The Adjudicative Method of Oliver Wendell Holmes

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Oliver Wendell Holmes was among this country’s most preeminent jurists, adjudicating cases for over fifty years, first on the Massachusetts high bench, and then on the United States Supreme Court. Yet he never explicitly revealed his method of adjudication. It is the thesis of this paper that Justice Holmes did have such a method, and that he revealed it implicitly.

The first three steps of the four-step method this author has identified were presented by Holmes in his classic address, The Path of the Law. There, he commended to students a three-step approach for fruitfully studying the law. However, the author discovered that Holmes appeared to use these same steps in his own process of judging a case. These steps are: discerning the governing principles within the rules bearing on the case, tracing the history of the rules to understand their adaptation to shifting public policy, and weighing the competing social policies at stake. The final step of Holmes’s adjudicative process, that of giving effect to the predominant policy, was supplied by the author from the thrust of Holmes’s academic writings, as encapsulated primarily in The Path, and in his other classic work, The Common Law.

After explicating Holmes’s three steps for mastering the law, and gleaning the fourth from his writings, the author analyzes several of Holmes’s opinions to test whether he applied this process to his work in judging cases. The author concludes that the first three steps of Holmes’s adjudicative method indeed mirrored his process for studying the law. His last step, that of sounding the public mind regarding the appropriate outcome, accorded with his central insight that the nature and development of the law: that it should always accord with public policy.

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INTRODUCTION

The law can ask no better justification than the deepest instincts of man.\(^1\)

According to many legal scholars and commentators, Oliver Wendell Holmes was the best known and one of the most influential jurists this country has ever produced.\(^2\) Even determined detractors cannot but


\(^2\) Richard A. Posner, *The Essential Holmes* ix (Univ. of Chicago Press 1992) ("Oliver Wendell Holmes is the most illustrious figure in the history of American law."); Benjamin N. Cardozo, *Mr. Justice Holmes*, 44 Harv. L. Rev. 682, 684 (1931) ("He is today for all students of the law and for all students of human society the philosopher and the seer, the greatest of our age in the domain of jurisprudence, and one of the greatest of the ages."); Stuart Shiffman, *A Long Shadow*, 91 Judicature 95 (2007) (reviewing Frederic R. Kellogg, *Oliver Wendell Holmes, Jr., Legal Theory, and Judicial Restraint* (Cambridge Univ. Press. 2007) ("The shadow cast by Oliver Wendell Holmes, Jr. over American law and jurisprudence is lengthy. Though it has been more than a century since Holmes was nominated and confirmed as a justice of the United States Supreme Court, and 74 years since his retirement, Holmes remains a towering figure for any scholar of the role of law in our society. In the past two decades alone he has been the subject of four biographies, four symposia, two new collections of his writing, and numerous articles and monographs."); Wendy Brown Scott, *Oliver Wendell Holmes on Equality and Adarand*, 47 How. L.J. 59, 85 (2003) ("The views expressed by Justice Holmes in his judicial and extra-judicial writings profoundly influenced the formation of law and legal reasoning."); Michael Coper, *The Path of the Law: A Tribute to Holmes*, 54 Ala. L. Rev. 1077, 1077-78 (2003) ("The Path of the Law . . . is a brilliant forerunner of a movement called ‘American legal realism’ that swept the United States in the 1920s and 1930s, with an impact that is still being felt today, not only in the United States but also in other common law countries.") (internal cites omitted); Gerald Caplan, *Searching for Holmes Among the Biographers*, 70 Geo. Wash. L. Rev. 769, 770 (2002) ("Although dead for well over half a century, Holmes remains one of the best known and most quoted American jurists."); Catharine Pierce Wells, *Reinventing Holmes: The Hidden, Inner, Life of a Cynical, Ambitious, Detached, and Fascistic Old Judge Without Values*, 37 Tulsa L. Rev. 801, 801 (2002) (reviewing
acknowledge his impact on American jurisprudence. Holmes’s remarkable law career spanned sixty-six years, fifty of which he sat as a Justice, first on the Supreme Judicial Court of Massachusetts, and then on the United States Supreme Court. He was known for his pithy opinions, his inimitable prose, and for his prescience, as many of his positions written in
dissent ultimately prevailed as law.\textsuperscript{8} He also authored many articles, treatises, and lectures, at least two of which, \textit{The Common Law}\textsuperscript{9} and \textit{The Path of the Law},\textsuperscript{10} are widely regarded as classics.\textsuperscript{11}

One of Holmes’s central and most celebrated insights was that the law more closely tracks experience than logic.\textsuperscript{12} Public policy, rather than transcendent principle, is the root of the law,\textsuperscript{13} and the law typically reflects the prevailing will of the community in every age.\textsuperscript{14} A related but less noted insight is that every adjudication involves a clash of opposing public
For all his remarkable longevity and influence as a jurist, Holmes did not provide an explicit account of how he decided cases, although he did reflect on his judicial philosophy after his service on the Massachusetts bench. In this paper, I posit that Holmes’s adjudicative process was the same as his approach to the study of the law, with one further step. He commended the first three steps to the law students he addressed in *The Path of the Law*. The fourth step is inferred by Holmes’s fundamental insight that the law should express the public will.

In this paper, I first review some of Holmes’s central insights about the law, and then elucidate his four-step process of adjudicating a case. I then examine several of Holmes’s decisions to examine whether he adopted these steps in his own jurisprudence. I also analyze a case where Holmes

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15 *Path*, *supra* n. 1, at 998 (“Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds.”).
16 On the difficulty of giving such an account, Judge Benjamin Cardozo remarked: “Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth.” *The Nature of the Judicial Process* 9 (Yale University Press 1921).
17 Posner, *supra* n. 2, at 151 (from “Twenty Years in Retrospect”). *See* Part III, *infra*.
19 Because I draw largely from *The Common Law* and *The Path of the Law* for Holmes’s legal theories, and because these two works almost “bookend” his service on the Massachusetts high court, I have restricted my examination of cases to his Massachusetts opinions. (*Common Law* published 1881; service on Massachusetts Bench, 1882 to 1902;
appeared to go against his own formula, and assess whether this result can be reconciled with his general approach. I conclude that, for the most part, Holmes did indeed adjudicate cases by the same process he used to study and master the law, and that his decisions were consistent with his fundamental insight that law is grounded in and expresses the life and experience of the community.

I. THE PRIMACY OF PUBLIC POLICY IN THE COMMON LAW AND THE PATH OF THE LAW

The Common Law announced a major break from the predominant legal theory of its time, which was that the law descended from eternal principles and proceeded by neat syllogisms, with judges as its mere mouthpiece. Instead, Holmes asserted the “revolutionary” idea that the law was drawn from the life of the community, and that judges gave effect

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Path published 1897).

20 Gilmore, supra n. 2, at 381 (“The common law is not a brooding omnipresence in the sky.”) (citing Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917); Common Law, supra n. 9, at xviii (“If law is nothing more portentous then the judicial formulation, within accepted limits, of public policy, then surely it need pay no special respect to Kant’s imperatives or Hegel’s dialectic.”) (Howe ed., commenting).

21 Path, supra n. 1, at 998 (“The danger of which I speak is . . . the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct. . . . So judicial dissent often is blamed, as if it meant simply that one side or the other were not doing their sums right.”).


23 Benjamin Kaplan, Encounters with O.W. Holmes, Jr., in Holmes and The Common Law: A Century Later 1, 1 (Harvard Law School 1981). Kaplan later asserts that the central point of Holmes’s thrust against Langdell, a prominent exemplar of the syllogistic viewpoint, was that judicial opinions should find their justification in public policy rather than in conclusions arrived at by merely logical means. Id. at 18.
to changing public sentiment.\textsuperscript{24} The development of the law is thus organic, having its roots in the soil of human experience, and changing in response to circumstances of life and the prevailing public mood.\textsuperscript{25} Surely, Holmes’s dramatic summation of this theory is the most quoted paragraph in all of American legal thought:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.\textsuperscript{26}

Holmes’s theory that law rested at bottom on public policy was fundamental. For Holmes, public policy meant, quite simply, what the community desires:\textsuperscript{27}

The substance of the law at any given time pretty nearly corresponds . . . with what is then understood to be convenient.\textsuperscript{28}

The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.\textsuperscript{29}

\textsuperscript{24} \textit{Path, supra} n. 1, at 999 (“I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage.”).

\textsuperscript{25} \textit{Path, supra} n. 1, at 998 (“We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.”).

