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The Pluralistic Universe of Law: Towards a Neo-Classical Legal Pragmatism*

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Abstract. After a brief sketch of the history of philosophical pragmatism generally, and of legal pragmatism specifically (section 1), this paper develops a new, neo-classical legal pragmatism: a theory of law drawing in part on Holmes, but also on ideas from the classical pragmatist tradition in philosophy. Main themes are the “pluralistic universe” of law (section 2); the evolution of legal systems (section 3); the place of logic in the law (section 4); and the relation of law and morality (section 5).

1. Legal Pragmatism, Old and New

We have too little theory in the law rather than too much.
(Oliver Wendell Holmes 1896)¹

[P]ragmatism [is] a mediator and reconciler [. . .] she
“unstiffens” our theories [. . .]. Her manners are various
and flexible, her resources [. . .] rich and endless.
(William James 1907)²

In 1869 James wrote to Holmes from Berlin: “[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 predicted that this “might grow into something very important after a sufficient number of years.”³ “This,” of

* This paper is based on a lecture given at the conference of the IVR (International Association for Legal and Social Philosophy) in Kraków, Poland, in August 2007. I have drawn here and there on two earlier papers (Haack 2005a, Haack 2007).

¹ Holmes 1896, 3, 404.

² James 1907, 43. James notes that he borrowed the word “unstiffens” from the young Italian pragmatist Giovanni Papini.

³ Quoted in Perry 1935, 508; in Fisch 1964, 4; and in Baker 1991, 214–5.

course, was the Metaphysical Club, the birthplace of the classical pragmatist tradition in philosophy; and Holmes was involved even before the beginning. He had attended some of Peirce's lectures at the Lowell Institute in 1866;⁴ and after James's return from Europe he participated in early meetings of the Club. Many years later, reminiscing over the origins of pragmatism, Peirce would write that "Mr. Justice Holmes will not, I believe, take it ill that we are proud to remember his membership" in the band.⁵

After the winter of 1871–2, however, Holmes seems to have dropped out; and he never officially described himself as a pragmatist. Indeed, when James introduced his pragmatism to the philosophical world Holmes, like many readers, had difficulty distinguishing it from the Will to Believe—an idea with which he had so little sympathy that in a 1908 letter to Sir Frederick Pollock he dismissed it as "an amusing humbug."⁶ Nevertheless, Holmes is traditionally regarded as the founding, and still the leading, representative of legal pragmatism—and with good reason; for the understanding of law that he articulated in *The Common Law* (1881), in his most famous paper, "The Path of the Law" (1896), and in his opinions as a Justice first of the Massachusetts and then of the United States Supreme Court is unmistakably pragmatist in tone and tenor. Dewey published a "credo" on philosophy of law, and wrote on logic in the law, on the legal idea of corporate "personality," and in praise of Holmes's legal empiricism;⁷ James alluded to discussions with "a learned judge" of his acquaintance about decisions that have to be made on inadequate evidence;⁸ Peirce used the adversarial legal procedure as a foil to his epistemological reflections.⁹ But in that great hotel to which Giovanni Papini likened pragmatism,¹⁰ only Holmes was at work on the deepest and most difficult issues about the nature of the law and its place in society.

⁴ Howe 1957, 251, citing Weiner 1949, 75. Peirce's (unpublished) lectures were entitled "The Logic of Science and Induction."

⁵ Peirce, in Hartshorne *et al.*, eds., 1931–58, 5.12 (c. 1903).

⁶ Holmes to Sir Frederick Pollock (June 17, 1908), in Howe, ed., 1941, vol. 1:139.

⁷ Dewey 1941 (the "credo" on philosophy of law); Dewey 1924 (logic in the law); Dewey 1926 (corporate personality); Dewey 1921 (Holmes's legal empiricism).

⁸ "[A]s a learned judge once said to me, few cases are worth spending much time over; the great thing is to have them decided on *any* acceptable principle, and got out of the way." (James 1896, 236).

⁹ "Some persons fancy that hot and partisan debate is the way to investigate. This is the theory of our atrocious legal system. But Logic puts its heel upon this suggestion" (Peirce 1878, in Hartshorne *et al.*, eds. 1931–58, 2.635).

¹⁰ "As [. . .] [Giovanni] Papini has well said, [pragmatism] lies in the midst of our theories, like a corridor in a hotel. Innumerable chambers open out of it. In one you may find a man writing an atheistic volume; in the next, someone on his knees praying for faith and strength; in a third a chemist investigating a body's properties; in a fifth the impossibility of metaphysics is being excogitated. But they all own the corridor, and all must pass through it if they want a practicable way of getting into or out of their respective rooms": James 1907, 32.

In recent decades philosophical pragmatism has often been vulgarized and abused; and of late it has sometimes found itself co-opted in support of this or that neo-analytic fashion.¹¹ Something not dissimilar has also happened in legal thinking: occasionally you read that legal pragmatism is enjoying a “renaissance,”¹² but as you look closer you soon begin to wonder what, exactly, this is a renaissance of; for the sad fact is that, in legal as in mainstream philosophy, vulgarization and co-option seem to be the order of the day. Moreover, various as they are, many if not most recent articulations of legal neo-pragmatism manifest a marked distrust of, or even outright hostility to, legal theory: pragmatism is “a general aversion to theory,” Patrick Atiyah wrote in 1987;¹³ it is “freedom from theory-guilt,” Thomas Grey averred in 1990;¹⁴ it holds that “moral, political, and legal theories have value only as rhetoric, not philosophy,” Richard Posner explained in 2003.¹⁵

This association of pragmatism with the repudiation of theory seems more than a little ironic, given Holmes’s insistence that “we have too little theory in the law rather than too much”—almost as ironic as Richard Rorty’s airy observation that the pragmatist thinks that “Truth is not the kind of thing one should expect to have an interesting theory about”¹⁶ sounds, given Peirce’s, James’s, and Dewey’s efforts to articulate the meaning of truth.¹⁷ So it should come as no surprise to hear that, as usual, my approach will run counter to recent intellectual fashion. My “neo-classical legal pragmatism” is a theoretical understanding of the law; but it is a theoretical understanding which—entirely in accordance with James’s idea of pragmatism as “unstiffening” our theories—offers a “various and flexible” account of legal phenomena. I won’t put much stress on the so-called “prediction theory” or “bad man theory” which some (somewhat misleadingly, in my opinion)¹⁸ attribute to Holmes; or on the more recent law and economics “movement,” of which some (very misleadingly, in my opinion)¹⁹ see Holmes as a pioneer. But what

¹¹ For a summary history, see Haack 2004.

¹² As witnessed by the titles of Symposium 1990 (“The Renaissance of Pragmatism in American Legal Thought”) and of Morales 2003 (*Renasant Pragmatism: Studies in Law and Social Science*).

¹³ Atiyah 1987, 5.

¹⁴ Grey 1990, 1569.

¹⁵ Posner 2003, 12 (I note that Posner is writing of “everyday pragmatism”; but disentangling his account of the relation of “everyday” to “philosophical” pragmatism is not a task I can undertake here).

¹⁶ Rorty 1982, xiii.

¹⁷ See e.g., Peirce 1878; James 1907, 95–113; Dewey 1911.

¹⁸ I read Holmes’s references to the Bad Man and to the law as predictions of what judges would decide as first and foremost a heuristic device to persuade readers of the distinction between law and morality. See Haack 2005a, 86–7, and section 5 below.

¹⁹ Holmes certainly believes that an understanding of economics, and of other social sciences, is of value in the law; but there is no suggestion in his work of the more ambitious, imperialistic relation of economics to law presently in fashion. See Haack 2005a, 83–4, and section 5 below.

I offer will be legal theory, all right; only not rigid or essentialist legal theory.

As I develop my main themes—the diverse plurality of legal systems encompassed within the whole congeries of social arrangements we call “law”; the evolution and adaptation of pre-legal, legal, sub- and post-legal systems; the growth of meaning of legal concepts; the role of logic in the law; and the complex interrelations of law, morality, and society—I will start from some key ideas of Holmes’s, and draw freely on ideas from Peirce, James, and Dewey. My goal, however, is not primarily exegetical, but philosophical; and while the understanding of law sketched here will be in the spirit of classical pragmatism, my primary concern is not that the theory be pragmatist, but that it be true.

2. The Pluralistic Universe of Law

In “The Path of the Law,” Holmes criticizes Sir James Stephen for “striving for a useless quintessence of all [legal] systems, instead of an accurate analysis of one.”²⁰ Many years later, in his dissenting opinion in *Southern Pacific v. Jensen* (1917), he famously observes that “[t]he common law is not some brooding omnipresence in the sky,”²¹ but is always the law of some state. But Holmes also writes of the whole congeries of legal systems, past and present, as a rich, complex tapestry still being woven in legislatures and in courts:

When I think [...] of the law, I see a princess mightier than she who 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.²²

Every legal system is local to a place and to a time; but the whole ensemble, the whole vast conglomeration of systems of law—from the earliest precursors of modern legal systems to as-yet only dimly-perceivable future developments—represents a long and still on-going struggle to supplant arbitrary, brute force by intelligent, peaceable ways of resolving the disputes that inevitably arise in any human community.

This picture brings James’s almost-but-not-quite oxymoronic title, “A Pluralistic Universe,” nearly irresistibly to mind.²³ James himself was

²⁰ Holmes 1896, 403.

²¹ *Southern Pacific v. Jensen*, 244 U.S. 205 (1917), 222 (Holmes, J., dissenting).

²² Holmes 1885, 63.

