

HOLMES' COMMON LAW AS LEGAL AND SOCIAL SCIENCE

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"My notion in writing these articles," Holmes told a friend, speaking of the *American Law Review* pieces¹ on which he later based his lectures² on *The Common Law*,³ "is to take up from time to time the cardinal principles and conceptions of the law and make a new and more fundamental analysis of them - For the purpose of constructing a new Jurisprudence or New First Book of the law."⁴ Holmes' declaration of intent makes explicit what it is hard for a reader of *The Common Law* to doubt: The work is primarily one of legal theory with excursions into legal history to support the theory. Thus it is as a work of theory and not of history that *The Common Law* must be assessed.

The first reaction that a reader — or even a re-reader — is likely to come away with from this famously Delphic text is one of bafflement at its recklessly miscellaneous quality. One is quite as

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1. *The Arrangement of the Law: Privity*, 7 AM. L. REV. 46 (1872); *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870) (unsigned article written by Holmes); Holmes, *Common Carriers and the Common Law*, 13 AM. L. REV. 609 (1879); Holmes, *Possession*, 12 AM. L. REV. 688 (1878); Holmes, *Primitive Notions in Modern Law*, 10 AM. L. REV. 422 (1876); Holmes, *Primitive Notions in Modern Law No. II*, 11 AM. L. REV. 641 (1877); *The Theory of Torts*, 7 AM. L. REV. 652 (1873) (unsigned article written by Holmes).

2. See 2 M. HOWE, JUSTICE OLIVER WENDELL HOLMES 135-36 (1963).

3. O.W. HOLMES, THE COMMON LAW (M. Howe ed. 1963) [hereinafter cited as COMMON LAW].

4. Letter from O.W. Holmes to A.G. Sedgwick (July 12, 1879) (Holmes Manuscripts, Harvard Law School Archives) (copy on file in office of *Hofstra Law Review*). I am grateful to Professor Grant Gilmore for permission to quote from the Holmes Papers.

likely, on turning the pages, to run across an anthropological account of animism in primitive societies⁵ as an orthodox history of Year Book doctrine,⁶ a polemic from political economy against strict tort liability,⁷ or a proposal to revise the classification scheme of analytical jurisprudence.⁸ The reader's reactions are confirmed upon turning to Mark Howe's masterly explication of the text,⁹ for there he learns that Holmes was, in fact, pursuing in the lectures a variety of theories he had suggested earlier in the *American Law Review*: that sources of the common law are largely Teutonic, not Roman;¹⁰ that Kant and Hegel were wrong to see legal rules as manifestations of the free expression of autonomous, self-determining individual wills;¹¹ and that Austin was wrong in making rights, rather than duties, the primary concept of his analytic apparatus.¹² Though to be sure these projects have in common that they show all of Holmes' most eminent contemporaries to have been in error—not an accidental similarity, in view of Holmes' very competitive drive toward originality—there is no other obvious thread uniting them, or explaining their all being tossed together in a book.

In the face of such bewildering diversity, the reader does well to try to follow T.S. Kuhn's advice: "When reading the works of an important thinker, look first for the apparent absurdities in the text, and ask how a sensible person could have written them."¹³ This useful precept suggests that the secret of this text may lie in its context of intellectual discourse, the Victorian legal and social science that defined the problems for which Holmes and his contemporaries thought it important to offer solutions. Yet my argument here will be that once one has investigated this context, one will not be able to draw from it any single thread of ideas that unifies and integrates *The Common Law*. One will discover, rather, that it contains multiple and contradictory strands of thought, taken from contemporary positions that often conflict sharply with one another. The explanation of *The Common Law* will turn out to be that it is a book at war

5. See, e.g., COMMON LAW, *supra* note 3, at 12-13. For a discussion of Holmes' historical use of animism in primitive societies, see 2 M. HOWE, *supra* note 2, at 161-68.

6. See, e.g., COMMON LAW, *supra* note 3, at 177-79.

7. See *id.* at 72-73.

8. See, e.g., *id.* at 115, 173, 235-36.

9. See 2 M. HOWE, *supra* note 2, at 135-252.

10. See, e.g., *id.* at 143-44, 146-48, 152-53, 205-07, 211-14, 228, 252, 277.

11. See, e.g., *id.* at 168-77, 202-04.

12. See *id.* at 76-79, 173.

13. T. KUHN, THE ESSENTIAL TENSION xii (1977).

with itself.

For some time, scholarly writing on Holmes selected a single intellectual movement—American philosophical pragmatism¹⁴—as the candidate from the surrounding discourse of his time most likely to explain his thought. Pragmatist philosophy seemed promising first because Holmes belonged, along with the acknowledged founders of pragmatism,¹⁵ to the Metaphysical Club of Cambridge,¹⁶ and second because many of Holmes' themes resonated with the general tenor of pragmatism.¹⁷ For example, the principal theme of the majestic overture to *The Common Law*, that societies are constantly reworking and reinterpreting old legal forms to serve new purposes,¹⁸ has been called "evolutionary pragmatism."¹⁹ According to this idea, no legal form has a frozen meaning; rather, legal forms are changing and contingent and depend on the specific practical uses to which successive generations wish to put them.²⁰ The form may stay the same, but the content changes with changing views of policy—the policy upon which all law must ultimately be grounded.²¹ Holmes' prediction theory of law,²² where the lawyer is asked to respond to a client's query of "If I go ahead with my scheme, what can they [the courts] do to me?," is also a pragmatist notion.²³ Such themes—as well as the political side he appeared to favor on the bench—have led legal scholars to call Holmes the father of Legal Realism²⁴ and

14. See, e.g., P. WIENER, *EVOLUTION AND THE FOUNDERS OF PRAGMATISM* (1949).

15. The founders of pragmatism referred to include Chauncey Wright, Nicholas St. John Green, William James and Charles Sanders Peirce. See *infra* note 16.

16. See Fisch, *Was There a Metaphysical Club in Cambridge?*, in *STUDIES IN THE PHILOSOPHY OF CHARLES SANDERS PEIRCE* 3 (2d ser., E. Moore & R. Robin eds. 1964).

17. See, e.g., *COMMON LAW*, *supra* note 3, at 120. "Pragmatism" is obviously too loosely and variously used a term to be capable of any exact definition. In this context, I use it to refer to the general position that scientific truths are not absolute and universal but vary according to—and are only realized in—their "operational" uses in "experience." Legal pragmatists' application of the general position is that legal concepts, such as "property," "contractual agreement," and "the cause of the accident," may be given meaning only through examination of the operational uses, or "purposes," to which they are put, so that, for example, whether electricity is "property" will depend upon the functional purposes, in a particular social-historical context, for which the classification is made.

18. See *id.* at 5.

19. P. WIENER, *supra* note 14, at 172.

20. See *id.* at 176-89; *COMMON LAW*, *supra* note 3, at 5, 8, 31-32.

21. See *COMMON LAW*, *supra* note 3, at 5, 8, 31-32.

22. See O.W. HOLMES, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 167 (1920) [hereinafter cited as *The Path of the Law*].

23. See P. WIENER, *supra* note 14, at 182-84.

24. W. TWINING, *KARL LLEWELYN AND THE REALIST MOVEMENT* 15-20 (1973).

name him a leader of the "revolt against formalism."²⁵

More recently, Rand Rosenblatt has explored the relation to pragmatism of yet a third idea of Holmes,²⁶ which deserves, more than the famous overture theme of not "logic" but "experience,"²⁷ to be regarded as the central motif of *The Common Law*. This third idea maintains that throughout the growth of the common law, liability for crimes, torts, and contract-breaking has been based decreasingly on personal, moral culpability and increasingly on an objective or external standard.²⁸ The standard is sometimes derived from behavior that the community, speaking through the legislature or the jury, considers to be blameworthy in the average person, and that it then proscribes;²⁹ other times, the standard is derived from policy grounds unrelated, even indirectly, to moral blame.³⁰ Rosenblatt, in a well-supported argument, has pointed to the resemblances between this external standard idea and C.S. Peirce's pragmatist epistemology,³¹ according to which truth cannot be defined subjectively, as what any one person believes, but only socially, as the prevailing consensus in the community of scientific thinkers.³²

As seductive as these writers' claims are for using pragmatism as a basis for interpreting Holmes' thought, I think that we have to start somewhere else—specifically with positivism—in order to understand *The Common Law*. In particular, I am referring to the scientific positivism³³ of such authors as Clifford³⁴ and Spencer,³⁵ two of the most aggressive supporters of the tendency "to treat the world

25. M. WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* 11, 15-18 (rev. ed. 1957).

26. Note, *Holmes, Peirce & Legal Pragmatism*, 84 *YALE L. J.* 1123 (1975).

27. *COMMON LAW*, *supra* note 3, at 5.

