

*BY THEIR FRUITS YOU SHALL KNOW THEM:  
PRAGMATISM AND THE PREDICTION THEORY OF LAW*

MARCIA J. SPEZIALE\*

Charles Sanders Peirce and Oliver Wendell Holmes, Jr. were both members of the Metaphysical Club which met at Cambridge in the early 1870's; this is historical fact.<sup>1</sup> The annals show little direct influence of the one upon the other, and yet the similarity of the published thoughts of these two men is striking. Peirce's pragmatist philosophy and Holmes' predictive theory of law, which emphasize particular instances, real generals, and conceivable effects, are certainly the product of kindred spirits. As members of the informal discussion group which met fortnightly, they may have fertilized the growth of each other's ideas. As members of a metaphorical Metaphysical Club, they were joint participants in the flowering of the first American philosophy.<sup>2</sup>

**The Prediction Theory of Law**

A new hall was dedicated at the Boston University School of Law on January 8, 1897, and Oliver Wendell Holmes, Jr., Justice of the Supreme Judicial Court of Massachusetts, delivered a speech,

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\* Teaching Fellow; J.S.M. candidate, Stanford Law School.

1. Although not an undisputed one:

If this Club were not primarily a symbol of Peirce's metaphysical imagination of the "Search for a Method" — as he called one of his many unfinished treatises — one would expect to find at least one reference to the Club in the writings or biographies of its members.

P. Wiener, *Evolution and the Founders of Pragmatism* (1949) 24-25. But Philip Wiener could find no mention of the Club in James' writings; he also searched the letters and biographical testimonials of the senior and leading members of the Club, but found nothing.

Perhaps some further search may secure more data than my unrewarded efforts to supplement Peirce's history of a Metaphysical Club whose existence is so definitely associated in his mind with the birthplace and conscious adoption of a new philosophical doctrine. Either Peirce invented the name of the Club, "half-ironically, half defiantly," or the group he named was a more casual and informal one than anything one would call a club.

*Id.*, at 25.

Max Fisch did search further, and in 1964, he wrote "Was There A Metaphysical Club in Cambridge?", dedicating it to Wiener. Fisch examined evidence independent of Peirce's testimony and concluded that there was a Metaphysical Club in Cambridge, starting in the winter of 1871-72 and still meeting in the winter of 1874-75.

[A]mong its members were James, Holmes, Peirce, Wright, Green, and Warner, probably Fiske, and possibly Abbot; . . . it was reorganized under the same name in the winter of 1875-76; . . . among its later reincarnations were the Harvard Philosophical Club and the Graduate Philosophical Society, as well as a series of unofficial clubs of serious and mature students of philosophy, including always at least one member of the original Metaphysical Club; . . . in these later years the Metaphysical Club was sometimes referred to as "the old Philosophical Club."

M. Fisch, "Was There a Metaphysical Club in Cambridge?" in E. Moore and R. Robin (eds.), *Studies in the Philosophy of Charles Sanders Peirce* (1964) 19.

2. See generally E. Moore, *American Pragmatism: Peirce, James, and Dewey* (1961); C. Morris, *The Pragmatic Movement in American Philosophy* (1970); M. White, *Social Thought in America* (1957); H.S. Thayer, *Meaning and Action: A Critical History of Pragmatism* (1968); B. Kuklick, *The Rise of American Philosophy: Cambridge, Massachusetts, 1860-1930* (1977).

which was later to be published as "The Path of the Law."<sup>3</sup> Speaking to law students, and trying to describe what lawyers do, Holmes said that attorneys advised people as to their risks of coming up against the public force "through the instrumentality of the courts."<sup>4</sup> Clients were not likely to care "two straws" for an espousal of the law as axioms or deductions, and neither did Holmes: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law,"<sup>5</sup> for . . . "a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; — and so of a legal right."<sup>6</sup>

Justice Holmes' use of particular cases to forecast judicial action was a reaction against the generally accepted view that law was ". . . something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions."<sup>7</sup> The prediction theory was a challenge to Coke's maxim that "reason is the life of the law" and an answer to Rufus Choate's description of the body of law:

The judge does not make it. Like the structure of the State itself, we found it around us at the earliest dawn of reason, it guarded the helplessness of our infancy, it restrained the passions of our youth, it protects the acquisitions of our manhood, it shields the sanctity of the grave, it executes the will of the departed. Invisible, omnipresent, a real yet impalpable existence, it seems more a spirit, an abstraction, — the whispered yet authoritative voice of all the past and all the good, — than like the transient contrivance of altogether such as ourselves.<sup>8</sup>

The prediction theory was a rejection of any concept of a "body" of law existing by itself and independent of courtroom activities.<sup>9</sup>

3. O.W. Holmes, "The Path of the Law" (1897) Harv. L. Rev. 457. This is probably the most famous law review article ever written.

When he made the address, Holmes was fifty-five years old, beginning his fifteenth year as a Justice of The Supreme Judicial Court of Massachusetts. "There can be no doubt that his philosophy as then set forth was the product of a mature mind at the pinnacle of its ability."

B.F. Brody, "The Pragmatic Naturalism of Mr. Justice Holmes" (1969), 46 Chi.-Kent L. Rev. 9, at 12n.8.

4. "Path of the Law," *Supra* n. 3, at 457.

5. *Id.*, at 461.

6. *Id.*, at 458. Elsewhere, Holmes wrote:

[F]or legal purposes a right is only the hypostasis of a prophecy — the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it — just as we talk of the force of gravitation accounting for the conduct of bodies in space.

O.W. Holmes, "Natural Law" (1918), 32 Harv. L. Rev. 40, at 42.

7. "Path of the Law," *Supra* n. 3, at 460.

8. *1 Works of Rufus Choate* 436 (1862), quoted in M.D. Howe, "The Positivism of Mr. Justice Holmes" (1951), 64 Harv. L. Rev. 529, at 538.

9. Gilmore contends that, "Legal realism may be viewed as an elaborate commentary on an attitude toward law symbolized by the figure of that master of epigram, Justice Holmes." G. Gilmore, "Legal Realism: Its Cause and Cure" (1961), 70 Yale L.J. 1037.

The trouble with the nineteenth century, said the realists, was that lawyers believed, and law professors taught, that law was a symmetrical structure of logical propositions, all neatly dovetailed. The truth or error,

Justice Holmes told law students to leave axioms and deductions brooding in their omnipresence, and instead to read reports of what past courts had done, to anticipate what future courts in general would do.

Holmes developed the prediction theory when he himself was a lawyer, lecturing on jurisprudence and discussing "the very tallest and broadest" questions in the Metaphysical Club.<sup>10</sup> In 1872, he wrote of "lawyers' law" ("enforced by the procedure of the courts, and therefore of practical importance to lawyers"): "The only question for the lawyer is, how will the judges act?"<sup>11</sup> Holmes' idea of law as prediction is reflected in *The Common Law* (1881), finally reaching a crescendo in the 1897 Boston University dedication speech. The theory is said to have had a pervasive influence upon legal thinking in the United States, providing a framework for the re-examination of traditional legal doctrines and the puncturing of a "good many inflated windbags."<sup>12</sup>

Yet for all its uprooting of traditional concepts and dethroning of logical systems, the prediction theory comes back, in the end, to generalized rules, to a ". . . body of dogma or systematized prediction which we call the law. . . ."<sup>13</sup> Holmes did not stop at particular cases, nor at predictions of the results in individual instances of litiga-

the rightness or wrongness, of a judicial decision could be determined by merely checking to see whether it fitted into the symmetrical structure; if it fitted, it was right; if it did not fit, it was wrong and could, or at least should, be disregarded. Moreover, law students could be trained by being made to read carefully selected collections of correct cases, from whose study, by induction, they could arrive at the correct general principles.

*Id.*, at 1038.

Holmes rejected the prevailing nineteenth century conception of law and urged a view reflective of the method of science:

. . . [T]he practical study of the law ought also to be scientific. The true science of the law does not consist mainly in a theological working out of dogma or a logical development as in mathematics, or only in a study of it as an anthropological document from the outside; an even more important part consists in the establishment of its postulates from within upon accurately measured social desires instead of tradition.

O.W. Holmes, "Law in Science and Science in Law" (1899), 12 *Harv. L.Rev.* 443, at 452.

10. William James wrote to Oliver Wendell Holmes, Jr. from Berlin, on January 3, 1868:

When I get home let's establish a philosophical society to have regular meetings and discuss none but the very tallest and broadest questions — to be composed of none but the very topmost cream of Boston manhood. It will give each one a chance to air his own opinion in a grammatical form, and to sneer and chuckle when he goes home at what damned fools all the other members are — and may grow into something very important after a sufficient number of years.

