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Gary Minda

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# COMMENTARY: THE DRAGON IN THE CAVE\*

Gary Minda<sup>†</sup>

## INTRODUCTION

We celebrate Holmes and *The Path of the Law* because we are still living in the "Century of Holmes." Yet, as the papers by Professors G. Edward White, Thomas C. Grey and Catherine Pierce Wells suggest, there is much about Holmes that we still do not understand. We are still trying to figure out why Holmes is such an important figure in the development of American law. We are still trying to make sense of the cryptic nature of Holmes's legal theory. We are still struggling to appreciate the significance of Holmes's role in the development of American jurisprudence.

Professors White, Grey and Wells offer different interpretations about the following: (1) Holmes's dissent in *Lochner v. New York*;<sup>1</sup> (2) the contradictory nature of his essay, *The Path of the Law*;<sup>2</sup> and (3) the meaning to be attributed to the cynical nature of general Holmesian thought. While the substantive focus of each of these papers is different, all three attempt to shed new light on Holmes. The combined effort of these papers, however, ultimately fails to clarify the many mysteries surrounding Holmes and his ideas. Indeed, after considering what Professors White, Grey and Wells have to say about Holmes, we are left pondering a new set of perplexing puzzles.

First, there is the problem of assessing Holmes's popularity and the meaning to be attributed to his famous dissent in *Lochner v. New York*.<sup>3</sup> Is the orthodox wisdom about Holmes's dissent correct in portraying Holmes as an enemy of substantive due process? Was Holmes a modernist hero who helped to

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<sup>†</sup> William J. Mairer, Jr., Visiting Professor of Law, West Virginia University College of Law; Professor of Law, Brooklyn Law School.

<sup>1</sup> 198 U.S. 45 (1905).

<sup>2</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

<sup>3</sup> *Lochner*, 198 U.S. at 74.

push us into the twentieth century, or was Holmes a troubled modernist thinker who was still caught up in the nineteenth century jurisprudence of his day? What explains the popularity of Holmes's *Lochner* dissent in the progressive era, and why did it take so long for Holmes to be lionized?

Holmes is now, as Professor White has argued, a professional and cultural icon in the history of American legal thought. His humanity was turned into marble long ago as judicial biographers and legal theorists idolized and mystified the man. In the paper he presented today, Professor White is chiseling and hacking at Holmes's dissent in *Lochner* in his most recent effort to rediscover the "real Holmes" underneath all the marble erected by those who put Holmes on a pedestal. In getting us to the real Oliver Wendell Holmes underneath all the marble, Professor White hopes to recover the way Holmes and his contemporaries on the Supreme Court actually thought about the constitutional issues in *Lochner*.

The standard story about what the Court did in *Lochner* is as follows: In *Lochner*, the Court struck down the New York law restricting the number of hours bakers could work because the Court mistakenly assumed that the constitutional concept of "liberty" was a prepolitical, universal concept, shaped by the laws of the political economy. New York's maximum hours legislation was found to violate the Due Process Clause because it was contrary to the universal laws of a laissez faire market. The standard story about Holmes's dissent in *Lochner* is that he exposed how the concept of liberty embraced a conservative, laissez faire ideology that was blocking the much needed state regulation of the economy.

Commentators casted the *Lochner* majority as nineteenth century Langdellians who believed in obsolete natural law; Holmes was cast as a modernist hero advancing the twentieth century case for big government and the modern regulatory state. Professor White's intellectual project is to expose how these perceptions deviate from what Holmes and his contemporaries actually thought, and how they were created in the 1930s by liberal progressives, like Felix Frankfurter, in order to undermine substantive due process.

Professor White also hopes to tame a canonization process which he says has distorted our historical understanding of Holmes and his famous *Lochner* dissent. To do this, White must reinterpret the meaning of the icon that has become Oliver Wendell Holmes.

