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THINKING THINGS, NOT WORDS: IRVIN RUTTER'S PRAGMATIC JURISPRUDENCE OF TEACHING

Gordon A. Christenson*

Those of us in legal education and in the profession of law are in debt to the Law Review for publishing in this issue the last work of the late Professor Irvin Rutter, Law, Language, and Thinking Like a Lawyer.¹ In his study of Karl Llewellyn and American Legal Realism, William Twining wrote:

At the University of Cincinnati Professor Irvin C. Rutter in conjunction with a series of particular courses developed the best theoretical analysis of lawyers' operations that has yet appeared in print.²

On the occasion of Irvin Rutter's retirement in 1980, I briefly summarized these earlier contributions, locating them within the legal realist tradition, and we awaited the publication of his last work, then still in draft not quite satisfactory to Professor Rutter.³ In this essay, I situate his final work on teaching law in the pragmatist tradition with special emphasis on Charles Sanders Peirce. I also try to relate the work to scholarly and critical inquiries about law that were just emerging as Rutter completed his 1977 draft.

A Teaching Pragmatic

Rutter's earlier work, a jurisprudence of lawyers' operations and applied skills, led Karl Llewellyn to organize a plenary session at the 1961 annual meeting of the Association of American Law Schools focused on Rutter's work.⁴ Rutter completed both curricular and scholarly projects by constructing the Applied Skills Program at the University of Cincinnati College of Law and publishing his theses.⁵ Finally, in the mid-eighties, Rutter authorized me to help him find a publisher (after I had passed on from Yale Law School Myres Mc-

* University Professor of Law, University of Cincinnati College of Law.
3. Gordon Christenson, Irvin C. Rutter, 49 U. Cin. L. Rev. 337 (1980). There, I pointed out that Rutter studied at Columbia Law School with the great legal realists who were completely rethinking legal education during the 1920s and early 1930s. These included Karl Llewellyn, William O. Douglas, Herman Oliphant and Walter Wheeler Cook, among others. Id. at 337.
Dougal’s plea to publish it). Grounded in legal realism, this work was not then of interest to the law reviews or else they wanted it updated to include more recent scholarship in hermeneutics, critical thinking, and post-realist jurisprudential developments from this country and the post-structuralists or deconstructionists from the Continent.6

As a fresh reading will reveal, Rutter had anticipated many problems and contradictions. He had chosen explicitly to keep his project simple, focused on fact-skepticism and language, and instrumentally in the “how” of teaching lawyers to think specific things and events, not abstract words. That choice now seems a virtue. The work left off in 1977. While it may seem too embedded in realist instrumentalism7 instead of theorizing about justice and value choices or uncovering deceptions and illusory choices, it does offer a strength and purpose far broader than a pure “how to” manual. Its core method has an intellectual “praxis” or practical rigor that anticipated, perhaps better than the realists did, many questions now before us in current scholarship.8 In the “how” of showing students and lawyers to think words and events, not abstractions, Rutter’s project provides a sorely needed communicative link between the academy and the profession. It sees print just as the McCrate Commission’s final report on bridging this gap, especially in skills training and values, has once again asked what it is that law schools and the bar ought to teach and learn.9

6. That Rutter knew of these questions is clear in examining his text carefully. See, e.g., Rutter, supra note 1, at 1318, 1323 (semantics and values); id. at 1324-25, 1331 (deconstruction or deception); id. at 1331-33 (refining “reification” of language and the argument against essentialism); id. at 1341-42 (language and multiculturalism or race); id. at 1349-50 (skepticism about neutral principles); id. at 1345-46 (factual character of rules of law); id. at 1354 (“the community” needs visualization); id. at 1327 (nonverbal “traces”); id. at 1325, 1350-51 (indeterminacy of language); id. at 1323-25 (events and things; social facts as value descriptions).


8. Comments to Rutter on the preliminary circulation in 1977 included those of Myres S. McDougal of the Yale Law School: “The most profound study of law and semantics I have seen. It makes most of the points the American legal realists made, but much more clearly and persuasively than they ever made them.” Then Chief Judge of the New York Court of Appeals, Charles D. Breitel, also wrote Rutter: “Magnificent, and as important as was Llewellyn’s The Bramble Bush.” Verified from private papers of Irvin C. Rutter.

9. Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, ABA, Sec. of Legal Education and Admission to the Bar, Robert MacCrate, Esq., Chairperson (July 1992) (identifying “fundamental skills and values to be acquired”).
Law, Language, and Thinking Like a Lawyer begins with the famous Holmes adage from an address to lawyers on law and science. Holmes said that we must use law language to "think things not words."10 In his work's introduction, Rutter links "reality" of particulars in the external world (or things and events) to thinking, using language for both facts and thinking. When Rutter then narrows his focus to how "thinking like a lawyer" can be taught and achieved as a "life-long development of learning by experience," he plunges us deceptively, perhaps ironically, into semantics, semiotics, pragmatism, linguistics, psychology, psycholinguistics, and anthropology but without grand theorizing.11 Actually, Charles Sanders Peirce had used similar words in his essay, How to Make Our Ideas Clear, generally thought to contain the earliest published kernel of Peirce's pragmatic theory of logical meaning for scientific con-

10. Rutter opened his work with the entire enigmatic quote: "We must think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep the real and true." Oliver W. Holmes, Law in Science and Science in Law, 12 HARV. L. REV. 443, 460 (1899). Judge Posner commented, in comparing Holmes to Nietzsche, that this adage illustrated Holmes's "antimentalism"; "[b]ut a highly referential theory of language is compatible with a disdain for abstraction (as in Bentham); what is not a thing, is nothing." RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 241 n.30 (1990). Will Durant, in discussing the ancient paradoxes of Zeno (e.g., any body such as an arrow in order to move to point A, a tree, must reach B, the middle of its course toward A, but to arrive at B it must first reach C, the middle of its course toward B, and so on to infinity, so that an arrow logically never reaches its destination), said that these discussions may continue—as they have from Plato to Bertrand Russell—"so long as words are mistaken for things." The assumption that "infinity" is a thing instead of merely a word indicating the inability of the mind to conceive an absolute end invalidates the puzzle. 2 WILL DURANT, THE STORY OF CIVILIZATION 351 (1939); see also ERNST GELLNER, WORDS AND THINGS (rev. ed. 1959).

