

ON LEGAL PRAGMATISM:

WHERE DOES "THE PATH OF THE LAW" LEAD US?¹

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When I think ... of the law, I see a princess mightier than she who once wrought at Bayeux, eternally weaving into her web dim figures of the ever-lengthening past,—figures too dim to be noticed by the idle, too symbolic to be interpreted except by her pupils, but to the discerning eye disclosing every painful step and every world-shaking contest by which mankind has worked and fought its way from savage isolation to organic social life.²

This all started with a deceptively simple-sounding pair of questions: "What is legal pragmatism, and is there anything worthwhile in it?" It will end, however, with some not-so-simple answers: "What is called 'legal pragmatism' today is very different from the older style of legal pragmatism traditionally associated with Oliver Wendell Holmes; and there is much that is worthwhile in the conception of law revealed by reading Holmes's 'The Path of the Law' in the light of the philosophy of the classical pragmatist tradition, though less in contemporary legal neo-pragmatism." As I articulate and defend these answers, my reflections on the varieties of pragmatism—philosophical and legal, old and new—will be wrapped around my exploration of the meaning of "The Path of the Law" and the strengths and weaknesses of its arguments.

1. Legal Pragmatism Today

Of late, the word "pragmatism" appears in the titles of books, chapters, and articles on legal philosophy often enough to convey the impression that there must be

¹ © 2005 Susan Haack. All rights reserved. (This paper first appeared in the *American Journal of Jurisprudence*, 50, 2005: 71-105. The footnotes have been updated, where appropriate, for this publication.)

² Holmes, "The Law," address delivered to the Suffolk Bar Association Dinner, February 5th, 1885; reprinted in Julius J. Marke, ed., *The Holmes Reader* (Dobbs Ferry, NY: Oceana, Docket Series, 1955; second edition, 1964), 62-3, p.63.

some kind of renaissance of pragmatism going on among legal scholars.³ When you look at the contents of those books and articles, though, you are likely to find yourself more than a little confused about just what this apparent renaissance is a renaissance of.

Pragmatism, you will read, is simply a "general aversion to theory" (Atiyah, 1987);⁴ it is "solving legal problems using every tool that comes to hand, including precedent, tradition, legal text, and social policy—[and] renounc[ing] the entire project of providing a theoretical foundation for constitutional law" (Farber, 1988);⁵ an "understand[ing] that what we see always depends upon our viewpoint, and that understanding others is frequently a matter of attempting to recreate the standpoint from which they view events" (Hantzis, 1988);⁶ "a realistic expression of the recognition that metatheoretical claims to truth are philosophically indefensible" (Patterson, 1990);⁷ "freedom from theory-guilt" (Grey, 1990);⁸ "a kind of exhortation about theorizing ... not say[ing] things that lawyers and judges do not know, but rather remind[ing] lawyers and judges of what they already believe but often fail to practice" (Smith, 1990);⁹ "looking at problems concretely, without illusions, with a full awareness of the limitations of human reason, with a sense of the "localness" of human knowledge, the difficulty of translations between

³ Indeed, a symposium in *Southern California Law Review*, 63, 1990, was entitled "The Renaissance of Pragmatism in American Legal Thought."

⁴ P. S. Atiyah, *Pragmatism and Theory in English Law* (London: Stevens and Sons, 1987), p.5.

⁵ Daniel A. Farber, "Legal Pragmatism and the Constitution," *Minnesota Law Review* 72, 1988: 1331-78, p.1332.

⁶ Catharine Wells Hantzis, "Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.," *Northwestern University Law Review*, 82, 1988: 541-95, p.595.

⁷ Dennis Patterson, "Law's Pragmatism: Law as Practice and Narrative," *Virginia Law Review*, 76, 1990: 937-98, p.996.

⁸ Thomas C. Grey, "Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory," 63 *Southern California Law Review*, 63, 1990: 1569-95, p.1569.

⁹ Steven D. Smith, "The Pursuit of Pragmatism," *Yale Law Journal*, 100, 1990: 409-49, p.411. (Smith acknowledges that his is a non-standard interpretation of legal pragmatism.)

cultures, the unattainability of 'truth'" (Posner, 1990);¹⁰ the view that "practice is not undergirded by an overarching [*sic*] set of immutable principles, or by an infallible or impersonal method" (Fish, 1990);¹¹ "a synthesis of contextualism and instrumentalism" (Grey, 1991);¹² "antifoundationalism, and ... social optimism" (Hoy, 1991);¹³ "the distinctly American philosophical movement begun by C. S. Peirce and William James, developed by John Dewey, and recently espoused by Richard Rorty ... a substantive position ... [which] yields relativism about truth and justice" (Warner, 1993);¹⁴ "an eclectic, result-oriented, historically-minded antiformalis[m]" (Luban, 1996);¹⁵ "a critique of essentialist-/conceptualist formalism, and an admonition to avoid excessive theorizing or abstractions," urging "more dialogue, traditionalism, attention to context, and the middle way" (Tamanaha, 1997);¹⁶ the idea that "a satisfactory theory of adjudication for lawyers must enable lawyers to predict what courts will do" (Leiter, 1997-8);¹⁷ "a philosophical discourse that is general, hysteric, external, practical, and progressive, and beside it a legal antecedent discourse (that of Holmes) that is

professional, obsessive, internal, theoretical, and conservative" (Alberstein, 2002);¹⁸ "a disposition to base action on facts and consequences rather than on conceptualisms, generalities, pieties, and slogans ... reject[ing] moral, legal and political theory when offered to guide legal ... decisionmaking" (Posner, 2003);¹⁹ "an extension of skepticism, ultimately rooted in Greek sophism" (Leaf, 2003);²⁰ an acknowledgment that "devotion to theory may be just as damaging and unfruitful as devotion to traditional legal formalism" (Weaver, 2003);²¹ "an eclectic and self-reflective stance about both theory and methods; a recognition of a plurality of contingent 'truths' and 'meanings' that are grounded in concrete experience rather than absolute or fundamental truths; and avoidance of dichotomies and uni-dimensional approaches and an explicit incorporation of democratic ideals in both the outcomes (goals) of public policy and in the way that policy analysis is itself conducted" (Schneider and Ingram, 2003);²² the view that "the validity of consensus building depends not on its theoretical possibility of achieving 'win-win' solutions, but on the efficacy of consensus building in its application" (Coglianese, 2003).²³

¹⁰ Richard A. Posner, "A Pragmatist Manifesto," *Problems of Jurisprudence* (Cambridge: Harvard University Press, 1990), chapter 15; the quotation is from p.465.

¹¹ Stanley Fish, "Almost Pragmatism: Richard Posner's Jurisprudence," *University of Chicago Law Review*, 57, 1990: 1447-75, p.1464.

¹² Thomas C. Grey, "What Good is Legal Pragmatism?," in *Pragmatism in Law and Society*, eds. Michael Brint and William Weaver (Boulder, CO: Westview Press, 1991), 9-27, p.15.

¹³ David Hoy, "Is Legal Originalism Compatible with Philosophical Pragmatism?," in Brint and Weaver, *Pragmatism in Law and Society* [note 12], 343-58, p.344.

¹⁴ 1993 Richard Warner, "Why Pragmatism? The Puzzling Place of Pragmatism in Critical Theory," *University of Illinois Law Review*, 1993: 535-63, p.537. Later he adds, rather confusingly, that

¹⁵ "[t]he views of legal pragmatists are generally inconsistent with Peircean pragmatism." *Id.*, p.543.

¹⁶ David Luban, "What's Pragmatic About Legal Pragmatism?," *Cardozo Law Review* (18, 1996: 43-73, p.44.

¹⁷ Brian Z. Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (Oxford: Clarendon Press, 1997), p.35.

¹⁸ Brian Leiter, "Naturalism and Pragmatism in Legal Theory," section III of "Rethinking Legal Realism: Toward a Naturalized Jurisprudence," *Virginia Law Review*, 76.2, 1997-8: 267-315, pp.285-6.

What we have here is not simply—as perhaps we do with "realism" and "positivism"²⁴—a divergence of the

¹⁸ Michal Alberstein, *Pragmatism and Law: From Philosophy to Dispute Resolution* (Dartmouth: Ashgate, 2002), p.2.

¹⁹ Richard A. Posner, *Law, Pragmatism, and Democracy* (Cambridge: Harvard University Press, 2003), p.3.

²⁰ Murray J. Leaf, "Pragmatic Legal Norms," in Alfonso Morales, ed., *Renasant Pragmatism: Studies in Law and Social Science* (Aldershot, Hants: Ashgate, 2003), 72-89, p.73.

²¹ William G. Weaver, "The 'Democracy of Self-Devotion': Oliver Wendell Holmes, Jr., and Pragmatism," in Morales, *Renasant Pragmatism* [note 20], 3-30, p.4.

²² Anne Larson Schneider and Helen Ingram, "The Pragmatic Policy Analyst," in Morales, *Renasant Pragmatism* [note 20], 156-79, p.157.

²³ Gary Coglianese, "Does Consensus Work? A Pragmatic Approach to Public Participation in the Regulatory Process," in Morales, *Renasant Pragmatism* [note 20], 180-95, p.189.

²⁴ "Realism" has not one but umpteen philosophical meanings (see Susan Haack, "Realisms and Their Rivals: Recovering Our Innocence," *Facta Philosophica*, 4.1, 2002:

legal meaning(s) of a word from its philosophical meaning(s); it is a desperately confusing scholarly mare's nest. Rather than tackling it directly, I shall first sketch the origins of the classical pragmatist tradition in philosophy, and Oliver Wendell Holmes's place in this story; and then articulate the complex argument of "The Path of the Law," and explore what this famous lecture of Holmes's might have to teach us now. With this work in hand, it should be possible to dispel at least some of the current confusions.

2. The Pragmatist Tradition in Philosophy

Besides its use(s) in legal theory, the word "pragmatism" has, of course, both an everyday and a technical philosophical use—well, I say "of course": but (of course!) the two are often run together, and the philosophical use is ambiguous to say the least.

In the eighteenth century, to describe someone as a pragmatist was to say that he was a practical, busy person. By the late nineteenth century, and apparently for much of the twentieth, the word had acquired a pejorative tone, as "pragmatic" came to mean "officious, opinionated," and "pragmatism," correspondingly, "officious meddlesomeness." By now, the meaning of these words has shifted once again: in ordinary speech today, "pragmatism" usually connotes concern with expediency rather than principle, with "matters of fact, often to the exclusion of intellectual or artistic matters; practical as opposed to idealistic."²⁵

67-88); but they share the idea that something—truth, reality, moral or epistemic or etc., values, or whatever—is, in some sense, independent of us. And "positivism," as used philosophically, is understood sometimes in more and sometimes in less expansive ways.

²⁵ I am relying on the *Oxford English Dictionary Online* (2005)—which offers as an example of the nineteenth-century usage this, from Charles Cowden Clarke, *Shakespeare's Characters: Chiefly Those Subordinate* (1863; New York: AMS Press, 1974), p.209: "[Malvolio] is a moral teetotaler, a formalist, a pragmatist ..."; *Dictionary of the English Language* (Philadelphia: David Mackay, 1885); *A Standard Dictionary of the English Language* (London: Funk and Wagnalls, 1897); *The Concise Oxford Dictionary of*

In philosophy, "classical pragmatism" refers to the late nineteenth-century movement in American philosophy of which the first moment was Charles Sanders Peirce's pragmatic maxim, which characterized meaning in terms of the "pragmatic" (practical, experiential) consequences of a concept's applying; and by extension to later work in the spirit of this tradition. "Neo-pragmatism" refers to the late twentieth-century development associated with Richard Rorty's attacks on foundationalism, essentialism, and scientism.

