Holmes and Legal Pragmatism

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Oliver Wendell Holmes is the great oracle of American legal thought, but as with other oracles his message is subject to much dispute. His admiring readers have mainly stressed Holmes the critic of Langdellian legal formalism, who said the life of the law was not logic but experience.[1] Others, generally less admiring, have focused on Holmes the Social Darwinist, who celebrated the struggle for existence, or Holmes the amoral positivist, who analyzed law from the perspective of a "bad man."[2] In recent years, still others have emphasized yet another Holmes, one whose main achievement as a legal thinker, apart from a few memorable anti-formalistic jurisprudential slogans, was a body of surprisingly abstract and conceptual doctrinal writing.[3] One of the few points on which all commentators agree is Holmes' greatness as a prose stylist.[4] But when combined with the range of competing interpretations of his work, even the brilliance of his prose suggests another unflattering account—Holmes the eclectic aphorist, whose purely literary talent for glittering phrases conceals a muddle of mutually inconsistent ideas.[5]

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1. Among the most enthusiastic expressions of this perspective are the various essays in the collection edited by Felix Frankfurter, especially those by Morris Cohen, John Dewey, Frankfurter himself, and Harold Laski. MR. JUSTICE HOLMES (F. Frankfurter ed. 1931). For a contemporary expression of the same view, see the chapter *Mr. Justice Oliver Wendell Holmes, the Completely Adult Jurist,* in JEROME FRANK, LAW AND THE MODERN MIND 253-60 (1930). A more sophisticated appreciation of Holmes which treats his critique of formalism as central to his work is MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 59-75 (2d ed. 1957).

2. *See, e.g.,* LON L. FULLER, THE LAW IN QUEST OF ITSELF 62-63, 92-95 (1940); Henry M. Hart, *Holmes' Positivism—An Addendum,* 64 HARV. L. REV. 929 (1951); Yosal Rogat, *The Judge as Spectator,* 31 U. CHI. L. REV. 213 (1964).

3. Grant Gilmore particularly stressed this aspect of Holmes. *See* GRANT GILMORE, THE DEATH OF CONTRACT 13-53 (1974); GRANT GILMORE, THE AGES OF AMERICAN LAW 48-56 (1977). Robert W. Gordon has pursued the theme as well. *See* Gordon, *Holmes'* Common Law *as Social and Legal Science,* 10 HOFSTRA L. REV. 719, 726-29 (1982).

4. The agreement is not confined to the parochial world of lawyers; even so demanding a literary critic as Edmund Wilson judged Holmes' style to be "perfect." EDMUND WILSON, PATRIOTIC GORE 781 (1962).

5. *See* Saul Touster, *Holmes a Hundred Years Ago:* The Common Law *and Legal Theory,* 10

My thesis is that while there are indeed multiple and apparently clashing strands in Holmes' thought, most of them weave together reasonably well when seen as the jurisprudential development of certain central tenets of American pragmatism. Conflicts do remain when Holmes' work is interpreted from this perspective, but they can be explained by a characteristic paradox—the man was disabled by temperament, by experience, and by the historical context in which he found himself from adequately practicing the pragmatism he so eloquently preached.

Holmes as legal pragmatist is hardly a new idea. His associations with Charles Sanders Peirce and William James, as well as his admiration for John Dewey, have led a number of intellectual historians to count him as an adherent and even a founder of the pragmatist movement.[6] At the same time, legal theorists have associated both his generally empirical and instrumental approach to law, and his specific account of legal rules as predictions of judicial decisions, with familiar pragmatist teachings.[7] But there are serious problems with these standard positions. On the biographical side, while Holmes did express admiration for Dewey, he never made clear what it was that he admired. And his more specific remarks about pragmatism and the other well-known pragmatists were critical, often harshly so. He condemned James' version of pragmatism as "humbug";[8] and while he apparently knew little of Peirce's ideas, he did not think highly of what he knew. In the end, what Holmes said directly about pragmatism and its exponents does not by itself support placing him in the pragmatist camp.[9]

When we turn from Holmes' direct statements about pragmatism and the pragmatists to his legal thought itself, the difficulty is to identify anything *distinctively* pragmatist in his writings. He did treat law as a utilitarian instrument for the satisfaction of human desires, but as he said himself, "the judging of law by its effects and results did not have to wait for W[illiam] J[ames]."[10] The English analytical positivists who followed Bentham and Austin had made the instrumental approach to

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HOFSTRA L. REV. 673, 707 (1982) (characterizing Holmes as an unsystematic "utterer of 'smart things' ").

6. *See, e.g.*, MAX H. FISCH, *Justice Holmes, the Prediction Theory of Law, and Pragmatism*, in PEIRCE, SEMEIOTIC, AND PRAGMATISM: ESSAYS BY MAX FISCH 6 (K. Ketner & C. Kloesel eds. 1986) (reprinting Max H. Fisch, *Justice Holmes, the Prediction Theory of Law, and Pragmatism*, 39 J. PHIL. 85 (1942)); PHILIP P. WIENER, EVOLUTION AND THE FOUNDERS OF PRAGMATISM 172-89 (1965).

7. On instrumentalism, see Benjamin Cardozo, *Mr. Justice Holmes*, in MR. JUSTICE HOLMES, *supra* note 1, at 1, 6-7; ROBERT S. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 20-34 (1982). On the pragmatic aspects of the prediction theory, see Fisch, *supra* note 6; *see also* Frederic Rogers Kellogg, *The Making of an American Legal Philosophy*, in THE FORMATIVE ESSAYS OF JUSTICE HOLMES 1, 50-57 (F. Kellogg ed. 1984) [hereinafter FORMATIVE ESSAYS].

8. 1 HOLMES-POLLOCK LETTERS 139 (M. Howe ed. 1941) (letter dated June 17, 1908).

9. I review the evidence on Holmes' views of the leading pragmatists in an appendix to this article. *See* text accompanying notes 368-421 *infra*.

10. 1 HOLMES-LASKI LETTERS 20 (M. Howe ed. 1953) (letter dated Sept. 15, 1916).

law prominent long before American pragmatism came on the scene. Holmes was certainly one of the important American exponents of English analytical positivism, and his prediction theory is a significant elaboration of that approach to law. But if this were all there were to Holmes, we would add little by calling him a pragmatist.[11]

My suggestion is that we can understand the distinctively pragmatist cast to Holmes' legal thought if we take account of the recent revival and reinterpretation of pragmatism within Anglo-American philosophy.[12] The "neo-pragmatists" reject the long-standing treatment of pragmatism as simply a minor element in the triumphant advance of scientific positivism.[13] In this traditional view, the pragmatists were merely thinkers who anticipated and stated in a confused way some of the ideas later worked out more rigorously by the logical positivists and their successors in the philosophy of science. A parallel view of pragmatism in legal theory would see Holmes, Roscoe Pound, and its other exponents as relatively primitive and confused precursors of the more rigorous and sophisticated form of scientific instrumentalist jurisprudence represented by contemporary law and economics, cost-benefit analysis, and public choice theory.

By contrast, the new philosophical interpretation of pragmatism stresses certain ways in which it departs from and indeed undermines orthodox scientific empiricism, particularly in its focus on human inquiry as a culturally situated form of activity. Much as William James' original formulation of pragmatism sought to mediate between "tough-minded" devotees of science and "tender-minded" religious believ-

11. H.L. Pohlman argues that Holmes is best seen as continuing the tradition of Bentham and Austin, *see* H.L. POHLMAN, JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE (1984), and concludes that nothing is gained by characterizing him as a pragmatist. *Id.* at 163-64. In my view, Pohlman significantly understates the importance of historicist social theory in Holmes' legal thought. *See* text accompanying notes 74-81, 90-91 *infra*.

12. Richard Rorty has been the best-known promoter of the pragmatist revival. *See* RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979); RICHARD RORTY, CONSEQUENCES OF PRAGMATISM (1982). Rorty's introductory essay to the latter volume, *Introduction: Pragmatism and Philosophy,* is a good introduction to the new interpretation of pragmatism. *Id.* at xiii-xlvii. For a sample of the many other recent philosophical works that take neo-pragmatist positions, though without adopting the pragmatist label, see RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS (1985); NELSON GOODMAN, WAYS OF WORLDMAKING (1978); SAUL KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982); HILARY PUTNAM, REASON, TRUTH AND HISTORY (1981); P.F. STRAWSON, SKEPTICISM AND NATURALISM (1985). Kripke and Strawson both stress the influence of Hume and the later Wittgenstein on their formulations. Another important influence on the neo-pragmatist revival has been the modern historicist reconception of natural science associated with Thomas Kuhn. *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970); THOMAS S. KUHN, THE ESSENTIAL TENSION (1977).

13. *See, e.g.,* A.J. AYER, THE ORIGINS OF PRAGMATISM (1968); W.V. Quine, *The Pragmatists' Place in Empiricism,* in PRAGMATISM: ITS SOURCES AND PROSPECTS 21 (R. Mulvaney & P. Zeltner eds. 1981). Quine, who downplays the historicist aspects of pragmatism stressed by Rorty and others, argues that the term "pragmatism" fails to usefully distinguish itself from "empiricism," and hence "draws a pragmatic blank." *Id.* at 23.

ers,[14] the neo-pragmatists seek a bridge across the divide that has separated Anglo-American from European philosophy in this century. On one side of this divide, English speakers (and some Austrian helpers) have tended to conceive of philosophy as an enterprise dedicated to exploring the foundations of knowledge through a rigorous account of natural scientific method, with the ultimate aim of extending that method to all areas of human inquiry.[15] On the other side, European philosophy has long stood in an adversary relation to natural science and technology, pursuing the (often quasi-religious) search for meaning, sometimes culminating in a discovery of meaninglessness, through the exploration of culture and lived experience.[16]

This schism matters to legal scholars because it extends beyond philosophy to divide students and theorists of social phenomena more generally, including those who focus upon law. The positivist project of developing "social sciences" modeled on physics, chemistry, and biology has dominated Anglo-American social theory, while the European tendency has been to study society and culture interpretively, as text-analogues to be understood rather than as natural phenomena to be explained. The extension of the European style of theorizing into American intellectual life in recent years has produced sharp divisions between the traditionally dominant positivist approach, and a newer movement toward "hermeneutic" and "post-modernist" modes of thought. This division is evident within legal thought as well, where jurisprudential approaches based upon the economic paradigm of rational choice remain dominant, but are increasingly subject to challenge from approaches that stress the centrality of culture, history, language, ideology, and rhetoric.

The neo-pragmatists' pluralistic conception of inquiry challenges the dominance of natural science in the intellectual life of the English-speaking world, and some traditional positivists see their work as a nihilistic challenge to reason itself. But when compared with other post-modernist thinkers, the new pragmatists can be seen as still working within the scientific empiricist tradition broadly conceived. They tend to reject both the pervasive relativism and the oppositional stance toward natural science that many European philosophers and social thinkers have adopted, and they accept the spirit of scientific inquiry, in which theory is tested against experience by a reflective and critical community of inquirers. Pragmatists see even natural scientific inquiry as having unavoidably interpretive and culturally conditioned aspects;

14. WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING 3-40 (1907) [hereinafter W. JAMES, PRAGMATISM].

15. This ambition runs throughout the work of the Logical Positivists, a representative selection of whose writings can be found in LOGICAL POSITIVISM (A.J. Ayer ed. 1959).

16. This generalization is meant to characterize the main line of European philosophy since Kant's critiques overthrew the tradition of Cartesian foundational rationalism; the line begins with Hegel, runs through Kierkegaard, Nietzsche, and Dilthey, and encompasses such disparate modern thinkers as Heidegger, Sartre, Gadamer, Ricoeur, and Derrida.

at the same time they believe that humanistic and explicitly evaluative inquiry can be pursued rationally and with the reasonable hope of progress. In social theory generally, and legal theory more particularly, the pragmatist tendency is to promote trade rather than warfare between normative and descriptive theorists, storytellers and model-builders, interpreters and causal explainers.[17]

Finally, in interpreting the history of pragmatism, the neo-pragmatists have departed from their predecessors by emphasizing Dewey over Peirce and James as the central figure in the movement.[18] Dewey's own focus was not so much on the methods of the natural sciences (as with Peirce) or on the life-situation of the individual (as with James), but more on issues of social theory, politics, and law. It was Dewey who particularly developed the pragmatist critique of the traditional philosophical "quest for certainty", Dewey who particularly undermined the positivist dualisms of subject and object, mind and matter, fact and value, and Dewey who particularly stressed the shaping effect of cultural and historical context on human inquiry. And these are the aspects of pragmatism that have dominated the recent revival.

In what follows, I spell out my own version of the recent reinterpretation of pragmatism, and then look at Holmes' legal theory from the perspective it provides, with special emphasis on the elements common to the thought of Holmes and Dewey. I was moved to my study by the strongest single piece of direct evidence linking Holmes to pragmatism: when late in life he read Dewey's *Experience and Nature*, Holmes wrote that its "view of the universe . . . came home to me closer than any other that I know."[19] As one for whom Dewey's masterpiece also

17. For some philosophical applications of "the new pragmatism" to social thought, see RICHARD RORTY, *Method, Social Science, and Social Hope*, in CONSEQUENCES OF PRAGMATISM, *supra* note 12, at 191, 203-08 (contrasting the progressive and optimistic John Dewey with the relativistic and pessimistic European post-modernist Michel Foucault); and HILARY PUTNAM, MEANING AND THE MORAL SCIENCES 66-77 (1978). For a political theorist's work in a pragmatist vein, see DON HERZOG, WITHOUT FOUNDATIONS (1985). The reach of pragmatism beyond philosophy to social thought and practical politics is nothing new; David Hollinger has shown that in the heyday of Dewey's influence, his version of pragmatism provided a significant framework for the general thinking of educated Americans on social questions, and hence was influential in arenas well beyond the philosophy department. See DAVID A. HOLLINGER, *The Problem of Pragmatism in American History*, in IN THE AMERICAN PROVINCE 23 (1985).

The point is made most impressively in JAMES KLOPPENBERG, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870-1920 (1986). This book, which I discovered just as this article was going to press, gives an account of pragmatism strongly parallel to my own.

18. At the same time, both James and Peirce have themselves been persuasively reinterpreted along "neo-pragmatist" lines. On James, see David A. Hollinger, *William James and the Culture of Inquiry*, in IN THE AMERICAN PROVINCE, *supra* note 17, at 3. And in a study that parallels this one in many ways, Catharine Hantzis brings out elements in Holmes' legal theory that depart from the conventional legal positivism so often attributed to him by noting the similarities between his ideas and the pragmatism of Peirce. Catharine Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U.L. REV. 541 (1988).

19. 2 HOLMES-POLLOCK LETTERS, *supra* note 8, at 272 (letter dated July 26, 1930). Dewey expressed similar intellectual kinship with Holmes. *See* John Dewey, *Justice Holmes and the Lib-*

comes very close to home, I was particularly struck by this remark, especially in view of the great differences in social and political outlook between the two men. Could there perhaps be some deeper unity that explained the sense of intellectual kinship they shared? That question started me in search of a Holmesian theory of law that fit with Dewey's kind of pragmatism.[20]

Such a study responds to two motives, and I can only hope that I have somehow managed to negotiate the conflicts between them. First, in common with many American lawyers, I am fascinated by Holmes, a fascination compounded of repulsion and attraction. It is easy to list the man's repulsive aspects: his naive attraction to pseudo-scientific eugenics, his fatalism, his indifference to human suffering, his egotism and vanity, his near-worship of force and obedience. But even when all that is taken into account, I am drawn on by Holmes' charms of person and of style, charms enhanced for the interpretive suitor by the complexities and paradoxes that shroud his character and thought. And the substance of his most famous teaching, the primacy of experience over logic, still seems to me the central, if obscure, truth of American legal thought; as Cardozo wrote, "Here is the text to be unfolded. All that is to come will be development and commentary."[21]

That conviction introduces my second motive, which is the wish to have my own present say in furtherance of a neo-pragmatist approach to legal theory. It has been common to promote legal theories by enlisting Holmes among their sponsors, but the precedents are not all auspicious. One who attempts to combine in a single study a commentary on Holmes and a contribution to contemporary legal theory risks doing neither well. While incurring this risk, I take some comfort from the words of Chauncey Wright, an early influence on Holmes, who wrote that "[t]he most profitable discussion is, after all, a study of other minds—seeing how others see, rather than the dissection of mere propositions."[22] The personal is the theoretical. Such, at least, is my justification for this binocular effort to present pragmatism through the lens of Holmes while at the same time presenting Holmes through the lens of pragmatism.

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eral Mind, in MR. JUSTICE HOLMES, *supra* note 1 [hereinafter Dewey, *Justice Holmes*]; JOHN DEWEY, EXPERIENCE AND NATURE 417-19 (2d ed. 1929).

20. I should say a word about my sources. Holmes' published extra-judicial writings are not voluminous, and I have read them all—his essays, speeches, letters, and his one book, *The Common Law*. I have not reviewed the mass of his judicial opinions as exhaustively, nor drawn on them as much in my argument, but my knowledge of the familiar among them, along with a sampling of the less familiar, confirms that they do not add new elements to the body of his general legal thought. He had only so many things to say, a mid-sized stock of basic insights and aphorisms. The interpretive problem is to show how a set of familiar elements fit together, if they do at all.

For my account of pragmatism, I have drawn inspiration from the neo-pragmatist writers already cited, and material mainly from the writings of Dewey, supplemented by references to Peirce and James.

21. Benjamin Cardozo, *Mr. Justice Holmes*, in MR. JUSTICE HOLMES, *supra* note 1, at 3.

22. Quoted in P. WIENER, *supra* note 6, at 30.

The study is a long one, and a sketch in advance may be helpful. In Part I, I spell out my version of what distinguishes American pragmatism from the scientific empiricism out of which it grew, its doubly practical account of inquiry as at once situated in existing practice and instrumental to practical ends. In Part II, I summarize the core of Holmes' application of this perspective to law, his conception of "law as experience," a conception synthesizing the apparently conflicting historical and analytical schools of jurisprudence. In Parts III and IV, I consider aspects of Holmes' legal thought often believed to conflict with his experiential account of law—respectively, the conceptualism discernible in his treatment of legal doctrine, and the apparently narrow positivism of his emphasis on the prediction of judicial action. I argue that when properly understood, both Holmes' conceptualism ("law as logic") and his positivism ("law as prediction") are consistent with his pragmatist account of law as experience. In Part V, I turn to a real and serious practical contradiction in Holmes' work, the conflict between his spectatorial detachment from his own society on the one hand, and his commitment to a life of active participation in its government by law on the other. Finally, in Part VI, I argue that in the course of Holmes' unsuccessful struggle with this contradiction, he came to understand and articulate his own version of the important concept that Dewey called "the end-means continuum," a concept that is essential if legal pragmatism is to differentiate itself from the more reductive forms of legal instrumentalism.

I. THE PRIORITY OF PRACTICE

Those who would make Holmes a pragmatist have usually had in mind his conception of law as the coercive use of state power through the courts, aimed at the promotion of public welfare or the satisfaction of collective wants. The conception is thought pragmatic because it is at once empirical and instrumental. Descriptively, for Holmes, the law is "what the courts . . . do in fact," and it draws its content largely from "[t]he felt necessities of the time."[23] Prescriptively, legal principles are to be derived from "accurately measured social desires," with these to be approximated, in the absence of a better measuring stick, by "conformity to the wishes of the dominant power" in the community.[24]

While nothing in such a conception of law is inconsistent with pragmatism, the difficulty, mentioned already, is seeing anything *distinctively* pragmatist in it. As Holmes himself was quite aware, the view of law as

23. OLIVER WENDELL HOLMES, *The Path of the Law* (1897), in COLLECTED LEGAL PAPERS 161, 173 (1920) [hereinafter *The Path of the Law*]; OLIVER WENDELL HOLMES, THE COMMON LAW 5 (M. Howe ed. 1963) (originally published 1881) [hereinafter THE COMMON LAW].

24. OLIVER WENDELL HOLMES, *Law in Science and Science in Law* (1899), in COLLECTED LEGAL PAPERS 210, 226 (1920) [hereinafter *Law in Science*]; OLIVER WENDELL HOLMES, *Montesqueieu* (1900), in COLLECTED LEGAL PAPERS 250, 258; *see also* THE COMMON LAW, *supra* note 23, at 36.

regularized coercion and as a means to an end was not new either with him or with those we think of as pragmatists.[25] Beginning more than a century before pragmatism was first heard of, and continuing throughout a long and immensely influential career, Jeremy Bentham had promoted the idea that law was the use of collective force as a means to human happiness. In this, he was followed by his disciple John Austin, whose theory became the orthodoxy of English analytical jurisprudence while Holmes was a law student.[26] Holmes was a member of the first generation of American lawyers to be much influenced by the utilitarian positivism of the analytical jurists; only in a later generation would such views become dominant, as, in a sense, they remain to this day. Yet there was nothing original to America, nothing derived from James or Peirce, nothing peculiar to pragmatism, in Holmes' often reiterated application of Benthamite slogans to law.

Bentham's instrumentalism applied the post-Enlightenment spirit of scientific positivism to law and politics. Central to this spirit was the conviction that, as Richard Rorty has put it, "natural science—facts about how spatio-temporal things worked—was all the Truth there was."[27] Applied to law, the positivist spirit required that if legal propositions were to have scientific standing, they must be reducible to factual claims. Accordingly Austin, following Bentham's lead, analyzed legal rights and duties in terms of two straightforwardly factual questions: what person or group in society is habitually obeyed, and what has he, she, or it commanded?[28] Under this conception, the determination of what the law is requires no value judgment; the lawyer needs only to identify behavioral regularities and consult the plain meanings of words.

For positivists of the Benthamite persuasion, moral and political evaluation could proceed rationally only if evaluative discourse itself could be reduced to factual terms. Otherwise it was pure rhetoric,

25. *See* note 10 *supra* and accompanying text. The point that there is nothing uniquely pragmatic in a utilitarian, instrumental conception of law is forcefully made throughout H. POHLMAN, *supra* note 11.

26. The publication of a second edition of Austin's *Province of Jurisprudence Determined* in 1861 rescued the work from the obscurity into which it had sunk after its original publication in 1832. Sarah Austin's edition of his *Lectures on Jurisprudence*, reconstructed from his manuscripts, appeared in 1863. For this bibliographic history, see H.L.A. Hart, *Introduction* to JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE at vii, ix (1954) (originally published 1832) [hereinafter J. AUSTIN, THE PROVINCE OF JURISPRUDENCE]. Holmes checked Austin's *Lectures* out of the library some five times between 1863 and 1871. MARK DE WOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS, 1841-1870, at 194 & note d (1957) [hereinafter M. HOWE, THE SHAPING YEARS]. Peter King unfortunately omits any consideration of Holmes in his otherwise useful study of the transmission of analytical positivism to America. *See* PETER S. KING, UTILITARIAN JURISPRUDENCE IN AMERICA: THE INFLUENCE OF BENTHAM AND AUSTIN ON AMERICAN LEGAL THOUGHT IN THE NINETEENTH CENTURY (1986).

27. RICHARD RORTY, *Introduction: Pragmatism and Philosophy*, in CONSEQUENCES OF PRAGMATISM, *supra* note 12, at xiii, xv.

28. *See* J. AUSTIN, THE PROVINCE OF JURISPRUDENCE, *supra* note 26, at 9-33; JEREMY BENTHAM, OF LAWS IN GENERAL, 1, 18-19 (H.L.A. Hart ed. 1970) (originally completed 1782).

"simple nonsense," or "nonsense upon stilts."[29] The only empirical realities available as plausible sources of value judgements were human desires and sensations of pleasure or pain. Thus utilitarianism became the prescriptive corollary of positivism. An action or a law was right to the extent it promoted pleasure or satisfaction, and prevented pain or frustration. Given this starting point, moral questions became in principle issues of fact, which, it was hoped, technical progress would one day reduce to mere matters of measurement. But this day was not yet at hand, and the still immature science of utilitarian ethics or "censorial jurisprudence"—the study of what the law should be—had to be kept strictly separate from "expository jurisprudence," the identification of the positive law that was actually in force.[30]

Much of Holmes' legal thought can be explained in terms of this Victorian scientific positivism—what Holmes himself called "the scientific way of looking at the world."[31] From this outlook followed his legal positivism and a version of utilitarianism tempered by skepticism about the practical possibilities of measuring utility. Not only his functional account of law generally, but also his analysis of lawyer's law as prediction, his promotion of an external standard of liability, and his critique of the use of moral terms in legal discourse, all were consistent with a program of reducing vague and value-laden questions to clear and factual ones. These aspects of Holmes' legal thought fit in with the utilitarian analytical jurisprudence of Bentham and Austin—the legal branch of nineteenth-century scientific positivism. But while ideas such as these are consistent with pragmatism, they are in no way distinctive to it.

The founding pragmatists managed to break away from the standard brand of scientific positivism. At the same time, and in an analogous way, Holmes' work in legal theory came to surpass that of his positivist predecessors. The differences between pragmatist and positivist theories of knowledge are, in fact, the background against which one can show that Holmes took legal thought beyond analytical positivism, in a distinctively pragmatist direction.

We can best begin our account where the pragmatists themselves did, with their naturalistic account of human mind and mental activity—"inquiry," in Dewey's encompassing term. The pragmatist view of inquiry represented a major departure from long-standing views of human knowledge. British empiricism and its traditional rival, European rationalism, had implicitly shared a dualistic conception of the

29. JEREMY BENTHAM, *Anarchical Fallacies,* (n.d.), in 2 THE WORKS OF JEREMY BENTHAM 489, 501 (1962) (J. Bowring ed. 1838-1843) [hereinafter WORKS OF BENTHAM].

30. JEREMY BENTHAM, *An Introduction to the Principles of Morals and Legislation* (1780), in 1 WORKS OF BENTHAM, *supra* note 29, at 1, 148; *see also* J. AUSTIN, THE PROVINCE OF JURISPRUDENCE, *supra* note 26, at 184-91.

31. *The Holmes-Cohen Correspondence,* in PORTRAIT OF A PHILOSOPHER: MORRIS R. COHEN IN LIFE AND LETTERS 313, 321 (L. Rosenfield ed. 1962) (letter dated Feb. 5, 1919) [hereinafter *Holmes-Cohen Correspondence*].

human being as a spiritual or immaterial mind somehow lodged in a material body. In its origin, this conception of the mind as metaphysically distinct from the body traces back in Western thought at least to Plato, and over time it became fused with the "soul" of Christian theology. Carrying its multiple philosophical and religious origins with it, the notion of the immaterial but substantial mind-soul or spirit was implanted in the foundations of the developing Western scientific world view by both the rationalist Descartes and the empiricist Locke in the seventeenth century. Through the period of the Enlightenment, Western philosophers, however oriented they were toward science, did not root it out. Even in the work of a nineteenth-century philosophical positivist who came as close to pragmatism as did John Stuart Mill, we find an implicitly dualistic account separating mind from matter, in which human knowledge of an objective, material and external world must somehow be built up from subjective and immaterial impressions and ideas occuring in an internal and intangible mental medium.[32] How this is to be done is the "problem of knowledge," to be solved by the special philosophical sub-discipline of "epistemology"; epistemology in turn is built upon an ontology that divides the world into mind and matter, Descartes' *res cogitans* and *res extensa*.[33]

The pragmatist departure from this traditional concept of the mental world seems in large part traceable to the influence of nineteenth-century evolutionary thinking.[34] By locating mankind firmly within the animal kingdom, Darwin made it plausible to treat human mental capacities as evolved functions of natural organisms, arising from simpler forms of animal behavior as a result of their survival-promoting tendencies. As this perspective took hold, the distinction between spirit and nature, or mind and matter, came to seem increasingly arbitrary. If the human being was a biological organism, "mind" and "the mental" could only refer to those workings of the organism that rose above whatever level of complexity had come to be defined as "merely animal."

It is a mistake, however, to overemphasize the place of evolutionary biology in the origins of pragmatism; certain characteristic elements of nineteenth-century social thought were equally important. In reaction to the ahistorical rationalism of the Enlightenment, a wide range of social theorists emphasized and developed the importance in human affairs of cultural evolution, or History with a capital "H." This tendency in social thought, which we may loosely label "historicism," stressed the fundamental character of historical change and cultural variation, and thereby undermined the philosophical search for a single definite

32. JOHN STUART MILL, A SYSTEM OF LOGIC RATIOCINATIVE AND INDUCTIVE, in 7 COLLECTED WORKS OF JOHN STUART MILL 1, 56-64, 74 (J.M. Robson ed. 1973).

33. RENÉ DESCARTES, *Meditations on First Philosophy* (1642), in DESCARTES: PHILOSOPHICAL WRITINGS 114-15 (E. Anscombe & P. Geach eds. 1964).

34. *See generally* P. WIENER, *supra* note 6.

set of faculties and categories that constituted "the human understanding."[35]

The collectivist bias of emerging historical, linguistic, and anthropological studies helped undermine the notion of the human being as an individual who, by virtue of the imprisonment of his or her spirit in a carnal body, was a little lower than the angels. In its place arose the idea of humanity as a species that, by virtue of its collective capacity to generate, transmit, and adapt culture by means of language, was a little higher than the apes. This concern with cultural as well as biological evolution provided the pragmatists with an essential safeguard against materialist reductionism, or behaviorism, which attempts to escape the "mind-body problem" by simply reducing to the physical, or even denying the reality of, phenomena traditionally classified as mental or cultural.

These developments in biological and social theory focused philosophers' attention on some of the fundamental difficulties with the traditional accounts of mind. How can a ghostly mind be linked to the material world through the bodily machine that it somehow haunts? How can we have reliable knowledge of an outer physical world if all our experience is made up of mental impressions and ideas projected in some inner and immaterial theater? The acute debates over these questions during the previous two centuries had preoccupied philosophers with what John Dewey called "[t]he alleged discipline of epistemology."[36]

The pragmatist breakthrough was to reject all mind-body dualisms and treat thought or "inquiry" as a mode of the human organism's activity, an adaptive product of biological and cultural evolution. Peirce, the founder of pragmatism, described a belief as a "habit of mind" that enables the organism to cope with some aspect of its environment.[37] When action on a habitual belief does not produce the expected result, the believer experiences the "irritation of doubt." "Inquiry," which Peirce described as "a struggle to attain a state of belief" or "settlement of opinion," is supposed to resolve the irritation of doubt in favor of some belief that can once again reliably guide the believer's action.[38] Of course, this new belief, when acted upon, might itself lead to new doubt, thus requiring new inquiry.[39]

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35. For the importance of historical and cultural themes in the development of nineteenth-century British evolutionary thought, and their relative independence from Darwinian theory, see generally J.W. BURROW, EVOLUTION AND SOCIETY (1966).

