WESTBROOK, *Democratic Logic*, *supra* note 24, at 196–97.

54. *See id.* at 195.

55. *Id.*

56. *Id.* (citing CHERYL MISAK, TRUTH, POLITICS, MORALITY: PRAGMATISM AND DELIBERATION 1 (2000)). Misak restates her view of truth, inquiry, and belief in substantially the same terms in Cheryl Misak, *Pragmatism on Solidarity, Bullshit, and other Deformities of Truth*, 17 MIDWEST STUD. IN PHIL. 111–21 (2008).

57. *See* WESTBROOK, *Democratic Logic*, *supra* note 24, at 195–96; MISAK, TRUTH, POLITICS, MORALITY, *supra* note 56, at 53, 69, 98.

Because her pragmatism rejects correspondence theories of truth, Misak believes it applies to moral and political beliefs (since there is nothing "out there" to which a true statement "corresponds").[58] Misak only insists "that in morals and politics we have 'genuine beliefs with truth as their aim,' and that these beliefs answer to experience and to inquiry."[59] Moral and political beliefs meet this low threshold and are therefore "truth-apt."[60] According to Misak, beliefs are not private matters and "[w]hat it is to have a belief is to be committed to giving reasons for that belief."[61] Again, "[a] belief is something that one gives, would give, or could give reasons for; something that one takes to be responsive to the way things are."[62] To have beliefs is implicitly to want to have true beliefs, and this in turn commits the holder to inquire and be open to experience and other possible reasons. Indeed, genuine belief *requires* democracy: "my argument is that the requirements of genuine belief show that we must, broadly speaking, be democratic inquirers."[63] Even more emphatically: "[T]he pragmatist thus supports a kind of *radical democracy* in inquiry."[64]

Moral and political beliefs are truth-apt, but Misak, like Putnam, seeks a modest middle course between insisting that all moral and political questions must have right answers, and a position that "infers from the fact that morals and politics are rife with unanswerable questions that the notion of a right answer [is] inappropriate."[65] We may still therefore conclude that a number of different ways of life, though not all, are both incompatible with one another and still reasonable, respectable choices. This view is presented as modest and pluralistic while still retaining some critical bite, since it seeks true answers to moral and political questions. Moreover, Westbrook believes that Misak's view enables a response to those (such as Nazis – a favored example) who simply refuse to subject their beliefs to reasons or experience. According to Westbrook, the response would be something like, "[Y]our 'belief' is not really a belief since you refuse to respect the experience of others and thereby open your belief to the sort of inquiry that the very act of asserting a belief implies."[66] Obviously, one doesn't expect to change the Nazi's mind with this

58. *See* WESTBROOK, *Democratic Logic*, *supra* note 24, at 196.
59. *Id.*; *see also* MISAK, *supra* note 56, at 83–84.
60. WESTBROOK, *Democratic Logic*, *supra* note 24, at 196.
61. MISAK, *supra* note 56, at 102.
62. *Id.* at 106.
63. *Id.*
64. *Id.* at 94 (emphasis added).
65. WESTBROOK, *Democratic Logic*, *supra* note 24, at 196; MISAK, *supra* note 56, at 144.
66. WESTBROOK, *Democratic Logic*, *supra* note 24, at 197; MISAK, *supra* note 56, at 104-05, 124.

response – nothing can do that, since the Nazi is impervious to rational criticism – but it does provide a basis for opposition, which is ground not available to other forms of pragmatism (including Posner's).

If Misak's conception of truth is compelling, then it appears Posner is utterly wrong by assuming moral and political disagreements are "interminable" and severing the connection between epistemic and political pragmatism. For Misak, like Putnam, draws heavy political consequences from her pragmatism. She claims that if moral and political debate is resolvable in many cases (is "truth-apt"), then we must conduct moral inquiry, which in turn requires individual autonomy, equal worth, tolerance, pluralism, and free speech throughout our political and social arrangements.[67] Truth in moral inquiry, Misak explains, "requires us to listen to others, and anyone might be an expert."[68] Radical democracy in inquiry leads in a straight line to radical democracy in politics; the logical connection between pragmatism and democracy, *pace* Posner, is confirmed.

IV. A CRITIQUE OF PUTNAM: SCIENCE, RATIONALITY, AND MORAL OBJECTIVITY

In this and the following section, I provide both theoretical and empirical reasons why the logical arguments drawn from Putnam and Misak are unconvincing. This is not to say these arguments are utterly mistaken, wrongheaded, or devoid of insight; that would be implausible and uncharitable. My point is that these arguments, as they stand, cannot withstand the full weight that Westbrook and others would have them bear, and that at best these arguments support a significantly more limited position consistent with much (if not all) of Posner's view.

First, Putnam's argument for democracy proves far too much. Arguing that scientific inquiry must be democratic to be successful, Putnam initially, and modestly, states that "the scientific enterprise always suffers" under conditions "[w]here there is *no* opportunity to challenge accepted hypotheses."[69] This is uncontroversial, as no one argues that science can thrive just as well with *no* public criticism (at least not when that is conceived as peer review). But Putnam reaches significantly further when he says that, "[w]hen relations among scientists become relations of hierarchy and dependence, or when scientists instrumentalize other

67. WESTBROOK, *Democratic Logic*, *supra* note 24, at 198; MISAK, *supra* note 56, at 96.
68. *Id.*
69. PUTNAM, *Pragmatism and Moral Objectivity*, *supra* note 38, at 172 (emphasis added).

scientists, again the scientific enterprise suffers."[70] This is a comment both on science as an institution (how science teams should be organized, directed, managed) and a comment on the moral relations that constitute genuine science (how scientists should treat one another). Taken together, Putnam believes these claims support "an *instrumental* justification of the democratization of inquiry."[71] The difficulty with Putnam's claim is that he appears to ignore a third possibility: that scientific practice is characterized by *both* significant hierarchy, dependence, and scientists "instrumentalizing" one another, on one hand, *and* committed to (sometimes very limited) public criticism of scientific results on the other. While *some* democracy may be justified and needed for healthy scientific inquiry, it is not clear how much (a truly pragmatic question) and practical constraints may well suggest a kind of equilibrium or the sort of tradeoffs one finds embedded in large institutions. In short, more democracy in science than exists as it is currently practiced might be costly without benefit.

If adequate understanding of a specific social practice (including science) requires close examination of current *actual* forms of that practice, then Putnam is more than missing a logical possibility, for science, with all its enormous success, is well known to exhibit powerful and influential forms of hierarchy, dependence, and interpersonal instrumentalization. Indeed, narratives of scientific practice, such as James Watson's account of how he and Francis Crick discovered the double helix, suggests we add petty rivalry, jealousy, and narrow obsession to enrich our understanding of scientists at work.[72] At the institutional level in which science is currently practiced, philosophers of science have shown that a more complete picture recognizes thorough administrative bureaucracy and hierarchy, distribution and delegation of tasks resulting in "classes" of scientific workers, steep concentration of decision-making in the hands of a very small number of managing scientists, and significant influence by external political and economic pressures on research agenda.[73]

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70. *See id.*

71. *Id.* at 173.

72. *See generally* JAMES WATSON, THE DOUBLE HELIX: A PERSONAL ACCOUNT OF THE DISCOVERY OF THE STRUCTURE OF DNA (1980). *See also* SUSAN HAACK, DEFENDING SCIENCE WITHIN REASON: BETWEEN SCIENTISM AND CYNICISM 109–14 (2d ed. 2007). Similar tales may be told about other periods of scientific discovery, such as the Copernican revolution. *See* ARTHUR KOESTLER, THE SLEEPWALKERS: A HISTORY OF MAN'S CHANGING VISION OF THE UNIVERSE 355–83 (1959).

73. *See* SANDRA HARDING, THE SCIENCE QUESTION IN FEMINISM 72 (1986); *see also* DONNA HARAWAY, MODEST_WITNESS@SECOND_MILLENIUM.FEMALEMAN©_MEETS_ONCOMOUSE, 87-101

As Sandra Harding, a leading feminist philosopher of science points out, only a few hundred individuals are key decision-makers in science; the rest of the nearly two million participants are technicians, research assistants, computer programmers, etc. – all performing specialized, relatively isolated duties.[74] While there is obviously some criticism of scientific results at a very high level (through peer reviewed journals, for example), the flow of information, decision-making, and decision-implementation occurs within this striated, and very lean, pyramidal structure. The various flows of information and authority in question are typically *not* symmetrical, *not* reciprocal, *not* democratic – and it this very structure that makes science productive and successful. The life of a modern scientist, it turns out, for the most part resembles that of a factory worker, not a participant in collaborative inquiry.[75]

Moreover, despite the apparent similarities between models of science and democracy, there is little evidence that scientists in practice conform to the norms of transparency, openness, and mutual criticism indicative of participatory democracy. As the sociologist of science Michael Mulkay observes, "there is some indication that, even when scientists endorse these values [of openness, mutual criticism], at the verbal level, they do not necessarily *act* in accordance with them."[76] Scientists often do not respond critically to published work by others and in fact employ a norm of *secrecy* about their work, rather than complete communal transparency. Perhaps counter-intuitively, secrecy facilitates good science by avoiding disputes about priority and enables extended periods of research and confirmation of findings.[77] Again, the point is not that there is no transparency, no sharing of work, no shared criticism; the point is that these norms are useful only

(1997).

74. HARDING, *supra* note 73, at 72.

75. *See* Mary Frank Fox, *Gender, Hierarchy, and Science*, *in* HANDBOOK OF THE SOCIOLOGY OF GENDER 452–53 (Janet Saltzman Chafetz ed., 1999). Recent studies also confirm that science "is a fundamentally hierarchical institution, and its valued attributes of rationality and control have been more ascribed to men than to women." *Id.* at 452. Science, primarily done and controlled by men, both reflects and extends gender stratification in society, and men disproportionately shape the contents and methods of science. *Id.* at 453. Nevertheless, science thrives. And while socially unjust, the practice may actual reap important benefits from its hierarchization as women scientists appear to be *more* cautious and careful in their methods, *more* attentive to detail than men due to societal pressures to succeed while at a social disadvantage. *Id.* at 452. While this perverse result is clearly *not* an argument in support of gender inequality, it does throw cold water on Putnam's insistence that science *always suffers* from hierarchy or instrumental relations.

76. *See* MICHAEL MULKAY, SOCIOLOGY OF SCIENCE: A SOCIOLOGICAL PILGRIMAGE 53 (1991).

77. *Id.* at 64.

until a certain point at which they are in practice counterbalanced by other norms that are not typically associated with democracy.

Putnam's approach, which invokes an ideal of science for political purposes, suggests that however successful science currently is, it would become *even more so* if more democratically organized. As we have already seen, this claim is descriptively misleading of science as practiced. But it also underwrites a self-defeating program for reform. It invokes a standard according to which more democracy is always an improvement, rather than calling for an effort to strike an appropriate – that is, the most productive – balance among competing values. The latter calls for empirical data, greater understanding of how institutions actually work in practice, and careful experiment. The former imposes an *a priori* standard derived from armchair philosophy and should be regarded with suspicion. For example, consider the following issue, which is usual grist for first-year law courses in procedure.

