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# THE PRAGMATIST TRADITION: LESSONS FOR LEGAL THEORISTS\*

SUSAN HAACK\*\*

*[H]ow quickly the visions of genius become the canned goods of intellectuals—Saul Bellow<sup>1</sup>*

As you probably noticed, my title is ambiguous—deliberately so, because my purpose here is twofold: to teach legal theorists something of the pragmatist tradition in philosophy, its history, its character, and its content; and to suggest some of the ways in which the intellectual resources of that tradition can enhance our understanding of the law. And as you probably also noticed, my opening quotation is two-sided—again, deliberately so, because I hope to achieve two things: to convey some sense of the rich potential of classical pragmatism to illuminate issues in legal theory; and to reveal something of the poverty and crudeness of the caricatures of pragmatism that, sadly, seem to be as common in legal circles as they are in the philosophical mainstream.

Some of you may suspect that I've already set out on the wrong foot. Isn't pragmatism, after all, inherently *anti-theoretical*<sup>2</sup>—and doesn't that mean that both my title, and my project, must be misconceived? Not at all. Perhaps the misconception results from a confusion of the ordinary-language meaning of "pragmatism" ("a practical approach to problems,"<sup>3</sup> "dealing with matters with respect to their practical consequences,"<sup>4</sup>

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\* © 2017 Susan Haack. All rights reserved. This lecture was presented at a conference on "Exploring Jurisprudence" at Washington University School of Law (October 2017) in honor of the publication of Professor Brian Z. Tamanaha's book *A Realistic Theory of Law* (2017). I hope it will be apparent, without my needing to dwell on them, that there are important affinities and points of connection between his approach and my own.

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1. SAUL BELLOW, *HERZOG* 82 (2003) (1964).
2. *See, e.g.*, PATRICK S. ATIYAH, *PRAGMATISM AND THEORY IN ENGLISH LAW* 5 (1987); Thomas Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 *S. CAL. L. REV.* 1569, 1569–70 (1990); RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 2–3 (2003).
3. *Pragmatism*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).
4. *Pragmatism*, OXFORD NEW DESK DICTIONARY AND THESAURUS (3d ed. 2009).

concern for political or practical expediency rather than principle)<sup>5</sup> with its specialized philosophical meaning; perhaps it results from a confusion of the regular use of “theory” with its recent specialized use by legal scholars to refer to systematic prescriptions about how the law should be interpreted. But whatever the reason, the idea that pragmatism (in the philosophical sense) is hostile to theory (in the regular sense of “explanatory account”) is way off the mark. The philosophers of the classical pragmatist tradition were in no way anti-theoretical; neither was legal pragmatist Oliver Wendell Holmes—who believed, on the contrary, that “we have too little theory in the law rather than too much”;<sup>6</sup> and neither, of course, am I.

However, the usual fare of analytic legal theory—all too often preoccupied with its own internecine disputes, and operating at such a dizzyingly high level of generality and abstraction that it fails to engage with any actual legal system in its particularity—is, to my way of thinking, too thin, too bloodless, and too idealized;<sup>7</sup> and the usual fare of recent legal Theory-with-a-capital-T—focused in large part on the idea that law should be viewed through the lens of race, gender, etc.—too narrow, too parochial, and too politicized. Pragmatist legal theory offers us something better than either. Unlike analytic philosophy, pragmatism invites us to focus, not exclusively on our language or our concepts, but on the world; and so, in the legal sphere, not exclusively on the *concept* of law but on the *phenomenon* of law—law as embodied in real legal systems. And, unlike recent capital-T legal Theory, pragmatist legal theory aspires not to prescribe how the law should be interpreted, but to suggest how to understand the origin, the evolution, and the functions of the myriad legal systems of the world.

Of course, it’s quite impossible, in one short paper, to give anything like a full account either of the history of the pragmatist tradition in philosophy, or of the insights the ideas of that tradition might offer to legal theory—let alone to do both. Here, the relatively modest goal is, first, to sketch the origins and evolution of pragmatism in enough detail to convey some sense both of the predilections and attitudes that the old pragmatists shared, and of the enormous variety of their ideas (Part I); then, to explore Oliver Wendell Holmes’s and other legal thinkers’ role in this story (Part II); next, to look briefly at how some influential forms of neo- or, more exactly,

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5. The reviewer of a recent book on President Kennedy and Dr. Martin Luther King writes that “King was imbued with a deep moralism, but Kennedy was ever the pragmatist, always seeking out the optimal political angle.” Vincent C. Cannato, *The Pragmatist and the Reformer*, WALL ST. J., July 27, 2017, at A13 (reviewing STEVEN LEVINGSTON, *KENNEDY AND KING* (2017)).

6. OLIVER WENDELL HOLMES, *The Path of the Law*, reprinted in 3 THE COLLECTED WORKS OF JUSTICE HOLMES 391, 404 (Sheldon M. Novick ed., 1995) (1897).

7. As I said in the introduction to SUSAN HAACK, *EVIDENCE MATTERS: SCIENCE, PROOF, AND TRUTH IN THE LAW* xvi (2014).

pseudo-pragmatism have distorted our understanding, and weakened our appreciation, of this tradition (Part III); and finally to articulate some of the lessons those old pragmatists might teach us about the scope and the growth of law (Part IV).

### I. ORIGINS AND EVOLUTION

According to Charles Sanders Peirce's much later reminiscence, it all began in the early 1870s with "a knot of . . . young men in Old Cambridge," in meetings of what they called, "half-ironically, half-defiantly, 'The Metaphysical Club.'"<sup>8</sup> It was a remarkable group,<sup>9</sup> and a very mixed one. Three of its members—Joseph Warner, who was still a student, and two attorneys, Nicholas St. John Green and Oliver Wendell Holmes—were involved in the law. Other members included Unitarian clergyman Francis Ellingwood Abbot; historian John Fiske; Chauncey Wright, who was working on the application of the theory of evolution to psychology;<sup>10</sup> William James, trained as a physician, but at this time "nursing his health and reading [Charles] Renouvier";<sup>11</sup> and Peirce, trained in chemistry, who was working for the U.S. Coastal Survey and had lectured on logic at Harvard and the Lowell Institute.<sup>12</sup>

The Metaphysical Club was the birthplace of pragmatism. But pragmatism was nothing like an official ideology to which all the participants subscribed; rather, it was a distinctive way of tackling philosophical questions, a method that emerged from the discussions at

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8. CHARLES SANDERS PEIRCE, 5.12 COLLECTED PAPERS, eds. Charles Hartshorne, Paul Weiss, and (vols. 7 and 8) Arthur Burks (1931–58) (c.1906). References to the *Collected Papers* are given by volume and paragraph number; the date in parentheses at the end is the original date of the material cited, as given by the editors. See also Max Fisch, *Was There a Metaphysical Club in Cambridge?*, in *STUDIES IN THE PHILOSOPHY OF CHARLES SANDERS PEIRCE* 3 (Edward C. Moore & Richard Robin eds., 1964).

9. As William James said when he first proposed the idea of such a club, in an 1868 letter to Oliver Wendell Holmes, its members should be "none but the very topmost cream of Boston manhood." Letter from William James to Oliver Wendell Holmes (Jan. 3, 1868), in 1 *THE LETTERS OF WILLIAM JAMES* 124, 126 (Henry James ed., 1920). Here and throughout the paper, "Oliver Wendell Holmes" and "Holmes" will refer to Oliver Wendell Holmes, Jr., not his physician-poet father.

10. Chauncey Wright, who would have been forty in 1870, was somewhat older than most of the other members. His work on (what we would now call) evolutionary psychology appeared in 1873. Chauncey Wright, *Evolution of Self-Consciousness*, 116 *N. AM. REV.* 245 (1873). See generally EDWARD H. MADDEN, *CHAUNCEY WRIGHT AND THE FOUNDATIONS OF PRAGMATISM* (1963).

11. Max Fisch, *Justice Holmes, the Prediction Theory of Law, and Pragmatism*, in *PEIRCE, SEMEIOTIC, AND PRAGMATISM* 6, 9 (Kenneth Laine Ketner & Christian J.W. Kloesel eds., 1986).

12. Peirce began working for the Coast and Geodetic Survey in 1861; in 1865 and 1866 he delivered two courses on the logic of science, one at Harvard and the other at the Lowell Institute, and in 1869–70 he gave a course at Harvard on the history of logic in Great Britain. Max Fisch, *Introduction* to 1 *CHARLES SANDERS PEIRCE, WRITINGS OF CHARLES S. PEIRCE: A CHRONOLOGICAL EDITION* xx–xxi (the Coast and Geodetic Survey), xxi–xxii (lectures at Harvard and Lowell) (1982). In 1867 Peirce was elected both to the American Academy of Arts and Sciences and to the National Academy of Science. *Id.* at xviii.

meetings of the group, especially the discussions between Peirce and James. It was Peirce who articulated the key idea, the Pragmatic Maxim of meaning: empirical concepts, from the relatively familiar and simple, such as *hardness*, to the much more difficult, such as *force*, *truth*, and *reality*, need to be understood by reference to the experiential or “pragmatic” consequences of their applying. But when, several years later, Peirce first put these ideas in print,<sup>13</sup> he deliberately avoided using the word “pragmatism”<sup>14</sup>—as he later wrote, he *dared* not use it, because the specialized sense he gave the term was so far removed from its usual meaning at that time<sup>15</sup> (and also, no doubt, because that usual meaning, now obsolete, was distinctly pejorative: “officious meddlesomeness”).<sup>16</sup> It would be twenty years before James first used the word “pragmatism” in public in its specialized, philosophical sense;<sup>17</sup> and it would be James, not Peirce, who started the pragmatist movement in philosophy.

Peirce had emphasized,<sup>18</sup> and James agreed,<sup>19</sup> that pragmatism is not a body of doctrine, but a method: a distinctive way of doing philosophy rather than a philosophical creed or list of theses or theories to which every card-carrying pragmatist must subscribe. And this conception of pragmatism as method was also implicit in the work of John Dewey and George Herbert Mead, who would carry the tradition forward. “No particular result then . . . , but only an attitude or orientation, is what the pragmatic method means,” James wrote in 1907:

As the young Italian Papini has well said, [pragmatism] lies in the midst of our theories, like a corridor in a hotel. Innumerable chambers

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13. In two papers originally published in the *Popular Science Monthly*: Charles Sanders Peirce, *The Fixation of Belief* (1877), reprinted in 5.358 COLLECTED PAPERS, *supra* note 8; Charles Sanders Peirce, *How to Make Our Ideas Clear* (1878), reprinted in 5.388 COLLECTED PAPERS, *supra* note 8.

14. The version of *How to Make Our Ideas Clear* that appears in the *Collected Papers* includes the headings “The Pragmatic Maxim” and “Applications of the Pragmatic Maxim”; but these (as the superscript “E” in the *Collected Papers* indicates) were added by the editors and did not appear in the original. See also Peirce’s unpublished *Logic of 1873*, a precursor to the *Popular Science Monthly* papers. PEIRCE, 7.313 COLLECTED PAPERS, *supra* note 8, and the editor’s long introductory footnote.

15. PEIRCE, 5.13 COLLECTED PAPERS, *supra* note 8 (c.1906).

16. That meaning is still given in my old edition of the Concise Oxford Dictionary. *Pragmatism*, CONCISE OXFORD DICTIONARY (4th ed. 1951). For a detailed history of the meanings of the words “pragmatist” and “pragmatism,” see Susan Haack, *On Legal Pragmatism: Where Does “The Path of the Law” Lead Us?*, 50 AM. J. JURIS. 71, 74 n.24 (2005).

17. William James, *Philosophical Conceptions and Practical Results* (1898), reprinted in PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING 257 (Fredrick Burkhardt & Fredson Bowers eds., 1975) (1907).

18. PEIRCE, 5.12 COLLECTED PAPERS, *supra* note 8 (c. 1906).

19. WILLIAM JAMES, *What Pragmatism Means*, reprinted in PRAGMATISM, *supra* note 17, at 32 (Frederick Burkhardt & Fredson Bowers eds., 1975) (1907). In 1903 some young thinkers had introduced pragmatism to Italy with the launch of a new journal, *Leonardo*; Giovanni Papini was the most radical of these (as they called themselves) “Leonardisti.” See CORNELIS DE WAAL, ON PRAGMATISM 70–75 (2005).

open out of it. In one you may find a man writing an atheist volume; in the next someone on his knees praying for strength and faith; in a third, a chemist investigating a body's properties. In a fourth a system of idealistic metaphysics is being excogitated; in a fifth the impossibility of metaphysics is being shown. 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.<sup>20</sup>

As this suggests, pragmatism was very various from the beginning. For one thing, Peirce came to pragmatism after an intensive study of Kant,<sup>21</sup> while James (whose attitude was that philosophy should go round Kant, not through him),<sup>22</sup> was much more attuned to the British empiricists,<sup>23</sup> and Dewey came to pragmatism via Hegel.<sup>24</sup> For another, the pragmatists were extraordinarily diverse in their interests: Peirce primarily concerned with logic, semiotics, theory of inquiry, metaphysics, and philosophy of science; James more focused on philosophy of religion, ethics, and philosophy of mind; Dewey tackling all of these and adding philosophy of education, political philosophy and, albeit relatively briefly, philosophy of law,<sup>25</sup> to the list; and Mead passing through the pragmatist corridor to open the door to a new discipline, social psychology, and make his important contributions to our understanding of our distinctive human mindedness.<sup>26</sup>

From the beginning, however, pragmatism was also divided in another and potentially more troubling way. As James acknowledged in his 1898 paper introducing pragmatism to the philosophical world, his and Peirce's understandings of the Pragmatic Maxim were somewhat different—his

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20. JAMES, *supra* note 19, at 32. The ellipses in the introductory sentence indicate that I have omitted James's phrase, "so far." If all James meant by this was to suggest that the pragmatist method could be expected to produce constructive results, fair enough; if he was suggesting that some body of pragmatist doctrine would emerge, however, that was a slip on his part.