11. Rutter greatly admired WILLIAM R. BISH & CHRISTOPHER D. STONE, LAW, LANGUAGE, AND ETHICS (1972), a path-breaking course-book for law schools. It spawned much work in philosophical underpinnings of law, fact, and language. But Rutter thought that most law students, in contrast to professors, also needed a theory of practical skills. Richard Posner, who finds the new pragmatism bracing, thinks the most important thing law schools do for students is to impart a "feel for the outer bounds of permissible legal argumentation at the time when the education is being imparted." POSNER, supra note 10, at 100. He stated:

What "thinking like a lawyer" means is not the use of special analytic powers but an awareness of approximately how plastic law is at the frontiers—neither infinitely plastic, as a Thrasymachus might think, nor rigid and predetermined, as many laypersons think—and of the permissible "moves" in arguing for, or against, a change in the law. It is neither method nor doctrine, but a repertoire of acceptable arguments and a feel for the degree and character of doctrinal stability, or, more generally, for the contours of a professional culture—a professional culture lovable to some, hateful to others.
cepts. At the time it differed from the pragmatic theory of truth or belief associated with William James:

One singular deception . . . [imaginary distinctions drawn between beliefs which differ only in their mode of expression] is to mistake the sensation produced by our own uncleanness of thought for a character of the object we are thinking. Instead of perceiving that the obscurity is purely subjective, we fancy that we contemplate a quality of the object which is essentially mysterious; and if our conception be afterward presented to us in a clear form we do not recognize it as the same, owing to the absence of the feeling of unintelligibility. . . . Another such deception is to mistake a mere difference in the grammatical construction of two words for a distinction between the ideas they express. In this pedantic age, when the general mob of writers attend so much more to words than to things, this error is common enough.  


[Until people become gods]—which will never be—they will live with the sense of the tragic in their hearts as they go in quest for wisdom.

Pragmatism, as I interpret it, is the theory and practice of enlarging human freedom in a precarious and tragic world by the arts of intelligent social control.

Id. at 25.

13. Charles S. Peirce, Illustrations of the Logic of Science, Second Paper—How to Make Our Ideas Clear, 12 Popular Sci. Monthly, Jan. 1978, at 286-302 (emphasis added). Compare Peirce's thinking to the discussion of Zeno's paradox of the arrow for a concrete image. See supra note 10. Holmes, James, and Peirce all were members of the "Metaphysics Club" in Boston beginning about 1870 and lasting for a few years, where they attacked the old metaphysics of absolutism and the a priori method and favored scientific Darwinism and experimentation. Apparently, Peirce presented a paper to the Club in 1870 mentioning "pragmatism" from the Greek "practical" or "praxis." James borrowed the term, but later resurrected Peirce in his 1898 lecture, "Philosophical Conceptions and Practical Results," reminding the philosophical world of Peirce's 1878 article as the foundation of pragmatism. Peirce still later used "pragmaticism," probably to try to salvage some credit, but also because he had credited someone else for the term "pragmatism." Just how much Holmes was influenced by either Peirce or James is open to conjecture and remains unclear. See Thomas C. Grey, Holmes and Legal Pragmatism, 41 Stan. L. Rev. 787, app. (1989). Mark Howe doubted any influence, as did G. Edward White. Mark D. Howe, Justice Oliver Wendell Holmes: The Proving Years, 1870-1882, 75 (1963); G. Edward White, Looking at Holmes in the Mirror, 4 Law & Hist. Rev. 440 (1986). Morton White connected Holmes with the Metaphysical Club. Morton White, Social Thought in America 62 (1947). Other scholars agree with Morton White. F.R. Kellogg, Formative Essays of Justice Holmes (1984); Max H. Fisch, Justice Holmes, The Prediction Theory of Law and Pragmatism, 39 J. Phil. 85 (1942); Jerome
While Rutter cited to Peirce,\(^1\) he made no attempt to connect the adage he called Holmes’s “isolated ornament dropped to float in no readily discernible context”\(^2\) to either Peirce’s or James’s pragmatism. Rutter did keep a connection to Holmes’s legal realism, no doubt related. He simply resisted—explicitly—venturing into philosophical underpinnings of “truth” or “reality” or “meaning” and accepted the common sense intuition of external reality of things and events that language could reflect and impress with meaning.\(^3\) Nor did Rutter see any point in belaboring subjective or ideological world-views of value or culture concealed in language, thought, and legal process or the contradictions within them. Beyond doubt, he knew they were there. Were he, however, to have pursued theoretical relationships between perception, fact, value, and thought, he would have strayed from the effectiveness of his teaching methodology.

Rutter was sophisticated; better, we should say he was learned. In Part II of the work, for example, he described the theoretical sources he drew upon for understanding the relationship between language and thinking. That various languages (such as those in other disciplines and in diverse cultures) have selected different interpretations from the same nonverbal world, he saw clearly. Rutter then had to accept the conclusion that the meaning of language cannot be meaning-free or neutral. In Part III, he applied this understanding of the structure of language to show us examples of why rules as words, as in the plain meaning rule, cannot be free-floating in meaning disconnected from a contextual reality of the nonverbal world.\(^4\) The irony we can now fully appreciate lies in his aside that Holmes’s adage itself free-floated.

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\(^1\) Rutter, supra note 1, at 1313 n.18 (mentioning only that the linguistic insights of Peirce were expanded by William James in Pragmatism (1907), leaving open Peirce’s originality not appreciated by James).

\(^2\) Rutter, supra note 1, at 1303.

\(^3\) Compare Rutter’s use of common-sensism to that of Peirce who drew part of his pragmatism (his “critical common-sensism”) from the Scottish Enlightenment philosophers, Thomas Reid in particular. See Joseph Brent, Charles Sanders Peirce: A Life 52 (1993).

