

# LEGAL FALLIBILISM: Law (Like Science) as a Form of Community Inquiry

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## ABSTRACT

Fallibilism, as a fundamental aspect of pragmatic epistemology, can be illuminated by a study of law. Before he became a famous American judge, Oliver Wendell Holmes, Jr., along with his friends William James and Charles Sanders Peirce, were members of the Metaphysical Club of Cambridge in the 1870s, the birthplace of pragmatism. As a young scholar, Holmes advanced a concept of legal fallibilism as incremental community inquiry. In this early jurisprudential work, Holmes treats legal cases more like scientific experiments than as deductive applications of already clear rules. Legal rules are a product of 1) the conflicts that occur in society, 2) the channeling of conflicts into legal disputes, 3) the gradual accumulation of judicial decisions classified into groups, and 4) the development of a consensual understanding, expressed in rules and principles, as to how future cases should be classified and decided. This does not involve only lawyers and judges. Especially in controversial public law cases, it may involve an entire community. The legal process is seen as an extended intergenerational process of inquiry. It illuminates the relation of thought, expression, and conduct among a community of inquirers, applied to the problems of social ordering.

## Introduction

As we survey the terrain of contemporary philosophy since the publication in 1979 of Richard Rorty's *Philosophy and the Mirror of Nature*, the dominant analytical tradition that he challenged has yielded more and more ground to pragmatism. This is not in the precise sense found in C.S. Peirce and William James, but one broadened by Rorty to encompass Ludwig Wittgenstein and Martin Heidegger, as well as W. V. Quine, who never really saw himself as a "genuine" pragmatist. All this has led many to wonder, What is "genuine" pragmatism?

In the recent literature two distinct perspectives have emerged: pragmatism as a contemporary critique of the analytical tradition, really a self-critique following Rorty, and pragmatism as an ongoing critique of human inquiry itself. Within the former, the word "fallibilism" is rarely spoken (it is virtually absent from Robert Brandom's indices). For the latter, it is the central theme.

For the former, the principal focus derives from Rorty's attack on representationalist metaphysics and epistemology. Drawing on other analytical self-critiques such as those of Wilfrid Sellars and Donald Davidson, Rorty has pressed the case for abandoning the obsession with a philosophically grounded "truth." His challenge has come to haunt, if not dominate, the agenda of analytical philosophy, mobilizing defenses of truth (implicit forms of foundationalism or essentialism, according to Rorty) into a spirited, but constantly retrenching, defense.

For the other group of pragmatists, the focus has lately been on how the classical fallibilists, particularly Peirce and Dewey, would conceive inquiry in relation to Rorty's anti-representationalism. Is fallibilism merely regulative over inquiry, suggesting a

separation of inquiry from the subject, or is it somehow constitutive of reality, suggesting perhaps a partnership?

A lack of rigor in this debate has dampened the relevance of fallibilism for the first group, whom we may call the “analytical pragmatists.” But among the second group, the new fallibilists, are some who are now forging a connection with an already vigorous community of scholars from outside of the pragmatic tradition, the post-Kuhnian philosophers of science, where the notion of fallibilism drawn from Peirce and Dewey stands to gain wider contemporary relevance.<sup>1</sup>

In this paper I will argue that the new fallibilists have as much to gain from another quarter previously unrecognized: legal pragmatism. So far, this possibility has been obscured by a development that roughly parallels the one already recounted. The influence of analytical method has long dominated jurisprudence, even longer than general philosophy, running more or less directly back through Hans Kelsen and John Austin to Thomas Hobbes (who revived and modernized the ontological separation of law and morals). This has given contemporary debate, even regarding the bearing of pragmatism on law, a decidedly analytical cast. The alternative to an analytical legal pragmatism is a hitherto obscured legal fallibilism. Tracing its roots, we find that it may be the very first systematic application of fallibilism itself to the history of thought.<sup>2</sup>

### Holmes and Pragmatism

An important influence on Peirce’s fallibilism was Chauncey Wright, Peirce’s famous “boxing-master,” who in 1873 published his developmental study of human cognition, “The Evolution of Self-Consciousness.” Also in attendance at early meetings

of the Metaphysical Club were several lawyers, including Oliver Wendell Holmes Jr., who acknowledged a deep formative influence from Wright.