It was William James who, in 1898, first put the word "pragmatism" into philosophical currency, and who made this style of philosophy famous.²⁶ But James acknowledged that the key idea had arisen in discussions with Peirce at the Metaphysical Club in Cambridge, Mass., in the very early 1870s. Indeed, some seeds of pragmatism are already discernable in Peirce's 1868 series of anti-Cartesian papers and his 1871 review of Fraser's edition of the works of George Berkeley;²⁷ and Peirce had articulated the pragmatist conception of meaning, quite unmistakably, in a paper published in 1878: "How to Make Our Ideas Clear,"²⁸ which he would later describe as "a little paper expressing some of the opinions I had been urging [at the Metaphysical Club] under the name of pragmatism." However, he explained, when he published this paper he had deliberately

Current English (Oxford: Clarendon Press, revised fourth edition, 1959); and *Webster's Ninth New Collegiate Dictionary* (Springfield, MA: Merriam-Webster's, 1991), from which the current meaning quoted in the text is taken.

²⁶ William James, "Philosophical Conceptions and Practical Results," *University Chronicle* (University of California, Berkeley), 1, September 1898: 287-310; reprinted in James, *Pragmatism*, eds. Frederick Burkhardt and Fredson Bowers (Cambridge: Harvard University Press, 1975), 255-70.

²⁷ Charles Sanders Peirce, *Collected Papers*, eds. Charles Hartshorne, Paul Weiss, and (vols 7 and 8) Arthur Burks (Cambridge: Harvard University Press, 1931-58), 5.213-357 (1868) and 8.7-38 (1871). **[References to the *Collected Papers* are by volume and paragraph number. With published papers, the date given in parentheses is the year of publication; with unpublished papers, it is the year the paper was written.]**

²⁸ Peirce, *Collected Papers* [note 27], 5.388-410 (1878).

avoided the word "pragmatism," because "in those medieval times, I dared not in type use an English word to express an idea unrelated to its received meaning"²⁹—i.e., presumably, its *then* received meaning, "officious meddlesomeness."³⁰ Peirce took his bows as founder of pragmatism in a lecture at Harvard in 1903; though the dove he had sent forth in 1878 had never returned to him, he wrote, "of late quite a brood of young ones have been fluttering about, from the feathers of which I might fancy that mine had found a brood."³¹

Both Peirce and James wrote that they saw pragmatism as a method, an approach to philosophical questions focused on pragmatic consequences, not as a body of philosophical doctrine; and pragmatist philosophy was from the beginning extraordinarily various. It encompassed a vast range of interests, areas, and angles—as the young Italian philosopher Giovanni Papini emphasized when he likened pragmatism to a great hotel, where all the guests pass through the same corridor, but each works alone in his own room on the questions that especially interest him. But a second and less benign kind of variousness was also present from the beginning, in differences between Peirce's understanding of the Pragmatic Maxim and James' construal: Peirce stressed the connection between "pragmatic" and Kant's "*pragmatische*," meaning, roughly, "experiential," as contrasted with "*a priori*"; James stressed the connec-

tion between "pragmatic" and the Greek "*praxis*," "action," as contrasted with theory.

These differences became more marked as Peirce moved towards a realist, subjunctive formulation of the maxim (according to which to say, for example, that a diamond is hard, means not just that if it *is* rubbed against other substances it *will* scratch them, but that if it *were* rubbed against them it *would* scratch them);³² and as James developed his doctrine of the Will to Believe, and then found himself struggling, not entirely successfully, to distinguish this doctrine from the pragmatism-as-method he took himself to share with Peirce. By 1905—though writing warmly of James and even of the radical British pragmatist F. C. S. Schiller—Peirce was complaining about the "merciless abuse" to which his word had been subjected in the literary journals, abuse so egregious that he was ready "to kiss his child good-by," and "to announce the birth of the word 'pragmaticism,' which is ugly enough to be safe from kidnappers."³³

In view of the potential for fissure already present in the differences between Peirce's and James's elaborations of the pragmatic method, and the potential for confusion with this or that specific philosophical doctrine, not to mention the shifting meaning of the word in ordinary usage, the subsequent fragmentation of philosophical pragmatisms is hardly surprising. And once Rorty got hold of James, pragmatism took a sharply radical turn: what could be further from Peirce's observations that the truth "is SO, whether you, or I, or anybody believes it is so or not," and that "every man is fully convinced that there is such a thing as truth, or he would not ask any question"³⁴ than Rorty's cheerful boast that he "does not

²⁹ Peirce, *Collected Papers* [note 27], 5.13 (c.1906). (It was the editors of the *Collected Papers*, and not Peirce himself, who supplied "The Pragmatic Maxim" and "Applications of the Pragmatic Maxim" as subtitles of the relevant sections of "How to Make Our Ideas Clear.")

³⁰ So far as I have been able to determine, Peirce first used the word "pragmatism" in print in his August 1899 review of John Fiske, *Through Nature to God* (reprinted in *Charles Sanders Peirce: Contributions to the Nation*, eds Kenneth Laine Ketner and James Edward Cook (Lubbock: Texas Tech Press, 1975-79), 2: 210-211); he used the word again in his January 1901 review of two books by Anthony, Earl of Shaftesbury (*ibid*, 3: 261); and, finally, describes his own view as "pragmatism" in his entry under "Pragmatic and Pragmatism" in J. M. Baldwin, *Dictionary of Philosophy and Psychology* (New York: MacMillan, 1902) 2: 321-2, reprinted in *Collected Papers* [note 27], 5.1-5.

³¹ Peirce, *Collected Papers* [note 27], 5.17 (1903).

³² Peirce, *Collected Papers* [note 27], 5.453 (1905): "the question is, not what *did* happen, but ... whether that diamond *would* resist an attempt to scratch it." In 1878, Peirce admits, he had "endeavored to gloze over this point," or had perhaps been unclear in his own mind. ("Realist," as used here, contrasts with "nominalist"; Haack, "Realisms and Their Rivals" [note 24], pp.78-80.)

³³ Peirce, *Collected Papers* [note 27], 5.414 (1905).

³⁴ Peirce, *Collected Papers* [note 27], 2.135 (1902), 5.211 (1903).

have much use for the notion of 'objective truth'," or his breezy assurance that truth is "entirely a matter of solidarity"?³⁵

Wide-ranging as their philosophical interests were—Peirce's in logic, semiotic, metaphysics, cosmology, theory of inquiry, philosophy of science, and so on, James's in metaphysics, philosophy of religion, philosophy of mind, ethics, and so forth—neither had much to say about the philosophy of law. Though recently it seems to have been Rorty's style of neo-pragmatism that has been most warmly welcomed by legal commentators, traditionally it is Oliver Wendell Holmes who has been seen as the originator of the pragmatist tradition in legal theory. Elsewhere, I have traced the evolution of philosophical pragmatism from Peirce to Rorty and beyond;³⁶ here, I shall begin with Holmes's place in the classical-pragmatist chapter of this story.

Holmes, we know, attended some of Peirce's lectures at the Lowell Institute in 1866;³⁷ and he seems to have been involved in the Metaphysical Club even before the beginning. In 1868 James had written to him from Berlin, proposing "[w]hen I get home let's establish a philosophical society to have regular meetings and discuss none but the very tallest and broadest questions—to be

composed of none but the very topmost of Boston manhood," and predicting that this might "grow into something very important after a sufficient number of years."³⁸ The evidence suggests, however, that though Holmes participated early on, he was rarely present at meetings of the club after the winter of 1871-2; at any rate, in 1927—at which point he was the only surviving member—he told Charles Hartshorne (one of the young editors of Peirce's *Collected Papers*) that he "soon dropped out of the band."³⁹

In 1906, reminiscing in print about the origins of pragmatism, Peirce testifies to the influence of two other attorneys who also participated: Nicholas St. John Green, "a skillful lawyer, ... a disciple of Jeremy Bentham," who urged the importance of applying Alexander Bain's definition of belief as "that upon which a man is prepared to act"—from which, Peirce continues, "pragmatism is scarce more than a corollary"; and Chauncey Wright, "something of a philosophical celebrity in those days ... our boxing-master whom we ... used to face to be severely pummeled." While he also writes warmly of Holmes—"Mr. Justice Holmes will not, I believe, take it ill that we are proud to remember his membership"⁴⁰—Peirce says nothing specific about his influence. Holmes himself would later write that he thought he "learned more from Chauncey Wright and St. John Green" than from Peirce; and express reservations about Hartshorne's prediction that the publication of

³⁵ Richard Rorty, "Trotsky and the Wild Orchids," *Common Knowledge*, 1.3, 1992: 140-53, p.141; *Objectivity, Relativism and Truth* (Cambridge: Cambridge University Press, 1991), p.32.

³⁶ Susan Haack, "Pragmatism, Old and New," *Contemporary Pragmatism*, 1.1. 2004: 1-41; reprinted in Susan Haack and Robert Lane, eds., *Pragmatism, Old and New* (Amherst, NY: Prometheus Books, 2006), 15-57. Page references here are to *Pragmatism, Old and New*.

³⁷ Mark DeWolfe Howe, *Justice Oliver Wendell Holmes: The Shaping Years* (Cambridge: Belknap Press of Harvard University Press, 1957), p.251, citing Philip P. Wiener, *Evolution and the Founders of Pragmatism* (Cambridge: Harvard University Press, 1949; Philadelphia: University of Pennsylvania Press, 1972), p.75. Peirce's lectures, entitled "The Logic of Science: Or, Induction and Hypothesis," appear in *Writings of Charles S. Peirce: A Chronological Edition* (Bloomington, IN: 1982), 1.358-504.

³⁸ Quoted by Max Fisch, "Was There a Metaphysical Club in Cambridge?", in Edward G. Moore and Richard Robin, eds., *Studies in the Philosophy of Charles Sanders Peirce* (Amherst, MA: University of Massachusetts Press, 1964), 5-32, p.4, citing Ralph Barton Perry, *The Thought and Character of William James* (Boston: Little, Brown, and Company, 1935), I, p.508; also found in Liva Baker, *The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes* (New York: HarperCollins, 1991), pp.214-5.

³⁹ Max Fisch, "Was There a Metaphysical Club in Cambridge?" [note 38], p.22.

⁴⁰ Peirce, *Collected Papers* [note 27], 5.12 (c.1906).

Peirce's papers would be an important philosophical event.⁴¹

And—not surprisingly, given that the then-common meaning of "pragmatism" was so off-putting, and that *The Common Law* and "The Path of the Law" were both published before James had put the word into circulation in its special philosophical sense—Holmes never officially allied himself with pragmatism. Indeed, when James introduced his pragmatism to the philosophical world Holmes, like many readers, had trouble distinguishing it from the Will to Believe—which he described in a letter to Frederick Pollock as "an amusing humbug."⁴² So when, much later, he read an early anthology of Peirce's work,⁴³ what struck him was that Peirce's "reasoning in the direction of religion &c., seems ... to reflect what he wants to believe—despite his devotion to logic."⁴⁴ He was, however, apparently much impressed by Dewey, of whose *Experience and Nature*⁴⁵ he wrote in 1931 that "although [it] is incredibly ill written ... [s]o methought God would have spoken had He been inarticulate but keenly desirous to tell you how [the cosmos] was."⁴⁶

⁴¹ Holmes to Charles Hartshorne, August 25th, 1927; my source is Fisch, "Was There a Metaphysical Club in Cambridge?" [note 38], pp.10-11.

⁴² *Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1932*, ed. Mark DeWolfe Howe (Cambridge: Harvard University Press, 1941), 1:139 (June 17, 1908).

⁴³ *Chance, Love, and Logic*, ed. Morris R. Cohen (1923; Lincoln, NE: University of Nebraska Press, 1998). Peirce, however, apparently didn't like the "Will to Believe" doctrine much more than Holmes did; at any rate, the year after *The Will to Believe*, dedicated "to my old friend, Charles Sanders Peirce," was published, he is found writing rather pointedly of the "Will to Learn" (*Collected Papers* [note 27], 5.583 (1898)). Holmes may have been misled by the title of Peirce's paper, "The Doctrine of Evolutionary Love," included in this early anthology: a paper which in fact articulates the cosmological theory Peirce calls "agapism," positing the evolution of order from chaos by "affectability."

