E S S A Y

Pragmatism on the Shoulders of Emerson: Oliver Wendell Holmes Jr.'s Jurisprudence as a Synthesis of Emerson, Peirce, James, and Dewey

by Allen Mendenhall

> If I ever do anything, I shall owe a great deal to you.
> — Oliver Wendell Holmes Jr., allegedly 14 years old, according to a letter Holmes wrote to Patrick Augustine Sheehan (Holmes-Sheehan 51)

> The only firebrand of my youth that burns to me as brightly as ever is Emerson.
> — Oliver Wendell Holmes, Jr., letter to Sir Frederick Pollock (Holmes-Pollock 264)

1881 and the Reemergence of an Extant Way of Thinking

In 1881, America was in tumultuous transition. Reconstruction was coming to a close in the South. Immigration, urbanization, and industrialization continued apace; the federal government expanded and solidified its power over the states. The presidency of Rutherford B. Hayes met its end, and President James A. Garfield took the oath of office only to be assassinated shortly thereafter. Garfield spent just 200 days in office. Chester A. Arthur succeeded him, becoming the first and only widower to assume the nation's highest station.

In the West, legends were being made; the distinction between heroes and villains blurred on the frontier, Billy the Kid and Jesse James and other notorious outlaws having become household names. News of the shootout at the O.K. Corral made its way east, and the American government continued to feud with Mormons over the issue of polygamy. In the Northwest, Sitting Bull organized a successful revolt against federal troops, and in the Midwest, Kansas became the first state to outlaw alcoholic beverages.

Everything, it seemed, was changing; the quotidian habits and practices of individuals in all areas of the country seemed to have transformed after the Civil War. Gone was the transcendental optimism in New England; gone were the feudal ways of the Old South. Gone were the defining characteristics of American culture with which the founding generation would have been familiar. America was taking shape, growing, waking up from its post-war slumber and reaching out for fresh ideas.

Louis Menand suggests that "the Civil War discredited the beliefs and assumptions of the era that preceded it" (x). He submits that those "beliefs had not prevented the country from going to war; they had not prepared it for the astonishing violence the war unleashed; they seemed absurdly obsolete in the new, postwar world" (x).

A crisis of belief had taken hold of the population. As a result, the population had begun to search for narratives that would chart the emergence of postwar civilization while offering promise and direction for the future.

And then there was the publication, in Boston, of a curious little book called *The*

Common Law, a compilation of essays by Oliver Wendell Holmes Jr., who had intimate connections with traditional, Protestant New England families and traditions. A generation earlier, these families and traditions had been represented by the Boston Brahmins, one of whom was Holmes's father, Oliver Wendell Holmes Sr., a colorful and outspoken figure, a poet, doctor, and socialite, the author of the popular *Autocrat of the Breakfast Table* series and a darling of the Harvard elite.

Because of his father's reputation and connections, young Holmes, or "Wendell," as he was known before he reached the age of maturity, was blessed to grow up among the intelligentsia and specifically among such giants as Ralph Waldo Emerson (who became "Uncle Waldo"), Henry Wadsworth Longfellow, William Ticknor, James Fields, and James Russell Lowell. There were, of course, many prominent visitors to the Holmes residence, and the regular company of sophisticated minds seems to have left an indelible stamp on Wendell, who was always, without fail, bookish and curious.

Holmes turned forty in 1881. The publication of *The Common Law* that year gave him a chance to express his jurisprudence to a wide audience. This marked a turning point in his career. Over the next year, he would become a professor at Harvard Law School and then, a few months later, an associate justice of the Massachusetts Supreme Judicial Court.

The trauma of the War affected his thinking and would eventually impact his jurisprudence. Leading up to the War, he had been an Emersonian idealist who associated with such abolitionists as Wendell Phillips. As a student at Harvard, he had served as Phillips's bodyguard. He later enlisted in the infantry before joining the Twentieth Massachusetts, a regiment that lost five eighths of its men (Lerner xxiii). He was wounded at the Battle of Ball's Bluff in October of 1861, when he took a bullet to his chest; the bullet passed through his body without touching his heart or lungs. In September of 1862, he was wounded at the Battle of Antietam, a bullet having passed through his neck. In May of 1863, at Marye's Hill, close to where the battle of Fredericksburg had taken place six months earlier, Holmes was shot and wounded a third time. This time the bullet struck him in the heel, splintered his bone, and tore his ligaments; his doctors were convinced that he would lose his leg. He did not, but he limped for the rest of his life.

He emerged from the War a different man. He was colder now, and more sober-minded. "Holmes believed," Menand says, "that it was no longer possible to think the way he had as a young man before the war, that the world was more resistant than he had imagined. But he did not forget what it felt like to *be* a young man before the war" (68).

And he learned that forms of resistance were necessary and natural in the constant struggle of humans to organize their societies and to discover what practices and activities ought to govern their conduct. The War, accordingly, made him both wiser and more disillusioned. In light of his disillusionment, he reflected the general attitudes of many men his age.

But not all men his age shared his penetrating intellect or his exhilarating facility with words; nor did they have his wartime experience, for most men who experienced what he had during the war did not live to tell about it. Certainly no one besides Holmes could claim to have enjoyed such intimate and privileged access to the Brahmin, Emersonian culture of New England before the War, and he more than anyone was equipped to see the continued relevance of that culture to the present. He knew there were things the War could not destroy and varieties of thought that could endure.

