
Frederic R. Kellogg

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Judicial restraint is a subject properly bound with the interpretation, and hence the definition, of law. The nature and contours of what judges interpret dictate what is appropriate for them to do. Supreme Court Justice Oliver Wendell Holmes, Jr., who was a scholar and a philosopher before a judge, espoused a pronounced form of judicial self-restraint in constitutional law. Restraint is generally identified with forms of judicial activism. Much of the literature on judicial restraint focuses on constitutional law. In form and explanation, Holmes' judicial self-restraint is unlike versions found in recent literature. Its most
remarkable aspect is a radical form of nonintervention, not mere moderation. To be properly understood, it must be examined in light of a distinctive concept of law.

Justice Holmes' concept of law primarily developed between 1865 and 1880. After returning from the Civil War, Holmes studied law, first at Harvard Law School and later as a reader and a private practitioner. Later between 1870 and 1871, he was an independent scholar and lecturer on constitutional law at Harvard College, and on jurisprudence at Harvard Law School from 1871 to 1873. Holmes framed his concept of law in a series of published articles from 1870 to 1880, and fully developed it in his book THE COMMON LAW, which first was delivered as the Lowell Lectures in 1880 and later published in 1881. THE COMMON LAW is based on Holmes' depiction, or perhaps construction, of the general concept of the common law. The concept drew heavily from the historical debate among English legal theorists over the nature and the source of legal rationality. Holmes' concept remarkably paralleled the ideas of his friends Chauncey Wright, Charles Peirce, and William James—all of whom, with others, are associated with the American school of philosophical thought later known as "pragmatism."


7. Holmes received his bachelor's degree from Harvard College in 1861, and began a two-year course of study at Harvard Law School in the fall of 1864. He was discharged from the Twentieth Massachusetts Regiment on July 17, 1864. He left law school in the middle of his second year to finish his studies as a reader in the office of attorney Robert M. Morse of Boston. The Harvard Law School faculty consisted of three men—Theophilus Parsons, Joel Parker and Emory Washburn—all former practitioners and none an original scholar. They gave no examinations, and the only requirement for a degree was occasional attendance at lectures. Holmes received his degree in the summer of 1866. In 1870, he anonymously published the comment, "for a long time the condition of the Harvard Law School has been almost a disgrace to the Commonwealth of Massachusetts." There is no evidence of an influential mentor in Holmes' formal education. Several items in his diaries of early reading stand out as influences on his later theory. Foremost among them is the originating work of legal positivism, John Austin's Lectures on Jurisprudence, which was begun during Holmes' final term of Harvard College while awaiting a commission in the Twentieth Massachusetts Regiment. Holmes recorded reading Austin again in 1865, 1866, 1868, 1870 and 1871. He noted that on December 5, 1871 he finished his second reading of Austin's
Before tracing Holmes' intellectual path, it is useful to distinguish the common law broadly from its more recent alternative, legal positivism. John Dewey, the American philosopher whom Holmes much admired, believed the law was a social phenomenon and that all legal theories should be judged as programs for action. Dewey warned against the use of the word "law" as "a single general term." The law, he explained, must be viewed as intervening in the complex of other activities, and as being a social process. "Law cannot be set up as a separate entity, but can be discussed only in terms of the social conditions in which it arises and of what it concretely does there."

This was a classic statement of the law without bounds—endogenous and embedded. Or, as a social theorist might say, it represents an "open system." It emerges in part from, and applies to, the common law. It is distinct from the competing and now dominant view of legal positivism, which sees law as fundamentally separate, exogenous and autonomous, acting upon society rather than acting within it. The current methodology of American law reflects in some degree both common law and legal positivism. Yet, the two conceptions are at odds. They imply a deep inconsistency in our corporate belief of what law is. But what difference is made by which assumption one takes?

For the longstanding legal/theoretical debate, there have been substantial and shifting political consequences in the locus of legal authority. For present purposes, we should first focus on an operational contrast between the two views, in their different approaches to legal interpretation. According to the positivist

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8. JOHN DEWEY, MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 77 (1941).

9. Id.

10. Id.


12. See GERARD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 314 (1986). I am greatly indebted to Postema's comprehensive study, as further acknowledgements will I hope adequately reflect.
model of law as a separate and autonomous entity, the law, when considered as an adjudicative matrix, either succeeds or fails on its own. In deciding difficult cases, this means the positivist must accept the real and problematic possibility of "legal indeterminacy." The issue of the boundary location of law itself becomes intimately involved with the question of legitimacy of judicial decisions. For the alternative model, legal indeterminacy carries a very different meaning, denoting degrees of uncertainty and difficulty.

The term "legal indeterminacy" can, of course, be understood conversationally to mean a high degree of difficulty, but this is not its meaning under legal positivism. The core of positivist jurisprudence, which lends itself to the technique and style of analytical philosophy, is the definition and boundary of the concept of law. When the entire authoritative text of the law does not appear to have any clear answer to a pertinent question, the positivist paradigm forces the conclusion that it is "indeterminate." The answer must lie, in some crucial respect, outside the boundary. This bears an obvious implication for the conduct of judges: if the decision of an unclear case is not covered by what is inside the accepted boundary, it must have been guided by something outside, something not properly within the definition of the "law." The decision is tantamount to judicial activism or legislation.

In a short but trenchant analysis, the legal philosopher David Lyons recently pursued some implications of legal positivism to a troublesome conclusion. Drawing on H.L.A. Hart's influential CONCEPT OF THE LAW, Lyons demonstrates that positivist "open texture" theory adopts the concept of metaphorical space in an open-textured entity (the "law"), and renders the project of legal interpretation impossible or the language of judges and lawyers fraudulent. For the metaphorical space to be truly empty, any gap in a rule must be a gap in the law as a whole, as there would otherwise be someplace else within the law to find an answer. For such gaps it is impossible to decide a case by interpreting "the law." Lyons observes that this is inconsistent with what happens in actual legal disputes.

Lyons takes the example used by Hart in his exposition of open texture. A local ordinance bans vehicles from a public park.

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15. Lyons, supra note 13, at 297-302.
16. Id. at 300-03.
Competent users of English are uncertain or disagree about whether bicycles are vehicles. Hart infers that the rule banning vehicles from the park has a core of determinate meaning and a penumbra of indeterminate meaning, into which the bicycle would fall. Therefore, according to Hart, to decide the case a court must assign to the rule an increment of determinate meaning it did not previously have.\textsuperscript{17}

But, as Lyons observes, this assumes a logical step that is not necessary in actual practice. Assume that a judge rules for the defendant. This would not require incremental meaning for the term “vehicle.” The case could simply be decided under the principle that “conduct which is not legally prohibited is legally permitted.”\textsuperscript{18} Thus, although there might be an appearance of open texture in the language of authoritative legal materials, this does not in practice give rise to gaps in the law, as deciding the matter requires no gap-filling. A court deciding a paradigmatic “open texture” case does not have to become a surrogate legislature by contributing new meaning to the indeterminate term. Lawyers and judges who speak and act in such cases as if they are applying the law reinforce this working assumption. To hold otherwise would imply that judges and lawyers are confused or deceitful in purporting to resolve difficult cases according to “the law.”\textsuperscript{19}

This observation implies that a model of law cannot attribute an element of uncertainty to the general entity that resolves it, thus by definition rendering impossible the removal of the uncertainty. We may wonder whether the law can be conceived as a separate entity without bringing on some form of the problem that Lyons identifies. To be separate philosophically implies a distinctive and coherent form, affording a comparison between what is within and what is without. Whether the internal form is seen as a “texture,” it must be distinctive enough to be described. Implicitly, it must then be inert at the moment of analysis, insulated from the deciding judge’s revision. But, as litigation reflects, “uncertain” and indeed “original” cases arrive and must be decided. No philosophical analysis precedes the decision of lawyers and litigants to file a lawsuit. From Lyons’ operational perspective, the law must be as broad as any claim that can be stated within the rules of pleading. Even a denial of relief reflects the operation of “law.” Anglo-American law began as a process of controlling disputes, and it has been largely dispute-driven throughout its history.

\textsuperscript{17} HART, supra note 14, at 124.
\textsuperscript{18} Lyons, supra note 13, at 302-03.
\textsuperscript{19} Id. at 303.
Dewey's warning was directed at this sort of issue. He did not engage in the centuries-old debate whether law and morals were separate. Hart, at mid-century, upheld the strict separation of law against Professor Lon Fuller of Harvard, who maintained that there were several enumerable aspects of "inner morality" to the law. For Dewey, the matter was not a real question at all, as it required "setting law up as a separate entity." The leading alternative to positivism today, natural law theory, seeks to expand, not expunge, law's boundaries. The choice appears a radical one: is the law an entity identifiable from moment to moment, even as it develops, or is it something more amorphous, like a term of convenience or method, or as Dewey said, "a process?" Does it contain all of the elements necessary to decide a case in advance, or do its very decisions "make" the law, as suggested by Holmes' dissent in *Northern Securities v. United States:* "[g]reat cases, like hard cases, make bad law[?]"

How law is viewed or conceived profoundly influences the protocols with which it may be interpreted and implemented. Holmes himself has been associated with the notion of separating law from morals, mostly from his mid-career speech, "The Path of the Law," given at Boston University Law School. But, significantly, he noted in that speech that, from the historian's view, the law is "the witness and external deposit of our moral life." This article will demonstrate that Holmes agreed with Dewey that law cannot be set up as a separate entity, and this accounts for his distinctive approach to legal interpretation and judicial restraint.

I. THE ENDOGENOUS MODEL

The endogenous view of law derives from the common law origins of Anglo-American law. By contrast, legal positivism derives from the growth of enacted law, first in its defense by Thomas Hobbes, then by Jeremy Bentham's profound reformist criticism of common law, and followed by the jurisprudential system of classification of John Austin. Holmes falls on the common law side of a debate beginning with Hobbes' challenge to Sir Edward Coke (1552-1634). Holmes is part of the common law

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21. DEWEY, supra note 8, at 77.
22. Id.
25. Id. at 457.
tradition of Coke, William Blackstone (1609-1676), and Matthew Hale (1723-1780). Popular rhetoric about good and bad judging reflects the current dominance of the positivist model. Remarks by political candidates that judges have departed from “strict construction” or have “substituted their own judgment for that of an elected legislative body” are two types of such rhetoric that derive from the positivist paradigm, albeit indirectly. It is a mark of the dominance not merely of positivist legal theory but of legislation itself over the common law. Common law has no contemporary theorist. Indeed, a leading recent COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY has no entry on common law, in either the table of contents or the index. It does, however, have a substantial section on “Legal Indeterminacy.”

In the endogenous, or embedded, model, uncertainty arises not from the vagueness of language, but rather from the novelty of the situation. This model might view the bicycle hypothetical as a case of atrocious city management. Bicycles were certainly in existence when the code provision barring vehicles was adopted. The uncertainty over the coverage of “vehicle,” once noted, should immediately have been cleared up at a special meeting of the city council. Such cases do not usually fill the dockets of the courts of appeal. Those cases may invoke analysis of the extension of terms, but their resistance to resolution arises from more problematic doubts involving the consequences of applying a given rule to a novel situation.

This can be true of cases involving the extension of a settled rule, but it is more typical of cases involving interaction or contradiction among apparently settled but diverse rules. All such novel cases may “make law” because a new precedent must be cut into the settled context from unique conditions. Difficulty in this context is principally associated with anomalous facts. The “difficult” case is not one that the legislature clearly ought to have foreseen, but one which no official, whether prior common law judge or legislator, could foresee.

Some elucidation of the alternative model is necessary. As previously stated, it is drawn from an historical study of the common law. In a now famous remark, Holmes wrote:

It is the merit of the common law that it decides the case first and

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26. See SHINER, supra note 11, at 2 (stating, “[T]here are (very broadly) three main ‘movements’ in legal thought—legal positivism, anti-positivism or natural law theory, and legal realism or legal instrumentalism or Critical Legal Studies.”). Common law theory does not fit any of these.


determines the principle afterwards. . . . In cases of first impression Lord Mansfield's often-quoted advice to the business man who was suddenly appointed judge, that he should state his conclusions and not give his reasons, as his judgment would probably be right and the reasons certainly wrong, is not without its application to more educated courts.29

Holmes' comment implied a sort of common-law judicial minimalism, which decides one case at a time. Cass Sunstein recently employed this phrase approvingly, in referring to decisions of the Supreme Court that avoid formulae and sweeping generalization.30 For this principle, Sunstein might profitably have cited Holmes, who in 1870 proposed a model in which common law rules are ideally formulated:

It is only after a series of determinations on the same subject-matter, that it becomes necessary to "reconcile the cases," as it is called, that is, by a true induction to state the principle which has until then been obscurely felt. And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape. A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step.31

Holmes called this process "successive approximation."32 Legal rules are viewed historically, and Holmes proposes that these rules emerge from classes of activity, or more precisely from classes of disputes within discrete activities.

