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Catharine P. Wells, *Boston College Law School*

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HOLMES ON LEGAL METHOD: THE PREDICTIVE THEORY OF LAW AS AN INSTANCE OF SCIENTIFIC METHOD

Catharine Pierce Wells*

INTRODUCTION

When it comes to legal method, Holmes is well known for two claims: first, that lawyers and legal scholars should employ an empirical rather than a deductive method and second, that the task of lawyers is to predict the actions of judges. These claims raise a number of questions. Three questions, in particular, seem to recur among thoughtful readers: (1) Why does Holmes, leader of the revolt against formalism, place so much emphasis on the role of logical analysis in law? (2) If legal method is empirical, what is law “empirical” about? What are the facts or the data upon which an empirical science of law should be based? and (3) Under the predictive theory of law, what is it that a judge is supposed to do when (s)he decides a case? Does the judge decide a case by predicting his or her own decision?

These questions recur because of continuing confusion about the nature of Holmes’s legal philosophy. Conventional wisdom asserts that Holmes is a legal realist and a legal positivist. Indeed, Holmes’s most ringing declarations about the nature of law tend to support these claims. Memorably, Holmes declares:

The life of the law has not been logic: it has been experience. The seed of every new growth within its sphere has been a felt necessity. The form of continuity has been kept up by reasonings purporting to reduce every thing to a logical sequence; but that form is nothing but the evening dress which the new-comer puts on to make itself presentable according to conventional requirements.¹

* Professor of Law, University of Southern California Law Center. B.A. 1968 Wellesley College; M.A. 1973, Ph.D. 1981, University of California, Berkeley; J.D. 1976, Harvard Law School.

1. Oliver W. Holmes, Jr., *Book Notices*, 14 *AM. L. REV.* 233-34 (1880) (reviewing CHRISTOPHER COLUMBUS LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS, WITH A SUMMARY OF THE TOPICS COVERED BY THE CASES* (1880)).

This is “exhibit one” for Holmes’s realism. No less memorable are the exhibits of his positivism: “A legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court.”² And could Holmes be anything other than a positivist when he declares: “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”³

Despite the conventional view that Holmes is both a realist and a positivist and despite the seeming clarity with which Holmes’s own words seem to support this view, careful analysis of his work seems to suggest that his true views are far more moderate and complex. One way to understand this complexity is by focusing on the questions cited at the beginning of this essay.

QUESTION I: WHY DOES HOLMES, LEADER OF THE REVOLT AGAINST FORMALISM, PLACE SO MUCH EMPHASIS ON THE ROLE OF LOGICAL ANALYSIS IN LAW?

One way to answer this question (and to get a start on the rest) is to compare Holmes’s views with those of Langdell. Langdell believed that the common law was a quasi-philosophical system of abstract principles that provided a basis for deciding individual cases. Specifically, for Langdell, legal decision making was defined by three elements. First, it was based upon a logical deductive method that could derive the result of individual cases from a designated set of premises. Second, its premises were a series of rules and principles that had a distinctly legal character. This meant that legal reasons were not reducible to political, moral, or policy considerations. Third, proper use of the method insured a uniquely correct result for every legal case. In short, legal method, for Langdell, proceeded by practical syllogism. For example, the abstract principles:

Communication is the essence of an offer.
Every valid acceptance contains an implied offer.

together with the factual statement:

In the mailbox situation, an acceptance of the offer is not actually communicated to the offeror.

entailed the conclusion:

2. Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

3. *Id.* at 461.

In the mailbox situation, there is no contract.

For Langdell, this argument was decisive.⁴ If an acceptance got lost in the mail, he believed that a judge should decline to enforce the contract even if this result ran contrary to justice, convenience, and the intent of the parties.⁵

In the context of Langdell's conception of law as logic, the case method is an ideal form of legal instruction. Legal education, he thought, ought to teach students how to do what lawyers chiefly do:

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law.⁶

Thus, Langdell rejected the idea that students should memorize large numbers of rules and precedents in favor of a method that focused upon a handful of common law cases. From these cases, students would gradually acquire an understanding of legal structure and analysis. They would learn to extract principles from the cases, to order them logically into a coherent system and then to apply this system to the decision of new cases and hypotheticals.

