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Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.

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LEGAL THEORY

LEGAL INNOVATION WITHIN THE WIDER INTELLECTUAL TRADITION: THE PRAGMATISM OF OLIVER WENDELL HOLMES, JR.

*Catharine Wells Hantzis**

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Oliver Wendell Holmes, Jr. is one of the dominant figures in American jurisprudence. As a scholar, he wrote prolifically about legal theory and legal history. His book *The Common Law* is one of the most influential studies of the common law tradition; it has shaped the views of American legal scholars for several generations. In addition, Holmes spent nearly forty years as a judge—first as a justice on the Massachusetts Supreme Judicial Court and later as an Associate Justice of the United States Supreme Court. On the bench, Holmes was a formidable presence influencing the development of American law. His judicial opinions are both numerous and memorable. More than fifty years after his death, casebooks still include many of his opinions and legal periodicals frequently contain analyses of his judicial philosophy.¹ Indeed, Holmes is so central to the American legal tradition that understanding what Holmes thought about law is an important step in understanding one's own thoughts on legal theory.

There are two recurring themes in the efforts of scholars to understand Holmes and his influence. The first is a continuing effort to understand Holmes by placing him in a wider intellectual tradition; the second is an on-going debate about the extent to which Holmes embraced legal positivism. The purpose of this paper is to address both these traditions by considering Holmes' views within the wider context of nineteenth century pragmatism and by using this context to shed light on Holmes' so-called positivism. The importance of addressing these issues is intensified by the current dramatic rekindling of interest in pragmatism both among professional philosophers² and among legal theorists. For example, pragmatism shares several of its central conceptions with feminist theory³ as well as serving as an important focus for critical legal theorists.⁴

Holmes has been misunderstood as a positivist in part because nineteenth century pragmatism and twentieth century logical positivism are easily confused. Each philosophical theory owes a heavy conceptual debt to the philosophy of Immanuel Kant; each focuses on the meaning and interpretation of symbols; and each rejects, in its own way, traditional metaphysical speculation. Nevertheless, they are markedly different theories which give rise to radically different consequences for law and morality.

¹ There are more than sixty articles about Holmes in legal periodicals since 1980 listed on LEGALTRAC.

² See, e.g., Quine, *Two Dogmas of Empiricism* in FROM A LOGICAL POINT OF VIEW, (1953); H. PUTNAM, REASON, TRUTH, AND HISTORY (1981); and R. RORTY, CONSEQUENCES OF PRAGMATISM (1982).

³ The nineteenth century pragmatists, as I understand them, embraced emotivism in ethics and rejected the possibility of a single objective and universal viewpoint. These methodological commitments are shared by many feminist theorists. See, e.g., Minow, *Forward: Justice Engendered* 101 HARV. L. REV. 10 (1987).

⁴ See, e.g., Singer, *The Player and the Cards: Nihilism and Legal Theory* 94 YALE L. J. 1 (1984), but see Stick, *Can Nihilism be Pragmatic?* 100 HARV. L. REV. 332 (1986).

I will argue that much of the confusion surrounding Holmes' legal views is due to the fact that the positivist views and vocabulary of a later generation have been wrongly attributed to him. In making this argument, I will begin with a brief examination of what it might mean to place Holmes within a wider tradition (Section I). I will then proceed to examine the general philosophical views of the nineteenth century pragmatists. In this connection, I will rely heavily upon the writings of Charles Peirce, who is widely conceded to be both the founder of and the dominant figure in the pragmatic tradition⁵ (Section II). Next I will examine the consequences of these views first with respect to law and science (Section III) and second with respect to law and morality (Section IV). Finally, I will examine the relevance of Holmes' views on legal theory to his practice as a judge (Section V).

I. PLACING HOLMES WITHIN A WIDER INTELLECTUAL TRADITION

It is difficult to think about questions of legal theory without also thinking about more general philosophical questions. We cannot, for example, examine the question of the relation between law and ethics unless we have in mind some ethical theory. And formulating an ethical theory requires some preexisting commitments about ontology (what there is) and epistemology (how it's known). These theories and commitments may be unconscious or suppressed; they may be entirely uncritical. Nevertheless, whether conscious or critical, they influence the form of our pronouncements on law. It follows that the philosophical context of legal theory is one relevant factor in its interpretation. As an example, take Justice Holmes' famous assertion that the law should assign negligence liability according to "external" and "objective" standards. By this he meant that courts should not inquire into internal and subjective mental states but instead should examine the circumstances of each case to determine what conduct would meet the requirements of due care. While this part of his statement is clear enough, we might also ask: what does Holmes mean by "objectivity"? How could Holmes possibly view normative judgments about what care should be used as more "objective" than factual judgments about mental states?

Holmes' wide-ranging intellectual interests invite examination of philosophical context and, perhaps for this reason, many studies of Holmes have tried to place him within a broader intellectual tradition. Morton White made the first attempt by placing Holmes in a group that included Dewey, Veblen, Beard, and Robinson and which was marked, White argued, by a rejection of formalism.⁶ More recently, Robert Gordon has linked Holmes' legal views to a logical positivist epistemol-

⁵ See, e.g., WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 444 (1902).

⁶ M. WHITE, *SOCIAL THOUGHT IN AMERICA* (1947).

ogy.⁷ Robert Summers has argued that Holmes shared with Dewey, Pound, and others an instrumentalist outlook.⁸ And lastly, H.L. Pohlman has suggested that Holmes should be read in the context of a utilitarian philosophy.⁹

The divergence of these efforts shows that Holmes is a hard person to classify. Indeed, his superb ability to express himself in aphorisms has heightened confusion about the true nature of his beliefs on certain basic philosophical issues. But he is hard to classify for a deeper reason as well. Holmes read widely¹⁰ and numbered among his acquaintances many of the influential thinkers of his day.¹¹ At various times and in various ways a number of different intellectual traditions probably colored his thought. It is informative to compare Holmes with many of his contemporaries as the studies cited above do. But the scholarship on Holmes has not cleared up the confusion about Holmes' views on certain fundamental philosophical questions. On these questions, I have concluded that the relevant tradition is the pragmatism of Peirce and James.

The suggestion that Holmes be read in conjunction with the pragmatists is not wholly original. Max Fisch has documented the existence of a Metaphysical Club in Cambridge in the early 1870s whose membership included Holmes, Peirce, William James, Chauncey Wright, and Nicholas St. John Green.¹² The club discussed a wide variety of topics including Peirce's pragmatism and Holmes's own emerging theory of law. These two theories have much in common. For example, Fisch noted the similarity between Peirce's formulation of the pragmatic maxim and Holmes' predictive theory of law.¹³ The pragmatic maxim states that the meaning of a conception lies in its practical effects; Holmes' predictive theory of law identifies the meaning of a legal conception with its effects on judges' behavior in deciding individual cases. Fisch goes so far as to argue that the predictive theory of law is the "only systematic application of pragmatism that has yet been made."¹⁴ But he does not form a conclusion as to whether Holmes' views arose from an

⁷ Gordon, *Holmes' Common Law as Legal and Social Science*, 10 HOFSTRA L. REV. 719 (1982).

⁸ R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982).

⁹ H. POHLMAN, *JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE* (1984).

¹⁰ See generally, M. HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS 1841-1870* (1957)[hereinafter HOWE, vol. I]; M. HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 1870-1882* (1957)[hereinafter M. HOWE, vol. II][vols. I & II hereinafter M. HOWE]; C. BOWEN, *YANKEE FROM OLYMPUS* (1944).

¹¹ Fortunately, we can sit in on some of his extended "conversations" with them. Much of Holmes' correspondence has been published. See, e.g., *HOLMES-LASKI LETTERS* (M. Howe ed. 1953); *HOLMES-POLLOCK LETTERS* (M. Howe ed. 1953).

¹² Fisch, *Was There a Metaphysical Club in Cambridge?*, in *STUDIES IN THE PHILOSOPHY OF CHARLES SANDERS PEIRCE* 3 (E. Moore and R. Robin eds. 1964).

¹³ Fisch, *Justice Holmes, The Prediction Theory of Law and Pragmatism*, 39 J. OF PHIL. 85 (1942).

¹⁴ *Id.* at 87.

application of Peirce's theory or whether Peirce's theory stemmed from a generalization of Holmes' views on law.¹⁵

Since Fisch's article, there have been two attempts to shed light on Holmes' theory by examining Peirce's philosophical writings.¹⁶ The first, Rand Rosenblatt's *Holmes, Peirce and Legal Pragmatism*,¹⁷ focuses on three areas of common ground: 1) the question of external rather than internal standards; 2) the role of the community in formulating external standards; and 3) the indefinite nature of inquiry and adjudication. The second paper, by Marcia Speziale¹⁸ makes the intriguing suggestion that Holmes' conception of legal ultimates should be interpreted in light of Peirce's scholastic realism—the doctrine that what is named by general terms is real.

While these articles are rich with insights, both authors note similarities in vocabulary and strategy without attempting to systematically understand Peirce's or Holmes' deeper philosophical views. The similarities between Holmes and Peirce are not merely the stylistic and linguistic ones reported by these authors. These surface similarities reflect deeper intellectual and spiritual characteristics which Holmes and Peirce shared. Our vision of these men acquires depth only when we examine their philosophical outlook.

It is reasonable to expect that Holmes and Peirce shared much of their fundamental philosophical outlook. They each had Calvinist grandparents and Unitarian-leaning parents. They each went to Harvard and Europe for an education.¹⁹ Each had an intellectual father who was prominent in the mid-nineteenth century Cambridge community.²⁰ They read many of the same books and cut their philosophical teeth on discus-

¹⁵ *Id.* at 94. Fisch does find the latter more probable: ". . . or, as I think more likely, that pragmatism was a generalization of the prediction theory of law." *Id.* More recently, Frederic Kellogg has pursued Fisch's suggestion with good results. I think he is correct in arguing that Holmes' alleged positivism is really an effort to use the pragmatic maxim to free law from a priori theories of morality. See F. KELLOGG, *THE FORMATIVE ESSAYS OF JUSTICE HOLMES: THE MAKING OF AN AMERICAN LEGAL THEORY* 67 (1984).

¹⁶ In addition, in Frank, *A Conflict with Oblivion: Some Observations on the Founders of Legal Pragmatism*, 9 RUTGERS L. REV. 425 (1954), Jerome Frank discussed Holmes in connection with Peirce and others in the Metaphysical Club, most notably Nicholas St. John Green. The article makes interesting reading because Frank quotes generously from many sources (including an appendix containing Green's essay on proximate cause) but it is not an attempt at a systematic analysis of Holmes' philosophical positions.

¹⁷ 84 YALE L.J. 1123 (1975).

¹⁸ Speziale, *By Their Fruits You Shall Know Them: Pragmatism and the Prediction Theory of Law*, 9 MANITOBA L.J. 29 (1978).

¹⁹ There are many biographies of Holmes which disclose these facts. As yet there is no biography of Charles Peirce, but the fact of his education at Harvard and his trips to Europe are well documented. Less clear are the religious view of his parents and grandparents, but given his father's presence in the Saturday Club, one would expect the family to have espoused New England religious orthodoxy. See generally HOWE, *supra* note 10.

²⁰ Indeed, the fathers shared their own philosophical discussions. Oliver Wendell Holmes, Sr. and Benjamin Peirce (teacher of mathematics at Harvard) belonged to the discussion group that met

sions with common contemporaries.²¹ Each was touched strongly by Emerson and Darwin; each was profoundly affected by the arguments of Bain and the resident Cambridge genius, Chauncey Wright.²² It is small wonder that when as adults they turned to theorizing they should sound so similar.²³ Thus, I believe that the connections between Holmes' views and Peirce's are worth exploring in this paper.

I will begin my discussion by acknowledging plainly that, despite their shared background, there are reasons why one might be skeptical about Peirce's influence on Holmes. The first set of reasons stems from Holmes' own statements about Peirce. Holmes knew Peirce in the early years in Cambridge, but they were not friends.²⁴ In 1866, Holmes attended Peirce's lectures at the Lowell Institute on science and induction,²⁵ but there is no sign that the lectures had any particular effect on his views. Holmes' attendance at the Metaphysical Club was infrequent²⁶ and, by his own description, "I think I learned more from Chauncey Wright and St. John Green, as I saw Peirce very little."²⁷ Holmes dismissed pragmatism as "an amusing humbug,"²⁸ and wrote critically about the collection of Peirce's essays published after Peirce's death.²⁹

on Saturdays at the Parker House in Boston as did Emerson and Henry James, Sr. See R. PERRY, *THE THOUGHT AND CHARACTER OF WILLIAM JAMES* 17 (abr. ed. 1947).

²¹ Such discussions were the focus of the Metaphysical Club, see *supra* text accompanying note 12. In addition, there were numerous opportunities for more informal cross-fertilization. William James was a good friend to both Holmes and Peirce in their youth. Holmes and James, in particular, visited each other's families, corresponded with one another, and enjoyed conversations late into the night lubricated by liquor and philosophy. PERRY, *supra* note 20, at 89; HOWE *supra* note 10, at 256.

²² Wright was a good ten years older than Holmes' cohort and tended (along with Nicholas St. John Green) to dominate discussions at the Metaphysical Club. Wright's surviving writings are found in *PHILOSOPHICAL DISCUSSIONS BY CHAUNCEY WRIGHT* (Norton ed. 1878) and *LETTERS OF CHAUNCEY WRIGHT* (Thayer ed. 1878). Wright was not only an influential thinker; his letters convey his originality and warmth.

²³ See generally Rosenblatt, *supra* note 17; and Speziale, *supra*, note 18.

²⁴ Holmes wrote to Hartshorne (the editor of Peirce's *Collected Papers*):

I am afraid that I cannot help you much in the way of recollections of Charles Peirce. I think I remember his father saying to me, "Charles is a genius," and I remember the august tone in which at one of the few meetings (of the Metaphysical Club) at which I was present, Charles prefaced his opinion with "Other philosophers have thought." Fisch, *supra* note 12, at 10-11.

²⁵ M. HOWE, vol. I., *supra* note 10, at 251.

²⁶ Fisch, *supra* note 12, at 10-11 (quoting Holmes' letter to Hartshorne).

²⁷ *Id.* But in the same letter Holmes states: "Once in a fertilizing way he challenged some assumption that I made, but alas I forgot what." *Id.*

²⁸ 1 HOLMES-POLLOCK LETTERS, *supra* note 11, at 138-9.

²⁹ Holmes wrote: "I feel Peirce's originality and depth—but he does not move me greatly—I do not sympathize with his pontifical self-satisfaction. He believes that he can, or could if you gave him time, explain the universe. He sees cosmic principles and his reasoning in the direction of religion, etc. seems to me to reflect what he wants to believe - in spite of his devotion to logic." GOUDGE, *THE THOUGHT OF C.S. PEIRCE* 325 (1950).

The second set of reasons stems from the idealism³⁰ inherent in any attempt to consider intellectual history in isolation from the actual events that shaped it.³¹ A person's philosophy is, to borrow a Holmesian phrase, shaped as much by experience as by logic. Although Peirce and Holmes shared common origins, their lives as adults could not have been more different. Holmes was wounded three times in the Civil War,³² while Peirce sat on the sidelines. Holmes led a phenomenally successful professional life, while Peirce wrote volume after volume in obscure poverty. While Peirce seems to ignore the political and legal issues of his day, Holmes was at the center of many of them. Thus, the mature views of both men are as much the product of their differing experience of the political and economic realities of their time as they are of their common intellectual background.³³

The answer to both of these sets of objections lies in the limited nature of my project. I do not claim that Peirce personally influenced Holmes' intellectual development, nor do I claim that Peirce's philosophy provides a complete explanation of Holmes' views. My claim is that our understanding of Holmes can be enriched by examining his views in their intellectual context. In making this study, I seek to do a little of what Michael Moore labels "modest history."³⁴ Moore's modest historian attempts to follow faithfully her subjects' own understanding of his views and what they mean. Her project is different from "the imperial historian" who, by placing historical beliefs into a contemporary framework, "relates them to our own concerns and enables the ideas to speak to us in a way that we can understand."³⁵ My suggestion is that, in the case of Holmes, there has been too much imperial history and not enough of the modest kind.

The need for modest history rests on a few assumptions. While it is true that a person's views are shaped largely by her experience, they are also shaped by the philosophical framework in which they are placed. The construction of this framework begins early in life; its early structure shapes much of what is to follow. It includes a particular vocabulary (that is, the ability to name some things and not others), a set of beliefs about what is real and what is illusory, and a set of attitudes about what

³⁰ I am using the term "idealism" here in the sense in which it opposes materialism.

