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Thoughts and Lives. Book Reviews of Justice Oliver Wendell Holmes: Law and the Inner Self, by G. Edward White; and Learned Hand: The Man and The Judge, by Gerald Gunther

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BOOK REVIEW

THOUGHTS AND LIVES

JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF. By G. Edward White. New York, Oxford University Press, 1993. Pp. 628. \$37.50

LEARNED HAND: THE MAN AND THE JUDGE. By Gerald Gunther. New York, Alfred A. Knopf, Inc., 1994. Pp. 818. \$35.00

*Reviewed by William P. LaPiana**

Oliver Wendell Holmes, Jr. and Learned Hand shared a number of characteristics. Both well-known judges, they had uncommonly long careers on the bench and in old age attained a remarkable degree of public prominence. It is not too much to say that the legal profession idolized them both, and certain of their opinions remain staples of law school teaching. Both men even looked the part: Holmes' dramatic moustache and Hand's bushy eyebrows lent credence to the adjective "distinguished."¹ Now they both are the subjects of monumental biographies.

I

Gerald Gunther's *Learned Hand: The Man and the Judge* is an authorized biography, in the sense that the author was given exclusive access to Hand's enormous collection of papers.² Authorized though it may be, it is also independent and certainly is not hagiography. G. Edward White's *Justice Oliver Wendell Holmes: Law and the Inner Self* was made possible by the collapse of the attempt to secure the writing of

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1. "[Hand's] rugged square features and imposing eyebrows became the public's ideal of what a judge should look like . . ." Lewis F. Powell, Jr., *foreword to* GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* at xi (1994). "[Holmes] was exceptionally attractive, especially as he aged and his countenance, with its piercing eyes, shock of white hair and prominent moustache, seemed to reflect the roles of soldier and jurist that had been so important in his life." G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 3 (1993).

2. It should be noted that Professor Gunther was generous in allowing others to use the Hand papers as Professor White's "Preface" shows. WHITE, *supra* note 1, at ix.

an authorized biography of the justice and the subsequent opening and dissemination in microfilm form of the Holmes papers.³ Authorized or not, both works share the aura of being something of the last word. Important events and aspects of the lives of the subjects are carefully examined and every bit of evidence seemingly has been unearthed in order to provide the clearest possible picture. Whether the question is why Hand was never appointed to the Supreme Court or why Holmes suddenly abandoned his new position at the Harvard Law School to accept appointment to the Massachusetts Supreme Judicial Court, it is difficult to imagine going beyond the answers presented. In short, White and Gunther have given us the standard against which all subsequent efforts will be measured.

Like their subjects, the books exhibit some common characteristics. Both are gracefully written, although Gunther's work probably will be more accessible to lay people than those portions of White's study which closely examine Holmes's writings. Both are based on enormous research in the voluminous original sources. The books do differ, however, in their scope. Gunther devotes less space to discussing Hand's intellectual premises and outlooks. His work is more concerned with the details of Hand's life; in a sense, it is, if that is possible, more of a "biography," more the complete story of a life. There are more comings and goings, and more details about daily life and actions. In terms of traditional biography, Gunther's work is more definitive than White's, which is much more an intellectual and personal history of his subject the aim of which is as much to illuminate the personality of Oliver Wendell Holmes, Jr. as to describe his thought.

In spite of these differences in form, Gunther and White share the same broad interpretive framework: an emphasis on the distinctive aspects of their subjects' personalities. Gunther shows that Hand "viewed himself as beset and driven by self-doubts."⁴ He analyzes Hand's "style of modest judging"⁵ in light of that inability to fasten on absolute truth. "[T]he questioning, open-minded human being could not help acting that way as a judge."⁶ One source of those self-doubts was the memory of his father, "a memory that was more of a myth than of a reality," fostered in great part by Hand's mother, Lydia Coit Learned Hand.⁷ This self-doubt fed a skepticism which marked Hand's outlook on life. Gunther believes

3. *Id.* at 591-92.

4. GUNTHER, *supra* note 1, at xvii.

5. *Id.*

6. *Id.*

7. *Id.* at 133.

that "Hand's unease with an aggressive judicial role was but one aspect" of the skepticism that marked his life.⁸

White's analysis of Holmes's inner life reveals some interesting parallels to Hand's. Just as the younger man was driven by his father's assumed reputation, Holmes was driven by his need to exceed his father's widely acknowledged fame and mark out his own place in the world while at the same time, in a sense, following in the elder Holmes's footsteps.⁹ Holmes, according to White, had a "life plan" which "was a product of the discernible similarity between his father's and his own life goals and the discernible difference in their personalities."¹⁰

Holmes, too, was a skeptic, and indeed Hand invoked his name often in justifying his own restrained approach to judging. White claims that Holmes's skepticism was "a well-developed and refined philosophical position," which did not, however, guide his life.¹¹ He approached life with a relish which belied any belief that what he did or could do would not really matter. If Hand was often filled with self-doubt and questioned his abilities, Holmes was confident that he was important and that what he did and wrote really mattered. Like Hand, he often deprecated the honors and adulation which came to him, as they came to Hand, later in life, but White calls this "pseudohumility," an attempt to bring his doubts into the open where they would "dissipate."¹²

Other features of personality, however, distinguished the two judges. Hand married and fathered three daughters, and, while Gunther does not provide many details about his family life, it seems that he enjoyed his children and grandchildren and entered into fatherhood with the relish that Holmes usually reserved for his work. Indeed, Holmes approached his life with the belief that it should center around him. "It is one of the ironies of Holmes's career," White writes, "that although he cared so much for recognition, and although so many persons, over the years, have made an investment in his ideas or his work or his life, he gave so little of himself to the persons around him, even those whom he loved."¹³ Most striking is the difference in their relationships with their wives.

Fanny Dixwell Holmes was her husband's helper. She managed the household, reluctantly but effectively played the Washington hostess once Wendell was appointed to the United States Supreme Court, and, White observes, "implicitly permitted herself to be relegated to a distinctly

8. *Id.* at xii.

9. WHITE, *supra* note 1, at 11-14.

10. *Id.* at 14.

11. *Id.* at 481.

12. *Id.*

13. *Id.* at 411.

bounded realm of Holmes's existence: a realm not less central for its bounded quality, but limited nonetheless."¹⁴ So bounded was that role, that when Holmes sought passionate involvement with others he often sought it outside of marriage, especially during his solo trips to England where he fell in love with Clare Castleton, with whom he carried on a passionate correspondence. White concludes that speculation about whether or not they had a physical relationship is a "fruitless exercise" while acknowledging that the evidence of Holmes's letters makes it seem unlikely.¹⁵

Frances Fincke Hand was a different sort of woman. One of the first graduates of Bryn Mawr, she thought long and hard before she accepted Hand's proposal of marriage, especially because it conflicted with her desire to enter into a "Boston marriage" with her intimate friend and classmate, Mildred Minturn.¹⁶ Gunther cautions that we should not read this as indications that the two women were lovers. Such arrangements were common in the period, appealing as they did to the "New Woman" who sought "more than domesticity."¹⁷ It was "a living arrangement with another woman who shared similar aspirations" which "was thought to be more supportive and rewarding than traditional marriage, especially when one has not yet met a man who could be a 'husband-friend' as well as a 'husband-lover' and who would respect one's autonomy."¹⁸

Once married, Frances formed a "passionate" attachment to Louis Dow, a Dartmouth professor. Unlike Wendell and Clare, however, Frances and Louis spent long periods of time together, both during the summer while Learned remained in New York, and on trips they made to Europe without the judge. Gunther concludes that there is no evidence of a physical affair,¹⁹ and Learned Hand remained on good terms with Dow until the latter's death in 1944. Even more important, Hand remained passionately devoted to his wife, reproaching himself for any shortcomings in their relationship and writing her adoring letters until the end of his life. Nothing could better illustrate the difference between the two judges. Holmes taking it for granted that his world revolved around himself; Hand always beset with worries that he was deeply flawed in every sense.

