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# A CRITICAL ANALYSIS OF HOLMES'S THEORY OF CONTRACT

*Patrick J. Kelley\**

## DEDICATION

A scholar, like everyone else, needs heroes—those whose lives show the possibilities and the glory of a life devoted to discovering and reporting the truth about important things.

One of my scholar-heroes is John Finnis. I first read his *Natural Law and Natural Rights*<sup>1</sup> in 1982. That brilliant synthesis of the natural law tradition with the positivism of H.L.A. Hart was an inspiring example of methodical, painstaking, and scrupulously honest scholarship. Moreover, his reformulation of a natural law social science methodology provided a fruitful methodology to use in my own legal theory.<sup>2</sup> I first met John Finnis on a visit to Notre Dame in 1984. Since then, he has generously supported, encouraged, and, at times, edited my work. I am deeply grateful for his inspiring example, his foundational thought, and his friendly help.

It is an honor for me to dedicate this Article, heavily influenced by his work,<sup>3</sup> to my friend John Finnis.

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\* Professor of Law, Southern Illinois University School of Law. I appreciate the helpful comments of R.J. Robertson, Jr., and Maria Frankowska. This work carries forward a continuing study of the thought of Oliver Wendell Holmes, Jr. The summary of Holmes's early readings in positivist thought in Part I.A is taken from Patrick J. Kelley, *A Critical Analysis of Holmes's Theory of Torts*, 61 WASH. U. L.Q. 681, 697–700 (1983) (reprinted with permission). The summary of Holmes's positivist goals in *The Common Law*, *infra* note 6, in Part I.B is taken from Patrick J. Kelley, *Oliver Wendell Holmes, Utilitarianism, and the Positivism of John Stuart Mill*, 30 AM. J. JURIS. 189, 204–11 (1985) (reprinted with permission).

1 JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

2 See, e.g., Patrick J. Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Liability*, 38 CLEV. ST. L. REV. 315 (1991).

3 See *infra* Part IV.B.2.

## INTRODUCTION

By the time Oliver Wendell Holmes started to prepare his lectures on contract for his *Common Law* lecture series, he had accomplished a great portion of the task he had set for himself, which was to present a general view of the common law. Putting together and reworking his previously published articles, Holmes had elaborated a theory of the ultimate ground of judicial decision and the consequences of that decision for the community. He had also elaborated a general theory that law evolved from purely subjective liability standards through more and more objective standards to purely objective standards. He had applied these two theories in developing a unified theory of tort and criminal liability, reworking his prior articles on tort liability and adding a new treatment of criminal law. To round out the lectures, Holmes had reworked his later, highly philosophical articles on possession and his earlier, more technical articles on succession.

There remained a big hole in Holmes's attempted general coverage of the common law: the law of contract. Holmes had not published any original articles on contract, so there was no body of work already done to revise and rework.<sup>4</sup> And Holmes was running out of time. The lectures were scheduled for the late fall of 1880. He did not start writing his contract lectures until the summer of 1880.<sup>5</sup>

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4 Contract law was not, however, *terra incognita* for Holmes. In the course of preparing his edition of Kent's *Commentaries*, he updated the footnotes to Kent's treatment of contracts. See 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 607-763 (Oliver Wendell Holmes, Jr. ed., Boston, Little, Brown, & Co. 12th ed. 1873). In addition, Holmes had reviewed both the first and second editions of Langdell's casebook on contracts, *A Selection of Cases on the Law of Contracts*, adding a brief review of William Anson's treatise on contracts, *Principles of the English Law of Contract*, to his review of Langdell's second edition. See Book Notices, 5 AM. L. REV. 534, 539-40 (1871) (reviewing 1 C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (Boston, Little, Brown, & Co. 1st ed. 1871)); Book Notices, 6 AM. L. REV. 340, 353-54 (1872) (reviewing 2 C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (Boston, Little, Brown, & Co. 1st ed. 1871)); Book Notices, 14 AM. L. REV. 233, 233-35 (1880) (reviewing C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (Boston, Little, Brown, & Co. 2d ed. 1879), and discussing WILLIAM R. ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT (Oxford, Clarendon Press 1879)); see also Harry C. Shriver, *Preface* to JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS at vii (Haity C. Shriver ed., 1936) (1871-72) [hereinafter JUSTICE HOLMES] (noting that Holmes wrote these unsigned *Book Notices*); Harry C. Shriver, *A Bibliography of Selected Articles and Books Relating to Justice Oliver Wendell Holmes*, in JUSTICE HOLMES, *supra*, at 253 (same).

5 See MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1872, at 223 (1963).

Triumphing over these intense deadline pressures, Holmes elaborated a coherent theory of contract consistent with his previously developed theories. In order to appreciate fully that achievement, we need to understand fully Holmes's theory of contract. But Holmes gave his three lectures on contract well over a century ago. If we are to understand fully the theory set forth in those lectures, we must recover their historical context. Besides the ordinary reason for reading any serious thinker in historical context, there are additional reasons for reading Holmes that way. Holmes carefully avoided identifying any influences on his thought, and his writing is aphoristic and complex. Therefore, often, his meaning is elusive.

The relevant historical context for any theorist includes at least two elements: what he brings to the table—his philosophical and methodological commitments and his overarching theoretical agenda—and who is already at the table—the contemporary theorists whose works present obstacles or provide aid. In Part I, we will explore what Holmes brought to the table. We will examine the positivism of John Stuart Mill and Auguste Comte that Holmes seemed to adopt as his philosophical and methodological base. Also, we will explore Holmes's overarching theoretical agenda by analyzing the first four lectures of *The Common Law*.<sup>6</sup>

In Part II, we will look at who was already at the table. We will examine Henry Sumner Maine's influential theory that contract law evolved from primitive formal contracts to modern informal or consensual contracts. We will examine Frederick Pollock's solid, careful treatise, *Principles of Contract*,<sup>7</sup> published in 1876, which related in a systematic way the prevailing will theory of contract to the current English law. We will examine Christopher Columbus Langdell's brilliant but quirky *A Summary of the Law of Contracts*,<sup>8</sup> published in 1880. Finally, focusing on what Holmes brought to the table and on those already at the table, we will define more precisely the challenges facing Holmes as he drafted his lectures on contract.

In Part III, we will place Holmes's three contract lectures in their relevant historical context and use that context to explore the positiv-

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6 OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881).

7 SIR FREDERICK POLLOCK, *PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY* (London, Stevens 1st ed. 1876).

8 C.C. LANGDELL, *A SUMMARY OF THE LAW OF CONTRACTS* (Boston, Little, Brown, & Co. 2d ed. 1880) [hereinafter LANGDELL, SUMMARY]. *A Summary of the Law of Contracts* was first published as a supplement to the second edition of C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* (Boston, Little, Brown, & Co. 2d ed. 1879) [hereinafter LANGDELL, SELECTION OF CASES].

ist character of Holmes's contract theory. In Part IV, we will assess the strengths and weaknesses of that theory.

## I. THE CONTEXT OF HOLMES'S CONTRACT LECTURES: HOLMES'S PHILOSOPHICAL COMMITMENTS AND AGENDA

### A. *The Positivism of Mill and Comte*

In interpreting and evaluating a theorist's work, it is helpful to know what philosophical tradition he is working in, for that context helps us identify the probable goals he seeks to achieve, the things he may assume, and the possible specialized meanings of terms he may use.

What philosophical tradition was Holmes working in? Holmes himself doesn't say; neither in *The Common Law* nor in any of his other articles or speeches does Holmes admit an allegiance to any particular school or tradition.<sup>9</sup> He scrupulously followed the advice he gave to others not to attach a "fighting tag"<sup>10</sup> to one's work.

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9 Holmes came close to doing so only twice: First, in his article on primitive notions in modern law, he cited Edward Burnett Tylor's work *Primitive Culture* in such a way and with such praise as to indicate that Tylor strongly influenced his own analysis. See O.W.H., Jr., *Primitive Notions in Modern Law*, 10 AM. L. REV. 422, 428-30 (1876) [hereinafter O.W.H., *Primitive Notions*] (citing EDWARD BURNETT TYLOR, *PRIMITIVE CULTURE* 285 (New York, H. Holt 1st Am. ed. 1874)), reprinted in FREDERICK ROGERS KELLOGG, *THE FORMATIVE ESSAYS OF JUSTICE HOLMES* 129, 135-37 (1984). In reworking this essay into his first lecture in *The Common Law*, Holmes characteristically deleted this fulsome praise of Tylor, with its implication of influence. See HOLMES, *supra* note 6, at 5-33.

Second, in his second article on primitive notions in modern law, Holmes explicitly characterized the progression in thought he had sketched in his first *Primitive Notions* article, in the terminology of Comte:

In an earlier article, the frame of mind with which we have to deal was shown in its theological stage, to borrow Comte's well-known phraseology, as when an axe was made the object of criminal process; and also in the metaphysical, where the language of personification alone survived, but survived to cause confusion in reasoning.

O.W. Holmes, Jr., *Primitive Notions in Modern Law No. II*, 11 AM. L. REV. 641, 654 (1877) [hereinafter Holmes, *Primitive Notions II*] (footnote omitted), reprinted in *THE FORMATIVE ESSAYS OF JUSTICE HOLMES*, *supra*, at 147, 160. Again, this explicit reference to Comte was deleted in *The Common Law* version of this article. See HOLMES, *supra* note 6, at 265-317.

10 Letter from Oliver Wendell Holmes to Harold Laski (Sept. 15, 1916), in 1 HOLMES-LASKI LETTERS 21 (Mark DeWolf Howe ed., 1953). In his letter to Harold Laski dated September 15, 1916, Holmes criticized Laski's article, *The Political Theory of Disruption*, 10 AM. POL. SCI. REV. 437 (1916), reprinted in HAROLD LASKI, *THE PROBLEM OF SOVEREIGNTY* 27 (1917), in part as follows:

We do, however, have one invaluable aid in placing Holmes in the appropriate philosophical context. From 1865 until his death in 1935, Holmes kept a list of books he had read, by year and sometimes by month. These book lists survived, and the list for the period from 1865 through 1880 has been published.<sup>11</sup> We have the opportunity, then, to read Holmes's work against the background of the books he himself had read.<sup>12</sup> By comparing Holmes's writing with Holmes's reading, we may be able to trace more precisely the specific influences on Holmes's thought.

Holmes was a prodigious reader; the search for specific influences in the mass of books on his reading list seems a daunting task. Fortunately, three separate indicators suggest that the works of Mill on Holmes's reading list were particularly important to his intellectual development. First, Holmes's sympathetic and knowledgeable biographer, Mark DeWolfe Howe, singled out the period from 1865 to 1867 as critically important for Holmes's intellectual development and emphasized the strong influence of Mill's work on Holmes in that period.<sup>13</sup> Second, significant events in Holmes's life point in this direction as well. In the summer of 1866, Holmes traveled to England where he met Mill himself.<sup>14</sup> Howe characterizes this trip as "the pilgrimage of a maturing mind which had already found its tenden-

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I should drop pragmatic and pluralistic. Perhaps I am the more ready to say so because after honest attention I don't think there is much in either of those parts of W. James's philosophy. But in any event, though Pound also talks of pragmatism, the judging of law by its effects and results did not have to wait for W.J. or Pound for its existence, and to my mind it rather diminishes the effect, or checks the assent you seek from a reader, if you unnecessarily put a fighting tag on your thought.

Letter from Oliver Wendell Holmes to Harold Laski, *supra*, at 20-21 (footnote omitted).

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

12 We even have Holmes's own notes on some of his reading. Holmes kept detailed notes on some of the books he read from before 1876 through 1897 in a bound folio-sized volume. This "Black Book," as it is called, is at the Harvard Law School Library, together with a number of facsimile copies. See Oliver Wendell Holmes, Jr., *The Black Book of Oliver Wendell Holmes (1876-97)* (unpublished collection on file with the Harvard Law School Library).

13 See MARK DEWOLFE HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS, 1841-1870*, at 210, 212-17 (1957). Howe's judgment deserves respect; he was Holmes's secretary for a time, edited volumes of Holmes's letters, and immersed himself in Holmes's life and thought before publishing the first two volumes of a projected multi-volume biography.

14 See *id.* at 223-44.

cies."<sup>15</sup> Third, the number and weight of Mill's books on Holmes's reading list suggest their importance: from 1865 to 1867, Holmes read seven works by Mill, including his two formidable technical works in philosophy, *A System of Logic* and *An Examination of Sir William Hamilton's Philosophy*.<sup>16</sup>

The works of Mill that Holmes read all reflect Mill's commitment to certain basic tenets of Comte's positivism.<sup>17</sup> Mill made clear the extent of his agreement with Comte in his 1865 essay, *Auguste Comte and Positivism*,<sup>18</sup> which Holmes read in 1865 or 1866.<sup>19</sup> Mill explicitly approved Comte's evolutionary theory of the three stages of human thought and Comte's views on the limitations on human knowledge. A brief review of those basic Comtean positions, as explained by Mill, may 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 wills of living beings, either natural or supernatural. In the metaphysical mode of thought, phenomena are explained by abstract metaphysical entities, such as the "natures" and "efficient causes" of things.<sup>20</sup> In the final, positive mode of thought, the futile search for the essential nature and ultimate causes of events is given up, and phenomena are

15 *Id.* at 208.

