

Holmes, Langdell and Formalism

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Abstract. Both Holmes and Langdell believed that science was the model for all human inquiry and the source of all human progress. Langdell was influenced by an unsophisticated scientism, which led him to attempt to identify the true meaning of legal doctrines. Holmes was influenced by the sophisticated positivism of John Stuart Mill, which led him to attempt to reduce legal rules and doctrines to scientific laws of antecedence and consequence, justified only by their social consequences. Both Holmes and Langdell concluded that judges ought to decide a case by applying the rules established by precedent, without appeal to any special claims of justice and without appeal to any higher-order normative principle.

1. “Formalism” in Late Nineteenth Century Judicial Opinions

Karl Llewellyn’s *The Common Law Tradition: Deciding Appeals* is the *locus classicus* for the thesis that the common-law courts in the United States changed their opinion-writing style from an early nineteenth-century “grand style,” involving broadly stated policy rationales, to a formal style, involving an established rule or doctrine to be applied in mechanical fashion to the facts (Llewellyn 1960, 62–75). Llewellyn supported this thesis by reporting his reactions to opinions from different decades in the New York, Massachusetts, Pennsylvania and Ohio reports (Llewellyn 1960, 64–157).

Llewellyn’s examples and his impressionist methodology seem persuasive but not conclusive in support of his thesis of a general historical trend in opinion-writing styles over the course of the nineteenth century. Two questions arise. First, was there such a change and, if so, what kind of a change was it? Second, what was it that influenced the judges on these common law courts to change their style of opinion-writing?

One ought to approach these questions with a certain degree of scepticism, for “formalist” is a derogatory term employed by early legal realists like Llewellyn to characterize methods of legal reasoning they rejected. We do not find any self-described legal formalists in the nineteenth century.

Nevertheless, my own studies in the history of torts and in the doctrine of proximate cause have convinced me that there was indeed a change in the nature of appellate court opinions in the United States during the nineteenth century (Kelley 1990, 357–61; 1991, 57–82). Broadly described, the change may be said to be this: Earlier in the nineteenth century, courts were more likely to justify their decisions by reference to specific prior cases and to general principles; later in the nineteenth century, courts were more likely to justify their decisions by reference to settled rules or settled doctrines.

What can account for this change? At least four developments internal to the law pushed judicial opinions in the same direction: (1) the breakdown of the forms of action and the rise of substantive law, (2) the maturation of each state's common law as it moved beyond an early foundational period, (3) the attempt to retain a unified common law in the face of the splintering of the common law into many different common laws in the different states, and (4) the influence of nineteenth-century scientism on legal thought. Each development had separate and substantively distinguishable influences on legal scholars, lawyers, and judges. The influences may have overlapped in some, but not necessarily all, cases. I will discuss these developments in an order that roughly reflects both their relative importance and their chronology.

The Breakdown of the Forms of Action

The traditional way of categorizing and thinking about the common law—the forms of action—broke down. This proceeded rapidly throughout the first half of the nineteenth century in both England and the United States, culminating in the procedural reforms abolishing the forms of action around the middle of the nineteenth century in the New York Field Code and the English Procedural Reform Acts.

The common law under the forms of action was basically a law of pleading: procedural law based on formulaic pleadings. The pleading reforms abolished the formulaic pleadings and adopted fact-based pleading. This moved the common law at its core from a law of procedure and pleading formulas toward a substantive law, which led to the flowering of the substantive law treatises, using substantive categories like contract and tort, in the latter half of the nineteenth century. This whole process is well-explained by Milson (1981) and his successor J. H. Baker (1979, 74–82).

A. W. B. Simpson (1981, 651–68) has written thoughtfully on the rise of the treatises.

In moving from a formulaic law of pleading to a substantive law, legal doctrine obviously becomes more and more important. The change in the nature of judicial opinions toward more reliance on settled doctrines may reflect, in part at least, this sea-change in the very nature of the common law.

The Maturation of Each State's Common Law

Although we often seem to ignore the fact when we talk about “American Legal History,” what we have is a collection of separate histories of the common law in each of the states. The common law in each state can be said to have started with a foundational period, in which the common law courts of that state did two things. First, under the reception statutes, the courts sorted out which parts of the English law they would adopt and which they would reject. Second, they recognized basic general principles to guide courts in subsequent cases. During this period, the common law in that state could be said to be more open-textured and less certain than it would be later on, when the legal system in that state became more settled. It would make sense that judges in the foundational period would write opinions that were primarily based on general principles, with the explicit or implicit understanding that they were making basic choices for a relatively open-textured legal system.

The Splintering of the Common Law

Toward the middle of the nineteenth century, it became obvious that each state was developing its own peculiar common law, and that the unity and coherence of “the common law” was thereby threatened. In practical terms, this became a problem for lawyers who might want to practice in more than one state and for law teachers and law schools who professed to be able to prepare law students from many different states for law practice in the states from which they had come. More importantly, this was a problem for those supporting the nationalist ideal of a united people, sharing common political commitments, a common language, and a common law.

These problems led to a drive to identify and retain a core common law applicable for the most part in all the states. One way to promote consistency in the common law over a number of states is to focus primarily on doctrine and avoid arguably peripheral arguments about broader normative justifications. The drive toward a single common law gave a special twist and a special urgency to the treatise movement in the United States. This drive was also expressed in the collections of “*Leading Cases*,” later replaced by American Law Reports (ALR), and the various “Restatements” of the law.

The Rise of Scientism

From the middle to the end of the nineteenth century, most educated, sophisticated people were enamored with one form or another of scientism—the belief that science was the model for all human inquiry and the source of all human progress (Sorell 1991). This general trend affected late nineteenth-century writers on the common law.

The effects of scientism on legal thought can be explored most fruitfully in the work of Christopher Columbus Langdell and Oliver Wendell Holmes. In the rest of this paper, I will argue that both were greatly influenced by the prevailing scientism: Langdell by a crude popular understanding of science and Holmes by the highly sophisticated positivism of Auguste Comte. I will further argue that the effect of scientism on both Holmes and Langdell was to emphasize doctrine and to exclude the broader normative principles that common law courts had traditionally invoked to invent, develop, and limit doctrine.

2. The Old Story about Holmes and Langdell

You have probably heard the old story about the relationship between Oliver Wendell Holmes, Jr. and Christopher Columbus Langdell. In the story, Langdell was the prime example and most enthusiastic cheerleader for the legal formalism that infected American judges and lawyers in the latter half of the nineteenth century. The formalists banished policy and principle from the law and decided cases by applying technical legal doctrine with syllogistic logic to the facts. In the story, Holmes was the arch-foe of legal formalism, emphasizing the necessary role of public policy in judicial decisionmaking and insisting in his celebrated quote that “the life of the law has not been logic; it has been experience” (Holmes 1963, 5).

The most compelling evidence for the truth of the old story is the history of that very quote. The line became famous as part of Holmes’s general critique of legal formalism in the first paragraph of *The Common Law* but it began life earlier as part of Holmes’s critical review (Holmes 1880, 234) of Langdell’s methodology in the second edition of Langdell’s *Cases on the Law of Contracts* (Langdell 1879). The conclusion seems obvious: Holmes developed his devastating critique of legal formalism by generalizing his criticism of Langdell’s methodology. That conclusion in turn seems to confirm the story, which pits Holmes the chief anti-formalist against Langdell the archetypal legal formalist.