\textsuperscript{26} \textit{Common Law, supra} n. 9, at 5.

\textsuperscript{27} Gilmore, \textit{supra} n. 2, at n. 23 (“‘Holmes saw the function of the law as simply to channel private aggression in an orderly, perhaps in a dignified, fashion .... The law effectuates the will of the dominant majority (what Holmes meant by ‘The Community’) and must arrange to carry it out with, as we might say, due process. Otherwise society would out its popular prejudices privately.’ Gilmore, \textit{Ages of American Law} 49 (1977).”)

\textsuperscript{28} \textit{Common Law, supra} n. 9, at 5. Holmes’s use of the terms “convenient” and “expedient” do not mean fleeting, but rather an enduring habit or inclination of a large part of the community.

\textsuperscript{29} \textit{Id.} at 36. Holmes once wrote, “[I]f my fellow citizens want to go to Hell I will help them.” Alschuler, \textit{supra} n. 3, at 136 (quoting from a Mar. 4, 1920, letter from Holmes to
The substance of the law, then, was legislative in its very grounds, embodying choices between differing ends, and how best to achieve them. Because the law embodied social choices and served social ends, law practitioners should understand the public policies embedded in it:

I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions.

Holmes believed lawyers would better understand social policy issues if they studied economics, for in political economy

we are called on to consider and weigh the ends of legislation, the means of attaining them, and the cost. We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect.

Holmes saw that all law was situated in time and place, no matter how self-evident and enduring a proposition seemed. For this reason, a

Laski; id. at n. 30). But see Kaplan, supra n. 23, at 16 (imagining Holmes explaining what he meant by following the community’s feelings and demands: “I did not picture a judge . . . keeping his ear to the ground to hear the tramp of insistent crowds; I meant that, in order to attract general obedience to law, surely a condition of stable government, the law must remain within a reasonable range of popular conceptions of what is right.”).

30 Common Law, supra n. 9, at 31 (“In substance the growth of the law is legislative.”).
31 Path, supra n. 1, at 1000.
32 Id. at 1005.
33 Id. at 998 (“the means do not exist for determinations that shall be good for all time, and . . . the decision can do no more that embody the preference of a given body in a given time and place.”).
34 Path, supra n. 1, at 998 (“No concrete proposition is self-evident, no matter how
body of law must continually track the prevailing mood of public sentiment to be enforceable.\textsuperscript{35} However, the public mind was not always apprehended directly. In fact, Holmes believed that judges often weighed competing public policy and intuited the public will at a subrational level:

Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. 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, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions.\textsuperscript{36}

Because the law is based upon public policy, every dispute is in reality a clash between contending policies.\textsuperscript{37} Holmes provided some particularly illustrative examples of policy face-offs:

Why is a false and injurious statement privileged, if it is made ready we may be to accept it, not even Mr. Herbert Spenser’s Every man has a right to do what he wills, provided he interferes not with a like right on the part of his neighbors.”).\textsuperscript{35}  
\textit{Path, supra} n. 1, at 993 (“I once heard Professor Agassiz say that a German population would rise if you added two cents to the price of a glass of beer. A statute in such a case would be empty words, not because it was wrong, but because it could not be enforced.”).\textsuperscript{36}  
\textit{Path, supra} n. 1 at 998. \textit{See also Common Law, supra} n. 9, at 32 (“the unconscious result of instinctive preferences and inarticulate convictions, but nonetheless traceable to views of public policy in the last analysis.”); Oliver Wendell Holmes, \textit{Law in Science and Science in Law}, 12 Harv. L. Rev. 443, 462 (1899) [hereinafter \textit{Law in Science}] (“our estimate of the proportion between these, now often blind and unconscious”).\textsuperscript{36}  
\textit{Common Law, supra} n. 9, at 32 (“Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy.”). Holmes, of course, did not intimate that every case was close. It was quite amusing to discover several which he dispatched in one paragraph, sometimes without any citation to law whatsoever. (E.g., \textit{Kane v. Worcester}, 182 Mass. 210 (1902); \textit{Commonwealth v. Duprey}, 180 Mass 523 (1902); \textit{Hyde v. Mechanical Refrig.}, 144 Mass. 432 (1887); \textit{Brown v. Ladd}, 144 Mass. 310 (1887)).
honestly in giving information about a servant? It is because it has been thought more important that information should be given freely, than that a man should be protected from what under other circumstances would be an actionable wrong. Why is a man at liberty to set up a business which he knows will ruin his neighbor? It is because the public good is supposed to be best subserved by free competition.\(^3^8\)

The judge’s role was therefore to weigh the competing policies and choose between them.\(^3^9\) They should be cognizant that they are making such choices, and they should unabashedly state the grounds for their judgment:

\[
\text{[It is] natural and unavoidable that judges . . . should openly discuss the legislative principles upon which their decisions must always rest in the end, and should base their judgments upon broad considerations of policy.}\(^4^0\)
\]

Judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate.\(^4^1\)

Holmes was aware that judges disliked this role.\(^4^2\) In fact, Holmes said elsewhere, “I do not expect or think it desirable that the judges should undertake to renovate the law. That is not their province.”\(^4^3\) His meaning

\(^{3^8}\) Path, supra n. 1, at 998.

\(^{3^9}\) Path, supra n. 1, at 998 (Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds . . . the very root and nerve of the whole proceeding.”)

\(^{4^0}\) Common Law, supra n. 9, at 64.

\(^{4^1}\) Path, supra n. 1, at 999.

\(^{4^2}\) Id. (“judicial aversion”); see also Common Law, supra n. 9, at 31-32 (“[policy considerations which judges most rarely mention, and always with an apology”).

\(^{4^3}\) Law in Science, supra n. 36, at 460-61 (“[W]hat really is before us is a conflict between two social desires, each of which seeks to extend its dominion over the case, and
must be that when adjudicating between competing interests in a particular
dispute the judge had no choice but to make a choice,\(^44\) but that theirs was
not the wholesale writing of new law.

Holmes was also keenly aware of the various tensions at work in the
law, such as the strain between what the law was and what it was becoming.
The law always strove for consistency with itself but never reached it,\(^45\) for
precedent sometimes had to yield to present need. In a wonderfully succinct
and felicitous statement of how the law developed, Holmes said, “[T]he
whole outline of the law is the resultant of a conflict at every point between
logic and good sense — the one striving to work fiction out to consistent
results, the other restraining and at last overcoming that effort when the
results become too manifestly unjust.”\(^46\) This statement well illustrates that
the law conforms to public policy in every age.

In short, Holmes believed all legal practitioners should understand
that public policy issues pervaded every aspect of the law. However, the
weightiest duty fell to judges, for the essence of adjudicating a dispute was
deciding between the competing social policies presented. But how was a

\(^{44}\) Id. at 461 (“[J]udges are called on to exercise the sovereign prerogative of choice.”).

\(^{45}\) Common Law, supra n. 9, at 32 (“[t]he law is always approaching, and never
reaching, consistency. It is forever adopting new principles from life at one end, and it
always retains old ones from history at the other, which have not yet been absorbed or
sloughed off. It will become entirely consistent only when it ceases to grow.”)

\(^{46}\) Oliver Wendell Holmes, Agency, 4 Harv. L. Rev. 345, 346 (1891) (Part I of II)
[hereinafter Agency].
judge to make that choice?

II. Holmes’s Four-step Adjudicative Process

Although Holmes never provided an explicit blueprint of his adjudicatory process, he occasionally remarked on his judicial philosophy, including this extended reflection:

I have tried to see the law as an organic whole. I also have tried to see it as a reaction between tradition on the one side and the changing desires and needs of a community on the other. I have studied tradition in order that I might understand how it came to be what it is, and to estimate its worth with regard to our present needs; and my references to the Year Books often have had a skeptical end. I have considered the present tendencies and desires of society and have tried to realize that its different portions want different things, and that my business was to express not my personal wish, but the resultant, as nearly as I could guess, of the pressure of the past and the conflicting wills of the present. I have considered the social and economic postulates on which we frame the conception of our needs, and I have to see them in a dry light. It has seemed to me that certainty is an illusion, that we have few scientific data on which to affirm that one rule rather than another has the sanction of the universe, that we rarely could be sure that one tends more distinctly than its opposite to the survival and welfare of the society where it is practiced, and that the wisest are but blind guides.47

This passage recapitulates many of Holmes’s enduring insights about the law. For one, we see his awareness of the conflicting forces at work in adjudicating the conflicts of society. Holmes contrasts “the pressure of the past” with “our present needs.” He also notes the concurrent tensions within society: “its different portions want different things.” He further

47 Posner, supra n. 2 at 151 (from “Twenty Years In Retrospect”).
provides his perception of his own role, which was to leave aside his personal views and to “guess,” as nearly as he could, the result dictated by the most dominant of the contending pressures. His thought on “social and economic postulates” reveals his belief that lawyers and judges should consider the policy choices the laws serve, and the social costs and trade-offs inherent in those choices. Lastly, Holmes provides his reason for giving effect to the predominant will of society, which is that no one can say that a different rule would more likely serve the survival and welfare of society than the one which society chose in that moment.