Judges decide new cases that arise within given classes (for example, vehicular accidents) on their facts, one case at a time. Eventually, case-specific analysis of the relevant varieties and conditions of vehicular accidents permits the promulgation of a general rule that reconciles a body of decisions. In contrast, legal positivism emphasizes language, which gives the appearance of fixity. The common law model emphasizes patterns of conduct, which are always changing. Finality of generalization is elusive. Introducing new forms of travel or communication may require new amendments to the rules of travel or contract, as the airplane and the telegraph added in previous centuries.33

32. Id. at 2.
33. The model can be adapted to legislation. Statutes too are the work of many minds, in elected bodies. Diverse circumstances are explored all at once, in legislative committees, instead of seriatim through litigation. Unclear circumstances remain to be addressed in a case-specific manner by the judiciary, if not through legislative amendment. See generally, GUIDO
Indeterminate cases more often involve the conflicting effects of multiple applicable rules than the extension of just one. In the positivist texture model, the aggregate of all legal rules—common law as well as statutes, constitutions, and accompanying principles—is presumably already interconnected in its recognizable form, despite having arisen from diverse unrelated human pursuits. The common law model differs from the positivist one, in that consistency must be worked in as part of the ongoing project.

In Holmes' model, the resolution of interaction among contrary cases was handled in roughly the same case-specific experimental manner as was the original formulation of the rules themselves:

The growth of the law is very apt to take place in this way: Two widely different cases suggest a general distinction, which is a clear one when stated broadly. But as new cases cluster around the opposite poles, and begin to approach each other, the distinction becomes more difficult to trace; the determinations are made one way or the other on a very slight preponderance of feeling, rather than articulate reason; and at last a mathematical line is arrived at by the contact of contrary decisions, which is so far arbitrary that it might equally well have been drawn a little further to the one side or to the other.\(^{34}\)

Such interactions are not resolved immediately through interpretation and application of an antecedent underlying textural pattern by a Herculean intelligence. Instead they are addressed in appropriately timed retrospective examinations of various prior decisions. Decisions based on different case-specific considerations are depicted as gradually filling a metaphorical space between the two rules, or "cluster[ing] around the opposite poles."\(^{35}\) Judges eventually resolve the conflict by recognizing and describing a line between the opposing poles.

Holmes' indeterminate case is one that does not nicely fit the otherwise emergent line between opposing poles and that cannot readily be reconciled with the pattern of other cases in the same metaphorical space. This image can be seen in later comments, such as one in the *Northern Securities* dissent:

Great cases like hard cases make bad law. For great cases are

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\(^{35}\) Holmes, *supra* note 34, at 654.
called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well-settled principles of law will bend.\textsuperscript{36}

Holmes' imagery is hardly consistent—he has moved from electromagnetics to fluid dynamics. And, his terminology is confusing. He earlier suggests that in ideal circumstances “a mathematical line is arrived at by the contact of contrary decisions.”\textsuperscript{37} As an example, the standard of substantial damage to neighboring property from construction near a boundary has become gradually abstracted into a judicial rule that the height of the new building must not exceed “the distance of its base from the base of the ancient windows.”\textsuperscript{38} But the example is not one that cleanly elucidates the principle. It is a stretch to describe the rule as growing out of “two widely different cases [that] suggest a general distinction, which is a clear one when stated broadly.”\textsuperscript{39}

Even if the model is roughly representative, it is rare that conflicts among cases are resolved “mathematically.”\textsuperscript{40} Holmes suggested that the line has nothing to do with mathematical logic: it is drawn “so far arbitrary that it might equally well have been drawn a little further to the one side or to the other.”\textsuperscript{41} Holmes means that case-specific decisions based on a general standard like “substantial damage” were bound to vary widely from one case to the next, like sentences for similar crimes:

*Between these clearly opposed cases there lie a great number of others which may as well be decided one way as the other, and so the exact limit of the defendant's duty is measured by the opinion of the jury. But all the elements of these cases are permanent, and there is no reason why a case should be decided one way to-day, and another tomorrow. To leave the question to the jury forever, is simply to leave the law uncertain.*\textsuperscript{42}

\textsuperscript{36} N. Sec., 193 U.S. at 400 (1903) (Holmes, J., dissenting). “Hard cases” referred not to indeterminacy but to matters that had a legally clear, yet inequitable or “hard,” result under the applicable law. See, e.g., Cty. of Morgan v. Allen, 103 U.S. 498, 515 (1880). The term is now often understood to refer to the case that has no clear result under the applicable law, as opposed to the “easy” case. Frederick Schauer, Easy Cases, 58 S. CAL. L. REV. 399, 399-400 (Jan. 1985).

\textsuperscript{37} Holmes, supra note 34, at 654.

\textsuperscript{38} Id. at 655 (citing Beadel v. Perry, L.R. 3 Eq. 465, 467 (1866)).

\textsuperscript{39} Id. at 654.

\textsuperscript{40} Id.

\textsuperscript{41} Id.

\textsuperscript{42} Id. at 654-55. For a critical assessment of the historical accuracy of Holmes’ account of the specification of rules, see P.S. Atiyah, The Legacy of
At some point it becomes part of the judicial responsibility to remove the issue from the gray area of case-specific decision and to abstract a rule and a rationale. Holmes' common law perspective makes this the boundary between activism and restraint. It is set up as a question of consensual judgment and timing. Moreover, it assumes that disputes can be plotted on a rough intellectual graph, working their way into the courts in related clumps, to be sorted out case by case until patterns of decision emerge. The patterns consist of relatively clear cases, emerging in visibly opposing areas, separated by a dimly visible line where the distinctions are less clear. Absent a governing rule, roughly similar cases may be decided on either side, but the law will remain uncertain. Therefore, it is better—at the appropriate point—for judges to exercise what Holmes called "the sovereign prerogative of choice," than to leave future actors to guess where the limits of legal liability lie.

There are a number of assumptions behind this model. First, the judiciary, while important, is not envisioned as the primary creative force in the development of legal rules. It is substantively limited in an important respect. The court sits to evaluate the relationship of disputes to the practices that give rise to them, and to let the practices, insofar as possible, dictate the solutions. Second, the process involves, as Holmes said, "many minds." It suggests an ongoing communal exploration of common problems. This exploration is similar to the model of scientific inquiry that emerged at roughly the same period in the writings of Holmes' controversial friend Charles Sanders Peirce, a model John Dewey later adopted. All thought and its conceptual products were for Peirce a response to human problems, driven by doubt and seeking commonly accepted belief. Such belief would be expressed in language as principles of knowledge, but the language was itself fallible. New circumstances were bound to arise that could not possibly have been foreseen, and hence expressed. Dewey systematically applied the model to logic in his 1939 Logic: The Theory of Inquiry.

In the early 1870s, Holmes was advancing a theory of law as itself a process of inquiry. Like the scientific philosophy of Peirce, it was driven by something akin to problematic doubt—specifically, the problem of disputes flowing into the courts—and resolved by the formulation of general rules and principles. These


43. Holmes, Law in Science and Science in Law, 12 HARV. L. Rev. 443, 461 (1899).

were subject to modification while new circumstances were still forthcoming. Holmes' 1870 article noted that even if a code were adopted by a committee of lawyers, "[n]ew cases [would] arise which [would] elude the most carefully constructed formula. The common law, proceeding, as we have pointed out, by a series of successive approximations—by a continual reconciliation of cases—is prepared for this, and simply modifies the form of its rule." 45

Holmes' model is similar to, but unique among, other theories of the common law. Before making comparative assessments it must be noted that the model would affect his approach to constitutional law. While a common law approach might seem to unfetter constitutional decision-making, for Holmes it had precisely the opposite effect. The reason for this requires extended analysis, but at this point, it may be simply stated. Constitutional language cannot be interpreted as part of the text of a positive body of authoritative law—as "ordinary law," which is what a group of recent critical constitutional scholars now call it. 46 It is too sweeping, and will provide constitutional courts with an unlimited license to override other settled areas of law. The Constitution is part of the history of the common law, to be interpreted in that context, of specific activities and disputes.

A perspective that accepts the traditional involvement of judges in the growth of legal rules provides a keener awareness of the historical conditions of the judicial role. This may, indeed, make it all the more effective in preserving realistic constraints.

II. HOLMES AND COMMON LAW THEORY

The common law is the absolute perfection of reason.

SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND

Would you have every man to every other man allege for law his own particular reason? There is not amongst men a universal reason agreed upon in any nation, besides the reason of him that hath the sovereign power. Yet though his reason be but the reason of one man, yet it is set up to supply the place of that universal reason, which is expounded to us by our Saviour in the Gospel; and consequently our King is to us the legislator both of statute-law, and of common-law.

THOMAS HOBBES, DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND

We may begin the search for the origins of Holmes' common law vision with Sir Edward Coke's above comment, and the rhetorical question inspired by it, put to an imaginary seventeenth-century common law theorist by Thomas Hobbes, in a manuscript written late in his life in the 1670s. The question, from the "Philosopher" to the "Lawyer," implies a new resolution Hobbes gave to the problem of the relation between reason and authority in the law. It is generally consistent with Hobbes' earlier and better known writings, though specifically designed as a challenge to Coke and his defense of the common law. Hobbes derided Coke's notion of an innate rationality to the common law, mocking the possibility of a universal or natural reason that can supply coherence and consistency in the search for answers to difficult legal questions. For Hobbes, Coke's assumption would let "every man to every other man allege for law his own particular reason." Law could only have coherence and consistency if its reason comes from a single source, a fully empowered sovereign.

The conditions surrounding Holmes' early life and research differed markedly from those of Coke and his contemporaries. The sovereign power of nineteenth-century America lay in a republic of divided powers, not a monarch asserting royal prerogatives in the face of challenges from rising and shifting economic and social forces. Hobbes wrote in defense of royal authority in a century of political disorder, radical revolution, and eventual restoration. Coke, and anyone else asserting common law reason in his time, would have had in mind different professional and political interests from those two hundred years later in post-Civil War America. Those favoring either legislation or executive authority would be as different in their interests and temperaments from each other as they were from Thomas Hobbes. The targets of persuasion and the stakes of belief differ greatly over this long span, but there is remarkable common ground.

Where did the peculiar "model" of common law interpretation and decision derive in Holmes' early research? Nothing quite like it is found in previous theoretical writings about the common law, and it is evident that Holmes himself believed it to be original. In certain basic respects it clearly is not. The comment that

49. POSTEMA, supra note 12, at 46 n.13.
50. CROPSEY, supra note 48, at 109.
Holmes in 1870 attributes to Lord Mansfield, for instance, evokes claims and observations about the nature of common law that were made by its defenders during the period of its emergence in the sixteenth and seventeenth centuries. Its principal expositors were engaged in various phases of the political conflict over increasing centralization of authority in England: Sir Edward Coke, Sir Matthew Hale, and Sir William Blackstone. The common law, according to Blackstone, was:

That ancient collection of unwritten maxims and customs, which is called the common law, however compounded or from whatever fountains derived, [that] had subsisted immemorially in this kingdom; and though somewhat altered and impaired by the violence of the times, had in great measure weathered the shock of the Norman Conquest.  

The common law is seen here as universal, shared by the people of England notwithstanding the history of divisions and conflicts. It was “a law common to all the realm, the jus commune or folkright mentioned by King Edward the elder, after the abolition of the several provincial customs and particular laws before-mentioned.” As can be seen from Blackstone’s comment on the Norman Conquest, it is also continuous. Its validity lies in the fact that it is of long standing:

The maxims and customs, so collected, are of higher antiquity than memory or history can reach: nothing being more difficult than to ascertain the precise beginning and first spring of an ancient and long-established custom. Whence it is that in our law the goodness of a custom depends upon it’s having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it it’s weight and authority; and of this nature are the maxims and customs which compose the common law, or lex non scripta, of this kingdom.

