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Deweyan Pragmatism and the Challenge of Institutionalizing Justice under Transitional Circumstances

El pragmatismo de Deweyan y el desafío de institucionalizar la justicia en circunstancias transitorias

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Abstract

For the past thirty years, the Transitional Justice (TJ) research program has been undergoing a period of transition, simultaneously expanding and consolidating; in one sense, expanding its scope to encompass the measurement of TJ's impact and the redefinition of 'transitional' to include societies afflicted by deep social and economic injustice; and in a second sense, consolidating its practical approach to the promotion of democracy and peace, by developing best practices for institutionalizing TJ. While there have been advances in designing new TJ mechanisms and remedying the concept's under-theorization, little comparative progress has been made, to date, in offering a guiding framework for TJ's push to institutionalize. The thesis of this article is that philosophical pragmatism, specifically Deweyan pragmatism, offers a bevy of resources —a virtual tool-kit— for scholars and practitioners wishing to design TJ-friendly institutions within transitional societies.

Keywords: *Dewey, justice, democracy, institutions, state violence, reconciliation, pragmatism, international relations.*

Resumen

Durante los últimos treinta años, el programa de investigación de Justicia Transicional (TJ) ha experimentado un periodo de transición, expandiéndose y consolidándose simultáneamente; en un sentido, expandir su alcance a la medición del impacto de TJ y la redefinición de "transicional" para incluir sociedades afectadas por una profunda injusticia social y económica; y en un segundo sentido, consolidar su enfoque práctico para promover la democracia y la paz mediante el desarrollo de mejores prácticas para institucionalizar la TJ. Si bien ha habido avances en el diseño de nuevos mecanismos de TJ y en remediar la sub-teorización del concepto, hasta la fecha se ha realizado un pequeño progreso comparativo al ofrecer un marco guía para el impulso de TJ para institucionalizar. La tesis de este artículo es que el pragmatismo filosófico, específicamente el pragmatismo de Deweyan, ofrece una gran cantidad de recursos, un kit de herramientas virtual, para académicos y profesionales que desean diseñar instituciones amigables con los TJ dentro de las sociedades en transición.

Palabras clave: *Dewey, justiciar, democracia, instituciones, violencia estatal, reconciliación, pragmatism, relaciones internacionales.*

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Introduction

> *Philosophy recovers itself when it ceases to be a device for dealing with the problems of philosophers and becomes a method, cultivated by philosophers, for dealing with the problems of men.*
>
> —John Dewey (MW 10, p. 42)[1]

> *Transitional justice is . . . pragmatic in the sense that just responses to wrongdoing will offer a pragmatic resolution to the dilemmas inherent in transitional contexts.*
>
> —Colleen Murphy (2016, p. 19)[2]

At the intersection of Philosophical Pragmatism (PP) and Transitional Justice (TJ), there is a metaphorical void. Despite the declared interest of Classical Philosophical Pragmatists (such as John Dewey—see above) to address real-world issues, Contemporary Pragmatists have not leapt to the task of theorizing justice under transitional circumstances. Some commentators acknowledge the need for more collaboration between praxis-oriented IR scholars and Pragmatists (Kratchowil, 2019; Ralston, 2011b). Although Contemporary Pragmatists have become more attentive to the topic of justice, Philosophical Pragmatism has, for the most part, been silent on the topic of TJ.[3]

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[1] Citations are to *The Collected Works of John Dewey: Electronic Edition* (1996) [1882-1953], following the conventional method, LW (Later Works) or MW (Middle Works) or EW (Early Works), volume, page number. For example, EW 5, p. 93 refers to the Early Works, volume 5, page 93.

[2] This is Murphy's characterization of Ruti Teitel's (2002) seminal articulation of transitional justice, not Murphy's own account.

[3] There is a single edited collection devoted to the topic of Philosophical Pragmatism and justice, of which none of the chapters address justice under transitional

Meanwhile, the number of countries in transition, recovering from civil wars, genocides, colonialism, post-colonial dictatorships, and state-sanctioned violence, has ballooned in recent years (International Center for Transitional Justice 2014). Scholars have made advances in identifying transitional societies, designing TJ mechanisms, remedying the concept's under-theorization and broadening the research program's agenda to encompass social and economic justice (see, for instance Kritz, 1995, Murphy, 2017, Urueña & Prada, 2018). However, in all of these projects, Philosophical Pragmatists have not been among TJ's pioneers.

PP can assist the TJ research program insofar as it is conceptually well equipped to answer TJ's most pressing question: What is the best way to institutionalize justice under transitional circumstances? The thesis of this article is that *PP, specifically Deweyan pragmatism, offers a bevy of resources —a virtual tool-kit— for scholars and practitioners wishing to design TJ-friendly institutions for transitional societies*.

The article is organized in six sections. Section 1 offers an overview of the current state of the TJ literature and research program, which I contend are in a state of fluid transition, both expanding and consolidating in reaction to pressures from within and outside the scholarly community. Section 2 addresses three misconceptions TJ scholars harbor about PP. Section 3 sketches the classic pragmatist John Dewey's accounts of conflict, justice, and institutions, and how they can accommodate shortcomings in the TJ literature and TJ practice. Section 4 tackles TJ's institutional question within a Deweyan pragmatist framework, suggesting a new, expanded definition of a transitional society, a pluralist account of justice in transition and, finally, a flexible view of institutions that makes small-scale changes

circumstances. See Rondel & Voparil (2017). Another collection on Philosophical Pragmatism and international relations (Ralston, 2013) treats the subject only tangentially, through its relation to other areas of global politics (e.g., peacekeeping, international conflict, diplomacy). A promising recent addition to the literature on Philosophical Pragmatism and transitional justice is Lucas Lixinski's (2021) pragmatist treatment of cultural heritage law in the context of transitional societies.

and intermediate fixes acceptable outcomes. Section 5 examines the political situation on the Mediterranean island of Malta, treating it as a test case for a pragmatist framework for institutionalizing justice under transitional circumstances. Section 6 concludes with a brief summary of the practical and theoretical implications of a pragmatist-inspired TJ research agenda, as well as some plausible objections to the paper's conclusions.

