THE FORMATIVE ESSAYS OF JUSTICE HOLMES

The Making of an American Legal Philosophy

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PREFACE

It is just over a century since Oliver Wendell Holmes, Jr., published his classic work *The Common Law*. On the occasion of Holmes' 75th birthday in 1916 Professor John H. Wigmore observed:

> As I look over the long list of judges of American Supreme Courts, and even over the much shorter one of those who achieved eminence or possessed originality (and those two are not always the same), Justice Holmes seems to me the only one who has framed for himself a system of legal ideas and general truths of life, and composed his opinions in harmony with the system already framed.[1]

The list is far longer now than it was in 1916, and one has the sense that Wigmore's comment, if it may not still hold true, might yet stand with an addendum. Holmes has had a profound impact on those who have since attempted to frame a body of legal theory, and his thought continues to affect decisions long after his death in 1935. Ironically it still remains unclear exactly what his "system" was. Differing schools of jurisprudence claim him as an early adherent. An influential group of modern scholars finds him self-contradictory. His writings are full of aphorisms as fascinating as they are unfashionable—and often unfathomable—today. There is the feeling that Holmes was the messenger of glimpses of an understanding greater than he was given to explain.

The edition of *The Common Law* familiar to today's readers was

published in 1963 by the Belknap Press of Harvard University. It is now found in paperback on the shelves of academic bookstores year after year, its price creeping up with inflation along with the rest of the regular stock. The late Professor Mark DeWolfe Howe of Harvard Law School, in his lengthy introduction to that edition, apologized that "it is a difficult book." While it has found a place on our bookshelves, Howe noted, "dust has found lodgings on its pages." The work is sparely written with abbreviated and often unexplained references. It assumes considerable knowledge. It is ambitious in scope but does not take pains to assure that its full implications are understood. "Though often started," Howe observed, "it is seldom finished by today's readers."[2]

Much of the difficulty can be allayed if *The Common Law* is read together with these nine essays, interpreting its peculiarities through the analysis which produced them. It represents the culmination of an intellectual journey that began in earnest after Holmes had returned from the Civil War and had left Harvard Law School. This journey was so intense that Mrs. Henry James (mother of Holmes' famous friend William), at a time after Holmes had begun the journey by undertaking to edit the major legal source book *Kent's Commentaries*, wrote to her other son Henry in 1873 that Holmes' face was pallid and he was physically inseparable from his work:

> He carries about his manuscript in his green bag and never loses sight of it for a moment. He started to go to Will's room to wash his hands, but came back for his bag, and when we went to dinner, Will said, "Don't you want to take your bag with you?" He said "Yes, I always do so at home." His pallid face, and this fearful grip upon his work, makes him a melancholy sight.[3]

This picture of Holmes is so hard to reconcile with the detached and urbane image of his later years that he seems another person altogether. Surprisingly, we may search his voluminous later correspondence in vain for any real elucidation of what obsessed him during those years. Once it all culminated in the lectures published as *The Common Law* in 1881, the philosophic quest appears in large part to have ended abruptly. An extremely

valuable source of information about his thought is the set of writings that was published in the *American Law Review*, which he edited from 1870 to 1873, during the previous decade. The nine pieces that are reprinted here are at the core of his intellectual growth and show that what ultimately obsessed Holmes were the elemental questions of pure legal theory.[4]

Tracing Holmes' intellectual path is made somewhat easier by the passage of time and it begins with these questions: Why did he write *The Common Law*? What did he mean by his message that the law has evolved away from moral and toward external standards of liability? How did he arrive at this conclusion? The answers are to be found in this series of essays, essays which have too readily been dismissed as disconnected thoughts or studies for the later book. They link Holmes closely with the philosophic method of his early friend Charles Sanders Peirce: the pragmatic reduction of concepts to their applied consequences. They also reveal a profound discovery that came to Holmes concerning the nature of law. It came gradually, not all at once, and was to provide the groundwork for a wholly original and uniquely American legal philosophy.

A recent writer has echoed one popular notion that Holmes "had no systematic, integrated philosophy."[5] These essays, taken together with *The Common Law*, should put that view to rest. Another view has it that Holmes was a "legal positivist," referring to the school characterized by its belief that law and morals are rigidly separate. Advanced by the late Lon Fuller and others in the 1940s, this view touched off a spirited controversy which has never been resolved.[6] The essays establish without doubt that Fuller was wrong, but in a way that his disputants never comprehended. Still another perspective links Holmes to extreme legal realism, which has become associated with defining law as nothing more than the decisions of the courts and with the notion that "talk of legal rules is a myth."[7] Holmes stopped far short of denying the importance of legal rules and concepts, as his early writings elucidate; instead he recast them to reflect that the law is a process of inquiry, not a static body of logic or obligation.