28. See, e.g., *id.* at 119-21, 233-39, 242.

29. See, e.g., *id.* at 119-21.

30. See *infra* text accompanying notes 121-28.

31. See Note, *supra* note 26, at 1129-34.

32. See *id.* at 1134-37.

33. I am not speaking here of the legal positivism that is sometimes tied to Holmes. For a sampling of commentaries on Holmes' legal positivism, see L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940); Mark de Wolfe Howe's response to Fuller in Howe, *The Positivism of Mr. Justice Holmes*, 64 *HARV. L. REV.* 529 (1951); Henry M. Hart's response to Howe in Hart, *Holmes' Positivism—An Addendum*, 64 *HARV. L. REV.* 929 (1951); Howe's response in Howe, *Holmes' Positivism—A Brief Rejoinder*, 64 *HARV. L. REV.* 937 (1951); and the famous exchange between H.L.A. Hart and Lon Fuller: Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593 (1958); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *HARV. L. REV.* 630 (1958).

34. See W. CLIFFORD, *THE COMMON SENSE OF THE EXACT SCIENCES* (1885).

35. See H. SPENCER, *ILLUSTRATIONS OF UNIVERSAL PROGRESS* (1864).

as a hard object gradually being discovered by means of the suppression of human subjectivity,"³⁶ the same tendency on which the pragmatist members of the Metaphysical Club had declared war.³⁷ Positivism, in this sense, is the belief that explanation must be scientific, and that to be scientific it must confine its investigation to observable phenomena—facts—and its method to induction, from regularities in the occurrence of past facts, of laws or statements of the probability of the occurrence of future events.³⁸ The method, in short, should enable the scientist to specify or predict the implications of given empirical conditions.³⁹

One can read whole sections of *The Common Law* as Holmes' attempt to turn law into something that permits the exercise of this sort of positivist method. The chapter on possession⁴⁰ presents a prime example of a positivist's formulation of a legal right:

A legal right is nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation by the aid of the public force. Just so far as the aid of the public force is given a man, he has a legal right, and this right is the same whether his claim is founded in righteousness or iniquity. Just so far as possession is protected, it is as much a source of legal rights as ownership is when it secures the same protection.

Every right is a consequence attached by the law to one or more facts which the law defines, and wherever the law gives any one special rights not shared by the body of the people, it does so on the ground that certain special facts, not true of the rest of the world, are true of him. When a group of facts thus singled out by the law exists in the case of a given person, he is said to be entitled to the corresponding rights; meaning, thereby, that the law helps him to constrain his neighbors, or some of them, in a way in which it would not, if all the facts in question were not true of him. Hence, any word which denotes such a group of facts connotes the

36. Hollinger, *William James and the Culture of Inquiry*, 20 MICH. Q. REV. 264, 267 (1981).

37. See P. WIENER, *supra* note 14, at 26, 28-30.

38. See Heller, *Is the Charitable Exemption from Property Taxation an Easy Case? General Concerns about Legal Economics and Jurisprudence*, in *ESSAYS ON THE LAW AND ECONOMICS OF LOCAL GOVERNMENTS* 183, 184-85 (D. Rubinfeld ed. 1979).

39. For historical accounts of nineteenth-century positivism, see L. KOLAKOWSKI, *THE ALIENATION OF REASON* (1968) and M. MANDELBAUM, *HISTORY, MAN, & REASON* 10-20 (1971). My understanding of the relationship between scientific and legal positivisms has been much improved by Heller, *supra* note 38, at 184-207, 236-51.

40. COMMON LAW, *supra* note 3, at 163-94.

rights attached to it by way of legal consequences, and any word which denotes the rights attached to a group of facts connotes the group of facts in like manner.

The word "possession" denotes such a group of facts. Hence, when we say of a man that he has possession, we affirm directly that all the facts of a certain group are true of him, and we convey indirectly or by implication that the law will give him the advantage of the situation. Contract, or property, or any other substantive notion of the law, may be analyzed in the same way, and should be treated in the same order. . . . When we say that a man owns a thing, we affirm directly that he has the benefit of the consequences attached to a certain group of facts, and, by implication, that the facts are true of him. The important thing to grasp is, that each of these legal compounds, possession, property, and contract, is to be analyzed into fact and right, antecedent and consequent, in like manner as every other. . . . There are always two things to be asked: first, what are the facts which make up the group in question; and then, what are the consequences attached by the law to that group. The former generally offers the only difficulties.⁴¹

Holmes also uses positivist method to refute Kant's theory that possession should be legally protected because it is an extension of personality, an exercise of free will.⁴² Holmes first tries to dispose of the theory through positivist fiat: "[T]he 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. Law, being a practical thing, must found itself on actual forces."⁴³ He then proposes such a grounding in sociobiology: "[M]an, 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 . . . [of a thing] without trying to get it back again."⁴⁴ Holmes also refutes Kant through an empirical falsification, arguing that although *Roman* law gave possessory remedies only to owners or almost-owners (seemingly supporting Kant's will-personality theory of possession), the *common* law has always given possessory remedies to evident non-owners such as bailees. The German jurists, Holmes argues, have thus overgeneralized from a limited field of data; from the perspective of the broader field, it is clear that the Roman practice is an

41. *Id.* at 169-70.

42. *See id.* at 163-64.

43. *Id.* at 168 (emphasis added) (footnote omitted).

44. *Id.*

anomalous case.⁴⁵

One may also witness Holmes' positivist thinking in his well-known chapters on tort law, where there are at least three positivist moments. In the first, the jury determines liability by asking whether the defendant's behavior could, on the basis of experience, be predicted to cause harm.⁴⁶ In the second moment, the judge is encouraged to look over the field of primary data—jury verdicts in negligence cases—and extract from them a prediction regarding future outcomes.⁴⁷ The judge is then to freeze the probable verdict in law as a standard,⁴⁸ for “[t]he ideal average prudent man . . . is a constant, and his conduct under given circumstances is theoretically always the same.”⁴⁹ Juries, however, are an imprecise tool of measurement since their verdicts may vary;⁵⁰ thus, in formulating the standard, the judge must take readings from several juries, average them, and then dispense with the jury.⁵¹ Finally, Holmes suggests that the lawyer may predict outcomes for a client based on the data synthesized in law reports.⁵²

Holmes' method in the chapter on possession⁵³ and the chapters on tort law⁵⁴ seems to be the substitution of the observable for the unobservable: facts plus legal consequences for rights, animal behavior for free will, and decided case law for philosophers' theories. In each instance, the subjective element is suppressed. There is a clear relation here between Holmes' thought and what I call one of the major theses of *The Common Law* that liability should be fixed by an objective, external standard.⁵⁵ Subjectivity in the form of actual intentions is suppressed and replaced by a description of observable, outward facts.

In other words, the standards of the law are external standards, and, however much it may take moral considerations into account, it does so only for the purpose of drawing a line between such bodily motions and rests as it permits, and such as it does not. What

45. *Id.* at 165-67, 184.

46. *Id.* at 87-89, 116-19.

47. *Id.* at 88-90.

48. *Id.* at 88-90, 120.

49. *Id.* at 89.

50. *Id.* at 88-89.

51. *See id.* at 92-93, 119-21. Of course, this is a paraphrase almost to the point of parody, but it seems to me faithful to Holmes' intentions in these passages.

52. *See id.* at 91-103.

53. *Id.* at 163-94.

54. *Id.* at 63-129.

55. *See supra* note 28 and accompanying text.

the law really forbids, and the only thing it forbids, is the act on the wrong side of the line, be that act blameworthy or otherwise.⁵⁶

I do not claim, however, that scientific positivism is the final secret of *The Common Law*. It was not a mode in which Holmes, with his strong historicist sense of the contingency of experience, could comfortably operate for very long. Moreover, although scientific positivism does serve to unite several themes, it remains violently discordant with others, notably the famous overture on experience rather than logic.⁵⁷ Holmes' positivist method and attitude, however, are well and truly entrenched. Indeed, one must be convinced of this if aware of his repeated assertions, both explicit and implicit, that the proper role of the jurist, the role that Holmes is himself performing, is to develop a method to extract from legal materials the regularity and order that is already present inside them,⁵⁸ *not* to impose, by a creative act of interpretation, a new order upon them.

