Similarity in Legal Analysis & The Post-Literate Blitz

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> "So," Marshall Trueblood said, "I can't use the pig as precedent, since your aunt actually won that case. Unbelievably. For it's much the same thing, isn't it? The plaster pig allegedly attacked her on the pavement, and in this case it's the chamber pot. I can't think of two things more alike."
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> It amazed Melrose that Trueblood was so deep into law he could make statements like this without laughing. But on the other hand that was what too much law did to one.[1]

WHAT PASSES FOR LEGAL ANALYSIS routinely involves little more than the claimed similarity of the present case to older cases. The opposition makes the converse argument: the present case isn't anything like the older case. This is called distinguishing authority. The shorthand works in most routine matters. In a Fourth Amendment suppression motion, for example, the defense might cite precedent to the effect that handcuffing a suspect at gunpoint and bundling him into the squad car for transportation to the station is enough to sug-

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[1] Martha Grimes, THE CASE HAS ALTERED (1997).

gest an arrest, triggering the requirement that *Miranda* warnings precede any incriminating statements. On the civil side, the defendant in a breach-of-contract case might file a demurrer (a.k.a. motion to dismiss) arguing that the plaintiff's pleading fails to note that the contract is oral or written, or when it was made, or what its provisions are, and citing precedent to show that such allegations are essential. In these situations, the same workhorse cases are trotted out, paraded about the papers, and returned home to await the issues' recurrence.

This shorthand suggests that legal analysis is generally a matter of discerning similarities among cases, and, concomitantly, that once similarities are noted, the case has (as it were) been made. But this is not true.

I.

Practicing lawyers should intuitively understand the principles of legal reasoning. But lawyers do not always practice them. The post-literate culture is taking its toll. Newspapers and books are losing their force, replaced with images and video; structural searches through subjects arranged in the hierarchies of card catalogues are being replaced with associative searching via search engines such as Google. I leave it to others to make the preliminary case on this point.[2] But I attest that the shift is evident in the trial courtroom, that it cannot be dismissed as mere stupidity, and that it has practical consequences.

The signs include citations to cases that seem on point because of a word or notion reminiscent of the case at issue. A case about counting credit for prison time served in one context (parole) is cited to suggest that a defendant cannot be sentenced both for a new

[2] See, for example, Sven Birkerts, THE GUTENBERG ELEGIES (1994); Neil Postman, AMUSING OURSELVES TO DEATH (1985) (among other Postman books); and Umberto Eco's perfectly named essay, "Cogito Interruptus," in TRAVELS IN HYPERREALITY (1986). And see more generally Philip Rieff, FELLOW TEACHERS (1973), which speaks despairingly of the view that "the one task of the present was to emancipate the future from the past." *Id.* at 105.

offense and in connection with the revocation of his earlier probation. Why? Not because the two situations are relevant to each other under any general rule, but because both situations concern a sort of "overlapping time" in custody. An experienced lawyer mixes up the authenticity of a document with its hearsay status, because both notions are associated with admissibility. A brief argues that a state does not have a "fundamental policy" on one type of law, citing a case that says just that about a different law, but suggesting no general rule projected between the two. Perhaps there is one, but the simple citation of an associated case won't show it. An exaggerated example is the argument – which I see frequently, in one guise or another – that because I admitted (or excluded) a piece of evidence for one side I should now do the "same" thing for the other. Sure, there is always connective tissue: in both cases, it was deposition testimony, or perhaps an apparent business record; but that is a poor substitute for real reasoning.

Literacy is required to understand large amounts of text, and to hold and express ideas in some sort of order. Without this, without context, one may not be able to determine the holding of a case; one can only select sentences which are harvested like low-hanging fruit, but which obscure the true landscape. The post-literate lawyer has a hard time following the development of rules across cases, understanding which ones are outliers and which ones are the meat. He may not know that a case in one area does not help in a different area. It may be expedient to latch onto the similarity of words and so invoke an opinion; but that attachment to the surface of the text can lead one astray. Perhaps condominium law has no more connection to old property law (seisin, etc.) than the "due" process of having certain protections at trial is connected to the substantive due process of *Lochner*. Post-literate reasoning jumps through a series of hyperlinks, where instinct and gut reactions are powerful; while it generates enormous creativity, it is very dangerous. It is attention deficit disorder; it eviscerates history. Where associative reasoning prevails, the development of doctrine doesn't matter very much. Was the tort case decided before or after strict liability was adopted? Was the case on confessions decided before or after *Miranda*?

