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## HOLMES A HUNDRED YEARS AGO: *THE COMMON LAW AND LEGAL THEORY*\*

*Saul Touster\*\**

*Only when you have worked alone—  
when you have felt around you a  
black gulf of solitude more isolating  
than that which surrounds the dying  
man, and in hope and in despair have  
trusted to your own unshaken will—  
then only will you have achieved.<sup>1</sup>*

*Oliver Wendell Holmes, Jr.*

*Already, people's acquaintance with  
suffering had dropped off very much;  
and as a consequence, that unlovely  
hardness, by which our times are so  
contrasted with those that immediately  
preceded them, had already set in, and  
inclined people to relish a ruthless  
theory.<sup>2</sup>*

*Charles S. Peirce*

By the time when, a few years ago, the portrait of Justice Oliver Wendell Holmes, Jr. was staring out at us daily from the fifteen-cent maroon postage stamp, his general reputation and his influence on the law were already in a state of decline. As his nineteenth-century daguerrotype features, with white military handlebar mustache and piercing eyes, were effaced by the continuous rise in first-class postage rates, his reputation was suffering comparable erosion. Thus it

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\* An abbreviated version of this article is appearing in *The American Scholar*.

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1. O.W. HOLMES, *The Profession of the Law*, in COLLECTED LEGAL PAPERS 29, 32 (1920).

2. C.S. PEIRCE, *Scientific Metaphysics*, in 6 COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 199 (C. Hartshorne & P. Weiss ed. 1960), quoted in P. WEINER, *EVOLUTION AND THE FOUNDERS OF PRAGMATISM* 3 (1965).

may come to great American heroes to be replaced at the rate of inflation. But one would expect, in each case, that some group of specialists—in this instance, the academic lawyers—would, like a fan club or religious order, attempt to keep fresh and alive the reverence, taking every centennial opportunity to recall or restore the hero to his due place.

For Holmes, the once towering figure of “the great dissenter,” the ideal judge in the “liberal” pantheon of the Twenties and Thirties, whom Cardozo described as “the great overlord of the law and its philosophy,”<sup>3</sup> and the Freudian Jerome Frank, in an act of adoration perhaps unequalled in psychoanalytic annals, called “the completely adult jurist,”<sup>4</sup> the years 1981 and 1982 provide centennial occasions for possible restoration. And they do so for the Holmes whose consummate style, as a writer of opinions, letters, and speeches, led Edmund Wilson in 1962—a point of recovery of a reputation already fast waning—to describe him as “perhaps the last Roman”<sup>5</sup> in American history who alone survived the Civil War “to function as a first-rate intellect, to escape the democratic erosion.”<sup>6</sup> By the time Wilson wrote this, however, the image of Holmes’ Roman toughness and vigor had already been watered down by a serial popularization.<sup>7</sup>

It was a hundred years ago, in 1881, that *The Common Law*,<sup>8</sup> Holmes’ “masterpiece,” was published. The following year he was called to the bench. The quotation marks around the word masterpiece stand not for an uncertainty as to the reception of the work by public, bar or intellectual community—it was never quite received as such—but rather for the fact that his later influence and grandeur, as a judge on the United States Supreme Court (after serving twenty

3. Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682, 691 (1931). Cardozo’s article was reprinted as an introduction to a volume honoring Holmes on his 90th birthday. F. FRANKFURTER, *MR. JUSTICE HOLMES AND THE SUPREME COURT* 20 (1st ed. 1931).

4. J. FRANK, *LAW AND THE MODERN MIND* 253 (1930).

5. E. WILSON, *PATRIOTIC GORE* 795 (1962).

6. *Id.* at 782.

7. We saw Holmes first in the Forties as an idealized Yankee from Olympus whose courage, originality, wit and wisdom so overshadowed that of his father—the poet, physician and man of letters, still remembered as the amiable Autocrat of the Breakfast Table—that the six-foot, four-inch son appeared at least eight feet tall to his father’s five-foot five; and then in the Fifties as The Magnificent Yankee, on stage and celluloid, whose crisp, avuncular spirit, heroic survivor of one war, spoke to a generation that had just survived another. See C. BOWEN, *YANKEE FROM OLYMPUS* (1944) (a popularized view of Holmes which was, in fact, a Book-of-the-Month Club selection); E. Lavery, *The Magnificent Yankee* (1945), reprinted in *THE BEST PLAYS OF 1945-46*, at 141 (B. Mantle ed. 1946).

8. O.W. HOLMES, *THE COMMON LAW* (1881).

years on the Massachusetts Supreme Judicial Court) and as a legal theorist, seem to require a reverential treatment of his first work, which he himself offered to greatness. In 1931, when *The Common Law* was fifty and Holmes turning ninety, Holmes hagiography was at its flood, and issues of the Harvard, Yale and Columbia Law Reviews were dedicated to him and his works.<sup>9</sup> It is hard now to appreciate the extent and manner of the reverence shown. One has to read in the period to get the flavor of Felix Frankfurter's call for canonization of Holmes, or Harold Laski's, or Morris Raphael Cohen's, or Jerome Frank's. Frankfurter placed Holmes in a niche with Whitman and Melville,<sup>10</sup> and even pointed to a perhaps higher niche when he suggested that Holmes may have anticipated Freud's theory of the unconscious.<sup>11</sup> Cohen compared him to Einstein and Socrates.<sup>12</sup> Frank found in Holmes the ideal "leader" in the psychological struggle to get "rid of the need for father-authority" and to achieve personal and legal maturity, even without psychoanalysis.<sup>13</sup> And Laski, well, he was patently falsifying when he wrote of the "agony of mind" Holmes suffered in coming to his "ultimate refusal to interfere in the last tragic hours of Sacco and Vanzetti."<sup>14</sup> There isn't a shred of evidence that Holmes suffered any agony at all in this or any other case we know of. He thought their last minute petition had "no shadow of a ground" for intervention.<sup>15</sup> "I could not feel a doubt," wrote Holmes to Laski.<sup>16</sup> "I wrote an opinion on the spot . . ."<sup>17</sup> Petition denied, just as Holmes would have denied Laski's claim that Holmes had a deep "sense of justice," denied with the word Holmes always had ready when there was talk of jus-

9. 31 COLUM. L. REV. 349-67 (1931); 44 HARV. L. REV. 677-827 (1931); 40 YALE L. J. 683-703 (1931).

10. Frankfurter, *The Early Writings of O. W. Holmes, Jr.*, 44 HARV. L. REV. 717, 723 (1931).

11. See F. FRANKFURTER, *MR. JUSTICE HOLMES AND THE SUPREME COURT* 12 (2d ed. 1961).

12. M. COHEN, *THE MEANING OF HUMAN HISTORY* 175 (1947).

13. See J. FRANK, *supra* note 4, at 243-60. Frank's book ends with a chapter on "Getting Rid of the Need for Father-Authority," in which Frank invoked several anti-father father-figures of his own, the leading one being Holmes. *Id.* at 253-60.

14. Laski, *Mr. Justice Holmes: For His Eighty-ninth Birthday*, in *MR. JUSTICE HOLMES* 138, 162 (F. Frankfurter ed. 1931).

15. Letter from Oliver Wendell Holmes to Harold J. Laski (Aug. 24, 1927), reprinted in 2 HOLMES-LASKI LETTERS 974, 974 (M. Howe ed. 1953).

16. Letter from Oliver Wendell Holmes to Harold J. Laski (Aug. 18, 1927), reprinted in 2 HOLMES-LASKI LETTERS, *supra* note 15, at 970, 971.

17. Letter from Oliver Wendell Holmes to Harold J. Laski (Sept. 1, 1927), reprinted in 2 HOLMES-LASKI LETTERS, *supra* note 15, at 975, 976.

tice—"humbug"<sup>18</sup>— a term he used to Laski himself in connection with the Sacco-Vanzetti agitation, along with "idiotical,"<sup>19</sup> "twaddle"<sup>20</sup> and "hysterical."<sup>21</sup>

But powerful if not great men inspire strong responses, and matching the devotion shown by his disciples were a series of bitter attacks on Holmes launched by conservative natural law advocates in the Forties who associated Holmes' positivism with the rise of Fascism. His positivist position, which separated law from morals and justified almost any law or policy the majority, as the dominant force in society, might enact, was seen as the legal philosophic underpinning of the claims of the secular state to a power unconstrained by morals, religion, or natural rights. The excesses of the Holmes clerisy were matched by the obtuseness and venom of his newly articulate opponents who found in Nazism a warning of where legal positivism (especially when colored by Holmes' penchant for military hyperbole about a soldier's duty and noble sacrifice) might—no, *did* in their view—lead. Thus, articles appeared such as one in the November, 1945 *American Bar Association Journal* entitled *Hobbes, Holmes, and Hitler*.<sup>22</sup>

To be clear of these excesses one must correct the distortions on both sides. Holmes was neither a humane liberal democrat nor a proto-fascist. Still, if one had to choose, one would have to say that

18. Letter from Oliver Wendell Holmes to Harold J. Laski (Aug. 24, 1927), reprinted in HOLMES-LASKI LETTERS, *supra* note 15, at 974, 974.

19. Letter from Oliver Wendell Holmes to Harold J. Laski (Sept. 1, 1927), reprinted in 2 HOLMES-LASKI LETTERS, *supra* note 15, at 975, 975.

20. Letter from Oliver Wendell Holmes to Harold J. Laski (Nov. 16, 1927), reprinted in 2 HOLMES-LASKI LETTERS, *supra* note 15, at 993, 993.

21. *Id.*

22. Palmer, *Hobbes, Holmes and Hitler*, 31 A.B.A.J. 569 (1945). Ben Palmer contributed several attacks on Holmes in the *A.B.A. Journal*. See Palmer, *Defense Against Leviathan*, 32 A.B.A.J. 328 (1946); Palmer, *Reply to Mr. Charles W. Briggs*, 32 A.B.A.J. 635 (1946); Palmer, *The Totalitarianism of Mr. Justice Holmes: Another Chapter in the Controversy*, 37 A.B.A.J. 809 (1951). For a more weighty and balanced assault, see Lucey, *Natural Law and American Legal Reform: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 GEO. L. J. 493 (1942). For a persuasive defense of Holmes against what was an essentially Catholic natural-law attack, see Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529 (1951) [hereinafter cited as Howe, *Positivism*]. Professor Henry Hart, Jr., responded with an analysis of the complexity of Holmes' positivism. Hart, *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929 (1951). Professor Howe disagreed. Howe, *Holmes' Positivism—A Brief Rejoinder*, 64 HARV. L. REV. 937 (1951). In 1958 this controversy, in its most general jurisprudential terms, reached its highest and most illuminating statement in the famous Hart-Fuller exchange. Compare Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) with Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

Holmes on the Supreme Court did serve well the liberal agenda of the Teens, Twenties and Thirties by upholding eloquently the right of the majority, acting through their legislature, to have their say and way on social legislation free of judicial intervention or veto, although personally he saw most of the legislation and social experiment as misguided humbug.<sup>23</sup>

Also on the liberal side was his Darwinian view on labor unions. Since force and self-preference are the ultimate *ratio* of social life, workers should be able to organize to fight organized capital in the struggle for existence. He didn't think this would get them or the society anywhere, but he thought it the rule of survival that had to be obeyed.<sup>24</sup> In similar fashion, his eloquent but limited free-speech position in seditious advocacy cases, adopted by Holmes while on the Supreme Court, was justified on two grounds: that such ideas were entitled to compete in "the market" where "time has upset many fighting faiths";<sup>25</sup> and that the ideas were in any event puny and ignorant, and thus hardly dangerous.<sup>26</sup> On the other side of the Janus-face, that of the proto-fascist, there is less substantive support. Of course, one may be troubled by the military rhetoric of his speeches, and the hyperbole of his jurisprudence as he postulates that all social life rests on the death of others, or advises us to view the law as the bad man does so as to determine exactly where its sanctions lie. When his rhetoric was in the service of deeply held personal views on the genetic improvement of the race, he could erupt into a black eloquence, as he did in at least one case, *Buck v. Bell*.<sup>27</sup> "Three generations of imbeciles are enough," said Holmes in upholding a Virginia law permitting the sterilization of a feeble-minded eighteen year-old woman who was the daughter of a feeble-minded mother and who had had a feeble-minded child:

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is

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23. Holmes indeed feared that "[s]ome kind of despotism is at the bottom of the seeking for change." Letter from Oliver Wendell Holmes to Harold J. Laski (May 12, 1927), reprinted in 2 HOLMES-LASKI LETTERS, *supra* note 15, at 941, 942.

