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JUSTICE HOLMES AND THE COMMON-LAW TRADITION

JOHN C. H. WU*

Case law is the most characteristic product of the Anglo-Saxon genius. From the standpoint of its substance, it had assimilated a good deal of Christian ideas in its formative stage during the Middle ages. But it is of its *mode* or functional aspect that I am now speaking. From this standpoint we can readily agree with Sir William Holdsworth that "English lawyers have invented a wholly original method of developing law."[1] Nor was Burke exaggerating when he said about case law that "nothing better could be devised by human wisdom than argued judgments publicly delivered, for preserving unbroken the great traditionary body of the law, and for marking . . . every variation in the application and the construction of particular parts . . . ."[2] Briefly, case law may be described as "a method of developing law which preserves the continuity of legal doctrine, and is, at the same time, eminently adaptable to the needs of a changing society."[3] On the whole, it is not far from the truth to say that "it hits the golden mean between too much flexibility and too much rigidity . . . ."[4] But what makes it so matter-of-fact and racy of the soil is to be found in Holdsworth's further observation that "this method keeps the law in touch with life, and prevents much unprofitable speculation upon academic problems which serves only to illustrate the ingenuity of the speculator."[5] Here we find reflected some of the most salient characteristics of the Anglo-Saxon mind: the predilection for the concrete, the aversion to speculation, the practical sense of the useful, the reliance on experience, the view of law as an integral part of life, the readiness to adapt its rules to the changing needs of men, the cautious striking out upon new paths, and instinctive response to the new values and novel situations constantly presented by a growing civilization. The common law is not laid out by rule and line. It is *un chemin qui marche,* to borrow a phrase from Pascal. It is life coping with life. It is like managing a wild horse by a robust "horse sense." There is method in its madness.

A well-known French publicist of the last century, Emile Boutmy, compared the English Constitution "to a river whose moving surface

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1. HOLDSWORTH, ESSAYS IN LAW AND HISTORY 159 (1946).
2. BURKE, WORKS 453 (Bohn ed. 1901).
3. HOLDSWORTH, *op. cit. supra* note 1, at 159.
4. *Id.* at 162.
5. *Ibid.*

glides away at one's feet, meandering in and out in endless curves, now seeming to disappear in a whirlpool, now almost lost to sight in the verdure."[6] It is just because it meanders in and out in endless curves that it has permeated gradually the soil of the whole land, and the people have come to regard it as a part of their lives. No one to my knowledge has made a happier comparison between the French constitutions and the constitutions of England and the United States.

> Slow changes, careful transitions, which follow and reflect the natural progress of events; half concealed and almost unconscious transformations, which do not run counter to consecrated formulas until innovation has secretly gained over the instincts of the people, and has allied itself with long custom—all these different forms of growth take place more easily in England, and even in the United States, than in France. . . . A French constitution may be likened to a town defended by a single wall without any redoubts inside it. A breach once made, the enemy pours in and occupies the position. The two Anglo-Saxon Constitutions, on the other hand, are well provided with these internal defences; by their very nature they could never go through those sudden transformations, which are so often in advance of the needs and ideas of the people. . . . They are endowed with an elasticity, and with a capacity for adaptation, which have up to this day insured to them a far longer existence than has been granted to the classic constructions and the 'eternal mansions' of French constitution-makers.[7]

These words are true of the common law as a whole. The spirit of the common law permeates even the constitutional systems of England and the United States.

I have dwelt so long upon this because it is quite impossible to understand and appreciate the judicial method of Justice Holmes without taking into account the fact that he was steeped in the tradition of the common law. Whether he was dealing with cases in constitutional law, or in criminal law, or in civil law, whether he was dealing with the problems of legal education or with philosophy, art and letters, you will find the same emphasis on the concrete as against the abstract, on insights as against systems, on experience as against logic, on practical good sense as against speculative reasoning. Even when he was talking about the universal, he meant a very concrete thing, the cosmos, which was to him "only an empirical fact."[8]

In a speech on the use of law schools, delivered in 1913 before the Harvard Law School Association, he declared:

> For whatever reason, the Professors of this School have said to themselves more definitely than ever before, We will not be contented to send forth students with nothing but a rag-bag full of general principles—a throng

6. BOUTMY, STUDIES IN CONSTITUTIONAL LAW 2, 3 (Dicey transl. 1891).
7. *Id.* at 171-72.
8. 1 HOLMES-LASKI LETTERS 810 (Howe ed. 1953).

> of glittering generalities, like a swarm of little bodiless cherubs fluttering at the top of one of Correggio's pictures. They have said that to make a general principle worth anything you must give it a body; you must show in what way and how far it would be applied actually in an actual system; you must show how it has gradually emerged as the felt reconciliation of concrete instances no one of which established it in terms.[9]

In defending the Langdell method of teaching law through the cases, he said: "Why, look at it simply in the light of human nature. Does not a man remember a concrete instance more vividly than a general principle. And is not a principle more exactly and intimately grasped as the unexpressed major premise of the half-dozen examples which mark its extent and its limits than it can be in any abstract form of words?"[10] In these words one hears the very voice of the common law.