Professional and cultural icons, however, are not easily interpreted because they are similar to a religious text. To interpret the meaning of the text, one must interpret the meaning of a particular interpretive culture and tradition. For Professor White, the culture responsible for the lionization of Holmes's *Lochner* dissent was the progressive era, and the religion was a new epistemology, or theory of knowledge, now known as modernism in law.<sup>4</sup> According to Professor White, the epistemological assumptions of Holmes's interpretive community provide clues for reexamining the standard story about *Lochner*.

White first claims that Holmes's popularity must be reexplained in the light of an epistemological shift in constitutional jurisprudence that took place in the 1930s. This shift supposedly enabled legal progressives like Felix Frankfurter to lionize Holmes as a great champion of progressive legislation. According to Professor White, legal progressives found within Holmes's *Lochner* dissent the inspiration for replacing an epistemology that assumed there was nothing one can do about the economy (*laissez faire*), with a new epistemology that accepted the view that human beings have the power to control their economic destiny. Professor White argues that the lionization of Holmes was successful in making him a champion of progressive causes because, by mid-century, legal progressives were pushing American jurisprudence towards this new epistemology, an epistemology White identifies with modernism in law.

Professor White's thesis is that when Holmes's *Lochner* dissent is read in light of his interpretive community, however, Holmes should be understood as merely a "transitional figure" in the passage from a premodernist to modernist jurispru-

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<sup>4</sup> For my interpretation of modernism in law, see GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 5-6, 13-80 (1995) [hereinafter MINDA, *POSTMODERN LEGAL MOVEMENTS*]; Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, 28 *IND. L. REV.* 353 (1995) [hereinafter Minda, *One Hundred Years*].

dence. According to White, Holmes was a legal modernist to the extent that he accepted the importance of human will and human agency in the development of law, but Holmes's modernism was tempered by premodernist assumptions about the capacity of government to regulate the economy.<sup>5</sup> White attempts to show how Holmes's "premodern" sensibilities were in fact influenced by a nineteenth century political philosophy which accepted the notion that the economy was constrained by external "forces."<sup>6</sup>

Following White's suggestion, I think one would find that Holmes's premodernist sensibilities were consistent with the laissez faire philosophy of the *Lochner* majority: economic regulation was unwise because it interfered with the external laws of a laissez faire market economy. Why, then, did Holmes's "premodernist" cast to jurisprudence not lead him to side with the majority in *Lochner* and strike down the maximum hours legislation?

Professor White's answer is that by 1905, Holmes's skepticism of the powers of legal reasoning had combined with the principle of legislative supremacy and the belief in majoritarian will. Holmes's skepticism isolated him from the progressives, but Holmes's belief in legislative supremacy worked in favor of the progressive attack on substantive due process. Professor White thus argues that Holmes dissented in *Lochner* because he believed in the principle of legislative supremacy. Nonetheless, as Professor White says, Holmes never

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<sup>5</sup> E.g., G. Edward White, *Revisiting Substantive Due Process and Holmes's Lochner Dissent*, 63 BROOK. L. REV. 87, 91 n.7 (1997) [hereinafter White, *Revisiting*]. See also G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576, 579 n.11 (1995). White argues that modernists believed in the power of human reason and human will to control the universe, and that premodernists were united by external constraints.

<sup>6</sup> This view is similar to the view in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In *Abrams*, Holmes stated that "the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." *Id.* Hence, Holmes seems to embrace the premodern idea of truth—the "truth" of some idea can be determined by an external process regulated by the laws of marketplace competition.

On the other hand, Holmes's ideas about legislative supremacy or the truth process may be merely a reflection of Holmes's refusal to decide difficult social issues himself.

avored maximum hours regulation as such because he was skeptical about the ability of government to alter the forces of market competition.