1 R. Perry, *The Thought and Character of William James* (1935) 508.

Fisch guesses that some of the meetings of the Club in the spring of 1872 were devoted to the prediction theory of law. M. Fisch, *Supra* n. 1, at 20. He is reasonably sure that the prediction theory was invented during the most active years of the Metaphysical Club. Fisch, "Justice Holmes, the Prediction Theory of Law, and Pragmatism" (1942), 39 *J.Phil.* 85, at 94.

*Accord*, Kuklick, *Supra* n. 2, at 50-53.

11. O.W. Holmes, "Book Notices: The Law Magazine and Review" (1872), 6 *Am. L. Rev.* 723, at 724.  
 12. E. Patterson, *Jurisprudence* (1953) 120.  
 13. "Path of the Law," *Supra* n. 3, at 458.

tion. For him, “. . . the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalize them into a thoroughly connected system.”<sup>14</sup> Rules re-emerge, this time as the constructs of cases rather than as deductions from ethical axioms. “The Path of the Law” closes with Justice Holmes, the purported Positivist, catching an “. . . echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.”<sup>15</sup>

14. *Id.*, at 457-58.

15. *Id.*, at 478.

By legal positivism I mean that direction of legal thought which insists on drawing a sharp distinction between the law *that is* and the law *that ought to be*. Where this distinction is taken it is, of course, for the sake of the law *that is*, and is intended to purify it by purging it of what Kelsen calls “wish-law.” Generally — though not invariably — the positivistic attitude is associated with a degree of ethical skepticism.

L. Fuller, *The Law in Quest of Itself* (1940) 5.

Fuller felt that Holmes’s positivism diminished his influence as a judge and caused him to fall far short of realizing his intellectual potentials. *Id.*, at 62-63.

H.L.A. Hart identified five meanings of positivism:

1) the contention that laws are commands of human beings . . . 2) the contention that there is no necessary connection between law and morals . . . ; 3) the contention that the analysis (or study of the meaning) of legal concepts is a) worth pursuing, and b) to be distinguished from historical or sociological inquiries or appraisal of law . . . ; 4) the contention that a legal system is a “closed logical system” in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies, and moral standards and 5) the contention that moral judgments cannot be established or defended, (as statements of fact can), by rational argument, evidence, or proof.

H.L.A. Hart, “Positivism and the Separation of Law and Morals” (1958), 71 *Harv. L.Rev.* 593, 601-02 n. 25.

“The Path of the Law” and the prediction theory have been the focus of much critical writing, in which Holmes has emerged as an arch“-positivist.” See generally H.L.A. Hart, “Comment: Holmes’ Positivism” (1951), 64 *Harv. L. Rev.* 930; L. Fuller, “Positivism and Fidelity to Law — a Reply to Professor Hart” (1958), 71 *Harv. L. Rev.* 630; B.W. Palmer, “Hobbes, Holmes and Hitler” (1945), 31 *A.B.A.J.* 569; B.W. Palmer, “Defense Against Leviathan” (1946), 32 *A.B.A.J.* 328; F.E. Lucey, “Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society” (1942), 30 *Geo. L.J.* 493. A few have suggested that Holmes has been misunderstood, that he was not entirely skeptical, amoral, and unable to appreciate higher values.

Professor Fuller, with others, treats Holmes’ definition of law — the prediction of what the courts will do in fact — as another aspect of the positivist’s refusal to let conceptions of morality play their appropriate part in the legal process. . . . [T]his seems to involve an almost willful refusal to understand his thesis and his definition. Believing as Holmes did that “the law is the witness and external deposit of our moral life,” it is inconceivable that he should ask lawyers to leave out of their predictions of what courts might be expected to do in fact — all attention to the influence of morality on the minds of judges and jurors. What he was asking was that lawyers and judges should think things and not words, and become conscious of their responsibility to bring decisions into conformity with current standards of morality.

Howe, *Supra* n. 8, at 532.

Implicit in the naturalist condemnation of Holmes’ positivism is the belief that the advocacy of ignoring morality is a complete denial of higher principle or ends. But such could not be further from the truth. Holmes had ends firmly in mind; these ends are what he had in mind when he spoke of “social value.” Separating the *is* from the *ought* is not an end in itself, as the naturalists would have us believe, but rather merely a means of achieving an end — the perfection or purification of the law. Therefore, the first half of the *Path* does not conflict with the second, but rather is a means of achieving it.

C.F. Brody, *Supra* n. 3, at 14.

Brody concluded that Mr. Justice Holmes’ philosophy has few of the flaws found in Legal Positivism and that the Justice and his Naturalist critics share the same goal: “. . . good order through laws which, by their inherent consummate fairness, promote a high degree of compliance with themselves.” *Id.*, at 31.

### The Pragmaticist Philosophy

Pragmatism was for Charles Peirce a theory of meaning, a method of inquiry into the way we think and the symbols we use. Himself a scientist, his approach was that of the experimentalist:

The rational meaning of every proposition lies in the future. How so? The meaning of a proposition is itself a proposition. Indeed, it is no other than the very proposition of which it is the meaning: it is a translation of it. But of the myriads of forms into which a proposition may be translated, what is that one which is to be called its very meaning? It is, according to the pragmaticist, that form in which the proposition becomes applicable to human conduct. . . . For an experimental phenomenon is the fact asserted by the proposition that action of a certain description will have a certain kind of experimental result; and experimental results are the only results that can affect human conduct. . . . Whenever a man acts purposively, he acts under a belief in some experimental phenomenon. Consequently, the sum of the experimental phenomena that a proposition implies makes up its entire bearing upon human conduct.<sup>16</sup>

Pragmatism recasts our conceptions into conditional propositions about their future effects. Peirce's consideration of the quality "hardness" illustrates this theory.

To get at what we mean by calling a thing "hard," Peirce asked us to imagine that a diamond could be crystallized in the midst of a cushion of soft cotton and should remain there until it was finally burned up without ever having been struck against corundum. Was the diamond *really* hard? Or do all hard bodies remain perfectly soft until they are touched, when hardness increases with pressure until a scratch is made? Peirce's final<sup>17</sup> answer was that it would be a "monstrous perversion of the word and concept *real*"<sup>18</sup> to say that the lack of the corundum test prevented the hardness of the diamond

16. C.S. Peirce, "What Pragmatism Is" (April 1905), *The Monist* 173-74. See W. Gallie, "Peirce's Pragmatism," in P. Wiener and F. Young (eds.), *Studies in the Philosophy of Charles Sanders Peirce* (1952) 61-62, for a discussion of pragmatism as a method of logic and a method of scientific investigation.

17. In 1878, Peirce had written that "[t]here is absolutely no difference between a hard thing and a soft thing so long as they are not brought to the test." C.S. Peirce, "How to Make Our Ideas Clear," (Jan. 1878), *Pop. Sci. Mo.*, in P. Weiner (ed.), *Charles S. Peirce: Selected Writings, (Values in a Universe of Chance)* (1958) 124.

We may . . . ask what prevents us from saying that all hard bodies remain perfectly soft until they are touched, when their hardness increases with the pressure until there are scratches. Reflection will show that the reply is this: there would be no *falsity* in such modes of speech. They would involve a modification of our present usage of speech with regard to the words "hard" and "soft", but not of their meanings. For they represent no fact to be different from what it is; only they involve arrangements of facts which would be exceedingly maladroit. This leads us to remark that the question of what would occur under circumstances which do not actually arise is not a question of fact, but only of the most perspicuous arrangement of them.

*Id.*, at 125.

Were it impossible that anything should rub against the diamond, it would be "quite without meaning" to say that it is hard, because there was "no fact, no event, nothing whatsoever, which made it different from any other thing which is not so hard, until the other stone rubbed against it." Peirce, quoted in J. Boler, *Charles Peirce and Scholastic Realism: A Study of Peirce's Relation to John Duns Scotus* (1963) 95. Peirce later regretted these remarks as too nominalistic, and in the 1905 *Monist* article he was criticizing and modifying the misleading character of the illustration. V. Potter, *Charles S. Peirce: On Norms and Ideals* (1967) 56.

18. C.S. Peirce, "Issues of Pragmatism" (Oct. 1905), *The Monist* 496.

from having the reality which it otherwise would have had. The reality of the diamond's hardness consisted in the truth of a general conditional proposition.

