Justice Holmes at the Intersection of Philosophical and Legal Pragmatism

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I. Introduction

When Richard Rorty published *Philosophy and the Mirror of Nature* in 1979, his academic reputation helped reintegrate the tradition of classical American pragmatism into the academic conversation among contemporary philosophers. However, Rorty’s novel reading of classical pragmatists, such as John Dewey, rankled those scholars, who built their careers as curators of Dewey’s work during his unfortunate exile from academic philosophy departments. The situation worsened for these Dewey scholars, as others began reading all references to “pragmatism” as references to Rorty’s ideas, taking Rorty’s creative reading of the classical pragmatists as authoritative. Rorty’s previous allies in analytic philosophy mostly disapproved of the philosophy born of Rorty’s pragmatic turn, nor did they hold in high regard those philosophers, such as Dewey, who inspired his new vision for philosophy. Thus, opportunities to reintegrate Dewey’s ideas into mainstream academic philosophy were, at least for a time, lost.

Something similar is afoot in the prolific scholarship on legal theory by Judge Richard Posner, especially since his turn away from law and economics toward “pragmatism.” Legal scholars began reading “legal pragmatism” as references to Posner’s thought alone. In the same way that scholars of classical...
American pragmatism responded to Rorty’s scholarship by publishing helpful criticisms of Rorty’s version of pragmatism,¹ my present task is part of a larger process of rethinking Posner’s version of legal pragmatism. If Rorty’s inspiration can be attributed, in part, to John Dewey, Posner’s can be attributed, in large measure, to Oliver Wendell Holmes, Jr. Posner buys into three central insights of legal pragmatism, whose origins lie in the work of Holmes, anti-formalism, the prediction theory of the law, and a modicum of indeterminacy in judicial decision making. Posner is a pragmatist in that he is skeptical of “legal reasoning,” of formalism in law, and he advocates the incorporation of natural and social scientific knowledge into the law. Further, Posner is a methodological pluralist, refusing to reduce the process of adjudication to any one method or approach, such as textual literalism or originalism. He takes the mask off of these judicial theories and claims that underneath each is a pragmatist. Posner claims that the core of legal pragmatism hinges on the recognition of a certain ambiguity and indeterminacy at work in the law, which usually functions between two conceptual poles, such as “rule-of-law and case-specific

consequences, continuity and creativity, long-term and short-term, systematic
and particular, rule and standard.”

But Posner’s central position, to which the present article is a propadeutic
to a more substantial criticism, is that academic philosophy and philosophical
pragmatism in particular have no role to play in legal pragmatism as it manifests
itself in the process of adjudication or in the process of legal scholarship.
Posner’s method, in part, is to point to what he calls “academic moralists” and
“constitutional theorists” and show how their work does not and should not
affect the law either at the statehouse or the bench. However, these moral,
political, and legal philosophers, Martha Nussbaum, John Rawls, H.L.A. Hart,
and Ronald Dworkin among them, do influence legal theory. Therefore, Posner’s
position is not only that philosophy does not have a role to play in the law, but
most legal theory does not either—because it is so infused with philosophy.

If legal theory is not relevant to the law, legal institutions seem
intellectually impoverished, ignoring the storehouse of wisdom in philosophy
and depriving law of the intelligence necessary for social growth. Posner’s
polemical stance has not gone unnoticed in the world of jurisprudence and legal
theory. But the result has been that legal scholars have now begun to associate

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legal pragmatism with Posner’s seeming “anti-theory.” Thus, an important element in rethinking Posner’s version of legal pragmatism is presenting a defense of Holmes as a philosophical pragmatist and a pragmatist in the tradition of his contemporary, Charles Sanders Peirce. Such is my present task. Holmes’s scholarship resides at the intersection of philosophical and legal pragmatism, where Posner imagines that these roads run parallel to each other and therefore do not intersect.

The inclusion of Holmes within the network of philosophical pragmatism is controversial in the scholarly community. The reasons for the resistance to associate Holmes with philosophical pragmatism vary widely, and I only have space to mention a few of them. First, anthologies of jurisprudence almost universally include Holmes’s 1897 speech “The Path of the Law” under the category of Legal Realism, followed by essays by self-titled realists such as Jerome Frank. This is understandable but misleading. The legal realists self-consciously took Holmes’s “The Path of the Law” as their philosophical starting point and inspiration, building on Holmes’s prediction theory of the law, the

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3 A notable exception to this trend is the recent publication by Michael Sullivan, *Legal Pragmatism Community, Rights, and Democracy*, (Bloomington: Indiana University Press, 2007), whose third chapter is called “Posner’s Unpragmatic Pragmatism.” Sullivan’s chapter makes criticisms of Posner’s version of legal pragmatism, with which I agree, but which lie outside the purview of the present article.

4 For a recent instance of this mode of organizing a text see *Readings in the Philosophy of Law*, Ed. Keith Culver, 2nd Edition (Broadview Press, 2007).
premise of indeterminacy in judicial decisions, and the idea that judicial
decisions are not made using formal, syllogistic logic alone. This genealogy
makes the association of Holmes with the realists reasonable and
understandable. But it is misleading given the divergent political prejudices of
Holmes, on the one hand, and of the legal realists generally, on the other. While
the realists were affiliated with support of the progressive movement and New
Deal legislation, Holmes was severely skeptical of left-leaning politics. He
wrote, “The social reformers think that they can get something for nothing by
legislation. The wholesale social regeneration which the reformers expect cannot
be got by tinkering with the institution of property, but only by taking in hand
life and trying to build a race. That would be my starting point for an ideal of the
law.” He criticized his correspondent, Harold Laski, at length on the matter:
“[Harold Laski] seems to believe in the fundamental thesis that the rich exploit
the poor and the ideal of equality, both of which (with some slight explanation) I
believe to be drool. Indeed they provoke me out of intellectual indifference into
a fiercely contemptuous wrath.” As we will see below, Holmes’s openness to

5 LL. Fuller, “American Legal Realism,” University of Pennsylvania Law Review, Vol. 82 No. 5
(March, 1934), 429.
6 Posner, Law, Pragmatism, and Democracy, 84.
University of Chicago Press, 1992), 118.
8 Holmes to Einstein, May 19, 1927 in The Holmes-Einstein Letters Correspondence of Mr. Justice
Holmes and Lewis Einstein, 1903-1935, To Lewis Einstein, Ed. James Bishop Peabody, (New York:
progressive social legislation was not a product of his political prejudices, but a function of his pragmatism, his methodology of adjudication in the spirit of experimentalism and judicial self-restraint.

The second reason I hypothesize for the distance between Holmes and philosophical pragmatism in contemporary scholarship is the way that the most prolific scholar on legal pragmatism, Posner himself, separates legal pragmatism from philosophical pragmatism. Consider several premises taken together on this matter. (1) Posner’s version of legal pragmatism stands free of philosophical pragmatism.\(^9\) (2) Posner’s most significant antecedent for his legal pragmatism is the jurisprudence of Oliver Wendell Holmes Jr.\(^10\) (3) According to Posner, in order to understand pragmatism as a mood and method, we need not look to the philosophy of Charles Sanders Peirce, (who coined the pragmatic maxim later

\(^9\) Posner divides pragmatism into two types, philosophical pragmatism and everyday pragmatism. Everyday pragmatism demonstrates the traits common to philosophical pragmatism, such as fallibilism, experimentalism, and consequentialism but again is independent of them. And it would seem that the utility of everyday pragmatism is expressive practically in law without remainder. Everyday pragmatism, according to Posner, demonstrates common and valuable features with respect to law. Its legal principles are contingent, contextual, empirical, and situated historically. These beneficial features apply to the judge, who is situated in a specific context and who needs to examine the cultural and consequential features of the case, assembled empirically. Everyday pragmatism is somewhat hard-nosed, somewhat cynical, but thoroughly realistic in its willingness to use rhetoric to decide cases “without taking the rhetoric of legal formalism seriously and without bothering [the judge’s head] about pragmatic philosophy either.”\(^9\) Posner has accepted the destructive and critical work of philosophical pragmatism, but rejected its claims to have any constructive merit, stating, “There is no longer anything in philosophy to help a judge decide cases. We are back in the sunlight.” Posner, Law, Pragmatism, and Democracy, 53. Posner’s position is in line with Thomas Grey, who makes a similar argument in “Freestanding Legal Pragmatism,” 18 Cardozo Law Review 21, (September, 1996), 21-42.

popularized by William James). These premises taken together lead to the conclusion that pragmatism as a mood and method and legal pragmatism as a philosophy of law may lead us to investigate Holmes’s jurisprudence, but they need not lead us to read Peirce, the founder of philosophical pragmatism. I intend to demonstrate that this conclusion is misguided.

The last reason for the distance between Holmes and philosophical pragmatism points us back to the opening words of this article. Contemporary scholarship on pragmatism in legal journals, as we will see below, reads the history of pragmatism through the lens of Richard Rorty. This is a mistake, one which distorts the philosophy of Holmes by distancing it from pragmatism—only when pragmatism is read as an index to Rorty’s creative reading of the classical pragmatists. Part of my task in this article is to amend the second two of these possible reasons for distancing Holmes from philosophical pragmatism.

However, other Holmes scholars conclude that Holmes was not a pragmatist in a more piecemeal way. And my defense of the influence of classical pragmatism on Holmes, and of his active role in giving life to pragmatism as a philosophical movement, deserves to be embedded in an appraisal of these opinions as well. Thus, before presenting my substantial positive defense of Holmes’s pragmatism, I will give a critique of several

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arguments used to distance Holmes from the pragmatic tradition. Next, I will present an in-depth exposition of several elements of Charles Sanders Peirce’s pragmatism most relevant to a discussion of Holmes. Last, I will offer Holmes’s inheritance of Peirce’s philosophy as illustrative of his pragmatism in action.

The central position I advance here is that Holmes’s historical legal scholarship and several of his judicial arguments evince the pragmatic sensibility of C.S. Peirce. Holmes puts to work several elements of Peirce’s pragmatism: (1) that we must infer knowledge internal to the mind by external signs; (2) that the best method to fix our beliefs and settle our doubts relies on a communal inquiry as opposed to authoritarian dictates; (3) that the meaning of a concept, such as law, is found in the effects of its enactment; (4) that fallibilism, liberalism, and skepticism of absolute truth are the proper norms to deter dogmatism and authoritarianism; (5) that the reality of values and ideals are found in their functional effects; and (6) that the norms, principles, standards, and rules, which guide the process of judicial inquiry, are generated by the facts of the case, as opposed to being a priori principles (versus natural law theory) and as opposed to lacking any reality at all, (versus nominalism). Peirce offered us the idea that to understand the meaning of a concept, we must look to its practical effects. I offer the idea that if we want to know the meaning of pragmatism itself, we
should look to its practical effects in the scholarship and judicial decisions of Oliver Wendell Holmes, Jr.

II. Sketches of Holmes and Pragmatism

Recently, Louis Menand incorporated Holmes into the tradition of American pragmatism. Other commentators, such as the editor of his collected works, Sheldon M. Novick, have tried to distance him from it. Judge Richard A. Posner has taken Holmes as his entry point to legal pragmatism and gives a fitting defense of Holmes as a pragmatist. To defend Holmes as a pragmatist, I will first take on the position of those who try to distance him from the tradition, including Novick. Novick draws his conclusion on the weight of references Holmes made to the philosophy of William James, and from pronouncements Holmes made concerning the nature of truth. Concerning the former, Holmes wrote of James, “I regard [James's Pragmatism] as an amusing humbug. […] His suggestions that prayer is answered in the subliminal consciousness was a true spiritualists' thought: a miracle, if you will turn down the gas. So as to free will. And as to the will to believe.” This is the same passage Albert Alschuler cites to distance Holmes from pragmatism. However, I do not see how the fact that

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12 Louis Menand begins three recent works, Pragmatism (1997), The Metaphysical Club (2001), and American Studies (2002), on the pragmatist tradition and American intellectual history with excerpts from Holmes’s work and chapters on Holmes.


14 Holmes to Lewis Einstein, June 17, 1908, in The Holmes-Einstein Letters, 35-36.
Holmes’s suspicion of James’s position concerning spiritualism renders the proposition that Holmes was a pragmatist bunk. Peirce, the central philosophical pragmatist in my present analysis, as well as John Dewey, seemed equally suspicious of some of James’s positions, (including his supposed nominalism and his transformation of pragmatism from a theory of meaning to a theory of truth). But we do not fail to characterize Peirce or Dewey as pragmatists.15

As to the latter of Novick’s evidences, he makes two points. First, Holmes viewed truth as the system of his limitations—his “can’t helps.” These included all his tastes and moral premises which he could not reason around, those which paved the path he had to travel.16 Novick remarks: “This was not relativism; still less was it pragmatism.”17 Novick may be correct in his first assertion, but I wholly disagree with the second. Novick does not give any reason for Holmes’s theory of truth not to be pragmatic. Holmes’s vision of truth certainly begins with experience in a radically empirical way and aligns with the idea of truth as that which pushes back at us in experience or as that which lies at the horizon of our knowing, an ever-receding ideal. Later Novick cites Holmes’s tendency to

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15 Peirce’s disagreements with James concern both James’s use of Peirce’s pragmatic theory of meaning as theory of truth and James’s supposed nominalism. On this latter note, Peirce was a thoroughgoing Scotistic realist, arguing for the reality of universals, ideals, although he conceived of ideals as dynamic and evolving, not fixed or static.
verify his ideas by comparing them with others’. Then Novick triumphantly states that it is “not the pragmatists’ social test of truth by agreement,” but instead a “triangulating and checking” of observations by reference to other points of view, the truth of which were a part of Holmes’s “can’t helps.” I suppose I miss the distinction between a pragmatic and consequentialist social test of truth and a triangulating among others observations in order to get at the truth.