14. *Id.* at 107. While Holmes himself indicated that he and his wife were childless by design, White suggests "the most likely explanation for the Holmes' childlessness appears to be that at least one of the participants in the marriage was infertile, although there is no direct evidence confirming that supposition." *Id.* at 106.

15. *Id.* at 249.

16. GUNTHER, *supra* note 1, at 95-96.

17. *Id.*

18. *Id.* at 96.

19. *See id.* at 185.

Gunther clearly links Hand's reverence for judicial restraint with his self-doubt. Hand seems to have had a limited view of his institutional role because he was convinced that he could do no more. He declared himself a member of the "Society of Jobbists" of which Holmes was president. A jobbist was committed above all to doing one's job well. Hand's view was that Holmes "had attained serenity and experienced the joy of creation."²⁰ For Hand, however, "solace was usually the more modest consequence of commitment to craftsmanship."²¹ Holmes did indeed use the term "jobbism" to refer to his approach to his work. For him, however, it "was the logical culmination of his own self-confidence in being a gifted professional."²² Holmes knew how good he was, and he seized every opportunity to prove it to the world.

According to White, Holmes's personality did influence his judging. It helped to foster the "ambivalence about the professional role he occupied."²³ His desire for greatness led him to treat opinions as "forms of words" through which he could express his insights and philosophical outlook. He assumed, according to White, that to be a celebrated jurist required "doctrinal consistency and theoretical integrity,"²⁴ yet he desired to be the philosopher-judge. With Holmes's judicial work, "what starts as a purported exercise in doctrinal analysis quickly disintegrates, revealing beneath the surface other language—language communicating the human, intellectual, and cultural dimensions of Holmes's opinions."²⁵ White makes this point most vividly in discussing Holmes's free speech opinions, persuasively arguing that they cannot be read as coherent doctrinal statements. Rather, they are reflections of "cultural and ideological messages" of the first three decades of the twentieth century.²⁶ White makes the broader point quite bluntly: "Holmes the judge was often consumed by the sheer attraction of language itself."²⁷

For all the common emphasis on personality, the works do differ. White spends a great deal of time and effort on close analyses of Holmes's writings, as befits a study of a judge who put so much effort into choosing the words he used to convey his opinions. A clear example, which also delineates Holmes's attitude toward his judicial work and colleagues on the bench, is White's analysis of two sentences Holmes wrote to Felix

20. *Id.* at 404.

21. *Id.*

22. WHITE, *supra* note 1, at 296.

23. *Id.* at 452.

24. *Id.* at 453.

25. *Id.* at 454.

26. *Id.*

27. *Id.* at 444.

Frankfurter during a break in one of the Supreme Court's conferences: "I stepped out of a cloud of biting mosquitoes for a word of freedom with you. Now I go back to the swamp."²⁸ White first notes that during his service in the Peninsula campaign of 1862, "Holmes had marched through swamps and had doubtless been exposed to mosquitoes."²⁹ In the note to Frankfurter, however, release from those annoyances is a "word of freedom." White suggests that Holmes found his colleagues on the Court to be an annoyance, "but the principal effect of their presences was to inhibit and annoy his language."³⁰ Holmes's life was to a great degree lived through his words, and his biographer's work is to a great degree accomplished through the close analysis of those words.

Both books, of course, are biographies, not general histories of the period of their subjects' lives. One of the fascinations of biography, however, is the insight it gives into the history the subject lived. We can imagine the past much better when we can imagine the lives of individuals. The imagining is all the more vivid when the lives we examine have something in common with our own. An American lawyer reading these two books almost certainly will try to relate his or her understanding of the legal world in which we live to these two lives lived in legal worlds more or less like our own. What can be learned about our own lives from these two lives should be all the more interesting because Hand and Holmes not only are of two different generations, but also of two different legal cultures: Holmes is of the nineteenth century and Hand of the twentieth.

What follows is an attempt to outline some of the differences between those two legal cultures by using the contributions both biographies make to our understanding of two exemplary lives. First, I consider the differences between Holmes and Hand revealed by these works. Second, I try to generalize these differences into a highly tentative view of the transition from nineteenth to twentieth century legal culture, considered as a problem in intellectual history.

II

A

A review of the two biographies is a good place to begin such a project because both books are more than fine examples of an important genre which has always had a significant place in the study of history. They also represent a particular way of doing legal history, or, rather, of

28. *Id.* at 314.

29. *Id.*

30. *Id.*

doing the intellectual history of law. One of the characteristics of the legal history done by American law professors since perhaps the 1960s has been close attention to the role law plays in supporting dominant social structures. That attention was first expressed by scholars loosely grouped together as the law and society movement. Their most prominent practitioner is James Willard Hurst whose careful, detailed study of the relationship between the law and the Wisconsin timber industry is a classic example of the approach.³¹ In that approach law is both the servant and reflection of a broad social consensus on the importance of economic growth and the production of wealth.³²

Another expression of the scholarly interest in the relationship between law and social structure was a "soft" form of Marxism, which, in its crudest form maintains that all ideas are merely superstructure, built on the reality of ownership of the means of production. This approach to the study of legal history is associated with that loose conglomeration of scholars known as the Critical Legal Studies (CLS) movement.³³ CLS is far more nuanced and has been far more influential than a sentence or two can describe.³⁴ In briefest compass, the CLS historians see far less consensus in American history and tend to emphasize the ways in which the legal system aided the powerful. The most prominent historian associated with CLS is Morton Horowitz, whose first book, *The Transformation of American Law, 1780-1860*, published in 1977, was subjected to strong criticism because of the assumption that it was based on just such a soft Marxist approach.³⁵ To sum it up as pithily as

31. JAMES WILLARD HURST, *LAW AND ECONOMIC GROWTH* (1964). For Hurst's personal view of his work and the state of legal history, see Dirk Hartog, *Snakes in Ireland: A Conversation with Willard Hurst*, 12 *LAW & HIST. REVIEW* 370-90 (1994).

32. In his interview with Hartog, Hurst says: "The thing that is significant to me is that just dealing with the facts and records shows the extent to which there was almost no question about the idea of economic progress, in the sense of increased output of goods and services, as a good in itself, regardless. There was almost no dissent to that attitude." See Hartog, *supra* note 31, at 387.

33. For a brief discussion of the history of the CLS approach to history, see Daniel R. Ernst, *The Critical Tradition in the Writing of American Legal History*, 102 *YALE L.J.* 1023-34 (1993).

34. Indeed, Ernst points out that some advocates of CLS have moved beyond a structural approach to history and into "post-modernism." *Id.* at 1032.

35. See, e.g., John Phillip Reid, *A Plot Too Doctrinaire*, 55 *Tex. L. Rev.* 1307, 1315 (1977) (book review) ("There is no neutrality in the legal history of Horowitz. Economics determines all issues, conspiracy explains most events."); see also Grant Gilmore, *From Tort to Contract: Industrialization and the Law*, 86 *YALE L.J.* 788, 797 (1977) (book review) ("What principally disturbs me in Professor Horowitz's excellent book is that he seems to be proposing a formalism of the left which I find quite as distasteful as the more familiar formalism of the right.").

possible, Horwitz's study of antebellum American law emphasized the subsidy it gave to capitalistic development.³⁶ Hurst described the same interaction between law and society as a "release of energy."³⁷

In spite of the differences, the law and society and Critical Legal Studies movements are both structural approaches to the study of legal history. Practitioners of both views tend to look for and explicate the relationship between law and social outcomes. What interests them is what law does in society, what various actors use law to accomplish. Both approaches have played important roles in breaking down the idea of legal history as a celebration of great lawyers' contributions to the stability of American government and great judges' contributions to the creation and improvement of legal doctrine.

