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## AUTHOR'S NOTE

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## 1. Introduction

- 1 John Dewey's interest in anthropology is well known. In the year before his death he declared, “were I to write (or rewrite) *Experience and Nature* [1925] today I would entitle the book *Culture and Nature*,” specifying that he was using “the name ‘culture’ in its anthropological [...] sense” (LW.1: 361-2; see also Edel 1985: 28-30; Goldman 2012; Zask 2015). Most scholarship to date on Dewey's relation to anthropology has focused on his years in Chicago and New York. During his time in Chicago, as Thomas Fallace has shown, Dewey's philosophy of education was closely engaged with the so-called culture-epoch theory, an account of human development linked to the stadial framework of enlightenment philosophers and evolutionary anthropologists (Rein 1893: 93-101; Dewey 1896/2015; Fallace 2011, chaps. 1-2; Stocking 1987). Dewey's relationship with Franz Boas at Columbia University has also been extensively discussed (Lamont 1959: 55-6; Lewis 2001; Torres Colón & Hobbs 2015, 2016; Harkin 2017). For example, Dewey and Boas taught a joint philosophy-anthropology graduate seminar for three consecutive academic years from 1913-1914 to 1915-1916, billed

initially as “an examination of the evolutionary and historical methods in the study of morals” (Columbia 1913: 9; see also Columbia 1914: 9, 18; Columbia 1915: 10, 19).<sup>1</sup>

- 2 This paper goes back even further, to Dewey’s final years at the University of Michigan, when he began teaching two new courses for graduates and advanced undergraduates: “Political Philosophy: The Theory and Institutions of Social Organization” and an associated class on “Special Studies in the History of Political Philosophy” (Calendar 1893: 67; Calendar 1894: 68). The second of these featured Herbert Spencer’s *Principles of Sociology* (1877) as the last of three assigned textbooks. I will suggest in what follows that what I have called the “dynamic functionalism” of Dewey’s evolutionary approach to ethics – moral norms emerge to address specific problems but must be constantly readjusted to changing contexts – had its roots in this Michigan period, especially in the comparative jurisprudence of Sir Henry Sumner Maine and Oliver Wendell Holmes Jr. (Pearce 2017: 54). This anthropological and legal context for the 1890s “turn” in Dewey’s thought reinforces and complements the Hegelian and Jamesian-Darwinian context emphasized by existing scholarship (Shook 2000: 18-20; Pearce 2020: 159-60, 298-9).
- 3 First, I will discuss the rise of the comparative sciences in the nineteenth century, part of the backdrop for the work of Maine and various evolutionary anthropologists. Next, I will examine Maine’s *Ancient Law* (1861), Edward Burnett Tylor’s *Primitive Culture* (1871), and Holmes’s *The Common Law* (1881), three related books that set up a dichotomy between existing custom and historical progress. Finally, I will show how this dichotomy was reflected in the dynamic functionalism of Dewey’s writing and teaching in the early 1890s, including “Anthropology and Law” (EW.4: 37-41).

## 2. The Comparative Sciences

- 4 The comparative approach was critical to the emergence of the modern *Geisteswissenschaften* in the nineteenth century (Evans-Pritchard 1963; Hoenigswald 1963; Foucault 1966; Girardot 2002; Adcock 2006; Molendijk 2016; Griffiths 2017). In this section, I will briefly introduce this approach as part of the context for the historical-comparative understanding of law and custom in Maine, Tylor, and Holmes.
- 5 The most venerable of the comparative sciences is comparative anatomy, which already in the early nineteenth century was seen as culminating in the work of Georges Cuvier (Lawrence 1819: 35). In his *Lessons on Comparative Anatomy*, Cuvier argued that the anatomist, to understand in their true generality the material underpinnings of physiological phenomena, has to examine them in all their combinations and modifications – that is, across all species of living things (Cuvier 1800, 1: iv).
- 6 The example of comparative anatomy was often cited by pioneers in the other comparative sciences. Friedrich Schlegel, who seems to have coined the term “comparative grammar” in his book *On the Language and Wisdom of the Indians*, famously analogized the new science with its elder sibling:  

The decisive point that will clarify everything here is the inner structure of languages or comparative grammar, which will give us completely new explanations of the genealogy of languages, just as comparative anatomy has shed light on higher natural history. (Schlegel 1808: 28)
- 7 Carl Ritter, in his *Study of the Earth in Relation to Nature and to Human History, or Universal Comparative Geography*, also made the connection: “It will be called comparative in the

sense that other disciplines have already worked out for this sort of teaching, above all for example comparative anatomy” (Ritter 1817-1818, 1: 21).<sup>2</sup>

