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OLD-FASHIONED POSTMODERNISM AND THE LEGAL THEORIES OF OLIVER WENDELL HOLMES, JR.*

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INTRODUCTION

Whether Holmes was the greatest American jurist is a question for debate. What needs no debate is the fact that Holmes is the most published, the most discussed, the most praised and the most criticized judge in American history. In view of this fact, one might well doubt the need for yet another paper on Holmes. The sheer number of studies, discussions, collections and biographies raises question as to whether we have not already said enough. Is there any point—besides the obvious pleasure of a good symposium—to more discussion of Holmes and his effect on American law? For a number of reasons, I think that the answer to this question is a surprising "yes." No one would dispute that Holmes is an important source of our understanding about the American legal tradition. It is not just that his writings are widely read; it is also that lawyers and scholars have treated him as a particularly important symbol of American law, who—depending on your viewpoint—should be praised for his virtues or condemned for his shortcomings. For example, some scholars think that Holmes deserves high praise for rescuing American law from the rigidity of formalism.[1] Others disagree: they suggest that

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[1] *See, e.g.*, JEROME FRANK, LAW AND THE MODERN MIND 270 (Peter Smith 1970) (1958).

Holmes was insufficiently principled;[2] that he was self serving, insensitive and cynical;[3] and that, in view of these shortcomings, he is an unworthy representative of American law.[4]

These criticisms are part of the reason why Holmes remains—sixty years after his death—an important focus of legal discussion. By all accounts, Holmes was a successful lawyer, scholar and judge. Yet he is the subject of particularly vigorous criticism—not from those who would tear down the institutions of American law—but from those who would exalt them. On the one hand, there is the reality of Holmes's successful and distinguished career. On the other, there is his "bad man" image[5] and the recurring doubts about his suitability to serve as a salutary symbol of American law. This contrast is an important part of his legacy—it suggests that there is, within the American legal culture, a kind of collective ambivalence about law and about the value of lives that are devoted to its practice.

Despite all the pages that have been written about Holmes, there is much about his views and his character that remains elusive. It is easy enough to show that he was sympa-

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[2] As a pragmatist, Holmes is often criticized for the lack of principles that a pragmatist philosophy entails. A good—if somewhat extreme—example of this kind of criticism is found in Ben W. Palmer, *Hobbes, Holmes and Hitler*, 31 A.B.A. J. 569, 573 (1945).

[3] *E.g.*, Yosal Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 254 (1963); Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833 (1986).

[4] For example, Mark DeWolfe Howe writes: "[The concern is] not only that Holmes' philosophy of law was inconsistent with the highest traditions and aspirations of Western thought, but that his scale of moral and political values was badly suited to measure the needs of a progressive and civilized society." Mark DeWolfe Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529, 531 (1951).

[5] In *The Path of the Law*, Holmes writes:

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

OLIVER WENDELL HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 171 (1920) [hereinafter Holmes, *Path*]. While his point is to clarify the distinction between law and morals, many writers have taken this distinction to mean that the law and those who practice it are not subject to any moral constraints. The distinction between law and morals provides clarity but it is not a popular rallying cry for those who desire that law should be both uplifting and inspiring.

thetic to this or that intellectual tradition. Some have argued, for example, that Holmes was a utilitarian.[6] But, if so, why would he describe human beings as "ganglia" and "grains of sand?"[7] Why would he speak so disparagingly of human existence? As a utilitarian, after all, he would think that human preferences should reign supreme. Or, as another example, if Holmes were truly a cynical realist, what would account for all the inspirational speeches about duty? What would explain his references to "the infinite" and to the "universal" law?[8] The problem is that Holmes seems to slip easily into many intellectual categories but, in fact, fits none of them well.[9] Although Holmes was well read, his opinions were uniquely his own. When we go below the surface, we do not find an inconsistent dilettante; we find instead a confident and coherent thinker with a serious grasp of the human condition.

There are many factors that influenced Holmes in formulating his own unique view of the world. Certainly one of the major influences on Holmes was the extreme hardship he experienced during the Civil War. During his three years in the United States Army, he participated in some of the heaviest fighting in the war. He was wounded three times—each time emerging from the ordeal to witness a continuing bloodbath where many of his friends suffered and died.[10] These experiences transformed his youthful idealism into a grim recognition of the undeniable claims of duty.[11] But, while his war

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[6] *See, e.g.*, ROBERT SAMUEL SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982) and H.L. POHLMAN, JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE (1984).

[7] *See infra* text accompanying note 68.

[8] Holmes, *Path*, *supra* note 5, at 202.

[9] My first article on Holmes, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541 (1988), went further in this direction than I would now like. It is not so much a question of whether Holmes *is* a pragmatist as it is a more generalized question of context. Does a pragmatic vocabulary and world view serve us well in our attempt to understand Holmes and to reconcile whatever contradictions are apparent in his views?

[10] Saul Touster, *In Search of Holmes from Within*, 18 VAND. L. REV. 437 (1965).

[11] Holmes's most recent biographer, G. Edward White, argues that Holmes's civil war experience had weakened his concept of duty—changing it from "concept of duty had thus progressed from an idea of fidelity to a cause to that of loyalty to a regiment and finally to that of loyalty to oneself." G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 70 (1993). To support this,

experiences may have shaped his life, they did not fall on a blank slate. Holmes was the well educated son of a well respected New England family;[12] he grew up in an environment where people were intensely interested in spiritual and philosophical questions. When he returned from the war, he took an active part in this environment, and it was this participation that enabled him to structure the traumatized remains of his Civil War experience into a serviceable and productive world view. Understanding this world view will help us not only understand Holmes, but also the legal tradition in which he played such a central role.

There are at least two distinct ways of understanding the content of one's own legal tradition. One can view it as the development of certain intellectual themes or, in the alternative, view it as it is particularized in the thoughts and feelings of individual participants. This paper is an attempt at both kinds of understanding. While the focus is Holmes, I will proceed by analyzing a number of themes that define pragmatic jurisprudence. In the first section, I describe classical pragmatism as it was formulated by Charles Peirce.[13] In the second, I discuss the pragmatic aspects of Holmes's jurisprudence. In the third section, I note the similarities between Holmes's pragmatic views and those that make up the more recent development of postmodern jurisprudence. Finally, in the conclusion, I

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he quotes a letter home in which Holmes wrote:

> I honestly think the duty of fighting has ceased for me—ceased because I have laboriously and with much suffering of mind and body *earned* the right . . . to decide for myself how I can best do my duty . . . . The ostensible and sufficient reason [for leaving the service] is my honest belief that I cannot now endure the labors & hardships of the line.