16 The seven works are John Stuart Mill, *A System of Logic, Raciocinative and Inductive* (1843), John Stuart Mill, *An Examination of Sir William Hamilton's Philosophy* (1866), John Stuart Mill, *Auguste Comte and Positivism* (1865), John Stuart Mill, *Considerations on Representative Government* (1861), John Stuart Mill, *Dissertations and Discussions: Political, Philosophical, and Historical* (1859), John Stuart Mill, *Principles of Political Economy* (1848), and John Stuart Mill, *Utilitarianism* (1863). See Little, *supra* note 11, at 169, 171, 173-74. In addition, Holmes read extensively in the contemporary critical commentary on Mill, including John Henry Bridges, *The Unity of Comte's Life and Doctrine: A Reply to Strictures on Comte's Later Writings, Addressed to J.S. Mill* (1866), David Masson, *A Recent British Philosophy* (1865), James McCosh, *An Examination of Mr. J.S. Mill's Philosophy* (1866), and Herbert Spencer, *Mill Versus Hamilton: The Test of Truth*, 1 FORT. REV. 531 (1865). For a reproduction of this reading list, see Little, *supra* note 11, at 171-74. Holmes's reading of Mill was accompanied by extensive reading of other English and American positivists, including George Henry Lewes, *The Biographical History of Philosophy* (1857), Aristotle, and Chauncey Wright's devastating, rigorously positivist review of Herbert Spencer's work. See Little, *supra* note 11, at 170.

17 For a careful discussion of Mill's positivism, see W.M. SIMON, *EUROPEAN POSITIVISM IN THE NINETEENTH CENTURY: AN ESSAY IN INTELLECTUAL HISTORY 172-201* (1963).

18 JOHN STUART MILL, *Auguste Comte and Positivism*, in 10 COLLECTED WORKS OF JOHN STUART MILL 261 (J.M. Robson ed., 1969).

19 See Little, *supra* note 11, at 169.

20 See MILL, *supra* note 18, at 265.

explained by their relationships to other phenomena. As Mill explained it,

We know not the essence, nor the real mode of production, of any fact, but only its relations 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 phænomena together, and the constant sequences which unite them as antecedent and consequent, are termed their laws. The laws of phænomena are all we know respecting them.<sup>21</sup>

These laws of phenomena are all men have ever wanted or needed to know, however, since

the knowledge which mankind, even in the earliest ages, chiefly pursued, being that which they most needed, was *foreknowledge*. . . . 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 phænomena, and power over them, depends on knowledge of their sequences . . . .<sup>22</sup>

The heavy emphasis on positivism in Holmes's reading during his formative years gives us this hypothesis: in his own later work in legal theory, Holmes attempted to apply the positivism of Mill and Comte to the law. Reading Holmes's work in light of his early reading seems to confirm that hypothesis, as the next Section suggests.

Before we move on to examine the evidence confirming that hypothesis, however, we need to be very clear about the meaning of the term "positivism" in the hypothesis. "Positivism" as applied to the law may have a number of meanings different than the one exclusively intended here. It might mean the legal positivism of John Austin, who carefully distinguished between law and morality by defining "positive law" as rules that were commands of the sovereign and, hence, were laws by virtue of their being "laid down" by the sovereign.<sup>23</sup> It might mean the textual positivism of statutory law, which holds that all law

21 *Id.*

22 *Id.* at 266. Mill was not as fastidious as Comte, for Mill accepted these scientific laws of antecedence and consequence as laws of *causal* relationships between phenomena, although Mill agreed that ultimate or efficient (metaphysical) causes cannot be known. *See id.* at 292-94.

23 Austin thus shared the conception of the nineteenth-century German Pandectists that law was a positive science "in which the rules of law and how to apply them were drawn exclusively from the system, concepts, and doctrinal principles: extralegal values or aims, whether religious, social, or scientific, were denied any title to create or alter the law." FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE* 341 (Tony Weir trans., Clarendon Press 1995).



comes from the state legislature and exists only by the legislature's command. It might mean one of the modern variants of philosophical positivism:<sup>24</sup> *logical positivism*, which focuses on meaning, logic, and verifiability; *analytic or natural language philosophy*, which focuses on the meaning and logic of natural language; and *evolutionary positivism, à la Herbert Spencer*,<sup>25</sup> which sees universal progress in all fields of

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24 For a helpful attempt to distinguish the quite different philosophies that share the common label "positivism," see Nicola Abbagnano, *Positivism*, in 6 THE ENCYCLOPEDIA OF PHILOSOPHY 414-19 (Nina Langiulli trans. & Paul Edwards ed., 1967).

25 Many people believe that Holmes was a follower of Herbert Spencer and that Holmes, too, was a social Darwinist. A leading example of this interpretation of Holmes is Jan Vetter's 1984 article on Holmes. See Jan Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CAL. L. REV. 343 (1984). Vetter claimed that Holmes's evolutionary theory in *The Common Law* was a social Darwinist theory. Social Darwinists believed that the law of survival of the fittest applied to human beings, classes, societies, or cultures: thus, human evolution favored the fittest. See, e.g., HERBERT SPENCER, *THE STUDY OF SOCIOLOGY* 324-49 (University of Mich. Press 1961) (1873). See generally RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* (rev. ed. 1955); DAVID WILTSHIRE, *THE SOCIAL AND POLITICAL THOUGHT OF HERBERT SPENCER* (1978). The weakness of Vetter's view can be seen by asking a simple question: if Holmes was a social Darwinist, what class, group, individual, or society is the beneficiary of the process of natural selection that results in the "survival of the fittest"? The question has no answer because Holmes's theory is a theory of the evolution of the human thought about law and the concomitant evolution of legal standards. Those standards, he thought, become more rational and scientific as the accumulated experience of mankind provides us with more positive knowledge. This is scientific, gnostic progressivism, not social Darwinism. Vetter nevertheless attempts to answer the question by saying that the evolution Holmes traced benefits the "supreme power in the community," *the ordinary reasonable man*. Vetter, *supra*, at 366. But this is absurd. Throughout *The Common Law*, Holmes recognized that the ordinary reasonable man was a fiction, used in the intermediate general standard of liability to get the jury's judgment about the teaching of experience or the community's objective standard of moral blameworthiness. See HOLMES, *supra* note 6, at 88-89, 119-21. No self-respecting social Darwinist would have said that natural selection favors a fictional entity.

Vetter used Holmes's 1873 commentary on the Gas-Stoker's Strike to support a social Darwinist reading of Holmes. Holmes, *The Gas-Stoker's Strike*, 7 AM. L. REV. 583 (1873), *reprinted in* 44 HARV. L. REV. 795 (1931). In that commentary, Holmes stated, "the more powerful interests [in the community] must be more or less reflected in legislation; which, like every other device of man or beast, must tend in the long run to aid the survival of the fittest." *Id.* at 796. This seems a clear adoption of the social Darwinist position until one puts it into its full context. Holmes wrote in response to an article in *The Fortnightly Review* accusing the courts of implementing class legislation in jailing striking workers. Holmes used that occasion to attack Herbert Spencer's theory of legislation in Spencer's *The Study of Sociology* (serialized in 1872 and published in 1873). In doing so, Holmes used Spencer's own theories against him. First, Holmes pointed out that it was anomalous "that believers in the theory of evolution and in the natural development of institutions by successive adaptations to the environment, should be found laying down a theory of government intended to estab-

reality, modeled on Darwinian biological evolution, from the simple to the complex and from the homogeneous to the heterogeneous. As used in this Article, "positivism" refers exclusively to the philosophical positivism of Comte and Mill and does not refer to any of these other, different meanings of positivism.

*B. The First Four Lectures in The Common Law: Holmes's Positivist Theories of Common Law Development and the Evolution of Liability Standards*

Reading the first four lectures in *The Common Law* while looking back at the positivist works of Mill that Holmes had read suggests that

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lish its limits once for all by a logical deduction from axioms." *Id.* at 795. Second, Holmes used Spencer's theory that legislation cannot eliminate burdens but can only shift them to argue against Spencer's condemnation of "class legislation." *Id.* All legislation is class legislation, said Holmes, as it merely shifts a burden from one class to another. Spencer cannot criticize any legislation as class legislation, then, because legislation cannot be anything else, and because all legislation necessarily furthers the survival of the fittest. Even legislation honestly intended to promote the greatest good of the greatest number is class legislation, because the greatest number is a class, and we cannot tell "for the present," *id.* at 796, what would be the greatest good of the greatest number in the long run. "The objection to class legislation," said Holmes, "is not that it favors a class, but either that it fails to benefit the legislators, or that it is dangerous to them, . . . or that it transcends the limits of self preference which are imposed by sympathy." *Id.* After going on to point out our ignorance about the long-range consequences of legislation, Holmes concludes that "the fact is that legislation in this country, as well as elsewhere, is empirical. It is necessarily made a means by which a body, having the power, put burdens which are disagreeable to them on the shoulders of somebody else." *Id.*

Holmes's commentary on the Gas Stoker's Strike, then, was a subtle and devastating attack on Herbert Spencer, the social Darwinist guru; it was not a follower's friendly, constructive criticism. First, it adopts Spencer's social Darwinist assumptions to use against him. Second, it reduces the "survival of the fittest" to a truism, as we can describe the consequences of any set of social or natural conditions as "the survival of the fittest." Third, it points out that the real problem for a theory of legislation is the acquisition of scientific knowledge about the consequence of legislation. The current theory of legislation, Holmes thought, is still in the "empirical" stage, without scientific positive knowledge of the consequences of different legislation. It is a thoroughly positivist critique of a social Darwinist theory of legislation. This interpretation is confirmed by a look at Holmes's own theory of legislation, elaborated in *The Path of the Law*, 10 HARV. L. REV. 457 (1897) [hereinafter Holmes, *The Path of the Law*], reprinted in OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 167 (1920), and *Law in Science and Science in Law*, 12 HARV. L. REV. 443 (1899). There we find thoroughly positivist theories of legislation, without any talk of the survival of the fittest or natural selection.

Holmes's overarching theory, methodology, and agenda were applications of the positivism of Mill and Comte.<sup>26</sup>

Holmes put into his first lecture the historical analysis of his 1876 article, *Primitive Notions in Modern Law*,<sup>27</sup> in which he traced certain modern laws back to their origins in the primitive notion that the thing that caused harm ought to be held liable, whether that thing was a physical object, an animal, or a slave. Just as he did in that earlier article, Holmes derived from this history the practical conclusion that we ought to reconsider and perhaps revise rules that are merely "sur-

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26 Reading those lectures in the context of all the works Holmes had read, however, suggests that Holmes borrowed some of the details of his descriptive theory from other writers. The two that Holmes seemed to have borrowed from most were the German legal scholar Rudolf von Jhering and the English historical anthropologist Edward Burnett Tylor. From Tylor's pioneering work, *Primitive Culture*, Holmes adopted Tylor's famous theory of survivals, the idea that primitive notions survive into later times. See *supra* note 9 and accompanying text. Tylor was a Comtean positivist, too, so here Holmes did not seem to be straying far from his central commitments in picking up the details to incorporate into his theory.

Jhering was not a thoroughgoing positivist. Nevertheless, Holmes seems to have borrowed a number of details from Jhering's famous book, RUDOLF VON JHERING, *DER GEIST DES ROMISCHEN RECHTS* (1865) (partial English translation of Vol. I, Title II, *Method of the Study of the History of Law* on file with author and the *Notre Dame Law Review*, from Richard Danzig, Unpublished Teaching Materials (1975)), which Holmes read in 1879. See Little, *supra* note 11, at 200. The similarities between Holmes and Jhering are striking. Holmes and 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 realisability" or effectiveness of the law in achieving its social goals, and 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 direct borrowing finds support in comparisons of Holmes's writings before and after 1879. The basic material in the first lecture of *The Common Law* comes from Holmes's 1876 article *Primitive Notions in Modern Law*, but the additions are ideas similar to those of Jhering: the process of legal development and the notion of unarticulated legislative policy as the secret root of judicial decision. See HOLMES *supra* note 6, at 5-33; JHERING, *supra*, at 21-34; O.W.H., *Primitive Notions*, *supra* note 9. Similarly, Holmes's 1873 article, *The Theory of Torts*, covered much the same ground and included many of the same ideas as the third and fourth lectures of *The Common Law*, but the additions are again ideas similar to those of Jhering: the foreseeability test derivable from a legislative policy and the emphasis on formal realisability or the effectiveness of the law in achieving its ends. See HOLMES, *supra* note 6, at 63-129; JHERING, *supra*, at 27-34; Note, *The Theory of Torts*, 7 AM. L. REV. 652-63 (1873), reprinted in THE FORMATIVE ESSAYS OF JUSTICE HOLMES, *supra* note 9, at 117; see also HOLMES, *supra* note 4, at vii, 253 (noting that Holmes authored this unsigned article).

