

# Philosophical gymnastics for the would-be pragmatist

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When considering the perduring trend to aim for an axiologically neutral account of law, one may retort that such aim is ill-fitted to the ‘reality’ of law-making practices, suffused as they are with a variety of moral concerns that cannot be simply bracketted out. One may also adopt a different kind of strategy: instead of criticizing such neutral account by pointing at the social practices with which our concept of law has to fit, one may seek to expose the factors that contributed to making such axiological neutrality a desirable aim in the first place.

Typically, those theories that aim to circumvent difficult questions relating to the role of moral standards in law-making practices do so in the name of an (unacknowledged) principle of parsimony. According to this principle, we are better off proceeding with a ‘lean’ concept of law for fear of the metaphysical postulates that would unavoidably underlie a richer account, encompassing the various moral aspirations that are typically associated with law. What goes wrong here is not the principle of parsimony itself but rather the assumption that there are necessarily some ‘postulates’ to be feared if one were to give this moral dimension its proper weight.

The philosophical gymnastics proposed in this paper aim at debunking this assumption; they proceed in two steps. First, the endeavour to present an axiologically neutral concept of law is presented as the perplexed answer to a ‘false dilemma’, whereby the *only* alternative to fundamental pessimism about practical reason must consist in welcoming the rescue of some rationalist metaphysics. Given the scaffolding needed for the latter option, the fall-back position is to ‘declare morality a private matter’, and ‘placing the field of public life -and, as a result, positive law- in the hands of an axiologi-

cally neutral and instrumental reason'.<sup>1</sup>

To bypass such a dilemma -and shed one's pessimism about practical reason at the same time- one must confront what Blackburn calls 'the metaphor of two spaces - the space of reasons, and the space of causation'.<sup>2</sup> The challenge is to overcome the dualist structure inherent in both the rationalist and skeptical understanding of our moral experience; this is where the gymnastics kick in, and take a pragmatist turn.

Among the contemporary efforts to map a way out of this dualist predicament, Habermas formulates his own endeavour as that of tracing a 'path from Hobbes to Kant', yet it is far from clear —even by Habermas' own lights— whether that path necessarily ought to lead to (or stop at) Kant. The second part of this paper explores the challenges associated with the drawing of such 'middle way' (rebutting the skeptical option while staying clear of any rationalist metaphysics) for legal theory. Drawing inspiration from the confrontation between Rawls and Habermas, my purpose is to build on the pragmatist elements emerging from this confrontation to highlight an 'axiologically charged' way out of traditional jurisprudential binds (the issue of normativity in particular will be considered).

## **0.1 Intimate morality or rationalist metaphysics: the false dilemma**

When questioning the authority of the moral standards with which we are confronted on a daily basis, a common trend is to think that only the postulate of some transcendent, practice-independent source of morality may rescue us from skepticism.

While the difficulty inherent in such a postulate is apparent to anyone who shares a reluctance to *ground* morality in some metaphysically queer reality, sustaining a skeptical position while nevertheless remaining committed to key democratic ideals is no easy feat either. Most Western legal systems are structured around the possibility of engaging in genuine argument, whatever the nature of the disagreement on which it may bear (whether it be prudential, moral or both). In rebutting the possibility of ethical objectivity, skepticism denies precisely that possibility: if moral judgments are

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<sup>1</sup>Apel 1988, p. 57 (my translation).

<sup>2</sup>Blackburn 2001

but the expression of our personal taste, many of the practices aimed at providing a legal framework for the public discussion or adjudication of moral disagreements have to be a farce. Why go to such lengths, making sure that every argument is heard and pondered, when we might as well toss a coin (or exchange blows)?

Given the infelicity of either way of conceptualising moral values, it is tempting to just steer away from it all, and delineate the domain of legal theory so as to avoid such clumsy considerations. While it may be unfair to say that this is exactly what Hart did, I do think that many of the tensions and ‘gaps’ in his work are attributable to this philosophical dilemma<sup>3</sup>. While the denomination of its terms varies widely, the commitments they refer to do not.

**Rationalist metaphysics** When qualified as ‘metaphysical’, the rationalist label is mostly used in an antagonist way -as a target to lean against- rather than as a standard to strut about. From William James’ to Berlin’s assaults against metaphysical rationalism, one element stands out as a key (and most problematic) characteristic of the rationalist outlook: its a-priori belief in the possibility of a single, unified, true solution to ethical dilemmas.<sup>4</sup>

While it may sound like a welcome relief in the face of our incurable shortsightedness and ethical fleetingness, such a belief does not come cheap. The *a priori* guarantee of (as opposed to the mere hope for) a single true solution indeed cannot possibly come from *within* the world of human experience. It has to postulate a ‘second world’, resolutely distinct from the space of causal events; for it is only from that world that the rationalist may have absolute

