The Pragmatic Naturalism of Mr. Justice Holmes

Burton F. Brody
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I. Introduction

It is somehow fitting that Lon Fuller, Carter Professor of Jurisprudence at the Harvard Law School, the most respectable critic of Justice Holmes' jurisprudence, provides the means of defending Holmes' elegant thinking against the onslaughts directed at it. Not that Holmes needs defense, but it would seem from the attacks made that his extremely lean thoughts can use some expansion. Professor Fuller, by articulating the standard of promoting fidelity to law, for the first time permits an analysis of Holmes not from philosophical bias, but from the goal the Justice sought. In a nutshell, Fuller's thesis is that if there is to be widespread obedience (efficacy of law), law must embody morality. Although he scrupulously avoids articulating any substantive rules of morality, implicit in his, and other naturalist jurisprudence, is that the morality the law must embody is his morality—or to be completely fair, His morality. It was at this precise point Justice Holmes declined the dogma of naturalism.

Oliver Wendell Holmes believed that law and morality were intertwined. In the speech to which his severest critics often turn, Holmes said:

The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men.3

However, Holmes, who also knew that the life of the law is ex-

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1 Howe, The Positivism Of Mr. Justice Holmes, 64 Harv. L. Rev. 530 (1951). Other, less objective, criticism of the Justice's jurisprudence appears in the following: Lucey, Natural Law and American Legal Realism: Their Respective Contributions To A Theory Of Law In A Democratic Society, 30 Geo. L.J. 493 (1942); Palmer, Hobbes, Holmes And Hitler, 31 A.B.A.J. 569 (1945); Palmer, Defense Against Leviathan, 32 A.B.A.J. 328 (1946).

2 Fuller, Positivism And Fidelity To Law—A Reply To Professor Hart, 71 Harv. L. Rev. 650 (1958).

3 Holmes, The Path Of The Law, 10 Harv. L. Rev. 457, 459 (1897).
had learned from experience, both personal and vicarious, that morality is an amorphous, quicksilver, often quixotic body of ideals. He knew that moral values may, and do vary, from person to person, especially in an open, pluralistic society. Therefore he believed to be effective, i.e., promote a high degree of obedience, the law must avoid all reference to the sundry propositions of particular moral beliefs. He knew that differences in moral codes, although slight, were deeply held and gave rise to highly emotional disputes.

Professor Howe, in an article on Holmes' jurisprudence, points out that Catherine Drinker Bowen in *Yankee From Olympus* painted a misleading picture of the relationship between Justice Holmes and his father, the irrepressible Doctor Holmes.\(^5\) Surely, as Howe writes, a leader of progressive thought of the stature of Doctor Holmes could not help but impart some of his distrust of anti-intellectual absolutism to his son. However, Howe's article overlooks an event in the history of the Holmes family that gives great insight to Justice Holmes' skepticism. After thirty-seven years as minister of the First Congregationalist Church of Boston, Abiel Holmes, the Justice's grandfather was dismissed.\(^6\) The schism which brought about his dismissal developed over a conflict between the older, strict Calvinists and the Unitarian movement within the church. Certainly such severe treatment after such devoted, able service had to strike deep into a proud family. It had to effect the moral philosophy of all the members of the family; and further, it had to influence their evaluation of other moral philosophies.

Combine familial and paternal distrust of the selfrighteousness of moral absolutism with Justice Holmes' realization of the wide gap between morality as practiced and morality as articulated, and the basis of Holmes' skepticism is patent. Holmes' admiration of Ralph Waldo Emerson is well known, and the philosopher-poet's influence is certainly great. It is Emerson who in response to the question, "What is the largest sea in the world?" is popularly said to

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4 O. W. Holmes, Jr., The Common Law 1, (1881).
5 Howe, The Positivism Of Mr. Justice Holmes, 64 Harv. L. Rev. 530, 532-536 (1951).
6 C. D. Bowen, Yankee From Olympus 49-51 (1944).
have responded, “The sea of blood shed in the name of the Prince of Peace.” Holmes’ misgivings for which he is so soundly condemned as a cynic, were not directed at law or morals. Rather, as Emerson’s, his doubts were directed at Man’s ability and desire, as witnessed by history, to fulfill the moral codes espoused.

I submit that those who condemn Justice Holmes as a cynic, share his doubt that man can adhere to a demanding moral code. In fact, I will venture the thought that the degree to which any critic shares the Justice’s misgivings is directly proportional to the vituperation employed in condemning him. The distinction is simply that his critics are concerned only that Man cannot adhere to their moral code; and those critics can, in their supreme righteousness, absolve individuals for falling short of the mark. On the other hand, Justice Holmes was convinced that Man could not fulfill any demanding code, and he was equally certain that it was beyond his power to forgive this shortcoming. His job, as he saw it, was to live with the shortcoming and contribute to molding a society that could cope with it. The condemnation flows then, not from moral rectitude, but from moral certitude; and it is directed at dissent rather than immorality.