Whereas Holmes sometimes made explicit his judicial philosophy, he did not provide a roadmap which he self-consciously followed in adjudicating a case. However, it is the thesis of this paper that Holmes did have such a roadmap, and that he divulged it, if only implicitly, in The Path of the Law. This was the three-step process of gaining mastery of the law which he commended to the students he addressed. The sentence in which he offered all three was easy to miss, although his entire speech was an extended explication of them. In Holmes’s words:

The way to gain a liberal view of your subject is not to read something else, but to get to the bottom of the subject itself. The means of doing that are, in the first place, to follow the existing

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48 Path, supra n. 1, at 1005 (“[W]e are called on to consider and weigh the ends of legislation, the means of attaining them, and the cost.”).
49 Holmes elsewhere sardonically remarked that the epithet on his tombstone should read, “Here lies the supple tool of power.” Grey, supra n. 2, at 38-39 (citing Merlo J. Pusey, 1 Charles Evans Hughes 287 (Columbia Univ. Press 1951)).
body of dogma into its highest generalizations by the help of jurisprudence; next, to discover from history how it has come to be what it is; and, finally, so far as you can, to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price.\(^{50}\)

In short, the steps are:

1. to discover the over-arching principles governing the rules bearing on the case;
2. to understand the historical development of the rules, to discern the social choices embedded within them; and
3. to consider the societal ends the rules serve, and what costs and trade-offs are inherent in these choices.

To these three steps, I have added a fourth which seems to me impelled by logic, and by Holmes’s writings and opinions. That step is determining where the public will lay in the matter. What was the outcome which the prevailing mood demanded, or in which direction was the law being pushed by the needs and desires of the community? After fleshing out these steps, this paper will examine some cases demonstrating Holmes’s method in action.

First, the practitioner must understand the broad, general principles underlying a given body of rules. Holmes said that while jurisprudence could be considered the science of laws’ “broadest rules and most

\(^{50}\) *Path, supra* n. 1, at 1007.
fundamental conceptions,"51 every effort to reduce a case to a rule was an act of jurisprudence.52 The truly effective practitioner apprehended and applied these broad principles,53 while misapprehension of them led to aberrant rulings and miscategorizations of law.54 “If a man goes into law it pays to be a master of it, and to be a master of it means to look straight through all the dramatic incidents and to discern the true basis for prophecy.”55 An effective advocate must know on what principle the case would turn. Likewise, a judge’s rulings should be rooted in broad principles which remain relevant in future circumstances.

Second, practitioners should understand the history of the rules at issue, in order to understand the ancient reasons for them and the way that have adapted to new times and situations. One cannot even understand what the law is without knowing “what it has been, and what it tends to become.”56 Rules come into being in response to a need, custom or belief, but change over time to accommodate shifting need and custom.57 Holmes

51 Path, supra n. 1, at 1005 (especially as the term was understood in England. Id.).
52 Path, supra n. 1, at 1005.
53 Path, supra n. 1, at 1005-1006.
54 Holmes tells the story, with a touch of disdain, of a suit involving a broken churn. The judge, not finding anything in the law about churns, gave judgment for the defendant. Path, supra n. 1, at 1006.
55 Id. at 1006. Holmes’s decisions are striking in this quality of seeing straight through to the principles involved.
56 Common Law, supra n. 9, at 5 (emphasis added).
57 Id. at 8 (“The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the
coined the term “survivals”\textsuperscript{58} for ancient rules whose raison d’être have disappeared. Although he explains that new reasons are typically supplied to account for ancient rules,\textsuperscript{59} survivals should be continually evaluated to “decide anew whether those reasons are satisfactory.”\textsuperscript{60} Like many of his time, Holmes was a pragmatist with a disgust for empty forms which had outlived their usefulness:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.\textsuperscript{61}

For this reason, an understanding of history was freeing, for it “enables us to make up our minds dispassionately whether the survival which we are enforcing answers any new purpose when it has ceased to answer the old.”\textsuperscript{62} In general, practitioners should understand that the law has grown organically and spontaneously, “each generation taking the inevitable next step.”\textsuperscript{63} Holmes believed that the law grew somewhat logically in form, rule adapts itself to the new reasons which have been found for it, and enters on a new career.”\textsuperscript{64}

\textsuperscript{58} Common Law, supra n. 9, at 33.
\textsuperscript{59} See quote at n. 57, supra.
\textsuperscript{60} Common Law, supra n. 9, at 33.
\textsuperscript{61} Id. at 1001.
\textsuperscript{62} Law in Science, supra n. 36, at 452.
\textsuperscript{63} Path, supra n. 1, at 1000. In some respects, growth by accretion was natural and right; humans could not afford to reinvent the wheel in every generation, and a modicum of blind imitation was permissible: “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, and the same is true of a larger part than we suspect of what we think. The reason is a good one, because our short life gives us no time for a better, but it is not the best.” Id.
although in substance it derived more from experience than logic.\textsuperscript{64} By taking stock of how a law had developed, one might predict how it would respond to society’s changing values and circumstances.

Third, the law practitioner must consider what ends the law served in society, whether it accomplished those purposes, why those ends were desirable, and what was given up to gain them.\textsuperscript{65} A judge must remain cognizant that he chose between policy preferences, and therefore must keep the ends each policy served firmly in mind.\textsuperscript{66} Because rules developed over time in response to the changing needs of a community, they must be continually re-examined to ensure they still gave effect to society’s preferences: “a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated.”\textsuperscript{67} The law ideally approached presently-held desires of society, discarding antiquated and empty forms in its forward march through time.

These first three steps, drawn directly from his suggested approach

\textsuperscript{64} Common Law, supra n. 9, at 31. The logical growth of form likely meant predictable growth. This understanding melds his somewhat contradictory assertions that the law is not logical yet it is predictable. It was the substance, or life of the law, which drew from experience rather than logic.

\textsuperscript{65} Path, supra n. 1, at 1005 (“We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect.”)

\textsuperscript{66} Law in Science, supra n. 36, at 198 (“But inasmuch as the real justification of a rule of law . . . is that it helps to bring about a social end which we desire, it is no less necessary that those who make and develop the law should have those ends articulately in their minds.”).
to mastery of the law but applied to the adjudicative process, suggest the following methodology for the would-be Holmesian judge: One must first discern the deep principles expressed in the rules relevant to the dispute before him. One must then review the historical development of those rules and seek the reasons behind them, both to understand the law as it stood and to assess the likely direction of the law’s growth. Finally, one must apprehend the competing social advantages couched in the contest, and consider the trade-offs involved.

But how, finally, does a judge decide which of the competing policies should prevail? This is the fourth step, not drawn by Holmes but nevertheless one of his major themes in *The Common Law*, *The Path of the Law*, and other writings: the judge must assess the predominant mood of the community.

Community experience informs both the substance of the law and the judge’s determination of the winner in any given policy struggle. Holmes sometimes spoke of the seeming arbitrariness of decisions close to the line. When contending policies went head to head in the “interstices”\(^7\)

\(^6\) *Path, supra* n. 1, at 1000-1001.

\(^6^8\) Holmes himself called it a “guess.” Posner, *supra* n. 2, at 151 (from “Twenty Years in Retrospect”).

\(^6^9\) *Law in Science, supra* n. 36, at 461 (“The social question is which desire is strongest at the point of conflict.”) “[T]he only way to solve the problem presented is to weigh the reasons for the particular right claimed and those for the competing right . . . as well as one can, and to decide which set preponderates.” *Id.* at 462.

\(^7^0\) Holmes used this language in reference to cases that drew finer and finer distinctions between facts which categorize conduct as either lawful or unlawful, or otherwise call for
between areas of settled law, the logic failed and a judge grasped for the half-conscious apprehension of where the judgment should fall. However, the judge had three sources from which to draw for his assessment of the community’s will in the matter: the judge’s own experience as a member of society, the jury as a proxy for society at large, and the disposition of the community as embodied in precedent.