The story is simple and powerful. It has a hero in Holmes and a villain in Langdell. To be sure, since it’s a modern story, the villain is not so much evil as benighted. It has a happy ending: Legal formalism is vanquished and clear-eyed realism prevails. Finally, it has a moral: We should all avoid the sterile formalism of Langdell and his ilk.

But is the story true?

3. Holmes on Langdell

If we look at other things Holmes wrote about Langdell, the story grows more complicated.

As an editor of the *American Law Review*, Holmes published highly favorable reviews (1871, 1872) for each of the two volumes of the first edition of Langdell's pathbreaking casebook on contracts, as they came out. Commenting on the first volume, Holmes (1871, 540) advised "every student of the law to buy and study the book," and praised the organization of the casebook, which arranged the cases first according to significant legal doctrines and second, for each doctrine, presenting the leading cases developing that doctrine chronologically and without comment. Holmes (1871, 540) noted that "[t]racing the growth of a doctrine in this way not only fixes it in the mind, but shows its meaning, extent, and limits as nothing else can." Commenting on the second volume, Holmes (1872, 353) again praised the organization of the casebook, focusing this time on the index, which referred to the cases under "the general principles of the law of contracts" instead of the subject matter of the contract (e.g., coal), or the popular name of the particular kind of contract (e.g., charter-party or insurance).

The way Langdell organized his casebook was about the only thing to react to, for Langdell provided no commentary on the cases or the principles they stood for. But the analytical organization of the law was a peculiarly important issue in the 1870s, when the law was stuck in the immediate aftermath of the collapse of the forms of action as organizing categories. And Holmes in the early 1870s was primarily concerned with that issue. In his first major article, Holmes (1870) had set himself the task of providing a thorough philosophical arrangement of the whole body of law. Holmes evidently saw as complementary to his project both Langdell's overall arrangement of the law of contracts in terms of legal doctrines and legal principles as subcategories, and Langdell's chronological organization of leading cases within each subcategory. Holmes and Langdell evidently stood united against the mindless attempts in the currently popular practitioner treatises to organize the law around the different kinds of situations to which the law could be applied or, rather less mindlessly, around the different kinds of contracts as popularly understood.

In the second edition of his casebook on contracts, Langdell (1879) expanded his index to include short essays setting forth his analysis of the relevant legal doctrines. There were thus separate essays on Offer, Acceptance, and Consideration, among other doctrines. This essay-index, later published separately as *A Summary of the Law of Contracts* (Langdell 1880), revealed for the first time Langdell's substantive theories. In his review of the essay-index, Holmes (1880, 234) criticized Langdell's purely logical approach to the determination and application of legal doctrine. In the concluding sentence of that criticism, Holmes suggested that Langdell's purely logical methodology was unscientific:

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 consequences 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. (Holmes 1880, 234)

Holmes's review of Langdell's second edition was not, however, uniformly negative. Holmes's vigorous critique of Langdell's methodology was sandwiched between almost equally vigorous praise both for Langdell's powerful doctrinal analysis and for Langdell's pedagogically helpful organization of contract doctrines. Thus, at the start, Holmes said:

No man competent to judge can read a page of [Langdell's Appendix] without at once recognizing the hand of a great master. Every line is compact of ingenious and original thought ... 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. (Holmes 1880, 233–4)

And, in closing his discussion, Holmes said:

[T]he book is published for use at a law school, and ... for that purpose dogmatic teaching is a necessity ... 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. (Holmes 1880, 234)

The picture of Holmes's relationship to Langdell that we get from this book review is more subtle than the old story would have it. True, Holmes attacked Langdell's purely logical methodology as unscientific, but Holmes also praised the originality and power of Langdell's doctrinal analysis, comparing Langdell favorably to the more conventional, less original treatise on contracts just published by Sir William Anson (Holmes 1880, 233). Holmes (1880, 234) also praised Langdell for providing his students with a useful guide to the doctrinal structure of the law of contracts. In light of his earlier enthusiastic reviews of Langdell's work, this review reads like an attempt to correct Langdell's methodological errors and thereby possibly reclaim a former ally.

The same curious mixture of admiration and rejection is evident in Holmes's comments (1946) on Langdell in a letter to Frederick Pollock dated April 10, 1881. Holmes had mailed a copy of *The Common Law* to Pollock a little over a month before and had, in the interim, received a letter, now missing, from Pollock. Evidently Pollock had not commented on *The Common Law* in his letter, probably because he had not yet received it. So in the second paragraph of his letter Holmes went on and on about his book, an effusion evidently triggered by Pollock's discussion of certain points of contract doctrine either in Pollock's missing letter or the advance sheets

Pollock had sent earlier. Holmes (1946, 17) said he had discussed the question of bilateral contract accepted by letter in his Eighth Lecture in *The Common Law*, as well as “one or two other things of which you speak.” After briefly summarizing his position on acceptance by letter, Holmes went on, without breaking for a new paragraph, to urge Pollock to read Langdell.

Here is Holmes (1946, 17) on Langdell to Pollock: “I should like you to see the Appendix to the 2nd ed. of Langdell’s *Cases*, also published separately in a small book called (I think) *Elements of Contract*. A more misspent piece of marvelous ingenuity I never read, yet it is most suggestive and instructive.” Holmes (1946, 17) went on in the letter to criticize Langdell’s excessive devotion to logic and to note that Langdell’s explanations and reconciliations of the cases “would have astonished the judges who decided them.” But what is truly astonishing is that, in the middle of a discussion of Holmes’s and Pollock’s writing on contracts, Holmes urged Pollock to read Langdell’s essay-index, which he condemns as a “misspent piece of marvellous ingenuity,” yet praises as “most suggestive and instructive.”

4. Holmes’s Lectures on Contract in *The Common Law*

Holmes’s letter to Pollock and his curious recommendation that Pollock read Langdell points us back to Holmes’s three lectures on contract (Holmes 1963, 195–264) in *The Common Law*. A careful analysis of those lectures supports another conclusion we might not have expected: The primary target of Holmes’s contract lectures was not Langdell’s doctrinalism but Frederick Pollock’s attempt (1876) to explain the common law in terms of Savigny’s will theory of contract (1848) and Henry Sumner Maine’s (1970, 295–328) theory that the law of contract has evolved from recognizing only formal or objective contracts to recognizing consensual or subjective contracts.

Each of Holmes’s three lectures on contract attacked one of Pollock’s central theoretical claims and each lecture developed an alternative theory radically at odds with Pollock’s.

Thus, Holmes’s first lecture (1963, 194–226), on the history of the common law of contracts, was a careful, brilliantly argued brief against Pollock’s application of Maine’s evolutionary thesis to the common law of contract. The primary focus of the lecture was a detailed history of the earliest appearance and subsequent development of consideration in the common law, tending to show that the requirement of consideration had developed internally and was not borrowed from the Roman law *causa*. This was all a direct attack on Pollock’s speculation (1876, 147–53), based on Maine’s evolutionary theory, that the common-law doctrine of consideration ultimately derived from the Roman law *causa*, which entered English law first in the equity courts, which were the first to start enforcing informal, consensual contracts. Pollock had carefully labeled his theory as speculation based on what you would expect if Maine’s theory were true (Pollock 1876, 152). Pollock’s theory was,

therefore, on its own terms, a test case to determine whether Maine's evolutionary theory applied to the common law.