Holmes and Langdell are often portrayed as holding positions at the opposite ends of the legal theory spectrum. Langdell is commonly viewed as the dinosaur—the representative of antiquated formalism⁷—while Holmes is viewed as the innovative founder of the modern school of realistic jurisprudence. While this contrast has some force, it has led to substantial confusion about the nature of Holmes's views on law. Specifically, it has led to the erroneous supposition that Holmes rejected legal reasoning as a method for doing law. To avoid this misunderstanding, it is helpful to note the substantial areas of agreement between the two men.

4. Langdell, in fact, makes just this argument. See CHRISTOPHER COLUMBUS LANGDELL, SUMMARY OF CONTRACTS 15 (1880).

5. *Id.* at 21.

6. Christopher Columbus Langdell, *Preface to the First Edition*, CASES ON CONTRACT (1871) [hereinafter *Preface*].

7. At least one author has effectively questioned this simplistic view of the matter. See Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

Holmes and Langdell were alike in their rejection of the idea that law consisted simply of a collection of legal precedent.⁸ It was not enough, they believed, to simply learn all the intricate variations of legal rules that could be found in Blackstone. Instead law had to be understood as a conceptual system. Langdell writes: "The number of fundamental legal doctrines is much less than is commonly supposed If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number."⁹

And Holmes, praising the case method, echoes Langdell's opinion:

The professors of this school have said to themselves more definitely than ever before: We will not be contented to send forth students with nothing but a ragbag full of general principles (They) mean to make their students know law They, therefore, mean to make them master the common law and equity as working systems.¹⁰

Thus, for both men, legal precedent did not consist of isolated legal decisions. It was instead a coherent logical system whose underlying structure could be uncovered by patient legal analysis. The key thing, as Langdell noted, was that the cases should be properly "classified" and "arranged" so that the underlying logical structure would be apparent. Holmes too thought that the point of classification was to display logical structure: "(T)he end of all classification should be to make the law knowable; and . . . the system best accomplishes that purpose which proceeds from the most general conception to the most specific . . . in the order of logical subordination."¹¹ Thus, both Langdell and Holmes viewed the common law not as an isolated series of precedents but as a doctrinal system which could best be known through an understanding of its logical structure.

While both Langdell and Holmes believed in the importance of understanding logical structure, the role of structure in their respective legal theories was decidedly different. Langdell thought that logical structure was timeless and universal and, that, once discovered, it would dictate the correct outcomes for legal cases. Thus, for example, logic dictated that all offers

8. *But see* 7 AM. L. REV. 659-60 (1873) where Holmes says, "an enumeration of the actions which have been successful, and of those which have failed, defines the extent of the primary duties imposed by the law."

9. Langdell, *Preface*, *supra* note 6.

10. Holmes, 9 *Law Quarterly Review* (1886).

11. OLIVER W. HOLMES, JR., *The Arrangement of the Law—Privity*, 7 AM. L. REV. 46 n.2 (1872), reprinted in FREDERIC R. KELLOGG, *THE FORMATIVE ESSAYS OF JUSTICE HOMES: THE MAKING OF AN AMERICAN LEGAL THEORY* 96 (1984) [hereinafter *Arrangement of the Law*].

contain at least three terms: an offer, a description of the desired counteroffer, and an acceptance of the desired counteroffer if made. If any of these terms were not explicit, then they should be inferred: "Nor is it ever necessary for an offeror to say that he will accept a counteroffer, if made; for if his offer requires a counteroffer then it is necessarily implied that he will accept the latter."¹² By making generous use of implied terms, Langdell was able to argue that the logical structure of the law is universal and timeless. And it was this universal structure which guaranteed that every legal case could have but one logically correct outcome. Thus, Langdell believed that logic provided the iron hand that regulated legal decision making.