\(^4\) As made clear in Karl N. Llewellyn, The Case Law System in America xvii (Paul Gewirtz ed., Michael Ansaldi trans., 1989). A completely different use of context in interpreting statutory language showed up in a recent Supreme Court opinion. In Rowland v. California Men’s Colony, 61 U.S.L.W. 4060 (Jan. 12, 1993), Justice Souter, had to determine whether a use of the word “person” for purposes of authorizing in forma pauperis proceeding in federal courts indicated a context different from its broad
According to Rutter, in agreement with Holmes, all theorizing—even the grandest jurisprudential speculations—originated from the experience of life. For Rutter, in contrast to Holmes, this experience consisted of the events of daily existence. Immediately or remotely the theorizing must be about these events. When abstract generalizations lose touch with the daily "trivia" of life, they become meaningless. However, so long as the nexus with things and events is maintained, the theorizing—even theorizing about sensate perceptions of reality through language—illuminates thought with insight and affects the "trivia," transforming it at its most concrete.

For law students, Rutter's classroom reminder to "visualize" was "convenient shorthand for reaching nonverbal behavior." This imaginative activity of the mind's-eye aimed at reducing "abstractions to lower levels, approaching nonverbal behavior as closely as our purpose may require—close enough to restore the nexus with the originating experience without which all language is meaningless." This "picturing" drew straight from American pragmatism of the Peirce variety, but applied specifically to law teaching, not to the world at large. Peirce called this provisional hypothetical imagi-

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19. Holmes referred to the "life of the law" or history of what judges decided—the "felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men"—not their logical syllogisms, as equivalent to experience. Id. Rutter referred to the daily trivia of life as the things or events law takes account of through language of rules or facts, including "type-facts" akin to social facts.
20. See generally Rutter, supra note 1. There is a bit of Emerson here, that insight transcends and transforms the moment. That Emerson had some influence on American pragmatism—through Peirce, James, Holmes, and Dewey—seems to have been accepted. See BRENT, supra note 16, at 28, 45-46, 200, 209, 255; POSNER, supra note 10, at 463.
21. Rutter, supra note 1, at 1333.
22. Id.
nation, "abduction," setting it apart from inductive and deductive logic.\textsuperscript{23}

Rutter illustrated his method. For example, in a simple problem he gave students to draft a bulk sales agreement, Rutter would consciously omit the date from the facts that would specify how the creditors were to be ascertained. He would then ask that students "'visualize factually' the nonverbal process of rounding up creditors as persons."\textsuperscript{24} Often came a stunned recognition that it cannot be done "in some timeless cloud." They could not escape doing it at some time and place, whatever intellectual exercise existed in selecting a correct "reasonable" date.\textsuperscript{25} When lawyers go through the physical conduct of closing the bulk sales agreement, avoiding a specific real time to round-up the creditors is physically inescapable. "Yet in the verbal world of language, when we 'talk about' (actually write) it, it becomes possible to escape the inescapable."\textsuperscript{26}

He illustrated the "visualization" method in the political arena, as well, addressing the question whether President Ford had made a deal to pardon President Nixon as part of a resignation package. The political setting favored using such abstractions as, "There was no agreement between us." These abstractions easily concealed (thus avoiding the recognition of) any nonverbal political understandings. Rutter examined the congressional hearings process by asking questions to show how to create pictures of the actual setting for any alleged "deal" by imagining the circumstances before asking for the precise details from those involved. The best lawyers know this skill by habit.

Applied to more complex events closer to our own time, such as doing something about gross violations of human rights, Rutter's method shows us how easy it is to create verbal escape from a problem. Verbal expression might describe the outrages or try to rectify them by general arguments made to some authority about whether the acts are violations of human rights norms, but these semantic and syntactic manipulations can be but avenues of escape. Abstract words might become solutions without "picturing" and specifying precisely what intervention is to be done and by whom it will be

\textsuperscript{23} For a recent connection, see Jeanne Schroeder, \textit{Abduction from the Seraglio: Peirce's Logic of Imagination and Feminist Methodologies}, 70 Tex. L. Rev. 109 (1991).

\textsuperscript{24} Rutter, supra note 1, at 1306.

\textsuperscript{25} Id. "Yet by 'talking about it' (the 'verbal world') it becomes possible and in fact frequent to escape what would be inescapable in the 'nonverbal world' of behavior. . . .[T]his 'gap' arises from the 'illusion of meaning' inherent in language, chiefly attributable to its 'abstractness,' with consequent shortcomings in observation, analysis and 'thinking.'" Id.

\textsuperscript{26} Id. at 1306-07.
done to correct the abuses and solve the problem without setting in motion unintended or worse consequences. Consider how the term, "ethnic cleansing," developed rapidly both shaping and being shaped by the nonverbal pictures and events daily broadcast from the Balkans. To the participants and to journalists and politicians the words mean many different things. To international lawyers, they have little legal meaning without precise factual reports of specific events, specific operational options to intervene under Security Council or other authority; the identification through language of the norms of international law that characterize the events and specifically how counter-force is to be applied without doing more harm than good. If a war crimes tribunal is to be more than verbal escape, particular perpetrators must be captured and charged with violating specific humanitarian law. Operations of arrest and trial must be constituted by particular officials, persons, or governments. And if the verbal escape is the only response possible, then we must accept the primitive vengeance of tribal feuds or worse and try to contain those outrages lest the carnage and brutality escape and spill over and affect the general stability of the central Euroasian land mass.