There is no doubt Mr. Justice Holmes firmly believed that the efficacy of law depended on something more than the will and physical power of the government to impose it. However, in searching for this meta-legal criterion he turned from articulated moral codes to something equally clear, but more widely shared. He turned to practiced ideals rather than merely articulated ones. He labelled his meta-legal phenomenon “social value” rather than morality, and thereby incurred the everlasting wrath of the moral absolutists. He displeased them not only because he set forth different criteria of justice, but also because there is the distinct possibility he has found a more universally humane one.

Justice Holmes’ reference to a standard to which the law itself must conform shall be demonstrated by analyzing his philosophy as articulated in The Path Of The Law. Then the investigation will shift to his philosophy as practiced, by scrutinizing the opinions he

7 Holmes, supra note 3.
wrote in the Court year (September, 1896 through June, 1897) during which The Path Of The Law was published.8 (The Justice, eternally more concerned with what judges did rather than said, would approve having his ideals scrutinized in the unflattering light of action.) Both his articulated and practiced ideals will be analyzed by concentrating on the three major faults of Legal Positivism found by Professor Fuller: 1) Law is a command, 2) enforced by an uncommanded sovereign and, 3) a dichotomy between law and morality must be maintained. And so that the analysis of the critique will remain true to the critique, emphasis will be given to the separation of law and morals.

II. The Path of the Law

The Law In Quest Of Itself begins by referring to Hobbes' admonition in the Leviathan to discipline one's mind to reach objectives. Fuller reaffirms his dedication to purposeful thought by raising, "Nietzsche's trenchant dictum that the commonest stupidity consists in forgetting what one is trying to do." When one reads criticism of Holmes' jurisprudence, one is confident that his critics know full well their purpose. However when one then reads what is being condemned, one is equally certain that Holmes' critics do not even concede that the Justice was also capable of purposeful thought. However no one should infer that I consider this inability to recognize disciplined thought as a subtle form of the stupidity condemned by Nietzsche. Quite the contrary, I consider it a most clever dialectic ploy.

As an admirer of both Holmes' judicial and literary talents, I see a gross injustice in finding it incumbent upon me to expand on The Path Of The Law. I can cope with this necessity only by the knowledge that I am not aiding the author, but rather his readers. One critic separates Holmes' speech into two distinct, and according to him, contradictory portions.10 It is with regret that Professor

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8 Delivered as a dedication speech at the Boston University School of Law, January 8, 1897. Justice Holmes was, at the time making the address, beginning his fifteenth year as a Justice of The Supreme Judicial Court of Massachusetts (appointed December 15, 1882) and was exactly three months away from his fifty-sixth birthday (March 8, 1841). There can be no doubt that his philosophy as then set forth was the product of a mature mind at the pinnacle of its ability.

9 L. Fuller, The Law In Quest Of Itself 41 (1966).

10 Hart, Holmes' Positivism—An Addendum, 64 Harv. L. Rev. 529 (1951).
Henry Hart found it necessary to see two Holmeses—the one who advocated the separation of law from morality and the other who condemned judges and lawyers for not considering the "social value" of a law. However, the schizophrenia Hart bemoaned did not exist. Read with the same discipline with which it was written, *The Path Of The Law* discloses a viable unity of thought. Holmes brought both the precision and consistency of his Yankee heritage to his jurisprudence. To fully understand *The Path Of The Law* one must dissect it, concentrate one's scrutiny on each part, but at all times keep in mind the total thrust of the thoughts. One must realize that at any given moment one is viewing only a part of a whole and the worth of that part has meaning only in its relationship to the whole. To do otherwise, is an attempt to choose Miss America by studying the soles of her feet. A philosophy, as a woman, is more than the sum of its parts.

A. The "Is" and the "Ought"

Contemporary naturalists condemn Holmes' attempt to separate the *is* of the law from the *ought* of the law. They believe that a statute or rule of law is not a segment of being, but, . . . "a process of becoming." However this indictment does not lie, because Holmes would be the first to agree that a rule of law is a process of becoming. In fact, he would not limit the application of this truth to a particular statute, as do the naturalists, but would apply it to the law as an entirety (the Law, with a capital "L"—if you will). The Justice's admonition to study history, which comprises a significant portion of the article, is the ultimate recognition of the evolutionary quality of the law. Therefore, the attempt to characterize Holmes' desire to see the law as it "is" as proof of his failure to see law as a dynamic, as opposed to static phenomenon, must fall before his own words in the very article under attack. It is precisely because Justice Holmes did see the law as a "process of becoming" that he urged separating the *is* from the *ought*.

It is on this issue of separating the *is* from the *ought* that Holmes' critics elect to ignore his ability to reason with a specific

11 L. Fuller, *supra* note 9 at 10.
objective in mind. Holmes was speaking to law students and members of the bar who desire, "(A) right study and mastery of the law as a business with well understood limits, a body of dogma enclosed within limits." He was speaking to men who would make their livings advising and representing clients at one stage, or during one era, of the evolution. He wanted them to do it well so they would be successful and hopefully, as he makes so clear in what Hart considers the inconsistent second half, so that justice would be rendered.