Holmes's second lecture (1963, 227–40) developed a descriptive theory of the elements of contract in deliberate opposition to Pollock's theoretical explanation of the formation of a contract based on Savigny's mutual common-intention version of the will theory of contracts. Pollock's sophisticated discussion of the requisites for a valid contract (1876, 1–8) began with the generally accepted doctrine that a legal agreement formed by a proposal and an acceptance was necessary for a valid contract and went on to make explicit the seemingly undeniable connection between offer and acceptance and the mutual common-intention will theory expounded by Savigny. In the teeth of case law adopting offer and acceptance as requisites for a valid contract and in the teeth of Pollock's persuasive argument that offer and acceptance embodied the mutual common-intention form of the will theory, Holmes, in his analysis of the elements of contract, dispensed with offer and acceptance altogether. Instead of offer, acceptance, and consideration as the elements, Holmes has promise and consideration. Although Holmes (1963, 235) defines promise as an "accepted assurance that [an] event ... shall come to pass," it turns out that the assurance is accepted not by the expression of consent but simply by the act of providing the consideration called for by the promisor. Moreover, the test of consideration is also purely external. Consideration is what *by the terms of the agreement* is given and accepted as the motive or inducement of the promise (Holmes 1963, 230).

Holmes's third lecture (1963, 241–64), on void and voidable contracts, was a subtle, somewhat roundabout response to the entire last half of Pollock's treatise (1876, 356), in which Pollock discussed the doctrines of mutual mistake, fraud, misrepresentation, coercion, and undue influence as "subjective conditions" for a valid contract (Pollock 1876, 355). Pollock (1876, 356) had again invoked the will theory of contract: If a party's consent to an agreement is not true, full, and free, the contract is not binding on that party. Coercion or undue influence means the consent was not free; mistake, misrepresentation, or fraud means that consent given in ignorance of a material fact was not true or full. Pollock's thorough, sophisticated analysis seemed to make of these topics a stronghold for the mutual common intention theory.

Holmes's third lecture on contract can be seen as an ingenious response to the challenge posed by Pollock's analysis of these "subjective condition" doctrines. Holmes shifted the initial focus away from the individual doctrines. He focused instead on the judicial remedies and categorized Pollock's "subjective condition" cases as void contracts or voidable contracts. He attempted to show that a contract was void only when one of the objective elements of a contract was missing (Holmes 1963, 241). He attempted to show that a contract was voidable only for failure of an express or an objectively implied condition in the contract (Holmes 1963, 246).

Throughout his discussion of contract, Holmes persistently attacked Pollock's three major theoretical positions and turned those attacks into critically important structural elements in each of his three lectures. By contrast, when Holmes attacked Langdell's positions on acceptance by mail (Holmes 1963, 239–40), conditions precedent and subsequent (Holmes 1963, 247–8), and dependent promises (Holmes 1963, 260–64), those attacks were not central to Holmes's theoretical arguments. In each instance, Holmes used Langdell's analysis simply as a starting point against which he developed his own analysis of these subsidiary issues.

Moreover, there are notable similarities between some of Langdell's other discussions and Holmes's treatments of the same topics. These similarities suggest that Holmes borrowed without attribution the doctrinal insights of Langdell that were consistent with Holmes's positivism. There are at least four of these similarities. First, Langdell (1880, 129–30) questioned the applicability of Maine's category of consensual contract to common-law contracts whose breach is redressible in *assumpsit*, for in each case there must be consideration for the contract to be enforceable and consideration is a formal requirement. Holmes (1963, 215) said that "consideration was a form as much as the seal." Second, Langdell (1880, 2) pointed out that acceptance as an independent element of an enforceable contract is not really important in either unilateral or bilateral contracts, for those contracts are not enforceable until the consideration called for by the offer is provided, and providing the consideration in and of itself supplies sufficient evidence of acceptance. Holmes (1963, 238) left out acceptance as an essential element of contract because giving consideration counted as evidence of acceptance, and acceptance without consideration did not make a contract. Third, Langdell (1880, 234–44) relegated the will theory of contract formation to a legal fiction and insisted that the contract was made not by the subjective wills of the parties but by their physical acts. Holmes (1963, 240) insisted that contracts were made by the overt acts of the parties, not their subjective intent. Fourth, in his discussion of consideration, Langdell (1880, 82) argued that detriment to the promisee was sufficient, even without a benefit to the promisor; he argued (1880, 82) that the consideration must be the inducement for the promise only "in contemplation of law," and need not be the inducement in fact; and he argued (1880, 83) that the initial offer conclusively designates the consideration that was called for. Holmes (1963, 230) defined consideration as what is designated by the parties as the conventional inducement for the promise.

Altogether, these similarities suggest that Holmes may have borrowed heavily from Langdell on these four issues. Holmes evidently spoke from his own experience when he wrote to Pollock that Langdell's summary was "most suggestive and instructive."

5. Holmes, Langdell and Legal Science: A Thesis

When we take into account Holmes's other writings relevant to Langdell, then Holmes's relationship to Langdell seems very complicated indeed. How are we to understand that relationship? My thesis is this. The key to understanding the relationship between Holmes and Langdell lies in their different understandings of legal science, which nevertheless lead them to similar prescriptions for judicial decisionmaking.

Although Langdell was fifteen years older than Holmes, they both began publishing for a legal readership around 1870. That was a time when one form or another of scientism was all the rage. Darwin's *Origin of Species* was published in 1859 and almost immediately exerted a significant influence. Modern developments, such as railroads, textile mills, and steamships, all attributable to scientific advances, seemed to be transforming everyday life. The study of man and his institutions, long thought to be the province of philosophers, moralists, and political theorists, was invaded by those marching under the banner of science: anthropologists, sociologists, and economists. Not surprisingly, serious writers about the law claimed the mantle of science as well. For example, Frederick Pollock, in his treatise on contract (1876, vii), and Christopher Columbus Langdell, in his pioneering *Casebook on Contracts* (1871, vi–vii), both characterized their work as scientific. Given the popularity of science in general, one might expect that authors with widely differing aims and methodologies would all claim to be doing legal science.

6. Langdell and Unsophisticated Scientism

Christopher C. Langdell invented the case study method of teaching law and applied it to his teaching of contracts. The case method was based on Langdell's belief that "law is a science, and ... all the available materials of that science are contained in printed books" (Langdell 1887, 124). Students could learn the law of contracts scientifically, by studying original sources: decided cases that Langdell had selected for his pioneering casebook in contracts. What did Langdell mean when he said that "law is a science"? The answer is not completely clear. Over the last twenty-five years, we have seen vigorous and sophisticated academic debate over Langdell's legal science.¹

¹ See: Gilmore 1974, 12–14; 1977, 42–8 (Langdell's science a simple-minded formalism); Speziale 1980 (*contra* Gilmore: Langdell's science empirical, dedicated to formulating working hypotheses from analysis of original sources); Grey 1983 (*contra* Gilmore and Speziale: Langdell's science a curious combination of induction from the cases of principles then used to deduce subsequent conclusions, analogous to John Stuart Mill's inductive explanation of geometry); Reimann 1992 (Langdell's science similar to but in important ways different from Kantian formalism of the German pandectists, so Langdell halfway between Kantian formalism and a rigorously empirical, inductive, historicist legal science); LaPiana 1994, 55–78 (Langdell's science an amalgam of technical legal analysis of cases, a coherent classification of the law based on fundamental but technical substantive doctrines, and a loosely understood Austinian positivism separating law and morality).