Legislation, the lex scripta, was written or in some form enacted law: “the written laws of the kingdom; which are statutes, acts, or edicts, made by the king’s majesty, by and with the advice and consent of the lords spiritual and temporal and commons in parliament assembled.” But when Blackstone wrote, the lex scripta and non scripta were considered to be of the same substance: “[s]tatutes also are either declaratory of the common law, or remedial of some defects therein.” Coke and Blackstone

52. SIR WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 17 (William S. Hein & Co. 1992) (1767) (emphasis added).
53. Id. at 67.
54. Id.
55. Id. at 85.
56. Id. at 86.
were skeptical and often severely critical of legislation as the product of a temporary consensus among arbitrary wills.\textsuperscript{57}

The mischiefs that have arisen to the public from inconsiderate alterations in our laws, are too obvious to be called in question; and how far they have been owing to the defective education of our senators, is a point well worthy the public attention. The common law of England has fared like other venerable edifices of antiquity, which rash and inexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence, frequently its symmetry has been destroyed, its proportions distorted, and its majestic simplicity exchanged for specious embellishments and fantastic novelties. For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays (which have sometimes disgraced the English, as well as other, courts of justice) owe their original not to the common law itself, but to innovations that have been made in it by acts of parliament.\textsuperscript{58}

Blackstone's emphasis on custom suggests a different view common lawyers had of reason. Coke, Blackstone and Hale all insisted that "[t]he common law is the absolute perfection of reason."\textsuperscript{59} This special common law reason has been described as "artificial" and "within the law,"\textsuperscript{60} but like the Holmesean model it had much to do with conduct and practice. As Postema writes, it was "inseparable from the particular situations brought to the law and resolved by it. It is the reason not of rules and principles, but of cases."\textsuperscript{61} It may be misleading to describe this reason as internal to the law, as it reflects the fact that cases are the byproduct of problematic interaction among humans engaged in social and economic activities, which fall naturally into patterns that might qualify as "custom," from which reason cannot be detached. It is quite distinct, then, from the meaning Hobbes gave the term.

When Hobbes asked: "[w]ould you have every man to every

\textsuperscript{57} POSTEMA, supra note 12, at 15. Postema notes that, after the sixteenth century, common law theory struggled to find a satisfactory explanation of legislation, as the latter took on an ever greater importance in English life and society. The medieval notion of legislation as merely another form, with adjudication, of discovering preexisting law gave away to the realization that law could be created anew: "Law could be seen not merely as the formal and public expression of an existing social (or even natural) order, but as an instrument with which that order could be altered or even recreated." Id.

\textsuperscript{58} BLACKSTONE, supra note 52, at 10.


\textsuperscript{60} POSTEMA, supra note 12, at 30 (emphasis in original).

\textsuperscript{61} Id. at 31.
other man allege for law his own particular reason, he had
accepted that individuals would disagree about legal questions
according to their differing interests. Although it might be applied
to particular situations, this reasoning is essentially subjective
and abstract. Clearly Hobbes had no confidence in Coke's claim
that common law reason would resolve close cases; but in an
important way Hobbes had misconstrued Coke's perspective.

Coke accepted the fact of complexity and diversity of opinion;
his observations in the Institutes reflect a sense of great difficulty
"to reconcile doubts... arising either upon diversity of opinions or
questions moved and left undecided." He recognized that judges
often disagreed. "The learned" had to "perplex their heads to
make atonement and peace by construction of law between
insensible and disagreeing words, sentences and provisos." How
best to do this? "It is the best manner of expounding, so to
interpret the laws that they may agree with one another," and "the
best interpreter of the law is..." With this device Coke
removed the individual interested thinker as the source of logic
and, as Holmes later did, replaced it with patterns of communal
action.

Hobbes' attack on Coke was not published until after his
death in 1681, but it was apparently circulated widely enough in
manuscript form to come to the attention of Sir Matthew Hale.
Hale's reply, Reflections by the Lord Chiefe Justice Hale on Mr.
Hobbes his Dialogue of the Lawe, was unpublished until 1921
when its importance was recognized by the British legal historian
Frederick Pollock, by then a forty-seven-year friend and
correspondent of Holmes. It engaged Hobbes on the subject of
legal reason as well as on sovereignty, and although in 1870 it
remained as yet undiscovered by Pollock and unread by the young
Holmes, it stood as an important precursor to Holmes' nineteenth-
century views.

63. COKE, 1 REPORTS, Preface to the Reader.
64. COKE, 4 REPORTS, sig. B v.
65. COKE, 2 REPORTS, To the Learned Reader.
66. Id. at 81; COKE, 10 REPORTS, 70.
67. See D.E.C. Yale, Hobbes and Hale on Law, Legislation and the
Sovereign, 31 CAMBRIDGE L. J. 125-26 (1972). "[In Coke's theory the common
custom of the realm was totally reasonable, in the sense that it represented
the product of a professional skill working a refinement and co-ordination of
social habits into a system of rules]." Id.
68. SIR MATTHEW HALE, Reflections by the Lord Chiefe Justice Hale on Mr.
Hobbes his Dialogue of the Lawe, in WILLIAM HOLDSWORTH, A HISTORY OF
ENGLISH LAW 499-513 (1956) [hereinafter Reflections]. There is no evidence
that Holmes studied Hale until 1876, and then only by way of Andrew Amos,
author of Ruins of Time Exemplified in Sir Matthew Hale's History of the Pleas
of the Crown (1856). However, there is no way of assessing the content and
Hale began his *Reflections* with an elaborate demonstration that reason is by no means univocal as applied to different subjects of inquiry, such as mathematics, physics and politics, and that it must be permitted to assume a special meaning in the difficult field of law. This is because:

[Ye texture of Humane affaires is not unlike the Texture of a diseased bodey labouring under Maladies, it may be of so various natures that such Phisique as may be proper for the Cure of one of the maladies may be destructive in relation to ye other, and ye Cure of one disease may be the death of the patient.]

Hale's comparison of law to a curative introduced into the "texture of human affairs" separates both his notion of reason and his conceptualization of law from those of Hobbes. His terminology ironically anticipated Hart's "open texture" of legal language; but unlike Hart, the texture of interest was outside the law, a texture of activity, and the element of difficulty would necessarily be located there. His analysis resisted separating law, whether as language or reasoning, from the disputes that engage the courts and the generality of human activity giving rise to them. Moreover, the reasoning of the common lawyer was not only different from that of the moral philosopher, it was directed at a different subject matter, a distinct type of problem. It was not, for Hale, akin to a mathematical or scientific dissection and analysis of a preexisting system of rules. It looked beneath rules and decisions to an organic reality, from which abstract consideration of rules alone cannot be separated. "There is no sharp conceptual boundary between law and other social phenomena because, on this view, there is no sharp difference between them in the community governed by law."

The contrast between Hobbes' *Dialogue* and Hale's *Reflections* is obscured by the use of similar terms. Both disputants in the *Dialogue*, the Lawyer and the Philosopher, are in agreement that law has a rational basis—that law must be informed by reason and cannot be law if it conflicts with reason. Hobbes' point is simply that the claim of a universal reason opens the way to disobedience by any who set up their own individual reason against that of the law: it is the nature of law to command, and commands must require obedience. It is the nature of reason always to be open to question. Thus the reason of law must emanate from a single sovereign commanding source.

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influence of conversations between Holmes and English common law scholars such as Pollock and James Fitzjames Stephen on his trips to England beginning in 1866.

69. *Id.* at 503.

70. POSTEMA, supra note 12, at 38.
Hobbes' Philosopher asks the imaginary "Lawyer" to explain how Coke can avoid the charge that in tying the law to reason he is discouraging disobedience. The Lawyer's defense of Coke, demonstrating Hobbes' personal view of common law theory, is telling: he cites Coke's dictum that the law is not based on what is reasonable to any individual man but to the reason of men specially trained and possessing the legal art; "[b]ecause by so many successions of ages it hath been fined and refined by an infinite number of Grave and Learned Men." Thus the selected straw argument, taken without further context, is knocked down by the failure of Hobbes' Lawyer to recognize reasoning as anything but subjective individual judgment, albeit coming from a profession claiming special expertise.

Hale's Reflections, in contrast, bound the definition of reason closely to the nature of the inquiry:

It is taken complexedly when the reasonable facultie is in Conjunction w[i]th the reasonable Subject, and habituated to it by Use and Exercise, and it is this kind of reason or reason thus taken that Denominates a Man a Mathematician, a Philosopher, a Politician, a Phisician, a Lawyer; yea that renders men excellent in their p[a]rticular Acts as a good Engineer, a good Watchmaker, a good Smith, a good Surgeon—all w[hi]ch consists in the application of the Facultie of reason to the particular Subject . . . .

Hale anticipated Lord Mansfield's later comment, quoted by Holmes in 1870, that the businessman suddenly appointed judge should avoid abstract reasoning and should instead rely on common sense.

Hobbes could not appreciate the common law argument from custom and practice, because he could not see how custom or precedent could have any special authority apart from their

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71. CROPSEY, supra note 48, at 109.
72. A note appears here in Pollock's text: "This should probably be 'Arts.' — F.P." HALE, supra note 69, at 501-02.
73. HALE, supra note 69, at 501-2.
74. Hale wrote:

And upon this accoun[t] it is that when men of observation and Experience in Humane affaires and Conversation between man and man make many times good Judges, yet for the most part those men that have greate reason and Learneing w[h]ich they gather up of Casuists, Schoolmen, Morall Philosophers, and Treatises touching Morals in the Theory, that So are in high Speculations and abstract Notions touching Justice and Right, and as they differ Extremely among themselves when they come to particular applications, So are most comonly the worst Judges that can be, because they are transported from the Ordinary Measures of right and wrong by their over fine Speculacons Theories and distinctions above the Comon Staple of humane conversations.

Id. at 503.
explicit adoption into the law by an empowered sovereign on strictly legal or equitable grounds:

I deny that any Custome of its own nature, can amount to the authority of a law: For if the Custome be unreasonable, you must with all other lawyers confess that it is no law, but ought to be abolished; and if the Custome be reasonable, it is not the custom, but the equity that makes it law.76

He failed to see that the common lawyers did not so much isolate specific customs one by one but kept in mind the continuing effect of public practices on the substantive framework of law. We see here the danger of which Dewey warned: using "law" as a single general term so as to set it up as a separate entity. In Hobbes' usage, custom was objectified as a discrete class of entity, set off from a similarly objectified entity "law," while insofar as the common lawyers had conceptualized law, custom was already at work within it. For Hobbes, a presumptive boundary preexisted the analysis; each custom had to be separately evaluated as part of the law or not. The objects in his mental exercise were static and synchronous, while for Hale diachronous custom was working within the living social organism that must be administered to by a judge's decision.

What Hale, especially, seems to have been driving at by "custom" are the settled and orderly habits of economic and social activity that provide the basis for a coordinate legal order; both law and custom are organically connected and integrated. This order is constantly interrupted and threatened by dispute and conflict, which would cause considerable disruption to the social fabric were the law not available to restore it, first by explicitly identifying and recognizing it, notwithstanding its complexity, then by gradually and experimentally crafting a coherent and consistent response.

*First*, the Common Law does determine what of those Customs are good and reasonable, and what are unreasonable and void. *Secondly*, the Common Law gives to those Customs, that it adjudges reasonable, the Force and Efficacy of their Obligation. *Thirdly*, the Common Law determines what is that Continuance of Time that is sufficient to make such a Custom. *Fourthly*, the Common Law does interpose and authoritatively decide the Exposition, Limits and Extension of such Customs.76

The above is from Hale's posthumous HISTORY OF THE COMMON LAW OF ENGLAND; in the Reflections Hale made clear that his concept of custom, seen through the eyes of the judge, was akin

75. POSTEMA, supra note 12, at 47 (quoting CROPSEY, supra note 48, at 55).
to experience, and law should be based on as large a variety of experience as possible:77

Againe I have reason to assure myselfe that Long Experience makes more discoveries touching conveniences or Inconveniences of Laws then [sic] is possible for the wisest Council of Men att first to foresee. And that those amendm[en]ts and Supplem[en]ts that through the various Experiences of wise and knowing men have been applied to any Law must needs be better suited to the Convenience of Laws, then the best Invention of the most pregnant witts not ayed by Such a Series and tract of Experience.

