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A CRITICAL ANALYSIS OF HOLMES'S THEORY OF TORTS

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The centennial of Oliver Wendell Holmes, Jr.'s lectures on *The Common Law*[1] has come and gone; as the glow of the centenary speeches fades, we may perhaps begin to see Holmes's achievement in a new light. No part of Holmes's work is more ripe for reappraisal than his theory of torts. G. Edward White, in his recent intellectual history of tort law in America,[2] began with Holmes,[3] naturally enough, and ended with the "neoconceptualists"[4] who have just recently returned to the basic theoretical issue Holmes first raised: What is the common ground of all tort liability? Grant Gilmore traced[5] to Holmes the conceptual foundations of classic contract theory and the intellectual underpinnings of an "Age of Faith"—faith in the internal consistency and external stability of the law. Both White and Gilmore stress Holmes's importance in the development of tort theory; both recognize and deplore the renewed interest in the bedrock question Holmes first asked. Neither gives a critical analysis of Holmes's theory of torts, for both are after bigger game. White is interested in the relationship between Holmes's thought and prevailing intellectual fashions; Gilmore, perhaps satisfied with his critique of Holmes's contractual theory, analyzes Holmes's tort theory only as it relates to the broader theme of faith in the consistency and certainty of the law.

Given the renewed interest in the conceptual problems of tort liability first dealt with by Holmes, we need a fresh analysis of Holmes's theory. First, identification of methodological and substantive defects in Holmes's theory may steer modern theorists away from similar problems. Second, analysis of Holmes's pervasive contribution to tort

* Associate Professor of Law, Southern Illinois University. I appreciate the helpful comments by Don Garner, Alan Gunn, Frank W. Miller, R. Dale Swihart, and Stanley L. Paulson.

1. O.W. HOLMES, THE COMMON LAW (M. Howe ed. 1963) [hereinafter cited as THE COMMON LAW].

2. G. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (1980).

3. *Id.* at 7-19.

4. *Id.* at 211-30.

5. G. GILMORE, THE AGES OF AMERICAN LAW (1977); G. GILMORE, THE DEATH OF CONTRACT (1974).

theory may show what features of modern tort law are directly traceable to Holmes's theoretical construct, and thus prevent modern theorists from unwittingly incorporating Holmes's theory by taking as a necessary part of the reality to be explained what is merely a necessary part of Holmes's possibly flawed explanation of that reality.

Any theory is an attempt to describe, analyze, and explain a certain part of reality.[6] That part of reality with which a theory is concerned is its subject matter; the questions it asks about its subject and the ways it goes about answering those questions constitute its methodology; the resulting description, analyses, and explanations comprise the resulting substantive theory. In this article I will first attempt to describe Holmes's theory of torts in a sufficiently broad context to reveal his methodology, the assumptions underlying his methodology, and the relation between Holmes's methodology and his substantive theory. After placing Holmes's theory within the philosophical tradition of nineteenth-century positivism, I shall attempt a practical critique of Holmes's methodology by analyzing its assumptions, the reasonableness of these assumptions, and the matters the methodology is forced to conclude are irrelevant. I then focus on Holmes's substantive theory to see whether it is internally coherent in light of these methodological assumptions. The analysis concludes by isolating the novel theoretical concepts introduced by Holmes to explain tort liability. This work is a preliminary to further theorizing about tort liability. It is purely critical and analytical.[7]

I. CONTEXT

Holmes set forth his theory of torts in Lectures III and IV of *The Common Law*. These two lectures formed the last part of his investigation, begun in Lecture I, of "the general theory of liability civil and criminal."[8] Given the apparent continuity of the first four lectures, any careful student must consider Holmes's tort theory within the context

6. J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 3 (1980).

7. The much more significant task of formulating a more adequate methodology, and applying it to this subject matter freed from prior theoretical misdescription remains to be done. Although this purely critical preliminary is meant to be of use to all torts theorists, it also provides part of the historical and critical base for the author's own descriptive theory of torts, currently in manuscript.

8. THE COMMON LAW, *supra* note 1, at 6.

of both Lecture I, on early forms of liability, and Lecture II, on the criminal law.

Lecture I, ostensibly an analysis of early forms of liability, is, in fact, a brilliantly argued brief for Holmes's theory of the process of common law development, which he stated in the now-familiar opening of the first lecture. In that first paragraph Holmes asserted:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[9]

Holmes supported and refined this central thesis in Lecture I by analyzing the original basis and subsequent development of rules imposing vicarious liability for harm inflicted by another person or thing. Holmes's extensive analysis of the origins and development of vicarious liability rules thus formed the basis for the thesis reformulation at the end of Lecture I:

> In form [the law's] growth is logical . . . .
>
> On the other hand, in substance the growth of the law is legislative. . . . It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.[10]

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9 *Id.* at 5.

10. *Id.* at 31-32. *Cf.* R. VON JHERING, GEIST DES RÖMISCHEN RECHTS (1865). The similarities between Holmes's theory of common law development and von Jhering's views were first pointed out by Jerome Frank, who noticed the similarities between Holmes's theory of legal development in Lecture I and the very language of von Jhering, as translated in the appendix to an 1880 American treatise by Lieber. Frank, *A Conflict with Oblivion: Some Observations on the Founders of Legal Pragmatism*, 9 RUTGERS L. REV. 425, 443 n.87 (1954). Holmes's biographer, apparently responding to Frank's veiled accusation of plagiarism, stated:

> Though he evidently saw that Jhering shared his own suspicion of the metaphysical foundations on which his fellow countrymen had built their jurisprudence and their interpretations of legal history, it does not seem that Holmes was willing to recognize that Jhering was, to a very considerable extent, his philosophical ally. Though he read the four volumes of *Jhering's Spirit of the Roman Law* (again in a French translation) in 1879, there is, I think, no indication that he ever recognized that Jhering had uttered

According to Holmes, this understanding of the substance of legal development is needed not only to understand what the law is but also to realize that the law can and should be revised to conform to current enlightened views of public policy:

> When we find that in large and important branches of the law the various grounds of policy on which the various rules have been justified are later inventions to account for what are in fact survivals from more primitive times, we have a right to reconsider the popular reasons, and, taking a broader view of the field, to decide anew whether those reasons are satisfactory.[11]

This reformulated theory of common law development and the vicarious liability analysis underlying it provide important clues to understanding Holmes's aims and methodology in the subsequent lectures on the general principles of criminal and civil liability.

Since the common law is in a continual process of development,

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protests no less vigorous than his own against the beatitude of logic and sanctity of will in German legal thought.

M. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 1870-1882 152 (1963). Howe further stated that although Holmes kept copious notes on his readings during this period, no notes on von Jhering survive.

The similarities between Holmes and von Jhering are striking. Holmes and von Jhering both advocated the following concepts: the controlling theory of the process of legal development by unarticulated implementation of social policies; the consequent superiority of the scholar in determining the "true" law hidden from those working in the legal system; the importance of "formal realisibility" or effectiveness of the law in achieving its social goals; the acceptance and promotion of *malum prohibitum* crimes, consistent with the notion of law as a means to certain social welfare ends. These conceptual similarities are strong. Moreover, the hypothesis of von Jhering's direct influence finds support in comparisons of Holmes's writings before and after 1879. The basic material in Lecture I of *The Common Law* comes from Holmes's 1876 article, *Primitive Notions in Modern Law,* 10 AM. L. REV. 422 (1876), but the additions are ideas similar to those of von Jhering: the process of legal development; the notion of unarticulated legislative policy as the secret root of judicial decision. Similarly, Holmes's 1873 article, *The Theory of Torts,* 7 AM. L. REV. 652 (1873), covered much the same ground and included many of the same ideas as Lectures III and IV of *The Common Law*, but the additions are again ideas similar to those of von Jhering: the foreseeability test derivable from a legislative policy; the emphasis on formal realisability, or effectiveness of the law in achieving its ends.

Holmes cited von Jhering in his later lecture on possession, and even called him "a man of genius," THE COMMON LAW, *supra* note 1, at 165, but did not cite von Jhering at all in the first four lectures. The extent of von Jhering's influence on Holmes's ideas in these lectures, therefore, is a question that the historical materials raise but do not answer. Howe's minimizing of any direct influence of von Jhering on Holmes is understandable in light of the analysis in section III of this article, which suggests that John Stuart Mill was the primary influence on Holmes. Von Jhering was also strongly influenced by Mill. The marked similarities between von Jhering and Holmes can be explained as easily by their common antecedent as by the direct borrowing hypothesis.

11. THE COMMON LAW, *supra* note 1, at 33.

changing in response to often unarticulated and subconscious judicial perceptions of current public policy, the search for the current policies underlying tort liability must be a search for historical tendencies[12]—for the direction in which the common law is headed. Since most judges have not articulated the public policies underlying their decisions, but have instead cast their explanations in misleading logical form,[13] the theorist cannot rely on judicial opinions for the real policy bases of judicial decisions. Instead, the theorist must treat the legal rules and decided cases as data to be explained by hypothesized policies. To persuade us that one policy explains the data rather than another policy, then, the theorist must show a greater congruence of the proposed policy with all relevant facts, or show the policy's superior logical explanatory power. The theorist's method is empirical and scientific rather than normative; consequently, the scientific theorist is in a better position to understand the law in terms of its underlying policies—even ancient law and its underlying policies—than the judges and lawyers who made or fought for those laws.

As a practical matter, the theorist must gather the relevant legal rules and decisions wanting policy explanation, propose all potential policies (or combinations of policies) explaining those rules and decisions, and then eliminate all but one policy explanation. Since this is a scientific exercise, the theorist cannot appeal to the correctness or superiority of a policy *as policy* in choosing one over another, but can appeal only to greater congruence with the data or superior explanatory power.

An example of the scientific method in action is Holmes's discussion of "the most important [purpose] of [criminal] punishment"[14] in Lecture II. Holmes first collected three potential candidates: reformation, retribution, and deterrence. He quickly eliminated reformation as inconsistent with two widely accepted practices in criminal punishment: capital punishment and punishment of those unlikely or unable to commit crimes again.[15] Then, after an extensive critique of the substantive arguments favoring retribution as the most important purpose, Holmes eliminated retribution as a candidate because it is not coextensive with all cases of criminal punishment—we punish crimes *malum prohibitum* to which society's feeling of the fitness of punishment as just

12. *Id.* at 63.
13. *Id.* at 31-33.
14. *Id.* at 36.
15. *Id.*

retribution does not extend.[16] Since Holmes assumed that the most important purpose of criminal punishment would be "coextensive with the whole field of its application,"[17] retribution cannot be the most important purpose. Under this test, deterrence must be the most important purpose, for in every case where a lawmaker makes conduct criminal, he shows "a wish and purpose to prevent that conduct."[18]

Three things should be noted about this methodology. First, its result depends on an initial pretheoretical judgment about what constitutes the coherent body of facts to be explained by a single policy or set of policies[19]—i.e., why was the relevant class all criminal punishment rather than criminal punishment for *malum in se* crimes? Second, a similarly pretheoretical choice of the competing explanatory policies channels and limits the possible results reached by this method. Third, by focusing on an objective standard of pervasiveness or congruence as the criterion for determining importance, and ignoring the actual understandings, purposes, and explanations of those formulating and enforcing criminal laws, Holmes reached a result contrary to what many thoughtful people within the system would have said.[20]

Although Holmes's method seems purely descriptive, the first four lectures reveal two ways in which Holmes sought to transform his purportedly neutral, "scientific" descriptions of current public policies underlying tort and criminal liability into prescriptions for enlightened legislative policies that courts ought to attempt to further in tort and criminal law. These methods of turning description into prescription are closely related to Holmes's theory of the evolution of criminal and tort liability from an original concern with satisfying the passion for revenge, with a concomitant internal standard of personal moral blameworthiness, toward a public policy favoring maximum feasible deterrence of dangerous conduct, with a concomitant external, objective standard of conduct.[21] Holmes identified this historical tendency

16. *Id.* at 39.

17. *Id.* at 36.

18. *Id.* at 40.

19. Compare Finnis' critique of Hans Kelsen's methodology in J. FINNIS, *supra* note 6, at 5-6.

20. For the importance of starting any analysis of human institutions with the internal point of view of those operating within that institution, see J. FINNIS, *supra* note 6, at 1-28. *See also* H.L.A. HART, THE CONCEPT OF LAW 97-120 (1961).

21. Compare J.S. Mill's emphasis on the importance of external standards in utilitarian moral theory: "[U]tilitarian moralists have gone beyond almost all others in affirming that the motive has nothing to do with the morality of the action . . . ." J.S. MILL, *Utilitarianism,* in 10 COLLECTED WORKS OF JOHN STUART MILL 205, 219 (1969) [hereinafter cited as *Utilitarianism*].

and suggested that it progressed in the right direction for two reasons. First, it embodied progress from a barbaric concern for vengeance to a civilized concern for the overall public good. Second, it represented a refinement or improvement of the law *qua* law: external, objectively defined standards of behavior are much more effective means of achieving the legislative policy ends of the law than internal standards of personal moral blameworthiness. These two ways of transforming description into prescription are never argued for or justified; they are, instead, asserted or suggested, the supporting arguments hinted at obliquely or left out altogether. But these assumptions pervade Holmes's work, and the first lecture is the vehicle Holmes used to plant them in his audience's minds.

In Lecture I, Holmes traced then-current common law vicarious liability rules back to the early primitive legal systems of Rome and the Germanic tribes. In both, he claimed, the liability of an owner of a slave or animal causing harm was originally limited to surrendering the slave or animal to the injured party.[22] As such, that liability to surrender was just "a way of getting at the slave or animal": the object was revenge on the offending thing, not compensation for harm caused by any fault imputed to the owner.[23] Seeing revenge as the controlling principle, Holmes analogized these rules to primitive Greek laws imposing punishment on stones and knives that caused harm, and suggested that there was a "trace" of this primitive revenge on offending inanimate objects in later Roman law.[24] Holmes therefore tarred all these early rules, based on revenge, with primitive irrationality:

> But it may be asked how inanimate objects came to be pursued in this way, if the object of the procedure was to gratify the passion of revenge. Learned men have been ready to find a reason in the personification of inanimate nature common to savages and children, and there is much to confirm this view. Without such a personification, anger toward lifeless things would have been transitory, at most.[25]

By starting his analysis of the development of vicarious liability rules with procedures based on a primitive animism "common to savages and children," Holmes made vivid to his audience how far we have

22. THE COMMON LAW, *supra* note 1, at 11-12.

23. *Id.* at 12.

24. *Id.* at 10-12.

25. *Id.* at 12. Compare the more sympathetic treatment of similar liability rules in McLaren, *The Origins of Tortious Liability: Insights from Contemporary Tribal Societies,* 25 U. TORONTO L.J. 42 (1975).

progressed; formal argument that the process of legal development leads to more enlightened law was rhetorically superfluous. Thereafter, Holmes's preliminary assumption that "the law has grown, without a break, from barbarism to civilization"[26] would be taken as established by this example.

The other basis for assuming the desirability of the evolution from internal, subjective standards to external, objective standards of liability is stated but not embodied in Lecture I and elaborated but never restated in the civil and criminal liability theories. The argument, stated at the very end of Lecture I, is this:

> It remains to be proved that, while the terminology of morals is still retained, and while the law does still and always, in a certain sense, measure legal liability by moral standards, it nevertheless, *by the very necessity of its nature*, is continually transmuting those moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated.[27]

This passage can be understood when read in conjunction with Holmes's theory of the process of legal development. If the real bases for judicial decisions are legislative policies, as explained above, the law improves *as law* when it transforms subjective into objective standards because objective standards are a more effective means of influencing human behavior to conform to the desired policy goals.[28]

II. INTERPRETATION AND SUMMARY

Holmes was such a great stylist that the charm of his words cast a spell immobilizing the critical faculty. His analysis is often cryptic and allusive. It may therefore be useful to outline the main arguments supporting his torts theory as a prelude to critical analysis.

Holmes stated that the object of his two lectures on torts was "to discover whether there is any common ground at the bottom of all liability in tort, and if so, what that ground is."[29] Holmes then explained why he limited the "common ground" question to torts. Liability in tort is fundamentally distinguishable from liability for breach of con-

26. THE COMMON LAW, *supra* note 1, at 8.

27. *Id.* at 33 (emphasis added).

28. Compare von Jhering's theory of "formal realisability" of the law in R. VON JHERING, *supra* note 10 (author's source is unpublished anonymous English translation of Vol. 1, title II, on file at the Southern Illinois University School of Law).

29. THE COMMON LAW, *supra* note 1, at 63.

tract: liability for breach of contract is based on the defaulting party's consent to pay for the harm caused by the breach, while tort liability is imposed without the defendant's consent, based on "some general view of the conduct which every one may fairly expect and demand from every other."[30]

After stating his topic and justifying its limited scope, Holmes proceeded to redefine the problem, paraphrased as follows:

(1) Tort law decides whether a defendant is liable for harm he has done: there is no liability in tort unless defendant's acts result in harm.