Id. (footnote omitted). I think that White's reading of this letter is somewhat uncharitable. Holmes is not, after all, talking about deserting the army or even about trying to pull easy duty. He is talking about resigning at the end of his enlistment because, after three long years and three nearly mortal wounds, he has reached the limit of his abilities to persevere in the face of constant combat.

[12] *See generally* MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS 1841-1870 (1957).

[13] Charles Sanders Peirce (1839-1914) was born in Cambridge, Massachusetts. He was an American philosopher, physicist, mathematician and the founder of pragmatism. Peirce wrote philosophical works predominately on logic from 1866 onwards. MURRAY G. MURPHEY, 6 THE ENCYCLOPEDIA OF PHILOSOPHY 70 (Paul Edwards ed., 1967).

suggest that Holmes, despite his "bad man" image, is a salutary symbol for American law, and that the real virtues of his position have not been fully appreciated.

I. CLASSICAL PRAGMATISM

American pragmatism originated in The Metaphysical Club—a philosophical discussion group that met in the early 1870s. Its membership included Charles Peirce, William James, Chauncey Wright, and Nicholas St. John Green, as well as Holmes.[14] The name "pragmatism" was first put forward by Charles Peirce[15] to describe a method of philosophy based upon a simple maxim:[16] "[c]onsider 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."[17] Simple though the maxim may be, its consequences for philosophy are very profound. Pragmatism, with its rejection of formalism, represented a new way of looking at the world and an alternative way to understand the increasingly rapid development of science. During Holmes's lifetime, it became a powerful influence not only in philosophy but in many other fields as well.

Although Holmes was a friend of William James[18] and a participant in the Metaphysical Club,[19] he did not consider

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[14] Max Fisch, *Was There a Metaphysical Club in Cambridge?, in* STUDIES IN THE PHILOSOPHY OF CHARLES SAUNDERS PEIRCE 3 (Edward C. Moore & Richard S. Robin eds., 1964).

[15] 2 ELIZABETH FLOWER AND MURRAY G. MURPHEY, A HISTORY OF AMERICAN PHILOSOPHY 568 (Putnam 1977).

[16] In this essay, I treat the maxim as a premise of pragmatism. In fact, the pragmatists offered arguments in its favor. I will not go into these here except to say that they are of the type generally offered for empirical and reductionist philosophies.

[17] CHARLES SANDERS PEIRCE, 5 THE COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 5.402 (C. Hartshorne & P. Weiss eds., 1934).

[18] On the other hand, Holmes had little admiration for Peirce. He wrote:

> I feel Peirce's originality and depth—but he does not move me greatly—I do not sympathize with his pontifical self-satisfaction. He believes that he can, or could if you gave him time, explain the universe. He sees cosmic principles and his reasoning in the direction of religions, etc. seems to me to reflect what he wants to believe—in spite of his devotion to logic.

THOMAS A. GOUDGE, THE THOUGHT OF C.S. PEIRCE 325 (1950).

[19] Although Holmes's attendance at the Metaphysical Club was somewhat infrequent. Fisch, *supra* note 14, at 10-11.

himself a pragmatist. Pragmatism, he would say, was "an amusing humbug."[20] Nevertheless, it is clear that these discussions had a significant effect upon his emerging theories of law for, despite his protestations, he repeatedly used pragmatic methods in pursuing his own legal studies. One should note, for example, how the predictive theory of law can be seen as an instantiation of the pragmatic maxim.[21] The maxim requires that we analyze abstract conceptions in terms of their practical effects on observable phenomena. The predictive theory follows the maxim by analyzing abstract legal concepts in terms of their discernible effects on judicial outcomes. Indeed, *The Common Law*,[22] Holmes's influential history of the common law tradition, is consistently pragmatic in that it analyzes each legal concept in terms of the historical conditions that shaped it and in terms of its real world effects on the development of legal practices.

These surface similarities between the pragmatic method and the predictive theory of law signal a deeper resonance as well. There are certain concepts that are fundamental to one's understanding of the world. For example, many of us are empiricists but there can be many variations on what it means to limit ourselves to experiential knowledge.[23] Similarly, a community's conception of reality and truth will have a profound effect on its knowledge seeking practices. These basic concepts provide the contours of our theories and it will be my aim in the course of this paper to show how Holmes's ideas on these fundamental matters shaped his legal views. Since Holmes left no rigorous or systematic account of his philosophical views, I will use Peirce's work to suggest a context for reading Holmes. Thus, in the remainder of this section, I will brief-

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[20] 1 HOLMES-POLLOCK LETTERS 139 (Mark DeWolfe Howe ed., 1953).

[21] Max Fisch, *Justice Holmes, The Prediction Theory of Law and Pragmatism*, 39 J. PHILOSOPHY 85 (1942).

[22] OLIVER WENDELL HOLMES, JR., THE COMMON LAW (Mark DeWolfe Howe ed., 1963) (1881).

[23] Experience may be reduced to sense terms or propositions. It may mean the perception of a thing or the thing as experienced through perceptions. It can be limited to five senses or it can include emotional experience. How one chooses among these possibilities will have a large impact on the substance of these theories.

ly describe the pragmatic philosophy of Charles Peirce. In the next section, I will talk about Holmes's jurisprudence in the context of Peirce's pragmatism.

A. *Post-Kantian Phenomenalism and the Problem of Viewpoint Dependency*

Pragmatism is most easily understood in terms of the Kantian distinction between phenomena and noumena.[24] Like Kant, Peirce made a distinction between two entities: an object that exists independently of human perception and the appearance of an object that has meaning by virtue of representing something besides itself. According to the pragmatic maxim, entities of the first type (what Kant calls noumena) have no meaning since, by definition, they are removed from human experience. On the other hand, entities of the second type (what Kant calls phenomena) are the building blocks of human cognition. They are the constituents of experience and, properly understood, they convey knowledge by representing reality.

This leads to a puzzle. What do cognitions represent if they do not represent the noumenal object? Peirce's answer to this is that each cognition should be understood as a representation of previous cognitions—the phenomenal manifestation of a table does not refer to a noumenal table but rather to the thought of a table as it appeared in previous cognitions.[25] Central to this way of understanding cognition is a type of inference that Peirce calls "abduction."[26] In everyday life, we perform an abduction when we formulate an hypothe-

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[24] Kant believed that a distinction could be made between the appearance of a chair, i.e., the chair as it exists in the world of sense perception, and the real chair, i.e., the chair that exists independently of human perception. The former he called the phenomenal chair; the latter, the noumenal chair.

