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## The Influence of the German Concepts of Volksgeist and Zeitgeist on the Thought and Jurisprudence of Oliver Wendell Holmes

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# THE INFLUENCE OF THE GERMAN CONCEPTS OF *VOLKSGEIST* AND *ZEITGEIST* ON THE THOUGHT AND JURISPRUDENCE OF OLIVER WENDELL HOLMES

JAMES KNUDSON

## Table of Contents

I.	INTRODUCTION . . . . .	407
II.	THE CONCEPT OF THE <i>VOLKSGEIST</i> IN GERMAN LEGAL SCIENCE . . . . .	409
III.	THE PHILOSOPHY AND JURISPRUDENCE OF OLIVER WENDELL HOLMES . . . . .	412
	A. <i>The Influence of German Legal Science on Holmes</i> . .	412
	B. <i>The Influence of Social Darwinism on Holmes’     Thought</i> . . . . .	413
	C. <i>The Influence of Utilitarianism on Holmes’ Thought</i>	414
	D. <i>The Effects of Positivism on Holmes’ Thought</i> . . . . .	415
IV.	THE INFLUENCE OF PRAGMATISM ON HOLMES’ THOUGHT	417
V.	CONCLUSION . . . . .	418

## I. INTRODUCTION

Justice Oliver Wendell Holmes is perhaps the most famous and influential judge in American legal history. Just listen to what some other great legal minds have said about Holmes. Felix Frankfurter said Holmes “is indeed the philosopher become king” and added “[f]or centuries . . . men who never heard of him be moving to the measure of his thought.”<sup>1</sup> Benjamin Cardozo called Holmes “the great overlord of the law and its philosophy.”<sup>2</sup> Richard Posner has called him “the most illustrious figure in the history of American law.”<sup>3</sup> A 1990 study shows Holmes to be the most cited judge in law review articles other than a select few judges who are still on the bench.<sup>4</sup> Regardless of what one thinks of the jurisprudence of Holmes, his influence cannot be denied.

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1. Felix Frankfurter, *Mr. Justice Holmes and the Constitution*, in MR. JUSTICE HOLMES 46, 54 (Felix Frankfurter ed., 1931); Felix Frankfurter, *Mr. Justice Holmes*, 48 HARV. L. REV. 1279, 1280 (1955).

2. Benjamin N. Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682, 691 (1931).

3. Richard A. Posner, *Introduction* to THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. at ix (Richard A. Posner ed., 1992).

4. RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 76 (1990).

Holmes fought in the Civil War and lived throughout the second half of the Nineteenth century.<sup>5</sup> As such, the thought and philosophy of the time no doubt influenced him. The big question in academic circles, however, has been specifically which thoughts and which philosophies influenced Holmes.<sup>6</sup> Different scholars have described Holmes as a utilitarian, a pragmatist, a social Darwinist, a positivist, a nihilist, and a Nietzschean.<sup>7</sup> The debate over what Holmes believed goes on today. One thing that is clear, however, is that Holmes was influenced by the German legal science of the nineteenth century.<sup>8</sup>

German legal science has greatly influenced American law.<sup>9</sup> The "case method" of teaching the law developed by Dean Christopher Langdell at Harvard Law School, the American Law Institute's *Restatements*, and the Uniform Commercial Code were all outgrowths of German legal science.<sup>10</sup> Holmes was also influenced by the German legal science.<sup>11</sup> Holmes' famous address, *The Path of the Law*,<sup>12</sup> encourages the reading of eminent German jurists.<sup>13</sup> Holmes also made statements that were directly paralleled in the works of leading German legal scientists.<sup>14</sup>

The question to be answered in this article is whether Holmes was influenced by the concept of the *Volksgeist* (also known as *Zeitgeist*) in German legal thought. While most scholars agree that Holmes was influenced by German legal science in general,<sup>15</sup> the issue of whether Holmes ascribed to the concept of *Volksgeist* as the source of the law is unresolved.<sup>16</sup> Solving this question will help

5. CATHERINE D. BOWEN, *YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY* 152-174, 418 (1944). See also LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 105-06 (1991).