Why do we have a hearsay rule anyway? None of these seems to matter, and they do not factor into the selection of authority presented to the judge.

So, what is relevant precedent?

II.

One purpose of this essay is to bring attention to my former professor Nelson Goodman's "Seven Strictures on Similarity," re-published in his *Problems and Projects* (1972). Goodman, who was a Harvard philosophy professor from 1968 to 1977, explains how everything is similar to everything else – and in just the same number of ways. It depends on what one is interested in – on what the underlying theory is. Designs do or do not look like each other, depending on whether one is interested in discerning a letter (in which case a wide variety of patterns may all qualify as a "q" for example[3]) or a topographical aspect (in which case W, L and V are alike, as are A, Q, and D, but the first three are not similar to the last three). Repetitions of the "same" act, such as hitting a tennis ball, may involve widely different gestures. Three glasses of liquid, two clear and one with red food coloring, suggest that the first two are alike unless the first clear glass contains poison – and you are thirsty. When is an experiment truly replicated? The question is unanswerable until one knows what the experiment was for. One needs at least part of a theory before one knows what a "result" means and whether it has been replicated. And Goodman delightfully notes that the future will be similar to (or "like") the past – he guarantees it – but no one knows in which particular ways this will be so.

In general, Goodman asks, when *are* two things similar? Presumably when they share a common characteristic, when they have a property in common. That is what similarity means. This chair is like that one because . . . because it has a seat. Or some legs. Does that mean all chairs are similar? Not if you are choosing among

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[3] The "same" letter: Q  q q  .

chairs at a department store, or selecting one for the Museum of Modern Art. Chairs can be like tables and beds, too: made of wood, having legs, or sharing a design theme. Items that are alike in one way are not alike in other ways. Oranges are and are not alike: perhaps one orange is larger than another, but the same size as a fat lemon or a baseball. An orange may be as hard as licorice; that too is a similarity.

So, what is similar to what? Goodman classifies qualities and properties as *membership in a class* (so that red beds and red flowers are instances of the class of "red"). He makes the following observation: if there are three things in the universe, then any two of them belong together in exactly two classes and so have two properties in common: the property of belonging to the class they are in and the property of belonging to the class of three things. With more things in the universe, there are of course more properties (because more classes), but the calculation is the same. Where the number of things in the universe is equal to n, then any two things have in common exactly 2^{n-2} properties. With an infinite number of things in the universe, there are an infinite number of properties each thing has in common with another, i.e. an infinite number of ways in which one thing is "similar" to another.

This is a precise (perhaps overly precise for our purposes) way of saying something that is, I suggest, ultimately intuitive: given free range to select properties, we can with any group of items come up with the same number of similarities. Quite aside from the Goodman calculation, it is clear that things, events, or sets of facts are not inherently more or less similar. *Similarity* always relates to theory, and pretending otherwise, or using similarity as a shorthand to elide underlying theory, is pernicious – or "insidious," as Goodman says. "Similarity . . . is a pretender, an imposter, a quack."

Similarity is a heuristic, a rapid-fire judgment based on prior experience and assumptions. It both erupts from and covers up that network of assumptions. The judgment is often *pattern recognition*, and while it sometimes leads to the "right" result, it may have no more foundation then seeing faces and sailing ships in clouds, or in the serendipitous arrangement of leaves.

So when a lawyer argues that a case is like another, he is always right, and he is always wrong. The relevant question will always be: *in what respect* are they alike, because every case is like every other case, and in the same number of ways. David Hume put it this way:

> If direct laws and precedents be wanting, imperfect and indirect ones are brought in aid; and the controverted case is ranged under them by analogical reasonings and comparisons, and similitudes, and correspondencies, which are often more fanciful than real.[4]

The general issue is induction, or reasoning from past events to predict the future. It sometimes works. But – as the Thanksgiving turkey finds out on the last day of its life, expecting the nice farmer to arrive with grain as he always has before – it sometimes doesn't. The issue of similarity can simply be rephrased, then, as one of induction in legal analysis: When and how does precedent tell us what to do now?