36. JOHN DEWEY, ESSAYS IN EXPERIMENTAL LOGIC 264 (1916) [hereinafter J. DEWEY, EXPERIMENTAL LOGIC].

37. CHARLES SANDERS PEIRCE, *The Fixation of Belief*, in 5 COLLECTED PAPERS OF CHARLES SANDERS PEIRCE paras. 358, 367 (C. Hartshorne & P. Weiss eds. 1934).

38. *Id.* paras. 374-375.

39. Peirce's earliest pragmatist essay was a taxonomy of the methods of settling opinion, among which he included "tenacity" (resisting doubt), "authority" (accepting the opinions of leaders), and "inspiration" (reasoning a priori, as in philosophical rationalism). But better than any of these, according to Peirce, is the method of science—hypothesis and experi-

Though there were important differences among the leading pragmatists, all of them endorsed this Darwinist-historicist account of human inquiry.[40] They treated "the mind" as an evolved mode for coping with the environment, a set of biologically based powers that included the crucial capacity to learn language. Linguistic capacity allowed human mental powers to be vastly augmented and modified along many different paths of cultural development.[41] The pragmatists thus provided an escape from the philosophical paradoxes inherent in the confused conception of the Platonic-Christian-Cartesian-Lockean mind-soul, that hybrid entity with its many and conflicting roles: the locus of personal identity and moral being, the active organ of decision, the seat of creativity and imagination, the passive theater of perception, the storehouse of memory, and the immaterial and indestructible survivor of the body's mortality.

The pragmatists' account of the mind and inquiry was thus thoroughly *practical*, in two related senses. First, on the side that derived from historicist social thought, they treated thinking as contextual and situated; it came always embodied in *practices*—habits and patterns of perceiving and conceiving that had developed out of and served to guide activity. Some of these habits and patterns were instinctive, some were learned individually, but those most distinctively human resulted from the capacity for language; they were products of culture, collectively developed and transmitted. Second, on the side that derived from Darwinism, the pragmatists regarded thinking as an adaptive function of an organism, practical in the sense that it was *instrumental*. It had evolved as a problem-solving capacity, oriented toward survival. In its most developed form, thinking functioned to help resolve, by means of conscious reflection and experimental revision, the real problems and live doubts that arose in the course of acting on unreflective and habitual practices. Holmes himself provided a characteristically compact summary of these two tenets: "all thought," he said, is at once "social" and "on its way to action."[42]

Whereas older accounts of pragmatism emphasized its instrumentalism, the distinctive feature of recent reinterpretations of pragmatism is to give equal significance to its contextualist thesis—the idea that thought is essentially embedded in a context of social practice. Not

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ment—because its practice is self-confirming and its achievements progressive. *Id.* paras. 377-387; *see also* JOHN DEWEY, THE QUEST FOR CERTAINTY 227-28 (1929).

40. *See, e.g.*, J. DEWEY, EXPERIMENTAL LOGIC, *supra* note 36, at 183-219; JOHN DEWEY, HUMAN NATURE AND CONDUCT 172-80 (1922); J. DEWEY, THE QUEST FOR CERTAINTY, *supra* note 39, at 224-28; JOHN DEWEY, LOGIC: THE THEORY OF INQUIRY 7-10, 12-14 (1938) [hereinafter J. DEWEY, THE THEORY OF INQUIRY]. W. JAMES, PRAGMATISM, *supra* note 14, at 59-66.

41. *See* J. DEWEY, EXPERIMENTAL LOGIC, *supra* note 36, at 331-32. Dewey's best general statement of the importance he placed upon language as an independent force in the development of culture is the chapter *Nature, Communication, and Meaning*, in J. DEWEY, EXPERIENCE AND NATURE, *supra* note 19, at 166-207.

42. OLIVER WENDELL HOLMES, *John Marshall* (1901), in COLLECTED LEGAL PAPERS 266, 270 (1920) [hereinafter *John Marshall*].

only is contextualism no less fundamental to the pragmatists' thought than instrumentalism; it is what most sharply distinguishes them from orthodox scientific positivists. Indeed, development of the contextualist thesis led the pragmatists to their most profound philosophical innovation: the rejection of philosophical "foundationalism."

Foundationalism is a long name for the age-old philosopher's dream that knowledge might be grounded in a set of fundamental and indubitable beliefs. For the rationalist tradition descended from Descartes, the cornerstones of knowledge are those rational intuitions that survive as clear and distinct ideas in the face of the thinker's effort at universal doubt. For the empiricist tradition running from Bacon, Hobbes, and Locke to the logical positivism of this century, the foundations of factual knowledge are the bare uninterpreted data delivered to the mind by the senses. The tradition of modern Western epistemology, both rationalist and empiricist, has imagined that knowledge can be securely based only if the inquirer strips away all habitual and conventional ways of thought, and builds a purified structure based on valid inferences from indubitable premises.

The pragmatists' first thesis—that knowledge is essentially contextual, situated in habit and practice—holds that no such zero-based method of inquiry is possible. Peirce stated the point forcefully: No one, he said, can set out to think either by "doubting everything" or by "observing 'the first impressions of sense.' " Rather:

> [T]here is but one state of mind from which you can "set out," namely, the very state of mind in which you actually find yourself at the time you do "set out"—a state in which you are laden with an immense mass of cognition already formed, of which you cannot divest yourself if you would; and who knows whether, if you could, you would not have made all knowledge impossible to yourself?[43]

In a similar vein, James stressed that the individual always begins with "a stock of old opinions."[44] When these are put under strain by some incongruous perception or desire, the individual seeks to escape from the "inward trouble" thus generated by "modifying his previous mass of opinions."[45] But "[h]e saves as much of it as he can, for in this matter of belief we are all extreme conservatives. . . . The most violent revolutions in an individual's beliefs leave most of his old order standing."[46] Similarly, Dewey stressed the beginning of thought in habit; the human being is in the first instance a creature of habit, not of reason.[47]

43. CHARLES SANDERS PEIRCE, *What Pragmatism Is* (1905), in 5 COLLECTED PAPERS OF CHARLES SANDERS PEIRCE, supra note 37, paras. 411, 416; *see also* CHARLES SANDERS PEIRCE, *Some Consequences of Four Incapacities* (1868), in *id.* at paras. 264, 265 [hereinafter C.S. PEIRCE, *Four Incapacities*].

44. W. JAMES, PRAGMATISM, *supra* note 14, at 59.

45. *Id.* at 59-60; *see also id.* at 64.

46. *Id.* at 60; *see also id.* at 224-25.

47. *See* J. DEWEY, HUMAN NATURE AND CONDUCT, *supra* note 36, at 172-80; J. DEWEY, EXPERIMENTAL LOGIC, *supra* note 40, at 184-88.

Only when habit and practice become problematic is there occasion for inquiry, the application of conscious intelligence to a situation. The task of inquiry is not the impossible one of building a purified structure of truths from the ground up, but rather the practical one of making such modifications in the existing body of knowledge as will solve the difficulty at hand. This remains as true for the most abstract theoretical puzzle in mathematics or speculative philosophy as it does for those ordinary problems of daily life in which conscious deliberation originates.[48]

Practices are not only habitual and largely unconscious; they are mainly collective in origin. The pragmatists emphasized the *social* origins of the great mass of settled belief from which inquiry proceeds. We see that practices are collective, when we consider that they are mediated by language, the conventional, collectively constituted, spontaneously evolved, complex communicative structure of meaningful signs that underlies all reflective or conscious thought. Language supplies not only the forms in which thought is represented and conveyed, but much of the stuff of thought itself.[49] Thus, Peirce argued that thought was essentially carried on by means of signs, of which the most important were the conventional signs that constitute language.[50] In fact, in emphasizing the role of language and the collective notion of inquiry, Peirce went so far as to hold that reality itself is simply the object on which the representations of a community of inquirers are destined in the long run to converge.[51]

The pragmatists thus broke not only with the foundationalism of the empiricist tradition, but also with its methodological individualism. They did not regard society as a construct built up out of elementary individuals, each possessing a rich array of pre-social qualities. Rather, they argued, the individual person, the knowing, willing subject of Enlightenment epistemology and political philosophy, is only the late and sophisticated product of a complex cultural development.[52]

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48. *See* J. DEWEY, THE QUEST FOR CERTAINTY, *supra* note 39, at 186-87; *cf.* J. DEWEY, EXPERIENCE AND NATURE, *supra* note 19, at viii-ix ("We cannot lay hold of the new, we cannot even keep it before our minds, much less understand it, save by the use of ideas and knowledge we already possess.").

49. *See* J. DEWEY, EXPERIENCE AND NATURE, *supra* note 19, at 166-207; J. DEWEY, THE THEORY OF INQUIRY, *supra* note 40, at 45-47. George Herbert Mead's contribution to pragmatism was to work out in far more detail than Dewey or James the role that language and communication play in establishing selfhood and social cooperation—that is, to work out a pragmatic social philosophy. *See* H.S. THAYER, MEANING AND ACTION: A CRITICAL HISTORY OF PRAGMATISM 232-68 (1981).

50. *See* C.S. PEIRCE, *Four Incapacities*, *supra* note 43, para. 283; C.S. PEIRCE, *What Pragmatism Is*, *supra* note 43, para. 421.

51. *See* C.S. PEIRCE, *Four Incapacities*, *supra* note 43, para. 311; *see also* H.S. THAYER, *supra* note 49, at 235-36.

52. *See* J. DEWEY, EXPERIENCE AND NATURE, *supra* note 19, at 208-11; C.S. PEIRCE, *What Pragmatism Is*, *supra* note 43, para. 421; *see also* H.S. THAYER, *supra* note 49, at 232-34 (discussing Mead's views). James is often said to have neglected the cultural and linguistic bases of thought, but David Hollinger argues persuasively to the contrary. *See* D. HOLLINGER, *supra* note 17, at 9-10, 20-22.

This first thesis of pragmatism—the situated, historical, practice-constituted character of human life and thought—is not unique to the pragmatists. It has been a central theme for all those modern philosophers who have broken from the foundationalist tradition in Western thought. The erstwhile logical positivist Otto Neurath captured the essence of anti-foundationalism in a famous metaphor, when he described human inquirers as sailors on a boat that can never come to drydock for repair, so that they must maintain and reconstruct it as they sail, using its own material and what flotsam they come upon.[53] In his later work, Wittgenstein often stressed the social, habitual, and practical basis of all reasoning: "What has to be accepted, the given, is . . . *forms of life*."[54] And Heidegger held that all beliefs presuppose prejudices—judgments already made, implicit in practice, prior to reflection, largely historical and collective in origin, tacitly accepted, and for the moment unquestioned.[55]

Even before pragmatism as such came on the scene, the concept of human inquiry as essentially situated and historically conditioned was one of the central themes of nineteenth-century social thought. It appears in Hegel, from whom it was taken in a revolutionary direction by Marx. But it was most conspicuous in the Burkean-romantic brand of conservative social theory that in the English-speaking world drew inspiration from the traditional ideology of the common law, and found theoretical expression in Friedrich von Savigny, Sir Henry Maine, James Coolidge Carter, and the other proponents of the historical school of jurisprudence.[56] The leading pragmatists, however, did not share the Burkean conservatism common among so many thinkers who stress the centrality of history and context to human social life. Their analysis grants no special authority to unconscious habit and slowly evolved custom; self-conscious reflection and innovative reason are equally central to their account of inquiry. The pragmatist thesis is that human thought always and necessarily arises in a situated complex of beliefs; on any given occasion, the great mass of these beliefs must be left tacit and simply used, not made explicit and subject to doubt, if thought is to proceed at all. But from this the pragmatists draw no

53. Otto Neurath, *Protocol Sentences*, in LOGICAL POSITIVISM, *supra* note 15, at 199, 201.

54. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS pt. 2, at 226e (G.E.M. Anscombe trans. 3d ed. 1968). For similar late-Wittgensteinian remarks, see, for example, *id.* pt. 1, paras. 19, 23, 217, 240-242; LUDWIG WITTGENSTEIN, ON CERTAINTY paras. 166, 189, 204 (G.E.M. Anscombe & D. Paul trans. 1969); LUDWIG WITTGENSTEIN, REMARKS ON THE FOUNDATIONS OF MATHEMATICS pt. 1, paras. 113-116 (G.E.M. Anscombe trans. rev. ed. 1978).

55. *See* MARTIN HEIDEGGER, BEING AND TIME 188-203 (J. Macquarrie & E. Robinson trans. 1962).

56. Among the best studies of historicist evolutionary thought are J. BURROW, *supra* note 35, and PETER STEIN, LEGAL EVOLUTION (1980) (focusing on legal thought). An important background figure in the development of historicist social thought, neglected by these writers, was David Hume. On the striking extent to which Hume's ideas anticipate the historicist aspects of pragmatism sketched here, see DONALD W. LIVINGSTON, HUME'S PHILOSOPHY OF COMMON LIFE 24, *passim*, (1984). For the legal significance of Hume's social thought, see GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 81-143 (1986).

inference that any particular idea or belief should be treated as even presumptively immune from questioning.

Rather, pragmatists treat critical reflection as a natural aspect of thought, an aspect as natural, if not as easy, as following habit. Conscious inquiry arises naturally whenever a person enters a problematic situation, a case in which habitual and unconscious belief produces trouble.[57] And this happens all the time, romantic conservatism notwithstanding. Here we come to the second and more familiar pragmatist thesis: Thought or inquiry is instrumental as well as situated in practice. Reflective, deliberative, even contemplative thinking originates in the practical need to solve real problems.

The pragmatists were not, of course, the first to situate thinking within the experience of everyday life; this insight goes back at least to Aristotle.[58] Their innovation was to move the category of the practical from the periphery to the center in their account of human reason. This reversed the familiar Platonic and Aristotelian ordering in which speculation or theory is the primary and highest form of reason. For pragmatists, the capacity for reason is best suited to practical concerns because it arises from our efforts to deal with those concerns.[59]

Both the traditional ordering of the practical and theoretical, and the pragmatist reversal of that ordering, are illustrated in the origin of the term "pragmatism" itself. Peirce took the word from Kant, who had defined "pragmatic" beliefs as those that were "contingent only," supplying "a ground for the actual employment of means to certain actions" even though "another might form a better judgment."[60] The strength of a pragmatic belief was measured by the believer's willingness to bet on it: "Sometimes it turns out that a man has persuasion sufficient to be valued at one ducat, but not at ten . . . . Thus pragmatic belief admits of degrees which, according to the difference of the interests at stake, may be large or small."[61]

In Kant's view, this merely contingent and relative pragmatic type of

57. *See* J. DEWEY, EXPERIMENTAL LOGIC, *supra* note 36, at 225; *see also* J. DEWEY, THE QUEST FOR CERTAINTY, *supra* note 39, at 244-45.

58. Dewey explicitly makes the connection to Aristotle in J. DEWEY, EXPERIMENTAL LOGIC, *supra* note 36, at 331-34. The pragmatist thesis that thought is always situated in a social context could likewise be traced to the Aristotelian thesis that human beings are essentially social animals. For works of a neo-pragmatist tendency that stress their Aristotelian roots, see ALISDAIR MACINTYRE, AFTER VIRTUE (1981); MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS (1986).

59. Contemplative and theoretical reason gained its traditional privilege in Western thought, Dewey argued, by virtue of the pervasive class-divided form of social organization that associates work and practical concerns with menial status, and the leisure for contemplation and theory with high status. *See* J. DEWEY, THE QUEST FOR CERTAINTY, *supra* note 39, at 4-5; J. DEWEY, EXPERIENCE AND NATURE, *supra* note 19, at 93-94.

60. IMMANUEL KANT, CRITIQUE OF PURE REASON 661 (F. Müller trans. 2d ed. 1896) (originally published 1781).

61. *Id.* at 661-62. Compare Holmes' view: "I describe myself as a *bet*tabilitarian. I believe that we can *bet* on the behavior of the universe in its contact with us. We bet we can know what it will be." 2 HOLMES-POLLOCK LETTERS, *supra* note 8, at 252 (letter dated Aug. 30, 1929).

belief was different in kind from genuine knowledge. Through science, human beings could gain true knowledge of the spatio-temporal natural world of cause and effect; and through reflection on their capacity for deliberation about what to do, they could gain true practical knowledge of the moral realm. But the assessment of the likelihood of attaining an end through given means must remain in the lower category of the pragmatic—mere guesswork. In a transvaluative flip worthy of Nietzsche, Peirce reversed the Kantian hierarchy, and assimilated all human science, speculative philosophy, and moral inquiry into the category of the pragmatic.[62] All judgments—scientific and moral as well as prudential and technical—were contingent, probabilistic, relative to a situation and to the interests of an agent or a community of agents. Thought was no longer to be conceived as something distinct from practice, but rather it simply *was* practice, or activity, in its deliberative or reflective aspect.[63]

In making this assimilation, the pragmatists took a decisive step beyond orthodox nineteenth-century positivism. Following a tradition as firmly lodged in British empiricism as in European rationalism, positivists had treated philosophy and science not as forms of problem-solving practical reason, but as autonomous, distinctively "mental" activities prior to and independent of practice, aimed at providing an accurate representation of an objective external reality. Rejecting this dualism, the pragmatists applied the utilitarian test of consequences to theories, as well as to rules for action, on the ground that all beliefs were, directly or indirectly, action-guiding and, accordingly, should be judged by their efficacy in leading the agent through experience successfully.[64]

The notion of making beliefs, thoughts, or propositions accurately represent external reality played no essential part in the pragmatic account of inquiry. The "externality" of "the world" was the other side of the coin to the "internality" of "the mind"; having rejected the one, the pragmatists had no need for the other.[65] They believed that it

62. *See* C.S. PEIRCE, *What Pragmatism Is*, *supra* note 43, para. 412.

63. Dewey makes the point best in the chapter *Nature, Life and Body-Mind*, in J. DEWEY, EXPERIENCE AND NATURE, *supra* note 19, at 248-97. *See also* 2 WILLIAM JAMES, THE WORKS OF WILLIAM JAMES: THE PRINCIPLES OF PSYCHOLOGY 1136-93 (F. Burkhardt ed. 1981) (originally published 1890).

64. Peirce once described pragmatism as "scarce more than a corollary" of the English psychologist Alexander Bain's definition of a belief as " 'that upon which a man is prepared to act.' " C.S. PEIRCE, *Historical Affinities and Genesis* (1906), in 5 COLLECTED PAPERS OF CHARLES SANDERS PEIRCE, *supra* note 37, para. 912. Peirce learned of Bain's definition from Holmes' friend, the young Boston lawyer Nicholas St. John Green, whom Peirce called "the grandfather of pragmatism." *Id.* On Bain's influence, see M. FISCH, *Alexander Bain and the Genealogy of Pragmatism*, in PEIRCE, SEMEIOTIC, AND PRAGMATISM, *supra* note 6, at 79. Holmes himself evidently learned of Bain's conception of belief indirectly, through the writings of James Fitzjames Stephen. *See* M. HOWE, THE SHAPING YEARS, *supra* note 26, at 267-70. On Green's contributions to pragmatism, see P. WIENER, *supra* note 6, at 152-71; on his apparent anticipation of some of Holmes' own ideas, see Jerome Frank, *A Conflict with Oblivion: Some Observations on the Founders of Legal Pragmatism*, 9 RUTGERS L. REV. 425, 434-44 (1954).

65. For a pragmatist, the materialist and behaviorist theories that deny the reality of the

sometimes made sense to speak of ideas or propositions as copying or representing facts, but representational accuracy was not a *general* criterion for evaluating either ordinary beliefs or scientific theories. The general criterion was success in helping people cope with the world.[66]

Holmes understood this feature of pragmatism and appreciated its originality; in one of his few bits of grudging praise for James' version of pragmatism, he acknowledged that his old friend had "made a valuable contribution in pointing out that ideas were not necessarily faint pictures of original experience . . . ."[67] He himself often invoked this pragmatist insight into the instrumental character of thought, most notably in the words of his *Gitlow* dissent: "Every idea is an incitement. It offers itself for belief and if believed it is acted on . . . ."[68]

A corollary of pragmatism, derived from the tenets that thought is always both situated and instrumental, is a kind of perspectivism. Because new beliefs emerge out of a complex of already existing beliefs that can never be made fully conscious and explicit, all useful beliefs may not ultimately prove commensurable with each other. Furthermore, because inquiry is at root an instrument to guide action (including the action of further inquiry), its products are subject to revision as the ends sought in action change. This double relativity of situation and purpose implies a tentative attitude toward all beliefs, including especially those "theoretical" and "fundamental" ones to which we are most likely to attribute permanent and universal validity. The pragmatist recognizes that the best account of a phenomenon (such as law) from one angle, for one purpose, at one time, might not serve as well from another perspective, rooted in another temporal context, and

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mental simply rehearse the standard Cartesian error of dividing the world into *res extensa* and *res cogitans*. *See* text accompanying note 32 *supra*. Such views accept the Cartesian categories, only to assert that one of them is empty. Pragmatists, instead, reject the basic metaphysical views on which the "spirit-matter" distinction rests. As Holmes wrote, "I don't perceive why there is any more right to think away consciousness than there is to think away nerve tissue—the total is the datum." *Holmes-Cohen Correspondence, supra* note 31, at 325 (letter dated July 21, 1920).

66. James promoted the so-called "pragmatic theory of truth," which equated true beliefs with those that are on the whole advantageous to hold. *See* W. JAMES, PRAGMATISM, *supra* note 14, at 197-236. This has long drawn the fire of critics who argue that we have independent standards of truth and falsity at least for some beliefs, such as those for which a "correspondence" account of truth is apt, and that there is no guarantee that beliefs true in the correspondence sense will always prove expedient, even in the long run, for those who hold them. *See* BERTRAND RUSSELL, *William James's Conception of Truth*, in PHILOSOPHICAL ESSAYS 112, 125-26, *passim* (rev. ed. 1966). Dewey corrected James on this point. *See* J. DEWEY, EXPERIMENTAL LOGIC, *supra* note 36, at 318-20. A solution to the problem, consistent with Dewey's approach, and reasonably congruent with ordinary usage, would be to confine judgments of truth or falsity to those claims or beliefs that are in principle subject to assessment in terms of representational accuracy.

67. 1 HOLMES-POLLOCK LETTERS, *supra* note 8, at 191 (letter dated Apr. 26, 1912).

68. Gitlow v. New York, 268 U.S. 652, 673 (1925); *cf. John Marshall, supra* note 42, at 270 ("all thought is social, is on its way to action"); OLIVER WENDELL HOLMES, *Introduction to the General Survey by European Authors in the Continental Legal Historical Series* (1913), in COLLECTED LEGAL PAPERS 298, 298 (1920) ("The philosophers teach us that an idea is the first step toward an act.") [hereinafter *Introduction to the General Survey*].

aimed at different goals. In its mature version, as Dewey stated it, pragmatism rejects the assumption that there must exist a comprehensive and final account of "reality" that, if attained, would bring the process of scientific and philosophical inquiry to a close.[69]

A pragmatic legal theorist will embed questions about law in a context and address them for a purpose, and so may reach different and apparently inconsistent answers as context and purpose vary. The point of view of the judge, the legal commentator, the counselor, and the legal historian or anthropologist might produce analyses of the concept of law that seem mutually inconsistent. There is no reason to assume in advance that these alternative accounts, directed as they are to different purposes, are, like the different perceptions the blind men had of the elephant, to be reconciled in some all-comprehending meta-account, though a wise pragmatist will also accept as legitimate the "philosophical" human need to generate such unifying accounts. This perspectival pluralism turns out to be particularly important to understanding Holmes' pragmatist jurisprudence, with its apparently conflicting accounts of the legal elephant as experience, logic, and prediction. To these accounts we now turn.

II. Law as Experience

To apply the central pragmatic tenets to law means to treat it as a practical enterprise in two senses. First, law is constituted of practices—contextual, situated, rooted in custom and shared expectations. Second, it is instrumental, a means for achieving socially desired ends, and available to be adapted to their service. The first point, about practice and context, suggests the perspective of the historical school of jurisprudence; the second or instrumental point suggests Benthamite utilitarian positivism. Standard nineteenth-century jurisprudence regarded these theories as rivals. A central innovation of legal pragmatism was to comprehend that each of them expresses a partial truth about law, the one reflecting its situated and the other its instrumental character. An adequate theory should synthesize them rather than

69. For an example of Dewey's perspectivism, see his comments on the aims of education:

> [T]he *statement* of aim is a matter of emphasis at a given time. And we do not emphasize things which do not require emphasis—that is, such things as are taking care of themselves fairly well. We tend rather to frame . . . our explicit aims in terms of some alteration to be brought about. It is, then, no paradox requiring explanation that a given epoch or generation tends to emphasize in its conscious projections just the things which it has least of in actual fact. A time of domination by authority will call out as response the desirability of great individual freedom; one of disorganized individual activities the need of social control as an educational aim.

JOHN DEWEY, DEMOCRACY AND EDUCATION 111-12 (1916). Nelson Goodman has provided an excellent contemporary version of perspectivism in N. GOODMAN, *supra* note 12, at 1-21, 91-140. For a clear account of the perspectivism of Nietzsche, a contemporary of the American pragmatists, and a thinker whose views on this subject paralleled theirs in important ways, see ALEXANDER NEHAMAS, NIETZSCHE: LIFE AS LITERATURE 42-73 (1985).

choose between them.[70] It is to Holmes that we owe the first clear statement of such a synthesis.

John Dewey stated the same synthesis when he came, late in life, to attempt a brief summary statement of his "philosophy of law."[71] With the historical jurists, he argued that the main source of law was custom, the network of interaction and expectation that gave structure to social life. At the same time, with the utilitarian positivists, he held that law's end or criterion of evaluation was the extent to which it produced desired practical consequences in application.[72]

In this synthesis, Dewey followed Holmes, with whose dictum that "the life of the law is not logic but experience" he was certainly familiar.[73] The well-known words that follow "experience" in the opening passage of *The Common Law* elaborate Holmes' conception of the sources of law:

> The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining how men should be governed.[74]

On the one hand, law is situated: It draws on *felt* necessities; *unconscious* intuitions; *prejudices*—the tacit patterns of thought inherited from the past. It cannot be treated as a pure logical system because it "embodies the story of a nation's development through many centuries."[75] On the other hand law is instrumental: It responds to moral and political *theories*; *avowed* intuitions of public policy—the products of future directed deliberation. To identify what law is, one must attend both to "what it has been" and to "what it tends to become."[76] The jurist must both

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70. Holmes indicated his ambition to synthesize the analytic and historical schools in OLIVER WENDELL HOLMES, *Science of Legal Judgment*, in JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 5 (H. Shriver ed. 1936) [hereinafter BOOK NOTICES] (reprinting Book Notice, 6 AM. L. REV. 134 (1871)):

> A treatise on the sources of the law which shall strike half way between the somewhat latitudinary theorizing of Savigny and the too narrow exclusiveness of Austin, will form a chapter of jurisprudence which is not yet written, and which it is worthy of the ambition of an aspiring mind to write.

Id. at 5-6.

John Stuart Mill had contrasted the Bentham-Austin analytical approach to Sir Henry Maine's historical jurisprudence, but without suggesting any synthesis of them, in his review essay on Austin's *Lectures on Jurisprudence*. JOHN STUART MILL, *Austin on Jurisprudence* (1863), in DISSERTATIONS AND DISCUSSIONS 157, 161-71 (1873). Holmes read this essay of Mill's. *See* Patrick Kelley, *Oliver Wendell Holmes, Utilitarian Jurisprudence, and the Positivism of John Stuart Mill*, 30 AM. J. JURIS. 189, 199 (1985).

71. John Dewey, in My Philosophy of Law 73 (Julius Rosenthal Foundation ed. 1941).

72. *See id.; see also* John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924); JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 51-57 (2d ed. 1954); John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926).

73. See Dewey's extensive quotation from Holmes' works in Dewey, *Justice Holmes*, *supra* note 19, at 33.

74. THE COMMON LAW, *supra* note 23, at 5.

75. *Id.*

76. *Id.*

remember and imagine, "alternately consult[ing] history and existing theories of legislation."[77] Law is "a reaction between tradition on the one side and the changing desires and needs of a community on the other."[78] To identify law with experience is to treat it as "policy coupled with tradition."[79]

Given that legal "experience" has both past-embedded (customary) and forward-looking (deliberative) aspects, what relation should these elements bear to each other for the judges and commentators who state and shape the law? Holmes answers, as usual, with an aphorism: "[C]ontinuity with the past is only a necessity and not a duty."[80] On the one hand, continuity with the past *is* a necessity—which is merely to repeat that law is always situated. No working system of practice can be built by reasoning from the bare ground of human nature alone. If we leave out all the institutions, practices, and beliefs that exist now only because they existed in the past, we will have insufficient resources to build with—no culture, no shared values, no language (hence no collective deliberation), and indeed no recognizably human individuals. Custom, the accretion of situated experience, "limits the possibilities of our imagination, and settles the terms in which we shall be compelled to think."[81]

On the other hand, continuity with the past is no categorical imperative—law is a functional instrument meant to meet present and future human needs. To show that a legal rule has a customary basis is not to justify that rule, though it may suggest expectations that impose legitimate claims. But the main practical point of historical research on law is to stress the contingent and variable character of practices that historically unsophisticated practical lawyers may regard as inevitable and rationally necessary. Historical inquiry aims toward reform. Rather than blindly follow a rule for no better reason than that "so it was laid down in the time of Henry IV,"[82] the judge and commentator should recognize that "the present has a right to govern itself so far as it can" and engage in "scrutiny and revision" guided by "considerations of social advantage."[83]

It is worth reviewing the debate between the schools of legal theory that supplied the context for Holmes' aphorism about continuity with the past. On the one side, English utilitarian positivists and European rationalist codifiers stood for the spirit of the Enlightenment, the spirit

77. *Id.*

78. OLIVER WENDELL HOLMES, *Twenty Years in Retrospect* (1902) [hereinafter *Twenty Years in Retrospect*], in THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 154, 155 (M. Howe ed. 1962) [hereinafter OCCASIONAL SPEECHES].

79. THE COMMON LAW, *supra* note 23, at 123.

80. *Law in Science, supra* note 24, at 211; *see also* OLIVER WENDELL HOLMES, *Learning and Science* (1895), in COLLECTED LEGAL PAPERS 138, 139 (1920) [hereinafter *Learning and Science*].

81. *Law in Science, supra* note 24, at 211; *cf.* THE COMMON LAW, *supra* note 23, at 5 n.a.

82. *The Path of the Law, supra* note 23, at 187.

83. *Learning and Science, supra* note 80, at 139; THE COMMON LAW, *supra* note 23, at 33; *The Path of the Law, supra* note 23, at 184.

summarized by Kant in the slogan "think for yourself!"[84] For all their differences, Kant, the philosopher behind German legal science, and Bentham, the founder of English analytical positivism, shared a commitment to liberate the human mind from its state of "tutelage"—the tutelage of the past, with its weight of customs, traditions, and inherited texts.