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<sup>3</sup>Hart shows every sign of being stuck in the middle of the ‘false dilemma’ I am about to develop: while he has always adopted a cautious skepticism, and at some stage even ‘strenuously defended’ Mackie’s theory (see Wiggins 2005, footnote 1), his review of Bernard Williams’ *Ethics and the limits of philosophy* nevertheless reveals a longing for some external, rationalist ‘foundation’ for ethics (Hart 1986). As Amanda Perreau-Saussine puts it: ‘Hart seems to have striven to keep jurisprudential thought open to a moral truth that he feared might not exist’ (Perreau-Saussine 2006, p. 388). I argue that this fear may be the by-product of the dualist outlook within which Hart is confined: because he could not conceive of a moral truth but in metaphysically-loaded rationalist terms, Hart surrendered instead —reluctantly?— to the skeptical position.

<sup>4</sup>‘When such dilemmas arise it is one thing to say that every effort must be made to resolve them, and another that it is certain a priori that a correct, conclusive solution must always in principle be discoverable- something that the older rationalist metaphysics appeared to guarantee.’ (Berlin 2002, p. 42)

truth ‘shoot[ing] straight over the head of experience, and hit[ting] its reality every time’.<sup>5</sup>

It is in the distance needed for such ‘truth shooting’ (no matter how comforting it may be) that the metaphysical cost goes up, for it leaves us stuck with the metaphor of two spaces (causation v. reasons), with an unbridgeable gap between them -and it is precisely then that the metaphor becomes ‘dangerous’.<sup>6</sup>

**Intimate morality** While the rationalist position seeks to rescue us from the mess of human affairs by lending oughts some extra ‘oomph’, the skeptics ‘feel that their understanding of things has enabled them to see *through* something; something to which the rest of us remain in thrall. They have seen through the authority of “ought”, and come to believe in the hegemony of “is”’.<sup>7</sup>

Among these skeptics, John Mackie may be one of the most influential. His ‘argument from queerness’ rejects the possibility of ethical objectivity on the basis of the fact that ‘[I]f there were objective values, then they would be entities or qualities or relations of a very strange sort, utterly different from anything else in the universe’.<sup>8</sup> Mackie concludes that our ethical discourse is fundamentally flawed, as it seems to presuppose precisely such ‘strange’, independent entities: they are ‘queer’, according to Mackie, because they are not susceptible to empirically grounded investigation.<sup>9</sup>

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<sup>5</sup>James 2000, p. 96

<sup>6</sup>‘Where the metaphor becomes dangerous is where it implies a *gap*, and what is more an unbridgeable gap of just the kind that exists between different spaces. Its danger lies, then, in denying any intelligible link between events conceived as intentional, and events conceived as lying in the space of causes.’ (Blackburn 2001, p. 140)

<sup>7</sup>Blackburn 2001, p. 143.

<sup>8</sup>Mackie 1990, p. 38.

<sup>9</sup>I adopt this interpretation of ‘queerness’ on the basis of a passage where Mackie states that the only satisfactory reply to a counter-argument underlining that our knowledge of many things turns out to be queer and hence that queerness is not really objectionable (Putnam 1981) is to ‘show how, on empiricist foundations, we can construct an account of the ideas and beliefs and knowledge that we have of all these matters. I cannot even begin to do that here [...]I can only state my belief that satisfactory accounts of most of these can be given in empirical terms. If some supposed metaphysical necessities or essences resist such treatment, then they too should be included, along with objective values, among the targets of the argument from queerness’ (Mackie 1990, p. 39).

The key element, in this ‘argument from queerness’, is the taken for granted divorce between the sphere of normativity and the sphere of our experiences: to argue that our standards of correctness may be the gradual product of our own experiences while nevertheless being able to claim some objective status is not only presumptuous, it also completely misses the point. The point, for ‘empiricist naturalists’, as McDowell calls them, is to insist on a univocal, ‘natural-scientific’ concept of objectivity as ‘non-subjective’. Any claim to objectivity has to be backed up by objects as they are found in a nature stripped bared of the human touch, in ‘a world purged of meaning’.<sup>10</sup> We may of course doubt that there are any such ‘pure’ objects to be found, especially in ethics. If one is to decline the rationalist lifeline, it may look like a surrender to the skeptical ‘privatization’ of the moral sphere is the only option left; except, that is, if one refuses to buy into a ‘natural-scientific’ concept of objectivity.

While ‘it is one thing to recognize that the impersonal stance of scientific investigation is a methodological necessity for the achievement of a valuable mode of understanding reality; it is quite another thing to take the dawning grasp of this, in the modern era, for a metaphysical insight into the notion of objectivity as such, so that objective correctness in any mode of thought must be anchored in this kind of access to the real’.<sup>11</sup>

Since the real we have access to is necessarily infused with (our) meaning, since nature is best construed as ‘addressed to us’, we had better stop hankering for some ultimate grounding of our ethical convictions in a sphere ‘constitutively independent of the structure of subjectivity’.<sup>12</sup> When it comes to understanding our ethical judgments, and assessing their worth, our gaze should be turned to the myriad practices woven into our naturally enchanted world, rather than to an ‘ineffable [natural] lump devoid of structure or order’ (as McDowell’s ‘empiricist naturalists’ would have it). But is it necessarily an enchanted world we are turning to, or are we rather acknowledging the need to talk ‘enchantingly’ about nature?