The accuracy of the United States judicial system is obviously imperfect. Cases are sometimes wrongly decided (there is judicial error); findings of fact are often biased, distorted, or incomplete and justice is not done. Could accuracy be improved? Absolutely. Any number of procedural or substantive modifications could be made to improve accuracy. But there are costs. For example, more thorough, longer trials restrict access, since resources are limited, and this means that justice better served in some instances results in no justice done in others. Similarly, useful evidence not otherwise available could become so – if only restrictions on search and seizure and police interrogation were relaxed. And some evidence, though clearly relevant, is considered too prejudicial.[78] In short, there are a range of values relevant to procedure and the current judicial system, however imperfect, reflects an effort to strike a balance among many competing values in order to achieve the best overall results.[79]

Just so, contemporary science is not more democratic than it is for good reason, namely, because *more* democracy would actually be *less* productive of good science. Indeed, in the enormously competitive and high-stakes environment in which scientists and science firms operate, if

78. *See* Katz v. United States, 389 U.S. 347, 348–54 (1967); *see also* Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573, 1585 (2007).

79. *See generally* LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY (2006). These institutional choices reflect values other than getting the right answer, such as the view that it is far better than a guilty person go free than that an innocent one be convicted. *Id.* For an excellent treatment of this issue, including a compelling argument that we should further refine or adjust the relative weight of values in criminal proceedings. *Id.*

more democracy produced better science, such a strategy would have been tested and, if successful, exploited. What is more likely is that organizations adopting a more deliberative model *suffer* in terms of efficiency and quality of decision-making, division of labor, and/or overall productivity. In short, even very important values (democracy in inquiry, accuracy in fact-finding) bump up against other values in the real world and must suffer limit on behalf of overall success.[80]

If, as the above suggests, science is not as democratic as Putnam makes it out to be, and might in fact would be worse off if made more so, one may wonder whether more democracy is needed in our political institutions.[81] Moreover, Posner's view is not that there should be *no* deliberation, but that deliberation is necessary constrained to voting in large democracies: "Its [deliberative democracy's] essential utopianism is its conception of democracy as self-government, so that its implicit model is Athenian democracy, which is utterly unworkable under modern conditions."[82]

Accepting that in a large democracy elected officials cannot engage in widespread dialogue with voters and cannot be their direct agents, Posner nevertheless insists that representatives are keenly aware of their *interests* and "the electoral process does tend to align the representatives' interest with those of the voters – to keep the representatives on a tether, though a long one."[83] This is a form of democracy that remain responsive, if attenuated by comparison to the Athenian model, and leaves persons to pursue other interests (or rather, their actual interests). As Posner notes, "[p]eople don't want to be lectured to by their intellectual superiors about needing to become informed about esoteric political issues, to participate actively in political and ideological deliberation, to subordinate their interests to some abstract public interest, and to allocate precious time to the political arena. But they do want to be heard concerning their interests by those who have power to do anything to protect or advance those

80. A different way of putting this is that science involves limited deliberation and is not more deliberative because it is responsive to evidence in ways that moral and political debate is not. Even in the context of policy decisions in science, it is not clear that deliberation, as this is conceived in the political realm, is helpful to science. *See* HEATHER E. DOUGLAS, SCIENCE, POLICY, AND THE VALUE-FREE IDEAL 159 & 191 n.4 (2009). There is, in short, no straight line from the model of scientific inquiry to deliberative democracy because the former is as mixed as the latter in terms of encouraging only *limited* deliberation.

81. *See generally* Ian Shapiro, *Optimal Deliberation?*, *in* DEBATING DELIBERATIVE DEMOCRACY 121–37 (James S. Fishkin & Peter Laslett eds., 2003) (discussing the effects of deliberation and increased democracy).

82. POSNER, *supra* note 1, at 164.

83. *Id.* at 167.

interests. Concept 2 [pragmatic liberalism] caters to this desire."[84]

With Posner, one might suspect that our actual system – one of limited democracy in which elites periodically vie for votes to govern the rest of us – is not only unavoidable, but optimal (all things considered). Instead of more deliberative democracy, perhaps it is better to embrace Posner's view of elite, competitive democracy (at least for large institutions) and instead seek greater accountability (through, e.g., term limits for Supreme Court judges or campaign finance reform for presidential and congressional elections). Such institutional changes that better tether elites to the governed do not appear nearly as Utopian as deliberative democracy. Indeed, Posner vigorously considers these sorts of remedial measures elsewhere. In *How Judges Think*, for example, Posner concludes that "[i]f I am right that it is a political court, the absence of term limits is an affront to democratic theory; conferring life tenure on politicians [in this case, judges] is profoundly undemocratic."[85]

Putnam's argument also trades on a mistaken view of rationality and its relationship to deliberation. Putnam states that an ethical community, one that "*wants* to know what is right and good – *should* organize itself in accordance with democratic standards and ideals . . . *because they are the prerequisites for the application of intelligence to the inquiry*."[86] Putnam further claims that any society that limits democracy limits rationality: the oppressed are intellectually stunted and the oppressors must resort to rationalization for legitimacy. Such a society, insofar as it is falls sort of deliberative democracy, produces solutions to value disagreements that are not rationally acceptable.[87]

While oppressive societies may be *morally* culpable, this does not necessarily indicate that they are irrational. As Richard Rorty has suggested for some time, it is not clear that the failure to treat others as equals is a failure of *reason*: "There is no faculty called 'reason' which tells us to listen to the other side (tells the slave-owner to listen to the slave, or the Nazi to listen to the Jew)."[88] More specifically, the Nazi, or slave-owners like Thomas Jefferson, are distinguishing differences among

84. *Id.* at 168. It is easy to forget in these debates how long and tedious lawmaking can be. For example, the Food and Drug Administration took nine *years* to determine how many peanuts are required to label a product "peanut butter", a rule that still apparently requires revision. *See* Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 504–505 (1986).

85. RICHARD A. POSNER, HOW JUDGES THINK 159–60 (2008).

86. PUTNAM, *Pragmatism and Moral Objectivity*, *supra* note 38, at 175.

87. *Id.*

88. RICHARD RORTY, RORTY AND HIS CRITICS 62 (Robert B. Brandom ed., 2000).

humans that render some others not relevantly human. If anything, this is a *deployment of reason.* As Rorty put it, "Serbian murderers and rapists do not think of themselves as violating human rights. For they are not doing these things to fellow human beings, but to *Muslims.* They are not being inhuman, but rather are discriminating between true humans and pseudo-humans."[89] Such persons still want to know what is good and right, and may well consider themselves good inquirers; they just don't think that Muslims (or for Jefferson, slaves) have (or could have) anything relevant to say about moral matters. While better moral choices would likely be made by extending inquiry to what these persons have to say and responding to their claims, failing to do so does not reflect a failure of *reason.*

One may also draw on the pragmatism of Charles Peirce, on whom Westbrook and Misak heavily rely, to make the point that persons who do not inquire are not thereby irrational. Doubt, Peirce insisted, had to be "real and living" to prompt inquiry and many individuals do in fact "fix" beliefs (resolve their doubts) by limiting the information they consider: "[a] man may go through life, systematically keeping out of view all that might cause a change in his opinions."[90] This method, the "method of tenacity" is admirable for "its strength, simplicity, and "directness."[91] Peirce also claimed that this method of fixing belief is unstable, because in practice other persons think differently "and it will be apt to occur to him, in some saner moment, that their opinions are quite as good as his own."[92] But if

89. RICHARD RORTY, *Human Rights, Rationality, and Sentimentality, in* TRUTH AND PROGRESS: PHILOSOPHICAL PAPERS 167, 167 (1998). The point can be made differently by recognizing that group norms (norms that identify individuals in an exclusive manner as part of a group, such as a religious affiliation) are, as Russell Hardin points out, more forceful that universal norms (such as equality before the law, tolerance, etc.) and can overwhelm them in conflicted situations. RUSSELL HARDIN, ONE FOR ALL: THE LOGIC OF GROUP CONFLICT 140–41 (1997).

90. CHARLES PEIRCE, *The Fixation of Belief, in* THE ESSENTIAL PEIRCE: SELECTED PHILOSOPHICAL WRITINGS 1867–1893 109, 115–16 (Nathan Houser & Christian Kloesel eds., 1992).

91. *Id.* at 122.

92. *Id.* at 116. Peirce elsewhere stated that "[n]o matter how strong and well-rooted in habit any rational convictions of ours may be, we no sooner find that another equally well-informed person doubts it, than we begin to doubt it ourselves." CHARLES SANDERS PEIRCE, *The Fallibility of Reasoning and the Feeling of Rationality, in* 5 COLLECTED PAPERS OF CHARLES SANDERS PIERCE 151, 160 (Charles Hartshorne & Paul Weiss eds., Harv. Univ. Press 1931). Where we find someone "equally well-informed", that person's disagreement will instill doubt in our contrary belief; but individuals who avoid such contact, or do not consider others equally well-informed, such doubts do not arise. *Id.* Peirce's discussion in "Methods of Fixing Belief" is an enormously important philosophical contribution, but one that should also be fleshed out by recognizing our human tendency toward "groupishness" and the potential this has for extending the method of tenacity. *See* CHARLES SANDERS PEIRCE, *Methods of Fixing Belief, in* 5 COLLECTED PAPERS OF CHARLES SANDERS PIERCE 377, 378 (Charles Hartshorne & Paul Weiss

those others are not members of his group, not considered relevant, not worth listening to because, (for example) like Jefferson, he is convinced that "they" are more animal than human, then there will be no relevant challenge to the belief held (however acquired).[93] It would seem that no real doubt would occur under these circumstances and no irritation prompting inquiry would arise. The belief that the "other" is not relevantly human would continue unchecked, but this would not be a failure of *rationality*, but of having never had real occasion to doubt one's belief (due to other held beliefs).

Moreover, as studies by Edward L. Glaeser and Cass R. Sunstein suggests, when we do discuss and debate issues of fact and policy, the result is often *not* more rational.[94] In their recent empirical work on group polarization, Glaeser and Sunstein suggest that democratic deliberation, unless it occurs under very specific circumstances, often leads to *even more extreme*, or as Putnam would say, *irrational*, views.[95] In *Extremism and Social Learning*, Glaeser and Sunstein introduce their hypothesis of "credulous Bayesians" to explain why engaging in group deliberation often leads participants to take extreme positions.[96] Examples of such behavior include studies of liberals and conservatives in Colorado, in which participants emerged from group debate holding more extreme versions of views they already held prior to engaging in debate. Where liberals debate with other liberals, participants drift toward more radical versions of liberalism, and the same holds true of conservatives: debate among conservatives drives participants towards more extreme conservative claims.[97] Tendency to group polarization has been identified in group discussion of a wide range of political issues, including affirmative action, civil unions, and global warning, and extends to discussion of factual issues, such as how far Sodom is below sea level.[98] Perhaps incredibly, in one study by Solomon Asch, participants were significantly willing to

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eds., Harv. Univ. Press 1934).

93. *See* RICHARD RORTY, *Human Rights, Rationality, and Sentimentality*, *supra* note 89, at 167–68; *see also* STANLEY FISH, THE TROUBLE WITH PRINCIPLE 282–83 (1999) (making a similar point in his short essay, *Beliefs about Belief*, Stanley Fish discusses how he has observed that we only question one of our beliefs when put under pressure by someone we consider an appropriate authority).