Nowhere did the Enlightened feel the weight of the past more than in the law. They responded with the thought-experiment of stripping away the tutelage of the past in imagination, preliminary to a similar defoliation in actual social practice. Thus Bentham sought to clear away the tangle of customary English common law and construct in its place a code designed on the Principle of Utility, every provision of which was rationally aimed at attaining the greatest happiness of the greatest number.[85] His enemy was a jungle of irrational custom, prejudice, and superstition, hidden behind a false front of pretended reason. The enemy was epitomized by the *Commentaries* of Sir William Blackstone, which culminated the long common law tradition while domesticating its inherited irrationalities in the smooth rhetoric of the Age of Reason.[86]

Against the codifying jurisprudence of the Enlightenment there arose a romantic and conservative reaction based upon faith in the virtues of tradition, organic solidarity, and cultural particularity, and upon distrust of innovation and abstract reason. In Europe, this reaction found its vehicle in the formation of the historical school of jurisprudence. The historicists argued that the basis of all law is custom, the set of evolved norms that give a society its identity. According to their central metaphor, a community's law is like its language, a collective product, peculiar to its people and their history, gradually developed, a structure of contingent elements and rules, and yet one so deeply rooted in practice as to be almost entirely resistant to conscious modification. Because law had this character, to reform it through codification was impossible and where attempted harmful—as misguided as the attempt to impose a constructed artificial language on a people.[87]

Though the historical school had an important English spokesman in Sir Henry Maine, it never found as large a following in the English-speaking countries as it did in Germany.[88] This was not because it

84. "*Sapere Aude*!"—literally, "Dare to know!" IMMANUEL KANT, *What is Enlightenment?* (1784), in KANT ON HISTORY 3 & n.1 (L. Beck ed. 1963).

85. J. BENTHAM, *An Introduction to the Principles of Morals and Legislation*, *supra* note 30, at 2.

86. *See generally* JEREMY BENTHAM, *A Fragment on Government; or a Comment on the Commentaries* (1776), in 1 WORKS OF BENTHAM, *supra* note 29, at 221 [hereinafter J. BENTHAM, *A Fragment on Government*].

87. The classic statement of the historical school position is FRIEDRICH KARL VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (reprint ed. 1975) (A. Hayward trans. 2d. ed. 1831).

88. Sir Henry Maine's best known works applied historicist social theory to law but did not take the polemical position in favor of customary law and against codification and reformist legislation characteristic of von Savigny and his American disciple James Coolidge Carter.

failed to touch a sympathetic nerve but rather because it said nothing that was in substance new to English and American lawyers. Historical jurists only restated the conventional wisdom of the "the common law tradition" as it had been articulated over the centuries by Coke, Hale, and Blackstone and translated into the language of political theory by David Hume and Edmund Burke. The commonplaces of that tradition included the conception of law as custom, adapted to circumstances through a gradual process of case-by-case decision by judges each of whom felt bound to discover a law implicit in the body of prior precedents. This process, in its collective wisdom, was thought more impressive than the conscious intelligence of any individual could possibly be; the law that emerged from it was said to be the perfection of reason, but an admittedly artificial reason, to be learned only through apprenticeship and experience.[89]

The two schools of jurisprudence thus shared the factual premise that the law up to the present had largely been the product of custom. At that point they diverged—the Enlightened argued that the only proper way to remove the law's haphazard excrescences was to start from scratch (at least in imagination) and build up a new body of law by rational inference from first principles; the historical jurists responded that workable law must always be based in custom, and that no good could possibly come from conscious and instrumental law reform.

Holmes' maxim that "continuity with the past is no duty but only a necessity" synthesized these two schools and provided a reconciliation of their main tenets. On the one hand, the historicists were importantly right. The Benthamite project of clearing away and building anew was the social and institutional analogue of the Cartesian epistemological project of submitting all inherited belief to doubt, so as to rebuild knowledge from the ground up upon indubitable foundations. And the pragmatic response was the same one Peirce had made to Descartes: In remaking a society or its law there was no ground zero to set out from; the only starting point was where you actually found yourself, "laden with an immense mass of cognition already formed, of which you cannot divest yourself if you would; and who knows whether, if you could, you would not have made all knowledge impossible to yourself?"[90] As

See, e.g., HENRY MAINE, ANCIENT LAW (2d ed. 1863). But in his later work, Maine revealed his full commitment to the standard Burkean legal conservatism of the historical jurists. See, for example, his praise of "historical Constitutions, Constitutions gradually developed through the accumulation of experience" as compared to "*a priori* Constitutions, Constitutions founded on speculative assumptions remote from experience." HENRY MAINE, POPULAR GOVERNMENT 176 (1885).

89. For "the artificial reason of the law," see Prohibitions del Roy, 12 Coke's Reports 63, 65 (1608); for the connection between Burkean political philosophy and the common law tradition, see J.G.A. POCOCK, *Burke and the Ancient Constitution: A Problem in the History of Ideas*, in POLITICS, LANGUAGE AND TIME 202 (1973); for Hume's place in that tradition, see G. POSTEMA, *supra* note 56, at 110-43; and for a modern conservative political philosopher's restatement of the common law tradition, see the chapter *The Changing Concept of Law*, in FRIEDRICH AUGUST VON HAYEK, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER 72-93 (1973).

90. C.S. PEIRCE, *What Pragmatism Is*, *supra* note 43, para. 416.

Holmes put the same point in the legal context,

> [o]ne fancies that one could invent a different code under which men would have been as well off as they are now, if they had happened to adopt it. But that *if* is a very great one. The tree has grown as we know it. The practical question is what is to be the next organic step.[91]

On the other hand, Holmes' view of law also embodied utilitarian reformism, because recognition of law as customary and situated did not necessarily have conservative implications. No one could discard all customary beliefs and practices at once, but this did not immunize any subset of those beliefs and practices from "scrutiny and revision."[92] As Holmes said, just because "we all are compelled to take on faith at second hand most of the rules on which we base our action and our thought," it does not follow "that each of us may not try to set some corner of his world in the order of reason, or that all of us collectively should not aspire to carry reason as far as it will go thoughout the whole domain."[93] In the short run we may be ruled by our habits and unreflective desires; in the longer run we have "every reason . . . for trying to make our desires intelligent."[94]

This is the framework of Holmes' mature pragmatic conception of law. In thus describing it, I do not mean to deny that Holmes himself did indeed hold many conservative political and legal views. In fact, he began his career quite close to the orthodoxy of the common law tradition. In his first essay in legal theory, *Codes, and the Arrangement of the Law*,[95] Holmes debated in fairly conventional terms the standard topic of codification. He argued that the strength of the common law was its flexibility and adaptability. The source of this strength was the tacit practical wisdom of the common law judge, who "decides the case first and determines the principle afterwards."[96] Legal principles gradually emerged out of lines of precedent, so that a "well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step."[97] No individual's "faculty of generalization, however brilliant," could supply these advantages, which would be lost if a code were adopted as binding law.[98]

But even in his early writings, Holmes came to deviate significantly from conservative common law orthodoxy. He soon recognized that

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91. OLIVER WENDELL HOLMES, *Holdsworth's English Law* (1909), in COLLECTED LEGAL PAPERS 285, 289 (1920) [hereinafter *Holdsworth's English Law*].

92. THE COMMON LAW, *supra* note 23, at 33.

93. *The Path of the Law, supra* note 23, at 185.

94. OLIVER WENDELL HOLMES, *Ideals and Doubts* (1915), in COLLECTED LEGAL PAPERS 303, 305 (1920) [hereinafter *Ideals and Doubts*].

95. Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, in FORMATIVE ESSAYS, *supra* note 7, at 77, 77 (reprinting *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870) [hereinafter *Codes, and the Arrangement of the Law*].

96. *Id.*

97. *Id.*

98. *Id.*

the traditional viewpoint presupposed the existence of a unified community, bound by shared values and interests. Yet he saw before him an industrial society rapidly dividing along class lines at the same time that it was becoming more economically interdependent.[99] And he became increasingly skeptical about the rationally adaptive character of the process of case-by-case decision. Borrowing a concept from the anthropologists, Holmes came to believe that "in large and important branches of the law the various grounds of policy on which the various rules have been justified are later inventions to account for what are in fact *survivals* from more primitive times."[100] No longer did it seem so clear to him that the less conscious the process of evolution the better the product. Rather the discovery that new reasons have been invented to justify old practices that in fact survive merely by the force of social inertia should encourage lawyers to "reconsider" and "decide anew whether those reasons are satisfactory."[101]

During his years on the Massachusetts bench, Holmes became more sympathetic with Benthamite reformism—particularly toward the end of the 1890s, when he confronted the obdurately conservative response of the bench and bar to the demands of the labor movement. This experience drove him to write that it was "revolting" to retain dysfunctional rules of law supported by nothing more than "blind imitation of the past."[102] He advocated yet more strongly the practical use of legal history for "clearing away rubbish" by identifying those rules that were "mere survivals" ripe for reform.[103] The ultimate aim was to produce a legal system in which "every rule . . . is referred articulately and definitely to an end which it subserves, and . . . the grounds for desiring that end are stated or are ready to be stated in words."[104] The law's postulates should ideally be established "upon accurately measured social desires instead of tradition."[105]

But these Benthamite words alone do not fully convey Holmes' views; he retained his historicist skepticism about the prospects for ac-

99. See his anonymously published editorial note on the prosecution of the leaders of the British Gas Stokers' Strike. OLIVER WENDELL HOLMES, *Herbert Spencer: Legislation and Empiricism*, in BOOK NOTICES, *supra* note 70, at 104 (reprinting *Summary of Events: Great Britain*, 7 AM. L. REV. 582 (1873)).

100. THE COMMON LAW, *supra* note 23, at 33 (emphasis added). Holmes took the concept of the "survival" from the early English anthropologist Sir Edward Tylor. For a discussion of Tylor, see J. BURROW, *supra* note 35, at 234-59. Holmes cited Tylor's work in O.W. Holmes, *Primitive Notions in Modern Law* (pt. 1), in FORMATIVE ESSAYS, *supra* note 7, at 129, 135-36, 139 (reprinting *Primitive Notions in Modern Law*, 10 AM. L. REV. 422 (1876)).

101. THE COMMON LAW, *supra* note 23, at 33.

102. *The Path of the Law*, *supra* note 23, at 187.

103. *Law in Science*, *supra* note 24, at 225-26. Holmes thus articulated his pragmatic approach to history in a letter to Laski: "History has to be rewritten because history is the selection of those threads of causes or antecedents that we are interested in—and the interest changes in fifty years." 1 HOLMES-LASKI LETTERS, *supra* note 10, at 409 (letter dated Mar. 11, 1922).

104. *The Path of the Law*, *supra* note 23, at 186. Compare the similar discussion of legal classification in J. BENTHAM, *A Fragment on Government*, *supra* note 86, at 237.

105. *Law in Science*, *supra* note 24, at 225-26.

curately measuring social desires. He did not believe that even with the help of "statistics and every modern appliance" there would ever be "a commonwealth in which science is everywhere supreme."[106] In practice, it was "only occasionally" possible to measure competing desires accurately; in the usual case, "the worth of the competing social ends . . . cannot be reduced to number and accurately fixed."[107] On the question of the "worth" of different policies "in a more far-reaching sense than that of expressing the *de facto* will of the community for the time. . . . as yet no one has much to say."[108] Thus for him the notion of a code comprehensively justified on utilitarian grounds could never be more than an ideal providing inspiration for more limited changes.[109]

Holmes' attitude toward legal and political reform remained at bottom "an unconvinced conservatism."[110] "I don't believe much in anything that is," he once wrote to John Henry Wigmore, "but I believe a damned sight less in anything that isn't."[111] Precisely because he "rarely could be sure" that one rule "tends more than its opposite to the survival and welfare of the society where it is practiced,"[112] he was slow to depart from precedent. "Precisely my skepticism, my doubt as to the absolute worth of a large part of the system we administer, or of any other system, makes me very unwilling to increase the doubt as to what the court will do."[113] The only legal value that could be "assumed as certainly to be wished" was "that men should know the rules by which the game will be played."[114]

In fact, Holmes' conservatism was not always simply skeptical and "unconvinced." Alongside his pragmatic conception of the critical uses of history, he had a powerful streak of romantic antiquarianism. "I love the old," he wrote to Pollock.[115] "I feel . . . to my finger tips" a "reverence for venerable traditions," he said in a speech dedicating a memorial to the sailors of Ipswich, every sentence of which expresses his passionate attachment to the Massachusetts past.[116] The sentiment applied to law as well, where it produced some deep purple Holmesian rhetoric. The common law, growing "for near a thousand years," was "one of the vastest products of the human mind," a mighty system that

106. *Id.* at 242.
107. *Id.* at 231.
108. *Holdsworth's English Law, supra* note 91, at 288.
109. *See Law in Science, supra* note 24, at 242-43.
110. *Holdsworth's English Law, supra* note 91, at 289.
111. Letter From Oliver Wendell Holmes to John Henry Wigmore (Dec. 4, 1910), *quoted in* MARK DE WOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1882, at 198 (1963) [hereinafter M. HOWE, THE PROVING YEARS].
112. O.W. HOLMES, *Twenty Years in Retrospect, supra* note 78, at 156.
113. *Id.*; *see also Law in Science, supra* note 24, at 239; *Holdsworth's English Law, supra* note 91, at 290; *cf.* Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting); Stack v. New York, N.H. & Hart. R.R., 177 Mass. 155, 158-59, 58 N.E. 686, 687 (1900).
114. *Holdsworth's English Law, supra* note 91, at 289.
115. 2 HOLMES-POLLOCK LETTERS, *supra* note 8, at 123 (letter dated Nov. 5, 1923).
116. OLIVER WENDELL HOLMES, *Ipswich* (1902), in OCCASIONAL SPEECHES, *supra* note 78, at 136, 136.

had "the final title to respect that it exists, that it is not a Hegelian dream, but a part of the lives of men."[117]

As with most of his passions, Holmes had the capacity for self-critical distance from his antiquarianism. Thus he could write: "How delightful is the mixed emotion half noble, aesthetic—half fishy—that of the collector, with which one turns to ancient things . . . ."[118] He warned of the "deceptive charm" of legal history and the accompanying "pitfall of antiquarianism" into which lawyers were drawn by the "peculiar logical pleasure in making manifest the continuity between what we are doing and what has been done before."[119]

But awareness of the "peculiar" and "half fishy" pleasures of nostalgia did not always protect Holmes. His intended masterpiece, *The Common Law*, is deeply flawed by sentimental legalistic antiquarianism. His project in the book was to produce a doctrinal restatement of the common law that was guided by the demands of contemporary policy, using historical research primarily to identify anachronistic survivals. But Holmes' love of the old and the alluring logical pleasures of historical continuity led him repeatedly astray. The book today reads as a hodgepodge, honeycombed with passages in which ancient cases are treated not as objects of critical historical explanation, but as authoritative precedents, to which Holmes gave ingenious but tendentious lawyerly readings in support of controversial propositions of law he favored.[120]

Because Holmes' conservatism in both its skeptical and its romantic mode was so pervasive, it is important to see that it has no necessary connection with the basic pragmatist tenets that he so well articulated. Dewey, for example, welcomed Holmes as a philosophical kindred spirit even while recognizing that the two of them disagreed on many of the political questions of the day.[121] Dewey used pragmatist premises as a basis for an optimistic brand of activist liberal reformism. For him, the situated character of human belief and practice served a liberating rather than a Burkean and cautionary function; when he criticized the ascription of finality and universality to some set of local, customary, and partial principles, he conceived himself as removing an obstacle to social transformation.[122]

Others have made even more radical use of the pragmatist stress on

117. *Learning and Science, supra* note 80, at 140; *The Path of the Law, supra* note 23, at 194; *see also* 1 HOLMES-POLLOCK LETTERS, *supra* note 8, at 24 (letter dated Nov. 5, 1883) (Holmes found Burke "marvelous great.").

118. 1 HOLMES-LASKI LETTERS, *supra* note 10, at 64 (letter dated Feb. 27, 1917).

119. *The Path of the Law, supra* note 23, at 194; *Learning and Science, supra* note 80, at 139.

120. The point was made first in 1882 in A. V. Dicey's review of *The Common Law*. *See* A.V. Dicey, *Holmes's "Common Law"*, THE SPECTATOR, LITERARY SUPPLEMENT, June 3, 1882, at 745, *reprinted in* Touster, *supra* note 5, app. 2, at 712 [reprinted version hereinafter cited as *Dicey Review*]. For specific quotes, see note 258 *infra*. The point is made again, persuasively, in Gordon, *supra* note 3, at 733.

121. Dewey, *Justice Holmes and the Liberal Mind, supra* note 73, at 37, 43.

122. *See* JOHN DEWEY, HUMAN NATURE AND CONDUCT, *supra* note 40, at 80-82; JOHN

context and situation. The point is that if theory is necessarily situated within and closely dependent upon practice, then current theory loses its claim to finality. Things now "impossible even in theory" become possible as theory adapts to changes in practice, themselves driven in part by earlier theory. That is the common-sense basis of the dialectical Marxist conception of revolutionary *praxis* and of the critique of ideology characteristic of much modern Marxism.[123] The application of this idea to law has been one of the central themes of the Critical Legal Studies movement.[124] These radical uses are as consistent with a pragmatist framework as Dewey's liberal reformism or Holmes' skeptical conservatism.

From a certain philosophical perspective, Holmes' pragmatist theory of law is, like much pragmatist theory, essentially banal. At its most abstract level it concludes in truisms: Law is more a matter of experience than of logic, and experience is tradition interpreted with one eye on coherence and another on policy. Similarly, Peirce's critique of foundational epistemology did away with the exciting theories that had engaged great minds from Descartes to Kant and, if accepted, left nothing interesting to say at the most general level about how human beings acquire knowledge. In the same vein, almost all of Dewey's best work involved the critique of elegantly structured dualistic theories and their replacement with one version or another of his standard monistic (and monotonous) truisms: that generalizations tend to be situated instrumentalities marking temporary distinctions of degree, not absolute truths delineating sharp boundaries, and that some of them are good for some purposes in some contexts, others for other purposes in other contexts. After a pragmatist critique, the theory of the effect of separation on human relationships might come down to: sometimes "out of sight, out of mind," and sometimes "absence makes the heart grow fonder."

The payoff of pragmatist philosophy is thus often more in the critique than in the construction. This is why Dewey called philosophy "criticism" and metaphysics the "ground-map of the province of criticism."[125] Pragmatism rejects the maxim that you can only beat a theory with a better theory, when this carries with it such essentially

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DEWEY, LIBERALISM AND SOCIAL ACTION 48-50, *passim* (1935); J. DEWEY, THE PUBLIC AND ITS PROBLEMS, supra note 72, at 6-7.

123.

> The materialist doctrine concerning the changing of circumstances and upbringing forgets that circumstances are changed by men and that it is essential to educate the educator himself. . . . The coincidence of the changing of circumstances and of human activity or self-changing can be conceived and rationally understood only as *revolutionary practice.*

KARL MARX, *Theses on Feuerbach*, in THE GERMAN IDEOLOGY 121, 121 (C. Arthur ed. 1970) (discovered and originally published in 1888).

124. *See, e.g.*, Robert W. Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281, 286 (D. Kairys ed. 1982).

125. J. DEWEY, EXPERIENCE AND NATURE, *supra* note 19, at 412-13.

aesthetic criteria of theory choice as elegance, rigor, and originality. No rational God guarantees in advance that important areas of practical activity will be governed by elegant theories. Certain useful theories, such as those concerning the motions of the heavenly bodies, do indeed turn out to be simple, rigorous, and altogether pleasing to the intellectual taste. On the other hand, the theories most helpful for understanding the weather are messy, complex, and unlovely, and they may always remain so.

Pragmatists thus tend to be theoreticians armed with a presumptive suspicion of neat theories; this is not because they despise neatness, but because they know how obsessively those drawn to theorizing love it. Thus, typically of pragmatist theory, Holmes' central point about judges' law was a critical one; law *isn't* "logic" in Langdell's exciting and geometrically precise sense.[126] It was partly to avoid a discursive vacuum, and partly to nudge practice roughly in the right direction, that he added the vague constructive alternative that law *is* "experience," by which he meant an indefinite mixture of habit, instrumental reason, and the search for internal coherence. Dewey used the term "experience," and his other favorite, "situation," in very much the same way, as designedly vague terms meant to give a sense of partial closure and some approximate practical remapping of the conceptual space his critique had vacated.[127]

Within the field of legal practice and ideology, the Holmesian slogan about the primacy of experience over logic serves as a guide and morale-booster to practitioners and scholars who work in a context in which Langdellian formalism retains a primeval and often unrecognized power. But from an external philosophical perspective that evaluates theories according to their intrinsic intellectual interest, the slogan has nothing much to recommend it. No doubt this is why books about legal philosophy discuss Holmes' "prediction theory" much more than his maxim about logic and experience. The idea that statements of law are no more than predictions of judicial decisions is bold, reductive, and stimulating; it is also easily discredited if treated as a general definition of law, good for all purposes. But that is not how Holmes intended it. The conception of law he recommended to judges and other authoritative interpreters is to be found in the inspired imprecision of his account of law as experience.

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126. *See* text accompanying notes 133, 147-148, 162 *infra.*

127. Rorty pushes this point further than I would and criticizes Dewey's tendency to supply vague affirmative accounts to replace the rigorous but misleading theories that were the object of his critique. RICHARD RORTY, *Dewey's Metaphysics*, in CONSEQUENCES OF PRAGMATISM, *supra* note 12, at 72. In my view, the affirmative accounts are essential; Dewey's promotion of an alternative metaphysics organized around appropriately vague (but never wholly contentless) concepts like "experience" and "the situation" responds to a widespread and entirely legitimate human need for basic concepts, ontological ultimates, an overall "groundmap" or world-picture, even in the absence of epistemological foundations.

III. LAW AS LOGIC

Before we come to consider Holmes' prediction theory, it will be helpful to take account of the role of logic in his overall approach to theory within law. As we consider this subject, we come upon an apparent Holmesian paradox. Led by the late Grant Gilmore, revisionists have recently drawn attention to the fact that much of Holmes' actual work was devoted to the abstract and conceptual ordering of doctrine into a structured and coherent system[128]—in other words, the kind of doctrinal legal "logic" that Langdell specialized in and that Holmes so famously contrasted with "experience." How are we to reconcile these doctrinal labors, which mark Holmes as one of the leading practitioners of classical nineteenth-century legal science, with his own celebrated critique of that enterprise? The answer is that although Holmes was indeed a conceptualist, he viewed legal systematization as a practical aid in teaching and understanding law. Unlike Langdell, Holmes did not believe doctrinal conceptualization could produce a deductive system that would make legal reasoning formal and scientific.

The revisionist commentators have correctly pointed to an aspect of Holmes' work not sufficiently stressed before. The project behind *The Common Law* was avowedly doctrinal and conceptual: "to make known the content of the law; that is, to work upon it from within, or logically, arranging and distributing it, in order, from its *summum genus* to its *infima species*, so far as practicable."[129] Holmes sought to replace the old arrangement of Anglo-American private law, based on Blackstone and the writ system, with a new "philosophical" structure organized around the categories of contract and tort. Supplementing this recategorization, he also sought to focus private law doctrine around the generalization that legal standards, even when misleadingly phrased in terms of internal and subjective states of mind, actually tended to make liability turn on the objective question whether the actor's external conduct matched that which was to be expected of the typical member of the community, the "reasonable man." And to a large extent, in collaboration with Langdell, Ames, Wigmore, Keener, and others, Holmes succeeded: By the end of the century, the new doctrinal classification, and to a lesser degree the generalization of the "external" standard of liability, had come to dominate teaching and professional commentary in private law.[130]

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128. G. GILMORE, THE DEATH OF CONTRACT, *supra* note 3, at 14-53; G. GILMORE, THE AGES OF AMERICAN LAW, *supra* note 3, at 48-56; Gordon, *supra* note 3, at 726-29.

129. THE COMMON LAW, *supra* note 23, at 173.

130. The best account of this doctrinal reclassification remains Duncan Kennedy, The Rise and Fall of Classical Legal Thought 1850-1940 (Oct. 1975) (unpublished manuscript) (on file with the author). On Holmes' central role in the classical reordering of tort law, see G. EDWARD WHITE, TORT LAW IN AMERICA 12-19 (1980). On his role in the development of classical contract doctrine, see G. GILMORE, THE DEATH OF CONTRACT, *supra* note 3, at 14-53. For the triumph of the external standard, see Pollock's letter of 1893: "Nemesis is upon us. The reasonable man and the 'external standard' have filtered down to the common examina-

In his earliest theoretical work, Holmes attempted to follow Austin's lead and develop a universal scheme for the classification of legal duties. By the mid-1870s, however, he had come to doubt that the concept of legal duty was sufficiently general to serve as the basis for any such ordering. And in the process he had lost interest in universal schemes—which he later called "striving for a useless quintessence of all systems, instead of an accurate anatomy of one."[131]

But the anatomical metaphor itself suggests his continued interest in the structural treatment of legal concepts. As he wrote to James Bryce in 1879, Holmes' aim in *The Common Law* was to "analyse what seem to me the fundamental notions and principles of our substantive law, putting them in an order which is a part of or results from the fundamental conceptions."[132] This is not a project obviously different from the one Langdell stated in his much-quoted manifesto of classical legal science:

> Law, considered as a science, consists of certain principles or doctrines. . . . If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number.[133]

Nor did Holmes abandon the conceptualist enterprise after he went on the bench.[134] Almost two decades after *The Common Law*, in *The Path of the Law*, Holmes' most comprehensive statement of his mature legal theory, he restated in the strongest terms his dedication to conceptualism. The "most important" point of "every new effort of legal thought" was to "generalize [the law] into a thoroughly connected system," made up, as Langdell had insisted, of a "not unmanageably large" number of legal principles.[135] To thus systematize legal doc-

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tion candidate, who is beginning to write horrible nonsense about them." Letter from Frederick Pollock to Holmes (Aug. 31, 1893), *reprinted in* 1 HOLMES-POLLOCK LETTERS, *supra* note 8, at 46.

131. *The Path of the Law, supra* note 23, at 196-97. For an example of the idea of "general jurisprudence" which Holmes was criticizing, see J. AUSTIN, THE PROVINCE OF JURISPRUDENCE, *supra* note 26, at 366-69, 373.

132. Letter from Holmes to James Bryce (Aug. 1879), *quoted in* M. HOWE, THE PROVING YEARS, *supra* note 111, at 25. In another letter written in 1879, Holmes said his purpose was to "make a new and more fundamental analysis" of the "cardinal principles and conceptions of the law" so as to make "a new Jurisprudence or new first book of the law." Letter from Holmes to Arthur Sedgwick (July 12, 1879), *quoted in* Gordon, *supra* note 3, at 719.

133. 1 CHRISTOPHER COLUMBUS LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS viii-ix (2d ed. 1879).

134. For the contrary view that Holmes' experience as a judge led him to abandon his interest in the conceptualist "arrangement of the law," see Mark Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court,* 63 VA. L. REV. 975, 1045-46 (1977); and G. Edward White, *The Integrity of Holmes' Jurisprudence,* 10 HOFSTRA L. REV. 633, 649-51 (1982).

135. *The Path of the Law,* supra note 23, at 168-69. Holmes later repeated that his ambition was to give the law a "continuous, logical, philosophical exposition." OLIVER WENDELL HOLMES, *Speech at Bar Dinner* (1900), in COLLECTED LEGAL PAPERS, 244, 245 (1920) [hereinafter *Speech at Bar Dinner*]. Holmes there explained that although he had not been able to realize this ambition as a judge, he would never abandon the project. Even after retiring from the Supreme Court in 1932, he spoke of "writing a little book embodying my views on the ultimates of the law." "[B]ut," he went on to say, "I have expressed them *passim* and I desire only

trine, the jurist must "look straight through all the dramatic incidents" presented by a case, analyze it in purely legal terms, and recognize the application of the broadest rules. The failure to get past the merely "dramatic" led jurists to write useless books on the law of subjects such as "Railroads or Telegraphs."[136]

The Legal Realists in their critique of conceptual jurisprudence would later seek (without much success) to reorder the law around just such "functional" and "real-world" topic headings. And ironically the Realists claimed Holmes as their chief authority in the assault upon the classical doctrinal framework of legal thought—a framework that he had helped to build.[137] In addition to his slogan about logic and experience, consider these other Holmesian taglines that served, and still serve, as battle cries in the never-ending War Against Langdell: "Law, being a practical thing, must found itself on actual forces";[138] "The important phenomenon is . . . the justice and reasonableness of a decision, not its consistency with previously held views";[139] "[T]he real justification of a rule of law, if there be one, is that it helps to bring about a social end which we desire";[140] "General propositions do not decide concrete cases."[141]

Nor did the Realists simply misconstrue the object of Holmes' critique in these famous passages. The line about logic and experience first appeared in Holmes' unsigned review of Langdell's *Summary of Contract*,[142] where the context makes clear that Langdellian legal conceptualism was indeed the conception of "law as logic" that Holmes had in mind.[143] Later he referred to the "fallacy" that a system of law "can be worked out like mathematics from some general axioms of conduct."[144] In *The Common Law* he described two forms of the mistake of considering the law "only from its formal side": attempting "to deduce the *corpus* from *a priori* postulates," and "the humbler error of supposing the science of the law to reside in the *elegantia juris*, or logical cohesion of part with part."[145]

It is not difficult to identify the two groups of legal logicians Holmes had in mind. Those who would deduce the content of the law from *a priori* postulates were the German Pandectist legal scientists; they pur-

repose. I am persuading myself that one has no duties at 91." 2 HOLMES-POLLOCK LETTERS, *supra* note 8, at 307 (letter dated Apr. 5, 1932).

136. *The Path of the Law*, *supra* note 23, at 196.

137. *See, e.g.*, J. FRANK, *supra* note 1, at 253-60.

138. THE COMMON LAW, *supra* note 23, at 168.

139. Book Notice, 14 AM. L. REV. 233, 234 (1880) (unsigned review; for attribution to Holmes, see M. HOWE, THE PROVING YEARS, *supra* note 111, at 155-57) [hereinafter *Langdell Review*].

140. *Law in Science*, *supra* note 24, at 238.

141. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

142. C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS (2d ed. 1880).

143. *See* M. HOWE, THE PROVING YEARS, *supra* note 111, at 155-58.

144. *The Path of the Law*, *supra* note 23, at 180.