21. PEIRCE, 5.464 COLLECTED PAPERS, *supra* note 8 (c. 1906).

22. "The true line of philosophic progress lies, in short, it seems to me, not so much *through* Kant as *round* him to the point where now we stand." WILLIAM JAMES, *Philosophical Conceptions and Practical Results*, *supra* note 17, at 269.

23. JAMES, PRAGMATISM, *supra* note 17, is dedicated "To the Memory of John Stuart Mill[,] from whom I first learned the pragmatic openness of mind and whom my fancy likes to picture as our leader were he alive today." *Id.* at 3.

24. See, e.g., John Dewey, *From Absolutism to Experimentalism*, in 2 CONTEMPORARY AMERICAN PHILOSOPHY 13 (George P. Adams & Wm. Pepperell Montague eds., 1930); Jane M. Dewey, *Biography of John Dewey*, in THE PHILOSOPHY OF JOHN DEWEY 3, 17 (Paul Arthur Schilpp ed., 1939).

25. Besides the papers discussed in detail *infra* section II, I found these: John Dewey, *Force, Violence and Law*, 5 NEW REPUBLIC 295 (Jan. 22, 1916); John Dewey, *Fiat Justitia, Ruat Coelum*, 12 NEW REPUBLIC 237 (Sept. 29, 1917); John Dewey, *War and a Code of Law*, 36 NEW REPUBLIC 224 (Oct. 24, 1923); John Dewey, *Psychology and Justice*, 52 NEW REPUBLIC 9 (Nov. 23, 1927); John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926).

26. GEORGE HERBERT MEAD, MIND, SELF, AND SOCIETY FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST (1934).

being, as he saw it, broader.<sup>27</sup> James stressed the consequences of belief for action; Peirce stressed the experiential consequences for possible conduct of a concept's truly applying.<sup>28</sup> And, as their thought matured, this divergence grew more marked. Recognizing that there are real "generals," i.e., real kinds and real laws of nature, Peirce came to describe himself as "a scholastic realist of a somewhat extreme stripe."<sup>29</sup> But James always remained staunchly nominalist, focused on the concrete, the particular, and thought of natural laws as human constructions that enable us "to summarize old facts and to lead to new ones," but essentially only "a man-made language" tolerating much choice of expression.<sup>30</sup> Pragmatism, he wrote, "turns away from abstraction . . . towards facts, towards action, and towards power."<sup>31</sup> Dewey was in some respects closer to Peirce than to James; but more radical pragmatists, like the frankly relativist Ferdinand Schiller<sup>32</sup> and the wildly enthusiastic Papini,<sup>33</sup> were attracted by James's emphasis on facts, on action, on power, rather than by Peirce's deeper, but more difficult, ideas.

In short, those old pragmatists were a heterogeneous bunch, each pursuing his own distinctive path. Sometimes there were substantive disagreements in the theories they developed: Peirce was leery of James's doctrine of the Will to Believe,<sup>34</sup> for example, and critical of Dewey's

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27. JAMES, *supra* note 17, at 259.

28. Peirce, we know, conceived of "pragmatic" as meaning "*pragmatisch*" in the sense Kant had given it in his *Anthropology*: roughly, "conduct" rather than "action." PEIRCE, 5.412 COLLECTED PAPERS, *supra* note 8 (1905). See also IMMANUEL KANT, *Preface*, in ANTHROPOLOGY FROM A PRAGMATIC POINT OF VIEW 3, 3–4 (Robert B. Loudon ed., trans., Cambridge Univ. Press 2006) (1798). (In the English edition "*pragmatisch*" is rendered "pragmatic.") To judge by his reference in PRAGMATISM, *supra* note 17, at 30, to Wilhelm Ostwald's *Theorie und Praxis*, however, James would have been more inclined to tie "pragmatism" to the Greek "*praxis*," action. See Wilhelm Ostwald, *Theorie und Praxis*, 57 ZEITSCHRIFT DES ÖSTERREICHISCHEN INGENIEUR UND ARCHITEKTEN-VEREINES 3 (1905).

29. PEIRCE, 5.470 COLLECTED PAPERS, *supra* note 8 (c. 1906). The allusion is to the work of John Duns Scotus (c.1266–1308). See generally JOHN BOLER, CHARLES PEIRCE AND SCHOLASTIC REALISM: A STUDY OF PEIRCE'S RELATION TO JOHN DUNS SCOTUS (1963); ROSA MARÍA PEREZ-TERAN MAYORGA, FROM REALISM TO REALICISM: THE METAPHYSICS OF CHARLES SANDERS PEIRCE (2007).

30. JAMES, PRAGMATISM, *supra* note 17, at 33.

31. *Id.* at 31. "Realism" and "nominalism" are used here in their philosophical sense, to refer to opposing positions on the question of the status of universals versus that of particulars. (In this context, "realism" in the usual legal-theory sense is not relevant.)

32. See, e.g., F.C.S. SCHILLER, *The Making of Truth*, in STUDIES IN HUMANISM 179 (1907).

33. See, e.g., Giovanni Papini, *What Pragmatism is Like*, 71 POPULAR SCI. MONTHLY 351 (1907); GIOVANNI PAPINI, *Giovanni Papini*, in FOUR AND TWENTY MINDS 318 (Ernest Hatch Wilkins trans., Thomas Y. Crowell Co. 1922) (1916). In GIOVANNI PAPINI, THE FAILURE 90 (Virginia Pope trans., Harcourt, Brace, & Co. 1924) (1912), Papini describes himself as "the nut in a metaphysical nut-cracker."

34. The year after James's *The Will to Believe* was published, Peirce wrote pointedly of the "will to learn." WILLIAM JAMES, *The Will to Believe* (1897), reprinted in THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY 13 (Frederick Burkhardt and Fredson Bowers eds., Harvard Univ. Press 1979) (1897); PEIRCE, 5.583 COLLECTED PAPERS, *supra* note 8 (1898).

descriptive approach to logic.<sup>35</sup> There never was such a thing as *the* pragmatist metaphysical position,<sup>36</sup> *the* pragmatist theory of truth, *the* pragmatist ethical theory, etc. Rather, there were Peirce's metaphysical theories, James's, and Dewey's; Peirce's conception of truth, James's conception, and Dewey's; Peirce's understanding of mind, James's, Dewey's, and Mead's; James's approach to ethics and Dewey's; and so on.

Still, all those theories, conceptions, and approaches bear the traces of certain key predilections and attitudes, discernable through the whole rich tapestry of classical pragmatist thought—predilections and attitudes that, to my mind, are the real heart of pragmatism:

- an approach to meaning in terms of consequences and, especially in Peirce, a conception of meaning as in constant evolution, shifting and growing “in use and in experience”;<sup>37</sup>
- a disinclination to philosophize in an *a priori* way, and an understanding of philosophy as about the world, not exclusively about our concepts or our language;
- a distaste for dogmatism and, correspondingly, a robust and thorough-going fallibilism;
- a repudiation of false dichotomies, and a corresponding stress on continuity—to borrow Peirce's word, “synechism”;
- a concern with the social character both of language and of inquiry;
- an acknowledgment of contingency, of the role of chance, both in the cosmos and in human affairs;
- a willingness to draw on results from the sciences and, in particular, to take evolution seriously;<sup>38</sup> and
- an inclination to look to the future, and a distinctive way of knitting future and past.

Pragmatism, James wrote in 1907, “‘unstiffens’ our theories”;<sup>39</sup> “[h]er manners are various and flexible, her resources . . . rich and endless.”<sup>40</sup> And the work of the classical pragmatists really is, in that clichéd phrase, a treasure trove of ideas, illuminating just about every area of philosophy. I

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35. PEIRCE, 8.190 COLLECTED PAPERS, *supra* note 8 (1904).

36. However, unlike the earlier positivist, Auguste Comte, and his followers (and also unlike the later Logical Positivists), the pragmatists were in no way hostile to metaphysics as such.

37. PEIRCE, 2.302 COLLECTED PAPERS, *supra* note 8 (c. 1895). Dewey, interestingly enough, would later make the same point specifically with respect to legal concepts. John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 20 (1924).

38. Darwin's *Origin of Species* was published in 1859, and pragmatism might fairly be described as the first philosophical tradition to take Darwin's ideas to heart. CHARLES DARWIN, *THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION, OR, THE PRESERVATION OF FAVOURED RACES IN THE STRUGGLE FOR LIFE* (John Burrow ed., 1970) (1859).

39. JAMES, PRAGMATISM, *supra* note 17, at 41.

40. *Id.* at 42.



think, for example, of Peirce's reconception of metaphysics as not *a priori* but empirical, about the world, not just our ideas, but as requiring not experiments, voyages of exploration, archeological digs, and the like, but only the kind of experience everyone has every day—provided we pay sufficiently close attention to it;<sup>41</sup> of James's<sup>42</sup> and Dewey's moral fallibilism;<sup>43</sup> of Mead's conception of human mindedness as the joint product of nature and culture, physiology and socialization<sup>44</sup>—among many, many other fruitful suggestions.

Some of these shared predilections and attitudes, and some of these fruitful ideas, remained in play in the twentieth century in the work of C.I. Lewis<sup>45</sup> and, in different ways, in the work of Sidney Hook<sup>46</sup> and Morton G. White.<sup>47</sup> But by 1952, the year of Dewey's death, pragmatism was already being eclipsed, first by the Logical Positivist movement, and then by the analytic paradigm; and many philosophers—perhaps influenced by Bertrand Russell's<sup>48</sup> and G. E. Moore's<sup>49</sup> unsympathetic criticisms of James and Dewey—had written pragmatism off as *passé*. In the latter half of the twentieth century Hilary Putnam<sup>50</sup> and Nicholas Rescher<sup>51</sup> in the United

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41. PEIRCE, 8.110 COLLECTED PAPERS, *supra* note 8 (c. 1900). See also Susan Haack, *The Legitimacy of Metaphysics: Kant's Legacy to Peirce, and Peirce's to Philosophy Today*, 1 POLISH J. PHIL. 29 (2007).

42. WILLIAM JAMES, *The Moral Philosopher and the Moral Life* (1891), in THE WILL TO BELIEVE, *supra* note 34, at 184.

43. JOHN DEWEY, *The Construction of Good*, in THE QUEST FOR CERTAINTY 242, 254 (1929). Though they had rather different ethical theories, both James and Dewey thought that we have to work out ethical principles empirically, by reference to what satisfies the most demands (James) or to what is genuinely conducive to human flourishing (Dewey); and that we can, of course, make mistakes as we work this out.

44. See generally MEAD, *supra* note 26. See also Susan Haack, *Belief in Naturalism: An Epistemologist's Philosophy of Mind*, 1 LOGOS & EPISTEME 67 (2010); SUSAN HAACK, *Scientific Philosophy, No; Scientific Philosophy, Yes*, in SCIENTISM AND ITS DISCONTENTS (2017), downloadable free at <https://roundedglobe.com>; Susan Haack, *Brave New World: On Nature, Culture, and the Limits of Reductionism*, in EXPLAINING THE MIND (Bartosz Brozek & Jerzy Stelmach, eds.) (forthcoming).

45. See, e.g., C.I. Lewis, *The Pragmatic A Priori*, 20 J. PHIL. 169 (1923); C.I. LEWIS, *Terminating Judgments and Objective Beliefs*, in AN ANALYSIS OF KNOWLEDGE AND VALUATION 203–53 (1946) (applying the Pragmatic Maxim of meaning to “terminating judgments”).

46. See, e.g., Sidney Hook, *Naturalism and First Principles*, in AMERICAN PHILOSOPHERS AT WORK 236 (Sidney Hook ed., 1956).

47. Morton G. White, *The Analytic and the Synthetic: An Untenable Dualism*, in PRAGMATISM AND THE AMERICAN MIND 121 (Morton G. White ed., 1973) (1950).

48. Bertrand Russell, *William James's Conception of Truth* (1908), reprinted in PRAGMATIC PHILOSOPHY 310 (Amelie Rorty ed., 1966); Russell, *Pragmatism*, reprinted in *id.* at 308 (1909); Russell, *Dewey's New Logic*, reprinted in *id.* at 315 (1939).

49. G.E. Moore, *William James's "Pragmatism"* (1922), reprinted in PRAGMATIC PHILOSOPHY, *supra* note 48, at 328. Neither Russell nor Moore, it seems, read James's or Dewey's words with any charity, or even with careful attention to context.

50. See, e.g., HILARY PUTNAM, *Is There Still Anything to Say about Reality and Truth?*, in THE MANY FACES OF REALISM 3 (1987); HILARY PUTNAM, *PRAGMATISM: AN OPEN QUESTION* (1995).