All these things are reasonable, the particular reason of the Laws & Supplem[en]ts themselves perchance are not obvious to the most Subtill Witts or Reason.

And this adds to ye difficultie of a present fathomeing of the reason of Laws, because they are the Production of long and Iterated Experience.78

This point, especially taken after the lengthy argument concerning the nature of reasoning itself, provides a striking historical precedent for Holmes' famous passage, written two centuries later, at the beginning of THE COMMON LAW: “the life of the law has not been logic, it has been experience.”79

III. HOLMES AND AUSTIN: THE PROJECT OF LEGAL CLASSIFICATION

Holmes' early essays addressed a subject largely abandoned after the deaths of Coke, Blackstone, and Hale: analysis of the non-abstract, situation-oriented reasoning inherent in the common law. If Hobbes was the immediate impetus for Hale, there is an obvious candidate for an analogous impetus two centuries later, the founder of modern analytical positivism, John Austin. There is much to be said for this comparison, though like other such analogies in intellectual history, there is a danger of oversimplification. This is especially true given Holmes' apparent ambivalence regarding Austin, combining deference toward Austin's great and growing reputation with his initially tentative but ultimately fundamental objections to Austin's work itself.80

77. Yale, supra note 67, at 126-27.
78. HALE, supra note 69, at 504-05.
80. Outside his essays Holmes refrained from criticizing Austin, even to Pollock, who twice wrote harshly of him in their correspondence: “I wish Dicey had more sense of history: he is not clear of the damnable heresies of Austin.” Letter to Holmes, October 2, 1896. “Thanks for the fresh copy of the Boston Address.” THE PATH OF THE LAW, 10 HARV. L. REV. 457 (1897). “I am a little bit disappointed that you only say Austin did not know enough law.” Id. at 475.

The truth is that his law is thoroughly amateurish—his Roman law
The objections emerged in the essays covering the period between 1870 and the Lowell Lectures in 1880. They have much to do with the attempt by Austin to establish a coherent logical arrangement for law that would, in effect, place a discrete boundary around it with the objective of a universal comprehensive analysis. Both of these elements, the notion of boundary and internal analysis, were sketched by Hobbes, but they were by no means attempted with Austin's scope and detail. Hobbes led the way with his identification of law as sovereign commands, and as previously noted, subjected the law to analysis as a static aggregate, inert at the instant of exposition. While not immune to change over time, at the moment of investigation it was a discrete body of something conceptually identifiable. The key elements of Anglo-American positivism and analytical jurisprudence are clearly articulated by Hobbes.

Interestingly, the issue most closely allied with the debate over legal reasoning in Hobbes' and Hale's late tracts is that of sovereignty. The importance of a clear location and identity for sovereign power was plain to Hobbes, although given the nature of parliamentary participation in the sixteenth century he could not solve the problem cleanly. Hobbes and his critics devoted much attention to defining precisely the locus of supreme power to make the laws.8

Hale, in the Reflections, takes issue with certain aspects of this account reflected in Hobbes' late Dialogue, in particular with Hobbes' lack of attention to the historical consensual limitations attributable to the unwritten English constitution.82 Similar issues would be taken up by Holmes in response to Austin's definition of the sovereign power two centuries later.

To Holmes, writing in 1870, the command definition simply solved one definitional problem by creating another. Holmes wrote, "In the first place, who has the sovereign power, and whether such a power exists at all, are questions of fact and of degree."83

The center of the debate had by this time begun to shift away from the source of raw power toward identification of the

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81. Yale, supra note 67, at 134.
82. HALE, supra note 69, at 507-12.
conceptual framework and boundary of law. This movement would develop considerably further by the time of Fuller's challenge to Hart at mid-twentieth century, becoming still more advanced today. Indeed, the two matters, the ultimate source of political power and the boundaries of positive law, are alike in important respects. Both appear as critical matters of empirical fact from which important conclusions must arise. They offer palpable assurance of an identifiable, authoritative character to law, as well as the prospect of an intimacy of perception and understanding of what is most essential in it.  

Confidence in such essentials would presumably promote the effectiveness of the legal order itself and its beneficial operation and improvement. It should expose the law's vulnerabilities and increase the prospect of fulfilling the law's putative purposes, including the promotion of justice.

With Austin, sovereignty and boundary are still linked by the command definition, but there is an important new element: logical arrangement. Why arrangement? This had not seemed imperative to Hobbes in his defense of the sovereign prerogative. If there is a glaring weakness in Hobbes' position, it is found in the remark made by the Philosopher in response to the Lawyer's insistence on reason inherent in the common law: "There is not amongst men a universal reason agreed upon in any nation, besides the reason of him that hath the sovereign power. Yet though his reason be but the reason of one man, yet it is set up to supply the place of that universal reason." Hobbes' sovereign reason drew on the image of a single monarch, and was vulnerable to a charge of arbitrariness. It demanded elucidation by later theorists interested in the Hobbesean project of fortifying the state's legal authority. Jeremy Bentham addressed this deficiency in the seventeenth century with his theory of utility.

Austin has been seen as an earnest disciple of Bentham, and there is a lengthy treatment of rule utilitarianism in the Lectures. There is also a direct connection between this discussion and Austin's choice of logical arrangement, based on various types of right and duty found throughout the law.  

84. See, e.g., SHINER, supra note 11, at 5-9 (discussing the nature of law and its normative characteristics).
85. CROPSEY, supra note 48 at 109.
86. JOHN AUSTIN, 1 LECTURES 109-70.
87. Id. at 412.

A monarch or sovereign body expressly or tacitly commands, that one or more of its subjects shall do or forbear from acts, towards, or in respect of, a distinct and determinate party. The person or persons who are to do or forbear from these acts, are said to be subject to a duty, or to lie under a duty. The party towards whom those acts are said to be done or forborne is said to have a right, or to be invested with a right.
recognizing the close relationship of duties and rights, Austin apparently preferred the latter out of concern to emphasize the positive scope of action necessary to maximize utility:

But the final cause or purpose for which government ought to exist, is the furtherance of the common weal to the greatest possible extent. And it must mainly attain the purpose for which it ought to exist, by two sets of means: first, by conferring such rights on its subjects as general utility commends, and by imposing such relative duties (or duties corresponding to the rights) as are necessary to the enjoyment of the former: second, by imposing such absolute duties (or by imposing such duties without corresponding rights) as tend to promote the good of the political community at large, although they promote not specially the interest of determinate parties.88

Holmes too was drawn to the prospect of logical arrangement, but for exploratory reasons. Bentham's earlier call for codification, as a precondition for the reform of society and legal institutions, was much discussed in England and America, and codification was a live issue in several states before the Civil War.89 Holmes' initial mistrust of the codification project is evident in remarks made in the 1870 article, Codes, and the Arrangement of the Law,90 opening as it does with the reference to Lord Mansfield and the case-specific reasoning of the common law.91 It is followed by the remark, "These [aspects of common law method] are advantages the want of which cannot be supplied by any faculty of generalization, however brilliant, and it is noticeable that those books on which an ideal code might best be modeled avowedly when possible lay down the law in the very words of the court."92

This further demonstrates that Holmes was from the outset not disposed to take the Hobbesean or Austinian side of the historic debate over sovereign reason. Nevertheless, he proceeded to experiment with his own logical arrangement, preferring a

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88. Id. at 282.


90. Holmes, supra note 29, at 1-2.

91. Id. at 1.

92. Id. at 1-2.
classification under the rubric of duty rather than right, as duty was empirically closer to the proscriptive nature of the law.\textsuperscript{93}

His criticism of the “rights” system was that it was not close enough to the actual operation of law and legal sanctions. It presented an image of an envelope of protection, emphasizing the scope of conduct made permissible by law, whereas that of duties was of conduct merely prohibited or required. Holmes concluded that the latter was closer to the true picture. Holmes’ analysis comports with the visions of Coke and Hale rather than Hobbes and Austin; the scope of possible social conduct had no necessary relation to the phenomenon called law. It could be engaged in anyway, and was neither created by nor dependent upon state sanction, nor any hypothetical legitimating concept like rights.\textsuperscript{94}

In his writings between 1870 and 1880, Holmes experimented with what he called the “philosophical” organization of the different branches of law seen as classifications of duty. In the course of doing so, his initial doubts concerning sovereign command and sanction rapidly matured in a manner that was to transform his ultimate perspective into an evolutionary one. By 1872, using a book notice to summarize a series of lectures he had given to seniors at Harvard College, Holmes reached a more explicit critique of Austin’s command definition, specifically in response to Austin’s rejecting custom as part of law. As pure custom was neither commanded nor sanctioned by the sovereign, Austin considered it but a “motive for decision,” becoming law only when its adoption by the legislature or courts demonstrated the tacit consent of the sovereign.\textsuperscript{95} To this Holmes replied:

Austin said, following Heineccius (Recitationes, § 72), that custom only became law by the tacit consent of the sovereign manifested by its adoption by the courts; and that before its adoption it was only a motive for decision, as a doctrine of political economy, or the political aspirations of the judge, or his gout, or the blandishments of the emperor’s wife might have been. But it is clear that in many

\textsuperscript{93.} Duties precede rights logically and chronologically. Even those laws which in form create a right directly, in fact either tacitly impose a duty on the rest of the world, as, in the case of patents, to abstain from selling the patented article, or confer an immunity from a duty previously or generally imposed, like taxation. The logical priority of the duty in such instances is clear when we consider that in its absence any man might make and sell what he pleased and abstain from paying for ever, without assistance from law. Another illustration is, that, while there are in some cases legal duties without corresponding rights, we never see a legal right without either a corresponding duty or a compulsion stronger than duty.

\textit{Id.} at 3-4.

\textsuperscript{94.} \textit{Id.}

\textsuperscript{95.} \textit{Austin, supra} note 86, at 112.
cases custom and mercantile usage have had as much compulsory power as law could have, in spite of prohibitory statutes; and as to their being only motives for decision until adopted, what more is the decision which adopts them as to any future decision? What more indeed is a statute; and in what other sense law, than that we believe that the motive which we think that it offers to the judges will prevail, and will induce them to decide a certain case in a certain way, and so shape our conduct on that anticipation?  

While this passage has frequently been interpreted as an early statement of legal realism, it is more noteworthy for the comment that "custom and mercantile usage have had as much compulsory power as law could have, in spite of prohibitory statutes." This too is an extension of the approach of Hale and Blackstone, and quite at odds with that of Hobbes and Austin. Custom is already at work with a "compulsory power." Law is not objectified as separate from the factors motivating decision, and custom is indeed placed on the same footing as statutory law, even as Blackstone had equated the lex scripta with the lex non scripta. Austin, on the other hand, had drawn a sharp distinction between custom and statutes, holding that unsanctioned custom was merely a rule of morality.  

Holmes then addressed a question that, since Hobbes, has connected sovereignty with the boundary of the law: the definition of law as the command of the sovereign. Holmes wrote:

Passing to the sufficiency of Austin's definition for determining what sovereign commands are to be called law . . . the specific penalty or sanction which Austin seemed to tacitly assume as the final test, could not always be relied on.

The notion of duty involves something more than a tax on a certain course of conduct. A protective tariff on iron does not create a duty not to bring it into the country. The word imports the existence of

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97. Id.
98. Id.
99. Id.
100. BLACKSTONE, supra note 52, at 10.
101. Austin states:

Now a merely moral, or merely customary rule, may take the quality of a legal rule in two ways—it may be adopted by a sovereign or subordinate legislature, and turned into a law in the direct mode; or it may be taken as the ground of a judicial decision, which afterwards obtains as a precedent; and in this case it is converted into a law after the judicial fashion. In whichever of these ways it becomes a legal rule, the law into which it is turned emanates from the sovereign or subordinate legislature or judge, who transmutes the moral or imperfect rule into a legal or perfect one.

AUSTIN, supra note 34, at 553.
an absolute wish on the part of the power imposing it to bring about
a certain course of conduct, and to prevent the contrary. A legal
duty cannot be said to exist if the law intends to allow the person
supposed to be subject to it an option at a certain price. The test of
a legal duty is the absolute nature of the command.\textsuperscript{102}

Here the criticism by Hale, of the dubious location by Hobbes
of the sovereign power and its problematic identification, is given a
still further elaboration. Addressing the overall character of the
law itself, Holmes argued that various manifestations are not of
the nature of commands.\textsuperscript{103} It is not just the difficulty of
establishing a clear identification of the sovereign that
undermines positivist analysis; Holmes now points to aspects of
law that are empirically antithetical to the analytical project.

