Public Reason 6 (1-2): 67-76

Judge Posner on Dewey, Democracy and Knowledge: A Critical Assessment

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Abstract: This paper provides a critique of one of the more pivotal aspects of Judge Richard Posner's legal pragmatism: his interpretation of John Dewey's account of the relationship between democracy and knowledge, what I call the democracy-knowledge relationship. For Dewey, knowledge and action, including political action, are part of the same continuous process. Posner argues Dewey fails to make a convincing argument on this point. According to Posner, Dewey offers an incoherent democratic theory that is fragmented into what he calls "epistemic" and "deliberative" democratic theories. I argue Posner is wrong in at least three ways: first, Posner exaggerates the extent to which Dewey believed his suggested reforms could actually be implemented; second, he misinterprets Dewey's understanding of knowledge, both its origin and its function; and finally, Posner commits a classic straw man fallacy in that he presents a distorted account of Dewey's democratic theory that is readily subject to his own criticisms.

Key words: law, democracy, Dewey, Posner, pragmatism.

In his book *Law, Democracy and Pragmatism* (2003), Judge Richard Posner develops and defends an elaborate, systematic and sophisticated account of the relationship between law, democracy and pragmatism, as he understands it. My criticism in this paper is of course not directed toward the whole of Posner's theory, but rather is directed toward one of the more pivotal aspects thereof: his interpretation of John Dewey's understanding of the relationship between democracy and knowledge, what I will call the democracy-knowledge relationship. For Dewey, knowledge and action (including political action) are part of the same continuous process. Posner argues Dewey fails to provide a satisfactory argument concerning the democracy-knowledge relationship, and that this results in problems for Dewey's democratic theory more generally. Specifically, Posner argues that Dewey's democratic theory is fragmented into what he calls "epistemic" and "deliberative" democracies, as opposed to being a democratic theory composed of intertwined political and epistemic elements. I will argue that Posner's argument on this point is flawed in at least three ways: first, Posner exaggerates the empirical nature of Dewey's political philosophy and reform in regards to actual implementation. Dewey's vehemence toward participatory and deliberative democracy does not equate to a claim by Dewey that these are feasible modes of democratic politics; second, Posner misinterprets Dewey's account of knowledge, both its origins and its social function; and finally, Posner commits a classic straw man fallacy in that he bifurcates Dewey's democratic theory in a way that allows him to present a supposed Dewey an deliberative democracy that is readily subject to his criticisms, which subsequently serve as support for his legal pragmatism. Posner's own democratic theory will not be discussed here.

This paper will proceed in the following way: first, I will provide a brief review of the aspects of Dewey's philosophy that emphasize his arguments concerning the relationship between democracy and knowledge; second, I will present Posner's interpretation of Dewey's account of the democracy-knowledge relationship and provide counterpoints to criticisms presented in his interpretation; third, I will offer a brief summation of where Posner goes wrong in his account and how he fails to provide a viable interpretation of Dewey's democratic theory. It being the case that Posner's criticisms of Dewey's account of democracy are essential to his legal pragmatism, it might also be the case that his broader theory is subject to similar criticisms; and finally, I conclude by summarizing my arguments and explaining the potential contributions of this research.

I. DEWEY'S DEMOCRACY-KNOWLEDGE RELATIONSHIP

To fully understand Dewey's democracy-knowledge relationship, it is helpful to understand the significant influence of Darwinian biology on his thought. This influence, among others, led Dewey to understand society as a kind "social organism" where citizens and institutional arrangements are adaptive to constantly changing social conditions (1916). One of several indications of this influence can be found in Dewey's writings on the contemporaneous developments in physiology and psychology, which explain the brain as evolutionary and organic: the brain is understood as an organ constantly responding to external, environmental stimuli. Based on this experience, the brain coordinates activity accordingly. To elucidate this idea, Dewey provides a specific example: that of the carpenter's craft. Upon observing the carpenter in action, one notices,

