

Geometry & Mechanism: Material Metaphors and the Force of Uncertainty in Legal Thought

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Abstract

This essay takes up the metaphors through which realists and Critical Legal Studies scholars created an idea of legal formalism. These insistently material metaphors emphasized that the errors of so-called formalist jurisprudence arose from two things: first, the material location of law; and second, the purpose of law in relation to the material world. The essay shows how metaphor in particular was rhetorically suited to this kind of dual work. The material metaphors helped to mark and differentiate realists' intellectual interventions. These metaphors were also part of the aim to reorient law toward the material world by resignifying its materiality. Last, this essay shows that this reorientation toward the material was forged through making material forces precisely out of the immaterial of contingency and uncertainty.

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Although the term “formalist” is common enough in legal scholarship, there has been much scholarly debate about the very existence of a practice of law and legal thought identifiable as such.¹ Some have proposed, for example, that formalism, a term used only in retrospect, was first and foremost a category created by figures such as Roscoe Pound and Benjamin Cardozo, and later revived by early Critical Legal Studies scholars to periodize legal thought and to identify historical and theoretical antecedents for the conservative tendencies of

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¹ In the more recent past, Brian Tamanaha's *Beyond the Formalist-Realist Divide: The Role of Politics in Judging*, argued that the sharp distinction assumed between realist and formalist modes of legal thought was not borne out by the archive. He proposed the distinction was not a philosophical, but rather a political distinction. His book sparked a series of responses. Brian Leiter, in answer to Tamanaha's *Beyond the Formalist-Realist Divide*, gives a full-throated defense, not of formalism as a theory of law or adjudication, but of formalism as a useful category for understanding how judges think about and talk about how to judge. Brian Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (2010); Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 *Legal Theory* 2 (2010).

members of the U.S. Supreme Court in the 1970s.² What interests me in this essay is that those engaging in debates about realism vis-à-vis formalism nonetheless agree in two ways: first, in that the term “formalist” can be attributed to realists and Critical Legal Studies scholars, and secondly, in that realists and Critical Legal Studies scholars were invested in articulating their own practices of thinking by way of distinguishing them from the formalism they named and described. That is to say, whether or not formalism is a coherent historical phenomenon, it also became a matter of representation. This essay takes up these representations of formalism as its object of inquiry.

The depiction of “formalist” legal thought (that of judges, lawyers, and theorists) was part of realists’ overall desire to reinvigorate practices of justice. I argue that pedagogical, scholarly, and theoretical texts constructed formalism as a negative reflection of the practices of thought to which they laid claim. Specifically, I analyze the ways in which jurists across time mobilized metaphors and analogies in order to pose formalists’ mistaken understanding of the relationship between material reality and legal thought. Insistently material metaphors emphasized that the shortcomings of so-called formalist jurisprudence arose from two things: the material location of law, and the purpose of law in relation to the material world. Realism emerges then, not only as a reformist impulse, but also as a reorientation toward, and resignification of, the material world in the hopes of bringing law ever closer to it.³ Counterintuitively, this resignification involved imagining the *immaterial* of uncertainty and contingency as material forces themselves.

In addition to the attention I pay to the predominance of material metaphors for describing formalist thought, I also gesture towards the feminizing language used to signal formalist thinking over and against more *strenuous*, *arduous*, and *dynamic* modes of thinking. Where formalism is identified as too obsessed with formulas and, thus as a passive rather than an active mode of thinking, realist thinking is portrayed by contrast as pliable, adaptive, aggressive, fearless, and robust. I make this series of more local points about gendered depictions to continue to affirm that using gender as a critical tool of analysis opens new possibilities for our relationship to law and history, even when our arguments are not primarily about forms of gender oppression. Further, examining how these metaphors of materiality work to create a (feminized) sense of formalism also calls further attention to the ways in which realists understood legal thought as a way to reinforce law as a masculine vehicle.