Even when general rules must be used with a high degree of abstractness, as in statutes or international norms, the visualization required is of a more comprehensive process involving policies and decisionmaking aimed at reaching postulated goals with operational precision. Legislative and quasi-legislative fact processes work through specifying goals and then operationally reaching them through precise verbal and procedural know-how. Rutter did not tackle these policy-oriented approaches. In the same general tradition, however, Lasswell and Myres McDougal spent much of their lives developing a comprehensive and policy-oriented or "configurative" jurisprudence that insisted on clarifying goals and specifying operations to implement community expectations measured as social facts over time. Rutter might have drawn abundantly from the now-burgeoning field of law and literature to deepen his students' "legal imagination" as they visualize nonverbal, human experiences and use them

27. Cf. Harold Lasswell & Myres McDougal, Legal Education and Public Policy: Professional Education in the Public Interest, 52 Yale L.J. 203, 206 (1943) (adding a constructive dimension to legal realism reshaping it into "conscious, efficient, and systematic training for policy-making").

in words and practice. This critical and creative literature pleased Rutter, and it was too late for him to take it into account. He was not about to stray into this scholarly community. I wish he had. It would have been a fruitful encounter, to try to expand the legal imagination as new voices from ancient and new communities appear. He might have asked whether words themselves can constitute violence as Robert Cover thought. Richard Weisberg would have challenged him with the poetics of jurisprudence (poethics) returning, as Peirce did too, to Plato or Nietzsche for an aesthetic grounding of ethics and law. It was also late for Rutter to watch Richard Posner grow in his encounters with feminist critics such as Robin West in understanding the unity she claims feminist jurisprudence has with literature. And Rutter would have been glad to see a new colleague, Thomas Eisele, join Rutter's own faculty to offer a course on legal imagination and to write on teaching lawyering skills.

THINKING AND LEARNING

Grounded in a thorough knowledge of structural and semantic linguistics, Professor Rutter's interest in language was "operational" in the sense that he insisted on its practical and functional utility. His connection of language with the learning process derived from the proposition that it was the unique human capacity for language that made the generalizations of theory possible but in separable from what we call "thinking." By utilizing our knowledge of the structure and function of language, Rutter sought to enhance the effectiveness of the "thinking" counterpart. He called this approach training in thinking and, for a lawyer, "thinking like a law-


30. Of the many new voices, consider the powerful narratives of Toni Morrison, Playing in the Dark (1992).


yer." Lawyering is merely a special kind of thinking, using rules or legal categories as a special language.

"Does this kind of thinking enmesh us in dominant male legal language?" feminist pragmatists might ask. Why not "thinking like a woman" or "thinking like a woman lawyer"? Or, why not "thinking like an African American (or Hispanic, Asiatic, or Catholic) or homosexual lawyer"? These questions would not have been alien to Rutter, since he assumed language meaning shifts with circumstances, culture, or psychology. His "picturing" process easily encompassed different visualizations of the nonverbal things and events words are used to depict. But he would have asked students from these various groups, "So what? Can you visualize what the difference means and makes? If you can, then shape your words close to that nonverbal picture of the specific practical difference you are seeing."

Rules are only words, not "reifications," Rutter assumed we all knew. He thus resisted the temptation to belabor or even to use vaguely what the realists showed long ago. He did not need to deconstruct rules or texts or show how indeterminate they are. Nor did he need to demonstrate how inescapably determinate their formulation could be through tight rules of decision to control later decisions. Broadly formulated and clear "rules" of doctrine might reintroduce formalism to keep judges from too much subjective discretion and bind them more closely through reformulated stare decisis. Rutter found such considerations word play, perhaps the-


37. Rutter, supra note 1, at 1331. He called "reification" a disagreeable-sounding word, used with as much deception as it seeks to avoid. He used the term to refer to the treatment of language as having "full" meaning, an ideal wholly at variance with its abstract character. More accurately, it ignores the omission from language of the fullness of nonverbal experience. Using "meaning" to refer to the adequacy and accuracy of language to reproduce nonverbal experience, it is the assumption that language has more meaning than it does in fact. This is not a conscious assumption. The result is that the character of language permits and even encourages its use without simultaneous relating back and taking into account its factual foundations. I have called this "deceptive" or "illusory" meaning because its occurrence is largely unconscious.

Id. at 1331-32.

38. See Paul Gewirtz, Introduction, in LLEWELLYN, supra note 17, at xvii-xxiii.

39. Rutter's use of stare decisis would seem to follow the radical empiricism of Herman Oliphant, one of the great realists who assembled at Columbia Law School in the 1920s where Rutter received his law degree in 1931. Oliphant left Columbia in 1929 for the Law Institute at Johns Hopkins University where for a few years the realists
ology,\textsuperscript{40} avoiding the connection with untidy human events and chaotic phenomena that later decisionmakers using his method would obviously make. Rutter’s method, approaching even a tight formulation of rules with visualization, might escape the formal lock of previous words.

Rutter both anticipated and avoided what Paul Gewirtz has called “the enduring crisis that realism produced in legal thought.” In reviewing Llewellyn’s recently published 1928-29 Leipzig lectures to a German audience on the case law system, Gewirtz has written:

Indeed, Llewellyn’s focus on contradictions, dualities, and leeways in the law clearly anticipates some central elements of the modern critical legal studies movement, which has focused insistently on the contradictions and indeterminancies of law. In this and other respects it is fair to say that critical legal studies is, as one of its founders recently wrote, “a direct descendant of American Legal Realism.”\textsuperscript{41}

Rutter agreed with Llewellyn’s view that “[a]ll words (that is, linguistic symbols) and all rules composed of words continuously change meaning as new conditions emerge.”\textsuperscript{42} He did not, however, seek to describe, as Llewellyn did and as a policy scientist might, the trends of judicial decision when each judge makes the “direction and degree of semantic change in a legal rule (or a verbal symbol used by the rule) keep up with the corresponding change in the real-life situation.”\textsuperscript{43} That intellectual task was for the social or

\begin{footnotes}
40. Oliphant advocated reversing the retreat from stare decisis by “making law more a science of realities and less a theology of doctrines.” \textit{Return to Stare Decisis}, supra note 39, at 81.

41. See Gewirtz, supra note 38, at xvii (quoting Mark Tushnet, \textit{Critical Legal Studies: An Introduction to Its Origins and Underpinnings}, 96 J. LEGAL EDUC. 505 (1986)).

42. LLEWELLYN, supra note 17, at 83.

43. Id.
\end{footnotes}
policy scientist. Rutter narrowed his focus. He wanted to show only how the teacher or lawyer actually brings thinking and insight into the particular thing expressed through legal language. He wanted to teach the lawyer or judge to engage in a process, which Llewellyn was merely describing, at its most basic point of transformation. This learning skill is similar to how a child learns the world of particular things and language through experience and play.