⁴⁴ "The Holmes-Cohen Correspondence," ed. F. M. Cohen, *Journal of the History of Ideas*, IX, 1948: 3-52, p.34.

⁴⁵ John Dewey, *Experience and Nature* (New York: W. W. Norton, 1929).

⁴⁶ *Holmes-Pollock Letters* [note 42], 2:287 (May 15, 1931).

In 1942, Max Fisch described Holmes's *The Common Law* as "full of the spirit of pragmatism from the ringing sentences in which its theme is announced—'the life of the law has not been logic; it has been experience'—on to the end";⁴⁷ in 1949 Philip Weiner entitled chapter 8 of his *Evolution and the Founders of Pragmatism*, "Evolutionary Pragmatism in Holmes's Theory of the Law";⁴⁸ and many commentators have noted the apparent parallel between Holmes's presentation of the "prediction theory" in "The Path of the Law" (1896), and Peirce's statement of the pragmatic maxim in "How to Make Our Ideas Clear":

Consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then our conception of these effects is the whole of our conception of the object. [Peirce]⁴⁹

... a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court;—and so of a legal right. [Holmes]⁵⁰

⁴⁷ Max Fisch, "Justice Holmes, the Prediction Theory of the Law, and Pragmatism" (1942), in Kenneth Laine Ketner and Christian J. W. Kloesel, eds, *Peirce, Semeiotic, and Pragmatism: Essays by Max Fisch* (Bloomington, IN: Indiana University Press, 1986), 6-18, p.8. This observation of Fisch's should not be taken as suggesting that the pragmatists were hostile to logic. James, to be sure, was no logician; but (as Fisch would have been well aware) Peirce was a major figure in the history of modern logic, developing a unified propositional and predicate calculus by 1883. See Peirce, "On the Algebra of Logic" (1880), and "The Logic of Relatives" (1883), *Collected Papers* [note 27], 3.154-251 and 3.328-58; and O. H. Mitchell, "On a New Algebra of Logic," in *Studies in Logic by Members of the Johns Hopkins University* (Boston, MA: Little, Brown, 1883), 72-106 (Mitchell was Peirce's student, and Peirce the editor of this volume). Gottlob Frege had also arrived at a unified propositional and predicate calculus, a few years earlier, in his *Begriffsschrift* (1879; English translation by Terrell Ward Bynum, *Conceptual Notation and Related Articles*, Oxford: Clarendon Press, 1972).

⁴⁸ Wiener, *Evolution and the Founders of Pragmatism* [note 37].

⁴⁹ Peirce, *Collected Papers* [note 27], 5.401 (1878).

⁵⁰ Holmes, "The Path of the Law," *Harvard Law Review*, 10, 1897: 457-78; in Sheldon M. Novick, ed., *The Collected Works of Justice Holmes* (Chicago: Chicago University Press, 1995), vol.3, 391-406. The quotation is from p.391. Page references in what follows are to the *Collected Works*.

Indeed, Fisch once suggested that, rather than Holmes's idea being a special case of Peirce's, Peirce's pragmatic maxim may have been a kind of extrapolation of this strand in Holmes's thinking⁵¹ (as, it seems, J. L. Austin's theory of performative utterances was a kind of extrapolation of H. L. A. Hart's concept of operative speech).⁵² For Holmes had expressed something like this idea as early as 1872, in a note in the *American Law Review* in which, summarizing and endorsing Pollock's critique of John Austin's *Lectures on Jurisprudence*, he had written:

[A]s is clear from numerous instances of judicial interpretation of statutes and of constitutions in this country, ... in a civilized state it is not the will of the sovereign that makes lawyers' law, even when that is its source, but what a body of subjects, namely the judges, by whom it is enforced, say is his will. ... The only question for lawyers is, how will the judges act?⁵³

Fisch's conjecture oversimplifies, however. As I noted earlier, some proto-pragmatist ideas were already apparent in Peirce's work before this note of Holmes's; moreover, the philosophy of law Holmes had developed by the time of "The Path of the Law" turns out to be far subtler and more sophisticated than the label "prediction theory" suggests. So we need to look more closely.

3. The Path of the Law: Or, You Take the Low Road and I'll Take the High Road

Holmes's elegantly aphoristic style has tempted many readers to assume that this or that memorable phrase in "The Path of the Law" encapsulates the whole; but summary descriptions like "the prediction theory," "the Bad Man theory," or "the revolt against formalism," and one-dimensional pictures of Holmes simply as early

precursor of the legal-realist movement or of the law-and-economics approach, as anti-theoretical, etc., aren't really adequate to the depth, or the inner complexities, of his jurisprudence.

Inner complexities — or inner contradictions? The opening lines of "The Path of the Law" seem eminently down-to-earth and practical: "When we study law we are not studying a mystery but a well-known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. ... The object of our study ... is ... the prediction of the incidence of the public force through the instrumentality of the courts" ("The Path of the Law," p.391). But Holmes's closing lines take us very far from mundane practical concerns about when the bailiff may be expected at the door: "happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food besides success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you ... connect your subject with the universe, and catch an echo of the whole, a glimpse of its unfathomable process, a hint of the universal law" (405-6). Some may be inclined simply to ignore these concluding sentences, or to write them off as nothing more than an embarrassing effusion of late-nineteenth-century purple prose; but this would be a mistake. There is a larger picture here, a larger picture in which Holmes's briskly practical opening and his visionary closing are seamlessly integrated.

As he climbs the steep path from the mundane specificities that concern the working attorney to the intellectual aspirations of the legal theorist, Holmes's arguments begin negatively. His concern is to dispel some common illusions: Law, he argues, cannot be identified with Morality; does not transcend the specific practices of the many and various legal systems; and

⁵¹ Fisch, "Justice Holmes, the Prediction Theory of the Law, and Pragmatism" [note 47], p.12.

⁵² J. L. Austin, *How to Do Things With Words* (Cambridge: Harvard University Press, 1962), p.7, n.1. My thanks to William Widen for drawing this footnote to my attention.

⁵³ Oliver Wendell Holmes, *American Law Review* 6:723, 1872; reprinted in Novick, *The Collected Works of Justice Holmes* [note 50], vol. 1, 294-7; the quotation is from p.295.

bears little resemblance to a set of first principles or axioms from which correct decisions may be deduced.

Unjust laws have been enforced; and though terms like "duty," "right," "malice," "intent," etc., play a role both in moral and in legal discourse, their meanings diverge in the two contexts (nor are all legitimate moral demands legally enforced, or legally enforceable). So, to begin to get a clear view of the law as distinct from morality, we need to set ethical considerations firmly aside: Holmes advises taking the perspective of a working attorney advising a hypothetical client who doesn't give a damn what's right, but just wants to know what's legal. Thus: "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, and not as a good one, who finds his reasons for conduct, whether inside the law or out of it, in the vaguer sanctions of conscience" (392).

When "our friend the bad man" (393) consults an attorney, he isn't interested in The Law in the abstract: he wants to know what the current law in Massachusetts (or wherever) is. Moreover, since statutes, rules, and precedents are to some degree open-textured and, where they are, may be construed in more than one way, the bad man wants to know, not just what the statutes, etc., say, but how judges can be expected to interpret them. Thus: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law" (393). It is this strand of the argument, of course, that is captured in the description of Holmes's approach as "the prediction theory," and—along with the focus on the Bad Man—in the classification of Holmes as proto-legal-realist.

Judges tend to present their rulings and opinions as if they were deductions from general principles—in "logical form," as Holmes says; and often suppose that judicial dissent must be a sign that someone has made a mistake in logic. This, however, is another illusion. To be

sure, logic has a place in law; still, a legal system is very different from a set of axioms from which correct decisions may be deduced.⁵⁴ Judicial dissent is unavoidable; for disagreements among judges really turn, not on the formal validity or invalidity of their arguments, but on their substantively different ideas about questions of policy. Thus: "The language of judicial decision is mainly the language of logic. ... [But b]ehind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment" (397). It is this strand of the argument, of course, that is captured by classifying Holmes's approach under the rubric "the revolt against formalism."⁵⁵

Now Holmes can move to higher jurisprudential ground, and present a positive account of the growth and evolution of the law going far beyond the-law-in-England-in-1215 or the-law-in-Massachusetts-in-1897.⁵⁶ The first side of this positive account is historical: the intelligent study of its history illuminates the forces that made present law thus and so. This will sometimes reveal, however, that the source of a legal distinction or rule, etc., is to be found in circumstances or procedures which no longer obtain, or that there is no better warrant for a rule we still confidently enforce than that things have always been done this way.

Holmes gives as example the doctrine in English law that "a material alteration of a written contract by a party avoids it as against him" (402); i.e., not only can you not use the writing, but the contract itself is cancelled—a

⁵⁴ See Scott Brewer, "Traversing Holmes's Path toward a Jurisprudence of Logical Form," in Steven J. Burton, ed., *The Path of the Law and Its Influence: The Legacy of Oliver Wendell Holmes, Jr.* (Cambridge: Cambridge University Press, 2000), 94-132; Susan Haack, "On Logic in the Law: 'Something, but not All,'" *Ratio Juris*, 20.1, 2007: 1-31.

⁵⁵ Morton G. White, *Social Thought in America: The Revolt Against Formalism* (1947; New York: Viking Press, 1949).

⁵⁶ I chose 1215 because this was the date of Magna Carta, and of the fourth Lateran Council, which prohibited priests from participating in in-court tests by ordeal; and 1897 because this was the date of "The Path of the Law."

doctrine, Holmes argues, explicable only historically. Once upon a time, in the case of a bond specifically, the contract was inseparable from the actual parchment on which it was written; if the document was destroyed or the seal torn off, the obligee could not recover because the bond no longer existed.⁵⁷ Then, contrary to the general tendency of the law, this doctrine was extended to contracts generally.

However, Holmes insists, "this is how we have always done it" is no reason for continuing to do things that way: "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds on which it was laid down have vanished long since ... " (399).⁵⁸ And so the other part of Holmes's positive account is forward-looking: the intelligent study of "the ends which [legal] rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether those ends are worth the price" (404) can illuminate how the law might best adapt itself to new circumstances.

In considering how well this or that interpretation of a law forwards the ends that justified having the law in the first place, Holmes urges that judges look to the social and economic consequences of their rulings: "I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. ... I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the law they

lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable ... questions" (398). Hence Holmes's dictum that "[f]or the rational study of the law the blackletter man may be the man of the present; but the man of the future is the man of statistics and the master of economics" (399)—which, of course, is the strand of his argument that is captured by enlisting him as precursor of the "law and economics" movement.

However, it isn't only economics Holmes has in mind, but the social sciences generally. He also illustrates the role of considerations of "social advantage" when he asks: "[w]hat better have we than a blind guess to show that the criminal law in its present form does more good than harm?", and urges that judges look to the work of social scientists who are beginning to investigate whether the criminal "is a degenerate, bound to swindle or murder by as deep seated an organic necessity as that which makes the rattlesnake bite," or whether "crime, like normal human conduct, is mainly a matter of imitation" (400).⁵⁹

Now the path from the rocky foothills of Holmes's opening words to the Olympian heights of his final peroration comes into full view; and what looked at first like a passing dismissal of Sir James Stephen's legal analyses—"striving for a useless quintessence of all systems, instead of an accurate analysis of one" (403)—stands as a clear signpost. All legal systems are local, specific to a place and time; the idea of "Law-in-Itself" is an illusion. As Holmes would write much later, dissenting

⁵⁷ As, today, there is no obligation to pay if the actual physical check is destroyed (an analogy I owe to Jonnette Watson-Hamilton).

