Holmes and The Common Law: A Jury's Duty

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HOLMES AND *THE COMMON LAW:*
A JURY’S DUTY
ARTICLE
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I. Introduction

The notion of a small group of peers whose responsibility it is to play a part in determining the outcome of a trial is central to the common conception of the American legal system. Memorialized in the Constitution of the United States as a fundamental right, and in the national consciousness as the proud, if begrudged, duty of all citizens, juries are often discussed, but perhaps not always understood.

Whatever misunderstandings have come to be, certainly many of them sprang from the juxtaposition of jury and judge. Why do we have both? How are their responsibilities divided? Who truly decides the questions at hand? Needless to say, such questions are difficult. And in fact, ‘misunderstanding’ is a mischaracterization—the role of the jury is a matter of legal philosophy with no objectively correct position.

Supreme Court Justice Oliver Wendell Holmes, Jr. attempted, long before he sat on the highest (or any) court, to lay out the role of the jury at common law. Revered as one of the greatest legal thinkers of American history, scholars often look to Holmes for his thoughts on juries.¹ This Article will provide an in-depth analysis of those thoughts.

Interestingly, accounts of Holmes’ view of the role of juries are static.² That is, although Holmes spent over half a century thinking and writing about the law, there has been a presumption in much of the scholarship that his thoughts on juries did not change over time. As part of its analysis, this Article will attempt to parse out any changes in Holmes’s conception of

²See id.
the jury from the time he wrote *The Common Law* as a relatively young lawyer to his retirement from the Supreme Court.

Part II contains an analysis of history’s first exposure to Holmes’s view of the role of juries, which he explained in *The Common Law*; Part III analyzes Holmes’s position in one of his later essays; and Part IV looks at his opinions from the bench. At each stage, I will endeavor to reconcile Holmes’s position on the role of juries over time, and in Part V, I will briefly conclude.

II. *The Common Law*

Of all of Holmes’s writings, he gives us his longest, most cogent reasoning of the jury’s role in *The Common Law*. Still, his discussion—at times seemingly contradictory, and at times seemingly too forceful one way or another—requires a close reading in order to discern Holmes’s true opinions on the matter.

Holmes begins by unveiling the jury’s role as one of determining standards of conduct. Then he describes the obsolescence of juries over time, whose roles are ever more diminished by ever more experienced judges. Seemingly contradictorily, Holmes maintains throughout the position that juries serve an indispensible role in the common law.

A. “To Represent the Feeling of the Community”

Writing on negligence, Holmes first explains that juries, and not judges, are to determine the “standard of conduct” because the judge himself is not “possessed of sufficient practical experience to lay down the rule intelligently.” Holmes takes for granted that the greater legal “standard” to apply is what is now well known as the “reasonable person standard.” What he

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4 *Id.* at 123.
refers to in *The Common Law* as the *standard* of conduct means more precisely what *specifically* should be considered reasonable or not given the facts of a particular case.\(^5\)

Such a prescription for the jury is intuitive and inoffensive. At the heart of such intuition is the idea that reasonableness is better defined by the community as a whole than by any individual. After all, reasonableness is a matter of varying opinion, and a group of individuals will form less volatile opinions and will more closely approximate the community’s feelings than will a single person. Furthermore, as a matter of legal policy, it makes sense to apply a consistent definition in order for people to conform their behavior to known consequences. Holmes makes his point himself when he describes the desirability “to know as nearly as we can the standard by which we shall be judged at a given moment.”\(^6\)

While Holmes acknowledges the desirability of consistency as evinced by this quoted language, in fairness its context actually reflects Holmes’s opinion that greater consistency can be achieved not by juries, but rather by judges.\(^7\) Holmes’s reasoning, however, is not dissimilar from mine. Holmes argues—perhaps counterintuitively—that the unilateral ruling of an experienced judge reflects the opinions of not just one person, but rather of hundreds or thousands of jurors he has observed over years on the bench. On the contrary, juries reflect only a handful (twelve or so) of individual opinions.\(^8\) Therefore, at the root of Holmes’s reasoning, the proposition that many opinions are better than one, if not couched in a bit of arrogance, still stands. (Holmes’s counterintuitive explanation of the superiority of judges over juries reemerges shortly.)

