DISSENT AS A SITE OF AESTHETIC ADAPTATION IN THE WORK OF OLIVER WENDELL HOLMES JR.

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ABSTRACT

This article considers Oliver Wendell Holmes Jr. as a writer in the aesthetic, pragmatic tradition of Ralph Waldo Emerson and William James. Holmes, like Emerson, has been compared to Nietzsche, and may be said to have ushered in an era of postmodern jurisprudence in America. Holmes's aesthetic pragmatism anticipates the antifoundationalism of Richard Rorty and lends itself to rhetorical superfluity, especially in the medium of dissent. Holmes turned the dissent into an aesthetic medium both pleasurable and memorable; in so doing, he ensured that future judges, practitioners, academics, and other commentators would revisit his dissents. By revisiting Holmes's dissents, these individuals were revisiting legal reasoning, and judges in particular were vindicating that reasoning and perhaps even transforming that reasoning into law. Section one contextualizes Holmes's ideas within the broader currents of American jurisprudence and postmodern philosophy in the nineteenth and twentieth centuries. This section shows that Holmes was a transitional and transformational force in American legal thought and that he ushered in an era of postmodern judging. Section two spells out the concept of pragmatist aesthetics as a judicial framework. It suggests that Holmes is an Emersonian who falls within the pragmatic-aesthetic tradition. This section builds on themes about postmodernism, but focuses above all on Holmes's style and creativity. Although classical pragmatism is not postmodern, and although Holmes is not a postmodernist, Holmes's pragmatism enabled the development of postmodern jurisprudence. Against entropy, Holmes stood for mobility and expediency, the implications of which were more postmodern than Holmes

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probably intended. Section three considers this postmodern jurisprudence and synthesizes sections one and two while analyzing the dissent as a communicative and rhetorical medium. This final section is both biographical and theoretical; it brings together the three principal themes of this piece: pragmatism, aesthetics, and postmodernism.

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I. INTRODUCTION

Before the tenure of Oliver Wendell Holmes Jr., Supreme Court justices rarely dissented. Dissents seemed discourteous.[1] They unsettled the supposed unity of the Court. They implied fragmentation and disorder, which flew in the face of any jurisprudence prizing science, linearity, consistency, and reason. After Holmes's tenure, dissents became common; dissenting judges were no longer stigmatized.[2] The Court began to leave behind the Enlightenment and to enter into postmodernity.

The author of what Louis Menand calls "vibrant dissents,"[3] Holmes was the first "Great Dissenter." He inaugurated the widespread and frequent use of dissents. His careful logic, poetic prose, and playful tone drew attention to his dissents, which, in keeping with his pragmatist methodology, ensured the preservation of good ideas for future generations. Influenced by William James, to whom he never gave due credit, and by Ralph Waldo Emerson, whom he knew as a boy and with whom he corresponded as a young man, Holmes treated dissents as a theater for acting out methods and signals of pragmatism. He turned the dissent into an aesthetic medium that was both pleasurable and memorable; in so doing,

[1] *See From Consensus to Collegiality: The Origins of the 'Respectful' Dissent*, 124 HARV. L. REV. 1305 (2011). For this reason, modern justices include the phrase "I respectfully dissent" in their dissents. ("For the first century of the Court's history, a typical dissenting speech act read as a long, prolix apologetic justifying the dissent's deviation from the majority opinion.").
[2] *See* John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. U. L. Q. 137, 170-78 (1999).
[3] LOUIS MENAND, THE METAPHYSICAL CLUB xxix (2001).

he ensured that future judges, practitioners, academics, and other commentators would revisit his dissents. By revisiting Holmes's dissents, these individuals were revisiting legal reasoning, and judges in particular were vindicating that reasoning and perhaps even transforming that reasoning into law. Holmes put his pragmatism and prose to work to enable non-law to become law, or to prevent good logic from being exhausted. He ensured the preservation of text and argument by making them appealing to the senses. All of this has to do with what Menand dubs the experiment of democratic participation, the purpose of which is "to keep the experiment going."[4]

Dissents keep the judicial experiment going, especially when they are useable. They are useable when they are citable, and they are citable, by and large, when they are aestheticized or memorable. Holmes's dissents were both aestheticized *and* memorable—so much so that they activate what Richard Poirier, as against Richard Rorty, calls superfluity or superfluency: rhetorical excesses and syntactical spurts that trope and energize past ideas to thwart intellectual stasis. In this respect Holmes is an Emersonian.

Holmes is also a precursor to postmodernism. His work anticipates the jurisprudence of the critical legal theorists and inaugurates the postmodern Court. More skeptical about "truth" than William James, Holmes stops short of Richard Rorty on matters of metaphysics. His pragmatism is not postmodern even if it paved the way for postmodernism. His complex notions of truth, to cite just one example, have radical implications for a society regulated by laws about which individuals swear oaths "to tell the truth, the whole truth, and nothing but the truth, so help me, God." Be that as it may, Holmes cannot be lumped together with such later figures as Luce Irigaray, Jean Baudrillard, Zygmunt Bauman, Gilles Deleuze, or Félix Guattari, although a comprehensive case could be made that his jurisprudence relates to the ideas of thinkers like Michel Foucault and Jean-François Lyotard. His postmodernism—if that is the right word—could not be tied to politics of liberation or the aesthetics of rupture and do not deal definitively with such philosophical questions as subjectivity. Furthermore, the political and artistic ramifications of modernism had hardly reached their zenith as Holmes penned his judicial writings; to the extent that postmodernism is a response to modernism, Holmes was not postmodern.

Holmes's notions of truth are tied to experience. In his opinions, dissents, and articles, Holmes celebrates the ballast of experience even though he crows about experiential limitation. From his maxims, one gathers that he thought that experience teaches society to adapt to change and to shape philosophies to remain reasonable and practical in new environments. His jurisprudence seems to champion progress to prevent ideational inertia, and his literary flourishes seem to stimulate sensation, provoke thought, and enable kinetic thinking. His "truth" is a fluid category of discourse dependent upon cultural and social circumstances. It is a Darwinian truth with traits that vary or conform to survive. In short, Holmes is a transitional and transformational figure on the Supreme Court because his jurisprudence, unlike the jurisprudence of other justices sitting during his long tenure, is shot through with the epistemologies, metaphysics, and aesthetics that gained

[4] *Id.* at 442.

popularity under Emerson, C.S. Peirce, William James, and George Santayana. Epistemology, metaphysics, and aesthetics of this kind are not reducible to any clear-cut category, and that is to some extent their point.

This article will proceed as follows. Section one will contextualize Holmes's ideas within the broader currents of American jurisprudence and postmodern philosophy in the nineteenth and twentieth centuries. This sweeping section will show that Holmes was a transitional and transformational force in American legal thought and that he ushered in an era of postmodern judging. He was not a postmodernist, yet his ideas about "truth" and "true law" anticipated the skeptical thinking of Rorty, and Holmes's inquiries into legal history resemble Nietzschean and later Foucaultian genealogy. Holmes's philosophy of judicial restraint, moreover, smacked of Nietzschean perspectivalism, and Holmes's language philosophy dealt with semiotics and signification and their implications for law as a system of commands. Section one is broad in scope and cannot possibly expound on all the connections it makes between Holmes and postmodernism. Nevertheless, it lays the groundwork for future inquiry.

Section two spells out the concept of pragmatist aesthetics as a judicial framework. It suggests that Holmes is an Emersonian who falls squarely—or, in Emersonian terms, circularly[5]—in the pragmatic-aesthetic tradition. This section is theoretical, but, I hope, pragmatic. It builds on themes about postmodernism, but focuses above all on Holmes's style and creativity. Although classical pragmatism is not postmodern, and although Holmes is not a postmodernist, Holmes's pragmatism enabled the spread of postmodern jurisprudence. Against entropy, Holmes stood for mobility and expediency, the implications of which were more postmodern than Holmes probably intended.

Section three considers this postmodern jurisprudence and synthesizes sections one and two while analyzing the dissent as a communicative and rhetorical medium. This final section is both biographical and theoretical; it brings together the three principal themes of this piece: pragmatism, aesthetics, and postmodernism.

II. HOLMES AND THE ADVENT OF THE POSTMODERN COURT

The twentieth-century heralded a shift in American legal thought. That this shift coincided with Holmes's tenure on the Supreme Court ought to come as no surprise to those familiar with Holmes's pragmatism. Holmes joined the Court in 1902. At this time, Langdellian pedagogy and jurisprudence had taken hold in America just as the Court began to overrule previous decisions and to undertake new discursive experiments with old rhetorical media. The tendency of the Court to overrule corresponds with the tendency of justices to dissent. Both tendencies mark a transition or transformation in jurisprudence "from the classical thought of the nineteenth century to the fragmented, postmodern thought of the late twen-

[5] *See*, *e.g.*, RALPH W. EMERSON *Circles in* ESSAYS: FIRST SERIES (2003).

tieth century."[6] Against Enlightenment rationality, uncompromising teleology, and scientific protocols, the postmodern Court is characterized by "the agency of particular Justices, fragmented discourse, the collapse of larger narratives within substantive areas of the law, and the absence of the nineteenth century's grand narrative of scientism."[7] If Langdellian jurisprudence epitomized the scientific or orthodox jurisprudence of the Enlightenment, then postmodern jurisprudence was a break from Langdellian models and methods. "If Langdell gave the new jurisprudence its methodology," Grant Gilmore once said, "[then] Holmes, more than anyone else, gave it its content."[8]

This essay is not bold enough to define "postmodern" or "postmodernism." Maybe postmodernism is a political or aesthetic enterprise of the kind championed by Jean-François Lyotard.[9] Maybe postmodernism is, as Fredric Jameson believes, a period or age that we are (or were) in.[10] Conservatives of some stripes inveigh against the radicalism of postmodernism while leftists of some stripes, including European intellectuals such as Jürgen Habermas, denounce postmodernism as conservative. Definitions of "postmodern" or "postmodernism" betray the term as soon as they purport to describe it. With Judith Butler, this author takes the position that "I don't know about the term 'postmodern.'"[11] Postmodernism has nameable qualities, but cannot be named. The singular term "postmodern" is not postmodern. It cannot summon forth the plurality of meanings it is supposed to represent.