⁵⁸ Compare this, from *Javins v. First National Realty Corporation*, 428 F.2d 1071, 1 (1970): "The assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural agrarian society But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. ... Some courts have realized that certain of the old rules of property law governing leases are inappropriate for today's transactions." My thanks to Terence Anderson for drawing this case to my attention.

⁵⁹ Though Peirce doesn't refer to Holmes explicitly, this passage from the *Minute Logic* of 1902 suggests that he might have been taking notice of Holmes's thinking: "[A]s for public force, let it be restricted to doing what is necessary to the welfare of society. ... [T]he barbaric punishment of a prison cell ... is not in the least conducive to public or private welfare. As for the criminal classes, I would extirpate them ... by keeping the criminals confined in relative luxury, making them useful, and preventing reproduction ... [making them] self-supporting harmless wards of the state. The only expense would be that of losing our darling revenge upon them." *Collected Papers* [note 27], 2.164 (1902).

in *Southern Pacific v. Jensen*, "[t]he common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified ... it is always the law of some state."⁶⁰ Moreover, every legal system is an artifact of history; all have evolved, grown, adapted (and many have died away) in response to changing social circumstances, pressures, and needs.

And this means that from the very broadest perspective the law—now understood as referring to the whole accumulated history and ongoing evolution of the myriad legal systems of the world—encompasses both the past and the future of the social organization of humanity; in short, of civilization. Holmes returns to this theme over and over:

If your subject is law, the roads are plain to anthropology, the science of man, to political economy, the theory of legislation, ethics, and thus by several paths to your final view of life.⁶¹

What a subject is this in which we are united,—this abstraction called the Law, wherein, as in a magic mirror, we see reflected not only our own lives, but the lives of all men that have been! ... to the lover of the law ... no less a history will suffice than that of the moral life of his race.⁶²

I venerate the law ... as one of the vastest products of the human mind. ... It has the final title to respect in that it exists, that it is not a Hegelian dream. (402)

This is how the study of the law "connect[s] with the universe" and may even vouchsafe "a hint of the universal law" (406).

Holmes begins with a down-to-earth, practical view of the law; and, commenting that "a good deal of pretty poor stuff" goes under the name of jurisprudence (403),

scoffs at the idea of a "quintessence of all law." Still, we can't classify him as "pragmatic," in the now-current everyday sense of focusing on the practical at the expense of the theoretical; for this would make it impossible to accommodate his emphatic declarations that "theory is my subject, not practical details" (405) and that "[w]e have too little theory in the law rather than too much" (404).⁶³ It would be more accurate to say that, while he eschews uselessly free-floating abstractions, and respects the practical concerns of the working attorney, Holmes aspires to nothing less than a comprehensive theoretical conception of the law *qua* ever-evolving human institution.

Holmes urges the tonic effect of looking at the law from the perspective of the Bad Man. Acknowledging that this will "stink[] in the nostrils of those who are anxious to get as much ethics into the law as they can" (394), he insists that questions of law not be confused with questions of morals; he believes that judges are often mistaken or self-deceived about the real reasons for their rulings; and he recommends that they look clear-eyed (hard-nosed?), at considerations of "social advantage." So it is no wonder he is seen as "one of the most important forerunners" of the legal realist movement⁶⁴—or that the realists were later to cite him over and over. In 1930, Karl Llewellyn wrote that "*rules* ... are important so far as they help you see or predict what judges will do or so far as they help you get judges to do something. ... That is all their importance except as pretty playthings;⁶⁵ and, acknowledging Holmes's influence, that "th[e] concept of 'real rule' has been gaining favor since it was first put into clarity by

⁶⁰ *Southern Pacific v. Jensen*, 244 U.S. 205, 222 (1917), Holmes, J., dissenting. (The passage in which this occurs isn't entirely clear on this point, but as I read him Holmes must be contrasting "the law of some state" with Law-in-General, not with federal law.)

⁶¹ Holmes, "The Profession of the Law," conclusion of a lecture delivered to undergraduates at Harvard, February 17th, 1886, in Marke, *The Holmes Reader* [note 2], 67-8, p.67.

⁶² Holmes, "The Law" [note 2], p.62.

⁶³ Compare "Justice Holmes does not succumb to the fashionable but foolish glorification of the practical over the theoretic or contemplative life": Morris R. Cohen, "Justice Holmes" in *Mr Justice Holmes*, ed. Felix Frankfurter (New York: Coward McCann, 1921), 21-32, p.23.

⁶⁴ I quote from the editors' introduction to the first chapter, "Antecedents," of William W. Fisher III, Morton J. Horwitz, and Thomas A. Reed, eds., *American Legal Realism* (New York: Oxford University Press, 1993), 3.

⁶⁵ Karl Llewellyn, *The Bramble Bush: Our Law and Its Study* (New York: Oceana, 1930), p.5.

Holmes." In this context—in a phrase startlingly reminiscent of Peirce's criticisms of Descartes' "paper doubts"—Llewellyn contrasts "real" with merely "paper" rules;⁶⁶ and in the same article, reflecting on the interconnections of law and the social sciences, he observes that "Holmes' mind had travelled most of the road two generations back."⁶⁷ The same year, Jerome Frank described Holmes as "the Completely Adult Jurist."⁶⁸

So perhaps it would be fair to classify the realists as "post-Holmesians." Still, it is important not to forget that Holmes had caught, at the end of what Llewellyn thinks of as his proto-realist path, a glimpse of that "comprehensive theoretical vision of the law *qua* ever-evolving human institution" stressed in my reading.

4. Filling Some Potholes in the Path of the Law

Even if it is plausible to think that a working attorney advising his client the Bad Man is trying to predict what a judge would decide, it seems ludicrous to suppose that this is what the judge himself is doing (though, to be sure, he may try to predict what a higher court might decide were the case to be appealed). This was the objection that came first to my mind; and, as I subsequently discovered, it had been made long before by Hart,⁶⁹ and, decades before that, by Fisch.⁷⁰ But now I see it can be avoided by reading Holmes with a little charity.⁷¹ Taking the perspective of working attorney and

his client the Bad Man is a heuristic device,⁷² a way of highlighting two key contrasts: between law and morality, and between The Law in the abstract and Massachusetts-law-in-1897 or EC-law-in-2005 in the particular. It highlights a perspective, the Bad Man's, from which what matters isn't what's right, or what "the Will of the Sovereign" is, or even simply what the statutes, etc., say, but what the courts, which are the instruments of the public force, will determine the law to be.

An attorney may well be able to predict that if the Bad Man drives at 39 miles an hour in a 30-mile-an-hour zone he won't be subject to any penalty; but of course this doesn't mean that the speed limit *is* (say) 40 miles an hour, not 30. So, Luban argues, Holmes's account is "preposterous," missing the obvious fact that a rational Bad Man's risk-benefit analysis would take into account how likely it is that a law will be enforced.⁷³ But this objection also misfires. Holmes asks his audience to imagine an attorney advising a client what conduct is legal, not what illegal conduct might go undetected or unpunished—for his purpose is, precisely, to highlight the distinction between *law* and morality. (Perhaps he would have made this clearer had he written the relevant lines, in the manner of Peirce's revised, more realist, subjunctive version of the pragmatic maxim, in the subjunctive mood, in terms of what courts *would* decide *were* the case to come before them.)

More importantly, perhaps, criticisms like these focus on Holmes's first steps; while what is most valuable about "The Path of the Law," as I see it, is the much broader view to which those steps ultimately lead: a view which

⁶⁶ Karl Llewellyn, "A Realistic Jurisprudence —the Next Step," *Columbia Law Review*, XXX.4, 1930: 431-65, p.448. Peirce, *Collected Papers* [note 27], 5.264 (1868); 5.376 (1877).

⁶⁷ *Id.*, p.454.

⁶⁸ Jerome Frank, *Law and the Modern Mind* (1930; Gloucester, MA: Peter Smith, 1970), 270.

⁶⁹ H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), p.143.

⁷⁰ Fisch, "Justice Holmes, the Prediction Theory of Law, and Pragmatism" [note 47], p.8: "[i]t is inconceivable that in his work as a judge [Holmes] should have thought of law as prediction except with reference to a possible appeal ..."

⁷¹ As, in effect, Fisch does when he acknowledges that Holmes is here thinking of the law from the point of view of the practicing lawyer.

⁷² After I had written this clause, I found that Brewer had also used the phrase "heuristic device" in this context; see "Traversing Holmes's Path toward a Jurisprudence of Logical Form" [note 54], p.96. (Earlier, David Luban had considered this interpretation but rejected it—but for what seem to me bad reasons; see Luban, "The Bad Man and the Good Lawyer," *New York University Law Review*, 75, 1997: 1547-83, p. 1573.)

⁷³ David Luban, "The Bad Man and the Good Lawyer" [note 72], 1571.

is all-encompassing, yet not unhelpfully abstract; firmly anchored in real-world institutions and practices — realistic in the ordinary-language sense of the word — yet not cynical; anti-essentialist in eschewing the search for a mythical "quintessence of all law," yet not anti-theoretical. Legal systems are local⁷⁴—one might almost say (but not without appreciating the irony) essentially so; they are, as the jargon of our day would have it, "socially constructed," marked by the contingencies and curiosities of the circumstances in which they originally arose, and by each of the many Pushmepullyou mechanisms at work as they continue to grow and adapt to new circumstances. And yet; ... and yet, the continuing history of the evolution of legal systems is the history of humanity's long, ragged struggle towards civilized social life.

To be sure, Holmes's integration of the specific and the general, the local and the global, the humdrum and the inspiring, is a long way from perfect. But it is good enough to repay the effort of trying to improve it, to fill some gaps where he seems to have "too little theory rather than too much"—especially where his argument seems, as it stands, covertly to presuppose the kind of purely abstract and essentialist philosophy of law that he officially, and in my opinion rightly, eschews.

Holmes steers clear of questions like "What is Law?", and the pretentiously unhelpful answers they are apt to prompt. It might be objected, however, that when he refers to "the incidence of the public force through the instrumentality of the courts" (391), and assumes that what's relevant is what penalty a judge will impose on the Bad Man, and not, say, what penance his priest will demand or what the boss of the local Mafia family will

⁷⁴ Arthur R. Hogue writes that "the common law, properly so called, is not local custom. It is not ordinarily spoken of as the usage of a locality ... such as the shire of Kent, ... which was permitted to enjoy until 1926 its own peculiar rules of inheritance by gavelkind," but rather "applies throughout the realm" (*Origins of the Common Law* (Bloomington, IN: Indiana University Press, 1966; Indianapolis, IN: Liberty Fund, 1986), 187-8). But "throughout the realm" is local, in the sense I intend.

have his goons do to him, Holmes implicitly takes for granted an answer to this question in terms of—well, of legal institutions. But there is another way of looking at this, more in harmony with the general tenor of Holmes's jurisprudence, that does not invite the essentialist kind of answer he is anxious to avoid.

In the spirit of Holmes's observation that "most differences" are merely differences of degree, "when nicely analyzed,"⁷⁵ and of the regulative principle Peirce called "synechism"—that hypotheses that posit continuities are to be preferred over hypotheses that rely on sharp dichotomies⁷⁶—I suggest looking at the continuum of systems of social norms from tribal and religious customs, taboos, rules, and penalties through the "illegal legal orders" of the favelas of which Boaventura de Sousa Santos writes,⁷⁷ to the most central, paradigmatic cases of legal systems past and present and the complex, overlapping, and sometimes conflicting meshes of federal and state or provincial legal orders, of national and international law, ... and so forth and so on; and, rather than fussing over which qualify as really, genuinely *legal*, exploring the respects in which

⁷⁵ *Rideout v. Knox*, 148 Mass. 368, 19 N.E. 390 (1889). Holmes's opinion is reprinted in Harry C. Shriver, *The Judicial Opinions of Oliver Wendell Holmes: Constitutional Opinions, Selected Excerpts and Epigrams as Given in the Supreme Judicial Court of Massachusetts (1883-1902)* (Buffalo, NY: Dennis and Co., 1940), 162-6.