³¹ Perhaps this is why so many of the books on Holmes have been biographical and why it is tempting to use psychological study to interpret his work. See, e.g., Touster, *In Search of Holmes from Within*, 18 VAND. L. REV. 437 (1965).

³² For an analysis of the effects which this experience may have had on Holmes' legal views, see *id.*

³³ A helpful explanation of how these realities may have affected Holmes' views can be found in Horowitz, *The Place of Justice Holmes in American Legal Thought* (1980) (unpublished manuscript on file with the author).

³⁴ Moore, *The Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism* (Book Review), 69 CORNELL L. REV. 988 (1984).

³⁵ *Id.* at 1001.

is worth doing or having. The framework is philosophical in that the traditional philosophical disciplines of ontology, metaphysics, epistemology, ethics, and aesthetics study these basic questions. The framework is socially constructed in the sense that it is developed through interactions with parents and friends and with the wider society around us.³⁶ In some cases, the framework is shaped without conscious thought. In other cases, parts of it are chosen after deliberate study.

My claim in this paper is that Holmes and Peirce shared such a framework and that the framework they shared is just enough different from ours as to require modest history. While such basic frameworks are elusive things to talk about, I believe that one way in which they are manifested is through vocabulary. "Experience" means a different thing to an idealist than it does to a materialist. Or, to take another example, consider the word "explanation." What does it mean? What a person accepts as an adequate explanation will have an effect on what information-gathering activities she spends time on. Consequently it will greatly affect the form and shape of what she knows. I will show below that Holmes and Peirce had a distinctive notion of "explanation" which involved neither the four causes of Aristotle nor the physical causes which we postulate as common sense "explanations." Further, I will show that this notion of explanation is a key step in understanding Holmes' views.³⁷

In reading Holmes and Peirce together, I hope to flesh out Holmes' views in such a way that we can begin to understand his philosophical vocabulary. In doing this, I acknowledge that there is some risk that we will be left with Peirce's vocabulary rather than that used by Holmes. After all, if the members of the Metaphysical Club all agreed on philosophical questions, their meetings would have been very short and unbearably dull. How then can we be sure we can safely look to Peirce rather than to James or Wright to "flesh out" Holmes' views?

One answer, I think, lies in the extreme generality of the questions I am considering. Disagreements among members of this group were especially sharp because they shared so many philosophical presuppositions and a common vocabulary. Of all the members of this group, however, it was only Peirce who attempted to state these presuppositions and to examine the reasons behind them. For example, I will argue in this paper that Peirce had distinctive views about the nature of experience. We can see that some such view of experience underlies James' great work *The Principles of Psychology* and defines the nature of his project, though James himself never makes this view explicit. While Peirce is extremely

³⁶ See, e.g., P. BERGER & LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1966) and J. MAQUET, *THE SOCIOLOGY OF KNOWLEDGE* (1951).

³⁷ Holmes himself was aware of this change. He says: "Explanations . . . , when I was in college, meant a reference to final causes, later they came to mean tracing origin and growth." O.W. HOLMES, *COLLECTED LEGAL PAPERS* 303 (1920).

critical in his review of *Principles of Psychology*,³⁸ the criticism tends to focus on complaints about imprecision and illogicality. Such complaints suggest wide areas of agreement on fundamental questions.³⁹

Moreover, Holmes was not entirely silent on these questions. I take seriously Holmes' own statements concerning his philosophical views and I acknowledge differences between Holmes and Peirce where they occur. Furthermore, as we move from general philosophical questions to questions about legal and moral theory, we can hear Holmes' voice more clearly. The philosophical vocabulary that I attribute to Holmes makes his views on law and morality seem strongly supportable and consistent, and this result seems desirable. Holmes was an intelligent man with a real fondness for study and dispute. Men of such temperament do not usually hold opinions which are superficial or easily refuted. Thus one argument for my interpretation of Holmes is that it gives depth and strength to his views.

Not all readings of Holmes have been as sympathetic as mine. In the years following his death a debate raged over Holmes' "positivism." This debate—centered on Holmes' image of "the bad man"—drew a vast array of participants. The first attacks were shrill and strongly condemnatory of Holmes both as a moral theorist and as a moral person. These articles attributed to him moral skepticism of a particularly naive and vicious kind.⁴⁰ In a more moderate tone, Lon Fuller also condemned Holmes not so much for his personal failings, but for the insufficient attention he paid to the moral aspirations of the legal profession.⁴¹ This led to two separate debates in the pages of the *Harvard Law Review*. The first took place in 1951,⁴² the second in 1958.⁴³ Like their predecessors, these articles did not focus upon the theoretical questions posed by legal positivism. Nor were they scholarly attempts at interpreting Holmes' thought. Lurking behind these debates are deep-seated feelings about law and its relation to moral values.

Holmes is a dominant figure of American jurisprudence. Our feelings about him and his moral stance are therefore central to our legal culture. As Howe has written, many legal theorists were troubled "that

³⁸ C. PEIRCE, VIII THE COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 8.55 (A. Burks ed. 1958).

³⁹ See *id.* at 8.250; but see *id.* at 8.58.

⁴⁰ See, e.g., FORD, *The Fundamentals of Holmes' Juristic Philosophy*, in PHASES OF AMERICAN CULTURE 51 (1942); Lucey, *Natural Law and American Legal Realism*, 30 GEO. L. J. 493 (1942); Gregg, *The Pragmatism of Mr. Justice Holmes*, 31 GEO. L. J. 262 (1943); Palmer, *Holmes, Hobbes, and Hitler*, 31 A.B.A.J. 569 (1945); Palmer, *Defense Against Leviathan*, 32 A.B.A.J. 328 (1946).

⁴¹ L. FULLER, THE LAW IN QUEST OF ITSELF (1940).

⁴² Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529 (1951); Hart, *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929 (1951); Howe, *Holmes' Positivism—A Brief Rejoinder*, 64 HARV. L. REV. 937 (1951).

⁴³ Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) and Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

Holmes' philosophy of law was inconsistent with the highest traditions and aspirations of western thought and that his scale of moral and political values was badly suited to measure the needs of a progressive and civilized society."⁴⁴ What disturbed these scholars was Holmes' professed skepticism about moral requirements and his belittling cynicism about the nature of persons and their rights.⁴⁵ We would expect such a man to be ungenerous and narrow minded. Yet our images of Holmes suggest that he was neither. In this paper, I will try to reconcile these conflicting views by interpreting Holmes' statements within the context of a pragmatic philosophy. Pragmatism and positivism are two distinct philosophies which are similar enough that they are frequently confused; yet they are also distinct enough to have very different consequences for law and morality. In the following sections of this paper, I will examine the similarities and differences between these two philosophical views with particular emphasis on their consequences for moral and legal theory.

II. THE PHILOSOPHICAL CONCEPTIONS OF NINETEENTH CENTURY PRAGMATISM

Peirce is best known for formulating two philosophical doctrines which lie at the core of pragmatism: the pragmatic maxim and a theory of truth that identifies truth with the final opinion obtained by a community after the indefinite practice of the scientific method.⁴⁶ Peirce formulates the pragmatic maxim as follows: "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."⁴⁷ Thus stated, the maxim has much in common with the later slogans of the logical positivists. Like positivism, pragmatism provides a theory of meaning that limits meaningful discourse to statements saying something about actual or potential experience. Furthermore, like positivism, pragmatism proposes this theory in

⁴⁴ Howe, *The Positivism of Mr. Justice Holmes*, *supra* note 42, at 531.

⁴⁵ See, e.g., *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding a Virginia statute providing for the sexual sterilization of insane inmates of institutions supported by the state). Holmes writes in the Court's opinion: "[i]t would be strange if [the public welfare] could not call upon those who already sap the strength of the state for these lesser sacrifices [being sterilized], in order to prevent our being swamped with incompetence." *Id.* at 207.

⁴⁶ These two conceptions are found in Peirce's most widely read papers, *How to Make our Ideas Clear* and *The Fixation of Belief* in C. PEIRCE, V THE COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 5.388, 5.358 (C. HARTSHORNE & P. WEISS EDS. 1934).

⁴⁷ *Id.* at 5.402. This is the most famous of Peirce's formulations of the maxim although it is surely not the clearest. The use of the undefined term "practical effects" creates an ambiguity between "practical effects on the believer's conduct" and "practical (experimental) effects on the believer's experience." Note that Peirce has in different places translated it in both these ways. Compare 5.196 with 5.412. Note also that the examples in *How to Make Our Ideas Clear* would support both interpretations. *Id.* at 5.403 *et. seq.*

the hope of exposing as meaningless certain abstract or theoretical statements.⁴⁸

The second major conception for which Peirce is credited is the pragmatic conception of truth. Unlike the logical positivist's correspondence theories,⁴⁹ a pragmatic coherence theory of truth sees truth as a coherence among ideas rather than a correspondence with fact. For Peirce, truth is the object of final opinion in a community that has indefinitely practiced the scientific method,⁵⁰ while modern pragmatists, preferring a more immediately available conception of truth, define it in terms of coherence with the currently best available theory.⁵¹

These twin conceptions of meaning and truth, together with a psychological account of belief and doubt largely borrowed from Bain,⁵² form the bases of Peirce's pragmatism. But the brevity of this account suggests its potential for deception. We get the spirit of the pragmatists: their respect for the achievements of science and their bored contempt for hair splitting and scholastic arguments. But we don't get their underlying philosophical commitments. Certainly there is an admiration for "science," but how did they understand the nature of the activity which this word denotes? Like the logical positivists, the pragmatists were empiricists, but in saying that all knowledge was based on experience, did they mean the same thing?

In the remainder of this section, I approach these questions by carefully considering Peirce's and Holmes' views concerning the nature and limits of experience. I will also describe the "metaphysical faith" that I believe both men held. In sections III and IV I will consider the implication of these views for legal and moral theory.

A. *The Nature and Limits of Experience*

One way to understand Peirce's concept of experience is to examine his conception of the branch of philosophy he called phenomenology. Phenomenology, according to Peirce, observed "ordinary experience," but this designation is misleading. For Peirce, ordinary observation does not involve observation of the ordinary world of physical objects or even minute observation of sensory input. Instead, phenomenology makes an "analysis of what kind of constituents there are in our thoughts and

⁴⁸ *Id.* at 5.401. As an example in this essay Peirce uses the dispute between Catholics and Protestants over transubstantiation.

⁴⁹ An example of a correspondence theory is contained in Bertrand Russell's *PRINCIPIA MATHEMATICA* 42-45 (1970 ed.). Under a correspondence theory there is only one true theory; under a coherence theory there could be several.

⁵⁰ C. PEIRCE, *supra* note 46, at 5.384.

⁵¹ See, e.g., R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979).

⁵² Bain defines belief as that upon which one is prepared to act. See, e.g., A. BAIN, *THE EMOTIONS AND THE WILL* 505 (3d ed. 1875).

lives”⁵³ and is the study of “the kinds of elements universally present . . . to the mind in any way.”⁵⁴ In doing phenomenology, Peirce examines not the content of experience—what it tells us about a supposedly external world—but rather the nature of experience itself.⁵⁵

It is important to note the difference between the nature of Peirce’s task and that of the logical positivist. The positivist begins with an assumption about the nature of experience which marks as relevant only those things which are, in one form or another, reports from one of the five senses. Peirce, on the other hand, does not begin with a normative prescription as to what will count; he begins instead by looking to see what is really there. His method is to carefully examine what is present to his consciousness—the images, the thoughts, etc.—and to describe their progression.

Peirce’s study of phenomenology begins with the notion of cognitions present to consciousness. He observes that the process of cognition consists of a series of individual cognitions that have a certain relationship to one another. Peirce first describes the cognitions themselves, and then analyzes the relations among them.

Each cognition has two aspects.⁵⁶ It has a material quality. The cognition is what it is; it has a brute characteristic which is simple and unanalyzable. In addition to the material quality, each cognition has a representational quality. The cognition, when viewed in this way, stands for something besides itself. This makes it intelligible and capable of further analysis. The cognition both stands alone in its bruteness and stands with company in its “representational” aspect.

We now get to the second set of questions concerning cognition. To what does the cognition relate and what is the nature of the relationship? In answering these questions, Peirce reveals his fundamental idealism.⁵⁷ Cognitions relate not to things in the world but only to other cognitions. An individual cognition relates to a previous cognition by denoting it. Thus the thought “table” does not denote some real table but some previous thought of a table. The individual cognition relates to a subsequent

⁵³ C. PEIRCE, *supra* note 38, at 8.295.

⁵⁴ C. PEIRCE, I THE COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 1.186 (C. Hartshorne & P. Weiss eds. 1931).

⁵⁵ In this respect, his project resembles that of the German idealists. See, e.g., E. Husserl, *Philosophy as a Rigorous Science* in PHENOMENOLOGY AND THE CRISES OF EUROPEAN MAN (1965).

⁵⁶ I will argue later that as Peirce began to worry about the subsequent problem of normative science, he added a third aspect to cognition. See *infra* text accompanying note 164.

⁵⁷ This word is used in so many senses that it is well to be explicit about the sense intended here. I am using it only in the ontological sense. In this sense, the idealist’s answer to the question, “What is there?” is “There is the stuff of consciousness.” The focus of Peirce’s idealism is to deny the realm of Kantian things-in-themselves. As will be discussed below, such idealism does not make it meaningless to speak of things in the world when referring to things which we experience in consciousness.

cognition by interpreting it.⁵⁸ The thought "table" does not simply bring to mind the previous cognition but describes that cognition as a cognition of a table.⁵⁹

Peirce's idealist perspective is an important feature of his philosophy, and so it would be useful to say a little more about where it came from. Peirce began his study of philosophy with a three year program of reading Kant. Kant introduced a crucial distinction between phenomena—those mental representations that are immediately present to us in experience—and noumena, or things-in-themselves.⁶⁰ Kant's case for the existence of noumena rests on a transcendental argument. From the fact that experience is ordered in a certain way, Kant deduced that it must bear a relationship to the world of transcendental objects, or noumena. Peirce accepted Kant's account of experience as phenomenal but rejected his transcendental argument. In doing so, he was beginning to form the distinctive elements of his pragmatism. I will show below that Holmes most likely shared these philosophical views and that he too should be considered a pragmatist.

The chief appeal of positing things-in-themselves is that our experience appears to us to be a representation of something that is outside of ourselves.⁶¹ Dr. Johnson kicks the stone; others accuse the idealist of ignoring the plain evidence of her senses. But Peirce was convinced that if one looked at the evidence carefully enough,⁶² the hypothesis that a stone exists in an external world is generated within the process of cognition as an explanation of the stone-like elements of ideas present to the mind. At this point, however, it is essential to be careful about what is meant by an explanation. If we interpret "explanation" as "causal explanation," then the existence of things-in-themselves must be accepted at least insofar as they cause the phenomena we experience. But Peirce is not concerned with causal explanations; his interest is focused on a differ-

⁵⁸ For Peirce, to interpret a cognition is to see it as standing for something else. I interpret a cognition, in this sense, when I describe that cognition as representing some other thing.

⁵⁹ Here I have sketched the relationship between cognitions primarily by the use of an example. If our inquiry were focussed upon the truth of Peirce's theory, it would be necessary to consider his semeiotic theories more carefully. For our purposes, a sketch is sufficient. In 1868 when the theory of cognition was originally formulated, Peirce believed that all of the relationships between cognitions took the form of valid syllogistic reasoning. See C. PEIRCE, *supra* note 46, at 5.266-68. Later, his theory of semeiotics evolved into a complicated analysis of signification. This analysis was developed not as a distinct philosophy of language but rather as an essential element of the phenomenological project. Phenomenology notes that consciousness contains intelligible items. Semeiotics—Peirce's analysis of the nature of signs—was meant to explain this intelligibility by describing what it means for one thing (a sign) to represent another (its object).

⁶⁰ Scholars have disagreed about the importance of things-in-themselves to Kant's metaphysics, but the importance of the noumenal world to Kant's ethical theory cannot be questioned.

⁶¹ While this is the appeal of Kant's argument, it is not its substance. For a fuller account of transcendental arguments, see Stroud, *Transcendental Arguments*, 65 J. PHIL. 241 (1968).