Judges themselves are situated within society and subject to the political opinions and intellectual theories of the day. Judges also gain a

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71 Grey supra n. 2, at 33 (quoting Southern Pacific v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) (“I recognize . . . that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions”).

72 Grey, supra n. 2, at 35 (“The difficult cases . . . typically arose in the overlapping penumbras of competing legal concepts.”); Common Law, supra n. 9, at 101 (“But as new cases cluster around the opposite poles, and begin to approach each other, the distinction becomes more difficult to trace; the determinations are made one way or the other on a very slight preponderance of feeling, rather than of articulate reason.”)

73 Law in Science, supra n. 36, at 461 (“Where there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious the judges are called on to exercise the sovereign prerogative of choice.”); Common Law, supra n. 9, at 32 (“at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions”); Id. at 5 (“intuitions of public policy, avowed or unconscious”); Path, supra n. 1, at 998 (“a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment”).

74 Holmes, like everyone, was shaped by the community of which he was a part. He was certainly in touch with the intellectual milieu of his time. But he also remarked on his own ignorance of current events. See Grey, supra n. 2, at 40 (Holmes was ‘academic to the
fund of experience and an accurate sense of public sentiment through hearing cases and receiving the verdicts of juries. Holmes referred frequently and admiringly to former Massachusetts Chief Justice Shaw, in part attributing his greatness as a judge to his instinct for discerning the sentiment of the community:

[T]he strength of that great judge lay in an accurate appreciation of the requirements of the community whose officer he was. . . . [F]ew have lived who were his equals in their understanding of the grounds of public policy to which all laws must ultimately be referred.

Holmes found the judge’s own experience a sufficiently accurate measure of the public will, and all the more so through constant exposure to citizen disputes.

The jury was an obvious source of community sentiment, although of course they were not utilized in every case. Additionally, as just noted, a judge might gain a better sense of community sentiment than the average jury. Holmes actually held a dim view of juries in their role as point of unreality; did not ‘read the papers or otherwise feel the pulse of the machine’; ‘never knew any facts about anything’ and was ‘baffled’ whenever a visitor asked ‘some informal intelligent question about our institutions or the state of politics or anything else.’ (quoting original sources). Grey saw Holmes as “hardly a man of his time,” id., but I think it hardly avoidable that he was, however disconnected from the minutiae of life he might have been.

75 Common Law, supra n. 5, at 99 (“A judge who has long sat at nisi prius ought gradually to acquire a fund of experience which enables him to represent the common sense of community in ordinary cases far better than an average jury.”); Id. at 5 (“the felt necessities of the time, the prevalent moral and political theories . . . even the prejudices that judges share with their fellow-men”).


77 See quotes at n. 75, supra.
factfinders;\textsuperscript{78} nevertheless, he found in their inherent prejudices and biases precisely the barometer of community sentiment which should inform the result.\textsuperscript{79}

Finally, the judge had case law, the very record of society’s preferences encapsulated in time. But how did the judge utilize past preferences to decide a present dispute?\textsuperscript{80} The judge must perhaps extend precedent to cover a new situation, or perhaps he sensed a changing direction in public policy. Distinguishing facts to remove the case from the reach of precedent was easy; the point was why the judge made this move.

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.\textsuperscript{81}

As always, back to policy, back to the judge’s sense of society’s preference in the contending policies before him, back to whatever measure of community experience the judge could access.

With these understandings of Holmes’s four-step process -

\textsuperscript{78}Law in Science, supra n. 36, at 459 (“I confess that in my experience I have not found juries specially inspired for the discovery of truth.”); Common Law, supra n. 9, at 101 (“the more or less accidental feelings of a jury”).

\textsuperscript{79}Law in Science, supra n. 36, at 460 (“[T]hey will introduce into their verdict a certain amount - a very large amount, so far as I have observed - of popular prejudice, and thus keep the administration of the law in accord with the wishes and feelings of the community.”).

\textsuperscript{80}Holmes assumed that precedent gave a fairly contemporaneous measure of public sentiment. For instance, he admonished law students not to despair in the face of ever-increasing numbers of decisions for “[t]he reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law, and restate it from the present point of view.” Path, supra n. 1, at 992.
extracting principles, tracing history, apprehending the contending policies at stake, and discerning the public will - we turn to examples of Holmes applying his theory and method as he adjudicated cases.

III. HOLMES’S METHOD IN ACTION

Holmes’s four-step process is by no means evident in every opinion. In fact, searching for illustrative cases required sifting through many more not chosen. This is because the decision-making process was “often an inarticulate and unconscious judgment,”82 and “the unconscious result of instinctive preferences and inarticulate convictions.”83 Holmes’s process was simply not always explicit. The following cases, then, are actually atypical in the extent to which they reveal Holmes’s underlying method. But they suggest that Holmes applied a consistent and recognizable method in reaching his decision in almost every case.

A. A Consideration of Reasons

The first case is illuminating because it involved a lack of on-point precedent, and two compelling social policies in tension. Early in Holmes’s judicial career as a judge, the Massachusetts Supreme Judicial Court heard Cowley v. Pulsifer,84 a libel case which neatly pitted the privacy concerns of the individual against society’s interest in the open administration of justice.

81 Path, supra n. 1, at 998.
82 Path, supra n. 1, at 998.
83 Common Law, supra n. 9, at 32.
84 137 Mass. 392 (1884). The facts are presented at 392-393.
A petition for the disbarment of an attorney was presented to a court clerk, who marked it filed but did not present it to the court or enter it on the docket. The petition contained actionable allegations unless justified. The defendants, owners and publishers of the Boston Herald, relied on a recognized privilege to actionable libel: publishing fair and correct reports of judicial proceedings. The issue, therefore, was whether the privilege operated under the circumstances.

Holmes began by observing the lack of governing precedent. The justices could not simply apply case law, but must instead come to a conclusion based on a “consideration of the reasons upon which admitted principles have been established.” In this sentence, Justice Holmes cited two of his three steps: understanding the principles governing the case, and understanding the historical reasons behind those principles. He inferred the third step: the competing policies which must be weighed against one another in light of perceived societal preferences, and the ends those preferences served.

Holmes first inquired into the rationale for privileging the fair reporting of judicial proceedings, and approved Justice Lawrence’s succinct statement of these reasons:

Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast
importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.  

Holmes next postulated that some of the advantages in adopting these principles included the security which publicity provided to the administration of justice, that those who administered justice should do so with a sense of public responsibility, and that the public might satisfy itself as to the mode in which this public duty was performed.

But against these stood the privacy of the individual. Justice Lawrence believed it more important that justice be done openly than that the individual concerned should suffer the public spotlight. But Holmes distinguished the situation from a proceeding in open court. Here instead were preliminary written allegations, the knowledge of which shed no light upon the administration of justice, and the content of which depended wholly and solely upon a single individual, acting unilaterally and with unexamined motivations. Because the situation did not lend itself to the reasons for which the privilege had been established - a public airing of argument and evidence - the publication of the petition was not privileged.

“It would be carrying privilege farther than we feel prepared to carry it, to

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86 Id. at 394 (quoting Rex v. Wright, 8 T. R. 293, 298).
87 Id. He suggested that privileged publicity was founded on the principle that courts are open to the public but, following another opinion, agrees this foundation is too narrow for the privilege, albeit resting on similar reasoning.
say that, by the easy means of entitling and filing it in a cause, a sufficient foundation may be laid for scattering any libel broadcast with impunity.”

So, Holmes saw through to the governing principles within the rules, examined how the rules had changed through time to reflect new policies, and weighed the competing policies at stake. Finally, he queried what ends the rules now served, and whether society still chose these ends, moving forward.

To discern where the public would draw the line, Holmes assessed the point at which the operation of a desired policy passed into public outrage. Society demanded that justice be done in the light of day, but the countervailing consideration was the privacy of the individuals involved, preserved indeed in some specialized proceedings such as bankruptcy. While court filings may be public record, Holmes intuited the outcry that
merely by filing a complaint with the court, one could effectively and lawfully circumvent the law against libel. The point where public will slipped into public outrage was the point to which the policy extended, and no further. On these facts, the publishers did not stand upon privilege.

B. A Tale of Two Quarries

In an equity case, the court had to decide whether an ancient covenant could be enforced by a current landowner. The policies in contention were the enforcement of covenants making property more valuable, versus the right to freely use one’s land. To decide the case, Holmes extracted the principles animating this branch of property law through history, finally considering the ends the rules served, and whether society now made a different choice.