Alschuler claims that Holmes cannot be a pragmatist because Holmes believes in a mind-independent reality, often stating of himself that he is in the universe, rather than it being in him. Here, Alschuler makes the mistake of reading the tradition of pragmatism through the anti-realism of Richard Rorty. Otherwise he would not make reference to pragmatism’s “anti-realism.” But juxtaposing Holmes’s belief in a mind-independent reality and his criticism of James, Alschuler has insinuated that James was an anti-realist. James explicitly claimed to be defending a version of realism, and is widely acknowledged as a realist. Alschuler’s reference to “pragmatism’s anti-realism” relies only on a claim made by David Luban. Next Alschuler cites in his notes that one of Holmes’s commentators, Anne Dailey, called Holmes a pessimist. Novick

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18 David Luban, “Justice Holmes and the Metaphysics of Judicial Restraint”, 44 Duke Law Journal, 488. However, Luban’s claim refers only to Holmes’s realism and not to James’s or anyone’s pragmatism as antirealistic.
recruits this as further evidence against Holmes’s pragmatism, disregarding Holmes’s claim about himself that he was neither an optimist nor a pessimist.\footnote{Alschuler, \textit{Law without Values}, 18. And see Anne Dailey’s \textit{Holmes and the Romantic Mind}, 48 Duke L J 429, 483 (1998). Holmes to Alice Stopford Green, Oct 1 1901, \textit{The Essential Holmes}, 111.}

On my reading, both Novick’s and Alschuler’s reasoning fails. They seem to treat pragmatism as a monolith, a finite and demarcated school of philosophy with distinct and specific theses, apparently, Jamesean, anti-realistic, and optimistic. However, it is not the case that all we need to understand pragmatism is to read the works of certain philosophers, such as William James, with whom Holmes disagreed on some issues, and then decide whether or not Holmes fits the bill. Even less do we need to decide before hand which metaphysical or temperamental positions one would have to take before making our determination.

In place of these positions, I offer my own brief defense of Holmes as a pragmatist in areas not covered in detail below. In line with the tradition of pragmatism, Holmes reasoned from the particulars of experience toward general principles, rejecting the purely formal deduction of conclusions from first premises. He was skeptical of invoking as first premises universal, \textit{a priori} truths. His concept of truth, as an “unattainable” to strive after, was thoroughly pragmatic, in line with Peirce’s concept of truth as an ideal achieved only after an
indefinite amount of inquiry.\textsuperscript{20} Holmes’s ethics was equally pragmatic: he avoided appeals to moral principles too far removed from our experience. His ethical principles were contingent, reflecting one’s cultural conditions, and emerging from the felt problems of one’s environment.\textsuperscript{21} Further, Posner describes his own position on morality, “pragmatic moral skepticism” as in line with Holmes’s moral philosophy.\textsuperscript{22}

With this introductory defense in view, I will turn to the classical pragmatist, Peirce, to outline two ways that Holmes puts a pragmatic conception of knowledge and inquiry to work in legal theory. The first way concerns Peirce’s insight that, by adopting as a guide the idea that our cognitions are derived from external observations, we can advance our thinking and avoid confusion and error. The second way concerns Peirce’s discussion of the various methods by which we amend the irritation of doubt through inquiry and stabilize our beliefs. I will show that Holmes’s development of the external standard in \textit{The Common Law} follows the former normative logic, and his dissents in \textit{Abrams v. the United States} and \textit{Lochner v. New York} promote the latter path for fixing belief.

\textbf{III. C.S. Peirce’s Epistemology}


\textsuperscript{22} Posner, \textit{The Problematics of Moral and Legal Theory}, ix.
Holmes wrote that “the tendency of the law everywhere is to transcend moral and reach external standards.” The analysis by which Holmes arrives at this dictum concerns his appropriation of pragmatic epistemology. The latter pertains both to the rules of legal materiality and the manner by which we know what we know. Tracing the origin of the rules of legal materiality involves a close reading of Holmes’s preparatory essays for *The Common Law*, while discerning the epistemological elements of the external standard is more difficult. Holmes thought that the law opened up a way to philosophy as much as anything else, and his purpose in legal scholarship tended toward a philosophical treatment. However, Holmes did not often attribute his ideas to the influence of his teachers or peers, which was common among 19th century intellectuals. But this difficulty should not deter an attempt to trace the philosophical influences on Holmes’s thought, which is my purpose in this section. In *The Metaphysical Club*, Louis Menand, building on the work of Max Fisch, offers an intellectual history connecting Holmes with several philosophers, including Peirce. In 1872, Holmes met with this circle of intellectuals in Boston, although it is unclear how frequently. These meetings were wedged in between

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24 Oliver Wendell Holmes to Ralph Waldo Emerson, April 1876, Ralph Waldo Emerson Papers, Houghton Library, Harvard University, bMS Am 1280 (1535).
Peirce’s publication of “Questions Concerning Certain Faculties Claimed for Man” and “Some Consequences of Four Incapacities,” in the Journal of Speculative Philosophy\(^{26}\) in 1868 and Holmes’s preparatory works for The Common Law, published in 1876.

My argument is that Peirce’s conclusions in these essays are the most concise philosophical basis for the external standard in The Common Law, which I will discuss after an exposition of Peirce’s insights. The questions Peirce raises are strictly epistemological, concerning our ability to intuit directly things outside of thought, our ability to intuit directly the self, our ability to intuit the qualities of experiences, our ability to have introspective intuitions, and our ability to think without signs.\(^{27}\) He concludes that by adopting as a guide the idea that our cognitions are derived from external observations, we can advance our thinking and avoid confusion and error.\(^{28}\)

Holmes’s object of study on the other hand is the general principle of liability; but in discerning that principle, Holmes runs squarely into similar epistemological questions concerning the state of mind of the defendant. Insofar as the state of mind of the defendant determines the moral characterization of the act in question, we must scrutinize the ability to portray this state of mind. This


\(^{27}\) Peirce, The Essential Writings, 64-65.

\(^{28}\) Peirce, The Essential Writings, 65.
task is further removed from those Peirce investigates, as the court is not attempting to intuit its own experiences introspectively, but the defendant’s. Insofar as the state of mind is relevant, the courts must reason towards it by external facts. Holmes’s arguments for the external standard parallel Peirce’s arguments by which he concludes that our cognitions are derived from external observations. Peirce uses the term external to distance cognition from reliance on the capacity of intuition. If intuition is unmediated access to knowledge, then cognitions based on external facts are mediated by signs. Furthermore, the premises of our reasoning are themselves also conclusions of other cognitions. Holmes develops an external standard to show how conclusions concerning concepts ordinarily thought of as internal, such as intent, are derived from external observations. Holmes uses an historical analysis to show that the concepts of intent and malice, for instance, are late developments which evolved from more primitive legal conceptions which relied on external standards. Before I trace the way Holmes puts Peirce’s ideas to work below, I will recount Peirce’s arguments most relevant to Holmes.

Central to Peirce’s investigation concerning these capacities claimed for man is the term “intuition.” He defines this as any cognition, which is not
determined by a previous cognition, but instead by its transcendental object.\textsuperscript{29} His short-hand way of defining this is a “premise not itself a conclusion.”\textsuperscript{30} To summarize the question at hand, we might work backwards in reflection from what we feel we know as an intuition. For instance, A=A is no doubt felt to be known as an intuition, and Peirce does not doubt or attempt to invalidate that. Instead the question hinges on whether this proposition is \textit{known} intuitively and not from a previous cognition. And although it certainly feels as though we know it intuitively, to \textit{assert} that our feeling of its intuitive nature is itself intuitive backs our inquiry into a regress, whereby we must at some point presuppose that which we are trying to demonstrate.\textsuperscript{31} Whether a cognition has been determined by another cognition or by a transcendental object does not seem to Peirce to be a part of the cognition itself. If the “action or passion of the transcendental ego” contains an element a part of which is this determination or

\textsuperscript{29} Peirce’s use of “transcendental object” here deserves some marginal explanation. Taking any intentional object of consciousness, we can trace our ability to constitute it as an objective unity or whole out of the continuous flow of experience. The description of the process by which we form these transcendent objects, or objective unities, belongs to phenomenology. But if the objective sense of the transcendent object itself is the condition for the possibility of our cognitions, that object is better characterized as \textit{transcendental}. Thus, as our experience runs up against that which we never intuit as a unity or whole, but that missing whole still serves as a necessary condition of our ability to think and solve problems, we can characterize the object as a transcendental object. That is not the issue at this point in the article by Peirce, but it is fair to say that Peirce, arguing for the reality of universals, is doing transcendental philosophy, and therefore uses the term transcendental. Peirce later treats his transcendental arguments as abductions, hypotheses whose truths are retroduced based on the evidence of experience. That is, his transcendental arguments lose their \textit{necessity}, and they function as hypotheticals, \textit{possible} conditions of the knowledge that ensues from their assumption.

\textsuperscript{30} Peirce, \textit{The Essential Writings}, 66.

\textsuperscript{31} Peirce, \textit{The Essential Writings}, 67.
nondetermination by a previous cognition, then we do have this intuitive power to differentiate an intuition from another intuition.\textsuperscript{32}

But Peirce argues that there is no evidence that we have this faculty.\textsuperscript{33} Several arguments support his case.\textsuperscript{34} But his most decisive argument against the evidence for this faculty is by reference to the intuition of two dimensions of space.\textsuperscript{35} The momentary excitation of any one nerve point on the retina or elsewhere cannot produce a sensation of two-dimensions, and therefore the momentary intuition of all of them cannot. Instead of reconstructing his arguments in detail, I want to show that this first capacity claimed for man, and disclaimed as established for man by Peirce, is the epistemological groundwork for the other incapacities.

Concerning knowledge of our personal selves, Peirce wants to know whether we have an intuitive self-consciousness or whether knowledge that “I” exist (not the I/ego but my personal self), is determined by previous cognitions. Again we can work backwards from what we surmise we know based on an

\textsuperscript{32} Peirce, \textit{The Essential Writings}, 67.
\textsuperscript{33} Peirce, \textit{The Essential Writings}, 67.
\textsuperscript{34} First, recourse to intuition is analogous to the reliance upon authority in the Middle Ages. Second, witnesses are often unable to distinguish between what they have seen and what they have inferred. Third, the evidence presented in dreams is too flimsy to provide the ability to reconstruct it, and that evidence is constantly confused with our present interpretations of the dream in our reconstructions of it. Fourth, children are unable to distinguish between an intuition and a cognition determined by others when asked how they learned their native language.
\textsuperscript{35} Peirce, \textit{The Essential Writings}, 71.
intuition. It might be argued that we are most certain of our own existence and that this fact, viewed as a conclusion inferred from some external fact as its premise, cannot be more certain than its premise. However, if this conclusion is inferred from all other external facts as its premises, it can indeed be known with more certainty than if it were an intuition not also a premise. Similarly, when many witnesses testify to one particular event’s occurrence, their conclusion deserves more weight than based upon one witness. The occurrence of the event may be more certain than any one witness’s testimony as an external fact.36 Furthermore, Peirce has shown that we have do not possess the capacity to determine intuitively whether our cognition (in this case of ourselves) is known intuitively or by a previous cognition. Thus, the intuitions we do have may not be safely appealed to in a sound theory of knowledge.

So with regard to our knowledge that we exist as private persons, what are the external premises which give rise to this conclusion? Peirce refers to the experience of a child, whose body, as the locus of all sensation, is “the most important thing in the universe,” hearing sounds and thinking not of herself hearing but of the object sounding.37 When the child wills to move an object, she thinks of the table to be moved, not of herself desiring it. Next, after acquiring the ability to communicate, the child listens to the testimony of others, and infers

37 Peirce, *The Essential Writings*, 75.
knowledge by it. Often she confirms the testimony by her own sense-perceptions, giving her own body greater importance. Often she finds the testimony at odds with her own perceptions, and by ignorance and error she becomes able to distinguish her private self from the absolute ego of apperception (that which accompanies all perceptions).\textsuperscript{38} Peirce concludes that there is no necessity in supposing an intuitive self-consciousness.\textsuperscript{39}

Peirce’s third question is whether we have any usable intuitive power of distinguishing the subjective elements of different kinds of cognition. Every cognition contains an objective side, that which is represented, and a subjective side, the passion by which it becomes represented. Peirce wants to know whether the character of the subjective element, such as imagining, conceiving, and believing, can be intuited. If we are distinguishing between sensing and imagining objects, the fact that we can discern a difference in the objects sensed and imagined serves as an argument against the need to suppose the power of intuiting their subjective difference, as we can start with the objective character of those cognitions and infer their subjective character.\textsuperscript{40} When we distinguish between beliefs and conceptions, we must confront the hypothesis that knowledge of a belief is essential to its existence. But beliefs can be differentiated

\textsuperscript{38} Peirce, \textit{The Essential Writings}, 76.
\textsuperscript{39} Peirce, \textit{The Essential Writings}, 77.
\textsuperscript{40} Peirce, \textit{The Essential Writings}, 78-79.
from conceptions by being accompanied by a feeling of conviction in them. On
the one hand, the feeling of conviction in a belief is a mere sensation, in which
case that sensation is another cognition, whose subjective character needs to be
inferred from its objective character. On the other hand, the feeling of conviction
takes the form of a judgment to act, in which case, the observation of the external
fact of the act gives rise to the inference of the sensation of conviction
accompanying the belief. Thus Peirce disposes of the arguments for the need to
suppose this power of intuiting the subjective qualities of cognitions. To advance
our knowledge, it is not necessary, according to Peirce, to presuppose this
capacity as a formal or empirical condition of an act of knowing.

I now turn to the question as to whether we can argue that we have any
power of introspection, or whether a theory of knowledge can claim that our
whole knowledge of the internal world is derived from the observation of
external facts. Peirce argues that knowledge of what is ordinarily regarded as an
internal fact is always known by inference from knowledge of what is ordinarily
regarded as an external fact. Since all perceptions have internal objects and are
partly determined by internal conditions, we can arrive at knowledge about the
mind by inference from perceptions. For instance, the knowledge of the mind
(that it contributes to the experience of qualitative redness) is derived from an
inference from redness as a predicate of something external. And a predicate stands in a formal relation to its subject that is external to the act of introspecting it.

