Knowledge and Inquiry: Pragmatism and Legal Practice

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Abstract

Panel Proposal for Second European Pragmatism Conference

Knowledge and Inquiry: Pragmatism and Legal Practice

Section: Epistemology and Metaphysics

General Abstract

This panel investigates the relevance of the thought of Charles Sanders Peirce and Oliver Wendell Holmes, Jr. to issues of legal interpretation, knowledge growth and legal practice. All four panelists use the theories of classical first-generation pragmatists to understand and critique current conceptions of legal practice. Clarice von Oertzen de Araujo investigates law in relationship to Peirce's triadic concept of sign and concludes that law, as thirdness, mediates between admirable justice and its choice as summum bonum. Brian E. Butler investigates the thought of Oliver Wendell Holmes, Jr. and Richard Epstein on takings and concludes that Holmes's Peircian-like reasoning offers a more coherent jurisprudential theory that also, and more importantly, gives an alternative and superior picture of legal reasoning. Frederic Kellogg investigates Holmes's conception of legal reasoning in light of the contemporaneous investigations of scientific reasoning by J.S. Mill, William Whewell and Peirce. In his paper he argues that Holmes's theory shows that in law the bearing of particular to general is not one of logical relation but consensual emergence, that is, an integration from repeated experience into a constantly developing system of classification. Giovanni Tuzet, finally, argues that the role of abduction has not been sufficiently analyzed by legal scholars. He claims that abduction is a good inferential tool for reconstructing causal chains and an even better tool when it is built into an inference to the best explanation model where the selected explanation points at a causal difference in the relevant facts. The panel as a whole emphasizes the relevance of classical pragmatist thought, especially that of Peirce, to legal practice and jurisprudential theory.

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Individual Abstracts

Legal Semiotics

The presentation focuses on the internal dynamics of Peirce's triadic concept of sign. Semeiotic, as a normative science, determines the interpretants that direct conduct for Justice, which is revealed as the dynamic object of law. The legal system, as representamen, denotes the Law as its immediate object and takes the form of the pragmaticist maxim, in which the conditional proposition becomes applicable to human conduct: if X, then Y. The law, as thirdness, mediates between admirable justice and its choice as summum bonum.

Clarice von Oertzen de Araujo

Pontifical Catholic University of São Paulo

Takings and Methods of Legal Reasoning

Richard Epstein has claimed that Oliver Wendell Holmes's takings jurisprudence is intellectually incoherent and offers what he claims is a more defendable version of takings theory. In this paper it is argued that the truth is in fact just the opposite. That is, Holmes's takings jurisprudence is not only more effective but also more defensible philosophically. The defense shows that Holmes offers a takings analysis using aspects of reasoning very analogous to those found in Peirce's pragmatism. Ultimately it is claimed that Holmes's takings jurisprudence is not only legally coherent, but also philosophically important as an example of pragmatist legal reasoning. On the other hand, Epstein's foundationalist and deductivist argument is found to rest upon extremely implausible, indeed incoherent, foundations.

Brian E. Butler

University of North Carolina at Asheville

Conflict Resolution Through Social Induction: A Pragmatist Logic of Law

Abstract. C. S. Peirce and O. W. Holmes Jr both reflect the influence of William Whewell, whose opposition to J. S. Mill shed light on the social dimensions of knowledge, applicable to natural science as well as moral and political philosophy. Whewell's thesis envisions a reciprocal and research-centered growth of knowledge through a tension between the particular and the general. Holmes, in a comment that echoes Mill's critique of the syllogism and his notion of "reasoning from particulars to particulars," adds an element of the emergence of generals from particulars, missing from Mill's account. Holmes addresses how general rules are attained in a progression from particular judgments to consensually negotiated generals. The bearing of particular to general is not one of logical relation but consensual emergence, integration from repeated experience into a constantly developing system of classification.

Frederic Kellogg

George Washington University

Abduction and Causal Reasoning

For a long time abduction was not taken seriously by philosophers and legal scholars. It

was considered to be a logical fallacy and a mere psychological process belonging to the context of discovery, and bearing no relevance to the context of justification. Now there is a growing interest in the role of abduction for reasoning in general and legal reasoning in particular. One of the uses of abduction in legal reasoning (probably the best known) concerns evidence and fact-finding: it can be argued that fact-finding has a significant abductive component, given that abduction is the hypothetic inference suggesting a plausible explanation of the evidence. But a lot of theoretical work is still to be done to assess the role of abduction in this context. This paper will focus on three issues, basically: 1) the distinction between abduction and induction; 2) the relationship between abduction and inference to the best explanation (IBE) in the context of legal fact-finding; 3) the role of abduction in causal reasoning. On the third issue the paper will claim that abduction is a good inferential tool for reconstructing causal chains and an even better tool when it is built into an IBE model where the selected explanation points at a causal difference in the relevant facts.

Giovanni Tuzet
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