[25] I put it a bit more precisely in my earlier article on Holmes:

> Thus the thought "table" does not denote some real table but some previous thought of a table. The individual cognition relates to a subsequent cognition by interpreting it. The thought "table" does not simply bring to mind the previous cognition but describes that cognition as a cognition of a table.

Catharine Wells Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541, 553-54 (1988) (footnotes omitted).

[26] For an extended discussion of abduction, see *id.* at 554-55.

sis that will explain and unify experience.[27] For example, the hypothesis "there is a stone" might explain and unify certain initially random bits of visual and tactile data.[28] Thus, for Peirce, cognition does not give us direct knowledge of an external world. Instead, it gives us a basis for hypothesizing reality by reaching a correct understanding of the representational relationships that individual cognitions bear to one another.[29] As a result, the test of truth becomes a matter of internal logic and coherence rather than a matter of correspondence to a preexisting noumenal world.

It follows from Peirce's phenomenalism that viewpoint and perspective are important concepts for understanding the world. Investigation of the phenomenal world is vastly simplified by the adoption of two hypotheses. One is that there are physical objects that persist in time and space. The second is that these objects are experienced by others as well as ourselves.[30] These two hypotheses are supported by the fact that, when we compare our experience with others, the differences in what we see can often be explained by suppositions about differing viewpoints and perceptual abilities. The blind man does not see the elephant nor does a sighted person in another room. But, while perceptions vary, we cannot help but note that there are relatively regular relationships between a person's viewpoint and the content of his or her cognition. We observe, for example, that physical objects have different appearances when we view them under differing conditions and

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[27] Such hypotheses are in the form of general rules that assign representational significance to present cognition and thereby form the basis for predicting the nature of future cognition.

[28] Thus, Kant's distinction between the appearance of the object and the noumenal object gives way to a more pragmatic distinction between the appearance of the object in cognition and the hypothesized object whose existence would account for various aspects of cognition.

[29] Thus, even though the series of cognitions purport to tell a story about a larger world outside of consciousness, this appearance is fundamentally incoherent. Under the pragmatic maxim, there is no mind-independent reality about which the story has been told.

[30] There is the old story of the six blind men and the elephant. Each of the men touches the elephant, but since they are all in different places, each feels something different. One way to reconcile the differing experiences that resulted from feeling the elephant is to suppose that there is "something out there" that has a number of parts and to reconstruct the whole by using the various observations and what is known about the locations from which they are made.

from different viewpoints. And we also note that cognition is shaped at all times not just by our physical circumstances but also by our individual wants, needs and attitudes. If we are looking for a lost pen, we see the desk drawer differently than if we were looking for a lost notebook. If we are cold, a fire in the fireplace will exert a particularly welcoming glow. If we think that a house is haunted, we will see and hear more unexplained phenomena than if we stalwartly refuse to believe in ghosts. Thus, what we experience is at least partly determined by who we are, what is familiar, and the nature of our expectations about future experience. This gives rise to an important distinction between the appearance of the object in an individual stream of consciousness and the abstract notion of a public object that is consistent with all its reported phenomenal manifestations.[31]

The distinction between public objects and private experiences poses an important question: What is real—the public object or the private experience? In ordinary discourse, we use the term "real" primarily to refer to public objects. If, for example, I see an elephant that no one else seems to notice, I might believe that the elephant is a figment of my imagination and therefore not real. Generally, we speak of what is real in terms of what is public and verifiable. This means that "the public" or "the community" plays an important role in the acquisition of knowledge.

B. *The Ethics of Belief*

In the last section, we saw that pragmatism rejects the concept of a noumenal reality and requires us to view reality as a matter of construction: a thing is real when we hypothesize its existence in order to make sense of the intersubjective aspects of the phenomenal world.[32] This identification of reali-

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[31] Note that this distinction between private experience and public objects is not the same as the Kantian distinction between phenomena and noumena. The Kantian noumenon is not a hypothesized or constructed reality. Rather, it is a thing that is real in the sense that it is what it is independently of human experience.

[32] I stated it more precisely in my earlier article:

> Reality is found in the fact that the opinions of individuals tend to converge over the long run into agreements about particular theories. Thus,

ty with public objects rather than noumenal objects gives the pragmatist a distinctive theory of knowledge. For the nonpragmatist, the theory of knowledge is epistemological in the sense that it must provide a justification for the claim that certain beliefs are true of the world. For the pragmatist, the theory of knowledge addresses a different problem. The problem is not to provide justification for individual beliefs; rather the problem is to find a good reason for preferring one set of knowledge acquisition habits to another.[33] Thus, the pragmatist must justify a set of practices rather than a set of beliefs and, for this reason, the theory of knowledge becomes a special case of ethics—it aims at giving a normative justification for particular types of thinking activity.

Peirce addresses this normative question directly in an essay called *The Fixation of Belief*.[34] Every human being, he argues, seeks to find beliefs that are stable, that will not dissolve into doubts each time we confront a new experience. He considers four distinct strategies for accomplishing this goal—the method of tenacity, the method of authority, the a priori method, and the method of science. With tenacity, one achieves stable belief by stubbornly refusing to change one's mind. This technique yields stability but only at a cost—a gradual withdrawal from human society and particularly from those whose beliefs are at variance with one's own. The second method, authority, is much like tenacity but it operates at a wider level and depends upon the power of society to enforce its terms. Authority maintains stable belief by using force to suppress doubts. The third method, a priorism, also suppresses doubt but does so by means of ungrounded abstractions rather than force. Finally, there is the method of science which, for Peirce, is the most desirable alternative. Science is a method for examining and decoding the world. It begins with tentative beliefs in certain hypotheses and a strong commitment to continuously reexamining them in the light of future experience.

> the external world is real if and only if, over some indefinitely long period, we will continue to hypothesize it as a unifying explanation for cognition.

Wells Hantzis, *supra* note 25, at 556 (footnote omitted).

[33] As later pragmatists would describe it, the pragmatist believes in the primacy of technique—"knowing how"—over the substantive result—"knowing that."

[34] 5 PEIRCE, *supra* note 17, at 5.358-5.387.