145. THE COMMON LAW, *supra* note 23, at 32.

ported to found their universalized version of Roman law on neo-Kantian first principles of justice.[146] Closer to home were those who portrayed the law as an entirely self-contained geometric system of axioms, theorems, and proofs, generated by constructing the simplest and most elegant internally consistent set of principles that could organize and reconcile most of the cases; for Holmes, these were the Langdellians, as his review of Langdell's book confirms beyond doubt.[147]

How can we reconcile Holmes' critique of Langdell and the German Pandectists with his own highly conceptualistic doctrinal work? Holmes supplies an important partial answer in the practical conception of logic that he shared with Dewey and the pragmatists. As we shall see later, Holmes' answer is only a partial one; he loved the logical manipulation of doctrine for its own sake nearly as much as Langdell did, and this could lead him astray in practice. But he differed from Langdell in possessing a coherent and useful working conception of the point and place of doctrinal concepts and principles in the law.

Unlike many of the Legal Realists, Holmes greatly valued the role of conceptual systems in legal study, but unlike Langdell, he saw that role as a subordinate one. For Langdell, the fundamental principles of the common law, once extracted by induction from the cases, had the status of axiomatic general truths; they *were the law*, and individual decisions shown to conflict with them were thereby shown to have been wrongly decided.[148] Holmes, by contrast, considered the same general principles to be guidelines, rules of thumb, instruments of inquiry designed as practical aids to making sound decisions. They were not like mathematical axioms; the very generality of their terms guaranteed that their application would give rise to difficult or borderline cases, in which judges would have to exercise "the sovereign prerogative of choice."[149] In exercising that prerogative, judges would be guided, consciously or not, by "views of public policy" and "considerations of social advantage."[150] And this was as it should be, for the principles were meant only as intermediate premises designed to guide judges toward decisions in the public interest.

The contrast between Holmes' and Langdell's views can be illustrated by their respective treatment of the "mailbox rule" chestnut—the question of when a contractual proposal accepted by mail became binding. For Langdell, there was only one acceptable answer: The doctrine of consideration required that there must be a return promise before there could be a contract, and by its very nature a promise could

146. Holmes later makes clear that the German Pandectists are the target of his critique. *Id.* at 163-68.

147. *See Langdell Review, supra* note 139, at 233-34. For my own analysis of Langdell's geometric vision of legal thought, see Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

148. *See* Grey, *supra* note 147, at 11-13, 16-20.

149. *Law in Science, supra* note 24, at 239.

150. THE COMMON LAW, *supra* note 23, at 32; *The Path of the Law, supra* note 23, at 184.

not be complete until communicated. Hence the decisions holding that a contract became binding when the letter of acceptance was mailed were simply wrongly decided. Once it was shown that these decisions were inconsistent with established principle, any arguments that the rule they embodied was more just or more practical were simply "irrelevant."[151]

By contrast, Holmes, who accepted the same general view of the consideration doctrine as did Langdell, believed that no general principle could deductively settle such a question of legal detail. He criticized Langdell's treatment of this issue as that of a "legal theologian."[152] On a question at the borderline of an established legal principle, "[i]f convenience preponderates in favor of either view, that is a sufficient reason for its adoption."[153] And a rigid rule prohibiting contract formation without actual communication would violate practical common sense; it would mean, most inconveniently, that "if the letter had been delivered to the promisee and was then snatched from his hands before he had read it, there would be no contract."[154]

Holmes' attitude toward the place of principles in legal reasoning is likewise illustrated when we put his slogan "[g]eneral propositions do not decide concrete cases" back into its context within his *Lochner* dissent.[155] The general principle Holmes referred to was one he had just stated and relied on himself: "[A] constitution is not intended to embody a particular economic theory."[156] He meant his famous slogan only to qualify, not to negate, the force of this general principle, a principle which would if accepted "carry us far toward the end."[157] The principle did not deductively decide *Lochner*; one might accept it and yet strike down the maximum hours law, characterizing liberty of contract not as part of a controversial and historically transient economic theory but rather as a fundamental aspect of personal liberty. Yet Holmes believed that a judge who approached the case guided by this principle would be nudged in the direction of the correct decision.

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151. C. LANGDELL, *supra* note 142, at 15, 20-21. I discuss Langdell's approach to arguments of justice and policy in Grey, *supra* note 147, at 13-15.

152. *Langdell Review*, *supra* note 139, at 234.

153. THE COMMON LAW, *supra* note 23, at 239.

154. *Id.* at 240; *cf. id.* at 167 (on the propriety of the "sacrifice of principle to convenience").

155. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). The line was a Holmesian "chestnut," often repeated in various forms. *See, e.g.*, Otis v. Parker, 187 U.S. 606, 608 (1903); Vegelahn v. Guntner, 167 Mass. 92, 106, 44 N.E. 1077, 1080 (1896) (Holmes, J., dissenting); *See also* 1 HOLMES-LASKI LETTERS, *supra* note 10, at 243 (letter dated Feb. 19, 1920)("I always say in conference that no case can be settled by general propositions, that I will admit any general proposition you like and decide the case either way."); *id.* at 390 (letter dated Dec. 22, 1921) (virtually identical statement).

156. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

157. *Id.* at 76 (Holmes, J., dissenting). Similarly, Holmes concluded an essay setting forth general principles of tort law with the words "my object is not to decide cases, but to make a little clearer the method to be followed in deciding them." OLIVER WENDELL HOLMES, *Privilege, Malice and Intent* (1894), in COLLECTED LEGAL PAPERS 117, 137 (1920) [hereinafter *Privilege, Malice and Intent*].

Holmes first clearly articulated his view of general doctrines as guidelines and legal distinctions as matters of degree early in his career. There was no single idea about law that he repeated so often or was so proud of:

> The growth of the law is very apt to take place in this way: Two widely different cases suggest a general distinction, which is a clear one when stated broadly. But as new cases cluster around the opposite poles, and begin to approach one another, the distinction becomes more difficult to trace; the determinations are made one way or the other on a very slight preponderance of feeling, rather than articulate reason; and at last a mathematical line is arrived at by the contact of contrary decisions, which is so far arbitrary that it might equally well have been drawn a little further to the one side or to the other. The distinction between the groups, however, is philosophical, and it is better to have a line drawn somewhere in the penumbra between darkness and light, than to remain in uncertainty.[158]

When Holmes says that the distinctions between legal categories are "philosophical," he means (among other things) that the concepts defining and structuring those distinctions are fundamental in a practical sense, superior to alternative frames of analysis for purposes of decision.[159] He does not mean, however, that legal decisions follow deductively from "the very nature" of legal categories like contract or tort, or legal concepts like consideration or proximate cause.[160] To paraphrase Holmes' view, a fundamental legal concept, necessarily general and imprecise, applies with decreasing certainty to fact situations as they diverge from its paradigm instance.[161] In the area where neighboring concepts overlap, legal decision must assign disputed particular cases to one or another on grounds not deducible from the internal structure of the concepts.

To fix the contrast between Holmes' and Langdell's views of the place of legal principles, it is useful to distinguish between conceptual-

158. Holmes, *The Theory of Torts* (1873), in FORMATIVE ESSAYS, *supra* note 7, at 117, 119 (reprinting *The Theory of Torts*, 7 AM. L. REV. 652 (1873)) [hereinafter *The Theory of Torts*]. For a few among the many repetitions of the point, see, for example, THE COMMON LAW, *supra* note 23, at 101; *Law in Science, supra* note 24, at 232. Chief Justice Charles Doe of New Hampshire repeated the gist of the idea in his opinion in Stewart v. Emerson, 52 N.H. 301, 314 (1872). With characteristic jealousy, Holmes resented Doe's failure to give him credit; he later characterized Doe, in many ways a better judge than he, as "second-rate." The controversy is explored by Doe's biographer John Philip Reid in Reid, *Brandy in His Water: Correspondence Between Doe, Holmes and Wigmore*, 57 NW. U.L. REV. 522 (1962). Ironically, Holmes seems to have picked up the idea he was so proud of from Nicholas St. John Green. *See* NICHOLAS ST. JOHN GREEN, *Insanity in Criminal Law*, in ESSAYS AND NOTES ON THE LAW OF TORT AND CRIME, 161, 166-67 (1933) (reprinting Book Notice, 5 AM. L. REV. 704 (1871)).

159. There was more to what Holmes meant by "philosophical" than this. *See* text accompanying notes 259-263, 265-268 *infra*.

160. Holmes describes the demand for a doctrine of property based upon "internal juristic necessity drawn from the nature of possession itself" as expressing "a characteristic yearning of the German mind." THE COMMON LAW, *supra* note 23, at 164. Coming from him, this was not a compliment.

161. Compare the well-known discussion of the "open texture" of language and its significance for the law in H.L.A. HART, THE CONCEPT OF LAW 121-32 (1961).

ism and formalism. Conceptualism is the project of structuring law into a system of classification made up of relatively abstract principles and categories; formalism is the project of making law certain by making legal reasoning deductive. Both Holmes and Langdell were conceptualists; both were formalists. But they differed in how they conceived the relation between the two projects. For Langdell, the two were integrated; formality was to be achieved through the conceptualist enterprise itself. The general principles must serve as axioms constituting a deductive system that would make legal reasoning exact and scientific.[162]

For Holmes, by contrast, the conceptualist goal of coherent order and the formalist goal of objective predictability had to be pursued by different means. The concepts that were best for classificatory purposes, by virtue of their very generality, could not be applied exactly and predictably in deciding particular cases. Their application invariably involved inexact judgments of degree. The only way to achieve certain and predictable law was to artificially fix "a mathematical line" at some relatively arbitrary point within the penumbra where opposing concepts overlapped. For example, the law started with the distinction between infancy and adulthood, and ended with a line at age twenty-one; it began with the genuinely distinct but fuzzily bounded notions of night and day, and ended with a statute drawing the line at one hour before sunrise and one hour after sunset.[163]

Langdell thought of legal categories and principles as ideal realities which the legal scientist could discover and describe and which a judge could simply follow. By contrast, Holmes' primary criterion for assessing legal concepts was instrumental; legal principles were "correct" insofar as they served a practical purpose, and that purpose was typically a heuristic one. A principle was an indexing device that guided the lawyer to relevantly similar cases, while at the same time guiding the judge to the policy considerations relevant in deciding the hard cases that fell under it. Holmes stated the heuristic aim in one of his earliest essays, claiming "the end of all classification should be to make the law *knowable*."[164] He repeated the point a quarter century later in *The Path of the Law*: The aim of conceptual arrangement was to make the law "easier to be remembered and to be understood."[165]

Holmes' practical heuristic criterion made "telegraphs" an inappropriate category because grouping cases on this subject did not efficiently organize legal knowledge for the law student, the lawyer, or the

162. For a fuller discussion of conceptualism, formalism, and Langdell's combination of the two, see Grey, *supra* note 147, at 6-15.

163. *Law in Science, supra* note 24, at 232. For other examples, see THE COMMON LAW, *supra* note 23, at 101-02.

164. Holmes, *The Arrangement of the Law: Privity*, in FORMATIVE ESSAYS, *supra* note 7, at 95, 96 n.2 (reprinting *The Arrangement of the Law: Privity*, 7 AM. L. REV. 46 (1872)) [hereinafter *The Arrangement of the Law: Privity*].

165. *The Path of the Law, supra* note 23, at 168.

judge. Courts did not decide cases according to whether telegraph companies were involved. By contrast, Holmes said, "marine insurance" was a proper subdivision of contract law because "the fact that the agreement was of that sort has attached to it further and more specific consequences, such as the implied warranty of seaworthiness, which cannot be reduced under any more general head."[166]

The efficiency of conceptual schemes cannot be determined in the abstract where the aim is a practical heuristic one. Holmes often made this point by denying Langdellian claims of *scientific* status to the activity of legal categorization. "Law is not a science, but is essentially empirical. Hence, although the general arrangement should be philosophical, even at the expense of disturbing prejudices, compromises with practical convenience are highly proper."[167] Or as he wrote in direct criticism of Langdell's treatment of the law of contract:

> As a branch of anthropology, law is an object of science; the theory of legislation is a scientific study; but the effort to reduce the concrete details of an existing system to the merely logical consequence of simple postulates is always in danger of becoming unscientific, and of leading to a misapprehension of the nature of the problem and the data.[168]

In conceptually ordering the law, Holmes thought a practical balance must be struck between the claims of habit on the one hand, and those of taxonomic efficiency on the other. He favored retaining certain legal concepts even though we would not adopt them if we were arranging the law from scratch; the costs of relearning and reindexing would outweigh the gains from added clarity. Holmes mentioned the concept of ownership and the (since generally abandoned) category of the law of persons as examples of taxonomically awkward legal notions that were probably too well entrenched to be worth replacing.[169] But the benefits of conceptual efficiency and the costs of inertia were real. A quarter of a century later, still pursuing the same themes, Holmes said: "Our forms of contract, instead of being made once [and] for all, like a yacht, on lines of least resistance, are accidental relics of early notions . . . ."[170]

Since the heyday of the Realists, legal thinkers have tended to as-

166. OLIVER WENDELL HOLMES, *Codification and Scientific Classification of the Law,* in BOOK NOTICES, *supra* note 70, at 59, 60-61 (reprinting Book Notice, 7 AM. L. REV. 318 (1873)).

167. *Codes, and the Arrangement of the Law, supra* note 95, at 80.

168. *Langdell Review, supra* note 139, at 234. In 1925, Holmes wrote to his young friend Dr. John Wu, who had written an essay praising the German neo-Kantian legal theorist Rudolf Stammler:

> Perhaps your phrase legal *science* indicates the beginning of our divergence. . . . [W]hen it comes to the development of a *corpus juris* the ultimate question is what do the dominant forces of the community want and do they want it hard enough to disregard whatever inhibitions may stand in the way.

OLIVER WENDELL HOLMES, *Letters to Dr. Wu,* in BOOK NOTICES, *supra* note 70, at 149, 187 (letter dated Aug. 26, 1926) [hereinafter *Letters to Dr. Wu*].

169. *Codes, and the Arrangement of the Law, supra* note 95, at 80.

170. *Learning and Science, supra* note 80, at 139.

sume that legal taxonomy and conceptual doctrine-building necessarily rest on Langdellian premises. Behind this assumption often lies the instinctive nominalism, or cult of the concrete, that denies all practical importance to generalization and abstraction. Yet no pragmatist would endorse such an antipathy to generalization. All the major pragmatist figures accepted and asserted the importance of general principles and systematic thought; they insisted only that the test of abstractions must be their usefulness for action and concrete inquiry. Peirce in particular abhorred nominalism and argued for the independent reality of universals.[171] And other pragmatists who did not share his metaphysical views nevertheless agreed with him about the practical importance of coherent and systematic generalization in all fields of human thought. In a 1924 essay, Dewey applied this standard pragmatist position to legal thought:

> [L]ogical systematization with a view to the utmost generality and consistency of propositions is indispensable but is not ultimate. It is an instrumentality, not an end. It is a means of improving, facilitating, clarifying the inquiry that leads up to concrete decisions . . . . It is most important that rules of law should form as coherent generalized logical systems as possible.[172]

He could have been paraphrasing Holmes; indeed he probably was.

Holmes had written that "[a] generalization is empty so far as it is general. Its value depends on the number of particulars which it calls up to the speaker and the hearer."[173] He did not mean by this that generalization was useless and should be abandoned, no more than when he wrote that he would "admit any general proposition that anyone wants to lay down and decide the case either way."[174] Though he rejected the Langdellian conception of principles as axiomatic foundations for legal decision, he found great value in a system of general legal principles which could call to mind just those rules, cases, and considerations of policy that were useful in deciding the matter at hand.[175]

Indeed, all the leading Anglo-American legal thinkers of the period from about 1870 to 1920 were conceptualists in the same sense. They all would have rejected the later Legal Realist project of breaking the general and abstract concepts of the law into narrow categories and

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171. CHARLES SANDERS PEIRCE, *Lectures on Pragmatism,* in 5 COLLECTED PAPERS OF CHARLES SANDERS PEIRCE, *supra* note 37, paras. 93-101.

172. Dewey, *Logical Method and Law*, *supra* note 72, at 19.

173. *Law in Science, supra* note 24, at 240. This was another of Holmes' "chestnuts," and he repeated its substance often. *See, e.g., Letters to Dr. Wu, supra* note 168, at 167 (letter dated Sept. 20, 1923) ("[T]he only use of a pint pot is to present the beer (or whatever lawful liquid it may contain), and infinite meditation upon the pot never will give you the beer.").

174. 1 HOLMES-LASKI LETTERS, *supra* note 10, at 390 (letter dated Dec. 22, 1921).

175. *See* THE COMMON LAW, *supra* note 23, at 173; OLIVER WENDELL HOLMES, *The Use of Law Schools* (1886), in COLLECTED LEGAL PAPERS, 35, 41-42 (1920) [hereinafter *The Use of Law Schools*]; *The Path of the Law, supra* note 23, at 168, 195-202.

type-situations based in extra-legal experience.[176] The legal thinkers of Holmes' generation confronted a practical historical situation that impressed upon them the need for a new and perspicuous categorical arrangement of the common law. With the demise of the writ system, the organization of cases around the traditional forms of action was breaking down.[177] Blackstone's arrangement of the common law, the basis of elementary legal education for a century, had become obsolete; its scheme had served as a transition between a feudal status-based and a liberal market-based legal system, and the period of transition was over.[178] The spread of university-based legal education had created new demand for an intelligible arrangement of curriculum and courses, and as members of a new full-time law professoriate, with the time and the incentive to do scholarship, Holmes' contemporaries saw meeting that demand as their primary task and opportunity.

While conceptualism was universal during the classical period of Anglo-American legal thought, adherence to the Langdellian notion of legal science was not. Not only Holmes, but Gray, Nicholas St. John Green, Thayer, and Wigmore, and in the next generation Arthur Corbin—conceptualists all in their legal scholarship—were critics of (or at least deviants from) Langdellianism. They did not accept Langdell's insistence that legal thought could and should be autonomous and universally formal as well as conceptually ordered. They did not aspire to make common law reasoning exact and deductive by excluding considerations of justice and social policy. Conceptual system-building had a significant but subordinate place in the law for them; they treated principles, categories, and taxonomies as instruments for use in the process of legal inquiry rather than its end result.[179]

176. One articulation of the Realist preference for narrow and real-world categories is Karl N. Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222 (1930). Holmes, in comparison, prefered "tort" and "contract" as legal categories over "shipping" and "telegraphs." *See The Path of the Law*, *supra* note 23, at 196. In his memoirs, Williston focused upon the preference for narrow categories as the only idea of the Legal Realists that he wholly rejected. SAMUEL WILLISTON, LIFE AND LAW 208-09, 213-14 (1940).

177. Holmes himself emphasized the disappearance of the forms of action as one of the factors facilitating his kind of conceptual rearrangement of common law doctrine. Other factors were "[t]he philosophical habit of the day, the frequency of legislation, and the ease with which the law may be changed to meet the opinions and wishes of the public"; these contributed to a situation in which "judges as well as others should openly discuss the legislative principles upon which their decisions must always rest in the end . . . ." THE COMMON LAW, *supra* note 23, at 64.

178. *See* Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV., 205, 231-34 (1979).

179. For Gray's criticism of Langdell, see M. HOWE, THE PROVING YEARS, *supra* note 111, at 158. For Green's practical and policy-oriented approach to the law, see almost any of the pieces in N. GREEN, *supra* note 158. *Proximate and Remote Cause*, *id.* at 1, is the best known, but just as notable are *Contributory Negligence on the Part of an Infant*, *id.* at 18, 24-26, and *Married Women*, *id.* at 31, a powerful argument which concludes: "The law of the status of women is the last vestige of slavery." *Id.* at 48. For the pragmatism of Thayer and Wigmore, see almost any passage from their treatises on the law of evidence. *E.g.*, JAMES BRADLEY THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 484-89 (1898) (introducing the "best evidence rule"); 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT

It was Holmes who best articulated the view of the place of doctrinal "logic" that these early critics of classical Langdellian legal science shared. He can be fairly criticized for preaching better than he practiced the subordination of conceptual elegance and the primacy of convenience and justice.[180] But his preachments on this subject, greatly influential when he produced them, and surviving through the years by virtue of the lasting power of his literary art, remain one of the most valuable of his legacies to American law.

IV. Law as Prediction

With a sense of Holmes' instrumental approach to theorizing in mind, we are in a better position to understand what he is best known for by legal philosophers—his statement that "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[181] This has come to be enshrined in the orthodox jurisprudence textbooks as "the prediction theory," where it competes with "right reason," "tradition and custom," "the command of the sovereign," and "the behavior of officials" to be accepted as the ultimate definition of law.[182]

Holmes developed the prediction theory during the early 1870s at the same time that he was attending the meetings of the Metaphysical Club at which the pragmatic movement was founded. For this reason especially, intellectual historians have taken a keen interest in the connection between this theory and the doctrines of pragmatism.[183] They have stressed the reductive aspects of Holmes' theory: the analysis of statements about "the law" as predictions of judges' decisions, and the analysis of the decision in terms of the remedy. These elements are indeed consistent with pragmatic analysis, particularly of the sort Peirce favored, but they equally follow from the application to law of the scientific positivism of Bentham, Austin, and Mill.

Actually, the distinctively pragmatic aspect of Holmes' approach was the practical conception of jurisprudential theory that it embodied. When Holmes defined law as the prediction of judicial action, he was theorizing in the pragmatist way, contextually and instrumentally. The context and the purposes Holmes had in mind were those defined by a limited but particularly important legal perspective, that of a private

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Common Law §§ 24-36 (1904) (introducing "general theory of relevancy"). No one can doubt that Corbin was a critic of Langdellianism, but his multi-volume treatise on contract law also attests to his careful attention to the conceptual structure of the subject. *See* Arthur Linton Corbin, Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law (1950).

180. *See* texts accompanying notes 246-271, 298-310 *infra*.

181. *The Path of the Law*, *supra* note 23, at 173.

182. Since Holmes was at least as much concerned to direct attention to what courts "do in fact"—that is, the remedies they grant—as he was to recast propositions of law in predictive form, "the predicted remedy theory" would better capture his double emphasis. But I will stay with the standard nomenclature.

183. *See, e.g.*, M. Fisch, *supra* note 6.

lawyer counseling a client. Once this perspectival limitation is seen, most of the standard objections against the prediction theory drop away.

Holmes divided legal thought and discourse between the categories of the theoretical and the practical in two quite different ways. First, he distinguished between treating law practically (from the inside) as a working body of rules, concepts, and techniques meant to guide private and official decisions and treating it theoretically (from the outside) as an object of historical or anthropological investigation or a stimulus to philosophical speculation.[184] Second, within the internal ("practical" in the first sense) treatment of law, he distinguished between the practical (everyday, relatively concrete) formulations used by the working practitioner, and the theoretical (academic, relatively abstract) discourse of the teacher or doctrinal commentator. The predictive analysis of law is a theory only in the second sense; it is a relatively abstract and general formulation, but it is practical in the sense of internal to the law, rooted in the activity of legal practice, and conceived instrumentally as a means for carrying on that activity. This pragmatic conception of internal theory underlay Holmes' remarks to the effect that theory was "not to be feared as unpractical" and that "even for practical purposes" it "generally turns out the most important thing in the end."[185]

This pragmatic perspective on legal theory was not standard in Holmes' time, and even today it is by no means commonly made explicit. Typically, the kind of analytical jurisprudence pursued by Bentham, Austin, and their successors has not been seen in these practical terms, but rather as a scientific analysis of legal phenomena. Analytical jurisprudence thus presents itself as "philosophy of law"—an external account of legal phenomena purporting to be truth for truth's sake, using the apparatus of another discipline, as does "history of law" or "anthropology of law." This standard view—which treats jurisprudence as theoretical in the first or external sense described above—is implicit, for example, in T. E. Holland's statements that "an exposition of existing law is obviously quite another thing from a science of law," and that jurisprudence, in contrast to law as such, is the "formal science of those relations of mankind which are generally recognised as having legal consequences."[186]

184. *See, e.g., Law in Science, supra* note 24, at 211; *Introduction to the General Survey, supra* note 68, at 300-01.

185. *The Path of the Law, supra* note 23, at 200; OLIVER WENDELL HOLMES, *The Theory of Legal Interpretation* (1899), in COLLECTED LEGAL PAPERS 203, 209 (1920).

186. THOMAS ERSKINE HOLLAND, THE ELEMENTS OF JURISPRUDENCE 4, 8 (4th ed. 1888). Consider in this light Sarah Austin's recollection of her husband's remark that he " 'ought to have been a schoolman of the twelfth century—or a German professor.' " Sarah Austin, *Preface* to 1 J. AUSTIN, LECTURES ON JURISPRUDENCE 1, 12 (5th ed. 1885) (2d ed. 1861). For Austin, the laws were one thing—sovereign commands, backed by force, aimed at social utility. The principles of jurisprudence or legal science were quite another—discoveries, axioms and theorems, conceptual truths about the nature of things legal. Austin presents his never-end-

In comparison, Holmes saw jurisprudence as internal to the legal enterprise, "simply law in its most generalized part," so that "the process [of legal thought] is one, from a lawyer's statement of a case . . . up to the final analyses and abstract universals of theoretic jurisprudence."[187] He viewed his analyses of jurisprudential concepts such as right, duty, and law itself in the same light that he viewed his conceptual formulations of substantive legal doctrine. They were meant to be practical guides to the better working of the legal system.

Unlike Holland and most of the other analytical jurists, Holmes never spoke of internal legal theory as "legal science." Rather he saw it as recipe-making, with the proof of the pudding in the eating. Science was not so practical; it was the grander enterprise of seeking exact knowledge, typically for its own sake, at the hands of those who serve "Truth, their only queen."[188] In connection with the study of law, Holmes reserved the honorific term "science" for the external historical or anthropological study of law, sometimes adding the pious hope that the utilitarian calculus might one day produce a genuinely useful Benthamite "science of legislation."[189]

Holmes proposed his prediction theory as a useful guideline for a particular and confined heuristic purpose, not as a general scientific or conceptual truth about the nature of law. As a scientific definition—one that might, for instance, identify the essence of the distinctively legal subset of social phenomena, and hence provide a theoretical basis for the comparative study of widely varying legal systems—its inadequacies have often been noted. The prediction theory fails to capture the legal attitudes of officials and probably of most ordinary citizens, attitudes that any reasonably complete sociological account of law must consider. It leaves out the element of perceived legitimacy, which seems a necessary aspect of any serious attempt to distinguish legal from other constraints as part of a general scientific study of society.[190] Nor, for similar reasons, is it an adequate account of law from the perspective of the judge.

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ing cascade of definitions and subdefinitions, distinctions and subdistinctions without ever saying for what purpose they are offered. His lecture, *The Uses of the Study of Jurisprudence,* in J. AUSTIN, THE PROVINCE OF JURISPRUDENCE, *supra* note 26, at 366-93, is a somewhat inept effort to list certain practical side benefits for law students of a study that Austin himself obviously regards as self-justifying.

187. *The Path of the Law, supra* note 23, at 195, 168. Or as Holmes noted in another context, "jurisprudence means simply the broadest generalization of the principles and the deepest analysis of the ideas at the bottom of an actual system. It is the same process, carried further, by which the law is carried out from particular cases into general rules." OLIVER WENDELL HOLMES, *The Bar as a Profession* (1896), in COLLECTED LEGAL PAPERS 153, 157 (1920) [hereinafter *The Bar as a Profession*].

188. *The Use of Law Schools, supra* note 175, at 38.

189. *See Codes, and the Arrangement of the Law, supra* note 95, at 80; *Langdell Review, supra* note 139, at 234; *Letters to Dr. Wu, supra* note 168, at 187 (letter dated Aug. 26, 1926).

190. Modern legal positivists have taken account of this element in their analyses: Kelsen, with his concept of the "normativity" of law, and Hart with his requirement that some participants take an "internal" attitude. *See* HANS KELSEN, PURE THEORY OF LAW 4-10 (1967); H.L.A. HART, *supra* note 161, at 79-88.

Holmes began to work toward the prediction theory in his first jurisprudential essay, *Codes, and the Arrangement of the Law*.[191] His project was to develop a systematic arrangement for teaching and storing legal materials. As a preliminary step in working out such a taxonomy, it is natural to seek a working definition of the subject matter, a principle by which to identify material for arrangement. An especially useful working definition might also serve to suggest a basis for the classificatory categories themselves.

Seeking a working definition and a principle of classification in 1870, Holmes looked first to Austin, who had defined "the province of jurisprudence" as comprising the general commands of the sovereign. Austin had analyzed a command as an expression of desire backed by the threat of sanction and defined the sovereign as that determinate body habitually obeyed without itself habitually obeying anyone else. Austin had inherited from Bentham a focus on sanctions as the feature distinguishing between legal and other norms; a legal right is a claim backed by a sanction.[192]

Holmes agreed with this focus, but asked why Austin had confined the province of jurisprudence to rules laid down by a sovereign. He pointed out that there were other quite definite rules of conduct backed by reliable threats of enforcement, such as rules of "positive morality," which differed from proper laws in Austin's sense only in that the sanctions backing them were applied directly by public opinion, rather than through the courts. Holmes suggested that Austin's purpose in excluding these rules of popular morality from the province of jurisprudence must be a practical one, defined by the range of professional concerns. "Courts . . . give rise to lawyers, whose only concern is with such rules as the courts enforce. Rules not enforced by them, although equally imperative, are the study of no profession. It is on this account that the province of jurisprudence has to be so carefully determined."[193]

But if the professional concerns of lawyers defined the province of law study, then Austin had been wrong to define law as the commands of a sovereign. International law, for example, fell outside this definition, but it was a subject, as Holmes said, "which lawyers do practically study"; it had "rules of conduct so definite as to be written in textbooks, and sanctioned in many cases by the certainty that a breach will be followed by war."[194] A practical definition of law—in the sense of treating whatever concerned lawyers in their professional practice—must include rules such as these.

Moving from the issue of sovereignty to the question of how to classify the rules enforced by courts, Holmes noted that Austin had fol-

191. *Codes, and the Arrangement of the Law, supra* note 95.

192. *See* J. AUSTIN, THE PROVINCE OF JURISPRUDENCE, *supra* note 26, at 9-33; J. BENTHAM, OF LAWS IN GENERAL, *supra* note 28, at 1, 18-19.

193. *Codes, and the Arrangement of the Law, supra* note 95, at 81.

