

Washington University Law Review

Volume 68 | Issue 2

January 1990

The Life of Oliver Wendell Holmes, Jr.

Patrick J. Kelley

Southern Illinois University School of Law

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview



Part of the [Legal Biography Commons](#)

Recommended Citation

Patrick J. Kelley, *The Life of Oliver Wendell Holmes, Jr.*, 68 WASH. U. L. Q. 429 (1990).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol68/iss2/8

This Book Review is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

BOOK REVIEW

THE LIFE OF OLIVER WENDELL HOLMES, JR.*

HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES. By Sheldon M. Novick. Boston: Little, Brown and Company, 1989. Pp. x, 522. \$24.95.

*Reviewed by Patrick J. Kelley***

I. STRENGTHS AND WEAKNESSES

Sheldon Novick's recent biography of Oliver Wendell Holmes, Jr. has been well received,¹ and for good reason. The book has some outstanding strengths. It is the result of careful research into the unpublished source materials at the Harvard Law School and the published works by and about Holmes. It is well written. Novick has a vivid, forceful style, a novelist's eye for the telling detail, and a keen sense of drama. The book includes ample quotations from Holmes's letters, scholarly writings and judicial opinions, so the reader is touched directly by Holmes's eloquence and wit. Holmes himself will charm the reader of this biography, as he always charmed his correspondents, his listeners, and his readers. Novick lets the facts of Holmes's life speak for themselves, without interpretive commentary, psychologizing, or moralizing. And the facts of Holmes's life are the stuff of a romantic novel²: Holmes the tall, handsome Civil War veteran, wounded three times in battle; Holmes the famous son of a famous father, determined to make a lasting, scientific contribution to the law, becoming a legal scholar, theorist and historian

* Copyright 1990 by Patrick J. Kelley.

** Professor of Law, Southern Illinois University School of Law. B.A., Notre Dame; J.D., University of Iowa. I appreciate the helpful comments of William Schroeder. This review essay carries forward an ongoing project exploring Holmes's intellectual development. The sections below on *Codes, and the Arrangement of the Law* and on *The Common Law* restate and expand arguments originally made in Kelley, *Oliver Wendell Holmes, Utilitarian Jurisprudence and the Positivism of John Stuart Mill*, 30 AM. J. JURIS. 189 (1985).

1. See, e.g., Morris, *The Judge Who Had Everything*, N.Y. TIMES BOOK REV., Aug. 20, 1989, at 3; THE NEW YORKER, Oct. 2, 1989, at 120; Posner, *Bookshelf: Star of the Legal Stage*, Wall St. J., Aug. 9, 1989 at A9, col. 1.

2. They were turned into a romantic novel by Catherine Drinker Bowen in her partially fictionalized book, C. BOWEN, *YANKEE FROM OLYMPUS* (1944). A modern novel that comes close to paralleling Holmes's life is W. MURPHY, *VICAR OF CHRIST* (1979), in which the protagonist is first a combat infantry hero in the Korean war, then a law professor, a United States Supreme Court Justice, and finally Pope. Holmes skipped the last stage.

by night, while working as a lawyer by day; Holmes the author of the finest American book on the law—ever—at age thirty-nine, who then in quick succession accepted a professorship at Harvard and was appointed to the Massachusetts Supreme Judicial Court; Holmes the eloquent judge, who served on the Massachusetts Supreme Judicial Court for twenty years and the United States Supreme Court for thirty, revered for the last fourteen of those years by liberals who saw him as the perfect judge, fighting to protect the constitutional right to free speech and willing to let states try progressive solutions to modern social problems; Holmes the ladies' man and incorrigible flirt who nevertheless had a long and evidently happy marriage to a devoted childhood friend.

Novick has the good sense to let Holmes's life and Holmes's words carry the story along. The book is a rollicking good read, and a substantial accomplishment. Sheldon Novick can be proud. Nothing human is perfect, however, and this book has weaknesses that mirror its strengths.

The book follows a rigid chronology, with a variety of anecdotes, events, and quotations strung together with little comment or evaluation. This is "life as just one damned thing after another." The approach works well for Holmes's Civil War experiences, which form an extended adventure story with their own inherent theme: the maturing of a brave youth under fire. But it works less well for the treatment of continuities in Holmes's life that call for more sustained treatment: the important relationships between Holmes and his father, Holmes and his mother, Holmes and his wife; the development of Holmes's legal theories and his implementation of those theories as a judge; and Holmes's persistent thirst for achievement and recognition. Ultimately, Novick's approach leaves the story of Holmes's life without a theme.

The focus of the book, moreover, is the personal and the human. This focus, unfortunately, leads Novick to scant the nature and extent of Holmes's accomplishments as a scholar and as a judge. The most telling, and unfortunate, example of this is Novick's treatment of Holmes's almost twenty years on the Massachusetts Supreme Judicial Court. Novick spends only about six pages discussing Holmes's Massachusetts opinions and dissents.³ Yet, he devotes a whole chapter to Holmes's infatuation during part of that time with the lovely Lady Castletown,⁴ in-

3. S. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 172-73, 179, 184, 197-98, 203, 221-23* (1989).

4. *Id.* at 207-19. Surprisingly, for all the space Novick devotes to Holmes's obvious infatuation, he never addresses the question raised by the only record we have of it—Holmes's letters. One

cluding seven pages of quotes from Holmes's love letters to her.⁵ One might conclude from this that Holmes's relationship to Lady Castletown was twice as important as all his opinions for the Massachusetts Supreme Judicial Court.

Novick anticipated this criticism and gave his response in the preface:

I have not tried to evaluate Holmes's contribution to present-day law in any systematic way, except as such assessments seemed necessary for the narrative of his life [A]s Holmes said, each generation pretty well rewrites the law for its own time, and the importance of even [Holmes's most influential] opinions is now principally historical.

If Holmes is of interest today to any but scholars, it is for his character, which shines through his writings even from the distance of a century or more. This book is the story of Holmes's life as a man, a life he labored to make a work of art in itself.⁶

Novick's approach, however, ultimately fails to deal with Holmes on his own terms. Holmes thirsted for accomplishment and recognition.⁷ A biography aimed at illuminating his character, therefore, should convey a better understanding of his professional goals and accomplishments than this one does. Moreover, Novick's truncated treatments of Holmes's scholarship and judicial career are in many respects misleading.⁸

Finally, Novick tells much of Holmes's story in Holmes's own words, and mostly from Holmes's side. The reader is not told a number of things that raise questions about Holmes's character;⁹ the reader is not told enough about Holmes's judicial opinions to allow a balanced assessment of Holmes's judicial career.¹⁰ The negatives in Holmes's life that Novick does raise are resolved, by and large, in Holmes's favor.¹¹ Even

reading the letters today might quickly conclude that the affair was physical as well as emotional. A careful review by John S. Monagan of all the letters concludes that it may just as likely have been a highly emotional infatuation, and adulterous only by mail. J. MONAGAN, *THE GRAND PANJANDRUM: MELLOW YEARS OF JUSTICE HOLMES* 71-94 (1988). From the written evidence of this episode and the reports of Holmes's witty and elegant flirtations, one can conclude that Holmes enjoyed the company of beautiful and intelligent women, who he attempted to charm with his wit, learning, and eloquence. Beyond that, the record is, mercifully, sealed.

5. S. NOVICK, *supra* note 3, at 213-19.

6. *Id.* at xvii-xviii.

7. *See infra* notes 12-24 and accompanying text.

8. *See infra* notes 25-111 and accompanying text.

9. *See infra* notes 169-174 and accompanying text.

10. *See infra* notes 112-117 and accompanying text.

11. For example, Novick mentions that other United States Supreme Court Justices complained at times about the brevity and obscurity of Holmes's terse opinions. S. NOVICK, *supra* note 3, at 256, 272. Novick gives Holmes's own response: "I think that to state the case shortly and the

with its wealth of anecdote, personal detail and hint of adultery, this biography is a curiously sanitized version of Holmes's life. Holmes seems to have charmed Novick, too.

A biographer paints a picture, like a portrait artist. The weaknesses in this biography are in the brush strokes. They are mostly matters of tone, emphasis, and interpretation. These are skewed, perhaps, by Novick's aim to interest the general reader, his favorable reaction to Holmes as a man, and his judgements about what is significant in a man's life and what is not. Individually, of course, these are questions of judgment and of degree. When Novick's portrait emerges, however, one who knows Holmes from other sources may suggest that the weaknesses in Novick's approach have combined to give an incomplete and, in some ways, distorted picture. The following pages are offered to complete Novick's portrait by identifying the dominant theme of Holmes's life, correcting Novick's picture of Holmes's record as a scholar, suggesting a different perspective on Holmes's accomplishments as a judge, and identifying ways in which Holmes's ambition may have affected his character.

ground of decision as concisely and delicately as you can is the real way. That is the English fashion and I think it civilized." *Id.* at 256 (quoting letter from O.W. Holmes, Jr. to Nina Gray (Mar. 2, 1903)). Novick absolves Holmes of any fault here: "[Holmes] could not do otherwise than to pursue his craft as he understood it." *Id.* Novick fails to explore the irony in obscure opinions from a judge who as a scholar emphasized the primacy of clarity in the law. Nor does he explore the related criticism made of Holmes, that Holmes did not devote enough careful thought and attention to individual cases, but lost interest in the details as soon as he figured out how to place the case in his general theoretical scheme.

Novick discusses some of Holmes's opinions that today appear illiberal: the black voter registration case refusing to invalidate a state scheme rigged against blacks, *Giles v. Harris*, 189 U.S. 475 (1903); the case upholding the constitutionality of a state statute mandating sterilization of the feeble-minded, *Buck v. Bell*, 274 U.S. 200 (1927); and the first round of World War I Espionage Act cases upholding convictions for seditious antiwar speech: *Schenk v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); and *Frohwerk v. United States*, 249 U.S. 204 (1919). See discussion of these cases *infra* at notes 195-205 and accompanying text. Novick generally defends Holmes. For example, he contends that *Buck v. Bell* was just the Court doing its duty to allow legislative experimentation by the states. S. NOVICK, *supra* note 3, at 352. Further, Novick states that *Schenck*, *Debs*, and *Frohwerk* were correctly decided even under a speech-protective interpretation of the clear and present danger test. *Id.* at 327-28. Novick rejects the claim by certain scholars that Holmes changed his position on the first amendment's free speech protection between his *Schenck* majority opinion and his famous dissent in *Abrams v. United States*, 250 U.S. 616 (1919). S. NOVICK, *supra* note 3, at 473 n.87. The only one of Holmes's decisions that Novick criticizes is *Giles*, and even there Novick allows that the decision was consistent with past precedents. *Id.* at 258-59. Novick merely claims that Holmes's statement that the United States Supreme Court lacked the power to enforce an equity decree encouraging the equal opportunity of blacks to register to vote was inconsistent with Holmes's scholarly theory that all law rested on the power of the courts to summon the armed force of the state. *Id.* at 259.

II. HOLMES'S AMBITION

Oliver Wendell Holmes, Jr. was driven by one dominant motive throughout his long and successful legal career: the desire for great accomplishment. This motivation, often acknowledged by Holmes,¹² was the goad to a life of toil, sacrifice, and achievement. Holmes was known to study the law harder than anyone.¹³ As a young lawyer, he accepted the editorship of the comprehensive American legal bible, Kent's *Commentaries*, and finished an outstanding job by working at it obsessively for three years. He accepted the editorship of the *American Law Review*, and in that position read and commented on the latest books and the latest developments in the law. While working full time as a lawyer by day, he developed his legal theories by night. Ultimately, Holmes applied those theories to the full range of the common law, in a book, *The Common Law*,¹⁴ generally acknowledged to be the finest American book on the law, period. As a judge, he worked diligently at his opinions, finished them with incredible speed, and always asked for more. While he was a judge, he elaborated on his legal theories in several brilliant scholarly writings.¹⁵ Holmes longed for greatness. He paid the price.

In a speech to Harvard undergraduate students just five years after publication of *The Common Law*, Holmes revealed the extent of his intellectual ambition:

The law is the calling of thinkers. But to those who believe with me that not the least godlike of man's activities is the large survey of causes, that to know is not less than to feel, I say—and I say no longer with any doubt—that a man may live greatly in the law as well as elsewhere; that there as well as elsewhere his thought may find its unity in an infinite perspective; that there as well as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable.

12. See generally M.D. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS 1841-1870, at 280-84 (1957) [hereinafter 1 HOWE].

13. In January 1870, Arthur G. Sedgwick wrote to Henry James that "[Holmes] knows more law than anyone in Boston of our time, and works harder at it than anyone." *Id.* at 273 (quoting letter from Arthur G. Sedgwick to Henry James (Jan. 1870)).

14. O.W. HOLMES, THE COMMON LAW (M. Howe ed. 1963) (originally published in 1881) [hereinafter THE COMMON LAW].

15. See Holmes, *Agency*, 4 HARV. L. REV. 345 (1891); Holmes, *Agency*, 5 HARV. L. REV. 1 (1892); Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894) [hereinafter *Privilege, Malice, and Intent*]; Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) [hereinafter *The Path of the Law*]; Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443 (1899). These articles are reprinted in O.W. HOLMES, COLLECTED LEGAL PAPERS (1920) [hereinafter COLLECTED LEGAL PAPERS].

. . . [Y]our business as thinkers is to make plainer the way from some thing to the whole of things; to show the rational connection between your fact and the frame of the universe. If your subject is law, the roads are plain to anthropology, the science of man, to political economy, the theory of legislation, ethics, and thus by several paths to your final view of life. It would be equally true of any subject. The only difference is in the ease of seeing the way. To be master of any branch of knowledge, you must master those which lie next to it; and thus to know anything you must know all.

. . . .

. . . No man has earned the right to intellectual ambition until he has learned to lay his course by a star which he has never seen—to dig by the divining rod for springs which he may never reach. In saying this, I point to that which will make your study heroic. For I say to you in all sadness of conviction, that to think great thoughts you must be heroes as well as idealists. Only when you have worked alone—when you have felt around you a black gulf of solitude more isolating than that which surrounds the dying man, and in hope and in despair have trusted to your own unshaken will—then only will you have achieved. Thus only can you gain the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought—the subtile rapture of a postponed power, which the world knows not because it has no external trappings, but which to his prophetic vision is more real than that which commands an army.¹⁶

This speech reveals a lot about Holmes. Holmes wanted to “live greatly in the law.” He saw his intellectual ambition as heroic, and lonely. He was willing to sacrifice himself for the “subtile rapture of a postponed power” that would eventually be his when the law embodied his legal theories. He believed that legal theory had to be advanced within a broader perspective, so that one could “show the rational connection between [law] and the frame of the universe.” Holmes’s intellectual ambitions were indeed vast. If the speech avoids pomposity, it does so only because the personal is presented elliptically and by way of exhortation. But the exhortation somehow seems just a cover for personal revelation, for surely it was vain to exhort undergraduates to attempt what Holmes had already done.