These formative essays, taken together with Holmes' later work and viewed in light of American philosophy, rightly place Holmes as the founder of a distinct approach to jurisprudence, one

stemming from the general philosophy of pragmatism. It has original implications for these fundamental questions: What is law? Are we obligated to obey? What is the relationship of law and morals? Tempting the danger of oversimplification that attends philosophical labels, Part One will portray Holmes as the first comprehensive "legal pragmatist."

Five years after publishing *The Common Law* Holmes, then a Justice of the Supreme Judicial Court of Massachusetts, gave a speech to Harvard undergraduates in which he dwelt on the law as a career. There is a passage near the end which, although not explicitly autobiographical, must refer to his own life during the decade in which he struggled over these essays. In a few words he portrayed the personal experience almost as a purgatory:

> For I say to you in all sadness of conviction, that to think great thoughts you must be heroes as well as idealists. 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. Thus only can you gain the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought.[8]

My own experience in studying this period of Holmes' life has, I am glad to say, been a good deal less exacting thanks to the help and encouragement of Nick Burke, David Wigdor, Paul Churchill, Bob Park, Louis Mayo, Erika Chadbourn, Grant Gilmore, Lobel, Novins & Lamont, Gandalf, and all those who shared the lower floors of 1523 L Street, N.W., where I was trying to make a living while working on this project. All who write on Holmes recognize the enormous debt we have to Mark DeWolfe Howe. While this study diverges from his conclusions in some respects, it can only build upon—not supplant—his achievements.

Washington, D.C.

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Part I

THE MAKING OF AN AMERICAN LEGAL PHILOSOPHY

1

ANTECEDENTS

POSITIVISM AND JOHN AUSTIN

In the ten-year period between 1870 and 1880, coinciding almost exactly with the decade in which he was in his thirties, Oliver Wendell Holmes, Jr., produced a series of remarkable essays which record the central aspects in the development of his philosophy. *The Common Law* was published in 1881 as a compilation of the Lowell Lectures that Holmes delivered in Boston in November and December of 1880. It is well known that Holmes reworked several of the later essays—dating from 1876 onward—into the lectures, which became chapters of the book.[1] However, it is not generally recognized that the entire ten-year period reflects a continuous development in Holmes' quest for a legal philosophy that would combine his detailed knowledge of the common law, gained by editing *Kent's Commentaries*,[2] with his philosophic orientation, tinctured as it must have been by his membership in the "Metaphysical Club," the discussion group led by Charles S. Peirce in Cambridge during the early 1870s.[3]

Holmes' philosophy did not emerge full-blown at once; it was worked out between 1870 and 1880 through a rigorous process of framing logical tests for working assumptions, meticulously carrying each test forward like a mathematical proof, and acknowledging incongruous results as valid grounds for abandoning accepted assumptions and seeking a new approach. The set of assumptions with which Holmes began were the legacy of another

great innovator in the field of jurisprudence, perhaps the most influential Anglo-American legal philosopher who has yet lived, John Austin. To be sure, Austin's *Lectures on Jurisprudence*, first published in 1863,[4] had undergone effective criticism and Holmes already had serious doubts when he began his exploration. One might characterize his quest as an effort to clarify those doubts and transform them into the rudiments of a new theory.

Issues still of vital interest to current philosophical inquiry dominated Holmes' early essays. Due primarily to Austin's influence, the three issues on which Holmes focused were the relationship of law and morals, whether and how law could be studied as a separate science, and, ultimately, what unifying concepts or themes could tie the massive body of legal facts into a general understanding. The first two issues controlled the third—in a sense they were issues of method or procedure that had to be resolved satisfactorily if the ultimate substantive questions were to be addressed. The degree to which these issues have remained preeminent throughout this century testifies to the lasting influence of Austin's work.

Method had a great deal to do with both Austin's and Holmes' substantive conclusions. Both were members of an intellectual movement whose mission was seen as seriously unfulfilled in the nineteenth century: that of advancing the cause of empirical science and freeing all human knowledge from traditional and unverifiable assumptions of religion and metaphysics. Both men adhered to the "positivist" view—in the general sense as framed by Comte, not necessarily its more recent meaning[5]—that law in particular and social thought generally lagged behind the mathematical and physical sciences in following modern methods of inquiry.