- 8 In many cases, comparison promised to uncover not only basic shared features – as in Cuvier’s anatomy – but also historical relationships and causes. The object of comparative grammar, said one author, is the “comparison of the different [language] families, to see whether there be any real historical affinity; or merely a general and necessary resemblance” (Oriental Herald 1824: 491). In his *Comparative Grammar of Sanskrit, Zend, Greek, Latin, Lithuanian, Gothic, and German*, Franz Bopp wrote that the teacher of a language must – as the title indicates – “gather around him the testimonies of all members of the lineage, thus bringing life, order, and organic connection to the expanded linguistic material of the original language” (Bopp 1833: viii).
- 9 Philosophers were attentive to these developments. In *History of the Inductive Sciences*, William Whewell treated physiology and comparative anatomy under the heading of “organical sciences” because of the central role of notions like organization and function (Whewell 1837, 3: 377-8). Then in the last section of the book he introduced the new term “palaetiological sciences” to cover those areas of research that attempt to explain the present state of things by reference to historical causes (*ibid.*: 481-2). His primary example was geology, which included “the *Geography of Plants and of Animals*, and the *history of their change and diffusion*” (*ibid.*: 570). But he also said that anyone inquiring into the causal history of “works of art,” “institutions of society,” or “forms of language” was engaged in palaetiology (*ibid.*: 486). Since Whewell included even the origin of the solar system under this heading, it is fair to say that his new category picked out what philosophers today call “historical science” (Cleland 2002; see also Hodge 1991; Tanghe 2019; Quinn 2024; Dresow 2024).
- 10 A few years later, in *The Philosophy of the Inductive Sciences*, Whewell began describing at least some of the palaetiological sciences as “comparative.” Comparative philology, “cultivated with great zeal and success in modern times, compares the languages of different countries and nations, and by an examination of their materials and structure, endeavours to determine their descent from one another.” Comparative archaeology likewise examines “the progress of the Arts (Architecture and the like); how one stage of their culture produced another; and how far we can trace their maturest and most complete condition to their earliest form in various nations” (Whewell 1840, 2: 96-7; see also Quinn 2016; Gillin 2024).
- 11 At around the same time, in the third volume of his *Course of Positive Philosophy*, Auguste Comte made “comparison” and “the comparative method” his “third fundamental mode of rational exploration” after observation and experimentation:

The essential condition of this precious method consists in the existence of a sufficiently extensive sequence of analogous but distinct cases in which a common phenomenon modifies itself more and more, either by simplifications or by successive and almost continuous degradations. (Comte 1838: 30-1)
- 12 Since this condition is most perfectly satisfied by “vital phenomena,” said Comte, the comparative method is essential to the biological sciences (*ibid.*).
- 13 Comte also thought the method – with some modifications – could be employed in sociology. In one passage, describing what came to be called evolutionism in anthropology, he noted that the “various coexisting states of human society on different parts of the earth’s surface” could represent “various essential phases of human evolution,” with some peoples and populations seen as having achieved only an

“inferior degree” of humanity’s “general development” (Comte 1839: 442). But Comte saw this version of the comparative method as less important than and as dependent upon what he called the proper “historical method” of sociology, that is, “the historical comparison of the various consecutive states of humanity.” Comte declared that this historical study of “social development” or “social evolution” would be “the principal scientific tool of the new political philosophy” (*ibid.*: 450-1).

- 14 As the above discussions indicate, there was already a close relationship between so-called comparative approaches and so-called historical or evolutionary approaches in the first half of the nineteenth century. It was Jean-Baptiste Lamarck’s work on the comparative anatomy of invertebrate groups that led him to the view that the classification of animals should correspond to “the order followed by nature in giving successive existence to her living products” (Lamarck 1809, 1: 269). Comparative philology likewise examined the details of languages “to determine their descent from one another” (Whewell 1840, 2: 96). In what follows I will thus refer to “the comparative-historical method” for convenience. I will also follow Comte – and later Dewey – in treating “historical” and “evolutionary” as synonyms when applied to human ideas and institutions.<sup>3</sup>
- 15 Although Whewell and Comte both rejected biological evolution, by the 1850s the comparative-historical method was being applied not only to social progress but also to the history of life (Carpenter 1854: 106-17; Spencer 1855: 366-487). New subfields were appearing: Friedrich Max Müller, who had studied with Bopp, declared in an influential essay that “the mythology of the *Veda* is to comparative mythology what Sanskrit has been to comparative grammar,” predicting that “the science of comparative mythology will soon rise to the same importance as comparative philology” (Müller 1856: 47, 86; Nicholls 2015; Davis & Nicholls 2016). By this time, August Schleicher had already illustrated the relationships of the Indo-European languages using “the image of a branching tree,” which he appended to a short article (Schleicher 1853: 787; see also Schleicher 1860: 28, 81; Koerner 1989: 355-7).
- 16 By the mid-nineteenth century, the comparative approach was thus well established across the historical sciences, with comparative philology being especially prominent. When Dewey entered college in the 1870s, Müller’s lectures on the science of language were still recommended reading, and he checked them out of the library as a junior in March 1878 (Müller 1861-1864; Catalogue 1875: 18; Feuer 1958: 418).