I. TJ in Transition

The TJ research program is undergoing transition, simultaneously expanding and consolidating under pressure from TJ scholars and human rights practitioners alike. In one sense, it is expanding its scope to include within its definition of 'transitional societies' those countries afflicted by deep social and economic injustices, without recovering from war or genocide. In another, it is consolidating its traditionally practical outlook to focus on a question which implicates both theory and practice: How should institutions that realize the principles of TJ be designed?

In this section, I briefly describe the different phases or moments of the transition. This genealogical account concludes with the institutional moment, the most recent phase of TJ's trajectory, in which pragmatism, I argue, can render assistance to TJ scholars and the research program, generally, offering an expanded account of violence and the transitional, as well as more flexible tools to conceptualize pluralistic justice and institutional repair.

Definitions of TJ abound. The International Center for Transitional Justice (2018) defines TJ as "a response to systematic or widespread violations of human rights [that] . . . seeks recognition for the victims and to promote possibilities for peace, reconciliation, and democracy." TJ scholar Ruti Teitel (2003) understands it as "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes" (p. 69). Likewise, Colleen

Murphy (2016) conceives TJ as "formal attempts by postrepressive or postconflict societies to address past wrongdoing in their efforts to democratize" (1). Lastly, a concern for human rights is at the center of TJ discourse (Sikkink, 2011). Christine Bell (2009) sees TJ as "an ongoing battle against impunity rooted in human rights discourse; a set of conflict resolution techniques related to constitution-making; and a tool of international state-building in the aftermath of atrocity" (p. 13). Similar to some Contemporary Pragmatists (e.g., Caspary, 2000; Ralston, 2011c), Bell conceives the research program as a source of tools, techniques, and methods for resolving conflict and restoring government legitimacy and stability in the shadow of mass killings and state-sanctioned violence.

Transitional Societies and Corrective Mechanisms

According to Colleen Murphy (2015), there are four background conditions most TJ scholars agree identify a society as transitional: 1) *pervasive structural injustice*, 2) *collective and political wrongdoing*, 3) *moderately severe existential uncertainty* and 4) *fundamental uncertainty about authority* (8-9). Case studies can be found throughout the TJ literature, the most common of which address transitions in post-Apartheid South Africa, post-civil war Guatemala, and post-Mubarak Egypt.

In what Balasco (2013b) calls the "first wave of transitional justice," TJ scholars and human rights practitioners focused their energies on designing mechanisms to enable a country to transition from dictatorship to democracy. The operative question was, "What mechanisms need to be in place to address past human rights violations in order to transition to a democratic state?" (p. 200). After the conflict and during the transitional period, mechanisms to promote justice —such as legal trials, truth commissions, amnesties, reparations, lustrations, and memorials— are initiated by the regime or a neutral party to bring closure to a chapter of violence and repression

in a country's history.[4] Forgiveness, recognition, peace-making, and the restoration of victims' sense of dignity feature strongly in TJ mechanisms (Andrieu, 2010; Oettler, 2017).

TJ's Goals and Measuring Outcomes

Defining TJ is no easy task, simply because the research agenda encompasses so many diverse goals.[5] Goals of TJ, as stated in the literature, include: 1) Stopping human rights violations; 2) identifying human rights violators; 3) conducting investigations of claimed human rights abuses; 4) enabling national, group, and individual reconciliation; 5) punishing wrongdoers, including private citizens and state actors; 6) compensating victims of state repression and state-sanctioned violence; 7) anticipating and preventing future violence and repression; and 8) reforming institutions that undermine a just, democratic social order.[6] Some scholars judge the vagueness of TJ's goals as problematic for measuring its impact (Balasco, 2013b, Call, 2004).

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[4] Neil Kritz's (1995) multi-volume work on TJ, which is representative this first wave of TJ scholarship, profiles TJ mechanisms and the transitional societies where they have been implemented. For literature on a sampling of these mechanisms, see Slye (2002), Snyder & Vinjamuri (2003), Freeman (2006), Orford (2006), and Sikkink & Walling (2007).

[5] TJ emerged as a distinct area of research in the late 1980s and early 1990s, coinciding with the third wave of democratization in South America and the dissolution of the Soviet Union and Eastern Bloc, particularly as an outgrowth of peace studies, security studies, and international criminal law. See Andrieu (2010) and Balasco (2013a).

[6] Thomas Carothers (2002) insists that there are five assumptions underlying TJ, all of which are closely related to the goal of democracy promotion (pp. 6-8). First, countries recovering from dictatorships are in a period of transition toward democracy. Second, democratization happens in successive stages. Third, free and fair elections are crucial for the transition to be successful. Fourth, the economic, political, institutional, ethnic make-up and other unique characteristics of the country are not determinative of whether or not it transitions to a stable, peaceful democracy. Fifth, the reform or redesign of state institutions is necessary for a full transition to occur. This final assumption is the basis for TJ's institutionalization question.