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<sup>10</sup>It is a commonplace that modern science has given us a disenchanting conception of the natural world. [...] The tendency of the scientific outlook is to purge the world of meaning’ (McDowell 1998, p. 174).

<sup>11</sup>McDowell 1998, p. 182.

<sup>12</sup>Interestingly, McDowell suggests that our obstinate wish ‘to acknowledge a role for the “in itself”’ may have something to do with ‘an intelligible wish to avoid responsibility. If something utterly outside the space of *logos* forces itself on us, we cannot be blamed for believing what we do’ (McDowell 1998, p. 181).

‘Consider, for instance, someone taught to use a carpenter’s plane to shave a piece of wood flat. The process is one of sticks and carrots until the skill develops. To the metaphysician’s eye this is all just is’s, so if, for instance, after the process the apprentice shaves a plank leaving it wavy or jagged, that is just the way the causal process developed. There are dispositions and events all the way down, but nothing that counts as or constitutes, or, in one ugly terminology, acts as a truth maker for correctness or incorrectness (as Kripke’s skeptic famously laments). But against the background of the activities of which the technique is a part there is more than that. The jagged or wavy result is unskilled, unintended, and it gives rise to disappointment and rejection’.<sup>13</sup>

To understand the process whereby we come to develop evaluative stands towards our various practices, Blackburn maintains, all we need is to make room for ‘creatures with needs to meet’, and ways of training themselves to meet these needs against a background of prior practices. ‘[B]y the time we have these “is’s” up and running we have all that our normative nature require’.<sup>14</sup> So there is ‘no unmoved mover: no intervention of the divine spark, or gifts from unexplained quarters’.<sup>15</sup> Does this necessarily expose Blackburn to the infamous ‘bald and shallow metaphysics’ of empiricist naturalism, as McDowell contends? Some of this quarrel may look like it turns on a question of timing: is nature to be thought of as ‘enchanted’ even before we’ve started talking enchantingly about it? Such question may however be deemed equally misleading by both Blackburn and McDowell, as they would probably both denounce the ‘even before’ as striving towards an unavailably ‘bare’, [un]humanized nature. And it is precisely this striving that may have misled Hart into thinking that a skeptical position (if pushed) was all he could afford.

Remember the terms of the dilemma we started with: my ‘debunking strategy’ amounts to showing that both the rationalist option and the skeptical surrender are structured around the same -dangerous- ‘metaphor of two spaces’. In both cases, the realm of reason is presented as resolutely alien to that of nature, whether this ‘alienation’ is meant to better enable reason to ‘order our animal nature about from outside’,<sup>16</sup> or whether it is the stepping

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<sup>13</sup>Blackburn 2001, p. 147.

<sup>14</sup>Blackburn 2001, p. 148.

<sup>15</sup>Blackburn 2001, p. 150.

<sup>16</sup>McDowell describes the dualism underlying the rationalist (or ‘supernaturalist’) option: ‘Perhaps we need not confine ourselves to the realm of nature? But then we are conceiving reason as a foreign power, ordering our animal nature about from outside the

stone to some form of moral skepticism.<sup>17</sup>

## 0.2 Drawing a way out

Any endeavour to elude the dualist predicament discussed above would have to start modestly: we'll have needs, we'll have desires, and projects, some of which can only be realised as a joint venture. There will be better and worse ways of achieving these collective aims: we will need to be able to discern among them. We will also need to allow for ways of justifying the adoption of this or that aim in the first place. When values clash, when divergent worldviews call for different ways of living together, how do we go about (re)defining the fundamental rules and institutions outlining our political landscape?

Habermas' answer, in a nutshell, lies in 'the moral point of view' or 'we-perspective':

'Under the pragmatic presuppositions of an inclusive and noncoercive rational discourse between free and equal participants, everyone is required to take the perspective of everyone else and thus to project herself into the understandings of self and world of all others; from this interlocking of perspectives there emerges an ideally extended "we-perspective" from which all can test in common whether they wish to make a controversial norm the basis of their shared practice'.<sup>18</sup>

Rawls differs. Stopping short of a full-fledged moral point of view, Rawls prefers to emphasise the importance of the 'reciprocity criterion'.<sup>19</sup> Less ambitious in both domain and scope, this preference epitomizes a more general trend within Rawls' works, which do not aim at quite the same all-encompassing justificatory aspirations as Habermas'. This trend is confirmed by his *Political liberalism*'s endeavour to give its proper weight to the fact of pluralism while 'leaving philosophy as it is'. Now this is an odd claim: how could a work such as *Political liberalism* 'leave philosophy as it is'? Before discussing this further, an endeavour to understand the dynamics underlying

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natural world. Our lives are mysteriously split, somehow taking place both in nature and in some alien realm in which reason operates' (McDowell 1998, pp. 176-7).