24. "I always have said that the rights of a given crowd are what they will fight for." Letter from Oliver Wendell Holmes to Harold J. Laski (July 23, 1925), reprinted in 1 HOLMES-LASKI LETTERS, *supra* note 15, at 761, 762.

25. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

26. *Id.* at 629 (Holmes, J., dissenting).

27. 274 U.S. 200 (1927).

broad enough to cover cutting the Fallopian tubes.<sup>28</sup>

But we can hardly lay the burden of twentieth-century enormities on a nineteenth-century judicial philosopher who wanted to let the people and their legislators have their say. Still, it is the intensity of Holmes' language that chills us: language that was already modified, at the insistence of his brethren, from an even more brutal original draft.<sup>29</sup>

But to avoid the backwash of these old controversies, we should turn to the more scholarly and thoughtful reappraisals of Holmes. In 1957 the first volume of Mark Howe's projected full-scale biography of Holmes was published—*Justice Oliver Wendell Holmes: The Shaping Years (1841-1870)*<sup>30</sup>—in which the shaping force of the Civil War was clearly delineated. Howe had previously tried to restore some perspective to the Holmes controversy after World War Two by viewing Holmes' positivism as a rejection of nineteenth-century idealism.<sup>31</sup> He saw Holmes' skepticism as an outcome of his bitter battle experiences in the Civil War,<sup>32</sup> a perspective taken up by Edmund Wilson in 1962.<sup>33</sup> In 1963 Howe's second volume, *Justice Oliver Wendell Holmes: The Proving Years (1870-1882)*,<sup>34</sup> came out: a masterful study of the nineteenth-century intellectual and cultural forces that formed Holmes' mind as a philosopher-scholar in the law and determined the shape and substance of *The Common Law*. That year also saw the publication of Howe's new edition of

28. *Id.* at 207.

29. "I am amused," wrote Holmes to Laski about his opinion, at some of the rhetorical changes suggested, when I purposely used short and rather brutal words for an antithesis [to] polysyllables that made them mad. I am pretty accommodating in cutting out even thought that I think important, but a man must be allowed his own style. . . . However, sooner or later one gets a chance to say what one thinks.

Letter from Oliver Wendell Holmes to Harold J. Laski (April 29, 1927), reprinted in 2 HOLMES-LASKI LETTERS, *supra* note 15, at 938, 939. Chief Justice Taft, in assigning the opinion to Holmes, made several precautionary points whereby Holmes might "lessen the shock that many feel over such a remedy." Letter from Chief Justice Taft to Oliver Wendell Holmes (April 23, 1927). It is not known how much of the original draft was changed. One thing we do know is that Taft made several suggestions to ameliorate the slip opinion Holmes circulated to his brethren, one of which Holmes took. He changed the short and brutal word "kill" to "execute." See O.W. Holmes, Slip Opinions for 1927 (Holmes Archives, Harvard Law School).

30. 1 M. HOWE, JUSTICE OLIVER WENDELL HOLMES (1957).

31. Howe, *Positivism*, *supra* note 22.

32. See, e.g., *id.* at 536.

33. See E. WILSON, *supra* note 5, at 747.

34. 2 M. HOWE, JUSTICE OLIVER WENDELL HOLMES (1963).

*The Common Law*,<sup>35</sup> and so there was a natural occasion for a re-consideration of the man and the book. By this time a sense of the ambiguities and double-facedness of Holmes, what Boorstin called the elusiveness of the man,<sup>36</sup> had already surfaced. Commentary on Howe's work reflected this by more cautious judgments on Holmes and his influence as a legal theorist and judge. One such essay, by the late Yosel Rogat, was a powerfully argued and documented critique of Holmes' work on the Supreme Court in which Holmes' callousness to civil liberties, exemplified by his consistent denial of the constitutional claims of Negroes and aliens, was explored.<sup>37</sup> Rogat's work was important in providing a lasting corrective to the myth of Holmes as one of "the most liberty-alert Justices of all time."<sup>38</sup> Perhaps more important was Rogat's analysis of Holmes' reasoning. He revealed how Holmes—who had magisterially told us "[t]he life of a law has not been logic: it has been experience"<sup>39</sup>—continuously resorted to a legalistic logic rather than the counsels of human experience in liberty-sensitive matters.<sup>40</sup> By 1965, it was clear that he was no longer the overlord of the law.

One note struck in this commentary, and repeated whenever and wherever Holmes is the subject of attention, concerns Holmes' power as a writer. It is the obligatory cliché—whether one is decrying the cavalier way he treats the facts of a case before him, or heralding him for bringing the clarity of unforgettable epigram to a babel of judges—that Holmes could write like the devil. Indeed, he could.<sup>41</sup> At times, of course, we hear in the remarks of admirers the vulgar tonalities of those who view any inflated rhetoric as "poetry." But this may be just the surface of a deeper intuition: Language that has mysterious power must derive its power from art. In Holmes' case this is true. *The Common Law*, although a work largely unread in the last few generations, and perhaps never fully read at any time, survives among us as a monument of legal thought mainly by virtue

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35. O.W. HOLMES, *THE COMMON LAW* (M. Howe ed. 1963).

36. Boorstin, *The Elusiveness of Mr. Justice Holmes*, 14 *NEW ENGLAND Q.* 478, 480 (1941). For another early piece touching on the ambiguity of Holmes, see Hamilton, *On Dating Mr. Justice Holmes*, 9 *U. CHI. L. REV.* 1 (1941).

37. Rogat, *Mr. Justice Holmes: A Dissenting Opinion* (pts. 1-2), 15 *STAN. L. REV.* 3, 254 (1962-1963).

38. Justice Jackson's phrase refers to Holmes and Brandeis. Rogat, *supra* note 37, at 4 (quoting *Terminiello v. Chicago*, 337 U.S. 1, 29 (1948) (Jackson, J., dissenting)).

39. O.W. HOLMES, *supra* note 35, at 5.

40. See Rogat, *supra* note 37, at 11-18.

41. "It is arguable that [Holmes'] style was more alive, enjoyable, and immediately effective than that of any other common-law judge." *Id.* at 9 n.31.



of passages that have been continuously quoted.<sup>42</sup> Indeed these passages, which have a compelling power even today, seem to have taken on a life of their own, divorced from the book. They are selectively at the service of the reigning orthodoxy or quite different sides of any number of disputes in legal philosophy. In this sense, they give the work the quality of a commonplace book, if not the Bible it was once thought to be.

But monuments, important as they may be as landmarks that help us place ourselves in the historic landscape, may also serve as walls that block our view of what lay behind. If, as we pursue the tasks of reconsideration, we ask what lay behind *The Common Law*, we will find the answer as much in terms of literary values as in legal or philosophic analysis. We will have to attend to Holmes' language much as we do the poet's or novelist's. We continue to read Burke's *Reflections on the Revolution of France*<sup>43</sup> even though its factual basis has long been proved unsound, because it is essentially a work of the imagination, reflecting the creative engagement of the whole man with his subject and revealing a philosophy of life of lasting interest. We must approach *The Common Law* in the same spirit, as a work representing the person and ideal of the author in struggle with the life of the law, and projecting in subtle and important ways a vision of the lawyer and the scholar in the law. It is by thus taking his language seriously that we will find the sources of his extraordinary and, at times, unfathomable influence in the law, and of the powerful public image he created. We should also find clues to help overcome the continual elusiveness of the man and his enigmatic doubleness: the realist who hated facts; the Puritan who acted the Cavalier (Banish morals from the discourse of the law!); the skeptic who, with contempt for the enthusiasm of do-gooders, was himself an enthusiast of the law; the philosopher who saw his object as the framing of general propositions which, in any event, wouldn't be worth a damn; the aloof aristocrat who, in giving the mob its misguided head, is viewed as humane democrat; in short, the cold, hard man whose favorite word was passion.

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42. E.g., C. GREGORY, H. KALVEN & R. EPSTEIN, *CASES AND MATERIALS ON TORTS* 67-74, 130-31, 205-07 (3d ed. 1977) (quoting O.W. HOLMES, *supra* note 8).

43. E. BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (London 1790).

Although Holmes was used to speaking about being kicked into the law, at times blaming his father, the evidence suggests that he made the choice himself pretty much the way most of us make important choices. These decisions are never easy or simple. There are attractive alternatives, and no choice is so clear-cut as to be unaccompanied by lingering doubts. And when one is young, there is always the anxiety that it is not one's own choice at all but father's, or the world's. A few days after Fort Sumter was fired upon, when Holmes was twenty and still at college, he enlisted and marched off to war voluntarily and with enthusiasm.<sup>44</sup> He was afterwards, however, to transform his experiences, framing as the metaphor of the law's coercive power, and its sacrifice of the individual to society's needs, an entirely different figure: that of conscripts being seized and marched off "with bayonets in their rear, to death."<sup>45</sup> This figure from the early pages of *The Common Law* suggests not so much that Holmes revised in memory the experiences of his life—which he surely did, more than most of us, I think—but that Holmes used those experiences in the deepest ways, much the way an artist does, to give powerful life to his work in the law.

Holmes' struggle with the life of the law, or what might better be called his life *in* the law, can be most usefully explored by looking at the two choices he made that bracket the fifteen years of intellectual and scholarly work between law school and the publication of *The Common Law*. First, there is his choice of law as a calling, and then his choice, after *The Common Law* was completed, to give up a life of scholarship for a judicial career. At the outset, the law's call to him was rather uncertain. A few months after his enlistment, and after he had graduated from Harvard, young Holmes, the Class Poet, wrote in his Class Album: "The tendencies of the family and of myself have a strong natural bent to literature . . . [but if] I survive the war I expect to study law as my profession or at least for a starting point."<sup>46</sup> In the three years of soldiering that followed, young Holmes was, as he put it, "soaked in a sea of death."<sup>47</sup> He was three

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44. 1 M. HOWE, *supra* note 30, at 68-74.

45. O.W. HOLMES, *supra* note 35, at 37.

46. Holmes' entry in Album of the Harvard College Class of 1861 (Harvard Archives), quoted in M. LERNER, *THE MIND AND FAITH OF HOLMES* 8 (1943); see also Fiechter, *The Preparation of an American Aristocrat*, 6 *NEW ENGLAND Q.* 3, 3-5 (1933) (discussing Holmes' aristocratic background and quoting the Holmes album entry).

47. O.W. HOLMES, *Remarks at a Meeting of the Second Army Corps Association* (1903), in *THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES* 158, 159 (M. Howe ed. 1962) [hereinafter cited as *OCCASIONAL SPEECHES*].

times wounded, once left for dead on the battlefield, and once near death from a virulent dysentery. Most of his friends were killed or maimed. He had paid in full what he came to call "the butcher's bill" and left the army before the war was over.<sup>48</sup> His "bent to literature" continued to lead him to poetry but the experiences of war seemed to end the impulse, an ending he marked with a memorial poem to himself and his soldier classmates whom he saw as "all untuned amid the din of battle."<sup>49</sup> We should remember this, for when Holmes did turn to the law after leaving the army it is on the elegaic note that "The cannon's roar" has "stilled the song," and on a stoic note: "We do in silence what the world shall sing."<sup>50</sup>

Holmes' first encounter with the law was at Harvard Law School in what he later described as "a thick fog of details—in a black and frozen night, in which were no flowers, no spring, no easy joys."<sup>51</sup> He was still wrestling with his muse, bemoaning the fact that "truth sifts so slowly from the dust of the law."<sup>52</sup> But the law began to weave its compelling spell. His first moot court excited him, so much that it seemed to agitate a war wound with the prospect of battle where he might "stick the enemy in the guts."<sup>53</sup> He had first framed his choice as between Poetry and Philosophy, and then as between Philosophy and the Law. Philosophy was apparently the middle term, the psychological bridge between Poetry and the Law,<sup>54</sup> and when he crossed that bridge it was "law-law-law," as he put it at the time in a letter to William James.<sup>55</sup> He was reconciled to it for "the simple discipline of the work" and the "increasing conviction" that law might be approached and studied in a philosophic way. And if he looked back at the muse, it was almost with contempt: "If a man chooses a profession he cannot forever content him-

48. See 1 M. HOWE, *supra* note 30, at 169-75.

49. First Triennial Report of the Class of '62, *reprinted in* M. HOWE, *supra* note 30, at 175.

50. *Id.*

51. O.W. HOLMES, *Brown University—Commencement 1897*, in *COLLECTED LEGAL PAPERS*, *supra* note 1, at 164, 164.

52. Letter from Oliver Wendell Holmes to H. H. Brownell (May 9, 1865), *quoted in* M. HOWE, *supra* note 30, at 196.

53. Letter from Oliver Wendell Holmes to Harold J. Laski (Nov. 22, 1917), *reprinted in* 1 HOLMES-LASKI LETTERS, *supra* note 15, at 111, 112.