Although TJ has a strongly normative orientation, it is also a research program devoted to empirical and comparative studies of country conflicts and regimes in transition. According to Balasco (2013b), in the early 2000s, TJ scholars were "confronted with an existential question: Does transitional justice accomplish what it was intended to fulfil?" In order to address this pivotal question, inquirers had to determine not only which outcomes of implementing TJ mechanisms to measure, but also how best to measure them – anecdotally, through rigorous data analysis, genealogical narratives, etc. Some, for instance, investigated how reparations were distributed using quantitative methods, including polls and random sampling (De Greiffe, 2009). Others examined the exclusion of women from TJ mechanisms by employing qualitative techniques, such as ethnographic interviews (Ross, 2010). Leading scholars in the TJ research program have called for more rigor and "evidence-based evaluations" to counteract demands by state and non-state perpetrators of violence to demand the same remedies and deferential treatment as the victims of injustice (Borzutsky 2017; Collins, 2010; Olsen et al., 2010; Uprimny & Saffron, 2006; Wiebelhaus-Brahm, 2010).

Remedying the Field's under-theorization

In its early years (1980s and 1990s), TJ was a policy-oriented research program with little scholarly investment in the development of theory (Kritz 1995). Most theory was borrowed from more theory oriented sub-disciplines, such as political philosophy and political theory. With time (early 2000s), TJ became more praxis-oriented, targeted at country studies and projects to build peace and promote post-conflict reconciliation. It became obvious that TJ's weakness was its undertheorization. Lund and McGovern (2008) criticized the small body of extant TJ theory for being *both* undertheorized and ethnocentric, based predominantly on a westernized, liberal notion of justice, wed to a teleology of democratization.

By the mid-2000s, TJ scholars began to remedy the research program's undertheorization problem. The first volume of essays exclusively addressing the theorization of TJ appeared in the following decade (Buckley-Zistel et al., 2014). Nevertheless, many of the program's theories of justice remained parasitic, rather than freestanding, relying on previously developed theories, especially the dominant Rawlsian approach in justice studies. Colleen Murphy (2017) has made strides in establishing a theory of transitional justice that differs from traditional theories of corrective, retributive, and distributive justice. TJ is distinctive, she argues, insofar as it presumes the full breakdown of rule of law and judicial mechanisms; whereas the other kinds of justice occur within a stable, functioning democracies, featuring only minimal structural injustice, little or no collective wrongdoing, a small degree of existential uncertainty, and isolated cases of vagueness about legal authority (Murphy, 2016).

Broadening the Research Agenda

Arguments for extending TJ beyond its traditional scope have proliferated over the past decade. Most commonly, these extensions involve accounting for socioeconomic limitations and how these limitations affect the adoption of TJ initiatives (Urueña & Prada, 2018). For most of the research program's life, TJ inquiries have been almost exclusively informed by frameworks and theories based on legal and quasi-legal approaches, especially in human rights law. However, as TJ's contact with a number of social sciences (e.g., geography, anthropology, and sociology) increased, the result of their interaction has been the inevitable broadening of the research program's agenda beyond law, including a strong emphasis on interdisciplinary inquiry (Arthur, 2009; Bell 2009). TJ and PP share this commitment to interdisciplinary exploration and cross-disciplinary sharing (Ralston, 2011a). TJ scholars have also begun to consider developmental constraints, given that a country's scarce resources could limit its ability to implement TJ measures and institutionalize long-term solutions (Duthie, 2008; Urueña & Prada, 2018).

The Institutional Moment

In what is now referred to as "fourth generation transitional justice," TJ scholars have taken a decidedly institutional turn (Sharp, 2013). Even some critical theorists, who would normally limit themselves to criticizing the dominant research paradigm, have chosen to refocus their energies on projects to create TJ solutions and design new institutions (Birjandian 2019). Several are based on "interrogating the peripheries" and correcting "some of the foundational blindspots and limitations of the field" (Sharp, 2019). Other scholars and practitioners have sought institutional fixes and discourse alterations that appropriately negotiate conflicting accounts of past events (Bell, Campbell & Aolain, 2004).

Instead of aiming for fundamental transformations of the social order (what is sometimes called "transformational justice"), these fourth generation TJ scholars adopt a more modest, incremental approach to institutional design in transitional societies, leading them to deploy mid-sized institutional fixes (McAuliffe, 2017b, p. 175). For example, in some transitional societies, institutionalization involves the creation of TJ ministries, miniature bureaucracies for administering small-scale transitional solutions (e.g., the building of memorials), initiated by domestic entrepreneurs rather than international bodies (McAuliffe, 2017a; Lamont et. al., 2019).

This institutional moment represents an opportunity for pragmatists to make their mark on the TJ research program. As I have discussed elsewhere, pragmatism, and especially Deweyan pragmatism, are entirely compatible with a focus on institutional design, in virtue of the twin emphases on methodological pluralism and the flexibility of inquiry, especially evident in Dewey's open-ended statements on what counts as suitably democratic political arrangements (Ralston, 2010; 2019b). Unfortunately, such collaboration has been blocked because of an assortment of mistaken views TJ scholars hold about pragmatism, to which we turn.

II. TJ's Mistaken View of Pragmatism

Despite the virtually non-existent intersection between the TJ and PP literatures, TJ scholars do make infrequent references to pragmatism, though more often to vulgar or simplistic characterizations of the concept. Here, 'pragmatic' means expeditious, situationally responsive, forward looking, and effective. For example, Colleen Murphy (2016) characterizes Ruti Teitel's approach to TJ as pragmatic: "Transitional justice is . . . pragmatic in the sense that just responses to wrongdoing will offer a pragmatic resolution to the dilemmas inherent in transitional contexts" (p. 19). Pragmatic for Murphy means situationally responsive or adaptive. However, most TJ scholars are guilty of pedestrian mistakes in this area too, mischaracterizing either pragmatism or its relation to justice studies. Besides casual references to pragmatism as being exclusively forward-looking, the three most common and serious mistakes are as follows: (1) miscalculating pragmatism as simple expediency, (2) mistaking pragmatists for IR Realists and (3) understanding pragmatists as exclusively non-ideal theorists of justice.