### 3. Comparative Jurisprudence

- 17 I have offered the brief historical overview in the previous section primarily as background to Maine’s work in comparative jurisprudence. But the comparative method was part of Dewey’s educational context as well. At Johns Hopkins University as a graduate student in 1882-1884, one of Dewey’s primary professors was the historian Herbert Baxter Adams, who brought comparative institutional history from Europe to America (Adcock 2006: 126-7). Dewey attended Adams’s seminary on Institutional History every Friday evening in all four of his semesters at Hopkins; he also took Adams’s classes on Sources of English History, Comparative Constitutional History, and International Law (Enumeration 1882; Enumeration 1883a; Enumeration 1883b; Enumeration 1884).

- 18 History at Johns Hopkins was explicitly comparative. In the very first number of the Johns Hopkins University Studies in Historical and Political Science, a series that began under Adams's editorship while Dewey was a graduate student, Edward Augustus Freeman advocated "the comparative method" as the proper "scientific view" of history:

To say that a certain custom exists in Massachusetts now and to say that a certain custom existed at Athens ages ago are both of them pieces of knowledge which, if they go no further, are of no great value or interest. But, if you can bring the Massachusetts custom and the Athenian custom into some kind of relation towards one another – if you can show that, among much of unlikeness in detail, the likeness of a general leading idea runs through both – if you can show that the likeness is not the work of mere chance but that it can be explained by common derivation from a common source – if again you can show that the points of unlikeness are not mere chance either, but that they can be explained by differences in time, place, and circumstance – if you can do all this, you have indeed done something for the scientific study of Comparative Politics. (Freeman 1882: 14)

- 19 Adams himself praised the method during Dewey's time at Hopkins:

A great impulse was given to the historical sciences by the introduction of the comparative method into the study of philology, mythology, religion, law, and institutions. It seemed as though the horizon of all of these fields suddenly widened, and as if the world of human thought and research were expanding into new realms. Through comparative philology the kinship of the Indo-European family of nations was made known to History, and upon the basis of this one great fact, comparative mythology, comparative religion, comparative jurisprudence and comparative politics have been raised into independent sciences. (Adams 1884: 36)

- 20 Many of the talks at Adams's Friday evening seminary were comparative and anthropological. In February 1884, for example, Dewey would have heard Elijah Haines "draw at some length a parallel between the political constitution of certain Indian nations, especially the Iroquois, and our Anglo-Saxon local institutions," as well as John Wesley Powell discussing "the political organization and social polity of the early North American tribes" (Gettleman 1987: 51, 55). Thus Dewey certainly encountered the comparative approach as a student, and this was probably also when he first became interested in the work of Maine, who was a standard reference for his teacher Adams (e.g., Adams 1882; citing Maine 1871, 1875).

- 21 In this section, I will examine the work of Maine, Tylor, and Holmes, who all adopted the comparative-historical approach and highlighted the tension between static custom and dynamic history. Existing work on the relationship between Dewey and Maine has analyzed Dewey's criticisms of Maine on democracy and sovereignty (EW.1: 227-49; EW.4: 70-90; Rogers 2011, 2016; Chun 2021). I will instead highlight Maine's method, which had a positive influence on Tylor, Holmes, and Dewey himself.

- 22 What was this method? In the opening pages of *Village-Communities in the East and West*, Maine wrote that "the chief function of Comparative Jurisprudence is to facilitate legislation and the practical improvement of law" (Maine 1871: 4). Since lawmakers of different communities frequently pursue the same end by different means, "the examination and comparison of laws" can reveal "valuable materials [...] for legal improvement" (*ibid.*: 5). But although such improvement was the ultimate aim, Maine said that his own approach could "only be said to belong to Comparative Jurisprudence, if the word 'comparative' be used as it is used in such expressions as 'Comparative Philology' and 'Comparative Mythology'" (*ibid.*: 6). In these areas, said Maine, "the

Comparative Method [...] is not distinguishable in some of its applications from the Historical Method.” That is, “the past form of [...] facts, ideas, and customs” is inferred “not only from historical records of that past form but from examples of it which have not yet died out of the world” (*ibid.*: 6-7).

