

Introduction

Born and bred on Beacon Hill during the height of the American Renaissance, Oliver Wendell Holmes was one of the most interesting men of his era. At twenty, he enlisted in the Union Army, where he survived three serious wounds and a nearly fatal bout of dysentery. Returning home, he began a legal career that spanned seventy years and included service as a practicing lawyer, a legal scholar, and a law professor. He spent fifty years on the bench, moving from the Massachusetts Supreme Judicial Court to the Supreme Court of the United States. Since his death in 1935, his legacy has been the subject of hundreds of books and scholarly papers. Many of these offer important insights, but, taken as a whole, they convey an image of Holmes that is more like a Rorschach inkblot than a real man of flesh and blood. In this book, I try to recreate the man by exploring the historical circumstances that formed him and his own unique response to those circumstances.

It is no exaggeration to say that Holmes is the preeminent voice of American law. There are many reasons for this. First, there was the longevity of his career. Second, there was the fact that his tenure on the bench was extremely well timed. When he served on the Massachusetts court, it was a leader in reshaping the common law to meet the needs of the industrial age; and when he arrived at the US Supreme Court, it was the beginning of the Progressive Era when new forms of regulation posed challenges of interpretation and constitutional adjudication. Nor was his influence simply the result of his judicial opinions. He also wrote two of the classics of American jurisprudence. In *The Common Law* (1881), Holmes traced the development of the common law from ancient times to the present day. In doing so, he made a distinctive statement about the

nature of law. His second contribution to legal theory – “The Path of the Law” (1898) – was in the form of a speech to Boston University law students. The speech is notable both for its analysis of law and for the wise counsel it has given to generations of law students.

But Holmes is not just known for his professional accomplishments – his private life has been a subject of continuing interest. He came from an illustrious family – his father was famous, both as a poet (a friend of Longfellow and Emerson with whom he founded the *Atlantic Monthly*) and as a medical educator (he was one of the moving spirits behind Harvard Medical School, serving on its faculty and then as its dean). Holmes, the son, received public notice as a hero of the Civil War. Later, when he served on the Supreme Court, he was well known for his quotable opinions and his striking appearance. He was exceptionally tall, stood very straight, had thick white hair, and sported a military mustache. He was an imposing figure who captured the public imagination as he became the subject of countless books, a general release motion picture, and even a Broadway show. By the time of his death, he had achieved a measure of fame greater than most presidents.

For Holmes, the price of celebrity has been high. Celebrities are not just people who are famous; they are the shared images of our public life. Since his death, Holmes’s persona has survived many such incarnations. At first, he was the “Yankee from Olympus,” standing for the triumph of old-fashioned American values over the creeping mediocrity of the industrial age. Dozens of books sang his praises, portraying him as a seasoned jurist who represented the law’s ability to be both flexible and fair.

All this changed, however, with the Second World War. After the war, there were some who thought that Holmes’s pragmatism was tainted, finding it incompatible with the high ideals they had fought to defend. And the Cold War provoked a similar reaction. American values faced off in an ideological struggle with godless communism, and, in this context, Holmes’s blunt skepticism seemed like an embarrassment.

With the end of the Cold War, one might have expected that Holmes’s reputation would be restored, but a third image emerged. Influenced by the American misadventure in Vietnam, a new set of scholars found Holmes’s love of war pathological and unacceptable. Like their 1950s counterparts, these writers believed that Holmes was a poor – even dangerous – role model. They thought that he, like so many war veterans, had been psychologically damaged by military service. They painted him as cold and distant; they argued that he was handicapped as a judge due to his inability to empathize with others. But not everyone agreed. Holmes

still has many admirers who think of him as a fitting ideal for American law.

What, then, is Holmes's story and why have so many found it compelling? To tell Holmes's story is not an easy task. Amidst all the controversy, it is hard to find the man of flesh and blood whose real life became the repository for so much ambivalence. Holmes was a private person. Like many New Englanders, he was reticent to speak about what was most personal to him. He would occasionally – and somewhat coyly – hint at it. Sometimes, we can hear it when he talks about the Civil War – hence, we have “The Soldier's Faith” and other intensely personal speeches. But the heart of his philosophy – the part that involved “great questions of right and wrong” and “the relations of man to God” – remained unexpressed. Thus, we cannot understand Holmes simply by reading his words. To understand the words, we must try to understand the man who spoke them.