In Norcross v. James,93 the defendants held land adjoining the plaintiffs’ property, and each property included at least one stone quarry. The remote owner of the undivided property conveyed the quarry which passed in time to the plaintiffs, while the defendants owned the parcel which the original grantor had kept for himself. The original grantor covenanted with the original grantee to refrain from working the quarries on his own land, which of course made the conveyed quarry more valuable. The defendants were working the quarry on their land and the plaintiffs

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public. We do not admit that this is true’; however, “we are of opinion [sic] that such papers are not open to public inspection.” Id. at 396.
sought an injunction.

Holmes first delineated the principles by which the case was governed. To do so, he looked back at the old cases and noted the distinction made by Lord Coke between rights which run with an estate in land and rights which run with the land. The former were those created by contract, the issue then being whether and how successors in interest had privity of estate to enforce the contract. The latter rights were not created by contract. They therefore did not require privity but simply attached to the land, burdening the servient estate. Some confusion entered the law because rights of the latter kind embraced both affirmative duties, such as maintaining fences, as well as negative duties, such as a covenant not to erect structures which block a neighbor’s air or light.

After examining the history and seeing through to the principles that explain why some covenants attach to the land while others do not, Holmes classified the covenant involved as one which ran with the land because it restricted the use of the land. But this did not end the matter, for the question remained whether the restriction was absolute. “[E]quity will no

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93 140 Mass. 188 (1885). The facts are presented at 188.
94 Id. at 188.
95 Id. at 190.
96 Id. at 192.
97 Id. at 191 (“In the main, the line between the two classes of cases distinguished by Lord Coke is sufficiently clear; and it is enough to say that the present covenant falls into the second class [running with the land], if either. Notwithstanding its place among the covenants for title [an indicator of a matter of contract], it purports to create a pure negative restriction on the use of land, and we will take it as intended to do so for the benefit of the
more enforce every restriction . . . than the common law will recognize as creating an easement every grant purporting to limit the use of land in favor of other land.”

The covenant would not run with the land in perpetuity unless it directly “touch[ed] and concern[ed]” the dominant estate, or tended to its support, another governing principle.

Holmes concluded that the covenant did not tend directly to the support of the dominant estate by making, for instance, its use or occupation more convenient. It was not a negative restriction which had a direct physical advantage, such as disallowing structures which block air and light. Instead, the benefit was of an indirect nature, a mere economic advantage. The restriction kept the defendants’ competing stone out of the local marketplace, which tended to increase the value of the stone from the plaintiffs’ quarry. Because the covenant benefited the dominant estate only in this indirect way, it should not run with the land, and the court would not enjoin its contravention. This distinction between direct and indirect support created the same result as if Holmes had classified the covenant as merely personal in the first place.

Why did he rule in this

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98 Id. at 192.
99 Id.
100 Id.
101 Id. at 192 (“[W]e think that if this covenant were regarded as one which bound all subsequent owners of the land to keep its products out of commerce, there would be much greater difficulty in sustaining its validity than if it be treated as merely personal in its burden.”). I assess this sentence to be Holmes’s case-in-a-sentence: issue, conclusion, reason. See discussion at n. 89, supra.
In short, he did it for policy reasons. In *Norcross*, Holmes faced the contending policies of the right of landowners to enjoy a benefit conferred by covenant long ago, and the right of the neighbors to make full use of their property. If Holmes classified the covenant as running with the land, which the old cases apparently dictated, he would end up with an outrage. “If it is of a nature to be attached to land, as the plaintiff contends, it creates an easement of monopoly,—an easement not to be competed with,—and in that interest alone a right to prohibit one owner from exercising the usual incidents of property.” For Holmes, it was unacceptable that an “easement not to be competed with” should run with land. Thus, he distinguished the covenant as conferring an “indirect” benefit which did not run with the land.

So we see the discernment of governing principles, followed by an examination of the old cases to demonstrate that the way covenants were created dictated whether or not they attached to the land. Next came an appraisal of the social policies in contention, and finally, an assessment of which policy should prevail. Holmes crafted the opinion to arrive where he wanted to go by making a distinction which reversed the normal operation of the type of covenant involved.\(^{102}\) Convoluted, yes, but governed

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\(^{102}\) Why not just characterize the covenant as personal (contractual) in the first place, so that it would not run with the land? For one, I believe the logic of the older cases compelled Holmes’s categorization of the covenant as one running with the land. For all his arguments about logic not being the last word in how the law develops, Holmes was as
throughout by Holmes’s striking sense of principle, history, the policies in
tension, and public pressure regarding the outcome. The covenant would run no longer.

C. Over-Arching Principle Meets Ambiguous Authority

In a case involving alleged duress in the signing of a note, Holmes framed a uniting principle for the effect of fraud and duress, and questioned authority which suggested they should operate differently when perpetrated by a stranger to the contract. The defendant in *Fairbanks v. Snow*\(^{103}\) contended that she signed a promissory note secured by her own property because her husband was threatening suicide.\(^{104}\) The only issue on appeal was whether the trial court erred in refusing to rule that if the defendant signed the note under duress, it was immaterial whether the plaintiff knew of the duress or not.\(^{105}\)

Holmes began his search for governing principles by first noting the common law distinction between the level of compulsion which makes a

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\(^{103}\) 145 Mass. 153 (1887).

\(^{104}\) *Id.* at 156.

\(^{105}\) *Id.* at 153-154.
contract void, versus that which makes it voidable.\textsuperscript{106} This was the
distinction between bodily or mechanical compulsion (grasping the hand
and forcing the signature) and mental compulsion (duress). He noted that
“the civilians” hotly debate the distinction, with some maintaining that no
act done under compulsion is a legal act.\textsuperscript{107} As a starting point, then, even if
the signature was made under duress, the note at issue was not void but
merely voidable.

Holmes identified two principles at work. Each, he believed, should
operate identically whether the foundation of the action was fraud or duress.
The first principle was that a contract may be avoided in cases of duress or
fraud because each is an “improper motive for action . . . whether
spring[ing] from a fear or a belief.”\textsuperscript{108} The second was that a party to a
contract cannot be responsible for fraud or duress which he had no part
in.\textsuperscript{109} But Holmes discovered an unaccountable dissimilarity in the
operation of the second principle, depending on whether fraud or duress
was involved.\textsuperscript{110}

\textsuperscript{106} Id. at 154.
\textsuperscript{107} Id. Holmes’s use of the term “civilians” is an instance of what could comprise an
entire paper on the deep influence that his experience as a thrice-wounded soldier in the
Civil War had on his outlook on life, his philosophy of law, and his liberal employment of
military terms and metaphors in his writings. Here, I just note a touch of condescension in
his use of this term, suggesting by it ‘those unschooled in the matter.’
\textsuperscript{108} Id. at 154.
\textsuperscript{109} Id. (“A party to a contract has no concern with the motives of the other party for
making it, if he neither knows them nor is responsible for their existence.”)
\textsuperscript{110} Id. (“But, if duress and fraud are so far alike, there seems to be no sufficient reason
why the limits of their operation should be different.”). This, by the way, is his case-in-a
The Adjudicative Method of O.W. Holmes

Understanding the historical development of the rules at issue became especially prominent in Holmes’s method whenever their existence or operation was hard to understand. Here, the clear rule was that a defendant could not prevail by arguing that his assent was obtained by the fraud of a stranger to the contract.\(^\text{111}\) Yet the cases regarding duress were more ambiguous. On the one hand, Holmes cited authority for the proposition that A could avoid a deed to B if made under threat from a party unknown to B.\(^\text{112}\) On the other hand, he found authority suggesting that a contract would not be avoided due to duress by a stranger.\(^\text{113}\)

Attempting to discover the reasons for the difference in outcomes, Holmes continued to scour the law books. He noted that duress had been likened in some authorities to infancy, and that ancient distinctions made contracts by an infant’s own hand valid, whereas those done by letter of attorney were void.\(^\text{114}\) But if this principle were analogized to contract law, contract validity would turn on whether or not there was personal delivery by the defendant to the plaintiff.\(^\text{115}\) This plainly outrageous result appears to

\(^{111}\) Id.

\(^{112}\) Id. (citing Thoroughgood’s Case, 5 Coke, 241).

\(^{113}\) Id. at 155 (citing Keilway, 154a, pl. 3, “the defendant in debt pleaded that he made the obligation to the plaintiff by duress of imprisonment (on the part) of a stranger, and the opinion of Rede and others was that this is not a plea without making the oblige party to this duress.”).