The same voice is heard when he declares from the bench such *aperçus* as:

> Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.[11]

> The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least make the evil less.[12]

> [T]he law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured. A typical instance is the prohibition of the sale of unintoxicating malt liquors in order to make effective a prohibition of the sale of beer.[13]

> When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to the one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark. . . . If it is right as to the run of cases a possible exception here and there would not make the law bad.[14]

> [T]he character of every act depends upon the circumstances in which

9. HOLMES, COLLECTED LEGAL PAPERS 42 (1920) [hereinafter cited as C.L.P.]
10. C.L.P. 44.
11. Missouri, Kan. & Tex. Ry. v. May, 194 U.S. 267, 270 (1904).
12. Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 115 (1928).
13. Schlesinger v. Wisconsin, 270 U.S. 230, 241 (1926).
14. Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 41-42 (1928).

> it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.[15]

> [I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom of the thought that we hate.[16]

In all these utterances there is a certain mellowness and sweet reasonableness, a certain catholicity and largesse characteristic of the best tradition in the common law jurisprudence. It is to be noted that most of these cases have to do with what St. Thomas has called "determinations of the natural law."[17] These concrete determinations are based on some general precepts of the natural law, in the sense that where there exists an actual necessity for a clear legal distinction, the law-giver must provide one for the sake of the common good. But such positive legal distinctions cannot in the nature of things possess perfect rectitude. They can only be more or less reasonable. This is what Holmes meant when he said that most distinctions are matters of degree. The judges, in passing upon the constitutionality of a statute laying down such a distinction, should not pronounce it arbitrary simply because they think that a better distinction could have been made. As Holmes said in his opinion in *Otis v. Parker*: "Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this court can know but imperfectly, if at all."[18] There is a penumbra of reasonableness in all such particular determinations of the natural law. It is in these penumbral regions of the law that Holmes is most in his element.

The enchanted garden of the common law is full of shady groves which cheer your heart and refresh your spirit at the same time that they lure you on to new vistas. It is not a closed garden, but one which is continuous with the wild fields, hills and rivers on one side, and leads to the streets and highways on the other. At first you feel all but lost in the labyrinthine paths and by-paths; you want to discover some design but there is none. But daily saunterings in the garden familiarize you gradually with the genie of the place, the atmosphere, and the ever-changing moods of the garden, with the inevitable result that you are more and more fascinated by it. You begin to divine a certain vague design, but the element of surprise is never lacking, because it seems to change with the weather and assumes a new aspect when a new season arrives. Perhaps you find some traces of human planning here and there, but you are not able

15. Schenck v. United States, 249 U.S. 47, 52 (1919).
16. United States v. Schwimmer, 279 U.S. 644, 654-55 (1929).
17. See AQUINAS, SUMMA THEOLOGICA, I, II, Q. 95, art. 2 *in corpore*.
18. Otis v. Parker, 187 U.S. 606, 608-09 (1903).

to tell exactly where nature ends and art begins. And, in fact, there is no design, except perhaps the design of nature. What you find is not logical consistency, arrived at once and for all, but organic adaptation which must be renewed every day.

The most significant lesson that a student of comparative law learns from the common law lies in its marvellous combination of stability and progress. Dean Pound, who is too cosmopolitan a jurist to be charged with narrow provincialism, has testified to the real merits of the case law.

> The chief cause of the success of our common-law doctrine of precedents as a form of law is that it combines certainty and power of growth as no other doctrine has been able to do. Certainty is insured within reasonable limits in that the court proceeds by analogy of rules and doctrines in the traditional system and develops a principle for the cause before it according to a known technique. Growth is insured in that the limits of the principle are not fixed authoritatively once for all but are discovered gradually by a process of inclusion and exclusion as cases arise which bring out its practical workings and prove how far it may be made to do justice in its actual operation.[19]

Professor Seavey has gone a step further in showing us an inside view of the judicial process. "The judicial advocates of progress," he writes,

> have not intended to change principles of English law. They have merely sought to make the rules to accord more nearly with the fundamental conceptions of justice which underlie the specific rules. To preserve archaic individual rules in a modern society, to fail to respond to changing ideals and needs, necessarily saps the vitality of the law. Without change, the law must obey the order of all living things and die. It is one of the glories of the common law that its capacity for change enables it to remain human and vital. The common law was and should remain as the response of the judges to the civilisation of the times in view of its history. There is no principle of common law which prevents the weeding out of historical anachronisms or the correction of judicial errors, and this without resort to Parliament. The judges have at times succeeded in making changes without appearing to do so, through the use of legal fictions; old formulas are given new interpretations to create new rules. Thus the rule given to the assignability of contracts was destroyed through the fiction of a power of attorney; the liability of an agent for failing to have the authority which he purports to have is based upon the fictitious promise put into his mouth by the courts, as also is the quasi contractural liability enforced in an action formerly called general assumpsit. Sometimes older cases are explained away by restricting their effect within a narrow compass. Sometimes a court relies only upon justice or common sense or notes the divergence of a right from the principle which gave it birth. In whatever manner the result has been accomplished, it is clear that the common law has moved with the development of economic needs and judicial insight.[20]