Auguste Comte, by eloquently reducing the history of all knowledge to an inevitable progression from theology to scientific method, became the symbol of the emergence of social theory as a true positive science. To him has gone the credit for observing, if not alone at least with the greatest effect, that much of Enlightenment theorizing about society was based upon wholly unscientific mental constructs. The great sweeping political theories of the preceding century he lumped together with the theological explanations of traditional religion as a stage of intellectual immaturity. Notions of the State of Nature, the Law of Nature, the

Social Contract were dismissed by Comte as mere metaphysics, carried away by the fancy of hollow ontological structure.

As a Harvard undergraduate Holmes' writing reflected the fresh empiricist, positivist spirit lately marshalled on the continent by Comte and his followers. Howe has suggested that Holmes was among something of a vanguard, even at Harvard, as such writings were considered of an "agitating tendency" by much of the still theologically minded Harvard faculty.[6] "It is only in these last days," observed Holmes in 1860 at age nineteen, "that anything like an all-comprehending science has embraced the universe, showing unerring law prevailing in every department, generalizing and systematizing every phenomenon of physics and every vagary of the human mind."[7]

As far as British utilitarianism is concerned, Comte was but the popularizer of an attitude that already had independently governed Jeremy Bentham's work. The aim of Bentham, said Halévy, was to establish morals as an exact science.[8] The basic landscape forming the background of Holmes' thought, painted on a canvas of Comtean positivism, was Bentham's analysis of law, legislation, and the principle of utility, for these gave form to John Austin's jurisprudence and the long-to-endure school of legal positivism. There is an unavoidable historical connection between the general drive toward positivism in philosophy and the more specific "positivist" school of legal philosophy, which has been characterized since Austin by the conceptual separation of law and morals. Both movements shared the same epistemological mission and let it shape their paths of inquiry.

John Austin, walking close to Bentham's own footsteps, first fully propounded a systematic purification of morals from law. There is absolutely no question why he did this; it was to create a scientifically respectable body of fact, the *sine qua non* of inquiry. Morals were part of another distinct field, the science of ethics, best explained, of course, by the Benthamite principle of utility. One has not to read far through Austin's delineation of "the province of jurisprudence" before being struck by repeated references to the prime procedural importance of this separation. It was as imperative as using clean test tubes in the laboratory. It was particularly imperative for Austin to wash off moral notions in light of his dim view of the state of ethical science: "Those who

have inquired, or affected to inquire into ethics, have rarely been impartial, and, therefore, have differed in their results.''[9] He was convinced that, as Bentham's disciple, he stood virtually at the threshold of modern scientific inquiry into law. His task was thus one of defining the procedure and organizing the tools of inquiry.

Austin hoped that purifying the concepts of law of their moral content would reveal the law's essential principles.[10] He discerned that the crucial analytical problem was to develop a methodology that could see behind the ''technical language'' of a given legal system.[11] His solution to this lay in establishing a universal system of logical classification based on uniform and rigorous definitions that would insure against the ''tendency to confound Law and Morals'':

> By a careful analysis of leading terms, law is detached from morals, and the attention of the student of jurisprudence is confined to the distinctions and divisions which relate to law exclusively.[12]

Inherent in the rationale that underlies Austin's extensive and complex system of jurisprudential classification is the confidence that there exists a universal structure or ''anatomy'' (a word applied to systematic jurisprudence by Bentham) which binds together the entire body of law—whether one is examining a given legal system or the cross-cultural subject of ''General Jurisprudence.'' This anatomy Austin saw as implicity logical.

Holmes had first become acquainted with Austin's writings while still a senior at Harvard College in 1861, and he read the lectures at least twice between 1863 and 1871.[13] That Holmes was interested in the possibilities of such an analytical system is demonstrated by his earlier philosophical articles published in the *American Law Review*. In the first three of these essays he explored the question as to whether difficulties that had arisen with Austin's system of classification might not be solved by an amended set of definitional criteria based on duties instead of rights. That this was not an original notion, but had in fact been advanced by Comte himself, was brought to Holmes' attention after the first essay ''Codes, and the Arrangement of the Law'' appeared; it was attributed to Comte in Hodgson's *Theory of Practice* and explains the apology found at the beginning of ''The Arrangement of the Law. Privity.''[14]

Holmes was eventually to find the problems of analytical classification greater than its possibilities. After an initial period of primarily logical criticism, Holmes came to doubt whether any system of logical classification however generalized and divorced from "technical language" could, in his own words, "exhaust the whole body of the law."[15] As will be developed in Chapter 2, Holmes grew increasingly disillusioned with the assumption implicit in conceptualizing law as a system of rights or duties, that law was a separate entity consisting of logic or obligation. This began with his doubts concerning the analytical attempt, begun by Austin in the spirit of empiricism, to draw a definitive boundary around "positive" law and "pure" legal phenomena. But it was ultimately the authority of historical sources that forced a definitive breach with Austin and analytical classification. The explanatory perspective with which Holmes replaced such essentially static analysis was one based on historical evidence of evolutionary change.