Holmes is just as hard to pin down as the term "postmodern." Conservatives and liberals part company with him, and conservatives and liberals claim him as one of their own. "Liberals no longer consider Holmes a progressive, a friend of labor, or a champion of civil rights," explains one author, "and conservatives find no comfort in his atheism, moral relativism, or embrace of Malthusian tenets. As an emissary of judicial restraint, he is honored largely in the breach, as today conservatives and liberals alike practice judicial activism."[12] Another author contends that a "cherished American myth is that Oliver Wendell Holmes, Jr., was liberal," and that "Holmes, in fact, was as profound, as civilized, and as articulate a conservative as the United States has produced."[13] Others have shared this view. Max Lerner says that "[o]n the whole [Holmes's] were the views of an aristocratic conservative who did not care much either for business values or for the

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[6] Andrew M. Jacobs, *God Save this Postmodern Court: The Death of Necessity and the Transformation of the Supreme Court's Overruling Rhetoric*, 63 U. CIN. L. REV. 1119, 1120 (1995).
[7] *Id.* at. 1121.
[8] GRANT GILMORE, THE AGES OF AMERICAN LAW 48 (1977).
[9] *See*, e.g., JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE (Geoff Bennington and Brian Massumi trans., Manchester Univ. Press 1984).
[10] *See*, *e.g.,* FREDRIC JAMESON, POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM (Verso 1991).
[11] Judith Butler, *Contingent Foundations: Feminism and the Question of Postmodernism*, *in* FEMINISTS THEORIZE THE POLITICAL 6 (Judith Butler & Joan Scott eds., 1992).
[12] Gerald Caplan, *Searching for Holmes Among the Biographers*, 70 GEO. WASH. L. REV. 769, 770 (2002).
[13] Irving Bernstein, *The Conservative Mr. Justice Holmes*, 23 NEW ENG. Q. 435 (1950).

talk of reformers and the millennial dreams of the humanitarians."[14] Lerner portrays Holmes as "a great spokesman of our Constitutional tradition because [Holmes] was a great enough conservative to stretch the framework of the past to accommodate at least some of the needs of the present."[15]

Richard Posner provides his own take on Holmes's politics:

> Holmes's reputation has fluctuated with political fashion, though never enough to dim his renown. Although many of his opinions took the liberal side of issues, the publication of his correspondence revealed—what should have been but was not apparent from his judicial opinions and occasional speeches—that, so far as his personal views were concerned, he was liberal only in the nineteenth-century libertarian sense, the sense of John Stuart Mill and, even more, because more laissez-faire, of Herbert Spencer. He was not a New Deal welfare state liberal, and thought the social experiments that he conceived it to be his judicial duty to uphold were manifestations of envy and ignorance were doomed to fail. […] Hostile to antitrust policy, skeptical about unions, admiring of big businessmen, Holmes was a lifelong rock-ribbed Republican who did not balk even at Warren Harding.[16]

Holmes was apparently many things, and perhaps all we can say of his politics is that they defy simple classification. As early as 1916 Justice Felix Frankfurter came to this conclusion: "Only the shallow would attempt to put Mr. Justice Holmes in the shallow pigeonholes of classification."[17] The amorphousness of his thought makes Holmes an unusually suitable subject for a study in postmodernism.

Without Holmes, the postmodern Court, whatever it is, may never have materialized. Holmes brought about a foundational, anti-foundational change in the way justices considered precedent. His jurisprudence "was carried through by Roscoe Pound and the Legal Realists" and later the critical legal theorists.[18] Its methodology "was to render law and legal theory increasingly instrumental."[19] This instrumentalism altered the landscape of U.S. legal theory, which today "consists of what some have called 'postmodern jurisprudence,' a plethora of competing approaches, each representing a particular normative or interest group perspective, each arguing that law should serve the interests they tout."[20] Holmes differs from the legal realists and the sociological jurisprudents in one very im-

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[14] OLIVER WENDELL HOLMES, THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS xxx (Max Lerner ed., Boston, Little, Brown and Co., 1943).
[15] *Id*. at xlvii.
[16] *Introduction* in THE ESSENTIAL HOLMES; SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, xv (Richard Posner ed., 1992).
[17] Felix Frankfurter, *The Constitutional Opinions of Justice Holmes*, 29 HARV. L. REV. 683, 698 (1916).
[18] Brian Z. Tamanaha, *Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction*, 41 AM. J. JURIS. 315 (1996).
[19] *Id.*
[20] *Id.* at 316.

portant respect: they believe that the question "What rule is instrumentally best?" can be settled scientifically whereas Holmes recognizes that even this question assumes a kind of formalism. This point of difference reinforces the suggestion here that we should consider Richard Rorty, Michel Foucault, and Friedrich Nietzsche rather than John Stuart Mill (to whom William James dedicated his lecture series *What is Pragmatism?*) when we think of Holmes.

Holmes was just as postmodern as Nietzsche and his disciple Foucault, since Holmes used the word "inquiry" in the same sense that Nietzsche and Foucault used the word "genealogy" to reject assumptions about origins and to rebuff those who presumed the ability to trace ideas to their roots. Holmes opens his essay "Ideals and Doubts" by saying that "we have been preoccupied with the embryology of legal ideas."[21] He adds that "explanations, which, when I was in college, meant a reference to final causes, later came to mean tracing origin and growth."[22] One wonders whether Holmes's jurisprudence is not at its core like a Nietzschean or Foucaultian genealogy of Anglo-American law, despite Holmes's reference to origins in the previous quotation; after all, his "one book, *The Common Law*, was not a systematic theoretical framework, but rather a synthesis of Anglo-American private law doctrine, supplemented by a good bit of legal history and a few now-famous jurisprudential observations."[23]

This essay is not the first to link Holmes to Nietzschean thought. Another author has said that one "need only recognize Holmes as the Nietzschean that many of his writings reveal—a figure who not only saw Darwinian struggle as the order of the universe but also venerated power, conflict, violence, death, and survival."[24] Still another author has referred to Holmes's philosophy of judicial self-restraint as "a set of commitments amounting to a full-blown metaphysics and theory of value, broadly Nietzschean in cast and doctrine."[25] Even more to the point is the claim that "Holmes's philosophical views were, with a few instructive divergences, strikingly similar to those of Nietzsche."[26] Holmes's "interest was in spirit and even in details of doctrine and literary timbre very close to Nietzsche's root problem: How, in a godless world filled up with senseless destruction, can one find meaning and avoid sinking into nihilism, 'the radical repudiation of value, meaning, and desirability'?"[27]

The philosophy of judicial restraint—or deference to local legislators—is of a piece with Nietzsche's perspectivalism in that it is an "intellectual Gemeinschaft"[28] that starts from the premise that a judge sits in a privileged position and cannot fully understand the cultural and discursive formations that generated the laws of a particular place at a particular time. Therefore, judges should not pre-

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[21] Oliver Wendell Holmes, Jr., *Ideals and Doubts*, 10 U. ILL. L. REV. 1 (1915).
[22] *Id.*
[23] Thomas C. Grey, *Plotting the Path of the Law*. 63 BROOK L. REV. 19, 20 (1997).
[24] Albert W. Alschuler, *The Descending Trail: Holmes' Path of the Law One Hundred Years Later*, 49 FLA. L. REV. 353, 358 (1997).
[25] David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 453 (1994).
[26] *Id.* at 465.
[27] *Id.*
[28] *Id.* at 452.

sume that their beliefs about law amount to something "righter" or "better" than the beliefs of those who created the law to fit their own cultural and social climate. The perspective of a judge is not superior to the perspective of a litigant or a party; it is simply different. It is all the judge has to work with because a judge cannot be someone else or think what someone else thinks, although a judge may broaden his perspective by accounting for the perspectives of others.

One commentator overtly links Holmes's pragmatism with budding postmodernism: "[S]ince modern pragmatism has important links to the various strands of postmodern thought, it should not surprise us that there is a strong postmodern flavor […] in Holmes's jurisprudence. Indeed, there is much about the pragmatism of Holmes's time that anticipates what we have come to call postmodernism."[29] Another commentator remarks that "Holmes's skepticism points in the direction of postmodernism."[30] This second commentator qualifies his claim by saying that the "main message" of "The Path of the Law" was "that there is no basis in reason or morality for discovering legal truth," and also by adding that "[l]ingering doubts about faith and reason seem to push Holmes in the direction of postmodernism."[31] Holmes's pragmatism enabled postmodern jurisprudence just as the pragmatism of Peirce, James, and Dewey enabled Rorty's postmodern epistemology and metaphysics. In the late nineteenth and early twentieth centuries, there was a striking parallel between lines of American jurisprudence and lines of American philosophy generally. This parallel led to a possibly permanent reconstruction of American legal thought:

> Pragmatic philosophy, applied to law through the work of Holmes and the Legal Realists, broke the back of essentialist/conceptual formalism. Beliefs about law are unlikely to return to the old vision of law standing apart, above and pure, with its own nature and set of necessary relations with society, untainted by the conflicts within society.[32]

Holmes's contributions to postmodern jurisprudence have to do first of all with language philosophy. Holmes rejected the notion that words correspond with truth. His position stands in contradistinction to natural law theory, which in its most simplistic manifestation holds that there is one universal, discoverable system of laws that precede human promulgation, and that language can mirror natural law if humans employ the right words and concepts in the right situations. For Holmes, however, it is not that the right word is needed to express the truth of an idea. It is that the truth of the idea cannot reside in the word. In *Towne v. Eisner*, he says, "A word is not a crystal, transparent and unchanging; it is the skin of a living thought and may vary greatly in color and content according to the circum-

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[29] Catherine Pierce Wells, *Old-Fashioned Postmodernism and the Legal Theories of Oliver Wendell Holmes, Jr.*, 63 BROOK. L. REV. 59, 75 (1997).
[30] Gary Minda, *Commentary: The Dragon in the Cave*, 63 BROOK. L. REV. 129, 142 (1997).
[31] *Id.* at 143.
[32] Brian Z. Tamanaha, *Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction*, 41 AM. J. JURIS. 315, 353 (1996).

stance and time in which it is used."[33] Likewise, he says in a landmark dissent that courts "are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them."[34] Words, for Holmes, were vehicles for policy, but their meaning was not fixed. Words could constitute law to the extent that they made people act certain ways, but they did not signify transcendental realities or first principles.

Although the jurisdiction, structure, and meaning of language may impress upon the law, not even precise words obtaining as law can bring about complete congruency between the disciplinary properties of language and the disciplinary properties of law that individual minds internalize. In other words, law and language are dominated by rules, yet rules do not refer to unmediated realities but rather to judgments about the quality of realities. Law is made up of and constitutes language. If language cannot adequately express the way human intellect apprehends shapes and outlines of reality, then law cannot correspond with intelligible, expressible reality. In law as in language, or in law *as* language, no accord exists between signifier, signified, and referent. There might be a temporary appearance of accord that enables law to gain force among the *polis*. That appearance, however, does not represent an alignment of the phenomenal world with speech and thought. It does not signify truth or natural law, and it does not seek to render absolute qualities of some physical object. Rather, it represents an interim command of one group of judges or legislators over a *polis* that accepts or follows that command.[35] I pause here to note that I am not so much describing Holmes's language-based jurisprudence as I am teasing out its implications.

To issue a command that a *polis* will accept, a judge or legislator must impart the conviction that law can be known by the processes of reason, or that the immediacy of feeling or the logic of experience reveals the real and true nature of law. Nevertheless, law remains a command. No matter what philosophical clothing they wear, no matter how prettily or profoundly they are ornamented, words constituting law command individuals to do or not to do something, even if they are produced through the filtering mechanisms of the common law rather than by legislative fiat. Law may forbid the *polis* from acting in a certain way, or it may forbid the State from restraining the activities of the *polis*. Regardless, law commands one set of people or groups to refrain from acting at the same time that it enables another set of people or groups to act. Either an activity is forbidden, or the regulation of an activity is forbidden. Law is therefore always double-edged: it enables action even as it restrains action. By telling someone he *cannot* act in one way, a law tells someone else—an agent of the State, for example—that he *may* act in another way. If Law X says that no person shall jaywalk, it also authorizes Person Z, an agent of the State, to penalize a person who jaywalks. Law, in short, is wordplay, regardless of how unaware of that a judge or legislator may be.

