Molecular Motions: The Holmesian Judge in Theory and Practice

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OLIVER WENDELL HOLMES WAS PERHAPS OUR MOST FAMOUS JUDGE, AND HIS VIEW OF THE JUDICIAL ROLE IS STILL INFLUENTIAL IN OUR LAW TODAY, TWO-THIRDS OF A CENTURY AFTER HE DECIDED HIS LAST CASE. FOR EXAMPLE, HOLMES WAS INVOKED AS A KIND OF MODEL JUDGE THROUGHOUT THE CONFIRMATION PROCEEDINGS FOR THE TWO MOST RECENT SUPREME COURT NOMINEES.1 SO HOW DID HE THINK JUDGES SHOULD GO
about deciding cases? On this central question, despite all the attention he has received, I do not think his ideas and practices have been well understood.

This is not because of any shortage of evidence. Holmes served as an appellate judge for almost fifty years, twenty on one of the most important state supreme courts in the country, and twenty-nine on the U.S. Supreme Court. He wrote well over two thousand opinions (has any American judge written more?), and, in the age before law clerk ghost writers, wrote every one of them himself, in his mimitable, often cryptic, style. There must have been few issues in the state or federal law of Holmes's judicial half-century that he did not rule on at least once.

In addition, he left us a celebrated body of extrajudicial writings. Before he became a judge, he had written a classic of legal theory, *The Common Law,* which began with the mantra that the life of the law had not been logic but experience, and went on to develop doctrinal ideas that first-year law students still confront: the objective theory of negligence, and the option theory of contracts. Later, after he had been a judge for many years, Holmes looked at the law from the perspective of the Bad Man and came up with his famous prediction theory: "The prophesies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." And he left behind many other speeches and essays that touched on his ideas about judging. We also have available the hundreds of letters he wrote on legal subjects to friends and fellow legal insiders, which allow us to compare his candid personal views with his public utterances. Finally, we have more than a century of commentary on his judicial performance and his jurisprudence, some of it by scholars who have simply tried to understand what he said, much of it by the creative movers of later legal thought, so many of whom have used Holmes as their springboard or their foil.

Justice Oliver Wendell Holmes*).


3. Id. at 5.

4. OLIVER WENDELL HOLMES, The Path of the Law, in COLLECTED LEGAL PAPERS 167, 173 (1920) [hereinafter HOLMES, The Path of the Law] (originally appearing at 10 HARV. L. REV 457 (1897)).
If we turn to the commentators for some initial sense of the main outlines of Holmes's ideas, we can see why he still attracts interpretive debate. The extensive paper trail he left behind is really no trail, but a confusing (if inviting) expanse of open territory. While it has been explored by many experienced travelers over many years, their maps do not yet agree on even the basic features of the terrain. In his general philosophy, was Holmes a scientific rationalist, a romantic, a pragmatist, or an early existentialist? In politics, was he a liberal Progressive or a reactionary Social Darwinist? In social theory, was he an individualist or a collectivist? In legal theory, was he a utilitarian positivist or a common-law historicist? The evidence gives plausible support to all of these interpretations. There is similar room for debate about my topic today, Holmes's judicial philosophy. To simplify matters, let me narrow that debate to a single issue: was he a strict backward-looking formalist, or a flexible forward-looking pragmatist?

The legal formalist believes that the office of a judge is to apply preexisting law to facts. Judges can and must find existing law that will decide cases in a determinate way. The legislator alone is authorized to make new law based on policy and anticipated consequences. Inevitably personal and partial judicial opinions about policy and fairness have no proper place in the decisional process if the Rule of Law is to be respected. This has been the orthodox jurisprudence of the bench and the bar, at least until recent times.

Legal pragmatism, which has bid to replace formalism as the conventional legal wisdom in this century, is more complex. The pragmatist treats legal thought as practical in two senses. Lawyers' and judges' deliberations are instrumental—meant to guide action and produce good results. As such, they should be judged by how successfully their judgments promote the welfare of those to whom they apply. At the same time, for the pragmatist, legal thought is contextual. A legal actor is embedded in the complexity of actual social practices: for the lawyer, the practice of law and, for the judge, the practice of adjudication. These practices have a life of their own and are not ultimately subject to any clear-cut or simple theory of the nature of law, of justice, or of social welfare.
This does not negate the practical importance of theory to law. For the pragmatist, the relation between practice and theory is dialectical. Lawyers and judges, like people generally, must often live and act without reference to any explicit theories. But customary ways of doing things often run people into trouble. In problematic situations, human beings sometimes can overcome their practical difficulties by stepping back from their habits and engaging in reflective deliberation and self-critical generalization. Theories are attempts to regularize methods of critical deliberation and systematize the results. But theories derived in this way must be checked back against practice to test their power to resolve problematic situations.

A legal pragmatist might say that judges are the socially designated experts in resolving those problematic situations that are thought to justify the use of state power. Law, at least in one aspect, is the more or less systematic body of authoritative generalizations made or enacted for the purposes of channelling and coordinating conduct and settling or avoiding disputes. Since these generalizations are guidelines for action rather than axioms, judges sometimes make law rather than find it, and in doing so they should take account of the forward-looking criterion of social welfare. The contextual side of pragmatism reminds us that what will seem a problem, and what will be judged an advance in social welfare, cannot be fully settled by any a priori theory.

The pragmatist also takes forward-looking account of the virtues of backward-looking rule following, to enhance coordination and avoid frustrated expectations. The normal pragmatist judicial tendency is to "balance" against each other the factors supporting, respectively, the traditionally judicial formal virtues and the legislative search for the better rule. Thus Benjamin Cardozo and Richard Posner, judges of different politics and different times, have both argued for pragmatism in legal theory, and have both been middle-of-the-road balancers of stable law against forward-looking public policy. Though few judges are

self-conscious legal theorists like Cardozo and Posner, many of the most respected American judges of this century have followed the same general approach to judicial office.