\(^{114}\) Id. (citing 2 Co.Inst. 483; Finch, Law, 102.).

\(^{115}\) Id. (“[T]he contracts in all the New York cases which we have cited would be void by the law of that state for want of a personal delivery by the defendant to the plaintiff.”).
confirm for Holmes that the ancient association between duress and infancy shed little light on the divergence of results both in the duress cases, and as between duress and fraud. Having come up empty in his hunt for a historical reason for the puzzling divergence, Holmes’s explicit rationale for holding against the defendant was that “the ruling requested was wrong upon principle and authority.”

To refer only to principle and authority is to understate the part which public policy played in the outcome. Holmes was somewhat dismissive of the average layperson’s grasp of these fine points of law, but he nevertheless tested the public mind through his oft-used technique of demonstrating the absurdity of an opposite ruling. Making this particular choice was undoubtedly not even a close call for Holmes. Despite ambiguous precedent, neither fraud nor duress by a stranger to a contract would be charged against a party with no knowledge of it.

Holmes’s adjudicative process didn’t necessarily proceed in a strict order, nor was each step always explicit. Here, the third step of apprehending the contending policies at stake is inferred from the choice that Holmes sets up throughout his discussion: either apply murky, illogical precedent for the sake of stability in the law, or merge divergent lines of authority into a single rule, whether the ground for avoiding a contract was

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116 Id.
117 See discussion at n.107, supra, regarding those ‘unschooled in the law.’
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fraud or duress. Thus, we see all of four of Holmes’s steps: distilling principles, seeking historical rationales, perceiving the policies in tension, and discerning the predominant one. As we know, Holmes often assessed the public mind through his experience as a judge hearing hundreds of cases, informed by his legal expertise. In the end, Holmes gave effect to his intuition that fraud and duress, which alike created improper motive for a contract, should lead to similar outcomes, and thereby smoothed out a puzzling inconsistency in the law.

D. External Standards in Criminal Law

This following case presents Holmes’s objective theory of liability applied to a criminal case. One of the major propositions which Holmes announced in The Common Law, which is now so thoroughly appropriated by modern lawyers that it is hard to appreciate its acumen at the time,\(^\text{119}\) was that the basis of legal liability had shifted over the long development of the law from moral conceptions of a person’s actual culpability or blameworthiness to the comparison of conduct against an external standard, that of the reasonably prudent person in similar circumstances.\(^\text{120}\) According

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\(^\text{118}\) See quote at n. 115, supra.

\(^\text{119}\) See Kaplan, supra n. 23, at 25 (“His vision of law and legal process, as described in The Common Law, we have all appropriated and absorbed. We could not escape it if we would; it informs all that we do as lawyers. We move to the measure of his thought.”).

\(^\text{120}\) Common Law, supra n. 9, at 128-129. “But as the law has grown, even when its standards have continued to model themselves upon those of morality, they have necessarily become external, because they have considered, not the actual condition of the particular defendant, but whether his conduct would have been wrong in the fair average member of the community, whom he is expected to equal at his peril.” Id. at 128. “[T]he
to Holmes, the principle undergirding this development was that “when men live in society, a certain average conduct, a sacrifice of individual peculiarities . . . is necessary to the general welfare.”\footnote{Common Law, supra n. 9, at 86.} Additionally, external standards sidestep the impossible task of assessing individual capacities. The law can only deal with externalities, not matters of conscience; it forbids conduct “on the wrong side of the line,” whether blameworthy or not.\footnote{Id. at 88.} According to Professor Alschuler, this case was an unwarranted and disastrous extension of Holmes’s theory of external standards of civil liability into the criminal law.\footnote{Alschuler, supra n. 3, at 110-111.} Alschuler, as previously noted, is a harsh critic of Holmes’s thought. He described at length the effect of this external standard in the famous 1997 case of Louise Woodward, a young English au pair convicted by a Massachusetts jury of murdering the infant in her care, under jury instructions that murder could be found without intent to kill or without deliberately risking harm. According to Alschuler, the trial judge, bowing to public outrage, quickly set aside the verdict. \textit{Id.} at 110, n. 176. Alschuler further notes that Holmes’s views regarding external standards of criminal culpability, perhaps especially in cases of homicide, have been widely discounted and criticized. \textit{Id.} at 110-111. In sum, Alschuler calls \textit{The Common Law}, arguing as it does that the law moves toward increasingly objective standards of conduct, “Holmes’s mercifully unread book.”

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\textit{Id.} at 129. This is “the test of the prudent man.” \textit{Id. See also Common Law, supra n. 9, at xxvi (Howe makes clear that it was Holmes who recognized the move toward external standards in the development in the common law); but see Alschuler, Law Without Values, supra n. 3.} Alschuler, a determined critic of Holmes, asserts that an objective standard of negligence was established in an 1837 English decision well-known in tort liability law but not cited by Holmes (citing \textit{Vaughn v. Menlove}, 132 Eng Rep 490, 493-4 (CP 1837)). \textit{Id.} at 112, n. 191. “Holmes’s objective theory was considerably less creative than he made it seem.” \textit{Id.} at 112.
adjudication.

In *Commonwealth v. Pierce*, a doctor was called to an ill woman’s home and with her consent had her clothed in flannel garments and kept saturated with kerosene oil for a period of about three days. This treatment blistered and burned her flesh and led directly to her death. The doctor had prior good results with the treatment used in a more limited way but there was also evidence of a poor result. The case was before the court on appeal from his conviction of manslaughter. The defendant had argued his honest intent to cure and his ignorance of the fatal tendency of the treatment. The trial judge refused his proffered jury instructions in this vein and instead instructed the jury that, “it is not necessary to show an evil intent,” and that, “if by gross and reckless negligence he caused the death, he is guilty of culpable homicide.” The defendant relied on an early Massachusetts case, *Commonwealth v. Thompson*, which acquitted a prisoner of felonious homicide when he held himself out as a physician and ignorantly but with honest intent to cure administered a fatal treatment. The defendant in the instant case argued that if juries could convict physicians for gross ignorance, the effect would “tend to encompass a most important and

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*Id.* at 131.

*Id.* 38 Mass. 165, 174 (1884). The facts of the case are given at 174-175.

*Id.* A further instruction was summed up by Holmes: “he was bound at his peril to do no grossly reckless act when in the absence of any emergency or other exceptional circumstances he intermeddled with the person of another.” *Id.* at 175.
anxious profession with such dangers as would deter reflecting men from entering into it.”

Holmes set up the issue by discussing the applicable law. He immediately pronounced *Thompson* wrong to the extent that it declared that manslaughter must be based upon acts unlawful for reasons other than their likeliness to kill; instead, case law had long since recognized that murder or manslaughter could be based on otherwise lawful acts committed recklessly. Then Holmes distinguished recklessness “in a moral sense,” meaning the appraisal of a person’s actual state of consciousness or condition of mind in relation to the act, from recklessness judged by an objective standard, meaning the “mere knowledge” of facts and circumstances as would lead most citizens to appreciate likely consequences. The court had to determine which assessment of recklessness should prevail, or more simply put, whether good intentions were an “absolute justification for acts, however foolhardy” and whether ignorance of kerosene’s effects in the way it was administered could be excused.

Holmes asserted that an objective standard for civil liability was

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127 6 Mass. 134 (1809).
128 *Pierce*, 138 Mass. at 173 (quoting Lord Ellenborough from the “cited case,” which in the context seems to be *Thompson*; however, *Thompson* does not contain the above cite or quote).
129 *Id.* at 175.
130 *Id.* at 175-176.
long established. He reasoned that there was an equally compelling argument that criminal law should have external standards of conduct when its entire purpose was maintaining general levels of conduct directed toward the safety of the community. After an extensive review of English and Massachusetts law, Holmes declared that “in light of admitted principle,” criminal recklessness, as in civil law, must be tested by an external standard.

But how was criminal recklessness determined? In civil law, recklessness was equivalent to an assessment of the degree of danger which by common experience is known to attend an act under circumstances known to the actor. Even in criminal law, an act causing death may be “murder, manslaughter or misadventure,” depending on the attendant degree of danger. Thus, the measure of recklessness both in civil and criminal law was simply the degree of danger accompanying an act. The legal fiction of implied malice simply meant that a high degree of danger accompanied

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131 Id. at 176.
132 Id. at 176 (quoting Tindal, C.J., from the 1837 English decision Vaughan v. Menlove, 3 Bing. N. C. 468, 475 (“Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe.”)). This is the case Alschuler charged Holmes with failing to cite in The Common Law. See discussion at n. 120, supra.
133 Pierce, 138 Mass. at 177-178.
134 Id. at 178.
135 Id.
an act causing death, and made that act murder. If a lesser but not remote degree of danger accompanied that same act, it was manslaughter.