While Langdell believed that the common law contained a universal logical structure, Holmes viewed the logic of law as being inextricably tied to the context of legal decision making. Implied terms were created to serve temporary conceptions of convenience and policy rather than a universal legal structure:

You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place.¹³

Thus, for Holmes, the structure of the common law was neither timeless nor inevitable. It was instead the result of an historically contingent set of decision making practices—judges who routinely struggled with conflicting legal claims would develop a repetitive structure for dealing with these claims. And, as the surrounding context of litigation might change, so too the logical structure. This was why the self-conscious study of legal history was so important to sound judicial decision making—it was only by examining the context of received doctrine that a sound judgment could be made as to its continuing viability in ever changing circumstances. For Holmes, the logic of legal analysis was meant to facilitate legal reasoning not to regulate it with an iron hand:

Most of the things we do, we do for no better reason than that our fathers have done them or that our neighbors do them . . . the reason is a good one . . . but it is not the best. It does not follow, because we all are

12. LANGDELL, *SUMMARY OF CONTRACTS*, *supra* note 4, at 14.

13. Holmes, *The Path of the Law*, *supra* note 2, at 466.

compelled to take on faith . . . most of the rules on which we base our action and our thought, that each of us may not try to set some corner of his world in the order of reason, or that all of us collectively should not aspire to carry reason as far as it will go throughout the whole domain.¹⁴

Holmes understood the common law in this spirit. The common law is a history of decision making practices. As the accumulated wisdom of many centuries, it can aid current decision makers by suggesting convenient analytical categories. These categories form the basis for legal analysis. Examined uncritically, they may seem, as they did to Langdell, like the inevitable and uniquely logical way to judge human affairs. But this inevitability, Holmes argues, stems from a failure of imagination rather than the requirements of logic. Thus Holmes wrote:

Continuity with the past is only a necessity and not a duty. As soon as a legislature is able to imagine abolishing the requirement of a consideration for a simple contract, it is at perfect liberty to abolish it . . . without the slightest regard to continuity with the past. That continuity simply limits the possibilities of our imagination, and settles the terms in which we shall be compelled to think.¹⁵

Thus, legal rules should be followed only so long as they are useful in sorting out human affairs—their authority must be limited by their continuing usefulness. When a rule had outlived the conditions that had rendered it sensible, it should be discarded. Law, for Holmes, involved the progressive use of reason to order human affairs and progressive reason required that rules for human conduct should be ever revisable in the light of changing social conditions.

The foregoing discussion helps us to put the difference between Holmes and Langdell in proper perspective. Holmes and Langdell were not at the extreme ends of the realism-formalism debate. While disagreeing on many things, they shared some fundamental presuppositions about the nature of legal reasoning. Holmes agreed with Langdell that legal reasoning was an important part of legal method. He also agreed that legal reasoning was based upon an underlying logical structure. But he disagreed with Langdell in the supposition that the common law was based upon one timeless

14. *Id.* at 468.

15. OLIVER W. HOLMES, JR., *COLLECTED LEGAL PAPERS* 211 (1920). Holmes was writing in an era when many legal scholars doubted the ability of legislatures to revise common law rules. Thus, this passage speaks in terms of legislative enactments. It is clear, however, that Holmes held similar views about courts—under certain circumstances, he believed, courts were justified in abandoning ancient precedent.

structure, and that this structure of the common law was somehow implicated in the natural order of the universe. For Holmes, legal structures were historically contingent and functionally related to social context. And this different conception of legal structure resulted in a dramatically different view of legal decision making. If legal structure was context dependent, then one could always question whether some particular structure was appropriate for a given legal context. Thus Holmes did not share Langdell's view that legal logic determined legal outcomes. For Holmes, legal logic shaped legal decision making but it was only a part of the story. Equally salient was experience—the “felt necessities” of justice and fairness—and it is this element of legal experience that accounts for Holmes's insistence that the science of law was empirical rather than merely logical.

QUESTION II: IF LEGAL METHOD IS EMPIRICAL, WHAT IS LAW
“EMPIRICAL” ABOUT? WHAT ARE THE FACTS OR THE DATA
UPON WHICH AN EMPIRICAL SCIENCE OF LAW SHOULD BE
BASED?

While Holmes was clear and explicit in rejecting the view that legal decision making was exclusively logical, he was less explicit about his own conception of legal method. He described law as “scientific” but his concept of legal science was somewhat ambiguous. It is certainly true that Holmes believed that knowledge of the social sciences was essential to sound legal decision making.¹⁶ Judges, he thought, ought to be concerned with the practical effects of their judgments. But, while this conception explains how law might *use* empirical social science, it does not explain how law itself might *proceed* in accordance with a scientific method.