54. The philosophy motif was put clearly in a letter to Emerson: "[T]he law opens a way to philosophy as well as anything else, if pursued far enough, and I hope to prove it before I die." Letter from Oliver Wendell Holmes to Ralph Waldo Emerson (April 16, 1876), *quoted in* 1 M. HOWE, *supra* note 30, at 203.

55. Letter from Oliver Wendell Holmes to William James (Dec. 15, 1867), *quoted in* R. PERRY, *THE THOUGHT AND CHARACTER OF WILLIAM JAMES* 90 (1954).

self in picking out the plums with fastidious dilettantism and give the rest of the loaf to the poor, but must eat his way manfully through crust and crumb . . . ."<sup>56</sup>

Holmes began his career in the law with a combination of practice and scholarly work, and one can imagine that the practitioner's sense of combat must have fueled the student's aspiration for achievement. One cannot speak of Holmes' decisions to engage in scholarly work—his editing of the *American Law Review*, his early writings in it, or his undertaking the revision of Kent's *Commentaries*<sup>57</sup>—as a separate career choice since such engagement seemed implicit in his original acceptance of the law as worthy of his philosophic ideals. But the way he pursued that scholarly work is another matter. It is at this time, and with this new scholarly pursuit, that the relentless ambition, the hardness and coldness of the man, begin to be seen and commented on. William James would soon find that his warm spiritual and intellectual relation with Holmes had so soured that he could remark on the "cold-blooded, conscious egotism and conceit" by which "[a]ll the noble qualities of Wendell Holmes . . . are poisoned."<sup>58</sup> By the time Holmes had completed his edition of Kent and was embarked on the work leading to *The Common Law*, he had become to James "a powerful battery, formed like a planing machine to gouge a deep self-beneficial groove through life."<sup>59</sup>

I have not intended to dwell on Holmes' failings nor, as one ironic critic of Holmes put it, "to elevate [him] from deity to mortality."<sup>60</sup> Any reader of Mark Howe's volume on the making of *The Common Law* will be familiar with the story of Holmes: his preoccupied, isolating, self-absorbed intellectual work in the law; his driving ambition to do something really "great" before he was forty; and his sacrifice of all else in that cause. One need not rehearse that story to recognize here the image of the lawyer-scholar as grind, or in Holmes' special version which emphasized the manliness of his choice, the lawyer-scholar as lonely soldier in a joyless terrain, excited by the prospect of combat but for whom, in the end, even vic-

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56. Letter from Oliver Wendell Holmes to William James (April 19, 1868), *quoted in* R. PERRY, *supra* note 55, at 92, 92.

57. J. KENT, *COMMENTARIES ON AMERICAN LAW* (12th ed. O.W. Holmes ed. 1896).

58. Letter from William James to Henry James (Oct. 2, 1869), *quoted in* R. PERRY, *supra* note 55, at 115, 115-16.

59. Letter from William James to Henry James (July 5, 1876), *quoted in* R. PERRY, *supra* note 55, at 99, 99.

60. Hamilton, *supra* note 36, at 1.

tory is not so important as the harsh duty he must do. It is only with reference to this commitment of his life in the law that we can understand that when Holmes, some fifteen years later, would describe the Soldier's Faith, he was describing his lawyer's faith as well. "[I]n the midst of doubt," said Holmes,

there is one thing I do not doubt . . . and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the use.<sup>61</sup>

Turning to the text of *The Common Law*, then, we should not be surprised that its terrain reflects that of the inner man. What confronts us, in the main, is the thick fog of details, the black and frozen night, in which a few passages shine forth, moments of heroism, one might say. Those lucid and marvelous periods by which Holmes' inner struggle is transformed into insights about the law are immediately understandable and intensely felt. As for the rest, it is the usual dust of the law that we all know. Why this small measure, we might ask? We recall the broad intellectual culture Holmes brought to the work, his readings in philosophy, anthropology and history, and his effort to bring the law into the mainstream of the intellectual life of the time. Holmes' ambition for *The Common Law* was, indeed, a very high one: to do from the materials of the common law what Sir Henry Maine in his *Ancient Law*<sup>62</sup> had done from the materials of the Roman law twenty years before. Maine's book had traced the evolution of early Western legal institutions by a new historical method and had arrived at several general propositions about how law and its institutions develop. Both the method and the propositions had an extraordinary impact at the time. Maine proposed, for example, that law, in its formal aspects, moves from a period of legal fictions to one of equity or case-law to one of legislation;<sup>63</sup> or, in its substantive aspect, moves from status to contract.<sup>64</sup> Holmes seems to have been determined to do a comparable work of historical analysis for the common law and even went so far as to structure his book chapter by chapter on the model of Maine's work.

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61. O.W. HOLMES, *The Soldier's Faith* (1895), in OCCASIONAL SPEECHES, *supra* note 47, at 73, 76.

62. H. MAINE, *ANCIENT LAW* (Beacon Paperback ed. 1970).

63. *Id.* at 24.

64. *Id.* at 295.

Holmes would apparently go further than Maine by using the new biological and anthropological materials on evolution that the Darwinian revolution in thought was providing. His work would be *scientific* in the broadest sense.

Why, then, the clear, if not always acknowledged, failure of the work? Without really acknowledging the work to be a failure, Mark Howe ascribed Holmes' problems in the book to a mistake of method—that is, using the materials of history to do the work of philosophy<sup>65</sup>—a point which may be more revealing, and damning, than Howe realized. For when history, biology, and anthropology are used to demonstrate a thesis we get not science but the very opposite; and, indeed, Holmes' use of evidence—a melange of materials and references, from diverse periods, used quite a-historically—is the root of the tendentiousness we so often feel in the work. And when we add to this Holmes' view, taken from his contemporary in legal history, Henry Adams, that the origins of Anglo-Saxon legal institutions were to be found in the practices of the Teutonic tribes and not in Roman institutions, a subject Adams may have been a master of but Holmes was not, the work could hardly be rescued from its difficulties.

Given the ambition of the author, the work is a surprise. It is preoccupied with the early common law in its most detailed and picayune aspects. Holmes' attention to early forms of action, the dicta of cases from the Year Books, and narrow readings on points of law—in short, to early cases and the principles derived from them—evokes the hermetic feeling of being *inside* the law at the same time as the author is advising us to look to the forces *outside* the law which give it its shape and substance. In a way, this is an early version of the vice Rogat found in Holmes' Supreme Court opinions on civil liberties.<sup>66</sup> Holmes speaks eloquently of how we must look to experience and yet suffers himself to be confined by the narrow systemic logic of the law. In this, his work in *The Common Law* may be closer to that of Dean Langdell, the founder of the case method of law school study, than anyone would imagine. In 1880, Holmes had called Langdell “the greatest living legal theologian”<sup>67</sup>

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65. See 2 M. HOWE, *supra* note 34, at 135-44.

66. See *supra* text accompanying note 37.

67. Book Notices, 14 AM. L. REV. 233, 234 (March 1880) (reviewing C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (2d. ed. 1879); W. ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT (1879)). The notices were published anonymously, see *infra* note 91, and are reprinted as appendix I to this article. See *infra* pp. 709-11.

and associated his idea of science in the law with "the powers of darkness."<sup>68</sup> It was, therefore, no doubt a painful irony that the most perceptive contemporary review of *The Common Law*—published anonymously, but now known to be the work of A.V. Dicey—spoke of a similar lapse in Holmes. Dicey saw Holmes as dealing "with the texts of the common law in the same way in which speculative but orthodox theologians deal with texts of Scripture."<sup>69</sup>

As for the powers of light, Holmes would obviously associate them with the liberating work of Maine. But Maine is conspicuous by his absence in *The Common Law*, suffering the additional indignity of having his thesis on the movement of the law from status to contract associated in a footnote with Blackstone.<sup>70</sup> But more important is to note what Maine had and Holmes did not: an interest in social structure and a sense of the complexity of society. It is the absence of this interest in social structure, this sense of institutional complexity, that leaves Holmes' work quite barren. Maine did not develop his thesis out of the air, but by an attention to the family as an evolving institution, and its role and function in early Western history. Similarly, we continue to read the great English legal historian Maitland because of his concern for the forces outside the law. His picture of the early sources of criminal law is subtly composed, with shadows and highlights, depicting clan and family relations, compositions of the blood feud (itself a complex of conciliations) and other institutional elements that make Holmes' notion, stated at the beginning of his book, "that the early forms of legal procedure were grounded in vengeance,"<sup>71</sup> appear simple-minded and wrong. In like fashion, we find Holmes' own sweeping thesis that the movement of common law is from subjective, internal, moral standards to objective, external, amoral standards to be unsupported by his own evi-

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68. Letter from Oliver Wendell Holmes to Sir Frederick Pollock (April 10, 1881), reprinted in 1 HOLMES-POLLOCK LETTERS 16, 17 (M. Howe ed. 1961).

69. Book Review, *The Spectator*, June 3, 1882 (Literary Supplement), at 745 col. 2, 746 col. 1 (reviewing O.W. HOLMES, *supra* note 8). The review was published anonymously, see *infra* note 92, and is reprinted as appendix II to this article. See *infra* pp. 712-17.

70. In the chapter on bailment, Holmes considers a very technical point in the history of forms of action—whether one need plead in *assumpsit* in actions on the case against those pursuing what was known as a common calling. This footnote, after citing Year Book cases, reads: "See further, 3 Bl. Comm. 165, where 'the transition from status to contract' will be found to have taken place." O.W. HOLMES, *supra* note 35, at 145 n.53. Not unexpectedly, an examination of Blackstone discloses nothing about a transition from status to contract, only early case materials on *assumpsit* and common callings. See 3 W. BLACKSTONE, COMMENTARIES 165 (Oxford 1768).

71. O.W. HOLMES, *supra* note 35, at 6.

dence, or by his brilliant metaphoric epigrams on animal psychology or biological evolution.<sup>72</sup>

There was another great influence on Holmes, John Austin, and he also is neglected in *The Common Law*. Holmes never treated those central tenets of legal positivism he took from Austin, whether it was to acknowledge, qualify or argue with them; and there were, indeed, many important matters on which Holmes disagreed with Austin. But his main scholarly project in the book, to banish the language and ideas of morality from legal discourse, was essentially an Austinian one.<sup>73</sup> What do we find of Austin? Four or five places where his points on more or less minor legal issues are referred to,<sup>74</sup> three times to show him to have been wrong.<sup>75</sup> Holmes was notorious for not giving credit to his intellectual forbears and for being petty in his insistence on the primacy of his own contributions. This streak of egoism had especially dire consequences for the book. For example, in his first lecture Holmes notes that his "general view of the Common Law" will require that one know what the law "has been, and what it tends to become. We must alternately consult history and

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72. It should also be noted that Maitland was doing his work pretty much at the same time as Holmes was. See, e.g., F. MAITLAND, *The Law of Wales—The Kindred and Blood Feud* (1881), in 1 COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 202 (Fisher ed. 1911) [hereinafter cited as MAITLAND PAPERS]; F. MAITLAND, *The Early History of Malice Aforethought* (1883), in 1 MAITLAND PAPERS, *supra*, at 304. In his piece on malice aforethought, *id.*, Maitland, with his characteristic sense of social structure and historical complexity, demonstrates quite clearly—contrary to Holmes' notions of subjectivity in early law—"the utter incompetence of ancient law to take note of the mental elements of crime." *Id.* at 327. Indeed, Maitland traces a history that goes the other way—from objective external standards to subjective internal ones; that is, from status considerations to those of the individual will or intent. For example, he wrote: "The rank of the slayer, the rank of their respective lords, the sacredness of the day on which the deed was done, the ownership of the place at which the deed was done—these are the facts which our earliest authorities weigh when they mete out punishment; they have little indeed to say of intention or motive." *Id.* Maitland's work, as well as Maine's, still stands up and is a continued source of respect in current legal historical and anthropological literature. For example, Max Gluckman, in his important work *The Ideas in Barotse Jurisprudence*, speaks of his own work as "footnotes to Sir Henry Maine's *Ancient Law*." M. GLUCKMAN, *THE IDEAS IN BAROTSE JURISPRUDENCE* at xvi (1965). He also uses Maitland as still one of the most significant authorities on the status-intent development. *Id.* at 214-19. Indeed Gluckman, who does not use Holmes at all, may be thought to answer Holmes' misguided simplification when he wrote the following: "To understand feuding, we must look at more than vengeance. To grasp how the law regarded intention, we must include in the objective circumstances the social relationships in which injuries were committed." *Id.* at 217.