51. See, e.g., NICHOLAS RESCHER, *METHODOLOGICAL PRAGMATISM: A SYSTEMS-THEORETIC APPROACH TO THE THEORY OF KNOWLEDGE* (1977); NICHOLAS RESCHER, *REALISTIC PRAGMATISM:*

States and Karl-Otto Apel<sup>52</sup> and Jürgen Habermas<sup>53</sup> in Germany continued to draw on the old pragmatists' ideas;<sup>54</sup> in our times, however, the thoroughly ahistorical ethos of the neo-analytic philosophy that remains so firmly entrenched in English-speaking circles has meant that the rich intellectual resources of classical pragmatism are largely neglected, seriously under-appreciated, and lamentably under-exploited.

## II. LEGAL ANGLES

Reminiscing about the Metaphysical Club, Peirce speaks particularly warmly of Nicholas St. John Green, “a disciple of Jeremy Bentham,” recalling his talent for “disrobing warm and breathing truth of the draperies of long worn formulas”;<sup>55</sup> moreover, he tells us that it was Green who urged on the members of the Club the importance of Alexander Bain’s definition of belief as “that upon which a man is prepared to act”<sup>56</sup>—of which, Peirce continues, “pragmatism is scarce more than a corollary.”<sup>57</sup> Of Holmes, he says only that “Mr. Justice Holmes will not, I believe, take it ill that we are proud to remember his membership.”<sup>58</sup> But it was to be Holmes, not Green, who came to be the key figure of the classical pragmatist tradition in legal theory.

Holmes’s role in the pragmatist story, however, is hardly straightforward. Though he was a founding member of the Metaphysical

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AN INTRODUCTION TO PRAGMATIC PHILOSOPHY (1999); NICHOLAS RESCHER, *PRAGMATISM* (2012); NICHOLAS RESCHER, *THE PRAGMATIC VISION: THEMES IN PHILOSOPHICAL PRAGMATISM* (2014).

52. See, e.g., KARL-OTTO APEL, CHARLES S. PEIRCE: FROM PRAGMATISM TO PRAGMATISM (1981); KARL-OTTO APEL, *UNDERSTANDING AND EXPLANATION: A TRANSCENDENTAL-PRAGMATIC PERSPECTIVE* (1984). However, what Apel offers us seems to be a more Kantian Peirce than we know he became after he concluded that Kant was “nothing but a somewhat confused pragmatist.” PEIRCE, 5.525 COLLECTED PAPERS, *supra* note 8 (c. 1905).

53. See e.g., JÜRGEN HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS* (1968); JÜRGEN HABERMAS, *ON THE PRAGMATICS OF SOCIAL INTERACTION* (Barbara Fultner trans., 1976). What Habermas offers us also seems to be a more Kantian Peirce, but this time shaped less by Kant’s First Critique than by his Second; and he confines himself, as Peirce most emphatically did not, to the realm of discourse.

54. As I have also done, and continue to do. See, e.g., SUSAN HAACK, *EVIDENCE AND INQUIRY: A PRAGMATIST RECONSTRUCTION OF EPISTEMOLOGY* (expanded ed. 2009) (1993); SUSAN HAACK, *DEFENDING SCIENCE—WITHIN REASON: BETWEEN SCIENTISM AND CYNICISM* (2003); SUSAN HAACK, *Not Cynicism but Synecism: Lessons from Classical Pragmatism*, in *PUTTING PHILOSOPHY TO WORK: INQUIRY AND ITS PLACE IN CULTURE* 83 (expanded ed. 2013) (2006); Susan Haack, *The Growth of Meaning and the Limits of Formalism*, in *Science and Law*, XXIX(1) *ANÁLISIS FILOSÓFICO* 5 (2009); Susan Haack, *The Fragmentation of Philosophy, the Road to Reintegration*, in SUSAN HAACK: *REINTEGRATING PHILOSOPHY* 3 (Julia Göhner and Eva-Maria Jung eds., 2016).

55. PEIRCE, 5.12 COLLECTED PAPERS, *supra* note 8 (c. 1906).

56. *Id.* Peirce is alluding to ALEXANDER BAIN, *THE EMOTIONS AND THE WILL* 507 (1875).

57. PEIRCE, 5.12 COLLECTED PAPERS, *supra* note 8 (c. 1906).

58. *Id.*

Club,<sup>59</sup> apparently he “soon dropped out of the band.”<sup>60</sup> He was much impressed by Dewey’s *Experience and Nature*,<sup>61</sup> commenting that “although [it] is incredibly ill-written . . . [s]o methought God would have spoken had He been inarticulate, but keenly desirous to tell you how [the cosmos] was”;<sup>62</sup> but he was badly put off by the association of pragmatism with James’s doctrine of the Will to Believe<sup>63</sup> (“an amusing humbug”),<sup>64</sup> and by the religious elements in the papers included in an early anthology of Peirce’s work,<sup>65</sup> which seemed to him mere wishful thinking.<sup>66</sup> And so far as I know he never described himself as a pragmatist.

Does this mean that Holmes wasn’t really a pragmatist at all?—Far from it. As Max Fisch wrote in 1942, Holmes’s *The Common Law* is “full of the spirit of pragmatism from the ringing sentences in which its theme is announced—‘The life of the law has not been logic: it has been experience’—on to the end . . . .”<sup>67</sup> In fact, Holmes’s writings about the law reflect just about all the characteristically pragmatist attitudes I listed above.<sup>68</sup>

The most obvious point of affinity, as Fisch evidently realized,<sup>69</sup> is the striking parallel between the idea of law as prediction found at the beginning of *The Path of the Law*, and the Pragmatic Maxim. As early as 1871 Holmes had written: “[I]n a civilized state it is not the will of the sovereign that makes lawyers’ law, even when that is its source, but what . . . the judges, by whom it is enforced, say is his will.”<sup>70</sup>

And, more famously, in *The Path of the Law*: “A legal duty so called is nothing but a prediction that if a man does or omits certain things he will be

59. He had also attended some of Peirce’s lectures at the Lowell Institute. PHILIP P. WEINER, *EVOLUTION AND THE FOUNDERS OF PRAGMATISM* 72 (1975) (1949).

60. Fisch, *supra* note 8, at 22.

61. JOHN DEWEY, *EXPERIENCE AND NATURE* (1929).

62. Letter from Oliver Wendell Holmes to Frederick Pollock (April 12, 1931), in 2 *THE POLLOCK-HOLMES LETTERS: THE CORRESPONDENCE OF SIR FREDERICK POLLOCK AND MR. JUSTICE 1874–1932*, at 287 (Mark DeWolfe Howe ed. 1942).

63. JAMES *supra* note 34, at 13.

64. Letter from Oliver Wendell Holmes to Frederick Pollock (June 17, 1908), in 1 *POLLOCK-HOLMES LETTERS*, *supra* note 62, at 139.

65. CHARLES SANDERS PEIRCE, *CHANCE, LOVE, AND LOGIC* (Morris R. Cohen ed., 1923).

66. Letter from Oliver Wendell Holmes to Morris R. Cohen (Aug. 18, 1924), in *The Holmes-Cohen Correspondence*, 9 *J. HIST. IDEAS* 34, 39 (F.M. Cohen ed., 1948).

67. Fisch, *supra* note 11, at 8; OLIVER WENDELL HOLMES, *The Common Law*, in 3 *COLLECTED WORKS*, *supra* note 6, at 110, 111.

68. I draw here on two earlier papers: Haack, *supra* note 16; Susan Haack, *Pragmatism, Law, and Morality: The Lessons of Buck v. Bell*, III(2) *EURO. J. PRAGMATISM & AM. PHIL.* 206 (2011).

69. “Whatever may be thought of the merits of this prediction theory, it is, I believe, the only systematic application of pragmatism that has yet been made.” Fisch, *supra* note 11, at 8.

70. OLIVER WENDELL HOLMES, Note, 6 *AM. L. REV.* 723–25 (1871), in 3 *COLLECTED WORKS*, *supra* note 6, at 294–97, 295.

made to suffer in this or that way by judgment of the court; and so of a legal right.”<sup>71</sup>

This is unmistakably in the spirit of Peirce’s statement of the Pragmatic Maxim, and perhaps even more clearly of James’s:

[T]here is no distinction of meaning so fine as to consist in anything but a possible difference of practice. . . . Consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then our conception of these effects is the whole of our conception of the object (Peirce).<sup>72</sup>

[T]he effective meaning of any philosophic proposition can always be brought down to some particular consequence in our future practical experience. . . . There can *be* no difference anywhere that doesn’t *make* a difference elsewhere . . . (James).<sup>73</sup>

Nevertheless, it’s unwise to put too much weight on this point, because the so-called “prediction theory of the law” is not so central to Holmes’s thinking as is often supposed; rather, like the so-called “bad man theory,” it is primarily a heuristic device, a way of persuading his audience that law is conceptually distinct from morality, that “is this legally permitted/required/correct?” are quite different questions from “is this morally permitted/required/the right thing to do?”<sup>74</sup>

But many other characteristically pragmatist predilections and attitudes are also manifest in Holmes’s thought. In his ruling for the Supreme Court of Massachusetts in *Rideout v. Knox*, for example, we hear the pragmatist repudiation of false dichotomies and stress on continuity: “most differences [], when nicely analyzed,” turn out to be matters of degree.<sup>75</sup> And we hear the pragmatist distaste for *a priori* philosophy in *The Path of the Law* with Holmes’s comment that Sir James Stephen would do well to give up his grandiose aspirations to tell us about Law-in-General, his “striving for a useless quintessence of all [legal] systems,” and focus instead on understanding one legal system in particular.<sup>76</sup> The pragmatist focus on the future is apparent in Holmes’s observation that “[f]or the rational study of

71. HOLMES, *The Path of the Law*, *supra* note 6, at 391.

72. PEIRCE, *How to Make our Ideas Clear*, in 5.388–410 COLLECTED PAPERS, *supra* note 8 (1878). Later, however, Peirce will express reservations about the emphasis on action in the first part of this statement, acknowledging that his early formulation of the Pragmatic Maxim suggested that the end of man is action, which “to the present writer at the age of sixty, does not recommend itself so forcibly as it did at thirty.” PEIRCE, 5.3 COLLECTED PAPERS, *supra* note 8 (1902).

73. James, *supra* note 17, at 259, 260.

74. As I argued in *On Legal Pragmatism: Where Does “The Path of the Law” Lead Us?* Haack, *supra* note 16, at 80–86.

75. *Rideout v. Knox*, 19 N.E. 390, 392 (Mass. 1889).

76. HOLMES, *The Path of the Law*, in 3 COLLECTED WORKS, *supra* note 6, at 403.

law the blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics . . . .”<sup>77</sup> The pragmatist recognition of contingency is apparent in Holmes’s acknowledgment that some legal provisions may have had their origin in sheer accidents of history.<sup>78</sup> And when Holmes urges that we look to the emerging science of criminology to tell us whether “the criminal law does more good than harm” we hear the pragmatist willingness to use results from scientific work where they are relevant to philosophical issues:

Does punishment deter? . . . If the typical criminal is a degenerate, bound to swindle or to murder by as deep-seated an organic necessity as that which makes the rattlesnake bite, . . . [h]e must be got rid of . . . . If, on the other hand, crime, like normal human conduct, is mainly a matter of imitation, punishment fairly may be expected to keep it out of fashion.<sup>79</sup>

And Holmes shares the other pragmatists’ concern to escape verbalism, and even Peirce’s focus on the growth of meaning. Just as Peirce recognized that scientific and social concepts shift and change, embodying new information and shedding older connotations,<sup>80</sup> Holmes recognizes that legal concepts shed older meanings and acquire new ones. In the first lecture of *The Common Law, Early Forms of Liability*, he notes, for example, how an older conception according to which animals (such as an ox that gored someone) and even inanimate objects (such as a sword that injured someone, or a well in which someone drowned) could be held legally responsible for the death or injury they caused has gradually given way to a more discriminating and fine-grained modern understanding requiring intent or culpable negligence on the part of a human agent.<sup>81</sup> And, rather as Peirce saw the growth of meaning as enabling the sciences to develop better, more precise, and more informative vocabularies, it seems that Holmes saw the elasticity in legal concepts as one of the means by which the law adapts as social conditions change, new forms of manufacture and transportation are invented, and social mores and values shift.<sup>82</sup>

This is one of the reasons Holmes rejects any conception of law-as-axiomatic-system, and severely criticizes the version of this idea developed

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77. *Id.* at 399.

78. *Id.*

79. *Id.* at 400. Arguably, however, here Holmes himself takes two false dichotomies for granted: (1) that the class of criminals can be divided cleanly into two sub-classes, i.e., every criminal is *either* a rattlesnake *or* an imitator, and (2) that human conduct is determined *either* by nature *or* by nurture.

80. PEIRCE, 7.587 COLLECTED PAPERS, *supra* note 8 (1873) (scientific concepts); *id.* at 2.302 (c. 1895) (social concepts).

81. HOLMES, THE COMMON LAW, *supra* note 67, at 115–34.

82. *Id.* See also Susan Haack, *The Growth of Meaning and the Limits of Formalism*, *supra* note 54.

by Christopher Columbus Langdell<sup>83</sup>—whom in 1880 he described, more accurately than kindly, as “the greatest living legal theologian.”<sup>84</sup> But in *The Path of the Law*, we see that another reason for Holmes’s repudiation of legal formalism is a characteristically pragmatist fallibilism:

The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusory, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.<sup>85</sup>

The same fallibilism, I believe, informs what Holmes has to say about ethical matters, especially his warnings against moral over-confidence:<sup>86</sup> “[i]t 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.”<sup>87</sup>

And, of course, we see the pragmatists’ evolutionary leaning when Holmes observes that “[t]he development of [the common] law has gone on for nearly a thousand years, . . . each generation taking the inevitable next step, mind, like matter, simply obeying a law of spontaneous growth,” as he says, “like a plant.”<sup>88</sup> In short, Holmes’s approach is indeed, as Fisch observed, thoroughly imbued with the spirit of pragmatism.