One of the weaknesses of functional approaches, however, is that they turn the scholar's vision away from the individuals who think the thoughts that the scholar studies. In turn, thinking less about individuals makes it more difficult to appreciate the role that law and legal ideas play in their lives.³⁸ In short, it is more difficult to think about and study legal culture when the scholarly focus is on the role legal rules and doctrines play in economic development. Such an approach slights the links between legal thought and other aspects of the intellectual life of the particular time and place.³⁹ Looking closely at those links can help us understand what the past accepted without question but what we in the present can subject to critical examination. Such studies can be as thought provoking as the attempt to delineate the structural "reality" behind the law. Once we learn to critically examine the common sense assumptions of the past, we may look more carefully at our own commonplaces and postulates.

Biography can be a fruitful approach to a history of legal culture because it always concentrates on individuals. These biographies of

36. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

37. JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956).

38. White's recent study of James Bradley Thayer's famous essay on the role of American courts in judicial review is an example of such a cultural study. At the end of the work, White calls for more such studies of Thayer and his contemporaries: "We need to begin to see them as cultural figures rather than as caricatures of formalism or as progenitors of the Realists." G. Edward White, *Revisiting James Bradley Thayer*, 88 NW. U. L. REV. 48, 83 (1993).

39. Several CLS historians have been interested in intellectual history, however, and Morton J. Horwitz's second book, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISES OF LEGAL ORTHODOXY* (1992), is much more a story of legal ideas and more closely examines individual thinkers.

Learned Hand and Oliver Wendell Holmes, Jr. provide a wealth of detailed information with which to begin a study of American legal culture in the nineteenth and twentieth centuries. The place to begin the inquiry is the contrasts the books reveal between the lives of Holmes and Hand.

B

One aspect of Hand's life that illustrates the difference between his world and Holmes's is his version of "jobbism." Holmes's "jobbism", according to White, was an expression of his supreme self-confidence. For Hand it was an expression of the modest claims of careful craftsmanship. Hand's status as a professional was important to him and certainly was important to his attempts to overcome his doubts and find a sense of self-worth. One of the staples of historians' understanding of the early twentieth century is the idea that social status became more and more a matter of occupation, of social function rather than of social position.⁴⁰ As American society became more and more national, secure social status came from membership in a functional group which did something good for society. Holmes's jobbism was part of his strong belief in his own talent and his need, and duty, to use it to the full. In some way, too, duty and jobbism are related to the world of Brahmin Boston, to Holmes's class. Even their relationships to their fathers illustrate the contrast. Holmes, Sr. was a physician, but it was through his writings that he attained fame and status and a position his son could try to surpass. His was a literary fame, and his son's attempt to equal and surpass it was as literary as it was legal. Here was a judge who submerged doctrine in language. Samuel Hand's fame came from his legal career (at least as it was remembered). It was solely as a lawyer and jurist that Learned tried to make his mark. Holmes's attempt to find a place in the world took place through the law while Hand's was within the law.

All in all, Hand might have had the more difficult task. His father's early death seems to have magnified his accomplishments, at least in part because it allowed speculation about what more he could have accomplished. Holmes, Sr. was constantly on the scene during his son's struggle to establish himself. At least he was there to see, and, one hopes, be impressed with and take pride in his son's accomplishments. Hand could never hope for any sort of approval from the paragon into which his dead father had been transformed. Perhaps his constant torment

40. Perhaps the best known statement of this view is RICHARD HOFSTADTER, *THE AGE OF REFORM* (1955), expanded on in ROBERT H. WIEBE, *THE SEARCH FOR ORDER 1877-1920* (1967).

over his own incapacity was magnified by the inability to ever find reassurance.

Certainly Hand required help, and lots of it, trying to find his place in the law. Holmes, of course, did not simply blunder into his judicial appointments, but they did not involve an undue amount of arranging. The appointment to the Massachusetts high court seems simply to have happened. White mentions the recommendation of Holmes to the governor by "one W.C. Russell," but no other information seems to exist. After all, Holmes's grandfather Charles Jackson sat on the court; the outgoing Republican governor wished to fill the vacancy rather than leave it to his Democratic successor; Holmes was a Republican, if not a fiercely partisan one; and he certainly wanted the position.⁴¹ Appointment to the United States Supreme Court was a little more problematic and serendipitous. The "Massachusetts seat" on the court was coming vacant with the retirement of Horace Gray, but President McKinley resolved to appoint another, a resolution made moot by an assassin's bullet. Theodore Roosevelt had admired Holmes's speeches, and his own close friend, Senator Henry Cabot Lodge, was a strong supporter of his friend, Holmes. In the end, most important was the fact that Holmes was "the social and intellectual compatriot of Lodge and Roosevelt."⁴²

Learned Hand had a more difficult time. His appointment to the district court came about through lobbying by his friends, especially C.C. Burlingham, who had access to Taft's Attorney General, George Wickersham and his brother Henry, a prominent New York lawyer. Unlike Holmes, Hand was not a "natural" for a judicial appointment. He needed the help of the better connected. His elevation to the Second Circuit was greatly aided by the actions of Julius Mayer whose resignation to return to practice created the vacancy to which Hand was appointed. Mayer was well connected and "resorted to his wide range of contracts, from New York Republican senator James Wadsworth to 'the local political people' to ensure Hand's nomination."⁴³ Hand, of course, never reached the highest court, but the details of those campaigns, so well told by Gunther, illustrate how dependant Hand was on influence wielded by others.⁴⁴

By the time Hand was considered for the United States Supreme Court for the last time in 1942, the world was far different from the one in which Holmes had ascended to the court. The pool of potential appointees was much larger and, in a sense, there were more layers between the

41. See WHITE, *supra* note 1, at 202-08.

42. *Id.* at 307.

43. GUNTHER, *supra* note 1, at 275.

44. See *id.* at 553-70.

candidates and the president. Holmes knew Roosevelt and was a friend of Lodge. At best, Hand knew some of the men who counted, but his friendships stopped with those, like Burlingham or Felix Frankfurter, who were close to power. Professional competence got one noticed, but actual access to power required more.

The professional worlds in which these two men lived and worked differed. Holmes's world was smaller and more personal, one in which personal acquaintance and being the "right sort" meant a good deal. Hand, however, lived in a world in which professional competence and craftsmanship were perhaps even more important than social position, but the accomplished professional was apt to be at some remove from the centers of power. Thus, Hand needed friends more than Holmes. And once again, matters of personality were important. To say that White's portrayal of Holmes's relationships with others is complex is only a beginning. In brief, Holmes craved "intimacy," a form of friendship which involved the sharing of inmost thoughts, "real feelings" without pretense and without emotional abandon. His relationships with women especially were governed by this desire, and to White, the most significant aspect of Holmes's relationship with Clare Castleton was its transcendence of "intimacy" and development into "romance."⁴⁵ Holmes's closest friendships with men were limited to those he considered to have first-rate intellects and seem to have been few.⁴⁶ Hand found it easier to open himself to others and was more inclined to form a much greater number of friendships. Although he had been an outsider in his youth, Gunther notes, "in New York City's social gatherings, he was now a welcome guest at last: a lively, brilliant conversationalist with enormously wide interests, a gift for the ribald story and delightful mimicry, a relish for rubbing elbows with cultivated acquaintances."⁴⁷ In short, Hand was blessed with (or perhaps cultivated) the very abilities he needed to make a place for himself in the world. The friends he made were the very men who helped advance his career.

Different social structures are not the only indicia of change between Holmes's legal world and Hand's. They thought about law in different ways and thus went about the job of judging in different ways. Holmes, of course, is an important figure in the history of Anglo-American jurisprudence. "Had he never been a judge," White writes, "*The Common Law* would remain one of the great works of jurisprudence. . . . No previous writer had attempted the distinctive combination of history,

45. WHITE, *supra* note 1, at 250-52.

46. *Id.* at 315.

47. GUNTHER, *supra* note 1, at 408.

analytics, and policy that Holmes forged in *The Common Law*.⁴⁸ Hand lived in the jurisprudential world Holmes helped to make, but Holmes was not the only creator.