While Holmes’ emphasis on the concept of duty reflected the
centrality Austin gave to both duties and rights in his systematic
account of jurisprudence, it also began to challenge the project of
any such logical arrangement. H.L.A. Hart would make a similar
criticism to that of Holmes nearly a century later: "Legal rules
defining the ways in which valid contracts or wills or marriages
are made do not require persons to act in certain ways whether
they wish to or not. Such laws do not impose duties or
obligations."\textsuperscript{104} But whereas Hart would restructure legal
positivism by placing the concept of law within a new boundary
consisting of primary and secondary rules,\textsuperscript{105} Holmes would
proceed in a direction that would lead him to abandon the quest
for an analytical system for all law, and to question whether any
determinate boundary could be established at all.

In 1873 Holmes published \textit{The Theory of Torts}, in which the
common law model was enhanced with the previously quoted
depiction of decisions accumulating around opposing poles.\textsuperscript{106} He
was by now moving away from the notion of arranging or
schematizing all law around the concept of duty, and toward the
theory of liability for which he is best known: the theory of
"external standards."\textsuperscript{107} The connection between the early and later
articles has not been altogether clear to Holmes’ biographers and
commentators. If the early articles on legal arrangement are diffi-
cult to fathom now, they presented difficulty when first written to
no less a scholar and confidant than Frederick Pollock.

Holmes had been introduced to Pollock during a visit to
England in the summer of 1874, and the two became lifelong

\textsuperscript{102} Holmes, \textit{supra} note 96, at 724.
\textsuperscript{103} Id.
\textsuperscript{104} Hart, \textit{supra} note 14, at 27.
\textsuperscript{105} Id. at 79-96.
\textsuperscript{106} Holmes, \textit{supra} note 3, at 652.
\textsuperscript{107} See \textit{infra} note 154 and accompanying text.
friends. There is much evidence in their fifty-eight-year correspondence of common views about law. Yet Pollock in 1877 asked Holmes whether a codified arrangement was undesirable "in itself," or only "that there [was] no advantage in doing it by legislative authority." Pollock confessed, "I am not really in possession of your view," and suggested it be made plainer in a future article. Holmes' reply, if any, has not survived, but his published writing had already moved beyond this issue. He had satisfied himself that a comprehensive philosophical arrangement was impossible and was by 1876 critical of the nature of right and duty as legal concepts, and concerned with the nature of legal concepts in general. Though he had sent Pollock all the articles published through 1876, Pollock failed to see the shift.

In his Lectures on Jurisprudence, Austin stressed the relationship between the concepts of rights and duties and the status of people they affected:

There are certain rights and duties, with certain capacities and incapacities to take rights incur duties, by which persons, as subjects of law, are variously determined to certain classes.

The rights, duties, capacities, or incapacities, which determine a given person to any of these classes, constitute a condition or status which the person occupies, or with which the person is invested.

One and the same person may belong to many of the classes, or may occupy, or be invested with, many conditions or status. For example, one and the same person, at one and the same time, may be son, husband, father, guardian, advocate, or trader, member of a sovereign number, and minister of that sovereign body. And various status, or various conditions, may thus meet or unite in one and the same person, in infinitely different ways.

To understand his focus, it is important to remember that Austin had in mind the creation of a chart or table that would effectively and comprehensively display the arrangement of the essential classifications of the law. Austin's published lectures contained various tables, but none are dispositive in detail or vindicate his project. Holmes, in an article published in 1872 that still experiments with the duty scheme, The Arrangement of the Law Privity, set forth a table that is intended to show that the task is impossible. His claim is that, because rights and duties

109. Id.
110. AUSTIN, supra note 34.
111. Id. at 706.
112. See, e.g., id. at 79 (containing one such table).
“may be succeeded to by another who cannot fill the situation [on which the original status was based],” the task of organizing the law around the concepts of right and duty is impossible. “It is obvious,” notes Holmes of his own table, “that this scheme does not exhaust the whole body of the law.”

Holmes' second attempt to arrange the law under categories of duty in 1872 encountered a distinct threat to the prospective comprehensiveness of the overall project of logical arrangement. To see whether his system of duties could be applied across the board, Holmes, focusing on the methodological implications of Austin's Lectures, developed a chart dividing the law by reference to the classes of persons upon whom burdens were imposed as well as to those in favor of whom they are imposed. Holmes divided duties as follows:

1. all the world to the sovereign;
2. all the world to all the world;
3. all the world to persons in particular situations;
4. persons in particular situations to the sovereign;
5. persons in particular situations to all the world; and
6. persons in particular situations to other persons in particular situations.

When he proceeded to test the arrangement it became apparent that the conceptual scheme ascribed a primary importance to what Holmes called “the situation of fact” or the “definition of the situation.”

The duties to persons in a particular situation begin with their beginning, and end with their ceasing, to fill that situation. When you describe the situation, that is, the facts, to which the duties are incident as a legal consequence, you describe the beginning and end of the duties as to a given individual.

A problem arose in considering legal succession. If classifying duties depended upon the situation of fact creating such duties, then succession of others to those duties should in theory depend upon succession to the situation of fact. But while this might be true in the majority of actual instances, it was by no means true of all:

(1872).
114. Id.
115. Id. at 47.
116. Id. at 48.
117. Id.
118. Id. at 49. See AUSTIN, supra note 34, at 718-59 (reflecting that these concerns apparently originated with Austin’s lectures on the relation of rights to status).
119. Holmes, supra note 113, at 49.
Some continuing rights are incidents to a situation of fact, which can only be filled by the first person entitled to the rights in question. A certain individual and no other is the person with whom a certain contract was made, or to whom a certain franchise or monopoly was granted; yet the continuing rights incident to the situation of contractee or grantee may be succeeded to by another who cannot fill the situation, and the same is true of ownership as distinguished from bare possession.  

This led Holmes to ask how the law had made possible succession by others not party to the original situation and the ascription of the original duties to or for the successor. Another way of putting the question was to ask how the law had been able to continue using the absolute terminology of duties, which implied a relationship between the individual and the situation, in instances where the original defining relationship did not exist. His answer was that it had succeeded in so doing through the creation, at an earlier time, of a fictitious identification of the successor with the original person.  

The aggregate of the ancestor's rights and duties or total persona sustained by him was easily separated from his natural personality, and regarded as sustained in turn by his heir, in view of the fact that it was originally his only as head of the family, and consisted of the aggregate of the family rights and duties. If we start here with succession to the entire situation of an individual in the community, on the assumption of his entire persona, we shall find the other and more usual examples of succession in privity easier to understand. . . . The first succession in privity was the universal succession of the Roman law; then privity in the succession to specific things occurs when the notion of ownership was originally subordinate to a personal relation with the right over a thing as an incident, then it is extended to successions generally.  

In the course of researching this issue Holmes found the history of the relation between master and servant to be particularly illuminative of the phenomenon, although constituting a special case:  

We have thus far dealt with clear cases of substitution where a successor assumes a persona to the exclusion of the individual who had sustained it until then. There is another class, where the new comer is introduced under a persona without excluding his

120. Id.  
121. Id.  
122. Id. at 50-62. The early family had been identified with its head. The heir would assume the family headship with its rights and obligations. This led to the fiction that a grantee assumed the grantor's identity in the same manner, eventually spreading to the law of chattels and other rights and obligations. Id.  
123. Id. at 51.
While a servant eventually assumed a legal status independent of his master, this was not originally true:

Under the early Roman law the wife, children, and servants of a citizen were his slaves. They could not be said to stand in a legal relation to him, for they had no standing before the law except as sustaining the persona of the family head.  

It was here that Holmes observed that the fictitious identification of servant and master might also elucidate the origin of the doctrine of vicarious liability:

It will be observed, moreover, that as the master's right to benefits acquired by his servants is general, and as he is liable for the latter's torts wherever a liability is imposed, the slave may be said to sustain his master's persona for purposes indefinite not only in number but in kind.

This amplification of the essay on privity was to become the connecting link to Holmes' next essay, The Theory of Torts, published in July of 1873. While in form it sought to set forth a new arrangement of duties implicit in the branches of tort law consistent with the overall duty scheme, the essay devotes much of its attention to bringing together the strands of earlier doubt and weaving the outline of a new theme—the growth of case law through the gradual articulation of standards of conduct. Through the master-servant example Holmes first confirmed the connection between his early demonstration of the lack of coextensivity of duty and sanction with its corollary that liability to a civil action does not import culpability. The continuity with the previous essay is revealed in Holmes' reference to it.

Upon securing this connection, Holmes set the stage for one final approach to classification based on duty, now by dividing

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124. Id. at 61.
125. Id.
126. Id. at 62
127. Holmes, supra note 34, at 652.
128. Id.
129. Id.

I do not owe my butcher a duty not to buy his meat, because I must pay for it if I buy. And as liability to a civil action for the amount of the plaintiff's detriment is quite different from a punishment proportioned to the defendant's guilt, so, conversely, liability to such an action does not necessarily import culpability, as it has been thought to do by some of Bentham's followers. The liability of a master for his servant, which is one of the instances illustrative of this proposition, and which Austin tried to account for by the notion of remote inadvertence, has been explained heretofore.

Id.
torts into categories of duties in which the consciousness of the party liable is an element and those in which it is not. In the latter category Holmes distinguished between duties determined by acts or events exactly defined and those not exactly defined. Into the latter category he placed “negligence *latiori sensu*.” The majority of the essay is devoted to explaining how negligence came to be put there, and it marks a turning point.

Negligence *latiori sensu* meant negligence in the broadest sense, covering all the cases in which it might be pleaded, not necessarily involving proof of a particular state of mind. In dividing torts into duties wherein consciousness was and was not an element, “negligence” cases in the broad sense at first posed a dilemma. It had become clear from the master-servant example that there were at least some within this group—master-servant cases having been treated as negligence by lawyers as well as by the Austinian school of jurisprudence—that did not involve any proof of the defendant’s lack of care. What then was to be done with the entire group?

Half-way between the two groups which have been indicated [requiring and not requiring consciousness] lie the great mass of cases in which negligence has become an essential averment, since Bentham’s ideas have gotten into the air, and the abolition of the old forms of action has allowed pleaders to state their case according to their own views of its essential elements. What does this modern negligence mean? Austin, following his general notion that liability imports culpability, analyzed negligence as the state of the defendant’s mind. This seems to us unsatisfactory; and to show why, we must begin at a little distance from the subject.  

Presenting the question in this manner led Holmes to examine the entire group from the standpoint of the development of legal precedents in negligence cases, and it brought him to the position that the entire group should be placed in the latter category, those not requiring consciousness of the defendant. Looking behind the practice of lawyers, and the assumptions of analytical jurisprudence that were based on it, the law had to be seen as a process of constant change:

The growth of the law is very apt to take place in this way: Two widely different cases suggest a general distinction, which is a clear one when stated broadly. But as new cases cluster around the opposite poles, and begin to approach each other, the distinction becomes more difficult to trace; the determinations are made one way or the other on a very slight preponderance of feeling, rather than on articulate reason; and at last a mathematical line is arrived at by the contact of contrary decisions, which is so far arbitrary that

130. *Id.* at 653.
it might equally well have been drawn a little further to the one side or the other.\textsuperscript{131}

The critical observation was that the submission of a case to the jury for trial on the issue of negligence was, as a practical matter, simply part of the process of the evolution of explicit standards of conduct in areas where they had not been settled upon by either statute or the growth of precedent. Holmes cited the \textit{Badel v. Perry} decision, for the proposition of making explicit a rule emerging from prior cases by holding that “a building cannot be complained of unless its height exceeds the distance of its base from the base of the ancient windows.”\textsuperscript{132}

Thus he concluded that negligence was not a hybrid class between conscious and unconscious tortuous action but was governed generally by external standards of conduct. Having reached this generalization, Holmes was able to avoid an ambiguous place for negligence. This led to his threefold division of tort law into the categories of “duties of all to all,” “duties of persons in particular situations to all,” and conversely “duties of all to a person in particular situations.”\textsuperscript{133} And, one final time, Holmes alluded to the original focus that had launched his research:

\begin{quote}
Indeed it is believed to be one of the evils of not having a comprehensive arrangement of the law that we lose the benefit of such generalizations as a philosophical system would naturally suggest, and cases are discussed only on the foot of the particular relation out of which they arise dramatically, but of which they are legally independent.\textsuperscript{134}
\end{quote}

This may be the best answer Holmes could have given to Pollock’s question concerning his early obsession with arrangement. But Pollock asked the question four years after this essay was published, having just received a copy of it along with the other papers that Holmes had sent from America.