COMMUNITIES OF INQUIRY AND THE TEACHING PRAGMATIC

Rutter's simplicity in fact-power has great relevance in teaching within various communities of inquiry. All communities use language and experience to reveal or conceal power structures and contradictions in social values imbedded in the word symbols of law. For example, various communities sustain or defend against a critique of the liberal state and the rule of law. Not only scholars in critical legal studies, but also those in critical race theories, feminist jurisprudence, and law and society might find Rutter's work, though dated, quaintly useful. Rutter himself was dubious about references to "the community." These words too, he thought, were abstractions. Perhaps they reflected a bias "in favor of a particular segment of the community, suggesting the need for more precise factual visualization of common references to the community."

44. One of the subjects Rutter taught was international law. He did not write in this field, but admired post-realist work such as that of Falk or Lasswell, McDougal and Reisman. In the work of signals and communications of social facts, he shared a similar view of language reflected in the work of W. Michael Reisman, International Lawmaking: A Process of Communication, The Harold D. Lasswell Memorial Lecture, in PROCEEDINGS, 75TH CONVOCATION, AM. SOC'y, INT'L L., Apr. 23-25, 1981, at 101, 105. (["L"]awmaking or the prescribing of policy as authoritative for a community is a process of communication . . . [involving] the mediation of subjectivities from a communicator to an audience and, in successful cases, a reception and incorporation by the intended audience, resulting in a set of appropriate expectations . . .”).

45. Rutter mentioned Wittgenstein in a footnote reference, but does not discuss his language games. Rutter, supra note 1, at 1313 n.18. Posner believes Wittgenstein is a pragmatist in his view of the sociality of knowledge. POSNER, supra note 10, at 149-51, 464.

46. Consider the experience reported by former Dean Sam Wilson, Irvin C. Rutter, 61 U. CIN. L. REV. 1277 (1993), who was one of Rutter's prize students.

47. These scholars include both the constructive communitarians and the nihilists of the radical left. But see Richard Delgado, The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?, 22 HARV. C.R.-C.L. L. REV. 304 (1987).

48. Rutter's teaching method could be useful to some feminists now working on Peirce's pragmatism as a way to construct a feminist jurisprudence by rethinking scientific knowledge by hypothesis formation. For an example of this, see Schroeder, supra note 24, at 109.

49. Rutter, supra note 1, at 1356.
refusing the grand theorizing about universals, ideals, or essences,\textsuperscript{50} which has disillusioned so many contemporary theorists who claim (generally in sophisticated attacks on the liberal Enlightenment tradition of reason)\textsuperscript{51} to have discarded the rule of law, Rutter framed his pedagogy from the pragmatic perspective. For many years, law school teaching methods have introduced the realist difficulty Llewellyn tried to work through and Gewirtz described. Rutter’s simple method strengthens the contemporary project to imagine and create nonverbal experience through language without universals, abstractions, or essences. He did not deny that these abstractions pervade our communities of inquiry.

Some commentators use the word, “postmodernism,” to describe post-Enlightenment projects that try to see through any legitimating “metanarrative” such as a declaration of universal rights that keeps the state out of the domain of private rights or that holds the state to an idealized set of positive human rights.\textsuperscript{52} What difference does it make whether to use the word “postmodern”?\textsuperscript{53} Picture in the mind’s eye nonverbal things or events to question Enlightenment rationality. By using Rutter’s pragmatic “visualization” of incoherent social facts, one can plainly “see” a legitimating myth system (as in equal privileges or immunities) that contradicts an operational code (such as special privileges in practice).\textsuperscript{54}

How might Rutter’s simple practicality fare with those students and lawyers who may sympathize with various critical race, critical


\textsuperscript{51} See Jean-François Lyotard, \textit{The Postmodern Condition: A Report on Knowledge} (Geoff Bennington & Brian Massumi trans., 1984) (seeking displacement of philosophy of the Enlightenment with a picture of knowledge as a move within a game, the pragmatics of interaction, as participants struggle for control of the game); James Boyle, \textit{The Politics of Reason: Critical Legal Theory and Local Social Thought}, 133 U. Pa. L. Rev. 685 (1985).

\textsuperscript{52} See generally Lyotard, supra note 51.

\textsuperscript{53} For a “postmodernist” survey of feminism and law that is sympathetic to pragmatism, see Dennis Patterson, \textit{Postmodernism/Feminism/Law}, 77 Cornell L. Rev. 254, 272-79 (1992). Patterson argues that postmodernism is no threat to feminism. But, if “[f]eminism aspires to a metanarrative about gender or patriarchy” and if (with Lyotard) we agree that “the era of the totalizing and legitimating metanarrative is at an end,” then doesn’t it follow that postmodernism is a form of male discourse, reifying what happens? \textit{Id.} at 257.

feminist, or ultra-conservative legal theorists but who do not wish to master the philosophical or theoretical discipline required to enter a community of inquiry? To engage fully from inside intellectual communities that are not yet part of the language of a larger and dominant legal community requires an extraordinary commitment. I believe there is a linkage not readily seen in Rutter's method. Revisiting the theories of Charles Sanders Peirce reveals Rutter's connection to the roots of pragmatism. The relationship of language, things, or events and thinking has been developed by modern "pragmatists." These roots have fed Noam Chomsky, Hilary Putnam, John Dewey and Thorstein Veblen (both were Peirce's students at Johns Hopkins University), Richard Rorty, Donald Davidson, W.V. Quine, among others, not to mention the work of William James, probably Holmes, and Judge Richard Posner today. Rutter's respect for Whorf's linguistics also has its pragmatic

55. See Posner, supra note 10, at 436 n.17 questioning whether "communities of inquiry" (a Peirce ethical construct) means the same thing as Stanley Fish's "interpretive communities" which he may have got from Josiah Royce (Christian interpretive communities) who studied with Peirce at Johns Hopkins. See Stanley Fish, Is There a Text in This Class? The Authority of Interpretive Communities (1980). Later in life Peirce came to believe that like Plato he had escaped the imprisonment of these communities (which Fish denies is possible) through aesthetics—admiration of one's hypothetical God-creation. See Owen M. Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739 (1982) (stating we can escape our interpretive community); see also Stanley Fish, Fish v. Fiss, 36 Stan. L. Rev. 1325 (1984) (stating we are already part of the one we can't escape).