Holmes was the most important founder of American legal pragmatism, and thus it seemed natural when, during the confirmations of Justices Ginsburg and Breyer, his authority was invoked on behalf of the kind of moderate judicial pragmatism that they preach and practice. But—this is the point I want to make today—unlike them, unlike Judge Posner, and unlike the prototype of judicial pragmatists, Cardozo, Holmes was by no means middle-of-the-road in his judicial philosophy, but unique and in certain respects quite strange. Before I describe the odd features of his approach to judging, I should say something about my view that, despite his oddities, he was nevertheless a pragmatist, the first great American legal pragmatist. As I understand legal pragmatism, it is the theory that combines an instrumental with a contextual view of law. And it was Holmes who first (or at least most quotably) articulated both the instrumental and the contextual sides of American legal thought. To take the instrumental aspect first, he wrote in The Common Law that "what the courts declare to have always been the law is in fact new" and based on "considerations of what is expedient for the community concerned." He proposed that "judges as well as others should openly discuss the legislative principles upon which their decisions must always rest in the end, and should base their judgments upon broad considerations of policy." Thus he criticized those of his judicial contemporaries who presented what were necessarily policy choices "as hollow deductions from empty general propositions." Famous, he wrote that, in the doubtful case, the judge is called upon "to

(1990) (describing Cardozo’s judicial method as one of measuring the rules of the common law against the demands of social welfare and legal stability).


7. For a fuller version of what follows, see Thomas C. Grey, Holmes and Legal Pragmatism, 41 STAN. L. REV. 787 (1989).

8. HOLMES, THE COMMON LAW, supra note 2, at 31-32.

9. Id. at 64.

10. OLIVER WENDELL HOLMES, Privilege, Malice, and Intent, in COLLECTED LEGAL PAPERS, supra note 4, at 117, 120 [hereinafter HOLMES, Privilege] (originally appearing at 8 HARV. L. REV. 1 (1894)).
exercise the sovereign prerogative of choice.” Thus we have Holmes the instrumentalist, who thought that judges must make law on the basis of policy and that they should do so explicitly. But that is only half of pragmatism. Holmes was also a contextualist, someone who believed that theory could not rule over practice but must live alongside it.

You might not see this if you pay too much attention to some of his more ambitious programmatic statements about reducing law to a policy science. Thus Holmes once said that “[f]or the rational study of law the man of the future is the man of statistics and the master of economics.” A “true science of the law” would have at its center “the establishment of its postulates from within upon accurately measured social desires instead of tradition.” To him, it was “revolting to have no better reason for a law than that so it was laid down in the time of Henry IV.”

Taken by themselves, these statements suggest that Holmes wanted to dispense with custom, tradition, and precedent and to promote an aggressive campaign of utilitarian law reform through judicial activism—indeed some commentators have so taken them. But the statements cannot be taken by themselves. Holmes’s gift for vivid epigrammatic statement often leads to the misinterpretation of his thought. In his thinking he was dialectical and eclectic, a theorist who always tended to see life and law in terms of continuing struggles between opposed tendencies, neither of which could, or should, be eliminated. At the same time, his literary inclination was to dramatize these struggles between ideas by boldly asserting both sides. His memorable phrasing often misleads readers into interpreting as Holmes’s definitive theory a position he was really putting forward as at most half of the story. Holmes shows his true literary and philosophical colors at once when he brings two incompatible absolutes together to form a paradox, as with the epigram he

11. OLIVER WENDELL HOLMES, Law in Science and Science in Law, in COLLECTED LEGAL PAPERS, supra note 4, at 210, 239 [hereinafter HOLMES, Law in Science] (originally appearing at 12 HARV. L. REV 443 (1899)).
12. HOLMES, The Path of the Law, supra note 4, at 187
14. HOLMES, The Path of the Law, supra note 4, at 187
often repeated in his letters that “the chief end of man is to frame general ideas—and that no general idea is worth a straw.”

Holmes’s striking reformist proclamations in favor of an all-embracing policy science must be qualified by the equally forceful statements in which he expressed his belief in the impossibility of subduing practice, custom, and tradition to articulate theory. Thus in the famous paragraph from The Common Law on the primacy of experience over logic, he included under the concept of experience a large tacit and contextual component—“the felt necessities of the times, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men.”

Judicial legislating, he said, had been largely “the unconscious result of instinctive preferences and inarticulate convictions.”

He did want to make judges more aware of this unconscious side of their enterprise, but not because he had any illusions that all could be made conscious and explicit. He believed that “the worth of the competing social ends cannot be reduced to number and accurately fixed.” For him, the only index of social utility available to the practical lawmaker—and a very imperfect one—was “the de facto will of the community.”

In short, Holmes believed that the conflicting policies on which issues of public policy turned were generally incommensu-
rable. The contextual side of his pragmatism supported what he called his "unconvinced conservatism."\(^{20}\) As he once wrote privately to a friend, "I don't believe much in anything that is, but I believe a damned sight less in anything that isn't."\(^{21}\) Judge Posner was right when he described Holmes as only a "tame utilitarian" yet a "militant skeptic."\(^{22}\)

Holmes's militant skepticism, it is important to understand, did not keep him from holding strong views on issues of public policy, as any reader of his letters knows.\(^{23}\) What he was skeptical about was the power of reason and argument to change strongly held views.\(^{24}\) He described his own convictions as his "Can't Helps," and he readily recognized that other rational and intelligent people held opposed views quite as forcefully.\(^{25}\) The pragmatic problem of politics for him was to allow for reasonably civilized common life given strong and enduring disagreement—hence his insistence that a constitution "is made for people of fundamentally different views."\(^{26}\)

Holmes's blend of militant skepticism and tame utilitarianism shaped his attitude toward judging. And the working judicial philosophy that emerged looked in many respects like orthodox

\(^{20}\) Id. at 289.


\(^{22}\) POSNER, PROBLEMS, supra note 5, at 241.