As early as 1870 we find in Holmes's writings a distinctive understanding of graduated community inquiry in the formation and modification of legal rules and generalizations, which Holmes referred to as "successive approximation." This is in fact an overlooked form of fallibilism. It was extensively developed by Holmes, and it illuminates the relation of thought, expression, and conduct in the process of inquiry among a community of inquirers, applied to the problems of social ordering. It has much to contribute to a comprehensive understanding of pragmatic epistemology.

Why? Because surprisingly absent from contemporary discussion of fallibilism, with the exception of those now turning to the philosophy of science, is an extensive reference to types of actual inquiry. The nature of revision of cognitive claims would appear crucial, but how exactly does revision operate in diverse specific cases? What is the precise role of new experience, and what is its relation to the revision of signifying general propositions? How is a general proposition reconstructed from new experience, and how do belief and habit interact in the process of continuing revision? And what, from case to case, is the nature of transformation of an object of knowledge? It is unlikely that such questions will be satisfactorily addressed in the absence of empirical inquiry.

A redirected fallibilist study of law can shed light on these questions, in particular the relationship of conceptual and communicative transformation to conduct and habit. However, hiding legal fallibilism from view has been a gross and persistent misreading of Holmes by the analytical community as a fellow "legal positivist", a decidedly analytical

perspective on Holmes as a theorist. This results from taking certain remarks out of context, such as his definition of law as the prediction of judicial decisions (given a behaviorist cast by the legal realists, whereas it actually referred to the anticipated consensus of judges as a community of interpreters), and his critique of moral language, which is commonly misread to indicate assent to the positivist drawing of a strict ontological separation between law and morals. Instead, it embodies an early version of pragmatism's critique of ideology. (Kellogg, 2007)

What I have called Holmes's "legal fallibilism" is a form of response to the resolution of emergent disputes in the common law tradition--that is to say, arising in the day-to-day and case-by-case operation of English and American courts of law. In his first tentative statement, Holmes writes in 1870:

It is the merit of the common law that it decides the case first and determines the principle afterwards. . . . In cases of first impression Lord Mansfield's often-quoted advice to the business man who was suddenly appointed judge, that he should state his conclusions and not give his reasons, as his judgment would probably be right and the reasons certainly wrong, is not without its application to more educated courts. 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. And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape. A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step. (1870, p. 1)

Depicted here is a process parallel to that of Peirce's community of scientists engaged in the exploration of a common and ongoing, but specific, problem. The "many minds" in the final sentence include trained judges, as well as lawyers on opposing sides of a succession of recurring disputes that, when arising at the first instance, is better resolved without prejudgment according to a preexisting principle. Hence the "business man suddenly appointed judge" should decide the case on its facts but refrain from explanation, and the same indeed goes for "more educated courts." The caution against premature generalization applies to the expert as well as the common person.

An early decision in an emergent controversy operates akin to a scientific experiment; it opens inquiry by creating a potential precedent for future similar cases. Like the record of scientific inquiry, that of legal inquiry consists at first of carefully recorded observation of multiple concrete experiences. The "business man" to whom Holmes alludes, in an apparent reference to the "special juries" used in England by Lord Mansfield, was actually more of a juror than a judge, and the role of juries has, since their emergence as deciders of factual questions, been to reach a decision without legal explanation from their findings on the evidence.

Multiple evidentiary findings can reveal similarities. After an accumulation of jury decisions discloses a pattern, according to Holmes's text, judges may initiate the process of generalizing. In law as in science, it is only after sufficient experience establishes a clear pattern that trained observers may begin to "abstract" a "general rule." And as in science, this is done by "reconciling the cases," which refers to the distinguishing of relevant from irrelevant detail in the articulation of a common rule or standard. Relevance, of evidence to ultimate conclusion, in both law and science, is an

emergent property. As the notion of relevance emerges, so also does the perception of coherence.