Similarly, Holmes's conception of a scientific anthropology of law explains how law might be made the *object* of scientific study but it does not provide a scientific method for *doing* law, i.e., for making the rules that will become the object of study. What is missing in Holmes's work is an explicit account of how the process of legal decision making can be regulated by the methodology of empirical science.

In an earlier article, I tried to fill this gap by examining Holmes's own methods of analyzing legal doctrines.¹⁷ This examination suggested that there were two forms of analysis that were essential ingredients of Holmes's

16. Holmes, *The Path of the Law*, *supra* note 2, at 474.

17. Catharine Hantzis (now Wells), *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541, 562 (1988).

practice of legal method: "First, the abstract legal conceptions could be analyzed to see what kind of particular legal relations they embody, and second, abstract and general conceptions could be posited that would make the law easier to understand and apply."¹⁸

But, while this account of legal analysis is an accurate description of Holmes's own methods, it is far from obvious how these methods could be fairly characterized as "empirical science." To clarify this, I will first describe the scientific method as it was understood by Holmes's contemporaries. I will then show how the above conception of legal analysis is an adaption of this method, and an application of it to the common law. Finally, I will compare this notion of legal science with Holmes's conception of the case method as it was developed in the last section.

A. Scientific Method¹⁹

Empirical science begins with observation. The scientist examines the world. This examination is not merely passive—it involves engaging actively with the facts, playing with them, and doing experiments. The process of observation gradually gives way to a process of generalization. For example, the scientist might begin with a series of observations:

When dropped, this book, this chair, and this sack of potatoes fall to the floor.

Proceeding on the assumption that nature is uniform, i.e., on the assumption that like action in like circumstances will always produce the same result, the scientist may generalize:

When dropped, all heavy objects fall to the floor.

And thus, by means of induction, the scientist may regard each individual observation as an instance of a more general rule.

Amidst accumulating generalizations, the scientist begins to formulate a theory. The point of a theory is to explain observed regularities. For example, the observations described above might give rise to the following hypothesis:

18. *Id.* at 563.

19. What follows is a fairly standard account of the scientific method as it was understood by Holmes's contemporaries. It is annotated in the footnotes from the writings of Charles Peirce, a nineteenth century pragmatist and contemporary of Holmes.

There is a gravitational force which acts on physical objects.

With further observation, this statement may form the basis for further hypotheses about gravity:

The force of gravity is constant.

Note that these theoretical hypotheses do not arise deductively from the observations. Nor are they the result of induction.²⁰ When a scientist hypothesizes a gravitational force, (s)he does more than simply suppose that future observations will resemble those of the past. The concept of gravity is a new element that is introduced by an act of intellectual creation.²¹ It does not simply record the generalization: "All objects fall." It explains the data by supposing the truth of a general theoretical statement from which the observed data would follow. Thus, the scientist might say: "If I suppose that there is a gravitational force, then the observations I have made would follow deductively from such a force."²²

The justification for such an hypothesis is not found in standard logic but in the commitment of the scientist to hold it tentatively and to check it against future experience.²³ Thus, the scientist uses the hypothesis as a basis for making predictions and observes, in the world, whether or not these predictions come true. For example, the hypothesis described above could be the basis for predicting future events:

When I drop this stone, gravity will make it fall.

If this prediction comes true, then the gravitational hypothesis remains as a part of the theory. If it does not, then the hypothesis must be discarded or

20. Peirce used the term "abduction" to denote the process of forming an explanatory hypothesis. He believed that abduction was distinct from deduction and induction but was nevertheless an important element of logical method.

21. Peirce wrote: "Abduction is the process of forming an explanatory hypothesis. It is the only logical operation which introduces any new idea." 5 CHARLES S. PEIRCE, *Three Types of Reasoning*, in THE COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 94, 106 (C. Hartshorne & P. Weiss eds., 1934).