\(^{23}\) See, e.g., Letter from Oliver Wendell Holmes to Harold J. Laski (Sept. 15, 1916), in 1 HOLMES-LASKI LETTERS, supra note 15, at 19 ("The claims of the Interstate Commerce Commission in ICC v. Harriman, 211 U.S. 407, [to broad powers of investigation for legislative purposes] made my blood and [sic] boil and it made my heart sick to think that they excited no general revolt."); Letter from Oliver Wendell Holmes to Harold J. Laski (Aug. 6, 1917), in id. at 72 ("I never read a socialist yet from Karl Marx down, and I have read a number, that I didn't think talked drool. Some essays by the great Webb in Fabian days I thought were slobber, if that is worse than drool.").

\(^{24}\) OLIVER WENDELL HOLMES, Natural Law, in COLLECTED LEGAL PAPERS, supra note 4, at 310, 310-11 [hereinafter HOLMES, Natural Law] (originally appearing at 32 HARV. L. REV 40 (1918)).

\(^{25}\) Id. at 311.

formalism. Holmes's actual judicial practice was marked by two unusually strong tendencies: adherence to judicial precedent and deference to legislative judgment. In his common-law decisions, the author of The Common Law was generally not an innovator, and most of the limited law reform he undertook as a judge was aimed not at advancing any substantive agenda, but rather at making the law more objective and precise, and hence more predictable.27 His major project in constitutional law was to clear away judicial barriers against Progressive social and economic legislation, even though he personally thought that most of the Progressive program was bad public policy28.

There are exceptions in Holmes's record to this pervasive judicial conservatism and deference, but though they are among his most important opinions, they are few and far between. The best-known are the two free speech dissents in which he pressed the Court to go beyond the existing case law to limit legislative power over subversive agitation.29 In a similar vein are two innovating opinions in favor of expanding federal habeas corpus review of state criminal proceedings.30 Perhaps we should add the two common-law dissents on behalf of labor's right to picket that he wrote while still on the Massachusetts court in the 1890s,31 and his dissents from the established doctrine that federal courts need not follow state common-law decisions in some diversity cases.32

27. Holmes's best-known effort in this direction was his campaign to gradually substitute specific safety rules for the general requirement of due care in negligence cases. See Baltimore & O.R.R. v. Goodman, 275 U.S. 66 (1927); HOLMES, THE COMMON LAW, supra note 2, at 97-103.
28. See infra note 63.
32. Black & White Taxi Co. v. Brown & Yellow Taxi Co., 276 U.S. 518, 532 (1928); Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370 (1910). Alternatively, these opinions might simply be seen as following from Holmes's tendency to defer to law already laid down, here, state law.
But memorable as they are, these and the few others like them represent less than a dozen out of more than two thousand opinions. In general Holmes's decisions over nearly fifty years on the bench followed existing law wherever he could find it, whether in precedent or legislation. This aspect of his judicial record has surprised many who believe that the famous pragmatist slogans naturally imply some form of judicial activism in the service of reform. Some commentators have postulated that Holmes found he could not sustain the reformist program implied by *The Common Law* once he was on the bench, and thereafter abandoned it for the Olympian and somewhat cynical positivism of his later years. They see the young Holmes as a pragmatist theoretician of actively legislative adjudication who then, upon exposure to the practicalities of judging or the complexities of industrial society, was converted into a judicial formalist.33

The problem with this theory is that Holmes continued to articulate his early pragmatist law-reforming views in his theoretical pronouncements of the late 1890s, after he had been a judge for nearly twenty years. At the same time, he extolled the virtues of judges' sticking to precedent and deferring to legislatures. He saw no inconsistency in the two positions.

For example, one of Holmes's best-known arguments for practical law reform involved what he called "survivals,"34 doctrines whose original policy basis had disappeared, but which had sur-

33. For "two Holmes" theories, see MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 109-44 (1992); G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 215-24, 253-55 (1993); Mark Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 VA. L. REV. 975 (1977). These commentators see Holmes as shifting from a mainly historicist (and pragmatist) jurist to a mainly positivist one. Tushnet and White stress the influence of Holmes's experience of the relatively petty daily work of judging in this transformation, while Horwitz stresses an external factor, the rise of overt social conflict in the country between the early 1880s and the late 1890s. See HORWITZ, supra, at 140-42; WHITE, supra, at 224; Tushnet, supra, at 982-83. All three argue that Holmes came to disbelieve in the significance of the kind of overall jurisprudential anatomy that he had pursued in *The Common Law*, and came to see law as the result of a collection of relatively disconnected disputes and power struggles—which the philosophical jurist could not much help resolving. See HORWITZ, supra, at 140-42; WHITE, supra, at 218-22; Tushnet, supra, at 1046-48.

34. HOLMES, *THE COMMON LAW*, supra note 2, at 33.
vived through inertia and been given new and unconvincing explanations. In *The Common Law* he said that identification of a legal survival of this kind justified “scrutiny” to determine whether the new reasons given for such doctrines “are satisfactory,” and if they are not, he required “revision.”

When he came to write *The Path of the Law*, after fifteen years on the bench, Holmes had not retreated from this view; indeed he restated it much more vividly and forcefully:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

At this point, he went on: “I am thinking of the technical rule as to trespass *ab initio*, as it is called, which I attempted to explain in a recent Massachusetts case.” He cited the case in a footnote, and the contemporary reader naturally infers that at least this one irrational excrescence has been cleansed from the law of Massachusetts. But if you look up the case, you will find that Holmes, after showing the doctrine to be a “survival” of the worst sort, then unhesitatingly *applied* it to affirm the appellant’s conviction for larceny. There are other instances of the same phenomenon, and Holmes took the trouble to make his general view explicit in his opinion for the court in another case, illustrating that this was not something forced upon him by his judicial brethren:

> We are not at liberty to refuse to carry out to its conse-

35. *Id.*  
36. *Id.*  
38. *Id.* (referring to Commonwealth v. Rubin, 43 N.E. 200 (Mass. 1896)).  
40. See Commonwealth v. Cleary, 51 N.E. 746 (Mass. 1898) (discussed in HOLMES, *Law in Science*, supra note 11, at 227). This essay provides another stark juxtaposition of Holmes’s coexisting beliefs in judicial legislation and strong adherence to precedent: “I do not expect or think it desirable that the judges should undertake to renovate the law Where there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious, the judges are called on to exercise the sovereign prerogative of choice.” HOLMES, *Law in Science*, supra note 11, at 239.
quences any principle which we believe to have been part of the common law simply because the grounds of policy on which it might be justified seem to us to be hard to find, and probably to have belonged to a different state of society.\footnote{Dempsey v. Chambers, 28 N.E. 279, 280 (Mass. 1891).}

In a speech to Massachusetts lawyers summing up his twenty years on the bench, Holmes concisely stated his philosophy of judging in words that are worth quoting at length:

I have tried to see the law as an organic whole. I have also tried to see it as a reaction between tradition on the one side and the changing desires and needs of a community on the other. I have studied tradition in order that I might understand how it came to be what it is, and to estimate its worth with regard to our present needs; and my references to the Year Books often have had a skeptical end. I have considered the present tendencies and desires of society and have tried to realize that its different portions want different things, and that my business was to express not my personal wish, but the resultant, as nearly as I could guess, of the pressure of the past and the conflicting wills of the present. I have considered the social and economic postulates on which we frame the conception of our needs, and I have to see them in a dry light. It has seemed to me that certainty is an illusion, that we have few scientific data on which to affirm that one rule rather than another has the sanction of the universe, that we rarely could be sure that one tends more distinctly than its opposite to the survival and welfare of the society where it is practiced, and that the wisest are but blind guides.

But we have a great body of law which has at least this sanction: that it exists. If one does not affirm that it is intrinsically better than a different body of principles which one could imagine, one can see an advantage which, if not the greatest, at least, is very great—that we know what it is. For this reason I am slow to assent to overruling a decision. 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. I have noticed the opposite tendency.
in minds that regarded our corpus juris as an image, however faint, of the eternal law.\textsuperscript{42}

Here we see the two elements of Holmes’s philosophy clearly juxtaposed: toward the beginning, the pragmatic reformism of the famous passages from \textit{The Common Law}, focused on obsolete “survivals,” and expressed in much the same terms Holmes had used twenty years before; and then the skeptical conservatism, the dogged insistence on adherence to whatever rules might be in place.

The latter was not a new element. Holmes had written to the same effect as a young lawyer in 1873.\textsuperscript{43} And in \textit{The Common Law}, when Holmes spoke of the reconsideration and “revision” of legal survivals, the agents for making the change were not judges, but “we”—which we may take as a reference to legislative law reform inspired by juristic experts.\textsuperscript{44} The only kind of judicial legislation Holmes did explicitly endorse in \textit{The Common Law} was the minimal sort that occurs when judges establish rules by drawing relatively arbitrary lines in the penumbral areas of vague legal concepts so that the law might be clearer and more predictable.\textsuperscript{45}

\textsuperscript{42} OLIVER WENDELL HOLMES, \textit{Twenty Years in Retrospect}, in \textit{THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES} 154, 155-57 (Mark D. Howe ed., 1962) \textit{[hereinafter HOLMES, Twenty Years]}.

\textsuperscript{43} Reviewing a new journal dedicated to the “emancipation of our courts from their present undue adherence to precedent,” he expressed the hope “that the editors will fail in their expressed desire to diminish the weight of precedents with our courts. We believe the weight attached to them is about the best thing in our whole system of law.” 1 OLIVER WENDELL HOLMES, \textit{Summary of Events}, in \textit{THE COLLECTED WORKS OF JUSTICE HOLMES} 322, 323 (Sheldon M. Novick ed., 1995) \textit{[hereinafter COLLECTED WORKS]} (originally appearing at \textit{7 AM. L. REV.} 558, 579 (1873)).

\textsuperscript{44} When we find 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, we have a right to reconsider the popular reasons, and, taking a broader view of the field, to decide anew whether those reasons are satisfactory.

\textsuperscript{45} Where Holmes says that it would be “useful” to “insist on a conscious recognition of the legislative function of the courts,” \textit{id.} at 32, he drops a footnote referring ahead to his discussion of the line-drawing judicial function in negligence cases, \textit{see id.} at 97-103. On Holmes’s minimalist approach to penumbral line-drawing by judges, see \textit{infra} notes 55-57 and accompanying text.
So the apparent paradox of Holmes's legal reformism juxtaposed to rigid judicial adherence to precedent cannot be explained as a change in his position. I think the key to understanding this puzzle is the very strong but often neglected and generally misunderstood distinction he made between the roles of judge and legislator. The orthodox formalist of course makes a firm theoretical distinction between legislation and adjudication. The essence of the legislator's function is to make law, while the essence of the judge's function is to discover and apply it. To the formalist, even the common-law judge, though operating without legislative guidance, discovers the legal principles immanent in the decided cases, and bases the rules for deciding new cases on deduction from those principles.

Holmes held no such view; indeed he is chiefly famous in legal thought for his critique of this orthodox view of the judicial process. As a jurisprudential pragmatist he thought judges must draw upon "legislative" considerations when they exercised what he called their "sovereign prerogative of choice." Given that view, you might think he would downplay the distinction between judge and legislator in practice. But recall that he was a very unusual pragmatist—a "militant skeptic" and only a "tame utilitarian." He did think that the aim of the law generally should be to advance the public welfare. And as we have seen, he had definite convictions on many issues of social policy. Yet his formative experience on how strong convictions were transmuted into public policy was the Civil War, and forever after the former soldier had little confidence in the power of evidence or rational argument to resolve disagreement. Human beings of good will would disagree and would have to fight it out—either on an actual battlefield or, better, through some agreed upon substitute for war, like majority vote. What was needed was not evidence or argument, which rarely convinced anyone, but some peaceful way of determining the preponderant or dominant sentiment of the community.