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[33] Towne v. Eisner, 245 U.S. 418, 425 (1918).
[34] Olmstead v. United States, 277 U.S. 438, 469 (1928).
[35] We know from several biographies that Holmes was influenced by the command theory of law put forward by John Austin, even if Holmes never expressly adopted Austin as his model.

If law is language, and language is contingent, then law is contingent. Holmes's ontology of law is not so far removed from Derridean—or, better yet, Saussurean—theories about the arbitrariness of the sign. The arbitrariness of the sign has implications for truth and law, and for true law. A signifier does not share the properties of the signified or the referent; it is a mark or utterance that stands in the place of the signified, which stands in the place of the referent. Law is a signifier because it is language: not just any language, but language about values. What it signifies is not a concrete referent with qualities that can be observed by everyone at all times. One commentator explains that "because Holmes was a metaphysical realist, he believed that values are either part of the objective order of things or else they are arbitrary. But values are not part of the order of things; hence they are arbitrary."[36] Holmes himself stated that "one's own moral and aesthetic preferences are more or less arbitrary."[37] Saying that moral and aesthetic preferences are arbitrary is not the same as saying that words are arbitrary. Yet moral and aesthetic preferences can be expressed only in words or actions, and the latter cannot be described except in words.

Holmes seemed to treat law as a system of arbitrary signification, although the arbitrariness of the sign did not lead him to reject general principles. In terms that recall Emerson's sonorities about the Oversoul, Holmes proclaimed that although in the law he found himself "plunged in a thick fog of details—in a black and frozen night, in which were no flowers, no spring, no easy joys,"[38] he nevertheless discovered that "law is human—it is a part of man, and of one world with all the rest,"[39] and as such, law is also "a humble instrument of the universal power."[40] Law may obtain universally in individual consciousness, perhaps by inspiring the human will, but there are separate and countless individuals, each with his or her own consciousness. Law is "universal" to the extent that it is general enough to be agreed upon by most reasonable individuals. Therefore, the complex signification of language and the arbitrariness of the sign do not, for Holmes, preclude universalities even though they have broad ramifications for the ontology of law.

Holmes's ontology of law is another aspect of his postmodernism. It leads to speculation about truth and moral definiteness. "All I mean by truth," he said, "is the road I can't help travelling [*sic*]. What the worth of that can't help may be I have no means of knowing."[41] Elsewhere, he remarked that truth was "simply what I can't help accepting."[42] Perhaps drawing from Emerson's praise of intui-

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[36] Luban, *supra* note 25, at 475.
[37] 1 OLIVER WENDELL HOLMES, HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932 104(Mark Dewolf Howe, ed., 1941).
[38] HOLMES, *Law as Calling, Life as Art*, *in* THE MIND AND FAITH OF JUSTICE HOLMES, *supra* note 14 at 36.
[39] *Id.*
[40] *Id.* at 37.
[41] HOLMES, *supra* note 37, at 100.
[42] Letter from Oliver Wendell Holmes Jr., to Lewis Einstein, *in* 1 THE HOLMES-EINSTEIN LETTERS: CORRESPONDENCE OF MR. JUSTICE HOLMES AND LEWIS EINSTEIN, 1903-1935 16 (James Bishop Peabody ed., 1964).

tion, Holmes suggests in these lines that truth is whatever he feels or senses when he encounters a thing or an event. Truth in this respect is out of an individual's control. It is what happens to us. It is what occurs before meaning is imposed upon circumstances. What is true is what transpires. Law may be true, but only in the sense that Holmes means.

The Path of the Law challenges the notion of pure and true law as indicia of moral definiteness. Interestingly enough, Holmes says in this piece that he *is* laying down "some first principles."[43] Yet his first principles constitute a "body of dogma or systemized prediction."[44] Law is not an absolute, tangible thing, but a prediction about how men will behave. As such, Holmes's laws—and his first principles about laws—are not foundations, but guesses about activities that are subject to chance and variation. The main point of *The Path of the Law* is "to understand the limits" of man's understanding of law—a result of man's limited understanding of himself and his society—and to "point out and dispel a confusion between morality and law."[45] Law is true because people follow and enforce it. That does not mean that law is also moral. "If you want to know the law and nothing else," Holmes says, "you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."[46] This "Bad Man" heuristic has become one of the most cited, criticized, and celebrated aspects of Holmes's jurisprudence. It implies that unjust laws are still laws, that moral deliberation has no effect on the legality of a command, and that judges should not agonize over the unknowable psychologies of litigants.

Holmes drove jurisprudence away from the natural law theories promoted by early Americans such as Thomas Jefferson and other political theorists. One could argue that Holmes drove jurisprudence in the direction of quotidian practice and away from abstract political theory. A student of the Enlightenment, ever the Newtonian, Jefferson sought to demonstrate that the laws of nature were concrete referents in the phenomenal world. Laws of nature, like the laws of gravity, regulated human activity.[47] Jefferson supposed that these referents, these natural laws, could be studied and understood through application of the scientific method. Yet Jefferson was never able to prove or experiment with such referents. He could not demonstrate that law was a manifestly knowable element of the tangible universe. Against Jefferson, Holmes realized that the verifiable qualities of law were discernible not in physicality but in language.

Natural law theories had their counterparts in England, most notably in the works of William Blackstone, but Jefferson's jurisprudence was grounded in science whereas Blackstone's was rooted in church canon and the Bible. Theories of natural law in early America were employed and deployed to justify the separa-

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[43] Oliver Wendell Holmes Jr, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *See* Allen Mendenhall, *Jefferson's 'Laws of Nature': Newtonian Influence and the Dual Valence of Jurisprudence and Science*, 23 CAN. J. L. & JURIS. (2010).

tion of the races on the suppositional grounds of "natural" racial inferiority.[48] Holmes sought to divorce jurisprudence from these natural law precedents, not because he disagreed with their *telos* or objected to their reasoning, but because he did not like their outcomes. Morality was not the reason he disliked their outcomes; he disliked their outcomes because they led to bad results—because they led to social arrangements that did not work well. His jurisprudence therefore did not cling to universal principles that would apply always and everywhere; rather, it treated law as a property of language that was subject to variation and incapable of ascertaining or representing absolute truth.

From originalism to textualism to strict constructionism to other, less formalist approaches with no set taxonomy, legal hermeneutics and judicial interpretive strategies since Holmes have examined law as a property of language rather than language as a property of law. Implicit in these approaches is the idea that law does not precede language; it *is* language. Therefore, language does not describe law; it ratifies and constitutes law. Law is not just couched in language; it is language that refers to other language that refers to a particular state of human affairs. Law is truth only to the degree that language is truth. Indeed, to realize the linguistic nature of truth or morality, and hence to doubt one's knowledge about truth or morality, is to become civilized. "To have doubted one's own first principles," Holmes declared, "is the mark of a civilized man."[49] Holmes did not altogether dismiss truth or first principles, but he suggested that they ought to be doubted and that their expression is just that: an expression. Words about truth or first principles are merely representations. They do not *constitute* truth or first principles.

Holmes and William James shared the idea that truth was a linguistic creation of social consensus and an instrument for communication. Both men spoke of truth in economic terms. James referred to the "cash value" of ideas, by which he meant either the ability of an idea to become agreed upon, or the quality of a thing that makes it observable to human senses and knowable to the human mind.[50] In a famous dissent, Holmes professed that "when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good

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[48] *See* Allen Mendenhall, *From Natural Law to Natural Inferiority: The Construction of Racist Jurisprudence in Early Virginia*, PEER ENGLISH (forthcoming 2012).
[49] Holmes, *supra* note 21.
[50] *See* WILLIAM JAMES, VARIETIES OF RELIGIOUS EXPERIENCE 443 (1922). ("The guiding principle of British philosophy has in fact been that every difference must *make* a difference, every theoretical difference somewhere issue in a practical difference, and that the best method of discussing points of theory is to begin by ascertaining what practical difference would result from one alternative or the other being true. What is the particular truth in question *known as?* In what facts does it result? What is its cash-value in terms of a particular experience). *See also* WILLIAM JAMES, PRAGMATISM, A NEW NAME FOR SOME OLD WAYS OF THINKING 89-90 (1909). ("Berkeley's criticism of 'matter' was consequently absolutely pragmatistic. Matter is known as our sensations of colour, figure, hardness and the like. They are the cash-value of the term. The difference matter makes to us by truly being is that we then get such sensations; by not being, is that we lack them. These sensations then are its sole meaning.").

desired is better reached by free trade in ideas."[51] He attached the following maxim to this claim: "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[52] Elsewhere, Holmes said that our "test of truth is a reference to either a present or an imagined future majority in favor of our view."[53] These remarks by Holmes recall James's remark, roughly a decade earlier, that "[t]he true is the name of whatever proves itself to be good in the way of belief, and good, too, for definite, assignable reasons."[54]

Truth is a flexible concept to Holmes and to James. Insofar as natural law is supposed to signify an absolute truth about the governance of human relations, Holmes's Jamesian theories about truth reject natural law and figure law as a product of discourse. Natural law is a foundation. It essentializes. It is absolute. It affirms. Holmes's jurisprudence, however, doubts. It is about fallibilism. It attends to what we do not know rather than to what we know (or think we know). Natural law cannot be "true" according to Holmes's conception of truth:

> When I say a thing is true, I mean that I cannot help believing it. I am stating an experience as to which there is no choice. But as there are many things that I cannot help doing that the universe can, I do not venture to assume that my inabilities in the way of thought are inabilities of the universe. I therefore define the truth as the system of my limitations, and leave absolute truth for those who are better equipped. With absolute truth I leave absolute ideals of conduct equally on one side.[55]

It is no wonder that Holmes can be read as a precursor to postmodernism. His theories of truth seem to lend themselves to Rorty's argument that "edifying philosophy aims at continuing a conversation rather than at discovering a truth."[56] This essay is not the first to compare Holmes and Rorty on the issue of truth.[57]

Holmes's conception of law relates to James's conception of *pure experience*. One of Holmes's most quoted maxims is that the "life of the law has not been logic; it has been experience."[58] James, who was, incidentally, Emerson's godson, once proclaimed that truth "happens to an idea." [59] One could argue that Holmes believed that law is what happens to an idea about regulating the *polis*. James also remarked that "truth is a relation inside of the sum total, obtaining between thoughts and something else, and thoughts […] can only be contextual

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[51] Abrams v. U.S., 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).
[52] *Id*.
[53] Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 41 (1918).
[54] JAMES, PRAGMATISM, A NEW NAME FOR SOME OLD WAYS OF THINKING *supra* note 50, at 76.
[55] Holmes, *supra* note 21, at 1.
[56] RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 373 (1979).
[57] *See*, *e.g.*, PETER GIBIAN, OLIVER WENDELL HOLMES AND THE CULTURE OF CONVERSATION 128-30 (2001).
[58] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Kessinger Publishing 2005) (1881).
[59] Wiliam James, *Pragmatism's Conception of Truth* in THE WORKS OF WILLIAM JAMES, PRAGMATISM 97 (Fredson Bowers & Ignas Skrupskelis eds., 1975).

things."[60] What I take James to mean here is that any knowledge or awareness of experience comes by way of particularized and individualized context. Experience is a broad category encompassing basic units of contextual familiarities and sensations. "[T]he pure experiences of our philosophy," James says, are "in themselves considered, so many little absolutes," and a "pure experience can be postulated with any amount whatever of span or field."[61] Only from an apparent consciousness of the internalization of externalities and discrete facts may one broaden his understanding into a state worthy of the label "articulable experience."