194. *Id.*

lowed the approach of the Roman lawyers, arranging legal doctrines according to the rights they created in claimants—dividing them first into the broad categories of personal and property rights, and further subdividing from there. Holmes questioned whether classification on the basis of legal rights was consistent with Austin's emphasis upon the sanction as the distinguishing mark of the legal norm. Since what gave a rule legal character was that it was backed by a sanction, and sanctions operated directly on defendants, Holmes thought that a sanction-based legal taxonomy should presumably classify rules in terms of *duties* (the liabilities of defendants) rather than *rights* (the claims of those benefiting from those liabilities.)[195]

Within two years of writing *Codes, and the Arrangement of the Law*, Holmes stated the prediction theory in the course of the jurisprudence lectures he gave at the Harvard Law School, a brief summary of which he published as a book notice in 1872.[196] Now he made his pragmatic orientation explicit; the defining feature of "lawyers' law" was the fact that it was "enforced by the procedure of the courts, *and therefore [was] of practical importance to lawyers*."[197] His theory was to be the theory of a practice, the practice of law:

> The only question for the lawyer is, how will the judges act? Any motive for their action, be it constitution, statute, custom, or precedent, which can be relied upon as likely in the generality of cases to prevail, is worthy of consideration as one of the sources of law, in a treatise on jurisprudence.[198]

The professional perspective led Holmes to think in terms of prediction. For the lawyer counseling a client, law was whatever general factors might motivate a judge.[199] That perspective also produced another crucial modification of Austin's analysis, replacing the sanction with the more general concept of "judicial action," or remedy. Austin had said that every proper law was a command, creating a duty; a command was an expression of a wish backed by a sanction, or threat of unpleasant consequence. But in this formulation, Holmes argued, Austin had "looked at the law too much as a criminal lawyer."[200] Taxes are levied by law, are of concern to lawyers, and are unpleasant consequences of taxed conduct, but no one would say that a "protective tariff on iron . . . create[s] a duty not to bring it into the country." Rather, the tax statute grants the person subject to it "an option at a certain

195. *Id.* at 80. For Holmes' later thoughts on this issue, see *The Arrangement of the Law: Privity, supra* note 164, at 95. *See also* THE COMMON LAW, *supra* note 23, at 173; *The Path of the Law, supra* note 23, at 168-69, 174-75.

196. Holmes, *Book Notices,* in FORMATIVE ESSAYS, *supra* note 7, at 91 (reprinting Book Notice, 6 AM. L. REV. 723 (1872)) [hereinafter *Notice: Jurisprudential Lectures*].

197. *Id.* at 91-92 (emphasis added).

198. *Id.* at 92.

199. Holmes distinguished "general" factors from such "singular motives" as "the blandishments of the emperor's wife"; these are not lawyers' law, Holmes thought, only because their singularity renders them useless as a "ground of prediction." *Id.* at 92.

200. *Id.* at 93.

price." The concept of duty only really applies to those actions that it is the legislature's "absolute wish" to prevent.[201]

Having made his point with the obvious case of the tax, Holmes went on to show its much more significant but less obvious extension to the common law's main civil remedy: compensatory money damages. In the normal case, the law only charges a defendant a price for his action, measured by the actual cost imposed on the plaintiff. Since they create merely "[l]iability to pay the fair price or value of an enjoyment," civil damages are "not a penalty."[202] Following the analysis developed in *Codes, and the Arrangement of the Law*, Holmes concluded that an award of only compensatory damages does not rest on a breach of a legal duty in any meaningful sense. The basic rules of private law thus do not fit Austin's definition because they create options rather than laying down commands. But nevertheless they are law for the practical reason that they are "applied by the courts and must therefore be known by professional men."[203]

The analysis of civil law in terms of remedy and liability rather than sanction and duty led Holmes directly to one of his central insights: Ordinary private law, rather than enforcing the principles of corrective justice that establish moral rights and duties among individuals, is primarily a device for distributing risk according to the variable demands of public policy. If the civil remedy of compensatory damages is not a penalty, then, contrary to what Austin thought (and contrary to the main current of nineteenth-century case law and commentary), justice does not require restricting civil liability to cases involving a breach of moral right or duty. Liability without fault simply charges the defendant the price of his activity, and might be imposed for reasons of "[p]ublic policy" alone. For instance, "it may be thought that titles should be protected against even innocent conversion," or that persons should be compensated "for injuries from extra-hazardous sources, in which case negligence is not an element."[204] Generally, in cases of ordinary civil liability "[t]he object of the law is to accomplish an external result," and legal rules imposing civil liability, like taxes and subsidies, can vary with public needs and demands. As an example, Holmes noted that strict liability for straying cattle had been "very properly abandoned in some of the western states, where the enclosure of their vast prairies is necessarily for a long time out of the question."[205]

The literature of legal theory contains few performances of more

201. *Id.* at 92.
202. *Id.* at 93.
203. *Id.* at 93.
204. *Id.*
205. *Id.* Later, Holmes claimed that general strict liability in tort should be rejected as "offending the sense of justice," and unconvincingly tried to defend the consistency of that argument with his central point that civil liability involving only compensatory damages should be allocated on grounds of policy not restrained by notions of fair punishment. *See* THE COMMON LAW, *supra* note 23, at 78, 118.

concentrated brilliance than the thirty-one-year-old Holmes' "book notice" of scarcely a thousand words.[206] His formulations represented a breakthrough, the implications of which would not be fully absorbed for several generations. At the outset of his career as a legal theorist, he planted the germ of the whole modern analysis of tort and contract in terms of risk allocation, later embodied in such notions as loss spreading, cost internalization, and efficient breach. He went on during the 1870s to develop further the policy conception of the common law, though the results of his work must be sought amidst cryptic and dubiously relevant historical and anthropological learning in *The Common Law*.[207]

Later, Holmes learned better to separate his scientific from his doctrinal interests, and he finally came to formulate his mature jurisprudential views, most fully articulated in 1897 in *The Path of the Law*.[208] In that speech he gave both the prediction theory and its associated public policy conception of civil liability their most familiar and influential statement. The occasion was an address to law students, and from the beginning Holmes stressed more forcefully than ever before the practical professional perspective out of which his theory arose. He began by noting that "[w]hen we study law we are not studying a mystery but *a well-known profession*," or, as he put it later, a "*business*."[209] The two main aspects of this business are advocacy ("to appear before judges") and counseling ("to advise people in such a way as to keep them out of court"). Law is a profession because people, knowing that "the command of the public force is intrusted to . . . judges in certain cases," are willing to pay for the advice of those who make "[t]he object of [their] study . . . the prediction of the incidence of the public force through the instrumentality of the courts."[210]

One might fairly criticize this account of law practice, centered on litigation and remedies, as too narrow, both normatively and descriptively. Good lawyers should frame advice to clients with more in mind than what remedial "price" will be charged if the clients are brought into court. And lawyers do in fact advise clients, conduct negotiations, and design transactions and legal structures with more in mind than the outcome of potential litigation. This was true in Holmes' time, and is even more true today. And yet even now practitioners often speak of aspects of their work not ultimately referable to the possibility of litigation as "extra-legal." However much lawyers need to understand ethics, commerce, technology, politics, public relations, and psychology, still they have no licensed monopoly as experts in any of these fields.

206. The essay contains yet another significant element, a trenchant criticism of Austin's concept of sovereignty. *Notice: Jurisprudence Lectures, supra* note 196, at 91.

207. For discussion of the contradictions and confusions in *The Common Law*, see Gordon, *supra* note 3; *see also* text accompanying notes 246-271 *infra*.

208. *The Path of the Law, supra* note 23.

209. *Id.* at 167, 171 (emphasis added).

210. *Id.* at 167.

But lawyers alone are permitted to argue before courts and to advise clients about what courts are likely to do; in this sense, litigation does provide the distinctive and, in a way, the defining focus of their work.

Whatever its faults, Holmes' account of the counseling lawyer's work bounds the claims of the prediction theory. For one who proposes to study "the law as a business with well understood limits," Holmes says it is heuristically useful to adopt the viewpoint of a "bad man" who cares only for "material consequences."[211] Not that good lawyers must be themselves bad men; indeed he thought the practice of law "tends to make good citizens and good men."[212] Rather, the bad man's perspective focuses attention on the operative aspect of the law, the remedy—"the law and nothing else" as Holmes put it.[213] He insists on the sharp distinction between law and morals embodied in the bad man's perspective "with reference to a single end, that of learning and understanding the law."[214]

Holmes applied the "bad man" or remedial perspective to generalize his earlier critique of the concept of duty in civil cases. The official rhetoric of the law claims to attach liability to violations of legal duty: wrongs (torts) and breaches (contracts). But when we wash this rhetoric in the "cynical acid" provided by the insight that the law acts as law only through its remedies, the "duty" element vanishes.[215] Because the only remedy normally available for an ordinary tort or contractual breach is compensatory money damages, the law really only charges the tort or contract defendant the *price* of his conduct and no more. "If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference."[216]

Holmes here suggests a double analogy. First, he assimilates normal tort and contract liability into each other by means of the unusual locution "commit a contract." Second, he compares both of these ordinary forms of civil liability to analogous liabilities that involve no "fault" or "breach of duty" as ordinarily understood. For an example of a tort, Holmes takes statutes that allow a mill owner to flood upstream neighbors' property on condition that they be compensated for the loss in value.[217] From the bad man's remedy-centered perspective, tort liability in trespass is like the duty to compensate for lawful flooding under these Mill Acts. And contractual liabilities are all, in the remedial sense, like an insurer's obligation to indemnify the insured against covered loss, a legal requirement of compensatory payment arising without any fault or "breach." In the more typical tort and con-

211. *Id.* at 171.
212. *Id.* at 170.
213. *Id.* at 171.
214. *Id.* at 170.
215. *Id.* at 174.
216. *Id.* at 175.
217. *Id.* at 173-74.

tract case, in which a compensatory damage award is predicated upon a supposed "breach of duty," the remedy is just the same as in these "no-fault" cases—payment of a money amount measured by actual loss.

Holmes' point is that from the "purely legal" (that is, remedial) point of view, the language of duty and breach is misleading in the standard instances of their use. Where we want to treat an act as a genuine legal wrong, and so express an absolute legal wish that it not be done, we have appropriate remedies: criminal penalties, punitive damages, or injunctions. Where we do not use those remedies, we show ourselves not to be serious about treating the act as legally wrong. Speaking in its true language of remedies, the law in such cases simply grants the supposed duty-bearer an option either to discharge the supposed duty or pay for the actual loss caused by not doing so. And it is the job of counsel to translate for the client the actual message of the law's working remedial language.

Analyzing private law in this way opens many possibilities, some of which Holmes noted in a remarkable passage concisely anticipating the turn toward enterprise liability that accident law would take as his risk-allocating conception of civil liability gradually took hold:

> [T]he torts with which our courts are kept busy to-day are mainly the incidents of certain well known businesses. . . . The liability for them is estimated, and sooner or later goes into the price paid by the public. The public really pays the damages, and the question of liability, if pressed far enough, is really the question how far it is desirable that the public should insure the safety of those whose work it uses. It might be said that in such cases the chance of a jury finding for a defendant is merely a chance, once in a while rather arbitrarily interrupting the regular course of recovery, most likely in the case of an unusually conscientious plaintiff, and therefore better done away with.[218]

The analysis to this point has focused on the remedial aspect of Holmes' theory; what of the prediction aspect? Holmes tells us that it is useful to look at legal propositions as predictions of judicial action, distinguishing them, for example, from descriptive statements about legal rights or duties, or as commands directed toward citizens. This aspect of the theory has been repeatedly assaulted for failing to guide the judge, who cannot be helped by being told that law is what she or he

218. *Id.* at 183. With this passage, Holmes abandoned his earlier defense of the fault system as required by the "sense of justice." *See* note 205 *supra*. But in another passage in *The Path of the Law,* Holmes again strayed from his own teaching on duties. In describing a legal duty as "nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court," *The Path of the Law, supra* note 23, at 169, he contradicted his position that the award of ordinary compensatory damages does not presuppose a breach of legal duty. Holmes returned to his true doctrine later in the lecture when he said that private law rules impose "duties in an intelligible sense" only when the injunctive remedy was available, and recommended against speaking of ordinary civil liabilities in the "inappropriate terms" of duties and rights, *id.* at 175-76; *cf.* THE COMMON LAW, *supra* note 23, at 173.

likely will decide.[219]

But Holmes' limited purpose is explicit and clearly defined; he is offering a perspective on the law for those "who want to use it as the instrument of their business," where that business is "to appear before judges, or to advise people in such a way as to keep them out of court."[220] This is essentially the perspective of the practitioner who counsels private clients—certainly the predominant professional work contemplated by the law students Holmes was addressing. Without much critical inquiry into the social role of the practicing bar, Holmes accepted it; moreover he thought it the proper perspective both for legal education and for much legal commentary.

Holmes was clear that the counselor's perspective is not the only one from which to view the law. We know he believed that the law could be viewed externally and impractically, as an object of study and speculation, a "great anthropological document," and from this point of view the history of the law "is the history of the moral development of the race."[221] There are other *practical* and internal points of view toward the law, as well, perspectives which dispense with the counselor's (and bad man's) clear-cut "distinction between morality and law." Holmes drew this distinction "with reference to a single end, that of learning and understanding the law."[222] From a "wider point of view . . . the distinction between law and morals becomes of secondary or no importance"—whether that is the point of view of the scholar, the speculative thinker, or for that matter the law-abiding citizen, a point of view Holmes adopted himself in a later speech when he condemned "the unrest that seems to wonder vaguely whether law and order pay."[223]

Of course Holmes was quite aware that in applying the law a judge—especially a judge of a higher court—could not operate solely on the basis of the predictive attitude. But the predictive perspective nevertheless was one the judge should have in mind, because it was the natural attitude of legal counselors, on whose advice ordinary citizens had to depend. The counselor expects to be able to advise clients on the basis of precedents. For that reason, Holmes did not think that judges "should undertake to renovate the law" wholesale.[224]

At the same time, he also believed that the judges of his time sometimes overexerted themselves in the quest for certainty; "certainty generally is illusion, and repose is not the destiny of man."[225] In the many doubtful cases that came before them, judges were called upon to "ex-

219. *See, e.g.*, Rogat, *supra* note 2, at 248-49.
220. *The Path of the Law, supra* note 23, at 169, 167.
221. *Law in Science, supra* note 24, at 212; *The Path of the Law, supra* note 23, at 170.
222. *The Path of the Law, supra* note 23, at 170.
223. *Id.* at 170; OLIVER WENDELL HOLMES, *Law and the Court* (1913), in COLLECTED LEGAL PAPERS 291, 292 (1920) [hereinafter *Law and the Court*].
224. *Law in Science, supra* note 24, at 239.
225. *The Path of the Law, supra* note 23, at 181.

ercise the sovereign prerogative of choice."[226] And Holmes criticized his contemporaries on the bench for failing "adequately to recognize their duty of weighing considerations of social advantage."[227] In context, it could hardly be more clear that Holmes never intended his "prediction theory" as a conception of law sufficient for a judge.[228]

Holmes did not put the strictly *predictive* aspect of his theory to work in any very significant way. As an analytical jurist his main contributions were his stress on remedies as the working instruments of the law, and, most originally, his point that not all remedies were duty-creating sanctions. He did not have to define law in predictive terms to make these points.[229] But the focus on prediction did center attention on the characteristic planning role of lawyers, and sharpened the standard jurisprudential discussions of the virtues of certainty and predictability. The larger importance of the predictive approach came later, when the Legal Realists took up the divergence between book law and the working law revealed by the effort to predict official actions. Holmes' formulation thus laid the conceptual basis for much later work.

Holmes was the first writer to base a jurisprudential theory on a perspective derived from the practice of law. In so doing, he was acting as a pragmatist, developing theory that was situated in and reflective upon practice, and that was meant to be evaluated as an instrument for serving human purposes. In criticism of Holmes' view, it is fair to say that he accepted without much critical evaluation a simple positivist conception of the bar's counseling role. Still, the view of law that Holmes derived from that doubtless incomplete conception served to bring the study of remedies to the center of legal scholarship. And the explicit adoption of the practical perspective on jurisprudential theory was itself a great advance. John Noonan has written that he "cannot understand those who write on law asking abstractly, 'What is law?' How can that question be answered without asking another—'Why do you want to know?' "[230] Holmes, unlike all his predecessors and most of his successors among legal theorists, explicitly embedded his best-known answer to the first question within an answer to the second one.

V. HOLMES DIVIDED: THE SPECTATOR AT THE STORM CENTER

At this point, we can see the main outlines of Holmes' legal pragmatism: his synthesis of historical ("situated") and analytical ("instrumen-

226. *Law in Science, supra* note 24, at 239.

227. *The Path of the Law, supra* note 23, at 184.

228. One might, though, quite properly criticize Holmes for not raising the question why the counselor interpreting the law to a client had no quasi-judicial duty (as an "officer of the court") to consider the public welfare in shaping that interpretation. I owe this point to my colleague Bill Simon, who elaborates just such a duty, defending it as a natural extension to the bar of the Holmesian approach to the judicial role, in William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

229. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 323 (1980).

230. JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW ix (1976).

tal") jurisprudence; his practical approach to legal "logic," or doctrinal conceptualism; and his account of legal reasoning, from the point of view of the counseling practitioner, as effort to predict what relief a judge will grant to a client. In presenting the story this far, I have sought to develop a general version of legal pragmatism, using Holmes as my example. Now I shift my focus more to the particularities and peculiarities of Holmes' thought and work. But even here, the Holmesian paradoxes and contradictions bear on the implications of pragmatism for law.

During Holmes' last years, his influential younger admirers promoted his reputation to truly Olympian heights; a prototypical encomium was Cardozo's characterization of the old justice as "the philosopher and the seer, the greatest of our age in the domain of jurisprudence, and one of the greatest of the ages."[231] The inevitable reaction against such extravagances—Holmes' "elevat[ion] . . . from deity to mortality"[232] at the hands of less starry-eyed critics—has motivated much of the best subsequent commentary on his work.[233] Having argued that Holmes' jurisprudence is more coherent than some of these critical commentators have thought, I now turn to consider a genuine Holmesian contradiction, one that pervasively flawed his work as judge and commentator, one that must be considered in assessing his relation to pragmatism.

While Dewey defined pragmatism by its contrast to what he called the "spectator theory of knowledge,"[234] Holmes was, as Yosal Rogat argued in one of the best of the revisionist studies, fundamentally a spectator in his approach to the law.[235] But he was a spectator who chose to work at "the storm centre," rather than to devote his energies to the kind of external study of law that might have benefited from his unusual capacity for detachment.[236] As Robert Gordon has noted in another fine critical study, Holmes supplied the slogans for the movement that emphasized the historically conditioned and socially embedded nature of legal institutions and ideas, but in devoting his working efforts to doctrinal commentary and adjudication, left the serious work in legal history and social science during his lifetime to others, such as Sir Henry Maine, F.W. Maitland, and Max Weber.[237] When we combine Rogat's point with Gordon's, we can see the practical contradiction within which Holmes was caught. He proceeded at perspectival

231. Cardozo, *supra* note 7, at 5; *cf.* J. FRANK, *supra* note 1, at 253-60; Harold Laski, *Mr. Justice Holmes*, in MR. JUSTICE HOLMES, *supra* note 1, at 138.

232. Walton H. Hamilton, *On Dating Mr. Justice Holmes*, 9 U. CHI. L. REV. 1 (1941).

233. For the fluctuations in Holmes' reputation, see G. Edward White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51 (1971).

234. J. DEWEY, THE QUEST FOR CERTAINTY, *supra* note 39, at 23.

235. Rogat, *supra* note 2. Rogat forcefully denies any important similarities between Holmes and Dewey. *Id.* at 251 n.194.

236. "We are very quiet there [at the Supreme Court], but it is the quiet of a storm centre." *Law and the Court*, *supra* note 223, at 292.

237. Gordon, *supra* note 3, at 746.

cross-purposes; though drawn to the law by the external viewpoint of the observer, he worked on it from the internal viewpoint of the practitioner.

Holmes himself often noted the distinction between the perspectives of the "witness" and the "actor,"[238] and he organized his 1899 lecture *Law in Science and Science in Law* around the difference between these two viewpoints.[239] Seen from the external perspective, law was an object of study or contemplation, "a great anthropological document," providing raw material for the investigation of "the morphology and transformation of human ideas." This kind of investigation could be "science in the strictest sense," to be "pursued for the pleasure of the pursuit and of its fruits, as an end in itself."[240] From the internal perspective, on the other hand, law was an instrument of government, its study a practical enterprise meant to guide the man who must "make up [his] mind . . . upon a living question, for purposes of action."[241] In this latter aspect, law study could not be scientific until the distant day when its postulates were established in Benthamite fashion "upon accurately measured social desires."[242] In the meantime, practical law study would be mainly craft rather than science, eclectically combining history, doctrinal clarification, and—most important of all—the prudential legislative art required to keep the law in its application congruent with the demands of the community.[243]

In the abstract, Holmes' recognition of distinct and even incommensurate internal and external perspectives on law is neither inconsistent nor unpragmatic. But in fact Holmes' attitudes toward the two perspectives reflected an unresolved conflict, as his tortured rhetoric at the point of transition between the two parts of *Law in Science and Science in Law* reveals. The first part concludes with a characteristic hymn of praise to the life of the mind; Holmes tells us that he knows no "more exalted form of life than that of [the] great abstract thinker" who pursues knowledge "simply to feed the deepest hunger and to use the greatest gifts of his soul."[244] But he immediately qualifies this judg-

238. For "witness" and "actor," see OLIVER WENDELL HOLMES, *The Law* (1885), in COLLECTED LEGAL PAPERS, 25, 26 (1920) [hereinafter *The Law*]. *See also Langdell Review*, *supra* note 139, at 234; *The Path of the Law*, *supra* note 23, at 201-02. Of special interest on this point is *Introduction to the General Survey*, *supra* note 68, at 300-01, where Holmes divided the world between "external" and "internal" types, the latter of whom think "that ideas are more interesting than things." It was clear that he saw himself as "internal." *See, e.g.*, 1 HOLMES-LASKI LETTERS, *supra* note 10, at 128 (letter dated Jan. 16, 1918). Holmes' terminology may confuse; in the context of the *type of person*, the internal person (the intellectual) is drawn to theory and the external to practice. In the context of *perspective on law*, however, the external perspective is theoretical and the internal practical.

239. *Law in Science*, *supra* note 24.

240. *Id.* at 211-12.

241. *Id.* at 224.

242. *Id.* at 225-26.

243. *Id.* at 225.

244. *Id.* at 224. Statements similar in content and (mostly) in dithyrambic tone could be multiplied almost endlessly. *See, e.g.*, OLIVER WENDELL HOLMES, *The Profession of the Law* (1886), in COLLECTED LEGAL PAPERS, 29, 30 (1920) [hereinafter *The Profession of the Law*]; OLI-

ment so sharply as in effect to contradict it: "But after all the place for a man who is complete in all his powers is in the fight." The "great abstract thinker" of the previous paragraph now becomes, less flatteringly, "the professor, the man of letters" who "gives up one-half of life that his protected talent may grow and flower in peace."[245] The witness' "exalted form of life" suddenly is portrayed as incomplete, stunted, and effete, by comparison to the actor's role.

This ambivalence about the roles of actor and witness characterized Holmes' entire career in the law. Rogat has persuasively made the case for this claim with respect to his judicial work. Similarly, in his role as a legal thinker, my main concern here, Holmes was likewise caught between these external and internal perspectives. In his scholarship, he chose to write as a commentator or doctrinalist, which for him meant treating the law internally, as a working system of guidance for practical decision; legal history and anthropology had a limited role in this kind of work.[246] Yet he pursued this course as a man who was attracted to law mainly by its interest as a spectacle and an object of contemplation. As a result *The Common Law* is, as Gordon says, "a book at war with itself."[247] So distorting is Holmes' perspectival wobble that the work, for all its nominal status as a classic, was scarcely understood and perhaps rarely read as a whole until Mark Howe devoted a masterful volume to unraveling its complexities and excavating its underpinnings in Holmes' reading and thinking during the 1870s.[248]

Howe's account allows us to trace the fault lines in *The Common Law* back to their origins. Holmes' first interest in the law was entirely external. As a young Civil War veteran his passions were science, poetry, and philosophy; his companions at the time were the young writers and intellectuals of Boston and Cambridge, William and Henry James, Chauncy Wright, and Nicholas St. John Green. He came to the law in

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VER WENDELL HOLMES, *Brown University—Commencement 1897*, in *id.* at 164, 165-66 [hereinafter *Brown Commencement*]; *The Path of the Law*, *supra* note 23, at 202; OLIVER WENDELL HOLMES, *Address of Chief Justice Holmes* (1902), in COLLECTED LEGAL PAPERS at 272, 276-77 (1920) [hereinafter *Northwestern Address*]; OLIVER WENDELL HOLMES, *Bracton de Legibus et Constuetudinibus Angliae* (1915), in *id.* at 308, 309; OLIVER WENDELL HOLMES, *The Use of Colleges* (1891), in OCCASIONAL SPEECHES, *supra* note 78, at 62, 63 [hereinafter *The Use of Colleges*]; OLIVER WENDELL HOLMES, *A Provisional Adieu* (1902), in *id.* at 150, 152 [hereinafter *A Provisional Adieu*]; 1 HOLMES-LASKI LETTERS, *supra* note 10, at 374 (letter dated Oct. 9, 1921).

245. *Law in Science*, *supra* note 24, at 224; *see also* OLIVER WENDELL HOLMES, *George Otis Shattuck* (1897), in OCCASIONAL SPEECHES, *supra* note 78, at 92, 95 [hereinafter *George Otis Shattuck*]; Letter from Holmes to Felix Frankfurter (July 15, 1913), *quoted in* M. HOWE, THE PROVING YEARS, *supra* note 111, at 282.

246. For the "internal" juristic aims of *The Common Law*, see THE COMMON LAW, *supra* note 23, at 173; *see also* Letter from Holmes to A.G. Sedgwick (July 12, 1879), *quoted in* Gordon, *supra* note 3, at 719; Letter from Holmes to James Bryce (Aug. 1879), *quoted in* M. HOWE, THE PROVING YEARS, *supra* note 111, at 25; Letter from Holmes to John Norton Pomeroy (Aug. 8, 1881), *quoted in id.* at 137. On the limited relevance of historical material in *The Common Law*, see Gordon, *supra* note 3, at 730-33.

247. Gordon, *supra* note 3, at 720-21.

248. M. HOWE, THE PROVING YEARS, *supra* note 111; *see also* Howe, *Introduction* to THE COMMON LAW, *supra* note 23, at xi, xx.

1865 not out of any sense of professional calling, but because he was, as he put it, "kicked," "thrown," and "shoved" into it.[249] At first he doubted whether this "ragbag of details" was "worthy of the interest of an intelligent man."[250] But he soon reconciled himself, not because of any attractions from the profession's practical side, but on the ground that "law . . . may be approached in the interests of science" and "opens a way to philosophy."[251]

What did Holmes count as "science" or "philosophy"? We know that he identified as scientific the work of both the German academic historians of ancient Roman law and the mostly American historians who were uncovering the English law's Teutonic roots.[252] What gave this work the status of science was its objectivity and its detailed reliance on evidence drawn from original sources. "All scientific study nowadays is microscopic," Holmes wrote, "even the study of history . . . ."[253] Holmes likewise regarded as true "scientists" the anthropologists, Tylor and others, who were during this period founding the scholarly study of primitive society and law.[254]

Early on, Holmes concluded that the enterprise of the jurist, who works "from within" the law to "make known [its] content," was "not a science."[255] Yet he aspired to the scientific (external) study of law, and in the 1870s he did extensive secondary reading and some original research in legal history and anthropology. At the same time, he committed himself to the very kind of internal juristic work to which he had denied scientific status. Unable to leave the fruits of his "scientific" labors unused, he distributed throughout *The Common Law* little essays and asides on primitive social arrangements and Roman and ancient German and English law; these asides, scattered among policy arguments and doctrinal reclassifications, contribute substantially to what Gordon rightly calls the work's "recklessly miscellaneous" quality.[256] The first chapter, for example, is an extended study of the phenomenon of animism in primitive law; how it bears on Holmes' primary doc-

249. Letter from Holmes to Mrs. John C. Gray (Apr. 30, 1905), *quoted in* M. HOWE, THE SHAPING YEARS, *supra* note 26, at 176; *Letters to Dr. Wu*, *supra* note 168, at 167 (letter dated Sept. 20, 1923); 1 HOLMES-LASKI LETTERS, *supra* note 10, at 205 (letter dated May 18, 1919).

250. *Introduction to the General Survey*, *supra* note 68, at 301; *see also* 1 HOLMES-LASKI LETTERS, *supra* note 10, at 430 (letter dated June 1, 1922); *A Provisional Adieu*, *supra* note 244, at 152.

251. Letter from Holmes to William James (Apr. 19, 1868), *quoted in* 1 RALPH BARTON PERRY, THE THOUGHT AND CHARACTER OF WILLIAM JAMES 510 (1935); Letter from Holmes to Ralph Waldo Emerson (Apr. 16, 1876), *quoted in* M. HOWE, THE SHAPING YEARS, *supra* note 26, at 203; *see also* 1 HOLMES-POLLOCK LETTERS, *supra* note 8, at 16 (letter dated Mar. 5, 1881).

252. *See The Use of Law Schools*, *supra* note 175, at 41-42; *see also* M. HOWE, THE PROVING YEARS, *supra* note 111, at 142-48, 153.

253. Book Notice, 11 AM. L. REV. 327 (1877) (for attribution of this anonymous review to Holmes, see M. HOWE, THE PROVING YEARS, *supra* note 106, at 148) [hereinafter *Book Notice*].

254. *See* M. HOWE, THE PROVING YEARS, *supra* note 111, at 149-50.

255. THE COMMON LAW, *supra* note 23, at 173; *Codes, and the Arrangement of the Law*, *supra* note 95, at 80, *see also Langdell Review*, *supra* note 138, at 234.

256. Gordon, *supra* note 3, at 719.

trinal concerns is, as Howe gently remarks, not "wholly clear."[257] And Holmes' fascination with the antiquities of English legal history led him to give them too much doctrinal weight, as A.V. Dicey pointed out in his contemporary review of the book.[258]

Holmes' conceptual and expository juristic focus in *The Common Law* was blurred not only by his interest in "science," but also by his ambition to do "philosophy." For Holmes, philosophy encompassed all forms of broad and speculative thought that claimed intrinsic intellectual interest. Above all it included what we might call social theory—work involving broad generalizations about human society that rested loosely on scholarly findings, but which went beyond them to guide further research and speculation.[259] Thus he wrote during the 1870s that the "scientific" researches of the new legal historians "prepare the ground for a true philosophic history of the law."[260] The paradigm of the kind of philosophy Holmes had in mind was Sir Henry Maine's *Ancient Law*,[261] a work too speculative to count as scientific history or anthropology, but which, as Holmes later said, "fe[d] the philosophic passion."[262] Maine contributed no original research, but rather a set of fruitful social-theoretic generalizations about the patriarchal origins of government, the communal roots of property, and the movement of progressive societies from status to contract.