When judges make law, he thought that they should do so on behalf of the community, not on the basis of personal views of public policy that they know half their fellow citizens think

46. HOLMES, Law in Science, supra note 11, at 239.
wrong. Marked as he was by his war experience, Holmes was vividly aware of the community not as an organism but as a field of battle—"its different portions want different things,"\textsuperscript{47} as he said. Skeptic that he was, he "rarely could be sure that one [rule] tends more distinctly than its opposite to the survival and welfare of the society where it is practiced."\textsuperscript{48} All that could be tested objectively was the weight of current preference, and the legislature was the only institution reasonably designed to register that. In the absence of legislation, the existing body of law had the virtue "that it exists" and "we know what it is."\textsuperscript{49} His respect for precedent derived from his "doubt as to the absolute worth of a large part of the system we administer, or of any other system."\textsuperscript{50} "[A]lmost the only thing that can be assumed as certainly to be wished is that men should know the rules by which the game will be played."\textsuperscript{51}

Holmes best expressed his view on the relation of judge to legislator in a familiar sentence from his dissent in \textit{Southern Pacific v. Jensen}: "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."\textsuperscript{52} Here Holmes used a metaphor already familiar in his day: the rules of the legal system dictate the decision in most cases, but those rules leave some gaps, and when (but only when) a case falls in one of those gaps the judge must legislate.

When Holmes adopted the gap metaphor, he of course rejected the classical or purely declaratory theory of the judicial function; the existence of gaps meant that judges could not decide all

\begin{itemize}
\item \textsuperscript{47} HOLMES, Twenty Years, supra note 42, at 156.
\item \textsuperscript{48} \textit{Id}.
\item \textsuperscript{49} \textit{Id}.
\item \textsuperscript{50} \textit{Id}.
\item \textsuperscript{51} HOLMES, Holdsworth's, supra note 19, at 289.
\item \textsuperscript{52} 244 U.S. 205, 221 (1917) (Holmes, J., dissenting); cf. RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 872 (1991) (defining molar as "pertaining to a body of matter as a whole, as contrasted with molecular and atomic"). This statement makes a macabre reference back to an opinion Holmes had written as a state judge, rejecting a constitutional challenge to the replacement of hanging by electrocution as the method of execution: "The suggestion that the punishment of death, in order not to be unusual, must be accompanied by molar rather than molecular motion seems to us a fancy unwarranted by the constitution." \textit{In re Storti}, 60 N.E. 210, 211 (Mass. 1901).
\end{itemize}
cases simply by applying established law. But that does not tell us how deferential or activist he thought judges should be. That depended on his view of the number and size of the gaps compared to the area covered by the rules. And that in turn depends on the extent to which Holmes anticipatorily adopted the later Legal Realist stance of rule skepticism.

Here is another major source of the general misunderstanding of Holmes’s judicial philosophy. Holmes was a skeptic generally, so it is natural to assume that he must have been a rule skeptic, like the later Legal Realists or today’s Critical Schools. As such, he should have believed that the gaps left by the system of legal rules were large, perhaps even all-encompassing, so that all judicial decisions were legislative—or “political,” as the current discourse puts it. After all, the Realists (like Jerome Frank) who took Holmes as their model were rule skeptics. And their skepticism drew heavily on Holmes’s well-known theory that legal concepts typically have a core-penumbra structure, and so apply as a matter of degree rather than all-or-nothing.

Holmes certainly thought that legal concepts were generally fuzzy rather than clearly bounded, and this view was tied to his well-known insistence, which appears again and again in his opinions and other writings, that many legal disputes turned on questions of degree. He thought most legal concepts had paradigmatic instances, to which they uncontroversially applied, but then applied less and less clearly to cases that diverged increasingly from the prototype. This formulation stemmed from Holmes’s instrumental pragmatism. Legal rules gained their point from their aims, but the purpose or policy behind a rule applied not in an all-or-nothing way, but along a continuum, more or less.


54. See 1 OLIVER WENDELL HOLMES, The Theory of Torts, in COLLECTED WORKS, supra note 43, at 326, 328 (originally appearing at 7 AM. L. REV 652 (1873)). Holmes repeated his observations from The Theory of Torts when he summarized the point in The Common Law: “Legal, like natural divisions, however clear in their general outline, will be found on exact scrutiny to end in a penumbra or debatable land.” HOLMES, THE COMMON LAW, supra note 2, at 101.
On this theory, the difficult cases that actually came to litigation typically arose in the overlapping penumbras of competing legal concepts. This theory sounded like a form of rule skepticism, and, indeed, in a certain sense it was. But—and this is the crucial point—the kind of rule skepticism involved did not enhance the scope of the legislative role for the Holmesian judge. Consider the implications of Holmes's dominant metaphor, “interstitial legislation.” In saying that judges legislate “interstitially,” rather than simply “in the gaps,” Holmes was already suggesting that he thought of the gaps as small. The *Oxford English Dictionary* defines an interstice as “[a]n intervening space (usually, empty); [especially] a relatively small or narrow space, between things or the parts of a body the minute space[s] between the ultimate parts of matter.”

In Holmes’s metaphor, then, law was a largely solid structure irregularly punctuated by interstices—“small, narrow, minute” gaps. Compare this to another form of gapped structure, a net, which might represent the relation of rule to discretion for Jerome Frank or for the contemporary Critic. In a net, the open spaces are large in comparison to the solid structure, and they perform the important function of letting the fluid or small particles pass through. No one would call the gaps in a net “interstices.” Interstices are there by default, the results of an imperfect fit between structural components. Holmes further reinforced the impression of a solid structure with minor gaps by calling the judicial motions that the interstices permit “molecular,” and contrasting them with the “molar” motion of real legislation. Molecules are after all very small in comparison to the gross physical objects suggested by the term “molar.” Nor were the gaps in Holmes’s picture of the law truly empty space, inviting or requiring pure judicial invention. Rather, when we add Holmes’s metaphor of core and penumbra to the metaphor of structure and interstices, we picture the gaps as already occupied by the overlapping penumbral policies that radiate out from the adjoining concepts or rules.