To answer the question, we must look carefully both at what he said and at what he did.

Langdell said precious little about what he meant when he said “law is a science.” He wrote about it first in the Introduction to the first edition of his *Casebook on Contracts* (Langdell 1870, vi–vii). He talked about it again in his speech celebrating the 250th anniversary of the founding of Harvard University (Langdell 1887, 123–4). From these two sources, we can identify the essential ideas that Langdell thought were entailed by his notion that law was a science. First, law must be studied scientifically, by studying the original sources—the decided cases. Second, law as a science consists of certain fundamental doctrines, which are relatively few in number. Third, those fundamental doctrines grew to their current form slowly, and that growth can be traced through a series of cases. Fourth, an appropriate classification and arrangement of those fundamental legal doctrines would facilitate the scientific study of the law.

A private letter from Langdell to Theodore Dwight Woolsey of Yale, recently discovered by William LaPiana in Yale’s manuscript collection (LaPiana 1994, 77), adds an additional element to Langdell’s notion of law as science. Writing about the study of jurisprudence, Langdell expressed his understanding of a distinct line between the study of law as it is and the study of law as it ought to be. He concluded that lawyers and law professors ought only to study the law as it is. Based on the views expressed in this letter, Langdell’s notion of law as a science probably included John Austin’s rigid distinction between law and morality.

Since Langdell said so little about what he meant by law as a science, we are forced to look at the details of what Langdell actually did in his *Summary of the Law of Contracts* (1880) in order to understand what he meant. In the *Summary*, we can see Langdell at work as a legal scientist. This work followed a consistent pattern. By examining decided cases, Langdell isolated the fundamental doctrines applied by the courts in contract cases, including the basic requirements of offer, acceptance, and consideration. By careful, critical analysis, Langdell then penetrated to the true meaning of each doctrine. For example, that method led him to the following statement of the true meaning of “offer”:

An offer, as an element of a contract, is a proposal to make a promise. It must be made by the person who is to make the promise, and it must be made to the person to whom the promise is to be made. It may be made either by words or by signs, either orally or in writing, and either personally or by a messenger; but in whatever way it is made, it is not in law an offer until it comes to the knowledge of the person to whom it is made. (Langdell 1880, 12)

He then used those meanings to elaborate a coherent, logically consistent blueprint for the law—here, the law of contract.

Langdell thus seemed to work with the dispassionate objectivity of a scientist: Isolating the true meaning of the doctrinal terms was a matter of

critical analysis; coherently applying those meanings over a broad range of questions called for analytical discrimination and logical consistency; the resulting doctrinal conclusions were reached without injecting any normative views into the analysis. In fact, because the fundamental doctrines themselves were stated conceptually, without reference to any moral or policy base, and the application of those doctrines was determined by criteria of logical coherence, the resulting purified doctrinal structure seemed purely conceptual. It thus offered a self-proclaimed scientist like Langdell the opportunity to be completely objective. And the process of deciding legal issues under Langdell's theory could then be purely analytical.

For example, Langdell recognized that in bilateral contracts the consideration for the first promise is a counter-promise by the offeree. From this, Langdell argued purely analytically that notice of acceptance must actually be communicated to the original offerer for a valid bilateral contract:

When the contract is to be bilateral, ... the offer [still] requires an acceptance and the giving of the consideration to convert it into a binding promise; but as the consideration consists of a counter-promise, so the giving of the consideration consists in making this counter-promise. (Langdell 1880, 12)

[T]he acceptance of the original offer, in the case of a bilateral contract, must be expressed, i.e., must be made by words or signs; ... the reason for this is, that the acceptance contains a counter-offer. Moreover, the reason why the counter-offer makes it necessary that the acceptance should be expressed is, that communication to the offeree is of the essence of every offer. The acceptance, therefore, must be communicated to the original offerer, and until such communication the contract is not made. (Langdell 1880, 15)

Langdell's legal science, based on the objective meaning of legal doctrines, was radically different from traditional legal reasoning, which focused on the normative rationale for prior decisions. Appeals to higher-order normative principles seemed to be banished from Langdell's legal science altogether. For example, in defending his position that the effective date of a bilateral contract by mail was the date the letter of acceptance comes to the knowledge of the offerer, not the date it was mailed, Langdell recognized that some have argued that "the purposes of substantial justice, and the interests of the contracting parties as understood by themselves," (Langdell 1880, 20) would be served by the date-of-mailing rule. Langdell responded: "The true answer to this argument is, that it is irrelevant"² (Langdell 1880, 21).

² "Assuming it to be relevant," Langdell went on to make three arguments for his position, based on the understanding of the parties, substantial justice, and the need for certainty about legal obligations. Langdell's argument is a model of brevity: "The only cases of real hardship are where there is a miscarriage of the letter of acceptance, and in those cases a hardship to one of the parties is inevitable. Adopting one view, the hardship consists in making one liable on a contract which he is ignorant of having made; adopting the other view, it consists in depriving one of the benefit of a contract which he supposes he has made. Between these two evils the choice would seem to be clear: the former is positive, the latter merely negative; the former

Langdell didn't pause to explain why arguments from substantial justice and the self-understood interests of the parties are irrelevant, but the structure of his analysis here and elsewhere in the *Summary* suggests the following two reasons.

The first reason is this. Langdell had previously established, by critical, scientific analysis of the legal meaning of acceptance in a bilateral contract, that acceptance necessarily contains a counter-offer. He had further established, by his critical, scientific analysis of the legal meaning of offer, that an offer must actually be communicated, as "communication to the offeree is the essence of every offer" (Langdell 1880, 15). It follows necessarily, then, that the acceptance must actually be communicated to make a bilateral contract. Indeed, according to Langdell, this is so fundamental that the original offeror could not change it by the terms of his offer. If he said the offer would be accepted at the time of posting the acceptance, that "declaration would be wholly inoperative" (Langdell 1880, 20).

The second reason is this. Judicial decision based on the objectively discoverable meaning of legal doctrines is, for Langdell, the only appropriate way to decide these questions. As Langdell showed, equally persuasive arguments based on "substantial justice and the self-understood interests of the parties" can be made for the opposite position, so there is no objective, disinterested way of using these kinds of arguments to choose between the opposing positions. A judge who accepted one argument over another, then, would simply *either* be mistaken that one argument is stronger than the other *or* would be choosing arbitrarily or for some undisclosed reason between two positions equally supportable by "substantial justice" arguments. Langdell's concern for scientific objectivity, therefore, seemed to support a legal analysis that stopped at the level of legal doctrine.

We can now better understand Langdell's notion that law is a science. The legal scientist focuses on the decided cases. The scientist extracts, by the ordinary techniques of legal analysis, the current fundamental legal doctrines in any particular field of law. The scientist makes no judgments about what the law ought to be, so he separates the fundamental legal doctrines from the normative justifications given by judges and others, and "purifies" those doctrines by technical, objective analysis of their true meaning. This purification is simply a rational determination of what the law is. The scientist may then recommend that future cases be decided by logical application of the purified doctrines because that will simply be an application of the law as it is.

imposes a liability to which no limit can be placed, the latter leaves everything *in statu quo*. [See *Vassar v. Camp*, 1 Kern. 441, Cas. on Contr. 110, and compare par. 14.] As to making provision for the contingency of the miscarriage of a letter, this is easy for the person who sends it, while it is practically impossible for the person to whom it is sent. [See *Br. & Am. Tel. Co. v. Colson*, L.R. 6 Exch. 108, 118, Cas. on Contr. 45, 51, per Bramwell, B.]" (Langdell 1880, 21).