What one must keep in mind is that Holmes was in equal measure a man of thought and deed. He was not satisfied to merely know something was just; his nature drove him to strive for it. As an action oriented philosopher, he realized that to accomplish an end one must, of course, have that end (the highest principle) firmly in mind, and of equal importance, one must know exactly where one stands in relation to achieving that end. The flaw in Holmes' critics is their belief that in articulating the goal they have attained it. In law as in every human undertaking, Holmes knew what his critics have yet to learn,—wishing will not make it so. The difficulty in escaping from a maze is not that one does not know one is trapped; nor is it that one does not know that there is some exit from it. The problem is determining exactly where one is located in relation to that exit.

Implicit in the naturalist condemnation of Holmes' positivism is the belief that the advocacy of ignoring morality is a complete denial of higher principle or ends. But such could not be further from the truth. Holmes had ends firmly in mind; these ends are what he had in mind when he spoke of "social value." Separating the is from the ought is not an end in itself, as the naturalists would have us believe, but rather merely a means of achieving an end—the perfection or purification of the law. Therefore, the first half of the Path does not conflict with the second, but rather is a means of achieving it.

Moreover, Holmes specifically decried the confusion of law and morals when he spoke to law students pursuing an even more specific objective. He wanted them to be able to make accurate ap-

12 Holmes, supra note 3, at 459.
proximations of the point to which the law had to date developed. This was reflective of his awareness of the gap between creed and deed. In mastering the present state of the law, Holmes did not want the young scholars to be, "all bleeding heart and no bloody head." To ignore the gap and try to "know the law" as if morality and law were at each and every moment inextricably intertwined would be to study the aspirations of Man when one was seeking the acts of Man. Remember, Holmes was at this point of the speech addressing students of and future practitioners in an adversary procedure. He was not speaking to judges or professors who are to function as disinterested, detached and objective arbiters of justice.

Later when speaking of judges and lawyers as officers of the law molding a meaningful legal system, he most explicitly articulates the necessity for the confluence of law and some higher principle. However, he still maintains that the clear line between law and the higher goals law seeks, must be retained. Because how can one assess whether the law conforms to morality if one assumes that law and morality are identical? How can one begin to work free from the maze of injustice if one believes he is not caught within it, but rather sees oneself in the vast openness of revealed truth? How can one determine whether law conforms to the highest principles of society unless one knows what those principles are, knows what law is and compares each to the other? Something cannot be compared with itself. The very nature of comparison assumes a plurality of subjects. While perfection of law is the goal of both Holmes and his critics, the latter will never achieve it if they begin their quest by assuming they have finished. Perfection is an end, not a beginning. Wendell Holmes, the activist, knew this, so Justice Holmes, the philosopher, said it. It may be rare that a man be both philosopher and activist; however, the traits are neither mutually exclusive nor inconsistent.

B. Law is a Command

The next seemingly effective criticism levelled at Holmes' philosophy has been that he and other Positivists consider law a command. 13 Closely read, the criticism reveals itself as an objection

13 Disparaging relativism, and thus revealing himself as one who in fact viewed law as a command, one of Holmes' severest critics said:

Philosophically belief in absolutes, universals, objective standards, a universal idea
to, or at least a questioning of, the theory of legislative supremacy in a government where a separation of powers exists. The naturalists are concerned that by considering law as a command, positivist courts will default to the legislative branch, the authority to enact unjust or immoral laws. Although they do not say so in so many words, the naturalists seem to opt for judicial supremacy. I think the reason they do not come right out and say so is because they realize that judicial supremacy is subject to the identical abuses that legislative supremacy is. Unarticulated in both positions is a fear of supremacy, regardless of which branch reigns.

However, it is incorrect to believe Holmes thought the judiciary could not negate an act of the legislature. Implicit, if not explicit, in his desire to have judges consider the social value of a law is the belief that judges can set aside a law enacted by the legislature, but which has no social value. If judges could not negate an act of the legislature for failure to conform to a meta-legal standard, why should they consider such a standard? If judges could not negate legislative acts on the basis of social value, the only extra-legal standards essential to the judiciary would be a dictionary and a grammar primer. He urged lawyers as well as judges to consider the social value of a law—lawyers so they could call judges' attention to this aspect of a law; and judges so they could overturn legislation having either no social effects or negative social effects. Contrary to popular belief it is not the positivists, but the naturalists with their drive for absolutism who must find a supreme, "uncommanded commander." Who other than an omnipotent commander can make laws so absolute all must follow? Holmes had no difficulty with the knowledge that the judicial and the legislative branches two-thirds of sovereignty. He was content that neither was supreme, but both were required.

The unkindest cut of all the injustices done Holmes comes about through this criticism. The dual erroneous beliefs that Holmes thought the judicial could not countermand the legislative...
and thus that he considered law a command, were subtly shifted from a discussion of the intragovernmental system of checks and balances to a discussion of the relationship of the individual to his government. By setting the discussion of "law as command" in this new arena, it became an easy task for his critics to portray Holmes, one of the original judicial civil libertarians, as an advocate of totalitarianism. Nothing is, or could be, further from the truth. The only way such a distorted conclusion can be reached is the way it was done. Begin by disregarding what is being studied, then fail to understand what is said and finally, take those uncomprehended thoughts and apply them to an entirely different subject.

