

Natural Law, Natural Rights, and American Constitutionalism

Oliver Wendell Holmes, Jr. and the Natural Law

Ideals and Doubts

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For the last thirty years we have been preoccupied with the embryology of legal ideas; and explanations, which, when I was in college, meant a reference to final causes, later came to mean tracing origin and growth. But fashion is as potent in the intellectual world as elsewhere, and there are signs of an inevitable reaction. The reaction, if there is one, seems to me an advance, for it is toward the ultimate question of worth. That is the text of an excellent article, "History versus Value," by Morris R. Cohen in the *Journal of Philosophy, Psychology and Scientific Methods*, and although perhaps rather in the form of conservation than of advance, of Del Vecchio's *Formal Bases of Law* in the *Modern Legal Philosophical Series*. To show that it has my sympathy I may refer to the *Law Quarterly Review*.^[1] But perhaps it will not be out of place to express the caution with which I am compelled to approach any general recension from which the young hope so much.

The first inquiry is for the criterion. If I may do Del Vecchio the wrong of summing up in a sentence or two what from a hasty reading I gather to be his mode of reaching one, it is that of a Neo-Kantian idealist. Experience takes place and is organized in consciousness, by its machinery and according to its laws, such as the category of cause and effect. Therefore consciousness constructs the universe and as the fundamental fact is entitled to fundamental reverence. From this it is easy to proceed to the Kantian injunction to regard every human being as an end in himself and not as a means.

I confess that I rebel at once. If we want conscripts, we march them up to the front with bayonets in their rear to die for a cause in which perhaps they do not believe. The enemy we treat not even as a means but as an obstacle to be abolished, if so it may be. I feel no pangs of conscience over either step, and naturally am slow to accept a theory that seems to be contradicted by practices that I approve. In fact, it seems to me that the idealists give away their case when they write books. For it shows that they have done the great act of faith and decided that they are not God. If the world were my dream, I should be God in the only universe I know. But although I cannot prove that I am awake, I believe that my neighbors exist in the same sense that I do, and if I admit that, it is easy to admit also that I am in the universe, not it in me.

When I say that a thing is true, I mean that I cannot help believing it. I am stating an experience as to which there is no choice. But as there are many things that I cannot help doing that the universe can, I do not venture to assume that my inabilities in the way of thought are inabilities of the universe. I therefore define the truth as the system of my limitations, and leave absolute truth for those who are better equipped. With absolute truth I leave absolute ideals of conduct equally on one side.

But although one believes in what commonly, with some equivocation, is called necessity; that phenomena always are found to stand in quantitatively fixed relations to earlier phenomena; it does not follow that without such absolute ideals we have nothing to do but to sit still and let time run over us. As I wrote many years ago, the mode in which the inevitable comes to pass is through effort. Consciously or unconsciously we all strive to make the kind of a world that we like. And although with Spinoza we may regard criticism of the past as futile, there is every reason for doing all that we can to make a future such as we desire.

There is every reason also for trying to make our desires intelligent. The trouble is that our ideals for the most part are inarticulate, and that even if we have made them definite we have very little experimental knowledge of the way to bring them about. The social reformers of today seem to me so far to forget that we no more can get something for nothing by legislation than we can by mechanics as to be satisfied if the bill to be paid for their improvements is not presented in a lump sum. Interstitial detriments that may far outweigh the benefit promised are not bothered about. Probably I am too skeptical as to our ability to do more than shift disagreeable burdens from the shoulders of the stronger to those of the weaker. But I hold to a few articles of a creed that I do not expect to see popular in my day. I believe that the wholesale social regeneration which so many now seem to expect, if it can be helped by conscious, coordinated human effort, cannot be affected appreciably by tinkering with the institution of property, but only by taking in hand life and trying to build a race. That would be my starting point for an ideal for the law. The notion that with socialized property we should have women free and a piano for everybody seems to me an empty humbug.

To get a little nearer to the practical, our current ethics and our current satisfaction with conventional legal rules, it seems to me, can be purged to a certain extent without reference to what our final ideal may be. To rest upon a formula is a slumber that, prolonged, means death. Our system of morality is a body of imperfect social generalizations expressed in terms of emotion. To get at its truth, it is useful to omit the emotion and ask ourselves what those generalizations are and how far they are confirmed by fact accurately ascertained. So in regard to the formulas of the law, I have found it very instructive to consider what may be the postulates implied. They are generically two: that such and such a condition or result is desirable and that such and such means are appropriate to bring it about. In all debatable matters there are conflicting desires to be accomplished by inconsistent means, and the further question arises, which is entitled to prevail in the specific case? Upon such issues logic does not carry us far, and the practical solution sometimes may assume a somewhat cynical shape. But I have found it a help to clear thinking to try to get behind my conventional assumptions as a judge whose first business is to see that the game is played according to the rules whether I like them or not. To have doubted one's own first principles is the mark of a civilized man. To know what you want and why you think that such a measure will help it is the first but by no means the last step towards intelligent legal reform. The other and more difficult one is to realize what you must give up to get it, and to consider whether you are ready to pay the price.

It is fashionable nowadays to emphasize the criterion of social welfare as against the individualistic eighteenth century bills of rights. I may venture to refer to a book of mine published thirty-four years ago to show that it is no novelty.^[2] The trouble with some of those who hold to that modest platitude is that they are apt to take the general premise as a sufficient justification for specific measures. One may accept the premise in good faith and yet disbelieve all the popular conceptions of socialism, or even doubt whether there is a panacea in giving women votes. Personally I like to know what the bill is going to be before I order a luxury. But it is a pleasure to see more faith and enthusiasm in the young men; and I thought that one of them made a good answer to some of my skeptical talk when he said, "You would base legislation upon regrets rather than upon hopes."

[1] 25 *Law Quarterly Review*, 412, 414, October, 1909. Ante, pp. 285-200.

[2] *The Common Law*, pp. 43, 44» 48.

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