⁶² Peirce cites a number of examples of illusions as well as attempts to reconstruct the child's first efforts at interpreting the world around her. C. PEIRCE, *supra* note 46, at 5.223-5.236.

ent notion of "explanation" called abduction. Abduction, as a form of reasoning, is the basis of what Peirce would term an "explanatory hypothesis." In science, an abduction is the action of a scientist in forming an hypothesis that he will subsequently test experimentally. In everyday life, it is the formation of an idea that will simplify and unify certain elements of cognition. To take a simple example, certain initially random bits of visual data may be explained by the hypothesis "There is a stone." It is like an heuristic; that particular piece of the puzzle remains constant and does not, under normal circumstances, need further analysis. If I go further and kick the stone, it is because my preexisting theory of physical objects entails the conclusion that stones have not only visual but tactile qualities; it is not because the sight of the object itself informs me of the presence of a rock.

What Peirce is pursuing here is a strategy that admits the existence of a theory at the earliest possible moment.⁶³ It is not the case that there are things in the physical world about which we theorize; it is instead the case that the existence of the physical world is itself a theory and, as such, is part of the ideational stuff that makes up cognition. This way of looking at the matter may seem counterintuitive,⁶⁴ but the things that render it inevitable for Peirce are, first, his notion of an explanation, and second, his concept of reality.

In recasting Peirce's argument I have tried not to obscure the fact that much of the argument over physical objects is nothing more than an argument over the adequacy of an explanation. The materialist argues: my perceptions are explained when I know their physical cause. Peirce replies that an explanation in terms of a physical cause is no explanation at all.⁶⁵ Within our theory of physical objects, causal explanations may be useful, but when we examine the physical world as a whole, it does not help us to appeal to a realm of noumenal things whose nature cannot be determined.

The necessary companion to Peirce's idealism is his conception of reality. If his notion of reality related to an external and physical world,

⁶³ Indeed, for Peirce there is no clear distinction between perceiving something and theorizing about it. "[A]bductive inference shades into perceptual judgment without any sharp line of demarcation between them The abductive suggestion comes to us like a flash. It is an act of *insight*, although of extremely fallible insight." Peirce, *supra* note 46, at 5.181.

⁶⁴ Even if the view is somewhat counter intuitive, it has its share of adherents today. See, e.g., R. RORTY, *supra* note 51; QUINE, FROM A LOGICAL POINT OF VIEW (1953).

⁶⁵ C. PEIRCE, *supra* note 46, at 5.260.

So, that to suppose that a cognition is determined solely by something absolutely external, is to suppose its determinations incapable of explanation. Now, this is a hypothesis which is warranted under no circumstances, inasmuch as the only possible justification for a hypothesis is that it explains the facts, and to say that they are explained and at the same time to suppose them inexplicable is self-contradictory.

then his idealism would revert to skepticism and solipsism. But such is not his conception.

We have only to stop and consider a moment what was meant by the word *real*, when the whole issue soon becomes apparent. Objects are divided into figments, dreams, etc., on the one hand, and realities on the other. The former are those which exist only inasmuch as you or I or some man imagines them; the latter are those which have an existence independent of your mind or mine or that of any number of persons.⁶⁶

Reality is found in the fact that the opinions of individuals tend to converge over the long run into agreements about particular theories. Thus, the external world is real if and only if, over some indefinitely long period, we will continue to hypothesize it as a unifying explanation for cognition.⁶⁷

One need only examine Peirce's description of reality⁶⁸ to see that his conception is equivocal on the issue of whether reality is truly independent of cognition. The real, he says, is "independent of your mind or mine or that of any number of persons."⁶⁹ Given his earlier examples in which "figments and dreams" were the opposite of real things, it is tempting to read him, as I just did, as saying that a thing is real if it is perceived not just by myself but by relevant others. On the other hand, he goes on to say: "The real is that which is not whatever we happen to think it, but is unaffected by what we may think of it."⁷⁰ By this he seems to indicate a concept of reality which is external to and totally independent of cognition.

I believe that this equivocation stems from the circularity in his definitions of "truth," "reality," and the "scientific method." The circle begins with his conception of the scientific method as a method that produces agreement. Then, if all one means by the true opinion is the opinion which would be achieved by an indefinite practice of the scientific method, and if all one means by "reality" is the object of that opinion, there is not much reason for a person to seek truth. Notions of truth and reality are more than just definitional; they are motivational. If all we mean by truth is the outcome of a logical method, what reason can there possibly be for preferring any particular logical method or the

⁶⁶ C. PEIRCE, *supra* note 38, at 8.12 (emphasis in original). See also C. PEIRCE, *supra* note 46, at 5.382. This quotation is from his review of Fraser's edition of Berkeley, which was written in 1871 and which was the basis of some of the early discussions in the Metaphysical Club. See Fisch, *supra* note 12, at 20. Fisch argues that Berkeley's theory of vision was influential to Peirce and other members of the group. My contention that the theory of reality shapes Peirce's ontological views is supported by the fact that the discussion of reality is followed by "This theory of reality is instantly fatal to the idea of a thing in itself." C. PEIRCE, *supra* note 38, at 8.13.

⁶⁷ This is, in effect, a fancier but more accurate way of stating the pragmatic theory of truth. See *supra* text at note 50.

⁶⁸ See *supra* text at note 66.

⁶⁹ C. PEIRCE, *supra* note 38, at 8.12.

⁷⁰ *Id.*

“truth” it produces? Thus, for Peirce, reality could not be conceptualized simply as the object of the final opinion. Reality also invoked, for Peirce, the objectivity of “God’s truth.”⁷¹

In addition to hypothesizing the reality of an external world, Peirce also thought that experience contained cognitions that related to an hypothesized internal world of self. The point of Peirce’s discussion of self-knowledge is to deny that individuals have any privileged or internal access to information about themselves. If experience consists of a series of cognitions that relate solely to other cognitions within the series, the denial of self-knowledge means two distinct things: that all of my knowledge of myself is derived from cognition, and that there is no directly experienced “me” which is the subject of cognition.⁷² For example, consistently with Peirce’s idealism, my knowledge concerning the existence of my physical body is derived from visual, audible, and tactile bits of information that are contained in cognition. More difficult for Peirce is knowledge of our internal states such as emotions and volitions. He again hypothesizes that we have such states in order to explain certain aspects of cognition. For example, Peirce asserts that the statement “I am angry at *x*” is first perceived as a statement about something contained in our external cognition, such as “*X* is vile.” Or, in the case of volition, “I want to move *x*” is first understood as “*X* is fit to be moved.” Thus, knowledge of the “internal” world has the same status and structure as knowledge of the “external” world of physical objects. The normative qualities of “vileness” and “fitness to be moved” are as much a part of cognition as are the more descriptive qualities of “redness” and “blueness.”

Now we can see that pragmatism does not share positivism’s restrictive notions about experience. Both positivism and pragmatism are empiricist philosophies—both believe that discussion is meaningless unless it can be translated into, or related to, talk about experience. Where they disagree is upon the nature of experience. The logical positivists made numerous attempts to define what sorts of statements expressed the data of experience. While they never reached a consensus upon the exact form of such statements, they took as a given that each statement would report information seen, touched, heard, smelled, or tasted. Thus, what experience taught was the sum total of these reports together with such theories as could logically be constructed on the basis of these reports. The pragmatist’s concept of experience is clearly much broader than that of the positivist. The five senses are not privileged within this world; experience includes the entire spectrum of whatever is present to us in consciousness.

⁷¹ “That truth and justice are great powers in the world is no figure of speech, but a plain fact to which theories must accommodate themselves.” C. PEIRCE, *supra* note 54, at 1.348.

⁷² In this sense Descartes commits the fallacy of inferring “I am” from the premise “There is a thought.”

B. *Philosophy and the Need for Metaphysical Faith*

Peirce's expansive notion of experience requires an expanded empiricism as well as an enlarged conception of philosophy. The positivist has but a few philosophical objectives. One of these is to figure out precisely how her theory can be stated; a second is to clarify certain problems by analyzing the language in which they are presented. Beyond these narrow borders, much of traditional philosophy—metaphysics, ethics, and legal theory—ceases to exist. On the other hand, a mere browse through Peirce's *Collected Papers* clearly shows that these traditional questions of philosophy were on his philosophical agenda. While the positivist scoffed at metaphysics, Peirce was determined to practice it.

For Peirce, philosophy had three divisions: phenomenology, normative science, and metaphysics. We have seen that phenomenology is the observation and analysis of ordinary experience.⁷³ Normative science, on the other hand, tells us how we ought to reason and behave in light of our experience.⁷⁴ Beyond these two, however, Peirce conceived of a metaphysics that would seek "to give an account of the universe of mind and matter."⁷⁵ That is, his metaphysics would compare the truth as revealed by our experience with "God's Truth." But this third branch of philosophy raises, for Peirce, a formidable problem: How is it possible to form an opinion about the relationship of "God's truth" to experience while confining one's philosophical method to observations of ordinary experience? It is for this reason perhaps that the Lowell Lectures end with an appeal to faith:

But the sum of it all is that our logically controlled thoughts compose a small part of the mind, the mere blossom of a vast complexus, which we may call the instinctive mind, in which this man will not say that he has faith, because that implies the conceivability of distrust, but upon which he builds as the very fact to which it is the whole business of his logic to be true.⁷⁶

While Peirce could have been clearer, he seems to identify faith as the cornerstone of his metaphysics. Beliefs tend to converge, he thinks, upon one unanimous and final opinion. Peirce's faith concludes that opinion is the truth about the universe of mind and matter. In the discussion that follows we will see that Holmes shared a similar faith.

In the above discussion, it was evident that Peirce's conception of experience is vastly different from that of the positivist. Peirce differs from the positivist in that his empiricist epistemology is enriched by his refusal to privilege the five senses. For Peirce, the numerous aspects of

⁷³ See *supra* text accompanying notes 53-59.

⁷⁴ For a discussion of normative science, see *infra* text accompanying notes 161-65.

⁷⁵ C. PEIRCE, *supra* note 54, at 1.186.

⁷⁶ C. PEIRCE, *supra* note 46, at 5.212. See also C. PEIRCE, 2 THE COLLECTED PAPERS OF CHARLES SANDERS PEIRCE (C. Hartshorne & P. Weiss eds. 1931) 2.118. ("Our final view of logic will exhibit it . . . as faith come to years of discretion.")

experience give rise not just to judgments of taste, vision, touch, smell, and sound, but also to emotional, attitudinal, and normative judgments. That Holmes similarly rejected a positivist conception of experience as aggregations of sense data is also evident from many aspects of his work. For example, he appeals to the experience of the jury as the proper measure of liability in negligence cases. In such cases the jury is supposed to determine what "ought to have been done or omitted under the circumstances of the case" on the basis of its experience.⁷⁷ Another example is his famous statement:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.⁷⁸

In both these examples experience is portrayed as the wellspring of normative insight; Holmes clearly does not share the positivist's view that experience yields only factual knowledge.

Less easy to determine is whether Holmes, like Peirce, regarded experience as a series of essentially Kantian phenomena.⁷⁹ While there is some direct textual evidence that he did,⁸⁰ the most persuasive testimony comes from his descriptions of his faith. We have seen that Peirce invokes the concept of faith in order to connect the teachings of experience with an objective reality—a "universe of mind and matter."⁸¹ Holmes, likewise, describes a "faith in a universe not measured by our fears, a universe that has thought and more than thought inside of it."⁸²

The nature of this faith is apparent when Holmes describes the argument of the "Neo-Kantian idealist." The idealist proceeds from the premise that "[e]xperience takes place and is organized in consciousness, by its machinery and according to its laws,"⁸³ to the conclusion: "[t]herefore consciousness constructs the universe and as the fundamental fact is entitled to fundamental reverence."⁸⁴ What is wrong with this conclusion, Holmes argues, is not its premise but the fact that its proponents cannot behave in accordance with its conclusion.⁸⁵ For example, he suggests that when such individuals write books, they have given up

⁷⁷ See, e.g., O.W. HOLMES, *THE COMMON LAW* 119-20 (1963).

⁷⁸ *Id.* at 5.

⁷⁹ Kant distinguished between phenomena—the appearance of things in experience—and noumena—the thing-in-itself as it exists independently of experience.

⁸⁰ For example, Holmes described certain philosophers who pursue "some spiritual ray outside the spectrum that will bring a message to them from behind phenomena." O.W. HOLMES, *supra* note 37, at 276.

⁸¹ See *supra* text accompanying note 75.

⁸² O.W. HOLMES, *supra* note 37, at 297.

⁸³ *Id.* at 303-04.

⁸⁴ *Id.* at 304.

⁸⁵ In this argument, Holmes adopts, as the pragmatists did, Bain's definition of a belief as that upon which we are prepared to act. See, e.g., A. BAIN, *supra* note 52, at 568-76.

their claim to solitary possession of the universe—"they have done the great act of faith and decided that they are not God."⁸⁶ He goes on:

If the world were my dream, I should be God in the only universe I know. But although I cannot prove that I am awake, I believe that my neighbors exist in the same sense that I do, and if I admit that, it is easy to admit also that I am in the universe, not it in me.⁸⁷

While this argument has some obvious weaknesses,⁸⁸ it does suggest the basis of Holmes' faith. It is not simply that one cannot help believing in a "universe of mind and matter"⁸⁹ but that one cannot help behaving as though this were the case.⁹⁰

While Holmes' faith may find its origins in its irresistibility, its substance is conveyed in the following passage: "I believe that we are in the universe, not it in us, that we are part of an unimaginable, which I will call whole, in order to name it"⁹¹ To understand what Holmes meant, it is useful to compare this passage with similar statements by Emerson. Both Holmes and Emerson conceived of the relationship of individual consciousness to the "universe of mind and matter" (what Holmes frequently called the cosmos and what Emerson seemed to mean by "God") as that of a part to a whole. Thus Emerson writes: "Man is conscious of a universal soul within or behind his individual life. . . . This universal soul he calls Reason: it is not mine, or thine, or his, but we are its; we are its property and men."⁹² For Emerson, the part—that is the individual consciousness—can transcend its limitations and become identical to the deity that is the whole. This identity consists in feeling or knowing experience as it is experienced by God. Thus: "Standing on the bare ground,—my head bathed by the blithe air, and uplifted into infinite space,—all mean egotism vanishes. I become a transparent eyeball; I am nothing; I see all; the currents of the Universal Being circulate through me; I am part and parcel of God."⁹³ Thus, Emerson sees individual consciousness as part of the cosmos—but it is a part capable of merging with the whole, thus producing an insight into the nature and purposes of the whole cosmos.

As we have seen, Holmes shared Emerson's view of the individual

⁸⁶ O.W. HOLMES, *supra* note 37, at 304.

⁸⁷ *Id.*; see also JUSTICE OLIVER WENDELL HOLMES 165 (H. Shriver ed. 1936) (Holmes in letter to Dr. Wu).

⁸⁸ A solitary thinker might write books as notes to herself or because she learns that such efforts produced desired results within her consciousness.

⁸⁹ C. PEIRCE, *supra* note 54, at 1.186. Holmes asserts that the truth is what I "cannot help" but believe. O.W. HOLMES, *supra* note 37, at 304.

⁹⁰ Note that Peirce was reluctant to term a similar belief "faith" because "that implies the conceivability of distrust." See *supra* text accompanying note 76.

⁹¹ JUSTICE HOLMES TO DOCTOR WU: AN INTIMATE CORRESPONDENCE, 1921-1932 35 (1947) (letter of May 5, 1926 from Holmes to Wu).

⁹² R.W. EMERSON, *Nature*, in NATURE, ADDRESSES AND LECTURES 33 (1885).

⁹³ *Id.* at 15-16.

person as a part of a greater design but, while Emerson believed that individuals could transcend their limitations, Holmes believed that an individual could not aspire to merge with the whole. An individual consciousness, Holmes believed is an "inseverable part of the unimaginable," no more cognitively related to the cosmic purposes of the universe than "my little toe"⁹⁴ is to my purpose. Thus, Holmes rejects the earlier generation's notion that God and man are one in favor of his often-noted skepticism. As a consequence of his faith that "we are in the universe, [and] not it in us," it follows for Holmes that "all my ultimates have the mark of the finite upon them."⁹⁵

Holmes' response to the finite nature of his knowledge is typically pragmatic. His ultimates may not transcend into the realm of the greater whole, yet they are "the best I know" entitled to "practical respect, love, etc."⁹⁶ Nor is this a counsel of despair. "It is enough," he argues, that the universe has produced us and has within it, as less than it, all that we believe and love. If we think of our existence not as that of a little god outside, but as that of a ganglion within, we have the infinite behind us. It gives us our only but our adequate significance. A grain of sand has the same, but what competent person supposes that he understands a grain of sand.⁹⁷

It is useful to summarize Holmes' views on experience and faith and compare them to Peirce's. Both men are empiricists in that they believe that all that can be learned will be learned on the basis of experience. Their approach to empiricism conceives of experience as including whatever is present to consciousness. Each asserts the necessity of a faith that one's individual consciousness is not the limit of reality, while at the same time rejecting Emersonian notions that we can transcend our limitations in the context of direct experience. For Holmes, the ultimate reality is ever unknowable and unintelligible; Peirce agrees that ultimate reality (being outside of cognition) is unintelligible and, at least during any definite time period, unknowable.⁹⁸

III. THE ROLE OF REASON AND EXPLANATION IN THE DEVELOPMENT OF LAW

In the last section I considered Holmes' views on general philosophical questions. In the remainder of this article, I will consider his views

⁹⁴ 2 HOLMES-POLLOCK LETTERS 178 (M. Howe ed. 1946).