An interstitial case, then, required the judge to identify the competing policies that underlay the adjoining legal rules, and

then pick between them. Neither of the competing policies were likely to be centrally implicated—the case was interstitial and penumbral precisely because it lay at some distance from the core applications of the competing rules or concepts. And even if the policies were both strongly applicable, Holmes did not believe there was any rational metric for balancing one against the other. For him, competing policies represented a split in the community, whose different portions “want different things,” and, in the absence of a legislative resolution based on counting heads or registering the dominance of one group over another, these conflicting wants were incommensurable.

To Holmes, the judge’s concern in such a situation was not mainly with the substantive policies behind the competing doctrines but with considerations of present and future peace and stability. First, the case should be authoritatively resolved. Second, the resolution should allow ready prediction of how similar future disputes would be resolved—thus closing the legal gap. The judge’s sovereign prerogative of choice in such cases thus came down to articulating which marginally implicated policy should take precedence in the interest of present peace and future predictability.

This view of judicial legislation helps explain the style of many of Holmes’s opinions in cases he regarded as interstitial. He would very briefly state what he thought were the policies or social interests that conflicted in the case and then would simply announce which one had prevailed. This procedure followed from his theory. A judge who thinks there is nothing at stake beyond reaching a decision in the case at hand and specifying a precedent for very similar cases in the future will not agonize over explaining why the decision came out the way it did.

Holmes might have used his core-penumbra view of legal concepts expansively, increasing the area of judicial discretion by showing that legal doctrines conventionally viewed as firm were actually permeable. This approach—softening up “existing law” preparatory to changing it—was pioneered by Cardozo and

56. HOLMES, Twenty Years, supra note 42, at 16.
57. See, e.g., Boston Ferrule Co. v. Hills, 34 N.E. 85, 86-87 (Mass. 1893); Middlesex County v McCue, 21 N.E. 230, 231 (Mass. 1889).
58. See MacPherson v Buck Motor Co., 111 N.E. 1050 (N.Y. 1916) (softening
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has become standard in post-1940 realist-style judicial activism. With his reiterated insistence on the pervasiveness of matters of degree in the law, Holmes laid the conceptual groundwork for the technique.

But the fact is that he hardly ever practiced it. For the pragmatist Holmes, there was no simple "fact of the matter" on the question of how firm or how flexible legal rules and doctrines were. This was a matter for decision by the judge, who should be guided by the relevant policies in light of the prevailing traditions. And for Holmes, the dominant policies guiding the judge were not any substantive agenda, which would involve illegitimately taking sides within a divided community. Rather, they included deference to politically sovereign authorities on the one hand and predictability on the other. Both of these policies would be undermined if judges regularly used sophisticated arguments to evade the force of rules that were conventionally thought firm enough to favor one side of a dispute. And we find Holmes quite consistently interpreting statutes and past decisions to give them broad scope and hence to make the gaps left by established law relatively small.\(^5\)

In one important class of cases, Holmes was less respectful of precedent, and did exercise his logical and rhetorical powers to show that well-established doctrines could be dragged from the solid core into the debatable penumbra for judicial scrutiny.

\(^5\) The distinction between exceptional inherently dangerous products, as to which the manufacturer owed a general duty of due care, and ordinary products that would be foreseeably dangerous if defectively manufactured, as to which the duty extended only to the those in privity with the defendant.

59. Holmes' approach to statutory interpretation is a large subject, whose details must be left for another occasion. Characteristically, he provided much-quoted slogans to both sides of the traditional dispute between using legislative intent or plain meaning as the primary guide. Compare Johnson v United States, 163 F 30, 32 (1st Cir. 1908) with OLIVER WENDELL HOLMES, The Theory of Legal Interpretation, in COLLECTED LEGAL PAPERS, supra note 4, at 203, 207 (originally appearing at 12 HARV. L. REV. 417 (1899)); see also Nicholas S. Zeppos, The Use of Authority in Statutory Interpretation: An Empirical Analysis, 70 TEX. L. REV. 1073, 1126-28 (1992) (noting that Holmes is the most cited authority on methods of statutory interpretation, supplying language for both sides). For further illustrations of Holmes' approaches, see Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928); International Stevedoring Co. v. Haverty, 272 U.S. 50, 52 (1926); Panama R.R. v. Rock, 266 U.S. 209, 215 (1924); Northern Secs. Co. v. United States, 193 U.S. 197, 400 (1904).
and revision. These were his opinions rejecting constitutional challenges to legislation, challenges that in his day mainly involved claims that Progressive reform statutes took property without compensation, infringed on the liberty of contract, or exceeded enumerated federal powers. In these cases, Holmes undermined the apparent solidity of constitutional limitations often relatively well-established in the case law. It was mostly these opinions that gave Holmes the reputation of being a creative judge and a Great Dissenter. But, while rule skepticism may have undermined the virtue of predictability based upon adherence to precedent in these cases, it served the other policy that dominates Holmes's judicial philosophy—the policy of deference to the dominant forces in the community, most authoritatively represented by the legislature.

In his Lochner dissent, Holmes wrote of the "right of a majority to embody their decisions in law," and there was no other right to which he was so committed as a judge. In The Common Law, when he praised Chief Justice Lemuel Shaw of Massachusetts as the greatest American judge, he spoke of Shaw's "accurate appreciation of the requirements of the community whose officer he was." Holmes believed profoundly in being a good officer of his community—while having little sympathy with the sentiments of the majority of his day.

Nor did he conceive of his officership in aristocratic terms. That is, he had no notion that his function was to lead the people to measures more enlightened than they could formulate for themselves. It was not to the majority's happiness that he was committed, but to their actual policy choices. "Here lies the supple tool of power"—so he joked should be the inscription on

60. See, e.g., Truax v Corrigan, 257 U.S. 312, 342 (1921) (Holmes, J., dissenting) (noting "[t]he dangers of a delusive exactness in the application of the Fourteenth Amendment").
62. HOLMES, THE COMMON LAW, supra note 2, at 85.
64. MERLO J. PUSEY, 1 CHARLES EVANS HUGHES 287 (Columbia Univ Press 1963)
his tombstone. But he was not joking when in *The Common Law* he wrote that “[t]he first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.”