This suggests a parallel between scientists and lawyers evaluating and generalizing within an established professional tradition from records of diverse but related data. The data itself, in science and law, would appear radically distinct, but there is a sense in which the two forms of inquiry are comparable. Both are prompted by practical problems confronting the community at large, reflecting Peirce's doubt-belief model of inquiry. In both, informal and non-professional attempts to resolve such problems, burdened by superstition, have been replaced by formal and professionalized analysis. As Holmes would later elucidate, the social understanding of legal disputes has, in the western world, abandoned a primitive culture of revenge (even as science has abandoned animism), and undergone a transformation from personification to objectification through abstraction and systematic classification, in the emergence and growth of modern law.

This parallel has, quite naturally, been obscured by the emphasis of contemporary jurisprudence on legislation. There exists among nonprofessionals a common presumption that law largely operates by fiat from sovereign institutions and, accordingly, that the general rule or statement may be made firm, unrevisable, and clear in application. But the degree and complexity of litigation, and the perennial problem of resolving conflicts among disparate rules and statutes, not to mention constitutions, undermines this presumption. Close examination reveals that interpretation of statutory and even constitutional language, constantly applied to new and unforeseen circumstances, proceeds on a case-by-case revisionary basis that can equally be

understood as fallibilistic.

### Contemporary Fallibilism

Meanwhile, pragmatic fallibilism has itself been subjected to closer scrutiny. Joseph Margolis has argued in *Reinventing Pragmatism: American Philosophy in the 21st Century* (2002) that fallibilism, not Rorty's analytical self-criticism, is the central insight that characterizes the diverse pragmatic tradition and accounts for its expanding influence in contemporary American philosophy. Margolis distinguishes the fallibilism of Peirce from that of John Dewey, the former having given it a "metaphysical" element in his famous construct of the final opinion, the suggestion that truth can be found, indeed consists in, the infinite end of inquiry. Pinning down just what this entails has proven elusive.

Common to both are the themes that (1) "with regard to any proposition, it is humanly possible to hold a mistaken belief" which is "tantamount to a denial of Cartesian indubitability," and (2) "it is both possible and likely that, for any mistaken belief, a society of inquirers can, in a pertinently finite interval of time, discern its own mistakes and progress toward discovering the true state of affairs." Yet, claims Margolis, fallibilism takes two entirely different forms in Peirce and Dewey. In Peirce it signifies the perpetual postponement of inquiry's ever arriving at the "truth about reality" . . . . In Dewey it signifies the restriction of all cognitive claims within a thoroughly fluxitive world, by means of practical skills (on which science depends) that first emerge from certain non-cognitive animal powers implicated in our survival and viability. (2002, p. 135)

Favoring Dewey's version, Margolis suggests that Peirce leads himself into a "paradox of the known object," consisting of two incompatible claims, which Margolis summarizes as follows:

Claim 1: "the act of knowing a real object alters it" (5.555).

Claim 2: "the real thing is as it is, irrespectively of what any mind or any definitive collection of minds may represent it to be" (5.565).

Nathan Houser has recently defended Peirce by questioning whether Claim 1 is as central to Peirce as to Dewey, adding that Peirce never gave fallibilism a rigorous definition, and suggesting from other tolerant comments that he allowed it the broader view that both Dewey and Margolis favor. In any event, Houser commends Margolis for focusing on the variant implications of fallibilist theory and urges more attention to it. (2005, p. 737-9) Both would appear to agree that, in Margolis's words, discussion of Peirce's fallibilism has been "remarkably slack." (2007, p. 231)

#### Objectification as Common to Science and Law

In both science and law we may find distinctive forms of objectification. The identification and definition of material objects and entities engages much scientific research, even while the nature of emergent scientific objects, as in particle physics, is to some degree hypothetical, evolving, and contingent upon means of observation. Yet despite the evidence of some conceptual transformation while inquiry is particularly active, common understanding resists the conclusion that scientific entities are human constructs--as Margolis suggests of Peirce in Claim 2.