For this reason, this book is divided into two parts. In Part I, I explore Holmes's early life and influences. In Part II, I consider his intellectual development and his mature writings, including some of his legal opinions. The conclusion I reach is that Holmes's personal philosophy rested on three main pillars. The first was pragmatism. Pragmatism fueled his intellectual humility, reminding him that there is no privileged access to the truth. The second pillar was his commitment to empirical science. Holmes believed in the scientific method, and had an enduring interest in applying it to the study of law. The third pillar came from Emerson, whose Transcendentalism inspired him to live what Emerson had described as a life that was “secretly beautiful.”¹

This project has been complicated by the fact that even a superficial reading of Holmes's words suggests two very different attitudes that underlie his work. On one hand, Holmes was reductionist – law is reduced to power, knowledge to belief, etc. Note, for example, the way in which he debunks the concept of natural law:

The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar . . . as something that must be accepted by all men everywhere.²

Rejecting this, Holmes identifies law with the power to punish, finding the foundation of law in the fact that his fellow citizens “tell me that I must

¹ Ralph Waldo Emerson, *The Young American* (Feb. 7, 1844).

² Oliver Wendell Holmes Jr., *Natural Law*, 32 *Harvard Law Review* 40, 41 (1918).

do and abstain from doing various things or they will put the screws to me.” The clear implication is that Holmes believes that law is a way of decision-making that is shaped by instinct and custom, and that its power is enhanced by the seeming inevitability of thinking as we always do. Thus, Holmes’s reductionism leads him to equate law with power, and the demand for justice with the very same instinct that makes “a dog fight for its bone.”

On the other hand, Holmes had a speculative reach that seemed to find hidden meanings, glimmers, and echoes of the divine in every aspect of human experience. It is not incidental that he would sometimes refer to the Universe (with a capital U) or Law (with a capital L). Note, for example, how he closes *The Path of the Law* with the suggestion that law is a path to mystical insight:

The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.³

Does this suggestion return him to the realm of natural law? And if so, we are left to wonder: Where is the dog? Where is the bone?

This duality was no mere ambivalence about law. In fact, we see something similar when he talks about truth and the meaning of experience. For example, here is the reductionist account:

When I say that a thing is true, I mean that I cannot help believing it. I am stating an experience as to which there is no choice. But as there are many things that I cannot help doing that the universe can, I do not venture to assume that my inabilities in the way of thought are inabilities of the universe. I therefore define the truth as the system of my limitations and leave absolute truth for those who are better equipped.⁴

And here is Holmes, the mystic, suggesting truth rises from life in the same way that a mist rises from a swamp.

Life is a roar of bargain and battle, but in the very heart of it there rises a mystic spiritual tone that gives meaning to the whole. It transmutes the dull details into romance. It reminds us that our only but wholly adequate significance is as parts of the unimaginable whole. It suggests that even while we think that we are egotists we are living to ends outside ourselves.

³ Oliver Wendell Holmes Jr., *The Path of the Law*, 10 *Harvard Law Review* 457, 478 (1897).

⁴ Oliver Wendell Holmes Jr., *Ideals and Doubts*, 10 *Illinois Law Review* 1, 2 (1915).

Can Holmes be both a mystic and a skeptic? If he can learn the secrets of life by listening to a “mystical spiritual tone,” then why is he so skeptical about man’s ability to know “absolute truth”?

This duality presents a special problem for understanding Holmes. Was Holmes just pontificating with no particular desire to be consistent? If not, which voice should we credit as serious? Or, in the alternative, how can these voices be reconciled? The answers are not obvious.

To address these questions, I look to Holmes’s pragmatism. Pragmatism is a distinctly American philosophy that was first articulated by men such as Charles Peirce, William James, and – yes – Oliver Wendell Holmes. The key to understanding pragmatism is to recognize that it mandates a different way of thinking about objectivity and subjectivity.