If Holmes had reservations about the deductive powers of law and government, why would he think that the principle of legislative supremacy would enable him to deduce the correct result in a case like *Lochner*? Holmes's skepticism about legal reasoning and his views about the "fallacy of logic" surely must have carried over to his thoughts about the principle of legislative supremacy. Even if he had faith in legislative supremacy, that principle did not have to lead him to dissent in *Lochner*. As Professor Grey once explained, "one might accept [the principle of legislative supremacy] and yet strike down the maximum hours law, characterizing liberty of contract not as part of a controversial and historically transient economic theory but rather as a fundamental aspect of personal liberty."<sup>7</sup>

This is not to say that Holmes did not have reasons for abstaining from deciding the constitutional issue raised in *Lochner*. Holmes's position on the principle of legislative supremacy may have been merely another example of his general refusal to decide difficult social issues.<sup>8</sup> Perhaps Holmes simply did not want to decide the issue in *Lochner* because he was more comfortable deferring to the opinions of others. Thus, I do not think we can say with any certainty that Holmes was wedded to a nineteenth century theory of laissez faire.

By the time *Lochner* was decided, Holmes had abandoned attempting to decide the underlying social policy questions at issue in cases like *Lochner*. By 1905, Holmes had given up on his search for the imminent rationality in law and embraced the mantle of judicial self-restraint. As Morton Horwitz stated:

Judicial restraint follows from the collapse of [Holmes's] search for imminent rationality in customary law. If law is merely politics, then the legislature should in fact decide. If law is merely a battle

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<sup>7</sup> Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 820 (1989).

<sup>8</sup> Holmes frequently reached decisions by deferring to someone else's point of view. See, e.g., Catharine Wells Hantzis, *Legal Innovation Within The Wider Intellectual Tradition: The Pragmatism Of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541, 590-92 (1988).

ground over which social interests clash, then the legislature is the appropriate institution for weighing and measuring competing interests.<sup>9</sup>

Horwitz's view places Holmes squarely in the progressive camp, along with Felix Frankfurter. I wonder, then, whether Professor White's effort to distance Holmes from Frankfurter is correct.

There are also some perplexing questions raised by the way Professor White frames his project. In the introduction of his paper, he states that "[Holmes's] particular consciousness made him read police power cases in a quite different fashion from his fellow jurists and commentators."<sup>10</sup> Moreover, he announces that "[his paper will] proceed to trace the implications of this epistemological divide between Holmes and most other judges of his time."<sup>11</sup>

What follows are questions I raise about how Professor White has framed the theoretical issues of his paper: Why does Professor White say that Holmes had a "particular consciousness," and why does he believe that this made Holmes read the police power cases in a particular way? Is judicial interpretation in constitutional adjudication the product of a particular consciousness? Can we reconstruct the historical consciousness of a particular judge by deducing it from the judge's epistemology or theory of knowledge? Do modernist and premodernist epistemologies determine how judges interpret the law and cast their votes in cases like *Lochner*? And, what kind of epistemology would frame the analysis in this way?

Surely, something more than just epistemology is at work in constitutional adjudication. At the outset, I would raise the possibility that interpretation is not epistemology. If we want to interpret the historical meaning of judicial opinions we should think more about how legal interpretation operates in constitutional adjudication.

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<sup>9</sup> MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1870-1960*, at 142 (1992).

<sup>10</sup> White, *Revisiting*, *supra* note 5, at 90-91.

<sup>11</sup> White, *Revisiting*, *supra* note 5, at 91.

We need to interrogate the authority of the epistemological assumptions that frame Professor White's historical inquiry. As Stanley Fish suggested, we should consider how historical and legal interpretations, like all interpretations, are conventional, in the sense that they are the product of particular interpretive assumptions of a particular interpretive community.<sup>12</sup> To do this, we need to investigate how different interpretive assumptions frame the scholarly inquiry as applied to both the person doing the analysis as well as the person who is the object of that analysis.

Additionally, I wonder whether Professor White's epistemological categories of premodernism and modernism can really be distinguished from one another.<sup>13</sup> I think that modernism in law should be thought of as a reaction to the tension posed by the two epistemologies categorized by Professor White.<sup>14</sup> Thus, I argue that what Professor White calls premodern and modern epistemologies are really two different sides of the same coin—they reflect the different sides of modernism in law. One side is committed to the view that there are external constraints on policymaking—law is discovered, not made. The other side is committed to the contrary view that law is a social construction, and hence policymaking is unrestrained. The two sides contradict each other, and that is what creates the tensions within modernism in law.

