

1987

# Final Disclaimer Regulations Offer Flexibility in the Use of General Powers of Appointment for the Marital Deduction

William P. LaPiana

Ronald A. Brand

Follow this and additional works at: [http://digitalcommons.nyls.edu/fac\\_articles\\_chapters](http://digitalcommons.nyls.edu/fac_articles_chapters)

---

## Recommended Citation

65 Taxes 133 (1987)

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

# ESSAY

## VICTORIAN FROM BEACON HILL: OLIVER WENDELL HOLMES'S EARLY LEGAL SCHOLARSHIP

*William P. LaPiana\**

In the years leading up to the publication of *The Common Law*<sup>1</sup> Oliver Wendell Holmes wrote extensively, publishing numerous articles and many book reviews in the *American Law Review*. After taking his seat on the Massachusetts Supreme Judicial Court in 1883 he wrote far less frequently for publication and the vast majority of his work, of course, is his opinions. In his article on Holmes's Supreme Judicial Court opinions Professor Tushnet rightly emphasizes the difficulties of using those opinions as gauges of Holmes's thought.<sup>2</sup> The content of the opinions is constrained by the nature of the questions before the court, and Holmes's addressing of those questions is further constrained by the need to carry his colleagues with him, at least in majority opinions. These constraints of collegiality often removed Holmes himself from the work he produced.<sup>3</sup> Occasionally, however, Holmes himself shines through and he is able to apply his ideas about law to the case at hand.<sup>4</sup>

Still, on the whole, it is in those early writings, culminating with *The Common Law*, that Holmes's ideas were formed. Those ideas remained with Holmes for all of his long life, although as Professor Tushnet observes, they underwent a change in emphasis, certain themes moving into greater prominence and others receding deeper into the background.<sup>5</sup>

Investigating Holmes's thought is not a straightforward undertaking. Neglect of his early writings and concentration on his judicial opinions has led to distortions, especially exaggerated assertions of his originality and pivotal place in American legal thought.<sup>6</sup>

---

\* Associate Professor of Law, New York Law School. A.B. 1973, A.M. 1975, J.D. 1978, Ph.D. 1987, Harvard University.

1. O.W. Holmes, *The Common Law* (1881).

2. Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 *Va. L. Rev.* 975, 978 (1977).

3. *Id.* at 978-79.

4. See, e.g., *Vegeahn v. Guntner*, 167 *Mass.* 92, 104-09, 44 *N.E.* 1077, 1079-82 (1896) (Holmes, J., dissenting) (discussion of policy issues involved in labor dispute picketing); *Norcross v. James*, 140 *Mass.* 188, 192, 2 *N.E.* 946, 949 (1885) (historical discussion of covenants running with the land).

5. Tushnet, *supra* note 2, at 978.

6. See G. Aichele, *Oliver Wendell Holmes, Jr.: Soldier, Scholar, Judge* 123-24 (1989); Tushnet, *supra* note 2, at 1005-12. One exception is *The Formative Essays of Justice Holmes: The Making of an American Legal Philosophy* (F. Kellogg ed. 1984),

The themes were present from the beginning, however, and a careful teasing out of the various strands of thought present in the early work provides the indispensable framework for evaluating Holmes both as a thinker and as a judge. This Essay examines Holmes's early writings through the publication of *The Common Law* from the perspective of their relationship to Anglo-American legal thought of the time. The salient characteristics of Holmes's thought—the empirical nature of legal science and the importance of studying law as it is rather than as it should be—are a fundamental part of the legal culture in which Holmes came to intellectual maturity. Much of what we associate with Holmes as his unique contribution to legal thought, especially his “bad man” theory of the law and his refusal to equate law with morality, are elaborations of a rich stream of legal thought in which he was a participant. Even the antidemocratic aspects of his thought that have caused much discomfort to some commentators were shared among Victorian legal thinkers.<sup>7</sup> By putting Holmes into context, this Essay hopes to illuminate one aspect of the legal culture of the past.<sup>8</sup>

### I. HOLMES AND VICTORIAN LEGAL THOUGHT

Oliver Wendell Holmes, Jr., came of age at an exciting time in the intellectual history of Anglo-American law and of thought about society in general. One of the most important developments was the emergence of the new idea of legal science. Turning away from the moral-

---

which reprints the early essays and finds them important clues to Holmes's legal thought.

7. See, e.g., G. Aichele, *supra* note 6, at 162–64; G. Gilmore, *The Ages of American Law* 48–49 (1977).

8. Holmes's personality seems to have fascinated those who have studied him even more than have his ideas. See, e.g., G. Aichele, *supra* note 6, at 3, 20, 69; White, *The Rise and Fall of Justice Holmes*, 39 *U. Chi. L. Rev.* 1, 51–52 (1971). The net effect of this personalized approach to Holmes is to find the source of his ideas in his personality. Holmes's family life, his difficult relationship with his father and his experiences in war all undoubtedly contributed to his outlook on life in general and his views of law in particular. To focus so intensively on these aspects of the man, however, obscures the extent to which he consciously thought about the matters that engaged his interest and the extent to which he consulted, accepted and rejected the views of others. This approach also puts us in danger of losing sight of the extent to which Holmes was a person of his times, participating in the general culture of his world.

The great attention paid to Holmes as judge says much about the state of legal history in America. On the whole, American legal history lives in America's law schools rather than in graduate faculties of arts and sciences. Its practitioners often are lawyers first and historians second, even when they have done graduate study in history. As lawyers, they are wedded to the text in which the law is found, and this focus on the specific document sometimes tends to limit historical inquiry. At the extreme, such an attitude has probably contributed to the strength in current legal thought of a congeries of ideas and attitudes loosely grouped under the term “deconstructionism.” Perhaps it is not surprising that many of the law school adherents of these new ideas have been drawn to the study of history. See P. Novick, *That Noble Dream: The “Objectivity Question” and the American Historical Profession* 555–57 (1988).

ism of the preceding generations, the new legal scientists sought to study law as it was without considering what it should be. Their goal was to develop a jurisprudence that would properly classify and arrange the principles of the law. Holmes played an important role in American attempts to refine and apply the new legal science. Along with his companions in the Metaphysical Club, especially Nicholas St. John Green, he labored to break the hold of an antiquated moralism on the study of the law. He eventually came to place the greatest importance on facts—in certain factual situations, the power of the state forces individuals to conform to standards of behavior.

Holmes came to this empirical approach to law through the study of history, which confirmed for him the basic truth of John Austin's assertions about the nature of law. Holmes blended historical and analytical jurisprudence, concluding that the former confirmed the latter. His final position was shared by the law teachers who were transforming the Harvard Law School. The case method itself is a reflection of the new scientific approach to law, and Holmes himself is in some ways an intellectual comrade of Christopher Columbus Langdell. Scholarly treatment of Holmes's ideas has suffered from the lack of appreciation of his deep immersion in the new legal thought.

#### A. *A New Legal Science*

About the time of the American Civil War thinkers on both sides of the Atlantic had begun to examine critically and to refashion the general approach to society that had held sway over earlier generations.<sup>9</sup> In the field of law this change was symbolized by the writings of John Austin and Henry Maine. These two men became the exemplars of two "modern" approaches to law, the analytical and the historical.

For Austin, understanding could be reached only by separating what he called positive law from positive morality. Granted, Austin's thought is subtle and is often expressed in convoluted prose.<sup>10</sup> In addition, he never finished his great project to restate definitively the science of the law. The posthumous publication of Austin's work in the early 1860s, however, set loose upon the common law world two important ideas. First, law could and should be separated from morality, at least for purposes of study. Second, all law is directly or indirectly the command of the sovereign. Both of these ideas have long reverberated in Anglo-American legal thought.

Austin was not an amoral monster, nor did he share in the atheism of most utilitarians. Much of his first published work, *The Province of*

---

9. For concise explanations of traditional common law thinking, see D. Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* 1-176 (1989); G. Postema, *Bentham and the Common Law Tradition* 3-38 (1986).

