The Case of Experience v. Efficiency

An Examination of the Influence of Justice Oliver Wendell Holmes, Jr., on Judge Richard Posner

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Introduction

The history of American jurisprudence is dotted with truly great judges, those who have altered our perceptions of what our legal system is meant to do. At or near the top of any informed list of these great judges one will find Oliver Wendell Holmes, Jr., joined by numerous other members of the Supreme Court and a handful of judges from other benches, most notably Learned Hand. In our own time, Judge Richard Posner has served on the United States Circuit Court of Appeals for the Seventh Circuit for a quarter-century, including seven years as Chief Judge; he has taught at the University of Chicago Law School as a professor or lecturer for thirty-seven years and at Stanford Law School for one; and he has authored numerous highly influential books and papers, not to mention countless opinions in his current capacity. His impacts on the American judiciary and the legal academy – both what they are and what they should be – are widely debated, but it seems almost certain that the magnitude of those impacts has not been fully measured. Only time will tell whether Judge Posner will ultimately join the ranks of Holmes and Hand, but he certainly ranks as one of the most influential jurists and legal academics of the last fifty years.

Because of Judge Posner's great influence, the legal community will benefit from understanding his jurisprudential philosophy as thoroughly as possible. In order to appreciate the implications of his work, one must give special attention the sources of his philosophy; it is only by placing Judge Posner properly in the history of American jurisprudence that we can estimate how future judges and academics might build on his work. In this paper, I plan to examine the

influence of Justice Holmes, especially in his idea that "the life of the law has not been logic: it has been experience,"[2] on Judge Posner.

An Approximation of Judge Posner's Impact

To begin to understand the scope of Judge Posner's impact on American legal theory, we should understand his career path. I have already noted Judge Posner's lengthy career as a teacher in elite law schools and an appellate judge. Prior to his academic career, Posner earned an A.B. at Yale University in 1959, *summa cum laude*, and an LL.B. from Harvard University in 1962, *magna cum laude*. At Harvard, Posner served as President of the Harvard Law Review. Immediately after his graduation from Harvard Law School, Posner clerked for Justice William J. Brennan, Jr., on the Supreme Court of the United States. He then served for two years as an assistant to Commissioner Philip Elman of the Federal Trade Commission, for two years as an assistant to the solicitor general of the United States, and as general counsel of the President's Task Force on Communications Policy, just before starting his academic career at Stanford Law School.[3]

Since 1969, Posner has authored thirty-seven books,[4] 278 articles or monographs of comparable length,[5] and 2,217 judicial opinions.[6] He is the most-cited federal Circuit Judge

[2] Oliver Wendell Holmes, Jr., THE COMMON LAW 1 (Dover Publ'ns 1991).

[3] University of Chicago Law School, University of Chicago Law School > Richard Posner, http://www.law.uchicago.edu/faculty/posner-r/ (last visited May 26, 2006).

[4] This does not include revisions and updated editions, which bring the total to forty-six. University of Chicago Law School, University of Chicago Law School > Publications, Presentations and Works in Progress, http://www.law.uchicago.edu/faculty/posner-r/ppw.html (last visited May 21, 2006).

[5] *Id.*

[6] As of May 21, 2006. This number includes 2,071 majority opinions, 63 concurring opinions, and 97 dissenting opinions (in 14 cases, Judge Posner concurred in part and dissented in part). Figures obtained by Lexis search.

currently on the bench.[7] As Lance Liebman, Director of the American Law Institute has put it, "For law professors, and particularly for casebook authors, Dick Posner is the number-one judge. His opinions are brief, pointed, funny, and disputable. They were made for the Socratic method. . . . We teachers love [him]."[8] Clearly, Judge Posner is having an impact on the legal community, both as a judge and as an academic.

The Enigmatic Philosophy of Justice Holmes

To understand the impact of Holmes on Posner, one likewise needs to understand just who or what Holmes was, at least in some part; a brief examination of his life will be helpful. Holmes is widely considered the greatest judge in American history.[9] His classic work, *The Common Law*, "has been called the greatest work of American legal scholarship and one of the great intellectual achievements of nineteenth-century America."[10] Holmes left Harvard College just two months before his graduation, in April 1861, to enlist in the Massachusetts Militia. A hero of the Civil War, Holmes was wounded three times, twice nearly fatally. Holmes's three years of service "shaped [his] jurisprudence and his personal qualities more than any other."[11] After the war, Holmes enrolled in Harvard Law School. Admitted to the bar in 1866, Holmes would accept a faculty position at Harvard in 1882, only to be appointed to the Supreme Judicial Court of Massachusetts in the middle of the term. In 1902, President Theodore Roosevelt

[7] American Law Institute, Press Release: Judge Richard A. Posner and Professor Ronald M. Dworkin Awarded American Law Institute's Henry Friendly Meda[l], https://www.ali.org/ali/pr21Oct05.htm (October 19, 2005) (citing Letter from Chief Judge Michael Boudin to the American Law Institute (2005)).

[8] *Id.*

[9] Benjamin Cardozo called him "the great overlord of the law and its philosophy." Benjamin N. Cardozo, *Mr. Justice Holmes*, 44 Harv. L. Rev. 682, 691 (1931).

[10] Sheldon M. Novick, *Introduction* to OLIVER WENDELL HOLMES, JR., THE COMMON LAW iii (Dover Publ'ns 1991).