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19. POUND, THE SPIRIT OF THE COMMON LAW 182 (1921).
20. Seavey, *Candler v. Crane, Christmas & Co.: Negligent Misrepresentation*

All this bears out the subtle point made by Holmes that our continuity with the past is only a necessity but not a duty. "The tree has grown as we know it. The practical question is what is to be the next organic step."[21]

The fact that Holmes was steeped in the spirit of the common law furnishes one of the most important clues to the understanding of his mind. It may also be said that the common law runs in his blood. This is why it is not easy to say whether Holmes is an idealist or a positivist. He is both, just as the common law is a combination of the actual and the ideal.[22] At any rate, no one seems to know more intimately the *mode,* if not the inner soul, of the common law. "The truth is," says Holmes, "that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow."[23] This is truly a penetrating insight into the *modality* of the common law and, for that matter, of any system of living law. But what is of even greater importance for our present purposes is that it reveals in all nakedness the interior landscape of Holmes himself.

It was Emerson who said that a foolish consistency is the hobgoblin of little minds. Be that as it may, consistency is not a virtue of the mind of Holmes. Like an innocently mischievous child, he seems to take a special delight in contradicting not only others but himself.

Often he was aware of his inconsistency, but he found solace in the thought that it was a sign of aliveness and perfectibility. Francis Biddle has put it very well: "If there were contradictions in his own being, they were fused by a belief that extremes need not be reached before a line can be drawn. And if morality was but a check on force,

by Accountants, 67 L.Q. REV. 466, 468 (1951).

In Dwy v. Connecticut Co., 89 Conn. 74, 99, 92 Atl. 883, 891 (1915), Wheeler, J., has said something to the same effect: "That court best serves the law which recognizes that the rules of law which grew up in a remote generation may in the fullness of experience be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance upon the old rule. It is thus great writers upon the common law have discovered the source and method of its growth, and in its growth found health and life. It is not and should not be stationary. Change of this character should not be left to the Legislature." See also the opinions of Justice Lusk in Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P.2d 438 (1941); and Judge Crane in Oppenheim v. Kridel, 236 N.Y. 156, 140 N.E. 227 (1923).

21. C.L.P. 289.

22. That Holmes is not a positivist pure and simple has been ably brought out by Mark DeWolfe Howe in his article on *The Positivism of Mr. Justice Holmes,* 64 HARV. L. REV. 527 (1951).

23. HOLMES, THE COMMON LAW 36 (1881) [hereinafter cited as COMMON LAW].

he would none the less spend a life in asserting the value of courage, of truth, of tolerance. Contradictory? Certainly, he would have answered, but so too is life full of contradictions."[24]

To take one instance out of many, once he wrote me: "I am interested by your account of what you have been reading. On the other hand, I after having freed my mind by declaring that . . . the literature of the past is a bore, I have been reading old books this summer . . . . Just now I am finishing the *Odyssey*. I read it rather slowly even with a translation alongside. It has suggested some reflections to me—too long to put on paper—but I have been surprised to find that it gave me very considerable pleasure."[25] To a drily logical reader, he would appear to be contradicting himself flatly. Since he thought the literature of the past a bore, why did he continue to read Homer, Plato, Tacitus, Seneca, Plutarch, Plautus, and the Gospel? In fact, in his studies of the common law, he had gone right to the origin, to Glanville and Bracton, to the Year Books and *Doctor and Student*. His interest in history and the classics was very strong, so strong that he had to beware of the pitfall of antiquarianism. His inborn sense of balance seldom went to sleep. What appears to be logical inconsistency was really the result of psychological self-adjustment and compensation. In a speech to learned scholars of Harvard, he uttered a warning against pedantry. "Learning, my learned brethren," he said,

> is a very good thing. I should be the last to undervalue it, having done my share of quotation from the Year Books. But it is liable to lead us astray. The law, so far as it depends on learning, is indeed, as it has been called, the government of the living by the dead. To a very considerable extent no doubt it is inevitable that the living should be so governed. The past gives us our vocabulary and fixes the limits of our imagination; we cannot get away from it. There is, too, a peculiar logical pleasure in making manifest the continuity between what we are doing and what has been done before. But the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity.[26]