² Some of this foundational work by Critical Legal Studies Scholars includes the following: Grant Gilmore, *The Ages of American Law* (1974); Morton J. Horwitz, *The Rise of Legal Formalism*, 19 *Am. J. Legal Hist.* 251 (1975); Duncan Kennedy, *Legal Formality*, 2 *J. Legal Stud.* 351 (1973).

³ Much of my thinking through materiality here has benefited from Carolyn Biltoft’s work on what she has termed the “dematerialization of material life.” While her work focuses on making intimate knowledge out of global political economies that interweave with the “dawn” of the information age during the interwar period, her theoretical mobilization of media studies, political histories, and global systems in terms of relationships to the material/immaterial world(s) has been crucial to my own work in ways that I think will be very clear in this essay. Carolyn N. Biltoft, *Global Flesh and Spirit: Violence, Information and the Inter-war Crisis* (forthcoming manuscript).

The payoff of this kind of thinking could be nothing short of refining the practice (and theory) of the ability to think towards justice, by not only clarifying the hidden analogies by which we understand our own relationships to the material world, but also calling attention to how we understand what counts as such, and thus what realities we take on a responsibility for thinking through.

I. A Note on Method

As this essay appears in the special issue on “Literary Analysis of Law,” I thought it would be fruitful to say a word about my critical method and its aims. As stated previously, I leave to legal historians, and to historians of legal thought especially, the important work of synthesizing the intentions and doctrinal debates around and through legal realism. I leave to other scholars, too, the work of assessing the contingent development of bodies of thought in law as a practice of argumentation for lawyers, theorists, and judges alike. The editors and contributors to the *American Journal of Legal History*, among others, for example, have been continuing to do this important work. Moreover, my project is adjacent, rather than identical, to Quentin Skinner’s call two decades ago to understand legal texts as “contributions to particular discourses, and thereby to recognize the ways in which they followed or challenged or subverted the conventional terms of those discourses themselves.”⁴ These histories accomplish a great deal in pursuit of historical narratives that can be carved out from the gifts and non-quite-gifts of these archives. In what follows, I am not interested in whether these men knew or intended their language to register a reorientation toward materiality. Whether through interpretation the ghosts of the past can be made present is a story and set of questions for a different kind of teller.

The critical practice I take on here is yet another route by which to forge a wormhole between past and present legal thought. In this essay I do two things: first, I center the imaginative work texts perform through material metaphors; second, I read for resonances across texts to ask what they elucidate about their under-appreciated aspects. After Tina Campt’s work with the photographic archive of the African diaspora, I try to *listen* to these archival bits as she *listens* to the lower registers of historical images.⁵ In this way, I listen alongside the work of structuralist legal history as Justin Desautels-Stein has described it: “[L]etting go of the ‘law of now,’ the structuralist looks for a structure of legal argument and then asks, *across space and time* [sic], when and where has this structure been operated.”⁶ Although metaphors are not exactly the *structure* of legal thought, in the texts I analyze, the duality of metaphor is particularly suited to the task of serving as a conceptual double-mirror.

⁴ Quentin Skinner, *Visions of Politics* 125 (2002).

⁵ Tina Campt, *Listening to Images* (2017).

⁶ Justin Desautels-Stein, A Context for Legal History, or, This Is Not Your Father’s Contextualism, 56 *Am. J. Legal Hist.* 29, 40 (2016).

With this in mind, the reading practice I use values openness and criticality to forge historicism as *itself* a fleeting encounter with the archival. This version of historicism departs from social scientific methods of proof and assertion, instead sharing affective and critical space with art's insistence on making impossible tasks (like writing about history) into practices and crafts. Put another way and taking inspiration from Colin Dayan's work, more than precise knowledge, the aim here is intellectual (maybe also emotional) intimacy with these texts.⁷ Even in a conversation about staid (in our imaginations) legal thinkers, perhaps the intimacy of listening can be a useful critical method for refreshing our relationships with well-known texts. Ultimately, by attending to material metaphors I mean to activate a more intimate relationship to these archives.