<sup>17</sup>For the skeptic, the 'realm of reason' is just as alien, only there is no hope of intersection with the natural realm, it being 'scientifically purged' of meaning.

<sup>18</sup>Habermas 1999b, p. 58.

<sup>19</sup>As formulated by Rawls, the reciprocity criterion only applies to citizens rather than individuals at large and the range of claims it can justify is narrower.

the disagreement between Rawls and Habermas will prove helpful.

**From Hobbes to Kant: the ‘straight’ path?** It couldn’t have come out better: in an effort to pinpoint what lies at the core of his disagreement with Rawls, Habermas happens to refer to precisely the same dilemma as that discussed in the first section, only he starts with his way out (and tacitly presupposes the inadequacy of the skeptical option):

‘We can either follow the path leading from Hobbes to Kant and develop a notion of practical reason that in some way preserves the cognitive content of moral statements, or we can fall back once again on the “strong” traditions and “comprehensive” doctrines that ground the truth of the moral conceptions embedded in them’.<sup>20</sup>

Given the inappropriateness of any form of skepticism, the only alternative to the ‘comprehensive grounding’ option<sup>21</sup>, according to Habermas, is to ‘follow the path from Hobbes to Kant’. The problem, according to Habermas, is that Rawls only does so half-heartedly, still ‘borrow[ing] from the Hobbesian tradition the idea that the sought-for public agreement must be supported by private, nonpublic reasons’ while at the same time ‘shar[ing] with the Kantian tradition the idea of a moral foundation of political justice’.<sup>22</sup>

Habermas does acknowledge that ‘for Rawls both value skepticism and moral realism are equally unacceptable’<sup>23</sup>. But Rawls’ half-heartedness when it comes to endorsing Habermas’ suggested ‘way out’ —a full fledged, Kantian concept of practical reason— would have him dangerously close to the realist side of the dilemma. Habermas indeed deplores the fact that ‘on Rawls’s conception, metaphysical doctrines and religious world-interpretations admit of truth and falsity’.<sup>24</sup> This admission rings false for Habermas, who retorts that, ‘under the conditions of postmetaphysical thinking’, ‘worldviews are measured more by the authenticity of the lifestyles they shape than by the

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<sup>20</sup>Habermas 1999a, p. 80.

<sup>21</sup>In order to ‘ground the truth of the moral conceptions embedded in them’, comprehensive doctrines have to have some metaphysical footing, whether rationalist or not. I will come back to this.

<sup>22</sup>Habermas 1999a, pp. 85-6.

<sup>23</sup>Habermas 1999b, p. 63.

<sup>24</sup>Habermas refers to the ‘perplexing usage’ Rawls adheres to, ‘according to which worldviews need not be true even when they are reasonable, and vice versa’ (Habermas 1999a, p. 65).

truth of the statement they admit'.<sup>25</sup>

Now, for our purposes, what's important in this particular argument is not so much whether Rawls does indeed fall prey to the 'metaphysical sin' Habermas reproaches him for. Of particular interest is Habermas's underlying assumption that Rawls's shortcoming when it comes to developing a concept of public practical reason<sup>26</sup> is paid for by a return of the 'traditional', 'realistic' view<sup>27</sup> by the back door.

While the impulse for both Rawls' and Habermas' theories springs from a common acknowledgment that such realistic view is ill-fitted in our post-metaphysical, pluralist societies, Habermas suggests that the elements which Rawls borrows from Hobbes (who 'wanted to reduce practical reason to instrumental reason'<sup>28</sup>) end up —unwittingly— needing to be counterbalanced by elements borrowed from the realistic view.<sup>29</sup>

Rawls' first answer would probably consist in reminding Habermas that his theory is not aimed at developing a concept of practical reason.<sup>30</sup> Its explicit aim is to develop a *political* theory of justice that is 'freestanding': it is supposed to 'move entirely within the domain of the political'.<sup>31</sup> Yet the further arguments Rawls advances in response to Habermas' have a way

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<sup>25</sup>Habermas 1999a, p. 67.

<sup>26</sup>In *Political liberalism*, 'practical reason is robbed of its moral core and is deflated to a reasonableness that becomes dependent on moral truths justified otherwise' (Habermas 1999a, p. 82).

<sup>27</sup>'[I]n traditional societies [...] moral norms and principles were viewed as elements of a rational "order of things" imbued with value or as part of an exemplary way of life leading to salvation' (Habermas 1999a, p. 79).

<sup>28</sup>Habermas 1999a, p. 80.