Nowhere in the Path is Holmes speaking of the relationship between citizen and State. Nowhere does he say an individual must obey a law which fails to meet meta-legal criteria. To the contrary, patent in his admonition to judges to assess the social value of a law is the belief that citizens disobedient to a law with no or negative social value should go unpunished. Why else would he have judges consider a meta-legal criterion, if not to have them refrain from punishing individuals who violated laws falling short of such a standard?

Professor Howe, defending Justice Holmes, says that those who accuse Holmes of totalitarianism rely on one of the Justice's speeches where he said:

I do not know what is true. I do not know the meaning of the universe. But in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, that no man who lives in the same world with most of us can doubt, and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the purpose.\(^\text{14}\)

Professor Howe then goes on to explain that any one who is at all familiar with Holmes' life would know the Justice was not setting forth a despot's creed, but was merely articulating the dismay and disillusionment of a mature man whose youth witnessed slaughter in the name of cause. As correct as Professor Howe is, he is too kind. Those who would condemn Holmes on the basis

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\(^{14}\) Howe, \textit{supra} note 3, at 532; citing Holmes, Speeches 59 (1913).
of the above passage miss the mark in both character judgment and grammar. The subject of Mr. Justice Holmes sentence and praise is not obedience, but faith. The faith in one's government, the faith in one's cause, the faith in one's freedom, even the faith which causes one to risk his life to free the Holy Land from the infidel—that faith is true and adorable. What is done and obeyed in the name of that beautiful faith is grotesque, and is precisely why Holmes rejected blind, beautiful faith for the rational evaluation of social worth.

C. The Value of an Idea

A lesser criticism of legal positivism is that in its emphasis on the sanction as a tool of promoting obedience, positivism ignores the acceptability of an idea as a means of fostering compliance with itself. Even this seemingly tangential criticism is inappropriately directed at *The Path Of The Law*. Holmes concluded by saying:

To an imagination of any scope the most far-reaching form of power is not money, it is the command (of) ideas. . . . Read the works of the great German jurists, and see how much more the world is governed to-day by Kant than by Bonaparte.

In his eloquent way, Mr. Justice Holmes clearly states that the power of an idea is demonstrably superior to that of force. Further, the same words may be used to head off any attempt to characterize the Justice's concern for those who make their living at the law, as a cynic's view of a most honorable profession. Ever the acceptor of life as it is, Holmes recognized the economics of practice yet he urged that economics are not only of secondary importance, but counseled that profit provides only secondary satisfaction.

D. The Bad-Man Test

Another concept expressed in the *Path* that Holmes' critics have chosen to misconstrue is the so-called bad-man test. Here again their error flows from an unwillingness to see the objective Holmes sought. Too strongly committed to establishing Natural-

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15 L. Fuller, *supra* note 9, at 91 and 115.
ist theory, they equated this test—merely one means to an end—with the end itself. To place the bad-man test in its proper context and thereby examine the totality of Holmes' jurisprudence, not just parts of it, I shall retread _The Path Of The Law_. However, Holmes' goals will be kept uppermost in mind. Hopefully the outline form used will aid, not oversimplify the organization of the Justice's thoughts.

I. The goal of the legal profession is to make laws conform to and achieve the "social values" of the civilization.
   A. To accomplish this end, the profession must know what it is the society seeks (474 & 476)
      1. To determine what is sought the profession must study society;
         a. as it was (history; pp. 469-474)
         b. as it will become—through the study of statistics and economics (469).
   B. After the profession knows from where the society has come and has discovered where it is society wishes to go, the profession must next determine exactly where society is on the journey it has charted for itself.
      1. To place society's position with accuracy, the profession must distinguish between law and morality.
         a. one means of making that separation is to view the law from the perspective of a man who has no scruples.

Placed in its true relation to the totality of Holmes' philosophy, it is obvious that the bad-man test has been given too prominent a position by the naturalists. Holmes' critics have had to ignore more than the goals the Justice sought in order to condemn him as a scofflaw. They have disregarded to whom he was speaking, and they have ignored other things he said and the way he lived.

Notwithstanding their disregard for these points, the critics did not see the purpose of the test. Holmes, who understood our system of checks and balances, knew that the executive branch shares the sovereignty in our governmental structure. Therefore, exactly as the judicial must agree that legislation meets _meta_-legal criteria, the executive must implement that approved legislation. In our system, unanimity among the three branches of government is required for operative law. Looking at the law as a bad man might, enables the legal _practitioner_ to determine if the requisite unanimity exists.
Further, because Holmes knew the link of law and higher principle, and yet remained aware of the gap between creed and deed, he realized that the perspective of a bad man could provide a valuable insight to both law and morality. Laws enacted by the legislature, approved by the courts but ignored by the executive, are articulated higher principle which the civilization is unwilling to practice. Thus, the bad-man test to Holmes is one means to accurately determine the exact extent of the gap, and is the beginning of the effort to establish the desired identity of the is and the ought.