A judge makes decisions like everyone else makes decisions—by aggregating and evaluating bits of data registered and verified first by sensation and then by sustained thought—and James's psychology found its way into Holmes's ideas about what judges do as decision-makers. The human mind, selective and purposive as it is, cannot comprehend experience except by amassing and filtering pieces and particles of information. Seemingly aware of this limitation on human faculties, Holmes's dissents give us lines like "General propositions do not decide concrete cases."[62] Or: "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified."[63] Or: "The character of every act depends upon the circumstance in which it is done."[64] The point by now should be clear: Holmes does not wish to sacrifice the intelligibility of pure experience by neglecting or dismissing specificity, circumstance, setting, and situation as consequential and constituting components of knowledge.

Fixation on the absolute authority of one legal principle or another leaves no room for considering other, exacting and possibly competing principles about people and their relation to law and society; nor will such fixation satisfactorily account for the several, constituent elements of experience. Therefore, the prudent judge ought not to privilege grand moralities or teleology over the more empirically determinable consequences of deciding one way or another. "The aim of the law," Holmes says, "is not to punish sins, but is to prevent certain external results."[65] The aim of the law, in other words, is to deal first with the ontologically and empirically testable or knowable; only after that can law be expressed as sets of principles or rules. Holmes takes care to avoid generalization, which too often takes on the vocabulary of absolutism. He wrote to his friend Morris R. Cohen that "I always say that the chief end of a man is to frame [general propositions] and that no general proposition is worth a damn."[66] The problem for Holmes is not that law is unquantifiable or untrue as general experience, but that

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[60] WILLIAM JAMES, ESSAYS IN RADICAL EMPIRICISM 134 (New York, Longmans, Green, and Co., 1912).
[61] *Id*. at 135.
[62] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes,J. dissenting).
[63] Southern Pacific Company v. Jensen, 244 U.S. 205, 222 (1917) (Holmes,J. dissenting).
[64] Schenck v. U.S., 249 U.S. 47, 52 (1919) (Holmes, J. dissenting).
[65] Commonwealth v. Kennedy, 170 Mass. 18, 20 (Mass. S. Ct. 1897).
[66] 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932 118 (Mark DeWolfe Howe eds., 1961).

law is quantifiable and true relative to a limited supply of assumptions and inquiries.

To simplify to the extreme: just as for James true belief is that which is useful to the believer, so for Holmes true law is that which is useful to the *polis*. James himself draws the analogy between "the whole notion of *the* truth" as "an abstraction from the facts of truths in the plural" and "a mere useful summarizing phrase like *the* Latin language or *the* Law."[67] The substitution of the word "truth" for "law" would situate James and Holmes in similar positions with regard to their favored topics of metaphysics and epistemology. Put differently: just as for James, truth is verifiable if it corresponds with definite functions and good results in the phenomenal world, so for Holmes law is verifiable if it corresponds with demonstrated efficacy and practical, positive consequences within the social sphere. That is probably why Holmes declares in *The Path of the Law* that for "the rational study of the law the blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."[68] Holmes seeks to divorce law from claims to morality. He constructs the "bad man theory of law" not to say that good and bad are fictions or nothings, but to suggest that judges and lawyers ought not to assume special or unmediated access to, or knowledge of, good and bad. "If you want to know the law and nothing else," he says, "you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."[69] Holmes is not glorifying the bad man over the good man, or vice versa; he is saying that to know what the law is ontologically, or to prescribe what the law ought to be, one person cannot presume to comprehend the intents and purposes of another person.

One can only speculate about the objectives of another acting agent based on one's personal experiences concerning a search for the validity or viability of an idea; such validity is assessed by purposefully doing one thing rather than another and then analyzing whether the act corroborates or undermines the impulse motivating the idea. To superimpose one's suppositions about motivations onto another's action is merely to guess at (not to test or to verify) the other's set of preferences. One ought not to restrict by decree the behavior of another if the putative warrant of the restriction depends upon total knowledge of another's objective. One can create rules that maximize good consequences and that minimize bad consequences, that incentivize actions correlating with positive outcomes and that disincentivize actions correlating with negative outcomes. One cannot conceive of how another's ideas correspond to the real, or what Wallace Stevens calls "*the res*," because the desires of another are independent of what one can name and, therefore, are merely inferable, never actual in the sense of being confirmable. [70] Laws, then, ought not to be designed to compel or coerce an individual if their

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[67] JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING, *supra* note 50.
[68] Holmes, *supra* note 43.
[69] *Id.*
[70] See, e.g.,Wallace Stevens, *An Ordinary Evening in New Haven, in* STEVENS: COLLECTED POETRY AND PROSE 397 (Frank Kermode & Joan Richardson eds., 1997).

liability attaches to mental states consisting of purposes that are not and cannot be known except by the acting agent himself, if even he knows such things.

By treating decent people as capable of acting like bad men, the law according to Holmes ensures that biases and presuppositions about morals, character, and personality do not get in the way of judgments about rules and regulations as applied to acting agents. If such biases and presuppositions get in the way of judgments about rules and regulations as applied to acting agents, then law might fail to curtail bad results—it might even *enable* bad results. That would drain law of its utility and diminish the function of law as a social good. For Holmes, the purpose of the law is to facilitate social cooperation and to decrease conflict; the purpose is not to gratify or realize some eschatological, universal, or perfect paradigm.

Law is the expression of a command, and commands are justified on the grounds of philosophy, itself a systematic arrangement of language bearing upon human organization. For a Rortyian, law may represent an apologetic: an attempt "to externalize a certain contemporary language game, social practice, or self-image."[71] The ontological status of law would therefore be subject to whatever changes are necessary to solve immediate social problems or to satisfy temporary desires. Law would be the language of whatever philosophy has prevailed over other philosophies of the moment, and truth or true law would be "a matter of individual preferences, not of empirical realities."[72] Therefore, because truth is "personal and idiosyncratic, it should be cabined from judicial decision-making."[73] In other words, judges should not impose their interpretation of truth onto other people or communities, especially because the judicial function is by design undemocratic and because judges enjoy an exceptional power to control the *polis*.

It is too much to call Holmes a postmodernist or a Rortyian. Nevertheless, Holmes's aphorisms and dicta anticipate Rorty's call to "think of the true referents of these terms (the Truth, the Real, Goodness) as conceivably having no connection whatever with the practices of justification which obtain among us."[74] What Rorty says of the Platonic philosophers could be said of natural law jurisprudents: their hypostatization creates a dilemma by which "on the one hand, the philosopher must attempt to find criteria for picking out these unique referents [the Truth, the Real, Goodness], whereas, on the other hand, the only hints he has about what these criteria could be are provided by current practice (by, e.g., the best moral and scientific thought of the day)."[75]

Holmes railed against ideas of natural law in *The Natural Law*. One suggestion in that essay is that judges and jurisprudents, like the Platonic philosophers according to Rorty, "condemn themselves to a Sisyphean task" by adhering unconditionally to fixed paradigms, "for no sooner has an account of a transcendental term been perfected than it is labeled a 'naturalistic fallacy,' a confusion be-

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[71] RORTY, *supra* note 56, at 10.
[72] Caplan, *supra* note 12, at 795.
[73] *Id*. at 795.
[74] RORTY, *supra* note 56, at 374.
[75] *Id*. at 374.

tween essence and accident."[76] Those are Rorty's words, not Holmes's. But does not Holmes anticipate Rorty in the claim that "[c]ertitude is not the test of certainty. We have been cocksure of many things that were not so."[77] This line by Holmes echoes another maxim that Holmes put forth twenty-one years earlier: "Certainty generally is illusion, and repose is not the destiny of man."[78]

It is not merely an abiding uncertainty that Holmes shares with Rorty. What Holmes shares "with Rorty is their pragmatic belief that philosophy, legal theory, jurisprudence, or whatever else you want to call it, does not and should not affect legal outcomes, which are merely another form of public and political reasoning."[79] Critics of legal pragmatism have claimed that the Darwinism that influenced Holmes "led to both the postmodernist neopragmatism of Richard Rorty and the pragmatic moral skepticism of Richard Posner."[80] Darwinism notwithstanding, Holmes and Rorty came down on the same side regarding such issues as freedom of speech,[81] even if their pragmatic beliefs did not determine outcomes.

At risk of belaboring the point about Holmes and Rorty, does not the following passage by Holmes mark him as one of the philosophers who Rorty says are "often thought to be questioning the notion that at most one of the incompatible competing theories can be true"[82]:

> Deep-seated preferences cannot be argued about—you cannot argue a man into liking a glass of beer—and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as appears, his grounds are just as good as ours.[83]

Holmes and Rorty seem to agree about the value of skepticism. Given his ideas about the linguistic properties of law and the fluidity of truth, and given his willingness to reject unity and natural law in favor of dissent and, to some extent, logical positivism, Holmes can be read as anticipating postmodernism. That Holmes was not a postmodernist or a Rortyian by most twenty-first century criteria does not preclude us from viewing him as the first American postmodern judge. Holmes's pragmatism was in a sense postmodern. As Susan Haack remarks, "Though recently it seems to have been Rorty's style of neo-pragmatism that has been most warmly welcomed by legal commentators, traditionally it is Oliver Wendell Holmes who has been seen as the originator of the pragmatist tradition in legal theory."[84] Holmes made American jurisprudence what it is to-

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[76] *Id*.
[77] Holmes, *supra* note 53, at 40, 41.
[78] Holmes, *supra* note 43, at 457.
[79] Steven J. Macias, *Rorty, Pragmatism, and Gaylaw: A Eulogy, a Celebration, and a Triumph*, 77 UMKC L. REV. 18, 88 (2008).
[80] Nancy Pearcey, *Darwin's New Bulldogs: Scopes and American Legal Philosophy*, 13 REGENT U. L. REV. 483, 510 (2000/2001).
[81] See Michael Rosenfeld, *Pragmatism, Pluralism, and Legal Interpretation: Posner's and Rorty's Justice Without Metaphysics Meets Hate Speech*, 18 CARDOZO L. REV. 97, 134 (1996).
[82] RORTY, *supra* note 56, at 373.
[83] Holmes, *supra* note 53, at 41.
[84] Susan Haack, *On Legal Pragmatism: Where Does 'The Path of the Law' Lead Us?* 50 AM. J. JURIS. 71, 77 (2005).

day. It is impossible to imagine what American law—from the Supreme Court down to the everyday practices of local lawyers—would be if Holmes had never set down his antifoundational foundations.[85]

