The Integrity of Holmes' Jurisprudence

G. Edward White

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Part of the Law Commons

Recommended Citation

Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol10/iss3/1
Writing about Oliver Wendell Holmes can be likened to playing Hamlet in the theatre: It is a kind of apprenticeship that legal scholars undertake as a way of measuring their fitness to endure the academic travails ahead. Holmes himself engaged in a similar rite de passage when he wrote an essay on Plato as a Harvard undergraduate. Plato’s thought, Holmes claimed, “needed a complete remodeling”; Holmes’ generation “start[ed] far beyond the place where Plato rested.”

Ralph Waldo Emerson, to whom Holmes showed a draft of his essay, suggested that “[w]hen you strike at a king, you must kill him.” The urge to strike at Holmes has been recurrent, and the man, as a jurist, is far from dead.

Ten years ago I suggested that Holmes’ reputation was on the decline, and complained about his “articulated refusal to take pride in being human.” In an intellectual culture dominated by liberal humanism, I surmised, Holmes would not be likely to fare well: He
was not much of a liberal and certainly not a humanist. Once again Holmes seems to have triumphed over his critics. His thought has had a capacity to contain insights sufficiently diverse and contradictory to appeal to someone regardless of prevailing intellectual fashions. And the gap between Holmes and prevailing opinion has narrowed rather than widened in the 1970's. The "disturbing dissonance" I found between Holmes' "very conspicuous social and professional success" and his "gloomy musings that . . . man has no more cosmic significance than a baboon or a grain of sand"4 presupposed an obligation in those whom life has favored to believe in the optimistic possibilities of living. Optimism is harder to come by these days; what I called a "cranky negativism"5 in Holmes now seems more like sensible resignation. At any rate, interest in Holmes has dramatically revived,6 and I should not like to be thought of as having given up on him too soon.

My concern in this essay is with a feature of Holmes that, for all that has been written on him, scholars are just beginning to address. The feature involves an apparent discontinuity between Holmes' theory of judging in the private law and public law spheres. Holmes' famous book, The Common Law,7 reads like a credo for activist judging in pursuit of broad general principles of law; judges are to help arrange legal subjects in what Holmes called a philosophically continuous series.8 His constitutional opinions on the Supreme Court, by contrast, extol the virtues of judicial deference. How is Holmes simultaneously the reformer of private law and the passive public law judge? How could the same judge who wanted to take all grade crossing cases away from juries9 feel comfortable allowing legislatures to make all sorts of discriminatory classifications, so long as they were arguably rational?10 Are these tendencies another example of the internal contradictions in Holmes' thought, which have been

---

4. Id. at 76.
5. Id. at 77.
6. In the past two academic years, Harvard Law School, Northwestern University School of Law, the University of Illinois School of Law, and the American Society for Legal History have devoted lectures or symposia to Holmes' work, and Professors Patrick Atiyah, Robert Cover, Grant Gilmore, Robert Gordon, Morton Horwitz, Saul Touster, and Jan Vedder, as well as Judge Benjamin Kaplan, have delivered papers on various features of Holmes' career.
9. See infra text accompanying notes 171-178.
10. See infra text accompanying notes 161-166.
so regularly pointed out? Or is there a basic, if latent, integrity to Holmes' jurisprudence?

The reason this inquiry may be put as a fresh proposition so late in the history of scholarship on Holmes is that scholars have thus far given only limited attention to his experience as a judge on the Supreme Judicial Court of Massachusetts. Although Holmes was sixty-one when appointed to the Supreme Court of the United States, he remained a Justice for over twenty-nine years and made his public reputation as a Justice. Early scholarship on Holmes paid almost no attention to his years as a Massachusetts judge, and although a major biography, that of Mark DeWolfe Howe,11 was begun in the 1950's, Howe died before he had addressed the Massachusetts cases. Howe's last volume on Holmes appeared in 1963;12 there was a gap of nearly fifteen years before any detailed treatment of Holmes' Massachusetts years appeared.13

The explanation for this neglect of Holmes’ state court opinions is obvious. Scholarship in American legal history that emphasized private law subjects languished in the 1950's and 1960's; there was little interest in the opinions of any state court judges. Further, there was so much else in Holmes' career of interest—his early scholarship, his Supreme Court opinions, his engaging correspondence—that scholars could justify neglecting what seemed to be a collection of boring, insignificant Massachusetts cases.

Holmes himself, as we will see, found his state cases relatively trivial and dull exercises. His opinions are not particularly path-breaking, rarely detailed, and not even the rich source of aphorisms and epigrams that his Supreme Court opinions are.14 But the experience of being a state court judge, when taken in connection with the other two major roles of Holmes' career—scholar and Supreme Court Justice—was a vital link in the forging of Holmes' jurisprudence. The experience of a Massachusetts judgeship transformed Holmes' thought from its expansive, conceptualistic, reformist early form to its cryptic, skeptical later variety. It was on the Massachu-

12. 2 id.
14. There are a few exceptions. See, e.g., Crocker v. Cotting, 170 Mass. 68, 71, 48 N.E. 1023, 1024 (1898) ("The jurisdiction is not affected by a defendant's recalcitrance"); Laplante v. Warren Cotton Mills, 165 Mass. 487, 489, 43 N.E. 294, 295 (1896) ("A boy who is dull at fifteen probably was dull at fourteen"); Lincoln v. Commonwealth, 164 Mass. 368, 378, 41 N.E. 489, 491 (1895) ("All values are anticipations of the future").
setts bench that Holmes came to adopt his familiar posture of resignation, a posture he had never expected to adopt as a judge.

This article traces the evolution of Holmes' jurisprudence in the three major phases of his career. The first section discusses Holmes' early scholarship, which culminated in *The Common Law* in 1881, and the theory of judging that Holmes held at the time of *The Common Law* 's publication. Section II examines the process by which Holmes' ideas about judging private law cases became modified with his experiences as a Massachusetts judge, and contrasts the scholarship he produced between 1882 and 1902 with his earlier efforts. Section III discusses the relationship of Holmes' revised theory of judging, which had been developed in a private law setting, to his approach to public law cases as a Supreme Court justice. The fourth section assesses some of the implications of Holmes' jurisprudence for contemporary judging.

I. THE EARLY SCHOLARSHIP: ORDER AND ACTIVISM

Holmes' early life, as a practitioner in a Boston firm, a lecturer and professor at Harvard, and an editor of the *American Law Review*, has been one of the most fully examined phases of his career. We know that by the 1870's Holmes had become attracted to the idea of "analys[ing] what seem to me the fundamental notions and principles of our substantive law [and] putting them in an order." Beginning in 1870 he published a series of unsigned articles and book reviews, primarily in the *American Law Review*, in which he argued that the purpose of legal scholarship should be "classification," by which he meant the organization of a subject "from the most general conception to the most specific proposition or exception in the order of logical subordination."

We know, as well, that Holmes found the subject of Torts a particularly fruitful one to examine in this fashion. After an original judgment that Torts was "not a proper subject for a law book," Holmes, by 1873, had concluded that "there is no fault to be found with the contents of [Torts] text-books." Torts appealed to Holmes

15. See, e.g., 1 M. Howe, supra note 11, at 245-86 (Boston law practice); 2 id. at 26-95, 253-83 (Harvard years); id. at 1-95 (editor experience).
because it seemed to be a subject ripe for classification. While earlier Torts treatises had attempted to associate concepts, like trespass, evidence, and defamation, that bore no "cohesion or legal relationship" to one another, Holmes became convinced that some fundamental notions and principles could be derived. He claimed that "an enumeration of the [tort] actions which have been successful, and of those which have failed, define[d] the extent of the primary duties imposed by the law." This was in keeping with his belief that "form[s] of action" could be made "to correspond to every substantial duty," and thereby "embod[y] in a practical shape a classification of the law." Holmes discovered that the tort writs could be divided into three groups, one requiring culpability as a prerequisite for liability, another indifferent to culpability, and a third determining culpability from "motives of policy . . . kept purposely indefinite."

The last category of wrongs introduced for Holmes the standard of modern negligence, which he seized upon as a clarifying principle for tort law. Eight years after his preliminary survey of tort writs he was prepared to argue, in The Common Law, that the negligence principle had increasingly dominated tort law. And that shift from analytic classification to philosophical synthesis was characteristic of his scholarship in the late 1870's. In five articles in the American Law Review between 1876 and 1880 Holmes revealed a new style of scholarship. His subjects and his explorations were primarily historical; his purpose, however, was not merely to clarify the historical origins of doctrine, but to claim that doctrine could not be understood apart from its historical origins. A historical exploration of a legal subject, for Holmes, revealed its essentials: its standards of liability, its core elements, its character. History, he later said, was "the first step . . . towards a deliberate reconsideration of the worth of those rules." "History sets us free and enables us to make up our minds dispassionately whether the survival which we are enforcing answers any new purpose when it has ceased to answer the old."
The pattern of scholarship first introduced in Holmes’ articles on tort law thus continued through other subjects to culminate in *The Common Law*. As Mark Howe has shown,28 *The Common Law* was a reformist work in two senses of the word. In his efforts to show that all the common law fields—criminal law, property, torts, and contracts—had arguably been governed by shifting external standards of liability throughout their history, Holmes was attempting to reform jurisprudence by emphasizing the derivation of general principles rather than the pleading of specific writs. Uncertainty would be reduced in the law if common law subjects were arranged according to general principles and lawyers recognized that those principles were simply manifestations of current community preferences. The study of law was thus to proceed from the individual case through history to the derivation of general principles. This would require, among other things, a basic change in the way law was taught and practiced.