Christopher Columbus Langdell appears in Gunther's work as the exemplar of a narrow, coldly logical view of law which excludes appreciation of the social function of legal rules. This is to a great degree the standard view of Langdell and by extension of the changes Langdell helped to bring to Harvard Law School after he became dean in 1870. Hand found some good in Langdell's work, but he distrusted Langdell's attempt to "construct airtight logical structures," an enterprise in which Hand would not participate.⁴⁹ The skeptical Hand, following the example of his hero Holmes, would never attempt to impose a false coherence on the law.

Once again, however, the Holmes that Hand admired is not the Holmes that White describes. White explains that the relationship between Holmes and Langdell was not as hostile as has often been believed. First, Holmes appreciated and approved of the increased rigor of legal education at Harvard. The case method's emphasis on the study of cases as the original sources of the law, and the use of the Socratic method in class, made for the scientific study of law of which Holmes approved.⁵⁰ Langdell and his colleagues made the study of law a worthy and demanding enterprise. Given Holmes's desire to prove his personal worth through demanding work, the transformed law school not surprisingly met with his approval.

Just as significant, and more surprising, perhaps, are the intellectual affinities between the judge and the dean. Holmes's *The Common Law* is a complex and subtle work into which readers have often projected their own views. Those views usually are congenial to finding in his work the beginnings of a type of legal realism. "Holmes has thus been seen," White writes,

as a proto-Realist, focusing on the "prejudices" of judges and the "felt necessities" of generations as shaping forces in the law, as a legal anthropologist, ranging through the doctrines and practices of "primitive" societies, as a proto-economist, championing "empirical" analysis and market-based theories of liability, and above all as an arch-critic of formalist jurisprudence, the orthodox

48. WHITE, *supra* note 1, at 486.

49. GUNTHER, *supra* note 1, at 46-47, 520.

50. WHITE, *supra* note 1, at 197-98. Gunther makes the same point, *see* GUNTHER, *supra* note 1, at 47.

discourse of the late nineteenth-century elite legal profession, of whom Langdell was one of the high priests.⁵¹

Careful examination of the work which looks beyond Holmes's "riveting passages contrasting 'prevalent moral and political theories' with 'the syllogism'" reveal, according to White, "a methodology strikingly like that of Langdell."⁵² Like all of White's analysis, his reading of *The Common Law* is subtle and deeply engaged with the text, and a summary inevitably will not do justice to that analysis. Keeping that warning in mind, however, it is fair to say that White finds Holmes's most famous work to embody a methodology which is both historicist and positivistic, devoted both to doctrine and policy, and which, most importantly, was not regarded as revolutionary by contemporaries. Indeed, what might today appear odd to us was an established part of the intellectual milieu. Holmes could be as "presentist" as Langdell and as devoted to logic in the development of law. At the same time Holmes was concerned with the development of doctrine and the social and intellectual forces behind that development. It seems fair to say that he and Langdell were far closer intellectually than most twentieth-century commentators have realized. What has often been portrayed as a difference in kind was a difference in emphasis.⁵³

Holmes's intellectual development did not end with the publication of his great book, of course, and White traces a growing positivism in Holmes's view of law related to his service on the Massachusetts Supreme Judicial Court. By the time the judge published *The Path of the Law* in 1897 he was clearly a believer in the idea that judges make the law: "Older forms were retained or abandoned because their substantive basis was either endorsed or rejected; judging was inevitably a matter of policy choices."⁵⁴ White argues that the views expressed in these later works are at least somewhat different from those Holmes held when he produced his early essays and *The Common Law*.⁵⁵ Whether those earlier works

51. WHITE, *supra* note 1, at 170.

52. *Id.*

53. *See id.* at 178-95.

54. *Id.* at 222.

55. *Id.* at 535 n.98. As noted, White links this change in Holmes's thought to his experience as a judge. Morton Horwitz suggests that Holmes' relationship with Clare Castleton was the discovery of a "deep love . . . that produced in Holmes what Freud called an 'oceanic' feeling, inducing him to transcend the prior categories of his thought." HORWITZ, *supra* note 36, at 143. White believes that Holmes' intellectual growth led him to Clare Castleton; Horwitz that Clare Castleton, along with the social and economic upheavals of the 1890's, led Holmes to new ideas. *See* WHITE, *supra* note 1, at 138-39.

contain more than a seed or foreshadowing of the later views is, of course, a matter of interpretation. In any event, Holmes was always at least touched by positivism. But so were Langdell and his fellows at Harvard. Part of the strength of the case method was its assertion that cases, and the judges who decided them, were the source of law.⁵⁶ Even Holmes's later, more "modern" views, then, do not distance him that far from his contemporaries.

If Holmes's speculations and what was going on at Harvard Law School were of a piece, it is worthwhile to think for a bit about the effect of the transformed Harvard Law School on the young Learned Hand. Gunther finds that Hand disliked Langdell's overemphasis on logic, but saw the value in the case method because it drove the student to think for himself.⁵⁷ The strongest influence, however, was James Bradley Thayer. Thayer's views on the limited role of judicial review of legislation were an important influence on Hand's deferential approach to judging.⁵⁸ There may have been other, less obvious influences, however. For example, Hand was an expert at distinguishing cases and that skill was an important part of his judicial technique.⁵⁹ The case method gave intensive training in the close reading and analysis of cases and perhaps helped influence Hand. In addition, Gunther quotes Hand deprecating natural law and referring to the sovereign power of the legislature, ideas which were central to the approach to law that informed the reformed legal education that had its start at Harvard.⁶⁰

All these various influences and suggestions come together in considering one of the most important aspects of Hand's professional life, his work with the American Law Institute (ALI). Gunther describes the ALI as "the elite incarnation of the American legal establishment, a select group of leading practitioners, scholars, and judges committed to 'the improvement of the law.'"⁶¹ That improvement was first pursued by the creation of the Restatements, "which sought to identify and articulate the governing principles of the common law for the guidance of judges and

56. I have made this argument at length in WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* 122-31 (1994).

57. GUNTHER, *supra* note 1, at 46-47.

58. White's study of Thayer's famous essay, *The Origin and Scope of the American Doctrine of Constitutional Law* finds it to advocate a less deferential attitude to legislatures than is usually believed. White identifies Thayer as a Brahmin legal scientist whose idea of judicial review is class-based, reflecting "the rationality of Brahmins and their ilk." White, *supra* note 35 at 82.

59. GUNTHER, *supra* note 1, at 327.

60. *See id.* at 250, 494.

61. *Id.* at 410.

lawyers.”⁶² Gunther acknowledges that the very concept of the Restatements “resembled the ambitious schemes of C.C. Langdell . . . to construct a logical structure that would form an airtight system of its own with little regard for the law’s social content,” but asserts that Hand’s “craftsman’s spirit unceasingly pursued the underlying principles amid the flood of precedents, and he appreciated the Restatements’ potential of guidance for judges and lawyers.”⁶³ Whether or not Langdell was actually hostile to consideration of the law’s social context, it is clear that his idea of legal education, and the idea of legal education exemplified by his reformed school, placed great emphasis on the law itself as a worthy subject of study, separate and apart from legislation and considerations of policy.⁶⁴ Hand’s “craftsman’s spirit” may in part be a reflection of a legal education that paid close attention to the careful identification and explanation of relatively narrow legal principles, extracted from the cases that were the basis of all study.⁶⁵ The “flood of precedents” was widely deprecated and even feared by late nineteenth-and early twentieth-century American lawyers and a project like the Restatements was a coherent response to those worries. In a way, the entire project was one extended exercise in sophisticated case method, designed to extract from the raw material the best (if not the “true”) legal principles which should guide the courts.⁶⁶

Holmes was never as enthusiastic about the ALI as was Hand. At the time of the founding meeting Holmes wrote Harold Laski:

Some of the virtuous under the call of E[lihu] Root and William Draper Lewis meet here [in Washington] next week to talk of restatement of the law (I believe). . . . I will try to [look in on them] but I will take no hand and won’t believe till they produce the good. You can’t evoke genius by announcing a *corpus juris*.⁶⁷

62. *Id.* at 411.