The projects Holmes set for himself provide the best evidence of his intellectual ambition. From 1870 to 1873, while he was preparing the latest version of Chancellor Kent’s comprehensive treatise on the Ameri-

16. O. W. HOLMES, *THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES* 28-31 (M. Howe ed. 1962) [hereinafter *OCCASIONAL SPEECHES*].

can common law, Holmes was busy formulating his own coherent philosophical arrangement of the entire body of the law, which he published in a series of scholarly, tightly reasoned articles.¹⁷ In addition, he attempted to clarify certain basic legal concepts, such as law, duty, and the difference between a penalty and a tax.¹⁸ Holmes thus took on himself, alone, the task that John Stuart Mill had urged on a whole generation of young legal scholars: make the law more fixed, definite and knowable by picking up where John Austin left off; make a better, philosophically coherent arrangement of the law; and clarify fundamental legal concepts, as a preliminary to ultimate codification and reform.¹⁹

The industry, attention to detail, and scholarship Holmes brought to this effort was impressive. Holmes took on duties that, when fulfilled, would make him a complete master of the common law. Editing Kent's *Commentaries* made him review the entire common law. Editing the *American Law Review* kept him in touch with all recent legal developments, all new books on the law, and all new developments in legal theory. He used his hard-earned mastery to complete an analytical ordering of the entire law, basing his classification scheme on different types of duties: duties of sovereign powers to each other; duties to the sovereign—that is, duties without corresponding rights; duties from all the world to all the world; duties of all the world to persons in particular positions or relations; and duties of persons in particular relations.²⁰

Holmes later came to believe that this analytical arrangement of the

17. Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870) [hereinafter *Codes*]; Holmes, *The Arrangement of the Law—Privity*, 7 AM. L. REV. 46 (1872) [hereinafter *Privity*]; Holmes, *The Theory of Torts*, 7 AM. L. REV. 652 (1873) [hereinafter *Torts*]. These essays are reprinted in F. KELLOGG, *THE FORMATIVE ESSAYS OF JUSTICE HOLMES: THE MAKING OF AN AMERICAN LEGAL PHILOSOPHY* (1984). Henceforth, this Article will cite works reprinted in Kellogg's collection using both their original and reprinted page numbers.

18. See *Codes*, *supra* note 17, at 3-5, reprinted in F. KELLOGG, *supra* note 17, at 79-83; Holmes, *Book Notices*, 6 AM. L. REV. 723, 723-25 (1872), reprinted in F. KELLOGG, *supra* note 17, at 91. (summary of jurisprudence lectures).

19. See J. S. Mill's review, first published in *Edinburgh Review*, October 1863, of John Austin's posthumously published *Lectures on Jurisprudence*. 4 J.S. MILL, *DISSERTATION OF DISCUSSION: POLITICAL, PHILOSOPHICAL AND HISTORICAL* 206 (Am. ed. 1868). For analysis of Mill's "call" and Holmes's response, see Kelley, *Oliver Wendell Holmes, Utilitarian Jurisprudence, and the Positivism of John Stuart Mill*, 30 AM. J. JURIS. 189, 199-204 (1985) [hereinafter Kelley, *Positivism*].

20. This was the arrangement Holmes put forward in *Codes*, *supra* note 17, at 5-9, reprinted in F. KELLOGG, *supra* note 17, at 81-85. He later modified the arrangement to eliminate duties of sovereigns to each other and make other minor adjustments. See *Privity*, *supra* note 17, at 48, F. KELLOGG, *supra* note 17, at 97.

law was not enough. Beginning with an article in 1876²¹ and culminating in the lectures on *The Common Law*²² delivered in late 1880, Holmes attempted to reduce the study of the common law to its final scientific constitution, applying the positivist theories and methodology of Auguste Comte and John Stuart Mill.²³ Holmes, alone, developed fully reductive, "scientific" theories of judicial decisionmaking and legal history, formulated a unified positivist theory of civil and criminal liability, and put forward reductive, scientific theories of possession, succession, and contracts. Holmes formulated the first and only comprehensive positivist theory of the common law, which reduced the study of law to a "science," as it was then understood.²⁴ Both his ambition and his achievement are astonishing.

To miss the grand scope of Holmes's fulfilled intellectual ambition is to miss the central fact of Holmes's life. Unfortunately, Novick's book is weakest in its treatment of Holmes's scholarly accomplishments.

III. HOLMES'S ACCOMPLISHMENTS AS A LEGAL SCHOLAR

Novick discusses Holmes's accomplishments as a scholar, but the treatment is skimpy, and the simplified, summary discussions are often inaccurate and misleading. Most troubling are the inaccuracies in Novick's brief treatments of three major works: Holmes's first lengthy article, *Codes, and the Arrangement of the Law (Codes)*,²⁵ published in 1870; his 1876 article *Primitive Notions in Modern Law (Primitive Notions)*,²⁶ which seemed to mark a turning point in Holmes's legal theory; and Holmes's masterpiece, *The Common Law*, published in 1881.²⁷

A. Novick on Codes

In his short discussion of *Codes*, Novick introduces two major themes in his interpretation of Holmes's scholarship. First, Novick implies that

21. Holmes, *Primitive Notions in Modern Law*, 10 AM. L. REV. 422 (1876) [hereinafter *Primitive Notions*], reprinted in F. KELLOGG, *supra* note 17, at 129.

22. THE COMMON LAW, *supra* note 14.

23. See generally J.S. MILL, *Auguste Comte and Positivism*, in 10 COLLECTED WORKS 261 (1969) (originally published in 1865) [hereinafter J.S. MILL, *Auguste Comte*]. For a full discussion of Holmes's positivism in *The Common Law*, see Kelley, *A Critical Analysis of Holmes's Theory of Torts*, 61 WASH. U.L.Q. 681, 697-713 (1983).

24. At least as it was understood by the positivists Comte and Mill.

25. *Codes*, *supra* note 17, F. KELLOGG, *supra* note 17, at 77.

26. *Primitive Notions*, *supra* note 21, F. KELLOGG, *supra* note 17, at 129.

27. THE COMMON LAW, *supra* note 14.

Holmes was an original thinker whose major contributions derived not from a received intellectual tradition but from Holmes's reflections on his own experience as a lawyer. Novick dismisses Holmes's attempt in *Codes* to set out a philosophically coherent arrangement of the law, as an "abstract, lifeless scheme"²⁸ and he downgrades Holmes's general ideas in the article as "abstract and academic, reactions to Austin and other books."²⁹ But Novick sees in this "otherwise inert discussion" a "nearly hidden jewel"³⁰—Holmes's answer to the question "What is law?" That answer sprang, Novick says, "[f]rom the heart of his own experience."³¹

Second, Novick argues that Holmes's theory of the common law relied heavily on his highly original analysis of the unconscious motivations for judicial decision. Holmes criticized Austin's theory that law was the command of the sovereign. Novick summarizes Holmes's alternative theory of law:

the search for law ended at the judge's bench: 'Courts . . . give rise to lawyers, whose only concern is with such rules as the courts enforce.' The student of law therefore looks to the decision of the courts—and no farther—for the law. The courts in turn might look into many sources [including commands of political superiors and custom]. Sometimes—often—the judges themselves were unaware of the sources from which they drew their decisions.³²

Neither of Novick's themes finds support in *Codes*. Holmes treats the question "What is law?" more subtly than Novick's interpretation suggests. Further, Holmes's discussion bears the hallmarks of intensive reflection on a received philosophical tradition. The following more detailed summary of Holmes's argument may clarify Holmes's positions.

In discussing the question "What is law?,"³³ Holmes took as his starting point Austin's definition: law is a command of a definite political superior enforced by sanction, which obliges intelligent human beings to acts or forbearances of a class.³⁴ This definition, according to Holmes, has practical value as a definition of what lawyers call law, but has little philosophical value, because others besides a definite body of political

28. S. NOVICK, *supra* note 3, at 125.

29. *Id.* at 124.

30. *Id.* at 125.

31. *Id.*

32. *Id.*

33. *Codes*, *supra* note 17, at 4-5, reprinted in F. KELLOGG, *supra* note 17, at 80-81.

34. J. AUSTIN, *The Province of Jurisprudence Determined*, in *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE STUDY OF JURISPRUDENCE* 10-26 (H. Hart ed. 1951).

superiors may make "what is properly called a law."³⁵ Initially, whether sovereign power exists and who has it are questions of fact and degree. More important, who imposes a duty is less important than the definiteness of its expression and the certainty of its enforcement. Holmes asked rhetorically, "which is most truly a law,"³⁶ the definite social rule that one wear evening dress to dinner parties in London, enforced by the certain sanction of not being invited again, or the legal rule against usury in New York, widely ignored by those officially charged with its enforcement? Holmes did not explain how he derived his two criteria for law "properly [so] called," but his criteria of definiteness of form and certainty of sanction have a strong scientific cast. The definite form makes the conduct the rule prohibits knowable and the certain sanction combines with that definite form to allow people subject to the rule to predict the consequences of their actions: "If I do X [violate the rule] then Y [sanction] will follow." A rule definite in form and certain in sanction thus seems akin to a scientific law that allows one to predict the consequences of certain actions under certain circumstances.

Holmes then recognized that the province of jurisprudence is practically limited to the rules enforced by courts, because those are the rules studied by lawyers. These rules comprise a subset of "laws (philosophically speaking),"³⁷ that is, the rules definite in form and certain in sanction. This subset is defined practically, however, and not analytically. Holmes was therefore willing to include international law within the field of jurisprudence, because some of its rules meet the criteria for law "philosophically speaking" and lawyers study those rules. Although Holmes did not emphasize it, his discussion of war as a sanction for breach of a rule of international law and his emphasis on the practical delineation of the province of jurisprudence by the conduct of lawyers suggests that enforcement by the courts was not essential to this practical definition of law.

In fact, Holmes seemed to suggest two different definitions of the scope of the law. At one point, he suggested that it is defined as the rules enforced by courts.³⁸ In discussing international law, he implied that it is defined as the rules studied by lawyers.³⁹ There was no analytical prob-

35. *Id.* at 4, F. KELLOGG, *supra* note 17, at 80.

36. *Id.*

37. *Id.* at 5, F. KELLOGG, *supra* note 17, at 81.

38. *Id.*

39. *Id.*

lem in this ambiguity, however, for the choice between these two practical definitions of the province of jurisprudence was not central to Holmes's analysis. What was critical was his concept of laws "philosophically speaking," implicitly defined as rules definite in form and certain in sanction. Those rules allow people to predict what conduct will constitute a violation and to predict the consequences of such a violation. This analysis of laws "philosophically speaking" seems to be an attempt to apply the positivist notion of scientific laws to the domain of social rules in general, and law in particular. Holmes seems to be saying that social rules definite enough in form and certain enough in sanction to allow one to predict the consequences of certain actions qualify in some sense as scientific laws. The subset of these scientific laws that lawyers study, or that courts enforce, are what "lawyers call law." Holmes refined and elaborated this idea fully only later, in his 1897 speech, *The Path of the Law*,⁴⁰ but it is here, in embryo, in 1870.

Holmes was clearly onto something, and his contribution was original, but it did not, as Novick suggests, spring from "the heart of his own experience." It sprang from a careful application of nineteenth-century positivism to the question of defining the province of jurisprudence. Once one sees law as a subset of laws philosophically—that is, scientifically—speaking, the province of jurisprudence can and should be defined conventionally. It does not matter which convention is selected—whether judicial enforcement or lawyers' study. The theory is neither conventional nor derived from Holmes's experiences with convention. It is, or at least it aspires to be, scientific, and it seems to be an application to law of a particular philosophical tradition—nineteenth-century positivism.⁴¹

40. Holmes's ultimate theory in *The Path of the Law* eliminated the troublesome metaphysical concepts still stuck in his 1870 writing. So, instead of law as a *rule* definite in form and certain in sanction, Holmes in *The Path* talked of law as the prophecy of what a court will do in fact. These prophecies were in the form of scientific laws of antecedence and consequence: If one does X, the courts will do Y. Holmes had thus reduced "what lawyers call law" to the form of scientific laws, and had eliminated the carry-over metaphysical notion of a *rule* that prevented his theory in *Codes* from being a complete reduction. See *The Path of the Law*, in COLLECTED LEGAL PAPERS, *supra* note 15, at 167-69 (1920) (originally published in 1897).

41. In the middle of the nineteenth century, positivism was understood as the philosophical system of Comte, explained in his 1839 work, *Cours de Philosophie Positive*. See W. SIMON, POSITIVISM IN THE NINETEENTH CENTURY (1863). That system embodied three essential elements. First, the positivists adopted an extremely limited notion of what we can know. Comte said that all we can know are phenomena and their relationships, discovered by experience. So all we can know are the phenomena and the scientific laws of association and of antecedence and consequence, discovered by induction from repeated experiences. Given this notion of the limitations on human knowledge,

Finally, Holmes did not discuss unconscious judicial motivation in *Codes*; he did not address the sources of judicial decision in that article at all. That discussion first came in his 1872 article⁴² summarizing the jurisprudence lectures he had recently given at Harvard. But neither the 1870 article nor the 1872 article argued that the sources of judicial decision were unconscious. Novick quotes from the opening lines of *Codes*, where Holmes argues that common-law rules are derived by induction from a series of cases.⁴³ Holmes did not claim, however, that the ultimate inductively derived rule was the unconscious motivation for the judges deciding the prior individual cases. Holmes's theory was a description of how rules are inductively derived from a series of common-law cases, not an exploration of the psychology or the motives of judges.

B. *Novick and Primitive Notions*

Novick emphasizes Holmes's alleged theory of unconscious judicial motivation again in his description of Holmes's 1876 article, *Primitive Notions*.⁴⁴ Novick sees the theory of jurisprudence in *Primitive Notions* as the product of mature reflection on practical experience: "After ten years of law practice," Novick writes, "[Holmes] had gained a settled mastery. He had arrived at clear ideas . . ."⁴⁵ Those ideas, according to Novick, made him a structuralist.⁴⁶ The underlying order Holmes saw beneath the complexity of the common law was, Novick asserts, "a system of elements or structures of unconscious thought."⁴⁷ According to

Comte adopted a reductive methodology, breaking down our concepts and propositions into phenomena and scientific laws of association and of antecedence and consequence. The meaning of general proposition for the positivist, then, was just a shorthand reference to all the specific phenomena from which the general proposition was introduced. Second, Comte held as a goal the reduction of all fields of human thought to their ultimate "scientific" constitution, using as his model the science of mathematics, in which all the scientific truths in the field are shown to be derivable from certain basic, fundamental principles. Third, Comte believed that human thought in any field always progresses, from the theological mode, where events are attributable to the wills of natural or supernatural beings, through the metaphysical stage, where events are explained by reference to unreal metaphysical entities, such as essential natures, to the final positivist stage, where events are explained by reference to the operation of scientific laws relating phenomena to each other. Mill accepted each of these three essential elements in Comte's philosophy. See generally J.S. MILL, *Auguste Comte*, *supra* note 23, at 1-54.

42. *Book Notices*, *supra* note 18, F. KELLOGG, *supra* note 17, at 91.

43. S. NOVICK, *supra* note 3, at 125.

44. *Primitive Notions*, *supra* note 21, F. KELLOGG, *supra* note 17, at 129.

45. S. NOVICK, *supra* note 3, at 148.

46. *Id.* at 148, 434 n.59.

47. *Id.* at 148.

Novick, Holmes “dissected” one of these elements in *Primitive Notions*: “the obscure thought or feeling that compelled an injured person to seek vengeance, the primitive impulse that led a person to kick the stone on which he had stumbled. This impulse, Holmes thought, was traceable to an instinctive animism, which endowed all things that moved with life.”⁴⁸ This primitive unconscious animism supported the rules in primitive cultures that authorized vengeance against the thing or animal that inflicted harm. Novick says that Holmes thought the law evolved away from these rules under the influence of a newer, but still unconscious, element: “A new element of culpability or blame, equally unconscious, began to replace the older impulse of vengeance.”⁴⁹ When one saw clearly the influence of these unconscious forms on the evolution of the law, when “what before had been unconscious” was “brought . . . into awareness,”⁵⁰ lawyers and judges could consciously choose to remake the law. Novick’s interpretation of Holmes thus smacks of Freud and psychoanalysis: the legal theorist exposes unconscious structures influencing the law and thereby allows us to make conscious choices freed from those influences.