\(^5\)See id. at 123–29.
\(^6\)See id. at 126.
\(^7\)See id. at 125–26. Holmes’s argument as to juries’ inconsistency is that they might unpredictably overturn precedent to conform the law to a changing community’s standards; judges will rule predictably according to the standards they have been given by past juries. See id.
\(^8\)See id.
Putting aside for a moment questions of whether community standards—well informed of daily experiences but ill informed of the law—are desirable, Holmes’s starting point is logically sound.

Only when Holmes continues his discussion do seeming contradictions and too-extreme positions crop up. He describes scenarios of jury obsolescence followed by instances of their usefulness. He takes a hardline position, and all the while carves out exceptions to his argument.⁹

B. Obsolescence of Juries

Holmes explains that gradually, a judge will need to rely on juries increasingly less, with only some exceptions.¹⁰ His argument is that in observing a number of juries decide similar cases, a judge will have learned which actions are blameworthy, and become competent at applying jury-originated standards himself.¹¹ Holmes anticipates two counterarguments and addresses them with short (if not shoddy) shrift. First, he concedes his argument does not hold water in cases where the standard is rapidly evolving.¹² Even in these cases, however, Holmes believes—apparently without substantiation—that judges should be able to “lead and instruct” the jury (“in detail,” even).¹³ Second, Holmes admits that fact patterns don’t “exactly repeat themselves,” such that a judge would know with certainty how a jury would decide,¹⁴ but he maintains that most fact patterns are similar enough to others to inform judges of the applicable standards of liability.

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⁹This is not unlike the way Holmes treats his main thesis for The Common Law.
¹⁰HOLMES, supra note 3, at 123.
¹¹See id.
¹²See id. Holmes provides “questions of medical treatment” as one such “rapidly changing” area of the law. Id.
¹³See id. at 124.
¹⁴See id.
Considering his acknowledgement of these exceptions without fully disposing of them, Holmes makes his case for an autonomous bench surprisingly heavy-handedly, expressing some incredulity at the idea of the contrary: “. . . [I]s it to be imagined that the court is to go on leaving the standard to the jury forever?”\(^\text{15}\) In fact, Holmes goes further than to say that an experienced judge can perform as well as a jury—he posits that the judge can do the jury one better:

“A judge who has long sat at *nisi prius* ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances *far better than an average jury*.”\(^\text{16}\)

Much more troubling than such hubris in the face of not insignificant counterarguments, however, are the confusing moments when Holmes seems to salute the ongoing *usefulness* of juries.

### C. Usefulness of Juries

At the same time he is describing their obsolescence, Holmes makes the case that juries are useful in “de-blurring” the lines.\(^\text{17}\) In other words, while extreme cases at either pole may be easily decided by a judge as either clearly blameworthy or clearly not, there are cases nearer to the middle that don’t fall squarely on one side or the other of the line demarcating blameworthiness. Rather, Holmes describes, they fall in a “penumbra or debatable land.”\(^\text{18}\) It is the jury’s role to decide close cases, ever narrowing the penumbra of uncertainty.

It is unclear whether Holmes sees this narrowing as an ongoing process or one that the “experienced” judge has already observed to completion in his experience on the bench. Given a natural desire to reconcile this role of the jury with Holmes’s view that juries are—at least to experienced judges—obsolete, and given Holmes’s generally negative attitude toward juries, one

\(^{15}\) *Id.* at 123. “Why not?” is one answer (question?) to Holmes’s question, and it rolls off the tongue quite naturally.  

\(^{16}\) *Id.* at 124 (emphasis added).

\(^{17}\) *See id.* at 127.

\(^{18}\) *See id.*
might determine that Holmes views the jury’s role in brightening shades of gray as complete. Indeed, Holmes provides at least one example of juries, over time, having drawn a fine, bright line.\textsuperscript{19} Regarding actions for obstruction by lighthouses in England, Holmes describes the process of arriving at the bright line rule—that “the building complained of must not be higher than the distance of its base from the dominant windows,” the view from which is that in question.\textsuperscript{20}

If it is so, that Holmes believes the jury’s line-drawing roles to be complete, he may have underestimated the area of gray still to be narrowed in many cases. At times, however, Holmes seems to grasp this:

“My trouble with many cases of negligence is, that they are of a kind not frequently recurring, so as to enable any given judge to profit by long experience with juries to lay down rules, and that the elements are so complex that courts are glad to leave the whole matter in a lump for the jury’s determination.”\textsuperscript{21}

And in fact, Holmes reasons that whether it is prudent to stand on a railroad track depends on the distance of an approaching train, and that the reasonable distance “\textit{could} be determined to a foot.”\textsuperscript{22} That is, while it is theoretically possible to arrive at some bright line in the manner of a mathematical limit approaching a finite value, it would take an infinite number of juries to reach such certainty. In other words, juries will continue to improve standards of liability on into the future forever.