Here again we find the spirit of the Janus-faced common law at work. Rooted in the old, the common law is constantly adapting itself to the new. As he says, "We must alternately consult history and existing theories of legislation."[27] Learned as he was, he could say: "We must beware of antiquarianism, and must remember that for our purposes our only interest in the past is for the light it throws upon the present."[28] On the other hand, he was also aware that

24. BIDDLE, MR. JUSTICE HOLMES 126-27 (1942).
25. Letter From Oliver Wendell Holmes to J. C. H. Wu, Sept. 6, 1925.
26. C.L.P. 138-39.
27. COMMON LAW 1.
28. C.L.P. 194-95.

history will move on and what is new today will be old tomorrow. There is a provincialism of epoch as there is a provincialism of place.[29] The Promethean spirit of Holmes refuses to be attached and bound to anything short of the Whole. "Our own word seems the last always; yet the change of emphasis from an argument in Plowden to one in the time of Lord Ellenborough, or even from that to one in our day, is as marked as the difference between Cowley's poetry and Shelley's. Other changes as great will happen. And so the eternal procession moves on, we in the front for the moment; and, stretching away against the unattainable sky, the black spearheads of the army that has been passing in unbroken line already for near a thousand years."[30]

It was Burke who said that law sharpens the mind by narrowing it. With Holmes, the study of the common law has indeed sharpened his mind, but at the same time it has broadened his vision until he could see it as an "eternal procession." This, no doubt, is partly due to his poetic insight, but one feels that his intimate knowledge of the common law had a great deal to do with giving birth to this insight. At least, the marvelous adaptability of the common law reinforced the native intellectual flexibility of Holmes. He learned from the common law the importance of constant self-transcending in order to keep on living and growing.

In this respect, no critic of Holmes has shown a deeper insight into his true significance for modern jurisprudence than Dr. Miriam T. Rooney. In her estimate:

> Much of what Mr. Justice Holmes wrote and did has unusual merit. He fought valiantly against the formalism of logic which in its decadent days got itself separated from its substance and cast a ghostly blight on legal vigor. He contended always against the neglect of experience in providing conditions for advancement and progress. He recognized, though not with desirable consistency, the power of reason to analyse problems presented by experience and to solve them constructively for the attainment of valued ends. These, along with many other features of his writing, marked a considerable improvement over Bentham and Maine and the other writers upon whom he drew.[31]

In this, as she says, Holmes is in the great tradition of the common law. In fact, no jurist seems to me to have embodied more perfectly the *modality* of the common law.

On the other hand, there can be no denying that Holmes did not pay sufficient attention to the liberalizing and humanizing influence of Christianity on the formation and development of the common law. Competent historians of the common law, like Maitland, Pollock,

29. See WEAVER, IDEAS HAVE CONSEQUENCES 67 (1948).
30. C.L.P. 140.
31. ROONEY, LAWLESSNESS, LAW, AND SANCTION 135 (1937).

Holdsworth, and Plucknett have with one voice testified to the profound influence that Christianity exercised on the English law, especially in its formative stage. Speaking of the Anglo-Saxon period, Plunknett has written:

> [T]he Church brought with it moral ideas which were to revolutionise English law. Christianity had inherited from Judaism an outlook upon moral questions which was strictly individualistic. The salvation of each separate soul was dependent upon the actions of the individual. This contrasted strongly with the custom of the English tribes which looked less to the individual than to the family group of which the individual formed a part. Necessarily such a system had little place for an individualistic sense of morals, for the group . . . can hardly be credited with moral intention that an individual can. With the spread of Christianity all this slowly changed.[32]

Perhaps it would have been more accurate to say "personalistic" instead of "individualistic," but the main idea is clear enough. Even in the present century, Lord Sumner, while denying the validity of the sweeping statement that "Christianity is part of the law of England;" had to admit, "Ours is, and always has been, a Christian State. The English family is built on Christian ideas, and if the national religion is not Christian there is none."[33]

In fact, the very idea of a government by law and not by men, as it has been developed in the common-law countries, came from Christianity. Ever since the days when the Apostles were saying to the powers that be, "We ought to obey God rather than men,"[34] there has been a continuous tradition, which is still vital today. Rooted in natural reason, it has been confirmed by faith and made invincible by grace. "Set aside justice," says St. Augustine, "and what are kingdoms but enterprises of robbery?"[35] St. Isidore of Seville says: "If the king rules rightly, he will keep the name of king; by transgressing he will lose it."[36] So John of Salisbury: "The only and supreme difference between the tyrant and the prince is that the prince governs the people according to law and obeys the law himself while the tyrant rules the people by his arbitrary will. . . . The prince fights for the laws and the liberty of the people. The tyrant considers he has done nothing unless he has made the laws void and reduced the people to servitude."[37] Bracton, whose works have been called "the

32. PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW 8-9 (5th ed. 1956).

33. Bowman v. Secular Soc'y, Ltd., [1917] A.C. 406, 464.

34. *Acts* 5:29.