(2) Acts that are identical in all relevant respects sometimes cause harm and sometimes do not.

(3) Therefore, tort law cannot enable one to predict with certainty "whether a given act under given circumstances will make him liable."[31]

(4) The only guide for the future derivable from a tort decision imposing liability is the conclusion that similar, indistinguishable acts are done at the "peril of the actor":[32] the actor will be held liable in tort should harm follow.

(5) Therefore, to find the general principle of all tort liability, one should eliminate the event as it turns out (i.e., the harm) and look for the principle on which the "peril of an actor's conduct" (the risk of liability should the act result in harm) is thrown on the actor.

Holmes then posited two potential answers to his redefined question: the first, naturally suggested by the "moral phraseology" of tort law, is that "the risk of a man's conduct is thrown upon him as the result of some moral short-coming,"[33] and the second, a "far more popular notion,"[34] is that the risk of a man's conduct is thrown on him whenever he acts. Holmes proposed to test the first theory by examining the legal meaning of morally freighted words like "negligence" and "intent." He proposed to test the second theory (that a man always acts at his peril) by seeing whether it accurately reflects tort liability rules in any of the common law forms of action. Holmes then combined the two approaches and examined both theories together by first analyzing the common law action of trespass and the legal meaning of negligence in Lecture III and then analyzing the nominate "intentional" torts in Lec-

30. *Id.*
31. *Id.* at 64.
32. *Id.*
33. *Id.* at 65.
34. *Id.*

ture IV. Holmes justified treating trespass and negligence together, and leaving out a discussion of trespass on the case, by the following argument.[35] The action of trespass lay for unintended as well as intended harms. There is no conceivable reasonable basis on which the principles of liability in trespass for unintended but directly caused harm could differ from the principles of liability in case for unintended but indirectly caused harm. In fact, given Holmes's definition of an act as a voluntary muscular contraction, the distinction between direct and indirect consequences of an act is analytically empty. If it turns out that liability in trespass depends on defendant's negligence, then the same conclusion will necessarily be true for case. If it turns out, on the other hand, that liability in trespass does not depend on defendant's negligence, but is imposed on the theory that one always acts at one's peril,[36] the same conclusion will necessarily be true for case.

Holmes prefaced his discussion of the basis for liability in trespass with the observation that the current law, which no longer recognizes the old forms of action, requires an allegation of negligence to support liability for any unintended harm.[37] This is the rule even in those cases of directly caused harm that would have been categorized under the old forms as trespass which, under the old rules, did not require an allegation of negligence when the harm was unintended. Holmes then went on to argue that, in terms of underlying principles, the current law is not a recent innovation: absolute responsibility for all harmful consequences of an act was never the basis for liability in trespass for unintended harm, except perhaps "in that period of dry precedent which is so often to be found midway between a creative epoch and a period of solvent philosophical reaction."[38] To support this conclusion, Holmes turned to the most "scientific" part of his argument, in which he examined whether the principle that a man acts at his peril is consistent with tort liability for unintended harm under the old common law forms of action. Since Holmes defined an act as a voluntary muscular contraction, he reasoned that the principle that a man always acts at his peril would require liability without fault for all indirect consequences

35. *See id.* at 65-66.

36. The handwritten notes in Holmes's personal copy of *The Common Law* give another reason for focusing on trespass rather than case: "Trespass being the stronghold of the stricter doctrine here combatted." THE COMMON LAW, *supra* note 1, at 66 n.b (Howe designates Holmes's annotations as footnote a, b, etc.).

37. *Id.* at 72.

38. *Id.*

of one's acts, as well as for all remote direct consequences, regardless of the nature or foreseeability of the intervening causes. These necessary conclusions derived from the proposed theory are plainly inconsistent with the common law. Liability for unintended indirect consequences of one's acts was imposed, in case, only upon a showing of defendant's negligence; liability in trespass was not imposed for unintended direct consequences of an act innocent in its direct and obvious effects if those consequences would not have occurred "but for the intervention of a series of extraordinary, although natural, events."[39] Thus, the principle that a man acts at his peril is inconsistent with the common law of liability for unintended harm in the actions of case and trespass.

Holmes argued that these rules show that both trespass and case recognize and implement the "general principle of our law . . . that loss from accident must lie where it falls . . . relatively to a given human being anything is accident which he could not fairly have been expected to contemplate as possible, and therefore to avoid."[40] The very requirement of an act is consistent with this general principle, for "the only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability. There is no such power where the evil cannot be foreseen."[41] Furthermore, Holmes argued that the contrary principle, that a man acts at his peril, is bad legislative policy for three reasons: (1) it would impose a sanction on all human activity, which is both necessary and generally beneficial, (2) it achieves the policy goal of mutual insurance against loss less efficiently than private insurance, and (3) it offends the sense of justice embodied in the common law requirement of an act: unless I had the opportunity to avoid the harm, it is unjust to force me to pay for it. Holmes then showed that his view is consistent with the rules, precedent, and authorities usually cited in support of the contrary contention that the principle underlying Trespass was that a man acts at his peril.[42] Holmes therefore concluded that the theory that a man always acts at his peril was inconsistent with the common law, and that

39. *Id.* at 75.

40. *Id.* at 76.

41. *Id.* at 77.

42. *Id.* at 82-86. Holmes's brilliant analysis of the relevant cases to disprove the strict liability explanation is perhaps his most significant contribution to the historical analysis of tort law. Holmes achieved insights about the basis of early common law decisions later elaborated more systematically by others. *See* S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW (2d ed. 1981). Holmes's solid arguments that early tort liability was not based on the strict liability

the basis of liability in trespass was fault or blameworthiness in some sense.

Holmes next turned to the alternative theory that a man acts at his peril only when his acts are personally morally blameworthy. Holmes identified this theory with John Austin's notion that negligence is a standard of personal fault denoting a state of the defendant's mind. In a single paragraph, Holmes made short shrift of this argument by pointing out that it is inconsistent with the common law of trespass, in which, according to Year Book authority, "the intent [interpreted broadly by Holmes to mean the defendant's state of mind] cannot be construed."[43] Moreover, Austin's theory is inconsistent with the current law of negligence, in which the defendant's actual considered judgment and conscientious concern for safety would be irrelevant to the controlling issue of whether his conduct was that of a prudent man.

Having eliminated these two proposed principles on the grounds that they are both inconsistent with the common law, Holmes faced the task of formulating a principle that adequately explains both liability in trespass under the old common law and liability under the current law for unintentional but negligently inflicted harm. He had shown that liability is based on fault or blame in some sense but not in the sense of personal fault or blame. Since his previous analysis had shown that the underlying principle can be neither that a man acts at his peril nor that a man acts at his peril only when personally blameworthy, Holmes stated the problem as that of finding "some middle point . . . between the horns of this dilemma."[44]

Holmes's solution to this problem was foreshadowed in his earlier discussion of the principle that one is not liable for loss from accident. He argued that the law determines liability by a general, external standard of blameworthiness rather than a personal, internal standard. The test of the law is "what would be blameworthy in the average man, the man of ordinary intelligence and prudence."[45] The reasons for this general, external standard are two: first, courts are incapable of determining the facts about individual capacities that would be necessary to apply a standard of personal moral blameworthiness; and second, a

principle that a man "acts at his peril" does not, of course, prove that early liability was based on the "foreseeability of harm" standard Holmes proposed.

43. THE COMMON LAW, *supra* note 1, at 86.

44. *Id.*

45. *Id.* at 87.

"more satisfactory explanation,"[46] is to protect members of society from harm by deterring dangerous behavior. The exceptions to this external standard of negligence (for manifest physical incapacity, infancy, and some cases of insanity) confirm the moral basis of liability in general: it is not fair to hold someone liable when he was manifestly incapable of taking precautions and therefore could not have been influenced by the motive of avoiding foreseeable harm to others. Holmes concluded this analysis by equating the external standard of blameworthiness with failure to avoid foreseeable harm:

> [O]n the one hand, the law presumes or requires a man to possess ordinary capacity to avoid harming his neighbors, unless a clear and manifest incapacity be shown; but that, on the other, it does not in general hold him liable for unintentional injury, unless, possessing such capacity, he might and ought to have foreseen the danger, or, in other words, unless a man of ordinary intelligence and forethought would have been to blame for acting as he did.[47]

Holmes next asked whether the vague external standard of the ordinary prudent and intelligent man's foresight is all that the law has to say on the matter. In answering that question, Holmes posited four criteria for a legal standard: (1) a legal standard can deal only with external conduct—manifest acts or omissions; (2) a legal standard ought to apply uniformly to those similarly situated; (3) a legal standard therefore ought to be fixed; and (4) a legal standard should be knowable, as liability is imposed on the theory that one has broken the law.[48] Holmes recognized that the general negligence standard, as applied to individual cases by juries, does not meet the last three criteria; he therefore suggested that that general standard ought continually to be replaced by more specific, fixed, and knowable rules of behavior in particular situations. Holmes claimed that this process of specification in fact has continually been at work in the field of torts. Statutes replace the general standard with specific rules, and courts adopt specific rules based on the teachings of custom and the consistent application of the general standard by prior juries dealing with similar factual situations. Holmes concluded that courts ought to continue the process of specification. Based on the teachings of experience regarding the dan-

46. *Id.* at 86.

47. *Id.* at 88.

48. *Id.* at 88-89.

ger or safety of conduct,[49] the courts should translate the general standard of foreseeable danger into specific legal rules, thereby taking from the jury in more and more instances the task of applying the general principle of tort liability.

In the first part of Lecture IV, Holmes considered the nominate torts involving fraud, malice, and intent to determine whether liability is based on a standard of personal moral fault or on the same external standard Holmes had found underlying liability for negligence. In this lecture, Holmes relied heavily on his prior lecture on the criminal law, in which he had taken James FitzJames Stephen's definition of criminal intent and reduced it to knowledge by the defendant of facts from which an ordinary reasonable person would foresee the probability of harm.[50] Criminal liability is imposed when the defendant acted voluntarily with knowledge of circumstances from which an ordinary reasonable man would foresee the probability of certain specified harms resulting from the act. Personal moral blameworthiness, malice, or evil intent in the common sense of the terms was not required: the test is purely external, adopted to deter dangerous conduct. In Lecture IV, Holmes performed a similar philosophical reduction on the nominate torts of deceit, slander, malicious prosecution, conspiracy, and trover to show that forms of action that seem to be based on personal moral blameworthiness are really based on an external standard of what would be morally blameworthy in an average, prudent man. The standard of liability in each case is a voluntary act with knowledge of circumstances that would lead an ordinarily reasonable man to foresee probable harm of a particular kind. Thus, even the forms of action for "intentional" torts have adopted an external standard imposing liability for harm resulting from conduct that, because of its foreseeable danger, is blameworthy in the average ordinary man. These "intentional"

49. *Id.* at 98-100, 117-26. Compare Mill's statement:

> Again, defenders of utility often find themselves called upon to reply to such objections as this—that there is not time, previous to action, for calculating and weighing the effects of any line of conduct on the general happiness . . . The answer to the objection is, that there has been ample time, namely, the whole past duration of the human species. . . . During all that time mankind have been learning by experience the tendencies of actions; on which experience all the prudence, as well as all the morality of life, are dependent. . . . It is truly a whimsical supposition that if mankind were agreed in considering utility to be the test of morality, they would remain without any agreement as to what *is* useful, and would take no measures for having their notions on the subject taught to the young, and enforced by law and opinion.

Utilitarianism, supra note 21, at 224 (emphasis in original).

50. THE COMMON LAW, *supra* note 1, at 45 & n.12.

torts, then, are ultimately based on the same policy as that underlying liability for negligence—the policy of deterring conduct foreseeably dangerous to others.

Midway through the fourth lecture, then, Holmes had shown that the various tort forms of action and the legal meaning of morally freighted words like "negligence," "intent," "malice," "slander," and "deceit" were inconsistent with the two alternative tort theories; they were consistent only with Holmes's theory of an external standard imposing tort liability for harm caused by conduct that an ordinary reasonable man would foresee as dangerous, based on the prior experience of the community with such conduct. Holmes then continued in the last part of Lecture IV to reiterate and refine his basic theory. This reiteration is of critical importance to a full understanding of Holmes's theory, for in it he explained clearly his view of the "public policy" or "legislative" considerations underlying tort liability rules. Furthermore, he explained how his theory explains all of tort law and is therefore a fully congruent "scientific" theory of tort liability.

In his summary recapitulation Holmes gave this clear statement of the policies underlying tort liability:

> [T]he general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation, or estate, at the hands of his neighbors, not because they are wrong, but because they are harms. The true explanation of the reference of liability to a moral standard, in the sense which has been explained, is not that it is for the purpose of improving men's hearts, but that it is to give a man a fair chance to avoid doing the harm before he is held responsible for it. It is intended to reconcile the policy of letting accidents lie where they fall, and the reasonable freedom of others with the protection of the individual from injury.[51]

In unusual cases, according to Holmes, the public policy favoring freedom of action outweighs the public policy favoring prevention of harm. In such cases, certain harms are not compensated, even though they are the foreseeable consequences of a defendant's voluntary act, and even though the act is done with intent or malice in the ordinary, morally significant sense. On the other hand, in some kinds of cases other public policies may so outweigh the policy favoring freedom of action that defendants are held strictly liable for certain harms even though the harm was not foreseeable by an ordinary, reasonable man, and hence not avoidable. In most cases, however, liability is imposed

51. *Id.* at 115.

only when the defendant had knowledge of circumstances that would lead an ordinary, reasonable man, based on the accumulated experience of the community, to foresee danger to others.

The process of specification continually derives specific liability rules from the general external standard. These specific rules often appear indistinguishable from rules of strict liability based on policy grounds. Holmes therefore explored a number of these rules to show that their origin lay in the general external standard. Holmes suggested that the process of specification is more likely to occur when the circumstances one needs to know to judge the dangerousness of an act are few and simple. In such cases, the experience of the community, originally reflected in jury verdicts based on the general negligence standard, will quickly be incorporated into specific rules of law. In this class fall cases in which the offending conduct itself proves with relative certainty the defendant's knowledge of one or more concomitant circumstances that experience shows make the conduct dangerous. Thus, when walking, one knows that one walks on ground belonging to someone, so the courts adopted a specific rule of "strict" liability for trespass *quare clausum fregit*. The same rationale explains the derivation from the general principle of specific rules imposing apparently strict liability on meddlers with personal property, keepers of wild animals, owners of trespassing cattle, and those bringing onto their land anything likely to do mischief should it escape. In each case, the voluntary act itself implies knowledge of a circumstance from which common experience enables an ordinary reasonable man to foresee danger. When the circumstances are more complex, so that knowledge of danger cannot be implied from the voluntary act itself, the process of specification will not ordinarily work, and the courts will leave to the jury the problem of determining whether the defendant had knowledge of circumstances, beyond those necessary to complete the act, that would lead a reasonable man to foresee danger. Holmes used this theory to explain why the general negligence standard, and not a specified rule, is applied to keepers of domestic animals:

> Experience as interpreted by the English law has shown that dogs, rams, and bulls are in general of a tame and mild nature, and that, if any one of them does by chance exhibit a tendency to bite, butt, or gore, it is an exceptional phenomenon. Hence it is not the law that a man keeps dogs, rams, bulls, and other like tame animals at his peril as to the personal damages which they may inflict, unless he knows or has notice that the

particular animal kept by him has the abnormal tendency which they do sometimes show. The law has, however, been brought a little nearer to actual experience by statute in many jurisdictions.[52]

III. HOLMES THE UTILITARIAN POSITIVIST

In evaluating any theorist's methodology, it is helpful to know what school or tradition he is following. As Holmes in *The Common Law* admits to no allegiance to any particular school or tradition, categorization must be based on similarities between Holmes's work and that of others with which Holmes may have been familiar. This search for antecedent influences is aided by the survival of Holmes's own reading lists for the period from 1865 to the publication of *The Common Law* in 1881.[53] Holmes's biographer, Mark DeWolfe Howe, singled out the period from 1865 to 1867 as critically important to his intellectual development:

> From 1865 through 1867 [Holmes's] non-professional reading was principally directed to those works in which the scientific point of view was utilized for the comprehension of man's largest problems. Whether this reading strengthened an earlier tendency or initiated a new conviction in Holmes is, perhaps, unimportant, for in either case they became an element of critical importance in the molding of his convictions.[54]

While noting that Holmes read George Henry Lewes' relentlessly positivist works, *Biographical History of Philosophy and Aristotle*,[55] Howe emphasized the primary importance to Holmes's intellectual development of John Stuart Mill's works, which combine positivist methodology with utilitarian ethics.[56]

Howe's conclusions are certainly consistent with the sheer number of John Stuart Mill's works on Holmes's reading list for this period: Holmes read seven works by John Stuart Mill[57] and two works about

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52. *Id.* at 125.