[11] Albert W. Alschuler, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 41-42 (2000).

nominated Holmes to the Supreme Court of the United States, where Holmes sat for thirty years. During his tenure on the court, Justice Holmes would write some of the most provocative and most-cited opinions – both for the majority and dissenting – in the history of American law.[12]

Scholars disagree, however, on what to call Holmes's philosophy. "Was Holmes a pragmatist or a utilitarian, or was he a Nietzschean, a social Darwinist, or a nihilist?"[13] Holmes explicitly rejected utilitarianism, the philosophy of Kant, and pragmatism.[14] Alschuler claims that both utilitarian pragmatism and a more extreme skepticism, in which law is "the self-interested exercise of power," are present in Holmes's writings, but that the latter dominates.[15] Further, in the sense of believing that "human life is meaningless except insofar as it is invested with meaning through personal acts of will," Alschuler concludes that Holmes was truly an existentialist.[16] Posner, on the other hand, calls Holmes "the American Nietzsche," noting, "I daresay my suggestion, even duly qualified, . . . will not endear [Holmes] to those for whom Nietzsche is the philosopher of Nazism – nor even to those for whom Nietzsche is the philosopher of postmodernism."[17] Holmes himself gave perhaps the most enigmatic description of himself, calling himself a "humorous bettabilitarian (one who treats the Universe simply as bettable)."[18] To complicate things still further, Holmes often made nihilist statements, such as the

[12] Alschuler, *supra* note 11, at 37, 41-43, 52.

[13] *Id.*, at 2. *See also* H.L. Pohlman, JUSTICE OLIVER WENDELL HOLMES: FREE SPEECH AND THE LIVING CONSTITUTION 20 (1991).

[14] Alschuler, *supra* note 11, at 17-18.

[15] *Id.* at 20.

[16] *Id.* at 19.

[17] Richard A. Posner, THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. xxvii (1996) (citing Richard A. Posner, THE PROBLEMS OF JURISPRUDENCE 239-42 (1990)).

[18] *Id.* at xxvi (citing Letter from Holmes to Lewis Einstein (Aug. 19, 1909), *in* THE HOLMES-EINSTEIN LETTERS: CORRESPONDENCE OF MR JUSTICE HOLMES AND LEWIS EINSTEIN 1903-1935, at 49 (James Bishop Peabody ed., 1964))

claims that "[t]he useless is the ideal expression of man,"[19] and that "[n]othing could be more enchanting than to see a man nearly killing himself for an end which derives its worth simply from his having affirmed it."[20]

Regardless of the label applied to Holmes, the man, or to his philosophy, it is clear that certain themes pervade both his work and his reputation, today. Perhaps his most famous statement was the claim that "[t]he life of the law has not been logic: it has been experience."[21] That is, the law, particularly the common law, has never been developed by strict logic, as in mathematics, but is subject to change by judges responding to political exigencies and new political or social theories, or simply making policy out of their own biases and opinions. Indeed, Holmes famously accused the majority of the Court of doing the latter in his dissent in *Lochner v. New York*, saying

> The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views.[22]

At the same time, however, that he was putting formal logic in its place Holmes proposed a more cynical view of the law in his "bad man" proposal and "prediction theory," claiming that

> [I]f you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge

[19] Letter from Holmes to Morris R. Cohen (Feb. 5, 1919), in *The Holmes-Cohen Correspondence*, 9 J. Hist. Ideas 3, 15 (cited in Alschuler, *supra* note 11, at 22 n.100).

[20] Letter from Holmes to Clare Fitzpatrick, Lady Castletown (Apr. 10, 1987), in Novick, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 216 (Little, Brown, 1989).

[21] Holmes, *supra* note 2.

[22] *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).

> 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. . . .
>
> . . . .
>
> . . . The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.[23]

This latter view – the prediction theory – has been thoroughly criticized, chiefly as presenting a logical impossibility; while the "prophecies" may be useful to the criminal and have some use by the advocate, they surely have none for the judge, since the judge has to prophecy with respect to his own reasoning or, using the same inquiry, to the reasoning he believes judges on a higher court will conduct. They, in turn, would have to make the same inquiry, until the judges of the highest court in the land would be left searching for the law in predictions of their own actions.[24] Nonetheless, because it so difficult to describe Holmes's philosophy in its entirety, his description of the bad man has become one of the most enduring proxies for a concise statement of his judicial philosophy, especially as it is introduced to first-year law students.

The difficulty of applying a label either to Holmes's philosophy or to his jurisprudence may be one reason his reception has been less than uniformly warm. While Professor Alschuler has noted that "[h]ymns have been written of Justice Holmes,"[25] Ben Palmer claimed that, "[i]f totalitarianism ever comes to America . . . it will come through dominance in the judiciary of men who have accepted a philosophy of law that has its roots in Hobbes and its fruition in

[23] Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459, 461 (1897).

[24] *See* Posner, *The Jurisprudence of Skepticism*, 86 Mich. L. Rev. 827, 880-83 (1988). Posner attempts to "save" Holmes's theory by stating that, for judges, law is not a prediction of what a court will do; it simply is the activity the judges *do*. This saves the theory only by rendering it an incomplete definition.

[25] Alschuler, *supra* note 11, at 2.

implications from the philosophy of Holmes."[26] Sheldon Novick observed that Holmes "in personal letters seemed to espouse a kind of fascist ideology,"[27] a characterization Posner has explicitly rejected.[28] Whether or not Novick's characterization is fair, he is correct in noting that several competing themes – some of them rather extreme – can be found in Holmes's writing, with there sometimes being quite a gap between his judicial and private philosophies.

Holmes and Posner: Mutual Debtors

Although Holmes died four years before Posner was born, each man owes the other a tremendous debt. Posner has been influenced by Holmes in much the same ways every other modern American lawyer has been, but especially so in that his own theories, writings, and even jurisprudence draw heavily – and perhaps sometimes unconsciously – on Holmes. Holmes is indebted to Posner for the work the latter has done in preserving and polishing the legacy of the former. Not only has Posner edited a collection of Holmes's writings and written several articles dealing with Holmes in depth, but he is prone to making statements such as, "When we set aside our temporal parochialism, we see what a previous generation saw – that Holmes was the greatest legal thinker and greatest judge in our history."[29] Yet in almost the same breath, Posner has observed that "the recent surge in . . . interest [in Holmes] is, I believe, largely a result of developments internal to academic law, and to social thought more generally, having little to do

[26] Ben W. Palmer, *Hobbes, Holmes and Hitler*, 31 A.B.A.J. 569, 573 (1945).