Instead of silencing doubts, science utilizes them as an incentive for investigation and for the development of beliefs that are increasingly more stable. Relative to the scientific method, truth must be understood as the final opinion of a community of inquirers, obtained after practicing the scientific method for an indefinite period of time.[35]

The concept of a scientific community is a complex notion. Community belief is not a simple matter of taking votes to determine whether particular claims are true.[36] Rather, the mark of truth is a certain kind of consensus. People may not agree on everything. They may see different things; they may entertain different accounts of what they see. Nevertheless, what defines a scientific community is a general understanding of what criteria should be used in determining whether things are real or an aberration. Community membership is only available to those who are committed to the discipline of a scientific and collective search for truth.

It is important to note that Peirce's justification for science does not rest upon its role in producing true belief. For Peirce, science leads to truth only because that is how he defines truth; truth is the final opinion of a scientific community. Instead, his rationale rests upon truly practical considerations. On one level, it is strategic: the scientific method is the most effective way to achieve stable beliefs. On a deeper level, however, the choice of a scientific method is not just a matter of strategy. Peirce recognized that our choice of method defines who we are in the world. At bottom, it is a choice of self—it establishes identity and dictates the most intimate terms of one's intellectual life. If, for example, we choose the method of

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[35] 5 PEIRCE, *supra* note 17, at 5.407. This formulation does nothing to obscure the inconsistency between "practicing the scientific method for an indefinite period of time" and the concept of a "final" opinion. For this reason, modern pragmatists often speak of truth in terms of its coherence with the best available theory.

[36] Suppose that ten percent of the people in a given community see a pink elephant while ninety percent see nothing. Under these circumstances, is the elephant "real" or not? If fixing belief were a matter of majority rule, then we would say that the elephant is an hallucination affecting a small minority of those present. But note that this approach is somewhat irrational. The reason why the pragmatists see community belief as a test of truth is because they are operating under the hypothesis that there are publicly observable physical objects, and that differences in perception must be explained in terms of differences in ability or viewpoint. Under this hypothesis, conflicts in perception are properly matters for investigation and explanation rather than a matter of majority rule.

tenacity or authority we end up as intellectual hermits or hostages. Alternatively, if we choose the a priori method, we commit ourselves to lives of abstraction and detachment. Only with the scientific method do we seem to get a full life—a life in which we are alive to the phenomenal world and part of a human community that seeks truth. Peirce describes this choice in highly romanticized terms:

> The genius of a man's logical method should be loved and reverenced as his bride, whom he has chosen from all the world. . . . [S]he is the one that he has chosen . . . he will work and fight for her, and will not complain that there are blows to take . . . and will strive to be the worthy knight and champion of her from the blaze of whose splendors he draws his inspiration and his courage.[37]

Thus, Peirce's response to the question—How do I decide what to believe?—is a passionate argument for choosing the scientific method and an acknowledgement of the way in which such a choice can affect every aspect of one's life.

II. HOLMES AS AN EXPOSITOR OF PRAGMATIC JURISPRUDENCE

In an earlier article, I attempted to document the similarities between Peirce's pragmatism and Holmes's own philosophical outlook.[38] Hence, there is little reason to cover the same material here. Instead, I will focus directly on Holmes's jurisprudence. How, according to Holmes, should judges decide cases? Or, to put it in more Peircean terms, what are the ethics of judicial decisionmaking? The foregoing discussion of pragmatism will help us to answer these questions by giving us a vocabulary and a structure: we can use the concept of viewpoint dependency as a way of analyzing the judicial task and the notion of community standards as a way of addressing the questions that this raises.

A. *Viewpoint Dependency*

Viewpoint differences are an essential part of legal controversy. Typically, both parties believe that they are right. Nor can either of their beliefs be easily condemned as unreasonable

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[37] 5 PEIRCE, *supra* note 17, at 5.387.

[38] *See* Wells Hantzis, *supra* note 25.

from their particular viewpoint. This creates a dispute that cannot be adjudicated without doing violence to one perspective or the other.[39] Since pragmatism insists that the true outcome is found by accepting and reconciling all points of view, a pragmatic judge cannot simply decide by endorsing the "objectivity" of one particular perspective. Resolving the controversy requires more. It requires an understanding of how individual viewpoints may be incorporated into community standards and, ultimately, how these community standards govern the process of judicial decisionmaking.

It is apparent that Holmes, despite his reputation for speedy decisionmaking, did not decide cases simply by imposing his own particular viewpoint upon the controversy. Indeed, Holmes seems generally mindful of the limitations of his own perspective:

> When I say that a thing is true, I mean that I cannot help believing it. I am stating an experience as to which there is no choice. But as there are many things that I cannot help doing that the universe can, I do not venture to assume that my inabilities in the way of thought are inabilities of the universe. I therefore define the truth as the system of my limitations, and leave absolute truth for those who are better equipped.[40]

It is also the case that Holmes recognized the viewpoint dependency of normative judgments. It was Holmes, after all, who argued that law came from the concrete realm of human experience rather than the abstract realm of logical truth.[41] And just as Holmes rejected the absolutism of formal logic so also did he reject the abstract claims of natural law theorists who believed that law was grounded upon certain universal moral truths: "The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."[42]

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[39] For an extended discussion of what it means to do violence to a world view, see Robert M. Cover, *The Supreme Court, 1982 Term, Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 53 (1983).

[40] OLIVER WENDELL HOLMES, *Ideals and Doubts, in* COLLECTED LEGAL PAPERS 303, 304-05 (1920).

[41] In Holmes's review of Langdell's *Treatise on Contracts*, he wrote: "The life of the law has not been logic; it has been experience." Oliver Wendell Holmes, 14 AM. L. REV. 233, 234 (1880).

[42] OLIVER WENDELL HOLMES, *Natural Law, in* COLLECTED LEGAL PAPERS 310,

To the contrary, for Holmes law is a creature of the community—a contingent set of values that arose from common practice that maintained a claim to legitimacy only so long as they had a good effect on human affairs.

B. *Community Standards and the Resolution of Viewpoint Dependent Disputes*

In an earlier paper, I argued that Holmes's predictive theory of law could be understood in terms of the scientific method.[43] Under this interpretation, legal doctrine is understood as a theory that explains and unifies patterns of legal decisionmaking and, at the same time, provides a basis for predicting future outcomes. This is what Holmes means when he writes: "[i]t seems to me well to remember that men begin with no theory at all, and with no such generalization as contract. They begin with particular cases, and even when they have generalized they are often a long way from the final generalizations of a later time."[44] Note how this description of law has all the elements of pragmatic science—the gathering of data, the generalization into certain explanatory rules, the continuous testing of hypotheses and the progressive nature of truth.

