# HOBBES, HOLMES, AND DEWEY: PRAGMATISM AND THE PROBLEM OF ORDER[*]

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ABSTRACT

Civil war was a catalyst in forming the jurisprudential views of Thomas Hobbes and Oliver Wendell Holmes Jr.  In this paper I claim that Holmes's pragmatism advances a fundamentally distinct view of order from Hobbes, a dynamic rather than analytical and static conception, which can be seen by comparing their response to perennial conflict, which both made central in all its forms: military, political, moral, and intellectual.  The difference is that Hobbes resolved the problem of conflict through authority,

while Holmes does so through inquiry and the adjustment of practices.

I propose three dimensions in which to elucidate this: historical, ontological, and practical. By historical I mean Holmes's replacement of the Hobbesian analytical model of law, designed to address (and presumably suppress) conflict by state control, with an endogenous model that assimilates conflict in a process of formal but communal inquiry into discrete types of dispute. By ontological I mean Holmes's rejection of the analytical boundary around law, dating to Hobbes and still reflected in the contemporary separation of law and morals, in favor of a holistic fallibilism, which like Dewey's encompasses all inquiry--legal, scientific, ethical, aesthetic, philosophical--under one ontological roof. The third or practical dimension refers to Holmes's critique of ideology, best known from the words of his famous dissent in *Lochner v. New York*: "The fourteenth amendment does not enact Mr. Herbert Spencer's *Social Statics"*; or, more to the point, "general propositions do not decide concrete cases."

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If pragmatism (as Richard Rorty and others have claimed) has no grand scheme beyond the commitment to deliberative democratic pluralism,

does it have some stronger account, as Wilfrid Sellars puts it in defining

philosophy, of "how things, in the broadest possible sense of the term, hang

together, in the broadest possible sense of the term"?  In this paper I will

pursue the vision of a distinctly dynamic and transitional concept of order

implicit in classical pragmatism, rather than an analytical vision grounded in

a fixed cognitive image.  Central to this theme is the very different response

to human conflict of Oliver Wendell Holmes, Jr., from that of Thomas

Hobbes.

On November 11, 1862, Captain Holmes wrote from his regiment in

Virginia to his sister Amelia despairing that the Confederacy could be

overcome by force.  He had been wounded twice, in October of 1861 while

his regiment was being thrown by a superior force off Balls Bluff into the

Potomac River, and again in September 1862 by a bullet through the neck at

Antietam.  He would soon be hit again at Fredericksburg, his regiment all

but decimated.  After witnessing the dead piled 5 deep at the Bloody Angle

at the Battle of the Wilderness, he would decline promotion and resign his

commission in August of 1864 to return to Cambridge to study law.

Holmes's despair proved unjustified and the Union did somehow

hang together--how barely he was acutely aware.  Philosophical

pragmatism--in its classical form--followed the American Civil War. This was only 80 years after the American Revolution, and 60 years after the War of 1812. Emerging in the wake of three fratricidal wars, it is to be expected that within the origins of pragmatism would be some response, if not a distinctive one, to the problem of human conflict.

The flip side of conflict is order; and the problems of moral and intellectual order if not inseparable are resistant to separation if we take Sellars seriously. Hume's task in his moral philosophy, notes Haakonssen, is completely analogous to his task in epistemology: to explain how a common world is created out of private and subjective elements (1981, 4). Holmes, in many ways a successor to Hume, has not been fully recognized as an original philosopher by legal academics, but a comprehensive reading, in context with his pragmatist contemporaries, adds a distinctive dimension to the making of the moral, and certainly legal, character of that common world. What makes a real community hang together, in the broadest sense of the term?

