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Seth Vannatta's Justice Holmes

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Abstract

Seth Vannatta identifies the common law as a central feature of the jurisprudence of former United States Supreme Court justice Oliver Wendell Holmes, Jr. Holmes treated the common law as if it were an epistemology or a reliable mode for knowledge transmission over successive generations. Against the grand notion that the common law reflected a priori principles consistent with the natural law, Holmes detected that the common law was historical, aggregated, and evolutionary, the sum of the concrete facts and operative principles of innumerable cases with reasonable solutions to complex problems. This view of the common law is both conservative and pragmatic. Vannatta's analysis of Holmes opens new directions for the study of conservatism and pragmatism—and pragmatic conservatism—demonstrating that common-law processes and practices have much in common with the form of communal inquiry championed by C.S. Peirce.

Keywords

Seth Vannatta – Justice Holmes – pragmatism – conservatism – Oliver Wendell Holmes Jr

I have written about the salience of Seth Vannatta's *Conservatism and Pragmatism in Law, Politics, and Ethics*,[1] which was published shortly before Robert Lacey's incisive *Pragmatic Conservatism: Edmund Burke and His American*

1 Seth Vannatta, *Conservatism and Pragmatism in Law, Politics, and Ethics* (New York: Palgrave Macmillan, 2014). See Allen Mendenhall, "Towards Pragmatic Conservatism: A Review of Seth Vannatta's *Conservatism and Pragmatism in Law, Politics, and Ethics*." *Dayton Law Review*, Vol. 41, No. 1 (2016), pp. 45–56.

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Heirs.[2] If these books are any indication, the affinity between conservatism and pragmatism properly understood is receiving heightened attention. The ambiguity, caricature, cliché, and tendentiousness arising out of journalistic and popular use of the terms "conservatism" and "pragmatism" complicate discussions of these significant schools or modes of thought. The rehabilitative efforts of Vannatta and Lacey are therefore important if modest correctives during this time of political polarization and rancorous public discourse.

Here I wish to examine, briefly, one element of Vannatta's sound study that merits a closer look, namely his account of the influence of the common law on Justice Oliver Wendell Holmes Jr., a judge who in an official capacity instituted common-law practices and processes. Holmes portrayed the common law—with its genealogical hermeneutics, evolutionary characteristics, citational networks, and traceable continuities—as inherently pragmatic, although Holmes did not use that term.[3] The common-law system as represented by Holmes is historical, the principles and rules it transmits from generation to generation emerging out of immemorial usage, practical reasoning, and lived experience. It is, in this respect, conservative and a mode of epistemology insofar as it supplies a process for acquiring, preserving, and conveying knowledge.

"However much we may codify the law into a series of seemingly self-sufficient propositions," Holmes stated, "those propositions will be but a phase in a continuous growth."[4] He continued: "To understand their scope fully, to know how they will be dealt with by judges trained in the past which the law embodies, we must ourselves know something of that past. The history of what the law has been is necessary to the knowledge of what the law is."[5] The law thus described is the common law, which "has grown, now rapidly, now reluctantly, to keep pace with changes in the social order, from which, again, it is inseparable."[6] When changes develop in the common law, they are gradual and bottom-up, incorporating the aggregated subjective preferences of numerous

2 Robert J. Lacey, *Pragmatic Conservatism: Edmund Burke and His American Heirs* (New York: Palgrave Macmillan, 2016).

3 Holmes called William James's version of pragmatism an "amusing humbug." Oliver Wendell Holmes Jr., Letter from Holmes to Lewis Einstein, June 17, 1908, Harvard University Holmes Digital Suite, Mark DeWolfe Howe's research materials on Holmes, 1858–1968: Finding Aid, Major Correspondence: Einstein, Lewis, Correspondent, March 22, 1908–July 23, 1910, online. See also Allen Mendenhall, *Oliver Wendell Holmes Jr., Pragmatism, and the Jurisprudence of Agon: Aesthetic Dissent and the Common Law* (Lewisburg, Pennsylvania: Bucknell University Press, 2017), p. 124.

