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### Book Review (reviewing Frederic Rogers Kellog, *The Formative Essays of Justice Holmes: The Making of an American Legal Philosophy* (1984) and H. L. Pohlman, *Justice Oliver Wendell Holmes and Utilitarian Jurisprudence* (1984))

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## Book Review

THE FORMATIVE ESSAYS OF JUSTICE HOLMES: THE MAKING OF AN AMERICAN LEGAL PHILOSOPHY *by Frederic Rogers Kellogg.\** Westport, Conn.: Greenwood (1984) *xii*, 289 pp. \$29.95.

JUSTICE OLIVER WENDELL HOLMES & UTILITARIAN JURISPRUDENCE *by H.L. Pohlman.\*\** Boston, Mass.: Harvard (1984) 223 pp. \$18.50.

*Reviewed by Richard A. Posner\*\*\**

These two books, by a practicing lawyer (Kellogg) and a political scientist (Pohlman), address the intellectual antecedents of Oliver Wendell Holmes's legal philosophy. Kellogg's book consists of a substantial introductory essay of some seventy-four pages, followed by reprints of nine law review articles that Holmes published prior to *The Common Law*.<sup>1</sup> The thesis of the introductory essay is that Holmes's philosophy was pragmatism, derived from Charles Pierce, William James, and other fellow members of the Metaphysical Club.<sup>2</sup> In contrast, Pohlman's book advances the

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1. O.W. HOLMES, *THE COMMON LAW* (1881).

2. F. KELLOGG, *THE FORMATIVE ESSAYS OF JUSTICE HOLMES: THE MAKING OF AN AMERICAN LEGAL PHILOSOPHY* 350-57 (1984).

thesis that Holmes was a utilitarian in the tradition of Bentham and Austin, the great English utilitarian jurists who had preceded Holmes.<sup>3</sup> Kellogg's and Pohlman's books appeared more or less simultaneously, and apparently neither author was aware of the other's work. Indeed, there is considerable overlap; both books, for example, discuss at length Holmes's debt to Bentham and Austin.

To those who still revere Holmes as the premier figure in American law, and to the larger number who find him merely fascinating, these two books are a welcome addition to the literature about him. Although much of the material in the essays reprinted by Kellogg was incorporated (sometimes verbatim) in *The Common Law*, not all was, and the essays are at least worth a skim. Both Kellogg's own essay and Pohlman's book contain interesting expositions of Holmes's philosophy and, not least, many quotations from the great man himself — quotations that (though for the most part already familiar to the Holmes aficionado) gain new interest against the background of Holmes's philosophical antecedents. Pohlman's essay also contains (in Chapter VI) acute criticisms of some of Holmes's recent critics.<sup>4</sup>

However, the books will have a limited appeal. Neither book makes clear why anyone but a specialist in the history of jurisprudence — a specialty with a confined membership, to say the least — should be interested in whether Holmes was a pragmatist, a utilitarian, or some other philosophical type. This is especially so because neither pragmatism nor utilitarianism is a fashionable philosophy just now. Although the authors are excited to have discovered Holmes's affinities to pragmatism and utilitarianism, respectively, they do not try to convince the reader that these affinities make Holmes more interesting or more contemporary than the reader might have thought before reading these books. In the remainder of this brief review, I shall pick up the fallen torch and make a very preliminary and incomplete effort to show why Holmes repays study more than a century after the publication of *The Common Law*, and fifty years after his death; I shall also raise a question about the authors' (particularly Pohlman's) theses.

To put the matter very bluntly and with some exaggeration, law is a system of coercion, and to make the coercion more palatable and the law's practitioners more esteemed and well remunerated, lawyers and judges (not all, of course, but many) have long tried to

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3. H. POHLMAN, JUSTICE OLIVER WENDELL HOLMES & UTILITARIAN JURISPRUDENCE 4-10 (1984).

4. *Id.* at 144-77.

present law as a sacred mystery of which they are the votaries,<sup>5</sup> rather than as — what it all too often is — an expression of will and a branch of politics (albeit of the higher politics, not partisan politics — not usually, at any rate). They, the clerics of the law, have tried to show both that law is continuous with ethics and thus expressive of permanent values rather than of shifting political arrangements and that legal decision making is a matter of deduction from fundamental (i.e., ethical) principles of law rather than of goal-oriented, practical reason.<sup>6</sup> They have used moral language to describe legal concepts and logical terminology to describe legal analysis. And they have largely achieved their rhetorical purpose. Most people in the United States think, for example, that the Constitution codifies fundamental ethical principles from which judges deduce the results in constitutional cases; actually, of course, federal constitutional law is the most political of all branches of law.