The question is made more urgent by the vast amount of available "precedent." As a California state judge, I sit down to a banquet of opinions every day. The state Supreme Court issues relatively few opinions (96 in fiscal year 2009-2010[5]), but I also have access to the opinions of six state Courts of Appeal (about 11,000 opinions for the same period[6]), which I may follow without regard to their regional location (although the opinions of the folks at the local Court of Appeal – which reviews my decisions – seem somehow to be peculiarly persuasive). On many criminal constitutional issues, where federal law governs, or in areas where federal and state law are kin (similar?), I may be persuaded by federal-court decisions

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[4] D. Hume, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS, Appendix III, 259 at p. 308 (L.A. Selby-Bigge 2d ed. 1902).

[5] *See* www.courts.ca.gov/documents/2011CourtStatisticsReportIntroduction.pdf.

[6] About 10,270 opinions in appeals and another 609 opinions in original proceedings (e.g. writs). *Id.* But only 10% of these opinions were published and therefore citable.

from across the nation, which adds many, many thousands of cases annually. And federal judges apply state law in diversity cases, in ways that serve as conduits of precedent and, while not binding, may be as interesting and persuasive as state-court decisions.

If we know which cases are similar to the one under discussion – that is, if we know which precedents are likely to be useful – then we have already decided much, for we have already selected the general theory that controls the ultimate resolution of the case. We have determined, say, that this is a contract case and that the issue is whether we shall consider oral evidence. That means we have implicitly rejected the notion that this is a tort case involving promissory estoppel, and thus that oral evidence is *of course* permitted and indeed poses no issue whatsoever. Contracts and promissory estoppel are similar in that (among other things) a promise is made, but right now that is, as we might say, a similarity without a difference. So too in criminal matters. Touting a case in which a glimmer of reasonable suspicion was enough to detain a suspect is pointless when the issue is whether an *arrest* was made in the present matter; but it might still be relevant in analyzing why the detaining officer's subjective intent and motivations should not be considered.

In both the contract case and the criminal case, having a pretty good idea of the lay of the land allows us to reject as fallacious one line of authority in favor of another – probably without thinking much about it. And often, especially on procedural and evidentiary matters, we have no compunction about reaching for a case in another area, knowing, for instance, that a probate-law case can be helpful in a contract case. While wholly different, the cases are still similar in a useful way. It seems we cannot decide until we have already decided.

That seems puzzling, but the opposite approach won't work. Assume we have no prior reference to general theory. Instead, we simply reach out and claim as precedent any opinion (or statute) that seems similar. Thus, I bring suit in a case involving a house, and

cite another one with a house, in which the plaintiff won. So, I, the plaintiff here, should also win. Or, I have won a case and demand attorney's fees as part of the judgment, citing a dozen cases in which others have been awarded attorney's fees. Or, in a contract dispute, I cite a contract case involving the same party on the other side, in which it lost. We recognize all these arguments as nonsense (though perhaps with diminishing assurance).[7] Although our brains are built to operate on associative reasoning,[8] it is an oxymoron. We associate the warmth of a hot drink with warm people and so like people better when we hold a warm cup of coffee,[9] but we must reject mere association as a basis for decision. We must seek what might be termed a *justifiable* selection of precedent, which means we must invoke a pre-existing justification.

These justifications accept certain types of factual predicates and generate a result. In so doing, they define the sort of facts which will be relevant and acceptable, and thus state the specific rules of similarity which will be employed. In this way they resemble computer programs designed to accept only certain types of data. We first accept the algorithm on faith, as it were, and then apply it. But why this algorithm rather than that? Why isn't the following a perfectly good algorithm: "*if* this is a case involving a house, *then* plaintiff wins"? What sort of faith is employed when we select justifications? To bring us back to Hume, how do we choose among the infinite set of rules of induction? Or, to paraphrase Goodman, how do we justify the general rules of induction?[10] Goodman's answer is that an in-

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[7] In the last example, perhaps the same result should obtain if the contract is the "same" (if that is possible with a different party). But the nonsense is clear in the other examples.