Holmes was also advocating another kind of reform in *The Common Law*. Since certainty and predictability were desirable goals for the legal profession, those institutions in the legal system that fostered certainty should be rewarded at the expense of those that appeared to hinder its pursuit. In his 1873 essay on torts Holmes expressed what he took to be the view of “many whose opinion is entitled to respect” that “negligence [was] always and in the nature of things a question for the jury.”29 This echoed a position he had taken two years earlier, when he said that “we suppose it is wholly for the jury to say whether the party has used such care as a reasonable and prudent man would have used under the circumstances of the particular case.”30 But by 1880 Holmes had changed his mind about the efficacy of allowing legal standards to be formulated by juries. In *The Common Law* he complained about “leav[ing] all our rights and duties throughout a great part of the law to the necessarily more or less accidental feelings of a jury,” arguing that “the sphere in which [a judge] is able to rule without taking [jury] opinion at all should be continually growing.”31 This was in keeping with his belief that “the tendency of the law must

210, 225 (1920).
always be to narrow the field of uncertainty."

Holmes' early scholarship, in its final phases, thus envisaged a "creative epoch" in late nineteenth-century American private law in which a philosophically oriented class of scholars would join with a class of judges who had acquired "a fund of experience" to develop broad, predictable rules. The pursuit of order in American jurisprudence would be fostered by judicial activism. Given Holmes' confidence in the techniques of analysis he had used in *The Common Law* and in the principles he had derived as a result of their use, it was hard for him to imagine that others could not do likewise. But those others would have to be persons capable of understanding the law and its history, and dedicated to the goals of certainty, predictability, and coherence. Judges were such persons.

One of the curiosities of Holmes' early life is why, after finding his scholarly labors finally coming to fruition as he approached forty, he did not regard a life of future scholarship with more enthusiasm. After severely pressing himself to secure some scholarly achievement by his fortieth birthday—the result of which was some petty competitiveness with other scholars, a neglect of his home life, and a "fearful grip upon his work" that made him "a melancholy sight" to one observer—Holmes, who had written *The Common Law* while in active law practice, was then given an opportunity to continue a life of scholarship. By November, 1881, he had been offered a position on the Harvard Law School faculty, subject to the contingency of funds being raised to endow a new professorship, and had indicated his readiness to accept. In his letter of acceptance, however, Holmes reserved the right "not . . . to feel bound in honor not to consider" a judgeship should one subsequently be offered him.

Less than a year later, after finally accepting Harvard's offer of a professorship in jurisprudence, Holmes resigned to go on the Supreme Judicial Court. The circumstances of his resignation—he consulted no one on the Harvard faculty and accepted the judgeship three hours after it was offered—produced a good deal of bitterness at Harvard. James Bradley Thayer, who had helped raise funds for

---

32. Id. at 127.
33. Id. at 89.
34. Id. at 124.
the professorship that brought Holmes to Harvard, poured out his resentment in a diary. “[W]ith all his attractive qualities and his solid merits,” Thayer concluded, Holmes was “wanting sadly in the noblest region of human character,—selfish, vain, thoughtless of others.”\textsuperscript{37} Much later, when Felix Frankfurter was considering joining the Harvard faculty, Holmes wrote him that “academic life is but half life—it is withdrawal from the fight in order to utter smart things that cost you nothing except the thinking them from a cloister.” He also said, in the same letter, “My wife thinks I unconsciously began to grow sober with an inarticulate sense of limitation in the few months of my stay in Cambridge.”\textsuperscript{38}

Apparently Holmes was unsure where a scholarly life would take him. He wrote James Bryce shortly after his decision to take the judgeship that he “had already realized at Cambridge that the field for generalization inside the body of the law was small and that the day would soon come when one felt that the only remaining problems were of detail.”\textsuperscript{39} The choice, he later wrote to Harold Laski, “seemed to be between applying one’s theories to practice and details or going into another field.”\textsuperscript{40} Judging appeared to provide “an all round experience,” and a “share in the practical struggle of life.”\textsuperscript{41} It “hardens the fibre,” Holmes later said, and “is more likely to make more of a man of one who turns it to success.”\textsuperscript{42} Had he stayed at Harvard he would have felt that he “had chosen the less manly course.”\textsuperscript{43}

The striking feature of Holmes’ conception of the academic and judicial worlds at this point in his career is not his sense that academic life was more cloistered or less “manly” than a judgeship. It is rather his feeling that “the field for generalization inside the body of the law was small” and that “as a philosopher” Holmes needed to

\textsuperscript{37} Thayer, Memorandum (Dec. 22, 1882), quoted in 2 M. Howe, supra note 11, at 268.

\textsuperscript{38} Letter from Oliver Wendell Holmes to Felix Frankfurter (July 15, 1913), quoted in 2 M. Howe, supra note 11, at 282.

\textsuperscript{39} Letter from Oliver Wendell Holmes to James Bryce (Dec. 31, 1882), quoted in 2 M. Howe, supra note 11, at 280.

\textsuperscript{40} Letter from Oliver Wendell Holmes to Harold Laski (Nov. 17, 1920), quoted in 2 M. Howe, supra note 11, at 281.

\textsuperscript{41} Letter from Oliver Wendell Holmes to James Bryce (Dec. 31, 1882), quoted in 2 M. Howe, supra note 11, at 281.

\textsuperscript{42} Letter from Oliver Wendell Holmes to Felix Frankfurter (July 15, 1913), quoted in 2 M. Howe, supra note 11, at 282.

\textsuperscript{43} Letter from Oliver Wendell Holmes to James Bryce (Dec. 31, 1882), quoted in 2 M. Howe, supra note 11, at 281.
"extend his range." Holmes apparently believed that his labors on *The Common Law* had resulted in a comprehensive theory of jurisprudence, that he was not likely to modify that theory, and that the remainder of academic life, if he stayed in the law, would be filling in the details. This was not as limited a conception of scholarship as it might first appear. Holmes was reluctant to abandon an insight once he had formulated it; nearly forty years after publishing *The Common Law* he defended its findings against critics. Moreover, the seminal work of many scholars is done early in their careers, and there are temptations to rest on one's reputation and "fill in the details." Holmes may have understood that there was not much more he could do, at least in the private law subjects that held his greatest interest, after he had plumbed their depths in *The Common Law*.

But if Holmes was interested in "generalization" and the pursuit of "tempting [philosophical] themes," why did he choose to become a judge? He never made the reasons for his choice explicit, but he appears to have thought that if he were going to "apply one's theories to practice and details," performing their function in "the practical struggle for life," rather than in a "cloister," would be more satisfying. Academic detail was just nit-picking; judicial detail was "the gradual weaving of one's contribution into the practical system of the law." Judging was to provide a means by which the theories of *The Common Law* were to have an impact on "business in the world."

One cannot review Holmes' choice to forego academic life for a judgeship without sensing that he was proceeding under the assumption that judging would give him an opportunity to put his theories into practice. He had spent too much time deriving his views on contracts, the criminal law, property and torts to regard them merely as "smart things"; his jurisprudence was the jurisprudence of reform. Here was an opportunity to put his reforms into action, to rewrite the corpus of Massachusetts jurisprudence. Here was an opportunity

---

44. *Id.* at 280.
45. *Id.*
46. Letter from Oliver Wendell Holmes to Harold Laski (Feb. 1, 1919), *quoted in* 2 M. Howe, *supra* note 11, at 137.
49. Letter from Oliver Wendell Holmes to Felix Frankfurter (July 15, 1913), *quoted in* 2 M. Howe, *supra* note 11, at 282.
to be an activist judge creating an orderly, predictable system of laws.

II. THE SUPREME JUDICIAL COURT: DEFLATED EXPECTATIONS

In 1900, after nearly twenty years as a judge, Holmes asked himself "what is there to show for this half lifetime that has passed?" He had considered "[a] thousand cases, many of them upon trifling or transitory matters." He "would have liked to study to the bottom and to say his say on every question which the law has ever presented." He would have liked to "invent new problems which should be the test of doctrine, and then to generalize it all and write it in continuous, logical, philosophic exposition, setting forth the whole corpus with its roots in history and its justifications of expedience." Instead he had decided a great many dull cases. That was "life," he felt; "we cannot live our dreams." The experience of judging had not conformed to Holmes’ expectations. He had contemplated being able to study cases "to the bottom,” to “say his say” fully on matters of common law doctrine, to use existing cases as a means of anticipating “new problems,” and perhaps even to “generalize it all.” For the most part he had not been able to do these things. There was not enough time to study cases in depth. Saying one’s say fully ran the risk of offending one’s colleagues: Opinions were joint projects. Lawyers, litigants, and even judges were not so interested in a case as an index of future doctrinal development; practical issues were at stake, results had to be reached and decisions made. And the common law, as it evolved in the Massachusetts Supreme Judicial Court, was hardly a “continuous, logical, philosophic” system. It was better described as a series of largely dilatory cases that were decided without much attention to the “whole corpus.”

Decisionmaking on the Massachusetts court was best captured by the old metaphor that Holmes had first written in his 1873 essay, *The Theory of Torts,* where he had speculated on the development of the law:

Two widely different cases suggest a general distinction, which is a clear one when stated broadly. But as new cases cluster around the

51. *Id.*
52. *Id.*
opposite poles, and begin to approach each other, the distinction becomes more difficult to trace; the determinations are made one way or the other on a very slight predominance of feeling, rather than articulate reason; and at last a mathematical line is arrived at by the contact of contrary decisions, which is so far arbitrary that it might equally well have been drawn a little further to the one side or to the other.\textsuperscript{54}

Rather than studying cases to their bottom, appellate courts made determinations on a "predominance of feeling." The "mathematical lines" drawn by courts were "arbitrary." Clear distinctions evolved into intuitive preferences.