It is tempting to criticize Langdell's legal science as unscientific or incoherent or both. A number of commentators (Phelps 1892; Tiedeman 1892; Gilmore 1974, 1977; Grey 1983), in addition to Holmes, have succumbed to the temptation. Langdell's legal science seems incoherent because it is internally inconsistent. The historical contingency of current rules and doctrines recognized by Langdell's choice of cases illustrating the development of current case law would be erased by courts deciding cases the way Langdell proposed they do, because continued logical application of the true meaning of current doctrine would freeze the law at that stage in its development. Langdell's methodology seems unscientific for several reasons. Langdell did not include in his base for induction all the decided cases on a particular topic. The subsequent induction of the true rule or the true meaning of a legal doctrine was not a scientific induction at all. It just reflected Langdell's preconceived notions, which led him to include some cases in the base and to exclude others. Moreover, Langdell on some questions, such as the effective date of acceptance by mail, included cases reaching diametrically different results. One cannot scientifically derive by induction a single rule from diametrically opposed cases. Even within the set of cases arbitrarily chosen, what Langdell purported to determine scientifically from the cases was not a scientific law, or a generalized description of common characteristics of the set, but a concept—the true meaning of a legal doctrine. Because the purportedly scientifically-determined concept is not itself normative, Langdell did not purport to derive an "ought" from an "is." But if it was not normative, there was then no apparent reason to apply the concept to decide subsequent cases.

Langdell included in the domain of cases for his scientific analysis only those illustrating or developing a particular legal doctrine; he excluded cases that recognize that the doctrine is defeasible when an overriding normative principle applicable to the facts suggests that the ordinary application of the legal concept would be unjust. Langdell thus set up a non-normative conceptual system of law radically at odds with the underlying phenomena. This points to the most fundamental problem with Langdell's methodology. It was inconsistent with the way common law judges decided cases, then and now. Judges do not seek to discover the true meaning of the legal terms prior judges used in explaining their decisions in prior cases; judges do not, then, try to decide cases before them by applying those legal meanings to achieve a purified doctrinal consistency over a range of cases, regardless of the specific claims of justice by the parties in an individual case. Instead, legal doctrines are created, controlled, and limited by judicial recognition of a set of broader normative principles, each of which may have different weight in different factual situations. None but the most narrowly legalistic judge, insensitive to concerns to do justice in the case before him, would even consider deciding a case simply by applying the legal doctrine without considering whether, in light of broader normative principles, that application would lead to a just result on those facts.

At first glance, this last critique seems to be what Holmes, Langdell's first critic, wrote in his review (Holmes 1880) of Langdell's essay-index. Holmes addressed his criticism "to the ideal of the final methods of legal reasoning which [Langdell's] Summary seems to disclose." Holmes characterized Langdell's ideal in the law as the logical integrity of the legal system. In pursuing this ideal, Holmes noted (1880, 234), Langdell seemed "less concerned with his postulates than that the conclusions from them hang together." To support this criticism, Holmes quoted Langdell's dismissing as irrelevant an argument from substantial justice and the self-understood interests of the contracting parties, discussed above. Holmes went on to argue (1880, 234) that logical consistency in the law is less important in shaping the substance of the law than other influences: "experience," "human feelings," "the justice and reasonableness of a decision," and "history and the nature of human needs."

On its face, then, Holmes's critique of Langdell's methodology seems to endorse traditional methods of legal reasoning from higher-order normative principles. That conclusion might be premature, as the following discussion of Holmes's scientific positivism and his theory of judicial decisionmaking suggests.

7. Holmes and Sophisticated, Scientific Positivism

Although Holmes rarely labeled his work "scientific," a critical analysis of his theories, read against the background of the works he had read, suggests strongly that Holmes's aim and ultimate accomplishment was to apply the scientific positivism of August Comte and John Stuart Mill to the common law.

Neither in *The Common Law* nor in any of his other articles or speeches does Holmes admit an allegiance to any particular school or tradition. He scrupulously followed the advice (Holmes 1953, 20–21) he gave to others not to attach a "fighting tag" to one's work. We do, however, have one invaluable aid in placing Holmes in the appropriate philosophical context. From 1865 until his death in 1935, Holmes kept a list of books he had read, by year and sometimes by month. These book lists survived, and the list for the period from 1865 through 1880 has been published (Little 1954). We have the opportunity, then, to read Holmes's work against the background of the books he himself had read. By comparing Holmes's writing with Holmes's reading, we may be able to trace more precisely the specific influences on Holmes's thought.

Holmes was a prodigious reader; the search for specific influences in the mass of books on his reading list seems a daunting task. Fortunately, three separate indicators suggest that the works of John Stuart Mill appearing on Holmes's reading list were particularly important to his intellectual development. First, Holmes's sympathetic and knowledgeable biographer, Mark DeWolfe Howe (1957, 210, 212–17), singled out the period from 1865 to 1867 as critically important for Holmes's intellectual development, and emphasized the strong influence of John Stuart Mill's work on Holmes in

that period. Second, significant events in Holmes's life point in this direction as well. In the summer of 1866 Holmes traveled to England, where he met John Stuart Mill himself (Howe 1957, 223–44). Howe (1957, 208) characterizes this trip as “the pilgrimage of a maturing mind which had already found its tendencies.” Third, the number and weight of Mill's books appearing on Holmes's reading list suggest their importance: From 1865 to 1867 Holmes read seven works by John Stuart Mill,³ including his two formidable technical works in philosophy, *A System of Logic* and *An Examination of William Hamilton's Philosophy*.

The works of Mill that Holmes read all reflect Mill's commitment to certain basic tenets of Auguste Comte's positivism (Simon 1963, 172–201). Mill made clear the extent of his agreement with Comte in his 1865 essay *Auguste Comte and Positivism* (Mill 1969), which Holmes read in 1865 or 1866 (Little 1954, 171). Mill explicitly approved Comte's evolutionary theory of the three stages of human thought and Comte's views on the limitations on human knowledge. A brief review of those basic Comtean positions, as explained by Mill, may thus be helpful.