73. See J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* at xxxix-xl (2d ed. 1861).

74. O.W. HOLMES, *supra* note 35, at 41, 66, 67, 85, 298.

75. See *id.* at 41, 86, 299.



existing theories of legislation.”<sup>76</sup> Holmes thus tells us clearly and well that it is the forces outside the law that determine its growth, but he does not really look to or weigh them. As for theories of legislation, he does not address them: not Bentham, nor Mill, nor the issues raised by Reconstruction or other contemporary social legislation. Theoretical discussion of legislation is limited to the criminal law in its strict sense, and Holmes, in an intellectually disastrous choice, makes the criminal law the model for his theory of liability and this in turn the model for all law. For him, law derives from vengeance; and the ultimate rule and reason of private persons, as well as of society, is “a justifiable self-preference”<sup>77</sup> which expresses itself in force, compelling people to live up to an objective standard of conduct for the good or survival of society.

From this view, surely derived from the ethos of war, the next logical step was a belief that the law is simply the operation of that force in the courts: as Holmes would later say in *The Path of the Law*, “what . . . the courts [will] do in fact.”<sup>78</sup> It is no wonder that his concept of law should be so casebound, so litigation oriented, the result in effect of trials conducted by lawyer-combatants. Where Maine’s vision, and Maitland’s as well, derived from the civil society and is concerned with institutions in all their complexity, Holmes’ vision is narrow, concentrating on conflicts, court cases and litigation. It obscures the various ways society pursues its values or addresses conflict. It is in this sense that I identified Holmes’ Soldier’s Faith with his notion of the lawyer’s. A lawyer’s faith is true and adorable when it leads him to do his duty in a client’s cause—a cause the lawyer, like a good soldier, need not believe in nor understand.

If this were all, we could simply place Holmes’ personal philosophy and those propositions he set out to prove in *The Common Law* in the perspective of the Civil War. What amazes us, however, is how he transformed that war experience into a legal philosophy that seemed to others to be fresh and lifegiving, unconnected with its sources in death and despair. This creative misprision might be ascribed to a confluence of two forces: the artist-like personal struggle in the man; and the surrounding social conditions, which, although he tried to remain oblivious to them, had already marked his

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76. *Id.* at 5.

77. *Id.* at 38.

78. O.W. HOLMES, *The Path of the Law* (1897), in COLLECTED LEGAL PAPERS, *supra* note 1, at 167, 173.

spirit. When Holmes was playing with the notion that vengeance is a prime source of law, federal troops were withdrawing from the South, echoing the end of one vengeance, the North upon the South, and the beginning of another, the whites upon the blacks. When he was saying that the ultimate reason and rule of private persons, as well as society, is "a justifiable self-preference," he found an approving echo in the world of laissez-faire capitalism. And when he was thinking of force and the sacrifice of individuals to the social good, he imagined conscripts being marched off "with bayonets in their rear, to death,"<sup>79</sup> an image vibrant not only with the memories of a war only fifteen years behind, but with the conditions of the near-conscripts serving in the factories of New England. What makes Holmes' style so vivid, so felt, is this relation between his inner world, which cannot be entirely repressed, and an outer world that is receptive because it recognizes in him the child of its times. Once Holmes took his turn down the dark path of the law, I think it no exaggeration to say that when he was talking about law he was talking about war; and when he talked of war he lived it through the images of law, with the soldier, scholar and lawyer superimposed one on another.<sup>80</sup>

If anyone doubts this, let him read Holmes' address on *The Use of Law Schools*, delivered just five years after *The Common Law*, where he speaks of the "little army of specialists" marching forth from the university, among whom are the lawyers, fed on the "manly diet" of the law:

They carry no banners, they beat no drums; but where they are, men learn that bustle and push are not the equals of quiet genius and serene mastery. They compel others who need their help, or who are enlightened by their teaching, to obedience and respect.

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79. O.W. HOLMES, *supra* note 35, at 37.

80. Despite his almost willed isolation from current events, Holmes' reaction to the War was not unlike that of the country generally. The monumental military-industrial "establishment" by which the North won was, after victory, almost immediately dismantled, leaving, it would seem, very little institutional memory. It was as if the War were a job that needed to get done, and could then be walked away from, forgotten for the other jobs that needed doing. Thus, the idea of the "job" may be seen as paradigmatic of the American response to experience, an idea that resonates in Holmes, whose Soldier's Faith may be said to be the credo of the "jobbist." In this regard, Professor White is very perceptive in viewing as jobbist Holmes' approach to rendering judgment on the bench. See White, *The Integrity of Holmes' Jurisprudence*, 10 HOFSTRA L. REV. 633 (1982). But of course, as to the War, Holmes and America had hardly forgotten it; but rather, in trying to, had continued to be marked by it. For a revealing history of this "forgotten war" that so unremittingly endured, see T. LEONARD, *ABOVE THE BATTLE* (1978).

They set the examples themselves; for they furnish in the intellectual world a perfect type of the union of democracy with discipline. They bow to no one who seeks to impose his authority by foreign aid; they hold that science like courage is never beyond the necessity of proof, but must always be ready to prove itself against all challengers. But to one who has shown himself a master, they pay the proud reverence of men who know what valiant combat means, and who reserve the right to combat against their leader even, if he should seem to waver in the service of Truth, their only queen.<sup>81</sup>

The military metaphors that characterized his vision were almost demonstrably enacted by Holmes, finding sympathetic echo in the world. The call to intellectual adventure resonated with that other kind of adventure: turn-of-the century imperialism. It is not strange that Teddy Roosevelt would, in a few years, name Holmes to the Supreme Court as much for his ideological leanings as for his juristic capacities. But real intellectual adventure, real scholarship, requires a communal effort of a special kind: building on the work of past others and contributing to the work of future others. This was hardly for Holmes, whose vision of himself as scholar was that of the isolated thinker. He likened himself to Nansen, the explorer, and, forgetting what an extraordinary group effort Arctic exploration must be, he spoke of the courage one needs to leave one's fellow-adventurers behind, to go forth alone "into a deeper solitude and greater trials."<sup>82</sup> The image is of the lonely soldier for whom survival is all. It is this image, embodied so painfully by Holmes in his book which gives his language its vital quality while at the same time reflecting an over-simplification, the soldier's insensitivity to social complexity.

And yet, despite Holmes' failure to achieve in his book what he set out to do, he did develop a legal theory which, as refined and elaborated on in his later career, was to have a dominant influence, if not *the* dominant influence, on American jurisprudence in the first half of the century. What Holmes did was to set out a theory of the judicial process which recognized that judges in deciding cases played a creative role in laying down the rules by which we are governed. These rules are, as he put it at the outset of the book, the result of value choices that judges make, reflecting "the felt necessities of the time, the prevalent moral and political theories, intuitions

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81. O.W. HOLMES, *The Use of Law Schools* (1866), in COLLECTED LEGAL PAPERS, *supra* note 1, at 35, 38.

82. O.W. HOLMES, *supra* note 51, at 165.

of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men.”<sup>83</sup> Holmes’ work served as a clear division between one set of juridical assumptions and another. The old assumption was that judges “found” the law whose existence preceded any case that came before them, either in the form of custom or in logical inferences which could be drawn from previous cases. Holmes found this idea, that the whole cloth of the law lay, so to speak, on the judge’s bench to be unfolded or rearranged, its patterns implicit in it, only to be discovered, to be hateful. He thus criticized Langdell’s deductive method for concerning itself solely with “*elegantia juris*, or *logical* integrity of the system as a system.”<sup>84</sup> Holmes replaced this with a more inductive method whereby the judge had to test his judicial choices against the social ends and values the legal rules served. The judge could do this creatively by the way he read the prior cases, or interpreted a statute, or even made law more openly in those cases where no law seemed to exist. In the latter instances Holmes saw that the whole cloth of the law had more holes than anyone imagined, despite the pretense of what he would later derogate as the idea of the law as “a brooding omnipresence.” How judges were to reflect social values, or weigh social ends, Holmes did not at this time address; and when he did later, his lack of a sense of social complexity left him suspended in an admonitory posture. Just as he had pointed to forces outside the law but had not himself explored them, he would later point to an unexamined “sci-

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83. O.W. HOLMES, *supra* note 35, at 5. Since I will later be comparing these familiar opening passages of the book with Holmes’ original text of them, *see infra* text accompanying notes 100-11, it would be useful to set them out in full:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.

O.W. HOLMES, *supra* note 35, at 5 (editor’s footnote omitted).

84. Book Notices, *supra* note 67, at 234.

ence" as the solution to all problems, even those of values or ends.<sup>85</sup> The underlying value system of *The Common Law*, however, could probably best be characterized as simply utilitarian. The judge-made law was to serve society's ends much the way Benthamite legislation should,<sup>86</sup> and this assumption underlay Holmes' clear declaration that the judge's decision was "*legislative in its grounds.*"<sup>87</sup> And just as Bentham had tried to make the process of legislation scientific, Holmes tried to make his theory of the judicial process scientific by disassociating the law's commands from a morality that necessarily imported the uncertain grounds of subjectivity and internality. It is here we can discern the roots of his hard-nosed positivism and a realism that relies on a behavioristic model and supports liberal views on social engineering. These tendencies would find full expression in *The Path of the Law*,<sup>88</sup> a short address that is his acknowledged masterpiece in jurisprudence. Indeed, the strongest passages of *The Common Law*, no more than thirty pages, perhaps, can be read as an early draft of *The Path of the Law*.

When Holmes criticized Langdell for "his seemingly exclusive belief in the study of cases," he echoed a warning he had taken from Burke, that the law sharpened the mind by narrowing it. "[A] case lawyer is apt to want breadth, . . ." said Holmes.<sup>89</sup> And yet it was just such concern for cases that led to the want of breadth of *The Common Law*, and to its failings. For again we must take note that

85. O.W. HOLMES, *Law in Science and Science in Law* (1899), in COLLECTED LEGAL PAPERS, *supra* note 1, at 210.

86. See J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 12-13 (J. Burns & H. Hart, eds. 1970) (suggesting scientific calculus to justify legislation).

87. O.W. HOLMES, *supra* note 35, at 31 (emphasis added).

88. O.W. HOLMES, *supra* note 78, at 167.

89. Book Notices, 6 AM. L. REV. 353 (1872) (reviewing C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871)), reprinted in JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 92-94 (H. Shriver ed. 1936) [hereinafter cited as BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS]. The story of Holmes' very unfavorable review of the second edition of Langdell's casebook is told in the text that follows. See *infra* text accompanying notes 98-108. The text of that review is reprinted as appendix I, *infra* pp. 709-11. For the inner voices haunting Holmes as he took up the law, one of which was Burke's, see O.W. HOLMES, *supra* note 51, at 164. After the passage on "the black and frozen night" of the law, he continued:

Voices of authority warned that in the crush of that ice any craft might sink. One heard Burke saying that the law sharpens the mind by narrowing it. One heard in Thackeray of a lawyer bending all the powers of a great mind to a mean profession. One saw that artists and poets shrank from it as from an alien world. One doubted oneself how it could be worthy of the interest of an intelligent mind.

*Id.* at 164-65.

Holmes' theory, although couched in the terms of law—all law—offers, indeed, a very narrow slice of it: it was basically a theory of the judiciary alone, limited to the special conditions of common law development during a period before legislation became the dominant mode of lawmaking. Indeed, it is an irony that this theory of how courts make law should have found its full expression just when, at the end of the nineteenth century, legislation had become the acknowledged and central means by which the state pursued social ends. It is an irony that would be compounded; for just as Holmes would later take a strong position that the courts should defer to the legislature on matters of social policy—the legislature being the truer reflection of the dominant forces in society—his own theory about the active lawmaking role of courts (themselves acting legislatively) would indirectly justify judicial vetoes on social legislation.

Holmes' view of the law as the outcome of social warfare, and of lawsuits as duels fought by lawyer-combatants, may be seen as the underside of the judge's higher role as determiner or reflector of social values. Together, the two sides put lawsuits, and the case opinions by which they were resolved, at the center of attention as the most significant, if not exclusive, source of legal theory. Holmes' pre-occupations with judicial lawmaking could thus find very little favor in England where Parliamentary supremacy was so well established that a legal theory, to carry weight, had to engage the legislative and administrative issues that were the grist of the law-in-action. But this was not Holmes' domain, and so it was only Holmes' speculations on specific doctrines in tort, or contracts, or criminal law that would perturb the British waters. In the United States, however, where judicial supremacy might be postulated by virtue of the constitutional doctrine of judicial review, Holmes' attention to the courts and what they could do might be accepted as almost natural. And this was true as well of Langdell's "scientific" method which directed attention to what the courts did and said in case reports. It may be strange that these two, so apparently different, should find a convergence of emphasis, and so inaugurate a lawyer's jurisprudence which would dominate legal education and legal theory in America for the next century.