An interesting variation on this pattern may be found in law, where conceived

legal entities, such as rights and duties, are given static objectivity by a language suggesting discrete objects in space, even while specific disputed rights and duties are constantly undergoing emergence or revision. Here too the majority of legal “entities” (legislated or otherwise settled basic rights and duties) are not in constant dispute. This is reflected in the fact that judges and lawyers commonly speak of the law as an analytical practice, involving logical relationships between fixed rights and duties. The image of fixity is reinforced by the language of objects applied even to emergent and still fluid patterns of legal controversy, as in the nature and extent of a constitutional right to “privacy.” But the imagery has practical defects in application.

In controversial cases, where opposing rights are found to conflict, it is common to find legal language turning to the task of “balancing” the rights themselves. By that term another characteristic of concrete objectification, weight, is attributed to legal concepts. Such consideration, from a purely analytical perspective, distracts attention from the meandering path of judgments out of which particular rights have arisen. Here Holmes’s caution against premature rationalizing comes into play. A balancing analysis in a fresh situation may prompt a decision upon broader policy considerations than is warranted by the novelty of a particular case.

### Conflict and the Modification of Conduct

If the fallibilist account of the emergence of legal concepts as entities is even roughly accurate, it should illuminate the challenge of resolving conflicts among legal rights. Emergent rights are rooted in individual judgments, by jurors and others like the “business man,” made by comparing injurious with prudent conduct. The grounds on

which such judgments are initially made is the familiarity of juries and judges with prevailing standards of conduct in the community at large, with respect to the activity engaged in when an injury has occurred.

The chronology, and diachronicity, of this process is important. Standards of conduct are preceded by, and drawn from, patterns of activity; the standards of prudence are inferred from familiarity with the better ways that things are done, with particular concern to ground judgments upon that which is seen to be the prudent or “correct” way. Failure to display a certain kind of light on a ship at night, which has become a common practice to decrease the likelihood of collision, becomes through repeated common law judgments a reason for strict liability for collisions whenever the light was absent. Thus does common practice lead to legal duty. Moreover, the example indicates the potential role of both expert and general opinion in the shaping of legal standards.

In this admittedly simplified account, legal concepts demarcating rights and duties are cognitive products of prevailing patterns of conduct as gathered and evaluated by courts of law. This has special relevance for the methodology of resolving conflicts. When legal rights are seen to conflict in the abstract, the fallibilist denies that they can be “balanced” in the abstract. Rather, the conflicts have to be resolved on an experimental, case-by-case basis, just as the conflicting rights were themselves formed. Here is how Holmes described the process of their resolution in 1873:

The growth of the law is very apt to take place in this way: Two widely different cases suggest a general distinction, which is a clear one when stated broadly. But as new cases cluster around the opposite poles, and begin to approach each other, the distinction becomes more difficult to trace; the determinations are made one way or

the other on a very slight preponderance of feeling, rather than articulate reason; and at last a mathematical line is arrived at by the contact of contrary decisions, which is so far arbitrary that it might equally well have been drawn a little further to the one side or to the other. (1873, p. 654)

In this description, as in the 1870 text, conflicts among existing rights are not resolved at once, through interpretation and application of an antecedent underlying set of legal principles. Instead they are gradually explored, first by gathering new experience, and then by appropriately timed retrospective examinations of an array of specific prior decisions. Holmes describes a process whereby the new cases are seen as gradually filling a metaphorical space between the two rules (“cluster[ing] around the opposite poles”). Judges eventually resolve the conflict by recognizing and describing a “line” between the opposing poles or principles.

Despite the emphasis on specific judgments, there is no attempt here to avoid language of objectification; indeed Holmes deploys a new concrete metaphor of “line drawing” to emphasize the primary role of particular decisions. Each new decision is recorded in his account as a point on a metaphorical line defining the boundary between still-evolving separate categories.