The explanation for Pollock’s puzzlement is that he failed to note the movement of Holmes’ theory, a common problem with Holmes scholarship. An irony may be found in the fact that this last exercise in solving the problems of arrangement introduced a new principle that was to supplant the original undertaking and gain a life of its own. The principle of evolution toward external standards of liability would tie together the leading strands of his criticism of analytical jurisprudence and lead to a new synthesis, emerging after he published again nearly three years later.

\textsuperscript{131} \textit{Id.} at 654.
\textsuperscript{132} \textit{Id.} at 655.
\textsuperscript{133} \textit{Id.} at 663.
\textsuperscript{134} \textit{Id.} at 660.
In the same letter of July 3, 1874, a comment by Pollock challenged Holmes' citation of Beadel v. Perry for the key principle that would occupy a central place in Holmes' thought:

As to the case which professed to lay down a mathematical rule about rights to light and air, I think you will find that notion has been exploded by several later decisions in the Appeal Court. (N.B. Our equity cases in courts of first impression are for various reasons to be used with great caution as authorities on questions of pure law).

Apparently, Holmes chose to ignore this highly relevant criticism. He would go on to use the same argument, still citing Beadel, in The Common Law. He had become convinced of the accuracy of his own vision of the emergence and growth of specific standards of liability.

IV. Holmes and Austin: The Theory of Liability

Holmes' journal of his reading, which he kept from 1865 until the end of his life, reflects new interests in the three years preceding his next publication in 1876-1877, the two-part essay Primitive Notions in Modern Law. The journal shows an

135. Letters, supra note 80, at 4.
136. Holmes, supra note 79, at 128. However, Holmes now cited three additional cases, City of London Brewery Co. v. Tennants, L.R. 9 Ch. 212, 220 (1873); Hackett v. Baiss, L.R. 20 Eq. 494 (1875); and Theed v. Debenham, L.R. 2 Ch. D. 165 (1876).
137. In a note to his edition of Kent's Commentaries, written shortly after Theory of Torts, Holmes enlarged as follows:

Furthermore, when the facts are admitted, or capable of exact statement, it is simply a question of policy, not here discussed, whether the function of the jury shall not cease after a rule suggested by their finding has been applied to the satisfaction of the court, and whether that rule shall not be adopted thereafter by the court as a precedent in like cases, on the principle mentioned at the beginning of this note, and in accordance with the tendency of the law to work out exact lines through the region of uncertainty always to be found between two opposite extremes, by the contact of opposite decisions. As has been done, for instance, in the rule against perpetuities, or as to what is a reasonable time for presenting negotiable paper, as is happening with regard to sales, by successive decisions as to what are differences in kind, and what are only differences of quality; as has partially taken place with regard to ancient lights, where the former rule, that an infraction of a prescriptive right of light and air, to be illegal, must be substantial, a question of fact for the jury (Back v. Stacey, 2 C. & P. 465), is giving place to the exact formula that, in ordinary cases, the building complained of must not be higher than the distance of its base from the dominant windows. Beadel v. Perry, L.R. 2 Eq. 465.

James Kent, 2 Commentaries on American Law 561 n.1 (O.W. Holmes, ed. 1873).
138. Little, supra note 7, at 186-91.
increased interest in historical studies of English, French, German and Roman law, as well as studies in the emergent discipline of cultural anthropology. The first part of the essay, appearing in April of 1876, indicates that the early law of surrender and noxae deditio had reached the center of his attention. This essay concentrates on documenting the influence of these primitive notions on strict and vicarious liability as well as the limitation of liability in admiralty law.

In a passage near the beginning of the April installment Holmes relates how, in developing his previous perspective in *The Theory of Torts*, his interest became focused on the primitive origins of modern standards of liability.139

It should be remembered that Holmes' use of the master-servant example entered the essay on torts to buttress the corollary to the proposition that duty and legal sanctions are not coextensive, first demonstrated in the lectures at Harvard College summarized in July 1872. The corollary was that legal liability is not coextensive with culpability, an idea which had emerged as a working assumption through the work on tort law. In a footnote to the essay on torts we find evidence of Holmes' glancing "incidentally" at the origin of liability in the primitive notion that it "somehow attached upon the thing doing the harm." Yet the same footnote refers back to Holmes' use, in the essay preceding, of the master-servant example to elucidate the incompleteness of the duty scheme when applied to succession. The footnote in the essay on torts thus bears witness to the acquisition of a key piece in the puzzle from which he would eventually assemble an

139. Holmes wrote:
To lay the foundation for the discussion to which we have referred [the essay on torts] we were led to glance incidentally at the historical origin of liability in some cases which Austin, following the jurists of the mature period of Roman law, had interpreted on grounds of culpability; and to point out that it sprung from the much more primitive notion, that liability attached directly to the thing doing the damage. This suggestion will be found to have occurred to earlier writers who will be quoted. But we shall endeavor in this article to explain that primitive notion more at length, to show its influence on the body of modern law, and to trace the development from it of a large number of doctrines which in their actual form seem most remote from each other or from any common source; a task which we believe has not been attempted before. If we are successful, it will be found that the various considerations of policy which are not infrequently supposed to have established these doctrines, have, in fact, been invented at a later period to account for what was already there,—a process familiar to all students of legal history.

Holmes, *Primitive Notions in Modern Law*, 10 AM. L. REV. 422, 423 (1876) [hereinafter *Notions*].
evolutionary legal philosophy.\textsuperscript{140}

It was not until the first part of \textit{Notions} that this piece assumed its preeminent place. There, as announced in the passage just cited, Holmes ascribed to the primitive desire for vengeance a formative influence on a number of doctrines including strict and vicarious liability, as well as to the limitation of liability in the law of admiralty. The same examples were to be prominent in \textit{The Common Law}.\textsuperscript{141}

Holmes traced these modern forms of liability back to a common foundation in ancient systems of law—principally drawing on early Greek, Roman, German, and Anglo-Saxon sources, with a variety of others from the Old Testament to recent anthropological studies of primitive tribes. All demonstrated an interest in “getting at” the offending instrumentality, whether person, animal, or object, as in Exodus, “If an ox gore a man or a woman that they die, then the ox shall surely be stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit.”\textsuperscript{142}

In Plato, he noted that if a slave caused harm he was to be given up to the injured person if the owner failed to remedy the mischief himself.\textsuperscript{143} In early German and English law, even in the customs of primitive tribes, the injured party or his relatives might seek redress against the offending animal or thing.

The rude Kukis of Southern Asia were very scrupulous in carrying out their simple vengeance, life for life; if a tiger killed a Kuki, his family was in disgrace till they retaliated by killing and eating this tiger, or another; but further, if a man was killed by a fall from a tree, his relatives would take their revenge by cutting the tree down, and scattering it in chips.\textsuperscript{144}

Thus, if early law were to intervene it was through a cause of action against the owner, as the instrumentality was not subject to legal process. The only alternative to surrender lay in the payment of “composition,” the value of the offending thing. Hence the early action was not based on the fault of the owner. When payment of money originated as an alternative to surrender, these early practices of effecting revenge—and not the logic of fault—created the owner or master’s liability for the animal or servant’s acts. So also the limitation of liability to the value of the offending instrumentality, insofar as it remained in the law of admiralty after damages had otherwise assumed a relation to harm, was better explained by ancient history than by any \textit{post hoc}

\begin{footnotes}
\footnote{140.} Holmes, \textit{ supra} note 34, at 652 n.2.
\footnote{141.} From Holmes’ reading between 1873 and 1876 was drawn the original documentation for this proposition.
\footnote{142.} Holmes, \textit{ supra} note 139, at 427.
\footnote{143.} \textit{Id}.
\footnote{144.} \textit{Id.} at 429.
\end{footnotes}
rationale.\textsuperscript{145}

Neither installment of the new essay carried any update of Holmes' duty scheme of classification, which had now lost its dominant focus. What appears to account for this change of emphasis, and for the renewed drive of his writing that would culminate in THE COMMON LAW, is the attitude that there is an overriding lesson to be learned from the primitive origins of modern standards of liability greater than the doubts they had cast on pure classification. This lesson is that the logic of modern law, notwithstanding gradual accommodation of considerations of public policy, is generated nonetheless from origins which must by its own standards be considered illogical. Thus emerged a further argument for the elevation of experience over abstract reason, articulated two centuries before by Hale.

A similar development can be seen in the second part of the essay, which begins with the following statement of purpose: "The object of the following investigation is to prove the historical truth of a general result, arrived at analytically in the pages of this Review five years ago."\textsuperscript{146} The result to which Holmes alludes is the explanation he developed to account for the manner in which the law had been able to accomplish the passage of special rights to successors to whom the original situation of fact did not apply.\textsuperscript{147}

Holmes took pains to document the earlier point from Roman, German, and early English sources, reaching the conclusion that "the question propounded at the beginning of this article has now been answered by history in a way which confirms the results of analysis."\textsuperscript{148}

Holmes continued, however, by tracing the intrusion of illogical elements into the law of succession. Identification of the successor with the grantor could not explain the emergence of the notion that a given right could become associated with the object of possession itself.

But, although it would be more symmetrical if the above analysis

\textsuperscript{145} Id. at 457-58.
\textsuperscript{147} Holmes wrote:
How does this happen? How can a man who has not used a way for twenty years acquire a right by prescription? How can a man sue or be sued on a contract to which he was not a party? The article referred to [the October 1872 essay on Privity] furnished further examples, and the answer there given was that in such cases there is a fictitious identification of distinct persons for the purpose of transferring or completing the right. We have now to consider what light history will throw on the same question.

\textit{Id.}
\textsuperscript{148} See generally id. at 653.
exhausted the subject, another case will show that something still remains to be accounted for. It has been stated above, that a disseisor would not be allowed to join the time of his disseisee to his own. If the change of hands is wrongful, there is no room for the analogy just explained. But, suppose a right of way had been already acquired before the disseisin, how would it be then? Would the disseisor have an action against a person, other than the rightful owner of the dominant estate, for obstructing the way? Very little authority has been found in the books of the common law; but it is believed that such an action would lie.\textsuperscript{49}

Courts had later came to the rationale that such an action could be brought because easements ran with the land. The attribution of possessory rights and duties to inanimate objects developed parallel to the influence of the law of surrender on the development of tort liability, indicating again the proclivity of the law to permit the “language of personification,” drawn from primitive notions, to “cause confusion.”\textsuperscript{50} This example further strengthened Holmes’ historical argument against any attempt to comprehend the law as a logical system: “How comes it, then, that one who neither has possession in fact nor title, is so far favored? The answer is to be found not in reasoning, but in a failure to reason.”\textsuperscript{51}

By 1880, when the last of the preliminary essays, \textit{Trespass and Negligence}, was published, Holmes had gone on to confront the problem of defining the actual grounds on which judges and juries act in such cases. Traditional analysis offered but two alternatives. It was either because, as Austin contended, the harm caused was based on the fault of the defendant, or it must be the opposing view, that the defendant would be held strictly liable for any harm regardless of fault.\textsuperscript{52}

Holmes had concluded by 1880 that this traditional dichotomy was a false one. Instead he offered a third alternative. Negligence “does not mean the actual state of the defendant’s mind, but a failure to act as a prudent man of average intelligence would have done.”\textsuperscript{53} The test of liability was the measure of foresight. If the average reasonable man could or should have foreseen the consequences of the act, then the defendant would be held liable. Austin’s view was that “the guilt or innocence of a given actor, depends upon the state of his consciousness, with

\textsuperscript{149} Id. at 653-54.
\textsuperscript{150} Id.
\textsuperscript{151} Id. at 654.
\textsuperscript{152} “If the act was voluntary, it is totally immaterial that the detriment which followed from it was neither intended nor due to the negligence of the actor.” Holmes, \textit{Trespass and Negligence}, 14 AM. L. REV. 1, 2 (1880).
\textsuperscript{153} Id. at 28.
regard to those consequences, in the given instance or case. It struck Holmes as wrong because no evidence of the defendant's mind was in fact required. The opposing view, that "a man acts at his peril," was equally wrong because "if the intervening events are of such a kind that no foresight could have been expected to look out for them, the defendant is not to blame for having failed to do so, and therefore his act was innocent."