III. Pragmatism, Aesthetics, and Law

Richard Poirier misses the mark in *Poetry and Pragmatism* when he claims that "[i]t is through [William] James that one can most profitably trace an Emersonian linguistic skepticism that, in my view, significantly shapes those aspects of pragmatism which get expressed in the work of these great twentieth-century figures."[86] Instead of being, as is usually the case, spot on, Poirier here overlooks Holmes, perhaps because Holmes is considered above all a judge—not a poet or a member of the literati and hence not a precursor to Robert Frost, Wallace Stevens, Gertrude Stein and the like. Yet Holmes carries out the Emersonian tradition in robust and telling ways, most notably in his poetic prose. Justice Frankfurter calls Holmes's opinions "great art."[87] David H. Burton suggests that Holmes should rank alongside "Jefferson and Harriet Beecher Stowe as an author whose writings helped to change the course of American history."[88] More than Frost or Stevens or Stein, Holmes wrote at the intersection of theory and practice because, put simply, law *is* the praxis: the point where theory and practice converge. For this reason, law reveals much about the history of pragmatism, and it "offers one of the liveliest areas of debate about the consequences of pragmatism."[89]

Law is applied philosophy, and the judicial opinion is a unique literary genre because "judges, alone in American officialdom, explain every action with a distinct and individual writing, which then becomes the measure of their performance."[90] Judges are "literary craftsmen in ways that executive leaders and legislators are not," and the judicial decision, although "heavily prescribed by custom, procedure, and professional expectations," which "often disguise levels of creativity,"[91] is a textual medium conducive to rhetorical strategy and poetic finesse. Judicial opinions and dissents are like language playgrounds for writers such as Holmes, who is Emersonian in both rhetoric and philosophy. That is why it has

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[85] Jennifer Ratner-Rosenhagen has mapped the connections and continuities between Nietzsche, Emerson, and the pragmatists and has pointed out how Harold Bloom, Richard Rorty, and Stanley Cavell linked the aforementioned to antifoundationalism. These latter three figures "turned to Nietzsche, not to turn away from antifoundational elements in American thought, but to face them in Emerson and his pragmatist children." JENNIFER RATNER-ROSENHAGEN, AMERICAN NIETZSCHE: A HISTORY OF AN ICON AND HIS IDEAS 274 (2012). Holmes more than anyone else ought to be linked to Nietzsche and Emerson in terms of philosophy and as a precursor to Bloom, Rorty, and Cavell.

[86] RICHARD POIRIER, POETRY AND PRAGMATISM 5 (1992).

[87] Frankfurter, *supra* note 17, at 698.

[88] DAVID H. BURTON, OLIVER WENDELL HOLMES, JR. 69 (1980).

[89] James T. Kloppenberg, *Pragmatism: An Old Name for Some New Ways of Thinking?* 83 JOURNAL OF AMERICAN HISTORY 129 (1996).

[90] Robert A. Ferguson, *Holmes and the Judicial Figure*, 55 CHI. L. REV. 506 (1988).

[91] *Id*.

been said that "Holmes's mastery of the judicial opinion as literary genre is unmatched in the twentieth century," and why "more than any other figure, [Holmes] knowingly shapes the concept of the American judge."[92] Max Lerner is even more celebratory: "I venture the belief that the son of Dr. Holmes turned out to be more of a poet than his father, if by poet we mean someone who pierces the appearances and life and expresses his vision in moving symbols."[93] Posner takes this praise still further: "Holmes's true greatness is not as a lawyer, judge, or legal theorist in a narrowly professional sense of these words, but as a writer and, in a loose sense … as a philosopher—in fact as a 'writer philosopher'; and …his distinction as a lawyer, judge, and legal theorist lies precisely in the infusion of literary skill and philosophical insight into his legal work."[94]

Poirier refers to another Emersonian, John Jay Chapman, as an "Emersonian individualist and dissenter," and it is suggestive, is it not, that Poirier, by honing in on Chapman, employs the very epithet—"dissenter"—that has come to identify Holmes? Poirier is not wrong about James's Emersonian qualities. But his depiction of James as the quintessential Emersonian pragmatist is not quite as good as the portrait of Holmes in that role.

The Emersonian believes that the new owes its articulacy to the past; that all texts and paradigms spring from works we inherit; and that, nevertheless, the new requires a definitive, measured break from the past. Nowhere are these ideas realized more palpably than in the common law, which creates, celebrates, borrows from, and extends textual precedent. Judges constantly reinterpret and revise previous opinions (or laws) and so facilitate social and cultural trends. Judicial opinions interact with constitutional and legislative or statutory law, which add layers of complexity to the hermeneutics of judging.

Judges are writers, and writers "are necessarily obliged by the language they use to express the historical moment in which they find themselves."[95] Writers, however, "can also use that language to free themselves from any absolute obligation."[96] A judge's obligation is to the law, whatever that might be at any given time and place, because a judge must, in the common law tradition, apply rules handed down to him. Yet judges can use old legal concepts to carve out spaces for rules that fit the current socio-political climate. Law is fluid. Judges are restricted by precedent, but the imaginative ones use language to free themselves from precedent. They use language to adhere to while adapting rules, to unleash creative energies within the confines of previous court decisions. Recognizing that law must be mutable if it is to remain credible or useful to future generations, talented judges, like Emersonian writers, "can so far transfigure historical discourse that they end up speaking to a posterity in no way bound by that discourse."[97] If a foolish consistency is the hobgoblin of little minds,[98] then prudent

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[92] *Id*.
[93] LERNER, *supra* note 14, at xlviii.
[94] Posner, *supra* note 16, at xvi.
[95] POIRIER, *supra* note 86, at 75.
[96] *Id*. at 75.
[97] POIRIER, *supra* note 86, at 75.
[98] *See* RALPH W. EMERSON *Circles in* ESSAYS: FIRST SERIES (Joseph Slater et al. eds., Harvard Univ. Press 1980) (1841).

judges like Holmes are consistently inconsistent, able to make old paradigms suitable for present purposes. To this end, Holmes claimed not only that a "page of history is worth a volume of logic,"[99] but also that the thing he "always wanted to do is to put as many new ideas into the law as I can, to show how particular solutions involved general theory, *and to do it with style*."[100]

What makes Emerson's aestheticism pragmatic, or his pragmatism aesthetic? Poirier goes some length toward answering this question by focusing on words, their signification and their use value. Special meaning attaches to the moment of simultaneous creation and demolition, when words both enable and erase meaning. The Emersonian writer, such as he is, capitalizes on this moment, with its double function, by overcoming, or striving to overcome, the limitations of language. This idea is tied to linguistic skepticism: the pragmatic insistence that the signs and syntax we inherit carry particular meanings, but fail to account for pure, unmediated reality. Wallace Stevens captured this idea in one alliterative phrase: "Not Ideas About the Thing But the Thing Itself."[101]

Writers strive to represent the immediate, but must settle for the mediate. As Poirier explains, "Attempts to shape reality in language may be, from a literary point of view, dazzlingly successful, but they are always to some degree a betrayal of that reality."[102] Anxiety about the inability of words to signify their referent leads the Emersonian to speak or write with rhetorical gushes and syntactical acrobatics—that is, to convey meaning and sensation with demonstrative rhetoric to prevent ideas and feelings from suffering from immobility or exhaustion. Put another way, the Emersonian anxiety about the inadequacy of language brings about an exaggeration of style and an amplification of syntax. The inability to state what "is" results in overstatement.

Holmes tended toward overstatement and rhetorical extravagance. "He did not write in the plain style," explains Thomas Grey, "nor was he given to careful qualification or modest Anglo-Saxon understatement."[103] What Holmes "praised in the writers he most admired was not care, clarity, or accuracy, but the qualities of 'intensity' and 'magnificence' they were able to achieve."[104] For this reason, Holmes was "particularly drawn to the rhetorical devices of hyperbole and paradox,"[105] and in "the statements for which we best remember" him, he "tended to pronounce in unequivocal and often exaggerated terms."[106] It is little wonder that scholars have compared Holmes to Nietzsche, who has been compared to Emerson.

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[99] New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).
[100] OLIVER WENDELL HOLMES JR., THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 29 (Richard Posner ed., Chicago, IL: Univ.of Chicago Press, 1992) (emphasis added).
[101] Wallace Stevens, *Not Ideas About the Thing But the Thing Itself*, *in* STEVENS: COLLECTED POETRY AND PROSE, *supra* note 70 at 451.
[102] Poirier, *supra* note 86, at 27.
[103] Grey, *supra* note 23, at 29.
[104] *Id.*
[105] *Id*.
[106] *Id*.

Emersonians like Holmes might feel paralyzed by the experience of "the sublime," an idea first articulated in Roman antiquity and later developed by Anglo-Irish statesman Edmund Burke and recycled by Immanuel Kant, Arthur Schopenhauer, and such postmodernists as Frederic Jameson, Jean-François Lyotard, and Slavoj Žižek. The sublime means different things to different people, but generally it refers to the quality of a thing that is so terrible and awesome that it is ineffable. Alternatively, the sublime can refer to the experience or sensation one feels when encountering a thing that is so terrible and awesome that it is ineffable. In either case, ideas about the sublime are tied to ideas about beauty and representation, which are evident in Emerson and Holmes. Writers trying to depict or describe the sublime might suffer angst when they realize that what they feel cannot be captured in words.

Rhetorical gushes and linguistic acrobatics appear in Emerson's *Nature*, most notably when the speaker of the essay discusses nature as "not only the material," but also "the process and the result." [107] For Emerson, nature is identifiable as a tangible referent in the phenomenal world, but it is constantly changing and, therefore, always the end-result of some prior change or moment of interpretation. The phenomenal world is constituted by shapes and forms, and the "plastic power of the human eye"—perhaps the "transparent eyeball"—allows us to sense that pleasure which comes with beauty.[108]The eye is responsive to and contingent on externalities; it cannot control but only process what is out there. The eye mediates (creates) images and signs and enables our perspective of things. What the eye creates and the intellect internalizes is not reality, but "endless imitations" of reality. [109]Therefore, when Emerson speaks of the western clouds dividing and subdividing themselves "into pink flakes modulated with tints of unspeakable softness," he questions his ability to articulate the physical qualities of the signified; he doubts the ability of the sign to signify the referent.[110] Viewing the clouds is sublime. Because "each moment of the year has its own beauty and in the same field […] beholds, every hour, a picture which was never seen before," nature is constantly fleeting and unfolding; accordingly, its description is not applicable across time and cannot be fixed, and the sensations that it simulates cannot adequately be described.[111]

"Was there no meaning in the live repose of the valley behind the mill," wonders the speaker, "which Homer or Shakespeare could not re-form for me in words?" [112]To reformulate the speaker's suggestion here: there *was* meaning, but words could not represent it. Not even the brilliant and beautiful words of Shakespeare or Homer could do that. Our understanding of a reality becomes an unreality: "The shows of the day, the dewy morning, the rainbow, the mountains, orchards in blossom, stars, moonlight, shadows in still water, and the like, if too

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[107] Ralph Waldo Emerson, *Nature*, *in* NATURE: ADDRESSES & LECTURES 13 (Boston & New York: Houghton, Mifflin & Co., 1903).
[108] *Id.* at 10.
[109] *Id.* at 16.
[110] *Id.* at 17.
[111] *Id* at 18.
[112] *Id.* at 17-18.

eagerly hunted, become shows merely, and mock us with their unreality." [113]And then: "The beauty that shimmers in the yellow afternoons of October, who ever could clutch it? Go forth and find it, and it is gone; tis' only a mirage as you look from the windows of diligence." [114]Emerson's fascination here lies with the incapacity of human faculties to realize the referent, even to realize presence itself. Human will makes things intelligible; the universe is made up of properties man gives it; the world is constituted by the human mind. Beauty is not out there; it "becomes an object of the intellect." [115]"The beauty of nature," far from being obvious or available to all, "re-forms itself in the mind, and not for barren contemplation, but for new creation." [116]The intellect, not words or signs, is reproductive and regenerative; words and signs are, both of them, enablers: tools to be used in the creation of meaning.