To address this question we may pick up a line of thought developed by Holmes and continue it in Dewey's extended wake. Dewey's lifelong project, as Ralph Sleeper has characterized it, was to elucidate a radical

pragmatic naturalism as a critique of, and an alternative to, the dominant

analytical tradition in logic, epistemology, and ontology (Sleeper 1986).  I

read Holmes as doing the same for jurisprudence: launching a profound

naturalist critique of analytical jurisprudence as it re-emerged with John

Austin in the 19th century, following Thomas Hobbes in the 17th and

continuing today with H.L.A. Hart and Joseph Raz.  Holmes's radical

naturalist account highlights critical aspects of Dewey's project, particularly

the precarious nature of democratic order, and the lingering presence of

authoritarian models of law.  It grounds the often overly abstract

conversation about pragmatic models of democracy, and while bringing it

down to earth, also suggests a pragmatic agenda in other areas of

contemporary philosophy.

It does this by exploring, as an aspect of pragmatism, the problem of

order as one of addressing and reconciling perennial conflict, which both

Hobbes and Holmes made central in all its forms: military, political, moral,

and intellectual.[1]  The difference between them is that Hobbes resolved the

problem through authority, while Holmes does so through inquiry and

adjustment.  How is this related to the origins of pragmatism?

Remarkably, on returning to Cambridge Holmes showed no signs of

post-traumatic stress disorder. From 1866 into the 1870s he was active in round-robin discussions of philosophy with William James, Chauncey Wright, Charles Peirce, and others; after a disappointing stint at Harvard Law school he worked in a Boston law office; he read philosophical and scientific works recommended by Wright, as well as the *Lectures on Jurisprudence* of John Austin and other legal treatises; he eagerly took over from James B. Thayer the revision of the encyclopedic legal treatise, *Kent's Commentaries on American Law*, a massive task; and he edited and wrote for the *American Law Review*, eventually tracing a path from which can be devined an original conception of law influenced by Emerson, Wright, Mill, Darwin, Maine, and an immersion in diverse historical and anthropological studies. His conception was the antithesis of Hobbes's.[2]

In this essay I will examine the mechanism by which Holmes, in the 1870s, came to describe the developing and maintaining of social order. He did not characterize it as such; his subject was law, the common law, and his focus was on cases, rooted in the revision and updating of *Kent's Commentaries*. Yet the nature of this mechanism, eventually applied to constitutional law, holds so much in common with the emergent themes of pragmatism that it is illuminating to abstract from it a cognate response to

conflict: a pragmatic theory of order, legal in the immediate sense, moral and conceptual by implication.

I propose three approaches to elucidate this, in three dimensions, historical, ontological, and practical. By historical I mean Holmes's replacement of the Hobbesian analytical model of law, designed to address (and presumably suppress) conflict by state control, with an endogenous model that assimilates conflict in a process of formal but communal inquiry into discrete types of dispute. By ontological I mean Holmes's rejection of the analytical boundary around law, dating to Hobbes and still reflected in the contemporary separation of law and morals, in favor of a holistic fallibilism, which like Dewey's encompasses all inquiry, legal, scientific, aesthetic, and philosophical, under one ontological roof. The third or practical dimension refers to Holmes's critique of ideology, best known from the words of his famous dissent in *Lochner v. New York*: "The fourteenth amendment does not enact Mr. Herbert Spencer's *Social Statics"*; or, more to the abstract point, "General propositions do not decide concrete cases."

Having established these three aspects, I hope the reader will agree with me that what distinguishes the pragmatic approach to jurisprudence is

that law must be analyzed not as a separate entity but as part of the more general problem, or set of problems, of social ordering.  Thereupon we will be in a position to explore pragmatism's approach to conflict as a *dynamic* theory of order, distinct from the dominant analytical tradition, and to see its advantages.[3]

<p style="text-align:center">I</p>

It is well known that Hobbes placed conflict at the center of his thinking about law and government.  "My mother gave birth to twins: myself, and fear."  It is also well known that from the premise of inveterate conflict, he deduced in Euclidian fashion a "social contract" by men in the state of nature to cede certain innate rights to the state to establish and maintain civil society.  While hardly the first to conceive of law as an autonomous force maintaining and directing society, Hobbes gave the tradition a modernist and rationalist rebirth, renewed in succeeding centuries by Bentham, John Austin, H.L.A. Hart, and lately Joseph Raz.