94. *See* Edward L. Glaeser and Cass R. Sunstein, *Extremism and Social Learning*, 1 J. OF LEGAL ANALYSIS 263, 309 (2009).

95. *Id.* at 300; PUTNAM, *Pragmatism and Moral Objectivity*, *supra* note 38, 167.

96. Glaeser & Sunstein, *supra* note 94, at 263.

97. *Id.* at 269. The phenomenon has also been confirmed in over twenty areas of substantive law. *Id.* at 270.

98. *Id.* at 269, 274.

overlook the direct evidence of their own senses (viewing the length of a line drawn on a white card) if the evidence was contradicted by a majority of other participants.[99]

The best predictor of the results of group discussion, it turns out, is simply the pre-deliberation median of participants; participants tend to conform to the majority and drift toward the more extreme views of the group.[100] Glaeser and Sunstein attempt to explain this behavior by introducing the idea of "Credulous Bayesians" to describe the process of ordinary social learning.[101] Credulous Bayesians will not adequately correct for (a) "the common sources of their neighbors' opinions, even though common sources ensure that those opinions add little new information," (b) "the fact that their correspondents may not be a random sample of the population of the whole," (c) "any tendency that individuals might have to skew their statements towards an expected social norm, even though peer pressure might be affecting public statements of view," and (d) Credulous Bayesians "will not fully compensate for the incentives that will cause some speakers to mislead" them.[102] As a result of Credulous Bayesian behavior, persons' beliefs often become *more erroneous* after group discussion and their confidence in those beliefs is greater because bolstered by the views of others in the group.[103] And as Glaeser and Sunstein emphasize, "accuracy may decline as group size increases. As group size increases, mistakes can become more numerous and more serious."[104]

If persons typically act as Credulous Bayesians – and group polarization studies clearly suggest that most of us do, most of the time – then democratic deliberation is not a *sine qua non* of rationality.[105] Under

99. *Id.* at 276–77 ("Asch's striking finding was that when confronted with the obviously wrong but unanimously held views of others, most people end up yielding to the group at least once in a series of trials.").

100. *See id.* at 268.

101. *See id.* at 265.

102. *See* Glaeser & Sunstein, *supra* note 94, at 265.

103. *See id.* at 266.

104. *Id.*

105. Robert Talisse, *Deliberative Democracy Defended: A Response to Posner's Political Realism*, 11 RES PUBLICA 185, 193 (2005). (arguing that Posner fundamentally misreads Sunstein's work on group polarization). Talisse argues "the polarization effect provides an argument in *favour* of deliberative democracy." *Id.* The lesson of group polarization, according to Talisse, "is to block the polarization effect by widening the 'argument pools' to which the average citizen is exposed." *Id.* at 194. Sunstein himself has suggested specific remedies, such as laws requiring political websites to include links to opposing views. *See id.* One of the lessons of group polarization may be that laws intended to counter polarization in certain circumstances would be desirable (and perhaps effective), but Posner's view of the significance of Sunstein's

very specific conditions, where persons are fully correcting and compensating for deficits in the information they receive, then deliberation may indeed lead to rational consensus around correct answers.[106] Unfortunately, such conditions are rare.[107] Under ordinary circumstances, where there is a "lean" in one direction on a question within a group, that view will be confirmed, possibly radicalized. And where there is equal opposition among groups, the result of deliberation is in fact *entrenchment*, not a drive toward rational consensus:

> But there also are abundant examples of cases in which group members stick to their extreme opinions when they connect with each other (Brown 1995; Sunstein 2003). In other words, *a group that consists of equally opposed subgroups might well show neither convergence nor polarization but simply entrenchment of members' antecedently held views.*
>
> For example, connections between different religions rarely leads to a merging of religious beliefs. And if (certain) Palestinians meet with (certain Israelis), convergence is not expected. Entrenchment and continuing conflict are at least as likely. We conjecture that the model could generate permanent disagreement if people put a high weight on the views of "insiders" but believe that the opinions of "outsiders" are essentially worthless.[108]

In short, the findings of Glaeser and Sunstein not only support our everyday intuitions about the futility of debating issues of fundamental disagreement (e.g. gay marriage, religion in our schools, abortion), they also lend support to Posner's view that deep deliberation is not a desideratum of democracy, *precisely because* it often exacerbates conflict (a significant cost) without achieving the proposed benefit of generating consensus.[109]

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work turns on the further (realistic) observation that there is little we can do about polarization on any significant scale, thus supporting Posner's liberal pragmatic conception of democracy. *See id.*

106. Glaeser & Sunstein, *supra* note 94, at 300 ("If people are acting as Bayesians, they will end up both more unified and more extreme as a result of group discussion"). And this may well lead to good results, provided the initial distribution of information is adequate. *See id.*

107. *See id.* at 305 (arguing that even though it is rare, it is not impossible). In institutional settings, such as panels of judges in appellate court cases, rules for diversity may be imposed and judges, as experts, may be able to discount information obtained by others (i.e., be good Bayesians, rather than Credulous Bayesians). *See id.* Posner has already argued for such diversity in the judiciary. *See* POSNER, *supra* note 1, at 119–21.

108. Glaeser & Sunstein, *supra* note 94, at 283 (emphasis added).

109. Posner, *supra* note 1 at 139 (noting that debate may at times have the benefit of allowing citizens to "blow off steam" through conflict, even though this doesn't generate agreement). This is a virtue, though not one embraced by deliberative democrats. *See id.*

Finally, Putnam's procedural model of democratic inquiry not only recasts democracy in an attenuated form as a drive toward consensus (when one of its virtues is cultivation of diversity), but fails to resolve fundamental disagreement. Putnam advocates democratic inquiry to help resolve moral and political disputes, suggesting that inquiry helps us achieve moral objectivity.[110] Hasty to achieve agreement, this approach significantly loses the commitment to not merely tolerating, but *cultivating* different ways of life in a democratic polity. But as Dewey notes in the quotation below, democracy seeks both "shared concerns" *and* "greater diversity", i.e. consensus is one, but not the only, desideratum:

> The widening of the area of shared concerns, and the liberation of a greater diversity of personal capacities which characterize a democracy, are not of course the product of deliberation and conscious effort. On the contrary, they were caused by the development of modes of manufacture and commerce, travel, migration, and intercommunication which flowed from the command of science over natural energy. But after greater individualization on one hand, and a broader community of interest on the other have come into existence, it is a matter of deliberate effort to sustain and extend them.[111]

As the Dewey scholar, Gregory Pappas, notes in his recent monograph on Dewey's ethics, the epistemic conception of deliberative democrats (such as Putnam and Misak) discards the moral virtues Dewey supported, among which is precisely the commitment to *deep pluralism* in democracy.[112] As Dewey stated in *Reconstruction in Philosophy*, the purpose of democracy "is to set free and to develop the capacities of human individuals without respect to race, sex, class or economic status" and he claimed that if democracy "has a moral meaning, it is found in resolving that the supreme test of all political institutions and industrial arrangements shall be the contribution they make to the all-around growth of every member of society."[113]

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110. *See* PUTNAM, *Pragmatism and Moral Objectivity*, *supra* note 38, at 172–73. Putnam notes:

> [W]hen one human being in isolation tries to interpret even the best maxims for himself and does not allow others to criticize the way in which he or she interprets those maxims, or the way in which he or she applies them, then the kind of "certainty" that results is always fatally tainted with subjectivity . . . Cooperation is necessary both for the formation of ideas and for their rational testing.

Id.

111. JOHN DEWEY, *Democracy and Education*, *in* 9 JOHN DEWEY: THE MIDDLE WORKS 1899-1924, at 93 (Jo Ann Boydston et al eds., 1980).

112. *See* GREGORY PAPPAS, JOHN DEWEY'S ETHICS: DEMOCRACY AS EXPERIENCE 257–59 (2009).

113. JOHN DEWEY, *Reconstruction in Philosophy*, *in* 12 JOHN DEWEY: THE MIDDLE WORKS 1899-1924, at 186 (Jo Ann Boydston et al. eds., 1982).

Conversely, the deeply deliberative conception seeks convergence and only grudgingly concedes that certain moral views may be fundamentally irreconcilable, rather than pluralistically celebrating (as Dewey and Posner do) the many distinctive ways one may live a human life. As John J. McDermott, a James and Dewey scholar significantly responsible for renaissance of interest in American Pragmatism, notes, "[p]luralism is not a fall from the grace of unity, not a step on the way to final resolution of disagreement, difference, or conflict. Pluralism is an ontology, a 'form of communal life' without which neither this American nation nor the planet can survive, humanly."[114]

Moreover, the attenuated form of democracy that Putnam proposes delivers very little in the way of agreement beyond what Posner already envisions. Putnam promises ethical objectivity, but concedes that not all disputes will be objectively resolved: some may be "relativized" (if only relevant to individual lives) and other disputes may be ultimately undecidable.[115] Putnam does not, however, identify which disputes may prove resistant, or specifically why, presumably because that could only be known after diligent democratic inquiry. The modesty may be endearing, but a closer look at some of those typically "hard problems" indicates that Putnam's approach cannot make good on his promises.

Consider, for example, legalized abortion, euthanasia, same-sex marriage, gun control, prostitution, prayer in public schools, immigration, affirmative action, welfare rights, school busing, universal healthcare, torture – the list goes on and on – and note that disagreement about these communal issues has proven fundamental, divisive, and resistant to agreeable resolution (entrenched in the language of group polarization). While in principle the problem may be that parties have failed to inquire sufficiently (or sufficiently well), that answer seems rather implausible (if not irksome and condescending) given how extensively these issues have been publicly debated. These issues have long proven resistant to resolution and further inquiry in fact promises little (except, perhaps,

114. JOHN J. MCDERMOTT, THE DRAMA OF POSSIBILITY: EXPERIENCE AS PHILOSOPHY OF CULTURE 28 (Douglas R. Anderson ed., 2007).

115. PUTNAM, *Pragmatism and Moral Objectivity*, *supra* note 38, at 176. Putnam stated:

> [B]elieveing that ethical objectivity is possible is not the same thing as believing that there are no undecidable cases or no problems which, alas, cannot be solved. The point is that once we give up the metaphysical claim that there cannot be such a thing as ethical objectivity, and once we observe that objectivity in other areas is strongly connected with values, we can begin to see not just that ethical objectivity might be possible, but, more important, that investigating ethical problems requires just the values that have come to be linked with the open society.

Id.

further entrenchment). Yet in these instances, it appears Putnam has nothing else on offer for resolving them (as, for example, a utilitarian or Kantian approach might by applying a rule).

If Putnam cannot assist with these "hard cases," then his approach to moral objectivity falls hard on the following dilemma: people already resolve most of their everyday disagreements in the usual rough and tumble way of talking it out, agreeing to disagree, negotiating compromise piecemeal, ignoring one another, etc. (what Posner calls "everyday pragmatism"), and so no help is needed. But there are important instances where this everyday process breaks down: the gears of social interaction lock up as fundamentally different and conflicting values emerge in some area of social life. People dig in, become angry, and take opposition as threatening to themselves or their way of life.