6. ALBERT W ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 10 (2000).

7. H.L. POHLMAN, *JUSTICE OLIVER WENDELL HOLMES: FREE SPEECH AND THE LIVING CONSTITUTION* 20 (1991); ALSCHULER, *supra* note 6, at 2.

8. JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA, CASES AND MATERIALS* 503-04 (1994) [hereinafter MERRYMAN I].

9. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 69-79 (2d ed. 1985) (1969) [hereinafter MERRYMAN II].

10. MERRYMAN I, *supra* note 8, at 503; James Whitman, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 *YALE L.J.* 156 (1987).

11. MERRYMAN I, *supra* note 8, at 503.

12. Oliver Wendell Holmes, *The Path of the Law*, Address at the Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), reprinted in *THE HOLMES READER* 59-85 (Julius J. Marke ed., 1955) [hereinafter Holmes, *The Path of the Law*].

13. MERRYMAN I, *supra* note 8, at 504.

14. *Id.* at 503.

15. *Id.* at 503-04.

16. None of the reasearch for this article has revealed that this topic has been directly

bring clarity in understanding what Holmes believed and possibly influenced his decisions.

The method by which this question will be resolved is to compare the idea of the *Volksgeist* to the various influences on Holmes' thought. First, German legal science will be discussed. Second, the various aspects of Holmes' thoughts and beliefs will be outlined. Finally, the two will be compared to determine if the concept of *Volksgeist* logically fit within Holmes' world-view. If so, a conclusion that Holmes ascribed to the concept of *Volksgeist* has merit. If not, then the logical conclusion is that Holmes did not believe in the concept of *Volksgeist* as found in German legal science.

## II. THE CONCEPT OF THE *VOLKSGEIST* IN GERMAN LEGAL SCIENCE

The concept of the *Volksgeist* is an interesting and important aspect of German legal science.<sup>17</sup> The concept of *Volksgeist* in German legal science states that law can only be understood as a manifestation of the spirit and consciousness of the German people.<sup>18</sup> German legal science assumes that the law can be studied scientifically as naturally occurring phenomena from which inherent legal principles and relationships can be discovered.<sup>19</sup> Although logic was used as a tool, German legal science rejected the focus on logic in developing law that was popular in civil law states such as France.<sup>20</sup> The German legal scientists of Holmes' time believed that it was impossible to create a simplified code of law.<sup>21</sup>

Another important aspect of German legal science is that it eliminated ethical and value judgments about the law.<sup>22</sup> In fact, the German legal scientists sought to be value free in analyzing the law.<sup>23</sup> Concepts such as natural law, which states that some values and laws are objectively true, had no place within the scholarship and thought of the legal scientists.<sup>24</sup>

The German philosopher, Frederick Carl Von Savigny is credited with creating German legal science.<sup>25</sup> Savigny felt that "a proper code [of law could only] be an organic system based on the true

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addressed in depth.

17. MERRYMAN I, *supra* note 8, at 477-78.

18. Mathias Reimann, *The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, 37 AM. J. COMP. L. 95, 97-98 (1989).

19. MERRYMAN II, *supra* note 9, at 57, 59-67.

20. *Id.*

21. *Id.*

22. JOHN P. DAWSON, *THE ORACLES OF THE LAW* 196, 198-201, 203, 206-07, 227-28, 231, 240-41, 450-52, 454-60 (1968).

23. MERRYMAN II, *supra* note 9, at 57, 59-67.

24. *Id.*

25. Reimann, *supra* note 18, at 95, 97-98.

fundamental principles of the law as they had developed over time.<sup>26</sup> Savigny did not believe that a proper code of law could be created, at least certainly not for the foreseeable future.<sup>27</sup>