[8] *E.g.*, D. Kahneman, THINKING, FAST AND SLOW (2011); D. Buonomano, BRAIN BUGS 4, 10, 163 *et seq.* (2011); J. Lehrer, HOW WE DECIDE 130 (2009); Chris Guthrie et al., "Blinking On The Bench: How Judges Decide Cases," 93 Cornell L. Rev. 1 (2007).

[9] Lawrence E. Williams et al., "Experiencing Physical Warmth Promotes Interpersonal Warmth," 322 SCIENCE 606 (24 October 2008).

[10] N. Goodman, "The New Riddle of Induction," reprinted in FACT, FICTION, AND FORECAST 63 (3d ed. 1973).

ductive inference is justified if it conforms to the rules of inference, and the rule of inference is justified if it conforms to instances of acceptable inferences.[11] A circle, but a virtuous one.

Lawyers and judges know this iterative process well: new cases (instances of a rule) are generated from the rule (or algorithm), and the rule is so modified over time. It's a slow mechanism, because a reach too far will be killed by the constraints of the theory. By the same token it can be tough to shift a judge who thinks he knows the answer before much argument (because he often does).[12]

This has consequences for the process of legal reasoning. One cannot determine a rule from a single case in isolation: we expressly or implicitly allude to the string of cases that precede (and perhaps follow) it. (I will refer to these as the "linked cases.") Just as an infinite number of lines may pass through a point, so too innumerable algorithms or rules of decision may be consistent with a single precedent. We select viable candidates for a proposed rule by examining the cases cited in the opinion in question. Think of a given case as a central point surrounded by its linked cases: each of those cases too stretches back to cited authorities in an ever-expanding series of circles or networks of authority. Some rules that might be extracted from the original case ("plaintiffs win cases involving blue houses") do not survive scrutiny: they are not found in linked cases. Others (such as "victorious plaintiffs get their attorney's fees") might be found in some linked cases but die out in further links, replaced by a different rule that is discernible in many

[11] *Id.* at 64.

[12] That proposition will worry lawyers, but the real problem is worse. Although the judge can often correctly anticipate the answer, sometimes he can't – and the judge might not be able to tell the difference. Decisions synthesized from wide experience are often made unconsciously (*see e.g.*, M. Gladwell, BLINK (2007)), and the evidence is then read, in light of "confirmation bias," to support the unconscious decision (*see*, Kahneman, above n.8 at 79 *et seq.*). Techniques for effective argument are beyond the scope of this essay, but to be forewarned is to be forearmed.

linked cases ("victorious parties in contract cases with attorney's fees clauses in the contract get their attorneys fees"). We justify a rule by looking to past projections. We see whether the proposed rule has instances in the past, a vector running through and so possibly explaining a series of linked cases.[13] Indeed, we not only look at the networked *cases*, but also at commentaries and compendia that network legal propositions, such as law reviews, Restatements, Westlaw head notes and arrangements, and collections like Bernard Witkin's SUMMARY OF CALIFORNIA LAW (2010). Some links are stronger to the extent that the linkage is expressly or authoritatively made, such as by a supreme court; some are weaker because the linkage is done by a note or law-review article, or because the authority is from a foreign jurisdiction. Some links are made, but are later destroyed when cases are overruled or superseded by later decisions. And rules are sometimes supplanted by legislatures, by shifts in the perception of economic reality, or by other causes. *See e.g.*, notes 19-20, below.

Goodman refers to the amount and quality of repetitive projection as the degree of *entrenchment* of the projection.[14] Thus, for example, lawyers have previously projected the hypothesis that oral contracts for the sale of a car are enforceable, and this hypothesis has been repeatedly upheld in a network of cases; it is entrenched. So that rule candidate can be generalized, but not the one that suggests all oral contracts are enforceable, for there is only a weak history of a successful projection of that putative rule. Some of the links through the networks are stronger because they appear repeatedly.