When woven together, these two sides of modernism help explain the intellectual mood of modern legal scholars who believe in the authority of the rule of law but accept the lessons of legal realism that law is made, not discovered. The

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<sup>12</sup> See STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* 269-72 (1980).

<sup>13</sup> In an important footnote, Professor White contends that Holmes was a modernist to the extent that he affirmed the primacy of human-centered causation. White, *Revisiting*, *supra* note 5, at 91 n.7. White argues, however, that Holmes also embraced a premodernist epistemology that accepted the idea that there were external constraints on policymaking. White, *Revisiting*, *supra* note 5, at 91 n.7. As White puts it:

Although Holmes denied the intelligibility of essentialist external principles in law, he acted as if such principles retained an intelligibility in other realms. Hence he could launch a critique of the judicial doctrine of "liberty of contract" without endorsing the efficacy of initiatives in "social legislation."

White, *Revisiting*, *supra* note 5, at 91 n.7.

<sup>14</sup> See MINDA, *POSTMODERN LEGAL MOVEMENTS*, *supra* note 4, at 13-22. See also Minda, *One Hundred Years*, *supra* note 4, at 357-67.



history of modern legal thought can then be told as a story of a series of failed attempts to reconcile and synthesize this tension. What makes Holmes 'a modernist is that he, like Langdell, believed that the faculties of the mind or the forces of faith would enable human beings to someday resolve the conflicting aspects of modern law. I thus read Professor White as discovering within Holmes's legal thought the contradictions of legal modernism.

Finally, I wonder whether Professor White's epistemology thesis explains what is really going on in the canonization of Holmes. As Professor White observed, the canonization of Holmes in the progressive era was stimulated by political opposition to the canon that had been created by substantive due process. Professor White argues that Holmes became a canon in the progressive era so that progressives could kill or tame the substantive due process canon. I do not think we can explain why one canon wins over another merely by looking to the theory of knowledge or epistemology. On this point, politics and culture must also play a role.

As noted by Professor White, the legend of Holmes has so waxed and waned in the last one hundred years that it is quite difficult to understand what is pulling and pushing this legend—particularly because we are still in the process of discovering amazing new details about this man. After all, it was only a few short years ago that we discovered that Holmes had an affair during his long marriage to Fanny. Indeed, with what judicial biographers are now saying about Holmes, one wonders whether Holmes is on his way to becoming a new kind of romantic hero or antihero. This is not based on shifts in epistemology, but rather on new speculation about his extramarital affairs and his sexuality. Consider, for example, the startling new revelations of Sheldon Novick's recent book on Henry James, suggesting that Holmes and James were lovers.<sup>15</sup>

Could it be that Holmes is on his way to becoming a new cultural icon for the gay and lesbian communities? Stranger things have happened in the current postmodern era. Consider, for example, what the new historians have said about one of

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<sup>15</sup> See Michiko Kakutani, *Rummaging in the Mind of a Genius Growing Up*, N.Y. TIMES, Nov. 1, 1996, at B4 (reviewing SHELDON M. NOVICK, *HENRY JAMES: THE YOUNG MASTER* (1996)).

my favorite cultural icons of the 1950s: Davy Crockett and the defenders of the Alamo. The new historians now say that Crockett did not wear a coonskin cap, that he put on a dress and tried to escape with the women and children in the Alamo, and that the defenders were actually attempting to hoard silver and gold from Santa Anna which they stole from the Apaches whom they had butchered.<sup>16</sup>

Thus, I would not be surprised if Holmes ends up becoming a new kind of multicultural icon. If Davy Crockett was cross-dressing at the Alamo, then maybe Holmes and James were more than just literary friends. Who knows for sure? In thinking about the canonization process, we need to consider how politics and culture, and in our case, the "politics" of postmodernism, work to canonize and re-canonize famous dead people in American history.