II. Not a Mystery, Pedagogy

In "The Path of the Law," Oliver Wendell Holmes insisted the law was not a mystery but a profession.⁸ I begin with this contrast between mysteries and professions (and the end, specifically, of mysteries) in order to signal the desire to be distinguished from a previous generation of legal thinkers. Through the language they chose, the realists who followed Holmes likewise signaled not just an adjustment, but a break from previous legal thought. Holmes further proposed that there was a difference between mysteries and uncertainties. It was uncertainties rather than mysteries that shot through the law. Holmes makes this distinction in part because his is a pedagogical text, by which I mean it is both a text about pedagogy and a text that wants to be pedagogy.⁹ This pedagogical imperative is one reason for distinguishing between mysteries and uncertainties. Making lawyerly prediction into the subject of a profession also means that it can be the product of a certain kind of training. Even as this Holmes essay (which was first a speech) predates realist jurists' careers, I linger on it here because its pedagogical context accounts for many of the realists. In fact, echoing Holmes's assertion, Roscoe Pound would later declare that the "[l]aw is no longer anything sacred or mysterious."¹⁰ Understanding the pedagogical context by which law was distanced from the sacred and mysterious, then, becomes important.

Holmes was of the generation of lawyers in the United States that was moving away from an apprenticeship model as the preferred mode for professionalization and towards credentialization by universities.¹¹ We can think of the fundraising efforts of people like John Henry Wigmore at Northwestern University, among others, to see how this was a time in which universities were building up and investing in their law schools. Alongside

⁷ Colin Dayan, *The Law Is a White Dog: How Legal Rituals Make and Unmake Persons* (2011).

⁸ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *Harv. L. Rev.* 457 (1897).

⁹ The most explicitly pedagogical portion of "The Path of the Law" is the section on the "bad man of the law." Along these same lines, Al Brophy has argued for the importance of genre in understanding a legal text. Al Brophy, *Did Formalism Never Exist?*, 92 *Tex. L. Rev.* 383 (2013) (book review).

¹⁰ Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 *Green Bag* 607, 610 (1907).

¹¹ Jean-Louis Halpérin, *For a Renewed History of Lawyers*, 56 *Am. J. Legal Hist.* 53 (2016).

institution building, there was a pedagogical shift in those schools towards what David Rabban has called “inductive historical thinking.”¹² Inductive historical thinking turned toward the empirical aspirations and new methods in the social sciences in search of a different version of historically-grounded understanding of social conditions. Some would look to history for an evolution to legal thought, while others would find in history’s uneven terrain validation for the need for reform. This new mode of teaching law was echoed not just in curricula but in scholarship as well. At Harvard Law School, which Holmes attended, the pedagogical aims and curriculum were profoundly shaped by Christopher Columbus Langdell. Langdell gave law school its modern shape: a three-year curriculum for lawyers-in-training, and the case method as a primary pedagogical form. I mention the creation of standardized university curricula because this new sense of training through explicit and reproducible pedagogy undergirds the impulse to do away with or, perhaps more precisely, to distinguish the thinking Holmes’s moment needed from a sense of mystery.

As Holmes was largely addressing aspiring lawyers with “The Path of the Law,” a “legal mystery” for him did not mean what was unsolvable, quite the opposite: it meant the likeliest outcome for a certain case. What’s curious is that, while he distanced a more mystical, perhaps too *immaterial*, notion of “mystery” from legal practice and aimed to assert the very practical concern of training lawyers, he nonetheless termed legal treatises “sibylline leaves” and lawyers’ professional activities acts of “prophecy” and “prediction.” The question is, then, how would practical prophecy work?