Regardless of whether Holmes views the process of “narrowing the penumbra” as one that occurs sufficiently within the career of a single judge or one that is ongoing, he seems to equivocate on the amount of reverence he grants the jury with respect to their ability to perform

\textsuperscript{19}See \textit{id.} at 128.
\textsuperscript{20}Id.
\textsuperscript{21}Id. at 129.
\textsuperscript{22}Id. (emphasis added).
the task at all. He repeatedly states that juries are able to draw the lines to “mathematical”
certainty, yet explains their process as “accidental” and lacking in “articulate reason.”

So scholars of Holmes are left for a moment wondering whether he finds juries obsolete
or valuable, discerning or obtuse. The answer is yes.

Critical to resolving any apparent equivocation is an appreciation that Holmes views
differently the role of juries as an institution and the role of a single jury in a single case. With
that distinction in mind, his point is clear: juries are useful in narrowing gray areas over time into
ever finer lines of uncertainty, but the line that any one jury might draw in a given case does not
necessarily provide the right result. Holmes is probably best read as understanding that all bright
lines, no matter who draws them, involve a degree of arbitrariness. Therefore, while juries, over
time, come closer and closer to finding an objective standard, it is up to the experienced judge to
amalgamate these findings to a “line of best fit.” After all, no one jury is aware of the decisions of all the juries before it. Given that, the arbitrariness of a single jury and the role of the
experienced judge become clear.

III. Law in Science and Science in Law

After The Common Law, the next most lucid, compact discussion of the role of the jury appears
in a law review article Holmes published just before the turn of the century. In Law in Science
and Science in Law, Holmes employs much of the same language he did in his seminal work in
describing the role of the jury. He focuses on line-drawing and legal standards, and for the most
part reaffirms his earlier thoughts—but Holmes appears to stray at least momentarily when he

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23 See id. at 127, 129.
24 See id. at 127.
writes about the jury’s role in maintaining consistency between the standards of the community and the standards of the law.

A. A Reaffirmation

Holmes begins by drawing a distinction between theory and reality, which could in itself be considered a mild difference between his earlier writing and this. (Thinking biographically, this is not surprising—Holmes had now sat on the bench for over sixteen years, as opposed to the zero he had served at the time of the publication of The Common Law.26) The distinction is that in practice, bright lines are arbitrary—as illustrated by “putting cases very near to [the line] on one side or the other”27—yet theoretically we are forced to make a decision as to where those lines are; the law must decide that behavior is either blameworthy or not.28 The distinction between practice and theory, while perhaps starker now than in The Common Law, does not constitute inconsistency within Holmes’s thinking. He previously identified the theoretical necessity and practical arbitrariness of line-drawing when he dichotomously praised the jury for usefulness in determining standards of liability and decried them for their obsolescence as “accidental” decision-makers.29

With an eye to the practical, Holmes goes on to explain that determining facts aids line-drawing; the more facts we know about a particular case, the more accurately we can draw the line.30 This reasoning leads Holmes to conclude that juries are useful in close cases because of their role as fact-finders.31 To say that juries are fact-finders is not itself a departure from his

27 See Holmes, supra note 24, at 457.
28 See id.
29 See supra Part II.B–C.
30 See Holmes, supra note 24, at 457.
31 See id. (“In some regions of conduct . . . we have to be informed of facts which we do not know before we can draw our lines intelligently, and so, as we get near the dividing point, we call in the jury.”).
earlier position, but to describe juries as fact-finders to the exclusion of casting them in any other role is.

Recall that in *The Common Law* Holmes saw juries not only as fact-finders, but also as determiners of standards of legal liability.\(^\text{32}\) Indeed, with respect to experienced judges, Holmes described this role as a shrinking one—but it was at least partially the province of the jury. Had his thinking shifted in the two decades that had passed? In a manner classically himself, Holmes equivocates but endeavors at internal consistency.