Like the stress on predictability that made him so reluctant to depart from judicial precedent, Holmes’s deference to dominant opinion is best understood as the position of a “tame utilitarian” who is at the same time a “militant skeptic.” He did not think anyone could come close to proving which of the contending social ideas of his time would advance human welfare in the long run. Therefore it was by default that the law settled for “the *de facto* will of the community for the time.” Though he thought “[t]here is every reason for trying to make our desires intelligent,” he despaired of any immediate prospects of that, and was willing to settle for shaping public policy according to “our desires” of the moment, unintelligent as he suspected many of them were. In Holmes’s martial view of the world, when people did not get what they wanted, they fought for it. The dominant power would win the fight and get what it wanted eventually. That’s what it means to be dominant: for Holmes as for Hobbes, clubs were trumps. So giving in at once spared the casualties, which were definite and avoidable disutilities.

Holmes’s strong belief in judicial deference to the sovereign community and its formal institutions may also have had some

(1951).

65. HOLMES, *THE COMMON LAW*, supra note 2, at 36 (emphasis added). Holmes’s view on this subject did not change. In 1900, he wrote:  

What proximate test of excellence can be found except correspondence to the actual equilibrium of force in the community—that is, conformity to the wishes of the dominant power? Of course, such conformity may lead to destruction, and it is desirable that the dominant power should be wise. But wise or not, the proximate test of a good government is that the dominant power has its way.

OLIVER WENDELL HOLMES, *Montesquieu, in* COLLECTED LEGAL PAPERS, supra note 4, at 258.

66. HOLMES, Holdsworth’s, supra note 19, at 288.

67. OLIVER WENDELL HOLMES, *Ideals and Doubts, in* COLLECTED LEGAL PAPERS, supra note 4, at 303, 305 (originally appearing at 10 ILL. L. REV. 1 (1915)).

68. *Id.* Holmes showed no trace of public-choice style skepticism; he evidently did not doubt that democratic legislation was the best index of the actual balance of preference in the community.
basis, perhaps only partly conscious, in his sense of his own limitations. Product as he was of the preindustrial New England intellectual and social aristocracy, he was hardly a man of his time. He described himself as "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."

Perhaps he would have been less deferential as a judge had he sensed in himself more of the capacity he ascribed to Shaw for "accurate appreciation of the requirements of the community whose officer he was." Shaw had been, after all, a great common-law activist, an energetic judicial legislator. Holmes also praised his friend and colleague, U.S. Chief Justice Edward Douglass White, for "always thinking what will be the practical effect of the decision (which of course is the ultimate justification or condemnation of the principle adopted)."

He added revealingly, "I think of [the decision's] relation to the theory and philosophy of the law [W]e sometimes come together head on with a whack." Holmes may have so assiduously avoided the kind of judicial law reform his best-known jurisprudential slogans have been thought to justify, in part simply because he sensed that he had little aptitude for it.

After he had consulted the policies of making the law maxi-

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71. Letter from Oliver Wendell Holmes to Fredrick Pollock & Lady Pollock (Sept. 24, 1904), in 1 HOLMES-POLLOCK LETTERS, supra note 15, at 118. For more on Holmes's deference and its connection to his patriotism and his attitude toward democracy, see Thomas C. Grey, Holmes, Pragmatism, and Democracy, 71 OR. L. REV 521, 536-38 (1992).
72. HOLMES, THE COMMON LAW, supra note 2, at 85.
74. Id.
75. Note Judge Posner's interesting comparison of Holmes and Shaw as judicial policy analysts, which much favors Shaw. POSNER, PROBLEMS, supra note 5, at 251-54. "Holmes believed in policy analysis but lacked the patience to do it." Id. at 252.
mally predictable and deferring to legislative judgment, Holmes generally found only very small interstices within which the judicial legislator could work. In all but the reasons he gave for what he did, he acted like a formalist, not like a pragmatist, judge. But the reasons that he gave mattered and have come to matter more with the passing years. How they mattered surfaced in those opinions, rare but memorable, in which Holmes persuaded himself that the law left a substantial gap unfilled by precedent or legislation. What is remarkable about these opinions is the uniquely candid way in which he took off the hat of rule applier and put on that of legislator. I will give only two examples—there were not very many in all, but they tend to be among his best-known opinions.

First is his dissent in *Vegelahn v. Guntner*76 The issue was whether workers should be enjoined from peacefully picketing an employer with whom they had a labor dispute.77 They obviously intended to inflict economic loss through the picketing, and Holmes treated the question of whether their goals justified this harm as an open question of public policy, stating that “[t]he true grounds of decision are considerations of policy and of social advantage.”78 At common law, businesses had been allowed to enforce cartel arrangements by boycott, and in Holmes’s view concerted action by labor should be allowed the same freedom.79 “[T]he organization of the world, now going on so fast, means an ever-increasing might and scope of combination.”80 The injunction should therefore be denied.81

The other and even more striking example is his dissent in *Olmstead v. United States.*82 The issue was whether wiretap evidence obtained in violation of state law could be admitted in a federal prosecution.83 Brandeis dissented, arguing that wiretapping fell under what Holmes called “the penumbra of the

76. 44 N.E. 1077, 1079 (Mass. 1896) (Holmes, J., dissenting).
77. Id. at 1077.
78. Id. at 1080.
79. Id. at 1081.
80. Id.
81. Id. at 1081-82.
82. 277 U.S. 438, 469 (1928) (Holmes, J., dissenting).
83. Id. at 455.
Fourth and Fifth Amendment.\textsuperscript{84} Holmes dissented on nonconstitutional grounds, under what we now call the supervisory power. "I think that apart from the Constitution the government ought not to use evidence obtained and only obtainable by a criminal act. There is no body of precedents by which we are bound and which confines us to logical deduction from established rules."\textsuperscript{85} Here he signaled that the case fell in a legal interstice. Note what he made of it:

Therefore we must consider the two objects of desire, both of which we cannot have. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It is also desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.\textsuperscript{86}

The "for my part" makes more explicit than is customary among judges the exercise of the sovereign prerogative of choice.