For Holmes, the science of law occupies the familiar ground of legal analysis—our knowledge of precedent, our general understanding about wise policy, and our rough sense of community values lead us to formulate a theory about how judges decide certain kinds of cases, and ultimately to test this theory against the ongoing practice of legal decisionmaking. There is, however, a certain difficulty in connection with this view of law as science. While the notion of legal science seems to work well as a description of legal practice, it seems to work less well as a theory of judicial decisionmaking. Judges do not decide cases by predicting their own decisions. To the contrary, judges *make* decisions. For this reason—and for several oth-

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312 (1920).

[43] Catharine Pierce Wells, *Holmes on Legal Method: The Predictive Theory of Law as an Instance of Scientific Method*, 18 S. ILL. U. L.J. 329, 355 (1994).

[44] OLIVER WENDELL HOLMES, *Law in Science and Science in Law*, *in* COLLECTED LEGAL PAPERS 210, 218 (1920).

ers[45]—it is important to make a distinction between the predictive science of law and the decisionmaking practices that are used to determine legal outcomes. To engage in the practice of legal decisionmaking, judges must exercise a particularly personal form of judgment—they must decide each case for themselves in an intuitive "all things considered" kind of way.[46] But "deciding for themselves" does not mean that they are free from constraint. While the judgment is personal, it must be made within the intellectual and practical context that constructs the community's sense of justice.

In Holmes's discussions of judicial decisionmaking, we see the community context functioning in many different ways. The first and most obvious is through the common law. Holmes does not think of the common law as a simple set of rules that determine legal outcomes. Rather, for Holmes, the common law is a more loosely defined conceptual scheme that provides both a language for describing legal controversies and a rough ordering of social values that serves as a matrix for the decisionmaking process.[47] Thus, while it is true that judges must decide each case in accordance with their own particular viewpoint, it is also true that the judge's particular viewpoint is itself constructed from the concepts of the common law and heavily influenced by the judge's own immersion in legal culture.[48]

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[45] For a discussion of these, see Wells, *supra* note 43.

[46] For a detailed discussion of this kind of decisionmaking, see Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348 (1990).

[47] This is the clear import of statements like:

> The life of the law has not been logic: it has been experience. 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 the rules by which men should be governed.

OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

[48] It is important to note that legal expectations are also shaped by the nonlegal beliefs of the culture. Suppose, for example, that the religious beliefs of the community center around an omnipresent and omnipotent god who speaks directly to humans through natural activity. This would suggest that the "common law" of the community would have numerous ways of marginalizing human agency and emphasizing what we would call the "random elements" in accidental occurrences. Since most of the judges in the community are raised in this culture, they would not think of themselves as utilizing any particular bias in adjudicating tort cases,

Within the common law framework, judges incorporate community standards in a variety of ways. Sometimes a judge need not formulate a standard for herself. Instead, she may try to find an external standard by determining what group or agency within the community may legitimately speak for the community as a whole. In cases where there are no external standards, the court often makes a direct appeal to community sentiment. Many legal "rules" are thinly disguised appeals to community norms of social behavior. For example, negligence is defined as the absence of that degree of care that would be used by the reasonably prudent person; self-defense is limited to those cases where the defendant had reasonable apprehension of harm; and the meaning of a contract is determined with reference to the way a reasonable person would have understood the overt words and actions of the parties. Judges often send the normative question in these cases to the jury as a representative of the community but sometimes they decide the case themselves on the basis of their own understanding of community standards. Holmes sums up the process of judicial decisionmaking this way:

> In some cases, [the basis for decision] . . . is an act of the legislature; in others it is . . . the custom or course of dealing of those classes most interested; and in others where there is no statute, no clear ground of policy, no practice of a specially interested class, it is the practice of the average member of the community,—what a prudent man would do under the circumstances,—and the judge accepts the juryman as representing the prudent man. But still the function of the juryman is only to inform the conscience of the court by suggesting a standard . . . .[49]

Thus, although Holmes's jurisprudence must be distinguished from the legal science of predicting judicial outcomes, it is nevertheless similar to science in that it focuses on community

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but nevertheless tort decisionmaking would reflect such a bias. In such a community, the decisions of a judge who decides for himself in an "all things considered" kind of way will be highly predictable. One could predict them in one of two ways—either by knowing (as an outsider) that there is this "act of god" bias in the judge's conceptual scheme, or by knowing (as an internal participant in the legal system) how the problem appears to the judge—i.e., how the common law constructs the issue in the case.

[49] Oliver Wendell Holmes, Jr., *The Theory of Torts*, 7 AM. L. REV. 652, 658 (1873).

standards—the judge resolves viewpoint dependent disputes by replacing individual standards with those that have the wider endorsement of the community.

III. POSTMODERNISM—OLD-FASHIONED AND NEW FANGLED

It is hardly a new thought that classical pragmatism has much in common with its modern day counterpart. Contemporary pragmatists such as Richard Rorty and Hilary Putnam readily acknowledge the influence of earlier pragmatists such as Peirce, James and Dewey. And since modern pragmatism has important links to the various strands of postmodern thought, it should not surprise us that there is a strong postmodern flavor both in Peirce's pragmatism and in Holmes's jurisprudence. Indeed, there is much about the pragmatism of Holmes's time that anticipates what we have come to call postmodernism. As a way of demonstrating this, I will compare contemporary postmodernism with what I call—somewhat oxymoronically—classical or old-fashioned postmodernism.[50] The comparison will center upon three claims that are fundamental to the postmodern position. These claims are: 1) that reality is socially constructed; 2) that power affects the way in which we understand reality; and 3) that legalistic notions of equality must give way to a true respect for human differences.

A. *The Social Construction of Reality*

To many, the postmodern claim that reality is socially constructed seems counterintuitive and paradoxical at best.[51] But to the pragmatist it is a natural consequence of the pragmatic maxim. As we saw above, the maxim requires that we reject the idea that there is anything that can be known apart from

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[50] It is difficult to name the precursor of a contemporary theory that calls itself postmodern. Strictly speaking, the "postmoderns" are really "antimoderns"—that is, they oppose the conceptual scheme that lies at the heart of modernism. This suggests that the proper alternative to the oxymoronic "old-fashioned postmodernism" would be "pre-postmodern anti-modernism."