> While each motor response is adjusted to the state of affairs indicated through the sense organs, the motor response shapes the next sensory stimulus. Generalizing this illustration, the brain is the machinery for the constant reorganizing of activity so as to maintain continuity; that is to say, to make such modifications in future action as required by what has already been done. (1998, 209)

This, for Dewey, demonstrates how in everyday activity a person, or any organism for that matter, goes through a continuous process of engagement-stimulus-adjustment-reengagement. This in turn generates a practical knowledge that is of use in future experience. Dewey's understanding of a constant reciprocity between a given organism and its environment – which is the basis of his epistemology – carries over to his political philosophy (Hoy 1998).

In a broader social and political context, the acquisition of experience-based knowledge is a practical social endeavor; that is, knowledge is essential to a functional democracy and democracy is itself an education promoting social and political knowledge (McDermott 1973). As an example, Dewey argues the education of society's younger members prior to their entrance into social life must be of certain kind: it must be based in experience in the world and be able to impart knowledge, derived from that experience, that will in turn be useful in future experience. Knowledge "must begin in experience

and relate back to experience." (Sullivan 2007, 75) This prepares young citizens for life in society. Similarly, in the political sphere voluntary involvement in political action educates political agents for future political action. According to Dewey, an ideal democracy would be one in which such an understanding of the democracy-knowledge relationship is coextensive with the social body and put into practice, therefore providing governments with practical approaches to wide-ranging social problems through knowledge that is based in real-world, political experience.

It being the case that democratic societies are constituted by a plurality of groups with varying interests and proposed strategies for overcoming obstacles faced in political life, the transmission of ideas is of great import (Dewey 1916). Solutions will be those that are derived from different political experiences and their corresponding knowledge conveyed through free interaction and the sharing of ideas. This provides knowledge on which citizens and governments can depend when faced with constantly changing political phenomena. Social and political adaptation to environments is the engine of political development, and such adaptation is the experience that ensures the survival of a political community or society. This involves a publically active, rather than a passive, political community. For Dewey, a stagnant government and citizenry are not only incompatible with democracy, but in fact can help to set the stage for the imminent death or devolution of a democratic society.

To further argue this point, Dewey reiterates the import of the transmission of ideas to the democracy-knowledge relationship,

> Democracy is more than a form of government; it is primarily a mode of associated living, of conjoint communicated experience. The extension in space of the number of individuals who participate in an interest so that each has to refer his own action to that of others, and to consider the action of others to give point and direction to his own, is equivalent to the breaking down of those barriers of class, race, and national territory which kept men from perceiving the full import of their activity. (1916, 101)

Knowledge of democratic values, that is, is conveyed through the transmission of ideas, the primary vehicle of which is practical knowledge and subsequent communication, which is not only promoted through educational institutions, but is also a life-long process.

Alfonso Damico (1978) provides an interpretation of Dewey's democracy-knowledge relationship that helps to clarify what some consider Dewey's complicated account. He writes,

> Dewey's insistence that action and its consequences are critical to any valid theory of politics is important. A positive political philosophy for improving social life will not be discovered unless we learn to test our concepts, theories and judgments in terms that ultimately refer to the experience from which we learn how to solve problems. (1978, 123)

Damico's comment is a clear statement of the democracy-knowledge relationship. Intertwined in Dewey's democratic theory are both epistemic and political elements. Damico echoes Dewey on this point. Years before, responding to critics characterizing

his political philosophy as utopian and, as Posner later suggests, dependent on an over exaggerated role of intelligence, Dewey writes,

> What is the faith of democracy in the role of consultation, of conference, of persuasion, of discussion, in the formation of public opinion, which in the long run is self-corrective, except faith in the capacity of the intelligence of the common man to respond with commonsense to the free play of facts and ideas which are secured by effective guarantees of free inquiry, free assembly, and free communication. (1998, 342)

Dewey is arguing that the emphasis he places on knowledge and communication is quite consistent with democracy in practice. Faith in commonsense-based intelligence is so intrinsic to democracy that to subordinate it would be to miss the point of democratic governmental together. To put this another way,