Here, some kind of dispute resolution is certainly needed, but unless "more inquiry" is really the solution, these issues remain "undecidable" in terms of moral objectivity. Further inquiry may sharpen our understanding of facts underlying disagreement, but not break the deadlock. And as Posner suggests, insisting on further deliberation about ultimately irreconcilable differences frequently inflames political discord.[116] In short, the pragmatic embrace of modesty, along with its commitment to procedural rather than substantive norms, delivers a moral theory that is impotent (and possibly deleterious) when dispute resolution is needed most.[117] If this is so, then Posner's view is surely the better one: the best we can do to resolve these issues is resort to independent (and relatively remote) decision mechanisms, such as popular voting or judicial procedures, to resolve the issue (at least temporarily, piecemeal) one way or another. What such procedures lose in terms of any claim to "getting it right" they make up for by greasing the wheels of decision-making and defusing social conflict.[118] Indeed, this is what democracy is *for*. As

116. *See* Posner, *supra* note 1, at 139 (comparing deliberations among judges to those among legislators and citizens, alike). "[A]rgument over fundamentals creates anger and is more likely to deepen and congeal disagreement than to overcome it." *Id.*

117. *But see* Kory Spencer Sorrell, *Feminist Ethics and Dewey's Moral Theory*, 35.1 TRANSACTIONS OF THE CHARLES S. PEIRCE SOCIETY 89, 104–108 (1999) (discussing Dewey's criteria for determining the good, right, and moral approbation). Deweyan pragmatism need not be as modest as Putnam suggests, as Dewey provided *criteria* for intelligently adjudicating among competing ends. *See id.*

118. *See* Posner, *supra* note 1, at 10. Posner stated:

> Democratic Government allows people to agree to disagree—that is, to acknowledge that there is no better method of resolving many disputes than by counting noses. This has a pacifying effect; conflict[] over fundamental value[s], the kind that deeply upset and even enrage people, are bracketed. Which is not to say that democracy is always and everywhere the best form of government. History suggests that the preconditions

Stanley Fish suggests, "[d]emocracy . . . is not a program for transforming men and women into capacious and generous beings but is a device for managing the narrow partialities that (as Hobbes saw so clearly) will always inform the activities of human actors."[119] And resort to these procedures is not a second-best solution, a grudging acknowledgment that some moral problems cannot be resolved. On the Posnerian approach, these mechanism are wondrously effective means of preserving a truly pluralistic society.

V. A CRITIQUE OF MISAK ON BELIEF: TOO RADICAL AND INSUFFICIENTLY PRAGMATIC

The above section identified large flaws in Hilary Putnam's view of science, rationality, and moral objectivity and showed why Posner's approach remains compelling. This section argues against Cheryl Misak's position that pragmatism supports radical democracy in inquiry and deliberative democracy in politics. Strikingly, at the heart of Misak's purportedly pragmatic approach lies a conception of "belief" deeply at odds with the idea of belief proposed by Charles Peirce and adopted by other pragmatists (including his contemporaries William James, John Dewey, and more recent pragmatists including Richard Rorty). According to Peirce, a belief is best understood broadly as a *habit* of *action,* as the following statements, written in 1878, 1880, 1905 and 1907, respectively indicate:

> And what, then, is belief? It is the demi-cadence which closes a musical phrase in the symphony of our intellectual life. We have seen that it has just three properties: First, it is something that we are aware of; second, it appeases the irritation of doubt; and third, it involves the establishment in our nature of a rule of action, or, say for short, a *habit.*[120]

> A cerebral habit of the highest kind, which will determine what we do in fancy as well as what we do in action, is called a *belief.*[121]

> Belief is not a momentary mode of consciousness; it is a *habit of mind* essentially enduring for some time, and mostly (at least) unconscious; and like other habits, it is (until it meets with some surprise that begins its dissolution) perfectly self-satisfied.[122]

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of successful democracy are seldom satisfied.

Id.

119. FISH, *supra* note 93, at 306.

120. PEIRCE, *The Fixation of Belief, supra* note 90, at 129.

121. *Id.* at 201.

122. CHARLES PEIRCE, THE ESSENTIAL PEIRCE: SELECTED PHILOSOPHICAL WRITINGS, VOL.

> Nicholas St. John Green. . .often urged the importance of applying Bain's definition of belief, as "that upon which a man is prepared to act". From this definition, pragmatism is scarce more than a corollary; so that I am disposed to think of him as the grandfather of pragmatism.[123]

For Peirce, the definition of belief offered by Bain and advocated by Green is the fountain from which pragmatism flows. And while Peirce suggested in 1878 that we are aware of our beliefs, his mature view (1905) is that beliefs are "mostly (at least) unconscious"; they are embodied habits of conduct that may become more or less conscious during the course of experience, but as we can only doubt a belief when "it meets with some surprise," we hold the vast majority of our operative beliefs not knowing – and perhaps never knowing – whence they came or how they were formed.[124] Nonetheless, beliefs dispose us to act in specific ways under appropriate circumstances.

Misak, however, evinces little interest in Peirce's talk of habit. She instead welds Peirce's observations about scientific inquiry to a conception of belief borrowed from the philosopher David Wiggins. The following capture Misak's preferred concept, one that emphasizes the purported aim of belief and the commitments she thinks assertion of belief incurs:

> Another is a point about belief, a point made nicely by David Wiggins. A belief aims at truth – if I believe *p*, I believe it to be true. But if this is right, then the belief that *p* must be sensitive to something – something must be able to speak for or against it.[125]

> First, when I assert or believe that *p*, I commit myself to certain consequences – to having expectations about the consequences of *p*'s being true. . . . Second, I commit myself to defending *p*; to arguing that I am, and others are, warranted in asserting and believing it. . . . I also commit myself to giving up the belief in the face of sustained evidence and argument against it and to saying what *could* speak against the belief.[126]

Embedded in her conception of belief is also a claim about what distinguishes legitimate, or genuine, belief from belief Misak describes as degraded, spurious and/or empty:

> - failing to see that one is required to offer reasons for one's belief, results in the *degradation* of belief into something like prejudice or tenacity

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II (1893-1913), 336–37 (Nathan Houser & Christian Kloesel eds., 1998).

123. *Id.* at 399.

124. *See id.* at 349–50, 433.

125. MISAK, *supra* note 56, at 51.

126. *Id.* at 73–74.

> - A 'belief' which thinks so well of itself that it claims to be immune from recalcitrant experience and reasoning is *spurious*
>
> - a 'belief' which is such that nothing could speak against it is *empty*.[127]

According to Misak, only belief that aims at truth, that is committed to reasons and justification, is genuine belief.[128] Misak relies substantially on Wiggins for her conception, but also invokes Peirce for support: "As Peirce insisted, there is a distinction between tenacity, or holding on to a 'belief' come what may, and genuine belief. Believing is a practice which is, by its very nature, linked to reason-giving or justification-giving."[129] Consequently, only belief that aims at truth – belief that is tied to inquiry and the giving of reasons and justification – is legitimate belief.

Setting aside (for the moment) the question of whether beliefs that are not susceptible to evidence (such as belief in God) are truly degraded, empty or spurious, it is important to see how far Misak separates herself from Peirce's (and by extension pragmatists') conception of belief. As Stefan Kappner and T.L. Short have shown, Peirce conceived inquiry very broadly in "The Fixation of Belief" to include all four methods of resolving doubt (the methods of tenacity, authority, the *a priori* and science) and not only the scientific method.[130] Peirce deliberately extended the concept so as not to beg the question at the outset of which method was superior. Misak acknowledged this in prior work, where she criticized Peirce's account as excessively inclusive in its definition of inquiry, and corrected it to arrive at her current position:

> The problem with Peirce's construal of the aim of inquiry (as the settlement of belief) is that it seems to suggest than an inquiry is anything that makes a hypothesis stick in an inquirer's head and a belief is anything that sticks. . .But if we take the notion of fixing belief seriously, then it becomes clear that the specious methods are not methods of fixing belief. They might fix some other mental state, but only the method of science and reasoning can fix genuine belief.[131]

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127. *Id.* at 74 (emphasis added).

128. *See id.*

129. *Id.*

130. *See* Stefan Kappner, *Why Should We Adopt the Scientific Method? A Response to Misak's Interpretation of Peirce's Concept of Belief*, 36.2 TRANSACTIONS OF THE CHARLES S. PEIRCE SOCIETY 255, 257–58 (2000); T.L. Short, *Peirce on the Aim of Inquiry: Another Reading of "Fixation"*, 35.1 TRANSACTIONS OF THE CHARLES S. PEIRCE SOCIETY 1, 4–8 (2000). Short points out that Peirce's achievement is showing how moving from one method of fixing belief to another results in changes in the *goal* of inquiry. *See id.*

131. CHERYL MISAK, TRUTH AND THE END OF INQUIRY: A PEIRCEAN ACCOUNT OF TRUTH 59 (Oxford Univ. Press 1991).

But this seemingly mild reconstruction in fact has enormous impact on Peirce's views. It passes over Peirce's extraordinary account of the relative merits of each method of fixing belief, e.g. tenacity's "strength, simplicity, and directness" or authority as "the path to peace," and focuses only on each method's shortcomings.[132] It ignores Peirce's subtle (and brilliant) recognition that the test of particular beliefs is internal to the method that produces it (e.g. where a state imposes belief through its authority, "the only test *on that method* is what the state thinks").[133] And it recasts Peirce's own considered judgment, that the methods of tenacity, authority, and *a priori* are, as Susan Haack correctly observes, "inherently unstable," as the view that beliefs fixed by these methods are not genuine beliefs.[134] But what distinguishes science from the other methods for Peirce is that it is more stable, that is, it produces beliefs less likely to be shaken by disagreement, not that it is the only method that produces genuine belief or beliefs that are true. As Peirce put it, "I hope it will now be plain to the reader, that the only rational ground for preferring the method of reasoning to the other methods is that it fixes belief more surely" – not that it is the only method of forming *genuine* belief.[135]

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132. *See* PEIRCE, *The Fixation of Belief*, *supra* note 90, at 122. Westbrook has suggested that Peirce's praise is ironic: "There was an ironic, even comic cast to Peirce's characterization of the three inferior methods of fixing belief. At his best, he could hold his tongue in cheek nearly as firmly as Thorstein Veblen." WESTBROOK, *Democratic Logic*, *supra* note 24, at 27. Peirce may well have been a little cheeky in "Fixation", but in his other discussion of the inferior methods, such as in his notes for a history of science, he makes the same point in tone both somber and appreciative. *See* PEIRCE, *Fallibility supra* note 92, at 1.59–60.

133. PEIRCE, *The Fixation of Belief*, *supra* note 90, at 121.

134. Susan Haack, *The Pragmatist Theory of Truth*, 27 THE BRIT. J. FOR THE PHIL. OF SCI. 3 231, 233 (1976). Haack states in full:

> Peirce argues that some methods of acquiring beliefs – the method of tenacity, the method of authority, and the *a priori* method – are unsatisfactory because they are inherently unstable. A person using one of these methods will acquire an opinion, but different people will thereby acquire different opinions, and the existence of rival opinions will raise doubt all over again. Only one method, the Scientific Method, is stable; enables one, that is, to acquire a belief that will not be shaken.

Id. Peirce stated: "Men's opinions will act upon one another and the method of obstinacy will infallibly be succeeded by the method of persecution and this will yield in time to the method of public opinion *and this produces no stable result.*" PEIRCE, *Fallibility*, *supra* note 92, at 7.318 n.82 (emphasis added).