The Common Law in its overall thrust shows Holmes' desire to emulate Maine's kind of "philosophy," just as its many "asides" reflect the "science" of the historians and anthropologists.[263] The book's central doctrinal thesis is that contemporary standards of civil liability are (and should be) typically "objective," determined by collective social expectations, whereas their verbal formulations often misleadingly portray them as "subjective" by making reference to a defendant's individual capacities or state of mind. But Holmes does not present his "objective theory" as a normative doctrinal thesis; rather he offers it as a historical generalization, one he obviously thinks is comparable to Maine's hy-

257. M. HOWE, THE PROVING YEARS, *supra* note 111, at 163.

258. As Dicey noted, Holmes' "attempt to unite the historical with the analytical method," led to an "uncertainty of aim" between stating doctrines "in conformity with the decisions to be found in the year-books" and "in conformity with the dictates of right reason, or expediency. The plain truth is that our author is too much an apologist." *Dicey Review*, *supra* note 120, at 713-14.

259. In 1913 Holmes wrote that works of legal history "provide philosophical food to philosophical minds." *Introduction to the General Survey*, *supra* note 68, at 300. And as he later wrote to Laski, "I regard philosophy as simply the broader generalizations of thought that can't lift itself by the slack of its own breeches." 1 HOLMES-LASKI LETTERS, *supra* note 10, at 706 (letter dated Feb. 7, 1925).

260. *Book Notice*, *supra* note 253, at 331.

261. H. MAINE, ANCIENT LAW, *supra* note 88.

262. 1 HOLMES-LASKI LETTERS, *supra* note 10, at 429 (letter dated June 1, 1922). For Holmes' general assessment of Maine, see HOLMES-POLLOCK LETTERS, *supra* note 8, at 31 (letter dated Mar. 4, 1888).

263. Howe points out that the structure of *The Common Law* corresponds to that of *Ancient Law*, M. HOWE, THE PROVING YEARS, *supra* note 111, at 149 n.31, suggesting that Holmes was more influenced by Maine than he liked to admit.

potheses of the law's tendency to move from status to contract, or from communal to individual ownership. As a historical thesis, Holmes' theory is wholly unconvincing, and his formulation of the external standard in these terms has led many readers to take *The Common Law* as a work of philosophical history or social theory comparable in purpose to *Ancient Law*.[264]

Though Holmes generally considered philosophy external to the actual discourse of law, he gave internal or practical legal writing the accolade "philosophical" when it had, or aspired to, intrinsic intellectual interest along with its practical classificatory and decision-guiding use.[265] And he found ideas intrinsically interesting only when they were *general*. He "hate[d] facts" and thought the "chief end of man is to form general propositions," to which he always added the twist—meant to stress that he valued his generalities as ends in themselves, not for their utility—that "no general proposition is worth a damn."[266] The philosophy that consoled him as he lay at Ball's Bluff, thinking himself mortally wounded, was a faith in *general* ideas: "*good & universal* (or *general law*) are synonymous terms in the universe."[267] And as he often said in later years, what differentiated gossip from philosophy for him was only that the former treated a fact "as if it really stood apart" while the latter made it "a part of the whole."[268]

Holmes' conscious or unconscious striving to make his internal legal discourse "philosophical" led him to his most characteristic vice as a doctrinal writer—a pervasive and excessive generality. As John Chipman Gray observed, "Mr. H. carries his theories of simplification too far: there is too much tendency on his part to make cases come under

264. *See, e.g., id.* at 212-13 (quoting FREDERICK POLLOCK, PRINCIPLES OF CONTRACT xi (1881)).

265. Thus Holmes wrote that an "interest in philosophical speculation" lay behind the renewed interest shown at Langdell's Harvard in "analyzing and generalizing the rules of law and the grounds on which they stand." *The Use of Law Schools, supra* note 175, at 42. And he urged that the general categorical arrangement of legal doctrine should be at the same time "philosophical" and subject to "compromises with practical convenience." *Codes, and the Arrangement of the Law, supra* note 95, at 80; *see also The Theory of Torts, supra* note 158, at 119. And if in the midst of practical commentary, there arose the chance to make a pretty, though useless, point, so much the better; thus Holmes admitted to Pollock that "in practice it does not much matter" whether his own objective or an opponent's constrained subjective theory of interpretation was adopted, but added that "theory is none the less interesting when it is outside the limits of possible proof or refutation . . . ." 1 HOLMES-POLLOCK LETTERS, *supra* note 8, at 95, 96 (letter dated July 16, 1899).

266. 1 HOLMES-LASKI LETTERS, *supra* note 10, at 205 (letter dated May 18, 1919); 2 HOLMES-POLLOCK LETTERS, *supra* note 8, at 13 (letter dated May 26, 1919); *see also* OLIVER WENDELL HOLMES, *Dr. S. Weir Mitchell* (1900), in OCCASIONAL SPEECHES, *supra* note 78, at 119, 121 [hereinafter *Dr. Mitchell*]; *Holmes-Cohen Correspondence, supra* note 31, at 314 (letter dated Apr. 12, 1915).

267. OLIVER WENDELL HOLMES, JR., TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL HOLMES, JR., 1861-1864, at 28 (M. Howe ed. 1946) [hereinafter TOUCHED WITH FIRE].

268. *Brown Commencement, supra* note 244, at 16; *see also* OLIVER WENDELL HOLMES, *Remarks to the Essex Bar*, in OCCASIONAL SPEECHES, *supra* note 78, at 48, 49; 1 HOLMES-LASKI LETTERS, *supra* note 10, at 129 (letter dated Jan. 18, 1918); *id.* at 810 (letter dated Dec. 27, 1925).

the principle, wh[ich] cannot really belong there."[269] In *The Common Law*, for example, Holmes tended to leave out aspects of living tort law that focus on subjective states of mind in the service of his effort to force doctrine into "a philosophically continuous series" arranged along the dimension of objectively foreseeable probability of harm.[270] And the extension of the external standard to the criminal area led him to understate quite grossly the concern with individual moral culpability reflected in the substantive law of crimes.[271]

After finishing *The Common Law*, Holmes came to believe that "inside the body of the law" the "field for generalization . . . was small," so that if he was to continue to write about law "as a philosopher," he must approach it externally, through other disciplines like ethics, history, anthropology, and political economy.[272] He had every opportunity to make the change when he was offered and accepted a professorship at the Harvard Law School, where he insisted that, in addition to teaching ordinary law courses, he should be free to devote part of his working time to "studies touching the history and philosophy of law."[273] But a few months into his academic career, he unhesitatingly—some colleagues thought precipitately—accepted a seat on the Massachusetts Supreme Judicial Court.[274] He would be a judge for the remaining fifty years of his active life, thus guaranteeing that his daily work would confine his thinking "inside the body of the law," where he had said there was little room for significant generalization.

As he later described his state of mind at the time of his appointment, he was confronted by a choice between "applying [my] theories to practice and details or going into another field."[275] Why did he choose "practice and details" over "science" and "philosophy"? In a letter to James Bryce written soon after the decision, Holmes anticipated the language he later used in the *Law in Science* lecture; to reject a "share in the practical struggle of life which naturally offered itself"

269. Lecture by John Chipman Gray, Harvard Law School (Jan. 12, 1883), *quoted in* M. HOWE, THE PROVING YEARS, *supra* note 111, at 276 (Chipman quote based on student notes of lecture).

270. *See* THE COMMON LAW, *supra* note 23, at 104. Holmes to some extent corrected the excessive focus on the objective degree of probability as the determinant of liability in *Privilege, Malice and Intent*, *supra* note 157, at 118-19.

271. *See* THE COMMON LAW, *supra* note 23, at 41-43. Holmes' failure to sufficiently distinguish criminal prohibition from civil liability was one of the (lesser) flaws of his dissent in Bailey v. Alabama, 219 U.S. 219, 245-51 (1911) (Holmes, J., dissenting).

272. Letter from Holmes to James Bryce (Dec. 31, 1882), *quoted in* M. HOWE, THE PROVING YEARS, *supra* note 111, at 280.

273. Letter from Holmes to Charles Eliot (Nov. 1, 1881), *quoted in* M. HOWE, THE PROVING YEARS, *supra* note 111, at 260.

274. For Howe's account of Holmes' decision to accept the judicial appointment, see M. HOWE, THE PROVING YEARS, *supra* note 111, at 265-70 (Holmes' failure to consult with his Dean or colleagues before leaving his post in the middle of the academic year left behind some bitterness against him at Harvard, though he had specified in joining the faculty that he would be free to accept a judgeship if one were offered.).

275. 1 HOLMES-LASKI LETTERS, *supra* note 10, at 291 (letter dated Nov. 17, 1920).

would be "the less manly course."[276] But many years later, after his reputation and self-esteem were finally secure and he could speak of the decision in less self-serving terms, he put the matter differently. He told his young admirer Laski that in addition to "natural fear and the need of making a living," he had thought that "(at 40) . . . it would take another ten years to master a new subject," and he "couldn't bargain that my mind should remain suggestive at that age." He concluded wistfully: "I think I was right but there are many tempting themes on which it seems as if one could say something if one knew enough—I am glad on the whole that I stuck to actualities against philosophy (the interest of all actualities)."[277]

In fact, Holmes seems to have accepted the judgeship on the assumption that his creative work as a scholar and thinker was done. He had no inclination for further detailed research in legal history or anthropology, and his taste in "philosophy" ran to the artful aphorism or *apercu*, not to systematic exposition.[278] In this, his abilities and his

276. Letter from Holmes to James Bryce (Dec. 31, 1882), *quoted in* M. HOWE, THE PROVING YEARS, *supra* note 111, at 280-81. Years later, Holmes wrote to Frankfurter in a similar vein. *See id.* at 282; *see also George Otis Shattuck, supra* note 245, at 95-96.

277. 1 HOLMES-LASKI LETTERS, *supra* note 10, at 291-92 (letter dated Nov. 17, 1920). Howe notes Holmes' persistent Puritan tendency to approve the less pleasant course, M. HOWE, THE PROVING YEARS, *supra* note 111, at 282. To this effect, see OLIVER WENDELL HOLMES, *Memorial Day* (1884), in OCCASIONAL SPEECHES, *supra* note 78, at 4, 11 [hereinafter *Memorial Day*] (the Puritan virtue is to choose the "most disagreeable" alternative—the context makes plain that Holmes is not being wholly ironic); OLIVER WENDELL HOLMES, *Arthur P. Bonney and Frederic T. Greenhalge* (1896), in *id.* at 87, 89 (" 'The good is one thing, the pleasant is another; the wise prefer the good.' "). Holmes described his choice to enlist in the army in 1861 in the same terms as he later described his decision to become a judge: "[A]s life is action and passion, it is required of a man that he should share the passion and action of his time at peril of being judged not to have lived." *Memorial Day, supra*, at 6-7. He wrote of the chance to serve on the United States Supreme Court in terms of preparing for battle. *See Twenty Years in Retrospect, supra* note 78, at 157.

278. For some of Holmes' many statements of preference for philosophers' *apercus* over their systems, see 1 HOLMES-POLLOCK LETTERS, *supra* note 8, at 261 (letter dated Mar. 1, 1918); 2 *id.* at 52 (letter dated Aug. 28, 1920); 1 HOLMES-LASKI LETTERS, *supra* note 10, at 133 (letter dated Feb. 7, 1918); *id.* at 277 (letter dated Aug. 30, 1920); 2 *id.* at 971-72 (letter dated Aug. 18, 1927); *Letters to Dr. Wu, supra* note 168, at 162 (letter dated Apr. 1, 1923); *id.* at 186 (letter dated Aug. 26, 1926). It is interesting to compare these statements with what he wrote of his father, the celebrated poet and essayist:

> [H]e contented himself too much with sporadic *apercus*—the time for which, I used to say when I wanted to be disagreeable, had gone by. If he had had the patience to concentrate all his energy on a single subject, which perhaps is saying if he had been a different man, he would have been less popular, but he might have produced a great work.

Letter from Holmes to Clara Stevens (July 26, 1914), *quoted in* M. HOWE, THE SHAPING YEARS, *supra* note 26, at 19.

The possibilities for psycho-biographical speculation here are further enriched by considering Holmes' oft-reiterated insistence on the great differences between the "thinker" (like himself) and the "poet" or "man of letters" (like Emerson, James, and his father), generally to the advantage of the former. *See The Profession of the Law, supra* note 244, at 29-31; OLIVER WENDELL HOLMES, RUDYARD KIPLING (1893), *quoted in* OCCASIONAL SPEECHES, *supra* note 78, at 71; *Dr. Mitchell, supra* note 266, at 120; 1 HOLMES-POLLOCK LETTERS, *supra* note 8, at 96 (letter dated July 16, 1899); 1 HOLMES-LASKI LETTERS, *supra* note 10, at 474 (letter dated Jan. 13, 1923); *id.* at 533 (letter dated Sept. 4, 1923); *id.* at 593 (letter dated Feb. 17, 1924). And yet Holmes conceived of philosophy in an artist's way; he sought to "see the universal in the

tastes were in harmony; few if any writers on the law have matched his gift for compressed expression, which is seen to its best effect in letters, essays, and judicial opinions. On the other hand, his only attempt at a full-length and systematic work of "science" or "philosophy," *The Common Law*, does not represent his best work. Holmes spoke of himself, perhaps even half-consciously so, when he wrote of those "men of the world," the aphorists, whose work outlives "the greatest works of intellect"; "it is the second rate that lasts."[279]

In becoming a judge, Holmes entered a life to which, for all the scope it gave to his literary gifts, he was not wholly suited. Judging is an enterprise deeply concerned with "practice and details," and neither Holmes' talents nor his inclinations lay in this direction. Generations of law students have marveled at the simple lack of informed common sense manifested by such judgments as his pronouncement that a motorist at a rail crossing must stop, look, and listen for a train, and get out of the car if necessary to do so, on pain of being found contributorily negligent.[280] By his own admission, he was "academic to the point of unreality"; he did not "read the papers or otherwise feel the pulse of the machine"; he "never [knew] any facts about anything" and was baffled whenever a visitor asked "some informal intelligent question about our institutions or the state of politics or anything else."[281]

Becoming a judge did not change his attitude toward the gritty facts of human disputation. To him lawsuits were "mannerless conflicts over often sordid interests."[282] The cases he decided dealt mostly with "trifling and transitory matters."[283] The realm of "[t]he practical" was "a mean and stony soil," the world of fact a "mass of sordid details" until transfigured by "some new generalization."[284] Then it served only as "raw material" that could "challenge your power to idealize the brute fact," and "nourish" valuable abstractions with the necessary empirical content.[285] Until the thinker's power of generalization could impart to life some "mystic spiritual tone," it was only a "roar of bargain and battle," inhabited by "men . . . like flies—here swept away by a pes-

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particular," to "show the infinite in the finite." *Letters to Dr. Wu, supra* note 168, at 164 (letter dated June 16, 1923); HOLMES-SHEEHAN CORRESPONDENCE 51 (D. Burton ed. 1976) [hereinafter HOLMES-SHEEHAN CORRESPONDENCE] (letter dated Oct. 27, 1912).

279. OLIVER WENDELL HOLMES, *Montesquieu* (1900), in COLLECTED LEGAL PAPERS 250, 250 (1920). *But see Holmes-Sheehan Correspondence, supra* note 278, at 51 (letter dated Oct. 27, 1912) ("Only the first rate lasts.").

280. Baltimore & O.R.R. v. Goodman, 275 U.S. 66, 69-70 (1927).

281. 1 HOLMES-POLLOCK LETTERS, *supra* note 8, at 116 (letter dated Jan. 10, 1904); *id.* at 124 (letter dated May 25, 1906); *id.* at 118 (letter dated Sept. 24, 1904).

282. *The Profession of the Law, supra* note 244, at 29.

283. *Speech at Bar Dinner, supra* note 135, at 245; *cf. Holmes-Cohen Correspondence, supra* note 31, at 319 (letter dated Sept. 10, 1918).

284. *Letters to Dr. Wu, supra* note 168, at 184 (letter dated Jan. 31, 1926); *id.* at 176-77 (letter dated Jan. 27, 1925).

285. *Id.* at 190 (letter dated Jan. 31, 1927); Letter from Holmes to Felix Frankfurter (July 15, 1913), *quoted in* M. HOWE, THE PROVING YEARS, *supra* note 111, at 282; *Letters to Dr. Wu, supra* note 168, at 175 (letter dated Mar. 6, 1924).

tilence—there multiplying unduly and paying for it."[286]

In Holmes' conception, the working of the idealizing imagination upon the world of brute fact was aesthetic rather than political; it might transfigure but not transform. Like his Calvinist ancestors, Holmes saw in the sequence of events the unfolding of a predestined tale. The philosophy that consoled him at Ball's Bluff was fatalistic: "now as ever I believe that whatever shall happen is best—for it is in accordance with a general law . . . ."[287] "I see the inevitable everywhere," he wrote.[288] "I do in a sense worship the inevitable . . . ."[289] Of course "the mode in which the inevitable comes to pass is through effort," and as a practical matter "[w]e must be serious in order to get work done," but ultimately the human sense of power over events was only "the trick by which nature keeps us at our job."[290] His fatalism led him to accept "a rough equation of isness and oughtness."[291]

In its practical aspects, judging was for Holmes only a "job"; he remained drawn to the law by the same purely external interests as had

286. OLIVER WENDELL HOLMES, *The Class of '61* (1911), in OCCASIONAL SPEECHES, *supra* note 78, at 160, 162 [hereinafter *The Class of '61*]; 1 HOLMES-LASKI LETTERS, *supra* note 10, at 762 (letter dated July 23, 1925); *see also id.* at 194 (letter dated Apr. 8, 1919) ("I respect your respect for the human soul while still doubting whether to share it. The formula of life to great masses would be Feed—*F-outre* [Fuck] and Finish, and I am not sure that it won't remain so."). In interpreting statements like these, on which Rogat and others build much of their indictment of Holmes' world view, one should apply to him what he said to his fellow veterans of the 20th Massachusetts Regiment: "[A] great trial in your youth made you different." OLIVER WENDELL HOLMES, *The Fraternity of Arms* (1897), in OCCASIONAL SPEECHES, *supra* note 78, at 100, 101. He spent three of his formative years "soaked in a sea of death." OLIVER WENDELL HOLMES, *Remarks at a Meeting of the Second Army Corps Association* (1903), in *id.* at 158, 159. For the definitive account of Holmes' war experiences, see M. HOWE, THE SHAPING YEARS, *supra* note 26, at 80-175. Holmes wrote, only half ironically, "I lost my humanity with my abolition days in college and in the army." 1 HOLMES-LASKI LETTERS, *supra* note 10, at 769 (letter dated Aug. 1, 1925). Saul Touster sensitively explores the numbing effect of the war on Holmes' capacity for emotional involvement, in Touster, *In Search of Holmes from Within*, 18 VAND. L. REV. 437 (1964), and Edmund Wilson interestingly compares Holmes' reaction to his war experience to that of Ambrose Bierce, in E. WILSON, *supra* note 4, at 621-28, 753-66. Holmes was given to skeptically sanguinary remarks about killing the other fellow when you disagree with him enough, even though his view is as good as yours. *See, e.g.*, OLIVER WENDELL HOLMES, *Natural Law* (1918), in COLLECTED LEGAL PAPERS 310, 312 (1920) [hereinafter *Natural Law*]; 2 HOLMES-LASKI LETTERS, *supra* note 10, at 862 (letter dated Aug. 5, 1926). These remarks were rooted in the personal experience of killing Confederate soldiers. For after Holmes' abolitionist idealism had been extinguished by years of slaughter, as well as by his formation of close bonds with fellow officers who were Southern sympathizers, he came to regard the Confederate soldiers as honorable men doing their duty.

287. TOUCHED WITH FIRE, *supra* note 267, at 28.

288. 2 HOLMES-POLLOCK LETTERS, *supra* note 8, at 230 (letter dated Sept. 20, 1928).

289. *Holmes-Cohen Correspondence, supra* note 31, at 334 (letter dated Jan. 30, 1921); *see also* 1 HOLMES-LASKI LETTERS, *supra* note 10, at 469 (letter dated Jan. 6, 1923) (the proposition that "repressions and extinctions" are "inevitable" is "sufficiently established by their occurrence.").

290. *Ideals and Doubts, supra* note 94, at 305; *Letters to Dr. Wu, supra* note 168, at 185 (letter dated May 5, 1926); *see also Northwestern Address, supra* note 244, at 273-74; HOLMES-SHEEHAN CORRESPONDENCE, *supra* note 278, at 28 (letter dated July 17, 1909).

291. "I do accept 'a rough equation of isness and oughtness' . . . . I also would fight for some things—but instead of saying that they ought to be I merely say they are part of the kind of a world that I like—or should like." 2 HOLMES-LASKI LETTERS, *supra* note 10, at 948 (letter dated June 1, 1927).

first motivated him.[292] In 1876, writing as a young lawyer to the old philosopher Emerson, he said that what justified law to him was the path it opened to philosophy.[293] In 1915, writing as an old judge to the young philosopher Morris Cohen, he expressed his pleasure that a philosopher should be interested in the law, and added: "I hardly should be interested in it—if it did not open a wide door to philosophizing . . . ."[294] Though the lawyer's working life is a "greedy watch for clients and practice of shopkeepers' arts," still "a man may live greatly in the law" because it stimulates "the large survey of causes" where "thought may find its unity in an infinite perspective."[295] Though "artists and poets" shrink from law, still it is "human"—not because lawyers deal with human beings and their human joys and pains, but because law as "a part of man, and of one world with all the rest" teaches the "philosophical" lesson of the "continuity of the universe."[296] And the law's true fascination, he said in the Emersonian peroration to *The Path of the Law*, lies in those "remoter and more general aspects" wherein the lawyer can "catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law."[297]

Those who believe that questions of law should be kept sharply separate from questions of public policy might regard Holmes' kind of intellectual detachment as a positive qualification for a judicial career. But of course one of Holmes' chief claims to greatness as a legal thinker is his critique of any such view of the judicial process. Holmes believed that adjudication should and must be result-oriented, fundamentally legislative. For him, the formal justification of judicial decision in terms of precedent and legal principle was "the evening dress which the newcomer puts on to make itself presentable according to conventional requirements"; but "[t]he important phenomenon" was the "justice and

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292. On Holmes' view of "jobbism," see OLIVER WENDELL HOLMES, *Sidney Bartlett* (1889), in OCCASIONAL SPEECHES, *supra* note 78, at 51, 54 [hereinafter *Sidney Bartlett*]; *Speech at Bar Dinner*, *supra* note 135, at 247; 1 HOLMES-LASKI LETTERS, *supra* note 10, at 385 (letter dated Dec. 9, 1921); *id.* at 723 (letter dated Mar. 26, 1925); *Letters to Dr. Wu*, *supra* note 168, at 178 (letter dated Mar. 26, 1925). Yosal Rogat explores the roots of this stoical professionalism in Holmes' alienation from the America of the Gilded Age, comparing him to his contemporaries Henry James and Henry Adams. Rogat, *supra* note 2, at 228-43. Both Holmes' "jobbist" or professionalist ethic and his aesthetic approach to law have further (and positive) implications developed later. *See* text accompanying notes 347-366 *infra*.

293. Letter from Holmes to Ralph Waldo Emerson (Apr. 16, 1876), *quoted in* M. HOWE, THE SHAPING YEARS, *supra* note 26, at 203.

294. *Holmes-Cohen Correspondence*, *supra* note 31, at 314 (letter dated Apr. 12, 1915).

295. *The Profession of the Law*, *supra* note 244, at 29-30.

296. *Brown Commencement*, *supra* note 244, at 165, 166.

297. *The Path of the Law*, *supra* note 23, at 202; *see also Introduction to the General Survey*, *supra* note 68, at 300-02; 1 HOLMES-POLLOCK LETTERS, *supra* note 8, at 22 (letter dated Aug. 27, 1883). I thank Sandy Levinson for drawing my attention to the Emersonian echoes in many of Holmes' purple passages. Holmes was greatly influenced by Emerson, whom he credited with "imparting a ferment." *Letters to Dr. Wu*, *supra* note 168, at 176 (letter dated Jan. 27, 1925). From the sage of Concord he drew not only his sentiment of acceptance of the universe and worship of the inevitable, but also his celebration of action, vitality, and process. On the importance of Emerson in the origins of pragmatism, see RICHARD POIRIER, THE RENEWAL OF LITERATURE 13-14, 17-18, 192-202 (1987).

reasonableness" of the actual decision itself.[298] In cases not settled by clear positive command, judges were to exercise their "sovereign prerogative of choice," producing interstitial legislation based on "considerations of social advantage."[299]

Sound legislative judgment was thus a primary judicial qualification, and Holmes best expressed his sense of the kind of person likely to possess this quality in the uncharacteristically unstinted praise he gave to Massachusetts' antebellum Chief Justice Lemuel Shaw. Though in "technical knowledge" many judges had surpassed Shaw, Holmes wrote, "the strength of that great judge lay in an accurate appreciation of the requirements of the community whose officer he was." Because "few have lived who were his equals" in understanding those "grounds of public policy" which are the ultimate criteria of good law, he had been "the greatest *magistrate* which this country has produced."[300]

Years later, after more than thirty years on the bench, Holmes wrote in similar terms of his colleague and good friend, United States Chief Justice Edward Douglas White: "He is always thinking what will be the practical effect of the decision (which of course is the ultimate justification of condemnation of the principle adopted.)" Holmes went on to add a revealing note of contrast between White's mode of judging and his own: "I think of [the decision's] relation to the theory and philosophy of the law—if that isn't too pretentious a way of putting it. We generally come out the same way by very different paths. But we sometimes come together head on with a whack."[301]

In fact Holmes did not believe that "theory and philosophy" necessarily supplied the practical knowledge and understanding that made a good judicial legislator. As a pragmatist, and hence a believer in the situated and tacit character of belief, he thought that "successful men of affairs" operated on "premises" that though "inarticulate" were often "profound."[302] Applying the point to the judiciary, Holmes defended the appointment of politicians as judges, which had produced Marshall, Story, Taney, and Chase, along with his contemporaries Taft and White. He feared that "men . . . of the abstract type only exceptionally prove wise in practical affairs," adding wryly that coming from him this was obviously a "disinterested judgment."[303] Though no one

298. *Langdell Review, supra* note 139, at 234.

299. *Law in Science, supra* note 24, at 239; *The Path of the Law, supra* note 23, at 184. For other statements of this often reiterated Holmesian theme, see THE COMMON LAW, *supra* note 23, at 5, 32-33, 167-68, 244, 263-64; *Privilege, Malice and Intent, supra* note 157, at 120, 129-30; *Learning and Science, supra* note 80, at 139; *Law in Science, supra* note 24, at 225-26; *Ideals and Doubts, supra* note 94, at 306-07.

300. THE COMMON LAW, *supra* note 23, at 85.

301. HOLMES-SHEEHAN CORRESPONDENCE, *supra* note 278, at 58 (letter dated Jan. 31, 1913). On Holmes' high opinion of White's legislative judgment, see also 1 HOLMES-POLLOCK LETTERS, *supra* note 8, at 170 (letter dated Sept. 24, 1910); 1 HOLMES-LASKI LETTERS, *supra* note 10, at 294 (letter dated Nov. 26, 1920).

302. 1 HOLMES-LASKI LETTERS, *supra* note 10, at 121 (letter dated Dec. 26, 1917).

303. *Id.* at 797 (letter dated Nov. 13, 1925).

could ever have mistaken Holmes for a modest man, he was able to admit his own deficiencies in practical wisdom and common understanding (at least to a fervent admirer). Thus he wrote to Laski: "[N]ot being a man of affairs and affairs being half at least of life I look up to those who have profound insights and foresights and successfully act on them."[304] And when Brandeis scolded him for ruling on labor legislation without understanding the facts of industrial life, he accepted the criticism as fair, and even read a few legislative studies of factory conditions before begging off on account of age and going back to Aristotle, Hegel, and French novels for his vacation reading.[305]

Perhaps sensing his own deficiencies as "a man of affairs," Holmes in his judicial role adopted, as a kind of surrogate for Shaw's or White's sound instinctive sense of good public policy, his well-known attitude of deference to legislative judgment.[306] His reputation as a great judge rests largely on his many eloquent reiterations of this attitude in constitutional cases during a period of progressive legislative activity—and his reputation as a liberal statesman rests almost wholly on this basis.[307]

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304. *Id.* at 374 (letter dated Oct. 9, 1921).

305. *See id.* at 204-05 (letter dated May 18, 1919); *id.* at 212 (letter dated June 16, 1919); *id.* at 268 (letter dated June 11, 1920); *id.* at 430 (letter dated June 1, 1922); 2 HOLMES-POLLOCK LETTERS, *supra* note 8, at 13 (letter dated May 26, 1919); *id.* at 17-18 (letter dated June 27, 1919). For Holmes' recognition of the advantages of Brandeis' practical knowledge of affairs, see 1 HOLMES-LASKI LETTERS, *supra* note 10, at 485 (letter dated Mar. 1, 1923); *id.* at 810 (letter dated Dec. 27, 1925); 2 *id.* at 1135 (letter dated Feb. 22, 1929). More generally, for Holmes' admiration of Brandeis, perhaps the greatest *practicing* pragmatist American law has known, see 2 HOLMES-POLLOCK LETTERS, *supra* note 8, at 191 (letter dated Oct. 31, 1926). Samuel Konefsky provides a judicious comparative assessment of their practical contributions as Supreme Court justices, giving Holmes his considerable due but ranking Brandeis clearly higher. SAMUEL J. KONEFSKY, THE LEGACY OF HOLMES AND BRANDEIS 258-84 (reprint ed. 1974).

306. Holmes' conception of judicial impartiality required the judge to be "superior to class prejudices and to his own prejudices," OLIVER WENDELL HOLMES, *Despondency and Hope* (1902), in OCCASIONAL SPEECHES, *supra* note 78, at 146, 148 [hereinafter *Despondency and Hope*], and to remember "that what seem to him to be first principles are believed by half his fellow men to be wrong," *Law and the Court*, *supra* note 223, at 295. "I hope and believe that I am not influenced by my opinion that it is a foolish law," he said of the Sherman Act. 1 HOLMES-LASKI LETTERS, *supra* note 10, at 248-49 (letter dated Mar. 4, 1920). The judge was to legislate only in the interstices left by the legislature, Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting), and the cultivation of an attitude of impartiality was all that could confine judicial legislation to its properly interstitial character. When Holmes criticized admired colleagues like White and Brandeis for being unjudicial, it was because he thought they lacked this attitude, and hence sometimes went beyond the interstitial in their judicial legislating. *See, e.g.*, 1 HOLMES-LASKI LETTERS, *supra* note 10, at 294 (letter to Justice White dated Nov. 26, 1920); *id.* at 556 (letter dated Nov. 5, 1923.).

