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HOLMES' THEORY OF LAW

DISSERTATION

Presented in Partial Fulfillment of the Requirements for
the Degree Doctor of Philosophy in the Graduate
School of The Ohio State University

By

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* * * * *

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INTRODUCTION

This dissertation is an attempt to formulate and evaluate the overall legal theory of Oliver Wendell Holmes, Jr. It is based upon two discoveries: first, that Holmes put forth a comprehensive theory of law, and not just a series of reflective observations upon various jurisprudential topics, and second, that no single full-length analytical treatment of Holmes' legal thought existed in the literature. After a relatively brief opening chapter discussing these discoveries in greater detail, I go on to show how the three most fundamental branches of Holmes' legal thought can be integrated by a recognition of their underlying pragmatic orientation. I argue this broadly-reaching claim by means of a comparative analysis, contrasting the thoughts of Holmes with those of several American pragmatist philosophers. The result of this contrast is my substantive reconstruction of "Holmes' Theory of Law." The final chapter is an evaluation of the Holmesian theory I have posited, and shows that several of the "classic" objections to Holmes' legal thought are either misguided or overly simplistic. A final section gives an overall statement of the positive and negative aspects of Holmes' theory, and some conclusions are reached.

Notes are placed at the end of each of the three chapters; a comprehensive list of references (from footnotes) is placed at the very end of the dissertation. In addition, I have included as an appendix a table of cases cited in the text, arranged in alphabetical order.
Holmes' Theory of Law

CHAPTER ONE

The Necessity for Philosophical Research and Analysis of Holmes' Legal Thought

A. Philosophical Importance.

Holmes as Philosopher of Law.

Although Oliver Wendell Holmes, Jr. gained his reputation in recent American history primarily as a result of his three decades of service on the United States Supreme Court, he is often regarded as a significant and even revolutionary figure in the modern philosophy of law. This means that Holmes is important from a philosophical standpoint as well as from a historical one. His judicial career, for which he is most widely renowned, was but one part of his whole life's intellectual endeavor. The fact is that Holmes was a legal philosopher turned appellate judge, and so, his philosophical work deserves attention from those scholars engaged in the study of the history of ideas. Because of Holmes' stature in American judicial history, this would be the case even if Holmes' legal philosophy were of only minor importance. However, much of Holmes' legal thought constitutes one of the most important and influential contributions to jurisprudence that has been recently made, which makes Holmes' importance to the modern philosophy of law all the more far-reaching. I will address this point more fully in a moment.

2. Motivations of This Study.

This dissertation is an effort to discover in Holmes' philosophical writings (and to a lesser extent in his judicial writings) exactly what his theoretical contributions to the philosophy of law were, and to assess the value of those contributions. It will be argued in these pages that Holmes' legal philosophy amounts to much more than a series of reflective observations about this-or-that aspect of jurisprudence, which may be
the first impression one gets from Holmes' philosophical writings. This impression may be due, at least partly, to the fact the Holmes never wrote a systematic or generalized treatment of his legal thought. The question that arises is—did Holmes even have a comprehensive theory of law?

What I have discovered, through my research into Holmes' philosophical and judicial writings, is that Holmes did put forth an overall theory of law which is distinctively and essentially pragmatic. The underlying pragmatism of Holmes' many views is precisely what unites and integrates those various parts of his legal thought, and so, is the core element of his philosophy of law. The thesis that Holmes was a pragmatist will therefore allow various aspects of his thought to be better understood, since their proper overall context will have been found. Further, the elaboration and criticism of "Holmes' theory of law" will provide new material for the philosophical community to consider and analyze. Hopefully, any misconceptions about what Holmes' theory was, as well as what his theory implied, will be corrected as a result of this study. A philosophical analysis of Holmes' theory of law will also result in an increased understanding of Holmes from the historical point of view, and will serve to put his judicial behavior into a larger intellectual context.

3. A Review of Literature Connecting Holmes to American Legal Realism.

When the claim is made that Holmes apparently made a major philosophical contribution to jurisprudence, what has usually been meant by this? In other words, what is Holmes' philosophical reputation, as opposed to his judicial reputation?

That Holmes is considered as a major figure in the modern philosophy of law is primarily due to the credit he has been given in stringing the school of legal thought known as "American Legal Realism." This particular school of jurisprudential thinking has recently been called the "dominant general theory about law and its use" in twentieth-century America.[1] This is a significant observation, for it not only says that legal realism dominated the thought of twentieth-century American legal theorists, but also implies that legal realism has a present-day philosophical importance, at least to the extent of its being studied as modern history. Basically, legal realism is an anti-traditional view of jurisprudential thought which tends to de-emphasize the role of legal rules and principles and correspondingly emphasize the actual (i.e., "real") behavior of courts and administrative officials. The modern influence of legal realism, in fact, is tremendous—it is widely considered as a viable theory of law for the present day, at least in America, as Theodore Benditt points out in a recent volume, Law as Rule and Principle:

"It is probably correct to say that realism is the
prevailing legal philosophy among teachers and practitioners of law in the United States, and among many legal scholars."[2]

A similar point has been made by William Seal Carpenter, who observes in his book Foundations of Modern Jurisprudence, that:

"... if British jurists are still under the influence of Austin, their American colleagues are still dominated by Holmes."[3]

The literature of jurisprudence in the last sixty years is full of concurring opinions about Holmes' fundamental role in modern jurisprudence, citing him to be one of the founders, if not the most distinctive one, of American legal realism. Here is a sampling of such observations:

"More than any other figure in American law, the late Justice Oliver Wendell Holmes was the man who laid the groundwork for the various schools of 'legal realism' that followed him ... into the twentieth-century."[4]

"The aggregation of ideas which came in time to be known as American Legal Realism contained many which were either genuinely derived from Holmes or were inspired by his ripped-out aphorisms."[5]

"In the field of law two great American jurists above all may be considered as the mental fathers of the realist movement: John Chipman Gray and Oliver Wendell Holmes."[6]

"Much of the special quality of the approach of the American legal 'realists', as they term themselves, was incorporated by the writings and legal opinions ... of Oliver Wendell Holmes."[7]

"The realists trace their intellectual ancestry to the skepticism of Holmes, J."[8]

"The intellectual inspiration of the realist movement in America is generally credited to Oliver Wendell Holmes ..."[9]
"Holmes' ... views laid the foundation for the school of jurisprudence known as American Legal Realism ..."[10]

"The distinguished American judge, Oliver Wendell Holmes, is considered one of the founders of the school called 'legal realism'."[11]

It is not always clear, however, which of Holmes' writings should be used to pinpoint the origin of American legal realism. Some authors contend that the seeds of this movement can be found in Holmes' book, The Common Law (published in 1881). For example, some very recent studies observe:

"Taking as our domain of study the legal order ... it places us in the tradition of American legal realism, a school of jurisprudence that began in 1881 when Oliver Wendell Holmes, Jr. (later a great Supreme Ct. justice) wrote that 'the life of the law has not been logic, it has been experience ...!'"[12]

"Between 1881 when Holmes published The Common Law and the 1930s, a dramatic reorientation of American legal thought occurred."[13]

Other authors insist that Holmes began the realist tendency in legal thought in 1897, with his essay "The Path of The Law."[14] Some even claim that the legal realist tradition can be traced to a single passage in that essay, wherein Holmes avers that the meaning of "the law" is in "the prophecies of what the courts will do in fact."[15] For example, speaking of this passage, it has been observed that:

"This arresting dictum became at one time a kind of sacred text for much realist doctrine."[16]

"This epigrammatic definition of law became a basic tenet in the credo of some American realists ..."[17]

On the other hand, a few authors attempt to place Holmes' thought in a larger intellectual and historical setting. Speaking of the nineteenth-century "revolt against formalism", Dennis Lloyd writes:
"In America this movement was associated with such figures as William James and Dewey in philosophy and logic, Veblen in economics, Beard and Robinson in historical studies, and Mr. Justice Holmes in jurisprudence."[18]

This broader perspective is one that I will be adopting in this essay. My attempt will be to show that Holmes' legal ideas are consistently analyzable in terms of their underlying pragmatism, and that this places Holmes into the forefront of the American pragmatic tradition in philosophy. My method for such a demonstration, or the means by which I will support this position, will consist of a comparative analysis of several major segments of Holmes' legal thought with the philosophical positions of some famous American pragmatist philosophers (viz., Charles Peirce, William James, and John Dewey). In the course of the analysis, I will point out the ways in which the various major themes of Holmes' legal thought can be seen as individual aspects of a single, comprehensive theory of law. Hence, I will not simply concentrate on any one of Holmes' works, but will, in fact, draw from them all in an attempt to re-construct now what Holmes never constructed himself--his overall theory of the law.

This endeavor, surprisingly, is being done here for the first time. That is, there has been no full-length attempt to re-construct, analyze, and evaluate "Holmes' theory of law." No study even comes close to attempting a broad synthesis of his various views into a single, coherent theory. The philosophical literature, then, contains a major gap which needs to be filled. In support of these contentions, which also serves to define the necessity for the present study, let me review the analytical literature on Holmes in the following section.


Since Holmes refrained from writing a general account of his legal thought, all subsequent scholars who have attempted to study Holmes' legal ideas have had to look at what he did write, which falls into five basic categories.

First, Holmes' only book, The Common Law, is a masterpiece of both historical analysis and philosophical theorizing, and so, must be considered as fundamental to any effort to reconstruto Holmes' overall legal thought.

Second, Holmes wrote several technical and philosophical articles for publication during his life which reveal various aspects of his legal thought. Many of his early articles, though, published in the 1870's, were later incorporated into The Common Law. Overall, however, Holmes' articles are also an important source of Holmesian
Third, Holmes carried on a voluminous correspondence with several persons during his lifetime, and many sets of letters have been edited for publication. From an analytical perspective, however, the letters cannot be considered as a major source of Holmes' legal thought for two reasons: (1) they are usually written in a casual, non-theoretical, or what I would call a "non-serious" manner, that is, they were probably not intended to be the clear, thought-out expositions of Holmes' legal thought which his articles and book obviously were, and (2) they are not very substantive, meaning that Holmes' references to his legal philosophy in the letters are often mere snippets, short comments, and reflections, which in any case, he usually stated elsewhere, in one of his "serious" writings. This does not mean, of course, that Holmes' correspondence is unimportant, but only that these sets of letters cannot be taken as a primary source of Holmes' legal theory. I would argue that they are best used for illustrative purposes.

Fourth, Holmes served for five decades as an appellate judge on the highest courts of both Massachusetts and the United States, and in so doing, wrote a tremendous number of legal opinions. Using these opinions as a source of Holmes' thought also presents some problems, however. In the first place, judicial decisions are often written as collaborative efforts, so that the following question would arise about many decisions: "Which of these ideas are Holmes' and which are not?" There is virtually no way to tell in most cases.[19] In the second place, the opinions are often quite narrow in scope, tending to focus on technical legal points rather than general theoretical matters. This presents a problem of interpretation, namely, that of attempting to see a general theory behind the pointillistic display of extremely individualized decisions. On the other hand, individual dissents probably present the best prospects as judicial sources of Holmes' legal thought, since their authorship is definite and the attention paid to general theoretical issues is a little more prevalent. For these reasons, Holmes' judicial opinions can only sometimes be used as an important source of his legal philosophy.

Fifth, there are various miscellaneous bits and pieces which Holmes wrote: reviews of books, introductions to books, reading notes, diaries, and speeches. These are surely not major sources of his legal theory, but are often informative and/or illustrative of singular issues. They are properly used as back-up sources along with the correspondence, rather than as fundamental sources.

As for the secondary literature on Holmes, it can be divided up in several ways, but in the present context of my claim that no full-length philosophical treatment of his ideas exists, I will classify the literature on Holmes in terms of the full-length works and the shorter articles and essays.

Of the full-length works on Holmes, there are the biographies and the analytical works. Probably the most important of the
biographies of Holmes is Mark DeWolfe Howe's work, which is often quite sophisticated with regard to some of Holmes' early legal thought. Although Howe wrote the first two volumes of a projected definitive and "official" biography of Holmes, the author died before the project was completed. These two volumes only cover Holmes' life from 1841 until his appointment as an appellate judge in Massachusetts in 1882. Howe's work, had it been finished, may have come closest to being a full-length analytical treatment of Holmes' thought, though in a biographical form. Even so, it would still not have been a philosophical work, as the present essay purports to be. In any case, the point is now moot. Of the other major biographies, none are basically done as serious philosophy, though there is some analytical effort in a few of the biographies. David Burton's volume on Holmes' life is apparently the most recent, but is relatively short, and covers much ground addressed elsewhere. Although Burton does offer some theoretical analysis of Holmes' thought, there is probably less of it than has appeared in several short articles on various aspects of Holmes' philosophy. The early biography by Silas Bent is critical and interesting, but lacks historical perspective as well as philosophical depth. Bent's emphasis, moreover, is upon Holmes as a judge rather than a philosopher of law. Similar comments apply to the two works by Francis B. Biddle. His first book on Holmes, entitled simply Mr. Justice Holmes, is an informal and personalized portrayal of Holmes' life; the second book, entitled Mr. Justice Holmes, The Natural Law, and The Supreme Court, is argumentative but still lacks the comprehensive analytical/philosophical perspective needed to see Holmes' legal thought in an overall, coherent sense. Catherine Drinker Bowen's volume on Holmes' life is quite entertaining because it borders on fiction, relating many incidents in Holmes' life in the form of a dramatic narrative. Not surprisingly, it contains very little critical analysis of Holmes' legal thought. There are several other minor biographical works which are often somewhat shorter than full-length treatments. These, however, are either completely non-analytical treatments of Holmes' life or are straightforwardly sympathetic tributes (even "glorifications") of Holmes. Overall, then, a full-scale philosophical analysis of Holmes' legal thought is not to be found in any of the biographical works completed to the present.

There are, in comparison to the biographies, extremely few full-length works on Holmes which are analytical rather than biographical. None of these, however, offers a philosophical treatment of Holmes' legal thought on the whole, or attempts to synthesize various aspects of his thought into a coherent theory. The analytical treatments, moreover, mostly deal with Holmes as a judge rather than as a philosopher of the law. Four authors deserve mention here. David Burton's collection of essays, Oliver Wendell Holmes, Jr.—What Manner of Liberal? again appears to be the most recent non-biographical full-length work, but lacks an in-depth analysis of Holmes' philosophy of law. The same comment applies to Felix Frankfurter's edition of Mr. Justice Holmes, another (though more laudatory) collection of essays. However, Frankfurter's other volume, Mr. Justice Holmes and The Supreme Court is a much more
sustained analytical treatment of Holmes, but is rather short, and is concerned with various aspects of Holmes' theory of constitutional law alone. In this narrow sense, however, it is a fairly good philosophical effort, though much of the bulk of the book is made up of quotations from Holmes himself. In the same vein of purely judicial analysis is Samuel J. Konefsky's book, The Legacy of Holmes and Brandeis. Though not a treatment of Holmes alone, the book offers a fair amount of analysis and discussion regarding the general theoretical aspects of Holmes' later judicial opinions and dissents, and in this limited range, provides some good material. The only other full-length published treatment of Holmes that is not biographical is James W. Hurst's Justice Holmes and Legal History, which analyzes one more specific aspect of Holmes' thought. However, not only is this work a non-comprehensive treatment, but its content is extremely difficult to grasp, as Hurst tends to deal in terms of grand-scale abstractions with regard to American social, economic, and legal history. The work may still be considered the only historical/analytical treatment of Holmes attempted so far. Of all the full-length works published on Holmes, then, both biographical and analytical, there is no comprehensive philosophical treatment of his philosophy of law. This is rather surprising, considering not only Holmes' historical stature, but his importance as the legal philosopher responsible for the "dominant" legal theory of modern-day America. The literature on Holmes' legal thought apparently contains a definite gap of theoretical attention, and this essay is intended to remedy that situation.

In the interest of comprehensiveness, however, let me briefly outline the non-comprehensive, article-sized literature on Holmes. In the first place, there are many short articles of a biographical nature which have been written about Holmes. These, of course, are non-philosophical. In addition, there are also many analytical articles on Holmes' ideas as well, though most of these deal with his judicial behavior on the U.S. Supreme Court. What remain in the Holmes literature are approximately one to two dozen primarily theoretical/philosophical articles which have appeared in philosophical journals, in books, and in law reviews. The present study will be the first full-length comprehensive effort in this latter area of theoretical/philosophical analysis. I will be concentrating on what I have found to be the major theoretical areas of Holmes' legal thought, culled from both his philosophical and judicial writings. In addition, I will be using several of the analytical articles as references, as some of these have been short treatments of themes which I will address directly in this essay. What I will attempt to do, however, is go further than any single philosophical article by offering a full-length and comprehensive treatment of Holmes' legal thought.

There is one area of writings which I have not yet addressed, and that is the literature specifically written in the philosophy of law. I have already provided a sample of passages above from this body of writing, which gives credit to Holmes for beginning the school of thought known as Legal Realism. Of course, there is a sizable body of literature on legal realism with many references to
Holmes in it, but I have also discovered that there is not a single full-length exposition of Holmes' theory of law, even in this area of the literature. This is partly due to the fact that the "realists" apparently preferred to write their own treatises of legal theory rather than reconstruct and analyze the theory of their progenitor. Further, the school of thought known as "legal realism", though derived in its basics from Holmesian ideas, developed and became theoretically diversified to a great extent apart from Holmes. Hence, legal realism has come to refer to a wider and wider body of ideas, and though many of these ideas are recognizably Holmesian, not all of them are. As one author has pointed out:

"Any attempt to draw parallels between the views of Holmes and those of the legal realists is, of course, dangerous ... his ideas are not without their own inner stress ... many of their [i.e., the Realists] cues were taken from, or at least justified by reference to, Holmes. Yet these cues were developed and defended in ways which Holmes had not anticipated. How much he would agree with all of them is open to question."[35]

Therefore, though the body of literature dealing with legal realism is extensive, it does not deal directly with Holmes' legal theory, as I will be re-constructing it below. On the other hand, many of the issues addressed by the realists are significantly related to Holmes' legal theory, and in those respects, some of the work done by the realists (and their critics) will be relevant and valuable to this study. Since, however, I will first attempt to reconstruct Holmes' theory by means of a comparative analysis from primary sources, I will generally not be referring to the literature on legal realism in that regard. When I attempt to evaluate the theory I have constructed, however, both in terms of criticisms of Holmes that have already been made in the literature, as well as in terms of my own critiques, this body of writings will become much more useful. The main point for now is that, although Holmes is considered to be important as the modern father of the legal realist movement, his own legal theory is not co-extensive with that of any of the realists, and so, must stand or fall on its own. The drawbacks or advantages of legal realism, then, only apply to Holmes' theory of law to the extent that Holmes' theory actually resembles legal realism. It will be seen, later on in this essay, that many criticisms of what is taken to be "Holmes' theory" are apparently misguided, in the sense that they are criticisms of legal realist tendencies which Holmes' legal theory, as formalized herein, does not embrace.

In summary, my effort in this essay will be to investigate historically and to analyze philosophically Holmes' legal thought. In this section, I have shown that no comprehensive treatment of his thought exists as of now, and that the philosophical analyses of Holmes' legal ideas which have been published are limited in both
size and scope. In keeping with the spirit of critical analysis, I will subsequently evaluate what I will have constructed as "Holmes' theory of law" in terms of the objections that have been (and could be) made regarding it, as well as in terms of the Holmesian responses to those objections. In some of this evaluative effort, I will draw from the recent literature in the philosophy of law, especially that which deals with American legal realism to the extent that it actually bears upon Holmes' theory as constructed.

Before my primary argument begins, however, let me briefly clarify some of the background issues surrounding my study, and describe (as well as justify) my methodological approach.

B. Background Comments to the Present Study of Holmes' Legal Thought

When I say that Holmes was a philosopher of law, and that most of the analytical treatments of Holmes approach him as a jurist, I am not suggesting that these two roles are exclusive. My claim is that Holmes' activity as a jurist was only part of his overall activity as a philosopher of law, which in turn was only part of his intellectual life in general. What I have been arguing above is that, although Holmes is given credit for beginning a major school of thought in the philosophy of law, he is most often not treated as a legal philosopher, but as a jurist. It is my position that the broader view of Holmes as primarily a philosopher of law will clarify the more limited role he played as a judge, and I will support this claim below. Whether someone will attempt to fit Holmes' philosophy of law as a whole into the even larger context of Holmes' overall intellectual life remains to be seen. Such a task goes far beyond the scope of this particular project. The outlines of Holmes' thought which I am concerned with here, then, are those which address major theoretical issues in the philosophy of law. But how am I even justified in saying that Holmes was a philosopher of law?

Philosophers are normally engaged in a dual activity. On one hand, they construct theories in whatever area of philosophy they are engaged in, for example, the philosophy of art, ethics, the philosophy of knowledge, the philosophy of language, or in Holmes' case, the philosophy of law. As I will show, Holmes appears to have put forth a "theory of law", which can be explicitly reconstructed from his writings. Philosophers also engage in critical analysis, especially of each others' theories. In relation to this, Holmes also offered his share of critical analysis in jurisprudence, directed at those approaches to law which were commonly accepted when he began his intellectual career. In this dissertation, Holmes will often be shown as one who was quite critical of "traditional" legal thinking and theorizing. Since Holmes engaged in both of these activities in a certain discipline to a considerable extent, then, I contend that he is rightfully called a philosopher of law.

What I will do first is attempt to piece together Holmes' approach to the law from his various writings. Now, if it were the
case that Holmes' various observations and positions on legal matters did not reveal any specific pattern or underlying general approach, Holmes could still be said to have held a "philosophy of law", simply in terms of the totality of those ideas. However, upon a careful examination of Holmes' legal writings, both judicial and non-judicial, a pattern can be perceived—an overall approach to legal matters begins to appear. The discovery of this underlying general tendency in Holmes' legal thought, and the formulation of its major aspects, shows that Holmes had more than a collection of jurisprudential observations. He was putting forth a general, systematic theory of law, and the articulation of this theory is one of the major results of this paper.

As the term is commonly used, a "theory" is a statement (or a set of statements) which explains, clarifies, or makes understandable some body of data. Of course, for any such body of data, there are an infinite number of possible explanations. Each of these theories would simply say "this body of data can be explained thusly." The important issue, therefore, is not whether some set of statements is a theory or not, but rather, which set of statements does the best job of explaining the data. In that case, what is vital to the consideration of theories is the set of criteria by which they are to be evaluated. Now, how does this apply to the theories put forth in the philosophy of law?

In the field of the philosophy of law, the basic domain for theorizing appears to surround that area of human activity in various communities which concerns, among other things, the following phenomena: the enactments of the legislatures of those communities, the decisions of their courts and administrative agencies, the regularities of such decisions, the enforcement of such enactments and decisions, the effects of all of these activities on the community involved, the regularities of those effects, the conceptual notions used by the human actors in this realm (e.g., "the law", "legal duty", "reasonable claim", "contract", "crime", "courts", and so on), the methods by which such actors reason and justify conclusions related to these activities, and so on. However, this general body of events, activities, and ideas has no strictly-defined boundary, and is in that respect related to many other non-legal phenomena. This general body of data, which I will simply refer to as "legal matters", or the "legal domain", is obviously linked to political, moral, sociological, historical, and economic areas to one degree or another. Hence, a "complete" explanation of the legal domain would seem to also involve theories of law, politics, ethics, economics, and so on. In other words, giving a complete explanation of one subject matter means giving a complete explanation of them all. In that case, the most that could be asked of any theory would be that it give such a complete and comprehensive explanation. However, it would be odd to call such a totally comprehensive construction a "theory of law". Total comprehensiveness, then, does not seem to be required for such a theory.

The best way to proceed here is to say that a "theory of law" is one that addresses primarily those items referred to above as its
area of concern. The "comprehensiveness" of such a legal theory will be a function of its explanatory power over this legal domain. Hence, though a broader theory might cover more and more areas into which such legal matters shade off, and so, be rightly judged as a more comprehensive explanation on that account, that kind of theory will actually become less of a "theory of law." Hence, a "theory of law" ought not to be too broad, and should be judged in comparison to other theories which primarily address the same general subject matter. "Comprehensiveness" as a criteria, then, refers only to a certain context, to a comparison-class of similarly-oriented theories.

Of course, it is not enough to say that an adequate "theory of law" should explain legal matters comprehensively. Such a theory should explain the data efficiently and systematically as well, leaving out redundancy and incorporating generality. Good theories ought to be internally consistent as well as externally consistent with other generally accepted and successful approaches to the surrounding disciplines. A good theory ought to be evaluated to a considerable extent on the possible external implications of its adoption—what increases in understanding does it yield? What predictions are possible from it? What benefits does it entail? Finally, a good theory ought to stand up to objection and criticism. These, then, are some of the major criteria by which theories are evaluated. When I claim that Holmes puts forth a "theory of law," then, I spell out for myself two tasks: (1) to identify and reconstruct the theory, and (2) to evaluate the theory.

In relation to the first task, I will place Holmes' ideas side-by-side with some others, arguing that the similarities are strong enough so that an identification or classification of Holmes' thought as being of a certain "type" can be supported. The comparison in this case will involve the three most fundamental themes of Holmes' legal thought and some of the most basic ideas of the three most important American pragmatist philosophers—Charles Peirce, William James, and John Dewey. My aim in such a comparison is to show the way Holmes' thoughts "fit in" with those espoused by the pragmatists. Not only will this serve to classify Holmes' major views, but will be seen to form the basis for their underlying theoretical systematization. Hence, in this work, I am presenting a meta-theory about Holmes' legal thought, namely, that Holmes was working within the context of a pragmatic philosophical theory. It will be shown that various aspects of Holmes' thought can be integrated when their underlying pragmatism is identified in this way, such that a coherent theory of the law results. When this reconstructive task is complete, the evaluation of the resultant theory will proceed. In that effort, I will look at the ways in which Holmes' legal thought (as previously understood) has been criticized in the literature, and will show that many of the objections to Holmes have been misguided. Some criticisms of Holmes' legal thought, however, will be more troublesome. In addition to offering my own critiques of Holmes' theory in the course of such an evaluation, I will end the paper with an overall summary of the evaluative comments regarding Holmes' theory of law, in the attempt
to draw some conclusions.

The reason why I have chosen to build Holmes' theory of law from such a comparative analysis rather than simply present it straightforwardly as "pragmatic" is that the doctrines of pragmatism are not themselves formally systematized principles. Pragmatic thought is a broad batch of metaphilosophical methods as well as philosophical positions applicable to a broad range of individual disciplines. It is not a monolithic structure, but a family of ideas. Recognizing this, I have attempted to show that the fundamentals of Holmes' legal thought were remarkably similar to the pragmatic thought of the three most famous American pragmatists. Of course, most of the philosophy of Peirce, James and Dewey was not put forth in a jurisprudential context, and so, the comparisons with Holmes' thought will show how the underlying nature of his legal thought is of the same general type as that of the pragmatists'. This comparison will also serve to place Holmes in his rightful place as a major figure in the American pragmatist tradition, alongside of Peirce, James, and Dewey. That is, Holmes will now be seen as the foremost American advocate of legal pragmatism. This essay, therefore, is both a study in the history of ideas as well as an analysis of a certain body of ideas. The method of comparison which I will utilize, then, effectively fits the overall concern of the study to identify, reconstruct, and evaluate Holmes' theory of law.

So much for the preliminaries. I will now move on to reconstruct, via a comparative analysis, Holmes' theory of law.

2) Theodore M. Benditt, Law as Rule and Principle (Stanford, California: Stanford University Press, 1978), p. 22; Benditt goes on to say that: "... this view of law and the legal process is associated with ... Oliver Wendell Holmes ...", ibid.


13) Summers, op. cit., p. 862.
14) See, e.g., R.W.M. Dias, *Jurisprudence* (London: Butterworths, 1970), who writes: "The seeds of the [Realist] movement were sown in a famous paper of Mr. Justice Holmes (1841-1934) in 1897. In it this great judge put forward a novel way of looking at the law.", p.517. In Carpenter, op. cit., Roscoe Pound is quoted as having written to Holmes: "Many years ago your epoch-making address on The Path of the Law won me over to this functional conception of jurisprudence ...", p.220.


19) For an interesting story about Holmes' own dissatisfaction with an opinion he initially resisted signing, but eventually signed anyway (because the alternatives were less desirable), see Felix Frankfurter, *Felix Frankfurter Reminisces* (New York: Reynal, 1962), pp. 296-7.


31) See, e.g., note 25 supra, Shriver, ed., What Justice Holmes Wrote, etc.

32) Ibid.

33) See references throughout the second and third chapters of the essay, with a comprehensive listing in the Bibliography.


35) Wilfrid E. Rumble, American Legal Realism (Ithaca, New York:
CHAPTER TWO

The Pragmatism of Holmes' Legal Thought

A. Introduction

In this chapter, I will attempt to accomplish the following tasks: (1) I will argue that Oliver Wendell Holmes, Jr. put forth a legal philosophy which contained several of the most distinctive and fundamental elements of American pragmatism, and (2) I will argue that the best understanding of Holmes' overall legal theory can be gained when its underlying pragmatism is recognized.

In connection with the first of these tasks, I will begin by supplying evidence of Holmes' personal connections with several major pragmatist philosophers. I will then demonstrate the substantive similarities between Holmes' views and the pragmatic thought of Charles S. Peirce, William James, and John Dewey. This comparative analysis will show that the unifying force behind many of the fundamental elements of Holmes' legal philosophy is precisely this pragmatic vision. Hence, an attempt will be made to harmonize Holmes' legal views into a coherent whole. In addition, this comprehensive approach will also serve to explain a good deal of Holmes' judicial behavior. Most importantly, however, I will demonstrate that such an integrated statement of Holmes' legal theory shows it to be a more formidable approach to the law than has been previously thought.

My argument for this last claim will be set forth in Chapter 3, where several of the "standard objections" to Holmes' legal theory will be examined. It will be seen that some of these criticisms stem from an oversimplification or misunderstanding of Holmes' overall legal theory, and that other criticisms can be successfully answered from the standpoint of this integrated pragmatic view.

With regard to the primary tasks set forth for the present chapter, a comprehensive Holmesian legal theory will be offered as a new approach to legal matters, and so, will be subject to further jurisprudential consideration and analysis. In other words, once the integrated theory has been properly delineated and understood, an evaluation of that theory will be warranted. Though many objections to Holmes' thought have been misguided, this new, more powerful
Holmesian theory will still be subject to criticism, and I will also attend to the task of evaluating and criticizing the comprehensive Holmesian position put forth in the present chapter.

Let me begin my analysis with a brief look at Holmes' historical connections with several well known pragmatic philosophers.

B. Historical Contacts between Holmes and Some Major American Pragmatists.

In the early 1870's, it appears that a group of learned men from the Boston area met on an informal basis in order to discuss and exchange philosophical ideas. This group, known as "The Metaphysical Club", counted among its members some of the foremost pragmatic thinkers of the day, including Charles S. Peirce, William James, Chauncey Wright, and Nicholas St. John Green.[1] The historical evidence also shows that Oliver Wendell Holmes, Jr. was at least a semi-regular member of the group in its early days.[2] The Metaphysical Club is important in the history of American philosophy because the discussions among its members appear to have served as the locus of thought from which American pragmatism was spawned. According to Peirce, it was during the early sessions of the Metaphysical Club (when Holmes was a member) that the doctrine of pragmatism first saw the light.[3] In that regard, Peirce wrote:

"Our metaphysical proceedings had all been in winged words ... until at length, lest the club should be dissolved, without leaving any material souvenir behind, I drew up a little paper expressing some of the opinions I had been urging all along under the name of pragmatism. The paper was received with such unlooked-for kindness, that I was encouraged, some half-dozen years later ... to insert it, somewhat expanded, in the Popular Science Monthly for November 1877 and January 1878."[4]

The expanded version of Peirce's "little paper" became two essays which must be considered as truly seminal works of American pragmatic thought: "The Fixation of Belief" and "How to Make Ideas Clear".

The place of Holmes in the American pragmatic tradition, however, is not a matter of general consensus. For example, in H.S. Thayer's excellent history of pragmatism, Holmes' thought is virtually ignored. Thayer claims (though without any support) that it is "debatable" whether Holmes' legal thought was ever "seriously influenced" by the pragmatic approaches taken by Peirce or James.[5] A similar but more open-ended opinion was also held by Mark De Wolfe
Howe, Holmes' biographer. Howe argued that Holmes' legal philosophy was not (at least in its early years of development, namely, the 1870's) a derivation or application of the pragmatic principles developed by Peirce, et al., at the meetings of The Metaphysical Club.[6] Holmes' early jurisprudential efforts, claimed Howe, were not intended to be "philosophical", but were part of a more limited task—the criticism of a specific thesis, that is, the Austinian idea that law was identifiable with the command of the sovereign.[7] Furthermore, Holmes' own scattered references to the pragmatists are themselves a source of confusion. For instance, in a letter written to Morris Cohen (dated July 21, 1920), then Justice Holmes remarks that he had not heard of "pragmatism" before 1891.[8] Moreover, in another letter (to Sir Frederick Pollock, dated June 17, 1908) Holmes referred to the pragmatism of William James in a rather derisive way, calling it "an amusing humbug."[9]

The problem, of course, with the claim that Holmes' legal thought should not be firmly grounded as part of the American pragmatic tradition is that an analysis of Holmes' philosophy shows it to be clearly and remarkably of the same general theoretical orientation as that of the more well-known pragmatists. Such an analysis is forthcoming herein. The fact that Holmes did not call his ideas "pragmatic" is irrelevant, as is the fact the Holmes downplayed his intellectual kinship with James and Peirce.[10] As one author has pointed out with regard to the connections (philosophical and otherwise) between Holmes and the American pragmatists, their respective thoughts did not have to be identical to be akin.[11] And of course, it would be obviously wrong to claim that there was (or is) any one set of specific doctrines that can be tagged as being "pragmatic," for there has been a great amount of theoretical diversity in this philosophical movement.[12] When I speak of the "American pragmatic tradition," then, I refer to the broadly-defined family of ideas (and approaches to ideas) that have been developed by philosophers such as Charles Peirce, William James, and John Dewey. Hopefully, such an ostensive identification will be sufficient.

One of my primary claims in this essay is that Holmes' writings suggest a definite philosophical orientation towards pragmatic thought. The facts indicate that there probably was some interchange of ideas between Holmes and some of the more well-known names of American pragmatism. For my purposes, however, the purely historical question of whether Holmes was influenced directly by his contacts with several of these famous philosophers (or vice-versa[13]) is not of paramount importance. Even if Holmes had never been associated with Peirce, James, and the others, his thoughts on legal matters would remain as examples of an approach that is a distinctively pragmatic one. Historical evidence of the exchange of ideas that occurred among these men is being presented here mainly in the interest of comprehensiveness. The evidence to be presented in support of my overall claim comes from a comparative analysis of the thoughts of Holmes and the pragmatists, and it is in that direction that this essay now proceeds.
C. A Comparative Analysis of The Thoughts of Holmes and Some Major Pragmatic Philosophers.

In this lengthy section, I will show in a substantive way that the philosophical directions which Holmes followed with regard to legal matters bear a striking resemblance to the pragmatic orientation in philosophy developed by such philosophers as Charles Peirce, William James, and John Dewey.

This comparative analysis will focus on three major areas of Holmesian and pragmatic thought. First, the issue of the pragmatic meaning of concepts will be examined. Both Holmes and the pragmatists will be shown to approach the issue of meaning in the same ways, namely, in terms of the appeal to ordinary human experiences in general contexts and situations, and more specifically, in terms of general conditional statements which predict conceivable circumstances and results. Second, the use of external standards of justification will be addressed. Both Holmes and the pragmatists advocate a similar position, which amounts to a strong stance against Cartesian-style subjectivism and for the use of external standards of justification. Finally, the idea of pragmatic experimentalism in thought, inquiry, judgment, and action will be examined. Again, both Holmes and the pragmatists will be shown to have similar positions concerning, for example, dynamic over static approaches to philosophy, the use of general types, and the element of indeterminacy in all judgments. An examination of these three areas of thought will be used to construct "Holmes' theory of law," in terms of the following fundamental elements:

1. a theory of the meaning of legal concepts,
2. a theory of the standards by which legal concepts are defined and legal judgments (especially those of liability) are supported, and
3. a theory of the kind of judicial reasoning and decision-procedures that are (and ought to be) used by legal authorities.

Although there are many other minor and technical legal issues which Holmes touched upon in his writings, at one time or another, these three areas comprise the most fundamental jurisprudential foci of Holmes' legal thought. They are ones he consistently refers back to, again and again, in both his official and non-official writing. The perspective here will be on Holmes' legal thought as a broad philosophical position on the "big questions" of jurisprudence, and so, his views on several more-or-less technical legal matters will not be of primary interest. If my approach is correct, however, and Holmes was consistent, then Holmes' views on other more technical legal matters will also fit into the broad theoretical outlines which I am reconstructing herein.

Because human beings happen to be living, acting agents, it is often the case that our conception of an object in terms of its practical bearings or possible effects upon experience is clearer to us than is our purely abstract conception of that object. This fundamental idea, which is the basic motivation behind the pragmatic approach to meaning, was neatly summarized by C.S. Peirce when he wrote:

"Man is so completely hemmed in by the bounds of his possible practical experience ... that he cannot, in the least, mean anything that transcends those limits."[14]

In other words, the claim here is that when human beings are purposefully seeking a "clarity of apprehension" regarding certain concepts, they can best attain such an end by translating those concepts into those which refer directly to the realm of actual or possible human experience. In this way, the meaning of a concept is taken to be the purposeful clarification of that concept. It is simply because humans are the types of beings that they are that their rational cognitions are linked to rational purposes and actions.[15] Hence, the clarification of a concept involves a reference to the world of human experience and human activity. Though this may certainly not be the proper approach with all concepts, Peirce argued that the use of this basic idea yielded a method for "... determining the meanings of intellectual concepts, that is, of those upon which reasonings may turn."[16]

To be more specific, what Peirce called the "kernel of pragmatism,"[17] by which the meaning of an idea is characterized through the utilization of a reference to some type of possible activity in a certain context, was stated by Peirce in the following way:

"... the whole meaning of an intellectual predicate is that certain kinds of events would happen, once so often, in the course of experience, under certain kinds of existential conditions."[18]

This "principle" of pragmatism is given other formulations by Peirce, one of which was expanded upon and endorsed by William James in his book of lectures entitled, Pragmatism, A New Name for Some Old Ways of Thinking:
"To attain perfect clearness in our thoughts of an object, then, we need only consider what conceivable effects of a practical kind the object may involve—what sensations we are to expect from it, and what reactions we must prepare. Our conception of these effects, whether immediate or remote, is then for us the whole of our conception of the object, so far as that conception has positive significance at all."[19]

Several years later, in what H.S. Thayer calls "the second phase in the historical development of pragmatism,"[20] a fuller statement of the pragmatic approach was developed in the writings of John Dewey. The version of pragmatism put forth by Dewey was expanded to encompass the broader context of a whole theory of rational inquiry. Ideas, concepts, and thoughts of all kinds were seen by Dewey as instruments to be used for the resolution of difficulties or problems. Hence, for Dewey, as was the case with Peirce and James, the meaning of ideas was inextricably linked to purposive human actions. Dewey called his theory of the function of conceptual thinking "instrumentalism," and defined it in the following way:

"... an attempt to constitute a precise logical theory of concepts, of judgments and inferences in their various forms, by considering primarily how thought functions in the experimental determinations of future consequences."[21]

For all three philosophers, then, the elucidation of the meaning of a concept was tied to an analysis of its function or operation, including the purpose of its use.[22] The pragmatic approach to meaning is therefore a contextual method, whereby the clarification and understanding of concepts or ideas is distinctively directed towards the consideration of possible human activity which occurs in certain situations and under certain conditions. There can be variations on this theme, of course.

For instance, one of Peirce's examples of the use of this general method for attaining a clear apprehension of a certain concept is found in his discussions regarding what is meant by calling an object "hard." To Peirce, what it means to say that something has the quality of "hardness" is to make reference to a conditional recipe that describes what generally would occur if some type of experimental situation were set up. Meanings, then, were found in general formulas or rules which prescribed various types of actions or operations, from which various types of events would result. In the case of "hardness," then, to say that "X is hard" for Peirce meant that "if X were exposed to an agency of a certain kind, then a certain kind of sensible result would ensue."[23]

On the other hand, James' specific approach to the use of the pragmatic method is a noticeable deviation from Peirce's. To James,
Pragmatic analysis was tied in a much closer way to practical human experiences. In other words, James' interpretation of the idea of "conceivable effects" referred conceptual structures more to actual and particular human sensations. To James, pragmatism was a kind of "practicalism."[24] Meanings in the Jamesian sense were to be found in actual test cases, in specific actions, and in particular actions. To Peirce, meanings were never present in specific experiences or events, but only in general conditional "rules of action." It was as a result of this practicalist shift that the approach to meaning for James became something different from the original Peircean formulation. That is, James obviously was using the term "meaning" in a somewhat different manner than Peirce, much akin to the way we presently speak of certain life-activities as being "meaningful." A short passage from James illustrates this usage. He wrote:

"...if it can make no practical difference whether a given statement be true or false, then the statement has no real meaning."[25]

For James, the pragmatic meaning of a concept or an idea was present in a reference to its practical (and often immediate) import, or to the actual difference it made in the experiences of human beings. To say that a concept had "meaning" was to show that it had certain specific experiential consequences, or as James called it, "cash value."[26] The primary philosophical motivations of both Peirce and James to clarify concepts in terms of possible human experience, however, were more similar than different.

In addition, both Peirce and James agreed upon another essential notion—the purposive nature of human cognition. For example, James wrote in this regard:

"What now is a conception? It is a teleological instrument. It is a partial aspect of a thing which for our purpose we regard as its essential aspect, as the representative of the entire thing."[27]

As was pointed out above, Peirce held this link between rational cognition and "some definite human purpose" to be the very basis of his pragmatist approach.[28] But it is precisely with regard to the purposive or instrumental nature of human reasoning and conceptualization that Dewey's position may be seen as a "synthesis" of the basic approaches of Peirce and James.

In other words, the pragmatic program in general seeks to relate conceptual meaning to purposive human conduct or action. One way in which to approach this notion would be to emphasize such conduct as a potential object, namely, as a generalized idea or possibility of human action. Another way would be to emphasize not the action
itself but the particular and specific consequences which it actually engenders. The former yields Peirce's approach, which holds that the rational interpretation of a concept is not contained in any specific activity, present or future, but in a habit of conduct which "may come to be."[29] The latter yields James' approach, which stresses the results of specific, individual acts. Between these two approaches, however, would be the position which emphasizes these habits of action as purposive ways of acting. This middle position is Dewey's standpoint, which views human actions as instrumental means to certain ends. Hence, though all three philosophers are in general agreement that the meaning of concepts is to be related to purposive human activity, then, each of the three appears to accentuate a different aspect of this relation, and so, an examination of the thoughts of all three gives a comprehensive and overall picture of what "pragmatic thought" in general is all about. My purpose in arguing the case for Holmes' legal pragmatism, then, would not be as well-supported if it were only shown that Holmes compared favorably to only one "style" of pragmatic thought. Therefore, the fact that the ideas of Peirce, James, and Dewey complement each other so well is why they have been chosen herein to represent "American pragmatism" in a general sense. Holmes' legal thought will later be seen to have aspects from all three approaches.

2. The Relativity of Pragmatic Meanings.

The foregoing brings up an interesting and important issue which is implied by the pragmatic approach to meaning, and which ought to be presently explored. If the meanings of concepts are tied to purposive human activity, then meanings of concepts are relative items that are created rather than fixed items that are discovered. In other words, the pragmatic meaning of concept X (namely, its clarification) is always something that is relative to certain purposes (or interests, or ends).[30] Hence, "the meaning of concept X" will always be pragmatically specified as the meaning for group G, with interests I, ... I. 

Is such a relativization of meaning problematic? It appears that anyone who would claim that meanings are fixed or absolute entities which are inseparably bonded to concepts would clearly find the pragmatic position troublesome. Such a person might insist that we endeavor to find the true meaning of, say, "hardness" or "the law" or "chair." But anyone making this type of claim about meanings is surely neglecting the unavoidable relevance and necessity of contexts in the way the world is made intelligible to human beings. For example, such a person might say that the true meaning of the concept of "chair," for instance, does not refer to ordinary, everyday chairs at all, but to what chairs really are, namely, collections of tiny, fast-moving wave-particles. But this is only to claim that one context (or point-of-view) has some authoritative pre-eminence over all others—in this case, the point-of-view of modern theoretical physics versus that of ordinary human experiences. However, how is this claim justified except by an appeal to certain purposes, that
is, "the goal of reducing all descriptions of objects to the language of theoretical physics?" It is not at all clear how or why such a purpose can be shown as superior to all others, or is one that excludes all others (especially when one needs a place to sit down). There is no compelling reason to claim that meaningful expressions are (or can be) the products of only one specific point-of-view, no matter what it is.[31] We could not even begin to communicate if the content of what was expressed were not understandable relative to some context. After all, one could never clearly grasp the full intellectual import of a concept or idea without first having some acquaintance with related (or presupposed) concepts or ideas. Further, such a clear apprehension will always be attempted in actuality from some standpoint, which is defined by a purpose or interest, and so, never occurs in a Platonic vacuum. Hence, hypothesis that there are "true" meanings, separated from contexts, points-of-view, and teleological considerations is unsupported, and so, ought to be rejected.

This discussion shows that there are two parts, then, to the relativization of meaning for pragmatic theory: the relative context in which a concept is intelligible and the relative point-of-view of the person(s) purposefully seeking to understand the concept's signification.

Dewey's approach to logical theory can be used to illustrate the basic issue here. The two fundamental ideas in Dewey's theory are the "situation" and the "inquiry" which is a natural outcome of those situations which are indeterminate or troublesome. Dewey takes a "situation" to be the context in which a certain point-of-view is taken in order to serve some purpose, interest, or end. He writes:

"What is designated by the word 'situation' is not a single object or set of objects or events. For we never experience nor form judgments about objects and events in isolation but only in connection with a contextual whole ... In actual experience there is never any such isolated singular object or event; an object or event is always a special part, a phase, or aspect, of an environing experienced world--a situation."[32]

Following Peirce, Dewey argues that a process of purposive inquiry develops from situations that are doubtful, problematic, or in Dewey's own words, "indeterminate." He describes the process of inquiry as:

"... the controlled or directed transformation of an indeterminate situation into one that is so determinate in its constituent distinctions and relations as to convert the elements of the original situation into a unified whole."[33]
The result of inquiry for Dewey is an "answer" to the problematic situation, which is simply the transformation of that situation into one that is clear, settled, and unproblematic. The clarifications of concepts, by which situations are intelligible at all, are thus relativized to situations and interests in this functional or instrumental way. Clearly, such a scenario does not appear to lead to unreasonable or problematic results for the pragmatic approach to meaning. On the contrary, relativization to some degree appears to be both useful and necessary to the clarification or analysis of concepts. In other words, without the introduction of situational considerations, purposes and interests, the notion of the "conceivable effects" of some concept would imply a totally unmanageable undertaking, akin to conceiving everything possibly true of that concept. Where clarification is an object or aim, then, the meaning of a concept is that which counts the relevant "conceivable effects," relative to the context and the other purposes or interests involved.

So far, then, the relativity of pragmatic concepts is only a problem when: (1) meanings are considered to be the essences that are "attached" to concepts, or (2) only one specific purpose (or interest, or end) is considered to be "proper" or "correct." Neither of these positions is justified, however.

On the other hand, the relativity inherent in the pragmatic approach might be open to an objection from the opposite pole. That is, does not the fact that different purposes point to different meanings show that the meanings of concepts are totally individualized matters? In other words, since person S has a specific point-of-view, understands the world from a certain specific perspective, and has his own specific purposes, interests, or ends, then for any concept, there are as many "clear ideas" of that concept as there are persons. That is, there are as many conceptions of, say, "hardness," or "the law," or "chair" as there are individual persons. And since no two individual persons are identical, presumably, all of the purposes and interests of these different persons must also be different from each other. Pragmatic meanings then become unique to individuals. Even further, as the interests and perspectives of persons are continually changing through time, the meaning of any concept is itself in a continual state of flux. In that case, meanings become unique not to persons, but to person-stages, so that at each point in a temporal continuum, there is a "meaning" of a concept which is different from all others. If this is so, what sense does it make to speak of the concept of "hardness," for instance? In this way, the relativization of meaning inherent in the pragmatic approach apparently leads to a cumbersome multiplicity of "meanings" for every concept, which is surely an unacceptable consequence of pragmatism. How might the pragmatist respond to this reductio?

It has already been argued above that the notion that conceptual meanings ought to be approached in terms of the idea that there is
something like the one "true" meaning (viz., the meaning) for any
given concept is without support. Hence, the present criticism is
apparently not directed against the fact that the pragmatic approach
to meaning yields a multiplicity of meanings for concepts. The
objection seems to be addressed to the idea that the pragmatic
approach allows too many meanings for any given concept. But is this
truly the case?

It turns out that the present objection depends primarily upon
an extremely powerful assumption having to do with the particular use
of the dual concepts of "same" and "different." What can it mean to
say that two things are "the same?" Upon the strictest possible
interpretation, two objects are "the same" if and only if they have
identical properties. Conversely, two objects are "different" if and
only if they are not "the same." But there are surely less rigorous
ways to approach "sameness" and "difference." Objects can be
fruitfully called "the same" when they are generally identical, to
some degree less than 100% congruence. Similarly, "difference" can
be taken to point out dissimilarities to some degree of significance,
such that extremely minor (and unimportant?) dissimilarities can be
overlooked. The latter sense of "sameness" and "difference" is that
which is commonly used in everyday discourse. The former is more of
a technical concept. The problem that now appears, however,
is this—which sense ought to be adopted, in the context of
philosophical discourse? This is an evaluative question, and so,
asks about the advantages and disadvantages of using either sense.

Clearly, the technical sense of "sameness" has an incredible
number of drawbacks. For example, in the strict sense, no person is
the same person today as he was yesterday (or one second ago). That
is, a person who exists at time T has the property of "existing at
time T." At time T+1, however, the person who existed at time T has
cess to exist, having been "replaced" by a different person, with
the property of "existing at time T+1." In fact, any object that
exists in time (and so, has such an indexical property) can have
absolutely no continuity in time upon this interpretation. Indeed,
perhaps even ideas and conceptions (such as "sameness," perhaps?) are
continually changing into "different" objects. The reader may be
moved to ask whether we are actually still talking about "the same"
concept of "sameness." It might be, of course, hard to tell, since
we did not exist a few seconds before to have read the beginning of
this paragraph. We are "different" persons now. The plain result of
such a strict identity approach to the "sameness" concept is that
there are no general kinds or types, no categories, and no classes of
more than one object. From that result, it is clear that
communication and language themselves (and so, explanation and
philosophical analysis) would be incredibly difficult, if not
impossible, were the strict identity view of "same" and "different"
adopted.[34] Need any more of an indictment be provided? It is
obvious that the interpretation of "sameness" as strict identity is
highly problematic for any sort of ordinary philosophical usage, and
on that account, ought to be rejected for analytical discussions.[35]
The alternative approach to "sameness" as something less than strict
identity is a quite understandable and useful concept, and so,
warrants adoption over the strict sense.

Now, the present reductio against the relativization of meaning depends upon the usage of the "sameness" concept as strict identity. It is only when "sameness" and "difference" are interpreted in this strictest possible sense that the result is the infinite number of meanings implied in the reductio. When a more sensible and useful approach to this concept is taken, and the assumption of "sameness" as strict identity is rejected, it is simply false that the relativization of pragmatic meaning yields the excessive multiplicity of conceptual constructions mentioned above. That is, although there are various concepts of, say, "hardness" or "the law" or "chair," they are only general ones, relative to purposes and interests that are generally "the same." In this way, the quantity of conceptual variations is greatly reduced to much more manageable dimensions.

A few illustrations would be useful here. For instance, there are obviously various styles and methods of printing English letters, but when taken to the extreme, each instance of the English alphabet is unique—person-stage A's handwriting is different from person-stage B's, block type is different from script, italic is different from Gothic, and so on. It would be quite strange, however, to say that this implies that there is not some general type of thing that is the object of these variations, for there is—the English alphabet. When one's interest is in communication in English, then any number of styles are sufficient, as long as the one used is relatively clear. In that case, why should anyone be troubled with this "multiplicity" of approaches? Clearly, the idea that there are several ways to construct English letters is no problem at all as long as function fits purpose.

Another example which illustrates the contextual nature of conceptual meanings can be taken from Peirce. In regard to the related concepts of "inquiry," "facts," and "truth," Peirce talks of two distinct groups of individuals (not necessarily actual persons, of course) with different interests in regard to such concepts. On the one hand, there is the community of science, made up of those who are purely interested in the discovery of facts. On the other hand, there is the community of problem-solvers, made up of those whose interest is to control situations and to realize specific human purposes in the world.[36] Peirce calls the latter context that of "practice," and writes that the former context, that of "science," "takes an entirely different attitude towards facts from that which practice takes."[37] The perspective of science is one that is not tied to temporal considerations, and so, views "inquiry," "facts," and "truth" in a long-run context. The practical point-of-view, however, is a short-run perspective which is concerned about here-and-now answers to specific problems.[38] The following passage from Peirce illustrates these different purposes and interests of each community of inquirers:

"The only end of science, as such, is to learn the lesson that the universe has to teach it ... The
value of Facts to it, lies only in this, that they belong to Nature; and Nature is something great, and beautiful, and sacred, and eternal, and real—the object of its worship and its aspiration ... For Practice, facts are the arbitrary forces with which it has to reckon and to wrestle. Science, when it comes to understand itself, regards facts as merely the vehicle of eternal truth, while for Practice they remain the obstacles which it has to turn, the enemy of which it is determined to get the better. Science feeling that there is an arbitrary element in its theories, still continues its studies, confident that so it will gradually become more and more purified from the dross of subjectivity; but practice requires something to go upon, and it will be no consolation to it to know that it is on the path to objective truth—the actual truth it must have, or when it cannot attain certainty must at least have high probability, that is, must know that, though a few of its ventures may fail, the bulk of them will succeed. Hence the hypothesis which answers the purpose of theory may be perfectly worthless for art.”[39]

Consequently, the problem-solving community of inquirers has little need of the "facts" to be gained in the scientific millenium—the problems that need to be solved now cannot wait. Theoretical science, on the other hand, has literally "all the time in the world" to pursue its ends. In other words, whereas the problem-solving community requires beliefs about states of affairs so that plans of action can be undertaken, the scientific community can afford to entertain or speculate upon things.[40] Now, these are two general kinds of groups, each with general kinds of interests. What is generated by each is an approach, an interpretation, a clear idea—the meanings of certain conceptions, in this case, "inquiry," "facts," and "truth." But as long as these two general contexts are understandable, the conceptual multiplicity which results is also understandable, and non-problematic.

In these last few pages, the problem of the relativity of conceptual constructions has been examined and defended from several criticisms. Although the pragmatic position has been found to yield conceptual variety, this does not lead to extreme subjectivity or multiplicity of conceptual content when it is realized that the generality of contexts and purposes simply generates general conceptual constructions. I will return to the question of "generality" near the end of this chapter, for it deserves its own separate treatment as a fundamental part of pragmatic theory.

3. Pragmatic Meaning and Prediction.
There is one more aspect of the pragmatic approach to meaning that deserves attention—it's predictive component. To return to Peirce's example of "hardness," saying that a stone is hard is, in effect, to entertain a prediction that a certain type of event would occur were the stone to be acted upon in a certain type of way. Hence, pragmatic meanings are essentially future-oriented. This predictive or future-directed aspect of meaning is also importantly tied to some of the other elements of pragmatic thought discussed above—generality and purpose. Of this web of ideas, Peirce writes:

"The rational meaning of every proposition lies in the future. How so? The meaning of a proposition is itself a proposition ... But of the myriads of forms into which a proposition may be translated, what is that one which is to be called its meaning? It is, according to the pragmatist, that form in which the proposition becomes applicable to human conduct, not in these or those special circumstances, nor when one entertains this or that special design, but that form which is most directly applicable to self-control under every situation, and to every purpose. This is why he locates the meaning in future time; for future conduct is the only conduct that is subject to self-control. But in order that that form of the proposition which is to be taken as its meaning should be applicable to every situation and to every purpose upon which the proposition has any bearing, it must simply be the general description of all the experimental phenomena which the assertion of the proposition virtually predicts."[41]

Thus, to act with some purpose in mind is to attempt to control the future such that certain states of affairs become realized. The intent behind such action is both to apprehend and to assign value to something in the future. The action to be taken entails that one consider predictions that, under certain generally describable conditions, such-and-such an object would, for example, be satisfactory to some general group of interests or purposes (in some situational context) and that such-and-such efforts would or would not bring the satisfaction about.[42] That is the essence of the idea that there is a futurative or predictive element in the pragmatic approach to thought and ideas (and so, to meanings).

Dewey's instrumentalist version of pragmatism is especially enlightening in regard to the central role played by the predictive element in pragmatic thought and its relation to purposive human activity. For example, Dewey argued that we can become clearer about the nature of a "value" when we realize that it relates to the fulfillment or satisfaction of certain conditions.[43] He wrote:
"To declare something satisfactory is to assert that it meets specifiable conditions. It is, in effect, a judgment that the thing "will do." It involves a prediction; it contemplates a future in which the thing will continue to serve; it will do. It asserts a consequence the thing will actively institute; it will do ... It denotes an attitude to be taken, that of striving to perpetuate and to make secure."[44]

In this particular instance, Dewey shows that the predictive aspect with regard to a satisfactory object has a dual nature—not only is a prediction made that the object in question "will do," but a statement of policy is put forth, predicting future action to perpetuate and secure that object.

In a similar way, James emphasized the futurative or predictive elements in the pragmatic approach. In contrast to the empiricist view that the meaning of an idea is to be found in its origins, that is, by looking to the past, James held that the meaning of ideas was to be found in their "destiny," that is, in what grows out of them.[45] As was pointed out above, the "consequences" of ideas which concerned James were different ones from those which Peirce spoke of. The "future consequences" of a conception for James were of a more particularized nature: the sensations, behavior, conduct, and actions of actual persons. The Peircean subjunctive formulation is not used by James. Even so, James' concentration upon the future is paramount to his philosophical effort, as he illustrates in the following passage:

"The whole function of philosophy ought to be to find out what definite difference it will make to you and me, at definite instants or our life, if this world-formula or that world-formula be the true one."[46]

To James, ideas and beliefs were to be thought of as "plans of action" for the future; concepts and theories were "instruments" to be used for the future task of adaption to the world.

More will be said in a subsequent part of this chapter about the futurative aspects of pragmatic thought, especially in regard to the emphasis upon experiments and tests. For now, however, a short look backward over the ground covered by the American pragmatists on the question of conceptual meaning would be useful, especially in order to see what is ahead in regard to Holmes' approach to legal concepts.

The pragmatic approach to philosophy regards human conceptualization as a purposive activity, simply because human
beings are recognized as living, acting manipulators of their environment. Because of this, the clarification of concepts can be accomplished by referring those ideas to their actual or possible experiential significance. This entails the consideration of the future consequences of ideas (in contrast to the consideration of their sources) relative to the purposes or interests of the human actors involved. The meaning or rational purport of a concept, then, is contained in a hypothetical statement setting forth certain general operations and the results which will (or would) obtain from those operations. The emphasis here can be upon the potential aspects (as with Peirce and Dewey) or the actual aspects (as with James) of these operations and results. Another implication is that concepts are relative constructions, generated with reference to the general purposes, interests, aims, or values of groups. In other words, concepts are teleological. In this way, the pragmatic approach to the meaning of concepts is said to be contextual or situational. Ideas do not occur in a vacuum, and are always related to certain general (or definite) situations. The relativity of meanings engendered by this approach was criticized, but was eventually found to be unproblematic. These are the essential aspects of the pragmatic theory of the meanings of concepts.


Given the analysis above, my claim is that we most fruitfully understand a vital part of Holmes' legal thought when we interpret him as offering a similarly pragmatic approach to the clarification of concepts. The particular class of concepts which he dealt with were, of course, those occurring in legal discourse. The method of analysis he employed with regard to those concepts appears in several of his writings, throughout his literary life, and forms one of the major aspects of his overall theory of the law. In light of the previous section, the following will show that many of Holmes' expositions of this method exhibit an incredibly striking similarity to the writings of Peirce, James, and Dewey. This comparison will demonstrate that Holmes adopted the same general pragmatic approach to conceptual meaning as did the more-famous American pragmatists already discussed.