10. The fullest treatment of Austin's thought is W. Rumble, *The Thought of John Austin: Jurisprudence, Colonial Reform, and the British Constitution* (1985).

*Jurisprudence Determined*,<sup>11</sup> is taken up with an elaborate discussion of ethics. The precise role of this discussion in his thought is a matter of dispute, but it is clear that for Austin the study of the science of law meant the study of law as it is, without consideration of what it should be. The study of what law ought to be is the province of the science of legislation.<sup>12</sup>

If Austin sought scientific accuracy through the separation of the is and the ought, Maine sought it through the investigation of the origin of legal rules in the past, especially the Roman past, and through explanation of the mechanisms by which the law had changed in response to changes in society. Maine clearly emphasized his work's scientific character:

If by any means we can determine the early forms of jural conceptions, they will be invaluable to us. These rudimentary ideas are to the jurist what the primary crusts of the earth are to the geologist. They contain, potentially, all the forms in which law has subsequently exhibited itself.<sup>13</sup>

Ignorance of these early forms is responsible for the "unsatisfactory condition in which we find the science of jurisprudence."<sup>14</sup> By ignoring the facts of legal history jurists place assumption over observation. The result is that:

[t]heories, plausible and comprehensive, but absolutely unverified, . . . enjoy a universal preference over sober research into the primitive history of society and law; and they obscure the truth not only by diverting attention from the only quarter in which it can be found, but by that most real and most important influence which, when once entertained and believed in, they are enabled to exercise on the later stages of jurisprudence.<sup>15</sup>

11. J. Austin, *The Province of Jurisprudence Determined* (1861).

12. *Id.* at 71-87.

13. H. Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* 2-3 (F. Pollock ed. 10th ed. 1906) (London 1861). See generally R. Cocks, *Sir Henry Maine: A Study in Victorian Jurisprudence* 33-34 (1988) (discussing Maine's historical approach to law); G. Feaver, *From Status to Contract: A Biography of Sir Henry Maine, 1822-1888*, at 45-64 (1969) (Maine hoped to demonstrate that a greater appreciation of the social basis of all legal institutions would be achieved by using historians' techniques). Cocks emphasizes Maine's use of comparative method, which was widely regarded at the time as the highest form of scientific inquiry. See R. Cocks, *supra*, at 34-38.

14. H. Maine, *supra* note 13, at 3.

15. *Id.* at 3. Maine hoped to break the hold of such a priori concepts on legal thought and substitute for them a scientific understanding of the growth of law. His chapter on the early history of property is a model of his method. See *id.* at 237-94. He criticizes the belief, given classic form by Blackstone, that occupancy is the foundation of private property. The whole law of private property, according to Blackstone, is "a natural development from the physical appropriation of unowned things." Utz, *Maine's Ancient Law and Legal Theory*, 16 *Conn. L. Rev.* 821, 833 (1984) (footnote omitted); see also H. Maine, *supra* note 13, at 245-46. The gradual development of permanent own-

The philosophic aspect of *Ancient Law* was overshadowed by what was assumed to be the historical message of the work.<sup>16</sup> It seems that for many readers only one phrase in the entire book was important: "[W]e may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*."<sup>17</sup> Although as Frederick Pollock noted "it is not clear how far Maine regarded the movement of which he spoke as a phase of the larger political individualism which prevailed in the eighteenth century and a great part of the nineteenth, or what he would have thought of the reaction against this doctrine which we are now [in 1906] witnessing," many of Maine's readers found in his assertion support for their faith in *laissez-faire*.<sup>18</sup> They also found a convenient weapon with which to fend off Austin's analytical jurisprudence. Commentators often stated that Maine's historical jurisprudence proved that the law was not a command of the state but an organic growth. Holmes, however, never shared that opinion.

### B. *Holmes and the New Jurisprudence*

The ferment in legal thought did not go unremarked in Boston. As Christopher Columbus Langdell was settling into his new job as Dean of the Harvard Law School, a "distinguished group of young intellectuals" in the Boston area had been investigating legal science for some years, discussing their findings in a group that would be known to history as the Metaphysical Club and publishing some of their work in the

---

ership thus appears to be the natural accompaniment of progress towards modernity. Maine, however, denigrated this sort of reasoning:

These sketches of the plight of human beings in the first ages of the world are effected by first supposing mankind to be divested of a great part of the circumstances by which they are now surrounded, and by then assuming that, in the condition thus imagined, they would preserve the same sentiments and prejudices by which they are now actuated,—although, in fact, these sentiments may have been created and engendered by those very circumstances of which, by the hypothesis, they are to be stripped.

H. Maine, *supra* note 13, at 246–47. In this case, the sentiment or prejudice which is assumed to be always in existence is "an instinctive bias towards the institution of Property." *Id.* at 249. In Maine's view, however, occupancy; or "mere possession," as a means of gaining ownership can arise only after the institution of property has been well established. Only after society accepts "a presumption, arising out of the long continuance of that institution, that *everything ought to have an owner*" can the person who merely asserts ownership acquire permanent, inviolable rights. *Id.* In short, talk of the almost mystical primacy of private property is misplaced. See Utz, *supra*, at 824–38. Once the jurist had untangled the developments leading to law as it was today he would have a collection of principles which could be properly ordered into a code of law. R. Cocks, *supra* note 13, at 5.

16. See Utz, *supra* note 15, at 823–24.

17. H. Maine, *supra* note 13, at 165.

18. F. Pollock, Introduction and Notes to Sir Henry Maine's *Ancient Law* 424 (1906). Maine's biographer emphasizes his "Whiggish flexibility and lack of dogmatism" on contemporary economic questions. G. Feaver, *supra* note 13, at 293 n.45.

*American Law Review*.<sup>19</sup> Among the Club's members were Nicholas St. John Green and Holmes.

1. *The Collapse of the Old Order*. — The goal of the advocates of a new legal science was familiar: they sought to order the principles of the common law. They also recognized, however, that the traditional ordering schemes were no longer viable. Holmes quite explicitly pointed out the obsolescence of the old science of procedure. "We cannot help saying that useful as books often are which gather under a remedy or class of remedies, such as injunction or action, the rights which it protects," he wrote in 1871, "the day for such an arrangement is passed."<sup>20</sup> Such arrangements were useful "earlier in the history of jurisprudence," when procedure was more highly developed than were rules, "but now we want principles as they are related to each other, not according to the accidental differences in the way of enforcing them."<sup>21</sup> The science of ordered principles fared no better.

The goal of earlier legal scientists like Joseph Story had been the creation of a proper understanding of the system of law through the intelligent application of inductive methods. Because the system that was to be revealed had an independent existence in the very nature of things, and because the forms of action provided a practical ordering of legal knowledge, before the Civil War there was little explicit discussion of how the much talked-of legal principles were to be arranged. In a sense, the proper arrangement merely awaited revelation; legal scientists did not need to construct it. There were, however, some explicit attempts at ordering—Blackstone's broad arrangement of his lectures around the law of persons and the law of things, itself a reflection of Roman law ideas, was something of a paradigm, which could at least be pointed to as an example of science. The most prevalent theme of American descriptions of orderly science was the superiority of the classificatory scheme of the Roman law.<sup>22</sup> Appeals to Rome meant little, however, to Holmes and Green.

In 1871 Holmes contributed an article to the *American Law Review* on "Misunderstandings of the Civil Law."<sup>23</sup> He gave several examples of the misuse of civil law concepts in the common law, including Lord Holt's opinion in *Coggs v. Bernard*,<sup>24</sup> famous for its attempt to explain common law rules of liability in bailment in terms of Roman law principles and often regarded as a paragon of legal science. Holmes's principal point, however, was that study of the civil law had no place in the

19. G. Aichele, *supra* note 6, at 95.

20. Holmes, Book Notices, 5 *Am. L. Rev.* 534, 534-35 (1871) (reviewing A. Dicey, *A Treatise on the Rules for the Selection of the Parties to an Action* (1870)).