⁹⁵ Holmes, *supra* note 91, at 35. This hints at a pragmatic rejection of the relationship between experience and a knowable noumenal world. See also, O.W. HOLMES, *supra* note 37, at 315. ("If we believe that we come out of the universe, not it out of us, we must admit that we do not know what we are speaking about when we speak of brute matter.")

⁹⁶ JUSTICE HOLMES TO DOCTOR WU, *supra* note 91, at 35.

⁹⁷ O.W. HOLMES, *supra* note 37, at 316.

⁹⁸ Obviously, I qualify this because Peirce believed that the "universe of mind and matter" could be known after some indefinite period of practicing the scientific method. C. PEIRCE, *supra* note 54, at 1.186.

on law in the context of the philosophical world view developed in the last section.

Like many of the pragmatists of his era, Holmes believed that the methods of science provided the central legitimate means of furthering human inquiry. Respect for science as a method for law is everywhere apparent in his writings. What is less apparent is Holmes' general conception of science and its method, and his particular ideas about how the scientific method could be applied to legal doctrine or legal cases.⁹⁹ He clearly believed that judges could be aided by scientific evaluations of the effects of judicial policies. It is equally clear that he thought that there could be a scientific anthropological study of law and legal institutions. But these two notions do not exhaust Holmes' conception of legal science, for he thought that he was doing something scientific in writing about the law. What was it about his own legal projects that qualified them as science?

One scientist criticized Holmes' notion of science as being naive and ill-informed.¹⁰⁰ While that criticism is probably inflated, it is true that Holmes' own work lacks any systematic account of his method. When one considers that Holmes conceived himself as bringing a new method to the study of law,¹⁰¹ it is surprising how little systematic exposition he provides concerning how this method should operate.¹⁰² Thus my discussion will look to examples of Holmes' work to determine his underlying methodology.

Even though Holmes emphatically rejects the notion that law rests exclusively on logic, he himself was interested in the application of logical tools to legal inquiry. Langdell's methodology most clearly typified the kind of legal logic that Holmes found unsatisfactory. Holmes thought that Langdell's search for an "elegantia juris" was faulty because: "the effort to reduce the concrete details of an existing system to the merely logical consequence of simple postulates is always in danger of becoming unscientific, and of leading to a misapprehension of the nature of the problem and the data."¹⁰³ In Holmes' view, Langdell's use of

⁹⁹ Holmes conceived of this as his project from early in his career. Writing to William James in 1868, he said, "I now go on with an ever increasing conviction that law as well as any other series of facts in this world may be approached in the interests of science." R. PERRY, *THE THOUGHT AND CHARACTER OF WILLIAM JAMES* 92 (abr. ed. 1948).

¹⁰⁰ M. HOWE, vol. I, *supra* note 10, at 221. ("[Thomas Barbour] not only emphasized that Holmes 'knew of science only by hearsay so to speak,' but insisted that his 'curiously definite idea about science [was] an utterly erroneous one.' The error, according to Thomas Barbour, was derived from Holmes' mistaken belief 'that the scientist, given time and painstaking research, could reasonably be expected to solve all problems.' He was, in brief, 'extraordinarily trusting and uninformed.'") (quoting T. BARBOUR, *NATURALIST AT LARGE* 150-51 (1943)).

¹⁰¹ See generally, M. HOWE, vol. II, *supra* note 10.

¹⁰² And what little there is is not terribly helpful. For example, Holmes writes: "And this suggests a further remark. Law is not a science, but is essentially empirical." Holmes, *Codes and the Arrangement of Law*, 5 AM. L. REV. 1, 4 (1871).

¹⁰³ Holmes, *Book Notice*, 14 AM. L. REV. 233, 234 (1880).

logic not only distorted the process of judicial decision making¹⁰⁴ but also obscured “the forces outside of it [the law] which have made it what it is” and neglected its roots “in history and the nature of human needs.”¹⁰⁵

While Holmes was emphatic in repudiating the effort to rationalize legal results, he also believed that there was an appropriate place for two kinds of logical analysis in the study of law. First, the abstract legal conceptions could be analyzed to see what kind of particular legal relations they embody, and second, abstract and general conceptions could be posited that would make the law easier to understand and apply.

A. The Analysis of Abstract Legal Conceptions As Particular Relationships

Holmes advocates analyzing an abstract or general conception in terms of its concrete constituents: “A generalization is empty so far as it is general. Its value depends on the number of particulars which it calls up to the speaker and the hearer.”¹⁰⁶ It is clear from Holmes’ writing that these “particulars” can be either of two kinds. They can be the particular historical instances from which general conceptions arise, or they can be the particular effects upon our conduct that general conceptions have by virtue of predicting outcomes. Holmes used both kinds of analysis to formulate a method of particularization that encompassed both historical antecedents and the future actions of courts.¹⁰⁷

1. *The Analysis of Historical Antecedents.*— Holmes is perhaps best known for his suggestion that the analysis of legal conceptions should proceed by examining the origins of such conceptions in historical circumstances. Dismissing Langdell as a “legal theologian,”¹⁰⁸ Holmes writes: “In our less theological and more scientific day, we explain an object by tracing the order and process of its growth and development from a starting point assumed as given.”¹⁰⁹ The purpose of examining historical origins is at once theoretical and practical.¹¹⁰

The practical purpose of focusing upon the historical origins of legal

¹⁰⁴ In his review of Langdell’s contracts casebook, Holmes wrote: “Decisions are reconciled which those who gave them meant to be opposed, and drawn together by subtle lines which never were dreamed of before Mr. Langdell wrote.” *Id.* at 233.

¹⁰⁵ *Id.* at 234.

¹⁰⁶ O.W. HOLMES, *supra* note 37, at 240; *see also id.* at 238 (“We must think things not words, or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true.”).

¹⁰⁷ I have noted below that the pragmatic maxim, itself, admits to this ambiguity about the nature of particular or concrete phenomena which are to form the constituents of abstract conceptions. *See infra*, text accompanying note 132.

¹⁰⁸ Holmes, *supra* note 103, at 234.

¹⁰⁹ O.W. HOLMES, *supra* note 37, at 210.

¹¹⁰ *Id.* at 211.

conceptions is largely prophylactic. Analysis of the origins of a concept grounds that concept in the practical circumstances from which it arose. Historical analysis is a "tool": "Its use is mainly negative and skeptical. It may help us to know the true limit of a doctrine but its chief good is to burst inflated explanations."¹¹¹

A good example of this kind of analysis is Holmes' treatment of the concept of possession.¹¹² In *The Common Law*, he begins his discussion of possession with the question: "Why is possession protected by the law, when the possessor is not also an owner?"¹¹³ He then explores the "German" explanation—that possessing property is the exercise of will, and that the will is entitled to respect.¹¹⁴ That explanation, he argues, legitimates bogus legal rules—as, for example, the rule that "the man in possession is to be confirmed and maintained in it until he is put out by an action brought for that purpose."¹¹⁵ While the Germans sought their answers in ever more abstract theories, Holmes' approach delved more deeply into the doctrine's historical roots. Where, he asks, did this concept come from?¹¹⁶ After tracing the various legal doctrines surrounding the concept of possession, he concludes that the concept stems from the particularities of pleading and practice at particular stages of legal development. These origins, Holmes argues, should not only sharply limit our conception of the relevance of "possession" to contemporary legal discourse, but should also guard us from the temptation to resolve legal questions by means of speculative philosophy.

Holmes' approach to historical analysis is specifically endorsed by the pragmatic maxim. The maxim advocates examining general conceptions in terms of their concrete effects on experience.¹¹⁷ Holmes' discussion of possession applies this maxim, in effect, by searching out the historical facts and arguing that these facts constitute not only a sufficient explanation of legal conceptions, but also the only acceptable basis for further theorizing.

2. *The Predictive Theory of Law.*— The second way in which Holmes reduces general conceptions to particular facts is through ana-

¹¹¹ *Id.* at 225.

¹¹² See F. KELLOGG, *supra* note 15, at 48-57 (Kellogg makes a similar point about Holmes' theory of possession and draws the analogy to Peirce's pragmatic maxim).

¹¹³ O.W. HOLMES, *supra* note 77, at 163.

¹¹⁴ *Id.* at 164.

¹¹⁵ *Id.* at 165.

¹¹⁶ *Id.* at 167 ("The first call of a theory of law is that it should fit the facts. It must explain the observed course of legislation.").

¹¹⁷ Peirce's editors, Hartshorne and Weiss, wrote in their introduction to the *Collected Papers* that the mark of pragmatism was that it reversed "the traditional philosophical view that the abstract explains the concrete, and that the most abstract ideas are ultimate and unanalyzable. Pragmatism . . . was thus Peirce's way of insisting that abstractions must give an account of themselves, and must do it in terms of concrete experience." C. PEIRCE, *supra*, note 46, at v.

lyzing legal terms as predictions of how courts will act in concrete disputes. The general notion is explained, not through the concrete circumstances that gave rise to it, but through the concrete actions that are prompted by belief in the concept. Thus, law is in part a question of prediction: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."¹¹⁸ To say that a person has a legal duty is merely to say "that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money."¹¹⁹ For example, what does it mean to say that one has a duty to perform one's contracts? Holmes answers this question not by formulating a theory of moral or legal obligation, but by saying: "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else."¹²⁰ Similarly, Holmes analyzes a right:

A legal right is nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation by the aid of public force. Just so far as the aid of the public force is given a man, he has a legal right, and this right is the same whether his claim is founded on righteousness or iniquity.¹²¹

Thus, his predictive theory of law, like his analysis of the law in terms of historical antecedents, is a straightforward application of the pragmatic maxim. Indeed, Fisch has made a historical case that both Peirce's pragmatic maxim and Holmes' predictive theory of law were worked out during the period in which *The Metaphysical Club* was meeting.¹²² Howe is skeptical about the influence of pragmatism upon Holmes, citing not only his scorn for pragmatism and its followers¹²³ but also Holmes' focus during this period in his life upon understanding Austin—a concern that in Howe's view occupied Holmes far more than did "searching for a jurisprudence consistent with the philosophical premises of his generation."¹²⁴ Howe's doubts concerning Holmes' conscious motivation are well taken, but the similarities I note below suggest that there is a substantial relationship between the two theories.

One clear similarity between Peirce's pragmatic maxim and Holmes' predictive theory of law is that the two theories have the same avowed purposes. According to Peirce, his pragmatism has both philosophical and practical purposes: the maxim serves to clear up the confusions of

¹¹⁸ O.W. HOLMES, *supra* note 37, at 173.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 175.

¹²¹ O.W. HOLMES, *supra* note 77, at 169.

¹²² Fisch, *supra* note 13 at 92-93.

¹²³ M. HOWE, vol. I, *supra* note 10, at 75.

¹²⁴ *Id.* at 75. *But see* O.W. HOLMES, *supra* note 37, at 223-24. ("Any one who thinks about the world as I do does not need proof that the scientific study of any part of it has an interest which is the same in kind as that of any other part.")

metaphysics,¹²⁵ and it is also useful for the practical purposes of life.¹²⁶ Holmes offers his theory for similar philosophical and practical purposes. As we saw in the discussion of possession,¹²⁷ Holmes returned to the historical origins of concepts in order to avoid the over-generalizations and incomprehensible statements of the German theorists, thereby discarding what he took to be useless philosophizing. On the more practical side, his analysis is offered for its prophylactic effect. He argues, for example, that the problem with a vague and general conception of right is that it obscures the fact that different legal rights have differing extensions. This ambiguity leads one erroneously to infer from the fact that a man has a right to do a certain thing that he may do that thing no matter what his motives.¹²⁸

The connection between Holmes and Peirce becomes even stronger when we note that the two men use similar examples to explain their meaning. In *How to Make our Ideas Clear*, Peirce illustrates his maxim using the concept of a force, stating that the concept is entirely understood when we explain its effect upon acceleration: "This is the only fact which the idea of force represents, and whoever will take the trouble clearly to apprehend what this fact is, perfectly comprehends what force is."¹²⁹ Holmes frequently offers a similar analogy, an appeal to the concept of gravity, in explaining his concept of legal rights as predictors of how the courts will act.¹³⁰ There is also a certain similarity in structure between the two theories. The pragmatic maxim directs our attention to practical effects. The version of the maxim quoted earlier refers to practical effects in the form of conceivable effects upon our experience; other versions of the maxim refer to practical effects upon conduct. For example, Peirce writes:

For the maxim of pragmatism is that a conception can have no logical effect or import differing from that of a second conception except so far as, taken in connection with other conceptions and intentions, it might conceivably modify our practical conduct differently from that second conception.¹³¹

Similarly, when Holmes analyzes legal conceptions in terms of the partic-

¹²⁵ C. PEIRCE, *supra* note 46, at 5.6. Pragmatism expects, Peirce writes,

to bring to an end those prolonged disputes of philosophers which no observations of facts could settle, and yet in which each side claims to prove that the other side is in the wrong. Pragmatism maintains that in those cases the disputants must be at cross-purposes. They either attach different meanings to words, or else one side or the other (or both) uses a word without any definite meaning. What is wanted, therefore, is a method of ascertaining the real meaning of any concept.

Id. at 5.5.

¹²⁶ See e.g., *id.* at 5.25.

¹²⁷ See *supra* text accompanying notes 112-16.

¹²⁸ O.W. HOLMES, *supra* note 37, at 241.

¹²⁹ C. PEIRCE, *supra* note 46, at 5.404.

¹³⁰ See, e.g., O.W. HOLMES, *supra* note 37, at 200, 212; 2 HOLMES-POLLOCK LETTERS; *supra* note 94, at 200, 212.

¹³¹ C. PEIRCE, *supra* note 46, at 5.196. Peirce elsewhere describes "practical consequences" as

ular, he expresses the particular in terms both of historical origins and of effects upon future conduct.¹³²

B. *The Creation of General Classes as Explanatory Hypotheses*

One of the strongest common bonds between Holmes and Peirce is their shared approach to generalization, which they conceptualize in terms of the same basic technique and function. I will first describe these shared views and then consider the effect of this analysis on Holmes' legal theory.

1. *Generalizations as Explanations.*— Both the predictive theory of law and the analysis of the historical antecedents of law apply the strategy advocated by the pragmatic maxim, analyzing general terms in terms of their practical consequences. Some philosophers have coupled this kind of reductionism with the conclusion that general conceptions are little more than names or abbreviations for lists of practical results. Peirce entirely rejects this conclusion by embracing the doctrine of scholastic realism; Holmes' own attitude is equivocal.¹³³

On the one hand, Holmes seems to argue that his predictivist theory entails the conclusion that general conceptions represent a pretense—that they are in fact empty phrases. He writes:

It starts from my definition of law . . . , as a statement of the circumstances in which the public force will be brought to bear upon men through the courts: that is the prophecy in general terms. Of course the prophecy becomes more specific to define a right. So we prophesy that the earth and sun will act towards each other in a certain way. Then as we pretend to account for that mode of action by the hypothetical cause, the force of gravitation, which is merely the hypostasis of the prophesied fact and an empty phrase. So we get up the empty substratum, a *right*, to pretend to account for the fact that the courts will act in a certain way.¹³⁴

In this passage, Holmes makes an analogy between hypothesizing a right to explain legal results, and hypothesizing a force to explain physical phenomena. To say that someone has a right to do *x* is to predict that public force will prevent interference with that person's actually doing *x*. That the person has a right does not account for the fact that interference will be prevented, but only "pretends to account" for it.