<sup>29</sup>In other words, Rawls' borrowing from Hobbes the idea that 'the sought-for public agreement must be supported by private, nonpublic reasons' has to be counterbalanced, according to Habermas, by Rawls' allowing for metaphysical doctrines and religious world-interpretations to admit of truth and falsity, an allowance that rings false 'under the conditions of postmetaphysical thinking'.

<sup>30</sup>Unlike Practical Reason, Rawls' concept of 'public reason' is aimed at citizens, not persons. 'Public reason is characteristic of a democratic people: it is the reason of its citizens, of those sharing the status of equal citizenship' (Rawls 2005, p. 213).

<sup>31</sup>Habermas cannot see 'how Rawls can explain the epistemic status of a freestanding political conception, without taking a position on philosophical questions which, while not falling under the category of the metaphysical, nevertheless reach well beyond the domain of the political' (Habermas 1999a, p. 76).

of suggesting he is not completely immune to the ‘comprehensive grounding’ temptation mentioned above. Trying to elaborate what Habermas may mean by the ‘substantial’ elements of comprehensive doctrines, Rawls writes:

‘people often think that their basic way of doing things —their communicative action with its presuppositions of ideal discourse, or their conception of society as a fair system of cooperation between citizens that are free and equal —needs a foundation beyond itself discerned by a Platonic reason that grasps the essences, or else is rooted in metaphysical substances. In thought, we reach behind or deeper to a religious or metaphysical doctrine for a firm foundation. This reality is also expected to provide moral motivation. Without these foundations everything may seem to us to waver and experience a kind of vertigo —a feeling of being lost without a place to stand’.<sup>32</sup>

Does Rawls include himself in the ‘us’ prone to vertigo? It is possible, yet it is meant to remain irrelevant. For Rawls, too, is seeking a way out. He is not a skeptic, and he clearly denies that ethical ‘first principles, as statements about good reasons, are regarded as true or false in virtue of a moral order of values that is prior to and independent of our conceptions of person and society and of the public and social role of moral doctrines’.<sup>33</sup> Yet his move away from his *Theory of Justice*’s ‘Kantian’<sup>34</sup> framework does signal a perplexity. His distinction between metaphysical and political conceptions of justice is meant to answer the communitarian objection pointing at the conception of the good (and self) necessarily presupposed by his *Theory of Justice*. Rawls’ hope, in moving to a ‘political’ conception, is to develop principles of justice which proceed from assumptions that are ‘formulated not in terms of any comprehensive doctrine but in terms of certain fundamental intuitive ideas viewed as latent in the public political culture of a democratic society’.<sup>35</sup>

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<sup>32</sup>Rawls 2005, p. 379.

<sup>33</sup>Rawls 1999, p. 511.

<sup>34</sup>It seems safer to use quotation marks here: one may argue that throughout his works Rawls gradually increases his distance from Kant —a distance that is already present from the very beginning. From this perspective Onora O’Neil argues: ‘it is far from clear whether the fundamental strategy of justification of *A theory of justice* is Kantian. Although Rawls is like Kant in appealing neither to individual preferences nor to notional hypothetical agreement or social contract, nor to an independent order of values, he is unlike Kant in appealing to a conception of *reflective equilibrium* to justify OP’ (O’Neil 2003, p. 351).

<sup>35</sup>Rawls 1988, p. 252.

**The ‘pragmatically bended’ path** Does this necessarily entail a claim to ‘leave philosophy as it is’? I think not. I think it may be more fruitfully interpreted in a pragmatist spirit, one that is notably emphasised by Burton Dreben: ‘Rawls always begins *in medii rebus* [...] You start with intuitive moral, political considerations, and then you see what they come to. You cannot ground them’.<sup>36</sup> He continues: ‘[W]herever Rawls has gone slightly astray in exposition has been when he has paid too much lip service to Immanuel Kant. It does not help at all’.<sup>37</sup>

From the very beginning, Rawls ‘coherentist’ justification of the original position —OP—(arguing that the principles generated by the OP must be in reflective equilibrium with our ‘considered judgments’) may be understood in the spirit of James’ concern to ‘marry previous parts of experience with newer parts’.<sup>38</sup> His later insistence that the OP is the object of a contingent overlapping consensus among citizens who hold a variety of comprehensive moral views similarly entails modesty when it comes to the justification of his principles of justice. Not only is there absolutely no guarantee of convergence on the reasons for accepting the principles of justice stemming from the OP, there is also a necessary restriction on the *nature* of the justification underlying these principles of justice. To use Rawls’ words, it has to be of a *political* kind.

Among the many things that may be read in that particular use of the term ‘political’, a concern to establish ‘the primacy of practice in philosophy’ sheds a distinctively pragmatic light upon Rawls’ works. This concern is described by Putnam as one of four theses characteristic of American prag-

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<sup>36</sup>Dreben 2003, p. 322.

<sup>37</sup>Dreben 2003, p. 340.