53. *See* Little, *The Early Reading of Justice Oliver Wendell Holmes,* 8 HARV. LIBR. BULL. 163 (1954)

54. M. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS, 1841-70 210 (1957)

55. *Id.*

56. *Id.* at 212-17.

57. The seven works are *Considerations on Representative Government*, *Examination of Sir William Hamilton's Philosophy*, *Utilitarianism*, *Auguste Comte and Positivism*, *A System of Logic*, *Principles of Political Economy*, and *Dissertations and Discussions; Political, Philosophical and Historical* *See* Little, *supra* note 53, at 169, 171, 173-74.

him;[58] the readings include Mill's famous essay *Utilitarianism* as well as Mill's original work on inductive scientific methodology (*A System of Logic*); his overwhelmingly sympathetic but partially critical treatment of the French founder of the positivist school (*Auguste Comte and Positivism*) as well as Bridge's reply to Mill's criticism of Comte. During this period Holmes travelled to England (a trip that Howe characterized as a pilgrimage),[59] where he met with Mill and other British positivists.[60] As Holmes's only extensive study of theoretical methodology was this early voracious reading in the works of John Stuart Mill, it makes sense to begin the search for Holmes's antecedents with John Stuart Mill.

A comparison of Holmes's 1881 lectures on torts with Mill's 1863 essay *Utilitarianism* reveals certain remarkable parallels. In that essay, Mill asks what is the "one first principle, or common ground of [moral] obligation."[61] He answers that it is the principle of utility, or the greatest happiness principle, that is the "foundation of morals":[62] "[the principle that] holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain and the privation of pleasure."[63] This "theory of morality" is grounded on the "theory of life . . . that pleasure, and freedom from pain, are the only things desirable as ends."[64] This "theory of life" is established by the observation that these are all that people actually desire.[65] In answer to the objection that the principle

58. Listed in Holmes's published reading list are *The Unity of Comte's Life and Doctrine, A Reply to Strictures on Comte's Later Writings, Addressed to J.S. Mill* by John Henry Bridges, and *An Examination of Mr. J.S. Mill's Philosophy* by James McCosk. *See* Little, *supra* note 53, at 172-73.

59. "The European voyage was not simply the journey of a young Bostonian. It was the pilgrimage of a maturing mind which had already found its tendencies." M. HOWE, *supra* note 54, at 208.

60. *Id.* at 223-44. Holmes met Mill, and renewed his friendship with Leslie Stephen, who took Holmes mountainclimbing in Switzerland. *Id.* at 226, 228, 235-39. Leslie Stephen and Holmes remained friends and correspondents for a long time. *See* F.W. MAITLAND, THE LIFE AND LETTERS OF LESLIE STEPHEN (1906). For a discussion of Leslie Stephen's positivism, see M. HOWE, *supra* note 54, at 238-39; W. SIMON, EUROPEAN POSITIVISM IN THE 19TH CENTURY: AN ESSAY IN INTELLECTUAL HISTORY 221 (1963).

61. *Utilitarianism, supra* note 21, at 204.

62. *Id.* at 210.

63. *Id.*

64. *Id.*

65. *Id.* at 210-14.

cannot be applied as a principle of action because of the impossibility of calculating the net effect on general happiness of each possible line of conduct, Mill states: "[During] the whole past duration of the human species . . . mankind [must] have been learning by experience the tendencies of actions; on which experience all the prudence, as well as the morality of life, are dependent."[66] Particular rules of morality are therefore based on generalizations about the tendencies of certain acts to cause pleasure or pain, derived from the common experience of mankind.[67]

Before tracing the parallels between Holmes's theory of torts and Mill's theory of moral obligation, it will be helpful to put Mill's 1863 essay in historical context. Mill had for some time prior to 1863 accepted certain basic tenets of Auguste Comte's positivism.[68] He was to make clear the extent of his agreement with Comte in his 1865 essay *Auguste Comte and Positivism*.[69] It is in the light of this later expression of Mill's positivism that Mill's essay on utilitarianism should be read.

Mill explicitly approved Comte's evolutionary theory of the three stages of human thought, his views on the limitations on human knowledge, and his resulting positivist scientific methodology. A brief review of these notions, as explained by Mill, will thus be helpful. Comte claimed to have discovered an invariable law of three successive stages in the evolution of human thought about phenomena. In the theological mode of thought, phenomena are attributed to the will[s] of supernatural being[s]; in the metaphysical mode of thought, phenomena are explained by abstract metaphisical entities, such as the "natures" and "efficient causes" of things. In the final, positive mode of thought, man gives up the futile search for the essential nature and ultimate causes of events, and realizes that all we can know are the phenomena, and that that knowledge is relative. As Mill explains it:

> We know not the essence, nor the real mode of production, of any fact, but only its relation to other facts in the way of succession or of similitude. These relations are constant; that is, always the same in the same circumstances. The constant resemblances which link phaenomena to-

66. *Id.* at 224.

67. *Id.* at 224-25.

68. *See* W. SIMON, *supra* note 60, at 172-201.

69. J.S. MILL, *August Comte and Positivism,* in 10 COLLECTED WORKS OF JOHN STUART MILL 261 (1969).

> gether, and the constant sequences which unite them as antecedent and consequent, are termed their laws. The laws of phaenomena are all we know respecting them.[70]

These laws of phenomena are all men have ever wanted or needed to know, since "the knowledge which mankind, even in the earliest ages, chiefly pursued, being that which they most needed, was *fore*knowledge. . . . When they sought for the [metaphysical] cause, it was mainly in order to control the effect, or if it was uncontrollable, to foreknow and adapt their conduct to it. Now, all foresight of phaenomena, and power over them, depend on knowledge of their sequences. . . ."[71] Mill is not as fastidious as Comte, for Mill accepts these scientific laws of antecedence and consequence as laws of *causal* relationships between phenomena, although Mill agrees that ultimate or efficient (metaphysical) causes cannot be known.[72]

The final, positive stage in the evolution of thought about any subject is scientific. According to Comte, the first body of thought to reach the status of a positive science was mathematics, followed by (and dependent on all the next preceding) astronomy, physics, chemistry, biology, and finally (and not quite yet) sociology.[73] Since for Comte the paridigm positive science was mathematics, none of the other bodies of thought could reach the status of a positive science until they were reconstituted along the mathematical model, in which the scientist identified the central axioms from which all other scientific laws are derivable. In Mill's words:

> But what [Comte] really meant by making a science positive, is what we will call, with M. Littré, giving it its final scientific constitution; in other words, discovering or proving, and pursuing to their consequences, those of its truths which are fit to form the connecting links among the rest: truths which are to it what the law of gravitation is to astronomy, what the elementary properties of the tissues are to physiology, and we will add (though M. Comte did not) what the laws of association are to psychology. This is an operation which, when accomplished, puts an end to the empirical period, and enables the science to be conceived as a co-ordinated and coherent body of doctrine.[74]

The task of giving a final scientific constitution to the understanding

70. *Id.* at 265.
71. *Id.* at 266.
72. *Id.* at 292-94.
73. *Id.* at 281-90.
74. *Id.* at 290.

of human behavior is complicated by the historicity of human existence. The model of a deductive, mathematical science must be modified: one cannot "[construct] a positive Social Science . . . by deducing it from the general laws of human nature, using the facts of history merely for verification,"[75] because "as society proceeds in its development, its phaenomena are determined, more and more, not by the simple tendencies of universal human nature, but by the accumulated influence of past generations over the present."[76] Therefore, the positive social scientist must reverse the relationship between induction and deduction in the deductive physical sciences—"for while, in these [deductive physical sciences], specific experience commonly serves to verify laws arrived at by deduction, in sociology it is specific experience [i.e., history] which suggests the laws and deduction [from universal laws of human nature] which verifies them."[77] By sheer good fortune, the facts of history, empirically considered, do give rise to generalized laws of historical development that can be deductively verified from the universal laws of human nature.[78]

When considered against his background of positivism, Mill's reason for asking the "common ground" question in the 1863 essay becomes clear: Mill was attempting to transform ethics into a positive science by giving it its final scientific constitution—discovering the fundamental scientific truth underlying all moral obligation. Seen as an attempt to use Comte's theories to formulate a positive science of moral obligation, Mill's project faced some formidable problems. Ethics, as traditionally understood, constitutes a normative system comprised of interrelated normative principles, standards, and rules. Normative systems seem peculiarly resistant to positive scientific reconstitution, for three related reasons. First, a normative system already has a structure of derivative relationships: specific norms are derived from more general normative principles, which explain and justify the more specific norms. But the positive theorist cannot accept those explanations and that structure of derivation, for to do so would be to adopt the theological or metaphysical mode of thought that he seeks to supplant.[79] Sec-

75. *Id.* at 307.
76. *Id.*
77. *Id.*
78. *Id.*
79. This is the thrust of Holmes's attack on those "theories which consider the law only from its formal side, whether they attempt to deduce the *corpus* from *a priori* postulates, or fall into the humbler error of supposing the science of the law to reside in the *elegantia juris*, or logical cohe-

ond, the positive scientific method does not seem applicable to normative systems at all, for the positivist is limited to phenomena and their interrelationships. In positive social science, the only phenomena are human behavior:[80] normative systems are neither explanations of the phenomena nor part of the phenomena itself. A positive science of morals separate from a positive science of human behavior therefore seems impossible. The third problem can be seen by reformulating the first objection. Since any "common ground" of morals would have to be normative, it could not qualify as a scientific law or axiom underlying other scientific laws of phenomena. These problems with a positive science of ethics, of course, also seem to be problems for any science of law, another normative system.

Mill solved these threshold problems in an ingenious way. He said

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sion of part with part." THE COMMON LAW, *supra* note 1, at 32. For a more complete, and more clearly positivist attack on those who attempted to make the study of law scientific by refining the normative structure of the law, see Holmes's review of Dean Langdell's casebook on contracts, in which Holmes stated the following:

> It may be said without exaggeration that there cannot be found in the legal literature of this country, such a *tour de force* of patient and profound intellect working out original theory through a mass of detail, and evolving consistency out of what seemed a chaos of conflicting atoms. But in this word "consistency" we touch what some of us at least must deem the weak point in Mr. Langdell's habit of mind. Mr. Langdell's ideal in the law, the end of all his striving, is the *elegantia juris*, or *logical* integrity of the system as a system. He is, perhaps, the greatest living legal theologian. But as a theologian he is less concerned with his postulates than to show that the conclusions from them hang together. . . .
>
> If Mr. Langdell could be suspected of ever having troubled himself about Hegel, we might call him a Hegelian in disguise, so entirely is he interested in the formal connection of things, or logic, as distinguished from the feelings which make the content of logic, and which have actually shaped the substance of the law. The life of the law has not been logic: it has been experience. The seed of every new growth within its sphere has been a felt necessity. The form of continuity has been kept up by reasonings purporting to reduce every thing to a logical sequence; but that form is nothing but the evening dress which the new-comer puts on to make itself presentable according to conventional requirements.

Holmes, Book Review, 14 AM. L. REV. 233, 234 (1880) (emphasis in original).

80. Holmes also made this clear in his attack on Dean Langdell's preoccupation with the normative structure of the law:

> No one will ever have a truly philosophic mastery over the law who does not habitually consider the forces outside of it which have made it what it is. More than that, he must remember that as it embodies the story of a nation's development through many centuries, the law finds its philosophy not in self-consistency, which it must always fail in so long as it continues to grow, but in history and the nature of human needs. As a branch of anthropology, law is an object of science; the theory of legislation is a scientific study; but the effort to reduce the concrete details of an existing system to the merely logical consequence of simple postulates is always in danger of becoming unscientific, and of leading to a misapprehension of the nature of the problem and the data.

Id.

that the common ground of all moral obligation was the principle of utility. But he recognized that the principle of utility was in turn derived from the "theory of life . . . that pleasure, and freedom from pain, are the only things desirable as ends."[81] Mill then established the truth of this theory of life by the observation that men in fact only desire pleasure and freedom from pain.[82] Thus, the common ground of all moral obligation is a scientific law of human behavior, based solely on observation of the phenomena of human behavior.[83] Mill's explanation of the historical derivation of moral and legal rules also effects a similar reduction of normative directives to scientific laws of phenomena: under Mill's theory, moral rules are based on generalizations about the tendencies of certain acts to cause pleasure or pain, based on the common experience of men with such acts.[84] At bottom, then, particular moral rules can be reduced to generalized scientific laws derived inductively from men's observations of recurrent patterns of events. *Voilà*. There you have a positive science of morality. The positive scientist need pay no attention to the normative explanations and justifications given for apparently normative moral rules because the real basis for the "rule" is the scientific law it embodies. The positive scientist can accept the principle of utility as the common ground of moral obligation because, in reality, it is not a normative principle at all but rather a scientific, verifiable law of human behavior.

Mill's reduction of previously accepted moral rules to scientific laws of antecedence and consequence would appear to present a problem for his theory of historical progress: if moral rules previously explained in theological or metaphysical terms are really based on laws of causation discovered inductively through human experience, in what way does the achievement of a positivist understanding of these rules constitute moral progress? Mill's answer can be found in his essay on utilitarianism, although one has to look closely to find it, for the essay is primarily an essay in apologetics, showing that utilitarianism is not at all

81. *Utilitarianism, supra* note 21, at 210.

82. *Id.*

83. One problem with this, as pointed out by Germain Grisez, is that Mill's theory cannot explain moral wrong: If everyone always in fact chooses pleasure and avoidance of pain, we can have no basis in Mill's system to blame anyone for his choices. *See* Grisez, *Against Consequentialism*, 23 AM. J. JURIS. 23, 41-49 (1978).

84. *Utilitarianism, supra* note 21, at 224-25. For an earlier formulation of this argument, see J.S. MILL, *Sedgwick's Discourse*, in 10 COLLECTED WORKS OF JOHN STUART MILL 31, 58-59 (1969) (essay first published in 1835).

strange or radical or inimical to commonly held beliefs. His answer is clear, nevertheless—once we understand the true scientific basis of morality, progress in ethics will come more quickly because we can focus on the actual results of certain kinds of action, thereby correcting and purifying the often mistaken or incomplete rules previously derived from human experience without conscious attention to the underlying common ground. Thus, Mill states:

> [M]ankind must by this time have acquired positive beliefs as to the effects of some actions on their happiness; and the beliefs which have thus come down are the rules of morality for the multitudes, and for the philosopher until he has succeeded in finding better. That philosophers might easily do this, even now, on many subjects; that the received code of ethics is by no means of divine right; and that mankind have still much to learn as to the effects of actions on the general happiness, I admit, or rather, earnestly maintain. The corollaries from the principle of utility, like the precepts of every practical art, admit of indefinite improvement, and, in a progressive state of the human mind, their improvement is perpetually going on.[85]

Holmes parallels in certain particulars Mill's positivist methodology in *Utilitarianism*. Holmes asks the "common ground" question, in precisely the same words as Mill. Holmes's conclusion that judges in the past decided cases based on unexpressed legislative policy allows him to ignore the normative structure of derivations used by judges to explain and justify their decisions, just as Mill's assumption that men always desire only to obtain pleasure or to avoid pain allowed him to ignore traditional inconsistent explanations for rules of morality. And Holmes's theory concludes that most of the specific rules of tort liability are based on generalizations, drawn from the common experience of mankind, concerning the dangerousness of certain actions under certain circumstances. In this, Holmes seems to follow closely Mill's apparent reduction of normative rules of morality to scientific laws concerning succession of phenomena that provide a basis for "foreseeing" the consequences of certain acts.[86]

These parallels between Mill's and Holmes's work suggest that Holmes, too, was attempting to give a final scientific constitution to his field of study. At a key point, however, the similarity seems to break down. Mill's common ground of moral obligation (the principle of

85. *Utilitarianism, supra* note 21, at 224.

86. THE COMMON LAW, *supra* note 1, at 119-20.

utility) was reducible to a scientific law of psychology: men in fact desire nothing but pleasure or the avoidance of pain. The element in Holmes's theory comparable to Mill's scientific law of psychology is Holmes's theory of judicial development in Lecture I: regardless of what judges say, the secret root of the law's growth is "legislative policy." But "legislative policy" is not a single determinate thing like pleasure: legislative policies seem to be both irreducibly normative and multifarious. Holmes's theory therefore must be historical rather than scientific in the positivist sense.