What did Holmes' positivist method in the form of the external standard contribute to the discourse of its time? Certainly, the external standards idea was a tremendous success⁵⁹ in that it became generally known and adopted. It was also a great success, however, even among lawyers who could not swallow Holmes' cynical acid, and whose work the critical implications of Holmes' thought would one day help destroy. *The Common Law* is difficult to analyze because Holmes begins to demolish some of the most important premises of the structures that he was, at the same time, assiduously helping to build. I am speaking here of the structures to which Holmes' positiv-

56. COMMON LAW, *supra* note 3, at 88.

57. *Id.* at 5; *see supra* text accompanying note 18.

58. *See, e.g.*, COMMON LAW, *supra* note 3, at 173:

What may be [the] relation [of legal duties] to moral rights if there are any, and whether moral rights are not in like manner logically the offspring of moral duties, are questions which do not concern us here. 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; that is, to work upon it from within, or logically, arranging and distributing it, in order, from its *summum genus* to its *infima species*, so far as practicable.

Id. (italics in original).

59. *See, e.g.*, Letter from Sir Frederick Pollock to Oliver Wendell Holmes (Aug. 1893), reprinted in 1 HOLMES-POLLOCK LETTERS 46 (M. Howe ed. 1941): "Nemesis is upon us. The reasonable man and the 'external standard' have filtered down to the common examination candidate, who is beginning to write horrible nonsense about them." *Id.* Undoubtedly the external's longest-lived application is the "objective" theory of contract formation, as influentially adopted by Samuel Williston. *See* 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 20, 95 (3d ed. 1957); 13 *id.* § 1536 (3d ed. 1970).

ism in the form of the external standard seemed so useful a contribution: formalism, classical-legal, or liberal thought.⁶⁰

The classical-legal science that achieved dominance in the Harvard and Oxford Law Schools of the 1870's and 80's, and among the members of the United States Supreme Court into the 1920's, was a collective construct of many minds whose basic purpose was the reconceptualization of the legal system so that it might more perfectly vindicate the principles of political liberalism. Liberalism in its broadest sense attempts to maximize the freedom of self-regarding individuals to do as they choose as long as such freedom is consistent with a like freedom in other individuals.⁶¹ To accomplish this objective, liberal thought endows people with (or treats them as naturally having) rights that define what they may freely do, and correlative duties not to interfere with the like rights of others. The state is instituted to protect these rights through enforcement. This institution in turn requires a specification of the state's powers vis-a-vis individuals and the individuals' rights vis-a-vis the state. Late nineteenth-century classical-legal science was an attempt to formulate a systematic general statement of the actual legal rules in force in order to clarify the boundaries of rights and duties, particularly the boundaries between public power and private rights and between one right-holder and another. It was assumed that where one boundary ended another began.⁶² Liberal practice, therefore, was to: (1) ex-

60. Others who are more familiar with the secondary literature on Holmes than I am will correct me if I'm wrong to say that it was Karl Llewellyn who first noticed that there was a classic chassis under Holmes' modern chrome and tailfins, and assigned his work on contracts to the formal style. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS 187-89* (1960). Grant Gilmore followed, crediting to Holmes, as well as to Samuel Williston and C.C. Langdell, the patrimony of the classical law of contracts. G. GILMORE, *THE DEATH OF CONTRACT* 14-53 (1974). G. Edward White similarly places Holmes in his new history of tort law, G. WHITE, *TORT LAW IN AMERICA* 12-19 (1980), and Morton Horwitz explicitly identifies Holmes with formalism in recent lectures at Northwestern University. M. Horwitz, *The Place of Justice Holmes in American Legal Thought* (1980) (unpublished manuscript) (copy on file in office of *Hofstra Law Review*). C.H.S. Fifoot, in a valuable and strangely neglected little book, noted Holmes' contributions to English classical-legal science. C. FIFOOT, *JUDGE AND JURIST IN THE REIGN OF VICTORIA* 49-52, 90-91, 124-26 (1959).

61. What follows is heavily indebted to Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, in 3 *RESEARCH IN LAW & SOCIOLOGY* 3 (S. Spitzer ed. 1980). See P. Atiyah, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 388-97 (1979); McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 *J. AM. HIST.* 970 (1975); R. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise* 27-38 (1980) (unpublished manuscript) (copy on file in office of *Hofstra Law Review*).

62. Judges Thomas M. Cooley, John Forest Dillon, Samuel Miller and Stephen Field

plain as many rules as possible as necessary derivations of general, all-inclusive principles, such as protection of property, freedom of contract, or responsibility for wrongful conduct; (2) multiply bright-line tests to aid in determining when a state or individual had crossed the boundary of its sphere of appropriate autonomous action into a sphere in which its invasion could be sanctioned; and (3) clearly classify all human activity as either private or public. The aim was to maximize the spheres of individual freedom as the liberals understood it; ensure the rightful and limit the wrongful reach of state power; standardize endowments of rights in order to achieve a formal equality of individuals; and limit judicial action to the protection of either state or individual will: the will of the parties in a contract action, for example, or the will of the state in an exercise of the police power.⁶³

We can hardly wonder that liberal theorists latched on to the positivist sections of *The Common Law*, especially the external standard. Holmes had pushed previously for a "comprehensive arrangement of the law"⁶⁴ in order to develop standards that would apply to people generally, irrespective of status relations.⁶⁵ In *The Common Law*, however, he developed these standards, creating, for example, a standard of negligence holding a prudent man liable for harms he could be expected to avoid with foreknowledge.⁶⁶ In addition, in his treatment of contracts, Holmes used the external standard notion to help courts find the making and meanings of contracts by reference to the objective, or outward, signs of the parties' intentions.⁶⁷ A classical lawyer reading these sections might well have been excused for supposing them a brilliant technical apparatus for putting into effect liberal legal ideas. After all, Holmes' standards for imposing liability were general inclusive standards applicable to everyone. The standards were expressed in a positivist form, suggesting that the enforcing court need only apply regularities observed in similar factual situations to determine the appropriate legal consequence of the facts in the present case. The aim of Holmes' scheme, like that of

are among the leading pioneers of this enterprise, particularly on the public law side; on the private law side, one thinks first of C.C. Langdell, J.B. Ames, Samuel Williston, and, to a considerable extent, Holmes, and the English jurists William Markby, T.E. Holland, and Frederick Pollock.

63. See L. KOLAKOWSKI, *supra* note 39.

64. *The Theory of Torts*, *supra* note 1, at 660.

65. See *id.*

66. COMMON LAW, *supra* note 3, at 63-129.

67. See *id.* at 242.

classical law generally, appears to be to maximize the sphere of autonomous freedom by giving individuals advised by lawyers reliable predictions of where the courts will limit their actions and the actions of others, and equalize the formal legal treatment of persons. Holmes at various points seems to *say* this is his aim.⁶⁸

Yet, if this was his aim, there can be no doubt that it conflicted with others, for Holmes was at best only ambivalently a liberal. In fact, his work cruelly laid stress on some of the cardinal weaknesses of, and contradictions within, liberal thought. Such elements of his work represent a sharp break with the classical phase of liberalism.

In the overture to *The Common Law*, for example, Holmes marked his determination to bring the historical and social contingency of legal doctrine into the forefront of legal theory.⁶⁹ Attacks on the classical economists, utilitarians, and analytical jurists of the previous generation for their aprioristic, abstract, and ahistorical theories of the "individual" and the "sovereign" were not uncommon in the progressive scholarship of Holmes' time.⁷⁰ Holmes' emphasis in the overture on experience over logic⁷¹ signals his allegiance to the historicist enemies of classical legalism.