For to what else does the entire teaching of chemistry relate except to the "behavior" of different possible kinds of material substance? And in what does that behavior consist except that if a substance of a certain kind should be exposed to an agency of a certain kind, a certain kind of sensible result *would* ensue, according to our experiences hitherto. As for the pragmatist, it is precisely his position that nothing else than this can be so much as *meant* by saying that an object possesses a character.<sup>19</sup>

To say that a gem is hard — even our untested diamond on a bed of cotton — is to predict that if the gem were struck against a touchstone, it would not scratch easily; apart from this and other such "consequences," nothing more is meant by hardness.

In Peirce's view, a conception — the rational purport of a word or other expression — consisted solely of its conceivable bearing upon the conduct of life, so that "if one can define accurately all the conceivable experimental phenomena which the affirmation or denial of a concept could imply, one will have therein a complete definition of the concept, and *there is absolutely nothing more in it.*"<sup>20</sup> For the pragmatist, meaning consists of "would-be's" and of consequences (connections between antecedents and consequents) and is identical with rational purpose.<sup>21</sup> And what a pragmatist means by a conception cannot be stated in terms of a particular experiment, but in general conditional propositions (although there can be no generals without individual instances as a source, or basis).<sup>22</sup>

19. *Ibid.*

"How magical it is that by examining a part of a class we can know the future: in short, that we can know what we have not experienced!" Peirce, quoted in Boler, *Supra* n. 17, at 21n.12. Applying this to the diamond illustration, Peirce recognized that one need not test for the presence of every property of a diamond in order to determine that a gem possesses that complex character peculiar to diamonds (a complex character involving hardness).

"What Pragmatism Is." *Supra* n. 16, at 162-63.

For this doctrine he invented the name *pragmatism*. Some of his friends wished him to call it *practicism* or *practicalism* (perhaps on the ground that *praktikós* is better Greek than *pragmatikós*). But for one who had learned philosophy out of Kant, as the writer, along with nineteen out of every twenty experimentalists who have turned to philosophy have done, and who still thought in Kantian terms most readily, *praktisch* and *pragmatisch* were as far apart as the two poles, the former belonging in a region of thought where no mind of the experimentalist type can ever make sure of solid ground under his feet, the latter expressing relation to some definite human purpose. Now quite the most striking feature of the new theory was its recognition of an inseparable connection between rational cognition and rational purpose; and that consideration it was which determined the preference for the name *pragmatism*.

*Id.*, at 163.

21. See Potter, *Supra* n. 17, at 58-60, 96-97.

22. To say that X is hard is to predict that the experiment of scratching X will fail every time, no matter how it is tried. A limited number of tests may make the meaning of the statement clear.

But what the meaning is and how it is prompted or taught differ in this respect: the records of actual confirming instances are ordinarily but a subclass of the meaning of the sign or term. For the statement asserts, or means,

When an experimentalist speaks of "Hall's phenomenon," or of "the chessboard phenomenon," explained Peirce, he is not speaking of an event which happened to somebody "in the dead past, but what *surely will* happen to everybody in the living future who shall fulfill certain conditions," for the pragmatist maxim refers only to "general kinds of experimental phenomena." Therefore, general objects are real, and the laws of nature are true.<sup>23</sup> Evidently, Peirce's conditional propositions are on the order of rules.

When Charles Peirce was asked what lithium means, he did not say that it was an element with the atomic weight of 7; instead he advised that search be made among minerals that are "vitreous, translucent, grey or white, very hard, brittle, and insoluble,"

for one which imparts a crimson tinge to an un luminous flame, this mineral being triturated with lime or with erite rats-bane, and then fused, can be partly dissolved in muriatic acid; and if this solution be evaporated, and the residue be extracted with sulphuric acid, and duly purified, it can be converted by ordinary methods into a chloride, which being obtained in the solid state, fused, and electrolyzed with half a dozen powerful cells, will yield a globule of pinkish silvery metal that will float on gasolene; and the material of *that* is a specimen of lithium.<sup>24</sup>

Peirce explained that the peculiarity of this precept (which is "more serviceable than a definition") is that it tells what the word lithium

that it is *always* the case, *whenever* you try, that X *will* not be scratched. Thus, understanding the meaning of a sign, we will know how to supply a confirming instance of the sign. But knowing how to confirm and knowing the meaning of a sign are not the same. Knowing the meaning involves understanding an assertion about an "innumerable series" of confirming instances.

H.S. Thayer, *Supra* n. 2, at 101.

Peirce sometimes called pragmatism "experimentalism" or "conditional idealism" and he formulated its essential character in terms of the conditional proposition: "If a certain experiment were performed, then an experience of a given description would ensue." D.J. Bronstein, "Inquiry and Meaning", in *Studies in the Philosophy of Charles Sanders Peirce*, *Supra* n.1, at 43. To explain the meaning of an empirical proposition, we invoke a subjunctive conditional; if that proposition is true, there will be a law to which the object or event in question is subject.

*Id.*

23. "What Pragmatism Is", *Supra* n. 16, at 173.

Peirce aimed to get Nominalists to see that, as actually used, standard scientific expressions are irreducibly general observations; or to get them to see that every object of desire is essentially general; or to get them to recognize the inevitable vagueness of all predicate terms that are not "by a well understood convention" rendered general. Gallie, *Supra* n. 16, at 71.

By a law of nature, Peirce meant "a predictive [prognostic, foreknowing] generalization of observations . . .". Peirce, quoted in Wiener, *Supra* n. 1, at 223.

24. Peirce, quoted in Moore, *Supra* n. 2, at 36.

The pragmatic theory of meaning necessitates the belief that concepts have a real external counterpart; if this belief is accepted, the pragmatic definition will provide a practical guide for actions that will result in an experience of the counterpart. "In short, to accept pragmatism is to accept metaphysical realism with reference to concepts."

*Id.*, at 37.

If one admits that concepts are general ideas and then asks, is there anything in reality that stands in a one-to-one relation to the concept, an affirmative answer is only possible on a realist position; a negative answer relegates concepts to the realm of fictions. It follows from this that pragmatism could not be accepted by anyone who does not also accept metaphysical realism, and that the former could scarcely have entered the head of anyone who did not already understand the latter.

*Ibid.*

denotes by prescribing what one is to do to attain a perceptual acquaintance with the object of the word. Thus, "lithium," and "hard" refer to definite operations leading to definite sensible results. Meaningful statements about objects and qualities take on the character of rules.<sup>25</sup> To mean something, a hypothesis "ought to be little more than a ligament of numberless possible predictions concerning future experience, so that if they fail, it fails."<sup>26</sup> The home of pragmatists, and of Charles Peirce, their founding father, was in the realm of real potentialities, possibilities, and predictions.

In 1942, Max H. Fisch wrote that the prediction theory was "the only systematic application of pragmatism that has yet been made."<sup>27</sup> On a later page of the same article, he boldly proclaimed that "pragmatism was a generalization of the prediction theory of law."<sup>28</sup> A footnote even further on teeters between these two pronouncements: "Holmes's general outlook was" close to "Peirce's . . . and many phrases . . . read like echoes of Peirce's conversation — or was it the other way around?"<sup>29</sup> We are left with the impression that the Peirce-Holmes relation was reciprocal, if only indirectly — by virtue of their common membership in the Metaphysical Club. But who were these Cambridge "Metaphysicians," and what went on in their gatherings?

### The Metaphysical Club

The Metaphysical Club was a group of Harvard-educated men ("the very topmost cream of Boston manhood"),<sup>30</sup> who met in each

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25. See J. Buchler, *Charles Peirce's Empiricism* (1966) 115-16.

Thomas Goudge explained Peirce's hardness illustration by saying that it involves the "presence of a law in the form of an established rule of usage for the term *hard*. The law expresses a regularity which holds an indefinite future." T. Goudge, *The Thought of C.S. Peirce* (1950) 92.

26. Peirce, quoted in R. Chisholm, "Fallibilism and Belief", in *Studies in the Philosophy of Charles Sanders Peirce*, *Supra* n. 16, at 94.

John F. Boler described the special contribution of Peirce's pragmatism in this way:

The pragmatic formulation makes the rational purport of any conception consist in the truth of a conditional proposition relating to the future. This means that (1) every predicate involves (virtually) a relative character, which brings into prominence the generality of the character itself as a system, in contrast to the more commonly recognized generality of the collection of similar (sets of) subjects; and (2) every predicate becomes a virtual prediction. Of course, pragmatism does not verify predictions; it simply puts our conceptions into a form that will allow for the scientific inquiry which alone can separate law from fiction. The fact of scientific prediction, however, shows that in some cases something more than an accidental succession of events or a simple uniformity is involved. Ultimately, prediction shows there is something real now that accounts for a future actuality; and since the only actuality involved is the future event, the present reality must be a possibility.