[51] For example, a common sense realist insists upon the common sense idea that there are real things in an external world that are objects of direct perception. Social construction would also pose a difficult issue for several forms of empiricism including, for example, logical positivism or Lockean empiricism.

its practical effects on human experience, as well as the idea of a noumenal reality existing independently of human perception. As we saw above, the pragmatist thinks of real objects as hypotheses that are "made up" to explain why there are such regular relationships between our own cognition and that of other people. Thus, the notion of reality does not describe a nonhuman, nonexperiential realm but rather a hypothetical realm that helps us to differentiate between perceptions that are private and those that are publicly shared.

Given this view of reality, there is nothing particularly puzzling about the claim that reality is socially constructed. Indeed, a shared notion of reality is often a matter for explicit negotiation. For example, I see an elephant and you see no trace of it. *We* must decide whether the elephant is real. We do this by engaging in a certain kind of discussion. We might say to each other: "I see an elephant. You don't. Am I hallucinating? Are you blind? What do other people see? How sure are you that there is no elephant there? Have you looked? Is there anything which might impair your vision? How persistent and firm is my vision? Has there been anything lately in my experience that might lead me to hallucinate?" The resolution of these questions eventually results in a mutually satisfactory notion of reality that does not represent an *external* world but rather a *mutual* world that is defined by a negotiated settlement of perceptual differences.

B. *The Power of Power*

The more we understand the process by which the public conception of reality is formulated, the more we understand that the process is easily tainted by the private interests of those who are capable of dominating the discussion. Imagine, for example, that I see an elephant and the Empress of the World does not. I say, "I see an elephant." She says, "There is no elephant." In a hopeful voice, I ask, "Doesn't anyone else see it?" The crowd is silent. Why is the crowd so silent? It could be because no one else sees the elephant. But it could also be that those who do are afraid to speak. Or suppose there is one brave soul who is willing to come forward: "Wait a minute," he says, "I also see the elephant. The Empress is blind. She is abusing her power." The crowd laughs somewhat uncomfort-

ably. The Empress then stands to her full height and says: "Guards! This man is hallucinating. He is dangerous. Take him to the dungeon." The guards remove the speaker. "Now," she says, "Does anyone else see the elephant?" Silence reigns. These stories may seem silly and obvious but the point is real enough: power affects discourse and therefore affects the outcome of discussions about reality.

The process of settling group opinion is always vulnerable to corruption and that is why the ideal of scientific inquiry starts with two requirements: 1) that each observer have an equal say and 2) that there be no impediments to a candid exchange of views.[52] Whether this ideal can be achieved is itself a matter of controversy. Some argue that this ideal is real; that it in fact regulates certain scientific and academic communities. Others are more skeptical; they believe that the acquisition of knowledge is strongly affected by the realities of professional power.[53] Some of these skeptics note, for example, that there are circles of discourse where a small number of people cite to one another in order to demonstrate the truth of their beliefs.[54] In any case—whatever one thinks of the quality of professional discourse—there are many who think that there are some special cognitive problems attached to law. They argue that law is a normative discourse and that legal questions therefore fall on the value side of the fact/value distinction. This means that legal questions, as opposed to scientific questions, are inherently subjective and unable to be analyzed in an objective fashion.[55] For them, there is simply no

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[52] This would be what Habermas calls "an ideal speech" situation. *See, e.g.*, Lawrence Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 96-99 (1988).

[53] This is, for example, part of the thesis of Thomas Kuhn's book, *The Structure of Scientific Revolutions*. *See* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 163-67 (1962). In an academic setting, there are many dichotomies that are created by power. Race and gender are often noted, but there are many others: student/teacher, untenured/tenured, belonging to prestigious institution/belonging to a lesser known or less well thought of institution, etc.

[54] *See, e.g.*, Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 562-64 (1984). It is also the case that double standards abound. For example, appealing to common sense and personal experience in an argument about law and economics is normally considered useful, whereas similar appeals in a race critical context are often dismissed as being merely anecdotal.

[55] For a brief explanation of the fact/value distinction and the role its rejection

sense to the idea that discussions about ethics, law, and politics could be made free from the distortions of power.

So far, we have seen that the social construction of reality contains the potential for abuse. The question then is, given our largely democratic, non-empress ridden society, who has the power of corruption, and do they exercise it in a regular manner? Of course, we are all familiar with arguments about ideology, false consciousness, and cultural control. One example of this kind of argument is Marx's assertion that the ruling class manipulates the prevailing culture in order to support its own interests.[56] Another example is Catharine MacKinnon's analysis of sexuality—men desire to dominate women and therefore create a culture in which female submission seems sexy even to women themselves.[57] It seems unlikely that either of these theories describe conscious strategies—the exertion of power need not be conscious in order to have its effect on public discourse. On an unconscious level, however, if the pragmatist is right that our perceptions are altered by our interests, character and prior experience, then it is not hard to see that a socially constructed reality will systematically favor those who have the power to dominate public discussion.

C. *Pragmatic Pluralism and Respect for Human Differences*

While power plays an important role in the social construction of reality, it does not operate in a vacuum. What distinguishes the pragmatist from the more extreme postmodern theorists[58] is the belief that there are means by which the influence of power can be countered and minimized. The pragmatist chooses a scientific method rather than an authoritarian one and this results in a further commitment to act in ways that open up the process of inquiry. Power is per-

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plays in postmodern theory, see Catharine Pierce Wells, *Pragmatism, Feminism, and the Problem of Bad Coherence*, 93 MICH. L. REV. 1645, 1652-55 (1995).

[56] *See* KARL MARX, THE COMMUNIST MANIFESTO 15-16 (Pluto Press 1996) (1888).

[57] *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 6-7 (1987).

[58] Foucault, for example, believes that all of our experience is so permeated by power that it is impossible to get a foothold from which to try to ameliorate the situation. *See* MICHAEL FOUCAULT, THE HISTORY OF SEXUALITY 93-96 (Robert Hurley trans., 1978).

vasive; it affects our perceptions in barely visible ways. Nevertheless, pragmatism suggests the possibility that we can adopt strategies that lessen the effects of power. One obvious example is freedom of speech. While speech rights do not, by themselves, guarantee a process that is not distorted by power, it can, in combination with other circumstances, tend to promote more open discussion.[59] And, of course, free speech is not the only strategy. There are others as well: increased or compensatory access to the means of communication, the avoidance of needlessly technical vocabularies, communication techniques that undercut particular forms of coercion, the adoption of community norms that foster inclusiveness, etc. Furthermore, since power inevitably finds a way to circumvent its restrictions and to utilize unforeseen loopholes, these strategies for increased and more equal access must be progressive—they must adapt to changing conditions within the scientific or legal community.