Comte claimed to have discovered an invariable law of three successive stages in the evolution of human thought about phenomena. In the theological mode of thought, phenomena are attributed to the will(s) of living beings, either natural or supernatural. In the metaphysical mode of thought, phenomena are explained by abstract metaphysical entities, such as the “nature” or “efficient cause” of a thing. In the final, positive mode of thought, the futile search for the essential nature and ultimate cause of an event is given up, and phenomena are explained by their relationships to other phenomena. As Mill explained:

We know not the essence, nor the real mode of production, of any fact, but only its relation to other facts in the way of succession or of similitude. These relations are constant; that is, always the same in the same circumstances. The constant resemblances which link phenomena together, and the constant sequences which unite them as antecedent and consequent, are termed their laws. The laws of phenomena are all we know respecting them. (Mill 1969, 265)

These laws of phenomena are all men have ever wanted or needed to know, however, since “the knowledge which mankind, even in the earliest ages, chiefly

³ The seven works are *Considerations on Representative Government*; *Examination of Sir William Hamilton's Philosophy*; *Utilitarianism*; *Auguste Comte and Positivism*; *A System of Logic*; *Principles of Political Economy*; and *Dissertations and Discussions: Political Philosophical and Historical*. See Little 1954, 169, 171, 173–4. In addition, Holmes read extensively in the then current critical commentary on Mill, including David Masson, *Recent British Philosophy*; John Henry Bridges, *The Unity of Comte's Life and Doctrine: A Reply to Strictures on Comte's Later Writings Addressed to J.S. Mill*; James McCosh, *An Examination of Mr. J.S. Mill's Philosophy*; Herbert Spencer, *The Test of Truth* [1865, *Fortnightly Review* 1: 531ff.] (discussion of the debate between Hamilton and Mill) (Little 1954, 171–4). Holmes's reading of Mill was accompanied by extensive reading of other English and American positivists, including George Henry Lewes's *Biographical History of Philosophy and Aristotle*, and Chauncey Wright's devastating review of Herbert Spencer's work: “The Philosophy of Herbert Spencer” [1865, *North American Review* 100: 423ff.] (Little, 1954, 170).

pursued, being that which they most needed, was *foreknowledge* ... When they sought for the [metaphysical] cause, it was mainly in order to control the effect, or if it was uncontrollable, to foreknow and adapt their conduct to it. Now, all foresight of phenomena, and power over them, depends on knowledge of their sequences” (Mill 1969, 292–4)

The heavy emphasis on positivism in Holmes’s reading during his formative years yields the following hypothesis: In his own later work in legal theory, Holmes attempted to apply the positivism of Mill and Comte to the law. Reading Holmes’s work in light of Holmes’s early reading seems to confirm that hypothesis.

A number of elements in Holmes’s famous theory in *The Common Law* (Holmes 1963, 34–129) that tort and criminal law liability standards evolved from subjective to objective standards suggest that it was strongly influenced by the positivist philosophy of Comte and Mill. Holmes adhered to two commitments in this evolutionary theory that seem to be derived from the positivist insistence on the significance of *foreknowledge*, based on knowledge of the scientific laws of antecedence and consequence. These commitments were to the external purpose of the law, which operates by the threat of sanctions, giving men incentives to avoid certain acts (Holmes 1963, 42, 88); and to the consequent need for the law to be knowable if it is to be effective in achieving its external purpose (Holmes 1963, 88–90).

In addition, Holmes seemed to subscribe to and apply the positivist theory that human thought always progresses through three stages. In his second “Primitive Notions” article (Holmes 1877, 654) preceding *The Common Law*, Holmes had explicitly characterized the evolution from early liability rules, based on revenge against the causing agent, to later liability rules, based on the attenuated fault of the owner of the causing agent, as a progression from Theological to Metaphysical thinking. Holmes did not explicitly characterize the three-stage evolution in liability standards sketched in *The Common Law* as a progression from Theological to Metaphysical to Positive, but the structure of the theory tracks with these three stages. In the first stage, liability standards reflect a primitive desire for revenge against the causing agent, based on its ascribed evil will (Holmes 1963, 34–5). In the second stage, liability standards are based on an imaginary thing—the moral blameworthiness of the average member of the community (Holmes 1963, 86–8). In the final stage, that general standard becomes specified into fixed, definite and certain rules (Holmes 1963, 88–92, 98–103). Those liability rules are *in the form* of scientific laws of antecedence and consequence identifying particular behavior which, under particular circumstances, will be followed by particular legal sanctions. Moreover, those liability rules are *based on* scientific laws about the danger of particular behaviors under particular circumstances, discovered by experience (Holmes 1963, 89, 98–9, 126–9).

Consistent with positivist reductive epistemology, Holmes continually reduced morally-freighted terms in the law, such as intent, malice, and

negligence, to descriptions of voluntary action with knowledge of circumstances enabling a reasonable man to foresee danger (Holmes 1963, 43–7, 104–14). These reductions purge the law of metaphysical notions and relate liability standards to scientific laws of antecedence and consequence.

Finally, Holmes's theory of common law development in Lecture I of *The Common Law* (Holmes 1963, 5–33) can be seen as thoroughly positivist. If the only things we can know are our experiences of phenomena and the scientific laws of similitude and of antecedence and consequence which we derive from those experiences, it follows that the only basis for a judicial decision we can know must be the consequences of that decision—its legislative policy (Holmes 1963, 31–2). Thus, it follows from the positivist epistemology that, whatever judges think the reason for their decision may be, the only knowable basis for the decision is its legislative policy—its consequences (Holmes 1963, 31–2).

Holmes's last major statement of his legal theory, "The Path of the Law" (Holmes 1897), exhibits in stark form his positivist methodology and commitments. The law is reduced to predictions of what courts will do in fact (Holmes 1897, 457); legal duty is reduced to a prediction of certain consequences from certain conduct under certain conditions (Holmes 1897, 458). The true ground of any legal decision lies in the consequences of that decision (Holmes 1897, 466–7). The law is progressing toward an ideal, in which the content of the law will be based on rational choices, informed by scientific knowledge of the social consequences of different choices (Holmes 1897, 468–9). The study of legal history shows us the origins of current laws, and in so doing frees us to reconsider the law from the standpoint of its social consequences (Holmes 1897, 469–74).

8. The Problem with Holmes's Judging

After writing *The Common Law* as a young man, Holmes spent fifty years of his professional life as an appellate court judge. From 1882 to 1902 he served as a justice of the Massachusetts Supreme Judicial Court; from 1902 to 1932 he served as a Justice on the United States Supreme Court. Recently, scholars studying Holmes's judicial career have been puzzled by the seeming discrepancy between Holmes's apparent theories and his performance as a judge (Grey 1989; Tushnet 1977). Given Holmes's seemingly radical critique of traditional legal reasoning, his seemingly radical call for explicitly policy-based judicial decision making, and his championing of experience over logic as the basis for judicial decisionmaking, they expected to find that his judicial opinions would be marked by independent, critical, policy-based rejection of precedent, and that his decisions would be based on a sensitive exploration of the human experiences to which the law applied. Instead, they found that Holmes as a common-law judge hardly ever dissented, deferred obsequiously to precedent, and was almost obsessively concerned

with drawing distinct lines between competing strands of precedent. They were disturbed to find in Holmes's opinions not a sensitive exploration of the full range of human experience but a harsh disregard for human weakness and natural human emotion. And they were puzzled that in cases in which the court had to resolve policy questions, Holmes ordinarily refused to make an independent policy choice, deferring instead to the legislature or to public opinion or to precedent. Thus, these two respected scholars concluded that Holmes as a judge simply abandoned his enlightened theory of judicial decisionmaking (Grey 1989; Tushnet 1977).