A random survey\textsuperscript{55} of Holmes' torts opinions on the Massachusetts court provides an entry to his work as a state judge. Torts had been the private law field in which Holmes had arguably made his greatest scholarly contributions. It is possible to claim that in essays such as \textit{The Theory of Torts} and \textit{Trespass and Negligence},\textsuperscript{56} and in \textit{The Common Law}, Holmes had supplied a principle for late nineteenth-century tort law—the modern negligence principle—that allowed torts to develop its identity as a discrete branch of law. Holmes' achievement had been to see that it was possible to speak of the myriad tort writs as manifestations of a general civil duty owed by everyone not to carelessly injure others. The concept of this duty of very great generality and the limitation of the duty through the fault principle—reasonable conduct under the circumstances—were major catalysts to the growth of modern tort law. Almost all the leading torts theorists of the late nineteenth century—Thomas Cooley,\textsuperscript{57} Melville Bigelow,\textsuperscript{58} John Wigmore,\textsuperscript{59} Jeremiah Smith\textsuperscript{60}—owed their conception of the subject as dealing with universally imposed civil duties to Holmes.\textsuperscript{61}

\textsuperscript{54} Id. at 654.

\textsuperscript{55} Even the term "random survey" may impart too much rigor. I have examined Holmes' torts opinions in three time periods from 1881 to 1902. Adjustments were made if the number of opinions in a given year seemed too low to be revealing. I was interested in the significance or insignificance of the case, as suggested by Holmes' opinion and subsequent treatment of the opinion, and in comparisons between Holmes' jurisprudential perspective in one time frame and another.

\textsuperscript{56} Holmes, \textit{Trespass and Negligence}, 14 Am. L. Rev. 1 (1880).

\textsuperscript{57} See T. Cooley, \textit{A Treatise on the Law of Torts} 628-58 (1880).

\textsuperscript{58} See M. Bigelow, \textit{The Law of Torts} 106-16 (8th ed. 1907).

\textsuperscript{59} See 1 J. Wigmore, \textit{Select Cases on the Law of Torts} 7-8 (1912).


\textsuperscript{61} See G. White, \textit{Tort Law in America} 6-62 (1980).
What were the tort cases that Holmes, with this rich scholarly background, considered on the Massachusetts court? Holmes wrote over 400 torts opinions, the most he wrote on any legal subject and nearly one-third of his entire output. Of these only three were dissents.\textsuperscript{2} One would have thought that with this amount of cases, the very high percentage of majority opinions, and Holmes’ understanding of the intellectual foundations of tort law, he would have had ample opportunity to put his scholarly theories into practice. Instead his torts opinions were exceptionally routine. Two opinions in the 1883 term merely disposed of evidentiary exceptions taken by the defendant at trial.\textsuperscript{6} A third was a conventional assumption-of-risk case that was decided on its facts.\textsuperscript{64}

Only in \textit{Cowley v. Pulsifer},\textsuperscript{65} a case testing the limits of the record libel privilege, did Holmes attempt an elaborate discussion. The case involved publication in a newspaper of the contents of a petition to remove an attorney from the bar. Before the petition had been presented to the court or entered on the docket, it appeared in the paper. Holmes stated that “no binding authority has been called to our attention which precisely determines this case, and we must be governed in our conclusion mainly by a consideration of the reasons upon which admitted principles have been established.”\textsuperscript{66} He then grounded the decision on a distinction between proceedings in open court, which could be recorded without subjecting the recorder to a libel suit, and “preliminary written statement[s] of a claim or charge.”\textsuperscript{67} The record libel privilege did not extend to the latter.

Trivial torts cases again outnumbered significant ones in the 1884 term. Of the seven cases in which Holmes wrote opinions, two simply disposed of exceptions,\textsuperscript{68} one held that the technical requirements for a libel had been made out,\textsuperscript{69} one allowed an action for


\textsuperscript{63} McMahon v. O'Connor, 137 Mass. 216 (1884); McAvoy v. Wright, 137 Mass. 207 (1884).

\textsuperscript{64} Williams v. Churchill, 137 Mass. 243 (1884).

\textsuperscript{65} id. at 392 (1884).

\textsuperscript{66} id. at 393.

\textsuperscript{67} id. at 394.

\textsuperscript{68} New Salem v. Eagle Mill Co., 138 Mass. 8 (1884); Purple v. Greenfield, 138 Mass. 1 (1884).

diverting water to be maintained by a citizen of another state, one refused to find contributory negligence as a matter of law where an officer in the act of arresting a person stepped into a partly covered well in the darkness, and one labeled the actions of a deputy sheriff misrepresentations of fact. Only in Dietrich v. Northampton did Holmes find a case on which he could ruminate. There a pregnant woman slipped on a defective highway constructed by the town of Northampton and suffered a miscarriage. She recovered for her physical injuries, and the deceased child's administrator sought to recover for the child's death. The case raised a number of issues, including whether infants could maintain actions for injuries suffered before birth, whether an injured fetus was a "person" entitled to legal redress, and whether the common law of negligence had a different standard of liability from that imposed on towns for failure to maintain highways in proper repair. For Holmes the case turned on the proposition that "no case, so far as we know, has ever decided that, if the infant survived, it could maintain an action for injuries received by it while in its mother's womb." That dictum was to survive in tort law for seventy-five years.

The 1890 Term contained more cases that approximated the typical late nineteenth-century tort action: the industrial accident leading to a suit in negligence. None of the negligence cases, however, involved more than a simple application of reasonable conduct standards to their facts. An employee assumed the risk when he passed closely to a band saw, slipped, and put his hand on it. A conductor of a street car was not contributorily negligent when knocked off the car by a protruding post from an excavation barrier. A husband and wife injured at a grade crossing where the gates were up and no whistle or bell was sounded by the approaching train were entitled to have the question of their contributory negligence decided by a jury. A commuter who, ignoring closed gates,

73. 138 Mass. 14 (1884).
74. Id. at 15.
walked behind one train and was hit by another train on a neighboring track was grossly negligent as a matter of law. A town had a responsibility to repair a mudhole in a road that caused the driver of a wagon to injure himself when he drove off the road to avoid it. An unauthorized person using a water closet in a railroad station was owed no duty of care by the railroad, and no liability ensued when he was killed by a train that ran off its track. The maintenance of a heavy steam hammer by a car wheel company was not a nuisance.

Only one case in the Term, Burt v. Advertiser Newspaper Co., presented Holmes with an opportunity to clarify legal doctrine. Burt was a libel action against the Boston Daily Advertiser for a series of articles on fraud in the New York customs house. Two brothers, James and Silas Burt, were mentioned in the articles; James Burt, a broker, was accused of "outrageous sugar frauds" and Silas Burt, a naval officer, of having a "long-time connection with some of the most disreputable elements in the New York custom-house." In response to a letter of protest the Advertiser, while conceding that Silas Burt had not been accused of any wrongdoing, said that James Burt's practices "hold the New York custom-house up as a national disgrace." The question raised by the Burt case was the scope of the Advertiser's privilege of "fair criticism upon matters of public interest." That privilege, Holmes held, did not extend to the publication of false facts. It was the criticism—the opinions of the critics—that was privileged. Holmes distinguished between "private inquiries . . . about a private person," such as "answers to inquiries about the character of a servant," and comment on public matters. The Advertiser's reasonable belief that its allegations about James Burt were true did not constitute a defense, Holmes noted: "A person publishes libelous matter at his peril." The Burt case furnishes a good example of nineteenth-century common law attitudes toward

84. Id. at 241, 28 N.E. at 3.
85. Id. at 239, 28 N.E. at 2.
86. Id. at 241, 28 N.E. at 3.
87. Id. at 242, 28 N.E. at 4.
88. Id. at 243, 28 N.E. at 4.
89. Id. at 242, 28 N.E. at 4.
90. Id. at 245, 28 N.E. at 5 (citations omitted).
freedom of the press in defamation cases. Not even a showing that a reasonable editor would have believed the false facts about James Burt to be true would have helped the Advertiser: Strict liability was the standard in defamation cases.

The 1891 Term produced no significant torts cases. The city of New Bedford was exonerated from liability for nuisance when a homeowner who connected his drain with a sewer, which concededly had a narrow outlet, had his basement filled during a heavy rainstorm with water and sewage. A person who fell down unlighted cellar stairs in the course of delivering wood was held to assume the risk of an open cellar being near the house. A case where a woman fell down a lighted flight of stairs was not sufficient for res ipsa loquitur, and could be taken from the jury since its elements were "permanent, few, and simple." A workman who set on fire a shafting box soaked with oil, thereby damaging the owner's premises, was negligent as a matter of law. And a traveler who picked up a loose telephone wire in a road, and was injured from electric current, was considered to be owed a duty by the city of Cambridge, which had negligently allowed the wire to fall into the road. In none of the above cases did Holmes' opinions extend beyond a few paragraphs.