But Holmes’s *Primitive Notions* theory was not like that at all. The mirror of the past has shown Novick our Freud where there was really only Holmes’s Comte, Mill, and Tylor. Holmes’s theory of legal evolution in *Primitive Notions* must be understood in its historical context, which shows it to be a careful application of the positivist theory of the evolution of all human thought. Moreover, if one reads *Primitive Notions* in the context of the philosophical works of Mill and the anthropological works of Edward Tylor, one can see that Holmes’s work is not an original reflection on Holmes’s practical experience. It is instead a careful application of the historico-scientific method elaborated by Mill in his commentary on Comte,⁵¹ combined with Tylor’s positivist anthropology, which identified “survivals” from primitive cultures in modern societies.⁵²

A careful analysis of *Primitive Notions* in its historical context may help clarify Holmes’s objective. *Primitive Notions*, published in 1876, clearly departed from Holmes’s earlier published works, for Holmes did

48. *Id.*

49. *Id.* at 149.

50. *Id.*

51. J.S. MILL, *Auguste Comte*, *supra* note 23.

52. E. TYLOR, *PRIMITIVE CULTURE* (1871).

not follow either of the two paths he had taken before. He did not attempt to clarify the meaning of fundamental legal notions, nor did he classify the body of law using philosophically coherent principles of arrangement. Instead, Holmes traced the history of the Roman noxal actions and similar rules in the early Greek, Salic, Jewish, and English laws involving the surrender or punishment of the thing, animal, or slave causing harm.⁵³ He showed the common origin of these rules to be the primitive notion that the thing that caused harm ought to be liable.⁵⁴ Holmes then explored the meaning of the state of mind reflected in these institutions. He found that “anthropology comes in to aid the researches of jurisprudence.”⁵⁵ Quoting extensively from Tylor’s 1871 book, *Primitive Culture*,⁵⁶ Holmes showed that the primitive notion in question is traceable to the belief in animation of all nature—“that primitive mental state where man recognizes in every detail of his world the operation of personal life and will.”⁵⁷ This explanation, derived from anthropological studies, is confirmed, Holmes suggested, by a finding from psychology that a “universal tendency of the human mind (which psychology might perhaps have demonstrated unaided) [is] to hold a material object, which is the proximate cause of loss, in some sense answerable for it.”⁵⁸

Holmes then examined a common pattern of progress in the development of the Roman, Salic, German, and Jewish laws.⁵⁹ First, in the most primitive stage of the law, proceedings were brought against the object that had caused harm itself. Next, proceedings were brought against the owner of the object. Later, as the law became more refined, legal proceedings focused on the wrong or the fault of the owner.

Holmes next traced certain doctrines in modern maritime law that personified the ship or its freight to their origins in primitive notions⁶⁰: the limitation of tort liability to the value of the ship; the doctrine that freight is the mother of wages; and the attachment of maritime liens to the ship itself. Holmes saw all of these doctrines as remnants or survivals of primitive animism in modern law. Because “truth [is] often suggested

53. *Primitive Notions*, *supra* note 21, at 424-28, reprinted in F. KELLOGG, *supra* note 17, at 131-35.

54. *Id.* at 423, F. KELLOGG, *supra* note 17, at 130.

55. *Id.* at 428, F. KELLOGG, *supra* note 17, at 135.

56. *Id.*

57. *Id.*, F. KELLOGG, *supra* note 17, at 135 (quoting E. TYLOR, *PRIMITIVE CULTURE* (1871)).

58. *Id.* at 430, F. KELLOGG, *supra* note 17, at 137.

59. *Id.* at 430-32, F. KELLOGG, *supra* note 17, at 137-39.

60. *Id.* at 432-36, F. KELLOGG, *supra* note 17, at 137-39.

by error,"⁶¹ the recognition that these rules originated in primitive notions does not necessarily require their change, but it does justify "scrutiny and revision." Holmes then suggested possible changes in some of these maritime rules that would further more enlightened views of policy.

Holmes's articles from 1870 to 1873 responded to Mill's 1863 call⁶² for work in analytical jurisprudence to clarify fundamental legal concepts and formulate a philosophically coherent arrangement of the law. Did Holmes's turn to history, anthropology and psychology in 1876 mark a shift away from the analytical utilitarian commitments so evident in his earlier articles? A careful reading of *Primitive Notions* in its historical context suggests that Holmes's shift in emphasis brought him closer to Mill and to Mill's later reworking of the utilitarian philosophic tradition to be consistent with Comte's positivism. The following three arguments support this conclusion.

First, even in Mill's 1863 call for further work in analytical jurisprudence, he spoke favorably of Henry Sumner Maine's historical work tracing customs and institutions to their origins in primitive ideas of mankind.⁶³ Mill said that although this had some value in simply furthering an historical understanding of primitive mankind, its greatest utility was practical. Identifying the origins of existing institutions in "ideas now universally exploded,"⁶⁴ Mill thought, paved the way for reform. Holmes's use of Tylor's theory of survivals focused exclusively on the kind of history that Mill applauded as having the greatest utility. Further, the immediate conclusion Holmes drew from his study was that "enough has been said to justify scrutiny and revision"⁶⁵ of the modern doctrines shown to have their origins in an outmoded primitive notion.

Second, Holmes later explained in positivist terms the recurring pattern of development he had traced in *Primitive Notions*. In 1877, he wrote:

In an earlier article, the frame of mind with which we have to deal was shown in its theological stage, to borrow Comte's well known phraseology, as when an axe was made the object of criminal process; and also in the metaphysical, where the language of personification alone survived, but sur-

61. *Id.* at 438, F. KELLOGG, *supra* note 17, at 145.

62. *See* J.S. MILL, *supra* note 19.

63. *See id.* at 161-63.

64. *Id.* at 163.

65. *Primitive Notions*, *supra* note 20, at 438, F. KELLOGG, *supra* note 17, at 145.

vived to cause confusion in reasoning.⁶⁶

Thus, Holmes himself explained, in positivist terms, the evolution he traced in *Primitive Notions*, referring explicitly to Comte's theory that human thought in any field progresses from the theological stage, in which events are ascribed to the wills of divine, animate, or inanimate beings, through the metaphysical stage, in which events are explained in terms of unreal metaphysical abstractions, to the positivist scientific stage, in which events are explained as the consequences of prior events, according to scientific laws of antecedence and consequence. Mill had adopted and promoted this view of human progress in his 1865 comment on Comte.⁶⁷ Holmes's reference to the positivist stages of human thought and his application of them to legal history is therefore consistent with Mill's positivist utilitarianism.

Holmes's idea of evolution is not, as Novick misinterprets it, an evolution from one unconscious idea to another. Holmes believed that primitive people thought that all things, inanimate as well as animate, were moved by internal or external wills.⁶⁸ The survival of primitive forms

66. Holmes, *Primitive Notions in Modern Law No. II*, 11 AM. L. REV. 641, 654 (1877), reprinted in F. KELLOGG, *supra* note 17, at 160.

67. J.S. MILL, *Auguste Comte*, *supra* note 23, at 9-32.

68. *Primitive Notions*, *supra* note 20, at 428-30, F. KELLOGG, *supra* note 17, at 136-37. In *Primitive Notions* Holmes provided his readers with two seemingly separate alternative explanations of the state of mind that led men in primitive cultures to pursue vengeance against both animate and inanimate objects. Holmes first quoted at length from Tylor's answer to this question: primitive peoples' consciously held "belief in the animation of all nature, rising at its highest pitch to personification." *Primitive Notions*, *supra* note 20, at 428-29, F. KELLOGG, *supra* note 17, at 135-36 (quoting E. TYLOR, *PRIMITIVE CULTURE* (1871)). Holmes then provides an alternative explanation: "Without insisting too much upon the theory of a definitely held belief, we may say that it is the universal tendency of the human mind (which psychology might perhaps have demonstrated unaided) to hold a material object, which is the proximate cause of loss, in some sense answerable for it." *Id.* at 430, F. KELLOGG, *supra* note 17, at 137. This comes about because "[t]he untrained intelligence only imperfectly performs the analysis by which jurists carry responsibility back to the beginning of a chain of causation," *id.*, and stops at the object in the causal chain closest to the harm. But, one may well ask, why does the untrained intelligence make that mistake? Must it not be, as Tylor argued, because children and savages alike actually believe that such object has life and will and therefore responsibility? The alternative psychological explanation thus seems to collapse into the explanation based on primitive animist beliefs. Holmes himself goes on to suggest this reduction: "But, as Mr. Bain remarks, without clothing inanimate objects in personality, we cannot feel proper anger towards them." *Id.* Holmes thus seemed to provide his readers a psychological notion that primitive peoples actually believed that inanimate objects had life and will. The apparent refuge, however, was in reality just a different way of saying the same thing. It seems a mistake, then, to read this alternative, psychological explanation as a theory of unconscious motivation.

Holmes in *The Common Law* again provided the reader a choice among competing explanations for the primitive rules imposing vengeance on inanimate objects. *THE COMMON LAW*, *supra* note 14, at 12-13. He adds an expiation explanation to the primitive animist belief explanation and the

into the next stage is not through the unconscious, but through often unthinking imitation and repetition of past forms, to which new reasons consistent with the current mode of thought are eventually given. Unthinking repetition, of course, is not the same as action motivated by deep-seated unconscious structures.

Third, Holmes's methodology in *Primitive Notions* is not purely historical. Although he examines certain historical developments in early systems of law and concludes that they started with a certain primitive notion, he then confirms this conclusion with conclusions derived from truths about man determined by anthropology and psychology.⁶⁹ And Holmes explicitly links the conclusions derived from his historical studies with the conclusions he reached in his prior analytical study of the same subject in 1873.⁷⁰ Thus, the historical studies are presented as part of a broader investigation. The nature of that investigation is evident in Mill's commentary on Comte.⁷¹ There, Mill sets out the two necessary parts of any positivist social science: the historical part, in which scientific laws of human behavior are derived inductively from historical facts, and the analytical part, in which those laws are confirmed deductively from the universal laws of human behavior.⁷² Holmes's addition of historical studies to his prior analytical studies, then, can be seen as an attempt to provide the other half of a positivist social science of law.

Holmes's methodology and purpose in *Primitive Notions* are thus consistent with continued allegiance to the positivist utilitarianism of Mill.⁷³

psychological tendency explanation. As in *Primitive Notions*, Holmes does not indicate his preference among the three theories; as in *Primitive Notions*, the psychological tendency explanation easily reduces to the animist belief alternative.

69. *Primitive Notions*, *supra* note 20, at 428-30, F. KELLOGG, *supra* note 17, at 135-37.

70. *Id.* at 422, F. KELLOGG, *supra* note 17, at 129.

71. J.S. MILL, *Auguste Comte*, *supra* note 23.

72. *Id.* at 83-86.

73. Novick argues that Holmes was not a utilitarian because he rejected the "greatest good of the greatest number" as the criteria for judging legislation in his 1873 commentary on the gas stokers' strike. He attacks H.L. Pohlman and this author for describing Holmes "as in some degree" a follower of utilitarianism. S. NOVICK, *supra* note 3, n. 23. A history of English utilitarianism in the 1860s and 1870s, however, would show that in some sense Holmes was still a utilitarian.

Mill attempted to weld utilitarian ethical theory to positivism in his essay on utilitarianism. See Mill, *Utilitarianism* in J.S. MILL and J. BENTHAM, *UTILITARIANISM AND OTHER ESSAYS* 272 (1987). For Mill, a key problem was the appropriate criteria for ethical choice. A positivist scientific reductive methodology applied to ethics will have difficulty providing criteria for choice among alternative sets of consequences, because the reductive methodology rules out any normative human "nature" that could determine the appropriate ends for human beings and thus the ends for human communities. For ethics, Mill had attempted to resolve this problem of scientific criteria for choice in the following way: Mill said that every man always chooses to obtain pleasure or avoid pain. But

Further, they suggest a movement toward a more positivist science of

which pleasures are "better"? Can one scientifically determine that one pleasure is more desirable than another? One can, said Mill, by consulting the teachings of experience. What do those who have experienced both kinds of pleasure in fact choose? *Id.* at 276-83. One can in this way discover a hierarchy of pleasures scientifically.

Mill's solution was flawed in two ways. First, to make a scientific comparison, we have to assume that people are fungible, that they are equal in their capacity for pleasure, so that the quantum of pleasure each person derives from the same activity is roughly equal. Only on that assumption could one accept the choices of people who have played both push-pin and chess as a guide. But it is a commonplace that one's enjoyment of a particular activity depends on a number of variables, including one's capacity to do it well and one's personal inclinations and tastes. Second, the ability to engage in certain activities that Mill suggests rank high in the hierarchy of pleasures depends on wealth, leisure, and education—scarce resources that are not distributed equally. How can one tell what people would choose if they were equally wealthy, leisured, and educated? Any quantitative study of what people in fact choose to do will thus be inadequate as a guide for behavior. Mill's argument works at all only because it appeals to the tastes, inclinations, and experience of a preselected group—those who choose to read analyses of political and ethical questions. The argument therefore stacks the deck in favor of the choices of that audience—educated, inclined to reflection and study, and leisured. The argument ultimately collapses into intuitionism.

The problems are essentially the same for law or political theory, because one cannot scientifically compare the "choices" of societies with different political institutions, and it is hard to equate social consequences in one society with those in another. Even if we could measure the consequences in terms of the aggregate of individual activities furthered or denied, the failure of a scientific ethics to provide criteria for individual choice among different activities would preclude scientific legal or political choice. James Fitzjames Stephen attacked Mill's failure to solve the problems of scientific utilitarian criteria for choice in ethics and political theory. In his 1873 book, *Liberty, Equality, Fraternity*, Stephen argued that, because there are no scales to weigh different kinds of human happiness, the utilitarian standard of the greatest happiness for the greatest number can provide no guide for action. Stephen concluded that, without religious belief in revelation, there was no basis to judge between differing moral positions because questions of morals would either be matters of taste or questions of fact. J. STEPHENS, *LIBERTY, EQUALITY, FRATERNITY* 256-318 (1873).

Holmes had come to a similar critique of Mill's political theory in his 1873 commentary on the British gas stokers' strike, in which he doubted whether society could determine scientifically what is the greatest good for the greatest number. Holmes, *The Gas Stokers' Strike*, 7 AM. L. REV. 582, 583 (1873), reprinted in 44 HARV. L. REV. 795, 796 (1931). Holmes read Stephen's *Liberty, Equality, Fraternity* in August 1873. See Little, *The Early Reading of Oliver Wendell Holmes*, 8 HARV. LIBR. BULL. 162, 186 (1954). Holmes evidently agreed with Stephen that there were no scientific grounds for preferring one pleasure over another. Holmes summed up his position by stating that "pleasures are ultimates," and in cases of difference between oneself and another there is nothing to do except "in unimportant matters to think ill of him and in important ones to kill him." 2 HOLMES-LASKI LETTERS 862 (M. Howe ed. 1953) (letter of August 5, 1926). Throughout his writings Holmes displayed a striking agnosticism about the relative worth of different ends, or policies, including a deliberate indifference to his own personal preferences. See THE OCCASIONAL SPEECHES, *supra* note 16, at 156. When Mill's weld of utilitarianism and positivism came apart, then, Holmes went with the positivist side of the split. But he still retained all the rest of Mill's utilitarianism positivist apparatus—a radical ethical consequentialism, the notion that we learn about consequences through experience, and the belief that policy (consequences) alone could justify legal rules. The question is therefore a nice question of semantics: What do you call someone squarely in the utilitarian positivist tradition who adopted the positivist agnosticism toward the relative worth of different conse-

jurisprudence. Without repudiating his prior analytical work, Holmes added historical analysis in the scientific positivist mode. This reflected both a broadening of his notion of a complete science of jurisprudence and a firmer commitment to the positivist methodology sketched by Mill in his comment on Comte. It is difficult to see in this careful application of a received philosophical tradition the influence of Holmes's experience as a practicing lawyer. It is equally difficult to see any theory of changing unconscious impulses in Holmes's application to legal history of the positivist theory of the three stages of human thought.