<sup>38</sup>‘Purely objective truth, truth in whose establishment the function of giving human satisfaction in marrying previous parts of experience with newer parts played no role whatever, is nowhere to be found. The reasons why we call things true is the reason why they ARE true, for “to be true” MEANS only to perform this marriage-function’ (James 2000, p. X).

matism:<sup>39</sup> on this count, Rawls only ‘half-qualifies’ as a pragmatist,<sup>40</sup> yet that particular half contributes significantly to mapping a way out of the ‘false dilemma’ discussed above.

For the political philosopher, practice may be said to be ‘primary’ when, starting from the acknowledgment that we cannot go about democratically defining the fundamental rules and institutions organising our living together without engaging in some kind of discussion (which in turn needs to be structured around some principle of mutual respect), the philosopher does not give in to a search for the ‘deeper ground’ of the assumptions indispensable to that discursive practice.

Talk of right and wrong is going to be pretty indispensable, and when we argue about those value judgments, we take them seriously. When a decision needs to be made, and we disagree, we try to get it right. Without presupposing the possibility of ethical objectivity, these efforts would all be feigned. Now to argue that this presupposition may *feel* indispensable in real life, but that it’s all a mistake, for there *are* no values out there capable of ‘backing up’ our claims to objectivity<sup>41</sup>, is to make a distinctively anti-pragmatist move: it presupposes that we have access to some Archimedean point from which we may criticise our practices *from the outside*. In Mackie’s case, this involves imposing some metaphysical dogma (to put it crudely, the world ‘really is’ an ineffable [natural] lump) to revise our practical experiences. Dodging this kind of ‘revisionary metaphysics’ may be what Rawls is hoping to achieve when claiming to ‘leave philosophy as it is’.

Yet there has to be a worry, and it is one which Rawls came up against (without being able to provide a pragmatist answer to it): what if the beliefs or assumptions that prove indispensable to our practices are just plain wrong? Is the pragmatist stance content with identifying truth with suc-

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<sup>39</sup>Cursorily summarized, those theses are (1) *antiskepticism*: pragmatists hold that doubt requires justification as much as belief [...]; (2) *fallibilism*: pragmatists hold that there is never a metaphysical guarantee to be had that such-and-such a belief will never need revision (that one can be both fallibilistic *and* antiskeptical is perhaps *the* unique insight of American pragmatism); (3) the thesis that there is no *fundamental* dichotomy between “facts” and “values”; and (4) the thesis that, in a certain sense, practice is primary in philosophy’ (Putnam 1994, p. 152).

<sup>40</sup>So does Habermas, but for different reasons — see below.

<sup>41</sup>See Mackie’s ‘argument from queerness’, discussed above.

cessful practice? Too many hasty readings of William James<sup>42</sup> in particular have contributed to dismissing pragmatic accounts of truth as dangerously reductionist ‘whatever works’ stories<sup>43</sup>: if the consequences of believing that  $p$  are good for humanity, then  $p$  is true.

If there is a trace of ‘humanization’ of truth in James’ account, it is in his insistence in viewing it as a ‘human instrument, and not as an idea that dropped from the sky’.<sup>44</sup> Instead of conceiving of truth as some neutral *correspondence* marker with an equally *neutral* world, James reminds us that there is no such thing as a ‘totality of observational facts’ fixed in advance to be described and ‘corresponded to’:

‘I, for my part, cannot escape the consideration, forced upon me at every turn, that the knower is not simply a mirror floating with no foothold anywhere, and passively reflecting an order that he comes upon and finds simply existing. The knower is an actor, and coefficient of the truth on one side, while on the other he registers the truth which he helps to create.’<sup>45</sup>

The key to James’ antiskepticism lies in the balance between his emphasis on our role as ‘coefficients of the truth on the one side’ and his insistence that we do share a common world, that we ‘register’ the truth which we help to create. It is against this ‘registered truth’ that we may find some of the assumptions underlying our practices wanting. No matter how successful these

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<sup>42</sup>The passage which is most often plucked out of context and used as a stick with which to beat James is the following: “the ‘true’ is only the expedient in the way of our thinking...in the long run and on the whole of course”. That is verbatim how Russell quotes it. As his critics read this, what James is saying is that if the consequences of believing that  $p$  are good for humanity, then  $p$  is true. [...] But this is not what James means; indeed it is not even what James *says*. What he actually wrote is: “*The true*”, to put it very briefly, is only the expedient in the way of our thinking, just as “*the right*” is only the expedient in the way of our behaving. Expedient in almost any fashion; and expedient in the long run and on the whole of course, for what meets expediently all the experience in sight won’t necessarily meet all further experiences equally satisfactorily’ (Putnam 1995, p. 8).

<sup>43</sup>Charles Taylor contributes to re-inforcing this myth when he denigrates what he calls the ‘more radical sense of pragmatism’, according to which ‘what we call “truth” doesn’t depend on getting it right, either in the sense of correspondence, or in any sense in which “illusion” would be the antonym. What we call the truth is what works for us, in the sense of what lets our crucial activities go forward in the most successful and unimpeded way’ (Taylor 2004, pp. 75-6).

