

DARWIN'S NEW BULLDOGS: SCOPES AND AMERICAN LEGAL PHILOSOPHY

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I. INTRODUCTION

In 1990, the judges of the Seventh Circuit ruled in *Miller v. Civil City of South Bend* that the state of Indiana is constitutionally required to permit erotic dancers to perform nude.¹ The case involved dancers at the Kitty Kat Lounge who had challenged the constitutionality of a public-indecency statute requiring them to wear “pasties” and a “G-string.”² The dancers argued that nude barroom dancing is a form of artistic expression protected by the First Amendment.³ The court agreed.⁴

One of the concurring judges was Richard Posner, a proponent of legal pragmatism. Surprisingly, in a separate opinion Posner debunked the high-flown arguments about the First Amendment and argued that the true reason for the decision was a gut sense that “[c]ensorship of erotica is pretty ridiculous. . . . What kind of people make a career of checking to see whether the covering of a woman’s nipples is fully opaque, as the statute requires?”⁵ In a recent interview, Posner explained that his decision reflected a conviction that it is not possible for the government to “stamp out nude striptease dancing,” adding, “The power of government is relative to the desires and values of its people. The State of Indiana cannot take the erotic edge off American culture.”⁶ In other words, given the erotic nature of American culture, the statute was simply not pragmatic.

Legal pragmatism traces its origins to the early decades of the twentieth century, when America was wrestling with the implications of

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¹ 904 F.2d 1081 (7th Cir. 1990).

² *Id.* at 1082.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 1100 (Posner, Circuit Judge, concurring).

⁶ James Ryerson, *The Outrageous Pragmatism of Judge Richard Posner*, LINGUA FRANCA, May 2000, at <http://www.linguafranca.com/oo5/posner.html>.

Darwin's theory of evolution, culminating in the *Scopes* trial. In tracing the fall-out of the *Scopes* trial on American legal culture, what may come to mind first are issues in public education (what should be taught in science classes?) and religious liberty (what are the rights of Christian students in the public school?). But, arguably the most significant impact of the *Scopes* trial was on legal philosophy itself. At the same time that reports of the trial were appearing on every newsstand, a group of scholars was working out the implications of Darwinism for an overarching philosophy of life, which came to be called pragmatism.

Pragmatism is the only "home-grown" American philosophy, and it flowered during the "golden age in American philosophy"⁷ involving such luminaries as John Dewey, Chauncy Wright, Charles Peirce, William James, George Herbert Mead, and the lawyers Nicholas St. John Green and Oliver Wendell Holmes, Jr. All were very much involved with the debates over Darwinism, and it is no exaggeration to say that pragmatism can be defined as an attempt to work out what Darwinism means for the mind—and hence for philosophy and the human sciences (psychology, education, morality, and law).⁸

After that initial period of creative ferment, pragmatism declined somewhat due to the rise of analytic philosophy, but in recent decades it has returned in full force. One of the most influential American philosophers today is the neo-pragmatist Richard Rorty, who acknowledges a profound debt to Dewey. Thus, pragmatism has been a major force shaping American thought over the past century and continues strong today. In order to limn the landscape of contemporary legal thought, it is imperative to understand the origin and enduring impact of pragmatism. In this article, I will first trace key factors in the formation of philosophical pragmatism, starting with the classical pragmatists, especially John Dewey, and highlighting the role that Darwinian theory played in their thinking. I then bring the discussion up to our own time period by showing the way pragmatism has been developed by contemporary neopragmatists such as Richard Rorty. Beginning in section VII, I explain legal pragmatism and the way it applies similar themes to the origin and justification of the law. Again, I begin with the classical pragmatists, especially Oliver Wendell Holmes,

⁷ PAUL K. CONKIN, *WHEN ALL THE GODS TREMBLED: DARWINISM, SCOPES, AND AMERICAN INTELLECTUALS* 144 (1998).

⁸ *Id.* Dewey wrote that "Peirce lived when the idea of evolution was uppermost in the mind of his generation. He applied it everywhere." PHILIP P. WIENER, *EVOLUTION AND THE FOUNDERS OF PRAGMATISM* 70 (1969). See also Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 *STAN. L. REV.* 787, 798 (1989) ("Though there were important differences among the leading pragmatists, all of them endorsed this Darwinist-historicist account of human inquiry. They treated 'the mind' as an evolved mode for coping with the environment, a set of biologically based powers . . .").

and then bring the discussion up to date by analyzing the thought of contemporary legal pragmatists, focusing especially on Richard Posner. I end by outlining the contours of a Christian critique of legal pragmatism.

II. AMERICA'S "HOME-GROWN" PHILOSOPHY

In his book on the *Scopes* trial, *When All the Gods Trembled*, Paul Conkin surveys the theological and philosophical responses to Darwinian theory among American intellectuals.⁹ Among the responses Conkin identifies are three major strands. First were the "evangelical Christians," many of whom rejected Darwinism.¹⁰ They believed that by subsuming life under completely materialistic, mechanistic forces, Darwinism eliminated any concept of divine or supernatural action. Thus, Charles Hodge asked (in the title of a book), *What is Darwinism?* and he answered, "[i]t is atheism."¹¹ Second were those influenced by Romanticism, especially the New England Transcendentalists, who welcomed Darwinism.¹² "From their perspective, a god was immanent in all that happened in nature," Conkin explains.¹³ Darwin's theory "not only seemed to pose no problem, but offered a developmental explanation that seemed complementary to their belief in the continuous unfolding of an immanent divine mind."¹⁴ Finally, there were those who, like Darwin himself, rejected any notion of a transcendent God (beyond nature), or an immanent divine mind or force (within nature), and embraced agnosticism or atheism instead.¹⁵

Among this last group were many who went through "traumatic periods of rebellion against their childhood religious faith," Conkin writes.¹⁶ Some revolted vehemently, such as H.L. Mencken,¹⁷ whose acerbic writings on the *Scopes* trial did so much to fan the fires of scorn and derision against the "booboisie." Others "sought ways of preserving some of the heart values of the older religion"¹⁸— not by retaining any of its fundamental beliefs but by finding "rich and inspiring versions of

⁹ See generally, CONKIN, *supra* note 7.

¹⁰ *Id.* at 40.

¹¹ CHARLES HODGE, *WHAT IS DARWINISM? AND OTHER WRITINGS ON SCIENCE AND RELIGION* 155-56 (Mark A. Noll & David N. Livingstone eds., 1994). "Natural selection is a selection made by natural laws, working without intention and design," Hodge wrote. *Id.* at 85. "[T]he denial of design in nature is virtually the denial of God." *Id.* at 155.

¹² CONKIN, *supra* note 7, at 38.

¹³ *Id.* at 39.

¹⁴ *Id.* at 38.

¹⁵ *Id.* at 40.

¹⁶ *Id.* at 143.

¹⁷ *Id.*

¹⁸ *Id.* at 144.

naturalism to replace it,"¹⁹ which is to say, by turning Darwinian naturalism itself into a comprehensive philosophy that would satisfy the need to make sense of life. Among the latter were the pragmatists.²⁰

Pragmatism is best understood as an interweaving of two strands of intellectual history previously thought to be incompatible. The first is British empiricism and utilitarianism, from which pragmatism took its instrumental view of knowledge—its definition of ideas as means for achieving empirically measurable social ends. It is often mistakenly said that instrumentalism was the central contribution of pragmatism. Yet an instrumentalist school of jurisprudence had already been in existence from Thomas Hobbes through Jeremy Bentham. What actually made pragmatism unique, as we will see, was that it united this instrumentalist, empiricist tradition with the historicism of the Romantic movement, which viewed knowledge as changing, contextual, and rooted in evolving custom. This explains one reason Darwinism was so central to the pragmatists' thinking: it served as a model for reconciling these two traditions, offering an account that was thoroughly historical (no eternal essences), while at the same time explaining historical development via a completely naturalistic, empirical mechanism.

III. HEGEL AND HISTORY

The two streams of thought are clearly evident in the work of John Dewey, arguably the most influential American intellectual in the early decades of the twentieth century.²¹ As a young man, Dewey was a Hegelian, and he never lost the sense of history and cultural evolution that he acquired from German idealism. Prior to Hegel, the world was seen as essentially static. In his masterful book *The Great Chain of Being*, Arthur Lovejoy describes the crucial transition from a static to a dynamic picture of the world.²² From the time of the ancient Greeks, the dominant image of reality was captured in the phrase, "the great chain of being."²³ "This was a picture of the universe as hierarchically ordered from the lowliest clump of matter through simple life forms, to higher organisms, to human beings, and then through a series of spiritual

¹⁹ *Id.* at 143.