27 O.W.H., *Primitive Notions*, *supra* note 9, at 129-46.

vivals from more primitive times.”<sup>28</sup> But Holmes went further than that in *The Common Law* and derived from that history a general theory of common law development. In form, Holmes recognized, the growth of the law is logical, with each new decision purportedly derived syllogistically from prior precedents. However, in substance, the growth of the law is not logical but legislative: judges faced with old precedents based on outmoded notions will find new policy reasons for the old rules, and those new policies will subsequently control their development. The growth of the law thus reflects changes in the underlying legislative grounds of decision:

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.<sup>29</sup>

Holmes used the term “policy” throughout the lectures to refer to the consequences to society of a particular rule or decision.<sup>30</sup>

Consistent with this theory of common law development, Holmes’s general theory of civil and criminal liability was evolutionary. Holmes attempted to point out and justify a “tendency” in the progress of the law.<sup>31</sup> Holmes traced the same progression of liability standards in both tort and criminal law, which he saw had both started with standards of personal moral blameworthiness, based on the passion for revenge. The public policy furthered by those standards was that of preserving the peace by satisfying the passion for vengeance, which would, if unsatisfied, erupt into socially disruptive private retribution.<sup>32</sup> The law had moved on from that primitive beginning. Retaining the language of morals—malice, intent, and negligence—the law evolved into a general, external standard of what would be morally

28 HOLMES, *supra* note 6, at 33.

29 *Id.* at 32.

30 *See, e.g., id.* at 16 (discussing the “true reason” for liability of shipowners and innkeepers); *id.* at 26–27 (discussing “hidden ground[s] of policy” for holding a ship itself liable in maritime law); *id.* at 28 (suggesting a “plausible explanation of policy” for treating freight as “the mother of [seamen’s] wages”); *id.* at 115 (suggesting two policies underlying an objective standard of tort liability).

31 *Id.* at 63 (discussing explicitly this “tendency” for the theory of torts, implicitly for criminal law); *cf. id.* at 5 (“The law embodies the story of a nation’s development through many centuries . . . . In order to know what it is, we must know what it has been, and what it tends to become.”).

32 *See id.* at 36.

blameworthy in the average member of the community.<sup>33</sup> Thus, if a defendant acted with knowledge of circumstances from which an ordinary member of the community would predict possible harm of a certain type to others, the defendant could be held liable under that external standard even though his motives were blameless, he himself intended no harm or wrong to anyone, and he was not careless. If the ordinary prudent man would have been to blame for acting as the defendant acted because he would have foreseen danger to others, the defendant may be held liable. Whether the ordinary prudent man would foresee danger from a given act under certain known circumstances depends on the experience of mankind with the danger of such acts under similar circumstances.<sup>34</sup> This external, general standard, linked to what would be morally blameworthy in the average man, serves the legislative policy of protecting people from harm by deterring dangerous behavior.<sup>35</sup> At the same time, it serves the legislative policy of encouraging socially desirable conduct that poses no foreseeable danger to others.<sup>36</sup>

As experience with certain acts under certain circumstances makes the danger of those acts clearer, the vague liability standard still formulated in morally-freighted terms will continually give way to more precise and specific rules imposing liability for certain conduct under given circumstances.<sup>37</sup> These more specific standards will be more effective in achieving the legislative policies of deterring dangerous activity while encouraging socially desirable conduct.<sup>38</sup> That is so because the specific standards are more fixed, definite, and certain than the vague standard of moral blameworthiness in the average man. Hence, the rules are more easily knowable and can more effectively influence peoples' behavior through their threat of criminal or civil liability.

This evolutionary development through three distinct phases shows progress on two levels. First, the law as law improves. Since law is aimed only at external results, it improves as its liability standards become more objective and, consequently, more effective at achieving those external results, whatever they may be.<sup>39</sup> Second, the law im-

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33 This, according to Holmes, is true in both criminal and tort law. *See id.* at 61-62, 86-88.

34 *See id.* at 61-62, 119-20.

35 *See id.* at 42-43, 47-48, 56-57, 86-88, 115.

36 *See id.* at 77-78, 115.

37 *See id.* at 89-92, 119-21, 129.

38 *See id.* at 88-89.

39 *See id.* at 33, 42, 88-89. The general standard of average moral blameworthiness is more effective at deterring dangerous conduct because people know their per-

proves because the policy base of the law improves. The only policy served by the subjective liability standard of personal moral blameworthiness is the minimal one of preserving the peace by satisfying the passion for revenge.<sup>40</sup> But the passion for revenge is not one that we should encourage.<sup>41</sup> As liability standards evolve toward objective, external standards, the law starts to serve the more enlightened policy of protecting individuals from harm by deterring conduct that experience has shown to be dangerous.<sup>42</sup>

A number of elements in Holmes's theory suggest that it was strongly influenced by the positivist philosophy of Comte and Mill.

Holmes adhered to two commitments in his evolutionary theory that seem to be derived from the positivist insistence on the significance of *foreknowledge*, based on knowledge of the scientific laws of antecedence and consequence. These commitments were to the external purpose of the law, which operates by the threat of sanctions, giving men incentives to avoid certain acts,<sup>43</sup> and to the consequent need for the law to be knowable if it is to be effective in achieving its external purpose.<sup>44</sup>

Holmes seemed to apply the positivist theory that human thought always progresses through three stages. In his *Primitive Notions* article preceding *The Common Law*, Holmes had characterized the evolution from early liability rules, based on the attenuated fault of the owner of the causing agent, to later liability rules based on the attenuated fault of the owner of the causing agent, as a progression from theological to metaphysical thinking, explicitly.<sup>45</sup> Holmes did not explicitly characterize the three-stage evolution in liability standards sketched in *The*

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sonal inadequacies will not be taken into account. The hasty, awkward, and naturally imprudent are thus given greater incentive to act safely. *See id.* at 40, 43, 86–87. Moreover, the final fixed, definite, and certain rules are more effective than the vaguer standard of average moral blameworthiness from which they evolve, because it is easier to know the specific rules and to predict when they will be applied. *See id.* at 88–89.

40 *See id.* at 36.

41 *See id.*

42 *See id.* at 46–47, 61–62, 86–88. The achievement of this policy is limited only by the need to preserve the law's effectiveness: imposing liability for dangerous conduct that would not be morally blameworthy in the average member of the community might be "too severe for that community to bear." *Id.* at 42; *see also id.* at 62, 128–29. This practical limitation becomes less and less significant as the process of specification leads to fixed and definite liability rules, based on the teachings of experience about the danger of certain conduct under given circumstances, for those rules do not refer to moral blameworthiness in any form.

43 *See id.* at 42, 88.

44 *See id.* at 88–90.

45 *See Holmes, Primitive Notions II, supra* note 9, at 654.

*Common Law* as progress from theological to metaphysical to positive, but the structure of the theory tracks with these three stages. In the first stage, liability standards reflect a primitive desire for revenge against the causing agent, based on its ascribed evil will. In the second stage, liability standards are based on an imaginary thing—the moral blameworthiness of the average member of the community. In the final stage, liability rules are fixed, definite, and certain. Those liability rules are *in the form* of scientific laws of antecedence and consequence, identifying particular behavior which, under particular circumstances, will be followed by particular legal sanctions. Moreover, those liability rules are *based on* scientific laws about the danger of particular behaviors under particular circumstances, discovered by experience.

Consistent with positivist reductive epistemology, Holmes continually reduced morally-freighted terms in the law—such as intent, malice, and negligence—to descriptions of voluntary action with knowledge of circumstances enabling a reasonable man to foresee danger.<sup>46</sup> These reductions purge the law of metaphysical notions and relate liability standards to scientific laws of antecedence and consequence.

Finally, Holmes's theory of common law development can be seen as thoroughly positivist. If the only things we can know are our experiences of phenomena and the scientific laws of similitude, antecedence, and consequence that we derive from those experiences, it follows that the only basis for judicial decision we can know must be the consequences of that decision—its legislative policy. Thus, it follows from the positivist epistemology that, whatever judges think the reason for their decision may be, the only knowable basis for the decision is its legislative policy—its consequences.

## II. THE CONTEXT OF HOLMES'S CONTRACT LECTURES: CONTEMPORARY CONTRACT THEORISTS AND THEIR CHALLENGE FOR HOLMES

In the late 1870s, two theories about contract were widely accepted. Those theories were the will theory of contract, in its most up-to-date formulation by Friedrich Carl von Savigny,<sup>47</sup> and Henry Sumner Maine's theory that contract law evolves from primitive formal

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46 See HOLMES, *supra* note 6, at 89–92, 119–21, 129.

47 See FRIEDERICH CARL VON SAVIGNY, *SYSTEM DES HEUTIGEN ROMISCHEN RECHTS* §§ 104–40, at 5–309 (Berlin, Veit und Comp. 1848), *cited in* POLLOCK, *supra* note 7, at 1–2, and in JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 162–63 nn.3–4 (1991).

contracts to modern consensual contracts.<sup>48</sup> Before we turn to Holmes's immediate predecessors, Pollock and Langdell, it makes sense to examine both the common background they shared with Holmes and the problems it posed for him.

A. *Deep Background: Savigny's Will Theory and Maine's Evolutionary Theory*

Since 1806, one form or another of the will theory of contract had dominated the thinking about the substantive law of contract in England and the United States. The will theory, simply stated, was this: contractual duties derive from the subjective will of a party to enter a binding contract and thus voluntarily to accept the associated contractual obligations. In his work on the Roman law, the German legal scholar Savigny had elaborated a version of the will theory that was popular and influential at the time Pollock and Langdell developed their theories. For Savigny, a contract is just a special form of agreement, and an agreement requires the consent of two or more persons. Each person must have a distinct intention, the intention of all the parties must be the same, and the parties must, through mutual communication, be aware that their intentions agree.<sup>49</sup>

To a thoroughgoing positivist like Holmes, the will theory of contract would seem to be a theological explanation of legal liability, since it explains legal phenomena by reference to the subjective wills of living beings. The will theory, to one extent or another, would divert attention away from what Holmes believed was the real ground of all legal obligation—considerations of public policy, or what would be expedient for the community concerned.

Maine, the most influential English contract theorist of his day, argued that contract law developed historically by moving from objective standards of contracting (formal contracts) to subjective standards of contracting (consensual contracts). In his influential 1861 work on ancient law, Maine had analyzed the apparent progression of contract law in ancient Rome from purely formal contracts, where the actual intent of the parties was unimportant and a ritualized form was the only consideration, through progressively less formal contracts to the consensual contracts, in which the contractual obligation is an-

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48 See generally HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* (London, J. Muttay 10th ed. 1884) (containing an introduction and appendices by Frederick Pollock).

49 See 3 SAVIGNY, *supra* note 47, at 309.



nexed to the consensus or mutual assent of the parties.<sup>50</sup> Maine saw this progression as a movement from a primitive to a more modern conception of contract:

The Consensual Contracts, it will be observed, were extremely limited in number. But it cannot be doubted that they constituted the stage in the history of Contract-law from which all modern conceptions of contract took their start. The motion of the will which constitutes agreement was now completely insulated, and became the subject of separate contemplation; forms were entirely eliminated from the notion of contract, and external acts were only regarded as symbols of the internal act of volition.<sup>51</sup>

Maine proceeded to generalize the Roman example. He concluded that the Roman progression was the starting point for modern Western ideas of contract, based on Roman notions, and that the Roman progression from formal to consensual contracts was probably typical of the development in other ancient societies.<sup>52</sup>

Maine's evolutionary theory therefore seemed to be just the reverse of Holmes's general theory that law evolved by moving from subjective standards to objective standards. Moreover, Maine's evolutionary theory seemed to buttress the prevailing will theory of contract, for it claimed that the "modern conception of contract" (rooting contractual obligations in the wills of the contracting parties) is the result of an ineluctable evolution away from primitive conceptions of contract.

### B. *Immediate Background: Pollock and Langdell*

The obstacles posed by the will theory and Maine's evolutionary theory were made more troublesome by the work of Holmes's contemporaries. By 1880, there had been published full-length works on contract by Frederick Pollock in 1876,<sup>53</sup> and William Anson<sup>54</sup> and

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50 See MAINE, *supra* note 48, at 324. Holmes read this edition of Maine's *Ancient Law* in 1865 or 1866, and again in 1868. See Little, *supra* note 11, at 169, 178.