63. *Id.* at 412-13.

64. See LAPIANA, *supra* note 56, at 77, 130.

65. Indeed, in his final Holmes lecture Hand paid tribute to his law school teachers: “From them I learned it is as craftsmen that we get our satisfaction and our pay.” GUNTHER, *supra* note 1, at 654.

66. There were exceptions, such as § 90 of the Restatement of Contracts, written by Samuel Williston which shows that the search for the “best” rules was often guided by the urge to make better rules. For a thorough discussion of the reformist aspect of the ALI, see N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 LAW & HIST. REV. 55-96 (1990).

67. HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935 at 482 (Mark DeWolfe Howe ed., 1953).

The part of Holmes's intellect which could never accept the overuse of logic to explain the law may have rebelled against the attempt to carefully state the "best" rule, no matter what the basis for making the judgment of what was best. Perhaps Holmes also lacked the enthusiasm for cooperative ventures like the ALI. White strongly emphasizes Holmes's desire for recognition and documents his strenuous efforts to make his views well known and accepted by embodying them in striking prose. "Holmes was thus at bottom an individualist judge in a collegial profession."⁶⁸ Educated in a school which emphasized the role of the professional and coming to maturity in an America which gave great importance to the role of the professional, Hand may have been more accepting of corporate professional activity. The best law would come from the cooperative thought of the best lawyers, not through the brave excursions of the solitary knight.

Still, the similarities again lead to thoughts about the contrast between the nineteenth and twentieth centuries as illustrated by Hand and Holmes. The Holmes that White portrays would be unlikely to see much value in group projects in which his own distinctive personality and talents would be submerged. Gunther's Hand, in contrast, wanted to be part of the group, perhaps not only because he felt left out and alone, but also because his vision of being a lawyer was closely tied to being part of a profession with a collective claim to respect, honor, and even power.

If these two judges were so different, why did the younger so admire, even idolize, the elder? Surely there is no simple answer to that question, but part of the answer may be found in the manipulation of Holmes's image by the same people who were Hand's friends. White explores at length the remaking of Holmes as a paragon of progressive judging by the "New Republic crowd" which included Walter Lippmann, Felix Frankfurter, both of whom were close friends of Hand, and Harold Laski. As White points out, "Holmes did not fully hold" any of the core beliefs of the "New Republic lot": "that unregulated capitalism was passe; that experimental regulatory or redistributive legislation . . . should be encouraged at the state level; that the 'melting pot' was a viable social ideal; that the future was an improvement upon the past; and that a beneficent state should become more of a presence as a policy making force."⁶⁹ In White's judgment, however, "Holmes' learning, antecedents, bearing, pithy informal style, and deferential attitude toward social and economic regulation were more than enough for his admirers."⁷⁰ The Holmes that Hand admired was not the self-absorbed philosopher White portrays but rather the Olympian, perfectly restrained

68. WHITE, *supra* note 1, at 481.

69. *Id.* at 360.

70. *Id.*

judge, totally in control of his craft and himself that Frankfurter and company, in part at least, created. Perhaps Hand's own reticence and self-doubts made it easier for him to accept what the presumably well-informed said about Holmes, especially when what they said made Holmes an exemplar of the qualities Hand felt he himself lacked.

III

Biography remains one of the most accessible ways of understanding the past, and perhaps one of the most readable, at least when practiced with the skill, learning, and style exhibited by both these works. Lives *are* interesting, and the emphasis on the interior life may reflect one of the dominant tendencies of our time, the desire to understand public actors by understanding their inner selves. In these two instances, that desire really does lead to revelation. Probing behind the images reveals something about these two men and about their times. Stripping away the image built around Holmes reveals an intellectual life much closer to that of his contemporaries than we have generally been led to believe. Gunther's story of Hand's life gives much evidence that Hand's thoughts were the product of his education and of the legal culture of his time, both of which reinforced and were reinforced by his habits of mind and personality.

Both these works, however, are more than particularly striking examples of methodology because both the lives they examine cast doubt on the received wisdom about American legal history in the late-nineteenth and early-twentieth centuries. To some degree, the same persons who manufactured the Holmes persona and were Hand's friends also created the story of a revolt against formalism in which Langdell and his colleagues were agents of the forces of darkness. These same people were among the advocates of Legal Realism who claimed Holmes as their precursor and with some of whose premises Hand agreed.⁷¹

There are many sources for this view. In the world of law, many of the early legal realists set up Langdell and his assumed works as the antithesis of their own approach to law.⁷² Morton White, in *Social Thought in America: The Revolt Against Formalism*, linked Holmes to

71. Gunther expresses this point of view when he writes that Hand would have found much in Jerome Frank's work with which to agree. "[Hand] was never a wholehearted admirer of C.C. Langdell's efforts to construct airtight logical structures, nor would he have doubted the role of personality and personal biases in judicial decision making." GUNTHER, *supra* note 1, at 525.

72. The classic expression is the work of Jerome Frank; for example, his *A Plea for Lawyer Schools*, 56 YALE L.J. 1303 (1947), where he characterizes Langdell as "a brilliant neurotic" and asserts that his ideas of teaching reflected his personality. *Id.* at xx.

such icons of progressive thought as John Dewey, Charles Beard, and Thorsten Veblen in their opposition to a society built on unquestioned verities.⁷³ In the ongoing discussion, Langdell and to some lesser degree his colleagues at Harvard Law School were lumped with the bad guys and made exemplars of a wooden and over-intellectualized approach to law. It is as if Langdell and the early advocates of legal education founded on the case method were one with the justices of the United States Supreme Court who produced the decision in *Lochner v. New York*.⁷⁴

Both works under consideration here, however, cast doubt on that story. White carefully shows that Holmes and Langdell both participated in a legal culture which honored logic as a means of understanding law. Hand's particular strengths as a judge, as described by Gunther, certainly owe a good deal to his education at the supposed citadel of formalism. The stories of both these lives should help turn our investigation of American legal thought in the late nineteenth and early twentieth centuries to new paths.

The world in which Hand came to maturity in the law was one in which the legal profession was also coming to a sort of maturity. As noted above, one of the contrasts between Holmes and Hand involves the nature of their life's ambition, the way they went about making a mark. Holmes worked through the law to obtain the recognition and renown he so fervently desired. In the process he had to carefully balance his literary ambition with the technical demands of judging. Indeed, most of his interaction with his judicial colleagues "came primarily in the form of their removing too vivid or too sweeping passages in his draft opinions rather than any deliberation over the merits of the case."⁷⁵

The contrast with Hand's judicial style could not be greater. Gunther recounts at length the pains Hand took to shape each argument and craft each opinion. During his tenure on the Second Circuit, each decision was preceded by the preparation by each judge of a pre-conference memorandum, the preparation of which required each judge to thoroughly think through each case. In Hand's case, these memos reveal "the sheer joyful thoroughness with which he tackled each case."⁷⁶ Taught law by

73. MORTON WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* 74-75, 105-06 (1957).

74. 198 U.S. 45 (1905).