This puzzling problem with Holmes's theory necessitates a closer look at Holmes's contentions that "[e]very important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy,"[87] and that these "considerations of what is expedient for the community concerned" are "the secret root from which the law draws all the juices of life."[88] The first question is what Holmes means by "public policy considerations." An examination of his discussion of things he labels "policy" considerations shows that in each case a policy consideration justifies or explains a legal rule in terms of its social effects—its consequences, results, or utility.[89] The "policy" label is reserved exclusively for such result-oriented explanations. Although Holmes discusses other justifications based on primitive animism ascribing personality to inanimate objects,[90] or the "metaphysical confusion" of ascribing personal moral blameworthiness to ships,[91] none of these other kinds of justification are dignified with the "policy" label. So it seems that public policy considerations, for Holmes, are considerations of the social consequences of the legal rule of judicial decision. That meaning is, of course, consistent with Holmes's reference to these as "considerations of what is expedient for the community concerned."[92]

This understanding of Holmes's use of the term "public policy" suggests that Holmes's theory of legal development is a simple application

87. *Id.* at 32.

88. *Id.*

89. *See, e.g., id.* at 16 ("true reason" for liability of shipowners and innkeepers); *id.* at 26-27 ("hidden ground of policy" for holding ship itself liable in maritime law); *id.* at 28 ("plausible explanation of policy" for treating freight as the "mother of seamen's wages"); *id.* at 115 (two policies underlying objective standard of tort liability).

90. *Id.* at 12.

91. *Id.* at 30.

92. *Id.* at 32.

to the law of the positivist theory of the three stages of human thought: the law has progressed from the primitive animism of the theological stage through the metaphysical confusion of the metaphysical stage to the policy-based, result-oriented clarity of the positivist stage. Under this interpretation, however, Holmes would have put forward a purely historical theory that is necessarily normative and that cannot claim to be scientific: if judges have based their decisions in the past on theological or metaphysical grounds, the principal question is normative—*should* judges decide on theological, metaphysical, or positivist grounds. Moreover, this interpretation seems inconsistent with passages in which Holmes states his "legislative policy" theory as an explanation of all judicial decisions,[93] regardless of the judge's consciousness, and not simply as an evolutionary theory explaining the latest and most enlightened judicial decisions. For Holmes as well as Mill, then, there is a conflict between his apparently normative theory of historical progress and his apparently scientific theory of judicial decision.

Holmes did not explicitly resolve this apparent contradiction, but a careful analysis of the structure of his theory shows that it is internally consistent once one accepts Holmes's positivist understanding of law, which he made clear in his lecture on criminal law: "All law is directed to things manifest to the senses. And whether it brings those conditions to pass immediately by the use of force . . . or whether it brings them about mediately through men's fears, its object is equally an external result."[94] This understanding of law necessarily follows from the positivist epistemology: if all that we can know are sense impressions of the physical world and scientific laws of antecedence and consequence, that is all that is real. The only possible basis for law is its external effects; all law *qua* law has to be based on legislative policy—any explanation in terms of theological or metaphysical entities must be disregarded, for those entities are unreal. Thus, we can say that even though the deciding judge consciously based his decision on the meta-

93. *Id.* at 56 ("the principle is believed to be similar to that on which all other lines are drawn by the law. Public policy, that is to say, legislative considerations are at the bottom of the matter."), 64 ("legislative principles upon which [judges'] decisions must always rest in the end"). See also the first statement of the theory, in language which can be interpreted as stating a theory of judicial decision as well as judicial change: "Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy . . . ." *Id.* at 32.

94. *Id.* at 42.

physical ascription of moral blameworthiness to an animal or a ship, the decision itself, as law, must be based on some legislative policy. This is so even in the most primitive period, in which the common ground of liability for harm caused by inanimate objects, animals, and the actions of slaves and children is revenge: Holmes in the criminal law lecture shows that judicial satisfaction of a primitive people's passion for revenge is necessary to promote the legislative policy of preserving the effectiveness of the law.[95] Thus, Holmes's theory of judicial decision, apparently supported only inductively by historical analysis, can also be supported deductively from Holmes's positivist understanding of the law.

Holmes's theory that all judicial decisions are necessarily policy-based provides the key to a positive legal science. This theory of judicial decision itself is a scientific law, supportable inductively from study of legal history and deductively from the positivist understanding of law. Further, this understanding of the policy basis of all judicial decision enables one to study law and legal history scientifically. In legal history, one may find the actual policy or policies underlying historical rules or judicial decisions by studying their consequences; the study of legislative policy itself may become scientific by focusing on the actual consequences of different laws.

Holmes's theory of judicial decision resolves the tension between Holmes's scientific explanation of *all* judicial decisions in terms of public policy and his belief in progress. The first conclusion Holmes draws from his theory of judicial decision is an optimistic, progressive one:

> [H]itherto this process [of fitting new, better suited policy justifications to older rules] has been largely unconscious. It is important, on that account, to bring to mind what the actual course of events has been. If it were only to insist on a more conscious recognition of the legislative function of the courts . . . it would be useful. . . .
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> The study upon which we have been engaged is necessary both for the knowledge and for the revision of the law. . . .
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> . . . When we find that in large and important branches of the law the various grounds of policy on which the various rules have been justified are later inventions to account for what are in fact survivals from more primitive times, we have a right to reconsider the popular reasons, and,

95. *Id.* at 35-36.

> taking a broader view of the field, to decide anew whether those reasons are satisfactory.[96]

In the context of the overall positivist structure of Holmes's theory, this optimistic conclusion is fully justified. Although law as law is necessarily based on legislative policy, not all legislative policies are equally beneficial. Recognition that all law is based on some policy will allow judges and legal scholars to focus exclusively on policies, free from theological and metaphysical obfuscation. Careful study of the actual social consequences of particular decisions may then lead to the adoption of more effective and more socially beneficial rules.[97] Holmes's analysis of the legislative policies in fact currently underlying the different areas of the common law is therefore a necessary precursor to the scientific revision of the common law.

Just as Mill found the principle of utility underlying most of common morality, so Holmes found a purely utilitarian, positive set of legislative policies underlying most of current tort law: maximum deterrence of dangerous conduct consistent with maximum freedom of action. Tort law implements these policies by prohibiting acts posing foreseeable danger to others. The process of specification of this general foreseeability standard into particular rules is based on the common human experience with the danger of certain acts under certain circumstances. Holmes found that all the "morally freighted" concepts in the law of torts, such as malice, intent, and negligence, could be reduced to a common scientific description of certain human behavior: an act (a voluntary muscular contraction and nothing more) done with knowledge of certain surrounding circumstances that provides a basis for predicting certain harmful consequences, in light of past human experience with such actions in such circumstances.

Holmes's view of the evolution of liability standards in tort and criminal law is decidedly positivist. Holmes's thesis was that tort and criminal law have progressed from standards of personal moral blameworthiness to an external standard of what would be blameworthy in the ordinary reasonable man, and that tort and criminal law con-

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96. *Id.* at 32-33.

97. Holmes called for such a science of policy in his review of Langdell's casebook, *see supra* notes 79-80, and in Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 470-71 (1897). *See also* Holmes, *Codes, and the Arrangement of the Law,* 5 AM. L. REV. 1 (1870); *cf.* C.M. COOK, THE AMERICAN CODIFICATION MOVEMENT 201-10 (1981) (contrast Holmes's role at tail end of utilitarian codification movement).

tinue to progress from that generalized external standard to more specific rules based on human experience with the danger of certain acts under particular conditions. The key to understanding Holmes's theory on this point is his view of personal moral blameworthiness: although he never says so explicitly in *The Common Law*, Holmes assumed throughout the first four lectures that personal moral blameworthiness was an unreal metaphysical entity. That assumption is certainly a straightforward conclusion from the classic positivist theories of Mill and Comte: personal moral blameworthiness is not evident to the senses; it is not a law of antecedence or consequence; it does not help us foreknow or control the future—it is, therefore, a metaphysical fancy. This radical conclusion might well have shocked Holmes's audience, so it is not surprising that he omitted such a bald statement of the premise. But he obliquely acknowledges the premise nonetheless, in his argument against the retribution theory of criminal punishment. Personal moral blameworthiness is a primary concern of those favoring retribution as a significant reason for criminal punishment. In his discussion of the retributionist position, Holmes never specifically mentions personal moral blameworthiness, but he does ridicule the retributionists in terms a positivist would use to describe a metaphysical mode of thought:

> [T]he [retributionist] notion [is] that there is a *mystic bond* between wrong and punishment . . . . Hegel, one of the great expounders of the [retributionist] view, puts it, in his *quasi mathematical* form, that, wrong being the negation of right, punishment is the negation of that negation, or retribution. Thus, the punishment must be equal, in the sense of proportionate to the crime, because its only function is to destroy it. Others, without this *logical apparatus*, are content to rely upon a felt necessity that suffering should follow wrongdoing.[98]

If personal moral blameworthiness is an empty metaphysical notion, it should be possible to reduce it to something real whenever it is purportedly the basis for any practical decision. Holmes, in his discussion of retribution, supplies that reduction, again without explicitly mentioning personal moral blameworthiness, when he argues that the alleged instinctive feeling of the fitness of punishment for wrongdoing is simply the passion for vengeance in disguise.[99] This, of course, is con-

98. THE COMMON LAW, *supra* note 1, at 37 (emphasis added).

99. This is an argument from introspection into a conscience from which the metaphysical notion of personal moral blameworthiness seems to have been banished:

sistent with Holmes's initial contention in Lecture I that primitive liability standards of personal moral blameworthiness are all based on the common ground of revenge.[100] But since the only legislative policy served by satisfying the passion for revenge is the limited one of preserving the effectiveness of the law, real progress in the law will come only when it moves beyond liability standards based on the empty metaphysical concept of personal moral blameworthiness.

Holmes found that that first step forward had been taken by the adoption of a general liability standard of what would be blameworthy in the average man, the man of ordinary intelligence and prudence. This intermediate step is a "survivor of true moral standards,"[101] and the continued reference to some sort of moral blameworthiness is necessary for continued public acceptance of the law, since "a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear."[102]

After his analysis of inevitable accident and the negligence standard in tort law, Holmes equated the objective standard of blameworthiness in the average member of the community with the utilitarian foreseeable danger standard: "[The law] does not in general hold [a man] liable for unintentional injury, unless, possessing such [ordinary] capacity [to avoid harming his neighbors], he might and ought to have foreseen the danger, or, in other words, unless a man of ordinary intelligence and forethought would be to blame for acting as he did."[103] This equation of the objective blameworthiness standard with the utilitarian foreseeable danger standard allows Holmes to use the phrase

> I think that it will be seen, on self-inspection, that this feeling of fitness [of punishment following wrong-doing] is absolute and unconditional only in the case of our neighbors. It does not seem to me that any one who has satisfied himself that an act of his was wrong, and that he will never do it again, would feel the least need or propriety, as between himself and any earthly punishing power alone, of his being made to suffer for what he had done, although, when third persons were introduced, he might, as a philosopher, admit the necessity of hurting him to frighten others. But when our neighbors do wrong, we sometimes feel the fitness of making them smart for it, whether they have repented or not. The feeling of fitness seems to me to be only vengeance in disguise . . . .

Id. at 39. If Holmes had read Dostoevski's *Crime and Punishment*, he would have thought it nonsense.

100. THE COMMON LAW, *supra* note 1, at 8-9.

101. *Id.* at 62.

102. *Id.* at 42.

103. *Id.* at 88.

"moral basis of tort liability" to refer to purely positivist, utilitarian policy bases for the law. Thus, for example, the exemption of the obviously insane, infants, and the physically incapable from tort liability illustrates the "moral basis of liability in general." That basis is to deter harmful acts. If the defendant was manifestly incapable of being deterred by the threat of liability, there is no reason for holding him liable.[104] Holmes emphasizes the importance of this equation of the moral basis of tort liability with utilitarian policies in his final authoritative summation: "The true explanation of the reference of liability to a moral standard, in the sense which has been explained, is not that it is for the purpose of improving men's hearts, but that it is to give a man a fair chance to avoid doing the harm before he is held responsible for it."[105] The reason for this reference to a moral standard lies in legislative policy, not in common morality: "It is intended to reconcile the policy of letting accidents lie where they fall, and the reasonable freedom of others with the protection of the individual from injury."[106] The morality underlying tort liability is not the totality of common morality, then, but that part of it which embodies the basic teaching of utilitarian ethics—avoid acts that may harm others. In tort law, just as in criminal law, common morality inconsistent with utilitarian ethics has no necessary relationship to liability, but is only a check on the implementation of other legislative policies, a check imposed by the legislative policy of preserving the effectiveness of the law. Thus, Holmes himself carefully qualified his equation of the average blameworthiness standard with the utilitarian foreseeable danger standard, suggesting that, although the two were congruent over almost all cases, if the two ever diverged the average blameworthiness standard arguably might control.[107] And, of course, as the law progressively adopts

104. *Id.* at 87-88. Holmes says that these exceptions confirm the rule (external standard of moral blameworthiness in the average man) and show its moral basis. Since he has in the preceding paragraphs rejected the evidentiary explanation of the external standard in favor of the deterrence explanation, however, he cannot be saying that the moral basis that these exceptions confirm is a judgment of personal moral blameworthiness presumed generally because of problems with proving personal blame. What Holmes must mean is that when it is clear that the defendant for one reason or another could not conform his conduct to the objective standard, the moral basis for the standard (maximum deterrence) is not applicable. Thus, Holmes would not hold an insane person liable for a tort only "if insanity of a pronounced type exists, manifestly incapacitating the sufferer from complying with the rule which he has broken." *Id.*

105. *Id.* at 115.

106. *Id.*

107. *Id.* at 42-43, 62, 117-19, 128-29.

the more effective specific rules of behavior, based on experience with the danger of certain acts under particular circumstances, this intermediate objective standard of blameworthiness will be almost completely left behind.[108] The historical movement of the law from liability standards of personal moral blameworthiness to external standards of moral blameworthiness in the ordinary man and then to purely objective standards without any reference to moral blameworthiness is, then, truly progress, for it shows a progressive weakening of the influence of empty metaphysical notions on the formulation of liability standards. Since law is directed at bringing about certain consequences, the law as law improves as well in this movement, for external standards can more effectively deter undesirable conduct than standards of personal moral blameworthiness, and specific rules of behavior, more fixed, knowable, and certain, can more effectively deter undesirable conduct than the general external standards of the ordinary reasonable man. Thus did Holmes establish in his lectures on tort and criminal law what he said remained to be proved at the close of his first lecture:

> [T]hat, while the terminology of morals is still retained, and while the law does still and always, in a certain sense,[109] measure legal liability by moral standards, it nevertheless, by the very necessity of its nature, is continually transmuting these moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated.[110]

Read against the background of Mill's positivist utilitarianism, then, Holmes's theory can be seen as thoroughly positivist in methodology and result. This wholehearted positivism would also explain Holmes's peculiar reticence about his philosophical allegiances and the underlying aims of his theory. Mill's blend of Comte's law of the three stages of human thought with utilitarian ethics made a heady brew: those drinking deeply knew "scientifically" the direction of history and its final end state in a positivist society, where law and morals would be purely scientific and hence purely utilitarian. Given this scientific

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108. *See id.* at 88-103. See also Holmes's personal annotation:

> I shall try to show that the [purpose] [of criminal punishment] is [prevention] & that in acc. with this standard are general—starting with ethical notions & working to [objective] standards—viz. in 1st stage what is wrong in [average] man—2nd definition of this by experience [determining] degree of danger.

Id. at 36 n.a.

109. I.e., as Holmes has redefined it in utilitarian terms.

110. THE COMMON LAW, *supra* note 1, at 33.

knowledge of historical development, the most significant tasks were political and educational: how can one best hasten the inevitable positivist age? One can sense in the writings of Mill and Holmes a certain tactical discretion at the expense of theoretical clarity. The positivist theorist speaking to those still lost in the metaphysical darkness may well not blind them with ideas too harsh for them to bear, but gently and gradually lead them from darkness to light without telling them where the journey will end. Thus, Holmes presents only the inductive historical evidence suggesting his theory of judicial decision, leaving out the positivist deductive confirmation; Holmes never explicitly labels "legislative policies" as utilitarian policies; Holmes never clearly labels personal moral blameworthiness a metaphysical notion; Holmes continually qualifies his equation of the external standard of moral blameworthiness with the foreseeable danger test. But the underlying structure of his theory is undeniably the positivist utilitarianism of John Stuart Mill.

IV. A Critique of Holmes's Scientific Methodology

Before one can search "scientifically" for the principles in fact underlying a particular area of the law, one must first define the area of the law singled out for analysis. This choice cannot be "scientifically" based on objective analysis of factual data, since the choice itself defines the field of facts to be analyzed scientifically. How then did Holmes justify his choice of the field of torts as the relevant area for analysis, and how persuasive is that justification?

Holmes first excluded civil liability for breach of contract from the relevant field by pointing out that liability for breach of contract depends on the prior consent of the breaching party to pay the damages caused by his breach, whereas there is no such prior consent to tort liability. This attempted distinction is unpersuasive. Without a liquidated damages clause, a contract contains no express consent to pay damages for breach of the promised performance. In most cases, then, the prior consent to which Holmes refers must be inferred from two facts: (1) the defendant promised certain performance under circumstances sufficient to make a binding legal contract, and (2) courts order parties who breach binding contractual promises to pay for the damages caused by the breach. If this is the basis for inferring prior consent to pay damages for the breach, however, the same kind of prior consent can be inferred in all tort cases. For example, we could say that one

who keeps a wild animal impliedly consents to pay for all damages caused by the creature because: (1) he kept a wild animal, and (2) courts order keepers of wild animals to pay for any damages caused by those animals.