A jurist “foretold” the future by being able to oscillate between the instant case and the legal principle, between gaining and losing specificity. For Holmes, a legal “prophecy” that a lawyer might make became more precise so as to be more generalizable, and in order to connect the local with the systemic workings of law. The work of “making prophecies more precise” bridged the distance between the instant case and the generalizable, but never equated one with the other, never lost the texture of the specific to the span of the “thoroughly connected system.” A jurist sculpted the most apt legal principle from specific cases through the effect of unceasingly alternating between the general and the specific; the back and forth somehow brought both more clearly into being. Paradoxically, specificity characterized the unreachable past of the case itself while aspiration (toward justice) and affirmation (of just laws) became twinned under the guise of a generalizable legal principle.¹³ Each slipped into its distinct and receding horizon, but without losing its purchase on the other, like vanishing points positioned on either side of a canvas. Enacting this process of mutual refinement, according to Holmes, would save legal thinking from a tendency toward

¹² David M. Rabban, *Law’s History: American Legal Thought and the Transatlantic Turn to History* (2014); Simon Stern, *Detecting Doctrines: The Case Method and the Detective Story*, 23 *Yale J. L. & Human.* 339 (2011).

¹³ Legal historian Kunal Parker argues that in the late-nineteenth century, “legal scholars thought in terms of a perpetual mismatch between temporal context and object, a mismatch having to do with the way they represented time itself.” The law, according to Parker, “produced its own temporal context, a bit of itself detached from itself, hypostasized as ‘life’ and set afloat as time.” Kunal M. Parker, *Context in History and Law: A Study of the Late Nineteenth-Century American Jurisprudence of Custom*, 24 *Law & Hist. Rev.* 473 (2006).

judgments based in “inarticulate and unconscious judgment.”¹⁴ The point of balancing these vanishing points was ultimately to make any unconscious grounds for legal conclusions visible, to make them legible. That is, recognizing unconscious *grounds* as their own material force.

“The object of our study, then, is prediction,” Holmes writes.¹⁵ This sentence can be read in the ways that we have been trained to forge ideological critique: as positivist, imperialist, capitalist. But here is where Holmes surprises. He uses the word “prediction” not to mean that lawyers, through training, become infallible in their capacity to predict. Training, in fact, would only make them better guessers. He foregrounds the importance of uncertainty, the need to gauge probability and distills “uncertainty” from the idea of falling prey to “mystery.” That is, he reimagines the meaning of prophecy from one of revelation to one of approximation. From that vantage point, venerating mysteries becomes a weakness of character, whereas strenuously contending uncertainty is the work of a proper legal (and properly masculine) mind.

In reorienting toward probabilistic thinking, Holmes evinced a shifting relationship to materiality. Part of the power of probabilistic thinking is that it intrinsically refers to an aggregate knowledge of past events, behaviors, or tendencies. In the context of the new social sciences to which Holmes and the realists would turn with enthusiasm, this “aggregate knowledge” entailed knowledge that was turned into calculable data from which there could then be mathematized approximations. The logic of aggregation, in this way, is a new form of engagement with the material world. Further, in drawing prophecy close to the work of approximation, the implication is that the aim of social scientific methods was not only to produce accurate assessments of the present. On the contrary, these methods were invested in mobilizing data towards a possible, desirable future. That is, the approximations of social science were a new way in which to foretell.

Through engaging with the social sciences, Holmes, and after him Pound and Dewey, wanted new kinds of legal thinking to make more aspects of the world visible and so material to the law. Holmes’s call for judges to pay attention to “social advantage” sounds like a simple expansion of the scope of what decisions take into consideration. But what he calls “the often proclaimed judicial aversion to deal with such considerations” is not simply an absence that can be filled with more information, a matter of addition.¹⁶ Holmes explains that in failing to account for social advantage, unconscious judgments masquerading as “logic” could become the basis for legal decisions. Holmes writes,

The language of judicial decision is mainly the language of logic. . . . 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

¹⁴ Holmes, *supra* note 8, at 466.

¹⁵ *Id.* at 457.

¹⁶ *Id.* at 467.

and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.¹⁷

If “social advantage” is “the very *ground* and *foundations* of judgments” [emphasis mine] then this is not a matter of filling an absence, but of reformulating the nature of legal judgment vis-à-vis the material world. Making “articulable” the grounds and foundations also means restructuring the idea of how the law works. By contrast, Holmes creates a sense of legal thinking ignorant of social advantage by way of its focus on the *matter* of logic.