[27] Novick, *supra* note 20, at xvii. Alschuler notes that "Novick presumably did not mean the word *fascist* to be taken literally; nothing in Holmes's letters suggests support for the economic program of Benito Mussolini. Perhaps, while trying to avoid use of the more inflammatory word *Nazi*, Novick meant something like 'Nazi junior-grade.'" Alschuler, *supra* note 11, at 16 n.30.

[28] Posner, *supra* note 17, at xviii-xxix; *see also* Alschuler, *supra* note 11, at 16. Posner's rejection of the label *fascist* is based on the observations that Holmes was not an anti-Semite and believed in democracy and free speech. This indicates a rather narrow conception of fascism.

[29] Posner, *The Path of the Law 100 Years Later: Holmes's Influence on Modern Jurisprudence*, 63 Brooklyn L. Rev. 7, 17 (1997).

with Holmes per se,"[30] developments to which Posner has clearly contributed in large part. Indeed, the link between the two men is strong enough that Professor Alschuler, in his work criticizing Holmes's philosophy, noted, "I may have cast Justice Holmes as the villain of this book, but Judge Posner is the runner-up."[31]

Posner's own commentary is illuminating:

> I do not share all of Holmes's beliefs, philosophical and otherwise, and I do not think that the most important thing about a judicial opinion is that it be well written. But I would not have undertaken this volume if I did not think that there was much of permanent value in what I am calling Holmes's philosophy of life.[32]

In listing "the legal and economic thinkers who since law school have most shaped my own academic and judicial thinking," Posner lists Holmes, Coase, Stigler, Becker, and Director, in that order.[33] It is remarkable that Posner's list includes one Supreme Court Justice and four economists; of the economists, three are Nobel laureates,[34] the fourth is considered the founder of the field of law and economics,[35] and all four teach or taught at the University of Chicago. While Posner may have been writing somewhat "off the cuff," here, and has surely not provided a comprehensive list of influences on his post-law school thinking, this list indicates both the importance of Holmes in Posner's continuing intellectual formation, as the only judge he lists,

[30] *Id.* at 8.
[31] Alschuler, *supra* note 11, at x.
[32] Posner, *supra* note 17, at xxvi.
[33] Posner, OVERCOMING LAW 3 (1995).
[34] More accurately, laureates of the Bank of Sweden Prize in Economic Sciences in Memory of Alfred Nobel. Stigler received the honor in 1982, Coase in 1991, Becker in 1992. This remarkable list, focused as it is on heavyweights of the so-called "Chicago School," may also say something about the influence of one's peers in an academic institution and perhaps even about the benefits and risks of appointing lifelong academics to the judiciary, but this is a topic for another paper. It is also worth briefly noting that Professor Becker and Judge Posner co-own a blog ("web log"), accessible at http://www.becker-posner-blog.com/, on which each posts a substantive comment roughly weekly.
[35] *See, e.g.*, University of Chicago, Aaron Director, Founder of the field of Law and Economics, http://www-news.uchicago.edu/releases/04/040913.director.shtml (Sep. 13, 2004).

and the vast extent to which economic thinking has influenced Posner's thought. The fact that Holmes is listed first, despite being the only individual listed who was not working both contemporaneously with Posner and at the same institution, is also revelatory of the degree to which Posner has consumed Holmes's work.

There is some evidence that Holmes's jurisprudential "style" is Posner's ideal, at least in its rhetorical qualities. For example, Holmes's *Lochner* dissent has been criticized as poor in legal reasoning,[36] yet Posner says it is not "a good judicial opinion. It is merely the greatest judicial opinion of the last hundred years."[37] As quoted *supra*,[38] Posner rejects the idea "that the most important thing about a judicial opinion is that it be well written,"[39] yet he also says, "Holmes was never further off the mark than when he called law the calling of thinkers, not poets. Much of Holmes's own celebrity . . . is due to the power of his rhetoric."[40] Posner's own method of judging is, in striking ways, similar to Holmes's. As Lance Liebman observed, *supra*,[41] Judge Posner's opinions are distinguished by brevity and humor, qualities for which Holmes's opinions are also known. In an era in which the majority of judicial opinions are written by law clerks, Posner is one of only a handful of judges who writes their own opinions, without delegating the task to law clerks.[42] While it is likely that Justice William J. Brennan, Jr.,

[36] *See, e.g.*, David P. Currie, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY: 1888-1986 82 (1990).
[37] Posner, LAW AND LITERATURE 285 (1988).
[38] Note 32 and accompanying text.
[39] Posner, *supra* note 17, at xxvi.
[40] Posner, *supra* note 33, at 75.
[41] Page 3.
[42] Stephen J. Choi & G. Mitu Gulati, *Empirical Measures of Judicial Performance: Which Judges Write their Opinions (and Should We Care)?*, 32 Fla. St. U.L. Rev. 1077, 1080 n.6 (2005).

for whom Posner clerked,[43] had the most profound impact of any single judge on Posner's judicial style, it appears that Posner's style has been influenced by Holmes, as well.

Economic Analysis and the Life of the Law

The strongest ideological link – and one source of ideological tension – between Holmes and Posner may be found in Holmes's formulation of "the life of the law." For his part, Judge Posner is as much an economist or at least an economic analyst of the law as he is a legal academic or jurist. His first, most reprinted, and most famous book is his *Economic Analysis of Law*. A central theme of that work is Ronald Coase's suggestion that the English common law of nuisance had an "implicit economic logic,"[44] which has been extended by numerous authors to many other aspects of the legal system. Gary Becker, in turn, extended economic analysis "to a surprising range of nonmarket behavior (including charity, love, and addiction)."[45] Such analysis of what is typically non-market behavior also plays a major role in the book, as in Posner's famous market in parental rights, which forms a section of the book,[46] or in indirect markets in school segregation.[47] Further, as noted above, many of the individuals exerting the greatest influences on Posner as an adult have been celebrated economists. It is also worth noting that fifteen of Judge Posner's thirty-seven books have titles containing the word "economic."[48]

[43] University of Chicago Law School, University of Chicago Law School > Curriculum Vitae, http://www.law.uchicago.edu/faculty/posner-r/cv.html (last visited May 26, 2006).