> The foundation of democracy is faith in the capacities of human nature; faith in human intelligence, and in the power of pooled cooperative experience. It is not belief that these things are complete but that if given a show they will grow and be able to generate progressively the knowledge and wisdom needed to guide collective action. (1997, 219)

Democratic, political knowledge is practical and not of the kind Posner charges Dewey with advocating. It "nothing but commonsense sharpened." (Damico1978, 1)

To reiterate, political knowledge is the product of individuals and social institutions being adaptive to changing social conditions. This knowledge helps to overcome future challenges in political life. This process is best facilitated by a political-institutional arrangement that allows for the development of common hopes, values, and goals, of a political community via open and free communication. Since contemporary political life is constituted by a plurality of groups, the transmission of ideas is essential for coming to consensus or compromise. For Dewey, democratic government can only facilitate this since it allows for the transmission of such ideas – the transmission of practical political knowledge.

II. JUDGE POSNER ON DEWEY, DEMOCRACY AND KNOWLEDGE

Posner begins his book with one of several distinctions to follow: that between "philosophical" and "everyday" pragmatism. The former is meant to convey the manner in which "pragmatism" is discussed and treated in professional philosophy and in academic departments. The latter, on the other hand, is what is implied by the use of the term "pragmatism" in popular conversation: to take things as they come, not to be rash, to make informed and judicious decisions, and the like. This is the domain of Posner's legal pragmatism. Right away, then, Posner attempts to bring his pragmatism down even further from abstraction than Dewey does his own. Dewey of course takes issue with excessive abstraction, so Posner is setting the stage for an exceptionally strong critique of Dewey's philosophy, specifically the democracy-knowledge relationship.

Having made the distinction between so-called philosophical and everyday pragmatism, Posner turns to Dewey's work, which he believes suffers from certain defects that render Dewey's pragmatism at odds with everyday pragmatism, which Posner argues is the proper domain of politics and law. As mentioned, he takes aim at Dewey's conception of democracy and its important relationship to knowledge. Posner suggests that despite what might on a superficial level seem to be a coherent presentation of the democracy-knowledge relationship, upon further consideration the relationship is not so clear. If Posner is right, Dewey's democratic theory is fragmented: on the one hand, he argues, there are the epistemic aspects and on the other there are the political, deliberative aspects. According to Posner, this is problematic for Dewey's democratic theory because it severs the democracy-knowledge relationship on which the theory depends. This results in Dewey's democratic theory being less practical than he maintains. As a consequence, the proposed reforms derived from his democracy-knowledge relationship are unlikely to ever come to fruition.

However, Dewey never claimed to offer remedies to empirical issues as much as he seemed to be normatively reactive thereto. Much of his social and political philosophy is empirically diagnostic and normatively prescriptive. To be sure, there are suggestions for actual reform in Dewey's political philosophy, but the expectations of actual implementation are not to the extent to which Posner would have others believe, and it is certainly not the driving force behind his democratic theory. Dewey felt experience generates knowledge and that this could be a good thing for democracy, hence his focus at once on democracy and education. However, Dewey did have his doubts that his suggested reforms could actually be implemented.

Dewey especially thought America's increasing infatuation with industrialism and technological innovation served as an impediment to the kinds of reforms for which he argued. Technology and industry, although not antithetical to democratic reform, served as an impetus for a reconceptualization of politics that was more rigid than adaptive, while also promoting a kind of individualism adverse to Dewey's understanding of the individual as a social being, something he believed essential to a healthy democracy. Dewey saw technological and industrial advancement and its correspondence to the bureaucratization of politics as delimiting to the adaptive capacities of political systems. This caused Dewey to lament the direction in which he believed American politics was geared, which is indicative of his limited expectations concerning democratic reform (1999).