75. WHITE, *supra* note 1, at 481.

76. GUNTHER, *supra* note 1, at 291-303. The difference in judicial style between the two men may help explain their disagreement over First Amendment jurisprudence. Gunther's description of the colloquy between the two judges can be read to show that Holmes was simply impatient with Hand's careful dissection of the problems involved, which Holmes seemed to see more in grand terms of the rights of the majority which reduced some of these now famous cases to "essentially routine criminal appeals." *Id.*

the case method, Hand approached the work of writing judicial opinions with the vigor the student was supposed to exhibit in ripping apart those same opinions. Hand's work involved the application of a special legal skill while Holmes's judging called on a broader range of talents.⁷⁷

The larger point is that one of the characteristics of a profession is the possession by its practitioners of a special skill. Hand's technical competence and concern for technical competence, just as his view of judging, were related to his education. In the conventional story, Langdell and company are guilty of separating the study of law from the study of society, a separation which Holmes deprecated in his classic statement about the relative roles of logic and experience in the life of the law. White shows, however, that the famous statement does not make Holmes so different from Langdell and other legal thinkers of his time. What has often been ignored is that the exclusion of non-legal topics from legal education was part of a conscious intellectual strategy. It was dictated by the view of law as what judges actually enforce and became a valuable weapon to use against the view of law as eternal principles. Langdell himself clearly believed that law schools should content themselves with teaching law as it is. The study of jurisprudence, he wrote to a correspondent, of "what the law *ought to be*," is the province of "those aiming at public life or a high order of journalism."⁷⁸ One of the rallying cries of Legal Realism, of course, was the claim to separate the *is* and the *ought* for purposes of studying law. It is ironic to find something of the same view held by the high priest of formalism. Leaving the *ought*, which we moderns might identify as public policy, to other than lawyers certainly could help produce judges like Hand who deferred to the legislature.⁷⁹

at 164.

77. I do not mean to give the slightest impression that Hand was a philistine. Just the opposite was true. Gunther shows that Hand read widely and loved ideas and language as much as he loved the law. His pre-conference memos were liberally salted with literary and philosophical allusions. *Id.* at 292. The point is that these intellectual flights were limited to pre-conference memos.

78. Letter from C.C. Langdell to T.D. Woolsey (Feb. 6, 1871), in WOOLSEY FAMILY PAPERS, Series I, Box 23, folder 433, Yale University Library, Ms. Div., quoted in LAPIANA, *supra* note 56, at 77.

79. Of course, such an approach to legal education could mask or even justify a mindless acceptance of things as they are and lead to opposition to any sort of change. I believe, however, that this approach to the study of law promoted lawyerly acceptance of at least some varieties of social change by casting doubt on the verities of the past and by giving lawyers a claim to professional competence and social position based less on the defense of a particular set of ideas about society and government than on apparently apolitical technical expertise.

Paradoxically, it may also have made it easier for lawyers to attain political leadership by surrendering overtly political stances. In his study of the *Pollock v. Farmers Loan and Trust*⁸⁰ entitled *Conservative Crises and the Rule of Law*, Arnold Paul chronicled the outrage and fear of bar association speakers confronted with the attempt to enact a federal income tax in the 1890's.⁸¹ To put it crudely, many of these speakers, and perhaps many of their listeners, were adherents of a view which found an income tax to be a legislative and majoritarian violation of the eternal principle declaring the sanctity of private property.

With the dawn of the twentieth century came a fundamental shift in American political life which we usually call the Progressive Era. And while "progressivism" is difficult to describe and even more difficult to define, it can be said that extreme views on the sanctity of private property became politically far less palatable in a society dominated more and more by a middle class which possessed some property but also saw itself as consumers and possible victims of the concentration of wealth. Negative reaction to the *Lochner* case, the growth of anti-monopoly sentiments, and even perhaps the eventual passage of the Sixteenth Amendment validating an income tax, all evidence this change. In such a world, a profession which proclaimed itself day in and day out to be out of sympathy with dominant political forces might fear for its position. By turning to more technical, narrow concerns, lawyers and judges may have been securing broader influence by renouncing overt political activity. Whether this change was powered by deliberate choice on the part of some lawyers or whether it was an unplanned response to change, or whether it was more or less of both, by the 1920s the new position was clearly set out.

In this context, the founding of the ALI is especially important. Gunther notes that Hand was not always overwhelmingly enthusiastic about the Restatements. He was deeply involved in the ALI because it allowed him to associate with law teachers and gave him a welcome social

An approach to legal education focused on technical rules could also inculcate a certain modesty in students. No longer was the lawyer the master of all that was necessary to understand society, a natural member of the governing class. As the case model law schools stripped from their curricula cultural courses such as Roman law, oratory, and political science they promoted a vision of a profession devoted to the more mundane, and subtly controlling, role of facilitating others' use of the legal system. See LAPIANA, *supra* note 56, at 144. It is possible that this modesty is yet another contributor to Hand's restrained view of the judicial function.

80. 157 U.S. 429 (1895) (holding that a federal tax on rents, income from real estate, or interest on municipal bonds is a direct tax in violation of the Constitution).

81. See ARNOLD M. PAUL, *CONSERVATIVE CRISES AND THE RULE OF LAW* (2d ed. 1976).

outlet. The ALI was a group of leading professionals working together to better the science of their profession without expressing an overt political agenda.⁸² The esprit de corps the organization fostered helped to reinforce its members' vision of the importance of their role in society.

Another illustration of the turn to technical expertise is the amount of time and energy law professors and at least some bar associations poured into the attempt to enact procedural reform of the type eventually embodied in the Federal Code of Civil Procedure. It is convenient to find the beginning of that movement in 1906, the date of Roscoe Pound's address before the American Bar Association entitled *The Causes of Popular Dissatisfaction with the Administration of Justice*.⁸³ Pound listed four major sources of the dissatisfaction he saw. Some were common to all legal systems. They were the natural result of regular procedures necessary to protect litigants against personal prejudice and of the inevitable gap between law and the developing moral sense of the community. Other causes were peculiar to the Anglo-American legal system. The individualistic nature of the common law was out of joint with an increasingly collectivist age, and the constitutional guarantees of the rights of both natural and artificial persons frustrated attempts to redress wrongs and prevent harms. In addition, the contentious nature of common law procedure had been exaggerated in America until the administration of justice had become a game. Other causes were related to judicial organization and procedure. There were too many courts with overlapping jurisdictions and too many cases were decided not on the merits but on points of practice and procedure. The last category of causes was related to social perceptions of courts and lawyers. The public expected the courts to do their job but did not fund them properly, yet blamed them for every perceived miscarriage of justice, often abetted by irresponsible reporting in the press. Courts themselves were too involved in politics. Too many lawyers approached the practice not as a profession but as a business.⁸⁴

Pound's list of causes does not seem to be particularly dated. Many of the same complaints are made today. Far more interesting is his prescription for the role lawyers should play in solving the problem. He summarized by noting that some causes

82. Cf. N.E.H. Hull, *Restatement and Reform: A New Perspective On the Origins of the American Law Institute*, 8 LAW & HIST. REV. 55 (1990) (suggesting that the ALI had a self-conscious reformist agenda).

83. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906), reprinted in 35 F.R.D. 241, 273 (1964).

84. See *id.*

inhere in all law and are the penalty we pay for uniformity; that some inhere in our political institutions and are the penalty we pay for local self-government and independence from bureaucratic control; that some inhere in the circumstances of an age of transition and are the penalty we pay for individual freedom of thought and universal education. These will take care of themselves. But too much of the current dissatisfaction has a just origin in our judicial organization and procedure. The causes that lie here must be heeded. Our administration of justice is not decadent. It is simply behind the times.⁸⁵

Pound's speech, which to modern readers seems almost routine, caused consternation among some of his listeners. A motion to reprint it and circulate it among the bar met with furious opposition. Apparently, the temerity Pound showed in criticizing the courts was not appreciated. Years later, John Henry Wigmore recalled that the nature of the speech was so different from the self-congratulatory rhetoric that usually flowed on such occasions that "the conservatives were hotly impatient to suppress the whole matter."⁸⁶ In the end, the subject matter of the speech was referred to a special committee of the American Bar Association which became an important force in working for reform of procedure. These efforts eventually led to the adoption of the Federal rules, at the core of which was the idea that the judges (and experts appointed by them) should write the rules, subject only to legislative veto.