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Over the course of the first half of the twentieth century we find those pragmatist predilections and attitudes at work in other legal thinkers too; beginning, perhaps, with Roscoe Pound’s remarkable 1908 paper, *Mechanical Jurisprudence*.<sup>89</sup> Pound not only cites James several times,<sup>90</sup>

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83. CHRISTOPHER COLUMBUS LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1879) (arguing that we could discern the essential elements of the legal concept of a promise from existing case law and, with the definition of “promise” as axiom, could then deduce the correct results in new cases syllogistically). I learned from Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 610 (1908) that Friedrich Carl von Savigny had proposed a “logic of contract law” well before Langdell proposed his. FRIEDRICH CARL VON SAVIGNY, DAS OBLIGATIONENRECHT (1851–53).

84. Oliver Wendell Holmes, 14 AM. L. REV. 233, 234 (1880) (unsigned review of LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, *supra* note 83). See also Susan Haack, *On Logic in the Law: “Something, but Not All,”* 20.1 RATIO JURIS 1, 2 (2007).

85. HOLMES, *supra* note 6, at 397.

86. See generally Haack, *supra* note 68.

87. Oliver Wendell Holmes, *Law and the Court* (1913), reprinted in 3 COLLECTED WORKS, *supra* note 6, at 505, 507.

88. HOLMES, *supra* note 6, at 398.

89. Pound, *supra* note 83.

90. *Id.* at 607, 608, 621.

but even acknowledges explicitly that the sociological approach to jurisprudence he recommends is “a movement for pragmatism as a philosophy of law.”<sup>91</sup> Pound’s observation that “[t]he life of the law is in its enforcement”<sup>92</sup> echoes Holmes; his critique of the conception of legal reasoning as deduction from “principles” recalls Holmes’s critique of Langdell; and when he complains that “mechanical jurisprudence” (which he apparently means to cover both legal deductivism and, more broadly, legal formalism) “forgets the end in the means,”<sup>93</sup> and that it “fail[s] to respond to vital needs of present-day life,”<sup>94</sup> and goes on to urge that logic be treated as a tool, an instrument, not an end in itself,<sup>95</sup> he sounds remarkably like Dewey.

Two other important contributions to classical legal pragmatism appeared in 1924: one by Dewey; the other by a jurist who, so far as I know, never identified himself as a pragmatist: Benjamin Cardozo. In “Logical Method and Law” Dewey reminds us of Holmes’s observation that “the whole outline of the law” results from a “conflict . . . between logic and good sense,” a conflict in which logic strives to “work fiction out to consistent results,” and good sense strives to overcome that effort “when the results become too manifestly unjust.”<sup>96</sup> And indeed, Dewey argues, the mechanical jurisprudence Pound criticized couldn’t possibly have more than a very limited place in legal reasoning.<sup>97</sup> If we think of logic in terms of the syllogism or even, more generally, in terms of formal consistency, we must agree with Holmes that its role in the law is a very modest one.<sup>98</sup> But, realizing that legal decisions may be entirely reasonable despite not being formally derivable from statutes, rules, or precedents, Dewey concludes that legal argument is a matter of what he calls “experimental” logic.<sup>99</sup>

The same year, 1924, saw the publication of Cardozo’s rewarding little book, *The Growth of the Law*.<sup>100</sup> Like Dewey, Cardozo cites Pound;<sup>101</sup> he

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91. *Id.* at 609.

92. *Id.* at 619.

93. *Id.* at 620.

94. *Id.* at 614.

95. *Id.* at 610.

96. Dewey, *supra* note 37, at 20 (citing OLIVER WENDELL HOLMES, *Agency*, in COLLECTED LEGAL PAPERS 50 (Harold Laski ed., 1998) (1920)).

97. *Id.* at 22.

98. *Id.* at 20.

99. *Id.* at 22. See also JOHN DEWEY, *ESSAYS IN EXPERIMENTAL LOGIC* (1916).

100. BENJAMIN CARDOZO, *THE GROWTH OF THE LAW* (1924).

101. *Id.* at 2–3 (citing Roscoe POUND, *INTRODUCTION TO THE PHILOSOPHY OF LAW* 1 (1922)).

also cites Holmes,<sup>102</sup> Holmes's admirer Dr. John Wu,<sup>103</sup> James,<sup>104</sup> and Dewey himself.<sup>105</sup> "Law must be stable, and yet it cannot stand still," Pound had written,<sup>106</sup> and we need a philosophy of law, Cardozo adds, to understand "[t]he genesis, the growth, the function, and the end of law."<sup>107</sup> As this suggests, he is well aware of the potential usefulness of legal theory, writing that: "The theorist has a hard time to make his way in an ungrateful world. He is supposed to be indifferent to realities; yet his life is spent in the exposure of realities which, till illumined by his searchlight, were hidden and unknown."<sup>108</sup>

Since legal decisions can't always be deduced from statute or precedent, Cardozo argues, judges must sometimes *make*, and not merely *apply*, the law. He had learned by painful experience as a judge, he tells us, that "the creative element was greater than I had fancied; the forks in the road more frequent; the signposts less complete."<sup>109</sup> And inevitably, he continues, when judges have to be creative, they will need to weigh and balance competing desiderata:<sup>110</sup> they must call, he urges, on a combination of analysis and synthesis,<sup>111</sup> and always take account of "the realities of human nature."<sup>112</sup>

Almost a decade later, in a 1931 volume in honor of Holmes's ninetieth birthday, Cardozo opens his tribute by telling us that, when young people ask him whether a life in the law "can fill the need for what is highest in the yearnings of the human spirit," he refers them to *The Path of the Law*<sup>113</sup>—presumably because of the subtle way this lecture of Holmes's gradually builds from its down-to-earth beginning to its intellectually ambitious and

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102. *Id.* at 45 (citing John C.H. Wu, *The Juristic Philosophy of Justice Holmes*, 21 MICH. L. R. 523, 530 (1923) (citing OLIVER WENDELL HOLMES, *The Path of the Law*, reprinted in COLLECTED LEGAL PAPERS 167–202, 173 (Harold J. Laski ed., 1920))); *id.* at 97–98 (citing 1 Oliver Wendell HOLMES, *Introduction to a General Survey of Continental Legal History* xlvi (1912); *id.* at 115; *id.* at 125 (citing Holmes's opinion in *Brown v. United States*, 256 U.S. 335 (1921))).

103. *Id.* at 45 (citing Wu, *The Juristic Philosophy of Justice Holmes*, *supra* note 102).

104. *Id.* at 24, 48, 59.

105. *Id.* at 67 (citing JOHN DEWEY, *RECONSTRUCTION IN PHILOSOPHY* (1920) and JOHN DEWEY, *HUMAN NATURE AND CONDUCT: AN INTRODUCTION TO SOCIAL PSYCHOLOGY* (1922)); *id.* at 73 (citing John Dewey, *The Nature of Principles*, in *HUMAN NATURE AND CONDUCT*); *id.* at 85 (citing *HUMAN NATURE AND CONDUCT*); *id.* at 91 (citing *HUMAN NATURE AND CONDUCT*); *id.* at 130 (citing *RECONSTRUCTION IN PHILOSOPHY*).

106. ROSCOE POUND, *INTERPRETATIONS OF LEGAL HISTORY* 1 (1923).

107. CARDOZO, *supra* note 100, at 25.

108. *Id.* at 21.

109. *Id.* at 57. In this context Cardozo also cites ROSCOE POUND, *INTERPRETATIONS OF LEGAL HISTORY* 117 (1923).

110. CARDOZO, *supra* note 100, at 85.

111. *Id.* at 91.

112. *Id.* at 125.

113. Benjamin Cardozo, *Mr. Justice Holmes*, in *MR. JUSTICE HOLMES* 1 (Felix Frankfurter ed., 1931).



inspiring conclusion.<sup>114</sup> A whole philosophy of law, Cardozo continues, is packed into in the opening paragraph of *The Common Law*.<sup>115</sup> And then he raises some questions—eminently pragmatist questions, to my ear—that Holmes didn't answer explicitly:

Is a legal concept a finality, or only a pragmatic tool? Shall we think of liberty as a constant, or, better, as a variable that may shift from age to age? Is its content given us by deduction from unalterable premises, or by a toilsome process of induction from circumstances of time and place?<sup>116</sup>

Cardozo modestly declines to guess how Holmes would answer. But he is *too* modest: Holmes would clearly favor the latter, pragmatist answers, as does Cardozo himself—and as do I.

In this same 1931 volume, Dewey wrote of “*Justice Holmes and the Liberal Mind*.” Were he to select a single passage to sum up Holmes's intellectual temper, he says, it would be this:

When men have realized that time has upset many fighting beliefs, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment.<sup>117</sup>

This passage is notable for its fallibilism, its reference to experiment and, of course, its affinity to Dewey's own description of truth as the “*tried and true*.”<sup>118</sup>

After Holmes's death, Dewey's *My Philosophy of Law*<sup>119</sup>—one of a series of papers in a 1941 anthology of the same title that also includes

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114. See Haack, *supra* note 16, at 80–86.

115. Cardozo, *supra* note 113, at 2.

116. *Id.* at 6–7.

117. John Dewey, *Justice Holmes and the Liberal Mind*, 53 *New Republic* 210 (Jan. 11, 1928), reprinted in MR. JUSTICE HOLMES 33 (Felix Frankfurter ed., 1931) (citing Holmes's dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting)). As it happens, the very day I wrote this footnote an article in the *Wall Street Journal* celebrated Holmes's defense of free speech. Richard Dooling, *Justice Holmes's Free-Speech Lesson*, WALL ST. J., Oct. 13, 2017, at A15.

118. “The association of ‘tried and true’ is not a mere piece of literary alliteration.” JOHN DEWEY, *The Problem of Truth*, in 2 THE ESSENTIAL DEWEY 101, 116 (Larry A. Hickman and Thomas M. Alexander eds., 1998) (1911).

119. John Dewey, *My Philosophy of Law*, in MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 73 (1941).

papers by such legal luminaries as Pound,<sup>120</sup> Lon Fuller, Karl Llewellyn, and John Wigmore—gives us some clues as to what considerations might play a role in the “experimental logic” he had alluded to in 1924. The primary concerns of philosophy of law, Dewey begins, “arise from the need for having some principles which can be used to justify and/or criticize existing legal rules and practices.”<sup>121</sup> “The standpoint taken is that law is through and through a social phenomenon: social in origin, in purpose or end, and in application”;<sup>122</sup> and that the justification or criticism of existing law must refer to its *function* and its *consequences*. In a passage strikingly reminiscent of Holmes’s observations about what we would need to know to determine whether the criminal justice system does more good than harm, Dewey writes that justification or criticism of existing law “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 legal rules and of proposed legal decisions and acts of legislation.”<sup>123</sup>

Dewey’s stress on law-as-social-institution and his thesis that the evaluation of legal provisions must focus on their function and their consequences are at once characteristically pragmatist and, it seems to me, entirely correct—so far as they go; though it has to be said that this very abstract paper of Dewey’s raises many more questions than it answers.<sup>124</sup>

I should also mention Edward Levi’s 1949 book on legal reasoning, which manifests the pragmatist spirit both in its firm resistance to formalism and in its full acknowledgment of the social character of legal systems. “The law forum,” Levi observes, “is the most explicit demonstration of the mechanism required for a moving classification system.”<sup>125</sup> After all, “new situations arise [and] people’s wants change. The categories used in the legal process must be left ambiguous ... to permit the infusion of new

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120. Pound’s paper in this volume, while less overtly pragmatist than his 1908 paper, continues to focus on the function of law and to look to sociology and psychology. Roscoe Pound, *My Philosophy of Law*, in JULIUS ROSENTHAL FOUND. FOR GEN. LAW, *MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS* 249 (1941). And when Pound writes of the function of law in terms of its adjudicating competing interests, he sounds strikingly like James on moral philosophy. See JAMES, *supra* note 42.

121. Dewey, *supra* note 119, at 73.

122. *Id.* at 76.

123. *Id.* at 78.

124. For example: are we to look only to the function and the consequences of specific legal provisions, or to the intended function, or functions, of a legal system as a whole? Is it sufficient that a legal provision, or a legal system, function as it is intended, or should we also be asking whether the intended function (e.g., to ensure a safe and stable community life under Islam) is itself legitimate? And if so, on what basis are we to evaluate those intended functions? What about unintended functions?

125. EDWARD LEVI, *AN INTRODUCTION TO LEGAL REASONING* 4 (2013) (1949).

ideas.”<sup>126</sup> Like Pound, Levi sees that laws need to be stable, predictable, and yet also ever-changing and adapting; and that, though legal decisions aren’t always certain, unchanging, or formally derivable from legislation and/or precedent, this doesn’t mean that they can only be arbitrary or capricious.<sup>127</sup>

But, rather as philosophical pragmatism came to be eclipsed first by logical positivism and then by linguistic-conceptual philosophy in the analytic mold, legal pragmatism seems to have been eclipsed first by legal realism<sup>128</sup> and then by legal theory in that same analytic style. As a result, the “rich and endless” resources of the pragmatist tradition remain as sadly under-developed and under-used in legal theory as they do in philosophy more generally.