This is not the occasion for a full exploration of the relations, personal or philosophic, between Holmes and Langdell, or how their work contributed to the great orthodoxies represented by the case method. Still, to pair the two as I've done, contrary to the received tradition that Holmes was a realist and Langdell a formalist and so represented diametrically opposed modes, requires a little more explanation. I will not go so far as Grant Gilmore whose view, derived from a critical study of the rise and fall of the nineteenth-century formalist theory of contracts, is that "Langdellian jurisprudence and Holmesian jurisprudence were like the parallel lines which have arrived at infinity and have met."<sup>90</sup> But Professor Gilmore has an im-

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90. G. GILMORE, *THE AGES OF AMERICAN LAW* 56 (1977) [hereinafter cited as G. GILMORE, *AGES*]. The work on which this view is based is best expressed in G. GILMORE, *THE DEATH OF CONTRACT* (1974). This view was questioned in a thoughtful review by Morton Horwitz. Horwitz, Book Review, 42 U. CHI. L. REV. 787 (1975). "It would," wrote Horwitz, require a more extensive inquiry to determine whether it is appropriate to link Langdell's formalism with Holmes's objectivism and then, in turn, to saddle Holmes with the uses that Williston made of him. Suffice it to say that Holmes's policy-based objectivism cannot easily be made the equivalent of [their] longing for an apolitical "science of law."

*Id.* at 797. Gilmore came back to his thesis in *The Ages of American Law*, noting that [s]ome reviewers seem to have taken—I would say, mistaken—my discussion as an attack on Holmes. . . . It is surely true that my Holmes has little in common with the Holmes of popular myth and legend. Holmes, to the extent that I can follow the dark outlines of his thought, seems to me to have been both a greater man and a more profound thinker than the mythical Holmes ever was.

G. GILMORE, *AGES*, *supra*, at 127. Morton Horwitz returned to the attack in a review of *The Ages of American Law*. See Horwitz, Book Review, 27 BUFFALO L. REV. 47 (1978). This review repeated an important point—that the determinants of late nineteenth century legal theory are to be found in the social and economic conditions of post-Civil War market capitalism and not in the originating force of either Holmes' or Langdell's theorizing. I take my own work, of which this essay is a part, as standing outside this controversy between Gilmore and Horwitz, but sharing something of the view of each. That is, I link Holmes with Langdell in establishing the case method—that narrow view of law that limited its vision to the judicial process—a method which had its own theoretical power and was, in all likelihood, determined by the conditions and forces Horwitz would have us look to. Consider, for example, the way Langdell and Holmes contribute to a certain amoral ideal of the lawyer, during the period of the rise of the law as a profession. In this context we can value Gilmore's point that "Holmes's accomplishment was to make Langdellianism intellectually respectable." G. GILMORE, *AGES*, *supra*, at 56. Still, the link is a difficult one to maintain over Holmes' long career, where we must deal with his influence (diverging from Langdell among the realists) as well as his works. In this regard, Professor Horwitz, by noting important changes in Holmes' jurisprudence—an early Holmes of *The Common Law* (1881) and a later Holmes of *Privilege, Malice and Intent* (1894) and *The Path of the Law* (1897)—will be making important contributions to the field. For this, however, we must await publication of his recent lectures on Holmes at Northwestern Law School. See generally O.W. HOLMES, *supra* note 35; O.W. HOLMES, *Privilege, Malice, and Intent* (1894), in *COLLECTED LEGAL PAPERS*, *supra* note 1, at 117; O.W. HOLMES, *supra* note 78, at 167.

portant idea by the tail. Though we can't pursue it here, an historical excursion into the years 1880 through 1882, into the making and reception of *The Common Law*, will, I think, take some of the mystery out of the origins of an issue still important to legal theory: the relation between Holmesian and Langdellian thinking. Between those three years two reviews appeared which have strange histories. In 1880 Holmes wrote his now famous anonymous review of Langdell's work in which he called Langdell "perhaps the greatest living legal theologian," a review that would be lost to the Holmes canon for almost eighty years until recovered in 1963 by Mark Howe.<sup>91</sup> In

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91. As I indicate in the text that follows, *see infra* text accompanying notes 100-11, Holmes' review of Langdell is too important to remain neglected. The review is reprinted in its entirety as appendix I, *infra* pp. 709-11. How account for its loss? Most of the responsibility must be traced to Felix Frankfurter. In 1931, as part of a *Harvard Law Review festschrift* commemorating the 50th anniversary of *The Common Law* and in honor of Holmes' 90th birthday, Frankfurter contributed a section on the early writings of Holmes which included reprints of those early writings from the *American Law Review* that Frankfurter thought important and, in an appendix, a bibliography of Holmes' articles and reviews, both signed and unsigned. Frankfurter, *supra* note 10, at 717 (Frankfurter's preface to the section); *id.* at 725-96 (selected reprints of Holmes' early writings); *id.* at 797-98 (appendix I containing bibliography of Holmes' early articles, book reviews, and comments). In his preface to the section, Frankfurter also quoted at length several passages from Holmes' work in the *American Law Review* that later came to be incorporated in *The Common Law*. *E.g.*, *id.* at 719-20 (quoting Holmes, *Common Carriers and the Common Law*, 13 AM. L. REV. 608, 630-31 (1879)). In neither the bibliography, *id.* at 797-98, nor the quoted or reprinted pieces, *id.* at 717-96, is there any entry or reference to Holmes' 1880 review of Langdell's second edition. There is, however, an entry for Holmes' 1871 review of the first edition. *Id.* at 797. Frankfurter's lapse is surprising when we find in the "lost" review the original version of Holmes' most famous statement about the life of the law being not logic but experience. When Harry Shriver in 1936 published Holmes' *Book Notices and Uncollected Letters and Papers* he did not entirely rely on the Frankfurter bibliography. For example, he added to his own more extensive bibliography Holmes' 1872 review of the latter part of Langdell's first edition. Still, no reference was made to the 1880 review. *See* BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS, *supra* note 89, at 253. Holmes biographies were likewise silent about this review, relying on Frankfurter's bibliography. *See* S. BENT, JUSTICE OLIVER WENDELL HOLMES (1932); C. BOWEN, *supra* note 7. It was not until Mark Howe's second volume of his Holmes biography that the critical 1880 review of Langdell appeared and received the consideration it deserved. *See* 2 M. HOWE, *supra* note 34, at 155-57. But the elusiveness of the review persisted, as if Holmes' harsh anonymous view of Langdell defied acknowledgment. In the most extensive Holmes bibliography prepared to date, Henry Shriver's, there is no entry for the 1880 review. *See* H. SHRIVER, WHAT JUSTICE HOLMES WROTE; AND WHAT HAS BEEN WRITTEN ABOUT HIM: A BIBLIOGRAPHY, 1866-1976, at 37-43 (1978) (entries: Unsigned Book Notices; Unsigned Articles). By reprinting the review now, *see infra* pp. 709-11, I would echo Frankfurter's words when he reprinted the early writings: "[Holmes'] analysis deserves wider currency than the seared pages of the *American Law Review* now give it." Frankfurter, *supra* note 10, at 718. I would, as well, hope to cure even if belatedly Frankfurter's lapse. But to do so completely, one should note that Holmes had a brief second ironic go at Langdell six months later, in September 1880, when the appendix to Langdell's casebook appeared. Holmes wrote: "Further study and reflection have more than confirmed the opinion [in our March



it Holmes made a devastating attack not only on Langdell but upon the case method generally. During the years following the "lost" review Holmes would be publicly praising Langdell; so it is not strange that two rather different approaches could be viewed as having common ground. The second mystery concerns an anonymous English review<sup>92</sup> of *The Common Law*, in which Holmes himself would be called a theologian excessively reverential of case law. This review was discussed by Mark Howe who, however, did not know that the review was authored by A.V. Dicey, the distinguished English jurist who could be counted among Holmes' intellectual friends.<sup>93</sup> In telling the brief story of these three years, we will uncover a moment

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number] of the author's ability. It may be desirable, at a proper time, to give some reasons for different conclusions on many essential points; but that time is not the present." Book Notices, 14 AM. L. REV. 666 (1880). That time, presumably, was to be the delivery of the lectures for *The Common Law*.

92. Book Review, *supra* note 69, at 745, col. 2.

93. The basis for identifying the anonymous reviewer as A.V. Dicey, who would become Vinerian Professor of English Law at Oxford the year the review was published, is as follows. Professor Robert H. Tener of the Department of English, University of Calgary, after examining the editorial records of *The Spectator*, notes that Dicey contributed several reviews on law topics, among them the review of "Holmes's *Common Law*, 3 June 1882." See Tener, *The Spectator Records, 1874-1897*, THE VICTORIAN NEWSLETTER, Spring 1960, at 33, 33-36 (No. 17). I was led to Professor Tener and this reference on the basis of a hunch, based on a letter Dicey wrote to Holmes about the newly published *The Common Law*. See Letter from A.V. Dicey to Oliver Wendell Holmes (Jan. 19, 1880) (Holmes-Dicey correspondence, Holmes Archives, Harvard Law School). The letter contained, in mild and embryonic form, the main lines of the *Spectator* critique. There was, as well, the following passage toward the end which provided an ironic clue: "I was very glad to hear of Langdell. Your description of him as a legal theologian is excellent. It is curious that the theology of law seems to me to flourish much more on the other side of the Atlantic than with us." *Id.* From a substantive viewpoint, it is important to note that Dicey's orientation was more sensitive to matters of legislation and was therefore likely to be skeptical of a theology which honored the law only as made, or declared, by judges. See, e.g., A. DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 359-463 (1905). Whether Holmes knew it was Dicey who wrote the review is hard to say. He had, in mild outline, the criticism in Dicey's letter. But it might be that once Dicey had compared him to Maine, all criticism faded from Holmes' mind. Holmes was, at the time, familiar with Dicey's doings, as indicated in his letter to Pollock, who lost out to Dicey in the election to the Vinerian Chair: "I was sorely disturbed when in London [last year], to think that two friends whom I value as I do you and Dicey should find themselves in competition." Letter from Oliver Wendell Holmes to Sir Frederick Pollock (March 25, 1883), reprinted in 1 HOLMES-POLLOCK LETTERS, *supra* note 68, at 19, 20. In one of the inside leaves of Holmes' own copy of *The Common Law* (Treasure Room, Harvard Law School), in which he made corrections, citations and notes, Holmes entered a list of the reviews of the book through 1890. Included among them is the *Spectator* review, without an author noted—although in several other instances the authors are noted. Thus, on this point, of Holmes' knowledge of Dicey's authorship, we must remain in doubt. In view of the interest in both Holmes and Dicey, this review is reprinted as appendix II to this article. See *infra* pp. 712-17.

when, in the midst of writing *The Common Law*, Holmes made a critical intellectual choice leaning toward Langdell and not away from him. It is an important moment, for here Holmes rejected a broad philosophical approach to jurisprudence in favor of a narrow case-oriented one.

The story should begin in 1871, when the first part of Langdell's new casebook on the Law of Contracts appeared and Holmes, as the young editor of the *American Law Review*, commented briefly in an unsigned notice. Holmes commented favorably on "the chronological arrangement" of the cases by which "the growth of a doctrine" could be traced.<sup>94</sup> In 1872, noticing the completed volume, Holmes praised its concern for and use of fundamental legal doctrines instead of popular distinctions. The popular distinctions Holmes referred to were those reflected in merely practical works that arranged the law by such categories as "railroads or telegraphs, or going a step further, as mercantile law, or shipping, or medical jurisprudence," a tendency Holmes was then disparaging as lacking a sound philosophical basis.<sup>95</sup> What Holmes must have liked was Langdell's view that "the number of fundamental legal doctrines is much less than is commonly supposed,"<sup>96</sup> a view resonant with Holmes' own philosophic tendency to look for universal ideas that informed the law and transcended the particularities of its various subject areas. Still, Holmes was worried over Langdell's "seemingly exclusive belief in the study of cases," noting that "[t]he popular prejudice that a case lawyer is apt to want breadth, has something in it, although it is certain that the opposite danger is more to be feared now-a-days in America."<sup>97</sup> Holmes would in the next several years overcome that danger, especially by editing Kent, but whether he would overcome the other, the case-narrowness, remained somewhat of an open question when he was preparing his lectures for *The Common Law*.

That last question came to crisis for Holmes when, in late 1879,

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94. Book Notices, 5 AM. L. REV. 539, 540 (1871) (reviewing C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1870)), reprinted in BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS, *supra* note 89, at 89-91.

95. Book Notices, *supra* note 89, at 353-54, reprinted in BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS, *supra* note 89, at 92-93.