Saving Emersonian Tendencies from Adversity and Giving Them Renewed Strength

It is not too much to say that only Holmes could have served as an intellectual link between the old and new ethos of New England; he was a carryover, a lively and sometimes bombastic highbrow whose ideas and methodologies retained qualities of Emersonian transcendentalism. But Emersonian transcendentalism was maladapted. It could not survive the turmoil of the preceding era, at least not in the form in which Emerson had articulated it. Philosophy and idealism had advanced in slow degrees since the Revolution, and Emerson seemed to have been the culmination of American optimism.

The War undermined Emerson; its massive slaughter and economic tumult suggested there was no heritable advantage to embracing transcendentalism, and that Emerson, brilliant though he was, had not produced the particular combination of aesthetics and knowledge necessary to outlast the selective elimination of unfit ideas.

Yet Emerson's ideas were not destroyed; they descended by modification. They survived, in part, because of thinkers like Holmes. Holmes revised them and in so doing endowed them with the variation necessary for their subsequent existence. He also realized their poetic vision in the most improbable of fields: the law.

The hard and mechanical features of the law enabled Emersonian thought to differ in the critical ways necessary to remain fit in the new American climate. Holmes, like his father and Emerson, was a poet, indeed had been the class poet at Harvard, and he discovered that poetry was most effective and powerful, for him, when it was clothed in legal lexica and preserved in legal canons.

Holmes did not think like his father or his father's friends, but he knew how they thought, and he employed what features of their thought were worth preserving and discarded what features he knew to be unsuited for the challenges of the day. He maintained his correspondence with Emerson after the War and mimicked Emerson's prophetic voice with a temper more in keeping with the changed intellectual habitat.

That habitat was ripe for the flourishing of pragmatism. Roughly a decade before *The Common Law* reached print, Holmes's involvement as a member of the Metaphysical Club—a philosophical conversation group that numbered among its participants C.S. Peirce, William James, Chauncey Wright, John Fiske, and Francis Ellingwood Abbot—immersed him in the ideas of pragmatism. With this vibrant philosophy, Holmes carved out his legacy and found room for old principles, including Emersonian aesthetics and propheticism, in the rapidly transitioning society. Although more skeptical and realistic after the War, "his enthusiasm for Emerson never faded," and his "posture of intellectual isolation" was "essentially Emersonian" (Menand 68). Holmes recognized, in short, the significance of Emerson to the index of modern thought.

It is no coincidence that Holmes admired both the common law and Emersonian pragmatics and treated them as paired enterprises; the two have much in common, as will become evident. Holmes was historically conscious; he revered the past from which he sought to break; he felt that the new necessarily derived from what came before, that nothing was without an antecedent, and that ideas did not spring from a vacuum outside of time. He agreed with Emerson that "the inventor only knows how to borrow" (Emerson 42). Just as Emerson held that "the artist must employ the symbols in use in his day and nation" (87), or that "the new in art is always formed out of the old" (87), so Holmes be-

lieved that the law "embodies the story of a nation's development through many centuries" (Holmes, *The Common Law* 1) and is "forever adopting principles from life at one end" while "retain[ing] old ones from history at the other, which have not yet been absorbed or sloughed off" (Holmes, *The Common Law* 25). In this respect, Holmes did not view the artist and the judge as working in mutually exclusive fields, and he demonstrated with his own writings that Emersonian aesthetics had a place in the otherwise dull and doctrinal prose of the law.

Emerson had in mind an aesthetic canon of ingenious inventors, himself among them, building upon the works of one another. This notion carried over into Holmes's conception of the common law: "When we find 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" (Holmes, *The Common Law*, 25). Like Emerson, Holmes considered extensive knowledge of the past empowering to the creative mind; also like Emerson, he was willing to attribute invention and insight to genius: "In the course of centuries the custom, belief, or necessity [of a rule or a formula] disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for" (Holmes, *The Common Law*, 4). For Emerson as for Holmes, genius could be realized in the course of studying ordinary social conditions prevailing at various points in history. This genius could have meliorating effects on the associations that tie people together into social units.

Genius, then, did not arise without some effort on the part of the person possessing it, and Holmes was inclined to view that effort as a search for the clarity needed to apprehend the complex instrumentalities of legal institutions. This clarity motivated prudent judges in their search for the desirable directions for the law to take and for the useful categories for the law to assume. "[W]hen ancient rules maintain themselves," Holmes explained, "new reasons more fitted to the time have been found for them, and […] they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted" (Holmes, *The Common Law* 24). Inferred in these lines and in Holmes's treatment of the common law is the idea that it is personal knowledge that makes one aware of the impersonal mechanisms driving the law toward some imperfectly realized ideal about regulating the population.

To come to Holmes's understanding of the law as a system of growth rooted in human knowledge requires an initiation into the flows of history. The more comprehensive one's knowledge of history, especially as it pertains to the law, the greater facility one has to contextualize any fleeting standard within the operative paradigms that influence ongoing conversations about human conduct. "However much we may codify the law into a series of seeming self-sufficient propositions," Holmes maintained to this end, "those propositions will be but a phase in a continuous growth" (*The Common Law* 25). Analyzing such propositions in light of the waxing and waning standards, values, and tastes with which various communities have experimented is itself a test of the validity of those standards, values, and tastes. In other words, such analyses reveal the practical consequences of instituting the standards, values, and tastes by operation of law.