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[13] The structure of a network of linked cases is actually far more complex. *See e.g.*, J. Fowler et al., "Network Analysis and the Law: Measuring the Legal Importance of Precedent at the U.S. Supreme Court," 15 *Political Analysis* 324 (2007), at jhfowler.ucsd.edu/network_analysis_and_the_law.pdf; R. Posner, CARDOZO: A STUDY IN REPUTATION 74-91 (1990). *See generally,* Thomas A. Smith, "The Web of Law" (May 2005), *University of San Diego Legal Working Paper Series,* Working Paper 8; law.bepress.com/sandiegolwps/le/art8; Daniel Martin Katz and Michael J. Bommarito, "Network Analysis and the Law" (2011), computationallegalstudies.com/network-analysis-and-law-tutorial.

[14] FACT, FICTION, AND FORECAST, above n.10 at 94 *et seq*.

Others are weak because they exist perhaps only once; we call these dubious invocations of authority *ad hoc*.

Rules mutate for many reasons, but when they do it is often in retrospect: a network of authority seems to be pointing in one direction, but then it shifts and, with the benefit of 20-20 hindsight, the network supports a different rule, often because a slightly different set of authorities is incorporated into the analysis.[15] And because rules mutate, the result of the next case is *always* to some greater or lesser extent uncertain, for these are not matters of logic, but rather of practical extrapolation. Rules of decision lurk in the network; and every valid legal argument for a future result is archeology.

III.

In fields such as physics and chemistry there is an actual world. We try something out and, through experimentation, eventually see that our general theory is wrong, or was only roughly right (and so essentially wrong).[16] We usually don't have that sort of push back in the law. The idea of *progress* in the sciences is meaningful because over time we do come up with more comprehensive explanations, or more satisfactory ones which have a higher degree of testability, indeed theories which are at least preliminarily embraced because of the phenomena in the world they predict but which other theories do not.[17]

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[15] Examples abound. Here's one, picked at random. In *Zelig v. County of Los Angeles*, 86 Cal. Rptr. 2d 695, formerly published at 73 Cal. App. 4th 741 (1999), the Court of Appeal cited cases and statutes to conclude a plaintiff could sue the county for failing to maintain a safe courthouse where her husband was shot. The Supreme Court, however, reversed, applying what it termed a more general rule, which was based on many of the same authorities but pointed away from liability. *Zelig v. County of Los Angeles,* 27 Cal. 4th 1112, 1126 (2002). Now (or for now), we know.

[16] *E.g.*, K. Popper, Conjectures and Refutations: The Growth of Scientific Knowledge (5th ed. 1989).

[17] *E.g.*, "Truth, Rationality, and the Growth of Scientific Knowledge," *id.* at 215 *et seq.*

I don't think the law develops in quite that way, especially not at the trial level. To be sure, the world will sometimes push the courts this way or that: there is a moral universe which may condemn a certain approach, cast in constitutional garb or not;[18] an economic reality which will be seen as undermining precedent;[19] and legislatures which may reverse the course set by a court. These are the big deal cases – the stuff of Guantanamo Bay and torture, abortion, civil rights, overarching antitrust theory, the stuff of newspaper headlines (remember those?).

But law's daily grist is not subject to that extrinsic pressure. It is a rare day that summary judgment procedures get a fresh look, or that the Penal Code is re-evaluated in light of the stated objectives of criminal law. Vast swaths of tort and contract law are unmolested by external forces.[20] A legislature may jump into the morass of SLAPP law, but having writ a few times, it moves on, leaving the courts to sort a thousand and one permutations without further guidance.[21]

The evils of impressionistic (unstructured) arguments are really those of the trial courts. Appellate review encourages parties and judges to take a broader view, to take a breath, back up, and tease out the law's trajectory. This is wonderful. But virtually all the law

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[18] *E.g., Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (cruel and unusual punishment).

[19] *Lochner v. New York*, 1989 U.S. 45 (1905) (invalidating work hour restrictions); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 894 (2007) (holding that resale price maintenance is not always illegal under antitrust law). *See generally* M. Horwitz, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977), and M. Horwitz, THE TRANSFORMATION OF AMERICAN LAW 1970-1960 (1992).

[20] For an exception that proves the rule, see California's Medical Injury Compensation Reform Act of 1975 (MICRA), which regulates medical malpractice litigation and is thus the subject of perennial lobbying efforts.