96. Preface to C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1st ed. 1871), quoted in Book Notices, *supra* note 89, at 354, reprinted in BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS, *supra* note 89, at 93.

97. Book Notices, *supra* note 89, at 354, reprinted in BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS, *supra* note 89, at 93-94.

in the midst of his work to reduce to a general theory the variety of diverse specialized matter of the common law, the second edition of Langdell's book came out.<sup>98</sup> By this time, of course, Holmes' policy-oriented view of law had matured, and so we might not expect him to express so benign a view of Langdell as he had shown eight years before. Holmes, no longer an editor of the *American Law Review*, now responded with an anonymous critique of Langdell and of the case method that was devastating.<sup>99</sup> From a publisher's standpoint, the review might have been considered mixed, as it described the work as being "extraordinary in its merits and its limitations." Still, even the praise of the merits was couched in terms that one could only treat as ironic. For example:

No man competent to judge can read a page of it without at once recognizing the hand of a great master. Every line is compact of ingenious and original thought. Decisions are reconciled which those who gave them meant to be opposed, and drawn together by subtle lines which never were dreamed of before Mr. Langdell wrote. It may be said without exaggeration that there cannot be found in the legal literature of this country, such a *tour de force* of patient and profound intellect working out original theory through a mass of detail, an evolving consistency out of what seemed a chaos of conflicting atoms.<sup>100</sup>

This review was accompanied by a favorable review of an English work on contracts by Anson<sup>101</sup> which Holmes praised as being "written by one who is at home with ideas, and who seizes with the readiness of a scholar everything which is in the air." Thus Anson, whose work is described as "remarkably readable" and without pretense,<sup>102</sup> is a model against which Langdell's work will be found to be hermetic, pretentious, or worse. The remaining passages of Holmes' essay contain some of his greatest writing on the law and suggest the heights Holmes could reach when his feelings as well as his mind were fully engaged; indeed they are the Ur-text of the great introductory passages of *The Common Law*. But what should be noted especially is that between this essay of 1880 and the book itself in 1881 Holmes edited out some very substantive ideas about the study of law. That is, Holmes made a choice that must be read as a turn-

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98. C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (2d ed. 1879).

99. Book Notices, *supra* note 67, at 233.

100. *Id.* at 233-34.

101. W. ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACTS (1879).

102. Book Notices, *supra* note 67, at 233.

ing toward Langdell and a case methodology, and away from a philosophic endeavor whereby the postulates of the common law could be critically valued and tested. The matter is important enough to consider at length.

After having "praised" Langdell's work as moving toward "an evolving consistency," Holmes went on:

But in this word "consistency" we touch what some of us at least must deem the weak point in Mr. Langdell's habit of mind. Mr. Langdell's ideal in the law, the end of all his striving, is the *elegantia juris*, or *logical* integrity of the system as a system. He is, perhaps, the greatest living legal theologian. But as a theologian he is less concerned with his postulates than to show that the conclusions from them hang together. A single phrase will illustrate what is meant. "It has been claimed that the purposes of substantial justice and the interests of contracting parties as understood by themselves will be best served by holding &c, . . . and cases have been put to show that the contrary view would produce not only unjust but absurd results. *The true answer to this argument is that it is irrelevant; but*" &c. . . . The reader will perceive that the language is only incidental, but it reveals a mode of thought which becomes conspicuous to a careful student.<sup>103</sup>

For Holmes, at this time, that an argument from justice or reasonableness of consequences could be characterized as "irrelevant" seemed the touchstone of theologic formalism. It obviously aroused his ire.

Lest Langdell be let off, however, with having replicated Blackstone in a new form, with a more or less pragmatic or descriptive development of an internally consistent theory, Holmes then focused his attack on Langdell's claim to science. Langdell, in the preface to his casebook, had claimed that, as a science, law "consists of certain principles or doctrines" and that "all the available material of that science are contained in the printed books,"<sup>104</sup> that is, in reported cases. "If Mr. Langdell could be suspected of ever having troubled himself about Hegel," Holmes continued, "we might call him a Hegelian in disguise, so entirely is he interested in 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>105</sup> One might stop here and wonder whether this

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103. *Id.* at 234 (emphasis in original) (quoting C. LANGDELL, *supra* note 98, at 995-96).

104. C. LANGDELL, *supra* note 98, at viii.

105. Book Notices, *supra* note 67, at 234.

reference to *feelings* was a slip of the pen. One recalls Holmes' consistent efforts to banish subjectivity, motive, morals and feelings from the law. And yet at this moment, in 1879, before *The Common Law* was completed, Holmes seems to be opening the critical frame of inquiry. Feelings are, it would seem, Holmes' shorthand way of referring to justice and reasonableness, as becomes clear in the next passage which will later echo in the famous opening of *The Common Law*. It is important to quote in full, not only to illustrate how great a style Holmes was capable of when he did not disengage feeling from thought, or moral ideas from legal ideas, but to suggest that this original text contains a point of view about the law that unfortunately fades into rhetorical shadows over the next twenty years:

If Mr. Langdell could be suspected of ever having troubled himself about Hegel, we might call him a Hegelian in disguise, so entirely is he interested in 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. The life of the law has not been logic: it has been experience. The seed of every new growth within its sphere has been a felt necessity. The form of continuity has been kept up by reasonings purporting to reduce everything to a logical sequence; but that form is nothing but the evening dress which the new-comer puts on to make itself presentable according to conventional requirements. The important phenomenon is the man underneath it, not the coat; the justice and reasonableness of a decision, not its consistency with previously held views. No one will ever have a truly philosophic mastery over the law who does not habitually consider the forces outside of it which have made it what it is. More than that, he must remember that as it embodies the story of a nation's development through many centuries, the law finds its philosophy not in self-consistency, which it must always fail in so long as it continues to grow, but in history and the nature of human needs. As a branch of anthropology, law is an object of science; the theory of legislation is a scientific study; but the effort to reduce the concrete details of an existing system to the merely logical consequence of simple postulates is always in danger of becoming unscientific, and of leading to a misapprehension of the nature of the problem and the data.<sup>106</sup>

What we must remark here is that Holmes' attack on Langdell's theo-logic was based on Langdell's failure to be concerned with

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106. *Id.* For a comparison of this with the final and more finished version in the opening of *The Common Law*, see *supra* note 83.

"history and the nature of human needs." Indeed, law as a science could not hope to be vital until, "as a branch of anthropology," it attended to these aspects of human experience by which "the feelings . . . shaped the substance of the law."<sup>107</sup> At this moment, Holmes had in hand a project truly inspired by Maine and not Kent, a project which would have required a considerable revision of the course of lectures on which he was then working. It would have required of Holmes, at forty, a turning toward anthropology or economics, toward a recognition of social complexity by which the law's growth could have been critically judged from the outside. The revision Holmes undertook was not to change his approach, however, but to edit his review so that *The Common Law* did not contain any references to feelings or the nature of human needs. That Holmes, thereby, had turned toward Langdell may have been confirmed three months later when he honored the works of the man he privately referred to as representing "the powers of darkness."<sup>108</sup>

At the Harvard Commencement dinner of 1880 Holmes took the occasion to speak about the "great contributions" that had been made in the law in the twenty years since "the first book of Sir Henry Maine was published," and to praise Dean Langdell's contribution as "not the least important of them." In this same speech, Holmes honored "the distinction of the scholar [which] is our only counterpoise to the distinction of wealth" and ended with what might be viewed as an exhortation to self: that against "the cynicism of business" must be recognized "the duty of the scholar [which] is to make poverty respectable."<sup>109</sup> This ambivalence toward Langdell (I won't call it hypocrisy) may well have been a function of Holmes' design to pursue a teaching career at Harvard Law School where Langdell was Dean: a plan which would indeed be broached and successfully carried out after his book came out. Similarly, Holmes was probably struggling over whether a scholarly career was, indeed, right for him. Thus, the remarks at the commencement. But these biographical matters are not as significant as what happened to the Ur-text when it was edited into *The Common Law*, which appeared a year later.

The passages in the book no longer contained any references to

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107. Book Notices, *supra* note 67, at 234.

108. Letter from Oliver Wendell Holmes to Sir Frederick Pollock (Apr. 10, 1881), *supra* note 68, at 17.

109. O.W. HOLMES, *Remarks at the Harvard Commencement Dinner* (1880), in OCCASIONAL SPEECHES, *supra* note 47, at 1, 3.

the “feelings” which Holmes insisted “actually shaped the substance of the law.” And the reference to the justice and reasonableness of a decision, the “man beneath the coat,” was similarly lost. Indeed, there seems to be only one appeal to “the sense of justice” in all of the book, and this is an argument Holmes puts against the state making itself a “mutual insurance company against accidents, and [so to] distribute the burden of its citizens’ mishaps among all its members”.<sup>110</sup> in short, against a non-judicially declared public policy. And the important passage—that an effort such as Langdell’s “to reduce the concrete details of an existing system to the merely logical consequence of simple postulates is always in danger of becoming unscientific, and of leading to a misapprehension of the nature of the problem and the data”—is also gone. Holmes criticized Langdell’s logic for being removed from experience—“history and the nature of human needs”—and for being *within* a closed system, of which Langdell was the great theologian. And yet, was he not flirting with the same vice himself? The case orientation of the book, its ingenious readings of decisions, its neglect of legislation: do not these qualities too often turn Holmes’ analysis and argument into merely logical ones? Indeed, at one point in the book, Holmes confesses to working as a jurist *within* the system rather than a philosopher “who approaches the law from without.” “The business of the jurist,” he wrote, “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.”<sup>111</sup> This sounds like a Langdellian project, very much at odds with the exhortation of the work.

The irony is that Holmes would, in Dicey’s review in *The Spectator*, be compared with Sir Henry Maine at the same time as he is viewed as something of a “theologian” himself, a “case” lawyer with “a religious reverence for the dicta of Westminster Hall.”<sup>112</sup> Although Dicey saw fit to praise this mastery of case law which had led Holmes “to keep his feet fixed on the solid ground of reported legal decision” rather than practicing “jurisprudence in the air,”<sup>113</sup> Holmes’ tendency to confound the “decisions to be found in the year-books . . . with the dictates of right reason, or of expediency”<sup>114</sup> led

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110. O.W. HOLMES, *supra* note 35, at 77.

111. *Id.* at 173.

112. Book Review, *supra* note 69, at 745, col. 2.

113. *Id.* at 746, col. 1.

114. *Id.* at 745, col. 2.

Dicey to a critique of Holmes which may have been prescient:

The plain truth is that our author is too much of an apologist. He hardly distinguishes, in his own mind, between the doctrines of the common law and the dictates of common sense. . . . He farther sometimes writes as though he held that to prove that Savigny's dogmas differed from the doctrines of the common law, was necessarily the same thing as showing that the German jurist had fallen into demonstrable error. Mr. Holmes, in short, deals with the texts of the common law in the same way in which speculative but orthodox theologians deal with texts of Scripture. They devote a great deal of ability to showing that certain doctrines are in themselves true, and at the same time labour, with equal assiduity, to prove that these doctrines may be deduced from, or are consistent with, a mass of texts which, to impartial readers, seem to have but a remote bearing on the matter in hand. The textualist, whether he be a jurist or a theologian, is apt to make his readers feel that the force of a sound and sensible theory is weakened rather than strengthened by the mass of authorities quoted in its support.<sup>115</sup>

Mark Howe in noting the use of the same epithet Holmes had used for Langdell—theologian—suggests that “the reviewer had one fault of theologians in mind, and Holmes another.” Howe commented:

It was not Langdell's respect for reported decisions of the courts of common law which led Holmes to look upon the Dean's proclivity as theological. It was rather his tendency to subordinate considerations of convenience and expediency to the rule of logic which led Holmes to label him a theologian in the law.<sup>116</sup>

But to distinguish the faults in this way is to ignore the natural tendency of theology, whether scriptural (in the case of Holmes) or sophisticated (in the case of Langdell) to live within a common church and embrace a common underlying orthodoxy. There would be much in the development of Holmes' jurisprudence in later years to distinguish him from Langdell; at the time of *The Common Law*, however, Holmes, by his preoccupation with case analysis *within* the system had—to use the terms he used on Langdell—been led “to a misapprehension of the nature of the problem and the data.”

Contrary to his own declared intentions, and at odds with his own understanding, Holmes had turned away from “history and the

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115. *Id.*

116. 2 M. HOWE, *supra* note 34, at 250-51.



nature of human needs." His work on *The Common Law* had not, in the end, looked outside the system, although the rhetorical advice to do so was powerful enough to provide, if not the influence of example, then that of direction.