57. Rutter, supra note 1, at 1326 n.53 (citing Noam Chomsky, Language and Mind (1968)).

58. Hilary Putnam, Representation and Reality 12-14, 32, 36 (1988) (stating changes in scientific reality "out there" over time affects the meaning of a word).


62. See Edwin W. Patterson, Pragmatism as a Philosophy of Law, in The Philosophy of the Common Man: Essays in Honor of John Dewey to Celebrate His Eightieth Birthday 172 (1940); Daniel A. Farber, Legal Pragmatism and the Constitution, 72 Minn. L. Rev. 1331 (1988).

Peirce's pragmatism may have influenced newer scholars such as Joan Williams, Margaret Radin, and Katharine Bartlett. Rutter's method should be useful to law teachers as they teach law students who are interested but do not have the commitment of scholars engaged in an appropriate community of scholarly inquiry.

Rutter, modest to a fault, used much of what was spawned by Peirce through the legal realists. Peirce developed a triadic relationship between a sign, the thing or event signified, and the imaginative visualization by the thinking observer using the sign. Rutter's teaching method reflected this triadic architectonic of signifier, signified and imagined meaning or thinking for the community of lawyers he taught. In its early formulation, which Peirce later revised, a thinking person's normative structure is furnished through the relevant community that practices the inquiry. This idea is quite compatible with Rutter's assumption that language meaning varies with culture. We must keep clearly in mind that Rutter was participating in a community of practice as a teaching lawyer not as a scholar engaged with others in developing theories about law. Explicitly, he was developing a theory of teaching. The pragmatic tradition grounded his teaching method, not his general theory about law. Rutter recognized the inadequacy of this approach, but wanted merely to develop a tool, an instrument for effective learning. He

64. Rutter relied on the "Whorfian Hypothesis" that language is a "shaper of ideas" including categories and types isolated from the "world of phenomena we do not find there because they stare every observer in the face. . . . because we are parties to an agreement . . . that holds throughout our speech community and is codified in the patterns of our language." Rutter, supra note 1, at 1329-30 (citing Benjamin L. Whorf, Language, Thought and Reality 212 (1956)).

65. Joan C. Williams, Deconstructing Gender, 87 Mich. L. Rev. 797 (1989); see Joan C. Williams, Critical Legal Studies: The Death of Transcendence & The Rise of the New Langdells, 62 N.Y.U. L. Rev. 429 (1987) (rejecting the "picturing" of an underlying structural reality of reason or knowledge and accepting the later Wittgenstein's use of language from inside the borders of a practice—this would be close to Peirce's early pragmatism before he left communities of inquiry and attempted to create his own aesthetic ground for ethics).


68. Peirce developed a self-proclaimed all-encompassing theory he thought equalled the logic of Aristotle and Leibnitz. He suffered mightily for this hubris throughout his life. He remained outside or left nearly every community of inquiry except perhaps in his early life those science communities involving semiotics and the logic of science. Brent, supra note 16, at 325-47.

69. See id. at 330-35. The full range and powers of Peirce's pragmatism has been made more accessible by this extraordinary biography and by the continuing Peirce Edition project of Indiana University.

70. Cf. Reisman, supra note 44.
stayed with his point. He resisted wrapping up the universe. In conversations with me, he said simply that moving beyond his teaching pragmatic would take him too close to the abyss and to inquiries about life and existence, too close to the deeply religious and ultimate questions for him to put in his law.

PRAGMATISM, ETHICS, AND AESTHETICS

Toward the end of his own life, Peirce approached these fundamental questions concerning life and existence. In private Rutter did too, although he never related these ultimates to his work. Peirce reached his synthesis by connecting ethics normatively with logic, but not as previously he had through a community of inquiry.71 New normative experiences might enter a traditional language not from within the borders of a practice, he concluded, but from a self’s aesthetic connection with the whole external world. This relationship seems strikingly close to an understanding of Plato’s later forms of truth as being grounded in aesthetics. Peirce classified ethics, logic, and science as normative ultimately through aesthetics. That leap came from a human being’s willed admiration of the physical universe.

Ten years before James used his varieties of religious experience, Peirce created quite dramatically a triad of relations drawing upon poetic imagination inspired by Shakespeare. Peirce’s article, “The Architecture of Theories,” elaborated his triad vividly: “First is the conception of being or existing independent of anything else. Second is the conception of being relative to, the conception of reaction with, something else. Third is the conception of mediation, whereby a first and second are brought into relation.”72

Peirce’s biographer, Brent, described how “meaning” is constructed:

For the pragmaticist, the meaning of a first and a second is constituted as Thirdness. Meaning is, therefore, purposive because something will happen when a first meets a second. Words to describe Thirdness are mediation, purpose, generality, order, interpretation, representation, and hypothesis. While the abso-

71. He thought he escaped the communities of inquiry but as in a Greek tragedy approached madness for his earlier hubris. If Stanley Fish is right, one can never escape one’s interpretive community, and Peirce suffered and atoned because he could not. See Fish, supra note 55. Compare Hook’s view of the tragic sense of life as “pragmatic.” See Hook, supra note 12.