Boler, *Supra* n. 17, at 147. See also *id.*, at 31-32.

27. 39 J. Phil., *Supra* n. 10, at 87.

28. *Id.*, at 94.

29. *Id.*, at 96n.27.

30. See, letter from William James to Oliver Wendell Holmes, Jr., quoted in n. 10.



others' studies in the early 1870's to discuss scientific methodology, semantic clarity, the new Darwinian theory of evolution, physiology, the new psychology, and ethical and moral problems.<sup>31</sup> It is also likely that the prediction theory of law was a topic of discussion, since three of the six most active members — Oliver Wendell Holmes, Jr., Nicholas St. John Green, and Joseph Warner — were practising attorneys.<sup>32</sup> The other core members were men of science: William James, Charles Peirce, and Chauncey Wright;<sup>33</sup> other members included Francis Ellingwood Abbot (editor and theologian), and John Fiske (historian), both interested in science, and John Chipman Gray (another lawyer).

At the time, Wright was lecturing in psychology and working on his major essay, "The Evolution of Self-Consciousness." Peirce was lecturing on logic and philosophy of science, assisting in the Harvard Observatory, and working for the United States Coast and Geodetic Survey. James had not yet begun to teach, and was "nursing his health and reading Renouvier."<sup>34</sup> Green was lecturing on criminal law, Gray on conflict of laws and evidence (having already conceived his books on the Rule Against Perpetuities and analytical jurisprudence). Holmes was editing the American Law Review, revising Kent's Commentaries on American Law, and lecturing on jurisprudence.<sup>35</sup>

In later years, Charles Peirce said that the name "Metaphysical Club" was chosen "half-ironically, half-defiantly," for "agnosticism was then riding its high horse, and was frowning superbly upon all metaphysics. . . ."<sup>36</sup> Indeed, it was a strange sort of metaphysical club, where argument concerned the legitimacy of metaphysics itself. Chauncey Wright, a nominalist, was seen by Peirce and James as an arch positivist, consistently attacking the realism to which they and Abbot ascribed. Wright said no to

31. P. Conkin, *Puritans and Pragmatists: Eight Eminent American Thinkers* (1968) 226.

32. 39 J. Phil., *Supra* n. 10, at 88; Fisch, *Supra* n. 1, at 20.

33. M. Murphey, *The Development of Peirce's Philosophy* (1961) 98.  
See also Patterson, *Supra* n. 12, at 474-75.

Others with peripheral connections to the Club were William Montague and Henry Putnam (lawyers) and Francis Greenwood Peabody (theologian), friends of Warner or students of the older members. Kuklick, *Supra* n. 2, at 48. For Peirce's own description of the members, see the Appendix to Fisch, *Supra* n. 1, at 24-29.

34. 39 J. Phil., *Supra* n. 10, at 90.

35. *Id.*

36. Peirce, quoted in Wiener, *Supra* n. 1, at 19.

Edward C. Moore suggests that the name of the Club survived only in the memory of Peirce. Moore, *Supra* n. 2, at 74n.1. While Max H. Fisch documented the existence of a Metaphysical Club in Cambridge in the 1870's, he did not specify the name of the Club in its early years, or if it had a name at all. See Fisch, *Supra* n. 1 at 19-20.

metaphysics; Abbot, Peirce, and James said yes, but looked to science and the scientific method for support.<sup>37</sup>

#### Pierce had high praise for the Club:

[I]n 1872 . . . a group of young men . . . used . . . to meet once a fortnight in Cambridge, Mass., under the name of 'The Metaphysical Club,' — a name chosen to alienate such as it would alienate. Its constitution was likewise effective, consisting in a single clause forbidding any action by the Club as a collective body. This saved it from wasting the only intrinsically precious element in the world as many societies waste it, in the idle frivolity they call 'business.' . . . It proved quite the most successfully organized body of students for genuine educative efficiency, in contradistinction to saw-dust-stuffing, that ever I had the good fortune to be placed in;<sup>38</sup>

Henry James, Jr., not himself a member of the group, had a different comment:

Wendell Holmes, my brother, & various other long-headed youths have combined to form a Metaphysical Club, where they wrangle grimly & stick to the question. It gives me a headache merely to know of it.<sup>39</sup>

However Metaphysical Club discussions are characterized, it was a forum for budding minds to air their ideas on current issues. The Club was a seedbed in an era of great American intellectual excitement; most members would go on to excel in their fields, utilizing similar methods of inquiry, grounded by some of the same philosophical underpinnings.

### Pragmatism

#### In 1907, Charles Peirce recounted:

Our metaphysical proceedings had all been in winged words . . . until at length, lest the club should be dissolved, without leaving any material *souvenir* behind, I drew up a little paper expressing some of the opinions that I had been urging all along under the name of pragmatism. This paper was received with such unlooked-for kindness, that I was encouraged, some half-dozen years later . . .

37. Murphey, *Supra* n. 33, at 99.

The founder of nineteenth century positivism was Auguste Comte. Positivism represented the third stage in the history of thought — the scientific stage. For the positivist, a scientific law is not a demonstration of a divine power working in the universe or even an exemplification of an abstract principle; positivists think of laws as statements of how objects have been observed to behave.

Accordingly the positivist tends to refer the meaning of all terms to what is found in experience. There is no evidence that Peirce or James studied Comte's work in any detail. However, John Stuart Mill was closely allied to Comte's position, and they knew his views. Even more direct, however, was the influence of the American, Chauncey Wright. . . .

Moore, *Supra* n. 2, at 5.

For a very good discussion of Peirce as Realist, see Boler, *Supra* n. 17.

38. Appendix to Fisch, *Supra* n. 1, at 24. Peirce continued:

All the members of our little club have been more or less marked for their philosophical breadth ever since that time. We may, at any rate, be permitted to exult that we had among us the foremost psychologist of the present time, Professor William James, member of the Institute of France, of the Royal Prussian Academy, of the Royal Danish Academy, and of the first of such bodies, the "Accademia dei Lincei", as well as Mr. Justice Holmes of the Supreme Court of the United States and formerly Chief Justice of Massachusetts, of whose profundity as a philosophical jurist I may not presume to say a word.

*Id.*, at 28.

39. Henry James, Jr., quoted in Fisch, *Supra* n. 1, at 4-5.

to insert it, somewhat expanded, in *Popular Science Monthly* for November 1877 and January, 1878.<sup>40</sup>

The little paper of which Peirce spoke has not survived, but the expanded version comprised the first two of six essays written by Peirce as "Illustrations of the Logic of Science" (1877-78); we know them as "The Fixation of Belief" and "How to Make Our Ideas Clear." These were his first popular philosophical articles, but from them he did not become a noted American philosopher. Recognition came twenty years later when William James popularized Peirce's pragmatism in an 1898 University of California lecture, "Philosophical Conceptions and Practical Results" and in a 1907 book, *Pragmatism*. But this popularization did not agree with Peirce, who then invented "pragmatism" to distinguish his philosophy from the many pragmatisms that he saw developing in turn-of-the-century America.<sup>41</sup>

40. 39 J. Phil., *Supra* n. 10, at 92n.16.

The essays for *Popular Science Monthly* were written as Peirce sailed to England to attend a geodetic conference in the fall of 1877. Peirce later reported that he had the smoking room entirely to himself, and "I occupied myself by writing an article in which I enunciated a logical maxim for making ideas clear, which I called *Pragmatism*." Peirce, quoted in Murphey, *Supra* n. 9, at 103-04.

In the intervening years between the reading of the little souvenir and the publication of the two essays, Peirce took charge of the U.S. Coast Survey's pendulum researches on gravity, in addition to the work in stellar photometry in which he was already engaged. See Fisch, *Supra* n. 1, at 6-7, 15-16, 19.

By the time the two essays were published, Chauncey Wright and Nicholas St. John Green were dead, O.W. Holmes, John Chipman Gray, and Joseph Warner had married, Peirce had left Cambridge, and the original Club had ceased to meet. 39 J. Phil., *Supra* n. 10, at 92 n. 16.

41. Writing in 1905, Charles Peirce noted that literary journals were mercilessly abusing his term "pragmatism":

Sometimes the manners of the British have effloresced in scolding at the word as ill-chosen — ill chosen, that is, to express some meaning that it was rather designed to exclude. So then, the writer, finding his bantling "pragmatism" so promoted, feels that it is time to kiss his child good-by and relinquish it to its higher destiny; while to serve the precise purpose of expressing the original definition, he begs to announce the birth of the word "pragmatism", which is ugly enough to be safe from kidnappers.