The unique contribution of *The Common Law* clearly lies in a break from European legal scholarship. It was this studied breach that lent such force to Holmes' aphorism "the life of the law has not been logic: it has been experience," expressed in the opening paragraph of *The Common Law*. Austin's compendium of definitions and classifications was essentially a logical system. So also, we are reminded by Howe, were the Kantian conceptualizations emanating from Germany.[16] Holmes' first philosophic writing had been stimulated by Austin's analytical attempt to build a comprehensive explanatory scheme. Gradually during the 1870s he was confirmed in the belief that such an endeavor was fruitless. What cemented this development was the realization that the law's logic is largely the residue of historical change:

> A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new

> reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.[17]

This has serious implications for the Austinian assumption that a logically consistent analytical structure can be found to underlie all systems of law. Austin's "principles and distinctions," though presumptively less conditional or circumstantial than "technical language," presume a basic structure which may in fact be tainted with impermanence, and worse, with false logic.

Several key examples discussed in *The Common Law* serve to bring this home. Take for example the law of "strict liability" for keepers of wild animals:

> A man has an animal of known ferocious habits, which escapes and does his neighbor damage. He can prove that the animal escaped through no negligence of his, but still he is held liable. Why? It is, says the analytical jurist, because, although he was not negligent at the moment of escape, he was guilty of remote heedlessness, or negligence, or fault, in having such a creature at all.[18]

Take also "vicarious liability," whereby a master is held liable for damage caused by his servant:

> A baker's man, while driving his master's cart to deliver hot rolls of a morning, runs another man down. The master has to pay for it. And when he has asked why he should have to pay for the wrongful act of an independent and responsible being, he has been answered from the time of Ulpian to that of Austin, that it is because he was to blame for employing an improper person. If he answers, that he used the greatest possible care in choosing his driver, he is told that that is no excuse; and then perhaps the reason is shifted, and it is said that there ought to be a remedy against some one who can pay the damages, or that such wrongful acts as by ordinary human laws are likely to happen in the course of the service are imputable to the service.[19]

Holmes found in these examples two significant objections to the analytical approach. The first is evident in the attempt to find a logical place in the system of classification for strict and vicarious liability. Holmes observed that they had come by tradition to be classified as forms of negligence, while common sense would suggest that the operative principle was nothing of the kind: it made no difference that the master or the animal-keeper was able to demonstrate the utmost care. The more conclusive objection is that the given rationale for these areas of liability bore little relation to their early development, to the actual historical reasons for their emergence. They originated, Holmes contended, in the early law of *noxae deditio*, grounded in vengeance or expiation, by which an offending animal or slave was to be surrendered to the complainant as atonement for the injury. Here lay the true reason for the existence of a cause of action against the owner. The practice of paying monetary compensation arose subsequently as an alternative.[20]

A system of analytical classification was thus faced with an impossible dilemma. Since these forms of liability were applied by the courts and backed by sanctions they could hardly be ignored—they were part of "positive" law. But where did they fit into a universal system of rights and obligations? To retain them as a branch of the law of negligence ran contrary to the very effort to universalize the elements of negligence into a logical system. ("In order that the party may be placed in that predicament [of guilt or imputability]" said Austin in his *Lectures On Jurisprudence*, "his intention, negligence, heedlessness, or rashness, must be referred to an act, forbearance, or omission, of which it was the *cause*.")[21] To find or invent a new place for vicarious and strict liability was to ignore the reasoning of generations of courts and treatise-writers, and raised serious problems of systemwide logical structure. Could these two forms of common law liability be reconciled with the general importance of fault and intention? Were they inherent aspects of liability to be found in all systems of law? Their historical origins strongly suggested that neither could be the case.

To Holmes such examples suggested that rights and obligations were not the expression of a universal logical structure, but were descended from ancient rules of practice with new logic poured into old forms and procedures. It was this that explained the inability of Austin's scheme to stand up to close scrutiny. No universal