As early as July of 1872 (and probably with some of the discussions of the Metaphysical Club still fresh in his mind), Holmes published a notice dealing with an article which appeared in England by Sir Frederick Pollock,[47] wherein a pragmatic-type of approach to the meaning of legal conceptions was first put forth. Contrary to Austin's view that law was identifiable with the commands of the sovereign, Holmes claimed that a clearer and better grasp of the concept of the law was attained as the result of the observation that a certain class of subjects of the sovereign, the class of judges, had the official capacity to interpret the will of the sovereign in actual situations.[48] From a pragmatic standpoint, then, the concept of the law was to be referred to possible human activities within the context of a legal system. That is, the judicial system
itself served as the situational context upon which the possible human experience of the operations of "the law" took place. Hence, achieving clarity about "the law" quite naturally entailed a familiarity with judicial behavior. Holmes wrote:

"What more indeed is a statute; and in what other sense law, than that we believe that the motive which we think that it offers to the judges will prevail, and will induce them to decide a certain case in a certain way, and so shape our conduct on that anticipation?"[49]

The pragmatic approach of referring a concept to its possible experiential significance is clearly evident here. A little further on in the same article, Holmes elaborates on this line, and brings up the distinctively pragmatic role that future-oriented prediction plays in the attempt to get clear about legal concepts:

"The judges have other motives for decision, outside their own arbitrary will, beside the commands of their sovereign. And whether those other motives are, or are not, equally compulsory, is immaterial, if they are sufficiently likely to prevail to afford a ground for prediction. The only question for the lawyer is, how will the judges act? Any motive for their action, be it constitution, statute, custom, or precedent, which can be relied upon as likely in the generality of cases to prevail, is worthy of consideration as one of the sources of law, in a treatise on jurisprudence. Singular motives, like the blandishments of the emperor's wife, are not a ground of prediction, and are therefore not considered."[50]

Sixty years later, and with almost a half-century of judicial experience at the highest levels behind him, Holmes still held to this pragmatic approach to legal concepts. In a letter written to Pollock in 1932, for example, Holmes wrote of his dream of putting together a book which embodied his own legal philosophy,

"... getting rid of all talk of duties and rights—beginning with the definition of law in the lawyers' sense as a statement of the circumstances in which the public force will be brought to bear upon a man through the Courts, and expounding rights as the hypostasis of a prophecy."[51]
It was in 1896, however, that one of the most important statements of Holmes' pragmatic approach to legal conceptions can be found. In that year, he published his influential article, "The Path of the Law." In this essay, Holmes enunciated what seems clearly to be an application of the pragmatic theory of meaning to several legal concepts.

Holmes begins "The Path of the Law" by acknowledging the fact that the object under consideration—the law—can be viewed from several different perspectives. Each of these perspectives defines some general community of persons who share certain common interests. Though Holmes was a justice of the Supreme Judicial Court of Massachusetts when "The Path of the Law" was written (and delivered as a speech), he was definitely aiming his pragmatic program at the class of non-judges. Of course, clearly the most obvious members of this group, with relation to a purposive concern about the operations of the law, are lawyers. But this class also encompasses ordinary individuals, who live in political units and are themselves vitally interested in their possible and actual dealings with the official bodies of those political units. Hence, Holmes not only attempts to separate various groups of persons in relation to their general interests, but also defines the specific context or situation (viz., that of state/individual interaction through the legal system) in which the operations of the law are to take place. In giving such attention to a context of analysis and to various interest-focused groups, Holmes is theorizing in a way that is very similar to Peirce and Dewey, recognizing both the situational contexts and interests/purposes necessary for the pragmatic analysis of conceptual constructions. Holmes writes:

"When we study law we ... are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. The reason why it is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is entrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts."[52]

To Holmes, the meaning of this "object" will thus be relativized to the interests and purposes of general groups. Holmes obviously sees no problem with the idea of a conception's having "meaning for" some general class. In this case, the class of non-judicial officials
breaks down in the context of a legal situation into two sub-groups: lawyers and ordinary citizens. These two sub-groups share a common general purpose, namely, successful or satisfactory interactions with the judicial system. The interests of the two groups are different primarily in the fact that dealing with the judicial system is a "business" to lawyers, whereas in Holmes' view, it is apparently the primary interest of ordinary citizens either to avoid such interactions with "the public force," or to minimize the damage to their interests when such interactions cannot be avoided. And Holmes goes even further than this, dividing the class of ordinary citizens (viz., non-lawyers and non-judges) into two more groups--the "good men" and the "bad men." Again, he makes this distinction in terms of the general focus of interests or purposes of the two sub-groups. Holmes writes:

"You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practiced by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can." [53]

Furthermore, Holmes recommends that lawyers adopt the perspective of the "bad man" in order that they attain a "business-like" understanding of the law and its limits. [54] The primary interest of such a group deals with a certain instrumentality, namely the prediction of state behavior for self-centered use. Holmes claims:

"If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience." [55]

Holmes' own purpose here is to point out a confusion that often takes place in the popular mind between legal and moral concepts. They are different, though related, conceptual families. The confusion between the two results from the fact that legal discourse is full of phraseology drawn from morals, and that this is a continual invitation to move from one domain to the other without perceiving it. [56] For lawyers to avoid this mistake, they ought to purge their legal thought of "moral" concerns. (There are some subtle distinctions that Holmes makes here, however, and more will be said below about the senses of "moral" that Holmes uses.)
Once Holmes' construction of the situational context for legal analysis and the primary groups involved therein are outlined, he presents what he holds to be the meaning of the concept of "the law," pragmatically-determined to refer to the possible activities of the judicial system, and from the perspective of the lawyer/"bad man.

Holmes writes:

"Take the fundamental question. What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of this kind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[57]

My claim here is that much of the philosophical impact of Holmes' legal thought is lost, when attention is not directed to the distinctly pragmatic path which Holmes is taking with respect to the meaning of legal concepts. In light of the previous discussion of the pragmatic approach to conceptual meaning, this orientation in Holmes' legal thought simply cannot be overlooked.

A few words need to be said about Holmes' use of the "bad man's" perspective as a reference point with which to approach "the law." What kinds of general interests does this point of view embrace? It is my contention that Holmes' advocacy of the "bad man" approach stems from his own political philosophy. That is, Holmes' political views serve to define the pragmatic context for legal analysis he adopts—the relationship between the individual and the state which for Holmes is carved in distinctly Hobbesian terms. One of the passages above indicates that Holmes viewed this relationship purely in the "cash value" terms of the respective physical powers of individuals and states. To recall that thought in this tighter focus:

"People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared."[58]

There is definitely a certain type of attitude about state-citizen
interaction that is being put forth here. Of course, there are a number of different ways in which the interactions between the state and the individual can be approached. Analogies are sometimes given that compare the state and the individual to parent and child, with subsequent political and legal theories built upon that basis. Alternatively, this relationship could be examined in a historical fashion, tracing the development of the greater and greater influences which ordinary citizens have had upon states over time—with the corresponding political and legal theory that would grow from such a foundation. There are other ways, obviously, to approach this fundamental relationship. But which route does Holmes take? He does, in fact, continue his pragmatic line with regard to the concept of "the relationship between the state and the individual." That is, Holmes interprets this idea primarily in terms of the possible human experiences this concept would engender under a certain situation (viz., that of confrontation). This amounts to seeing this relationship in terms of physical power.[59] Holmes did not mythologize or romanticize this relationship. States had an interest in securing their powers. Individuals residing within those states had an interest in conducting their affairs with as little interference from the state as possible. The "bad man's" point-of-view, then, stems from Holmes' harshly realistic portrayal of the bottom-line relations between government and citizen. It is apparent in this case that Holmes is closest to the pragmatism of James and Dewey here, in placing the fundamental emphasis upon the practical and instrumental aspects of this relationship. The prediction of state behavior becomes the means to the end of minimizing state interference in the ordinary citizen's affairs. Such is the primary pragmatic rationale behind Holmes' use of the viewpoint of the "bad man."

Furthermore, as will be seen in a subsequent section, Holmes devotes most of his only book, The Common Law, to an argument against the idea that the viewpoint of the "morally good man" is (or ought to be) legally relevant, or conceptually useful. To Holmes, the subjective moral motivations for compliance with the commands of the state are simply not important in the legal context, for a number of reasons. Viewing legal matters from the perspective of the "good man," says Holmes, will only result in the above-mentioned confusion of "the law" with "morals." (See sections C.7 and C.8 for more discussion of this point.)

Thus far, all of the passages from Holmes' writings above have concerned primarily one legal conception, that is, the concept of the law itself. Indeed, upon the beginning of an examination of legal conceptions, it seems as though the natural first question to ask is precisely, "what is law?" And it is apparent from the above that Holmes was attempting to address this precise question. However, the question "what is Law?" itself seems to presuppose a certain kind of answer, as it is structured in such a way that the subject/predicate response of "Law is such-and-such" would be appropriate. Because of this, it would seem that the question is one that calls for a definition of law. That is, in fact, what Holmes calls his response in one of the texts cited above, and in that sense, it appears as
though Holmes is attempting to do the same thing that many others have done, namely, positing an overall analytical definition of the concept of "law," in terms of its necessary and sufficient conditions.

But this interpretation of Holmes is misleading, I would maintain, in light of the distinctively pragmatic approach to this question which Holmes is taking. That is, Holmes was not simply supplying yet another definition of the concept of the law. He was, rather, applying a pragmatic method of analysis to both the primary question "what is law?" and to the concept of "the law" itself, apparently with the same motivations as Peirce and James—to translate unclear, imprecise, and vague ideas (including questions about those ideas) into clear ones, from the context of the purposes and interests of a certain community, in Holmes' case, the class of non-judges.

To concentrate on the most lucid of the passages above, namely, the one from "The Path of the Law," note the manner in which Holmes approaches the most fundamental concept of jurisprudence: What constitutes the law? What is meant by the law? I aver that such constructions, when seen in the light of the answers which Holmes gives, demonstrate that Holmes was also approaching the very question "what is law?" in a pragmatic fashion, by translating that question into one that might be pragmatically re-stated as "what is the empirical significance of 'the law' from a certain perspective?" or "what conceivable difference does 'the law' make to most human beings?" In this respect, Holmes comes very close to James' position, which emphasizes the "practical difference" aspects of using the pragmatic method of clarifying meanings. Like James, Holmes structures his inquiry in the context of the practical interests of a certain group, and comes up with an approach to "the law" which essentially focuses upon its "cash value" to ordinary humans seeking to further their own private interests without state interference.

In addition, by taking the steps he does, Holmes shows that he is cognizant of the problem that can occur in any attempt at conceptual clarification or analysis when it is not carried on in a certain context, guided by certain general purposes and interests. This is simply the problem of the infinite regression of analysis. To divorce the question "what is law?" from all interests is to ask it "in a vacuum." In that case, when does an analysis of a concept ever cease? The first stage of such a non-contextual analysis might reveal, for example, that "law has properties x, y, and z." But what do these properties amount to? A second stage of analysis might then reveal that properties x, y, and z can be further analyzed in terms of properties x', y', and z'. But then what do these mean? Without the limiting influence of contexts and purposes, the clarification or analysis of concepts goes on and on indefinitely. Clearly, the pragmatic approach which Holmes takes to the very question "what is law?" limits this question to a certain general context, given the purposes and interests of certain general groups, and so, avoids the infinite analysis problem.
Again, to be unaware of the definite pragmatic factors in Holmes' thought and approach is to lose much of the impact and freshness of Holmes' contribution to the philosophy of law. Much of the intellectual significance of Holmes' legal thought does not originate, in my view, in his answers to certain traditional questions of jurisprudence, but in his own restructuring proposals regarding the proper clarifying approaches and perspectives to take, and the proper questions to ask. Consequently, given the proper interpretive framework with which to see Holmes' legal thought, it is no surprise that his assertion that the ordinary, non-judicial, man-on-the-street meaning of the concept of "the law" (pragmatically speaking, its possible empirical significance) turns out to be embodied in the predictions of state and/or judicial actions.

Giving Holmes' position a more formal, Peircean "conditional rule" formulation might yield the following approximation:

"X is the law with regard to a state of affairs of type A" means for the group of lawyers/bad men, interested in successful dealings with the legal system, "if a state of affairs of type A occurs, then it is probable that there is a state/judicial response to A of some type, B, that would result."

Such a prediction functions in pragmatic terms as a "rule of action," or a guide by which behavior can be governed. It would be wrong, then to say that Holmes' approach is an abandonment of the notion that there are "rules of law," for he clearly recognizes that such conditional rules play an important part in the regulation of the activities of human beings. The traditional view of "law" takes it to refer to actual, specific (and usually categorical) rules, which are thought to be embodied in precedents, regulations, and statutes. However, in Holmes' pragmatic view, these things do not function as "the law," but as indicators or signs of general judicial tendencies to treat cases of certain types in certain ways. The "rules of law," then, are not precedents and statutes, but are generalized tendencies of official response to various events. These official enactments (viz., statutes, regulations, etc.) only serve to signify or predict such generalized tendencies of official behavior. What is written in statute-books is not as important, from Holmes' pragmatic viewpoint, as what is actually given effect in the courts. The predictions of official actions function as "rules of law," then in the sense that they are general, and that they are used as guides for future behavior. What Holmes would deny about "rules of law," then, is that they are static, fixed, precise dictates in categorical form, to which citizens conform their behavior and the judiciary "consults" in deciding cases, as if judicial decision-making were a matter of syllogistic reasoning. (More will be said on this below.)

Similar hypothetical formulas to the one spelled-out above could be constructed from what Holmes has to say regarding other legal concepts. In each case, Holmes' approach fits the mold of a pragmatic construction in terms of conditional rules. For example, regarding the concept of a "legal right," Holmes wrote:

...
"... a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it."[60]

In dealing with the concept of a "legal duty," the pragmatic nature of Holmes' analysis is clearly expressed in another passage from "The Path of the Law:"

"... a legal duty so-called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court—and so of a legal right."[61]

Further, the pragmatic clarification Holmes gives of the concept of "contractual duty" is just as straightforward:

"The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference."[62]

Remarkably, these passages from Holmes' writings sound almost as if they were taken directly from a text dealing with the theory of pragmatic meaning. In all cases, a context or situation has been delineated and a group's interest-focused perspective is outlined. In each case, the conditional approach is used; in each case, the conditional formula is a reference to possible human activities and official responses, which can itself serve as a guide to future human conduct. Even Holmes' statement of the motivation for this particular approach is the same as that of the pragmatists. He writes, for example:

"You see how the vague circumference of the notion of duty shrinks and at the same time grows more precise when we wash it with cynical acid and expel everything except the object of our study, the operations of the law."[63]

In the same tradition as Peirce and James, then, Holmes sought a way
“to make our ideas clear.” The following section will elaborate upon this important theme, which is simply the value of the pragmatic approach to the meaning of legal concepts. Before that, however, a short summary of Holmes' views is in order.

It has been shown that Holmes followed a method for the philosophical analysis of legal concepts that must be placed in the mainstream tradition of American pragmatism. Holmes recognized, as the pragmatists did, the necessity that conceptual analysis be approached in terms of general situational contexts, and identified the fundamental general context in the domain of legal theory as the realm of possible interactions between the state and the individual. Given this context, he proceeded, as the pragmatists did, to show that various interests and purposes of persons in this context produced various general viewpoints with regard to legal concepts. The population of human actors was first divided into the judicial officials (including, presumably, non-judicial officials who operated in a quasi-judicial function) and the non-judicial persons. The latter group he divided into the lawyers and the laymen. Finally, the latter of these was further divided into the "good men" and the "bad men." In Holmes' view, the most profitable perspective to take in the context of state/judicial interaction is that of the "bad man," and for lawyers to be successful in their business (such that they can predict the movements of the judiciary), Holmes recommends that lawyers take this perspective also. Given this point of view, Holmes restructures the whole approach to "the law" (as well as other legal concepts) in a distinctively pragmatic manner—in terms of future-oriented, predictive, conditional statements that refer to possible human experiences and interactions with the legal system. Similarly, the very question "what is law?" is thereby re-interpreted pragmatically to be an inquiry about possible human experiences. When analyzed in terms of its pragmatic foundations, Holmes' "prediction theory" of legal concepts is correctly seen to be only a part of a much broader theoretical orientation, and can also be related more easily to other major aspects of Holmes' overall theory. An examination and analysis of these other aspects will be forthcoming below, following a discussion of the benefits of the pragmatic approach to the meaning of legal conceptions.

5. Reasons for the Holmesian/Pragmatic Approach to the Meaning of Legal Concepts.

What the pragmatic method with regard to meaning amounts to, as it is used by both Holmes and the more well-known pragmatists, is basically a departure from the traditional subject/predicate analysis of concepts in favor of an antecedent/consequent analysis. That is, the intent is not to attempt to specify the necessary and sufficient conditions of an idea, or its essential classification, but to expose the human experiential import of the idea—its conceivable practical effects upon the experience of human beings. And since such antecedents and consequents are so closely tied to real-world situations, they have an empirical, testable nature, calling for
experimental confirmation rather than mystical insight or intuition for their evaluation.

Of course, there is nothing wrong with saying that Holmes was offering certain definitions of several fundamental legal conceptions, as long as one important thing is kept in mind. That is, it is a misuse of the language to attempt to provide a counter-example to a definition, as if definitions were true or false. Rather, definitions are either relatively useful or not. Hence, the approach put forth by a pragmatist such as Holmes should be evaluated such that the question is not, "does this approach yield the 'true' idea of law?" but "what are the overall benefits to be obtained from using such an approach to legal conceptions?"

The former question calls for an indulgence in Platonic speculation, and as such, is probably unsettled. Such an approach assumes, moreover, that we have some a priori idea of "the law," such that we can recognize "the true" analysis when we see it. Clearly, such an approach is inconsistent with Holmes' pragmatic outlook. On the other hand, the latter question is definitely clearer, and from the perspective of the conceivable benefits which such an approach will yield, appears to be answerable. In response to such a question, there are several benefits that a Holmesian theorist might point out which result from the pragmatic approach to conceptual meaning. Some have already been alluded to above. If Holmes were to attempt to support his pragmatic view directly, though, what would he say?

First, Holmes might point out that the pragmatic approach supplies a criterion by which traditional legal concepts can be evaluated as meaningful constructions. The criterion involved here, of course, is the "challenge" to legal concepts of translation into terms relating to possible human experience. As one writer has observed, such a method asserts that:

"... any word that cannot pay up in the currency of fact, upon demand, is to be declared bankrupt, and we are to have no further dealings with it."[64]

As a correlative benefit, Holmes' approach facilitates the eradication of legal concepts that are meaningless. Metaphysical fictions such as "title," "vested rights," "due process," and so on, which fill the legal literature and from which factual conclusions are supposedly drawn, can either be eliminated or reformulated in light of concrete social facts. Along with this is the further benefit of dissolving those traditional legal problems and issues which cannot stand up to the criterion of pragmatic meaningfulness. As William James once observed regarding many of the traditional questions of philosophy:

"It is astonishing to see how many philosophical disputes collapse into insignificance the moment
In the history of Western jurisprudence, several basic legal questions have been discussed and debated almost continually. For example, lengthy treatises abound on such issues as, "Where is a corporation?", "When is a corporation?", "What is a legal person?", "What is the ratio decidendi (viz., the legal holding) of a precedent, as opposed to the dicta?", "What are the essential conditions of every will/estate/trust/contract/tort?" The problem is that many times the answers given to these types of questions are taken to be factual, that is, objects of discovery. Conclusions are then drawn from these "facts" in application to actual cases. The questions are treated in the sense that there really are essential conditions of "negligence," for example, if we could only perceive "the truth." But such futile inquiries, along with their respective Platonic responses, ought to be dropped from legal discourse unless they can pass the pragmatic test. This is simply because, when seen clearly, such pedantic inquiries appear to be, as Wittgenstein once pointed out, "... of the same class as the question whether the good is more or less identical than the beautiful."[66]

Second, Holmes could argue that the pragmatic orientation allows for the clarification and reconstruction of traditional legal concepts. After the realm of legal thought is thoroughly cleansed of metaphysical constructions, those which remain will be those which are in some way related to factual, empirical phenomena, and so, will have to be clearly reformulated and re-analyzed in order that their use represents those phenomena accurately. Earlier in this essay, I asserted that the pragmatic rationale for reformulating concepts in terms of their effects upon human experience was based upon the assumption that, as living, acting beings, our idea of something is usually "clearer" when it is formulated in terms of its practical bearings on our (possible) experience. In other words, the way we (as human beings) exist facilitates a method by which our conceptions can be clarified. In light of this, Holmes might say that a legal concept, for example, having little or no reference to common experience is simply more difficult to comprehend, is more vague, more tenuous, and more unclear than one that is referred directly to experience. Of course, there is an immense value to such a clarity of apprehension, which allows the advance of our understanding and the solution (or dissolution) of our legal questions and problems.

In the present context, Holmes would assert that it is a definite advance in legal understanding to realize that "the law" does not exist a priori and apart from real legal decisions, that there is no Platonic heaven where all of the ideal legal conceptions of "contract," "property," and "fair value" reside, objective and independent of human concerns. Indeed, one might wonder, if it were true that legal discourse and reasoning consisted primarily of logical, syllogistical deductions from abstract concepts or principles, why so many of these basic principles (and their component conceptions) are still so uncertain, after so many years of
use. One of Holmes' contemporaries on the U.S. Supreme Court once expressed this thought, with a sense of amazement that:

"... with all our centuries of common law development, with all our multitudinous courts, and still more multitudinous decisions, there are so many questions, elementary in the sense of being primary and basic, that remain unsettled even now ... Take the fundamental privileges or claims of privilege as these—the privilege to employ force against another who threatens one with bodily harm; the privilege to employ force to effect a recapture of chattels taken from one's custody; the privilege to employ force to effect an entry upon land. It is astonishing how obscure and confused are the pronouncements upon these fundamental claims of right."[67]

I believe that Holmes would have been similarly "astonished," had he not possessed the point-of-view of a philosophical pragmatist, who could recognize these problems with traditional legal conceptions, and whose main concern was the striving for clear ideas. The pragmatist simply looks at issues from a different, and more use-oriented angle. Hence, instead of endless hair-splitting and debate, the pragmatic approach allows that the time we do spend in legal thought will be much more economical, since it will be redirected to the clearer understanding of the actual relationship between the state and the citizen (viz., in terms of physical power), and to a determination of the significance of that relationship. Such a determination could help to justify and facilitate whatever changes need be made in that relationship to the end of satisfying (actual and possible) social and individual needs. To Holmes, the content of "the law" therefore becomes a created object, geared to serve certain ends—an experiment, and not an object of discovery. Holmes will address this precise point in another part of his overall theory of law—his theory of pragmatic experimentalism. (See section C.9 and C.10 below for more detail.)

Third, Holmes might aver that his pragmatic approach to the meaning of legal conceptions allows for a clearer distinction between legal and moral concepts. The problem here, as Holmes would put it, is that many terms from moral philosophy, such as "right," "duty," "malice," and so on, are also used in legal discourse, and as a result, a confusion of the legal versus the moral aspects of these conceptions can result. Again, in "The Path of the Law," Holmes writes on this issue:

"The law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless
we have the boundary constantly before our minds. The law talks about rights, and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some stage of the argument, and so to drop into fallacy."[68]

Holmes claims that, for example, the notion of "legal duty" is continually filled with a content that is drawn from morals. Using the pragmatic approach to this concept, namely, looking at it in terms of a prediction of state action from the eyes of a "bad man," a clearer, more business-like idea of what is actually involved in "legal duties" is attained. This is what Holmes means when he says that this approach causes the notion of legal duty "to shrink," and at the same time grow more precise. He takes the same position in regard to the moral intimations made in contract law, tort law, criminal law, the law of possessions, and so on. Regarding each of these, Holmes argues that his pragmatic approach to legal concepts demonstrates the limits of legal concerns, and so, facilitates a clear understanding of how the law works. In this light, Holmes wrote:

"I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion, we should gain very much in the clearness of our thought."[69]

It is important to recognize the particular connotation of "moral" which Holmes was using in these passages. The reference of "morals" is a Kantian one, to an internal, subjective "good will" characteristic in individual human agents. The next few sections of this comparative analysis will focus upon this aspect of Holmesian thought more fully, and show the pragmatic orientation underlying another major component of Holmes' overall legal theory.


The last point raised above, concerning the subjective connotation of "morals" brings up another major area in which the thoughts of Holmes display a remarkable pragmatic quality, which is seen most clearly in contrast to the thoughts of Peirce and Dewey,
and to a lesser extent in James' approach. This second major aspect of Holmes' thought is perhaps the most important thesis of Holmes' only book, *The Common Law*, and so, is another major part of his philosophy of law. The core of this area of comparison with the American pragmatists is expressed as an attack upon the importance of internal or subjective elements in the process of legal justification. The pragmatic argument is that such appeals ought to be replaced by standards grounded in objective, communal agreement. Such an intersubjective process is "objective" in that no single person's viewpoint is paramount. To Holmes, the internal, the subjective, and the personal were the domain of morals. Legal matters, on the other hand, prescribed external conduct only.

Following the pattern I set down above, let me first discuss the more well-known pragmatist positions, and then show how the Holmesian position is similar.


The Cartesian method of epistemology set forth as its ultimate criterion of truth the clear and distinct intuitions of an individual person (as guaranteed by God).[70] Through the use of such a method, it was claimed that a certain, basic foundation to knowledge could be found, such that the rest of the "edifice" of human knowledge, to use the Rationalist metaphor, would derive its validity and justification from these undoubtable foundations. As Peirce was inclined to see it, the central aspect of Cartesianism, was "... that the ultimate test of certainty is to be found in the individual consciousness."[71] To the pragmatists, the Cartesian method was seen an attempt to fix our beliefs by "looking backwards", as it were, to their "indubitable" sources.[72] However, such a justifying source had a fundamentally subjective, internal character rather than an objective one. To Peirce, such a criterion for justification amounted to the idea that "... whatever I am clearly convinced of, is true."[73] The implications of such a method were obvious--truth was reduced to sincere belief, and so no one need ever be "incorrect" in any belief as long as it is held sincerely enough. That is, it was possible that no belief was false. Clearly, such was not an adequate method for the attainment of knowledge, for it allowed that contradictory propositions could be known (presumably by different persons) to be true. No scientific advances could be made, for there would never be a need to give up old theories. All inquiry and progress would cease. Peirce found these to be good reasons to reject the Cartesian method:

"... thus to make single individuals absolute judges of truth is most pernicious. The result is that metaphysicians will all agree that metaphysics has reached a pitch of certainty far beyond that of the physical sciences;--only they can agree upon nothing else."[74]
In place of the idea of a clear and distinct personal apprehension, Peirce substituted the agreement of a community of inquirers, which was an inter-subjective, external, public standard to be used to justify claims about the truth. Peirce pointed out that the fundamental hypothesis underlying this externalized method was, in fact, centered in another external item—the "Reals" or "Real Things whose characters are entirely independent of our opinions about them." [75] In other words, the assumption here is that reality is something that is independent of any particular human mental process. Indeed, the concept of what is real probably first arose when we discovered that there was an unreal, an illusion, in other words, when we first corrected ourselves. [76] Hence, the concept of "truth" must allow for falsehood to facilitate an accurate reflection of reality; "knowledge" is to be justified belief about truths. [77] The whole Peircean/pragmatic emphasis then, is away from the internal-subjective standards of Cartesianism and towards external-intersubjective standards, which will come as close as possible to something that is "objective". The method of science, which is based in the investigations conducted by a group of trained and disciplined minds, was found by Peirce to yield the external, objective character of justification being sought. He wrote:

"... it is necessary that a method should be found by which our beliefs may be determined by nothing human, but by some external permanency—by something upon which our thinking has no effect. Some mystics imagine that they have such a method in a private inspiration from on high. But that is only a form of the method of tenacity, in which the conception of truth as something public is not yet developed. Our external permanency would not be external, in our sense, if it was restricted in its influence to one individual. It must be something which affects, or might affect, every man. And though these affections are necessarily as various as are individual conditions, yet the method must be such that the ultimate conclusion of every man shall be the same. Such is the method of science." [78]

Such a method as this is fundamentally infused with the idea that each member of the community is willing to sacrifice what is personal and private in order to follow the dictates of an impersonal process by which views and results are freely exchanged. [79]

The whole context of the search for knowledge is, for both the Cartesian and the pragmatic perspectives, one in which inquiry is employed in order to settle doubt. In contrast to the Cartesians, the point made by the pragmatists is simply that inquiry ought to be
non-subjective, or externalized from any one particular consciousness, since a purely individualized process of inquiry can only produce, in Dewey's words, "the feeling of certainty."[80]

The fundamental issue here, then, is that the interrelated concepts of reality, truth, knowledge, inquiry, and justification all involve the idea of a community, an intersubjective group which reduces the influences of personal, subjective factors and ideoyncrasies. As Peirce wrote:

"The real, then, is that which, sooner or later, information and reasoning would finally result in, and which is therefore independent of the vagaries of me and you. Thus, the very origin of the conception of reality shows that this conception essentially involves the notion of a COMMUNITY, without definite limits, and capable of a definite increase in knowledge."[81]

In Peircean terms, the "external standard" for the justification of knowledge claims was found in the agreement of a community of purposive inquirers, who carried out their investigations through time. According to Peirce, truth would be the result of such investigations, if they were to be carried on without limit.[82] Of course, this implies that, until the hypothetical scientific millennium (when the truths of reality are known and inquiry therefore stops), there is an element of inaccuracy in any statement. Peirce even claims that this "confession of inaccuracy" is an "essential ingredient" of truth.[83] More will be said on this topic in a subsequent section of this essay (see section C.10 of this chapter). What is important here is that, in the pragmatic view, truth is attained with the progressive elimination of such inaccuracies by the use of a continual, communal process. The eradication of error does not proceed in private or as a redeeming effort of individual consciousness, but rather, is operative in the public, externally shared systems of communication in common sense and scientific thought.[84] This is Peirce's view of the use of external standards of justification.


At first glance, it would seem as though Dewey's pragmatic approach would admit of a substantial subjective element, but such a judgment of Dewey's view would be misleading. The confusion arises out of Dewey's continual references to the "successful" or "satisfactory" consequences which result when a problematic situation (in Peirce's terms, one involving doubt) is transformed by inquiry and experiment into a determinate one. It is a mistake, however, to infer that Dewey's use of concepts such as "satisfaction" refers to private, internal, subjective states of an individual
The view incorrectly attributed to Dewey is that when a hypothesis is "true," it is because the hypothesis has yielded the "desired results" to a person in a problematic situation. The Cartesian bias of this interpretation of Dewey is obvious, when it is assumed that terms such as "desired results" and "satisfactory consequences" necessarily refer to purely subjective mental events. It is no surprise that such a reconstruction of Dewey's theory leads to absurd consequences.

Of course, Dewey recognized this misinterpretation, and explained it in the tendency of modern (Newton-influenced) thought to separate the mental from the physical, isolating human experience from nature. Dewey writes:

"The inherently incomplete was eliminated from nature along with qualities and ends. In consequence, the mental was sharply marked off from the physically natural; for the mental was obviously characterized by doubt and uncertainty. Mind was placed outside of nature; its relation to nature in knowing the latter became a dark mystery; the uncertain and determinate were said to be merely subjective. The contrast between the doubtful and the determinate became one of the chief marks by which objective and subjective were demarcated from each other and placed in opposition. According to this doctrine, we are doubtful, puzzled, confused, undecided, objects are complete, assured, fixed."[87]

Alternatively, instead of construing Dewey's "doubtful situation" as one involving personal doubt, the proper interpretation is one in which situations themselves are problematic. In that case, the "satisfactory consequences" of ideas which resolve problematic situations are such relative to conditions prescribed by the problem. Subjective satisfaction, Dewey would say, enters in as it does when any job is well done according to the requirements of the job itself, but such satisfaction "... does not in any way enter into the determination of validity, because, on the contrary, it is conditioned by that determination."[88] In other words, an idea for Dewey has "satisfactory consequences" when, given conditions $C_1$, the idea leads to or describes conditions $C_2$, such that $C_2$ answers or resolves $C_1$.[89]

From this it is obvious that Dewey, like Peirce, rejects Cartesian subjectivity as a means of attaining knowledge or as a means of justifying claims of truth. In Dewey's terms, knowledge is "warranted assertibility," or the product of inquiry, a process that is both communal and continual.[90] That it is communal follows from the fact that inquiry involves communication, which in turn, presupposes the existence of language and culture. In the case of scientific inquiry, which is Dewey's model of a "competent and
controlled" activity directed at the justification of assertions by experimental means, the necessity of a community of inquirers is especially important. As with Peirce, the intersubjectivity of a community of inquirers tends to expurgate personal, subjective, and ideosyncratic features from the process of justification. Of this, Dewey writes:

"... if inferences made and conclusions reached are to be valid, the subject-matter dealt with and the operations employed must be such as to yield identical results for all who infer and reason. If the same evidence leads different persons to different conclusions, then either the evidence is only speciously the same, or one conclusion (or both) is wrong. The special constitution of an individual organism which plays such a role in biological behavior is so irrelevant in controlled inquiry that it has to be discounted and mastered ... To be intellectually "objective" is to discount and eliminate merely personal factors in the operations by which a conclusion is reached."[91]

It is obvious for Dewey that the warranted assertions which result from directed inquiry, and which thereby satisfy the problematic nature of some situation, cannot be attained by "conjuring with mental states," and so, must involve an objective existential reconstruction.[92] He writes:

"If doubt and indeterminateness were wholly within the mind—whatever that may signify—purely mental processes ought to get rid of them. But experimental procedure signifies that actual alteration of an external situation is necessary to effect the conversion."[93]

This means that the source of the "warrant" or "justification" in knowledge is something external to human mental states, something objective.

Thus, for Dewey as for Peirce, both the sources of knowledge and the method by which knowledge is obtained are grounded in external rather than internal or subjective objects. This emphasis upon externality is obviously an important aspect of the overall pragmatic approach, as it plays a fundamental role in the pragmatic analysis of knowledge, truth, and justification.

A few final observations regarding the pragmatic doctrine of external standards of justification can be made at this point.
6c. Some Implications of the Pragmatic External Standard.

For one thing, the use of an external, non-subjective method can itself be used to generate other external standards, which can then be used in the specific applications of that method itself. The external standards being referred to here are those of the "reasonableness" of experimental testing procedures. In any experimental test where observations are to be taken, it is assumed that the test is done "under normal conditions." This is necessary so that no disturbing factors are present that could distort the observations taken. Clearly, a "reasonable testing procedure" is one that takes measures to block out any disturbing factors. Yet, the number of possible disturbing factors for any testing situation is always infinite, ranging from faulty instruments to the complex manipulations of our brains by the Andromedans (who practice this mischief only as a part-time hobby, of course). In that case, how can the community of inquirers concerned about certain specific test procedures account for this negative existential? How can an accurate specification of test conditions be found? The answer here is in the construction of a certain external standard of "reasonableness," which is generated from the ordinary practices and experiences of the scientific community itself. Past experience in the detection of disturbing factors has yielded fruitful results when certain precautions have been taken—these precautions then make up the external standard of "reasonable" testing procedures. In other words, the presence of the standard of "normal conditions" would indicate that reasonable precautions against the presence of potentially disturbing factors had been taken. Hence, the standards of "reasonableness" are simply to be those external standards of common, successful use, that is, of the practices of the community itself. A reasonable experimental procedure, then, is the result of a non-subjective, communal standard derived from the common practices which have been found to be fruitful. In this way, the use of external, intersubjective agreement results in the general specification of external standards of procedure. As Peirce wrote on this general point:

"... with the scientific method ... I may start with known and observed facts to proceed to the unknown; and yet the rules which I follow in doing so may not be such as investigation would approve. The test of whether I am truly following the method is not an immediate appeal to my feelings and purposes, but, on the contrary, itself involves the application of the method."[94]

The idea of the necessity of external standards of justification also comes up for both Peirce and Dewey with regard to the pragmatic method for the clarification of concepts, and thereby demonstrates the unity of these two aspects of pragmatic thought. The pragmatic approach to conceptual meaning is intimately bound up with the notion
of using a public, external, communal practice, as opposed to a private or subjective one. That is, the conditional statements by which propositions are found to be meaningful refer to generalized experiments, operations, and tests that are impersonal. To use Peirce's example, exactly who attempts to scratch a "hard" rock with a knife is totally unimportant, as long as the procedure is followed correctly, in accordance with the general interests and purposes involved which are relevant. This non-subjective nature of experimentation results from the fact, at least for Peirce, that the meaning of a concept refers to an indefinite number of confirming instances. In Peirce's words:

"To call the stone hard is to predict that no matter how often you try the experiment, it will fail every time. That innumerable series of conditional predications is involved in the meaning of this lowly adjective." [95]

For Dewey, a similar emphasis upon external, non-subjective conditions (or "standards") was necessary for the specification of the meaning of a concept. To Dewey, language operates not as mere physical sounds or marks on paper, but in virtue of the representative capacity or meanings of these symbols. He writes:

"A sound or mark of any physical existence is a part of language only in virtue of its operational force; that is, as it functions as a means of evoking different activities performed by different persons so as to produce consequences that are shared by all the participants in a conjoint undertaking." [96]

The non-personal nature of the processes of inquiry and experimentation for Dewey have already been outlined above. The pragmatic meaning of a concept, which is the clarification of that concept in a language as a reference to common operations, is therefore a general or external matter rather than a subjective one, for both Peirce and Dewey. It is in this way that the notion of external standards finds an important application in the pragmatic approach to meaning.

6d. The External Standard in James' Writings.

Finally, a word must be offered with respect to the third member of the representative pragmatist troika being considered in this comparative analysis—William James. As was the case with Dewey, at first glance it appears as though James' pragmatic approach is significantly infused with subjective elements. However, although
James does say many things in his writings which indicate that his rejection of subjectivity was not as strong as Peirce's or Dewey's, to say that James endorsed a subjective over an objective standard of justification across-the-board would be a misinterpretation of James, who was also cognizant of the need for objective and socially-shared controls over what was to count as truth and what as falsehood.[97]

The problem is that James tried to take too many positions at once, and so, his endorsement of the pragmatic external standard is not as clear and as forthright as it is in the writings of Peirce and Dewey. This is why I have claimed that the pragmatic doctrine of external standards is most clearly to be seen in Peirce and Dewey rather than in James. But even so, James does provide many examples in his writing of the idea that justification could not simply be a matter of subjective, personal desires alone. For example, James wrote:

"Truth ... meaning nothing but eventual verification, is manifestly incompatible with waywardness on our part. Woe to him whose beliefs play fast and loose with the order which realities follow in his experience: they will lead him nowhere or else make false connexions."[98]

And further on in the same essay, James re-emphasizes the external nature of meaning and truth:

"Between the coercions of the sensible order and those of the ideal order, our mind is thus wedged tightly. Our ideas must agree with realities, be such realities concrete or abstract, be they facts or be they principles, under penalty of endless inconsistency and frustration."[99]

Like Dewey, James construes the notion of the truth of an idea in terms of the usefulness of that idea in a certain situation or context. In this case, the "relativity" of truth merely implies that a true idea is related to something else, which is not necessarily a subjective, private will or consciousness. Rather, truth and meaning are related to various situations, the appraisals of which, in terms of the purposes and interests involved (for humans are parts of these situations), are subject to definite, non-subjective considerations of efficacy, usefulness, and evaluation. It was in consideration of such non-subjectivist tendencies in James' pragmatic thought that led H.S. Thayer to the position that James' overall orientation was not, in fact, as strongly infused with subjectivity as it often seems. Thayer writes of James:

"The orientation of judgment remains in all outward respects the same; the focus always is upon how ideas operate or perform in given contexts,
relative to some working purpose and point of view. The contexts, indeed, may differ ... being different under different interpretations, or different depending upon whether what we are considering is a situation, a judgment of a situation, a judgment of a previously judged situation, etc. But, once granting this relativity of contexts and of rulings upon useful and useless conceptualizations, and granting, too, the various working purposes to which pragmatic judgments of truth and falsehood are perforce confined, we can still affirm that the resulting judgments of truth are just as absolute and objective as any that could be desired."

Hence, although the endorsement of external standards by James is present in his writings, it is simply not as obviously apparent as in the writings of Peirce and Dewey.

6e. A Short Look Backward.

A brief summary of the basic position of the American pragmatists regarding external standards of justification will once again bring the forthcoming analysis of Holmes' thoughts on this issue into a tighter focus. The thought of the most well-known American pragmatists has been found to emphasize the primary importance of external factors in the approach to inquiry, knowledge, justification, and meaning. Alternatively, subjectivity in these regards is rejected. These external standards enter the pragmatic world-view as objects (i.e., reality, the nature of an actual situation) to be addressed by claims to knowledge, or as methods to attain knowledge (i.e., the communal activity of scientific or problem-solving inquiry). In both ways, the justification of valid claims and judgments is centered outside of any one particular consciousness. The warrant behind a pragmatic judgment is the result of a communal process of inquiry and agreement, conducted in reference to a definite contextual situation. Both of these are external matters, wherein personal, subjective elements are reduced to irrelevancies. The usefulness of this doctrine in the pragmatists' view is clear—for one thing, the ruling out of subjectivity in the justification of claims implies that the advance of knowledge is possible, and for another thing, the use of the external standard of communal agreement can itself be used to generate more particular standards of practice and conduct, for example, those dealing with the "reasonability" of certain behavior.

I will now move on to show the ways in which one of the major aspects of the legal philosophy of Holmes was similar to the thought of the pragmatists—in the emphasis upon external standards.

In the preceding section, it was at first found that the general position of several famous pragmatist philosophers favored a rejection of Cartesian subjectivity. Holmes took a remarkably similar view whenever he discussed his own notion of "truth." In one of his more famous essays, "Natural Law," Holmes expressed his philosophical opposition to Cartesianism in the following way:

"If, as I have suggested elsewhere, the truth may be defined as the system of my (intellectual) limitations, what gives it objectivity is the fact that I find my fellow man ... subject to the same Can't Helps. If I think that I am sitting at a table I find that the other persons present agree with me; so if I say that the sum of the angles of a triangle is equal to two right angles. If I am in a minority of one they send for a doctor or lock me up; and I am so far able to transcend the to me convincing testimony of my senses or my reason as to recognize that if I am alive probably something is wrong with my works. Certitude is not the test of certainty. [101]

Holmes' attitude in passages such as this is a clear and striking indictment of the use of personal, subjective criteria for the justification of judgments and claims, and as such, puts Holmes squarely in agreement with a more well-known pragmatist such as Peirce. This similarity is seen in two important ways. Not only is there an acknowledgement by Holmes of the shortcomings of the Cartesian method of justification, but there is also the suggestion of intersubjective agreement as the proper means of attaining a non-personal, external standard. To a pragmatist, this is what "objectivity" amounts to.

Holmes discusses the internal versus the external standards issue in several ways throughout his legal and philosophical writing. In fact, this particular doctrine is so pervasive a factor in Holmes' legal thought that it must be seen in itself as one of the major aspects of his overall legal theory. Probably the most basic theme in Holmes' only book, The Common Law, is that legal liability has justifiably come to reject the material relevance of subjective, internal, personal, "moral" factors. Most of The Common Law is in fact devoted to an extended argument intended to show that such subjective concerns have been rightly replaced in legal affairs with external standards. In addition, Holmes used similar lines of reasoning as an appellate court judge, for almost fifty years. This second area of comparison with the pragmatists, then, is a fundamental part of Holmes' intellectual contribution to legal thought, and so, deserves careful and detailed attention. I will
therefore approach this topic by examining the following items in this order: (1) Holmes’ usage of the term “moral” to refer to “subjective” or “internal” matters, (2) Holmes’ treatment of subjective versus external standards in criminal, tort, and contract law, (3) the importance of the Holmesian theory of external standards in relation to what has already been addressed as another fundamental part of Holmes’ legal theory, namely, his pragmatic approach to the meaning of legal concepts, and (4) the ways in which Holmes argued that external standards in the processes of the law could be generated. In these ways, Holmes’ advocacy of the use of external over subjective standards will not only show again his philosophical links to the American pragmatists, but will also demonstrate how seemingly different areas of Holmes’ thought can be integrated and made coherent when their underlying pragmatic orientation is made explicit.


Holmes was ambiguous in his use of the term “moral.” That is, he does not use it consistently, but rather, he moves from one connotation to another. However, this is not a major problem in understanding Holmes’ philosophy because the sense in which Holmes is speaking of “morality” can usually be determined from the particular context in which he is writing. On the other hand, when the ambiguity is unrecognized, a distorted picture of what Holmes is advocating can result, setting up a straw man as Holmes’ position that is, of course, problematic and easily criticized.[102] To insure that there is no confusion on this point, let me address it briefly.

In many places in his writings, Holmes advocates the separation of “legal” from “moral” concerns. This point has already been touched upon above, in the context of a discussion of the meaning of legal concepts (see section C.5 of this chapter). To recall what was said therein, it was found that Holmes considered it a major “fallacy” in legal reasoning when words and phrases “drawn from morals” (e.g., malice, intent, rights, etc.) were translated as morally evocative in legal discourse.[103] This resulted in a confusion of legal with moral ideas, which in Holmes’ view were of different domains; for this reason, Holmes often recommended that the conceptual connections between legal and moral matters be severed. However, the particular sense of “moral” Holmes is addressing in such passages is one in which “moral” refers to the mechanics and conduct of individual persons’ consciousnesses—personal desires and satisfaction, subjective intentions, individual “good” or “evil” wills, motivations, and so on. This connotation of “morals,” then, is a reference to the realm of internal or subjective phenomena.[104]

In contrast to this sense of “moral,” of course, are the purely external concerns of legal processes. It is this particular sense of “moral” that Holmes is using throughout much of The Common Law in his exposition and analysis of the “external standards” of the law.[105]
This use of the term "moral" should not be confused with the other sense with which Holmes avails himself, such as when he claims that the law itself demonstrates the moral development of our society,[106] or that a necessary condition for a sound body of law is that it takes the morality of its community into account.[107] This second sense of "moral" connotes a set of public, communal, and shared values, preferences, and interests, and is in fact many times the source of the content of such concepts as "the reasonable man's conduct," as I will show below. Hence, "morality" in this second sense is directly linked to Holmes' notion of the "external standards" of liability. In other words, with regard to this second concept of morals, Holmes' position on the relation of law to morality is the precise opposite of his position in regard to the former conception. That is, when "morals" are taken to represent the dominant feelings and values of the community, Holmes stresses the fundamental links between morality and positive law. Since the present area of analysis concerns Holmes' views on the internal/external standards issue, though, references to "moral" notions should be taken in the first sense specified above.

7b. The External Standard in the Criminal Law.

It has already been observed (see section C.4 above) that Holmes envisioned the relationship between the individual and the state in terms of a pragmatic, "cash value" approach, namely, in terms of the respective physical powers of each. The pragmatic nature of such an understanding implied as a quite natural outcome the Holmesian recommendation to approach legal matters from the point-of-view of the "bad man," who is only interested in legalities insofar as they will bear on his possible future experience and interests. In this way, Holmes utilized the pragmatic approach to the meaning of concepts, and applied that method specifically to legal ones. However, it is also clear, given this arrangement, that Holmes would desire to analyze one legal concept in particular that is centrally related to human interactions in the legal context—the concept of liability. From the perspective of the "bad man," the conceivable responses of the state to possible antecedent events mostly dealt with various aspects of liability. Therefore, it is again a quite natural outcome of Holmes' "cash value" pragmatic approach that his major work in jurisprudence is a study of liability.

In the beginning chapters of The Common Law, the questions which Holmes sets out to analyze are concerned with the fact that legal liability has come to be imposed upon persons who apparently bear no personal guilt with regard to the events which elicited the imposition of such liability. How can this be explained? For example, why is S sometimes legally liable for the acts of R, when R is S's agent? Similarly, why is a person S legally liable for the damages of an escaped animal owned by S?

In tracing the historical origins of legal liability, Holmes
found that this concept arose in more primitive times as the result of a moral consideration, that is, from the thought that someone (or even some thing) was to blame. [108] In other words, liability seems to have been regarded in the past as something "attached" to the body doing the damage, in an almost physical sense. [109] Holmes gives several examples of instances where an inanimate object, such as a dead branch which snaps off a tree and kills a man, is judged to be "at fault," and is subsequently "punished" (e.g., the branch would be burned). Similarly, owners of wild animals or slaves simply offered up the offending animal or person to the injured party; with principals and agents, liability was attached to the agent only. Hence, personal fault was at the core of primitive liability, with personification extending to any object that proximately brought about injury. [110] Further, Holmes found that modern liability was still often conceived in terms of personal fault, even in cases where there appeared to be no such fault involved. For example, the owner of a wild animal was said to be legally liable for its offenses because of his personal guilt in failing to control the animal properly. Similarly, a person was said to be liable for the harmful actions of his agent because of his personal fault in employing an improper person. [111] But it was Holmes' view that this approach to the question concerning the justification for imposing liability on persons without fault was incorrect, even though this question had been answered in this way "from the time of Ulpian to that of Austin." [112] In the alternative, Holmes suggested that the phenomenon whereby liability was transferred from "the offending thing" to those parties without personal fault was the result of the transformation of "moral" standards (viz., personal, subjective, internal) of blame into external or objective ones, from which the actual guilt of the party concerned "is wholly eliminated." [113] Hence, in explaining and justifying the modern concept of legal liability, Holmes adopted what was a fundamental aspect of pragmatic thought—the use of external standards of judgment. And Holmes applied this notion almost uniformly across the map of the legal universe, to criminal law, tort law, and contract law.

With regard to the first of these three areas, the criminal law, Holmes first examines the phenomenon of punishment. He observes that punishment in ancient times was rooted in personal vengeance, and so, was not governed by an external standard. Holmes writes:

"The desire for vengeance imports an opinion that its object is actually and personally to blame. It takes an internal standard, not an objective or external one, and condemns its victim by that." [114]

Holmes argues, however, that the modern view of punishment embraces an discernable elements of "blame" (even though there are still discernable elements of vengeance which remain).

The contrast here is primarily between two basic approaches to
criminal liability and punishment. On the one hand, there is the Kantian theory, whereby human beings are punished from an internal or moral standard, since they are not to be treated as means, but as ends in themselves. This is sometimes called the retributive theory of punishment. On the other hand, there is the view that human beings are punished in order to deter similar such conduct which might arise in the future from anyone in the community. This is sometimes called the preventive theory, and is obviously directed away from the individual's specific action, towards a kind of conduct and to the external community as a whole. The preventive view, then, uses punishment to serve as the external expression of a public disapproval of a certain type of behavior. It is Holmes' position that the modern treatment of punishment (and criminal liability) is progressing from a vengeance-orientation to a prevention-orientation. In other words, the Kantian approach is rightly on the way out. To Holmes, the internal conduct of the criminal, that is, his actual moral evil in the commission of an act, is an irrelevant concern to the legal system. Modern liability takes notice only of the criminal's external acts. The only necessary internal element to criminal liability is that the act involved is voluntary; and even this requirement is a necessity for external reasons of public policy, namely, that it would be disruptive of the public peace if a person were made answerable for harm, unless that person might have chosen otherwise. [115] As will be shown, virtually all other internal elements in Holmes' liability thesis but this one are rejected.

Holmes even goes so far as to say that there would really be no need to punish an individual's crime, assuming the wrong done were indemnified, if the whole affair had been a secret between the sovereign and the subject. Under such conditions:

"... the sovereign if wholly free from passion, would undoubtedly see that punishment in such a case was wholly without justification." [116]

From this it can be seen that Holmes forcefully rejects the Kantian dictum, and freely admits that the preferred preventive approach sometimes sees men as means to certain social ends. It is in this way that the Holmesian emphasis on the importance of the community (over and above the individual) emerges. This is one of the ways in which Holmes, along with the other well-known pragmatists, embraces an external, communal standard over an internal, personal standard of judgment. The very reason that persons can be treated as means to social ends is in recognition of a simple fact of human experience—that there is no "equality" between individuals and the community. In his "cash value" pragmatic style, Holmes affirms that:

"No society has ever admitted that it would not sacrifice individual welfare to its own existence."
If conscripts are necessary for its army, it seizes them, and marches them, with bayonets in their rear, to death. It runs highways and roads through old family places in spite of the owner's protest, paying in this instance the market value, to be sure, because no civilized government sacrifices the citizen more than it can help, but still sacrificing his will to that of the rest."[117]

Further, the remaining vestiges of the internal standard of punishment, namely, the use of punishment at least partially as a means for gratifying the feelings of vengeance, is itself continued not for "moral" reasons, but from an external means of justification—considerations of public policy. (Such considerations seem to be very much akin to the second sense of "morality" described here—referring to the set of public, social values, interests, and standards; and this kind of "morality" is a definitely public entity.) With regard to vengeance, then, Holmes claims that the law follows the external standards of public morality:

"The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong. If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution."[118]

From this view of punishment as that which is justified by external, public considerations, Holmes argues that it becomes possible to punish a person regardless of the state of that person's conscience. Holmes is thus building his case for the externality of criminality liability in general. Basically, Holmes' position is that a person is judged by the Anglo-American legal system not by his or her personal blameworthiness with regards to the criminal acts, but with reference to an external objective standard of behavior. Since the purpose of the criminal law is to induce compliance with a certain standard of conduct, its only concern is that standard of outward behavior. Sometimes this standard takes the familiar form of the concept of "the conduct of the average prudent men." Other times, this standard is simply one of "reasonable behavior" in a certain situational context. Holmes' idea here is that each person in a society is required to "come up to a certain height" as set by that society's concept of the conduct of "the man of ordinary intelligence and reasonable prudence."[119] When a person's behavior does not come up to such a standard, and the context in which the person's act occurs is governed by criminal law, then that person is criminally liable, no matter if the person is morally pure of heart. (The only exceptions to this doctrine which Holmes mentions are those of infancy or madness.) Holmes writes:
"Considering this purely external purpose of the law together with the fact that it is ready to sacrifice the individual so far as necessary in order to accomplish that purpose, we can see more readily than before that the actual degree of personal guilt involved in any particular transgression cannot be the only element, if it is an element at all, in the liability incurred. So far from its being true, as is often assumed, that the condition of a man's heart or conscience ought to be more considered in determining criminal than civil liability, it might almost be said that it is the very opposite of truth."[120]

To Holmes, the criminal law is completely satisfied with certain external results, such as the prevention of robbery or murder; the subjective motives of persons which may bring about those results are irrelevant. Hence, Holmes has in effect rejected any consideration of mens rea, or the "actual wickedness" of a party, as a necessary concern of the criminal law.[121]

Looking at Holmes' thoughts on the crime of murder as a beginning example, both the pragmatic working-out of an external standard of criminal liability and the Holmesian advocacy of the separation of moral from legal terms are demonstrated. Holmes gives the standard definition of murder as the taking of a human life with "malice aforethought." In ordinary speech, however, "malice" refers to the internal, evil intentions of a person. In criminal law, "malice" means "criminal intent." Both uses apparently point to a subjective state of a party's mind—his or her "intentions." Yet Holmes argues that, from the law's point-of-view (the purpose of which is the prevention of certain external conduct), "intent" does not refer to a subjective conscience, but to the foresight of the consequences of an act. However, is this not also a reference to something subjective? Holmes' answer is again consistently in the negative. With regard to the concerns of the criminal law, "foresight" does not refer to the actual knowledge of a particular subject, but to what a standardized reasonable person would have seen, if that hypothetical person had been in a certain type of circumstance. As Holmes points out:

"If the known present state of things is such that the act done will very certainly cause death, and the probability is a matter of common knowledge, one who does the act, knowing the present state of things, is guilty of murder, and the law does not inquire whether he did actually foresee the consequences or not. The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have seen."[122]
The striking similarity of passages such as these to the writings of the more famous American pragmatists (especially C.S. Peirce, in this case) cannot be overlooked. The Common Law is literally full of passages in which Holmes lays down the same kind of pragmatic line. All of the pragmatic elements of conceptual analysis are here—the meaning of concepts is determined by reference to general purposes, and in reference to general types of situations; a conditional statement referring to a certain operational test is constructed as a meaning of a concept; the external standard of the community's concept of "reasonable" behavior is used as a criterion of judgment. Given the evidence produced so far, it is safe to say that failing to see the pragmatic orientation here means failing to see the ways in which various parts of Holmes' theory fit together. It is in passages such as this one that the two fundamental elements of Holmes' theory of law, thus far examined, are integrated—his approach to the meaning of legal concepts and his advocacy of external standards are both aspects of an underlying and clearly recognizable pragmatism.

To finish up the point about murder, Holmes shows that the subjective element in murder, that is, "malice," reduces first to "intent," and then to the external standard of the "foresight of a person of reasonable prudence." Holmes also shows that "knowledge" (i.e., "foresight") itself is judged not by what a person actually did know, but by an external hypothetical standard—that which a person of reasonable prudence "would have inferred" in a certain situation.[123] For example, in Holmes' words:

"... if a workman on a house-top at mid-day knows that the space below him is a street in a great city, he knows facts from which a man of common understanding would infer that there were people passing below. He is therefore bound to draw that inference, or, in other words, is chargeable with knowledge of that fact also, whether he draws the inference or not. If then, he throws down a heavy beam into the street, he does an act which a person of ordinary prudence would foresee is likely to cause death, or grievous bodily harm, and he is dealt with as if he foresaw it, whether he does so in fact or not."[124]

Conversely, Holmes implies that a person is not criminally liable when the common experiential import of "foresight" in a certain type of situation is such that the hypothetical reasonable man would not have known of certain dangers.[125] The requirements of a state upon its citizens therefore includes not only the knowledge of the law itself, but "to know the teachings of common experience."[126]

Holmes also examines other crimes, some of which do not at first
glance appear to fit his external standards approach to criminal liability. The distinction between murder and manslaughter, for example, arises when one commits an act out of a certain provocation. According to Holmes, "current morality" (in the sense of the general set of public, social values and standards) would not hold such a provoked person to be as blameful as an unprovoked one, and so, the offense of taking a life under such circumstances can be reduced from murder to manslaughter. Two important points arise from such a distinction in Holmes' legal theory. First, Holmes' commitment to the separation of legal and moral concepts through his advocacy of an external standard of liability can be totally misinterpreted in cases such as this, unless the distinction made above regarding the two senses of "moral" which Holmes utilizes is kept clearly in mind. In this particular case, and in other cases where Holmes appeals to the standards of "common morality," it is vital to be aware of the fact that the "morals" Holmes was referring to were of a public, social, external order—in contrast to the "moral" considerations (viz., those which take a person's private, subjective, consciousness and motives into account) he juxtaposes to the external hypothetical standards of liability, which are themselves directly related to "morality" in its external sense. In this way, Holmes is clearly advocating that the law and public morality ought to coincide, while at the same time arguing that (subjective) moral concerns ought to be ignored by the law. The apparent contradiction can be resolved here only when Holmes' uses of "moral" are distinguished. Second, Holmes argues that cases such as manslaughter, in which a person's subjective state of mind appears to be legally relevant, are not understood correctly unless the objective nature of this "mental element" is recognized. According to Holmes, the mitigating effect from murder to manslaughter does not come from the fact that a person was actually experiencing an internal state of rage, but that the person had grounds to be provoked that would be sufficient for an ordinary person to justify the resulting actions. (Again, the subjunctive tense is employed.) In other words, legal standards themselves come from the general considerations of the common experience of the community regarding what provocations ought to be taken as sufficient to justify certain acts.[127] In the same way as before, then, Holmes' pragmatic view of the law of manslaughter justifies liability by an external standard of behavior relative to the external situation in which one finds oneself.

Holmes extends this line of analysis to other crimes in which the subjective motives for crimes appear to be legally relevant. However, I will look at only two of his examples here—those where "malicious behavior" is an element and the law of attempts.

In the first of these, Holmes admits that the popular sense of "malice" is often used, which is a reference to the subjective motives of the defendant. As Holmes has already shown, however, "malice in this sense has nothing in common with the malice of murder."[128] But is there an inconsistency here with regard to the crime of "malicious behavior?" Holmes claims there is not, simply because the "pure malice" of a person is legally relevant in this case only for the reason that it is an objective indicator of the
actual type of harm done. The law does not, therefore, incur liability for maliciousness because it is a person's harmful motive, but because the presence of that motive contributes to the external result, or harm, which is accomplished. Malice is not legally important for the subjective evil that it is, but only for the objective results it shows. Hence, although subjective malice becomes an element in the crime, the external concerns of the law only look to the results of the crime in justifying a type of criminal liability. Actual malice is only important, then, "because the act when done maliciously is followed by harm which would not have followed the act alone."[129]

Holmes takes a similar line in dealing with crimes which fall under the "law of attempts." Again it would seem as if a subjective state of a person's consciousness, namely, his or her "intent" to commit a crime, enters into the justification for holding a person criminally liable. Of course, says Holmes, a subjective intention alone to commit a crime is no crime at all, while there are many cases of crimes where an attempt alone is punishable. The subtle distinction here is that an attempt is an overt act, and so, on that basis, becomes legally noticeable. A subjective intention is only legally relevant in so far as it indicates that an overt harmful act is more probable than would have been the case had the intention not been present. Says Holmes of subjective intent:

"The importance of the intent is not to show that the act was wicked, but to show that it was likely to be followed by hurtful consequences ... or events in connection with which it will accomplish the result sought to be prevented by the law."[130]

Again, upon Holmes' analysis, the common law is seen to follow an external standard of criminal liability, even in cases in which subjective concerns appear to be legally relevant. In so far as such concerns enter the liability picture at all, says Holmes, it is only because they are used as external signs which point to certain overt results. In other words, Holmes' claim is that a voluntary act of an individual is merely considered to be a causing of muscular contractions, and as such, is legally irrelevant. Acts only have legal import from their place in a contextual situation, wherein a consequence results that is addressed by the law.[131] Hence, Holmes' approach to the idea of the legal import (viz., the meaning) of certain concepts—in this case, criminal liability—is a characteristically pragmatic analysis. Holmes uses the same line of thought in other major areas of the law, also, as will now be seen.