The second intellectual project about Holmes concerns the explanation of the contradictions and tensions within his legal thought. What should we make of the inconsistent cast to Holmesian jurisprudence? Is Holmes's most famous legal essay hopelessly doomed to analytical tension and inconsistency, or is there a way to read *The Path of the Law* as a consistent and coherent jurisprudential text? This is Professor Grey's project, although both Professors White and Wells have contributions to make on this point. Nevertheless, I will focus on Professor Grey's paper.

Professor Grey seems to say that the tensions in Holmes's *The Path* are good examples of what one can expect when a legal pragmatist engages in legal theory. Because legal pragmatists do not believe in theory, they are not too concerned with tensions, contradictions or logical coherence. Instead, legal pragmatists care primarily about the law serving a useful purpose in getting a job done. Legal pragmatists exhibit what Professor Grey called "freedom from theory-guilt."<sup>17</sup> Or, as

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<sup>16</sup> See Allen R. Meyerson, *For Defenders of the Alamo, the Assault is Joined Anew*, N.Y. TIMES, Mar. 29, 1994, at 1.

<sup>17</sup> See Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1569 (1990). Professor Grey seems to be saying in his paper that Holmes's *The Path of the Law* exhibits good-old American "freedom from theory-guilt" because Holmes's pragmatism leads him to use whatever works—a little of this, a little of that—to convince us of the importance of being pragmatic about law.

Jack Balkin once put it: "Being a legal pragmatist means never having to say you have a theory."<sup>18</sup>

Professor Grey seems to be saying that in *The Path* Holmes was engaged essentially in a marketing strategy designed to overcome a problem of nonexistent consumer demand.<sup>19</sup> It is akin to the problem that Ford had with the Edsel—it was ugly, boring, and no one really liked it because everyone wanted to buy the standard Ford. Indeed, I imagine that the law students and lawyers from Langdell's Harvard Law School, listening to Holmes at Boston University in 1897, must have thought that Holmes had lost sight of the vocational track for lawyers and judges of his time and was instead trying to sell a new vocational track or "path."<sup>20</sup> Holmes's problem in

<sup>18</sup> Jack Balkin, *The Top Ten Reasons To Be A Legal Pragmatist*, 8 CONST. COMMENTARY 351 (1991).

<sup>19</sup> Remember, Holmes's *The Path* was given as a speech to law students, lawyers and judges at Boston University in 1897. In 1897, Langdell, not Holmes, was at the center of American jurisprudence. In addressing the future lawyers of his day, Holmes wanted his audience to see how the prevailing formalism and naturalism of Langdell at Harvard had placed too much emphasis on the imminent rationality of law. His position was similar to that of an entrepreneur trying to sell a new product idea to unaccustomed customers.

<sup>20</sup> To determine the basis for the formation of a particular rule of law using Langdell's analysis, one would identify the relevant appellate court decisions responsible for the rule and, if possible, examine the rule in relation to history. The rules were thought to develop on the basis of an evolutionary process much like the development of a plant. In thinking of law as a science, lawyers never questioned the worth of the rules. As Holmes put it in *The Path*:

[A]n evolutionist will hesitate to affirm universal validity for his social ideals, or for the principles which he thinks should be embodied in legislation. He is content if he can prove them best for here and now. He may be ready to admit that he knows nothing about an absolute best in the cosmos, and even that he knows next to nothing about a permanent best for men.

Holmes, *The Path*, *supra* note 2, at 468.

While Holmes thought that Langdell made amazing progress in reforming legal pedagogy at Harvard, he nevertheless thought that there was something missing: a critical attitude or ethic, or "enlightened skepticism." Holmes, *The Path*, *supra* note 2, at 469. This term referred to the reconsideration of the usefulness or "worth" of the rules.

Holmes wanted us divert our attention away from abstract moral questions about "right" and "duty." Holmes's "prediction theory": "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law;" and his theory of the "bad man" became Holmes's guide for emphasizing the importance of analyzing law in terms of consequences. See Richard A. Posner, *Introduction to THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.* at xi (Richard A. Posner ed., 1992).