On the other hand, Holmes also writes in ways that suggest that the process of generalization has some real basis. Thus:

It is the merit of the common law that it decides the case first and determines the principle afterwards. Looking at the forms of logic it might be

"consequences either in the shape of conduct to be recommended, or in that of experiences to be expected. . . ." *Id.* at 5.2 (emphasis added).

¹³² See *supra* text accompanying note 107.

¹³³ Speziale overlooks the ambiguity in Holmes' attitude in arguing that Peirce and Holmes, in fact, shared a belief in the reality of generals. Speziale, *supra* note 18, at 29.

¹³⁴ 2 HOLMES-POLLOCK LETTERS, *supra* note 94, at 212 (emphasis in original).

inferred that when you have a minor premise and a conclusion, there must be a major, which you are also prepared then and there to assert. But in fact lawyers, like other men, frequently see well enough how they ought to decide on a given state of facts without being very clear as to the *ratio decidendi*. It is only after a series of determinations on the same subject-matter, that it becomes necessary to "reconcile the cases," as it is called, that is, by a true induction to state the principle which has until then been obscurely felt.¹³⁵

If general terms are but empty phrases that are mere surrogates for particular results in particular cases, if the general principle is but a pretense, why should lawyers have to struggle to determine the *ratio decidendi* of a case? How is it that a principle can be only "obscurely felt," while the result in the particular case is seen "well enough" to decide the case? Holmes thinks that it is important for judges not only to get the result right in the individual case, but also to formulate a correct general principle that "explains" the result. But if that is his view, then general legal terms cannot be merely the names for a finite number of individual cases.

There are several explanations for this apparent discrepancy in Holmes' views. Howe, I think, would favor a historical explanation. He notes that in the period between the series of articles which appeared in the *American Law Review* and *The Common Law*, Holmes steadily weaned himself from analytical questions in favor of reporting the historical development of the law:

Having become convinced that "an enumeration of the actions which have been successful, and of those which have failed, defines the extent of the primary duties imposed by the law," (Am. L. Rev. 7: 659-60) Holmes renounced the analytic faith which had first inspired him and set his course by the historian's compass.¹³⁶

Thus, if we accept Howe's analysis, Holmes simply changed his mind concerning the role of generalization in legal studies. While in the early years Holmes believed that legal scholarship should generalize the results in legal cases, he later came to believe that a simple enumeration of results in particular cases would be entirely adequate.

I think that Howe's suggestion is wrong for two reasons. On a textual level, Holmes spoke throughout his life about the desirability of generalizing legal results. For example, *The Path of the Law* advocates the use of "rational generalization"¹³⁷ and jurisprudence as law's "most generalized part."¹³⁸ The second reason is more conceptual: it is impossible to separate Holmes' historical method from the generalizations of analytical theory. Holmes' most historical work, *The Common Law*, does not simply report the results of individual cases. Instead, the historical de-

¹³⁵ Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870).

¹³⁶ M. HOWE, vol. I, *supra* note 10, at 82.

¹³⁷ O.W. HOLMES, *supra* note 37, at 190.

¹³⁸ *Id.* at 195.

velopment of doctrine is used as an argument to show that certain contemporary general legal categories are misleading or inelegant. The book does not represent the triumph of individual cases over legal theory, but instead argues that legal theory is done properly only when it takes account of the historical facts surrounding the development of the common law.

My own explanation for the discrepancy between Holmes' two very different attitudes towards generalization is that they are responses to two quite different issues. The first statement (general explanations are a pretense) occurs when Holmes is denying the relevance of the moral categories to legal discourse;¹³⁹ the second is found in *Codes, and the Arrangement of the Law*, where Holmes explicitly considers the role of generalization in legal theory. The first quotation represents Holmes' concern about the misuse of moral generalizations in legal theory, while the second plainly acknowledges that generalizations of the proper kind are essential if legal theory is to predict outcomes.

To understand what was, for Holmes, the power of generalization, we must examine his most sustained effort at analytical jurisprudence. Early in his career Holmes sought to find an appropriate classification for legal subject matter.¹⁴⁰ Holmes' purpose in trying to classify law was educational:

It suffices to say in opposition to so-called practical schemes, which are sometimes formally suggested, and always implicitly by books on such subjects as telegraphs, railroads, etc., that the end of all classification should be to make the law knowable; and that the system best accomplishes that purpose which proceeds from the most general conception to the most specific proposition or exception in the order of logical subordination.¹⁴¹

Holmes' classification scheme was a kind of heuristic.¹⁴² That he viewed generalizations as heuristics is apparent in statements such as the following: "It is to make the prophecies easier to be remembered and to be understood that the teachings of the decisions of the past are put into general propositions."¹⁴³ The general scheme "explained" law in the

¹³⁹ It is followed by: "We have gotten accustomed to our phraseology and might find it hard for a time to do without it; but in that as in other cases I think our morally tinted words have caused a great deal of confused thinking." 2 HOLMES-POLLOCK LETTERS, *supra* note 94, at 212.

¹⁴⁰ Peirce occupied himself with a similar endeavor. Part of the purpose of this effort was epistemological. Sciences had to be ordered so that their discoveries would not be circular. Logic, for example, should not presuppose psychology if psychology, in turn, is going to rely on logic. This notion of one branch of knowledge presupposing another is not part of Holmes' classification scheme.

¹⁴¹ Holmes, *The Arrangement of the Law—Privity*, 7 AM. L. REV. 46 n.2 (1872), reprinted in Kellogg, *supra* note 15, at 96.

¹⁴² "The number of our predictions when generalized and reduced to a system is not unmanageably large. They present themselves as a finite body of dogma which may be mastered within a reasonable time." O.W. HOLMES, *supra* note 37, at 169.

¹⁴³ *Id.* at 168.

sense that it unified diverse legal conceptions and made them easier to assimilate.

Holmes' notion of generalization in the law has much in common with Peirce's concept of abduction. Peirce described abduction as "studying facts and devising a theory to explain them."¹⁴⁴ A similar explanation is given by Holmes of the process of legal generalizations:

It seems to me well to remember that men begin with no theory at all, and with no such generalization as contract. They begin with particular cases, and even when they have generalized they are often a long way from the final generalizations of a later time.¹⁴⁵

For both Peirce and Holmes, then, generalizations have their origin in the observation of individual cases. Peirce describes it even more specifically:

[T]he operation of adopting an explanatory hypothesis—which is just what abduction is—was subject to certain conditions. Namely, the hypothesis cannot be admitted, even as a hypothesis, unless it be supposed that it would account for the facts or some of them. The form of inference therefore is this:

The surprising fact, C, is observed; But if A were true, C would be a matter of course, Hence, there is reason to suspect that A is true.¹⁴⁶

Analogously, Holmes might say: we see that Jones must return Smith's horse; if we had a principle that a person cannot retain another's property against her will, the result in the Smith case would be a matter of course; thus we have reason to suspect that such a principle governs our relations. The principle explains the result but is subject to revision in the light of later cases.

For both Holmes and Peirce, it makes sense to speak of two distinct forms of explanation. On the one hand, general terms are explained in terms of the particular cases that give rise to them. On the other hand, generalizations explain the individual cases in a different way by unifying experience and rendering it intelligible.¹⁴⁷

2. *The Embeddedness of Legal Concepts.*— I have labored over this question of generalization because it is related to Holmes' views concerning what I will call the "embeddedness" of legal concepts.¹⁴⁸ A good

¹⁴⁴ C. PEIRCE, *supra* note 46, at 5.145.

¹⁴⁵ O.W. HOLMES, *supra* note 37, at 218. Compare "Abduction consists in studying the facts and devising a theory to explain them. Its only justification is that if we are ever to understand things at all, it must be in that way." C. PEIRCE, *supra* note 46, at 5.145.

¹⁴⁶ C. PEIRCE, *supra* note 46, at 5.189.

¹⁴⁷ The similarities between Peirce and Holmes with respect to the process of generalization has led one author to suggest an analogy between Peirce's scholastic realism and Holmes' idea of legal ultimates. See Speziale, *supra* note 18. The suggestion is an interesting one, but an examination of it would take us very far afield. Peirce gives several versions of his scholastic realism, and Holmes' attitude toward generalization is, as I have suggested in the text, equivocal at best.

¹⁴⁸ Holmes does not explicitly address the role of legal concepts in legal decision making. In this

description of what I mean by “embeddedness” is found in *Law in Science—Science in Law* where he writes:

[C]ontinuity with the past is only a necessity and not a duty. As soon as a legislature is able to imagine abolishing the requirement of consideration for a simple contract, it is at perfect liberty to abolish it, if it thinks it wise to do so, without the slightest regard to continuity with the past. That continuity simply limits the possibilities of our imagination, and settles the terms in which we shall be compelled to think.¹⁴⁹

In what sense is our imagination constrained by legal conceptions? Isn't it the essence of every disputed case that at least two outcomes are perfectly conceivable? Even Holmes' example is unconvincing. Can't we easily imagine a simple rule of promise—one devoid of any consideration requirement? These questions suggest a need to consider more closely the relation between our general conceptions and our experience. Peirce's analysis of abduction is aimed precisely at this issue.

The Peircean notion of abduction relies on a rough distinction between facts, on the one hand, and the abductive inferences or generalizations which they prompt, on the other. This rough distinction is obviously an oversimplification, since Peirce portrays cognition as a series of individual thoughts in which each thought interprets a previous one. He consequently denies that any individual thought in a series could be traced back to an original thought representing brute fact. Instead, he bases his distinction between fact and theory on a more subtle conception of the irresistibility of certain judgments. He describes facts in terms of perceptual judgments—a judgment is “perceptual” with respect to some individual if that individual is unable to believe that the judgment is false. Theoretical judgments, on the other hand, are defined as those about which we can be critical. This distinction replaces the traditional logical distinction between fact and theory with a far more subtle, psychological one. And from this move it follows that the distinction between perceptual judgments and abductive inferences is not a bright-line distinction. He writes:

[A]bductive inference shades into perceptual judgment without any sharp line of demarcation between them; or, in other words, our first premisses, the perceptual judgments, are to be regarded as an extreme case of abductive inferences, from which they differ in being absolutely beyond criticism.¹⁵⁰

In asserting that the line between fact and theory is a subtle psycho-

section, I use Peirce's description of the process of perception to “flesh out” a theory that would explain Holmes' somewhat offhand comments on this subject.

¹⁴⁹ O.W. HOLMES, *supra* note 37, at 211.

¹⁵⁰ C. PEIRCE, *supra* note 46, at 5.181; *see also id.* at 5.185, where Peirce writes that we “perceive what we are adjusted for interpreting, though it be far less perceptible than any express effort could enable us to perceive; while that, to the interpretation of which our adjustments are not fitted, we fail to perceive although it exceed in intensity what we should perceive with the utmost ease, if we cared at all for its interpretation.” While thoughts have surely been given more graceful and intelligible

logical matter rather than a logical one, Peirce is denying the positivist division between facts, on the one hand, and theories about facts, on the other. Peirce believed that so-called "facts" were already interpreted in the context of theories actually held by the observer. Thus, in each cognition, there is an element of the particular—the appearance of the cognition as a concrete thing—and there is an element of the general—that concrete thing interpreted by a general theory. For Peirce, the relationship between the particular and the general not only involves reciprocal explanations, as we saw above, but also the inherent duality present in all aspects of cognition.

In talking about the inconceivability of certain legal alternatives, I take Holmes to be making a similar point about legal theories. To put it in simple terms, Holmes denies that there is a distinction between fact and law. He is striking deep at the formalist view that judges apply *rules* to the *facts* of individual cases. Holmes sees no real distinction between the case as a particular collection of factual circumstances and the legal interpretation of those circumstances. This is because our legal theories are embedded in our apprehension of the case, in ways that cannot be rooted out. Legal generalizations do not merely sum up past cases; they also determine to a large degree the appearance of future ones.

Perhaps an example will make this clearer. One of Holmes' most famous decisions was the "stop, look, and listen" rule he suggested in *Baltimore & Ohio Railroad v. Goodman*.¹⁵¹ This case involved an accident at a railroad crossing. The decedent had been driving slowly and carefully but, because of a section house beside the track, had not had a clear view of the track until he was within twenty feet of the rail. At trial, the defendant railroad had asked for a directed verdict on the grounds that the decedent had been contributorily negligent. The trial court denied this request and the case went to the jury, which found for the plaintiff. The Supreme Court reversed, with Holmes writing:

When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle. . . .¹⁵²

Holmes' approach to resolving this case is worth noting. He does not use abstract legal reasoning in his decision; he merely makes the common sense observation that it is the motorist who must stop for the train and not the train for the motorist. Holmes does not frame the issue

expression, I interpret Peirce as saying here that our theories create expectations about what we are about to experience, and that these expectations affect our experience—by making us quick to perceive those aspects that match our expectations, and slow to process unexpected data.

¹⁵¹ 275 U.S. 66 (1927).

¹⁵² *Id.* at 69-70.

as a two-fold problem in which fact and value are distinct such as: 1) what does the law (or reason or morality) require; and 2) do the facts show that this requirement was met. Instead, he expresses himself in terms that defy an easy separation between fact and value. While his common sense observations presuppose many factual and normative judgments that, in some sense, could be reconstructed, Holmes plainly reaches his decision without overt reference to these judgments. Indeed, his judicial technique is plainly consistent with his view, discussed above,¹⁵³ that the decision in the individual case comes first while abstract normative principles are only formulated in the context of a later analysis of the results in individual cases.

The theory of embeddedness comes to this: a judge is able to reach an appropriate result in the individual case whether or not she is able to articulate any general moral or legal principles relevant to the case. Her result in the case arises from an interconnected theory of fact and value which may be approximately reconstructed by examining her decisions in a number of cases, but which is never entirely severable from the ongoing process of adjudication. An analogy may make this clearer:

Victoria goes to a restaurant three times a day and selects an item from the menu. She never has difficulty deciding what to order but is unable, except by reflection upon her memory of past ordering, to articulate any general principles of menu-ordering. Even after reflection, Victoria can only assemble a set of principles which are woefully incomplete and somewhat inconsistent. Though she has arrived at her best judgment about the underlying theory she may still order what *she wants* to eat and not what *the theory says she will want* to eat. This is because her inclination in certain cases is more certain than her theory. Nevertheless, her inclination may be shaped by her theory in the sense that her preferences are formed in a context that includes her understanding about what she likes to eat.¹⁵⁴

As I read Holmes, a common law judge exercises her judgment in much the same way that Victoria decides what to order. As discussed below, I take Holmes to be an emotivist with respect to normative questions.¹⁵⁵ If I am right, then in Holmes' view the judge's inclination or feeling about a case will usually be decisive; her theory will rarely move her to come to a different result. But the judge also does not form her response to the case in a vacuum. The received legal tradition colors her perception of the case by suggesting the possible frameworks within which it may be described or characterized. Her theory is embedded in her perception of the case.

The historical development of the "stop, look, and listen" rule illustrates Holmes' point about the ongoing need for subsequent cases to assist in the reconstruction of legal principles. Seven years after *Goodman*

¹⁵³ See *supra* text accompanying note 145.

¹⁵⁴ This analogy was suggested by my colleague Richard Craswell.

¹⁵⁵ See *supra* text accompanying note 158 *et seq.*

and two years after Holmes had left the Supreme Court, the Court decided *Pokora v. Wabash Railway Co.*¹⁵⁶ *Pokora* also involved a railroad crossing accident, but in this case the crossing was at a "frequented highway in a populous city."¹⁵⁷ The view down the track was obstructed by trains left by the defendant on a siding, and the approaching train sounded no whistle. Finding that the decedent had not stopped his car, the trial court directed a verdict for the defendant on the basis of *Goodman*. The Supreme Court reversed. Writing for the Court, Justice Cardozo acknowledged that the result in *Goodman* had clearly been appropriate, but argued that the difference in the factual circumstances in *Pokora* justified the plaintiff's reliance upon the railroad for some kind of warning.

As every first-year law student knows, the difficulty with cases like *Goodman* and *Pokora* is how to unpack the recalcitrant phrase "under these circumstances." No mere mechanical adding up of the facts of the opinion will make this phrase more specific. Not even a full statement by the judge of which facts are relevant and which are not would enable a subsequent judge or a legal scholar to unpack fully the legal or moral principles that lurk behind the judge's decision.