35. AUGUSTINE, CITY OF GOD, bk. IV, c. 4.

36. "Recte igitur faciendo regis nomen tenetur, peccando ammittitur." ISIDORE OF SEVILLE, ETYMOLOGIARUM, bk. IX, § 3.

37. "Est ergo tiranni et principis haec differentia sola vel maxima, quod hic legi obtemperat et eius arbitrio populum regit . . . ." JOHN OF SALISBURY, POLICRATICUS, bk. IV, c. 1. "Princeps pugnat pro legibus et populi libertate; tirannus nil actum putat nisi leges evacuet et populum devocet in servitutem." *Id.* at bk. VIII, c. 17.

crown and flower of English medieval jurisprudence,"[38] touched the very springs of the spirit of true democracy and the reign of law when he wrote:

> The king himself, however, ought not to be under a man but under God, and under the Law because the Law makes the king. Therefore let the king attribute to the Law what the Law attributes to him, namely, dominion and power; for there is no king where will, and not law, wields dominion. That as a vicar of God he ought to be under the Law is clearly shown by the example of Jesus Christ whose place he takes on earth. For although there lay open to God, for the salvation of the human race, many ways and means beyond our telling, His true mercy chose this way especially for destroying the work of the devil: *he used, not the force of his power, but the counsel of justice.* And thus He wished to be under the Law 'that He might redeem those who were under the Law;' for He was unwilling to use power, but judgment. Thus also the blessed parent of God, the Virgin Mary, mother of the Lord, who by a unique privilege was above the Law, for the sake of giving an example of humility did not recoil from following lawful ordinances. The king should act likewise, lest his power remain unbridled.[39]

In fact, it was in the spirit of the common law, as Bracton understood it, that Thomas More could declare on the scaffold that "he died the King's good servant, but God's first." As his modern biographer has observed, "he died for the right of the individual conscience, as against the State."[40]

These ideas are no mere rhetoric; they are the hidden roots from which the common law has grown into such a magnificent elm, putting out great branches, "so that the birds of the air can dwell beneath its shade."[41] If one's attention is concentrated upon the branches, leaves and flowers, it is all too easy to forget its roots, to say nothing of the soil and atmosphere from which the tree has constantly drawn its vital nourishment. Quite apart from the question of personal faith, it is simply *unhistorical* to treat of the common law without going seriously into its Christian foundations. In 1886, in a speech on "The Puritan," Holmes said: "Whether they knew it or not, they planted the democratic spirit in the heart of man. It is to them we owe the deepest cause we have to love our country,—that instinct, that spark that makes the American unable to meet his fellow man otherwise than simply as a man, eye to eye, hand to hand, and foot to foot, wrestling naked on the sand."[42] After thus gracefully acknowledging the great works of the Puritan ancestors, he played the *enfant terrible* and made a public confession which

38. 1 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 206 (1903).
39. BRACTON, DE LEGIBUS, bk. I, c. 8, § 5. I have done the translation with the help of Rev. Edward Synan.
40. CHAMBERS, THOMAS MORE 400 (1935).
41. *Mark* 4:32.
42. HOLMES, SPEECHES 19 (1900).

almost sounded like a death-knell to Puritanism: "I confess that my own interest in those thoughts is chiefly filial; that it seems to me that the future lay in the heads of Bacon and Hobbes and Descartes, rather than in that of John Milton. I think that the somewhat isolated thread of our intellectual and spiritual life is rejoining the main stream, and that hereafter all countries more and more will draw from common springs."[43]

It is significant that he should have mentioned Bacon, Hobbes, and Descartes. The strains of empiricism, positivism and rationalism had begun to influence his mind.

He had not forgot his Christianity entirely. In *The Common Law,* he did not hesitate to assert: *"The degree of civilization which a people has reached, no doubt, is marked by their anxiety to do as they would be done by."*[44] Then he went on to say, "It may be the destiny of man that the social instincts shall grow to control his actions absolutely, even in anti-social situations." Finally came the *"but."* "But," he said, "they have not yet done so, and as the rules of law are or should be based upon a morality which is generally accepted, no rule founded on a theory of absolute unselfishness can be laid down without a breach between law and working beliefs."[45]

This passage reveals many things about the mentality of Holmes. To begin with, it is obvious that his thought is grounded on the Golden Rule, which he rightly considers as the ultimate and objective test by which human civilization is to be measured. Here he unconsciously touched one of the primary precepts of the natural law. As Christ Himself has told us, *"[F]or this is the law and the prophets."*[46] Holmes is also right in thinking that the Golden Rule cannot without more ado be enacted into human law and enforced with all its equipment of police force, and that to be effective human law must adapt itself to the degree of civilization a people has actually reached. Here he shows the good sense similar to that of St. Thomas, who had said, "human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain . . . ."[47] Nor does it prescribe all the acts of every virtue, but only some with a view chiefly to the common good. Here, Holmes and St. Thomas agree. But the trouble with Holmes is that he has not coördinated these two truths, as St. Thomas had done. He does not seem to see the distinction between