It was John Austin's just-published version of analytical jurisprudence that seized Holmes's attention in the 1860s, much as it was Lotze's version of analytical logic that seized Dewey's in 1903 (Sleeper

1986, 5, 64-5).  Accepting for the moment the pervasiveness of conflict, is

there a more plausible paradigm than Hobbes's mythical contract for

explaining its relationship to law?  Exemplifying a historicist naturalism,

Holmes's model is taken directly from the law books.  His is the recorded

one of constant disputes, channeled into law courts and thence organized

into legal intelligence.  For Holmes, litigation, seen all around us, is a key

part of the process of social ordering; and I will suggest that he found within

it features that are representative of more general relations between dispute

and inquiry, between conflict and theory.

I suggested that the model was original, but it had important

precedents.  An earlier version of common law based theory was developed

in response to Hobbes by Sir Edward Coke (1552-1634) in the *Institutes*,

and Sir Matthew Hale (1609-1676) especially in his posthumous

*Reflections*, building on Coke.   They are the first in the Anglophone

tradition to spell out that there is a difference between the form of reasoning

implied from the two versions of regulating conflict through law.  Law is

either exogenous or endogenous.[4]   Either you control conflict from outside

(leading, as the tradition reveals, to formal analytical thinking) or you

assimilate it from within, through a frequently inelegant and messy *ad hoc*

system of negotiation and gradual classification.

Hobbes, who favored Euclidian elegance, was annoyed by common lawyers like Coke and Hale, who resisted his authoritarian model. Late in life he wrote his *Dialogue Between a Philosopher and a Student of the Common Law*. Posing as the philosopher, Hobbes asks the student "Would you have every man to every other man allege for law his own particular reason? There is not amongst men a universal reason agreed upon in any nation, beside the reason of him that hath the sovereign power. Yet though his reason be but the reason of one man, yet it is set up to supply the place of that universal reason, which is expounded to us by our Saviour in the Gospel; and consequently our King is to us the legislator both of statute-law, and of common-law."

Hobbes's attack on Coke was not published until well after his death in 1681; but it was apparently circulated widely enough in manuscript form to come to the attention of Sir Matthew Hale, whose manuscript reply, *Reflections by the Lord Chiefe Justice Hale on Mr. Hobbes his Dialogue of the Lawe*, was unpublished until 1921 when its importance was recognized by the British legal historian Frederick Pollock, by then an old friend and correspondent of Holmes.

Hale begins his *Reflections* with an elaborate demonstration that reason is by no means univocal as applied to different subjects of inquiry, such as mathematics, physics and politics, and that it must be permitted to assume a special meaning in the difficult field of law. This is because "the texture of human affairs is not unlike the texture of a diseased body laboring under maladies, it may be of so various natures that such Phisique as may be proper for the cure of one of the maladies may be destructive in relation to the other, and the cure of one disease may be the death of the patient." (1921, 503)

Though unread by Holmes until much later, it prefigures his own common law based habit of thinking from particular situations, closer to raw experience, while resisting easy general answers. By reasserting an endogenous model against Austin's analytical scheme, Holmes was obliged to flesh it out and respond to Austin's more insistent ontological separation of law from morals. Here he would draw on the naturalist, empiricist attitudes of the Scottish Enlightenment that influenced his own education and that of his Harvard-graduated peers like Wright, Peirce, and James.

As noted above, Hale's view was an early challenge to the rationalist approach that Bentham and his disciple John Austin would later elaborate.