4 Oliver Wendell Holmes Jr. *The Common Law* (1881) (Chicago: American Bar Association Publishing, 2009), 25.

5 Holmes, *The Common Law*, p. 25.

6 Arthur R. Hogue, *Origins of the Common Law* (1966) (Indianapolis: Liberty Fund, 1986), p. 4.

individuals living within a particular jurisdiction. The common law is thus a repository of accumulated decisions over generations. It is characterized by incremental reform, precedential constraints, customary principles, spontaneous ordering, and contextual solutions to concrete problems. It is a form of communal consensus, a fund of lived experience that no one mind working in isolation could fully appreciate or comprehend.

The common-law system is conservative in the sense that it limits the range of possible, practical outcomes in actual cases (unlike in hypothetical disputes about abstract theories that have little bearing on the quotidian experience of the workaday world) and thereby trends towards moderation and gradualism and away from radical extremes or revolutionary change. The common law is anti-ideological because it is confected by innumerable, and typically narrow, judicial decisions regarding spirited disputes between opposing parties who have appealed, in formal pleadings, to normative principles and operative rules to validate prior acts or omissions. The common law is realized meliorism to the extent that it harmonizes disparate facts, issues, standards, and judgments as a complex whole. Viewing the common law as an epistemology provides clarifying context for future inquiry into the interrelationship between Holmes, pragmatism, and conservatism.[7]

In what follows I discuss three epistemological propositions raised by Vannatta's analysis of Holmes and the common law: that knowledge as embodied in the common law is historical, aggregated, and evolutionary. Each of these features of the common law presents opportunities for further research into the complementarity of pragmatism and conservatism. Each challenges, as well, standing misconceptions about Holmes's positions on natural law and other jurisprudential schools. Therefore, pragmatism and conservatism should play an organizing role in the reassessment of Holmes's contested legacy.

1 The Common Law is Historical

Holmes rejected the notion that the common law was ahistorical, timeless, rationalistic, universal, abstract, or transcendent, existing outside time and space as the inevitable expression of fixed or divine principles.[8] Nor was the

7 For more on this subject, see Allen Mendenhall, "Justice Holmes and Conservatism," *Texas Review of Law and Politics*. Vol. 17 (2013).

8 Vannatta at p. 72 (discussing Holmes's middle-way between different paths of legal theory) and 131 (discussing Holmes's "historical exposition of the movement of legal concepts from an internal to an external standard").

common law, he said, a "chain letter of syllogisms or a mechanical and formal application of legal rules, found statutes, or constitutional texts to specific cases."[9] Rather, the common law was, in his mind, rooted, concrete, particular, and conditioned by the real, ordinary experiences of an evolving society trying to pacify conflict, improve quality of life, and ensure domestic tranquility. Rules that win out in a common-law system either remain operative and useful or else are ineffectual, unserviceable holdovers.[10] The latter, rather than being completely irrelevant or abstruse, most likely inadequately communicate or protect those general principles which obtain from century to century, and thus must be repurposed for a new climate.[11]

Vannatta says, and I agree, that Holmes's historical pragmatism was influenced by Sir Henry Maine,[12] who was "reacting to the unhistorical perspective characteristic of 17th and 18th century political and legal philosophers, including Locke, Hobbes, Rousseau, Bentham, and Austin."[13] Vannatta might have added Sir Edward Coke, Sir Matthew Hale, and Sir William Blackstone to this list. These jurists hailed the common law superlatively as the perfection of reason,[14] but their greater body of work reveals that their views of the common law were complex and multifaceted, and that they did not necessarily or simplistically treat the common law as the worldly reflection of higher laws. Their superlative statements about natural law and the common law, however, stand in contradistinction to Holmes's "naturalistic theory of inquiry, in which intractable legal disputes were viewed as bearing a certain degree of unforeseen novelty or originality, and the legal profession, in concert with the community at large, worked out a gradual resolution through progressive abstraction from specific cases."[15]

Holmes examined claims of immutable truth or inalienable rights through history, looking at their various expressions in actual cases about concrete

9 Vannatta at p. 133.

10 "The official theory is that each new decision follows syllogistically from existing precedents. But just as the clavicle in the cat only tells of the existence of some earlier creature to which a collar-bone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten." Holmes, *The Common Law*, p. 24.