[44] Ronald H. Coase, *The Problem of Social Cost*, 3 J. Law & Econ. 1 (1960); Richard A. Posner, ECONOMIC ANALYSIS OF LAW 24 (6th ed. 2003).

[45] Posner, *supra* note 44, at 24.

[46] *Id.*, at 154-58. Despite the controversial nature of this "market," which is more often referred to as his argument for "baby selling," Judge Posner has, in fact, written extensively on it and related ideas. *See, e.g.*, Elisabeth M. Landes & Posner, *The Economics of the Baby Shortage*, 7 J. Legal Stud. 323-48 (1978); Posner, *The Regulation of the Market in Adoptions*, 67 Boston U.L. Rev. 59 (1987); Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. Contemp. Health L. & Pol'y 21 (1989).

[47] Posner, *supra* note 44, at 683-84.

[48] University of Chicago Law School, *supra* note 4.

Thus, Posner's legacy, at least in part, is likely to be his broad application of economic analysis to diverse areas of law. At the center of this is what he calls "the efficiency theory of the common law":

> that the common law is best (not perfectly) explained as a system for maximizing the wealth of society. Statutory or constitutional as distinct from common law fields are less likely to promote efficiency, yet even they, as we shall see, are permeated by economic concerns and illuminated by economic analysis.[49]

In Posner's mind, economic efficiency is a guiding force for many, if not most, common law rules and judicial decisions, much as Adam Smith's "invisible hand" guides free markets.[50] Posner even equates justice and efficiency, in large part, saying that a person who calls unjust criminal convictions without trial "means nothing more pretentious than that the conduct wastes resources."[51] While this is a true statement about the outcome of such convictions, it seems counterintuitive in the extreme to think about convictions without trial in this way, as few people actually "mean" anything of the sort, and those who do likely do mean something "more pretentious." The objection most people – at least, most citizens of Western-style democracies – would raise would be more along the lines of, "But that's not fair," and, if the speaker were pressed, would be justified by, "Because that's wrong."[52] While both this objection to convictions without trials and the argument from efficiency are, ultimately, equally susceptible to

[49] Posner, *supra* note 44, at 25.
[50] Adam Smith, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 456 (R. H. Campbell & A. S. Skinner eds., 1981) (1776).
[51] Posner, *supra* note 44, at 27.
[52] See the discussion of rights and morality, *infra*.

Arthur Leff's "sez who" objection,[53] efficient outcomes remain a large part of what Posner understands as justice.

In contrast, it seems doubtful that Holmes would have agreed with Posner that, in effect, the life of the law has been economic efficiency. Holmes did apply economic analysis in some of his opinions and writings[54] and would probably have seen economic efficiency as a legitimate goal of a system of laws (though not necessarily as the goal of or necessary outcome of Anglo-American law). After all, Holmes advocated a much more radical basis for a system of laws when he wrote:

> I believe that the wholesale social regeneration which so many now seem to expect, if it can be helped by conscious, coordinated human effort, cannot be affected appreciably by tinkering with the institution of property, but only by taking in hand life and trying to build a race. That would be my starting point for an ideal for the law.[55]

In clarifying what he meant by "taking in hand life," Justice Holmes said, "I meant . . . restricting reproduction by the undesirables and putting to death infants that didn't pass the examination,

[53] Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 Duke L.J. 1229, 1230-32 (1979). Leff argues that, just as any assertions of right and wrong, not to mention rights, on the playground can be met with "the grand sez who," so can any moral argument that does not provide an adequate (i.e., unquestionable) source of authority, capable of setting rules and evaluating conduct with respect to them. "[T]he evaluator must be the unjudged judge, the unruled legislator, the premise maker who rests on no premises, the uncreated creator of values. Now, what would you call such a thing if it existed? You would call it Him." *Id.*

[54] *See, e.g., Buck v. Bell*, 274 U.S. 200, 207 (applying a "greater good" analysis to compulsory sterilizations of the mentally ill: "It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence."); Holmes, *supra* note 23, at 466-67 ("I think the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage."); *see also id.*, at 462 ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it – and nothing else."); discussion in Posner, *supra* note 44, at 119, 119 n.1.

[55] Holmes, *Ideals and Doubts*, 10 Ill. L. Rev. at 3, reprinted in 3 THE COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES 443 (Sheldon M. Novick ed., Univ. of Chicago Press 1995) (cited in Alschuler, *supra* note 11, at 27).

etc., etc."[56] What Holmes has in mind here is certainly a brand of efficiency – namely, promotion and preservation of those deemed most fit, under some standard, to do the work of a society, at the expense of those deemed least fit – but it is not an economic efficiency.

Economic efficiency, as used by Posner, "denote[s] that allocation of resources in which value is maximized," where value represents an expected cost or benefit. This is further restricted by most economists to "purely voluntary transactions."[57] Certainly, Holmes's ideal for the law would fail to include purely voluntary transactions and would thus fail to be optimal or even near-optimal in a Pareto or even Kaldor-Hicks sense.[58] It seems highly unlikely to fit the unqualified definition as value maximization, either.[59] Rather, Holmes proposes a social

[56] Letter from Holmes to Felix Frankfurter (Sep. 3, 1921), in *Holmes and Frankfurter: Their Correspondence* 124, 125 (Robert M. Mennel & Christine L. Compson eds., Univ. Press of New England 1996) (cited in Alschuler, *supra* note 11, at 28).

[57] Posner, *supra* note 44, at 11.

[58] "A Pareto-superior transaction (or 'Pareto improvement') is one that makes at least one person better off and no one worse off." Posner, *supra* note 44, at 12. To say that a transaction has Kaldor-Hicks superiority, also called "potential Pareto superiority," means that the transaction may benefit some parties and injure others, but that the benefits to those who gain outweigh the losses to those who are harmed. *Id.*, at 13.