At the beginning of this paper, I suggested that Holmes' vision of himself as scholar-adventurer had a kind of isolating egoism about it. In a way, this may be the internal correlative of the turn of his work to a within-the-system analysis. It may also reflect a larger turn of spirit. Just as he gave up art for philosophy, he now seems to be giving up philosophy for law. This movement may be read into the passage on the work of the jurist quoted above. In a discussion on Roman law sources in the chapter on Possession, Holmes pushes his objectivist theories, as follows:

Let us begin afresh. Legal duties are logically antecedent to legal rights. What may be their relation 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.<sup>117</sup>

With this banishing of moral ideas from the realm of the jurist, Holmes has rejected the values he espoused when he attacked Langdell's conclusion that arguments from justice or consequences were irrelevant. He has also set down a narrow program for the jurist, who no longer is to do the work of the philosopher. He would follow this program only too well during the next twenty years when, on the Massachusetts bench, he would exhibit too much of that "want of breadth of the case lawyer" he had once so feared.<sup>118</sup>

With this reading of *The Common Law*, we have gone far toward answering the question raised by his next important life choice: Why, less than a year after accepting an endowed chair at Harvard Law School, where Langdell was dean, did Holmes give up the pro-

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117. O. W. HOLMES, *supra* note 35, at 173.

118. See White, *supra* note 80, at 642-53.

fessorship his book had earned him to accept an appointment to the bench? When we review his reasons, we will find that Holmes was motivated not by any sense of going on with creative work in the law but by a continuation of his inward turn, toward a narrowing of his horizons in the law, toward a "job."

Holmes explained his choice in a letter to James Bryce written within a few weeks of his decision:

My motives so far as I could disentangle them in half an hour, which is all the time I had to decide the momentous question, were, in a word, that I thought the chance to gain an all round experience of the law not be neglected, and especially that I did not think one could without moral loss decline any share in the practical struggle of life which naturally offered itself and for which he believed himself fitted. I had already realized at Cambridge that the field for generalization inside the body of the law was small and that the day would soon come when one felt that the only remaining problems were of detail and that as a philosopher he must go over into other fields—whether of ethics—theory of legislation—political economy or anthropology-history &c. depending on the individual, but that somehow he must extend his range. I was however as happy as a man could desire but I felt that if I declined the struggle offered me I should never be so happy again—I should feel that I had chosen the less manly course.<sup>119</sup>

It is difficult to accept the cant about "the struggle offered" and "the less manly course" from a man who was to remove himself from struggles, whether those of engaged passion or intellectual risk, to sit aloof, above even the controversies coming before him. The important point, rather, is the recognition that if he was to carry out the task he had set for the philosopher in the law, if not for himself—in "history and the nature of human needs"—he had to "go over into other fields" and "extend his range" and this he was unwilling or unable to do. One might ask: Why not go over into other fields? Would that have been less manly? Had Charles Peirce or William James or Thorstein Veblen or John Dewey taken the less manly course? Why raise a personal inclination to the level of virtue?

Almost forty years later he wrote Laski that:

the choice seemed to be between applying one's theories to practice and details or going into another field—and apart from natural

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119. Letter from Oliver Wendell Holmes to James Bryce (Dec. 31, 1882), *quoted in* 2 M. HOWE, *supra* note 34, at 280-81.

fear and the need of making a living I reasoned (at 40) that it would take another ten years to master a new subject and that I couldn't bargain that my mind should remain suggestive at that age.<sup>120</sup>

This is a far cry from the manly course, and as for his "living," his salary and tenure as professor were ample and secure. But of course once this note—from the "untuned lyre" of the desolate veteran—is sounded it resounds through a lifetime. And when we read of what the Supreme Court Justice of seventy-two says in retrospect about his short academic career, we wonder about the preoccupation with "manliness":

[A]cademic life is but half life—it is withdrawal from the fight in order to utter smart things that cost you nothing except the thinking them from a cloister. . . . Business in the world is unhappy, often seems mean, and always challenges your power to idealize the brute fact—but it hardens the fibre and I think is more likely to make more of a man of one who turns it to success.<sup>121</sup>

Perhaps the explanation lies in Holmes' isolation. What sustenance of spirit could he have gotten from the drama of ideas when he was, through temperament, withdrawn from the world and, by commitment to the law, isolated from men like William James who might have provided it? Could it be that Holmes, despite his skeptical spirit and his isolation from the affairs of the period, was deeply affected by the dynamism of expanding American capitalism, to make and to do, and so committed himself to the more worldly pursuit? He was, perhaps, a more representative man than he would have us believe. If so, then we might say that the Puritan sensibility that kept him from the luxury of the reflective life might also have prevented him from pursuing the coarse amoral life of business whose "cynicism" needed the counterpoise of scholarly idealism. Becoming a judge was probably the right choice, the perfect resolution. In it he could feel part of that making and doing, the *jobs* of the post-Civil War period, by which men could forget their idealism and the painful wounds it had earned them.

In this sense, Holmes' move to the bench may be read more as withdrawal than as engagement. Recall that after his three years of

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120. Letter from Oliver Wendell Holmes to Harold J. Laski (Nov. 17, 1920), *reprinted in* 1 HOLMES-LASKI LETTERS, *supra* note 15, at 290, 291.

121. Letter from Oliver Wendell Holmes to Felix Frankfurter (July 15, 1913), *quoted in* 2 M. HOWE, *supra* note 34, at 282.

soldiering, Holmes had left the army before the war had ended, having paid "the butcher's bill." One can read his choice of the bench as a comparable retreat from the warrior's role. On the bench he would be above the battle, and he might be renewed in his perhaps true vocation, not as combatant but as spectator to the battles fought before him. Indeed, it is the spectator motif which must dominate any portrait of Holmes.<sup>122</sup> He was so far removed from the world that he could report, with a contemptuous pride, that he never read newspapers. The ordinary and day-to-day hardly concerned the man who would acknowledge only the Cosmos. His distance from the ordinary affairs of humankind could be measured on the bench by his growing distance from anything that might be described as art. Five years as a judge and he could find no better way to testify to his life of the law than to diminish his once honored muse: "how small a thing seem the novelists' tales . . . how pale a phantom even the Circe of poetry." Even philosophy and anthropology are set aside as he stands before his mistress, the Law, as one of the "actors in a drama of which she is the providence and overruling power."<sup>123</sup>

Might such a disengagement from scholarship reflect Holmes' sense that he had not done in *The Common Law* what he had set out to do? Had he been disappointed by the reception of the book? Had he taken to heart Dicey's anonymous review? Perhaps he realized, as Mark Howe suspected, "that his greatest gifts and most ardent tastes were for clarifying *aperçus*, rather than for systematic thought."<sup>124</sup> We must agree. Given his virtues as a stylist, perhaps it is best to view his choice of the judge's over the scholar's vocation as the choice of one genre, the judicial opinion, over another, the book or essay. For, after all, he was himself an utterer of "smart things" and instead of research and facts, the other genres he cultivated—speeches and letters—allowed him public and private play for his brilliant sallies as much as his opinions did. In one sense, the personal, he had put poetry into the law; in another, in the barren philosophic landscape he left, he had taken it out.

In the end, neither the grandeur of his language, nor the bite of his wit, should blind us to the vision of the law that has been his

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122. For the sources of the spectator posture in Holmes, see my article on his experiences in the Civil War. Touster, *In Search of Holmes from Within*, 18 VAND. L. REV. 437 (1965). For this aspect of Holmes on the Supreme Court, see Rogat, *Mr. Justice Holmes: The Judge as Spectator*, 31 U. CHI. L. REV. 213 (1964).

123. O.W. HOLMES, *supra* note 51, at 98.

124. 2 M. HOWE, *supra* note 34, at 281.

lasting legacy. Shaped by a warrior's perspective, it assumes a battlefield and not a city, a martial condition of stark alternatives and not the gradings and shadows that normally surround us on the human journey. It gave us a jurisprudence of lawyering narrowly reflecting an adversarial ideal, and a philosophy that came so close to saying that might made right that only the scandal of the thought kept him and his trembling admirers from the brink. No matter how we admire the human struggle in Holmes and the way he transformed his experience of war into something close to art, no matter how we respect a philosophy so deeply earned and so honorably declared, and no matter what changes came in the years ahead, we still must ask: At what cost to the law has his influence been felt these hundred years?

## APPENDIX I

Holmes' review of Langdell's second edition of his Casebook on Contracts, originally published anonymously in 14 *American Law Review* 233-35 (March 1880).

## BOOK NOTICES

*A Selection of Cases on the Law of Contracts, with a Summary of the Topics covered by the Cases.* By C. C. LANDGELL, Dane Professor of Law in Harvard University. Prepared for use as a Textbook in Harvard Law School. Second Edition. Boston: Little, Brown, & Co. 1879. Two vols. 8vo. pp. xviii, 1116.

*Principles of the English Law of Contract.* By Sir WILLIAM R. ANSON, Bart., M.A., B.C.L., of the Inner Temple, Barrister-at-Law, Vinerian Reader of English Law, Fellow of All Souls' College, Oxford. Oxford, at the Clarendon Press. 1897. One vol. 12mo. pp. xxxii, 358.

It is a circumstance of note in the history of the English law of contract that two such books as these should fall to be chronicled at the same time. The little volume from the Clarendon Press, which would almost tempt a layman to read law by its attractive form, will delight lawyers by the merits of its style and matter. It is written by one who is at home with ideas, and who seizes with the readiness of a scholar every thing which is in the air. It is remarkably readable, its illustrations are new and most widely chosen, and, without pretending to be a work of great originality, it gives proof of the writer's fresh and apprehensive intelligence on every page. It is also a model of proportion. Most works of the sort which rise above mediocrity show a bias in the direction of some particular doctrine, and develop that at the expense of others equally important. But here every thing receives its due and orderly attention, and every thing is seen in the clearest light.

Without holding one's self ready or bound to prove the proposition, one may suspect that the work owes some of its more penetrating qualities to Mr. Langdell's Appendix attached to the first edition of his Cases on Contracts. There was a deal of suggestive matter hidden away there in a few lines, sometimes, to be sure, almost as latent as the good law which Lord Coke tells us is expressed by Littleton's "&c.," but nevertheless to be found by the careful student. And now Mr. Langdell has published a second edition, and the brief index of the first had grown into a series of systematic discussions.

It is hard to know where to begin in dealing with this extraordi-

nary production,—equally extraordinary in its merits and its limitations. No man competent to judge can read a page of it without once recognizing the hand of a great master. Every line is compact of ingenious and original thought. Decisions are reconciled which those who gave them meant to be opposed, and drawn together by subtle lines, which never were dreamed of before Mr. Langdell wrote. It may be said without exaggeration that there cannot be found in the legal literature of this country, such a *tour de force* of patient and profound intellect working out original theory through a mass of detail, and evolving consistency out of what seemed a chaos of conflicting atoms. But in this word “consistency” we touch what some of us at least must deem the weak point in Mr. Langdell’s habit of mind. Mr. Langdell’s ideal in the law, the end of all his striving, is the *elegantia juris*, or *logical* integrity of the system as a system. He is, perhaps, the greatest living legal theologian. But as a theologian he is less concerned with his postulates than to show that the conclusions from them hang together. A single phrase will illustrate what is meant. “It has been claimed that the purposes of substantial justice and the interests of contracting parties as understood by themselves will be best served by holding &c., . . . and cases have been put to show that the contrary view would produce not only unjust but absurd results. *The true answer to this argument is that it is irrelevant; but*” &c. (pp. 995, 996, pl. 15). The reader will perceive that the language is only incidental, but it reveals a mode of thought which becomes conspicuous to a careful student.

If Mr. Langdell could be suspected of ever having troubled himself about Hegel, we might call him a Hegelian in disguise, so entirely is he interested in 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. The life of the law has not been logic: it has been experience. The seed of every new growth within its sphere has been a felt necessity. The form of continuity has been kept up by reasoning purporting to reduce every thing to a logical sequence; but that form is nothing but the evening dress which the new-comer puts on to make itself presentable according to conventional requirements. The important phenomenon is the man underneath it, not the coat; the justice and reasonableness of a decision, not its consistency with previously held views. No one will ever have a truly philosophic mastery over the law who does not habitually consider the forces outside of it which have made it what it is. More than that, he must remember that as it embodies the

story of a nation's development through many centuries, the law finds its philosophy not in self-consistency, which it must always fail in so long as it continues to grow, but in history and the nature of human needs. As a branch of anthropology, law is an object of science; the theory of legislation is a scientific study; but the effort to reduce the concrete details of an existing system to the merely logical consequence of simple postulates is always in danger of becoming unscientific, and of leading to a misapprehension of the nature of the problem and the data.