11 "[W]hen ancient rules maintain themselves in the way that has been and will be shown in this book, new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted." Holmes, *The Common Law*, p. 24.

12 Vannatta at p. 67.

13 Vannatta at pp. 67, 69.

14 Kellogg, *Oliver Wendell Holmes, Jr., Legal Theory, and Judicial Restraint*, p. 49.

15 Kellogg, *Oliver Wendell Holmes, Jr., Legal Theory, and Judicial Restraint*, p. 56.

controversies involving real people.[16] In Vannatta's words, Holmes used history "to reduce questions of rights to questions of facts."[17] Tracing legal doctrines to their discernable origins, Holmes averred, often revealed their practical rather than philosophical roots. "[W]henever we trace a leading doctrine of substantive law back far enough," he wrote, "we are very likely to find some forgotten circumstance of procedure at its source."[18] Historical context, Holmes added, shows us that laws are neither *a priori* nor divorced from cultural context. "When we find," he said, "that in large and important branches of the law the various grounds of policy on which the various rules have been justified are later inventions to account for what are in fact survivals from more primitive times, we have a right to reconsider the popular reasons, and, taking a broader view of the field, to decide anew whether those reasons are satisfactory."[19] History, then, is no small matter: it can challenge leading theories about the ultimate sources of law, demonstrating, in some instances, that grand reasons and rigid doctrines derive from mere expedients, which may be justifiably discarded or displaced if new and more important expediencies so require.

Knowledge of history includes an understanding of custom, which, unlike statutes or (modern) cases,[20] is unwritten or uncodified, and thus encompassing of wider cultural norms and attitudes. "Written laws contain no more than the wisdom of one man or one generation," explains J.G.A. Pocock, "whereas custom in its infinite complexity contains the wisdom of many generations, who have tested it by experience, submitting it to a multitude of demands, and

16 See Vannatta at pp. 134–35. See also Holmes, *The Common Law*, pp. 144–145 ("Those who see in the history of law the formal expression of the development of society will be apt to think that the proximate ground of law must be empirical, even when that ground is the fact that a certain ideal or theory of government is generally entertained. Law, being a practical thing, must be found itself on actual forces. It is quite enough, therefore, for the law, that man, by an instinct which he shares with the domestic dog, and of which the seal gives a most striking example, will not allow himself to be dispossessed, either by force or fraud, of what he holds, without trying to get it back again. Philosophy may find a hundred reasons to justify the instinct, but it would be totally immaterial if it should condemn it and bid us surrender without a murmur. As long as the instinct remains, it will be more comfortable for the law to satisfy it in an orderly manner, than to leave people to themselves. If it should do otherwise, it would become a matter for pedagogues, wholly devoid of reality.")

17 Vannatta at p. 135.

18 Holmes, *The Common Law*, p. 171.

19 Holmes, *The Common Law*, p. 25.

20 See Allen Mendenhall, "The Corrective Careers of Concurrences and Dissents," *Faulkner Law Review*, Vol. 8 (2016), pp. 51–57 (supplying a brief history of the opinion form in the United States).

by retaining it have shown that it has proved equal to them all."[21] The common-sense empiricism practiced by the common-law judge accounts accordingly for this custom, which is antecedent to the positive law. Such accounting, of course, is not entirely conscientious but, in some instances, the inadvertent byproduct of the judge's immersion in a particular place with distinct cultural values and norms.