On the other hand, if one believes as Holmes did, that the executive is in some way reflective of the desires of the people, who are the ultimate residuum of sovereignty, then one may further find the moral beliefs of the people by noting the executive's refusal to enforce a particular law. For this particular purpose, determining morality, as opposed to the purpose of learning the law—Holmes would rely on the relationship of law and morality as he saw it, "The law is the witness and external deposit of our moral life." Thus, Holmes believed any law that cannot be enacted by the legislative, approved or "found" by the judicial and enforced by the executive evidence a reticence by the People to externalize the specific moral tenet involved. And further, to a man of Holmes' integrity, reticence to externalize was strong evidence of a lack of internal commitment. I offer as testimony of the soundness of Holmes' thinking the agonizing lack of the required unity in the law ordering racial integration of the public schools.

Considered from its relation to the whole and recognizing its intended use discloses that the bad-man test has been over emphasized and misunderstood.

E. "Social Value"

This examination of The Path has shown that Holmes was firmly convinced law must comply with some higher principles. However, he chose as the most effective meta-legal criteria "social value" because of his distrust of the emotionalism that generally surrounds morality. It seems that in choosing "social value" instead of morality as the meta-legal standard, Holmes created a semantic, not a real, difference between himself and the naturalists.
He chose to distinguish "social value" from morality not because he thought these two standards were essentially exclusive, but because if there was at some given point any gap between aspiration and act, the latter would be more widely held. And thus if the goal sought is effective law by engendering widespread voluntary compliance, that goal will be most readily achieved by requiring what those whose obedience is sought are willing to do as distinguished from what they are willing to discuss. Holmes chose "social value" not because he was immoral, nor because he felt society was immoral, but because he believed the law (because of our political system) reflected the morality society was willing to practice. He further felt that it would be unwise to demand from the people a great deal more than they were willing to give. The law could correct only a degree of the imperfection. As much as the law might like to, completely closing the gap between creed and deed perforce fell to professions other than the law. "For most of the things that properly can be called evils in the present state of the law I think the main remedy is for us to grow more civilized," he said. As much as he might personally be tempted to use the law as a panacea, he was ever aware that its curative powers could be completely dissipated by overuse.

If the end is, as Professor Fuller has made clear, efficacy of law through fidelity to law, Justice Holmes advocated that end. Further, he advocated as the naturalists do, that fidelity is best achieved by requiring laws to conform to some meta-legal criteria. He articulated a pragmatic meta-legal standard and therefore classifying him as a Pragmatic Naturalist is not inaccurate.

III. Holmes' opinions Contemporaneous with The Path

During the Court year beginning in September, 1896, and ending June 27, 1987, Holmes wrote sixty-six opinions in his capacity as a Justice of the Supreme Judicial Court of Massachusetts (see Appendix). His first opinion was Chase v. Henry on October twenty-first and his last of the year Attorney General v. Donohue,

17 C. D. Bowen, supra note 6, at 352.
18 166 Mass. 577 (1896).
19 169 Mass. 18 (1897).
on June fifteenth. There are two dissents (#1 & #13) and twelve opinions deal with Workman’s Compensation situations. The opinions run the full gamut of legal problems from adultery to trusts (see Appendix) and appear to be representative of both his judicial and legal philosophies. The analysis reveals the Justice’s use of a meta-legal criterion and at the same time a belief in judicial restraint. Holmes believed he had the authority to overrule the legislature, but he was reluctant to use that authority except in the worthiest cases. This reluctance resulted from Holmes’ distrust of absolutism, whether that certainty existed in his or someone else’s mind. There has been a tendency on the part of some critics to equate the Justice’s belief that he should not impose his judgment on the legislature with the belief that he could not do so. Thus these same critics find his occasional, “eloquent if somewhat vague expression to . . . human aspirations,”\textsuperscript{20} inconsistent. This very inconsistency, one critic points out, makes Holmes a most effective advocate of legal positivism. However, if one distinguishes between the Justice’s conception of the extent of judicial power from his conception of the responsible exercise of that power, one will see that Holmes was in fact most consistent. The Justice held both beliefs, which are not mutually exclusive, and was consistent to both of them.

A. A Problem

One difficulty in analyzing Justice Holmes’ opinions in the attempt to distill his devotion to a meta-legal criterion is how far one desires to go. If the analysis confines itself to the language and holding of the opinion, one conclusion may be reached. If, however, the investigator pursues the decision to the social effect it may have, a different conclusion may appear. An example of this problem is \textit{Newburyport Water Co. v. Newburyport}\textsuperscript{21} (#62).