307. Holmes' many illiberal views have been adequately chronicled. *See generally* Yosal Rogat, *Mr. Justice Holmes: A Dissenting Opinion* (pts. 1 & 2), 15 STAN. L. REV. 3, 254 (1962-1963). In addition to Holmes' well-known adherence to Social Darwinism, laissez-fairism, and eugenics, note also his attitudes on race, 1 HOLMES-LASKI LETTERS, *supra* note 10, at 372 (letter dated Sept. 27, 1921) ("One accepts the union of O[thello] and D[esdemona], black and white, because one has been so accustomed to it. Otherwise it would disgust most of us"), and gender, 2 *id.* at 1035 (letter dated Mar. 7, 1928) ("if I were sincere and were asked certain *whys* by a woman [I] should reply, 'Because Ma'am I am the bull.' "). On the other side are the relatively rare opinions in which he invokes the power of judicial review on the liberal side, particularly on questions of free speech and fairness in criminal procedure. Did any of

Of course deference to the legislature could not guide him in common law adjudication, and it is in this area, where his learning was so deep, that his judicial performance was least impressive and has had the least influence. As a judge, he was skilled at the conceptual aspect of the work ("untying knots" he called it[308]), and he could follow the wishes of his community when those wishes were given positive embodiment.[309] But his very lack of connection to that community and lack of empathy with its central concerns disabled him from being the kind of "great magistrate" that Lemuel Shaw had been. When, occasionally, his judgment was not distorted by jealousy or vanity, it was even a deficiency he recognized in himself.[310]

VI. THE END-MEANS CONTINUUM AND THE LAWYER'S WORK

Holmes' predicament, then, was to be an instrumentalist without an adequate system of ends. While he conceived of law as a tool for the achievement of the good, on the question of what the good was, he thought that apart from "the *de facto* will of the community for the time . . . as yet no one has much to say."[311] Nor, in the absence of formal

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Holmes' "liberal activist" opinions, other than his dissent in Frank v. Mangum, 237 U.S. 309, 345-50 (1915), predate Brandeis' joining him on the Court?

308. *See* 2 HOLMES-POLLOCK LETTERS, *supra* note 8, at 61 (letter dated Jan. 23, 1921); *Letters to Dr. Wu*, *supra* note 168, at 167 (letter dated Sept. 30, 1923).

309. For the kind of relatively minute legal conceptual points that especially engaged Holmes' interest as a judge, see, for example, 1 HOLMES-POLLOCK LETTERS, *supra* note 8, at 27 (letter dated Mar. 12, 1886); *id.* at 33 (letter dated Feb. 23, 1890); *id.* at 39-40 (letter dated July 8, 1891); *id.* at 50-51 (letter dated Apr. 2, 1894); *id.* at 243 (letter dated Feb. 18, 1917) ("We have had all manner of interesting and important cases—the two are not the same."); *id.* at 262 (letter dated Mar. 22, 1918); *id.* at 273 (letter dated Nov. 24, 1918) (a "pretty point in Sovereignty").

310. Holmes' jealous vanity appears in his snide "tribute" to John Marshall; he characterized Marshall as basically a party politician who had luckily happened on the scene at a moment when history was on his party's side. *John Marshall*, *supra* note 42, at 267-68. Holmes went on to say that he preferred to celebrate the "originators of transforming thought," those who see theoretical issues in "little decisions" which effect "interstitial change[s]" in the "tissue of the law." *Id.* at 269. But, he concluded sadly, "what the world pays for is judgment, not the original mind," so that centenary tributes must be paid to those (like Marshall) who decide "great questions and great cases" of the sort that involve "the Constitution or a telephone company." *Id.* Marshall's political "judgment" was, of course, exactly the quality Holmes had praised in Shaw, and would later praise in White. It was the same quality, he admitted in his better moments, that he lacked himself.

Later, after his nomination to the Supreme Court, Holmes groused to Pollock about press commentary, which naturally focused on his widely publicized pro-labor dissent in Vegelahn v. Guntner, 167 Mass. 92, 104-09, 44 N.E. 1077, 1079-82 (1896), the opinion that had led a Progressive president to appoint him. Holmes particularly resented the journalistic charge that he was "brilliant but not very sound," complaining that journalists "bully me with Shaw, Marshall and the rest." 1 HOLMES-POLLOCK LETTERS, *supra* note 8, at 106 (letter dated Feb. 23, 1902). For other gloomy reflections on his failure to get the credit he thought he deserved for his work as a state court judge, see *Despondency and Hope*, *supra* note 306, at 147, and *Twenty Years in Retrospect*, *supra* note 78, at 157.

Toward the end of his life, after Holmes' career on the U.S. Supreme Court had finally gained him the reputation he wanted, Harvard Law School hung his portrait next to Marshall's. Holmes referred to this as "the handsomest compliment that they could pay." 2 HOLMES-POLLOCK LETTERS, *supra* note 8, at 268 (letter dated June 9, 1930).

311. *Holdsworth's English Law*, *supra* note 91, at 288.

legislative guidance, did he even have much of a sense for the temporary *de facto* collective will; he had chosen to serve a community with whose values he was out of sympathy, whose opinions he did not know, whose very newspapers he did not read.

As an "internal" man who thought that "ideas are more interesting than things," Holmes was by nature a spectator or "witness," yet he chose to work within the law as an "actor."[312] He was reconciled to being a lawyer by a faith that law could "furnish philosophical food to philosophical minds."[313] But he had to struggle to square this faith, which drove him to see every case as an illustration of the "theory and philosophy of the law," with his instrumental conception of law as essentially legislative, to be judged by its "justice and reasonableness."[314] This struggle gave him a curious half-out-of-body vision, an ability to look in on the law from the outside at the same time as he operated upon it from within.

His double vision led Holmes to celebrate the value of the lawyer's work in an unusual way. The passages he composed for ceremonial legal occasions on the theme of how to "live greatly in the law" are familiar ornaments of law school deans' welcoming speeches and commencement speakers' valedictories.[315] But these passages are exceptional within the canon of the law's celebratory rhetoric for more than their stylistic qualities. They lack the usual references to law as a force for good in the community, whether as the bulwark of liberty, the refuge of the oppressed, the source of order and stability, or the guarantor of prosperity.[316] Their focus is entirely on the intrinsic joys rather than on the instrumental justifications of the lawyer's work.

The dangers of this kind of rhetoric, especially when it has behind it the force of Holmes' literary art, are evident. It renders in impressive terms lawyers' self-conception as practitioners of a demanding craft and members of a learned profession, while ignoring the immediate

312. *Introduction to the General Survey, supra* note 68, at 300-01; *The Law, supra* note 238, at 26-27.

313. *Introduction to the General Survey, supra* note 68, at 300.

314. HOLMES-SHEEHAN CORRESPONDENCE, *supra* note 278, at 58 (letter dated Jan. 31, 1913); *Langdell Review, supra* note 139, at 234.

315. As Holmes put it in the most-quoted of these passages, "I say . . . that a man may live greatly in the law as well as elsewhere; that there as well as elsewhere his thought may find its unity in an infinite perspective; that there as well as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable." *The Profession of the Law, supra* note 244, at 30; *see also The Law, supra* note 238, at 26; *The Use of Law Schools, supra* note 175, at 38-39, 48; *The Bar as a Profession, supra* note 187, at 159; *The Path of the Law, supra* note 23, at 202; *Law in Science, supra* note 24, at 212, 224; *John Marshall, supra* note 42, at 270; *Northwestern Address, supra* note 244, at 276-77; *Introduction to the General Survey, supra* note 68, at 300-01 OLIVER WENDELL HOLMES, *Albert Venn Dicey* (1898), in OCCASIONAL SPEECHES, *supra* note 78, at 106, 107; *A Provisional Adieu, supra* note 244, at 152; *cf. The Bar as a Profession, supra* note 187, at 154 (discussing the possibility of great success at the bar without much education).

316. A rare counterexample, which focuses on the practical work of the bar as its main function, is *Twenty Years in Retrospect, supra* note 78, at 154-57.

and material external consequences of their work on others.[317] This portrayal of legal practice flowed naturally out of Holmes' most conspicuous defect as a judge and "practical legislator"—his spectatorial detachment from his social context. Having noticed this defect in his qualities, it is now time to consider the qualities of the defect.[318] In my view, Holmes' lack of any strong vision of the social good led him to concentrate with unusual focus on the respects in which pragmatism's stress on situation and context differentiate it from simple instrumentalism.

Excessive focus on the instrumental aspects of pragmatism, especially with emphasis on its evolutionary biological roots, readily makes it into the philistine and drearily reductive philosophy portrayed by its critics. Pragmatists treat human inquiry as a means, an instrument—but an instrument to what ends? As Holmes once said, the theory of evolution seems to decree constant attention to survival, so "that man should produce food and raiment in order that he might produce yet other food and other raiment to the end of time." And yet, as he added, "who does not rebel at that conclusion?"[319] Well, not everyone does. Holmes himself associated the term "pragmatism" with the world view of those who endorse this same grimly philistine "food and raiment" creed, in which every activity is subordinated to some end external to itself, and nothing is done for its own sake—the world view of Mr. Gradgrind, Dickens' great parodic embodiment of English positivism and utilitarianism.[320]

Holmes vehemently and self-consciously repudiated this view. He denied that "the justification of science and philosophy is to be found in improved machinery and good conduct"; they were "themselves necessaries of life" which "civilization sufficiently accounts for itself" by producing. "[S]cience, like art," he said, was to be "pursued for the pleasure of the pursuit and of its fruits, as an end in itself."[321] It was in this spirit that Holmes praised a Cambridge mathematician's dedication

317. For critique along these lines of Holmes' version of "living greatly in the law," see J. NOONAN, *supra* note 230, at 144-51. Noonan unflatteringly portrays Cardozo (following Holmes) as seeking to extract "great and shining truths" from "the sordid controversies of the litigants." *Id.* at 150 (quoting Cardozo). Also see Bill Simon's critique of the vision of legal practice as either a craft guided mainly by its own internal standards or a game to be played for its intrinsic pleasures. William Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics,* 1978 WIS. L. REV. 29.

318. "[M]en may be pardoned for the defects of their qualities if they have the qualities of their defects." *The Class of '61, supra* note 286, at 161.

319. *Northwestern Address, supra* note 244, at 272; *see also Speech at Bar Dinner, supra* note 135, where Holmes, while conceding that "we all want" to "make a living and to succeed," referred to "our ulterior intellectual or spiritual interest," "the ideal part, without which we are but snails or tigers." *Id.* at 246.

320. "Now, what I want is Facts. Teach these boys and girls nothing but Facts. Facts alone are wanted in life. Plant nothing else, and root out everything else." CHARLES DICKENS, HARD TIMES 11 (1961) (originally published 1854).

321. *Holmes-Cohen Correspondence, supra* note 31, at 326 (letter dated July 21, 1920) (quoting *The Use of Colleges, supra* note 244, at 63); *Law in Science, supra* note 24, at 211-12.

to the derivation of a theorem he believed to be entirely useless.[322] The point was not confined to the abstract thinker; the same value attached to the care a stonemason lavished on a cathedral gargoyle placed where no one could see it, and to an explorer's search for the North Pole, simply because it was there. In Holmes' mind, these kinds of inquiry and activity respond to "categorical imperatives" that "hold their own against hunger and thirst" and "scorn to be classed as mere indirect supports of our bodily needs, which rather they defy."[323] The World War, he wrote to Laski, would be nothing but "a fight of swine for swill" if "we ceased to be interested in philosophy and art."[324] Holmes spoke on no theme with so much passion so often as he did on the value of activity, including intellectual activity, that in any usual sense we would find inexpedient and uneconomic. These passages make it impossible to accept the harsh universality of Yosal Rogat's judgment of Holmes as a man who in the end "simply did not care."[325]

How did Holmes reconcile his romantic celebration of the impractical, especially the impractical life of the mind, with the pragmatic account, which he accepted, of the place of thought in life? Pragmatic instrumentalism, after all, holds that beliefs are instruments for coping with life, treating (in Holmes' own words) "all thought" as "on its way to action."[326] How then to explain, much less justify, the delight of the mathematician at his useless theorem, not to mention the explorer's life-risking quest for the Pole? If "mind" is the name for a set of animal capacities and dispositions naturally selected, like other such capacities and dispositions, for their survival value, why should anyone pursue an end that ignores or even defies the drive to survive and reproduce? And why should anyone think such conduct praiseworthy?

These questions created a genuine paradox for Holmes, and he spent considerable reflection upon them. Perhaps he put his thoughts best in a letter to Cohen:

> Man is like a strawberry plant, the shoots that he throws out take root and become independent centres. And one illustration of the tendency is *the transformation of means into ends.* A man begins a pursuit as a means of keeping alive—he ends by following it at the cost of life. A miser is an example—but so is the man who makes righteousness his end. Morality is simply another means of living but the saints make it an end in itself. Until just now it never occurred to me I think that the same is true of philosophy or art. Philosophy as a fellow once said to me is only thinking. Thinking is an instrument of adjustment to the conditions of life—but it becomes an end in itself. So . . . we can see how

322. *Law in Science, supra* note 24, at 211.

323. *Northwestern Address, supra* note 244, at 273-74.

324. 1 HOLMES-LASKI LETTERS, *supra* note 10, at 111 (letter dated Nov. 22, 1917).

325. Rogat, *supra* note 2, at 255.

326. *John Marshall, supra* note 42, at 270.

man is inevitably an idealist of some sort . . . .[327]

This idea of Holmes'—"the transformation of means into ends"—closely parallels an important theme in Dewey's work. Holmes' first notion—that philosophy is "only thinking," and that thinking is, or begins as, "an instrument of adjustment to the conditions of life,"—reflects the instrumental side of Deweyan pragmatism. The second notion, that thinking "becomes an end in itself," is equally Deweyan, though it reflects a less well-known aspect of his work. Holmes' point is that the human capacity for generalizing is indeed a useful aid to survival; but the development of this capacity then makes its exercise intrinsically rewarding; and so the chief end of life, for some, becomes "framing generalizations" which are not (in terms of survival) "worth a damn."[328]

At the center of both Dewey's account of human action and his theory of value is the concept of the continuum of ends and means. This is one of his most important ideas, and it sharply differentiates him from other "instrumentalist" thinkers, such as Bentham and Hobbes, who understand that human action is always directed toward certain fixed ends, whether the avoidance of death or the attainment of pleasure. For Dewey, the second pragmatist tenet, the culturally situated and contextual aspect of all human inquiry and deliberation, undercuts any idea that all human activity is aimed at some limited set of fixed ends, just as it undercuts the concept that the moral life should be directed by fixed rules or principles formulated and applied without regard for context and consequence. The dualism of ends and means is, for Dewey, no more tenable than any other, when it is taken to divide experience into mutually exclusive categories.[329]

As Dewey understands human conduct, individuals make plans, setting provisional goals at varying levels of abstraction, and selecting among the alternative courses of conduct that might lead to the goals.[330] But the goals that give structure to human plans are never "final"; they are at best momentary resting points whose attainment has further foreseeable consequences desirable or undesirable; hence they must themselves be evaluated as means relative to those consequences. Nor can alternative plans of action be evaluated only on the basis of their efficacy in achieving their (provisional) ends; activities, however instrumentally conceived, are to be evaluated by their intrinsic satisfac-

327. *Holmes-Cohen Correspondence, supra* note 31, at 329-30 (letter dated Sept. 6, 1920) (emphasis added); *see also Sidney Bartlett, supra* note 292, at 54.

328. *See* note 266 *supra*.

329. These aspects of both Dewey's and Holmes' versions of instrumentalism can be seen as developments of the Emersonian elements in the origins of pragmatism. *See* note 297 *supra*.

330. See, for example, Dewey's discussion of the movement between ends and means in the process of building a house in J. DEWEY, HUMAN NATURE AND CONDUCT, *supra* note 40, at 268-69.

tions or frustrations as well as by their consequences.[331]

Dewey's conception of the end-means continuum challenges another of the standard dualisms of Western thought: the economist's division of human activity into distinct categories of production and consumption. For Dewey, these concepts as commonly understood denote pathological rather than paradigm cases, and are of little use in characterizing normal human activity, which integrates instrumental or productive aspects with those that are final or consummatory. The concept of pure production—activity valued purely as a means of attaining external results—may approximate the reality of, for example, the most mindless and degrading forms of industrial labor. But this simply confirms that such labor is a pathological rather than a normal form of human activity.[332]

Similarly, pure consumption, behavior carried on entirely for its immediate reward, with no further purpose whatever, scarcely qualifies as human activity for Dewey. The economist's account of consumption might describe a kitten's play with a ball, but such purely "consummatory" conduct lacks the purposefulness which is the characteristic feature of normal human action. Even the play of very young children, Dewey noted, has this characteristic; the most initially aimless play tends to become an improvised game or drama, in which "purpose becomes a thread that runs through a succession of acts."[333] Purposefulness and enjoyment are thus not antagonists, as in the economist's account of production and consumption, but complements.

Play often involves not only an ordering of activities, as in a game, but also an "ordering of materials"[334]; in such cases it merges imperceptibly into artistic creation. For Dewey, the making of art, in its organic integration of the instrumental and consummatory aspects of conduct, is the prototype of authentic human activity. Though art, like play, has its own immediate rewards, it is not pursued purely for its own sake; as with play, a thread of purpose, ulterior motive, gives unity to the process. The artist aims in the first instance at the production of the work of art itself. But the thread of purpose is not cut with the completion of the art object; the object too is an instrument for use, just as are more evidently utilitarian products. For Dewey, art is "peculiarly instrumental in quality . . . a device in experimentation . . . a new training of modes of perception." Works of art are tools for learning,

331. Dewey's works contain numerous discussions of the end-means continuum, as well as other, related critiques of the concept of fixed human ends. *See, e.g.*, JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY 161-86 (2d ed. 1948); J. DEWEY, HUMAN NATURE AND CONDUCT, *supra* note 40, at 199-277; J. DEWEY, EXPERIENCE AND NATURE, *supra* note 19, at 354-437; J. DEWEY, THE QUEST FOR CERTAINTY, *supra* note 39, at 258-64; JOHN DEWEY, ART AS EXPERIENCE 35-57 (1934); JOHN DEWEY, THEORY OF VALUATION 40-50 (1939).

332. J. DEWEY, RECONSTRUCTION IN PHILOSOPHY, *supra* note 331, at 181; J. DEWEY, ART AS EXPERIENCE, *supra* note 331, at 341.

333. J. DEWEY, ART AS EXPERIENCE, *supra* note 331, at 278.

334. *Id.*

insight, and communication; like "microscopes and microphones" they "open new objects to be observed and enjoyed."[335]

Any human activity informed by purpose and shaped by structure falls upon the end-means continuum and can be seen to resemble not only art but also work, "provided work is not identified with toil or labor."[336] For Dewey, "[w]ork which remains permeated with the play attitude *is* art."[337] And the aesthetic dimension properly pervades workaday life.[338] The social separation of activities into those pursued for their own sake and those merely instrumental, consumption and production, is, on Dewey's account, a piece of ideology reflecting and defending the class-based association of material production with menial status and leisure with privilege.[339]

Thus Dewey's psychology of action, his aesthetics, and his social philosophy are linked together around the central concept of the end-means continuum. From his account of normal human action as an integration of instrumental and consummatory aspects emerges a critique that blurs the common distinctions between work and play, on the one hand, and between play and art on the other. The consequence is a commitment to ensuring meaningful work—playful, artful, and "unalienated"—as one of the central goals of social organization. This commitment is what gives to Dewey's social philosophy its radically critical bite. Though he considered himself a liberal democrat, and rejected many aspects of Marxism, he did believe that capitalist economic organization as he knew it had failed to fulfill the goal of meaningful work for all and that classical liberal political theory and political economy had failed even to articulate this goal as one of its ideals.[340]

Now we must return our attention to Holmes, who of course was no radical, scarcely even a liberal, and who had no faith at all in the advancement of human happiness by the economic reorganization of society. These are real and irreducible differences between him and

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335. J. DEWEY, EXPERIENCE AND NATURE, *supra* note 19, at 392.

336. J. DEWEY, ART AS EXPERIENCE, *supra* note 331, at 278.

337. J. DEWEY, DEMOCRACY AND EDUCATION, *supra* note 69, at 206.

338. In one of his best passages, Dewey insisted that an understanding of art must begin with

> the events and scenes that hold the attentive eye and ear of man, arousing his interest and affording him enjoyment as he looks and listens: the sights that hold the crowd—the fire-engine rushing by; the machines excavating enormous holes in the earth; the human-fly climbing the steeple-side; the men perched high in air on girders, throwing and catching red-hot bolts. The sources of art in human experience will be learned by him who sees how the tense grace of the ball-player infects the onlooking crowd; who notes the delight of the housewife in tending her plants, and the intent interest of her goodman in tending the patch of green in front of the house; the zest of the spectator in poking the wood burning on the hearth and in watching the darting flames and crumbling coals.

J. DEWEY, ART AS EXPERIENCE, *supra* note 331, at 4-5.

339. J. DEWEY, EXPERIENCE AND NATURE, *supra* note 19, at 368; J. DEWEY, ART AS EXPERIENCE, *supra* note 331, at 4-10.

340. J. DEWEY, ART AS EXPERIENCE, *supra* note 331, at 343-44; J. DEWEY, LIBERALISM AND SOCIAL ACTION, *supra* note 122, at 87-90.

Dewey. Yet alongside these differences, we can now see the important similarities. Holmes' conception of "living greatly in the law" projected—at least for lawyers—a Deweyan vision of work as uniting means enjoyed for their own sake, and ends produced for use: work-play-art.

That Holmes had himself arrived at something like Dewey's conception of the ends-means continuum is evident in the "strawberry plant" passage already quoted, with its account of the transformation of the purely instrumental into the intrinsically valuable.[341] In one speech, Holmes applied the insight to that most instrumental of activities, industrial production, when he said that the "chief worth of civilization" is not that it produces more goods but that it "makes the means of living more complex" and thereby "calls for great and combined intellectual efforts . . . in order that the crowd may be fed and housed and moved from place to place." The "more complex and intense intellectual efforts" called forth by industrial society "mean a fuller and richer life. They mean more life. Life is an end in itself . . . ."[342] This passage strikingly juxtaposes the bitter and the sweet in Holmes—on the one hand, his remoteness from the "crowd" of ordinary people, whose real material needs for decent food and housing scarcely concern him; on the other, the genuine and uncommon insight into the intrinsic value arising out of a realm of material production usually conceived entirely in instrumental terms.

Holmes' infusion of the workaday world with intrinsic value, value conceived in aesthetic terms, was a remnant he always retained from his early Emersonian romanticism. He spoke in this spirit when he told his Harvard classmates that "[l]ife is painting a picture, not doing a sum,"[343] and when, writing to his young friend Wu, he quoted Croce to the effect that "all experience is art." As he elaborated Croce's point, he noted the creatively selective quality of both art and ordinary perceptual experience: "all art is caricature, that is, it emphasizes what the artist wants to call attention to at the expense of other elements . . . ." The kind of "insight" that guides this selection of the telling detail, Holmes called "the great human gift."[344] Holmes describes the philosopher in terms usually reserved for the artist as one who can "see the universal in the particular" and "show the infinite in the finite."[345]

But unlike his mentor Emerson, Holmes conceived of the "universal" and "infinite" not in Platonic terms as discoverable objects of rational inquiry; rather his conception was a genuinely pragmatic and perspectival one. For him, the idealist is one who seeks to "make—I do not say find—his world ideal," in part by adopting "an infinite *perspec-*

341. *See* text accompanying note 327 *supra*.

342. *Speech at Bar Dinner, supra* note 135, at 248.

343. *The Class of '61, supra* note 286, at 161.

344. *Letters to Dr. Wu, supra* note 168, at 156-57 (letter dated Dec. 2, 1922).

345. *Id.* at 164 (letter dated June 16, 1923); HOLMES-SHEEHAN CORRESPONDENCE, *supra* note 278, at 51 (letter dated Oct. 27, 1912).

tive," accepting that "the universe has more in it than we understand."[346] Similarly, the Holmesian "universal" involves the connection of the particulars of ordinary experience to each other by the transfiguring vision of the imaginative eye.[347]

For the purpose of seeing the infinite and the universal, "*every* particular is as good as any other," subject to "only the qualification, that some can see it in one, some in another matter more readily, according to their faculties."[348] Everyday work thus opened the door to both art and philosophy for Holmes, and he spoke in these terms of his own work: "Life having thrown me into the law, I must try to put my feeling of the infinite into that, to exhibit the detail with such a hint of a vista as I can, to show in it the great line of the universal."[349]

Focus on the similarity between Dewey's and Holmes' thoughts on art and work risks distortion without the offsetting reminder of the very important differences. Dewey, as a temperamental activist and a convinced democrat, clearly meant his conception of work as play and art to apply to everyone, recognizing that for this to be achieved the whole system of industrial labor would have to be transformed. With Holmes, a detached skeptic whose commitment to democracy was at best ambivalent,[350] there is more doubt whether he thought the ideal of work as

346. *The Profession of the Law, supra* note 244, at 29, 30 (emphasis added); *Natural Law, supra* note 286, at 315.

347. In his essay, *Natural Law*, Holmes identifies himself as one who "sees no reason for believing that significance, consciousness and ideals are more than marks of the finite," *Natural Law, supra* note 286, at 315, and added that "[i]f we think of our existence not as that of a little god outside, but as that of a ganglion within, we have the infinite behind us. It gives us our only but our adequate significance." *Id.* at 316. All that is required is an "imagination . . . strong enough to accept the vision of ourselves as parts inseverable from the rest . . . ." *Id.*

348. *Letters to Dr. Wu, supra* note 168, at 164-65 (letter dated June 16, 1923).

349. *Id.* at 167 (letter dated Sept. 30, 1923). Holmes was presumably alluding to the Emersonian origins of his ideas about the "infinite" and "universal" when he wrote to Cohen that "early associations affect my emotional attitude toward the mystery of the world." *Holmes-Cohen Correspondence, supra* note 31, at 334 (letter dated Jan. 30, 1921).

350. Holmes' ambivalence about democracy was lifelong. As a Civil War officer he wrote: "While I'm living *en aristocrat* I'm an out-and-outer of a democrat in theory, but for contact, except at the polls, I loath the thick-fingered clowns we call the people . . . ." Letter from Holmes to Amelia Holmes (Nov. 16, 1862), *reprinted in* TOUCHED WITH FIRE, *supra* note 267, at 71. Also, recall Holmes' comments on the mass of men as suited only for "Feed—*F-outre* and Finish." *See* note 286 *supra*. On the other side, he once said in a speech that "the deepest cause we have to love our country" was its "democratic spirit"—"that instinct, that spark that makes the American unable to meet his fellow man otherwise than simply as a man . . . ." OLIVER WENDELL HOLMES, *The Puritan* (1886), in OCCASIONAL SPEECHES, *supra* note 78, at 25. And he wrote of Jane Addams as

> a big woman who knows at least the facts and gives me more insights into the point of view of the working man and the poor than I had before. How excellent her discrimination between doing good *to* them and doing good *with* them. I believe with her that we need more democratic feeling—I like to multiply my scepticisms—for in administering constitutional law one cannot realize too clearly the possibility of different points of view for all of which there ought to be room to assist themselves if the constitution is not to be a Procrustean bed.

Benjamin G. Rader and Barbara K. Rader, *The Ely-Holmes Friendship, 1901-1914*, 10 AM. J. LEGAL HIST. 128, 137 (1966).

partaking of art and philosophy could be extended beyond learned professionals to ordinary people.

On the one hand, Holmes did present his ethic of professionalism or "jobbism"—" 'Whatsoever thy hand findeth to do, do it with thy might' "—as a value of potentially universal application.[351] In this vein, he quoted George Herbert's lines on the infusion of the divine into the most humble work: "Who sweeps a room as for Thy laws,/ Makes that and th' action fine"[352]—a reference that Dewey noted favorably in his own essay on Holmes.[353] Holmes often showed appreciation of the intrinsic pleasures of basic human activity.[354] And he said that "[e]very calling is great when greatly pursued."[355]

On the other hand, by "greatly pursued" Holmes seems generally to have meant pursued with learning and with a bent toward abstract speculation. Sweeping a room might be "fine" but not "great"—it is hard to imagine Holmes trying it out for the challenge. He conceived of intellectual pursuits as naturally reserved for the few. Thus he celebrated the special virtues of the little band of professionals or "specialists," including lawyers, who set high intellectual standards for their work. At the same time he deplored the "effervescence of democratic negation" that "attacks the lines of Nature which establish orders and degrees among the souls of men."[356]

At this point one might ask what present use less ambivalent democrats than Holmes might make of his version of professionalism. As a beginning, his insistence on the intrinsic rewards of law practice as a craft, an art, and a goad to speculative thought reminds us of a valued partial ideal of professional life. If his words on how to "live greatly in the law" are balanced by some stress on the external and political consequences of professional activity, they do still belong in those deans' remarks and commencement speeches. Further, Holmes' rhetoric can be generalized along the lines Dewey suggests and thus can serve to articulate the broader social ideal of universal access to intrinsically sat-

351. *Speech at Bar Dinner, supra* note 135, at 247. Characteristically, Holmes described the commitment to doing one's job well as "infinitely more important than the vain attempt to love one's neighbor as one's self." *Id.* He made explicit the link between "jobbism" or professionalism and the transformation of means into ends in *Sidney Bartlett, supra* note 292:

> It seems to me further that the rule for serving our fellow men . . . is to do one's task with one's might. If we do that, I think we find that our motives take care of themselves. *We find that what may have been begun as a means becomes an end in itself;* that self-seeking is forgotten in labors which are the best contribution that we can make to mankind; that our personality is swallowed up in working to ends outside ourselves.

Id. at 54 (emphasis added).

352. *The Bar as a Profession, supra* note 187, at 159.

353. Dewey, *Justice Holmes, supra* note 19, at 36.

354. "[A]n adequate vitality would say daily: 'God—what a good sleep I've had.' 'My eye, that was dinner.' 'Now for a rattling walk—' in short realize life as an end in itself. Functioning is all there is . . . ." 2 HOLMES-POLLOCK LETTERS, *supra* note 8, at 22 (letter dated Aug. 21, 1919).

355. *The Law, supra* note 238, at 26.

356. *The Use of Law Schools, supra* note 175, at 37-38.

isfying work. Following Dewey, one might say what Holmes would not: It is false that "every calling" as presently constituted can be "greatly pursued." But it should be true, and its falsity stands as a continuing rebuke to the present social constitution of work.