### III. CRITICS AND KIDNAPPERS

Naturally, pragmatism had its critics from the beginning. Not all of them very clearly understood the ideas they were criticizing,<sup>129</sup> and some, like Russell<sup>130</sup> and Moore<sup>131</sup>—probably reading James and Dewey through the lens of what they knew about the radical Schiller—seized eagerly on their bolder and more sweeping statements without attending to their caveats and qualifications. Indeed, as early as 1903, the year he took his bows as the founder of pragmatism,<sup>132</sup> Peirce complained about the “merciless way” his

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126. *Id.* Frederick Schauer’s Foreword to the reprinted version of this book classifies Levi as a legal realist; I believe this is an oversimplification. Frederick Schauer, *Foreword* to EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING v (2013).

127. LEVI, *supra* note 125, at 4–5. Not so incidentally, perhaps, Levi cites two classical pragmatist philosophers: John Dewey and George Herbert Mead. *Id.* at 3 (citing GEORGE HERBERT MEAD, THE PHILOSOPHY OF THE ACT (Charles W. Morris, John M. Brewster, Albert M. Dunham & David L. Miller, eds., 1938)); *id.* at 4 (citing JOHN DEWEY, LOGIC, THE THEORY OF INQUIRY (1938)).

128. So much so that I sometimes hear Holmes described as “proto-realist.” See, e.g., Karl N. Llewellyn, *Some Realism about Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222–64, 1227 n.18 (1931); Lon Fuller, *American Legal Realism*, 82 U. PA. L. REV. & AM. L. REG. 429–62, 429 (1934); and, more recently, Louise Weinberg, *Holmes’s Failure*, 96 MICH. L. REV. 691–723, 692 (1997). For a critical perspective, see Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731–85 (2009). But while there are, to be sure, similarities—not to mention a truly striking parallel between Karl Llewellyn’s disdain for “paper” rules and Peirce’s for Cartesian “paper doubts”—this seems like a reason to call the legal realists post-pragmatists, not a reason to call Holmes a proto-realist. See Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 448 (1931); PEIRCE, 5.515 COLLECTED PAPERS, *supra* note 8 (1905).

129. See e.g., PEIRCE, 6.604 COLLECTED PAPERS, *supra* note 8 (1893) (explaining why Paul Carus’s claim that his logic of science is positivistic is a “travesty”); WILLIAM JAMES, *The Pragmatist Account of Truth and Its Misunderstandings*, in THE MEANING OF TRUTH 99 (Frederick Burkhardt, Fredson Bowers, & Ignas Skrupskelis eds., 1975) (1909) (explaining how his account of truth has been misunderstood).

130. See Russell, *supra* note 48.

131. Moore, *supra* note 49.

132. PEIRCE, 5.414 COLLECTED PAPERS, *supra* note 8 (1905).

technical term, “pragmatism,” had been abused in the literary journals,<sup>133</sup> and the “many writers” who, “in spite of pragmatists’ declarations, unanimous, reiterated, and most explicit,” still “persist in twisting our purpose and purport all awry.”<sup>134</sup> In 1905 he introduced another neologism, “pragmaticism,” to refer to the specific doctrines and theories that distinguished his version of pragmatism;<sup>135</sup> and—explaining that he was distancing himself, not from James and Dewey, or even from Schiller, but from literary dilettanti not just careless but outright contemptuous of exact terminology—famously hoped that this new word would prove “ugly enough to be safe from kidnappers.”<sup>136</sup> And James too complained about ill-informed criticism, writing in *Pragmatism’s Conception of Truth*<sup>137</sup> of “the unwillingness of some of our critics to read any but the silliest of possible meanings into our statements.”<sup>138</sup>

To be sure, there’s no bright line between pragmatists of a radical disposition who, finding James’s and Dewey’s more incautious formulations especially attractive, pushed the classical pragmatist tradition to extremes, and outright kidnappers who offer a different bill of goods entirely under the label “pragmatism.” But in recent years some of those who have described themselves as pragmatists have been *so* far from appreciating the spirit of pragmatism that they really must be classified as kidnappers. And, to my mind, the chief obstacle to a judicious appreciation of the legacy of pragmatism has been not so much those ill-informed or unsympathetic critics as these self-proclaimed “friends.”

Most successful of the philosophical kidnappers was Richard Rorty, who not only described Peirce as a “whacked out triadomaniac”<sup>139</sup> but also informed us that Peirce’s “contribution to pragmatism was merely to have given it a name.”<sup>140</sup> Stripping Peirce’s account of truth of everything that connects it to the world, cheerfully boasting that he didn’t “have much use for the notion of ‘objective truth,’”<sup>141</sup> and offering us here-and-now consensus in its place, Rorty transmuted pragmatism into a vaguely postmodern *anti*-philosophy.<sup>142</sup> Like many others, Louis Menand jumped

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133. *Id.*

134. *Id.* at 5.464 (1905).

135. Peirce writes, for example, that “pragmaticism could scarcely have entered a head that was not already convinced there are real generals.” PEIRCE, 5.503 COLLECTED PAPERS, *supra* note 8 (1905).

136. PEIRCE, 5.414 COLLECTED PAPERS, *supra* note 8 (1905).

137. WILLIAM JAMES, *Pragmatism’s Conception of Truth*, in PRAGMATISM, *supra* note 17.

138. *Id.* at 112.

139. Richard Rorty, *The Pragmatist’s Progress*, in INTERPRETATIONS AND OVER-INTERPRETATIONS 89, 93 (Stefan Collini ed., 1992).

140. RICHARD RORTY, CONSEQUENCES OF PRAGMATISM 161 (1982).

141. Richard Rorty, *Trotsky and the Wild Orchids*, 1 COMMON KNOWLEDGE 140, 141 (1992).

142. See, e.g., RICHARD RORTY, *Pragmatism, Relativism, and Irrationalism*, in CONSEQUENCES OF PRAGMATISM 160 (1982) (1979); Richard Rorty, *Pragmatism as Anti-Authoritarianism*, 53 REVUE INTERNATIONALE DE PHILOSOPHIE 7 (1999). See also SUSAN HAACK, *Vulgar Pragmatism: An*

on the Rorty bandwagon, at one time even claiming that the evidence that there ever even *was* a Metaphysical Club was thin;<sup>143</sup> and so felt able to cut Peirce out of the pragmatist family portrait altogether and hang Rorty's picture in pride of place as the culmination of the tradition.<sup>144</sup>

By now, with Rorty's vulgar pragmatism waning somewhat, Robert Brandom offers a new, safely domesticated "analytic" neo-pragmatism<sup>145</sup>—"pragmatism" transmuted into analytic philosophy-as-philosophy-of-language—in an approach more reminiscent of the later Wittgenstein than of Peirce's pioneering work in semiotics<sup>146</sup> or Mead's pioneering insights into how human language, mind, and consciousness might have evolved out of such animal communication as the "conversation of gestures" in a dogfight.<sup>147</sup>

Rorty has had some influence in certain legal circles,<sup>148</sup> and Brandom has had some appeal to some legal thinkers in Europe who hope that his "inferentialism" might be a useful tool for modeling legal reasoning,<sup>149</sup> but

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*Unedifying Prospect*, in EVIDENCE AND INQUIRY 239 (2d expanded ed. 2009) (1993); Susan Haack, *Philosophy/philosophy: An Untenable Dualism*, XXIX(3) TRANSACTIONS OF THE CHARLES S. PEIRCE SOCIETY 411 (1993); SUSAN HAACK, "We Pragmatists ..."; *Peirce and Rorty in Conversation*, in MANIFESTO OF A PASSIONATE MODERATE: UNFASHIONABLE ESSAYS 31 (1998) (1997); Susan Haack, *Pragmatism, Old and New*, in PRAGMATISM, OLD AND NEW: SELECTED WRITINGS 15–57 (Susan Haack & Robert Lane eds., 2006); Susan Haack, *Pining Away in the Midst of Plenty: The Irony of Rorty's Either/Or Philosophy*, 1 HEDGEHOG REV.: CRIT. REF. ON CONTEMP. CULT. 76 (2016).

143. See generally Louis Menand, *An Introduction to Pragmatism*, in PRAGMATISM: A READER xi (Louis Menand ed., 1997).

144. *Id.* at xv–xviii. But didn't Menand subsequently publish a book entitled *The Metaphysical Club*? LOUIS MENAND, *THE METAPHYSICAL CLUB* (2001). Indeed, he did; *after* I had pointed out in my critical notice of the earlier anthology that there certainly *was* evidence of the existence of the Club. Susan Haack, *Vulgar Rortyism*, 16 NEW CRITERION 67, 68 (1997). (In the interests of full disclosure, I should add that, when we met at a conference at Yale in 2001, Professor Menand told me he "had heard about" my review, "but hadn't read it.")

145. ROBERT BRANDOM, *BETWEEN SAYING AND DOING: TOWARDS AN ANALYTIC PRAGMATISM* (2008).

146. PEIRCE, 2.227–444 COLLECTED PAPERS, *supra* note 8 (material assembled by the editors dating from c. 1895 to c. 1903).

147. MEAD, *supra* note 26, at 13–18.

148. See, e.g., Richard Rorty, *Unger, Castoriadis, and the Romance of a National Future*, 82 NW. U. L. REV. 335 (1988); Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811 (1990); Richard Rorty, *What Can You Expect from Anti-Foundationalist Philosophers: A Reply to Lynn Baker*, 78 VA. L. REV. 719 (1992); Richard Rorty, *Pragmatism and Law: A Response to David Luban*, 18 CARDOZO L. REV. 75 (1996); Richard Rorty, *Dewey and Posner on Pragmatism and Moral Progress*, 74 U. CHI. L. REV. 915 (2007).

149. See e.g., DAMIANO CANALE, *Implicita/Esplícita*, in FORME DEL LIMITE NELL'INTERPRETAZIONE GIUDIZIALE 172 (2003); Damiano Canale & Giovanni Tuzet, *On Legal Inferentialism: Toward a Pragmatics of Semantic Content in Legal Interpretation?* 20 RATIO JURIS. 32 (2007); MATTHIAS KLATT, *MAKING THE LAW EXPLICIT: THE NORMATIVITY OF LEGAL ARGUMENTATION* (2008); Damiano Canale & Giovanni Tuzet, *On the Contrary: Inferential Analysis and Ontological Assumptions of the A Contrario Argument*, 28 INFORMAL LOGIC 31, 36 (2008); Damiano Canale & Giovanni Tuzet, *The A Simili Argument: An Inferentialist Setting*, 22 RATIO JURIS. 499 (2009); Damiano Canale & Giovanni Tuzet, *What Is the Reason for This Rule? An Inferential Account of the Ratio Legis*, 24 ARGUMENTATION 197 (2009); THE RULES OF INFERENCE: INFERENCE IN LAW AND PHILOSOPHY (Damiano Canale & Giovanni Tuzet eds., 2009); Franz-

it is Richard Posner who is most often taken to represent legal pragmatism today. As we shall see, however, it's far from clear whether Posner is best classified as a kidnapper of pragmatism, a critic, or another "misunderstander"—or, indeed, as simply irrelevant to present concerns.

When he describes his position as pragmatist, Posner says quite explicitly that he refers, *not* to pragmatism in the technical philosophical sense, but to "everyday" pragmatism<sup>150</sup>—meaning, apparently, pragmatism in its now-current ordinary-language sense,<sup>151</sup> concern for expediency rather than principle; which, Posner claims, is "the best description of the American judicial ethos and also the best guide to the improvement of judicial performance."<sup>152</sup> His "everyday" pragmatism, he says, can and should be "cut loose" from philosophical pragmatism.<sup>153</sup> *Philosophical* pragmatism, he adds—referring both to the classical tradition and to what he calls "recusant" pragmatism, meaning anti-philosophical pragmatism in the style of Rorty—"has little to contribute to law at the operational level."<sup>154</sup> You might be tempted to conclude that Posner's point is simply that the best guide for judicial decision-making is pragmatism, in the current everyday sense; in which case he really wouldn't belong in this section or, for that matter, in this paper.

But this would be *too* simple. For Posner also writes that everyday pragmatism is "related" to philosophical pragmatism;<sup>155</sup> and offers an account of the pragmatist tradition in philosophy. This account begins with the correct thought that "pragmatism is more a tradition, attitude, and outlook than a body of doctrine";<sup>156</sup> unfortunately, it continues with the highly dubious claim that there is a "pragmatic mood" that branched "from its ancient roots . . . into a philosophical pragmatism . . . and into an everyday practice of pragmatism."<sup>157</sup> And what Posner presents as a survey

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Alois Fischer, *Praktizierte Normativität—Robert Brandoms Philosophische Rezeption des Rechts*, in *DER ERKENNTNISWERT VON RECHTSWISSENSCHAFT FÜR ANDERE DIZIPLINEN* 19 (M. Rehberg ed., 2017); Damiano Canale, *What Inferentialism Tells Us About Combinatory Vagueness in Law*, in *PRAGMATICS AND LAW: PRACTICAL AND THEORETICAL PERSPECTIVES* 43 (A. Capone & F. Poggi eds., 2017). I found only one law-related article by Brandom himself: Robert Brandom, *A Hegelian Model of Legal Concept Determination: The Normative Fine Structure of the Judges' Chain Novel*, in *PRAGMATISM, LAW, AND LANGUAGE* 19 (Graham Hubbs and Douglas Lind eds., 2014).