In the article, Holmes seems firmer on his stance that once the facts of a case have been determined, the question of liability is one for the judge.\(^\text{33}\) It is no surprise that having now been a judge, Holmes would believe more than ever in experienced judges’ abilities to state legal standards. But Holmes also maintains in his argument at least a sliver of the jury’s role in determining those standards:

> “In some regions of conduct of a special sort we have to be informed of facts which we do not know before we can draw our lines intelligently, and so, as we get near the dividing point, we call in the jury.”\(^\text{34}\)

Here he acknowledges that in at least some cases the standard of liability is yet to be determined and that the jury is called upon, not only to determine facts, but to draw a line.

As Holmes expounds upon this point, however, it becomes clearer that he does indeed view the jury’s role in determining standards as minimal: only when a general rule will not fit a unique set of facts will a jury be called upon to determine the standard for a particular case.\(^\text{35}\)

His reasons are twofold. First, once a standard has been laid down, it ought not to change from

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\(^{32}\)See *supra* Part II.A.

\(^{33}\)See Holmes, *supra* note 24, at 457 (“[E]very time that a judge declines to rule whether certain conduct is negligent or not he avows his inability to state the law . . .”).

\(^{34}\)Id. I read the “we” here not as a “royal we” of the bench, but as referring much more generally to the greater community of legal theorists.

\(^{35}\)See id. at 459.
case to case, so long as the facts are the same, in order that people might conform their behavior to the law.\textsuperscript{36} Therefore, it is unnecessary to ask a jury to decide what a judge already knows from juries past. Second, and critical to understanding why in most cases Holmes seems to choose judge over jury, Holmes trusts judges far more than “twelve men taken at random from the street” to correctly apply the law.\textsuperscript{37} He implies that “the whim” of any given jury might deviate from the standard of liability—the settled law—that has already been laid down.\textsuperscript{38}

B. \textit{A Turnabout?}

After all this, however, nearing the end of Holmes’s discussion of juries in the article, he appears to drop a bomb (and the ball?) by revealing that he still “believe[s] in . . . leaving questions of negligence to [the jury]” \textit{because} (and not in spite of) the “popular prejudice” with which they will inject their verdict.\textsuperscript{39} Why? Because in this manner do we conform the law to the “feelings of the community.”\textsuperscript{40}

It is easy to read this as a departure from Holmes’s reasoning in \textit{The Common Law} that experienced judges “represent the common sense of the community” better than juries.\textsuperscript{41} But whether his positions are truly inconsistent over the span of the final two decades of the nineteenth century deserves a closer look, beginning with the opinion of Holmes himself, who is quite confident in the consistency of his position when he alludes in the article to his publication of the same thoughts in \textit{The Common Law}, implying that his position has not changed.\textsuperscript{42}

\textsuperscript{36}See \textit{id.} at 458 (“When we rule on evidence of negligence we are ruling on a standard of conduct, a standard which we hold the parties bound to know beforehand, and which in theory is always the same upon the same facts . . . .”).\textsuperscript{37}Id. at 457.\textsuperscript{38}See \textit{id.} at 458.\textsuperscript{39}See \textit{id.} at 460.\textsuperscript{40}See \textit{id.}\textsuperscript{41}See HOLMES, supra note 3, at 123.\textsuperscript{42}See Holmes, \textit{supra} note 24, at 457 (“I venture to think . . . now, \textit{as I thought twenty years ago}, before I went upon the bench . . . .” (emphasis added)).
(Curiously, he declines to “repeat arguments which [he] published long ago,” implying that the arguments he puts forth now in the article regarding the role of the jury are novel from those he advanced in *The Common Law*.\footnote{\textit{See id.} at 458.} This is not necessarily problematic to a thesis that argues consistency in Holmes’s position on the role of juries, for two reasons. First, even though Holmes is declining to repeat past arguments, he does not disown them. Far from it, he arrogantly brags with sarcastic humility that they have been “more or less quoted in leading textbooks.” In other words, a novel position on the role of juries is not necessarily inconsistent with a dated position. Second, perhaps Holmes is merely employing literary technique, a sort of quasi-\textit{praeteritio} in the style of Cicero, whereby he undertakes not to discuss precisely the topic he brings up.\footnote{\textit{Praeteritio}, also referred to as paralipsis, which “states a resolve to avoid mentioning something while doing precisely that” and was “[c]onsidered useful as a mode of innuendo when lengthier discussion might prove embarrassing” was famously and frequently employed by Cicero. \textit{CICERO’S RHETORIC}, \url{http://www.angelfire.com/art/architecture/rhetoric.htm#p} (last visited Jan. 25, 2012). For example, take this line from Cicero himself: “Quid ego adventus istius prandia, cenas, equos muneraque commemorem?” (“Why should I recount the dinners, suppers, horses, and presents that marked that arrival?”) Marcus Tullius Cicero, \textit{ACTIONIS IN VERREM SECUNDÆ [Secondary Orations Against Verres]}, Book I, Chapter XLIX.} That is, perhaps this “novel” theory of the jury’s role is not novel at all, but rather is exactly the same as the one Holmes published “long ago.” In either case, Holmes’s insistence not to repeat his arguments does not mean that whatever argument he does put forth now is logically inconsistent with what he wrote in *The Common Law.*