There is something refreshing about this style of opinion writing in the close case, and it is not simply a stylistic point but has implications for legal theory. On Holmes's model of adjudication, the judge does two different things in deciding cases: follows the rules where there are rules to follow, and where there are not, legislates a new rule for the case and for the future. H.L.A. Hart elaborated a more nuanced version of this dual view of the judicial process in his jurisprudential classic, \textit{The Concept of Law}.\textsuperscript{87} Critics of this positivist model of judicial deci-

\textsuperscript{84} Id. at 479 (Brandeis, J., dissenting); \textit{id.} at 469 (Holmes, J., dissenting).

\textsuperscript{85} Id. at 469-70 (Holmes, J., dissenting).

\textsuperscript{86} Id. at 470.

\textsuperscript{87} The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case. None the less, the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules which, unlike the applications of variable standards, do not require from them a fresh judgment from case to case.

sion—Ronald Dworkin has been one of the most eminent—have noted that judges and lawyers do not generally write or speak in terms consistent with it when actually arguing and deciding cases. Rather the language of advocacy and justification seems the same in all cases, suggesting an attempt to reach the "right" (or best) answer for the case by considering all the analogies, and when considerations of fit or consistency do not determine things, to reach the decision that makes the overall law the best it can be while maintaining the commitment to overall legal "integrity," as Dworkin calls it.\footnote{8}

Holmes, in opinions like those in \textit{Vegelahn} and \textit{Olmstead}, supplies a strong counterexample to Dworkin's point. He openly practiced the "interstitial legislator" view of judging, and used the language the view implied. That is to say, he sharply distinguished between the judicial activities of rule finding and rule applying, on the one hand, and forward-looking decisionmaking according to considerations of social policy on the other. Later activist judges have provided many more and more extensive examples of frank judicial legislation than Holmes ever did.\footnote{9} I think particularly of those cases in which courts announce that they are creating a new rule and therefore will make its application prospective only.\footnote{90} But contemporary judicial pragmatists tend not to sharply distinguish legislative from rule-driven decisions; rather they treat cases as lying along a spectrum from

\footnote{8. See \textit{RONALD DWORINK, LAW'S EMPIRE} 151-75 (1986) (contrasting "pragmatism," which for Dworkin includes any instrumentalist account of law, with "law as integrity," which treats the principled coherence of the law as an independent value). Despite his instrumentalism, Holmes continued to place some emphasis on the overall coherence of law, Dworkin's "integrity." See \textit{HOLMES, THE COMMON LAW}, \textit{supra} note 2, at 5 ("It is something to show that the consistency of a system requires a particular result, but it is not all."). I believe he did this on instrumental grounds, assuming that, other things being equal, when a body of law was more systematic—more like a body than a heap—its provisions were easier to identify and to understand. For a discussion with reference to sources, see Grey, \textit{supra} note 7, at 822-23.}

\footnote{9. For the prototype of the modern legislative style in groundbreaking common-law decisions, see \textit{Escola v. Coca-Cola Bottling Co.}, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring) (basing proposed change in common law on a frank discussion of policy grounds).}

\footnote{90. See, e.g., \textit{Li v. Yellow Cab Co.}, 532 P.2d 1226, 1244 (Cal. 1975); see \textit{CARDOZO}, \textit{supra} note 5, at 146-49 (giving an early endorsement of the prospective overruling device).}
relatively easy to relatively hard, blending policy discussion with considerations of stability and doctrinal consistency in varying proportions.

For Holmes, by contrast, a case was either covered by an applicable rule or it fell in a gap. If there was a rule, however dubious or obsolete its justification, it governed, as with the Rubin case and the obsolete doctrine of trespass ab initio—because it was there to be relied on. On the other hand, when the rules ran out, it was the judge's job to legislate. Equally important, the judge was to make it clear this was being done, describing the competing policies and stating the choice between them. This was not primarily to justify the decision; to Holmes a decision the other way would typically be nearly as good in substantive terms. Rather the policy ground was given so that lawyers could better construe the rule laid down, and predict outcomes to clients. And the statement of rationale would allow future legislators to identify the rule as ripe for revision when the grounds given no longer applied.

Such judicial legislation was in general appropriate, on Holmes's theory, only when it did not much matter which way the judge decided. The judicial task was to enforce the rules that the dominant forces in the community had laid down or had left undisturbed, and otherwise to help keep the peace by settling disputes with an eye to preventing future ones. As I have mentioned, Holmes once proposed, only half in jest, that on his tombstone should be inscribed the words: "Here lies the supple tool of power." If you could bring him back, you might ask him why he would sum himself up that way. After all, contrary to the implication of those self-deprecating words, he was an unusually independent-minded person with many very strong views that ran contrary to the common wisdom of his day. Why would he bend himself so accommodatingly to the beliefs and desires of the many?

92. Sometimes, in the interest of predictability, the judge would sublegislate a rule significantly broader than the case at hand. An example is Holmes's project of supplementing the standard of due care in negligence cases with specific judge-made safety rules. See supra note 27.
93. See supra note 64.
He might first respond to your question with one of his celebrated passages of high rhetoric:

[When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market.]

But finally he would have to modulate into an ironic key. In his view, this best test was still not a very good one, for "truth [has its] root in time. What we most love and revere generally is determined by early associations. And this again means scepticism[94]. You cannot argue a man into liking a glass of beer.

Holmes never meant to state an inspiring judicial philosophy. He thought of the judiciary, quite traditionally, as the reasoning branch of government, and yet was skeptical of the power of reason to change people's minds. He did not consider it his job as a judge either to make the world conform more closely to a vision of the good or a theory of justice, or to respond with sympathy to the human equities of the individual case. The Holmesian judge is an austere minimalist, there to see first of all that the serious game is played by the rules; secondly, where there is no rule, to devise a new one sufficient at least to decide the instant case; and finally, to keep the distinction between these modes of decision altogether clear.

95. HOLMES, Natural Law, supra note 24, at 311-12.