By the 1901 Term Holmes had become Chief Justice, and his workload had increased. He wrote Sir Frederick Pollock in 1899 that he "had more to do than ever," and that he had been taking on himself "perhaps rather a lion's share." But the torts cases were no more significant than they had been in the 1880's or 1890's. Holmes found no contributory negligence in a parent whose child had been run over by a wagon in a quiet road, but did find it where another child was run over by an electric car in a “teeming” city street. He upheld a jury's verdict that a street railway car had negligently run into a baker's wagon that had been lawfully driving on the streetcar tracks, construed a dram shop act to impose liability on the owner of a bar who illegally sold liquor to a person who while intoxicated

96. Letter from Oliver Wendell Holmes to Frederick Pollock (Dec. 1, 1899), in Holmes-Pollock Letters 98 (M. Howe ed. 1941).
stumbled into the path of a train,\textsuperscript{100} and refused to impute to a passenger the alleged contributory negligence of a driver of a coal wagon.\textsuperscript{101} He found a spout that spilled water on a sidewalk, causing ice to form, to be a nuisance, and its owner strictly liable for the injuries of a pedestrian who slipped on the ice.\textsuperscript{102} He held that proof that a woman had committed adultery was not a defense against calling her a dirty old whore.\textsuperscript{103} He allowed recovery from emotional distress when accompanied by a slight physical injury.\textsuperscript{104} He found a gateman who inexplicably stood between the tracks of a railroad and was killed by a freight train in the process of coupling and uncoupling cars to be contributorially negligent.\textsuperscript{105} And he denied recovery to a postal clerk who had sued the railroad owning the train on which he was unloading mail for injuries suffered when a car from another railroad negligently hit that train.\textsuperscript{106}

In only one torts case that Term was there a glimpse of the kind of role Holmes might have expected himself to play as a judge. In \textit{Patnoude v. New York, New Haven, and Hartford Railway}\textsuperscript{107} a street railway company and the New York, New Haven and Hartford Railroad had agreed to unload a streetcar at a point on the railroad's tracks near the streetcar company's barn. The unloading process required the temporary dismantling of a fence that shielded the tracks from an adjoining highway. While the fence was dismantled and the streetcar, covered with a white canvas, was resting on a flat car of the railroad, a rider drove by on the adjacent highway and his horse, startled by the sight of the streetcar, reared and threw him. The question was whether the railroad was liable in nuisance or in negligence.

"As in many cases," Holmes said in his opinion finding for the railroad, "two principles or social desiderata present themselves, each of which it would be desirable to carry out but for the other, but which at this point come into conflict." It was "desirable that as far as possible people should be able to drive in the streets without their horses being frightened, [and it was also] desirable that the owners of land should be free to make profitable and otherwise inno-

\textsuperscript{100} McNary v. Blackburn, 180 Mass. 141, 61 N.E. 885 (1901).
\textsuperscript{103} Rutherford v. Paddock, 180 Mass. 289, 62 N.E. 381 (1902).
\textsuperscript{107} 180 Mass. 119, 61 N.E. 813 (1901).
cent use of it." A "line has to be drawn to separate the domains of the irreconcilable desires, [but] such a line [could] not be drawn in general terms." In the Patnoude case, however, the condition of the railroad's car and fence was transitory, and its potential for frightening horses did not necessarily mean that it was unlawful. Torts cases involved drawing lines, balancing irreconcilable desires, and giving common sense interpretations to facts. General propositions were not much help in deciding them.

With Patnoude one can see how far Holmes' conception of judging had evolved from the one he held when first appointed to the Massachusetts court. While he had enjoyed getting to the bottom of things and formulating generalizations as a scholar, such activities were not easily related to appellate judging. The facts of individual cases were so diverse, and the competing principles so generally worthy, that arbitrary line-drawing was the inevitable result. Such line-drawing could not be generalized. Setting forth "the whole corpus" of law, or "writ[ing] it in continuous, logical, philosophic exposition" were tasks beyond the reach of judges, who had to decide difficult, limited, and largely trivial cases.

Holmes had learned two lessons from his experience on the Supreme Judicial Court of Massachusetts. The first lesson was that cases inevitably presented conflicts between desirable social principles, and judges simply had to choose. That choice was an act of policymaking, not an inevitable unfolding of common law principles. The second lesson was that since such choices were arbitrary, and since the process of line-drawing could not be generalized, judging was a far more modest and less creative activity than Holmes had expected. These lessons fostered two judicial habits in Holmes: the habit of deferring especially arbitrary policy choices to some other body, such as a legislature or a jury, that arguably reflected community sentiment; and the habit of not agonizing over the reasoning that justified an arbitrary choice. By the time Holmes left the Massachusetts court in 1902 his opinions were already notable for their brevity, their assertiveness, and their cryptic language. It was as if Holmes recognized that his decisionmaking process was largely arbitrary and decided to get on with it.

The Massachusetts years were also notable for a significant

108. Id. at 120-21, 61 N.E. at 814.
109. Id.
110. See supra text accompanying notes 50-61.
111. O. W. HOLMES, supra note 50, at 123.
change in the attitudes expressed in Holmes’ scholarship. The Common Law, I have argued, had been a reformist tract, seeking to show by example that a thorough canvass of private law subjects could yield some clarifying and organizing principles. One message of The Common Law was that such principles were there to be extracted and applied to real life situations by judges. The meaning of a private law subject, Holmes seemed to be saying, could be found in this body of intelligible principles.

By 1897, when he delivered his address, The Path of the Law, Holmes was offering a very different definition of the meaning of law. Notwithstanding the claims of “some text writers,” that law was “a system of reason” or “a deduction from principles of ethics or admitted axioms,” law could be most accurately described as “prophecies of what the courts will do in fact.” While the “language of judicial decision” was “mainly the language of logic,” behind the “logical form” lay “a judgment as to the relative worth and importance of competing legislative grounds.” Judicial decisions were “opinion[s] as to policy” that merely “embod[ied] the preference of a given body in a given time and place.” The “duty” of judges was to weigh “considerations of social advantage.”

The Path of the Law had stressed lesson one of Holmes’ experience as a judge: While judges may attempt to cloak their decisions in logic, the decisions were instinctive policy preferences. Law in Science and Science in Law, delivered two years later, stressed lesson two. Holmes had some faith in science as a vehicle for measuring the social desires that he saw competing in a case. He conceded that an “absolutely final and quantitative determination” could only occasionally be reached “because the worth of the competing social ends which respectively solicit a judgment for the plaintiff or the defendant cannot be reduced to number and accurately fixed.” Since policy grounds lay behind the use of legal rules, a “quantitative comparison” of the competing social desiderata seemed desirable. Such a comparison led Holmes back to a variant on his original

112. See supra text accompanying notes 28-32.
113. O. W. HOLMES, supra note 26, at 167.
114. Id. at 172-73.
115. Id. at 181.
116. Id. at 184.
117. O. W. HOLMES, supra note 27, at 210.
118. Id. at 226.
119. Id. at 231.
passage from *The Theory of Torts*.\(^{120}\)

In our approach towards exactness we constantly tend to work out definite lines or equators to mark distinctions which we first notice as a difference of poles. . . . When [we] ha[ve] discovered that a difference is a difference of degree, that distinguished extremes have between them a penumbra in which one gradually shades into the other, . . . [we realize that we have] to draw the line, and an advocate of more experience will show the arbitrariness of the line proposed by putting cases very near to it on one side or the other. But the theory of the law is that such lines exist . . . . We like to disguise the arbitrariness, we like to save ourselves the trouble of nice and doubtful discriminations.\(^{121}\)

Thus Holmes concluded that judging ended up being the arbitrary resolution of “a conflict between two social desires, each of which seeks to extend its dominion over the case, and which cannot both have their way.” In making that resolution judges were “exercis[ing] the sovereign prerogative of choice.”\(^{122}\) They were “weigh[ing] the reasons for the particular right claimed and those for the competing right.” Their solutions could not be in general terms, because “generalities [were] worse then useless.”\(^{123}\) Their solutions were bound to rest on “general grounds of policy blindly felt.”\(^{124}\)

Such were the lessons of twenty years on the Massachusetts bench. And there were two curious, and potentially contradictory, corollaries to those lessons. Since legal decisions were at bottom choices between competing social policies, it was essential that such choices reflect the wishes and feelings of the community, so that the law might keep pace with current thought.\(^{125}\) Judge-made law had a tendency to prefer the logical form to the candid policy statement, and consequently sometimes became ridden with anachronistic rules and outmoded propositions. Especially in doubtful cases, then, Holmes thought that the practice of deferring policy choices to the jury was a good one: Juries were apt to “introduce into their verdict a certain amount . . . of popular prejudice.”\(^{126}\) In a case like

---

120. For the original passage from *The Theory of Torts*, see supra text accompanying note 54.
122. *Id.* at 239.
123. *Id.* at 242.
124. *Id.* at 232.
125. *Id.* at 238.
126. *Id.* at 237-38.
Patnoude, where a right to ride without fear of injury conflicted with a right to use property in a profitable manner, one could label as a question of fact whether the use that invaded the right was negligent, and let a jury decide which social desideratum it preferred. A sense of the arbitrariness of judicial decisionmaking, then, led to a desire to defer, in close cases, to a more community-minded tribunal.

At the same time, however, that sense of arbitrariness led to a desire to exercise the sovereign prerogative of choice. Holmes had no particular confidence that juries “could see further into things or form a saner judgment than a sensible and well trained judge.” He thought that a well-trained judge could “follow the existing body of dogma into its highest generalizations,” then “discover from history how it has come to be what it is,” and finally “consider the ends which the several rules seek to accomplish” and make a choice. Indeed, he thought that a judge need not do all those things; he might have liked to have done them, but he had not done them often in his opinions. What he had done was to see the internal conflict presented by a case, measure the competing social desires in his mind, and make an arbitrary choice. Having done that, he had made use of logic and his own command of language, and had produced an opinion. Judging in that manner was not difficult, so long as one recognized what one was doing.

In these two peculiarly divergent corollaries lay the seeds of Holmes’ constitutional jurisprudence. Holmes’ opinions on the Supreme Court were of two very different types. The first type, which brought him public acclaim, emphasized the unsoundness of judges substituting their judgment on social issues for that of legislatures. Legislatures, like juries, were repositories of contemporary prejudices; there was something to be said for letting them decide difficult policy questions. In this deferential stance Holmes appeared as a judge aware of his own limitations, an appearance that was deceptive. The second type of opinion that Holmes produced on the Court resembled many of his private law opinions in Massachusetts: It was a brief, cursory, and cryptic determination of a difficult and complex issue. In the first type of opinion Holmes seemed chastened

127. Id. at 237.
128. O. W. Holmes, supra note 26, at 198.
by the recognition of his arbitrary power; in the second he seemed to
revel in it.