²⁰ *Id.* "By far, the most influential advocate of such a naturalism was John Dewey, arguably the most influential American intellectual in the twenties and thirties." *Id.*

²¹ *Id.*

²² ARTHUR O. LOVEJOY, *THE GREAT CHAIN OF BEING: A STUDY OF THE HISTORY OF AN IDEA* (1964). See also NANCY R. PEARCEY & CHARLES B. THAXTON, *THE SOUL OF SCIENCE: CHRISTIAN FAITH AND NATURAL PHILOSOPHY* 107 (1994) [hereinafter PEARCEY & THAXTON].

²³ PEARCEY & THAXTON, *supra* note 22, at 107.

entities to God Himself.²⁴ Under the influence of Romanticism, this entire chain was historicized—“toppled over on its side, as it were,” so that instead of being a static structure, it became a dynamic process, a series of stages through which the universe develops.²⁵ Everything moves from one rung to the next in an endless progression toward perfection.²⁶

Thus, everything was in a process of constant change and evolution—not only living things but also customs, cultures, and concepts. The universe was caught up in a great transformation from primitive beginnings to some exalted future. As a result, writes Thomas Grey, the Romantics argued that “human nature should not be conceived as an unchanging set of needs and faculties facing an essentially unchanging external environment. Rather it is, above all, a set of capacities for adaptation and change, typically exercised in a collectivity, a society with its own distinctive language, culture, and history.”²⁷ In historicism, “thought always comes embodied in practices—culturally embedded habits and patterns of expectation, behavior and response. This is the *contextual* side of pragmatism.”²⁸

Historicism led to what Grey considers “pragmatism’s most important philosophical innovation—its Deweyan critique of the quest for certainty, the longstanding Western project of placing solid and impersonal *foundations* under human beliefs.”²⁹ Foundationalism in epistemology is the age-old ideal, bequeathed by the ancient Greeks, that a philosophical system should reach all its judgments by deduction from a coherent system of axiomatic principles, on the model of Euclidean geometry.³⁰ This ideal became widespread during the Enlightenment, in the wake of Isaac Newton’s striking successes in framing a mathematical physics.³¹ The axiomatic method, exemplified supremely by Euclidean geometry, became the standard of all knowledge.³²

It took a particularly modern turn in the philosophy of René Descartes, whose

epistemology begins with a program of systematic doubt whereby we strip our minds of all half-baked, unfounded notions until we reach a bedrock of clear and simple ideas so fundamental that they cannot be doubted. These are the self-evident truths; they serve as the axioms of

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Thomas C. Grey, *What Good is Legal Pragmatism?*, in PRAGMATISM IN LAW AND SOCIETY 12 (Michael Brint & William Weaver eds., 1991).

²⁸ *Id.*

²⁹ *Id.* at 13.

³⁰ PEARCEY & THAXTON, *supra* note 22, at 133.

³¹ *Id.* at 130.

³² *Id.* at 133.

any true science. By a process of deduction from those axioms Descartes hoped to build a solid structure of knowledge³³

Descartes likened his approach to laying a firm foundation, then building a house on it. Those who followed him differed over the appropriate starting point—the rationalists argued that knowledge must be based on innate ideas knowable directly by the light of reason, while the empiricists maintained that knowledge must begin with the immediate deliverances of the senses—yet all agreed that knowledge was a product of deduction from indubitable premises or foundations.³⁴

It would be hard to exaggerate the impact of Cartesian foundationalism on subsequent centuries. Through the Age of Reason and down through the Enlightenment in the later eighteenth century, nearly all who were concerned with social, moral, and political thought followed the strictly rationalistic, overwhelmingly deductive procedures of the Cartesians.³⁵ By that time, a great reservoir of empirical data had been accumulated, yet the writings of the social philosophers made use of these materials, if at all, for merely illustrative purposes. This explains why the pragmatists' challenge to Cartesian foundationalism was so revolutionary. They denied the very possibility of stripping away all culture and convention (Descartes's starting point), and they denied the possibility of gaining knowledge of any ahistorical, eternal, universal truths (Descartes's goal). The pragmatists insisted that all knowledge is situated, contextual, temporal, contingent, and fallible.

Yet, they were not merely Hegelian historicists, for they also applied an empirical critique to the tenets of German idealism. The other side of pragmatism that needs to be examined is its empiricism or naturalism.

IV. TURNING HEGELIANISM ON ITS HEAD

Dewey's thought bears an intellectual kinship to the philosophy of Karl Marx, for it is often said that Marx turned Hegelianism on its head, and the same could be said of Dewey. Hegel taught a form of idealism in which history is the progressive unfolding of God or Reason or the Absolute Spirit, which became a central idea of Romanticism (and American Transcendentalism). The roots of this idealism go back to Immanuel Kant, who taught that in knowledge the mind does not passively receive impressions through the senses but actively shapes, arranges, and interprets sensory impressions. As a result, the mind is primary; the mind is what gives meaning to the external world. This was

³³ *Id.*

³⁴ *Id.* at 133-34.

³⁵ See Nancy R. Pearcey, *The Creation Myth of Modern Political Philosophy*, Remarks at the Sixth Annual Kuyper Lecture (Sept. 29, 2000).

seized on by the Romantics, who rejected the mechanistic, clockwork image of the universe offered by Enlightenment science and substituted an image of the world as an organism, with God as an immanent spirit, the soul of the universe, unfolding through history.³⁶

This quasi-pantheistic idealism is what both Marx and Dewey rejected. For Dewey, the basis for a naturalistic understanding of historical development was Darwinism, which provided a strictly materialistic mechanism for the origin and development of living things—including human beings. Darwinism thus subverted both traditional theism and Romantic idealism. As Conkin explains, in traditional theology, a transcendent God creates the world for his own purposes; in idealistic or immanent forms of theism, a divine spirit realizes its purposes in and through the historical development of the world.³⁷ In both cases, “[m]ind is formally, if not temporally, prior to things. . . . [but] Darwin began to reverse this order. In his *Descent [of Man]*, mind is a very late emergent,” a product of random variation and natural selection.³⁸ “By making mind, or self-consciousness or thought, an emergent in nature, Darwin seemed to leave no phenomena outside nature. He naturalized mind.”³⁹

Dewey felt that “this naturalizing of mind . . . was the most revolutionary implication of organic evolution.”⁴⁰ Of course, it did not disprove the existence of God as the ultimate cause behind all empirical phenomena, Conkin writes; but it rendered any such cause “unneeded and irrelevant and, in this sense, more gratuitous than ever before.”⁴¹

Moreover, Darwinism suggested that mental functions were adaptations produced by natural selection—tools for solving problems, superior to but not inherently different from teeth and claws. This was the basis of Dewey’s instrumentalist view of knowledge. As Grey writes, Dewey stressed “mind as an adaptive device for coping with the external environment.”⁴² He conceived of the process of inquiry as continuous with what happens in the animal world. For Darwin, evolution proceeds when an animal encounters a physical challenge in its environment and adapts to it; for Dewey, inquiry begins when an individual encounters a challenge in his normal habits of thought and life and learns to adapt by creating a new belief, a new habit. Thus, the primitive basis of the most

³⁶ A good description of Romanticism’s effect on the sciences can be found in chapter five of PEARCEY & THAXTON, *supra* note 22, at 97-120. See also *id.* at 266, 268, 279-80.

³⁷ See CONKIN, *supra* note 7, at 42.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 43.

⁴¹ *Id.*

⁴² Grey, *supra* note 27, at 12.

sophisticated human cognitive activity is a homeostatic process in which the organism strives to return to equilibrium.

Darwinism seemed to imply a new way of thinking, a “new logic.”⁴³ In a 1909 essay entitled *The Influence of Darwinism on Philosophy*, Dewey said Darwin “introduced a new mode of thinking that in the end was bound to transform the logic of knowledge, and hence the treatment of morals, politics, and religion.”⁴⁴ Darwin’s *Origin of Species* “embodied an intellectual revolt and introduced a new intellectual temper”—a new epistemology that rejected the deductive search for certainty and eternal truths and embraced a view of truth as empirical, temporal, historically contingent.⁴⁵ This new Darwinian logic required one to abandon the Greek and scholastic approach of explaining things by reference to unchanging natures (e.g., by inquiring into the “nature of man”) and instead to explain things by the use of “genetic and experimental ideas” (e.g., empirical study of the process whereby human features emerged from the animal world).⁴⁶ Thus, the mind became one more object in the empirical world, subject to study by scientific methods.