Obviously, Holmes's ideal is far from Pareto-superior, relative to current society – some people just have to die, in his world, and are therefore clearly harmed. It is not clearly Kaldor-Hicks superior, either. We can easily imagine assigning values to every aspect of life. Suppose every person who is not extraordinarily mentally handicapped places a value of 100 "preference units" (PU) on life itself, 50 on freedom from slavery, 50 on the life of each immediate family member, 40 on sufficient food and water to remain healthy, etc. While at first blush it might seem possible, if unlikely, that the 100 PU lost by each "undesirable" eliminated would be less than the collective gains of others who no longer have to "put up with" or financially support "undesirables," it seems extremely unlikely that this would be true when one accounts for the facts that large numbers of "desirable" adults would see mentally handicapped children killed, that many adults would be deprived of reproductive opportunities and possibly of their freedom, that the productive power of those who are actually killed would be lost, etc. Additionally, the law of diminishing returns serves to decrease the PU value of each eliminated "undesirable" to those who remain. *Id.*, at 408.

[59] In a society employing eugenics to "build a race," even if such tactics eliminate the least productive or least "desirable" individuals and no highly productive or highly "desirable" individuals, the most menial tasks of that society would still be necessary. Of course, historically, such programs have tended to sweep up highly creative people and intellectuals, whatever criteria for desirability are nominally used. One need only consider the Nazis' "Final Solution," internment of Japanese-Americans during World War II, McCarthyism, the Inquisition, etc.

Imagine, for example, that IQ is used as the determinant of one's desirability (leaving alone the inherent problems with measuring IQ or even what it signifies). Indeed, this is not far from the implication of Holmes's dicta in *Buck*, 274 U.S. at 207 ("Three generations of imbeciles are enough."). In this scenario, one would have a society in which relatively high-IQ individuals were not only the leaders, teachers, and professionals, but also the janitors and store clerks. Thus, the average, potential, economic output – value creation – of each member of society would be lower than it would be in which sufficiently demanding jobs were available to all high-IQ members and jobs demanding less intellectual rigor were filled by average- and low-IQ individuals. Adding to this reduction in output

Darwinist efficiency, in which the quantities sought to be maximized include reproductive prowess, lack of genetic disorders, intellect, creativity, and the like, while genetic deficiencies, low intellectual capacity, etc. were to be repressed or eliminated.[60] Holmes wrote, "I doubt if any write of English except Darwin has done so much to affect our whole way of thinking about the universe."[61] In contrast, Posner's *Economic Analysis of Law* nowhere explicitly mentions Charles Darwin, Darwinism, Herbert Spencer, *Social Statics*, *On the Origin of Species*, "natural selection," or social Darwinism.[62] This does not, of course, mean that nothing in Posner's thinking could be called Darwinist; rather, what Darwinist thoughts Posner has are less explicitly so.[63]

Holmes's concept of "the life of the law" as expressed in *The Common Law* is, in fact, relatively innocent and unlikely to raise much of a stir in the modern legal community; he says nothing more provocative there than, "My aim and purpose have been to show that the various

the lost output of individuals who are killed (which not measurable, since some killings would be of infants) means that the only way in which a Holmesian society could be value-maximizing is if the individuals killed and reproduction prevented offered a net savings, when the cost of the bureaucracy necessary to carry out the "race building" activities is considered. This seems possible only in the most extreme cases, such as prisoners for life without parole, individuals handicapped to the extent that they can perform no wage-paying labor, and those few people who are able to work but refuse to do so; the latter two categories merit attention only if one assumes that there would still be a welfare system, whether formal or informal, which, presumably, there would not be, by definition (if only desirable individuals remain, why would anyone need welfare or charity except in case of disaster?). Factoring in the lost productivity of those whose children are deemed undesirable and killed and of those who undergo compulsory sterilization, not to mention the possibility of frequent rebellions, makes it even more unlikely that such a system could achieve a net savings, no matter the standard of desirability.

In short, Holmes has proposed an ideal that cannot be economically efficient, in the sense in which Posner or most other economists use the term.

[60] *See, e.g.*, Alschuler, *supra* note 11, at 49-83. Indeed, Holmes went so far as to suggest "substitut[ing] artificial selection for natural by putting to death the inadequate." Holmes to Clare Fitzpatrick, Lady Castletown (Aug. 19, 1897) (quoted in Novick, *Justice Holmes's Philosophy*, 70 Wash. U.L.Q. 703, 729; cited in *id.*, at 27).

[61] Holmes to Lady Pollock (July 2, 1895), in 1 THE HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, at 57, 58 (Mark DeWolfe Howe ed., Harv. Univ. Press, 1941).

[62] At least, not to the best of my belief; none of these names or terms appears in the indices or, to the best of my knowledge, in the text. Spencer's *Social Statics* "is the classic exposition of what probably will forever be called 'social Darwinism,' although the doctrine preceded Darwin's work." Alschuler, *supra* note 11, at 49.

[63] Judge Posner does mention Darwin and natural selection elsewhere. *See, e.g.*, Posner, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 33-34, 37-38, 62 (1999). The point is not that he has not considered the theories of Spencer and Darwin as they relate to law, but that neither Spencer's nor Darwin's theory figures into the reasoning of Posner's greatest work in any substantial and direct way.

forms of liability known to modern law spring from the common ground of revenge."[64] Further, the experiences fleshing out these forms of liability Holmes described as judicial and political give and take, as the needs and norms of societies change, saying, "The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past."[65] As we have seen from his private writings, however, the "experience" Holmes refers to seems to be one heavily affected by such social Darwinist thinking, as well as by Nietzsche,[66] at least in Holmes's "ideal for the law."