150. POSNER, *supra* note 2, at 1–2, 4.

151. I found no evidence that Posner is aware that this was not the ordinary meaning when Peirce spoke, but dared not write, of his philosophy as "pragmatism."

152. POSNER, *supra* note 2, at 1. In this context it is worth noting that one goal of this book of Posner's was to defend the Supreme Court's ruling in *Bush v. Gore*, 531 U.S. 98 (2000). See Posner, *supra* note 2, at 322.

153. POSNER, *supra* note 2, at 4.

154. *Id.* at 41. The contrast with Cardozo's acknowledgment of the potential usefulness of legal theory is truly striking.

155. *Id.* at 4.

156. *Id.* at 26.

157. *Id.*

of classical pragmatist philosophy introduces numerous misconceptions: e.g., that Peirce repudiated pragmatism because he disagreed with James;<sup>158</sup> that he wasn't really a pragmatist at all, but more like Frege and Russell,<sup>159</sup> that pragmatism, like positivism, is hostile to metaphysics;<sup>160</sup> even that, since it didn't concern itself with skepticism, pragmatism repudiates epistemology.<sup>161</sup> Now you might be tempted to conclude that Posner is simply one of the many who just misunderstand what the classical pragmatist philosophers were about.

But this is *still* too simple. The fact is that—much like the old sophists whom, he tells us, the everyday pragmatist resembles<sup>162</sup>—Posner ties his audience in knots. His efforts to disentangle everyday and philosophical pragmatism are so confusing as to leave one unsure not only who he thinks the pragmatist philosophers were<sup>163</sup> and what he takes them to have said, but also whether he's *really* only concerned, as he claims, with everyday rather than philosophical pragmatism. Whether or not this was his intention, it's certainly not surprising if, in legal circles, his misconceptions of classical pragmatism have been as seductive as Rorty's, and now Brandom's, in philosophy; which is why, despite my reservations, I included him here.

Long ago, James lamented how pragmatism had been misunderstood and misrepresented; it was “confusion worse than Babel.”<sup>164</sup> By now, sadly, the confusions have been compounded not only by the kidnappers themselves but also by second-generation critics who simply assume that Rorty—or

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158. *Id.* at 24.

159. *Id.* at 25. Peirce was indeed, like Frege and Russell, a pioneer of modern logic. For a good introduction to Peirce's contributions to logic, see HILARY PUTNAM, *Peirce the Logician*, in REALISM WITH A HUMAN FACE 252 (1990) (1983). But it obviously doesn't follow from the fact that Peirce was a pioneer of logic that he wasn't really a pragmatist.

160. POSNER, *supra* note 2, at 5–6 (claiming that, according to philosophical pragmatism, metaphysics has at best psychological or aesthetic value). This is false: Peirce, James, and Dewey all made significant contributions to metaphysics. See, e.g., PEIRCE, 6.1–4 COLLECTED PAPERS, *supra* note 8 (1898); *id.* at 6.6 (c. 1903); *id.* at 6.7–34 (1891); *id.* at 6.35–65 (1892); *id.* at 6.12–163 (1892); *id.* at 6.238–270 (1892); *id.* at 6.287–317 (1893); *id.* at 6.452–93 (1908). WILLIAM JAMES, RADICAL EMPIRICISM AND A PLURALISTIC UNIVERSE (Ralph Barton Perry ed., 1971) (*Essays in Radical Empiricism* was first published in 1912; *A Pluralistic Universe* represents James's Hibbert Lectures given at University College, Oxford in 1909). DEWEY, *supra* note 61.

161. POSNER, *supra* note 2, at 36. This is also false: Peirce, James and Dewey all made significant contributions to the theory of inquiry. See, e.g., PEIRCE, 5.213–314 COLLECTED PAPERS, *supra* note 8 (1868); *id.* at 5.358–387 (1877); *id.* at 5.574–604 (1898); JAMES, *supra* note 17, at 34–37; JOHN DEWEY, THE QUEST FOR CERTAINTY (1929); JOHN DEWEY, LOGIC: THE THEORY OF INQUIRY (1938).

162. POSNER, *supra* note 2, at 12.

163. He mentions, for example, W.V. Quine (whose supposed “pragmatism” seems to me doubtful) and Donald Davidson (who, as Posner acknowledges, firmly *repudiated* the label). POSNER, *supra* note 2, at 12.

164. Edwin Bjorkman, *Pragmatism—What It Is—By Prof William James*, N.Y. TIMES, Nov. 3, 1907, at SM8 (the last section of the interview carries the headline “CONFUSION WORSE THAN BABEL”).

Brandom, or Posner—can be taken to represent pragmatism. When Bernard Williams repudiates pragmatism, for example, it's apparently Rorty's anti-philosophical "pragmatism" he's objecting to,<sup>165</sup> and when Ronald Dworkin complains that "pragmatism can be rescued . . . only by procrustean machinery that seems wildly inappropriate," it's apparently Posner's anti-theoretical "pragmatism" he's dismissing out of hand.<sup>166</sup> Disentangling all these confusions would be—well, if you'll pardon the pun, it would be a Herculean task. Fortunately, however, we have more constructive things to do.

#### IV. NEO-CLASSICAL LEGAL PRAGMATISM

Neo-classical legal pragmatism—legal theory truly in the classical-pragmatist spirit—won't provide us with ready-made answers; but it will suggest fruitful ways of looking at the phenomenon of law, specific ideas and theories we might adopt or adapt in application to the law, and sometimes just a happy phrase or an apt metaphor—James's "pluralistic universe,"<sup>167</sup> for example, or Peirce's "labyrinth of signs"<sup>168</sup>—a phrase or metaphor that, while introduced for other purposes, opens our eyes to helpful ways of looking at the law. But of course, as Rescher once wrote, "[i]f two people agree, one of them isn't a philosopher";<sup>169</sup> so what follows will be an introduction, not to *the* pragmatist contribution, but to *my* pragmatist contribution to legal theory.<sup>170</sup>

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165. BERNARD WILLIAMS, TRUTH AND TRUTHFULNESS: AN ESSAY IN GENEALOGY 128–129, 219 (2002) (speaking at page 128 of Richard Rorty, but then generalizing at page 219 to "the pragmatists" as if Rorty were representative of the pragmatist tradition). See also Mark Migotti, *Pragmatism, Genealogy, and Truth*, 48 DIALOGUE 185 (2009). Williams really should have known better: a couple of years before this book appeared, he had asked me for references on classical pragmatism, which I duly supplied; but apparently he never followed them up.

166. RONALD DWORKIN, LAW'S EMPIRE 159 (1986). (There is no reference in the index to this book to Peirce, James, or Dewey.) And when he writes that "pragmatism self-destructs wherever it appears," it is Rorty's pseudo-pragmatism to which he refers. Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, in PRAGMATISM IN LAW AND SOCIETY 359, 361 (Michael Brint & William Weaver eds., 1991).

167. WILLIAM JAMES, *A Pluralistic Universe*, in RADICAL EMPIRICISM AND A PLURALISTIC UNIVERSE, *supra* note 160, at 121 (1909).

168. Peirce's sketch of the "labyrinth of signs" is reprinted in JOSEPH BRENT, CHARLES SANDERS PEIRCE: A LIFE 309 (1993), in a context that suggests that it should be dated around 1909; an e-mail message from Andre de Tienne at the Peirce Edition Project tells me that this sketch "cannot be dated with any certainty," but that "a plausible approximation would be c.1896–1908." E-mail from André de Tienne, Dir., Peirce Edition Project, to Susan Haack (Oct. 14, 2017, 12:06 p.m. EST) (on file with author).

169. NICHOLAS RESCHER, THE STRIFE OF SYSTEMS: AN ESSAY ON THE GROUNDS AND IMPLICATIONS OF PHILOSOPHICAL DIVERSITY 3 (1985).

170. Here again I will draw on an earlier paper of mine: Susan Haack, *The Pluralistic Universe of Law*, 21 RATIO JURIS. 453 (2008).



As Holmes famously observed in his dissenting opinion in *Southern Pacific v. Jensen*, “[t]he common law is not a brooding omnipresence in the sky,”<sup>171</sup> but is always the law of some place at some time. With Holmes—and Pound, Cardozo, Dewey, and Levi—I think of legal systems as social institutions, like banking systems or marriage customs or organized religions and, like all social institutions, rooted in the needs of human social life. As this suggests, I start by asking in what ways legal systems are like other social institutions, and in what ways they are different.

First, then, like all social institutions, legal systems are brought into being by things people do; and, again like many social institutions, they are local to a place and a time. Second, like most social institutions, legal systems interact with *other* social institutions; and, like most social institutions, they tend to increase in complexity as the society of which they are part becomes more complex.<sup>172</sup> there will be education law only when and where there are schools, for example, banking law only when and where there’s a banking system, stock exchange regulation only when and where there are stock exchanges, internet law only when and where there is an internet, rules for making a contract electronically only when and where there is electronic communication, and so on. However, third, a legal system is unlike such social institutions as a movie studio, a trade union, or a monetary system; like standards of fair play or decent behavior, or rules of etiquette, professional associations’ codes of conduct, copy-editors’ rules, etc., it is inherently *normative*, are aimed at controlling and shaping how people act.

Because legal systems are created by things people do, legal truths—that is, truths about what the law is at a given place and time—are made true by the actions of legislators and judges. The idea that truth is something we *make* rather than something we *discover* is to be found in James,<sup>173</sup> in Dewey,<sup>174</sup> and in Schiller;<sup>175</sup> and while this idea is not, to my mind, defensible with respect to truth generally, it is entirely apropos in the legal context. Legal truths do indeed become true when the relevant people, or bodies, make them so (though *after* they’ve been made true, it becomes possible for judges, attorneys, and legal scholars to discover their truth). For example, we can date when it became true that Massachusetts adopted the

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171. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (Holmes speaks here exclusively of the common law; but I believe the point is quite general).

172. Which of course is why I so much like the cover of Professor Tamanaha’s *A REALISTIC THEORY OF LAW* (2017), which evokes precisely this idea.

173. *PRAGMATISM*, *supra* note 17 at 104.

174. *See, e.g.*, DEWEY, *supra* note 118, at 116. *See also generally* Susan Haack, *Nothing Fancy: Some Simple Truths About Truth in the Law*, in *EVIDENCE MATTERS*, *supra* note 7, at 294.

175. FERDINAND CANNING SCOTT SCHILLER, *The Making of Truth*, in *STUDIES IN HUMANISM* 179 (1907).

mailbox rule to 1898, with the ruling in *Brauer v. Shaw*.<sup>176</sup> Again, we can say that in 2004 it became true that Michigan is a *Daubert* state;<sup>177</sup> and that in 2013, when the legislature amended the evidence code to this effect<sup>178</sup> and the governor signed off on the change<sup>179</sup> it looked as if Florida had, too—except that the Florida Constitution gives the Supreme Court of Florida the last word on procedural changes,<sup>180</sup> and so far it has declined to endorse the change,<sup>181</sup> so this situation remains unclear.

We also need to understand how a legal system differs from other systems of social norms. When Peirce wrote of “synechism,” the methodological principle favoring hypotheses that posit continua over those that require sharp distinctions,<sup>182</sup> he was thinking primarily of *metaphysical* hypotheses. But the same principle is useful here.<sup>183</sup> Instead of seeking that elusive quintessence of all legal systems, trying to give necessary and sufficient conditions under which a normative system qualifies as a system of law, it’s best to acknowledge frankly that the distinction between normative systems we would count as legal and those we wouldn’t is itself, “when nicely analyzed,” a matter of degree. And so, instead, we should try to articulate what kinds of normative system we should definitely count as legal, what kinds we should definitely rule out, and what kinds—probably a large and various class of what you might call “penumbral” or “quasi-legal” phenomena—would have us reaching for our scare quotes.

Here, from a present-day perspective, is a tentative list ordered roughly from the centrally-legal through the penumbral to the definitely *not* legal.<sup>184</sup>

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176. 46 N.E. 617 (Mass. 1898). See *McTernan v. LeTendre*, 351 N.E.2d 566, 567 (Mass. App. Ct. 1976) (where Brauer is the first case mentioned in which a Massachusetts court took the view that “an acceptance [of a contract] is effective upon posting”).

177. MICH. R. EVID. 702. See *People v. Wright*, No. 261380, 2006 WL 2271264, at \*5 (Mich. Ct. App. Aug. 8, 2006).

178. 2013 Fla. Sess. Law Serv. 107 (West) (legislation amending the Florida Evidence Code to adopt the *Daubert* standard); FLA. STAT. ANN. §§ 90.702, 90.704 (West 2017) (sections of the Florida Evidence Code affected by this legislation).

179. FLA. GOV. MESS., 2013 H.B. 7015 (Governor Rick Scott’s message on signing the bill into law).

180. FLA. CONST. art. V, § 2 (West, Westlaw through Nov. 2016) (stipulating that “[t]he supreme court shall adopt rules for the practice and procedure in all courts . . .”).

181. *In re Amendments to the Florida Evidence Code*, 210 So. 3d 1231, 1239 (Fla. 2017) (declining to adopt the change “due to the constitutional concerns raised, which must be left for a proper case or controversy,” as potentially “undermining the right to a jury trial and denying access to the courts”).

182. PEIRCE, 6.169 COLLECTED PAPERS, *supra* note 8 (1902).

183. As I explained in *Not Cynicism but Synechism: Lessons from Classical Pragmatism*, a synechistic approach proves fruitful in many areas of philosophy—philosophy of law, I now believe, included. Haack, *supra* note 54.