Moreover, knowledge does not consist in passively viewing an unchanging, independent reality; Dewey denounced this older view as the “Spectator Theory of Knowledge.”⁴⁷ Instead, he said, knowledge is a kind of practice that involves actively manipulating experiments, projecting hypotheses, sifting background beliefs, and selecting concepts to solve problems. Thus, ideas are not to be judged against a transcendent, eternal Truth; instead, they should be judged by how successfully they do their job, how well they work in meeting human needs and coping with the environment. Dewey’s instrumentalism defines ideas on the model of scientific hypotheses: ideas are strategies for actively restructuring the world. Or, in William James’s famous economic metaphor, truth is the “cash value” of an idea.

Charles Peirce added two emphases that would turn out to be important in the legal philosophy of Oliver Wendell Holmes. First, for Peirce, the meaning of a word is how well it enables us to predict events.⁴⁸ If we say that quartz is hard, we mean it will not be scratched if we rub it with wood or cork or plastic. That is, given the meaning of the

⁴³ JOHN DEWEY, *The Influence of Darwin on Philosophy*, in *THE INFLUENCE OF DARWIN ON PHILOSOPHY AND OTHER ESSAYS IN CONTEMPORARY THOUGHT* 9 (1910).

⁴⁴ *Id.* at 1.

⁴⁵ *Id.*

⁴⁶ *Id.* at 9.

⁴⁷ See, e.g., CHRISTOPHER B. KULP, *THE END OF EPISTEMOLOGY: DEWEY AND HIS CURRENT ALLIES ON THE SPECTATOR THEORY OF KNOWLEDGE* (1992) (discussing the “Spectator Theory of Knowledge”).

⁴⁸ James Miller, *Holmes, Peirce, and Legal Pragmatism*, 84 *YALE L.J.* 1123, 1132 (1975).

word "hard," we may predict the outcome of various operations on a lump of quartz. This predictive definition would be an important element in Holmes's legal philosophy.⁴⁹ Second, Peirce emphasized the social aspect of knowledge: what counts as reliable knowledge is that which is accepted by a "community of inquirers."⁵⁰ Private certainty was replaced with public consensus as grounds for belief.⁵¹ This distinction between public and private was to be a prominent theme in Holmes's philosophy of law as well.⁵²

V. CHANCE AS FREEDOM

If Dewey was like Marx in seeking a naturalistic form of cultural evolution, he was *unlike* Marx in rejecting a mechanistic, deterministic account of the process. Marx was one of many early anthropologists and sociologists who were influenced by the Newtonian image of nature as a huge machine, operating by inexorable laws. These scholars sought to apply the same machine image to social life, hoping to discover a few general principles that would explain society in the same way Newton's law of gravity explained motion—a principle that would reduce society to a single, law-governed, deterministic system.⁵³ Thus, there began a search for "laws of development" that would reveal the pattern of history and the direction of evolutionary progress from the simple to the complex.⁵⁴ Henry Morgan taught that societies evolved through a series of stages, from Savagery to Barbarism to Civilization.⁵⁵ Edward Tylor added a sequence of stages for the evolution of religion, from Animism to Polytheism to Monotheism.⁵⁶ Marx proposed a strict series of stages based on economic relationships.⁵⁷ These schemas were mechanistic and deterministic; they assumed that societies universally pass through the same stages in a strict, invariable, inevitable, unilinear sequence.⁵⁸

By contrast, because of his roots in the Romantic movement and its organic model of nature, Dewey rejected the deterministic model of

⁴⁹ *Id.* at 1132.

⁵⁰ *Id.* at 1130-31, 1140.

⁵¹ *Id.* at 1130-31, 1139-40.

⁵² *Id.* at 1139-40.

⁵³ See PEARCEY & THAXTON, *supra* note 22, at 93-95.

⁵⁴ The mechanistic worldview found support in Darwin's theory of evolution, which implied that even living things evolve according to strictly naturalistic, law-governed processes. *Id.* at 114-16.

⁵⁵ See Allen C. Turner, *Prolegomena to a Forensic Cultural Anthropology*, 16 AM. J. TRIAL ADVOC. 2, 4-5 (1992). See also ENCYCLOPAEDIA BRITANNICA, *Social Change*, available at <http://www.britannica.com/bcom/eb/article/4/0,57161175+6+109551,00.html>.

⁵⁶ ENCYCLOPAEDIA BRITANNICA, *supra* note 55.

⁵⁷ *Id.*

⁵⁸ *Id.*

cultural evolution. Along with Peirce and James, he proposed a theory of history as completely contingent—spontaneous, unpredictable, open to genuine novelty.⁵⁹ There are, after all, two elements to Darwin's theory: chance and law. Random variations (chance) are sifted through the "sieve" of natural selection (law). While many Darwinians interpret the latter as the basis for a metaphysics of strict environmental determinism, the pragmatists turned the former into a metaphysics of indeterminacy, freedom, spontaneity, variety, and contingency.⁶⁰ The "openness" of the world, they said, takes the form of chance at lower levels of complexity and the form of choice at the human level.⁶¹

James even made this principle the cornerstone of his philosophy. The main concept he took from evolution, says Philip Wiener in *Evolution and the Founders of Pragmatism*, was the idea that spontaneous variation in nature can be used as a "defense of the primary importance of individual experience and personal freedom."⁶² The "elusive but genuine character of individual spontaneity in both the external world and in man is in James's view of evolution epitomized by 'saltatory' mutations, original, spontaneous, irreducible phases of experience."⁶³ In short, for the pragmatists, history was not constrained either by iron-clad laws of cultural evolution, nor by an overarching cosmic purpose; instead, it was completely contingent.

VI. DECONSTRUCTING DEWEY

In recent decades, pragmatism has made a dramatic resurgence. The best-known proponent of neo-pragmatism is Richard Rorty, who explicitly ties his views to Dewey—and ultimately to Darwin.⁶⁴ As we have seen, the classic pragmatists "naturalized" the mind, rendering it part of the empirical world known by scientific methods; they reduced mental activities to merely continuations of the Darwinian struggle for

⁵⁹ WIENER, *supra* note 8, at 101-105.

⁶⁰ *Id.*

⁶¹ *Id.* at 101-05.

⁶² *Id.* at 101.

⁶³ *Id.* This emphasis on freedom was important in the rise of process philosophy, which in turn birthed process theology. The key figure among the pragmatists was Peirce, who held a notion of a divine spirit evolving in the world. He taught a form of panpsychism, in which the entire cosmos is evolving toward Mind—or the Absolute or God—in a process of "evolutionary love." See *id.* at 76. The founder of process theology is Charles Hartshorne, and contemporary process theologians who explicitly link their theology to Darwinism include Ian Barbour and John Haught.

⁶⁴ Rorty hopes people in the West will exchange their "common sense much influenced by Greek metaphysics and by monotheism" for the "startlingly counterintuitive self-image sketched by Darwin, and partially filled in by Dewey." Matthew Halteman & Andrew Chignell, *Agent Provocateur*, BOOKS & CULTURE, Jul./Aug. 2000, at 10, available at <http://www.christianitytoday.com/bc/2000/004/2.10/html> (quoting Richard Rorty).

survival by other means. Concepts are not ways of decoding a truth "out there"; they are merely tools we invent to help us in the Darwinian struggle. Rorty has incorporated this understanding of knowledge into his influential version of postmodernism. "Keeping faith with Darwin," he writes, means understanding that the human species is not oriented "toward Truth" but only "toward its own increased prosperity."⁶⁵ Darwin taught us that "our species, [with] its faculties and its current scientific and moral languages, are as much products of chance as are tectonic plates and mutated viruses."⁶⁶

Rorty draws connections between Dewey's thought and the postmodernism of Derrida, Heidegger, Wittgenstein, and finally Nietzsche, the nineteenth-century prophet of postmodernism. One of Nietzsche's favorite metaphors was that all previous philosophy had sought to provide a transcript of the book of the universe.⁶⁷ This stemmed from an old Christian tradition that regarded the created world itself as a kind of writing, a text for us to study. "'These heavens,' said St. Augustine, 'these books, are the works of God's fingers . . .'"⁶⁸ John Scotus Erigena wrote, "The eternal light is proclaimed to the world in two ways, namely, Scripture and Creation."⁶⁹ The early modern scientists spoke about the book of God's word and the book of God's world.⁷⁰ Because God created all things by his Word, explains Patrick Henry Reardon, for Christian faith "there is no need for man to formulate human meaning out of whole cloth. He is expected to presume, as more or less obvious, that the universe is possessed of a story line, that it is a rational and poetic place."⁷¹

All of that changed when Darwin demonstrated, as it seemed, that there is no message written in nature, no story of divine purpose.⁷² Nature operates only by the blind, material processes of chance and law.⁷³ Things come into being without purpose or reason, and they

⁶⁵ Richard Rorty, *Untruth and Consequences*, THE NEW REPUBLIC, Jul. 31, 1995, at 36.