⁷⁶ Peirce, *Collected Papers* [note 27], 6.102-163 (1892); see also Susan Haack, "Not Cynicism but Synechism: Lessons from Classical Pragmatism," XLI.2 *Transactions of the Charles S. Peirce Society*, XLI.2, 2005: 239-52; in Joseph Margolis and John Shook, eds., *A Companion to Pragmatism* (Oxford: Blackwell, 2006), 141-53; and in Susan Haack, *Putting Philosophy to Work: Inquiry and Its Place in Culture* (Amherst, NY: Prometheus Books, 2008), 79-94.

⁷⁷ Boaventura de Sousa Santos, *Toward a New Common Sense* (New York: Routledge, 1995), especially 158-249. According to my Brazilian informants, however, it is the drug dealers who keep order in the favelas; so perhaps this case is further from the centrally legal, and closer to my example of penalties imposed by the Mafia, than Santos's descriptions might suggest. (There is no entry in the index of Santos's book under "drugs" or "drug dealers"; whether this is because things were different in 1970, the year of Santos' study of the quasi-legal role of the Residents' Association in the favela he calls "Pasargada," I have been unable to determine.)

they are like each other, and those in which they are unlike.⁷⁸ To be sure, this would be a tough job; still, I believe it could tell us everything we really need to know, without trapping us in a metaphysical impasse as the old essentialist question, "What is Law?" is apt to do.⁷⁹

Holmes urges that judges look to considerations of "social advantage," and specifically to the economic consequences of their rulings; but he doesn't seem to tell us where such considerations legitimately apply, or how they are to be weighed against considerations of other kinds. I can find nothing explicit in "The Path of the Law" that distinguishes, say, framing an innocent man to prevent public panic because there's a serial killer on the loose or re-incarcerating a sexual predator beyond his sentence to prevent him committing further crimes, from relying on considerations about incentives and such to hold all manufacturers of a certain type of drug partly liable when it is impossible to determine which of them actually made the drug that harmed these plaintiffs⁸⁰ (or

to hold a manufacturer partly liable even when we know they didn't sell the drug that injured this plaintiff);⁸¹ nor, more generally, anything that indicates how Holmes sees considerations of economics or social policy interacting with considerations of liberty, fairness, equity.

This is in effect the lacuna Benjamin Cardozo noticed when he asked:

Shall we think of liberty as a constant, or, better, as a variable that may shift from age to age? Is its content given us by deduction from unalterable procedures, or by a toilsome process of induction from circumstances of time and place? Shall we say that restraints and experiments will be permitted if all that is affected is the liberty to act, when experiment or restraint will be forbidden if the result is an encroachment upon liberty of thought or speech? ... I do not dare say how Holmes would make answer to these queries or others like them ...⁸²

Like Cardozo, I would elect the less abstract option; and my guess (and I suspect Cardozo's) is that, if pressed, Holmes would, too. Holmes's preference for the vague term "public force" over Austin's "sovereignty" points in this direction. He alludes to "the customs of the Salian Franks ... the German forests, ... the needs of the Norman kings" (399); which reminds us that, while "the Will of the Sovereign" could once be construed as literally referring to the fiat of tribal chieftains or feudal

⁷⁸ Compare the strategy adopted in my *Defending Science—Within Reason: Between Scientism and Cynicism* (Amherst, NY: Prometheus Books, 2003), chapter 6: rather than asking whether the social sciences are *really* sciences, exploring and trying to articulate the ways in which they are like the natural sciences, and the ways in which they are unlike.

⁷⁹ The approach I am recommending has much in common with some ideas expressed in Llewellyn, who writes: "I am not going to attempt a definition of law. ... A focus, a core, a center—with the bearings and boundaries outward unlimited." Karl Llewellyn, "A Realistic Jurisprudence—the Next Step" [note 66], 432. More recently, arguing against "legal centralism" and urging a "centrifugal" over a "centripetal" approach, Galanter has suggested looking at the many and various non-legal means of settling disputes as operating "in the shadow of" the legal system narrowly conceived, which sets a framework for party negotiation by providing "bargaining chips." Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law," *Journal of Legal Pluralism*, 19, 1981: 1-47; citing M. Damaska, "A Foreign Perspective on the American Judicial System," in T. J. Fetter, ed., *State Courts: A Blueprint for the Future* (National Center for State Courts, 1978), 237-42.

⁸⁰ For example, in DES (diethylstilbestrol) cases, where the injury—cancers that developed in the daughters of women who had taken the drug during pregnancy—was not apparent until decades after the women's exposure. *Sindell v. Abbott Laboratories*, 26 Cal.3d 588, 612, 607 P.2d 924,

937, 163 Cal.Reptr. 132, 145 (1980) (holding that "[e]ach defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries"). *Bichler v. Eli Lilly & Co.*, 79 A.D.2d 317, 329, 436 N.Y.S.2d 625, 632 (1981) (holding that "[i]t does not strain one's sense of fairness to allow a limited expansion of the doctrine of concerted action to cover the type of circumstance faced in a DES case where the traditional evidentiary requirements of tort law may be insurmountable").

⁸¹ *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 512, 539 N.E.2d 1069, 1078, 541 N.Y.S.2d 941, 950 (1989) (holding that "there should be no exculpation of a defendant who, although a member of the market producing DES for pregnancy use, appears not to have caused a particular plaintiff's injury").

⁸² Benjamin Cardozo, "Mr. Justice Holmes," introduction to *Mr. Justice Holmes*, ed. Felix Frankfurter [note 63], 1-20, pp.6-7.

kings, in complex modern societies there is only that diffused, delegated "public force" expressed in the decisions of federal, state, military, and administrative courts, of international tribunals, ... and so on.

Peirce is again helpful; this time, though, it is his conception of the growth of meaning on which we can draw. Thinking about how, as our knowledge grows, scientific concepts become deeper and thicker (and sometimes shed old connotations), the young Peirce had observed "[h]ow much more the word *electricity* means now than it did in the days of Franklin; how much more the term *planet* means now than it did in the time of Hipparchus. These words have acquired information."⁸³ Later he makes a similar point using a different and more immediately relevant kind of concept as example: "Symbols grow Such words as *force*, *law*, *wealth*, *marriage*, bear for us very different meanings than those they bore to our barbarous ancestors."⁸⁴ Yes; and concepts like *liberty*, *right*, etc., are deepened, thickened, made more specific (and sometimes stripped of old accretions) in the long, ongoing struggle of legal disputes and challenges, interpretations and reinterpretations. They are not Platonically fixed and uncontested, but initially thin, schematic concepts inherently open to more and less expansive readings, to finer specification, to broader extrapolation.⁸⁵

Holmes conceives of the law as encompassing all the many and various legal systems, past and present: remember that description of the history of the evolution of the law as disclosing "every painful step and world-shaking contest by which mankind has fought and worked its way from savage isolation to organic social life";⁸⁶ and he observes that "[a] man may live greatly in

the law as well as elsewhere; there as well as elsewhere his mind may find its unity in an infinite perspective"⁸⁷ This is a grand vision reminiscent of Peirce's conception of science as the long, ongoing struggle of the community of inquirers—the notional community of all those, past, present, and future, who have "storm[ed] the stronghold of truth," each new wave climbing clambering over those who went before.⁸⁸ In a speech the year before "The Path of the Law" Holmes had written:

The eternal procession [of generation after generation of lawyers, judges and legal thinkers] moves on, we in the front for the moment; and stretching away against the unattainable sky, the black spearheads of the army that has been passing in unbroken line already for over a thousand years."⁸⁹

This has more than a military metaphor in common with Peirce's conception of the human struggle to understand the world.

However, while Peirce makes an intimate connection between truth and inquiry by means of his pragmatist conception of truth as the hypothetical Final Opinion that would be reached were inquiry to continue indefinitely, and reality as the object of that Final Opinion,⁹⁰ Holmes leaves one wondering how, exactly, he sees the evolution of legal systems as connected with "the moral life of the race."

⁸³ Peirce, *Collected Papers* [note 27], 7.587 (c.1867). The second italics are mine.

⁸⁴ *Id.*, 2.302 (c.1895).

⁸⁵ From *Hymowitz v. Eli Lilly* [note 81], 507: "*the ever-evolving dictates of justice and fairness*, which are the heart of our common-law system, require formation of a remedy for injuries caused by DES" (emphasis added).

⁸⁶ Holmes, "The Law" [note 2], p.63.

⁸⁷ Cited in John Dewey, "Justice Holmes and the Liberal Mind" [note 63], 33-45, p.35.

⁸⁸ Peirce, *Collected Papers* [note 27], 7.51 (undated). The "fortress of knowledge" metaphor is borrowed and adapted from John Locke.

⁸⁹ Holmes, "Learning and Science," speech given at a dinner of the Harvard Law School Association in honor of Prof. C. C. Langdell, June 25th, 1895; in Marke, *The Holmes Reader* [note 2], 72-3, p.73.

⁹⁰ So the true and the real, as Peirce defines them, are independent of what you, or I, or any individual think them to be; not, however, of what the hypothetical community of inquirers would think them to be at the end of inquiry. It is also worth noting that Peirce's definitions are not intended to provide any guarantee of steady progress towards or convergence on the truth, or even any guarantee that the truth will actually ultimately be attained.

Some critics have suggested that Holmes's attitude to the relation of law and morality is just inconsistent.⁹¹ It is, however, entirely consistent to maintain (as Holmes does) that law and morality cannot be identified—that the two are conceptually distinct, that "morally bad, unjust law" is not an oxymoron; and at the same time to hold (as Holmes also does) that there may be greater or lesser overlap in extension between law and morality, and that the evolution of law may constitute progress in a moral sense. But perhaps the critics have in mind, rather, the apparent difficulty of reconciling Holmes's insistence that he "take[s] for granted that no hearer of mine will misrepresent what I have to say as the language of cynicism," his description of the law as "the witness and external deposit of our moral life" (392), and the indications that, by "considerations of social advantage" he means something more like "promoting the good of society" than "favoring the interests of a given social class," with passages that suggest that he thinks might makes right. As I understand him, however, when Holmes writes of (legal) "battle grounds where ... the decision can do no more than embody the preference of a given body in a given place and time" (397), or of the more powerful interests' winning the struggle, what he means is that a legal system is a forum for competing social groups to sort out their conflicts *without resorting to brute force*. So it might be more accurate to see Holmes's conception of the evolution of the law as fumbling steps on the road to more civilized social life as manifesting a kind of meliorism.

⁹¹ See Lon Fuller, *The Law in Quest of Itself* (1940; Boston: Beacon Press, 1966), p.118; Morton White, *Social Thought in America* [note 55], 69-70; Henry M. Hart, "Holmes's Positivism—An Addendum," *Harvard Law Review*, 64, 1951: 929-37, p.923. For earlier responses to this criticism see Mark DeWolfe Howe, "Holmes's Positivism—A Brief Rejoinder," *Harvard Law Review*, 64, 1951: 937-939, p.939, and Frederic Rogers Kellog, *The Formative Essays of Justice Holmes: The Making of an American Legal Philosophy* (Westport, CT: Greenwood Press, 1984), pp.58-74.

But now it begins to appear that the problem with Holmes's view of the relation of law and morality is not an inconsistency but—ironically enough, given that he is sometimes accused of moral skepticism—a tendency to elide the weak, plausible thesis that the growth of legal systems mirrors the evolution of human social life, tracking moral steps forward *and backward*, into the much stronger and much less plausible thesis that the history of law is a history of moral *progress*.