*The Path* was to get consumers who were weaned on Langdellian formalism to buy an "Edsel"—that is, legal pragmatism. Legal pragmatism, being "a little of this, and a little of that," is a hard sell when the audience is trained to want science and logically correct results.

Professor Grey argues that Holmes's strategy in *The Path* was to rely upon his great talents as a prose stylist to sell his pragmatism. Holmes thus used a classic literary narrative to sugar coat pragmatism so that it would go down with ease. As Professor Grey tells it, Holmes takes us from sharp descent—law is a practical business, law must be separated from morality, law must be viewed from the perspective of a bad person—to the familiar theme of wisdom and salvation—law is an "echo of the universal." I wonder, however, whether there are other ways of explaining the meaning of the tensions within Holmes's *The Path*.

Professors White and Wells offer different views. Professor White's view is that Holmesian thought is fraught with tension and contradiction because Holmes was a "transitional figure," who had one foot in a premodernist epistemology and the other in a modernist epistemology. Because Holmes was standing between two great epistemologies, his work in the law ends up advancing both, leaving us with the legacy of the tensions and contradictions posed by two competing theories of knowledge. The tensions within *The Path* are thus characterized by White as the result of Holmes's troubled modernist jurisprudence rather than his pragmatic philosophy.

Professor Wells, on the other hand, argues that the tensions in Holmes's legal thought must be understood as a consequence of his cynicism and "old-fashioned" postmodern sensibilities about the ability of human beings to reach some ideal understanding about the law.<sup>21</sup> Professor Wells argues that Holmes's view is that knowledge about law must always be derived from experience, and that "all there is" is experience. As stated by Professor Wells in a previously published paper, "in Holmes'[s] analysis, the relationship of law both to morality and to power depends upon the standpoint of the person doing

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<sup>21</sup> See Catharine Pierce Wells, *Old-Fashioned Postmodernism and the Legal Theories of Oliver Wendell Holmes, Jr.*, 63 BROOK. L. REV. 59 (1997).

the describing."<sup>22</sup> According to Professor Wells, Holmes believed that observational experience, describing what is before one's eyes, is as close as we ever get to knowing universal truth.

My view is somewhat different. In thinking about the tensions in Holmes's essay, it is helpful to consider what Holmes was trying to do in *The Path*. Think for a moment about the title of the essay we celebrate today: *The Path of the Law*. Why did Holmes choose to regard law as a "path?" We do not normally think of law that way; rather, we tend to think of law as a "constraint" that limits the exercise of power. As my colleague Steve Winter has recently noted, much of modern jurisprudence in America has used the metaphor of "constraint" to describe the meaning of law.<sup>23</sup> Conceptual metaphors like "constraint" and "path" enable us to think about law in different ways. The choice of the metaphor tells us something about the character or ethos of the author. Why did Holmes encourage us to think of law as a path? What does the path metaphor reveal about Holmes, the author?

I think Holmes thought of the law as a path because he understood that law is a social construction created from the legal imagination of human beings. As a social construction, new paths of law can be discovered if we only consider new imaginative possibilities for the law. Perhaps Holmes was saying to his audience at Boston University in 1897, "come with me; join me on my 'path.'" He never really tells us where his path will take us, except when, as Professor Grey observes, he cryptically mentions at the end of his essay something about the "hint of universal law."

I think Holmes hoped that we might someday discover universal law by adopting his ideal of remaining skeptical about the powers of logic and reason in the law. Holmes wanted us to adopt what Professor Grey calls mainstream pragmatism. He wanted us to give up trying to explain the nature of things, to stop theorizing and philosophizing about the law, and instead focus our energies on figuring out how law actual-

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<sup>22</sup> See Wells Hantzis, *supra* note 8, at 575.

<sup>23</sup> Steven L. Winter, *A Clearing in The Forest*, (forthcoming 1998).

ly works in practice. The tensions within Holmes's legal thought may be part of the "path" that he hoped would lead us someday to discover his ideal.