Such analyses are, therefore, indispensable guides for judges considering how to rule

in specific cases with particular facts. A judge determining whether a seemingly unfair or deceptive label on a product should qualify as "false advertising" or mere puffery would consult the decisions of past judges and compare whether and to what extent the facts before the past judges are analogous to the facts at present. If the comparison suggests that a similar ruling in this case would lead to a bad result, then the present judge modifies the rule by highlighting the facts that are readily or obviously distinguishable. But if the present judge thinks a past decision would apply to the circumstances at hand, he downplays or disregards the distinguishable facts and highlights their family resemblances.

Hence when judges and jurists study the history of the law, they must bear in mind their own historical position in relation to those older propositions that shaped the current content of the law: "To understand [the propositions'] 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" (Holmes, *The Common Law* 25). On this score, Holmes echoes Emerson:

> No man can quite emancipate himself from his age and country, or produce a model in which the education, the religion, the politics, usages, and arts, of his times shall have no share. Though he were never so original, never so wilful and fantastic, he cannot wipe out of his work every trace of the thoughts amidst which it grew. The very avoidance betrays the usage he avoids. Above his will, and out of his sight, he is necessitated, by the air he breathes, and the idea on which he and his contemporaries live and toil, to share the manner of his times, without knowing what that manner is. (87)

The difference between Holmes and Emerson in this regard is that Holmes suggests we can, in fact, know what the manner is, at least to some degree, if we understand how and from where it developed. The function of the common law is to supply us with this understanding.

The common law describes a body of rules that develop as literary canons develop. That is to say, works of literature become canonized just as rules become settled through the endless processes of the common law. Only the test of time shows whether a work of literature will remain in the canon after extraordinary content has been filtered from content unable to speak meaningfully to future generations. Literary works of enduring appeal are able to outlast the embedded prejudices, pressing issues, and prevailing tastes of an age. On the other hand, works that cannot remain relevant do not survive the onslaught of competition that must be overcome to procure a place in the canon. This is what Emerson meant when he described the eternal process of transmuting life into truth through texts as a "distillation" of "products," none of which is "quite perfect" ("The American Scholar" 13). He goes on to say, in furtherance of this theme, "As no air-pump can by any means make a perfect vacuum, so neither can any artist entirely exclude the conventional, the local, the perishable from his book, or write a book of pure thought, that shall be as efficient, in all respects, to a remote posterity, as to cotemporaries, or rather to the second age. Each age, it is found, must write its own books; or rather, each generation for the next succeeding. The books of an older period will not fit this" ("The Ameri-

can Scholar" 13-14). So it is with the common law: the decisions issued by various judges speak to their present audience but with an eye toward an imagined future consisting of rational citizens to whom earlier principles remain valid and by whom those principles advance in further increments.

In this manner, the common law, at least in theory, parallels the Emersonian concepts of influence. The principle that perennial truths must be restated in the vocabularies of successive generations has been embodied in the common law since time immemorial. Indeed, that principle defines the common law. To know why pragmatism was such a natural fit for an Emersonian Holmes, one needs only to consider what the common law is and why it appealed to him. Doing so will show that pragmatism is not "The American Philosophy," as it is so often proclaimed to be, for the common law is, in effect, pragmatism by another name, and its characteristics and methodologies gradually have developed, hand in hand with evolving mores, for centuries.

Theories of pragmatism are so intertwined with theories about the common law that Thomas Grey has insisted that "pragmatism *is* the implicit working theory of most good lawyers" (1590, emphasis added), and Richard Posner has insisted that "most American judges have been practicing pragmatists" (Posner, "What Has Pragmatism" 1666). What makes Holmes's pragmatism unique—what sets it apart from what other lawyers or judges did and do—is its use of Emersonian aesthetics to draw attention to antagonistic arguments, which, by their very antagonism, ensure that competition among ideas continues in the legal canon.

The common law is the vast accumulation of judicial decisions as opposed to the commands of legislatures or the unbinding whims of equity courts; a legislative code announces rules whereas judicial decisions follow, clarify, and sustain them. The common law is a body of cases, a growing organism representing the general rules and inherited customs of the land. It is simultaneously conservative and progressive. It has come together through centuries as innumerable judges have struggled with and against precedent to apply longstanding rules to new and unique situations. To study the common law is, therefore, to see how traditions evolve and how inarticulate wisdom becomes embodied in text.

What distinguishes the common law from a civil law system is the doctrine of *stare decisis* ("let the decision stand"), which requires judges to follow precedents established by prior decisions or to distinguish the facts of new cases from the facts of previous cases in order to reach an applicable rule. Certain rules persevere because they triumph over lesser practices that have not worked. Holmes explained that this process of creating and sustaining laws in graduated stages does not always make sense or produce the perfect outcome: "In form its growth is logical. 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* 24). If some laws seem to be artifacts, Holmes qualifies, they are not likely to burden the people subject to them, for their effect is in their use, and anyway it is only a matter of time before they are overgrown by the "secret root from which the law draws all the juices of life," which is to say the legislature (Holmes, *The Common Law* 24).

Judges interpret the law; legislators make it. The legislative process is marked by

"considerations of what is expedient for the community concerned" (Holmes, *The Common Law* 24). In theory, the legislature consists of elected representatives that enact the will of the people. Holmes favored a doctrine of judicial restraint whereby judges would not infringe upon the province of the legislature, since doing so would be to impose the belief of one person—or a few people, in the case of courts made up of multiple judges or justices—onto the will of the people. The intent of the legislature, and hence of the people, is memorialized in statute; and it is the emphatic duty of a judge to construe the statutory language according to its plain meaning and common usage.