Although it could be objected that TJ scholars' criticisms of pragmatism are aimed at a shallow or vulgar version of the concept *exclusively*, not the more philosophical version, the two are closely related. For instance, Murphy's usage (above) indicates how TJ mechanisms confront contradictions by flexibly responding to unique country contexts and adapting to transitional situations. Context sensitivity is not only a characteristic of vulgar pragmatism, but also of its sophisticated cousin, Philosophical Pragmatism (Johnson, 2009, p. 45). As Michael Eldridge (2009) remarked, the adjectival and generic senses of pragmatism motivate the philosophically robust concept. Since these attacks aim at the weaker version, but pretend to undermine pragmatist accounts generally, these critiques of pragmatism resemble straw-person arguments.

Pragmatism is Simply Expediency by Another Name

TJ scholars often conflate pragmatism with expediency. For instance, Jack Snyder and Leslie Vinjamuri (2003) see pragmatism as an expedient method of reaching compromise through bargaining: "When enforcement power is weak, pragmatic bargaining may be an indispensable tool in getting perpetrators to relinquish power and desist from their abuses" (p. 12). Colleen Murphy (2016), likewise, argues that some advocates of TJ are too quick to embrace 'pragmatic considerations' —by which she means expedient— while neglecting moral concerns. When institutionalizing TJ through compromises (e.g. sacrificing fairness for post-conflict normalcy), pragmatists ignore morally complex claims by war crime victims about moral desert. In Murphy's words, "establishing a truth commission may be justified in a transitional context, but [not] summary executions [. . . for] reducing or ending violence is not only of pragmatic interest for those potentially targeted, but reflects a moral concern with preventing unnecessary suffering" (p. 9). While the point is well taken (that is, choosing any efficient means is not morally defensible), a so-called 'pragmatic interest' encompasses further commitments to experimentalism, fallibilism, context-sensitivity, and moral progress, not just expediency. Nevertheless, Murphy is correct that pragmatism offers a more transparently instrumentalist way of construing justice: namely, as an effective means to achieve a collectively chosen end.

Pragmatists are Disguised IR Realists

Jack Snyder and Leslie Vinjamuri (2004) present three lenses of TJ: (i) legal, (ii) pragmatist, and (iii) emotional-psychological. Similar to IR Realism, pragmatism guides the choice of TJ mechanisms by asking which options will consolidate power and advance the self-interest of specific actors, especially nation-states (p. 350). Since the project of post-conflict reconciliation and peacebuilding has predominantly fallen within the purview of IR Liberals, the identification of pragmatism with IR Realism pits it against TJ's

vision, mission, and goals. Pragmatists are thereby exiled to the camp of IR Realists and the history of *Realpolitik*.

The tendency of TJ scholars to equate Philosophical Pragmatists with IR Realists is likely due to a common error noted by Michael Eldridge (2009), namely, conflating the adjectival sense of pragmatism (*pragmatic* understood as opportunistic) or common-sense pragmatism (*pragmatism* as flexibly adaptive to situations) with the sophisticated philosophical sense (*Philosophical Pragmatism* as a commitment to experimentalism, fallibilism, pluralism, meliorism etc.). Since Realism indicates that nation-states behave opportunistically and react flexibly to the international situation in order to advance their interests, it is unsurprising that the Pragmatists would be equated with Realists (Weber, 2013). However, pragmatists such as Dewey expressly criticized the *Realpolitik* that characterized early versions of IR Realism. Dewey's approach to internationalism and endorsement of the Outlawry of War movement place him in the orbit of IR Liberals and Cosmopolitans, not IR Realists. He wished to fashion American foreign policy instruments to resolve global problems, not to simply weaponize it as a means to advance U.S. geopolitical interests (Ryder).

Pragmatists Theorize Justice Exclusively in Nonideal Terms

Rather than theorize justice under ideal or perfect conditions, Philosophical Pragmatists, according to the editors of the only collection on pragmatism and justice, show a unique concern for just arrangements, achieved under non-ideal circumstances: "Because pragmatists tend not to be involved in the search for 'perfect justice' —because justice is not, they think, the sort of thing one 'gets right' once and for all— they tend also not to be perturbed by the fact that judgments of justice and injustice suffer from a certain degree of vagueness and indeterminacy" (Dieleman, Rondel & Voparil, 2017, p. 6). Given this self-characterization, TJ scholars have also begun to characterize Philosophical Pragmatism as endorsing a non-ideal theory of justice or as anti-ideal theory *tout court*.

Unfortunately, this characterization casts pragmatists in an excessively simplistic light. For instance, Elizabeth Anderson (2010) insists that PPs' "method is unorthodox" insofar as it begins "from diagnosis of injustices in the actual world" (3). In actuality, Pragmatists' empirical method starts with specifying the background conditions of a problematic situation, not with diagnosis. Given TJ's history of negotiating its own undertheorization problem, welcoming a group of scholars into the TJ fold who are, according to them, opposed to ideal theory would not appear wise. To the contrary, though, as Festenstein (2017) reminds us, Dewey conceived ideals and ideal theory as regulative of inquiry, motivating inquirers toward grander achievements, rather than permitting them to simply settle for second-best alternatives. Relative to what I have called the "three cornerstones of pragmatism" (hope, growth, and progress), ideals and ideal theory regulate personal growth, guide inquiry toward successful outcomes, and inspire something closer to perfection than would otherwise be possible (Ralston, 2017, 2019b). Ideal theory is a recurrent feature of PP (Pappas, 2016). So, casting pragmatists as exclusively non-ideal theorists is counterproductive to any project of cooperation between contemporary pragmatists and TJ scholars.