Additionally, Holmes gave no initial justification for choosing all of tort liability as the area for analysis rather than any particular subsection of tort liability. In stating his basic question ("*whether* there is any common ground underlying tort liability, and, if so, what it is"[111]), however, Holmes implied that this choice would be justified during the course of the subsequent analysis. But examination of Holmes's subsequent analysis shows that at certain key points he either argued that there can be or simply assumed that there is a unifying common ground underlying all tort liability: he never argued that there was such a common ground. Holmes recognized that the search for a general legislative principle underlying all tort law is made difficult by the fact that past thought and theorizing had been limited to specific individual tort forms of action. Holmes argued that this difficulty is not insurmountable, since the "ancient forms of action have disappeared," and "the philosophical habit of the day, the frequency of legislation, and the ease with which the law may be changed to meet the opinions and wishes of the public, all make it natural and unavoidable that judges as well as others should openly discuss the legislative principles on which their decisions must always rest in the end . . . ."[112] This argument, at most, supports the conclusion that it should now be possible for all tort liability; it does not even suggest that there is now or has been such a common ground. Later, in his argument for focusing on the common law of trespass as a vehicle for analyzing both the tort law concerning unintended harms and the legal concept of negligence, Holmes simply assumed that there is a single principle underlying liability both in trespass and in case.[113] This assumption played an important part in Holmes's rejection of the theory that liability in trespass embodies the principle that a man always acts at his peril. Holmes based his assumption of the existence of a single, unified principle on the argument that it would be unreasonable, in the application of the "man acts at his peril" principle, to distinguish between direct and indirect consequences of one's acts. This argument seems unpersuasive. It

111. *Id.* at 63 (emphasis added).
112. *Id.* at 64.
113. *Id.* at 65-66.

first assumes rational consistency in the application of a principle across two forms of action and then concludes that it cannot be the principle underlying the one (trespass), because it clearly cannot be the principle underlying the other (case).

Of course, one could say that the capacity of Holmes's ultimate theory to explain all of tort liability is his ultimate argument that there is a common ground underlying all of tort liability. That argument is untenable for two reasons. First, since the argument for his theory required him to assume at a critical point that there is a common ground underlying all tort liability, it is circular to use the result of that argument to support the conclusion that there is in fact a common ground underlying all liability in tort. One could respond that it is not circular because it is only the explanatory capacity of Holmes's theory, not the argument showing its superiority over other theories, that is important. But this response does not protect against a related and more fundamental problem with the argument: one cannot, by showing that it is possible to formulate a principle that seems to explain adequately all of a defined set of normative rules, thereby demonstrate that the set is in fact based on that principle, instead of a different principle underlying a broader set (e.g., all civil liability for damages), or a set of different principles underlying smaller included sets of normative rules (e.g., different basic principles underlying trespass, case, deceit, etc.). To do that "scientifically," Holmes would have to show more than what he has claimed to show—that his proposed principle better explains the chosen set of normative rules than the two competing explanatory principles. He would also have to show that his explanatory principle is better than all broader principles explaining broader sets of normative rules and better than all sets of narrower principles explaining narrower subsets of his chosen set of normative rules. This Holmes did not do.

The second problem facing the scientific legal theorist is compiling an exhaustive list of principles that might explain the chosen area of the law. For the area of torts, Holmes's list was comprised of just three candidates: the principle of strict liability for all harm caused by one's voluntary acts; the principle of liability only for harm caused by voluntary acts for which the defendant is personally morally blameworthy; and the principle of liability for harm caused by a voluntary act that a man of average intelligence and prudence would foresee to be dangerous. As the persuasive force of Holmes's scientific method is derived

from eliminating all but one competing explanatory principle from the set, it is important to examine carefully how Holmes compiled his list of potential explanatory principles.

One way Holmes limited the number of potential answers to the "common ground" question was to redefine the question in a way that ruled out *ab initio* certain kinds of answers. We must therefore examine the steps by which Holmes reduced the question of the common ground of all tort liability to the question of the principle on which the peril of one's conduct is thrown on the actor. One might argue that this redefinition of the question is insignificant, since all Holmes is really saying is that since harm alone cannot explain tort liabilty, one must look in addition to the nature of the conduct causing harm. But this interpretation is not acceptable, for the argument as reinterpreted would not support Holmes's conclusion that one should rule out the resulting harm entirely when searching for the general principle of all tort liability. That conclusion is what makes Holmes's redefinition significant: in his redefining argument, Holmes starts by recognizing compensation for harm done as the central distinguishing feature of tort liability and ends by concluding that we should ignore this central feature in searching for the general principle of tort liability. This paradoxical conclusion leads one to suspect some sleight of hand here, and the hidden ball is not hard to find. Holmes's argument is persuasive only if one assumes that the primary function of law is to guide and control human behavior. This assumption flows directly from the basic positivist assumption that the only knowledge men want or need (or can obtain) is foreknowledge. For knowledge of "the law" to be useful at all to men—i.e., to be scientific—it must be knowledge of consequences or possible consequences of actions that men can use to guide their conduct.[114] In fact, "the law" itself is probably in positivist theory a metaphysical term, which Holmes took great pains both before[115] and after[116] 1881 to reduce to an acceptable positivist understanding—the

114. *See* J.S. MILL, *supra* note 69, at 266.

115. See Holmes's critique of Austin's theory of law in the summary of Austin's early jurisprudence lectures at Harvard Law School.

> It must be remembered . . . that in a civilized state it is not the will of the sovereign that makes lawyers' law, even when that is its source, but what a body of subjects, namely, the judges, by whom it is enforced, *say* is his will . . . . The only question for the lawyer is, how will the judges act.

6 AM. L. REV. 723, 724 (1872) (emphasis in original).

116. *See* Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 460-61 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

prediction of what courts will do. The common ground of tort liability must therefore be consistent with this primary purpose; it must be a principle that can guide and control human behavior. The argument then works like this. The primary function for courts in tort cases is to determine when to throw the peril of an actor's conduct on the actor. Since actual harm has been factored out of the question, and "peril" is the risk of liability in the future should harm result from the actor's conduct, the judicial function is a forward-looking, essentially legislative one: to determine how people ought to act in the future. This makes the decision of any particular case primarily important as an occasion for exercising a legislative policy judgment. The redefinition therefore brought the analysis of the basic principles of tort liability within Holmes's theory of common law development: "In substance the growth of the law is legislative . . . . Every important principle which is developed by litigation is . . . the result of more or less definitely understood views of public policy."[117]

By redefining the "common ground" question to incorporate his theory of the judicial function, Holmes ruled out any answer to that question which would entail a different theory of the judicial function. One such alternative answer would focus on the central distinguishing feature of tort law: plaintiff's claim that defendant caused him harm. Under this view, courts in deciding tort cases resolve competing claims. Plaintiff claims defendant wronged him and ought to pay for the harm he caused; defendant claims that he did not wrong plaintiff or that there are other good reasons why he should not pay for the harm. The parties to the lawsuit do not ask the court its opinion on what they and others should do in the future. Primarily they ask whether, under the prevailing, accepted, expected standards of conduct at the time of the harm, the defendant wronged the plaintiff. The parties therefore refer to prevailing community expectations about conduct, expectations that may be influenced to one degree or another by prior judicial decisions of similar claims, but which are not primarily or exclusively judicial in origin. This theory, one might argue, is a more accurate reflection of what courts do in deciding tort cases than Holmes's theory. For Holmes, by factoring out the harm and the claim for redress, has invented a purely imaginary role for the courts—deciding when to throw on the actor the peril of his conduct. By putting hypothetical courts

117 THE COMMON LAW, *supra* note 1, at 31-32.

into a hypothetical pre-injury time, Holmes forces his hypothetical judges to make legislative policy decisions about how people ought to act in the future, since they are given nothing else to do. But if courts actually become involved only after harm has been done and a plaintiff sues a defendant for redress of a claimed wrong, courts in tort cases are not acting primarily in a regulatory role, and the decision of any particular case is only incidentally, if at all, guidance for the future conduct of others.

Besides ruling out certain answers *ab initio*, Holmes's redefinition made plausible his limiting to three the potential answers to his question. By incorporating into the question his theory that the law's function is to guide and control human conduct, Holmes naturally focused attention on the relationship between the defendant's conduct and the tort law. The three potential answers Holmes considered seem to exhaust the potential relationships between defendant's conduct and the law of torts viewed as a guide to human conduct. The "criminalist" theory of Austin requires that the defendants have known the law and deliberately refused to follow it—it limits the effectiveness of law as a deterrent while maximizing individual freedom of action; the strict liability theory seems to aim at maximum deterrence at the expense of legitimate concerns for freedom of action; Holmes's theory, emphasizing the external standard of maximum deterrence of dangerous conduct consistent with the policy of freedom of individual action not posing risk of harm to others, stands midway between the other two. The three theories therefore seem to make up a continuous and exhaustive series.[118]

This apparently exhaustive set of policy positions is only exhaustive if one accepts Holmes's basic assumption that the function of judicial decision is to guide and control human conduct. If there may be other functions, such as redressing wrongs, this list is not exhaustive. The critical question then is whether one accepts this limitation on the function of judicial decision. That depends, of course, on whether one accepts the positivist view of the limitations on human knowledge underlying Holmes's basic assumption. The rigidly positivist epistemology underlying Holmes's restrictive view of the function of judicial decision is that of Mill and Comte: the only thing we can know are

118. Holmes was particularly fond of putting things into "philosophically continuous" sequences. *See id.* at 104; *see also id.* at 101; Holmes, *The Theory of Torts,* 7 AM. L. REV. 652, 654 (1873).

observations of phenomena and their recurrent patterns of succession, which we can formulate in scientific laws of antecedence and consequence.

This extreme reduction of the scope of human knowledge to scientific laws of consequence derived from inductive observations simply leaves out too much of the reality that we know. This problem can be seen by looking at Holmes's positivist reductions. When someone says that the complex set of institutions, rules, principles, procedures, and judicial decisions that we call law is nothing but the predictions of what judges will do in fact, or that legal malice is nothing but a voluntary muscular contraction done with knowledge of certain circumstances, we know that he has not clarified or deepened our pretheoretical understanding of these things, but simply lost it. By making inductive methodology the criterion of what counts as knowledge and of what is theoretically relevant, the positivist puts the cart before the horse: theory is supposed to clarify and deepen our pretheoretical grasp of reality—anything is relevant that accomplishes that aim.[119] The positivists' methodology is fundamentally defective as applied to human actions, institutions, and arrangements because it assumes that the "scientist" can simply observe these things, as if he had no inside knowledge. But this observer does have inside knowledge: as a human being he is a participant or vicarious participant in the human drama.[120] Any theory that ignores, on methodological grounds, this vast storehouse of pretheoretical knowledge is bound to be defective. A prime example of this is Holmes's refusal to pay any attention to the reasoning and explanations by judges of their decisions. In both his criminal law lectures and his tort lectures, Holmes searched for the legislative policies underlying judicial decision without consulting the reasons given by the judges who made those decisions. Any theory that takes seriously the inside knowledge of those acting within the human institution under study would have to take those judicial explanations very seriously, at least as a starting point for ultimate critical clarification.

But does Holmes ignore the actual reasoning of judges in his torts lectures? One could argue that it is unfair to equate Holmes's methodology in his analysis of tort theory with the "scientific" methodology in his analysis of criminal law, where he proposed three alternative poten-

119. *See* E. VOEGELIN, THE NEW SCIENCE OF POLITICS 1-26 (1952).

120 For critiques of positivist social science methodology based on the importance of this inside information, see J. FINNIS, *supra* note 6, at 1-19; E. VOEGELIN, *supra* note 119, at 1-26.

tial explanatory principles for criminal punishment, eliminated two as inconsistent with the facts of criminal punishment, and thus "scientifically" established the third. In his tort law analysis, Holmes began as he did in the criminal analysis, but with only two potential explanatory principles drawn from prior attempts of others to explain the basis of tort liability. He proceeded, as in the criminal law analysis, to test these explanatory principles by analyzing their consistency with the facts of existing common law rules, but he seemed to develop his third alternative explanatory principle during the course of his analysis, by a process resembling that of critical clarification of the meaning of the general rule that there is no tort liability for accident even though harm was caused directly by defendant's voluntary act. Closer analysis of this argument, however, suggests that Holmes was just making an argument of "scientific" congruence starting from the other end; that is, Holmes started with the legal rules and posited a consistent principle to explain them rather than starting with the principle and then testing to see whether it is congruent with the legal rules. The two techniques are methodologically identical, however, and the only difference between the processes is the rhetorical advantage Holmes gained from a method of exposition which suggested that he derived his explanatory hypothesis by critical clarification of the meaning of legal terms. But a careful analysis of each part of Holmes's analysis that seems to be critical clarification reveals that each argument is at bottom simply an argument from consistency or congruence. Each time that Holmes introduced his external standard of liability for causing reasonably foreseeable harm—in explaining the rule that one is not liable for harm caused jointly by one's action and an extraordinary intervening cause;[121] in explaining the principle that loss from accident must fall where it lays;[122] and in explaining the general negligence standard[123]—it is, with one possible exception discussed below,[124] simply posited as a consistent explanation of the rule as generally stated, without analysis of the range of application of the rules or the reasoning of the courts in applying the rules. Holmes did not even attempt to show that his explana-

121. THE COMMON LAW, *supra* note 1, at 85.

122. *Id.* at 76.

123. *Id.* at 86-87.

124. The possible exception is Holmes's citation of Judge Nelson's language in Harvey v. Dunlop, Hill & Den. 193 (N.Y. Sup. Ct. 1843), during his discussion of the inevitable accident defense. THE COMMON LAW, *supra* note 1, at 76. *See infra* notes 133-46 and accompanying text.

tion was in fact the meaning or rationale for the rules as understood by those charged with applying and elaborating the rules.

The remarkable originality of Holmes's theory of torts is due in large part to the freedom bestowed on him by the scientific method. The assumption that courts have not articulated the real legislative policies underlying their decisions allowed Holmes to explore the question of the common ground of tort liability free from the bother of analyzing the reasoning of judges. Holmes's theory was constrained only by the facts of common law precedent and rules; it was not limited by the reasoning in judges' opinions. Holmes's freedom in developing his torts theory can be demonstrated by comparing his treatment of inevitable accident as a defense in trespass cases.[125]

125. Compare Frederick Pollock's more constricted treatment of the same question in F. POLLOCK, THE LAW OF TORTS: A TREATISE ON THE PRINCIPLES OF OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW (1887). Pollock's treatment of inevitable accident differed from that of Holmes, for although Pollock was strongly influenced by Holmes's theory, he never adopted Holmes's "scientific" method. Pollock therefore paid attention to the actual reasoning of courts; unlike Holmes, he was deeply concerned with what courts said to justify and explain their decisions. In discussing the inevitable accident defense, Pollock was careful to give the term the meaning commonly ascribed to it by the courts:

> Inevitable accident is not a verbally accurate term but can hardly mislead; it does not mean absolutely inevitable (for, by the supposition, I was not bound to act at all), but it means not avoidable by any such precaution as a reasonable man, doing such an act then and there, could be expected to take. In the words of Chief Justice Shaw of Massachusetts, it is an accident such as the defendant could not have avoided by use of the kind and degree of care necessary to the exigency, and in the circumstances, in which he was placed.