There was a different response to British rationalism in Scotland in the century after Hale: the moral sense theory of Shaftesbury, Hutcheson, Hume and Adam Smith.  As the legal historian John Cairns writes, "from the work of Frances Hutcheson . . . rationalist natural law theories in the tradition of Pufendorf had been progressively superseded in Scotland by versions of moral sense theory.  A follower of the philosophy of Lord Shaftesbury, Hutcheson attempted to ground ethics in observation and study of the thinking and behavior of human beings. . . . The foundation of moral judgment was not in reason, but in the senses." (2003)

Cairns traces the influence of this on Kames, Hume, Smith and Millar, as well as the influence of Montesquieu on Scottish Enlightenment thinking about law.  We may find that Holmes actually reaches into both traditions, that of Coke and Hale as well as of Kames and Smith.  He had absorbed Scottish thought as an undergraduate at Harvard through Francis Bowen, who had taught philosophy and political theory to the members of the Metaphysical Club (and even attended some of their meetings). Holmes's post-war diaries show that he too read Hamilton, Bain, and other Scots, as well as Montesquieu, and of course Darwin, a major influence on all the members of the Club.

We might say that Holmes reinterpreted Hale in privileging precedent as the organic body of patterns of decision—or what is beneath, patterns of conduct, eventually translated into legal concepts as they first clashed and then were adjusted and reconciled. He saw common law as pulling moral standards out of conflict resolution, as reworking them and thereby developing and constantly writing and revising the moral component of law.

What Holmes does with moral sense theory seems particularly noteworthy. Holmes historicizes Smith's "impartial spectator" in a way that conditionally validates precedent. Holmes's "reasonable and prudent man" was the test for negligence, the standard of care. The prudent person is Holmes's *historical* spectator. We value precedent because the prudent person has been there all along, in the role of jury and judge, constantly infusing the common law with a historically more plausible--even while still highly idealized--version of Scottish moral sense.

This simplified explanation hides underlying complexity but serves to sketch the lineage. What it fails to show, yet, are the implications for applying conflicting precedents and resolving disputes. Smith's impartial spectator had been a device, a trope, originally devised to emphasize Hutcheson's anti-rationalist ethics. The prudent man is also a device, but it

is drawn from legal history (explicitly introduced into English law in 1781 by Sir William Jones) and it speaks with caution, more than a touch of Humean or Burkean skepticism.  While Smith's theoretical spectator might say, "Aha! I can look inside myself to do the right thing in any doubtful case," Holmes's prudent man is a consensus builder: "Whoa, I think this looks right *for now*, *to me*, in *this instance*, but first let's check the precedents, allow for future variations, and await a consensus before laying down a rule."  Smith thought the impartial spectator could find the universal in the particular,[5] but Holmes recognized from Kent that this takes time and experience.  The prudent judge looks first to precedent, and only finds the universal when the time is ripe:

> It is the merit of the common law that it decides the case first and determines the principle afterwards. . . . In cases of first impression Lord Mansfield's often-quoted advice to the business man who was suddenly appointed judge, that he should state his conclusions and not give his reasons, as his judgment would probably be right and the reasons certainly wrong, is not without its application to more educated courts (1870).

Here the legal decision is described as coming before the reasoning; the

analytical matrix of the law, and its *a priori* rules of decision, would appear

surprisingly irrelevant.  This surely appears unsound, until we recognize that

Holmes is speaking not of the ordinary case, but of the tough case, the novel

situation, often representing a new and at first intractable clash of interests.

The simplified sketch implies--perhaps too much so--that there is no

clear rational itinerary from the written law to the specific decision.  More

importantly, though, it implies a common-law judicial minimalism, deciding

"one case at a time."  This phrase has most recently been deployed by Cass

Sunstein, referring to decisions of the Supreme Court that avoid formulae

and withhold sweeping generalization (1999).  Sunstein, writing of

controversies that are in his phrase "not yet fully theorized," might

profitably have cited Holmes for this principle, as Holmes had in 1870

proposed a quite sophisticated model through which common law rules are

ideally formulated:

> It is only after a series of determinations on the same subject-matter,
>
> that it becomes necessary to "reconcile the cases," as it is called, that
>
> is, by a true induction to state the principle which has until then been
>
> obscurely felt.  And this statement is often modified more than once by
>
> new decisions before the abstracted general rule takes its final shape.