III. Dewey on Violence, Transitions, and Justice

How can Philosophical Pragmatists and Philosophical Pragmatism, generally, assist the TJ research program in reconceptualizing violence, transitional, justice, and institution-building? John Dewey's writings on international relations, education, and politics offer new avenues towards understanding what events ought to trigger TJ measures, both domestically and internationally, and how intrusive or coercive these measures should ultimately be. Although Dewey and Deweyan Pragmatists cannot offer final solutions, they can suggest a bevy of situationally-flexible tools and novel pathways for tackling TJ issues. These include: (1) widening TJ's traditionally narrow justice horizon, or what are

considered to be relevant harms or injustices that TJ mechanisms can address, (2) reconstructing the meaning of transitional in terms of the Deweyan notion of justiciability and (3) enlarging TJ to encompass a pluralist notion of justice in transition.

Violence and a Wider Justice Horizon

Traditionally, TJ studies conceive conflict as a narrowly defined range of harms associated with international human rights abuses and violations of humanitarian law. Genocides, civil wars, terrorism, and unjustified violence against civilian populations fall within this narrow band of harm-inducing injustices. The victims of violence in transitional societies suffer from ills outside of physical harm though, including loss of voice, decreased sense of political agency, social ostracism, and feelings of shame, especially once the events gain international attention (McEvoy & McConnachie, 2013). Although TJ scholars and practitioners account for these non-physical harms resulting from conflict in transitional societies, the TJ research program has what critical theorists would call a "narrow justice horizon" (Sharp, 2019). Excluded from that horizon are many other forms of equally unjustified violence, much of which originates with the state and little of which is proscribed by international law. This category includes gender-based violence, violence against journalists, cultural violence, structural violence, and economic violence (Gready & Robins, 2014; Sharp 2018).

John Dewey's theory of value offers one avenue towards expanding TJ's narrow justice horizon. In "Some Questions about Value," Dewey articulated a theory of conflict in terms of value incommensurability. He notes that "at the present time serious *differences in valuing* are in fact treated as capable of settlement only by recourse to force and in so far the view in question has empirical support" (my emphasis). Force, by a state or nonstate actor, is only justified to settle conflicts that involve so-called "serious differences in valuing." He goes on: "This is the case in recourse to war, between nations, and in less obvious and complete ways

in domestic disputes between groups and in conflicts between classes." (MW 35, p. 107). Wars between nation-states should always be a last resort, reflecting deep value incommensurability between opposing regimes, peoples, and their ways of life. Justifying force requires the exhaustion of alternative means, such as diplomacy, deliberation, and negotiation. In the case of civil wars and genocides, or "domestic disputes between groups," the state has a duty to intervene. The extreme "differences in valuing" (in Dewey's words), or value incommensurability (in my own), between conflicting non-state actors or groups (e.g. the Hutus and Tutsis in the Rwandan genocide) make intervention incumbent upon the state. In the language of IR Constructivists, these domestic conflicts should trigger a norm, the duty or "responsibility to protect (R2P)" innocent civilians, consistent with which the state must act (Ralph, 2018). If the state fails to act to protect innocent civilians, or refuses to abide by the R2P norm, then it is complicit in the conflict. During the post-conflict period, evidence of human rights abuses should trigger appropriate TJ measures, whether lustrations to eliminate the responsible state officials, the building of memorials to commemorate the victims, or the holding of trials to ascertain the historical truth and how to achieve reconciliation within the affected communities.

Justiciability and the Transitional

Dewey's expanded definition of violence also suggests an alternative account of the transitional in TJ. After noting that value incommensurability precipitates justified conflict in "Some Questions about Value," Dewey (1996/1944) elaborates a crucial distinction: "In *international relations short of war*, the view is practically taken in acceptance of an ultimate difference between '*justiciable*' and '*non-justiciable' disputes*" (my emphasis) (MW 35, p. 108). A justiciable dispute is one that can be settled by the courts, judges, judicial panels, legal processes, etc. A non-justiciable dispute, cannot. Rather than focus on the dispute itself, in societies that are questionably transitional, we should instead survey the

institutional background conditions and ask: Is there rule of law? Are there suitably impartial judges? Is there a non-politicized judicial system in place? Are there institutions of justice that can reliably deliver outcomes that are widely perceived as just, not simply the dictates of the ruling political party?

On this Dewey-inspired definition of 'transitional', TJ is unique insofar as it applies to societies with specific features that mark its institutions of justice as overwhelmingly defective or unstable because disagreements are no longer justiciable, such as (1) laws that are not widely enforced, (2) state actors who commit crimes with impunity, (3) government sanctioned violence against individuals or groups (e.g. dissidents and civil society activists), and (4) little trust that the government is a fair and impartial party with the legitimate power to create and enforce norms.

The terrain of transitional justice overlaps, to some degree, with ordinary justice insofar conflict associated with rule of law breakdown should trigger TJ processes. Posner and Vermeule (2004) insist that "[i]f transitional justice is continuous with ordinary justice, then there is no reason to treat transitional justice measures as presumptively suspect on either moral or institutional grounds, unless we are to treat the justice systems of consolidated liberal democracies as suspect as well" (p. 764). This position directly challenges Murphy's contention that TJ is distinctive insofar as it is discontinuous with ordinary justice. Recall that Murphy demands that there is a full breakdown of rule of law and judicial mechanisms in order to trigger TJ. However, Dewey's notion of *justiciability* bridges the gap between the two positions, offering a third way: namely, if in the wake of conflict and impunity for mass rape, murder and torture the situation cannot be resolved through judicial means (that is, they are *injusticiable*), then the implementation of smaller-scale TJ measures are *prima facie* warranted. Ordinary justice does not usually have contingency plans for its own breakdown (except perhaps the adoption of martial law) and TJ on Murphy's account does not allow for borderline cases, where there still exist vestiges of rule of law and democratic governance,

but the institutions and practices are so defective that resolving the conflict at hand proves impossible. The Deweyan alternative —based on Dewey's distinction between *justiciable and injusticiable disputes*— offers a contingency plan when ordinary justice cannot deliver and traditional TJ cannot accommodate borderline cases.