21. *Id.* at 535.

22. See generally Hoefflich, *Law and Geometry: Legal Science from Leibniz to Langdell*, 30 *Am. J. Legal Hist.* 95, 108-18 (1986) (the geometric paradigm in Anglo-American law).

23. Holmes, *Misunderstandings of the Civil Law*, 6 *Am. L. Rev.* 37 (1871).

24. 92 *Eng. Rep.* 622 (1703).

training of American lawyers because "it tends to encourage a dangerous reliance on what Mr. Choate would have called glittering generalities" at the expense of "the exhaustive analysis of a particular case, with which the common law begins and ends."<sup>25</sup>

As early as 1869, in a review of Benjamin's treatise on the law of sales, Holmes set forth his own vision of a proper philosophical arrangement of the law. "A book of reference on any subdivision of the law," he wrote, "must set forth at length, not only the principles constituting the specific difference of the subject-matter, but also those common to it and to many other classes of the same genus."<sup>26</sup> Fraud, for instance, should be treated as an aspect of contract "or possibly under some still wider head, rather than repeated in every text-book dealing with every one of the different sorts of contract known to modern commerce."<sup>27</sup>

2. *The Turn to Facts*. — Holmes's analysis of the shortcomings of traditional legal thought led him to the conclusion that a truly scientific system would have to be built from the bottom up, from the cases that give examples of the legally significant facts on which recovery is based. The system thus created may be based on "rights," or "obligations," or "duties," but the foundation must be factual. Holmes made this point quite clearly in a letter to John Chipman Gray written in July of 1877. The two friends had spent an evening discussing an article Holmes had recently written.<sup>28</sup> In a letter written a few days later, Holmes de-

25. Holmes, *supra* note 23, at 41. He made the same point several times during the next two years, denying "that fundamental principles are more clearly brought out in the Roman than in the English law" and emphasizing the importance of "the solution of a particular case" to the common law. Holmes, *Book Notices*, 7 *Am. L. Rev.* 320, 320 (1873) (reviewing T.W. Greene, *Outlines of Roman Law* (1872)). In fact, the much vaunted principles of the civil law are meaningless to the modern world, since they "are obscured by traditions which prevented their consistent application, by historical difficulties which have to be overcome before the law can be understood, by principles of classification that have lost their significance, and by a philosophy which is no longer vital." *Id.*

26. Holmes, *Book Notices*, 3 *Am. L. Rev.* 541, 541 (1869) (reviewing J. Benjamin, *A Treatise on the Law of Sales of Personal Property* (London 1868)) [hereinafter *Holmes, Review of Benjamin*]. For similar expressions, see Holmes, *Book Notice*, 1 *Am. L. Rev.* 375-76 (1867) (reviewing D. Power, *Roscoe's Digest of the Law of Evidence in Criminal Cases* (6th ed. Philadelphia 1866)); Holmes, *Book Notice*, 5 *Am. L. Rev.* 113, 113 (1870) (reviewing J. Schouler, *A Treatise on the Law of the Domestic Relations* (1870)); Holmes, *Codes, and the Arrangement of the Law*, 5 *Am. L. Rev.* 1, 12-13 (1870) (Holmes's first major article).

27. Holmes, *Review of Benjamin*, *supra* note 26, at 542.

28. Letter from Oliver Wendell Holmes to John Chipman Gray (July 13, 1877), *Oliver Wendell Holmes, Jr. Papers*, box 33, folder 26, Harvard Law School Library Manuscript Division [hereinafter *Holmes Papers*], reprinted in *Microfilm Edition of the Holmes Papers*, reel 53, frames 256-59 (original) (1985); *id.* reel 24, frames 544-45 (typed transcript). The article referred to is evidently Holmes, *Primitive Notions in Modern Law*. No. II, 11 *Am. L. Rev.* 641 (1877) [hereinafter *Holmes, Primitive Notions in Modern Law*. No. II].

scribed to Gray "my ultimate object":

viz: to point out a distinction which is of the first importance to a philosophical classification—which has two distinct things to do (1) to enumerate the groups of facts which generate a right or obligation—(2) to enumerate the facts which do *not* generate either, and yet give a man the right or obligation *as if* the generative fact were true.<sup>29</sup>

The facts, of course, are to be sought in the cases. As Nicholas St. John Green wrote, dismissing John Townsend's theorizing about slander and libel in terms of malice, "[t]he latest decided cases upon this subject *make the law*."<sup>30</sup>

Holmes seems to have first formulated his belief about the primacy of facts in the series of lectures on jurisprudence that he gave at Harvard College in the spring of 1872. These lectures seem, at least at first glance, to have grown out of a rejection of Austin's ideas. The substance of what Holmes said is preserved only in the form of a "Book Notice" in the *American Law Review*, nominally a review of an article on Austin by Frederick Pollock.<sup>31</sup> According to Holmes, law, at least "in the more limited meaning which lawyers give to the word," consists of the rules enforced by the courts; such rules are not necessarily the commands of the sovereign.<sup>32</sup> Such a statement is, of course, a rejection of one of Austin's basic premises and is, in turn, the result of a rejection of Austin's concept of sovereignty. Holmes pointed out that the identity of the sovereign is defined by power. "That is to say," Holmes wrote, "the will of the sovereign is law, because he has power to compel obedience or to punish disobedience, and for no other reason."<sup>33</sup> There are, Holmes maintained, real limits on the power of the political sovereign, a statement he supported by showing in his lectures "that there might be law without sovereignty, and that where there is a sovereign, properly so called, other bodies not sovereign, and even opinion, might generate law in a philosophical sense against the will of the sovereign."<sup>34</sup> He pointed out that in the end, no command of the sovereign could prevail against the "physical power" of that "large number" which in most states has even been a "numerical majority of males, who have had no share in the political power."<sup>35</sup>

---

29. Letter from Oliver Wendell Holmes to John Chipman Gray (July 18, 1877), Microfilm Edition of the Holmes Papers, *supra* note 28, reel 53, frames 260-61 (original); *id.* reel 24, frame 546 (typed transcript).

30. Green, Slander and Libel, 6 Am. L. Rev. 593, 612 (1872) (reviewing J. Townsend, *A Treatise on the Wrongs Called Slander and Libel, and on the Remedy by Civil Action for those Wrongs* (2d ed. 1872)).

31. Holmes, Book Notices, 6 Am. L. Rev. 723 (1872) (reviewing *The Law Magazine and Review New Series No. 3* (April 1, 1872)) [hereinafter Holmes, Review of Pollock].

32. *Id.* at 723.

33. *Id.*

34. *Id.*

35. *Id.*

Once the Austinian conception of sovereignty was disposed of, it was easy for Holmes to show that judges decide cases on many motives "outside their own arbitrary will, beside the commands of their sovereign."<sup>36</sup> All the lawyer is concerned with, as he pointed out, is what the judges will do in the future because "in a civilized state" what "makes lawyers' law" is not the will of the sovereign "but what a body of subjects, namely, the judges, by whom it is enforced, *say* is his will."<sup>37</sup> The true subject of jurisprudence, the true source of law, therefore, is any motive for judicial decision which lawyers can reasonably rely on to be used by other judges in the future, which they can use to predict a future outcome. This first appearance of Holmes's "prediction theory of law" grew out of a belief that what judges do is the law.<sup>38</sup> Holmes's early work on the factual basis of law laid a solid foundation for that belief.

## II. THE CONTOURS OF HOLMES'S THOUGHT

When Holmes set out to formulate his own views on the issues that agitated legal thinkers of his day, he drew first on history. Keeping in mind Austin's admonitions on the source of law and Maine's use of history to illustrate existing legal rules, Holmes searched the past for the origins of current legal doctrine. Those origins were to be found in the reality of the past rather than in transcendent principles that somehow simply existed. Not surprisingly, he took an increasingly empirical view of law, grounding legal science in the facts of human life, among which were judicial decisions. His view was shared by the first generation of modern law teachers and in this respect, contrary to what many have assumed, Holmes and Langdell were more intellectual allies than enemies.