While this element of Holmes' theory gained some acceptance, it has been less welcome that he then sought to frame it in such a manner as to be applicable across the board. By the time Holmes completed THE COMMON LAW, he had concluded that external standards governed virtually all rules of liability, including those subjectively defined as "fraud" or "malice." This did not mean that the substantive law may not concern itself with the individual state of mind. Rather, it was an effort to emphasize the importance of community standards in molding common law rules of liability as they gradually became settled. This aspect of his emerging theory establishes a further connection with the traditional or "classical" common law theory of Coke, Blackstone and Hale, and it would eventually shape his constitutional restraint.

Holmes had shown with respect to negligence that cases were only submitted for individual determination where a clear rule did not exist, that the general rules were applied equally without regard to state of mind, and that even the individual jury determination was made without any need for subjective evidence of the thoughts of the party accused but rather by comparison of his or her conduct to the hypothetical "reasonable man." In close cases the issue would revolve around the foreseeability of harm. Simply stated, the point was that rules of negligence, whether general or individually determined, were categories of action rather than thought, that a defendant would be held to a community-wide norm, and that liability for injury occasioned to

154. AUSTIN, supra note 86, at 440. Austin used the terms guilt and innocence even in discussing liability for negligence. He confessed some confusion:

Now a state of mind between consciousness and unconsciousness—between intention on the one side and negligence on the other—seems to be impossible. The party thinks, or the party does not think, of the act or consequence. If he think of it, he intends. If he do not think of it, he is negligent or heedless.

Id. at 441-42. Yet he concludes that Intention is always separated from Negligence, Heedlessness, or Rashness, by a precise line of demarcation. The state of the party's mind is always determined, although it may be difficult (judging from his conduct) to ascertain the state of his mind. Id. at 443-44.

155. Holmes, supra note 152, at 10.

156. Atiyah, supra note 42.
others would be determined by apparent and cognizable circumstances—or by the visible environment of such action rather than the subjective consciousness of the actor.

This generalization, focusing as it did upon the requisite facts necessary to a cause of action, could be and for consistency had to be applied across the board—even to criminal law. In so doing, Holmes was forced to abandon his 1873 category of torts “in which the Consciousness of the Party liable is an element”—such as “Fraud” or “Maliciously causing breach of contract,”—as the same practical observation could be applied to the legal usage of “malice” and “fraud.”157 Indeed, as a generalization, it fitted neatly with Holmes’ long-held doubt concerning the uncertainty of fundamental legal concepts implying moral absolutes such as rights and duties, and tied his earlier analytical criticism together with the later evolutionary theme to provide a uniform perspective.

Just as in his earlier treatment of the concept of duty, Holmes’ argument applied strict scrutiny to the moral overtones of legal terminology. The word “malice” in ordinary language, he noted in the chapter on criminal law, includes something more than mere intentionally. It means “not only that a wish for the harmful effect is the motive, but also that the harm is wished for its own sake.”158 But in contemporary practice he observed that intention alone was enough to constitute legal malice, and intention itself he demonstrated to be reducible to knowledge of the consequences of the act, not judged by any attempt to look inside the mind of the individual offender. This was true even of criminal law, where one would most expect to find concern with the subjective state of mind. “The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen.”159 An example made this clear.160

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157. HOLMES, supra note 79, at 52.
158. Id.
159. Id. at 54.
160. Holmes wrote:
   For instance, if a workman on a house-top at mid-day knows that the space below him is a street in a great city, he knows facts from which a man of common understanding would infer that there were people passing below. He is therefore bound to draw that inference, or, in other words, is chargeable with knowledge of that fact also, whether he draws the inference or not. If then, he throws down a heavy beam into the street, he does an act which a person of ordinary prudence would foresee is likely to cause death, or grievous bodily harm, and he is dealt with as if he foresaw it, whether he does so in fact or not. If a death is caused by the act, he is guilty of murder. But if the workman has reasonable cause to believe that the space below is a private yard from which every one is excluded, and which is used as a rubbish-heap, his act is not blameworthy, and the homicide is a mere misadventure.
Once having demonstrated the role of external standards even in criminal and tort rules that specifically imposed an element of intent, Holmes' evolutionary philosophy was firmly in place.  

Unlike the pure analytical jurisprudence of John Austin that drew his initial interest, Holmes' final perspective saw law as neither a closed nor logical system. Nor was it an essentially static formulation, as was Austin's. Holmes' perspective was evolutionary and stressed three elements: 1) a legal analysis guided by evolution; 2) modern theories of liability springing from vengeance; and 3) a moral basis gradually supplanted by external standards.

V. REASON AND AUTHORITY IN THE LAW

It is a significant error to interpret Holmes as an early exemplar of canonical legal realism such as Jerome Frank, defining the law strictly as the decisions of judges. This interpretation has a clear implication for the relation of reason and authority; it holds that the reason of judicial decisions is the reasoning – or lack thereof – of judges alone. This article has sought to foreclose that conclusion by tracing the persistence of 

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Id. at 55-56.
161. KELLOGG, supra note 6, at 46.
162. Id.
163. Id.
164. See HOLMES, supra note 79, at 36 (stating "the law is always approaching, and never reaching, consistency").
165. See id. at 37 (stating that legal liability "spr[ulng from the common ground of revenge" and "started from a moral basis, from the thought that some one was to blame").
166. See id. at 38 (stating that the law continuously transmutes "moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated").
167. See JEROME FRANK, LAW AND THE MODERN MIND (1930) (providing an example of the canonical legal realism which differs from Holmes' interpretation). Holmes wrote Pollock about this misinterpretation as well as the Hobbesian theory of sovereignty in 1919. He stated:
John M. Zane walks into me in the Michigan Law Review and later in the Illinois Law Review and thinks I am hopelessly precluded from the place that otherwise I should occupy by accepting the old notion of a sovereign being superior to the law that he or it makes and by believing that judges make law. I suspect he means a different thing from what I do by law and that the fight is more about words than he thinks. But there is a real difference expressed by him in a tone of dogmatism upon which I should not venture, although I think I could smash him if he would say what he thought and not only what he didn't believe. He does believe that Hobbes, Bentham, Austin, and every German jurist that ever was are asses.
Letters, supra note 80, at 4.
classical common law theory at every stage of Holmes' development as a theorist. The defining elements of that tradition are the endogenous nature of law and the importance of community standards or practices in shaping its method and content. When Holmes, in the July 1872 book notice, first advanced the suggestion that law can be viewed as the prediction of judicial decisions, he was careful to qualify this as "law, in the more limited meaning which lawyers give to the word."\(^{168}\) Moreover, this remark came in the larger context of challenging Austin's adoption of two principles of Hobbesean positivism, that law is the sovereign command and that custom is outside it.\(^{169}\)

Another mistake has been to identify Holmes with the positivist separation of law and morals.\(^{170}\) For Austin, a definitive separation was the result of his claimed isolation of law within a discrete boundary, by defining law as the commands of the sovereign. Holmes' earliest criticism of Austin focused on the ambiguity of the command definition and went on to challenge the very possibility of comprehensive arrangement. This led to his investigation of legal terms that have moral connotations, such as right, duty, malice and intent, and eventually to his conclusion that in determining liability they have come to be grounded in external community standards. Holmes saw the law as replete with moral language, the ordinary meaning of which went well beyond its operational meaning in defining legal liability. Paradoxically, it became no less important for Holmes to distinguish legal from moral language, despite a philosophical perspective radically different from Austin's positivism. Whereas Austin believed that confusion of the two stood in the way of universal logical classification, to Holmes it obscured the development of standards of liability and the law's non-logical origins.

This aspect of his thought has also contributed to a reputation for skepticism. Holmes' famous skepticism has frequently been identified as a largely personal and emotional component of his thought, whether deriving from his Civil War experience or putative social-Darwinist leanings.\(^{171}\) But skepticism, as Postema has shown, was part of the strategy of traditional common law theory in challenging the defenders of the centralized state in their

\(^{168}\) Holmes, supra note 96, at 723.

\(^{169}\) Id. at 724.

\(^{170}\) The most famous example of this is LON FULLER, The Law in Quest of Itself (1940). See KELLOGG, supra note 6, at 58-62 (discussing this example).

problematic reliance, like that of Hobbes, upon sovereign natural reason.\textsuperscript{172} Coke employs this strategy in his \textit{Institutes}: “the Common Law is nothing else but reason.... But this is an artificial perfection of Reason gotten by long study, observation, and experience, and not every mans natural reason,” concluding, “No man (out of his private reason) ought to be wiser than the law, which is the perfection of reason.”\textsuperscript{173} A similar point is advanced by Hale in the \textit{Reflections}, questioning the existence of a uniform faculty of reasoning, and stressing the difficulty of ministering with transparent rationality to the “diseased body” of human affairs.\textsuperscript{174}

Common law skepticism has been tied to a notion that the collective wisdom represented in rules of long standing is more reliable than the logical judgment of any particular individual. It is more reasonable, Hale writes in the \textit{Reflections},

\begin{quote}
[T]o preferre a Law by wh[i]ch a Kingdome hath been happily governed four or five hundr[el]d yeares then to adventure the happiness and Peace of a Kingdome upon Some new Theory of my owne tho' I am better acquainted w[i]th the reasonableness of my owne Theory than w[i]th that Law.
\end{quote}

Implicit in this argument is the idea that long experience has afforded ample opportunity to adjust the common law to peculiar and unforeseen circumstances.

While we have yet to assess the full measure of Holmes’ skepticism, similarities in outlook are already obvious. What Holmes described in 1870 as the case-specific method of decision making, which he called “successive approximation,” is not far from what Postema described as legal rules being “constantly, though incrementally, readjusted to the complexities of civil life and the common good.”\textsuperscript{176} It is a skepticism of first impressions, and as will be demonstrated, also of the allure of doctrinal certainty.

Skepticism of first impressions is found as early as 1870 in the Holmesean comment that “A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step.”\textsuperscript{177} It is only strengthened by Holmes’ later conclusions that moral terminology in the law hides the operation of external standards of liability, and his discovery of non-logical origins of settled legal doctrines.

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\textsuperscript{172} Postema, supra note 12, at 60-71.
\textsuperscript{173} Coke, supra note 47, at 138.
\textsuperscript{174} Hale, supra note 69, at 508.
\textsuperscript{175} Id.
\textsuperscript{176} Postema, supra note 12, at 64.
\textsuperscript{177} Holmes, supra note 29, at 1-2.
\end{flushleft}
Nearly sixty years later in 1929, Holmes would recall the early influence of Chauncey Wright in a letter to Frederick Pollock:

Chauncey Wright a nearly forgotten philosopher of real merit, taught me when young that I must not say necessary about the universe, that we don't know whether anything is necessary or not. So that I describe myself as a bettabilitarian. I believe that we can bet on the behavior of the universe in its contract with us. We bet we can know what it will be. That leaves a loophole for free will—in the miraculous sense—the creation of a new atom of force, although I don't in the least believe in it.7

Wright was nine years older than Holmes, had graduated in 1852 from Harvard, and lived in Cambridge, not far from the College and Holmes' birthplace.8 He was the only one of a number of brilliant Holmes friends in Cambridge—including William James, Charles S. Peirce, and N. St. John Green—whom Holmes credited as an influence.9 These five would, with a few others in 1872, form a discussion group called “The Metaphysical Club,” where Peirce reported that Wright had a leading role.10 While Peirce recalled Holmes' attendance at the group's meetings, Holmes did not mention it in his diaries.11 Holmes was by nature restrained in his attribution of inspiration.12 Yet it is clear from correspondence among his contemporaries that he engaged in something like a round-robin of philosophical discussions with these and other Cambridge intellectuals, before and after 1872.13 Similarities among their writings suggest a mutual influence.14

Philip Wiener has noted the powerful impact that evolutionary theory had on this loose grouping of young intellectuals.15 Particularly influenced by Wright, who corresponded with Charles Darwin, an essential commonality of approach was the notion "that the meaning of a theory evolves with its experimental application, that all claims to truth have to be publicly verifiable and withstand the competition of prevailing ideas, and that the function of ideas is to adjust man to a precarious and changing

178. Letters, supra note 80, at 252.
180. Id. at 216-17.
181. Id.
182. Id. at 201. Nor does it appear that Holmes' reading during the period that Menand identifies was notably affected. He appeared absorbed with the law and with his writing for the AMERICAN LAW REVIEW and KENT'S COMMENTARIES.
183. Id. at 216.
184. Id. at 216-35.
185. Id.
The name given to the group serves as an ironic reminder of their abhorrence of metaphysical absolutism. Peirce described it as implying "that almost every proposition of ontological metaphysics is either meaningless gibberish . . . or else is downright absurd." An example is the concept of force in physics. Peirce contended that it must be limited to the actual motions of particles or bodies from which force is inferred. We may find a parallel with the method used by Holmes to analyze legal concepts. An example is found in his 1878 essay on Possession.