Of course, Holmes has an interest in self-reporting himself as a consistent legal theorist. Admitting to waffling would undermine the strength of his scholarship. Even without Holmes, however, a careful reading of both texts reveals the harmony between the two. There is certainly a tension in what Holmes is saying, and thus the reactionary desire to flag him as a flip-flopper, but there is no inconsistency across time. It is the same tension that existed in Holmes’s discussion of the jury in *The Common Law.*
On the one hand, juries are useful in conforming the law to the feelings of the community as those feelings change gradually over time. On the other hand, any “random” panel of people unfamiliar with the law are likely to (and in Holmes’s experience undoubtedly did) decide cases with some imprecision relative to any other given jury. But, just as Holmes described in The Common Law (albeit perhaps with slightly less cynicism towards juries), we maintain both judge and jury, in tension but in balance, in a binary role of narrowing and fine-tuning the lines beyond which lie blameworthiness.

IV. Judge Holmes, Justice Holmes

The Common Law and Holmes’s later article, Law in Science and Science in Law provide the convenience of compact, pithy discussions on the role of the jury in the common law. Notably, however, though Holmes served as a judge for nearly fifty years (approximately twenty as a state judge on the highest court of Massachusetts and thirty as a Supreme Court justice), such discussions escape much mention in his judicial opinions. The role of the jury is not completely absent from Holmes’s rulings, but they tend to be short, matter-of-fact statements describing the judge as the decider of questions of law and the jury as the decider of questions of fact. Unlike Holmes’s earlier scholarship, there is little discussing the juries’ roles as developers of standards of liability, as barometers of the community.

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45 Holmes felt strongly on the point that community standards were constantly and forever changing, writing on the same idea in a more famous article published two years before, explaining that no standard of liability will be accepted “always, everywhere, and by all”: “[I]f any one thinks that [the law] can be settled deductively, or once for all, I only can say that I think he is theoretically wrong, and that I am certain that his conclusion will not be accepted in practice semper ubique et ab omnibus.” Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 466–67 (1897).
This Part will look at the nature of Holmes’s scant references to the role of the jury in his judicial opinions followed by a brief consideration as to why he refrains from the more in-depth discussions his followers may have come to expect from him.

A. **Supreme Judicial Court of Massachusetts**

As a judge on the Supreme Judicial Court of Massachusetts, there is evidence that Holmes maintained the thesis on juries that he laid out in his seminal work. One set of cases reflects Holmes’s baseline view of juries as determiners of standards. Another set (with some overlap) reflects Holmes’s assertion of a shrinking role for juries as standard determiners in the face of experienced judges.

1. **Juries as Determiners of Standards**

A number of cases reflect Holmes’s starting point in his discussion on the role of the jury in *The Common Law*—that the judge’s role is to clarify for the jury what the law says and the jury’s role is to apply the facts of the case to the law to determine blameworthiness. That is, for example, the judge instructs the jury to determine negligence by determining reasonable behavior, and the jury draws the line of reasonableness. In *Com v. Pierce*, a colorful case about a defendant doctor who treated (and killed) a woman by soaking the clothes she wore in kerosene, Holmes reviews with approval a lower court judge’s “instructions to the jury on the standard of skill by which the defendant was to be tried,” as well as the jury’s subsequent finding that the defendant’s actions constituted gross negligence.

Throughout his Massachusetts judgeship, Holmes continued to treat as normal this situation where the court explains the standard of conduct and the jury freely and competently interprets his instructions and the facts in order to determine liability. *Riley v. Harris* asked the

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47 *Com*, 1884 WL 6544 at *10–11.
jury to decide whether a defendant’s conduct constituted “due care.”