These Emersonian ideas about the limitations of words and representation resonate in Holmes's writing about law. "[L]ike Nietzsche," explains one scholar, "Holmes approached the question of meaning with doctrines that mixed Emerson—a great early influence on Holmes as well as on Nietzsche—and evolutionism and that stressed the foundational role of affirmation, what Nietzsche would call 'the will to power.'"[117] Holmes remarked to a friend that "[p]robably you will find as I do, that ideas are not difficult, that the trouble is in the words in which they are expressed."[118] He said of his judicial opinions that to "arrange the thoughts so that one springs naturally from that which precedes it and to express them with a singing variety is the devil and all."[119] While singing praises about Justice John Marshall, Holmes announced, "We live by symbols, and what shall be symbolized by any image of the sight depends upon the mind of him who sees it."[120] At the very least, these quotations suggest a linguistic skepticism common to both Emerson and Holmes and contextualized by Poirier as part of the American poetic tradition. They also show that Holmes cared a great deal about style, and they might even anticipate the metaphysical skepticism that finds its most quarrelsome voice in Rorty.

What Holmes calls "skin of a living thought" has to do with what Rorty calls the "linguistic turn" as a framework for inquiry.[121] One should not overstate the connections between the schools of thought that influenced Rorty and the jurisprudence that emanated from Holmes, despite what this essay has argued about their compatibility. Holmes's epistemic and analytic methods are observable only in a limited number of cases, and Holmes was an Emersonian, which Rorty emphatically was not. Unlike Rorty and Rorty's subjects in *Philosophy and the Mir-*

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[113] *Id.* at 19.
[114] *Id.*
[115] *Id.* at 22.
[116] *Id.* at 18
[117] Luban, *supra* note 25, at 466-67.
[118] OLIVER WENDELL HOLMES JR., *1923 Letter to Doctor Wu*, *in* THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS, AND JUDICIAL OPINIONS 421 (1943).
[119] HOLMES, *supra* note 42, at 31.
[120] Holmes, *supra* note 118, at 385.
[121] *See, e.g.*, RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE, 170-212, 257-11 (1979).

ror of Nature (including Wilfred Sellars, W.V.O. Quine, and Donald Davidson), Holmes did not write treatises dealing with ontology or epistemology. Rather, Holmes dashed off short, colorful passages constrained by the abbreviated fact patterns of cases already sanitized by numerous lawyers and editors before him. His jurisprudence was expressed mostly through lectures, law review articles, and judicial opinions or dissents: textual mediums directed at non-philosophical audiences though not withdrawn from philosophical themes and questions. Holmes's writings are like dressed down philosophy or philosophy in fragments and sound bites.

It seems apparent that Holmes appreciated the linguistic exercises that his vocation both afforded and required. Using extraordinary language, Holmes troped and modified the judicial rhetoric that came before him. He understood the complicated and dependent relationship he necessarily had with precursor judges and jurisprudents. The relation of his language to past writing and literature was, while troubling to him, illuminating. Writers constantly make the past by making the present—by seeking out and employing words and narratives to describe the present—just as they comprehend the present-past and future-present by engaging with texts. All texts owe their intelligibility to the past; all texts reconstruct previous texts; therefore, all texts are works-in-progress, just as history and human experience are works-in-progress.

The Emersonian takes the language and ideas available to him and makes them his own. He does so, Poirier explains, "by troping or inflecting or giving a new voice to the idea, by reshaping it, to a degree that makes any expression of gratitude to a previous text wholly unnecessary."[122] Emersonians participate with the past, giving it new purchase "in terms specifically appropriate to the exigencies of the writer's own conditions and cultural locality."[123] Each Emersonian writer is repeating, Poirier claims, but each is also original.[124] As Emerson, referring to the Great Books that preceded him, says in *Self-Reliance*, "They teach us to abide by our spontaneous impression with good-humored inflexibility."[125]

How, if even the most creative and poetic among us are enmeshed in systems and networks of discourse, does the Emersonian writer break free from the restraints imposed by history, language, and circumstance? The answer, according to Poirier, is superfluity, which has to do, as I have already suggested, "with excess and luxury and exuberance and uselessness and desire,"[126] concepts that the Emersonian genius pronounces with "an aboriginal power of troping, of turning or changing the apparently given."[127] Poirier adds that writing can show us how "instead of trying to revoke or revere or repeat the past we might, to a limited degree, renew it by troping the language, consciously or unconsciously."[128] Tropes and inflections are articulations of freedom within syntactical boundaries. Tropes and inflections are therefore elements of superfluity; so are puns and fine-

[122] Poirier, *supra* note 86, at 19-20.
[123] *Id.,* at 19.
[124] *Id.*.
[125] RALPH W. EMERSON, THE ESSAY ON SELF RELIANCE 10 (NewYork: Roycrofters 1908).
[126] *Id.* at 37.
[127] *Id*., at 39.
[128] *Id.*.

ly developed metaphors; so are rhymes and rhythms; so is repetition. One could argue that judges, like poets, suffer from what Harold Bloom calls "anxiety of influence": the inspiration and frustration that writers sense when they try to creatively mimic the visions and forms of previous writers. [129] Such simultaneous inspiration and frustration account for the rhetorical surpluses evident in works by figures like Emerson and Holmes; by the same token, anxiety of influence, to some extent, enables the canonization of writers like Emerson and Holmes.

Tactics and technologies of writing are manifest in great works of the past and reenergized in great works of the present. According to the Emersonian, these tactics and technologies emanate from individuals who are able to tap into their creative will and poetical sense.[130] "The heritage most worth reclaiming," says Poirier, "consists of exemplifications of energy and fullness always and forever available *in* yourself; its merely textual embodiments, however admirable, are also superfluous."[131] In short, style—the effect and demonstration of creative selfhood—is generative; it propels ideas forward, preserving and reanimating their utility and influence. "Style," Poirier remarks, "represents a movement of mind as against the stasis achieved by former movements that have become textualized or intellectualized."[132]

Style prevents the fixity of ideas; it enables fluidity, adaptability, and appeal. It connects old and new corresponding ideas by developing inferential relationships between old and new texts. Perhaps more importantly, it allows one to express, or to try to express, sensations or the subjective registers made possible by language: to express the "law" that Emerson claims is "sacred" because it represents "the integrity of your own mind."[133] The point here is to contemplate and appreciate an awesome quality in language that is beyond all possibility of imitation and measure, but that requires imitation and measure if it is to be understood. This quality—the *aesthetic sublime*—enables, engenders, and produces. It prevents ideational stasis.

Holmes had style. He was an Emersonian. His writing troped, inflected, punned, and re-signified.[134] His aphorisms are unforgettable and have contributed

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[129] *See generally* HAROLD BLOOM, THE ANXIETY OF INFLUENCE: A THEORY OF POETRY (2d ed.1997).

[130] C.f., RALPH W. EMERSON, *Nature in* ESSAYS: FIRST SERIES (Joseph Slater et al. eds., Harvard Univ. Press 1980) (1841).

[131] Poirier, *supra* note 86, at 61.

[132] *Id*. at 65.

[133] EMERSON, SELF RELIANCE *supra* note 130 at 15.

[134] See, e.g., Allen Mendenhall, *Holmes and Dissent*, 12 J JURIS. 679, 709 (2011): "Holmes follows his four long opening sentences [in *Lochner*…] with diction that pitches headlong across the page, tripping over commas and at last running into a period: 'It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract.' With impeccable timing, he then offers this short, clipped statement: 'A more modern one is the prohibition of lotteries.' This syntax variation results in a footstep-like rhythm supplemented by the regulated succession of 's' and 'th' sounds: '*s*ettled,' 'various,' 'dec*i*sion*s*,' '*th*i*s*,' '*th*at,' 'cons*t*itution*s*,' '*s*tate,' 'law*s*,' 'way*s*,' 'a*s*,' 'legi*s*lator*s*,' '*th*ink,' 'a*s*,' 'injudicious,' 'a*s*,' 'a*s th*i*s*,' 'wi*th th*i*s*,' 'wi*th*,' '*th*e.' Add to this alliteration the other alliterative combi-

to his "quotability." He became famous for his dissents, which ensured the preservation of legal argument by way of superfluity. Holmes had a "literary motive" for using "hyperbole and paradox to vivify his ideas," and these "rhetorical tendencies might incline him to display his theoretical points in such a way as to make them seem very distinct, even at the cost of concealing their mutual relations."[135] Holmes's literary flair could turn his dissents into poetry; if dissents represent dead law, then poetry can reanimate the dead and bring old principles back to life. The more pleasurable a dissent, the more memorable it is; the more memorable a dissent, the more likely it will generate or become law.

A dissent records a justice's disagreement with a majority or plurality opinion. A majority or plurality opinion becomes law. A dissent, however, is not law. It represents rejected or discarded legal argument. But Holmes's dissents, endowed as they were with Emersonian aesthetic moves and turns of phrase, *did something*. They gave pause, surprised, alarmed; they called attention to themselves. They disclosed, to a degree, what Emerson's essays disclosed: "that by a conscious effort of linguistic skepticism it is possible to reveal, in the words and phrases we use, linguistic resources that point to something beyond skepticism, to possibilities of personal and cultural renewal."[136]

Although the majority or plurality opinion supposedly determines what the law is and will be, a dissent that is elegantly or memorably written can invest non-law (the legal argument that did not win out) with unforgettable, extraordinary, impressive possibility. An Emersonian dissent is not, strictly speaking, non-law, because it always remains aesthetically charged and hence functional or viable. An Emersonian dissent is indulgent, extravagant, beautiful; it is rhetorically excessive such that it always seems provisional and liminal, bursting forth with an energy that cannot be ignored, that might even establish itself as law if it impacts and influences future justices. Holmes's diction and syntax are scored for oration, memorization, and citation. Holmes does not describe; he *enacts*.[137] His dissents do not enumerate or explain; they demolish and restore. In so doing, they facilitate the ongoing process of judicial transformation and adaptation. They cause symbolic action—language—to become human action, or to obtain to human action. Menand might say that they keep the experiment going. In this respect, Holmes's aesthetics anticipate and substantiate Dewey's theories in *Art as*

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nations—'l' as in 'laws,' 'life,' 'legislators,' 'like,' 'liberty'; 't' as in 'It,' 'court,' 'state,' 'constitutions,' 'state,' 'regulate,' 'might,' 'contract'; 'r' as in 'various,' 'court,' 'regulate,' 'contract'; 'w' as in 'ways,' 'which,' 'we,' 'which,' 'with,' 'with'—and this sentence begins to seem like poetry. Many rhymes and near rhymes—'ways' and 'laws,' 'with' and 'this' and 'injudicious,' 'state' and 'regulate,' 'tyrannical' and 'liberty'—complement this impression." This article contains other specific examples of Holmes's use of literary technique. For more on Holmes's literary and rhetorical precision, see RICHARD POSNER *Judicial Opinions as Literature in* LAW AND LITERATURE 266-282 (1998).