Holmes' analysis of legal reasoning is reminiscent of Peirce's analysis of generality. Like Peirce, Holmes appears to reject a formal division between fact and theory. Holmes does not believe in a distinction between legal cases and the principles which decide them. He also does not believe in a distinction between principles and the cases which form them. Instead, the process is reciprocal; the individual case owes its shape to the judge's preexisting theory of legal analysis, but that analysis has, in turn, been formed by the individual cases the judge has confronted in the past. Thus legal explanations run both ways—from the case to the principle and from the principle to the case. The first is abductive and heuristic; the second roots the meaning of a principle in the individual circumstances to which it might be applied.

It is the reciprocal nature of particular and general explanations in Holmes' legal philosophy that makes it distinctive. Holmes shares the positivist's insistence upon studying law within the context of legal practices and institutions. Yet, unlike the positivist, he discerns in the common law judge a rationalizing tendency that distinguishes her from an arbitrary sovereign. Because he recognizes a role for reason in the development of the law, he shares common ground with the formalist—but he is not a formalist. He rejects the formalist paradigm, with its rationally developed and timeless legal rules capable of application to the facts of any individual case. In denying the separation between fact and legal theory, Holmes recognizes that theory exists not merely in black letter

¹⁵⁶ 292 U.S. 98 (1934).

¹⁵⁷ *Id.* at 101.

rules but in our very characterization of legal cases. Like Peirce's conception of logic, Holmes' notion of legal theory presents human reason not merely in its deductive mode, but as a richer and more complex attempt to make sense of human experience.

IV. THE RELATIONSHIP BETWEEN LAW AND MORALITY

In the last section, I argued that Holmes was neither a positivist nor a formalist regarding the role of reason in the development of law. In this section, I will argue that he was neither a positivist nor a naturalist with respect to his views on the relationship between law and morality.

The positivist and the naturalist have a fundamental disagreement about the nature of the obligations that the law imposes. The positivist argues that legal obligations arise from the power of the sovereign to punish disobedience. The naturalist takes the opposite approach and locates legal obligation in the moral obligation to comply with morally just laws. Since Holmes rejects naturalism, some commentators have insisted that he is really a positivist; others, pointing to his appeals to conscience and morality, have suggested that he is just plain inconsistent. Obviously such arguments presuppose the exhaustiveness of the positivism/naturalism dichotomy. In fact, I think it is the pervasive acceptance of this dichotomy—a dichotomy that is the legal echo of the conventionalism/realism dichotomy in moral theory—that has made it difficult for legal scholars to interpret Holmes.

In this section, I will demonstrate that Holmes had two different but not inconsistent views about the relationship between law and morality. I will begin by putting Holmes' views on legal theory in the context of what I take to be pragmatic moral theory: first, by examining Peirce's views concerning the nature of morality; and then, by considering Holmes' conception of duty within that context. Both men embraced what today would be called an emotivist ethical theory.¹⁵⁸ An emotivist theory is neither conventionalist nor realist. It is not a realist theory because it readily concedes that the dictates of morality are highly contingent and perspective-dependent; it is not a conventionalist theory because it portrays morality as the natural emotional response of persons to particular features of their environment. Next, I will show that this non-realist, non-conventionalist view of morality leads to a non-positivist, non-naturalist view of the legal order. Thus, in Holmes' analysis, the relationship of law both to morality and to power depends upon the standpoint of the person doing the describing. Finally, I will relate Holmes' views on legal theory to the general philosophical views discussed in Section III.

¹⁵⁸ An emotivist moral theory identifies moral judgments with statements about one's own emotional reaction to a moral question.

A. *Pragmatic Method and Moral Philosophy*

Peirce's views on moral theory must be considered in the context of his views on experience. Unlike the logical positivist, the pragmatist does not exclude as meaningless anything present to us in consciousness that is not traceable to one of the five senses. Instead, it is the philosopher's job to describe what is present; in particular, it is the task of the moral philosopher to describe the way in which moral considerations enter our experience. As we saw in the last section, this observational theory does not result in endless recitation of particular facts. According to the pragmatists, the general terms by which we characterize such facts are embedded in the observation of those facts. Thus observation leads inevitably to more general interpretations. Given this view of philosophical method, it is not surprising that when Peirce turns to moral philosophy, he starts with what might be termed the phenomenology of moral conduct.

1. *Moral Conduct.*¹⁵⁹—It would seem, at first blush, that Peirce does not share the positivist's difficulties in doing ethics. Even though he confines the area of possible knowledge to what is experienced, the experience of which he speaks contains inherently evaluative items. Peirce finds no distinction between facts and values, based on their presence or absence from experience. We experience both that something is red, and that it is vile or fit to be changed. However, for Peirce, the difficulty posed by normative science is that such cognitions are fundamentally subjective. Emotion is not the sort of thing that is uniformly shared by others. Peirce explains the difference in this way:

[A]ny emotion is a predication concerning some object, and the chief difference between this and an objective intellectual judgment is that while the latter is relative to human nature or to mind in general, the former is relative to the particular circumstances and disposition of a particular man at a particular time.¹⁶⁰

Since Peirce was strongly committed to the position that normative science could be objective, subjective emotions could not in his view form the bases of ethical studies. The problem Peirce faces is how to locate something in cognition that is at once objective or recognized by others, and yet is capable of supporting normative judgments. The problem is particularly acute for him because he recognized, as the positivists did not, the normative character of logical judgments.

Peirce defines normative science as the "analysis of the conditions of attainment of something of which purpose is an essential ingredient;"¹⁶¹ or more explicitly, as a science that "distinguishes what ought to be from

¹⁵⁹ A substantially similar version of this section appears in Hantzis, *Peirce's Conception of Philosophy*, 23 TRANSACTIONS OF THE CHARLES S. PEIRCE SOCIETY 289.

¹⁶⁰ C. PEIRCE, *supra* note 46, at 5.247.

¹⁶¹ C. PEIRCE, *supra* note 54, at 1.575.

what ought not to be.”¹⁶² There are three normative sciences: logic, which defines good reasoning; ethics, which defines good conduct; and aesthetics, which defines good states of affairs.

We have already seen that Peirce thought there were two aspects of cognition—its “brute” aspect and its “representational” aspect.¹⁶³ I think that ultimately he added a third, as he began to explore the basis for normative science in cognition. My evidence for this is contained in a fragment that his editors labeled *Ideals of Conduct*.¹⁶⁴ In this fragment, he describes the process by which people determine what they should do. He begins the discussion with an observation that “[e]very man has certain ideals of the general description of conduct that befits a rational animal in his particular station in life, what most accords with his total nature and relations.”¹⁶⁵ These ideals are formed early in childhood, and are largely taught to the child by family and friends. As time goes on, one’s individual ideals are “shaped to his personal nature and to the ideas of his circle of society rather by a continuous process of growth than by any distinct acts of thought.”¹⁶⁶ Several different processes lead to changes in a person’s ideals. First, as we translate them into action, we can see whether the acts that the ideals endorse are truly meritorious. Second, we periodically review our ideals: “The experience of life is continually contributing instances more or less illuminative. These are digested first, not in the man’s consciousness, but in the depths of his reasonable being. The results come to consciousness later.”¹⁶⁷ Finally, there is the theoretical study of ethics which, despite its theoretical nature, is “more or less favorable to right living.”¹⁶⁸

Peirce’s attempt to understand the process by which we formulate our ideals is a good illustration of his descriptive methodology in a number of ways. Its first aim is to be faithful to his own observation of cognition. Further, it is not surprising that he finds the foundation of ethical principles in the “experience of life.” On the other hand, for Peirce’s explanation to be complete he must establish a connection between these moral conclusions and some item in cognition. For Peirce, it is essential not only that an explanation interpret cognition using general terms, but also that it ground abstract notions in their concrete effects on cognition and conduct. For this reason, Peirce goes on to examine in detail the relationship between our ideals and our conduct.

Peirce thought that ideals shape our conduct through a series of

¹⁶² *Id.* at 1.186.

¹⁶³ See *supra* text accompanying note 56.

¹⁶⁴ C. PEIRCE, *supra* note 54, at 1.591-1.615. The fragment was prepared as part of a draft for the Lowell Lectures which he gave in Cambridge in 1903.

¹⁶⁵ *Id.* at 1.591.

¹⁶⁶ *Id.* at 1.592.

¹⁶⁷ *Id.* at 1.599.

¹⁶⁸ *Id.* at 1.600.

mental intermediaries: an *ideal*; a *general rule* which we adopt to promote our ideal; and a *resolution* which applies that rule to the particular circumstance. Through these intermediaries, the actor forms a conscious determination to act in a given way. In his essay Peirce gives the following example:

In the course of my reflexions, I am led to think that it would be well for me to talk to a certain person in a certain way. I resolve that I will do so when we meet. But considering how, in the heat of conversation, I might be led to take a different tone, I proceed to impress the resolution upon my soul; with the result that when the interview takes place, although my thoughts are then occupied with the matter of the talk, and may never revert to my resolution, nevertheless the determination of my being does influence my conduct.¹⁶⁹

Once an ideal has led to a certain type of action the process is not over. The action must be evaluated retrospectively with respect to each of its intermediaries. Thus I consider: 1) whether the act was according to my resolution; 2) whether the act followed my general rule; and 3) whether the act was an instance of my ideal. Peirce recognized that this process of evaluation must be more than a mere reconsideration of all the factors that initially prompted my act. Having done the action, I find that a new factor enters my deliberations in making the comparisons. Peirce describes this new factor as the pleasures and pains of reflection that accompany the comparisons. If my action truly promoted my ideal, my reflection on it is pleasurable; if not, I feel the pang of conscience.

Peirce's account relies on the presence of pleasures and pains in cognition as the foundation for ethical understanding. What he has in mind here is clearly something quite different from what is normally counted by the hedonist or the utilitarian. The hedonist traditionally counts *things* that are pleasurable as good. Peirce, on the other hand, sees pleasure as something that accompanies reflection on our own conduct—that is, as a property of the cognition itself.¹⁷⁰ Nevertheless, Peirce's pleasures and pains are not merely informative; they also urge us to action by providing a natural motive for conduct that will maximize pleasures and minimize pains. In grounding right conduct in the pleasures of right conduct, however, Peirce must be careful not to categorize pleasures and pains as mere feelings, for if they are feelings then, like the emotions, they will form only a subjective basis for normative science.

It is for this reason perhaps that in the final version of the 1903 lectures, Peirce attacks the conventional view that pleasures and pains are feelings and that they have a common "feeling quality" which leads

¹⁶⁹ *Id.* at 1.594.

¹⁷⁰ See *supra* text accompanying note 164.

to their classification as pleasurable or painful.¹⁷¹ A careful examination of the phenomena, he claims, reveals that pains are accompanied by a "struggle to give a state of mind its *quietus*," while pleasures are accompanied by a "peculiar mode of consciousness allied to the consciousness of *making a generalization*, in which not Feeling, but rather Cognition is the principle constituent."¹⁷²

It is not relevant to the current task to examine this account of normative science in great detail.¹⁷³ It is, however, worth noting three things.

First, we should note the particular kind of information conveyed by pleasures and pains. When a pleasure accompanies my reflection that an action was in accordance with my ideals, I conclude that, all things being equal, the experience of acting in accordance with this ideal is worth repeating. The pleasurable and painful aspects of cognition inform us of the relative value of potential action and are therefore an appropriate basis for normative science. It is also information that is capable of analysis. On the one hand, the message is unambiguous: a pleasure argues for repetition; a pain for avoidance. On the other hand, it may not be clear exactly which aspects of cognition the pleasure is endorsing. One learns to repeat *this kind* of experience but may not know what "this kind" means. Analysis is needed to tell us what we should repeat and what we should avoid. In analyzing experience we seek to formulate general rules about pursuing pleasure and avoiding pain.

The second issue arising from Peirce's account of normative science involves objectivity. His account does not lack objectivity simply because it is unable to relate the presence of pleasures and pains in cognition to an external reality. It is not necessary, for example, for Peirce to demonstrate that man is like a laboratory animal that learns a complicated maze because an all-knowing scientist judiciously applies the appropriate stimulus. Peirce's idealism renders such appeals to external reality useless. Even visual images do not represent something outside of cognition. Thus, if pleasures and pains are subjective in that they cannot be hooked up to an external reality, then this is a defect of all cognition: for Peirce, pleasures and pains are no more unrelated to an external reality than are visual images.

Finally, even though Peirce need not relate pleasures and pains to an external reality, he obviously intends to ground normative science in cognition, thus avoiding an emotional or subjective basis for normative sci-

¹⁷¹ See *supra* note 164. The lectures are reprinted in C. PEIRCE, *supra* note 46, at 5.14-5.212.

¹⁷² *Id.* at 5.113 (emphasis in original). Peirce's argument in support of this relies entirely upon his expertise in observing and analyzing the phenomenon of consciousness. See *id.* at 5.112. Whether this constitutes an adequate justification for his conclusion that pleasures and pains are objective is far from clear. It does however support my view that much of Peirce's conception of philosophy consists of reports of such observations and analysis.

¹⁷³ I have considered it at length elsewhere. See Hantzis, *supra* note 159.

ence. If pleasurable feeling were properly attributed to some object in cognition, then—as with anger and desire—the failure of that object to excite a like feeling in others would doom this experience as hopelessly subjective. But Peirce regards pleasures and pains not as properties of objects in cognition, but as properties of the cognitions themselves.¹⁷⁴ Thus in Peirce's terms the failure of the object to cause similar responses in others is not fatal to the objectivity of those responses. However, while this move distinguishes pleasures and pains from the subjective emotions, it hardly vindicates their objectivity. Are they objective merely because they are said to be properties of the cognition, or can they be rendered objective by some process of recreating the cognition for judgment by others?

One answer to these questions might be that value judgments, like other judgments, may be subject to an ongoing inquiry by a community of persons practicing a uniform method for settling disputes. While Peirce never takes up this possibility, Holmes does consider it in a number of different contexts.¹⁷⁵

2. *Adherence to Duty.*—Holmes proclaimed himself to be a skeptic with respect to moral questions. His readers have often interpreted this as an indication that Holmes believed that we have no moral duties, or that we are uninformed concerning them.¹⁷⁶ However, this interpretation is hard to square with Holmes' evident preoccupation with moral questions. In his writings, for example, one finds frequent mention of duties. Holmes seeks to be a skeptic without becoming a cynic; he writes: "The rule of joy and the law of duty seem to me all one. I confess that altruistic and cynically selfish talk seem to me about equally unreal."¹⁷⁷ I take it, then, that Holmes' skepticism is not inconsistent with a belief in the existence of moral duties and an ability of persons to discern them.

This aspect of Holmes' skepticism has been overlooked, in part because a total moral skepticism is consistent with the pro-science positivistic conceptions frequently attributed to him. If, as I contend, Holmes is not a positivist but a Peircean-type pragmatist, there would be no inconsistency between his pro-science stand and a belief that the nature of moral obligation can be humanly known.

It is likely that Holmes, like Peirce, believed that adherence to one's duty was a source of positive feeling. After all, Holmes equates "the law of duty" with "the joy of life."¹⁷⁸ One knows one's duty by reflecting

¹⁷⁴ In 1868, Peirce described a cognition as having two aspects: its material quality and its representational quality. See *supra* text accompanying note 56. We can see that Peirce is now adding a third which is the location of that cognition on a spectrum of painful or pleasurable experience.

¹⁷⁵ See *infra* Section IV.B.

¹⁷⁶ See *supra* text accompanying note 40.

¹⁷⁷ O.W. HOLMES, *supra* note 37, at 247.

¹⁷⁸ *Id.*

upon the joy of life; one does one's duty because that is the way to achieve human happiness. This experiential conception of duty is markedly different from the view that moral obligations arise from one's moral theory. For many of Holmes' contemporaries, the experiential conception of duty was so common that no explanation of the term seemed warranted. However, Chauncey Wright¹⁷⁹ explicitly discussed this concept of duty in a number of his letters.¹⁸⁰

Wright begins by distinguishing the Calvinist concept of duty from more contemporary notions. For the Calvinist, all duties were essentially similar because this life as well as the next were "all one and part of a grand moral scheme, in which obligations, duties, rights and sanctions are completely balanced and mutually fitted to each other."¹⁸¹ All duties were "legalistic" in that they consisted of duties of "perfect obligation" which created absolute entitlements either on the part of God or of other human beings.