Influenced by British empiricism, we are led to think of these terms in the context of a particular epistemology. Central to this view is the claim that all objective knowledge originates from one of the five senses. For example, if I say that the rose is red, I am reporting the result of an empirical observation. Since this is based on visual input, we treat it as information about an external object and therefore classify it as objective. On the other hand, my judgment about the beauty of the rose is not merely the product of sight. It reports something about me, the speaking subject. It says, in effect: I have an emotional response to the rose that flows from the nature of my subjective self. Therefore, we treat judgments about beauty as subjective. This way of analyzing knowledge leads to a distinction between facts and values. Facts are statements about the world. They are objective because they report information from the five senses. Values, on the other hand, report something about the observing subject and are therefore subjective. And this way of putting it has the additional virtue of explaining why it is that we easily come to an agreement about matters of fact but are not able to do so in assessing value.

The pragmatists turn all of this on its head. For reasons that I explain in Chapter 5, they begin with the idea that something is objectively true if it becomes the object of consensus. Subjective things, on the other hand, are those about which we often disagree. In embracing this idea, the pragmatists do two things. First, they remove the privileged status of sense data as the determinant of objective truth. Second, they confer new importance on things that are subjective. The traditional empiricist might say: In knowing that the rose is red, I know the objective truth, but when I hear you say the Rose is beautiful, all I learn is a relatively transitory fact about you. The pragmatist, on the other hand, believes that the “subjective” realm contains the answer to life’s most important questions.

When we put Holmes's views in the context of his pragmatism, the contradiction between the two sets of statements seems less troublesome. The first (law is power; truth is the irresistibility of an idea) statements belong in the objective realm. The truth behind these claims stems from the fact that all matters of personal disagreement have been swept away. As Holmes might say, they have been washed with a cynical acid. The notion of the law as power is true whether or not you are a member of the community whose moral life has defined it. The second set (law is an echo of the infinite; truth is a mystic spiritual tone) records the subjective. For the British empiricist, such thoughts might be hardly worth mentioning. But for Holmes, the second was even more important than the first. It not only defined the substance of his internal life, it also illuminated his connection to the Universe.

Of course, this emphasis on the subjective was not unique to Holmes. It goes back at least as far as the pre-Socratics, and in modern times, it has been the focus of the Romantic poets and their American counterparts – Emerson and the Transcendentalists. Thus, it is not surprising that Emerson plays such an important role in Holmes's intellectual life.

Emerson was also an empiricist, but his view of experience was more complex than that of the British empiricists. On one level, he thought that experience represented a seemingly material world, but on a different level, he believed that it operated metaphorically, offering multiple layers of insight. Experience, he taught, teaches us how best to accomplish our goals. For example, we learn that a stitch in time saves nine – not just when we are mending, but also when we are building bridges and delivering medical care. On an even deeper level, experience becomes a metaphor for life itself as we watch a stream flow or the sun rise. As Emerson put it:

Have mountains, and waves, and skies, no significance but what we consciously give them, when we employ them as emblems of our thoughts? The world is emblematic. Parts of speech are metaphors, because the whole of nature is a metaphor of the human mind. The laws of moral nature answer to those of matter as face to face in a glass. . . . The axioms of physics translate the laws of ethics. Thus, "the whole is greater than its part"; "reaction is equal to action"; "the smallest weight may be made to lift the greatest, the difference of weight being compensated by time"; and many the like propositions, which have an ethical as well as physical sense.⁵

Looked at in this way, experience yields both practical knowledge and mystical insight. Thus, the two seemingly disparate parts of Holmes's

⁵ Ralph Waldo Emerson, *Nature*, 41 (1836).

character are joined together. On one hand, it makes sense for him to speak of law as a “well known profession”:

When we study law we are not studying a mystery but a well-known profession. . . . The reason why it is a profession, why people will pay lawyers to argue for them or to advise them, is that [p]eople want to know under what circumstances . . . they will run the risk of coming [up] against [public force] and hence it becomes a business to find out when this danger is to be feared.⁶

On the other hand, it is also true that we can look at law as “the witness and deposit of our moral lives,” and when we look at law this way, it has a deeper meaning.⁷ We gain an understanding of human nature and human aspiration. We learn to admire some things and scorn others. We are able to “connect [our subject] with the universe and catch an echo of the infinite.”