The motivating spirit of these attempts to open discussion is pragmatic pluralism. One consequence of pragmatic pluralism is that individual people must be understood as different from one another. They are not just at different stages on a unitary path to truth; they are irreducibly and significantly different. It can be extremely hard to keep this in mind. William James, in an essay called *On a Certain Blindness in Human Beings*[60] describes the problem this way:

> We are practical beings, each of us with limited functions and duties to perform. Each is bound to feel intensely the importance of his own duties and the significance of situations that call these forth. But this feeling is in each of us a vital secret, for sympathy with which we vainly look to others. The others are too much absorbed in their own vital secrets to take an interest in ours. Hence the stupidity and injustice of our opinions, so far as they deal with the significance of alien lives. Hence the falsity of our judgments so far as they presume to decide in an absolute way on the value of other persons' conditions or ideals.[61]

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[59] For Holmes's defense of free speech as a promoter of truth, see Abrams v. United States, 250 U.S. 616, 624, 630 (1919) (Holmes, J., dissenting).

[60] William James, *On a Certain Blindness in Human Beings, reprinted in* WILLIAM JAMES, TALK TO TEACHERS ON PSYCHOLOGY: AND TO STUDENTS ON SOME OF LIFE'S IDEALS (Norton & Co. 1958) (1907).

[61] *Id.* at 149.

Similarly, in weighing evidence, it is easy for us to assume that the reason why our own observations are different from those of other people is that our own are better or more accurate. We convince ourselves, for example, that a person who is blind knows less about elephants than we do—we completely overlook the possibility that blindness may yield insights that are unavailable to those who are sighted. Pragmatic pluralism requires that we remember this and that we honor all forms of difference in our attempts to order human affairs.

It follows that a pragmatist will find formal notions of equality somewhat unhelpful. Since two things are never exactly similar, the description "equal to . . . " can never stand alone. Thus, equality is generally understood to be a relative term—every attribution of equality explicitly or implicitly compares two objects with respect to a particular characteristic.[62] For example: A is equal to B in height; B is equal to C in educational qualifications; or C is equal to D with respect to the number of years on the job. Thus the ability to enforce a claim of equality is dependent upon an ability to say in what way two persons are—or ought to be—equal. This cannot be done in the absence of an agreement as to what should count in making the relevant comparisons. But such comparisons are not made in a neutral environment. Understandings about what counts and what does not, about what is worth more and what is worth less, are deeply embedded in the practices of the prevailing culture; these practices, in turn, reflect the interests and attitudes of the dominant class. For example, suppose that a sighted person and an unsighted person apply for the job of evicting elephants from the palace grounds. Suppose also that the unsighted person could do a better job—perhaps she has a strong sense of smell or particularly acute hearing. Nevertheless, in weighing qualifications, it is very likely that these special qualifications will be overlooked. This is because there is a "natural" assumption among sighted members of the com-

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[62] *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 577-80 (1982) (the principle of equality is empty of content, and in order to have meaning must incorporate external values that determine which persons and treatments are alike); *see also* Steven J. Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, 91 YALE L.J. 1136, 1148-50 (1982) (incorporating the logical positivist method of analysis renders both equality and rules empty of meaning).

munity that eyesight is required for this particular job.[63] Thus, the unsighted person's powers of sense and smell are marginalized within the prevailing culture and cannot be properly counted and compared.[64] The problem, then, is that legalistic forms of equality are not simply comparisons; they are comparisons within a context and, since such comparisons inevitably favor those who create the context, they are not likely instruments of reform.

A commitment to respecting difference is an essential element of a pragmatic—or old-fashioned—postmodernism. Too often contemporary postmodernists argue that such commitments are simply too unrealistic to keep. Power is so distorting, they say, that we are intellectually unable to free ourselves from our own epistemological privileges. And, even if we could, contemporary postmodernism gives us little reason to renounce them. If nothing is ultimately meaningful, then what can be the point of respecting difference? If every point of view is equally salient, then isn't every point of view equally disposable?

This dilemma stands at the center of contemporary postmodernism. On the one hand, there is a tendency towards nihilism.[65] On the other, there are those who argue that respect for difference is a strong reason for reform.[66] The problem with the former is that few of us have the temperament for nihilism. The problem with the latter is that there is nothing in postmodern theory that motivates reform.

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[63] And indeed, even when the truth of this assumption is questioned, it may still seem that making this assumption is the most efficient way to proceed. There are many situations where engaging in overt forms of discrimination seems to be efficient. For example, there is the much discussed problem of the jeweler who refuses to admit black teenagers into his store. *See* David M. Kennedy, *Gunnar Myrdal and Black-White Relations: The Use and Abuse of an American Dilemma*, 259 THE ATLANTIC MONTHLY 86 (1987).

[64] Such miscountings are particularly common in discussions of racial differences. The worst forms of racial discrimination are often accompanied by a denial that such discrimination exists. Thus the ability to function in the face of such discrimination will not be properly nameable or measurable within the dominant culture.

[65] *See* Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 49-52 (1984).

[66] MARTIN MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 50 (1990).

Unlike contemporary postmodernism, old-fashioned postmodernism faces this dilemma straight on by focusing its theory of knowledge on the ethics of inquiry. There is one thing that each person must decide for him or herself. This is the fundamental question of who we are. Postmodernism can mean nihilism—after all, postmoderns believe that there is no logical reason that prohibits such a choice. Or postmodernism can mean that we become engaged members of a human community. This membership will not solve substantive problems once and for all, but it can give us a manner of proceeding. If we picture ourselves as seekers of truth and as conscientious actors on the human stage, then we must commit ourselves to all the requirements of scientific method including empiricism, rigor, inclusiveness, and respect for other observers. Thus, it comes back to an almost Emersonian insistence that each individual must harken to his own inner voice of conscience. Morality is not the stuff of philosophical arguments; it is not a unitary system of principles that prescribe a set of all purpose, one size fits all rules for conduct. Each person must discover—and respond to—the ideals that truly animate his or her individual existence.