- 23 Ten years earlier in *Ancient Law*, Maine had attempted to reconstruct the evolution of law prior to its written codes. He drew an analogy with one of the most successful historical sciences:

If by any means we can determine the early forms of jural conceptions, they will be invaluable to us. These rudimentary ideas are to the jurist what the primary crusts of the earth are to the geologist. They contain, potentially, all the forms in which law has subsequently exhibited itself. (Maine 1861: 3)

- 24 Prior to written legal codes, according to Maine, there was a “spontaneous development” from (i) the epoch in which a divinely inspired ruler would make possibly habitual but individually isolated commands or judgments to (ii) “the epoch of Customary Law,” in which customs “exist as a substantive aggregate, and are assumed to be precisely known to the aristocratic order or caste” (Maine 1861: 5, 12, 21).

- 25 Maine gave a more detailed account of the progress of law after the emergence of written codes, since at this point “legal modification” could begin to be attributed to “the conscious desire of improvement” (*ibid.*: 21). He opened with an orientalist distinction, perhaps inspired by François Guizot, between the progressive societies of the West and the stationary societies of the East (Maine 1861: 23; cf. Guizot 1838: 16, 31-40). Then, looking especially at the history of Roman jurisprudence, Maine diagnosed a constant tension between static law and dynamic society:

With respect to [progressive societies] it may be laid down that social necessities and social opinion are always more or less in advance of Law. We may come indefinitely near to the closing of the gap between them, but it has a perpetual tendency to reopen. Law is stable; the societies we are speaking of are progressive. The greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed. (Maine 1861: 24)

- 26 Maine argued that in addition to new legislation there were two other ways to close this law-society gap. First, with “Legal Fictions,” an assumption is made that “conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified” (*ibid.*: 26). Second, with “Equity,” there emerges a “body of rules existing by the side of the original civil law, founded on distinct principles and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles” (*ibid.*: 28; see Daston 2022: 248-55).

- 27 It is this dynamic and historical picture of the relationship between changing laws and changing society that I believe helped Dewey set up his own dynamic and evolutionary account of ethics and politics in the 1890s and early 1900s. More generally, Maine’s account of the deliberate development of law represented an early and influential version of the mismatch and readjustment framing that was used by a variety of reformist intellectuals in the late nineteenth century, from Alexander Crummell and W.E.B. Du Bois to Jane Addams and George Herbert Mead (see Pearce 2020: 268-75).

- 28 Maine’s ideas reached Dewey both directly and indirectly, since they were reinforced and extended by the later works of Tylor and Holmes. Tylor was strongly influenced by Müller’s comparative approach (Tylor 1865, 1866, 1868). In his book *Primitive Culture*, he also praised Comte’s historical method:



They who wish to understand their own lives ought to know the stages through which their opinions and habits have become what they are. Auguste Comte scarcely overstated the necessity of this study of development, when he declared at the beginning of his "Positive Philosophy" that "no conception can be understood except through its history," and his phrase will bear extension to culture. (Tylor 1871, 1: 17-8; quoting Comte 1830: 3)

- 29 Tylor emphasized in particular "the risks that philosophers run in detaching any phenomenon of civilization from its hold on past events, and treating it as an isolated fact," commenting, "to ingenious attempts at explaining by the light of reason things which want the light of history to show their meaning, much of the learned nonsense of the world has indeed been due." He then gave an example from Maine's *Ancient Law* to show what proper historical explanation looked like (Tylor 1871, 1: 18-9).
- 30 *Primitive Culture* popularized the idea of survivals, which Tylor defined as "processes, customs, opinions, and so forth, which have been carried on by force of habit into a new state of society different from that in which they had their original home." These survivals, said Tylor, "remain as proofs and examples of an older condition of culture out of which a newer has been evolved" (*ibid.*: 15). He even suggested that all cultural norms without an obvious function were likely to be survivals:

It seems scarcely too much to assert, once for all, that meaningless customs must be survivals, that they had a practical, or at least ceremonial, intention when and where they first arose, but are now fallen into absurdity from having been carried on into a new state of society, where their original sense has been discarded. (*ibid.*: 85)
- 31 Tylor's idea gained currency beyond anthropology, with quite a few uses by philosophers during Dewey's years at the University of Michigan (Wundt 1886: 94; Hodgson 1886: 54; Bax 1886: 255; Ritchie 1891: 133; Muirhead 1892: 13).
- 32 The earliest publications of Oliver Wendell Holmes Jr., culminating in *The Common Law* (1881), were directly engaged with evolution, anthropology, survivals, and the historical-comparative method (Parker 2003; Rabban 2013, chap. 7; Vannatta 2014, chap. 7; Kellogg 2018, chap. 3). Holmes read Maine's *Ancient Law* two separate times in the 1860s, along with Whewell's *History of the Inductive Sciences* and a series of works by Spencer (Little 1954: 169-70, 178). Inspired by these and other authors, Holmes drew a distinction between evolutionary-historical and logical-analytical approaches in law and philosophy:

It has always seemed to us a singular anomaly that believers in the theory of evolution and in the natural development of institutions by successive adaptations to the environment, should be found laying down a theory of government intended to establish its limits once for all by a logical deduction from axioms. (Holmes 1873: 583)
- 33 At this point, Holmes had already appealed to anthropological work on marriage and succession in a discussion of the origin of privity (Holmes 1872: 50; citing Maine 1861, chap. 7; McLennan 1865, chap. 9). Then after reading Tylor's *Primitive Culture* in 1874, Holmes wrote an article on "Primitive Notions in Modern Law" that examined the development of law away from the ancient idea that "liability attache[s] directly to the thing doing the damage" rather than to the thing's owner (Holmes 1876: 423).
- 34 Holmes's approach was comparative: he presented examples of this "primitive notion" in Roman law, Greek law, Jewish law, Salic law, and Anglo-Saxon law, concluding, "the universality of the notion we are discussing must have struck the reader as surprising."



Why, asked Holmes, was it found “in the institutions of so many independent tribes and nations?” He answered with “a passage from Mr. Tylor’s great work”:

First and foremost among the causes which transfigure into myths the facts of daily experience, is the belief in the animation of all nature, rising at its highest pitch to personification. This, no occasional or hypothetical action of the mind, is inextricably bound in with that primitive mental state where man recognizes in every detail of his world the operation of personal life and will. (Tylor 1871, 1: 258; quoted in Holmes 1876: 428)

35 Thus Holmes appealed to what Tylor called animism to explain “the universal tendency of the human mind [...] to hold a material object, which is the proximate cause of loss, in some sense answerable for it” (*ibid.*: 430). Although he did not use Tylor’s term, Holmes argued that key aspects of modern maritime law were survivals of this mostly abandoned animism. For example, he claimed that when a lien is placed on a ship that has damaged another even when its owner is “free from any personal liability,” this rule does not stem from practical policy considerations but rather from the ancient animist desire for “vengeance on the offending thing” (*ibid.*: 433, 437).

36 Holmes was soon explicitly describing many features of the law as survivals: “There is no adequate and complete explanation of the modern law,” he wrote, “except by the survival in practice of rules which [have] lost their true meaning” (Holmes 1878: 710). A year later, he defended the thesis that “the responsibility of common carriers” in modern law “is a survival of the general obligation of all bailees” in medieval Germanic law (Holmes 1879: 610). Holmes concluded this 1879 article with a reflection on why logical – as opposed to historical – approaches to the law are inadequate:

The official theory is that each new decision follows syllogistically from existing precedents. But as precedents survive like the clavicle in the cat, long after the use they once served is at an end, and the reason for them has been forgotten, the result of following them must often be failure and confusion from the merely logical point of view. (*Ibid.*: 630)

37 In other words, legal precedents are often like Tylor’s cultural survivals or the vestigial collarbone of felids: they persist despite no longer having any function.

38 With his final lines, Holmes echoed Maine’s contrast between dynamic social progress and static legal precedent:

Law hitherto has been, and it would seem by the necessity of its being is always approaching and never reaching consistency. It is for ever adopting new principles from life at one end, and it always retains old ones from history at the other which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow. (*Ibid.*: 631)

39 Moreover, because “the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism,” rules that have lost their original function are gradually transformed, eventually assuming a new and more policy-relevant function. Once this process is understood, said Holmes, judges are “at liberty to consider the question of policy with a freedom that was not possible before” (*ibid.*).<sup>4</sup>

40 Thus, both Maine and Holmes endorsed a historical-evolutionary-anthropological approach to the law, according to which its change and growth reflects lawgivers’ continual attempt to resolve the ever-renewed tension between code and precedent on the one hand and social life and experience on the other.