This is not to say that Dewey was not a steadfast advocate of deliberative and participatory democracy; but again, this is not Dewey suggesting these modes of democracy could actually be implemented. In fact, Dewey was observant of the ubiquitous conflict in American politics that often makes productive deliberative democracy unlikely. As William R. Caspary writes, "Dewey does not deny conflict" in democratic politics, "but instead stresses constructive conflict resolution" (2000, 9). The fact that Dewey believed conflict resolution was necessary in democratic government strongly suggests his awareness of political conflict as a hurdle to the kind of democracy he envisioned. It is true, as Caspary acknowledges, at different times in his sweeping political philosophy

Dewey neglects the obstructive role of conflict in democratic politics, but throughout the whole of his philosophy there are numerous references to democratic conflict.

Furthermore, in his middle period writings Dewey placed a great deal of emphasis on the development and dynamics of group morality. In these writings, Dewey explains communities of different sizes are most often dependent on tradition, informal norms, and social habits. Dewey explains that in communities, "there are approved ways of acting, common to the group, and handed down from generation to generation. Such approved ways of doing and acting are customs." (1972, 56) These customs influence and guide individual conduct: "they imply the judgment of the group that they are to be followed. The welfare of the group is regarded as somehow imbedded in them." (Dewey 1972, 54-55) This means humans are inherently social, something Dewey strongly believed, but this social nature carries with it a propensity to strongly adhere to practices rooted in tradition. This account of group dynamics is much more conservative than Dewey's democratic theory. Dewey's preferred form of democracy is radical in that existing institutions would have to be significantly altered and perhaps reinvented. This is something Dewey could not have anticipated given what he saw as the comparatively rigid, conservative nature of American political institutions. As such, Posner's attack on, and dismissal of, Dewey's democratic theory because of its being impractical is subject to criticism.

In looking deeper into the epistemic aspects of Dewey's theory of democracy, Posner rightly observes that for Dewey, "the best forms of inquiry and decision-making in general, not just political inquiry and decision-making, are democratic in character." (2003, 99) That is: Dewey, following Peirce, James and others, was skeptical of the emphasis on different modes of inquiry based on ideas of an immutable truth as well as the notion that an individual utilizes her rational capacities and arrives at conclusions in solitude. To the contrary, Dewey understood inquiry as cooperative and inherently democratic; Posner suggests that for Dewey it is "oriented toward a *cooperative* acquisition of *useful* knowledge" (2003, 101, emphasis in original). Dewey did not pursue an ultimate truth since he believed purely objective inquiry was impossible. Instead, what some would call "objective" is more of a set of criteria derived from compromise and eventual consensus. To put it differently, "progress is a social rather than an individual undertaking and achievement because people see things differently" (Posner 2003, 102). These differences help to guide inquiry.

Up to this point, Posner offers a viable and defendable interpretation of the epistemic aspects of Dewey's democratic theory: he rightly suggests Dewey's account of inquiry is inclusive to a significant degree. As Raymond Geuss (2001), anticipating Posner, explains:

> Democracy for Dewey is a good form of political organization because it is the appropriate political modeling of a more general form of human interaction which has epistemological and valuative advantages, and which finds its best realization in a free scientific community dedicated to experimental research. Just as such a community is trying to invent theories that will allow us to deal with our environment in a satisfactory way, so a good human society would be one that was a kind of experimental community devoted to trying to discover worthwhile and satisfying ways of living. (2001, 124-25)

Posner does recognize these aspects of Dewey's democratic theory in an appropriate manner. They are after all an important part of Dewey's democratic theory. However, Posner quickly turns to what he believes is the fragmented character of Dewey's democratic theory.

Posner posits, "no reason is given to suppose that the democratic character of knowledge is the only precondition of a successful a political democracy." (2003, 105) In fact, Posner believes it is not even a necessary precondition, at least not to the extent that Dewey believes. Dewey, though, never argues the former claim (that such is the only precondition for a well-functioning democracy), but would defend the latter claim (that it is necessary). For Posner, democracy requires something different: practical knowledge is of course of value, but it is one of several factors contributing to a well-functioning democracy. Advocating a form of rigidly representative democracy similar to that advocated by Joseph Schumpeter (1976), Posner juxtaposes it with Dewey's so-called deliberative democracy. Having teased out the epistemic elements of Dewey's democracy, Posner looks to what is left, which he suggests is not only flawed in theory but also impossible in practice.