A well settled legal doctrine embodies the work of many minds, and

has been tested in form as well as substance by trained critics whose

practical interest it is to resist it at every step (1870).

Holmes called this process "successive approximation." Legal rules

are viewed historically, and Holmes here proposes that they be understood

as emerging from classes of activity, or more precisely from classes of

disputes within discrete activities. As new cases arise within a given class,

for example vehicular accidents or communications among people forming

contractual arrangements, they are initially decided on their facts, a case at a

time. Eventually a body of decided cases can be "reconciled," with the

laying down of a general rule, after time has permitted sufficient case-

specific analysis, probing the relevant varieties and conditions of accidents

or contractual communications.

Whereas analytical legal positivism emphasizes language and text,

which gives the appearance of fixity, the updated common law model

emphasizes patterns of conduct, which may be in the process of adjustment

and gradual change. While the positivist model sees legal change as

possible primarily through legislation, Holmes saw it as ongoing in areas

even already covered by statute; and finality of generalization is ever

elusive. The introduction of new forms of travel or communication may require new amendments to the rules of travel or contract, as did the airplane and the telegraph in the previous century. And even new legislation will need to be interpreted and applied on a case-by-case basis.[6]


## II

This truncated historical tour brings us short of important developments in the twentieth century, when the analytical tradition was revised by Hart and his disciples at Oxford and elsewhere. The ontological aspect of Holmes's position becomes evident when we consider his conception of the difficult case and compare it to that of Hart and the contemporary legal positivists.

Recall that Hale's comparison of law to a curative introduced into the "texture of human affairs" separated both his notion of reason and his conceptualization of law from those of Hobbes. His "texture" terminology anticipates Herbert Hart's "open texture" of legal language; but unlike Hart, the texture of interest to Hale is *outside* the law, a texture of "affairs" or *activity*, and the element of difficulty would necessarily be located there instead of within the isolated text.

We may compare an example made famous by Hart, the famous
bicycle in the park case, and its relation to the notion of an "open texture" in
legal language.  A local ordinance bans vehicles from a public park.
Competent users of English are uncertain or disagree about whether bicycles
are vehicles.  Hart infers that the rule banning vehicles from the park has a
core of determinate meaning and a penumbra of indeterminate meaning, into
which the bicycle would fall. (1994, 123-7)

For Hart, deciding the bicycle case requires a court to assign to the
rule an increment of determinate meaning that it did not previously have.[7]
Positivist open texture theory, adopting the conception of metaphorical
space in an open-textured entity "law," either renders the project of legal
interpretation impossible or the language of judges and lawyers fraudulent.
For the metaphorical space to be truly empty, any gap in a rule must be a
gap in the law as a whole, as there would otherwise be someplace else
within the law to find an answer.  Hence for such gaps there is no possibility
of deciding a case by interpreting "the law."

Picture a circle, with the label "LAW" on the inside, and "MORALS"
on the outside.  This is the conceptual image of positivist analytical
jurisprudence--with law and morals separated by a definable boundary.  (I

use the idea of a circle for clarity.  Perhaps rather than a circle, implying

uniformity to varying analytical theories, I should suggest an enclosing line

with indeterminate shape.)[8]

The picture is reinforced by language concerning the very question of

law's relation to morals, and of analysis of that question.  It forces the

conversation about law into an epistemic boundary issue, rather than a

question of process.  It focuses on the issue of how things inherently (or at

least presently) *are*, rather than of how things *come to be*.  This line of

inquiry in analytical jurisprudence is presumed to be a "*given,*" as an

ancient, fundamental, and defining question of jurisprudence.