7c. The External Standard in Tort Law.

Holmes argues for a general theory of tort liability on the same
underlying pragmatic ground of external standards derived from community experience. As with criminal liability, Holmes admits that

civil liability is also based upon the single internal factor of choice inherent in a voluntary act, again, because personal choice to do an act is necessary for the charge of legal responsibility, that is, liability. However, as pointed out above, the reasons for this very limited subjective concern are grounded in external moral standards and public policy considerations.\[132\] The main problem with regard to liability in tort, for Holmes, was in the justification of such liability once a voluntary act was committed. Two opposing views on this question were apparently struggling for acceptance at the time Holmes wrote The Common Law, and Holmes' theory was evidently put forth as a compromise between the two. As Mark DeWolfe Howe writes of these two dominant theories of tort liability:

"The one view, perhaps to be described as American, asserted that liability in tort is to be imposed only when the defendant is guilty of some personal fault. The other, apparently supported by English decisions, recognized that some liabilities in tort may be imposed on defendants who are personally quite blameless."\[133\]

To Holmes, one end of tort theory embraced a strict liability approach whereby a person would always act at his or her peril. On this view, it was sufficient for liability that a voluntary act resulted in damage; the fact that the act was done negligently or intentionally was immaterial.\[134\] At the other end of the spectrum was Austin's view, whereby liability in tort was based upon personal fault, and which referred negligence to a "state of the party's mind."\[135\] Holmes argued against both approaches. Obviously, Holmes stood against Austin's position because of Austin's reliance upon an internal rather than an external standard. On the other hand, Holmes rejected the "strict liability" approach as being against sound public policy. The strict view entailed that a person could be held liable for any and all damage brought about by that person's action, however remote the damages from the original act. To Holmes this meant that all individual activity would be stifled, for it could never be known whether or not some act could open the door to a series of physical sequences which ended in damage.\[136\] Since Holmes claimed that it was a public benefit to allow the maximum degree of personal freedom of action, he argued that the strict view of tort liability ought to be rejected also.

Holmes' own theory of tort liability, put forth in response to the two views outlined above, shows his consistent application of pragmatic principles. As has already been pointed out, Holmes claimed that the purpose of the law, both criminal and civil, was to prescribe external circumstances only. As shown, "acts" by themselves were merely muscular contractions, and as such, were legally irrelevant. It was the results brought about by acts which
the law would address. The legal import of an act, then, was pragmatically determined by reference to a certain situation, in terms of this general purpose. As far as tort liability was concerned, then, Holmes argued that the best justifying grounds for such liability were founded in the hypothetical behavior of the "reasonable man"--a pragmatic external standard based upon the value-standards (viz., the public morality) of a community. In typically pragmatic fashion, the standards Holmes set down for liability in tort were in terms of the "would be" foresight and conduct of a general type of person acting in a certain type of situation as determined by a community agreement. A person was liable in tort under the condition that such a person's actions were a deviation from this external standard of hypothetical behavior. Holmes writes:

"... when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary for the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself and his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account ... The law considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that. If we fall below the level in those gifts, it is our misfortune ..."[137]

The test of tort liability for Holmes, then, is very similar to that of criminal liability--the hypothetical foresight that certain types of acts in certain types of situations will bring about harm or damage. Further, as Holmes points out, the tendencies of a given act to cause harm in certain types of situations "must be determined by experience."[138]

Before moving on to a brief look at Holmes' views on contract law, it is necessary to point again to the overall consistency of Holmes' strategy in dealing with both criminal and civil liability. Holmes' ongoing concern is to argue against the use of pseudo-Cartesian standards of liability and to argue in favor of a hypothetical external standard based upon the community's conception of the "conduct of a reasonable man" in certain kinds of circumstances. Holmes seeks to separate, in general, the "legal" from the "moral" only in so far as the latter concept refers to subjective wills and intentions. Alternatively, when "morality" is taken to represent the communal standards of social value and
preference, Holmes seeks to make such an external moral standard the basis of his theory of liability. The definitive pragmatic aspects of these parts of Holmes' outlook have been discussed above, and are especially obvious when compared side-by-side to certain more well-known pragmatic doctrines, as has been done herein.

7d. The External Standard in Contract Law.

In regard to the theory of contracts, Holmes' positions are aimed at continuing the legal focus upon external rather than internal standards. At first glance, it would seem as though the area of contract liability would be hard pressed to fit the presently-constructed Holmesian/pragmatic mold. Traditional analyses as well as the common understanding of contracts interpret such agreements primarily in subjective terms, as in "the meeting of the minds of the contracting parties," or "the acceptance of a personal proposal intended to be accepted," or "the willingness expressed by a person to do or abstain from doing some act," and so on. Such constructions tend to make contracts out to be agreements between (or among) individuals which deal primarily with their personal wills, intentions, promises, and other subjective conduct. Liability in contract would seem to be grounded in Austinian terms, then, with an eye to the personal powers and responsibilities involved when promises are made and accepted.

Yet, to Holmes, this outline was the proper approach to promises in general rather than to legally binding promises. In terms of his "cash value" pragmatic orientation to legal matters, Holmes averred that the law ought to concern itself about what a person could promise in an external sense,[139] since the purposes of the law are served when it deals with external conduct alone. The set of all such possible promises was the domain of contract law. Such a broad view, however, would encompass many promises which might have nothing at all to do with a person's actual power, responsibility, and intention to do or refrain from an act. Holmes cites many examples which show that persons have incurred contractual liability in the courts for promised events which were totally out of their personal control. For example, a man may legally contract to the effect that it will be a sunny day tomorrow—an event that is virtually outside of his personal power to bring about. In light of such examples, Holmes claimed of "legal promises" that:

"... the law does not inquire, as a general thing, how far the accomplishment of an assurance touching the future is within the power of the promisor. In the moral world it may be that the obligation of a promisee is confined to what lies within reach of the will of the promisor ... But unless some consideration of public policy intervenes, I take it that a man may bind himself at law that any
future event shall happen. He can therefore promise it in a legal sense. It may be said that when a man covenants that it shall rain to-morrow, or that A shall paint a picture, he only says, in a short form, I will pay if it does not rain, or if A does not paint a picture. But that is not necessarily so. A promise could easily be framed which would be broken by the happening of fair weather, or by A not painting. A promise, then, is simply an accepted assurance that a certain event or state of things shall come to pass.\[140\]

Hence, while in the domain of ethics, "ought" is usually said to imply "can," in the legal domain, the "ought" of a legally binding promise implies no such thing. Since the power of the promisor over the promised event may be nil (and in the interests of a uniform theory which addresses all cases), Holmes concludes that the legal consequences for any kind of promise are the same--namely, that the promisor is made to compensate the promisee if the promised event does not come to pass. In this way, Holmes arrives at his famous "risk theory" of contract. Holmes argued:

"If the legal consequence is the same in all cases, it seems proper that all contracts should be considered from the same legal point of view. In the case of a binding promise that it shall rain tomorrow, the immediate legal effect of what the promisor does is, that he takes the risk of the event, within certain defined limits, as between himself and the promisee. He does no more when he promises to deliver a bale of cotton.\[141\]

According to Holmes, this was the proper way to state the common-law meaning of the concepts of "promise" and "contract." The striking similarity in this instance to the pragmatic positions of Peirce and James is remarkable. In exactly the same way as those other Metaphysical Club members did, Holmes insisted that a conceptual difference implied a difference in consequences. Holmes' pragmatic approach to legal concepts thus unified areas of contract law that had been artificially separated up to that time; in Holmes' view, when the legal results are the same, the nice distinctions disappear between legal concepts.

Holmes argues that his "risk theory" of contract does away with the idea that, when a party is contractually bound, that party's will is being legally subjected to another--"a kind of limited slavery." That is, according to Holmes, the law simply does not compel persons to keep their promises! Promises as such, are purely private matters. The law never interferes into contractual matters until a promise has been broken, and by that fact, "cannot possibly be performed according to its tenor."\[142\] Even when the law backs up
the "specific performance" of a contractual promise, it can never be
the actual "specific performance" because of this delayed reaction.
Hence, Holmes concludes that:

"The only universal consequence of a legally
binding promise is, that the law makes the promisor
pay damages if the promised event does not come to
pass. In every case it leaves him free from
interference until the time for fulfillment has
gone by, and therefore free to break his contract
if he chooses."[143]

Further, Holmes claims that his "risk theory" is supportable for
sound public policy reasons. According to Holmes, an increasing
number of disruptive factors to the specific performance of contracts
are being rightfully taken into consideration in contract litigation.
For this reason, modern courts are generally looking to their
common-law duty as being one that distributes the risks of
non-performance rather than one that enforces an "impossible"
specific performance.[144]

It is clear that in opposing the "will theory" of contracts with
his own "risk theory," Holmes was again attempting to replace an
internal standard of liability with an external one. Contracts are
taken in the legal perspective to deal with the occurrence or
non-occurrence of certain objective events, and not to deal with the
intentions or powers of private wills. Even the very existence and
interpretation of a contract, which courts often have to decide upon,
are questions determined by an external standard rather than the
internal "meeting of the minds" idea. Holmes wrote of this:

"There never was a more unfortunate expression used
than "meeting of minds." It does not matter in the
slightest degree whether minds meet or not. If the
external expression on the one side and the other
coincide, the fact that one party meant one thing
and the other another does not prevent the making
of a contract."[145]

Holmes' point was that since the law dealt with externals, then all
contracts were to be treated as objective, formal entities. The
legal use of phrases such as "meeting of minds" was yet another
instance of the confusion of moral and legal terminology which Holmes
continually inveighed against. In "The Path of the Law," Holmes
clearly described this confusion in the broader context of the
internal versus external standards issue. He wrote:

"In the law of contract the use of moral
phraseology has led to equal confusion, as I have
shown in part already, but only in part. Morals deal with the actual internal state of the individual's mind, when he actually intends. From the time of the Romans down to now, this mode of dealing has affected the language of the law as to contract, and the language used has reacted upon the thought. We talk about a contract as a meeting of minds of the parties, and thence it is inferred in various cases that there is no contract because their minds have not met; that is, because they have intended different things or because one party has not known the assent of the other. Yet nothing is more certain than that parties may be bound by a contract to things which neither of them intended, and when one does not know of the other's assent. Suppose a contract is executed in due form and in writing to deliver a lecture, mentioning no time. One of the parties thinks that the promise will be construed to them at once, within a week. The other thinks that it means when he is ready. The court says that it means within a reasonable time. The parties are bound by the contract as it is interpreted by the court, yet neither of them meant what the court declares that they have said. In my opinion, no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs,—not on the parties' having meant the same thing but on their having said the same thing."[146]

Again, much of this passage sounds remarkably like a reading from Peirce. In fact, the Holmesian emphasis in this case upon the communal, public nature of signs (viz., symbols, words, concepts, etc.) is almost exactly the same as the emphasis of Peirce and Dewey.[147]

The use of the "reasonable man" standard for Holmes thus arises in an important way in contract law, and is especially evident in Holmes' rationale for the method by which courts interpret (and ought to interpret) various documents. In examining a contract, for example, a court asks:

"... not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used, and it is to the end of answering this last question that we let in evidence as to what the circumstances were. But the normal
speaker of English is merely a special variety, a literary form, so to speak, of our old friend the prudent man. He is external to the particular writer, and a reference to him as the criterion is simply another instance of the externality of the law."

Holmes continues, in The Common Law, to examine a list of legal concepts from contract law, arguing in each case that an external over an internal standard is necessary for the best and most fruitful approach to the meanings of those concepts (e.g., "bargain," "consideration," "reciprocal inducement," "mistake," "duress," etc.).

Hence, Holmes' approach to contract law is clearly aimed at finding the same kinds of external standards of liability (viz., the "risk theory" and the "reasonable man" concept) as he applied to both criminal and tort law. Holmes apparently believed that his external standards approach to liability (as well as the meaning of legal concepts) supplied a grand-scale unifying theory that had, up to that time, been lacking in this area of jurisprudence. It is my position that Holmes' overall philosophical vision in this respect can be best understood by recognizing its underlying pragmatic grounds. Holmes' advocacy of external standards of liability, which is a major part of his overall theory, can thus be seen as part of the whole pragmatic project in which Holmes was engaged, and can be directly related to Holmes' views on the meaning of legal concepts examined in section C.4 above. In each case wherein Holmes argues for the analysis of a legal concept (e.g., "malice") in terms of external references over internal ones, he takes a path that has quite clearly a pragmatic direction. In all of the three major substantive areas of the law examined in this section, Holmes consistently analyzes concepts in terms of the purposes and interests of the legal system itself (and those of the "bad man" seeking to avoid state interference), in terms of certain general situations, and in terms of the hypothetical behavior of a general construction, the "reasonable man," which is itself pragmatically derived from the experience of the community. Holmes' theory of external standards of liability and his theory of the meaning of legal concepts are therefore only two related parts of a larger whole—a coherent pragmatic theory of the law.

8. Some Related Issues to Holmes' Adoption of External Standards in Legal Theory.

Several matters remain to be addressed before this analysis of Holmes' use of the pragmatic external standards notion can be concluded. First, what does Holmes say are the benefits of the use of the external standard in jurisprudence? Second, how does Holmes say that the external standards used in the law are to be generated? Third, how did Holmes apply this notion in his court opinions, if he
did at all? A brief treatment of each of these questions now follows.

8a. Holmes' Arguments for the Use of the Pragmatic External Standard in the Law.

One of Holmes' most fundamental arguments against the use of subjective factors in the operations of the law was apparently that such elements did not admit of a general, regular, and uniform application. The problem is that Holmes rarely makes this point explicit, and most often prefers in his writings simply to condemn the Austrian emphasis on subjective matters, juxtaposing his own view as an alternative. Mark DeWolfe Howe claims that Holmes' advocacy of an external standard of liability was an attempt by Holmes to increase the certainty and predictability of legal processes.[150] That is, when such standards of liability are developed and used by the courts, they become general guidelines which also serve as reliable indicators of official responses to certain situations or states of affairs. Surely there is great social value in such predictability, and it was to Holmes' credit that he realized that "only external, public standards can function as standards at all."[151]

In addition, Holmes' notion of the external standards of the "conduct of the reasonable man" has its origin in the shared morality of the community. The incorporation of such standards into legal thought and decision-making has the obvious benefit of making the law responsive to the values and interests of the community, which Holmes takes to be a major requirement for any "sound body of law."[152] More will be said of this in a moment.

Also, Holmes argued that many useful and important legal doctrines would make no sense if legal standards were internal rather than external. For example, it is an established legal doctrine that "ignorance of the law is no excuse" in matters of criminal behavior. This doctrine is necessary and beneficial because, were personal ignorance allowed as an excuse, it could always be claimed as a defense against liability for any kind of conduct. A person who has committed a certain act, say, throwing glass bottles into a heavily-traveled street, might simply aver that he personally did not know that such an act would bring about an official hostile reaction, or even that he simply had forgotten at that instant about the punishable nature of that act. However, the hypothetical "reasonable" or "prudent" person (as conceived by the community) would have known that such conduct was legally actionable, and in relation to such a non-subjective standard the actual person's state of mind becomes irrelevant to the determination of his or her legal liability. Holmes would say that the welfare of the community is promoted when certain non-harmful standards of behavior are enforced, and so, the community must necessarily subordinate the individual to its own external standards of conduct.
Perhaps most importantly, Holmes observed that the use of external over subjective standards was also a plainly practical matter. It would be extremely difficult, if not impossible, to attempt to judge persons "as God sees them," taking all of their personal idiosyncrasies into account. To Holmes, the task of "nicely measuring a man's powers and limitations" would be too cumbersome a burden for the state to bear, and so, in the alternative, the state simply sets down average standards of conduct (in various situations) to which persons must conform at their peril.[153] As a practical matter, then, such external standards are a necessity. All of these points are either stated or implied by Holmes as benefits of the use of the external standards doctrine.

8b. The Generation of External Standards in the Law.

The second question raised above will now be addressed. How are the impersonal legal standards which Holmes advocates, such as "the behavior of the reasonable man" generated? What is the method by which such constructions are given substance and applied in particular cases? The answer to these questions is another demonstration of the likenesses between the ideas of Holmes and those of the more well-known American pragmatists. As I pointed out above, Peirce's emphasis on the impersonal character of the inquiry conducted by a scientific community (who continued their endeavors through time) established the objective qualities of both the method utilized by this community as well as the results obtained.[154]

Holmes takes a remarkably similar line in regard to the establishment of external legal standards. The emphasis is again upon communities rather than individuals, along with the continuity of legal processes over time. (I will spend more time comparing Holmes and the other pragmatists on the developmental aspects of pragmatic thought in section C.9 to follow.) The "communities" which Holmes has in mind in this case are: (1) the legislature, taken to represent the whole electorate, (2) the jury, taken to represent a random sampling of the ordinary members of the society as a whole, and (3) the judiciary itself, which forms a smaller and more select group, but which still functions to reduce subjective and personal influences. Each of these "communities" serves to reduce individualistic, subjective factors in the making of legal judgments. The substance of a certain concept, also, that of "reasonable behavior," is derived from the general experience of the community as a whole. Let me comment briefly on each of these sub-communities, however.

An extremely important implication of Holmes' treatment of the origins and uses of the external standards of legal judgment is that it serves to explain much of his general judicial behavior while on the supreme courts of Massachusetts and the United States. That is, as a judge Holmes generally advocated and acted under a policy of
"self-restraint." He continually pointed out in both opinions and
dissents that it was not "his job" to put his own personal (read:
subjective, internal) views into his decisions of cases, but merely
to judge whether the parties involved (viz., civil litigants,
official agencies, legislatures) acted "reasonably" in light of the
Constitution. Unless it appeared that some case involved an
extremely unreasonable activity in relation to the Constitution,
Holmes was ready to defer to the legislatures, by not voting to
overturn its "experiments." To Holmes, it was simply a fact that an
elected legislature was usually much larger and more representative
of the community as a whole than was a court—the legislature itself
was a community representing a larger community. For this reason, a
legislature usually was in a better position to set forth (by its
enactments) the external standards of reasonableness. In Holmes' view, then, the proper judicial role was one of general deference to
the legislature in cases involving a legislative act.

On the other hand, judges themselves were part of another
community—the judiciary—and could sometimes act to overturn the
wishes of a legislature (in the American legal system, in any case).
Such interference, however, was only to be utilized as a last resort,
according to Holmes, when a clear disagreement about the standards of
reasonability occurred. Even in such cases, the subjective will of
any one particular judge is still not the standard of judgment
utilized, for judges operate in the much larger system of hearings,
trials, appellate review, appeals, judicial rotation, overrulings,
and impeachments. In addition, courts on the appellate level are
usually made up of more than one judge, and so, the majority vote of
a group is necessary for a decision. Added to this is the time
factor, which functions to expand the "judicial community" as
something that extends into the future (e.g., a decision reached at
time T can be overturned at time T+1, even when T has been made at
the very end of the appellate process). Again, from each of these
points, personal and subjective factors in judicial matters are
diminished as the communal emphasis is manifested.

Subjective influences in the determination of standards and
policies are even further counteracted, Holmes would claim, when
jurors are included as part of the judicial community. The use of
ordinary persons who are ignorant of technical legalistic
distinctions also serves to define the common standards of
"reasonable behavior" based on practical experience. Jurors are
especially useful, of course, when judges themselves are not sure
about the standards and/or policies to apply in a certain case. In
such circumstances, Holmes says that:

"... the court ... feels that it is not itself
possessed of sufficient practical experience to lay
down the rule intelligently. It conceives that
twelve men taken from the practical part of the
community can aid its judgment."
Holmes also claims that juries have an educative function with regard to the judiciary, so that judges who observe juries long enough can begin to articulate the standards and policies of reasonability themselves. In this way, the judicial community itself acts to check the ideosyncratic tendencies of particular juries. Of this, Holmes claims:

"A judge who has sat long enough at nisi prius ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than an average jury."

From all of the above, the ultimate answer for Holmes to the question of the source of the external standards of reasonable action and behavior is the common experience of the community itself (within which the legal system operates). The product of the community's experience is the impersonal, "average man" standard, and the method by which this standard is attained is itself based in non-subjective, objective agreement among many individuals in many kinds of groups (viz., the judiciary, the legislatures, the jury). Communal agreement as the method by which such standards are constructed is thus exactly the same in Holmes' legal communities as in Peirce's community of inquirers. It is obvious, then, that subjective factors have no place in such processes. When the temporal factor of continuing communal agreement is added, it is further seen that external standards come from an even broader community—one that extends into the future. Not only does this make such standards responsive to the communities of individuals subjected to them, but is another device to eliminate any particular subjective influences even further.

8c. The External Standard in Holmes' Court Opinions.

As I demonstrated in section C.4 above, Holmes' pragmatic views often extended into his judicial opinions, and this was especially true of his use of the external standards notion. A sample of his opinions follows which utilize this concept, and also point out his correlative rejection of subjective/personal/moral matters as concerns of the law.

For example, in Commonwealth v. Pierce (1884-5), the question arose of the "moral recklessness" of a physician who prescribed a certain treatment to a patient who subsequently died. In the opinion of the Court, Holmes uses precisely the same arguments as he does in The Common Law against the subjective aspects of a certain concept—"recklessness"—and in favor of the legal aspects, which arise from an external standard of conduct originating in common behavior. Therefore, with regard to the claim that the personal
habits and feelings of the doctor could be used as a defense, Holmes averred to the contrary:

"... if a man's conduct is such as would be reckless in a man of ordinary prudence, it is reckless in him. Unless he can bring himself within some broadly defined exception to general rules, the law deliberately leaves his idiosyncrasies out of account, and peremptorily assumes that he has as much capacity to judge and to foresee consequences as a man of ordinary prudence would have in the same situation."[159]

In the same case, Holmes puts forth the external view of "malice," as something that is inferred not by reference to subjective evil feelings, but to an objective degree of danger in a certain context:

"... if the dangers are characteristic of the class according to common experience, then he who uses an article of the class upon another cannot escape on the ground that he had less than the common experience. Common experience is necessary to the man of ordinary prudence, and a man who assumes to act as the defendant did must have it at his peril."[160]

In another case, Hawkins v. Graham (1889), Holmes again brings up his external versus internal standards distinction with regard to a contractual dispute. He wrote:

"We are of the opinion that the satisfactoriness of the system and the risk taken by the plaintiff were to be determined by the mind of a reasonable man, and by the external measures set forth in the contract, not by the private taste or the liking of the defendant."[161]

Further, in Commonwealth v. Kennedy (1897) Holmes' expression of the external/internal doctrine was again obvious and direct when he wrote that:

"As the aim of the law is not to punish sin, but it is to prevent certain external results, the act must come pretty near to accomplishing that result before the law will notice it."[162]
The notion of "proximate causation" in the common law, by which actions are judged as causal factors by an external standard of reasonableness from common experience, arises in many of Holmes' U.S. Supreme Court opinions. For example, in Schenck v. U.S. (1918), the question before the Court concerned the dangerous nature of certain language. Holmes wrote in this case:

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[163]

Cases wherein Holmes uses the "reasonable man" standard are simply too numerous to list, though many of Holmes' dissents provide relatively clear examples of this version of the pragmatic external standard. For example, in Lochner v. New York (1905), Holmes inveighs against the idea that judges ought to inject their own personal and subjective standards into the law:

"This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question of whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law."[164]

In the same dissent, Holmes explicitly brings up the "reasonable man" external standard of judgment. He goes on:

"I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law ... A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it ..."[165]

All of these references to Holmes' use of the external, non-subjective standards approach to judgment confirm the view that
one of Holmes' primary concerns as a judge was "self-restraint." In Holmes' view, legal processes could become more certain, and thus more predictable, were judges to reduce subjective, personal motives in decisions and emphasize in the alternative an objective standard. In this way, judges could support and fortify their claim to "impartiality," which to Holmes, was an essential part of the judge's job.

In summary, the argument put forth here is that several fundamentally important parts of Holmes' theory of law are based upon the idea that the justification of legal judgments was not to be found in personal or subjective satisfaction, but in the satisfaction of public, objective, external standards derived from communal agreement. This principle is virtually identical to that put forth by several American pragmatist philosophers, and by C.S. Peirce in particular. For Holmes, the rejection of the subjective in favor of the objective standard of judgment not only provided a framework for distinguishing between legal liability and moral culpability, but was quite useful in making sense out of the proper legal interpretation of signs (viz., contracts, statutes, and other documents). Both of these activities show the tendency in Holmes' thought to treat legal conceptions in a strict, business-like "cash value" manner, stripped of excess connotations drawn from non-legal sources. Hence, this effort is directly connected to the pragmatic approach to meaning, which relates the meanings of concepts to common human experiences, general situations, and shared purposes. In this case, the external purposes of "the law" (referring to the legal system itself) are considered as fundamental to the determination of legal meanings. In addition, another concept of "morality"—a public one, based upon shared communal values—is put forth which is often the embodiment of the external standard of liability in the law. The result is the joining of law and morality in this external sense. In general, then, the Holmesian pragmatic treatment of the standards of liability is done by means of hypothetical "would be" situations, which are themselves generated and defined by the common experiences of communities. These standards become the common guidelines for what will officially be considered to be "reasonable" or, for example, "dangerous" conduct. As can now be seen, when compared with the other more well-known American pragmatists, Holmes fits into the American pragmatic tradition in a clear and illuminating way.

In the following sections, Holmes and the pragmatists will be compared in one other major way, and this will complete my demonstration of their philosophical affinities as well as complete my picture of the major components of Holmes' Theory of Law.


In this rather lengthy section, I will depart to a slight degree from the format I have been utilizing in the past few sections, wherein I presented the view of the American pragmatists separately,
on the whole, from those of Holmes. The third area of philosophical comparison, I will address, however, has several sub-areas, such that in each of these sub-areas, the positions of Holmes are again demonstrably similar to those of the more well-known American pragmatists. In this section, then, I will construct my analytical comparisons using more of a point-by-point method within the broader issue, which is in this case the pragmatic emphasis on experimentalism in thought and judgment. I will also briefly address several other related issues, and tie several of these to an analysis of some of Holmes' most important (and often misunderstood) behavior on the U.S. Supreme Court. Finally, at the end of this particular comparison, I will be prepared to make a statement of my reconstruction of Holmes' theory of law, integrated into a coherent whole through the recognition of its underlying pragmatic framework.

9a. The Pragmatic Emphasis on Growth and Change.

In the nineteenth century, Western philosophy was changed and motivated in fundamental ways by what came to be a dominant conceptual theme—the recognition of the temporal dimension of reality. This concern of philosophical thought became especially pervasive in light of the influence of Darwinism in theoretical minds of almost every discipline. Growth, development, processes, continuity, change—all of these related concepts formed the framework for a new way of looking at the world. As Peirce observed of this intellectual tendency:

"As this Century is drawing to a close, it is interesting to pause and look about us and to ask ourselves in what great questions science is now most interested. The answer must be that the question that everybody is now asking, in metaphysics, in the theory of reasoning, in psychology, in general history, in philology, in sociology, in astronomy, perhaps even in molecular physics, is the question How things grow.[166]

Upon such a view, human beings as well as the cosmos they inhabit are taken to be "incomplete," or progressing to some state of future "perfection." Reality itself is seen to have an open-ended, non-static nature.

It has already been pointed out (see section C.3 above) that for Peirce, James, and Dewey, the analysis of the meanings of concepts contained an essentially futurist orientation. Concepts had rational purport, or meaning, in the sense that they engendered some bearing on possible future human experience. In effect, the pragmatists shifted the analytical emphasis regarding ideas from past, antecedent phenomena to future, consequent phenomena. Presently-held ideas were
not simply reducible to past ones, but were seen to have developed out of them, and were themselves in a state of transition. Where the study of the historical origins of ideas was still carried on, the new perspective emphasized the trends that continued from the past, through the present, and toward the future. Thus, ideas were analyzed and investigated in this way not through an appeal to their genesis, but by their future applicability, their fruitfulness in defining and controlling future situations relative to various types of human purpose and interest.

According to Peirce, all purposive reasoning whatsoever contained a reference to the future, since it is only the future that human beings can attempt to control.[167] Hence, the reasoning of humans is goal-directed, with the ultimate purpose of all evolving inquiry and thought being the attainment of truth, which is a representation of reality itself. To Peirce, however, reality was not to be thought of as a static, fixed ideal limit towards which human representations slowly converged, but as an evolving, changing object itself. The laws of nature, and in fact, uniformity in general were the results of evolution.[168] The very growth of human rationality appeared to Peirce as something which probably arose from natural selection, as it is probably "the most useful quality an animal can possess."[169] Further, human beings were those parts of reality capable not only of evolutionary change but of directing change. Peirce held that the evidence of evolutionary growth in both the physical world and the human world demonstrated a "growth of reasonableness" whereby a gradual ascendancy of order and stable habits slowly displaced random variations and indeterminateness.[170] In this sense, it could be said that for Peirce, reality "cooperates" with the evolution and development of thought.[171] In sum, in Peirce's pragmatic philosophy, the temporal processes of growth, evolution, and development play a central role.

To James, the rejection of the static, fixed idea of reality was an essential quality of pragmatic thought, and he used the pragmatist's view of reality as "plastic" and "changing" in contrast to such a view:

"... for rationalism reality is ready-made and complete from all eternity, while for pragmatism it is still in the making, and awaits part of its complexion from the future. On the one side the universe is absolutely secure, on the other it is still pursuing its adventures."[172]

From James' pragmatist position, the universe was in a process of evolution and change in all of its parts, but especially in the places where thinking beings were at work.[173] In other words, humans continually used their capacities to transform reality itself. In James' view, all human thought was geared to certain purposes and ends, which are completely set by our desires and interests. Changing the world to accomodate human desires is simply the result
of the fact of the existence of purposive, acting human agents. James' writings, as do Peirce's, show that the processes of growth, development, and purposive change were fundamental elements of the pragmatic world view.

That Dewey's position was similar to that of Peirce and James on this point is obvious. If anything, Dewey's stress upon growth and development, especially as directed by an attention to certain goals, is even more forceful and straightforward. For Dewey, the idea of "continuity" was the inclusive category of his philosophy, and the exemplar of "continuity" was growth. [174] Dewey wrote, in the context of an exposition of his naturalistic theory of logic:

"The term 'naturalistic' has many meanings. As here employed it means, on the one side, that there is no breach of continuity between operations of inquiry and biological operations and physical operations. 'Continuity,' on the other hand, means that the operations grow out of organic activities, without being identical with that from which they emerge ... The growth and development of any living organism from seed to maturity illustrates the meaning of continuity." [175]

Given this emphasis on growth, Dewey's overwhelming concern with education is easily explained, for education itself is but a model of human growth. From Dewey's philosophical perspective, then, the concepts of process and development, especially in the context of the human transformation of reality, were to be intellectually embraced as the tools by which a fresh, new image of the cosmos could be attained.

For all three of the American pragmatists I have been consulting herein, the need to reconstruct their approaches to the world in terms of a greater emphasis upon change and the human factors which brought about such change was very deeply felt. At this point, it is an easy matter to show that Holmes' philosophical perspective was also geared in precisely the same direction. Perhaps The Common Law provides the clearest examples. In that book, Holmes adopts a method that is fundamentally and essentially historical. He consistently constructs his analysis of legal conceptions, such as "liability" and "the law" itself, in terms of their growth and development. To understand the present state of the law, Holmes maintains, it is absolutely necessary to adopt the historical perspective, by which the modern phase of the law is seen to have grown out of previous stages. The very first page of The Common Law begins with words that make this pragmatic emphasis clear. Holmes wrote:

"The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories,
intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.\[176\]

In precisely the same way as the other pragmatists, Holmes recognizes the importance of purposive human activity in the changing of the law, and so, the world itself. To understand the law is to understand its development, and the ways such development has been brought about by purposive human endeavors. Further on in The Common Law, Holmes defends his historical emphasis by contrasting it to the "formalist theories" of the law, which have failed, in Holmes' view, because of their non-developmental perspective. Of this, Holmes wrote:

"However much we may codify the law into a series of self-sufficient propositions, these propositions will be but a phase in a continuous growth. To understand their scope fully, to know how they will be dealt with by judges trained in the past which the law embodies, we must ourselves know something of this past. The history of what the law has been is necessary to the knowledge of what the law is."\[177\]

In a later essay, "Law in Science and Science in Law," Holmes re-affirmed and forcefully embraced the developmental approach in philosophy, holding that the modern explanation and analysis of an object is done "... by tracing the order and process of its growth and development."[178] Hence, the fact that Holmes compared positively with the other American pragmatists is an emphasis upon the temporal perspective is a well-supported thesis. Holmes probably comes closest to Dewey in this regard, for in both men, the stress upon growth, process, and continuity is pervasive and absolutely fundamental to their respective philosophies. As one author has observed, Holmes was in fact as much a historian of the law as he was a judge.[179]


As will now be seen, the implications of the new, developmental
perception in philosophy were very much the same for all four pragmatists. Given a new image of the cosmos as one that is continually growing and evolving, it seems only natural that human experimentation and creativity are endowed with a new dignity, for they have gained a status within nature itself.[180] In that the world was capable of being shaped by human wills for future goals, the pragmatists held that all human conduct was of the nature of an experiment. The theory of pragmatic experimentalism thus became one of the essential conceptual schemes for the undertaking of all human activity. Utilizing the same path which I have followed before, I will first explore briefly the positions of the three major American pragmatists, and then show the ways in which Holmes' positions are similar. It will be shown that, as before, the philosophical affinities between Holmes and the American pragmatists in regard to this particular issue provide a striking and unmistakable support for the primary thesis of this essay. Furthermore, an exploration of pragmatic experimentalism will provide the means by which all of the primary issues so far examined (in sections C.1—.9) can be related and integrated.

Peirce says that the possibility of knowledge and scientific advancement is contingent upon the hope that there is an element of "Reasonableness" in experience to which humans can train their own reasonings to conform more and more. This element is what makes logical "goodness" and "badness" possible.[181] Hence, it is necessary to explore and understand the correct processes of human reasoning, so as to comprehend the proper methods by which the scientific enterprise could advance.

The goal of the advancement of knowledge (through the use of human reasoning), to Peirce, is another general kind of goodness, which Peirce saw basically as the adoption of means to certain ends. The attainment of knowledge and the use of reasoning themselves thus implied a definite kind of instrumentalism. In the case of the advancement of knowledge/science, the "means" are those ways of fixing belief that are most responsive to external permanencies, and are independent of individual predilections and prejudices.[182] The "ends" of this activity are simply those goals set forth by human interests, both in the short-run perspective of specific problem-solving, and in the long-run perspective, seeking the "ultimate" representations of reality.[183] Hence, the means-ends activity of science is a fundamentally purposive one.

Now, Peirce says that there are three types of human reasoning—deduction, induction, and abduction.[184] His description of the interconnected workings of these methods and their results as applied to the furtherance of scientific knowledge is a demonstration of his version of pragmatic experimentalism as an instrumentalist theory. Induction and deduction work together in scientific thought in the following way:

"Induction consists in starting from a theory, deducing from it predictions of phenomena, and
observing those phenomena in order to see how nearly they agree with the theory. The justification for believing that an experiential theory which has been subjected to a number of experimental tests will be in the near future sustained about as well by further such tests as it has hitherto been, is that by steadily pursuing that method we must in the long run find out how the matter really stands."

According to Peirce, the remaining method of abduction consists in the very process of forming an explanatory hypothesis, which is the "theory" with which induction begins, in the passage above. That is, abduction is merely the process of suggesting that something "may be."[186] In Peirce's view, the question of the "logic" of abduction is actually nothing but the question of pragmatism itself. The maxim of pragmatism is the idea that a conception can have no logical import or effect which does not conceivably modify the practical conduct of human agents.[187] Hence, this maxim functions to pick out, from the infinite number of possible explanations of phenomena, those hypotheses which are the admissible candidates for an approximation of the truth. To Peirce, a good explanatory hypothesis is one that fulfills its "end," which is:

"...通过接受试验的检验，
使在避免一切惊奇和建立一种
将不会被失望的习惯的
期望中适应。任何假说，
因此，可能被认为是适宜的，
在没有任何特殊原因的
怀疑，提供了它可能是
实验验证的，而且
仅仅因为它是能够满足
这种验证的。这
是近似于实用主义
的原则。"[188]

For Peirce, pragmatic experimentalism is at the core of the quest for knowledge and truth, as it is actually executed by science. Experimentalism simply describes the processes by which various methods of reasoning are used in order to bring about certain ends; the pragmatic essence of these processes is demonstrated in the notion that ideas, conceptions, hypotheses, explanations—in short, the objects being tested by experiment—must refer to possible human experience. This is Peirce's view of pragmatic experimentalism.

It is easy to see the ways in which Peirce's doctrine of experimentalism in reasoning and science relate to both his pragmatic theory of meaning and to his advocacy of external over internal standards. The result of experimentation is an explanatory hypothesis that is used for prediction and control of the future. In other words, it is a clear idea or clear conception of some object or event as it impinges upon human purposive action. To recall the
discussion in section C.1 above, this is simply to explicate the pragmatic meaning of a concept, which was to be found in a future-oriented conditional statement describing a certain set of operations, bearing in some respect upon human experience, in the context of human purpose and interest. Pragmatic meanings and pragmatic experimentalism are thus inextricably linked. That the method of experimentalism Peirce outlines is connected to his use of external standards of justification is also apparent. The results obtained through non-subjective, impersonal experimental inquiry are, not surprisingly, also non-subjective and impersonal. The idea that a concept or hypothesis is "tested" simply implies a certain general procedure that could be conducted under certain general conditions by anyone with the proper expertise. But this is simply to say that the methods of justification for hypotheses are external; the general standards and procedures of testing are themselves specified through an intersubjective agreement, and so, are not dependent upon any one subjective will. In this way, all three of the primary issues examined in this essay—the theory of meaning, the use of external over internal standards, and the emphasis upon experimentalism—are bound together as parts of the same philosophical whole, at least as far as Peirce is concerned.

For James, as with Peirce, all human thought and action is oriented to the achievement of goals. James wrote that the mind itself was:

"... an essentially teleological mechanism. I mean by this that the conceiving or theorizing faculty—the mind's middle department—functions exclusively for the sake of ends that do not exist at all in the world of impressions we receive by way of our senses ... It is a transformer of the world of our impressions into a totally different world,—the world of our conception, and the transformation is effected in the interests of our volitional nature, and for no other purpose."[189]

The products of human intellectual activity, that is, ideas, concepts, and theories were for James to be considered as instruments, whose functions and values resided in their capacity to lead us to future facts and experiences.[190] Human ideas were the tools by which humans dealt with an uncaring, independent, but still malleable reality.

In the same sense as Peirce, James also embraces the experimental principle that hypotheses and theories are tested by looking at their likely practical results or effects upon human experience. The "tests" are successful or not relative to the human purposes which are at stake. When explanations, hypotheses, and theories are treated in this way, the successful results of experimental testing yield a greater share of control over the world, that is, the world becomes more useful to human agents. James calls
this the "cash value" of knowledge in experiential terms. The growth of scientific knowledge through the acquisition of truths about reality is, for James, a profoundly purposive activity, making no sense at all unless it is directed to some end or goal. That is, knowledge is a means to certain ends. These ends are set by human purposes and the means utilized involve the pragmatic experimental processes of forward-looking testing, verification, and investigation.

It would be a misinterpretation of James, however, to suggest that his doctrine of knowledge and truth simply suggests that whatever persons subjectively find convenient in calling "true" is pragmatically true. James goes to great lengths to argue that truth is an agreement with reality, only that this "agreement" for humans has a practical, purpose-oriented character. He writes:

"To 'agree' in the widest sense with a reality, can only mean to be guided either straight up to it or into its surroundings, or to be put into such working touch with it as to handle either it or something connected with it better than if we disagreed ... To copy a reality is, indeed, one very important way of agreeing with it, but it is far from being essential. The essential thing is the process of being guided. Any idea that helps us to deal, whether practically or intellectually, with either the reality or its belongings, that doesn't entangle our progress in frustrations, that fits, in fact, and adapts our life to the reality's whole setting, will agree sufficiently to meet the requirement."[193]

For James, then, the acquisition of truths is intimately tied to the purposeful processes of forward-looking testing and experiment. To claim that something is an object of knowledge, and hence, is "true," is to imply that it can be verified or tested; such tests are of course relative to the ends or goals by which the tests themselves are constructed.

This is James' version of pragmatic experimentalism, and in virtually the same ways as with Peirce's view, is closely tied to the pragmatic theory of meaning and the use of external over internal standards. The processes of experimental verification which James describes are, again, ways of unpacking the "cash value" of certain ideas or hypotheses in terms of the ways such ideas or hypotheses touch upon human experience in a certain context relative to certain human purposes and interests. The external element for James is present in his experimental theory in the sense that reality itself is conceived as something fundamentally external to human beings, although it must be remembered that humans themselves are parts of reality and by their purposeful actions are capable of changing reality. Still, James talks of reality as something with "coerces"
human beings, and "forces" humans to adopt certain ideas as true and others as false.[194] Simply because the purposes of human beings compose another condition of the truth of ideas does not entail that James is adopting a subjectivist view, for the "agreement" of truth with reality is taken by him to be a matter of fact—does this claim to truth fit these purposes or not? This is not simply a matter of subjective belief, but is a factual, objective question to be publically investigated. Hence, in investigating the answer to such a question, forward-looking tests and experiments provide the processes by which the answers are found and justified. In this way, James' experimentalism is also fundamentally linked to his use of external standards of justification. Therefore, as with Peirce, all three of the issues examined herein are consistent and interdependent parts of James' pragmatism.

With regards to Dewey, the experimentalist character of his pragmatism is virtually all-encompassing. Much has already been pointed out above, however, concerning Dewey's experimentalist approach, and so, little needs to be added at this point.[195] As with the other two pragmatists examined above, thought itself had for Dewey an instrumental function. For human beings, certain kinds of contexts or situations were problematic, indeterminate, or doubtful. Dewey's whole approach to knowledge stresses its function and value as a means to the end of solving problems, which are the specific products of problematic situations. Because Dewey sees knowledge as an instrument of human beings, the processes of thought (and so, of logic itself) acquire for Dewey an empirical nature. Thinking, for human beings, is but one of their "life processes," a way in which human intelligence functions in certain situations.[196]

Given this view, how does thought function in solving problems which arise in various situations? Dewey's answer is—through the process of inquiry, which is the means by which a situation is "transformed" from an indeterminate, problematic state, to a determinate one.[197] After the problem is identified or isolated, Dewey says that inquiry continues in the formulation of hypotheses, theories, or explanations which may be relevant solutions to the problem.[198] Whether such constructions are successful or not, of course, depends upon their verification, through forward-looking experimentation. Possible solutions are simply anticipations of consequences, and so, are predictions of what would occur in some situation were certain things done. Dewey says that the process of reasoning occurs in the attempt to examine and compare these possible solutions. Hence, reasoning itself is an experimental process by which the experiential-situational import of certain solutions to problems is considered.[199] This kind of testing, which may actually be done, or may be completely hypothetical, ends when an acceptable hypothesis is found—that is, one that yields a solution to the original problem. To Dewey, human knowledge and truth advances in this way—by means of experimental processes geared to the solution of problems. These processes get their distinctively pragmatic character by their forward-looking orientation, such that the confirmation of an hypothesis or theory is determined by its consequences or results relative to human experience in a certain
situational context. As far as the phenomena of truth, knowledge, and science are concerned, this outlines Dewey's pragmatic experimentalism.

Once more, the connections between Dewey's experimentalism and his pragmatic approach to meaning and adoption of external standards of justification are clear. The experimental approach to knowledge portrays the attempt to consider the operational content of certain possibilities, which is one way of saying that the pragmatic meanings of ideas are to be examined relative to a certain problematic situation. Pragmatic meanings, of course, point to operations which bear upon possible human experiences. Such operations, then, are basically the tests by which hypotheses or theories are evaluated. The experimental tests themselves, as suggested by the pragmatic treatment of the proposed hypotheses, are used to gather evidence to sustain or deny the validity of those hypotheses. Hence, Dewey's pragmatic experimentalism is directly related and linked to the pragmatic theory of meaning. The links to the external over the internal standards issue are also apparent in three ways. First, initial problematic situations consist of "existential" conditions, that is, "facts of the case" which are non-subjective, impersonal objects. Such conditions "constitute the terms of the problem, because they are conditions that must be reckoned with or taken account of in any relevant solution that is proposed." Such external circumstances, of course, suggest possible relevant solutions to the problem at hand. In this way, inquiry begins its course from an external rather than an internal source. Second, the methods of reasoning used in the experimental testing of hypotheses are processes whereby the meaning-contents of ideas are related and evaluated. This process itself is an operation using symbols or signs, which make up the language of investigation relative to the situational context calling forth the inquiry. Languages, of course, are non-subjective activities, involving communal agreement upon the function of certain symbols or signs. In this way again, the means of the experimental consideration of hypotheses are external rather than internal. Finally, the end result of inquiry is an "answer" to the problematic situation itself, such that the answer satisfies the situation in the external sense of a "fulfillment of requirements." Again, this is not a subjective matter, and is dependent upon external objects—the problem and its "answer," which resolves the former's indeterminate circumstances. In all of these ways, Dewey's pragmatic experimentalism is vitally linked to these other fundamental aspects of pragmatic philosophy.

9c. Holmes' Emphasis Upon Experimental Processes in the Legal Domain.

It will now be demonstrated that the idea of pragmatic experimentalism played an extremely important part in Holmes' overall theory of law, such that its recognition and emphasis can serve to unite what are not only apparently diverse legal views of Holmes, but
can serve to explain some of Holmes' most significant, and often misunderstood, judicial behavior. The areas of Holmes' philosophy which display the pragmatic experimentalist orientation include: (1) Holmes' use of means-ends reasoning about the law, (2) Holmes' critique of stare decisis, (3) Holmes' views on the evaluation of the processes of the law, (4) Holmes' views on the use of science in the law, (5) Holmes' position on judicial behavior, and (6) Holmes' views on the nature and function of legal rules. It will also be seen that Holmes' experimentalism is fundamentally related to the other parts of his pragmatic theory of law, such that a consistent, cohesive, and holistic view results. That will be one of the primary pay-offs of my entire analysis. In the final section of this chapter, I will compare Holmes with Peirce on some issues related to and implied by pragmatic experimentalism and analyze Holmes' famous "free speech" opinions in light of the rest of the discussion regarding pragmatism and the use of experimental reasoning.

In the first part of this section, Holmes was found to embrace and emphasize a temporal and organic approach to philosophical thought, as did the other American pragmatists. It appears to be a natural result of such an orientation that purposive experimentation plays such a fundamental role in pragmatic thought. To Holmes, the manifestation of pragmatic experimentalism in legal theory meant the advocacy of means-ends reasoning in legal decisions and in the evaluation of such decisions, as well as the correlative critique of traditional legal reasoning from precedent. The implications of this position yield a theory of the role of the judiciary in the legal system, which is evidenced not only in Holmes' critical writings, but in his own judicial behavior.

The advocacy of means-ends reasoning in the law by Holmes was an attempt to switch the focus of legal thinking from a backwards-looking orientation to a forward-looking one. That is, instead of reasoning to a legal conclusion (or criticizing a legal decision) by asking whether or not it was consistent or deducible from past decisions or statutes, the Holmesian view recommends that legal thought be directed forward, to the future conceivable consequences of the decision relative to the future general purposes and values of human beings. The pragmatically "correct" decision, then, is a function of the manner in which those consequences satisfy certain social and/or individual ends. In this way, legal processes are taken to be social tools used to attain certain social goals. Law is simply one means by which a community attempts to reach certain ends.

The specific instrumentality of the legal process in one by which legal decisions are made in the courts (or in quasi-judicial administrative bodies) about "cases," or, in pragmatic terms, "problematic situations" needing to be resolved. The whole process of litigation itself can be seen as the pragmatic model of scientific experimentalism, such that, for each case that arises, a situational context is suggested and a certain kind of "problem" is set forth that needs to be satisfied by the operations of the system. It is Holmes' pragmatic view that the American legal system would probably
accomplish the best possible social results by reasoning about such decisions in a primarily forward-looking sense rather than a backward-looking way. This is the implication of the idea that the law's goal is to serve the interests of a human community at various periods in its history. It is directly related to the previously-examined idea that the law is a growing, changing, and evolving object to be used for the specific purposes of human communities, as those purposes and changes are dictated by historical exigencies. Of course, in any actual case, there is both a long-run and a short-run experimental context. The latter looks to a successful solution of the specific problem or controversy raised in the case at hand, while the former deals with the empirical implications which such a solution will have upon the community at large. The short-run solution to a specific case, or the "ruling," becomes a "rule" to guide community expectations and future legal decisions. Such "rules" are experimentally tested by their consequences for the community in the long-run. (More will be said about this below.)

Now, it must not be inferred that Holmes' advocacy of forward-looking legal reasoning and experimental justification meant a complete abandonment of the backward-looking method of stare decisis. Holmes did not, in other words, reject stare decisis as a valid means of legal reasoning. What his pragmatic experimentalism suggested, though, was that the use of stare decisis itself also had to be justified by its conceivable future consequences, that is, as it promoted stability, certainty, and predictability in legal processes, which were surely of great social value. The Holmesian point was that stare decisis was not to be valued in itself, but only in so far as it was an effective means to bring about the general social ends of certainty and predictability in the legal process. Therefore, upon such an analysis, the primary thrust is still towards a means-ends pragmatism, which is future-oriented and related to temporal interests, values, purposes, and ends of human beings.

In "The Path of the Law," Holmes criticizes the method of precedent, and pragmatically argues that the history, for example, of a line of decisions is only important in its suggestion of the purposes of those decisions. Precedents are not to be followed for their own sake if the purposes for which they were originally enacted are gone, and if no other general purpose presently recommends itself. In no uncertain terms, Holmes wrote:

"It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past... We must be aware of the pitfall of antiquarianism, and must remember that for our own purposes our only interest in the past is for the light it throws upon the present."[203]
It is evident that Holmes' reason for taking the historical view of legal matters was to stress the role that history plays in uncovering the ends or purposes to which a piece of legislation or a judicial decision were aimed. What Holmes is criticizing, then, is the established, conservative view of legal reasoning by which decisions are made (and also criticized) by reference to a fixed object called "the law," namely, the set of applicable precedents or statutes already in existence. Holmes referred to this as the judicial appeal to "tradition," and in much of his writing, offers a strong condemnation of that mode of reasoning.[204]

In fact, Holmes even suggested that legal continuity with the past was not even a necessity, much less a duty, when he wrote:

"As soon as a legislature is able to imagine abolishing the requirement of a consideration for a simple contract, it is at perfect liberty to abolish it, if it thinks it is wise to do so, without the slightest regard to continuity with the past. That continuity simply limits the possibilities of our imagination, and settles the terms in which we shall be compelled to think."[205]

Hence, even the social value which accrues from historic continuity (viz., stability and predictability of legal processes) can be overridden by more pressing interests in certain ends which the law can be transformed to serve.

What Holmes was arguing here, in his critique of the devotion to precedent or historical continuity in legal reasoning, was that the processes of the law ought to become more "rational." That is, Holmes was concerned that the reasons by which legal decisions, as well as various kinds of legislation, were enacted should simply be the best possible ones. To Holmes, the idea of "rationality" was taken to refer to the effective use of certain means to bring about certain ends. To the extent that the interests and values of a community were known, the legal processes were "rational" in so far as they actually helped to bring about the satisfaction of those interests. When social ends are not being met by the legal means being tested to attain them, we are thrown into a state of doubt—a problematic situation—from which we (viz., the legislature and other policy-makers, including judges) begin a rational, purposive inquiry to find a better means of attaining those ends. Of course, in light of the discussion above of the positions of Peirce, James, and Dewey, this Holmesian position on rational means-ends decision-making is obviously one more form of pragmatic experimentalism. And in the same way as these other philosophers, Holmes recognized that this method of reasoning was basically that which was utilized by science.

Contrasting the scientific with the traditional view, Holmes wrote:
"An ideal system of law should draw its postulates and its legislative justification from science. As it is now, we rely upon tradition, or vague sentiment, or the fact that we never thought of any other way of doing things, as our only warrant for rules which we enforce with as much confidence as if they embodied revealed wisdom."[206]

That the pragmatic methods of experimental science were useful in legal matters is obvious when the processes of the law are approached as instruments by which social policies are tested by their success in bringing about certain ends.

Science, moreover, not only yields a method by which possible hypothetical means to certain ends are suggested, tested, and verified, but also yields the apparatus by which social ends are actually determined, measured, and quantified. Hence, science itself is used to improve upon its own effectiveness, in that the clearer a community is about its actual interests, the clearer will be the tests of the instrumentalities it utilizes in order to bring those interests about. The injection of the scientific method of quantitative analysis (which Holmes referred to as "statistics" and "economics") into the legal realm, says Holmes, forces us:

"... to consider and weigh the ends of legislation, the means of attaining them, and the cost. We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect."[207]

Further, the utilization of scientific method, in its emphasis upon open, public experiment and statistical quantification, will in fact make the processes by which legal decisions are actually made more articulate, above-board, and as Holmes would say, "conscious." One problem, according to Holmes, is that much judicial activity is in fact motivated by the pragmatic concern for the setting of future-oriented policies fitted to the attainment of social ends. However, the judiciary still retains the traditional forms of expression whereby all legal decisions are made to appear as if they followed logically and mechanically from past decisions. Holmes calls this "the paradox of form and substance in the development of the law."[208] Substantively, Holmes says that the growth and development of every important principle in litigation is "... in fact and at bottom the result of more or less definitely understood views of public policy."[209] In order to uncover these actual reasons honestly, an open adoption of the methods of pragmatic experimentalism is urged by Holmes, so that a more conscious recognition of the actual legislative functions of courts is
realized. [210] Holmes writes of this:

"... I have had in mind an ultimate dependence upon science because it is finally for science to determine, so far as it can, the relative worth of our different social ends, and, as I have tried to hint, it is our estimate of the proportion between these, now often blind and unconscious, that leads us to insist upon and to enlarge the sphere of one principle and to allow another gradually to dwindle into atrophy." [211]

Holmes did not only recommend the open use of scientific reasoning by the judiciary itself, but in fact held that extra-legal critiques and evaluations of judicial decisions (as well as legislation) ought not be conducted from a formalistic standpoint, that is, by asking whether or not the official act was merely historically consistent (viz., "legally correct" in the traditional sense), but from the pragmatic experimentalist standpoint, looking to the act's future consequences, that is, its tendency to satisfy certain long and short-term ends. All official decisions, whether in the form of statutes, regulations, or judicial decisions (all the traditionally-conceived forms of "laws") ought ultimately to be evaluated, in Holmes' view, in the context of their social consequences. [212] Hence, the methods of pragmatic experimentalism, with their emphasis upon means-ends rationality, were advocated by Holmes for use not only by the judiciary itself, but by the critics of the judiciary also. The result of the adoption of such methods would be, for Holmes, a great improvement in the function of legal processes as the tools used to bring about human ends, as well as in their basic intelligibility. Holmes asserted that:

"... it is true that a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words ... I look forward to a time when the part played by history in the explanation of dogmas shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them." [213]

Such reasoning has an interesting implication for Holmes' overall theory of law, in its relation to other legal theories. It has been pointed out that one of the major aspects of "legal positivism" is that a dichotomy between law and morals must be maintained. [214] Now, although it has been shown above that Holmes did advocate the separation of legal and moral matters, it was also
found that Holmes used "morality" in two distinct senses. In the sense that "moral" referred to private, subjective culpability for actions, Holmes rejected this notion as useful for legal matters and advocated in the alternative that such matters adopt an external and/or hypothetical standard.[215] However, in that "morals" referred to the public, shared values and interests of a community, Holmes apparently held that the law and morals were fundamentally linked. If the law is to be evaluated as to whether or not it meets the test of being good social policy (viz., one that satisfies social ends), then this is often to say that the law ought to incorporate and embrace "morals" in the public sense of the term. In that case, Holmes' theory of law with regard to the issue of the relationship of law to morals is correctly interpreted to contain both positivistic and non-positivistic aspects.

Two comments can be made at this point. First, the sense of "morals" which Holmes wants openly incorporated into legal processes is one, of course, that takes "morality" to be relative to culture and history. As will be seen later, Holmes is harshly critical of moral dogma as any kind of static doctrine, especially as it becomes translated into something called "natural law." Holmes is definitely an ethical relativist, then, although many times he seems to imply that the social values which are adopted by communities are characteristically utilitarian to some degree. On the other hand, he sometimes observes that "the crowd" ought to have its way whatever it wants, even if it wants "to go to Hell." In a letter to Pollock, Holmes recognized the fact that "the crowd" often seemed as if it did want things contrary to its own best interests, when he claimed that, "... the crowd ... if it knew more wouldn't want what it does—but that is immaterial."[216] Second, and in relation to the first comment, when "morality" is taken to be the aggregate of social preferences and values, it becomes correspondingly easier to incorporate these "morals" into the law than would be the case if "morality" were something more transcendent and abstract. This is simply because, as Holmes points out above, "morality" in the social preference-sense has a distinctive empirical quality. Social values are, presumably, knowable and measurable to some degree, and so, the means by which we aim at their fulfillment are more easily judged to be successful or not. Thus, the task of evaluating the law by its adoption of "morality" is one of empirical experiment rather than abstract speculation.

The preceding discussion of Holmes' views on the links between legal and moral matters brings up the whole question of the role of the courts (and their judges) in Holmes' pragmatic theory of law. This question has two parts, however, which may be specified as: (1) How do courts actually decide cases of a given kind? and (2) How ought courts decide cases of a given kind?[217] Holmes has already addressed the first question in several ways. In this section, he has claimed that courts often decide cases by an inarticulate or unconscious reference to the public policy implications of the decisions. His view of the use the external standards doctrine of liability in common law matters was itself an interpretive analysis of modern judicial behavior, although it should also be seen as an
argument directed in response to the second question above. In addition, the answer to the first question was the most important concern of the Holmesian "bad man," or the hypothetical ordinary citizen wishing to avoid or constructively predict the activities of courts. Therefore, several aspects of Holmes' legal pragmatism touch upon this first question, and this is not unexpected, since the question is an empirical one.

The second question is a normative one, on the other hand, and so, is somewhat different from the first. It appears that Holmes did argue for a certain kind of response to this question—that courts ought to decide cases by using a certain method, namely, future-oriented means-ends pragmatic experimentalism, and that courts ought to avail themselves of the instrumentalities of science (viz., the measurement of social desires, etc.) in this regard. I have claimed that, in doing so, Holmes was positing a vital link between law and morality, in the sense that legal decisions should reflect the public, external values or "morality" of a community, and should tend to promote known social goals. All litigated cases, as pointed out above, have both short-term and long-term consequences, and so, what courts ought to do is attempt to decide cases by an appeal to both of these considerations, with the ultimate "correctness" of a decision being determined by its long-term consequences for the community as a whole.

Of course, in many cases, what a court should do, from the Holmesian perspective, will look very similar to what courts appear to be doing already (from the traditional perspective), namely, passively "applying" an existing body of rules, principles, and other dogmas to individual cases in a backwards-looking fashion. That is, in many cases, courts will seem to be mechanically turning out decisions justified upon traditional grounds of precedent, especially as the concept of a "court" is also used to refer to quasi-judicial administrative agencies, whose activities become more-or-less routine. Holmes' thesis is that what many judges and policy-making administrators are actually doing, however, is looking forward to the social policy implications of their decisions. Sometimes the best social consequences (viz., predictability, stability, etc.) will result if traditional "rules" are mechanismistically followed, but in Holmes' view, in those cases, such legal decision-making will be motivated by those consequences rather than by those formal rules. Hence, the change in judicial emphasis, from looking backward to "rules" to looking forward to the consequences of following those rules, marks a distinct theoretical break with traditional approaches to legal decision-making. Further, Holmes not only says that pragmatic experimentalism is often employed by judges, but ought to be employed by them, in a completely above-board manner. Therefore, in answer to the second question, Holmes' theory holds that courts ought to decide cases of a given kind on the basis of a pragmatic appeal to the consequences of the decisions, both in the short-run and the long-run contexts.[218]
9d. The Connections Between Pragmatic Experimentalism and Other Parts of Holmes' Theory.