22. Note that an abductive inference does not provide a reason for thinking that its conclusion is true. Thus, Peirce contrasts it with the other forms of inference: "Deduction proves that something *must* be; Induction shows that something *actually* is operative; Abduction merely suggests that something *may be*." *Id.* (emphasis in original).

23. Peirce wrote about the justification of abduction as follows: "Its only justification is that from its suggestion deduction can draw a prediction which can be tested by induction, and that, if we are ever to learn anything or to understand phenomena at all, it must be by abduction that this is to be brought about. No reason whatsoever can be given for it, as far as I can discover; and it needs no reason since it merely offers suggestions." *Id.*

modified.²⁴ Inevitably, this process generates many erroneous theories but, in the long run, these errors will not stand. It is the essence of a scientific method that it be self-correcting in the sense that it continually subjects its hypotheses to the test of worldly experience. Thus, erroneous theories will eventually be identified and revised.

To summarize, the steps of a scientific method are: 1) observing the empirical facts; 2) analyzing the accumulated data into general categories; 3) forming a tentative hypothesis that will explain the observed data; and 4) using the hypothesis to predict new events and observing whether these predictions come true. Such a method uses three different forms of logical reasoning: induction in generalizing the data, abduction in forming an hypothesis to explain the data; and deduction in using the hypothesis to predict future occurrences.

B. Legal Method

It is possible to apply the above description of the scientific method to the analysis of legal cases. When this is done, the result sounds very much like Holmes's own descriptions of legal method.

1. *Observing the Empirical Facts*

The lawyer begins with the reported cases. Holmes states: "The means of (legal) study are a body of reports, of treatises, and of statutes, in this country and in England, extending back for six hundred years These are what properly have been called the oracles of the law."²⁵

In reading the reports, the lawyer focuses on particular aspects of the case; for example, (s)he observes that a particular court has rejected a particular claim in particular factual circumstances. These observations form the data that will serve as the basis of legal analysis.

2. *Analyzing the Accumulated Data into General Categories*

To proceed, the cases must be grouped into general categories. Modern lawyers may well take this process for granted but Holmes reminds us that "men begin with no theory at all, and with no such generalizations as

24. More accurately, a failed prediction presents the scientist with a choice of whether to discard the hypothesis (s)he is testing or some other hypothesis that is implicated in the prediction. See, e.g., Williard Van Orman Quine, *Two Dogmas of Empiricism*, in FROM A LOGICAL POINT OF VIEW 42 (1963).

25. Holmes, *The Path of the Law*, *supra* note 2, at 457.

contract.”²⁶ Gradually, torts are distinguished from contracts; negligent torts from intentional torts; professional malpractice from accidental torts and so forth. But this process of generalization is no mere mechanical enterprise. If the analyst uses spurious categories (making, for example, a distinction between the “law of telegraphs” and the “law of railroads”),²⁷ then these categories will hinder, rather than assist, the process of analysis. Similarly, if categories are drawn too broadly or too narrowly, it will be difficult to reconcile the cases. For example, looking at the category—contracts cases—may be too broad for thinking about the wisdom of the mailbox rule. It may be that certain types of contracts pose special considerations that must be considered in legal decision making.²⁸

3. *Forming a Tentative Hypothesis That Will Explain the Observed Data*

Once the cases have been grouped into general categories, the legal scholar may seek to reconcile the cases. (S)he proceeds by searching for certain recurring themes and, on the basis of these themes, (s)he formulates an hypothesis that will unify and explain a wide range of legal outcomes. Thus, cases come to be described in distinctly legal terms and abstract conceptions such as “rights” and “privileges” are factored into the analysis.²⁹ Such legal conceptions do not describe the world directly. Rather, like scientific hypotheses, they represent an essentially creative effort to posit explanations for seemingly disparate data. As Holmes put it:

So we prophesy that the earth and sun will act towards each other in a certain way. Then . . . we pretend to account for that mode of action by the hypothetical cause, the force of gravitation So we get up the empty substratum, a *right*, to pretend to account for the fact that the courts will act in a certain way.³⁰

Thus, the ascription of a “right” is really a tentative theoretical move that is designed to explain certain observed regularities in legal decision

26. HOLMES, COLLECTED LEGAL PAPERS, *supra* note 16, at 218. And indeed these categories may not be obvious: “They begin with particular cases, and even when they have generalized they are often a long way from the final generalizations of a later time.” *Id.*

27. See Holmes, *Arrangement of the Law*, *supra* note 11, at 96.

28. For example, Cook argues that Williston’s failure to break down his discussion of contracts principles into relevant subheadings distorts his analysis of the mailbox rule. Walter W. Cook, *Review of Williston on Contracts*, 33 U. ILL. L. REV. 497, 510 (1939).