9. Holmes's Scientific Theory of Judicial Decision-making

A closer look at Holmes's scientific theory of judicial decision-making elaborated in *The Common Law* and "The Path of the Law" may help us decide whether his performance as a judge was consistent with that theory. For Holmes, the theological and metaphysical entities assumed by normative justifications for legal rules are unreal, or at least unknowable. The only scientific justification for a common law decision, therefore, is social policy—the socially beneficial consequences of that decision. Every decision promotes some social policy, Holmes thought, whether or not that policy was the conscious reason for the decision (Holmes 1963, 31–2). Paradoxically, then, judges who share the theological or metaphysical confusions of their society may decide wisely for that society precisely because they share its errors. Take, for example, judges in a primitive society who share its belief that inanimate objects have life and will. They may punish an offending tree that fell on the plaintiff only because they believe the tree willed the harm (Holmes 1963, 10–6), but in doing so they unconsciously promote beneficial social policy (Holmes 1963, 34–6). By satisfying the plaintiff's passion for vengeance, the judges forestall private acts of vengeance that might lead to feuds or violence. By deciding the way the people think they ought to, the judges preserve the effectiveness of the law.

Holmes recognized that people were unlikely to follow a rule contrary to the society's fundamental beliefs. Thus, social policy itself imposes a limit on the progressive development of the law. Judges cannot get too far ahead of their society or the law will lose its effectiveness (Holmes 1963, 36–42). In most cases, this is not a problem, because judges will share the community's prevailing beliefs and therefore unconsciously adopt rules that preserve the effectiveness of the law. Positivist judges, who have escaped from their society's metaphysical or theological modes of thought, however, must recognize the social policy of preserving the effectiveness of the law as a limit on their ability to implement other social policies.

Holmes thought that the common law may nevertheless improve in a number of ways. First, it may become more effective in achieving the socially

desirable consequences that justify it, whatever those consequences may be. The law must be knowable to be effective, because it operates by threatening actors with legal consequences if they take certain action (Holmes 1963, 42–3). Judges can make the law more effective, then, by making it more clear, definite, and certain. Those subject to the law will know better what legal consequences follow certain actions, and they are then in a better position to bring their conduct into line with the law.

Second, the law may improve as the community discards outmoded theological and metaphysical beliefs. When the community no longer believes that trees have life and will, for instance, its judges need no longer punish harm-causing trees. The old rule will either pass away or be fitted out with new policies more congenial to the community's current beliefs (Holmes 1963, 8–33).

Third, judges who realize that all common law rules are based on social policy may consciously improve the law by adopting rules that more effectively implement current policies or that implement a new policy preferable to the one underlying the old rules (Holmes 1897, 466–8). These decisions can be made scientifically, however, only after scientific studies showing the consequences of particular rules and comparing the social advantages of different consequences (Holmes 1897, 468–9).

10. Holmes's Reflections on Judging

Holmes's progressive historicism not only informed his theory of judging, it also defined his predicament as a judge: What should a positivist judge do when his society is still mired in theological and metaphysical modes of thought, and the scientific studies needed to make scientific choices among legal rules are not available? Holmes's response to this predicament can be seen in his personal reflections on judging, embodied in an article (Holmes 1899) and a speech (Holmes 1962) toward the end of his twenty years on the Massachusetts Supreme Judicial Court. We can determine his personal approach to judging from these reflections, read against the background of his scientific theories embodied in *The Common Law* and "The Path of Law."

First of all, Holmes thought, the positivist judge ought to adhere strenuously to the doctrine of *stare decisis*,⁴ as that makes the law more reliable,

⁴ Holmes 1962, 156: "It has seemed to me that certainty is an illusion, that we have few scientific data on which to affirm that one rule rather than another has the sanction of the universe, that we rarely could be sure that one tends more distinctly than its opposite to the survival and welfare of the society where it is practiced, and that the wisest are but blind guides. But we have a great body of law which has at least this sanction that it exists. If one does not affirm that it is intrinsically better than a different body of principles which one could imagine, one can see an advantage which, if not the greatest, at least, is very great—that we know what it is. For this reason I am slow to assent to overruling a decision. Precisely my skepticism, my doubt as to the absolute worth of a large part of the system we administer, or of any other system, makes me very unwilling to increase the doubt as to what the court will do."

certain, and knowable, and hence more effective in achieving its socially beneficial consequences, whatever they may be. In interpreting and applying precedent, however, the positivist judge should isolate the social policy behind the prior decision and reason from that to determine its scope; the judge should not reason from the metaphysical or theological justifications given by prior courts.⁵ Finally, judges can and should make technical decisions establishing a clear line between competing lines of precedent. Line-drawing decisions seem peculiarly apt for making the law more fixed, definite, and certain because a line-drawing decision can determine just how far each of two competing strands of cases extends. Since it clarifies the precise limit of both strands, it seems doubly beneficial (Holmes 1899, 232–3). A judge may sometimes have the opportunity to make a pure policy choice: for example, when an old precedent based on outmoded policy needs to be given a new policy base. But there will rarely be scientific studies that settle the policy question. Holmes (1962, 156) said: “We have few scientific data on which to affirm that one rule rather than another has the sanction of the universe, ... we rarely could be sure that one tends more distinctly than its opposite to the survival and welfare of the society where it is practiced” The judge ought not express his personal wish, then, but recognize that different portions of society want different things, and adopt “the resultant, as nearly as [he can] guess, of the pressure of the past and the conflicting wills of the present” (Holmes 1962, 156). Holmes recognized that there was no scientific way to choose among different beneficial consequences once and for all, so Holmes never articulated substantive criteria for preferring one set of consequences over another. For Holmes, the “worth” of competing social ends depended only on the intensity of the competing desires for those ends, which varies over time (Holmes 1899, 231). The only scientific way to choose between ends would be to measure the intensity of those competing desires scientifically. Holmes (1899, 242) held out hope that someday this could be done, while recognizing that it was still a distant, hoped-for ideal. The scientific studies of social consequences Holmes recommended in “The Path of the Law” were more immediately feasible, but they would not provide *criteria* for choosing between two competing social policies.

⁵ See Holmes’s criticism of a particular piece of judicial reasoning: “Now here the reasoning starts from the vague generalization Right, and one asks himself at once whether it is definite enough to stand the strain. If the scope of the right is already determined as absolute and irrespective of motive, *cadit quaestio*, there is nothing to argue about. So if all rights have that scope. But if different rights are of different extent, if they stand on different grounds of policy and have different histories, it does not follow that because one right is absolute, another is—and if you simply say all rights shall be so, that is only a pontifical or imperial way of forbidding discussion” (Holmes 1899, 241).

11. Holmes's Performance as a Judge

Holmes's performance as a judge seems perfectly consistent with Holmes's theories. Holmes's obsession with line drawing and his adherence to precedent are consistent with the positivist injunction to make the law more fixed, definite, and certain, and hence more effective in achieving its social policy. Every legal precedent promotes some social policy, according to Holmes, so even technical legal decisions without reference to specific social policies are perfectly consistent with Holmes's theory that social policy underlies every common law rule. Holmes's apparent reluctance to make explicit policy choices and his deference to the policy choices of the legislature and to public opinion also reflect both his positivist commitments and his conclusion that there is no scientific way to establish that one policy is better than another.

Holmes as a judge was innovative, however, in three recurring kinds of cases. First, whenever possible, Holmes gave policy-based reasons for accepted rules or doctrines, without changing the rules or doctrines themselves.⁶ In this, he was evidently attempting to substitute the real, policy based reasons for the theological or metaphysical reasons previously given by judges.