135. *See* PEIRCE, *Fallibility*, *supra* note 92, at 7.324 n.93. Misak's treatment of Peirce also significantly impacts our understanding of other pragmatists as well, for James and Dewey both adopt Peirce's approach. For example, as James W. Garrison points out, "By 'fundamental dispositions' Dewey meant beliefs, which he took to be an important category of habits. Habits embody predispositions to act that express emotion. When habits are organized into an interpenetrating system, they constitute character." JAMES W. GARRISON, *John Dewey's Philosophy as Education*, *in* READING DEWEY: INTERPRETATIONS FOR A POSTMODERN GENERATION 63 (Larry A. Hickman ed., Ind. Univ. Press 1998).

More importantly, Misak's distinction between genuine and spurious belief buries Peirce's insight that individuals typically deploy different methods of beliefs – concomitantly and in varying degrees at different times – and that all of our beliefs, regardless of how fixed, effectively resolve doubt.[136] Peirce himself thought the *a priori* method "the most generally successful in our day" and observed that the fourth method "will never be adopted when any of the others will succeed and it has itself been successful only in certain spheres of thought."[137] In *our* day it is perhaps a version of the method of authority – taking beliefs from others on trust – that is most successful (and necessary).[138] As Russell Hardin observes:

> We take most knowledge on authority from others who presumably are in a position to know it. Indeed, we take it from others who themselves take it from others who themselves take it from others and so forth *all the way down*. There are finally no, or at best vague and weak, foundations for most of an individual's knowledge.[139]

Many – perhaps the vast majority – of our beliefs are not formed through a process that approaches (or implicitly relies on) scientific inquiry and/or practices of reasoning and justification.[140] This surely includes many of our moral and political beliefs, but also many beliefs about the natural world, and it could hardly be otherwise given individuals' differing experience, expertise, interests, and available resources.[141] And yet,

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136. Although his essay takes the form of a progression, Peirce clearly recognized that different methods are used by the same persons, as for example, "Everybody uses the scientific method about a great many things, and only ceases to use it when he does not know how to apply it." PEIRCE, *The Fixation of Belief*, *supra* note 90, at 120 n.91.

137. PEIRCE, *Fallibility*, *supra* note 92, at 7.324.

138. Indeed, as Vincent Colapietro points out, even when we do use the scientific method, we still rely on the methods of authority and tenacity. Rather than replacing its predecessors, the method of science *depends* on them. *See* Vincent Colapietro, *Habit, Competence, and Purpose: How to Make the Grades of Clarity Clearer*, 45.3 TRANSACTIONS OF THE CHARLES S. PEIRCE SOC'Y 348, 348–77 (2009).

139. Russell Hardin, *Street-Level Epistemology and Democratic Participation*, *in* DEBATING DELIBERATIVE DEMOCRACY 167 (2003); *see also* Kory Spencer Sorrell, REPRESENTATIVE PRACTICES: PEIRCE, PRAGMATISM, AND FEMINIST EPISTEMOLOGY 138–50 (2004) (discussing means for accounting for epistemic authority).

140. *See* William James, PRAGMATISM AND THE MEANING OF TRUTH 100 (1978). As James emphasized:

> Truth lives, in fact, for the most part on a credit system. Our thoughts and beliefs 'pass,' so long as nothing challenges them, just But this all points to direct face-to-face verifications somewhere, without which the fabric of truth collapses like a financial system with no cash basis whatever. You accept my verification of one thing, I yours of another. We trade on each other's truth. But beliefs verified concretely by *somebody* are the posts of the whole superstructure.

Id.

141. PEIRCE, *Fallibility*, *supra* note 92, at 1.85; *see also id.* at 1.122–1.25. Peirce recognized and explored the limitations imposed by real world considerations, especially in his discussion of

without having performed anything like scientific inquiry and without having anything like a justification beyond a source we take as authoritative (friends, parents, teachers, priests, the internet), we have true beliefs and commit ourselves to various courses of conduct.[142] The point can also be made by inverting it: were Misak correctly distinguishing between genuine and spurious beliefs in her description of our everyday understanding of belief, the vast majority of our beliefs *would in fact be* degraded, empty or spurious – which they patently are not. Most of our beliefs, however fallible, haphazardly formed, and/or impervious to justification, are true (even if we cannot, at any given time, know which ones).[143]

Second, Misak frequently invokes descriptions of how "we" commonly understand belief – what it is, what it requires, how we attribute it to others, and what we expect from it – to support her view without ever accounting for who this "we" really is.[144] But Misak's claims, as far as I can tell, are not consistent with people how understand belief. In *my* experience, which as an attorney whose experience has been largely filled by other lawyers, witnesses, disputing parties, judges, evidence experts, and accountants, people often feel no obligation whatsoever to justify their beliefs, often know little about the origin of their beliefs, and in fact feel put-upon or hostile when account of their beliefs is required of them. This experience also seems to me continuous with the everyday world, where in fact people tend to avoid questioning core beliefs and even expect a right not to have to defend their beliefs against criticism (religious views, for

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economy and exactitude. Where precision is not practically needed, for example, a scientist should forego experiment, "[f]or there is a relation between the value of an increased certainty of an item of knowledge and the cost of such increase of certainty, which enables us to determine whether it is better to expend our genius, energy, time, and money upon one investigation or another." *Id.*

142. *Id.* at 1.32. Peirce recognized that the method of authority is sometimes the best we can do. In a revealing discussion of medieval thought, Peirce writes, "[t]he schoolmen, however, attached the greatest authority to men long since dead, and there they were right, for in the dark ages it was not true that the later state of human knowledge was the most perfect, but on the contrary." *Id.* The schoolmen were right to use the method of authority because it provided them *better knowledge* than any available alternative. *Id.*

143. MISAK, *supra* note 56, at 110. In her discussion of neutrality (chapter 3), Misak briefly invokes Donald Davidson's point that "in order to have an idea or a concept at all," persons must "communicate and thus share a picture of the world." *Id.* But Davidson's view – and Richard Rorty's – is stronger than that. *See* RORTY, *Human Rights, Rationality, and Sentimentality*, *supra* note 89, at 374. As Rorty puts it in his remarkable response to criticism from Bjorn Ramberg, "[w]hat I should have done, he [Ramberg] makes me realize, is to grant Davidson's point that most of our beliefs about anything (snow, molecules, the moral law) must be true of that thing – must get that thing right." *Id.*

144. *See* MISAK, *supra* note 56, at 3, 16, 30, 49, 52, 77, 87, and 90.

example). This is consistent with Peirce's central insight that we cannot pretend to doubt what we in fact do not.[145] Indeed, it may be more accurate to say that, for Peirce, fixed belief (by whatever method) is a state in which (*contra* Misak) the believer feels *no obligation whatsoever* to justify his belief. As Peirce says, "[w]hen doubt ceases, mental action on the subject comes to an end."[146]

Stefan Kappner offers a similar criticism. In response to Misak's claim that her inclusion of scientific norms in her redefinition of belief only explicitly recognizes what we all implicitly take belief and inquiry to be, Kappner states:

> But we simply do not have such a concept of belief. It is right that our commonsense or everyday notion of 'inquiry' includes scientific methods. That is why Peirce hesitated to use the *word* 'inquiry' for every method of fixing belief, as I argued in the previous section. But this is not true of the everyday use of 'belief.' On the contrary, we frequently explain some behavior by referring to beliefs which are not at all scientifically gathered or gathered in an experience-sensitive way.[147]

Despite the fact that Misak claims to take experience seriously (indeed, suggests that her view is superior to others in this regard), her representation of our common understanding of belief is not well grounded. If this is so, then her form of pragmatism does indeed impose normative constraints foreign to our shared everyday conception of belief. In short, it is not just that Misak diverges from Peirce, but that Peirce's own view helps us better appreciate both our everyday understanding of belief and the relative logical virtues of each method of fixing belief.

If this criticism of Misak is correct, it thoroughly undermines her argument for deliberative democracy. Recall that Misak's conception of genuine belief is to be committed to giving reasons for belief, entailing an implicit commitment to inquiry when confronted by opposing beliefs, which in turn requires that we take seriously the views of others.[148] This is a logical (and not merely moral or political) argument for democracy in inquiry. But if the above analysis is correct, beliefs are commonly formed in ways that do not involve commitment to inquiry. These beliefs may well

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145. *See* PEIRCE, *The Fixation of Belief*, *supra* note 90, at 115.

146. *Id.* Moreover, Posner's version of democracy incorporates this everyday fact. *See* POSNER, *supra* note 1, at 138–39. Focusing on demand rather than deep deliberation leaves persons free *not* to have to justify themselves to others as long as their beliefs and practices do not harmfully impinge on other persons. *Id.* Again, Posner's approach is more committed to deep pluralism. *See id.*

147. Kappner, *supra* note 130, at 262–63.

148. *See* MISAK, *supra* note 56, at 106.

be recalcitrant to experience (that is, not responsive to something external) and may not carry with them any obligation to justify those beliefs to others.

Democratic inquiry (i.e., taking the views of others seriously) is *not* logically entailed in what it means to have a belief. In some cases it might be *better* or *desirable* to make greater use of the method of science, including in moral and political inquiry, and I have advocated it elsewhere.[149] Using this method may help resolve moral and political problems and even where it fails may cultivate other desirable habits, such as tolerance and tentative conduct where disagreement is sharp. But as the above discussion of group polarization makes pointedly clear, deliberation frequently leads to extreme views or further conflict and entrenchment among participants. Indeed, Misak's view of belief, however demanding and distant from our ordinary conception, in fact does *nothing* to counter prevalent tendencies among participants in discussion. The heady process of participants exchanging reasons and defending claims is *how* such extremism and entrenchment occurs.

Finally, if we again consider those "hard problems" raised when discussing Putnam's view above, such as abortion rights, torture, affirmative action, it seems the very same criticism applies to Misak. In hard cases, where inquiry would seem to have run its course, problems must be deemed "interminable." More importantly, if we decline Misak's alternative and retain Peirce's view intact, it helps us understand *why* these disagreements remain intractable despite thorough public discussion. Such disagreements involve honest beliefs (formed in myriad ways) that are not susceptible to external constraint, such as beliefs about religion or when life begins or what constitutes "murder" or "injustice," and persons often resort to other methods to settle doubt, for in the actual world decisions about these matters must be made. But because these beliefs are unstable (subject to doubt) and conflict not subject to neutral criteria, disagreement continues. If this is so, then Posner's suggestion to accept a decision procedure that diffuses conflict in these situations, is patently good counsel. As Posner explains:

> Democratic government allows people to agree to disagree – that is, to acknowledge that there is no better method of resolving many disputes than by counting noses. This has a pacifying effect; conflicts over fundamental value, the kind that deeply upset and even enrage people,

149. *See* Kory Sorrell, *Cultural Pluralism and International Rights*, 10 TULSA J. COMP. & INT'L L. 396, 396–418 (2003).

are bracketed.[150]

Democracy, as Posner conceives it, does not promise right answers to hard problems. Democracy delivers a framework for resolving obdurate social disputes, and when inquiry – all forms of inquiry, including the scientific – has run its course, it is the best we can do *in these situations* to keep moving and working together. Democracy so conceived lacks a "moral compass," but by postponing the need for moral agreement, it allows us to continue uncharted moral and political experiment with the hope that something better presents itself later – perhaps a new compromise, a gradual shift in opinion resulting from policy implementation, or some other unforeseen change. It also allows us to retain our broad and important commitment to not merely tolerating, but cultivating diversity in a pluralistic society.