However, it might seem that emotions do not come to pass as predicates of external objects, but instead refer to the mind by itself, and our knowledge of the mind, qua emotional, is not inferred from the character of external objects. While an emotion, such as anger, does not have a constant and stable character in its object, it does have some relative character in the external object that arouses the emotion. Peirce argues that emotions are predications concerning some object, that is, emotions are intentional and take an object. However, emotions differ from objective intellectual judgment by being less relative to the general structure of the mind and more relative to the specific external circumstances of the emotional person. Even depression, an emotion which seems to have no definite object, comes to consciousness by way of the “tinging of objects of thought.” These emotions, according to Peirce, are simple predications of external objects, not just affections of self.

Furthermore, Peirce states that what can be said of the emotions in general is true in particular of the moral sense, which either makes predications of

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44 Peirce, *The Essential Writings*, 104.
45 Peirce, *The Essential Writings*, 104.
something other than the private self or is determined by previous cognitions, because there is no epistemically reliable intuitive power of distinguishing the subjective modes of consciousness.\textsuperscript{46} With less argumentation, Peirce dismisses the need to suppose this power for the sake of explaining the sense of willing. Volition is “the power of concentrating the attention, of abstracting.”\textsuperscript{47} Therefore, we can infer from abstract objects the power of abstracting much as we infer the power of seeing from colored objects.

Peirce’s early epistemology registers as an attack on Cartesianism. Descartes’ method begins in radical methodological doubt, but relies on intuition of clear and distinct ideas in order to resolve the doubt and constitute knowledge. Peirce calls into question this faculty of intuition and its bedfellow, introspection, claiming that we do not need to suppose such faculties in a theory of knowledge. Instead, we reason toward internal objects of cognition by external signs. As we will see, Holmes appropriates this logic and applies it historically in his development of the “external standard” in \textit{The Common Law}.

And below, we will see how Peirce illustrates the various methods by which we

\textsuperscript{46} Peirce, \textit{The Essential Writings}, 80.

\textsuperscript{47} Later in the essay entitled, “Consequences Concerning the Four Incapacities,” Peirce makes the argument that attention is the power of abstracting, of concentrating on one feature of an object over time connecting it by means of thought-signs with later thoughts. The repetition of the same predicate in several subjects arouses our attention, which is of an inductive character. Attention then affects the nervous system creating nervous habits and associations. Voluntary action then is a result of the sensations produced by habits. In the definition above of volition as the power of attention and abstracting, Peirce skipped these argumentative steps.
resolve the irritation of doubt into belief, during which he problematizes the methodological doubt with which Descartes begins. Below, I will illustrate how Holmes expresses this normative science of logic in his argument to protect free speech in the Abrams dissent.

IV. Pragmatic Epistemology in Holmes’s Preparatory Essays for The Common Law

Holmes’s preparatory essays for The Common Law, published in the mid-1870s, build on Peirce’s epistemological insights in order to establish a general principle of liability for the common law. Holmes’s external standard of legal liability relies on several factors articulated by Peirce, including both the lack of an intuitive ability to distinguish between subjective modes of consciousness and the lack of the ability to have introspective intuitions. These factors provide an epistemological groundwork for the historical analysis Holmes uses to uncover the external standard in The Common Law. Upon these foundations, Holmes shows that the language which draws moral distinctions in actions, such as malice, intent, and culpability, is only an inference based on external circumstances.

Holmes treats the evolution of the external standard for legal liability historically. In “Primitive Notions in Modern Law,” Holmes endeavors to show that civil liability depends not on culpability, as a state of the defendant’s consciousness, but on his failure to meet a standard of action or non-action.
When the case falls between the extremes of liability and not being liable, then the court adopts the standard of the jury, which is what they think the conduct of a “prudent man” under the same circumstances would have been. The fact found by the jury is the same as other facts of the case, that of a statute, or a custom, and the function of all of these is to “suggest a rule of law.”

Holmes attempts to overturn the scholarship of his predecessors, who argue that civil liability has its roots in Roman law on the grounds of culpability. The assumption Holmes is questioning is that culpability is a function of an internal state of mind of the defendant. But Holmes drives a wedge between culpability and liability to show that the latter cannot be reduced to the grounds of the former. Rather, the language of moral culpability is derived from the observation of external facts, the position articulated by Peirce.

Holmes begins by stating three cases, each of which lead to a ruling of liability on behalf of the defendant. The first, building a house which falls and does damage to his neighbor, suggests negligence and therefore culpability. The second, owning a dangerous animal who gets free by no negligence and does damage to his neighbor, suggests only “remote heedlessness” by owning such an animal, and also leads to liability. The last, a servant driving a master’s cart, carelessly runs down another, suggests “remote negligence,” and the master is

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held liable. From these examples Holmes turns to an 1851 Congressional statue which states that owners of ships in cases of maritime loss can surrender the vessel and the freight to the losers and thereby cease further proceedings. The legislators based this limit of the ship owners liability on the principle that if a merchant puts a portion of his property at risk in a hazardous venture, then his stake should be limited to what he puts at risk.\footnote{Holmes, \textit{Collected Works}, Vol. 3, 5.} I will return to this example after exposing the historical analysis which gives rise to his conclusion.

Holmes then turns to the rule of criminal pleading in an indictment for homicide. In the common law, this rule determined that an indictment for homicide must set forth the value of the instrument causing the death, so that the king or his grantee might claim forfeiture of the “\textit{deodand},”\footnote{Holmes, \textit{Collected Works}, Vol. 3, 5.} the cursed instrument, which according to British Common Law was to be “given to God.” The jury would appraise the value of the instrument, and the defendant would be compensated by that amount. Holmes traces the development of the principle of the \textit{deodand} to several primitive sources. First in the Twelve Tables, the animal which caused damage was to be surrendered as payment. Second, Gaius applied the same principle to children and slaves, who caused damage. Third, Ulpian reasoned that this applied to inanimate objects as well. In all of these cases, the
liability did not stand on the ground of fault.\textsuperscript{51} Furthermore, the action was brought against the owner of the \textit{deodand} at the time the action was sought, not at the owner at the time the damage was done.\textsuperscript{52} In even more primitive cases, we see that liability is attached to the offending thing, not the human agent, unless the offending thing was a mere instrument of the offending agent.

Holmes regresses further from Roman law, which was quite developed, to more primitive Greek customs. In doing so, he shows that Draco ordered that the process should be carried against inanimate things. Aeschines mentions that they banished beyond their borders inanimate things which caused the death of a man. The Jews stoned the ox which killed a man and refuse to eat it when after it was killed.\textsuperscript{53} Upon these examples and others, Holmes bases his reformation of the ground of liability.

Holmes shows that the law has evolved from its primitive forms, and its principles have transformed along the way. But the order of the transformation is important. It has proceeded from external standards to internal determinations. The history of the principle has reflected the order of operation which Peirce outlined for the sake of pure epistemology. In its early form, the principle of the law blamed the inanimate object, as the proximate cause of the

\textsuperscript{52} Holmes, \textit{Collected Works}, Vol. 3, 6.
\textsuperscript{53} Holmes, \textit{Collected Works}, Vol. 3., 7.
injury, analogous to the child who does the same, when an inanimate object is
the cause of her injury. Holmes cites several examples of revenge taken on living
things. Kuki tribes of Southern Asia needed to kill the tiger and eat it to avenge a
death it caused and cut down a tree and scatter it in chips if it fell on someone
and killed them. Holmes concludes that the development from primitive to
modern is one from vengeance to compensation and one from inanimate objects,
to living things, to owners of living things, to knowledge of the owner of the
living thing and finally to the point where attention is paid to negligence and
culpability.54 Again the order of the evolution of the principle works along the
lines of Peirce’s claims concerning epistemology. The empirical and analytical
work done by Holmes uses analogies to children as well, showing that
knowledge of things internal to the mind is of a second-order nature. The
inquiry proceeds from external facts to internal knowledge. The principle of
liability evolved in a similar pattern.

But the law must reflect our manner of knowing. Therefore, although the
evolution of the law proceeds, in Holmes’s thinking, from primitive to modern
and from external to internal principles, analysis of the law reveals the external
standard as the governing principle. Legal analysis refutes the efficacy of
recourses to evidences of states of minds of the defendant to purport moral

culpability. Instead the analysis shades away the moral side of the act in question.\textsuperscript{55}

Returning to the example of maritime law, Holmes claims that much modern law has its grounds in the animation and personification of the ship \textit{herself}.\textsuperscript{56} The case of the act of 1851 does not rely on a doctrine of agency, in which case the owner would be held liable for the whole damage, but this is not the case. Holmes shows the connection between the 1851 law and these cases of the history of liability in the common law in order to reveal that the ship herself is the limit of the liability of the owner.\textsuperscript{57} In a broader sense, he is proceeding towards the development of the external standard in tort law, which turns the focus away from the alleged intent of the defendant (as considered under a doctrine of agency) and more towards consequences of the defendant’s actions as determined by the external facts of his circumstances.

Embedded in Holmes’s development of a general external standard of legal liability is a critique of the foundations of the concept of possession in the German tradition. Holmes undermines the philosophical presuppositions of the German school of jurisprudence by way of historical analysis, as he develops his own pragmatic standard of liability. Holmes unfolds the external standard as the

\textsuperscript{55} Holmes, \textit{Collected Works}, Vol. 3, 184.
\textsuperscript{56} Holmes, \textit{Collected Works}, Vol. 3, 11.
\textsuperscript{57} Holmes, \textit{Collected Works}, Vol. 3, 12.
general principle of liability by way of an analysis of the concepts of possession, negligence, and trespass. The origin of these concepts in German and common law reveal an external standard at work. This external standard reveals the import of Peirce’s philosophy as foundational for Holmes’s legal theory.

Important to Holmes’s development of the external standard is his reduction of rights to facts. Rights often signal a transcendental import and invite the question as to how we have knowledge of rights. Insofar as rights can be intuited, Holmes rejects them, which reflects Peirce’s dismissal of the need for a supposition of the power of intuition in its various forms. Something akin to Kantian morality considers rights as existing separately from the consequences of violating a duty.\(^{58}\) Holmes differentiates moral duties from legal duties. The “good man” has moral duties, conceived as limits on actions from his conscience or from some ideal. The “bad man” is not limited by pangs of conscience, but does care about legal consequences, which do limit his actions. Therefore, Holmes considers legal duties and rights to be nothing other than predictions about the consequences of breaking the law, as determined by the court.\(^{59}\)

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\(^{58}\) Holmes’s references to Kant should not be read as authoritative references to Kant’s practical philosophy, but rather to jurisprudence in the German tradition, which Holmes often characterizes as in a “Kantian vein.” The closest Holmes comes to a critique of Kant’s actual work comes in his references to Kant’s appropriation of Rousseau’s concept of the general will in Kant’s “Of the Relation of Theory to Practice in Constitutional Law” in *The Philosophy of Kant Immanuel Kant’s Moral and Political Writings*. Edited by Carl Friedrich. New York: The Modern Library, 1949.

In order to reduce questions of right to questions of facts, Holmes turns to an historical analysis of the law. He shows that the origin of the common-law notion of possession, and therefore wrongful conversion, is found in the redress of tracking down stolen cattle and taking them back with a strong arm. In Salic law, reacquiring stolen cattle and the executive nature of the claim to get the cattle back was based on persons, not owners, on possession, not title.\(^{60}\) The case of wrongful transfer by the bailee revealed that bailees have the possessory remedies. The right of the bailee to trespass was founded on the fact of his possession.\(^{61}\) The result of the historical analysis of this rule through German law to common law is that possession is a fact, not a right. A right, as the law considers a right, is a legal consequence of a facts defined by the law extending to contract, property, and other substantive notions.\(^{62}\) The rights of ownership or contract are founded on possessory rights. The facts which constitute possession are control of the object, which is simply the physical relationship to the object and to others with respect to it, but this control, writes Holmes, is just a “relation of manifested power co-extensive to the intent,” which Holmes analyzes first.

The analysis of intent, in terms of intent to deal with the thing as owner, begins to address the access of the court to the state of mind of the person

possessing the object. Here, he finds the German legal theory, which has operated under some form of Kantian or post-Kantian philosophy, unsatisfactory. Holmes traces the influence of this way of thinking back to Roman law and the philosophy of Jean-Jacques Rousseau. German lawyers address the issue of possession and intent to deal with the object as an owner from the perspective of the “Rights of Man,” which treats possession as an extension of the ego’s will on an externality; the right to possession is treated, by Hegel for instance, as an objective realization of free will. The treatment of intent as “self-regarding” by German lawyers “goes to the height of an intent to appropriate,” to bring the object under the “personality of the possessor.”

However, according to Holmes, the German line of thinking gets the cart before the horse, as it confuses moral and legal thinking. Running through much of Holmes’s scholarship, first articulated in “Codes and the Arrangement of the Law,” is the determination that legal duties precede legal rights. The law operates by limiting freedom of action in particular ways. The law does not grant our freedom of use of certain objects; rather it limits the freedom of others from interfering with our use. Therefore, the intent sought after in the analysis

of possession, is the intent to exclude others. The principle of intent to exclude others is the wedge that he drives between the German and the Anglo-American accounts of possession and ownership. The latter grants the right of possession to bailees because of their intent to exclude others, but it does not grant them ownership because there is not intent to hold as an owner, which is how possession is defined if the order of the law proceeds along the German lines, from rights and free will to the exercise of intent to appropriate and make the object part of one’s person.\textsuperscript{68} Furthermore, when Holmes analyzes what the power to exclude others is—as the power is co-extensive with the intent—he emphasizes that the law only deals with the power manifested in external facts.\textsuperscript{69} In reference to a burglar peering into a window at a purse, Holmes states that since the law deals with overt acts which can be known by the senses, the burglar has not manifested his intent or obverted the owner of the house’s possession of the purse.\textsuperscript{70} The inability to judge the intent of the burglar corresponds to the inability of our own introspection, but once removed. The burglar may have the intent to steal before the external facts make that intent manifest, but the court has not power to intuit that intent, nor is it legally material. The burglar’s intent

\textsuperscript{68} Holmes, \textit{Collected Works}, Vol. 3, 47.

\textsuperscript{69} Holmes, \textit{Collected Works}, Vol. 3, 54. Holmes’s example is that a child, who picks up a pocket book on the side of the street with a ’ruffian’ nearby, has the same manifested power as if he had been supported by a hundred police officers.