III. THE SUPREME COURT: A "JOB" MENTALITY

After being appointed to the Supreme Court in 1902 Holmes
wrote Pollock of his delight with his new position. "I am . . . more
absorbed, interested and impressed than ever I had dreamed I might
be," he said. "The variety and novelty to me of the questions, the
remote spaces from which they come, the amount of work they re-
quire, all help the effect." But before long Holmes began to see
recurrent themes. Most questions before the Court were questions of
degree; beneath "the lion's hide" of a case was "the same old donkey
of a question of law." Holmes could write two opinions a week,
finishing the first one assigned to him at a Saturday conference by
Tuesday and the second by Saturday. In listening to counsel argue
before the Court he could summarize an argument before the lawyer
had finished making it. His law clerks, whom he hired from 1905 on
at the suggestion of John Chipman Gray, Ezra Thayer, or Felix
Frankfurter, had very little legal research to do: Holmes wrote his
own opinions, asking only for an occasional citation. The clerks paid
his bills, answered routine correspondence, read to him in his last
years, and above all were sounding boards on contemporary issues.
When another justice needed research help, Holmes lent them out.

Despite the "burning themes" that appeared in constitutional
cases and despite the great public attention that his opinions, espe-
cially his dissents, received, Holmes primarily thought of his work on
the Supreme Court as a "job." In 1928 Holmes wrote Lewis Einstein
that "when I am on my job I don't care a damn what you want or
what [a President] wants." Yosaf Rogat once likened Holmes' at-
titude toward his work on the Supreme Court to that of a pony ex-
press rider who "had to undertake a dangerous and exhausting series
of rides in order to insure the survival of the city." While Holmes
may have ridden hard, he "was not motivated by the city's survival
. . . . Rather, he executed the assignment simply because he had

130. Letter from Oliver Wendell Holmes to Frederick Pollock (Dec. 28, 1902), in 1
HOLMES-POLLOCK LETTERS, supra note 96, at 109.
131. Letter from Oliver Wendell Holmes to Frederick Pollock (Dec. 11, 1909), in 1
HOLMES-POLLOCK LETTERS, supra note 96, at 156.
132. For the reminiscences of one of Holmes' law clerks on these matters, see Derby,
133. Letter from Oliver Wendell Holmes to Lewis Einstein (Apr. 1, 1928), in HOLMES-
EINSTEIN LETTERS 279 (1964).
undertaken it and... to bring back a map of the terrain.”134 Repeatedly in his Supreme Court opinions Holmes conveyed this sense of detachment. He once said in a dissent that “[t]here is nothing that I more deprecate than the use of the Fourteenth Amendment... to prevent the making of social experiments... in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me.”135

Detachment seems the most accurate term to characterize Holmes’ stance on the Supreme Court. He was not merely skeptical; his emotions were for the most part not engaged. To put it more precisely, his emotions were stimulated by the professional features of his work but not by its substance. Few judges could pack more emotion into an opinion, but the emotion was not often generated from compassion for the litigants or concern for the seriousness of the issue at stake. It was the emotion of a literary talent, a person who liked the sound of memorable phrases. Holmes’ aphorisms were original and incisive; they were also repeated often.

One can see Holmes’ stance of detachment as a culmination of his intellectual history. By all accounts he was not only serious about philosophy and jurisprudence as a young man; he was in dead earnest. He clung to his manuscript on Kent, taking it with him to meals; he taught himself German so as to be able to read the contribution of German jurists in the original; he worked nights on the lectures that became The Common Law; he apparently married Fanny Dixwell, whom he had known most of his life, only when someone else mentioned that she was pining away out of love for him.136 From the 1870’s, when he first began to think and write about jurisprudence, to the time he went on the Supreme Judicial Court of Massachusetts, he was a passionate and zealous legal reformer, eager “to say his say on every question which the law has ever presented.” And then, as we have seen, the futility of his grand design revealed itself: Cases were not vehicles for propounding a grand theory, but merely clusterings around poles; judging was not writing law “in continuous, logical, philosophic exposition” but an exercise in the arbitrary drawing of lines. One could not live one’s dreams: “We are lucky enough if we can give a sample of our best...”137

136. See C. Bowen, Yankee From Olympus 259-61, 270-74 (1945).
Holmes' sense of his professional role thus radically contracted over time, and his reduced expectations combined with traits of personality to produce detachment. Acquaintances of Holmes had from his early years noted his apparent indifference to others. His father thought he "look[ed] at life as at a solemn show where he is only a spectator;" 138 William James called him "a powerful battery, formed like a planing machine to gouge a deep self-beneficial groove through life;" 139 James Bradley Thayer, embittered over Holmes' leaving Harvard for the Massachusetts court, had said that he was selfish, vain and thoughtless. 140 Holmes did not read a newspaper, paid little attention to contemporary affairs, had most of his intimate friendships with persons from whom he was physically separated, and once said that he was glad that he had no children. 141 The themes that engaged him, such as intellectual effort and war, were related to central personal experiences. Beyond that he seemed content to "do my job in the station in which we were born." 142

Holmes' job at the Supreme Court consisted of, in many instances, reviewing the constitutionality of actions of a legislature. In such cases Holmes forged his famous attitude of deference, which was seen as humility and "self-restraint" by admirers and had the added advantage of sustaining "progressive" legislation about which a number of early 20th-century intellectuals were enthusiastic. 143 Deference to legislative policymaking was consistent with the views Holmes had developed on the Massachusetts court. In twenty years on that court he had held unconstitutional only one Massachusetts statute. 144 His general attitude was expressed in an advisory opinion on the constitutionality of the legislature's authorizing towns to buy coal and wood and sell them to their inhabitants as fuel. 145 "[W]hen money is taken to enable a public body to offer to the public . . . an article of general necessity," Holmes wrote, "the purpose is no less public when that article is wood or coal than when it is water or gas

138. O.W. HOLMES, SR., 3 THE COMPLETE WRITINGS OF OLIVER WENDELL HOLMES 142 (1900).
139. Letter from William James to Henry James (July 5, 1876), quoted in 1 R. PERRY, supra note 35, at 371.
140. Thayer, supra note 37.
141. See 1 M. HOWE, supra note 11, at 8.
143. See White, supra note 3, at 56-61.
or electricity or education, to say nothing of cases like the support of paupers, or the taking of land for railroads." Holmes was unconcerned with "the need or expediency of such legislation;" he could simply "see no ground for denying the power of the legislature."

Deference, of course, was consistent with Holmes' belief that judging was an arbitrary exercise in policy choices, and, that being so, some policy choices were better made by more "representative" bodies of government. He may have been motivated to express his views more openly, however, by the clumsy policymaking of his contemporaries on the Supreme Court. In the first years of the twentieth century the constitutionality of a number of pieces of "welfare" legislation was tested by the Court. The legislation sought to regulate the working hours of certain occupations or persons, to insure minimum wage standards, to eliminate child labor, and other such "reforms." Holmes was not personally sympathetic to most of the legislation, but he was even less sympathetic to the treatment of it by majorities on his Court. Those majorities had invalidated the legislation by the use of the "liberty of contract" doctrine, which Holmes later called a "dogma." Liberty of contract was objectionable to Holmes in that it attempted to decide "concrete cases" on the basis of a "general proposition" that was suspect as a matter of textual interpretation and debatable as a matter of economic theory. The Court had sustained many legislative acts that interfered with freedom of contract, and the Constitution was "not intended to embody a particular economic theory." To transform the fourteenth amendment into an ideological creed was to "pervert" it.

It is instructive to dwell on what Holmes thought was wrong with the majority's decisions in such liberty of contract cases as *Lochner v. New York*, *Adair v. United States*, and *Adkins v. Children's Hospital*. He did not object to the substance of the doctrine itself; he would have "to study it further and long" before

146. *Id.*
147. *Id.*
150. *Id.* at 75 (Holmes, J., dissenting).
151. *Id.* at 76 (Holmes, J., dissenting).
152. 198 U.S. 45 (1905).
154. 261 U.S. 525 (1923) (overruled in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)).
endorsing it or rejecting it. Nor did he necessarily object, at least as a general proposition, to the Court’s substitution of its judgment for that of a legislature. What he objected to was the clumsy use of a “dogma” to decide questions that ought to have been decided by a consideration of the ends that rules seek to accomplish, the reasons those ends are desired, what is given up to gain them, and whether they are worth the price. Such a consideration was presumptively suited to a legislative judgment, and if the Court were to distrust that judgment it ought to do so in a manner that did not so transparently expose the “convictions or prejudices” of its members.

In deferring, Holmes thus neither espoused the worth of legislation nor expressed concern that judges ought to leave policy decisions to someone else. He merely felt that if judges were going to make arbitrary choices, they ought not to base those choices on vulnerable dogmas. Thus the principal problem with decisions like *Lochner* was not that the Court based its judgments on an economic theory, although Holmes said that a constitution was not made to embody economic theories, but that it based its judgments on a theory that “a large part of the country does not entertain.” While a constitution was “made for people of fundamentally differing views,” the views that counted were those of the majority. Policymaking in America was largely a majoritarian activity; where minorities, such as the courts, made policy, they had better keep their “theories” in line with popular sentiment.