29. Or we appropriate non-legal terms to a distinctly legal use. For example, we define legal intent by a series of legal doctrines that have little to do with the term’s ordinary usage.

30. 2 HOLMES-POLLOCK LETTERS 212 (Mark DeWolfe Howe ed., 1944).

making.³¹ It is important to note, however, that rights are “explanations” in a very precise and limited sense—rights “explain” outcomes by generalizing them and thereby making them easier to understand and remember.³² But, while rights explain outcomes in this sense, they do not—and cannot—function as justifications for those outcomes. Holmes’s renunciation of natural law entails that appeals to rights as justification will inevitably beg the fundamental question.³³

4. *Using the Hypothesis to Predict New Events and Observing Whether These Predictions Come True*

In Holmes’s scientific conception of the law, the point of formulating doctrinal hypotheses is to facilitate predictability in legal decision making. For Holmes, the point of defining rights and duties is so that the future actions of courts can be predicted:

Take . . . the notion of legal duty We fill the word with all the content which we draw from morals. But what does it mean to a bad man? Mainly, and in the first place, a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money.³⁴

If a certain set of legal outcomes can be explained by supposing a particular right, then it will make sense to proceed on the basis that such a right exists. And further, if the existence of such a right receives wide recognition, then this recognition will, in turn, affect future decision making.

C. The Case Method as Empirical Science

31. Holmes almost always uses the concept of rights as an example of hypothesized explanations. However, his point is a general one. Most doctrinal categories can be analyzed in this fashion. For example, an implied term of good faith and fair dealing can be understood as a hypothetical explanation of the general reluctance of courts to impose the harsh results that would sometimes follow from strict and literal enforcement of contract terms.

32. “It is to make the prophecies easier to be remembered and to be understood that the teachings of the decisions of the past are put into general propositions and gathered into textbooks, or that statutes are passed in a general form. The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies.” Holmes, *The Path of the Law*, *supra* note 2, at 458.

33. Rights cannot function as justifications because they are nothing more than generalizations. Holmes warns: “One of the many evil effects of the confusion between legal and moral ideas . . . is that theory is apt to get the cart before the horse, and to consider the right or duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward.” *Id.*

34. *Id.* at 461.

The above examination of legal method makes it possible to understand Holmes's own version of the case method. The case method begins with legal cases. These are the data that must be explained. The cases are found in casebooks which organize the cases under the appropriate general headings. Then the students are asked to do two things: first, to extract principles from cases and, second, to apply these principles to new cases. When students do the first (i.e., when they extract principles from cases), they, in effect, form a tentative hypothesis about the proper explanation for the results in given cases. Because legal cases typically present many possible bases for decision, extracting a principle is never a matter of simple logic. Rather it requires intuitive insight of the sort that can only be developed by the ongoing experience of interpreting legal cases. When students do the second step of the case method (i.e., when they apply these principles to the decision of new cases), they are, in effect, making predictions about what a court will do when confronted with particular circumstances. And finally, by comparing these predictions with the outcomes of reported cases, students are able to test their tentative choice of legal principle by assessing the accuracy of the predictions it generates.

Similarly, Holmes's conception of legal method as empirical science is the basis for understanding his predictive theory of law. The observed facts of judicial decision making—that is, the actual practices of deciding real world controversies in courts of law—are both the input and the output of legal method: on the one hand, they are the thing that the legal scientist seeks to explain and, on the other, they are the source of the analytical categories that will do the work of explanation. Thus, the legal scientist examines judicial opinions for two reasons: first, to learn the outcomes of specific cases; and, second, to understand the doctrinal structures that might be used to construct a legal resolution of similar controversies. For Holmes, these doctrinal structures do not represent empty formalism; they play a central role in his scientific conception of law.