On the other hand, Posner essentially claims that "the life of the law" *has* been logic, though a certain type of logic and often at a subconscious level. That is, in spite of all the other bases for judicial opinions than economics (e.g., constitutional and statutory law, popular theories, or even personal biases), the driving force being much of the common law and, indeed, some constitutional and statutory law, has been an implicit analysis in terms of economic efficiency. Posner credits Holmes, Brandeis, Learned Hand, and Robert Hale with preparing American law for economic analysis[67] and says of Holmes, "much like Learned Hand, the greatest lower-court judge in the history of the federal judiciary . . . he had a considerable intuitive feel for the economic and other policy implications of legal doctrine."[68] To a certain extent, this is undoubtedly true.[69] Holmes once observed, "The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws

[64] Holmes, *supra* note 2, at 37.
[65] *Id.*, at 1-2.
[66] *See*, *e.g.*, Alschuler, *supra* note 11, at 19; Posner, THE PROBLEMS OF JURISPRUDENCE at 239-41 (describing parallels and differences).
[67] Posner, *supra* note 33, at 438.
[68] Posner, *supra* note 17, at xxii.
[69] *See*, *e.g.*, *Buck*; Holmes, *supra* note 23, at 477 (on economic justifications for the doctrine of adverse possession); Holmes, *supra* note 2, at 247-339 (on contracts, generally); *id.*, at 298-301 (on contract damages and insurance against unavoidable breaches).

all the juices of life. I mean, of course, considerations of what is expedient for the community concerned."[70] Despite the difference between expediency and economic efficiency, there will clearly often be substantial overlap; Holmes consistently displayed a recognition of this in such comments, even if his language differs from that which would be used by a late twentieth century economist.[71] There is a counter-current in Holmes's thought, however.

The primary charge Holmes leveled against the majority in his dissent in *Lochner*, the very opinion which Posner ironically called "the greatest judicial opinion of the last hundred years," is an explicit attack on the use of a particular brand of economic analysis. Holmes wrote,

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . [A] constitution is not intended to embody a

[70] Holmes, *supra* note 2, at 35. It is important to note that there is an implied emphasis on "community." Holmes did not advocate particularly strongly for the pursuit of expediencies or efficient outcomes for individuals. See his nihilist comments, for example, *supra*, at pp. 4-5.

[71] *But see* Alschuler, *supra* note 11, at 100 (discussing Francis Hilliard's statement that "general expediency, – public policy, – is often the highest measure of right," as indicative of a pre-Civil War "adhere[nce] to core principles of decency and . . . [the] advance[ment of] enduring human goals" by natural lawyers). One suspects, however, that Holmes's concepts of what would be expedient for a given community and of what the citizenry of that community would consider expedient might often have been at odds, with the former often failing to meet a common standard of decency. Consider Holmes's support for eugenics. While "Posner has noted that 'belief in human eugenics was a staple of progressive thought in Holmes's lifetime.' . . . As Sheldon Novick has observed, . . . Holmes's position went 'well beyond the conventional views on eugenics of his day.'" Alschuler, *supra* note 11, at 28 (citations omitted). It seems likely that what Holmes meant by expediency, at least privately, often differed from what Hilliard had in mind.

particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire.[72]

This appears, at first, to be no less than a frontal assault on Posner's views both that the law tends to promote economic efficiency and that it is acceptable for a judge to promote such an end through his or her decisions. Two related caveats, however, are in order.

Firstly, the Court in *Lochner* was considering positive statutory law, enacted by a state legislature, making criminal the act of employing a baker for more than sixty hours in one week. *Lochner*, therefore, was about judicial review and the constitutional requirements of legislative actions, not about the traditional common law doctrines of contracts, torts, and property. This distinction rests on Holmes's idiosyncratic conception of judicial restraint, in which legislative enactments are due great deference.[73] Holmes's deference to legislatures was so great that he wrote, "[I]f my fellow citizens want to go to Hell I will help them. It's my job."[74] Secondly, Holmes believed in the judge as "interstitial legislator:" "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially."[75] Thus, Holmes might well approve of a use of economic analysis in interstitial legislation, even if it "is decided upon an economic theory which a large part of the country does not entertain," so long as it truly is interstitial, especially in the context of a traditional common dispute, rather than one substantially implicating statutes.[76] However, Posner disagrees with Holmes's conception of the

[72] *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

[73] *See generally* Alschuler, *supra* note 11, at 58-68.

[74] Holmes to Laski (Mar. 4, 1920), in 1 THE HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935, at 248, 249 (Mark DeWolfe Howe ed., Harvard Univ. Press 1953).

[75] *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (Holmes, J., dissenting).

[76] For example, Posner's applications of Judge Learned Hand's test for negligence, found in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947), which Posner puts into algebraic form, calling it the "Hand Formula [sic]," *might* pass muster with Holmes, provided no statutory provisions governed the behavior in question. Posner, *supra* note 44, at 168-70; Posner, *A Theory of Negligence*, 1 J. Leg. Stud. 29 (1972). Posner's reliance on the Hand formula has been criticized; Richard Wright claims that the formula is useless for judges deciding real cases,

judge as interstitial legislator, saying, "I suggest that in every case the [skeptical] judge is trying to reach the most reasonable result in the circumstances (which include but are not limited to the facts of the case and to legal doctrines). This position resembles but is different from Holmes's conception . . . . The picture of the judge as an interstitial legislator is misleading, on a realistic view of the legislative process, because . . . . [of the existence of] institutional and procedural differences between judges and legislators."[77] Thus, while Holmes might have found acceptable the use by Posner of economic analysis to decide real cases, Posner would have disagreed with Holmes on when and how to apply that analysis.

Ultimately, it is impossible to say with certainty what Holmes would have thought of Posner's emphasis on economic analysis of the law and of legal questions. Based on the preceding discussion, it seems most likely that Holmes would have agreed with Posner's use of economic theory to decide cases, within narrow bounds, but probably not with Posner's claim that the common law is best explained by economic analysis as a series of decisions tending to promote economic efficiency. On the contrary, one of Holmes's chief complaints in *The Common Law* was that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[78] Indeed, Holmes thought that, with much of the common law, this type of reason was far too common.[79] Holmes might have granted Posner that many common law doctrines were developed in a way that promoted economic efficiency in a given time and place, but probably

misleading when applied, and usually "merely trotted out as *dicta* or boilerplate separate from the real analysis." Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula"*, 4 Theoretical Inquiries in Law 145, 273 (2003).

[77] Posner, *supra* note 24, at 862.

[78] Holmes, *supra* note 23, at 469.