A recent comment by the preeminent European legal philosopher

Robert Alexy suggests that all of jurisprudence has been and must always be

dominated by this question, the question of whether law is separate from

morals:

> The central problem in the debate surrounding the concept of
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> law is the relationship of law and morality.  Notwithstanding a
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> discussion that reaches back more than two millennia, there remain
>
> two basic, competing positions--the positivistic and the non-
>
> positivistic. (1989, 3)

Here the "non-positivistic" position is simply the other alternative given by the analytical picture: the option of somehow putting a moral element *inside* the boundary. Western jurisprudence is thus overwhelmed by a powerful linguistic bias toward analytical legal theory and method, by a concept of law with a definitive boundary--whether that boundary includes morals or not. If we ignore Hale and accept Alexy's comment, the pragmatic view is then entirely original--a third "basic position." It cannot, however, be so simply mapped, as the pragmatist model of law is part of a model of *developing* intelligence in the context of *all* experience.

III

The analytical picture serves to illustrate the practical dimension of Holmes's critique of ideology. Picture again the circle with "law" on the inside, but put aside for the moment the precise location of "morals." If law has a boundary, the question arises, what *precisely* is inside, and what outside? If a question arises for which legal experts cannot find a clear answer from the materials (statutes, cases, authoritative texts, etc.) that are *inside*, can they look *outside* for an answer? And what if "moral principles" are believed to be inside, as Alexy, following Ronald Dworkin, has

steadfastly maintained?  Can such generals be utilized to *decide* the difficult

case?

Holmes's fallibilism resists the idea of a natural conceptual boundary

around law.  It sees no difficult case as occupying a place inside *or* outside a

legal boundary.  Rather, the hard case presents a degree of novelty or

uncertainty.  Cases come into the legal process from the chaos of life's

complexity.  They bring innumerable distinct kinds of uncertainty and

difficulty.  It is a categorical error to treat all types of legal uncertainty as

univocal, of one conceptual kind, an error that seems inevitably to follow

from the notion of a boundary, or at any rate from the debate over the

ontological separation of law and morals.  It is an error that, as Holmes

would later complain, may be used to rationalize a judge's predetermining

the outcome of an ongoing controversy by circumventing detail and

appealing directly to a "moral principle."

From this perspective, two fallacies have followed from the analytical

conception, going back at least to John Austin, that law has a distinct

conceptual boundary.  One is that a particular case, embodying a specific

question, can arise outside the boundary, and hence be legally

indeterminate.  According to the positivist model, law, considered as an

adjudicative matrix, either succeeds or fails on its own. When deciding

difficult cases this means the positivist must accept the problematic

possibility of a radical "legal indeterminacy."[9]

The other fallacy, following from the debate over whether law and

morals are separate, is that morals, or moral principles, must be included

within the boundary when necessary to resolve the legally indeterminate

case. This gives rise to the superficial notion that constitutional rights, as

privileged "moral principles," can be available as trumps over statute and

precedent whenever their sweepingly general language permits.

If a case represents a prevalent controversy on which a judge has strong

feelings, and there is a relevant constitutional value such as free expression,

annoying facts that may align the case with prior contrary decisions can be

ignored, in favor of a rhetorical recitation of the historic importance of the

constitutional right. While this may appear to be a twentieth-century

phenomenon, Holmes first encountered a nineteenth-century version of it

during his career as a state judge, in the yet unregulated area of labor

organization--the tendency to reject picketing as a violation of

constitutionally protected freedom of contract.[10]  Lochner, in 1902, invoked

the same right to overrule state welfare regulation, and would be his signal

encounter with this phenomenon on the Supreme Court.  In both cases he

dissented, and in both his position has been born out by historical

developments.

Constitutional rights are important, but they are implemented by

raising fundamental questions for society at large, not by dictating, to the

individual judge, shortcut answers to new perplexities like union organizing

or social welfare legislation.  More recent issues in which the temptation

exists to avoid complexity are corporate limits on campaign spending, and

medically assisted suicide.  Why should judges decide such matters on

particular grounds, as Holmes counseled, and refrain from reaching into the

constitution for a final, irreversible rationale?  The simple answer is that law

is part of a broad social inquiry, and in the most vexing controversies,

inquiry has to run its course before the correct principle, meeting the fully

explored contours of a problem, follows in policy as well as language.  And,

ample room must be given for input from outside the judicial arena.