51 MAINE, *supra* note 48, at 324.

52 See *id.*

The Contract-law of all other ancient societies but the Roman is either too scanty to furnish information, or else is entirely lost . . . . From the absence, however, of everything violent, marvelous, or unintelligible in the changes I have described, it may be reasonably believed that the history of Ancient Roman Contracts is, up to a certain point, typical of the history of this class of legal conceptions in other ancient societies.

*Id.* at 328.

53 POLLOCK, *supra* note 7.

54 ANSON, *supra* note 4.

Christopher Columbus Langdell in 1879.<sup>55</sup> Anson's was the least original of the three. He aimed to provide a comprehensive basic textbook for students.<sup>56</sup> He therefore covered topics not covered in Pollock's more limited treatise, but he followed Pollock's lead on most matters related to theory.<sup>57</sup> It makes sense, then, to focus on the more original works of Pollock and Langdell. Each of those works, to one degree or another, combined description and theory. Each work was more theoretically sophisticated and insightful than any contemporary work in torts. Each work showed a sophisticated grasp of the cases and the literature. And, although Pollock and Langdell both claimed their works were "scientific," neither Pollock nor Langdell followed the rigorously positivist tradition in which Holmes was working.

### 1. Frederick Pollock

The Pollock and Langdell treatises were as different as night and day. Pollock's treatise was the more traditional of the two. Reflecting the spirit of his times, Pollock described his work as "scientific."<sup>58</sup> The structure of his presentation suggests that he understood legal science in the following way. An analysis is scientific if it identifies the fundamental normative principles underlying a particular area of the law, relates basic legal doctrine to those fundamental principles, and accurately classifies the developed law using analytical categories that show the relationships to basic principles.<sup>59</sup> The basic principle, for Pollock, was the principle identified by Savigny: mutual common intention of the parties as the *sine qua non* of an enforceable contract.<sup>60</sup> To that, he added Maine's supporting theory that contract evolved from formal to consensual contracts.<sup>61</sup> Thus, although the form of Pollock's "scientific" analysis was similar to that of the eighteenth-century, natural law legal science of William Jones, the content of his basic principle as a single, abstract, normative concept, rather than as a set of natural law principles, seemed to make his legal science much less

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55 LANGDELL, SUMMARY, *supra* note 8.

56 See ANSON, *supra* note 4, at v.

57 See *id.* at vii.

58 POLLOCK, *supra* note 7, at vii.

59 Cf. SIR WILLIAM JONES, ESSAY ON THE LAW OF BAILMENTS 4, 123 (London, S. Sweet 1833) (1781) (explaining law of bailment by reference to fundamental natural law principles), quoted in A.W.B. SIMPSON, *Innovation in Nineteenth Century Contract Law*, in LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW 176-77 (1987) [hereinafter LEGAL THEORY AND LEGAL HISTORY].

60 See POLLOCK, *supra* note 7, at 1-8.

61 See *id.* at 116-52.

like that of Jones and much more like the Kantian legal science of Savigny and the German Pandectists who followed him.<sup>62</sup>

Pollock's detailed analyses reflect the significance he attached to the will theory of contract and to Maine's evolutionary theory.

Pollock applied to the history of the English contract law Maine's theory that contract law progressed from formal to consensual contracts. Pollock saw this progression repeated in the common law's movement from the formal covenant under seal to informal consensual contracts.<sup>63</sup> Pollock carried over this notion into his treatment of consideration in the common law. First, he noted that common-law consideration was significantly different from the modern civil law "cause," which had derived from the Roman requirement of *causa* for consensual contracts.<sup>64</sup> Pollock then speculated that the English consideration might be "directly descended" from the Roman *causa* nevertheless, since the English consideration could easily be derived from the Roman *causa* by determining the "common elements in the various sets of facts which under the name of *causa* made various kinds of contracts actionable."<sup>65</sup> Pollock carefully emphasized that this was a tentative, speculative thesis; he put it forward as only a possibility. He recognized that the history of consideration was obscure: after canvassing some of the historical evidence supporting his hypothesis, he said, "A more complete search than we have been able to make might perhaps be rewarded by the discovery of positive evidence on this point."<sup>66</sup>

In any event, Pollock's further analysis of consideration was based in part on the premise that consideration, like *causa*, is a requirement only for informal, consensual contracts and not for formal contracts.<sup>67</sup> Pollock thus carried over into his discussion of consideration Maine's theory that contract ineluctably progressed from formal to consensual contracts. Pollock saw the possibility that consideration arose in eq-

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62 For a careful analysis of Savigny's legal science, see WIEACKER, *supra* note 23, at 289-316. For the German Pandectists, see *id.* at 341-53.

63 Pollock concluded,

[In] the ancient view no informal contract is good unless it falls within some exceptionally favoured class: the modern view to which the law of England has now long come round is the reverse, namely that no contract need be in any particular form unless it belongs to some class in which a particular form is specially required.

POLLOCK, *supra* note 7, at 126.

64 See *id.* at 148-49.

65 *Id.* at 149.

66 *Id.* at 152.

67 See *id.* at 153, 163.

uity, the probable seed-bed for enforcement of consensual contracts, as further support for this correlation.<sup>68</sup>

Savigny's formulation of the mutual common intention version of the will theory informed Pollock's treatment of the formation of contracts as well as his treatment of mistake, misrepresentation, fraud, duress, and undue influence. In his chapter on agreement, proposal, and acceptance, Pollock closely followed Savigny's analysis of contract as a particular kind of generic legal transaction called an agreement.<sup>69</sup> An agreement, according to Pollock, requires the consent of two or more persons: each person must have a distinct intention; the intention of all the parties must be the same; the parties must, through mutual communication, be aware that their intentions agree; and the common intention must be directed to legal consequences, which confer rights or impose duties on the parties.<sup>70</sup> Following Savigny, Pollock thus defined "agreement" generically: "[w]hen two or more persons concur in expressing a common intention so that rights or duties of those persons are thereby determined, this is an agreement."<sup>71</sup> Pollock then asserted that "[t]he mutual communication which makes up an expression of common intention for the purposes of legal agreement consists of proposal and acceptance."<sup>72</sup> What makes a legal agreement so defined into a contract? Pollock reasoned,

[In] a contract something remains to be done by one or by each of the parties, which the other has or will have a right to call upon him to do. . . . In this case, therefore, the common intention expressed by the parties has this peculiar character, that it contemplates a future performance or performances to which one or each of them is to be bound. On the side of the party so bound, the expression of this intention is accordingly nothing else than an undertaking to perform the thing he is bound to—in other words, a promise.<sup>73</sup>

Pollock concluded with the observation that the final task in this analysis—embodying these ideas in definitions—had already been done in

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68 See *id.* at 152, 163–65.

69 See *id.* at 1–31.

70 See *id.* at 1–2.

71 *Id.* at 2.

72 *Id.* at 4.

73 *Id.* at 5.

the Indian Contract Act of 1872,<sup>74</sup> which he proceeded to quote and adopt as his own.<sup>75</sup>

After thus identifying the main principle of contract formation—"that a contract is constituted by the acceptance of a proposal"<sup>76</sup>—Pollock went on to discuss the application of that principle in detail to questions of the timing and manner of revocation of proposals,<sup>77</sup> the time within which the proposal must be accepted,<sup>78</sup> and the communication of acceptance and revocation.<sup>79</sup> Without in any way rejecting the will theory, Pollock sensibly deferred to "common sense and convenience"<sup>80</sup> rather than pure theory to resolve these questions.

74 See Indian Contract Act of 1872, reprinted in A.C. PATRA, *THE INDIAN CONTRACT ACT* 1-66 (1967).

75 See POLLOCK, *supra* note 7, at 6. The definitions of "proposal," "acceptance," and "promise" in that Act are as follows:

- (a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;
- (b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise:

*Id.*

76 *Id.* at 8.

77 See *id.* at 8-9.

78 See *id.* at 9-10.

79 See *id.* at 10-21.

80 *Id.* at 11. Thus, Pollock rejected Pothier's will-theory-based notion that revocation of a proposal is effective as soon as it is formally determined by the proposer, *before* its communication to the offeree. Pollock argued that this "wholly overlooks the consideration that not intention in the abstract, but communicated intention, is what we have to look to in all questions of the formation of contracts." *Id.* at 10. Furthermore, Pollock argued, it is "manifestly unjust" to let "a revocation take effect, though the other party has received, accepted, and acted upon the proposal without knowing anything of the proposer's intention to revoke it." *Id.*

Pollock took a similarly practical position on the question of acceptance by mail:

[I]t is plainly just and expedient that the acceptance should date from the time when the party has done all he can to accept, by putting his affirmative answer in a determinate course of transmission to the proposer. From that time he must be free to act on the contract as valid . . . .

*Id.* at 11.

Posted acceptance is neither irrevocable nor necessarily effective, however. The acceptance can be revoked if revocation reaches the proposer at or before the acceptance. And the mailed acceptance may not be effective if it is never delivered or if it is delayed in delivery past the time called for, explicitly or implicitly, by the proposal. By focusing on communicated intentions rather than some mystical coincidence of wills, Pollock was free to resolve these questions of contract formation based on common-sense notions of notice, fairness, and practical needs for legal certainty.

The will theory of contract in its mutual common intention form obviously shaped the basis for Pollock's chapters on "Mistake,"<sup>81</sup> "Misrepresentation,"<sup>82</sup> "Fraud and Rescission,"<sup>83</sup> and "Duress and Undue Influence."<sup>84</sup> His analytical introduction to these chapters identified the unifying theme he saw underlying each of these topics. Pollock said he was now turning from "the purely objective conditions of contract" that he had dealt with in earlier chapters to "a set of conditions which by comparison . . . may fairly be called subjective," and in which "[t]he consent of the parties is now the central point of the inquiry."<sup>85</sup> Usually, if the ordinary requirements for the formation of a contract are met, the mutual communication of the parties constituting proposal and acceptance will be taken as sufficient expressions of valid consent to establish a *prima facie* good agreement. But other, subjective conditions must be met to make the consent binding, although we don't require positive proof that these conditions are met to establish a valid contract *prima facie*. These conditions are that the consent be true, full, and free.<sup>86</sup> Coercion or undue influence in the making of the contract show that the consent was not free.<sup>87</sup> Mistake, misrepresentation, and fraud are all related to ignorance on the part of the consenting party of some fact material to the agreement, which means that the consent given was not true or full.<sup>88</sup>

This analytical approach, relating mistake, misrepresentation, and fraud to the quality of a contracting party's subjective consent, led Pollock to deviate uncharacteristically from his usual, carefully accurate description of the case law. When he came to the topic of innocent misrepresentation of a material fact inducing a contract, he recognized the traditional rule that the resulting contract is valid and enforceable against the mistaken party. Under the mutual common intention theory, however, this result seemed to be wrong, so Pollock labored mightily to describe the "tendency" of recent equity cases to be more in line with the teachings of the will theory.<sup>89</sup>

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81 *Id.* at 355-442.

82 *Id.* at 445-69.

83 *Id.* at 471-99.

84 *Id.* at 500-43.

85 *Id.* at 355.

86 *See id.* at 355-56.

87 *See id.* at 356.

88 *See id.* at 356-57.

89 Pollock started off with the very general definition of consideration from the case of *Currie v. Misa*, 10 L.R.-Ex. 153, 162 (1875): "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other." POLLOCK, *supra* note 7, at 147.

Pollock almost succeeded in giving a coherent explanation of common-law contract in terms of the will theory. The weak spot in his treatise was his treatment of consideration, which posed a serious threat to any attempt to rationalize common-law contract under the will theory. The problem was this: if mutual common intention is the basis of a contract under the will theory, why do the courts also require that there be consideration? Pollock never really answered that question in his treatment of consideration, which uncharacteristically lacked any clear organizing principle.

The work reflects the man. Pollock was an industrious researcher, cautious and conventional in judgment, erudite, and scrupulously honest. In this, the first of his many treatises, he analyzed a broad range of legal materials, including English cases at law and in equity, the Roman law of contract, and the 1872 Indian Contract

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After discussing the possible historical origins of this doctrine, Pollock went on to sketch some of the details of the common law doctrine of consideration. Pollock covered a number of specific subtopics, without elaborating any organizing, generally explanatory principles tying those subtopics together. Pollock discussed the rule that the amount of the consideration is not material: courts do not question the adequacy of the consideration. *See id.* at 154. In explaining this, Pollock quoted Thomas Hobbes's *Leviathan*: "The value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give." *Id.* (quoting THOMAS HOBBS, *LEVIATHAN* 75 (London 1651)). After going through a number of cases holding that the adequacy of consideration is not material, Pollock identified the "principle of all these cases, . . . [stated] in so many words by the judges, that the promisor has got all that he bargained for." *Id.* at 155. Pollock recognized, however, that "inadequacy of consideration, coupled with other things," may be evidence of fraud. *Id.* at 156.