43. *Id.* at 21.
44. COMMON LAW 44. (Emphasis added.)
45. *Ibid.*
46. *Matthew* 7:12. (Emphasis added.)
47. AQUINAS, SUMMA THEOLOGICA, I, II, Q. 96, art. 2 *in corpore.*

a goal and a standard. The standard must not be set too high, but the goal should always be kept in mind. Without the goal there can be no intelligent discussion about progress. In the words of St. Thomas, "The purpose of human law is to lead men to virtue, not suddenly, but gradually."[48] St. Thomas integrates human law with the Golden Rule without confusing them. In the hands of Holmes, the two threaten to fall apart. He tends to think that since the Golden Rule cannot be enforced absolutely and overnight, it is to be dismissed from the field of jurisprudence as being something irrelevant or too remote. This leads inevitably to the sterile separation of law from ethics, and of human law from the law of nature. Where St. Thomas thinks in terms of *more or less*, Holmes, under the influence of Austin, seems to think in terms of *all* or *nothing*. St. Thomas's view of the law is dynamic, because the goal constantly exercises a hydraulic pressure on the legal process. Holme's view is static, because he holds the mirror exclusively to the prevailing standards of morality. I am aware that Holmes was dynamic enough in many of his decisions and dissents, but I am now speaking of his *professed* philosophy, which seems to leave a hiatus between the actual and the ideal and does not furnish a satisfactory foundation to what he did as a judge.

But what he has lost in faith and in understanding very frequently resurges from his heart. In 1923, he wrote to Laski:

> I wish you would develop more at length your grounds for disliking our constitution. Of course it has the 18th century emphasis and Bagehot criticised forcibly the division of powers—but I suspect that you don't like the bill of rights of former days—whereas I have been rather led to the belief that we have grown so accustomed to the enjoyment of those rights that we forget that they had to be fought for and may have to be fought for again.[49]

When a man is willing to fight for something and die for it, it means that he sets a higher value upon it than life. Apropos of Hindus's *Humanity Uprooted*, he wrote to Laski in 1930, "I gather from the book and more from other sources that the Communists have killed so far as they could those who did not agree with them and want to kill the rest. They present a case where I fail to see that war is absurd."[50] While intellectually he was too sceptical to say that his preference for a free world had cosmic validity, morally he was willing to fight and die, even at the age of eighty-nine, for that world. In 1928, in the famous "wire-tapping" case, he wrote a dissent which reveals that the Puritan in him was still very much alive. He said,

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48. *Id.* at I, II, Q. 96 art. 2, ad 2.
49. 1 HOLMES-LASKI LETTERS 529-30 (Howe ed. 1953).
50. 2 *id.* at 1291.

"We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part. . . . If the existing code does not permit district attorneys to have a hand in such dirty business, it does not permit the judge to allow such iniquities to succeed."[51] This is no longer merely the modality of the common law, it is its very spirit, that we are witnessing. I suspect that he shuns the moral tone because he is so full of it. As Dr. Peter J. Stanlis so keenly observes, "[T]he corridors of Holmes' legal pragmatism echoed the hushed diction of morality."[52]

To many lawyers, one of his greatest opinions is his dissent in the child-labor case.[53] The case had to do with the constitutionality of the Keating-Owen Act of 1916, which prohibited the transportation in interstate commerce of any products from factories in which children were employed. Dagenhart had two sons, one under fourteen and one between fourteen and sixteen, working in a North Carolina textile mill, who would have been allowed to work under the law of the state which only forbade child labor under twelve, but who were affected by the federal ban. He sued for an injunction against the United States District Attorney, Hammer, to prevent him from enforcing the law. The federal district court held the law unconstitutional and the Supreme Court affirmed the judgment, by a five-to-four decision. In his majority opinion, Mr. Justice Day takes the position that, while Congress has the power to exclude from interstate commerce goods which are intrinsically harmful, it has no power to exclude goods which "are of themselves harmless" simply on the ground they have been produced by child labor. To do so would be to meddle with the internal affairs of the state.

In his minority opinion, joined in by Justices McKenna, Brandeis, and Clarke, Justice Holmes takes the position that to forbid transportation in interstate commerce of such goods is not to meddle with the affairs of the state, but simply to uphold the public policy of the nation with regard to child labor. If Congress has the power to exclude goods likely to work harm, it must also have the power to exclude "the product of ruined lives." "It does not matter whether the supposed evil precedes or follows the transportation. It is enough that in the opinion of Congress the transportation encourages the evil." Of course the law cannot undertake to prohibit all evils. "But if there is any matter upon which civilized countries have agreed—far more than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused—it is

51. Olmstead v. United States, 277 U.S. 438, 469 (1928).
52. Stanlis, *Dr. Wu and Justice Holmes: A Reappraisal on Natural Law*, 18 U. DET. L.J. 149, 163 (1955).
53. Hammer v. Dagenhart, 247 U.S. 251 (1918).