Henry II is credited with the institutionalization of the common law in light of his imposition of royal jurisdiction—as against ecclesiastical, local, or feudal jurisdiction—onto civil and criminal matters throughout England.[22] His reforms to the law involved formalizing the writ system under the crown and establishing differing forms of juries.[23] Over the centuries various legal doctrines developed in the English common law in response to social, cultural, and technological changes. Consider the history of trespass as a representative offense that took on different forms to fit changing climates. Sir Frederick Pollock and Frederick William Maitland's voluminous history reveals that trespass actions over the centuries encompassed numerous categories of harm, both civil and criminal, and diverse forms of pleading.[24] Knowing something of this history enables judges properly to contextualize which species of tort or liability controls the circumstances presented in a case. It also supplies material data from which to extrapolate, or with which to evaluate, claims of absolute truth, natural law, or natural rights, revealing that however coherent grand philosophical principles may seem in the abstract, in the workaday disputes of ordinary living people they obtain as inexact calculations and modest fixes.

What appears to be an assemblage of discrete cases is actually an indivisible whole (the common law) that defies total comprehension, each ruling bearing relationships, however tenuous, to other rulings, forming a vast network of necessarily connected decisions. Judges in a common-law system resolve complex puzzles presented by isolated cases and thus inadvertently build a philosophical system of general principles. The merit of the historical methodology

21 J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: English Historical Thought in the Seventeenth Century* (Cambridge University Press, 1957), p. 34.

22 Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983), p. 445; see also Theodore F.T. Plucknett, *A Concise History of the Common Law* (1929) (Indianapolis: Liberty Fund, 2010), pp. 16, 19, 357; see generally W.L. Warren, *Henry II* (Berkeley and Los Angeles: University of California Press, 1973), pp. 241–261, 301–361, 518–554.

23 Berman, *Law and Revolution*, pp. 446–459.

24 See Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I, Vol. II* (1898) (Indianapolis, Indiana: Liberty Fund, 2010), pp. 535–568.

of the common law that so attracted Holmes is that it furnishes jurists with models and patterns to be replicated or avoided, depending on felt results, and that it validates change and adaptation in the face of exigent problems. History affords the context necessary to justify and facilitate change while appreciating the potential harms that change might occasion. It reveals that rules and principles generally are circumstantial and contingent rather than rigidly fixed and without exceptions, and therefore that custom ought to guide the prudent judge or lawmaker because it is experiential, the product of lived situations, trade-offs, compromises, and conditions, not the deduction of higher laws through the flawless exercise of right reason.

2 The Common Law is Aggregated

Related to the historical approach to the law is the recognition that, in Vannatta's words, "legal doctrines worth stating had been the product of many minds and a long process of approximation and induction."[25] The judge in a common-law system does not adjudicate in a vacuum, isolated from the combined force of precedents that contain numerous reasons for difficult decisions, but rather classifies and analyzes "individualized case[s] within [a] patterned relation with others without exercising the prerogative of concretizing the principle."[26] Given the vast, inherited stock of knowledge embedded in prior cases, the judge in a common-law system may possess only tacit understanding of the social forces and factors that have accumulated over time to effectuate the disposition of the particular matter before him. This judge, immersed in the facts and issues of some proceeding, may not be fully aware of his greater role in receiving and transmitting the experience of successive generations through cases. His opinions will contribute to the cumulative growth and organic unity of the law notwithstanding his intentions and supply new combinations of decision-making to aid future judges.

The fallibilism, communal inquiry, meliorism, and synechism championed by Peirce manifest themselves in the common law, which consists of the aggregated deliberations of innumerable judges facing a wide variety of human problems. The common law is like a database that collates prior experiences involving the law and antagonistic human interaction. Holmes stated that "a well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest

25 Vannatta at p. 133.

26 Vannatta at p. 133.

it is to resist it at every step."[27] Elsewhere he remarked, "If truth were not often suggested by error, if old implements could not be adjusted to new uses, human progress would be slow. But scrutiny and revision are justified."[28] The dispersed knowledge contained in the canon of common-law cases makes available to searching judges viable options and practical guidance to be adapted to changed circumstances. Gradually, as more judges add rulings and rationale to the deposit of cases, principles tend to cluster into nameable patterns or correlates that become (or simply reveal) doctrines, e.g., nuisance, acquiescence, assumption of risk, etc. The probative power of the common law is in its ability to preserve and organize these doctrines that resolve pressing challenges. The proliferating variety of facts and rulings in the common law minimizes the possibility of selection bias among judges. For instance, in a system ungoverned by *stare decisis*—i.e., a system in which judges are not bound by precedent but may within reason formulate a singular rationale for rulings without resort to repeated outcomes in like cases—judges may apply principles known to or favored by them rather than mining the historical record for more tested, suitable resolutions. Precedent, however, cabins judges within verifiable experience, forcing them to engage the knowledge deposited by numerous judges who have confronted similar problems.

3 The Common Law is Evolutionary

"The changing experiences of a culture over time, not incontrovertible logic," Vannatta submits, "direct the path of the law."[29] He correctly identifies the connection between Darwinian evolution and Holmes's views of the common law.[30] Frederic R. Kellogg contends that the Darwinian features of Holmes's evolutionary common-law paradigm were, in their moment, novel.[31] However,

27 Oliver Wendell Holmes Jr., "Codes, and the Arrangement of the Law," *American Law Review*, Vol. 5 (1870), pp. 1–2.

28 Holmes, *The Common Law*, p. 25.

29 Vannatta at p. 139.

30 Vannatta at p. 65. See also Allen Mendenhall, "Oliver Wendell Holmes Jr. and the Darwinian Common Law Paradigm," *European Journal of Pragmatism and American Philosophy*. Vol. 2 (2015).

31 Frederic R. Kellogg, *Oliver Wendell Holmes, Jr., Legal Theory, and Judicial Restraint*, p. 47 ("It would seem that nothing quite like the intellectual background of Darwinian evolution and Wright-influenced fallibilism could be found in previous theoretical writings about the common law, and it is evident that Holmes himself believed his theory to be original").

the idea of social evolution predates theories of Darwinian biological evolution and, moreover, influenced Darwin's thinking on natural selection.[32] "[T]he idea of evolution is almost as old as society itself," says Allan C. Hutchinson.[33] "In the many centuries before Darwin's mid-nineteenth-century seminal contribution, so-called evolution appeared in many different incarnations."[34]

Evolutionary themes and theories feature prominently in discussions and descriptions of the common law. Hutchinson states that the "evolutionary motif has always loomed large over jurisprudential efforts to explicate the nature of the common law," that "jurists have utilized evolution not only to explain the past of the common law and its present dynamic but also to predict and propose its future direction," and that "evolution is a ubiquitous and persisting concept in jurisprudential discourse about the common law."[35] The evolutionary paradigm for the common law is inherently conservative in its rejection of radical or revolutionary change on the one hand and of inertia on the other. It embraces incremental modifications, mutations, and adjustments and is best understood as pragmatic.[36]

Much has been said about Holmes's evolutionary conception of the common law.[37] I will not belabor that topic here. It is, however, crucial to point out what this conception stands against, namely the portrayal of the common law as "inseparable from the natural law."[38] A stronger position, following Coke and Blackstone, maintains that the common law derives from and exposits Christianity.[39] While Christian principles and tenets have unquestionably influenced the Anglo-American common law and embedded themselves in cases,

32 F.A. Hayek, *The Constitution of Liberty* (Ronald Hamowy, ed.) (University of Chicago Press, 2011), p. 116; see also Larry Arnhart, *Darwinian Conservatism* (Exeter: Academic Imprint, 2005), pp. 24–25.

33 Allan C. Hutchinson, *Evolution and the Common Law* (Cambridge University Press, 2005), p. 12.

34 Hutchinson at p. 12.

35 Hutchinson at p. 13.

36 Hutchinson at p. 16.

37 See generally Allen Mendenhall, "Oliver Wendell Holmes Jr. and the Darwinian Common Law Paradigm"; see also Allen Mendenhall, *Oliver Wendell Holmes Jr., Pragmatism, and the Jurisprudence of Agon*, xv–xxvii, pp. 109–134.