Briefly stated, the city of Newburyport under enabling legislation, took the assets of the plaintiff, a private company supplying water to the city. The difficulty was in setting the price. The statute provided that the Commissioners setting the price to be paid were

\textsuperscript{20} L. Fuller, \textit{supra} note 9, at 117.
\textsuperscript{21} 168 Mass. 541 (1897).
limited to paying the value of the property to the city, "without enhancement on account of future earnings capacity or goodwill..." The Court, through Justice Holmes, held that the plaintiff was entitled to only the actual value of the physical assets taken.

The approach to interpreting the enabling act, if not positivistic is certainly formalistic. Holmes confines himself to the precise wording of the statutes to explain his decision. One is impressed with the meticulous devotion to the legislature's language and gets the disconcerting (for me anyway) feeling Holmes believed he must not question the legislature. However, his legal philosophy comes through his judicial philosophy, when he says:

> If capitalizing profits would give a much greater excess over the value of the land, water easements and plant of the company, than the Commissioners allowed, the reasons are to be found in the franchise and monopoly of the company, in the right to lay pipes in the streets, and partly perhaps in the personal skill of the management, none of which are things for which the city is to pay.

This language indicates that Holmes was concerned that the plaintiff had possessed the ability to squeeze profit from the community through control of vital waters.

One can characterize this concern about the ability to extort as a moral principle influencing Justice Holmes' decision. Morality as the meta-legal criterion would impose no duty on the city to compensate for ending the plaintiff's right to exact profits by controlling an item essential to life. One could go so far as to say it would be immoral to allow the plaintiff to continue his advantage.

However Justice Holmes would maintain social policy, not morality, dictated his decision. A law permitting the ending of tribute has positive social value and should be enforced; or, the power to extort has negative social value and therefore the law must end it. And to complete the picture, it is good social policy and consummate morality to return the developer of a water system to status quo ante when ending the monopoly granted to encourage development.

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22 Id. at 555. (Emphasis added.)
The fact is that for the most part, what is generally considered moral will be damned good social policy. Holmes wanted law and morality separated to avoid those instances where a particular creed demanded certain things not necessarily appropriate to society at large.

The language of *Newburyport* lends itself to such a pursuit. In other cases, the language may not make the *meta*-legal motivation quite so obvious but a perceptive investigator could, if so inclined, find it (see Appendix). This analysis will only rarely go beyond the opinions themselves to find that standard. However in one segment, the analysis of Holmes' position on injuries to employees, *The Path Of The Law* will have to be used to fully appreciate his position.

B. Morality in Holmes Decisions

The Justice's famous dissent in *Vegelahn v. Gunter*\(^2\) (\(^13\)) is an application of Holmes' *meta*-legal standard, social worth. Further, the opinion contains a specific denial of absolutism and reveals the similarity between morality and social value as *meta*-legal criteria. In dissenting from the decision to enjoin non-violent labor picketing, Holmes said:

The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes. *Propositions as to policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof*. They require a special training to enable any one even to form an intelligent opinion about them. *In early stages of law, at least, they generally are acted on rather as inarticulate instincts than as definite ideas for which a rational defence is ready.*\(^24\)

The "inarticulate instincts" Holmes speaks of seem identical with Fuller's description of where the all-important moral facts may be found; "They lie not in behavior patterns, but in attitudes and conceptions of rightness, in the obscure taboos and hidden reciprocities which permeate business and social relations."\(^25\) Both philosophers agree that law is truly controlled by *trans*-legal phe-

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23 167 Mass. 92 (1896).
24 *Id.* at 106. (Emphasis added.)
25 L. Fuller, *supra* note 9, at 65.
nomena which are neither known nor knowable, but only felt. On this point, one can only concede that the naturalists have raised a semantic shortcoming in Holmes' naming of the meta-legal criterion. There is no difference in the descriptions of it; nor, most significantly, as was established earlier, there is no dispute as to the existence of it.

But let us proceed. In later passages, Holmes uses language not even the most dogmatic naturalist can dispute. He refers to the "free struggle for life" and says no one can possibly believe that the struggle is limited to persons of the same class competing for the same end. Then he speaks in the language of naturalism itself and says:

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.

No one can deny the naturalism of these observations. The eternity of the struggle, the basically selfish end the struggle seeks and the demand for combination to make the battle equal are all principles with which naturalists identify.

But more than the language of the opinion speaks to the naturalism which dictated dissent. Holmes recognized the working-man's right to the ability to control his own destiny. He was prompted by his recognition of the worth and dignity of the individual, regardless of station in life. It is ironic to note that these same rights were not legislatively enacted as "law" until nearly forty years later. Holmes was painfully aware of the gap between creed and deed, and dissented to call the majority's attention to it. His decision was his attempt to establish the confluence of law and morality; but his reason for doing so was not because it is ordained that men should so conduct themselves. His reason was simply the

26 167 Mass. 92, 107 (1896).
27 Id. at 108. (Emphasis added.)
belief that more people would adhere to the law if more people were treated fairly by it.

In another case (#37) the Justice once again relies on a moral principle to explain his decision. The case involved a mortgagee's duty to advertise a foreclosure sale and Holmes said:

The first advertisements are required by the mortgage; any other duties are less defined, and embraced under the general obligation to make reasonable efforts to prevent a sacrifice of the property.29 That the Justice found no duty to advertise does not diminish the moral basis of the decision. He articulated the mortgagee's moral duty to prevent sacrifice and found it had been met.

