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JUSTICE HOLMES' LOGIC OF FORCE

OLIVER WENDELL HOLMES JR. AND LEGAL LOGIC. Frederic R. Kellogg.¹ Chicago, IL: University of Chicago Press, 2018. Pp. 229. \$45.00 (Hardcover).

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I. FORCE OF LOGIC

Skepticism is a defining characteristic of the jurisprudence of Oliver Wendell Holmes Jr.; but is it one born of deduction or induction? Induction, argues Frederic R. Kellogg, compelled Holmes to tentative legal generalities—specifically, moral generalities. Moreover, he maintains that Holmes did not advocate a legal realist position, that the law is what judges say it is, but rather that judges participate in an ongoing dialectical “social induction” to discover what the law is or ought to be. But Kellogg misunderstands that Holmes’ skepticism arose from his early conclusion that natural right cannot be known and the law is what the whim of the shifting dominant faction of the community says it is. Holmes deduced that law rests on force. Kellogg’s misunderstanding is owed to his omission of several of Holmes’ most important jurisprudential writings.

Kellogg’s book, the third he has written on Holmes,³ and one intended for a wider audience, is divided into an introduction, ten chapters, bibliography, and index (pp. 7, 20). The introduction advances the plan of the book and its two main arguments, first, that Holmes’ skepticism is the result of an inductive turn in his reasoning, influenced principally by his reading of John Stuart

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3. See FREDERIC ROGERS KELLOGG, *FORMATIVE ESSAYS OF JUSTICE HOLMES: THE MAKING OF AN AMERICAN LEGAL PHILOSOPHY* (1984); FREDERIC R. KELLOGG, *OLIVER WENDELL HOLMES, JR., LEGAL THEORY, AND JUDICIAL RESTRAINT* (2007).

Mill's *A System of Logic*,⁴ and, second, that Holmes' court decisions, especially his dissents, are the result of his stance that a judge's rulings participate in a dialectical "social induction." The first three chapters discuss Holmes' early thought, Mill's influence on it, and Holmes' own expansion on Mill's inductive reasoning toward "social induction." The fourth and fifth chapters critique past criticisms of Holmes' jurisprudence in light of the first three; most interestingly, in the fifth, Kellogg maintains that Holmes has been incorrectly labeled a legal realist. While the first half of the book focuses somewhat closely on Holmes and his writings, the second half focuses somewhat extensively on Holmesian scholars and their writings. Thus, the last five chapters do not have the coherence of the first five, as they seem to meander in analyzing further the book's two main contentions, especially in light of other scholars' own claims with regard to both. While Sheldon M. Novick's edition of Holmes' collected works⁵ is listed in the bibliography, a number of Holmes' most important jurisprudential writings reproduced there are entirely omitted in Kellogg's text and notes, most notably, "The Gas-Stokers' Strike" and "Natural Law."⁶

Kellogg portrays Holmes as a Baconian empiricist (pp. 8, 21-22, 31, 89, 99), one chiefly influenced by first meeting Mill and then reading his *Logic* in 1866 (pp. 8, 9, 18, 20, 22, 26, 37, 89ff., 104, 169, 170). But whereas Mill emphasized the inductive reasoning which occurs within a single mind, Kellogg argues Holmes stressed the inductive reasoning which transpires among many minds. If induction is an epistemology of taking particular experiences and extracting from them provisional generalities, including legal generalities, "social induction" is an ongoing dialectic among many minds, contemplating and categorizing many experiences (pp. 21-22, 113). The benefits of such "social induction" are two. First, it indefinitely refines man's understanding of what is naturally good for him, and thus allows for moral progress. Second, it acknowledges changing

4. See JOHN STUART MILL, *A SYSTEM OF LOGIC, RATIOCINATIVE AND INDUCTIVE: BEING A CONNECTED VIEW OF THE PRINCIPLES OF EVIDENCE AND THE METHODS OF SCIENTIFIC INVESTIGATION* (Harper & Brothers, 1848) (1843).

5. OLIVER WENDELL HOLMES, 1-3 *THE COLLECTED WORKS OF JUSTICE HOLMES* (Sheldon M. Novick ed., 1995).

6. Oliver Wendell Holmes, *The Gas-Stokers' Strike*, 7 *AM. L. REV.* 582 (1873) [hereinafter Holmes, *Strike*]; Oliver Wendell Holmes, *Natural Law*, 32 *HARV. L. REV.* 40 (1918) [hereinafter Holmes, *Natural Law*].

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circumstances, and so permits judges to rule in such a way that communal opinion and natural right roughly coincide to better ensure legal stability. It is in this way that Kellogg accounts for Holmes' continual emphasis on the growth of the law (pp. 24, 57, 66, 78, 86-87, 99, 106, 121, 142ff., 149, 179, 181).