IV

How do things hang together, amidst crisis and serious conflict?

Slavery and its aftermath has overwhelmingly been the greatest source of

violent dissension in the history of the republic, a clash of deep

commitments worked out only through two centuries of gradual and painful

adjustment--of habits, practices, beliefs, and even language. The path of

that dispute is irreconcilable with a Hobbesian social contract suppressing

the operation of conflicting moral views of law. Such a vision could hardly

have appealed to Holmes. As a young abolitionist, he was raised on

Emerson's call to personal responsibility, and he felt its sting.

For Hobbes, civil war was unmitigated evil to be avoided at all costs,

while for Holmes it came to be understood as simply a more explosive

manifestation of the constant clash of fundamental interests. We need not

condone fratricidal war in recognizing that, in 17th century England and

18th as well as 19th century America, it addressed moral deadlocks that

political and legal institutions could not break. This insight plausibly led

Holmes to the intimate connection of legal cases with their underlying

conflicts, and an emphasis less on analytical legal doctrine than the non-

legal dimensions of adjustment.

What is missing from Hobbes's view is the constant need for

continuous adjustment in any real scheme of social ordering. It is this that I

refer to as the *dynamic* order characteristic of pragmatism, the transactional

and transformative aspect of inquiry found in Dewey's work. The logic of the law is not the *a priori* dictate of legal reason but rather, paraphrasing Dewey, the *product* of inquiry. The dimension highlighted in retrospect through Holmes is the element of constant conflict as a catalyzing force.

As Ralph Sleeper notes, Peirce's doubt-belief formula directed Dewey's attention to the actual processes of thought. Inherently vague, the idea of doubt has always sought specificity in Dewey's work. For Sleeper the key to Dewey's logic was understanding inference "as a real event of transformational force and power, causally real in the emergence of new features of things 'entering the inferential function.' It takes inference as action, as behavior that causes changes in reality through interaction with things." (1986, 83). If the real process of inference begins with doubt, the doubt-belief formula needs to acknowledge that doubt is not merely spectral but must have its own physiology and history.

From Holmes we gain the insight that legal intelligence is a special case of inference deriving from constant controversies that find their way into the judicial system. Doubt is palpable in the difficult case. The gradual hammering-out of belief through case-specific resolutions is visible in the record of litigation. Flawed and chaotic though it may be, the resolution of

conflict by legal problem-solving provides a written record of naturalistic and pragmatic ordering, revealed in its full flawed and chaotic nature. This aspect of knowledge needs to be recognized equally in relation to the dynamic growth of universals and ideals. In an address given to the New York State Bar Association in 1899, Holmes summarized this point in a way that Dewey must have appreciated:

> It is perfectly proper to regard and study the law simply as a great anthropological document. It is proper to resort to it to discover what ideals of society have been strong enough to reach that final form of expression, or what have been the changes in dominant ideals from century to century. It is proper to study it as an exercise in the morphology and transformation of human ideas. (1899, p. 212)

This extraordinary passage demonstrates that Holmes saw law entirely differently from Hobbes. Rather than an autonomous force suppressing conflict as pathological, it is embedded within the social processes assimilating and meliorating conflict as a natural condition. Rather than viewing legal and political theory as a prophylactic program for a discrete governing entity, legal theory is cognate with the rest of knowledge and law is viewed as a written record offering evidence of social norms and ideas as

continuously cogenerated. Ideals are products of this view of knowledge-as-inquiry, and they are constantly developing in response to the changing nature of the human endeavor.