Id. at 116. Since the courts do not explain inevitable accident in terms of foreseeability, Pollock did not either. He showed, by careful analysis of the cases, that as so defined inevitable accident has been accepted as a complete defense to tort liability in the United States. *Id.* at 119-23. Then, relying heavily on Holmes's treatment of the older British precedents, he demonstrated that, except for Rylands v. Fletcher, 143 Rev. Rep. 629 (H.L. 1868), they were at least consistent with the defense. He then suggested, following Holmes again, that Gibbons v. Pepper, 91 Eng. Rep. 922 (1695), and similar cases seem to embody the inevitable accident rule. Pollock concluded his discussion by focusing on Holmes v. Mather, 10 L.R.-Ex. 261 (1875), a case with facts and holding strikingly similar to *Gibbons v. Pepper*. Pollock pointed out that the result in *Holmes v. Mather* is consistent with the inevitable accident defense, but he was troubled by the court's reasoning in that case:

> The Court refused to take this view, but said nothing about inevitable accident in general. "For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid." Thus it seems to be made a question not only of the defendant being free from blame, but of the accident being such as is incident to the ordinary use of public roads. The same idea is expressed in the judgment of the Exchequer Chamber in Rylands *v.* Fletcher, where it is even said that all the cases in which inevitable accident has been held an excuse can be explained on the principle "that the circumstances were such as to show that the plaintiff had taken that risk upon himself."
>
> Still Holmes *v.* Mather carries us a long way towards the position of the Nitro-glycer-

Holmes discussed inevitable accident in the middle of his discussion of the common-law theory that a man always acts at his peril. Holmes pointed out that that theory was inconsistent with the rule in the 1695 case of *Gibbons v. Pepper*.[126] He explained that *Gibbons v. Pepper* "decided that there was no battery when a man's horse was frightened by accident or a third person and ran away with him and ran over the plaintiff."[127] He further explained that *Gibbons* "takes the distinction that, if the rider by spurring is the cause of the accident, then he is guilty."[128] Holmes then gave the following reason for the *Gibbons* rule: "The reason is, that, if the intervening events are of such a kind that no foresight could have been expected to look out for them, the defendant is not to blame for having failed to do so."[129] This rationale applies equally well, according to Holmes, to cases in which the defendant acts dangerously under the existing circumstances, but could not possibly have known the circumstances that made his act dangerous,[130] alluding to the facts in *Brown v. Kendall*[131] but not mentioning the case by name.[132] Both rules, according to Holmes, are an application of a general principle:

The general principle of our law is that loss from accident must lie where

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ine Case and Brown *v.* Kendall [American precedents Pollock previously showed to be based on the inevitable accident rule]. And, that position being in itself, as is submitted, the reasonable one, and nothing really authoritative standing against it, we seem justified in saying on the whole that these decisions—entitled as they are to our best consideration and respect, though not binding on English courts—do correctly express the common law . . . .

F. POLLOCK, *supra*, at 128.

Pollock therefore considered seriously an alternative judicial statement of the doctrine in terms both of plaintiff's expectations and the assumption of risk doctrine. Pollock's desire to follow Holmes's lead, however, led him to dismiss the *Holmes v. Mather* interpretation and so to reject—after duly recognizing it—the suggestion in *Rylands v. Fletcher* that the inevitable accident defense was based on the expectations of the plaintiff, not on the lack of defendant's "fault." Holmes avoided this kind of messy assertion that judges were wrong in their understanding of the rationale behind their doctrines by simply ignoring the language in judicial opinions that did not support his theory in action: Holmes cited *Holmes v. Mather* as consistent with his theory of inevitable accident, THE COMMON LAW, *supra* note 1, at 85 n.47; Holmes cited *Rylands v. Fletcher* as an example of the external standard of liability reduced to a specific liability rule by the process of specification. *Id.* at 124-25.

126. 91 Eng. Rep. 922 (1695).

127. THE COMMON LAW, *supra* note 1, at 74.

128. *Id.*

129. *Id.* at 75.

130. *Id.*

131. 60 Mass. (6 Cush.) 292 (1850).

132. THE COMMON LAW, *supra* note 1, at 76.

it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune. But relatively to a given human being anything is accident which he could not fairly have been expected to contemplate as possible, and therefore to avoid. In the language of the late Chief Justice Nelson of New York: *"No case or principle can be found, or if found can be maintained, subjecting an individual to liability for an act done without fault on his part. . . . All the cases concede that an injury arising from inevitable accident, or from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility."* If this were not so, any act would be sufficient, however remote, which set in motion or opened the door for a series of physical sequences ending in damage; such as riding the horse, in the case of the runaway, or even coming to a place where one is seized with a fit and strikes the plaintiff in an unconscious spasm. Nay, why need the defendant have acted at all, and why is it not enough that his existence has been at the expense of the plaintiff? The requirement of an act is the requirement that the defendant should have made a choice. But the only possible purpose of introducing this moral element is to make the power of avoiding the evil complained of a condition of liability. There is no such power where the evil cannot be foreseen.[133]

In his entire discussion of inevitable accident as a defense in Trespass, the above italicized quotation from *Harvey v. Dunlop*[134] is the only time that Holmes referred to any judicial reasoning, as opposed to judicial decisions. But the quotation, which seems to support Holmes's interpretation of inevitable accident in terms of unforseeability of harm, is lifted out of context and on its face is ambiguous, as "foresight" can mean either pre-vision or prudence.[135] Holmes used the

133. *Id.* at 76-77 (quoting Harvey v. Dunlop, Hill & Den. 193, 194 (N.Y. Sup. Ct. 1843)) (emphasis added) (footnote omitted).

134. Hill & Den. 193 (N.Y. Sup. Ct. 1843).

135. In the context of the facts of the case and the entire opinion, the latter meaning seems more likely in *Harvey*. In that case, the defendant was a six-year-old boy at the time of the injury. While playing with a five-year-old friend, he threw a stone which put out her eye. The father of the five-year-old brought an action in trespass against the boy, who pleaded the general issue of special matter. There evidently was no direct evidence of how the injury occurred, as the injured child was not sworn as a witness and the plaintiff evidently relied solely on the defendant's extrajudicial admissions that he had thrown the stone that put out his friend's eye. It was shown, however, that the plaintiff (the injured child's father) had repeatedly admitted that the defendant was not to blame. The trial judge instructed the jury that if they found from the evidence that the injury complained of was the result of inevitable accident, one which ordinary care and foresight could not have prevented, then their verdict should be for the defendant. He further instructed the jury that they should find for the plaintiff if they found that the defendant had wrongfully thrown the stone, either willfully or carelessly. On appeal, the court held that the trial judge had

quotation without attempting to clarify the ambiguity, without showing that his interpretation captured the court's intended meaning, and without showing that this interpretation of the inevitable accident defense is consistent with the understanding of other courts applying the doctrine. Under these circumstances, Holmes's use of the quotation was purely rhetorical; it cannot be considered as a serious attempt at clarifying the meaning of the inevitable accident rule as understood and explained by the courts. The most that Holmes proved was that his theory was consistent with the inevitable accident rule, not that his theory was in fact the rationale for the rule given and understood by courts applying that rule.

Curiously enough, Holmes's "scientific" methodology excluded from consideration three significant elements in the reality of the system of tort liability: the damage remedy and associated rules designed to achieve redress for particular injury, the reasons judges have given for imposing liability and adopting certain rules, and the normative content of the law. That these bedrock realities of the system of tort liability were excluded on methodological grounds suggests that Holmes's methodology is seriously defective.

V. HOLMES'S SUBSTANTIVE THEORY

As background for a critique of Holmes's substantive theory of torts, it will be useful to recapitulate the essential elements of his theory.

> (1) The basic test of liability in tort is threefold: (a) defendant acted voluntarily, (b) that act caused harm to plaintiff, and (c) at the time defendant acted, a man of ordinary intelligence and prudence in defendant's position would have foreseen danger to others from the action.
>
> (2) The basic test of tort liability is related to moral blameworthiness in the following ways. In most cases, such conduct would be morally blameworthy in the man of ordinary intelligence and prudence because the community ordinarily judges it to be morally wrong to act knowing one's

not erred in these instructions to the jury, and that there was sufficient evidence for the jury to find that the presumption of wrongfulness, raised by the defendant's admission that he had caused the injury, had been overcome. *Id.* at 195.

It is in the context of the facts of this case, then, that we must understand the court's restatement of the inevitable accident defense as applicable to "an injury . . . from an act that ordinary human care and foresight are unable to guard against." *Id.* at 194. In that context, "ordinary care and foresight" simply refers to the question of whether the child-defendant was careful or careless, and "foresight" seems to mean, both in the jury instruction on inevitable accident and in the appellate court's opinion, not pre-vision but prudence.

action endangers others. A defendant may properly be held liable under the threefold test, however, even though he was not personally blameworthy, as liability is imposed when the defendant has less knowledge, capacity, and foresight than the man of ordinary intelligence and prudence. If conduct meeting the basic threefold test of liability would not be judged by the community to be morally blameworthy in the man of ordinary intelligence and prudence, a court may refuse to apply the basic test of liability, in order to preserve the effectiveness of the law. This decision depends in each case solely on the court's practical judgment about the detrimental effect of applying the ordinary test; there is no necessary relationship between legal standards for tort liability and community moral standards.

(3) The basic test of tort liability reconciles and forwards two public policies: it promotes the public safety by deterring and preventing dangerous conduct while preserving socially desirable freedom of action when danger from conduct is not foreseeable.

(4) The deterrence function of the threefold test is enhanced by the process of specification: the courts continually transform the very general threefold test of liability into more specific rules imposing tort liability on more narrowly defined conduct. This process, based on common experience with the danger of particular kinds of conduct, makes the law more knowable, fixed, and certain, thereby enhancing its effectiveness in deterring dangerous conduct, and, perhaps, also enhancing its effectiveness in assuring freedom of action.[136]

Holmes claimed that this theory was a scientific explanation of the common law of tort and its historical tendencies, more consistent with the common law and those tendencies than any alternative explanatory theory. Moreover, Holmes claimed that the basis for tort liability in the foreseeable consequences of action was consistent with his notion that legal standards must be fixed, definite, and knowable if they are to fulfill their function of guiding and controlling human conduct. The following critique will focus on how and whether Holmes supported these two claims.

How should one go about testing Holmes's claim that his tort theory

136. There is an analytical problem here which Holmes never faced directly. As long as the general negligence standard remains applicable, specific rules cannot assure freedom of action, since certain conduct not specifically proscribed may still violate the general standard. The policy of assuring maximum freedom of action can be fully achieved by the process of specification only when the general standard is completely superseded by specific rules, either throughout an entire area of human conduct or in areas of conduct defined clearly enough to ensure effective notice to actors of the area's boundaries.

is more consistent with the common law of torts than any alternative explanatory theory? One could, of course, examine materials that Holmes ignores: opinions by courts explaining the reasons for their decisions and prior treatises explaining the principles underlying liability for specific torts. One could thereby attempt to show that Holmes's theory was inconsistent with the expressed understanding of the basis for tort liability given by those operating the tort system.[137] But Holmes himself would consider this a trifling, irrelevant exercise, since he thought judges ordinarily do not explain the real policy reasons underlying their decisions. To make telling any inconsistencies between Holmes's theory and the understanding of the tort system expressed by those operating it, one would first have to establish, in the teeth of Holmes's assertions to the contrary, the relevance of the expressed judicial reasons to an understanding of the principled basis for judicial decisions and rules. Although this has been done,[138] there is an easier and more direct way of testing Holmes's theory: one could accept for purposes of analysis the limits set by Holmes, and simply examine the claimed consistency between his theory and the common law of torts. If one can defeat his claim of consistency, one can reject the claim that his theory explains the common ground of all tort liability without considering whether it is consistent with the expressed understanding of the reasons for tort liability given by those operating the legal system.

Another feature of Holmes's analysis supports a further limitation on the scope of this critique. Holmes spent most of his time in the two torts lectures analyzing the basis for tort liability for unintended harm; his analysis of intentional torts, while significant, lacks both the explanatory punch and the historical significance of his explanation of the basis for liability for unintended harms. A critical analysis that shows Holmes's theory to be inconsistent with the common law of tort liability for unintended harm, then, would be sufficient to undermine Holmes's entire theory, for his arguments are prima facie most persuasive in that area.

Holmes claimed that his theory of foreseeable danger as the touch-

137. That analysis would probably show that torts were understood to be wrongs, and that negligence was thought to be neglect of legal duty, or careless failure to act as reasonable persons. *See* S. MILSOM, *supra* note 42; *see also* Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation,* 90 YALE L.J. 1717 (1981).

138. *See* R. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 12-38 (1961).

stone of tort liability was confirmed by three exceptions to the general external standard of liability: the exceptions for physical incapacity, infancy, and insanity prove the general rule and illustrate the "moral basis of liability in general."[139] Thus, after sketching these three exceptions, Holmes concluded:

> [O]n the one hand, the law presumes or requires a man to possess ordinary capacity to avoid harming his neighbors, unless a clear and manifest incapacity be shown; but . . . on the other, it does not in general hold him liable for unintentional injury, unless, possessing such capacity, he might and ought to have foreseen the danger, or, in other words, unless a man of ordinary intelligence and forethought would have been to blame for acting as he did.[140]

As physical incapacity, such as blindness, does not affect one's capacity to foresee danger, the most important exceptions for Holmes's theory are those for infancy and insanity. As elaborated in current tort law, these exceptions do not support Holmes's foreseeability theory: infancy, regardless of manifest incapacity to foresee danger, is not accepted as an excuse in a negligence action when the child was engaged in a dangerous activity ordinarily engaged in only by adults;[141] insanity that manifestly incapacitates an individual from foreseeing the danger of his actions is no excuse in a negligence action.[142] Even at the time Holmes wrote, the law in these two areas was inconsistent with Holmes's theory—the effectiveness of infancy as a defense depended solely on the nature of the conduct constituting the tort, not on the capacity of the child to foresee danger, and the common-law rule that insanity was not a defense in trespass had been adhered to in the more recent cases of unintended harm, even after the abolition of the forms of action.[143] The argument that the law should excuse harm caused by an insane defendant manifestly incapable of foreseeing danger had been considered and rejected by Judge Thomas Cooley in his 1880 treatise on torts.[144] Cooley was responding to an argument in the influential treatise on damages by Sedgwick[145] that harm unintentionally caused by a lunatic unable to foresee and guard against the conse-

139. THE COMMON LAW, *supra* note 1, at 87-88.

140. *Id.* at 88.

141. W. PROSSER, HANDBOOK ON THE LAW OF TORTS 156-57 (4th ed. 1971).

142. *Id.* at 153-54.

143. *See* T. COOLEY, A TREATISE ON THE LAW OF TORTS 99-113 (1880).

144. *Id.* at 99-101.

145. T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 555 (6th ed. 1874).

quences of his actions should be considered inevitable accident. Cooley explained Sedgwick's argument as follows:

> In the case of *compos mentis*, he says, although the intent be not decisive, still the act punished is that of a party competent to foresee and guard against the consequences of his conduct; and inevitable accident has always been held an excuse. In the case of a lunatic it may be urged both that no good policy requires the interposition of the law, and that the act belongs to the class of cases which may well be termed inevitable accident.[146]

Cooley attacked this argument on three grounds: first, it is inconsistent with the law; second, it would provide an incentive to mischief by malicious people relying on the rule and their ability to mimic insanity to avoid responsibilty for harmful acts; and last and more important, it ignores basic policies of tort law:

> This view has plausibility, and it would be perfectly sound and unanswerable if punishment were the object of the law when persons unsound in mind are the wrong doers. But when we find that compensation for an injury received is all that the law demands, the plausibility disappears. . . . The question of liability in these cases [of insane persons], as well as in others, is a question of policy; and it is to be disposed of as would be the question whether the incompetent person should be supported at the expense of the public, or of his neighbors, or at the expense of his own estate.[147]

One could argue that Cooley's notion of public policy is essentially the same as Holmes's, and that Holmes simply made a mistake in analyzing the negligence liability of the insane. One could support this conclusion by showing that Holmes's limiting policy of encouraging maximum freedom of action does not preclude imposing liability on the insane, as the supporting assumption that activity is necessary and generally desirable does not apply to actions by lunatics who are incapable of foreseeing the danger of their conduct. This argument, however, ignores the internal logic of Holmes's position: the limiting principle works only in conjunction with the basic policy of deterring dangerous behavior, so if it is impossible to deter conduct because of the insane person's manifest incapacities, there is no reason whatsoever in Holmes's theory for imposing tort liability. Cooley's notion of a basic compensation purpose is completely foreign to Holmes's theory,

146. T. COOLEY, *supra* note 143, at 99.

147. *Id.* at 100.

both because it is ruled out methodologically by eliminating the actual harm from the analysis and because Holmes's policy of deterrence uses compensation only instrumentally, and not for its own sake.

If the exceptions do not prove the rule, but are instead inconsistent with Holmes's theory, are the basic rules of liability for unintentional torts consistent with Holmes's theory, that is, does the rule prove the rule?

One of the apparent triumphs of Holmes's theory is that it reconciles the application of the negligence standard for liability for some unintended harms with the apparently inconsistent application of a strict liability rule for other unintended harms. According to Holmes, the principle underlying most strict liability rules is the same as that underlying liability in negligence: strict liability cases involve situations in which the doing of the act alone establishes that a defendant, with the knowledge derived from the common experience of mankind, would realize its potential for danger. Thus, one who keeps a wild animal is presumed to know of the inherent danger, for the common experience of mankind attests to the dangerousness of that act. On the other hand, certain acts, according to the common experience of mankind, are not dangerous in and of themselves, so the more general negligence standard is applied to evaluate such conduct. In this category belong the acts of keeping certain commonly kept animals such as dogs, rams, and bulls, for "experience as interpreted by the English law has shown that dogs, rams, and bulls are in general of a tame and mild nature, and that, if any one of them does by chance exhibit a tendency to bite, butt, or gore, it is an exceptional phenomenon."[148] *Bulls*? It strains credulity to assert that experience has shown that a "wild" animal such as a spider monkey is generally more dangerous than a bull.[149] Holmes resolved this apparent inconsistency by suggesting that the common law made a mistake in "interpreting" experience, and by further pointing out that, after the initial mistake, "the law has . . . been brought a little nearer to actual experience by statute in many jurisdictions."[150] But explanation of incongruous data by the assumption that the courts were mistaken is inconsistent with Holmes's scientific method. All legal rules and precedents are data to be explained by a congruent theory. Only after one has established that a particular explanatory theory

148. THE COMMON LAW, *supra* note 1, at 125.

149. *See* Linnehan v. Sampson, 126 Mass. 506 (1879).