C. *Novick on The Common Law*

Novick does not attempt a full summary of Holmes's 1881 masterpiece, *The Common Law*.⁷⁴ Instead, Novick focuses on just two elements in that book. First, he discusses Holmes's theory of the development of modern tort liability rules and the changing notion of blame in that theory. According to Novick, Holmes found⁷⁵ a simple ordering principle: "[u]nder the skin of modern law lay not rules of behavior but a primitive impulse: blame."⁷⁶ The law of torts draws the line between accidental and blameworthy injuries. Tort law has changed as the notion of blame has evolved from an instinctive impulse for retribution to a modern notion of what Novick—not Holmes—calls fairness: "[w]hat a person of ordinary intelligence and foresight could not foresee was accidental and therefore blameless."⁷⁷

Second, Novick explains Holmes's alleged theory of unconscious judicial motivation and its role in the evolutionary process of legal develop-

quences when Mill's attempt to provide a scientific basis for preference collapsed? To say that Holmes was not a utilitarian seems an overly simple answer to this question. It is more accurate to say that Holmes worked in the utilitarian positivist tradition of Mill, followed the positivist path after the two traditions diverged, but continued to carry utilitarian baggage.

74. Novick begs off, in a footnote: "This is not the place for an extended analysis of *The Common Law* The summary in the text is my own effort to convey the overall argument to a reader or listener; it is not a paraphrase. No short summary could do justice to this long, difficult, and original work." S. NOVICK, *supra* note 3, at 437 n.97.

75. Novick evidently constructs a biographical detail—Holmes's happy discovery of the organizing "blame" explanation of tort liability—from Novick's interpretation of Holmes's treatment of torts in *The Common Law*. *Id.* at 157-58. Novick cites no documentary evidence to support this biographical fact. One wonders whether there is something to support this that he has not cited. If there is nothing, one wonders whether it is proper to infer biographical facts from a contestable interpretation of scholarly writing and then report the inferred fact in a way that tends to give credence to one's interpretation.

76. *Id.* at 157.

77. *Id.* at 158 (footnote omitted).

ment. Echoing his prior interpretation of *Primitive Notions*, Novick emphasizes the place of unconscious judicial motives in Holmes's thought: "[For Holmes, legal] rules and explanations were only rationalizations for what judges felt obliged to decide. Unconscious motives lay behind their opinions."⁷⁸ Again, Novick explains Holmes's theory of legal development in psychoanalytic, evolutionary terms:

[The force imposing legal duties] was an invisible presence that lay behind the courts; it was the force of collective instinct, of the common passions and prejudices of those who ruled. This looming existence had evolved . . . like the maturation of a single person. Dim unconscious motives slowly became evident to self-awareness; the unconscious became conscious, the subjective gave way gradually to the objective. The primitive law of vengeance gave way to more refined impulses of blame, and finally to modern ideas of fairness.⁷⁹

In a very short discussion,⁸⁰ Novick makes some very serious errors. First, his explanation of Holmes's theory about the evolution of tort liability rules, in which Novick sees a necessary relationship between changes in the prevailing notions of blame and changes in tort liability rules, distorts Holmes's theory that the relationship between prevailing notions of blame and liability rules is merely contingent. For Holmes, the two are related only when the policy of furthering the effectiveness of the law is implicated. Second, Novick misstates the place of "unconscious" grounds for judicial decision in Holmes's theory. Novick mistakes it for a theory of the actual motives of judges; it is instead a theory of the real justifications for judicial decision. Finally, Holmes would have scorned Novick's description of the evolution of some fictional entity. The "looming existence" of "collective instinct" sounds suspiciously like the "brooding omnipresence" that Holmes ridiculed.⁸¹ Holmes took pains all his life to reduce fictional metaphysical entities to facts. His theory of legal evolution does not postulate the evolution of any fictitious entity. It is a theory about historical changes in legal rules and their justifications, and is therefore just a general description of changes over time in the way people thought.

The cumulative result of Novick's misinterpretations is to conceal the

78. *Id.*

79. *Id.* at 159.

80. Novick devotes almost three pages of text and two substantive footnotes, one curiously placed, to a discussion of *The Common Law*. *Id.* at 157-60, 434 n.67, 437 n.97.

81. Holmes said, "The common law is not a brooding omnipresence in the sky . . ." *Southern Pac. Co. v. Jensen*, 244 U. S. 205 (1917) (Holmes, J., dissenting).

positivist nature of Holmes's theories by explaining them in terms of ideas that are more familiar to the modern reader: social evolution, fairness and the unconscious. The reader thus gets the impression that Holmes was really one of us: a forerunner of amazing prescience and originality. But that impression comes only from Novick's anachronistic misinterpretation. A different picture emerges if one looks more carefully at the three theories that Novick discussed: Holmes's theory of how objective tort liability rules developed, Holmes's theory of the ultimate bases for judicial decision, and Holmes's theory of legal evolution generally.

One unifying theme in *The Common Law* is Holmes's complementary theories of common-law development and the evolution of liability standards, set out in the first four lectures. Holmes's first lecture⁸² repeated the historical analysis contained in his 1876 *Primitive Notions* article, in which he traced certain modern laws back to their origins in the primitive notion that the thing causing harm ought to be held liable. This lecture, like the earlier article, concluded with the suggestion that courts ought to reconsider and perhaps revise rules that are "survivals from more primitive times."⁸³ But Holmes went further in *The Common Law* and derived from that history a general theory of common-law development. Holmes recognized that, in form, the growth of the law is logical, with each new decision purportedly derived syllogistically from prior precedents.⁸⁴ Yet he also recognized that, in substance, the growth of the law is not logical but legislative. Judges faced with old precedents based on outmoded notions will articulate new reasons for the old rules, and those new reasons will subsequently control their development. The growth of the law reflects changes in the underlying legislative grounds of decision:

[e]very important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.⁸⁵

Significantly, Holmes consistently used the term "policy" in his lectures to refer to the consequences for the society of a particular rule or

82. *THE COMMON LAW*, *supra* note 14, at 8-31.

83. *Id.* at 33.

84. *Id.* at 31.

85. *Id.* at 32.

decision.⁸⁶

Consistent with his theory of common-law development, Holmes's general theory of civil and criminal liability is an evolutionary one.⁸⁷ Holmes attempted to point out and justify a tendency in the progress of the law, and he started by tracing changes in liability standards. In both tort and criminal law, the law started with standards of personal moral blameworthiness—standards based, Holmes thought, on the passion for revenge.⁸⁸ The public policy furthered by those standards was that of preserving the peace by satisfying that passion, which would otherwise erupt into socially disruptive private retribution.⁸⁹ Then the law changed. It kept the language of morals—malice, intent, negligence—which smacked of personal moral blameworthiness but evolved into general, external standards of what would be morally blameworthy in the average member of the community.⁹⁰ Thus, if the defendant acted with knowledge of certain surrounding circumstances and an ordinary member of the community with that knowledge would predict possible harm to others from that act, the defendant could be held liable even though he was not careless and intended no harm or wrong to anyone. If the ordinary prudent man would have been to blame for acting as the defendant acted because the ordinary prudent man would have foreseen danger to others, the defendant could be held liable.⁹¹ Whether the ordinary prudent man would foresee danger from a given act under the known circumstances depends on the experience of mankind with the danger of such acts under similar circumstances.⁹² This external, general standard, linked to what would be morally blameworthy in the average man, serves the legislative policy of protecting people from harm by deterring foreseeably dangerous behavior, while, at the same time, encouraging socially desirable conduct that poses no foreseeable danger to others.⁹³

As experience with the danger of certain actions under given circumstances accumulates, and the teaching of that experience becomes

86. See, e.g., *id.* at 16 (“true reason” for liability of shipowners and innkeepers); *id.* at 26-27 (“hidden ground of policy” for holding ship itself liable in maritime law); *id.* at 28 (“plausible explanation of policy” for treating freight as the “mother of seamen’s wages”); *id.* at 115 (two policies underlying objective standard of tort liability).

87. *Id.* at 6.

88. *Id.* at 6-7, 34-35.

89. *Id.* at 35-36.

90. *Id.* at 42-43, 86-88.

91. *Id.* at 87-88.

92. *Id.* at 89-90, 118-27.

93. *Id.* at 117.

clearer, the vague liability standard of moral blameworthiness in the average man will continually give way to more precise and specific rules imposing liability for certain conduct under given circumstances.⁹⁴ These specific rules are more fixed, definite and certain than the vague standard of moral blameworthiness in the average man. Fixed, definite, and certain rules are more easily knowable, and can more effectively deter unacceptable behavior through fear of criminal or civil liability. Thus, these rules will better achieve the legislative policies of deterring dangerous activity while encouraging socially desirable conduct.⁹⁵

This evolutionary development through three distinct phases results in progress on two levels. First, the law improves as law. Because law is aimed only at external results, it improves as its liability standards become more effective at achieving the desired external results.⁹⁶ The external, general standards of average moral blameworthiness are more effective at deterring dangerous conduct than the subjective standards of personal moral blameworthiness because people know the law will not take their personal inadequacies into account. The hasty, awkward, and naturally imprudent are thus given greater incentive to act safely. Moreover, the final, fixed, definite, and certain rules are more effective than the vaguer standard of average moral blameworthiness from which they evolve, because it is easier to know them and to predict when they will be applied.⁹⁷

Second, the policy base of the law improves. The only policy served by liability standards of personal moral blameworthiness is the minimal one of preserving the peace by satisfying the passion for revenge.⁹⁸ But the passion for revenge, said Holmes, is not one that we should encourage.⁹⁹ As liability standards evolve into objective, external standards, the law begins to serve the more enlightened policy of protecting individuals from harm by deterring conduct that experience has shown to be dangerous.¹⁰⁰ Practically, achievement of this policy is limited only by the need to preserve the law's effectiveness. Imposing liability for dangerous conduct that would not be morally blameworthy in the average member of

94. *Id.* at 88-103, 119-29.

95. *Id.* at 88-89.

96. *Id.* at 33, 42-43, 88-89.

97. *Id.*

98. *Id.* at 35-36.

99. *Id.* at 36.

100. *Id.* at 76-77, 88-89, 117-18.

the community might be “too severe for that community to bear.”¹⁰¹ This limitation becomes less and less significant as the process of specification leads to fixed and definite liability rules, based on experience about the danger of certain conduct under given circumstances, for those rules do not refer to moral blameworthiness in any form.¹⁰² For Holmes, the relationship between blameworthiness and liability standards is a contingent one: the two are tied together only by the policy of preserving the law’s effectiveness. When that policy is not implicated, the law may impose liability without either personal or average blameworthiness.

Holmes’s evolutionary theory in *The Common Law* seems to be an application of the positivist theory of the three stages of human thought, which Mill specifically endorsed in his 1865 commentary on Comte. According to Comte and Mill, human thought on any subject progresses through three invariable phases. In the primitive theological mode, all events are attributed to the wills of a god or gods, inanimate objects, plants or animals. In the metaphysical mode, events are explained by imaginary metaphysical entities such as the nature of an object, its essence, or the virtues residing in it. In the final positivist mode, men give up supernatural and metaphysical explanations and “regard all events as part of a constant order, each one being the invariable consequent of some antecedent condition or combination of conditions.”¹⁰³ Holmes does not explicitly characterize the three-stage progression in liability standards sketched in *The Common Law* as a movement from theological to metaphysical to positivist standards. The structure of his theory, however, tracks precisely with these stages. In the first stage, liability standards reflect a primitive desire for revenge against the causal agent, based on an ascribed evil will. In the second stage, liability standards are based on an imaginary attribute of a fictional entity—the moral blameworthiness of the average member of the community. In the third and final stage, liability rules are fixed, definite and certain. They are in the form of scientific laws of antecedence and consequence, because they specify that certain behavior under given circumstances will be followed by certain legal sanctions. Moreover, they are based on scientific laws about the danger of certain behaviors under given circumstances, discovered by experience.

This analysis suggests that Holmes’s theory of legal evolution is best

101. *Id.* at 42. *See also id.* at 62, 86-88.

102. *Id.* at 88-103, 119-29.

103. J.S. MILL, *Auguste Comte*, *supra* note 23, at 270.

understood as an application of the positivist theory of the evolution of human thought to the law. What propels this evolution is not changes in the “looming existence” of “collective instinct.” Positivists like Mill believed that what propelled human thought from one stage to another was the growth of positive knowledge “as observation and experience disclosed in one class of phenomena after another the laws to which they are really subject.”¹⁰⁴ And Holmes evidently believed that what propelled legal liability standards from primitive subjective standards based on personal moral blameworthiness to more and more objective standards was the accumulation of positive knowledge through experience. The intermediate test of moral blameworthiness in the ordinary reasonable member of the community is a way of fixing the proper objective standard of behavior by consulting the jury about the experience of the community with the danger of this conduct under these circumstances.¹⁰⁵ As experience accumulates and the appropriate objective standard becomes clear to the judge, the standard of average moral blameworthiness gives way to specific rules.¹⁰⁶ Thus, the impulse for the movement from subjective standards to the first general, objective standard and the impulse for the movement from the second to the final specific, objective standard is the same—increased knowledge about the danger of conduct, derived from accumulated experience.

The thoroughgoing positivism evident in Holmes’s theory of legal evolution provides the key to understanding Holmes’s claim that “[e]very important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy”¹⁰⁷ Holmes throughout *The Common Law* uses the phrase “public policy” only in reference to the consequences for the community of the particular judicial rule or decision.¹⁰⁸ Thus, for Holmes, the policy behind primitive liability rules is to satisfy the passion for revenge and thereby prevent feuds and preserve the efficacy of the law. There is no policy in punishing the personally blameworthy just for the sake of punishment. It would be unrealistic, though, for Holmes to say that judges who consciously acted to punish the morally blameworthy were never-

104. *Id.* at 274. See also *id.* at 267-70 for a full statement of how the positivist mode of thought, rooted in knowledge of scientific law based on observation and experience, moves human thought from the theological to the metaphysical to the positivist stage.

105. See *THE COMMON LAW*, *supra* note 14, at 43, 90.

106. *Id.* at 116-21, 89-100.

107. *THE COMMON LAW*, *supra* note 14, at 32.