Likewise, in *Gray v. Standard Life & Accident Insurance Co.*, the “whole matter was left to [the jury]” because the court was unable to rule on the case as a “matter of law.”

In *Gray*, however, Holmes identifies the limitations of the court in determining standards while at the same time liberally construing the judge’s ability to instruct the jury. Holmes disposes—in a mere half page—of exceptions taken to the judge’s “prejudicial” instructions to the jury, asserting the right of judges to “state to the jury what the evidence was.”

In *Gray*, this does not yet amount to a judicial usurpation of the jury’s role as determiners of standards of conduct, but it foreshadows Holmes’s later position on judges’ instructions to juries, which grows more extreme as he rises to the Supreme Court.

2. *The Shrinking Role of Juries*

*Gray* is also part of a body of cases Holmes decided on the Massachusetts bench that serves to maintain a larger part of Holmes’s thesis. In particular, Holmes seems to have preserved the argument that the jury’s role as determiners of standards of conduct is ever diminishing.

In *Stanwood v. City of Malden*, Holmes describes this diminishing role, but with a twist not entirely present in *The Common Law*:

“No doubt there are many cases in which it is left to the jury to fix the difference of degree at which liability begins. . . . But there are also many, *and a constantly increasing number*, in which the law draws the line. The principles on which it has done so may not have been consistent, because it has acted sporadically, and not always upon a general theory, consciously held. Nevertheless one may doubt whether substantial justice has not been approached most nearly when it has not

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48 Riley, 177 Mass. at 164–65.
49 See id.
50 Gray, 170 Mass. 558.
51 See id.
52 See id. at 559.
53 See infra, Part IV.B.
54 See *Stanwood v. City of Malden*, 157 Mass. 17, 18 (1892).
been a matter of course to leave every nice question of the standards of conduct to the jury.”

As in *The Common Law*, Holmes describes an obsolescing jury. Here, however, the jury has lost partial responsibility in determining standards of conduct not to the judiciary, but to the legislature. Unlike before, Holmes is now discussing the role of the jury in formulating standards at common law with respect to the role of the legislature in formulating standards within the civil law. To that extent, a comparison between *Stanwood* and Holmes’s earlier expositions may be unfair. Still, *Stanwood* reflects Holmes’s low levels of confidence in the competence of the jury, especially when he continues on by implying that “justice has . . . been approached most nearly” when the jury’s role in determining standards of conduct has been curtailed. (This also raises interesting questions beyond the scope of this Article about Holmes’s position, both theoretical and practical, on the interplay between common and civil law in an American setting.)

Another pair of decisions Holmes authored on the Massachusetts court further substantiates the claim that he held fast in his theory of the shrinking role of the jury. In fact—apparently through the experience of actually applying theory to facts—he puts a sharper point on what he first tried to explain a decade or two before. In *Silsbee v. Webber*, Holmes exhibits comfort in determining, as a judge, threshold questions of sufficiency of evidence—that is, whether a reasonable jury could find the defendant liable based on the evidence:

“[W]e cannot say that the jury would not have been warranted in finding that the defendant obtained and knew that he was obtaining the assignment from the plaintiff solely by inspiring the plaintiff with fear . . . .”

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55 *Id.* at 18 (emphasis added).
56 *Id.*
58 *Id.* at 379.
In other words, Holmes demonstrates through *Silsbee* his position that the judge first decides whether the facts of a case fall within the “penumbra” of uncertainty. Only thereafter, and only if the case does indeed fall within that gray area, does the jury decide the relative positions of the defendant’s acts and the line beyond which he is blameworthy. In this way, *Silsbee* more coherently explains the balancing roles of (experienced) judge and jury. The practiced judge, upon facing the threshold question of whether a set of facts falls within the uncertain area that is the jury’s province, will be more certain whether or not it does. A less experienced judge, less familiar with the boundaries, blurred as they are, of the “penumbra,” and erring on the side of caution, may leave more questions to the jury.