²³ James 1909.

referring to the “mosaic” metaphysics of his radical empiricism;²⁴ but his phrase is no less apt as a reminder of the richness and variability of the legal systems of the world, past and present, their complicated interrelations, and their roots in commonalities of human nature and society.²⁵

From a global perspective the plurality is obvious. But even if we consider just one nation, the U.S., we see that its legal universe is distinctly pluralistic. The laws of the states differ in myriad ways, subtly and not so subtly, each from the others. Some states, for example, impose the death penalty, while others do not—and among those that do, some require the jury to determine, at the sentencing phase, whether the defendant will be dangerous in future, others allow it, and the rest don’t treat a defendant’s possible future behavior as relevant;²⁶ some states still follow the old *Frye* Rule for the admissibility of scientific testimony,²⁷ while others have adopted *Daubert*,²⁸ and others again follow neither, but go their own way;²⁹ etc. Federal law has its own scope, its own substance, and its own elaborate structure; and the U.S. Supreme Court hears appeals not only from federal courts of appeals, but also from state courts. Indian reservations are officially sovereign nations within the U.S., with their own prosecutors, courts, etc.; but these courts’ sentencing powers are very limited, and these prosecutors cannot prosecute non-Indians, not even non-Indians who live in the reservation.³⁰ Textbooks explain the complicated meta-rules for determining jurisdiction; but jurisdictional issues are themselves often the subject of legal maneuvering—so often, indeed, that commentators sometimes complain about what they perceive as an alarming growth of legal

²⁴ James 1912. I believe there is an interpretation (not, however, exactly James’s own) in which James’s metaphysical thesis is true. The way I would put it is this: there is one real world, but this one real world has many aspects. See Haack 2002; Haack 2003, chap. 5; Haack 2005c.

²⁵ “Legal pluralism,” in the context of this paper, should be understood as referring to a descriptive thesis, not a normative one; my concern is not, for example, to advocate for (or against) recognition under English law of polygamous marriages of immigrants from Bangladesh. Of late, however, the phrase is very often used normatively, as in e.g., Shah 2005.

²⁶ States requiring testimony regarding of future dangerousness include Texas (Tex. Stat. Ann. Art. 37.071) and Oregon (Ore. Rev. Stat. Ann 163.150). States allowing such testimony include Wyoming (Wyo. Crim. Code 6-2-102), and (as one of a disjunction of aggravating factors) Virginia (Va. 19.2-264.4). States silent on the matter include Georgia (Ga. Code. Ann. 17-10-30), Delaware (Del. Code. Ann. 921-141), and New Mexico (NM Stat. Ann. 31-20A-5).

²⁷ *Frye v. United States*, 54 App.D.C. 46, 393 F.1013 (1923) (suggesting as the test for admissibility of novel scientific evidence that the principle or discovery on which it is based should be “sufficiently established to be generally accepted in the field to which it belongs.”)

²⁸ *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993) (ruling that the Federal Rules of Evidence adopted in 1975, specifically Rule 702, supersede *Frye*, and that the test for the admissibility of expert scientific testimony is its relevance and reliability.)

²⁹ See Lustre 2001; and, for a summary account of the position in each of the states, Cather 2007.

³⁰ Fields 2007a. Indian tribes’ authority to prosecute serious offenses such as murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny was taken away under the Major Crimes Act of 1885; these offenses can now be prosecuted only by the federal government (Fields 2007b). On civil litigation involving Indian tribes, see Fields 2007c.

“forum shopping” (the focus of the complaints often, but not always,³¹ being plaintiffs’ attorneys’ efforts to get cases tried in a jurisdiction favorable to the admission of their expert testimony).³²

Other commentators, uneasy when U.S. courts appeal to precedents from foreign legal systems, express concern about what a memorable recent headline characterized as “judicial tourism.”³³ This reminds us—not that we should need reminding—that U.S. law is in turn part of the much larger pluralistic universe of legal systems of the world. Some of these legal systems grow out of or supersede others, some nest one inside another, overlap, interact, or conflict. U.S. law is close kin to other common-law systems. It is more distantly related to the civil-law systems with which, however, it long ago shared roots—and with some of which its close cousin, English law (itself sitting side by side with the distinctive Scottish law), now finds itself, along with the French, German, Polish, etc., legal systems, sharing the big umbrella of European Community law. U.S. law is more distant again from the many and various other, more exotic legal systems—with which, however, it interacts in numerous ways: helping to devise a new Iraqi constitution under which certain family disputes may be settled under sharia law is a striking example, but a full list would be very long, and very various.

And this is just part of an even vaster pluralistic universe, for I haven’t yet even mentioned international law: arms control agreements; trade agreements such as the General Agreement on Tariffs and Trade (GATT) and the North American Free Trade Agreement (NAFTA); organizations such as the World Trade Organization (WTO) or the International Civil Aviation Organization (ICAO); multilateral environmental agreements

³¹ The recent legal brouhaha over the estate of Anna Nicole Smith would be one example. See Cass 2007 and LaGarga, Larruba, and Garrison 2007 (reporting on legal issues over which court has authority to decide custody of Smith’s surviving child, and which probate court has jurisdiction over Smith’s estate).

³² See e.g. Gottesman 1998, 777 (predicting that, after *Daubert* (note 30 above) and *Joiner* (*General Electric Company v. Joiner*, 522 U.S. 136 [1997]) “[p]laintiffs will attempt assiduously to forum shop in order to keep their cases out of federal court, at least in those states where the state courts do not apply a similar reliability screen,” and “[e]ven when the case is indisputably destined for federal court, we can expect a heightened degree of forum shopping”); and, more generally, Berger 2001.

³³ Glendon 2006. The article refers to *Roper v. Simmons*, 543 U.S. 551 (2005), a case in which, by a 5-4 vote, the Supreme Court struck down the death penalty as it applied to persons under the age of 18; and in which Justice Kennedy wrote for the majority that “the overwhelming weight of international opinion [is] against the juvenile death penalty.” *Roper* also prompted a series of articles in the *Harvard Law Review*: Jackson 2005-6; Waldron 2005-6; Young 2005-6. Other significant examples include the Supreme Court’s ruling in *Miranda v. State of Arizona*, 384 U.S. 436 (1966), 486 (“The English procedure since 1921 under the Judges’ Rules is significant” in suggesting that “the danger to law enforcement in curbs on interrogation is overplayed”), and Judge Pollock’s reversal, in *U.S. v. Llera-Plaza*, 188 F.Supp. 2d 549 (March 13, 2002), 566, of his earlier partial exclusion of fingerprint examiners’ testimony in (citing a then-recent English decision, *Regina v. Buckley*, 143 SJ LB 159 [April 30, 1999]).

such as the Agreement on the Conservation of Small Cetaceans³⁴ of the Baltic and North Seas (ASCOBANS); the international tribunals that tried Germans and Japanese accused of war crimes, the more recent tribunals that tried persons accused of war crimes in the former Yugoslavia and in Rwanda, and now the International Criminal Court (ICC); and so on and so on.³⁵

Interactions between national and international law are multifarious: for example, U.S. civil-aviation law simply incorporates ICAO “standards” and “recommended practices”;³⁶ the two Libyan nationals accused of planting the bomb on Pan Am flight 103 were surrendered by the Libyan authorities after the U.N. imposed sanctions, and then tried by a Scottish court sitting in the Netherlands.³⁷ And these interactions are themselves sometimes the subject of legal disputes: in 2008, for example, the U.S. Supreme Court ruled that the decision by the International Court of Justice³⁸ in *Avena*,³⁹ that the U.S. had violated the Vienna Convention by failing to inform 51 Mexican nationals of their rights under that Convention, was not directly enforceable domestic law, and that President Bush’s Memorandum stating that the U.S. would have state courts give effect to *Avena* did not require the states to review these Mexicans’ claims regardless of their own procedural rules.⁴⁰

But what, you may be wondering, besides their many interactions, *unites* this diverse plurality of legal systems? The easy answer is that, for all their diversity, they are all systems of *law*; but this is much *too* easy, immediately raising a much harder question: what makes a set of social rules a legal system, what distinguishes laws from, say, rules of etiquette? In my view, this is a question best approached in the spirit of Holmes’s observation, from an opinion in a case involving the height of boundary fences, that “[m]ost differences, when nicely analyzed” are really differences of degree.⁴¹

Holmes’s comment is in the spirit of the regulative principle Peirce called “synechism”:⁴² an in-principle preference for hypotheses that posit continuities over those that posit sharp distinctions. Peirce himself had

³⁴ The word “cetaceans” refers to whales, dolphins, porpoises, etc.

³⁵ My list comes, not quite at random, from examples in chapter 6 of Scott and Stephan 2006, and chapter 5 of Murphy 2006. Evans 2003 includes a densely-printed 6-page list (xxxiii–xxxviii) of abbreviations for various international agreements, organizations, etc.

³⁶ Murphy 2006, 163–5.

³⁷ Murphy 2006, 168; citing *Her Majesty’s Advocate v. Megrahi*, No. 1475/99, slip. op. (High Court Judiciary at Camp Zeist, Jan. 31, 2001), reprinted in 40 I.L.M. 582 (2001). One of the Libyans was convicted, the other acquitted.

³⁸ The judicial arm of the United Nations, dealing with legal conflicts between nations.

³⁹ *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J.12.

⁴⁰ *Medellin v. Texas*, 128 S.Ct. 1346 (2008).

⁴¹ *Rideout v. Knox*, 148 Mass. 368, 19 N.E. (1889), 372. Holmes’s opinion is reprinted in Shriver, ed. 1940, 162–6.

⁴² Peirce 1892, 1893. See also Haack 2005b.

metaphysical hypotheses primarily in mind; but synechism is no less helpful as a way of approaching our problem in legal theory. Rather than trying to identify “the essential nature of law,” it suggests, we would do better to try to articulate in what ways those normative systems we would not hesitate to classify as legal systems are like those we are more inclined to describe, reaching for our scare quotes, as systems of “law,” and in what ways they are different.⁴³ Like Karl Llewellyn, who writes that he is “not going to attempt a definition of law,” I see “a focus, a core, a center—with the bearings and boundaries outward unlimited.”⁴⁴

To be sure, the kind of articulation I have in mind would be no easy task; but I think what we would find is that, besides clear, central instances that we would readily characterize as legal systems, there will be a broad and quite various range of penumbral phenomena which we feel in some degree unsure how to classify; and moreover that the reasons for our hesitation may be different in some cases than in others. Here is a very rough, preliminary list: of core cases of legal systems, of systems one might be tempted to describe as quasi-, barely- or scare-quotes “legal,” and of phenomena that seem clearly to fall outside the category of law:

- national/state law, the core extension of “legal system”;
- international law (though, where mechanisms for enforcement are lacking or very informal, some may feel the need for scare quotes);⁴⁵
- “pre-legal” systems, e.g., tribal codes where law is not clearly distinguishable from taboo and social custom;
- “sub-legal” systems, e.g., systems of arbitration or “alternative dispute resolution,” which operate in the shadow of the legal system⁴⁶ to settle disputes while avoiding the costs and the delays of regular legal proceedings;⁴⁷

⁴³ The effect of scare quotes is to turn an expression meaning “X” into an expression meaning “so-called ‘X,’” i.e., “purported, supposed X.” The *locus classicus* on this subject is chapter 1 of Stove 1982; see also Haack 2005c.