## 4. Dynamic Functionalism

- 41 Dewey engaged directly with all of this material in the early 1890s. In April 1893, he published a short essay in the *Inlander* – a magazine edited by the students of the University of Michigan – that amounted to a review of the first chapter of Holmes’s *The Common Law*, which Dewey described as “worthy in all respects to be put side by side with anything in the way of historic interpretation produced by Sir Henry Maine” (EW. 4: 37).<sup>5</sup> The stated goal of Dewey’s essay was comparative: to illustrate, using “some facts in the development of law,” the truth that diverse streams of ideas can often be followed back to a single common source. More specifically, he presented Holmes’s claim that “some of the most highly developed legal ideas and practices of to-day can be traced to a beginning in the crude psychological structure of primitive man” (EW.4: 37).
- 42 After reviewing Holmes’s argument, Dewey concluded that modern legal rules are often evolutionary modifications of ancient customs in which a new function with practical utility in a later context supersedes the original function:
- The rules are [...] the historic children of the old customs, preserved and modified through the agency of natural selection. The instances given illustrate, indeed, the law of historical development of all institutional forms. Every new institution is, like the organ of an animal, an old one modified. Continuity is never broken; the old is never annihilated at a stroke, the new never a creation *ab initio*. It is simply a question of morphology. But what controls the modification in the historic continuity is the practical usefulness of the institution or organ in question. (*Ibid.*: 40-1)
- 43 Unlike the cat’s clavicle, which is a mere vestige, most modern laws are exaptations: i.e., “characters, evolved for other uses,” that are “later ‘co-opted’ for their current role” (Gould & Vrba 1982: 6; cf. Parravicini 2019: §4.2).<sup>6</sup>
- 44 As Dewey’s analogy between institutions and organs suggests, he was at this time espousing the view that we should think of society as an organism. In *The Principles of Sociology*, which Dewey recommended and assigned to his students at Michigan, Spencer had famously argued in favor of this analogy, since both organisms and societies grow and have parts that are differentiated from but mutually dependent upon one another (Spencer 1877: 480; see Dewey 1892-93/2010: 107; 1893-1894/2010: 246; Calendar 1893: 67; Calendar 1894: 68). A similar view was – apparently independently – expressed by Johann Caspar Bluntschli in *Theory of the Modern State*, the textbook for Dewey’s Comparative Constitutional History class with Adams at Hopkins (Bluntschli 1875-1876, 1: 18-9; “Historical and Political Science” 1883: 135).
- 45 Dewey’s early 1890s classes in political philosophy thus began with the assumption that “Society is an Organism” and that “the fundamental traits both of social structure and social development flow from and must be referred to this fact” (Dewey 1892-93/2010: 108). Although he initially described it as an assumption to be verified, Dewey was ultimately even more enthused about the analogy than Spencer, who had noted two key differences: first, there is no direct physical connection between the parts of the social organism; second, there is no specific part of the social organism where consciousness resides (Spencer 1877: 475-80). After quoting Spencer on these points, Dewey argued that they were not as important as they seemed (Dewey 1892-93/2010: 122-3). Rather than simply denying the existence of a “social sensorium,” as Spencer

had done, Dewey suggested that it was something that emerged as society developed, effectively measuring how far “the individual [is] conscious of his own activity as an expression of the whole organism” or how far “the activity of the whole organism come[s] home to every individual so that it has value for him” (Dewey 1892-93/2010: 128-9). Expanding on Spencer’s idea that language performs “the inter-nuncial function” in the social organism, Dewey also claimed that “the development of the social sensorium is the development of language as an institution” (Spencer 1877: 478; Dewey 1892-93/2010: 130).

- 46 As Dewey’s repeated use of the term “development” indicates, his account of social dynamics was indebted to the evolutionary-historical approach of Maine, Spencer, and Holmes. Maine’s ideas were invoked and alluded to throughout Dewey’s lectures, from the notion of the village community – “a state of society in which [...] there is no strict line of demarcation between [government, family, industry, etc.]” – to the famous claim that “the progress of society so far has been but *Status* and *Contract*,” or in Maine’s words, “the movement of the progressive societies has hitherto been a movement *from Status to Contract*” (Dewey 1892-93/2010: 102, 127; Maine 1861: 170; Maine 1875). Dewey also gave a succinct overview of the broader historical account of *Ancient Law* (1861):

It is now generally recognized that laws had their origin in custom that grew up more or less spontaneously [...] – not as an overt utterance of particular power. Power originally declared custom. Express law-making a comparatively late fact [...]. Only two periods of great legislative activity – Roman Empire and nineteenth century. Former the dealing with many communities. Latter the rise of new conditions of life and unfitness of old laws to meet them. (Dewey 1893-94/2010: 261)