An interesting implication of Holmes' position on judicial decision-making is apparent when it is contrasted to his adoption of the pragmatic approach to the meaning of legal concepts. As Holmes' views on the meaning of legal concepts were explored above (see section C.4), it was found that Holmes posited, with the other pragmatists, that meanings were contextual and situational, and were relative to general human purposes and interests. The meanings of various legal concepts, such as "the law," "legal right," and "legal duty" were specified by Holmes as conditional statements formulated from a certain civilian perspective, namely, that of a "bad man" wishing to avoid or control his interactions with state power to as great a degree as possible. Hence, the meaning of the concept of "the law" for such a "bad man" resulted in a certain conditional construction which dealt with the prediction of possible future events. This particular meaning is pragmatically generated via the shared interests of a certain group, in this case, persons who are primarily interested in keeping the public force out of their private affairs. It is therefore quite a natural outcome of this pragmatic approach that the meaning of the law turns out to be a prediction of the probable uses of the public force through the official activities of the courts.[219]

But the judicial community is a different group from lawyers and the "bad men," with correspondingly different interests. According to Holmes, the primary interest which judges often in fact possess, and ought to possess, is in securing good public policy through their case decisions. In that light, what would be the pragmatic meaning of the concept of, say, "the law" for such a general group, with such interests, in the situational context of legal decision-making? Surely the meaning of this concept will not be the same as it is to the "bad man," and to the community of lawyers. However, there will be a similarity, since the pragmatic approach is being used in each case. Given what has been said above, then, it is apparent that the meaning of the concept of "the law," to the judicial community, from Holmes' pragmatic perspective, will be cast in terms of the forward-looking experimentalism which he is recommending for that community. That is, "the law" will refer to a prediction of the social value relative to social interests which will accrue from case decisions—this will be the rational, empirical import of the concept for the judicial community. Similarly with other legal concepts, such as "right" or "duty," the meaning to the judges will be cast in terms of the predictions of possible social value which would result were certain types of cases recognized as involving "rights" and "duties."

Seeing the role of judges in this pragmatic experimentalist fashion is a revolutionary change in legal thought. Traditionally, judges use a means of expression which makes it appear that all questions are settled by a mere deductive process. When a court, for instance, asked in the traditional manner, "Is this claim a 'right'
under the law?", the question was treated as a logical one, such that the "correct" answer (viz., the correct legal decision) was a matter of deductive insight. Under the Holmesian approach to the same question, a court would make its decision upon deliberating the issue in terms of various hypothetical tests, such as, "if the courts decide to rule that this claim is (or is not) a right, then what short-term and long-term social consequences will ensue?" When the question is resolved such that the official recognition of a certain claim to be a "right" will result in more social benefit (viz., the meeting or satisfaction of social ends) than social detriment, then the legal decision to recognize such a claim will receive a preliminary support. The ultimate justification of such a pragmatically-reached decision only comes with time, that is, its "correctness" will be determined by the resultant longer-term effects it has upon the community.

Hence, judges must also foresee and predict—not their own behavior, of course—but the conceivable social effects of their legal rulings. The relevant areas of judicial consideration, then, are those which take not only the instant case into account, but the whole social context also. Judges must consider and attempt to balance both long-term social desires, ends, and costs, as well as short-term human expectations of their behavior. In this way, it apparently becomes the business of a Holmesian judge to engage in much of what would commonly be considered as extra-legal matters.

The experimental role advocated by Holmes for judges comes out clearly in "The Path of the Law" when Holmes attacks what he calls a fallacy of legal reasoning—"... the notion that the only force at work in the development of the law is logic."[220] The attack here is basically intended to discredit traditional legal reasoning in its deductive form. Even though the formal logic used by lawyers and judges is that of deduction, the substance is at bottom a prediction of the probabilities of social value. Holmes writes:

"The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You can always imply a condition in a contract. But why do you imply? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of founding exact logical conclusions. Such matters really are
battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind."[221]

And further in the same essay, Holmes continues along this same experimentalist line, observing that, in litigated cases, there is:

"... a concealed, half conscious battle on the question of legislative policy, and if any one thinks that it can be settled deductively, or once and for all, I can only say that I think he is theoretically wrong, and that I am certain that his conclusion will not be accepted in practice ..."[222]

Finally, Holmes spells out his position on what judges ought to be doing when he writes:

"I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said."[223]

The connections between Holmes' pragmatic theory of the meaning of legal concepts and his adoption of pragmatic experimentalism by the judicial community are now apparent. In addition, both of these areas are themselves intimately related to Holmes' adoption of objective over subjective standards of legal justification. In the first place, the "successfulness" of a legal decision/experiment is to be measured in terms of its social policy implications for the entire community affected, and not for any one person, though the single litigant might feel the immediate effects of a ruling before everyone else does. As was pointed out above, this model is very similar to Dewey's notion of the "satisfaction" of a problematic situation through an appeal to inquiry, which yields possible hypotheses to satisfy the situation. By testing these hypotheses in terms of their tendencies to satisfy problematic situations, an answer can be found to the original problem. With relation to the legal context of action, case decisions become "working hypotheses" which are submitted to the community as a whole (as well as to the community of judges and other decision-makers) as "rulings" dealing
with certain situations. These rulings become "rules"—external signs to the community that the judiciary will behave towards certain citizen activity thusly, unless and until it can be shown that such treatment brings about more social harm than social good. Hence, a legal ruling is a "reliable sign" that can also be used to predict future official behavior, at least to the degree that future courts find that a ruling has been justified by its social consequences. To Holmes, this entire process is to be a non-subjective one; the subsequent measurements of social ends, as well as the success of the legal experiments designed to satisfy those ends, are to be attained through the non-subjective methods of scientific investigation. Thus, the legal decision itself as well as its ultimate evaluation of "correctness" is not to depend upon internal or subjective factors, but is community-based and scientifically-supported.

In the second place, pragmatic experimentalism in legal reasoning and decision-making is tied to the use of specific external standards or constructions which Holmes often appeals to, such as the "behavior of the reasonable prudent man." When a court asks, for example, "Is claim X a reasonable one?", it is necessary that the court look forward to the consequences of its answer, as well as backward to the external standards of the community itself. Often, however, the court has no other choice but to look only forward, as when a case involves a new, unconsidered legal situation. Since much of the disputed activity and behavior which comes to litigation is novel or different from that encountered in the past, there are correspondingly fewer ways to tell if certain activity has been, or would be considered as "reasonable." It is especially in cases such as these that the pragmatic experimentalist function of the courts is most obvious. The courts, in Holmes' view, should inquire about the advantages and disadvantages of their decision, and finally, issue a ruling or "working hypothesis" for general testing in the community's experience. The court thus says, "this is (or is not) a reasonable action" with regard to the case-situation before it; the correctness of the "rule" is to be judged by the results of the promulgation and application of such a ruling to the community. For many situations, then, forward-looking justification is inescapable. Even when external standards of conduct are familiar and established, the court re-Invokes them upon Holmes' reasoning not simply because they exist, but because their continual use is predicted to promote a social benefit—minimally, in such a case, the predictability of a certain type of legal treatment. If a traditional standard, however, is causing more social disvalue than social benefit, then judges ought to abandon it, even though this will result in short-term disvalue—the loss of some degree of predictability regarding a type of case. Hence, in Holmes' view, judges are not to substitute their own personal views of "reasonability" for those of the community, but are to consult community standards and/or establish new standards for testing in the community itself. In this way, Holmes is continuing to urge in his adoption of pragmatic experimentalism an impersonal, non-subjective approach to legal reasoning and decision-making.
9e. Holmes' Pragmatic Experimentalism and the Role of Judges in a Democratic System.

The last point brought up above highlights an important area of Holmesian thought—the proper role of the courts in the overall governmental (and democratic) system. The fact that Holmes was himself a judge affords the unique opportunity to observe the results of Holmes' theoretical views in practice. Of course, the assumption here is that Holmes' behavior as a judge was consistent with his theoretical positions, and that is a separate question in itself. I will assume for a moment that Holmes' words and deeds as a judge can be taken as a qualified extension of his philosophical theory dealing with the activities of judges in general, and will address one aspect of the consistency question later.[226] From what has been observed above, it can be said that Holmes viewed the legal processes as tools of the community, to be used to bring about social ends or purposes. Judges were to cooperate in this effort as much as possible by deciding cases from the ultimate grounds of good social policy. This meant that judges could continue to appear to reason in traditional-looking ways, that is, using the method of stare decisis to rule on present cases by an appeal to their similarity to past ones (as long as this activity is justified on forward-looking pragmatic grounds); or judges could neglect the form of this backward-looking method and try an openly forward-looking means of justification, deciding cases upon a direct appeal to their possible social consequences. The former method, as noted, was itself justified in Holmes' view from an appeal to the social values of stability, certainty, and predictability it tended to bring about. Hence, both methods of reasoning, justification, and decision-making were open to judges under Holmes' advocacy of pragmatic experimentalism, since for both approaches, the ultimate concern was that case decisions contribute to the satisfaction of social purposes.

It would seem, upon this line of analysis, that the upshot of such a view would be to de-emphasize judicial passivity, and to inject judges forcefully into the overall legislative picture. If judges were to be concerned about social policy, then they ought to take active steps to make sure that their decisions were going to bring about greater rather than lesser social value. The position Holmes held in regard to this issue, however, was quite the opposite. In the alternative to the idea that judges ought to increase their legislative activity, Holmes averred that the situational context of judicial action itself dictated that judicial restraint be followed. The judiciary was simply not in the best position to act as a legislative body, which could hold hearings, investigate factual matters, conduct research, and pragmatically test social programs for their social effectiveness. The role of the judiciary was correspondingly limited to those individual cases brought before it, and though it could act legislatively on the policy issues surrounding those cases, its scope of operation was still a very narrow one. Holmes expressed this view on the limitations of the judicial context while on the U.S. Supreme Court, saying:
"I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."

Further, the nature of courts in relation to the community itself did not suit the idea that courts should actively attempt to legislate broad areas of social policy. For one thing, the size of the judiciary was most often much smaller than the size of the legislatures. This is important because of the pragmatic need for non-subjective methods in justification, policy-making, and experiment—the smaller the community, the more likely are subjective, personal influences felt, and vice versa. Hence, the legislatures, which are usually made up of many diverse political forces, are probably better able to mutually nullify highly idiosyncratic views among their members. For another thing, legislative representatives are most often closer to the community than are judges. Legislators are almost always elected, often for relatively short terms of office. Judges, on the other hand, are very often appointed to their offices; when judges do run for office, their terms are usually much longer than those of legislators. Finally, though the judiciary in Holmes' view can and ought to function in its own limited way from an experimentalist perspective, it cannot actually carry out the tests of its policy rulings. That is, if a court rules a certain way on some question, even with a full regard of the social policy implications of that decision, it is still quite possible for the ruling to have contributed to social harm. In such cases, the court's ruling would be pragmatically "incorrect." However, because the courts only hear the cases brought before them, there is no guarantee that the courts could act to rectify their mistake and withdraw the failed "working hypothesis" which was submitted to the community for testing, unless of course another case involving that "hypothesis" is independently brought before them for re-consideration. A legislature, of the other hand, can actively test social policies with their own enactments, and can take active steps to repeal those enactments when those policies fail.

For all of these reasons, the judiciary is simply not as fit to legislate actively as are the legislatures themselves. Of course, in Holmes' view, this does not mean that the judiciary cannot act legislatively on its own, but that it ought to limit such activity as much as possible in deference to the legislatures. For Holmes, the pragmatically-based arguments for judicial restraint translated, in his own judicial behavior, into two related positions: (1) judicial impartiality or objectivity should be emphasized, and (2) the legislatures should be allowed by the judiciary the maximum amount of freedom to conduct social experiments. A few passages from Holmes' writings and opinions should be sufficient to support this dual position, since it has generally been recognized as an accurate description of Holmes' judicial attitudes. The important point
here is that Holmes' judicial behavior is best understood in its larger philosophical context, that is, in terms of his overall pragmatic theory of law. My analysis, then, is an explanation of why Holmes acted as he did on the bench.

Holmes directly addressed the question of judicial objectivity in one of his more famous speeches, which was published under the title "Law and the Court." Holmes' idea there was a re-statement of his view that a legislatively-active judiciary is often apt to allow subjective factors to enter wrongly into judicial decision-making:

"It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half of his fellow men to be wrong ... We too need education in the obvious—to learn to transcend our own convictions and to leave room for much that we hold dear to be done away with short of revolution by the orderly change of law."[230]

Thus, one of the most interesting implications of Holmes' view of the need for judicial objectivity and impartiality is that it promotes tolerance on the part of judicial decision-makers. In his admonition to judges to justify their activity by an external appeal to the social consequences of their acts, and to facilitate this by not allowing their personal idiosyncrasies to influence their judgment, Holmes was actually positing another quasi-moral directive—that judges seek to give the "benefit of the doubt" to many viewpoints, especially to those with which they might personally disagree. In one of his early U.S. Supreme Court opinions, Holmes observed that:

"While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions..."[231]

A few years later, in one of his most famous dissents, Holmes spelled out his impersonal position regarding the role of judges in a democratic society quite forcefully. In an excellent example of
pragmatic legal theorizing, Holmes wrote:

"This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question of whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law ... a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."[232]

Holmes' advocacy of judicial impartiality continued into his later years on the U.S. Supreme Court. In one later case, Holmes wrote in a dissent of the ways in which he was personally troubled by a certain legislative enactment being considered by the Court, but reaffirmed the position that his personal feelings ought not enter into the judicial decision-making process. In that case, Bartels v. Iowa (1923), Holmes was literally fighting with himself to remain objective and tolerant:

"It is with hesitation and unwillingness that I differ from my brethren with regard to a law like this but I cannot bring my mind to believe that in some circumstances, and circumstances existing it is said in Nebraska, the statute might not be regarded as a reasonable or even necessary method of reaching the desired result. The part of the act with which we are concerned deals with the teaching of young children. Youth is the time when familiarity with a language is established and if there are sections in the State where a child would hear only Polish or French or German spoken at home I am not prepared to say that it is unreasonable to provide that in his early years he shall hear and speak only English at school. But if it is reasonable, it is not an undue restriction of liberty either of teacher or scholar ... I think I appreciate the objection to the law but it appears to me to present a question upon which men reasonably might differ and therefore I am unable
to say that the Constitution of the United States prevents the experiment being tried."[233]

These samples of Holmes' views are adequate to display his emphasis upon judicial impartiality and objectivity, but also, suggest the second and related position mentioned above—that Holmes' theory of pragmatic experimentalism in the judicial context often meant that legislative experimentation was to be allowed by the judiciary to as great an extent as possible. This second position was the essence of Holmes' theory of constitutional law, and was probably best summarized in a dissent Holmes wrote in 1921, when he stated:

"There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires ... even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect."[234]

In the era during which Holmes served on the U.S. Supreme Court, the various state legislatures (as well as the U.S. Congress) were attempting an incredible number of reform measures, or "social experiments," with many of them geared to the regulation of private business. As much as Holmes privately disagreed with these "progressive" impulses, his constitutionalism, which was only one aspect of his overall pragmatism, did not allow him to find that such regulation was contrary to the U.S. Constitution. In Holmes' view, the U.S. Constitution itself is experimental, and so, "like other mortal contrivances has to take some chances."[235] The record of the period of time from the beginning of the twentieth century to the years just before the New Deal brought literally hundreds of cases to the Supreme Court wherein a state or federal "legislative experiment" was challenged upon constitutional grounds. In these cases, Holmes was consistent in his view that democratic government itself implied social experimentation, and that the Constitution could not be used to block or stifle such experiments unless they were clearly beyond the Constitution's fundamental limitations.[236] And since the Constitution was not self-defining (which is yet another pragmatic position), those basic limitations had to be decided—upon also. For example, Holmes attempted to show that even freedom of speech was only Constitutionally protected up to a certain point, and that a legislature which tried to restrict that freedom was not necessarily acting in a way contrary to the Constitution. In the case of Schenck v. United States (1919), Holmes wrote of the limits to which the Constitution extends:

"We admit that in many places and in ordinary times the defendants in saying all that was said ...
would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done ... The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic ... The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[237]

The most important point argued here, then, is that a major implication of Holmes' adoption of the pragmatic experimentalist line of thought is a theory of judicial behavior, which is evident from both his writings and his official opinions, and which stresses the fundamental notions of judicial restraint, impartiality, and tolerance, along with general judicial deference to legislative acts. In another section below, I will devote more time to Holmes' treatment of First Amendment rights, since he is often noted to have been a strong and judicially active civil libertarian,[238] and this apparently conflicts with some of what has been claimed here as his philosophical position. For now, however, a brief summary follows of the fundamental ideas put forth in this lengthy section on the basic role of pragmatic experimentalism in Holmes' legal theory.


I have demonstrated in this section that Holmes' view of legal processes was, in a similar way to the American pragmatists' perspective, shaped and based upon the idea of seeing such processes as non-static, organic, changing, and growing objects. Both Holmes and the pragmatists went a step further, however, to the view that human agents could change their environment to suit their own purposes or ends. Hence, change was not only in the nature of things, but could be directed, controlled, and fitted to human interests. For Holmes, this resulted in an instrumental view of legal processes, which were to be seen primarily as the tools by which a society attempted to satisfy its problems, meet its collective goals, and seek its interests. This is basically a pragmatic perspective, since its essence is the embrace of experimental reasoning, that is, the method of logic whereby reasoning is directed to the solution of certain actual problems. Reasoning itself, including legal reasoning, is thus to be oriented in terms of means and ends. Rational inquiry for Holmes and the pragmatists is therefore the empirical process by which humans seek to satisfy and attain their desires and preferences. Consequently, reasoning as well as justification becomes forward-looking, that is, geared towards the future consequences of a conclusion (or a legal decision). To Holmes, this amounted to a certain approach to the
legal context itself—both legal decisions as well as the evaluation of such decisions were to be reached on an experimentalist path. Cases brought before courts were to be treated as "problem-situations" which demanded a solution which was to be justified by its future beneficial consequences. Judges were to consider both the long-range social consequences of a "ruling" as well as the short-term consequences of the specific decision for the litigants involved in the case. Judicial decisions regarding a problematic situation of some type would then be used as guides for subsequent social behavior. Such "rules" would therefore receive their pragmatic justification (if any) by their social workability. In the pragmatic sense, judicial rulings functioned as "reliable signs" of probable future judicial behavior in future similar cases, and so, the pragmatic justification for stare decisis can be found in its tendency to increase the social values of certainty and predictability in the law. In the broadest sense, however, the pragmatic idea which Holmes puts forth is that the ultimate criterion for the justification and evaluation of legal decisions is in their effects upon the community as a whole, and upon that ground, Holmes recommended that scientific means of measurement be openly introduced into the law, not only to test the effects of legal decisions upon society, but to determine accurately the actual values and goals which a community endorsed. In Holmes' view, science could best measure how certain legal decisions could (or could not) help to bring about certain social ends.

Holmes claims that judges ought to see it as their duty to consider the social advantages and other consequences of their legal rulings and says that in fact this is what judges often do. Holmes thus offers an alternative explanatory analysis of much judicial behavior which appears as if it is based upon traditional reasoning rather than pragmatic experimentalism. Holmes' contention, however, is that the form of traditional legal reasoning is "logical" or "syllogistic," but its content and substance is primarily legislative and pragmatic.

The experimentalist approach has several other implications for the judiciary, and these implications act to pull together various parts of Holmes' jurisprudence into a more coherent overall theory. One such implication is that when the legal decision is to be justified and evaluated by its consequent social value, then this results in the connection of "the law" and "morality," wherein the latter term is taken to refer to social values, preferences, interests, and ends. The law, then, as it is embodied in the decisions of the courts, is a moral instrument, a tool by which social ends can be satisfied. This consequence of Holmes' experimentalism ties in nicely to his adoption of the pragmatic approach to the meaning of legal concepts. Such an approach takes the meaning of a concept to be relative to a certain situational context, to certain purposes, and concerns the possible empirical significance of a type of operation which a concept suggests. Hence, pragmatic meanings are relative to general groups, and so, for the judiciary, the meaning of the concept of "the law," as well as other concepts, can be found in the experimental, future-oriented tests of
the social consequences of their own legal decisions. For example, what "reasonable behavior" in a certain context means to a court is a reference to what the empirical consequences for the community would be were the court to lay down that such-and-such behavior is "reasonable." But this is only to say that judicial rulings are hypotheses. Though courts often consult already-established rules, precedents, and community standards, the pragmatic reason for doing so is so that a prediction can be made about the future hypothetical consequences of the official renewal of those rules or standards. Hence, as it is for lawyers and "bad men," the meaning of legal concepts for judges involves a version of pragmatic prediction.

Another major implication of Holmes' advocacy of judicial experimentalism goes a long way towards explaining what was probably Holmes' most dominant judicial attitude while serving as an appellate judge—his advocacy of judicial self-restraint. This behavior took the form of judicial objectivity, impartiality, and tolerance, whereby Holmes strove to disregard his personal beliefs when deciding cases, and also implied that the Supreme Court in particular ought to allow the state and federal legislatures as much room for social experimentation as the Constitution would permit. This did not mean that legislatures were unrestricted by the Constitution, however, and Holmes did not hesitate to switch from a role of judicial passivity to a more active role when the circumstances of the litigation necessitated it. Even so, such judicial activism was a last resort in Holmes' view. In these ways, Holmes' behavior as a judge on the Massachusetts and United States Supreme Courts can be understood as directly related to his overall theory of law, and this is one of the most significant findings of this study.

10. Some Other Comparative Issues: Generals and Fallibilism in Peirce and Holmes.

Before a final statement of what I am attempting to reconstruct as Holmes' overall theory of law, I would like to briefly examine a few minor issues which offshoot from Holmes' pragmatic experimentalism. This will serve to complete the argument I am putting forth here, namely, that Holmes had a coherent philosophy of law which should be considered as an important part of the American pragmatic tradition. This examination will also serve to explain some of Holmes' Supreme Court behavior that has been traditionally misunderstood. In this section, then, I will compare Holmes and C.S. Peirce on the following pragmatic tendencies: (1) the emphasis upon generals and types, and (2) the idea of the fallibility or uncertainty in any judgment rendered by human beings. In connection with the latter point, I will show how Holmes' famous "free speech" decisions can be explained in terms of Holmes' judicial experimentalism and overall pragmatic approach to the law.
10a. Peirce and Holmes on Generalities.

Both Peirce and Holmes placed a good deal of emphasis upon the role of generalities (or generals) in their pragmatic philosophy. The importance attached to generalities is itself directly tied to all three of the interrelated aspects of pragmatic thought upon which I have been comparing Holmes and the other pragmatists—the theory of meaning, the use of external standards, and the embrace of experimentalism.

For Peirce, the conditional statements which served as the meanings of intellectual concepts displayed this emphasis upon generals in several ways. To begin with, the meaning of a concept was relative to interests and purposes, but these were always to be of a general type, and not individualized or particular ones. Such general types of interests were those shared by groups or communities, and Peirce often refers to the "community of science," whose general interest was to secure the truth about Nature, and the "community of practice," whose short-term interest was in finding the answers to presently pressing problems.[239] The emphasis upon such communities of inquirers sharing general interests and purposes also shows the link between pragmatic meaning and the use of impersonal standards, since the general, intersubjective interests of a group tend to reduce personal, subjective influences.

Of course, the hypothetical operations to which an intellectual concept referred were themselves generalized in Peirce's view in two ways. First of all, the set of operations which provide the conditional explication of a concept never describe any single test at any single time or place, but are to be thought of as completely generalized outlines or "rules of action." The peculiar, contingent, and individualized conditions which make the specific instances of an operation possible are precisely what do not count in pragmatic meanings.[240] Hence, becoming clear about an idea involves for Peirce an understanding of its general empirical significance, relative to the general interests involved. Another way of saying this is that the pragmatic meaning of a concept is expressed in the form of a conditional rule.[241] Peirce wrote of this approach:

"Proced according to such and such a general rule. Then if such and such a concept is applicable to such and such an object, the operation will have such and such a general result, and conversely."[242]

Secondly, the standards of procedure in which the operational reference of a concept is drawn are themselves items of general community practice. As was argued in section C.6 above, experimental procedures were to be specified as taking place under certain general test conditions, which were themselves traced to the standards of practice of the community.[243] Therefore, both the conditional
operations themselves as well as the ways by which those operations were to be actualized (or thought of), in regard to the pragmatic meaning of some concept, were for Peirce thoroughly generalized in character.

This emphasis upon generals is obviously tied to the use of external standards of justification as well as to the use of experimentalist reasoning in Peirce's pragmatism. In the first place, external standards drawn from intersubjective agreement are basically general rather than particular. In the second place, experimentalism in reasoning and testing operates in a generalized context such that any single, individual experimental test of a hypothesis is never in itself a good reason to conclude that the hypothesis itself succeeds or fails. What makes a hypothesis a success or a failure is its results in the long run, that is, its results in general, which tend to negate individual, contingent factors which can lead to anomalous results. Experimental thinking means conceiving of general results which occur from general operations in general contexts. The world itself is intelligible (and predictable) in Peirce's pragmatic thought, then, only to the extent that its features can be generalized.[244]

Holmes takes a similar line to Peirce in regard to the many roles played by generalities in his theory of law. In the same way as Peirce, Holmes argues that the way that "the law" is to be understood, both from the ordinary (viz., "bad man's") perspective as well as that of the judge, is in terms of generalized propositions, or predictive rules. For example, the meaning of "the law" for the classes of "bad men" and lawyers (which are themselves descriptions of general groups sharing general interests) consisted, in Holmes' pragmatic recommendation, of conditional rules which predicted the behavior of the courts. Similarly, the meaning of "the law" to the class of judges was a reference to the predicted social consequences which would occur if a certain decision were to be laid down as a "ruling" on a certain factual situation, which is then taken by the community as a declaration of official response regarding this type of situation. For such predictions to be even possible, of course, there must be the assumption of some kind of generality of legal treatment such that similar case-situations will be treated, ceteris paribus, in similar ways in the future as they have been in the past. Though the importance of the ceteris paribus condition in Holmes' approach cannot be understressed, when it is present, Holmes' position is that broad areas of legal treatment can be rationally generalized, and so, can be relatively certain and predictable. To both the "bad men" and the judges, then, past legal decisions were to be considered as prima facie indicators or signs of official experimentation regarding certain types of behavior in various situations. Though single decisions were often not enough to state a broad rule of legal treatment (just as a single experiment is not enough to conclude a general tendency), several decisions together could indicate that a certain general legal tendency was being put forth. If the social consequences of such a tendency were good ones, then the courts in Holmes' view had the duty to uphold that general tendency in similar cases, which in turn would produce the further
social values of stability and the predictability of legal processes. If the social consequences of some general tendency were contrary to good policy, then courts had a duty in Holmes' view to disregard those precedents, no matter how long they may have stood, as long as the disruption in judicial predictability which resulted was not too extreme. The point here is that such "tendencies of judicial treatment" took the form of general conditional rules of judicial behavior, by which citizens could gear their conduct. Hence, for Holmes, as for Peirce, the conditional operations by which legal concepts were understood were of a general nature, describing general judicial tendencies.

An interesting implication for Holmes' theory which comes out of this is the interrelatedness it demonstrates in both lawyer-based and judge-based predictions. A hypothetical example can serve as an illustration of this idea. Suppose that for many years, the courts of a certain country have held that the "equal protection" clauses of its constitution do not apply to women. In such a case, there is a clear line of historical precedents upholding a certain general tendency or "rule," namely, that women are legally excluded from this constitutional provision. A case is then brought before the judiciary in which the question is raised as to whether or not this constitutional clause applies to women. A traditional legal analyst might observe that "the law" on this question is "settled," and so, the correct legal decision (from traditional stare decisis reasoning) is for the courts to continue to exclude women under the stated clause.

To the Holmesian jurist, however, the whole picture is seen differently. Although it is true that the legal question has been treated in a certain way in the past, and that this has resulted in a general tendency or "rule" on this question, and further, that this situation has contributed to the fulfillment of the social policy ends of stability and predictability in legal processes, this is not enough for the Holmesian jurist. According to Holmes, legal decisions are ultimately justified on appeal to their conceivable social consequences, and the resultant predictability of judicial behavior on a certain question is only one among many relevant judicial considerations to the experimentalist judge.

Suppose also that the actual social effects of this particular "rule" (viz., this general tendency of courts to behave in a certain way to a certain type of situation) were obviously and increasingly bad ones, not only for women, but for other segments of the community as well. On Holmes' view, a court might justifiably choose to disregard the line of precedents and attempt to set a new tendency of legal treatment in motion. The incipient social disvalue of such an unpredictable turn might simply be outweighed by the social value it is predicted by the judges to bring about. Now, it is clear that when judges consider the social value of the predictability of legal decisions, they must clearly have the lawyer's perspective in mind. That is, one of the considerations of deliberating judges will be in asking, "Given the similar cases to this one which have been previously litigated, what would the lawyers predict that we would do
in the present case?" Similarly, in order to be the best predictors of judicial behavior (which is what lawyers do in their professional advisory role to their clients), lawyers must take the judges' perspective, and ask, "Given the present social climate, the growing unpopularity of the traditional rule, but also the predictability which has resulted from the past judicial endorsement of this rule, how ought the question be decided now, in light of the consequences of the decision?" In such a case, then, an astute lawyer might reason that the time was ripe for a judicial break with precedent, and would let that reasoning change his predictions (as well as his arguments to the court). Further, the judges also take into account the fact that a good lawyer will take the judges' perspective into account, and so on. In such a way, a judicial decision overturning a line of solid precedents which are causing an increasing amount of social disvalue might not be as unpredictable as it seems at first glance. In an interesting way, then, the predictions of the lawyers and the judges, though geared to different interests, are closely interrelated.

Another very important way in which generalities play a role in Holmes' theory is in the classification of factual scenarios as fitting into generalized legal categories. If lawyers, judges, and legislators did not engage in such generalization, there could be no "rules" to follow, because no two factual scenarios are ever exactly "the same" (in the strictest sense), and so, there could be no "similarity of cases" unless certain aspects of cases were generalized as legally relevant to a decision or a ruling and certain ones were not. Such generalizations, in fact, from individual, particularized factual scenarios are what make predictions of judicial behavior (and of future social consequences) possible at all. As with Peirce, for Holmes generalities make the legal process itself intelligible.

Thus, in Holmes' view, for lawyers as well as for judges, a clear understanding of "the law" entails that, for any set of particular circumstances, the legal relevance of those circumstances is determined with reference to an interrelated system of generalized predictions. The judiciary takes such particular circumstances and asks about the social value which might accrue were it to set down a general rule regarding those circumstances as a general type of situation, as if to say, "For any other similar type of circumstance, we will act thusly." The more decisions which indicate a certain tendency of judicial behavior, the broader the applicability of the "rule." The lawyers, on the other hand, look at particular circumstances and generalize from them those aspects which are legally relevant, both in terms of what has been considered as previously relevant, and in terms of what can be arguably asserted to be relevant, relative to possible future consequences which judges are to be concerned about. In fact, the lawyer may argue his or her case from the judge's point-of-view, that is, looking toward the social consequences of a certain ruling upon this type of case. To both judges and lawyers, then, the operations of "the law" work in a generalized system of interrelated and generalized predictions. On this, Holmes wrote:
"... pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalize them into a thoroughly connected system."[245]

To Holmes, the master of the subject of law, whether that person be a lawyer or a judge, is one that can understand its underlying generalized operations and tendencies. Such a person has the ability "... to look straight through all the dramatic incidents and to discern the true basis of prophecy."[246] For the lawyer, "the law" means a prophecy of the general operations of the courts in regard to types of situations; for the judge, "the law" means a prophecy of the future social consequences of a present decision.

In several ways, then, an understanding of Holmes' approach to the law is dependent upon the recognition of the various roles played by generalities. The conditional rules which lawyers formulate to predict judicial behavior are general prophecies forecasting general results, and are made on the basis of taking individual, particular circumstances and generalizing from them the legally relevant factors for subsequent prediction. The judges' forecasts of social consequence are similarly general in form, since a "ruling" in one case is to be taken by society as a general rule on that type of case, such that similar cases will be thought to fall under this general ruling, all other things being equal. Such rules can be narrow (as when there is but one ruling on one strictly defined type of situation) or broad (as when there is a cluster of rulings dealing with a whole area of legal treatment), but are constructed as general responses to cases considered as types of situations. In this way, both lawyers and judges generalize cases into legally relevant forms, abstracting away much factual detail, so that predictions are possible in other cases. "Similarity," of course, means "generally the same" in legally relevant aspects, then, and not precisely the same (see section C.2 for my arguments against the strict identity view of "sameness"). In this way, rulings upon particular factual scenarios can rightfully apply to many different factual circumstances which share certain general aspects, and so, fall under the general judicial tendency of treatment/general legal rule for situations of a type. Since the system of interrelated predictions which Holmes speaks of is the operational context in which lawyers, citizens, and judges act, the resultant emphasis upon generalities, which infuses all parts of that context, is surely not surprising, but is fundamentally important.

10b. Peirce and Holmes on Fallibilism.

Connected to the idea that both pragmatic meanings and pragmatic experimentalism emphasize the fundamental role of general conditional
Predictions is the notion of uncertainty or fallibility. A conditional prediction is simply a statement of the probability that, given certain conditions, certain other states of affairs will occur. The fact that pragmatic predictions, in both Peirce's and Holmes' use, are general ones is simply a recognition of their probabilistic, less-than-certain nature. Peirce openly recognized that there was some degree of uncertainty in any judgment or claim, that is, some degree of probability that the statement was wrong. He called this his doctrine of "fallibilism," and maintained that its very recognition added to the accuracy of any claim.[247] Peirce wrote:

"Truth is that concordance of an abstract statement with the ideal limit towards which endless investigation would tend to bring scientific belief, which concordance the abstract statement may possess by virtue of the confession of its inaccuracy and one-sidedness, and this confession is an essential ingredient of truth."[248]

Because of the element of uncertainty in human judgments, all of the claims which we call "true" are known to us only as approximations rather than certainties. This is not to say that all claims now taken as true will be eventually rejected, but only a recognition that any claim could be overthrown by future investigation. Hence, fallibilism is an epistemic concept, a result of the limited human capacity to be certain about any judgment. As Peirce said, there are three things which human beings cannot hope to attain—absolute certainty, absolute exactitude, and absolute universality.[249]

The upshot of this recognition of fallibilism is that, in so far as we desire to reach for truth in our judgments, we need a method by which we can continually improve the accuracy of those judgments. That is, the method should be one by which the element of error in our claims is continually and progressively being eliminated. Along with this is the idea that no claim is ever to be taken as unquestionable, final, or absolute, except perhaps the claim, "all judgments are fallible" itself. The method which Peirce suggests for this purpose, of course, is the self-corrective method of continued scientific experimentation.[250] As open inquiry was the basis of this method, Peirce held that "the one unpardonable offense" in human reasoning was "to block the way of inquiry."[251]

Therefore, there is an unexpected ethical implication in Peirce's position of uncertainty or fallibilism, and that is approval it gives to human tolerance in matters of thought. When there is an element of inaccuracy in all claims to truth, no person can claim to possess the unique and definitive systematization of any subject matter. The notion of fallibilism thus enjoins human beings to acknowledge the fact that no claim is final, and that all claims are open to modification and revision. Humans have a reason, then, for caution or restraint in their tendency to condemn other human beings who disagree with them.[252] The best method of settling such
disagreement, according to Peirce, is by further inquiry and further testing. The idea that all human judgments are subject to continual, open, critical revision depending upon their experimental consequences, is, of course, a basic (and now familiar) principle of pragmatic thought.

Holmes held similar views in his philosophy of law. Since he emphasized the fundamental role of prediction in understanding the nature of legal processes, he implicitly endorsed the notion that legal judgments were fallible to some degree. To the class of lawyers, a general prediction of the behavior of the judiciary becomes an extremely complex object, the product of several levels of inquiry and extrapolation. It is basically a general statement of various probabilities. The same goes for the predictions of social consequences for judges. These, too, are reasoned speculations about the future. In Holmes' view, as was seen above, all legal "rules" are merely generalizations of judicial tendencies, which may not be exactly instantiated in any particular case. The fact that Holmes adopts the pragmatic outlook with regard to the meaning of legal concepts demonstrates (since these concepts are always future-oriented, and since the processes of law are continually evolving) that there will always be an element of uncertainty in any legal judgment containing them. Simply put, Holmes rejected statements of the "absolute" in the law. In a manner that sounds again remarkably like Peirce, Holmes wrote in The Common Law:

"The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow." [253]

Holmes often attempted to trace-out the implications of his pragmatic approach and its resultant fallibilism. Some good examples of this effort can be found in his essays, "Natural Law," and "Ideas and Doubts," in which Holmes offered a thorough and straightforward condemnation of the idea that the law contained anything fixed, static, or certain. The fact is, of course, that human beings often believe many things to be fixed and certain, but this is merely an illusion, in Holmes' view:

"... while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they come to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else. And this again means skepticism." [254]
Holmes argues that there are in fact no "necessary" relations that must hold in every society, and so, no such thing as "natural law," transcendent of human positive law. Even the very fact of the desire for personal survival is a contingent one, for it may not continue tomorrow. No social arrangement whatever has the status of an "absolute," as Holmes avers when he writes of the "necessity" of social life itself:

"I see no a priori duty to live with others ... but simply a statement of what I must do if I wish to remain alive. If I do live with others they tell me that I must do and abstain from doing various things or they will put the screws on to me."[255]

Even what are the most basic claims of "right" are still often defeasible, in Holmes' view. For example, on the right to life, Holmes writes:

"The most fundamental of the supposed pre-existing rights--the right to life--is sacrificed without a scruple not only in war, but whenever the interest of society, that is, of the predominant power in the community, is thought to demand it. Whether that interest is the interest of mankind in the long run no one can tell ... in any event ... the sanctity disappears."[256]

The skepticism which characterizes much of Holmes' thought, which springs from his recognition of the errors of judgment we are liable commit, the changes of opinion we make, and so on, were transformed, however, into a more positive statement in Holmes' judicial behavior. The mark of civilized thinking was, for Holmes, to question one's first principles and beliefs.[257] What this leads to upon the judicial bench is the quasi-ethical directive of tolerance. The surprise about this result, of course, is that in coming to the conclusion that no judgment is certain, and especially that no ethical claim is immune from skeptical doubt, the moral tendency of tolerance is warranted by these very findings. To Peirce, this resulted in the idea that inquiry ought never be blocked. To Holmes, the fallibilism inherent in all human judgments implied that the processes of the free and open trade of ideas were to be given by society the maximum amount of protection.

10c. Holmes and the Free Speech Dissents--How These Fit into His Overall Theory of Law.
There is often an expressed confusion about Holmes' judicial behavior while on the U.S. Supreme Court. This confusion is aptly summed up in the title of a book of essays recently published about Holmes' judicial outlook: Oliver Wendell Holmes, Jr., What Manner of Liberal?[258] Some authors look to Holmes as an almost vicious political conservative whose views bordered upon (if not embraced) facism.[259] Other authors draw directly opposite conclusions about Holmes' judicial behavior, praising him as the foremost judicial exponent of civil rights in modern times.[260] Much of this confusion appears to stem from Holmes' opinions in several landmark Supreme Court cases late in his career. Long an advocate of judicial restraint, which has been shown here to fit in with his pragmatic theory of law, Holmes seemed to have abandoned that policy when certain types of cases (especially those involving free speech) came before the court. His decisions in several cases appear to assert the judicial power in a positive, active, non-deferential manner. Of course, the question of whether Holmes was "really" a "liberal" or a "conservative" is purely a matter of the interpretation and definition of those categories. Putting aside these vague and rather imprecise classifications, the deeper question remains—were Holmes' "civil liberties" opinions consistent with his advocacy of judicial restraint? This question is at once clearer and more direct than the trite liberal/conservative question, and appears in the present context to be answerable. My position is that Holmes' adoption of a "judicial activist" role in regard to many of the cases involving First Amendment (and other) rights is best explained in terms of the ethical implication of his pragmatic recognition of the uncertainty in all judgments. As was found above, the ethical result referred to here was that tolerance of the free trade of ideas was warranted as a reasonable social policy.

In the United States, this meant that the rights of free speech (as well as other civil liberties) were to be upheld and protected, if necessary, by the judiciary itself, to the maximum possible degree. This did not imply, of course, that the right of free speech was an "absolute," as Holmes himself pointed out in Schenck v. United States (1918), which involved the exigencies of wartime restrictions on certain rights. Though I have quoted Holmes from this opinion above, the present discussion demands a fuller recapitulation of Holmes' position:

"The most stringent protection of free speech would not protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight
and that no court could regard them as protected by any constitutional right." [262]

Although Holmes' views in such decisions as this one are sometimes considered as rather troublesome in light of Holmes' later opinions and dissents, wherein he goes to relatively great lengths to uphold the rights of free expression, they are clearly not puzzling at all, given the proper interpretive framework put forth herein. Holmes' strong advocacy of the rights of free speech was a result of his rejection of dogmatism, and so it is only to be expected that the right of free speech itself could not be taken as an unqualified right, but as a limited right. This is completely consistent with Holmes' view that free speech could be rightly curtailed as in the best interests of society as a whole—especially in times of war, when national survival itself might demand such an action.

It was within these broad limitations of social policy that Holmes acted in a seemingly uncharacteristic way to actively oppose restrictions on free speech and other civil liberties, even when these restrictions could be interpreted as "legislative experiments." One such "experiment" was the Sedition Act of 1918, which was far more restrictive of free expression than previous legislation had been. Even though this appeared to be an instance of a "legislative experiment," and even though Holmes argued that a judge's duty was to defer to such experiments as a way of achieving good social policies, Holmes' behavior showed that even his advocacy of judicial restraint was not a dogmatic position. Though judges had a duty in general to defer to legislatures, their overriding duty was to the community, and so, judges could block those "experiments" which appeared to unreasonably transcend even the broad latitude of activity which judicial deference allowed. In Holmes' view, the set of civil liberties and other doctrines laid out in the U.S. Constitution were the instruments by which a free society could experiment at all. Hence, to tamper with those liberties and doctrines through experiment was extremely dangerous, for it could mean a restriction upon the whole future process of social experimentation itself. The key question to Holmes was this—were the legislative experiments which came for review before the Court examples of unreasonable uses of Constitutional doctrines? In other words, were the experiments of a sort that might restrain future experimentation? Holmes' primary emphasis, in such cases, was placed considerably more on the idea of "reasonableness" than on "Constitutionality," since the latter document was only to be given a reasonable interpretation by the Court. Clearly, certain forms of self-destructive experimentation were unreasonable uses of the Constitution. As far as the distinction between "reasonableness" and "Constitutionality," Holmes acknowledged it as early as 1911, when he wrote in the case of Noble State Bank v. Haskell:

"We should be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain
to ask the Court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent.[263]

As always, for Holmes, the issue of Constitutional unreasonableness was a matter of degree. The place to draw the line beyond which some activity was "unreasonable" was, again, based on considerations of social policy. The main point here, though, is that Holmes held that there was an essential link between Constitutionality and "reasonableness," and that the former was dependent upon the latter.

What became a landmark example of this doctrine for Holmes was the case of Abrams v. United States (1919), in which a person was held to have violated the Sedition Act of 1918 by printing and scattering leaflets which protested the use of American soldiers in Russia during the time of the Bolshevik Revolution. The majority of the Court upheld the lower court conviction of Abrams, and found that freedom of expression was not protected when it demonstrated merely a "tendency" to cause social disruption.[264] To Holmes, such a ruling set down a policy that went beyond the limits of reasonability, and his dissent in this case was to foster the popular association of Holmes with the issue of "free speech." The dissent expresses many of the pragmatic themes which I have been discussing here: the role of generalities in the law, the notions of fallibilism and the role of pragmatic experimentalism in legal policy-making. Holmes averred:

"... 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 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 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 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 purpose of the law that an immediate check is required to save the country."[265]
Holmes' dissents in the following years consistently demonstrated his continued support of the argument that it is unreasonable to experiment with the restriction of the experimental processes themselves, that is, to restrict civil liberties when not absolutely necessary. For example, the freedom to openly trade and exchange ideas was thought by Holmes to encompass both written speech and the use of the mails, as his dissents in Milwaukee Socialist Democratic Publishing Company v. Burleson (1920)[266] and Leach v. Carlile Postmaster (1921)[267] both demonstrate. In the latter case, Holmes wrote:

"I do not suppose that any one would say that the freedom of written speech is less protected by the First Amendment than the freedom of the spoken word. Therefore I can not understand by what authority Congress undertakes to authorize anyone to determine in advance, on the grounds before us, that certain words shall not be uttered."[268]

Holmes' advocacy of civil liberties was not limited to freedom of speech, of course, and his opinions in several other cases in the 'twenties show his equal concern for the ultimate limitation of excessive governmental restriction of individual liberties, even when such restriction is advocated in the name of social experimentation.[269] On the other hand, the "free speech" opinions provide the clearest examples of the way in which Holmes' judicial behavior was a consistent outcome of his fallibilism, his experimentalism, and his overall pragmatic theory of the law. One especially forceful expression of Holmes' view came in another dissent in the case of United States v. Schwimmer (1929), wherein a Hungarian woman was denied U.S. citizenship under the Naturalization Act because she refused, as an extreme pacifist, to swear to bear arms in defense of the Constitution. Holmes' dissent was a powerful re-statement of the idea that pragmatic experimentalism and human fallibility in making judgments implied tolerance—and so, the protection of a free and open trade of all ideas, not only the ones that are comforting. Holmes wrote:

"... if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."[270]

Finally, Holmes' argument that the freedom of thought was itself part of the means of social experimentation, and that the restriction of such a freedom through experimentation was unreasonable, reached a broad philosophical expression in the case of Gitlow v. New York (1925). Gitlow was accused of criminal anarchy for circulating a pamphlet advocating proletarian revolution, which was quite an
unpopular and dangerous idea during the "Red Scare" days of the early 'twenties. In a courageous dissent, however, Holmes wrote:

"It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result... If in the long run the beliefs expressed in proletarian dictatorship are designed to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their way."[271]

In light of this evidence, it is my position that Holmes' pragmatic embrace of experimentalism and the incorporation of social value considerations into the law implied that a general policy of judicial restraint was to be undertaken by judges. In order to bring about good social policy through the instrumentality of governmental activity, the courts were to defer as much as possible to the experimental moves of the legislatures. However, the very embrace of experimentalism entailed that no opinion or claim or directive was ever to be allowed to prevent experimentation or any of its necessary conditions. The experimental instrumentality of the law was an open-ended, future-oriented process, and so, experiments which tampered with this process itself were unreasonable. That is, such measures would not be taken by a man of "reasonable prudence." In Holmes' view, to challenge, restrict, and subvert the processes of experimentation themselves through the guise of legislative experimentalism was an unsupportable position. In other words, to restrict the free trade of ideas was to restrict the essence of social experimentation itself, and this could not be reasonably done as long as human judgments were fallible. From the recognition of the element of uncertainty in all human judgments, Peirce admonished that the road of inquiry should never be blocked, that future experimentation should never be restricted. From a similar recognition, Holmes argued in his Supreme Court dissents that the law must never cease to grow, or cease to continue to serve as a means to the attainment of social ends. In judicial practice, this meant that experiments which tended to restrict free trade in ideas were often unjustified, on an appeal to the long-term interests of society in continuing the processes of experimentation themselves. Hence, the judiciary could rightfully use its power to "put its foot down" and limit legislative experimentation when it was of such an unreasonable, self-destructive type.

Holmes' view was that the ultimate source of justification in legal matters was contained in their implications for the attainment of social preferences and ends, and since it was always possible for
any idea to be embraced by society, then all ideas should have their
chance. It was not that Holmes thought that allowing unpopular
thoughts, such as socialism, would lead to their adoption, but that
the potential success of any thought required that its open
propagation be allowed (within other broad limits, of course).[272]
Experiments by the legislatures which tampered with the experimental
process itself had to be actively opposed by the judges, even though
this temporarily violated the judge's general duty of passive
deference. Hence, any confusion about Holmes judicial activism is
merely an oversight, a failure to see Holmes' judicial behavior in
the larger philosophical context in which it was actually shaped.

With this final bit of analysis completed, it is now time to
state what I have reconstructed in this chapter as Holmes' overall
theory of law, explicitly formulated and made coherent by the
recognition of its underlying pragmatism.


That Holmes had personal connections and relationships with a
number of famous American pragmatist philosophers is
well-established. That Holmes held a pragmatic legal theory is
sometimes suggested, but has not been thoroughly demonstrated until
now. What the success of such an analysis shows, in an obvious way,
is that Holmes rightfully fits into the American pragmatic tradition,
and further, that he occupies a place of major importance. But the
significance of this argument is not primarily historical, although
an increase in historical understanding should not be undervalued.
What I take to be the primary importance of my argument is that it
allows various aspects of Holmes' legal thought to be consistently
and coherently integrated. And the result of this endeavor is the
presentation to the world of jurisprudence what appears to be Holmes' "true" theory of law, that is, his overall approach to legal matters.
With the help of this comprehensive perspective, further research on
Holmes' thought can be more directed and focused. Hopefully, this
broad analysis of Holmes' legal philosophy will serve to explain,
clarify, and organize many of the narrower, more technical areas of
his thought. Because such a totally-encompassing scholarly analysis
of all of Holmes' legal views could perhaps take a substantial part
of a lifetime itself, I have chosen to begin that final analysis by
concentrating on the most fundamental parts of Holmes' theory of law,
thus necessarily ignoring many narrower, technical issues. Still, my
research and analysis lays the foundation for future scholars, who
will at least not be forced to cover this ground again.

It is unfortunate that Holmes never wrote another book on legal
philosophy after The Common Law, though he did have a "dream" of
doing so very late in his life.[273] Perhaps if he had done so, he
would have summarized his legal theory in the same way as I have
covered its fundamental aspects here, in terms of its underlying
pragmatism. In any event, he wrote no such systematic exposition,
and so, such a work had to be created in a second-hand manner, by looking at his theoretical writings. Would Holmes have approved of my analysis of his writings and my reconstruction of his overall legal theory? As Holmes himself might have observed, the internal feelings of a person are often irrelevant (from the legal point-of-view, anyway) to an interpretive analysis of a person's writings.[274] That is, the words left behind by Holmes are the external signs by which he must be interpreted, and so, the real question should be—is mine a reasonable interpretation of Holmes' legal thought? My position is that the theory of law I will now outline is an accurate overall reconstruction of the fundamentals of Holmes' legal thought, and I will stand by this claim as one that is well-supported by the available evidence.

Looking at the bulk of Holmes' jurisprudential writings, three basic themes are continually stressed and argued by Holmes, far and above any others, along with the many implications of these themes. These three major areas of Holmesian jurisprudence are those which I have presented above: (1) the theory of the meaning of legal concepts, which supplies a method of clarification and explanation as well as a method of doing, (2) the theory of external standards, which yields a method of justification and understanding, and (3) the theory of experimentalism, which also yields a method of justification as well as a method of knowing and of doing. These three areas of thought together are what I have found to be Holmes' "theory of law." The reason that they are a theory rather than a set of them is that they are all fundamentally interrelated and individually infused with a thoroughgoing pragmatism.

As stated above, Holmes never attempted to systematize and integrate his legal views. Though this might have followed from the possibility that his legal views were not capable of such systematization, a thorough investigation of Holmes' legal thought, which has been done here, reveals that his legal thinking was remarkably consistent and discoverably systematic.[275] The key to this discovery, I maintain, is the recognition of Holmes' underlying pragmatism. Each of the three themes in Holmes' legal thought is united to the others by the same pragmatic thread. My purpose in this essay has not been simply to state Holmes' positions in each of these three major areas of his thought and then say that they are all "pragmatic." What I have attempted to do is to demonstrate that this is the case by means of a comparative analysis. Hence, in arguing or showing that Holmes' thought was remarkably similar to that of the American pragmatists, my overall claim that pragmatism unites and integrates various aspects of his legal thought into a single theory is resultantly strengthened. (Of course, I am using the word, "theory" somewhat loosely here, so that I can speak of, say, "Holmes' theory of external standards" in particular as well as "Holmes' legal theory" in general—to be technical, the former is a sub-theory of the latter overall theory.)

The first area of Holmesian thought explored above showed that Holmes held a pragmatic theory of the meaning of legal concepts. His writings portray him as openly endorsing a pragmatic approach quite
similar to those of Peirce, of James, and of Dewey—he duplicates none of them, and yet comes very close to each of them at various points in his thought. For example, Holmes is much like Peirce in his adoption of the "conditional rule" approach to conceptual meaning. Holmes also recognizes, as do the other pragmatists, that meanings are contextual and situational, and therefore become relative objects, not only to those contexts and situations, but to the general interests and purposes of groups of persons. Of course, this line of pragmatic thought is clearly evident in the writings of Peirce, James, and Dewey. The fact that Holmes refers the conditional rules of meaning to human experience, especially in the Jamesian "cash value" perspective of the "bad man," again displays the dramatic pragmatic character of this aspect of Holmes' legal thought.

Holmes' theory of meaning thus stresses the future-experiential-consequential aspects of legal concepts, thus connecting his theory of meaning to his theory of experimentalism, which stresses instrumental, means-ends reasoning and experimental justification. Further, Holmes' theory of meaning is fundamentally connected to the theory of external standards in its emphasis upon the generality or non-subjective character of conditional rules, which are impersonal and/or communal operations rather than personal ones. In this sense, Holmes is probably closest to Peirce and Dewey.

In addition, in the same way as do the pragmatists, Holmes argues that this view of the meaning of legal concepts presents a completely non-traditional perspective for the analysis and understanding of legal ideas, focusing, as it does, upon the actual legal processes that take place rather than the abstract principles of capital-L, "Law." It was a revolutionary change in human thinking in this century to attempt to conceive of basic ideas in terms of their instrumental functions related to possible human experience, rather than their metaphysical "ultimateness" or "essence," and this revolution in thought must be traced, at least partially, to the growth of pragmatism as a philosophical movement. As I have pointed out above, the pragmatic approach to legal concepts which Holmes advocated is not as much "one more legal theory" as it is a whole change in jurisprudential outlook.

In relation to this first aspect of Holmes' overall theory of law, I have also presented some of the rationale offered by Holmes, as well as the other pragmatists, in favor of this new approach. To Holmes, the pragmatic approach to legal concepts resulted primarily in the clarification of legal thought and the lessening of distortion regarding legal concepts and practices, especially in terms of the common confusion of legal with moral terminology. To Holmes, the traditional approaches to legal conceptualization and reasoning were in great need of a radical reformation. The improved understanding of "the law" and related concepts engendered by Holmes' approach would itself result in more control over the future for most persons, who will subsequently act in ways that take the realities of legal/official processes into account rather than the myths. People with an accurate understanding of "the law," attainable in Holmes'
view by a switch to the pragmatic approach, will thus be fooled fewer times, be disappointed or frustrated in their dealings with the state fewer times, and so, will be stronger, more mature citizens. Surely the benefits which would accrue from this proposal, not even counting the increase in honesty it engenders, are not unsubstantial, in Holmes' view.

The second area of Holmes' overall legal theory presented herein was his theory of external, as opposed to internal, standards of justification. As does Peirce, Holmes soundly rejects Cartesian subjectivity and substitutes something non-subjective, or intersubjective—the notion of an external standard of justification—in its place as far as the perspective of the legal system is concerned. This is a pragmatic view in the sense that the external standards which Holmes posits are those of common experience rather than abstract, metaphysical principle. What fills in the content of the external standard of "reasonable conduct" is taken from the standards of behavior of the community itself, as are often discovered (or created by) their legislative representatives, or their direct representatives, the jury. To Holmes, an honest view of legal processes showed them to be directed only to external behavior—a person could be as morally reprehensible as he or she desired, as long as this evil confined itself to the person's heart, and did not extend to outward actions. The law, then, had purely external purposes, and so, internal states of mind were legally irrelevant. Indeed, this distinction is the key to the separation of "law" and "morals" in Holmes' jurisprudence, for it takes the latter term to refer to the internal, personal, subjective motives a person has for acting. Since the law ignored such factors, the law was separate from morality in that sense. Yet, in another sense, wherein "morals" are taken to be the communal standards, values, and preferences of a group, the connections between law and morals were basic manifestations of the law's adoption of an external standard, for morals in this second sense were public, external objects. In this sense, the Holmesian connection between law and morality is a pragmatic one, and so, was reliant upon nothing fixed or dogmatic except the dominant preferences of the majority in a community.

The connections between this line of thinking, where an external standard derived from community values is given legal expression, and Holmes' theory of experimental reasoning and justification, where legal and legislative decisions are justified on the grounds of an appeal to social values, are therefore obvious and direct ones. The connections of the external standard to the theory of meaning are also evident, for such standards of, for example, "reasonable conduct," are defined in terms of a hypothetical reasonable person, representing the average prudent person in the community. Hence, the communal, non-subjective nature of external standards shows the generality and conditional form of their meanings to ordinary self-interested citizens. That is, the question of "S's liability for A" refers to a conditional construction comparing S's activities (in whatever situation S was acted) to those of the "reasonable man." The pragmatic experimental aspects of this approach are also in evidence, in the sense that, in the absence of a well-defined
community standard of conduct in a certain type of situation, the legislatures or the courts may experimentally lay down a standard which says "this type of behavior is (or is not) reasonable," looking toward the social consequences such an enactment or ruling might bring about.

Holmes' advocacy of the pragmatic external standards approach to legal justification takes him across the whole sweep of legal categories, in criminal, tort, contract, and even constitutional law. One especially interesting aspect of the external standards view is its effect upon the legal interpretation of documents and statutes. Holmes takes a line on this question that is remarkably similar to Peirce's approach to signs, with both of them holding that signs (viz., things with the form of print, speech, pictures, etc.) are simply external manifestations which point to other external things. Signs are to be interpreted, then, not with reference to internal states of consciousness (which for Peirce are externally-derived anyway), but to the externalities they pick out.

Holmes offers arguments in favor of the external standards sub-theory, also. In the first place, external standards make general rules possible, by not allowing personal idiosyncrasy to block legal liability (except in some standardized cases, which are themselves a concession to the external standard of good public policy). In the second place, the external standards doctrine helps to separate and clarify both legal and moral concepts; the benefits of this already have been outlined. Finally, the use of subjective standards of justification is taken to be an impractical venture at the present time, and so, external standards of liability are necessary. All of these reasons are ultimately pragmatic in nature, since all of them rely upon the notion of the greater means-ends usefulness to all concerned, future persons included, of one approach over another.

The third major area of Holmes' legal thought is found in his embrace of pragmatic experimentalism. This doctrine also provides a means of justification which is a forward-looking one, as well as a method of reasoning, knowing, and acting in the legal sphere. It was shown that Holmes emphasized the fundamentally pragmatic ideas of growth, change, and directed/purposive control; the natural outcome of such an orientation, of course, is the corresponding emphasis on the use of science. The instrumentality of science provided not only the forward-looking experimental method of justification, but the whole means-ends approach to reasoning and logic itself. Of the pragmatists examined here, probably Dewey and Peirce come closest to Holmes on this account. The Holmesian experimentalist approach to legal reasoning is very much like Dewey's approach to logic. The litigated case for Holmes is like a problematic situation for Dewey, and both philosophers advocate that the resolution of these "situations" be worked out in terms of a future-oriented, experience-centered concentration upon the instrumental means that will bring that resolution about. To Holmes, this becomes "the duty" of judges—to look forward in their legal decision-making to the social consequences which such rulings will bring about. In this
way, Holmes connects the theory of experimentalism to the theory of pragmatic meaning, in that the meaning of various legal conceptions to the class of judges entails a prediction of social consequences that will accrue from this-or-that official ruling. And as I pointed out above, in Holmes' view, judges must sometimes create new external standards of "reasonable conduct" to apply to certain novel or changing situations, which are akin to hypotheses to be "tested" in the future experience of the community.

Holmes also derives from his pragmatic experimentalism a critique of traditional judicial decision-making, which conceives of the judicial decision as a more-or-less mechanical operation of logical deduction from fixed and static "rules." Not only does Holmes say that this is not an accurate description of what judges do in fact, but that this traditional role ought not be followed. His reasoning, again, is clearly pragmatic. Legal rulings from the judiciary are to be made and evaluated on the strength of their future consequences in the experience of the community. Although Holmes does not advocate the complete abandonment of the method of stare decisis for judges (as many of his writings and decisions clearly show), his reason for doing so is still a measure of his pragmatic emphasis. Stare decisis is justified in Holmes' view because it often leads to good social consequences, namely, the predictability of the legal processes regarding situations of certain types. Hence, in the absence of any other pressing social reasons, traditional-looking judicial behavior is sanctioned to some extent by Holmes. In this way, judges are enjoined by Holmes to connect the law to "higher" things, to social values and social interests. Looking at Holmes' own judicial outlook in this context is a good example of the way that Holmes' judicial opinions could tend to distort his true theory of the law, for his decisions are full of the traditional-looking appeals to precedent as a "correct" means of legal justification. The proper interpretation of Holmes' behavior as a judge, however, can only be garnered from his analytical, purely jurisprudential writings. To emphasize Holmes' decisions over his philosophical work could easily lead to a distortion of Holmes' actual position, for example, that Holmes stood squarely in favor of traditional methods of judicial decision-making. But nothing was further from the truth, and appearances can often be deceiving when all of the facts have not been explored.