Savigny also introduced the concept of the *Volksgeist* into the legal analysis of his time.<sup>28</sup> Savigny stated that law, like language, is an expression of the "common consciousness of the people,"<sup>29</sup> and is driven by "internal, silently operating powers."<sup>30</sup> For Savigny, German law was an expression of the common consciousness or "Spirit" of the German people.<sup>31</sup> The result of this is that law constantly changes and evolves as the German people change and evolve throughout time, and it is properly understood only in the light of history, both past and present.<sup>32</sup> Savigny felt that the peoples of each country had a similar effect on each nation's law,<sup>33</sup> and that this method was necessary to a proper understanding of law that could yield more effective laws.<sup>34</sup>

Much of German legal science can be traced back to German romantic philosophers, who lent credence to the concept of the *Volksgeist*.<sup>35</sup> G.W.F. Hegel, perhaps the most famous and influential German philosopher of the nineteenth century, was the driving force behind the historicism movement--the belief that the scientific study of history is necessary to a proper understanding of the world--which influenced Savigny and German legal science.<sup>36</sup> Along with Hegel, German romantics such as Herder and Goethe helped to have concepts such as the *Volksgeist* taken seriously.<sup>37</sup> The German romantic philosophers helped pave the way for German legal science to entertain a romantic sense of history and view the study of history as indispensable to understanding the law.<sup>38</sup>

Savigny's method stated that law is the product of the *Volksgeist*, embodying the whole history of a nation's culture and reflecting inner convictions that are rooted in the society's common

26. FREDERICK CHARLES VON SAVIGNY, *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* (Abraham Hayward trans., Arno Press 1975) (1831).

27. *Id.*

28. *Id.*

29. *Id.* at 28.

30. *Id.* at 30.

31. Reimann, *supra* note 18, at 95, 97-98.

32. *Id.*

33. *Id.*

34. *Id.*

35. MERRYMAN II, *supra* note 9, at 30-32.

36. ROLAND N. STROMBERG, *EUROPEAN INTELLECTUAL HISTORY SINCE 1789*, at 77-78 (6th ed. Prentice Hall 1994) (1966).

37. Reimann, *supra* note 18, at 95, 97-98.

38. ROMANTICISM AND EVOLUTION; *THE NINETEENTH CENTURY* 61 (Bruce Wilshire ed., Univ. Press of Am. 1985) (1968) [hereinafter ROMANTICISM AND EVOLUTION].

experience.<sup>39</sup> German legal science also rejected the concept of a “natural law,” or any other system external to the state by which the validity of a positive law could be judged.<sup>40</sup> The result of eliminating natural law was that ethics and value judgments were not to be considered in analyzing the law.<sup>41</sup> German legal science rejected the focus on logical deduction alone in developing law, instead believing logic to be one tool in understanding the current evolutionary development of the law.<sup>42</sup> The *Volksgeist* drives the law to slowly develop over the course of history.<sup>43</sup> Thus, a thorough understanding of the history of a people is necessary for studying the law accurately. German legal science is a “science,” but one that uses logic to study history, which in turn is based on the spirit (*Volksgeist*) of a people.

The work of Hegel, perhaps the most famous and influential German philosopher of the nineteenth century,<sup>44</sup> helps shed more light on what exactly is the concept of *Volksgeist*.<sup>45</sup> Hegel stated that the study of world history indicates that history has proceeded rationally, and history is the rationally necessary course of the “World Spirit.”<sup>46</sup> Hegel also spoke of a “National Spirit” that exists within nations and must be maintained, for when the “National Spirit” fails, the nation is sure to crumble.<sup>47</sup> It is this spiritual content that is the essence of individuals and the people as a whole, and is a “holy bond” that ties them together.<sup>48</sup> According to Hegel, the “Spirit” seeks freedom and is manifested in the State.<sup>49</sup> The concept of the *Volksgeist* is essentially this concept of a common “Spirit” of a people, and the German legal science of Savigny stated that law is an outgrowth of this common spirit of the people.<sup>50</sup>

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39. DAWSON, *supra* note 22, at 451.

40. MERRYMAN II, *supra* note 9, at 69-79.

41. DAWSON, *supra* note 22, at 452.

42. *Id.*

43. *Id.*

44. ROMANTICISM AND EVOLUTION, *supra* note 38, at 160.

45. The Hegelian concept of a “National Spirit” and the concept of the “*volksgeist*” are very similar, with both referring to a common essence or spirit among the people of a nation.