VI. DEWEY, DEMOCRACY AND INSTITUTIONAL REFORM

Previous sections defended Posner's pragmatic liberalism against arguments insisting on a logical (or necessary) connection between deliberative liberalism and democracy, that "true" democracy requires a deeply deliberative model. In distancing his view from such models, Posner insists on distancing himself from Dewey's conception of democracy as well. Having defended Posner's view at length, in this section I argue that Posner and Dewey are much closer than Posner realizes and they should complement, rather than conflict with, one another.

At the heart of the disagreement, I suggest, is a confusion between two concepts (democracy narrowly and broadly conceived) and a significantly different understanding of what deliberation (or as pragmatists prefer, collaborative inquiry) is in fact good for a Deweyan approach. At the level that concerns Posner, namely public government of a large population (state and national government, as opposed to local association), Dewey essentially *agrees* with Posner. In his political writings, Dewey sought to constrain representation by elected officials, to make them more responsive *to* the electorate. Dewey defined democracy, in the political realm, as "a mode of government, a specified practice in selecting officials and regulating their conduct as officials" – a definition not inconsistent with Posner's own view of competitive democracy.[151] Dewey further

150. POSNER, *supra* note 1, at 10.

151. *See* JAMES CAMPBELL, UNDERSTANDING JOHN DEWEY, NATURE AND COOPERATIVE INTELLIGENCE 180–81 (1995); DEWEY, *The Public and Its Problems*, *supra* note 35, at 286; POSNER, *supra* note 1, at 193–95. Many self-described Deweyans insist that Dewey envisioned a truly radical social transformation, including changes to the market economy and private

stated that "the supreme test of all political institutions and industrial arrangements shall be the contribution they make to the all-around growth of every member of society"[152] – a thoroughly pragmatic test that makes no direct claim to participatory democracy but rather to the effect institutions have on social conditions.

To secure this contribution, "[u]niversal suffrage, recurring elections, responsibility of those who are in political power to the voters, and the other factors of democratic government are means that have been found expedient for realizing democracy as the truly human way of living."[153] What Dewey was calling for in this context was increased public participation *with* government, in the rather limited but important form of selection, demand from, and response to, duly elected public officials. This is necessary because "no man or limited set of men is wise enough or good enough to rule others without their consent; the positive meaning of this statement is that all those who are affected by social institutions must have a share in producing and managing them."[154]

That share, in what Dewey calls "industrial democracy," is necessarily a very limited one, not only because a large population cannot directly participate in government as was perhaps possible in ancient Athens or New England towns, but because intelligence is indeed distributed *and* concentrated. Individuals *need* experts, just as experts need individuals, as the oft-quoted shoe analogy implicitly concedes: "The man who wears the shoe knows best that it pinches and where it pinches, even if the expert shoemaker is the best judge of how the trouble is to be remedied."[155] In this analogy, Dewey insists that officials be responsive to citizens, precisely because, as Posner also suggests, citizens know their own interests, their problems, if not the means for solving them. Tying officials to citizens' interest prevents the formation of a "class of experts" who, "so removed from common interests as to become a class with private interests and private knowledge," veer away from their responsibilities to

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property, and it is clearly true that in the 1930s Dewey was tempted in this direction. My reading of Dewey is deliberately more conservative, recognizing that some of Dewey's suggestions were likely naive and unwise, but that his view of democracy, properly domesticated, is still important (a "let's not throw the baby out with the bathwater" approach). For discussion of this issue, see RORTY, *supra* note 89, *Human Rights, Rationality, and Sentimentality*, at 239 n.15.

152. JOHN DEWEY, *Reconstruction in Philosophy*, *in* 12 JOHN DEWEY: THE MIDDLE WORKS 1899-1924, at 186 (Jo Ann Boydston et al. eds., 1982).

153. JOHN DEWEY, *Democracy and Educational Administration*, *in* 11 JOHN DEWEY: THE LATER WORKS 1925-1953, at 218 (Jo Ann Boydston et al. eds., 2008).

154. *Id.*

155. DEWEY, *The Public and Its Problems*, *supra* note 35, at 364.

the electorate to husband interests of their own.[156]

Regular elections force officials to *compete* with one another, *consult* voters, *discuss* issues publicly: As Dewey writes, "The ballot is, as often said, a substitute for bullets. But what is more significant is that counting of heads compels prior recourse to methods of discussion, consultation and persuasion, while the essence of appeal to force is to cut short resort to such methods."[157] Dewey's point is of course that government by experts (or as Plato would have it, by philosophers) is untenable because knowledge is distributed. And the same point runs in the other direction; because individuals have limited knowledge (no one can be an expert in all fields), persons need experts. The democratic process, though a limited form of participation in government, coordinates the two: it is driven by the active interest of citizens who benefit from the efforts and expertise of experts.[158]

Even in his early essay, *The Ethics of Democracy* (1888), in which Dewey casts democracy as an ethical ideal in terms of the philosophy of organism (an objective idealism derived from Plato and Hegel), Dewey argues that "the heart of the matter is found not in the voting nor in the counting the votes to see where the majority lies. It is in the process by which the majority is formed."[159] Dewey recognizes that in elections a very small percentage (less than five percent) determine the outcome. But this fact does not warrant the conclusion that a small proportion of the population determine policy; rather, the electoral process is such that political parties, competing for votes and contending with one another to capture a majority, shape themselves to represent the interests of most voters (which is why it is so often hard to tell parties apart). Dewey cites approvingly, Governor Samuel Tilden, "[t]he minority," he says,

> adopts enough of the ideas of the majority to attract those who are nearest to the line of division; and the majority in struggling to reclaim them makes concessions. The issue is thus constantly shifting with the wavering tide of battle, until the policy which at last prevails has become adjusted so as nearly to represent the average sense of the whole people. In shaping the policy which emerges from the conflict the minority acts a part scarcely less important than the majority"[160]

156. *See id.*

157. *Id.* at 364–65.

158. *See id.* at 347.

159. JOHN DEWEY, *The Ethics of Democracy*, *in* 1 THE EARLY WORKS OF JOHN DEWEY 1882-1898, at 227, 234 (Jo Ann Boydston et al. eds., 2008).

160. *Id.* at 234–35.

All of this is surely consistent with Posner's own pragmatic liberalism, conceived as a "competitive democracy" in which officials vie for voter support. But, as is well known in the literature, Dewey also tried to define "democracy" very broadly as a social ideal, as a relationship between the individual and the group:

> From the standpoint of the individual, it consists in having a responsible share according to capacity in forming and directing the activities of the groups to which one belongs and in participating according to need in the values which the groups sustain. From the standpoint of the groups, it demands liberation of the potentialities of members of a group in harmony with the interests and goods which are common. Since every individual is a member of many groups, this specification cannot be fulfilled except when different groups interact flexibly and fully in connection with other groups.[161]

Ability to participate in industrial democracy, Dewey thought, could be facilitated through *local* inquiry and experiment (i.e. neighborhood collaboration, not state or national government), in which individuals and groups could develop self-understanding, learn about others, and test possible solutions to urgent social problems directly affecting them.[162] This is, compared to the stringent aspiration of deliberative democrats, an extraordinarily modest proposal for improving understanding. It suggests that a marginal shift in our everyday social practice would benefit both participants and the democratic process. Deliberation, or rather collaborative inquiry, has value and serves various purposes; the difference between Posner's pragmatic liberal and deliberative democracy is Posner's insight that these values and purposes are extremely *limited* and those limits are not writ in stone: changed circumstances may compel or encourage us to redraw the lines.[163]

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161. DEWEY, *The Public and Its Problems*, *supra* note 35, at 327–28.

162. *See* CAMPBELL, *supra* note 151, at 201. Proponents of deliberative democracy invoke deliberation to accomplish more than clarification and problem-solving. Deliberative democracy is also intended to *legitimate* government by showing that this model delivers more accurate results or at least reasons for decisions that everyone could accept. The question has generated an enormous literature and no satisfactory conclusions. In addition to questioning whether the ideal of deliberative democracy is unworkable in practice (Posner's argument), the very idea of "reasons everyone could accept" has come under severe criticism. See Bohnman & Richardson, *supra* note 12, at 253–57, for a discussion of why reliance on "reasons all can accept" is a mistake. One advantage of Posner's approach is that such legitimacy is not at issue; competitive democracy is just a tool for resolving disagreements (at least temporarily) and defusing conflict. For an excellent and up-to-date bibliography of work in this area, see Mansbridge et al., *supra* note 12, at 94–100.

163. In the 1930s, confronting a economic and social upheaval, Dewey famously argued for significantly greater citizen participation in government and worker participation in industry. These suggestions for reform in retrospect appear questionable and probably unwise, and are

Even for Dewey, the purpose of collaborative inquiry into moral and political matters is indeed modest. It seeks enlarged understanding of facts, which includes recognition of common moral and political views, appreciation of real differences in ways of living, and the cultivation of novel solutions to social problems. Persons may seek, even hope for, agreement concerning the moral or political issues that affect them directly, and there is surely room for debate and argument, but agreement is neither required nor expected in this modest proposal, and where there is disagreement, there is, from a pragmatic perspective, nothing further to say. As Peirce noted in characteristically clear fashion,

> However it may be about taste, in regard to morals we can see ground for hope that debate will ultimately cause one party or both to modify their sentiments up to complete accord. Should it turn out otherwise, what can be said except that some men have one aim and some another? It would be monstrous for either party to pronounce the moral judgments of the other to be BAD. That would imply an appeal to some other tribunal.[164]

There is indeed, *pace* Putnam and other deliberative democrats who would seal the gap between science and morals and politics, significant limits to our ability to resolve moral and political disagreements. Such disagreements turn on differences of history, culture, ideology and personal preference, and there is simply no neutral court to which appeal can be made. Where issues present deep disagreement, we must, as Posner insists (and Dewey agrees), resort to a *modus vivendi*, a way to manage conflict that allows us to continue living together, earning a living, engaging in commerce, and pursuing our various individual forms of life.[165] This, according to Posner, is *the* primary function of government – management of conflict. Voting allows citizens to resolve – piecemeal, indirectly, and for the time being – deep differences that may otherwise entrench groups, grind commerce (broadly conceived) to a halt, and descend to outright conflict.[166] Posner is right to see this essential function of government and

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precisely the sorts of exaggerated prospects for participatory democracy that pragmatic liberalism helps ward off. Like the 1930s, current circumstances may call for greater citizen participation. Interesting, this is precisely what has happened in terms of voter turnout. The 2008 presidential election was the highest it has been for 40 years (56.8%). *See* National Voter Turnout in Federal Elections: 1960-2008, http://www.infoplease.com/ipa/A0781453.html (last visited Mar. 17, 2011) (compiling voter turnout statistics since 1960). It was also the second largest voter turnout for youth (ages 18-29) in American history. *See* Claire Morgenstern, *Election 2008: Second-largest Youth Voter Turnout in American History*, THE TARTAN, Nov. 10, 2008, http://www.thetartan.org/2008/11/10/news/elections.