Holmes looks specifically to political economy to bring legal thought into a more ergonomic relationship with the world:

As a step toward that ideal it seems to me that every lawyer ought to seek an understanding of economics. . . . [In political economy] we are called on to consider and weigh the ends of legislation, the means of attaining them, and the cost. We learn that for everything we have we 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.¹⁸

Thinking through political economy, rather than only through the history of legal precedent and principle, meant something like expanding the reach of empiricism. The benefit would be modes of thinking that led towards a process of consideration more than they led to specific answers: “[W]e are called on to consider and weigh the ends of legislation, the means of attaining them, and the cost.”¹⁹ That is, a constant, active, and vigorous reexamination of the kind of society that is desired, what role legislation and law play in getting there, and what ways laws and legislation are obstructionist to those ends.

Holmes proposes that legal work had not been, but should become, more strenuously attentive toward the entirety of what could be known about the material, social conditions. He went on, “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.”²⁰ Holmes does not describe how to tell the difference between “fossils of history” and the history that could be useful—the history, for example, of social advantage. But the metaphor of the “fossils of history” nonetheless does rhetorical work to signal a misreading of the material world, of what matters and is alive in it. That is, that kind of rigid thinking misunderstood *itself* and *its* tools as material, and even misunderstood what was in fact petrified for a site of vitality.

III. Geometry and Material Thoughts

Through their material metaphors, Roscoe Pound, John Dewey, and contemporary scholar Thomas Grey describe formalism as, among other things, the opposite of mysterious. Through the metaphors they use in creating a sense of these legal thinkers, they cast

¹⁷ Id. at 465.

¹⁸ Id. at 474.

¹⁹ Id.

²⁰ Id. at 464.

formalists as transmitters of empty though rigid abstraction, lacking a sufficiently engaged relationship to the material world. Grey uses an analogy to geometric logic to illustrate how overly material formalist thinking was. Pound asserts the idea of *mechanistic* thinking. And lastly Dewey seeks a new relationship to the material as a reinvigoration of logic as an un-fixed process.

It is a common enough assertion that one way to identify formalist thought is through its aspiration toward *architectural* coherence. Each decision somehow stands kaleidoscopically in relation to every other, and clusters of bodies of law together join to form some recognizable shape. Even Holmes, who in some ways anticipated the kind of thinking we call realist, asserted that the law was a “thoroughly connected system.”²¹ Or, as Benjamin Cardozo put it somewhat less kindly in the 1920s, the “demon of formalism tempts the intellect with the lure of scientific order.”²² Thomas Grey, among other late-twentieth century scholars, proposed that formalism was identifiable in part in just this way.²³

Grey’s late-twentieth-century analysis of Langdell parallels the ways in which realists framed that generation’s thinking, and for that reason, I parse it at some length here. Grey not only asserts the “architectural” aspirations of classical legal thought as a form of traditionalism. For formalists, according to Grey, “the fundamental principles of the common law were discerned by induction from cases; rules of law were then derived from principles conceptually; and finally, cases were decided, also conceptually, from rules.”²⁴ Grey proposed that this aspect of formalist legal thought, its method of discernment, understood itself not only as scientific but as scientific in a very specific sense: as a *geometrical* way of thinking. In Grey’s geometric analogy,

The axioms and postulates of Euclid stand to [Langdell’s] theorems as the principles of classical law stood to its rules. The application of legal rules to individual fact situations in the decision of cases was then like the application of geometric theorems to solve practical problems of measurement.²⁵

The affective desire here for the comfort of the kind of certainty geometry offers was *itself* a failure, firstly, of (masculine) fortitude. But the scientific register does more than merely propose that Langdell desired the stability of objectivity. The proposition is that Langdell worked with legal principles as though they were analogous to the principles that governed geometrical shapes, about which there could be “axioms and postulates.”

If Langdell’s theorems aspired to the logic of geometrical postulates, the implication was that they likewise mistook themselves for acting as though the theorems themselves

²¹ Id. at 458.

²² Benjamin N. Cardozo, *The Nature of the Judicial Process* 66 (1921).