Holmes saw the intrusion of Kantian notions into the law of possession as carrying the concept of intention beyond its practical bearing in legal proceedings. As summarized in THE COMMON LAW, "The theory has fallen into the hands of the philosophers, and with them has become a corner-stone of more than one elaborate structure." Holmes saw this as not only false but self-reinforcing.

If there is a distinct version of the pragmatic maxim implicit in THE COMMON LAW, it is a resistance to the diversion of legal meaning into detached abstraction (what Dewey would call the intellectualist fallacy) through the antidote of reducing legal concepts to their effects in determining liability. This specialized form of skepticism revealed the danger of importing ideology into the grounds for decisions, and would later be used by Holmes to resist the introduction of laissez faire economic theory into constitutional due process. A legal concept, including a

187. Id. at 26.
188. Id. at 25-26.
190. Id. at 258.
191. Id. at 265.
193. HOLMES, supra note 79, at 206.
194. Holmes wrote: What the law does is simply to prevent other men to a greater or less extent from interfering with my use or abuse. Such being the direct operation of the law in the case of possession, one would think that the animus or intent most nearly parallel to its movement would be the intent of which we are in search. If what the law does is to exclude others from interfering with the object, the intent which the law should require would seem to be an intent to exclude others. Holmes, supra note 192, 702.
constitutional "right," was denied any inherent abstract content and was limited in meaning to its effects in shaping the particular form of legal liability. The embodiment of those effects was to be sought in prior precedent. Precedent, meanwhile, had been reinterpreted in Holmes' early articles as a consensus growing out of the gradual sifting of case-specific decisions. Considered in light of the rest of Holmes' theory, the famous skepticism was part of a larger outlook, integral to a reconceptualization of common law.

It was also tied to the communal or social nature of inquiry. Peirce's formulation, applicable to his own fields of interest, was that inquiry began with doubt and sought belief, and that it took place in an ongoing community of the inquirers who worked on the given problem, experimenting and addressing new findings or circumstances as the inquiry progressed. Belief was expressed in general formulations that were themselves subject to revision as the inquiry progressed. For Holmes too, the growth of legal rules began with doubt relevant to an emergent problem and progressed over time in separate case-specific proceedings, connected by engagement with common forms of dispute-engendering conduct, though each instance might display slightly different circumstances. The outcome sought was a general rule, believed to address the relevant conditions but necessarily open to revision or refinement.

The nature of skepticism growing out of this perspective reflects several aspects of inherent uncertainty. At an early stage, no single observer is in a position to know the outcome, or perhaps even the direction, of inquiry. In a scientific context, the direction of inquiry might be roughly specified; but in legal disputes, even that may be subject to derailment by the caprice of human conduct. At later stages of legal inquiry there may be competing rules affecting similar situations, and competing interpretations of them, with opposing outcomes dictated by such small differences as Holmes noted in *The Theory of Torts*. The best that an individual judge or jury could do was to attempt to decide the original case on its facts, as principles could only be arrived at later.

Both Holmes and the common law tradition drew on the notion of collective insight. But for Holmes there were important departures from the tradition of classical common law. First, Holmes implicitly questioned whether to characterize the common law tradition as one of reason at all. The presumption of a pervasive collective wisdom throughout the common law is undermined by the apparent non-logical origins of legal rules and concepts, and

196. *Id.*
the use of fictions to hide surviving vestiges. And, even if Holmes was not a canonical legal realist, he maintained a realistic awareness of the persistence of capricious decision making by individual judges, and as a judge he would witness first hand the operation of the intellectualist fallacy. Holmes' formulation recognizes a far greater degree of novelty in the nature of conflicts that work their way up through the courts, as well as their embodiment of struggles among opposing interests seeking to impose their will on the eventual rules.

This should counter the impression that Holmes' skepticism borders on cynicism. Given the impediments to "reason" in the growth of the law, there was a sense in which Holmes' unvarnished realism is nevertheless benign and meliorative. Law is the result of centuries of collective responses to social disputes and conflicts, imperfectly refined and rationalized by judges, legislators and scholars. It is the residue of the actual historical reasoning process of society, warts and all: vestiges, fictions, intellectualisms, and unresolved struggles in a somewhat camouflaged display. Despite emergent and changing patterns of conduct, struggles among competing interests, and flawed individual decision makers, the depiction leaves ample room for a gradual and revisable formation of consensus.

In Holmes' early article The Theory of Torts, juries appear to play a critical role in legal development.9 Their decisions are depicted as providing the raw data, hundreds or thousands of case-specific decisions, indicating the relevant community standard of conduct from which judges eventually abstract rules. Jury decisions have the effect of impressing upon the law standards of conduct drawn from outside the legal profession and its body of doctrine. They shape general standards of ordinary prudence, using the standard of the "reasonable" or "prudent" man. In deciding where the cost of an injury should be born, juries are depicted as knowledgeable interpreters of the customs of the usual types of litigants, and judges refrain from rulemaking until a clear pattern of decisions has established the standards and expectations indigenous to a given practice.

197. See Lorenzo v. Wirth, 49 N.E. 1010 (1898) (noting, "broadly generalized conceptions are a constant source of fallacy").
198. See generally ALBERT W. ALSCHULLER, LAW WITHOUT VALUES (Univ. of Chi. Press 2000) (describing Holmes' personality).
199. See Holmes, supra note 34, at 658 (describing function of the juror as "to inform the conscience of the court").
200. Id. at 655.
201. Id.
202. Id.
203. Id. The picture sounds compelling but it is only barely plausible as a historical account. As a depiction of the origin of early rules of liability it has
It seems clear that the traditional depiction of common law inquiry as social in nature acquires an original definition and importance in Holmes' reconstruction of common law theory. Its sense of reason is far more realistic than that of Coke. Holmesian reason is but an ideal, never fully realizable, but perhaps made more attainable by an accurate map of flaws and misconceptions both past and present. Its authority is to be found not in a pure embedded collective wisdom, for this too is a chimera; continual reconsideration is in order. The authority for revision is to be found not in detached abstract or sovereign reason, but rather in a consultative partnership with the affected community and its practices.

In this reconstruction, the concepts and methods of the common law might almost be understood as conforming the legal order with a process of rule formation and revision that is, if not democratic in the majoritarian sense, nevertheless neither fundamentally autocratic nor surreptitiously counter-majoritarian. Holmes' initial formulation of common law rules, derived by the community-oriented process of "successive approximation" and so strikingly parallel to the process Peirce attributed to the development of scientific principles, prefigures Dewey's theory of democratic inquiry. The function of a community of inquirers was as central to the legal theory of Holmes as to the scientific and philosophical theory of Peirce. This picture could have political as well as philosophical significance. The generalizing element of law — the process of rulemaking and the analysis that goes along with it — could be seen not as imposed from above but as subservient to indigenous custom and practice, indeed to the distinctive practices of the new American society. The community of observers that governed Peirce's concept of scientific inquiry would translate into

almost no support. Juries began not as independent assessors of fact, but as recognitors, attesters to the oaths of parties. It was at a late stage, after much doctrine was established, that the fact-finding function became distinct. Early case reports were sketchy and not generally careful to report facts, focusing rather on the subjective interests of reporters. See S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 34, 36-38 (Butterworth & Co. 1969) (discussing role of juror in historical context). Holmes certainly knew this—his diaries reflect exposure to enough legal history to cast doubt on his model as a historical account. See Little, supra note 7, at 163 (discussing Holmes' diaries). Even as a later development of common law in America, his account is questionable. Nevertheless, the model appears to emerge from the research done by Holmes on his edition of KENT'S COMMENTARIES. It may also have been supported by an awareness of the practice of Lord Mansfield in relying upon "special juries" chosen to determine standards of conduct in specialized matters. Holmes, supra note 34, at 152. It may have been first inspired by generalizing from the historical account of the growth of the prudent man standard in Jones on Bailments.

204. Holmes, supra note 29, at 2.
a vast community of living actors determining the continuing growth of the law and making it responsive to emerging social practices.

Moreover, subjective legal theory-making could be reined in by such a concept. The fixation of legal concepts and classifications would await the deliberate and fair assessment of the actual consequences of specific decisions. Hence in the legal context can be seen the practical importance of the so-called pragmatic maxim, whereby concepts are to be tested by their consequences. If this maxim is not strictly observed in the legal arena, loose abstraction does more than cloud or distort theory-making; it impinges upon freedom of action, as the abstractions of law in the hands of judges carry coercive power.

The notion of restraint is thus not located strictly within the legal or political domain, as a condition of the proper operation of a putative system of governance. Nor is law seen as separate and autonomous, as in the dominant school of theory still prevailing in England and America. Instead, judicial restraint is seen as a limiting condition of collective inquiry into the conditions of social ordering, of which law and governance is a contributing, but not the only, factor. The overall creation of a legally ordered society determines the extent and operation of judicial restraint. How this is to be managed is a question that runs throughout Holmes' judicial career, albeit often obscured by his willingness to exercise judicial authority in settling difficult issues—when he viewed

\[205\] The best known version of the pragmatic maxim is "consider the effects, that might conceivably have practical bearings, we conceive the object of our concept to have. Then, our concept of these effects is the whole of our concept of the object." PEIRCE, supra note 189, at 258. In one version of the pragmatic maxim Peirce writes "if we know what the effects of force are, we are acquainted with every fact which is implied in saying that a force exists, and there is nothing more to know." Id. at 265.

\[206\] For classical pragmatism, generalizing was tested by consequences and connected to the solution of human problems. In law, this highlights the degree of inclusion; yet not just in law, but in science, and (a then revolutionary notion) in philosophy itself, meaning can be described as the best consensus of all those confronted with a practical stake in the outcome. Fallibilism, the attitude that no formulation of any principle can be comprehensively final, originated in the discussions of the Metaphysical Club as a reference to the inherent element of uncertainty and ambiguity in forming and translating that consensus through language. We should note how different this is from the continental associations of the more recent version of pragmatism, that has been given currency under the name of "neopragmatism." Both critique the foundationalist tendency of Western philosophy. But nineteenth century pragmatism came to this view less from a sense of exhaustion of the Enlightenment tradition and more from a democratic reconceptualization of Western scientific and political culture. See generally Frederic R. Kellogg, Who Owns Pragmatism?, 6 J. SPECULATIVE PHILOSOPHY 67 (1992).
them as ripe—and his evident pride in doing so.\footnote{207

It remains to be shown how Holmes would apply this perspective, emerging from the formative period of his writing in the decade of the 1870s, to the cases that would come before him as an appellate judge. This is not the subject of the present inquiry, which reaches no farther in time than the observation at the opening paragraph of The Common Law, “the life of the law has not been logic, it has been experience.”\footnote{208 While anticipated in Hale’s Reflections, that insight takes on a new meaning. In cutting away the presumptively precise and self-determining character of law and replacing it with human exigency, control over the generalizing and rule-making element was detached from its traditional location in the state and rooted in society at large. Holmes’ society was a revolutionary and presumptively classless society dedicated to the radical principles of 1776. It was necessary to recognize the breadth of the community with a stake in the outcome of debate, including philosophical debate, which might affect legal theory and in turn the exercise of sanctions affecting everyone. Holmes’ judicial restraint is grounded in the relation of law and community, and its roots in the common law.


208. HOLMES, supra note 79, at 1.}