46. W.F. HEGEL, REASON IN HISTORY: A GENERAL INTRODUCTION TO THE PHILOSOPHY OF HISTORY 1-3 (Robert S. Hartman trans., 1953), *reprinted in* 4 PHILOSOPHIC CLASSICS: NINETEENTH-CENTURY PHILOSOPHY 63 (Forrest Baird & Walter Kaufmann eds., 2d ed. 1997) [hereinafter PHILOSOPHIC CLASSICS].

47. *Id.* at 77.

48. *Id.* at 84.

49. *Id.* at 89.

50. DAWSON, *supra* note 22, at 453.

### III. THE PHILOSOPHY AND JURISPRUDENCE OF OLIVER WENDELL HOLMES

The concept of the *Volksgeist* in German legal science is a romantic, almost mystical concept.<sup>51</sup> An analysis of Holmes' thought and philosophy is necessary to determine whether Holmes believed in the concept. Holmes' thought contained aspects of positivism, social Darwinism, utilitarianism, and pragmatism.<sup>52</sup> Through analyzing each of the aspects of Holmes' thoughts and beliefs, it becomes apparent that Holmes did not ascribe to the concept of the *Volksgeist* as put forth by German legal science.

#### A. *The Influence of German Legal Science on Holmes*

Holmes agreed with the German legal scientists that scientific inquiry should be used to examine the law,<sup>53</sup> that logic is an element but not a focus of such an examination,<sup>54</sup> and that morality should be separated from the law.<sup>55</sup> Holmes believed that the law should be based on science and not tradition.<sup>56</sup> Holmes wrote "[a]n ideal system of law should draw its postulates and its legislative justification from science" and continued by saying "[a]s it is now, we rely upon tradition, or vague sentiment."<sup>57</sup> Holmes believed that everything, including law, should be put to the test of proof in a scientific analysis.<sup>58</sup> Holmes agreed with German legal science scientific inquiry should be used as a tool to analyze the law.<sup>59</sup>

The German legal scientists and Holmes also agreed that logic should not be the total focus of the law.<sup>60</sup> This can be seen in Holmes' famous statement that "the life of the law has not been logic, it has been experience."<sup>61</sup> This statement directly parallels an

51. *Id.* at 452; STROMBERG, *supra* note 36, at 42, 79.

52. It should be noted that Holmes' thought was not completely in line with any particular philosophy. In researching Holmes' thought, it is interesting that various authors claimed that Holmes ascribed to the modes of thought listed in this paper. It is not the purpose of this article to resolve this controversy. However, it is the case that Holmes' thought contains aspects of all these methods of thought, and this article seeks to examine the ways in the various aspects of Holmes' thought prove or disprove his belief in the *Volksgeist*.

53. Oliver Wendell Holmes, Learning and Science, Speech at a Dinner of the Harvard Law School Association in Honor of Professor C. C. Langdell (June 25, 1895), *reprinted in* THE HOLMES READER, *supra* note 12, at 107 [hereinafter Holmes, Learning and Science].

54. Holmes, The Path of the Law, *supra* note 12, at 68-70.

55. *Id.* at 68.

56. *Id.* at 68.

57. Holmes, Learning and Science, *supra* note 53, at 107.

58. *Id.*

59. Holmes Reader, The Path of the Law, *supra* note 12, at 94.

60. *Id.* at 68.

61. STEPHEN J. BURTON, THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER

earlier statement of the famous German legal scientist Rudolf von Jhering, who said that the “cult of the logical . . . is an aberration and rests on ignorance about the nature of the law.”<sup>62</sup> Holmes also indicated that law and history are intertwined, calling law the history of the moral development of humanity.<sup>63</sup>

Holmes also agreed with German legal science that considerations of morality should be eliminated from law.<sup>64</sup> In fact, Holmes seems to have been a moral skeptic who wrote that moral preferences are “more or less arbitrary, . . . [d]o you like sugar in your coffee or don’t you? . . . [s]o as to truth.”<sup>65</sup> This is in line with the attempt of German legal scientists to divorce morality from law.<sup>66</sup> Holmes also joined the German legal scientists in disbelieving in any sort of a natural law saying, “[a]ll my life I have sneered at the natural rights of man.”<sup>67</sup> It appears that Holmes was influenced by many of the aspects of German legal science.