The second cause of dissatisfaction that Pound insisted lawyers must address involved judicial organization. The American Judicature Society, founded in Chicago in 1913, and closely associated with several reform-minded law teachers, worked hard to promote the idea of a unified court system. While the society's materials provided alternative systems to suit local needs, the favored model for a state-wide system featured a unified General Court of Judicature, an elective chief justice who appointed judges of the Appeals division and the Superior Court division, and elective county judges. The model municipal court was similar. An elected chief justice appointed his associates who sat in appellate, chancery, domestic relations, civil jury, and civil non-jury divisions.⁸⁷ The great goal was

85. *Id.* at 290.

86. John Henry Wigmore, *Roscoe Pound's St. Paul Address of 1906: The Spark that Kindled the White Flame of Progress*, 20 J. AM. JUDICATURE SOC'Y 177 (1936-37).

87. American Judicature Society, *Bulletin VII, First Draft of a State-Wide Judicature Act*, and *Bulletin IV, First Draft of an Act to Establish a Model Court for a Metropolitan District* (Chicago, 1914). On the AJS, see MICHAL R. BELKNAP, *TO IMPROVE THE ADMINISTRATION OF JUSTICE: A HISTORY OF THE AMERICAN JUDICATURE SOCIETY* (1992).

to provide expert management for the court system and one elected official who would be held responsible by the public for the performance of the courts.

These suggestions for reform all centered around the expertise of the legal professionals who proposed them and presumably would be responsible for making them work.⁸⁸ The reliance on expertise brings us to another important aspect of the transition from the nineteenth century to the twentieth: the importance of political progressivism. White shows that Holmes's reputation was made by "the *New Republic* crowd," even though Holmes did not truly share most of their social and political views. Hand himself was part of that crowd, and was deeply involved in politics, especially at the time of Theodore Roosevelt's Bull Moose campaign in 1912. For progressive lawyers, substantive due process was the great battleground, and, of course, Holmes's dissent in *Lochner* certainly looked like a thoroughgoing rejection of that doctrine.

White shows, however, that Holmes did not share the values of the younger generation. He was "an unreconstructed social Darwinist" who believed in competition and in combination as "the logical end of competition."⁸⁹ He was uninterested in humanizing the workplace and found redistributive legislation meaningless. What he did believe, however, was that judges must defer to legislatures "absent an overwhelming textual mandate."⁹⁰ That translated, of course, into opposition to many of the applications of substantive due process to overturn "reformist" legislation, although Holmes cared little for its reformist nature.

88. One of the striking aspects of Pound's 1906 speech was the assertion that the "causes of dissatisfaction" which he related to social and intellectual changes would "take of themselves." Perhaps he was not being totally candid. Although Pound did devote time and energy to bringing about procedural reform, as a scholar, he devoted time and energy to creating a sociological jurisprudence that would provide the rationale and method for curing those very causes of dissatisfaction he slighted when addressing practitioners. The delineation of Pound's motives and agenda (if he had one) are far beyond the scope of this essay, but the implied limitation of lawyers to technical reform lends some support to the argument that the position of the legal profession was tied to technical expertise.

Any consideration of the movement for procedural reform must also take into account EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICAN, 1870-1958* (1992). Purcell examines federal diversity jurisdiction as a social litigation system and shows that the Supreme Court manipulated procedural doctrines to benefit or harm different players in that system. See *id.* at 244-94.

89. WHITE, *supra* note 1, at 360.

90. *Id.*

What he did care about was a proper understanding of the nature of law. "The great fallacy in jurisprudential thinking, Holmes believed, was the idea that judicial authority came from somewhere other than the sovereignty of the state."⁹¹ White shows that Holmes was not always consistent in applying this core belief. He happily used the federal common law, whose very existence he found jurisprudentially unsound, to write his views on negligence into law.⁹² The point, however, is that Holmes's jurisprudence, similar to that of the Harvard law teachers who were briefly his colleagues, made him defer to the legislature.

Hand held much the same view. He strongly opposed the use of substantive due process to invalidate reformist legislation. He believed that the role of the judge was to interpret the law by finding the meaning in the sovereign's "formal declarations," not in transitory popular opinion and certainly not in the judge's own opinions.⁹³ Like many eastern progressives, according to Gunther, Hand believed that "true progressivism required national policy-making based on expertise."⁹⁴ Hand hailed the creation of the Federal Trade Commission because it would be "an administrative agency of experts" creating "standards of antitrust policy."⁹⁵ He hoped "it might at last relieve the courts of the antitrust tasks they were so unfit to handle."⁹⁶

Gunther is not as explicit about Hand's jurisprudential beliefs as White is about Holmes's, but it seems fair to at least suggest, that just as Hand's legal education impressed him with the importance of narrow technical legal expertise, it also made him see law as the product of sovereign power. His teachers and Holmes were all enemies of law based on unexamined a priori assumptions. They used the history of law to explain and critique current law by showing that the law changed with changing ideas. Even more importantly, they worked to limit the study of law to what lawyers and judges actually do. The unceasing attack on Langdell and on the case method as a means of "isolating" law from life (an isolation to be cured by somehow bringing the social sciences into the law school) has impeded any understanding of the connection between limiting the study of law to the study of judicial decisions and the defeat of the ideas that are usually associated with "Lochnerism." The true enemy of a "realistic" view of law was not the technical learning of the case method law school, but a widely held view of law as the expression of eternal

91. *Id.* at 379.

92. *See id.* at 390.

93. GUNTHER, *supra* note 1, at 215, 248-49.

94. *Id.* at 213.

95. *Id.* at 246.

96. *Id.* at 247.

truth. Most of the varieties of this view of law revolved around the notion that legal principles were the product of historical development, which itself was beyond the control of the people who lived it. It was, in a word, teleological. Sometimes the principles were equated with the will of God; sometimes they were the product of a secular but nevertheless inescapable evolution. The first variety harkened back to antebellum views of law; the second owed more to the work of Henry Maine and to often confused ideas about the implications of Darwinian evolution for the study of society.⁹⁷

The point is that the case method law school was founded on a view of law diametrically opposed to a view of law as eternal principles. Hand's legal education probably contributed at least as much as his personality to his restrained and modest view of judging. Taught that law was what judges and legislatures did and taught by a method which often subjected judicial opinions to severe scrutiny, Hand was unlikely to utter oracular pronouncements about freedom of contract.

It is possible, then, that realism was not as different from what went before as the participants have led us to believe, or, at least, that the story of realism is a story of gradual, incremental change rather than one of a great leap in understanding. The positivistic and narrow legal science of the first case-method teachers helped to undermine the foundations of the sort of legal thinking that made substantive due process possible. It mocked the idea of law as, in Holmes's memorable phrase, "a brooding omnipresence in the sky,"⁹⁸ and insisted that it could only be the product of sovereign power. That belief supported a deferential approach to judging, especially since it complemented the young twentieth century's belief in the efficacy of expertise in finding answers to social problems. It was also more than convenient that the same approach to the nature of law helped to secure the position of the lawyer as one of the experts on whom society so clearly needed to rely.

If realism's distinguishing characteristic was the focus on the *is* and not the *ought*, on what law does and is supposed to do in society rather than on the mechanical application of a priori principles, then its lineage really does go back to that day in 1870 when Langdell began to teach

97. These ideas, often now labelled "historicist" or "historicism," are receiving more and more scholarly scrutiny. See LAPIANA, *supra* note 56, at 132-47; HORWITZ, *supra* note 36, at 118-23; William P. LaPiana, *A Jurisprudence of History and Truth: Conservative Legal Thought in the Gilded Age*, 23 RUT.-CAM. L.J. 519 (1992); Stephen A. Siegel, *Historicism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L.REV. 1431 (1990); Louise A. Halper, *Christopher G. Tiedeman, "Laissez-Faire Constitutionalism" and the Dilemmas of Small-Scale Property in the Gilded Age*, 51 OHIO ST. L.J. 1349 (1990).