Finally, it is important to note that Holmes's scientific conception of law entails several things about the nature and role of legal doctrine. First, legal doctrine derives from a scientific reading of the cases rather than from an *a priori* logical system. Second, legal doctrine is the means by which real world controversies can be translated into expected legal outcomes. Thus, it must be recognized as an empirical theory of law—a theory that is correct only in so far as it serves to explain and predict the observed behavior of real world decision makers. And, third, legal doctrine forms the basis of Holmes's claim that law must be predictive—it is by formulating legal

doctrines that we are able to formulate prophecies—"prophecies of what the courts will do in fact."³⁵

QUESTION III: UNDER THE PREDICTIVE THEORY OF LAW,
WHAT IS IT THAT A JUDGE IS SUPPOSED TO DO WHEN (S)HE
DECIDES A CASE? DOES THE JUDGE DECIDE THE CASE BY
PREDICTING HIS OR HER OWN DECISION?

The predictive theory of law has a strong intuitive appeal when it is understood as a theory about legal practice. Its strength stems from the fact that it accurately describes what lawyers do—in fact, lawyers *do* use legal doctrine to predict the outcomes of future cases.³⁶ The predictive theory, however, seems less persuasive when we apply it to what judges do—can it possibly be true that judges decide by predicting their own decisions? For a number of reasons, Holmes's answer to this question must be "no."

First, Holmes was an experienced judge. Thus, it is reasonable to think that his description of judging would be faithful to the facts surrounding his own decision making practices. But if we look at Holmes's opinions, it is apparent that he is "deciding" rather than using doctrine to "predict a decision." Indeed, his most famous opinions are short and to the point; they rest on a practical appraisal of the situation rather than on a foundation of legal doctrine.³⁷

Second, a predictive theory of judicial decision making inevitably entails a kind of formalism. If judges decide by using doctrine to predict the correct decision, then legal decisions can be analyzed solely in terms of the doctrine and reasoning that produces them. But we know that Holmes rejected this kind of analysis. Holmes, like the realists who succeeded him, believed that legal decisions are not produced from doctrine and reason alone. Instead, he believed that the decisions come first and that doctrine and reason follow as "evening dress"—as a kind of *ex post facto*

35. See *supra* text accompanying note 4.

36. This is normally disputed only by the extreme realists who, of course, insist that legal doctrine has little or nothing to do with legal decision making. See, e.g., Jerome Frank, *Why Not a Clinical Lawyer School?*, 81 U. PA. L. REV. 907, 910-11 (1933).

37. See, e.g., *Lamson v. American Axe and Tool*, 58 N.E. 585 (Mass. 1900); *Baltimore & Ohio R.R. v. Goodman*, 275 U.S. 66 (1927); *Buck v. Bell*, 274 U.S. 200 (1927); *Lochner v. New York*, 198 U.S. 45 (1905).

justification.³⁸ Thus, the notion that judges predict their own decisions is fundamentally at odds with Holmes's realism.

There is, however, a deeper reason why Holmes would not equate judicial decision making with judicial prediction. Law, for Holmes, is a science and the point of science is to comprehend reality as something external. One cannot pursue science by generating self-fulfilling prophecies. Science must focus on facts. A theory can be nothing more than empty words and phrases unless its predictions are constantly tested by the brute realities of daily life and practice. In terms of legal science, this requires that the practice of legal decision making stand on its own two feet as a practice *out there* in the world. Thus, a judge who is trying to make a decision that conforms to a prediction has it backwards. The prediction is not the test of a correct decision. Instead, the decision itself is the standard by which the prediction (and the theory that produced it) should be evaluated.

If I am right, that Holmes does not think of judicial decisions as acts of prediction, then how does he understand the nature of the judicial task? What is the decision making process? And what is it that a judge must do in order to get it right?