the evil of premature and excessive child labor." The opinion concludes with a masterly sample of judicial reasoning:

> The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. Instead of being encountered by a prohibitive tariff at her boundaries the State encounters the public policy of the United States which it is for Congress to express. *The public policy of the United States is shaped with a view to the benefit of the nation as a whole. . . .* The national welfare as understood by Congress may require a different attitude within its sphere from that of some selfseeking State. It seems to me entirely constitutional for Congress to enforce its understanding by all means at its command.[54]

Here you see Justice Holmes at his best, and you will be reminded of some of the high spots in the writings of Edmund Burke. A subtle judicial imagination and a vigorous legal analysis are united with a statesmanlike concern for the nation as a whole. Here logic and experience, philosophy and common sense, work harmoniously together. At the bottom of it all is a half-concealed moral judgment of a true humanist who pretends to shun the moral tone. "I should have thought," he says, "that if we were to introduce our own moral conceptions where in my opinion they do not belong, this was preeminently a case for upholding the exercise of all its powers by the United States."[55]

The last quoted sentence reveals a quality quite characteristic of Holmes. He likes to talk low and act high. In theory, moral conceptions are not supposed to enter into judicial decisions; in practice moral judgment surges from the depth of his heart in spite of his professed theory. His theory is as wrong-headed as John Austin, but his instinct is as sound as the common law. The truth, of course, is that, as Judge Dillon says: "[E]thical considerations can no more be excluded from the administration of justice, which is the end and purpose of all civil laws, than one can exclude the vital air from his room and live."[56]

Twenty-three years after *Hammer v. Dagenhart* was decided, it was overruled in 1941 in the case of *United States v. Darby*,[57] and the dis-

54. *Id.* at 281. (Emphasis added.)
55. *Id.* at 280.
56. Dillon, The Laws and Jurisprudence of England and America 17 (1894).
57. United States v. Darby, 312 U.S. 100 (1941).

sent of Holmes became law. Chief Justice Stone, speaking for a unanimous Court, says, "In that case it was held by a bare majority of the Court over the powerful and now classic dissent of Mr. Justice Holmes setting forth the fundamental issues involved, that Congress was without power to exclude the products of child labor from interstate commerce."[58] After reviewing the authorities, Chief Justice Stone continues, "The conclusion is inescapable that *Hammer v. Dagenhart* was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision and that such vitality, as a precedent, as it then had, has long since been exhausted. It should be and now is overruled."[59]

According to Max Lerner, when the decision of the *Darby* case was read in the court room, one lawyer was heard to remark that he thought he heard a peal of mellow laughter from the sky.[60] By the same token there must have been a continual series of such peals of mellow laughter. The *Adkins* case was overruled in 1937 by the decision of *West Coast Hotel Co. v. Parrish*,[61] where Chief Justice Hughes vindicated the Holmes dissent in the *Adkins* case by saying, "What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end?"[62] After quoting from the dissent of Justice Holmes, he solemnly declared that "the case of *Adkins v. Children's Hospital, supra,* should be and is overruled."[63]

Likewise, *Coppage v. Kansas*,[64] which invalidated a statute of Kansas making it a criminal offence for an employer to make nonmembership in a union a condition of continued or prospective employment, and in which Holmes wrote a brief dissent, was overruled in 1941 by the decision of *Phelps Dodge Corp. v. NLRB.*[65] In *Olsen v. Nebraska*,[66] which had to do with a Nebraska statute fixing the maximum compensation that a private employment agency might collect from an applicant for employment, Mr. Justice Douglas, speaking for a unaminous Court, reaffirmed the judicial views of Holmes in all such cases almost in a wholesale manner. "In final analysis," he

58. *Id.* at 115-16.
59. *Id.* at 116-17.
60. LERNER, THE MIND AND FAITH OF JUSTICE HOLMES 168 (1943).
61. 300 U.S. 379 (1937).
62. *Id.* at 398.
63. *Id.* at 400.
64. 236 U.S. 1 (1915).
65. 313 U.S. 177 (1941).
66. 313 U.S. 236 (1941).

said,

> the only constitutional prohibitions or restraints which respondents have suggested for the invalidation of this legislation are those notions of public policy embedded in earlier decisions of this Court but which, as Mr. Justice Holmes long admonished, should not be read into the Constitution. . . . Since they do not find expression in the Constitution, we cannot give them continuing vitality as standards by which the constitutionality of the economic and social programs of the states is to be determined.[67]