⁴⁴ Llewellyn 1930.

⁴⁵ Prof. Murphy writes that “those new to the field” sometimes question whether international law is really law, or only “law”—none-too-subtly hinting that the worry is naive. However, when, only a few pages later, he writes that “a contracting state that cannot meet its obligations [under Article 8 of the Montreal Protocol] is encouraged to report to a protocol implementation committee. [. . .] The committee then works with the non-compliant state to achieve compliance [. . .],” he reveals that the thought may not be quite so naive after all. Murphy, 208, 153, 162. Professors Scott and Stephan acknowledge more straightforwardly that enforcement of international law ranges from the formal to the very informal: “The European Court of Justice [. . .] unambiguously carries out formal enforcement of Community law. At the opposite extreme, the so-called Molotov-Ribbentrop Pact of 1939 [. . .] relied entirely on the two parties’ resources to ensure compliance” (Scott and Stephan 2006, 110–1, citations omitted).

⁴⁶ The phrase comes from Damaska 1978; see also Galanter 1981.

⁴⁷ These themselves range from the quite formalized to the very informal indeed. For an example of the latter, see Shishkin 2007.

- “illegal legal orders,” such as the “law” of the favelas⁴⁸ and systems of “law” imposed by authorities that have seized power illegitimately, where the regime that enforces laws is itself illegitimate;⁴⁹
- school rules, rules of etiquette, moral codes, copy-editors’ rules, etc., which are not, even in an extended sense, legal systems.

Rough as this list is—and as it stands, it is very rough indeed—it is enough to suggest that the concept of law may be a kind of cluster-concept that involves many elements including, at least, the source of the norms, their function, their content, and the mechanisms for enforcement. (Holmes’s preference for the vaguer and more ample phrase, “the public force,” over Austin’s “will of the sovereign” might be helpful here.)⁵⁰ We are comfortable speaking of “law” or “legal system” when all the elements are present; less so, in varying degrees, when some are present but others are not.

As H.L.A. Hart wrote almost half a century ago, “nothing precise enough to be recognized as a definition could provide a satisfactory answer” to the question, “What is law?” As the preceding thoughts suggest, an important reason for this may be that the concept of law has acquired its complex character in part because of the ways in which, over the course of human history, the normative systems we might call pre-legal, legal, and post- or sub-legal have evolved.⁵¹

3. Evolutionary Legal Theory

“The development of our law has gone on for nearly a thousand years,” Holmes writes, “like the development of a plant, each generation taking the inevitable next step, [...] simply obeying a law of spontaneous growth.”⁵² The old pragmatists were among the first philosophers to take Darwin’s work seriously; and Holmes was no exception.

Of course, legal systems are not biological organisms or species, but cultural phenomena. And perhaps, when Holmes speaks of the evolution of our legal system, this is not much more than a metaphor, a picturesque way of saying that the law constantly changes and adapts, responding “spontaneously” to changing circumstances. But it is also possible to

⁴⁸ Santos 1995, 158–249. Santos seems to think of these “legal orders” as somewhat analogous to tribal law; Brazilian acquaintances, however, tell me it is the drug dealers who effectively control these slums, and who enforce these norms.

⁴⁹ Interestingly, my reluctance to include these as really legal systems seems to decline if the regime has been in power long enough.

⁵⁰ Holmes 1896, 399.

⁵¹ The quotation is from Hart 1961, 16. This is not the place for a detailed exploration of similarities and differences, but it is worth noting that Hart’s approach is largely analytical and ahistorical, whereas mine is perhaps better described as synthetic, and certainly as historical.

⁵² Holmes 1896, 398.

construe the idea of the evolution of legal systems in a more robust way, as part of an understanding of the evolution of cultural phenomena generally. It is characteristic of human beings⁵³ to make tools to do things we want to do, to devise new ways of doing things, to create social institutions, roles, and rules, and to transmit all these to others; and such cultural practices, though shaped in part by our human genetic endowment, are also shaped in part by the processes of natural selection operating on cultural phenomena themselves (and can in turn affect what genetic traits are passed on).⁵⁴

Even understood in a minimal, metaphorical way, the idea of the law as evolving suggests useful ways of thinking about legal developments. Occasionally, legal systems evolve fast enough that significant shifts can be traced over the relatively short term. In our times, the rapid evolution of European law is an obvious example. In relatively recent history, the evolution of Indian and Pakistani law since 1947 may be another: at Partition, the two legal systems, both modeled on the English, were virtually identical; by now, I understand, they are significantly different—the Indian legal system so codified as almost to resemble a civil-law system, the Pakistani legal system still clearly a system of common law, but now overlaid by elements of Islamic law.⁵⁵

More often, legal systems evolve slowly, whether on the larger or the smaller scale. One large-scale example is the gradual and uneven shift away from trial by ordeal towards other methods of proof,⁵⁶ with Continental courts moving towards canonical law and the Inquisition, English courts towards jury trials,⁵⁷ and ultimately, after many centuries, to the present adversarial system and exclusionary rules of evidence.⁵⁸ There are even analogues of the evolutionary variant in its isolated environmental

⁵³ Though not quite exclusively of human beings. See, e.g., Wilson 1998; Begley 2001, Haack 2003, 154–7.

⁵⁴ I am calling here on the work of Robert Boyd and Peter J. Richerson: see Boyd and Richerson 1985, 2005a, 2005b.

⁵⁵ I owe the example to conversation with a young Pakistani attorney, Ali Nasir. According to “A Legal Research Guide to Pakistan,” <http://www.nyulawglobal.org/globalex/Pakistan.htm>, 2 (last visited August 31, 2007), “Article 1 of the 1973 Constitution declares that Pakistan’s official name shall be the Islamic Republic of Pakistan, and Article 2 declares Islam the state religion. [. . .] [T]he insertion of article 2A in 1985 [requires] all laws to be brought into consonance with the Quran and Sunnah.” According to an article in Globalex (Ramakrishnan 2006), in India “the primary source of law is in the enactments passed by the Parliament or State Legislatures. [. . .] An important secondary source is the judgments of the Supreme High Court and some of the specialised Tribunals.”

⁵⁶ The process seems to have been gradual and complex, with some parts of Europe moving away from ordeals earlier, others later, and various explanations are suggested for the shift. See Brown 1975; Hyams 1981; Bartlett 1986; Taruffo forthcoming.

⁵⁷ Kadri 2005, 69–70, gives a description of the first English jury trial, held in Westminster in 1220.

⁵⁸ For a summary history, including a sketch of recent compromises of adversarialism, in the form of court-appointed expert witnesses, see Haack 2008b.

niche—such as the twelve professional “jurats,” appointed usually until the age of 70, who are responsible for determining questions of fact in the Royal Court of the small Channel Island of Guernsey.⁵⁹ A relic of a much older French practice,⁶⁰ this puts me nearly irresistibly in mind of the rare species of turtle that survives on just one of the Galapagos Islands.⁶¹

For a smaller-scale but still very significant example we might turn to the history of U.S. Constitutional law. The First Amendment to the Constitution, providing in part that “Congress shall make no law respecting the establishment of religion,” crafted by James Madison, was ratified in 1791—shortly after the dis-establishment of the Anglican church in Virginia, a change of which Madison and Thomas Jefferson had been the prime movers.⁶² It was devised for a new nation of which virtually all citizens were Christian, but of rival sects, and many of whom had come from England to escape religious persecution; and it was intended, at a minimum, to prevent the establishment of a national church.

However, as Holmes would observe more than a century later in *Missouri v. Holland* (1920), by then the words of the Constitution had “called into life a being that could not have been foreseen completely by the most gifted of its begetters.”⁶³ And by now the U.S. is an almost unrecognizably-different nation in which there are representatives of a vast variety of religions, Christian and non-Christian, not to mention plenty of evangelical atheists, and in which most young people are educated, not by their families or in church schools, but in public schools; and courts find themselves called on to determine whether the provision, at public expense, of remedial education in mathematics or reading to

⁵⁹ I first learned this, I confess, not from legal research but from a novel: Elizabeth George, *A Place of Hiding* (George 2003). But I refer legal scholars to Dawes 2003, 385: “Jurats perform the role of jurors [. . .] There are twelve jurats at any one time and, once elected, [they] usually remain in office until the age of 70. [. . .] Jurats decide questions of fact.”

⁶⁰ Guernsey is a British crown dependency; it was legally separated from mainland Normandy in the 13th century, but still uses French as its legislative language. <http://en.wikipedia.org/wiki/Guernsey>. “The Jurats of the Royal Court [. . .] traditionally were the sole judges of both law and fact. They were, and to an extent remain, personifications of the island’s legal identity. [. . .] [I]n 1245 it was stated that King John had instituted *duodecim coronatores juratas*, in the Islands after the loss of Normandy. In these “twelve sworn coroners” we see the jurats in their nascent form” (Ogier 2005, 69).

⁶¹ Anonymous 2007 (reporting that “scientists are hoping to save the turtle species from Pinta Island, whose only surviving member is a 35-year-old tortoise named Lonesome George”). I note that Jersey also has twelve jurats, but the Jersey system differs slightly from the neighboring island: Jersey jurats are chosen by electoral college, appointed to the age of 72, and sit (but not all at the same time, as in Guernsey) as judges of fact in the Royal Court of Jersey.

⁶² As Madison wrote in his *Memorial and Remonstrance Against Religious Assessments* (1785, para. 7): “experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary effect.” For the relevant history see generally Cobb 1902, Adams and Emmerich 1990.