The preceding criticism is addressed to the ideal of the final methods of legal reasoning which this Summary seems to disclose. But it is to be remembered that the book is published for use at a law school, and that for that purpose dogmatic teaching is a necessity, if any thing is to be taught within the limited time of a student's course. A professor must start with a system as an arbitrary fact, and the most which can be hoped for is to make the student see how it hangs together, and thus to send him into practice with something more than a rag-bag of details. For this purpose it is believed that Mr. Langdell's teachings, published and unpublished, have been of unequalled value.

Not only for this purpose, however, for even if Mr. Langdell's results should hereafter be overruled in particular cases, they will have done very nearly as much to advance the law as if they had been adopted. For they must be either adopted or refuted, they cannot be passed by. And a conclusion based upon the refutation of its opposite is very different from the same opinion based on ignorance of the arguments by which such an opposite could be maintained.



## APPENDIX II

Review of Holmes' *The Common Law*, by A.V. Dicey, originally published anonymously in *The Spectator, Literary Supplement*, June 3, 1882, at 745-47.

## HOLMES'S "COMMON LAW."

MR. HOLMES'S book is the most original work of legal speculation which has appeared in English since the publication of Sir Henry Maine's *Ancient Law*. The feature which gives this special originality to Mr. Holmes's *Common Law* is, that the treatise exhibits in combination two different methods of treating legal problems. One school, of whom Sir Henry Maine is the most brilliant English example, have examined legal institutions and conceptions exclusively with a view to their historical development. Another school, deriving their parentage from Bentham, of whom Professor Holland may be taken as the ablest living representative, have treated law almost entirely as a matter of logic and analysis. It would be the idlest folly to underrate the vastness of the debt owed by students, no less to the historical than to the analytical school of jurists, but it is impossible for any candid critic to deny that jurisprudence has suffered much, from the fact that historical inquiry into the growth of legal ideas or rules has been separated from the attempt to analyse and define and arrange the notions which lie at the bottom of any existing legal system. A writer, for example, so able as Sir Henry Maine, if he does not himself forget, leads students to forget, that to trace the growth of a notion is not the same thing as explaining its meaning; whilst Austin, with all his immense merits as an analyzer of the fundamental terms of jurisprudence, commits the mistake of dealing with terms such as justice, law, duty, and the like, as if they were words which must, from the nature of things, have at all times possessed one rigid signification, viz., the meaning assigned to them by Austin himself. Of this kind of one-sidedness Mr. Holmes's book does not exhibit a trace. His object, as we understand it, is to explain, and to justify, the principles which govern the different departments of the Common Law, as, for example, the law of torts and the law of contracts. With this view, he not only analyses the rules and conceptions which, as a matter of fact, determine the decisions of the Courts of England and of America, but also attempts to show, and often succeeds in showing, that the notions and maxims which make up the common law are the slow growth of judicial decisions, which have for centuries tended towards the production of that legal system

which is, take it all in all, the most original, as it will be the most lasting, result of the genius of the English race. To attempt this task would, in any case, have shown originality and freshness of mind, but would also, in the case of most writers, have argued a good deal of temerity. Yet, whatever be counted the defects of Mr. Holmes's work (and it is not without its flaws), no one can deny that he possesses in a most extraordinary degree the qualities necessary for the performance of the work he has undertaken. His edition of *Kent's Commentaries* has from the moment of its appearance been a standard work, and of itself proves, what is apparent enough from every page of his *Common Law*, that he has acquired a knowledge and a command of "case law" which may be rivalled by one or two American Professors, but certainly is hardly to be found among English lawyers of the present generation, who do not lack industry, yet certainly do lack that religious reverence for the dicta of Westminster Hall which, possibly, is more easily cultivated at Boston than in London. To familiarity with the reports from the year-books downwards, Mr. Holmes adds that interest in historical speculation the absence of which, in the lawyers of the last generation, made it impossible for them fully to understand the development of the legal system which commanded their exclusive worship. But while Mr. Holmes is both a profound "case" lawyer, a student of history, and (what is no mean qualification for a jurist) a man versed in the practice of the Courts, he shows in every page of his last work that he has entered deeply into provinces of thought rarely trodden by practising lawyers, and knows not only the theories of Bentham, and of Austin, but also the views of Kant, Savigny, and a host of other German writers, some of whose names are scarcely known even to the most intelligent of our readers. Few, at any rate, are the lawyers who can, like Mr. Holmes, discuss with equal fervour and with equal knowledge the effect of the Kantian philosophy on German jurisprudence, the development of the action of "assumpsit" *on the case*, or the effect of a plea of "not guilty" in an action of trespass under a now obsolete system of pleading. Mr. Holmes's special qualifications for the task of legal speculation, and especially his combined interest in the historical and the logical aspects of law, have given the whole colour to his book. There is the more reason for insisting on this point, because his attempt to unite the historical with the analytical method of treating the problems before him, while it gives his work some very special and noteworthy merits, is, in our judgment, the cause of the only serious faults (and they are not many) with which

his treatise can fairly be charged. The chief of these defects is uncertainty of aim. Occasionally, the reader feels a doubt whether Mr. Holmes is contending that a given principle is in conformity with decisions to be found in the year-books, or that it is in conformity with the dictates of right reason, or of expediency. The plain truth is that our author is too much of an apologist. He hardly distinguishes, in his own mind, between the doctrines of the common and the dictates of common sense. He can hardly bring himself to believe that Littleton, or Sir Thomas Raymond, or Sir William Blackstone upheld dogmas which any modern lawyer would reject, and he here and there attributes to the sages of the common law a subtlety and acuteness which are really the growth of Mr. Holmes's own mind. He farther sometimes writes as though he held that to prove that Savigny's dogmas differed from the doctrines of the common law, was necessarily the same thing as showing that the Germán jurist had fallen into demonstrable error. Mr. Holmes, in short, deals with the texts of the common law in the same way in which speculative but orthodox theologians deal with texts of Scripture. They devote a great deal of ability to showing that certain doctrines are in themselves true, and at the same time labour, with equal assiduity, to prove that these doctrines may be deduced from, or are consistent with, a mass of texts which, to impartial readers, seem to have but a remote bearing on the matter in hand. The textualist, whether he be a jurist or a theologian, is apt to make his readers feel that the force of a sound and sensible theory is weakened rather than strengthened by the mass of authorities quoted in its support. The charge, at any rate, of excessive reverence for legal authorities is the main accusation to which Mr. Holmes is liable, and whoever remembers how much legal speculation has suffered from the tendency of theorists to build up systems of what has been well described as "jurisprudence in the air," will feel that there is no great harm done, if one jurist is careful even a little beyond measure to keep his feet firmly fixed on the solid ground of reported legal decisions.

Assuredly, Mr. Holmes's work gains a kind of reality lacking, for example, to Austin's celebrated *Lectures on Jurisprudence*, from the fact that Mr. Holmes, even in the midst of abstract discussions, has always before his mind questions which have actually arisen, or may arise, in the Courts of Massachusetts or of England. Whoever wishes to understand our meaning, should read with care the excellent chapters on the theory of torts. Mr. Holmes's object is to discover what is the common ground at the bottom of all liability for

torts. What, for example, is the principle on which a man who keeps water in a reservoir on his land is to be held liable, if it escapes and overflows a neighbour's fields? Why, and to what extent (if at all), is a person whose house catches fire, and who, to save his own property, throws out a burning piece of wood, and causes the next house to catch fire, liable for the damage done? Why, and in what cases, is a person liable to damages for harm to others from misstatements made by him, either maliciously or otherwise? These are the kind of questions which Mr. Holmes attempts to solve, on the ground of some principle, both sound in itself and in accordance with received legal decisions. Every one knows that a principle of some kind ought to be discoverable. Every one will see, on a moment's reflection, that such a principle is by no means easy to discover, and every barrister is aware that not a day passes on which counsel are not perplexed as to the opinion to be given about some actual case, just because the "principle of liability," to use Mr. Holmes's term, is not clearly defined. In other words, the question raised by our author is one at once both of great speculative interest, and also of daily practical importance. The problems of jurisprudence are, by his mode of treatment, absolutely proved to have a direct bearing on the difficulties of every-day practice. Moreover, Mr. Holmes's method (as may be seen from the chapters referred to) not only raises the right kind of question, but also goes a good way towards solving them. He demolishes entirely the notion, which is very prevalent with laymen, that the ground of legal liability is moral culpability, and makes clear that what the law looks at is not moral guilt (for a man may be heavily cast in damages for conduct in no way blamable, and may act with the utmost malignity without exposing himself to an action), but outward conduct. He also throws great doubt on the soundness of the view, very common with lawyers, and supported by many judicial dicta, that men "act at their peril," or, in other words, that in most or in many cases the "ground of liability" is that X, having acted in a way which has caused damage to A, is liable to an action, simply because his conduct has been the cause of harm to A. Having thus disposed of two prevailing theories, Mr. Holmes puts forward his own answer to the questions which he has raised. The theory of torts may, on his view, be thus summed up:—"At the two extremes of the law are rules determined by policy, without reference of any kind to morality. Certain harms a man may inflict, even wickedly; for certain others, he must answer, although his conduct has been prudent and beneficial to the community." But in the main, the law disre-

gards the moral culpability of the particular defendant in an action, and holds him liable to damages, if at all, because his conduct would have been wrong in the fair average member of the community, whom he is expected to equal at his peril. In general, the question whether an act would have been wrong in this sense of the word "will be determined by considering the degree of danger attending the act or conduct under the known circumstances. If there is danger that harm to another will follow, the act is generally wrong, in the sense of the law." Mr. Holmes's view, that what the law tends to make the test of liability is conformity or the want of conformity to an external standard, suggests some important inferences. In the first place, the standard of conduct tends, with the advance of civilization and with the increasing complexity of society, to become more and more specific. Thus, to take a familiar example, it probably was at one time the rule, as to the liability of a person who rode or drove over another, that the defendant was guilty, unless he was shown to have used the "ordinary care which most men would use in the like case." Now, however, there has grown up a more or less definite maxim that a person who does not keep the rules of the road is, *prima facie*, to be held negligent; and it would be easy to find in every department of law instances in which general principles of liability have given rise to definite rules of conduct, so that the only practical inquiry in a given case often is not whether the defendant has been negligent, still less whether his conduct has been blameworthy, but whether he has observed a very precise rule,—*e.g.*, whether he has driven on the proper side of the road. This gradual specification of the principles of law obviously tends to narrow the province of the jury, and Mr. Holmes makes some very pertinent remarks on this neglected feature in the development of English law. But this matter, though well worth consideration, is rather of professional than of general interest. In the second place, Mr. Holmes's theory as to the grounds of liability goes a good way to explaining a puzzle which must have perplexed many persons, when meditating upon the historical development of moral notions. Whoever examines legal conceptions must be struck with something which looks like a decline in moral sensitiveness accompanying the growth of society. All the forms of law seem to connect legal culpability with moral guilt. If you look merely at the old forms of actions, "malice," "fraud," "violence," and the like appear to constitute the essential basis of liability. If, on the other hand, you look at any existing system of law, you can see at a glance that the blameworthiness of an individual defen-

dant has nothing to do with his legal liability to make compensation for the damage he has done to others. The inference lies ready to hand, that civilization is hostile to the sense of moral responsibility. Mr. Holmes's theory goes far to explain the apparent paradox. As men's intelligence increases, they see more and more clearly that the law has to do not with sentiments, but with acts; and that the tendency of action or conduct must, for legal purposes, be tested by external standards, based on the general habits of ordinary men. To infer from this that, as civilization advances, the moral judgment of mankind becomes less exacting, is to reverse the true conclusion to be drawn from the phenomena of legal history. In early ages, grown men, like children at all times, make no distinction between a hurt and a wrong; every trespasser is held to be a wrongdoer. As the moral sense develops, legislators and judges realise the fact that many acts are hurtful which, estimated simply by the feelings or intentions of the doer, are not wrong. Further reflection shows that the aim of law is to check hurtful acts. Hence the law becomes, in one sense, unmoral, just because, men have learnt to distinguish between harmful and immoral conduct. As the internal sense of individual moral responsibility is developed, so the external character of legal standards becomes more and more marked. The more wide the distinction between vengeance and the infliction of legal penalties prevailing in any given society, the higher, we may be sure, is its condition, both of civilisation and of moral sensibility. It were vain, at the end of an article, to attempt to work out an idea suggested and corroborated by every line of Mr. Holmes's speculations. It is enough, if we can make our readers feel that his theories have an interest for persons entirely unversed in the technicalities of law, and constitute a most important contribution, by one of the ablest and most philosophical of American jurists, to the as yet scarcely explored history of the ideas and institutions which make up the Common Law.