To be sure, Dewey was fond of the increasing democratization in American government that occurred during the progressive era and the civil rights movement, but his dedication to American democracy was not aimed at directing the country toward a purely deliberative democracy, as Posner seems to think. Rather, it is derived from his robust belief that American democracy would do well to be as inclusive as possible. Indeed, he thought this was the only way American democracy could survive (Hoy 1998). Yet Posner's treatment unapologetically designates Dewey's democratic theory as a purely deliberative, which is generally considered a non-viable democratic arrangement in contemporary political life (Held 2006). This is where Posner quickly loses his traction.

For Posner, the weakness of Dewey's democratic theory is that it is incoherent and unrealistic in practice. Regarding the latter, he is right. As many scholars acknowledge, contemporary political life is not conducive to a purely deliberative democracy, nor was it during Dewey's long life. From this point on, Posner focuses on his account of Dewey's democracy as unrealistic. He argues given low IQ scores, voter-apathy, and general disenchantment with the political process, Dewey's deliberative democracy is not viable. But the point stands that Posner is addressing only one aspect of Dewey's democratic theory. He of course argues epistemic democracy is its own body of ideas, but he does not provide an adequate or satisfactory justification for his decision to jettison this aspect of Dewey's democratic theory.

In addition to what Posner sees as fragmentation in Dewey's democratic theory, he also argues Dewey commits the "intellectual's typical mistake of exaggerating the importance of intellect and of associated virtues such as commitment and disinterested inquiry" (2003, 108). Education, he suggests, does not necessarily improve character. This being the case, education – certainly a public good – does not significantly contribute to democracy in the manner in which Dewey claims. It is one among many variables that

converge to make possible a functional, well-ordered democracy. For Posner, the over exaggerated role of intelligence and knowledge removes Dewey's democratic theory from real-world politics and is therefore not productive in addressing real-world problems.

However, as demonstrated throughout this paper, Dewey's account of knowledge is derived from experience in the real world and is therefore practical in nature (think of the carpenter example, as well as Dewey's emphasis on the commonsense-based knowledge as essential to democracy). Dewey repeatedly refers to this throughout not only his democratic theory but also in his pragmatist philosophy more generally. It is difficult to imagine this is something that could be missed by such a sophisticated critic as Posner. Since Dewey's democratic theory is so dependent on his understanding that the most productive knowledge is a practical knowledge, to overlook this point is to miss the point Dewey is trying to make. It is of course one thing to disagree, but to suggest that Dewey's account of knowledge is excessively academic in nature requires a more robust and convincing critique.

As a further means to criticize Dewey's deliberative democracy, Posner returns to his notion that "everyday pragmatism" is the proper domain of law and politics. He provides the example of Franklyn Roosevelt, an American President who, according to Posner, was far less intelligent than Dewey, but much more practically minded. By Posner's account, in being a practical politician, but not engaging in excessive intellectual reasoning when it came to political matters, Roosevelt was better able to govern than the people. This, according to Posner, is demonstrative of why a more elitist (but pragmatic in the everyday sense) government employing officials with expertise in the matters with which governments deal is more desirable than Dewey's democracy. The general public, both historically and contemporaneously, are not to be trusted with certain issues of public policy. What is more, given the volatile nature of majoritarian politics, they *should* not be trusted, but rather tempered by a representative structure. Deliberative democracy is not only impractical but also undesirable. Elsewhere, (2013) I highlight how, in so arguing, Posner contradicts his earlier claims about "everyday pragmatism." Although this is an important point, it does not contribute significantly to the research presented here.