164. PEIRCE, *The Fixation of Belief*, *supra* note 90, at 2.151.

165. *See* POSNER, *supra* note 1, at 135.

166. *See id.* at 138.

celebrate its success.

However, while Posner is right to distance a pragmatic conception of liberalism from an ideal insistence on deliberation and participatory democracy, he unduly neglects its resources for moral guidance. In previous work, Posner has insisted that moral theory, as that is embodied in moral philosophy, simply cannot provide answers for deep moral, political, or legal disagreements. As the quote from Peirce above indicates, the pragmatists had already approximated this conclusion, but nevertheless insisted that pragmatism has *some* moral valence, provides *some* insight and guidance for approaching and handling moral and political problems.

Unfortunately, this is often missed because the recovery of pragmatism focuses almost exclusively on issues of epistemology to the exclusion of ethics. Indeed, at the heart of American pragmatism is a commitment, not to deliberative politics, but to deep *pluralism* in matters of knowledge *and* morals. This pluralism is rooted in experiential recognition that there are differences among persons that "go all the way down", that are constitutive of personal experience, of ways of life, of individual choice. This commitment, which initially takes the form of an *epistemic* insight, gives rise to a *moral* commitment to not only tolerate, but cultivate different forms of individual and communal development and growth as each having its own distinct value, each being worthy of respect in its own right, and each being a source of possibilities for others who do not share that form of life.

To better see how pragmatism provides these practical (not merely theoretical) moral resources, it is best to start with William James's influence on Dewey. In his lectures entitled *Talks to Teachers*,[167] James insisted that each of us has a "certain blindness" to the inner worlds of those around us, that we cannot fully apprehend the value of ways of life other than our own.[168] Whatever we can know "about" the lives of others pales besides the intimacy and wealth of significance that bathes the person undergoing it.[169] Witnessing what seemed to him a scene "of unmitigated squalor" during a trip in North Carolina, where farmers were clearing and planting fields, James was struck by how he had failed to do justice to the quality of lived experience enjoyed by the farmers. He realized that he "had been losing the whole inward significance of the situation,"[170] when in

167. WILLIAM JAMES, THE WRITINGS OF WILLIAM JAMES 631 (John J. McDermott, ed., 1977).

168. *See id.*

169. *See id.*

170. *Id.*

fact, "[t]he clearing, which to me was a mere ugly picture on the retina, was to them a symbol redolent with moral memories and sang a very paean of duty, struggle, and success."[171]

Conversely, James muses, were the farmer to observe James's own "strange indoor academic ways of life at Cambridge" the farmer would similarly miss the "peculiar ideality" of a way of life very different from his own.[172] Recognizing the full inner meaning of others' ways of life, of the inward qualities of their experience, as well as our native tendency to forget it, had "tremendous practical importance" for James,

> [i]t is the basis of all our tolerance, social, religious, and political. The forgetting of it lies at the root of every stupid and sanguinary mistake that rulers over subject-peoples make. . .No one has insight into all the ideals. No one should presume to judge them off-hand. The pretension to dogmatize about them in each other is the root of most human injustices and cruelties, and the trait in human character most likely to make the angels weep.[173]

James's experiential realization led him to enjoin us all to "tolerate, respect, and indulge those whom we see harmlessly interested and happy in their own ways, however unintelligible these may be to us."[174] This commandment is rooted in James' recognition of deep pluralism, in matters both epistemic and moral: "Hands off: neither the whole of truth nor the whole of good is revealed to any single observer, although each observer gains a partial superiority of insight from the peculiar position in which he stands."[175] Recognizing – through experience, and not as a theoretical matter – that we are epistemically fallibible agents indicates that as a matter of prudence we should be pluralistic, tolerant of others' ways of living, and regard those other ways of life as possible sources of amelioration in our own lives.

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171. *Id.*

172. *Id.*

173. JAMES, *supra* note 167, at 645.

174. *Id.* at 644–45.

175. *Id.* at 645. The point here is that each form of life harbors its own values and may embody strategies or practices others may wish to adapt. *See id.* It is not a justification of any form of life, in particular, and is not grounds for supposing that those who inhabit a form of life embrace or are grateful for all aspects of their circumstance. *See id.* For example, James seems unaware, or fails to appreciate, the grinding poverty that is also part of the way of life he observes, and there is little reason to believe these farmers liked being poor. *See id.*

In *The Moral Philosopher and the Moral Life*, James insisted that individual conceptions of the good are in fact ultimate, that is, not subject to revision or external theoretical criticism (as, for example, Utilitarians or Kantian deontologists argue).[176] Notably, even consequences fail to explain preference:

> The feeling of the inward dignity of certain spiritual attitudes, as peace, serenity, simplicity, veracity; and of the essential vulgarity of others, as querulousness, anxiety, egoistic fussiness, etc., – are quite inexplicable except by innate preference of the more ideal attitude for its own sake. The nobler thing *tastes* better, and that is all that we can say. "Experience" of consequences may truly teach us what things are *wicked*, but what have consequences to do with what is *mean* and *vulgar*?[177]

James notes that there have been many efforts to define the "good" (he lists some ten schools of thought), but none succeed for all cases.[178] James concludes, "[t]he various ideals have no common character apart from the fact that they are ideals," and "*the essence of good is simply to satisfy demand*," and that there is nothing more one can say (although philosophers seem to keep trying).[179]

James further recognizes that we have many, often incompatible ideals that we would like to realize – "spending our money, yet growing rich; taking our holiday, yet getting ahead with our work; shooting and fishing, yet doing no hurt to the beast" – and we must make choices. "The actually possible in this world is vastly narrower than all that is demanded; and there is always a *pinch* between the ideal and the actual which can only be got through by leaving part of the ideal behind."[180] To decide, James counsels a simple rule: "satisfy at all times *as many demands as we can*."[181] These demands include not only our own variously competing ideals, but also the ideals of others affected by our choices. James' "one unconditional commandment" is that one

> must vote always for the richer universe, for the good which seems most organizable, most fit to enter into complex combinations, most apt to be a member of a more inclusive whole. But which particular universe this is he cannot know for certain in advance; he only knows that if he makes a bad mistake the cries of the wounded will soon

176. *See generally* JAMES, *supra* note 167.
177. *Id.* at 613.
178. *See id.* at 620.
179. *See id.* at 621.
180. *Id.*
181. JAMES, *supra* note 167, at 623.

inform him of the fact.[182]

James cannot, and insists no one could, provide a theory that determines the good in advance. But one can sort ideals *practically* by preferring ideals that prevail at the least cost, foreclose the fewest other ideals, are inclusive, and mutually supportive.[183]

Like Posner, James took moral heterogeneity seriously, and he did not think there was any theoretic way to judge among competing moral values. Similar to Posner, James looked not to philosophy but to social institutions as the best means of changing human behavior. In his essay, "The Moral Equivalent of War", James urged adoption of a social program on behalf of greater peace (what he calls a "peace-economy").[184] James chastised would-be peace reformers for refusing to recognize the extent to which militarism is rooted in human nature and cannot be simply ignored or overcome by talk of peaceful utopia.[185] Martial tendencies, expressed by militarists in ideals of patriotism, hardihood, discipline, risk, and struggle, must instead be *redirected* and James suggests a conscription of youth that, rather than pitting them against other nations, enlists them in the struggle against nature.[186] James writes that,

> [s]uch a conscription, with the state of public opinion that would have required it, and the many moral fruits it would bear, would preserve in the midst of a pacific civilization the manly virtues which the military party is so afraid of seeing disappear in peace. We should get toughness without callousness, authority with as little criminal cruelty as possible, and painful work done cheerily because the duty is temporary, and threatens not, as now, to degrade the whole remainder of one's life.[187]

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182. *Id.* at 626.

183. *See id.* at 623.

184. *Id.* at 668; DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY & POWER 645 (2009). It is worth noting that James's essay gained political fame in the 1970's when Jimmy Carter and his Energy Secretary, Aurthur Schlesinger, invoked it in reference to responding to the then-current energy crisis. *Id.* The initiative was a failure and detractors came to call it by its acronym: MEOW. *Id.* While the failure of Carter's policy was surely due to a number of factors, it also illustrates the impuissance of moral suasion and attempts at rational persuasion. *Id.* What is needed, as Posner insists, is institutional reform that realigns incentives and modifies behavior, not abstract appeals. It also points up the need for rhetoric in presenting reform. *Id.*

185. *See* JAMES, *supra* note 167, at 666.

186. *See id.* at 669. Given his historical context, James see the relationship with nature as primarily one of economic development; in our own, we might see this as sustainable development, conservation, and drastically needed environmental cleanup of disasters such as the Exxon Valdese and BP Deepwater Horizon. *Id.*

187. *Id.* This is not James' only suggestion for social reform. As the James scholar George Cotkin emphasizes, James was deeply suspicious of large institutions, or "bigness" as he called it whether in the form of military, government bureaucracy, or even science, and urged

In offering this suggestion, James concedes that, until now, war has been the only force that can discipline a whole community and will remain so until some equivalent to war is organized.[188] But James is also sanguine in his view of human nature, in its ability to adapt to changed social circumstance, stating "[b]ut I have no serious doubt that the ordinary prides and shames of social man, once developed to a certain intensity, are capable of organizing such a moral equivalent as I have sketched."[189] The key is adjustment of social institutions, not resolving moral heterogeneity through theory or discourse. Indeed, James would heartily agree with Posner's claim, cited at the outset, that "[i]f political action is to be constrained, it must be by psychological, career, and institutional factors rather than by conversation leading to a moral or political consensus."[190] The difference between Posner and James lies in their respective views of human nature. Posner goes beyond realism to cynicism, whereas James underscored our ability to adapt and express our nature in myriad ways.[191]

James deeply impacted Dewey, who was transformed not only by James' pragmatism, but his pluralism, and emphasis on practical institutional change as a means for reform.[192] Dewey also saw James as a powerful visionary of democracy and urged extending its meaning to

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development of local organizations and individual struggle. *See* GEORGE COTKIN, WILLIAM JAMES: PUBLIC PHILOSOPHER 174–75 (Thomas Bender ed., 1990). Strikingly, recent work in evolutionary psychology supports James's assessment. *See* MATT RIDLEY, THE ORIGINS OF VIRTUE: HUMAN INSTINCTS AND THE EVOLUTION OF COOPERATION 264 (1998) ("If we are to recover social harmony and virtue, if we are to build back into society the virtues that made it work for us, it is vital that we reduce the power and scope of the state.").

188. *See* JAMES, *supra* note 167, at 669.