Some of the implications of Holmes' adoption of experimentalism show aspects of his legal thought that are also clearly pragmatic in character. To show this, I have compared Holmes' views to Peirce's in their mutual emphasis upon generalities and their emphasis upon fallibilism. To Holmes, the former theme showed the inter-connectedness of lawyer-based and judge-based predictions, thus establishing further connections between the theory of meaning and the theory of experimentalism. Moreover, the emphasis upon generalities showed how legal classifications of various facts were possible at all. This notion, in turn, is connected to the idea that legal rules and categories are general, impersonal things, in other words, they have an external, non-subjective character. The latter theme—the Holmesian/Peircean emphasis upon fallibilism or
uncertainty in human judgment resulted for both men in the advocacy of tolerance and openness regarding the interplay of ideas. To Peirce, the way of inquiry should never be blocked. To Holmes, the freedom of social experimentation ought to be allowed to as great a degree as possible. The upshot for Holmes in this regard was that judges should restrain themselves to the greatest possible degree from judicial activism. Hence, the fallibilism notion is also related to the idea that subjective standards are to be avoided as justifications for legal decisions—when judges legislated, they were apt to inject their own personal tendencies into their decisions. However, Holmes' adoption of the fallibilist doctrine actually led him, in one special class of cases, to the opposite position—that of judicial activism. The class of cases I refer to are, of course, those involving basic civil liberties, especially the freedom of speech. Upon my analysis, Holmes' behavior in those cases, actively upholding such freedoms within very broad limits, is a clear manifestation of his pragmatic embrace of experimentalism. Certain experiments, namely, those which threatened the very processes of experimentation themselves, were to be limited. These could never be, in Holmes' eyes, in the best social interest, for they were restrictions upon the very means by which social interests in general were to be met—by social experiment. To Holmes, freedom of ideas was the essence of the experimental process itself, and so, had to be protected from short-sighted, unreasonable experiments which threatened it, even if this meant the assumption of a distasteful judicial role—that of judicial activism. Holmes' behavior as a judge, especially in light of these often puzzling and seemingly inconsistent opinions, is easily explainable upon my analysis, and is seen to be an obvious outcome of Holmes' theory of pragmatic experimentalism.

In this way, all three aspects of Holmes' overall theory of law are intertwined and interrelated. The underlying connection among all three themes, however, is their pragmatic stress. Hence, it is through this pragmatic recognition that various elements in Holmes' legal thought are integrated and systematized. To ignore the pragmatic essence, as I have claimed several times above, is to be unaware of the fact that Holmes put forth a coherent and comprehensive theory of law. Previous to this study, it appeared that Holmes had simply offered a series of cogent observations on various areas of legal philosophy. Now it can be known that these various thoughts were theoretically linked, and that is the most important finding of the research and analysis that has gone into this study.

For the purpose of future reference in this essay, let me identify the principal doctrines of Holmes' theory of law in the form of an outline. The interconnectedness of many of the various parts of the theory are obvious from such an outline, as is the pragmatic thread underlying and integrating the whole. Henceforth, I will picture "Holmes' Theory of Law" in terms of the following system of ideas, which represents my reconstruction of the fundamentals of his legal thought:

A. The meaning of legal concepts is best approached and understood in terms of the functional or operational aspects of those concepts.
   1. Meanings of legal concepts refer to general conditional statements which describe certain operations or events which possibly affect the future experience of human beings.
      a. meanings are conditional, future-oriented, empirical statements.
      b. meanings are contextual, general, and communally-derived.
      c. meanings refer to possible or actual "cash value" import.

B. The meanings of legal concepts are relative in various ways.
   1. Legal meanings are relative to different contexts and situations.
      a. there are no "absolute" or "fixed" meanings of legal concepts.
      b. legal meanings change and evolve through time.
   2. Legal meanings are relative to different general purposes and interests, in relation to the legal system.
      a. general purposes or interests are those shared by some group.
      b. general purposes or interests yield various perspectives from which meanings are determined.
      c. some major perspectives for legal concepts are:
         1. "the good man"—one whose social behavior is such because it is thought that such behavior is morally correct.
         2. "the bad man"—one whose social behavior is such because of the threat of official interference or coercion.
         3. "the legal professional/advocate"—one who wishes to have successful dealings with the legal system (viz., one who is interested professionally in using the processes of the system effectively).
         4. "the judge/official decision-maker"—one whose proper interest is in settling disputes and promoting good social policy (e.g., by handing down rulings on litigated cases, by legislative experimentation, etc.).
      d. various groups engage in different kinds of conditional predictions, in relation to the determination of legal meanings.
         1. non-judges generally predict the behavior of courts.
         2. judges predict the consequences of their rulings for the community.
         3. the predictions of non-judges and judges are interrelated in a complex way.

C. Approaching legal concepts functionally and operationally (i.e., pragmatically) rather than formally (i.e., traditionally) yields a number of benefits.
   1. A functionalist jurisprudence clears up confusion about legal concepts.
      a. the legal versus the moral implications of concepts are clarified in terms of actual official processes.
1. there is greater certainty and/or predictability of legal processes by ordinary persons.
b. legal concepts are not understood as fixed objects, discoverable through metaphysical intuition, but as familiar realities or ordinary experience.
1. many pedantic legal questions can be dissolved.
2. legal theorizing can be utilized to make conceptions functional, useful, and beneficial in light of human purposes and interests.

2. A functionalist jurisprudence increases the self-conscious awareness and/or honesty of those who use it.

ARTICLE II: Theory of External Standards.

A. The idea that legal claims can be justified within a functional legal system by means of subjective appeals (viz., feelings of certainty, strong intuitions, etc.) is rejected.

B. The justification of legal claims within a functional legal system must be accomplished by means of impersonal, non-subjective, externalized standards.

1. The purposes of a legal system refer to external conduct alone; internal motives and personal feelings are, in themselves, legally irrelevant.
   a. in so far as "morals" connotes a private, inner motivation and/or feeling, the domain of the "legal" is separate from that of the "moral."
   b. legal concepts (e.g., "legal right," "legal duty," etc.) lose their moral connotations.
   c. whenever private, internal states of a person's consciousness are legally relevant, it is only in the sense that they act as external signs that some external conduct or harm has occurred, or because the requirement of voluntariness as a part of liability is a good public (i.e., external) policy.
   d. the analysis of the legal concept of liability in criminal, tort, and contract law depends upon the idea that the standards by which liability is imposed are not private, but are objective or external to the individual person.
   e. the interpretation of documents by courts is done by reference to what the words used, as external signs, would mean to a hypothetical normal speaker of the language, and not by reference to the subjective intentions of the speaker of those words.

2. External standards are inter-subjective and/or hypothetical objects, with their content derived from the common experiences of the community.
   a. what is considered to be "reasonable conduct" is defined by the community's standard of reasonability in a certain type of situation.
      1. the "reasonable man" is a hypothetical construct representing the communal standard of ordinary prudent behavior in a type of situation.
      2. external standards of internal conduct (e.g., reasonable provocation) are sometimes constructed from the
same communal standard of the "reasonable man."

b. common standards of conduct can be set by legislatures, by juries, or by experienced judges themselves.

1. in some cases, a new standard of conduct can be put forth, as an experimental enactment or ruling.

c. in so far as "morals" concerns the public, shared values and interests of a community, the domain of legal matters is vitally linked to that of morality.

C. The adoption of external standards in legal matters is beneficial.

1. The use of external standards makes generalized rulings possible.
   a. most personal excuses are not allowed as escapes from legal liability, since a personal excuse could always be claimed in any case.
   b. generalized rulings result in greater legal predictability and certainty.

2. The use of external standards helps clarify the distinctions between and the connections between the law and morality.
   a. certain legal concepts, such as intent, malice, and duty can be clarified, better understood, and used more efficiently.

3. The use of external standards is a practical necessity.
   a. it is virtually impossible for any judicial or quasi-judicial body to settle disputes by attempting to gauge the parties' actual subjective motives, feelings, intentions, etc.

ARTICLE III: Theory of Pragmatic Experimentalism.

A. Legal concepts, legal practices, and legal systems are in a continual process of change and growth.

B. Much of the evolution and change in the legal domain is the result of purposive, human-directed control of certain means to reach social ends.

1. The use of experimentalist, means-ends reasoning is fundamental in the process of justifying legislative and judicial activity.
   a. the instrumental view of legal processes sees them as means to the achievement of social ends.
   b. litigated cases can be thought of as "problem situations" which demand pragmatic solutions.
   c. the justification of legal activity is forward-looking, to the consequences of that activity for the community.

1. judges and legislators ought to use considerations of what is good social policy as the ultimate justification for their official conduct.

2. Traditional "deductive" legal reasoning ought to be rejected.
   a. judges do not in fact mechanically decide cases by consulting pre-existing rules, but attempt to balance the reasonability of competing claims by reference to the future consequences of a decision that will be taken by the community as a "ruling" (viz., a reliable sign that a certain type of situation is treated in a certain type of way by the
public force, other things being equal).

b. judicial rulings can still be used by the community in traditional ways, that is, as guides to follow for the structuring of their future conduct.

1. judicial rulings become prima facie signs of judicial behavior regarding certain types of situations, and so, form part of the basis for predicting future judicial behavior.

c. judges ought not decide cases using a backward-looking approach, but on the basis of the conceivable social consequences of their rulings.

1. in some cases, the social consequences of appearing to be "mechanically applying pre-existing rules" (by the judges) may itself justify such a practice.

d. for the judiciary, the meaning of what is "legal" (as well as the meaning of other related concepts) involves a prediction of the social consequences of its decisions.

C. The use of generalities and types is fundamental to an experimentalist jurisprudence.

1. "Legal rules" are descriptions of general judicial and legislative tendencies to react towards a general type of situation.

a. from such generality, the prediction of official behavior is possible.

2. Generalities allow the categorization of factual situations into legal classes.

a. from such generality, the prediction of the official treatment of legal claims is possible.

3. Legal generalities are somewhat vague, non-certain, non-dogmatic, probabilistic constructions.

a. there is a distinct element of uncertainty or imprecision involved in the use of such constructions.

D. An essential characteristic of all legal judgments, both official and non-official, is their fallibility, or defeasibility.

1. When legal judgments are justified by an appeal to social values and ends, and when such values and ends are continually changing, then legal judgments must never be considered as "fixed," but as objects that are susceptible to directed change and revision.

a. the activity of social experimentation by legislatures should generally not be blocked by the judiciary.

1. judicial activism or legislating is to be avoided.

2. judicial self-restraint, impartiality, and tolerance are to be promoted.

b. certain kinds of social experimentation are unreasonable in that they block the processes of further experimentation themselves.

1. in such cases (especially those involving the free trade of ideas), judicial activism may be warranted to preserve the processes of open social experimentation.

Now that the essentials of Holmes' pragmatic legal theory have been discovered, assembled, and systematized, the essay will proceed to
the critical analysis of this theory, both in terms of some "standard" critiques and objections which have appeared in the literature, and in terms of some original critiques. After such an examination, an overall evaluation of Holmes' Theory of Law will be possible.
1) The most definitive historical studies on the existence and nature of the Metaphysical Club have been done by Max H. Fisch. See his articles, "Justice Holmes, The Prediction Theory of Law, and Pragmatism," 39 Journal of Philosophy 85 (1942), and "Was There a Metaphysical Club in Cambridge?" in E. Moore and R. Robin, eds., Studies in the Philosophy of Charles Sanders Peirce (Amherst, Massachusetts: University of Massachusetts Press, 1964). In addition, Philip P. Wiener's book, Evolution and the Founders of Pragmatism (Cambridge, Massachusetts: Harvard University Press, 1949), is a noteworthy historical examination of the intellectual contributions of members of the Metaphysical Club. Wiener admits at one point, however, that more research is warranted to verify the existence and composition of the Metaphysical Club, as his own efforts were somewhat inconclusive (p. 25). Fisch appears to have done that additional research, and has dedicated the second of the articles mentioned above to Wiener "as one long footnote to his book" (see "Was There a Metaphysical Club in Cambridge?", p. 29, n.2).

2) See Fisch, "Was There a Metaphysical Club in Cambridge?", op. cit., especially pp. 10-11, wherein Holmes is quoted as admitting that he was present at some of the Club's meetings, and p. 20, wherein Fisch speculates that some of the meetings of the Club in the Spring of 1872 were probably devoted to discussions of what is known as Holmes' "prediction theory" of law. Compare with Wiener, op. cit., especially chapters 2 and 8.


4) Ibid., 5.12-.13.


7) Ibid.


10) For example, Holmes was very critical of Peirce's *Chance, Love and Logic*, the first published collection of Peirce's essays. In 1923, Holmes wrote of this book: "I feel Peirce's originality and depth—but he does not move me greatly—I do not sympathize with his pontifical self-satisfaction.", see Howe, ed., *Holmes-Pollock Letters*, p. 122. On the other hand, Holmes had quite a favorable reaction (though a somewhat inarticulate one) to John Dewey's *Experience and Nature*, which he read (several times) in the late 1920's, see Holmes' letters to John C.H. Wu in Harry C. Shriver, ed., *Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers* (New York: Central Book Co., 1936), especially pages 190-98. See also Holmes' mention of Dewey's book to Pollock in Howe, ed., *Holmes-Pollock Letters*, pp. 242, 272, and 287.


13) In "Justice Holmes, the Prediction Theory of Law, and Pragmatism," Fisch observes: "Holmes's general outlook was closer to Peirce's than to James's, and many phrases, including his formula for truth, read like echoes of Peirce's conversation—or was it the other way around?", p. 96, n.27.


15) Ibid., 4.12.

16) Ibid., 5.8. Peirce was not at all clear about the exact boundaries of the set of intellectual concepts, as opposed to non-intellectual ones. However, it should be sufficient to say that the pragmatic approach is to apply to any discipline in which truth claims have significance. On this point, see Thayer, op. cit., pp. 86-101, passim.


18) Ibid. Emphasis in original.

19) William James, *Pragmatism, A New Name for Some Old Ways of
Thinking (Cambridge, Massachusetts: Harvard University Press, 1978), p. 29. (Hereinafter cited as Pragmatism.)


22) Thayer, op. cit., p. 429.


24) Although James gives Peirce the credit for introducing the term "pragmatism" into philosophy, he ignored Peirce's own explanation of the origins of the term. To Peirce, the term "pragmatism" comes from a translation of Kant's pragmatisch, which does not mean "practical," but rather, "empirically conditioned" or "experimental"; see Peirce, CP, 4.12. James, on the other hand, stated that the term was derived from the Greek word meaning "action," "from which our words 'practice' and 'practical' come.", James, Pragmatism, p. 28.


26) For example, see Ibid., p. 278.


29) Ibid., 5.504.

30) For example, Peirce wrote that pragmatism is a "... method of reflexion which is guided by constantly holding in view its purpose and the purpose of the ideas it analyzes, whether these ends be of the nature and uses of action or of thought.", CP, 5.13, n.1. It was also central to James' philosophy that the human mind was conceived as essentially a teleological mechanism. By this, he meant that "... the conceiving or theorizing faculty—the mind's middle department functions exclusively for the sake of ends ... It is a transformer of the world of our impressions into a totally different world,—the world of our conception; and the transformation is effected in the interests of our volitional nature, and for no other purpose.", in The Will to Believe and Other Essays in Popular Philosophy (New York: Longmans, Green and Company, 1897), p. 117. Emphasis in original. In Meaning and Action, H.S. Thayer states that "Peirce is not a champion of a method for finding the meaning of a concept. His emphasis is less on the meaning than upon the recognizable ways of using certain kinds of terms in certain kinds of situations.", p. 103. Emphasis in original.


33) Ibid., pp. 104-5.

34) Peirce wrote of this notion: "Whatever is wholly incomparable with anything else is wholly inexplicable, because explanation consists in bringing things under general laws or under natural classes.", CP, 5.289. See also 5.448n: "... two signs whose meanings are for all possible purposes equivalent are absolutely equivalent."

35) On this point, James wrote: "Kinds, and sameness of kind—what colossally useful denkmittel for finding our way among the many! The manyness might conceivably have been absolute. Experiences might have all been singulars, no one of them occurring twice. In such a world logic would have had no application; for kind and sameness of kind are logic's only instruments. Once we know that whatever is of a kind is also of that kind's kind, we can travel through the universe as if with seven-league boots. Brutes surely never use these abstractions, and civilized men use them in most various amounts.", *Pragmatism*, p. 88. Emphasis in original.


38) Dewey's theory of inquiry apparently emphasizes the perspective of the community of problem-solvers, whose aim is transforming an indeterminate or problematic situation into a determinate one. See, e.g., *Logic: The Theory of Inquiry*, literally throughout.


40) Ibid.

41) Ibid., 5.427.

42) Thayer, op. cit., p. 424.


44) Ibid., pp. 260-1. Emphasis in original.


48) See supra, notes 6, 7.


50) Ibid. Emphasis added.

51) Howe, ed., Holmes-Pollock Letters, vol. II, p. 307. Holmes used almost exactly the same words in one of his early Supreme Court opinions to describe "the law": "...a statement of the circumstances in which the public force will be brought to bear upon men through the courts.," American Banana Co. v. United Fruit Co. 213 U.S. 347 (1909), at 356.

52) Oliver Wendell Holmes, Jr., "The Path of the Law," in Julius J. Marke, ed., The Holmes Reader (New York: Oceana, 1955), p. 59. (Hereinafter cited as HR.) Holmes took a similarly pragmatic/contextual view of the meanings of concepts in his court opinions. For example, in Towne v. Eisner 245 U.S. 418 (1918), Holmes wrote: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.", at 425; in Trimble v. Seattle 231 U.S. 683 (1914), Holmes observed that: "Words express whatever meaning convention has attached to them.", at 688; and with regard to the concept of "due process," Holmes wrote in Moyer v. Peabody 212 U.S. 78 (1908): "... what is due process of law depends on circumstances. It varies with the subject matter and the necessities of the situation.", at 84.


54) Ibid.

55) Ibid., p. 62.

56) Ibid.

57) Ibid., p. 63. Holmes apparently never abandoned this description of "the law." See, e.g. supra note 51.


59) While on the Supreme Court of the United States, Holmes expressed this thought quite frankly when he wrote: "The foundation of jurisdiction is physical power.", in Ex Parte Indiana Transportation Company 244 U.S. 456 (1917), at 457. See also Holmes' article, "Natural Law," in HR, p. 118, wherein Holmes wrote: "The most fundamental of the supposed pre-existing rights—the right to life—is sacrificed without a scruple not only in war, but whenever the interest of society, that is, of the predominant power in the community, is thought to demand it.", p. 121.
60) Holmes, "Natural Law," in HR, p. 120.
62) Ibid., p. 65.
63) Ibid., p. 64.
65) James, Pragmatism, p. 30.
68) Holmes, "The Path of the Law," in HR, p. 62. Holmes made similar observations in his private correspondence as well as in his judicial opinions. In a letter to Pollock, he wrote: "I think our morally tinted words have caused a great deal of confused thinking about rights." Howe, ed., Holmes-Pollock Letters, vol. II, pp. 212-3. Holmes stated in the case of Jackman v. Rosenbaum Company 260 U.S. 22 (1922), that concepts such as "right" were "a constant solicitation to fallacy.", at 31. In American Bank and Trust Company v. Federal Bank 256 U.S. 350 (1921), Holmes wrote that "... the word 'right' is one of the most deceptive of pitfalls; it is so easy to step from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified.", at 358.
70) On this point, Rene Descartes wrote in his "Fifth Meditation" the following: "But after having recognized that there is a God, and having recognized at the same time that all things are dependent upon him and that he is not a deceiver, I can infer as a consequence that everything which I conceive clearly and distinctly is necessarily true.", Meditations on First Philosophy (New York: Bobbs-Merrill Company, 1960), p. 67.
71) Peirce, CP, 5.264. Dewey also addresses "... the Cartesian attempt to find the locus of absolute certainty within the knowing mind itself...", The Quest for Certainty, p. 61.
72) In contrast, Dewey wrote of the pragmatic method: "Pragmatism ... does not insist upon antecedent phenomena but upon consequent phenomena; not upon the preceedents but upon the possibilities of action. And this change in point of view is almost revolutionary in its consequences.", in "The Development of American Pragmatism," in Philosophy and Civilization, p. 24.
73) Peirce, CP, 5.264.
74) Ibid.
75) Ibid., 5.384.
76) Ibid., 5.311. Emphasis added.
77) Ibid., 5.553 and 5.554.
78) Ibid., 5.384.
80) To which Dewey adds, "—something best obtained by withdrawing from the real world and cultivating fantasies," The Quest for Certainty, p. 232.
81) Peirce, CP, 5.384.
82) At ibid., 5.565, Peirce wrote: "Truth is that concordance of an abstract statement with the ideal limit towards which endless investigation would tend to bring scientific belief..."
83) Ibid.
84) Thayer, op. cit., p. 123.
85) For a famous example of this misinterpretation of Dewey, see Bertrand Russell's History of Western Philosophy (New York: Simon and Schuster, 1943), wherein "satisfactory consequences" are diagnosed as the desired effects of an individual person's acts, p. 825.
89) Thayer, op. cit., p. 203.
91) Ibid., p. 44. Emphasis added.
92) Ibid., p. 162.
94) Peirce, CP, 5.385.

95) Ibid., 1.615. Emphasis added.


97) Thayer, op. cit., p. 152.

98) James, Pragmatism, p. 99.


102) For example, in a recent article, James D. Miller makes this common mistake about Holmes' use of "moral" when he writes: "Holmes' theory of external legal standards is ambiguous on the relation of law to morality. Giving moral standards only private application while giving legal standards only public application makes moral standards and legal standards mutually exclusive." 84 Yale Law Journal 1123 (1975), pp. 1132-3. However, upon dis-ambiguation, it is clear that Holmes did not do this.

103) See, e.g., supra notes 68, 69.

104) The association of "morality" with internal conduct is probably seen most clearly in Kant's moral philosophy. See, e.g., Kant's discussion of a "good will" in Groundwork of the Metaphysics of Morals, (London: Hutchinson University Library, 1948), esp. pp. 61-2.

105) For another interesting discussion of the idea that the realm of law prescribes external conduct alone, while ethics deals with internal conduct, see Herman Kantorowicz, The Definition of Law (New York: Octagon, 1980), esp. pp. 43-6.

106) Holmes, "The Path of the Law," in HR, p. 61. Holmes also wrote that: "Our system of morality is a body of imperfect social generalizations expressed in terms of emotion.", in "Ideals and Doubts," in HR, p. 104.


110) Ibid., Chapter One, *passim*.

111) Ibid., p. 9.

112) Ibid.

113) Ibid., p. 33.

114) Ibid., p. 35. Emphasis added.

115) Ibid., p. 46.


117) Ibid., p. 37. The "cash value" pragmatism of such a statement is clear.

118) Ibid., p. 36.

119) Ibid., pp. 41-3.

120) Ibid., p. 42. Emphasis added.

121) Ibid., p. 61. See also Howe, Oliver Wendell Holmes, *The Proving Years: 1870-1882*, pp. 177-83, for a discussion of the revolutionary character of Holmes' treatment of the *mens rea* issue.


123) Ibid., pp. 61-2.

124) Ibid., p. 47. Emphasis added to highlight Holmes' use of the quasi-Percean construction, viz., "would be." Compare, e.g., with Peirce, who writes: "A conditional proposition,—say 'If A, then B' is equivalent to saying that 'Any state of things in which A should be true, would (within limits) be a state of things in which B is true.' It is therefore essentially an assertion of a general nature, the statement of a 'would be'.", *CP*, 8.380. Emphasis in original.


126) Ibid., p. 48.

127) Ibid., pp. 51-2.

128) Ibid., p. 52.

129) Ibid., p. 62.

130) Ibid., pp. 56, 62.

131) Holmes writes in the chapter of *CL* dealing with criminal law (viz., Chapter Two) that "All acts are indifferent *per se*.", p. 61; emphasis in original. Holmes takes exactly the same line in the
chapters on torts (viz., Chapters Three and Four), where he repeats that "... an act, although always importing intent, is per se indifferent to the law.", p. 105; emphasis in original.

132) See supra, note 115.

133) Howe, Oliver Wendell Holmes, The Proving Years: 1870-1882, p. 188.

134) Holmes, CL, p. 67.

135) Ibid.

136) Ibid., pp. 76-7.


138) Ibid., p. 129.

139) Ibid., p. 234.

140) Ibid., pp. 234-5.


142) Ibid., p. 236.

143) Ibid.

144) On this point, W. Friedmann writes: "To the extent that strikes, shortages of materials, or national or international policies affect the ability to perform—and they do in an increasing extent—contract is no longer primarily directed towards performance. It is essentially the basis on which the court determines how risk of non-performance shall be distributed.", in "Changing Functions of Contract in the Common Law," 9 University of Toronto Law Journal 14 (1951), pp. 39-40.


147) See, e.g., Peirce, CP, 5.249 and 5.251.


149) Holmes, CL, chapters 8 and 9, passim.


151) Miller, op. cit., p. 1130.
152) See supra, note 118.
153) Holmes, CL, p. 86.
154) See supra, note 94.

156) Examples of this line of reasoning in Holmes' judicial decisions are simply too numerous to list. Holmes' dissents in Lochner v. New York 198 U.S. 45 (1905), Coppage v. Kansas 236 U.S. 1 (1914), Adkins v. Children's Hospital 261 U.S. 525 (1922), and Bartels v. Iowa 262 U.S. 404 (1922), provide a good sample of his thought, however.

157) Holmes, CL, p. 98.
158) Ibid., p. 99.
160) Ibid., at 179-80.
161) 149 Mass. 284 (1889), at 289.
162) 170 Mass. 18 (1897), at 20. For a sample of other cases wherein Holmes appeals to the internal/external standards idea, see Heard v. Sturges 146 Mass. 158 (1888), Hanson v. Globe Newspaper Company 159 Mass. 293 (1893), and Clemens v. Walton 173 Mass. 286 (1899).


164) 198 U.S. 45 (1905), at 75.
165) Ibid., at 76. Emphasis added. For other examples of similar reasoning, see Holmes' dissents as listed in note 156 supra.

166) Peirce, CP, 7.267, n.8.

167) Ibid., 5.461. Peirce writes: "... a reasoned conclusion must refer to deliberate conduct, which is controllable conduct. But the only controllable conduct is Future conduct."

169) Ibid., 5.366.
171) Peirce, CP, 5.432-.433. Also see Thayer, op. cit., p. 125.
172) James, Pragmatism, p. 123. Emphasis in original.
173) Ibid., p. 124.
177) Ibid., pp. 32-3. Compare with James, supra note 172.
178) Holmes, "Law in Science and Science in Law," in HR, p. 124. Holmes held a similar view of Constitutional law. For example, in Gompers v. U.S. 233 U.S. 604 (1913), Holmes wrote: "... the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.", at 610.
182) J. Smith, Purpose and Thought, p. 117.
183) See supra note 37, and surrounding discussion.
185) Ibid., 5.170. Emphasis in original.
186) Ibid., 5.171.
187) Ibid., 5.196.
188) Ibid., 5.197.
190) Thayer, op. cit., p. 169.
191) James, Pragmatism, p. 97.
192) Ibid., p. 112-3.
193) Ibid., p. 102. Emphasis in original.
195) See sections C.1, .3, and .6.
197) See supra note 33.
198) Dewey, Logic: The Theory of Inquiry, pp. 110-1. This process is virtually equivalent to Peirce's "abduction."
200) Ibid.
202) See supra, notes 92, 93.
204) See, e.g., ibid., p. 77: "Everywhere the basis of principle is tradition, to such an extent that we even are in danger of making the role of history more important than it is." See also pp. 78-9.
205) Holmes, "Law in Science and Science in Law," in HR, p. 124-5. Compare with Holmes' 1895 speech, "Learning and Science," wherein Holmes asserted that "... it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity." Reprinted in HR, pp. 106-7.
208) Holmes, CL, p. 31.
209) Ibid., p. 32.
210) Ibid. Furthermore, Holmes pointed to the same issue in one of his most famous Massachusetts Supreme Court dissents. In Vegelahn v. Gunter 167 Mass. 92 (1896), Holmes wrote: "The true grounds of decision are considerations of policy and social advantage, and it is vain to suppose that solutions can be attained merely by logic and the
general propositions of law which nobody disputes. Propositions as to policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof... In early stages of law, at least, they are generally acted on rather as inarticulate instincts than as definite ideas for which a rational defense is ready.”, at 106.


212) In CL, Holmes even mentions by name Chief Justice Shaw, a judge whom Holmes commends for his "... understanding of the grounds of public policy to which all laws must ultimately be referred.", p. 85.

213) Holmes, "The Path of the Law," in HR, p. 73, 79.

214) See, e.g., Lon Fuller, The Law in Quest of Itself (Boston: Beacon Press, 1966), pp. 60-1, wherein Fuller implies that such positivistic qualities infect legal realist thinking as well.

215) See sections C.7 and .8.


219) See supra, note 57.


221) Ibid., pp. 69-70.

222) Ibid., pp. 70-1.

223) Ibid., p. 71. In another essay, Holmes wrote: "... the real justification for a rule of law, if there be one, is that it helps to bring about a social end which we desire ...", in "Law in Science and Science in Law," in HR, pp. 143-4.

224) For an interesting outline of this idea, see John Dewey, "Logical Theory in Law," 10 Cornell Law Quarterly 17 (1925).

225) In matters of "reasonable policy," Holmes urged that no single, fixed standard should be used, and so, courts should hesitate to say that certain actions or policies are unreasonable. In Schlesinger v. Wisconsin 270 U.S. 230 (1926), Holmes wrote in a dissent: "... when you realize that you are dealing with a matter of degree you must realize that reasonable men may differ widely as to the place where the line should fall.", at 241.
226) Whether Holmes' overall theory of law can be reconciled with all of his writings on the Supreme Courts of Massachusetts and the United States is a complex question, primarily because such official writings are often combinations of the views of various judges. See Chapter I, section A.4 for more detail. It would not be a fruitful task to search for a consistency between Holmes' theory and such opinions, when it cannot always be known exactly which portions of those official decisions were formulated by Holmes himself.

227) Southern Pacific Co. v. Jensen 244 U.S. 205 (1917), at 221.

228) On this point, see, e.g., Brody, op. cit., esp. p. 16.

229) See, e.g., Felix Frankfurter, Mr. Justice Holmes and the Supreme Court (Cambridge, Massachusetts: Harvard University Press, 1961), passim.


233) Bartels v. Iowa 262 U.S. 404 (1923), at 412. Compare also Holmes' opinion expressed in Central Lumber Co. v. South Dakota 226 U.S. 157 (1912) with his personal economic views, which he described in a dissent in Dr. Miles Medical Co. v. Park & Sons Co. 220 U.S. 373 (1911).

234) Truax v. Corrigan 257 U.S. 312 (1921), at 344.


239) See supra, note 39.

240) Thayer, op. cit., p. 91.


243) See, e.g., note 94 supra.

244) See, e.g., Peirce, CP, 6.344.


246) Ibid., p. 80.


248) Ibid.

249) Ibid., 1.141. The self-referential problems which this claim raises are interesting, but beyond the scope of this discussion.

250) Ibid., 5.575.

251) Ibid., 1.135.


253) Holmes, CL, p. 32.


255) Ibid., p. 120.

256) Ibid., p. 121.

257) Holmes, "Ideals and Doubts," in HR, p. 105.

258) See supra, note 238.


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261) For an enlightening discussion of this debate, see David H. Burton, Oliver Wendell Holmes, Jr. (Boston: Twayne Publishers, 1980), esp. chapter 7.

262) 249 U.S. 47 (1918), at 52. For similar reasoning by Holmes, see also Frohwerk v. U.S. 249 U.S. 204 (1918) and Debs v. U.S. 249 U.S. 211 (1918).


264) 250 U.S. 616 (1919).

265) Ibid., at 624. Emphasis added.

266) 255 U.S. 407 (1920).

267) 258 U.S. 138 (1921).

268) Ibid., at 140.

269) See, e.g., Holmes' opinion in Silverthorne Lumber Company v. United States 251 U.S. 385 (1920) and his dissent in Olmstead v. United States 277 U.S. 438 (1928), at 469. In both cases, Holmes argued against restrictions upon liberties derived from the Fourth and Fifth Amendments, viz., freedom from unreasonable search and seizure, freedom from self-incrimination, and freedom of privacy.

270) 279 U.S. 644 (1929), at 654-5.

271) 268 U.S. 652 (1925), at 672.

272) For a concurrent opinion, see Yosal Rogat, op. cit., p. 255. In another U.S. Supreme Court case, Holmes wrote: "No falsehood is thought about or even known by all the world; no conduct is hated by all.", Peck v. Tribune Co. 214 U.S. 185 (1909), at 190.

273) See supra, note 51.


275) While on the Supreme Court, Mr. Justice Brandeis said of Holmes' judicial decision-making consistency: "It's all been thought out. His work is a chemical composition and not a conglomerate. He has said many things in their ultimate terms, and as new instances arise they just fit in.", quoted in Alexander M. Bickel, ed., The Unpublished Opinions of Mr. Justice Brandeis (Cambridge, Massachusetts: Harvard University Press, 1957), p. 231.
CHAPTER THREE

The Evaluation of Holmes' Legal Thought

A. Introduction.

What has often been called "Holmes' Theory of Law" in the literature of jurisprudence has continually been a reference only to selected aspects of Holmes' overall legal thought, which has been assembled and systematized in this essay for the first time. Consequently, the standing critiques of "Holmes' theory" suffer from a distinctive short-sightedness.\[1\] However, many of the criticisms that have been levelled against Holmes still carry a considerable impact, even within such a relatively narrow range. For that reason, these "standing objections" need to be addressed as a vital part of the preliminary evaluation of Holmes' overall theory. On the other hand, since it has been found that Holmes did put forth an overall pragmatic theory of law, many of the narrower criticisms of Holmes' views can be avoided in the process of showing that the particular Holmesian view being criticized is only part of a larger whole, and that such views are more strongly supported in reference to that larger theoretical context. Of the criticisms that have been made of "Holmes' theory," then, many are now answerable in light of the present reconstruction of Holmes' thought—but some also continue to raise definite problems, despite the new systematization of Holmes' legal thought. In addition to an examination of these various questions, I am prepared to critique Holmes' overall theory from several new angles myself, so that a comprehensive, overall evaluative look at Holmes' Theory of Law can be attempted. I take it to be a major result of this paper that Holmes' theory of law will be shown to be a much stronger and more formidable approach to the law than has been previously thought.

The order I will follow in this chapter, then, will be the following: first, I will examine several of the most repeated objections to several of the aspects and/or implications of Holmes' legal thought, and show how these are either misguided or at least presently answerable from within the newly-created context of an overall pragmatic view of Holmes' legal philosophy (in this task, I
will examine what seem to be major objections first, followed by relatively minor ones); second, I will examine two other sets of objections to Holmes' legal thought which also have been raised in the literature, and show how these are more difficult criticisms for Holmes' theory to deal with (although Holmes will be seen to have responses to these criticisms also); and third, I will offer a new set of criticisms and analytical observations concerning Holmes' overall theory, as it has been reformulated in Chapter Two. All of this will lead to a final evaluation—both good points and bad points—of what has been reconstructed herein as "Holmes' Theory of Law."

A few words must be said about the style of my presentation in this chapter. Since Holmes did not personally respond to most of the objections and critical comments about his legal thought which I am about to raise, I will be in the somewhat awkward position of having to speak for Holmes, in light of the legal theory I have argued was his. It is important that the reader be aware of this fact—that I am re-creating Holmes as a hypothetical person, responding to the criticisms from the context of the legal theory outlined in Chapter Two. Hopefully, this admonition will minimize any confusion that might arise along the way.

B. The Major Standing Objections to Holmes' Legal Thought Which Are Now Properly Answerable.

1. Holmes' "Predictive" Approach to the Law is Too Narrow: The Objection.

Of all the criticisms that have been raised against any of the aspects of Holmes' legal thought, probably the most predominant objection has been that the prediction of judicial behavior which Holmes posits as the "meaning of the concept of 'the law'" cannot be applied in the judiciary's own situational context. One of the first commentators to make this observation was John Dickenson, who wrote in 1931:

"The view that the law is a prophecy of what will be decided has the weakness of emphasizing exclusively the outside spectator's point of view ... and consequently of ignoring the point of view of the judge ... He [the judge] is not interested in predicting what he himself is about to do. The standpoint of prediction is that of the observer; the judge's attitude toward the rule is that it is a guide or mandate for action."[2]
H.L.A. Hart endorsed this criticism in 1961, when he wrote that the predictive approach to the law (presumably derived from Holmes):

"... can at best apply to the statements of law ventured by private individuals or their advisers. It cannot apply to the courts' own statement of a legal rule."[3]

Similarly, in Martin P. Golding's treatment (1975) of Holmes' "Prediction Theory," the objection is repeated:

"... in adopting the perspective of the potential litigant, it [Holmes' prediction theory] leaves out the perspective of the judge. The judge is surely not trying to predict what he or other judges will decide when he asks himself what the law is on the issue of the case."[4]

Several other writers in the philosophy of law have raised this objection to this particular aspect of Holmes' legal thought, presumably as a criticism of the narrowness of its applicability.[5]

The basic criticism, then, is that viewing questions such as "What is the law with regard to some state of affairs, X?" from the Holmesian/pragmatist perspective yields a conditional statement referring to the official responses of the judiciary with regard to X, but that such a conditional formula is devoid of meaning for the judiciary itself. That is, the pragmatic approach to the meaning of "the law" appears to tell the judges that "the law" is simply whatever they will do, or whatever they predict they will do. Since this is absurd, the Holmesian approach cannot be considered as an adequate account of the meaning of the concept of "the law."

la. The Holmesian Response.

The fact that this kind of objection can be so seriously and repeatedly attempted as a legitimate criticism of "Holmes' theory" is an excellent demonstration of how little Holmes' overall legal approach has been understood. As I have reconstructed Holmes' theory herein, one major aspect of that theory is Holmes' advocacy of a pragmatic approach to the meaning of legal concepts (see Article I). Yet, the present objection to "Holmes' theory" addresses only a tiny fraction of this, namely, Holmes' pragmatic recommendations to two general groups with regard to the perspectives to take involving the meaning of legal concepts (see Article I, sections B.2.c.2 and .3). Hence, it is a complete misunderstanding of Holmes to imply that his
thoughts on the meanings of legal concepts encompass only this narrow range, and then to criticize him on that account.

Holmes clearly holds that the functional, "cash value" approach to meaning operates within certain contexts, as determined by: (1) types of situational circumstances, and (2) general purposes and interests. That is, Holmes' method relativizes meanings in certain ways that the present objection does not take account of. For certain groups of persons, the meaning of the concept of "the law" will refer to predictions of judicial behavior because those groups are interested in successful dealings with the legal system. Now, it is obvious that judges qua official decision-makers are not interested in successful dealings with the legal system, for their context of operation is within that system itself. Clearly, Holmes never intended that judges be thought of in the same terms as non-judges, regarding the meaning of legal concepts. To Holmes, the interests of the judges are in settling the disputes which come before them, on the basis of what is the best social policy. Hence, for the community of judges, the meaning of the concept of "the law" (or perhaps, the concept of what is "legal") will refer to predictions of the future social consequences which certain rulings will have in the community-at-large. What a legal concept means for the judiciary does, therefore, involve a prediction, but of a different kind than the prediction of judicial behavior itself, though the two are often interrelated.[6]

It is ridiculous to assert that one of Holmes' particular uses of the pragmatic method, namely, its use relative to the perspective of the lawyer and the "bad man," automatically applies to anyone regardless of situation or interest. Is it clear that Holmes did spell out the contextual, relativistic nature of his pragmatic approach to meaning.[7] His actual position, however, cannot be culled from only one or two passages quoted from his writings, but only from an understanding of the overall pragmatic program he was adopting, of which the "bad man's" prophecies are only one instance (though this special perspective covers a great deal of territory). In that case, this common criticism of Holmes fails simply because it is addressed to a straw man.

Holmes' "prediction theory," which in my reconstruction refers to most of Article I of his overall theory of law, gives a general pragmatic account of the meaning of legal concepts, showing how such concepts are best clarified and understood (viz., functionally, relative to situation and purpose). Alternatively, the objection supposes that Holmes is saying that there is only a single meaning of the concept of "the law"—a position forcefully rejected by Holmes.

The present reconstruction of Holmes' legal philosophy thus shows it to be a more powerful theory than has previously been thought; in light of the present overall view of Holmes' theory, then, the present objection becomes only an embarrassing oversimplification.

This objection to Holmes is directly related to the first one specified above, but is a more general criticism of Holmes' pragmatic emphasis upon prediction. That is, even when the specific kinds of predictions inherent in the Holmesian approach are accounted for, Holmes' theory still does not give an adequate explanation of the phenomenon of legal decision-making, simply because the judicial community does not handle legal questions pragmatically. Courts do not approach the meaning of concepts, such as what is "legal" by looking forward in time, but by looking backward, to pre-existing regulations, directives, or rules. These rules are the guides which the judiciary follows in order to decide cases. As H.L.A. Hart has written:

"... courts regard legal rules not as predictions but as standards to be followed in decision, determinate enough, in spite of their open texture, to limit, though not to exclude, their discretion."[8]

The actual reasons given by judges for their decisions, up and down the various appellate systems, are generally formulated in terms of appeals to rules, principles, and case precedents. Rarely if ever do judges engage in pragmatic speculation regarding the future social consequences of a ruling for the community-at-large. The part of Holmes' theory which says that judges do engage in a pragmatic activity is therefore mistaken.

2a. The Holmesian Response.

The answer which Holmes might give to this objection can be constructed by looking at two parts of his overall theory which address this particular issue in judicial decision-making. In his theory of law, Holmes takes both factual and normative positions in regard to the role of judges in a legal system. His purely descriptive effort (see Article I, section B.2.d.2 and Article III, section B.2.a--d) claims that judges in fact do something that is quite different from what they often appear to do. That is, Holmes says that while the form of the judicial decision is one by which decisions are made to appear as if they are purely logical deductions from past precedents, statutes or other rules, the actual substance of legal decisions shows that this is not, in fact, what is really going on.[9] Holmes' theory even implies a rationale for the fact that judicial appearances often do not reflect judicial realities--because such appearances often enhance the public view of
the judiciary as a non-legislative body of strictly mechanical
decision-makers. Though Holmes would definitely have preferred more
honesty, he probably would have conceded that some social value does
accrue from the furtherance of the myth that all judges do is
passively apply rules. However, Holmes went further than this, and
added a distinctively normative element to his theory. His position
was, in fact, an outcome of his theoretical (as well as personal)
preference for judicial honesty in regard to the real nature of
judicial actions. Holmes held that judges ought to decide cases
pragmatically, that is, by considering the future social consequences
of their rulings (see Article III, section B.1.c.1). These two
Holmesian positions (on the specific question now being addressed),
again show the unappreciated complexity of his theory when seen in an
overall, comprehensive light. Holmes' dual claims also serve to
define the ways in which the present objection can be answered.

In the first place, if it is assumed that Holmes' factual claim
is in error, and that judges do not in fact handle legal concepts and
questions pragmatically, it does not follow that such judicial
behavior should be engaged in. Holmes could simply give up his
empirical claim and concentrate upon providing good reasons to accept
his normative thesis. That is, Holmes can claim that, by acting in
certain mechanical/deductive ways, the judiciary is not doing what it
ought to do. This remaining part of Holmes' theory would still
function to point out the deficiencies of judicial actions, and show
the judges a better, more comprehensive means of supporting their
decisions.[10] Such a better means of support wil change judicial
perspectives, to be sure, but it will also allow the judges to act in
many of the ways in which they already do act—that is, Holmes can
argue that, in many cases, judges do what they should, but for the
wrong reasons. Let me elaborate on what Holmes' argument for his
normative claim amounts to.

The core area of theoretical concern here for Holmes is the
justification of legal decisions by the courts. Normatively
speaking, it is clear that judges should not decide cases
arbitrarily, but rather, should hand down rulings that can be
supported with good reasons. It would be wrong, as is obvious upon
Holmes' view, to conclude that giving "good reasons" automatically
means (for the class of judges) that pre-existing regulations simply
be consulted and applied to individual cases. For one thing,
sometimes there are no pre-existing rules to consult. But on the
other hand, it would also be wrong to suppose that Holmes' claim that
judges ought to justify decisions pragmatically means that such
regulations (and statutes, precedents, etc.) are irrelevant to
judicial decision-making. That is, in many cases, when a judge
"follows rules," he ought to do so precisely because it is
pragmatically correct to do so. When Holmes says that judges ought
to reason pragmatically, then, he is claiming that the ultimate
justification for a decision is pragmatic, which may mean, in any one
case, that a judge does "follow rules." The reason he follows rules,
however, is that such an activity will yield the best social
consequences, and not simply that the rules exist.
In reasoning from pragmatic grounds, a Holmesian judge (viz., Holmes' normative model for actual judges) attempts to predict the future social consequences of a ruling in a certain case, knowing that: (1) he will be expected, ceteris paribus, to treat this case as similar ones have been treated, (2) his predictability in this respect is socially valuable, (3) his own decision-making situation indicates that his legislative policy-making role should be a very limited one, which includes general deference to legislative enactments, and so on. In many cases, then, the Holmesian judge reasons pragmatically when he justifies a decision on the outwardly traditional basis that the decision "falls under" a certain regulation or precedent. What Holmes' pragmatic/experimentalist view of justification does is show how "rule-following" by judges is itself justified.

Now, the reason that Holmes does not say that judges ought simply to follow the precedents and regulations directly is that: (1) in many cases, this is simply impossible, and (2) in many cases, it is clearly not socially beneficial. For example, a decision may be required in a totally unique kind of case, with no applicable statute or precedent existent. In such a case, following a rule is not possible simply because there is no such rule. The view that judges only ought to follow pre-existing rules has no solution for such a situation. In another type of case, where there are applicable rules or precedents to cover the case, these pre-existing rules may be socially detrimental or obsolete, and so, a judge that reasons pragmatically can justifiably (in Holmes' view) disregard them in favor of a more socially beneficial ruling. Holmes' point is that the "rule following model" is too narrow to cover all of the types of cases which judges must typically deal with. What Holmes' pragmatic model of judicial justification does is address both kinds of situations—when rule-following is beneficial and when it is not—by appealing to the future-oriented, consequential aspects of legal decision-making directly. What results is a more comprehensive and efficient theory of judicial decision-making, approached normatively.

Holmes was quite critical of the idea that rules ought to be followed simply because they are the rules.[11] In Holmes' view, the judicial decision-making model by which judges only attempt to follow or apply rules is something that is clearly not the best theory of how judges ought to act, although such rule-following is, upon this analysis, something which judges can do justifiably if the reasons for doing so are pragmatically good ones.

Therefore, even if it is argued that Holmes' factual hypothesis concerning the behavior of judges is false, and that judges actually do decide cases by consulting rules, Holmes can still argue that this rule-following procedure itself must be justified. In such a way, the pragmatic approach gives judges a reason to follow rules, but also covers cases where the rule-following model breaks down.

In addition, Holmes could also respond to the present objection in another way. That is, it is a factual claim that the judiciary
behaves in certain ways and not in others. But can it be inferred from the empirical fact that, most often, the reasons given for legal decisions are couched in "rule-following" terminology that the judges are actually only following rules? Perhaps it is the case that judges in fact follow a Holmesian/pragmatic line of reasoning, making legal decisions and interpreting legal questions by translating them into their conceivable practical consequences for the future of the whole community. After doing so, the proper rules are found to include in the official decision, since this formality itself has its pragmatic usefulness. The point here is that perhaps this objection against Holmes confuses the forms or appearances by which judicial activity is expressed with the substance of that activity itself. In fact, this is precisely what Holmes claims—that judges generally decide cases upon the grounds of social policy considerations, which may include rule-following, and that judges usually decide cases before they find the rules to support their decisions.[12] This factual contention by Holmes also supports his normative position on this issue somewhat, for if judges do in fact decide cases upon pragmatic grounds, but publicize them on technical, legal grounds, it is difficult to ascertain what the true policy grounds of such decisions are. In so far as the community would benefit from such knowledge (more than they do benefit from the myth that judges passively apply rules), judges ought to be more honest and straightforward about their decision-making.

Now, is Holmes a reliable authority on the behavior of judges in general? The fact of his five decades of service as a judge, as well as his several years as a practicing lawyer, surely must lend some authoritative credibility to his empirical claims about judicial behavior. In addition, he was intimately associated throughout his life with dozens of other judicial officials, and this also increases his reliability with regard to factual claims made about the judiciary (at least in America). At minimum, the empirical claim that judges do in fact act in rule-following ways and not in pragmatic ways is obviously not a clear-cut question. Holmes' factual counter-claim simply cannot be rejected outright as implausible, for there is definitely evidence in its favor.

Therefore, Holmes can meet the present objection in two ways. First, if it were a fact that judges act (and have been acting) by following rules, this would not be enough to say that this practice is justified. To claim as much amounts to a fallacious appeal to tradition. Holmes' pragmatic view offers a more comprehensive alternative approach to the justification of judicial decisions; this view can in fact embrace rule-following, though traditional legal rules are overridable in Holmes' view by considerations of social policy. Second, it simply may not be a fact that judges actually follow rules in their decision-making, even though they may appear to be doing so. Judges may in fact follow a pragmatic line of reasoning, and actually use rules to socially legitimize the pragmatically-reached decisions they hand down. In that case, the underlying empirical claim supporting this objection must be considered problematic. On these grounds, then, the present objection simply does not hold up.
3. The Judiciary is Required to Decide Cases by Rules, Not by the Application of Holmes' Pragmatic Method: The Objection.

This objection is directly related to the previous one, but is different enough to warrant its own separate treatment. The idea here is that whether judges in fact apply rules or practice pragmatic methods, what they are (usually) required to do is decide cases "by the traditional rules" (viz., the applicable statutes, regulations, precedents, etc.), and this runs counter to Holmes' view. In other words, a court acts "correctly" when it decides a case by a legal rule. Although there are admittedly some cases that are not covered by any rules, these are exceptional. There are many more examples of "clear cases" where judges are simply required to follow the applicable, pre-existing rules. H.L.A. Hart points out that the way a court acts when it is bound by a rule is different from when its behavior "merely happens to coincide with it," because a court, when asked for the reason behind a certain decision, justifies that decision by citing a rule.[13] In that case, though Holmes' theory allows for judicial rule-following (as long as it is done from the pragmatic angle), such an activity is not a matter of the courts' being "bound" to act, but a case of coincidence, where the rules just happen to direct the same decision as does the pragmatic, forward-looking method.

To illustrate this thought, suppose that there is a legitimately-enacted regulation in a certain community which states that: "Driving a truck in the park is forbidden." Suppose also that S drives his truck in the park and is arrested for violation of this rule. When S's case comes before the court, the mere existence of the rule forbidding S's action is a reason for the correct judicial decision, for this obviously is an example of a "clear case." Hence, the court is required to find S in (at least technical) violation of the rule. Further, were the court, for whatever reason, to decide that S was not in violation of the rule, and were such a decision upheld all the way down the appellate line, such a decision would still be incorrect. Simply because a rule is ignored is no reason to say that it does not still require certain judicial (or non-judicial) behavior.

One of the fundamental criteria, then, for the correctness of a judicial decision is that it conform to the pre-existing rules, statutes, and precedents which cover the case under judicial consideration. In clear cases, such constructions require the courts to act in certain ways and not in others. As Hans Kelsen writes:

"The rule which a judge applies in a concrete case does not tell the judge how he actually will decide, but how he ought to decide. The judge does not turn to law for an answer to the question of
what he actually will do, but for an answer to the question of what he ought to do ... This is the sense with which law is directed to courts."[14]

Holmes' advocacy of judicial pragmatism is inapplicable to those situations (viz., clear cases) wherein judges are required to rule in certain ways. At most, perhaps Holmes' approach can be applied to novel cases in which no pre-existing rule holds. To recommend, as Holmes does, that the pragmatic approach ought to apply to judicial decision-making "across the board" is to ignore the ways that judges are constrained by rules.

3a. The Holmesian Response.

Sometimes Holmes is criticized as being a "rule skeptic."[15] Presumably, this means that Holmes strongly doubted the idea that the concept of "the law," the legal system, or judicial decision-making should be analyzed primarily in terms of binding legal rules. A more radical claim would be to say that legal rules are totally irrelevant to such an analysis. The present objection seems to be directed at such a rule-skeptical position. Clearly, however, this is an oversimplification and a misunderstanding of Holmes' legal theory. For one thing, Holmes' behavior as a judge showed that he did not think that statutes, precedents, or Constitutional provisions—all typical examples of traditionally-conceived "legal rules"—were irrelevant to judicial decisions, for he commonly acted in conformity to such rules. The present objection holds, however, that conformity is not enough, because a judge is "bound" (in some sense) to conform to legal rules. In other words, in any clear case, a judge has a duty to decide cases by an appeal to the applicable rules.

Holmes' position, however, is that this "ought" itself needs to be questioned and justified, if we are to escape the circumstance in which we presently enforce meaningless, irrelevant, and harmful rules, which may have been enacted in totally different past circumstances. To avoid such cases, Holmes' pragmatic experimentalism directs judicial decision-making forward rather than backward, to the conceivable social consequences which will accrue from a judicial ruling. If in fact the best social policies result from following the pre-existing rules, then Holmes would say, by all means follow them, but not simply because they are "the rules." Hence, Holmes' theory does not imply that judges are not "bound" by legal rules, but that this bindingness has a conditional quality. If a statute or precedent is pragmatically adequate, then a judge ought to comply with it, all else being equal. It is a clear misunderstanding of Holmes' position (and perhaps a confusion of his theory with the thoughts of some extreme legal realists) to say that Holmes abandons or rejects the idea that judges are "bound" to act in certain ways.
If it is further objected that such a pragmatically-derived "bindingness" is not the same as the kind implied in the objection, in other words, that this is really not the same judicial duty the objection refers to, Holmes could make a further move. The ultimate justification for a legal decision is attained by using pragmatic/experimental methodology, Holmes would claim. That very process or method is also the source, then, of the fundamental, over-arching, comprehensive "judicial ought" which may be at issue here, that is, the non-conditional "duty" of a judge. In Holmes' view, judges do have a duty to comply with a rule, but the rule Holmes has in mind is that of judging cases on the basis of their future effects upon the community as a whole. This single pragmatic rule is the source of the ultimate judicial duty, and when the ordinary, "lower-level" rules (viz., regulations, precedents) do not conflict with this pragmatic rule, and in fact are supported by the pragmatic rule, judges have a corresponding duty to decide cases on appeal to those "lower-level" legal rules.

What the present objection and the Holmesian responses portray is a conflict of two normative models of judicial decision-making. One model, which comes directly from the present criticism of Holmes, says that judges ought to decide cases (or at least, "clear cases") by appeal to pre-existing legal rules (if there are any). Holmes' pragmatic model holds that judges have an underlying, fundamental duty to decide cases pragmatically, and that this duty in many cases will justify a judicial appeal to traditionally-conceived legal rules. Obviously, in Holmes' view, the fact that there are legal rules covering a case is some indication that such rules ought to be considered, for such judicial action increases the social values of predictability and certainty in legal processes. But the mere existence of such rules is insufficient for a justified legal decision, Holmes would claim. That is, from Holmes' perspective, judges have a basic or overriding duty to follow the pragmatic/experimental method in deciding cases, and a conditional duty to follow pre-existing rules when they are in conformity with the fundamental rule. It could be said that Holmes' normative model only specifies a judicial duty to follow one rule, namely, the pragmatic one, since a Holmesian judge who decides by an ordinary legal rule is really only doing so in an ultimate appeal to the basic pragmatic rule. I would prefer, however, to keep the present distinction, if only to show that Holmes did not advocate that traditionally-conceived legal rules were irrelevant or unimportant to judicial decision-making. The question now, however, is one of evaluation—is the traditional rule model better or worse than the Holmesian/pragmatic model?

The most striking defect in what I will call the "traditional" rule-following theory is, again, its lack of comprehensiveness. The traditional theory admittedly applies best to "clear cases" where there are pre-existing rules to follow. The facts show, however, that judges must often decide cases that are not clear applications of any legal rule, either because the rules don't clearly apply to the facts, or vice-versa, or because there are no rules to apply at all (e.g., in bizarre cases, in new types of cases brought about by
technological changes, etc.). In contrast, the Holmesian model, with its forward-looking approach to judicial decision, can cover every possible case, no matter if such cases are novel, bizarre, or clear ones. In so far as theories are evaluated by their comprehensiveness, then, Holmes' theory of pragmatic experimentalism in judicial decision-making is clearly the superior view. For the same kinds of reasons, Holmes' approach is simpler and more efficient than the traditional normative view. Upon the traditional view, judges must find other ways to justify decisions in cases wherein no rule clearly applies or even exists. Perhaps judges ought to decide such cases by an appeal to broader legal rules—legal principles and standards, such as those which are concerned with "fairness" or "equality." But in that way, the traditional model must become more complicated, in order to become more comprehensive. But then what the traditional model gains in comprehensiveness, it loses in efficiency and simplicity, which are also criteria of theory-evaluation, and also indicate the relative superiority of Holmes' pragmatic approach.

In addition, Holmes would argue that the traditional model is defective in several ways. In the first place, the traditional theory puts forth the idea that, in clear cases, judges ought to follow the legal rules. But are there any clear cases? It may in fact be that all cases are intrinsically "unclear." Let me spell out this counter-objection in more detail.

It seems obvious that there are complex, unclear cases, as a reading through any series of appellate reports would quickly indicate. And it seems that it is a reasonable inference to say that "if there are complexes, then there must be simples" when the subject is legal matters. But on the other hand, a pragmatist might argue against even such a seemingly reasonable inference, and this is exactly, in fact, what Peirce did in his writings dealing with our capacity to attain direct knowledge through introspection. To analogize that pragmatic argument to the present context, it must first be noted that all judicial decisions involve references to factual scenarios of some type, and these do not carry their legal interpretations with them. That is, a factual scenario does not have as one of its components, for instance, the quality of being "decidable only in reference to section 1007.277c of the Municipal Code of Franklin County, Ohio." The scenario must be classified in this way. Though it is true that many scenarios will obviously fall into certain broad legal categories and not into others (e.g., a case involving delinquent taxes won't be decided as a first-degree murder case), it may in fact never be the case that some factual scenario obviously refers to one specific determinate legal rule alone. Hence, the "clear case" notion is not as clear-cut as was previously thought in regard to the application of legal rules to factual situations.

In addition, there is also the problem of interpretation. That is, even if some factual scenario is to be obviously decided by some particular rule, the "determinateness" of the rule raises the same problem of interpretation. The question then moves from "Does rule R
apply?" to "How does rule R apply?" Again, general rules do not carry their interpretations for specific cases with them. Further, all of this does not even recognize the additional fact that new theories of, say, tort law, can be argued by creative attorneys in favor of the claims of their clients whereas such claims may have been ignored before. In such cases, when these arguments are successful with the judiciary (and such arguments are being experimentally tried all of the time), the result is that formerly "illegal" behavior can them be considered to be "legal," and vice-versa. Consequently, the idea of a "clear case" is clearly not as unproblematic as it sounds at first. It is susceptible to criticism on the grounds of application as well as interpretation. In as far as the traditional rule following view (and its present objection to Holmes) depends upon this notion, then, it must be taken to be equally as troublesome.

In another sense, even if it can be supposed that the problems of application, interpretation, and experimentation mentioned above can somehow be avoided, there is still another problem with the traditional theory which Holmes might point out. To illustrate this further problem, let us suppose that rule R is the only rule which attempts to cover activity A, and states that any instance of A is forbidden. To attempt to make the cases even clearer, say that R also expressly allows absolutely no exceptions. A case then comes before a judge J wherein a person P, subject to J's jurisdiction (which I will assume is also totally clear), did A. According to the traditional view, J is "bound" by R to decide against P. If J were to give any other ruling, J would be making a "legal error," and even if such an erroneous ruling were upheld all the way up the appellate line (and presumably, for all time), it would make no difference. But even such an idealized example of a "clear case" is troublesome, for a very simple reason. The factual scenario in question in any adjudicated case never occurs in a vacuum, but always in a certain larger situational context of events and circumstances. This larger social context simply can never be totally ignored as a legitimate source of reasons for judicial decisions. If the social context of judicial decision-making were ignored, there would be no way, using such an example as this one, to decide a case otherwise when the R in question was obsolete and/or downright harmful to everyone concerned. Again, Holmes would call the situation where ancient rules enacted for presently non-existent purposes are enforced merely because they are the rules "revolting."[17] Hence, the complete set of reasons for the ruling in the case of P (which may come from the overall circumstances and the existence of R) may override the single "technical" reason (viz., that R exists) to decide the case against P. Present conditions could easily make the direct following of an old legal rule absurd. There is a difference, it is obvious, between having "a reason" to do something and having "good reasons" to do something. Clearly, traditional rules can be used as reasons for judgments, but whether they are still good reasons will always be a separate question, calling for an added, Holmesian dimension to judicial deliberation. This latter concern is what the idea of justification involves, and so, even in this clearest of all "clear cases," as Holmes might observe, the traditional model does not show
that rule-following is sufficient for a justified legal decision, and so, for a judicial duty to decide a case "by the rules."