Holmes took the position that a judge should not rule contrary to statutory language and must pay due deference to legislative discretion, even if the terms of a statute are absurd on their face. As Frankfurter remarked, "He has ever been keenly conscious of the delicacy involved in reviewing other men's judgment not as to its wisdom but as to their right to entertain the reasonableness of its wisdom" (Frankfurter 686). Holmes put it even more pointedly in a letter to his cousin John T. Morse: "It has given me great pleasure to sustain the Constitutionality of laws that I believe to be as bad as possible, because I thereby helped to mark the difference between what I would forbid and what the Constitution permits" (Holmes, letter to Morse 67). It was with this doctrine of judicial restraint, in conjunction with his portrayal and genealogy of the common law, that Holmes married some of the pragmatic ideas of Peirce and John Dewey. This marriage also implicates the federalist pluralism of William James, Holmes's longtime friend and sometime sounding board, a man who competed with Holmes for the affections of Fannie Dixwell, who became Holmes's wife.

Integrating Emerson with the Pragmatism of Peirce, Dewey, and James

Frederic R. Kellogg suggests that insofar as Holmes's conception of the law offers a model of an "ongoing community exploring common problems," it bears "remarkable similarities to the model of scientific inquiry emerging at roughly the same historical period in the writings of Holmes's controversial friend Charles S. Peirce, a model later adopted by John Dewey" (34). Kellogg could have added James, who advocated for the "experimental method" to guard against error, and for the "comparative method" to supplement the experimental method (James, *Principles of Psychology* 192-194). The mark of these methods was their starting point of "introspective observation" (James, *Principles of Psychology* 185) of "successive thoughts" or "subjective data" (James, *Principles of Psychology* 192-194, 342, 401) to the process of discerning the relation of individual consciousness to external objects (James, *Principles of Psychology* 187).

Peirce wished to model philosophy off the consensus-based practices and protocols of the scientific community. His essay "Some Consequences of Four Incapacities" proposed that a single, fallible mind cannot be the absolute arbiter of truth; for truth is established by a lack of doubt, which occurs when several individuals agree about some state of existence. A corollary to that proposition is the inverse notion that we should doubt whatever is rejected by a collection of intelligent and disciplined minds. These premises are strikingly resonant in Holmes's recognition that a single judge or small group of judges ought to have reason to doubt their logic and inferences that conflict with the legislative process. That rigorous process represents the end result of painstaking negotiations, compromises,

and experiments among officials receiving direction from their constituents, and it should not be undone by the convictions of a judge altogether dislocated from popular representation and electoral accountability.

Holmes considered good law to be the product of a thorough method similar to the scientific method, which, according to Peirce in "The Fixation of Belief," stands in contradistinction to the method of authority; the former prizes inquiry and practices the drawing of inferences from sustained observation, whereas the latter assumes without challenge the validity and viability of an allegedly right or unassailable premise. The former is like the common law with its inherent positivism; the latter is like natural law theories about origins preceding posited laws. The scientific method of the common law is always about experimentation; the theory of our Constitution, with its adoption of the common law within a covenantal framework, is "an experiment, as all life is an experiment" (Holmes, *Abrams* 630). What motivates experimentation is the irritation of doubt, the vexing insecurity that we are not right about what we believe. Inquiry is the means by which we seek to pacify or eradicate that irritation.

The sole object of inquiry for the scientific philosopher was, according to Peirce, the settlement of an opinion ("The Fixation" 6). But for the common law judge, who is not unlike the scientific philosopher, the sole object of inquiry is the settlement of rules, which remarkably is called an "opinion" in the legal vocabulary. The legislative method of authority operates by raw force or imposition and short-circuits inquiry: it directs others to conform to it and threatens to visit consequences upon those who fail to comply. Peirce and Holmes did not see this method as likely to generate good beliefs, whether in phenomena generally or in supposedly moral principles guiding legal rules. As Peirce declared,

> The willful adherence to a belief, and the arbitrary forcing of it upon others, must, therefore, both be given up, and a new method of settling opinions must be adopted, which shall not only produce an impulse to believe, but shall also decide what proposition it is which is to be believed. Let the action of *natural preferences* be unimpeded, then, and under their influence let men, conversing together and regarding matters in different lights, gradually develop beliefs in harmony with natural causes. ("The Fixation" 10)

By way of analogy, Peirce seems to be advocating a common law approach to the settling of opinions and rules as against the ritual of executive or sovereign command. The common law advances by accommodating natural preferences and by facilitating their constant articulation. Like the "machinery of the mind" that transforms knowledge "but never originate[s] it" (Peirce, "How to Make" 287), the common law never purports to have an identifiable origin. It registers indirect dialogues between judges and establishes precedents to ensure that the conversation is ongoing. Some precedents are preserved and passed down in their entirety; others persist in residual form only.

Residual precedents are improved or diminished by their utility; the effort to integrate the differentiated elements of experience within a system of rules tends to neutralize or eliminate bad and inexpedient practices. The corrective processes of the common law and of the scientific method (or method of inquiry) enable the incremental development of consistent and predictable guidelines; they provide the legal or scientific community

with an element of certainty and stability. They also establish a comprehensive and comprehensible record of the continual adaptations of human behavior. That is why Holmes begins *The Common Law* with these oft-quoted, axiomatic lines: "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed" (Holmes, *The Common Law* 1).