38 Charles I. Lugosi, "The Rejection of Divine Law in American Jurisprudence: The Ten Commandments, Trivia, and the Stars and Stripes," *University of Detroit Mercy Law Review*, Vol. 83 (2006), p. 655.

39 See, e.g., J. Nelson Happy and Samuel Pyeatt Menefee, "Genesis!: Scriptural Citation and the Lawyer's Bible Project," *Regent University Law Review*, Vol. 9 (1997), pp. 97, 100, 104, 111, 118, 120.

the sometimes awkward, sometimes problematic rulings of innumerable and flawed human judges should not be considered categorically Christian in any theological or moral sense. The tendency toward such grand representations, besides ignoring the messiness and inconsistencies in the development of legal rules and principles in the common-law tradition, implies that the common law is fixed and total, the inevitable and ordained manifestation of perfect order in the phenomenal world. According to this majestic understanding, deviation from established precedent acquires the air of heresy; flexibility and adaptation become profane or heterodox.

Yet no two cases are entirely alike; precedents proceed by rough analogy. The precise application of general principles to specific facts cannot be infinitely repeated to yield a totally consistent or exact group of outcomes that can be accurately labeled as definitively Christian. Given a large number of cases concerning a sufficiently specific or comparable set of facts and principles, judicial rulings will achieve reasonable approximation, resulting in consistency and uniformity in the law. Precedents evolve as loose replications, transmitting principles whose application adapts to present environments. Judges infer the purpose and function of principles from a given sample of on-point decisions within the population of cases bearing on that principle. Some level of estimation plays into every decision involving prior cases. If the solutions to problems presented in cases were easy or straightforward, litigation probably would not have been necessary to begin with. The more complex the facts of a case, the more unusual or singular they are, the wider the latitude the judge enjoys to rule creatively within the constraints of reason and precedent. The more typical or common the facts are, i.e., the more several prior cases resemble the present case, the more likely the potential variance between new rulings shrinks or narrows. On a general level principles in the common law may conform to Christian teachings, but their imperfect application in concrete cases involving disputed facts and limited evidence, and articulated by fallible judges, should not be glorified as holy or elevated as unconditionally Christian.

4 Conclusion

Vannatta summarizes the pragmatic elements of Holmes's thought as follows:

> Holmes reasoned from the particulars of experience toward general principles, rejecting the purely formal deduction of conclusions from formal propositions. He was skeptical of invoking as universal *a priori* premises to begin his arguments. His concept of truth, as an "unattainable" to strive

> after, was thoroughly pragmatist, echoing Peirce's description of truth as the opinion to be held by an indefinite amount of communal inquiry. His ethics are also pragmatist: he avoided appeals to moral principles too far removed from our experience. His ethical principles were contingent, reflecting one's cultural conditions, and emerging from the felt problems of one's environment. Perhaps most importantly, the meaning of his moral principles, the meaning of legal principles such as rights and duties, and the meaning of law itself are to be found in their effects, or in the prediction of their effects.[40]

These elements of Holmes's thought are also elements of "the slow-moving nature of British common law."[41] Vannatta claims that "the conservative legal tradition in England was the common law tradition."[42] Put differently, the legal heritage of England *is* (i.e., remains) the common-law tradition, which is inherently conservative. The common law also embodies the pragmatic or scientific method that Peirce advocated and explained. Peirce, a scientist, mathematician, and logician, may not have been familiar with the intricacies and history of the common law, nor with the methods and processes it enacted and perpetuated. Yet the common law both models and instantiates his consensus-based epistemology.