[135] Grey, *supra* note 23, at 51.

[136] Poirier. *supra* note 86 at 11.

[137] Mendenhall, *supra* note 134 at 690 ("Holmes used dissents to refine and exposit legal pragmatism. Unlike most poets, whose writing does not automatically generate social change, Holmes's 'poetry' automatically enacted social change. The medium through which Holmes expressed his 'poetry' affected public policy."

Experience, a book that treats aesthetics not in the traditional sense as disinterested and detached, but in the pragmatic sense as functional and serviceable: as directly *affecting* and *effecting* things. More scholarship ought to address the aesthetic connection between Holmes and Dewey. After all, Dewey is the one classical pragmatist whom Holmes openly praised.

Judicial dissents instantiate Holmes's poetic pragmatism. Consider the following lines (which I have rendered in poetic form to allow readers to observe how Holmes's writing generates sublimated effects akin to what Emerson calls a "poetical sense") from two of Holmes's dissents:

Black & White Taxi & Transfer Co. v. Brown & Yellow Taxi & Transfer Co.[138]

A Poem[139] (1928)

It is very hard to resist the impression
that there is one august corpus
to understand which clearly is the only task
of any Court concerned.

If there were such a transcendental body of law
outside of any particular State
but obligatory within it unless and until changed by statute,
the Courts of the United States might be right in using
their independent judgment
as to what it was.

But there is no such body of law.

The fallacy and illusion that I think exist
consist in supposing that there is this outside thing to be found.
Law is a word used with different meanings,
but law in the sense in which courts speak of it today
does not exist
without some definite authority
behind it.

Notwithstanding Holmes's very non-Emersonian reference to the "transcendental," these lines enact an Emersonian aesthetic. One can almost sense Wallace Stevens, another poetic pragmatist, in this "verse." Holmes, for so long a poet, surely knew what he was doing when he organized this succession of "c" sounds: "corpus-clearly-Court-concerned." These words generate not only alliteration but also iambic feet. Surely Holmes knew the "citability" and "re-citability" of the phrases "It is/resist/impress," "there is/august/corpus," and "exist/consist." Surely

[138] *See* Black & White Taxi & Transfer Co. v. Brown & Yellow Taxi & Transfer Co., 276 U.S. 518 (1928) (Holmes, J., dissenting).
[139] My addition.

he recognized the iambic rhythm of the phrases "which clearly is the only task / of any court concerned." That line might have rounded out an Emily Dickenson poem. Other iambic phrases include "might be right in using" (note the "might/right" rhyme here), "as to what it was" (note the "s" and "w" alliteration here), "that I think exist" (note the "th" alliteration here), "used with different meanings" (note the "with-diff-ent" assonance here), and "courts speak of it to-day" (note the "s" and "t" alliteration here). Either these turns of phrase are deliberate, or they are stunningly coincidental.

Consider another dissent.

Gitlow v. New York[140]

A Poem[141] (1925)

Every idea
is an incitement.
It offers itself for belief
and if believed
it is acted on
unless some other belief
outweighs it
or some failure of energy
stifles the movement
at its birth.

The only difference
between the expression
of an opinion and an incitement
in the narrower sense
is the speaker's enthusiasm
for the result.

Eloquence may set fire
to reason.

But whatever may be thought
of the redundant discourse
before us
it had no chance of starting
a present conflagration.

Do not these lines, with their raw idioms and variable feet, smack not only of Stevens but also of William Carlos Williams? Could not these lines represent Holmes's version of *The Red Wheelbarrow*, a poem published two years before this dissent? One could pore over the rhythm, alliteration, assonance, and other literary techniques at play in these lines, but that would belabor the point. It is

[140] Gitlow v. N.Y., 268 U.S. 652 (1925).
[141] My addition.

clear that Holmes seeks to energize language toward some jurisprudential end. It is clear that he is a wordsmith of remarkable depth and subtlety: a poet, in other words.

What Poirier says of canonical American writing holds true for a Holmesian dissent: "It is work that requires a skeptical excitement about the past as it still vibrates all round us in words, and it requires a determination that this inheritance of words will be transformed by our exploitations of the treasures hidden in them, before they are passed on to the generations."[142] This statement is pragmatically true on two levels: the one of diction and syntax, and the one of jurisprudence. Holmes's dissents do not merely play with words; they mold, shape, and form legal arguments. These arguments derive from other, older arguments and are rearticulated in extravagant, affirmative vocabulary and grammar. Holmes's judicial sonorities can be rehearsed, recited, and delivered. None more than Emerson resonates in Holmes's aphorisms and cadences; none more than Emerson is refracted into the rules and principles that Holmes put forth as the antifoundational foundation of American jurisprudence.

IV. Holmes's Pragmatic, Aesthetic Dissents

Pragmatism is about transforming and adapting thought or theory to make it relevant and practical. The common law has a pragmatic element built into it because of its grounding in precedent and experience and its simultaneous potential for revision and variation. How else would ancient laws regulating property come to regulate humans during the era of American slavery, or Internet activity during the present age? In keeping with the needs of his own time and place, Holmes used the dissent to ensure that the common law remained organic, and to improve and possibly extend legal concepts while improving and extending the methodologies and vocabularies of pragmatism. At one time, dissents were "particularly apologetic in tone," but increasingly during the late nineteenth and early twentieth century, dissents grew in number and were stripped of their justificatory appeals.[143] Because more dissents were handed down, more dissents were redeemed and more legal arguments were preserved. As a poetic pragmatist, much less as a judge, Holmes ensured, by way of aesthetic dissents, that good ideas remained part of the stock of texts that judges rely on. Dissents are *possibility* as it was defined by James: as things "more than nonreal existence, a twilight realm, a hybrid status, a limbo into which and out of which realities," or laws that obtain to the populace, "ever and anon are made to pass."[144]

When Supreme Court Justice William J. Brennan Jr. lectured to a California audience about dissents in 1985, he began to answer the question of why judges

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[142] Poirier, *supra* note 86 at 33.
[143] *From Consensus to Collegiality: The Origins of the 'Respectful' Dissent*, *supra* note 1, at 1308-1311..
[144] JAMES, PRAGMATISM, A NEW NAME FOR SOME OLD WAYS OF THINKING *supra* note 50, at 611.

dissent by citing author Joan Didion.[145] This move not only adds credibility to this essay's claim that the dissent is a medium that lends itself to literary grandstanding, but also suggests that Supreme Court justices are aware of literary figures and fads. Brennan believes that the "dissent is offered as a corrective—in the hope that the Court will mend the error of its ways in a later case."[146] Alluding to Holmes's dissent in *Abrams v. U.S.*, Brennan goes on to say that the function of the dissent "reflects the conviction that the best way to find the truth is to go looking for it in the marketplace of ideas."[147] The very function of the dissent is pragmatist in the way that Holmes's jurisprudence is pragmatist; and its pragmatism has to do with the Darwinian struggle for the melioration of ideas and laws, as well as with the surgical examination of truth described and carried out by William James. Perhaps most telling of all is Brennan's remark about dissents "that soar with passion and ring with rhetoric," because these dissents, like Holmes's, "straddle the worlds of literature and law."[148] The most memorable dissents (and the most memorable opinions) are rhetorically charged; they become part of the legal canon and are studied by lawyers, judges, scholars, and law students, and that is probably why Jack Balkin and Sanford Levinson liken casebooks to literature anthologies.[149]

Holmes's dissents have been objects of fascination for some time, and his dissent in *Lochner* was the first dissent to become canonized.[150] Holmes's writing style is a major reason for this fascination and canonization. Consider the following question-and-answer about Holmes's "gift for dissent that has puzzled students of judicial philosophy"[151]: "How does a judge who rejects many of the philosophical implications of dissent develop such a 'power of constructive negation?' The answer lies in the literary scope of the minority opinion in the hands of a master stylist. If Justice Holmes is most memorable in dissent, it is because his customary ability to see himself clearly is a primary requisite of that genre."[152] What Ferguson says here has to do with Holmes's ability to construct the image of himself as a writer and not just as a judge, although there remains some ambiguity about what Ferguson means regarding Holmes's "customary ability to see himself clearly," to say nothing of why Holmes is a "judge who rejects many of the philosophical implications of dissent." Besides glorifying Holmes's literary style, this question-and-answer establishes dissents as a genre conducive to literary expression. "When Holmes addressed questions of law in his dissenting opinions," explains another scholar, "he had little occasion to predict what the courts would do in fact. His fellow justices had done it already. If law is simply a matter

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[145] William J. Brennan Jr., *In Defense of Dissents*, 37 HASTINGS L. J. 427, 428 (1986).
[146] *Id.* at 430.
[147] *Id.*
[148] *Id.* at 431.
[149] Jack M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 970-973 (1998).
[150] Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781, 788 (2000).
[151] Robert A. Ferguson, *Holmes and the Judicial Figure*, 55 U. CHI. L. REV. 506, 536 (1988).
[152] *Id.*

of what the courts do in fact, dissenting opinions always have the law wrong."[153] Dissenting opinions may have the law wrong, but only because they seek to make the law right. The paradoxical character of dissent, about which this essay will say more momentarily, may have attracted Holmes, who once wrote, "There is nothing like a paradox to take the scum off your mind."[154]

Dissents are the state of exception. They are not law, but they influence law. They insist on their importance even though they are outside law. They confirm the validity of the rules that they undermine. They acknowledge that the law is one thing while suggesting that the law ought to be something else. They reify principles that they seek to demolish, and they demolish principles that they seek to reify. Their words do not constitute law; even their references to the holding of the majority or plurality opinion do not constitute law because the references are part of a medium that cannot be law. Nevertheless, dissents retain arguments that can become law. Dissents are liminal media that are not law, but that preserve language and rules that might become law. If a dissent becomes law, it is no longer a dissent. It is language that was once a dissent.

Dissents are subversive by design. They call into question the foundations upon which laws obtain to the *polis*. Dissents suggest that foundations can change or crumble. A foundation that changes or crumbles cannot be a foundation. Therefore, there are no foundations. There are only temporary platforms that allow law to gain its footing. Decisions once decided upon foundations are overruled or reinterpreted based on new sets of foundations. When this happens, foundations are treated as either wrong or misapplied, or as something altogether different from a foundation. What makes dissents compelling is the possibility that they do not have the law wrong, not because they have the law right, but because they show that law is neither right nor wrong: law just is. Perhaps one could argue to the contrary that law is right or wrong only to the degree that it brings about constructive and useful results. In either case, one would have trouble arguing that law is the accumulation of right principles or inevitable results.