<sup>44</sup>Putnam 1995, p. 21.

<sup>45</sup>James 1978, p. 21.

practices are, these assumptions may prove to be wrong. Far from denying the possibility of critically assessing the beliefs that are felt to be ‘indispensable’ to our practices, the pragmatist commitment to the primacy of practice simply denies the possibility of criticizing these beliefs without first acknowledging one’s ‘foothold’ in those very practices. There is no room, in other words, for an argument *à la Mackie*, denouncing a ‘metaphysical mistake’ on the basis of metaphysical dogmas.

While Rawls’ endeavour to develop a political conception of justice stemming from ‘certain fundamental intuitive ideas viewed as latent in the public political culture’<sup>46</sup> clearly partakes of a pragmatist commitment to the primacy of practice, his understanding of truth, by contrast, doesn’t have anything pragmatist about it. Despite Rawls’ best efforts to keep this issue at bay<sup>47</sup>, the very fact that he establishes a rift between reasonableness and truth<sup>48</sup> distances him from the pragmatist tradition.

Taking issue with this distinction, Habermas argues that Rawls need not have drawn such a rift, and could have understood “reasonable” in the sense of practical reason as synonymous with “morally true”.

‘By analogy with a nonsemantic concept of truth purified of all connotations of correspondence, one could understand “reasonable” as a predicate for the validity of normative statements’.<sup>49</sup>

Unfortunately, Rawls denies himself that possibility by maintaining that worldviews need not be true even when they are reasonable, and vice-versa. Pondering the reasons for this ‘perplexing usage’, Habermas wonders if ‘[a] possible motive might be the conviction that a profane, freestanding morality is untenable, that moral convictions must be embedded in metaphysical or

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<sup>46</sup>Rawls 1988, p. 252.

<sup>47</sup>See for instance Rawls 2005, p. 94, and p. 395: ‘Political liberalism views the idea of the reasonable as sufficient. The use of the concept of truth is not rejected or questioned, but left to comprehensive doctrines to use or deny’.

<sup>48</sup>Truth claims, Rawls contends, belong to the domain of the rational rather than the reasonable (see also Rawls 2005, p. 64). Many of his critics have taken issue with this ‘rationality v. reasonableness’ dichotomy: ‘any particular claim about the reasonableness of agreement among individuals holding otherwise disparate views similarly presupposes a structure of argumentation that necessarily relies heavily on truth claims, claims about how the world really is’ (Steinberger 2000, p. 164).

<sup>49</sup>Habermas 1999b, pp. 64-5.

religious doctrines'.<sup>50</sup> This would cohere with Rawls' acknowledgment of the 'vertigo' that would overcome 'us' were we to learn that our basic way of doing things lacks a 'foundation beyond itself'.<sup>51</sup>

This lingering quest for such 'foundation' —even if it is to remain firmly outside the scope of his *Political liberalism*— certainly contributes to Rawls only 'half-qualifying' as a pragmatist. What about Habermas? While he has long acknowledged a pragmatist influence —especially from Peirce's<sup>52</sup> concept of truth<sup>53</sup>— he 'has in fact struggled for years with the problem of how to maintain a Kantian bent toward universality in questions of justice, which entails maintaining a distinction between justice and the habits of ethical life, while at the same time questioning the traditional Kantian transcendentalism. Fallibilism and dialogical interaction are not properly addressed in traditional transcendentalism for Habermas, but they are privileged in the pragmatist tradition'.<sup>54</sup>

Over the years, this tension between Habermas' Kantian moorings and his pragmatist inclinations has resulted in his increasingly emphasising the fallibilistic nature of even the presuppositions of argumentation while at the same time seeking to preserve some 'lasting ground' for morality to counter 'irrationalism' —a word closely associated, in Habermas' works, with his experience of fascism. It may be that experience, according to Aboulafia, that stands in the way of Habermas ever proposing a 'full-blown' pragmatist theory; it may also be what lies at the root of his insistence, against Rawls, that

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<sup>50</sup>Habermas 1999b, p. 67.

<sup>51</sup>See quote on p. 11 -Rawls 2005, p. 379.

<sup>52</sup>'We [Habermas and Apel] perceived Peirce's pragmatist approach as a promise to save Kantian insights in a detranscendentalized yet analytical vein. That promise also pertained [...] to a reconciliation between Kant and Darwin, between a transcendental and evolutionary perspective' (Habermas 2002, p. 227).