"What Pragmatism Is", *Supra* n. 16, at 165.

For discussion of the difference between Peirce's and James' pragmatism, and the difference between pragmatism and practicalism, see Moore, *Supra* n. 2, at 139-40; Buchler, *Supra* n. 25, at 94-95; Murphey, *Supra* n. 33, at 155-56.

Even William James came to think that the name "pragmatism" was an unfortunate choice:

Critics treat our view as offering itself exclusively to engineers, doctors, financiers, and men of action generally, who need some sort of a rough and ready *Weltanschauung*, but have no time or wit to study genuine philosophy.

It is usually described as a characteristically American movement, a sort of bobtailed scheme of thought, excellently fitted for the man on the street, who naturally hates theory and wants cash returns immediately.

James, quoted in Morris, *Supra* n. 2, at 10. See also J. Frank, "A Conflict with Oblivion: Some Observations on the Founders of Legal Pragmatism" (1954), 9 Rut. L. Rev. 425, at 432n.41.

In his lecture at the University of California, James mistakenly said that Peirce introduced the term pragmatism in "How to Make Our Ideas Clear". Thayer, *Supra* n. 2, at 489. "It is worth noting that Peirce did not at first use the word "pragmatism" in a titular or emphatic way to designate some special doctrine; the pragmatic maxim was then regarded as part of a larger theory of inquiry and the study of signs." *Id.* From Peirce himself, we have this:

The word "pragmatism", which I had invented for the *practice*, that I had incessantly preached in the club, and also for my *formulation* of it . . . had been used in the paper read to the club; but I had struck it out in going to press . . . [My second article, "How to Make Our Ideas Clear", amplified] the paper read to the Club with illustrations of the maxim of clearness that had not been needed at first, or account of my having put forth sundry such interpretations at previous meetings, before I had undertaken to formulate their common motive.

Peirce, in Appendix to Fisch, *Supra* n. 1, at 28.

“Fixation of belief” refers to the settlement of opinion into some habit which will determine our actions. “Our beliefs,” wrote Peirce, “guide our desires and shape our actions.”<sup>42</sup> Belief creates in us a disposition to act in a certain manner when the occasion arises. Doubt is an irritation causing in us a struggle to attain a state of belief; this struggle, Peirce called “inquiry.”<sup>43</sup>

The irritation of doubt is the only immediate motive for the struggle to attain belief. It is certainly best for us that our beliefs should be such as may truly guide our actions so as to satisfy our desires; and this reflection will make us reject any belief which does not seem to have been so formed as to insure this result. But it will only do so by creating a doubt in the place of that belief. With the doubt, therefore, the struggle begins, and with the cessation of doubt it ends. Hence, the sole object of inquiry is the settlement of opinion.<sup>44</sup>

Peirce’s method of inquiry was both relative and evolutionary: we seek beliefs we shall *think* to be true, and no opinion is yet so settled as to be safe from new doubt, further inquiry, and supplantation by another belief.

Peirce evoked the image of an ostrich to characterize those who cling to their beliefs and shut out changing influences; they employ the “method of tenacity.” Under the method of authority, opinion is dictated by the state and all those in opposition are silenced. With the *a priori* method, fundamental propositions seeming agreeable to reason are adopted. “Let the action of natural preferences be unimpeded, then, and under their influence let men conversing together and regarding matters in different lights, gradually develop beliefs in harmony with natural causes.”<sup>45</sup> Peirce opined that this method was far more intellectual and respectable than the others, but he reserved his highest praise for the method of science. “To satisfy our doubts, . . . it is necessary that a method should be found by which our beliefs may be caused by nothing human, but by some external permanency — by something upon which our thinking has no effect.”<sup>46</sup> The fundamental hypothesis-of the method of science is that there are real things with characters independent of our thoughts about them. These things affect our senses according to regular laws

and through our sensations are as different as our relations to the objects, yet, by taking advantage of the laws of perception, we can ascertain by reasoning how things really are, and any man, if he have sufficient experience and reason enough about it, will be led to the one true conclusion.<sup>47</sup>

42. C.S. Peirce, “The Fixation of Belief”, (Nov. 1877) *Pop. Sci. Mo.*, in *Charles S. Peirce: Selected Writings*, *Supra* n. 17, at 98.

43. *Id.*, at 99.

44. *Id.*, at 100.

45. *Id.*, at 105.

46. *Id.*, at 107.

47. *Id.*, at 108.

Peirce said that reality is independent of what individuals think about it. Our perversity may cause an arbitrary proposition to be universally accepted for the duration of the human race. “Yet even that would not change the nature of the belief, which alone could be the result of investigation carried sufficiently far; and if, after the extinction of our race, another should arise with faculties and disposition for investigation, that true opinion must be the one which they would ultimately come to.” “How to Make Our Ideas Clear”, *Supra* n. 17, at 133-34.

Peirce's goal was to describe the method of scientific investigation in his essays — a "method of reaching a clearness of thought of a far higher grade than the 'distinctness' of logicians."<sup>48</sup>

In "How to Make Our Ideas Clear," Charles Peirce described "belief", as a demi-cadence closing a musical phrase of thought in our intellectual life's symphony. Thought pauses for a moment when belief is reached, but starts up again when beliefs — rules for action — are applied and doubt leads again to inquiry.<sup>49</sup> Indeed, "the whole function of thought is to produce habits of action."<sup>50</sup>

[T]he identity of a habit depends on how it might lead us to act, not merely under such circumstances as are likely to arise, but under such as might possibly occur, no matter how improbable they may be.<sup>51</sup>

Here again we see Peirce's emphasis on would-be's, on possibilities. Beliefs were not themselves actions, but dispositions to act on an occasion. What a habit is depends upon when and how it would cause us to act. And what a conception is depends upon what we foresee its future effects to be:

[T]he rule for attaining . . . clearness of apprehension is . . . consider what effects, which 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.<sup>52</sup>

48. *Id.*, at 118.

49. *Id.*, at 121.

50. *Id.*, at 123.

51. *Ibid.*

52. *Id.*, at 124.

Moore provides a good illustration of Peirce's meaning. Suppose that a child just learning to talk and becoming increasingly aware of the eternal world encounters an object, rough to the touch, that her father calls "a tree". The word "tree" now means to the child something that if touched will feel rough. The child leans against the tree and it supports her; "tree" now means something that if leaned against will give support. Her father cuts down the tree and burns it in the fireplace and warmth is exuded; "tree" now means something that if burned will exude warmth. What the child means by "tree" will coincide with that of most people. The child knows that if she touches the tree, it will feel rough; if she leans against it, it will support her; if she burns it, it will exude warmth, and so on.

The sum of all such propositions constitutes what is meant by treeness. Each of these propositions represents an idea of a relation which holds between an idea of volition and an idea of perception. The sum of these ideas of relations between possible experiences constitutes the meaning of treeness.

If we consider the effects of tree (the object of our conception) which might conceivably have practical bearings — rough to touch; supportive; warmth exuding; then our conception of these effects is the whole of our idea of "tree". Moore, *Supra* n. 2, at 50-51.

We watch how other people act in relation to trees to see if their idea of treeness is the same as ours. Conduct is the immediate interpretant of an idea. One's actions toward a tree (touching it, leaning against it, burning it) follow from, and are consequences of, the practical considerations which go to make up that person's idea. *Id.*, at 54-55.

For a critical analysis of the pragmatic maxim, see A. Lovejoy, "What Is the Pragmaticist Theory of Meaning? The First Phase", in *Studies in the Philosophy of Charles Sanders Peirce*, *Supra* n. 16, at 16-17.

One of the problems with the maxim is that Peirce does not define "conception;" and five derivatives of "concupere" were used in Peirce's formulation. See Potter, *Supra* n. 17, at 66.

Ironically, this most famous and often repeated of Peirce's statements on pragmatism is probably the unclearest recommendation for how to make our ideas clear in the history of philosophy. Peirce himself takes note of his use "five times over of derivatives of *concupere*", explaining that recrudescence as an emphatic to indicate that he was concerned here with "intellectual purport". Concepts are to be explained by concepts, not by images, not by actions. While this may not excuse the inelegance of his formulation, it is a noteworthy addendum. Access to the meanings of concepts is gained only through traffic with concepts.

Thayer, *Supra* n. 2, at 87.