In one sense the line may be described as “arbitrary” in that it “might equally well have been drawn a little further to the one side or to the other.” In another sense, the account describes a process in which conceptual products are constructed not unlike physical products. A legal right is a tool for the future as well as a judgment from and upon the past. A physical tool like a shovel or a computer may be put together in multiple ways and dimensions--with the “enter” or “delete” button “a little further to the

one side or the other.” There is no perfect or ideal shape to law, even as it is repeatedly modified to adapt to new conditions, shaping conduct as it forms and reforms legal concepts.<sup>3</sup>

Margolis (2007, 232) quotes Peirce with what I suggest is a parallel cautionary observation in 1890:

Try [Peirce says] to verify any law of nature, and you will find that the more precise your observations, the more certain they will be to show irregular departures from the law (6.46)

Although Holmes may not have had precisely the same intent, I suggest that he too, like Peirce, means (as Margolis says) “to disallow attributing such irregularities to error alone; he thinks they signify a deeper source in reality itself.” (2007, 232) I suggest that Holmes and Peirce both saw “reality” as having conceptual contours derived not merely from a fixed essential nature of things, but from human nature and its social, cultural, and linguistic constructs and choices.

### The Source of Structure and Consistency

From these and other texts it appears that the body of Holmes’s law is built up from legal categories and concepts formed by a process akin to negotiation, albeit an attenuated one. The whole enterprise must be woven together while being adjusted to accommodate shifting standards guiding future conduct. Different cases, situations, parties, judges, and lawyers (and, of course, scholars) are all involved over a continuum, as diverse judgments are analyzed and interpreted to forge eventual settlements of multiple controversies. Overall consistency is a dominant goal, but conceptual analysis is

only partly an exercise in logical reconciliation. It is also one of negotiating each new requirement for conduct through the clash of conflicting patterns already prevalent.

Holmes stressed that the process appears more analytical than it is, in the sense that consistency always seems to have been discovered, not made. In an essay written in 1878, Holmes wrote that consistency is by nature elusive:

The truth is, that law hitherto has been, and it would seem by the necessity of its being is always approaching and never reaching consistency. It is for ever adopting new principles from life at one end, and it always retains old ones from history at the other which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow. (1879, p. 631)

Many years later, Holmes compared his jurisprudential theory to anthropology:

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, or what have been the changes in dominant ideals from century to century. It is proper to study it as an exercise in the morphology and transformation of human ideas. (1899, p. 212)

Here we find fallibilism (or, in Holmes's words, "successive approximation") elucidated as the mechanism of an evolutionary theory of knowledge.

Where does Holmes stand in the comparison between the visions of Peirce and Dewey? We began with Joseph Margolis's comparison of the fallibilism of Peirce and Dewey, focusing on the nature of inquiry in its relation both to conduct and to ultimate conceptual objects, to its sharing both regulative and constitutive aspects. Holmes's version of fallibilism combines an account of revision or "modification" of a general with

the context of its origin and application. Like Dewey's, it is not metaphysical, in the sense that the final rule will be nearer a "truth." It is also patently related to the regulation of conduct or habit.

Like Peirce's fallibilism, it is not entirely open-ended, as it does foresee the arrival at an "abstracted general rule." We may "resort to it to discover what ideals of society have been strong enough to reach that final form of expression, or what have been the changes in dominant ideals from century to century." The belief in, and implementation of, fundamental rights suggests a distinctly constitutive role of legal fallibilism, and it need not be alluded to in Kantian or Hegelian generalities. It is entirely empirical and naturalistic, and may be investigated in the accumulation of rules and principles through judicial decisions marking "points on the line." Fallibilism in law would appear to be both regulative and constitutive, as a function of the beliefs and intentions of the community of inquirers.