⁶⁶ *Id.*

⁶⁷ Ian Johnston, *There's Nothing Nietzsche Couldn't Teach Ya About the Raising of the Wrist (Monty Python)*, at <http://www.mala.bc.ca/~johnstoi/introser/nietzs.htm+ricl>.

⁶⁸ Patrick Henry Reardon, *The World as Text*, TOUCHSTONE MAG., Jul.-Aug. 1999, at <http://www.touchstonemag.com/docs/issues/12.4docs/12-4pg85.html>.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See, for example, RICHARD DAWKINS, *THE BLIND WATCHER: WHY THE EVIDENCE OF EVOLUTION REVEALS A UNIVERSE WITHOUT DESIGN* (1996), as well as Dawkins' other works.

⁷³ See *supra* note 72.

change over history out of expediency, to adapt to material conditions.⁷⁴ Thus, Nietzsche drew out the consequences of Darwinian theory for beliefs and values: God is dead, as he famously said, and everything is in flux. There can be no appeal to any eternal, unchanging, definitive, divinely revealed truths, for there is no divine story to be drawn out of nature.

All that exists, according to Nietzsche, are language games.⁷⁵ Since philosophical systems deliver themselves to us in language, they are shaped by that language and by its history.⁷⁶ Thus, most of the concepts that have preoccupied Western philosophy are, for Nietzsche, merely accidental byproducts of a contingent process of linguistic development.⁷⁷ Languages are like games—soccer or baseball—where the rules are purely conventional. The rules of soccer are not written in nature; they are human constructions, developing over time, contingent and subject to change. There is no rule book in the sky, no Eternal Umpire. The language games we play are contingent creations, with no base in a divine story.

Echoing Nietzsche, Rorty says in *Contingency, Irony, and Solidarity* that truth is made, not found.⁷⁸ It is a human construction, not something “out there” waiting to be discovered.⁷⁹ In a remarkable passage, he writes, “The suggestion that truth, as well as the world, is out there is a legacy of an age in which the world was seen as the creation of a being who had a language of his own,” a “nonhuman language” written into the cosmos.⁸⁰ But Darwin demonstrated that the world need not be the creation of the Word, the Logos, of God. Hence, “The world does not speak.”⁸¹ Instead, humans merely acquire the “habit” of using certain vocabulary systems as “tools” to “cope” with the environment (all Deweyan terms) and get the results we want.⁸² Echoing James’s economic metaphor of the “cash value” of an idea, Rorty says we pick up a vocabulary when we find that it “pays” to use it, when we find it “profitable”—a “useful tactic in predicting and controlling [a person’s] future behavior.”⁸³

⁷⁴ *Id.*

⁷⁵ See Johnston, *supra* note 67.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ RICHARD RORTY, *CONTINGENCY, IRONY AND SOLIDARITY* 5 (1989).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 6.

⁸² *Id.* at 14-15, 18-19, 21.

⁸³ *Id.* at 8, 14-15, 21.

Thus, Rorty naturalizes not only mind but also language. He argues that Darwin's account of biological evolution as a nonteleological and undirected process gives the basis for "a nonteleological view of intellectual history."⁸⁴ Darwin's theory of a blind, mechanistic process of natural selection "let us see mind as something which just happened rather than as something which was the point of the whole process."⁸⁵ By the same token, the Darwinian metaphor

lets us think of 'our language'—that is, of the science and culture of twentieth-century Europe—as something that took shape as a result of a great number of sheer contingencies. Our language and our culture are as much a contingency, as much a result of thousands of small mutations finding niches (and millions of others finding no niches), as are the orchids and the anthropoids.⁸⁶

Like Dewey, Rorty relates freedom and novelty to the chance element in Darwinian theory.⁸⁷ "[G]enuine novelty can, after all, occur in a world of blind, contingent, mechanical forces," he writes, "when, for example, a cosmic ray scrabbles the atoms in a DNA molecule," producing a mutation.⁸⁸ Analogously, Rorty invites us to think of the great systems of thought, from Aristotle's philosophy to St. Paul's theology to Newton's physics, as "the results of cosmic rays scrambling the fine structure of some crucial neurons on their respective brains. Or, more plausibly, they were the result of some odd episodes in infancy—some obsessional kinks left in these brains by idiosyncratic traumata. It hardly matters how the trick was done."⁸⁹ The main point is that intellectual history is undirected, contingent, accidental. Language and concepts are merely tools we use for predicting what others will do so we can control and/or cooperate with them.

As Rorty put it in a magazine interview, "What I like about Dewey and pragmatism is the anti-metaphysical claim that there's no court of appeal higher than a democratic consensus."⁹⁰ In Dewey's "thoroughgoing secularism," he adds bluntly, "There's no God, no reality, no nothing that takes precedence over the consensus of a free people."⁹¹ Truth itself has become a matter of popular sovereignty.⁹² Thus, Rorty has extended the principles of pragmatism to their logical conclusion, spinning out their

⁸⁴ *Id.* at 16.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 17.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Scott Stossel, *A Conversation with Richard Rorty*, ATLANTIC UNBOUND, Apr. 23, 1998, at <http://www.theatlantic.com/unbound/bookauth/ba980423.htm>.

⁹¹ *Id.*

⁹² *Id.*

implications for a completely naturalistic and contingent view of knowledge.

VII. THE "EVOLUTION" OF LAW

We now turn to the effects of pragmatism on legal philosophy. Recalling the opening example of the Kitty Kat Lounge, why have legal pragmatists come to the point of arguing that the law must reflect American erotic culture—overturning even minimal local standards of public decency?

The classical pragmatists included several lawyers, such as Nicholas St. John Green and Oliver Wendell Holmes, who drew out the implications of pragmatism for the law. Like Dewey, these scholars were greatly influenced by Darwin's theory of evolution. In a letter, Holmes once said he could not remember as a student actually reading Darwin's *Origin of Species*, but its ideas were very much "in the air."⁹³ He was later to draw parallels between biological evolution in nature and the evolution of legal concepts. In one famous passage in his 1881 book, *The Common Law*, Holmes analogizes legal doctrines to the "clavicle in the cat," arguing that just as evolution adapts existing biological structures to different uses in different time periods, so too the functions of legal doctrines evolve from one period to another.⁹⁴ In an 1899 *Harvard Law Review* article, *Law in Science and Science in Law*, he describes the transformation of legal ideas as an evolution from the simple to the complex.⁹⁵ Thus, "[w]e have evolution in this sphere of conscious thought and action no less than in lower organic stages . . ."⁹⁶ To describe the evolution of law, Holmes applies Darwinian concepts of a "struggle for life among competing ideas" and "the ultimate victory and survival of the strongest."⁹⁷

⁹³ Letter from Oliver Wendell Holmes to Morris Cohen (Feb. 5, 1919), in *THE ESSENTIAL HOLMES* 110, 110 (Richard A. Posner ed., 1992).

⁹⁴ OLIVER WENDELL HOLMES, *THE COMMON LAW* 31 (Mark DeWolfe Howe ed., 1963).

The official theory [of the development of law] is that each new decision follows syllogistically from existing precedents. But just as the clavicle in the cat only tells of the existence of some earlier creature to which a collarbone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten.

Id.

⁹⁵ OLIVER WENDELL HOLMES, *Law in Science and Science in Law*, in *THE ESSENTIAL HOLMES*, *supra* note 93, 185, 185. See also E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 *COLUM. L. REV.* 38, 52-53 (1985). This article provides a good overview of legal theories that draw explicit metaphors to evolution.

⁹⁶ HOLMES, *supra* note 95, at 188.

⁹⁷ *Id.* at 190.