[79] *See, e.g.*, Holmes, *supra* note 2, at 2-24 (tracing the lineages of various doctrines back to Rome and the Germanic tribes, *inter alia*).

not that the common law courts have done a good job in developing doctrines that retain their efficiency well. This criticism is especially strong with respect to doctrines which were developed not only long ago and in foreign lands, but when the economic system motivating a given doctrine differed radically from our own, as is the case in much of the law of property, whose roots are found in feudal times in England and even earlier.

Still, in fairness to Judge Posner and the other scholars of the law and economics movement, it has been more than a century since Justice Holmes was appointed to the Supreme Court, in 1902, and nearly three-quarters of a century since he retired, in 1932. The intervening years have featured a World War, the Holocaust and other genocides, the threat of global nuclear war, and an incredibly rich set of developments in the field of economics. It is possible, if unlikely, that Justice Holmes would have been mellowed by the events of the seventy-one years since his death and would have softened his understanding of what the law can and should do, particularly with regards to eugenics, race, gender, and religion. To put it more plainly, Posner's approach to the law may not be all that different from what Holmes would hold to, were he alive, today, at least in application, if not in historical analysis. Crusty old soldier as Holmes already was during his time on the Court, time, the writings of Coase, Becker, and Posner, and the evening news might have smoothed some of the rough edges. As Posner has said, Holmes did, in some sense, help to prepare the ground on which the law and economics movement has built; perhaps Holmes would have been receptive to what has followed him.[80]

[80] One cannot help but wonder which of the major camps of twentieth-century, legal scholarship, if any, would have a valid claim to Holmes's allegiance. It is difficult to imagine that it would have been, say, the critical legal studies movement, especially as championed by scholars such as Duncan Kennedy and Peter Gabel. One cannot easily imagine the cynical and hardened war hero finding much use in terms such as "unalienated relatedness" or "intersubjective zap" or the concept(s?) they claim to represent. Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 Stan. L. Rev. 1 (1984). Of the academic movements with any momentum, today, which might seek to claim the most direct descent from Holmes, law and economics seems one of the strongest candidates.

The Bad Man as a Good Economist

Some brief comments are in order regarding Holmes's "bad man" and economic analysis. The "bad man, who cares only for the material consequences which . . . knowledge [of the law] enables him to predict,"[81] is concerned with nothing but the advantages and disadvantages of obeying the law. If he is caught breaking the law, he may be forced to pay a fine or serve a jail or prison sentence. Of course, he may not be caught, he may get a warning, he may be acquitted, he may obtain an executive pardon, etc. The bad man will thus weight the benefits to be obtained by each course of action by the likelihood of success; obeying the law will all but guarantee certain benefits, such as liberty, while breaking it offers chances both at success and at failure. As Professor Alschuler has put it,

> To a Holmesian bad man, law is a system of prices, and only material prices matter. The law's price may include damages, an injunction, a contempt citation, a fine, a prison term, or even death by hanging. Nevertheless, a man tough enough to pay the price always has the option of non-compliance with the law's directives.[82]

In other words, the bad man is an amateur economist. He may not perform the type of sophisticated charting and complex mathematics that real economists do – though he may, if he is contemplating extremely sophisticated and high-payoff crimes, such as those committed by the executives of Enron – but he still performs an essentially economic analysis. As Holmes understood the law, then, in order for the law to prevent criminal behavior, or at least reduce it to

[81] Holmes, *supra* note 23.
[82] Alschuler, *supra* note 11, at 174.

an acceptable level,[83] those making the law must think as the bad man does. In other words, to produce good laws with respect to crime, contracts, torts, etc., legislators and judges alike must conduct economic analysis. Positive and negative sanctions, whether monetary or otherwise, must be set at levels sufficient to deter behaviors society deems undesirable, when adjusted for the probability of enforcement.

The implications of the "bad man" approach are profound, in that it provided Holmes with the opportunity to formulate what Alschuler calls "an alternative theory of everything,"[84] integrating the criminal law with the traditional common law fields. Holmes did not do so, perhaps because of his aversion to mixing moral and legal terminology, but members of the law and economics movement have done so. Indeed, Posner has suggested that the only reason the criminal law is necessary is the insolvency of some criminals.[85] In any case, Holmes surely understood that his bad man was essentially an economic creature as clearly as his readers did. In this way, Posner is quite right to credit Holmes with helping to pave the way for the rise of the law and economics movement. On the other hand, Holmes did stop short of fully articulating the implications of his definition of the law and shied away from discussing the criminal law from the bad man's perspective. In this sense, Posner and the other members of the law and economics movement have left Holmes's bad man behind. Holmes's bad man was not quite intellectually honest, because there were some corners of his world Holmes refused to let him see; in short, he wasn't bad enough.

[83] No law enforcement effort can stop crime, entirely, without placing extraordinary restrictions on law-abiding citizens. The diminishing returns on enforcement efforts and the more or less fixed costs of each criminal act mean that some level of crime is efficient (though clearly not in terms only of voluntary transactions). Posner, *supra* note 44, at 219-227; Alschuler, *supra* note 11, at 177.

[84] Alschuler, *supra* note 11, at 174-76.

[85] *Id.* This point and several extensions of it have already been made by Professor Alschuler; I will not repeat his argument in full, here.