### B. *The Influence of Social Darwinism on Holmes’ Thought*

Holmes was a follower of social Darwinism.<sup>68</sup> Social Darwinism views life as a struggle between individuals in which those who are the strongest and most powerful prevail.<sup>69</sup> Social Darwinism appears logically opposed to the concept of the *Volksgeist*.<sup>70</sup> Social Darwinism is highly scientific and thus unlike the somewhat romantic theory of a *Volksgeist* among the people.<sup>71</sup> Additionally, the *Volksgeist* is a common “Spirit” among the people of a nation, at odds with the social Darwinist view of conflict in a society.<sup>72</sup>

Social Darwinism also states that society reflects evolution in that the stronger members of a society benefit and prosper at the

WENDELL HOLMES, Jr. 2 (Steven J. Burton ed., 2000) [hereinafter BURTON].

62. Konrad Zweigert & Kurt Siehr, *Jhering’s Influence on the Development of Comparative Legal Method*, 19 AM. J. COMP. L. 215, 217 (1971).

63. Holmes, *The Path of the Law*, *supra* note 12, at 61.

64. *Id.* at 61, 68.

65. Letter from Oliver Wendell Holmes to Lady Pollock (Sept. 6, 1902), *reprinted in* 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, at 105 (Mark DeWolfe Howe ed., 1942).

66. MERRYMAN II, *supra* note 9, at 57, 59-67.

67. ALSCHULER, *supra* note 6, at 2; Letter from Oliver Wendell Holmes to Harold Laski (Aug 6, 1917), *reprinted in* 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935, at 96 (Mark DeWolfe Howe ed., 1963) [hereinafter HOLMES-LASKI LETTERS].

68. ALSCHULER, *supra* note 6, at 49.

69. *Id.* at 60-61.

70. The concept of a common spirit among the people seems opposed to a “survival of the fittest” theory that all people are in constant competition with one another.

71. STROMBERG, *supra* note 36, 116-18 (Social Darwinism attempted to apply Darwin’s theory of the survival of the fittest to all knowledge).

72. ALSCHULER, *supra* note 6, at 60; Reimann, *supra* note 18, at 95, 97-98.



expense of the weaker members of society.<sup>73</sup> Holmes appears to have had tendencies toward social Darwinism<sup>74</sup> in that Holmes often said that ethical questions could be reduced to issues of dominance, power and survival.<sup>75</sup> According to Holmes, human rights are only what "a given crowd . . . will fight for."<sup>76</sup> This is quite different from Hegel's view of the "Spirit" or *Volksgeist*, as a common bond that inherently desires freedom.<sup>77</sup>

Holmes also indicated that one could not speak of the good of a community, because all that exists are the competing interests of different groups within the community.<sup>78</sup> If all that exists are the competing interests of groups in a community, it seems odd to speak of a common "Spirit" or *Volksgeist* within that community. Holmes believed that all authority is vested in force.<sup>79</sup> He also felt that "a law is good if it reflects the dominant forces of the community, even if such laws take us to hell."<sup>80</sup> Such laws, Holmes said, should tend towards survival of the fittest.<sup>81</sup> Holmes clearly believed in many of the tenets of social Darwinism.<sup>82</sup> Such a belief is at odds with the concept of the *Volksgeist*, and it is unlikely that Holmes would ascribe to both at the same time.<sup>83</sup>

### C. *The Influence of Utilitarianism on Holmes' Thought*

Holmes also was influenced by the theory of utilitarianism.<sup>84</sup> The British philosopher Jeremy Bentham is considered the founder of utilitarianism.<sup>85</sup> Utilitarianism hoped to establish morals as an exact science, though Bentham believed morals are not objectively true as stated in natural law.<sup>86</sup> Utilitarianism states that obtaining

73. ALSCHULER, *supra* note 6, at 49.

74. *Id.* at 48.