For Holmes, Langdellian formalism, and the blind obedience to the rules of case law, studied like a "science," constituted one path in the law. Holmes wanted to show how we might find another path. To get us on his path, Holmes had to first break free from the exclusive hold of logic and reason in law. Thus, he wanted us to focus our effort on the task of understanding how the ideals of law develop from experience, not logic.

I think it is important that Holmes was explicit about the importance of separating morality from law. He warned us not to confuse morality with law, or logic with experience. He did so because he wanted us to develop a skeptical attitude toward the law that would move us toward his ideal of studying the law, neither as a science nor as a specialized field of morality, but rather as a practical business where things get done and where there are material consequences flowing from judicial decisions.

In thinking about law in this way, Holmes was swimming against the prevailing jurisprudential currents of his time. Holmes acknowledged this, stating: "We still are far from the point of view which I desire to see reached. No one has reached it or can reach it as yet."<sup>24</sup>

Professor Grey and Wells seem to be saying that Holmes's new ideal was legal pragmatism. But what if Holmes's ideal was something else? What if Holmes wanted to leave that question open for future generations to decide? Is it possible that Holmes imagined that one hundred years later a new generation of legal thinkers might discover a new path for the law, leading away from mainstream pragmatism, as well as modernism, in law? I think Holmes thought that if we followed his example, we might someday be in a position to realize a hint of a universal law that had not yet been reached in jurisprudence. I think that what Professor Grey sees as legal pragmatism, or "a little of this, a little of that," in *The Path* may be critical moments in the development of a new jurisprudential paths for law.

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<sup>24</sup> Holmes, *The Path*, *supra* note 2, at 468.

I imagine Holmes wanted us to cultivate many "paths" in the law. He wanted us to see that we have it in our power to create a legal order better suited for our time. He wanted us to see that his "path" was merely one example of what could be done if we used our imagination. If law is to be considered a "path," as Holmes suggests, then what is to stop us from using the law to cultivate new paths leading in many new directions?

This brings us to the third intellectual project on Holmes—the problem of characterizing Holmes's jurisprudence. Was Holmes, as Professor White suggested, a "transitional figure in the development of legal modernism"? Or was he, as Professor Grey argued, a "mainstream legal pragmatist" who used his literary talents to peddle his pragmatist philosophy? Or, as Professor Wells seems to intimate, was Holmes really one of the first legal cynics in America to advance a postmodern stance toward the law? These are our choices: Was he (1) a modernist, (2) a pragmatist, or (3) a classical or old-fashion postmodernist? Ready to vote on the question? Maybe not just yet.

In thinking about your answer, I would like to offer a few thoughts about what was modern and what was postmodern about Holmes. In acknowledging that law was made, not discovered, Holmes accepted the modernist's view that it is within the power of human actors to create law. This makes Holmes "one of the most modernist of modern thinkers."<sup>25</sup> On the other hand, Holmes's skepticism points in the direction of postmodernism.<sup>26</sup> The main message of *The Path of the Law*

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<sup>25</sup> JOHN PATRICK DIGGINS, *THE PROMISE OF PRAGMATISM*, 344 (1994). The challenge of modernism is to figure out what to do once we realize that God is dead and that the problem of creating meaning is left to men and women. Legal modernism can be defined as an aesthetic, political, cultural and intellectual movement based on the lawyer's romance, faith, and yes, obsession, with the idea that we should be able to figure out and explain the essential truths of the world by employing the correct methodology, narrative, technique, or mindset. Legal modernism is the project of establishing law's claim to foundational authority.