In contrast, Wright offers a more modern view, based on his reading of Mill, that divides all duties into three distinct classes.¹⁸² The first class consists of legal duties, which have real world sanctions because the state can punish transgressions; the second class involves moral duties, which carry no official sanction but are enforced by "depriving the delinquent of voluntarily or freely rendered benefits;"¹⁸³ and the third class of duties are the religious duties, which find their sanction "in another life or in themselves."¹⁸⁴ Some examples may clarify these three different notions of duty, which underlie much of nineteenth century morality. One conforms to a legal duty when one obeys traffic signals out of fear of being apprehended by a policeman. A moral duty is acknowledged when one declines to flaunt convention in such a noticeable way that one's neighbors might be moved to undertake a boycott. A religious duty is superstitiously undertaken if one conforms in order to avoid sanction in an after-life; but "if immediate happiness in doing his duty, or misery in not doing it, is the ultimate sanction, then his religion is real, or a part of his character."¹⁸⁵

Wright's description of these three kinds of duties is instructive in

¹⁷⁹ Wright was a mathematician, scientist, and philosopher who was a frequent and influential participant in the Metaphysical Club. Fisch, *supra* note 12, at 19-22.

¹⁸⁰ See generally, LETTERS OF CHAUNCEY WRIGHT (Thayer ed. 1878) (Aug. 18, 1867 letter to Charles Norton).

¹⁸¹ *Id.* at 114.

¹⁸² While Wright attributes this tripartite division to the one "which Mill adopts from the Catholic Casuists," the concept of duties that Wright is expounding relies upon moral views which are similar but not identical to those of Mill. See *id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 115.

¹⁸⁵ *Id.* Wright goes on to identify this idea of intrinsic religious duty with Socrates: "to suffer injustice is better than to do it;" with the Stoics: "virtue is its own reward;" and with Christianity. See *id.* at 115-16.

several ways. First, Wright's division is based entirely upon the nature of the sanction imposed for disobedience. Because of this, the first two forms of duty represent a distinct but relatively uninteresting class. These are actions which I undertake for earthly and highly expedient reasons; they are not what we currently think of as moral actions. Wright's examples of "moral" duties indicate that he doesn't use the word "moral" in its contemporary sense. Rather, a moral action in his sense would be any action that does not evoke social condemnation. Thus wearing a red cloak to a funeral, or the wrong suit to a dress dinner, would be considered to be immoral actions.¹⁸⁶ Finally, Wright's discussion of religious duty also makes it plain that the interesting cases of true obligation stem from the "pleasure" (Peirce), "joy" (Holmes), or "happiness" (Wright) one feels when one's behavior conforms to the requisite standard.

It is fair to say that among these men and their circle, normative questions were not referred to moral theory. Instead, experience in its hedonistic aspect furnished both information about (intuitions or sentiment) and motivations for moral conduct. I also think that it is a distinctive feature of this kind of normative vision that its basic building blocks are case-specific duties, rather than a collection of general normative rules. This preoccupation of pragmatic normative theory with concrete duties rather than with general rules is consistent with Holmes' statements about legal theory. He believed that the results in individual cases preceded the formulation of general legal principles.¹⁸⁷ As I argued in Section III,¹⁸⁸ these decisions stem from a felt conviction about the correctness of a particular result in the particular case. General rules summarize these results over time, and in turn shape our convictions concerning new cases. This process can now be understood in terms of pragmatic normative theory. Such theories arise from a dynamic process of interaction between conduct or decisionmaking, and the development of normative rules and ideals.

B. *The Community of Citizens Subject to Law*

We have seen that Peirce's analysis of normative science raises serious questions about the potential objectivity of normative views. To the extent that Holmes' legal views present this same problem, he must give an account of how normative choice can be anything more than subjective and capricious. Central to Peirce's notion of objectivity was the notion of a community of scientific inquirers which, after an indefinite practice of the scientific method, would come to agree upon one, final,

¹⁸⁶ This view of morality certainly supports Howe's interpretation—that Holmes' "moral" skepticism was a rejection of conventional and pious morality. See Howe, *The Positivism of Mr. Justice Holmes*, *supra* note 42, at 529.

¹⁸⁷ See *supra* text accompanying note 145 (Holmes quote).

¹⁸⁸ *Id.*

true opinion. It is implicit in Peirce's view of logic as a normative science that this community must come to agree not only upon so-called scientific truths but also upon normative questions. While Peirce never explicitly considers how this process could work, Holmes made frequent appeals to the community as an objective source of standards of value. This section will explore several different ways in which Holmes made such appeals.

Rand Rosenblatt's article, *Holmes, Peirce and Legal Pragmatism*, notes the similarities in function between Holmes' community of citizens subject to law, and Peirce's community of scientific inquirers.¹⁸⁹ Rosenblatt argues that Holmes' views on the role of the community are best typified by his explanation of the function of the jury in negligence cases. Having emphatically rejected any theory of tort liability that did not rest upon objectively determined fault, Holmes owed his readers an explanation of how common law courts could come to objective judgments under the fault principle. In his view, the answer was found in the jury system; the jury was to determine not only the facts of the case, but also "mixed questions of law and fact"¹⁹⁰ regarding what standard of care was owed to the plaintiff by the defendant:

When a case arises in which the standard of conduct, pure and simple, is submitted to the jury, the explanation is plain. It is that the court, not entertaining any clear views of public policy applicable to the matter . . . [and] further feel[ing] that it is not itself possessed of sufficient practical experience to lay down the rule intelligently . . . conceives that twelve men taken from the practical part of the community can aid its judgment. Therefore it aids its conscience by taking the opinion of the jury.¹⁹¹

A judge, having aided his conscience in many cases by consulting a jury, can begin to apply his learning to new cases. He "ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than the average jury. . . . [T]he sphere in which he is able to rule without taking their opinion at all should be continually growing."¹⁹²

Rosenblatt is right that Holmes' account of the jury's role manifests the same basic strategy of defining "truth" that Peirce used in making the ultimate community the arbiter of truth. But Rosenblatt fails to note important differences. Peirce's conception is based on the infallibility of a self-correcting scientific method; Holmes' confidence in the jury rests upon the accumulated experience of twelve persons from "the practical part of the community." Peirce's community aims at discovering a scientific theory; by contrast, Holmes' jury is to determine community sentiment. According to Holmes, "[t]he first requirement of a sound body of

¹⁸⁹ Rosenblatt, *supra* note 17, at 1134.

¹⁹⁰ O.W. HOLMES, *supra* note 77, at 122.

¹⁹¹ *Id.* at 123.

¹⁹² *Id.* at 124.

law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."¹⁹³ The jury, then, does not arrive at a conclusive and objective moral judgment. It is a proxy for the community and, as such, its entitlement to speak is not dependent on the truth of its opinions. In making this move, Holmes separates the concept of legal objectivity from the concept of normative truth. This separation allows him to conceive of the possibility that disagreements over normative questions do not record "right" and "wrong" answers, but instead provide accurate descriptions of the legal order as it is seen from a variety of perspectives.

1. *Law from the Perspective of a Citizen.*—Holmes speaks about a community of citizens when talking more generally about legal theory. The community is relevant to these general questions because Holmes shares with Peirce a Bainian definition of belief as that upon which we are prepared to act,¹⁹⁴ and a conviction that thought is not an individual but a social process.¹⁹⁵ In addition, like Peirce, he portrays actions as the result not only of beliefs but also of the ideals of conduct:¹⁹⁶ "Man is born a predestined idealist, for he is born to act. To act is to affirm the worth of an end, and to persist in affirming the worth of an end is to make an ideal."¹⁹⁷ While Holmes frequently insists that such ideals are nothing but prejudice,¹⁹⁸ he also suggests just as frequently that they are subject to certain evolutionary processes.¹⁹⁹ It is clear, however, that Holmes does not conceive of the evolutionary process of thought in the same terms that Peirce does. Peirce, focusing on beliefs, foresees increasing agreement and accuracy generated by use of the scientific method; so long as science provides a procedure by which discrepancies in belief can be adjudicated, the process is not only evolutionary but ameliorative.

Holmes sees the evolution of conscious thought as producing not beliefs but societal ideals. This is his distinctive perspective on the evolutionary process. On the one hand, ideas are said to have "strength" and to be able to "struggle against competing ideas."²⁰⁰ Law records this

¹⁹³ See *id.* at 41.

¹⁹⁴ See A. BAIN, *supra* note 52, at 505.

¹⁹⁵ O.W. HOLMES, *supra* note 37, at 295, 298 ("Beliefs, so far as they bear upon the attainment of a wish (as most beliefs do), lead in the first place to a social attitude, and later to combined social action, that is, to law."); see also *id.* at 270 (Holmes refers to "the fact that all thought is social, is on its way to action.").

¹⁹⁶ See *supra* text accompanying note 164 (discussion of Peirce's conception of ideals of conduct).

¹⁹⁷ 2 HOLMES-POLLOCK LETTERS, *supra* note 94, at 181 n.2.

¹⁹⁸ O.W. HOLMES, *supra* note 37, at 289. He refers, for example, to the "naivete with which social prejudices are taken for eternal principles."

¹⁹⁹ "We have evolution in this sphere of conscious thought and action no less than in lower organic stages, but an evolution which must be studied in its own field." *Id.* at 217.

²⁰⁰ *Id.* at 220 ("I have mentioned them [oath and plighting of troth] only to show a lively example of the struggle for life among competing ideas, and of the ultimate victory and survival of the strongest.").

struggle: "It is perfectly proper to regard and study the law simply as a great anthropological document. It is proper to resort to it to discover what ideals of society have been strong enough to reach that final form of expression."²⁰¹ On the other hand, Holmes frequently recognized that the strength of ideas sometimes derives from the strength and brute force of those who become their champions. Thus, he writes: "[T]ruth was the majority vote of the nation which could lick all others. . . . [O]ur test of truth is a reference to either a present or an imagined future majority in favor of our view."²⁰² I do not think that Holmes is inconsistent when he suggests that the evolution of ideals is shaped both by the strength of ideas and by the power of those who espouse them. His study of the history of the common law surely gave him many examples that would support both explanations of legal change. As a factual matter, there are both changes due to doctrinal development and changes due to successful invasions. To see that law is shaped by both intellectual and political forces is simply to acknowledge the historical facts.²⁰³

The end result of both forms of legal evolution is a shared set of values and ethical commitments. These values are the result of a collective experience, and are therefore not merely conventional. It is this shared set of commitments which gives legitimacy to the operation of law. More specifically, it provides legitimacy from the standpoint of a person who shares the underlying consensus—that is, from the standpoint of one who views herself as a citizen subject to law. But what about the person who, for whatever reason, does not consider herself a citizen? For a pragmatist, lack of consensus raises concerns about relativity and subjectivity. Thus, absent consensus, he is unable to view the legal system as an objective arbiter of legal disputes. It is therefore necessary for the pragmatist to take seriously, and to attempt to describe, the legal system from an outsider's point of view.

2. *Law from the Perspective of an Outsider.*—Holmes' citizen regards her community's shared ideals as the result of an evolutionary struggle. Whether these ideals derive their strength from their content or from their adherents, the citizen believes that these ideals represent stan-

²⁰¹ *Id.* at 212.

²⁰² *Id.* at 310. *But see* M. HOWE, vol. I, *supra* note 10, at 174-75 (Holmes once explained what he meant when he said truth was a matter for majority vote: "The vote which he had in mind, he said, was the majority vote 'in the long run—and as to that we have to rely for consolation upon a few, at times.'") (quoting a Feb. 5, 1912 letter to Charles Owen).

²⁰³ Indeed, given Holmes' respect for fact and for particularity, it is no surprise that he would be extraordinarily reluctant to embrace a theory that denied the variety of factors that affect the evolution of law. This is one area in which it is obvious that Holmes' legal pragmatism differs fundamentally from what we now call legal realism. In observing what appear to be merely intellectual developments, the legal realist treats this level of description as illusory, and recasts the discussion in terms of underlying political or psychological realities. While Holmes possesses a strong desire to be realistic about political phenomena, it is hard to imagine him with Jerome Frank or Thurman Arnold arguing that the observed facts concerning the operation of law are deceptive.

dards of morally right conduct and as such are entitled to obedience. From the outsider's point of view, however, the struggle involves power; the community responds not so much to claims based on its ideals but to bare assertions of interest buttressed by power. These interests are the result of natural needs and desires but, again from the outsider's point of view, once a person gives up life in the wild to live in society, that person is forced to place the pursuit of these interests within the constraints imposed by law:

If I do live with others they tell me that I must do and abstain from doing various things or they will put the screws on to me. I believe that they will, and being of the same mind as to their conduct I not only accept the rules but come in time to accept them with sympathy and emotional affirmation and begin to talk about duties and rights.²⁰⁴

No matter how much "sympathy" or "emotional affirmation" the law is clothed with, Holmes insists that it should not ignore the underlying realities. Law must be based on instinct: "As long as the instinct remains, it will be more comfortable for the law to satisfy it in an orderly manner, than to leave people to themselves. If it should do otherwise, it would become a matter for pedagogues, wholly devoid of reality."²⁰⁵ Thus, from the point of view of the outsider, the law is not an evolving and shared process of thought but a politically brokered arrangement—an arrangement that may have a lofty appearance, but that is actually based upon instinct and the relentless pursuit of self interest. It is this latter vision of law that lies behind Holmes' well known comments on the gas-stokers' strike:

[L]egislation should easily and quickly, yet not too quickly, modify itself in accordance with the will of the *de facto* supreme power in the community, and . . . the spread of an educated sympathy should reduce the sacrifice of minorities to a minimum. But whatever body may possess the supreme power for a moment is certain to have interests inconsistent with others which have competed unsuccessfully. The more powerful interests must be more or less reflected in legislation. . . . The objection to class legislation is not that it favors a class, but either that it fails to benefit the legislators, or that it is dangerous to them because a competing class has gained in power, or that it transcends the limits of self-preference which are imposed by sympathy.²⁰⁶

In this view, the law properly reflects the self-interest of whoever is powerful.²⁰⁷ Any restraint used by the powerful in pursuing their interest is not a moral but a psychological restraint imposed by "an educated sym-

²⁰⁴ O.W. HOLMES, *supra* note 37, at 313.

²⁰⁵ Holmes, *Possession*, 12 AM. L. REV. 688, 719 (1878).

²⁰⁶ Holmes, *Comment on the Gas Stokers' Strike*, 7 AM. L. REV. 582-84 (1873).

²⁰⁷ In some ways, Holmes' insistence on considering law as a form of social control is reminiscent of Austin. See, e.g., O.W. HOLMES, *supra* note 37, at 167 ("The reason . . . why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees.").

pathy." The outsider and the citizen differ because they present two radically different portraits of the relationship between the individual and the community. In the first version, man is inherently social: "Beliefs . . . lead in the first place to a social attitude, and later to combined social action, that is, to law."²⁰⁸ Law arises from interaction among individuals; it is shaped both by thought and by political domination. In the second version, the individual is primary. Initially an individual submits to law only because she has no choice; later she surrounds it with a more favorable emotional tone. While the fact of human sympathy may constrain the powerful in promoting their interests, the legitimacy of the law is founded in strength and not in any way on sympathy that might be accorded by the strong to the interests of others.

One way to understand the difference between the views of the citizen and those of the outsider is to think of them in terms of Peirce's community of scientific inquirers. The citizen's community is not entirely like the one described by Peirce, for its residents have not finally agreed on the method by which disputes over ideals should be regulated. Nevertheless, they engage in a process which presupposes that such agreements are possible and desirable. It is the essence of this process that it should be a group process. The outsider rejects not only the possibility that agreement can be reached, but also any suggestion that agreement is relevant to the operation of law. What is at stake in the outsider's version is not beliefs about values but conflicting interests. The question is not, "What are our ideals concerning fair distribution?" but instead "Whose interests must we take into account?" While ideals may "compete," individual interests are compromised in a political way.

3. *Pragmatism and the "External" View.*—Given the context of nineteenth century pragmatism, it should not surprise us that Holmes examines the relationship between law and morality from more than one perspective. This diversity of perspective is only inconsistent and puzzling if we attribute to Holmes the positivist's goals of universality and objectivity. But Holmes' vision is pragmatic, not positivistic, and his pragmatism legitimates diverse points of views in three distinct ways.

First, the importance of viewpoint is inherent in the pragmatist's conception of philosophy. For the pragmatist, philosophy was an observational and descriptive enterprise; a philosopher must describe what is before her eyes. The standpoint of the observation is a critical determinant of its content; this is an inevitable aspect of observational judgments. Langdellian jurisprudence, by contrast, began with abstractions and analyzed them into equally abstract but extensionally smaller parts. Such analysis imparts a timeless quality to the legal issues it investigates; it suggests that the ultimate answer will be universally applicable. No

²⁰⁸ *Id.* at 298.

such universal answer is available to Holmes, since vision must depend on viewpoint.