⁶³ *Missouri v. Holland*, 252 U.S. 416 (1920), 433.

parochial-school children,⁶⁴ a school district specially created to follow the boundaries of a religious enclave,⁶⁵ or “evolution disclaimers” read in public-school biology classes or stuck in public high-school biology texts,⁶⁶ etc., etc., amount to an unconstitutional “establishment of religion.”

In 1802, then-President Jefferson had explained in his letter to the Danbury Baptists that the religion clauses of the First Amendment—the Establishment Clause together with the Free Exercise Clause—erected a “wall of separation” between church and state. By now, some commentators argue that the “wall of separation” originally intended to prevent government intrusions into religion has come, regrettably, to serve to prevent any intrusion of religion into government;⁶⁷ others, however, argue that the wall appears, regrettably, not to be high enough to protect against what they perceive as the threat of theocracy.

On a smaller scale again, I think of the evolution of the “mailbox rule,” according to which a contract is made as soon as the offeree mails his acceptance of an offer, before the offeror receives the acceptance. England adopted this rule in 1818, in the landmark case of *Adams v. Lindsell*.⁶⁸ In 1822, the Massachusetts Court ruled against it.⁶⁹ The state of New York accepted it in 1830,⁷⁰ in 1850, the U.S. Supreme Court endorsed it.⁷¹ Gradually, it spread from one jurisdiction to another; Massachusetts, for example, had accepted it by 1897.⁷² By now, however, contracts are very often made, not by regular mail, but electronically; and section 203 of the Uniform Computer Information Transactions Act (2002) adopts a “time of receipt” rule.⁷³

⁶⁴ *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (holding Pennsylvania and Rhode Island statutes providing state aid to non-public schools for secular purposes unconstitutional).

⁶⁵ *Board of Education of Kyrias Joel Village School District v. Grumet*, 512 U.S. 687 (1994) (holding the creation of such a school district unconstitutional). In a furious dissent, arguing that the majority has abandoned text and history, Justice Scalia writes scornfully of how surprised the rabbi of Kyrias Joel would be to learn that “the Powers That Be, up in Albany” had conspired to effect an establishment of Satmar Hasidim.

⁶⁶ *Selman v. Cobb County School District*, 390 F. Supp.2d 1286 (N.D. Ga. 2005) (holding evolution disclaimer in high-school biology texts unconstitutional); *Kitzmilller v. Dover Area School Board*, 400 F. Supp. 2d 707 (M.D.Pa. 2005) (holding an evolution disclaimer statement read at beginning of ninth-grade biology class unconstitutional).

⁶⁷ Carter 2006 and, more generally, Carter 1993.

⁶⁸ *Adams v. Lindsell*, 1 B. B. & Ald. 681 (1818).

⁶⁹ See *M’Culloch v. The Eagle Insurance Company*, 1 Pick, 278, 18 Mass. 278, 1822 WL 1594 (1822), 287 (“[t]he offer did not bind the plaintiff until it was accepted, and it could not be accepted, to the knowledge of the defendants, until the letter announcing the acceptance was received [. . .]”); fn 2 refers to *Adams v. Lindsell* (note 70 above), which was brought to the court’s attention after *M’Culloch* was decided, but suggests there are relevant differences in the facts of the two cases.

⁷⁰ See *Macther’s Administrators v. Frith*, 6 Wend. 103, Lock. Rev. Cas 408, 21 Am. Dec. 262 (1830).

⁷¹ *Taylor v. Merchants’ Fire Insurance Company of Baltimore*, 50 U.S. 390 (1850).

⁷² *Brauer v. Shaw*, 46 N.E. 617, 168 Mass. 198, 200 (1897) (the opinion was written by Holmes).

⁷³ Unif. Computer Information Transactions Act, §§101–905 (2002). My source is Norwood 2005–6.

Another small-scale but fascinating example is the gradual spread of the *Frye* Rule: introduced in 1923; at first hardly cited; then adopted here and there, usually specifically with respect to polygraph evidence (which had been the concern in *Frye* itself); then gradually spreading, until by the early 1980s it had become—now for the admissibility of novel scientific testimony generally—“probably the ‘majority rule’” across the country;⁷⁴ and then, after *Daubert* changed the federal standard, dropped by some states and retained by others, sometimes in modified forms—and in Florida, mutating into a kind of *Fryebert* Rule.⁷⁵

As you may have noticed, however, in the passage I quoted at the beginning of this section, Holmes wrote of “our” legal system, presumably referring to the Anglo-American system; and some may think the evolutionary conception is appropriate *only* to our legal system, and not more generally. Perhaps some legal systems, like the little slave girl Topsy in *Uncle Tom’s Cabin*, just “grow’d”;⁷⁶ but, they may argue, others have been deliberately shaped under the influence of some articulate philosophical understanding of justice, right, government, or society. Holmes himself, they may remind us, acknowledges that you have only to “[r]ead the works of the great German jurists [to] see how much more of the world is governed today by Kant than by Bonaparte.”⁷⁷

But any sharp division of legal systems into those that grow by seat-of-the-pants shifts, revisions, extrapolations, and reinterpretations in reaction to new circumstances and those that are deliberately built and rebuilt on the basis of articulated philosophical or political ideas would surely be overdrawn: we would doubtless find both kinds of process in all legal systems, albeit doubtless in differing proportions in different times and different places. (In this context I think, for example, of how much the conception of freedom of religion incorporated in the First Amendment owes both to the ideas of John Locke’s *Letter Concerning Toleration*,⁷⁸ and to Roger Williams’ much more radical conception of religious freedom).⁷⁹

More importantly, the more robust interpretation according to which the evolution of legal systems is conceived as part of the evolution of cultural phenomena more generally is quite compatible with an acknowledgment that cultural practices are not always “spontaneous,” but sometimes deliberately conceived and executed. The biological basis for our human capacity for culture is explicable without appeal to teleology; but so far from

⁷⁴ See Giannelli 1983, 196.

⁷⁵ See *Ramirez v. State*, 810 So.2d 836 (2001).

⁷⁶ Stowe 1851–2, 240.

⁷⁷ Holmes 1896, 405.

⁷⁸ Locke 1689.

⁷⁹ Unlike Locke, Williams deplored the idea of toleration, which he saw as a kind of condescension on the part of the dominant religion towards the less-favored: Roger Williams, *The bloody tenent, of persecution, for cause of conscience, discussed, in a conference betweene truth and peace* . . . (1644); my source is Cobb 1902, 12–3, 181–88.

implying that we humans don't deliberate, plan, and design, it provides the basis for understanding how we came to have this capacity.

Not only legal systems but also legal concepts shift and change, acquiring new meaning and shedding old connotations as they adapt to changing circumstances. This thought is in the spirit of Peirce's conception of the growth of meaning, which he first articulates with reference to scientific concepts like *planet* or *electricity*, but later applies to social concepts such as *force*, *wealth*, *marriage*.⁸⁰ Similarly, legal concepts such as *privacy*, *liberty*, *right*, etc., are not Platonically fixed, but initially thin and schematic; they are inherently open to interpretation, specification, extrapolation, and negotiation among competing social interests. Indeed, the concept of *law* itself, I suspect, is not only a cluster-concept, but also open-textured, shifting subtly over time.

Holmes reminds us how the legal concept of responsibility has changed since the time the law solemnly punished an animal or even an inanimate thing that injured someone;⁸¹ more recently, the DES (diethylstilbestrol) cases—where, because it was impossible to determine which of the companies then in the market had manufactured a drug that turned out, twenty years later, to have injured the daughters of the women who took it, liability was assigned on the basis of market share⁸²—remind us that the same is true of the concept of causation. In fact, we can see a whole range of legal concepts being gradually adapted, refined, amplified, restricted, contested, and revised. Constitutional law provides many and various examples, as courts address such questions as whether the right to privacy extends to a department-store dressing room⁸³ or a public telephone booth,⁸⁴ or whether the right to free exercise of religion extends to the use of a controlled substance, peyote, in a Native American religious ceremony.⁸⁵

To be sure, this evolutionary approach, and these ideas about the growth of meaning of legal concepts,⁸⁶ are quite at odds with the logical models

⁸⁰ Peirce 1877, in Hartshorne *et al.*, eds., 1931–58, 7.587 and Peirce 1893, in Hartshorne *et al.*, eds., 1931–58, 2.307.

⁸¹ Holmes 1881, Lecture I: "Early Forms of Liability."

⁸² *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 161 Cal. Rptr. 133 (1980); *Bichler v. Eli Lilly & Co.*, 79 A.D.2d 317, 438 N.Y.S.2d 621 (1981) (Even more radically, in *Hymowitz v. Eli Lilly*, 73 N.Y.2d 487, 539 N.E.2d 107, 541 N.Y.S.2d 941 (1989) a defendant company was held liable despite a showing that it was not in the market at the time of the injury).

⁸³ See e.g., *State of Ohio v. McDaniel*, 44 Ohio App.2d 163, 170, 337 N.E.2d 173, 178 (1975) ("the defendants, while using the Lazarus fitting rooms, had a reasonable expectation of privacy under the constitutional prohibition of unreasonable searches").

⁸⁴ See e.g., *Katz v. United States*, 389 U.S. 347 (1967), 352 ("a person in a [public] telephone booth may rely upon the protection of the Fourth Amendment").

⁸⁵ *Employment Division, Dept. Of Human Resources of OR v. Smith*, 494 U.S. 872 (1990) (ruling that "[...] Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from the use of [peyote]").

⁸⁶ See also Haack 2009.

and the formalistic conceptions of legal decision-making that still dominate much European legal theory. But, not surprisingly, I share Holmes's reservations about exclusively logical models of the law.