*Pinney v. Hall* shows the other side of the coin.\(^{59}\) In that case, Holmes finds the facts outside of the penumbra of uncertainty.\(^{60}\) Having fallen down a flight of stairs, the plaintiff argues that only negligence could explain her accident. Holmes opines in characteristically brief fashion that no reasonable jury could find in her favor:

> “What is meant by res ipsa loquitur is that the jury are warranted in finding from their knowledge, as men of the world, that such accidents usually do not happen except through the defendant's fault . . . . But that depends on the kind of accident. With regard to this kind we are of opinion [sic] that a jury would not be warranted in laying down such a premise or in drawing such an inference. We need not inquire whether, under any circumstances, it would be a question for the jury whether the defendant was liable for such stairs as these. Some rules and standards of conduct are plain enough for judges to be able to lay them down without the aid of a jury. It would seem that, when the elements of the case are so permanent, few, and simple as here, a jury ought not to be necessary.”\(^{61}\)

*Pinney* matches nicely the theory Holmes laid out in *The Common Law*. This is a case nearer to the poles, as in the example of the blameworthy individual who steps onto the railroad tracks in

\(^{59}\)See *Pinney v. Hall*, 156 Mass. 225 (1892).

\(^{60}\)See id.

\(^{61}\)Id. at 225 (emphasis added) (citations omitted).
front of a speeding train. The jury is simply not needed in this case to shine a light on some gray area to find the standard of conduct, for it is already clear to any judge.

In some senses, Silsbee and Pinney may come across as a softening of Holmes’s earlier position, which at times read as a harsh admonition that judges should take over for the incompetent jury as soon as they are able. Silsbee and Pinney more conservatively explain it as a question of evidentiary sufficiency. The Common Law, however, provided a different platform, and that could explain all the difference. There, Holmes could more explicitly address the competing roles of judge and jury; here, we are forced to read between the lines. There, Holmes was trying to make a splash in the legal community, perhaps deliberately charging his theory with starker, more extreme language; here, Holmes is confined by the convention of judicial opinion and the boundaries of the law in practice. While this serves as potential explanation for differences in the tone and forcefulness of his theory, it leaves us to speculate as to where exactly Holmes’s true feelings lay.

B. Supreme Court of the United States

As a Supreme Court justice, Holmes’s cynicism set in more fully. He continued to echo ideas he expressed in The Common Law as well as in subsequent fora, but with a new level of petulance, bred perhaps by added years of disillusionment about the capabilities of juries to deliver the right results. Such a view is not unlike that he originally espoused, for it highlights once again the tension between the two juries: the jury as an institution and the single jury in practice.63

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62See HOMES, supra note 3, at 128–29 (“If the whole evidence in the case was that a party, in full command of senses and intellect, stood on a railway track, looking at an approaching engine until it ran him down, no judge would leave it to the jury to say whether the conduct was prudent. If the whole evidence was that he attempted to cross a level track, which was visible for half a mile each way, and on which no engine was in sight, no court would allow a jury to find negligence. Between these extremes are cases which would go to the jury.”).

63See supra, Part II.C.
*Horning v. District of Columbia* was a Supreme Court case about a pawnbroker accused of violating a federal statute governing the amount of interest he could charge within the District. The case reached Holmes and the other justices of the Supreme Court on a question of whether the judge committed reversible error when he gave to the jury what the dissenting Justice Brandeis called a “moral command”:

> “In conclusion, I will say to you that a failure by you to bring in a verdict in this case can arise only from a wilful [sic] and flagrant disregard of the evidence and the law as I have given it to you, and a violation of your obligation as jurors. . . . Of course, gentlemen of the jury, I cannot tell you, in so many words, to find defendant guilty, but what I say amounts to that.”

Because this case has to do with statutory—as opposed to common—law, it may not afford for a discussion of juries as determiners of legal standards. That standard has already been set with “mathematical precision” by Congress—in this case, non-licensed pawnbrokers were forbidden from charging over six percent interest. But it does provide a good look at Holmes’s later position (now more than twenty years after *Law in Science and Science in Law*, and nearly forty after *The Common Law*) on the competence of juries even as fact-finders, and the competence of juries has been significant in Holmes’s discussions of their greater role.

As an aside, and speaking of jury competence, another Supreme Court case provides similar insight. *Frank v. Magnum* required the Court to decide whether a defendant’s due process had been violated by a level of disorder in the courtroom that amounted to “mob domination” of the jury. Holmes, dissenting, declares that due process cannot be reached “by securing the assent of a terrorized jury.” His dissent does not definitively show he views juries as incompetent (in this case, in rendering verdicts of their own free will), but the color of his

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65 *Id.*
66 *Horning*, 254 U.S. at 136 (majority opinion).
67 *See* *Frank v. Magnum*, 237 U.S. 309, 324 (1915).
68 *Id.* at 347 (Holmes, J., dissenting).
language, read in the context of *Horning* and Holmes’s other expressions of his view on the role of juries, certainly supports that view.