<sup>53</sup>In *L'éthique de la discussion et la question de la vérité*, Habermas articulates two of his fundamental objectives: to defend a 'non-epistemic conception of truth' and to allow for 'the reconciliation of epistemological realism and moral constructivism'. Accordingly, he argues: 'While the truth of a proposition expresses a fact, in the case of moral judgments we do not find any equivalent, establishing, for a given situation, some state of affairs. A normative consensus, which is reached in the context of the free and inclusive conditions of practical discussion, establishes a valid norm. Valid norms don't exist.' (Habermas 2003, p. 77 —my translation). Compare with Peirce's concept of truth in *Collected papers*, vol. 5, par. 407, p. 268.

<sup>54</sup>Aboulafia 2002, p. 6.

‘the concept of the citizen as a moral person, which also underlies the concept of the fair cooperation of politically autonomous citizens, stands in the need of a *prior* justification’.<sup>55</sup>

**A ‘path’ for contemporary jurisprudence?** Take Rawls’ emphasis on the primacy of practice on one hand, and Habermas’ ‘non-epistemic conception of truth’ on the other hand: you have all the basic material for an ‘axiologically loaded’ account of law, without any of the trappings Hart and his followers were so keen to avoid. Now one may legitimately ask: what, if anything, would be entailed by imposing the pragmatist label upon such an account? Beyond a commitment to negating traditional dualisms (‘the world is addressed to us’) and ‘humanizing’ the notion of truth<sup>56</sup>, the pragmatic label would stand for an effort that aims in two directions:

On the one hand, a pragmatist account of law would have no space for any acrobatic acts of self-legislation: no room, in other words, for an endeavour to bridge the gap between is and ought by way of some heroic leap of Reason. Whether such legislative task of Reason deserves its Kantian credentials or not, both Rawls’ (in his insistence to maintain a ‘rift’ between reasonableness and truth) and Habermas’ (in his quest for some ‘lasting ground’) works may be said to be ‘tainted’ by this voluntarist temptation. ‘We will want to explain the arrival of intentionality and normativity as outgrowths of animal nature. There must be no unmoved mover: no intervention of the divine spark, or gifts from unexplained quarters. By these standards, as I have already suggested, invoking acts of self-legislation, will count as a failure. So will invoking self-standing and unexplained demands of reason, or self-standing and unexplained facts visible to reason. They will only postpone progress. It is not only that “ought” supervenes upon “is”, but also that there is nothing spooky about the way it does so.’ (Blackburn 2001, p. 150).

Debunking such voluntarist acrobatics need not, however, leave us with an irremediable sense of vertigo. A committed pragmatist ascertains his

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<sup>55</sup>Habermas 1999b, p. 59 (for Rawls, the conception of free and equal persons as rational and reasonable is itself ‘elicited from our moral experience’ —Rawls 1999, p. 514).

<sup>56</sup>This expression is from Putnam, indicating a commitment to viewing truth as a human instrument and ‘not as an idea that dropped from the sky’.

ground: unlike Kant's insistence that the CI itself can be constructively justified<sup>57</sup>, both Rawls and Habermas acknowledge that not everything can be constructed. Seeking to elaborate upon the 'ethos involved in the practice of democratic debate'<sup>58</sup>, Habermas is keenly aware of the limitations of political theories that have been 'uncoupled from a thick ethical context'.<sup>59</sup>

What about *legal* theories? I have argued elsewhere<sup>60</sup> that one of the great limitations of mainstream 20th Century legal philosophy consists in its inability to account for the social and cultural practices which condition and enable law's normativity. Hart's 'scant concern' for these practices (and Kelsen's stark 'methodological dualism') may not just be the natural expression of an analytic mind bent on accounting for the 'linguistic usage' of expressions such as law, validity, obligation etc. It may also be the indirect result of an inability to account for precisely such 'thick ethical context', without which law-making practices take on a bleak —and perhaps threateningly— arbitrary appearance.

'As historical and social beings we find ourselves always already in a linguistically structures life-world [...] The *logos* of language embodies the power of the intersubjective, which precedes and grounds the subjectivity of speakers [...] The unconditional meaning of truth and freedom is a necessary presupposition of our linguistic practices, but beyond the constituents of "our" form of life they lack any ontological guarantee.'<sup>61</sup>

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<sup>57</sup>'Kant depicts the edifice of human Reason as doomed to failure without a vindication of Reason' (? , p.357).

<sup>58</sup>'[D]emocratic debate, ideally, requires a *willingness* to listen and evaluate the opinions of one's opponents, *respecting* the view of minorities, advancing arguments *in good faith* to support one's convictions with new evidence or better arguments. There is an ethos involved in the practice of democratic debate.' (Bernstein 1996, p. 1131).

<sup>59</sup>'Political theories are likewise unable to answer the question of why the citizens of a democratic polity, when they disagree about the principles of their living together, should orient themselves toward the common good —and not rather satisfy themselves with a strategically negotiated *modus vivendi*. Theories of political justice that have been uncoupled from a thick ethical context can only *hope* that processes of socialization and political forms of life meet them halfway.' (Habermas 2004, p. 33).

<sup>60</sup>Delacroix 2006

<sup>61</sup>Habermas 2004, p. 39.

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