One might use such considerations as a justification for doing philosophy in an analytic way. From the pragmatist's point of view, however, there are difficulties with this approach. The analysis of abstract conceptions will never, without more, tell you what to do in a concrete case. While generalizations are important to the pragmatist, they are meaningful only when paired with an array of particulars. Analysis that relates abstract terms only to other abstract terms is simply not informative except in a linguistic way. Another difficulty that the pragmatist has with the analytic approach is that the apparent universality of its answers is deceptive. The appeal to abstract doctrine begs the question: The worker does not bear the burden of work-related injuries *because* he freely entered into an employment contract but rather because the courts, *for whatever reason*, choose to call the employment relation one of contract and not one of exploitation.

A second way in which Holmes' view is pragmatic is that he links the general to the particular,²⁰⁹ and thereby bonds the activity of analysis to the experience that sustains it. In this way, Holmes makes apparent the legitimacy of divergent analyses. It is not hard to see how one's position in society would color one's perceptions—not only of the outcomes in legal cases, but of the entire legal system. From the employer's point of view, his relation to his workers is governed by contract; he has, after all, freely entered into this relationship in the pursuit of his own interest. His workers, however, probably experience the relationship differently. Depending on how they are treated, they may think of it as a sinecure, as a contract for mutual benefit, as the best choice of a rotten bunch, or as a situation only marginally better than outright slavery. Nineteenth century judges—whose experience more closely resembled that of the employers rather than that of the employees—routinely assumed and ruled that the employment relation was one of contract.²¹⁰ From the viewpoint of a worker who felt exploited, such a legal system not only perversely misdescribed the nature of his relationship to his employer, but also ruled irrelevant his testimony on this question. To such workers, the courts naturally appeared as a thinly disguised exercise of power by the ruling class. Holmes, by recognizing the role that our experience plays in determining our perceptions of legal cases, renounces the possibility that the judge's view is privileged by anything other than his office or his power. How we stand with respect to a case—whether our experience resembles that of the plaintiff or the defendant—will affect our attitude about the outcome of the case, about the rule it applies, and about the legal system that applies it.

²⁰⁹ See *supra* Section III.

²¹⁰ Holmes is no exception. See *Lamson v. American Axe and Tool Co.*, 177 Mass. 144, 58 N.E. 585 (1900).

Finally, it should not surprise us that the lack of a universal explanation does not trouble the pragmatist. The notion that more than one theory of the facts can prove to be true is consistent with an idealist ontology and with a coherence theory of truth. The demand for a universal answer to philosophical questions stems from a belief in an objective and external reality that the pragmatists reject. In denying the existence of an external reality, they deny themselves the refuge of privileging one particular point of observation; they refuse to accept that any particular point of observation reveals "the truth." That Holmes rejected the idea of an objective truth in favor of a more pragmatic stance is evident:

When I say that a thing is true, I mean that I cannot help believing it. I am stating an experience as to which there is no choice. But as there are many things that I cannot help doing which the universe can, I do not venture to assume that my inabilities in the way of thought are inabilities of the universe. I therefore define the truth as the system of my limitations, and leave absolute truth for those who are better equipped.²¹¹

It may be, as Peirce thought, that on some issues sufficient inquiry will produce universal agreement, but we can hardly expect early agreement on serious questions of distributive and corrective justice.

As a pragmatist, Holmes cannot say that those who are outside the legal system simply do not understand it. The description from an external perspective may be as accurate as one from an internal perspective. Holmes thought it naive to insist, as the internal observer often does, upon viewing the legal system as a natural order:

The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.²¹²

Holmes could not have helped noticing that the morally rigid environment of his youth had given way, during his lifetime, to a broad diversity of moral opinion and legal interests. This diversity, and his pragmatic background, forced him to acknowledge the legitimacy of other viewpoints—and challenged him to attempt to describe how those viewpoints differed from his own.

The recognition of the legitimacy of an "external" perspective in legal and moral theory is the most distinctive feature of Holmes' legal philosophy. It is perhaps ironic that Holmes, the archetypical insider, should insist so strongly that the legal system be viewed through the eyes of an outsider. Holmes was surely committed to the conventional morality of his time, but this commitment did not lead him, as it led others, to label it "God's Truth." While psychological explanations are tempting (for example, the alienation of his Civil War experience, or the distance acquired as a result of his study of ancient legal systems), they seem

²¹¹ O.W. HOLMES, *supra* note 37, at 304.

²¹² *Id.* at 312.

somewhat superficial. Holmes' recognition of the inherent limits of his own viewpoint is the inevitable consequence of his pragmatic world view.

V. THE ETHICS AND THE POLITICS OF JUDGING

Discovering Holmes' philosophical views is important because they play a central role in the development of American law. Holmes was an outspoken judge who contributed hundreds of opinions to our jurisprudence. For a period of fifty years, his views were influential in shaping legal discourse. If he was not always able to determine the outcome of cases, he was at least never silent concerning his views. Holmes' opinions are remembered and frequently quoted. They are among the most familiar texts in American law. In this final section, I will examine these familiar texts to see whether the philosophical views I have described shed light upon Holmes' actions and rhetoric as a judge.²¹³

Perhaps Holmes' most striking characteristic as a judge is the number of cases in which he reaches a decision by deferring to someone else's viewpoint. Most frequently, Holmes defers to the legislature's views on social policy. In opinion after opinion, Holmes argues for upholding legislation on the ground that the constitution leaves most judgments to the legislature. This deference had both good and bad aspects. On the one hand, when applied to legislative curtailment of rights for newly freed black citizens, Holmes' deference freed southern legislatures from constitutional restraint in establishing racist rules of black/white interaction.²¹⁴ On the other hand, Holmes' legislative deference was ultimately the winning argument against attempts to place constitutional restraints on progressive economic legislation.

However we evaluate the result of Holmes' deference, its origins are clear. His rejection of the possibility of an objective legal order leads to a distinctively modern analysis of the role of judging. His assertion that there is no viewpoint that can claim precedence on the basis of its presumed objectivity gives rise to the question of whose viewpoint is to prevail. For this reason, Holmes conceived of his role as judge not as that of an umpire who must determine the merits of each case, but as that of a conductor who must in each case determine which voice shall be heard.

²¹³ At least one interpretive piece has begun with the assumption that Holmes' professionalism prevented him from applying his personal philosophy to the cases before him. *See* Gregg, *supra* note 40. Obviously, given my views about the relevance of philosophical frameworks to all human thought and action, *see supra* text accompanying note 36, I reject such compartmentalism.

²¹⁴ *See, e.g.*, *Berea College v. Kentucky*, 211 U.S. 45 (1908). Yosaf Rogat describes this series of cases in *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 254, 254-75 (1963). It is interesting to note that Holmes' opinions in many of these cases do not turn on general arguments about deference, but on frequently disingenuous technicalities. Evidently he was willing to defer to the "general sentiment of the [white] community," *see, e.g.*, *Chiles v. Chesapeake and Ohio Railway Co.*, 218 U.S. 71, 77 (1910), but was uneasy about explicitly giving the legislature a free hand in this area.

Listen to Holmes as he describes the things which properly control the decision of judges:

In some cases, [it] . . . is an act of the legislature; in others it is the custom or course of dealing of those classes most interested; and in others where there is no statute, no clear ground of policy, no practice of a specially interested class, it is the practice of the average member of the community,—what a prudent man would do under the circumstances,—and the judge accepts the juryman as representing the prudent man. But still the function of the juryman is only to inform the conscience of the court by suggesting a standard, just as when the finding is on a custom.²¹⁵

Holmes does not see judging as a question of applying one's own viewpoint or one's own sense of duty to the merits of the case before the court. Instead, the duty of the judge is to consider what person or institution is most entitled to have its viewpoint count in adjudicating the case.

Holmes' understanding of his judicial role is well illustrated by his famous dissent in *Lochner v. New York*.²¹⁶ In that case, the Supreme Court struck down a New York law that limited the number of hours that bakers could work per week to sixty. Holmes began his dissent with a discussion of his "duty:"

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.²¹⁷

The Constitution, he argues, is "made for people of fundamentally different views,"²¹⁸ and the question of whose views should prevail should not be obscured by the "accident of our finding certain opinions natural and familiar or novel and even shocking."²¹⁹

Holmes' willingness to defer to the opinions of others was not limited to his treatment of legislative enactments in constitutional cases. As discussed above, Holmes did not, in common law cases, see factual questions as the province of the jury and legal standards as the province of the judge.²²⁰ Rather, the judge is to decide the standard of conduct in negligence cases not by applying his own normative views, but with reference to "community sentiment" as determined either by the jury or by his own familiarity with what the community thinks.²²¹

Holmes' analysis of First Amendment cases is also consistent with

²¹⁵ Holmes, *The Theory of Torts*, 7 AM. L. REV. 652, 658 (1873)

²¹⁶ 198 U.S. 45, 74 (1904) (Holmes, J., dissenting).

²¹⁷ *Id.* at 75.

²¹⁸ *Id.* at 76.

²¹⁹ *Id.*

²²⁰ See *supra* text accompanying note 77.

²²¹ *Id.*

the philosophical framework I have described. In free speech cases, Holmes argues for strong protection of speech based upon the desirability of a market place of ideas:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, 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. . . . That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.²²²

Obviously this theory is strongly motivated by his recognition of the legitimacy of differing viewpoints, and by his views on the evolution of thought.²²³

Because of his deference to the legislature and to the community, few cases presented Holmes with the need to exercise his own moral judgment in reaching a result. When presented with such an opportunity, Holmes appears to rely on pragmatic common sense rather than a legal superstructure of abstract considerations. We have seen that the pragmatists rejected the noumenal world that is so important to ascriptions of natural rights.²²⁴ Such a view underlies Holmes' declaration that:

I don't believe that it is an absolute principle or even a human ultimate that man always is an end in himself—that his dignity must be respected. We march up a conscript with bayonets behind to die for a cause he doesn't believe in. And I feel no scruples about it.²²⁵

Many have read this comment as indicating Holmes' willingness to treat individuals cruelly and without remorse. Much of what underlies such a statement, however, is the denial of the existence of objective moral or legal theory. It is not only the claimed objectivity of such theories that Holmes rejects, but also the abstraction and generality with which their claims are made. Whether the theory consists of pious platitudes or of the lofty assertions of the neo-Kantian, Holmes rejected such abstractions in favor of defining duty in the concrete case.

There are times when Holmes' impulse to examine the concrete consequences of legal issues is clarifying and refreshing. For example in *Abrams v. United States*,²²⁶ he reminds his colleagues that "nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opin-

²²² *Abrams v. United States*, 250 U.S. 616, 624, 630 (1918) (Holmes, J., dissenting).

²²³ See *supra* text accompanying note 200.

²²⁴ See *supra* text accompanying notes 60-65.

²²⁵ Shriver, *supra* note 87, at 187.

²²⁶ 250 U.S. 616.

ions would hinder the success of the government arms or have any appreciable tendency to do so.”²²⁷ While the majority sees a theoretical threat to the government, Holmes points out that, as a practical matter, the threat is non-existent. In a similarly practical way, he argues that a pacifist’s refusal to swear to defend the Constitution by force and arms seemed somewhat irrelevant, because as a result of her gender such services would be refused in any case.²²⁸ In addition, Holmes’ practical orientation makes it unlikely that a formal observance of rights will blind him to a serious claim of substantive denial. For example in *Frank v. Mangum*²²⁹ Holmes argued that a petition stated a case for habeas corpus relief when it alleged that the petitioner’s trial was conducted in an atmosphere of mob terror.²³⁰ Holmes wrote: “Mob law does not become due process of law by securing the assent of a terrorized jury.”²³¹

There are also times when his willingness to deal with particularity exposes the moral insensitivity endemic to his class. I have mentioned Holmes’ less than distinguished record in dealing with post-war civil rights cases,²³² and his cavalier invocation of the assumption of the risk doctrine in an unsafe workplace case.²³³ But it is Holmes’ decision in *Buck v. Bell*²³⁴ that is the most often cited example of his alleged moral insensitivity.

Before the court in *Bell* was the petition of the Commonwealth of Virginia to sterilize Carrie Buck, a “feeble-minded” inmate of a state institution who was the daughter of a “feeble-minded” mother and the mother of a “feeble-minded” daughter.²³⁵ The inmate, through a guardian, challenged the Virginia statute that permitted such sterilizations as contrary to the Fourteenth Amendment.²³⁶ Holmes, writing for the Court, declared in a now famous passage:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing

²²⁷ *Id.* at 628.

²²⁸ *United States v. Schwimmer*, 279 U.S. 644, 653 (1929) (Holmes, J., dissenting).

²²⁹ 237 U.S. 309, 345 (1915) (Holmes, J., dissenting).

²³⁰ *Id.* at 345.

²³¹ *Id.* at 347.

²³² See *supra* text accompanying note 214.

²³³ See *supra* note 210.

²³⁴ 274 U.S. 200 (1927).

²³⁵ *Id.* at 205.

²³⁶ *Id.*

their kind. . . . Three generations of imbeciles are enough.²³⁷

Of course the color of this prose offends the sensibility of a later age. The modern way of speaking of mental retardation protests the use of "feeble-minded" and we are not so quick to dismiss the retarded as capable only of starvation and crime. But it is not merely the color of Holmes' prose that is offensive. It is his arrogant assumption that he knows how such a person as Carrie Buck will feel about her "sacrifice" and the total credulousness with which he accepts her classification as feeble-minded. Holmes, despite his vehement rejection of natural law, seems quite at home with an invocation of natural fact:²³⁸ Carrie Buck can be sterilized because it is a natural fact that her offspring will be criminals and incompetents.²³⁹

Holmes is not wrong when he argues that, in dealing with hard cases, we should not lose our way in abstract theories of human rights and dignity. Nor is he wrong in arguing that we should look to our duty in the particular case to carefully weigh the unique set of circumstances that it presents. Holmes was concerned always to demonstrate that a realistic examination of human ends and purposes does more to achieve these purposes than an appeal to abstract moral theory. But in dealing with particular circumstances, Holmes is easily blinded by the limits of his own experience, and thus prevented from seeing the case as it might be seen by its participants. Holmes' skepticism imparts to him a humility and a tolerance that seem admirable in a Supreme Court Justice. But it also leaves him without moral guidance when he fails to accurately read and interpret the particular circumstances confronting him.

VI. CONCLUSION

I have concluded that Holmes' philosophical views are best understood in the context of nineteenth century pragmatism. This context gives us a deeper understanding of his legal views. We understand Holmes better when we see that his gaze is relentlessly focused on the individual and the concrete. Holmes' pragmatism leads him to deny the meaning of generalities when they are abstracted from the concrete cases which generate them. It also generates his skepticism and resulting tolerance. A pragmatist understands that what we see always depends upon

²³⁷ *Id.* at 207.

²³⁸ This is, of course, especially ironic given Holmes' view that the facts cannot be apprehended pre-theoretically or pre-legally. See *supra* text accompanying note 149.

²³⁹ Dudziak argues that Holmes was not only uncritical about the legislative category of "feeble-mindedness," but that he was also committed to the eugenicist movement. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833 (1986). While I remain unconvinced concerning Holmes' actual views, such a commitment would not be inconsistent with the views I attribute to Holmes. Even though Holmes would not be able to argue that the inferiority of the "feeble-minded" entitled him to sacrifice their reproductive capacities, he may have felt with others of his class and generation that such a sacrifice was in his interest to insure the survival of society as he knew it.

our viewpoint, and that understanding others is frequently a matter of attempting to recreate the standpoint from which they observe events. Thus, Holmes' two most important judicial characteristics—his rejection of abstractions and his toleration of other viewpoints—are directly related to his pragmatism.

I have also concluded that Holmes was neither a positivist nor a morally bad man. His skepticism did not prevent him from feeling bound by moral duties, but—not surprisingly—his perception of duty was not infallible. When viewed from a modern perspective, Holmes was occasionally insensitive in judging individual cases. He was not omniscient, nor was he able to observe concurrently from all relevant perspectives. Holmes was at his best when expressing his truly exceptional tolerance and at his worst when blinded by the interests of his class and the conventional values of his time. It would be remarkable if, more than one hundred years after his first judicial decision and more than fifty years after his last, we were to think of each of his decisions as ethically sensitive and politically farsighted. In assessing Holmes and his impact on American law, we should focus not on the moral limits of the individual man, but instead on the strength and vision with which he responded to the challenges of his time.