This last rule is the famed "pragmatic maxim," much heralded as an encapsulation of Metaphysical Club philosophy; but more felicitous statements have since been penned, even by Peirce.<sup>53</sup>

Peirce goes on, in "How to Make Our Ideas Clear," to discuss the question of truth, revising his earlier intimation that truth is subjective. It was very important to Peirce that the method of inquiry be seen as a collective activity. As each member of the "community of inquirers" continues scientific research, "the results will move steadily together toward a destined center. . . . The opinion which is fated to be ultimately agreed to by all who investigate is what we mean by the truth, and the object represented in this opinion is the real."<sup>54</sup> For Peirce, it was "unphilosophical" to suppose that investigation would not bring forth solution "if it were carried far enough."<sup>55</sup> And so we find the pioneer pragmatist hailing the scientific method, sounding like a realist with definite metaphysical sympathies.<sup>56</sup>

"The Fixation of Belief" and "How to Make Our Ideas Clear" were Charles Peirce's gift to American philosophy in the name of the Cambridge Metaphysical Club. These essays are the work of a mind engaging problems of the late nineteenth century world. In that world "many oppositions were apparent": science against religion, positivism against naturalism, intuition against experience, secular and democratic ideals against religious and aristocratic reactions.<sup>57</sup> These essays articulate all that we associate with "America's most distinctive contribution to philosophy,"<sup>58</sup> pragmatism: adulation of the methods of science, with emphasis on inquiry and insistence on fallibilism;<sup>59</sup> acceptance of evolutionary theories;<sup>60</sup> preoccupation

53. See, e.g., Peirce's Description of Pragmatism in Appendix to Thayer, *Supra* n. 2, at 494; "What Pragmatism Is", *Supra* n. 16; "Issues in Pragmaticism", *Supra* n. 18.

54. "How to Make Our Ideas Clear", *Supra* n. 17, at 133.

Fate means merely that which is sure to come true, and can nohow be avoided. It is a superstition to suppose that a certain sort of events are ever fated, and it is another to suppose that the word "fate" can never be freed from its superstitious taint. We are all fated to die.

*Id.*, at 133n.4.

55. *Id.*, at 134.

Peirce did not tell us, nor did he know, how far was "far enough". See Kuklick, *Supra* n. 2, at 122; Moore, *Supra* n. 2, at 87.

56. For discussion of the connection between pragmatism, realism, and idealism, see Boler, *Supra* n. 17, and Bosco, "Peirce and Metaphysics", in *Studies in the Philosophy of Charles Sanders Peirce*, *Supra* n. 1, at 356.

57. I. Scheffler, *Four Pragmatists: A Critical Introduction to Peirce, James, Mead, and Dewey* (1974) 1. Pragmatism is in effect a mediating philosophy between these many oppositions. See also Moore, *Supra* n. 2, at 2ff, for a discussion of the influence of science in this period.

58. 39 J. Phil., *Supra* n. 10, at 85.

59. See Morris, *Supra* n. 2, at 5f; Scheffler, *Supra* n. 57, at 20.

In a letter to James, dated March 7, 1904, Peirce wrote: "I also want to say that after all pragmatism solves no real problem. It only shows that supposed problems are not real problems. . . . The effect of pragmatism here is simply to open our minds to receiving any evidence, not to furnish evidence." Peirce, quoted in Potter, *Supra* n. 17, at 57n.10.

60. See Wiener, *Supra* n. 1.

with the necessary and essential connection between belief and human action;<sup>61</sup> subscription to the democratic ideal of collective effort;<sup>62</sup> rejection of systems of pure reason in favor of empirical analysis.<sup>63</sup> Charles S. Peirce spoke to and for the Metaphysical Club; even more, he was a symbolic speaker of the American consciousness, but did he also speak for Oliver Wendell Holmes, Jr.?

### The Peirce-Holmes Connection

Oliver Wendell Holmes, Jr. is neglected in H.S. Thayer's history of pragmatism because Thayer doubted that the prediction theory of law was ever seriously influenced by the pragmatism of Peirce or James; "and judging by some of the comments he made in correspondence later in life, it is debatable whether Holmes understood Peirce's pragmatism or the full philosophic import of the doctrine at all."<sup>64</sup> Mark De Wolfe Howe, Holmes' biographer, rejected the affiliation of Holmes' predictive legal theory with the philosophical pragmatism of Peirce, James, and St. John Green. "Perhaps this thesis can be sustained, yet it would seem that Holmes in the beginning, at least, was led toward the prediction theory of law by an impulse more critical than philosophical."<sup>65</sup> Howe argued that Holmes was not searching in 1872 for a jurisprudence consistent with the philosophical premises of his generation, but was "engaged in the more limited and quite hard-headed task of examining the validity of Austin's thesis that law is always identifiable as the command of the sovereign."<sup>66</sup>

Holmes attended Peirce's Lowell Lectures on "The Logic of Science and Induction" in the winter of 1866-67.<sup>67</sup> Both Peirce and Holmes were participants in the Metaphysical Club discussions in the winter of 1871-72.<sup>68</sup> Justice Holmes read *Chance, Love and Logic*, the first published collection of Peirce's essays, in the summer of

61. See Fisch, "Alexander Bain and the Genealogy of Pragmatism," 15 J. Hist. Ideas 413, at 438 (1954). The elements of every concept enter into logical thought at the gate of perception and make their exit at the gate of purposive action; and whatever cannot show its passports at both those two gates is to be arrested as unauthorized by reason.

Peirce, quoted in M. Thompson, *The Pragmatic Philosophy of C.S. Peirce* (1953) 202.

62. Peirce emphasized collectivity more than James — the community of inquirers, for instance. See Moore, *Supra* n. 2, at 70; Morris, *Supra* n. 2, at 5ff.

63. See Scheffler, *Supra* n. 57, at 20, 23, 52; Buchler, *Supra* n. 25, at 78; W. Gallie, *Peirce and Pragmatism* (1952) 61; C.S. Peirce, *Some Consequences of Four Incapacities*, in *Charles S. Peirce Selected Writings*, *Supra* n. 16, at 39-72.

For a good summation, describing and tracing the aim and formative doctrines of pragmatism, see Thayer, *Supra* n. 2, at 431.

64. Thayer, *Supra* n. 2, at 431.

65. M. Howe, *Justice Oliver Wendell Holmes: The Proving Years 1870-1882* (1963) 75.

66. *Ibid.*

67. Wiener, *Supra* n. 1, at 75; M. Howe, *Justice Oliver Wendell Holmes: The Shaping Years 1841-1870* (1957) 251.

68. Fisch, *Supra* n. 1, at 19.

1923.<sup>69</sup> And yet, Holmes was not long active in the Metaphysical Club.<sup>70</sup> In later life, he had few memories of Peirce:

I think I remember his father saying to me, 'Charles is a genius,' and I remember the august tones in which, at one of the few meetings at which I was present, Charles prefaced his opinion with 'Other philosophers have thought'. Once in a fertilizing way he challenged some assumption that I had made, but, alas, I forget what. But in those days I was studying law and I soon dropped out of the band, although I should have liked to rejoin it when it was too late. I think I learned more from Chauncey Wright and St. John Green, as I saw Peirce very little.<sup>71</sup>

He once confessed to Sir Frederick Pollock that he thought pragmatism "an amusing humbug,"<sup>72</sup> and after finishing *Chance, Love and Logic*, he 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.<sup>73</sup>

As for Peirce, his accounts of the Metaphysical Club contain few references to Holmes.<sup>74</sup> There is no evidence that Peirce attended the Boston University dedication speech or any of Holmes' jurisprudence lectures, or that he read *The Common Law*. Apparently, Charles Sanders Peirce and Oliver Wendell Holmes, Jr. inhabiting the same garden, were of separate sub-cultures. Cross-pollination, however, is one of the great mysteries of garden life.

The Metaphysical Club conversants took a functional view of social institutions such as law, focusing on the cumulative products of practical decisions. "They aimed to make our social thinking flexible, humane, and scientific, to cut into the cake of custom, though they were well aware of the crusty hardness of tradition and authority resistant to change."<sup>75</sup> The lawyers among them sought ways to make the law adaptable to changing social conditions in light of science and logic. Influenced by Darwin, they saw law as an instrument for adjusting conflicting human desires. "Against a static conception of the law as disembodied reason or eternal natural law discoverable by the jurist and applied syllogistically to each new case,

69. Goudge, *Supra* n. 25, at 325.

70. Fisch infers that Holmes was seldom present at Metaphysical Club meetings after the winter of 1871-72 (the very first winter of its existence). As reasons for his early withdrawal, Fisch mentions Holmes' absorption in law, the fact that he lived with his parents in Boston — removed from where the Club met, and his marriage in June, 1872. Fisch, *Supra* n. 1, at 22.