189. *Id.*

190. POSNER, *supra* note 1, at 56.

191. *See* JAMES, *supra* note 167, at 671. It is important to note that James's view of human nature is empirically, not theoretically, based. *Id.* James closes the essay with reference to the wide variety of expression human nature is capable of as a matter of fact. *Id.* ("The amount of alteration in public opinion which my utopia postulates is vastly less than the difference between the mentality of those black warriors who pursued Stanley's party on the Congo with their cannibal war-cry of 'Meat! Meat!' and that of the 'general staff' of any civilized nation."); JOHN DEWEY, *Human Nature and Conduct: An Introduction to Social Psychology*, *in* 14 JOHN DEWEY: THE MIDDLE WORKS 1899-1924, at 80 (Jo Ann Boydston et al. eds., 2008). Dewey cites James's essay in HUMAN NATURE AND CONDUCT to underscore the fact that human impulses may be expressed in many different sorts of activities, some of which serve us far better than others. *Id.* In this respect, both Dewey and James are more sanguine than Posner regarding human nature, specifically its ability to adapt, and run ahead, of evolving circumstance. *Id.*

192. *See* MCDERMOTT, *supra* note 114, at 155 ("Dewey absorbed the basic assumptions and claims of William James, and, indeed, saw earlier and more perceptively than most that James's thought was the direction the future should take."); DEWEY, *The Public and Its Problems*, *supra* note 35, at 13. Prior to his encounter with James, Dewey was an objective idealist. *Id. The Ethics of Democracy* articulates Dewey's early "organicism." *See* DEWEY, *Human Nature and Conduct: An Introduction to Social Psychology*, *supra* note 191, at 227–49 (2008).

encompass and support James's ideals of associated living.[193] The tolerant, inclusive ethics and politics that James encouraged Dewey thought could be cultivated through local practices of communication, in which persons learn from, and about, one another. Dewey famously stated late in life that his full conception of democracy required respectful, tolerant neighborhood discussion of the issues of the day:

> I am inclined to believe that the heart and final guarantee of democracy is in free gatherings of neighbors on the street corner to discuss back and forth what is read in uncensored news of the day, and in gatherings of friends in the living rooms of houses and apartments to converse freely with one another. Intolerance, abuse, calling of names because of differences of opinion about religion or politics or business, as well as because of differences of race, color, wealth or degree of culture are treason to the democratic way of life.[194]

Public discussion facilitates "a positive toleration which amounts to sympathetic regard for the intelligence and personality of others, even if they hold views opposed to ours, and of scientific inquiry into facts and testing of ideas."[195] The goal of discussion is "[t]o foster conditions that widen the horizon of others and give them command of their own powers, so that they can find their own happiness in their own fashion."[196] This form of local deliberation is essential to Dewey's broad understanding of democracy, not because it leads to consensus, and not because it facilitates the ordinary person's real involvement in government, but because it encourages tolerance, respect, and diversity, drives toward conditions that facilitate growth, and empowers individuals to realize their own ideals (find their happiness) as they see fit. This is, in short, a rather mild recommendation for how we may cultivate social values that have proven worthwhile over time, a means of truly respecting deep pluralism.[197] It is not a call for a return to Athenian-style democracy, a commitment to deep deliberation, or agreement to provide reasons for all of our beliefs.

Moreover, Dewey's insistence on communication and collaboration is not an end in itself or a pitch for a particular model of democracy (e.g. deep or deliberative democracy), but rather a means for better understanding

193. *See* PAPPAS, *supra* note 112, at 225.

194. DEWEY, *The Public and Its Problems*, *supra* note 35, at 227.

195. *Id.* at 329.

196. DEWEY, *Human Nature and Conduct: An Introduction to Social Psychology*, *supra* note 191, at 203.

197. Using Russell Hardin's formulation of group conflict, in which group norms overwhelm universal norms, encouraging collaboration under the pragmatist view is a means for further instilling institutions and social beliefs that reinforce universal norms in the face of group norms that can lead to disastrous consequences. *See* HARDIN, *supra* note 89, at 140–41.

concrete conditions and exploring possibilities for institutional reform. In *How to Anchor Liberalism*, Dewey suggests "as a working hypothesis the need of a thorough examination of what freedom demands under present conditions [of rising fascism, Soviet communism, and imperialism] if it is to be a reality and not just a cover for this and that scheme."[198] In place of historical socialist plans, what is needed is "much more study of specific social conditions to try to discover what kind of organization among them will bring about a wider, and hence more equitable distribution of the uses and enjoyments that our present technical resources make possible."[199] The emphasis is not on theoretical discussion, but practical reconstruction, for theory has failed to deliver on its promise of social improvement: "Attention of an organized intellectual sort must now focus on the problem of the kinds of concrete social reorganization which by their own nature will do what theorizing about the individual has been supposed to do."[200]

Deliberation, or rather collaborative inquiry, is a means for identifying and putting into practice new forms of social organization that will (hopefully) open the way to a society that is more free, open, tolerant, and inclusive. Like James (and again, like Posner), Dewey thought that amelioration would come not by achieving moral consensus, but through the transformation of institutions that constrain and enable human behavior in favor of greater pluralism.[201] Such transformations, at the large

198. DEWEY, *The Public and Its Problems*, *supra* note 35, at 249.

199. *Id.* at 250.

200. *Id.* Posner is no doubt skeptical of such reform, but his interpretation of Darwin is one-sided; the process that produced us may have been "genocidal," but Darwin also said that the "disinterested love for all living creatures" is "the most noble attribute of man." CHARLES DARWIN, THE PORTABLE DARWIN 330 (Duncan M. Porter & Peter W. Graham eds., 1993). Posner is behind the last forty years of evolutionary psychology which has come to see humans as successful because humans are deeply social and cooperative (rather than strictly competitive) by nature: "One of the things that marks humanity out from other species, and accounts for our ecological success, is our collection of hyper-social instincts." RIDLEY, *supra* note 187, at 6.

201. The values identified by James – tolerant pluralism, possibility, and empowerment – are moral values that have proven themselves historically, contingently, over time, to provide desirable social relations across morally heterogeneous societies such as is found in the United States and elsewhere. Recent history in other regions, including the Balkans, Turkey, and Rwanda, have shown how vulnerable groups can be subject to violence where these values are absent. Notably, in human rights dialogue across the Balkans region, a common complaint among human rights practitioners is that their governments readily sign human rights instruments, but citizens are largely unaware of or fail to use these protections. A significant focus of current activity is the development of a human rights *culture*, precisely one that encourages tolerance and inclusivity (and reduces instances, e.g., of hate crimes and discrimination among groups), that goes beyond merely installing a legal regime. For an example of such regional dialogue and list of participating organizations, *see* HUMAN RIGHTS AGENDA ASS'N, *Balkans Round-Table Meeting: Summary Report*, (Apr. 10, 2010), http://www.rightsagenda.org/index.php?view=article&catid=74%3Aaliasbalkans&id=624%3A1b

institutional level, would make government more responsive to the needs of the governed and leave free (and empowered) to pursue their own lives as they see fit, accountable to no one so long their pursuits do not impinge on the pursuits of others.[202]

VII. CONCLUSION

In this essay, I opposed logical arguments for deliberative democracy because they are insufficiently rooted in actual practice, excessively rationalistic, and unhelpful when moral and political guidance is needed most. Posner's conception of pragmatic liberalism provides a far better model of how large democracies do, and should, work. There remains, however, an important role for Dewey's conception of democracy as a way of life and is compatible with Posner's central insight. The relation between the two is quite clear: a richly democratic society requires both a democratic government and an ethos committed to deep pluralism, tolerance, and inclusivity. But Dewey's view cannot be logically justified by recourse to the nature of inquiry; rather, it must *earn* its keep the same way all values, principles and projects do – by over time proving itself better than alternatives as the most promising means of obtaining the widest possible range of other cultural values.[203] Logical justification, which is tantamount to *a priori* demonstration, is no more available here than anywhere else.

Although Posner encourages us to see his view of democracy as diverging widely from Dewey's, it is far more productive to hold these visions together. Posner shows us that delegated democracy has important virtues – such as harnessing the ambitious, defusing incendiary disagreement, and freeing citizens to pursue private interests – and is neither vulgar compromise nor wholesale disenfranchisement of the people.

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alkans-round-table-meeting-summary-report&format=pdf&option=com_content&Itemid=113.

202. For a picture of what this looks like, see RORTY, *supra* note 89, *Human Rights, Rationality, and Sentimentality*, at 209–10 (1991). Rorty describes his preferred society as a bazaar of interaction, in which many would prefer to die than share the beliefs of others they encounter and yet haggle away with them profitably. *Id.* This is a much reduced version of democracy, one far short of what deliberative democrats (including Dewey) envision, but leaves persons free to pursue their own lives and only requires tolerance and self-control. *Id.* Rorty's view may be excessively attenuated, but provides a useful corrective to excessively deliberative approaches. *Id.*

203. DEWEY, *supra* note 191, at 146–47, 154–55. As Dewey wrote in *American Education and Culture*, "I am one of those who think that the only test and justification of any form of political and economic society is its contribution to art and science – to what may roundly be called culture." JOHN DEWEY, *American Education and Culture*, *in* 10 JOHN DEWEY: THE MIDDLE WORKS 1925-1953, at 198 (Jo Ann Boydston et al. eds., 2008).

Delegated democracy, rendered competitive, denotes an historical *achievement* in democratic politics. Posner is indeed realistic in this respect, offering pragmatism a more accurate description of large government and opportunity for improvement at the highest levels.

On the other hand, Posner's description of persons as inherently selfish, intrinsically disinterested in deliberation and incapable of self-improvement, is excessively cynical. Dewey's notion of "radical democracy" indicates that greater, intelligent participation at many levels of self-government (extensive at local, increasingly formal and selective at state and national, levels) is possible, if demanding.[204] It is not always pleasant, or ennobling, but it is to some extent useful in serving other democratic values (notably, genuine pluralism). Where Posner sees apathetic, selfish, ill-informed constituents as evidence of true human nature, Dewey more perceptively notes systemic social failures in education, income distribution, and economic division of labor. Dewey characteristically saw such failures as opportunities for reform, not reason to forfeit the effort to secure a richer society. And Dewey was not, as Posner declares, merely another captive to utopia. Dewey reasonably believed that intelligent inquiry, because already enormously successful in natural science, could be profitably applied in some measure to moral and political problems at the institutional level.

The method of science, a self-correcting theory of inquiry, provides real-world means for progressive, needed social change from the ground up.[205] This separates Dewey from utopian visionaries who inadvertently support the status quo for lack of means of realization: "Every system of social thought which sets up ends without reference to the means by which they are to be brought about tends in effect to support the status quo, no matter how good the intentions of those who paint the picture."[206] In contrast, Dewey was ever refining means for realizing democratic institutions (such as his support for tax reform).[207] In short, we do not, as Posner thinks, have to choose between Dewey's expansive view of democracy and his own elite, competitive version. Each captures important

204. JOHN STUHR, *Dewey's Social and Political Philosophy*, *in* READING DEWEY: INTERPRETATIONS FOR A POSTMODERN GENERATION 82, 85–87 (Larry A. Hickman ed., 1998).

205. As Dewey writes, "democracy should be a means of stimulating original thought, and of evoking action deliberately adjusted in advance to cope with new forces." DEWEY, *supra* note 191, at 48.

206. JOHN DEWEY, *Liberalism in a Vacuum*, *in* JOHN DEWEY: THE LATER WORKS 489 (Jo Ann Boydston et al. eds. 2008).

207. For Dewey on tax reform, see JOHN DEWEY, *Taxation as a Step to Socialization*, *in* JOHN DEWEY: THE LATER WORKS 265–67 (Jo Ann Boydston et al. eds. 2008).

features of democracy, as an institution and as a way of life, and both offer valuable tools for reconstructive improvement. Taken together, they provide a principled pragmatic approach to law and democracy.