108. See *supra* note 86 and accompanying text.

theless motivated unconsciously by these policies. But Holmes did not say that. He said that the principle that is “*in fact and at bottom* the result of more or less definitely understood views of public policy [is] most generally . . . the unconscious result of instinctive preferences and inarticulate convictions, but none the less *traceable* to views of public policy *in the last analysis*.”¹⁰⁹ The studied ambiguity of this passage resolves into clarity when read against the background of the basic positivist theory of knowledge. The only things one can know, the positivists said, are one’s experiences of phenomena and the scientific laws of antecedence and consequence one derives from those experiences.¹¹⁰ Some go on to draw the corollary that reality itself is limited to what one can know: only what one can know can be real. It follows from this that the only basis for judicial decision one can know must be the consequences of the decision—its legislative policy. Under the corollary, the legislative policy must be the only real basis for the decision. Thus, it flows directly from the positivist theory of knowledge and its corollary theory of reality that, regardless of what judges believe to be the basis for their decisions, the only knowable, and therefore the only real, basis is its legislative policy—the consequences of the decisions. The unconscious and often inarticulate¹¹¹ policy grounds of legal principles in Holmes’s theory, then, are not unconscious judicial motives at all but the real justifications, unknown to the judges themselves, for decisions that are consciously based on judges’ mistaken theological or metaphysical views of the world.

D. Conclusion

Novick’s misinterpretation of Holmes’s legal theories weakens the book in a number of ways. First, by simplifying and distorting Holmes’s theoretical positions, it keeps the general reader from appreciating the power, consistency, and persuasiveness of Holmes’s great scholarly achievement. This is a serious problem in a book that attempts to tell the story of the man.

Second, Novick’s treatment may lead the reader to some erroneous conclusions. The reader may think that Holmes was a prescient and original thinker who derived his theories from reflections on his professional experience as a lawyer. The reader also may conclude that

109. THE COMMON LAW, *supra* note 14, at 32 (emphasis added).

110. J.S. MILL, *Auguste Comte*, *supra* note 23, at 265.

111. THE COMMON LAW, *supra* note 14, at 32.

Holmes anticipated the modern theory of unconscious judicial motivation, the role of unconscious, primitive structure guiding social evolution, and the primacy of notions of fairness in evaluating modern liability rules. None of these impressions would be correct.

Holmes's great achievement was his persistent, coherent application of the positivism of Mill and Comte to the law. Holmes, based on his view of science, created a completely scientific theory of the common law. In so doing, Holmes applied the reductive positivist methodology to the study of law, formulated a theory of legal evolution that tracked the positivist belief in the evolution of human thought, and rejected as unreal any justifications except policy justifications for legal rules. He then applied his theories to the common law of crimes, torts, contracts, possession, and succession. Holmes's accomplishment was comprehensive, astonishing, brilliant.

IV. HOLMES'S CAREER AS A JUDGE

Holmes believed that if a man were to accomplish anything great he had to do so before he turned forty.¹¹² Holmes could with good reason claim to have met his self-imposed deadline, as he published *The Common Law* when he was just thirty-nine. "The rest of life," Holmes said, before he turned forty, "was working out details."¹¹³ The next fifty years of Holmes's career as a judge show that his theory of personal accomplishment became a self-fulfilling prophecy, for Holmes as a judge busied himself applying the positivist insights and theories he had developed by 1881. Dean John H. Wigmore wrote in 1916:

Justice Holmes seems to me the only [American appellate court judge] who has framed for himself a system of legal ideas and general truths of life, and composed his opinions in harmony with the system already framed. His opinions present themselves as instances naturally serving to exhibit this general body of principles in application. The framework is his own . . .¹¹⁴

Mr. Justice Brandeis, after working closely with Holmes on the Supreme Court, echoed Wigmore's opinion: "It's all been thought out [Holmes's] work is a chemical composition and not a conglomerate. He has said many things in their ultimate terms, and as new instances arise

112. See 2 M. D. HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 1870-1882*, at 8 (1963) [hereinafter 2 HOWE].

113. G. AICHELE, *OLIVER WENDELL HOLMES, JR.: SOLDIER, SCHOLAR, JUDGE* 109 n.16 (1989).

114. Wigmore, *Justice Holmes and the Law of Torts*, 29 HARV. L. REV. 601, 601 (1916).

they just fit in.”¹¹⁵

The consistency with which Holmes worked out the details of his common-law theory as a judge provides a ready-made theme for exploring Holmes's judicial career. There is a rich lode to be mined here. One could explore how Holmes applied his theories in practice, where they fit and where they did not, the relevance of common-law theory to public law and constitutional issues, the problems with specific applications of the theory as a critique of the theory itself, and the extent to which Holmes modified his theory in practice. Except for a brief discussion of how Holmes developed his article, *Privilege, Malice and Intent*,¹¹⁶ to qualify his *Common Law* theories in light of certain defamation cases in the Massachusetts Supreme Judicial Court,¹¹⁷ there is little in Novick's book on these fascinating questions. The picture of Holmes as a judge is affected by Novick's scanting these issues. The reader may conclude that Holmes was an heroically disinterested judge, who took each case as it came and applied the same rules in politically important cases as in disputes between the corner grocer and his supplier. A more thorough presentation of Holmes's judicial career would paint a somewhat different picture. That picture might raise the question whether Holmes's predetermined theoretical scheme, developed with the common law in mind, was adequate for the resolution of public law and constitutional law cases. That picture might also cast doubt on the wisdom of Holmes's common-law theories themselves in light of their consistent application in a range of test cases. The following preliminary analysis, focusing on some representative Holmes opinions, suggests that there may be something to each of these questions. By identifying the positivist theory underneath these opinions, one may begin to see more clearly the problems with Holmes's legacy as a judge.

A. *Holmes and the Common Law: Pierce, Goodman and Peaslee*

Holmes as a theorist attempted to reduce morally freighted concepts in the law to facts or scientific laws of antecedence and consequence. That reductive approach implements the positivist rejection of all theological and metaphysical modes of thought. For Holmes and the positivists, the key to an appropriate analysis was always in the consequences: the fore-

115. A. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK* 231 (1957).

116. S. NOVICK, *supra* note 3, at 203-04.

117. *Id.*

seeable consequences of the parties' conduct under the known circumstances, or the consequences of a particular legal rule or decision, or both. Holmes's theory of external liability standards, his theory of specification of the negligence standard into particularized rules, and his theory of criminal attempts, for example, all focused on foreseeable consequences and eliminated morally freighted terms altogether. Analyzing the application of these positivist theories in particular cases may help evaluate those theories. It may also help in deciding whether it is wise to try to rid the law of all moral and metaphysical concepts.

1. *Commonwealth v. Pierce and Holmes's Theory of External Liability Standards*

Holmes's analysis in *The Common Law* called for the adoption of wholly external standards of liability in tort and criminal law.¹¹⁸ Holmes derived this conclusion from the purpose of the law—"to induce external conformity to rule"¹¹⁹—and the observation that external or objective standards, in which the personal motives or intentions of the actor are irrelevant, are more effective than subjective standards in inducing external conformity.¹²⁰ Holmes the judge did not hesitate to adopt external or objective liability standards in tort and criminal law. One author, after reviewing all of Holmes's tort and criminal law opinions in the Massachusetts Supreme Judicial Court, concluded that "Holmes' performance on the Massachusetts bench was highly consistent with his *Common Law* theory of external liability standards in criminal and tort law."¹²¹

The most famous of these external standards cases is *Commonwealth v. Pierce*.¹²² Franklin Pierce practiced as a physician. He wrapped one of his sick patients in flannels soaked in kerosene, with her consent. After three days of this treatment, she died. Pierce was convicted of manslaughter. The trial court had instructed the jury that the test of criminal liability was "gross and reckless negligence." It had rejected Pierce's requested instruction that he could not be convicted without a finding that

118. *THE COMMON LAW*, *supra* note 14, at 42-43, 61-62, 86-90, 115-29.

119. *Id.* at 42.

120. *Id.* at 86-89.

121. Note, *Oliver Wendell Holmes and External Standards of Criminal and Tort Liability: Application of Theory on the Massachusetts Bench*, 28 *BUFFALO L. REV.* 607, 623 (1979). Holmes amended his theory to recognize subjective standards for additional policy-based privileges in tort law. *Id.* at 617-20. Holmes elaborated this minor change in his theory in *Privilege, Malice, and Intent*, *supra* note 15, reprinted in *COLLECTED LEGAL PAPERS*, *supra* note 15, at 117.

122. 138 Mass. 165 (1884).

he knew of “the fatal tendency of the prescription” and that his action was the result of “obstinate, wilful rashness, and not of an honest intent and expectation to cure.”¹²³ Holmes, writing for the supreme judicial court, held that the defendant’s ignorance of the danger, and his presumed good intent and expectation of a cure, were irrelevant. The manslaughter standard of recklessness, according to Judge Holmes, was a wholly external one: did the defendant act with knowledge of facts that would have led a man of ordinary prudence to foresee a serious and unreasonable danger to the patient’s life?¹²⁴ Just as in *The Common Law*,¹²⁵ Holmes reduced this test of foresight to the teachings of common experience. “[I]f the dangers are characteristic of the class according to common experience,” Holmes wrote, “then he who uses an article of the class upon another cannot escape on the ground that he had less than the common experience.”¹²⁶ Holmes forced this external standard through the court despite a seemingly contrary 1809 Massachusetts decision.¹²⁷

Most would agree that *Pierce* was a terrible decision. It does not make sense to send an ignorant but well-meaning person to prison because he tried, in good faith, to cure a patient by unconventional means that others would know to be dangerous. Malpractice is not necessarily manslaughter.¹²⁸ This reaction to *Pierce* is based on a belief that criminal punishment should be related to personal moral fault. Because that belief in turn is based on a view that the purpose of the criminal law is to punish morally blameworthy violations of the social code, the critique of *Pierce* is based on a criminal-law theory that Holmes specifically rejected. Holmes thought the underlying purpose of criminal law was to deter dangerous behavior, not to punish those guilty of morally blameworthy breaches of the social code.¹²⁹

123. *Id.* at 170.

124. *Id.* at 179.

125. *THE COMMON LAW*, *supra* note 14, at 116-19.

126. *Pierce*, 138 Mass. at 179-80.

127. *Commonwealth v. Thompson*, 6 Mass. 134 (1809). Holmes first distinguished *Thompson* on the grounds that the court there did not consider the reckless manslaughter theory. Then Holmes tried to show *Thompson* was inconsistent with the historical external reckless manslaughter standard, despite an ancient statement by Lord Hale that seemed to assume a subjective test of recklessness. 1 M. HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 429 (1736).

128. Holmes’s unified theory of criminal and tort liability eliminated the differences between the two, for he saw as the purpose of both the deterrence of dangerous activity without discouraging conduct not shown by experience to be dangerous. See *THE COMMON LAW*, *supra* note 14, at 38, 42-47, 115-16.

129. *THE COMMON LAW*, *supra* note 14, at 39-43.

2. *Baltimore & Ohio Railroad v. Goodman and Holmes's Theory of Specification*

In *The Common Law*, Holmes elaborated his theory of specification: as experience with the danger of certain conduct under certain circumstances accumulates, judges should substitute specific rules of liability for the general negligence standard of danger foreseeable by the ordinary reasonable man.¹³⁰ This process of specification makes the law more definite, fixed, and certain and therefore more effective as a deterrent to dangerous conduct. When the judge is not sure what experience teaches about the danger of this conduct under these circumstances, he should leave the question to the jury, which is likely to have a clearer view of what experience teaches.¹³¹ But after a series of similar jury cases, the judge should adopt a specific rule to govern future cases that reflects the teaching of experience embodied in the consistent jury decisions.¹³² Even without a series of jury cases, the court can announce a specific rule if it understands fully what experience teaches about the danger of certain conduct under certain circumstances. “[W]hen standards of conduct are left to the jury,” Holmes said, “it is a temporary surrender of a judicial function which may be resumed at any moment in any case when the court feels competent to do so.”¹³³

Holmes applied his specification theory in *Baltimore & Ohio Railroad v. Goodman*,¹³⁴ a 1927 United States Supreme Court decision. Nathan Goodman, driving east, had approached a crossing of the B&O's railroad tracks. His vision up the tracks was obscured by a section house 243 feet to the north. He would have had no clear view beyond the section house until he was within twenty feet of the first rail. He slowed down to five or six miles an hour, but did not stop before starting across the tracks. A train going over sixty miles per hour, which had sounded no warning bell or whistle, hit and killed Goodman. His administratrix obtained a jury verdict in a wrongful death action against the railroad for negligence. The United States Supreme Court reversed, holding that Nathan Goodman was contributorily negligent as a matter of law. Writing for the Court, Holmes reasoned:

When a man goes upon a railroad track he knows that he goes to a place

130. *Id.* at 89-98.

131. *Id.* at 98.

132. *Id.* at 98-99.

133. *Id.* at 100-01.

134. 275 U.S. 66 (1927).

where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk. If at the last moment Goodman found himself in an emergency it was his own fault that he did not reduce his speed earlier or come to a stop. It is true . . . that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the Courts.¹³⁵

The result and the reasoning in *Goodman* are a direct application of Holmes's theory of specification. The dangerousness of Goodman's conduct in those circumstances was obvious. Therefore, no further experience with such conduct in such circumstances was needed to establish the danger, and no further jury verdicts consulting common experience were needed. The Court could set down a clear rule to guide future conduct under Holmes's theory even though that rule diverged from normal or customary conduct. The social policy of tort law, according to Holmes, was to deter conduct that experience has shown to be dangerous, not to enforce or perpetuate dangerous customs.¹³⁶ Goodman knew the facts from which a reasonable person, based on the collective experience of the community, would foresee danger. He failed to take the available action that would have eliminated that foreseeable danger. Therefore, he ought to be held contributorily negligent as a matter of law to encourage others in similar circumstances to take the necessary and available precautions to avoid that danger.

A critique of *Goodman* would start with the argument that the B&O Railroad wronged Nathan Goodman. Approaching an intersection with obstructed vision at over sixty miles per hour, the engineer failed to give any warning to approaching motorists. The purpose to sounding a warning bell or whistle is to protect people like Nathan Goodman from accidents like this—people who often rely on that warning practice in approaching partially obscured railroad crossings. Goodman did not do everything he could have done to avoid this injury, but in slowing down to six miles per hour as he approached the crossing he did what would

135. *Id.* at 69-70.

136. See THE COMMON LAW, *supra* note 14, at 115.

have avoided injury if the railroad had done what he could reasonably expect it to do. A jury familiar with the practices and expectations in the community could reasonably find that Goodman had a right to rely on the practice of railroads to sound warnings, because the purpose of that practice was to protect and therefore benefit him.

This critique of *Goodman* makes certain assumptions. It assumes that the purpose of a tort judgment is to right a wrong—to do justice by redressing a private injustice. It assumes that wrongs are defined by reference to the safety practices or coordination norms actually relied on by members of the community in their dealings with each other. It assumes that the jury's role in negligence cases is to identify and apply those community coordination norms. Those assumptions have no place in Holmes's theory. According to Holmes, the purpose of a tort judgment is to lay down a rule to guide future conduct into paths of safety.¹³⁷ Achieving justice between the parties and redressing private injustices, therefore, are not the concerns of tort law, and the primary role of the jury in negligence cases is to inform the court of what experience shows about the danger of certain conduct under certain circumstances.

3. *Commonwealth v. Peaslee and Holmes's Theory of Attempts*

In *The Common Law*, Holmes applied his theory of external liability standards to explain the law of criminal attempts. The purpose of the criminal law, Holmes thought, was to deter dangerous conduct by the fear of punishment. But “[a] fear of punishment for causing harm cannot work as a motive, unless the possibility of harm may be foreseen.”¹³⁸ Thus, the ordinary test of criminal liability is whether the defendant acted knowing the circumstances that would lead a reasonable person to foresee the harm the criminal law seeks to prevent.¹³⁹ If the defendant's actions in fact cause the harm, the defendant will be guilty of the crime. If the natural and probable tendency of the defendant's act under the known circumstances is to cause such harm, but by chance the harm does not result, Holmes's general deterrence rationale supports finding the defendant guilty of an *attempted* crime, regardless of the defendant's actual intent.¹⁴⁰ Holmes also recognized that there is a second class of attempts, in which the defendant's acts under the known circumstances

137. *Id.*

138. *Id.* at 46.