Finally, Holmes' account of "the transformation of means into ends" responds to the most common objection to pragmatism—that it is the soulless philosophy of Mr. Gradgrind, promoting a mean and reductive approach both to life and to law. On this score, it is instructive to compare Holmes' version of the ideal the lawyer should pursue with that stated by Roscoe Pound, who was probably the first significant American legal thinker to label himself a "pragmatist."[357] Expounding his conception of "sociological jurisprudence," Pound wrote that legal scholarship should dedicate itself to a "great task . . . of social engineering," aimed at the creation of a system of law rationally designed with an eye to "precluding friction and eliminating waste."[358] Pound's "social engineer" would study the law scientifically, accumulating information so as to assess the machinery of the law in terms of the efficient production and distribution of material goods. This purely instrumental conception of law was not all there was to Pound's jurisprudence, but it was certainly its most prominent strand.[359] It was a view entirely consistent with Bentham's conception of law as an instrument for the satisfaction of certain fixed human desires and the assuagement of certain fixed fears.[360]

There is much of value in Pound's engineering conception of law, especially by way of compensation for the spectatorial defects in Holmes' statement of the professional ideal. Pound rightly emphasizes the social consequences of legal practice and thus properly reinforces the sense that professional privileges carry with them social obligations. But for all this, his model of the lawyer as social engineer has defects that have become more evident over the years. For one thing, the engineering metaphor creates false hopes for the technical solution of social problems by experts, wrongly suggesting that injustice is always better redescribed as "friction" and "waste."[361] Further, it presupposes that so important an element in social life as law can remain sim-

357. *See* Roscoe Pound, *A Practical Program of Procedural Reform*, 1910 PROC. ILL. ST. B.A. 373, 375. On Pound's pragmatism, see generally DAVID WIGDOR, ROSCOE POUND 183-205 (1974).

358. ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 195-96 (1921); *see also* Roscoe Pound, *The Theory of Judicial Decision* (pt. 3), 36 HARV. L. REV. 940, 954-56 (1923).

359. Pound later leavened the "social engineering" picture with the claim that the judge requires imaginative "trained intuition" as well as calculative instrumental reason, at least for certain classes of cases. *See* Pound, *The Theory of Judicial Decision*, *supra* note 358, at 951.

360. For Bentham's view of the four fixed goals to be pursued by a legal system—subsistence, abundance, security, and equality—see J. BENTHAM, *Principles of the Civil Code*, in 1 WORKS OF BENTHAM, *supra* note 29, at 297, 302.

361. Dewey's writing is also laden with Progressive imagery suggesting scientistic and technocratic cures for social ills; but in his case, the "social laboratory" rhetoric is offset by a strong democratic sense for the importance of broad public participation in government and a recognition of the historically conditioned, political, and aesthetic dimensions of science.

ply a dependent variable, a means for achieving external ends. Holmes' and Dewey's concept of the ends-means continuum reminds us that law, even if it begins as an instrument for the attainment of basic ends like "food and raiment," can generate its own intrinsic values, both positive (due process, legality, the Rule of Law) and negative (legalism). Dewey well understood this; he wrote that a good system of law was partly constitutive of, not merely instrumental to, a good society.[362] Legal pragmatism thus understood is receptive to the classical republican conception both of law as a constitutive element in political life, and of politics itself as an activity of intrinsic as well as instrumental value. Together, these ideas suggest a model of lawyer as republican civil servant rather than as social engineer.[363]

The concept of the end-means continuum has another implication for law study: Dewey's and Holmes' ideas on the relations among art, play, and work remind us that law has a pervasive aesthetic dimension. Legal practice is inevitably an art and a craft, even a game, carried on partly for its own sake. Legal thinkers have rarely taken this point seriously. Some have recognized that a certain aesthetic sensibility supports the geometric conception of law as a closed logical system—thus the Romans' phrase *elegantia juris*. But fewer have seen that any critique of geometric formalism carries with it some aesthetic of its own, implicit if not explicit. Influenced by Holmes on this point, Karl Llewellyn was one of the few American legal thinkers really to attend to the aesthetic and rhetorical dimension of law. This appears most memorably in his treatment of jurisprudential approaches as "styles," grand and formal, rather than as "theories"; less well known is his use of the (Holmesian) analogy of law to architecture, which allowed him to formulate the aesthetic of the legal grand style as form in the service of function.[364]

But Llewellyn scarcely began the study of law as an art or craft. His most significant hint of the direction he might have followed came in a footnote written at the end of his life in which he spoke of the relation between legal aesthetics and justice, "the beautiful" and "the good" in law.[365] He suggested that justice, partly a surrogate for efficiency, is in part also an aesthetic ideal, and none the worse for it. The just is quite appropriately conceived of as the "fitting." Recent legal scholarship

362. "A good political constitution, honest police-system, and competent judiciary, are means of the prosperous life of the community because they are integrated portions of that life." J. DEWEY, EXPERIENCE AND NATURE, *supra* note 19, at 367.

363. For a modern account of legal practice as a constitutive aspect of American government, which explicitly draws on classical republican ideas, see Robert W. Gordon, *The Independence of Lawyers*, 68 B.U.L REV. 1, 14-30 (1988). Any such account must go significantly beyond Holmes' implicit view of the private counselor as purely the predictor of judicial action in the service of the private interests of clients. *See* text accompanying notes 181-230 *supra*.

364. *See* Karl N. Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U. CHI. L. REV. 224 (1942), *reprinted in* KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 167, 174-96 (1962). Holmes suggested the analogy of the legal theorist to the architect in *The Path of the Law*, *supra* note 23, at 200.

365. Llewellyn, *supra* note 364, at 224 & n.*.

has begun to develop the themes anticipated by Llewellyn's hint, focusing on the place in law of literary technique, visual imagery, and religious symbolism. Particularly notable in this development have been feminist writers on law, whose own practical and contextual approach to law indicates important parallels between pragmatism and contemporary feminist thought.[366]

Of course Holmes was even less of a feminist than he was a radical economic reformer. And while he often contrasted scientific with literary approaches to inquiry, he did so invariably to the disadvantage of the literary.[367] But taken all in all, his version of legal pragmatism supports those who would study the place in law of narrative, metaphor, and the aesthetics of conceptual architecture. And, inevitably, he will be enlisted to supply epigraphic and aphoristic inspiration for this approach to law study—a role that might seem trivial, but only because the approach has not yet taken sufficient root. If scholarship does establish the aesthetic and rhetorical element in law as intrinsic rather than merely decorative, we will better appreciate, though still with justified suspicion, the power that a legal theorist armed with the skills of a great literary artist can wield.

It is important, finally, for those of us susceptible to Holmes' charms to recall once more the need for that suspicion. Holmes never did resolve the contradiction between the work of an actor and the perspective of a witness. His resulting ideal vision of legal practice does indeed emphasize the important and neglected "philosophical" (or aesthetic) values that bear on the lawyer's working life. But this emphasis comes at the expense of the aspects of lawyering that make it both a political and a service profession, one with special access to the levers of power, to be judged primarily by how its exercise of that power affects the lives of those subject to it. If we insistently force ourselves to make this correction in the law's image as it appears through the lens Holmes' thought provides, those of us who cannot bury him need not rest con-

366. *See* Robert M. Cover, *Foreword:* Nomos *and Narrative,* 97 HARV. L. REV. 4 (1982); Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory,* 60 N.Y.U. L. REV. 145 (1985); *see also* Dennis E. Curtis & Judith Resnik, *Images of Justice,* 96 YALE L.J. 1727 (1987). Curtis and Resnick explore the iconography of justice, an issue on which Llewellyn said:

> I am rather clear that in a fuller presentation, there would have to be included under "The Good," a study of "Justice, Efficiency, and Warmth," developing not only the problem of finding the first, and of weaving the three together, but also that of finding a symbol for law of very different character from that of a large, cold, figure, distant, blind, and carrying a sword—a symbol earth-rooted and friendly as an oak.

Llewellyn, *supra* note 364, at 224 n.*.

For more on the striking analogies between pragmatist and feminist thought, compare the formulations of the distinction between the "tough-minded" and "tender-minded" in W. JAMES, PRAGMATISM, *supra* note 14, at 3-40, and the distinction between "separate" and "connected" approaches to knowledge in MARY FIELD BELENKY, BLYTHE MCVICKER CLINCHY, NANCY RULE GOLDBERGER, & JILL MATTUCK TARULE, WOMEN'S WAYS OF KNOWING 100-30 (1986).

367. *See* note 278 *supra.*

tent with simply praising him. Following his own best teachings, we can properly re-situate him, and put him yet again to good use.

Appendix: Holmes and the Pragmatists

Pragmatism was not only a theory; it was also an important movement, originating with Charles Sanders Peirce, later led by William James, and then by John Dewey. It used to be said that Holmes was part of this movement, indeed an important founder of it.[368] But the evidence for Holmes as a founder of pragmatism is weak, and he said much that casts doubt on whether he thought of himself as a pragmatist at all. Still, there are enough complexities on the issue to make it impossible to ascribe any simple view to Holmes.

When James introduced pragmatism by name to the world in 1898, he attributed both the word and the idea behind it to Peirce,[369] who had first articulated the idea, though without the name, in a series of articles published in *Popular Science Monthly* twenty years before.[370] Peirce's basic thesis was that general concepts get their meanings not from their antecedents in sensation, as traditional empiricism had it, but from their practical consequences in action.[371] Pragmatism, he said, followed as "scarce more than a corollary" from Alexander Bain's definition of a belief as " 'that upon which a man is prepared to act.' "[372] He first stated the thesis, and used the name "pragmatism," in a paper delivered in 1872 to a meeting of the Metaphysical Club, a small discussion group that met in Cambridge during the years after the Civil War.[373] Holmes was one of the original Metaphysicians, along with Peirce, Chauncey Wright, Nicholas St. John Green, and James.[374]

On the basis of these ties, Max Fisch argued that Holmes should be regarded as one of the principal founders of pragmatism.[375] Fisch argued that Holmes' prediction theory of law, which he first publicly articulated in jurisprudence lectures he gave at the Harvard Law School in 1872,[376] was a straightforward application of the basic pragmatic

368. *See* M. FISCH, *supra* note 6; P. WIENER, *supra* note 6, at 172-89.

369. WILLIAM JAMES, *Philosophical Conceptions and Practical Results* (1898), in COLLECTED ESSAYS AND REVIEWS 406, 410 (1920).

370. C.S. PEIRCE, *The Fixation of Belief, supra* note 37; CHARLES SANDERS PEIRCE, *How to Make Our Ideas Clear* (1878), in 5 COLLECTED PAPERS OF CHARLES SANDERS PEIRCE, *supra* note 37, para. 388.

371. "Consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object." C.S. PEIRCE, *How to Make Our Ideas Clear, supra* note 370, para. 402.

372. C.S. PEIRCE, *Historical Affinities and Genesis, supra* note 64, para. 12.

373. *Id.* para. 13; *see also* Letter from William James to Henry James (Nov. 24, 1872), *quoted in* 1 R. PERRY, *supra* note 251, at 332.

374. *See* C.S. PEIRCE, *Historical Affinities and Genesis, supra* note 64, paras. 12-13; Letter from William James to Holmes (Jan. 3, 1868), *quoted in* 1 R. PERRY, *supra* note 251, at 507. On the Metaphysical Club, see P. WIENER, *supra* note 6, at 18-30, and the authoritative account appearing in Max H. Fisch, *Was There a Metaphysical Club in Cambridge?*, in STUDIES IN THE PHILOSOPHY OF CHARLES SANDERS PEIRCE 3 (E. Moore & R. Robin eds. 1964).

375. M. FISCH, *supra* note 6.

376. Holmes first published the gist of the prediction theory in *Notice: Jurisprudential Lectures, supra* note 196.

maxim that Peirce had first presented to the Metaphysical Club in his paper of that year. Fisch inferred that Holmes' theory had been formulated along with Peirce's maxim and even speculated that Peirce might have derived the maxim by generalizing from the prediction theory.[377]

In fact, whatever is distinctively pragmatist in the prediction theory is not likely to have emerged from the discussions of the Metaphysical Club. As Fisch's own later research showed, Holmes' connection with the Club was very tenuous.[378] Holmes later wrote that he had not heard of pragmatism before the 1890s[379] and that he had seen Peirce "very little" during the Metaphysical Club period, because "in those days I was studying law and I soon dropped out of the band"; what benefit he had from the Club was derived from Wright and Green rather than Peirce, whom Holmes regarded as a self-important bore.[380]

Holmes apparently became aware of the term "pragmatism" only some time after James introduced it to the public in 1898.[381] Thereafter, he spoke of it several times in his letters, always critically. Holmes saw pragmatism as entirely James' creation, and his criticisms of the doctrine must be seen in the context of the complex relations between the two men. In their youth they were intense discussion partners and friends; Holmes could address James without any irony as "Oh! Bill, my beloved,"[382] while James called him in reply "my Wendly boy."[383] But they were friends always conscious of serious differences. Thus in 1868 James wrote to Holmes that when they were together "I put myself involuntarily into a position of self-defense, as if you threatened to overrun my territory and injure my own proprietorship."[384] A year later James wrote to his brother Henry of the "cold-blooded, conscious egotism and conceit" by which "[a]ll the noble qualities of Wendell Holmes . . . are poisoned."[385] As late as 1876 James was still close enough to Holmes to visit him and his wife on Cape Cod, where, as he wrote to Henry, he saw Holmes' "virtues and faults . . . thrown into singular relief by the lonesomeness of the shore"; against that background Holmes appeared to James as "a powerful battery, formed like a planing machine to gouge a deep self-beneficial groove through

377. M. FISCH, *supra* note 6, at 11-12.

378. Fisch, *supra* note 374, at 22.

379. *Holmes-Cohen Correspondence*, *supra* note 31, at 326 (letter dated July 21, 1920).

380. Letter from Holmes to Charles Hartshorne (Aug. 25, 1927), *quoted in* Fisch, *supra* note 374, at 11.

381. Holmes' first mention of the term is in a 1907 letter to James. *See* Letter from Holmes to William James (Mar. 24, 1907), *quoted in* 2 R. PERRY, *supra* note 251, at 459-61. Holmes had written to James over a decade before in response to the latter's essay *The Will to Believe*, which had, without using the term "pragmatism," deployed what James later treated as a central aspect of the idea. *See* Letter from Holmes to William James (May 24, 1896), *quoted in id.* at 458.

382. Letter from Holmes to William James (Dec. 15, 1867), *quoted in* 1 *id.* at 506.

383. Letter from William James to Holmes (Jan. 3, 1868), *quoted in* 1 *id.* at 508.

384. Letter from William James to Holmes (May 15, 1868), *quoted in* 1 *id.* at 514.

385. Letter from William James to Henry James (Oct. 2, 1869), *quoted in* 1 *id.* at 307.

life."[386]

Though these temperamental differences finally put an end to their active friendship, James continued to send Holmes his writings. But the breach colored all of Holmes' responses. In 1896, after reading *The Will to Believe*, Holmes commented that James' demands on the universe "are too nearly the Christian demands without the scheme of salvation. . . . This you will recognize as my ever recurring view ever since we have known each other."[387] A decade later, Holmes responded even more negatively to James' *Pragmatism* lectures. Holmes called the name itself "pedantic"[388] and declared his own adherence to one of the two warring factions—the "tough" and the "tender"—between which James wished his new philosophy to meditate:[389] "You would say that I am too hard or tough-minded . . . ."[390]

To others, Holmes used harsher terms. Thus he wrote to Sir Frederick Pollock: "*I* think pragmatism an amusing humbug—like most of William James's speculations . . . ."[391] James, he said, was not strong in "logic" or "abstract thinking";[392] his talent was for "art and *belles lettres*" rather than "philosophy";[393] he had taken positions "fitted to please free thinking Unitarian parsons and the ladies."[394] When James died, Holmes wrote to Pollock that it was his "little sympathy" with James' "demi spiritualism and pragmatism" that had finally driven them apart.[395]

Writing to Harold Laski, Holmes crudely parodied pragmatism: "I never could make anything out of [James'] or his friends' advocacy of his nostrum except either that in motives depending upon human conduct effort affects the result—which we have heard—or that by yearning we can modify the multiplication table, which I doubt."[396] And, with more justice, he objected to Laski's fashionable use of the term "pragmatic" to describe Benthamite legal ideas: "[T]he judging of law by its effects and results did not have to wait for W.J. or Pound for its exist-

386. Letter from William James to Henry James (July 5, 1876), *quoted in* 1 *id.* at 371. For Perry's analysis of the James-Holmes relation, see 1 *id.* at 504-19.

387. Letter from Holmes to William James (May 24, 1896), *quoted in* 2 *id.* at 459.

388. Letter from Holmes to William James (Oct. 13, 1907), *quoted in* 2 *id.* at 462.

389. W. JAMES, PRAGMATISM, *supra* note 14, at 12, 32-33.

390. Letter from Holmes to William James (Mar. 24, 1907), *quoted in* 1 R. PERRY, *supra* note 251, at 301.

391. 1 HOLMES-POLLOCK LETTERS, *supra* note 8, at 138-39 (letter dated June 17, 1908).

392. *Id.* at 192 (letter dated Apr. 26, 1912). James' own characterization reflects some agreement with Holmes' view: "You have a far more logical and orderly mode of thinking than I . . . ." Letter from William James to Holmes (May 15, 1868), *quoted in* 1 R. PERRY, *supra* note 251, at 513.

393. 1 HOLMES-POLLOCK LETTERS, *supra* note 8, at 78 (letter dated Aug. 11, 1897).

394. *Id.* at 139 (letter dated June 17, 1908); *see also Holmes-Cohen Correspondence*, *supra* note 31, at 350 (letter dated Feb. 16, 1925).

395. 1 HOLMES-POLLOCK LETTERS, *supra* note 8, at 167 (letter dated Sept. 1, 1910).

396. 1 HOLMES-LASKI LETTERS, *supra* note 10, at 70 (letter dated Mar. 29, 1917). In another letter, Holmes reports his "glee" that F.H. Bradley "falls foul of Pragmatism and chops it into mincemeat"; he feared he "had missed something until I was confirmed in my criticisms by him." *Id.* at 705 (letter dated Feb. 1, 1925).

ence . . . ."[397]

While Holmes spoke of James' psychological insight and personal charm,[398] qualities he attributed to the latter's "essential Irishness,"[399] only once did he praise one of his old friend's ideas; he conceded that James might have "made a valuable contribution in pointing out that ideas were not necessarily faint pictures of original experience."[400] Though isolated, the remark is significant, for it reveals Holmes' recognition, however grudging, of one of the basic pragmatist innovations upon orthodox empiricism.

Holmes extended his rejection of James' ideas to those of Peirce as well. After Peirce finally came to public attention in the 1920s, Holmes wrote that he was "overrated,"[401] observing that "his reasoning in the direction of religion &c seems to me to reflect what he wants to believe."[402] This reference to religion suggests an important factor common to Holmes' rejection of the ideas of both James and Peirce: "As to pragmatism . . . . I now see . . . that the aim and end of the whole business is religious."[403] This offended against one of Holmes' own deepest intellectual commitments: the religious skepticism that he had formed as a young student before the Civil War, and that he had held to in the most testing moment of his life, when he lay wounded, mortally he thought, after the battle of Ball's Bluff.[404] In Holmes' view, James and Peirce had succumbed to wishful thinking when they made room for God in their otherwise scientific views of the universe. He could befriend and admire the Irish Catholic priest Canon Sheehan,[405] but he detested softness toward religion from within the camp of science. To Holmes, James' thesis that "we are warranted in choosing what seems

397. *Id.* at 20 (letter dated Sept. 15, 1916).

398. 1 HOLMES-POLLOCK LETTERS, *supra* note 8, at 192 (letter dated Apr. 26, 1912).

399. *Id.* at 78 (letter dated Aug. 11, 1897); *see also Holmes-Cohen Correspondence, supra* note 31, at 325 (letter dated July 21, 1920). The connotations of "Irishness" for a Brahmin like Holmes were not likely to be strongly favorable.

400. 1 HOLMES-POLLOCK LETTERS, *supra* note 8, at 191 (letter dated Apr. 26, 1912).

401. 1 HOLMES-LASKI LETTERS, *supra* note 10, at 565 (letter dated Nov. 29, 1923).

402. *Holmes-Cohen Correspondence, supra* note 31, at 341 (letter dated Sept. 14, 1923). Holmes went on to question Peirce's claims to originality: "That we could not assert necessity of the order of the universe I learned to believe from Chauncey Wright long ago. I suspect C.S.P. got it from the same source." *Id.*

403. 1 HOLMES-POLLOCK LETTERS, *supra* note 8, at 140 (letter dated July 6, 1908).

404.

> Of course when I thought I was dying the reflection that the majority vote of the civilized world declared that with my opinions I was *en route* for Hell came up with painful distinctness—Perhaps the first impulse was tremulous—but then I said—by Jove, I die like a soldier anyhow—I was shot in the breast doing my duty up to the hub—afraid? No, I am proud—then I thought I couldn't be guilty of a deathbed recantation—father and I had talked of that and were agreed that it generally meant nothing but a cowardly giving way to fear—Besides, thought I, can I recant if I want to, has the approach of death changed my beliefs much? & to this I answered—No.

TOUCHED WITH FIRE, *supra* note 267, at 27-28; *cf.* M. HOWE, THE SHAPING YEARS, *supra* note 26, at 11.

405. *See* HOLMES-SHEEHAN CORRESPONDENCE, *supra* note 278, at 12 (letter dated Feb. 1904); *id.* at 28 (letter dated July 17, 1909). Holmes' admiration for Sheehan is evident throughout their correspondence.

to us the most effective and helpful view in cases where we have no proof either way" was "fishy" and unacceptable "for us hard-headed ones," because it created an "alliance of philosophy with religion" and allowed the religious to "bully *nous autres*" from a new "dogmatic foothold."[406] Holmes felt that in wanting "a warm God . . . that loves and admires us,"[407] James had given in to temptation by creating a theory that allowed him to believe in one: "His reason made him sceptical and his wishes led him to turn down the lights so as to give miracle a chance."[408]

Holmes criticized the pragmatists not only for softness toward religion, but also for philistinism. In commenting on pragmatism to Cohen, he quoted an old speech in which he had said that the "justification of science and philosophy" was not to be found in "improved machinery and good conduct." Rather "[s]cience and philosophy are themselves necessaries of life. By producing them civilization sufficiently accounts for itself . . . ." Holmes did admit that the "pragmatic utilitarian tests" were "more exquisite" than his words—"improved machinery and good conduct"—had indicated.[409] Holmes knew that he was invoking a popular canard against the pragmatists, but perhaps he felt a connection between their softness toward God and the philistine conception of progress popularly attributed to them.

But Holmes did not reject the ideas of all the leading pragmatists. Late in his life, he praised in the highest terms the work of John Dewey, who, unlike James and Peirce, did not combine pragmatism with theism. With Dewey, as with James, personal factors complicate any assessment of the significance of Holmes' judgment. In 1922, Holmes appraised Dewey's *Human Nature and Conduct* in mixed terms: it was "like shavings of jade—subtle—sometimes epigrammatic . . . an immense advance on any book there was when I was younger—yet somehow not quite seeming to arrive anywhere—and not feeling to me quite as new as it is civilized."[410] He disliked Dewey's reformist politics nearly as much as James' and Peirce's religiosity, noting that Dewey "talks of the exploitation of man by man—which always rather gets my hair up."[411] And three years later, his opinion was even less positive; on hearing that Laski found Dewey unreadable and that Bertrand Russell did not admire him, Holmes reported himself "pleased at what you say about John Dewey—whom I have supposed myself bound to revere, and have revered, but have not read—except in matters of no great moment or impressiveness."[412]

406. 1 HOLMES-POLLOCK LETTERS, *supra* note 8, at 191-92 (letter dated Apr. 26, 1912).
407. *Id.* at 140 (letter dated July 6, 1908).
408. *Id.* at 167 (letter dated Sept. 1, 1910).
409. *Holmes-Cohen Correspondence*, *supra* note 31, at 326 (letter dated July 21, 1920) (quoting *The Use of Colleges*, *supra* note 244, at 63).
410. 1 HOLMES-LASKI LETTERS, *supra* note 10, at 431 (letter dated June 14, 1922).
411. *Id.*
412. *Id.* at 803 (letter dated Dec. 5, 1925).

Then in 1926, when Holmes was 85, his young friend John Wu recommended that he read Dewey's new book *Experience and Nature*. Holmes agreed to try it, even though he had previously found Dewey "excellent but uninspired."[413] But the new work transformed his opinion; he wrote at once to Laski, "I thought [it] truly a great book."[414]

Holmes' praise for *Experience and Nature* may not have been motivated entirely by admiration for Dewey's views. Immediately after praising Dewey's book, Holmes added: "I mention that he quotes me in it as one of our great American philosophers, and pleased me thereby no little, only to say that that was not why I read it and is not why I think it great."[415] The protesting addition may protest too much; it casts some doubt on the source of the transformation of Holmes' opinion of Dewey. One is reminded of a bit of revealing self-deprecation he put in a letter to Pollock: "as Hohfeld used to crack me up naturally I thought well of him."[416] From his own testimony, we know that Holmes valued above all other things the praise of those few whom he regarded as experts.[417]

Of course we should not simply discount Holmes' insistence that Dewey's praise was "not why I think [the book] great." But when he came to say why he thought *Experience and Nature* a great book, Holmes was uncharacteristically inarticulate; he "could not have summed up a chapter or a page" and would "find it hard to give any intelligible ac-

413. *Letters to Dr. Wu*, *supra* note 168, at 189 (letter dated Nov. 23, 1916).

414. 2 HOLMES-LASKI LETTERS, *supra* note 10, at 904 (letter dated Dec. 15, 1926); *see also id.* at 901 (letter dated Dec. 4, 1926); *Letters to Dr. Wu*, *supra* note 168, at 287 (letter dated Jan. 30, 1928); 2 HOLMES-POLLOCK LETTERS, *supra* note 8, at 287 (letter dated May 15, 1931); *id.* at 272 (letter dated July 26, 1930) ("[Dewey's] view of the universe came home to me closer than any other that I know.").

415. 2 HOLMES-LASKI LETTERS, *supra* note 10, at 904-05 (letter dated Dec. 15, 1926). Dewey had written, before quoting for two full pages from Holmes' essays *Ideals and Doubts*, *see* note 94 *supra*, and *Natural Law*, *see* note 286 *supra*: "I gladly borrow the glowing words of one of our greatest American philosophers; with their poetry they may succeed in conveying where dry prose fails." J. DEWEY, EXPERIENCE AND NATURE, *supra* note 41, at 417; *see also id.* at 417-19 (quoting Holmes).

416. 2 HOLMES-POLLOCK LETTERS, *supra* note 8, at 64 (letter dated Feb. 9, 1921).

417. *See Letters to Dr. Wu*, *supra* note 168, at 200 (letter dated Nov. 2, 1928) ("the only thing that gives one real happiness is when one whose judgment one respects says the few words that are the laurel crown"); HOLMES-SHEEHAN CORRESPONDENCE, *supra* note 278, at 58 (letter dated Jan. 31, 1913) ("I like to have the Bar think well of me, but the only thing I care much for is what a few masters scattered here and there say."); 2 HOLMES-POLLOCK LETTERS, *supra* note 8, at 71 (letter dated June 20, 1921) (Holmes lived "solely" for the favorable judgments of the "few competents like you"); *id.* at 92 (letter dated Mar. 29, 1922) ("I have had some letters and one or two notices in the papers that have touched me deeply. They have said what I longed to hear said and would almost willingly have died to hear twenty years ago."); *id.* at 260-61 (letter dated Apr. 6, 1930) (to Pollock's criticism—"The butter's spread too thick"—of an effusive tribute by Laski, Holmes wrote that he "was so touched and moved by the note of affection and made so shy by the praise that I hardly like to speak about it and could not criticize."); *Letters to Dr. Wu*, *supra* note 168, at 201 (letter dated July 1, 1929) (of Cardozo: "I . . . owe to him some praise that I regard as one of the chief rewards of my life."); 2 HOLMES-LASKI LETTERS, *supra* note 10, at 1272 (letter dated Aug. 9, 1930) (likewise of Cardozo: "He is one of the few who have said in print and private the things that make my life seem worth having been lived.").

count" of the work.[418] Yet, he concluded, despite "defects of expression," Dewey seemed "to hold more of existence in his hand and more honestly to see behind all the current philosophers than any book I can think of on such themes."[419] Elsewhere, Holmes spoke of the book's "symphonic" quality and said that it reminded him of Walt Whitman.[420] Yet nowhere did he say anything specific about its content.

On this record I would certainly not confidently conclude that Dewey won Holmes' esteem merely by calling the old Justice a great philosopher. Much of this study has been devoted to tracing the similarities in the thought of the two men. And there are elements new to Dewey's work in *Experience and Nature* that might have especially appealed to Holmes.[421] But the very vigor and immediacy with which Holmes denied that Dewey's praise had influenced him reveals his discomfort with the coincidence that the book in which it appeared had elevated Dewey's stature in his mind from "uninspired" to "great."

The record of his direct remarks and their context simply leaves Holmes' relation to pragmatism in doubt. On the one hand, one might take his explicit rejections of pragmatism at face value. On this view, he accepted the pragmatists' basic positivism and empiricism, but thought on that score that James and Peirce had added nothing essentially new to Bentham and Mill. What he regarded as genuinely novel—James' justification of beliefs lacking evidentiary support on grounds of their good effect on morale—Holmes rejected. From this perspective, what Holmes found acceptable in Dewey's ideas was his generally naturalistic and evolutionary world view; and, since what he found more than merely acceptable he could not articulate, we must suspect that, especially at the age of 85, Holmes' judgment had been swayed by Dewey's praise of him.

On the other hand, Holmes might have rejected James' and Peirce's versions of pragmatism largely because they used it to justify religion. Holmes' critical judgment on this issue may have been nudged along by his dislike of Peirce and his more complex antipathy toward James. The negative part of his early reaction to Dewey could then be explained by the latter's awkward prose style and reformist politics. If we see the evidence in this light, Holmes never really confronted a statement of pragmatism that was not tainted by the adventitious elements of religion, personality, or politics until he read *Experience and Nature*, at which point he finally reacted with unmediated enthusiasm. Further excavation of a narrowly biographical kind is not likely to decide between these conflicting interpretations.

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418. 2 HOLMES-LASKI LETTERS, *supra* note 10, at 904.

419. *Id.* at 905.

420. *Letters to Dr. Wu*, *supra* note 168, at 190 (letter dated Dec. 5, 1926).

421. In particular, Dewey developed his theory of art further than he had before. *See* notes 335-339 *supra* and accompanying text. Also, compared to Dewey's other books, *Experience and Nature* has much less of the liberal reformist politics which Holmes disliked.