Other scholars have written about the discursive function of dissents in relation to law and legal principles. A recent law review article about LGBT adoption and custody cases argues that "the dissent is an important source of judicial narratives," that "certain dissents are more interesting than the majority opinion in that there seems to be a different set of norms governing their expression of often controversial and ardent opinions," and that dissents "may even affect majority opinions and the future of law."[155] This particular article suggests that "dissents can preserve an issue or argument for future consideration," dissents "may even set the stage for future majority opinions," and dissents "may actually be functional in [their] capacity to show the unsettled nature and flux of law."[156] Another article about a very different topic (patents) shares these views but discusses them in

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[153] Alschuler, *supra* note 24, at 365.
[154] Letter from Oliver Wendell Holmes Jr. to Harold J. Laski, *in* 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935*, at* 302 (Mark DeWolfe Howe ed., 1963).
[155] Kimberly D. Richman, *Talking Back: The Discursive Role of the Dissent in LGBT Custody and Adoption Case*, 16 LAW & SEX. 77, 82 (2007).
[156] *Id.* at 82-83.

light of apparent ambiguities about what the law is in technological fields.[157] Both of these articles indicate that dissents are forward-looking.

Dissents anticipate some future engagement with other texts. Why would a judge dissent if not to preserve his words for the benefit of future judges, legal scholars, lawyers, and litigants? The Honorable Robert S. Smith, an Associate Judge of the New York Court of Appeals, explains why he dissents: "[B]ecause my colleagues make mistakes."[158] The judge is, one suspects, being witty, but there is something to be said for his response. His more serious answer runs as follows:

> [T]here are good reasons not to dissent, even when you disagree with the majority. Nothing you say in dissent, no matter how brilliant, is the law or makes the majority opinion one bit less the law. In that sense, a dissent is a useless exercise. And dissents can do harm. You may annoy your colleagues. […] And there is a legitimate argument that, when you dissent, you injure the institution of which you are a part by lessening its credibility—the air of infallibility which, even if only shakily founded on fact, helps the courts preserve their role as the final arbiters of hotly-disputed questions.[159]

Despite such disadvantages, the judge concludes, "And yet, I keep dissenting. Is it just because my ego makes me do it? Maybe. But I can think of better reasons."[160] The judge goes on to list a few reasons for dissenting,[161] but he never comes to definitive conclusions. His answers are merely speculative. Yet he allows that "I dream, as perhaps every dissenting judge does, that future ages will recognize my wisdom—that my dissents will acquire the status of Justice Holmes's in *Abrams* and *Gitlow*."[162] Holmes's dissents achieved their status because of their philosophical or jurisprudential aphorisms and because of their literary nuance. Their greater impact upon the *polis* is in their vindication: their graduation from non-law into law. Besides *Abrams* and *Gitlow*, Holmes's dissents in *Lochner v. N.Y.*,[163] *Toledo Newspaper Co. v. U.S.*,[164] *Hammer v. Dagenhart*,[165] *Bartels v. Iowa*[166] and others have been vindicated by becoming, in small or large part, law.

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[157] Jeffrey A. Lefstin, *The Measure of Doubt: Dissent, Indeterminacy, and Interpretation at the Federal Circuit*, 58 HASTINGS L. J. 1025 (2007).
[158] Robert S. Smith, *Dissenting: Why Do It?* 74 ALB. L. REV. 869 (2010/2011).
[159] *Id.*
[160] *Id.* at 870.
[161] Three reasons are the possibility that the ideas in the dissent will later gain currency, the possibility that the dissent will force other judges to be more careful and precise in their reasoning, and the possibility that the dissent will make the majority opinion more understandable. Smith concludes by saying that sometimes a judge would simply rather express what he or she thinks than sign his or her name to an opinion representing a competing view.
[162] Smith *supra* note 158.
[163] Lochner v. New York, 198 U.S. 45 (1905).
[164] Toledo Newspaper Co. v. U.S., 247 U.S. 402 (1918).
[165] Hammer v. Dagenhart, 247 U.S. 251 (1918).
[166] Bartels v. Iowa, 262 U.S. 404 (1923).

The judge's reference to the "air of infallibility" ought to raise eyebrows. It was Holmes's mission to show that "law" was fallible because human knowledge was limited. In a letter to Sir Frederick Pollock, Holmes treated the idea of law's infallibility as an archaic offshoot of natural law theory. Holmes writes that in the Middle Ages "natural law was regarded as the senior branch of divine law and therefore had to be treated as infallible," and he adds, parenthetically, that "there was no infallible way of knowing what [divine law] was."[167] The implication is that divine law might exist, but humans, being fallible, cannot have full knowledge of divine law and so cannot capture divine law in human words. Dissents themselves suggest that law is fallible; their point is to register an error in the law.

Dissents are designed to be interactive with texts that do not yet exist. Poirier, *à la* Emerson, says the following about the interactivity of texts across generations:

> As Emerson would have it, every text is a reconstruction of some previous texts of work, work that itself is always, again, work-in-progress. The same work gets repeated throughout history in different texts, each being a revision of past texts to meet present needs, needs which are perceived differently by each new generation. While some of these texts or products may deserve to be called 'classics,' none is definitive, much less indispensable. The proposition that creation consists of repetition with a difference, of repeating in a new text work already being carried on in the texts of the past—this can be further illustrated by noting how the idea is itself repeated, out of the different texts of Emerson, not only, as we have just seen, in Stein, but in James and Dewey.[168]

And, I would add, in Holmes.

Poirier's remarks have striking implications for dissents. Holmes's dissents, for instance, reveal how narrowed conceptions of law meet practical purposes and interests; his dissents are aesthetically charged even as they call for evidentiary support as grounds for legal rules, for perspectival consideration of the facts in any given suit, for predictive concerns for potentially different outcomes resulting from the application of one legal rule or another, and for careful incorporation of past principles and events to the cases at hand. All of these concerns point to context and experience as criteria for good judgment. Holmes was not above humor in his celebration of context and experience. As he said in his opinion (not dissent) in *Brown v. U.S.*, "Detached reflection cannot be demanded in the presence of an uplifted knife."[169] His point is that law must not adhere to black letter rules when common sense indicates that black letter rules cannot be followed.

Holmes often advances these pragmatist ideas through the medium of dissent. His dissents enable the mutability of law as they imply and in some cases insist on the mutability of the words or expressions of law. "Courts are apt to err too closely to the words of a law," Holmes says in one dissent, "where those words import a policy that goes beyond them."[170] In another dissent, Holmes says that

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[167] HOLMES, *supra* note 37.
[168] Poirier, *supra* note 86, at 18.
[169] Brown v. United States, 256 U.S. 335, 343 (1920).
[170] Olmstead v. United States, 277 U.S. 438, 469 (1928) (Holmes, J. dissenting).

the "interpretation of constitutional principles must not be too literal" because we "must remember that the machinery of government would not work if it were not allowed a little play in its joints."[171] Holmes seems to suggest that words are malleable and with a little shove can fit into one package of thought or another, despite the apparent differences between those thoughts.

To the extent that words are malleable, the laws and rules that are made up of words are also malleable. The dissent is a rhetorical medium that ensures the malleability of laws and rules because it records an opposing scheme of laws and rules—that is to say, it registers alternative and sometimes rivaling viewpoints to make sure those viewpoints are not lost to the historical record. The historical record is essential to common law rulemaking, which depends upon the embeddedness of jurisprudence in text. By preserving one side of an argument or an alternative vision of the law within an authoritative text—a text issued by one who has the power to command instructions to others, who, in turn, obey the instructions—a dissenting judge safeguards argument and guarantees that ideas will continue competing for their truth value, or what James might have labeled their "cash value."

"Free competition is worth more to society than it costs," Holmes once remarked in his characteristically consequentialist way.[172] That notion carries over into dissents, which prevent the majority opinion from becoming a monopoly on jurisprudence, or a plurality opinion from becoming a cartel. In his dissent in *Abrams v. U.S.*, Holmes remarked that "when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas."[173] One may sense here an incipient antifoundationalism, but more definitely one may sense that Holmes conceives of belief as arising from competition among incompatible ideas. He adds in his *Abrams* dissent that "truth is the power of the thought to get itself accepted in the competition of the free market,"[174] and the formal process of dissenting permits certain ideas to continue in the textual record. Holmes's superfluity virtually ensured that his dissents not only remained in the textual record, but also determined the direction of the textual record for future generations.

Holmes's dissents are coded in pragmatism; with their brilliant aesthetics, they signal future judges to reconsider certain arguments. Holmes's dissents show how the ability of aesthetics to stimulate sensation can have sweeping and dramatic social implications. Perhaps that is a fact to be both celebrated and feared.

V. Conclusion

Holmes, whatever else he was, was an Emersonian. He was what Rorty called an "edifying philosopher" whose role "is to help us avoid the self-deception

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[171] Bain Peanut Co. v. Pinson, 282 U.S. 499, 501 (1931) (Holmes, J. dissenting).
[172] Vegelahn v. Gutner, 167 Mass. 92, 44 N.E. 1077, 1080 (Sup. Ct. Mass. 1896).
[173] Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J. dissenting).
[174] *Id.*

which comes from believing that we know ourselves," or that we know true law, "by knowing a set of objective facts."[175] What sets Holmes apart from other facilitators of pragmatist aesthetics is that his writing, more than Pierce's or James's or Dewey's or even Emerson's, had a practical bearing: it obtained to the *polis* by nature of its medium as soon as it became public record. To write and interpret law is to impact society; to write and interpret law *well* is to impact society for the better. Judicial opinions are as practical and productive as writing can get. Each of a judge's words in an opinion or a dissent has a direct effect on the *polis*. Judges' words influence and simultaneously regulate the *polis*, for better or worse. Those who doubt that literature has a utilitarian import fail to consider the judicial opinion (or dissent) as a literary medium. As I have suggested, judicial writing can be aesthetic. It can employ a wide variety of literary techniques. Judges can be poets.

Holmes was a poet. His Emersonian superfluities suggest a will to realize a poetical sense, and they describe epistemology and metaphysics in a postmodern way while treating laws as linguistic constructs and rhetorical games. His poetical sense, achieved not in nature where Emerson would have his geniuses achieve such self-actualization, but in the law where the use of aesthetics and the representation of data obtain directly to the *polis*, brought about experiments in democracy. Holmes's dissents were tests just as they inspired and provoked tests. It is not too much to say that Holmes's writing taps into the aesthetic sublime, at least if what is meant by that term is sensation beyond explanation, the feeling that defies meaningful or constructive signification, the awareness that what one is experiencing—in this case, Holmes's writing—kindles emotions that are indescribable. Holmes's writing enabled postmodern jurisprudence. In his writing, the intersection of pragmatism and aesthetics finds its most illuminating expression. In his writing, the treatment of law as language finds support. In his writing, law becomes the art of the possible.

[175] RORTY, *supra* note 56, at 373.