4. Law, Logic, and Policy

"The life of the law has not been logic; it has been experience." This is perhaps the best-known sentence of *The Common Law*—and it is the "ringing line" Max Fisch quotes when he describes Holmes's book as "full of the spirit of pragmatism" from beginning to end.⁸⁷ Not that pragmatism was in any way hostile to logic—far from it; in fact, Peirce was the first person to describe himself in *Who's Who* as a logician.⁸⁸ But Holmes's conception of law is, indeed, full of the spirit of the pragmatist aspiration—expressed in somewhat different ways by Peirce, by James, and by Dewey⁸⁹—to avoid the pitfalls both of the A Priori Method, and of traditional sensationalist Empiricism; and instead to take an approach based, as Peirce would have said, on the "method of experience and reasoning,"⁹⁰ or, as Dewey might have put it, on the "application of intelligence" in experience.⁹¹

What Holmes meant by his famous fighting words emerges more clearly when we put them in the context in which they first appeared, the year before the publication of *The Common Law*: in Holmes's review of a book by Christopher Columbus Langdell,⁹² first Dean of Harvard Law School—whom Holmes described, not entirely flatteringly, as "perhaps [. . .] the greatest living legal theologian."⁹³ Langdell conceived of legal argument as involving first the analysis and articulation of core legal concepts, and then the syllogistic deduction of the legally-correct conclusion given the facts of a case. From the proper analysis of the concept of *contract*, for example, he believed it could be deduced syllogistically that the mailbox rule is legally incorrect.

Holmes doesn't deny the value of consistency in the law; but, he continues, though consistency is "something; [. . .] it is not all"; and he

⁸⁷ Holmes 1881, 115; Fisch 1942, in Ketner and Kloesel, eds. 1986, 8.

⁸⁸ See Costello 1957, 264 ("What I have written here [. . .] was known to me in 1914, the year when Charles Peirce died, the only man, I believe, to write "logician" as his occupation in *Who's Who*").

⁸⁹ See e.g., Peirce 1877; James, "What Pragmatism Means," lecture II of James 1907; Dewey, "Escape from Peril," chapter 1 of Dewey 1929.

⁹⁰ Peirce 1877.

⁹¹ "[T]he view here presented, [. . .] demands that intelligence, employing the best scientific methods and materials available, be used, to investigate, in terms of the context of actual situations, the consequences of proposed legal decisions and acts of legislation" (Dewey 1941, 84). "What intelligence has to do in the service of impulse is to act not as its obedient servant but as its clarifier and liberator. [. . .] Intelligence converts desire into plans [. . .]" (Dewey 1950, 255).

⁹² Langdell 1871 (Holmes was reviewing the 2nd, 1880 edition).

⁹³ Holmes 1880, 234.

believes that Langdell's conception of law-as-logical-system is hopelessly unrealistic. Judges often present their conclusions *as if* they had deduced them from legal principles and precedents, Holmes argues; but it is naive to imagine that this means they actually arrive at their decisions by purely logical inferences. Very often, rather, they are quietly adapting existing law to new circumstances, and their arguments are only "the evening dress the newcomer puts on to appear presentable according to the conventional requirements."⁹⁴

It might be said in Langdell's defense that the thesis of law-as-logical systems is surely not descriptive, but prescriptive; so that the fact, if it is a fact, that judges fail to arrive at their conclusions, as they should, "syllogistically," is no real objection. But Holmes's essential point is that Langdell's conception is as indefensible as a prescription as it is false as description: that while consistency, and hence predictability, is undeniably desirable in the law, equally certainly it is not all. I might put it this way: some legal questions are quite cut-and-dried—perhaps even capable, in principle, of being made by a calculating machine; but legally important concepts may be indeterminate in relevant respects, new social arrangements and technologies may require that older legal principles be adapted,⁹⁵ and changing moral sensibilities may make certain precedents—of decisions upholding the rights of slave-holders, for example—no longer tolerable.⁹⁶

Of course, 1880 is quite a significant date in the history of logic. For just at the time when Holmes and Langdell were debating about the role of logic in the law—though evidently neither was aware of this—the intellectual revolution that gave us what is now called "modern logic" was getting under way. Frege's *Begriffsschrift* had been published in 1879;⁹⁷ a year later Peirce had also arrived, independently, at a unified propositional and predicate calculus.⁹⁸ Moreover, anyone aware of this history would see at once that syllogistic logic, at any rate, cannot do the job Langdell thought it could. For the concept of a contract is inherently relational, having the form "A promises B, in return for consideration *c*, to do *x*"; but one of the most important limitations of Aristotelian logic is that it is unable to express relations. But even though this would be no obstacle in the new, modern logic of which Frege and Peirce were the pioneers—which

⁹⁴ Holmes 1880, 234.

⁹⁵ As, for example, copyright law devised for print media has had to be adapted to handle new, electronic forms of publishing.

⁹⁶ I think in this context of what is probably Holmes's most notorious opinion: his ruling in *Buck v. Bell*, 274 U.S. 200 (1927) that the state of Virginia would not violate Carrie Buck's constitutional rights by sterilizing her without her consent. (At the time of the case, interestingly enough, only one Justice dissented; and Holmes's ruling for the majority occupies only a page and a half.)

⁹⁷ Frege 1879.

⁹⁸ Peirce 1880.

has much greater expressive power—the main thrust of Holmes’s critique of the idea of law-as-logical-system is unaffected.

Holmes returns to his critique of legal formalism not only in “The Path of the Law,” but also in his constitutional opinions: e.g., *Gompers* (1905), where he writes that “the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions [. . .].”⁹⁹ And a more recent constitutional case, *County of Allegheny v. ACLU* (1989),¹⁰⁰ provides a particularly fine contemporary illustration. At issue in this case were two holiday displays: a creche displayed on the staircase of the Pittsburgh County Courthouse, surrounded by potted poinsettias, and with an angel at its crest bearing a banner reading “*Gloria in excelsis Deo*”; and a 45-foot high Christmas tree and 18-foot high menorah displayed outside the City-County Building, with a sign at the foot of the tree bearing the name of the mayor and text including the city’s “salute to liberty.” The legal question was whether either, both, or neither of the displays was constitutional under the Establishment Clause. The District Court had held that both displays were constitutional; reversing the District Court’s decision, the Court of Appeals held that neither was. The Supreme Court, finally, held that the display of the menorah with the Christmas tree was constitutional, but that the courthouse display of the creche violated the Establishment Clause, and so was unconstitutional.

Specifically, Justice Blackmun wrote, the display of the creche in the courthouse failed the second prong of the test the Court had earlier articulated in *Lemon*:¹⁰¹ its primary effect was to advance religion. As Justice O’Connor had suggested a few years before in her concurrence in another Christmas-display case, *Lynch v. Donnelly* (1984), this “primary effect” prong of *Lemon* should be interpreted as precluding any government activity that sends a message of “endorsement” of one religion over another or of religion over non-religion;¹⁰² and—taking into account the

⁹⁹ *Gompers v. United States*, 233 U.S. 604 (1905), 610.

¹⁰⁰ *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

¹⁰¹ The test articulated in *Lemon v. Kurtzman* (note 66 above) required that, to satisfy the Establishment Clause, (i) the statute, provision, display, etc., at issue must have a secular purpose; (ii) that its primary effect should be neither to advance nor to inhibit religion; and (iii) that it must not lead to excessive government entanglement with religion. The *Lemon* Test was itself intended as an articulation of the “neutrality” requirement first articulated in *Everson v. Board of Education of Ewing TP*, 330 U.S. 1 (1947), the first case in which the Establishment Clause was applied to the states.

¹⁰² *Lynch v. Donnelly*, 465 U.S. 668 (1984), 690–694. (Justice O’Connor, concurring). In this case the ruling was that a city’s Christmas display that included a nativity scene along with reindeer, giant candy canes, and a “talking” wishing well, was constitutional (legal commentators now sometimes speak jokingly of the “reindeer rule,” referring to the idea that a religious symbol like a creche is legally neutralized if enough reindeer or other such kitsch are included in the same display). See Janocsko 1990 (Mr. Janocsko was co-counsel for the County of Allegheny in *Allegheny v. ACLU*).

location of the *crèche*, the angel's words, and the fact that nothing in the setting detracted from the religious character of those words—this was precisely the message conveyed by the *crèche*.¹⁰³ However, Justice Blackmun continued, the display of the menorah beside the Christmas tree—taking into account the fact that a Christmas tree is by now a secular rather than a religious symbol, that the tree was clearly the predominant element in the display, and that the message conveyed by the sign was one of pluralism—passed the *Lemon* test.¹⁰⁴ Justice O'Connor concurred in part and in the judgment, filing an opinion amplifying her proposed refinement of the effects clause of *Lemon*.¹⁰⁵

Justice Brennan concurred in part but dissented in part: when their context was taken seriously into account, he argued, it was clear that *both* displays violated the effects clause of *Lemon*.¹⁰⁶ Justice Stevens also reached the conclusion that both displays were unconstitutional; but his argument focused, not on *Lemon*, but on the interpretation of the word “respecting” in the Establishment Clause itself.¹⁰⁷ Justice Kennedy, with Chief Justice Rehnquist and Justices Scalia and White, also concurred in part but dissented in part; however, they believed that *neither* display violated the Establishment Clause, that both fell “well within the tradition of government accommodation” of religion.¹⁰⁸

Presumably everybody concerned was trying to determine whether either, neither, or both of the displays violated the Establishment Clause; but it would be thoroughly implausible to conclude, as a legal theologian like Langdell would be obliged to do, that one or both of the lower courts, and several of the Justices of the Supreme Court, must have made mistakes in logic. “Judicial dissent often is blamed, as if it meant simply that one side or the other were not doing their sums right, and if they would only take more trouble, agreement inevitably would come.” But this, Holmes continues, is a “fallacy.”¹⁰⁹ Indeed. No matter how powerful the formal-logical apparatus available, no unique, legally-correct conclusion *could* be logically derived from the words of the Establishment Clause, or even from those words together with the precedents of earlier decisions and the mediating principles and tests the Court had devised in the past. The disagreements arose, not because some of the justices weren't good enough

¹⁰³ *Allegheny v. ACLU* (note 102 above), 598–600.

¹⁰⁴ *Allegheny v. ACLU* (note 102 above), 614–22.

¹⁰⁵ *Allegheny v. ACLU* (note 102 above), 623–37 (Justice O'Connor, concurring in part and in the judgment).

¹⁰⁶ *Allegheny v. ACLU* (note 102 above), 637–46 (Justice Brennan, concurring in part and dissenting in part).

¹⁰⁷ *Allegheny v. ACLU* (note 102 above), 646–54 (Justice Stevens, concurring in part and dissenting in part).

¹⁰⁸ *Allegheny v. ACLU* (note 102 above), 654–78 (Justice Kennedy, concurring in part and dissenting in part); the quotation is from 633.