CONCLUSION: HOLMES AS A SALUTARY SYMBOL FOR AMERICAN LAW

I have tried to lay out in a simple way the general outline of a pragmatic/postmodern framework. The point of doing this is not so much to convince the reader that this is the best way to read Holmes—those arguments were made in an earlier article[67]—but to show that a pragmatic context makes a difference in how we interpret Holmes's legacy. What does it mean to understand Holmes this way? What difference does it make in how we understand his work and its effect on American law? My hope is that this understanding will dispel some of the ambivalence about his contribution to our legal heritage. The question about Holmes is not so much whether he was the "bad man" of American law but whether his vision represents an acceptable view about the nature of law and its function in a just society. In this connection, I think his vision has been

[67] *See* Wells Hantzis, *supra* note 25.

underestimated in two ways. First, Holmes's distrust of inflated generalizations and overblown abstractions has been mistakenly understood as a lack of commitment to American idealism and, second, the modesty of his world view has been wrongly understood as cynicism.

The pragmatic insistence on the primacy of individual perception, the relevance of viewpoint, and the good faith practice of listening as a precondition for knowledge are powerful incentives for respecting—perhaps loving—one's neighbors. For this reason, Holmes's framework is one that may promote a wholesome and moral life. Why, then, is Holmes so often regarded as less than moral man? Why is he the subject of so much ambivalence? One reason may be that pragmatism is a philosophy that—in the absence of humility and genuine respect for others—has some potential for abuse. But, even in the absence of these factors, a second reason seems equally important: Holmes's vision is at odds with a particularly American way of understanding the relationship between morality and law.

The notion that Holmes is a positivist and that he denies a connection between law and morality is only true relative to a particular form of naturalism: the belief that American law is based upon a genuine moral theory of natural rights and responsibilities. This form of naturalism entails the idea that judges should view themselves as steadfast guardians of certain values. Thus, for example, if freedom of speech is a natural right, then judges should make the broadest possible interpretation of both "freedom" and "speech." But, from a pragmatic standpoint, this is not good judging. A pragmatist sees the value of open debate, but at the same time understands that ringing declarations and broad interpretations will not necessarily produce goodness in the real world. For the pragmatist, the issue is not merely to minimize restraints on speech but rather, as a practical matter, to foster broad participation. Holmes's disagreement with naturalism is not so much that morality and law must be entirely distinct as it is that we must recognize that law is only law; it does not represent the last word in private morality. Law is what it is and, because it is law, we can make disobedience costly. Nevertheless, short of punishing disobedience, there is little sense in condemning those who are not in sympathy with the law's demands.

Those who decry Holmes's cynicism frequently mention his conception of a man as an insignificant grain of sand or as a ganglion within a larger universe. They have in mind passages such as this:

> It is enough for us that the universe has produced us and has within it, as less than it, all that we believe and love. If 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. A grain of sand has the same, but what competent person supposes that he understands a grain of sand?[68]

While it is certainly possible to interpret this as cynicism, it is also possible to understand it in a more pragmatic context. In this passage, Holmes contrasts the modest nature of the "ganglion within" to the pomp and circumstance of the "little god outside." The point of this contrast is to emphasize a more realistic appraisal of human significance; in effect, Holmes is saying that no one being—not even one's own self—is at the center of the universe. Rather, each human being is but a tiny piece of "the infinite" while, at the same time, being an expression of the greater whole. And from this understanding of human life flows a not very cynical sense of joy and duty:

> The rule of joy and the law of duty seem to me all one. I confess that altruistic and cynically selfish talk seem to me about equally unreal. With all humility, I think 'Whatsoever thy hand findeth to do, do it with thy might.' infinitely more important than the vain attempt to love one's neighbor as one's self. If you want to hit a bird on the wing, you must have all your will in a focus, you must not be thinking about yourself, and equally, you must not be thinking about your neighbor; you must be living in your eye on that bird.[69]

While Holmes may not admire "altruistic talk," neither does he favor cynicism. He is not urging selfishness and indolence but rather attention to the "rule of joy and the law of duty." Nor is he exalting a life spent in pursuit of dramatic but simplistic ideals. He does not urge us to do good, to pursue freedom or to

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[68] OLIVER WENDELL HOLMES, *Natural Law*, *in* COLLECTED LEGAL PAPERS, *supra* note 42 at 310, 316.

[69] OLIVER WENDELL HOLMES, *Speech*, *in* COLLECTED LEGAL PAPERS 244, 247 (1920).

maximize our material goods.[70] For Holmes, virtue is found not in heroic action but in a kind of conscientiousness, craftsmanship, and steady attention to detail.

All of this is not to say that Holmes should be eligible for sainthood. While he was a man who understood the simple values of doing one's job and respecting others, he was not always sensitive nor was he generally free of self absorption.[71] Holmes inhabited his own time and place;[72] believed in many of its prejudices;[73] and was not prone to hearing the "cries of the wounded."[74] Nevertheless, he did his job well. He showed up for work, he worked hard and productively, and he made only a few wrong decisions in a career spanning fifty years. Whether Holmes did the best he could is not for us to judge. What is for us to judge is whether he represents the type of decisionmaking that we want our judges to make. Are we happy with appeals to high principle or do we want a deeper inquiry into the social effects of contemporary practices? Is the genius of American law its so-called natural law aspirations or its ingenuity in responding to difficult circumstances? Since Holmes seems to favor the ad hoc over what we like to think of as "immutable values," we could, with a certain amount of righteousness, condemn him for this choice. But, to the contrary, I believe that it is better to fully appreciate his virtues—virtues of empiricism and tolerance—and their importance to the legal practice of an ongoing democratic community.

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[70] *See, e.g.*, Holmes, *Path*, *supra* note 5, at 202 where Holmes writes: "And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars."

[71] *See, e.g.*, WHITE, *supra* note 11, at 89, where he quotes William James describing Holmes as "a powerful battery formed like a planing machine to gouge a deep self-beneficial groove through life."

[72] *See, e.g.*, Lamson v. American Axe and Tool, 177 Mass. 144 (1900), where Holmes applies freedom of contract notions to an assumption of the risk defense asserted by a factory owner.

[73] There is, for example, Holmes's somewhat unseemly interest with the possibilities of eugenics. And indeed, his interest seems to flower into enthusiasm when he ends his opinion in *Buck v. Bell*, 274 U.S. 200 (1927) with the cry "[t]hree generations of imbeciles are enough." *Id.* at 207.

[74] The phrase is used by William James in *The Moral Philosopher and the Moral Life*, *reprinted in* WILLIAM JAMES, ESSAYS IN PRAGMATISM 83 (Alburey Castell ed., Hafner Publishing Co. 1968).