Holmes’ deference thus sustained repressive legislation as much as benevolent legislation. The Pennsylvania legislature could, under a wild game protection act, keep aliens from owning firearms because its members believed that aliens were more prone to violence in this area than native citizens. The Virginia legislature could sterilize persons thought to be feebleminded because it assumed that imbecility bred imbecility and that imbeciles were a burden on the state. The Iowa legislature could forbid the teaching of all languages except English in public schools because it believed that in this fashion

---

155. 198 U.S. at 75 (Holmes, J., dissenting).
156. See, e.g., *Adkins*, 261 U.S. at 568 (Holmes, J., dissenting).
158. *Id.* (Holmes, J., dissenting).
159. *Id.* (Holmes, J., dissenting).
160. *Id.* at 76 (Holmes, J., dissenting).
German culture and influence within the state would be reduced.\footnote{163} Congress could restrict speech so long as the words created "a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent,"\footnote{164} and those evils might be defined by mass prejudice. The most one could expect of legislation, Holmes had written very early in his career, was that it "modify itself in accordance with the will of the de facto supreme power in the community."\footnote{165} Keeping "the sacrifice of minorities to a minimum" was dependent on "the spread of an educated sympathy."\footnote{166}

Students of Holmes have found his posture of deference so fascinating that they have defined his entire career on the Court in terms of it.\footnote{167} But the bulk of Holmes' Supreme Court opinions were cases in which he did not defer to a legislative policy judgment, but rather made one himself, and made it, as he had on the Massachusetts court, with relatively little attention to exposition. Three cases are representative: \textit{Baltimore and Ohio Railroad v. Goodman},\footnote{168} \textit{United Zinc & Chemical Co. v. Britt},\footnote{169} and \textit{Pennsylvania Coal Co. v. Mahon}.\footnote{170}

In \textit{The Common Law} Holmes, in the course of arguing that courts would increasingly take negligence cases away from juries, supported his argument with some observations about grade-crossing accidents. "If the whole evidence," he wrote, "was that a party . . . stood on a railway track, looking at an approaching engine until it ran him down, no judge would leave it to a jury."\footnote{171} On the other hand: "If the whole evidence was that he attempted to cross a level track, which was visible for half a mile each way, and on which no engine was in sight, no court would allow a jury to find negligence."\footnote{172} These examples suggested to Holmes that "the limit of safety" in grade crossing cases "could be determined almost to a foot by mathematical calculation."\footnote{173} \textit{Goodman} was a grade crossing

\footnote{163. Bartels v. Iowa, 262 U.S. 404, 412 (1923) (Holmes and Sutherland, JJ., dissenting).}
\footnote{164. Schenck v. United States, 249 U.S. 47, 52 (1919).}
\footnote{165. Summary of Events, The Gas-Stokers' Strike, 7 Am. L. Rev. 582, 583 (1873).}
\footnote{166. Id.}
\footnote{167. See, e.g., F. Frankfurter, Mr. Justice Holmes and the Supreme Court 36-45 (1938).}
\footnote{168. 275 U.S. 66 (1927).}
\footnote{169. 258 U.S. 268 (1922).}
\footnote{170. 260 U.S. 393 (1922).}
\footnote{171. O. W. Holmes, supra note 7, at 128-29.}
\footnote{172. Id. at 129.}
\footnote{173. Id.}
case in which Holmes attempted to prove that point. Nathan Goodman, the driver of a truck, was approaching a grade crossing at the speed of about five to six miles an hour. The crossing was over a level section of track, but Goodman's view on one side was obscured by a section house, so that he could not see anything until he was about twenty feet from the first train rail, and "then the engine was still obscured by the section house." 174 Goodman continued to cross the tracks, was hit by a train going at least sixty miles an hour, and was killed.

After stating the facts Holmes announced that "it appears to us plain that nothing is suggested by the evidence to relieve Goodman from responsibility for his own death." 175 He then overturned a jury verdict for the driver, holding that Goodman was contributorily negligent as a matter of law. He declared 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." 176 This was a clear standard of conduct and was to be "laid down once for all by the Courts," although "the question of due care very generally is left to the jury." 177

Goodman seems to have been a case in which Holmes had forgotten the lessons of his Massachusetts experience. He may have continued to believe in 1927 that "the limit of safety" in grade crossing cases "could be determined almost to a foot," and he may have been correct that under the circumstances Goodman was negligent. But "mathematical calculation" or Holmes' "stop, look and listen" exercise was not going to fix the limits of safety in grade crossing cases. Some drivers might follow Holmes' standard, get back in their cars, and then get hit by a train that was plainly obvious from a considerable distance. Were they to be exonerated? Others might decide not to get out of their cars because of the dangers of approaching traffic. Were they necessarily negligent? Holmes' formula ended up being a good argument for retaining jury discretion in grade crossing cases, and seven years later the Supreme Court, with Justice Cardozo treading carefully, abandoned the formula. 178

Goodman shows Holmes anxious not only to make a judgment

174. 275 U.S. at 69.
175. Id.
176. Id. at 70.
177. Id.
himself but to deprive juries of the opportunity to make that judgment in subsequent cases. The case was striking in that it lent itself to Holmes' "competing desiderata" analysis. A policy of allowing drivers to drive on the streets without being injured competed with a policy of allowing railroads to use their property in profitable ways. In *Patnoude* Holmes had said that the line that "had to be drawn to separate the domains of the irreconcilable desires" could not be "drawn in general terms." In *Goodman* he had attempted to do so. One could hardly call his posture deferential.

Holmes' decision in *Britt* was somewhat less ambitious. He sought to ascertain the limits of the "child trespasser" doctrine, by which landowners were deemed to owe a duty of care to children trespassing on their premises if the children could be said to have been attracted onto the premises by something on the land. Examples were railroad turntables, ponds, and excavations. In the *Britt* case two boys were camping near land where the United Zinc & Chemical Company had formerly operated a sulphuric acid plant. The company had abandoned the plant but left its foundations, in which residue from sulphuric acid and zinc sulphate remained. Water had accumulated over the foundations, giving the area the appearance of a pond, but the water, although clear, had been poisoned by the residue. The two boys investigated the site, a little over 100 feet from a dirt road, were poisoned, and died:

Holmes distinguished previous child trespasser cases on the grounds that the United Zinc & Chemical Company did not know that children had been in the habit of visiting the site and had not maintained the site adjacent to the road. "[I]t is at least doubtful," he wrote, "whether the water could be seen from any place where the children lawfully were." There had been no inducements, Holmes felt; there was no evidence that the water had "led [the boys] to enter the land." There was no pattern of children trespassing on the land that might have informed the United Zinc & Chemical Company of potential dangers. Even the presence of roads close to the site were not invitations: "[A] road is not an invitation to leave it elsewhere than at its end."180

*Britt* seems to have been a case ideally suited to leave to a jury, and as such raises the question why Holmes did not adopt that course of action. Child trespasser cases inevitably turn on their facts:

---

180. 258 U.S. at 276.
how much of an "inducement" the dangerous substance was, how much awareness the landowner had of trespassers, how easy the dangerous substance was to reach, etc. Given the fact that landowners had long been held to owe no duty to trespassers, the child trespasser doctrine seemed designed for those circumstances where a landowner knew that he was maintaining a dangerous substance on his land and knew or should have known that it would be attractive to children. If the railroad turntable was a paradigmatic attractive nuisance, since it was adjacent to a roadway and since it was the kind of substance that would appeal to children as a place to play, a pond near an abandoned building was not far from that paradigm. The only complicating factors in the Britt case were that the company apparently had no experience with trespassers on the site and that the site was not adjacent to the road. But those were surely not conclusive on the question of liability, given the very dangerous condition of the pond. The case seemed designed to be decided by the "common sense" of a jury.

It appears that some of the same tendencies that motivated Holmes to lay down the "stop, look and listen" standard in Goodman were at work in Britt. In his early career Holmes had been dismayed at the unpredictability and uncertainty of jury-made rules: If the child trespasser doctrine was to be invoked or not invoked depending on the sympathies of a jury, it was not a doctrine whose existence helped landowners (or potential trespassers) plan their affairs. Holmes seems to have wanted to use the Britt case as a means of confining the doctrine to those cases where a landowner had notice of children trespassing near a dangerous substance on his property. So formulated, the doctrine's impact would be greatly reduced, since it could never be invoked against a landowner in a "first accident" case. Once two boys had died as a result of coming into contact with a zinc company's dangerous abandoned plant it is unlikely that the company would permit the plant to remain in that condition; at a minimum it would post conspicuous warnings. Only if the company did nothing and a second accident involving children occurred would the child trespasser doctrine come into play. That was a predictable state of affairs; it was also unlikely to happen.

Goodman and Britt may suggest that Holmes' "activist" decisions on the Supreme Court were confined to those instances where he had engaged himself as a scholar. But many of Holmes' most famous opinions came in areas, such as the first amendment, that he had not addressed in his early career, and in some of these opinions
he dropped his usual pose of deference to legislatures. The line of first amendment cases, stretching from *Abrams v. United States*\(^{181}\) through *Gitlow v. New York*,\(^ {182}\) *Whitney v. California*,\(^ {183}\) and *United States v. Schwimmer*\(^ {184}\) to *Near v. Minnesota*,\(^ {185}\) was one set of examples: Holmes attempted to fix the outer limits of legislative regulation of speech. *Nixon v. Herndon*,\(^ {186}\) a case invalidating a Texas primary system that excluded blacks from participation, was another. Holmes said for the Court: "States may do a good deal of classifying that it is difficult to believe rational, but there are limits . . . ."\(^ {187}\) *Olmstead v. United States*\(^ {188}\) was yet another: There Holmes read the fourth and fifth amendments to prohibit the use of illegally seized evidence in a criminal prosecution. The case invoked "two objects of desire, both of which we cannot have," Holmes said; "we must . . . make up our minds which to choose."\(^ {189}\) He was unwilling in that instance to let a legislature make the choice.