But while Holmes did indeed declare that law must reflect the opinion of the dominant faction of the community, insofar as a law contrary to it "would be empty words, not because it was wrong, but because it could not be enforced," he rejected the possibility of natural right.⁷ The basis of this rejection was his conclusion that what cannot be quantified cannot be known. Holmes was certain only that man is selfish, all association is magnified selfishness, and the law conforms to the arbitrary opinion of the shifting dominant faction simply because it can be enforced. In short, the force of Holmes' logic rests on Holmes' logic of force:

This mode of thinking [i.e., that the force behind the development of the law is logic] is entirely natural. The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given

7. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460 (1897) [hereinafter Holmes, *Path*].

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enter a shop does not necessarily convey a threat of bodily harm. No doubt they understand that the prerogative of force as such belongs to the state alone.¹⁴ Moreover, the intention to harm one's adversary is not necessarily unlawful:

The fact, that the immediate object of the act by which the benefit to themselves is to be gained is to injure their antagonist, does not necessarily make it unlawful, any more than when a great house lowers the price of goods for the purpose, and with the effect, of driving a smaller antagonist from the business.¹⁵

The basis of the court's decision rests on the tacit interest of the faction to which it belongs. A community is comprised of factions and the current court represents the interests of one, the rich, while the upholsterers represents those of another, the poor. Man is selfish and all association is magnified selfishness:

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 public policy rarely are unanimously accepted, and still more rarely, if ever, capable of unanswerable proof. . . .

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 the 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.¹⁶

"Fair and equal" for Holmes means a degree of "free competition" between the various factions within the community. And if the law as presently written should construe "free competition" too narrowly, Holmes suggests substituting for it the "free struggle for life."¹⁷ The upholsterers, the poor, are one combination struggling for dominance and ought to be given the same leeway as the other combination of capital, the rich. Nowhere does Holmes acknowledge the interests of the

14. *Vegalahn*, 44 N.E. at 1080 (Holmes, J., dissenting).

15. *Id.* at 1082.

16. *Id.* at 1080, 1081.

17. *Id.* at 1081.

community as a whole, as that would imply a common good; nowhere does he concede the right of workers to be treated in a certain manner, as that would imply natural right. Holmes' dissent in *Vegeahn* is the result of his rejection of the common good and natural right. It is the result of his early conclusion about human nature announced in his article, "The Gas-Stokers' Strike." It is the result of deduction.

Holmes' article concerns an English trial in which an English company prosecuted five men for conspiracy, a conspiracy that the company claimed resulted in the gas stokers' strike in 1872. The company required its employees to give notice of any intention to leave work ranging from one week to thirty days, depending upon their specific job and contract. The majority of the stokers were united in a union. One of their members was terminated for an unknown reason, and the union demanded reinstatement. When the company refused to comply, the union refused to work on December 2, plunging the city of London into partial darkness for several days. While the union employed no violence toward the company's officers, it used violence and threats on some of its own wavering members. The company took the union's five principal officers to court where they were found guilty of the criminal act of hindering or preventing the company from conducting its business by breaking their contracts.¹⁸

Holmes objects to the court's verdict on the same grounds as he would later dissent in *Vegeahn*. He begins by denying the existence of a common good. "But the objection which we wish to express at the present time is, that this [i.e., logic establishing permanent rules of government] presupposes an identity of interests between the different parts of a community which does not exist in fact."¹⁹ Holmes continues in language he would later employ in *Vegeahn*:

This tacit assumption of the solidarity of the interests of society is very common, but seems to us to be false. The struggle for life, undoubtedly, is constantly putting the interests of men at variance with those of the lower animals. And the struggle does

18. See Holmes, *Strike*, *supra* note 6, at 582. The above case details, as well as a detailed examination of "The Gas-Stokers' Strike" and "Natural Law" as they relate to Holmes' jurisprudence, may be found in Benjamin Patrick Newton, *Mr. Justice Hobbes? On the Jurisprudence of Oliver Wendell Holmes Jr.*, 7 AM. POL. THOUGHT 464, 465-73 (2018).

19. See Holmes, *Strike*, *supra* note 6, at 583.

not stop in the ascending scale with the monkeys, but is equally the law of human existence. Outside of legislation this is undeniable. It is mitigated by sympathy, prudence, and all the social and moral qualities. But in the last resort a man rightly prefers his own interest to that of his neighbors. And this is as true in legislation as in any other form of corporate action. All that can be expected from modern improvements is that legislation should easily and quickly, yet not too quickly, modify itself in accordance with the will of the *de facto* supreme power in the community, and that the spread of an educated sympathy should reduce the sacrifice of minorities to a minimum. But whatever body may possess the supreme power for the moment is certain to have interests inconsistent with others which have competed unsuccessfully.²⁰