139. *Id.* at 45.

140. *Id.* at 54-55.

could not, without further acts, have caused the harm.¹⁴¹ In those cases, Holmes said, the courts impose liability for attempt if the defendant actually intended ultimately to bring about the forbidden harm. Holmes assimilated this intent requirement to his general deterrence theory in the following way: "The accompanying intent in that case renders the otherwise innocent act harmful, because it raises a probability that it will be followed by such other acts and events as will all together result in harm."¹⁴² Holmes flatly rejected any moral blameworthiness explanation for this intent requirement. "The importance of the intent," Holmes said, "is not to show that the act was wicked, but to show that it was likely to be followed by hurtful consequences."¹⁴³ If acts not harmful in their immediate consequences but accompanied by wrongful intent may incur criminal liability as attempts to cause the intended forbidden harm, how can the line be drawn between preparation and attempt? Is the purchase of matches by one who intends to burn down a home an attempt? Is the entry into a store to purchase those matches an attempt? Holmes said that the line is drawn by "[p]ublic policy, that is to say, legislative considerations . . . in this case, the nearness of the danger, the greatness of the harm, and the degree of apprehension felt."¹⁴⁴ This last consideration explained for Holmes the pre-Civil War case of *Lewis v. State*,¹⁴⁵ in which a slave was convicted in Alabama of attempted rape of a white woman for running after her, even though he changed his mind and "desisted before he caught her."¹⁴⁶ Holmes explained the outcome in *Lewis* by referring to a legislative policy: the high degree of community apprehension. "No doubt the fears peculiar to a slave-owning community," Holmes said, "had their share in the conviction."¹⁴⁷ A youthful abolitionist and a Civil War veteran, Holmes the legal scientist did not criticize *Lewis*, but used it to illustrate his scientific, policy-based explanation of attempts in general.

In Holmes's last year of service on the Massachusetts Supreme Judicial Court, a case before the court presented Holmes with an opportunity to apply his theory of criminal attempt.¹⁴⁸ The defendant, Peaslee, owned a

141. *Id.* at 55-57.

142. *Id.* at 56.

143. *Id.*

144. *Id.*

145. 35 Ala. 380 (1860).

146. THE COMMON LAW, *supra* note 14, at 56.

147. *Id.* at 57.

148. Commonwealth v. Peaslee, 177 Mass. 267, 59 N.E. 55 (1901).

carriage painting and repairing business that was failing. He had an excess amount of insurance on the building and the personal property in it. Arson beckoned. Peaslee soaked excelsior in turpentine and put it and several unstopped cans filled with turpentine around a pan filled with turpentine. In the pan he rigged a delayed ignition device that only required the installation of a slow-burning lighted coach candle, which waited, unlit, on a shelf in a nearby room. Peaslee offered his long-time employee fifty dollars to go to the building, set the candle in the delayed ignition device, and light it. The employee refused, but he did go to the building at Peaslee's request, where he observed the arrangements. Later that evening Peaslee and the employee were in a carriage on the road to Peaslee's shop when Peaslee said he had changed his mind. Peaslee turned the carriage around, drove back to the railway station, and took a late train to Boston.

Peaslee was convicted of attempted arson. The indictment alleged only the arrangement of the incendiary materials and the rigging of the ignition device. It did not allege as an overt act the solicitation of another to light the collected materials. The Massachusetts Supreme Judicial Court reversed the conviction in *Commonwealth v. Peaslee*. Holmes, writing for the majority, saw this as an example of his second class of attempt cases—cases in which the defendant's acts under the circumstances require further acts to bring about the specifically intended evil.¹⁴⁹ And he applied his *Common Law* theory about this class of cases to *Peaslee*.

[S]ome preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor although there is still a *locus penitentiae* in the need of a further exertion of the will to complete the crime.¹⁵⁰

Holmes applied this test to the facts alleged in the indictment to explain the conclusion “of a majority of the court.”¹⁵¹ “A mere collection and preparation of materials in a room for the purpose of setting fire to them,” Holmes said “unaccompanied by any present intent to set the fire,

149. *Id.* at 271, 59 N.E. at 56.

150. *Id.* at 272, 59 N.E. at 56.

151. *Id.* at 273, 59 N.E. at 57. There were no dissents. Does this seemingly gratuitous qualification indicate that Holmes as Chief Justice was writing the opinion for a majority with whom he disagreed? Under Holmes's policy-based test of proximity, he could well have thought that Peaslee was guilty of attempted arson, even without the solicitation.

would be too remote.”¹⁵² Holmes continued on in dicta to say that on these facts, if “solicitation of some one else to set the fire” had been alleged as an overt act in furtherance of the attempt, the defendant’s conviction could have been upheld.¹⁵³

The ordinary human reaction to *Peaslee* is to rejoice for Peaslee that he changed his mind before he went too far. One would be surprised if Peaslee were convicted, as Holmes said he could be, of attempted arson. Why is that? Starting from the ordinary understanding that the purpose of the criminal law is to punish morally blameworthy violations of community standards, one could conclude that the test of attempt should not be proximity to harm or probability of harm but moral equivalence. The conduct of the unsuccessful assassin who shoots at the mayor and misses is just as bad as that of the successful assassin; both are worse than the would-be assassin who casts aside the plan while still in preparation. The test is not one of proximity to or probability of harm but moral equivalence between a failed attempt and a successful crime. Holmes’s test ignores this fundamental, deeply rooted distinction between preparation and attempt. Drawing a line between preparations and attempts may sometimes be difficult, but society recognizes a qualitative difference between the two.

The problem with Holmes’s probability of consequent harm test is that it deliberately diverts attention away from the kind of moral evaluation of the defendant’s conduct that would help one decide whether the defendant’s conduct is morally equivalent to a completed crime. In *Peaslee*, two facts are critical to this moral evaluation: Peaslee’s failed solicitation of his employee and Peaslee’s ultimate withdrawal from his plan. Both facts suggest that, using a qualitative test to distinguish preparation from attempt, Peaslee’s conduct should be classified as mere preparation.

First, the fact that Peaslee could still withdraw from the planned arson before the last acts necessary to carry it out shows that his conduct to that point was not the moral equivalent of a successful arson. Second, most courts have rejected the idea that solicitation can be an attempt. In the late nineteenth and early twentieth centuries, the question whether solicitation could be the overt act required to turn an evil intent into an attempt was a controverted one, with the two most respected authorities

152. *Id.* at 273, 59 N.E. at 57.

153. *Id.* at 274, 59 N.E. at 57.

taking opposite views. Wharton¹⁵⁴ said that solicitation could not be an attempt and Bishop,¹⁵⁵ with slim support in the cases, said that it could. Holmes in his *Peaslee* dicta thus adopted the Bishop view. But this position is suspect.

Holmes's approach, which focuses on consequences, proximity, probability, and nice questions of degree, ignores differences in the moral character of different conduct that have led most courts to distinguish between solicitation and attempt. As one example, the solicitor does not want to commit the crime himself. As another, to achieve the intended crime the solicitor needs both the independent agreement of a third party and that party's criminal action to carry out the crime. If the third party agrees, then the successful solicitor may well have done all that he can to bring about a completed crime. But if the third party does not agree, it is difficult to see how the failed solicitation is morally equivalent to the completed crime. Finally, because another party is involved, it is possible for the defendant in a solicitation case to reconsider before the crime is committed and call it off, as the defendant in *Peaslee* in fact did. The possibility of withdrawal before effective action in solicitation cases suggests that the solicitor has not always gone so far down the road to the crime that his conduct is morally equivalent to the completed crime.

B. *Consequentialist Tests in Constitutional Law: Pennsylvania Coal Co. v. Mahon*

Holmes supported consequentialist tests in constitutional as well as common-law cases. That is not surprising, for the positivists who reject the theological and the metaphysical, would see nothing but phenomena, consequences, and scientific laws in constitutional cases. This section will examine one of Holmes's consequentialist constitutional tests: *Pennsylvania Coal Co. v. Mahon's*¹⁵⁶ test of the fourteenth amendment's taking of property.¹⁵⁷ The final section will examine his most famous consequentialist constitutional test—the clear and present danger test in free speech cases.

154. 1 F. WHARTON, CRIMINAL LAW § 218 (12th ed. 1932). Holmes rarely agreed with Wharton on anything. See, e.g., THE COMMON LAW, *supra* note 14, at 37 n.5.

155. 1 J. BISHOP, CRIMINAL LAW § 768(c) (9th ed. 1923).

156. *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393 (1922).

157. The fourteenth amendment reads, in pertinent part: "No State shall . . . deprive any person of life, liberty or property without due process of law . . ." U. S. CONST. amend. XIV, § 1.

In *Pennsylvania Coal Co. v. Mahon*,¹⁵⁸ the plaintiffs owned a house in Scranton, Pennsylvania. They asked the Pennsylvania courts to enjoin the defendant coal company from mining coal under their home because the mining might cause subsidence. A 1921 Pennsylvania statute forbade the mining of anthracite coal in “such [a] way as to cause the subsidence of . . . any structure used as a human habitation.”¹⁵⁹ The plaintiffs held their property under an 1878 deed from the defendant coal company that had conveyed only the surface rights and had retained for the coal company the rights to mine the subsurface coal.

Justice Holmes, writing for the United States Supreme Court, held that the Pennsylvania regulatory statute applied here would be an unconstitutional taking of the coal company’s property without just compensation in violation of the due process clause of the fourteenth amendment.¹⁶⁰ Holmes wrote that regulation of the use of property may become a taking if it “goes too far,”¹⁶¹ and set out the factors at which a court will look to determine when regulation goes too far. These factors focus on the consequences of the regulation: the extent of diminution of the value of the plaintiff’s property, and the need for stringent regulation to achieve a legitimate public end.¹⁶² Applying those tests here, Holmes found that the statute made worthless the only property right the coal company had—the right to mine the subsurface coal.¹⁶³ Further, complete prohibition of mining was not necessary to protect human life because simple notice to inhabitants of the proposed mining would adequately protect that interest.¹⁶⁴

Pennsylvania Coal Co. marked a significant change in the Court’s approach to “regulation as taking” claims under the fourteenth amendment. The older test was a qualitative one, focusing on the nature of a property right. Under the old test, a taking was a harmful physical invasion of the owner’s property or an interference with the owner’s legal title.¹⁶⁵ Simple regulations of land use, therefore, were not takings.¹⁶⁶

158. 260 U. S. 393 (1922).

159. *Id.* at 412-13.

160. Holmes by implication may have held it an unconstitutional impairment of the obligation of contracts under article I, § 10 of the Constitution. 260 U.S. at 413-14.

161. *Id.* at 415.

162. *Id.* at 413-14.

163. *Id.* at 414.

164. *Id.* Holmes evidently assumed that the protection of the surface owner’s property from subsidence was not a legitimate public interest, given the explicit assumption of the subsidence risk in the deed under which the plaintiffs held surface rights.

165. See *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871).

That qualitative test assumed that property rights were distinct things that could be taken in the ordinary sense of the word. Holmes's reductive methodology had long since led him to reduce the metaphysical concept of property rights to actions and consequences. Because "[law is [just] a statement of the circumstances in which the public force will be brought to bear upon men through the courts," he argued, "all that is told us about rights of property is in the books on torts."¹⁶⁷ Property rights were not things that could be taken in the ordinary sense, then, for they were simply descriptions or predictions of the actions of the courts. Consistent with his reductive theory of property rights, Holmes in *Pennsylvania Coal Co.* replaced the qualitative, metaphysical test of a taking with a consequentialist one. Even without physical invasion of the owner's property or interference with legal title, a regulation could be an unconstitutional taking if a court determined that it "went too far" after examining the consequences of the governmental action.

Sixty-seven years of decisions under the *Pennsylvania Coal Co.* test have left the question of when a regulation becomes a taking in a hopeless muddle, culminating in the 1987 *Keystone* case,¹⁶⁸ in which the Supreme Court applied the *Pennsylvania Coal Co.* test to almost identical facts and reached the opposite conclusion. There is an irony here. Holmes as theorist and as judge was devoted to making the law more clear, definite and certain. The apparent inconsistency between Holmes's theoretical goal of certainty and the practical consequences of increased uncertainty from the *Pennsylvania Coal Co.* decision reflects an inherent tension in Holmes's consequentialist theory. This tension led to the split in philosophy between rule-utilitarians and act-utilitarians. If the consequences of a judicial decision are what is important, it should lay down a clear and effective rule that, when followed over the long run, will maximize socially beneficial consequences. But, by the same token, the decision also should be based on a nicely calibrated assessment of the immediate consequences of this particular decision. A rule that requires an individualized assessment of projected consequences in the particular case, however, seems much less effective in guiding future conduct than a rule that can be applied without prophesying future consequences. The conflict between Holmes's theoretical goal of legal certainty and his judi-

166. See *Mugler v. Kansas*, 123 U.S. 623 (1887).

167. Letter from O.W. Holmes, Jr. to John C. Gray (Oct. 27, 1914) (O.W. Holmes, Jr. Papers, Box 33, Folder 20, Harvard Law School, Library).

168. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

cial contribution to indeterminacy through this consequentialist decision, then, may reflect an inherent conflict within any thoroughly consequentialist legal theory.

C. *Lessons from Holmes's Application of Positivist Theories*

The indeterminacy and uncertainty found in the *Pennsylvania Coal Co.* test inheres also in the consequentialist tests of attempt in *Peaslee* and the external test of criminal liability in *Pierce*. If attempt of Holmes's second class is a matter of degree, and if the line is drawn by a public policy assessment of the nearness of the danger, the greatness of the harm, and the degree of apprehension felt, it might well be difficult to determine in advance which actions will or will not be attempts. If criminal liability in general is to be determined by what a reasonable person with the same knowledge of surrounding circumstances as the defendant would foresee, criminal liability will depend in any particular case on what the trier of fact determines to be the scope of the reasonable person's foresight. Specific rules like the one in *Goodman* may solve the otherwise problematic indeterminacy, but if those rules are based solely on foreseeability of harm and deterrence rationales, the resulting fixed, definite and certain rule may be, as in *Goodman*, harsh and unjust.

The basic problem with purely consequentialist tests in the law, whether those tests are determinate like *Goodman* or indeterminate like *Peaslee*, is that they leave out too much. Human beings are moral and social creatures. Judicial decisions that ignore the moral character of human action, like *Peaslee* and *Pierce*, and judicial decisions that ignore the web of expectations and claims on others based on accepted social conventions, like *Goodman*, are harsh, unrealistic, and inhuman. One grieves for the victims of Holmes's bleak vision—for Franklin Pierce, for Nathan Goodman's heirs. One rejoices that Peaslee escaped on a technicality. If Holmes was right that actions, consequences, and scientific laws are all there is, perhaps his harsh consequentialist tests would be all one could hope for. But that is an impoverished view of human beings and their world. It sees a world without duties, without rights, without moral claims and moral judgments, even without good and bad. Holmes had to be a hero to work so hard in that bleak world. But in this world his vision, carried into action, causes injustice and needless pain.