First and foremost, Holmes believed that legal decisions were matters of human judgment. While it often appears that legal rules determine legal outcomes, this is not the case. Legal rules are rarely decisive and this is true for all the familiar reasons—because there are not enough of them, *or* because there are too many of them, *or* because they come into conflict with each other, *or* because they contain unstated exceptions, *or* because the extent of their coverage is not clear. Further, as we saw above, the scientific conception of law entails that judges have an underlying responsibility to be sure that every decision they make “in accordance with a rule” is, in fact, the *correct* decision for the particular case. This means that a judge must decline to apply a rule if the result seems unfair or impractical in the particular circumstances. Thus, a common law judge has no alternative but to decide each case for *himself* in an “all things considered” intuitive kind of way.

For Holmes, however, the idea that judges must decide “for themselves” did not mean that judges were free from common law restraint. Indeed, the predictive theory would suggest just the opposite: if decisions were entirely

38. Perhaps the best known statement of this position can be found in Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the Hunch in Judicial Decision*, 14 CORNELL L.Q. 274 (1929). See also John Dewey, *Logical Method and the Law*, 10 CORNELL L.Q. 17 (1924).

a matter of personal politics, then legal doctrine could hardly be useful in predicting them. Understanding legal doctrine can help us to predict judicial outcomes precisely because common law judges are not free agents. Instead, they are part of an on-going legal tradition that places real constraints on their decision making practices. Thus, Holmes would require judges to render decisions that met two separate standards: first, the decision must be fair and practical in the particular circumstances and, second, it must be consistent with the common law and with its underlying purposes of stability, justice and the promotion of human prosperity. These two standards suggest a crucial question—Can Holmes have it both ways? Is the responsibility to make a bottom line assessment of the merits of a particular controversy consistent with the responsibility to decide the case within the confines of the common law tradition? To answer this question, it is necessary to be more specific about the way in which the common law tradition constrains judicial decision making.

One conception of the common law is that it provides a set of rules that directly govern judicial decision making. A second conception thinks of the common law more loosely as a method for thinking about legal problems. Under the second conception, the common law does not dictate results in individual cases but has instead an indirect effect on legal outcomes. It does this in at least two ways: first, by providing a language for describing and interpreting legal controversies and second, by providing a rough ordering of social values that functions as a touchstone for resolving conflict. Under this conception, the mind of a judge who is trained in the common law tradition is not a blank slate; (s)he has been socialized to examine human conflicts in very particular ways—ways that strongly affect her intuitive judgments about appropriate outcomes. Thus, knowing these ways, and knowing how they construct particular legal problems, enhances the lawyer's ability to predict judicial decisions.

To summarize, the answer to the question—Do judges decide cases by predicting their own decisions?—is an emphatic “no.” To the contrary, every judicial decision requires a bottom line assessment of all the circumstances that surround the particular controversy. But this does not mean that the decision is inherently idiosyncratic. The judge's understanding of the case—her construction of the problem as a legal problem—is fundamentally shaped by the conceptual apparatus of the common law and by the judge's own immersion in legal culture. Thus, the scientific conception of law requires that we differentiate between two distinct kinds of legal activity. First, there is the real world decision making of common law judges; and, second, there is the reasoning of lawyers who predict what these same judges will do. With respect to the first, the common law provides a

conceptual basis for deliberation; it structures the deliberative process without yielding a uniquely correct outcome. With respect to the second, the common law assists prediction precisely because it provides the complex array of reasons and policies that structures the decision-making process.

CONCLUSION

Holmes had a long and distinguished judicial career and, for this reason alone, his views on judicial decision making are entitled to serious consideration. But beyond this, his views are particularly important because they represent a moderate position that is often obscured by the American preoccupation with the formalism-realism controversy. Holmes's scientific theory of law is a middle ground that embraces neither the formalism of Langdell nor the realism of Llewellyn, Hutchison or Arnold. As we have seen, Holmes conceived of law as a language that described and constructed legal questions. He saw legal doctrine as a theory of judicial decision making that offered tentative explanations for legal outcomes and could be used to generate predictions about future decisions. Unlike the realists, Holmes saw legal doctrine as central to the legal enterprise. Unlike the formalists, he did not conceive of legal doctrine as decision rules for legal cases. In the last analysis, each case must be decided by a judge in a personal act of judgment—the outcome of which is often, but not always, predictable. For Holmes, law could be scientific even if there are many cases whose results are unpredictable—legal theory is useful science even if it can only increase the likelihood that we will know in advance how a court will decide.