In this original vision, legal philosophy is engaged in a radical departure from the analytical positivist tradition, with interesting and illuminating parallels, not so much to other established jurisprudential schools, but rather (as I have suggested elsewhere, 2010) to the post-Kuhn study of science, which has already become a vital research program generating its own account of "the morphology and transformation of human ideas."

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[1] See, e.g., Shapin and Shaffer 1985, 15, 99-100. "[S]olutions to the problem of knowledge are embedded within practical solutions to the problem of social order, and [] different practical solutions to the problem of social order encapsulate contrasting practical solutions to the problem of knowledge. *That* is what the Hobbes-Boyle controversies were about." (15)

[2] For a full account of this see Kellogg (2007).

[3] I am aware that the weight of opinion regarding Holmes has long held that, rather than a pragmatist, he is a positivist within the Hobbes/Austin/Hart tradition; e.g. Patrick Kelly, "Was Holmes a Pragmatist? Reflections on a New Twist to an Old Argument," 14 S. ILL. 427 (1990); Albert Alschuler, *Law without Values*, Chicago: University of Chicago Press, 2000. As I observed in Kellogg (2007), these sources over-rely on Holmes's "Path of the Law." In that essay Holmes writes, "I often doubt whether it would be a gain if every word of moral significance could be banished from the law altogether," and he mentions "the evil effects of confusion between legal and moral ideas." Without the insight from earlier texts, this is easily mistaken for an analytical separation of law and morals, as is his emphasis on an external standard of liability in *The Common Law*, from which his initial consideration and rejection of Austin was omitted as

irrelevant.

Dissenters from this conventional view who have seen Holmes as a

pragmatist notably include Thomas C. Grey, "Holmes and Legal

Pragmatism," 41 Stanford Law Review 787 (April 1989) 787-856 and

"Freestanding Legal Pragmatism,"18 Cardozo Law Review 21 (September,

1996) 21-42; also Anonymous Note, "Holmes, Peirce, and Legal

Pragmatism," Yale Law Journal. Vol. 84 No. 5 (Apr. 1975) 1123-1140.

[4] Common law reason has been described as "*within* the law." It is rooted in

conduct and practice. As Gerald Postema has noted, it was "inseparable

from the particular situations brought to the law and resolved by it. It is the

reason not of rules and principles, but of cases." It reflects the fact that

cases are the byproduct of problematic interaction among humans engaged

in social and economic activities, which fall naturally into patterns that

might qualify as "custom," from which reason cannot be detached. It is

distinct, then, from the meaning given to the term by Hobbes. (Postema

1986)

[5] See MacCormick 2008.

[6] Holmes applied this principle to legislation (1870). Statutes too are the

work of many minds, in elected bodies. Diverse circumstances are explored

all at once, in legislative committees, instead of seriatim through litigation. Again unclear circumstances remain, to be addressed in a case-specific manner by the judiciary, if not through legislative amendment.  See, e.g., Roscoe Pound, *The Spirit of the Common Law* (Boston: Beacon Press, 1921) 174; Edward H. Levi, *An Introduction to Legal Reasoning* (Chicago: Chicago University Press, 1949) 27-33.

[7] Hart 1994, 127.  This reading is reinforced by Hart's own remarks in the Postscript responding to Ronald Dworkin added to the second edition of *The Concept of Law*, 252-3, 272-3.

[8]  How about the non-positivist picture suggested by Dworkin, in which morals are *not* posited as outside of the putative boundary?  This has been described as a *non*-positivist conception, but it retains a fundamental similarity, probing the possibilities of a circle that includes within it an element of the "moral," but nevertheless implying a boundary.  The imaginary boundary is still extant, deeply embedded in the conversation, and the attention turns to the explanation of the nature of this distinctive boundary, not questioning whether it exists at all.

[9]  I use this phrase in its radical sense, not the moderate meaning sometimes given by legal realists.  See, e.g., Kellogg (2009).

[10] *Vegelahn v. Guntner* and *Plant v. Woods*; see Kellogg (2007, 127-34).