[21] Enacted in 1992, the Strategic Litigation Against Public Participation statute (C.C.P § 425.16) was amended 1997, 2003, and 2005 and has led to hundreds of appellate decisions. *E.g.,* Jerome I. Braun, "California's Anti-SLAPP Remedy After Eleven Years," 34 MCGEORGE L. REV. 731 (2003); Jonathan Segal, "Anti-SLAPP Law Make Benefit For Glorious Entertainment Industry Of America," 26 CARDOZO ARTS & ENT. L.J. 639, 646-653 (2009).

gets done in the trial courts. Even when cases do not eventually settle, they are often not appealed. Only about 0.026% to 0.027% of the cases filed in California's trial courts result in an appellate disposition.[22] So when I say the "daily grist" I really do mean trial-court proceedings, where we are fast and furious, and sometimes thoughtless.

Our past masters appeared to disagree with the proposition that we have few effective external constraints in the daily work of arguing and deciding cases. Cardozo[23] and his predecessor Holmes[24] famously reviewed the reasons one chose or rejected precedent, and both thought the practical world did provide touchstones. They reviewed deductive logic, analogy, the historical justification for rules, custom and the needs of commerce, social utility and the "welfare of society," "reason," "conscience," and so on, zeroing in on the utility of rules and social welfare. But finally they resorted to "justice,"[25] which gives us a nice insight into their conclusion. The honest Cardozo himself reveals the underlying nightmare. With the numberless bases for embracing this or that precedent, he says: "It is well enough to say that we shall be consistent, but consistent with what?"[26] All "loyalties are possible," he says.[27] And Holmes? He ends

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[22] In fiscal year 2009-2010, there were 220,631 trial filings in California civil disputes involving more than $25,000, and the Courts of Appeal disposed of 5,856 such cases. In felony cases, there were 248,340 trial-court filings, and 6,821 Court-of-Appeal dispositions. See www.courts.ca.gov/documents/2011CourtStatisticsReportIntroduction.pdf. Limited civil cases (involving less than $25,000), misdemeanors, and infractions are not reviewed by the Courts of Appeal, but rather by the Superior Court's appellate division.

[23] Benjamin N. Cardozo, THE NATURE OF THE JUDICIAL PROCESS (1921) (Dover ed. 2005).

[24] Oliver Wendell Holmes, "The Path of the Law," 10 HARV. L. REV. 457 (1897).

[25] Cardozo, above n.23 at 39, 41, 45, 146, etc.

[26] *Id.* at 60.

[27] *Id.*

with an appeal to the "deepest instincts of man"[28] and finally hopes for a "hint of the universal law."[29]

My guess is that the worlds of Holmes and Cardozo, at least their legal worlds, were more homogeneous than ours. They and their brethren (and it *was* brethren then) knew the same authoritative texts, and came from at least roughly similar backgrounds. Their appeals to "'justice" and "conscience" were understood, perhaps, as summaries of the general theories of the law. But those labels now solve no dispute. Judges should be a little nervous when we are implored to do "justice," and we should ask for more detail. These days, the plea for justice just postpones argument.

We are subject now, as we were not in 1897, to a highly fractured sense of what the past teaches us. Many of us read, but only in small bits; and not at all the same things. In the trial courts (at least), surface argument abounds, done as fast as it takes to cut and paste, grabbing any case that has a good line. This is a sort of pretend law, legal theater.[30] It ignores the network of cases and other authorities that show us the internal structure of the law, the entrenched predictions that tell us how it is probably going to go. Lawyers and judges must beware the easy analogy, in order to preserve the courts' claim to legitimacy.

[28] Holmes, above n.24, at 477.

[29] *Id.* at 478. Perhaps this was a prayer that even Holmes did not believe. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting: "[t]he common law is not a brooding omnipresence in the sky").

[30] Compare "security theater," a term coined by Bruce Schneier to describe the work of the Transportation Security Administration (TSA). For example, when I stupidly tried to bring a gift bottle of wine through security, the TSA agent took the potential explosive liquid from me and *threw* it into a bin with all the other potential explosive liquids (water bottles, etc.). A show, but not the substance, of security. For more, see www.schneier.com/essays-airline.html.