Returning to *Horning* and its question of whether a judge erred in quite peremptorily directing a guilty verdict, Holmes held that the judge had not overstepped his bounds in instructing the jury that the facts were undisputed and that the law required a certain result on those undisputed facts.\(^{69}\) Essentially, Holmes was explaining the judge’s role in deciding questions of law and the jury’s role in deciding questions of fact. At trial, however, it was not clear that the facts were in fact undisputed. In his opinion, Holmes himself admits that “there has been no formal agreement” as to the facts.\(^{70}\) Yet he comfortably states “there was no doubt of [the defendant’s] guilt.”\(^{71}\) Interestingly, Holmes only makes that statement to justify the means by which the verdict was obtained.\(^{72}\) Even though he is affirming the lower court’s actions, he recognizes they may not have been correct. He essentially suggests that the defendant may have been wronged, but dismisses it as having occurred only in a “purely formal sense.”\(^{73}\)

In the same manner, Holmes obnoxiously states that the jury had a “technical right . . . to decide against the law and the facts,” simultaneously describing the useful role of the jury while portraying them as obsolete.\(^{74}\) His statement, on the one hand, acknowledges the role of the jury in deciding the facts and interpreting legal standards, interpreting as one necessarily does—if only to a small degree—when applying facts to law. On the other hand, his wording implies an *objective* interpretation of law and determination of fact that the jury is left to either accept or

\(^{69}\) Id. at 137–39.
\(^{70}\) Id. at 138.
\(^{71}\) Id. at 139.
\(^{72}\) See id.
\(^{73}\) See id.
\(^{74}\) See id.
deny. In this way, once again, though in its most cynical form yet, Holmes presents the tension between the role of the jury as an institution, as a theoretical concept, and the role of the single jury, the jury in practice.

And indeed, Holmes may have been thinking more about the larger theoretical role of juries as barometers of the community than he lets on. The statute in question in *Horning* provided a bright line in a way—six percent. But the jury may have had to decide what it meant to be “licensed.” Or they may have determined that reasonable efforts to obtain a license, when underway, exempted individuals from the reach of the statute in *their* interpretation of it. That interpretation, of course, would be informed by the feelings of the community. In the context of Holmes’s earlier writings, it is not difficult to read this into his cynical phrasing of the jury’s right to “decide against the law.”

It can be somewhat troublesome to discuss on equal footing both a judicial opinion and legal scholarship. The vastly different purposes of the two “genres” make the comparison less than scientific. For example, do *Gray* or *Horning*, or any of the other opinions referenced here, present an accurate view of what Holmes really thought? In deciding a case, he should be stating what the law is, not expounding on how he believes it *should* be viewed. Then again, they are called “opinions” for good reason. Reasonable minds can differ on the law—indeed, in *Horning*, Brandeis offered his own well-reasoned dissent. Furthermore, what more were *The Common Law* and Holmes’s articles than attempts to state the law?

*Horning* presents but one case, and one outside of the context of scholarship on legal theory, and as such might not tell us much, but it makes one wonder that perhaps as Holmes aged, his experience on the bench bred a cynicism that caused him to question the theoretical

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75 See id.
framework he built in *The Common Law*, at least within the confines of a judicial opinion—within the practical arena of the Court—where it comes to applying, as opposed to merely expounding upon, the law.

V. Conclusion

It is time to answer the question of whether Holmes stayed true to his theory over the years. From the time he first and famously expounded on the role of the jury in *The Common Law*, then through the years in his scholarly articles, and finally as a judge, did Holmes’s theory remain consistent? While certain aspects of his later works may give us pause, the better answer is yes. That is not to say he never questioned himself, changed his tone, or refined his thoughts. But by and large, the theoretical framework Holmes built in *The Common Law* became the house he inhabited for the duration of his legal career, indeed of his entire life as a legal thinker. At times Holmes reiterated his theory in ways that flexed the framing, cast the walls in a darker shade of paint, or even rumbled the foundation—but the house stood. And considering he erected a structure before his fortieth birthday that he was able to occupy for half a century, it is easy to understand the legendary status of Oliver Wendell Holmes, Jr.