Jeremy Bentham was the first great debunker of the idea of law as a sacred mystery (or natural law, or legal formalism — these are essentially synonyms).<sup>7</sup> Holmes was the second, and so far — if the word “great” is taken seriously — the last. Bentham was also a utilitarian jurist in a quite literal sense. He criticized the English legal system for failing, as he thought, to promote the greatest happiness of the greatest number. What is distinctive about utilitarianism is, precisely, the belief that the proper goal for society, indeed for the ethical individual, is to maximize the amount of happiness in the society (in some versions, in the world, including the animal kingdom). Holmes was not a utilitarian in this sense. Perhaps, therefore, it would be better to think of him as not being a utilitarian in any sense, but simply as being an ally of the utilitarian jurists. Holmes was a social and biological Darwinian, and hence a skeptic who believed that the good and the true, in any sense that people could recognize, was whatever emerged from the struggles of warring species, nations, classes, and ideas.<sup>8</sup> He was also, and relatedly, a pragmatist, succinctly defined by Kellogg as someone who believes “in excising false con-

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5. In Blackstone's illuminating metaphor, judges are the “living oracles”, i.e., conduits, of the law. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (1765). Cf. *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 865 (1824) (Marshall, C.J.) (“Courts are the mere instruments of the law, and can will nothing.”).

6. For a discussion of legal formalism, see R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 201-03 (1985).

7. See, e.g., J. BENTHAM, *A FRAGMENT ON GOVERNMENT* (1776), reprinted in *A COMMENT ON THE COMMENTARIES AND A FRAGMENT OF GOVERNMENT* 391, 417 (J. Burns & H.L.A. Hart eds. 1977) (arguing that the justification for what the law ought to be should not be “technical . . . , such as none but a lawyer gives, . . . but reasons . . . , any man might see the force of as well as he”) (footnote omitted).

8. See, e.g., Elliott, *Holmes and Evolution: Legal Process as Artificial Intelligence*, 13 J. LEGAL STUD. 113, 118-20, 123-24, 140-41 (1984); Gordon, *Holmes' Common Law as Legal and Social Science*, 10 HOFSTRA L. REV. 719, 721 (1982); O.W. Holmes, *Herbert Spencer: Legislation and Empiricism*, in *JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES & UNCOLLECTED LETTERS & PAPERS* 104, 107-09 (H. Shriver ed. 1936).

ceptual essences from philosophical inquiry.”<sup>9</sup> Pragmatism, in turn, is closely related to the kind of realism (I am not attempting to use the word with philosophical precision) that distrusts fancy language and suspects that behind moral and idealistic discourse lurks a selfish interest — another point at which Holmes and Bentham intersect. So Holmes, a pragmatist, a skeptic, an evolutionist, a “logical positivist,” and a type of realist, has affinities with the pragmatist philosophers, on the one hand, and with the debunking side (but not the happiness-maximizing side) of utilitarian jurisprudence, on the other.

It is the pragmatism and realism of Holmes, rather than the evolutionism or the greatest-happiness principle — which I have suggested he did not accept — that makes him a contemporary. It seems that every generation must refight the battle between realism and conceptualism. When an issue is put to the courts, such as whether capital punishment should be deemed cruel and unusual punishment, or whether the state should be required to pay the cost of a psychiatric expert for a criminal defendant, or whether the children of aliens are entitled to a free public education, or whether residency should be a prerequisite to admission to a state’s bar, or whether public schools should be allowed to use political criteria in selecting books for the school library — to name just a tiny fraction of the controversies that agitate lawyers and judges today — the lawyer’s and judge’s instinct is to resolve the issue by a process of deduction from such basic constitutional-ethical principles as freedom of expression, equality, or due process, or at least to pretend that this is their decision-making procedure. But in truth, the issues I have named require, as the Holmes of the *Lochner v. New York* dissent<sup>10</sup> and *The Path of the Law*<sup>11</sup> would have pointed out if the issues had come to the Supreme Court during his tenure, political choices.<sup>12</sup> The Constitution — which contrary to the implicit assumption of many contemporary students and practitioners of constitutional law was not drafted twenty years ago by a committee chaired by Earl Warren — does not speak to these issues.