150. THE COMMON LAW, *supra* note 1, at 125.

is more consistent with all the data than any other potential theory can one explain away rules or precedents inconsistent with that theory. In fairness to Holmes, it should be noted that this discussion of the liability of bull-keepers occurs in the concluding portion of Holmes's lectures on torts, after he has purported to have established his theory scientifically. It should nevertheless be noted that the legal rules about tort liability for harm caused by keeping animals are, when taken together, radically inconsistent with Holmes's theory. They suggest that conduct known to be dangerous may yet not be at the peril of the actor, and that the degree to which conduct is common, ordinary, and expected may be more significant for tort liability than its foreseeable danger.

This analysis therefore leads us to confront Holmes's central "scientific" argument for his foreseeability theory: his explanation of inevitable accident as a defense in trespass cases. Holmes followed the lead of Chief Justice Shaw in *Brown v. Kendall*[151] in equating the old inevitable accident defense with the developing negligence standard.[152] Holmes claimed that the test of inevitable accident was whether harm from defendant's act was foreseeable at the time defendant voluntarily acted; if danger was not foreseeable, or if defendant did not act voluntarily, the result was inevitable accident. Holmes supported this interpretation of the inevitable accident defense by reference to two kinds of cases: cases in which defendant's apparently innocent act combined with an intervening extraordinary event to cause harm (relying on *Gibbons v. Pepper*[153] as his prime example),[154] and cases in which defendant acted without knowing of the circumstance that made the action dangerous (implicitly relying on *Brown v. Kendall*).[155] Holmes's principal argument, then, can be tested initially by examining its consistency with the decisions and rules of *Gibbons v. Pepper* and *Brown v. Kendall*.

In *Gibbons v. Pepper*, a 1695 Trespass action, plaintiff sued defendant for harm caused when the horse that defendant was riding collided with plaintiff. Defendant pleaded in justification that his horse became frightened, ran away with him, and then ran into plaintiff, who was

151. 60 Mass. (6 Cush.) 292 (1850).

152. For Shaw, the developing negligence standard was one of ordinary care; for Holmes, however, it was based on foreseeable danger. *See infra* text accompanying note 160.

153. 91 Eng. Rep. 922 (1695).

154. THE COMMON LAW, *supra* note 1, at 74.

155. *Id.* at 76.

standing in a crowd on the street and ignored defendant's shouts to get out of the way. The court held for the plaintiff on the grounds that the justification was not pleaded properly, but it clearly indicated that, properly pleaded, the facts alleged by the defendant would establish the defense of inevitable accident. The reasoning of the court seemed to be based on the argument that an intervening responsible cause between the defendant's conduct and the ensuing harm relieves the defendant of liability.[156] The critical question for Holmes's theory, however, is not the court's actual rationale but whether the defense of inevitable accident recognized in *Gibbons* is consistent with Holmes's foreseeability explanation of that defense. This is precisely where Holmes's explanation breaks down. Surely, one of the foreseeable risks of riding a horse "in the King's highway" was that something might happen to spook the horse and make it run away, ungovernable by its hapless rider, just as today, one of the foreseeable risks of driving on the highway is sudden mechanical failure of the automobile, without any prior warning, rendering it uncontrollable by the driver. We take that foreseeable but irreducible risk every time we drive a car;[157] riders in 1695 took the foreseeable but irreducible risk every time they rode a horse on the King's highway. Holmes himself recognized that "the possibility of being run away with when riding quietly, though familiar, is comparatively slight [compared to the risk from hard spurring or taking an unruly, unbroken horse into a congested area]."[158] This concession in the course of Holmes's argument suggests that the underlying standard is not foreseeability of danger *simpliciter*, but foreseeability of a certain magnitude of danger. Yet when Holmes summarized this very argument, questions of magnitude of foreseeable danger were entirely left out: "[Relative] to a given human being anything is accident which he could not fairly have been expected to contemplate as possi-

156. Northey for the plaintiff said, that in all these cases the defendant confessed a battery, which he afterwards justified; but in this case he justified a battery, which is no battery. Of which opinion was the whole Court; for if I ride upon a horse, and J.S. whips the horse, so that he runs away with me and runs over any other person, he who whipped the horse is guilty of the battery, and not me. But if I by spurring was the cause of such accident, then I am guilty. In the same manner, if A. takes the hand of B. and with it strikes C., A. is the trespasser, and not B.

91 Eng. Rep. 922 (1695).

157. If an accident is caused by sudden mechanical failure that could not have been prevented or discovered by ordinary reasonable care in the maintenance of the vehicle, the defendant is not liable under the common law of negligence. *See, e.g.,* Barber v. Gordon, 111 Cal. App. 279, 295 P. 377 (1931); Bewley v. Western Creameries, 177 Okla. 132, 57 P.2d 859 (1936).

158. THE COMMON LAW, *supra* note 1, at 76.

ble, and hence to avoid."[159]

Like *Gibbons*, *Brown v. Kendall* involves facts from which any fair observer would say that an ordinary prudent man in defendant's position would know that harm from his conduct was *possible*. In *Brown v. Kendall*, the defendant owned one of two dogs involved in a fight and was beating the dogs with a four-foot stick to separate them, knowing that the owner of the other dog was in the area—five and one-half yards away. Moving backwards as the dogs moved toward him, he unintentionally hit the plaintiff in the eye. It seems impossible to say that this is a case in which the possibility of harm to the plaintiff from the defendant's action was unforeseeable. The court nevertheless held that the defendant could escape liability on retrial if the jury decided that under these circumstances he was exercising "ordinary care," defined as "that kind and degree of care, which prudent and cautious men could use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger."[160] The test of ordinary care in *Brown*, then, could not have been simply foreseeability of possible harm.

Both cases of inevitable accident on which Holmes relied to support his theory involved facts or rules allowing for a finding of inevitable accident even though an ordinary reasonable man in the defendant's position would have contemplated the possibility of harm from the action. Holmes's stated principle of foreseeable harm *simpliciter*, then, is simply not consistent with the two major supports he himself used to show that his theory was consistent with the common law of torts.

There are a number of possible ways to modify Holmes's theory to make it consistent with the fact that some conduct is not tortious even though it entails a foreseeable risk of harm to others. To preserve as much of Holmes's original theory as possible, one should attempt to preserve the fundamental notion of reasonably foreseeable danger as primary and therefore focus on defining the nature and extent of the reasonably foreseeable risk that makes conduct in the face of such risk tortious. Analysis of the two most obvious modifications suggests that Holmes may have had good reason for avoiding any of the obvious reworkings of his theory.

The simplest reformulation would be to state that in order to make

159. *Id.* at 76.

160. 60 Mass. (6 Cush.) 292, 296 (1850).

conduct tortious the foreseeable risk must reach a certain level of probability: the knowledge that harm could possibly result from one's actions is not enough unless one should also know that the possible harm is likely, and that that likelihood reaches a certain minimum level of probability. Although this approach was hinted at by Holmes in certain passages,[161] every formal statement of his theory was phrased solely in terms of the foreseeability of possible harm.[162] A brief look at two problems for Holmes's theory that would be caused by reformulating his basic principle in this way may suggest reasons why Holmes refused to accept the reformulation. First, this reformulation would undermine Holmes's ability to explain all of tort liability by reference to a single foreseeability standard. Intentional torts in general involve a high degree of probability that a certain kind of foreseeable harm will follow one's actions; one can be held liable for negligently inflicting foreseeable harm under much lower degrees of probability of harm. Moreover, the two sets of torts do not always overlap, as one can be held liable in tort for intentionally inflicting certain kinds of harm that will not lead to liability if negligently inflicted.[163] The same standard of foreseeability, therefore, cannot be said to underlie all liability in tort. Second, by the notion of deterrence through the foreseeable harm test Holmes resolved brilliantly and completely the apparent inconsistency between the two fundamental legislative policies of maximum deterrence of dangerous behavior and maximum freedom of action. This resolution breaks down if one redefines foreseeability as knowledge of a particular degree of probability of harm rather than simply knowledge of the bare possibility of harm. For once you inject the issue of the *degree* of foreseeable probability necessary to impose liability on the actor into the question, the issue in every case becomes one of drawing the line between the two competing policies of deterring potentially dangerous behavior and maximizing freedom of action. That line cannot be drawn simply by reference to the deterrence function of law; it must necessarily be drawn by reference to something outside the two competing policies, such as other conceptions of public policy or other notions of the public good that would be difficult to treat "scien-

161 THE COMMON LAW, *supra* note 1, at 76, 125.

162. *Id.* at 76, 117.

163. For example, negligent misrepresentation and negligent infliction of emotional harm have been held to be not actionable while intentional fraud and intentional infliction of emotional harm are actionable.

tifically" and that might not be reducible to one view of the public good.

Holmes avoided both of these difficulties by adhering to a formal test of foreseeability that made controlling the foreseeability of any possible harm. In explaining how particular common-law rules are consistent with this theory, however, Holmes ambiguously hinted at other tests of foreseeability. At some points he suggested that the test is one of degrees of probability of foreseeable harm;[164] at other points he suggested that the test is knowledge of possibility of the specific harm that actually resulted;[165] and at others he suggested that the test is one of general foreseeability of any possible harm.[166] Thus, Holmes established that his foreseeability test was consistent with the facts of the common law by subtly changing the meaning of his key concept to explain apparently divergent facts.

The *Brown v. Kendall* opinion itself suggests the other obvious alternative reformulation which solves the problem presented by non-tortious conduct that entails obviously foreseeable risks of harm: if an ordinary reasonable man would have done the act anyway, in the face of the foreseeable risk, the conduct would not be tortious. The test of the nature and extent of the foreseeable risks sufficient to place the peril of conduct on the actor is therefore simple: those risks that would influence an ordinary reasonable man to avoid the conduct. One might say that this is in fact Holmes's test, as he incorporated the ordinary reasonable man into his basic liability standard. But Holmes used the ordinary reasonable man as a test of foreseeability of harm, not as a standard of conduct. The alternative test, from *Brown v. Kendall*, makes what the ordinary reasonable man would do the critical test, not what the ordinary reasonable man would foresee. This redefinition would require certain changes in Holmes's theory. An analysis of those changes may suggest reasons why Holmes avoided formulating his basic test in terms of what the ordinary reasonable man would do. First, unless one assumes that the ordinary reasonable man always acts consistently, and consistently to further one policy, this redefinition would seem to stymie the search for a consistent public policy underlying all tort liability. Second, this test would undermine Holmes's theory that common-law courts act to further "legislative" policies by prescribing

164. THE COMMON LAW, *supra* note 1, at 76, 125.
165. *Id.* at 106, 110.
166. *Id.* at 117.

rules of conduct which, if followed, will promote the public welfare. Using the ordinary reasonable man's conduct as a test of liability would have the courts acting in a different role—simply ascertaining and enforcing customary expectations about behavior in a community, regardless whether the customary, expected conduct promotes the public welfare or not.

The third and least obvious redefinition of Holmes's foreseeability theory does the least damage to Holmes's underlying assumptions. This is the redefinition proposed by Henry T. Terry in his influential article on negligence published in 1915.[167] Terry was the most perceptive and sympathetic of the torts theorists influenced by Holmes's work.[168] In his 1884 treatise on Anglo-American law, Terry clearly identified the problem in Holmes's tort theory here under discussion:

> [After stating an objective reasonableness standard as the test of negligence] This I understand to be substantially the same conclusion reached by Judge Holmes in his remarkable book on The Common Law, as to the nature of what is generally called legal negligence and intention. He finds the unlawful character of the conduct in such cases to depend upon the fact that it is likely to cause damage to others rather than upon its having been done with any bad state of mind. But, probably because the purpose of his work did not call for it, he does not discuss, at least at any length, the question what degree of likelihood of damage is sufficient to make this conduct unlawful, there being many sorts of conduct which have and are well known to have more or less tendency to cause harm to others which are yet perfectly lawful so long as this tendency is not too great. The criterion here is reasonableness.[169]

Although Terry alluded briefly in 1884 to a reasonableness standard that took into account not only foreseeable harm but also the value of the actor's ends,[170] it was not until 1915 that he published an analysis of negligence that redefined Holmes's foreseeability test in a way that solved some of the more obvious problems with Holmes's simpler theory. For Terry, the critical point was not whether a risk of harm from defendant's conduct was foreseeable by the ordinary reasonable man,

167. Terry, *Negligence,* 29 HARV. L. REV. 40 (1915).

168. Part of this may be ascribed to Terry's unique position when he first read Holmes's work. At that time, Terry was a professor of law at the Imperial University in Tokyo, Japan. The preface to Terry's book on Anglo-American law, *see infra* note 169, which was written while he was still in Japan, laments the inadequate library at his disposal. Terry thus had the time, the inclination, and the professional incentive to devour and digest *The Common Law*.

169. H. TERRY, SOME LEADING PRINCIPLES OF ANGLO-AMERICAN LAW 180-81 (1884).

170. *Id.* at 176-79.

but whether that foreseeable risk was unreasonable. Unreasonableness, however, was not defined by what an ordinary reasonable man would do in light of the foreseeable risk; instead, the reasonableness of a foreseeable risk depended upon the following five factors:

> (1) The magnitude of the risk. A risk is more likely to be unreasonable the greater it is.
>
> (2) The value of importance of that which is exposed to the risk, which is the object that the law desires to protect, and may be called the principal object. The reasonableness of a risk means its reasonableness with respect to the principal object.
>
> (3) A person who takes a risk of injuring the principal object usually does so because he has some reason of his own for such conduct,—is pursuing some object of his own. This may be called the collateral object. In some cases, at least, the value or importance of the collateral object is properly to be considered in deciding upon the reasonableness of the risk.
>
> (4) The probability that the collateral object will be attained by the conduct which involves risk to the principal; the utility of the risk.
>
> (5) The probability that the collateral object would not have been attained without taking the risk; the necessity of the risk.[171]

The brilliance of Terry's achievement can hardly be overemphasized. He preserved Holmes's basic consequentialist ethic and deterrence rationale for negligence liability, provided a theory that was more consistent with the negligence rules than Holmes's theory, and further preserved the legislative function of the courts by avoiding a test of negligence in terms of the conduct of the ordinary reasonable man.

Terry's reformulation of Holmes's theory has had a long and influential life: Judge Learned Hand adopted a truncated version of it in the leading case of *Carroll Towing Co. v. United States*[172] and the American Law Institute adopted Terry's formulation in the *First* and the *Second Restatements of Torts*.[173] There are, however, three serious problems with this reformulation. First, at key points in the test it incorporates unguided or very generally guided judgments about non-objectively determinable subjects such as the magnitude of risk, the social value of the interest threatened, and the social value of the actor's ends. As a scientific explanation of the particular rules or the results of particular cases, then, the reformulation achieves consistency at the

171. Terry, *supra* note 167, at 42-43.

172. 159 F.2d 169 (2d Cir. 1947).

173. RESTATEMENT (SECOND) OF TORTS §§ 291-93 (1965); RESTATEMENT OF TORTS §§ 281-82 (1934).

price of vacuity: given the uncircumscribed judgments presumably included in the test, any result can be seen as consistent with the proposed test. Second, given the amorphous, ill-defined nature of the critical judgments one must make to apply the test, it arguably is even less useful, either as a guide to judicial decision or as a guide to human conduct, than Holmes's original foreseeability theory. Last, because the categories for judgment are so fluid and indeterminate, in practice the test always runs the risk of collapsing the reasonable risk standard into the test of what risks a reasonable man would be willing to take.

Holmes directly faced the second essential problem of any purely consequentialist moral or legal theory: the problem of one's capacity to guide his conduct purely by its consequences. Holmes purported to solve this problem by his theory of specification, which he presented both as a conclusion from enlightened policy and as an explanation of the historical development of tort law. Holmes recognized that the general foreseeability test, although supportable by strong policies, was nevertheless not a sufficiently fixed, uniform, and determinable standard to be effective as a deterrent to potentially dangerous conduct. He therefore proposed that courts translate this general standard into specific, knowable rules of behavior by deferring to the common experience of mankind as expressed in statutes, customs, and recurrent jury verdicts. As an explanation of the specific liability rules current in Holmes's day, the theory of specification works well, particularly when coupled with Holmes's other two notions that some specific rules may be the result of pure policy decision, and not the result of specification,[174] and that some rules carving out specific exceptions to liability for foreseeably dangerous activities must be explained as the result of overriding policies favoring freedom of action in certain circumstances.[175] With this trio, Holmes could explain anything, so it is not surprising that they seem, with only a little straining,[176] to explain the then-current set of specific tort liability rules.