In early papers on "Primitive Notions in Modern Law,"⁹² as well as in the first chapter of *The Common Law*, Holmes points to the ways in which a primitive desire for vengeance, which he takes to be the original basis of law, has gradually been modified and adapted with the growth of civilization. As "an instructive example of the mode in which the law has grown ... from barbarism to civilization," Holmes refers to laws requiring that a slave or an ox that injures someone be stoned or surrendered by the current owner to the victim or his family, and to the provision in the Twelve Tables of Roman Law that an insolvent debtor may be cut up and his body divided among his creditors;⁹³ and then describes the ways in which such laws gradually changed and became more rational: "when ancient rules maintain themselves ..., new reasons more fitted to the time have been found for them, and ... they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted. ... [I]f truth were not often suggested by error, if old implements could not be

⁹² Holmes, "Primitive Notions in Modern Law," *American Law Review*, X, 1876: 422-39; "Primitive Notions in Modern Law II," *American Law Review*, XI, 1877: 641-660. These lectures are reprinted in Kellog, *The Formative Essays of Justice Holmes* [note 91], 129-46 and 147-66.

⁹³ "Lecture I: Early Forms of Liability," *The Common Law*, [1881], in Novick, *Collected Works* [note.50], vol.3, 109-324, 115-34. The relevant provision of the Twelve Tables is III.2; see <http://www.fordham.edu/halsall/ancient/12tables.asp>. (At first glance these "Tables" might look a lot like a set of legal "axioms"; but on second thoughts the idea that every specific legal decision could be deduced from them seems implausible to say the least.)

adjusted to new uses, human progress would be slow."⁹⁴ This last observation, like that phrase "from barbarism to civilization," strongly suggests that Holmes was assuming that the evolution of law is a progressive process.

Perhaps he is thinking, in part, that any peaceful means of settling disputes is better than the alternative and, in part, that some sort of stable and predictable legal order is necessary for any kind of civilized life; but obviously neither of these propositions is sufficient to establish a progressivist thesis. In a speech of 1913 Holmes observes that "[i]t is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to be first principles are believed by half his fellow men to be wrong."⁹⁵ Holmes repudiates the idea of moral axioms or first principles discoverable a priori; but, as I read him, he is no moral skeptic, but a moral fallibilist who thinks of ethics in an empirical, experimental way. So one might think of looking to James's moral philosophy—perhaps noting its affinity with Holmes's conception of "weighing of considerations of social advantage" in terms of accommodating the competing demands of different groups in society—for a more articulate theoretical account that might supply the missing argument.

For in "The Moral Philosopher and the Moral Life," James had argued that, since every desire makes some moral claim, one task of moral philosophy is, so far as possible, to reconcile competing desires: "The actually possible in this world is vastly narrower than all that is demanded; and there is always a *pinch* between the ideal and the actual, which can only be got through by leaving part of the ideal behind."⁹⁶ And Dewey, in effect,

amplifies and refines James's account when he shifts the focus from what is actually desired to what is really desirable, genuinely conducive to human flourishing; and, not entirely by the way, argues that economic conditions are not to be despised as "mere" means, but must be taken seriously as important elements in "the construction of good."⁹⁷

But even assuming that an empirical, experimental style of moral philosophy such as James's or Dewey's is defensible—which certainly isn't something I can hope to settle here, but a whole other question for a whole other lifetime—there could still be no theoretical guarantee that the evolution of legal systems is bound to be morally progressive; not at every step, and not even by and large and on the whole and in the long run. Outside of those Hegelian dreams to which Holmes dismissively alludes, there *can be no* guarantee that some class or classes of people will not, in principle or in practice, be denied access to the justice system, or denied any voice in the process by which laws are made; there *can be no* guarantee against the evolution of oppressive, totalitarian societies and oppressive, totalitarian laws; and there *can be no* guarantee against the stagnation, or the decline, of civilized social life.

In 1924, in the course of his first attempt, with the help of a German-English dictionary, to read the first volume of Oswald Spengler's extraordinary, visionary, over-reaching, infuriating rhetorical *tour de force*, *The Decline of the West*,⁹⁸ Holmes wrote to Pollock: "when one

Bowers, eds., Cambridge, MA: Harvard University Press, 1979), 141-62; and Graham Bird, ed., *Selected Writings: William James* (London: Dent; Rutland, VT: Everyman, 1995), 298-319, pp.310-311. Page references here are to Bird's anthology.

⁹⁷ Dewey, "The Construction of Good," *The Quest for Certainty* (1929; New York: Capricorn Books, G. P. Putnam's Sons, 1960), 254-86, especially pp.282-3.

⁹⁸ Oswald Spengler, *Der Untergang des Abendlandes*, 2 vols. (Vienna: Braumiller, 1918-22); English translation by Charles Francis Atkinson, under the title *The Decline of the West* (New York: Knopf, 1926-8). Among the many infuriating charms of this work is the fold-out chronology of the History of Almost Everything at the end of the second volume—which predicts, among other things, the year in which science will come to an end: 2000 (!).

⁹⁴ *The Common Law* [note 93], p.135.

⁹⁵ Holmes, "Law and the Court," speech at a dinner of the Harvard Law School Association of New York, February 15th, 1913, in Marke, *The Holmes Reader* [note 2], 64-6, p.65.

⁹⁶ William James, "The Moral Philosopher and the Moral Life" (1891), in *The Will to Believe and Other Essays in Popular Philosophy* (1897; Frederick Burkhardt and Fredson

suspects that a man knows something about life that one hasn't heard before one is uneasy It is long since I have got so much from a book as this, and if I heard that the swine were dead I should thank God."⁹⁹ In 1932, after reading both volumes in translation, he wrote again: "the accursed Spengler ... has as swelled a head as man can have and live, but the beast has ideas, many of which I don't know enough to criticize. I wish he were dead."¹⁰⁰ The "beast's" central and essential ideas, of course, were that all civilizations rise and fall, and that Western civilization was then in decline. For all its intellectual failings, for all its rhetorical excesses, Spengler's book must have been deeply unsettling to Holmes's hope that the evolution of the law tracks, not just the "moral life of the race," but the advance of civilization, of moral progress. Perhaps this explains Holmes's startlingly ambivalent reaction, his grudging acknowledgement that he had learned something from the "accursed Spengler"—the swine.

5. Theory and Practice: Mr. Justice Holmes

I don't believe Holmes was trying to provide a decision-procedure for judges. Since his philosophy of law is anchored in the insight that legal systems are local, it would hardly be appropriate that it aspire to say how a judge here and now (or there and then) should decide (or should have decided) an issue; for judicial decisions are apt to be focused on questions specific to a place, a time, a legal history, and a social context. So while some may take its failure to supply such a decision-procedure as an objection to Holmes's philosophy of law, I do not. Skimming through the list of Holmes's own thousand-odd opinions, what strikes me is, first, the sheer variety and the narrow specificity of the issues involved—the power of the Massachusetts legislature to grant woman suffrage;¹⁰¹ the restoration of remedies extinguished by

lapse of time;¹⁰² the right of the legislature to limit the height of boundary fences;¹⁰³ the right of the state to kill diseased horses;¹⁰⁴ the doctrine of "attractive nuisance";¹⁰⁵ the constitutionality of laws restricting hours of work,¹⁰⁶ etc., etc., etc.—and then the near-impossibility of understanding Holmes's arguments without reference to the legal setting and the social circumstances in which they arose.

However, two themes that recur in Holmes's constitutional opinions may have an indirect bearing on my interpretation of "The Path of the Law." The first is that, while the Constitution has its roots in the past, it is intended for an unknown future. As Holmes wrote in *Gompers*:

... the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and their line of growth.¹⁰⁷

And in *Missouri v. Holland*:

[W]hen we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us

Shriver, ed., *The Judicial Opinions of Oliver Wendell Holmes* [note 75], 6-9.

¹⁰² *Dunbar v. Boston and Providence R. R. Corp.*, 181 Mass. 383, 63 N.E. 916 (1902); reprinted in Shriver [note 75], 44-47.

¹⁰³ *Rideout v. Knox*, 148 Mass. 368 (1889); *Smith v. Moore*, 148 Mass. 407, 19 N.E. 393 (1889); reprinted in Shriver [note 75], 167-8.

¹⁰⁴ *Miller v. Horton*, 152 Mass. 540, 26 N.E. 100 (1891); reprinted in Shriver [note 75], 171-80.

¹⁰⁵ *United Zinc and Chemical Co. v. Britt*, 258 U.S. 268 (1922). On the concept of "attractive nuisance," compare *Sioux City & Pac. R.R. Co. v. Stout*, 84 U.S. 657 (1873); *Union Pac. Ry. Co. v. McDonald*, 152 U.S. 262, (1894); *Erie R.Co. v. Hilt*, 247 U.S. 97, (1918).

¹⁰⁶ *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁰⁷ *Gompers v. United States*, 233 U.S. 604, 610 (1914).

⁹⁹ Holmes to Pollock, July 18th, 1924, in Howe, *Holmes-Pollock Letters* [note 42], p.139.

¹⁰⁰ Holmes to Pollock, May 15th, 1932, *id.*, p.309.

¹⁰¹ *In re Municipal Suffrage to Women*, 160 Mass. 586, 36 N.E. 488 (1894); Holmes's opinion is reprinted in Harry C.

must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.¹⁰⁸

The second theme is that the Constitution leaves open the possibility of experiment, of trial and error.¹⁰⁹ This theme is expressed particularly clearly in Holmes's dissent in a 1921 picketing-law case, *Truax v. Corrigan*:

There is nothing I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me ...¹¹⁰

Of course, the same theme was heard, many years before, in one of Holmes's most celebrated opinions, his dissent in *Lochner* (1905). The majority had ruled legislation that limited bakers' working hours to no more than 10 a day or 60 a week unconstitutional: it "necessarily interferes with the right of contract between the employer and the employee."¹¹¹ In dissent Justice Harlan, with Justices White and Day, argued that "the liberty of contract may ... be subjected to regulations ... [to] guard the public health," and that bakery work was so strenuous, hot, and dusty that the restriction of hours was justifiable on public-health grounds. But Holmes's dissent not only observes that "[a] reasonable man might think it a proper measure on the score of health," but also stresses states' freedom to experiment.¹¹²

¹⁰⁸ *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

¹⁰⁹ One might wish that Holmes had said more about how it is to be determined whether states' experiments have succeeded or failed, and what should be done after we have learned from them.

¹¹⁰ *Truax v. Corrigan*, 257 U.S. 312, 344 (1921). In the same dissenting opinion, Holmes writes that "[d]elusive exactness is a source of fallacy throughout the law." *Id.* at 342.

¹¹¹ *Lochner* [note 106], 541.

¹¹² It may be worth noting, however, that in *Missouri v. Holland* Holmes had written that while "no doubt the great body of private relations usually fall within the control of the State, ... a treaty may override its power." *Missouri v. Holland* [note 108], 434.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. ...[A] constitution is not intended to embody a particular economic theory [I]t is made for people of fundamentally differing views¹¹³

I don't believe it is too fanciful to see this theme as having some connection with (though it is obviously not entailed by) Holmes's conception of the law as a forum for resolving the inevitable struggles between social groups in a peaceful way—nor, probably, as also having something to do with his personal experience of the horrors of the Civil War.¹¹⁴

By the end of his long life, Mr. Justice Holmes, the "Yankee from Olympus,"¹¹⁵ stood high in the public esteem. A volume celebrating his ninetieth birthday (the volume in which Cardozo raised his important question about the fixity or flexibility of legal concepts) included a

¹¹³ *Lochner* [note106], 546. I note that here Holmes does *not*, as one might have expected—and as his fellow-dissenters do—rely on his assessment of the social and economic consequences of ruling one way or the other. I also note the observation, later in his dissent, that "general propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." *Id.* at 547.