75. *Id.* at 6.

76. HOLMES-LASKI LETTERS, *supra* note 67.

77. PHILOSOPHIC CLASSICS, *supra* note 46, at 89.

78. ALSCHULER, *supra* note 6, at 17.

79. LIVA BARKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 159 (1991).

80. Letter from Oliver Wendell Holmes to Felix Frankfurter (Mar. 24, 1914), *reprinted in HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912-1934*, at 19 (Robert M. Mennel & Christine L. Compston eds., 1996).

81. ALSCHULER, *supra* note 6, at 58.

82. *Id.* at 17.

83. The only common spirit that can be found is Social Darwinism is constant competition, a concept at odds with the *Volksgeist*.

84. H.L. POHLMAN, *JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE* (1984).

85. STROMBERG, *supra* note 36, at 54-55.

86. FREDERICK ROGERS KELLOGG, *THE FORMATIVE ESSAYS OF JUSTICE HOLMES: THE MAKING OF AN AMERICAN LEGAL PHILOSOPHY* 5 (1984).

pleasure motivates each person.<sup>87</sup> That being the case, law (and everything else) should seek to maximize the overall pleasure of society and minimize the overall pain.<sup>88</sup>

Holmes agreed with the utilitarians that people naturally pursue their wants and pleasures.<sup>89</sup> He also believed that effective government provides the most pleasure with the least cost.<sup>90</sup> However, it would be incorrect to say that Holmes was an "orthodox" utilitarian.<sup>91</sup> Holmes was skeptical about the possibility of accurate utilitarian evaluation.<sup>92</sup> This was because human rights, and humans themselves, were constantly in conflict.<sup>93</sup> Thus, while Holmes may have believed that utilitarianism was correct in its insight that people constantly pursue pleasure, his social Darwinist belief in conflict prevented him from believing that the desires of society could be evaluated accurately.<sup>94</sup> Such a view of society as one whose members are in competition to have their desires for pleasure met seems at odds with the idea of a *Volksgeist* or common "Spirit" of a people.

#### D. *The Effects of Positivism on Holmes' Thought*

Positivism is another philosophy that had an effect on the thought of Holmes.<sup>95</sup> Positivism was in large part developed by the philosopher Auguste Comte.<sup>96</sup> Positivism declares that there has been an inevitable progression from theology to the scientific method as the basis for knowledge.<sup>97</sup> Positivism also posits that there are no objectively true moral truths,<sup>98</sup> and is a thoroughly materialistic theory.<sup>99</sup> In fact, positivist legal philosopher John Austin was one of the first persons to propose a systematic separation of law from morals.<sup>100</sup> "Austin hoped that purifying the concepts of law of their moral content would reveal the law's

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87. STROMBERG, *supra* note 36, at 56.

88. *Id.*

89. Holmes, *The Path of the Law*, *supra* note 12, at 84.

90. However, it would be incorrect to say that Holmes was an "orthodox" utilitarianism. Holmes was skeptical about the possibility of accurate utilitarian evaluation.

91. Richard A. Posner, Book Review, 53 GEO. WASH. L. REV. 870, 872 (1985) (reviewing KELLOGG, *supra* note 86).

92. KELLOGG, *supra* note 86, at 136.

93. *Id.* at 136; ALSCHULER, *supra* note 6, at 17.

94. ALSCHULER, *supra* note 6, at 60-61.

95. KELLOGG, *supra* note 86, at 136.

96. *Id.* at 4.

97. *Id.*

98. STROMBERG, *supra* note 36, at 239-40.

99. *Id.* at 86.