Despite its capacity for growth, or perhaps because of it, the law never attains some fixed, transcendental unity that allows us to predict all of the legal outcomes of any specified action; the law is constantly being remade and thus cannot attain perfect uniformity. "The truth is," Holmes remarked, "the law is always approaching, and never reaching, consistency" (*The Common Law* 25).

So it must be that the prudent judge determines the laws of social interaction as Peirce suggests that scientists and philosophers determine the natural laws of the universe: by the study of probabilities and chance. Holmes knew the law would never attain perfect consistency because, to borrow from Peirce (who, again, was referring to the natural laws of the universe, but whose comments are nevertheless germane to the laws of human society), they "developed out of pure chance, irregularity, and indeterminacy" ("A Guess at a Riddle" 223). "For every conceivable object," Peirce adds, "there is a greater probability of acting as on a former like occasion than otherwise. This tendency itself constitutes a regularity, and is continually on the increase" ("A Guess at a Riddle" 224).

The nature of a tendency in the common law matures in a similar manner; the difference, if there is one, is that in the common law tendencies reflect what judges figure will work to resolve a dispute between litigants while maintaining the integrity of the rule being applied. "The substance of the law at any given time," Holmes says, "pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past" (Holmes, *The Common Law* 1). Judges seek out the tendencies of human behavior to determine what tendencies in the law will suffice to keep the peace, compensate victims, punish wrongdoers, and maintain order. This is where exercises in probability come into play.

In "The Path of the Law," Holmes put forth the bad man theory or prediction theory of law, which holds that we should not view the law as an abstract statement about morals, but as those consequences which a bad man predicts will obtain if he chooses one course of action instead of another. The law is, accordingly, a prediction about what will happen if one performs certain acts. Informed and calculated guesses about outcomes are what most of us turn to before choosing any particular course of action. Most of us do not, when we stop at a traffic light, for example, consider the morality of the action we are performing, but instead consider the ramifications of our potential act should we actually carry it out. Therefore, determining in advance what the law is or might be involves determining the probability that certain social ramifications will result from choosing to perform the act under consideration.

But judges do not guess in advance what the law will be, at least not in their capacity as judges; other people do. Judges sort through facts already given to determine which

general principles will apply, and then, in Menand's words, "what judges say *is* law" (343). Put another way, judges decide what the law is only after the facts of the case, however sanitized, reach the court; or maybe it is more accurate to say that judges decide whether and how precedent squares up to those facts, since general principles are passed to him through prior cases, and he must categorize the facts in line with the general principles previously established. Once a general principle is made to fit a set of facts, the facts are just as dispositive as the general principles in illustrating what the law is. The general principle of trespass—for the purposes of this example, trespass can be a wrongful entry onto another's property—is only a principle and not a guide for human conduct (that is to say, a law) until the judge determines to which situations the principle pertains: a person's front yard may be property, but what about his poetry or his children? Once the judge determines whether and how the general principles attach to concrete facts, he announces the rule and thereby supplies the population with a guiding illustration. Now the population, bad men and all, can predict, with a little more certainty, whether taking actions in relation to, say, a man's property or children will trigger a legal analysis regarding trespass or whether a different law—or no law at all—will obtain. It is in light of this process that Holmes proclaimed, "General propositions do not decide concrete cases" (*Lochner* 79). The decision is not in the principle but in the method in which the facts are shaped to fulfill the principle.

This method resembles the method that Dewey considered necessary "to direct and make fruitful social inquiry," which itself proceeded "on the basis of the interrelations of observable acts and their results" (Dewey 59). Dewey, like Holmes, considered facts to come from method and technique (50) and to provide the basis for knowing the import of theories, which are like the general principles guiding the common law (86-89). Dewey's entire method of social inquiry is in fact comparable to the common law inasmuch as it rejects the search for causal origins (44, 60) and evaluates theories in terms of their perceived consequences (51) in the environment of a specific time. Dewey demonstrates his consequentialism this way: "Conditions are stated in reference to consequences which may be incurred if they are infringed or transgressed" (70).

What Dewey calls a "theory" might well have been a "law" for Holmes. Both entities reveal themselves in the concerted actions of others—bad men, if you will—and can be quantified as a series of predictions; the growth of that series of predictions is tantamount to the operation of the common law, namely, to the process of following and simultaneously establishing precedents to direct social inquiry and to order social relations. The common law is, in this respect, a system of probabilities about human action and its consequences. Dewey might as well have been referring to the common law when he said that "human acts have consequences upon others, [and] some of them are perceived, [and] their perception leads to [the] subsequent effort to control action so as to secure some consequence and avoid others" (46). The implication is that in one case after another, rules build upon rules and then eventually abstract into general principles to which facts about human action are made to conform; the resultant laws are therefore not legislative commands (69, 167), but an aggregation of dialectical developments.

The controlling question of law in most cases is framed by extant paradigms drawn from these developments. The sheer weight of precedent may mean that seemingly archaic taxonomies remain in force. Master-servant law, for instance, continues in full operation

in terms of principals and their agents under the doctrine of *respondeat superior*. But it does not follow that because such vocabulary and principles remain, the facts giving rise to the present cases reflect the facts that would have borne out at earlier times.