\textsuperscript{70} Holmes, \textit{Collected Works}, Vol. 3, 56.
can only be found by reasoning from external signs, again reflecting one of Peirce’s consequences of the incapacity to think without signs.

Holmes returns to his discussion of the so-called possession of rights. Holmes argues against the German approach to the theory which runs as follows: There may be true possession of obligations, as possession and right are co-extensive. Mastery of the will over an external object in general (be that object a thing or another will), when in accord with the general will, and consequently lawful, is called right. But Holmes claims that this is not right, but merely *de facto* possession.\(^{71}\) The difference between possession and right cannot be admissible as a legal distinction. The facts constituting possession generate rights, as do the facts which constitute ownership, even though the rights of an owner are more extensive than those of a mere possessor.\(^{72}\)

Holmes’s rejection of German legal theory concerning the grounds for protecting possession gets to the heart of the external standard at work, whose philosophical roots we find in Peirce’s early pragmatism. Holmes states that the yearning of the German mind attempts to find an “internal juristic necessity drawn from the nature of possession itself,” and therefore that the German jurists

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reject empirical grounds.\textsuperscript{73} The Germans attempt to ground this internal necessity on the philosophy of the human will:

Constraint of it is wrong which must be righted without regard to conformity of the will to law, and so on in the Kantian vein...The will is of itself a substantial thing to be protected, and this individual will has only to yield to the higher common will...the will which wills itself, that is, the recognition of its own personality is to be protected.\textsuperscript{74}

Because “the history of law is the formal expression of the development of society,” its ground must be empirical, according to Holmes.\textsuperscript{75} In the tradition of legal pragmatism, which Holmes helps initiate, society does not conform itself to the universal law. The law is a practical matter, and “must found itself on actual forces.”\textsuperscript{76} The law must conform to the externalities of empirical fact, and in doing so it formally expresses the growth of society.

Furthermore, Holmes applies Peirce’s pragmatic maxim, discussed in detail in the forthcoming section, in order to define the legal concept of

\textsuperscript{73} Holmes, \textit{Collected Works}, Vol. 3, 57.

\textsuperscript{74} Holmes, \textit{Collected Works}, Vol. 3, 57-58. Holmes is summarizing several German legal theorists including Bruns, Gans, and Puchta. However, it is probably helpful to separate Holmes’s rejection of German legal theory with his inheritance of or influence by Peirce’s epistemology. Peirce’s proclamations concerning the incapacity of intuitions of the self correspond to Kant’s paralogisms concerning the self, which is never the object of our experience. For Kant, the ‘I’ is not an object of possible experience, but it is the necessary condition of possible experience. The problem is that Holmes would probably not call himself a Kantian because his rejection of Kantianism is a rejection of Kant’s moral and legal philosophy, which rests entirely on its pure part, that is, its non-empirical part. For Holmes, the law is thoroughly empirical, and it is the empirical nature of knowledge that he and Peirce expose in the areas of epistemology and that Holmes exposes in legal theory. But it turns out that Holmes is accepting Kant’s theoretical philosophy without knowing it while quite consciously rejecting his moral philosophy.

\textsuperscript{75} Holmes, \textit{Collected Works}, Vol. 3, 59.

\textsuperscript{76} Holmes, \textit{Collected Works}, Vol. 3, 59.
possession. As we will see, we need not endow possession with any inherent content imported from any prevailing doctrinal system, such as Kant’s. The concept of possession need not include the Kantian postulate of free will or intent to use the possessed object in a self-regarding manner. Instead, the whole of the concept of possession appears in the consequences of that concept, which Holmes uncovered in his historical analysis.\textsuperscript{77} This consequentialist test for meaning will find its philosophical crystallization Peirce’s pragmatic maxim discussed below. Peirce’s epistemological externalism implants a firm philosophical foundation for the external standard as a legal principle.

V. Peirce’s Method of Inquiry

Important to the development of logic was an emphasis on the pragmatic norm of thinking learned through experiment and effort. In articulating the ways we have experimented with good and bad forms of reasoning, Peirce clarified various methods of resolving the irritation of practical doubts by fixing beliefs. In doing so, he gave a powerful argument that we should allow for a democracy and plurality of ideas. Peirce’s argument will have legal consequences at the highest legal level, once Holmes applies Peirce’s conclusion in Supreme Court decisions. Peirce argues that every achievement of science from the medieval schoolmen through Roger and Francis Bacon to the early

seventeenth century scientists has been a lesson in logic.\textsuperscript{78} Since all reasoning is meant to find out what we do not know by a consideration of what we already know, reasoning is good if it gives true conclusions from true premises.\textsuperscript{79} Based on the insights of his previous essay discussed above, Peirce’s assertion about reasoning is a question of fact, not of mere thinking or feeling. So much logic, inherited from Aristotle, began with intuited premises (those which were not also conclusions). But Peirce argues that these premises must also be conclusions, whose truth is a matter of fact, and he gives an evolutionary reason for this. He proposes that natural selection has favored logical thinking for its ability to solve problems and navigate precarious situations in order to survive. However, natural selection could equally have favored, as advantageous to the animal, the ability to satisfy itself by “fill[ing its mind] with pleasing and encouraging visions, independently of their truth.”\textsuperscript{80}

Peirce defines the determination to draw a particular inference from given premises a “habit of mind.” “The proposition whose truth depends on the validity of the inferences which the habit determines” is called a guiding principle of inference.\textsuperscript{81} Peirce endeavors to study these guiding principles of reasoning in order to provide a normative science of thinking which will help

\textsuperscript{78} Charles Sanders Peirce, “The Fixation of Belief,” \textit{The Essential Writings}, 121.
\textsuperscript{79} Peirce, \textit{The Essential Writings}, 122.
\textsuperscript{80} Peirce, \textit{The Essential Writings}, 122.
\textsuperscript{81} Peirce, \textit{The Essential Writings}, 122.
solve problems in novel situations. What Peirce takes to be the necessary facts already assumed in any logical question are the states of mind of doubt and belief and that the passage from the former to the latter is possible.\textsuperscript{82} We know when logical questions present themselves because we experience such profound differences in the sensation of doubting and believing. Doubting is an irritation, a dissatisfaction which we struggle to overcome. Believing, which is the state that resolves the irritation, is the habit that will determine our actions.\textsuperscript{83} Beliefs only deserve the name insofar as they have the ability to determine our actions in light of the beliefs. The doubt impels us to act only in an effort to destroy the doubt, and Peirce terms this effort and struggle “inquiry.”\textsuperscript{84} The purpose of the inquiry is to settle doubt, which must, contra Descartes, be a real, living doubt, not merely a hyperbolic doubt.\textsuperscript{85}

Thus, Peirce investigates the various methods by which we can fix our beliefs. The first method he calls tenacity, which is the constant reiteration of the opinion to ourselves and the training of ourselves to abhor its alternative.\textsuperscript{86} The recourse to this method speaks to the dread of doubt, which some experience,

\textsuperscript{82} Peirce, \textit{The Essential Writings}, 124.
\textsuperscript{83} Peirce, \textit{The Essential Writings}, 125.
\textsuperscript{84} Peirce, \textit{The Essential Writings}, 126.
\textsuperscript{85} Peirce, \textit{The Essential Writings}, 127. For Peirce, we cannot pretend to doubt, say, the law of gravity, because we act on the habit of its reality. Because we act on the habit of believing in gravity, we are not in doubt, we have already fixed a belief and do not need to inquire.
\textsuperscript{86} Peirce, \textit{The Essential Writings}, 127-128.
“which makes men cling spasmodically to the views they already take.”87 But Peirce problematizes this method, and suggests that the “social impulse is against it” because those who hold tenaciously to their own opinions are destined to run up against those with different opinions, which might disrupt the original tendency to conserve one’s own opinion.88 The conception that others have opinions potentially equal to our own, Peirce argues, is a novel and significant step in reasoning.89

Because of the necessity of social interaction and the inevitability of a plurality of opinions, the need to pass from doubt to belief becomes a communal need. And here we find the state often acts in a tenacious way, creating institutions whose purpose is both to perpetuate old opinions by transmitting them through generations and to prevent contrary opinions from “infecting” the public mind.90 In its most austere form, the state adheres to this method of tenacity, censures all dissent, and scares rebels into silence. This has long been the technique of the priestly class, whether religious or intellectual. The purpose of the method of tenacity is to preserve the peace, but such a method ends in “cruelties and atrocities of the most horrible kind.”91 Peirce calls this the method

87 Peirce, The Essential Writings, 128.
88 Peirce, The Essential Writings, 128.
89 Peirce, The Essential Writings, 129.
90 Peirce, The Essential Writings, 129.
91 Peirce, The Essential Writings, 130.
of authority, and it is the chief opponent in Holmes's dissent in the *Abrams* case as we will see below.

To these methods of tenacity and authority, Peirce adds that which attempts to develop beliefs in harmony with natural causes. The history of metaphysical philosophy from the Greeks to Hegel is representative of this method, which Peirce calls the *a priori* method of settling doubt and fixing belief.\(^\text{92}\) These, rather than resting on observed facts, depend on a certain agreeableness to reason, which Holmes says "flatters our longing for repose."\(^\text{93}\)

Peirce grants that the *a priori* method is more respectable from the perspective of reason, but that it fails by making an inquiry something akin to the development of taste, which is a matter of fashion. Consequently, beliefs derived from the *a priori* method constantly sway back and forth from the material to the spiritual, according to the intellectual fashion of the day. These offer "comfortable conclusions," which "flatter" our vanities until cold hard fact spoils the day.\(^\text{94}\)

Thus Peirce cannot sharply distinguish the *a priori* method from either that of tenacity or authority. All three ignore the plurality of ways that externalities affect those in the community of inquiry. Therefore, Peirce looks for a method that will yield conclusions that are the same for everyone, and this is the method

\(^{92}\) Peirce, *The Essential Writings*, 131-132.


of science. The fundamental hypothesis of the scientific method is that by conceiving of reality as having a character independent of any one of our opinions about it, which affects us with regularity, and about which we can arrive at similar conclusions with the aid of experience and reason, we can better resolve doubt and fix belief. Peirce argues that the existence of doubt itself, as evincing two incompatible conclusions, aiming at the one true proposition, points toward this hypothesis. Peirce concludes that the method of science is the one that distinguishes between the right and the wrong way of reasoning. The other methods do not accommodate the likelihood of error. The necessities of preventing opposing opinions in the method of tenacity are always justified and never wrong, viewed from a perspective within that method. The state is never wrong according to the method of authority. And with the a priori method, we think according to our natural inclinations to think, and so we never actually resolve doubt because our premises are never brought into the genuine struggle of inquiry. Peirce shows that the test of whether we are following the method of science does not appeal to immediate feelings, but instead the test refers back to its own method, and it is therefore self-correcting, not self-referential. The use of the scientific method demands an application of the method itself, and this

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95 Peirce, The Essential Writings, 133.
96 Peirce, The Essential Writings, 133.
97 Peirce, The Essential Writings, 134.
insight concerning the self-correcting nature of the scientific method demonstrates that bad and good reasoning exist and that the scientific method distinguishes between the two. 98

While all the methods have their advantages and temperaments more likely to adhere to them, we should return to the dangers of the method of authority to foreshadow the way Peirce’s methodological insights play a role in the development of legal pragmatism in Holmes’s scholarship. Peirce writes: “If liberty of speech is to be untrammeled from the grosser forms of constraint, then uniformity of opinion will be secure by a moral terrorism to which the respectability of society will give its thorough approval.” 99 Here we see that social opinion, while not always correct, will tend toward the security from doubt which each of us fears individually. The methods of tenacity and authority have their merits, and they yield flashes of “brilliant, unlasting success.” 100 Peirce even envies those who can dismiss reason, although he knows “how it must turn out at last.” 101

We will see elements of the method of science in Holmes’s theory of adjudication, but we should pay special attention for now on this last insight. Peirce writes: “What is more wholesome than any particular belief is integrity of

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98 Peirce, The Essential Writings, 134.
99 Peirce, The Essential Writings, 135.
100 Peirce, The Essential Writings, 135.
101 Peirce, The Essential Writings, 135.
belief, and that to avoid looking into the support of any belief from a fear that it
can turn out rotten is quite as immoral as it is disadvantageous.” This
normative methodology points to the role Peirce’s pragmatism played in
Holmes’s jurisprudence. First, the judge should not allow any one belief or
norm, such as laissez-faire economics, Herbert Spencer’s social statistics, or
wealth maximization, to direct adjudication. Second, although the judge works
according to unconscious premises often received authoritatively in the prejudice
of the culture, he is guided by a restraint which respects the experimental
qualities of both forward-looking statutory law and freedom of speech. Both of
these ways that a judge can morally honor the integrity of belief itself will be
made evident in my analysis of Holmes’s pragmatic adjudication.

Peirce treats logic as a normative science. That is, logic provides us with
the norms that guide our thinking. This has consequences which extend to the
manner in which we theorize. As we will see, the normative science of logic calls
into question the separation of theory and practice by those, such as Posner, who
want legal pragmatism to stand free of philosophical pragmatism. A return to
the philosophy of Peirce gives us an alternative, more integrated role for
pragmatism as it integrates logic as normative and practical. Furthermore, I will
argue that Holmes evinced a similar theory of logic as normative. That Holmes

102 Peirce, The Essential Writings, 136.
made manifest these Peircean insights demonstrates that Holmes’s jurisprudence resides at the intersection of philosophical and legal pragmatism. The pragmatic norms Holmes offers us helps integrate legal theory and practice. An integration of theory and practice will provide more meaningful guidance about the selection of ever-evolving ends.\footnote{Arriving at a similar insight are Michael Sullivan and Daniel J. Solove, “Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism,” Yale Law Journal, Vo. 113, No. 3, (Dec. 2003), 691. 687-741. in their review of Posner, \textit{Law, Pragmatism, and Democracy}.}

\section*{VI. Pragmatic Inquiry in Holmes’s \textit{The Common Law}}

Peirce’s assertion of one of the consequences of the incapacities he illuminates, the perniciousness of making single individuals the absolute judges of the truth, provides a norm governing Holmes’s reliance on the external standard of what the average member of a community could foresee as the consequences of his actions given his external circumstances. Just as Peirce charges truth with a community of philosophers, Holmes charges the jury with the function of embodying the prudent member of the community.