¹⁰⁹ Holmes 1896, 396.

at logic, but because each gave different weights to a whole vast tangled mesh of factors: to what he or she perceived as the intent of the framers, to the interpretation of precedents, to traditional practice in the past, or to broader considerations of policy.

Nor, I believe, could the question have been resolved by appeal to a “logic of analogy” (even supposing, for the sake of argument, that such a logic is possible); for disagreements of this sort are in part about which of the respects in which this case was like others already decided, and which of the respects in which it was different, were legally the most significant—not to mention, sometimes, about which past questions were correctly decided. It is just as Holmes said in *The Path of the Law*: “[b]ehind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds [. . .].”¹¹⁰

It may be feared that, if legal decisions are not a matter of logic, they can only be arbitrary and capricious; but a pragmatist will see at once that this fear arises from a false dichotomy. That legal decisions are underdetermined by legislation or precedent doesn’t mean there is no difference between wise decisions, based on judicious assessments of how best to marry older practice to new circumstances, and unwise decisions, based on hasty, prejudiced, or partisan assessments. Now it may be objected that such a contrast can only be sustained by appeal to some quasi-Kantian conception of the legal and the moral; but a pragmatist will see right away that this simplifies some very complicated questions both about ethics, and about the relation of law and morality.

5. Law, Morality, and Society

“The law is full of phraseology drawn from morals,” Holmes writes; but even though this “will stink[] in the nostrils of those who are anxious to get as much ethics into the law as they can,”¹¹¹ nevertheless “it is desirable at once to point out and dispel a confusion between morality and law.”¹¹² As I read him, this is a large part of the reason Holmes advises that “if you want to know the law and nothing else” you should look at it from the perspective of that hypothetical bad man who doesn’t give a damn what’s right, but does care what penalty the public force would impose if he did this or that.¹¹³ I would put the point by borrowing the distinction Peirce introduces in his discussion of the relation of perceptual event and perceptual judgment in the “percipuum,”¹¹⁴ between conceptual distinctness

¹¹⁰ Holmes 1896, 397.

¹¹¹ Holmes 1896, 394.

¹¹² Holmes 1896, 392.

¹¹³ Holmes 1896, 392.

¹¹⁴ Peirce 1903.

and separability in practice. However intertwined in practice, conceptually what is legal and what is moral are distinct.

Moreover, even in practice law and morality by no means always coincide. Some laws (e.g., about which side of the road you should drive on, which form you should submit to obtain a tax rebate on the price of your new air-conditioning system, or whether the contract is made when the acceptance letter is mailed or when it is received) concern matters which are morally indifferent; more importantly, as Holmes says, "it is certain that many laws have been enforced in the past, and it is likely that some are enforced now, which are condemned by the most enlightened opinion of the time."¹¹⁵ Quite so.

For example, the "Hudood Ordinances" enacted in Pakistan in 1979 under then-President Zia ul-Haq—intended to bring certain aspects of the criminal justice system into conformity with Islam by making certain offenses punishable by *hadd*, the penalties ordained by the Quran—provided *inter alia* that, to prove a charge of rape, a woman must produce four male, Muslim eye-witnesses to testify to the crime; and that a woman who brings a charge of rape but is unable to prove it as required may be prosecuted for making a false accusation. So far as I have been able to determine, no-one was ever convicted of rape under this law; but as of August 2006 more than 2,000 Pakistani women were imprisoned for violations of Hudood laws¹¹⁶ (these laws were amended later the same year).¹¹⁷ In my opinion, and I hope in yours too, these were morally objectionable laws. But even if you disagree—at least, if you disagree because you believe that laws that fail to enforce the moral teachings of the Quran, or laws that permit a man to be convicted of rape on what you take to be weaker evidence than this, are morally objectionable—you grant my key points: that what is legal and what is moral are conceptually distinct; and that some laws are morally objectionable.

Nevertheless, Holmes continues: "I take for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism."¹¹⁸ And so do I; for no moral cynic or moral skeptic would say, as I just did,

¹¹⁵ Holmes 1896, 393.

¹¹⁶ My sources are "Hudood Ordinances—The Crime And Punishment For Zina," at http://www.asiapacific.amnesty.org/apro/APROweb.nsf/pages/svaw_hudoo (visited July 13, 2007); Anonymous 2006 (the problem, if I understand correctly, stems from the fact that the concept of *zina* covers unlawful sexual intercourse generally, and hence includes fornication and adultery as well as rape).

¹¹⁷ According to Anonymous 2006, in July 2006 President Musharraf issued a decree making 1,300 women awaiting trial for violations of Hudood eligible for bail, and his government was pressing for "further amendments." The law was revised later that year. According to Mufti 2007, moderate Islamist Javad Ahmad Ghamidi led the Islamic Ideology Council, an independent body that consults for Pakistani legislators, in moving to amend sharia laws on rape and adultery, arguing that these laws were not genuinely Islamic. See also Masud 2006, available at www.pakistani.org (last visited September 24, 2007).

¹¹⁸ Holmes 1896, 392.

that “some laws are morally objectionable.” That there are moral truths, however, does not imply that those truths are transparent, that they are easily knowable—by appeal to moral intuition, to a sacred text, or whatever. Holmes’s phrase, “the most enlightened opinion of the time” recognizes this implicitly; his observation that it is a misfortune if a judge “forgets that what seem [to him] to be first principles are believed by half his fellow-men to be wrong”¹¹⁹ makes it explicit.

This is not moral cynicism or skepticism; it is a kind of ethical fallibilism, in the spirit of James’s essay, “The Moral Philosopher and the Moral Life.”¹²⁰ Setting moral skepticism aside as a “residual alternative,” eschewing both apriorism and hedonistic moral empiricism (the analogue of sensationalistic Empiricism in epistemology), James develops a kind of enlightened-empiricist, experimentalist approach to ethics. There is moral truth, he writes; but this moral truth is not a “self-proclaiming set of laws, or an abstract ‘moral reason.’”¹²¹ The “best action” is what contributes to the “best whole,” the world in which the fewest ideals have to be compromised or sacrificed. But what that best action is cannot be known a priori; it can only be worked out empirically.¹²² And so, James argues, casuistic ethics “must simply bide its time, and be ready to revise its conclusions from day to day,” as the physical sciences do.¹²³ For this is the only way to work out what social arrangements and what moral rules “prevail at the least cost.”¹²⁴

James writes at first of “the best action”: but as my phrase “social arrangements and moral rules” suggests, he soon shifts to writing, in a holistic way, of “the more inclusive order”:

Since victory and defeat there must be, the victory to be philosophically prayed for is that of the more inclusive side [. . .]. The course of history is nothing but the story of men’s struggles from generation to generation to find the more inclusive order. *Invent some manner* of realizing your own ideals which will also satisfy the alien demands,—that and only that is the path of peace! Following this path, society has shaken itself into one sort of relative equilibrium after another by a series of social discoveries quite analogous to those of science. Polyandry and polygamy and slavery, private warfare and liberty to kill, judicial torture and arbitrary royal power have slowly succumbed [. . .].¹²⁵

Dewey’s development of the distinction between what is actually desired and what is genuinely desirable¹²⁶ (by which, I take it, he means what is really conducive to human flourishing), is arguably an improvement on

¹¹⁹ Holmes 1913, 65.

¹²⁰ James 1891.

¹²¹ James 1891, 259.

¹²² James 1891, 264.

¹²³ James 1891, 267.

¹²⁴ James 1891, 264.

¹²⁵ James 1891, 264–5.

¹²⁶ Dewey 1929, chap. 10.

James's idea that whatever satisfies a demand—*any* demand—is *prima facie* good; and his acknowledgment that economic factors are relevant to such flourishing is a useful supplement to James's more abstract considerations, as is his attempt to articulate how the social sciences might contribute to ethical inquiry. Moreover, Dewey's "Construction of Good" is in some ways very reminiscent of ideas Holmes had articulated in *The Path of the Law*: e.g., that "the black-letter man is the man of the present, but the man of the future is the man of statistics and the master of economics";¹²⁷ and that we can't know even whether our criminal law does more good than harm until we figure out whether the criminal is like a rattlesnake, or merely imitating those around him¹²⁸ (is he hard-wired for anti-social behavior, as we might anachronistically say, and so incapable of "rehabilitation," or is he just easily influenced, like the pre-teen drug-runner in the ghetto?).

And, most to the present purpose, if James's and Dewey's enlightened moral empiricism is even roughly on the right lines, we can begin to see how—despite the fact that law is conceptually distinct from morality, and despite the fact that there have been, and still are, morally bad laws—the evolution of the law might indeed be, as Holmes says, "the witness and external deposit of our moral life,"¹²⁹ a "magic mirror [in which] we see reflected not only our own lives, but [. . .] the moral life of [the] race."¹³⁰ Ethics and the law, you might say, derive from the same root: from our nature as social animals who must live together as best we can in a world where "victory and defeat there must be." And each step in the evolution of the legal systems of the world can be seen as an experiment, on a small scale or a large—as part of a long, ongoing process of devising social arrangements, some of them more "inclusive," more conducive to human flourishing, and some less. From this perspective, judicial disagreements like those in *Allegheny v. ACLU* look, not like a logic examination that several justices flunked, and not like an illustration of the arbitrary and irrational character of legal decision-making, but like just what they are: small-scale examples of the whole on-going Pushmepullyou process through which our legal system "struggles [. . .] to find the more inclusive order."¹³¹

¹²⁷ Holmes 1896, 399.

¹²⁸ Holmes 1896, 400.

¹²⁹ Holmes 1896, 392.

¹³⁰ Holmes 1885, 62.

¹³¹ I was startled to find, re-reading Turow 1993, that Turow's fictional ex-cop lawyer Mack Malloy expresses essentially the same idea: "[D]on't sneer. [. . .] [C]ome into the teeming city, with so many souls screaming I want, I need, where most social planning amounts to figuring out how to keep them all at bay—come and try to imagine the ways that vast unruly community can be kept in touch with the deeper aspirations of humankind for the overall improvement of the species, the good of the many and the rights of the few. That I always figured was the task of the law, and it makes high-energy physics look like a game show" (Turow 1993, 203).