Morality and the Assignment of Rights

A few final observations are in order, on the moral philosophies of Holmes and Posner. Holmes, who entered the Civil War a staunch abolitionist, would leave it a moral relativist. He found no particular meaning in the lives of men, saying, "I see no reason for attributing to a man a significance different in kind from that which belongs to a baboon or to a grain of sand."[86] Those values Holmes claimed to have, he called his "can't helps," saying, "[A]ll I mean by truth is what I can't help believing – I don't know why I should assume except for practical purposes of conduct that [my] *can't help* has more cosmic worth than any other."[87] Likewise, Posner says,

> To summarize, I embrace a version of moral relativism, reject ambitious moral particularism, accept the descriptive accuracy (but not the normative authority) or moral pluralism, and accept diluted versions of moral subjectivism, moral skepticism, and noncognitivism. . . . My approach is similar to that of Oliver Wendell Holmes, Jr., as reconstructed from his scattered and fragmentary writings on morality. It is opposed to metaphysical and 'right answers' moral realism and so to natural-law theory whether metaphysical or nonmetaphysical, but it overlaps weak moral realism.[88]

Moreover, Posner argues for localized morality: "I [argue] first of all that morality is local, that there are no *interesting* moral universals. There are tautological ones, such as 'murder is wrong' . . . . But what counts as murder . . . varies enormously from society to society."[89] Thus, Holmes

[86] Holmes to Pollock (Aug. 30, 1929), in 2 HOLMES-POLLOCK LETTERS at 251, 252, *supra* note 61.
[87] Holmes to John Gray (Sep. 3, 1905), quoted in Novick, *supra* note 20, at 283.
[88] Posner, *supra* note 63, at 12.
[89] *Id.*, at 6. Posner seems to mean here by "moral universals" moral statements which are considered by every human to be true, in the same practical sense. That is, he means a principle accepted by all people as universally and absolutely true, such that all people also understand the principle to apply to exactly the same situations. For example, if universally adopted as true, the principle, "killing an adult chicken for any reason whatsoever on a

and Posner essentially agree on the nature of morality: it is individual, or limited to relatively small portions of the species, at best, and no moral system is demonstrably more correct than any other.[90]

What are more interesting are the perspectives Holmes and Posner hold on rights. Holmes did not believe in them: "All my life I have sneered at the natural rights of man – and at times I have thought that the bills of rights in Constitutions were overworked."[91] Rights are what "a given crowd . . . will fight for."[92] Posner, on the other hand, sees rights – including personal and property rights, such as those in the Bill of Rights – as tools to be assigned by a government and used in regulating behavior; creation of rights can be used as a check against overzealous law enforcement, for example, while excessive rights creation may lead to increased crime as enforcement becomes more difficult.[93] Of course, Holmes was willing to defer to legislative bodies a great deal in this regard, as in other areas. The difference between the two, here, is in how rights are created or assigned. For Holmes, who saw the entire democratic process as a Darwinian battle,[94] rights were transitory things, instituted by those in political power for as long as they could keep from power anyone who would reverse things, but relatively meaningless and not connected to an absolute.

For Posner, on the other hand, rights are primarily assignment problems; should the government have the power to search your home, or should you have the right to keep the

Tuesday is wrong," would presumably qualify as "interesting." If this is what Posner means – moral universals that are specific in application – then his statement itself borders on being tautological. This is rather narrow; most of the interesting moral discussion in modern societies focuses on what Posner would call tautological moral universals, such as whether or not abortion is murder or whether insider trading is in some sense theft. Sometimes such behaviors are prohibited more out of practical and paternalistic reasons (e.g., prohibiting insider trading promotes free trade in stable markets and protects small investors) than because of a broad moral consensus.

[90] *See* Leff, *supra* note 53.

[91] Holmes to Laski (Sep. 15, 1916), in *supra* note 74.

[92] Holmes to Laski (Jul. 23, 1925), in *supra* note 74.

[93] Posner, *supra* note 63, at 159-61.

[94] Alschuler, *supra* note 11, at 63.

government out? Should you have the right to select a mate and plan a family, or should the government use coercion to regulate the reproductive activities of society? The answers, for Posner, are decided by efficiency; a set of personal and communal rights that is narrower or broader in scope may be appropriate, depending on the current needs of a society. Moreover, the holders of those rights may effectively have negative rights – e.g., the freedom from government interference in hiring an attorney – if they are affluent, or they may have need of positive rights – e.g., assistance obtaining criminal defense counsel – if they are poor.[95] Posner also sees some, but not all, constitutionally guaranteed rights as serving to reign in the powers of the federal government.[96] In short, for Holmes, rights are byproducts of democratic power struggles, while for Posner, rights are tools of the government, to be assigned or withheld as necessary, and have a pragmatic purpose.

Conclusion[97]

Judicial reputations are developed over long periods of time, and what a judge will be most remembered for is rarely clear, without the advantage of hindsight. In the case of Justice Holmes, *The Common Law, The Path of the Law,* and the *Lochner* dissent are, of course, the most highly regarded written works of his career. The former two, however, might never have achieved such prominence if not for Holmes's status as a Supreme Court Justice and the respect

[95] Posner, *supra* note 44, at 653-55. Note that Posner does recognize here the more or less fixed legal status of some rights, such as those in the Bill of Rights.

[96] *Id.*

[97] Unfortunately, although Judge Posner teaches at the University of Chicago Law School, he is an extremely busy person and this paper was written in a relatively short period of time. Thus, I did not have an opportunity to discuss my research or a draft of this paper with him. In many ways, this made the task more interesting – I had the opportunity to try to probe two great legal minds through texts, rather than only one – but I am certain Judge Posner would have been able to provide many useful insights, had a discussion been possible. In any event, any errors or mistakes as to Judge Posner's opinions or jurisprudential philosophy are entirely my own.

given many of his judicial opinions. In Judge Posner's case, it is too early to tell exactly what will be most remembered. Surely, his *Economic Analysis of Law* will continue to prompt discussion long after he has left the bench. Time will tell which of his many articles, opinions, and other writings will be most influential, as well as whether or not he will be ranked with the likes of Learned Hand in the rolls of America's great judges.

What can be clearly seen, already, is the style and philosophical themes of Judge Posner's work. Through his extensive body of written work run consistent themes of economic efficiency and a profound respect for Justice Holmes. Holmes has influenced Posner tremendously, perhaps more than any other judge, according to Posner's own accounting. I have tried to show, in this brief discussion, that the philosophical threads connecting Holmes and Posner are, in fact, very strong. While Holmes would likely challenge Posner's economic analysis of the development of the common law, disagree on the appropriate circumstances under which economic analysis should be applied to particular cases, and possibly disagree with Posner on the nature of legal rights and the role of even a localized morality in jurisprudence, I believe that Holmes and Posner have more philosophical ground in common than in dispute. Judge Posner may be largely pursuing his own path in the law, but Holmes is the guide who went before.