### A. *The Role of History*

By the spring of 1872, then, Holmes seems to have made a public repudiation of total faith in Austin. He continued for the next year or so in the Austinian task of classification, albeit on the basis of duties. After the publication of "The Theory of Torts" in 1873,<sup>39</sup> however, the charts showing the arrangements of the duties disappeared. His next article, "Primitive Notions in Modern Law" published in 1876, marks an important transition.<sup>40</sup> In that essay Holmes carried forward the aim of "The Theory of Torts" to show that liability for tortious acts does not depend on culpability, as Austin maintained, but rather on the failure to come up to the standard of behavior established by the com-

---

36. *Id.* at 724.

37. *Id.*

38. *Id.*

39. Holmes, *Theory of Torts*, 7 *Am. L. Rev.* 652 (1873).

40. Holmes, *Primitive Notions in Modern Law*, 10 *Am. L. Rev.* 422 (1876).

munity. His methodology was historical. He pointed out that at least in some cases "which Austin, following the jurists of the mature period of Roman law, had interpreted on grounds of culpability," the root of liability was in fact "the much more primitive notion, that liability attached directly to the thing doing the damage."<sup>41</sup> He attempted to "explain that primitive notion more at length, to show its influence on the body of modern law, and to trace the development from it of a large number of doctrines which in their actual form seem most remote from each other or from any common source."<sup>42</sup>

Holmes's next article, "Primitive Notions in Modern Law. No. II," appeared in July of 1877.<sup>43</sup> Its purpose was "to prove the historical truth of a general result, arrived at analytically" in "The Arrangement of the Law."<sup>44</sup> Holmes's earlier article rested on his belief, which had formed for some time an important part of his view of law, that "all special rights are legal consequences of a special group of facts."<sup>45</sup> Supporting that belief required Holmes to explain why some "continuing rights [which] are incidents to a situation of fact, [and] which can only be filled by the first person entitled to the rights in question," can "be succeeded to by another who cannot fill the situation."<sup>46</sup> The conventional description of this situation uses the notion of "privity" to explain the relationship between the first holder of the right and his successor. In "The Arrangement of the Law" he analyzed the concept of privity in terms of an abstract *persona* that is the thing to which the fact situation attaches, an idea that in turn is traced to the treatment of heirship in the Roman law.<sup>47</sup> He came to the conclusion, as he put it in "Primitive Notions in Modern Law. No. II" "that in such cases there is a fictitious identification of distinct persons for the purpose of transferring or completing the right."<sup>48</sup> That article found the origin of that fictitious identification in an analogy to inheritance. Thus Holmes could explain the seemingly anomalous situation he described at the beginning of the essay. If a person uses a way over his neighbor's property in order to reach his own, the person who buys the land and continues to use the way "can add the seller's time of adverse user to his own, for the purpose of making out an enjoyment long enough to give him a right by prescription."<sup>49</sup> Someone not a buyer (one who has un-

---

41. *Id.* at 423. Holmes's first criticized Austin's conception of culpability in Holmes, Review of Pollock, *supra* note 31, at 725.

42. Holmes, *supra* note 40, at 423.

43. Holmes, Primitive Notions in Modern Law. No. II, *supra* note 28.

44. *Id.* at 641. The article referred to was Holmes, The Arrangement of the Law: Privity, 7 *Am. L. Rev.* 46 (1873) [hereinafter Holmes, Arrangement of the Law].

45. Holmes, Primitive Notions in Modern Law. No. II, *supra* note 28, at 641 (summarizing his earlier article on Arrangement of the Law).

46. Holmes, Arrangement of the Law, *supra* note 44, at 49.

47. *Id.* *passim*.

48. Holmes, Primitive Notions in Modern Law. No. II, *supra* note 28, at 641.

49. *Id.* at 641-42.

lawfully dispossessed (disseised) the original adverse user), however, cannot add (tack) his period of use to that of his predecessor. The idea of tacking arose from analogizing the purchaser to the heir who succeeds to all the rights of the deceased by assuming his *persona*; he is not in the eyes of the law a different person. Since heirship is always lawful or right, the analogy cannot be applicable to a disseisor. Holmes traces the use of this analogy through Roman, Germanic and English law.<sup>50</sup>

Holmes still faced a legal puzzle, however. The lack of privity between disseisee and disseisor arose from the apparent unwillingness to conceive of a "wrongful" succession by inheritance, or as Holmes put it, "without the element of consent, there was no likeness to be laid hold of."<sup>51</sup> In spite of this limit to the analogy, it seems that at common law, although the matter is not without doubt, a disseisor does have an action against anyone who obstructs a right of way over another's land (an easement) obtained by the disseisee through adverse use. The puzzle is compounded by the undoubted legal fact that an easement is incapable of possession, being "an ideal creation of the law."<sup>52</sup> The answer is found, Holmes believed, in the tendency, common in one period of the development of the human mind, to endow inanimate things with a personality, a concept he had already discussed in his earlier article on "Primitive Notions in Modern Law."<sup>53</sup> Rights obtained by prescription were "built up out of similes drawn from legal persons" at the time when personification was still common in criminal law, "and then, as often happens, language reacted on thought, so that conclusions were drawn as to the rights themselves from the terms in which they happened to be expressed."<sup>54</sup> Again Holmes traces this idea through Roman and English writers and uses it to explain one of the knotty concepts of the land law, the rule that privity of estate is necessary in order for a covenant to run with the land.<sup>55</sup>

It is important that the difference between the historical method of these later articles and the analytical method of the earlier be understood. In the earlier article on arrangement of the law, Holmes attempted to explain the problem of succession by showing that the notion of privity logically arose from the fictitious identification of decedent and heir. In the later articles he shows through the examination of legal thought of treatise writers how the fictitious identification was extended to other areas by analogy. This process was governed by ideas like the personification of inanimate objects, which his age did not accept and which are emphatically not logical. In these later works, Holmes is writing a sort of intellectual history that attempts to ground

---

50. *Id.* at 643-53.

51. *Id.* at 647.

52. *Id.* at 654.

53. Holmes, *supra* note 40, at 423.

54. Holmes, *Primitive Notions in Modern Law*. No. II, *supra* note 28, at 654-55.

55. *Id.* at 656-60.

legal ideas in the more general ideas of a specific historical era as well as in the operation of the human mind. Thus the difference between the treatment of easements and covenants cannot be explained by classifying them as rights *in rem* or obligations, or by differentiating between rights obtained by grant and those obtained by prescription. An accurate explanation requires an understanding of the intellectual (but not necessarily rational) processes that clothed an estate with something akin to personality.<sup>56</sup>

Holmes is not concerned, however, with testing his hypothesis against evidence other than that provided in commentaries and treatises. Regarding his conclusion that easements and like concepts were seen as part of the land itself, he wrote:

If evidence of a general tendency, in the early communities and manors, to impress a permanent character on particular parcels of land, or that services were due from or to their respective occupants simply by reason of their occupation, were necessary for the present argument, it would probably not be hard to find. But there is no need of going into further details.<sup>57</sup>

He did, however, add to this passage a footnote citing the work of the French scholar M.E. de Laveleye and his own lengthy footnote to Kent's discussion of the history of alienation in his edition of Kent's *Commentaries on American Law*.<sup>58</sup> The footnote is an elaborate discussion of what historical evidence Holmes could find, much of it in secondary sources, about the origins of property and the nature of village communities. He was not disdainful of the facts of social history, but the focus of his inquiry was ideas.

Holmes's thought continued in the empirical channel, as evidenced by his increasing concern with history. He published his next article, "Possession," in July of 1878.<sup>59</sup> It is most important for its expression of Holmes's notion about the relationship between facts and law and its rejection of a priori approaches to the law. In the second division of the article Holmes deals explicitly with the question, which, he points out, has been the focus of German scholarship on this subject, "whether possession is a fact or a right?"<sup>60</sup> The question, in Holmes's view, should never have been asked, at least by lawyers who are not concerned with what philosophers or moralists mean by the question. Every right "is a consequence attached by the law to a group of facts which the law defines."<sup>61</sup> If the facts exist with regard to a certain per-

56. *Id.* at 657-58.