- 47 As the last sentence shows, Dewey was aware of the idea of a mismatch between historically inherited laws and new social developments – a mismatch that could only be resolved by evolution and growth, as emphasized by both Maine and Holmes.
- 48 Dewey’s discussion of sovereignty, arguably the central topic of his political philosophy lectures at the time, was grounded in exactly this tension between existing legal structures and progressive ideals. He contrasted John Austin’s definition of sovereignty as “the power to command obedience without limitation” with Jean-Jacques Rousseau’s definition of it as “the supremacy of the common over the particular end” (Dewey 1892-93/2010: 110; see Austin 1832: 268; Rousseau 1762: 21-2; Chun 2021: 365-6). According to Dewey, whereas Austin “gives the legal, *de facto* side” of sovereignty, Rousseau “gives the ethical, *de jure* side. The one tells you who is the sovereign; the other points out who *ought to be*” (Dewey 1892-93/2010: 110-1). Dewey then described the legal and the ethical as two “phases” of Rousseau’s *volonté générale*: “The actual sovereign represents the common will in its past attainments; the ideal element is the striving or tendency for future developments” (*ibid.*: 111-2).
- 49 Dewey’s presentation of the “friction” and “constant conflict” between the legal and the ethical – as inseparable elements of sovereignty and as phases of the common will – was strikingly similar to Maine and Holmes’s account of the evolution of law:

The common will has secured and has followed certain modes of organization. This gives the *de facto* sovereignty. Now as new needs come to demand new activities the old organs become less rigid; they yield with more or less reluctance to the new demands [...]. The Fundamental Problem of Social Organization is to secure organs of activity which have recognized validity. This is the root of all political and social life [...]. The ideal organization is that when organs are not weak but at the same time are capable and ready to yield to the new, changing conditions. (*ibid.*: 112)

- 50 For Dewey, social evolution is driven by the conflict between static laws on the one hand and dynamic ideals on the other.
- 51 Dewey framed all of this in terms of the organic analogy, with Austin cast as anatomist and Rousseau as physiologist:
- The *de facto* side of sovereignty, the legal, positive side, is found in the existing organs considered in their structure; *de jure*, ethical, ideal side, in their functions, the relations of one organ to another. The static and the dynamic are sides of the same activity. (Dewey 1893-94/2010: 257)
- 52 For Dewey, “institutions are the habits of the social organism” (*ibid.*: 248). The conflict between the two aspects of sovereignty is thus also a conflict between (i) these habits, “all of which represent something that has been necessary in the past,” and (ii) those changing social needs that cannot be met when habits “become so mechanical as not to be capable of being put to new uses when new occasions arise” (*ibid.*: 249).
- 53 The tricky normative question is how to justify or criticize the institutions of a particular state. Although the ethical, ideal side of sovereignty implies a normative standard of some kind, in the second version of the course Dewey made this more explicit, asking the “*practical* question as to where we will find that moral standard and how bring it into operation” (*ibid.*: 257). Dewey’s preferred answer was that criticism had to proceed by way of functional analysis: the “moral standard is simply the complete function of the existing organization” and “particular laws and institutions” are evaluated “with reference to their place or function” within this larger organization (*ibid.*: 258; cf. Cummins 1975: 762-3). According to Dewey, because this moral standard was the result of objective functional analysis, it was also a scientific standard:
- The question here of effectively criticising positive laws and institutions is simply a question of *the development of science – how far we understand the social organism*. If we do understand it we do have a definite positive standard for determining what part a given law should play in the whole. We have no definite knowledge of social mechanism at present. (Dewey 1893-94/2010: 258)
- 54 This link between science and criticism explains why Dewey was so invested throughout his career in connections between moral and political philosophy on the one hand and the social sciences and “social arts” on the other (MW.4: 45).

## 5. Conclusion

- 55 The dynamic functionalism that Dewey developed in his early 1890s political philosophy classes, in conversation with the ideas of Maine, Holmes, and Spencer, is interesting in its own right. But it is also important as part of the backdrop for his methodological discussions of ethics in the early twentieth century, discussions which William James among others deeply admired (James 1904: 2; James 1905: 113 n. 2).
- 56 In “The Evolutionary Method as Applied to Morality” (1902), for example, Dewey contrasted his own evolutionary-historical-genetic method with both empiricism and intuitionism in ethics. Dewey thought that a key advantage of his method was that moral norms were situated historically and anthropologically, treated “as embedded in the life of the people, historically knit together with its whole body of memories and traditions” (MW.2: 37). In other words, Dewey wanted to approach ethics as Tylor had approached culture and as Maine and Holmes had approached law:

History, as viewed from the evolutionary standpoint, [...] is a process that reveals to us the conditions under which moral practices and ideas have originated. This enables us to place, to relate them. In seeing where they came from, in what situations they arose, we see their significance. (*ibid.*: 9)

57 That is, Dewey's method assumed that "norms and ideals, as well as unreflective customs, arose out of certain situations, in response to the demands of those situations," and that their relative success in meeting those demands could "be determined by study of the concrete case" (*ibid.*: 23).