But if traditional legal rules are not sufficient for the justification of a legal decision, are they at least necessary? In Holmes' view, they are not. In every case where a legal decision is made, giving "good reasons" for a decision might mean that a pre-existing rule or precedent should be overturned, even if it clearly applies to the case being decided. It is still an open question, as far as a court's duties are concerned, as to whether or not a previously-constructed rule ought to be applied in the context of a present decision. As stated above, the preponderance of reasons for a certain decision might far outweigh the single "rule-centered" reason, that is, the fact that, say, there is a precedent covering a similar case. If judges are to make the distinction between having "reasons" for their decisions and having "good reasons," and this seems to be reasonable and desirable, then the legal decisions they hand down may in fact require that they disregard old rulings or reverse old precedents. The fact that the judiciary does engage in such overruling procedures, as well as the fact that such reversals are upheld as justifiable, lends some support to Holmes' view. Hence, traditional legal rules are not only insufficient for the justification of legal decisions, they are also not necessary. The fact that, given any rule R and situation S, the legal reasoning for applying R to S is always an open question shows the sense in which "the law" is not a discovered object in Holmes' pragmatic view, but is a created one.

Holmes' responses to the present objection can thus be summarized as follows: (1) Holmes' theory does not claim that judges are not bound by legal rules, but only makes that "bindingness" conditional, (2) a more fundamental sense in which judges are "bound" comes from a more basic rule than ordinary legal rules, that is, the directive that judges justify decisions by the use of pragmatic experimentalist reasoning, (3) Holmes' normative theory of legal decision-making is more comprehensive that the traditional theory implied in the objection (and it is a simpler, more efficient theory than is a modified version of the traditional view), (4) the traditional view of rule-following is dependent upon the idea of "clear cases," but such a notion is problematic and unclear, and (5) following traditionally-conceived legal rules is neither necessary nor sufficient for the justification of judicial decisions.

At the very least, such responses show that Holmes' theory has been misunderstood and oversimplified, and that the traditional position from which it is criticized is itself a troublesome one. As far as Holmes' position on judicial decision-making is concerned, more will be said in forthcoming sections, and a complete evaluation will result from the totality of this examination of objections. In light of the responses given above, though, it must be concluded that the present objection is an inadequate criticism of Holmes' theory.
4. Legal Rules are Necessary to Identify State Officials: The Objection.

It has been claimed that Holmes' theory, which seems to identify the law with predictions rather than traditional rules, is "incoherent" if it is taken to apply generally to all kinds of legal rules. This is because it is claimed that certain kinds of rules, which H.L.A. Hart calls "secondary rules," serve simply to define the mere existence, jurisdiction, powers, and procedures of the judiciary and the rest of the "public force." Hart writes:

"... the existence of a court entails the existence of secondary rules conferring jurisdiction on a changing succession of individuals and so making their decisions authoritative. In a community of people who understood the notions of a decision and a prediction of a decision, but not the notion of a rule, the idea of an authoritative decision would be lacking and with it the idea of a court."

This criticism of Holmes (as well as several of his later legal realist followers) has been repeated several times by other writers in the philosophy of law. Basically, the idea here is that the meaning of the concept of "the law" cannot be properly analyzed in terms of references to prediction of official behavior, or by references to the prediction of the conceivable social value or advantages to public policy which may accrue from the decision of cases. These are two of the pragmatically-generated approaches that Holmes puts forth for the classes of non-officials and officials, respectively, in regard to legal concepts and questions. Since the notion of an "official," however, cannot be unpacked without resort to a traditionally-conceived legal rule, and since this kind of secondary rule is not explainable in terms of the pragmatic/predictive approach of Holmes, it must be concluded that this part of Holmes' overall theory is in error.

4a. The Holmesian Response.

As with several of the other standing objections to Holmes, this one, too, implies a misunderstanding of his legal thought. As has been established above, Holmes did not deny that there are legal rules, in the sense that there are statutes, regulations, precedents, constitutional provisions, and so on. Holmes even added to these a more basic legal directive, the overriding rule of using pragmatic methodology, meant as an ultimate judicial decision-making rule by which all of the others should be followed. Further, it is clear that Holmes embraced the idea that a "legal rule" could refer to certain general tendencies of judicial or official behavior, in the
sense of "policies," "principles," or "standards." So it would be wrong to say that Holmes claimed that "there are no legal rules at all," as this objection sometimes holds.[22] But the objection need not go that far, and so, in its most focused sense, simply says that legal rules are a necessary element in the identification of legal officials. Holmes' theory seems to presuppose the existence of officials, and analyzes legal concepts in terms of these officials, without specifying the means by which these officials exist and act. Now, how then might Holmes respond to this more highly specified form of the objection?

In the first place, Holmes could argue that there really is no fundamental distinction between so-called "primary" rules (viz., those which impose obligations and duties on the general citizenry) and "secondary" rules (viz., those which identify officials, courts, and the legal system itself). After all, many of the disputes which come before courts are concerned with the precise question of the "jurisdiction" of other courts and offices. Courts also hear cases about the exercise of official "powers" as well as the legitimacy and establishment of official agencies and governmental organs, including judicial ones. Questions of procedure are brought to courts to decide upon quite often, especially on the appellate levels. In all of these cases, judges still ought to decide, in Holmes' view, in the same ways--by means of a forward-looking, pragmatic approach in which the existence of a power-conferring (or similar type) rule is one of the factors that enter into the complete justification of the decision. Hence, from the judicial perspective, the rational import of such secondary rules is the same as with any kind of traditional rule (e.g., statutes, precedents, etc.), and so are the ways in which judges handle such rules. From the popular perspective, the power-conferring rules still serve as reliable signs of general official tendencies, and so, are still understood in terms of pragmatic predictions. How, then, are these secondary rules really different from any other kinds of traditionally-conceived legal rules?

The answer to this question might be that, from within an already-established legal system, all of the rules function in a similar manner, relative to certain general groups, but from outside of such a system, there is clearly a difference between those rules which apply to the members of the community qua citizens and those which merely set up the conditions by which that community's legal system operates. From this outside point-of-view the rules which define the system itself cannot be understood in terms of the operations of the system, because those operations themselves presuppose those rules. Hence, secondary rules are of a different sort, and are necessary for the system to operate at all.

Even in this light, however, the objection is answerable in terms of Holmes' pragmatic theory. To illustrate both the problem and the most appropriate Holmesian response to it, I shall borrow from an example used recently in the jurisprudential literature.[23]

Suppose that a person named Q is about to embark on a visit to
Klansylvania, a far-away country. Since Q is ignorant of "the law" of Klansylvania, she consults her lawyer for some information about the Klansylvanian legal system. Among other things, Q learns that the Klansylvanian constitution contains a secondary-rule type of provision whereby only white males may be judges in Klansylvanian courts. Though Q is personally offended by this provision, she finds that it gives her an interesting insight into the Klansylvanian legal system, and feels better prepared for what she might be "up against" in case she had to deal personally with that system. Upon her arrival in Klansylvania, Q inadvertently causes damage to the property of a Klansylvanian and is taken to court in a negligence suit. At the trial, however, Q notices that the judge is a black woman. During a recess in the trial, Q asks her Klansylvanian lawyer about the constitutional provision barring all but white males from the judiciary, and is told that this provision has not been overruled or amended. In spite of this, the judge in Q's case appears to be fully accepted by the police, the clerks, the lawyers, and everyone else. When the trial ends, Q loses the suit and is directed to pay damages to the injured Klansylvanian. Q appeals the case, however, on the grounds that no legitimate, authoritative trial occurred, (using Hart's terms and argument) because the judge's race and sex were not in accord with the secondary rule stated in the Klansylvanian constitution. Unfortunately, the verdict in Q's case is continually upheld, all the way up to the Supreme Court.

Now, the opinions of the Klansylvanian appellate courts in this case could imaginably have any number of explanations for such a result: foreigners have no standing in Klansylvania to contest the credentials of its judges; the constitutional provision banning all but white males is rarely honored anymore in light of the Klansylvanian civil rights movement; or even that strict conformity to rules has always been considered in Klansylvania to be narrow-minded and distasteful. Taken singly or together, such explanations would negate any inference made by an outsider, such as Q, that a "secondary" constitutional rule was operating to define who the officials were in Klansylvania.[24] Upon Q's return home, she is not the least bit comforted by her lawyer's observation that the result in her case was "illegal," since the judge at the trial was not a "judge" and since the whole proceeding was contrary to "the rules." Clearly, the secondary rules of Klansylvania did not serve in this case to identify the judge nor to define her powers. Clearly, the judge in Q's case exercised official power and held authority, as her ruling was recognized and upheld by the rest of the legal system.

Holmes' position is terms of this example is that the foundation of jurisdiction is physical power.[25] When a person is seeking to order his or her affairs in a certain area over which a group of persons (who call themselves "officials") hold the predominance of physical power, such a person seems well-advised to understand the realities of that situation. Such realities include the relative weakness of the individual person as compared to the strength of the dominant group. Although such a group may issue rules which identify the various "official" power-holders, such rules may not be issued,
may be quite vague, or may be misleading. Before such rules, if any, are consulted in the process of identifying the officials, however, the actual practices of the power-holders have to be investigated. But once such facts are known, the secondary rules become superfluous.[26] This is precisely the model of state-individual interaction which Holmes has adopted, and in so far as it is an accurate one, it shows that secondary rules are not necessary to identify the legal system itself, as the objection claims.

On the other hand, the objection itself could be modified. The "secondary rules" which the objection describes need not be those which are explicitly written down, but those which are implicit or inferable from the actual behavior of the officials. By simply observing the Klansyvanian system, then, an explicit secondary rule of the identification of officials could be formulated. Hence, secondary rules are still necessary, though it is not necessary that they take any particular, written-down form.

This revised objection does not succeed for two reasons, however. In the first place, it may simply be impossible to derive an explicit secondary rule (in the traditionally-conceived sense of "rule" as something fixed and categorical) from some set of observations of official behavior. For example, if secondary rule R is formulated by looking at facts F1...Fn, then such a rule could account for those facts at that point in time. But what happens when, the following day, a completely new fact of official behavior, Fn+1, arises? If the explicit secondary rule formulated from observations is R, then Fn+1 may violate the secondary rule, and if so, the formulation of the secondary rule is no longer the result of observing official behavior. In that case, facts F1...Fn+1 might be used to formulate a new secondary rule, R', which is a modification of R.[27] But that secondary rule fails when disruptive fact Fn+2 is observed, and so on. Hence, there may be no way to formulate such a categorical secondary rule by generalizing over observations of legal processes. Alternatively, for any set of observations, it is always possible to derive an infinitely-long list of generalized, but not categorical "rules" which explain the observations made. In such a case, making a claim about which of these possible secondary rules best describes the observations of legal processes in general becomes a matter of proposing a hypothesis to be evaluated, that is, of making a prediction—but then such a procedure leads directly back to the Holmesian model, and away from the model supposed in the counter-objection. Either way, the revised objection to Holmes' position on this issue fails.

In sum, the present objection to Holmes' view does not succeed, even in an amended form, because: (1) Holmes' theory does not hold that there are "no rules" operative in the legal system, (2) "secondary rules" can be treated as any other kind of traditionally-conceived rule from perspectives within the legal system, (3) from outside the legal system, observed behavior is apparently more important in identifying judicial roles and officers than are "paper" rules (viz., traditionally-conceived, categorical, fixed, and certain objects of discovery), (4) implicitly formulated
"secondary rules" may be impossible to derive from any set of observations, and as such, cannot be necessary for the identification of the legal system being observed, and (5) when "secondary rules" are treated in a more generalized, non-categorical fashion, they become hypotheses about the legal system, and so, fit into Holmes' pragmatic approach rather than the traditional rule approach.

5. The "Scorer's Discretion" Objection.

In one of the critical sections of H.L.A. Hart's book, The Concept of Law, an analogy is constructed which is supposed to show the failure of the (presumably Holmesian) pragmatic/predictive approach to the concept of the law and the corresponding superiority of the more traditional, rule-oriented approach. The argument compares a legal system (presumably of the Anglo-American type) to a game with an official scorer whose rulings are final. The upshot of the objection is that the Holmesian-predictive account confuses finality of judgment with infallibility, and for that reason, should be rejected. Hart says, for example, that in a game with an official scorer, it would be "absurd" for the statements of the players during the game with respect to the score to be classified merely as "predictions of the scorer's rulings."[28] Both the players and the scorer are not engaging in predictions, but are simply consulting the rules of the game. Hart writes:

"The player, in making his own statements as to the score after the introduction of the official scorer, is doing what he did before; namely, addressing the progress of the game, as best he can, by reference to the scoring rule. This, too, is what the scorer himself, so long as he fulfills the duties of his position, is also doing."[29]

Consequently, the players could rightfully claim that the official scorer was "wrong" in the event that the scorer for some reason recorded, say, a "run" when a batter had not even moved. Though it is true that the players' statements are unauthoritative and have no official significance, they are still applications of the scoring rules. However, if it is claimed in such a case that the scorer's official and final judgment is not "wrong" (viz., in breach of the rules), the game degenerates into one of "scorer's discretion," and so really isn't the same game at all.

To return to the law, the game analogy makes it possible to say that, for example, even though the supreme court of a country is the final legal authority on some issue or case, it is still meaningful to say that the court was "wrong." This is because the standard by which this supreme court's judgments are to be evaluated is not simply their finality in the system, but their adherence to the "rules of the game." Under the Holmesian account, the claim that the
supreme court "erred" would make no sense at all. Since this is the case, the Holmesian approach must be rejected; however, Holmes would have constructed several responses to this critique.

5a. The Holmesian Response.

In the first place, the game analogy is an obvious attempt to define a situation from which the notion of a "clear case" can best be exemplified. In most games, there are usually sets of definite (and often written) rules which govern, limit, and otherwise regulate the players. When a baseball player hits a ball over the outfield fence within the foul posts, along with several other conditions being present, the official scorer of the game must score a run for that player's team. There is no discretion involved. The scorer is "bound" by the scoring rule. How could a case be clearer than this?

For several reasons, however, the notion of analogizing the game situation to that of a legal system is quite problematic. To the extent that the present objection depends upon the game analogy, and the observations made about it, a Holmesian response which points out the relevant disanalogies between a game and a legal system serves to weaken the objection as well.

In the attempt to construct my own model of a "clear case" (see section 8.3 above), I pointed out that even the clearest case for actual adjudication would involve a factual scenario that occurred in a certain social and temporal context. Because of that, even the clearest case of applying a rule to a situation was subject to possible extenuating effects by particular surrounding facts. In other words, actually adjudicated cases never occur in a vacuum, that is, apart from social, economic, historical, and political influences, and neither does any empirical occurrence which is the core of any actual adjudication. This fact shows precisely the manner in which games are relevantly dissimilar from legal systems (again with the American system as the model in mind). That is, situations which occur in games whereby some official judgment is necessary do occur in a vacuum, that is, apart from possibly relevant social, economic, historical, etc. influences. The circumstances and organization of a particular game, whether it is baseball, tennis, chess, or Monopoly, are the entire domain of consideration for that game. Games such as the ones Hart has in mind are played, as it were, in a precisely defined context, outside of the universe of any surrounding human experience. The circumjacent social, economic, and political considerations, which form part of the context of any actually-adjudicated case, are completely irrelevant in the playing of a game. Indeed, it is because games are this way that they are often considered to be purely recreational exercises—escapes from the "real world." The game situation, in other words, is an idealized one—the rules exist most often with no (or very little) significant evolutionary history at all, and the "facts" to be considered in any official judgment are only as old and as limited
and precisely defined as the present playing situation. But this is simply not the case with regard to any complex legal system.

As was pointed out above, both the traditionally-conceived "rules of law" and the facts of a certain case occur in certain real-world contexts, which are themselves sources of reasons for decisions. Such contexts consist of the broad social and temporal circumstances of human experience, and are far beyond precise definition in the way that the limited contexts of games are specified. Therefore, though Hart might be correct in his observations about following the rules in a game with an official scorer, he can go no further than that, for such artificial, idealized contexts do not occur in real-life legal situations. The analogy simply does not work, and for that reason, the objection is an inadequate one.

But that's not all, for it has been pointed out that perhaps even Hart's observations about games are faulty when we stick with games themselves, and not even attempt the analogy to real legal systems. One author has argued that, for some games, it does make sense for players to keep score by predicting the movements of the scorers. For example,

"In boxing or diving ... knowledge of who the official scorers are and what they look for in awarding 'points' is certainly more helpful than knowledge of abstract scoring rules. Indeed, the latter--such as the 'rule' that a diver deserves more points if he hits the water with a minimal splash or the 'rule' that a single knockdown in a round wins that round for a fighter--are generalizations from the scoring of referees in many diving competitions and boxing matches. Yet future referees might not give similar weight to such 'rules' and the generalization would have to be modified."[30]

To add to this example, sometimes cases arise in such sports where there is no official scoring rule that adequately covers a certain activity, such as the adoption of an unconventional boxing style or the use of a totally new kind of gymnastic maneuver. In addition, the same comments apply to other kinds of sports and games, such as ice skating and ice dancing. Further, the specific calling of penalties, fouls, outs, strikes, faults, etc. (which admittedly affect the score only indirectly) in sports such as football, basketball, baseball, hockey, and tennis are examples of instances in which predicting the behavior of the scorers can be practically related to the actual final score of the game. The point here is that the game example itself does not even provide as clear a case in support of the rule-following thesis as it was intended to.

From another angle, it must also be pointed out that the
Holmesian approach is fundamentally misunderstood when it is interpreted to mean that supreme tribunals have the "final" word in legal processes. This is a clear distortion, via oversimplification, of Holmes' thought. As a philosophical pragmatist, Holmes takes a view of legal matters as continuous processes, and for that reason, there is simply no "finality" of legal processes (see Article III, section A of Holmes' theory, as outlined above). "Final" judgments, in Peirce's sense, for example, might be thought of as limits, which we continue to approach but may never actually reach.[31] To Holmes, who sees the legal realm in a continual state of evolution, there is no "final" judgment, even by a supreme court. The same court may overrule itself on the very same point one month later. The criteria used for such an overruling, to Holmes, should be the social policy considerations (viz., pragmatic ones) which his theory holds to be the ultimate reasons for judicial decisions. In that way, it is possible to make sense of the notion that a supreme court "erred," but from the standard of what is beneficial social policy rather than the judgment that the court's decision was not the proper application of a traditionally-conceived rule (see Article III, section D).

Holmes' response, via the present reconstruction of his thought, to the "scorer's discretion" objection shows in several ways how this criticism of his theory is fundamentally in error: (1) a relevant disanalogy between games and real-world adjudication shows the latter to be part of a completely different (and much more complex) kind of situational context than games, in which rules are used and practical decision-making occurs, (2) some examples of game-scoring practices do not fit the "clear case" model put forth in the objection, and (3) Holmes' theory does not hold that supreme court judgments are either "final" or "infallible"—when his theory is properly understood, it clearly provides a way by which such judgments can be said to be "in error."

6. Holmes' Theory Ignores the "Internal Aspects" of Obligatory Rules: The Objection.

It is sometimes claimed that Holmes' predictive approach to the meaning of legal concepts fails to take into account an important phenomenon—the ways in which persons who live under legal systems see their own personal relationships to those legal systems.[32] It is possible to define at least two different points-of-view in this regard: (1) the internal perspective, by which persons accept and voluntarily cooperate in maintaining the system's rules, and so, see their own and other persons' behavior in terms of those rules, and (2) the external perspective, by which persons attend to rules only as a sign of possible official action.[33] H.L.A. Hart calls the first of these the "internal aspect" of obligatory rules, and claims that the "predictive theory of obligation," which again is presumably intended to refer to Holmes' view, tries to define this phenomenon out of existence.[34] The evidence for the existence of the internal aspect of rules is presented by Hart in several ways. In the first
place, Hart writes:

"... where rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a reason or justification for such reaction and for applying the sanctions."[35]

In another way, the existence of the internal aspect of rules is demonstrated in the commonly-made distinction between "having an obligation" and "being obliged" to do something.[36] In order to understand this distinction, it is necessary to see the difference between doing something because it is the correct action under a certain general rule and doing something because of the likelihood of punishment. If this distinction were ignored, and "having an obligation" simply referred to the likelihood of punishment in the event of disobedience, Hart says that it would be a contradiction to say that a person had an obligation, for example, to report for military service, and that, owing to the fact that the person had escaped from the jurisdiction, bribed the police, or whatever, there was not the slightest chance of the person's being caught or made to suffer.[37] Since there is no such contradiction in saying this, then "having an obligation" cannot be a reference to the likelihood of punishment. In that case, the Holmesian account of the concept of obligation must be mistaken.

6a. The Holmesian Response.

Holmes could, within the context of his comprehensive theory of law as put forth here, answer this objection in several ways. In the first place, it is a mistake to say that Holmes' theory does not take into account the ethical motivations of persons who comply with official directives out of a sense that they are doing what is morally correct. Holmes recognized this perspective, and Article I, section B.2.c.1 of his presently formalized theory makes this explicit. Thus, Holmes' theory of the meanings of legal concepts does acknowledge the "internal aspects" quality which legal rules have in relation to persons, though such a characteristic is relative to a certain group which Holmes called, "the good men." That is, when a certain group's basic interest, in the context of its relation to the regulations of the state, is to act in accordance with those regulations because those persons feel an internal "bindingness" or other such feeling of "obligation," then the meaning of "the law" (as well as other concepts) will be different from the meaning of such terms from another perspective, based upon different interests. The meaning of legal concepts, in the context of state-individual interaction, is therefore relative to a group's general purposes and interests. Hence, the objection is easily answered if it is merely a
claim that Holmes' theory does not address the "good man's" perspective, for it clearly makes room for that point-of-view, and in fact, offers an explanation for it.

But the present objection apparently cannot be as simple as this. The objection seems to be directed not at Holmes' construction of various relative perspectives with regard to legal concepts, but at the very idea that the meaning of legal concepts should be approached pragmatically at all (see Article I.A). In other words, it is simply an incorrect analysis of "obligation" (presumably in its legal form) to say that its meaning depends upon a point-of-view, such that, were this point-of-view that of a moral man, an obligation means X, while from the point-of-view of an amoral man, an obligation means Y. Whether we have legal obligations does not, and should not, depend upon the point-of-view we are taking, for we could simply avoid legal obligations altogether by choosing to take a certain point-of-view from which they become meaningless. Hence, it is Holmes' whole approach to certain legal concepts that is in question.

This objection, on the other hand, comes suspiciously close to saying that there a correct meaning for certain legal concepts, in this case, that of "obligation." That line of argument has already been addressed (and rejected) above (see Chapter II, Section C.2). However, the objection need not go that far, and may merely be a claim that "legal obligation" is not explained adequately in Holmesian terms simply because it is not used in the Holmesian predictive sense. This is an indication of the metatheoretical account of meaning upon which Hart's example of the obligation to military service is based. We simply do not use the concept of "legal obligation" in the Holmesian manner, and so, since the meaning of a concept must capture its popular use, Holmes' theory gives us a distorted picture of legal concepts.

But if this is what the objection is saying, then what results is a clash of two metatheories regarding the meaning of legal concepts. It does appear that, according to one traditional approach, meanings are conceived in terms of their widespread usage, and that Holmes' approach is different from this. Still, it is not enough to formulate an objection to Holmes on the basis that his approach is not the traditional or presently-accepted one, for that is given. Holmes is the first to admit that his theory of the meaning of legal concepts is neither the traditional nor the prevalent approach. Holmes' theory challenges the ordinary approach, which cannot justify itself with an appeal to tradition alone. In Holmes' view, then, the whole idea that meanings can be "fixed" in any way, even in regard to popular use, ought to be rejected, for many good reasons. Holmes' pragmatic theory of conceptual meaning asserts that the ways that persons use legal concepts is precisely the problem—such use is so confused and unclear that it is often useless for the purpose of understanding and dealing practically with legal realities. If the concepts we formulate regarding legal systems do not allow us to interact successfully and fruitfully with those systems, then Holmes might claim, we have excellent reasons to get rid of them and try something else. Hence, Holmes' whole
motivation for a pragmatic theory of legal concepts is to change the popular and traditional uses of such concepts, not to embrace them.

In this particular case, Holmes argues that the very idea of approaching a concept such as "legal obligation" in the way that Hart (among others) suggests results in confusing the legal aspects and the moral aspects of the concept.[38] Not only that, but Hart presupposes that there exists some "true" concept (or analysis) of "legal obligation" to which our thoughts must somehow conform, and that it is possible to intuit that certain claims are "counter" or "contradictory" to that fixed, "proper" conception of legal obligation. What is actually Hart's theory of the concept of a legal obligation holds that this concept "must" (?) be analyzed or understood in terms of the "internal aspects" of rules. On the contrary, Holmes would claim that such an analysis better describes a moral approach rather than a legal one. Such internal aspects of obligations are, as a matter of fact, irrelevant to legal matters, which deal with externalities alone (see Article I, section B.1). In Holmes' view, both as a judge and as a legal philosopher, the legal system is not concerned with the subjective motivations by which the persons who live under it decide to act. The purposes of the legal system address outward conduct, that is, external activity, alone. Thus, Holmes would say that Hart's analysis of obligations takes certain observations that are best made in a moral context and tries to fit them into a legal one; this results in a useless confusion of the two contexts. Part of Holmes' contention, in putting forth his theory of meanings, is that because certain words, such as "duty" or "obligation" or "right" are used in both legal and moral discourse, there is a tendency to confuse them, and move from one sense to another without realizing it.[39] Thus, it appears that Holmes would agree that one's "legal obligation" is similar to what Hart calls "being obliged," from the most strictly business-like perspective of legal realities, and is in fact, nothing more. Hart's other notion, that of "having an obligation," is presumably what Holmes would call a "moral obligation."

Now, this contrast of two metatheoretical approaches to the meanings of legal concepts can be viewed in various ways. On the one hand, Hart's approach gives a central role to the phenomenon of the "internal aspects" of legal rules, and so, takes it into account because it appears to fall within the domain of "matters legal." Holmes' general approach to legal meanings does address this phenomenon also, but in a totally different way, by redefining it as best left outside the bounds of what should fruitfully be considered "legal." Thus, Holmes would contend that this phenomenon is more of a personal concern which persons have about legalities rather than a legal phenomenon itself. Holmes' theory recognizes that there is a "good man's" point-of-view, but also that there are other points-of-view, including the common perspective of one who approaches legal rules on a bottom-line, cash value basis. Holmes' theory clearly narrows the focus of what ought to be considered as "legal" versus something else. Holmes' pragmatic claim, therefore, is that we have good reasons (viz., increased clarity about legal realities, more control of our future in dealing with the legal
system, etc.) to wash our legal concepts in a "cynical acid," so that they "shrink" (in terms of which phenomena they address) in their scope.[40] So, although Holmes consigns the internal aspects notion to a "back burner," as it were, in his overall theory, his recommendation is that the internal aspects of legal rules (in Hart's sense) are not even part of the core phenomena that a theory of law need explain. That Holmes takes account of the internal aspect merely shows that his pragmatic theory of meaning is broad enough to cover this phenomenon, but will consequently re-define it as something which is "non-legal" or "legally irrelevant." What appears to be an important phenomenon for a potential legal theory, namely, the ways in which ethically-minded persons view their relationship to legal directives, is shown by Holmes to be better classified as a non-legal item. But there is still another way to approach this issue.

Thus far, I have been using the phrase "internal aspect of rules" in what appears to be Hart's sense (although his description is not terribly clear[41]), in which it refers to a phenomenon having an ethical quality. That is, the notion that a citizen feels an obligation to obey the state's regulations is taken to be grounded, to some extent, upon an ethical concern to "do the right thing" under the appropriate rule. But is this description really an accurate portrayal of the popular regard for official rules, as traditionally-conceived? There may, in fact, be a better way to describe the ways in which citizens feel "internally bound" to comply with state regulations that is closer to Holmes' approach. That is, Holmes might argue that the process by which citizens actually internalize "the rules" is in terms of the pragmatic/predictive meanings of such rules, rather than in terms of the "ethical aura" which such rules might carry. In terms of this approach, a person would comply with certain regulations, such as stopping his/her car at a red light, because the light is a signal for a certain kind of behavior, which is to be understood in terms of conditional propositions, such as "if a person in my situation stops now, then probably such a person will not receive a traffic citation," and "if a person in my situation does not stop now, then there is some likelihood that such a person will receive a traffic citation," etc. In this way, with "legalities" approached in the Holmesian predictive sense, legal rules can be used as internal guides by which ordinary citizens regulate their everyday conduct (see Article III, section C.1).

The internalization of "the rules" in this sense is not grounded in a moral attitude, but in a prudential one. The main point here is that Holmes' approach may be in fact a better description of the internal aspects phenomenon (used in a generic sense) than is Hart's; or perhaps Holmes' approach explains why there is any such internal attitude towards various regulations (viz., there is fear of possible punishment or other official consequences).

In any case, the Holmesian view seems to be consistent with many kinds of popular behavior that are quite troublesome upon Hart's approach to the "internal aspects" phenomenon. The behavior in
question here is that which involves the widespread disregard of legitimately enacted state regulations when there is little or no enforcement of such rules. For example, in this country, millions of people violate highway speed limits everyday, and in fact, use elaborate means to escape official detection (e.g., the use of radar detectors, CB radio warnings, headlight signals, etc.). Similarly, millions cheat on income tax forms annually, in effect, stealing billions of dollars per year. In addition, millions violate copyright regulations, and use replicating machines to photocopy "illegally" whole articles and books, while others regularly tape for private use television shows, sports events, films, and music from both audio and audio-visual media. State regulations forbidding fornication, as well as several other kinds of sexual activity, are commonly disregarded by millions. Merchants often ignore "blue laws" which are rarely, if ever, enforced. Further, it appears as though such violations of "the rules" incur very little (if any) inner feelings of guilt, which would be expected if such violations were best seen in terms of the binding obligations of rules in Hart's sense. In fact, persons who stop at stop signs in the middle of desert areas, where there is no other traffic for miles, are sometimes thought of in a derogatory or joking sense. Similarly, the failure to take advantage of the fact that some of one's income was in the form of cash payments, by subsequently not reporting those cash payments as taxable income, may even be seen as downright foolish and stupid.

How can such phenomena be explained when "obligations" are thought of in terms other than the predictability of official action? What is this "internal sense" which persons actually feel towards state regulations, when the threat of state sanction is removed? Holmes' claim would be that the "internal aspect" of state regulations is most commonly a prudential, selfish attitude, best understood in relation to the probability of state enforcement. Hart's claim that this internal sense is of a more ethical, binding nature seems to be flatly contradicted by the popular disregard of unenforced regulations. Such unenforced regulations, then, provide an interesting conceptual test regarding the actual, predominant feelings of persons about "the laws" of their state. Take away the coercive power, and Hart's sense of "obligation" disappears. Holmes might conclude that, if we (viz., ordinary persons) are really to be honest about it, we should admit that we view "the law" more often through the eyes of a "bad man" than with the eyes of a "good man," and that in fact, the latter perspective need never be taken at all, as far as the purposes of the legal system are concerned.

Hence, Holmes' theory answers the present objection in several ways: (1) Holmes' theory does address the perspective of the "good man," who complies with state regulations out of a sense of duty, (2) Holmes' theory does openly advocate that we change our concepts of legal obligations (and others) such that the moral aspects of such legal concepts be isolated from the purely legal ones; the result of this separation will be a clearer and more honest recognition of the realities of living under a legal system, (3) the "internal aspects" of obligations, in Hart's sense, become legally irrelevant upon
Holmes' view, and (4) the actual phenomenon of the internalized attitudes of ordinary persons about state regulations and their obligations to them are actually better explained in terms of Holmes' predictive approach than Hart's ethical approach.

7. Some Other Minor Standing Objections to Holmes' Legal Thought Which Are Now Answerable.

In this section, I would like to address several other objections to Holmes' legal thought which have been raised but which appear to be, at least in their present form, answerable from the overall Holmesian theory reconstructed here. Such objections have, in many cases, been raised only once or twice in the literature, and so, have not been considered as "major critiques" of Holmes' legal thought. Many of them appear to be rather easily answerable.

There are a few standing objections to Holmes that are more troublesome for his legal theory, and I will explore these in a subsequent section. Finally, I will offer some original criticisms and observations as well as an overall evaluation of Holmes' theory of law. It is important now, however, to complete the examination of standing objections to Holmes, primarily to separate the ones which are easily answerable from the more difficult ones.

7a. Holmes' Legal Thought Contains No Normative Aspects: The Objection.

There has been a systematic attack on the legal realists, and on Holmes in particular, by certain "natural law" theorists, who claim that Holmes' view of legal matters implies fascism, totalitarianism, and other generally bad things, because it leaves out any legal consideration of a moral "ought." A good example of such an attack is found in an article by Francis E. Lucey, S.J. entitled, "Natural Law and Legal Realism."[42] Lucey writes:

"Holmes grieved over the fact that law was full of moral concepts and terms such as rights and duties. He hoped the day would come when we could rid the law of all these moral terms. Holding the same view of law that the Realists champion, what did the law mean to Holmes? For Holmes the law does not say that a man ought not or should not commit murder, or rape or burglary, or fraud or trespass or slander or libel, etc. The law does not say that these things are wrong or bad ... Realism looks at law in precisely the same way. The Realists know no ought or norm."[43]
Thus, Holmes is criticized for creating a legal theory that takes into account only what "is," and what "will be," but not what "ought to be." Since this makes his legal theory "Godless" and "relativistic," Holmes' theory must be in error.[44]

7b. The Holmesian Response.

In light of the reconstructive effort I have made in Chapter Two of this essay, such a criticism of Holmes as this one is incredibly naive and simplistic. Again, a very small part of Holmes' overall theory, namely, his view that the meaning of "the law" consisted of the predictions of official actions from a "bad man's" point-of-view, is taken to be the definitive summary of "Holmes' Theory." Clearly, it is not. While this particular aspect of Holmes' theory of law does leave out a moral "ought," it does so for many good reasons. Holmes was attempting to show the ways in which legal concepts could be approached most fruitfully from the ordinary perspective, that is, in a functional way. In Holmes' view, this perspective on legal matters seemed to be the most useful one to take for non-officials, and Holmes was the first to admit that there were other points-of-view, and his theory takes these into account (see Article I). Therefore, the charge made above is based upon a distorted view of Holmes' legal theory.

The present objection also fails to take into account the distinctive normative elements in Holmes' theory, which play their most important roles in the context of judicial decision-making. The meaning of "the law" and other legal concepts for the class of judges was not the same as for ordinary persons, as Holmes clearly points out (see Article I, section B.2.c.4). Those concepts had moral connotations, as far as judges were concerned, because they involved judicial rulings, which in turn involved the question, "How should this case be decided?" This is a normative question, demanding normative criteria (viz., the morality of the community) to formulate an answer, as well as to evaluate that answer. Holmes' theory provides these criteria in the form of future-oriented social policy considerations, and in fact makes it the "duty" of judges and legislators to decide cases and create legislation upon those grounds (see Article III, sections B.1.c and B.2.c). As far as what this "duty" amounts to, I will explore such a question in a later section below. Hence, the separation of law from morality, long the sore point for the natural law critics of other legal theories, is for Holmes necessary for the purpose of preventing moral ends from obscuring a clear understanding of the ways and means for securing such ends.[45] In regard to Holmes' overall theory, it is clear that Holmes held that, in one important sense, law and morals were fundamentally linked. Hence, the present objection is an obviously inadequate line of attack against Holmes' legal thought.
7c. Holmes' Legal Theory Allows No Possibility for the Predicting of Some Judicial Behavior: The Objection.

This objection to Holmes' theory states that, for one who is generally interested in predicting the behavior of the judiciary, there are times when this cannot be done. In fact, when all law is seen as judge-made law, all of the behavior of the courts becomes impossible to predict. As Hans Kelsen has written on this subject:

"Holmes' definition of law as 'the prophecies of what the courts will do in fact' is scarcely adequate in those cases where a court acts as a legislator and creates substantive law for the case at hand without being bound by any pre-existing substantive law . . . almost all the general rules of statutory and customary law, and a remarkable part of the judge-made law are products of 'free creation' and hence unpredictable."

Since Holmes' theory gives a central role to predictions of behavior that are often impossible to make, Holmes' account of the meaning of legal concepts from the ordinary non-judicial perspective must be incorrect.

7d. The Holmesian Response.

The objection in this case is of the nature of a factual claim, that is, judicial rulings are unpredictable in many cases. The extended claim that they are unpredictable in all cases seems to be flatly contradicted by the evidence, which clearly shows that such predictions occur all the time, that these predictions are accurately formulated by both legal professionals and ordinary citizens, and that such predictions are internalized by ordinary citizens as guides for their conduct. Indeed, Holmes' view of "legal rules" constructs them in terms of generalized descriptions of regular (and so, predictable) official behavior. For example, if a legislature enacts statute S, which is upheld by the courts, then a person looking to "the law" on the area of activity addressed by S might in fact quote S as "the law," though what this means is that the courts will rule on cases using S as their primary guide, and in the meantime, S itself provides a compact, shorthand description of that official behavior (see Article III, section B.2.b). In any event, the accurate prediction of much official behavior simply cannot be denied.

The present objection, in a more reasonable form, appears to
attack the idea that when "the law" is understood in terms of
generalized predictions, certain unique or novel cases, for one
reason or another, do not fall under the generalizations, and so,
turn out to be unpredictable.

However, this line of reasoning is yet another instance of the
failure to understand Holmes' legal theory in all of its major
aspects; the objection also holds up an unrealistic standard of
expectation. Holmes was aware that the actual responses of officials
to various activities were in a process of on-going change and
evolution (see Article III.A). As long as the processes of the law
were to be relevant to social needs, however, this change was a
necessity. Holmes realized, however, that this implied an element of
indeterminacy in all official and non-official legal judgments (see
Article III.D). The problem is then to decrease the unpredictability
as much as possible. In this light, Holmes' theory also recognizes
the fact that the activities of judges and the expectations of
ordinary persons (as well as the lawyers which ordinary persons
consult for advice concerning future judicial behavior) are
interrelated and interdependent (see Article I, section B.2.d.3). And Holmes clearly held that the judiciary ought to restrain its
legislative powers, allowing the processes of "free creation" to be
left mostly to official bodies that were more able to ascertain and
bring about policies that satisfied social demands (see Article III,
section D.1.a). All of these points show that Holmes was aware of
the inescapable indeterminacy problem and that he attempted to
suggest ways by which its effects could be mitigated, so that
unpredictable judgments could be avoided to as great a degree as
possible. A full understanding of his theory shows this to be the
case.

But on the other hand, it should be noted that the
predictability of judicial decisions is only one among many varied
social values which are of importance. It is clearly not the only
one, for it would be easy to conceive of a legal system in which
cases were determined completely on the basis of eye-color or
skin-color, such that the predictability of official behavior was
100% accurate. That such a system would not be desirable shows that
other things besides "predictability" are important concerns of a
legal system. Hence, it may at times be necessary to "trade off"
some of the predictability of judicial actions in order to increase
some other social value.

That Holmes' theory does not postulate a strictly mechanical
prediction process, then, is certainly not a major defect in his
approach. To recognize the complex realities of judicial
decision-making, it is apparent that some indeterminacy will be
unavoidable, and to require that Holmes' prediction theory provide a
completely deterministic process of judicial decision-making and
judicial predictability is to judge his theory by an unrealistic, and
what might be called "Cartesian," standard. But certainty is simply
not required. When Holmes' overall theory is understood in all of
its most important aspects, it is clear that Holmes makes a definite
attempt to reduce the uncertainty problem in judicial decision-making
and predictability. Indeed, the reduction of this uncertainty is precisely the job of lawyers, whose service to the ordinary person is one that involves predictions of official behavior to as accurate a degree as possible. To accomplish that end, Holmes further recommended that lawyers familiarize themselves not only with "the rules," but with social, economic, and political trends and issues. Lawyers have to make themselves aware also of current trends in legal thought, reasoning, and justification. The best lawyers must constantly absorb information from many sources. Thus, the most competent lawyers will be able to discern that a "novel" break from a certain traditional judicial behavior pattern is imminent, by his or her professional "reading" of such signs. Because the competent legal professional becomes aware of all of the social factors which may influence judicial behavior, he or she further "fills in" the cracks through which unpredictable cases can fall.[47]

In all of these ways, then, Holmes' theory recognizes and addresses the problem of occasional judicial unpredictability. That Holmes' theory does not provide an account of predictability that yields certainty should not be taken as a serious criticism of his legal thought.


This objection raises doubts about Holmes' emphasis upon the judiciary. If the meaning of "the law" and other legal concepts is to be formulated in a pragmatic fashion, that is, in terms of its conceivable effects upon future experience relative to some set of general interests, then it would seem that the behavior of many other officials besides judges would figure in the resultant conditional predictions. As Karl Llewelyn writes:

"... central as are the judges actions in disputed cases, there is a vast body of other officials whose actions are of no less importance; quantitatively their actions are of vastly greater importance ... [such that] ... the actions of these other officials touch the interested layman more often than do those of the judge ..."[48]

In this case, Holmes' theory ought to address the behavior not only of the courts, but of administrative agencies and enforcement personnel, among others, for these kinds of officials also have a profound effect upon the future behavior of ordinary citizens.
7f. The Holmesian Response.

The point that is made in this objection, though quite a limited one, is accommodated and acknowledged by the presently-reconstructed version of Holmes' theory. The fact is that Holmes' theory of law is often couched in terms that might lead one to believe that only the judiciary is being addressed. However, it is obvious that Holmes' intention was not to limit his theoretical framework to the judges, but to extend it to all state officers who hold official power over individuals. This is why I have often used the expression "state official" rather than "judge" in my formal reconstruction of Holmes' theory of law. (See, for example, Article I, section B.2.c.4.) Holmes probably focused upon courts because they do play a central formal role in a legal system, as Llewelyn admits. But Holmes surely would not have excluded non-judicial official agencies from his theoretical framework, and in fact, often appears to simply take the term "judges" in a generic sense, such that it refers not only to actual judicial officers, but to any incidence of an official "public force."[49]

In so far as the objection points out that there are such non-judicial public forces which ordinary persons need to be pragmatically concerned about, the objection actually makes explicit a part of Holmes' theory that might otherwise be misunderstood. This objection, then, is really not an "objection" to Holmes' true legal theory at all, but is rather an objection to an oversimplified view of Holmes' theory which would take it to apply only to the judicial office. It is clear, upon a proper understanding of Holmes' theory, which takes it to be much more than a single sentence about "predicting court behavior," that the importance of non-judicial officials from the standpoint of a pragmatic approach to legal concepts must also be stressed. Hence, the objection to Holmes' thought again shows how little his overall theory has been understood, and serves to point out that Holmes did take the actions of non-judicial state officials into theoretical account.

7g. Holmes' Approach Leads to "Gastronomic Jurisprudence": The Objection.

If the Holmesian/pragmatic approach to the meaning of legal concepts prescribes that an ordinary self-interested person predict the behavior of state officials with regard to his or her activities, this appears to imply that such a person in a single case should be aware of all (or nearly all) of the factors which might influence a judicial decision. Such influences could include the judge's personal political ideology, his personal upbringing, his economic and social status, his health, and even whether or not he had a good breakfast on the day of the trial: hence the title of "gastronomic jurisprudence" is given to the predictive approach to the law. Of this issue, Kelsen has written:
"What a certain judge will decide in a certain concrete case depends in actual fact on a multitude of circumstances. To investigate them all is really out of the question ... All the peculiarities of the concrete case—the character of the judge, his disposition, his philosophy of life, and his physical condition—are, it is true, facts which are essential to a real understanding of the causal chain. But they are of no importance ... the only relevant question is, whether the judge will apply the law ..."[50]

The claim which underlies this objection is that such idiosyncratic factors regarding the judicial (or official) personality are, or ought to be, legally irrelevant with regard to proper official decision-making. Since Holmes' approach simply stresses the prediction of official behavior in a legal context, such an approach allows these idiosyncratic factors too much legitimacy. Further, when such factors become legally relevant, the result is that jurisprudence is reduced to the sociology of state officials, and that is reason to reject the Holmesian predictive approach.

7h. The Holmesian Response.

In response to this objection, it is interesting to note that, contained in the very first published formulation of Holmes' predictive account of the meaning of "the law," Holmes recognized the very issue brought forth by this objection. To recall that passage, Holmes wrote:

"What more indeed is a statute; and in what other sense law, than that we believe that the motive we think that it offers to the judges will prevail, and will induce them to decide a certain case in a certain way, and so shape our conduct on that anticipation? ... The judges have other motives for decision, outside their own arbitrary will, and besides the commands of their sovereign. And whether those other motives are, or are not, equally compulsory, is immaterial, if they are sufficiently likely to prevail to afford a ground for prediction. The only question for the lawyer is, how will the judges act? Any motive for their action, be it constitution, statute, custom, or precedent, which can be relied upon as likely in the generality of cases to prevail, is worthy of consideration as one of the sources of law, in a treatise on jurisprudence. Singular motives, like
the blandishments of the emperor's wife, are not a
ground of prediction, and are therefore not
considered."[51]

Holmes appears to have acknowledged the problem of the possible legal
relevance of various factors which enter into the prediction of
official behavior, but then simply dismissed it. The question, then,
is—what made Holmes think that this objection did not deserve a more
extended treatment? The correct answer to this question can be
found, I would claim, only as a result of a more extensive
understanding of Holmes' overall theory of law, especially in
relation to his pragmatic emphasis upon generalities and types.

For Peirce and Dewey, as was shown in Chapter Two, the
conditional statements which formed the meanings of concepts were of
a general nature.[52] Thus, to say that a stone was "hard," for
instance, meant that, in general, if the stone is tested in a certain
way, then the stone will resist being scratched. However, if a
particular stone, which is of a certain type of stones possessing a
certain degree of hardness, does not pass the test for stones of its
type, this in itself does not invalidate the general conditional
findings about such types of stones, but rather, serves to indicate
that perhaps something was different enough about that particular
stone from stones of its type to cause the anomalous result. In this
case, a single prediction about the particular stone would fail,
despite all reasonable indications to the contrary. To analogize the
situation to a legal context, a legal professional might judge that
cases of a certain type are generally treated by the courts in a
certain way, and so, as far as a particular case fits into the type
being considered, all other things being equal, this case will also
be officially treated in a certain way. When some particular case
violates a reasonable prediction, this is still not enough to say
that the prediction made will not still bear out in general, that is,
more times than not, in the same general context. This is, in fact,
one of the reasons that legal judgments are said to contain a degree
of uncertainty, as was shown in Chapter Two.

Hence, the very nature of predictions involves an appeal to
generality, such that a prediction that "X will occur" must be
translated in terms of a general scenario, or one that is carried on
through time. To predict that "X will occur" on the basis of a
general conditional rule is to say that, "in the long run, more X's
will occur in situations of this type than will not occur." Another
way of addressing the general sense of pragmatic predictions is
through use of the subjunctive tense. In that way, the pragmatic
prediction is not "Given Y, X will occur," but "Given Y, X would
occur." Predictions of this type can serve as guides to future
behavior when actual tests of whether or not X will occur are
inconvenient or impossible.

All of this demonstrates, I think, what Holmes' account of the
meaning of legal concepts primarily concerns—generalized
predictions. His theory thus creates a formula, which is a
generalized statement itself, for determining the meanings of legal concepts. This is why Holmes talks about predictions as non-particular objects, and is why the things to be considered in making those general predictions include only those judicial motives "... which can be relied upon in the generality of cases to prevail."[53] Just as certain disturbing factors (e.g., instrument malfunction, power failures, etc.) can bring about anomalous results in the test of some physical concept, judicial ideosyncrasies can bring about an anomalous decision in a legal context. But just as an anomalous result in a scientific experiment does not invalidate generalizations found to be successful in most cases, unexpected ideosyncratic judicial behavior does not invalidate predictions that would be successful in most cases of a certain type. Therefore, the objection that prediction of court behavior means a concern with individualized characteristics of judges does not apply when these predictions are thought to address judicial behavior in general. For such generalized predictions, singular motives are legally irrelevant in Holmes' view.

On the other hand, this response to the ideosyncratic judge problem may look respectable in the abstract, but it hardly suffices in any actual adjudication. That is, a particular person wants to be able to predict what will happen in his case, not what "would occur" in the "long run" with cases of "his type." If the pragmatic approach is to be one whereby the conceivable empirical consequences or "cash value" of a concept (or legal question) are to be paramount, then this abstract appeal to subjunctive "would be's" appears to violate the whole tone of this approach. In other words, why should a person care if the courts in general would rule in a certain way in cases of his type if the actual judge he faces rules in another way? To such a person, who is interested in avoiding state sanctions, the factors which allow him to predict the decision of the state official who handles his case are most important, and so, such a person would seemingly need to be concerned, again, with judicial ideosyncrasies. In this way, while Holmes' pragmatic response (via the generalized prediction route) to the question of the relevance of judicial ideosyncrasies eliminates the problem on a theoretical level, the problem still remains on the practical, everyday level, which is presumably the context in which pragmatic thought is supposed to be so useful. In such a light, how would Holmes respond to this counter-objection?

In the first place, Holmes clearly meant for his predictive account of judicial behavior not only to apply in a general sense, but in a communal sense, whereby legal decisions are made in the context of a legal system. That is, when the official response to some factual scenario is predicted, this "official response" is that of the legal system as a whole—it is a description of the official treatment and disposition of a person's case-situation. Hence, Holmes' theory presupposes that there is some community of judges and state officials, some at lower trial levels, and some at higher appellate levels, which make up the entire legal system. I will return to this presupposition in a moment.
Now, what really concerns the pragmatic person looking to predict the official response to his case is not how one particular judge might decide it, as the counter-objection suggests, but how his case will be ultimately disposed of by the system itself. In almost every existent legal system, individual judges operate within a larger system containing other judicial and non-judicial officials. Trials held at one level of most legal systems can be appealed to different courts, made up of different judges. Many times, in fact, courts, administrative agencies, arbitration panels, grievance boards, etc. are made up of more than one individual, precisely to get around the possibility of individual biases. Judges who decide cases upon idiosyncratic grounds will often be reversed on appeal, or even impeached and removed from office. Such "individual personalities" are not welcome to the judicial role, and their tendency of being unpredictable upon established grounds is a threat to the stability of the whole system. Further, complex legal systems often adopt the practice whereby judges are rotated or are interchangeable in particular courts. Such a practice reduces the advantage or the necessity of studying the idiosyncrasies of a particular judge when predicting how "the courts" will act in regard to a given factual scenario.\[54]\ In addition, the very idea of interchangeability suggests that, in complex systems, individual judges are not expected to decide cases as the individuals they are, but as a judge would. A judge, then, "...should not consider what he personally would decide except insofar as his decision would be interchangeable with that of any other judge."\[55]\

All of these factors work together to reduce the relevance of personal biases and other subjective characteristics of individual judges, and Holmes' theory recognizes the objectivizing effects which communities of decision-makers have in reducing the subjective nature of the disposition or decision ultimately handed down (see Article II). Therefore, when the context being considered in that of most legal systems, which are most often highly complex and involve procedures that tend to reduce subjective biases, the counter-objection fails. In such a complex legal system, judicial idiosyncrasies are still legally irrelevant for individually-oriented predictions. The procedures outlined above, as well as the presence of other officials in a legal system, tend to introduce generalized, predictable elements into the context of legal prediction of official responses.

The only case, it seems, in which the present counter-objection holds, would be one that involved a "legal system" with a single magistrate, who could not be removed from office, could not be overturned on appeal to any other official (if there were any), and could not be punished in any way for a decision based upon a personal bias. In this one limited case, the counter-objection to Holmes' theory appears to succeed. But in such a context, which would be quite different from any legal context ordinarily considered in jurisprudence, would the fact that idiosyncratic factors were legally relevant mean anything strange at all? It seems not, and so, the objection in this case says very little. That is, such a "system" would simply have as its "legal rules" and its legal procedures the
will (or the whims) of the magistrate. In the context of that primitive system, the personal biases of the magistrate are part of "the law." If the concept of the law is "cheapened" in some sense when the idiosyncratic factors of individual judges are made legally relevant, this is only because such a judgment is made from the standards of a complex legal system. In a one-magistrate system, this is simply the way the law works. Therefore, there would be nothing strange about the personal idiosyncrasies of a single magistrate being legally relevant in such a limited context. This would simply be part of such a system, and any aversion or objection to it only comes when this bizarre system is judged from a more sophisticated perspective.

Therefore, Holmes could answer the counter-objection proposed above in two ways: (1) in regard to extremely simple "legal systems," the idiosyncrasy factor would not be objectionable, but would merely be a fact-of-the-matter which legal predictions would have to take into account, and (2) in regard to almost every other existent legal system, the communal nature of the system's decisions, as well as its practices and procedures, tend to mitigate the effects of judicial idiosyncrasy, and so, diminish (if not eliminate) the tendency to view such personal biases as legally relevant factors in legal prediction.

71. Holmes' Theory Creates a Disturbing View of the Judiciary: The Objection.

In the context of a discussion of legal realism, Theodore Benditt raises two problems which might be taken as objections to Holmes' theory of law. In the first place, if the judiciary is to follow a forward-looking method of pragmatic/experimental justification, resolving conflicts by balancing the short-run concerns of the litigants and the long-run concerns of the ruling for society, the judicial process becomes disturbingly politicized. That is, if Holmes' view is adopted, the judicial process may come to be looked upon as simply one among many political institutions in a society, although perhaps as one which contains a bit more ceremony.[56] Of this view of the judiciary, Benditt writes:

"This conception of the roles of courts and judges is certainly not a flattering one. It is at odds with our usual conception of our judicial institutions, which for the most part we see as quite different from straightforwardly political institutions."[57]

The other problem which Benditt raises is directly related to the first. If the judiciary is to be politicized, and judges are to openly engage in legislative activity (for this is what handing down
rulings on the basis of forward-looking pragmatic vision amounts to), then how is this consistent with democratic ideals? Benditt claims that judges are, in Holmes' view, put into a position to make the law, which is "... a task that in a democracy is thought to be the prerogative of elected representatives." [58] The undemocratic aspects of the Holmesian view, then, result in another worrisome problem. The two problems together raise serious doubts about the adequacy of Holmes' theory of experimentalism, especially from a democratic perspective.

7j. The Holmesian Response.

Though these criticisms are not directed specifically at Holmes, the possible Holmesian responses to these problems clearly demonstrate the sophistication and complexity of Holmes' view, for there are several ways which Holmes' theory addresses such concerns directly. In the first place, Holmes' view of how judges behave and how judges ought to behave is straightforwardly non-traditional (see Article III, B.2). The ordinary and traditionally-conceived role of the judge pictured him as a totally impartial observer who heard disputes which came before him, and handed down decisions regarding those disputes by looking to "the legal rules" and applying it in the case before him. The syllogistic reasoning pattern by which judges behaved in this traditional role could be broken down as follows:

Major premise: All cases of type X deserve official treatment Y.

Minor premise: The present case is an instance of type X.

Conclusion: The present case deserves treatment Y.

What is traditionally conceived as a "rule of law" makes up the major premise, while the minor premise involves the classification of the present scenario in terms of the appropriate rule. Once this is done, however, the conclusion is mandated, and so, the judge hands down a decision on a case "by the rules".

The problem with this model is that, comforting as it may appear to be, it is a profoundly inaccurate picture of what judges actually do. Holmes goes even further to argue that it is not even what judges ought to do. The traditional model of judicial decision-making is inadequate, then, because of its oversimplified account of the judicial process. This account says nothing of how a judge is to find the major premise, how the case at hand is supposed to be applied to the rule, how the rule is supposed to be
interpreted, or how much weight should be given to other relevant factors. All of these are necessary elements for the justification of a judicial decision, and the traditional view leaves them totally out of consideration. As has been argued before in this essay, from Holmes' point-of-view, the traditional syllogistic model of judicial behavior must be rejected. Therefore, the claim that Holmes' model does not fit in with our "usual conceptions" of judicial behavior is quite candidly admitted by Holmes, and is seen not as an objection to his view, but indeed, forms part of the whole motivation for a more honest approach. According to Holmes', the honest recognition of what the judicial process is about, even if it upsets our previous conceptions, is more valuable than the comforts which the entertainment of myths can offer us.

The Holmesian model offers a picture of the judiciary that is called "unflattering", yet how flattering a view is the traditional conception whereby judges mechanically apply rules in a deductive process, totally unconcerned with the usefulness, relevance, or social consequences of their activity? The Holmesian judge honestly recognizes the political role which the judiciary plays in a society, and in so doing, makes himself aware of the possible social consequences of his official activity. It is hard to say why this is to be considered an "unflattering" view of judges.

Holmes' recommendation, then, in answer to the first problem raised by Benditt, is that our "usual conceptions" of the judicial institution are faulty, and that an honest consideration of the whole idea of having a judicial system shows the Holmesian model to be a more straightforward and preferable approach than the traditionally-conceived model.

In regard to the second problem, Holmes addresses it in several ways. First, Holmes presupposes that judges operate in complex legal systems, where other officials act as a check upon the abuse of power (or use of personal bias as a ground for official decisions) by any one particular judge. This communal context reduces the possible anti-democratic aspects of Holmes' judicial model by allowing judges to become answerable to the legal system (and the rest of the government) as a whole. Further, in actual fact, many judges are elected by popular vote in complex legal systems. Second, Holmes' theory recognizes that the judicial office is not the best place for social experimentation in the form of legislation, and so, recommends that judges refrain from such legislative activity (sometimes called "judicial activism") to as great a degree as possible (see Article III.D.1.a.). Certainly this was one of the basic principles by which Holmes guided his own judicial behavior, as was argued in Chapter Two above. In this way, judges are encouraged to let the legislatures engage in the democratic experimentation they are better suited for. Third, Holmes' theory provides for the judicial safeguarding of democratic practices. In some cases, democratic practices can take on a self-destructive tone, as when majorities use their power to subdue minorities, or when legislatures enact resolutions which restrict power of future legislatures. In such cases, the best service to "democracy" as a political ideal is accomplished when
transitory majorities are themselves restrained, and Holmes' theory (as well as judicial behavior) provides for judicial activity in such cases (see Article III. D.1.b.). As was shown in Chapter Two, the democratic ideals expressed in a Constitution make social experimentation itself possible. But when such experimentation is used in ways which may result in restraints upon democratic practices, Holmes advocated that judges could (and should) exercise their powers to preserve those processes of experimentation. Thus, although a majority might feel that "freedom of speech" is a present hindrance to its purposes, and may democratically move to enact restrictions upon this freedom, such actions are not in reality extensions of democracy. Such actions, in fact, are dangers to democracy, and in so far as a democratic governmental process is a desired ideal, such actions are rightfully opposed.

Of course, these responses do not guarantee that judicial activity under the Holmesian model will result in an increase in a society's democratic character. On the other hand, the notion that democracy is guaranteed by allowing legislatures free rein is also surely false. What Holmes' theory does is show how a certain model of judicial decision-making can not only be compatible with democratic ideals, but can provide some fundamental safeguards for such ideals. In doing so, Holmes' theory gives an adequate response to the "objection from democracy". Therefore, since Holmes' theory allows for the preservation and extension of democratic ideals, Benditt's second objection is also unwarranted.

7k. Holmes' Theory Allows for Too Many Concepts of "The Law": The Objection.

One final minor objection need be noted. Since Holmes' theory of the meaning of legal concepts is a pragmatic approach, the meaning of any concept, for instance, "the law" is unpacked in terms of conditional statements which refer to conceivable empirical effects. Such references, however, are obviously relative to those effects which are relevant only to certain contexts, and such contexts consist, at least partly, of human purposes or interests. Holmesian pragmatic meanings, then, become relative to human purposes, interests, values, or ends. As such interests, etc. are held by various persons, the meaning of the concept of "the law" becomes relative to various persons. But what is left of the philosophy of law, in this case? That is, how many concepts of "law" are there? The Holmesian formulation of meaning seems to allow a multiplicity of pragmatic constructions for any concept. This is troublesome, for it seems as if "the law", though quite elastic, is a singular concept. The same criticism goes for the Holmesian approach to other legal concepts, such as "right" or "obligation". Since the Holmesian-pragmatic theory of the meaning of legal concepts apparently leads to this quite unacceptable result, it ought to be rejected.
71. The Holmesian Response.