71. Holmes, quoted in 15 J. Hist. Ideas, *Supra* n. 61, at 414n.6.

72. M. Howe (ed.), 1 *Holmes-Pollock Letters* (1941) 138-39.

73. Holmes disavowed having heard of pragmatism before 1891. Wiener, *Supra* n. 1, at 21-22.

*But see* Wiener, *Supra* n. 1, at 21-22 (both Holmes and Peirce criticized James' "Will to Believe" doctrine as confounding metaphysics with morals). *Id.*, at 187. It is ironic that Holmes frequently expressed the following sentiment: "My ultimate test of truth . . . is that I *can't* help believing so and so."

74. Cf. Fisch, *Supra* n. 1, at 28; 39 J. Phil. *Supra* n. 10, at 96m.26.

75. Wiener, *Supra* n. 1, at 153.



they applied the more empirical notion of man's fallible groping for order and justice . . ."76 Amidst these conceptions, the prediction theory of law arose.

In April, 1871, Attorney Oliver Wendell Holmes was appointed Harvard University Lecturer on Jurisprudence for the next school year. While he prepared these lectures and explored the nature of law, he was an active Metaphysical Clubbist. The text for his course was Austin's Lectures on Jurisprudence, "and Holmes's views were shaped on that massive anvil."77 In April, 1872, the first printed statement of the prediction theory appeared.78 Four months later Peirce read his little "souvenir" paper to the Club. Max Fisch's investigations led him to the conclusion that the prediction theory took shape between 1870 and 1872, in the same years that "the general doctrine which Peirce called pragmatism was worked out in the Club . . ."79 To attempt to decide which theory was a generalization or application of which, would seal us into a round robin of cause and effect. Most important is that the ideas of Peirce and Holmes were developed simultaneously and aired in a common forum.

It matters not that the elderly Justice Holmes felt little indebtedness to Charles Peirce, or that he never grasped the "full philosophic import" of Peirce's philosophy, or even that he never understood it (if all of this is true). It makes little difference whether the young Attorney Holmes was consciously searching for a jurisprudence to coincide with the philosophical premises of his generation. Holmes turned from pure philosophy after the Civil War "in order to embark heroically on the romantic quest of living greatly in the law, 'to wreak his heart out after the unattainable.'"80 We would not expect Attorney Holmes, Professor Holmes, or Justice Holmes to appear a full-fledged pragmatist, sporting the vocabulary of pragmatism. But what does matter is that the prediction theory of law — focusing on actual cases; formulating precepts; looking forward to results; remaining open to change and growth — sounds very much like the philosophy to which Charles Peirce devoted his life. We would expect a law-oriented Holmes to examine Austin's theory and other theories about the nature of law, instead of "considering the nature of truth" or "twisting the tail of the

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76. *Ibid.* "These theories of meaning, though not the exclusive property of pragmatists, appealed to legal scholars and judges who were striving to make *their* ideas clear, even though some of them would reject the label, "pragmatist." Patterson, *Supra* n. 12, at 474.

77. 39 J. Fhil., *Supra* n. 10, at 92.

78. In July, 1872, Holmes published a notice of an article by Sir Frederick Pollock and set forth in it the prediction theory. 6 Am. L. Rev. 723 (1872). *Id.*, at 93.

79. *Id.*, at 94. See also 15 J. Hist. Ideas, *Supra* n. 61, at 441.

80. Wiener. *Supra* n. 1, at 188.

cosmos."<sup>81</sup> Holmes and Peirce did not have to be identical to be akin; that they were this is undeniable.<sup>82</sup>

### Holmes and Ultimates

Toward the end of his life, Justice Holmes wrote to Sir Frederick Pollock that he still dreamed of writing "a little book embodying my views on the ultimates of the law . . . getting rid of all talk of duties and rights — beginning with the definition of law in the lawyer's sense as a statement of the circumstances in which the public force will be brought to bear upon a man through the Courts, and expounding rights as the hypostasis of a prophecy."<sup>83</sup> In his mind, application of the prediction theory led to ultimates.

This link between prophecies and rules was not new to Holmes writing in 1932; it had been part of the theory first conceived and postulated in "The Path of the Law":

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.<sup>84</sup>

Even if every decision required the sanction of an emperor with despotic power and a whimsical turn of mind, we should be interested none the less, still with a view to *prediction*, in discovering some *order*, some rational explanation and some *principle* of growth for the rules which he laid down. In every system there are such explanations and principles to be found.<sup>85</sup>

Formulating predictions as to how the courts would act involved the study of past decisions to "discover"<sup>86</sup> general theories. Theories for Holmes were not established and accepted; rather they rested in "tendency." To illustrate, he said that each tort case was not decided upon a special ground but according to a general theory of liability — the infliction of temporal damage by a responsible person is actionable "if under the circumstances known to him the danger of his act is manifest according to common experience if it is more than common, except in cases where upon special grounds of policy the law refuses to protect the plaintiff or grants a privilege to the defendant."<sup>87</sup> Holmes said that malice, intent and negligence differ only in the degree to which danger is manifest. Such a general tendency could be found only in particular tort cases, not in an overarching system of logic from which axioms of law were deduced.

81. Howe, *Supra* note 65, at 75.

82. For analysis of the logical parallels between The Common Law and Peirce's philosophy, see "Holmes, Peirce and Legal Pragmatism" (1975), 84 Yale L.J. 1123.

83. Holmes, quoted in 39 J. Phil., *Supra* n. 10, at 95.

Thus, after ten years of further practise and teaching, and fifty years on the bench, Holmes still adhered to the theory he had first worked out in the circle in which pragmatism was born. So far as I can discover, though of course he had much else to say about the law, he never proposed another definition, or entertained another conception, of it. *Ibid.*

84. Holmes, *Supra* n. 3, at 458.

85. *Id.*, at 465 (emphasis added).

86. *Id.*, at 471.

87. *Ibid.*

Justice Holmes told lawyers-to-be that a great lawyer was one who saw the application of the broadest rules. Once a Vermont justice of the peace considered a suit between farmers over the breaking of a churn and decided for the defendant because the statutes said nothing about churns. Holmes used this case to bemoan the fact that legal digests and textbooks tucked the rudimentary rules of tort and contract under arbitrary titles (Mercantile Law) or historical subdivisions (Shipping, Equity) or other heads, such as Railroads or Telegraphs, and added: "[T]o be a master of [the law] means to look straight through all the dramatic incidents and to discern the true basis for prophecy."<sup>88</sup> The way to do this was by following the existing body of dogma, with the help of jurisprudence, into its highest generalizations.<sup>89</sup> Jurisprudence — law "in its most generalized part"<sup>90</sup> — would take us from individual cases to the "ultimates of the law" by making our prophecies more precise.<sup>91</sup> In Peirce, too, we find a pre-occupation with generals. Synecism, his concept of continuity and the reality of generals, was the fruit of his whole life's work.<sup>92</sup> It is to his ideas that we now turn.

### Peirce on Real Generals

Charles Peirce used the example of baking an apple pie to elucidate the relationship between prediction and generalization: When we follow the rules in a recipe book for making "an apple pie," we can predict (assuming we follow the rules correctly) that "an" apple pie will result, and that we will be satisfied with an object of this general quality. We begin with an idea of the sort of object that we desire, "and this idea taken in itself, independently of the deliberate decision to take the necessary steps to produce a concrete singular instance of that type of pie, is a pure possible — the airy object of a dream."<sup>93</sup> Between the dream and the pie, we select apples and follow the steps of the recipe. Throughout the whole proceeding, we follow our dream (which has no particular thisness or thatness, *i.e.* hecceity) because we wish to realize it in connection with an object of experience (which does possess hecceity), and so we make ran-

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88. *Id.*, at 474-75.

89. *Id.*, at 476.

Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house. The most improvements of the last twenty-five years are improvements in theory. It is not to be feared as unpractical, for, to the competent, it simply means going to the bottom of the subject.

*Id.*, at 477.

90. *Id.*, at 474.

91. *Id.*, at 457.