100. KELLOGG, *supra* note 86, at 5.

essential principles."<sup>101</sup> Holmes read many of Austin's lectures and works,<sup>102</sup> and much of his early writing was influenced by Austin's theory.<sup>103</sup>

Holmes' belief in positivism can be seen in the argument that he makes in his famous work, *The Path of the Law*.<sup>104</sup> Holmes disagreed that there were any objective moral truths, a thoroughly positivist argument.<sup>105</sup> This can be seen from his argument that "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 . . . and so of a legal right."<sup>106</sup> Thus the law is only a prophecy of what a court will do. Holmes indicated with this argument that there was no greater moral significance to the law, which is a statement very much in line with German legal science, which sought to divorce morals from the law.<sup>107</sup> As Holmes himself put it, "I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether."<sup>108</sup>

*The Path of the Law*<sup>109</sup> contains another statement by Holmes that directly indicates that, while he was familiar with the concept of the *Volksgeist* or *Zeitgeist*, he did not feel that the law was the embodiment of the spirit of the people.<sup>110</sup> In addressing the question of what the forces are that determine the content of the law and its growth, Holmes said "you may think that law is the voice of the *Zeitgeist*, or what you like . . . . It is all one to my present purpose."<sup>111</sup> Holmes mentioned nothing about whether he believed in the *Zeitgeist*, and seemed to view the concept as meaningless for his purpose of explaining how the law develops.<sup>112</sup>

Holmes also seemed to revolt against a heavy focus on the study of history as a primary means of a scientific study of the law, as put forth by German legal science.<sup>113</sup> He said of the law, "[e]verywhere the basis of principle is tradition, to such an extent that we are in danger of making the role of history more important than it is."<sup>114</sup> Holmes went on to opine that history hopefully will be minimized as

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101. *Id.* at 6 (citation omitted).

102. *Id.* at 6.

103. *Id.*

104. Holmes, *The Path of the Law*, *supra* note 12.

105. *Id.* at 60-62.

106. *Id.* at 60.

107. DAWSON, *supra* note 22.

108. Holmes, *The Path of the Law*, *supra* note 12, at 68.

109. *Id.* at 60-62.

110. *Id.* at 68.

111. *Id.* (emphasis added).

112. *Id.*

113. *Id.* at 77.

114. *Id.*

an explanation of the law and rather the focus of scholars will be on the ends and rationale of laws.<sup>115</sup>

However, lest one think that Holmes totally disagreed with German legal science in *The Path of the Law*,<sup>116</sup> it should be noted that at the end of the article Holmes recommends that lawyers read the works of German jurists to improve their knowledge of the law.<sup>117</sup> One would assume that if Holmes believed in the concept of the *Volksgeist*, he would have found the study of history to be of prime importance in studying the law.<sup>118</sup> Instead, Holmes appears to be more enamored with the aspects of German legal science that emphasized using science to analyze the law rather than German legal science's arguments stressing the importance of history and the spirit of the *Volksgeist*.<sup>119</sup>

#### IV. THE INFLUENCE OF PRAGMATISM ON HOLMES' THOUGHT

Pragmatism is yet another philosophy that Holmes used aspects of in his thinking.<sup>120</sup> Pragmatism was developed in large part by William James and Charles Sanders Pierce.<sup>121</sup> A pragmatist thinks about actions in terms of their practical effects, not in terms of abstract principles.<sup>122</sup> Put simply, pragmatism is the philosophy of determining what works.<sup>123</sup>

Pragmatists tend to use utilitarianism to determine what is good.<sup>124</sup> Pragmatists believe ethics should be derived from experience, and they follow two main precepts.<sup>125</sup> The first is that knowledge should be sought by intelligently observing the world around a person.<sup>126</sup> The second is that a pragmatist is always willing to revise their beliefs when faced with empirical facts.<sup>127</sup> At least one Holmes scholar has said that much of Holmes' argument in *The Path of the Law*,<sup>128</sup> specifically his view that the law should be viewed in the perspective of a bad man who only cares for the

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443-63 (Feb. 25, 1899), reprinted in THE HOLMES READER, *supra* note 12, at 129.