Given the ability of these three ideas to explain any set of specific

174. THE COMMON LAW, *supra* note 1, at 92-93, 116.

175. *Id.* at 115.

176. One such extension occurs in Holmes's discussion of tort liability for harm caused by animals, especially "wild" animals. *See supra* text accompanying notes 148-50. Even there, the problem faced is not explaining a strict liability rule, but showing how that rule is consistent with the application of negligence standards in similar situations. Presumably, the historical process of specification works more quickly in some areas than in others, so the problem discussed above is not fatal to the theory of specification as a historical tendency.

tort rules, the only possible test of Holmes's theory of specification as an explanation and prediction of historical processes is to examine developments in tort law since 1881. Here the evidence seems strongly opposed to Holmes's theory. One could cite the overwhelming evidence of daily practice to show that trial judges are not inclined to take negligence cases from juries based on prior verdicts of juries in similar cases. This common understanding contributed to the embarrassment Holmes caused himself in his attempt as an appellate judge to translate the general contributory negligence rule into a specific rule that travelers must stop, look, listen, and even get out and look before crossing railroad tracks.[177] Moreover, most of the significant changes in tort law in the United States in the twentieth century have brought cases that originally were covered by fixed, definite, and knowable rules (usually rules precluding liability) under the general negligence standard. The recognition of a cause of action for negligent infliction of emotional harm,[178] the assault and demolition of the citadel of privity in products liability,[179] and the general attack on immunities[180] are all examples of this retreat from specification. Of course, Holmes could argue that these developments represent movements away from policy-based rules denying recovery under certain circumstances and toward an application of the general foreseeability test, and are thereby consistent with his theory of the general historical trend. He could point out that, with the possible exception of the recognition of a due care defense in some negligence per se cases,[181] there are no examples of areas in which tort

177. Baltimore & Ohio R.R. v. Goodman, 275 U.S. 66 (1927). Mr. Justice Cardozo later gently "distinguished" *Goodman* into oblivion in Pokora v. Wabash Ry., 292 U.S. 98 (1934).

178. *See, e.g.,* Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); Daley v. LaCroix, 384 Mich. 4, 179 N.W.2d 390 (1970).

179. *See, e.g.,* Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

180. The following are representative: (1) the movement to abolish interspousal immunity, *e.g.,* Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972); (2) the movement to abolish charitable immunity, *e.g.,* Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 211 N.E.2d 253 (1965); (3) the movement to abolish or limit sovereign immunity, *e.g.,* Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957) (en banc).

181. In the late nineteenth century, tort liability for harm caused by defendant's violation of a safety statute was justified by reference to the concept of negligence as breach of a legal duty. *See, e.g.,* Osborne v. McMasters, 40 Minn. 103, 41 N.W. 543 (1889); Willy v. Mulledy, 78 N.Y. 310 (1879). The critical question was therefore one of statutory construction: if the statute imposed a legal duty not just for the public generally but for the benefit of a particular class of people to which plaintiff belonged, neglect of that duty was actionable. *See* C. ADDISON, THE LAW OF TORTS 45-46 (3d ed. 1874); T. COOLEY, *supra* note 143, at 650-58 (1880); T. SHEARMAN & A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE 16-17, 69 (3d ed. 1874). As the legal under-

law has reversed the process of specification by changing back to the indeterminate negligence standard for conduct previously covered by specific rules imposing tort liability for harm caused by certain defined acts. Furthermore, Holmes could point to the replacement of negligence standards by strict liability tests in worker's compensation systems and in products liability cases as significant examples of the process of specification. Neither of these developments, however, can be considered an example of the process of specification as defined by Holmes. Workers' compensation liability was not imposed because of a judgment that common experience shows that particular conduct by employers was dangerous; strict liability was imposed across the board for all work-related injuries on the basis of an enterprise liability theory[182] that Holmes rejected, at least by implication, in *The Common Law*.[183] And anyone who thinks that the test for determining whether a product was defective when sold under modern products liability law is more fixed, definite, and determinable than the general negligence standard should examine the matter more carefully.[184] One must

standing of negligence shifted from neglect of a legal duty to failure to act as an ordinary reasonable man under the circumstances, the rationale for tort liability for harm caused by violation of a safety statute also changed. Ezra Ripley Thayer reinterpreted negligence per se liability on Holmesian lines in his 1914 article, Thayer, *Public Wrong and Private Action,* 27 HARV. L. REV. 317 (1914). Thayer argued that the legislative judgment about prudent and safe behavior embodied in the safety statute should be accepted by the court as controlling: the jury should be instructed that, if they find defendant violated the statute, they must find he was negligent. The Thayer approach, consistent with Holmes's theory of specification, has been widely accepted by courts which hold that an unexcused violation of a safety statute is negligence per se. This approach simply preserves the result previously reached under a "neglect of legal duty" approach. Some courts have refused to accept the Thayer argument, however, and hold that although violation of a safety statute is presumptively negligent, the presumption can be rebutted by evidence that defendant acted as an ordinary reasonable man who desired to comply with the law. *See, e.g.,* Davison v. Williams, 251 Ind. 448, 242 N.E.2d 101 (1968). *Cf.* RESTATEMENT (SECOND) OF TORTS § 288A(2)(c) (1965) (including inability to comply after reasonable diligence as an excuse even in negligence per se jurisdictions). Other states go even further and hold that violation of a safety statute is just some evidence of negligence. *See, e.g.,* Guinan v. Famous Players-Lasky Corp., 267 Mass. 501, 167 N.E. 235 (1929). *See also* W. PROSSER, HANDBOOK ON THE LAW OF TORTS 200-02 (4th ed. 1971). These two minority approaches seem to reverse the process of specification as defined by Holmes.

182. *See* NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, COMPENDIUM ON WORKMEN'S COMPENSATION 21-26 (1973).

183. *See* THE COMMON LAW, *supra* note 1, at 77. See also Holmes's veiled suggestion in Lecture I that vicarious liability for the torts of one's employees is undesirable. *Id.* at 17.

184. RESTATEMENT (SECOND) OF TORTS § 402A (1965), adopted by many courts as the standard for strict tort liability for injury caused by a defective product, states that the product must be at the time of sale "in a defective condition unreasonably dangerous to the user or consumer or to his property." The official comments to this Restatement rule suggest that the test of defective

therefore conclude that there is no significant trend in twentieth-century tort law corresponding to the process of specification as defined by Holmes.

The purpose of the foreseeable danger standard is to deter potentially dangerous activities and also to encourage beneficial non-dangerous activity by removing from that beneficial activity the chilling spectre of potential liability. But neither of these policies can be effectively achieved unless and until the general standard is translated into definite, knowable liability rules. If the general foreseeable harm standard of negligence is not in fact continually being translated into specific, determinate liability rules, Holmes's theory is internally incoherent. The twentieth-century expansion of the scope of application of the general negligence standard and the refusal of the courts to elaborate specific rules of liability indicate that Holmes's theory is no longer an internally coherent explanation of the purposes and policies of tort law.[185]

CONCLUSION

Commentators agree that Holmes's 1881 theory of torts has had a significant influence on the subsequent development of tort theory in the United States.[186] The preceding analysis of methodological and

condition is whether the product is "safe for normal handling and consumption," *id.* § 402A comment h, and whether it is "in a condition contemplated by the ultimate consumer," *id.* § 402A comment g. The comments also suggest that "unreasonably dangerous" means "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Id.* § 402A comment i. Courts and commentators have had difficulty translating this standard into coherent "rules" when dealing with cases of products allegedly defective because of defective design: i.e., products that were sold in the condition they were designed to be in, unlike "manufacturing defect" cases of products that have a loose screw or a missing part due to some manufacturing or quality control mistake. *See* Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication,* 73 COLUM. L. REV. 1531 (1973); Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Product,* 20 SYRACUSE L. REV. 559 (1969). *Cf.* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972) (rejecting "unreasonably dangerous" test).

185. If Holmes's theory of prescription is not an accurate description of historical processes, is it nevertheless a valid prescription of what courts should do? Only if one accepts Holmes's notion that the purpose of tort liability is deterrence. If, instead, the primary purpose of tort law is to redress past wrongs, a jury representing the community seems an eminently sensible way of deciding controverted claims of wrong based on appeals to pre-existing community customs and morals.

186. *See* G. GILMORE, THE AGES OF AMERICAN LAW 48-67 (1977); G. WHITE, TORT LAW IN AMERICA 12-19 (1980).

substantive problems in Holmes's theory may be useful in pointing out certain pitfalls into which tort theorists may easily fall simply because Holmes's work is such an important part of their intellectual heritage.

The first pitfall may trap a theorist at the very start, when he is merely describing the current state of negligence law: he may accept Holmes's or Terry's emphasis on foreseeability of harm as the primary test of negligence.[187] But there are good grounds for believing that foreseeability of harm *simpliciter* has never had much to do with negligence liability, either before or after 1881. Prior to Holmes, negligence had been variously defined as the failure to act as an ordinary reasonable man under the circumstances[188] or as the neglect or breach of a preexisting legal duty,[189] but not simply as the failure to avoid foreseeable harm; prior to Holmes, foreseeability or foresight of danger, if referred to at all, was always subordinate to a broader test of what a reasonable man would do,[190] and foreseeable harm or danger was considered as one influence on the behavior of the reasonable man. Subsequent references to a simple foreseeability standard for determining negligence, then, can be traced directly to Holmes. That foreseeability test has seemingly enjoyed quite a vogue: it has been embodied as the test of negligence in the leading cases of *Palsgraf*[191] and (as reformulated by Terry) *Carroll Towing Co.*[192] by the leading jurists Benjamin Nathan Cardozo and Learned Hand, and has been endorsed by the *First* and *Second Restatements of Torts*.[193] In the day-to-day operation of the tort system, however, the foreseeability test may have little influence, as juries are ordinarily instructed that negligence is conduct con-

187. *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW 69-71 (1972); Calabresi & Hirschoff, *Toward a Test of Strict Liability in Tort*, 81 YALE L.J. 1055 (1972); Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

188. *See, e.g.*, Blyth v. Birmingham Waterworks Co., 156 Eng. Rep. 1047 (Ex. 1856); M. BIGELOW, LEADING CASES ON THE LAW OF TORTS 590-95 (1875); F. HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS 124 (1859); A. UNDERHILL, PRINCIPLES OF THE LAWS OF TORTS 271 (Moak ed. 1881).

189. *See, e.g.*, Winterbottom v. Wright, 152 Eng. Rep. 420 (Ex. 1842); F. WHARTON, A TREATISE ON THE LAW OF NEGLIGENCE 3 (2d ed. 1878).

190. See the two leading cases, Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850); Blyth v. Birmingham Waterworks Co., 156 Eng. Rep. 1047 (Ex. 1856).

191. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928). In holding that one had no legal duty to those not foreseeably endangered by one's conduct, Cardozo defined the wrong redressed by a negligence action solely in terms of foreseeability. *Id.* at 344, 162 N.E. at 100.

192. United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

193. RESTATEMENT (SECOND) OF TORTS §§ 291-93 (1965); RESTATEMENT OF TORTS §§ 281-82 (1934).

trary to that of a reasonably prudent (or "reasonably careful") person under similar circumstances,[194] or the word "negligence" is left out altogether and juries are instructed that defendant can be held liable for failure to exercise ordinary care, usually defined as the care used by reasonably prudent persons under similar circumstances.[195] We do not ordinarily burden our juries with the task of determining what was and what was not foreseeable; we ordinarily allow our judges to make that decision only within the protective cocoon of the rules governing submission of the negligence issue to the jury. The intractability of foreseeability simply leads courts to leave more and more cases to the jury, a result, ironically, at odds with Holmes's proposed process of specification.

The second pitfall is also the most subtle: tort theorists may accept without question Holmes's reduction of the common ground question to the question of the criterion on which courts, legislatively and prior to injury, put the "peril" of action on the actor. The legislative, goal-oriented model of the judicial process implicit in that reduction has in fact focused the attention of subsequent theorists on the relationship between tort law and human conduct, and on the nature of and justification for the law's influence on an individual's behavior. Thus, although subsequent theorists have given different answers to the "common ground" question, either as a descriptive or as a prescriptive inquiry, they have, with two principal exceptions,[196] stayed within the range defined by the Holmes reduction. They have selected one of

194. *See, e.g.,* ARIZONA UNIFORM JURY INSTRUCTIONS (negligence definition), *reprinted in* 9 ARIZ. B.J. 13, 20 (Spring 1974); ARKANSAS MODEL JURY INSTRUCTIONS, CIVIL § 301 (2d ed. 1974) (adding foreseeability instructions only "when foreseeability is an issue"); SUGGESTED PATTERN JURY INSTRUCTIONS, CIVIL 233, No. 3(a) (1980) (Council of Superior Court Judges of Georgia) (*compare id.* at 235, No. 6); ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL #10.01 (2d ed. 1971); MISSISSIPPI MODEL JURY INSTRUCTIONS § 36.01 (1977) (*cf.* § 36.03, "Foreseeability as test of proximate cause"); NEBRASKA JURY INSTRUCTIONS § 3.02 (1969); TENNESSEE PATTERN JURY INSTRUCTIONS, CIVIL § 3.10 (1979). *Contra* LOUISIANA JURY INSTRUCTIONS, CIVIL 56-57 (1980) (H.A. Johnson, III) (suggesting that, in addition to ordinary definition of negligence, juries be instructed to use the *Carroll Towing Co.* negligence test).

195. *See, e.g.,* 2 INSTRUCTIONS TO JURIES IN KENTUCKY—CIVIL 14.01 (1977) (J. Palmore).

196. Those two exceptions, interestingly enough, are by two theorists who based their theories on competing philosophies: George Fletcher on Rawls's anti-utilitarian theory of justice, and Richard Epstein on H.L.A. Hart's critical clarification of common language. Epstein, *A Theory of Strict Liability,* 1 J. LEGAL STUD. 151 (1973); Fletcher, *Fairness and Utility in Tort Theory,* 85 HARV. L. REV. 537 (1972). For a critique of Epstein's theory, see Kelley, *Causation and Justice: A Comment,* 1978 WASH. U.L.Q. 635, 640-44.

Holmes's three possible answers—liability for personal moral fault,[197] liability for "objective fault,"[198] and strict liability for all harm caused[199]—because those answers seem to exhaust the possible ways tort law could influence human behavior. Those who have proposed the strict liability approach have done so either on the basis of a legislative policy considered and rejected by Holmes[200] (loss-spreading), or on a combination of maximum deterrence and maximum freedom of action policies uncannily similar to that used by Holmes to support his negligence theory.[201]

The third pitfall is also subtle, and is also traceable to Holmes's methodology: subsequent torts theorists may confine their theorizing to torts by assuming with Holmes that the common ground of tort liability was not also the common ground of liability for breach of contract. This assumption should have been weakened as a matter of descriptive jurisprudence when the courts began to obliterate the important boundaries between tort and contract—the privity limitation in warranty actions and the *Thorne v. Deas*[202] rule in torts that there was no liability for harm caused by breach of a bare promise unsupported by consideration. With the success of the assault on the citadel of privity in products liability cases[203] and the adoption of section 90 of the *Restatement of Contracts*,[204] the boundary between tort and contract is hardly discernible. Although our academic prophet, Grant Gilmore, has called for a unified theory of civil obligation ignoring the distinction between tort and contract,[205] the theorists of tort and the theorists of contract still go their separate ways.

Holmes's methodology is inadequate; his theory is internally inco-

197. *See, e.g.*, J. SALMOND, THE LAW OF TORTS 20-21 (1907).

198. *See, e.g.*, F. POLLOCK, *supra* note 125; Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959).

199. *See, e.g.*, G. CALABRESI, THE COST OF ACCIDENTS (1970); James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948).

200. *Compare* James, *supra* note 199 with, THE COMMON LAW, *supra* note 1, at 77.

201. Compare Calabresi's theory of optimal deterrence in G. CALABRESI, *supra* note 199, with THE COMMON LAW, *supra* note 1, at 93, 115.

202. 4 Johns. 84 (N.Y. Sup. Ct. 1809).

203. *See* Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966).

204. Section 90 of the *Restatement of Contracts* allows for liability for breach of a bare promise unsupported by consideration if plaintiff reasonably relied on the promise to his detriment. Section 90 may therefore be seen either as a rule of both contract law and tort law, or as a rule that abolishes the difference between the two.

205. G. GILMORE, THE DEATH OF CONTRACT 94 (1974).

herent as prescription and, as description, is inconsistent with the common law of torts. Modern theorists should learn from his methodological problems, avoid the false trichotomy he imposed on three generations of torts theorists, and face the problem of formulating a theory of civil liability freed from his influence.