On a more philosophical level, Darwinism influenced legal pragmatism by combining the two major streams of thought dominant at the time: the empiricist and the historicist. We have already seen how a parallel synthesis was effected in philosophical pragmatism in a synthesis of British Empiricism and German Romanticism. Holmes applied the same strategy to the law, synthesizing the legal philosophies produced by each of these schools: namely, the analytical and historical schools of jurisprudence, respectively.⁹⁸ "Standard nineteenth-century jurisprudence regarded these theories as rivals," Grey explains; a central innovation of legal pragmatism was to combine them into a single, complex theory of law.⁹⁹

The first of these legal traditions, the analytical school, was a product of British Empiricism and Utilitarianism.¹⁰⁰ It shared in the Enlightenment spirit of liberating the human mind from the "tutelage" of the past, with its weight of customs, traditions, and inherited texts.¹⁰¹ "Nowhere did the Enlightened feel the weight of the past more than in the law," Grey writes,¹⁰² and they responded with the same kind of thought experiment we saw earlier in Descartes: they argued that the only way to remove the haphazard and ungainly growth of customs represented in British common law was to start over from scratch—to strip away the historical accumulations of the centuries and to construct in its place a new body of law by rational inference from first principles.¹⁰³ For Bentham, the new code should be designed on the Principle of Utility, rationally aimed at the greatest happiness of the greatest number.¹⁰⁴ For his disciple John Austin, the new code should be built on the commands of the sovereign.¹⁰⁵ In either case, the Benthamite project of clearing away and building anew was an analogue in law to Cartesian foundationalism in epistemology, with its goal of submitting all inherited beliefs to doubt so as to rebuild knowledge on indubitable foundations.¹⁰⁶

Against this idea of building a new system from scratch on abstract principles, Grey writes, "there arose a romantic and conservative

⁹⁸ Grey, *supra* note 8, at 805.

⁹⁹ *Id.* Similarly, Wiener notes, "Holmes took the analytic method of pre-Darwinian English positivistic thinkers and the comparative genetic method of evolution as furnishing the twin keys to law as an evolving institution and as an anthropological document for the science of jurisprudence." WIENER, *supra* note 8, at 175.

¹⁰⁰ Grey, *supra* note 8, at 808.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 829.

¹⁰⁶ *Id.* at 809.

reaction based upon faith in the virtues of tradition, organic solidarity, and cultural particularity.¹⁰⁷ Applied to law, this reaction found expression in the historical school of jurisprudence represented by Friedrich Karl von Savigny and his American disciple James Coolidge Carter, as well as Sir Henry Maine, who had a profound influence on Holmes.¹⁰⁸ "The historicists argued that the basis of all law is custom, the set of evolved norms that give a society its identity," developed by adaptation to circumstances through a gradual process of case-by-case decisions by judges reasoning on precedent.¹⁰⁹ The historicists' central metaphor was that "a community's law is like its language, a collective product, peculiar to its people and their history, gradually developed, a structure of contingent elements and rules, and yet one so deeply rooted in practice as to be almost entirely resistant to conscious modification."¹¹⁰ Hence, to impose a new, rationally constructed code of law on a people was as "harmful," the historicists argued, as trying to impose an "artificial language."¹¹¹

In America, the debate between these two schools arose in the controversy over codification.¹¹² Beginning around 1820, efforts to codify British common law grew into a full-scale movement.¹¹³ The result was hundreds of changes in the common law, which threatened to upset existing social and economic arrangements.¹¹⁴ In the ensuing controversy, the legal positivism of Bentham and Austin was imported into the United States by Christopher Langdell and Joseph Beale and became the intellectual fountainhead of the codification movement.¹¹⁵ Langdell articulated the hope of turning law into a science by extracting a few fundamental principles from the common law—fault, will, property rights—that could be formulated as axiomatic, universal truths and from which one could then logically deduce virtually all legal rules and doctrines.¹¹⁶ Opposed to codification were the defenders of custom and the common law, such as Carter, often appealing to Herbert Spencer's

¹⁰⁷ *Id.* at 808.

¹⁰⁸ WIENER, *supra* note 8, at 175.

¹⁰⁹ Grey, *supra* note 8, at 808.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY*, 117 (1992).

¹¹³ *Id.*

¹¹⁴ *Id.* at 117-18.

¹¹⁵ *Id.* at 123. "In America, Bentham had become the intellectual fountainhead of the codification movement." *Id.* at 121.

¹¹⁶ Grey, *supra* note 8, at 819.

evolutionary philosophy (Social Darwinism) to support the gradual, organic growth of law.¹¹⁷

How did Holmes reconcile these two contradictory schools of jurisprudence? His synthesis can be best summarized in a formula Dewey used in his later years (he, in turn, was summarizing Holmes): the historical jurists were right in identifying the *source* of law in historically evolving custom, tradition, and tacit patterns of thought inherited from the past; but the analytical jurists were right in identifying the *criterion* for law as utilitarian considerations of practical consequences, empirically measured.¹¹⁸

Let's unpack this formula. The pragmatists agreed with the historicists that the law is a cumulative social product of practical decisions.¹¹⁹

In Darwinian fashion, they interpreted the law as a human instrument for adjusting conflicting desires in the struggle for existence among men. Against a static conception of the laws as disembodied reason or eternal natural law discoverable by the jurist and applied syllogistically to each new case, they applied the more empirical notion of man's fallible groping for order and justice in the intense competition of the market place.¹²⁰

Thus, Holmes rejected the idea that one could start over and invent a different legal code; instead he used an organic metaphor, comparing the growth of the law to the growth of a tree: "The tree has grown as we know it. The practical question is what is to be the next organic step."¹²¹ Holmes's imagery was probably borrowed from Green, who wrote that we must account for the law "in the way we account for the distorted shape of a tree—by looking for the special circumstances under which it has grown, and the forces to which it has been exposed."¹²² Thus, Green traced the evolution of the law of slander and libel in English law, from its beginnings under the rule of the Druids, through the successive governments of the Romans, of the ecclesiastics of the medieval church, of the Norman conquerors, and into the subsequent separation of spiritual and temporal power.¹²³

It is against this historicist backdrop that one must understand Holmes's famous aphorism that "the life of the law has not been logic: it

¹¹⁷ HORWITZ, *supra* note 112, at 117-23.

¹¹⁸ Grey, *supra* note 8, at 806.

¹¹⁹ WIENER, *supra* note 8, at 153.

¹²⁰ *Id.*

¹²¹ OLIVER WENDELL HOLMES, *Holdsworth's English Law*, in THE ESSENTIAL HOLMES, *supra* note 93, at 206.

¹²² WIENER, *supra* note 8, at 163.

¹²³ *Id.*

has been experience.¹²⁴ Throughout his long career, Holmes seemed to be waging a campaign against something he called “logic” in legal theory. What did he have against logic? The answer is that “logic” was shorthand for the legal formalism of Austin and Langdell, with its ideal of reaching judgments by deduction from a system of precise, abstract general principles, on the model of Euclidean geometry.¹²⁵ Such legal formalism had become an increasingly mechanical process of finding precedents and applying them, whether or not the result made any sense under the rapidly changing conditions of modern industrialization.¹²⁶ Against formalism, Holmes argued that the justification for a law is not that it is consistent with universal principles but “that it helps bring out a social end which we desire.”¹²⁷

Of course, Holmes understood the need for logic in a limited sense—for example, to systematize and formulate the law into a coherent system of general principles.¹²⁸ But he wanted to separate law from metaphysics and morality and to transform it into the empirical study of evolving, historical conceptions of what is expedient in a society’s struggle for existence. He regarded law as a branch of anthropology, writing: “the law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”¹²⁹ According to Holmes, law is not the embodiment of universal reason or transcendent order; it is always the product of a particular, local culture and its unique history. As he put it, “[t]he common law is not a brooding omnipresence in the sky It is always the law of some state.”¹³⁰

VIII. THE PATH OF THE LAW¹³¹

To show that a legal rule is based in evolving historical custom, however, is not to justify the rule. From the analytical school of jurisprudence, Holmes took the principle that justification must be in terms of practical, utilitarian consequences. Indeed, for the pragmatists, the whole purpose of historical research was not to defend customary law

¹²⁴ HOLMES, *supra* note 94, at 1.

¹²⁵ Grey, *supra* note 8, at 815-16, 819.

¹²⁶ John J. Reilly, *Justice Faustus*, CULTURE WARS, Jan. 1996, available at <http://pages.prodigy.net/aesir/holmes.htm> (reviewing G. Edward White, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF (1993)).

¹²⁷ HOLMES, *supra* note 95, at 198.

¹²⁸ Grey, *supra* note 8, at 816.

¹²⁹ HOLMES, *supra* note 94, at 1.

¹³⁰ OLIVER WENDELL HOLMES, *Southern Pacific v. Jensen*, in THE ESSENTIAL HOLMES, *supra* note 93, at 229, 230.