²³ Grey’s terms for the kinds of fidelity aspired to by formalist thinking were: comprehensiveness, completeness, formality, conceptual order, and acceptability for legal science. Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. Pitt. L. Rev. 1 (1983).

²⁴ Id. at 19.

²⁵ Id. at 16.

were materially-based. The formalism of Grey's imagination held a "basic flaw [as] the failure of the link between conceptual order and formality."²⁶ Grey's analogy between geometrical thinking and formalism betrays that at issue is the question of how the very *formness* of thinking worked. Formness was not only about an abstract sense of order or assuring "order."²⁷ It was not only the ability to be catalogued or even identified into types. Rather, seeking to mimic the workings of geometrical principles, or of scientific derivations about the material world, the very idea of formness became that of a *substance, material*, or kind of *matter*. Through analogizing to the geometric, Grey implies that formalists believed in a material identifiability of ideas as the premise by which other, new ideas could be derived explicitly from them. In this depiction, ideas, derivations, and deductions could work with the icy precision of geometrical deduction. More than the ability for situations to be categorizable, Grey depicts a habit of thought in which ideas work *themselves* according to the laws of matter. Through this mistaken sense that legal thought itself was material, *architectural, geometrical*, Grey portrays formalists' idea of law as located in its own structure. That is, formalists mistook legal thought for the only matter in the material world to which the law had to attend.

Answering a question not of where law might be found but of how it should work, Roscoe Pound asserted that a "system decays into technicality" when "scientific jurisprudence becomes a mechanical jurisprudence."²⁸ Like Holmes's differentiation of law from mystery and mysticism, Pound's jurisprudence would no longer "stand as a sacred tradition in the modern world."²⁹ Mechanical jurisprudence, like the idea of aspirations toward the architectural and geometric, was too concerned with the "niceties of its internal structure."³⁰ For Pound, the "mistaken" science of the previous generation, presaging Grey's account nearly a century later, lay in the idea of a self-contained and self-sustaining legal logic. Mechanical jurisprudence misallocated law in the niceties of its internal structure *because* it had misplaced the ends of law: material justice. Or, put another way, justice that could be materially manifest in the world. Drawing on English jurist Frederick Pollock, Pound's call for a new kind of scientism was meant to bring about "full justice." According to Pound's parsing of Pollock, full justice meant "solutions that go to the root of controversies."³¹ The problem of "mechanical jurisprudence" was its failure to get at that "root." That is, the failure was in not being *grounded* in and addressing material realities.

Again, as with the geometric for Grey, Pound locates the problem of mechanical jurisprudence in its too-material understanding of thinking with the law as merely a *mechanistic* application of rules and principles. Legal rules emerge in Pound as too material, too

²⁶ Id.

²⁷ Id. at 43.

²⁸ Roscoe Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605, 607 (1908).

²⁹ Id. at 606.

³⁰ Id. at 605.

³¹ Id.

static, too fixed, a “rigid scheme.”³² This description distinguishes the persistent attentiveness needed from the dynamism of the present, an attentiveness that could be distinguished as non-reactive, not automatic. The mechanical in the metaphor signals a circumvention of thought, but it also articulates thought that has become as though materially fixed. Pound quotes William James to make this point:

We no longer hold anything scientific merely because it exhibits a rigid scheme of deductions from *a priori* conceptions. In the philosophy of to-day, theories are “instruments, not answers to enigmas, in which we can rest.” The idea of science as a system of deductions has become obsolete, and the revolution which has taken place in other sciences in this regard must take place and is taking place in jurisprudence also.³³

Furthermore, another aspect of what was “mechanical” about mechanical jurisprudence was also its working outside of the attention to human needs. Pound writes:

The sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument.³⁴

Pound implicitly makes two cases here. First, that what he calls full justice can be met only by way of meeting human needs, and second, that full justice (in the way he describes it) *itself* is a human need. These—human needs—are then the material realities that formalism does not take into account. Pound makes material what another might think of as immaterial, or, rather, as other than precisely material: human need. Through his representation of the formalists, Pound proposes that the *material* toward which law should bend and to which it should make itself accountable is the “human factor” over and against a mechanistic interpretation of principles and doctrines as themselves the fixed realities to which the law was responsible. It was then a formalist’s understanding of the balance between the material world and the law that obstructed full justice.