III. SUMMING UP HOW POSNER GOES WRONG

As mentioned above, Posner's interpretation of Dewey's democratic theory over emphasizes the role of its empirical nature in regard to implementation. Dewey was of course concerned with empirical issues, but not in the way or to the extent Posner describes. Rather, Dewey's democratic theory can be better characterized as critical of certain aspects of democratic politics and as suggesting reform. This is implied when Dewey writes: "We cannot set up, out of our heads, something we regard as an ideal society. We must base our conception upon societies which actually exist if we are to have any assurance our ideal is a practicable one" (1916, 96). The goal then becomes to "extract the desirable traits and suggest improvements" (96). Dewey did provide suggestions for

political reform, however there is little to suggest that he whole-heartedly believed his political ideals could come to fruition. His discussions about the increasing barriers to the transmission of ideas seem to suggest the same. Granted, he had faith in American democracy, and he had ideas about how it should operate, but to center one's argument, as Posner does, on the impractical nature of what is only really a part of Dewey's theory is at odds with a careful reading of Dewey.

Furthermore, Posner misrepresents Dewey's account of knowledge, both in regard to its origins and its social function. Posner claims that Dewey makes the academic mistake of over emphasizing knowledge. He argues further that the kind of knowledge Dewey advocates is not a necessary condition for democracy. That is: Dewey's democratic theory is in the realm of philosophical pragmatism, which is not the appropriate realm of politics. However, Dewey's political philosophy, and his pragmatist philosophy more generally, is replete with arguments concerning the import of practical knowledge; he of course places emphasis on knowledge, but this knowledge is derived from real-world experience, not from philosophical discourse in academic departments. As Susan Haack explains, Dewey "insists that knowing is not isolated from practice but is itself a kind practice – to be judged, like other practices, by it purposive success rather than by some accuracy of reflection of its objects" (1996, 652). A productive knowledge is not derived from abstract principles, but rather is generated through practice and everyday experience in the lived world.

Finally, and perhaps most penetrating, Posner can be interpreted as committing a classic straw man fallacy. As mentioned above, he does this by bifurcating Dewey's democratic theory in way that is not only at odds with Dewey's philosophy, but also misrepresents Dewey's account of democracy as purely deliberative, making it easy to attack and reject. Given that Posner dissects Dewey's theory along epistemic and deliberative lines, and given the fact that in Dewey's democratic theory such a demarcation is unclear if it exists at all, Posner's dismissal of the epistemic aspects of Dewey's democratic theory leaves only a shell of that theory. This is to say Posner presents a distorted form of Dewey's position. Posner formidably and successfully argues against this position, however the point remains that Posner spends a great deal of time and effort teasing out specific elements of Dewey's democratic theory, rejecting others, and putting what is left back together to form a democratic theory readily subject to his criticism. Thus a straw man fallacy is committed.

IV. CONCLUSION

I have argued that Judge Richard Posner's legal pragmatism is subject to criticism since he misrepresents Dewey's account of the democracy-knowledge relationship, an essential part of Dewey's democratic theory. I took issue with three specific aspects of Posner's account: the exaggerated extent to which he claims Dewey thought his ideas might be implemented, the misrepresentation of Dewey's account of knowledge, and

what I argued is Posner's straw man fallacy. In support of these claims, I provided aspects of Dewey's philosophy that I hope are demonstrative of his concern with the democracy-knowledge relationship, therefore at least casting a shadow of doubt on what Judge Posner seems to think is self-evident.

This research is important, if for no other reason, because many of Posner's weaknesses are concealed in the intricacy of the systematic presentation of his theory. To identify and criticize these weaknesses might contribute to other criticisms in that if this aspect of Posner's legal pragmatism is subject to such criticism, there might be implications for the whole of his theory. Moreover, Judge Posner claims a strong lineage with Dewey and other classical pragmatist. If this is so, Posner needs to account for this significant break. Finally, the research presented here can perhaps have implications in more than one area of philosophy: not only are there obvious implications for the pragmatist literature, but there might also be implications for political and legal philosophy more generally, as well as for epistemology and the history of philosophy.

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