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*Fallibilism in Law: Regulative or Constitutive?*

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 Peirce, were members of the Metaphysical Club of Cambridge in the 1870s, the birthplace of pragmatism. As a young scholar, Holmes 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 1) the conflicts that occur in society, 2) the channeling of conflicts into legal disputes, and 3) 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 involve only lawyers and judges. Especially in controversial cases, it may involve the entire community; the legal process is seen as an extended 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.