The principle established in the cases, according to Holmes, was that intention was beside the point. Acts endangering human life, in the absence of emergency or exceptional circumstances, were not privileged by good intentions. A person’s knowledge was measured by common experience, and a person is charged with this level of knowledge “at his peril.” Thus, if the defendant knew he was using kerosene and the jury found his use of it foolhardy or grossly negligent, that was enough to find manslaughter.

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136 Holmes delivered a steely-eyed pronouncement on this point: “The very meaning of the fiction of implied malice is . . . that a man might have to answer with his life for consequences which he neither intended nor foresaw.” Id. Another example of this sentiment: “If I were having a philosophical talk with a man I was going to have hanged . . . I should say, I don’t doubt that your act was inevitable for you, but to make it more avoidable by others we propose to sacrifice you for the common good. You may consider yourself a soldier dying for your country if you like. But the law must keep its promises.” Alschuler, supra n. 3, at 108 (quoting a letter to Harold Laski; id. at n. 163).

On the subject of individual sacrifice for the good of the State, I cannot resist including my favorite one-liner in all of jurisprudence, despite its being strikingly illiberal. It is the last sentence of a passage from Holmes’s infamous Supreme Court decision upholding the forced sterilization of Carrie Buck, whom Holmes described as “a feeble-minded white woman who . . . is the daughter of a feeble-minded mother, and the mother of an illegitimate feeble-minded child.”

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes . . . Three generations of imbeciles are enough. Buck v. Bell, 274 U.S. 200, 207 (1927) (emphasis added).

137 Pierce, 138 Mass. at 178-179.

138 Id. at 180. See also Common Law, supra n. 9, at 86: “The court would say, Gentlemen, the question is not whether the defendant thought his conduct was that of a prudent man, but whether you think it was.”
Holmes appears to have followed all four steps in adjudicating this case. He discerned the principles of liability for recklessness in civil and criminal law. He also traced the historical development of case law, finding increasingly external standards of conduct. Next, he apprehended the social policies in contention, which in this case were particularly evident as well as compelling. It was therefore not a question of disregarding one but of finding the appropriate balance between them. Here, the public’s right to trust that persons holding themselves out as physicians possess a beneficial level of skill and knowledge stood opposed to attracting talented and reflective persons to the practice of medicine by shielding them from an excessive risk of liability for treatments gone bad. The final step, the assessment of where the scale of public outrage tipped, was made by the jury, in pronouncing the defendant guilty of a criminal degree of recklessness. Holmes’s role was to dutifully follow that assessment.

The foregoing discussions suggest that Holmes closely followed his own prescription. He had brought to his role as a jurist a keenly-honed

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139 It is possible that Holmes more imposed than discovered increasing externality, especially in criminal law. According to the materials and argument presented by Alschuler, the argument is much more compelling that criminal law has instead moved from external to internals standards of liability. Alschuler, *supra* n. 3, at 109-110, nn. 168-171.

140 This discussion in not complete without Holmes’s “case-in-a-sentence”: “We think that the principle must be adhered to, where, as here, the assumption to act as a physician was uncalled for by any sudden emergency, and no exceptional circumstances are shown; and that we cannot recognize a privilege to do acts manifestly endangering human life, on the ground of good intentions alone.” *Pierce*, 138 Mass. at 179. Contest, conclusion, rationale. See discussion at n. 89, *supra*. 
intuition for the governing principles within the rules, and a fully-formed historical approach to the common law. He also brought an abiding conviction that community policy shaped the law’s substance over time. The essence of the judge’s task was to apprehend the social policies at stake and to discern the public will as to which should prevail in the contest. Holmes believed that the law had developed in conformity with public need and desire, and that judges should continue to give effect to this majoritarian tendency of the law.

IX. A COUNTER EXAMPLE

We have looked at some cases in which Holmes’s jurisprudence in action appeared remarkably consistent with his theory of adjudication, as previously outlined. However, Holmes on occasion appeared to depart from this theory, the chief tenet of which is that law reflects and must conform to present public policy. For instance, Holmes decried that existence of “survivals” in the law, hollow vestiges which sprang from some long-ago need of society but which no longer served any present cognizable purpose.\(^{141}\) However, when he had opportunities to prune such historical anomalies from the law, he often did not take them. Holmes, in short, was

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\(^{141}\) Holmes utilized an analogy from evolution to explain these “survivals:” “Just as the clavicle in the cat only tells of the existence of some earlier creature to which a collarbone was useful, precedents survive in the law long after the use they once served is at end and the reason for them has been forgotten.” *Common Law*, supra n. 9, at 31. *See also Law in Science*, supra n. 36, at 191 (“some rules are mere survivals”).
not always the reformer he seemed to be. Dempsey v. Chambers is a case in point.

Dempsey involved a person undertaking to deliver coal on behalf of the seller, although the seller neither knew of nor authorized this delivery. In the course of delivering the coal, the actor broke a plate-glass window in the buyer’s building. The seller later ratified the delivery, with knowledge of the damage done. The sole question was whether, in so ratifying, the seller had made himself responsible for that damage.

After setting forth the bare facts and posture of the case, Holmes immediately announced:

If we were contriving a new code today we might hesitate to say that a man could make himself a party to a bare tort in any case merely by assenting to it after it had been committed. But we are not at liberty to refuse to carry out to its consequences any principle which we believe to have been part of the common law simply because the grounds of policy on which it must be justified seem to us to be hard to find, and probably to have belonged to a different state of society.

This is an astonishing statement from the person who insisted that the law derived from and must be grounded in public policy, and that the duty

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142 See e.g. Grey, supra n. 2, at 28 (“In general Holmes’s decisions over nearly fifty years on the bench followed existing law wherever he could find it, whether in precedent or legislation. This aspect of his judicial record has surprised many who believe that the famous pragmatist slogans naturally imply some form of judicial activism in the service of reform.”); Kaplan supra n. 23, at 18, n. 91 (“[T]he Massachusetts record shows him on occasion, perhaps characteristically, hesitant to go the reformer’s way even when historical anomaly was shown.”) (citing Commonwealth v. Cleary, 172 Mass. 175, 176-177 (1898); Dempsey v. Chambers, 154 Mass. 330, 331-332 (1891)).
144 Id. at 331.
of the judge was to weigh competing policies and choose the course society preferred.

As the law then stood, a master was liable for the negligent acts of his servant acting within the scope of his employment. Holmes allowed that it was hard enough to explain the law of agency, let alone that liability could attach, by ratification, in an even greater remove between actor and act. To justify extending the doctrine, then, one must understand its historical development and assess its likely contours going forward.

Holmes undertook the historical survey with copious citation. He noted that the law of agency was an echo of the “patria potestas,” and was seen in the modern fiction that the actor was one person with the authorizer. “Possibly,” he says, “ratification is another aspect of the same tradition.” He observed the further development in the English law that a later approval counted as approval from the beginning in the case of trespass. Since a trespass could be ratified, the question was whether the principle could extend to tort law. Holmes decided that it could:

If we assume that an alleged principal, by adopting an act which was unlawful when done can make it lawful, it follows that he adopts it at his peril, and is liable if it should turn out that his previous

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145 Id. at 331-332 (emphasis added).
146 Id. at 332. See Agency, supra n. 46, in which Holmes explains the long development of the law that makes one person responsible for another’s acts.
147 Id. at 332, a concept embodying the ancient rights and liabilities of the paterfamilias; see also Agency, supra n. 46, at 350.
148 Dempsey, 154 Mass. at 332.
149 Id.
command would not have justified the act.\textsuperscript{150}

Holmes was applying an established principle into a new area of law. But what justified this? Holmes typically would have given effect only to some intuition or assessment that the community wanted this result, but here, he seemed aware the result instead bordered on the outrageous.\textsuperscript{151} Holmes explained that, “consistency with the whole course of authority requires us [so] to hold.”\textsuperscript{152} This statement links back to his earlier assertion that “we are not at liberty to refuse to carry out to its consequences any principle which we believe to have been part of the common law.”\textsuperscript{153} These two assertions provide Holmes’s reason for his ruling, which is that principles within precedent compelled the outcome in spite of indications that society favored the opposite ruling.\textsuperscript{154}