Nor was Holmes willing to defer to a legislative judgment in *Mahon*.\(^ {190}\) There the Pennsylvania legislature had passed a statute that forbade the mining of anthracite coal on land in such a way as to endanger structures erected on the surface of the land in question. A landowner sought to apply the statute to prevent the Pennsylvania Coal Company from mining on land he had bought from the company. The company had expressly reserved sub-surface rights to the land and had also retained the right to remove coal from beneath the surface. Since the contract between the coal company and the landowner granted the rights to the subsurface and the company had a right to remove coal from the surface, the landowner argued that the statute did not apply.

---

181. 250 U.S. 616, 628-31 (1919) (Holmes, J., dissenting) (stating that defendant had right to publish leaflets supporting Russian revolution and attacking United States policy).
182. 268 U.S. 652, 672-73 (1925) (Holmes and Brandeis, JJ., dissenting) (stating that Socialist Party member should not have been convicted of criminal anarchy merely because he advocated a proletarian dictatorship).
183. 274 U.S. 357, 379 (1927) (Brandeis and Holmes, JJ., concurring) (overruled in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam)) (stating that mere advocacy of the desirability of proletarian revolution is protected speech but intent to commit serious present crimes is not protected).
184. 279 U.S. 644, 653-55 (1929) (Holmes, J., dissenting) (stating that a Quaker should not be denied United States citizenship because of her pacifist views).
185. 283 U.S. 697 (1931) (Minnesota statute authorizing "previous restraints" of periodicals that publish defamatory or malicious articles held unconstitutional infringement of freedom of press).
187. *Id.* at 541.
188. 277 U.S. 438, 469 (1928) (Holmes, J., dissenting) (overruled in *Katz v. United States*, 389 U.S. 347 (1967)).
189. *Id.* at 470 (Holmes, J., dissenting).
190. 260 U.S. 393 (1922).
owner had been made prior to the passage of the statute, the question was whether the statute was an unconstitutional deprivation of existing property and contract rights.

Holmes, for a majority of the Court, held that it was. "The general rule," he announced, "is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as taking." Here the Pennsylvania legislature had provided no compensation for the mining companies, and thus had infringed their rights. "We are in danger of forgetting," Holmes noted, "that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Even if the statute had been passed "upon the conviction that an exigency existed," the "question at bottom [was] upon whom the loss of the changes desired should fall."\(^{191}\)

Compensation cases such as Mahon involved "question[s] of degree," Holmes said, and "therefore [could] not be disposed of by general propositions." That being said, he did not defer to legislative balancing. The Pennsylvania statute went "beyond any of the [compensation] cases decided by this Court." A strong public desire for property did not itself justify a taking without compensation; otherwise the legislature could invoke its police power "more and more until at last private property disappears."\(^{192}\)

Mahon was not different for Holmes from the speech cases or from Nixon v. Herndon: There were limits to what states could do under their discretionary authority. Commentators have reacted differently to Mahon because Holmes protected property rights rather than personhood rights, but Holmes made no such jurisprudential distinctions. When he invoked the Constitution to invalidate a legislative restriction on rights, that was because the legislature had gone "too far." What was "too far" was a "question of degree," but sometimes the answer was obvious. When it was, Holmes saw no reason—"exigencies" notwithstanding—to defer to legislative judgments.\(^{193}\)

Neither conventional political labels nor common terms from jurisprudence help clarify Holmes' stance on the Supreme Court. Several commentators have shown that his opinions are imperfectly described as "liberal" or "conservative."\(^{194}\) This article suggests that

---

191. Id. at 412-16.
192. Id. at 415-16.
193. See, e.g., id.
194. For a recent collection of such efforts, see D. Burton, What Manner of Lib-

Published by Scholarly Commons at Hofstra Law, 1982 31
they are no more satisfactorily described as "activist" or deferential. When Holmes' tenure on the Supreme Court is subjected to detailed analysis, two striking and hitherto largely unremarked features appear. First, Holmes was nowhere near as activist in private law cases as his early scholarship suggested he might have been, but he was more activist, if anything, than he had been on the Supreme Judicial Court of Massachusetts. The Goodman and Britt opinions were in some sense throwbacks to his earlier theory, formulated as a scholar, of how negligence cases ought to be decided. Holmes retained on the Supreme Court the idea that most cases presented policy choices between competing "social desiderata," and while this led him toward deference to legislatures in many cases, it did not prevent him from making choices in others. He believed the choices to be arbitrary, but he made them anyway. Calling Holmes an advocate of self-restraint on the Court does not fully capture him.

Second, while Holmes saw that at the bottom of nearly every Supreme Court case was a choice between competing public policies, he was not deterred by that realization from making a prompt decision. If he chose to defer to a legislature, he spent very little time justifying the legislature's actions: The simplest bow to minimal rationality generally sufficed. Sometimes, in cases like Patsone v. Pennsylvania, Holmes did not even seem to be lingering over the question of legislative rationality. In that case he blithely accepted the legislature's premise that aliens were more dangerous to wild life than citizens. Nor was Holmes any less peremptory when he chose to upset a legislative judgment. That the Texas legislature had gone too far in Nixon v. Herndon was "too clear for extended argument." That the Pennsylvania statute in Mahon went "beyond any of the cases decided by this Court" needed only to be stated.

The overwhelming impression of Holmes' performance on the Supreme Court, then, is the same impression one gets of his performance in Massachusetts: Here was a judge whose principal interest seems to have been in having cases decided, written up, and disposed of. The vivid sentence with which Holmes ended his opinion in Britt, "a road is not an invitation to leave it elsewhere than at its end," captures the mood in which Holmes appears to have written

196. 273 U.S. at 541.
197. 260 U.S. at 416.
198. 258 U.S. at 276.
most of his opinions. The sentence is striking, but it is not much help, either as a general statement or as an explanation of the case. Travelers leave roads at a variety of places—indeed almost no one who travels on a road leaves it at its end. A road, in fact, is not an “invitation” to leave it at all; if anything, it is an invitation to take it somewhere, as being an easier place on which to travel than a field or a stream. But the sentence is designed to dismiss the argument that the presence of the road in *Britt* may have been an enticement to travel near the poisoned site. The sentence does “dismiss” that argument, but only through a largely erroneous statement that captures our attention. It is as if having turned a phrase Holmes decided that he had said enough, and could get on to something else. Holmes makes cases seem like toys scattered in a child’s room: The idea is to pick them up and put them in place, not to linger over the differences among them nor to give some more special meaning than others. When the job is over, the room is clean; the toys are “put away.”

IV. **REMEMBERING HOLMES: WHAT DOES HE LEAVE US?**

However much Holmes is written about or ignored, his reputation seems secure. I have suggested that his reputation may contain some erroneous components, such as the idea that he was consistently an apostle of judicial self-restraint, but that is not to suggest that it will not endure. Three of Holmes’ contributions seem so significant as to resist even the most aggressive form of historical debunking. First, he identified judging as an exercise in intuitive policy choices at a time when few other judges or jurists were prepared to concede that judging was anything other than finding and applying preexistent legal principles. For Holmes to see that cases were repositories of clashing policies was a keen enough insight; for him to come upon that insight in the midst of a jurisprudential climate that denied any policymaking component to judging was remarkable.

Second, Holmes helped develop a significant corollary to his insight that judges were policymakers. The corollary was his theory of deference, and while he did not originate the theory nor practice it exclusively, several of his opinions were powerful arguments for its use. This was particularly true in the public law area, and most particularly true in Supreme Court cases, where Holmes’ version of good sense was juxtaposed against tortured judicial efforts to preserve “dogma” at all costs. The accident of Holmes’ being on the Supreme Court at a time when legislatures had become more active,
and the Court had not developed a theory of responding to that activism, made him one of the original spokesmen on the Court for a theory of constitutional adjudication that was to have great influence in the twentieth century. While Holmes was never as zealous a proponent of self-restraint as some of his disciples, his opinion in Lochner gave deference intellectual respectability.

Third, as the last sentence from Britt illustrates, Holmes had a distinctively arresting style. No Supreme Court Justice matched Holmes in this regard; only Robert Jackson occasionally came close. The holdings of Holmes' opinions may be forgotten, but the epigrams remain. "A word is... the skin of a living thought;"199 "[g]reat cases like hard cases make bad law,"200 "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statistics;"201 "the best test of truth is the power of the thought to get itself accepted in the competition of the market;"202 "[t]hree generations of imbeciles are enough."203 Not one of these sentences was necessary to the decision in the case in which it appeared; all contain overstatements or ambiguities. Each, however, helps to universalize the act of opinion writing, to make it a process of communicating at the deepest levels of human experience. When a judge can write in that fashion subsequent generations will be gripped by his style. No notes of dissatisfaction with his opinions as guidelines for future conduct will fully detract from his appeal. Holmes wrote lines that spanned time.

But can one remember Holmes as more than the author of arresting epigrams? Does his jurisprudence leave us a foundation for thinking about judging? Here it seems that on some issues Holmes seems so overwhelmingly right that one wonders how a contrary position was ever seriously maintained, and on other issues Holmes seems so disinclined to explore questions once he has raised them that one is tempted to conclude that an important function of his jurisprudence is to cut off thinking at preliminary stages.