In “Trespass and Negligence,” Holmes attempts to outline the general principles governing the liability for unintentional torts at common law. He analyzes the two predominate theories, the “criminalist theory,” in which the characteristic mark of the law is defiance to the sovereign commands, and the theory that a man acts at his own peril. The former implies personal fault, and it
assumes that negligence concerns the state of the defendant’s mind. The latter, adopted under the common law, states that a man “is never liable for omissions except in consequence of some duty voluntarily undertaken.” According to the latter theory, intention is immaterial.

In order to amend the latter of these, Holmes makes an argument for strict responsibility in order to point out its faults. In a case where a man’s cattle escapes into his neighbor’s field and does some damage, the owner is liable for trespassing without regard to intent. Holmes extends this logic from property to person such that if a man acts voluntarily, and the consequences of his act cause damage to the plaintiff, then he must answer for the consequences, however little he intended and however unforeseen those consequences were.

Next Holmes makes the argument for strict responsibility from policy. Every man has an absolute right to his person, and so the party whose voluntary conduct has caused damage to the person should suffer, rather than the person who has had no part in producing it. In terms of pleadings, Holmes concludes that if the defendant’s intent or neglect was essential to his liability, the absence of both would divest his act of the nature of a trespass and ought to be allowable under the general matter, but a ruling of “not guilty” according to common law “only denies the act,” not the intent or neglect, conceived of as a state of the

defendant’s mind. Holmes cites the traditional distinction between a felony, where intent is construed and trespass where it is not. He cites several examples of cases against defendants whose actions are lawful but whose consequences justify action against them.

But these are only preliminary arguments used to set up his arguments against strict responsibility. Many courts have rejected the idea that a man acts at his own peril. And “the allegation of negligence has spread from the action on the case to all ordinary declarations in tort which do not allege intent.” But it is Holmes’s position that the true principle has not been articulately grasped by those interested in it. He wants to inquire whether or not the common law has ever known such a rule of absolute responsibility. He wants to remind those still adhering to this rule that a change has been made to it both by recourse to policy and to consistency.

In terms of consistency, Holmes shows that if strict liability is to be maintained at all, then it must be maintained throughout. He defines an act as “a voluntary muscular contraction and nothing else.” But he gives examples A) where a long chain of intermediary sequences intervene between the act and the

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107 Holmes, *Collected Works*, Vol. 3, 79. The example Holmes gives here is that of a man lawfully protecting himself from attack, and in doing so, he lifts a stick and injures a man behind him, in which case if the man hit is injured, he is due recompense by the otherwise lawful action of the man in self-defense.
consequence such that the consequences could not be foreseen (by the prudent man) and B) where the consequences might be anticipated (by the prudent man). To be consistent absolute responsibility does not distinguish between these cases, but Holmes believes the distinction is paramount.\footnote{Holmes, \textit{Collected Works}, Vol. 3, 82.} His invention is of the reasonable man, the ideal, prudent man, who is supposed to be able to foresee certain, but not other, consequences of his actions. This ideal man, we later see, is embodied by the jury. Holmes states that “the general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune.”\footnote{Holmes, \textit{Collected Works}, Vol. 3, 83.} But anything is an accident if a man could not be likely to think possible and therefore avoid. According to this line of thought, to be an act requires that the defendant should have made a choice. The point of introducing this moral component is to make the power of avoidance a condition of liability. But there is no such power where the court cannot expect the man to foresee the evil consequence.\footnote{Holmes, \textit{Collected Works}, Vol. 3, 83.}

In terms of policy, Holmes states that although a man does not need to do this or that particular act, he must in fact act one way or another. And the public tends to profit by these individual acts. Since action cannot be avoided and tends toward public good, then there is no policy in weighing down the actor
with the risk of what is at once advantageous and unavoidable.\textsuperscript{113} In light of these remarks, Holmes gives three suggestions that he dismisses: first, that the state act as a mutual insurance company against accidents, distributing the burden of accidents among all the members; second, that it divide the damages between individuals when several were at fault; third, that it might throw all loss upon the actor irrespective of fault. But the state (de facto) does none of these things, and it is too cumbrous to do any of them unless a clear benefit is seen. Holmes proclaims, “State interference is an evil, where it cannot be shown to be a good.”\textsuperscript{114}

Holmes problematizes intention, by questioning the grounds for liability in a case of trespass. The defendant is brought to trial for doing damage not to anything, but to something owned by the plaintiff. If a man intentionally trespassed upon another’s land, but was ignorant that it belonged to another, his ignorance lying in his own mind only cannot be known to all or used as proof. But a man who intentionally does harm to something does know that it belongs to someone. If he thinks it belongs to himself, he understands that he is liable for the losses incurred by his action, and it would be odd indeed if he were to free himself of this cost by the fact that it belonged to someone else.\textsuperscript{115}

\textsuperscript{113} Holmes, \textit{Collected Works}, Vol. 3, 83.
\textsuperscript{114} Holmes, \textit{Collected Works}, Vol. 3, 84.
\textsuperscript{115} Holmes, \textit{Collected Works}, Vol. 3, 84.
Holmes shows that trespass was originally restricted to intentional wrongs.\textsuperscript{116} But Holmes reintroduces his fundamental thesis, that the defendant is liable when the consequences of his actions are foreseeable by the man of ordinary prudence.\textsuperscript{117} The true theory of liability is one which is neither based on fault or blameworthiness viewed as a moral shortcoming (as would be John Austin’s position). But it does not draw a distinction between trespass and felony on the lines of intent. Rather, Holmes aims to split the two horns of this dilemma.\textsuperscript{118} He writes, “The standards of the law are standards of general application. The law takes no account of the infinite varieties...which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them.”\textsuperscript{119} Here we see that the power of introspection and the power of intuiting knowledge based on no premises, belongs (perhaps to God), but is not a capacity in man, (as Peirce has shown us), and is not a capacity of the court. Rather, when men live in society, an average of conduct is necessary to the general welfare. The law determines blameworthiness by this external standard. It concerns the foresight of the consequences of action that a prudent member of the community man would have.\textsuperscript{120}

\textsuperscript{117} Holmes, \textit{Collected Works}, Vol. 3, 89.
\textsuperscript{118} Holmes, \textit{Collected Works}, Vol. 3, 90.
\textsuperscript{119} Holmes, \textit{Collected Works}, Vol. 3, 90.
\textsuperscript{120} Holmes, \textit{Collected Works}, Vol. 3, 90.
Law only works within the sphere of external phenomena; it is indifferent to the internal phenomena of conscience: “The standards of the law are external standards.”\(^{121}\) In theory, this external standard must be fixed, but in practice, juries are imperfect; nonetheless, the jury is the representative of the ideal, prudent man. The way prescribed by the jury as an external standard of conduct accords with custom: it is the way that a prudent man is in the habit of acting.\(^{122}\) Here we see the pragmatic theory of meaning writ large as social. Just as, for Peirce, a belief is a habit of action made conscious, the beliefs of the jury, according to Holmes, are their customary behaviors made conscious as they register as a norm governing their decision.

Holmes’s contention is that a man does not act in general at his own peril. And negligence does not mean the actual state of the defendant’s mind, (which we do not have access to and is not legally material), but his failure to act according to the jury’s (prudent man’s) standard. These standards change according to our experience. And precedents should be overruled when they become inconsistent with the present condition, which guide the continual change of the standards of custom and experience.\(^{123}\) Holmes follows the conclusions Peirce makes, extends them into our ability to judge one’s moral

sense, which is the extension Peirce suggested, and extends the pragmatic method into the realm of law by rejecting Kantian legal theory. Experience and custom inform the court as to what is to be expected in society. These customs grow and change with time. The law conforms to these customs as opposed to trying to bend society to the universal law, whose philosophy is grounded on internal necessity, not external standards. The experientialism and externalism at work in Holmes’s articulation of the common law relies on Peirce’s epistemology and influences the initiation and advance of legal pragmatism. These insights, lost on Posner, who defends a version of legal pragmatism independent of philosophical pragmatism, deserve to be incorporated into an understanding of the reasoning exemplified by the man thought to be, by Posner, the seminal legal pragmatist, Holmes.

VII. Peirce’s Theories of Meaning and Truth

As we have seen, Peirce’s 1868 essays provide self-critical epistemologies and methodologies which inform, guide, and become more fully developed in Holmes’s pragmatic contributions to legal theory. As I have illustrated above, Peirce’s arguments against positing the capacities of intuition and introspection guided Holmes’s analysis of the external standard in the articulation of a general principle of liability in The Common Law, and Peirce’s consequentialist test for meaning resonates in the way that Holmes reduced rights to facts. As I will
show below, Peirce’s warning against the method of authority will become manifest in Holmes’s defense of free speech in his dissent in the Abrams case. But Peirce’s pragmatism also informs Holmes’s legal pragmatism in other ways. Peirce articulated a theory of meaning, which would echo in Holmes’s predictive theory of the law and his refusal to separate matters of fact and matters of value. Therefore, I will explain Peirce’s pragmatic maxim in light of its role for Holmes’s legal pragmatism.

Peirce sought to restrain the excesses of modern logic, derived from Cartesianism. In doing so, Peirce enlivened our ability to conceptualize from our aesthetic and subjective experience. Descartes defined the clarity of a concept as “so apprehended that it will be recognized wherever it is met with, and so that no other will be mistaken for it.”\textsuperscript{124} According to Peirce, Descartes’s definition of a clear concept only amounted to the subjective feeling of a mastery over the concept, which could be mistaken. To clarity, Descartes added distinctness, defined as an idea that contains nothing in it that is not clear.\textsuperscript{125} But Peirce, rejecting Descartes’ reliance on introspection and intuition, draws a more subtle distinction between perceptual and theoretical judgments. The former, because we are immediately conscious of their objects, cannot be false. The latter,

\textsuperscript{124} Charles S. Peirce, “How to Make Our Ideas Clear,” Essential Writings, 137.
\textsuperscript{125} Peirce, Essential Writings, 137-138.
because we are mediately conscious of their objects, we can be critical about.\textsuperscript{126}

Abductive inference shades the latter into the former without any strict line of separation between them.\textsuperscript{127} Our premises are not intuited; rather they are already cognized, but as perceptual judgments, we do not criticize them. Thus the “facts” of the positivist or the “clear and distinct ideas” of the Cartesian are, for Peirce, already interpreted in the context of theories held by the observer. The distinction between the perceptual and theoretical judgments is subtle and psychological, rather than strict, as held by the positivists.

For Peirce, the function of thought is an activity which produces habits for action, and the essence of belief is in the establishment of a habit.\textsuperscript{128} Therefore, to develop the meaning of thought is to determine what habits it produces, “for what a thing means is simply what habits it involves.”\textsuperscript{129} Peirce goes on, “Thus, we come down to what is tangible and practical, as the root of every real distinction of thought, no matter how subtle it may be, and there is no distinction of meaning so fine as to consist in anything but a possible difference of practice.”\textsuperscript{130} Thus the idea of something is the idea of its sensible effects, and culminating this logic, Pierce coined the pragmatic maxim: “Consider what

\textsuperscript{126}Peirce, \textit{Essential Writings}, 142.
\textsuperscript{127}Peirce’s use of abduction refers to hypothetical inference. He explained abduction by stating that x is surprising (and causes the irritation of doubt), but if y were the case, x would be a matter of course. Y is hypothesized, or abduced, to explain away the surprise.
\textsuperscript{128}Peirce, \textit{Essential Writings}, 144-145.
\textsuperscript{129}Peirce, \textit{Essential Writings}, 145.
\textsuperscript{130}Peirce, \textit{Essential Writings}, 145.
effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object.” Peirce gives several examples, including one of the concepts of gravity and force. The meaning of the concept of gravity is “completely involved in its effects.” Peirce’s pragmatic theory of the meaning of concepts as a function of consequences will resonate throughout Holmes’s insights into the law both in terms of his reduction of rights to facts and his revision of John Austin’s definition of law. Holmes’s predictive theory of law amounts to a hypostatization of the forceful consequences brought to bear on the bad man who transgresses. That is, when asked what is the law? Holmes looks to the effects of the law, its habits of action manifested in the behavior of courts of law.

Peirce’s last major contribution to Holmes’s legal pragmatism is his pragmatic conception of truth. Peirce again takes Descartes as his foil, arguing against the criterion that amounts to: “Whatever I am clearly convinced of, is true.” Peirce argues that it is insidious to ask that individuals be the judges of truth. Truth is rather that opinion destined to be held by an indefinite, and ideally situated, community of inquirers. To Peirce, philosophy should pursue

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131 Peirce, *Essential Writings*, 146.
truth and certainty by recourse to the scientific method explained above.

Philosophers should pursue the (unattainable) ideal as a community of inquirers. Just as the pragmatic maxim carries with it the implication that the meaning of ideas is conditional upon the future events which display their effects, the meaning of a concept is also circumscribed by public and communal rules of assent.¹³⁴ Rules must be public and communal because the limits of the shared world are the limits of our practical experience, which we cannot transcend.¹³⁵ We may recall that Holmes felt truth to be an unattainable and a system of his own limitations, and I will return to this below.

VIII. The Meaning of Law in Holmes’s Pragmatism

The most influential definition of law in the nineteenth century Anglo-American jurisprudence was John Austin’s. Austin determined that the essence of law “properly so-called” is in a command by a political superior to an inferior which implies a sanction or enforcement of punishment and establishes a duty to

¹³⁴ “Holmes, Peirce, and Legal Pragmatism,” The Yale Law Journal, Vol. 84, No. 5, (Apr. 1975), 1131. I do not cite an author here because the practice of the Yale Law Journal in 1975 was not to cite the author if the author was a student, as was the case in this author. This unsigned contribution to the Yale Law Journal is a rare example of a connection being made between Holmes’s scholarship in his preparation for The Common Law and Peirce’s 1868 essays. Its author correctly identifies Holmes’s use of the external standard in the common law. However, its author makes the mistake of interpreting the internal standard as the voice of the sovereign command, which John Austin and the positivists pointed to as the origin of law. I disagree with this interpretation. Rather, the internal standard, which must be inferred from external sign, refers to the internal states of mind such as culpability due to malice and intent, which we cannot intuit directly.