In an overwhelming number of cases that have been decided by the Supreme Court and other courts during the past quarter of a century, one easily discerns the echoes of the voice of Justice Holmes, whether his name is explicitly mentioned or not. It is an unprecedented phenomenon in the judicial history of any country that the dissents of a single judge should have become the dominant opinion on so many points in the course of a few decades. It has been a posthumous landslide for the spirit of the "Venerable Old Justice." One often wonders how he would have felt if he were still living today. Unless I am greatly mistaken, he would repeat the same words he had written me in 1930: "So long as one is on the firing line, one lives in eternal doubt, because the question is not 'Did I do something well last year?' but 'Shall I do well today and tomorrow?' "[68] Whatever one may say about his final credo, the *modality* is that of the Saints of the Church, who have taught in one accord that, in the interior life of man, not to advance is to fall back.[69]

How the judgments of Holmes in all the cases involving social legislation fall in line with the great social Encyclicals of Leo XIII and Pius XI, has been ably brought out by John J. O'Connor in his book *The Supreme Court and Labor,* published in 1932 by the Catholic University of America. More recently, in a pamphlet on *Economic Liberalism and Free Enterprise,* Father Banjamin L. Masse, S.J., has also passed favorably upon the soundness of Holmes's dissents in the light of *Rerum Novarum* and *Quadragesimo Anno.*

But the question is, how did he arrive at such sound judgments when the prevailing judicial philosophy was that of ultra-individualism, which used to justify itself in the name of a perverted version of natural law and natural rights? He did not justify his position by the Thomistic philosophy of the natural law, of which he knew nothing. He arrived at his position instinctively, because he was more profoundly steeped in the tradition of the common law than any of his brethren, and the common law was, in turn, steeped in the true

67. *Id.* at 246-47.
68. Letter From Oliver Wendell Holmes to J. C. H. Wu, Feb. 28, 1930.
69. I have expounded this doctrine at length in WU, THE INTERIOR CARMEL: THE THREEFOLD WAY OF LOVE (1953).

spirit of Christianity.[70]

Laski once wrote to Holmes:

> Did I remark to you that I am beginning to discover that there is a genuinely English mind? I see that when I talk to Wallas, who is full of real insights, can never concentrate on any subject, never argue about it abstractly, is always driven to the use of a concrete illustration, is rarely logical and about eight times out of ten patently in the right. Well, say you, the life of the law has been experience and not logic; but I think these English (I write with the detachment of an outsider) specialise in subconscious processes the implications of which they don't understand.[71]

This seems to give a good picture of the *mode* of the common law; and the mode of the common law constitutes the dominant note of the mind of Holmes. Whatever may have been his conscious philosophy of life and of law, his instinct is that of the common law. He was living on the inheritance of Christian jurisprudence, without realizing what the world would be like if all were squandered. We are witnessing a tremendous revival of interest in "the laws of nature and of nature's God." In this movement, Holmes will be remembered as one who revolted heroically and successfully against the strait-jackets of a legal Phariseeism, which used the name of God and His laws in vain. His destructive efforts have cleared the way for a new constructive era of American jurisprudence.

Dr. Rooney has put it very well:

> On the activities of the American jurists of the future, the final estimate of Mr. Justice Holmes' life work rests. If the way he leaves open be utilized to restore the pristine vigor of the common law system, his name will signify the inauguration of a new era and a new hope. If, on the contrary, his doctrine of sanction be construed narrowly and accepted literally, it cannot but mark the end of an unhappy century, begun by the well-intentioned Bentham, which in becoming more and more lawless, has yielded less and less freedom.[72]

This is what I would call a "historical judgment," which Holmes himself would have liked, for he never regarded himself as more than a strategic point in the campaign of history.

In the recent years, there have not been lacking signs pointing to "a new era and a new hope." To mention just one out of many, the opinion of Mr. Justice Frankfurter in the *Steel Seizure Case*,[73] may be regarded as a straw in the wind. Our democracy, he says,

> implies the reign of reason on the most extensive scale. The Founders of this Nation were not imbued with the modern cynicism that the only

70. See among other books O'SULLIVAN, THE INHERITANCE OF THE COMMON LAW (1950).
71. 1 HOLMES-LASKI LETTERS 303 (Howe ed. 1953).
72. ROONEY, LAWLESSNESS, LAW, AND SANCTION 136 (1937).
73. Youngstown Sheet & Tube Co. v. Sawyer, 143 U.S. 579 (1952).

> thing that history teaches is that it teaches nothing. . . . For them the doctrine of separation of powers was not mere theory; it was a felt necessity. Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded—too easy. The experience through which the world has passed in our own day has made vivid the realization that the Framers of our Constitution were not inexperienced doctrinaires.[74]

This, I surmise, is exactly what Holmes himself would have said in view of the lessons of experience. Anyway, I know of no one who knows the mind of Holmes more intimately than Justice Frankfurter.

In conclusion, I wish to say that a true philosophy of law has nothing to lose but everything to gain from the lessons of experience and from the practical judicial wisdom of the legal artists. For both the art and the philosophy of law are based upon the reign of reason, and both are indispensable for its full realization.

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74. *Id.* at 593.