Pluralist Justice in Transition

In John Dewey's lifetime, the notion of a global political order emerged as dominant theme in his writings, especially during the years immediately prior to the United States' entrance into WWI. The international order, he insisted, demands more than protocols, bilateral treaties and trade agreements. In a global environment of competing nation-states, international institutions are commonly designed to promote peace, but in fact they are incapable of it. At best, they can reconstruct societies torn asunder by the inevitable stream of wars, civil wars and regional conflicts. Though the emergence of the TJ paradigm was still many years off, Dewey anticipated it in his critique of peacekeeping.[7]

For Dewey, peacekeeping is a negative ideal insofar as it presumes that the conditions engendering conflict between nations are perpetually fixed. Disrupting peaceful relations is of course harmful, he writes in *Democracy and Education,* when it upends the "fruitful processes of cooperation" (MW, p. 203). Instead of preserving peace, though, nation-states should aim to realize a positive ideal in the world order, namely the "furtherance of the breadth and depth of human intercourse" irrespective of differences in class or race, geography, or national boundaries (MW 8, pp. 203 - 204). The realization of this pluralistic ideal of justice on a global scale thus requires international and domestic institutions

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[7] For another view on Philosophical Pragmatism and peacekeeping, see Shields and Souters (2013). More than Dewey, Jane Addams was involved in the pursuit of lasting international peace through post-conflict reconstruction, especially in the wake of WWI. See Shields (2017).

to further human association as broad as humanity —a view that approximates what would nowadays be called Liberal Internationalism or Cosmopolitanism, not IR Realism.

On a more localized level, pluralist justice in transition means investing in institutions —schools, civic associations, sports clubs, deliberative assemblies, etc.— that bring people of different tribes, neighborhoods, races, ethnicities, and socio-economic classes together and into dialogue. In *The Public and Its Problems*, Dewey (1996/1927) insisted that the formation of "common meanings" through communication contributes to the creation of a "community of interest and endeavor" (LW 2, p. 124). Likewise, in *Democracy and Education*, he describes how the school becomes a community for the "intermingling of youth of different races, differing religions, and unlike customs," and thus constitutes a "broader environment" of discourse and tolerance (MW 9, pp. 25-26). Through dialogue comes understanding and the appreciation of differences. Through understanding and the appreciation of differences come shared values (or value commensurability). And through shared values, the conditions to avoid balkanization, conflict, and genocidal violence are instituted.

A Pragmatist Account of Institutions

For Dewey, institutions consist of funded beliefs and habits — what organizational theorists call 'organizational culture'— the accretion of which have created objective organizations and agencies that persist in space and time.[8] According to Dewey, "[t]

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[8] By habit, Dewey does not just mean a rutted channel or encrusted pattern of past behavior. Habits are live with values, virtues, and possibilities for intelligent action. Dewey explains why he chose to employ the word 'habit' as the repository of both values and virtues: "But we need a word ['habit'] to express that kind of human activity which is influenced by prior activity and in that sense acquired; which contains within itself a certain ordering or systematization of minor elements of action; which is projective, dynamic in quality, ready for overt manifestation; and which is operative in some subdued subordinate form even when not obviously dominating activity" (MW 14, p. 31).

o say . . . [something] is institutionalized is to say that it involves a tough body of customs, ingrained habits of actions, organized and authorized standards and methods of procedure" (LW 3, p. 153). So, ideas and ideals do not exhaust political experience; for their meaning to be suitably enriched, they should also manifest in stable political forms. However, ideals qualify the stability of institutional forms, permitting them to organically develop through critical scrutiny and reform.[9] While Dewey acknowledges that successful "institutions . . . are stable and enduring," their stability is "only relatively fixed" because "they constitute the structure of the processes that go on . . . and are not forced upon processes from without" (LW 14, p. 119). In Hegel's (2018/1807) philosophy of right, the dialectical opposition between intellect and sense gradually transforms into self-consciousness and social institutions from a raw physical world; ultimately, they are reconciled in the Absolute, where "the real is rational, and the rational is real." Although Dewey's Hegel-influenced pragmatism dispenses with the Absolute, it retains a concern for how ideas and ideals directly influence the growth of those habit-funded processes called institutions.[10]

Emphasizing institutions does not preclude concern for individuals, though. Indeed, personal growth is, for Dewey, a precondition for institutional development, for "individuals who are democratic in thought and action are the sole final warrant for the existence and endurance of democratic institutions" (LW 14, p. 92). So, as not to pre-emptively foreclose the many possible avenues before us, Dewey purposely avoided recommending a set of institutional arrangements or a final destination in the quest to realize a better form of democracy. In stark contrast, Francis Fukuyama (1989) declares that by the latter

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[9] In Dewey's words, "[i]deals . . . that are not embodied in institutions are of little avail" (LW 7, p. 10).