Again, man is selfish and all association is mere magnified selfishness. An association of gas-stokers, the poor, can be expected in the “struggle for life” to compete with an association of capital, the rich. If the stokers and workers like them should “possess the supreme power for the moment,” one can expect them to legislate “interests inconsistent with others which have competed unsuccessfully.” Later, capital or still another faction may seize power from labor, on and on, one arbitrary faction replacing another, endlessly. The function of the judge is to glean “the will of the *de facto* supreme power in the community” and rule accordingly. It is no accident that Holmes wrote *de facto* rather than *de jure*. This is the growth of the law as Holmes understood it.²¹ All that can be hoped for in these continual *coups* is that, “the spread of an educated sympathy should reduce the sacrifice of minorities to a minimum.” Or, as Holmes would later say, “force, mitigated so far as may be by good manners,”²² or, still

20. *Id.*

21. See Holmes, *Path*, *supra* note 7, at 457:

When we study law we are not studying a mystery but a well known [sic] profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. The reason why it is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted [sic] to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.

22. Letter from Oliver Wendell Holmes to Frederick Pollock (Feb. 1, 1920), in 2 HOLMES-POLLOCK LETTERS 36 (Mark DeWolfe Howe ed., 1941):

more succinctly, “force, mitigated by politeness.”²³ And he would maintain this position on man’s asocial nature throughout his life.²⁴

And yet the faction of the moment cannot legislate with its genuine interests in mind because man cannot know what is good for him. Nowhere in *Vegeahn* or “The Gas-Stokers’ Strike” is natural right acknowledged, only arbitrary, shifting preferences. Holmes’ most explicit rejection of natural right, even the right to self-preservation, in favor of force, occurs in his essay, “Natural Law”:

No doubt it is true that, so far as we can see ahead, some arrangements and the rudiments of familiar institutions seem to be necessary elements in any society that may spring from our own and that would seem to us to be civilized—some form of permanent association between the sexes—some residue of property individually owned—some mode of binding oneself to specified future conduct—at the bottom of all, some protection for the person. But without speculating whether a group is imaginable in which all but the last of these might disappear and the last be subject to qualifications that most of us would abhor, the question remains as to the *Ought* of natural law. . . .

The most fundamental of the supposed preëxisting rights—the right to life—is sacrificed without a scruple not only in war, but whenever the interest of society, that is, of the predominant

I do think that man at present is a predatory animal. I think that the sacredness of human life is a purely municipal ideal of no validity outside the jurisdiction. I believe that force, mitigated so far as may be by good manners, is the *ultima ratio*, and between two groups that want to make inconsistent kinds of world I see no remedy except force.

23. Letter from Oliver Wendell Holmes to Harold Laski (Mar. 7, 1928), in 2 HOLMES-LASKI LETTERS 1035 (Mark DeWolfe Howe ed., 1953) (“With your belief in some apriorities like equality you may have difficulties. I who believe in force (mitigated by politeness) have no trouble—and if I were sincere and were asked certain *whys* by a woman should reply, ‘Because Ma’am I am the bull.’”).

24. Compare his position in “The Gas-Stokers’ Strike” made in 1873 with two near-identical statements, the one above in the letter to Frederick Pollock in 1920, *supra* note 22, and the other below made in *The Common Law* in 1881:

But it seems to me clear that the *ultima ratio*, not only *regum*, but of private persons, is force, and that at the bottom of all private relations, however tempered by sympathy and all the social feelings, is a justifiable self-preference. If a man is on a plank in the deep sea which will only float one, and a stranger lays hold of it, he will thrust him off if he can. When the state finds itself in a similar position, it does the same thing.

OLIVER WENDELL HOLMES, *THE COMMON LAW* 38 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881) (“Lecture II: The Criminal Law”).

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power in the community, is thought to demand it.²⁵

It is strange that while “Natural Law” is not discussed by Kellogg, excerpts from two of Holmes’ letters in which the same language is used are cited and discussed by him (pp. 181n.38, 186). In sum, Holmes’ early conclusions, that man is asocial and that what cannot be quantified cannot be known, led him to deduce judicial rulings consistent with legal positivism, that is, with a jurisprudence in which the predominant power of the community and its perceived interest are arbitrary. Holmes deduced that law rests on force.

Frederic R. Kellogg’s *Oliver Wendell Holmes Jr. and Legal Logic* is recommended to political scientists, legal academicians, and other jurists interested in the jurisprudence of Justice Oliver Wendell Holmes, but with the above cautions. Let readers draw their own conclusions.

25. Holmes, *Natural Law*, *supra* note 6, at 41, 42. Compare this passage with Holmes’ letter to Harold Laski, (Oct. 26, 1919), in 1 HOLMES-LASKI LETTERS, *supra* note 23, at 217:

When you are thoroughly convinced that you are right—whole-heartedly desire an end—and have no doubt of your power to accomplish it, I see nothing but municipal regulations to interfere with your using your power to accomplish it. The sacredness of human life is a formula that is good only inside a system of law—and so of the rest—all which apart from its *banalit*. . . I fear seems cold talk if you have been made to feel popular displeasure.