¹¹⁴ Holmes served for three years in the Union army. In the first two years, as a Lieutenant in the Twentieth Massachusetts Volunteer Infantry, he "was wounded three times [at Ball's Bluff, Antietam, and Fredericksburg], twice near fatally, and suffered from dysentery" (Sheldon Novick, "A Brief Biography of Justice Holmes," in *Collected Works of Justice Holmes* [note 50], 8-17, p.9). It may also be worth noting that in *Buck v. Bell*, 274 U.S. 200, 207, (1927), his most notorious opinion, Holmes writes that the sacrifice asked of Carrie Buck, the retarded woman whom the State of Virginia wished to have sterilized, is not so great compared with that asked of those who are required to die for their country. See also Susan Haack, "Pragmatism, Law, and Society: The Morals of *Buck v. Bell*," *European Journal of Pragmatism and American Philosophy* (forthcoming).

¹¹⁵ I allude, of course, to Catharine Drinker Bowen's fictionalized life of Holmes, *Yankee from Olympus* (Boston: Atlantic/Little Brown, 1944). The play by Emmett Lavery based on the novel, and the subsequent motion picture, are entitled *The Magnificent Yankee*.

notable tribute from Dewey entitled "Justice Holmes and the Liberal Mind." Though Holmes had "no social panacea to dole out, no fixed social program, no code of fixed ends," Dewey wrote, he was profoundly committed to "[l]iberalism as a method ... the adoption of the scientific habit of mind in application to social affairs"; that he adopted this scientific habit of mind as a judge, in restricted legal contexts, in no way lowered the value of his work "as a pattern of the liberal mind in operation."¹¹⁶ And on Holmes's death, in 1935, the *New York Times* described him as "the chief liberal of [the] supreme bench for 29 years."¹¹⁷

Since then, however, many have come to believe Holmes's reputation undeserved—a triumph of magnificent literary style over miserable judicial substance—and to criticize his judicial opinions as conservative, narrow-minded, benighted, or worse.¹¹⁸ Between 1941 and 1943, a series of articles linked Holmes's philosophy with totalitarianism;¹¹⁹ in 1945, Ben Palmer popularized these criticisms in the *American Bar Association Journal* under the title, "Hobbes, Holmes, and Hitler."¹²⁰ In 1950, an article in the *Boston American* described Holmes as a "cynical and senile brutalitarian."¹²¹ More recently, in 1997, Louise Weinberg

wrote of the "littleness" of Holmes's judicial work;¹²² and when, in 2000, Albert Alschuler asked, "Would you have wanted Holmes for a friend?"¹²³ it was obviously a question-expecting-the-answer—"absolutely not!"

Whom one would have wanted as a friend really isn't the point. Still, it's an intriguing question. Reflecting on it, I suspect I might well have found Holmes *too* Olympian for my taste; as, it seems, James eventually came to find him¹²⁴—not surprisingly, for James manifests a sympathetic understanding of human foibles, and of the suffering caused to some individuals by even the most benign social institutions, nowhere to be found in Holmes's; for example this, from "The Moral Philosopher and the Moral Life":

Pegler writes that "The *Harvard Law Review* has inquired for the date of the essay in which I referred to the late Oliver Wendell Holmes as a cynical and senile brutalitarian. Let them look it up. I don't think I like them." I don't know whether the *Harvard Law Review* succeeded, but I have not been able to locate the essay to which he refers.) On the first page of his biography, entitled *Pegler, Angry Man of the Press* (c.1963: Westport, Conn: Greenwood Press, 1973), after reporting that Pegler was awarded a Pulitzer prize and had "an income exceeding that of the President of the United States," Oliver Pilat reassures readers that "[d]espite frequent insinuations that he must be unbalanced, [Pegler] was sane by ordinary medical and legal standards."

¹²² Louise Weinberg, "Holmes's Failure," *Michigan Law Review*, 96, 1997: 691-723, p.691. Not so incidentally, Weinberg reads "The Path of the Law" simply as "a manifesto of American legal realism" (p.696).

¹²³ Albert W. Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* (Chicago: University of Chicago Press, 2000); the question is the title of his chapter 3.

¹²⁴ Though they were at one time close friends, only a few months after James had written to Holmes as "my Wendly boy," he was complaining that Holmes's "logical and orderly mode of thinking" made him uncomfortable to be with; and a year or so later, he wrote to his brother Henry of Holmes's "cold-blooded, conscious egotism and conceit." The first quotation is from a letter from James to Holmes dated January 3rd, 1868, in Ralph Barton Perry, *The Thought and Character of William James*, 1 (Boston: Little, Brown, 1935), p.508; the second from a letter from James to Holmes dated May 15th, 1868, in Perry, *id.*, p.514; and the third from a letter from William to Henry James dated October 2nd, 1869, in Perry, *id.*, p.307. My source is Alschuler, *Law Without Values* [note 123], pp.36 and 216-7.

¹¹⁶ John Dewey, "Justice Holmes and the Liberal Mind," in Frankfurter, *Mr. Justice Holmes* [supra, n.87], pp.34-5. See also James Tufts, "The Legal and Social Philosophy of Mr. Justice Holmes," *American Bar Association Journal*, 7, 1921: 359; and Roscoe Pound, "Judge Holmes's Contributions to the Science of Law," *Harvard Law Review*, 34, 1921: 449-453.

¹¹⁷ *New York Times* (March 6, 1935), section 1, p.1, columns 2-3.

¹¹⁸ The story is well told in G. Edward White, "The Rise and Fall of Justice Holmes," *The University of Chicago Law Review*, 39, 1971: 51-77, which is my source for some of the information in this and the previous paragraph.

¹¹⁹ Francis Lucey, "Jurisprudence and the Future Social Order," *Social Science*, 16, 1941: 211-217; John Ford, "The Fundamentals of Holmes's Juristic Philosophy," *Fordham Law Review*, 11, 1942: 255-278; Paul Gregg, "The Pragmatism of Mr. Justice Holmes," *Georgetown Law Journal*, 31, 1943: 262-295.

¹²⁰ Ben W. Palmer, "Hobbes, Holmes, and Hitler," 31 *American Bar Association Journal*, 1945: 569-73.

¹²¹ Westbrook Pegler, "Fair Enough," *Boston Evening American* (December 18, 1950), 34, 35 and 45. (On p.34

The pinch is always here. Pent in under every system of moral rules are innumerable people whom it weighs upon, and goods which it represses; and these are always rumbling and grumbling in the background See the abuses which the institution of private property covers ... the unnamed and unnameable sorrows which the tyranny, on the whole so beneficent, of the marriage institution brings to so many ... the wholesale loss of opportunity under our regime of so-called equality and industrialism See our kindness for the humble and the outcast, how it wars with the stern weeding-out which until now has been the condition of every perfection in the breed. See everywhere the struggle and the squeeze.¹²⁵

"Detachment": this is Rosal Yogat's word for what he finds disturbing about Holmes the man;¹²⁶ and perhaps it is the *mot juste*.

When one turns to the controversies over Holmes's judicial practice, the first conjecture that comes to mind is that his admirers are simply focusing on different opinions from those that draw his detractors' attention: the admirers, probably, focus on his dissenting opinions in cases like *Lochner* and *Abrams* (where, in a memorable defense of the right to free speech, Holmes protested the imposition of a twenty-year sentence for the publication of "two leaflets that I believe the defendants had as much right to publish as the Government had to publish the Constitution ... now vainly invoked by them");¹²⁷ while the detractors focus on his rulings in cases like *Britt*¹²⁸ and, invariably, *Buck v. Bell*, with that memorably grim line: "[t]hree generations of imbeciles are enough."¹²⁹ Still, given that Frankfurter quotes from *Buck v. Bell*, including this very line, in the course of his admiring essay on "Justice Holmes and the

Constitution,"¹³⁰ this can't be the whole story. Holmes's defenders argue that critics unfairly ignore the vast differences between the circumstances of his day and of ours;¹³¹ his critics point out, in reply, that Holmes was sometimes at odds with more progressive colleagues on the Court.

I'm not going to get embroiled in these controversies; but I will suggest that part of the problem, probably, is that since Dewey wrote his tribute there has been a significant shift not only in the extension but apparently also in the meaning of the word "liberal." What Dewey had in mind in calling Holmes a great liberal was, evidently, his willingness to allow the states to make social experiments. Nowadays, however, while the upshot Holmes favored in *Lochner* would be thought of as liberal, his reasoning would likely be perceived as conservative, as *il*liberal.¹³² I suspect there is a fascinating historico-socio-legal-linguistic-story to be told about when and how this shift took place,¹³³ and about the

¹³⁰ Felix Frankfurter, "Justice Holmes and the Constitution," in Frankfurter, ed., *Mr. Justice Holmes* [note 63], 46-119, p.99.

¹³¹ It may be worthy of note that the ruling in *Buck v. Bell* is less than three pages long, and that only one Justice dissented. On sterilization laws across the U.S., see Paul A. Lombardo, *Three Generations, No Imbeciles: Eugenics, the Supreme Court, and Buck v. Bell* (Baltimore, MD: Johns Hopkins University Press, 2008), p. 294. On eugenics laws more generally, see Stephen Trombley, *The Right to Reproduce: A History of Coercive Sterilization* (London: Weidenfeld and Nicholson, 1988).

¹³² Dissenting from the majority in a 2005 Supreme Court case on the medical use of marijuana, Justice Thomas—hardly regarded as a liberal—writes:

[T]he majority prevents states like California from devising drug policies that they have concluded provide much needed respite to the seriously ill. ... Our federalist system, properly understood, allows California and a growing number of other states to decide for themselves how to safeguard the health and welfare of their citizens. *Gonzalez v. Raich*, 125 S.Ct. 2195, 2238 (2005).

¹³³ I take it that "liberal" does not, like "progressive" and "conservative," have any inherently indexical character; which is why I think there may be a shift in meaning, not only in reference. To judge by the interesting discussion in Palmer, "Hobbes, Holmes, and Hitler" [note 120], some elements of the shift seem already to have been on the way

¹²⁵ James, "The Moral Philosopher and the Moral Life" [note 96], 313-4. (I say that this is "nowhere" found in Holmes; but of course it would have been more accurate to say, "to my knowledge, nowhere")

¹²⁶ Rosal Yogat, "Mr. Justice Holmes: Some Modern Views," *University of Chicago Law Review*, 31.2, 1964: 213-56.

¹²⁷ *Abrams v. United States*, 250 U.S. 616, 629. (1919).

¹²⁸ *Britt* [note 105], 268.

¹²⁹ *Buck v. Bell*, 274 U.S. 200, 207 (1927).

much larger process of which it is probably part, a larger process in which older understandings of *right*, *liberty*, etc., have been contested and expanded over and over (and doubtless, also, a fascinating psycho-philosophical story about why Holmes didn't, like Cardozo, see any of this coming). Telling these stories, however, is beyond my present powers; and it is time, anyway, to return to the issues about the meaning of "pragmatism" with which I began.

6. Concluding Thoughts on the Old Legal Pragmatism and the New

"Was Holmes *really* a pragmatist?"¹³⁴—bad question. We know that Holmes didn't officially ally himself with pragmatism, and that he had reservations about some of Peirce's and, especially, James's ideas; we know that there were many other influences on his thinking—among them Mill, Bentham, Austin, etc., etc.. But we should also be aware of the many affinities of Holmes's thinking with ideas from the classical pragmatist tradition in philosophy—affinities which, as we can now see, go far beyond the similarity between his articulation of the working attorney's conception of what it means to say that the current law in Massachusetts is thus and so, and Peirce's of what it means to say that this diamond is

by 1945. Robin L. West, "Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision," *University of Pittsburgh Law Review*, 46, 1985: 673-738; and Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996) are focused on more recent developments.