This general objection has already been raised in this essay (see Chapter Two, Section C.2.), though not specifically in the context of Holmes' legal theory. However, since I am reconstructing Holmes theory as a fundamentally pragmatic one, the same criticism can be directed at Holmes. For the same reasons as were given in Chapter Two, though, the present objection is demonstrably non-problematic.

In the first place, the claim that there is but one ("true") conception of "the law" is an exceptionally strong one, and needs to be justified in some way. But even if such a justification were forthcoming, a singular concept may still have many meanings, unless it is also claimed that, for this one-true-concept there is but one-true-meaning. Unfortunately, there appears to be little in support for either of these claims, and in fact, there is more in support of their negation. Staying with the example of "law", for instance, it has been pointed out that the English language does a disservice to our legal philosophy because we clearly mean by the single word "law" different things in different contexts. The European languages, French and German for example, make a distinction between "law" in the sense of the formally enacted statutes and regulations and "law" in the sense of the non-formal principles, standards, or traditions which underly the whole judicial system. In French, the former conception is that of loi and in German gesetz; while the latter conception is droit in French and recht in German.[59] Of course, it is possible to run the two senses together and simply speak of "law" in general, but this seems to blur some useful distinctions. At the very least, though, this one example demonstrates that the concept of "law" has more than one sense, and so, is not really best analyzed as a singular concept at all. Holmes' more adequate approach sees "law" as a family of related concepts, each with its own meaning, or family of meanings.

The idea that meanings are relative to contexts is a relatively common notion. The concept of "water", for example, means something in the context of physics and something else in a more ordinary everyday context (in which the quenching of thirst is a primary interest). It cannot successfully be argued that any single context represents the "true" one, and so, determines the "true" meaning of a concept, for there seems to be no compelling reason to claim that the meanings of concepts must be the products of some single point-of-view, no matter what it is.[60]

Further, the relativity of meaning implied by the pragmatic approach to legal concepts need not lead into a cumbersome multiplicity of individualized "senses" of law, simply because interests and purposes are general, and so, generate general meanings. (See my discussion of this problem, Chapter Two, Section C.2.) The pragmatic approach allows that many concepts, such as "the
law", can be rightfully approached in their various senses, but does not necessarily lead to an unwieldy or infinite number of these senses. The pragmatic approach thus facilitates sub-conceptual distinctions while preserving conceptual generality.

Therefore, it is wrong to say that Holmes' theory allows for as many concepts of "law" as there are persons or individual interests. Holmes' theory of meaning spells out a highly general formula to be used in generalized ways to generate generalized meanings of legal concepts. Nothing in this approach indicates that, somehow, "too many" meanings of legal concepts result. The objection, in this case, is no problem for Holmes' account of the meaning of legal concepts.

8. Overview of the Standing Critiques of Holmes' Legal Thought.

In all, I have shown the many ways in which Holmes' legal theory can be defended from twelve different objections, all of which have appeared in the critical literature of jurisprudence. In many cases, these objections stem from an incredible oversimplification of Holmes' legal thought. If "Holmes' theory" is taken, as is sometimes done, as representing a single passage from "The Path of the Law," an inevitable distortion results. Part of the value of the present study can be seen in the way that such oversimplifications can now be exposed. On the other hand, in many of these standing objections, the problem is not just oversimplification but a failure to recognize the underlying philosophical approach that Holmes is taking, and this itself results in distortion.

Straw men are, by their very nature, easy to attack, but the present reconstruction of Holmes' thought shows that it is much more substantive than the straw man it is often represented to be. The fact that Holmes' theory is defensible upon so many grounds shows that it is a more formidable theory than has been previously thought. That it is a new and perhaps "revolutionary" approach to jurisprudence appears to be the cause of many objections which have been raised against Holmes' theory,[61] but as I have pointed out, appeals to tradition are not generally sufficient in themselves to stand as valid objections to a theory that admits of its non-traditional nature at the outset. Although I do not claim that my collection of objections to Holmes' legal thought is exhaustive, I do claim that the objections treated here are the most important ones, most often repeated in the critical literature. There are many minor criticisms of Holmes' legal thought, moreover, to which the proper response in the present context would simply be, "Yes, but Holmes addresses that point in another part of his overall theory," and I have found it unnecessary to list such objections here, as they are primarily a result of the fact that no comprehensive work on Holmes' theory has been done.

There have been other general objections raised in the
jurisprudential literature, however, that are more troublesome for Holmes' theory of law. These objections are usually not the results of oversimplification, but are relatively accurate criticisms of Holmes' legal thought as it has been thus far understood. I have combined these more difficult standing objections into two general ones. Though this set of objections is small in number, however, they have been given a significant amount of attention, and so, deserve to be addressed here. I will now explore this particular group of standing objections, formulating possible Holmesian responses to them whenever appropriate. I will then raise some further objections and critical comments of my own before attempting to construct an overall evaluation of Holmes' theory of law.

C. The Standing Objections to Holmes Which Are More Difficult to Answer.

1. Objections to Holmes' Analogy to Science, With Possible Holmesian Responses.

Holmes' theory of law obviously places a primary emphasis upon the pragmatic workability of legal concepts and legal decisions, and yet, one set of criticisms of Holmes' theory has been generated from this very same emphasis upon workability and practicality. That is, one group of objections which have appeared in the critical literature holds, in general, that Holmes' theoretical approach fails on the very grounds it lays down for success, namely, pragmatic ones. In one sense, Holmes' approach to legal concepts and legal decisions, it is claimed, simply will not work in practice. Further, even if his approach did work, it would not yield satisfactory results. There are several aspects to this objection, and I would now like to explore them carefully in terms of the specific claims made by the authors who have put forth this line of thought. First, a brief restatement of the specific part of Holmes' theory under attack.

In Holmes' advocacy of a pragmatic approach to legal concepts and an experimentalist approach to judicial (and legislative) decision-making, Holmes held that judges (among others) should conceive of legal matters and legal activity in terms of conditional, means-end guidelines. Legal decisions were only to be the means to the satisfaction of certain ends—social preferences and needs—and so, were justified to the extent that they brought about such satisfaction. Legal reasoning and legal justification, then, is to be forward-looking in Holmes' view, such that the future social consequences of official actions is of paramount importance (see Article I.B.2.c.4 and III.B.). Judges were to hand down rulings as "working hypotheses," to be experimentally tested in the experience of the community. The success of a legal ruling was therefore determined by its resultant socially advantageous effects. As was shown in Chapter Two, this method of theorizing was precisely that
which had been adopted by the pragmatist philosophers Peirce, James, and Dewey,[62] and as such, places Holmes in the forefront of the American pragmatist tradition.

Now, the problems which I would like to discuss in regard to this Holmesian position are the following: (1) the difficulty in identifying "social ends," and the effect this has upon identifying "means"--two processes which are necessary for the evaluation of a legal "working hypothesis," (2) the difficulty of assessing the sufficiency of the "success" of a legal experiment, (3) the limitations of both social scientific as well as legal instrumentalities, and (4) the idea that experimental satisfaction of interests may result in some cases in gross injustice. Let me examine these points in this order, and investigate the possible Holmesian responses to each.

If legal enactments (viz., judicial rulings, statutes, regulations, ordinances, etc.) are to be formulated with reference to the goal of the satisfaction of social interests, it may still be difficult to determine from any particular ruling exactly what are the "ends" or "goals" towards which it is aiming, and this, in turn, will make the evaluation of such enactments quite difficult. Robert S. Summers points out that this indeterminacy of goals may occur for two reasons:

"First, the lawmaker may not have explicitly incorporated the goals that determine the law's content in the law itself. This often occurs in part because intelligible forms of law can ordinarily be formulated without incorporating goals ... Second, the various goals that could be attributed to a form of law are usually ones that have come into conflict in the course of constructing the law. The emerging law is often the result of complex reconciliations, and this may make it difficult to map the extent to which various goals figured in the process."[63]

Although there are some ways of identifying the underlying ends which a legal enactment is intended to serve (viz., examining legislative documents, court opinions, administrative proceedings, etc.), these are still open to further interpretation, and so, the evaluation of a legal experiment remains a difficult matter. But even when the goals of legal enactments are identifiable, in many cases, such enactments are constructed in order to address many different goals or interests, which can be highly general, highly specific, or even both. The "ultimate" end of a legal ruling may simply be "the promotion of the general welfare" while the immediate end might be "the restriction of smoking in public places." Since these are quite different goals, and since these goals also differ in importance, the ways by which a legal experiment is judged to be successful will change relative to each specific end being considered, if such ends
can be recognized to begin with.

Further, the result of satisfying some interest may in fact lead to an impairment or restriction upon some other interest. As Edwin W. Patterson has observed, the national prohibition "experiment" in the U.S. was enacted for generally beneficent ends, but also produced widespread racketeering and gangsterism.[64] Hence, even when one specific social end of a legal enactment can be identified, the totality and the complexity of the social experience may lead to the situation in which the simple satisfaction of such an end still does not in itself pragmatically support the enactment. A related problem is that it is not possible to be sure that some particular legal means to some social goal, even if successful, will not result in totally unanticipated detrimental consequences further down the road. In effect, the solutions to problems can turn out to be worse than the original problems themselves.

In addition, means and goals are usually related, such that the identification of a certain goal depends upon the available means to reach that goal. That is, deciding upon the satisfaction of a certain social interest as a goal many times goes a long way in determining the means to that goal. The point here is simply that legal means and social ends form complex relationships among themselves, and this also makes the evaluation of any mean-ends legal experiment more complicated than it sounds at first.

Finally, it is obvious that when the goals which legal enactments are to address are difficult to sort out, identify, and rank, the experimental means to such goals will be correspondingly difficult to evaluate in terms of their pragmatic success in satisfying or meeting such goals. At the very least, a great deal of simple fact-gathering would become necessary for the pragmatic justification of a legal enactment. At worst, the whole approach would apparently become an endlessly frustrating endeavor of sorting out the specific factors by which the experiment could be evaluated (that is, experimentally tested), involving much speculation. Such would be an almost hopeless task. The problem of identifying the ends to be satisfied by legal means can thereby entail an incredibly complex kind of consideration, perhaps bordering on the impossible. This method of legal justification, then, evaluated upon its own pragmatic merits, seems to be highly troublesome.

From my research into Holmes' legal thought, I cannot say that Holmes ever addressed or even considered this part of the present objection. Holmes simply assumed that scientific investigation and methodology could identify and construct the means to attain social goals. Of course, the fact that such an undertaking would be complicated and quite a difficult task does not necessarily count as a strong objection to Holmes' theory, for his experimentalist approach never implied that the task of successful law-making was easy. If I might assume the role of speaking for Holmes in regard to other parts of this composite objection, Holmes might himself object to the idea that "goals" are some kind of thing to be "discovered." That is, Holmes would say that social goals are created by a society,
and so, are themselves hypotheses. In addition, the idea that it is not possible "to be sure" that some particular legal means will not lead to some detrimental effects assumes a Cartesian standard of certainty which Holmes would say is an unreasonable one by which to judge the whole experimentalist program. The most difficult part of the objection, then, for Holmes' theory of law, seems to be that the task of successful experimentalist law-making would be a very laborious and probably unobliging endeavor. Basically, this is simply to say that following Holmes' program will not be as easy as it sounds.

Related to the problem above is that of judging a legal experiment's pragmatic, means-ends success. If it were given that definite goals can be set and that definite legal means can be put into motion in the attempt to meet such goals, what are the criteria by which pragmatic success in this context is to be determined? It cannot simply be, as Robert S. Summers argues, a question of whether or not a legal experiment has been "effective" in satisfying some goal, but whether the experiment has been sufficiently effective.[65] The mistake that Holmes appears to make is that, although science might be able to give us the methodology by which we can quantify social ends and measure the effectiveness of the legal means intended to satisfy those ends, this type of measurement cannot in itself say whether a legal experiment is a "success" or not. The question is—how much legal effectiveness is enough? Summers writes on this point:

"... more is involved in judging legal success than simply determining actual effects and plotting them on some kind of scale. Rather, the issue becomes one of sufficiency of effects in relation to such factors as the difficulties of realizing the goals, the amenability of the goals to direct means, the conflicting goals that are affected, and the time interval required for the use of law to "take hold." Whether a given use of law is sufficiently effective, as judged in relation to such considerations, is therefore a complex evaluative question."[66]

Holmes, like Dewey, took an empirical approach to evaluative matters, and apparently believed that value questions could be translated into factual ones by means of pragmatic experimentation. But the kinds of scientific measurement which this method entails results in empirical observations only, which still must be judged evaluatively. Again, the question is still that of determining the degree by which the observations confirm or disconfirm the working legal hypothesis.

Holmes might respond to this criticism by saying that the classification of a legal experiment's success need not be a "yes-no" judgment, but merely a relative one. There can be degrees of successfullness, then, in Holmes' view, and a small number of positive
results would simply show that a legal experiment was somewhat successful (or had a certain likelihood of success), while overwhelming positive results would show great success. Nothing more, Holmes would say, is needed than this. On the other hand, Holmes might respond that specific "success criteria" could be set up initially as part of a social goal designed to be met by legal means. In that way, a "yes-no" judgment necessary, the empirical observations themselves would provide the factual basis for such a judgment. That is, when it is shown that legal means X results in Y observations of Z during time T1...Tn, and this state of affairs had previously been set as the criterion for X's success, then X can be judged as successful on a purely empirical basis. In both of these ways, then, a separate judgment of sufficiency can be dealt with by Holmes' experimentalist approach.

However, although I believe that Holmes' approach provides an answer to the "sufficient results" question, his two responses to this problem only serve to illuminate the third part of the present overall objection. The point here is that present scientific methodology does not yield the kind of controlled experimental processes in a social context by which even simple empirical judgments (such as, "X results in Y observations of Z during time T1...Tn") can be attained. What must be shown of some legal means, in order to say it is effective in any sense, is not just that certain observations followed it, but that certain observations resulted from it. For X to be effective as a legal means to some social goal, X must be a positive causal factor. The problem is in the fact that the experimental context in which the tests of the legal hypothesis are to occur is the community itself. But if the whole community is the "laboratory," the only study of X's effects will be an observational one, from which causal conclusions cannot be accurately drawn. Causal relationships are determined by comparing observations in an actual population with observations in two controlled populations, such that the possible causal factor is either completely present or completely absent in the controlled groups.[67] It is only in this way that X's influence over certain subsequent states of affairs can be sorted out from among the many other possible influences which could have brought about those states. Further, establishing a causal relationship calls for the repetition of such observations and comparisons, so that the accuracy of the data can be checked.[68] But such controlled causal studies cannot be done by observing only one group—the community, for it cannot be known that the "Y observations of Z during time T1...Tn" were due to X, or to some other factor or factors, or to chance variations. So, even if "success criteria" are established in a more-or-less specific sense, there is no scientific method by which it could be determined that a certain legal means did meet those criteria, as long as observational studies alone are conducted, and these seem to be the only feasible types of experiment when the entire community is concerned. Hence, the lack of control groups in real populations is one way in which the application of scientific procedures to law-making fails. Further, the issue of the repeatability of experimental findings is highly troublesome for the legal analogy to science, for, as Summers points out:
"Societies cannot afford to repeat phenomena such as famines, depressions, or deaths, etc. Social norms and taboos would bar the repetition of other sequences, for example, those invading privacy or the integrity of the person. Other phenomena that serve as variables are often in their nature not repeatable, for instance unique historical episodes."[69]

It should be pointed out, however, that governmental systems made up of federated states or communities can provide examples of different populations which might lend themselves to a causal comparison. For example, if two neighboring states are sufficiently similar with regards to several social, economic, and cultural factors, then the introduction of a legal experiment, say, handgun control, in only one of these states would allow a rudimentary causal analysis to proceed. The same could be said of comparing different cities with similar social, economic, etc. characteristics. Many such comparisons would yield some degree of experimental repetition, moreover. But even in these cases, the populations being compared really are not "control groups" in the sense that one and only one specific factor differentiates them. Neighboring states or cities or other communities are extremely complex units, and as such, would make the isolation of a single causal factor an incredibly difficult statistical task. Much of the repetition of experimental testing, again, might simply be impossible. However, in defense of Holmes, the mere difficulty of the task of carrying out the program of legal experimentalism is not troublesome in itself, for Holmes never promises that it will be easy. Still, the criticism shows again that the actual processes by which legal enactments are to be pragmatically tested by their empirical consequences for society are, at the very least, incredibly complex ones.[70] The establishment of a causal relationship between legal means X and social end Y, apparently necessary for the evaluation of X's effectiveness, cannot be done accurately simply by observing a community or by comparing various communities. Perhaps social scientific methodology will someday permit the kind of hypothesis-testing which Holmes' theory calls for, although that is mere speculation.[71] On the other hand, if social situations are actually networks of forces and events in which one variable cannot be tested without affecting many others, then such hypothesis-testing may in fact be impossible no matter how sophisticated the methods.[72]

Moreover, not only might scientific methods be inapplicable to the testing of legal means, but those legal instrumentalities themselves may be inadequate methods to reach social goals. One author in particular has argued this point quite extensively. Lon Fuller held that the processes of adjudication are practically limited to certain types of functions and are profoundly unsuited to others. For example, while a quasi-judicial government agency may be created in order to meet a certain social need, such as, preventing
public communications from being monopolized, it is altogether possible that this is more of a managerial task, "... unsuited to adjudicative determination or to judicial review."[73] Legislative and judicial forms are relatively few in number and have an inner integrity of their own that is not totally malleable, relative to the social goals being sought, and so, such forms are not "all-purpose tools of unlimited pliability."[74]

Holmes' probable response to this line of criticism would be to admit much of its validity, and so, to see it as a limitation upon his theory. However, perhaps this is not a very serious problem, since any theory is bound to have some practical limitations. In regard to the scientific testing of legal enactments in general, Holmes puts his faith into the power of science to devise the means by which to attain social goals. In that respect, what appears to be next-to-impossible for science now (viz., the accurate testing of legal hypotheses) may not be so in the future. The fact that the present state of social science has not developed the proper methods needed for the application of Holmes' pragmatic experimentalism merely shows the relatively primitive nature of these sciences. Theoretical models (perhaps in the form of extremely complicated computer programs and simulations) may yet be developed by which the multitude of social factors is no bar to an effective and accurate test of a legal hypothesis. In regard to the limited instrumentalities of the courts, Holmes does recognize their intrinsic limitations, and uses this fact to recommend a general policy of judicial deference to legislatures (see Article III, section D.1.a). In regard to the limited instrumentalities of government in general, Holmes might respond that although the forms by which the state can experiment are limited, they are also changeable, and so, can be re-shaped in terms of social needs. New legislative forms can also be invented for such ends. To insist upon "unlimited malleability" is totally unnecessary. Finally, Holmes realized that official, governmental activities are only some of the many methods by which social goals can be met. In many cases, Holmes observed, the best answer to many of our social problems is for the human race to become more civilized.[75]

There is one other part to this objection which is not a criticism of the difficulties in applying Holmes' approach, but rather, raises a serious question about the very nature of Holmes' pragmatic experimentalism, even if it were to be successfully applied. The issue of concern here involves the problem of how Holmes' theory accommodates the notion of justice. In terms of Holmes' pragmatic experimentalism, it would appear that:

"... the 'just' becomes merely the expedient in adopting the legal order to the social and economic structure. The legal rule enunciated in a decision becomes but a "working hypothesis" which will be demonstrated, experientially, to be sound or unsound. The rule will be just or unjust as its consequences reveal."[76]
However, it has been claimed that an experimentalist approach to the concept of justice amounts in fact to a rejection of all concern for justice.\[77] Holmes himself often appeared to be quite skeptical about the idea of "doing justice," as if such an activity had nothing at all to do with the making of legal enactments as means to the satisfaction of social ends.\[78] Let me break down the present criticism with regards to justice into two parts.

In the first place, if the purpose of legal enactments in Holmes' view is to serve as means to social goals, what kinds of goals are these to be? If satisfying "social goals" means for Holmes the satisfaction of the actual interests and desires of the members of the community, then such interests could in substance be anything at all, including, for example, the irrational prosecution of minorities. Holmes often spoke of the preferences of the community as "what the crowd wants," and of good social policy as that which quantitatively satisfied the most actual social interests.\[79] Of course, such interests can be good or bad, and so, a majority "vote" on policy X does not guarantee that X will be fair or even rational. That X might violate principles of justice, then, is apparently of no concern. In contrast to this is a claim that the social goals which are to be sought through legal means should themselves be the objects of a qualitative assessment. Social goals, as the will of the dominant forces of society, which are irrational or unjust should not be satisfied by legal means. At the very least here, the Holmesian idea of "social goals" is not a clear one in Holmes' theory. (I will return to this issue of the ambiguity of "social interests" in a separate objection below. See section D.2.)

In the second place, even if the concept of "social goals" is changed so that a legitimacy factor is added, and that something is not an adequate social goal unless it accommodates the idea of justice, there is no guarantee that the actual legal means to those ends will also be just. Hence, legal means should be subject to the same kinds of qualitative assessment as social goals. Basically, the objection here is that a concern for justice ought to be part of the criteria of "success" in a legal experiment, and that the Holmesian pragmatic approach should take this factor into consideration.

Holmes might respond to this criticism by raising a counter-criticism of his own—what is meant by "justice?" There are clearly different approaches to the concept of justice, each with its own possible implications for both legal means and social goals. But Holmes might skeptically ask—which of these is the correct theory? Clearly, there is much philosophical disagreement over "justice," and where there is room for reasonable men to disagree, Holmes might say, the best policy is that which does not force the issue one way or another. In light of such circumstances, it appears that Holmes' skepticism about the concept of "justice" supports the view that it need not (and perhaps ought not) play a central role in legal theory.

On the other hand, there are obvious examples of gross
unfairness which must clearly be considered to be unjust, no matter what theory of justice is embraced. For example, there is the traditional counter-example to utilitarian ethics, the lynch mob case, wherein an innocent person is killed in order to calm public disruption and hysteria. In such a case, one particular interest is sacrificed to the overall interests of society, on the idea that the greatest overall social benefit will result.[80] The present criticism of Holmes' pragmatic experimentalism is a claim that such obvious cases of injustice are consistent with Holmes' theory, and in so far as that particular claim is a reasonable assessment, it is simply not necessary that a complete account of "justice" be provided, as long as there are such obvious cases of injustice.

But once again, Holmes would attempt to provide counter-responses to this line of argument. First, Holmes' own behavior as a judge in several civil liberties cases in the 1920's shows that he clearly did not feel that "the crowd" ought to have its way at all times or in any dogmatic sense. As was pointed out in Chapter Two, this particular judicial behavior was an outcome of Holmes' overall theory of law, especially in its emphasis upon pragmatic experimentalism (see Article III.D.1.b).[81] Such behavior, grounded in a legal theory, tends to show that Holmes' view regarding the use of legal means to social goals is not as simple as it sounds at first. In other words, some legal means and some social goals were probably unacceptable in Holmes' eyes. On the other hand, though, Holmes' argument was based upon the idea that it was "unreasonable" for "the crowd" to act to restrain its own future freedom to experiment, and not upon the idea of justice.[82] But where popular majorities are more-or-less accidental, the existence of certain basic officially-protected liberties would apparently prevent many unjust situations of the type mentioned above, for in such cases it would be said that the innocent person's fundamental "rights" were being violated. Still, what about cases where majorities are "entrenched" so that the probabilities are high that a person in a majority will continue in that group while a person in a minority will remain in a minority? In such cases, majorities might act to restrict fundamental rights in drastic ways and to persecute judicial officials who try to stop them. Again, it seems that Holmes' theory accommodates the resultant injustices of such cases.

This brings up what I think would be Holmes' second response to the "problem of injustice." It is Holmes' position that the ultimate justification for official action is the overall social advantage that results from that action. If this means that some individuals will be unfairly treated by the dominant forces in the community, then Holmes would simply accept this as a cruel reality—a brute fact of social existence.[83] That is, if it were the case that the continued suppression of some minority might somehow result in an abundance of overall social benefit, Holmes would simply have to "bite the bullet," as it were, and admit that such a scenario is consistent with his theory. Of course, Holmes might also respond that such a possibility is so far-fetched and unlikely that, practically speaking, it is of no serious concern. Holmes' more hard-line response to the "problem of injustice," however, amounts to
the claim that there really is no problem at all, but only a dissatisfaction with the realities of social power and social existence. Still, in as far as the likelihood of gross injustices ought to be a concern for any legal theory, Holmes' theory is weakened to the extent that it facilitates such cases—but at this point, that is an open, factual question.

But Holmes could put forth a third line of argument, which is to point out that, after all, his legal theory is a new and non-traditional one, requiring a "paradigm shift" in our ordinary jurisprudential consciousness. Because of this, it would seem that many of our traditionally-held legal conceptions, such as "right," "duty," "law," and even "justice" will have to change. We may simply have to give up thinking that the sacrifice of an innocent person for the overall social benefit is an "unfair" or "unjust" situation, and learn to adopt less idealistic approaches to such conceptions. It is at this point that Holmes need go no further, for if he responds to the "problem of injustice" by saying that we need to reconceptualize our ideas of justice, and that his pragmatic method offers a better approach to such concepts, then no further objection can be offered on this particular level. The problem that arises, however, with the idea that Holmes' theory requires a shift in our conceptual understanding of certain phenomena (which amounts to a radical transformation of our traditional legal concepts), is that it appears to ask for too much, and that the conceptual transformation it offers really is not necessary. I would like to examine the general issue of this conceptual reformulation as a separate objection to Holmes, because it appears to have received some amount of attention in the literature, and so, deserves a fuller treatment.

Before moving to this next objection, though, a short overview of the first major standing objection to Holmes' theory is in order. The first standing criticism that is definitely more difficult for Holmes' theory to answer is a claim that the analogy to science implicit in Holmes' pragmatic experimentalism is not a good one for several reasons: (1) there are serious problems in identifying legal means and social goals, which would make the application of this part of Holmes' theory to real situations quite difficult, (2) the evaluation of the success of a "legal experiment" might be troublesome unless the criteria for success are spelled-out beforehand, (3) the nature of legal experiments do not offer the same kinds of controls as do scientific ones, so that causal conclusions will be very difficult, if not impossible, to establish in the evaluation of legal experiments, (4) legal forms themselves are subject to intrinsic limitations as experimental tools, and (5) the Holmesian pragmatic approach might, in some cases, permit gross injustices to occur, upon our present conception of what a "gross injustice" would amount to. On these sub-objections, it appears that (3) and (5) are the most damaging to Holmes' theory, though there are responses to these issues that Holmes might give. The others are relatively easier for Holmes to answer, though (4) shows that the Holmesian program might be extremely difficult to carry out in practice, which is rather odd for a pragmatic approach.

In several of the sub-sections prior to this one, it was shown that Holmes' theory of law requires a reformulation of traditional legal concepts. For example, in section B.6 of this chapter, it was argued that Holmes' approach to jurisprudence favored a significant reformulation of the traditional concept of "legal obligation." This whole idea of radically changing familiar concepts has been criticized as a disturbing result of Holmes' theory, for we are required to learn, in effect, a whole new way of talking and thinking about legal phenomena. The idea that such a reformulation of legal concepts is necessary seems to presuppose that our traditional legal conceptions are badly in need of such reformation. However, there has been substantial disagreement with the claim that our presently-used conceptions of legal phenomena are grossly inadequate, and so, the necessity of the reformulation program which Holmes advocates as part of his legal theory has been called into question.

Let me now cite several of the critical treatments of Holmes' legal thought on the issue of legal conceptualization. Along the way, I will attempt to reconstruct the possible defenses which Holmes might adopt to counter these objections.

As was found above, H.L.A. Hart objects to what he calls the "predictive interpretation of obligation," which presumably refers to the concept of legal obligation advocated by Holmes.[84] Hart's argument is in the form of a counter-example which hypothesizes the "perfect crime," in which a person called by the state to military service refuses this call and successfully eludes all of the efforts of the "public force" to capture him.[85] If Holmes' view were correct, says Hart, it would be wrong to say that such a person had a legal obligation to comply with the state's orders. Since it is clearly not wrong to say this, then Holmes' view of legal obligation (viz., the predictive interpretation) is in error. A similar example is found in the writings of Hans Kelsen, who writes that:

"... it may happen, for example, that somebody commits a murder in a way that makes it highly improbable that a court would be able to establish his guilt. If the accused person, according to Justice Holmes' definition of the law, consults a lawyer about 'what the courts will do in fact,' the lawyer will have to tell the murderer: 'It is improbable that the court will condemn you; it is very probable that the court will acquit you.' But would this statement be equivalent to the statement: 'There was no legal duty for you not to murder?' Certainly not ... The existence of a duty is the legal necessity, not the factual
probability, of a sanction. Likewise, right means the legal possibility of causing a sanction, not the probability that one will cause it." [86]

In terms of such examples, some serious doubts have been raised against Holmes' pragmatic reconceptualization of "legal obligation," "legal duty," "legal right," and "legal/illegal act." And there have been other objections that are similar to these, though from a different metatheoretical perspective.

For example, following up upon Holmes' general view of legal duties and rights, several authors have argued against the specific conception of contractual duties and rights which Holmes espoused. The fact that Holmes actually did propose a radical restructuring of our traditional legal concepts comes out quite clearly in what has been called Holmes' "risk theory" of contract. [87] In the course of constructing an objection to Holmes' pragmatic concept of contract, W.W. Buckland outlines Holmes' position as follows:

"... the making of a contract is the taking of a risk; the liability in contract is exactly analogous to that in tort. If you commit a tort, you are liable to pay damages. If you commit a contract, you are liable to pay damages, unless something happens (i.e., performance) over which you may or may not have control. It is a conditional liability to pay damages. There is no reason to speak of promise in the matter at all...." [88]

Buckland rejects, however, Holmes' attempted parallel between "committing a tort" and "committing a contract." A person who commits a tort renders himself liable to official proceedings, but a person who "commits" a contract in Holmes' sense, viz., makes one, does not render himself liable to proceedings, although later events can have such an effect. [89] The word "commit" is more clearly applicable not to the making of a contract, but to the breaking of one. Further, the Holmesian view of contracts seems to be inconsistent with other accepted legal doctrines and practices, such as the fact that courts often enforce the "reasonable expectations" of the contracting parties, or the practice by which courts enforce a "specific performance" of a contract's terms in the case of a breach, instead of awarding money damages. [90] Also, Holmes' view is inconsistent with the doctrine that premature refusal to perform a contract is considered in some cases as a breach of contract.

Finally, Buckland argues that Holmes' approach to contract allows the following quite puzzling and bizarre results: Suppose X contracts with an artist Y to paint a portrait of X, but Y states a very high price, say $100, to which X agrees. In fact, the portrait by Y would never be worth more than $50 on the market. The next day,
however, Y goes to X and says: "I am liable to pay you damages if I don't paint the portrait. I prefer to pay the damages, which is all that I am bound to do. Your damages are $50. Here it is. Now, please pay me the $100, for I have carried out my contract."[91] In light of such odd results, Buckland concludes:

"Thus it does not seem possible to square Holmes' doctrine with either English Law or Roman Law. It is surely permissible to think that a conception which is inconsistent with both the great systems of law which divide the western world is of no great value in Jurisprudence. It may be true, as Pollock says ... in some other planet. It may even be true in old Chinese Law, for we are accustomed to find, in China, reversals of our European notions. It might be a profitable factor in discussions de lege ferenda or in discussions of abstract law of the Kantian or Hegelian types. But as an element in the analysis of law as it actually is, it seems to be useless."[92]

Further on in his book, Buckland spells out his objection in terms of the basic issue of conceptual transformation in a direct and precise manner:

"Holmes' doctrine is in one way different from those others with which it may be associated. If he is right, some hitherto accepted rules of law are wrong. But the other theories do not seem intended to lead to this result. They are attempts to construct an exact and convenient terminology ... The new terminology [viz., Holmes'] does not seem more convenient."[93]

In addition, one other major objection has been raised against Holmes' claim that the element of mens rea is irrelevant to the criminal law. In this case, the concept of "criminal liability" is being challenged by Holmes, since the mens rea factor has traditionally been conceived as necessary to that concept.[94] The disagreement here is simply that the external purposes of the law are better served when the personal character or subjective state of a criminal's mind is not totally ignored, but is sometimes brought into judicial consideration. Of this point, G.W. Paton observes:

"Modern criminology considers that the personality of the offender is as important as his act and emphasizes that the wrongdoer is not only a criminal to be punished but a patient to be treated. The cry is for individualization of the penalty, not to let the punishment fit the crime,
but the personality of the criminal ... Even from an objective standpoint it is necessary to consider mens rea, for a prisoner who commits a dangerous act accidentally is on the whole less likely to repeat his conduct than is one who acted intentionally."[95]

In this case, Holmes' reformulation of the concept of "criminal liability" is not only set against the traditional notion, but against the most modern interpretations as well.

It is important to notice the metatheoretical differences with regard to the basic question of "what concepts are" in the examples given above. Both Hart and Kelsen presuppose that conceptual constructions are objects to be "discovered," such that the "true" concept of, say, "legal duty" is the one that conforms most closely with popular usage of that phrase. On the other hand, Buckland and Paton take the view that concepts are only instruments to be used for human purposes, that they are not discovered, but are created objects. The former view is one that Holmes explicitly rejects, and so, it is no surprise that, from the point-of-view of a totally different approach to concepts, Holmes' view comes out "wrong." But since Holmes is taking a different approach to the basic issue of "what concepts are" from Hart and Kelsen, their criticisms of him completely miss the point of what it is that Holmes is proposing. In that case, both Hart's and Kelsen's objections can be dismissed in the observation that they are made from within the metatheoretical perspective that views concepts as being tied or grounded to something else (viz., popular use), and that this is not the perspective from which Holmes is operating. For an objection against Holmes to carry any theoretical weight, it must be made upon the same metatheoretical grounds—and this is why Buckland's and Paton's critiques cannot be dismissed in this way, for their objections are constructed from the idea that our concepts are not fixed or tied to anything, but can be whatever we want them to be. What Buckland and Paton are arguing, then, is that Holmes' proposals are undesirable, and that the pragmatic restructuring program would lead to harmful and unnecessarily disruptive results. For the rest of this section, then, I will only be speaking of Buckland's and Paton's objections to Holmes' on the issue of conceptual transformation.

In the examples provided above, it is argued that Holmes' constructions of certain legal concepts are not only non-traditional (for this is given), but are positively awkward and inconvenient, often at odds with other accepted legal doctrines and practices, and set against conceptual constructions that have been found heretofore to be legally useful. In that light, how is such a radical transformation of the concepts of "law," "right," "duty," and "criminal liability" to be justified? Clearly, the burden of proof for the necessity of such conceptual reformulation is upon Holmes, and so, the question is—how can Holmes show that his new approaches to legal concepts are better than the traditional ones?
To begin with, it must be remembered that Holmes' theory, as reconstructed in this essay, takes a pragmatic approach to legal concepts. This means, among other things, that concepts are analyzed in terms of their possible practical effects upon future experience, that is, in terms of their empirical significance. This in turn implies that the meanings of legal concepts are contextual as well as relative to certain general interests or purposes. Hence, the meaning of concept X must always be approached in terms of X's empirical impact for a certain group in a certain situational context. Now, when Holmes is taken to have claimed that, say, contractual liability can be thought of in terms of taking a risk, it is not enough to stop there and ask—is this position correct or not? This is because Holmes' general pragmatic program for the analysis and clarification of legal concepts allows for many possible approaches to a given concept, depending upon the contextual situation and the general interests involved. In other words, Holmes' approach to legal concepts is not really an exercise in suggesting specific new definitions, but is a method of showing how legal concepts can be said to have a general practical import. Holmes should not, therefore, be interpreted (even on his own metatheoretical grounds) to have simply postulated that, for example, a legal right is a kind of prophecy of official action. When Holmes said this, he was offering a pragmatic analysis of a traditional legal concept from a certain point-of-view, namely, that of the "bad man" and the lawyer. From other points of reference, the meaning of the concept would change. As I have shown above, Holmes discussed several such perspectives, including those of the morally good person and the judge/official decision-maker (see Article I.B.2.c). Hence, not only is it important to recognize the underlying metatheoretical context in which this debate proceeds, but it is also vital that Holmes' actual pragmatic approach is not oversimplified, distorted, or ignored.

It appears, however, that Holmes' reformulation of several legal concepts is still questionable, even when the relativity of possible pragmatic perspectives is taken into account. The pragmatic meanings of legal concepts, say, from the perspective of the "bad man," are still quite bizarre ones, leading to strange results (as in Buckland's example of the artist's contract), and so, need to be strongly justified if they are going to replace traditional legal conceptions, whatever the point-of-view taken. In other words, the "cynical acid" with which Holmes wants to "wash" our legal conceptions seems to work too well, requiring a chain-reaction of radical changes in legal doctrines and practices peripherally related to those conceptions being reformulated. The primary objection here still stands, then, despite the acknowledged qualifications.

Furthermore, the point made about the necessity of recognizing the various interest-centered perspectives central to Holmes' approach to legal concepts has been used to bring up a secondary criticism, for it has been pointed out that the distinction between the "bad man" and the "good man" perspectives disappears when they are actually put into practice. This particular criticism of Holmes comes from Lon Fuller, who argued that an actual "bad man," who is
only deterred by official action which affects his own interests, will end up looking at legal processes through the eyes of a "good man." Fuller writes that the "bad man" must consider:

"'What are the chances that my conduct may lead to a detrimental interference in my affairs by the courts?' To answer that, he must ask, 'How will my conduct be viewed by judges?' ... [meaning that] ... He will have to ask, 'How would I myself view my conduct if I were not interested in it? How would it be viewed by a disinterested third party? Would it seem to him to be good or evil?' Only when he has answered this question will he have rounded out the equation on the basis of which he can calculate accurately the chances of judicial intervention in his affairs. In short, our bad man, if he is effectively to look after his own interests, will have to learn to look at the law through the eyes of a good man. To be a good positivist, he will have to become a natural-law lawyer."[98]

Although it was pointed out as part of Holmes' theory (see Article I, section B.2.d.3) that the conditional predictions of both judges and non-judges were interrelated, the idea that several possible non-judicial perspectives can actually collapse was apparently unanticipated by Holmes. On the other hand, Holmes constructed his good man/bad man models on the basis of their fundamental, underlying motivations, which Fuller's criticism does not actually take into account. In addition, and perhaps most importantly, Fuller is probably wrong in his description of a judge's attitude when confronting ordinary citizens in court, namely, that a judge questions the subjective "moral" qualities of a person--this is directly at odds with what Holmes claims in regard to the way the legal system looks only to external standards of liability and blameworthiness. However, even if Fuller's criticism were to hold, it is not very damaging to Holmes' theory, for the lessening of possible pragmatic perspectives results in fewer different concepts of "law," "duty," "liability," and so on. The fact that Holmes' theory supposedly allowed a cumbersome multiplicity of conceptual formulations was taken to be a defect of his theory above.[99] Fuller's criticism shows that even two apparently different perspectives as those of the "good man" and the "bad man" could be construed as being pragmatically similar enough so that perhaps only single general concepts of "law," "duty," etc. result from this non-judicial angle. In this respect, Fuller's objection actually helps Holmes' theory by reducing the conceptual varieties of legal concepts. Fuller's secondary criticism is therefore relatively easy for Holmes to answer. However, the essence of the primary criticisms of Holmes' reformulation program (i.e., that it leads to harmful consequences) still remains. How would Holmes have responded to this objection in the most forceful way?
Holmes argued that the difference between the perspectives of the "good man" and the "bad man" lies in the motivations for action in each of these perspectives. This difference of motivation (which may later break down if Fuller's argument is correct) is basically what underlies Holmes' primary argument against the present objection to his conceptual reformulation program. According to Holmes, our common legal conceptions are in need of a radical reformulation, primarily because those traditional conceptions have become so distorted by the practice of attributing moral and/or formal characteristics to them. Hence, when the ordinary conception of "legal duty," for example, becomes so tinged with moral connotation that persons begin to modify their behavior and form expectations based upon their own moral interpretations (rather than the practical realities) of that concept, then such persons are apt to have a distorted and relatively useless picture of the ways in which their "legal duties" are actually treated by those officials who administer and enforce them. From an ordinary, common-sense line of thought, a person might come to a conclusion about his "legal duties" by reasoning from vague moral principles, such as, "a person who owns property ought to be able to do with it whatever he or she wants, as long as others are not harmed." Such a person, thinking that such moral or formal notions are the "logical" basis for his having such a legal right, might be quite upset when he is taken to court for painting his house red, because the courts in fact uphold a policy which punishes persons who paint their houses red. Any number of reasons could explain this official policy—for instance, the color red may have been recently associated with an enemy nation, and painting a house that color is therefore now taken to be a subtle sign of disrespect for one's own country. In this case, the person's conception of his legal right was based upon his own moral sentiments about what he felt would be the "fair" policy about his house-painting activity. In addition, he may have even checked all of the statute books to see if there had been a "law" prohibiting him from painting his house red, finally to have concluded that there was no such "law."

Now, Holmes would ask us to consider, what kind of approach to "legal right" would have been the most useful in such a case—to conceive of it as something entailed by some common-sense principle of fairness, to conceive of it as something that was formally described in an official text of some kind, or as formally deducible from some general statement found in that official text, or to conceive of it as a prediction of what the courts would do in fact? The last of these, Holmes would claim, is the most useful way to approach legal concepts from the point-of-view of our house painter. In doing so, one gets an honest look at the ways in which the legal system actually behaves towards certain activities, and not how the system "should" behave or how the printed regulations say it is "supposed" to behave. Similar Holmesian examples could be constructed to illustrate the ways in which our ordinary, common-sense concepts of "legal/illegal," "legal duty," "liability," and so forth are also profoundly distorted pictures of what actually happens in our legal systems. In so far as we want our legal concepts to be useful tools in the organization of our everyday
activities, both private and state-related, Holmes says that we should reformulate our traditional concepts so that they focus upon only one thing—the potential operations of the public force.[100] Holmes is the first to admit that this approach deprives legal concepts, such as "the law" itself, of certain qualities which we wishfully believe them to possess (such as "justice," "moral goodness," and so on). But we are better off for having our legal illusions shattered, and we can better plan our lives if our approach to legal matters is touched with a healthy skepticism. As Holmes once wrote:

"When I talk of law I talk as a cynic. I don't care a damn if twenty professors tell me that a decision is not law if I know that the courts will enforce it."[101]

Thus, Holmes' basic counter-response to the present objection is that our traditional legal conceptions are in need of a radical reformulation, and that his pragmatic approach will remedy this situation.

One obvious problem with Holmes' counter-argument, however, is that it fails to acknowledge the fact that the members of the legal system—its judges, legislators, and other officials—are also members of the community, and as such, will probably share many of the commonly-held, traditionally-conceived notions regarding legal concepts that an ordinary person would, regardless of their legal training. In light of this, the need for Holmes' radical reformulation is decreased to the extent that legal conceptions are approached by state officials in traditional, common-sense ways. To that extent, a person with an ordinary, "confused" notion of some legal concept in a particular situation might be better off by not changing that conception, but simply by continuing to hold it, since it is probably already in conformity to the conception held by the officials.

Another problem with Holmes' argument stems from Holmes' view that judges are to use considerations of social advantage as their primary justification for their official decisions. Given that directive, if the predictability of judicial behavior is considered to be a social value to be maximized, then judges ought to behave so that what they do does not disappoint ordinary, traditional expectations about the ways that legal concepts are officially treated. In other words, even if judges realize that ordinary conceptions of "the law" are based on vague moral and formal assumptions about what is "legal," they have a pragmatic reason, based upon Holmes' theory, to uphold those ordinary conceptions of "the law," since they are doing so in consideration of the social advantages which accrue from their own predictability and reliability. Hence, this is another way in which the need for the radical reformulation of legal concepts which Holmes suggests is lessened.
Holmes might respond to these points by saying that the pragmatic approach is still the best one, because it makes explicit and clear the reasons that judges continue to use legal concepts in traditional ways. That is, we are better off when aware of the fact that judges interpret legal concepts traditionally because of their own community-based conceptual roots, or because of their recognition that their own predictability ought to be maximized. Even so, from the perspective of the person seeking to deal effectively with a legal system, the radical restructuring of legal concepts may simply not be worth the trouble. If the result of such a radical reformulation is that everything is pretty-much the same as it was before the reformulation, then, speaking pragmatically, what is the difference between doing this and simply staying with traditional approaches in the first place? If it is a fact that judges also use legal concepts in ordinary, traditional ways, and if in fact they recognize that they have reasons for continuing to do this, the question is again--why not simply remain with the traditional approaches? The only gain, it would appear, from Holmes' reformulation would come in a little better intellectual understanding of the underlying nature of the judicial/official decision-making process. But whether this justifies Holmes' radical approach to legal concepts or not is still not an obvious call in favor of Holmes' position.

There is yet another criticism of Holmes' counter-argument. His position is that it is better to be "realistic" about the practical consequences of legal concepts than to misunderstand them by believing that they have certain moral or formal qualities that we wish them to have. In other words, we should not expect that "the law" on any certain question, meets our common-sense ideas of fairness, but should simply ask how the public force will behave in fact. This position, however, ignores the idea that if people generally want certain standards of fairness, formality, or goodness in their state's activities, then by Holmes' own theory, the people should get what they want. As Holmes constantly argues, the fundamental source of justification for official decisions is the consideration of social interests and desires. Again, if the community has certain traditional interests in legal fairness, for example, when it construes a legal concept, then it seems that the judges themselves ought to construe those concepts with such popular desires in mind, especially when the state justifies its actions on the basis of "what the crowd wants." This position is slightly different than the one previous to it--popular expectations are not the same as popular desires. Yet, if it is a fact that the community both expects and wants the judiciary to handle legal concepts in traditional ways, then Holmes' theory says that judges ought to conform to that public expression. Of course, the assumption here is that such a popular desire is a fact, but this is not an unreasonable assumption. In this way, again, the cooperative reaction of the Holmesian judiciary to "what the crowd wants" illustrates another reason that the necessity for the radical restructuring of legal concepts is diminished.

Overall, the evidence presented in defense of Holmes' program to
radically transform legal concepts and the counter-arguments against
the need for such a transformation indicate that the question does
not clearly favor one side or the other. Several authors have
pointed out that the reformulation of legal concepts which Holmes
advocates would conflict with our ordinary legal conceptions, with
several established legal practices (such as that of the judicial
award of specific performance in contractual disputes, etc.), and
with some of the findings of modern criminology. Holmes' new legal
approach would mean a radical break with traditional legal thinking
and reasoning, and so, would cause a great deal of conceptual
disorientation. As a defense, Holmes could claim that, although the
shock of such a transformation might be disruptive of both public and
private consciousnesses, the resultant increase in the honest
awareness of actual legal (as opposed to moral) matters would make
the initial disorientation worthwhile. In Holmes' view, such an
awareness makes ordinary persons stronger, and puts them in a better
position to deal with the state, an entity so much more powerful than
themselves.

However, it has been shown that, given other parts of Holmes' theory, the need for the conceptual reformulation he recommends may
not be as great as he thought. In the first place, judges and other
state officials probably already use legal concepts in traditional,
as opposed to pragmatic, ways. If so, it becomes a superfluous
exercise to radically transform legal concepts so that they reflect
the realities of official behavior when those realities are already
captured by the pre-transformation usage of those concepts by state
officials. Secondly, the part of Holmes' theory which calls for
judges to decide cases on the basis of social advantage gives judges
a reason to stay with the ordinary, traditional approaches to legal
concepts simply because these approaches capture the legal
expectations of most people. The social value of judicial
predictability can be increased when judges try to treat legal
conceptions in terms of the ordinary ways in which people think about
them. Thirdly, since Holmes' theory says that judges and other
legislators should ultimately give "the crowd" what it wants, (within
broad limits, of course), then the infusing of various commonly-desired moral qualities into legal concepts may be a
perfectly proper undertaking on the part of state officials. That
is, if "the crowd" wants qualities such as "justice" in its
adjudicatory procedures and practices, it seems correct that state
officials use legal concepts in light of that popular desire, and
inject them with such qualities, and use them in that regard in
practice. In such a case, the radical reformulation of legal
concepts, done for the primary reason of separating-out their moral
from their strictly business-like qualities, will be an undertaking
that is contrary to the public will, and so, ultimately unwarranted.
At the very least, then, the present standing objection succeeds in
raising doubts about Holmes' primary claim that there is a great and
urgent need to reformulate our legal concepts pragmatically.

Further, the foregoing discussion has pointed out that the
various parts of Holmes' theory may not always be consistent with
each other. If this is the case, then this recognition must be seen
as another weakening objection to Holmes' theory of law. The facts apparently show that there are potential areas of theoretical conflict among the three primary areas put forth herein as the major components of Holmes' legal theory. That is, the pragmatic approach to the meanings of legal concepts and the use of external standards of justification may at times be at odds with the implications of Holmes' advocacy of forward-looking legislative experimentation. (I will return to this question regarding the internal consistency of Holmes' viewpoint in the final section of this essay.)

At this point, before I move into a final overall evaluation of Holmes' theory of law, I would like to sketch briefly several original critical observations about Holmes' legal thought which have arisen in the course of my research and writing. A few of these have been inspired by others who have seen earlier drafts of this work. In any event, the critiques I will now cover in the following section are new ones, and deal directly with Holmes' theory as it has been reconstructed here.


1. Holmes' Theory is Limited in Application.

Many of Holmes' observations about "the law" and "the legal system" suffer from a lack of generality, simply because many of his ideas are derived from the study of only one particular legal tradition and legal system, namely, the American one. Although there are legal systems similar to the American system in the rest of the world, it still must be recognized that many of Holmes' thoughts about "the law" and other legal concepts, doctrines, and practices fit only the American judicial tradition. For example, when Holmes speaks of judges and legislatures, the relationships between these two groups, the duties of judges to block certain "unreasonable" legislation,[102] and so on, he is presupposing something very much like the American legal system. But because of this, the parts of Holmes' theory which make sense only in the American legal context demonstrate that Holmes' theory has a somewhat limited range of application, and so, cannot be said to apply to judicial systems in general.

In fairness to Holmes, however, it might simply be the case that the theory he put forth was not intended to be a grand-scale, overarching "Theory of Law," applicable to any legal system in any circumstances whatsoever. Indeed, such grand-scale legal theories, intended to apply to any and all legal systems, are relatively rare items in jurisprudence. Further, the limits of Holmes' theory allow for a tighter focus upon American and/or democratic thought and practice (along with those of related systems), which are important in themselves. Hence, perhaps Holmes' theory of law is better
described as Holmes' theory of Anglo-American law, or of the law of western, democratic societies.

In addition, there are parts of Holmes' theory which apparently have more than a limited applicability. Article I, for example, puts forth a theoretical approach to legal concepts in terms of a certain basic situational context—the interactions of states and individuals. Certainly this part of Holmes' theory is general enough to apply to a wide range of actual situations and circumstances.

Even so, Articles II and III of Holmes' theory seem to presuppose a distinctively democratic-type of polity. Holmes' theory of external standards, which comes primarily from his book, *The Common Law*, is a forthright exposition of Anglo-American legal doctrines. What makes this exposition an original bit of legal theorizing is Holmes' attempt to explain and critique much Anglo-American legal practice by an appeal to the external versus internal standards notion. Article III of Holmes theory, dealing with his advocacy of pragmatic experimentalism, would not apply to any society in which the concept of "truth" was considered to be a static, fixed, and already-discovered object. In such a society's legal system, the job of the law-makers might be a totally different one from that which Holmes prescribes. In a society based upon certain strictly-held religious beliefs, or a society based upon a certain political ideology taken to be the embodiment of scientific truth, Holmes' recommendation that the decision-makers engage in a process of pragmatic experimentalism would simply be nonsense (at least on the official level).

Therefore, though some aspects of Holmes' overall theory of law have a greater range of application than others, the fact that much of Holmes' theory is tied to Western, democratic governmental practices and traditions shows that the theory itself has a somewhat limited applicability. This is not a major criticism of Holmes' legal thought, I would claim, however, simply because the domain of legal systems to which Holmes' overall theory does apply is a substantial one, making Holmes' legal theory an important one in the field of western jurisprudence. Still, the issue of theoretical generality is important enough such that this criticism of Holmes' theory be mentioned and acknowledged.

2. Holmes' Theory is Ambiguous with Regard to the Substantive Content of "Public Policy Considerations."

An important theme that runs through Holmes' legal theory is that the ultimate source of justification for legislative and judicial (i.e., broadly speaking, "legal") decisions is in the consideration of the social or public policy implications of those decisions. Sometimes Holmes refers to the objects of these considerations as "social ends,"[103] "social advantage,"[104] "public policies,"[105] and "social desires."[106] I have
characterized these objects above in my reconstruction of Holmes' legal thought as "social interests," "social preferences," and "social values."[107] In Holmes' court opinions, he used generally similar phrases, such as "public welfare,"[108] "public needs,"[109] "public opinion,"[110] "national welfare,"[111] and "the taste of the public."[112] Because Holmes used these phrases for the common general purpose of representing what were, to him, the underlying, fundamental justifications for legal decisions, it can be inferred that all of these phrases are intended to refer to the same thing. These terms, however, confuse rather than clarify Holmes' position, for it becomes clear that several possible interpretations of Holmes' basic idea, as expressed in such phrases, can be constructed. The issue, then, is this--exactly what does Holmes' theory refer to as the "considerations of public policy" which are supposed to justify legal decisions? Holmes appears to concentrate on the method by which "rules of law" are justified, but says little on the actual substance of those grounds of justification.

On the one hand, "public policy" may simply refer to the actual desires or preferences of a majority of a community, no matter what those desires happen to be. This could be called the "manifest will" version of public policy. But on the other hand, the idea of "public policy" can take on a normative or evaluative connotation, such that it does not simply refer to "what the crowd wants," but to something like, "what is in fact reasonable for the community to want," "what is in fact most beneficial for the community," or "what the community really needs." In other words, if the community were completely informed and aware of the facts of their social, economic, and political needs, realized all of the consequences of their desires, and chose things on a completely rational basis, aiming to maximize benefits and minimize harms, then they would want certain things and not others. This could be called the "real will" or "hypothetical will" version of public policy. Upon the former version, the public can desire anything at all, even if such desires are irrational, contradictory, or self-destructive. Upon the latter approach, however, if the expressed will of the public were internally contradictory or self-destructive, this would serve to indicate that such an expression was not what the community "really" wanted. Presumably, it is then the task of far-sighted legislators and judges to shape public policy into a useful form. Hence, "public policy" of the manifest kind is a fact to be discovered, while "public policy" of the hypothetical kind is a possibility to be created. And this is evidence of yet another complicating factor—the perception by official decision-makers of both the "manifest" and "real" community desires and needs.

This multiplicity of approaches to "public policy" could prove to be quite confusing to an official decision-maker attempting to follow Holmes' theory and decide some issue on the consideration of "public policy." For example, suppose the question requiring a court decision was one involving the censorship of certain printed material. The overwhelming voice of community sentiment, on the one hand, might be strongly in favor of strict censorship in this case. On the other hand, this sentiment may not have been adequately
expressed to the decision-makers, so that the official perception of the public's "manifest will" is different from what that sentiment actually is. Further, given the actual long range implications and consequences of such strict censorship, which might be quite harmful ones for the community, and the judge/legislator's perception of this actuality, these officials could justifiably decide that the expressed will of the community in favor of this censorship was based upon an emotional, narrow-minded, and myopic consideration of the question, and that the community's "real will" (if it knew more) was against strict censorship.[113] But this latter strategy requires a commitment to the evaluative view of public policy (where such policy is created), as against the former, more "democratic," empirical approach (where it is found). Alternatively, a decision-maker who actually felt that the community should simply have its way, whatever that entailed, would presumably follow only the "manifest will" version. Given this complex and confusing picture, what might Holmes say in response?

The answer to this question can be found, I would argue, not so much in Holmes' often-quoted claims that if the public really wanted to go to Hell, then he was there to help, but in Holmes' actual behavior as a judicial official, the implications of which I have included as part of his theory of law herein (see Article III, section D.1). Basically, Holmes appeared to adopt both the manifest and real will versions of "public policy" considerations. The judge's general role, in Holmes' view, was one of deference to social/legislative experimentation, and so, in so far as the enactments of the legislators actually represented the desires, preferences, and values of the community, such a deferential role meant the adoption of the manifest will version of public policy. However, Holmes was willing to follow the desires of the community only to a certain point (and so, probably not all the way "to Hell"), beyond which he could, as a judge, justifiably act to block the expressed will of the community by an appeal to their real or hypothetical will. This was often the rationale implied by Holmes in many of his Supreme Court dissents in the civil rights cases during the 1920's.[114] Holmes was arguing that, although the manifest will of the community represented the public policy guide to follow in most cases, when that will became too self-destructive or "Constitutionally unreasonable," official decision-makers had to switch over their public policy considerations to the real/hypothetical will approach, for the community's own good. In such cases, a judge who blocked an "unreasonable" legislative experiment (and presumably an expression of the community's manifest will) was, in effect, proclaiming to the community that "this is not what you really want."

Now, does this strategy answer the problematic character of Holmes' theoretical appeal to "social policy considerations?" At first it might appear as if Holmes spells out a clear difference between the manifest and real will versions of public policy, such that the former is utilized up to a certain point, at which time the latter approach is utilized. But the actual process by which this difference in approach is carried out is still quite vague. If
Holmes cannot show the ways in which a decision-maker can decide whether to follow the manifest will or the real will approach to public policy, then his theoretical directive to justify decisions by appealing to "public policy considerations" is still susceptible to the present objection (viz., that "public policy" is an ambiguous and confusing notion rather than an enlightening one). So, the question now becomes—how might Holmes argue that an official decision-maker can decide to follow either the manifest will or real will approach when trying to justify a decision on the basis of "public policy?" In other words, what is the general standard by which an official decision-maker can evaluate the expressed will of the community? In answer to this, I will examine several possibilities.

Since Holmes wants to defer to "the crowd" for anything up to a certain point, the answer to the question above could be found if the point beyond which the crowd is to be "disciplined" (for its own good, of course) can be specified. Minimally, a Holmesian judge could ask for simple logical consistency, such that, when the manifest will of the community is not inconsistent, then it should be the "public policy" which decision-makers should consult; when the expressed will of the community is logically inconsistent, then the official decision-makers can justifiably substitute a consistent "public policy." In the latter case, the "public policy" that is found is judged to be inadequate because of its inconsistency, and so, a "public policy" that is created then takes its place. However, the bare minimum requirement of simple logical consistency allows for some quite disturbing possibilities. If the community favored the harsh persecution of some of its minorities, for no utilitarian reason at all, or even if a community favored the practice of genocide, the official decision-makers could not justifiably act to block such public policies, since the minimum criteria of consistency would still be met. Even a community desire for national suicide would still be permissible. If Holmes' theory is one that does not want to accommodate genocide, or national suicide, then something more than logical consistency is needed as the standard by which decision-makers are to evaluate the manifest will of the community. Hence, while consistency may be a necessary condition of the "public policy" which Holmesian judges and other officials appeal to, it is by no means also sufficient.

Perhaps Holmes might suggest, following a similar line of reasoning by which I attempted to explain some of his behavior on the Supreme Court, that when the manifest will of the community is self-destructive, it can be justifiably disregarded in favor of a created policy that is more moderate. But this point, too, does not seem to be enough. For one thing, a community desire to commit genocide upon another community, for no reason, is consistent with this standard, as is any policy that is harmful to only a small part of the community itself. For example, a community could make it a crime, punishable by death, simply to be a member of a certain minority race or religion. Similarly, a community could decide that since it sees itself as the "master race," it can justifiably expand its territory into that of neighboring states, enslave other communities, commit all sorts of horrible atrocities, and so on. All
of these measures are possible expressions of popular desires, and none of them are actually self-destructive of the community itself, nor do such desires self-destructively "cut off" future social experimentation. If Holmes' theory is to be one that would not permit such radical expressions of the popular will to be unchecked, then some stronger standard than "non-self-destructiveness" must be found, though, again, this seems to be another necessary condition of the general standard being sought.

The particular rationale that was often utilized by Holmes himself to judge whether the manifest will of the community should be followed or transcended was that of reasonability.[115] Perhaps this notion will capture not only the necessary elements discussed above, but will also prove to be sufficient for the standard of judgment being sought. In other words, when expressions of the manifest will of the community are not reasonable, especially in terms of Constitutional provisions, when appellate court judges are concerned, then such expressions can be justifiably disregarded by the official decision-makers in lieu of what the community really does want, namely, something that is reasonable. The standard of reasonability is, to Holmes, an external and hypothetical one, representing the view of the "average prudent man of ordinary experience."[116] The basic problems with this standard, however, are its vagueness and its circularity. To use the same counter-example as above, could genocidal policies ever be consistent with such a standard? Could an "average rational man" be persuaded that the elimination by death of a minority of his community was "reasonable?" As Holmes pointed out, even radical deprivations of rights are sometimes reasonable in some desperate circumstances.[117] The question might be answered either way, it seems, since what can be considered in practice to be "reasonable" or the product of the opinions of the "reasonable man" will differ according to the interpretation given to "reasonability." So, the issue becomes one of giving some substance to the concept of reasonability, again, so that it might serve as the standard by which the manifest will of a community can be judicially evaluated. It has already been seen that logical consistency and non-self-destructiveness are probably required for such an overall standard, but are not sufficient to constitute a standard that would not allow some very nasty consequences. If "reasonability" is to provide the missing piece here, how is it to be given substantive content?