[10] Dewey credits the "Hegelian deposit" in his philosophy in his autobiographical essay "From Absolutism to Experimentalism" (LW 5, pp. 147-159).

half of the twentieth-century "the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government" had been reached (p. 210). Rather than advocate for "political democracy" or a discrete set of political institutions (in Fukuyama's case, liberal democratic ones), Dewey proposed a set of leading principles or postulations that together are termed the "social idea" of democracy (LW 2, p. 325).[11] As postulations, these ideas are intended to direct subsequent investigations into the design of a stable and viable governing apparatus; however, taken alone, they have no direct correspondence with any particular set of institutions.[12]

Dewey understands democracy as an open-ended struggle to achieve an emancipatory ideal which enriches individual and communal experiences. Although "the measure of the worth of any social institution" is usually its "limited and more immediately practical" consequences, what the measure should be, Dewey insists, is "its effect in enlarging and improving experience."[13] Realizing the ideal (i.e., the social idea of democracy) usually requires institutional change. In Dewey's words, "institutions exist for people, not the other way around. Institutions are means and agencies of human welfare and progress and should be judged by how well they serve those ends"

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[11] Similar to Fukuyama (1989), though, Dewey defines political democracy in liberal-democratic terms, that is, as those "traditional political institutions" which include "general suffrage, elected representatives, [and] majority rule" (LW 2, p. 325).

[12] Dewey's reluctance to specify model institutions that realize his democratic ideal is mirrored in the aversion that contemporary critical theorists have to institutional design. According to Schultz (2009), "Dewey resisted calls for him to develop a specific model of democratic government, arguing that it must look differently in different contexts" (p. 288). Dryzek (1987) explains: "Overly precise specification of model institutions involves skating on thin ice. Far better, perhaps, to leave any such specification to the individual involved. The appropriate configuration will depend on the constraints and opportunities of the existing social situation, the cultural tradition(s) to which the participants subscribe, and the capabilities and desires of these actors" (p. 665) See also Ralston (2019b), Westbrook (1991).

[13] Further on, Dewey writes: "[T]he ultimate value of every institution is its distinctively human effect—its effect upon conscious experience . . ." (MW 9, pp. 9-10).

(LW 14, p. 93). However, Dewey does not presume to know —let alone recommend— the exact character or even the general direction of that institutional change in advance of its determination by the people and institutions of actual political democracies (e.g., elections, commissions of inquiry, judicial decisions, and regulatory agency rulings). Generating social and political reforms demands institutional transformation. However, the instrumentalities of change should not be preordained by a philosopher. According to David Waddington (2008), Dewey "refuse[d] to specify the shape of social change in advance. If social change is to be truly democratic, it needs to be placed in the hands of the demos, in the hands of the workers and citizens who will actually make the change" (p. 62). Specifying the right political-institutional technology to obtain social change would block opportunities for citizens to develop competencies through their own participation in the process.

In this way, Dewey was a more complicated political theorist than most commentators (e.g., Anderson, 2010, p. 3) give him credit. The orientation of his political theorizing is neither thoroughly ideal, nor entirely non-ideal (Ralston, 2010). He communicates the aspirational dimension of democratic transformation without stipulating the exact mechanisms or outcomes of institutional change. Unlike Rawls (1971), he does not specify two principles of justice or anticipate the outcome of an idealized choice situation (i.e., deliberations in the Original Position). Unlike Nozick (1974), he does not specify the scope of authority that should be legitimately wielded by a government (i.e., a minimalist state). The reason for his intentional vagueness on these points is the avoidance of foreclosing future possibilities for development by institutional designers. Thus, for Dewey's heirs, it is left to contemplate particular tactics, strategies, and fixes when actual cases of institutional breakdown and transition occur—to which we now turn.

A Maltese Case Study

No inquiry into the question of how to institutionalize TJ in transitional societies would be complete without at least one case study.

Much of the extant literature addresses TJ cases outside Europe—for instance, in post-Apartheid South Africa (Allais, 2012, and van Zyl, 1999), Ethiopia (Denbel, 2013, and Sarkin, 1999), and Chile (Borzutsky, 2017, and Collins, 2010). Instead, the present inquiry examines a transitional society in North Africa/Europe, a dysfunctional democracy and former British colony plagued by official corruption, state-sanctioned violence, abuse of executive power, rule of law breakdown, and civil society suppression: the Mediterranean island-nation of Malta.

Transitional societies commonly feature more salient and exaggerated institutional characteristics than are typical in normal, stable, or non-transitional democratic societies (Posner & Vermeule, 2004). Malta clearly belongs to the category of 'transitional societies' in the enlarged pragmatist sense—that is, a transforming society. It displays evidence of institutional dysfunction but glimmers of hope for repair: 1) political capture of state regulatory bodies, 2) bribery and kickbacks to corrupt state actors, 3) rule of law breakdown, 4) abuse of executive power, 5) suppression of free speech, 6) civil society repression, 7) state-sanctioned violence against private citizens, especially journalists, and 8) refusals by corrupt state actors to resign. However, unlike most traditional transitional societies, it has not suffered war or genocide since colonization.

Arguably, Malta has been in a period of transition ever since either its independence (1964) or its transformation into a republic (1974). The worst state violence occurred in the late 1980s, when the country was on the verge of civil war, a period often referred to as the "Mintoff years" (after Dom Mintoff, the Prime Minister and Labour Party Leader). As Thomas Carothers (2002) observes, most postcolonial, developing nations whose political systems are plagued by corruption, abuse of power, state violence, and civil society repression stay in transitional purgatory, a "precarious middle ground between full-fledged democracy and outright dictatorship," and this becomes their perpetual "state of normality" (pp. 17-18). The return of the Maltese Labour Party to power in

2013 brought with it a new wave of corruption, and, by 2017, one of the most extreme acts of violence against a Maltese citizen: the assassination of Labour Party critic and investigative journalist Daphne Caruana Galizia. With the rule of law breakdown, an inquiry into the murder has been long delayed. Since justice delayed is justice denied, regime critics and investigative journalists fear that any attempt to prod the corrupt leadership to undertake the inquiry will only lead to retaliation, thus undermining a process of healing and reconciliation.