¹³¹ OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 186 (1952).

against reformist legislation but precisely the opposite. According to Grey, the main point was “to stress the contingent and variable character of practices that historically unsophisticated practical lawyers may [mistakenly] regard as inevitable and rationally necessary.”¹³² In short, the purpose of historical research was not conservative but liberating: to debunk the idea of finality or universality in any set of local, customary principles and to open the way for social transformation.¹³³ As Holmes wrote, “History sets us free and enables us to make up our minds dispassionately” whether the old legal rules still serve any purpose.¹³⁴

In making up our minds about the “old legal rules,” the key tool for Holmes is science. In his highly influential 1897 essay, *The Path of the Law*, Holmes wrote that the study of the history of legal rules “is the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules.”¹³⁵ Moreover, the way to determine their worth is through “considerations of social advantage,” as determined by empirical studies conducted by economists and social scientists.¹³⁶ Thus, “[t]he man of the future is the man of statistics and the master of economics.”¹³⁷ In sum, the law’s postulate should be established “upon accurately measured social desires instead of tradition.”¹³⁸

As law professor Phillip E. Johnson puts it in *Reason in the Balance*, for Holmes, law is “the science of state coercion”—the empirical study of how the state uses its coercive power to enforce policies.¹³⁹ Thus, law is little more than social engineering, and the only barrier to complete success is the practical difficulty of doing accurate statistical studies. As Holmes noted, in many cases, “the worth of the competing social ends . . . cannot be reduced to number and accurately fixed.”¹⁴⁰

Given this lack of empirical certainty, Holmes’s own attitude toward attempts at legal and political reform remained “an unconvinced conservatism.”¹⁴¹ In the end, the only legal value that is certain is “that men should know the rules by which the game will be played.”¹⁴² It is in

¹³² Grey, *supra* note 8, at 807.

¹³³ *Id.* at 813.

¹³⁴ HOLMES, *supra* note 95, at 191.

¹³⁵ HOLMES, *supra* note 131, at 186-87.

¹³⁶ *Id.* at 184.

¹³⁷ *Id.* at 187.

¹³⁸ HOLMES, *supra* note 95, at 192.

¹³⁹ PHILLIP E. JOHNSON, REASON IN THE BALANCE: THE CASE AGAINST NATURALISM IN SCIENCE, LAW AND EDUCATION 140 (1995).

¹⁴⁰ HOLMES, *supra* note 95, at 194.

¹⁴¹ HOLMES, *supra* note 121, at 206.

¹⁴² *Id.*

this pragmatic vein that one ought to understand Holmes's well-known predictive theory of law: law is the "prophecies of what the courts will do in fact."¹⁴³ This is not intended as a general definition of law; rather, speaking here as a practicing lawyer to other lawyers who need to counsel clients, Holmes is offering a purely practical guide to playing "the game": laws should be regarded as guidelines for anticipating how the judge will decide.

The game is easier to play, of course, if the law is predictable. To render it more predictable, Holmes sought to base it on principles that are public and communal.¹⁴⁴ This was an application of pragmatism's rule that reliable knowledge is that which is accepted by a "community of inquirers," most clearly explicated by Peirce. "Peirce's substitute for the Cartesian clear and distinct idea is the agreement of a community of inquirers," explains James D. Miller in a *Yale Law Journal* article.¹⁴⁵

"Descartes's paradigm of knowledge was geometry; Peirce's paradigm was the experimental or laboratory sciences. Peirce sought to replace Descartes's reliance on the 'natural light' of immediate intuition of clear and distinct ideas with the process of a community of inquirers reaching agreement through application of public and accepted methods of research."¹⁴⁶

For Holmes, this implied that law cannot be based on such morally charged concepts as "right" and "duty," "guilt" and "fault," for he regarded these as merely "internal" standards that are private, psychological, and subjective.¹⁴⁷ Instead he offered a behaviorist conception of law, for behavior is observable and objective.¹⁴⁸ For example, for Holmes a contract does not impose a moral duty, it merely creates a choice—either to perform, or else to pay damages for not performing.¹⁴⁹

Holmes does concede (in vague terms) that law is related "in a certain sense" to morality,¹⁵⁰ yet it is clear that the morality he is most concerned about does not reflect a transcendent moral standard but only the feelings and needs of a particular culture. He writes that "[t]he first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, *whether right or wrong*."¹⁵¹ This is the perspective of an anthropologist who is interested

¹⁴³ HOLMES, *supra* note 131, at 173.

¹⁴⁴ Miller, *supra* note 48.

¹⁴⁵ *Id.* at 1130.

¹⁴⁶ *Id.* at 1131.

¹⁴⁷ *Id.* at 1126-30.

¹⁴⁸ *Id.*

¹⁴⁹ Richard A. Posner, *Introduction to HOLMES*, *supra* note 93, at xi-xii.

¹⁵⁰ HOLMES, *supra* note 94, at 33.

¹⁵¹ *Id.* at 36 (emphasis added).

in how a culture's beliefs are developed and expressed, not in whether those beliefs are objectively true or valid. In another passage, he writes, "The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race."¹⁵² This language clearly implies the perspective of cultural relativism.

In some passages, Holmes seems to want to sever law from even this relativist morality. In the *Path of the Law*, he says that in order to understand law in itself, we must consider it from the viewpoint of a "bad man."¹⁵³ Whereas most of us connect law with moral ideals such as justice and fairness, a "bad man" who cares nothing for morality is interested only in what will happen to him if he violates the law.¹⁵⁴

To summarize, the Holmesian view of law is both historical, seeing it as a product of a particular cultural evolution, and also instrumental, seeing it as an instrument of social policy. On both counts, Holmes was crystallizing trends that had already been going on throughout the nineteenth century, as Morton J. Horwitz shows in *The Transformation of American Law, 1780-1860*.¹⁵⁵ Until that time, Horwitz writes, "the common law was conceived of as a body of essentially fixed doctrine to be applied in order to achieve a fair result between private litigants in individual cases," not to change social policy.¹⁵⁶ Law was thought to be based on nature or reason or divine law and often all three. In 1728, Daniel Dulany wrote that "the Common Law, takes in the Law of Nature, the Law of Reason and the revealed Law of God; which are equally binding, at All Times, in All Places, and to All Persons."¹⁵⁷ The role of judges was not to make law but only to discover and apply pre-existing rules, and "the conception of obligation [was] derived from the inherent rightness or justice of law."¹⁵⁸

By 1800, however, these concepts had been largely abandoned. To accord with a political system of popular sovereignty, law was redefined as based on will—not the will of the sovereign (as in Austin) but the will of the people (popular consent). Yet the idea that law is an instrument of will was a "two-edged sword," Horwitz says, for some judges began to act

¹⁵² HOLMES, *supra* note 131, at 170.

¹⁵³ *Id.* at 171.

¹⁵⁴ *Id.* at 170. "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict . . ." *Id.* at 171. "A man who cares nothing for an ethical rule which is believed and practiced by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can." *Id.* at 170.

¹⁵⁵ HORWITZ, *supra* note 112.

¹⁵⁶ *Id.* at 1.

¹⁵⁷ *Id.* at 7.

¹⁵⁸ *Id.* at 19.

as though the law were based on *their* will.¹⁵⁹ “Judges began to conceive of themselves as legislators,” Horwitz writes.¹⁶⁰ They “came to think of the common law as equally responsible with legislation for governing society and promoting socially desirable conduct.”¹⁶¹ They began to “formulate legal doctrine with the self-conscious goal of bringing about social change.”¹⁶²

The task of directing social and economic development did not always mean innovation; as often as not, it meant a conservative adherence to the past and to precedent—not, however, out of reverence for any presumed inherent justice in customary law but for purely pragmatic reasons: to maintain a certain level of predictability so that people might “plan their affairs more rationally.” Adherence to precedent was necessary “only to the extent that it allowed private parties to calculate in advance on the consequences of particular courses of conduct.”¹⁶³ In short, in the century leading up to Holmes we find all the elements of his thought, particularly his instrumental view of law as a tool of social policy. What made Holmes so influential was his philosophical justification of these views, along with his literary talent for expressing the outcome in pithy and memorable aphorisms.

IX. DARWIN'S NEW BULLDOG¹⁶⁴

Legal pragmatism is generally considered the intellectual source of legal realism, which arose parallel to it and was greatly influenced by it.¹⁶⁵ Figures typically included are Roscoe Pound, Benjamin Cardozo, Jerome Frank, Karl Llewellyn, Felix Cohen, and Max Radin.¹⁶⁶ By the end of World War II, both pragmatism and legal realism had declined, only to come charging back in the 1960s in the person of Richard Rorty. This was followed in the 1970s by critical legal studies (“the radical son of legal realism,” as Richard Posner calls it),¹⁶⁷ and in the 1980s by a school of legal neopragmatists that includes Posner, Thomas Grey, Daniel Farber, and Philip Frickey.¹⁶⁸

¹⁵⁹ *Id.* at 22.

¹⁶⁰ *Id.* at 23.

¹⁶¹ *Id.* at 30.

¹⁶² *Id.*

¹⁶³ *Id.* at 26.

¹⁶⁴ Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718 (1998).