In other words, *The Common Law* opens with a trumpet blast aimed at the demolition of the classical-legal system that his positivism, in the form of the external standard, was designed to fortify.⁷² Even this, however, is not the full extent of the confusion, because the fact is that after proclaiming his historicist program,⁷³ Holmes

68. See, e.g., *id.* at 46, 77, 88. Holmes observes:

The true explanation of the reference of liability to a moral standard . . . is not that it is for the purpose of improving men's hearts, but that it is to give a man a fair chance to avoid doing the harm before he is held responsible for it. It is intended to reconcile the policy of letting accidents lie where they fall, and the reasonable freedom of others with the protection of the individual from injury.

Id. at 115.

69. See *id.* at 5. The opening lines of *The Common Law* repeat, with some variations, a critical (unsigned) review Holmes wrote in 1880 of C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (2d ed. 1879), which unkindly called the Harvard Law School Dean "the greatest living legal theologian." Book Notices, 14 AM. L. REV. 233 (1880). For an account of this episode, see 2 M. HOWE, *supra* note 2, at 155-57.

70. Sir Henry Maine was the pioneer in Anglo-American studies of this new program of a return to the historically based jurisprudence of Hume, Smith and Montesquieu relying on "scientific" historiography on the German model and comparative anthropology, in place of the "conjectural" histories of the Enlightenment. See J. BURROW, *EVOLUTION AND SOCIETY* 65-100 (1966).

71. See *supra* notes 18-27 and accompanying text.

72. See *supra* notes 33-60 and accompanying text.

73. See *supra* notes 64-71 and accompanying text.

simply fails to follow it through.

The theme of the overture, the reader will recall,⁷⁴ is that throughout the history of the common law, old legal forms continually acquire new content; as the social function of a form changes, so too does its legislative rationale. Once this theme has been sounded, the reader naturally expects its frequent repetition; yet one of the puzzles of *The Common Law* is that it fails to undertake any sustained development of what is announced as its major theme. Although Holmes does at times give concrete illustration to his theme, showing how an ancient form has persisted through modern reinterpretations of its policy basis,⁷⁵ most of his historical explanations and examples are informed by quite different theories of legal-historical development: theories of underlying psychological unity, survivals, and origins.

Historicists objected to analytical jurisprudence because it pictured isolated individuals connected to one another and the state solely through rights, duties, powers, and contracts, but paid no attention to the culturally created, historically contingent social sources of law and morals. They accused the analytics of postulating an abstract and universal human nature (or—even more absurdly—a nature created and variable at will by each freely choosing subject), instead of one formed by the peculiar historical circumstances and cultural environments of different societies. Holmes seems at first to be operating in this historicist mode in the famous chapter explaining early forms of liability as the product of animism,⁷⁶ the imputing of a human-like intent to things or animals that cause harm.⁷⁷ Yet Holmes quickly develops these examples in an unexpected direction: a unified theory of legal liability in all societies, primitive and modern, sociobiologically rooted in the instinct for revenge.⁷⁸ True, he is able to cite for his theory impeccable social-scientific authority, the anthropologist Tylor and the psychologist Bain;⁷⁹ and might as easily have cited Spencer, who believed no explanation of a social form was complete until traced back to pre-historical physical causation.⁸⁰ But an authentically historicist approach would try to understand why it

74. See *supra* notes 18-25 and accompanying text.

75. See, e.g., COMMON LAW, *supra* note 3, at 28-31.

76. See, e.g., COMMON LAW, *supra* note 3, at 12-13, 30-31.

77. See, e.g., *id.* at 10-12, 31.

78. E.g., *id.* at 6, 31.

79. *Id.* at 13 n.25. The works cited are E. TYLOR, PRIMITIVE CULTURE (1871) and A. BAIN, MENTAL SCIENCE (1868).

80. See, e.g., H. SPENCER, THE STUDY OF SOCIOLOGY (1914).

might be *meaningful* to a particular people to treat trees and oxen ceremonially as human beings. Holmes' approach here does the opposite: His uses of history and anthropology lead him back through sociobiology to as reductionist a psychology as any of the classical ones.⁸¹

Holmes' general method of treating "survivals" is also not fully consistent with the announced theme of the overture. Holmes labeled old forms as mere survivals and made no attempt to give them a modern rationale.⁸² His approach to survivals differed both from that of contemporary anthropologists⁸³ who used them to test the hypothesis of the uniform evolution of societies,⁸⁴ and from twentieth-century legal functionalists who seek to discover through an analysis of the new functions they perform, why the old forms have survived.⁸⁵ The twentieth-century approach is consistent with Holmes' announced major theme and, as we have seen,⁸⁶ Holmes was a forerunner of this approach in his general theory. He failed, however, to follow through on this theory in his actual practice.⁸⁷

In *Commonwealth v. Cleary*,⁸⁸ for example, Holmes' court⁸⁹

81. See, e.g., COMMON LAW, *supra* note 3, at 77-78.

82. See, e.g., *id.* at 161, 180.

83. See, e.g., J. MCCLENNAN, STUDIES IN ANCIENT HISTORY 4 (1st ser. 1886); E. TYLOR, *supra* note 77, at 21.

84. Victorian anthropologists were interested in "survivals," apparently functionless vestiges of ancient practices, because, as evidence of an earlier stage of developed civilization, they could be compared with similar forms from existing "primitive" societies to test the hypothesis of the uniform evolution of societies. See sources cited *supra* note 83.

85. See B. MALINOWSKI, A SCIENTIFIC THEORY OF CULTURE 30-31 (1944); Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 65, 72, 76 (1967).

86. See *supra* notes 14-25 and accompanying text.

87. See Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 VA. L. REV. 975, 1031-35 (1977). Had Holmes followed his own advice, he would surely have had little trouble finding a new ground of policy for employers' liability. Holmes had played a significant role in construing the Employers' Liability Act of 1887. 1887 Mass. Acts ch. 270, §1 (current version at MASS. GEN. LAWS ANN. ch. 153, § 1 (West 1958)). The policy behind the Act was to remove certain bars from an employee's right to sue his employer and thus extend the employer's liability. *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 191, 22 N.E. 766, 766 (1889). Holmes, however, construed the Act narrowly so as to allow employers to raise common law defenses such as assumption of the risk. See *Mellor v. Merchants' Mfg. Co.*, 150 Mass. 362, 23 N.E. 100 (1890). For a discussion of Holmes' treatment of industrial accidents under the Employers' Liability Act of 1887, see Tushnet, *supra*, at 1029-35.

88. 172 Mass. 175, 51 N.E. 746 (1898).

89. Mark Tushnet has shown that Holmes' elevation to the Massachusetts bench made him even more shy about looking for modern policy rationales for old forms. Tushnet, *supra* note 87, at 1017-23.

had to decide whether it was error to admit, against a rape defendant, the victim's complaint, which had been delayed until the morning after the alleged rape. Judge Holmes first pointed out that the "rule that in trials for rape the government may or must prove that the woman concerned made complaint soon after the commission of the offence is a perverted survival of the ancient requirement that she should make hue and cry as a preliminary to bringing her appeal."⁹⁰ Holmes explained how Lord Hale had rejustified the rule as generating useful corroboration of the woman's trial testimony. Hale's "statement of the law has survived as an arbitrary rule in the particular case, notwithstanding the later-developed principles of evidence."⁹¹ Having taken the trouble to give two obsolete rationales for the rule, Holmes declined to argue either for discarding the old rule or for formulating a modern rationale.⁹² He later labeled the rule "a pure survival, having nothing or very little to back it except that the practice is established."⁹³

If Holmes had followed through on his promise to show new policies animating old forms, he would have had to consider modern social history. Instead, Holmes indicates that a rule can best be explained by its "origins," meaning the oldest traces the historian can find of something resembling the rule's present form. This is apparent on the first page of *The Common Law*:

In Massachusetts to-day, while, on the one hand, there are a great many rules which are quite sufficiently accounted for by their manifest good sense, on the other, there are some which can only be understood by reference to the infancy of procedure among the German tribes, or to the social condition of Rome under the Decemvirs.⁹⁴

90. 172 Mass. at 176, 51 N.E. at 746.

91. *Id.* The rule had become an exception to the general evidentiary exclusion of prior consistent statements.