When John Dewey writes that “experience shows that the relative fixity of concepts affords men with a specious sense of protection, of assurance against the troublesome flux of events,” he also has *mechanical jurisprudence* as his main target.³⁵ Both the call to the mechanistic and his critique of the previous generation’s scientism have at their center the idea that inadequate legal judgments are too *static* in nature. Dewey does not describe a kind of thinking that has *materiality* of its own, like Pound, but rather he asserts, like Grey, that for formalists the syllogism in legal thought acted as though it was its own material force. Dewey writes,

[T]he philosophy embodied in the formal theory of the syllogism asserted that thought or reason has fixed forms of its own, anterior to and independent of concrete subject-matters

³² Id. at 608.

³³ Id. (quoting William James, *Pragmatism: A New Name for Some Old Ways of Thinking* 53 (1907)).

³⁴ Id. at 609-10.

³⁵ John Dewey, *Logical Method and Law*, 10 *Cornell L. Rev.* 1, 20 (1924).

. . . This . . . shows by contrast the need of another kind of logic which shall reduce the influence of habit, and shall facilitate the use of good sense regarding matters of social consequence.³⁶

The form of the syllogism, for formalists, aspires to be a logic of rigid demonstration, not of search and discovery. As a logic of fixed forms—i.e., forms that are too material—Dewey asserts that formalism can never be the method by which to reach intelligent decisions on behalf of the public. This mode of thinking, for Dewey, “reinforces those inert factors in human nature which make men hug as long as possible any idea which has once gained *lodgment* in the mind.”³⁷ In the tension that Dewey describes, men both *bug* as long as possible to an idea, and this *bugging* is itself a manifestation of an *inert* factor of human nature. The implication is that enacting logic that is frozen, rigid, inert, itself involves a passive posture. It is not, after all, either logic or science that has been happening in this scenario. Dewey locates the problem in the workings of an interpretation of syllogistic thought. He writes, “The trouble is that while the syllogism sets forth the results of thinking, it has nothing to do with the operation of thinking.”³⁸ What was necessary was a way to resuscitate logic. Resuscitating logic mattered to Dewey because, as he put it,

If . . . logic is really a theory about empirical phenomena, subject to growth and improvement like any other empirical discipline, we recur to it with an added conviction: namely, that the issue is not a purely speculative one, but implies consequences vastly significant for practice.³⁹

That is, Dewey here asserts that even while the connotation of “logic” has some fixity to it, and so syllogistic thinking presumes it adheres to a structure of logic, true logic is a “theory” rather than a structure, rather than form. Dewey is illustrating a failure not only of intellectual imagination, but also of admitting constant and evolving vulnerability to the material world as a more masculine version of fortitude.

Specifically at issue for Dewey is the idea that legal thinkers had yet to distinguish the workings of logic from habit. Habit, for Dewey, exerts something like a material force of its own. Dewey writes, “They [i.e., certain tendencies of the human creatures who use logic] spring from the momentum of habit once forced, and express the effect of habit upon our feelings of ease and stability—feelings which have little to do with the actual facts of the case.”⁴⁰ At fault, for Dewey, is more than shortcomings or shortsightedness. There are joined habits of mind and feeling—what he here calls tendencies—that spring forth from “the momentum of” forced habits. These “forced” habits are presumably both those that are forced over time and those that might be forced into being in a single instance. These “forced” habits are also part of an expression *of* habit on “feelings of ease and

³⁶ Id. at 21.

³⁷ Id. at 22.

³⁸ Id.

³⁹ Id. at 27.

⁴⁰ Id. at 21.

stability” detached from any particular case. It is this complex network of producing habits, inhabiting habits, and seeking the ease promised as a default by the habitual that, for Dewey, gives rise to the misidentification of habit with the stable promises falsely presumed of logic and the logical. That is, habits can produce a force that itself *blocks* thought.