Holmes may have thought, when he was at the fever pitch of his scholarly efforts in the 1870's, that, while absolute certainty might be unattainable, fields of private law could be made more certain, in

the sense of being more regularized and predictable. The impulse toward certainty is a strong one in legal scholarship: Recently we have seen the "laws" of welfare economics offered as yet another source of regularizing the common law. But we should have learned the lesson Holmes had learned after sixteen years as a judge: "[C]ertainty generally is illusion, and repose is not the destiny of man."204 Too many variables exist for certainty in the law to be realizable: the discrete personalities and idiosyncracies of judges and other lawmakers; the changing intellectual climates in which research is conducted, which affect the normative dimensions of research and thereby insure that scholarly contributions will never be timeless; the fortuitous allocation of talent and incentives among counsel for one side or another; the strange ways in which the facts of a case compel a rule, which then evaporates when the facts fade into memory. Holmes may have been sensible, as a young scholar, to search for certainty; had he not thought it attainable he might not have tried to study private law subjects to their bottom. But he was even more sensible to abandon certainty as a judge. His metaphor of "growth" in the law, a series of decisions clustering around two poles and finally being separable only by an arbitrary line, rings truer than all the pronouncements that law can be made "scientific." I would not call Holmes' metaphorical description a process of growth, merely one of change, but I think as a description it is uncontroverted.

Does it follow, then, that since certainty in jurisprudence is elusive, humility and deference are the only appropriate lawmaking postures? Here I think Holmes' own indifference and the misguided labors of his disciples have contributed to lend prominence to a theory of judging that possesses serious limitations. During Holmes' tenure judicial deference resulted in legislation that helped alleviate some of the inequalities of rampant industrialism; in the 1950's and 1960's a similar version of deference would have perpetuated malapportioned legislatures, racially segregated facilities, the absence of legal representation for impoverished persons, and restrictions on the use and dispensation of birth control devices. The simple truth that law cases in America serve as a forum for testing conflicting ideas about public policy does not suggest that all such decisions should be made by "representative" or "community-minded" bodies, such as legislatures or juries. Sometimes the choices of the public are benighted or hasty

204. O. W. HOLMES, supra note 26, at 181.
or prejudiced; sometimes the majority oppresses those who differ with it. If Holmes taught us that judges, if unchecked, will make justice synonymous with their own prejudices, the Warren Court taught us that legislatures will do the same.

Deference or activism is thus a function of time and place and of the seriousness of the issues at stake. Sometimes a court does well to defer: The issues are volatile, the public divided, the principles hard to grasp. At other times a court seemingly has an obligation not to defer: A more representative body has forgotten elementary principles of justice and needs to be admonished by an institution whose popularity is not so dependent on majoritarian whim. It stretches Holmes beyond recognition to make him a Warren Court Justice, but he had his own areas, ranging from speech to sub-surface mining, where he found majoritarian solutions defective. Still, while one would like to blame Holmes' disciples for the agonized state in which self-restraint theory found itself after World War II, Holmes set it on that path. He found legislative rationality in too many mere pretexts, he tolerated repression in the name of democracy too often. Before long judges who considered themselves intellectuals and “liberals” in the tradition of Holmes were allowing legislatures to compel school children to salute the flag and to require that college professors go on record as opposing Communism. Holmes’ theory of deference had led them there; his having scrapped the theory when it suited him did not excuse his putting it on the market for others to misuse.

Linked to Holmes' beliefs that certainty was an illusion and that deference was often a sensible judicial posture was his conviction that judicial decisions were at bottom arbitrary exercises. As we have seen, the discovery of arbitrariness led Holmes in two directions, toward deference and also toward a “job mentality” that emphasized deciding cases so that they could be decided. Arbitrariness raises two separate issues: Are we resigned to its presence, and, if so, what can we do about it? As to the first, to sense that human decisionmaking is arbitrary seems to me the beginning of wisdom about the way persons conduct their affairs. All of us have our memories of a nakedly arbitrary decision, ranging from a situation when two devotees of one side of an issue forgot the date of a meeting, and the

205. See White, supra note 3, at 65-71.

206. For an example of one justice's agonized attempts to adopt Holmes' theory of deference to mid-20th-century cases, see H. Hirsch, The Enigma of Felix Frankfurter (1981).
other side won by a single vote, to a situation where a committee was deeply divided on the resolution of an academic matter, and finally decided in accordance with the views of the sole member who prepared written comments. Beyond those examples, all of us sense that many decisions are made that would have been made differently had different personnel been involved, had the timing of events been different, or had the issue been presented in different form. Holmes was right to see arbitrariness built into every discretionary decision; he was also right not to be afraid of it.

But does arbitrariness provide a justification for the kind of limited explanations for decisions that Holmes so regularly produced? Here it seems to me that one can advance two interpretations of the purpose of a judicial decision, and the explanations that one produces for one's results will be affected by the interpretation one chooses. One can see the decisions of cases as single existential phenomena: They occur, they dispose of a controversy, they cease to have an existence. Or one can see such decisions as communications beyond the immediate controversy, directed, potentially, at future litigants, future judges, commentators, the general public. If one holds to the first view there is not much point in advancing extensive justifications of one's results. New cases will necessarily be different; a whole host of variables will serve to distinguish them from the past, and prior explanations will not prove much use. I think that in many instances Holmes adopted this view, or at least was sufficiently skeptical of the utility of extensive explanations and sufficiently motivated to get on with the job that he acted as if he adopted it. On other occasions, of course, Holmes regarded a decision as a means of communicating more extensively; he did not dissent just to see how many memorable phrases he could turn.

The idea that judicial opinions communicate to audiences beyond the immediate parties in the dispute is one that once led me to characterize constitutional adjudication as a dialectical process.²⁰⁷ The dialectical theory holds that judicial decisions, at least when they interpret the Constitution, are in a kind of provisional state of acceptance: They possess the authority of the court that delivers them but their eventual acceptance—their legitimacy—has not been achieved. The process of legitimation involves a testing, over time, of the justifications advanced for the given interpretation. Of course the

interpretation yields a definite result, and the controversial nature of the result will play a part in how swiftly or how searchingly the interpretation is tested. But the process occurs to some extent in all decisions.

When a decision is being "tested," the pressure points of its explanatory apparatus may make a difference in how fully it becomes legitimated. To take a contemporary example, an opinion that seems not yet to have reached the status of being legitimated is *Roe v. Wade*, which is eight years old at this writing. *Roe v. Wade*’s indeterminate status is partially a function of the controversial nature of the issue it purports to resolve: Abortion is not an issue easily "settled" in one fashion or another. The decision’s indeterminate status seems also linked, however, to its explanatory strategy, which chose to emphasize the state of medical knowledge about when a life is “in being” as a crucial determinant for when an abortion is permissible. Such an emphasis, of course, renders the decision vulnerable to changes in the state of medical knowledge. If the time a life is said to come into being were to recede, in the view of a dominant number of qualified medical practitioners, until a point so close to conception that any abortion would be a termination of “life,” *Roe v. Wade*’s guidelines for abortion, which allow a mother unrestricted autonomy to terminate a pregnancy in the first trimester, might be threatened. In that instance *Roe v. Wade* could be taken as a communication into the future that was eventually found lacking in persuasive power due to the outmoded assumptions on which it rested.

Such seems to be the fate of many constitutional opinions. But one might argue that this form of communication, regardless of its vulnerability, is preferable to the cryptic, assertive form adopted by Holmes in many of his opinions. An explanation like that advanced in *Roe v. Wade* seems to be saying: “Here are my choices, between life and the autonomy of personhood; my decision to choose one over the other is necessarily arbitrary, but is influenced by some assumptions about the medical nature of ‘life’; if those assumptions are subsequently called into question, another arbitrary choice may result.” Holmes’ explanations rarely sought to communicate in so extended a fashion. Indeed when Holmes retreats to the kind of language he used to explain his results in such cases as *Patsone*—a reasonable man might well think aliens are dangerous to wildlife—one gets

---

209. See supra note 161 and accompanying text.
the impression that his tongue is in his cheek; that he is using the convention of deference to cut off communication rather than to open it up.

Here, finally, I come back to Holmes' job mentality. There are many cases, he seems to be saying, where the choices are between generally desirable policies that happen to conflict; we must prefer one or the other; we will surely not invariably prefer that one on every occasion; we have a case to decide; let's get on with it. But that method tells us precious little about why one policy should prevail over another even in this case. It seems to tell us, in fact, only that the judge made a choice; another judge might have decided differently. That message leads us to The Path of the Law and the "prophecies of what the courts will do in fact,"210 to the idea that law is synonymous with the arbitrary fiats of officials, and to related cynical revelations. If we end up endorsing such cynicism, Holmes can take some of the credit.

But I think Holmes intended to convey something more in his cryptic explanations. I think he was attempting to show that in a truly "hard" case, if you force an extended explanation, that explanation will crumble to pieces on reflection. And as one explanation after another crumbles, one is left with the fact of judicial power, the force of judicial intuition, and the way the law has of correcting itself over time. After a while, Holmes seems to say, it is not the explanations that count—they all crumble, eventually—but the decisions. One's job as a judge becomes to decide—that is what people count on one to do; that is what judges have the power to do where ordinary people do not—and not to agonize about why. Cryptic explanations, then, are intended to cut off thinking about issues that are sufficiently complicated and difficult to benumb one's mind. At some point one has to stop thinking and choose. It may be that Holmes' view of judging makes sense—and if it does, the concept of a dialectic of constitutional adjudication seems so much academic gossamer—but even if it cuts off thought and explanation too soon, it may not be the easy way out. The easy way out may be to pretend that sooner or later some disinterested, reasoned justification will emerge mysteriously out of one's ruminations as one tries to decide a case. Holmes looked to the bottom of cases and saw only his own reflection. Should we probe so far, we might conclude that reasoning in epigrams was preferable to more extended ratiocinations. Length is not the equivalent of depth.

210. See supra note 114 and accompanying text.