¹⁶⁵ Richard A. Posner, *What Has Pragmatism to Offer Law?*, in PRAGMATISM IN LAW AND SOCIETY 29, 30 (Michael Brint & William Weaver eds., 1991).

¹⁶⁶ *Id.* at 29-30.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 30.

Posner appeared at the beginning of this paper in connection with his controversial concurring opinion in the Kitty Kat Lounge case; it is time to consider his thought in greater detail as an exemplar of contemporary legal pragmatism. Posner is the most frequently cited American legal scholar alive today and is considered the founder of the law and economics movement. His application of economic reasoning to moral issues has often yielded startling results. In a notorious 1978 article in the *Journal of Legal Studies*, he suggested making it legal for parents to buy and sell unwanted babies on the free market in lieu of government-regulated adoption.¹⁶⁹ In the third edition of *Economic Analysis of Law*, he added new material on rape that substitutes economic for moral reasoning, arguing that “[a]llowing rape would be the equivalent of communalizing property rights in women. . . . Allowing rape would lead to heavy expenditures on protecting women, as well as expenditures on overcoming those protections. The expenditures would be largely offsetting, and to that extent socially wasted.”¹⁷⁰ In *Sex and Reason*, he describes prostitution as a “substitute for marriage”: the difference between them is “not fundamental. In . . . marriage, the participants can compensate each other for services performed by performing reciprocal services, so they need not bother with pricing each service.”¹⁷¹ Prostitution is simply a case of those same services being traded for ready money.¹⁷²

Perhaps Posner’s most controversial position, however, is that moral reasoning is irrelevant to law. In October 1997, he delivered the prestigious Oliver Wendell Holmes lectures at Harvard University (reprinted in the *Harvard Law Review*), using the occasion to launch a blistering attack on moral theory and moral theorists. He called moral philosophers “textmongers”¹⁷³ whose own “moral values are those of their professional set.”¹⁷⁴ The notion that law is “suffused with moral theory” is mistaken, Posner said, an error caused in part by “the law’s frequent borrowing of moral terminology, of such terms as ‘fair’ and ‘unjust’ and ‘inequitable.’”¹⁷⁵ He harkened back to Holmes, who “warned long ago of the pitfalls of misunderstanding law by taking its moral vocabulary too seriously.”¹⁷⁶

¹⁶⁹ E.M. Landes and Richard A. Posner, *The Economics of the Baby Shortage*, 7 JOURNAL OF LEGAL STUDIES 323-48 (1978).

¹⁷⁰ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 202 (3d ed. 1986).

¹⁷¹ RICHARD A. POSNER, *SEX AND REASON* 131 (1992).

¹⁷² See *id.*

¹⁷³ Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1671 (1998).

¹⁷⁴ *Id.* at 1687.

¹⁷⁵ *Id.* at 1695.

¹⁷⁶ *Id.*

Moral reasoning does not persuade anyone anyway, Posner charges.¹⁷⁷ ("For think: when was the last time a moral code was changed by rational persuaders, intoning or refining the arguments of Aristotle, Aquinas, Kant, Hegel, or Mill?")¹⁷⁸ Nor is this the way we acquire morality in the first place. We acquire our moral views "mostly in childhood, when moral instruction that appeals to reason takes a back seat to parental example, experience, and religion."¹⁷⁹ Thus, philosophical arguments are "only window dressing."¹⁸⁰ (Posner offers an example from personal experience: "I dislike abortion more since my grandchildren were born," he confides; but "this change in 'moral' feeling has nothing to do with argument.")¹⁸¹ Indeed, evidence suggests that education in moral philosophy "may actually lead people to behave *less* morally by making them more adept at rationalization."¹⁸² Posner cites Michael Gross, who analyzed statistical studies of people who were willing to hide Jews during World War II. Gross concludes that "morally reflective people were *less* likely to be rescuers than morally unreflective people."¹⁸³ Another study finds that under the Nazi regime, "professors were notable by their absence from the cells of resistance to Hitler."¹⁸⁴

Posner acknowledges that "[t]he only warrant for believing that there is a moral law that is 'out there' in the very strong sense claimed by a Plato or an Aquinas . . . is a certain type of religious faith, the faith in a Supreme Lawgiver and in a spiritual reality as real as a material reality."¹⁸⁵ But, Posner excludes this position by definition, without any argument, from academic discourse, stating flatly that "religious arguments are not a part of academic moralism."¹⁸⁶ In a recent essay, he writes that a pragmatist judge facing a new situation for which there is no clear legal precedent "does not look to God or other transcendental sources of moral principle."¹⁸⁷ For Posner, the only sound basis for a legal rule is social advantage; instead of attending to moral theory, he says, judges should attend to economics, sociology, evolutionary biology

¹⁷⁷ *Id.* at 1666.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 1676.

¹⁸¹ *Id.*

¹⁸² *Id.* at 1641-42.

¹⁸³ *Id.* at 1683 (citing MICHAEL L. GROSS, *ETHICS AND ACTIVISM: THE THEORY OF PRACTICE OF POLITICAL MORALITY* 150 (1997)).

¹⁸⁴ *Id.* at 1709 (citing ALICE GALLIN, *MIDWIVES TO NAZISM: UNIVERSITY PROFESSORS IN WEIMAR GERMANY 1925-1933*, at 4-5, 100-05 (1986)).

¹⁸⁵ *Id.* at 1649.

¹⁸⁶ *Id.*

¹⁸⁷ Richard Posner, *Pragmatic Adjudication*, in *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE* 235, 243 (Morris Dickstein ed., 1998).

(sociobiology), and psychology, balancing benefits against costs. It is no surprise to learn that Posner terms his position "pragmatic moral skepticism"¹⁸⁸ nor that his hero is Holmes, whom he has called "the American Nietzsche."¹⁸⁹

Outraged at Posner's attack on academic moralists, several scholars responded in the *Harvard Law Review*. Among them was Ronald Dworkin, who concluded that despite his hostility to moral theory, "Posner himself may be in the grip of a substantive, noninstrumentalist moral theory that he does not fully acknowledge or perhaps even recognize."¹⁹⁰ That theory might be labeled "adaptationist," a term Posner himself uses frequently. For example, in one passage in his Holmes lectures, he claims to be a moral relativist, while explaining that "[r]elativism suggests an *adaptationist* conception of morality, in which morality is judged—nonmorally, in the way that a hammer might be judged well or poorly adapted to its function of hammering nails—by its contribution to the survival, or other goals, of a society."¹⁹¹ In another passage, he insists that since morality is relative to the "goals of a society,"¹⁹² it cannot be judged by outsiders. The moral code of every society, he writes, is "shaped by the exigencies of life in that society,"¹⁹³ and "[t]o the extent that it is *adaptive* to those exigencies, the code cannot be criticized convincingly by outsiders."¹⁹⁴ He offers the example of killing babies, claiming "[i]nfanticide is abhorred in our culture, but routine in societies that lack the resources to feed all the children that are born."¹⁹⁵ Hence to call infanticide "presumptively bad" would be "provincial."¹⁹⁶ A few pages earlier he writes, "A person who murders an infant is . . . a violator of the prevailing moral code. But I would hesitate to call him immoral."¹⁹⁷

In short, morality that can be construed as "adaptive" within a given culture may not be criticized. From Posner's standpoint, even that most potent symbol of evil, Adolph Hitler, was not morally wrong; his policies were merely "maladaptive" for German society.¹⁹⁸ Posner writes, "One reason for the widespread condemnation of the Nazi and Cambodian

¹⁸⁸ Posner, *supra* note 173, at 1645.

¹⁸⁹ Ryerson, *supra* note 6.

¹⁹⁰ Dworkin, *supra* note 164, at 1718.

¹⁹¹ Posner, *supra* note 173, at 1641 (emphasis added).

¹⁹² *Id.*

¹⁹³ *Id.* at 1650.

¹⁹⁴ *Id.* (emphasis added).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 1644.

¹⁹⁸ *Id.* at 1654.

genocides is that we can see in retrospect that they were not *adaptive* to any plausible or widely accepted need of the societies in question.¹⁹⁹

Clearly, the biological metaphor of adaptation is the key to understanding Posner's underlying moral theory. Yet it is just as clearly inadequate. The notion that morality should be judged by whether it is adapted to a society's goals does not tell us whether those goals themselves are good or bad. To make his position coherent, Posner needs some other source of moral standards. That source, Dworkin suggests, is evolution.²⁰⁰ Throughout his Holmes lectures, Posner refers frequently to evolutionary psychology, the theory that human behavior and attitudes can be explained by evolutionary processes of adaptation and survival.²⁰¹ In Dworkin's words, Posner seems to hold the view "that through evolution human beings came to develop attitudes and dispositions that helped them not only to survive, but to flourish."²⁰² And if natural selection has produced our attitudes, values, and goals, then the best course would be to trust our natural instincts and inclinations.