You have only to think about what life is like when the rule of law has broken down, or is close to breaking down, to realize that *some* means of arriving at peaceable solutions to disputes is essential to even the most minimal human flourishing. A 2007 press report on the virtual chaos in Zimbabwe brings the point home inescapably when it quotes a human-rights worker in that desperate country: “You have no idea what’s going to happen next. Every day [is] about surviving to the next day.”¹³² (And at a much more mundane level, you see that some of the laws I described earlier as “morally indifferent” serve their purpose by setting up *a* rule where *some* rule is needed: e.g., if contracts are to be made by mail when the parties are not in the same place, there will have to be some rule about who bears the risk involved; so that, while we might have settled on a different rule, the mailbox rule serves a useful purpose.)

But the rule of law is only a necessary condition of any kind of viable, half-way civilized society, and certainly not a sufficient condition of that most inclusive order of which James writes; and of course not all legal orders are equally good. A legal order that is more inclusive, in something like the sense James tried to articulate, making more room for more of the people to flourish each in his or her own way,¹³³ is better—morally better—than one which is less inclusive. As “inclusive” suggests, a legal system which empowers one group at the expense of another is likely, for that very reason, to fall short morally.¹³⁴ But as “more room for more of the people to flourish” suggests, there may be no unique best system,¹³⁵ or even anything like a linear ordering; and because it is possible to make only fallible, imperfect assessments of what arrangements will, overall, be better, and what worse, this approach offers no simple decision-procedure for legislators or judges, no legal “theory” in the restricted, tendentious sense in which it is sometimes understood today.

In that case, you may ask, what is this “neo-classical pragmatist legal theory” good for? For the purpose for which theory generally is good—if it is good theory: for explanation and understanding; in the present instance, to explain among other things how, as Holmes wrote long ago, the evolution of the law bears witness to “the moral life of the race”; and

¹³² Johnson 2007, 41.

¹³³ Implicit in this is the thought that there are many and various projects, activities, etc., that may make a life worthwhile. See Haack 2001–2.

¹³⁴ A thought which might be explored more concretely by, for example, a study of the Civil Rights movement and more recent related developments in U.S. constitutional law.

¹³⁵ Perhaps this is what Dewey has in mind when he writes (1950, 275) that “[t]he better is the good; the best is not better than the good but is simply the discovered good. Comparative and superlative degrees are only paths to the positive degree of action.”

can be, though it has by no means always been, an engine of moral progress.¹³⁶

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References

- Adams, Arlin M., and Charles Emmerich. 1990. *A Nation Dedicated to Religious Liberty*. Philadelphia, PA: University of Pennsylvania Press.
- Anonymous. 2007. In Galapagos, a Race is on to Protect Turtles' Differences, *Wall Street Journal*, June 9, 2007, B8.
- Anonymous. 2006. Islam and Rape, *Wall Street Journal*, August 3, 2006, A6.
- Atiyah, Patrick. 1987. *Pragmatism and Theory in English Law*. London: Stevens and Sons.
- Baker, Livia. 1991. *The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes*. New York: Harper Collins.
- Bartlett, Robert. 1986. *Trial by Fire and Water*. Oxford: Clarendon.
- Begley, Sharon. 2001. Culture Club, *Newsweek*, March 26, 2001, 48–50.
- Berger, Margaret. 2001. Upsetting the Balance Between Adverse Interests: The Impact of the Supreme Court's Trilogy on Expert Testimony on Toxic Tort Litigation. *Law and Contemporary Problems* 64: 286–326.
- Boyd, Robert, and Peter J. Richerson. 1985. *Culture and the Evolutionary Process*. Chicago, IL: University of Chicago Press.
- Boyd, Robert, and Peter J. Richerson. 2005a. *Not by Genes Alone: How Culture Transformed Human Evolution*. Chicago, IL: University of Chicago Press.
- Boyd, Robert, and Peter J. Richerson. 2005b. *The Origin and Evolution of Cultures*. New York, NY: Oxford University Press.
- Brown, Peter. 1975. Society and the Supernatural: A Medieval Change. *Daedalus* 10: 135–51. Reprinted in Brown, Peter. *Society and the Holy in Late Antiquity*, 1982, 302–32. Berkeley, CA: University of California Press.
- Carter, Stephen L. 1993. *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*. New York, NY: Basic Books.
- Carter, Stephen L. 2006. An Upside-Down Metaphor. *Christianity Today* 50: 74.
- Cass, Ronald A. 2007. Forum Shopper of the Year, *Wall Street Journal* (January 12, 2007), A3.
- Cather, Karin Horwall, 2007. Guarding the Gate: Expert Witness Testimony After *Daubert*. In *Malingering, Lies, and Junk Science in the Courtroom*. Ed. J. Kitaeff. Youngstown, NY: Cambria, 181–355.

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- Cobb, Sanford. 1902. *The Rise of Religious Liberty in America: A History*. New York, NY: MacMillan.
- Costello, Harry J. 1957. Logic in 1914 and Now. *Journal of Philosophy* 54: 245–64.
- Damaska, Mirjan. 1978. A Foreign Perspective on the American Judicial System. In *State Courts: A Blueprint for the Future*. Ed. T.J. Fetter. Williamsburg, VA: National Center for State Courts, 337–42.
- Dawes, Gordon. 2003. *The Law of Guernsey*. Oxford: Hart.
- Dewey, John. 1911. The Problem of Truth. In *Collected Works of John Dewey*. Ed. J.-A. Boydston, 1976–1983, vol. 6, 12–68. Carbondale and Edwardsville, IL: Southern Illinois University Press; in *The Essential Dewey*. Ed. L.A. Hickman, and T.M. Alexander, 1998. Bloomington, IN: Indiana University Press; and (abridged) in *Pragmatism, Old and New: Selected Writings*. Ed. S. Haack, 2006. Amherst, NY: Prometheus Books.
- Dewey, John, 1921. Justice Holmes and the Liberal Mind. In *Mr. Justice Holmes*. Ed. F. Frankfurter. New York, NY: Coward McCann.
- Dewey, John. 1924. Logical Method and Law. *Cornell Law Quarterly* 10: 17–27.
- Dewey, John. 1926. The Historic Background of Corporate Legal Personality. *Yale Law Journal* 35: 655–88.
- Dewey, John. 1929. *The Quest for Certainty: A Study of the Relation of Knowledge and Action*. New York, NY: Minton Balch.
- Dewey, John. 1941. My Philosophy of Law. In *My Philosophy of Law: Credos of Sixteen American Legal Scholars*. Boston, MA: Boston Law Book Co.
- Dewey, John. 1950. *Human Nature and Conduct: An Introduction to Social Psychology*. New York: Modern Library, Random House. (1st ed. 1922.)
- Evans, Malcolm D., ed. 2003. *International Law*. Oxford: Oxford University Press.
- Fields, Gary, 2007a. On U.S. Indian Reservations, Criminals Slip Through Gaps. *Wall Street Journal* (June 12, 2007), A1, A14.
- Fields, Gary, 2007b. On Tribal Land, an Arson Leads to Murder, Prison, *Wall Street Journal* (August 13, 2007), A1, A12.
- Fields, Gary, 2007c. Plaintiffs Suing U.S. Tribes Can't Get Their Day in Court, *Wall Street Journal* (October 17, 2007), A1, A4.
- Fisch, Max. 1942. Justice Holmes, the Prediction Theory of Law, and Pragmatism. Reprinted in *Peirce, Semeiotic and Pragmatism*. Eds. K.L. Ketner and C. Kloesel, 1986, 6–18. Bloomington, IN: Indiana University Press.
- Fisch, Max. 1964. Was There a Metaphysical Club in Cambridge? In *Studies in the Philosophy of Charles Sanders Peirce*. Eds. E. Moore and R. Robin, 5–32. Amherst, MA: University of Massachusetts Press.
- Frege, Gottlob. 1879. *Begriffsschrift*. In *Conceptual Notation and Related Articles*. Ed. T.W. Bynum, 1972, 101–203. Oxford: Clarendon.
- Galanter, Marc. 1981. Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law. *Journal of Legal Pluralism* 19: 1–47.
- George, Elizabeth. 2003. *A Place of Hiding*. London: Hodder and Stoughton.
- Giannelli, Paul C., 1983. *Frye v. United States*: Background Paper Prepared for the National Conference of Lawyers and Scientists. 99 F.R.D. (Federal Rules Decisions): 189–234.
- Glendon, Mary Ann. 2006. Judicial Tourism, *Wall Street Journal*, September 16, 2006, A14.
- Gottesman, Michael. 1998. From *Barefoot* to *Daubert* to *Joiner*: Triple Play or Double Error? *Arizona Law Review* 40: 753–80.
- Grey, Thomas C. 1990. Hear The Other Side: Wallace Stevens and Pragmatist Legal Theory. *Southern California Law Review* 63: 1569–95.