184. As Llewellyn puts it, there is “a focus, a core, a center—with the bearings and boundaries outward unlimited.” Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 432 (1930).

- national and state law—the core extension of “legal system” (though where the régime that imposes a system of norms is one that has recently seized power illegitimately, we may be unsure whether or not to classify it as a *legal* system at all);
- international law (but where mechanisms for enforcement are lacking, or very informal, scare quotes might be in order);<sup>185</sup>
- what you might call “sub-legal” systems, such as systems of alternative dispute resolution, that operate in the shadow of a national or state legal system—or indeed in the shadow of international law<sup>186</sup>—settling disputes while avoiding the costs and delays of litigation;
- what you might call “pre-legal” systems, such as tribal codes not clearly distinguishable from taboo and social custom;
- school rules, rules of etiquette, moral codes, ethical guidelines for this or that profession, copy-editors’ rules, etc.—not legal systems at all.<sup>187</sup>

A more sophisticated list might also systematize the many different reasons for regarding this or that normative system as “penumbral”: that it’s unclear how effectively it can be enforced; that, while it can be enforced, the enforcers are of doubtful legitimacy; or, etc.

Legal concepts, like most concepts, grow and change: think, for example, of the history of the concept of an inherently dangerous object, explored by Levi,<sup>188</sup> or of the growing array of legal conceptions of causation, explored by Lawrence Friedman.<sup>189</sup> And, as the inclusion of “pre-legal” systems, and my caveat, “from a present-day perspective” reveal, the concept of law is itself not only gradational but also fluid, varying from culture to culture and changing as a society changes. The list would surely have looked very different a millennium ago, and significantly different, probably, a century

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185. Shortly after I’d written this list, I stumbled on this lovely little conversation between a precocious six-year-old, Bertie, and his father in a novel by retired law professor Alexander McCall Smith: “‘What is international law, Daddy?’ asked Bertie. Stuart raised an eyebrow: ‘It is, I believe, the system of rules countries have to obey.’ Bertie thought of this. ‘And do they?’ he asked. ‘When it suits them.’ said Stuart. ‘Otherwise, they say that the rules are all a bit vague.’” ALEXANDER MCCALL SMITH, *THE IMPORTANCE OF BEING SEVEN* 214 (2010).

186. See, e.g., ALEC STONE SWEET & FLORIAN GRISEL, *THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY* (2017).

187. Adapted from Haack, *supra* note 170, at 460–61.

188. LEVI, *supra* note 125, at 9–27 (tracing the gradual expansion of the legal concept of an inherently dangerous object over many years: first applied to a loaded gun in *Dixon v. Bell* (1816) 105 Eng. Rep. 1023 (KB), by the time of *George v. Shivington* (1869) 5 Law Rep. Exch. 1 it could be applied to a defective hair-wash).

189. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 409–18 (1973) (tracing the way the legal concept of causation ramified to handle claims arising from the many different types of accident that resulted as a system of railroads grew up across the country). The story is summarized in SUSAN HAACK, *Risky Business: Statistical Proof of Specific Causation*, in *EVIDENCE MATTERS*, *supra* note 7, at 264, 266–68.

or even fifty years ago—and maybe, also, even today, from an Islamic perspective, or to a Chinese thinker.

Does the fact that legal systems are local to a place and a time mean that, while it makes sense to speak of this or that legal system—Massachusetts law in 1896, U.S. federal law in 2017, the Mexican code of criminal procedure before and after the changes that took place in 2014,<sup>190</sup> etc., etc.—to speak of “law,” period, *without* any such qualification, is to presuppose just such a “brooding omnipresence in the sky” as Holmes repudiated? I don’t think so; and neither, it seems, did Holmes, who wrote in an 1885 address:

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 had has worked and fought its way from savage isolation to organic social life.<sup>191</sup>

“Law,” so understood, refers *not* to a revered abstraction, but to the whole congeries of legal systems of the world, past and present (and maybe, also, future developments, such as the possible new space law some now see on the horizon).<sup>192</sup>

James described his philosophy as “mosaic,”<sup>193</sup> and wrote of a “pluralistic universe.”<sup>194</sup> His concern was metaphysical, specifically the relation of world and mind. But that almost-but-not-quite-oxymoronic phrase, “pluralistic universe,” is also wonderfully apt as a description of the complex range of phenomena presented by the legal systems of the world.<sup>195</sup>

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190. The change was in part constitutional: Decreto por el que se reforman y adicionan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, CP, Diario Oficial de la Federación [DOF] 18-06-2008 (Mex.). It was also in part procedural: Código Federal de Procedimientos Penales [CFPP], Diario Oficial de la Federación [DOF] 30-08-1934, últimas reformas DOF 05-03-2014 (Mex.). I have relied on Carlos Rios Espinoza, *Redesigning Mexico’s Criminal Procedure: The States’ Turning Point*, 15 SW. J.L. & TRADE AMERICAS 53 (2008); Paul J. Zwier & Alexander Barney, *Moving to an Adversarial System in Mexico: Jurisprudential, Criminal Procedure, Evidence Law, and Trial Advocacy Implications*, 26 EMORY INT’L L. REV. 189 (2012).

191. HOLMES, *The Law*, reprinted in 3 COLLECTED WORKS, *supra* note 6, at 468, 469.

192. Jason Krause, *Rocket Law*, 103 A.B.A. J. 45, 46 (2017) (suggesting that the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 may no longer be adequate now that “commercial interests are putting new pressures on the law of outer space”).

193. William James, *Essays in Radical Empiricism: A World of Pure Experience*, in RADICAL EMPIRICISM AND A PLURALISTIC UNIVERSE, *supra* note 160, at 46 (1904).

194. A PLURALISTIC UNIVERSE, *supra* note 160.

195. Pound, too, adapts something James says about metaphysics to his legal-theory purposes. Pound, *supra* note 83, at 621 (suggesting that legal terms like “estoppel” are just such unhelpful “solving

a *universe* insofar as all are legal systems, but a *pluralistic* universe, since every system is different, marked by the peculiarities of a place, a time, and a society and its history. And while the pluralism of the extraordinarily many and extraordinarily various legal systems of the world is obvious, it doesn't take much thought to realize that even *one* legal system may be a pluralistic universe in its own right, as U.S. law surely is. Federal law has its own scope, substance, and structure, and the laws of the various states differ in a host of ways—and that's before we even consider administrative law, military law, the law of Indian reservations, or vaccine courts, traffic courts, and so forth; not to mention the complex meta-rules for determining jurisdiction—rules often themselves the object of legal strategizing as attorneys go “forum-shopping”<sup>196</sup> in hopes of getting their case heard in a jurisdiction likely to be favorable to their side.

Sometimes, when judges appeal to the practices of other legal systems in partial justification of their decisions, we hear complaints about “judicial tourism.”<sup>197</sup> This reminds us, if we need reminding, that the pluralistic universe of U.S. law is just one part of a whole mosaic of legal systems. (Maybe we should think in terms, not of the pluralistic *universe* of law, but of the pluralistic *multiverses* of law.) Conventionally, the legal systems of the West are divided into two classes, common-law and civil-law jurisdictions; but this crude division disguises both the significant differences within each of the two classes, and the significant ways in which, increasingly, civil-law systems borrow from common-law systems,

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words,” as James takes terms like “The Absolute” to be in metaphysics; and citing JAMES, PRAGMATISM, *supra* note 17, at 52).

196. “Forum-shopping” has recently been in the news because of the Supreme Court’s decision in *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773 (2017). *See, e.g.*, Brent Kendall & John D. McKinnon, *Ruling Curbs Patent Suits – Supreme Court Limits Plaintiffs Shopping for Favorable Jurisdictions; A Boost for Tech Firms*, WALL ST. J., May 23, 2017, at B1; Richard Dean & Michael Ruttinger, *After the BNSF Decision, There’s No Place Like ‘At Home.’*, LAW360 (June 6, 2017), <https://perma.cc/25KJ-QPHR>; Emily Field, *High Court Says Plavix Suits Can’t Stay in California*, LAW360 (June 19, 2017), <https://perma.cc/J8QJ-6KRA>; Editorial, *Talcum Tort Stick-Up*, WALL ST. J., Aug. 26, 2017, at A12; Amanda Bronstad, *Battle over Venue for 1,300 Mo. Talc Cases Flares in Wake of ‘Bristol-Myers.’* NAT’L L.J. (July 13, 2017), <https://perma.cc/PLH7-PY3Q>; Gary P. Naftalis & Michael S. Oberman, *‘Forum Selection’ or ‘Forum Shopping’: Framing the Divide*, N.Y. L.J., Feb. 28, 2011, at S3.

197. The phrase was introduced by Mary Ann Glendon, Opinion, *Judicial Tourism: What’s Wrong with the U.S. Supreme Court Citing Foreign Law*, WALL ST. J., Sept. 16, 2005, at A14. For an example of “judicial tourism,” see Judge Pollack’s shift on the admissibility of fingerprint identifications under *Daubert* between his original and, eight weeks later, his revised ruling in *United States v. Llera Plaza*, 179 F. Supp. 2d 492, 517 (E.D. Pa. 2002), *superseded by* *United States v. Llera Plaza*, 188 F. Supp. 2d 549, 555 (E.D. Pa. 2002) (appealing in part to the fact that in 2001 England abandoned the point-counting method); *see also* the Supreme Court’s decision in *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (appealing in part to the fact that most other jurisdictions do not permit the execution of offenders under eighteen). More recent discussions include Stephen Yeazell, *When and How Courts Should Cite Foreign Law*, 26 CONST. COMMENT. 59 (2009); Rex D. Glensy, *The Use of International Law in U.S. Constitutional Adjudication*, 25 EMORY INT’L L. REV. 197 (2011).

and common-law systems from civil-law systems.<sup>198</sup> Then again, one legal system may be embedded in another: as, for example, various and in some instances very different national legal systems in the European Union are embedded in EU law.<sup>199</sup> And then there are the complex structures of international law, of arms control agreements, trade agreements, environmental agreements, international arbitration, etc.

Moreover, those pluralistic multiverses of law are almost never static; they shift, grow, and change. (Maybe we should think, not of a *mosaic* of multiverses of law, but of a *kaleidoscope* of multiverses.) A timely example is U.K. law, which, while Britain was part of the EU, shifted and changed in response to European mandates;<sup>200</sup> but which will surely change yet again when the U.K. leaves the EU—though how much, and in what ways, remains to be seen.<sup>201</sup> But there are many other examples. Before Independence (from Britain) and Partition (of India and Pakistan) in 1947, the legal system of the Indian sub-continent was essentially English; since then, the Pakistani legal system has apparently remained quite close to the older English model—but for the Islamic overlay required by the Shari’a Act X of 1991,<sup>202</sup> while Indian law has become much more codified, and

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198. I think, for example, of the way *Daubert* shifted responsibility for determining certain matters previously conceived of as factual, not legal, from the jury to the judge, and, in the U.S., the various experiments with court-appointed experts, both moves in a civil-law direction; and of the recent reform of the penal code of Mexico to make it more adversarial, see *supra* note 189, and adoption of juries in criminal trials in some provinces of Argentina, moves in a common-law direction. “In Argentina, the 1853 Constitution copied the US Constitution and made a reference to jury trial. There has always been a claim that jury trials be finally settled in our system. Recently, many “provincias” enacted that possibility and the first trials are being held. . . . [T]here are voices openly in favor and enthusiastic about it, and . . . voices against.” E-mail from Andrea Meroi, Faculty Member in Dept. of Procedural Law, Universidad Nacional de Rosario, to Susan Haack (Sept. 23, 2017, 12:18 p.m. EST) (on file with author). See also Walter O. Zárate, *El veredicto en la ley 14.543 de Juicio por Jurados como herramienta de conocimiento*, LA LEY BUENOS AIRES, June 2015, at 535 (Arg.); Mariano Rios Artacho & Ramon Teodoro Rios, *Reflexiones sobre el jurado. Proyecto de legislación procesal penal de la provincia de Santa Fe*, LA LEY LITORAL, Nov. 17, 2016, at 2 (Arg.); Emilio A. Ibarlucia, *Observaciones constitucionales al juicio por jurados*, ACADEMIA NACIONAL DE DERECHO, Dec. 2016, at 55 (Arg.); see generally *Jury Trial Articles*, REVISTA PENSAMIENTO PENAL, <http://www.pensamiento penal.com.ar/etiquetas/juicio-jurados> (last visited Oct. 21, 2017); ASOCIACIÓN ARGENTINA DE JUICIO POR JURADOS, <http://www.juicioporjurados.org/> (last visited Oct. 21, 2017).

199. A recent press report describes some of the stresses and strains that have resulted in Greece, Hungary, and Poland. Daniel Michaels & Laurence Norman, *Disputes Expose Limits of EU’s Power*, WALL ST. J., Aug. 11, 2017, at A14.

200. See David Neuberger, President, Sup. Ct. U.K., Address at the National University of Singapore: Has the Identity of the English Common Law Been Eroded by EU Laws and the European Convention on Human Rights? (Aug. 18, 2016) (transcript available at <https://www.supremecourt.uk/docs/speech-160818-01.pdf>).