Like the Peircean scientist who relies upon community consensus or the Holmesian judge who defers to the legislature, Dewey acknowledged that no thought or scheme of organization springs from an individual mind deliberating in isolation; rather, all thoughts and schemes of organization make up "an association in the sense of a connection and combination of things" (Dewey 51). Generating knowledge by testing ideas within a community of thinkers enables the proliferation of democracy, which is, for Dewey, the ultimate ideal; and even if an ideal "is not a fact" and "never can be" (119-120), it nevertheless inspires or motivates people to assemble bodies of knowledge (like the canons of literature or the precedents of the common law) and facilitate communication between groups.

The associated ties of an intellectual community thus strengthen, not weaken, the individual minds within it. "There is no limit," Dewey intones, "to the liberal expansion and confirmation of limited personal intellectual endowment which proceed from the flow of social intelligence when that circulates by word of mouth from one to another in the communications of the local community" (159-160). Accordingly, the judge or justice divorced from the local community and withdrawn from the processes of deliberation that brought about habits of mind and conduct within the community cannot himself deduce the optimal legal conditions for the community; therefore, he must defer to the judgment of the community as embodied in enacted legislation. The term "majoritarianism" as ascribed to both Holmes and Dewey derives from this proposition.

Of all the so-called "classical pragmatists," Dewey was the one Holmes claimed to admire most. Max Harold Fisch describes this admiration as follows:

> Holmes did not discover Dewey until the latter's *Experience and Nature* was recommended to him by a young Chinese friend. He began it skeptically; it seemed to be so badly written. But he read it twice in the winter of 1926-27, and wrote his impressions in five letters over a period of a year and a half. 'He seems to me,' Holmes said, 'to have more of our cosmos in his head than any philosopher I have read.' Holmes reread the book in 1929 when a second edition appeared, and recommended it to Sir Frederick Pollock. The only clearly intelligible sentences Pollock professed to find in it were the two pages Dewey had quoted from Holmes. (8)

It is possible, in light of Holmes's late arrival to Dewey's writings, that Dewey benefited from Holmes's influence more than vice versa, but at any rate their ideas were similar enough to have attracted one another and to have arrived at similar conclusions using similar methods. It is also possible that Holmes, who never liked to give credit where credit was due, did not wish to draw attention to the similarities of his jurisprudence with the thinking of Peirce and James and thereby to detract from his reputed originality, but found Dewey to be different enough to warrant praise safe from public speculation about the two men's shared premises. Nevertheless, as I have suggested, Holmes's jurisprudence does not represent pragmatism to the exclusion of Peirce and James. It smacked of Peircean theories about probability, prediction, and communicative consensus and had much to

do with the philosophical musings of James, whose version of pragmatism Holmes disingenuously dismissed as an "amusing humbug" (Letter to Pollock 139).

James was a pluralist. So was Holmes. James's salutary stand against monism and deference to the practices and beliefs of different communities correspond with Holmes's judicial restraint and enthusiasm for the common law. His description of how the mind forms impressions and chooses between options would seem to have influenced Holmes's theories about intentional torts and quantitative prediction: "[T]he mind is at every stage a theatre of simultaneous possibilities. Consciousness consists in the comparison of these with each other, the selection of some, and the suppression of the rest by the reinforcing and inhibiting agency of attention. The highest and most elaborated mental products are filtered from the data chosen by the faculty below that, which mass in turn was sifted from a still larger amount of yet simpler material, and so on" (James, *Principles of Psychology* 288). The fundamentals of Holmes's bad man theory consist therein.

James likened a pluralistic world to a "federal republic" rather than an "empire or kingdom" ("A Pluralistic Universe" 321-22). A federal republic depends upon checks and balances not only between competing branches of government, but also between competing cultures. A federal republic is pluralist to the extent that its constituent parts "hitch up" but do not mirror one another or correspond absolutely. Pluralism is the opposite of monism, which holds that "when you come down to reality, everything is present to everything else in one vast instantaneous co-implicated completeness—nothing can in any case be really absent from anything else, all things interpenetrate and telescope together in the great total conflux" (James, "A Pluralistic Universe" 322).

Holmes noticed such totalism, or monism, in natural law theories, the uncompromising supporters of which believed their jurisprudence was universally binding and unconditionally true and therefore innately superior to anyone else's. Holmes, by contrast, did not view judges as Platonic guardians and was loath to intrude upon the local intelligence of distant communities. "I love granite rocks and barberry bushes," he said, "no doubt because with them were my earliest joys that reach back through the past eternity of my life. But while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be leaves one able to see that others, poor souls, may be equally dogmatic about something else" (Holmes, "Natural Law" 41). The utility of this skeptical position was to leave it to the people and their representatives to risk their own well-being in determining what they thought was best for themselves. "I always say, as you know," Holmes wrote to Harold J. Laski, "that if my fellow citizens want to go to Hell I will help them. It's my job" (*Holmes-Laski* 249).

Related to this constructive skepticism is the principle that one who is honest about the probable limitations of his ingrained convictions must acknowledge the danger of carrying those convictions to their logical end in an illogical world full of people with different convictions. The trouble is when hostile ideas, unlike in kind but not in degree, bring their adherents into irreconcilable conflict. Productive antagonisms and dissents are one thing; stalemate and destruction are quite another. The quickest way to retard growth and upset social harmony is unreservedly to embrace militant and extreme ideas.