98. *Southern Pacific v. Jensen*, 244 U.S. 205, 222 (1917).

using the case method. Nothing lasts forever, of course, and judges like Hand and Frankfurter who were at the cutting edge before the Second World War began to look somewhat old fashioned afterwards. To make a sweeping claim, the mainstream left them in a backwater because their positivism no longer appealed to legal thinkers. Legal culture changed. In part, the war itself contributed to that change.⁹⁹ Unlimited sovereign power looked very dangerous with the example of Nazi Germany staring lawyers in the face. Even more important, perhaps, was the rough equation of the sovereign with the legislature which dominated a world where substantive due process review of social and economic legislation was the principal problem. Progressivism depended on the expert working through the legislature. Somewhere along the way the legislature not only lost its mantle of authority but became the very source of the evils the law must remedy, especially racial discrimination. Today, of course, the reputations of state legislatures and Congress are at low ebb. Instead of the representatives of the sovereign people, they seem to be the preserve of special interests, responsive not to the public good but to the political action committees that can provide the funds to insure re-election. It is up to courts, then, to protect the people from the legislature by once again vigorously enforcing meaningful constitutional limits on legislative actions. It is not surprising that by the end of his life Hand seemed somewhat out of step with American legal culture. He had not changed, the grounds of the debate had.

The divergence between Hand's views and some of the legal thought of the mid-twentieth century is well illustrated by his Holmes Lectures, delivered in 1958 at Harvard Law School. He was eighty-six years old at the time, still vigorous, and still deeply engaged with what had been truly his life's work. What made his lectures controversial was their "nub": "a modestly phrased but unmistakably bold challenge to what was already well on its way to becoming the reigning philosophy of the widely admired Warren Court."¹⁰⁰ In 1958, of course, even modest, carefully nuanced criticism of the United States Supreme Court was bound to cause a sensation, especially when delivered by "the nation's most highly regarded judge, renowned as the most articulate advocate of liberty . . ."¹⁰¹ As Gunther points out, opposition to the decision in *Brown v. Board of Education*,¹⁰² handed down in 1954 and outlawing racial segregation in public schools, "was near its zenith," and the Court had

99. See EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 159-78 (1973).

100. GUNTHER, *supra* note 1, at 654.

101. *Id.* at 655.

102. 347 U.S. 483 (1954).

deeply offended the “subversion hunters” by rendering decisions that made their crusade more difficult.¹⁰³

Hand attacked the notion that the Court should be a third chamber of the legislature, and called into question the entire structure of judicial review. At most, he found judicial review to be desirable for prudential reasons and not required by the Constitution itself. Thus he had no more patience with judicial activism in defense of personal rights than he had for judicial activism in defense of property rights. The only area in which he saw a place for judicial control of “legislative excesses” was in the realm of the First Amendment. There it was the majority and the legislatures they controlled which were likely to oppress those dissidents whom the Amendment was designed to protect.¹⁰⁴ As that argument shows, Hand rested his argument, at bottom, on democracy. “For Hand, the notion of seeking the courts’ aid under the due process clauses in order to protect liberal values was ultimately negated by his belief in the democratic process—the right of the people and their representatives to decide controversial issues for themselves, rather than being ruled by the policy choices of an unelected, unresponsive, undemocratic judiciary.”¹⁰⁵ In Hand’s view, then, *Brown* “constituted impermissible second-guessing of legislative choices.”¹⁰⁶

Gunther concludes that Hand’s views had changed by the time of the Holmes Lectures only to the extent of an increased skepticism about the worth of judicial activism.¹⁰⁷ Some of that change Gunther traces to the influence of Felix Frankfurter. Hand and Frankfurter had been friends and correspondents for decades, and by the 1950s, when Hand seldom read Supreme Court opinions for himself, “Frankfurter’s letters were his only direct pipeline to the Court and his most important source of

103. GUNTHER, *supra* note 1 at 654. Referring to *Watkins v. United States*, 354 U.S. 178 (1975) (suggesting constitutional barriers to congressional investigations of subversion by overturning a conviction that was based on defendant’s refusal to answer whether he knew anyone who was a member of the Communist party, and holding the conviction violated the Due Process Clause of the Fifth Amendment because the defendant was not given a fair opportunity to determine whether he was within his rights in refusing to answer) and *Yates v. U.S.*, 354 U.S. 298 (1957) (interpreting the Smith Act narrowly in overturning conviction of fourteen members of the Communist Party of California by holding the Act did not prohibit advocacy and teaching of forcible overthrow of the government as an abstract principle absent an effort to instigate to that end).

104. GUNTHER, *supra* note 1 at 656-58.

105. *Id.* at 383 (describing Hand’s views in 1920’s).

106. *Id.* at 657.

107. *See id.* at 664.

information about Court decisions."¹⁰⁸ Gunther shows that those letters deeply influenced Hand's thought and changed his views on *Brown*. Hand originally believed that *Brown* was an equal protection case and that it really stood for the proposition that any law that treated Americans differently based on race was unconstitutional. Frankfurter did everything possible to convince Hand that the opinion really was about education. It was, in this view, a case in which the Court did the substantive due process thing: it had substituted its judgment for that of the legislature.¹⁰⁹ Why did Frankfurter work so hard to convert Hand to his point of view? Gunther shows that Frankfurter was deeply worried about the possibility that the Court would strike down state anti-miscegenation laws. Such a decision would lead to even more attacks on the Court and impede the attempt to enforce compliance with *Brown*.¹¹⁰ Concerned with protecting the institutional position of the Court, Frankfurter misled Hand.

If we discount the machinations of Justice Frankfurter, it is clear that Hand did not change very much; the American legal world did. Positivism and progressivism nourished a belief in democracy (or at least middle class democracy) and in a notion of law and lawyering appropriate to democracy. Law itself dealt with technical questions involved in making the world work, and since its source was the sovereign, there was no reason for it not to promote the good working of society. In the nineteenth century the first part of that proposition struggled for acceptance. In the twentieth century, the general triumph of a positivistic view of law made possible more and more careful consideration of the relationship between technical law and the working of society. Thus, in broad terms, realism, with its emphasis on social facts, is at the end point of a continuous arc of changing legal culture.

IV

These suggestions are not much more than speculation, but what is certain is that further investigation into the nature of realism and of

108. *Id.* at 665.

109. *See id.* at 667-71.

110. *See id.* at 666-67. Gunther's explanation is supported by Michael S. Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620-76 (1990), which shows that Frankfurter manipulated the historical record in an attempt to show that Justice Owen Roberts did not change his mind and produce the "switch in time that saved nine." According to Ariens, Frankfurter believed that a candid admission that Roberts had taken account of the political threat of FDR's court-packing plan would weaken the position of the Court. For a thorough analysis of the birth of the New Deal Court, see Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201-61 (1994).

American legal culture in the twentieth century will be greatly aided by the insights and understanding exhibited in these two life stories. White's careful parsing of Holmes's thought reveals the postivistic ground shared by important American legal thinkers of the pre-realist era, and shows us that Langdell and his methods were both less revolutionary and more significant than has been thought. Gunther's detailed telling of Hand's life shows how education shaped by the ideas of Holmes's generation influenced its professional children and helped to produce the modern American legal world.

Whatever use historians make of these works, for the general reader, and certainly for any lawyer, the revelation of the character and personality of both men is inherently interesting. But students of American legal history can also learn from, and should heed, both biographers' skillful use of careful portraits of their subjects' inner lives to illuminate their legal lives. While future scholars trace the subtle lines of influence and thought that mark the transition to legal realism and the legal thought of the later twentieth century, they must pay attention to the persons involved. They should heed the lesson of both these works, that the interplay between life and work is worth exploring.¹¹¹

111. N.E.H. Hull's article on the controversy between Pound and Karl Llewellyn illustrates the possibilities. She shows that the contretemps over Pound's *Harvard Law Review* article on the realists and Llewellyn's rather stiff reply is rooted in part in clashing personalities and generational differences. N.E.H. Hull, *Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange Over Legal Realism*, 1989 DUKE L.J. 1302, 1318-33 (1989).