Of course, once one recognizes these issues as political and,

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9. F. KELLOGG, *supra* note 2, at 52.

10. 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).

11. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

12. Holmes stated:

I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rules they lay down must be justified, they sometimes would hesitate where now they are confident and see that really they were taking sides upon debatable and often burning issues.

*Id.* at 468.

therefore, legislative choices, one must ask what authority empowers judges, rather than the representative branches of government, to make the choices. I am not concerned with pursuing that difficult question here. I am content merely to suggest that Holmes's example of astringent realism — the insistence (as in such famous examples, all from *The Common Law* and *The Path of the Law*, as the "bad man" theory of law,<sup>13</sup> the predictive theory of judge-made law,<sup>14</sup> and the objective theory of criminal liability<sup>15</sup>) on studying what law actually is as distinct from what its votaries say it is — remains timely.

I suggest as a complement to the more abstract theses of Kellogg and Pohlman that you go back to Holmes, both the Holmes of *The Common Law* (and the letters and the essays) and Justice Holmes, and try reading him as the great deflator of the pretensions of the legal clerisy. You will see a new unity in his work. Notice how *The Common Law* stresses the origins of law in vengeance — what a sharp antidote to a natural-law perspective — and how Holmes shows again and again the adaptation of an ancient doctrine to serve, not some abstract moral principle, but the mundane desires of some influential social group.<sup>16</sup> Notice how his great article, *The Path of the Law*, and his great dissents both in the economic-liberty cases (upholding the right of the states to regulate the economy) and in free-speech cases (rejecting the right of government to suppress free speech on the conjectural ground of public security) are all unified by a penetrating awareness that economic liberty and national security are sometimes names for class (or, as it is more commonly called today, "special") interest (as "equality" and "fundamental rights" are sometimes today), and not eternal constitutional verities.<sup>17</sup> And notice not only the

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13. *Id.* at 459-61.

14. *Id.* at 458-61.

15. O.W. HOLMES, *THE COMMON LAW* 41-43 (1881).

16. See, e.g., O.W. HOLMES, *Early Forms of Liability*, in *THE COMMON LAW* 1, 28 (1881) (discussing the development of maritime liability).

17. See, e.g., *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("This case is decided upon an economic theory which a large part of the country does not entertain . . . . But a constitution is not intended to embody a particular economic theory . . . ."); *Adair v. United States*, 208 U.S. 161, 191 (1907) (Holmes, J., dissenting) (the Constitution does not forbid the restraint of economic liberty so long as there is some important ground of public policy to justify the restriction); *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918) (Holmes, J., dissenting) (arguing that the unqualified right of Congress to regulate commerce cannot be diminished because some restraint of economic liberty may result); *Adkins v. Children's Hospital*, 261 U.S. 525, 567-70 (1923) (Holmes, J., dissenting) (arguing that the right of the District of Columbia to enact a minimum wage statute for women may not be overturned because a majority of Justices believes it is not for the public good); *Abrams v. United States*, 250 U.S. 616, 626 (1919) (Holmes, J., dissenting) ("Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your power . . . you naturally express your wishes in law and sweep away all opposition."); *United States v. Schwimmer*, 279 U.S. 644, 653, 655-56 (1929) (Holmes, J., dissenting) (arguing that the constitutional protections of free speech must be extended to those with whom the majority disagrees); Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466-67 (1897) (contending that the legal argument accepted by a court will often represent only one side of a debatable and controversial legal question).

brevity (sometimes excessive and becoming cryptic) but also the abruptness, the candor, of Holmes's judicial opinions. He does not pretend to be doing more than he is doing. He is content to give the reader the reasons that persuaded him to select an outcome — reasons that in very hard cases are perhaps best described no more pretentiously than as the reactions of an intelligent, cultivated human being and a learned, experienced lawyer to a novel question of social policy. The law circumscribes judicial discretion; it does not determine the outcome of the hard case, and more cases than we admit are hard cases. This much, at least, every student of Holmes should understand.