Pollock went on to discuss reciprocal promises, which may be the consideration for each other. *See id.* Pollock noted that a promise is not good consideration if it is a promise to do what one is already bound to do, either by the general law or by a prior contract with the other party. *See id.* at 157. A promise to do what one is contractually bound to a *third* party to do, however, may be good consideration. Pollock recognized a good policy reason for this apparent anomaly:

To allow promises to be binding if made in consideration of the promisee doing or undertaking what he is already bound generally or to the promisor to do would be to give direct encouragement to breaches of public and private duty. But where the duty is to a third person only, this reason does not apply; the encouragement to unlawful conduct, if any, is too remote and precarious to count for anything.

*Id.* at 160.

In the course of this disjointed ramble through the law related to consideration, Pollock argued in passing for a very thin purpose for the doctrine of consideration: "The main end and use of the doctrine of Consideration . . . is to furnish us with a reasonable and comprehensive set of rules which can be applied to all informal contracts without distinction of their character or subject matter." *Id.* at 163.

Act.<sup>90</sup> He organized the material analytically and elaborated organizing principles for each subtopic, except for consideration. The overall approach and the analysis of each subtopic reflected a thoughtful, judicious application of the theories of Maine and Savigny to the English law of contract. In its evident industry, erudition, honesty, explanatory power, and consistency with the prevailing will theory, Pollock's treatise was obviously destined to be influential. Pollock's was the gold standard: thoughtful, exhaustive within its range, and conventional.

## 2. Christopher Columbus Langdell

Dean Langdell's treatise, on the other hand, was not conventional at all. Langdell invented the case study method of teaching law and applied it to his teaching of contracts. The case method was based on Langdell's belief that "law is a science, and . . . all the available materials of that science are contained in printed books."<sup>91</sup> Students could learn the law of contracts, scientifically, by studying original sources: decided cases that Langdell had selected for his pioneering casebook in contracts, published first in 1871.<sup>92</sup> That edition contained a complete analytical index, but no commentary on the cases at all. In 1879, for the second edition of the casebook, Langdell expanded that analytical index by including short essays under each index topic.<sup>93</sup> Those essays referred to the cases in the casebook as authority. He published this elaborated index separately in 1880 as *A Summary of the Law of Contracts*.<sup>94</sup> That summary was kept in index form, however, with an essay on "Acceptance"<sup>95</sup> at the beginning of the book, separated by 174 pages from a later essay on "Offer."<sup>96</sup>

What did Langdell mean when he said that "law is a science"? The answer is not completely clear: over the last twenty-five years, scholars have engaged in a lively debate over this and related questions about Langdell's thought.<sup>97</sup> To answer the question, we must look carefully both at what he said and at what he did.

90 Indian Contract Act of 1872, *reprinted in* PATRA, *supra* note 74.

91 Christopher Columbus Langdell, Harvard Celebration Speech (Nov. 5, 1886), *in* 3 LAW Q. REV. 123, 124 (1887).

92 See I C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (Boston, Little, Brown, & Co. 1st ed. 1871).

93 See LANGDELL, SELECTION OF CASES, *supra* note 8.

94 See LANGDELL, SUMMARY, *supra* note 8.

95 *Id.* at 1-23.

96 *Id.* at 197-204.

97 Over the last 25 years, we have seen vigorous and sophisticated academic commentary on Langdell's legal science. See, e.g., GRANT GILMORE, THE AGES OF AMERICAN



Langdell said precious little about what he meant when he said "law is a science." He wrote about it first in 1871, in the introduction to the first edition of his casebook on contracts.<sup>98</sup> He talked about it

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LAW 42-48 (1977) [hereinafter GILMORE, AMERICAN LAW] (calling Langdell's science a simple-minded formalism); GRANT GILMORE, THE DEATH OF CONTRACT 13-15 (1974) [hereinafter GILMORE, CONTRACT] (same); WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 55-78 (1994) (calling Langdell's science an amalgam of technical legal analysis of cases, a coherent classification of the law based on fundamental but technical substantive doctrines, and a loosely-understood Austinian positivism separating law and morality); Thomas Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983) (calling Langdell's science a curious combination of induction from the cases of principles, then used to deduce subsequent conclusions, analogous to Mill's inductive explanation of geometry, contrary to Gilmore and Speziale); Matthias Reimann, *The Common Law and German Legal Science*, in THE LEGACY OF OLIVER WENDELL HOLMES, JR. 72 (Gordon ed., 1992) (calling Langdell's science similar to, but in important ways different from, Kantian formalism of the German pandectists, thus placing Langdell halfway between Kantian formalism and a rigorously empirical, inductive, historicist legal science); Marcia Speziale, *Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 VT. L. REV. 1 (1980) (calling Langdell's science empirical and dedicated to formulating working hypotheses from analysis of original sources, contrary to Gilmore).

98 See 1 LANGDELL, *supra* note 92, at vi-vii. In explaining how he had prepared a selection of cases to use in teaching contract law to students, Langdell said,

[Given] the great and rapidly increasing number of reported cases in every department of law . . . was there any satisfactory principle upon which such a selection [of cases] could be made? It seemed to me that there was. Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied. But the cases which are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless and worse than useless for any purpose of systematic study. Moreover, the number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension. If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number. It seemed to me, therefore, to be possible to take such a branch of the law as Contracts, for example, and, without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines; and that such a

again in his speech celebrating the 250th anniversary of the founding of Harvard University.<sup>99</sup> From these two sources, we can identify the essential ideas Langdell thought were entailed by his notion that law was a science. First, law must be studied scientifically, by studying the original sources—the decided cases. Second, law as a science consists of certain fundamental doctrines, which are relatively few in number. Third, those fundamental doctrines grew to their current form by slow degrees, and that growth can be traced through a series of cases. Fourth, an appropriate classification and arrangement of those fundamental legal doctrines would facilitate the scientific study of the law.

A private letter from Langdell to Theodore Dwight Woolsey of Yale, recently uncovered by William LaPiana, adds an additional element to Langdell's notion of law as science.<sup>100</sup> Writing about the study of jurisprudence, Langdell expressed his understanding of a distinct line between the study of law as it is and the study of law as it ought to be. He concluded that lawyers and law professors ought only to study the law as it is. Based on the views expressed in this letter,

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work could not fail to be of material service to all who desire to study that branch of law systematically and in its original sources.

*Id.*

99 See Langdell, *supra* note 91, at 123–24. In explaining how he tried “to do [his] part towards making the teaching and the study of law . . . worthy of a university,” by “placing the law school . . . in the position of the law faculties in the universities of continental Europe,” Langdell said,

To accomplish these objects, so far as they depended upon the law school, it was indispensable to establish at least two things—that law is a science, and that all the available materials of that science are contained in printed books. . . . But if printed books are the ultimate sources of all legal knowledge,—if every student who would obtain any mastery of law as a science must resort to these ultimate sources, and if the only assistance which it is possible for the learner to receive is such as can be afforded by teachers who have travelled the same road before him,—then a university, and a university alone, can afford every possible facility for teaching and learning law. . . . [M]y associates and myself, therefore, have constantly acted upon the view that “law is a science,” and that a well-equipped university is the true place for teaching and learning that science. Accordingly, the law library has been the object of our greatest and most constant solicitude . . . . We have constantly inculcated the idea that the library is the proper workshop of professors and students alike; that it is to us all that the laboratories of the university are to the chemists and physicists, the museum of natural history to the zoologists, the botanical garden to the botanists.

*Id.*

100 See Letter from Christopher Columbus Langdell to Theodore Dwight Woolsey (Feb. 6, 1871), in Woolsey Family Papers, ser. I, box 23, folder 433 (on file with the Yale University Library, Manuscript Division), *quoted in* LAPIANA, *supra* note 97, at 77.

Langdell's notion of law as a science probably included Austin's rigid distinction between law and morality.

Since Langdell said so little about what he meant by law as a science, we are forced to look at the details of what Langdell actually did in *A Summary of the Law of Contracts* in order to understand what he meant. In *Summary*, we can see Langdell at work as a legal scientist. This work followed a consistent pattern. By examining decided cases, Langdell isolated the fundamental doctrines applied by the courts in contract cases, including the basic requirements of offer, acceptance, and consideration. By careful, critical analysis, Langdell then penetrated to the true meaning of each doctrine. For example, that method led him to the following statement of the true meaning of "offer":

An offer, as an element of a contract, is a proposal to make a promise. It must be made by the person who is to make the promise, and it must be made to the person to whom the promise is to be made. It may be made either by words or by signs, either orally or in writing, and either personally or by a messenger; but in whatever way it is made, it is not in law an offer until it comes to the knowledge of the person to whom it is made.<sup>101</sup>

He then used those meanings to elaborate a coherent, logically consistent blueprint for the law—here, the law of contract.

Langdell thus seemed to work with the dispassionate objectivity of a scientist: isolating the true meaning of the doctrinal terms was a matter of critical analysis; coherently applying those meanings over a broad range of questions called for analytical discrimination and logical consistency; the resulting doctrinal conclusions were reached without injecting any normative views into the analysis. In fact, because the fundamental doctrines themselves were stated conceptually, without reference to any moral or policy base, and the application of those doctrines was determined by criteria of logical coherence, the resulting purified doctrinal structure seemed purely conceptual. It thus offered a self-proclaimed scientist like Langdell the opportunity to be completely objective. Then the process of deciding legal issues under Langdell's theory could be purely analytical.

For example, Langdell recognized that in bilateral contracts the consideration for the first promise is a counter-promise by the offeree. From this, Langdell argued purely analytically that notice of acceptance must actually be communicated to the original offerer for a valid bilateral contract:

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101 LANGDELL, *SUMMARY*, *supra* note 8, at 197.

When the contract is to be bilateral . . . the offer [still] requires an acceptance and the giving of the consideration to convert it into a binding promise; but as the consideration consists of a counter-promise, so the giving of the consideration consists in making this counter-promise.<sup>102</sup>

[T]he acceptance of the original offer, in the case of a bilateral contract, must be expressed, *i.e.* must be made by words or signs; . . . the reason for this is[] that the acceptance contains a counter-offer. Moreover, the reason why the counter-offer makes it necessary that the acceptance should be expressed is[] that communication to the offeree is of the essence of every offer. The acceptance, therefore, must be communicated to the original offerer, and until such communication the contract is not made.<sup>103</sup>

Langdell's legal science,<sup>104</sup> based on the objective meaning of legal doctrines, was radically different from traditional legal reasoning, which focused on the normative rationale for prior decisions. Appeals

102 *Id.* at 12.

103 *Id.* at 15.

104 It is tempting to criticize Langdell's legal science as unscientific or incoherent or both. A number of commentators have succumbed to the temptation. *See, e.g.,* GILMORE, *AMERICAN LAW*, *supra* note 97, at 42–48; GILMORE, *CONTRACT*, *supra* note 97, at 13–15; Grey, *supra* note 97, at 39–53; Edward J. Phelps, *Methods of Legal Education I*, 1 *YALE L.J.* 139, 140–42 (1892); Christopher G. Tiedeman, *Methods of Legal Education III*, 1 *YALE L.J.* 150, 152–57 (1892). Langdell's legal science seems incoherent or unscientific for at least six reasons. First, Langdell does not include in his base all the decided cases on a particular topic. The subsequent induction of the true rule or the true meaning of a legal doctrine is not an induction at all, but just reflects Langdell's preconceived notions, which leads him to include some cases in the base and exclude others. Second, Langdell on some questions, such as the effective date of acceptance by mail, includes cases reaching diametrically different results. One cannot scientifically derive by induction a single rule from diametrically opposed cases. Third, the historical contingency of current rules and doctrines recognized by Langdell's choice of cases that illustrate the development of current case law would be abolished by courts deciding cases the way Langdell proposes they do, for continued logical application of the true meaning of current doctrine would freeze the law at this stage in its development. Fourth, even within the set of cases Langdell chooses, what Langdell purports to determine scientifically from the cases is not a scientific law, or a generalized description of common characteristics of the set, but a concept of the true meaning of a legal doctrine. Fifth, because the purportedly scientifically-determined concept is not itself normative, Langdell does not purport to derive an "ought" from an "is." But there is then no apparent reason to apply the concept to decide subsequent cases. Sixth, by including in the domain of cases for scientific analysis only those illustrating or developing a particular legal doctrine, and excluding cases that recognize that the doctrine is defeasible, when an overriding normative principle applicable to the facts suggests that the ordinary application of the legal concept would be unjust, Langdell sets up a non-normative conceptual system of law radically at odds with the underlying phenomena.

to higher-order normative principles seemed to be banished from Langdell's legal science altogether. For example, in defending his position that the effective date of a bilateral contract by mail was the date the letter of acceptance comes to the knowledge of the offerer, not the date it was mailed, Langdell recognized that some have argued that "the purposes of substantial justice, and the interests of the contracting parties as understood by themselves," would be served by the date-of-mailing rule.<sup>105</sup> Langdell responded, "The true answer to this argument is[ ] that it is irrelevant."<sup>106</sup>

Langdell didn't pause to explain why arguments from substantial justice and the self-understood interests of the parties are irrelevant, but the structure of his analysis here and elsewhere in *A Summary of the Law of Contracts* suggests the following two reasons. The first reason is that Langdell had previously established, by critical, scientific analysis of the legal meaning of acceptance in a bilateral contract, that accept-

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It may be unfair to Langdell to find his thought and work incoherent as science, when Langdell himself always explained it in pedagogical terms. One can see Langdell's thought as a coherent whole from a pedagogical perspective, as Holmes himself noted:

The preceding criticism is addressed to the ideal of the final methods of legal reasoning which this Summary seems to disclose. But it is to be remembered that the book is published for use at a law school, and that for that purpose dogmatic teaching is a necessity, if any thing is to be taught within the limited time of a student's course. A professor must start with a system as an arbitrary fact, and the most which can be hoped for is to make the student see how it hangs together, and thus to send him into practice with something more than a rag-bag of details.