A case involving a manufacturer duplicating the packaging of his chief competitor reveals another aspect of Holmes' reliance of trans-legal standards.30 He enjoined the manufacturer from continuing the duplication because the defendant knew a deception was intended. The Justice said it was immaterial whether the defendant intended deception—it was sufficient that he knew his customers intended to deceive their customers. The reference to the intent of the defendant and the equating of guilty knowledge with the requisite intent are obvious applications of moral principles.

An opposite application of the moral requirement of knowledge for liability appears in Brauer v. Shaw31 (#45). Mr. Justice Holmes simply pointed out:

It would be monstrous to allow an inconsistent act of the offeror, not known or brought to the notice of the offeree, to affect the making of the contract; ....32

The thesis posited earlier, that in fact Justice Holmes articulated a meta-legal criterion controlling the law in The Path, is supported by his acts. His decisions, both in word and deed show a consistent reference to supra-legal standards. At times he even spoke in naturalistic terms, so that the semantic difference alluded to earlier may not even exist.

29 Marcus v. Collamore, 168 Mass. 56 (1897).
31 168 Mass. 198 (1897).
32 Id. at 200.
C. Statutory Interpretation

The primary thrust of the "law is a command" criticism is that legal positivists do not consider the purposes of a statute; but rather because they regard legislation as an order which must be obeyed, they apply it literally. Justice Holmes' decisions reveal that he did not practice this aspect of legal positivism.

In *Commonwealth v. Fleekner* \(^3^3\) (**#3**), the Justice recognized that legislative purpose was a proper item for judicial consideration. "We should be slow to suppose the legislature meant to take away the right to undo the disgrace and legal discredit of a conviction . . . merely because a wrongly convicted person has paid his fine or served his term," he decided.\(^3^4\)

A case interpreting the net effect of a city charter and a later statute shows conclusively Holmes' concern with legislative purpose:

We do not regard the foregoing argument (a literal reading that refusal to act cannot cause one to be "aggrieved by action") as conclusive. We agree that the last of § 20 could be taken in a looser sense. Arguments from the supposed policy of the Legislature, as exhibited in a series of charters are even more doubtful. Nevertheless the construction which we adopt seems to a majority of the Court to reach the plan and policy indicated by the charter, and certainly is in accord with the intent more definitely expressed in another charter. . . . \(^3^5\)

As final proof of Holmes' concern with legislative purpose, we can see his approval of putting desiradatum in the law:

When title to land is dealt with, the *intent* of the registry laws is that purchasers should not be required to look beyond the registry of deeds. . . . Not having been recorded, it (an assignment of mortgage) is invalid against Emerson by the *express terms* of the statute.\(^3^6\)

These few cases demonstrate that Justice Holmes thought *meta-*legal criteria controlled not only the Courts, but the legislature as well. He did not disapprove of the legislature considering such matters; nor did he feel judges could not review legislative deter-

\(^3^3\) 167 Mass. 13 (1896).
\(^3^4\) Id. at 14.
\(^3^6\) Swasey v. Emerson, 168 Mass. 118, 120 (1897).
minations of this type. If he had disapproved of such considerations, he would not have engaged in them.

D. A Valuable Insight

While it may be a mere coincidence (but such seems hard to believe), there is a most meaningful relation between a passage in *The Path* and Holmes’ contemporaneous judicial activity. During the year under scrutiny, he wrote twelve opinions in what we would describe as Workmen’s Compensation cases. In only four cases did Holmes find for the plaintiff-employee, and in each case the trial court had also found for the injured. At first it would seem that Holmes, by not recognizing the employees’ claims, takes a most positivistic approach to the problem. He seemed unwilling to compensate an employee for the loss of life or limb. He could have been accused of extending the moral belief in equality of man to an absurd conclusion; i.e., an employee did not have to work if he did not wish to assume the risks of the job he undertook. Little effort is required to find the consummate immorality of these decisions, however little additional insight is gained from superficial analysis. The fact of the matter, as revealed by *The Path*, is that Holmes cast the problem on an even higher moral or meta-legal plane.

Because he recognized the equities on both sides of the immediate moral issue, Holmes admitted in his address that he was not prepared to advocate a definite solution. Surely he sympathized with the injured employee, but he was likewise aware that additional moral issues were presented. The immediate moral decision was choosing between the employer and employee to bear the financial burden of the injury. Shortsighted moral absolutists on either side of the issue would be satisfied once this election was made by

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the application of their particular moral code. However Holmes, devoid of the emotional security resulting from intellectual absolutism concerning the surface issue, found greater questions as he searched for an answer.