58 As in the early-1890s political philosophy lectures, justification and criticism of present norms would proceed in functional terms. But why then is history needed at all? Theodore de Laguna, responding directly to Dewey's article, suggested that functionalism in ethics might be better off without it, since "in the process as it now operates we have a well-nigh infinitely richer field for observation than in all the records of the past" (De Laguna 1904: 334-5). But Dewey agreed with Holmes: just as judges, understanding the historical development of the law, are "at liberty to consider the question of policy with a freedom that was not possible before," philosophers taking an evolutionary approach to ethics can apply everything "learned from a study of the past [...] in the analysis of the present" (Holmes 1879: 631; MW.2: 38). Dewey summarized the results of such analysis in his concluding remarks on "the genetic method":

It becomes an instrument of inquiry, of interpretation, of criticism as regards our present assumptions and aspirations [...]. It eliminates surds, mere survivals, emotional reactions, and rationalizes, so far as that is possible at any given time, the attitudes we take, the ideals we form. (MW.2: 38)

59 That is, knowledge of the original function of particular moral norms leads to the right questions today: Did those norms meet the demands for which they were introduced? Do those demands still exist? Are there other ways of meeting those demands? Sometimes the answers to these questions show that particular norms are Tylorian survivals with no present function. Other times they reveal malfunction and the need for transformation. Thus for Dewey the historical-evolutionary and technical-functional approaches work hand in hand, since "the logic of the moral idea is like the logic of an invention," introduced to meet unmet needs but also creating new ones, prompting further progress (MW.2: 34; see also EW.3: 156-7, 369; Kitcher 2011: 218-21).

60 I have argued in this paper that the historical-comparative method, especially as employed by Maine and Holmes, was an important resource for Dewey as he developed his mature philosophy in the 1890s at the University of Michigan. Both of these jurists set up a contrast between unchanging custom – as enshrined for example in legal codes – and emerging social needs, leading to a picture in which historical progress is driven by a tension between a devotion to past wisdom and the need for readjustment to new developments. Although this picture of progress also of course displays the influence of Hegelian-dialectical and evolutionary-biological frameworks, I have tried to show here that Dewey scholars should not neglect the emerging sciences of sociology, anthropology, and comparative jurisprudence.

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## NOTES

1. The joint seminar, listed in the university *Catalogue* and the faculty *Bulletin* for all three academic years, was offered as a full-year course in 1913-1914 and 1914-1915 and as a half-year spring course in 1915-1916. The word "morals" in the description was replaced by "the intellect"

after the first year. This information corrects that given in Dewey (LW.7: xv) and in Torres Colón & Hobbs (2016: 133-4).

2. All translations are my own unless otherwise indicated.

3. Dewey taught a Masterpieces of Modern Philosophy class at Michigan in 1891-1892 that was focused on Comte's Positive Philosophy (Calendar 1892: 61).

4. On the importance of discretion in the history of rule interpretation, see Daston (2022: 35-40).

5. Holmes's first chapter recycled key ideas from the 1870s articles discussed above: for example, Holmes (1881: 35-6) reproduced the closing paragraphs of Holmes 1879 on the cat's clavicle, etc.

6. For more on Dewey's "Anthropology and Law" essay, especially his use of "one of the Chippewa Indian legends," see Villeneuve (2021: 603-10) as well as Villeneuve's forthcoming monograph with the University of Pennsylvania Press.

## ABSTRACTS

In this paper I argue that the "dynamic functionalism" of Dewey's evolutionary approach to ethics – moral norms emerge to address specific problems but must be constantly readjusted to changing contexts – had its roots in the comparative jurisprudence of Sir Henry Sumner Maine and Oliver Wendell Holmes Jr. First, I will discuss the rise of the comparative sciences in the nineteenth century, part of the backdrop for the work of Maine and various evolutionary anthropologists. Next, I will examine Maine's *Ancient Law* (1861), Edward Burnett Tylor's *Primitive Culture* (1871), and Holmes's *The Common Law* (1881), three related books that set up a dichotomy between existing custom and historical progress. Finally, I will show how this dichotomy was reflected in Dewey's writing and teaching at the University of Michigan in the early 1890s, including "Anthropology and Law" (1893) and several courses in political philosophy.

## INDEX

**Keywords:** John Dewey, Henry Sumner Maine, Oliver Wendell Holmes Jr., Edward Burnett Tylor, Comparative Jurisprudence

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