Book Notices, 14 AM. L. REV. 233, 234 (1880); see Oliver Wendell Holmes, Speech on the Quarter-Millennial of Harvard, in 3 LAW Q. REV. 118, 121-22 (1887).

105 LANGDELL, SUMMARY, *supra* note 8, at 20.

106 *Id.* at 21. Langdell went on, "assuming it to be relevant," to make three arguments for his position, based on the understanding of the parties, substantial justice, and the need for certainty about legal obligations. *Id.* Langdell's argument is a model of brevity:

The only cases of real hardship are where there is a miscarriage of the letter of acceptance, and in those cases a hardship to one of the parties is inevitable. Adopting one view, the hardship consists in making one liable on a contract which he is ignorant of having made; adopting the other view, it consists in depriving one of the benefit of a contract which he supposes he has made. Between these two evils the choice would seem to be clear: the former is positive, the latter merely negative; the former imposes a liability to which no limit can be placed, the latter leaves everything *in statu quo*. As to making provision for the contingency of the miscarriage of a letter, this is easy for the person who sends it, while it is practically impossible for the person to whom it is sent.

*Id.* at 219 nn.3-4 (internal citations omitted).

ance necessarily contains a counter-offer.<sup>107</sup> He had further established, by his critical, scientific analysis of the legal meaning of offer, that an offer must actually be communicated, as "communication to the offeree is of the essence of every offer."<sup>108</sup> It follows necessarily, then, that the acceptance must actually be communicated to make a bilateral contract. Indeed, according to Langdell, this is so fundamental that the original offerer could not change it by the terms of his offer. If he said the offer would be accepted at the time of posting the acceptance, that "declaration would be wholly inoperative."<sup>109</sup>

The second reason is that judicial decision based on the objectively discoverable meaning of legal doctrines is, for Langdell, the only appropriate way to decide these questions. As Langdell showed, equally persuasive arguments based on "substantial justice and the interests of [the] contracting parties" can be made for the opposite position,<sup>110</sup> so there is no objective, disinterested way using these kinds of arguments to choose between the opposing positions. A judge who accepted one argument over another, then, *either* would simply be mistaken that one argument is stronger than the other *or* would be choosing arbitrarily, or for some undisclosed reason, between two positions equally supportable by "substantial justice" arguments. Langdell's concern for scientific objectivity, therefore, seemed to support a legal analysis that stopped at the level of legal doctrine.

We can now better understand Langdell's notion that law is a science. The scientist focuses on the decided cases. The scientist extracts, by the ordinary techniques of legal analysis, the current fundamental legal doctrines in any particular field of law. The scientist makes no judgments about what the law ought to be, so he separates the fundamental legal doctrines from the normative justifications given by judges and others and "purifies" those doctrines by technical, objective analysis of their true meaning. This purification is simply a rational determination of what the law is. The scientist then may recommend that future cases be decided by logical application of the purified doctrines, because that will simply be an application of the law as it is.

Langdell's methodology thus led him to undertake careful doctrinal analysis, focusing on the case law, and to give no weight to the broad normative justifications for doctrine that Pollock emphasized so heavily in his treatise. Langdell was a gifted lawyer, with a great capac-

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107 *See id.* at 12.

108 *Id.* at 15.

109 *Id.* at 20.

110 *Id.* at 21.

ity to analyze cases and relate facts to relevant legal doctrines. Langdell's *Summary* was, therefore, a treasure trove of separable, brilliant doctrinal analyses. Because his overarching theory and methodology were at odds with ordinary legal reasoning, however, it was a work in which the whole was considerably less than the sum of its parts. This was curiously foreshadowed in the indexical organization of Langdell's *Summary*, which reflected a deliberate refusal by Langdell to put all the parts together into a coherent whole.

Langdell's attempt to achieve objective doctrinal purity led him to reject arguments from higher-order normative principles. Langdell, therefore, did not relate his analysis of doctrine to the broad principles of the prevailing will theory. In fact, many of Langdell's specific conclusions seemed to undermine the will theory's normative explanations of contract doctrine. Langdell's elegantly concise essays contained a number of brilliant doctrinal insights, incompatible with a thorough going will theory, which often were thrown out in just a sentence or two in the middle of another discussion.

Thus, in discussing the old form of action for debt, Langdell concluded, applying Maine's distinctions, that the transaction underlying the action of debt on simple contract was a formal, not a consensual, contract.<sup>111</sup> Ever the precisionist, however, Langdell went on to qualify this use of Maine's classification: "It should, perhaps, be added, that in strictness there are no consensual contracts in our law, as a promise which has nothing else to make it binding must have a consideration."<sup>112</sup>

Similarly, in explaining why revocation of an offer must be communicated to be effective, Langdell gave this critique of the subjective will theory of contract:

As to the rule that the wills of the contracting parties must concur, it only means that they must concur in legal contemplation, and this they do whenever an existing offer is accepted, no matter how much the offerer has changed his mind since he made the offer. In truth, mental acts or acts of the will are not the materials out of which promises are made; a physical act on the part of the promisor is indispensable; and when the required physical act has been done, only a physical act can undo it. An offer is a physical and a mental act combined, the mental act being a legal intendment embodied in, and represented by, and inseparable from, the physical act.<sup>113</sup>

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111 *Id.* at 129.

112 *Id.* at 129-30. Langdell went on, "Still, those contracts which can be enforced only by an action of *assumpsit*, though they are not purely consensual, are substantially so; and they may, therefore, properly be termed consensual." *Id.*

113 *Id.* at 244.

Langdell's analysis of acceptance equally undermined the subjective will theory. Langdell recognized that an acceptance turns an offer into a promise. Unlike an offer, however, an acceptance may be by a mental act only, which need not be communicated or evidenced by any other act. Legal transfer of property by gift requires acceptance by the donee, for example, but acceptance is presumed and need not be proved affirmatively. Except for covenants under seal, however, more than acceptance is required to make an offer into an enforceable promise. Langdell noted that "[a] physical act on the part of the promisee . . . , namely, giving or performing the consideration," is also required.<sup>114</sup> When consideration is required, then, "acceptance" as something separate from consideration becomes irrelevant:

Therefore, though the acceptance of an offer and the performance of the consideration are different things, and though the former does not imply the latter, yet the latter does necessarily imply the former; and, as the want of either is fatal to the promise, the question whether an offer has been accepted can never in strictness become material in those cases in which a consideration is necessary; and for all practical purposes it may be said that the offer is accepted in such cases by giving or performing the consideration.<sup>115</sup>

Finally, in discussing the rules concerning adequacy of consideration, Langdell said that "the promise is in legal contemplation given and received in exchange for the consideration, and for no other purpose. Therefore, a promise can never constitute a gift from the promisor to the promisee as to any part of it."<sup>116</sup> In his subsequent discussion of consideration and motive, Langdell reemphasized his point:

It must not be supposed, however, that motive, as distinguished from consideration, can constitute any element of a contract, or that it is a thing of which the law can strictly take any notice. On the contrary, as every consideration is in theory equal to the promise in value, so it is in theory the promisor's sole inducement to make the promise. As the law cannot see any inequality in value between the consideration and the promise, so it cannot see any motive for the promise except the consideration.<sup>117</sup>

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114 *Id.* at 2.

115 *Id.*

116 *Id.*

117 *Id.* at 78-79.



### C. *Contemporary Contract Theorists' Challenge for Holmes*

Holmes, ever the diligent worker, was no doubt familiar in detail with the current best work on contract when he wrote his contract lectures in 1880. We have direct evidence that Holmes had read Anson and Langdell. As editor of the *American Law Review* he had published highly favorable reviews of Langdell's casebook, *A Selection of Cases on the Law of Contracts*, as it first came out in two volumes in 1870 and 1871.<sup>118</sup> In early 1880, he published a piece reviewing both Anson's 1879 treatise and the second edition of Langdell's casebook, which included the essay-index, in the *American Law Review*.<sup>119</sup> While praising Anson's work for its style, readability, intelligence, and apt proportion, Holmes suggested that Langdell's *Summary* was more original and penetrating, and further flattered Langdell by devoting over three-quarters of the review to a critical analysis of Langdell's essay-index.<sup>120</sup>

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118 See Book Notices, 6 AM. L. REV. 353 (1872); Book Notices, 5 AM. L. REV. 539 (1871).

119 See Book Notices, 14 AM. L. REV. 233 (1880).

120 Holmes began his review of Langdell with fulsome praise:

No man competent to judge can read a page of it without at once recognizing the hand of a great master. Every line is compact of ingenious and original thought. Decisions are reconciled which those who gave them meant to be opposed, and drawn together by subtle lines which never were dreamed of before Mr. Langdell wrote. 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.

*Id.* at 233-34.

Holmes went on to attack Langdell's peculiar methodology, which he called "Mr. Langdell's habit of mind":

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. A single phrase will illustrate what is meant. "It has been claimed that the purposes of substantial justice and the interests of contracting parties as understood by themselves will be best served . . . and cases have been put to show that the contrary view would produce not only unjust but absurd results. *The true answer to this argument is that it is irrelevant . . .*" The reader will perceive that the language is only incidental, but it reveals a mode of thought which becomes conspicuous to a careful student.

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 inter-

It is somewhat more difficult to establish conclusively that Holmes had read Pollock's treatise. Holmes never published a review of Pollock's first edition of 1876 or his second edition of 1878. Moreover, his reading lists from 1876 through 1880 do not include Pollock's contract treatise.<sup>121</sup> A letter to Pollock dated June 17, 1880, when Holmes was in the throes of writing his contract lectures, suggests that Holmes had read Pollock's treatise before and was rereading it then. In it Holmes states, "I am just now writing that part of my course which deals with contracts and am struck anew with the value of your book. I referred to your account of Consideration in one of my articles as the best which I had seen."<sup>122</sup> A search of Holmes's prior articles, however, does not reveal any reference to Pollock's account of

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ested 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. The important phenomenon is the man underneath it, not the coat; the justice and reasonableness of a decision, not its consistency with previously held views. . . . 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 consequences 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.* at 234 (citation omitted).

Here, then, in his critique of Langdell's methodology, is the first appearance of Holmes's famous aphorism about the life of the law, which was repeated virtually verbatim in the very first lecture in *The Common Law*. See HOLMES, *supra* note 6, at 1.

The importance of Langdell's work to the development of Holmes's contract theory is suggested by a letter Holmes wrote to his friend Frederick Pollock after Holmes gave his lectures, in which Holmes responded to some comments on contract theory by Pollock. Holmes wrote, "I should like you to see the Appendix to the 2d Ed. of Langdell's *Cases*, also published separately in a small book called (I think) *Elements of Contract*. A more misspent piece of marvelous ingenuity I never read, yet it is most suggestive and instructive." Letter from Oliver W. Holmes to Frederick Pollock (Apr. 10, 1881), in 1 HOLMES-POLLOCK LETTERS 16, 17 (Mark DeWolfe Howe ed., 1941).

121 See Little, *supra* note 11, at 191-203. There are no entries in Holmes's reading list after May of 1880, and the intense work on *The Common Law* lectures may have interrupted Holmes's list-keeping. See *id.* at 167. Mark DeWolfe Howe also noted the absence of Pollock's treatise on Holmes's reading lists; he, too, concluded that Holmes must have read Pollock's treatise nevertheless. See HOWE, *supra* note 5, at 223 n.1.

122 Letter from Oliver W. Holmes to Frederick Pollock (June 17, 1880), in 1 HOLMES-POLLOCK LETTERS, *supra* note 120, at 14, 15.

consideration. One might conclude that Holmes had thrown this in just to flatter Pollock.