72. Brent, supra note 16, at 333. He also wrote poignant pieces about what he would have taught a son he never had and letters to James and Judge Francis Russell of Chicago (examining his life as a failure but with the persistence of a “wasp in a bottle”). Id. at 322-47.
lute present and immediate, unthought, unconscious experience describe Firstness, and existence and the compulsion of external reality, of brute fact, of the blank resistance we find everywhere in our experience—the Outward Clash—describe Secondness, Thirdness is that which mediates between the two and gives meaning, order, law, and generality. Thirdness is the category which brings intelligibility into the Peircean universe by showing where it leads. Thirdness is pragmatism reformed in its real purposiveness by the expulsion of nominalism. It is the idea that Mind moves toward concrete reasonableness in the long run. This brief illustration shows how Peirce's triadic architectonic ranges seamlessly from the most minute to the most immense concepts.\(^{73}\)

But if ethical conduct is self-controlled conduct, as Rutter's limited use of thinking like a lawyer assumed,\(^{74}\) this pragmatism, even reformed as pragmaticism, provides no way to distinguish between the virtue of one consequence and another, except in terms of ever more distant and indistinct consequences, that is, in terms of habit or continuity. . . . If we murder (an action which we currently call a moral evil) in such a way that the idea of it were to become realized in the long run in a general way in habit or law—it would become good because it had joined the harmony of the way things have come to be in the long run.\(^{75}\)

Judge Posner shows the close affinity between Holmes and Nietzsche (and Peirce and Dewey as well) in the ultimates of power and creativity.\(^{76}\) Holmes's early fascination with force as the ultimate basis for law, led him away from the pragmatic tradition of Peirce and Dewey. The later Holmes drew upon Nietzsche as Emerson did, for the affirmation of superior creative powers as against the mediocrity of the herd.

Rutter surely knew of this problem with legal realism. Every nuance in *Law, Language, and Thinking Like a Lawyer* revealed his awareness, but he resisted being drawn to seek an ultimate justification for his instrumentalism. All problems were fact problems, Rutter thought. Nonetheless, we are led to the question of value and ends through language and thought as mediated through things and events. Peirce's agony, in realizing that only through doing can concrete virtue be admired, drove him to his self-reflection in later

73. *Id.* at 334.
years. He constructed the highest good in "the esthetic ideal, that which we all love and adore, the altogether admirable, [which] has, as ideal, necessarily a mode of being to be called living. . . . Moreover, the human mind and the human heart have a filiation to God."77 Peirce reached the normative through aesthetics. Peirce's way of musing (he called it the Pure Play of Musement) was to re­pose in every part of one's mind for its beauty, for the ideal life. In time the depths of Peirce's soul was stirred by the "beauty of the idea and its august practicality, even to the point of earnestly loving and adoring his strictly hypothetical God, and to that of desiring above all things to shape the whole conduct of life and all the springs of action into conformity with that hypothesis."78 The justification for the moral life and for Peirce's final ordering of the normative sciences was aesthetics, followed by ethics and then logic.79

Rutter, of course, chose not to embark upon that philosophical journey, content to assemble some teaching tools for all those who are trying to enter a community of lawyers through the language of the law. But he inevitably did make choices, as all tools are cultural artifacts and legal tools no less so. The lawyer's craft has ethical and aesthetic reach, but in making his tools for the law teaching craft, Rutter did not connect with what Peirce finally did when he made his pragmatism normative through his aesthetic.

LANGUAGE, CULTURE, GENDER, AND RACE

Rutter pointed out that gender designations in languages have no meaning apart from cultural practices. He noted that "despite the historic conscious and tyrannical division between the sexes among the Polynesians and Chinese, their languages do not distinguish genders at all."80 When Rutter later accepted the Whorfian Hypothesis that language shapes experience, to order the chaos of the world "out there," a "buzzing blooming confusion" as described by William James,81 the tyranny of language or of prior experience re-

77. BRENT, supra note 16, at 346 (quoting from Peirce's article published in 1908, "A Neglected Argument for the Reality of God").

78. Id. Peirce had been rereading Plato's Timaeus, and his position is close to Plato's view of the universe as a "Living Being," "an everlasting likeness [of the creator] moving according to number—that to which we have given the name Time." Id. at 345.

79. Bertrand Russell in his early work rejected this pragmatic connection of the physical world with ethics through aesthetics and thought that it derived from a false conception of biological evolution inspired by Henri Bergson. BERTRAND RUSSELL, OUR KNOWLEDGE OF THE EXTERNAL WORLD, AS A FIELD FOR SCIENTIFIC METHOD IN PHILOSOPHY 24-28 (1914) (maintaining ethical neutrality for knowledge of the external world).

80. Rutter, supra note 1, at 1322.

81. Id. at 1315, 1329.
flected in the rules of law is evident. Rutter would have had great sympathy for feminists and critical theorists in their attempts to change the cultural meaning of the language of racist or sexual subordination. His method of pragmatic teaching, through picturing the nonverbal subordination (many now propose imaginative narratives or stories of subjugation), would force students to confront what mere ideological verbal skirmishes could escape.

Recently, Rorty has related philosophical pragmatism to the feminist thought of MacKinnon's non-essentialist version in his 1991 Tanner lectures, "Feminism and Pragmatism," at the University of Michigan. Feminist pragmatism is not concerned with whether some foundational unalienable natural right to equality and liberty has been denied women (the very notion of equal rights for women entails constituting a male community). It is concerned with using language through experiences in communities of inquirers constituted outside the dominant male civic discourse. Could Rutter's teaching tools themselves be trapped in male language discourse? I have explained above how at least he minimized the abstract ideological argument by asking students to visualize events that legal language constitutes and words subordi- 

Drucilla Cornell criticizes MacKinnon's realism for much the same reason as one might now criticize Rutter, for allowing the discourse to be characterized as male in its descriptive sense. A contradiction ensues within MacKinnon's own analysis, according to Cornell, about the all-pervasiveness of the reality of gender identity: "without the affirmation of some kind of ideal, even if that ideal be MacKinnon's own implicit conception of freedom, feminism loses its critical edge because it can only reinforce the masculine viewpoint as all of reality." Without a countervailing feminine "reality" or "imaginary" there is no possibility of "seeing" or experiencing the events of subordination except through the male viewpoint of abstract rights talk. There is "need to speak the unspeakable, to give

82. See Robin West, *Jurisprudence and Gender*, 55 U. Ch. L. Rev. 1 (1988) for an explanation of the difference between cultural feminism (based upon a positive difference from men through communal nurturing connections) and radical feminism (a form of essentialism describing invasion and torment in a male patriarchal verbal and nonverbal world as the essence of woman).


84. See Radin, *supra* note 66, at 1699. For a survey of feminist methodologies that attempt constructive—loosely "pragmatic"—approaches, see Bartlett, *supra* note 67, at 829.