Militant and extreme ideas are comprised of such particles and pieces as to become combustible when brought into contact with other ideas having similarly combustible properties. The collision of these ideational forces results in their total annihilation, along

with the people who cling to them. Holmes, extending the beer analogy to weightier subjects, puts it this way: "Deep-seated preferences cannot be argued about—you cannot argue a man into liking a glass of beer—and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as appears, his grounds are just as good as ours" (Holmes, "Natural Law" 41). For Holmes, then, the simple recognition of our possible error is enough to generate healthy opposition. It is when opposition shuts down all communication and disregards all awareness of probable error that it becomes violent and destructive. That is what happened during the Civil War.

Holmes took it upon his occupation to ensure that other civil wars would not happen, that antagonisms remained constructive, and that totalizing world-views would not result in the obliteration of good ideas or in complete intellectual stasis. The common law demonstrated that parties came into conflict all the time, and their conflicts led not to devastation but to clarity and growth in the legal system. Although it was acceptable for unfit ideas to become extinct, as it were, through natural processes, it was not acceptable to eliminate fit ideas by means of overpowering force. Opposition and dissent were necessary, of course, to facilitate competition among people and principles; in turn, competition was necessary to prevent militant people and principles from gathering such force that they would bring about violence.

Accordingly, it was not relativism that Holmes welcomed. It was a method of debate and exchange; the coordination of human action toward dispute resolution; the distillation and dispersal of power; and the arrangement of practical rules, derived from common experience, into an articulate classification that could guide judges and lawyers to the benefit of society writ large. This combination of traits was libertarian in the sense that it enabled the evaluation of ideas based upon "the demonstrated efficacy of free inquiry in enlarging knowledge" (Posner, "What Has Pragmatism" 1661). The "plausible extension of Holmes's marketplace of ideas approach" is that "there are ascertainable, 'objective' standards for establishing the proprieties of expression" and that, therefore, the "market," not the judge, ought "to be the arbiter" (Posner, "What Has Pragmatism" 1662). Let the people experiment with their own communicative standards and prescriptions, Holmes maintained, for an obligation is not enjoined on the courts to sit in ultimate judgment over the solemn acts and decent politics of reasonable people. Courts were not designed to referee or legislate moral tendencies but to ensure that the consequences of human action are reasonable and practicable in the workaday social sphere.

Legal Pragmatism as the Confluence of Emerson, Peirce, Dewey, And James

The confluence of Emerson, Peirce, Dewey, and James in the jurisprudence of Holmes gave rise to what Richard Posner has dubbed "legal pragmatism." The features of legal pragmatism retain the influence of each of these thinkers. Posner, a leading American jurist, a lecturer at the University of Chicago Law School, and a public intellectual who sits as a judge on the United States Court of Appeals for the Seventh Circuit, is an unabashed admire of Holmes. His legal pragmatism, which he sees as the natural extension of Holmes's jurisprudence, includes twelve tenets:

> 1. Legal Pragmatism is not just a fancy term for ad hoc adjudication; it involves consideration of systemic and not just case-specific consequences.
> 2. Only in exceptional circumstances, however, will the pragmatic judge give controlling weight to systemic consequences, as legal formalism does; that is, only rarely will legal formalism be a pragmatic strategy. And sometimes case-specific circumstances will completely dominate the decisional process.
> 3. The ultimate criterion of pragmatic adjudication is reasonableness.
> 4. And so, despite the emphasis on consequences, legal pragmatism is not a form of consequentialism, the set of philosophical doctrines (most prominently utilitarianism) that evaluates actions by the value of their consequences: the best action is the one with the best consequences. There are bound to be formalist pockets in a pragmatic system of adjudication, notably decision by rules rather than by standards. Moreover, for both practical and jurisdictional reasons the judge is not required or even permitted to take account of *all* the possible consequences of his decisions.
> 5. Legal pragmatism is forward-looking, regarding adherence to past decisions as a (qualified) necessity rather than as an ethical duty.
> 6. The legal pragmatist believes that no general analytic procedure distinguishes legal reasoning from other practical reasoning.
> 7. Legal pragmatism is empiricist.
> 8. Therefore it is not hostile to all theory. Indeed, it is more hospitable to some forms of theory than legal formalism is, namely theories that guide empirical inquiry. Legal pragmatism is hostile to the idea of using abstract moral and political theory to guide judicial decisionmaking.
> 9. The pragmatic judge tends to favor narrow over broad grounds of decision in the early stages of the evolution of a legal doctrine.
> 10. Legal pragmatism is not a supplement to formalism, and is thus distinct from the positivism of H. L. A. Hart.
> 11. Legal pragmatism is sympathetic to the sophistic and Aristotelian conception of rhetoric as a mode of reasoning.
> 12. It is different from both legal realism and critical legal studies. (Posner, *Law, Democracy, and Pragmatism* 59-60).

Although it is difficult to pinpoint where, exactly, the theories of Peirce or Dewey or James control in any of these tenets taken in isolation, it can scarcely be denied that the tenets taken together contemplate the general methods and attitudes of each of these pragmatists.