Peirce and Holmes, Vannatta suggests, believed that truth exists independently of human comprehension, standing as the ideal end of communal or scientific inquiry, and that unqualified certainty in the rightness of one's opinions leads to unconstructive dogmatism.[43] Peirce's epistemology involves a community of informed, leading minds, whereas the common law emanates out of the regular interactions of ordinary individuals and groups, i.e., not from elite scientists or trained academics but from everyday cases and controversies about felt harms that require remedies, repairs, or restoration. The experiential knowledge embedded in the common law is therefore more diffused and dispersed, one might even say democratic, than that which Peirce contemplated for his community of scientists. Judges with rare exceptions do not select which disputes they adjudicate; rather, they adjudicate those lawsuits filed with courts by disagreeing parties of often differing means, backgrounds, priorities, and stations in life. The problems judges solve therefore derive from the commonplace contacts and exchanges of acting agents within or touching

40 Vannatta at pp. 127–28.

41 Vannatta at p. 129.

42 Vannatta at p. 29.

43 Vannatta at p. 128.

the jurisdiction; judges are responsive rather than proactive in their chief duty as problem solvers. Cases come to them; they do not come to cases.

Vannatta explains Holmes's common-law paradigm in Peircean terms:

> Experience and custom, important denotative reference points in conservatism and pragmatism, inform the court as to what is to be expected in society. These customs grow and change with time. The law conforms to these customs as opposed to trying to bend society to the universal law, whose philosophy is grounded on internal necessity, not external standards. The experientialism and externalism at work in Holmes's articulation of the common law rely on Peirce's epistemology and demonstrate that the law is both a communal inquiry guided by experience and custom, and an experimental endeavor.[44]

Vannatta's treatment of the Peircean elements of Holmes's thought not only illuminates ideas about the common law but also raises important questions about Peirce's curious relationship to conservatism.[45] Holmes's conservative pragmatism, and the conservatism of the common law, recalls and extends a tradition characterized by Edmund Burke, David Hume, Russell Kirk, Michael Oakeshott, F.A. Hayek, Michael Polanyi, and Elinor Ostrom. There is no name for this vein of conservatism. Its representatives are not ordinarily associated with one another. Hayek and Kirk, for instance, famously differed on conservatism.[46] Perhaps *pragmatic conservatism* is the best designation for this tradition, bringing together diverse figures under one heading whose ideas are substantially similar and complementary yet infrequently invoked as partners in a common enterprise.

New books continue to be published on Holmes.[47] Although his relationship to pragmatism has long been studied, his relationship to conservatism, *through* pragmatism, alludes even his most astute biographers. Pragmatic

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44 Vannatta at p. 138.

45 See Thomas Short, "The Conservative Pragmatism of Charles Peirce," *Modern Age*, Vol. 43, No. 4 (Fall 2001).

46 See F.A. Hayek, "Why I Am Not a Conservative," in *The Constitution of Liberty* (Ronald Hamowy, ed.) (University of Chicago Press, 2011), pp. 519–533. Kirk debated Hayek in 1957 regarding the merits of conservativism. For an account of the debate, see Bradley J. Birzer, *Russell Kirk: American Conservative* (Lexington, Kentucky: University Press of Kentucky, 2015), pp. 157–58.

47 E.g., Frederick R. Kellogg, *Oliver Wendell Holmes Jr. and Legal Logic* (Chicago and London: University of Chicago Press, 2018); John M. Kang, *Oliver Wendell Holmes and Fixations of Manliness* (London and New York: Routledge, 2018).

conservatism is exemplified in Burke's thought and teachings.[48] "According to pragmatic conservatives," says Lacey, "human beings are sinful creatures by nature, prone to selfish and aggressive behavior if left to their own devices, and there is little hope that people can transcend their given nature, no matter how much effort societies devote to enduring and rehabilitating them."[49] Holmes may not have shared the theological premises that underscore this view, but he was committed to restraining excessive human impulses, open to dissenting opinions, and accommodating of ideological difference. He sought to balance inevitable political disagreements, moderate destructive social behaviors, and cultivate civil and constructive discourse in the name of civilization. He was in this sense a conservative pragmatist, and a pragmatic conservative.

48 Lacey at p. 1.

49 Lacey at p. 3.