What are we to make of this departure from Holmes’s insistence that present societal preference should dictate the decision? Some theories might be suggested. Was Holmes simply too enamored of the law to easily overturn that to which he had dedicated his life?\textsuperscript{155} Maybe he was too

\begin{footnotes}
\item[150] Id. at 332-333.
\item[151] “If a man assaulted another in the street out of his own head, it would seem rather strong to say that if he merely called himself my servant, and I afterwards assented, without more, our mere words would make me a party to the assault.” Id. at 333.
\item[152] Id. at 334.
\item[153] Id. at 331.
\item[154] “Doubts have been expressed . . . whether this doctrine applied to a case of a bare personal tort.” Id. at 333. See also quote at n. 151, supra.
\item[155] See e.g. Path, supra n. 1, at 1005 (“I venerate the law . . . [l]aw is the business to which my life is devoted.”). However, he immediately afterward asserted, “I should show less than devotion if I did not do what in me lies to improve it.” Id.
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knowledgeable of the law to throw it over.\textsuperscript{156} Perhaps, as one scholar suggested, it would instead be remarkable that Holmes’s jurisprudential views should be entirely consistent throughout the huge corpus of writing he left behind.\textsuperscript{157} Another commentator argues that Holmes consistently chose stability of the law over the perhaps fleeting public mood.\textsuperscript{158} Furthermore, Holmes found a certain sanction for choosing precedent, in the mere fact that it existed.\textsuperscript{159}

Holmes himself declared his essential conservatism in overruling precedent,\textsuperscript{160} and would have been the first to acknowledge that the law only imperfectly approached the ideal of according with society’s shifting

\textsuperscript{156} Common Law, supra n. 9, at 64 (“Ignorance is the best of law reformers.”).
\textsuperscript{157} Richard A. Posner, The Problems of Jurisprudence\textsuperscript{18} (Harv. Univ. Press 1990). Posner remarked that one scholar, who forcefully argued the many inconsistencies in Holmes’s work, lacked sympathy for his subject. Id. at n. 28).
\textsuperscript{158} See e.g., Kaplan, supra n. 23, at 19 (“[H]e believed in the binding force of precedent and put a high value on systemic regularity and certainty.”); Grey, supra n. 2, at 36 (“To Holmes, the judge’s concern in such a situation was not mainly with the substantive policies behind the competing doctrines but with considerations of present and future peace and stability.”). I differ with Grey on which concern was paramount to Holmes: the prevailing public will or considerations of future stability and prediction. If following precedent lent future stability and predictability to the law, it is true that Holmes, as here, often chose the latter. But as he asserted, all law was continually open to reconsideration: “We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.” Path, supra n. 1, at 998. Furthermore, this re-examination should take place continuously: “We are only at the beginning of . . . a reconsideration of the worth of doctrines which for the most part still are taken for granted without an deliberate, conscious, and systematic questioning of their grounds.” Id. at 1000. Perhaps the difference is one of degree and Holmes simply needed evidence of an enduring shift in public policy before he would move the law in that direction.
\textsuperscript{159} Posner, supra n. 2, at 151 (“But we have a great body of law which has at least this sanction: that it exists . . . one can see an advantage which, if not the greatest, at least, is very great - that we know what it is. For this reason I am slow to assent to overruling a decision.”).
\textsuperscript{160} Law in Science, supra n. 36, at 198 (“I am slow to consent to overruling a precedent.”).
values. He provided another strong clue to his unexpected retreat from the reformer’s role in this example of the judgment of courts running counter to popular opinion:

Why does a judge instruct a jury that an employer is not liable to an employee for an injury received in the course of his employment unless he is negligent, and why do the jury generally find for the plaintiff if the case is allowed to go to them? It is because the traditional policy of our law is to confine liability to cases where a prudent man might have foreseen the injury, or at least the danger, while the inclination of a very large part of the community is to make certain classes of persons insure the safety of those with whom they deal.

In other words, Holmes saw that popular instinct sometimes ran counter to the law. Indeed, Holmes acknowledged that some decisions were ripe for revision. Tort law, for instance, had developed in a time of “isolated, ungeneralized wrongs . . . where the damages might be taken to lie where they fell by legal judgment.” In his day, however, the bulk of tort actions were incidents of big business, the railroads and factories comprising the nation’s burgeoning industry. While juries sympathized with plaintiffs, the real inquiry, as Holmes saw, looked past the apparent contest between the little guy and big business to ask how far the public, by bearing the cost of compensating the injured, would subsidize the industrial juggernaut that

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161 Path, supra n. 1, at 1000 (“The ideal toward which [law] tends”); see also Seagle, supra n. 22, at 341 (“It is the merit of an ideal to be unattainable.”) (quoting Holmes without citing the source).

162 Path, supra n. 1, at 999.

163 Path, supra n. 1, at 999.
was providing livelihoods for so many. 164

Holmes seemed caught in this case between his sense of the pressure of precedent,165 and his perceived sense of popular outrage that “a man could make himself a party to a bare tort . . . merely by assenting to it after it had been committed.”166 From the standpoint of the defendant, the decision appeared unfair, but from a larger perspective, it was the public who would ultimately pay the price. At a time when the booming industrial machine was lifting many out of poverty, it appeared the public was willing to bear to great degree the costs incident to doing business. Liability would extend to this not-at-fault defendant.167

CONCLUSION

This paper set out to explore the glimmer of an idea: that Holmes not only provided a implicit blueprint for adjudication in his academic writings, but had followed this method in practice. Holmes commended to students a three-step process for fruitfully studying the law. In reading Holmes’s opinions, however, I realized he had followed these same steps in

164 “The public really pays the damages, and the question of liability, if pressed far enough, is really the question how far it is desirable that the public should insure the safety of those whose work it uses.” Path, supra n. 1, at 999.

165 “[W]e are not at liberty to refuse to carry out to its consequences any principle which we believe to have been part of the common law.” Dempsey, 154 Mass. at 331.

166 Dempsey, 154 Mass. at 331.

167 Instead of being an example of following precedent contrary to public policy, it could be argued that actually Holmes extended precedent - to his great discomfort - in the direction of the deep policy choices society was making. In that case, here as elsewhere, he followed his theory and deep conviction that the law must serve and reflect society’s choices.
adjudicating cases. It remained for me to supply Holmes’s final adjudicative step from the thrust of his writings, as primarily encapsulated in his two great classics, *The Path of the Law* and *The Common Law*.

Holmes’s revolutionary insight that law derives all its life from the community was the heart of his jurisprudence. At bottom, all law is about policy choices. The animating principles of the law are policy rationales. The historical development of the law is the chronicle of social policies shifting through time. To understand the contending policies within the contest at bar was to apprehend the “very root and nerve of the whole proceeding.” The judge must finally effectuate the prevailing public will. What end had this rule served in the past, and what end did society wish it to serve now? Understanding and answering that question was the whole duty of the Holmesian judge. However, Holmes also saw that the issues in litigation were not the real contest. Instead, much deeper choices were at stake.

For Holmes, a judge’s abiding obligation is to set aside personal predilections and give effect to the will of the people. This belief about the judge’s place is a deeply humble view, and contrary to his somewhat deserved reputation as an elitist. It seems to me that Holmes truly saw himself as a servant, a tool of his country, whether pitched into battle or

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168 *Path, supra* n. 1, at 999.
169 See discussion at n. 107, *supra*, regarding his service in the Civil War.
placed on the Bench. His was not to do what he thought best for society, but rather to serve what society thought best. Yet as fervently as he would have argued that a judge’s proper role is to defer to the people’s will, he just as readily would have dismissed mandating any such a philosophy. For even regarding ultimates, Holmes mocked the very idea of normativity, and despised imposing upon others one’s own truths. Holmes’s method was his, and that is all. As to what we today should take from his process of adjudicating cases, he would be the first to say, “Whatever you choose.”

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170 Posner, supra n. 2, at 182-183 (“I do not see any rational ground for demanding the superlative – for being dissatisfied unless we are assured that our truth is cosmic truth, if there is such a thing - that the ultimates of a little creature on this little earth are the last word of the unimaginable whole.”) (from “Natural Law”).

171 Posner, supra n. 2, at 116 (letter to Alice Stopford Green) (“I think that values like truth are largely personal. There is enough community for us to talk, not enough for anyone to command. How has a man who lives in the domain of taste and among the spices of moral vacillation a right to bully you - another who is wrapt in the spectacle of the growth and struggle for life of ideas? I don’t see that either can say more than that one likes one thing, another another.”).