Explaining his more nuanced understanding of logic free from the seemingly material confines of the habitual, Dewey asserts, “As a matter of fact, men do not begin thinking with premises. They begin with some complicated and confused case, apparently admitting of alternative modes of treatment and solution. Premises only gradually emerge from analysis of the total situation.”⁴¹ What Dewey does not answer, however, is how to distinguish between precedent and habit, and whether *habit* and *precedent* are themselves terms of the same order. But what is clear is that both can act as quasi-material impediments to what Dewey characterizes as actual thought.

Holmes, Pound, Dewey, and Grey each inherited the lessons of philosophical pragmatists like William James in asserting that “logical method and form” effectively flattered the “longing for certainty and for repose which is in every human mind.”⁴² When describing what he meant by provocations like this, James said that he meant to trouble the notion that truth was itself like an object (i.e., static, discernible, even material). For Holmes, it is this “longing for certainty” that clouds legal thinking. And it is that same “longing for certainty” that he poses as weakness of moral fiber, of fortitude. In “The Meaning of the Word ‘Truth,’” James too called belief in “absolute truth” a “moral holiday.”⁴³ This echoes Holmes’s own desire to break asunder the connection between morals and law. It is also reminiscent of James’s own differentiation between *tender-minded* and *tough-minded* intellects. From the standpoint of philosophy, James portrays a reliance on “absolute truth” as mistaking truth for an object, whose shape, structure, density, and precise properties might be known. Holmes, with considerably less animosity than James, alleged that lawyers and judges failed to account for the particulars of a case. What he named “social advantage,” moreover, frustrated the notion of an immovable and “absolute” truth.

Holmes, like Pound, Dewey, and Grey, poses a need for more dynamic modes of thinking in part through the misplaced materiality with which they identify formalism. Again, I do not mean to say that theirs was an “objective” or “truthful” depiction of formalist thinking. I have instead been arguing that part of their vision for law becomes discernible through the metaphors and analogies they use to pose previous jurisprudence as inattentive toward the material world.

IV. The Force of Uncertainty

Holmes’s depiction of legal thinking in “The Path of the Law” as distinct from logical deduction was not the first time, of course, he put forward this notion, nor the first time he

⁴¹ Id. at 23.

⁴² Holmes, *supra* note 8, at 466.

⁴³ William James, The Meaning of the Word “Truth,” in *The Meaning of Truth* ch. 9 (1911).

implied that the bounds of “logic” had been a limitation for legal thinking. In his review of Langdell’s *Summary of the Law of Contracts* Holmes famously wrote: “The life of the law has not been logic; it has been experience.”⁴⁴ Holmes, Pound, and Dewey portrayed previous legal thinking as an insufficient answer to the needs and experiences of American citizens. In this essay I have explored the material metaphors through which a certain idea of formalism took shape. These accounts depicted formalists’ failure to properly locate and activate law because of an inappropriate relationship to materiality. More, the “material” of law had become a rigid artifice ill-suited for the modern world. The work of material metaphors, then, helped to discern a reorientation toward materiality for the law. At the same time, these metaphors and analogies signaled an investment in accounting for a new sense of the material world with all the new tools of social science, toward the search for a fuller justice.

Holmes, Pound, and Dewey also turned to the generativity of uncertainty and contingency as part of what legal thinking should account for in order to arrive at holdings attentive to the needs of the moment. The more adequate orientation toward the material was to understand uncertainty and contingency as themselves forces that act on the material, and therefore should count as material. Uncertainty and contingency, too, became material forces in the world. This attentiveness to the material involved not only being subject to the material world as such, but also being vulnerable to this new sense of the immaterial, which was not the opposite of the material, but rather only *immaterial* because it was not yet apparent, not yet precisely material, but would be. This is a qualitatively different notion of law, of what materiality entails, and of what it means to try to think in relation to that materiality.

⁴⁴ Oliver Wendell Holmes, Book Notice, 14 Am. L. Rev. 233, 234 (1880) (reviewing Christopher Columbus Langdell, *Summary of the Law of Contracts* (1880)).