In other words, evolution winnows out successful patterns of life and provides a normative standard based on behaviors that work best under given conditions. Dworkin calls Posner's view "Darwinian pragmatism" and argues that it is a "substantive and noninstrumentalist moral attitude, because it presupposes that certain kinds of human lives and certain states of human societies are intrinsically superior to others."²⁰³ The assumption that whatever nature produces is superior explains why Posner despises academic moral theory while praising "ordinary," "unreflective," and untutored moral reasoning.²⁰⁴ It explains why he ends his lectures by urging judges to follow their "moral emotions" or "moral intuitions," even to the point of refusing to enforce a law that violates their "moral feelings."²⁰⁵ Whatever is natural is better.

Thus, despite his claims to the contrary, "Posner is himself ruled by an inarticulate, subterranean, unattractive but relentless moral faith,"²⁰⁶ Dworkin says, a faith in natural selection to produce the right "moral emotions." Evolution provides a normative standard based on the assumption that natural selection preserves behavior that is adapted to local circumstances. In a nice touch, Dworkin titles his response to

¹⁹⁹ *Id.* at 1652 (emphasis added).

²⁰⁰ Dworkin, *supra* note 164, at 1735.

²⁰¹ *See, e.g.*, Posner, *supra* note 173, at 1659-62.

²⁰² Dworkin, *supra* note 164, at 1735.

²⁰³ *Id.* at 1736.

²⁰⁴ *Id.*

²⁰⁵ Posner, *supra* note 173, at 1708-09.

²⁰⁶ Dworkin, *supra* note 164, at 1738.

Posner, *Darwin's New Bulldog*,²⁰⁷ modifying the moniker adopted by T.H. Huxley to reflect his own aggressive support for Darwin's theory in the nineteenth century.

What an "adaptationist" morality implies regarding particular moral issues we have already seen in Posner's controversial statements about rape, prostitution, and nude dancing. In a 1968 *UCLA Law Review* article, Roderic Gorney had already spelled out the implications more explicitly:

Hard work, frugality, thrift really are not adaptive to a world of automated abundance. Chastity is not particularly adaptive to a world of effective contraception Respect for elders is less and less adaptive to a world in which lifespan greatly exceeds the period during which great-grandchildren find their senior progenitor's wisdom of any interest. Submission to supernatural power is not adaptive to a world in which increasingly man himself controls even his own biological future.²⁰⁸

In short, an "adaptationist" morality seems to offer little more than high-sounding validation of whatever seems to be the cultural direction of any given historical period.

X. CONCLUSION

Legal pragmatism in its various forms is the dominant legal philosophy today. It was, as we have seen, a child of philosophical pragmatism, and both were greatly influenced by Darwin's *Origin of Species*. As suggested in the previous section, the chief theoretical failing of pragmatism is that its only measure for evaluating law or morality is whether it "works"—whether it achieves personal or social goals. It offers no transcendent principles by which to say whether those goals themselves are good or bad. Indeed, Posner has defined the heart of legal pragmatism as "a rejection of a concept of law as grounded in permanent principles . . . and a determination to use law as an instrument for social ends."²⁰⁹ Yet how do we know whether particular social ends are morally right or wrong? "There is an old joke among philosophers that the problem with pragmatism is that it doesn't work,"²¹⁰ as Johnson writes: "[A] philosophy that deals only with means and has nothing to say about ultimate ends is inadequate. Who wants to rely upon people who think that the only truth is that we should employ the most effective means to

²⁰⁷ *Id.* at 1718.

²⁰⁸ Roderic Gorney, *The New Biology and the Future of Man*, 15 *UCLA L. REV.* 273, 274 (1968).

²⁰⁹ Posner, *supra* note 165, at 44.

²¹⁰ Phillip E. Johnson, *The Limits of Pragmatism*, 59 *FIRST THINGS* 52, 54 (1996).

get whatever it is we happen to want?"²¹¹ Legal pragmatism frees judges to rule according to their own private sense of which social ends are "adaptive" for modern society.

Worse, since pragmatism treats law as an instrument for getting whatever we want, it offers no protection against the powerful using it to get whatever *they* want. In a personal letter, Holmes once wrote these chilling words: "when it comes to the development of a *corpus juris* the ultimate question is what do the dominant forces of the community want and do they want it hard enough to disregard whatever inhibitions may stand in the way."²¹² It is not surprising, perhaps, that Holmes also defined truth as "the majority vote of the nation that can lick all the others."²¹³ A pragmatic rule based on "social advantage" or "a social end which we desire" (Holmes's favored phrases) ends up in practice as the rule that the most powerful come out on top.

The development of American legal philosophy underscores the crucial role played by the Darwinian view of origins in every area of thought. Darwinism is not only a biological theory; it is also the basis for a comprehensive worldview—implying a new philosophy of mind, of knowledge, of morality, and of law. In modern society, science is given authority to tell us "what really is," with the result that philosophy and the humanities adapt to its vision of reality. Thus, Darwinism has led to both the postmodernist neopragmatism of Richard Rorty and the pragmatic moral skepticism of Richard Posner. In these philosophies, the only objective and absolute truth is that there are no objective and absolute truths. In essence, the death of God substitutes for the existence of God, in the sense that it functions as the one fundamental truth that cannot be doubted.

Clearly, the *Scopes* trial was about much more than the way public schools should teach science. It was a cultural watershed in American philosophy across the board. Thus, if Christians are to make a thoroughgoing critique of contemporary secular society, we must begin with Darwinism. Philosophical and moral critiques of pragmatism have been offered by several philosophers, from Bertrand Russell to Ronald Dworkin. But, such critiques will remain ineffective if the conviction remains that Darwin described what is, in fact, the case in nature. If natural forces alone produced the human mind, for example, then we must accept the naturalistic and reductionist conclusions drawn by Dewey, Rorty, and Posner (i.e., the mind is merely a tool adapted for survival), along with the relativistic and skeptical implications for morality and law. Thus, Christians need to be prepared to take the

²¹¹ *Id.*

²¹² Grey, *supra* note 8, at 823 n.168 (citing a letter to Dr. John Wu).

²¹³ HOLMES, *Natural Law*, in COLLECTED LEGAL PAPERS, *supra* note 131, at 310.

intellectual battle into science itself, critiquing Darwinian theory and offering a theistic alternative.

Ever since the discovery of DNA, the cutting-edge issue in science has become the origin of this cellular language, the origin of biological information. Any text, whether a book or the DNA code, requires a complex, nonrepeating arrangement of letters. Can this kind of order be produced by either chance or law? The answer, many scientists are concluding, is no. Chance produces randomness, while physical law produces simple, repetitive order—like using a macro on a computer to print a single phrase over and over. The only cause of complex, nonrepeating, specified order is an intelligent agent. The best key to interpreting the organic world is not natural selection but John 1:1, “[I]n the beginning was the Word,” the Logos—reason, intelligence, information.²¹⁴

This strikingly recalls Rorty’s insight quoted earlier that the very notion of objective truth “is a legacy of an age in which the world was seen as the creation of a being who had a language of his own.”²¹⁵ In the same context, he continues, “The very idea that the world or the self has an intrinsic nature . . . is a remnant of the idea that the world is a divine creation, the work of someone who had something in mind, who Himself spoke some language in which He described His own project.”²¹⁶ In other words, objective truth and morality are possible only if the world is an embodiment of the Word, the Logos, the language of a personal Creator. We have the capacity to decode that Word only if He Himself has spoken, giving us access to divine revelation—as Francis Schaeffer put it in the title of one of his books, only if *He is There and He is Not Silent*.²¹⁷ Thus, just as legal pragmatism arose as an application of the scientific theory of Darwinism, so it is best critiqued from the perspective of a renewed scientific understanding of design, of the Logos embodied in the world.

²¹⁴ PHILLIP E. JOHNSON, *THE WEDGE OF TRUTH: SPLITTING THE FOUNDATIONS OF NATURALISM* 151-52 (2000). “These simple words make a fundamental statement that is directly contradictory to the corresponding starting point of scientific materialism. Using the Greek word *logos*, the passage declares that in the beginning there was intelligence, wisdom and communication.” *Id.*

²¹⁵ RORTY, *supra* note 78, at 5.

²¹⁶ *Id.* at 21.

²¹⁷ FRANCIS A. SCHAEFFER, *HE IS THERE AND HE IS NOT SILENT* (1972).