We can see, therefore, that Holmes’s pragmatism and his admiration for Emerson provide us with clues for understanding how to reconcile the apparent inconsistencies in Holmes’s philosophy. But this is not a final answer. We have found one way to interpret Holmes, but is it the right way? Is it possible that Holmes believed in a reductionist theory about law and power, and that he viewed the rest as extraneous – a kind of icing on the cake, a bow to nineteenth-century conventions, or an *ex post facto* attempt to find meaning in an otherwise reduced world? This is not a question that can be answered by citing additional text.

My answer again involves pragmatism, but this time, it is not Holmes’s pragmatism, it is my own. As a pragmatist, when I wish to know the meaning of a concept, I look to its practical effects on action. In this case, I look not just to Holmes’s words but also to the way he lived his life, how his beliefs translated into habitual responses to common problems. Looking at these, I find the Emersonian explanation compelling. What convinced me were Holmes’s actions. During the Civil War, at a time when he was looking for inspiration and courage, he requested and received an autograph from Emerson. He carried it in his breast pocket throughout combat. Furthermore, when the war was over, he worked day and night to master the law, putting in a kind of effort that could not be justified by practical ambition. In fact, he was struggling to find a meaningful life – one that he felt could only be found in “the roar and bargain of battle.” His actions spoke louder than his words, and having spoken, they argued for his sincerity.

⁶ Holmes, *supra* n. 3 at 457. ⁷ *Id.*

In framing the issue this way, I am intentionally blurring the line between conventional biography and intellectual history. We all have a need to understand others, but as philosophers have pointed out for centuries, this goal is problematic. While we may form opinions about what others think and believe, there is no way to check our answers. The result is that understanding others is an inherently speculative process. This being so, it is important to have some principles of interpretation. Philosopher W. V. O. Quine, for example, suggests a principle of charity.⁸ This principle states that I should interpret others in a way that maximizes the truth of what they are saying. To this, another philosopher has added a principle of coherence, which requires us to assume a logical consistency on the part of the speaker.⁹ The result of adhering to these two principles is inevitably an interpretation that is most favorable to the subject – or at least one that maximizes his or her agreement with the views of the interpreter. While I view this as inevitable, others may think that it is an error to engage in this form of interpretation. For this reason, I offer the following external justification for my interpretation of Holmes.

I believe that my reading of Holmes corresponds with the known facts and with the provocative but incomplete statements that he made about his own beliefs. Even more, my interpretation of Holmes has an explanatory power that many of the other interpretations have lacked. The notion that Holmes was psychologically flawed and deeply ambitious goes only so far in explaining his largely successful life. Indeed, such negative assessments leave it a mystery that he achieved such importance not only to American law but also to America's conception of itself. Neither can they explain why he had such an inspirational impact on so many of the men who knew him. My more positive assessment of him at least has this one significant virtue: it explains Holmes in such a way that we can understand why he continues to engage us in useful and meaningful ways.

⁸ Quine cites the principle of charity as a maxim of translation. He states it thus: "Assertions startlingly false on the face of them are likely to turn on hidden differences of languages." W. V. Quine, *Word and Object* 59 (1960). It may seem odd to the reader that I need a maxim of translation to interpret the words of a man who spoke the same language as I do. It is important to keep in mind, however, that the notion of "the same language as" is itself problematic. Quine argued that this is the best we can do when we engage in what he calls "radical translation." I leave to another time the question of whether this includes a simple attempt to understand the views of another person.

⁹ The principle of coherence assumes the maximum logical consistency in the mind of the speaker. See Donald Davidson, *Three Varieties of Knowledge*, in Donald Davidson, *Subjective, Intersubjective, Objective* 211 (2001).