These pragmatists sought to strip philosophy—in Holmes's case, the philosophy of law—of its extraneous modes of reasoning and its abstract or dogmatic moralizing and to avoid attenuated lines of thinking that did not comport with commonsense empiricism. They viewed social communities as composite unities replete with differing opinions and motivations. They examined ideas in light of human expectations concerning causes and effects, actions and consequences. They quantified these expectations in terms of probability. And whatever meaning they took from these expectations depended upon what practical difference it made to interpret the expectations in one manner as opposed to another.

It is difficult to imagine the emergence of legal pragmatism as a named discipline or a celebrated method apart from the contributions of Peirce, Dewey, or James. The jurisprudence of Benjamin Cardozo and Posner, among others, seems to have cobbled together its substance from these pragmatists who inspired Holmes. Nevertheless, Posner notes a difference between philosophical and legal pragmatism. *Contra* philosophical pragmatism, which Posner deems "orthodox" pragmatism, legal pragmatism focuses on the everyday. "Everyday pragmatists," Posner clarifies, "tend to be 'dry,' no-nonsense types" (Posner, *Law, Pragmatism, and Democracy* 12). More often than formalist judges, judges who are pragmatic implement anti-foundational and precedent-based techniques to transform the useful or the convenient into the legal or operative. "An everyday-pragmatist judge," Posner submits, "wants to know what is at stake in a practical sense in deciding a case one way or another. . . . [He] does not deny the standard rule-of-law virtues of generality, predictability, and impartiality, which generally favor a stand-pat approach to novel legal disputes. He just refuses to reify or sacralize those virtues. He dares to balance them against the adaptationist virtues of deciding the case at hand in a way that produces the best consequences for the parties and those similarly circumstanced" (Posner, *Law, Pragmatism, and Democracy* 12).

A pragmatist judge might therefore dissent on the grounds that the majority opinion abstracts into airy flourishes about "justice," "rights," and "equity." Opinions that turn on such loaded terminology, the pragmatist judge might say, reveal more about judges' personal ideologies than about the meaning of the terminology.

Legal pragmatism would seem to be, in this respect, both common sense and no-nonsense. Certainly that is how Holmes thought of the law. "[T]he only definition of law for a lawyer's purpose," the English jurist Sir Frederick Pollock wrote to Holmes, "is something which the Court will enforce" (Pollock to Holmes 3). Holmes agreed with his friend and pen pal. It was not that he considered the law to be without philosophical substance or that he delighted in its inevitable malleability; it was that he had it out for jurists who overstated the ontology of the law and glorified the law as the earthly manifestation of divine purpose or as a majestic surrogate for morality.

Law did not work this way; it was not divorced from the mundane social sphere or autonomous from ordinary, routine human interactions. Indeed, it derived from those things. Lawsuits with specific facts and murky issues came before the courts, which assessed the arguments of both sides and extracted a general rule based on the evidence and consistent with the principles expressed in patterns of established precedent. The actions of a few people were thereby plugged into a vast network of human relations spanning different times and places; what linked the people and places was the general rule, which had been in circulation long before the parties disputed. When they initiated suit, the parties did not know which general rule the judge would apply to their case, but their aim was to present the facts in such a way as to implicate the general rule that would allow them to prevail. In essence, the parties knew the facts of their case and had an assortment of general rules to choose from, and based on the precedents related to their claim, they predicted what the judge or jury would need to hear in order to find or rule in their favor. Legal pragmatism looks at this process and does not see anything ontologically or epistemologically magnificent. It looks at this process and sees, rather, a plain representation of the way things are and a possible prophecy about the way things might be.

As a link between the old and the new, Holmes appreciated the ways in which the law, like history itself, unfolds in stages and in accordance with community consensus. He had witnessed firsthand the stark cultural transitions in New England before, during, and after the Civil War, and he understood the importance of adjusting to change, or rather of accommodating it. He neither liked nor disliked the concept of change; he simply recognized that it was what it was and would happen despite anyone's preferences for or against it.

That became his take on the law as well: it was neither good nor bad; it just was. Some people sought to remake it—they were supposed to be the legislators and their constituents—but whatever passed as law at any given moment was just a temporary place-marker until something different came along. This does not mean that he did not welcome certain changes, only that he did not see those changes as a step towards realizing an abstract teleology. When other justices or jurists seemed to champion an absolute or teleological position about the law, Holmes knew he had to dissent, and to dissent well, lest the law itself become fixed in a maladapted state from which it could not recover.

By the time 1881 came to a close, Holmes had made his mark. *The Common Law* had been favorably received; it earned him the reputation of an accomplished jurisprudent and guaranteed his continued friendship with such renowned legal figures as Pollock. It also made him a discussion point among important political figures and public intellectuals.

1882 ushered in a new phase of his life. He began to adjust to the duties and responsibilities of life on the bench. His lifelong hero Emerson died that year, and as a novice justice on the highest court in Massachusetts, he was faced with rare opportunities to give Emersonian expression to pragmatic principles that would obtain to the people of that state.

Emerson's ideas remained persuasive to Holmes and others inasmuch as they addressed theories that had not gone away. But Emerson's language no longer conveyed the convictions of the age and no longer registered a perspective familiar to the younger generation. The country was asking questions, and the answers were not to be found in pure transcendentalism. Holmes realized this and so sought to repackage Emerson in idioms that the current era could recognize and through a medium that would have a direct impact on the problems concerning Americans. Eventually he would sit on the United States Supreme Court, and from that revered post he would begin to promulgate and preserve his lively variety of pragmatism—which synthesized Emerson, Peirce, Dewey, and James—in the legal canons of the country.

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