201. See, e.g., Jenny Gross, *Theresa May Wins Vote on Brexit Bill*, WALL ST. J., Sept. 12, 2017, at A8 (reporting that the Prime Minister had won a vote on a bill designed “to transpose more than 10,000 EU laws onto the UK statute book,” but pointing out that this is just one step in what is likely to be a lengthy and contested legal process).

202. An Act for the Enforcement of Shari’ah, No. 10 of 1991, THE GAZETTE OF PAKISTAN EXTRAORDINARY, June 18, 1991. See also PAKISTAN CONST. (which opens: “Whereas sovereignty over

now includes different systems of family law for Hindus and for Muslims.<sup>203</sup> Again: as I learned from Majid Pourostad, many of the legal systems of the Middle East were influenced by European systems.<sup>204</sup> Egyptian law, for instance, was initially modeled on the French system, but after 1968 moved towards a mixture of inquisitorial and adversarial procedures,<sup>205</sup> Turkey also initially followed the Napoleonic Code, but in 1927 adopted the code of Neuchatel, Switzerland,<sup>206</sup> Iranian law is also strongly under French influence.<sup>207</sup> But substantive law in the Middle East, Pourostad writes, is Islamic, and “[t]he process of ‘Islamization’ is an inherent part of” these systems.<sup>208</sup> Moreover, naturally enough, “differences in political, economic, and social structure have produced different results in each country.”<sup>209</sup>

When you think of the ways in which legal systems grow, change, shift, reproduce, and sometimes die out, of how they adapt and take on local color when they are transplanted to a new cultural niche, etc., the word “evolution” comes very naturally to mind; as it does when you notice that there are legal analogues of such oddities of biological evolution as Lonesome George—until his death in 2012, the last turtle of his kind, surviving only in one isolated niche, the Galapagos Island of Pinta.<sup>210</sup> For example, “jurats,” the professional jurors of the Royal Court of the Channel Island<sup>211</sup> of Guernsey, which are just such a survival, a remnant of the long-ago days when these islands were part of France, and French law used professional jurors.<sup>212</sup>

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the entire universe belongs to Almighty Allah alone,” and continues in the preamble: “[in the Islamic Republic of Pakistan] the Muslims shall be enabled to live their lives . . . in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah”).

203. See, e.g., RAMAKRISHNAN VIRARAGHAVAN, UPDATE: GUIDE TO INDIAN LAWS §21.1–2 (2016), [http://www.nyulawglobal.org/globalex/India1.html#\\_Sources\\_of\\_Law](http://www.nyulawglobal.org/globalex/India1.html#_Sources_of_Law); Hanna Lerner, *Critical Junctures, Religion, and Personal Status Regulations in Israel and India*, 39 LAW & SOC. INQUIRY 387, 405–09 (2014); Amitabha Bose, *Do All Roads Lead to Islamic Radicalism? A Comparison of Islamic Laws in India and Nigeria*, 32 GA. J. INT’L & COMP. L. 779, 801 (2004).

204. Majid Pourostad, *Cultura y proceso judicial en el Medio Oriente: Viviendo en el propio y mirando el de otros*, in PROCESO JUDICIAL Y CULTURA: UNA MIRADA GLOBAL 93 (Mónica Bustamente Rúa ed., 2013).

205. *Id.* at 95–97.

206. *Id.* at 97–98.

207. *Id.* at 98–99.

208. *Id.* at 107 (my translation).

209. *Id.* at 99 (my translation).

210. See *Lonesome George*, GALAPAGOS CONSERVANCY, [https://www.galapagos.org/about\\_galapagos/about-galapagos/lonesome-george/](https://www.galapagos.org/about_galapagos/about-galapagos/lonesome-george/) (last visited Feb. 3, 2018).

211. The Channel Islands are in the English Channel, the narrow strip of sea dividing England and France.

212. See, e.g., *Jurats of the Royal Court of Guernsey*, THE ROYAL COURT OF GUERNSEY, <http://guernseyroyalcourt.gg/article/3089/Jurats> (last visited Feb. 3, 2018); Timothy Hanson, *Jurats as Adjudicators in the Channel Islands and the Importance of Lay Participation*, 39 COMM. L. WORLD REV. 250, 282 (2010).

But legal systems aren't biological species; so it's a question whether talk of their "evolving" is merely metaphorical, or something more—and if it's something more, what exactly that "more" might be.<sup>213</sup> Well, like talk of the evolution of languages or the propagation and mutation of computer viruses or, etc., talk of the evolution of legal systems obviously isn't literal biological truth; nevertheless, as I see it, it *is* something more than picturesque speech. In fact, legal systems evolve in much the same sense that languages evolve—by growth, expansion, adaptation to new niches, and so on. And, like languages, they may also eventually survive only in isolated pockets, or fall into desuetude and die.<sup>214</sup>

Legal systems, like languages, are among the vast range of cultural institutions human beings have brought into being; and no doubt our ability to create all these institutions, like our ability to create languages, is itself the product of our biological evolution. There is also an analogue, in the growth of legal systems as of languages, of the processes of random mutation and selective retention in biology: new legal practices, procedures, concepts, etc., are sometimes introduced by the merest happenstance, and then spread and take root in a legal system and even, occasionally, migrate beyond it to other jurisdictions. Karl Popper's philosophy of science seems to have snuck into *Daubert*,<sup>215</sup> for example, in part for no better reason than that a then-recently-published law review article presenting a (quasi-) Popperian conception of science caught Justice Blackmun's attention,<sup>216</sup> and *Daubert* has not only taken root in a majority of states in the United States,<sup>217</sup> but has extended its influence to other jurisdictions from Canada<sup>218</sup>

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213. I draw here on an earlier paper: Susan Haack, *The Evolution of Legal Systems: Response to Helena Baldina, Andreas Bruns, and Johannes Müller-Salo*, in SUSAN HAACK: REINTEGRATING PHILOSOPHY, *supra* note 54, at 195.

214. The obvious example is Latin, now a "dead" language, but still with us in the Romance languages—French, Spanish, Italian, Portuguese, Romanian—and, of course, in its many traces in English.

215. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 (1993).

216. Justice Blackmun's ruling in *Daubert* cites Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation*, 86 NW. U.L. REV. 643, 645 (1992), which in turn cites David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to Law as Science and Policy*, 38 EMORY L. J. 1005, 1015–17 (1989). *Daubert*, 509 U.S. at 593. No one involved, unfortunately, seems to have known what Popper actually said, or to have appreciated that Popperian philosophy of science—which emphatically denies that scientific theories can ever be shown to be reliable—is grossly unsuited to Justice Blackmun's purpose, to provide indicia of the reliability of proffered scientific testimony. See Susan Haack, *Federal Philosophy of Science: A Deconstruction—And a Reconstruction* (2010), in EVIDENCE MATTERS, *supra* note 7, at 122.

217. See generally Heather G. Hamilton, Note, *The Movement from Frye to Daubert: Where Do the States Stand?*, 38 JURIMETRICS J. 201 (1998); EDWARD J. IMWINKELRIED & PAUL C. GIANNELLI, SCIENTIFIC EVIDENCE § 1.11 (5th ed. 2012).

218. *R v. J.-L.J.*, [2000] 2 S.C.R. 600, 612–18 (Can.) (interpreting *R. v. Mohan*, [1994] 2 S.C.R. 9 (Can.) as requiring that novel scientific testimony meet a threshold reliability requirement and listing indicia of reliability almost identical to the *Daubert* factors).



to Colombia.<sup>219</sup> Again, the idea that epidemiological evidence of more than doubled risk is the key to proof of specific causation “by a preponderance of the evidence” apparently entered our legal system in a couple of toxic-tort cases over injuries allegedly caused by vaccination against the 1976 swine flu;<sup>220</sup> was then transmuted into a requirement on the admissibility of such testimony in *DeLuca v. Merrell Dow*;<sup>221</sup> and in this form spread rapidly through the federal courts after Judge Kozinski adopted it in his final ruling in *Daubert*<sup>222</sup> on remand from the Supreme Court.

You may object that Darwin’s theory of evolution explains the origin of biological species entirely in terms of past causes, with no need to appeal to a goal, design, or plan; and that it’s not clear whether or, if so, to what extent, this is also true of the evolution of law. Roughly speaking, I would say, shifts and changes in a legal system come about in two ways, by legislation and, as the examples just given suggest, as the result of numerous small steps of interpretation as judges extrapolate a statute or select among competing precedents by weighing the often-competing desiderata of which Cardozo reminded us. We might think of legislative changes as like artificial selection, the deliberately selective breeding of racing pigeons, horses, wheat, or whatever. But those small steps of legal interpretation are subject to something more like natural selection: some get taken up by other courts and eventually become part of legal practice; others have no, or no lasting, influence. This isn’t to suggest that such interpretive steps are random; each judge will doubtless have his or her rationale. But it is to say that, as with the numerous innovations, mistakes, mispronunciations, etc., that cumulatively result in the evolution of a language, *there is no overall goal; no overall plan.*

Obviously, this has by no means exhausted the ways in which legal theory might fruitfully call on the pragmatist tradition. I haven’t, for example, asked what, if anything, the pragmatists’ work in ethics might have to teach us about justice or about human rights; or what their work in social philosophy might have to teach us about the justification, or the criticism, of specific legal provisions, or of legal systems as a whole. And neither have I even begun to explore the potential of Peirce’s semiotic<sup>223</sup> for

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219. Article 422 of the Colombian Código de Procedimiento Penal (Criminal Procedure Code) lists indicia of reliability strongly reminiscent of the *Daubert* factors, satisfaction of at least one of which is required for the admissibility of new scientific evidence and scientific publications. Artículo 422 del Código de Procedimiento Penal.

220. *Cook v. United States*, 545 F. Supp. 306, 316 (N.D. Cal. 1982); *Manko v. United States*, 636 F. Supp. 1419, 1434 (W.D. Mo. 1986).

221. *DeLuca v. Merrell Dow Pharm., Inc.*, 911 F.2d 941, 958 (3d Cir. 1990).

222. *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1321 (9th Cir. 1995). The story is told in detail in Susan Haack, *Risky Business*, in *EVIDENCE MATTERS*, *supra* note 7, at 269–85.

223. I use the now-usual spelling of “semiotic” (theory of signs). Peirce, however, preferred the spelling “semeiotic,” since the word derives from the Greek, *seme* (sign), not the Latin, *semi* (half). *See*

understanding the process of legal interpretation.<sup>224</sup> Suffice it for now to say that probably all legal systems to some degree, but common-law systems especially, really are, to borrow a Peircean idea, labyrinths of signs—ever-growing structures of interpretations of interpretations of interpretations, . . . , continuing indefinitely.

I think, for example, of the interpretations, interpretations of interpretations, etc., of the Establishment Clause of the First Amendment to the U.S. Constitution: “Congress shall make no law respecting the establishment of religion.”<sup>225</sup> For a long time, this provision was understood simply to preclude the establishment of a national church.<sup>226</sup> Then in 1947, in the first case in which it applied the Establishment Clause to the states, the Supreme Court held—adopting a metaphor coined by Roger Williams<sup>227</sup> and made famous by Thomas Jefferson<sup>228</sup>—that what this constitutional provision requires is that there be a “wall of separation” between church and state.<sup>229</sup> There followed a whole slew of interpretations of interpretations: what the wall of separation requires is that government be neutral, both between one religion and another, and between religion and non-religion, which in turn requires that government actions have a secular purpose, and that their effect be neither to advance nor to inhibit religion (1963),<sup>230</sup> what this means is that government actions are unconstitutional unless they have a secular purpose, their effect is neither to advance nor to inhibit religion, and they create no “excessive entanglement” of church and state (1970/1971),<sup>231</sup> what the “purpose” and “effect” clauses require is that no government action be such as to convey to a reasonable observer the

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Max Fisch, *Peirce's General Theory of Signs*, in PEIRCE, SEMEIOTIC, AND PRAGMATISM, *supra* note 11, at 321–22.

224. Two volumes on the application of Peirce's ideas to the law appeared in the 1990s: PEIRCE AND LAW (Roberta Kevelson ed., 1991) and CONSCIENCE, CONSENSUS & CROSSROADS IN THE LAW (Roberta Kevelson ed., 1993). Neither, however, includes material of much relevance to the issues I have in mind here.

225. U.S. CONST. amend. I, cl. 1.

226. See, e.g., JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 630 (1833).

227. Roger Williams, *Mr. Cottons [sic] Letter Examined and Answered* (1644), reprinted in 1 THE COMPLETE WRITINGS OF ROGER WILLIAMS 316, 392 (Rubin A. Guild ed. 1963).

228. Letter from President Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802), reprinted in THE SEPARATION OF CHURCH AND STATE: WRITINGS ON A FUNDAMENTAL FREEDOM BY AMERICA'S FOUNDERS 129, 130 (Forrest Church ed., 2004).

229. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 16 (1947).

230. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 215, 223 (1963).

231. The “entanglement” clause was introduced in *Walz v. Tax Comm.*, 397 U.S. 664, 674 (1970); the purpose, effect, and entanglement clauses were combined in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). This standard—still governing, though much criticized—is the “*Lemon* test” for constitutionality under the Establishment Clause.

impression that the government endorses this or that religion, or religion in general (1984/1989);<sup>232</sup> . . . , and so, doubtless, on and on.

Penetrating deeper into issues about legal interpretation promises rich rewards for adventurous prospectors equipped with pragmatist tools. But this would be an enormous project which, for now, I can only postpone for another occasion—or perhaps another lifetime!

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232. First proposed by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring); and adopted by the majority in *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 620 (1989).