¹³⁴ Student Note, "Holmes, Peirce, and Legal Pragmatism," *Yale Law Journal*, 84, 1975: 1123-1140, and Hantzis [note 6] argue affinities between Holmes and Peirce. Thomas Grey, "Holmes and Legal Pragmatism," *Stanford Law Review*, 41, 1989: 787-870 argues affinities between Holmes and Rorty. H. Pohlman, *Justice Oliver Wendell Holmes and Utilitarian Jurisprudence* (Cambridge: Harvard University Press, 1984) and Patrick J. Kelley, "Was Holmes a Pragmatist? Reflections on a New Twist to an Old Argument," *Southern Illinois Law Journal*, 14, 1990: 427-67 argue Holmes's affinities with utilitarian positivism. (It may be worth noting that Peirce describes pragmatism as a kind of "prope-positivism," i.e., as broadly akin to Comte's ideas, though far more tolerant of metaphysics than classical positivism. See *Collected Papers* [note 27], 5.423 (1905).)

hard, that this proposition is true, or that this thing or kind or natural law is real.¹³⁵

Peirce criticizes the Cartesian notion of intuitive certainty, and describes himself as a "contrite fallibilist, ready to dump the whole cartload of his beliefs the moment experience is against them";¹³⁶ Dewey mounts a sustained attack on the Platonic, as well as the Cartesian, "quest for certainty";¹³⁷ Holmes observes that "certainty generally is an illusion ... no concrete proposition is self-evident" (397). Peirce objects that Descartes' epistemology, which makes the individual the judge of truth, is "viciously individualistic," and contrasts it with the method of science, which relies on interpersonal, objective standards; Holmes contrasts the objective, external legal use of terms like "malice" or "intent" with their subjective, moral use.¹³⁸ Peirce complains about the arguments of moral philosophers and theologians: "it is not the reasoning that determines what the conclusion shall be, but the conclusion that determines what the reasoning shall be. This is sham reasoning";¹³⁹ Holmes writes that judges think they are calculating legally-correct answers when really they are relying on perhaps unconscious policy preferences. Peirce writes to James that "it is of the very essence of [pragmatism] that belief is expectation of the future in all cases,"¹⁴⁰ and Dewey observes that pragmatism "does not insist upon antecedent phenomena, but upon consequent phenomena, ... the possibilities of action";¹⁴¹ Holmes's philosophy of law is forward-looking, calling for judges to "consider and weigh the ends of legislation, the means

¹³⁵ Peirce, "How to Make Our Ideas Clear," *Collected Papers* [note 27], 5.388-410 (1878).

¹³⁶ Peirce, *Collected Papers* [note 27] 1.11 (c.1897).

¹³⁷ John Dewey, *The Quest for Certainty* [note 97].

¹³⁸ Cf. Note, "Holmes, Peirce, and Legal Pragmatism" [note 134], pp.1126-1134. What Holmes means when he writes of morality as "subjective," I believe, is not that what is right depends on what a person thinks is right, but that moral appraisal must refer to inner, mental states such as intentions and the like.

¹³⁹ Peirce, *Collected Papers* [note 27], 1.57 (c.1896).

¹⁴⁰ *Id.*, 8.294 (1904).

¹⁴¹ John Dewey, "The Development of American Pragmatism," in *Philosophy and Civilization* (New York: Putnam, 1931; Capricorn edition, 1963), 13-35, p.24.

of attaining them, and the cost" (403). In the context of his agapism, a cosmological theory of how order might evolve from chaos, Peirce writes of "the law of mind": "ideas tend to spread continuously and to affect certain others that stand to them in a peculiar relation of affectibility";¹⁴² Holmes writes that "[t]he development of our law has gone on for nearly a thousand years, like the development of a plant, each generation taking the next step, mind, like matter, simply obeying a law of spontaneous growth" (398). In short: Holmes may not be officially on the team, but there is certainly much of the spirit of classical pragmatism in his thinking.¹⁴³

"Is contemporary legal neo-'pragmatism' really pragmatism?"—another pretty fruitless question. Despite the Foucauldian fogginess, Alberstein is undeniably correct on one point: the discourse of legal pragmatism from Holmes to the present has hardly been univocal. Holmes's philosophy of law eschews free-floating abstractions, and disavows the search for necessary and sufficient conditions that specify the essence of all law; but, like the philosophy of the classical pragmatist tradition, it is deeply theoretical. So it is far removed from the anti-theoretical stance of many contemporary legal neo-pragmatists.

And by now we can discern, in the mix of overlapping and competing recent conceptions of legal pragmatism, elements of pragmatism in its (present) ordinary-language sense; elements derived from the classical pragmatist tradition in philosophy; and elements from Rortyesque neo-pragmatism—which is in virtually every important respect diametrically opposed to Peircean pragmatism.¹⁴⁴ Moreover, the philosophical elements from classical pragmatism include, at least as often as

pragmatism-as-method, specific philosophical doctrines such as James's or Dewey's conception of truth,¹⁴⁵ or Dewey's political philosophy,¹⁴⁶ as well as elements of Holmes's jurisprudence¹⁴⁷—often, however, in simplified, and sometimes in distorted, forms. Nor is it a simple matter of each writer taking one or another of these elements as key; most, apparently, have drawn on several.

Things are further complicated because those who appeal to Peirce's or James's or Dewey's conceptions of truth don't always seem to realize that their concerns were far removed from legal propositions (and because those who appeal to Rorty's cynicism about truth—or, as he prefers to say, holding the concept at arms' length, "truth"—don't always seem to realize how thoroughly this cynicism undermines the very idea of justice),¹⁴⁸ by the wretchedly ambiguous use of "foundationalism" and "anti-foundationalism" encouraged by Rorty in epistemology,¹⁴⁹ and extrapolated by legal scholars to jurisprudence; and by a persistent false equation of "anti-essentialist" and "anti-abstraction" with "anti-theoretical."

The conceptual trap set by "foundationalism" and "anti-foundationalism" is, in brief, this. In epistemology, "foundationalism" has at least three senses; in the first, it refers to a family of theories of epistemic justification characterized by their reliance on a distinction between

¹⁴² Peirce, *Collected Papers* [note 27], 6.103 (1902).

¹⁴³ In this regard Kellogg's approach in *The Formative Essays of Justice Holmes* [note 91], seems to be somewhat in the same spirit as mine.

¹⁴⁴ See Susan Haack, "'We pragmatists ...'; Peirce and Rorty in Conversation" (1997), reprinted in Haack, *Manifesto of a Passionate Moderate: Unfashionable Essays* (Chicago: University of Chicago Press, 1998), 31-47, and in *Pragmatism, Old and New* [note36], 675-96.

¹⁴⁵ See, for example, Tamanaha, *Realistic Socio-Legal Theory* [note 16], and "A Pragmatic Response to the Embarrassing Problems of Ideology Critique in Socio-Legal Studies," in Morales, *Renascent Pragmatism* [note 20], 49-71.

¹⁴⁶ See, for example, Posner, *Law, Pragmatism, and Democracy* [note19], 99-115.

¹⁴⁷ See, for example, William G. Weaver, "The 'Democracy of Self Devotion': Oliver Wendell Holmes, Jr., and Pragmatism," in Morales, *Renascent Pragmatism* [note 20], 3-30.

¹⁴⁸ See Susan Haack, "Epistemology Legalized: Or, Truth, Justice, and the American Way," 49 *American Journal of Jurisprudence*, 49, 2004: 43-61.

¹⁴⁹ See Susan Haack, *Evidence and Inquiry: A Pragmatist Reconstruction of Epistemology* (1993; 2nd, expanded ed., Amherst, NY: Prometheus Books, 2009), chapter 9, for disambiguation.

basic ("foundational") and derived beliefs; in the second, to a conception of epistemology as an a priori discipline the task of which is to provide the foundation of all legitimate claims to knowledge; and in the third, to the idea that our standards of better and worse evidence, more and less justified beliefs, must be, not merely conventional, but grounded in some relation of justification and truth. Only the third has an analogue in legal theory: the idea that legal rules, to be (in a non-epistemic sense) justified, must be grounded in some relation to (presumably, moral) values. But Holmes's account is not clearly anti-foundationalist in this sense: while it repudiates the idea that what the law is may be deduced from some overriding set of moral principles, it also urges that judges look to the social benefits and disadvantages of their rulings, and it is if anything *over*-optimistic about the connection between the evolution of law and moral progress.

The false equation of "anti-essentialist" and "anti-theoretical" has been compounded by some unhappy developments in the use of the word "theory": a too-ready assumption that "theory" must mean "moral, social or political theory" (which are really only a couple of sub-classes of the vast variety of types of theory); and, relatedly, the specialized sense recently taken on by "Theory"—now with that imposing upper-case "T"—to connote this or that (feminist, postcolonialist, etc.) principle for "reading" literary or legal texts.

Returning to my opening quotations, we see that, like Atiyah, Schneider and Ingram are apparently using "pragmatism" in its ordinary-language rather than its philosophical sense; that Leiter has apparently misconstrued the purport of Holmes's description of the law as involving "prophecies" of what judges will decide;¹⁵⁰ and that Grey, Posner, and Tamanaha

apparently assume that legal pragmatism must be anti-theoretical because it is anti-essentialist. But Luban's formula, "result-oriented, historically-minded antiformalism," briefly captures some key elements of Holmes's jurisprudence quite well; and Tamanaha's reference to the "middle way" captures something important to the tenor of the old-pragmatist tradition.

In 2004, concluding my brief history of the fragmentation of philosophical pragmatism, I wrote that:

[i]t is easy to get hung up on the question of which variants qualify as authentic pragmatism; but probably it is better—potentially more fruitful, and appropriately forward-looking—to ask, rather, what we can borrow from the riches of classical pragmatism, and what we can salvage from the intellectual shipwreck of the new.¹⁵¹

Here, exploring the fragmentation of legal pragmatism, I have suggested a reading of Holmes's conception of law informed by ideas from the classical pragmatist tradition in philosophy: an interpretation in which "The Path of the Law" leads us to a comprehensive theoretical vision of the law as a vast congeries of legal systems, each local to its place and time, and all responding, some more and some less successfully, to human needs and to the conflicts that inevitably arise in any society.¹⁵²

substantial accounts of pragmatism, with affinities to my own." Leiter, "Rethinking Legal Realism" [note 17], 303, n.156. Leiter's "more substantial" is apparently intended in contradistinction to the idea that pragmatism is trivial or banal, as suggested by Richard Rorty in "The Banality of Pragmatism and the Poetry of Justice," *Southern California Law Review*, 63, 1990: 1811-1820, and Thomas Grey in "Holmes and Legal Pragmatism" [note 134]. But while it is true that neither I nor Warner interpret pragmatism as empty or banal, Leiter's suggestion that our conceptions of pragmatism are akin to his is mistaken: Warner's understanding of pragmatism is quite different from mine; and neither his nor my understanding of pragmatism is even close to Leiter's.

¹⁵¹ Haack, "Pragmatism, Old and New" [note 36], p.58.

¹⁵² My thanks to Mark Migotti for helpful comments on more than one draft, and to John Finniss for helpful suggestions on a near-final version; to David Hollander, in the University of Miami Law Library, for his help in tracking

¹⁵⁰ Leiter refers readers to my "Pragmatism," in Jonathan Dancy and Ernest Sosa, eds., *A Companion to Epistemology* (Oxford: Blackwell, 1992), 351-6, and to Richard Warner, "Why Pragmatism? The Puzzling Place of Pragmatism in Critical Theory" [note 14] "for sturdier and more

down relevant materials; to Robert Lane, for his help in finding Peirce's earliest uses of the word "pragmatism" and of the phrase "paper doubts"; and to audience members when this paper was presented in the Law Schools at the University of Miami, the Jagiellonian University, Kraków, the University of Oslo, and the University of Pennsylvania, and in the Department of Economics at the University of Missouri, Kansas City.