57. *Id.* at 657 (footnote omitted).

58. 4 J. Kent, *Commentaries on American Law* 441-42 n.1 (O.W. Holmes 12th ed. Boston 1873). Several articles by Laveleye are referred to in footnote one, as is Holmes's "Arrangement of the Law." *Id.*

59. Holmes, *Possession*, 12 *Am. L. Rev.* 688 (1878).

60. *Id.* at 698.

61. *Id.*

son, that person has the right in question. Possession, therefore, "is such a group of facts; and, when we say of a man that he has possession, we mean to affirm directly that all the facts of that group are true of him, and we convey, indirectly or by implication, that the law will give him the advantages of the situation."<sup>62</sup>

The importance of this definition, which Holmes believed is true for every substantive area of the law, becomes evident when he contrasts it to German ideas about possession. According to Holmes, all the best known German jurists are both scholars of the Roman law and disciples of some version of Kantian or post-Kantian philosophy.<sup>63</sup> Roman possession was "that of an owner or of one on his way to become owner."<sup>64</sup> Savigny took this fact of Roman law to the conclusion that "intent to deal with the thing as owner, is in general necessary to turn a mere physical detention into juridical possession."<sup>65</sup> This view in turn harmonizes with Kant's view of law. For him, possession was part of the ego, a manifestation of the will which can only be restrained when it interferes with the freedom of others. The intent necessary for possession, therefore, must be an intent to make oneself owner.<sup>66</sup> This intent should be protected because the entire legal system must respect the manifestations of the human will.<sup>67</sup> Holmes had already shown in the first part of the essay, however, that the common law gives possessory remedies to persons who are not owners.<sup>68</sup>

Holmes's entire view of the law becomes clear in his explanation of the inadequacies of the German position and the rightness of the common law approach. First, he reiterates the idea that legal duties come before legal rights. He makes explicit his view that "the direct operation of the law is to limit freedom of action or choice on the part of a greater or less number of persons in certain specified ways; while the fact that the power of removing or enforcing this limitation is generally confided to certain other private persons is not a necessary or universal correlative."<sup>69</sup> In other words, the law prevents people from interfering with other people. In fact, the law does this directly in the case of the protection of possession. The intent which must be found in order to protect possession is the intent not to make oneself owner, but to exclude others.<sup>70</sup>

Holmes then demonstrates through the analysis of cases that the common law protects as possessors those who have the intent to ex-

---

62. *Id.*

63. *Id.* at 700.

64. *Id.* at 701.

65. *Id.*

66. *Id.* at 700-01.

67. *Id.* at 717.

68. *Id.* at 696-98.

69. *Id.* at 702.

70. *Id.*

clude others. He admits that his proposed general test of intent does not fit the case of servants who are considered not to have possession of property entrusted to them although it is true that a servant clearly intends to exclude the world at large. The reconciliation is found in history. "A servant is denied possession," Holmes asserted, "not from any peculiarity of intent with regard to the things in his custody either towards his master or other people by which he is distinguished from a depositary, but simply as one of the incidents of his status."<sup>71</sup> The status still bears many of the marks of its origin in slavery and the possession of a slave was the possession of the owner. Here again history gives an answer which logic cannot. As Holmes put it, "there is no adequate and complete explanation of the modern law, except by the survival in practice of rules which lost their true meaning when the objects of them ceased to be slaves."<sup>72</sup> Just as the rules regarding easements and covenants are explained not by the concept of privity but by the operation of analogy and the survival of the idea of personification of objects, so the inability of servants to have possession is understandable only by understanding history.

Holmes was not quite done. He maintained not only that the common law actually required that the possessor have the intent to exclude but that "no more should be required on principle."<sup>73</sup> Possession is protected not for the philosophical reasons of the Germans regarding the will and personality, but because "man, by an instinct which he shares with the domestic dog, and of which the seal gives a most striking example, will not allow himself to be dispossessed, either by force or fraud, of what he holds, without trying to get it back again."<sup>74</sup> The grounds of this part of the common law are, therefore, empirical. "Indeed, those who see in the history of law the formal expression of the development of society will be apt to think that the proximate ground of law must be empirical, even when that ground is the fact that a certain ideal or theory of government is generally entertained."<sup>75</sup>

In "Possession," for the first time, all of the themes of Holmes's thought are brought together into one argument. First, the definition of law as the application of force on individuals is expressed as the source of the primacy given to duties. Second, the object of the study of law is the facts which must be true in order for the law to act. Third, no matter what sort of conclusions about general rules and principles can be drawn from the exploration of the facts that invoke the public power (an investigation which is itself historical, based on the records of the law), perfect symmetry can never be expected because the workings of the human mind in history are not perfectly logical. Reasons for

---

71. *Id.* at 707.

72. *Id.* at 710.

73. *Id.* at 702.

74. *Id.* at 719.

75. *Id.*

rules have disappeared, yet the effects of the rules persist. Finally, the study of the law is not concerned with philosophical systems, but rather with the realities of life in the world, which realities are not particularly lofty. Possession is protected because man—like other animals—defends what he has acquired.

### B. *Empirical Law*

The state of Holmes's thought at the time of the publication of "Possession" seems settled enough to attempt to assess the influence of the two major groups of ideas that dominated American legal thought in the period: the analytical and historical approaches to jurisprudence. In the first place, Holmes was critical of Austin. The definition of law as the command of a sovereign simply did not convince Holmes. He saw too many instances of the sovereign being powerless to make law in the face of power held by others, that "numerical majority of males"<sup>76</sup> who in the extreme could undo the sovereign's law by taking to the streets. What should not be overlooked, however, is that for all his criticism of Austin, Holmes still finds the source of law in the facts of power.<sup>77</sup> The complaint of some anti-Austinians was that the command theory promoted the unacceptable notion that the legislature could make any law it wanted, even if that law interfered with property rights in an effort to effect the redistribution of wealth, an aim which was totally contrary to the true nature of law, the rights of property being above and beyond human meddling. Holmes shared no such belief. What the public power enforces is the law. Given Holmes's belief about the instinct to preserve one's property, he might find something short of naked confiscation unwise, but it seems unlikely that he would say that something inherent in the nature of law deprived the legislature of such power. He came close to saying that might makes, if not right, at least law of the kind lawyers must study. Rejection of Austin's conception of the absolute nature of the sovereign's power does not entail, at least for Holmes, a rejection of the basic idea of the nature of law which Austin expressed.<sup>78</sup>

Nor did Holmes's abandonment of the attempt to classify the law on the basis of duties signify a complete rejection of Austin. In "Possession" he wrote: "The business of the jurist is to make known the content of the law; that is, to work upon it from within, or logically, arranging and distributing it in order from its *summum genus* to its *infima species*."<sup>79</sup> Holmes repeated this passage almost verbatim in *The Common*

---

76. Holmes, Review of Pollock, *supra* note 31, at 723.

77. See R. Cosgrove, *Our Lady the Common Law: An Anglo-American Legal Community, 1870-1930*, at 113-14 (1987).

78. See H. Pohlman, *Justice Oliver Wendell Holmes and Utilitarian Jurisprudence* 48-75 (1984).

79. Holmes, *supra* note 59, at 702.

*Law*, adding the words "so far as practicable" at the end.<sup>80</sup> This qualification of the need to classify symbolizes exactly to what extent Holmes rejected Austin's thought. His abandonment of the attempt to classify or arrange the law according to a schedule of duties marked the end of his engagement with "Austin's classificatory mania."<sup>81</sup> The passage from "Possession" reproduced in *The Common Law* is the only discussion of legal duties in the book. By 1883 Holmes had come to doubt whether there was any use in the concepts of rights and duties. "The primary duty," he wrote Pollock, "is little more than a convenient index to, or mode of predicting the point of incidence of the public force."<sup>82</sup> More than thirty years later Holmes wrote to John Chipman Gray in answer to Gray's inquiry about "an article of yours, I think in the Am. [sic] Law Review to the effect that the best classification of the Law was on duties."<sup>83</sup> Holmes replied:

The duty basis was the theme of my first article in the law Rev. Oct. 1870—Vol. 5 p. 1. "A long time ago, gentlemen," as old Parsons used to say in a melancholy voice, "a very long time ago." Later I became convinced that the machinery of rights and duties was a fifth wheel—and partially expressed it in an address to the Boston Law School Jan 8/97 ["The Path of the Law"] that was printed in the Harv. Law Rev. My theme and present view is expressed in *American Banana Co. v. United Fruit Co.* 213 U.S. 347, 356 [1908] "Law is a statement of the circumstance in which the public force will be brought to bear upon men through the Courts."<sup>84</sup>

Five years earlier, Holmes had been even more blunt in a letter to Gray on the same topic: "Personally I don't care a damn for the rights and duties business preferring to regard only the prophecy as to the incidence of the public force" as he discussed in "The Path of the Law."<sup>85</sup>

The evolution of Holmes's ideas about torts further illustrates his growing disillusionment with the concept of duties as well as with his prior adherence to Austinian ideas. In "The Theory of Torts,"<sup>86</sup> Holmes had put forward the idea that negligence is a question of fact, asking whether or not an actor has lived up to what the average mem-

80. O.W. Holmes, *supra* note 1, at 219.

81. R. Cosgrove, *supra* note 77, at 113.

82. Letter from Oliver Wendell Holmes to Frederick Pollock (Mar. 25, 1883), reprinted in 1 *Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1932*, at 20-21 (M. Howe ed. 2d ed. 1961) [hereinafter *Holmes-Pollock Letters*].

83. Letter from John Chipman Gray to Oliver Wendell Holmes (undated), *Holmes Papers*, *supra* note 28, box 33, folder 23.

84. Letter from Oliver Wendell Holmes to John Chipman Gray (Oct. 27, 1914), *Holmes Papers*, *supra* note 28, box 33, folder 26.

85. Letter from Oliver Wendell Holmes to John Chipman Gray (Nov. 3, 1909), *Holmes Papers*, *supra* note 28, box 33, folder 26. The article referred to is Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457 (1897).

86. Holmes, *supra* note 39.

ber of the community would do in the circumstances. This view rests all negligence law on facts which are to be investigated through the means of decided cases. As Holmes put it, "an enumeration of the actions which have been successful, and of those which have failed, defines the extent of the primary duties imposed by the law . . ." <sup>87</sup> He then proceeded to classify the law of torts according to duties by relating subjects of the substantive law to duties depending on the facts involved.<sup>88</sup> To remove the duties from the scheme leaves legal categories and facts, the only subjects he has discussed based on evidence of what courts really do. Duties truly are a "fifth wheel."

Holmes's modifications of Austin's ideas are, therefore, an extension of the empirical side of Austin's thought. If Austin's conception of law was based on the reality of power, his scheme for the classification and arrangement of legal ideas nevertheless partook of more abstraction than Holmes was willing to accept. One of the strains of thought which led Holmes to his position was his appreciation of history. Holmes's view of the sovereign was based on what history showed to be the limits of the political sovereign's power.<sup>89</sup> His conception of the non-logical side of the law was grounded on an understanding of the extent to which ideas and, in some cases, institutions long without any real life in contemporary thought still exercised influence through the existence of rules based on them.

The realization that Holmes was a historian of ideas sheds light on his treatment of the role of morality in law. Like Austin, Holmes believed that for purposes of study, law and morals must be separated. Holmes had made the point in print quite early. In 1867 he reviewed the ninth edition of Story's *Equity Jurisprudence* by Issac Redfield,<sup>90</sup> former chief justice of Vermont, whose eulogist had praised him as an ideal lawyer always concerned with sound principles and the morality of the law.<sup>91</sup> The young Holmes saw matters differently. Although Redfield was "an eminent and able man,"<sup>92</sup> his editing of Story exhibited the same flaws all of his works did. "One of them," Holmes wrote, "is a habit of moralizing, which is notably out of place among the rules and precedents of courts."<sup>93</sup> He then quoted Redfield's criticism of an English judge for doing justice rather than adhering to principle, something always to be deprecated by those who believe in principle and

---

87. *Id.* at 659-60 (footnote omitted).

88. *Id.* at 660-63.

89. For a discussion of the relationship between Austin's, Maine's and Holmes's ideas of sovereignty, see H. Pohlman, *supra* note 78, at 54-66.

90. Holmes, *Book Notices*, 1 *Am. L. Rev.* 554 (1867) (reviewing Story, *Commentaries on Equity Jurisprudence* (I. Redfield 9th ed. (1866))).

91. Phelps, Issac F. Redfield, in *Orations & Essays of Edward John Phelps, Diplomat and Statesman* 222-23 (J.G. McCullough ed. 1901).

92. Holmes, *supra* note 90, at 554.

93. *Id.*

trust " 'consequences to Him with whom are all the issues of life.' "94 Holmes's comment on that statement clearly ruled morality out of court: "When the learned editor calls in the authority of religion to make weight against the authority of the Master of the Rolls, by doing so he only renders the want of legal authority more conspicuous."95 In "Possession" he was more explicit:

We may leave on one side the question of their [legal rights'] relation to moral rights, and whether moral rights are not in like manner logically the offspring of moral duties; these are for the philosopher who approaches the law from without, as part of a larger series of human manifestations. The business of the jurist is to make known the content of the law . . . .96

Morality did not decide cases. It did, however, have a role to play in the growth of the law. Holmes explained that role in a passage near the end of the chapter in *The Common Law* on "The Theory of Torts":

But in the main the law started from those intentional wrongs which are the simplest and most pronounced cases, as well as the nearest to the feeling of revenge which leads to self-redress. It thus naturally adopted the vocabulary, and in some degree the tests, of morals. But as the law has grown, even when its standards have continued to model themselves upon those of morality, they have necessarily become external, because they have considered, not the actual condition of the particular defendant, but whether his conduct would have been wrong in the fair average member of the community, whom he is expected to equal at his peril.97

Ideas of morality are one more component in the intellectual history of the law. It must be taken into account in describing law's growth and even its current state. The notion of the average member of the community is at least in part shaped by community ideas of right and wrong. The tests of the law, however, do not address the moral state of the actor and moral standards have no inherent authority apart from their use to help set the objective legal test.98

### C. *Holmes and Legal Education*

Since the ultimate basis of the sort of systematic legal science sought by Green and Holmes was the decided case, they might be assumed to be advocates and allies of the transformation that was occurring at Harvard Law School at the very time they were formulating the

---

94. *Id.*

95. *Id.*

96. Holmes, *supra* note 59, at 702.

97. O.W. Holmes, *supra* note 1, at 161-62. See also Holmes's discussion of fraud, in which he states that "the moral starting-point of liability in general should never be forgotten." *Id.* at 137.

98. On Holmes's rejection of the authority of morals apart from their acceptance by a majority, see R. Cosgrove, *supra* note 77, at 117-18.

ideas examined above. Indeed, Green, Holmes and Gray occupied lectureships in Cambridge during this period. Green, however, left the reforming Harvard to help found the new law school at Boston University in protest against the new methods. Holmes wrote critical reviews of Langdell's work in the years before publication of *The Common Law*, and the intellectual relationship between Holmes and the dean has become a controverted point.<sup>99</sup> Saul Touster has maintained that Holmes moved from criticism of Langdell's reliance on cases to acceptance of the case method, a transformation which led Holmes in *The Common Law* to ignore "moral ideas" and "philosophy" in favor of a narrow, formalistic approach to law.<sup>100</sup> Like most assertions of a basic transformation in Holmes's thought, Langdell's assumed influence, exerted through his teaching technique, is misconstrued. Holmes quarreled with the dean, but their differences have obscured important areas of agreement.