85. See Radin, *supra* note 66, at 1710.
86. Cornell, *supra* note 54, at 130.
87. *Id.*
voice to the imaginary." That Peirce saw how to give voice to the imaginary, to speak the unspeakable, surely does not constitute all new voices into male discourse. Does Drucilla Cornell criticize this fallible experimentation (as Peirce would put it) as male language even when it invites women to join in and permits its own revision? I think she does. She asserts a feminist alliance with Derrida and deconstruction, pointing beyond social reform to justice, allowing women to affirm the feminine, differently, as "other than our mere opposition to the masculine." Cornell's language and thought imagery, though, seem very close to Peirce's—and in a sense to the pragmatism that Rorty finds in MacKinnon's refusal to reach the essence of Woman or of difference.

In 1914, near the end of a tragic life, Peirce wrote to his friend Mary Pinchot thanking her for a Christmas basket of food. It was the last letter he ever mailed. In it he said of women:

As for female suffrage, no doubt women are about as fit for it as the men,—or say, no more unfit. . . . But I don't believe that, in the mass, they desire it, or ought to desire it; and in this country I think they have all the influence they need desire. In the great mass your sex is so much better than ours, and does what it undertakes in so superior a fashion, that the only question to my mind is whether it will ever desire to cast votes. . . .

The same abstract language then and now to a pragmatist would mean different things. Rutter would not find it necessary to engage in the theoretical discussion to agree with the fact that language shapes experience, but experience also redefines language—as in the letter's sentiment of gratitude we do not have to find a pronouncement on the ultimate question of whether Peirce patronized women. By his remarkably flexible and radical visualization of non-verbal events, Rutter asked for imagination of circumstances in the mind's eye of the user of language to illumine the language only by

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88. Id. at 110. Alasdair MacIntyre’s criticism of Derrida for turning social pathology into philosophy illustrates the male tradition-constituted inquiry:

This self-defined success becomes in different versions the freedom from bad faith of the Sartrian individual who rejects determinate social roles, the homelessness of Deleuze's nomadic thinker, and the presupposition of Derrida's choice between remaining "within," although a stranger to, the already constructed social and intellectual edifice, but only in order to deconstruct it from within, or brutally placing oneself outside in a condition of rupture and discontinuity.


89. CORNELL, supra note 54, at 111.

the events that the language aims at constituting. Whether this method is male conversation inviting to women, depends upon the imaginary constitution of thought by language from the perspective of women or anyone else from within their own experience of subordination (or domination). This “picturing” can be done through Rutter’s tools as well as by any other, maybe even better for law students and lawyers not participating in the various communities of theoretical inquiry, but who need some lawyer’s tools stronger than tradition.

Just try visualizing subordination of someone of a different gender or race using another’s language; getting inside the situation. Peirce might applaud this exercise, but then we might imagine him today launching a full-scale assault on democracy beyond that even of MacKinnon’s critique of the State. Just as Rutter would require greater discipline for a lawyer’s visualization of Peirce’s possibly ironic statement about women’s superiority today and their vote. The same pragmatic could be used to visualize the subordination through language from within an African American experience or from within any language culture, so long as it reaches the nonverbal experience in its surroundings and creates its own response (thus avoiding structural realism).

It would be a hopeful sign if coalitions of human beings as lawyers might use language pragmatically, illumined by the aesthetic imagination.

91. Catharine A. MacKinnon, Toward a Feminist Theory of the State 162-64 (“[The] State is male jurisprudentially, meaning that it adopts the standpoint of male power on the relation between law and society. . . . especially vivid in constitutional adjudication, thought legitimate to the degree it is neutral on the policy content of legislation.”). Rorty defends MacKinnon’s extensively developed feminist theory in terms similar to those Peirce used to reformulate pragmaticism during his last days: an exercise of transformative imagination of what rational alternatives and circumstances would fall within the language used by the signifier. Richard Rorty, Feminism and Pragmatism, 13 Tanner Lectures on Human Values 1, 14-15 (1992). Posner sees the feminist jurisprudence differently, not necessarily as pragmatic. Posner, supra note 10, at 393-413.

92. A similar pragmatic understanding of language and race can be seen in the work of Toni Morrison and others. See Morrison, supra note 30, at 8 (a reluctance to substitute one domination for another, while insisting that the presence of race be acknowledged as an unspoken part of the formation of a new white cultural hegemony in the New World and in literature); Alex M. Johnson, Jr., The New Voice of Color, 100 Yale L.J. 2007 (1991)(stating that one’s own experience as a person of color legitimates claim to distinct scholarly voice); Toni Morrison, Unspeakable Things Unspoken: The Afro-American Presence in American Literature, 11 Tanner Lectures on Human Values 121 (1988). Cornell questioned whether anyone can escape “myth” of “blackness” or “Woman signifies” or dethrone myth altogether without a neutral concept of the person which only restates the gender and race divide. She agreed with Morrison that our “only option is to work within the myth to reinterpret it.” Cornell, supra note 54, at 196.
nation of those who see the world through different experiences. They may then think about it in language that visualizes myth and nonverbal events from the standpoint of communities outside the dominant culture. This pragmatic pedagogy does not deny and may even create broader communities with transformed language and literature speaking across all ethnic, gender, and racial barriers.

**Conclusion**

In teaching law, when we choose not to fight about abstractions in our language symbols, as Irvin Rutter's last work explains, then we do not have to wrap up the universe in every legal problem we solve by language discourse. Nor do we need to accept that we are trapped in the caves of our own communal language and myth, unable to transcend the shadows our own tribal connections cast on the wall. Instead we might seek to use the language of the law pragmatically, teaching "how to see" things and events or disputes about facts, relating them through new language to the fabric of continuous decision and the rules of decision in particular relationships within larger communities. As a practical matter outsiders to dominant communities of practice might gain without insiders necessarily losing.

Irvin Rutter ended his work as he began it, conceding that he did not show us, after all, how "to think things not words" as Holmes admonished; but he showed us how to bridge a number of gaps in the triadic relationships between the creative thinking person, the world of things and events, and the language of law. He did this through the teaching tools he left behind in the tradition of American legal pragmatism.