But where does fallibilism lie in the entire scheme of philosophy and human inquiry? The historical record of law, science, and philosophy is replete with un-fallibilist theories, constructs and methods. If the historical movement of thought is a defining feature of its nature, how are we to account for the preeminence of *a priori*, foundationalist, and pure analytical goals and methods? Within the analytical tradition--and this is true in jurisprudence and philosophy--foundationalism, not fallibilism, has been both regulative and constitutive throughout its period of dominance.<sup>4</sup>

We are reminded here of Peirce's early essay, "How to Make Our Ideas Clear," in which the pragmatic maxim is set forth as just one approach to knowledge among others. In the worlds of law, science, and philosophy, foundationalist alternatives can be both

regulative and constitutive insofar as they are believed and implemented. But Peirce's drift is, I take it, that fallibilism has the advantage of self-awareness over the alternatives.

This should give us pause regarding the question with which I began, of fallibilism's fundamental nature. The history of human inquiry reveals a hodgepodge of methods and constructs. Fallibilism is at best a critical template which can be laid over the entire hodgepodge, insofar as we can reconstruct it, for whatever help it affords in our efforts at addressing the issues and problems that concern us in the present. Insofar as it is either regulative or constitutive, it is only optionally so. Fallibilism itself reveals this-- indeed it reveals itself as an alternative, not a universal. It suggests that the entire body of known reality, considered (as it must be) as a historical and cultural fact, is variable and discontinuous like the body of legal knowledge, and hence is the more in need of a critical template.

### Conclusion

Fallibilism, as a fundamental aspect of pragmatic epistemology, can be illuminated by a study of law. The origins of pragmatism in the Metaphysical Club in Cambridge, Massachusetts, reveal this connection; half of the original members of the Club were lawyers. As a young scholar, Oliver Wendell Holmes, Jr. advanced a version of legal fallibilism as incremental community inquiry. In this early work, Holmes treats legal cases more like scientific experiments than as mechanical applications of already clear rules. Legal rules are a product of the conflicts that occur in society, the channeling of conflicts into legal disputes and eventual decisions, and the gradual accumulation of a consensual understanding, expressed in rules and principles, as to how future cases

should be classified and decided. This does not just involve lawyers and judges. Especially in controversial public law cases, the law of abortion or medically assisted death being prominent examples, it may involve the entire community. The legal process is seen as an extended, indeed intergenerational, process of inquiry. It illuminates the relation of thought, expression, and conduct in the process of inquiry among a community of inquirers, applied to the problems of social ordering.

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<sup>1</sup> Judging from the papers presented at the 11th International Congress on Pragmatism in Sao Paulo, Brazil, in November, 2009, a marked trend in this direction can be seen among the international community of pragmatist scholars.

<sup>2</sup> See generally Susan Haack, "The Pluralistic Universe of Law: Towards a Neo-Classical Legal Pragmatism," *Ratio Juris* Vol. 21 No. 4 December 2008 (453-80).

<sup>3</sup> See Haack, *supra*, at 466: "Not only legal systems but also legal concepts shift and change, acquiring new meaning and shedding old connotations as they adapt to changing circumstances. This thought is in the spirit of Peirce's conception of the growth of meaning, which he first articulates with reference to scientific concepts like *planet* or *electricity*, but later applies to social concepts such as *force*, *wealth*, *marriage*. Similarly, legal concepts such as *privacy*, *liberty*, *right*, etc., are not Platonically fixed, but initially thin and schematic; they are inherently open to interpretation, specification, extrapolation, and negotiation among competing social interests. Indeed, the concept of *law* itself, I suspect, is not only a cluster-concept, but also open-textured, shifting subtly over time."

<sup>4</sup> Since writing this paper I have encountered a possible perspective on the dominance of analytical conceptualization in science (perhaps applicable, *mutatis mutandis*, to law) advanced by the Science Studies Unit at the University of Edinburgh. In *Scientific Knowledge, A Sociological Analysis* (University of Chicago Press, 1996), the authors, Barry Barnes, David Bloor, and John Henry, advance the idea that scientists' talk of essential identity is not a simple response to empirical prompting, but a preferred strategy to sustain both coherence, consistency, and generalized belief. *Id.*, 81-94.