

Holmes and Legal Pragmatism

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Oliver Wendell Holmes is the great oracle of American legal thought, but as with other oracles his message is subject to much dispute. His admiring readers have mainly stressed Holmes the critic of Langdellian legal formalism, who said the life of the law was not logic but experience.¹ Others, generally less admiring, have focused on Holmes the Social Darwinist, who celebrated the struggle for existence, or Holmes the amoral positivist, who analyzed law from the perspective of a “bad man.”² In recent years, still others have emphasized yet another Holmes, one whose main achievement as a legal thinker, apart from a few memorable anti-formalistic jurisprudential slogans, was a body of surprisingly abstract and conceptual doctrinal writing.³ One of the few points

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- 1 Among the most enthusiastic expressions of this perspective are the various essays in the collection edited by Felix Frankfurter, especially those by Morris Cohen, John Dewey, Frankfurter himself, and Harold Laski. MR. JUSTICE HOLMES (F. Frankfurter ed. 1931). For a contemporary expression of the same view, see the chapter *Mr. Justice Oliver Wendell Holmes, the Completely Adult Jurist*, in JEROME FRANK, *LAW AND THE MODERN MIND* 253–60 (1930). A more sophisticated appreciation of Holmes which treats his critique of formalism as central to his work is MORTON WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* 59–75 (2d ed. 1957).
- 2 See, e.g., LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 62–63, 92–95 (1940); Henry M. Hart, *Holmes’ Positivism—An Addendum*, 64 HARV. L. REV. 929 (1951); Yosai Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213 (1964).
- 3 Grant Gilmore particularly stressed this aspect of Holmes. See GRANT GILMORE, *THE DEATH OF CONTRACT* 13–53 (1974); GRANT GILMORE, *THE AGES OF AMERICAN LAW* 48–56 (1977). Robert W. Gordon has pursued the theme as well. See Gordon, *Holmes’ Common Law as Social and Legal Science*, 10 HOFSTRA L. REV. 719, 726–29 (1982).

on which all commentators agree is Holmes' greatness as a prose stylist.⁴ But when combined with the range of competing interpretations of his work, even the brilliance of his prose suggests another unflattering account—Holmes the eclectic aphorist, whose purely literary talent for glittering phrases conceals a muddle of mutually inconsistent ideas.⁵

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

Holmes as legal pragmatist is hardly a new idea. His associations with Charles Sanders Peirce and William James, as well as his admiration for John Dewey, have led a number of intellectual historians to count him as an adherent and even a founder of the pragmatist movement.⁶ At the same time, legal theorists have associated both his generally empirical and instrumental approach to law, and his specific account of legal rules as predictions of judicial decisions, with familiar pragmatist teachings.⁷ But there are serious problems with these standard positions. On the biographical side, while Holmes did express admiration for Dewey, he never made clear what it was that he admired. And his more specific remarks about pragmatism and the other well-known pragmatists were critical, often harshly so. He condemned James'

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

5 See Saul Touster, *Holmes a Hundred Years Ago: The Common Law and Legal Theory*, 10 HOFSTRA L. REV. 673, 707 (1982) (characterizing Holmes as an unsystematic "utterer of 'smart things'").

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

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