Whether Holmes had read Pollock's treatise before the summer of 1880 makes little difference, however, for Holmes's prior reading of Anson, who followed Pollock on most important theoretical questions, would have introduced Holmes to Pollock's major points. Moreover, as we shall see, Holmes's contract lectures themselves reflect a detailed knowledge of Pollock's treatise.<sup>123</sup> It seems safe to conclude that Holmes read Pollock's treatise before he gave his lectures on contract, at the latest in the summer of 1880.

This review of what Holmes brought to the table and who was already there may help us identify the challenges facing Holmes as he began writing his lectures on contract. First, the prevailing view of the evolution of contract was that of Maine, who saw contract evolve from formal contracts to consensual contracts, an evolution flatly opposed to Holmes's view that law evolved from subjective to objective standards. Second, the will theory of contract had become the prevailing understanding of the law, perhaps as early as 1806, and had influenced the subsequent development of the common law.<sup>124</sup> It had found a solid, scrupulous expositor in Pollock, whose treatise on the law of contract was historically and philosophically sophisticated. A thoroughgoing positivist like Holmes, however, would have seen the will theory as a benighted "theological" explanation of contract. Finally, the brilliant doctrinal analysis by Langdell, while not based on the will theory, was embedded in what must have seemed to Holmes a naive imitation of a truly scientific, positivist methodology.

### III. HOLMES'S CONTRACT LECTURES, IN CONTEXT

Holmes delivered three lectures on contract in *The Common Law*. The first lecture was on the history of contract; the second lecture was

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123 See *infra* text accompanying notes 128, 140, 156–59, 178–82, 188–90, 194–95, 200, 218–21, and 242–44; see also *infra* text accompanying notes 258, 307, and notes 260, 277, 309 (explaining Pollock's reactions to Holmes's work).

124 The most significant event in all this was the translation of R.J. Pothier's *Treatise on the Law of Obligations* into English by William David Evans in 1806. See PATRICK ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 399 (1979); J.H. Baker, *From Sanctity of Contract to Reasonable Expectations*, in 32 *CURRENT LEGAL PROBLEMS* 17, 20–22 (1979) (emphasizing the rise of substantive law in the late eighteenth and early nineteenth century, replacing prior purely procedural common law); SIMPSON, *supra* note 59, at 178–81 (1987) (emphasizing needs of early textbook writers in the nineteenth century). For an analogous proposition, see JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 161 (1991) (arguing that will theory was all that was left after other scholastic elements of natural law theory had been eliminated).

on the elements of contract; and the third lecture was on void and voidable contracts. If we read these lectures against the background of Holmes's positivist agenda in the first four lectures of *The Common Law* and the sophisticated contracts treatises by Pollock and Langdell, we may see clearly what might otherwise be obscure. This reading, moreover, reveals Holmes's ultimate goal throughout the lectures, which was to develop a thoroughgoing positivist theory of contract. This reading also reveals Holmes's response to the challenge posed by Pollock and Langdell. Holmes used Pollock's limited treatment of contract as the basis for his own even more limited treatment, focusing on what Pollock called "objective conditions" for the formation of contracts and on the history of common-law consideration, which Pollock had made much of and part of which Pollock called "subjective conditions of contract"—mistake, misrepresentation, and fraud as grounds for finding a contract either void or voidable. On each of these topics, Holmes developed a positivist alternative to Pollock's will-theory explanation. In doing so, Holmes made heavy use of Langdell's work, either by adopting without attribution one of Langdell's insights or by using Langdell's analysis as a starting point to develop his own theory, often by simply reducing Langdell's analysis to a more positivist form.

#### A. *History of Contract*

At first glance, the announced aim of Holmes's lecture on the history of contract is puzzlingly modest, and the criteria for including some topics rather than others is obscure. Holmes opened the lecture by downplaying the importance of historical research on the "doctrine of contract, [which] has been so thoroughly remodeled to meet the needs of modern times, that there is less necessity here than elsewhere for historical research."<sup>125</sup> Nevertheless, Holmes continued, "a short account of the growth of modern doctrines, whether necessary or not, will at least be interesting."<sup>126</sup> As it turned out, this modest project became even more modest in the execution, as Holmes gave an account only of the growth of the modern doctrine of consideration, leaving out the history of the modern doctrines of offer and acceptance.

Moreover, Holmes surrounded his history of consideration with other historical material, the reasons for his inclusion of which were not immediately apparent. Holmes discussed at some length an early form of contract, suretyship-by-giving-hostages, the early germanic ori-

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125 HOLMES, *supra* note 6, at 195.

126 *Id.*

gins of the action of debt, the development of the action for breach of a covenant under seal, and the development of the modern action for breach of contract out of the tort action for trespass on the case in *assumpsit*. The casual reader might fail to see any unifying theme in Holmes's apparent ramble through a haphazard assortment of topics in the legal history of contract law.

Read against the background of Pollock's treatise, however, Holmes's diffident introduction to his history lecture seems close to irony. To those in the know, Holmes's short account would be seen for what it was: a careful, brilliantly argued brief against the application of Maine's evolutionary thesis to the common law of contract. To those in the know, the reason Holmes included some historical topics and excluded others would also be clear. Holmes included topics that supported a positivist reading of the history of contract or that undermined Maine's evolutionary theories.

The primary focus of the lecture was a detailed history of the earliest appearance and subsequent development of consideration in the common law. This was all a direct attack on Pollock's speculation, based on Maine's evolutionary theory, that the common-law doctrine of consideration ultimately derived from the Roman law *causa*, which entered English law first in the equity courts that were the first to start enforcing informal, consensual contracts. Pollock had carefully labeled his theory as speculation based on what you would expect if Maine's theory were true.<sup>127</sup> Pollock's theory was, therefore, on its own terms, a test case to determine whether Maine's evolutionary theory applied to the common law.

Holmes took dead aim at Pollock's test case. Introducing his discussion of the history of consideration, Holmes set out explicitly the thesis he subsequently attacked, and it was Pollock's thesis. "It has been thought," Holmes said, "that this [modern rule requiring consideration to make a promise legally enforceable] was borrowed from the Roman law by the Chancery, and after undergoing some modifications there, passed into the common law."<sup>128</sup> Holmes suggested that this thesis was questionable, for three reasons. First, *causa*, the Roman law term for what we would call consideration, was not used in England before Elizabethan times; before that what we now call consideration was always referred to in the reports as *quid pro quo*.<sup>129</sup> Second, the doctrine of consideration was fully developed by the common-law

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127 See POLLOCK, *supra* note 7, at 152.

128 HOLMES, *supra* note 6, at 200; *cf.* POLLOCK, *supra* note 7, at 152.

129 See HOLMES, *supra* note 6, at 200.

courts in debt before any mention of it can be found in equity.<sup>130</sup> Third, consideration was not required to make contracts under seal enforceable, while it was required to make a contract in debt enforceable.<sup>131</sup> This suggests that "the rule cannot have originated on grounds of policy as a rule of substantive law."<sup>132</sup> The limitation of the consideration requirement to actions in debt suggests that this peculiar substantive requirement was probably connected to the peculiar procedures in debt. Holmes went on to augment this third argument by sketching a plausible connection between the early procedure in debt and the substantive doctrine of *quid pro quo* consideration subsequently applied in debt.<sup>133</sup>

Finally, Holmes turned to the development of the action of assumpsit, out of which came the modern common law of contract. He pointed out that assumpsit arose out of the action of trespass on the case, a tort action based on injury caused by defendant's conduct.<sup>134</sup> In the earliest cases, the courts allowed an action in assumpsit where defendant had promised to do something for plaintiff, undertook to do it, and did it so negligently that he caused harm to plaintiff or his property. Eventually, the courts extended assumpsit by analogy to cases where the undertaking was simply defendant's promise, without any further action by the defendant to fulfill that promise. At that

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130 *See id.*

131 *See id.*

132 *Id.*

133 *See id.* at 200-26. Holmes's argument on this last point went like this. In the early action of debt, if the defendant denied the debt, the plaintiff had to establish his cause in one of three ways: by the duel, by "witnesses," or by a writing. Early on, "witnesses" were the transaction witnesses provided for by the early Germanic and Anglo-Saxon customary law. Customarily, a set of official witnesses were elected. From this group, two or three men were called in to every bargain of sale, to witness the voluntary delivery of property involved in the transaction and thereby protect the purchaser from subsequent charges of theft. Transaction witnesses were not used for agreements that were executory on both sides because there nothing changed hands and no later charge of theft could arise. Even after the demise of the institution of transaction witnesses, the substantive rule that debts enforced without a writing required a benefit persisted as judicial tradition. The persistence of this judicial tradition was aided by the redescription of the common law in Roman law terms by Glanville. But that redescription was never fully accurate, so attempts by later commentators like Fleta to construct legal arguments based on the Roman redescription rather than the underlying common law were doomed to failure. It was the persistence of the underlying *quid pro quo* model of consideration that led the common law courts to limit actions of debt to cases where the promisor received an actual benefit, and to reject the argument that detriment to the promisee alone would support an action against the promisor. *See id.*

134 *See id.* at 216.

point, according to Holmes, the courts realized that, at least in those cases, assumpsit was an action to enforce a promise, so they asked themselves whether consideration was necessary for that promise.<sup>135</sup> They ultimately decided that consideration was required, but the tort history of assumpsit gave the courts leeway and analogies with which to revisit the question, raised earlier in debt, whether consideration must be in the form of a benefit to the promisor or whether it might also be just a detriment to the promisee. The courts decided that detriment to the promisee was sufficient. Holmes conceded that this decision could have been influenced by the then-current "inclination" to "identify consideration with the Roman *causa*, taken in its broadest sense," but his analysis implied that the development was perfectly understandable as a natural development wholly internal to the common law.<sup>136</sup>

Holmes's historical analysis thus seemed to have demolished Pollock's speculation about the origins of common-law consideration. Holmes seemed to have shown that Pollock's underlying thesis—that Maine's evolutionary theory applies to the common law—flunked the test Pollock himself had proposed for it.

Moreover, Holmes's digressions away from the history of consideration all reinforced the same theme, for they highlighted other features of the history of common-law contract that further undermined the applicability of Maine's evolutionary thesis to the common law. Thus, Holmes argued that the common law of contract developed with little or no influence from Roman law. Instead, its origins were Germanic and its development indigenously based on practices and procedures that had specific social functions within a particular historical society. There were many different procedures to enforce what we might now call contracts. Some of the early practices, such as promissory oaths and hostage-giving, were clearly primitive but not necessarily "formal contracts" in Maine's sense. Moreover, the procedure in the early action of debt was Germanic, and the substance of the form of action for debt reflects the interaction of that procedure and the early Anglo-Saxon institution of transaction witnesses.<sup>137</sup>

Read in context, Holmes's analysis of the history of covenant reveals how carefully that, too, was aimed at Maine's evolutionary theory. Holmes started his analysis by focusing on another early method

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135 See *id.* at 222–24.

136 *Id.* at 224.

137 This, of course, directly contradicts Langdell's equation of the early law of debt with the Roman real actions and Langdell's corollary assumption of a direct Roman law influence. See LANGDELL, SUMMARY, *supra* note 8, at 123–30.

of establishing an action in debt—by a writing or “charter.”<sup>138</sup> Originally, the writing was only evidence of a promise. Later, with the widespread use of seals, which were more difficult to forge, a contract under seal (a covenant) became, not evidence of an enforceable promise, but an enforceable promise in itself. Thus, “[t]he man who had set his hand to a charter, from being bound because he had consented to be, and because there was a writing to prove it, was now held by force of the seal and by deed alone as distinguished from all other writings.”<sup>139</sup> The covenant thus seemed to fit squarely within Maine’s definition of a formal contract. The progression Holmes sketched, however, was from informal, consensual contract to formal contract, exactly the opposite of the general progression that Maine had posited.

Holmes then nodded to Pollock’s use of Maine’s classification: “Nowadays, it is sometimes thought more philosophical to say that a covenant is a formal contract, which survives alongside of the ordinary consensual contract, just as happened in the Roman law.”<sup>140</sup> But Holmes went on to explode that classification: “In one sense, everything is form which the law requires in order to make a promise binding over and above the mere expression of the promisor’s will. Consideration is a form as much as a seal.”<sup>141</sup> And Holmes suggested that the law of covenant was breaking down, not because covenant was an archaic formal rather than a modern informal contract, but because it was no longer seen as manifestly sensible.<sup>142</sup>

Finally, Holmes’s extensive discussion of the development of modern contract law out of the action of *assumpsit*, while relevant to his history of consideration, also had an independent part to play in Holmes’s attack on Maine’s evolutionary theory. The implicit argu-

138 See HOLMES, *supra* note 6, at 213.

139 *Id.* at 214.