92. *See id.*

93. O.W. HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 210, 227 (1920) (footnote omitted) [hereinafter cited as *Law in Science and Science in Law*]. Holmes contemptuously dismissed the rationale usually postulated that "the outrage is so great that there is a natural presumption that a virtuous woman would disclose it at the first suitable opportunity." *Id.* at 226. Rather, Holmes thought it most unlikely that "a sensitive woman would disclose such a horror." *Id.*

94. COMMON LAW, *supra* note 3, at 5. It is clear Holmes does not mean that some rules may be understood only by reference to their current social functions, for he would not have invoked ancient history. Nor could he have meant that rules may be understood only by an explanation as to why such ancient forms have for so long persisted, for such a meaning would require a showing of how the form had adapted to changing social circumstances. He seems in fact to mean that a rule can best be understood by reference to what lawyers call its "origins,"

The lawyer's hunt for such origins in this sense, if it is not to be the pure antiquarianism that Holmes explicitly disclaims,⁹⁵ must be tied to some theory that makes the origin relevant to the understanding of modern law. One such theory is that the exposure of a weird antique origin disqualifies a rule from contemporary use. Holmes sometimes did use history for this critical purpose, though it was not fully consistent with his general thesis.⁹⁶ A second theory is that the tracing of a rule from its origins to the present shows the logic, or teleology, of its evolutionary development,⁹⁷ the trend-line one can use to argue how it should be developed in the future. Holmes himself used this argument in his description of the rise of the external standard of liability.⁹⁸ But it is hard to see how this inner logic of development theory can be compatible with the major theme that what really determines the content of a rule is shifting and contingent social purposes.

Origin-tracing may also be important to a writer who, in order to justify or condemn some rule in force, asserts that good rules are traceable to one source⁹⁹ and bad rules to another.¹⁰⁰ Although Holmes repeatedly argued for Teutonic over Roman sources for the common law,¹⁰¹ so quaint a political theory of blessed and tainted sources of law seems far removed from Holmes' repeated declarations that law must be judged by how well it meets current needs.¹⁰² One seems reluctantly compelled to conclude that in his origins-hunting Holmes is simply carrying out the genteel antiquarian lawyer's task of tracing the formal antecedents of modern rules, and showing, as indeed it must be said he did show, that he could do it with far greater erudition than any Anglo-American writer had yet brought to that task.

It is not, then, in the historical sections of *The Common Law* that the intellectual payoff from Holmes' pragmatic-historicist perspective is to be sought. It is rather, by a curious irony, in the driest

meaning the oldest traces the historian can find of something resembling its present form.

95. "I shall use the history of our law so far as it is necessary to explain a conception or to interpret a rule, but no further." *Id.* at 6.

96. See *supra* notes 87-93 and accompanying text.

97. This kind of historical argument was exceedingly common in Holmes' day. See, e.g., P. STEIN, *LEGAL EVOLUTION* (1980).

98. See *COMMON LAW*, *supra* note 3, at 63-103.

99. For example, the Teutonic forests, Anglo-Saxon dooms and customs, and anti-monarchical movements.

100. For example, Roman tyrants, Norman jurists and Tudor-Stuart prerogative courts.

101. See *supra* note 10.

102. See, e.g., *COMMON LAW*, *supra* note 3, at 26, 32.

and most abstract sections; those devoted chiefly to categories of analytical jurisprudence, among which his theory of the sovereign and his theory of rights and duties best exemplify Holmes' departure from the classical-legal tradition.

The social theory of the sovereign, which first surfaces in his *American Law Review* articles,¹⁰³ is a brilliant flare that unfortunately fizzles out early. According to Holmes, "by whom a duty is imposed must be of less importance than the definiteness of its expression and the certainty of its being enforced."¹⁰⁴ For example, "[I]f I am invited to a dinner party in London I must appear in evening dress under the penalty of not being asked to similar entertainments if I disobey."¹⁰⁵ In law, however, a judge may disregard a precedent, empty the contents of a statute by construction, or fail to enforce the statute at all.¹⁰⁶

In considering the source from which law is derived, Holmes said: "Any motive for [judicial] action . . . which can be relied upon as likely in the generality of cases to prevail, is worthy of consideration as one of the sources of law."¹⁰⁷ Thus, motives for judicial decisionmaking may derive from custom, mercantile usage, or public policy.¹⁰⁸ Elsewhere, Holmes refers to the source of law, or sovereignty, as "the *defacto* supreme power in the community,"¹⁰⁹ meaning the class or group that is able to have its way against all others. Like his notion of legal rights, Holmes' theory of the sovereign presents itself as a matter of much interest to sociologists or historians, for, given Holmes' theory of sovereignty, an historian can determine who a society's sovereign may be by discovering which commands and rules are habitually obeyed by all of society. Sir Henry Maine later made a similar observation regarding sovereignty;¹¹⁰ Maine, however, had earlier conducted research through his anthropological work on Indian village communities.¹¹¹ Holmes never carried out any kind of research program,¹¹² yet he repeatedly invoked the "actual feelings

103. See, e.g., *Codes, and the Arrangement of the Law*, *supra* note 1, at 4.

104. *Id.* at 4.

105. *Id.*

106. Book Notices, 6 AM. L. REV. 723, 724 (1872) (unsigned but written by Holmes).

107. *Id.*

108. *Id.*; see *The Theory of Torts*, *supra* note 1, at 656.

109. *Summary of Events: The Gas-Stokers' Strike*, 7 AM. L. REV. 582, 583 (1873) (unsigned but written by Holmes).

110. See H. MAINE, LECTURES ON THE EARLY HISTORY OF INSTITUTIONS 342-400 (7th ed. 1914).

111. H. MAINE, VILLAGE—COMMUNITIES IN THE EAST AND WEST (1880).

112. Holmes *may* have justified this decision to himself on the "practical ground" that

and demands of the community"¹¹³ to explain the primary source of law. In his practice, however, Holmes' "communities," whose de facto supreme powers are supposedly sovereign and whose felt necessities determine the legislative content of legal forms,¹¹⁴ are almost wholly featureless and depopulated—they have no classes or guilds or corporations, no cities or villages, no families after the patriarchal family of antiquity, a limited economy, no bureaucracies, armies, or assemblies, barely even a state. Here we witness an expressly social theory of law without a society anywhere in sight.¹¹⁵

One can understand, however, why Holmes did not follow through on his theory of the sovereign in either his scholarly or his judicial practice. Considering the realities behind the power relations underlying legal enactments is hardly an approved technique of legal reasoning and justification. Imagine what would have happened if Holmes had applied his theoretical method to the "prompt reporting as corroboration" rule in the rape case.¹¹⁶ He might possibly have produced the following legal justification for the rule: The modern function of the prompt reporting requirement is simply to make claims of rape hard to prove, as many people believe that vindictive women persecute men with false accusations of rape.¹¹⁷ Whether this

lawyers (as compared with judges) are only interested in cases and courts. *See Codes, and the Arrangement of the Law, supra* note 1, at 4-5. If so, this would have been a strangely narrow and formal view of practicality. In Holmes' time, as in ours, lawyers were concerned about more than the courts' judgments. It was common, for example, for a corporation's chief counsel to double as its public relations office, *see, e.g., R. & M. HIDY, PIONEERING IN BIG BUSINESS, 1882-1911, at 217-18 (1955); G. WHITE, FORMATIVE YEARS IN THE FAR WEST: A HISTORY OF STANDARD OIL CO. OF CALIFORNIA AND PREDECESSORS THROUGH 1919, at 433-59 (1962)*, since adverse publicity meant reform movements and reform movements meant legislative and administrative nuisances for the counsel's office. They knew where they had to look for predictions of the public force, and it was often not in the law reports.

113. COMMON LAW, *supra* note 3, at 36. Tom Grey has pointed out to me that Holmes' idea of "the community" varied both over time and with the context. In the early *American Law Review* articles, the community out of which the common law arises is an organic whole, though legislation is the product of a community split into warring factions and classes. By the time of *The Common Law*, Holmes had assimilated the common law to the model of social struggle. Yet at the same time, as Grey says, Holmes' speeches on the soldier's faith, and his decision to leave all his money to the United States, suggest that in some ways he held on to an idea of community as something more enduring, compelling and spiritual than numerous interest-groups battling for domination. Letter from Thomas C. Grey to Robert W. Gordon (Feb. 17, 1982).

114. *See supra* notes 107-110 and accompanying text.

115. In his gentle criticism of Holmes, Willard Hurst makes a similar point. *See J. HURST, JUSTICE HOLMES ON LEGAL HISTORY 33-34 (1964)*.

116. *Commonwealth v. Cleary*, 172 Mass. 175, 51 N.E. 746 (1898).