Holmes was the author of the highly critical notice of the Harvard Law School which appeared in the *American Law Review* in 1870.<sup>101</sup> He found the school inadequate in almost every particular. He seems to have been soured on law schools by his experience at the unreformed Harvard. The next year, in reviewing Bryce's urgings that common lawyers study the civil law, Holmes observed that "[t]he common law begins and ends with the solution of a particular case," and that "the best training," therefore, "is found in our moot courts and the offices of older lawyers."<sup>102</sup> The implication is that the best learning comes by doing, a belief perfectly compatible with the ideas about education that accompanied the introduction of the case method to the law school.<sup>103</sup>

In the first years of the new regime at Harvard, the case method was used exclusively by Langdell and was known to the outside world through his casebooks. Holmes's review of the first part of Langdell's contracts casebook was full of praise for its historical arrangement. "Tracing the growth of a doctrine in this way," Holmes wrote, "not

---

99. See, e.g., Book Notice, 14 *Am. L. Rev.* 233, 234 (1880) (reviewing C. Langdell, *A Selection of Cases on the Law of Contracts, with a Summary of the Topics Covered by the Cases* (2d ed. 1879)) [hereinafter Holmes, 1880 Review of Langdell]. The involved story of the attribution of the review to Holmes is told in Touster, *Holmes a Hundred Years Ago. The Common Law and Legal Theory*, 10 *Hofstra L. Rev.* 673, 695 n.91 (1982). The link between Holmes and Langdell was most clearly made by Grant Gilmore. See G. Gilmore, *supra* note 7, at 48-56; G. Gilmore, *The Death of Contract* 14-22, 35-43 (1974). For a critical assessment of recent Holmes scholarship, including observations on the connection between Holmes and Langdell, see H. Pohlman, *supra* note 78, at 144-64.

100. See Touster, *supra* note 99, at 694-704.

101. Holmes, *Harvard University, Law School*, 5 *Am. L. Rev.* 177 (1870).

102. Holmes, Book Notice, 5 *Am. L. Rev.* 715, 716 (1871) (reviewing J. Bryce, *The Academical Study of the Civil Law* (1871)).

103. See Chase, *The Birth of the Modern Law School*, 23 *Am. J. Legal Hist.* 329, 329-48 (1979); Chase, *Origins of Modern Professional Education: The Harvard Case Method Conceived as Clinical Instruction in Law*, 5 *Nova L.J.* 323, 323-40 (1981).

only fixes it in the mind, but shows its meaning, extent, and limits as nothing else can."<sup>104</sup> Holmes went on, however, to criticize Langdell's treatment of the cases on forbearance as "collected with an over-scrupulous minuteness." Langdell, it seems, had paid too much attention "to the other side of what is now settled."<sup>105</sup> This failing did not, however, detract from the usefulness of the work.<sup>106</sup> The publication of the complete work later in 1871 was greeted by another anonymous Holmes review that praised the dean for using a philosophical rather than a manual method of arrangement and that also pointed out the importance of the principles to be deduced from the cases, at least for the instruction of students.<sup>107</sup> While Langdell's innovation was still new, Holmes had some reservations about Langdell's scholarship. Holmes approved the study of cases as the source of the law—as a place where the principles are found—but found Langdell's practice of the study defective.

Holmes expressed these same attitudes much more fully in his review of the second edition of the contracts casebook published in 1879. In this review Holmes characterized the dean as "perhaps, the greatest living legal theologian," concerned only with "the formal connection of things, or logic, as distinguished from the feelings which make the content of logic, and which have actually shaped the substance of the law."<sup>108</sup> What those "feelings" are is most simply said to be the lessons of history of the sort Holmes dealt with in his contemporaneous writings. The core of Holmes's criticism, however, is the same point he made in his first review of Langdell's work. The tendency to "over-scrupulous minuteness" seen in 1871 had blossomed into the dogmatism—"the effort to reduce the concrete details of an existing system to the merely logical consequence of simple postulates"—seen in the extensive summary of the law of contracts which Langdell added to the second edition of the casebook.<sup>109</sup> Having published his idea of a complete system for the first time, clearly Langdell was determined to prove his point even if that meant reconciling decisions "which those who gave them meant to be opposed" by drawing them together "by subtle lines which never were dreamed of before Mr. Langdell wrote."<sup>110</sup>

Holmes specifically disagreed with Langdell on the notion of equivalency, a concept involved in understanding the role of consideration in bilateral contracts. Broadly put, Langdell's observation was that

---

104. Holmes, Book Notice, 5 *Am. L. Rev.* 539, 540 (1871) (reviewing C. Langdell, *A Selection of Cases on the Law of Contracts* (1870)) [hereinafter *Holmes, 1871 Review of Langdell*].

105. *Id.*

106. *Id.*

107. See Holmes, Book Notice, 6 *Am. L. Rev.* 353, 353-54 (1872) (reviewing C. Langdell, *A Selection of Cases on the Law of Contracts* (1871)).

108. Holmes, 1880 Review of Langdell, *supra* note 99, at 233.

109. *Id.* at 234.

110. *Id.* at 233.

in the case of a contract made by giving a promise for a promise, the performance of one is payment for the performance of the other and therefore, as Holmes put it, neither party "can call on the other to perform without being ready at the same time himself."<sup>111</sup> This becomes in turn an important principle for understanding the role of conditions in contract law. Holmes, however, did not believe that the proper judicial treatment of conditions depended on the working out of a principle of equivalence.

Suppose A promises B to do a day's work for two dollars, and B promises A to pay two dollars for a day's work. There the two promises cannot be performed at the same time. The work will take all day, the payment half a minute. How are you to decide which is to be done first, that is to say, which promise is dependent upon performance on the other side? It is only by reference to the habits of the community and to convenience.<sup>112</sup>

Theory, the idea that "on the principle of equivalency a man is not presumed to intend to pay for a thing until he has it,"<sup>113</sup> is not sufficient to answer the question. The work is payment for the money and the money for the work. There is no reason in logic to say one person "intends" to pay before he has what he has bought and the other intends to give before he has been paid. What does give the answer, what explains the cases, is that amalgam of practice and belief which is summed up in history and which is the law.

The fact that employers, as a class, can be trusted for wages more safely than the employed for their labor, that the employers have had the power and have been the law-makers, or other considerations, it matters not what, have determined that the work is to be done first. But the grounds of decision are purely practical, and can never be elicited from grammar or from logic.<sup>114</sup>

Holmes's fourth sentence of *The Common Law* was the same sentence he had used in the review which described Langdell as a "legal theologian": "The life of the law has not been logic: it has been experience."<sup>115</sup> Langdell's system was too logical, too devoted to drawing distinctions and reconciling cases on grounds that had life only in his own mind. Holmes felt himself to be firmly grounded in the reality of history, human nature and the practicalities of life in the world. The heart of Holmes's criticism is an objection to Langdell's intellectual rigidity and a priori approach, to his creation of what Pollock called "the Langdellian ether of a super-terrestrial Common Law where authority does not count at all," not to the study of the law through the study of

---

111. O.W. Holmes, *supra* note 1, at 335.

112. *Id.* at 337.

113. *Id.*

114. *Id.* at 338.