<sup>26</sup> The challenge of postmodernism is to figure out what to do once we have given up on the modernists' quest for foundational authority in the law. Postmodernism may be thought of as a "late stage" in the development of modernism—a stage characterized by deep disenchantment with the projects of modernity. Postmodernists offer us a new message about what we should be doing in law. The message is that we try to go beyond modernism by taking a more relaxed look at the law. We should give up on trying to discover the foundations of legal authority and try instead to either figure out how law actually works in practice,

is that there is no basis in reason or morality for discovering legal truth. Lingering doubts about faith and reason seem to push Holmes in the direction of postmodernism in the law.<sup>27</sup>

Clearly, Professors Grey and Wells are correct in arguing that Holmes was influenced by American pragmatist philosophy.<sup>28</sup> While Professor White is on safe ground in pointing out how Holmes led us to modernism in law, I think Professor Wells is also right in suggesting that Holmes's cynicism moved beyond modernism to postmodernism in law. Yet, I think Holmes looks postmodern today only because we have the hindsight of almost one hundred years of modern legal thought. We are now living in the era of disenchantment; nothing guarantees that we can discover the solution to the current predicament.

That is to say, when we read Holmes today, we discover the basis for our deep disagreements and our diversity. Some want to "overcome" law.<sup>29</sup> Others want to "redeem" law, to go back to a "lost tradition."<sup>30</sup> Still others want to show us how we can do law without theory.<sup>31</sup>

It would seem that Holmes the icon has become a *mirror* that we look into only to find ourselves looking back. In looking into the mirror we get a glimpse of our current predicament. For this reason, Holmes's *The Path of Law* looks as fresh

or we should focus our energies on understanding how beliefs in law get justified.

<sup>27</sup> As John Patrick Diggins has said:

Holmes is almost postmodern in that the doubts and tensions that troubled thinkers like Adams—tension between knowledge and experience, events and meaning, truth and change—scarcely concerned Holmes. . . .

Holmes savored life. A natural skeptic, he felt no need to flee the 'irritation of doubt' to arrive at settled beliefs.

JOHN PATRICK DIGGINS, *THE PROMISE OF PRAGMATISM*, 344 (1994).

<sup>28</sup> Holmes was a member of the Metaphysical Club in Cambridge in the early 1870s whose membership included Charles Pierce and William James. Thus, he was likely well versed in the pragmatist philosophy of Pierce and James. In addition, as Wells indicated, Holmes likely shared the fundamental philosophical outlook of American pragmatist thinkers like Pierce. See Wells Hantzis, *supra* note 8, at 545 (discussing Max Fisch's documentation of the Metaphysical Club in Cambridge).

<sup>29</sup> See RICHARD A. POSNER, *OVERCOMING LAW* (1995).

<sup>30</sup> See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

<sup>31</sup> See Grey, *supra* note 17, at 1569. See also RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 454-69 (1990).



as the day it was given as a speech at Boston University in 1897. Maybe this explains the essay's astonishingly long shelf-life.

One hundred years have gone by, however, and constitutional revolutions have come and gone. Startling new developments in jurisprudence have appeared, only to fade, as they are revealed to be but incomplete and failed attempts to explain the mysteries of the law. Yet, here we are, still looking into the mirror that is Holmes, and still wondering where his "path" leads. Is this not just another illustration of the current predicament in legal studies—a predicament that some choose to characterize as postmodern?

What would Holmes think of this? If he were here today, at this symposium, what would he think about what we are doing? I think he would be amused. Indeed, I imagine that if he were here now he might invoke his "dragon in cave" metaphor from *The Path of the Law*. He used this metaphor to explain what we should do in approaching law from his ideal of "enlightened skepticism." The first thing we would need to do is to pull a "dragon out of his cave." The next step would require courage and resolve. For, as Holmes put it in *The Path*:

When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.<sup>32</sup>

I imagine that if Holmes were here today he would be surprised by discovering, ironically, that his legend and his jurisprudence have become our dragons in the cave.

If he were with us today, I think he would warn us that we are still in danger of coming under the spell of these new dragons in the evolution of the conceptual structures of the law. Holmes would encourage us to pull these new dragons out of their caves. He would want us to count their teeth and claws, and to see how powerful they really are in the light of day. And, Holmes would want us to either tame or kill them, including the dragon that has become "Holmes, the icon." We need to do this so that we might go on to do something useful with our law studies and practices.

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<sup>32</sup> Holmes, *The Path*, *supra* note 2, at 469.