- Haack, Susan. 2001–2. Worthwhile Lives. *Free Inquiry* 22: 50–1. Reprinted in S. Haack, *Putting Philosophy to Work: Inquiry and Its Place in Culture*. Amherst, NY: Prometheus Books, 2008, 217–20.
- Haack, Susan. 2002. Realisms and Their Rivals: Recovering Our Innocence. *Facta Philosophica* 4: 67–78.
- Haack, Susan. 2003. *Defending Science—Within Reason: Between Scientism and Cynicism*. Amherst, NY: Prometheus Books.
- Haack, Susan. 2004. Pragmatism, Old and New. *Contemporary Pragmatism* 1: 3–32. Reprinted in Haack, Susan, ed., *Pragmatism, Old and New: Selected Writings*, Amherst, NY: Prometheus Books, 2006, 15–67.
- Haack, Susan. 2005a. On Legal Pragmatism: Where Does “The Path of the Law” Lead Us? *American Journal of Jurisprudence* 50: 71–105.
- Haack, Susan. 2005b. Not Cynicism but Synecism: Lessons from Classical Pragmatism. *Transactions of the Charles S. Peirce Society* 41: 239–53. Reprinted in S. Haack, *Putting Philosophy to Work: Inquiry and Its Place in Culture*. Amherst, NY: Prometheus Books, 2008, 79–94.
- Haack, Susan. 2005c. The Unity of Truth and the Plurality of Truths. *Principia* 9: 87–110. Reprinted in S. Haack, *Putting Philosophy to Work: Inquiry and Its Place in Culture*, Amherst, NY: Prometheus Books, 2008, 43–60.
- Haack, Susan. 2007. On Logic in the Law: “Something, but not All.” *Ratio Juris* 21: 1–37.
- Haack, Susan. 2008. Irreconcilable Differences? The Troubled Marriage of Science and Law. *Law and Contemporary Problems*, forthcoming.
- Haack, Susan. 2009. The Growth of Meaning and the Limits of Formalism: Pragmatist Perspectives on Science and Law. *Teorema*, forthcoming.
- Hart, H.L.A. 1961. *The Concept of Law*. Oxford, Clarendon.
- Hartshorne, Charles, Paul Weiss, and Arthur Burks. 1931–58. *Collected Papers of Charles Sanders Peirce*. Cambridge, MA: Harvard University Press.
- Holmes, Oliver Wendell. 1880. Review of Langdell, *A Selection of Cases on the Law of Contracts*, 2nd ed. *American Law Review* 14: 233–5.
- Holmes, Oliver Wendell. 1881. *The Common Law*. In *The Collected Works of Justice Holmes*. Ed. S. Novick, 1995, 109–324. Chicago: University of Chicago Press.
- Holmes, Oliver Wendell. 1885. The Law. Address delivered to the Suffolk Bar Association Dinner, February 15th, 1885. In *The Holmes Reader*. Ed. J. Marke, 1955, 62–3, Dobbs Ferry, NY: Oceana Docket Series.
- Holmes, Oliver Wendell. 1896. The Path of the Law. In *The Collected Works of Justice Holmes*. Ed. S. Novick, 1995, vol. 3, 391–406.
- Holmes, Oliver Wendell. 1913. The Law and the Court. Speech at a dinner at the Harvard Law School Association of New York, February 15th, 1913. In *The Holmes Reader*. Ed. J. Marke. Dobbs Ferry, NY: Oceana Docket Series, 1955, 64–5.
- Howe, Mark DeWolfe, ed. 1941. *The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock*. Cambridge, MA: Harvard University Press.
- Howe, Mark DeWolfe. 1957. *Justice Oliver Wendell Holmes: The Shaping Years*. Cambridge, MA: Harvard University Press.
- Hyams, Paul R. 1981. Trial by Ordeal: The Key to Proof in Early Common Law. In *On The Laws and Customs of England*. Ed. Morris S. Arnold *et al.*, 90–126. Chapel Hill, NC: University of North Carolina Press.
- Jackson, Vicki C. 2005–6. Constitutional Comparisons: Convergence, Resistance, Engagement. *Harvard Law Review* 119: 109–128.
- James, William. 1891. The Moral Philosopher and the Moral Life. In *Pragmatism, Old and New: Selected Writings*. Ed. S. Haack, 2006, 247–72. Amherst, NY: Prometheus Books.

- James, William. 1896. The Will to Believe. In *Pragmatism, Old and New: Selected Writings*. Ed. S. Haack, 2006, 221–46. Amherst, NY: Prometheus Books.
- James, William. 1907. *Pragmatism*. Eds. F. Burkhardt and F. Bowers. Cambridge, MA: Harvard University Press.
- James, William. 1909. *A Pluralistic Universe*. Hibbert Lectures, delivered at Manchester College, Oxford. In *William James's Essays in Radical Empiricism and A Pluralistic Universe*. Ed. R. Bernstein, 1971, 121–284. New York, NY: E. P. Dutton and Co.
- James, William. 1912. *Essays in Radical Empiricism*. In *Essays in Radical Empiricism and A Pluralistic Universe*. Ed. R. Bernstein, 1971, 3–120. New York, NY: E. P. Dutton and Co.
- Janocsko, George M. 1990. Beyond the “Plastic Reindeer Rule”: The Curious Case of *Allegheny v. American Civil Liberties Union*. *Duquesne Law Review* 28: 445–87.
- Johnson, Scott. 2007. Digging a Grave for Zimbabwe. *Newsweek*, June 18, 2007, 38–41.
- Kadri, Sadakat. 2005. *The Trial: A History From Socrates to O. J. Simpson*. New York, NY: Random House.
- Ketner, Kenneth Laine, and Christian Kloesel, eds. *Peirce, Semeiotic and Pragmatism*. Bloomington, IN: Indiana University Press, 1986.
- LaGarga, Maria, Evelyn Larruba, and Jessica Garrison. 2007. Smith Case is More than Just Theatrics: Behind the Spectacle of Model's Death are Vexing Legal Questions. *Los Angeles Times*, February 18, 2007, A1.
- Langdell, Christopher Columbus. 1871. *A Selection of Cases on the Law of Contracts*. Boston, MA: Little Brown.
- Llewellyn, Karl. 1930. A Realistic Jurisprudence—The Next Step. *Columbia Law Review* 30: 431–65.
- Locke, John. 1689. *A Letter Concerning Toleration*. Reprinted 1950. Indianapolis, IN: Bobbs-Merrill Library of Liberal Arts.
- Lustre, Alice B. 2001. Post-*Daubert* Standards for the Admissibility of Scientific and Other Expert Evidence. *American Law Reports* 5th, 10, 453: 1–139 (originally published 2001, updated weekly).
- Madison, James. 1785. Memorial and Remonstrance Against Religious Assessment. In *James Madison: Writings 1772–1836*, 1999, 29–35. New York, NY: Library of America.
- Masud, In'Amullah Muhammad Khalid, 2006. Hudood Ordinance 1979 (Pakistan): An Interim Brief Report. Government of Pakistan. Available at www.pakistani.org.
- Morales, Alfonso, ed. 2003. *Renascent Pragmatism: Studies in Law and Social Science*. Aldershot: Ashgate.
- Mufti, Shalan. 2007. The Fundamentalist Moderate. *Boston Globe*, July 26, 2007, 1B.
- Murphy, Sean D. 2006. *Principles of International Law*. St. Paul, MN: Thomson/West.
- Ogier, Darryl. 2005. *Government and Laws of Guernsey*. St. Peter Port: States of Guernsey.
- Peirce, Charles Sanders. 1877. The Fixation of Belief. In *Collected Papers of Charles Sanders Peirce*. Eds. C. Hartshorne, P. Weiss, and A. Burks, 1931–58, Cambridge, MA: Harvard University Press, 5.358–87.
- Peirce, Charles Sanders. 1878. How to Make Our Ideas Clear. In *Collected Papers of Charles Sanders Peirce*. Eds. C. Hartshorne, P. Weiss, and A. Burks, 1931–58, Cambridge, MA: Harvard University Press, 5.388–410.
- Peirce, Charles Sanders. 1880. On the Algebra of Logic. In *Collected Papers of Charles Sanders Peirce*. Eds. C. Hartshorne, P. Weiss, and A. Burks, 1931–58, Cambridge, MA: Harvard University Press, 3.154–251.

- Peirce, Charles Sanders. 1892. *The Law of Mind*. In *Collected Papers of Charles Sanders Peirce*. Eds. C. Hartshorne, P. Weiss, and A. Burks, 1931–58, Cambridge, MA: Harvard University Press, 6.102–62.
- Peirce, Charles Sanders. 1893. *Immortality in the Light of Synechism*. In *The Essential Peirce*, 1998, 2: 1–3. Bloomington, IN: Indiana University Press.
- Peirce, Charles Sanders. 1903. *Telepathy and Perception*. In *Collected Papers of Charles Sanders Peirce*. Eds. C. Hartshorne, P. Weiss, and A. Burks, 1931–58, Cambridge, MA: Harvard University Press. 7.597–688.
- Perry, Ralph Barton. 1935. *The Thought and Character of William James*. Boston, MA: Little Brown.
- Posner, Richard A. 2003. *Law, Pragmatism, and Democracy*. Cambridge, MA: Harvard University Press.
- Ramakrishnan, V. 2006. *Guide to Indian Laws*. Available at <http://www.nyulawglobal.org/globalex/India.htm> (Last visited July 15, 2008).
- Rorty, Richard. 1982. *Consequences of Pragmatism*. Hassocks: Harvester.
- Santos, Boaventura de Sousa. 1995. *Towards a New Common Sense*. New York, NY: Routledge.
- Scott, Robert E., and Paul B. Stephan. 2006. *The Limits of Leviathan: Contract Theory and the Enforcement of International Law*. New York, NY: Cambridge University Press.
- Shah, Prakash. 2005. *Legal Pluralism in Conflict: Coping With Cultural Diversity in Law*. London: Glosshouse.
- Shishkin, Philip. 2007. *Angry Neighbors? In Turkey, People Call on Mr. Sanli*. *Wall Street Journal*, July 16, 2007, A1, A10.
- Shriver, Harry C., ed. 1940. *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.
- Stove, David. 1982. *Popper and After: Four Modern Irrationalists*. Oxford: Pergamon.
- Stowe, Harriet Beecher. 1851–2. *Uncle Tom's Cabin*. Reprinted. New York: Bantam Books, 1981.
- Symposium. 1990. *The Renaissance of Pragmatism in American Legal Thought*. *Southern California Law Review* 63.
- Taruffo, Michele, forthcoming. 1215. In Taruffo, *La semplice verità*.
- Turow, Scott. 1993. *Pleading Guilty*. New York, NY: Warner Books.
- Waldron, Jeremy. 2005–6. *Foreign Law and the Modern Ius Gentium*. *Harvard Law Review* 119: 120–47.
- Weiner, Philip P. 1949. *Evolution and the Founders of Pragmatism*. Cambridge, MA: Harvard University Press.
- Williams, Roger. 1644. *The bloody tenet of persecution, for cause of conscience, in a conference betwene truth and peace*. Now commonly referred to as *Bloody Tenet of Persecution*.
- Wilson, E.O. 1998. *Consilience: The Unity of Knowledge*. New York, NY: Knopf.
- Young, Ernest A. 2005–6. *Foreign Law and the Denominator Problem*. *Harvard Law Review* 119: 148–67.