V. HOLMES'S AMBITION AND HOLMES'S CHARACTER:
SCHENCK AND ABRAMS

In several different passages, Novick recognizes Holmes's towering ambition—his thirst for both accomplishment and recognition.¹⁶⁹ Novick treats it throughout as a benevolent and powerful motive. And to a certain extent it was. Most great men have a dominant motive that gives them singleness of purpose, courage, and tenacity to keep making great sacrifices to achieve their goals. But in human terms, dominant motives that strong amount to obsessions, and deform at least as often as they ennoble. Did Holmes's ambition to accomplish great things and receive due recognition mar his character? Two perceptive men who knew the youthful Holmes thought that it did. William James, a close friend of Holmes in their youth who was ultimately put off by him, had harsh things to say about him. In 1869, James said: "The more I live in this world, the more the cold-blooded, conscious egotism and conceit of people afflict me. . . . All the noble qualities of Wendell Holmes, for instance, are poisoned by them."¹⁷⁰ Seven years later, James commented again on Holmes: "He is a powerful battery, formed like a planing machine to gouge a deep self-beneficial groove through life . . ."¹⁷¹ And James Bradley Thayer, who believed he had good cause, drew up this personal indictment of Holmes: "[H]e is, with all his attractive qualities and his solid merits, wanting sadly in the noblest region of human character,—selfish, vain, thoughtless of others."¹⁷²

Novick does not tell the reader about these harsh judgments by two who knew Holmes well. He quotes James's "planing machine" comment, but implies that James wrote it because Holmes's single-mindedness threatened him.¹⁷³ Nor does he tell the reader of one of the two incidents that led Thayer to his baleful conclusion. In 1869, Thayer was employed by the heirs of Chancellor Kent to bring out a new edition of the famed Kent's *Commentaries* and he asked Holmes to help him with the work. Holmes took over the work completely; Thayer had nothing to do with the final product. Without consulting Thayer, however,

169. S. NOVICK, *supra* note 3 at 126-27, 130-31, 153.

170. 1 HOWE, *supra* note 112, at 282 (quoting letter from William James to Henry James (Oct. 2, 1869)).

171. *Id.* (quoting letter from William James to Henry James (July 5, 1876)).

172. 2 HOWE, *supra* note 112, at 268 (quoting entry in memorandum book by James Thayer (Dec. 22, 1882)).

173. S. NOVICK, *supra* note 3, at 152.

Holmes had his name put in the published work as the sole editor. In 1882, when Holmes had just started his professorship at Harvard, Thayer was his colleague on the faculty. Before the first school term was out, the governor offered Holmes a position on the Massachusetts Supreme Judicial Court, with an unusually short three-hour deadline for acceptance. Holmes did not ask for an extension of time or consult with the President of Harvard. He accepted the offer within the time allowed by the governor. Given the short deadline, and Holmes's explicit reservation of the right to consider a judgeship when he accepted the professorship, this may be understandable. But thereafter Holmes made no effort to tell the President, his colleagues or his students what he had done. He let them read about it in the papers. Thayer was furious. Novick mentions only this second incident, but minimizes its importance.¹⁷⁴

Examples of Holmes's thirst for recognition as an original thinker are numerous. He hurriedly published a summary of his jurisprudence lectures in 1872 because he feared that a recent publication of similar views in England might lead someone to think he had not thought of his theories first.¹⁷⁵ He was furious at Judge Doe of the New Hampshire Supreme Court for embodying in a judicial opinion, without attribution, Holmes's ideas on torts, which Holmes had sent Doe in manuscript.¹⁷⁶ He carefully stated in his second arrangement article that he developed his arrangement, using duties as the basis for classification before he read of Comte's similar idea.¹⁷⁷ He steadfastly refused to credit anyone who might have influenced his thought.¹⁷⁸ A telling example occurred when Holmes rewrote *Primitive Notions* as chapter one in *The Common Law*; he deleted the original extensive general quotation from Tylor and the paraphrase from Bain.¹⁷⁹

In his younger days, Holmes subordinated his desire for recognition to his desire for accomplishment in two important ways. First, he wanted

174. *Id.* at 169.

175. *Book Notices*, *supra* note 18, F. KELLOGG, *supra* note 17, at 91.

176. 2 HOWE, *supra* note 111, at 83-84.

177. *Privity*, *supra* note 17, F. KELLOGG, *supra* note 17, at 95.

178. See Holmes's vague reply to Harold Laski's request to explain the sources of his ideas in *The Common Law*. 2 HOWE, *supra* note 112, at 148-49 (quoting 1 HOLMES-LASKI LETTERS 429-30 (M. Howe ed. 1953)).

179. He eliminated the extensive quotation from Tylor and the paraphrase from Bain, although he did continue to quote a briefer passage from Tylor on a specific historical point. *THE COMMON LAW*, *supra* note 14, at 19.

respect and admiration not from the masses, but from those whose judgment and accomplishments he respected. Second, he was willing to sacrifice even that recognition in order to reach his ultimate goal—the embodiment of his theories in the law and in the way people thought about the law. Holmes in *The Common Law* had written a unified, positivist theory of the common law—an amazing accomplishment. But he did not advertise it for what it was, for that might get in the way of its ultimate acceptance. So he carefully qualified the key passages explaining his theory that law and traditional morality are totally distinct. He did the same thing in his 1897 summation, *The Path of the Law*.¹⁸⁰ As a judge on the Massachusetts Supreme Judicial Court, he worked to embody his theories in the law without necessarily alerting others to what he was doing. Holmes was willing to sacrifice immediate personal recognition for the “subtile rapture of a postponed [and anonymous] power.”¹⁸¹ So Holmes partially concealed the nature and extent of his accomplishments in legal theory in order to get those theories accepted and embodied in the law. This was consistent with Holmes’s romantic view of life—he glorified those who worked bravely and anonymously to achieve excellence in their crafts.

As Holmes grew older, however, he seemed to sour on the bargain he had earlier struck with the future. Anonymous, postponed power was not enough; the rapture was too subtle. So, later in life, he confided to friends his frustration that he was not getting the recognition he deserved. He was furious at the press coverage of his nomination to the United States Supreme Court for the press’s ignorance of his true accomplishments.¹⁸² When he was a United States Supreme Court Justice, Holmes grumbled to a friend that he wanted and deserved more recognition.¹⁸³ As he grew older, his burning thirst was partially satisfied by an honorary degree from Oxford in 1909,¹⁸⁴ the adulation of bright young lawyers and law professors to whom he had been introduced by his young friend Felix Frankfurter,¹⁸⁵ and by a set of laudatory articles in law reviews marking his seventy-fifth birthday in 1916.¹⁸⁶ But Holmes’s

180. *The Path of the Law*, *supra* note 15, reprinted in *COLLECTED LEGAL PAPERS*, *supra* note 15 at 167.

181. *THE OCCASIONAL SPEECHES*, *supra* note 16, at 31.

182. 1 *HOWE*, *supra* note 12, at 283.

183. *Id.* at 284.

184. S. *NOVICK*, *supra* note 3, at 293-94.

185. *Id.* at 311, 318-20.

186. *Id.* at 317.

thirst for recognition was by then unquenchable.

And that was the problem. Holmes's need for recognition made him vulnerable. In his old age he was susceptible to shameless and sometimes manipulative flattery on the one hand and the prospect of public adulation on the other. The combination of the two could prove irresistible. This may explain in part the development of Holmes's views on first amendment cases from *Schenck* to *Abrams*.

In his seventies, Holmes became friends with a number of brilliant, articulate, and liberal young men. The catalyst for most of these friendships was Felix Frankfurter, who became good friends with Holmes in 1912 and, as Novick notes, "flattered and pleased Holmes greatly."¹⁸⁷ Frankfurter introduced Holmes to Walter Lippman, Herbert Croly, editor of the *New Republic*, Morris Cohen, Benjamin Cardozo, and Harold Laski. As Novick states, Frankfurter "ensured that Holmes's admirers met the old man and that Holmes knew of their admiration."¹⁸⁸ These young men "flattered [Holmes] wildly,"¹⁸⁹ and were in positions to make their flattery public. Lippman wrote a gushing encomium in the *New Republic*;¹⁹⁰ Frankfurter organized an issue of the *Harvard Law Review* to honor Holmes on his seventy-fifth birthday;¹⁹¹ Laski dedicated his first book to Holmes¹⁹² and arranged to have Holmes's articles and addresses collected and published.¹⁹³ These men gave Holmes what he wanted: flattery, adulation, and articulate tributes to his accomplishments from those whose intellects Holmes respected. Holmes respected Laski especially, and Laski never failed in his long-lived correspondence with Holmes to flatter Holmes shamelessly.

These young men were liberals, optimistic about the ability of government to bring about social good. Holmes was skeptical about this "onward and upward" attitude¹⁹⁴ and doubted the effectiveness of most social welfare legislation. Nonetheless, they claimed him as one of their own because of his willingness as a judge to allow the states and the

187. *Id.* at 311.

188. *Id.* at 318.

189. *Id.* at 319.

190. *Id.* at 318-19.

191. *Id.* at 317, 319.

192. H. LASKI, *AUTHORITY IN THE MODERN STATE* (1919). See 1 HOLMES-LASKI LETTERS, *supra* note 178, at 189.

193. S. NOVICK, *supra* note 3, at 337.

194. 1 HOLMES-LASKI LETTERS, *supra* note 178, at 208 (letter from O.W. Holmes, Jr. to H. Laski (May 24, 1919)).

federal government to adopt social welfare legislation without interference by the Supreme Court. And Holmes's eloquence, *joie de vivre*, brutal yet witty iconoclasm, and delight in the life of the mind captivated these brilliant and literary intellectuals.

In 1919, just three years after Frankfurter had organized the *Harvard Law Review* tribute issue, Lippman had gushed in the *New Republic*, and Holmes had first been taken with the brilliant Laski, the first seditious speech cases came to the Supreme Court. Congress had passed an Espionage Act in 1917 to strike at what it considered seditious interference with the war effort.¹⁹⁵ Many opponents of the war were prosecuted under the Act for voicing their opposition to the war. Three of these cases reached the Supreme Court and were argued and decided in 1919, after the war was over. In *Schenck v. United States*,¹⁹⁶ the general secretary of the Socialist party, was convicted of conspiracy to attempt to obstruct the recruiting and enlistment service of the United States by mailing drafted men a pamphlet that attacked the constitutionality of the draft and urged them to assert their right to oppose the draft.¹⁹⁷ In *Debs v. United States*,¹⁹⁸ the most famous Socialist in the United States and its perennial candidate for president was convicted, as a result of a public speech attacking the war, of causing, inciting, and attempting to cause and initiate insubordination, disloyalty, mutiny, and refusal of duty in the military. Debs was also convicted of obstructing and attempting to obstruct the recruitment and enlistment of soldiers.¹⁹⁹ In *Frohwerk v. United States*,²⁰⁰ the defendant, who helped publish a German language newspaper in Missouri, was convicted of a conspiracy to obstruct recruiting and of attempting to cause disloyalty, mutiny and refusal of duty in the military by the publication of certain articles critical of the war.²⁰¹ The Supreme Court, in three separate opinions by Holmes,²⁰² upheld each conviction over the objection that the Espionage Act, as applied to these defendants, ran afoul of the first amendment.

195. Pub. L. No. 65-24, 40 Stat. 217 (1917). See generally Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1217-44 (1983).

196. 249 U.S. 47 (1919).

197. *Id.* at 49, 51.

198. 249 U.S. 211 (1919).

199. *Id.* at 212.

200. 249 U.S. 204 (1919).

201. *Id.* at 205-06.

202. Holmes later said he had been assigned the opinions because he was more sympathetic to the rights of free speech than most of the Court. 2 HOLMES-POLLOCK LETTERS 7-8 (M. Howe ed. 1946) (letter from O. W. Holmes, Jr., to Frederick Pollock (Apr. 5, 1919)).

Holmes's reasoning was similar to his criminal law theory of attempts elaborated long before in *The Common Law* and applied in *Commonwealth v. Peaslee*. In *Schenck*, he reasoned:

But the character of every act depends upon the circumstances in which it is done The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.²⁰³

In *Debs*, Holmes stated the attempt rationale in slightly different language: "[The jury was warranted] in finding that one purpose of the speech, whether incidental or not does not matter, was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting."²⁰⁴

In *Frohwerk*, Holmes applied his *Schenck* test to support a conviction of an attempt to obstruct recruiting even though Frohwerk had not sent his newspaper to drafted men. Pointing to the meagre record on appeal, Holmes argued that

we must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out.²⁰⁵

These decisions, particularly *Debs*, provoked articulate criticism. Immediately after the decisions were announced, the *New Republic* printed a brief commentary supporting the decision,²⁰⁶ but shortly thereafter it published a stinging critique of *Debs* by Ernst Freund, a respected Chicago law professor.²⁰⁷ Judge Learned Hand wrote a deferential letter to Holmes in which he criticized the clear and present danger test and ar-

203. *Schenck*, 249 U.S. at 52 (citations omitted).

204. *Debs*, 249 U.S. at 214-15.

205. *Frohwerk*, 249 U.S. at 209.

206. *Editorial Note*, 18 NEW REPUBLIC 362 (1919).

207. Freund, *The Debs Case and Freedom of Speech*, 19 NEW REPUBLIC 13 (1919), reprinted in 40 U. CHI. L. REV. 239 (1973).

gued for his qualitative test in the *Masses* case instead.²⁰⁸ And Zechariah Chafee, Jr., a friend and colleague of Frankfurter's at Harvard, published a critical analysis of the decisions in the *Harvard Law Review*.²⁰⁹

This unaccustomed criticism from the intelligent and the informed, some of it in the forum of his friends, moved Holmes to defensiveness. He wrote back to Hand, claiming to see no difference between Hand's substantive test of incitement and his own consequentialist test.²¹⁰ Holmes also wrote a long letter, which he never sent, to Croly, responding to Freund's criticism and defending reliance on jury verdicts in seditious speech cases.²¹¹ To his correspondents, and presumably to his listeners, he said that he deplored the seditious speech prosecutions, that he thought they should never have been brought, that the sentences were too long, and that he hoped Wilson would pardon the convicted.²¹² He said none of this, though, before he began hearing criticism of his seditious speech opinions. Holmes was obviously hurt by the criticism.

The Chafee article may not have been as distressing as other commentary, for it read like a brief directed at just one judge, Mr. Justice Holmes. Chafee quoted favorably from Holmes's general view that judges should articulate social policy.²¹³ He regretted that Holmes had not used the opportunity of *Schenck* to articulate the social interest behind freedom of speech,²¹⁴ and he praised Judge Hand instead because "[t]here is no finer judicial statement of the right of free speech than [Judge Hand's statement in *Masses*]." ²¹⁵ He equated Judge Hand's incitement test in *Masses* with Holmes's clear and present danger test in *Schenck*.²¹⁶ He concluded that Holmes's clear and present danger test in *Schenck* was the ultimate and proper resolution of the free speech di-

208. *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917). Hand's test for what speech could be criminalized focused on the *content*, not the consequences of the speech. If the speech was solely for the direct incitement to illegal action, it could be prohibited. See Rabban, *supra* note 194, at 1299-1303.

209. Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919).

210. Holmes was probably not being disingenuous. He had been reducing metaphysical, qualitative tests to quantitative, consequentialist ones for so long that it may have become automatic with him so that he simply could not recognize any difference between the *Masses* qualitative test and the *Schenck* consequences test.

211. 1 HOLMES-LASKI LETTERS, *supra* note 178, at 202-04.

212. 2 HOLMES-POLLOCK LETTERS, *supra* note 201, at 10-11 (letter from O.W. Holmes, Jr. to Frederick Pollock (Apr. 27, 1919)).