92. Murphey, *Supra* n. 33, at 294.

93. Potter, *Supra* n. 17, at 87.

dom selections of apples and follow the steps. Generality is involved in the desire to connect the dream and the object. The desire to select apples mediates between the given quality and the concrete case.<sup>94</sup> Our feelings that the prediction (an apple pie will result) has a decided tendency to be fulfilled “ ‘is to say that future events are in a measure really governed by a law.’ ”<sup>95</sup>

In uniformity, Peirce found evidence for the reality of generals.<sup>96</sup> He wrote that the scholastic doctrine of realism — the opinion that there are real objects that are general — was involved in Pragmaticism as an essential consequence of it. “Indeed, it is the reality of some possibilities that pragmaticism is most concerned to insist upon.”<sup>97</sup>

Pragmaticism makes the ultimate intellectual purport of what you please to consist in conceived conditional resolutions, or their substance; and therefore, the conditional propositions, with their hypothetical antecedents, in which such resolutions consist, being of the ultimate nature of meaning, must be capable of being true, that is, of expressing whatever there be which is such as the proposition expresses, independently of being thought to be so in any judgment, or being represented to be so in any other symbol of any man or men. But that amounts to saying that possibility is sometimes of a real kind.<sup>98</sup>

General concepts of objects are “real” because there are particular objects that have the potentiality of becoming actualized in an unlimited number of experiences; general concepts of laws are also “real” because there are real laws with the potentiality of acting in an unlimited number of cases.<sup>99</sup> Because a general cannot be exhausted by any singular individual instance, it is in the nature of a word or sign. Generals do not “exist”, but they have “the reality of types or forms to which objects conform but which none of them can exactly be.”<sup>100</sup> The ideal type or form plays a normative role with respect to concrete instances.

Peirce argued that generality is an indispensable ingredient of reality because individual existence or actuality without any regularity is a “nullity”.<sup>101</sup>

That which any true proposition asserts is *real*, in the sense of being as it is regardless of what you or I may think about it. Let this proposition be a general conditional proposition as to the future, and it is a real general such as is calculated really to influence human conduct; and such the pragmatist holds to be the rational purport of every concept.<sup>102</sup>

94. *Id.*, at 88. See also Goudge, *Supra* n. 25, at 91-92; Bolter, *Supra* n. 17, at 24-25.

95. Peirce, quoted in Goudge, *Supra* n. 25, at 92.

96. “Issues in Pragmaticism,” *Supra* n. 18, at 492.

97. *Ibid.*

98. *Id.*, at 492-93.

99. See Moore, *Supra* n. 2, at 101; Kuklick, *Supra* n. 2, at 112-13.

100. Potter, *Supra* n. 17, at 63. See also Conkin, *Supra* n. 31, at 236.

101. “What Pragmatism Is,” *Supra* n. 16, at 178.

102. *Ibid.*

The "summum bonum" of the pragmatist consists not in action, but in an evolutionary process "whereby the existent comes more and more to embody those generals which were . . . destined . . ." <sup>103</sup> The "growth of reasonableness" is the growing predominance of a variety of stable habits over random or chance variations, in the physical universe and in the human mind. This is Peirce's Synechism — Habit, Purpose, Continuity, the Third Principle of General Law — "which asserts the objective reality of a variety of evolving laws or habits; they coalesce feelings or ideas in the struggle for existence, thus giving the evolutionary process a goal." <sup>104</sup> It is upon this unity that the community of inquirers continually (ideally) converges.

Synechism is a metaphysical doctrine and at the same time, it is a principle of logic which seeks to prescribe " 'what sort of hypothesis is fit to be entertained and examined.' " <sup>105</sup> As a logical principle, synechism forbids the philosopher to consider inexplicability as a possible explanation. To do so would block the road to inquiry, and deny the assumption behind the scientific enterprise — that the world is knowable. And it would be contrary to the synechist's own principle

for the synechist not to generalize from that which experience forces upon him, especially since it is only so far as facts can be generalized that they can be understood; and the very reality, in his way of looking at the matter, is nothing else than the way in which facts must ultimately come to be understood. <sup>106</sup>

Facts, then, cannot be considered atomic, unrelated, and incapable of generalization; they must be seen as part of a system of relations and general laws — a continuum.

A true continuum is something whose possibilities of determination no multitude of individuals can exhaust . . . . True generality is, in fact, nothing but a rudimentary form of true continuity. Continuity is nothing but perfect generality of a law of relationship. <sup>107</sup>

103. *Ibid.* See also Scheffler, *Supra* n. 57, at 27-28, quoting Peirce.

104. Wiener, *Supra* n. 1, at 85-86.

In the beginning, according to Peirce's cosmology, these were only firsts — unpersonalized experiences in complete chaos.

There were no actually existing entities and no order. But there was secondness, or brute force, and thirdness, or the tendency to take habits. The secondness, exerting brute, unreasonable force on the firsts, gave some of them existence. Some of these existents were repeated and, by the tendency to habit-taking, tended to perpetuate themselves. As more existents developed, more habits developed. The firsts were mere possibilities of experience and hence feelings or ideas. But as more habits were developed the existents became more and more subject to habit, i.e., law, and lost the freedom and spontaneity of their firstness and became matter — "mind hidebound with habits". As the universe develops, these habits will become more and more binding so that what began as complete indeterminacy will end in complete determinacy.

Moore, *Supra* n. 2, at 91-92. For Peirce's view on evolution to final truth, see Conkin, *Supra* n. 31, at 239. See also P. Wiener, "Peirce's Evolutionary Interpretations," in *Studies in the Philosophy of Charles Sanders Peirce*, *Supra* n. 1, at 147.

105. Potter, *Supra* n. 17, at 72.

106. *Id.*, at 75.

107. *Ibid.*

[T]he form under which alone anything can be understood is the form of generality, which is the same thing as continuity.<sup>108</sup>

Peirce's synchism was developed in the years between 1880 and 1900 — after his souvenir had been read to the Metaphysical Club and after "How to Make Our Ideas Clear," containing the pragmatic maxim, had been published. He never disavowed his earlier pragmatism, but came to see it as a "step."<sup>109</sup> Peirce himself realized this shift (or development) of his ideas:

'In my youth,' he says, 'I wrote some articles to uphold a doctrine I called Pragmatism, namely, that the meaning and essence of every conception lies in the application that is to be made of it.'

All very well, he says, but *what is the application?* 'At that time I seem to have been inclined to subordinate the conception to the *act*, knowing to doing.' This is a mistake, for 'the only thing that is really desirable without a reason for being so, is to render ideas and things reasonable.' This, in turn, is a matter of association and generalization, of assimilation and union.<sup>110</sup>

This consciousness of the differences between his earlier and later views may have prompted him to coin the word "pragmaticism" in 1903. By using a new name, while insisting that he was restating his original ideas, he could divorce himself from the many pragmatisms that were springing out of the 1878 pragmatic maxim and bestow some continuity upon his work as a whole. Whatever the motivation for that decision, it is clear that pragmaticism adds notions of universality and generality to the empiricism (belief-action preoccupation) of Peirce's earlier pragmatism.

### Conclusion

The prediction theory of law says to look at the way judges have decided particular cases in order to predict how future judges will rule. Cases tend to be decided according to particular theories of liability and these tendencies may be discerned by the study of law. Reading cases with an eye toward generalization, lawyers can make their predictions more precise, discover legal principles, and catch a "hint of the universal law."<sup>111</sup> Pragmaticism says that the meaning of our words and symbols consists in our conceptions of their future effects upon human action. What we mean by a statement can be translated into a general conditional proposition for the future (a prediction) which is real even now as possibility. Inquiry is a collec-

108. *Id.*, at 74. But . . . there can be no law without cases under the law — there can be no truth generals without instances. *See Id.*, at 113. For discussion of Peirce's agapism and continuity, *see Conkin, Supra* n. 31, at 251f. On continuity and metaphysics, *see Goudge, Supra* n. 25, at 223.

[H]abit is a generalizing tendency, and as such a generalization, and as such a general, and as such a continuum of continuity. It must have its origin in the original continuity which is inherent in potentiality. Continuity, as generality, is inherent in potentiality, which is essentially general.

Peirce, quoted in Murphey, *Supra* n. 33, at 404.

109. Potter, *Supra* n. 17, at 71. *See Buchler, Supra* n. 25, at 154.

110. Scheffler, *Supra* n. 57, at 85. On Peirce's "change of mind," *see Bronstein, Supra* n. 22, at 52.

111. "Path of the Law," *Supra* n. 3, at 478.

tive process, and concrete reasonableness grows as more generals (habits) are established — Unity, Continuity, is the ultimate goal. Oliver Wendell Holmes, Jr. and Charles Sanders Peirce differed in temperament and intellectual concerns, but their ideas have much in common. Pragmatism and the prediction theory of law were born of the same garden; to taste of them is to know this.