Second, even without scientific studies of consequences, Holmes could adopt new common law rules when they were clearly called for by his positivist analysis alone. His analysis in *The Common Law*, for example, called for the adoption of wholly external standards of liability in tort and criminal law (Holmes 1963, 42–3, 61–2, 86–90, 115–29). Holmes derived this conclusion from the purpose of the law—"to induce external conformity to rule" (Holmes 1963, 42)—and the observation that external or objective standards, in which the personal motives or intentions of the actor are irrelevant, are more effective than subjective standards in inducing external conformity (Holmes 1963, 86–9). Holmes as a theorist needed no scientific studies to establish that conclusion, so Holmes as a judge never hesitated to adopt external or objective liability standards in tort and criminal law.⁷ Careful study bears this out. My review of all Holmes's tort and criminal law opinions in the Massachusetts Supreme Judicial Court concluded that Holmes did everything he could to move tort and criminal law in Massachusetts towards completely external liability standards (Kelley 1992, 283–352).

Finally, Justice Holmes could apply theorist Holmes's theory of specification, too, without any additional scientific policy studies.⁸ That theory was simple. As experience with the danger of certain conduct under certain circumstances accumulates, judges should substitute specific rules of liability for the general negligence standard of danger foreseeable by the

⁶ See, e.g., *Rideout v. Knox*, 148 Mass. 368 (1889); *White v. Duggan*, 140 Mass. 18 (1885); *Commonwealth v. Peaslee*, 177 Mass. 267, 59 N.E. 55 (1901).

⁷ See, e.g., *Commonwealth v. Pierce*, 138 Mass. 165 (1884); *Davis v. Rich*, 180 Mass. 235 (1902); *Cotter v. Boston Railroad Co.*, 180 Mass. 145 (1901).

⁸ See, e.g., *B. & O. Railroad v. Goodman*, 275 U.S. 66 (1927); *McCarvell v. Sawyer*, 173 Mass. 540 (1899); *Pinney v. Hall*, 156 Mass. 225 (1892); *Lorenzo v. Worth*, 170 Mass. 596 (1898).

ordinary reasonable man (Holmes 1963, 89–98). This process of specification makes the law more definite, fixed, and certain and therefore more effective as a deterrent to dangerous conduct. When the judge is not sure what experience teaches about the danger of this conduct under these circumstances, he should leave the question to the jury, which is likely to have a clearer view of what experience teaches. But after a series of similar jury cases, the judge should embody the consistent jury decisions in a specific rule laid down by the court to resolve similar cases in the future. Even without a series of jury cases, however, the court can announce a specific rule if it understands fully what experience teaches about the danger of certain conduct under certain circumstances. “[W]hen standards of conduct are left to the jury,” Holmes said (1963, 100–1), “it is a temporary surrender of a judicial function which may be resumed at any moment in any case when the court feels competent to do so.”

Even in these last two kinds of innovation, where Holmes as a judge seems to adopt a new rule, Holmes did not believe he was implementing his own view of public policy. Instead, in each kind of case, Holmes no doubt believed he was just taking the next step in the necessary evolution of the law from the metaphysical to the positivist stage. The change in each kind of case was simply in the form of the law, moving to a form that made the law more fixed, definite, and certain and hence more effective at achieving the consequences—the social policy—that already justified the prior law.

12. The Common Core of Legalism in Holmes and Langdell

We can see, then, that in their prescriptions for judicial decisionmaking, the theories of Holmes and Langdell converge. The point of convergence is at what we might call extreme legalism: the position that judges ought to decide a current case based on the rules established by past precedent, without appeals to special claims of justice in an individual case, and without appeals to any higher-order normative principles beyond or in back of the prior precedent.

Holmes arrived at this extreme legalism by the following route. All laws are scientifically reducible to laws of antecedence and consequence: If you do *X* and *Y* happens, judges will order that *Z* be done. Moreover, laws are only justified by their consequences. Law has only practical ends: its social consequences for the community or policy. But there is no scientific basis for choosing among policies, even with scientific studies of the social consequences of alternative laws. The judge’s role is not, therefore, to choose among different policies but to root out misguided metaphysical or theological reasoning, relate each law to the social consequences that alone justify it, and make the law more effective in achieving that policy by making the law more clear, definite, and certain, and therefore more effective in influencing human behavior.

Langdell arrived at this extreme legalism by a different route. If law is separate and distinct from morality, any scientific understanding of law must clearly separate the law from normative justifications for the law. The best way to do that is to isolate the true or correct legal meaning of legal doctrines. A scientific judge, then, should decide cases objectively, by logical application of these purified legal doctrines to the facts of the case. This would keep the judge's own personal moral judgments, which may differ from judge to judge, out of the law. The law will then be more even-handed, predictable, and knowable.

For both Holmes and Langdell, then, appeals to justice in the individual case and to higher-order normative principles related to justice were not persuasive. For Holmes, this was because justice was a metaphysical fiction, and an individual case is simply an occasion to set out a rule that will influence human behavior in a certain way in the future. For Langdell, this was because there are always equally plausible arguments about what justice requires in an individual case, there is no scientific way to determine the uniquely just result, and objective, predictable results are achievable if we focus simply on the logical application of purified legal doctrine.

For Langdell, then, and to a large extent for Holmes, judicial decision-making in a common-law system is appropriately legalistic. Courts should simply apply pre-existing rules and doctrines—purified by Langdell or reduced by Holmes—to make the legal system predictable, consistent, and knowable.

When Holmes lifted his critique of Langdell's methodology out of his review of Langdell's second edition and dropped it, without reference to Langdell, into the first lecture of *The Common Law*, he changed its context so radically that he changed its apparent meaning. In the context of his first lecture, Holmes's opening lines are an attack on all syllogistic judicial reasoning from general normative principles and a harbinger of his conclusion in that lecture that what always justifies judicial decisions are the social consequences of those decisions. Those who took this meaning and read it back into Holmes's critique of Langdell subsequently saw Langdell as a representative of the mythical "formalist" school of legal reasoning they thought was accepted by most late nineteenth-century judges. They did not see Langdell as he was: A philosophically naive, trendy, scientism wannabe⁹ whose legalistic, "purified doctrine" methodology would have been scorned by all the great judges of the nineteenth century precisely because it failed to account for the ordinary method of judicial reasoning from the ultimate normative principles that shape legal doctrines and limit their application.

There is an irony here. The historical success of Holmes's broadly understood transplanted critique of Langdell has swamped Holmes's apparent narrow critique of Langdell's methodology. Holmes's narrow critique seemed

⁹ American colloquialism for one who imitates and thus seems to "want to be" another.

to be this: A methodology of purified doctrinal terms collapses into a purposeless legalism that ignores judges' traditional concern for justice in the individual case, based on broader normative postulates. But Holmes's proposed judicial methodology, in which judges would look beyond the individual case only to the social consequences of their decision, was also antithetical to ordinary judicial reasoning from general normative principles. Furthermore, since Holmes's positivism left him an agnostic as to the relative worth of different consequences, his practical advice to judges, as well as his practice as a judge himself, was to decide cases so as to make the law more fixed, definite, and certain, and thus more effective at achieving whatever consequences in fact justified it. So Holmes's philosophically sophisticated scientism led him, like Langdell, to clarify and purify legal doctrine so that it could be applied objectively, consistently, and predictably. Holmes and Langdell were legal soul mates, differing only in the sophistication with which they understood the trendy scientism of their age.

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