213. Chafee, *supra* note 208, at 959.

214. *Id.* at 968.

215. *Id.* at 962.

216. *Id.* at 967.

lemma, for it appropriately balanced the two social interests at stake in wartime speech cases, public safety and the search for truth²¹⁷:

Every reasonable attempt should be made to maintain both interests unimpaired, and the great interest in free speech should be sacrificed only when the interest in public safety is really imperiled, and not, as most men believe, when it is barely conceivable that it may be slightly affected. In war time, therefore, speech should be unrestricted by the censorship or by punishment, unless it is clearly liable to cause direct and dangerous interference with the conduct of the war.

Thus our problem of locating the boundary line of free speech is solved.

It is fixed close to the point where words will give rise to unlawful acts.²¹⁸

Quoting Holmes's opinion on attempt in *Commonwealth v. Peaslee*,²¹⁹ Chafee recognized that the matter is "a question of degree,"²²⁰ and found that this clear and present danger test in *Schenck* embodies the proper rule.²²¹

Chafee's article displayed a sensitive understanding of Holmes's psychology. It cited wherever possible things Holmes had written. Chafee argued that Holmes's own test, applied according to Holmes's own theories, was the solution to the problem. He challenged Holmes to act consistently with his basic theories about the policy base of the law and praised Holmes's capacities and accomplishments, while mourning his lost opportunity.²²² And Chafee praised Hand's statement in *Masses*, possibly as a goad to Holmes to seize the laurel of the "fin[est] judicial statement of the right of free speech."²²³

Judge Hand, writing to congratulate Chafee on this piece, divined that Chafee had made a pragmatic decision to try to use Holmes's clear and present danger test to protect free speech. Hand wrote: "You have, I

217. *Id.* at 960.

218. *Id.*

219. *Id.* at 963.

220. *Id.*

221. After quoting Holmes in *Schenck* at length, Chafee commented:

This portion of the opinion, especially the italicized sentence, substantially agrees with the conclusion reached by Judge Hand, by Schofield, and by investigation of the history and political purpose of the First Amendment. It is unfortunate that "the substantive evils" are not more specifically defined, but if they mean overt acts of interference with the war, then Justice Holmes draws the boundary line very close to the test of incitement at common law and clearly makes the punishment of words for their bad tendency impossible. Moreover, the close relation between free speech and criminal attempts is recognized by the use of a phrase employed by the Justice in an attempt case, *Commonwealth v. Peaslee*.

Id. at 967.

222. *Id.* at 966-69.

223. *Id.* at 962.

dare say, done well to take what has fallen from Heaven and insist that it is manna rather than to set up an independent solution."²²⁴ Professor Rabban, who has recently published an intensive analysis of this history, agrees with Hand that Chafee really preferred Hand's *Masses* test, but used the *Schenck* clear and present danger test because the Court had already adopted it.²²⁵

Laski, one of the editors of the *Harvard Law Review* that year, wrote Chafee to tell him he agreed with the article wholeheartedly.²²⁶ Laski gave a copy of the article to Holmes, and invited both Holmes and Chafee to tea that summer, where they discussed the free speech issue.²²⁷ In a letter to Judge Amidon that September, Chafee indicated that he had failed to convince Holmes.²²⁸ But the ultimate proof of Chafee's success was Holmes's dissent in the next seditious speech case, *Abrams v. United States*.²²⁹

Abrams was different from *Schenck*, *Debs*, and *Frohwerk* in one important respect. The defendants in *Abrams* were Russian immigrant Bolsheviks who protested the United States sending troops into Russia toward the end of World War I after the Bolsheviks had withdrawn from the war. The immigrants secretly circulated pamphlets in New York City; some they just threw out the window of a tall building.²³⁰ The pamphlets called for a general strike. They also called on workers in ammunition factories to realize that the munitions they produced would be used not only to shoot Germans but to murder Russians fighting for freedom.²³¹

In *Abrams*, the majority of the Supreme Court upheld convictions under the Espionage Act for conspiracy wilfully to urge, incite and advocate curtailment of the production of war material.²³² The majority thought it did not matter that the defendants' specific intent was not to hinder the war effort against Germany, but to get the U. S. Army out of

224. Rabban, *supra* note 195, at 1301-02 (quoting letter from Learned Hand to Zechariah Chafee, Jr. (Jan. 2, 1921) (Zechariah Chafee, Jr. Papers, Box 4, Folder 20, Harvard Law School Library)).

225. *Id.* at 1301-02.

226. *Id.* at 1315 n.680 (citing letter from Harold Laski to Zechariah Chafee, Jr. (July 23, 1919)).

227. *See id.* at 1315.

228. *Id.* at 1315 (quoting letter from O.W. Holmes, Jr. to Judge Amidon (Sept. 1919)).

229. 250 U.S. 616 (1919).

230. *Id.* at 618.

231. *Id.* at 621.

232. *Id.* at 616-17.

Russia. The Court said: "Men must be held to have intended, and to be accountable for, the effects which their acts [are] likely to produce."²³³

Holmes disagreed. He pointed out that the statute criminalizing incitement to curtail production of war material required a particular intent, the "intent by such curtailment to cripple or hinder the United States in the prosecution of the war."²³⁴ He read this as a specific, subjective intent requirement of actual desire, and not the ordinary objective test of foreseeable consequences. Otherwise, he argued, the statute would lead to absurd results.²³⁵ Thus, the conduct of the defendants was not prohibited by the statute, as their subjective intent was only to protect Russia, and not to "cripple or hinder the United States in the prosecution of the war."²³⁶

Holmes did not rest his dissent solely on statutory construction. He went on to say that the clear and present danger test of *Schenck* was a constitutional test of the limits to governmental power imposed by the first amendment, just as Chafee had argued:

It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing however, might indicate a greater danger and at any rate would have the quality of an attempt. [But that is not the case here].²³⁷

This, of course, is perfectly consistent with Holmes's explanation in *The Common Law* of why the Court required specific intent in the second class of attempt cases. In those cases, a defendant with specific intent to bring about the forbidden harm may be held liable for attempt even if his overt acts are not sufficient under the known circumstances to bring about the forbidden harm.

Holmes did not end his opinion with this straightforward application of his attempt theory as espoused in *The Common Law*. He added a plea

233. *Id.* at 621.

234. *Id.* at 626 (Holmes, J., dissenting).

235. *Id.* at 627.

236. *Id.* at 626-27.

237. *Id.* at 628.

for the President to pardon these “poor and puny anonymities.”²³⁸ And in his now-famous peroration, Holmes gave an eloquent statement of the social interest underneath the first amendment:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be externally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.²³⁹

Holmes had shown Chafee. No one would now be able to “regret” that Holmes, the master of social policy, had not elaborated the social interests underlying the first amendment. No one would now be able to say that Learned Hand had given the finest judicial statement of the principles underlying freedom of speech.

Holmes’s *Abrams* dissent is the ultimate triumph of Chafee’s advocacy. In light of this history, the current argument about whether Holmes changed his position between the *Schenck* trilogy and *Abrams*²⁴⁰ seems to miss the point. Of course one can argue, as Holmes sincerely believed, and as Novick argues,²⁴¹ that the *Abrams* dissent was not a change from the *Schenck* trilogy. If one could not argue that, and if Holmes had not firmly believed that, Chafee would not have done his job as an advocate. But he did his job beautifully. He succeeded in taking what had fallen from heaven and persuading God that it was manna.

What happened, it seems, was this. In the *Schenck* trilogy, Holmes rejected out of hand the constitutional arguments against the seditious speech convictions because he thought there was no constitutional prohibition on speech that itself constituted the crime of attempt or conspiracy under traditional criminal-law doctrine. And Holmes was committed to

238. *Id.* at 629.

239. *Id.* at 630.

240. S. NOVICK, *supra* note 3, at 473 n.87.

241. *Id.*

the proposition that simple solicitation to commit a crime could be deemed an attempt. This left the contours of permissible restraints almost open-ended. Judgments about potential consequences, based on determinations of proximity, danger, and intent under Holmes's theory of attempt, could be left to the jury, on the theory that the jury is the best mechanism for discovering the experience of mankind with particular danger under particular circumstances. Moreover, the ultimate harms that speech could be an attempt to bring about were not limited by the first amendment. By urging a more rigid application of Holmes's theory of attempts, Chafee suggested a way to make the attempt category self-limiting rather than open-ended. The attempt exception, thus carefully delimited, could mark the boundary of the first amendment prohibition. This exception was defined and limited by Holmes's own consequentialist test of attempted crime.²⁴²

The real change was just a change in attitude. After the summer of 1919, Holmes took the seditious speech cases seriously. Previously, he had treated them the way he treated other claims that government action was unconstitutional: "too bad for you, the government wins." Characteristically, Holmes's changed attitude seems to have come about not because of Holmes's concern for the victims of governmental wartime repression—those "poor and puny anonymities"—nor by a realization that basic constitutional and governmental interests were at stake. What brought about the change was public criticism by those he respected and admired, the possibility that he might be seen in a negative light by the literate, educated public (in particular by the readers of the *New Republic*) and the fear that he might lose the adulation of his young, brilliant friends. Perhaps Holmes believed, too, that he could get the recognition he craved by appropriating with his eloquence the liberal leadership position on this issue. All he had to do was accept Chafee's invitation to see his own *Schenck* attempt test as a constitutional limit and to do what he alone could do best—articulate the purpose of the first amendment. This was not, then, a Faustian bargain. Holmes need not have repudiated any

242. As a consequentialist, line-drawing test, the clear and present danger test, like the *Pennsylvania Coal Co.* test, suffered from malleability and indeterminability. Whoever applies the test, and judges the proximity, gravity of danger and public apprehension of harm, may in good faith come up with either a speech-protective or a speech-prohibitive result, depending on their personal judgments of proximity and danger. See *Dennis v. United States*, 341 U.S. 494 (1951). Ultimately, Learned Hand's qualitative test in *Masses* would have provided better protection for speech. The current test in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) seems to be a double-pronged test combining the *Schenck* and *Masses* tests.

of his prior decisions, theories, or statements to accept what Chafee's article offered. The indeterminacy that was the weakness of his consequentialist tests allowed him to change his attitude without changing his mind.

Whether Holmes anticipated these benefits when he drafted the *Abrams* dissent, the benefits came his way as a consequence of that dissent. Although the liberal leadership on the free speech question almost immediately passed to Brandeis,²⁴³ Holmes in his eighties became a national icon, associated in the public mind primarily with the *Abrams* dissent. The *New Republic* publicists and others presented the image of a crusty, courageous old judge fighting for the rights of free speech and the authority of the states to enact liberal ameliorative legislation. The *Abrams* dissent marked Holmes's entry into the national consciousness.

There is more than a little irony in the belated Holmes iconography. He was admired for what his liberal, articulate, and literary friends revered: his liberal opinions on constitutional questions, his eloquence and his wit. But Holmes himself was essentially apolitical. He thought his great accomplishments were in common-law legal theory and the implementation of that theory as a judge. His positions on constitutional issues were shaped not by any overarching or original constitutional vision, but by the application of his common-law theories and his underlying positivist philosophy to constitutional issues. And yet the public adulation, even for these peripheral things, must have pleased Holmes, for he yearned all his life to become a great man and, later in life, to be known far and wide as a great man. His deepest wish came true.

VI. CONCLUSION: ANOTHER PICTURE OF HOLMES

As a boy, Holmes thrilled to the novels of Sir Walter Scott, which he

243. Holmes was handicapped in moving much beyond his *Abrams* dissent by the box into which he had gotten himself. His theory that attempts were questions of degree, determined by legislative considerations, was malleable enough to include the first amendment protection of free speech as one of the considerations in drawing the line between preparation and attempt, so that the line would be drawn very close to the intended harm. The problem was that he had not done so in *Debs*, *Schenck*, or *Frohwerk*, and Holmes of all people was least likely to retreat from a prior position. He could feel comfortable distinguishing *Abrams* from the *Schenck* trilogy because of the specific intent difference, which also seemed to fit nicely with his basic attempt theory, but without that hook, subsequent cases were more difficult to distinguish from *Schenck*, *Debs*, and *Frohwerk*. Given the indeterminacy of his test, they were all distinguishable (if nothing else, by the absence of war), but repeated distinctions of this sort would have been tedious and, ultimately, embarrassing to a man of Holmes's pride. Eventually, Holmes just let Brandeis carry the ball for him in free speech cases. See generally Rabban, *supra* note 194, at 1317-20.

reread at intervals as an adult.²⁴⁴ Holmes imagined himself a knight errant, who bravely persisted in the quest though the way was dark and the prospects dim.²⁴⁵ Holmes kept this romantic ideal, in slightly altered form, even after his combat experiences with the slaughters of the Civil War. He had been wounded in battles fought under generals almost criminally inept and foolish.²⁴⁶ He had grown to revere his friend Henry Abbott, a superb officer and a coolly brave soldier, who died in the wilderness.²⁴⁷ Abbott gave his life for a cause he did not believe in: he disagreed fundamentally with Lincoln's aims and strategies in the war.²⁴⁸ After the war, then, Holmes's romantic ideal had withered to an ideal of simple courage:

I do not know what is true. I do not know the meaning of the universe. But in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt . . . and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the use.²⁴⁹

Holmes's professional career turned out to be much like that. In the harsh world of the mid-nineteenth century positivists, where, as Matthew Arnold put it, "there is neither joy, nor hope . . . , nor peace nor help for pain,"²⁵⁰ Holmes bravely slogged on in pursuit of a legal science, after rejecting beliefs in duty, rights, and justice, and after losing faith in the ability to resolve scientifically questions of personal or political choice. His goal became more and more just a scientifically accurate understanding of the law. But what he discovered was so bleak that he had to soften it in reporting it to the tender-minded. And if, as some think, the world is more than phenomena and scientific laws, if there is joy and peace and help for pain, then Holmes in his courageous championing of the bleak positivist cause was more like Abbott than he knew. Abbott bravely gave his life in a cause he did not believe in; Holmes bravely spent his life in a cause that ultimately betrayed him.

By his lights, of course, Holmes succeeded in his lonely, heroic, and single-minded quest. He formulated a thoroughly positivist theory of the

244. See 1 HOWE, *supra* note 12, at 10-11.

245. See OCCASIONAL SPEECHES, *supra* note 16, at 30-31.

246. See S. NOVICK, *supra* note 3, at 42-52 (Ball's Bluff); *id.* at 77-78 (Chancellorsville).

247. See 1 HOWE, *supra* note 12, at 87, 142-44, 164.

248. See *id.* at 82, 83, 144-45.

249. *The Soldier's Faith*, in OCCASIONAL SPEECHES, *supra* note 16, at 76.

250. Arnold, *Dover Beach*, in THE NEW OXFORD BOOK OF ENGLISH POETRY 703 (1972).

common law, reported it as persuasively as he could to those still lost in the metaphysical darkness, and immediately set out on another glorious task—to weave his theory into the very fabric of the law through judicial opinions. This, too, called for a lonely and heroic struggle, warmed only, near the end, by the adulation of young squires for the crusty old knight, still courageously proclaiming the nonexistence of windmills.

This alternative picture of Holmes, highlighting his vast and fulfilled intellectual ambition, brings out more clearly than Novick's picture what is truly of enduring interest in Holmes's life: how a grand ambition led to great achievement but exacted its human cost; how a scholar's theories played out, for good and for ill, in a judge's hands; how a man's philosophy may let him down if it leaves out of account the things that make us fully human; and how life contrives for us its delicate ironies, precisely because we can neither foresee nor control all the consequences of our actions.