First he saw that the true party defendant was not the employer, but rather society. It was the Industrial Revolution which had caused the dramatic increase in employment injuries. The beneficiary of this revolution was society, not simply the particular industrialist for whom the injured had labored. The industrialist was merely a conduit through which society received largess of organized, mechanized manufacture. Thus to Holmes the moral question became the fairness of requiring the conduit to pay for the benefits it merely carried to the ultimate beneficiary. However, though Holmes had his doubts about the fairness of making the employer compensate in society's stead, he had absolutely no doubt that the employee was entitled to compensation.

After Holmes the philosopher drew the moral question, Holmes the pragmatist recognized one answer. He knew that if the price of progress was placed on the employer it would soon be shifted to the public through price increases. Although this solution placed the burden where Holmes thought it ought to be, it did not completely satisfy him. It failed to meet his demand for complete societal rationality of thought and decision. Society could not reach an adequate answer about industrial injuries unless it knew the exact cost of those injuries. It could not know the precise cost of those injuries if that cost was disguised as a cost of goods. On the other hand, if the cost of the injury remained with the employee, society would still bear it through welfare or other forms of charity; and by bearing the cost in an undisguised form, society would reach the decision required of it based on a complete, rather than obscured, understanding of the facts.

Granted, Justice Holmes reached decisions which seem to go against contemporary moral codes, but that is not cause to damn him as immoral. Disagreement? Certainly. Immorality? Ridiculous!

Holmes did in fact address himself to a moral question—the
morality of permitting society to evade its responsibility by shifting the burden onto one person. To condemn as immoral one who questions the morality of organized social action rather than private action, is error. And then to expand this erroneous assessment of immorality to describe it as the kind of immorality that gives rise to totalitarianism is a geometric progression of misunderstanding that creates an irony only Justice Holmes’ renowned sense of humor could appreciate.

The plain truth is that Holmes wanted our society to pay its own way. Further he demanded that it make the decisions required of it based on unobscured, undisguised, stark reality. The Justice’s choice is a difficult one for us to accept and no doubt caused him discomfort. He too was disturbed by the lack of compensation to the employee. His recognition of the justice of the claims is demonstrated by his opting for some sort of “tariff for life and limb.” However his instincts, as well as desiring justice, demanded a realistic, workable tariff, not one haphazardly fashioned.

The fact that Holmes could go beyond his instinct for justice at the level of applying principle, to reach the deeper and broader moral issue existing at the germination of principle; and at this essential level follow his instincts, regardless of the outcome at the surface issue, is by no means immorality. By all means, it is a difficult disciplined decision, but no more difficult or disciplined than some decisions demanded by other moral codes held by men never accused of immorality.

Contrary to proving Holmes immoral, his decisions in the Workmen’s Compensation cases prove his devotion to a moral code beyond the capacity of most men. These twelve decisions read with pertinent passage in The Path show Holmes required more of man banded together in a social group than he demanded of them as individuals. These more stringent standards he imposed on the conduct of human government make incredulous any accusation that Holmes’ philosophy could be used to justify any form of despotic rule. This insight to his moral code explains why he became—to the surprise of many—one of the original judicial civil libertarians.

39 Holmes, supra note 3, at 467.
when he emerged on the national scene. The "inconsistencies" that his critics find make him so formidable a philosophic adversary are truly consistent applications of a code transcending that of his critics.

IV. Conclusion

Mr. Justice Holmes' philosophy and his acts have been studied to determine if the flaws found in Legal Positivism appear in his work. It has been shown that few, if any, do. The goal of contemporary Natural Law philosophers is good order through laws which, by their inherent consummate fairness, promote a high degree of compliance with themselves. It is accurate to state that Justice Holmes sought this very same goal.

The only dispute between the Justice and his Naturalist critics is the means of implanting within law the requisite degree of fairness. The Naturalists hold that law must prescribe conduct conforming to morality in order to promote a sufficiently high degree of compliance. Justice Holmes however specifically denied morality as the means of eliciting the desired degree of voluntary compliance; instead he believed only law having value to society could achieve a high degree of voluntary adherence.

Much effort has been expended exploring this area of conflict. Each side intimates that fidelity to the opposite theory is at best the beginning of the descent to despotism, and at worst such devotion becomes the jurisprudential justification of totalitarianism.

However, little effort has been directed at an area of fundamental agreement of the two schools of thought. Both philosophies agree that law must conform to some higher standard. The demand for conformity to a higher standard, regardless of what name is given that standard, is the significant contribution of both theories to the prevention of the corruption of power. This demand that the law itself must comply with supra-legal standards is the penultimate citadel against immoral despotism.

It is unfortunate that the devotees of Natural Law, in the ardent support of their theory, have overlooked their basic agree-
ment with the philosophy of Mr. Justice Holmes. In this instance it is doubly unfortunate because their misunderstanding has caused them to link a man, whose life was committed to the defense of freedom, with the rationalizations of totalitarianism. No doubt, observing similar injustices likewise flowing from overzealous fidelity to particular creeds, contributed to the Justice’s distrust of absolutism. However this injustice becomes somewhat tolerable when one recognizes that it results from a failure to understand the Justice’s thinking. For after all, was it not Holmes’ mentor Emerson who noted that the price of greatness is to be not understood?

APPENDIX

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