¹³⁵ “Holmes, Peirce, and Legal Pragmatism,” 1132.
obey the command.\textsuperscript{136} The aggregate of these particular commands, Austin gives the term \textit{law}.\textsuperscript{137} Austin distinguished positive laws from divine laws, positive morality, and the types of laws whose similarity to positive law is only slim and analogical, such as laws observed by lower animals and vegetation. In these areas, “where intelligence is not, or where it is too bounded to take the name of reason, and therefore is too bounded to conceive the purpose of a law, there is not the will which law can work on, or which duty can incite or restrain.”\textsuperscript{138}

Given the requisite features of intelligence, ability to conceive of the purpose of a law and the will to act on duty, Austin shows that command and duty are correlative. Every command entails a duty and where one finds a duty, a command has been issued.\textsuperscript{139}

However, Holmes gave a critique of Austin’s definition of the law and Austin’s view that custom only becomes law by the sovereign’s tacit consent, which is manifested by the courts’ adoption of the custom. In doing so, Holmes illustrated the movement of legal concepts from an internal to an external model in several ways. The first move from rights to duties exhibits a move from the internal self-evidence of rights to life and liberty to the external immunity from obligations by those with rights. The second move from the law as the command

\textsuperscript{136} Austin, \textit{The Province of Jurisprudence}, 9-11.
\textsuperscript{137} Austin, \textit{The Province of Jurisprudence}, 11.
\textsuperscript{138} Austin, \textit{The Province of Jurisprudence}, 12-13.
\textsuperscript{139} Austin, \textit{The Province of Jurisprudence}, 14.
of the sovereign to the law as including the prediction of the consequences of transgressing the positive statute demonstrates a move from the internal will of the sovereign to the external consequences of transgression imagined by the practicing lawyer of the “bad man.”140 The third move from internal to external standards concerns Holmes’s distinction between the internal limits of moral duties and the predictions of the limitations on behavior by the courts, which constitute legal duties.

Concerning his mature attack on Austin’s definition Holmes applies an historical analysis to Austin’s logic. Because, according to Austin, the law is the command of the sovereign and it emanates from his will, the one issuing the command is sovereign because he has the power to enforce the sanction, such that sovereignty is a form of power.141 By this reasoning, the limits within which the sovereign has the power to punish are the limits within which his will is law.142 But Holmes states that the power of the sovereign is limited from outside sovereignty by the liability to war or rebellion and from inside by the conflicting principles of territorial or tribal sovereignty, by those outside sovereign power,

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140 The degree to which the law defined as the command of the sovereign makes use of an internal standard is discussed in “Holmes, Peirce and Legal Pragmatism,” The Yale Law Journal, Vol. 84, No. 5, (April 1975). However, by focusing only on the sovereign will as the example of the internal standard in law, the author misses the key transition Holmes makes from the internal to the external standard. This transition is from the will and intent of the defendant who transgresses as embodying an internal standard and the way the court measures objective consequences of the defendant’s actions by an external standard.


and by public opinion. Because law is an extension of power, there can be law without sovereignty insofar as bodies not sovereign can impose sanctions on the will of the sovereign.\footnote{Holmes, \textit{Collected Works}, Vol. I, 295.}

Thus, Holmes wonders what more could be meant by law as its common feature than this power to enforce by the courts. Austin said that custom becomes law only “by the tacit consent of the sovereign manifested by its adoption by the courts and that before this custom only served as a motive” for judicial decision.\footnote{Holmes, \textit{Collected Works}, Vol. I, 295.} Holmes took Austin’s position that custom was a motive for judicial decision to its logical conclusion by asking what more a positive statute was than another motive for judicial decision.\footnote{Holmes, \textit{Collected Works}, Vol. I, 295.} The prediction that statutory law would influence a judge’s decision amounts to law more than the statute which is the sovereign’s command.\footnote{Holmes, \textit{Collected Works}, Vol. I, 295.} The prediction theory of law is the legal analogue to the political adage that what matters in a democracy is who counts the votes, not who gets to vote.\footnote{The dictum is usually attributed, most likely erroneously, to Josef Stalin.} The extreme analogue would reduce the sovereign’s command to a vote counted by the judiciary, which has the practical power to decide the case at hand. The history of common law in England showed Holmes that interpretation is inevitable, that discretion is the rule not the exception, and therefore, the factors that motivate the judicial decision could not
be reduced to statutory law as Austin thought. Austin’s utilitarian hopes for reform led him to privilege positive statutory law over common law. He developed a jurisprudential theory, which aided in speeding up utilitarian reform. But when subjected to Holmes’s analysis, the sources of law must include anything regularly assumed to serve as a motive for judicial action by a practicing lawyer, such as statute, custom, precedent, and constitution, but not those singular motives, “like the blandishments of the emperor’s wife.”

Holmes began to depart from Austin’s position in his notice of Pollock’s article in 1872, (the year of his meetings with Peirce). Holmes showed that a duty cannot exist when the breach of it only results in a certain cost to the party violating the obligation. Just as a protective tariff on a certain commodity does not create a duty not to import that commodity, the liability to pay the price of a good for sale is not a penalty for the culpable breach of duty. Instead, it is just “the extent of ordinary liability to a civil action at common law.” To Holmes the duty can only be determined by the consequences of its transgression, and

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149 The historical circumstances around Holmes’s early formulation of the prediction theory of law in 1872, his amendment of Austin’s definition, and his interaction with Pierce and the attorney Nicholas St. John Green are addressed by Max Fisch, “Justice Holmes, The Prediction Theory of Law, and Pragmatism,” The Journal of Philosophy, Vol. 34, No. 4, (February 12, 1942), 85-97. Fisch argues that the influences between Peirce and Holmes surrounding the emergence of philosophical and legal pragmatism were probably reciprocal.

when the consequence is only the liability to a civil action, no duty exists.\textsuperscript{151}

According to Holmes, Austin had deduced his treatise on jurisprudence from criminal law, and this realization provided the needed impetus to extrapolate a general theory of liability across civil and criminal law, which was the project of \textit{The Common Law}. But even in 1872, Holmes articulated an early version of an external standard: “the object of the law is to produce an external result.”\textsuperscript{152}

The way Holmes defines the law to include the likelihood of consequences for transgression showed his early departure from Austin and his early articulation of legal pragmatism. The key features at this juncture were the consequential and external definition of the law. But utilitarian theories are consequential and determine their merit on external standards. Thus to balance the virtues of the Austin’s analytic school of jurisprudence and the conservative, often formalist schools, of Common Law theorists, Holmes needed to demonstrate the historical nature of sound legal doctrines. Holmes held that legal doctrines worth stating had been the product of many minds and a long process of approximation and induction. He disclosed the historical development of legal principle and the direction (from specific case to general principle) of that development. As opposed to the law being a chain letter of syllogisms or a mechanical application of found statutes to specific cases, the law


is the product of “an ongoing community exploring common problems, a
description resonating Peirce’s ideal of communal inquiry guided by the ideal of
truth. 153 Below I will present Holmes’s articulation of what norms guide the
judge’s decision to exercise “the sovereign prerogative of choice”154 and make
concrete and more certain the legal principles which until that determination had
remained only emergent patterns of individual, related cases. The norms
guiding this process speak to the “boundary between activism and restraint.”155
While the judge makes the legal principle more certain in this prerogative, he lets
the historical practices which give rise to the cases provide the constituents for
their resolution, and at times, he only plays the restrained role of grouping an
individual case within its patterned relation with others without exercising the
prerogative of concretizing the principle.

IX. Pragmatic Norms in Holmes’s Jurisprudence and Moral Philosophy

Holmes wrote: “It is the merit of the common law that it decides the case
first and determines the principle afterwards.”156 He denounces the opposite
order of reasoning, in which determinations are made from general propositions.
Holmes insists that the law (think “judicial decision”) is not a function of logic.

154 Holmes, Collected Works, Vo. 3, 419.
155 Kellogg, Oliver Wendell Holmes, Jr., Legal Theory, and Judicial Restraint, 33.
In *The Common Law*, he states, “The life of the law has not been logic; it has been experience.” 157 The changing experiences of a culture over time, not incontrovertible logic, direct the path of the law. 158 By experience, he meant the “felt necessities of the time,” the “intuitions of public policy,” 159 and the “beliefs, values, intuitions, customs, prejudices” of a society. 160 While his enemy here is formalism and the view which treats the law as “system of reason” or a “deduction from principles of ethics or admitted axioms,” 161 we could extend his positions here to the application of any *a priori* general principle including utility or wealth maximization. The law cannot be worked out like mathematics from these first principles. And while the law is a logical development and lawyers are educated in logic, behind the logic lies an “inarticulate and unconscious” judgment. 162 From this amorphous, but immanently first-order finding, a conclusion is reached, which is expressed in a logical form and to which abstract principles are later adduced. 163 The adduction of principle to the decision and its articulation in seemingly air-tight logic returns us to a state of repose. 164

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158 *Pragmatism A Reader*, xxii.
160 *Pragmatism A Reader*, xxii.
During Holmes’s career on the Supreme Court he became known for his
decisions which promoted judicial restraint, allowing for experimentation by
legislatures. Given his skepticism of claims of absolute certainty and his
unwillingness to use general principles to decide specific cases, Holmes’s judicial
writings offer the pragmatic norms of experimentalism and judicial restraint.
Holmes’s restraint extended to cases in which he felt that the laws in question
were misguided. Consider his dissent in *Lochner v. New York*. The majority ruled
that a state statute limiting the hours that bakers could work on the ground that
the statute violated the freedom of contract, and thereby due process.\footnote{165}
Holmes’s personal, political affiliations were well-known to be with his class,
and he supported free markets, competition, and laissez-faire economics
generally.\footnote{166} However, he argued that the constitution is made for people who
differ fundamentally.\footnote{167} And thus his skepticism was not just of received legal
concepts too feeble for current cases. Holmes’s skepticism extended to the
economic theory he avowed, and it applied to overconfidence in projecting law
into the future. For if we cannot be certain that our absolutes are the universal,
then we should reform the law conservatively, not rashly. Holmes thought

\footnote{165}{Kellogg, “Legal Scholarship in the Temple of Doom,” 30.}
\footnote{166}{Consider his 1915 article “Ideals and Doubts.” He wrote, “The social reformers of today seem to me so far to forget that we no more can get something for nothing by legislation […] Wholesale social regeneration […] cannot be affected appreciably by tinkering with the institution of property.” *Collected Works*, Vol. 3, 443.}
\footnote{167}{*Lochner v. New York*, 198 U.S. 45, 74-77 (1904) (Justice Holmes dissenting).}
lawyers needed to understand economics better, and he thought the divorce between law and political economy in his day revealed “how much progress in philosophical study still remains to be made.”168 But this prescription pointed him again to history, “on a larger scale,” to consider the ends and means of attaining them.169 Holmes most often left the definition of ends open, but he was skeptical of social engineering via legislation, and he felt that the means of attaining evolving ends must be tied organically to the operative customs and communal beliefs.170

Holmes’s preference for avoiding reasoning which begins with premises which are not also conclusions, (Peirce’s “intuitions”), and his preference for the method of science, reflected Peirce’s pragmatic reasoning. Consider how Peirce’s warning against the method of authority was made manifest in Holmes’s defense of free speech in his dissent in the Abrams case. Five Russian immigrants, three of whom considered themselves rebels, revolutionists, and anarchists, and one of whom considered himself a socialist, were convicted of conspiring to violate provisions of the Espionage Act of Congress.171 Each of the first three counts charged the defendants with conspiring, when the United States was at war with the Imperial Government of Germany, unlawfully to pronounce, print, write and

publish: in the first count, “disloyal, scurrilous and abusive language about the
form of Government of the United States;” in the second count, language
“intended to bring the form of Government of the United States into contempt,
scorn, contumely and disrepute;” and in the third count, language “intended to
incite, provoke and encourage resistance to the United States in said war.” The
charge in the fourth count was that the defendants conspired, “when the United
States was at war with the Imperial German Government, unlawfully and
willfully, by utterance, writing, printing and publication, to urge, incite and
advocate curtailment of production of things and products, to-wit, ordnance and
ammunition, necessary and essential to the prosecution of the war.”

The defendants collaborated to print and hand out the pamphlets
described above, and they succeeded in printing and distributing five thousand
of them in August, 1918. The defendant Abrams had both purchased a printing
outfit and had rented a room in New York City, where the group met to discuss
the printing and distribution of their propaganda. They circulated the pamphlets
by either throwing them from a window of a building where one of the
defendants was employed or handing them out secretly in New York City.