117. *See* 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 200, at 683 (3d ed. 1940).

is or is not true, consider that prospective defendants in such cases are frequently the "de facto power in the community" and that their "self-preference" is to reduce the risk of being falsely accused. They may do so by perpetuating a "survival," the prompt reporting requirement, because it is easier and cheaper than legislation and because it conceals their purpose. Now obviously I am not arguing that this is necessarily the true explanation of the survival of the prompt reporting rule. It is, nonetheless, completely consistent with Holmes' basic legal theories, namely the theory of the sovereign and the overture theme, and may help clarify why he so often declined opportunities to put his theories into practice.¹¹⁸

In any event, Holmes' historicizing of the sovereign, brief though it was, represented an important break with the classical-legal tradition. An even more important break with the classical-legal tradition is also apparent in one of his analytical rather than historical modes. The classicists, recall,¹¹⁹ hoped to fix definite boundaries to the spheres of free action of individuals vis-a-vis one another and the state, each sphere ending where the other's began. Thus, for a person to have rights of free action, everyone else had to have duties not to interfere with those rights.¹²⁰ If this program worked out perfectly, every nonconsensual invasion of a sphere of right would be sanctioned as a violation of duty. Holmes seemed to take particular pleasure in attacking this system, by pointing to important categories of immunities and liabilities that did not fit within this scheme: duties without correlative rights;¹²¹ legal sanctions viewed as a "tax on

118. See, e.g., *Vegeahn v. Guntner*, 167 Mass. 92, 104-09, 44 N.E. 1077, 1079-82 (1896) (Holmes, J., dissenting). Holmes expressed his displeasure when the court's opinion was later referred to as pro-labor. Letter from Oliver Wendell Holmes to Sir Frederick Pollock (Feb. [Sept.?] 23, 1902), reprinted in 1 HOLMES-POLLOCK LETTERS, *supra* note 59, at 106; see Tushnet, *supra* note 87, at 1035-40.

Holmes was occasionally willing to produce explanations consistent with his thesis once the "dominant power in the community" had spoken through legislation. See *Commonwealth v. Perry*, 155 Mass. 117, 124-25, 28 N.E. 1126, 1127-28 (1891) (Holmes, J., dissenting). In a series of decisions, however, Holmes restricted the scope of legislation that limited employers' common law defenses to liability, without interpreting the statute as reflecting the growing power of the labor class. Tushnet, *supra* note 87, at 1029-35; see discussion *supra* note 87.

119. See *supra* notes 61-63 and accompanying text.

120. Connoisseurs of this field will recognize that I am oversimplifying here, but I will rapidly become unintelligible if I don't.

121. As Holmes observes:

Legal duties then come before legal rights. To put it more broadly, and avoid the word duty, which is open to objection, the direct working 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 power of removing or enforcing this limitation

conduct" (meaning the law does not forbid you from doing the thing, but merely says that if you do it you must pay the tariff).¹²² Yet another, and perhaps the most important category, is the area of *damnum absque injuria*: "There are certain things which the law allows a man to do, notwithstanding the fact that he foresees that harm to another will follow from them."¹²³

The classical lawyers had recognized the existence of the sphere of *damnum absque injuria* but viewed it as an anomaly. Holmes brought it to the forefront by pointing to areas of social life where people or groups were free to harm others if they were willing to pay the harms tax,¹²⁴ and still other areas where they could harm with impunity.¹²⁵ Economic competition was the example par excellence of activity that was privileged even though it destroyed livelihoods,¹²⁶

which is generally confined to certain other private persons, or, in other words, a right corresponding to the burden, is not a necessary or universal correlative.

COMMON LAW, *supra* note 3, at 173.

122. See Book Notices, *supra* note 106, at 724-25. Much to the distress of his contemporaries, who were somewhat shocked by the amorality of the external standard carried to this length, Holmes was eventually to explain all civil liability as a tax on conduct, for example, finding a contract obligation to be nothing more than a promisor's option to perform or pay damages. COMMON LAW, *supra* note 3, at 235-36; see *The Path of the Law*, *supra* note 22, at 174-75.

123. COMMON LAW, *supra* note 3, at 115. I could not have appreciated the importance of this contribution of Holmes without the aid of a brilliant recent survey, J. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld* (1981) (unpublished manuscript) (copy on file in office of *Hofstra Law Review*). See also Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 *HOFSTRA L. REV.* 711, 751-58 (1980) (discussing Hohfeldian analysis and its lessons).

It is interesting to note that A.V. Dicey, in his otherwise perceptive review of *The Common Law*, overlooked this point. He did see that with the external standard Holmes had set up a system of strict liability for harms, regardless of fault, and that this was as much an important departure from the classical scheme as a more scientific means of implementing the standard. Dicey reconciled the apparent amorality of the external standard with his own notions of morality by pointing out that people often got hurt by actions that were not, judging by the defendant's state of mind, wicked or careless, and that a civilized community would nonetheless try to prevent these acts. Book Review, *The Spectator*, June 3, 1882 (Literary Supplement), at 745, col. 2, 746, col. 1. (I owe this attribution to Dicey to Saul Touster.) I find this to be a rather ironic reading in view of *The Common Law's* famous attempt to defend the status quo of fault-based liability in the fancy new language of external standards. See COMMON LAW, *supra* note 3, at 76-78. The point Dicey missed was that the community might also encourage people to harm each other knowingly, without imposing liability. See *infra* note 126 and accompanying text.

124. See *supra* note 122.

125. See *supra* note 123 and accompanying text.

126. Holmes developed his insight that communities might encourage people to harm each other knowingly and without imposing liability in his brilliant essay, *Privilege, Malice, and Intent*, in COLLECTED LEGAL PAPERS 117 (1920). Since the essay appeared after the labor disturbances and vast merger movements of the 1880's and 90's, its point could be more read-

and Holmes was beginning to argue that labor organization should, in principle, be no different.¹²⁷ What Holmes had done was extract a perception commonplace in one rational system of interpreting the world and transfer it to another: the formal apparatus of analytical jurisprudence.

To some extent he adopted the classical economists' view that the appropriate legal framework of rights and duties was a necessary and sufficient condition for a civil society of market relations that would maximize general welfare, at the necessary cost of driving some individuals to the wall.¹²⁸ There are hints that he also shared with the classical economists the view that the anarchy of market relations had to be, and could be, softened and regulated by morals,¹²⁹ meaning non-legal social sanctions, and that the appropriate moral framework was that of the Victorian middle class, whose morals, inculcated through religion, education, and the family, were slowly becoming the universal morals of society through a process of historical evolution.¹³⁰ Holmes sometimes used Hume's and Smith's term "sympathy"¹³¹ in reference to the softening of market relations to describe modern society's distinctive capacity for altruistic behavior, which comes from the ability to analogize others' sufferings to one's own.¹³² In addition, Holmes often spoke of men's ingrained sociobiological urges, such as the desire to dominate, wreak retribution on criminals, and enjoy exclusive possession, as being at least somewhat tempered by an educated sympathy.¹³³ He believed that individuals, to some extent, took the risk of whatever dangers inhaled in social situations in which they found themselves¹³⁴ and, to

ily appreciated. This essay is the central focus of Horwitz's Northwestern lectures. See M. Horwitz, *supra* note 60.

127. See, e.g., *Vegeahn v. Guntner*, 167 Mass. 92, 105, 44 N.E. 1077, 1080-81 (1896) (Holmes, J., dissenting).

128. See COMMON LAW, *supra* note 3, at 37, 86.

129. See W. SAMUELS, *THE CLASSICAL THEORY OF ECONOMIC POLICY* 21-76 (1966).

130. See S. BEER, *BRITISH POLITICS IN THE COLLECTIVIST AGE* 34-37 (1965); G. RUGGIERO, *HISTORY OF EUROPEAN LIBERALISM* 425 (1927).

131. D. HUME, *A TREATISE OF HUMAN NATURE* 318-20 (2d ed. L.A. Selby-Bigge ed. 1978); A. SMITH, *THE THEORY OF MORAL SENTIMENTS* 3-13 (reprinted ed. 1966) (reprint of new 1853 ed.).

132. Holmes had read the anthropologist Charles Staniland Wake, who, in the characteristic Victorian sociobiological mode, rooted "sympathy" in the maternal instinct and argued, on the basis of abundant anthropological and historical evidence, for its progressive growth in advanced civilizations. See 1 C. WAKE, *THE EVOLUTION OF MORALITY* 411-34 (1878).