It might be objected that any project to foster transitional justice in Malta would require institutional overhaul on the scale of demolition and rebuilding. Public corruption is rampant. Practically all political institutions are compromised. Political assassination and tribal cronyism have become normalized. Instead, on Deweyan model, TJ would involve the deployment of small interventions that undercut the status quo, end the ómerta among political elites, and empower civil society and supporters of an inquiry into journalist Daphne Caruana Galizia's assassination. A spirit of experimentation would have to pervade any Deweyan project to engender a healthy transition for Malta to a more just society, through peace and reconciliation, not force and violence.

IV. Conclusion

Whether transitioning from a brutal civil war to a peacetime regime in Libya or Syria, or instituting lustrations of corrupt politicians responsible for the assassination of journalists in Malta or Croatia, genuine change begs for experimentation with alternative institutional forms. James Campbell (1995) contends that pragmatist policy-making should resemble an open-ended experimental program: "[A]ll policy measures should be envisioned as experiments to be tested in their future consequences. As a consequence of this testing, the program will undergo ongoing revision" (pp. 207-208). Likewise, Dewey writes, "[t]hinking ends in experiment and experiment is an actual alteration of a physically antecedent situation in those

details or respects which called for thought in order to do away with some evil [or problem]" (MW 10, p. 339, emphasis in the original). Given the experimental thrust of institutional makeovers, long-term consequences are often uncertain, even to those who initiate them. As Dewey observes, "the great social changes which have produced new social institutions have been the cumulative effect of flank movements that were not obvious at the time of their origin" (LW 14, p. 96). Likewise, pragmatist theorizing about political institutions could, either intentionally or inadvertently, contribute to these "flank movements" that beget institutional change.

Indeed, there is circumstantial historical evidence for this account, such as the immense influence Dewey and other Classic American Pragmatists' ideas had on the Progressive movement of the early twentieth-century; and, more recently, some of the language and concepts of Contemporary Pragmatism that seeped into Barack Obama's domestic and foreign policy statements.[14] If they continue on this trajectory, it would appear that Philosophical Pragmatists might have their ideas and ideals realized in the design of new institutions and the reconstruction of old ones. Of course, there is also the risk that these Pragmatist ideas and ideals will be diluted or distorted in the process of institutionalization (Ish-Shalom, 2009).

Whatever the outcome of specific institutional recommendations, the marriage of institutionalism and Philosophical Pragmatism appears to remedy some of the problems in the TJ research program. Although Dewey refused to specify the right institutional make-up in advance, so as not to foreclose opportunities for genuine experimentation and democratic choice, he offers improved way of understanding institutions compared to the orthodox views in the current TJ literature. Institutions are not simply large-scale, fixed background structures, or even mid-scale prototype projects (e.g., TJ ministries). They can also resemble

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[14] For accounts of pragmatism's influence on Obama's policies, see Eldridge (2011), Ralston (2011a), Aboulafia (2009), Schultz (2009), and Sunstein (2008).

smaller-scale experimental approaches and interventions to in-grained patterns of habitual and culturally-informed activity (e.g., institutionally-licensed violence, corruption, and exploitation). Similar to Robert Goodin's mini-publics, these might be termed 'mini-institutions' insofar as they present micro-experiments in institutional design. Some Deweyan mini-institutions that could assist in the enactment of TJ initiatives include: (1) Remembran-ce education programs (Ralston, 2019a), (2) community-based deliberative forums (Ralston, 2008; Shook, 2013), (3) gardening projects (Ralston, 2012), and (4) judicial reform experiments. However, Dewey recommended none of these institutions (or mini-institutions), for he wished to leave the question of appro-priate political technology open-ended (Ralston, 2019a). That is where political agency enters the picture.

One possible objection to my account is that PP is too forward-looking to support the institutionalization of TJ. Deweyan prag-matism, in particular, converts all TJ mechanisms into instrumen-talities that serve to address future conditions, contingencies, and problematic features of situations. There are two defects with this objection. One, it relies on the vulgar version of pragmatism as tho-roughly prospective in nature (Eldridge, 2009). Two, this objection fails to grasp the orientation of pragmatist inquiry towards present and past problems, not simply future issues (Koopman, 2009).

Another more plausible objection is that PP is unnecessary, given that Liberalism already possesses the resources to motivate micro-institutional fixes in countries undergoing transition and regime instability. As mentioned, Dewey's own involvements in international politics align closely with the Liberal outlook. So, PP might be a superfluous addition to IR theoretical approaches applied to TJ problems. However, what PP adds to Liberalism is a more experimental outlook, a commitment to ongoing in-quiry, tentatively deployed institutional fixes, and a readiness to concede error and change course when these purported fixes fail. Unfortunately, Liberal foreign policy plans do not always

produce positive global outcomes (e.g. Wilson's "making the world safe for democracy" and its more recent incarnation as the Bush Doctrine) (Ralston, 2009). A Pragmatist foreign policy approach can easily pivot in the face of failure, since it lacks strong ideological commitments (Ryder, 2009). Likewise, Philosophical Pragmatism indicates a thoroughgoing experimentalist orientation to Transitional Justice.

In sum, PP offers TJ (1) a wider justice horizon, (2) a reconstructed notion of transition, improved by the relevant Deweyan notion of justiciability, and (3) an expanded pluralist notion of justice in transition. Although Deweyan pragmatism does not settle ultimate questions about, for instance, when foreign intervention in the domestic affairs of countries in transition are justified, it does suggest an assortment of conceptual tools, micro-institutional fixes, and inquiry-driven processes (e.g., remembrance education), in order to effectively address TJ issues. For these reasons, it should not be overlooked, misrepresented, or conflated with existing TJ and IR approaches.

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