It is in regard to the content of "reasonability," however, that Holmes' approach appears to come up short. This is because the content of what is to be considered as "reasonable" is taken from the attitudes and behavior of the community itself! In section 8 of Chapter Two of this essay, I exposed the ways in which Holmes claimed that the external standards of "the law" could be articulated—through legislatures, through juries, and through the community of judges themselves. All of these could, in some way or another, attempt to articulate "the common sense of the community," namely, what was "reasonable," on the basis of the actual experience of the community.[118] But if the content of what is to be considered "reasonable" comes ultimately from community experience,
then how could the manifest will of the community ever be anything but reasonable? The standard by which the expressed desires of the community are to be evaluated simply cannot be derived from the community itself, for this results in simple circularity. The only way out, it seems, for the Holmesian judge is to admit that the standard of "reasonability" itself is not always derived from the community, but can sometimes be derived from another source—a hypothetical one referring to what the community would agree is a reasonable policy. In such a case, it is the job of the judges to decide when the expressed will of the community about what is reasonable is not their actual will—but this is not to answer the question at issue, only to re-state it. The question is—how is the standard of reasonability to be determined by the judges?

The most apparent way out of the problem for Holmes would be to say that what is "reasonable" is always at bottom a hypothesis, to be tested in the community's future experience. In such a way, the idea of there being a general standard is derived from the use of the pragmatic method of experimentation itself. It takes a great deal of analytical digging, however, to forge such a solution from Holmes' theory to the problem of the substantive nature of "public policy considerations." The basic criticism I am raising, namely, that Holmes was unclear about the nature of "public policy" therefore stands, simply because of the amount of analysis required in order to get a clearer idea of what Holmes' theory would say about this notion. However, the fact that there is an answer in the context of Holmes' theory more than makes up for the initial vagueness on this question.

Although Holmes' theory of pragmatic experimentalism, with its recommendation to judges to look forward to the social policy implications of their decisions (rather than backward for some pre-existing rule, which may not exist), is a new and exciting way to view the justification of legal decisions, there are several definite problems with this position which must be worked out. In this section, I have attempted to point out one of these problems in terms of an objection based upon the unclear nature of the notion of "public policy" in Holmes' theory. Eventually, the most appropriate answer to the problems and questions raised could be found, but not without the expense of some considerable analytical work. Perhaps it is the case that such difficulties arise because Holmes' theory is being formulated for the first time, and that not all of its theoretical implications have yet been worked out. In any case, the next section will concentrate on another such problem of ambiguity, and will show that more digging is needed into the implications of Holmes' thought before a clearer grasp of his overall theory can be attained.

3. What Kind of "Duty" Does a Holmesian Judge Have?

Holmes claims that judges (and presumably, legislators) have a
"duty" to weigh the considerations of "social advantage" which may result from the decision of a case (or the enactment of a statute).[119] In the preceding objection, I traced out some of the problems which arise in trying to get a clearer idea of exactly what the substance of these considerations is supposed to be, in terms of Holmes' theory. My present criticism, however, simply involves the unexplained nature of the duty which Holmes posits for the judiciary. This duty, which Holmes calls an "inevitable" one, is that judges ought to decide cases by means of a forward-looking, results-oriented experimental procedure.[120] In many (if not most) instances, this might simply mean that judges ought to at least appear to do the same things they have been traditionally-conceived as doing, namely, more-or-less mechanically applying pre-existing "rules of law" to individual case situations (see Article III, section B.2.c.1). Holmes argued that the traditionally-conceived job of the jurist, which is one of applying legal rules, must itself be justified, and that the best means of doing so is by appeal to a general directive to judges to look to the social policy considerations of the rulings. When "applying legal rules" in the traditional sense was justified on these forward-looking pragmatic grounds, then such an activity fitted in with the Holmesian judicial duty. And when "applying legal rules" was not at all justified in the pragmatic sense, a judge's duty, presumably, was to ignore those rules.[121] (All of this is aside from the basic problems in attempting to "apply rules" at all.) It was seen, however, that the mere tradition of the judicial practice of applying legal rules had the intrinsically beneficial social results of "legal stability" and "legal predictability," but that these benefits could sometimes be overridden by the detrimental effects of applying obsolete or otherwise harmful legal rules.[122]

Now, in response to an objection above, I stated that Holmes' advocacy of a "judicial ought" was a demonstration that his legal theory had a normative dimension.[123] That is, the question for a judge attempting to decide a case was taken to be, "How ought this case be decided?" In section B.3 of this chapter, I argued that Holmes' "judicial duty" could be seen as having two parts—a conditional sense in which judges ought to follow legal rules, and a more fundamental, overriding sense in which judges ought to follow pragmatic methods of decision-making. Both of these obligations actually collapse into one in practice, for the impulse behind the conditional duty to follow legal rules is that they are pragmatically justified. However, the precise nature of this judicial duty, as is the precise nature of the substantive content of the "public policy" it is intended to address, is unclear on the face of Holmes' theory. Such obscurity, in turn, is a ground of objection to Holmes' theory of law. As with the preceding objection—from-unclear, I will review some possible Holmesian answers to this problem. How, then, might Holmes have explained and clarified his idea of the "duty" of judges?

One well-known Holmes scholar, Yosal Rogat, claimed that Holmes' use of normative terminology in regard to the activities of judges was misleading. According to Rogat, Holmes was not really positing a judicial duty with any binding sort of nature, but was, in fact,
simply expressing the idea that the dominant social desires (in the manifest will sense) ought to be considered by official decision-makers because, ultimately, the fact that such desires were dominant meant that there was no way to avoid taking them into consideration.[124] Hence, Rogat's position is that the word "should" in Holmes' sense, means "must."[125] Upon this interpretation, the "judicial ought" which Holmes speaks of is explained solely in terms of the ultimate power of the social force to manifest its will through its governmental institutions. Judges and other officials ought not to resist such power simply because they could not (for long, anyway) resist it. Perhaps this is why Holmes called this duty "inevitable."[126] Obviously, however, Rogat's claim implies that the "judicial duty" which Holmes posited is not a very important concern for a judge, and not a binding obligation of any sort, since it basically amounts to a trivial bit of common-sense advice: "One should not struggle against the inevitable."

I would argue, however, that Rogat's interpretation of Holmes on this point is incorrect. The fact is that Holmes simply did not speak of the duty of judges in this rather superfluous manner, but in a much more important way. It must be remembered that the judicial duty in Holmes' view is probably most often given effect in a negative sense, that is, as a directive to judges not to decide cases upon subjective, ideosyncratic grounds, not to substitute their personal views of public policy for those of the legislatures (except as a last resort), and not to block social experimentation that a reasonable man might recommend. Hence, the judicial duty to decide cases upon public policy considerations often translated into a judicial duty of deference to other officials in the government. In addition, when Holmes speaks of this duty in a more positive sense, he does so in an evaluative manner. In other words, Holmes criticizes judges who do not meet this obligation and praises those whose behavior conforms to it. If the Holmesian judicial duty were to be interpreted in Rogat's sense, as a common-sense dictum, Holmes would not have treated it with such seriousness. A brief look at these positive and negative senses in which Holmes wrote of this duty of judges might shed more light on what his conception of it actually was.

One of the best illustrations of the negative and critical senses in which Holmes brings up the idea of the judge's duty is found in one of Holmes' most famous dissents, Lochner v. New York (1905). To recall Holmes' words, he wrote:

"This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to
embody their opinions in law."[127]

In this dissent, Holmes is critical of a majority of the Court for attempting to inject their own personal economic views into a legal decision. They should not have done so. Further, Holmes clearly states that his "duty" as a judge prohibits him from deciding cases upon his own personal beliefs, and prescribes that he cooperate with the public will to as great an extent as possible. Holmes expressed similar views in other writings, which also speak of the judicial duty in primarily a negative and critical sense.[128] In *The Common Law*, Holmes openly criticized judges who did not act in conformity to their judicial duty. For example, he wrote:

"... judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage."

[129]

In the same text, Holmes explicitly praises a certain judge, whom he mentions by name, for doing exactly what many other judges have failed to do—consider the public policy implications of their decisions. Holmes wrote:

"... no authority is more deserving of respect than that of Chief Justice Shaw, for the strength of that great judge lay in an accurate appreciation of the requirements of the community whose officer he was ... few have lived who were his equals in their understanding of the grounds of public policy to which all laws must ultimately be referred."[130]

These passages clearly demonstrate that Holmes thought that the judicial duty was important and substantial, but they still do not say what kind of duty it was, though they are sufficient evidence to discredit Rogat's interpretation. Let me examine some other possible approaches.

A few obviously incorrect approaches to the Holmesian concept of judicial duty can be rejected in a pretty straightforward manner. In the first place, Holmes did not take the duty of the judge in any strict, categorical, ethical sense, such that, for a judge, the duty to decide cases by means of public policy considerations was a dogmatic requirement. As was shown above, Holmes had little use for dogma, moral or otherwise.[131]

Similarly, it does not appear likely that Holmes thought the judicial duty was of the same nature as that of keeping an explicit promise. That is, in the judicial situation, it might be said that, by becoming a judge, a person takes an oath to act in a certain way—namely, to decide cases pragmatically—such that this promise
incurs a duty to act in that way. The reason that this cannot be the correct approach is evident from Holmes' criticisms to the effect that many judges have not even realized their duty to weigh the demands of social policy. This indicates that whatever duties the explicit judicial oaths incur, the particular Holmesian judicial duty is not one of them. In other words, if the explicit promise made upon accepting the office of a judge-ship were such that it incurred the Holmesian duty, then judges surely would be more aware of such a duty, even though they may in fact generally be, in Holmes' words, naive and simple-minded persons. [132]

Perhaps the Holmesian duty has another kind of ethical nature, that is, of a straightforwardly utilitarian variety. The duty of a judge on this approach might be to maximize some "good," which in this case could be "social advantage" (whatever that is). This interpretation is a plausible one, and seems to be consistent with Holmes' writings on the subject, unlike the previous approaches. But there are still other possibilities.

Perhaps the duty of judges is merely a prudential one, such that, in order to secure and continue to hold positions of power and influence in the government, and in order to attain a level of social esteem and public approval, a judge ought to act in a certain way, namely, in conformity with the Holmesian pragmatic approach to decision-making. This possibility does not seem to be a very reasonable interpretation, however. In the first place, there is no evidence whatsoever that Holmes had this particular kind of duty in mind. In the second place, and most importantly, the "prudential ought" conflicts with Holmes' attitude about the impersonal nature of judicial activity. That is, a prudential duty substitutes a personal standard for a non-personal one. It is clear that, substantively, a fundamental part of Holmes' judicial duty is in the idea that judges should not introduce personal factors into judicial decision-making, and it would seem quite strange if Holmes meant that judges should act in this impersonal way because it would be personally beneficial to them. In addition, there is little reason to believe that a judge who acted in accord with his Holmesian duty would be any more secure or esteemed than a judge who decided cases on the traditional backwards-looking method. In fact, the Holmesian judge might even become unpopular, for his behavior would not always conform to many traditional and popular standards of "what judges ought to do." Hence, the "prudential ought" interpretation can be rejected.

Ethical and prudential duties aside, could Holmes' judicial duty be interpreted as a legal duty of some sort? As conceived by Holmes' theory, the concept of "legal duty" means to the ordinary person a general conditional sentence predicting the reactions of the "public force" to a certain state of affairs, all constructed from within a certain scheme of general purposes and interests. Now, what would it mean, pragmatically, to say that the Holmesian judicial duty is a "legal" one? To Holmes, the fundamental connotation of "legal" seems to be "having to do with the behavior of the public force." To say, then, that the Holmesian judicial duty is a legal one would mean that if judges did not act in conformity with such a duty, they they would
be subject to some kind of sanction from the public force. But this kind of "official reaction" simply does not happen, for Holmes frequently criticized judges for not acting in accordance with their pragmatic duty. Indeed, many judges, being the traditionally-minded souls that they are, probably act in continual violation of Holmes' comparatively revolutionary duty to decide cases in a forward-looking, pragmatic basis—and they are not subject to any kind of serious official sanction for acting in such a manner. Unless "criticism by Oliver Wendell Holmes, Jr." is to be considered as the "official sanction" for such judicial activity contrary to the Holmesian duty, this approach also seems to be incorrect.

There is one more kind of duty, however, that seems to be worthy of consideration, that is, the judicial duty which Holmes posits is a professional obligation. Basically, Holmes could be setting up a certain standard or criterion of professional activity with his idea of judicial duty, such that a "good judge" is one which behaves in accordance with such standards. The content of this behavior, of course, involves the deciding of cases on an experimentalist, pragmatic basis. It may be that Holmes is saying, "If the men who occupy the judicial offices want to be 'good judges,' then they ought to conform to the pragmatic standards of behavior as laid down in my theory." Holmes might argue that his pragmatic, future-oriented program of judicial decision-making will best promote long-run social order and social benefit, which are surely the fundamental purposes for which humans institute legal systems at all, and so, serve to define the professional standards of judges. Given Holmes' critical comments above, regarding what he feels is "his job" or what a "public servant" recognizes as his "duty," this approach seems also to be a plausible interpretation of the Holmesian judicial duty.

The most likely candidates, then, for the proper interpretation of the judicial duty which Holmes' theory postulates are: (1) the duty of a judge as derived from some sort of utilitarian grounds, and (2) the duty of a judge as derived from the standards of a professional "public servant." It can be observed that both of these approaches are not mutually inconsistent, and may in fact complement each other. In addition, while the former has a consequentialist quality, the latter of these approaches is somewhat similar to an ethical interpretation I rejected above, namely, that of the duty which is incurred from an explicit promise. What Holmes might be saying, upon the "professional duty" approach, is that becoming a judge involves a tacit promise to act in certain ways, and that such a promise is what incurs the Holmesian judicial duty.

In view of the fact that Holmes wrote no substantive philosophical essay which dealt specifically with what he took the duty of judges to be, the arguments presented here for the two possible approaches (which may in fact collapse into one single approach), and the arguments against other approaches, represent in my view the only plausible "Holmesian responses" to the present criticism, namely, that Holmes is not clear with regard to the nature of the duty he posits for judges. This new criticism of Holmes' theory, then, is answerable from a Holmesian perspective, as have
been many of the "standard" objections to his theory. On the other hand, this answer is still not all that substantive, and amounts to the claim that the Holmesian duty for judges was partly a professional one, partly derived from utilitarian ethical directives, and not several other things. What is needed, then, is a fuller-scale treatment of the implications of a theory of pragmatic judicial obligation in Holmes' sense, but such a task is, unfortunately, far beyond the scope of the present study.

4. Miscellaneous Critical Comments, Questions, and Observations.

I have reserved this final section for several relatively brief but original minor criticisms of Holmes' theory of law, as I have reconstructed it in this essay. Some of them are more in the nature of "serious concerns" than actual objections, and mostly deal with the actual workability of several parts of Holmes' overall theoretical approach to legal matters. I have divided this set of minor criticisms into three groups, each corresponding to one of the three major areas of Holmes' theory.

In regard to Holmes' theory of the meaning of legal concepts, I have three observations to record. First, Holmes' pragmatic approach views the meanings of legal concepts in terms of certain generalized predictive statements, for both judges and non-judges. Predictions, however, are sometimes very tricky things. On the one hand, all a "prediction" is, literally, is a statement that something is going to happen. But clearly this is not all that Holmes wants to say in the context of his position that a certain type of prediction embodies the "meaning" of some legal concept. What is needed are accurate predictions, if such meanings are to be the practical, useful objects they are purported to be. Holmes is not very precise as to how these accurate predictions are to be formulated, especially regarding those which are constructed from the judicial perspective, which must deal with the incredible complexity of a whole community as it moves into the future. One may ask, are such predictions really practical or useful at all—they may end up being so general as to become trivialities. Hence, since Holmes is not specific on the exact nature of how such accurate and useful predictions are to be constructed and tested, more theoretical analysis in this area seems to be warranted—not necessarily from the point of view of Holmes' theory of law, but from this general type of pragmatic approach. Further, the idea that these predictions take counterfactual form is somewhat troubling, because there is at present no universally agreed-upon theory of counterfactual logic, even though counterfactual claims themselves certainly have an intuitive, common-sense intelligibility. The main idea here, then, is simply that the nature and function of the predictive statements which are at the core of Holmes' theory of meaning, raise some practical and theoretical concerns.

Second, it sometimes appears as if Holmes' theory of meaning
results not only in a transformation of legal concepts into pragmatically-formed ones, but (pragmatically speaking) amounts to a radical reduction of legal concepts to a very few basic ones. For example, from the point-of-view of the "bad man," the concepts of "the law," "legal/illegal," "legal duty," legal obligation," legal right," and even "jurisdiction" and "legal authority" all translate into basically the same notion—a prediction of the actions of the public force (though, of course, the actions predicted are not the same). Now, although it could be claimed that such a reduction is a more efficient and simpler approach to legal matters than literally any other one, it does seem as if many (if not most) traditional legal distinctions will be "swept away" by the current of cynical acid with which Holmes' theory floods legal discourse. Many technical legal distinctions are surely in need of revision from a more practically-oriented, and less formalistic perspective, but Holmes' theory appears to do the job too well. Much must be granted to Holmes to say that many traditionally-used legal distinctions, which presumably have certain purposes, still ought to be swiftly done away with. That Holmes' approach possibly calls for too much of a reduction of our legal concepts, then, is a troublesome aspect of Holmes' theory, and definitely deserves an extended study.

Third, the perspectives of the "bad man" and the lawyer, which coalesce into one broad outlook on the legal process (because of the similarities of their purposes and interests), are the ones which Holmes spends the most time discussing. Because "the law" is concerned with external behavior alone, we can understand it best when we approach it in a non-moral, business-like manner, simply asking about the probabilities which are involved that the "public force" will respond to some situation in one way or another. Now, although Holmes does not straightforwardly claim that ordinary persons ought to take the "bad man's" point-of-view, he definitely is arguing that such a perspective has the practical benefit of allowing the most honest and realistic view of the processes of "the law." This makes the "bad man's" perspective an attractive one, and so, what might result if more and more persons adopted this point-of-view? Apparently, the some of the consequences would be that such persons would conduct their activities in an effort to escape official sanction as much as possible. Presumably, the incidence of the bribery of officials would rise, the harshness of official penalties and sanctions would increase, and the traditional idea that a "legal obligations" involves the idea that someone is bound, in some sense, to do something, would disappear. The resultant decrease in social order brought about by a community of criminally-minded persons surely does not seem to be desirable, nor would be the corresponding and inevitable increase in official controls to counteract this phenomenon. Whether or not Holmes is actually encouraging the "bad man's" perspective, it is likely that the social consequences of most of the community adopting such a perspective would not be very good ones. This is a troublesome possibility that Holmes' theory accommodates, and so, seems to be a point that counts against his approach.

In regard to the second part of Holmes' overall theory, his
thoughts on the adoption of external standards in legal matters, I have two comments to make. First, one of the primary reasons Holmes gives for the need to adopt external standards in the law is that it is a practical necessity, in other words, the state simply does not have the scientific instrumentality available for "nicely measuring a man's powers and limitations."[133] Because of this, it is a much more manageable task for the state to decide individual cases by reference to an external standard of community-determined "reasonable behavior" (see Article III.C.3). However, the supporting facts here for Holmes' position are largely dependent upon technological advancements. Progress in physiology and psychology, for example, may make it both possible and practical to do the kind of "internal measurement" which in Holmes' time was far beyond the level of scientific thought. Presumably, if such a scientific advance were actually to come about, it would be more reasonable for "the law" to take personal, non-external factors into account when dealing with individuals. Presumably, the concept of "legal liability" would be changed by this result, so that more legally recognized "excuses" could be developed. However, Holmes never speculated upon this technological possibility, and so, it is not at all clear how such a scientific advance would affect the rest of Holmes' theory of external standards. The ability to scientifically measure a person's powers and limitations might conceivably result in the law's adopting more of an internal standard, judging a person's behavior by measuring that person's actual intents, motives, and desires instead of holding the person responsible for measuring up to a hypothetical community standard. In that case, the second part of Holmes' theory would lose most of its significance. The idea that "the law," as well as theories of law, are in a continual state of growth, change, and revision, however, is central to Holmes' thought. The fact that his ideas might someday become technologically outdated, then, is actually consistent with his overall theoretical outlook. On the other hand, the idea that psychological and physiological methods will attain the required state of advancement is still only speculation itself. Even so, it is a possibility that could someday make a large part of Holmes' theory of law obsolete.

Second, the pragmatic idea that intersubjective agreement is a method of obtaining "objectivity," a claim that Holmes sometimes implies, along with the other pragmatists, is questionable. The fact is that biases can be shared, such that the "cancelling-out" effect of groups upon the idiosyncratic, particularistic qualities of single individuals will not take place if the individuals that make up the group are sufficiently alike in their common "peculiarities." It does no good, then, to say that the individual idiosyncrasies of a single judge on an appellate court are cancelled-out because the court in which that judge serves contains, say, nine members, and that the agreements which result from this community insure that the result is impersonal, if all of the judges on that court share some idiosyncratic attitude or bias. To use an example from cognitive psychology, the Peircean idea that an "objective event" can be inferred from the fact that the detection of the presence of such an event is replicable by others is susceptible to counter-example. That is, there are experiments in which everyone participating will
agree that a certain event occurs, yet no one would say that the event represents an "objective" occurrence. For example, when persons with normal eyesight hold a long tube up to one eye and position one of their hands next to the tube in front of their other eye, everyone will report seeing a large hole in the hand next to the tube.[134] Yet, the experience of the hole in the hand is still never taken to be veridical, even though everyone agrees upon the content of the experience. This kind of illusion is simply one example of the general claim above—that shared biases (in this case, the shared physiological tendency to have a visual experience of a hole in one's hand) can cause doubts about the "objectivizing effects" of groups. In so far as the theory of external standards depends upon the idea that a standard or a judgment can be "objective" because it is determined by intersubjective agreement, Holmes' theory runs into some difficulties to that extent. On the other hand, this problem might be met simply by saying that the standards of intersubjective agreement, while not necessarily "objective," are still "external" to the quirks of any one individual person. The main point here, then, is that the pragmatic claims made for the objectivity that results from intersubjective agreement must be understood in a cautious and limited sense. While this does not seriously threaten Holmes' theory of external standards, it does add to it an important qualification in regard to the nature of the pragmatic claims it adopts regarding the method for attaining "objectivity."

Finally, in consideration of Holmes' theory of pragmatic experimentalism, I have three critical observations to make. First, there are questions to be raised dealing with the considerations which an individual judge would have to undertake in order to follow Holmes' advice, and take the position that he had a "duty" to decide future cases pragmatically, that is, by considering the future social policy implications of such decisions. Suppose a judge decided to accept Holmes' view, but that another feels that Holmes' view is completely wrong. It is not clear whether the first judge should then go ahead and act as Holmes' theory says he "ought," for he would then be acting at odds with some of his fellow judges. Alternatively, should a judge accept Holmes' advice to decide cases pragmatically only on the condition that other judges do the same? Clearly, Holmes' suggestion that judges recognize their "duty" to decide certain cases in a certain way works best when all of the judges of a legal system cooperate in that activity. Otherwise, a judicial system in which some judges decide cases in one way and some in another becomes at odds with itself. Hence, as a "reform measure," Holmes' recommendation that judges revise their concepts of what it is that they ought to do could spell trouble if actually introduced into a real system. For a single judge to adopt the Holmesian style of judicial reasoning publically, the results might mean having his decisions continually overturned, his pragmatic reasoning criticized, and perhaps even his office taken away. These are not good practical results, it is obvious. The rather strange result is that judges who do want to follow Holmes' directive have a reason to do so only in a secretive manner, and should continue to use the same traditional forms while filling them secretly with the
new pragmatic substance. The point here, then, is that Holmes' normative directives to the judiciary would be somewhat disruptive were they publically adopted by only some part of the judicial system's officials, and that it might simply be better not to tell anyone. This is rather an odd result from a theoretical perspective that seems to value the ideas of honesty and straightforwardness with regard to the legal process.

Second, if it is supposed that the "goals" or "ends" which a community desires can be accurately identified, and that the judiciary and legislative decision-makers begin to make decisions with such goals in mind, what happens when a community changes its ideas, rejects former goals, and attempts to articulate different ones while the old ones are still the objects of legislative experimentation? If social goals are, more-or-less, set by the dominant forces in the community—a possibility discussed above (see section D.2 above)—then legislative experiments ought to be attempted which bring such goals about. Yet, the tests of such hypotheses take time. While an experiment aimed at meeting goal X is being undertaken, the dominant forces might shift, such that goal Y is then desired. Meanwhile, if it is found that the social experiments undertaken actually bring X about, this "success" might be a "failure" from the perspective of the newly-evolved community, which now wants Y. The situation is frustrating when X and Y are simply different goals, but there would be much greater problems when X and Y were mutually incompatible goals. In such a case, the process of time-consuming legislative experimentation regarding the best means to some social end might turn out to be quite impractical. As the lawmakers try out several different means to attain some particular goal, they must continually check back with the community to see if such a goal is still actively desired, for if a goal is no longer desired, why continue to test legislative hypotheses aimed at bringing it about? Again, this is another implication of the confusion which arises from the vagueness in the idea of "social policy." When such policy is taken in the manifest will sense and when a society is not a very stable one, perhaps nothing will ever get done with regard to the meeting of a society's goals by legislative experimentation. Hence, the criticism here is one of the practical applicability of the part of Holmes' theory which says that the processes of the law ought to be used as an experimental means to bring about social ends. If such ends are continually changing because the dominant powers in the society are changing, it may be impossible to devise (through necessarily time-consuming experimental testing) the means to attain such ends.

Third, Holmes' theory can accomodate the notions of both long-run and short-run social goals, it would appear. Upon Holmes' view, the processes of the law should be used as an instrumental means to bring about such goals through pragmatic experimentation. When the consequences of a legislative enactment or a judicial ruling fail to bring about the goals for which it was tested, such enactments and rulings are to be rejected and something else is to be tried. However, suppose a society has some definite long-term goal, X. The official decision-makers, following Holmes' theory,
experiment with a certain working hypothesis designed to bring X about. The problem is—how will it ever be determined that the experiment is a failure? Even if the initial results of the experiment are disappointing, this would not be enough to reject the experiment, since it might begin to yield more favorable results in the future. But the problem is that such a claim can always be made, and so, it becomes difficult to falsify a long-term experimental solution. It is always possible to simply "wait a little longer" in the expectation that the hypothesis will then begin to yield positive effects. Again, this is another of the potential practical difficulties with Holmes' theory, if it were to be actualized in a real situation.

As I pointed out at the beginning of this section, none of these minor criticisms of Holmes' theory of law appears to seriously weaken his overall theory, yet the combined effect of these comments demonstrate that there is much theoretical and scientific work to be done in regard to the construction of a full-blown pragmatic (or Holmesian) theory of law. Even so, Holmes' theory as it stands still has several positive aspects that count in its favor. The final section of the essay, which follows below, will attempt to weigh both the positive and negative aspects and implications of Holmes' theory, as have been encountered in these critical sections.


Generally speaking, a "theory" is an intellectual instrument that provides an explanation for or an understanding of something, and which goes beyond what is immediately obvious.[135] As was pointed out in Chapter One, almost all theories are purposely limited to certain contexts or bodies of data to the exclusion of others, and this is certainly the case with regard to legal theories. But the mere fact that some collection of claims is a theory is not philosophically interesting, for an infinite number of possible theories can be constructed to "explain" anything at all.[136] What is philosophically interesting and important is the analysis and evaluation of theories, that is, finding out which ones are the best.

Now, there is not a universal agreement with regard to what a theory of law should do. Some writers emphasize the empirical aspects of legal theories, and suggest that such theories ought primarily to explain various actual legal phenomena, making legal theories into those of a "sociological" type.[137] Other writers concentrate upon conceptual analysis, preferring to emphasize what is implicit, for example, in our concepts of "rules" or "obligation."[138] Various writers also suggest that theories of law ought to answer certain basic questions, such as, "What is the connection, if any, between legal and moral matters?", "What is the difference, if any, between legal directives and threats of force?", "What is a legal system?", and "What is a valid law?"[139] Hence,
the diversity of theoretical approaches to jurisprudence shows that it cannot legitimately be said that a "theory of law" must address any specific area or question. All that seems to be necessary is a generalized concentration upon "things legal." The narrowness or breadth of such a concentration simply serves to demonstrate the focused or grand-scale nature of the particular theory. In light of this background, how does Holmes' theory of law fit in?

As I have reconstructed it in this essay, Holmes' theory has both grand-scale aspects as well as narrower ones. Holmes' theory concentrates upon certain traditional questions, ignores others, and raises new ones. Let me expand upon this a bit. In the first place, Holmes is concerned about the nature of legal concepts, and so, attempts to provide a way in which both judges and ordinary persons can understand them better. His method for this, of course, is embodied in a pragmatic approach to such concepts, which means that they are to be analyzed in terms of their actual functions and operations. Holmes sees it as a problem that many legal concepts are represented with the same signs (i.e., words and phrases) as moral concepts, and that the result is a common confusion of the two. His theory is intended to remedy this problem, so that the use of legal concepts in both ordinary and official discourse and reasoning is made more efficient and realistic. In similar ways, Holmes' theory of external standards is an attempt to show that legal justification, in the context the judgments made by the state upon the individual, is and ought to be based upon non-subjective standards. This part of Holmes' theory is also intended to clarify legal thinking and reasoning on both ordinary and official levels, especially in regard to the concept of "liability," and again, in regard to the overlapping terminology between legal and moral discourse. The generality of Holmes' overall theory is also evident in both his theory of meaning and his theory of external standards, since both deal with a very basic bit of legal data—the relationship between the state and the individual citizen, both in an abstract, ideal sense, and in the concrete, real sense (with the external standards doctrine being somewhat less general than the theory of meaning). Finally, the third major part of Holmes' theory is an attempt to deal primarily with the issue of official decision-making. In this sub-theory, Holmes also argues in a normative as well as a non-normative sense, holding that judges (and other officials) have duties to decide cases (and create legislation) in certain ways and not in others. Although this part of Holmes' theory is most clearly applicable to democratic societies, the fact that such societies are one of the dominant forms of polity in the world shows that this part of Holmes' theory is not lacking at all in theoretical importance. The phenomena addressed here are basically the official decision-maker's attitudes toward his or her function and purpose in the legal system.

Hence, while Holmes' theory explicitly ignores some general theoretical questions, such as "What is a legal system?" or "What is a valid law?", it is a broad enough approach to legal matters that the answers to such questions can be implicitly derived from Holmes' overall viewpoint. In addition, Holmes' theory does address several
traditional theoretical questions specifically, such as, "How ought judges to decide cases?", "How is the regular behavior of both officials and citizens in the context of a legal system to be explained?", and "What are the connections between legal and moral matters?" Further, Holmes theory does take what seem to be the "core" phenomena of "matters legal" into account—to repeat the list of such phenomena I provided in Chapter One, these core phenomena include: (1) the enactments of official bodies, (2) the regularity of official behavior, (3) the enforcement of official enactments, (4) the beneficial and detrimental effects of such enactments (and other activities) upon the community, (5) the attitudes and behavior of ordinary citizens in relationship to their government and its various activities, (6) the regularities of citizen behavior in relation to the fact that they are living "under" a legal system, (7) the use of certain technical concepts by both officials and citizens, (8) the methods by which officials justify decisions they make, and so on. Holmes' theory of law, in one way or another, addresses all of these phenomena, and attempts to provide a systematic approach to their understanding as legal matters.

Basically, all of this simply shows that Holmes' theory of law as constructed herein, is a genuine and major legal theory in the sense that it does what other major legal theories do—it provides an explanation or a way to understand some general type of phenomena and goes beyond a statement of the obvious. The question that now arises is this—is Holmes' theory of law a good one?

Such questions must be approached cautiously, for the metaphilosophical area of theory-evaluation is one in which it is generally agreed that there is no complete set of hard-and-fast standards by which a theory is to be accepted or rejected.[140] There are, however, a series of general standards that are commonly used in the evaluation of theories.[141] Although no single one of those standards is by itself enough to show that a theory is incorrect (except perhaps the single exception of "internal consistency"), the more of these criteria which a theory fails to satisfy, the generally worse-off is the theory. Of the many metatheoretical standards which have been put forth, let me concentrate in the present context upon the following six, which I believe to embrace all of the most important criteria for the evaluation of theories: (1) internal and external consistency, (2) generality/practical applicability, (3) explanatory, clarifying power, (4) implications of implementation, (5) preferability to rival theories, and (6) susceptibility to objection without ad hoc moves. I will now look at Holmes' theory in regard to these criteria and in light of all of the critical and evaluational analysis that has been presented in this chapter.

With regard to the internal consistency of Holmes' theory, there do not appear to be any glaring contradictions, although in one of the criticisms examined in this chapter, two of the implications of Holmes' theory seemed at odds with each other (see section C.2). The objection being examined dealt with Holmes' argument for the radical reformulation of legal concepts, taken together with his idea that
the judiciary generally ought to let "the crowd" have its way. If it were the case that the popular will was against Holmes' radical reformulation of legal concepts, then he could not hold the two positions simultaneously, and there was reasonable evidence to support the notion that Holmes' reformulation of legal concepts might be actively resisted in the public mind. The only possible way out for Holmes in such a case would be to say that such popular resistance to his conceptual reformulation program was totally "unreasonable," such that, were the crowd to follow its "true" desires, it would embrace the pragmatic-functionalist approach. However, to show that simple resistance to Holmes' theory is downright "unreasonable" would be quite a difficult task. It seems that, in Holmes' own words, a "reasonable man" might conceivably reject Holmes' theory. In any event, although this move would technically avoid the charge of inconsistency, it also sounds suspiciously ad hoc. In an overall sense, then, Holmes' theory cannot be said to admit of any inconsistencies, and so, the evaluation of his theory on this account is generally a positive one, though somewhat qualified.

The criteria of external consistency refers to how well a theory fits in with previously-established theories in related areas which have already proven themselves to be successful. Sometimes this standard is called "theoretical conservatism."[142] Upon this criteria, however, Holmes' theory has been criticized as failing to "measure up." That is, the acceptance of Holmes' theory would mean the rejection of other broad areas of legal thought and practice (e.g., the treatment of contracts by the courts, the use of mens rea and other internal standards, the idea that judges should not "legislate," etc.) The single area that seems the least inconsistent with traditionally-accepted legal theories is Holmes' theory of external standards, but even in this case, it has been shown above that there is much substantive disagreement with Holmes' view.[143] On the other hand, Holmes readily admits that his whole pragmatic approach to legal concepts, legal standards, and legal reasoning is radically different than those of the accepted theories in areas surrounding "the law." His theory is, in fact, a response to the traditional approaches to legal and quasi-legal subject-matters, which Holmes claims are grossly inadequate. Hence, the idea the Holmes' theory is not externally consistent with many non-pragmatic, previously-accepted theories is not an unexpected finding at all. In fact, it is simply a "given" whenever a new theory is extremely revolutionary in its form, relative to the older views. In that case, although it must be judged that Holmes' theory does not succeed in meeting the criteria of external consistency, the idea that Holmes' theory is openly put forth as an approach which advocates an overthrow of the general theoretical monolith already in existence must also be taken into account. Of course, it has often happened that a new theory is simply so revolutionary that, although it requires profound conceptual changes in previously-held views, the other merits of the theory make up for this.[144] It remains to be seen, however, whether Holmes' theory can make up for its generally negative grade with regard to the standard of external consistency.
The subject of the generality and applicability of Holmes' theory has been discussed repeatedly in this chapter. I pointed out in section D.1 that many aspects of Holmes' theory appeared to best suit an Anglo-American, democratic type of legal system and political community. Hence, Holmes' theory does not have complete generality, and yet, because such systems are significant and important ones, the relevance of Holmes' theory in this general type of situational context counts in favor of the theory. Another positive factor is the fact that Holmes' theory does not limit itself only to the judiciary, and in fact, becomes a theory for all kinds of public offices and functions, even though the judiciary itself is most often used in Holmes' theory as the paradigm example of an office of the "public force." On the other hand, problems with the practical applicability of Holmes' theory abound, with the most difficult area being the use of the scientific, experimentalist analogy to apply to the processes of the law. This problem was delineated in section C.1 of this chapter, where it was found that Holmes' theory was troublesome in such a context upon several grounds. Other minor problems involving the applicability of Holmes' theory were pointed out by me in section D.4 of this chapter. Overall, however, the grade seems generally positive in regard to Holmes' theory in terms of its generality, again slightly qualified, but the judgment as far as the practical applicability of the theory is a mixed one. The application of Holmes' theory to actual legal/political situations appears to result in a significant amount of workability problems. This is puzzling, as I have observed before, since it is a pragmatic theory which Holmes is advocating.

Now, does Holmes' theory really provide a better understanding of the legal phenomena it addresses, or does it make things more obscure and confusing? In other words, how does Holmes' theory "size up" in terms of what is perhaps the basic function of theories, namely, explanation? The answer to this question is a mixed one. Holmes' theory of external standards seems to be the best aspect of his overall theory in regards to the explanation and clarification of why the (Anglo-American) courts often disregard personal factors in the judgment of legal liability, and in fact, why they must substitute an external, hypothetical standard. Holmes' extended application of this doctrine to so many areas of the law is also a positive mark on this account. Holmes' theory of the meaning of legal concepts is somewhat less enlightening with regard to legal phenomena, but it is still an extremely open and honest perspective, and may not be initially recognizable as an aid in understanding because of its radically non-traditional character. The idea that the functionalist approach remedies the common conceptual confusion between legal and moral concepts is definitely an interesting and initially promising hypothesis, and serves to increase our awareness of the dangers of equivocation in regard to words like "duty," "malice," "right," and so on. Therefore, both Article I and II of Holmes' theory definitely contribute to a greater understanding and a deeper clarity with regard to the areas they address. The problem here is that the third aspect of Holmes' overall theory is not as clearly helpful as are the first two parts. My main argument for the idea that parts of Holmes' theory of pragmatic experimentalism in the
law tended to obscure rather than clarify was set forth in sections D.2 and .3 of this chapter. The concept of "social policy," which is fundamental to Holmes' whole legal experimentalist approach, both empirically and normatively, takes a good bit of analysis to clarify. The clarity problem also comes up in regard to Holmes' advocacy of a "judicial duty," and it requires a considerable amount of work to clarify this idea also. Even so, this only shows that many of the implications of a Holmesian-type pragmatic theory of the law still have to be worked out in greater detail. However, other problems with the theory of pragmatic experimentalism arose in section C.1 of this chapter, dealing with the inadequacy of even trying to analogize legal processes with those of scientific experimentation. On the other hand, Holmes' factual claims that the formal behavior of judges is different from its substance is an intriguing hypothesis, and is given some amount of support from the fact of Holmes' personal experience and authoritative associations with the judiciary, as well as his broad knowledge of judicial history. The overall outlook for Holmes' theory of pragmatic experimentalism, then, from the standard of explanatory/clarifying power seems also to be a mixed one. However, in regard to Holmes' theory as a whole, the outlook is definitely better, because of the increased understanding and conceptual/empirical clarity that results from the first two parts of his theory, and from the last part, when some of its ambiguous quality is worked out. In that case, the verdict with regard to the third standard of theory evaluation put forth here is another positive, but reserved one.

The fourth standard I have set down involves a look at the external implications of Holmes' theory, were it to be accepted and put into practice. Notice that this is different from the question of the practical applicability of Holmes' theory, although the two criteria are definitely related ones. In the case of this particular standard, again, the results in regard to Holmes' theory are mixed ones. On the positive side, the adoption of Holmes' theory would presumably bring about, among other things: (1) a greater understanding by the ordinary citizen of the differences between legal and moral concepts, (2) a common appreciation for the legal necessity to disregard subjective factors as standards of judgment, (3) a community of ordinary citizens and lawyers who have a more realistic understanding of the legal process, and so, who can be better prepared for possible interactions with the legal system because of this awareness, (4) official decision-making that is geared to the scientific assessment and solution of real social concerns rather than the continuance of obsolete rules, and (5) the safeguarding of certain basic freedoms from encroachment by "unreasonably" restrictive legislative (i.e., majoritarian) experimentation. On the negative side, however, the adoption of Holmes' theory might result in: (1) a society of persons who think of their legal obligations or duties to "the law" as criminals would, looking to escape all official detection (or as lawyers would, which might be worse), (2) the disregard of personal factors which really could be relevant to the determination of responsibility for behavior; such factors may become increasingly more detectable as technological progress allows, and (3) a society in which "justice"
is often simply the will of the stronger force, and where gross
injustices are possible. In light of this mixed bag, the
corresponding judgment of Holmes' theory by the criterion of
implications-from-implementation is also a mixed one. Hence, it
cannot be said that Holmes' theory meets this standard; it can only
be said that while the theory has some good practical implications,
it may have just as many troublesome ones. Overall, then, the
verdict on this account for Holmes' theory is simply an indefinite
one.

Implicit in many of the objections that were examined in this
evaluative chapter were comparisons of Holmes' theory from the
point-of-view of other legal theories. Perhaps the main competitors,
or rival theories, to Holmes' (and similar pragmatic-realist theories
of law) are those of the natural law school and those of the
rule-oriented positivist school. On the meta-theoretical level,
Holmes' approach has been contrasted to the perspective which views
concepts to be objects of discovery, rather than created objects. I
have not given much space to the natural law theorists, except
perhaps for Lon Fuller, who is a naturalist in a specific sense
(viz., procedurally rather than substantively). The reason that
I have neglected much of the criticism of Holmes' thought that can be
levelled from a natural law perspective is that such a point-of-view
is most often grounded in one or another bodies of religious dogma.
Consider the following passage from an article critical of Holmes'
philosophy from the naturalist perspective:

"Holmes voice ... is a symbol of our intellectual
wretchedness, a conspicuous example of our
abandonment of those spiritual, philosophical and
moral truths that have been the life of the western
tradition, the foundation of our law and the
strength of our Republic. I mean the recognition
that it is a father-controlled world in the sense
that infinitely above the strivings of men is the
Providence of God ... that the ultima ratio is not
force but a truth and goodness that are founded in
the Creator and are reflected in the nature of man
and society..."[146]

The objections to Holmes' theory which are based in provincialistic
and superstitious beliefs such as these have simply not been worth
the trouble to consider. Any objection to Holmes' theory, then,
which criticizes it as being "godless" is in fact better seen as a
bit of praise on Holmes' behalf. Those claims of the natural law
theories which are based upon theological foundations are the ones
which I have not addressed, simply because they are not themselves
rationally supportable. For such reasons, Holmes' approach is
definitely preferable to the religious naturalist theories of law.
On the other hand, one problem with some of the not-so-dogmatic
natural law critics of Holmes is that they have failed to realize
that several of their most fundamental claims about the nature of law
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in relation to the welfare of the community were actually endorsed by
Holmes.[147] This shows that there is some overlap between Holmes' theory, especially Article III, and those parts of the natural law approach which hold that legal processes are instruments for social ends, and so, that there is a normative dimension to the operations of the legal system.

There are also many similarities between Holmes' views and those of the rule-positivists, which must be seen as the primary rival view to Holmes' pragmatic approach. Holmes does embrace the idea that legal rules play an important role in legal decision-making, but that the use of legal rules is itself only justified on appeal to any underlying non-legal "rule," namely, that of following pragmatic directives. Perhaps the most important theoretical criticism which is usually levelled against Holmes from the rule theories of law, however, has been that Holmes' theory fails to take account of an essential and important legal phenomenon—the "internal aspect" of obligatory rules, by which persons who live in a society governed by legal rules "accept and voluntarily cooperate in maintaining the rules, and so see their own and other persons' behavior in terms of the rules."[148] As was seen in section B.6 of this chapter, it was alleged that Holmes' theory simply defines this phenomenon out of existence.[149] Alternatively, it was shown in response not only that Holmes' view accommodates this perspective, but that it even gave a plausible rival explanation for it, in terms of the pragmatic approach.

One of the most fundamental problems in comparing Holmes' theory to rival legal theories, especially those of the rule-positivists, is that the revolutionary nature of Holmes' meta-theoretical approach means that, on several legal questions and issues, the positions taken by Holmes' theory are theoretically incommensurable to those taken by rival legal theories. For example, while many classical theories have attempted to give an answer to the basic question, "What is law?", Holmes' theory concentrates, alternatively, upon the question, "What does the concept of 'the law' mean in the context of our general purposes and interests?" Thus, the fact that Holmes offers a whole new approach shows that much of the criticism that is directed at him from the perspective of other theories is misguided, simply because such criticism is made from an entirely different kind of meta-theoretical approach. Holmes' theory, then, is commensurable with other legal theories only up to a certain point, and so, there are several issues where direct comparisons between Holmes' views and those of others is not fruitful.

The basic problem here is that a point-by-point evaluation of the comparable parts of Holmes' theory, alongside all of its jurisprudential rivals, would be a task equal to that attempted in this entire dissertation at the very least, and so, goes far beyond the scope of this particular essay. The most that can be furnished here is an examination of some of the critical claims and counter-claims of several theories (which has been done in this chapter), and a general observation of the results of that debate. Hence, in comparison to rival legal theories, the preliminary
judgment is that Holmes' general approach seems to be qualitatively comparable to its principle rivals, that it can respond to many objections levelled by its rivals, and that it can be used to criticize its rivals on its own grounds. In that case, the verdict on this count is that, until more analysis is completed, Holmes' theory (or a type of theory similar to Holmes', revised and reworked) must be considered to be of the same level of adequacy as a legal theory as any of its competitors.

Finally, how does Holmes' theory stand up to criticism? Surprisingly, it has been shown that many of the most popular objections to “Holmes' theory” are in fact rather easily answerable in light of an overall reconstruction of Holmes' legal thought. Part of the reason for this, I have argued, is that the complexity and integrated nature of various aspects of Holmes' legal thought have gone unrecognized, such that many objections intended to criticize Holmes were actually being aimed at an oversimplified, straw man version of Holmes' actual theory. Indeed, showing that Holmes' theory of law is in fact less susceptible to objection than has been previously thought is one of the most significant results of this study. On the other hand, there are still several areas in which Holmes' theory is weakened by objections, and I have given these a special treatment in sections C and D of this chapter. The most damaging set of objections is probably that which was discussed in sections C.1 and .2, concerning the problems with attempting to analogize legal processes to scientific ones, and the difficulties engendered in the adoption of Holmes' radical reformulation of legal concepts. These are serious problems that Holmes' theory can neither avoid nor easily answer. Are these problems enough, however, to say that Holmes' theory does not meet the presently-considered standard? Again, the response to this question is not a clear cut one, for while there are some definitely-recognizable problems with Holmes' legal theory, the demonstrated strengths of that theory cannot now be ignored.

Therefore, in light of this examination of Holmes' theory from six different metatheoretical perspectives, what can be said? It seems that for every one of the criteria laid down, both positive and negative observations can be made of Holmes' theory. Because of this, a single overall appraisal of Holmes' theory is a very difficult judgment to make, and would probably be an oversimplification in any case. I am therefore hesitant to conclude my analysis by saying that there are enough bad things about Holmes' theory of law to warrant its rejection, just as I am hesitant to take the opposite conclusion, and say that there are enough good things about it to warrant its acceptance.

I will in that case take a more cautious course, and end my examination and evaluation of Holmes' theory with the following conclusionary observations. Many of the standing objections that have been raised against Holmes' theory in the critical literature are grounded in certain factual claims. Similarly, many of the responses which Holmes supplied to such objections were of the nature of factual claims. For example, in section B.2 of this chapter, it
was held in objection to Holmes' theory that judicial officials do not in fact decide cases upon pragmatic grounds, but rather, follow traditional legal rules. Holmes' counter-claim was that the appearance of judicial rule-following was deceiving, and that the fact was that many judges actually do follow the directives of his legal theory, and secretly decide cases pragmatically. Similarly, the whole dispute between Hart, et. al. and Holmes with regard to the phenomenon of the "internal aspects" of obligatory rules is a factual debate about the ways that persons in legal systems actually respond to its rules. Moreover, the challenge to the scientific analogy and the objection to Holmes' radical reformulation of legal concepts, are both heavily dependent upon certain basic empirical claims.

In light of this observation, I think that the advice of one other author, Wilfrid Rumble, who did a comprehensive study of American legal realism, should be given serious consideration. Rumble looked at the debates between the realists and the rule-formalists which have occurred in this century, and observed that much of the debate was contingent upon certain factual conclusions which each side was simply speculating about to fit its own purposes. Rumble says we ought to ask, in this light—what is the impact of legal rules upon judicial decision-making?, what is the impact of non-legal, pragmatic considerations?[150] Similarly, how do persons really feel about legal rules—do they actually approach them as Hart claims or as Holmes claims? Would the community approve of Holmes' conceptual transformation of legal concepts or not? And so on. These purely factual issues need to be investigated more fully before legal theories can be completely evaluated in regard to them. There is simply much more work to be done.

Therefore, I am suspending any kind of final overall verdict on Holmes' Theory of Law, especially in comparison to its theoretical competitors, until more scientific evidence is gathered for many of the claims which all these theories make. Further, this is not the only area in which further study is required, for even if the factual disputes between Holmes' theory and its rivals can be settled, there is still more analytical work that ought to be done with Holmes' theory itself as an example of a type of legal approach, namely, a pragmatic one. In other words, if after more factual study it is found that Holmes' theory is susceptible to certain objections, it has clearly been shown in this essay that Holmes' theory will still have many positive factors going for it as well. In that case, the further analytical task will be one which involves the revision of Holmes' theory such that its advantageous aspects can be saved and its weak parts changed to meet or avoid the objections. Holmes' legal thought is a relatively new arrival on the stage of jurisprudence, the first of a new type of approach, and for that reason, ought not to be peremptorily dismissed until it has been clearly shown to be wrong. The pragmatic approach to jurisprudence, however, may in fact end up transcending the particular bounds of "Holmes' Theory of Law," and so, the final judgment of the success or failure of this type of approach must await further research and analysis.
CHAPTER THREE NOTES


4) Golding, op. cit., p. 37.


6) See Chapter II, section C.10, in which I point out this interrelationship as part of Holmes' theory, later specified as Article I.B.2.d.3.

7) See, e.g., Chapter II, section C.4. At least one other writer has noticed that the present objection is a complete misunderstanding of Holmes' theory. See Wilcox, op. cit., p. 1071.

8) Hart, op. cit., p. 143. For a similar view, presumably intended as a criticism of Holmes' theory, see R.W.M. Dias, op. cit., p. 524.

10) In "The Path of the Law," this is precisely what Holmes says. See Chapter II, note 223.

11) Holmes called this kind of rule-following "revolting" in "The Path of the Law," in HR, p. 75. See Chapter II, section C.9c. In one of Holmes' early Supreme Court cases, in fact, he spoke of a case brought before the Court that could not be decided in favor of a certain position, because that position had, "... nothing to commend it but the letter of the law," San Diego Land & Town Co. v. Jasper 189 U.S. 439 (1903), at 447.

12) See Chapter II, section C.9d, esp. notes 221 and 222. For an interesting insight into the form versus the substance of judicial decision-making, see Paul Mishkin, "The High Court, the Great Writ, the Due Process of Time and the Law," 79 Harvard Law Review 56 (1965). Mishkin argues that the law is really not embodied in rules or doctrines, and is better described as institutions and decision-processes, but that the "myth" of a rule-governed judiciary ought to be maintained because of its social benefits.


15) See, e.g., Benditt's mentioning of Holmes in op. cit., Chapter 2. Hart also implicitly criticizes Holmes on this ground in op. cit., Chapter 7. See also Jerome Frank, Law and the Modern Mind (New York: Brentano's, 1930), Appendix II.

16) Charles Sanders Peirce, Collected Papers, 8 vols. Vols. I-VI, C. Hartshorne and P. Weiss, eds. Vols. VII-VIII, A.W. Burks, ed. (Cambridge, Massachusetts: Harvard University Press, 1931-58), sections 5.244-.249 and 5.265. (Hereinafter referred to as CP; references will be made to section numbers and not to pages.)

17) See supra, note 11.

18) Hart, op. cit., p. 133.

19) See, e.g., ibid., p. 91-2. Secondary rules are constructed in addition to "primary" rules, the latter of which basically exist to impose duties or obligations.

20) Ibid., p. 133. Emphasis in original.

21) See, e.g., Lon Fuller, Law in Quest of Its elf (Boston: Beacon Press, 1966), p. 54; Golding, op. cit., p. 37; Harris, op. cit., p. 97.
22) This is what Hart implies of the "rule skeptics," op. cit., p. 133. He rarely mentions Holmes specifically, though it is implicitly clear that Hart is talking about Holmes' legal thought in many cases.

23) The hypothetical scenario I am constructing was inspired by a similar one used by Anthony D'Amato, "The Limits of Legal Realism," 87 Yale Law Journal 468 (1978), esp. pp. 474-7.

24) Ibid., p. 476.


26) D'Amato, op. cit., p. 477.

27) I am adopting this argument, again, from D'Amato, ibid.


29) Hart, op. cit., p. 140.

30) D'Amato, op. cit., p. 473.

31) See, e.g., Peirce, CP, 5.565 on the concept of "truth."


34) Ibid.

35) Ibid., p. 82.

36) Ibid., pp. 79-88.

37) Ibid., p. 82.


40) Ibid., p. 64.

41) See Hart, op. cit., p. 56. Hart says that the "internal aspect" of rules is not a matter of feelings, but then describes this phenomenon in terms of "attitudes." However, it is obvious that both "attitudes" and "feelings" are quite similar kinds of internal, subjective characteristics.

43) Ibid., p. 514. For similar views, see Chapter II, note 260.


47) On this point, see Holmes, "The Path of the Law," in HR, pp. 73-4.


49) See, e.g., Holmes, "The Path of the Law," in HR, p. 59. Also, see Howe, ed. Holmes-Laski Letters, vol. I, p. 115, wherein Holmes wrote: "Of course--when I speak of the lawmaking power I mean the concurrence of all the necessary organs in putting the enactment into execution."

50) For similar views, see, e.g., John Dickenson, op. cit.; and Anthony D'Amato, op. cit., esp. pp. 502-6.


52) See, e.g., Chapter II, sections C.1, .2, .9b, and .10.

53) See supra, note 51.

54) D'Amato, op. cit., p. 504.

55) Ibid., p. 505. Emphasis in original.

56) Benditt, op. cit., p. 19.

57) Ibid., p. 20.

58) Ibid.

59) See, e.g., George P. Fletcher, "Two Modes of Legal Thought," 90 Yale Law Journal 970 (1981), p. 980-4. Fletcher notes: "Hart argues that the word 'law' should be equivalent to the German gesetz; Fuller, that it should be equivalent to recht ... The debate thus appears to be an irresolvable dispute about the proper use of the word 'law.'", p. 984, n.74.

60) See Chapter II, note 31, and surrounding text.

61) In American Legal Realism (Ithaca, New York: Cornell University
Wilfrid Rumble observes that the realists compared the impact of Holmes upon legal thought to that of Kant upon philosophical reflection, and so, by implication, that of Copernicus in astronomy; no longer could legal, epistemological, or physical processes be analyzed without taking the perspective of the observer into account, pp. 38-44.

For example, see John Dewey, "Logical Theory in Law," 10 Cornell Law Quarterly 17 (1924).


Edwin W. Patterson, Law in a Scientific Age (New York: Columbia University Press, 1963), p. 52. In On Law and Justice (Berkeley, California: University of California Press, 1974), Alf Ross points out that the whole concept of "the interest of the community" or "social welfare" ignores the "... qualitative incommensurability of needs and the mutual disharmony of interests.", pp. 295-6.

Summers, op. cit., p. 938.

Ibid., p. 939.


Ibid.; see also Patterson, op. cit., pp. 39-45.

Summers, op. cit., p. 895.

For similar views critical to the Holmesian approach on this particular point, see Edwin N. Garlan, Legal Realism and Justice (New York: Columbia University Press, 1941), pp. 10-31 and Wilfrid Rumble, op. cit., pp. 167-79.

For a more optimistic assessment of the capabilities of social scientific inquiry, see generally Richard S. Rudner, Philosophy of Social Science (Englewood Cliffs, New Jersey: Prentice-Hall, 1966); also Patterson, op. cit., Chapter 3, esp. pp. 65-74.


Summers, op. cit., p. 923.

See Catherine Drinker Bowen, Yankee From Olympus (Boston:


78) One of Holmes' law clerks once related the following: "... the Court had debated at several sessions, Holmes and Butler carrying the opposing arguments, until finally Butler's position was accepted with only Holmes dissenting. Then Butler turned to Holmes and said with great solemnity, 'I am glad we finally arrived at a just decision.' 'Hell,' snapped back Holmes, 'Hell is paved with just decisions.'", quoted in Edward J. Bander, ed. Justice Holmes Ex Cathedra (Charlottesville, Virginia: Michie Co., 1966), p. 245. See also pp. 213 and 229 for similar anecdotes dealing with Holmes skepticism regarding "justice."


80) For a general critique of utilitarianism on these and other grounds, see, e.g., Bernard Rosen, Strategies of Ethics (Boston: Houghton Mifflin Co., 1978), pp. 96-104.

81) See Chapter II, section C.10c.

82) Ibid.

83) See Chapter II, note 117.

84) See section B.6 of this chapter.

85) See supra, note 37.


87) See Chapter II, section C.7, esp. notes 140-4.


89) Buckland, op. cit., p. 99.

90) Ibid., p. 98.

91) Ibid., p. 99.

92) Ibid., p. 101. For similar views, see Hall, op. cit., pp. 139-40; G.W. Paton, A Text-Book of Jurisprudence (Oxford: Clarendon

94) See Chapter II, section C.7, note 121.


96) See Chapter II, section C.2.

97) Holmes, "The Path of the Law," in HR, p. 64.

98) Lon Fuller, The Law in Quest of Itself, pp. 94-5.

99) See section B.7k. of this chapter.

100) Holmes, "The Path of the Law," in HR, p. 64. In his dissent in Lochner v. New York 198 U.S. 45 (1905), Holmes points out the differences between popular conceptions of what is "legal" from what the facts are: "The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.\textbf{\textquotedblright}, at 75-6.


102) See, e.g., Article III, section D.1.b. of the outline of Holmes' theory.

103) See Chapter II, notes 207, 211, 213.


105) Ibid., note 209.

106) Ibid., notes 213, 216.


110) See, e.g., ibid; and Holmes' dissent in \textit{Tyson and Brother v. Banton} 273 U.S. 418 (1927), at 446.


112) See, e.g., \textit{Bleistein v. Donaldson Lithographing Co.} 188 U.S. 239 (1903), at 252. See also \textit{supra}, note 79.

113) See Chapter II, note 216.

114) See Chapter II, section C.10c.

115) See Chapter II, sections C.7, .8, and .10c.

116) Ibid.

117) See Chapter II, notes 256, 262.

118) See Chapter II, notes 158, 158, and surrounding text.

119) See Chapter II, note 223.

120) See Chapter II, sections C.9c-f.

121) See \textit{supra}, note 11.

122) See, e.g., section B.2 of this chapter.

123) See sections B.2, .3, and .7a-b. of this chapter.

124) Rogat, \textit{op. cit.}, p. 255.

125) Ibid.


130) Ibid., p. 85.

131) See Chapter II, section C.10.


133) Holmes, \textit{CL}, p. 86.


136) See Chapter I, section B.

137) For two subscribers of this view, see Wilfrid Rumble, American Legal Realism, pp. 104, 138; and Theodore Benditt, op. cit., pp. 43-72.


141) See ibid., wherein Quine and Ullian go on to discuss five "virtues" that a good explanatory hypothesis should have, on the whole, pp. 66-82.

142) See, e.g., ibid., pp. 66-9.

143) See supra, note 95.


145) See, e.g., Fuller's The Morality of Law, esp., chapter 2.

146) Harold McKinnon, "The Secret of Mr. Justice Holmes: An Analysis," in HR, p. 254. See also supra, notes 42-4. For a good overview of the critiques Holmes has received from those of the natural law following, see Fred Rodell, "Holmes and his Hecklers," 60 Yale Law Journal 620 (1951).

147) For example, in ibid., McKinnon writes that, because Holmes did not invoke Christian dogma in his legal theory, he failed to realize that: "... the whole purpose [of the law] lies in being an instrument for the common good.", op. cit., p. 254. But this is remarkably close to Holmes' own position! Fuller's approach also finds the essence of law to be a "purposive" endeavor, but so does Holmes! See The Morality of Law, chapters 3 and 4.


149) Hart, ibid.
### APPENDIX A: TABLE OF CASES

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