133. See *Summary of Events: The Gas-Stokers' Strike*, *supra* note 109, at 583-84.

134. See *Lamson v. American Ax & Tool Co.*, 177 Mass. 144, 58 N.E. 585 (1900); *Chisholm v. New England Tel. & Tel. Co.*, 176 Mass. 125, 57 N.E. 383 (1900); *Campbell v.*

the extent they did not, were simply victims of natural misfortunes. There is a striking passage where Holmes compares the injury of a victim of non-legally liable, as compared with non-morally liable, conduct, to being struck by lightning instead of the agency of another human being.¹³⁵ In these respects, Holmes did not differ from his liberal contemporaries, and yet, to mention a notorious fact, Holmes' chief method of naturalizing the social order was not liberal at all, but Darwinian, as shown in his remarkable comments on "The Gas-Stokers' Strike" in 1873:

The struggle for life, undoubtedly, is constantly putting the interests of men at variance with those of the lower animals. And the struggle does not stop in the ascending scale with the monkeys, but is equally the law of human existence. Outside of legislation this is undeniable. It is mitigated by sympathy, prudence, and all the social and moral qualities. But in the last resort a man rightly prefers his own interest to that of his neighbors. And this is as true in legislation as in any other form of corporate action. All that can be expected from modern improvements is that legislation should easily and quickly, yet not too quickly, modify itself in accordance with the will of the *de facto* supreme power in the community, and that the spread of an educated sympathy should reduce the sacrifice of minorities to a minimum. But whatever body may possess the supreme power for the moment is certain to have interests inconsistent with others which have competed unsuccessfully. The more powerful interests must be more or less reflected in legislation; which, like every other device of man or beast, must tend in the long run to aid the survival of the fittest. The objection to class legislation is not that it favors a class, but either that it fails to benefit the legislators, or that it is dangerous to them because a competing class has gained in power, or that it transcends the limits of self-preference which are imposed by sympathy. Interference with contracts by usury laws and the like is open to the first objection, that it only makes the burden of borrowers heavier. The law brought to bear upon the gas-stokers is perhaps open to the second, that it requires to be backed by a more unquestioned power than is now possessed by the favored class; and some English statutes are also very probably open to the third. But it is no sufficient condemnation of legislation that it favors one class at the expense of another; for much or all legislation does that; and none the less when

Dearborn, 175 Mass. 183, 55 N.E. 1042 (1900); *Quinn v. New York, N.H. & H.R.R.*, 175 Mass. 150, 55 N.E. 891 (1900). I owe these references to Tushnet, *supra* note 87, at 994 n. 103.

135. COMMON LAW, *supra* note 3, at 78.

the *bona fide* object is the greatest good of the greatest number. Why should the greatest number be preferred? Why not the greatest good of the most intelligent and most highly developed? The greatest good of a minority of our generation may be the greatest good of the greatest number in the long run. But if the welfare of all future ages is to be considered, legislation may as well be abandoned for the present. If the welfare of the living majority is paramount, it can only be on the ground that the majority have the power in their hands. The fact is that legislation in this country, as well as elsewhere, is empirical. It is necessarily made a means by which a body, having the power, put burdens which are disagreeable to them on the shoulders of somebody else. Communism would no more get rid of the difficulty than any other system, unless it limited or put a stop to the propagation of the species. And it may be doubted whether that solution would not be as disagreeable as any other.¹³⁶

It has been noted that the only real Social Darwinist on the Court that decided *Lochner v. New York*,¹³⁷ was, in fact, Holmes.¹³⁸ If the Constitution does not embody Herbert Spencer's *Social Statics*,¹³⁹ Holmes' thoughts in *Lochner* surely do.¹⁴⁰ The difference between Holmes' and Spencer's philosophies is that Holmes did not think that the Darwinian struggle comes to an end with the triumph of the middle class or that legislation is exempt from becoming its object. Rather, Holmes believed that the working class is entitled to its triumph if it can get it, and should be able to use legislation as its instrument.¹⁴¹ Although working class legislation may well be futile and self-defeating, it is not for that reason unlawful.

Thus Holmes took a strong stand against the premises of freedom and formal equality that underlay the classical-liberal vision of law¹⁴²—those very premises that his external standard was welcomed as technically executing in modern scientific form. He even put forth the fascinating suggestion that the formal equality assumed by law, and promoted by his external standards, is nothing more than a pragmatic working assumption—like the rules of a game—made for

136. *Summary of Events: The Gas-Stokers' Strike*, *supra* note 109, at 583-84.

137. 198 U.S. 45 (1905).

138. See Wall, *Social Darwinism and Constitutional Law with Special Reference to Lochner v. New York*, 33 ANNALS SCI. 465, 475-76 (1976).

139. H. SPENCER, *SOCIAL STATICS* (1851).

140. This aphorism was supplied by Abe Chayes in conversation.

141. See, e.g., *Lochner v. New York*, 198 U.S. at 75-76 (Holmes, J., dissenting).

142. See COMMON LAW, *supra* note 3, at 165-67.

the limited purpose of facilitating certain kinds of public interactions.¹⁴³ Outside these interactions, the assumption of a formal equality is abandoned for the realistic recognition that the world is actually ruled by force.¹⁴⁴

Holmes elsewhere made clear his belief that formal rules of general application exist more for the promotion of administrative convenience than for the protection of individual autonomy,¹⁴⁵ although his external standard often reflects both the liberalism of much of his jurisprudence and the Darwinism of his historical-social vision. Indeed, the standard almost seems to be an attempt to mediate between them. The external standard, as the average of human conduct established by juries, represents a social consensus, although it sacrifices individuals whose personal qualities fall below it to the collective good. The objective theory of contract formation, for example, results in courts enforcing that which does not always reflect the actual will of the parties involved. It will, however, allow individuals to predict legal consequences more accurately and thus will enable them to plan their conduct in such a way so as to be able, in the future, to carry out their intent effectively. Thus, to the extent that public policy, representing some utilitarian general welfare function or the desires of the currently dominant class, sets the standard of liability, individual freedom and equality will be sacrificed completely, but all for the sake of some higher good.

[W]hen men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.¹⁴⁶

The conflict apparent here between law as an agent of freedom and law as an agent of collective good or natural necessity as deter-

143. "You cannot argue with your neighbor, except on the admission for the moment that he is as wise as you, although you may by no means believe it." *Id.* at 38.

144. *Id.*

145. *See, e.g., id.* at 86-87.

146. *Id.*

mined by forces external to individual human choice¹⁴⁷ is reproduced at another level of Holmes' thought, which deals with the lawmaker, specifically, the judge. The issue here could be phrased thus: Is the judge only an agent of outside wills or forces that effectively determine all judicial decisions, or is the judge a freely choosing person, an autonomous actor in social life? The classical lawyers had, of course, an answer to this conflict inherent in judicial decisionmaking: The judge could participate in society but only to the extent permitted by the formal theory of the separation of powers. The judicial function thus permitted was confined to responding to forces outside: the will of the parties to contracts, for example, or the will of the state as understood and applied by the legal science designed to make them and the boundaries between them clear and unmistakable.¹⁴⁸

Holmes, as I have mentioned,¹⁴⁹ was a pioneer in breaking up this system at the same time that he was engaged in furthering its development. *The Common Law* is a monument to this contradiction. Positivist legal science in one version poses as capable of making predictions from the case law; yet Holmes locates sovereignty in social domination, which is expressed both inside and outside the legal system, saying it is historically contingent and always changing.¹⁵⁰ In another version the predictive value of legal science is based on clear general principles, such as that of liability for harms the average prudent man could have avoided with foreknowledge. Yet even as he enunciates the principle, Holmes exposes the quality that allows it to apply to all cases: The ease with which results may be changed by moving the time frame for defendant's avoidance-choice backwards or forwards.¹⁵¹ Such a move requires continued legislative policy choices, not only in the decision of anomalous or difficult cases but in the decision of the ordinary and simple ones. We have to wonder what Holmes' intent is here. Is his theory of torts meant to be an operational concept for handling cases or predicting results, or is it an heuristic device for demonstrating the impossibility of solving cases without constant political choice? It seems

147. For example, the immanent rationality of the market, sociobiological instincts, and evolutionary processes.

148. See Kennedy, *supra* note 61, at 6-8.

149. See *supra* notes 88-102 and accompanying text.

150. See COMMON LAW, *supra* note 3, at 31-33.

151. A systematic application of this technique to criminal law may be found in Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

to mean all of these things simultaneously.