115. *Id.* at 1; Holmes, 1880 Review of Langdell, *supra* note 99, at 234.

cases.<sup>116</sup>

Perhaps the most dramatic example of the basic agreement between the two men can be seen in a letter Langdell wrote to Theodore Dwight Woolsey of Yale soon after assuming the deanship discussing the study of jurisprudence. The new dean had been appointed secretary of a "Committee on Jurisprudence" which appears to have been the relevant committee of the American Social Science Association. He does not appear to have been particularly honored by the appointment and wrote Woolsey to profess his bewilderment at exactly what he was expected to do as well as "to offer for your consideration the following suggestions in regard to the study of jurisprudence":

[I]t [the study of jurisprudence] does not specially concern lawyers or those intending to become lawyers, but other portions of the community as well; some perhaps more, e.g., those aiming at public life or a high order of journalism. The chief business of a lawyer is and must be to learn and administer the law *as it is*; while I suppose the great object in studying jurisprudence should be to ascertain what the law *ought to be*; and although these two pursuits may seem to be of a very kindred nature, I think experience shews that devotion to one is apt to give more or less distaste for the other.<sup>117</sup>

In fact, the study of jurisprudence does not even belong in the law schools, but rather should be part of the postgraduate studies available in the university and should be carried on by "University men who devote themselves to the higher education, and not lawyers, whether on or off the Bench, not even professors in Law Schools."<sup>118</sup> Like Holmes, Langdell shared the Austinian belief in the separation of the is and the ought. All that there is of law is in the cases. Anything else is the province of another field of study.

#### D. *Holmes and the Scholarly Tradition*

If this explication of Holmes's thought through the period ending with the publication of *The Common Law* is correct, it is necessary to reassess claims that Holmes was startlingly original in his thought and that his ideas underwent a far reaching transformation during his long career. Indeed, it seems that Holmes shared in widely held beliefs about the nature of law and about the way to go about studying it. Commentators have identified as his most notable contributions ideas—such as the prediction theory, the "bad man" view of law, and the separation of law and morality—which were firmly rooted in the

---

116. Letter from Fredrick Pollock to Oliver Wendell Holmes (Sept. 17, 1897), in 1 Holmes-Pollock Letters, *supra* note 82, at 80.

117. Letter from Christopher C. Langdell to Theodore D. Woolsey (Feb. 6, 1871) Woolsey Family Papers, Series 1, box 23, folder 433, Yale University Library Manuscript Division.

118. *Id.*

advanced legal culture of his younger years and which he himself held from the 1870s.<sup>119</sup> In particular, "The Path of the Law" represents not a new start or even a turning point, but the making explicit of his empirical approach to law and the emphasis on law as a coercive mechanism which he first described in his earliest articles. Even the aspects of his thought that have caused revulsion in the present day were a part of the legal culture in which he came to intellectual maturity.

Holmes's scorn for the mob, his almost cynical treatment of the democratic process has been much noted in recent scholarship. Grant Gilmore in particular found Holmes "savagely, harsh, and cruel, a bitter and lifelong pessimist."<sup>120</sup> Most commentators seem to explain this aspect of Holmes by pointing to the influence of "social Darwinism," which was heightened by Holmes's experiences as a soldier.<sup>121</sup> Distrust of democracy, however, was a common theme in Anglo-American legal thought throughout the mid- and late-nineteenth century. Austin himself was appalled by the progressive extension of Parliamentary suffrage.<sup>122</sup> Maine was no happier with political developments that extended the power of the "people" in politics.<sup>123</sup> Holmes's friend, James Fitzjames Stephen, was perhaps the most prominent antidemocrat of the Victorian age. His *Liberty, Equality, Fraternity*<sup>124</sup> was a withering attack on the premises of democracy. Stephen's basic assertion was that the vast majority of people were ignorant and vicious and dedicated to levelling society through the destruction of private property.<sup>125</sup>

The ignorance of which these thinkers complained was ignorance of the "truths" of classical political economy. In a sense, Adam Smith and Malthus were their guiding lights.<sup>126</sup> Holmes was one of the true believers. He found socialism stupid because it ignored economic truth. Indeed, he wrote to Pollock that rereading Malthus pleased him "immensely" but left him "sad." "A hundred years ago he busted fallacies that politicians and labor leaders still live on. One thinks that an error exposed is dead, but exposure amounts to nothing when people want to believe."<sup>127</sup> Holmes's belief in life as struggle, therefore, had at least some of its roots in an adherence to the tenets of classical liberal economics widely shared by his contemporaries. Unlike some of

119. See, e.g., G. Aichele, *supra* note 6, at 124-62.

120. G. Gilmore, *supra* note 7, at 48-49.

121. See Aichele, *supra* note 6, at 61, 144.

122. See W. Rumble, *supra* note 10, at 196-205.

123. See R. Cocks, *supra* note 13, at 131-40.

124. J. Stephen, *Liberty, Equality, Fraternity* (1873).

125. See B. Mylchreest, *The Anglo-American Dialogue on Constitutionalism, 1860-1920*, at 215-19 (1988) (unpublished dissertation available at Cornell University).

126. See B. Mylchreest, *supra* note 125, at 115, 216-19; W. Rumble, *supra* note 10, at 201.

127. 1 Holmes-Pollock Letters, *supra* note 82, at 219; see also G. Aichele, *supra* note 6, at 149; B. Mylchreest, *supra* note 125, at 218.

those contemporaries, however, he also believed that Austin's basic insight into law as power meant that he could not enforce those tenets on an unwilling polity. Holmes's early adherence to Austinian positivism is thus the direct ancestor of his judicial dismissal of freedom of contract as "an economic theory which a large part of the country does not entertain" in his dissent in *Lochner v. New York* in 1905.<sup>128</sup>

### CONCLUSION

Holmes began his legal career as a student of the two dominant strains of the legal culture of the time. Drawing from both the analytical and the historical schools, he attempted to create a science of law that would supersede the previous generation's belief in an ordered system of a priori principles. By separating law and morality, as Austin counselled, Holmes believed he could free the study of law from irrelevant considerations of what should or must be in favor of an empirical study of what the law really is. By studying history, Holmes believed he could demonstrate that legal doctrine did not develop according to logical rules, but rather reflected a society's social structure as well as its conscious judgments about policy.

Holmes had definite beliefs about how those policy decisions should be made. His policy preferences were based on classical liberal economics. When it came to judging, however, Holmes's beliefs about the nature of law proved stronger than his economic views. Having located the source of law in power, he refrained as a judge from opposing what he saw as expressions of society's will, even when those expressions were, in his eyes, stupid. As it happened, his restraint led to a reluctance to invalidate progressive legislation. Thus, with some careful editing of the record, he could be lionized as a "liberal" even though he was "liberal" only in the nineteenth century sense of that term. His disregard for individual rights,<sup>129</sup> except perhaps in the area of political speech, offends contemporary liberal ideas, but was at its base simply a reflection of his deference to the power of the majority. His scorn of the mob, and perhaps of the very idea of democracy, was a common posture among nineteenth century Anglo-American legal thinkers.

The connections between Holmes and other students of the common law have been neglected, in part because the Justice outlived them all.<sup>130</sup> Towards the end of his life, admirers half his age transformed him into a paragon of liberal virtue. The rediscovery of his true views has led to studies which concentrate on the man himself rather than on the legal culture in which he came to intellectual maturity. When those

---

128. 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

129. See G. Aichele, *supra* note 6, at 148-49.

130. Three exceptions to this neglect are R. Cosgrove, *supra* note 77; B. Mylchreest, *supra* note 125; H. Pohlman, *supra* note 78.

connections are reexamined, Holmes can be seen as a part of his times, as one of several Victorian legal thinkers, most of whom simply did not manage to hold an important judicial post well into the twentieth century.

This reexamination also reveals a final irony, one that Holmes might have appreciated. He once wrote that his epitaph should read "Here lies the supple tool of power."<sup>131</sup> Perhaps he should have said, "Here lies the supple tool of law professors." The legal realists seized him as their patron saint, the one true mature judge who had overcome formalism. Yet in his thought he did adhere to a formalism of a sort; he believed that the laws of the dismal science were true and inescapable. If he is the ancestor of any branch of current American legal thought, those who should erect his shrine are the advocates of law and economics. In Holmes they can find a thinker who knew that society and its law should be organized along the lines dictated by the "science" of economics. All they must do is ignore his appreciation for the role the irrational plays in the life of the law.

---

131. G. Aichele, *supra* note 6, at 145.