Although the defendants pleaded “not guilty,” the court upheld their
conviction on the evidence of the facts stated above and of copies of the two

\[172\] 250 U.S. 617.
printed pamphlets attached to the indictment. One was entitled “Revolutionists Unite for Action,” was written by the defendant Lipman, and was on his person when he was arrested. Another was found at the center of operations of the group, and Abrams assumed responsibility for it. The majority of the court found that the conspiracy and the “doing of the overt acts charged” were in large part admitted and established by the prosecution.173

However, Justice Holmes dissented. His argument rested on two distinct points. The first was rather technical. Although, as we have seen, Holmes spent much of his early career problematizing the concept of intent, his dissent on the fourth count rested on the inability of the court to prove this by reasoning toward intent by the external signs of the legally material facts. Holmes agreed that when the defendants suggested to workers in the ammunition factories that they were producing bullets to murder their “dearest” and when they advocated for a general strike, that they did “urge curtailment of production of things necessary to the prosecution of the war within the meaning of the Act of May 16, 1918, c. 75, 40 Stat. 553, amending § 3 of the earlier Act of 1917.” 174 However, this conduct became criminal only “with intent by such curtailment to cripple or hinder the United States in the prosecution of the war.” And Holmes did not see that this intent was proved. Holmes admitted that the concept of intent when

173 250 U.S. 618.
174 250 U.S. 626.
used vaguely in common legal parlance only means “knowledge at the time of
the act that the consequences said to be intended will ensue.” However, when
the statute used intent in this sense, it seemed to use it exactly, and this means
that an act is not done with intent to produce a consequence unless that
consequence is the purpose of the deed. Even if it is obvious to the actor that the
consequence will ensue, but “he does not do the act with intent to produce it
unless the aim to produce it is the proximate motive of the specific act, although
there may be some deeper motive behind.” Holmes thinks that this statute uses
intent in this highly strict sense. His argument by analogy is as follows:

It seems to me that this statute must be taken to use its words in a strict
and accurate sense. They would be absurd in any other. A patriot might
think that we were wasting money on aeroplanes, or making more cannon of
a certain kind than we needed, and might advocate curtailment with success,
yet, even if it turned out that the curtailment hindered and was thought by
other minds to have been obviously likely to hinder the United States in the
prosecution of the war, no one would hold such conduct a crime. I admit that
my illustration does not answer all that might be said, but it is enough to
show what I think, and to let me pass to a more important aspect of the case.
I refer to the First Amendment to the Constitution, that Congress shall make
no law abridging the freedom of speech.\textsuperscript{175}

And while Holmes’s reasoning may seem a departure from the
epistemology of his early pragmatism, consider his reasoning to allow free
speech of this sort, and consider his inheritance of Peirce’s pragmatism in the “Fixation of Belief.” He wrote:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States, through many years, had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, “Congress shall make no law . . . abridging the freedom of speech.” Of course, I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that, in their conviction upon this indictment, the defendants were deprived of their rights under the Constitution of the United States.\footnote{250 U.S. 630}
The significance of Holmes’s inheritance was not lost on later pragmatists, including Dewey, who wrote an article on the subject, “Justice Holmes and the Liberal Mind.” In this appraisal and praise of Holmes’s social philosophy, Dewey defines liberalism as a method of intelligence, which adopts the scientific habit of mind and applies it to social affairs. Dewey’s assesses Holmes as exhibiting the use of the scientific method defined by Peirce and the avoidance of the method of authority, which carries with it dangers, both social and philosophical. The former leads to violence and repression and the latter leads to intellectual atrophy. Both, by “reposing on a formula,” give up “the battle for truth,” and end in a “slumber that means death.”

Without getting overly concerned for the labels Dewey used to describe Holmes’s social philosophy, we can see that Dewey saw in Holmes’s application of the scientific method in law an expression of “an infinite perspective.” For Holmes, each fact offers us a possible starting place from which to begin our thinking, and the law exhibits some facts of this nature from which we can be led to philosophy as well as any other. That is, Holmes felt that thinking simply made plainer “the way from some thing to the whole of things,” showing the rational connection between the particular fact as a starting point and your

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“frame of the universe.” According to Dewey, Holmes, in the Abrams dissent, had displayed a frame of the universe in which “all action is so experimental that it needs be directed by a thought which is free, growing, [and] ever learning.”

Through Holmes’s definitions of truth, we will see with Dewey that while “intellectual conceit causes one to believe that his wisdom is the touchstone of that of social action. [But] the intellectual humility of the scientific spirit recognizes that the test can only be found in consequences in the production of which large numbers engage.” Dewey’s reflections on the dissent speak to the manner in which philosophical pragmatism is alive in Holmes’s dissent in Abrams with a productive and normative remainder.

If this is the case, legal pragmatism is not independent of philosophical pragmatism; rather, the latter makes manifest the former. Peirce’s articulation of the scientific method and Holmes’s critique of the method of authority provide the material for Dewey to reflect on the nature of the liberal mind and the open, experimental, and infinite nature of the universe and the social value of those insights revealed in Holmes’s adjudication. The legacy of the norm of free speech, conceived in part on these philosophical grounds, speaks to the worth of philosophical pragmatism in legal pragmatism.

Holmes has a pragmatic understanding of truth, which revealed his
general avoidance of dogmatism. A court’s decision is correct, according to
Holmes, as a result of its “fit” with the entire set of unarticulated cultural
assumptions that give moral credence, including considerations of social
advantages which ensue from the decision.¹⁸³ For Holmes, absolute certainty
amid our changing experience is “generally an illusion.”¹⁸⁴ In the place of
absolute certainty, Holmes gives a working definition: “Truth is the unanimous
consent of mankind to a system of propositions. It is an ideal and as such
postulates itself as a thing to be attained, like other good ideals it is
unattainable...It is a thing to be striven for on the tacit understanding that it will
not be reached.”¹⁸⁵ Recall how this resonates with Peirce’s definition of truth as
the opinion arrived at by an indefinite, ideally situated, community of inquirers.

Holmes extends his pragmatic conception of truth to the political realm.
He warned against absolute certainty as giving rise to imperious political
dogmatism: “The abolitionists thought everybody fools or knaves who did not
think as they. They knew to be right. [...] ‘When you know that you know that
you know persecution comes easy. It is as well that some of us don’t know that

we know anything.” As one might infer from this passage, Holmes saw the results of dogmatism first hand on the battlefields of the Civil War. Believers in absolutes murder each other. We can keep Holmes’s dictum in mind when we hear John McDermott claim that dogmatists, not relativists, hang people from trees. Characterizing Holmes’s political beliefs is so difficult precisely because he was a pragmatist. He thought “‘all isms silly.’” He claimed to have “no *a priori* objection to socialism any more than to polygamy.” He just thought it did not work.

Holmes’s pragmatic conception of truth registered as both moral skepticism and a more general fallibilism. Holmes was skeptical of taking a bird’s eye view of the world and judging morally. He thought that “A moral view is a dangerous way of judging.” Holmes was skeptical of making moral judgments about history. He wrote, “Good and bad are of real significance only for the future where our effort is one of the instrumentalities that bring the inevitable to pass.” All Holmes ever meant by truth was the path he had to travel. He elaborated, “Whether that compulsion has any more universal

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186 Holmes to Frederick Pollock, August 30, 1929, *Holmes-Pollock Letters The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock 1874-1932*, (Cambridge: Harvard University Press, 1942), 251.
189 Holmes to Lewis Einstein, November, 24 1912, *Holmes-Einstein Letters*, 75-76.
190 Holmes to Alice Stopford Green Oct 1 1901, *The Essential Holmes*, 111.
191 Holmes to Alice Stopford Green Oct 1 1901, *The Essential Holmes*, 111.
meaning than the compulsion that draws me to one woman and repels me from another I don’t know. It is final for me but I go no further.”

He revealed his falliblism at length in a letter to Lewis Einstein:

To jump to a more general aspect—when you realize my great formula no doubt often repeated to you that friendship, property, and truth have a common root in time—when you hear a great scientific man say apropos of science and Calvinism—oh yes I know all about that, but I believe this—presumably because he was shaped to his theology before he ever heard it questioned—how can you take man seriously on the speculative side—as the friend God needed in order to find out that he exists? Seriously for practical purposes, yes—but when one looks at him with the devitalized thought of contemplation may one not smile, if one includes oneself and also recognizes the smile postulates a fulcrum outside that does not exist and therefore should include not only the smiler but the smile itself?

And again to Morris Cohen: “As to the purposes of the cosmos— […] I leave open whether there is a plan of campaign. But as I don’t believe that I am a little god.”

And by recourse to one more lengthy citation, Holmes addressed Berkeleyan idealism in a pragmatic manner:

I begin by an act of faith. […] that I am not dreaming, although I can’t prove it—that you exist in the same sense I do—and that gives me an outside world of some sort […] so I assume that I am in the world and not it in me. Next when I say a thing is true I only mean that I can’t help believing it—but I have no grounds for assuming that my can’t helps are cosmic can’t helps and some reasons for thinking otherwise. I therefore define the truth as the system of my intellectual limitations. […] The ultimate […] is a mystery. I don’t see that

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194 Holmes to Morris Cohen, January 30, 1921, *The Essential Holmes*, 34.
it matters whether you call it motion or thought X—all that we know is that it is capable when tied in a certain knot of producing you and me and all the rest of the show. Absolute truth is a mirage.\textsuperscript{195}

Holmes’s pragmatic understanding of truth, which registers as skepticism, lays the groundwork for the question of normativity. That is, we must ask ourselves if, as some of Holmes’s critics have claimed, Holmes’s skepticism was nihilistic and if his understanding of “the inevitable” was deterministic.\textsuperscript{196} I argue that Holmes’s divorce of law from morality was an heuristic device, allowing him to analyze the law with precision and clarity, and that Holmes’s conception of fate included meliorism, reflecting a pragmatic normativity. For now, it is enough to show that a consequential and pragmatic understanding of truth as a path to travel and not as an absolute antecedent to inquiry is evident in Holmes’s writings. A pragmatic sense of truth informed his theorizing, undermining certain concepts as metaphysical substructions and empty hopes.

Holmes’ ethics are difficult to pin down, but they are best described as pragmatic. He avoided appeals to moral principles too far removed from the particulars of our experience. His pragmatic ethical principles, including the concept of duty, are contingent, reflecting the material, social, and historical conditions of his culture. These principles emerge from the felt needs of one’s

\textsuperscript{195} Holmes to Harold Laski Jan 11 1929, Holmes-Laski Letters, Vol, 2, 1124.
\textsuperscript{196} On the former of these claims, see Albert Alschuler, Law without Values, University of Chicago Press, 2000.
context. And the ethical principles Holmes espouses rely on the process of inquiry, investigating circumstances, and relying on empirical data when helpful.\(^{197}\) These pragmatic ethics are anti-Kantian, but also non-utilitarian because they do not rely on any \textit{a priori} principle of increasing happiness. Holmes’s moral philosophy operates against strong moral realism and within a weak cultural relativism. As such a pragmatist such as Holmes must account for the emergence of norms and ideals. For we \textit{must} act, and to act is to pursue an ideal. Holmes affirmed ends and pursued ideals because he wanted to make the future as he desired it. In this section I want to defend my claim that his ethics are pragmatic against opposing claims.

Values, for Holmes, were just “generalizations emotionally expressed.”\(^{198}\) He defined a system of morality as “a body of imperfect social generalizations expressed in terms of emotion.”\(^{199}\) But Holmes also aligned with one reading of Aristotle, who viewed life as “painting a picture not doing a sum, that specific cases can’t be decided by general rules, and that everything is a question of degree.”\(^{200}\) Theory, for Holmes, and other pragmatic ethicists, does not cultivate character, \textit{praxis} does. Holmes stated, “We learn how to behave as lawyers,

\(^{197}\) Posner, \textit{Law, Pragmatism, and Democracy}, 52.
\(^{199}\) Holmes, “Ideals and Doubts,” in \textit{Pragmatism A Reader}, 171.
\(^{200}\) Letter to Lewis Einstein, July 23, 1906, \textit{The Holmes-Einstein Letters}, 24
soldiers, merchants, or what-not by being them. Life, not the parson, teaches conduct.”

These pronouncements exude pragmatic ethics.

Consider the way Holmes undermines the fact-value dichotomy:

Values are simply generalizations emotionally expressed, the generalizations are matters for the same sciences as other observations of fact. [...] Of course different people and especially different races differ in their values—but those differences are matters of fact and I have no respect for them except my general respect for what exists. Man is an idealizing animal—and expresses his ideals (values) in the conventions of his time. I have very little respect for the conventions in themselves, but I respect and generally try to observe those of my own environment as the transitory expression of an eternal fact.

Inherent in this citation are several interpretative difficulties. First, the manner in which Holmes treats values as subject to scientific investigation leads some commentators to label him a positivist. Second, Holmes’s focus on emotion has motivated some to call him an “emotivist.” Third, his cultural relativism and his indifference to “conventions in themselves” has led others to deem him a thoroughgoing moral skeptic and a nihilist. We need to address these claims one at a time, but I will state first that I think this expression, taken together with his other writings, exudes philosophical pragmatism and pragmatic ethics. Experience furnishes the data for reflection upon conduct. Experience includes

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201 Holmes to Frederick Pollock, April 2, 1926, *Holmes-Pollock Letters*, 178.
our felt values and sentiments as well as our motives and ends in view. That is, experience is not reduced to sense data but includes all that is experienced and how it is experienced. We are “idealizing animals,” but this is a fact of our experience. We act according to ideals, which is also a brute fact. These ideals are not merely nominal: they have meaning in our associations and interactions with each other and in the consequences of their active endorsement. Holmes thought the world has meaning, intelligence, and significance because we are inside of it. This is not Platonic realism, but it reflects the functional realism of the classical pragmatists. Are ideals (values) real? Holmes must answer yes because these values function in a way that has real consequences. If you want to know the meaning and the reality of a concept, such as forgiveness, then, thinking with the pragmatist, you must look at the consequences of the value in action, at the habits of action it produces.

The first two labels of positivism and emotivism are related mistakes. The logical positivist excludes as meaningless much of our experience expressed in the form of statements that are not derivative of sense data or those which are not analytically necessary. The positivist dismisses reference to ideals as motives to action as meaningless because these are either not interestingly tautological or because they do not correspond in a verifiable way to states of affairs attained by

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205 Hantzis, “Legal Theory within the Wider Intellectual Tradition,” 582.
206 To Lewis Einstein’s Daughter, May 6, 1925, The Essential Holes, 75-76.
sense data. If ideals are meaningless in the way the positivist describes them, ideals as motives for conduct must be emotive states, questions of psychology, subjective, and therefore not binding. If the commentator artificially limits experience in this positivist manner, she can generate these labels. Positivism emerges if subjecting values as emotions to science means explaining away their efficacy by reducing them to brain states, and emotivism surfaces as a label to catch the efficacious remainder. The entire trend of emotivist ethics as a species of noncognitivism in ethics can only gather argumentative momentum if one begins with the demand that we must define what moral philosophy is by a rigorous and logically necessary conceptual analysis. This trend finds expression in Posner’s description of his own moral philosophy, as a species of noncognitivism. His choice of labels signals the fact that he interprets moral philosophies without the insights of the classical pragmatists. Once continuity is established among moral, practical, and scientific intelligence, (the position held by Peirce and Dewey) the argument used to generate the label of emotivism may be correct analytically, but it is trivial experientially. Here we see why Holmes must be read as a pragmatist. Reading Holmes’s ethics through the labels generated by the logical positivists’ project produces contradictions and

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inconsistencies, not mere nuances. Reading him as a philosophical pragmatist, we refuse to accept the reductionism which generates these contradictions.