120. Letter from Oliver Wendell Holmes to Felix Frankfurter (Dec. 23, 1921), reprinted in HOLMES AND FRANKFURTER, *supra* note 80, at 19.

121. PHILOSOPHIC CLASSICS, *supra* note 46, at 392-93.

122. BURTON, *supra* note 61, at 213.

123. PHILOSOPHIC CLASSICS, *supra* note 46, at 393.

124. ALSCHULER, *supra* note 6, at 2.

125. BURTON, *supra* note 61, at 214.

126. ALSCHULER, *supra* note 6, at 2.

127. BURTON, *supra* note 61, at 214.

128. Holmes, *The Path of the Law*, *supra* note 12.

consequences of his actions, is pragmatic in nature.<sup>129</sup> The basic rule of William James' ethics was respect for the perspective of others.<sup>130</sup> This viewpoint was one that Holmes shared, as indicated by much of his First Amendment freedom of speech jurisprudence.<sup>131</sup> However, while Holmes had some aspects of pragmatism in his thought he also had his problems with the theory, calling it at one point "an amusing humbug."<sup>132</sup> To the extent that Holmes did believe in some aspects of pragmatism, it is also clear that such beliefs in no way support a contention that he believed in the concept of the *Volksgeist*.<sup>133</sup> Pragmatism looks to personal experience as the key to understanding the world around us, a concept that has little to do with the common spirit of a nation.<sup>134</sup> It is probably fairest to say that the pragmatic aspects of Holmes' jurisprudence provide little guidance as to whether he believed in the concept of the *Volksgeist*.

## V. CONCLUSION

Holmes does not appear to have ascribed to the concept of the *Volksgeist*. Holmes' social Darwinism appears logically opposed to the concept of the *Volksgeist*. Social Darwinism is a highly scientific, theory of a *Volksgeist*. Additionally, unlike the romantic the *Volksgeist* is a common "Spirit" among the people of a nation. This is also opposed to the social Darwinist view of conflict amongst the members of a society.

The utilitarian aspects of Holmes' thought also show little proof that Holmes believed in the *Volksgeist*. Holmes believed that utilitarianism was correct in its insight that people constantly pursue pleasure. However social Darwinist beliefs prevented him from believing that the desires of society could be evaluated accurately, a view of society as one whose members are in competition to have their desires for pleasure met seems at odds with the idea of a *Volksgeist* or common essence of a people.

Holmes' positivist views as seen in *The Path of the Law*<sup>135</sup> indicates that he agreed with German legal science's use of scientific methods to analyze the law. However, Holmes did not agree with

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129. BURTON, *supra* note 61, at 224-27.

130. *Id.* at 214.

131. See *Schenck v. United States*, 249 U.S. 47 (1919) (Holmes creates the clear and present danger test); *Abrams v. United States*, 250 U.S. 616-18 (1919) (Holmes says "we should be eternally vigilant against attempts to check the expression of opinions").

132. ALSCHULER, *supra* note 6, at 18.

133. Pragmatism simply has little to do with the *Volksgeist* and the research for this article provided no distinguishable links between the two schools of thought.

134. BURTON, *supra* note 61, at 214; PHILOSOPHIC CLASSICS, *supra* note 46, at 77.

135. Holmes, *The Path of the Law*, *supra* note 12, at 68.

the focus on history and thus was unlikely to consider the *Volksgeist* an important aspect of analyzing the law, since knowledge of history is important in understanding the spirit of a people. In *The Path of the Law*, Holmes even gives short shrift to the concept of the *Volksgeist* as being important to obtaining an understanding of the law. Finally, the pragmatic elements of Holmes thought also do not indicate that he ascribed to the concept: of the *Volksgeist*

· There is almost no evidence that Oliver Wendell Holmes believed that the *Volksgeist* is the source of law. In fact the opposite is true. The strains of Holmes' thoughts indicate that he was quite unlikely to have believed in such a concept. The only most reasonable conclusion that can be reached from analyzing the beliefs of Oliver Wendell Holmes is that he did not believe in the concept of the *Volksgeist* as found in German legal science.