One sees a similar effect in his chapters on contracts,¹⁵² where, as with torts, Holmes tries both to develop generalizations that will apply to empirical instances and to purge the field of subjective moral constructs, such as the actual will of contracting parties. For example, Holmes held the concept of "promise" to extend beyond those instances where the promisor undertakes to act himself, to cases where the promisor agrees to take the risk of the non-occurrence of events over which he has no control.¹⁵³ Holmes' objective theory of contract liability¹⁵⁴ will prevent a buyer from rescinding a contract for the sale of "the barrels . . . and their contents," even where the seller says the barrels are full of mackerel and they are actually full of salt.¹⁵⁵ The objective theory will permit a buyer's rescission on the ground of fraud, however, where the seller makes innocent false statements of material facts if, under the external standard of knowledge imposed by the community, he should have known they were false, or if they were in fact false.¹⁵⁶ In determining the materiality of a false statement, however, Holmes discards the external standard as useless, for in their contractual relations parties may make anything essential, however trivial the community may find it.¹⁵⁷ Holmes concludes that "after all, the most important element of decision is *not* any technical, or even any general principle of contracts, but a consideration of the nature of the particular transaction as a *practical* matter."¹⁵⁸

In his first articles in the *American Law Review*,¹⁵⁹ Holmes' ambition was to refine the existing categories of analytical jurisprudence with a view toward making them more general and inclusive of legal doctrines. It was in this spirit that he contributed to the emerging classical law of tort his important and majestically general conceptualization of the field of negligence as consisting of the duties of care that everyone owes to everyone else;¹⁶⁰ even then, however,

152. COMMON LAW, *supra* note 3, at 195-264.

153. *Id.* at 234-35.

154. *See supra* note 67 and accompanying text.

155. COMMON LAW, *supra* note 3, at 253.

156. *See id.* at 109, 253-54.

157. *Id.* at 258.

158. *Id.* at 263 (emphasis added). "[When] does a difference in qualities rise to a difference in kind? It is a question for Mr. Darwin to answer." *The Theory of Torts*, *supra* note 1, at 654.

159. *E.g.*, *Codes and the Arrangement of the Law*, *supra* note 1.

160. *The Theory of Torts*, *supra* note 1, at 660-63.

he warned of the next phase of his development: "Law," he said, "is not a science, but is essentially empirical."¹⁶¹ Thus emerged Holmes' scientific-positivist mode, in which he began his quest for generalizations from empirically observed regularities in legal decisionmaking. Yet ultimately this ascent to new heights of generalization simply gave him a splendid vantage point from which to observe that none of them worked, and that he was looking down into a fragmented chaos of particularistic transactions and miscellaneous policies, varying with historically changing realignments of purposes and power relations.

Holmes sometimes used that old chestnut, the idea of the natural, evolutionary adaptiveness of the common law, whereby the judge would unconsciously refashion the law to suit the felt necessities of the time, to mediate the contradictions here exposed. He made clear, however, that unconscious evolution belonged to the prescientific state of law; the new grounds of legal policy should be conscious and articulate:

Since the ancient forms of action have disappeared, a broader treatment of the subject ought to be possible. Ignorance is the best of law reformers. People are glad to discuss a question on general principles, when they have forgotten the special knowledge necessary for technical reasoning. But the present willingness to generalize is founded on more than merely negative grounds. The philosophical habit of the day, the frequency of legislation, and the ease with which the law may be changed to meet the opinions and wishes of the public, all make it natural and unavoidable that judges as well as others should openly discuss the legislative principles upon which their decisions must always rest in the end, and should base their judgments upon broad considerations of policy to which the traditions of the bench would hardly have tolerated a reference fifty years ago.¹⁶²

How are judges to do this without making their own choices? Holmes offers theories throughout *The Common Law* that appear at least to minimize the occasions for exercise of what he calls the "sovereign prerogative of choice."¹⁶³ One theory is that the external standard device will make most cases easy cases for judicial decision; hard cases, where conflicting standards contradict one another, or where the community mood is shifting away from the standard,

161. *Codes, and the Arrangement of the Law*, *supra* note 1, at 4.

162. *COMMON LAW*, *supra* note 3, at 64.

163. *Law in Science and Science in Law*, *supra* note 93, at 239.

Holmes suggests, can be thrown to the jury.¹⁶⁴ Another solution for the judge faced with a hard case is apparent in what may be called the "consensus plateau" theory. Where there are historical periods of struggle for dominance among conflicting interests asserting conflicting views, legal science is impossible because judges must preserve their role as disinterested observers. Some group eventually wins the struggle, however, and its ideas become entrenched. At this point judges can ascertain the opinions of the community and synthesize from them external standards of liability.¹⁶⁵ At other times Holmes appears to rely on the Victorian march of science, whose evolution he hoped might one day produce the ideal scientific policymaker.¹⁶⁶ One can only speculate as to who this ideal policy maker might be. A guardian? A law-and-economics wizard? "[T]he man of statistics and the master of economics"¹⁶⁷ that he promised in a later essay?¹⁶⁸

After making the coherence of his view of lawmaking as science explicitly depend on a social-functional theory of law, a theory of historical direction, and a theory of legislation based either on utilitarian notions of general welfare or Darwinian ones of class struggle, Holmes offers us none of them and gives only the vaguest of aphoristic clues about how to think about them. Holmes' stance at times is simply conservative: To avoid taking sides, the judge should rest on the authority of settled cases simply because they are settled. Arbitrary or functionless survivals though they may be, they protect reliance interests.¹⁶⁹

The main way in which Holmes seems to have resolved the tension between his continually increased recognition of the political role of judges and his desire to maintain their status as disinterested scientists, was to emphasize more and more the determined nature of all social life: "The *necessities* seem to me the real king, and the dreaded monopolist depends for his power on embodying a true prophecy of the economic *must*. But people can say damn Rockefeller when they would not dare to damn the order of the universe or its

164. For the mediating functions of the notion of *hard cases*, see generally Heller, *supra* note 38.

165. O.W. HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 294-95 (1920).

166. See, e.g., *Law in Science and Science in Law*, *supra* note 93, at 238-39.

167. *The Path of the Law*, *supra* note 22, at 187.

168. *Id.*

169. See *Law in Science and Science in Law*, *supra* note 93, at 239.

Author."¹⁷⁰

I have criticized Holmes' inconsistencies in *The Common Law* and his failure to offer a means by which we may reconcile them. Perhaps I have been somewhat ungracious since his book is the occasion for this piece, in making him, in a sense, my host and me his parasite. I am reminded of the occasion when Holmes as a young man showed Emerson a quite critical essay Holmes had written about Plato, and Emerson said, "[W]hen you strike at a king, you must *kill* him."¹⁷¹ I, however, have no wish to try to kill *The Common Law*, which remains incredibly rich in insights.¹⁷² It is simply because Holmes saw so much deeper than others that I expect more of him and find his persistent reluctance to develop those insights harder to forgive. What I can admire in Holmes the theorist—of course this says nothing about Holmes the judge—is his deft dissection of classical conceptualism, his Nietzschean insight into the power relations underlying systems of rights and morals, his recognition of the historical and social contingency of legal rules, and most of all his aspirations for theory grounded in cosmopolitan historical learning and intended to treat the law as a cultural expression of the felt necessities, power struggles, and ideals of actual human beings in social life. Yet, though we may admire and here celebrate Holmes' aspirations, credit for their achievement in his time belongs, I think, more appropriately to others.¹⁷³

170. Letter from Oliver Wendell Holmes to Franklin Ford (Apr. 26, 1907) (Holmes Manuscripts, Harvard Law School Archives) (first emphasis added) (copy on file in office of *Hofstra Law Review*).

171. Quoted in 1 M. HOWE, *supra* note 2, at 54 (1957) (emphasis in original) (footnote omitted).

172. But I must say that outside the famous coloratura passages Holmes' insights require much patience to be noticed.

173. To Marx and Weber, for example, or to Maine and Jhering, Mommsen, Gierke, or Maitland.