The label of nihilism appears as a function of Holmes’s pervasive moral skepticism and his Darwinian evolutionism. Posner refers to Holmes as a “social and biological Darwinian, and hence a skeptic who believed that the good and true, in any sense that people could recognize, was whatever emerged from the struggles of warring species, nations, classes, and ideals.” Alschuler cites Holmes’s elevation of the life struggle, the will to power, and recourses to force as evidence of this Social Darwinism, but he goes further to argue that Holmes was a “noble nihilist” and not a pragmatist. But Holmes, like Dewey, integrated two nineteenth century trends into his philosophy, his Darwinian respect for positive science and Romanticism. Darwinism did influence pragmatism, but evolutionary naturalism does not entail reductionism or moral nihilism in any binding way.

Holmes’s reference to duty seems most decisive in undermining claims that he is a positivist or an emotivist. Holmes viewed the law of duty and the rule of joy as the same aesthetic experience. He wrote, “The rule of joy and the law of duty seem to me all one. I confess that altruistic and cynically selfish talk

seem to me about equally unreal.” 210 Holmes believed in moral duty as a fact of our experience. Furthermore, because of his pragmatism, there is no inconsistency in his faith in science and his belief in the felt value of moral obligations.211 Concerning his Darwinism, at times Holmes was fallible and skeptical of it as well. He thought evolution a faith, but a faith that there is a little bit more continuity than already established, which is at the heart of every advance in science. He wrote, “I mean by continuity quantitatively fixed relations of every phenomenon to antecedent phenomena.” 212 But he was also no reductionist. Holmes once read a behaviorist who said consciousness is a futile conception because no one can tell what it is, but he thought that was silly. As a child his father taught him how you cannot describe how salt tastes. Reflecting on this lesson, Holmes concluded that just because he could not go beyond consciousness does not disprove it.213 His comments about the cosmos tend toward realism at times, but this is in fact a rejection of skeptical idealism and

210 Holmes, Speech at a dinner given to Justice Holmes by the Bar Association of Boston, March 7, 1900, *The Essential Holmes*, 79-80.
Hegelianism. His metaphysical position seems radically empirical, and this allows him to treat felt values as facts within experience, not to be explained away in a reductionism or subsumed under *a priori* theories antecedent to the experiential problems from which they emerge.

I need to make two more points concerning Holmes’s ethics. First, his ethics defies a separation of fact and value by reference to his use of abstract normative principles as embedded in the specifics of any given individual case. Second, aesthetic experience generates pragmatic norms. Holmes’s refusal to distinguish fact and value runs parallel to Dewey’s. Dewey argued that there was not a strict distinction between factual and evaluative statements about the world and that we can inquire into these values in a way continuous with other inquiries. But we also construct values by forming hypotheses about how to reconstruct and transform moral situations. Therefore, scientific conclusions

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214 Consider his comment to Lewis Einstein: “It may be that one’s act is a cosmic necessity and has the whole weight of the universe behind it. It may be that there is no necessity, but that one’s unimaginable spontaneity takes now this turn now that. We may be important. It may be that the universe would be in ruins were not this paper on the table now in front of me a nodus that has the illusion of personality in its freaky moments fancies itself distinguishable from the before and after of the stream of energies that for the moment is able to say ‘I.’ I recur to my old formula. Having made up your mind that you are not God don’t lie wake nights with cosmic worries.” February 8, 1931, *The Holmes-Einstein Letters*, 321. Or his letter to Frederick Pollock: “I am thoroughly with him [Bradley, but possibly Hegel] on the inseparability of the individual from the cosmos. But his cosmos has got its tail in its mouth and is self-supporting as row of men sitting in each other’s laps in a circle, whereas mine is an I know not what, beyond my capacity to predicate (wherein I fear we are not quite at one).” February 10, 1925, *The Essential Holmes*, 62.


and moral concepts are both products of our inquiries which emerge from our intelligent responses to problematic situations. We do not find ideas antecedent to our inquiry which can guide our conduct by subsuming our actions under their rule. And last, this spirit of scientific inquiry in moral thinking is a public and communal affair. These norms of scientific inquiry are norms of praxis because thinking is an activity.  

Holmes denies a distinction between fact and law, broadly conceived. Catherine Wells Hantzis stresses this in her interpretation of Holmes’s adjudication. Where the formalists held that judges apply rules to the facts of a case, “Holmes sees no real distinction between the case as a particular collection of factual circumstances and the legal interpretation of those circumstances. This is because our legal theories are embedded in our apprehension of the case, in ways that cannot be rooted out. Legal generalizations do not merely sum up past cases; they also determine to a large degree the appearance of future ones.” Dewey held that ethics could generalize the types of moral conflicts which come to pass and enable a bewildered individual to clarify her own particular problem by including it in a larger framework. Legal generalizations work in a similar way, and the normative vision for resolving the

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220 Dewey, LW 7:166.
problematic case demands seeing the actual in light of the possible. Holmes wrote, “New cases will arise which will elude the most carefully constructed formula. The common law, proceeding as we have pointed out, by a series of successive approximations—by a continual reconciling of cases—is prepared for this, and simply modifies the form of its rule.” Holmes’s assertion on the genesis of legal principles rests on an understanding of legal determinations which result from a cumulative community consensus in two ways. The successive approximations of the community of judges converge on a consensus, and the customary practice of the relevant community provides a standard of conduct to the case at hand.

Consider the implications of the way Holmes decided *Baltimore and Ohio Railroad v. Goodman*. Holmes overruled a decision for the plaintiff in a railroad crossing accident, in which the defendant, (the railroad), had argued that the plaintiff, a man driving his car near a railroad crossing, had been contributorily negligent. Holmes argued that if a man is not sure whether a train is coming, he needs to stop, get out, and look. Holmes thought, wrongly, that this was customary practice. Important for our purposes is that Holmes does not search for a rule and then determine if the facts of the case fit. He begins with the facts

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of the case and rules on it from within those facts, the common sense observation which presupposes normative judgments. However, Holmes does not refer to such normative judgments. Instead, he decides the case first, and only in later analysis could abstract normative principles be adduced.\textsuperscript{224} As he wrote in his early article “Codes and the Arrangement of the Law,” “It is the merit of the common law that it decides the case first and determines the principle afterwards.”\textsuperscript{225} The feeling about the case is usually decisive, and abstract theories will rarely move Holmes to a different result, as Posner has argued. However, the premises which constitute the feeling emerge from a received tradition of culture and law which includes theory, and these are embedded in the judge’s perception of the case.\textsuperscript{226}

The legal cases and the principles which decide them, or put otherwise, the principles and the cases which form them, are not strictly distinguishable. This rejection of a formal division between fact and theory echoes both Peirce’s argument that the premises in the form of perceptual judgments are extreme cases of abductive inferences. The distinction in Peirce is one of degree.\textsuperscript{227} The rejection of a strict fact-theory dichotomy also resonates in Dewey’s denotative method, in which theory emerges from experience and returns to and constitutes

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\item\textsuperscript{224} Hantzis, “Legal Innovation within a Wider Intellectual Tradition,” 573.
\item\textsuperscript{225} Holmes, \textit{Collected Works}, Vol. 1, 212.
\item\textsuperscript{226} Hantzis, “Legal Innovation within a Wider Intellectual Tradition,” 573.
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in part the facts of experience. In the thinking of Holmes, Peirce, and Dewey, the facts and the theoretical principles share a reciprocal relationship. The judge forms general principles by induction from particular cases, but these principles always inform the perception of the future cases. The meaning of the principle always finds itself embedded in individual cases. The principles are not Platonically real (as the natural law theorist would have it), nor are they mere names for fleeting decisions (as the nominalist would have it). Their reality is not compromised by their genesis in particular cases, but they themselves do not decide the case (as the formalist would have it). This reciprocity between the facts and the principles is pragmatically normative. The principles’ efficacy in a given case is not a function of its internal consistency with other standards and rules, although such consistency usually helps. The reality of the principle, much like moral concepts in Dewey’s pragmatism, is a function of its association with particular cases, and its ability to resolve them.

X. Conclusion

I have attempted to illustrate in what ways Justice Holmes’s jurisprudence resides at the intersection of philosophical and legal pragmatism by presenting a conceptual, and historical, connection between Peirce’s 1868 essays on the capacities claimed for man and the consequences of these incapacities and Holmes’s jurisprudence. In these essays, Peirce problematizes the Cartesian
reliance on intuition and introspection and replaces it with a demonstration of
how we reason toward knowledge of internal states of mind, including
subjective differences in our cognitions by recourse to external signs. Holmes
employs this line of thought in his preparatory essays for *The Common Law*
written after his meetings with Peirce in 1872. In these he demonstrates the way
courts use external standards in ways which exemplify the epistemology Peirce
thought avoided confusion and provided useful, legally material, knowledge.
Holmes’s scholarship separates liability from the foundation of culpability
conceived as an internal state of mind, such as malice or intent, while at the same
time undermining strict liability. Holmes further manifests Peircean
epistemology by undermining the concepts of possession and rights conceived in
the tradition of German jurisprudence, reducing rights to matters of external fact.

According to Peirce, we do not reason from premises which are not also
conclusions. In the same way, Holmes shows that judicial decision are not
merely syllogistic, applying universal legal principles to specific cases at hand in
a court of law. Rather the legal principles, standards, and rules have a history.
And Holmes employs historical analysis to explode those principles whose
contexts which helped generate them no longer subsist.

Peirce offers us the best way to fix our beliefs, the method of science,
which avoids authoritarianism and which always tests itself against the needs of
the community. Holmes shows that the jury embodies the needs and customs of the community and serves as a proper external standard to judge many indeterminate legal cases.

Peirce offers us the pragmatic maxim, which asks us to look to the practical effects of a concept in order to understand its meaning. Holmes amends Austin’s definition of law as a command by a sovereign to a subject imposing a duty backed by a sanction in favor of his prediction theory of the law. If we want to know the meaning of a law, we turn the prediction of the behavior of the courts by the bad man into a thing we call law. The meaning of the law is a function of the consequences of the activity of the courts.

Peirce offers us the idea of truth as the ideal achieved only by an ideally situated and indefinite amount of inquiry. Holmes tells us that truth is an unattainable sought after. He works with a concept of truth as his can’t helps. But Holmes is skeptical of the mirage of absolute truth. Further, Peirce’s doubts about the alternative ways we fix belief—tenacity, authority, and *a priori*—have normative consequences. Holmes shows us that those who are certain of their certainty will resort to violence to achieve their tastes, misunderstood as absolute truths. Holmes employs the norms of pragmatic inquiry in his dissent in the *Abrams* case, allowing inquiry governed by the norms of falliblism, liberalism, and experimentalism—pragmatic norms. Holmes’s method of inquiry in *Abrams*
was noted by John Dewey who thought Holmes’s dissent exemplified the liberal mind and the “method of intelligence,” his analogue to Peirce’s method of science. These same norms of falliblism, liberalism, and experimentalism register as judicial self-restraint in Holmes’s dissent in *Lochner*. Holmes political prejudices were against social legislation of the sort struck down in *Lochner*, but his dissent was a function of philosophical pragmatism in the tradition of Peircean inquiry, not a function of his political affinity for the left-leaning politics of future Legal Realists.

Holmes’s non-judicial writings offer us a thoroughly pragmatic moral philosophy. Values are real insofar as they are a part of our experience and insofar as they govern behavior which has real consequences. They do not emanate from a transcendent source, but are products of involved situations which give rise to their need. The same holds true for the relationship between facts and norms in legal cases. Holmes’s decisions show how norms guiding adjudication emerge from the facts of the case and the experiences of the community which needs the rule of law. As experience and custom evolve, so do the rules which guide the judgment of these cases. Holmes resided at the intersection of philosophical and legal pragmatism in terms of epistemology, method of inquiry, reasoning, theory of meaning, theory of truth, moral philosophy, and the relationship between facts and values.
But we must remind ourselves of the contemporary relevance of this historical scholarship on Holmes. For the most part, Richard Rorty’s “neo-pragmatism” has been successfully integrated into a rich conversation about the nuances of classical and contemporary pragmatism. Rorty’s novel insights and spirited interpretations have become more appreciated by scholars of classical pragmatism. The result has been to decouple “pragmatism” and “all things Rorty.” Similarly, I want to provide the conditions for possibility for the academic community to decouple “legal pragmatism” from “all things Posner.” My hope is that what I have provided here can serve as a propadeutic to a more substantial, critical rethinking of Posner’s version of legal pragmatism. If successful, this will help continue the process of appreciating Posner’s polemics and lively legal analyses, while bringing the insights of classical pragmatism into the heart, not the periphery, of the conversation.

In order to accomplish this task, I have provided a defense of the claim that Holmes was a pragmatist. Thinking with a suggestion made by Posner, I place Holmes at the intersection of philosophical and legal pragmatism. Posner and Grey have argued that legal pragmatism stands free and independent of philosophical pragmatism. This claim alone demonstrates a misunderstanding of philosophical pragmatism itself. These could only be independent if the
pragmatist could think of theory as general, abstract, and metaphysical positions erected antecedent to practice.

The classical pragmatists consistently avoided this mistake. Peirce and Dewey remind us of the order of inquiry. When we find ourselves irritated by doubts, uncertainties, and indeterminacies, we inquire, and if our inquiry is successful, it ends in a belief, understood as a habit of action. Some inquiries, including many legal ones, involve the production of theories which alleviate the doubts which gave rise to the need for inquiry. These theories must return to practice in order to resolve our otherwise indeterminate situations. If pragmatism was a mere theory or metaphysical position, such as Rorty’s anti-realism, we could dismiss it as inessential to legal pragmatism. But pragmatism is a method, articulated by Peirce and Dewey, and put into practice in law by Holmes. The philosophical and legal must intersect in a dependent, reciprocal manner if they are to be labeled pragmatic. In the legal scholarship and judicial decisions of Holmes, we find ourselves at this intersection, and we are the benefactors of its normative consequences in law.

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