140 *Id.* at 215.

141 *Id.* Compare *id.*, with LANGDELL, SUMMARY, *supra* note 8, at 129–30. See also *infra* text accompanying note 270.

142 See HOLMES, *supra* note 6, at 215. Holmes argued,

The only difference is, that one form is of modern introduction, and has a foundation in good sense, or at least falls in with our common habits of thought, so that we do not notice it, whereas the other is a survival from an older condition of the law, and is less manifestly sensible, or less familiar. I may add, that, under the influence of the latter consideration, the law of covenants is breaking down. In many States it is held that a mere scroll of flourish of the pen is a sufficient seal. From this it is a short step to abolish the distinction between sealed and unsealed instrument altogether, and this has been done in some of the Western States.



ment goes like this. The whole modern law of contract grew out of the action of *assumpsit*, a special form of trespass on the case, that we think of as a tort cause of action. And at least in its early stages, this development was based on the general standard of tort liability: a voluntary act causing foreseeable harm to others. Since the early development of *assumpsit* occurred outside the realm of contract altogether, one cannot fit it within Maine's evolutionary categories of formal and consensual contracts at all. Therefore, Maine's theory that in all legal systems contract evolves from formal to consensual cannot be true for the common law.

### B. *Elements of Contract*

Nineteenth-century developments in the common law posed a serious problem for anyone, like Holmes, who might want to develop a positivist theory of contract. The common-law courts in the early nineteenth century were faced with the task of shaping a substantive law of contract as the old forms of action collapsed. To carry out this task, they seized on the will theory of contract, as developed by Robert Pothier, to elaborate the requirements of offer and acceptance.<sup>143</sup> These two requirements seemed to embody the will theory's teaching that contractual obligations sprang from the wills of the contracting parties. A positivist theorist concerned to rid the common law of any reference to subjective wills of living beings could find the law of offer and acceptance a significant challenge. Moreover, Pollock's sophisticated discussion of the requisites for a valid contract began with the generally accepted doctrine that a legal agreement formed by a proposal and an acceptance was necessary for a valid contract and went on to make explicit the seemingly undeniable connection between offer and acceptance and the mutual common intention will theory expounded by Savigny.

Pollock had asked the very lawyer-like question: What are the requisites for a valid contract? Holmes didn't ask that question. The formal organizing principle of *The Common Law* was Holmes's early work on the arrangement of the law according to the nature of the relevant legal duties. In that early work, contract was categorized as a subtopic under the heading of duties of persons in particular situations or relations to persons in particular situations or relations.<sup>144</sup> We might expect Holmes, then, to ask an equally lawyer-like question: What special

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143 See generally ATYAH, *supra* note 124, at 399-448; Baker, *supra* note 124.

144 See Oliver Wendell Holmes, Jr., *The Arrangement of the Law: Privity*, 7 AM. L. REV. 46, 48 (1872), reprinted in THE FORMATIVE ESSAYS OF JUSTICE HOLMES, *supra* note 9, at 97.

relationships give rise to contractual duties? Instead, Holmes started with that question, but then transformed it into what can be seen as two purely scientific questions:

Wherever the law gives special rights to one, or imposes special burdens on another, it does so on the ground that certain special facts are true of those individuals. In all such cases, therefore, there is a twofold task. First, to determine what are the facts to which the special consequences are attached; second, to ascertain the consequences.<sup>145</sup>

After disposing of two preliminary methodological problems, Holmes proceeded with these two tasks: first, to determine in the field of contract the elements common to different sets of special facts that lead to the same special consequences, and second, to identify these special consequences. Limiting his analysis to the modern law of contract arising out of the old action in *assumpsit*, Holmes identified just two common elements: promise and consideration.<sup>146</sup>

Turning to consideration first, Holmes pointed out that the traditional formulation of consideration as any benefit to the promisor conferred by the promisee or any detriment incurred by the promisee was inadequate, even after reducing the "any benefit" alternative to a "detriment," broadly understood, to the promisee. Focusing on a series of hypotheticals concerning consideration for the carriage of goods, obviously based on the leading case of *Coggs v. Bernard*,<sup>147</sup> Holmes noted that the same detriment to the promisee—releasing possession of the goods to the carrier—could be deemed considera-

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145 HOLMES, *supra* note 6, at 227.

146 Holmes recognized that the specific facts in contract cases are not always the same, and so in the field of contract the search must be for the elements common to different sets of special facts that lead to the same special consequences. Holmes identified two common elements: promise and consideration. He acknowledged that these elements had not always been common elements, that a promise was not necessary for liability in the older action for debt, that consideration was not necessary for liability in an action in covenant, and that there was an historical difference between consideration in debt and in *assumpsit*. Holmes proposed to analyze consideration in *assumpsit*, the "later and more philosophical form." *Id.* at 227. These brief qualifications made it clear that Holmes's descriptive theory was descriptive only of the modern common law of contract arising out of *assumpsit*. The cryptic reason he gives for focusing on consideration in *assumpsit* rather than in debt suggests an evolutionary justification for his limited focus. If the law, by "the very necessity of its nature," *id.* at 33, is improving, it makes sense to analyze the latest form of the law of contracts, even though that form may still coexist with remnants of the earlier forms, *cf. id.* at 30-33.

147 92 Eng. Rep. 107 (K.B. 1703). Holmes had commented extensively on *Coggs* in his prior lecture on "The Bailee at Common Law." See HOLMES, *supra* note 6, at 130-62.

tion under some circumstances and not consideration under others. The critical difference, said Holmes, was the way it was treated by the parties in their agreement:

[I]t is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise.<sup>148</sup>

This relation of reciprocal inducement was not, for Holmes, a question of the actual subjective motives of the contracting parties. In fact, echoing Langdell's earlier analysis,<sup>149</sup> he explicitly denied that the parties' actual motives were relevant.<sup>150</sup> For Holmes, the key was whether the promise and the consideration are treated *by the terms of the agreement* as reciprocal inducements one for the other.<sup>151</sup> Holmes's language emphasized this point—it is a relation of reciprocal *conventional* inducement, not reciprocal *actual* inducement.

This understanding of consideration, Holmes said, explains the cases holding that a prior executed consideration will not sustain a subsequent promise: the previously-executed consideration could not have been induced by the subsequent promise.<sup>152</sup> It also explains why the doing of an act in ignorance of a promise of a reward for doing it does not constitute consideration for the promise: the act done in ignorance of the promise of reward could not have been induced by that promise.<sup>153</sup> Although these examples might seem to suggest that the problem in each case is the actual motive of the promisor or the actor, Holmes carefully explained each case as an instance of his principle of reciprocal conventional inducement. In the executed consideration case, the subsequent promise could not be the conventional inducement for the consideration because the promise came after the consideration.<sup>154</sup> As to the unknown reward case, Holmes argued that

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148 HOLMES, *supra* note 6, at 230.

149 See LANGDELL, SUMMARY, *supra* note 8, at 78; see also *supra* notes 115–17 and accompanying text.

150 See HOLMES, *supra* note 6, at 230. At this point in the analysis, Holmes subsequently annotated his copy of *The Common Law* with the comment, "The whole doctrine of contract is formal and external." *Id.* at 230 n.a.

151 See *id.* at 230.

152 See *id.* at 232.

153 See *id.* at 231.

154 See *id.* at 232.

In such a case the reward cannot be claimed, because the alleged consideration has not been furnished on the faith of the offer. The tendered promise has not induced the furnishing of the consideration. The promise cannot be set up as a conventional motive when it was not known until after the alleged consideration was performed.<sup>155</sup>

Holmes then turned to the next common element—a promise. He started with a critique of the definition of promise in the Indian Contract Act of 1872, which Pollock had made the cornerstone of his treatment of promise.<sup>156</sup> That definition is in two parts, and it distinguishes between a proposal and a promise:

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal:

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise . . .<sup>157</sup>

Holmes criticized this definition of promise on one point: the definition limited the scope of promises to *conduct* on the part of the promisor—“his willingness to do or to abstain from doing anything.” Holmes pointed out that it is possible to assure another that anything at all will happen: “An assurance that it shall rain tomorrow, or that a third person shall paint a picture, may as well be a promise.”<sup>158</sup> The scope of “promise,” then, is not limited to assurances that the promisor shall do or abstain from doing something. And when one looks at the case law, one sees that, unless some consideration of public policy intervenes, the law does not limit the promise as an element in contract to assurances that the promisor himself will do or abstain from doing something. Holmes therefore revised the Indian Contract Act definition. “A promise,” Holmes said, “is simply an accepted assurance that a certain event or state of things shall come to pass.”<sup>159</sup>

How is an assurance “accepted”? In returning to that question later in the lecture, Holmes, again echoing Langdell’s earlier analy-

155 *Id.* at 231.

156 *See id.* at 233–34; POLLOCK, *supra* note 7, at vii–viii, 6–8. After Holmes published *The Common Law*, Pollock relied less and less on the Indian Contract Act in the subsequent editions of his contracts treatise. *Compare* FREDERICK POLLOCK, PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY xxii, 2–9 (3d ed. 1881) [hereinafter, POLLOCK, CONTRACTS, 3d ed.], *with* FREDERICK POLLOCK, PRINCIPLES OF CONTRACT 1–8 (7th ed. 1902).

157 HOLMES, *supra* note 6, at 233–34 (quoting POLLOCK, *supra* note 7, at 6).

158 HOLMES, *supra* note 6, at 234.

159 *Id.* at 235.

sis,<sup>160</sup> downplayed the importance of acceptance understood as an expression of agreement:

I find it hard to think of a case where a simple contract fails to be made, which could not be accounted for on other grounds, generally by the want of relation between assurance or offer and consideration as reciprocal inducements each of the other. Acceptance of an offer usually follows by mere implication from the furnishing of the consideration.<sup>161</sup>

Holmes emphasized that the key to contract formation is the actual furnishing by the promisee of the consideration called for in the promisor's offer, not the expression of agreement with the promisor's offer: "[B]y our law an accepted offer, or promise, until the consideration is furnished, stands on no different footing from an offer not yet accepted, each being subject to revocation until that time."<sup>162</sup>

An example may help to clarify Holmes's argument here. Assume *A* says to *B*, "I will pay you \$100 if you will whitewash my fence before Monday next." If *B* says, "All right, I'll do it," that doesn't make an enforceable contract, even though in ordinary language *B* has "accepted" the offer. *A*'s assurance that he will pay *B* \$100 calls for painting the fence by Monday next as the consideration. The assurance becomes "accepted," under Holmes's analysis, when *B* provides the consideration by painting the fence before Monday. The point Holmes was making, echoing Langdell, is that acceptance understood as expressed consent or assent to the offer is irrelevant to contract-formation because the agreement is not in any event enforceable until the called-for consideration is given and the courts will infer acceptance from the giving of that consideration.

In bilateral contract cases, of course, the promise does not call for performance as consideration but for a return promise of future performance. For Holmes, this makes no difference to the analysis, for the essence of the counter-promise in bilateral contract is not that it expresses consent to or acceptance of the offer, but that the promisee's return promise, an overt act, is precisely the consideration called for by the promisor.<sup>163</sup>

In his later analysis of a then-vexing question—when a contract is formed when a counter-promise in a bilateral contract is sent by letter—Holmes made clear his position that the return promise in a bi-

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160 See LANGDELL, SUMMARY, *supra* note 8, at 2; see also *supra* notes 114–15 and accompanying text.

161 HOLMES, *supra* note 6, at 238.

162 *Id.*

163 See *id.* at 240.

lateral contract is simply the conduct that is the consideration called for by the promisor:

[W]henever the obligation is to be entered into by a tangible sign, as, in the case supposed, by letter containing the return promise, and the consideration for and assent to the promise are already given, the only question is when the tangible sign is sufficiently put into the power of the promisee. [And that is when the offeree drops the letter containing the counter-promise in the letter-box, because then he] does an overt act, which by general understanding renounces control over the letter, and puts it into a third hand for the benefit of the offeror . . . . [T]he making of a contract does not depend on the state of the parties' minds, it depends on their overt acts. When the sign of the counter promise is a tangible object, the contract is completed when the dominion over that object changes.<sup>164</sup>

Holmes had analyzed the two common elements of contract. Consideration is a detriment to the promisee—that is, “by the terms of the agreement, it is given and accepted as the motive or inducement of the promise.”<sup>165</sup> A promise is “an accepted assurance that a certain event or state of things shall come to pass.”<sup>166</sup> Significantly, each of these elements is an objectively-determinable, observable fact or set of facts. What counts as consideration can be determined by observing the terms of the agreement. The “promise” is an observable act by the promisor that constitutes an assurance that a certain state of things shall come to pass. The assurance is “accepted” when the consideration called for by the agreement is given. And that, too, is a simple matter of fact.

Consistent with his announced methodology, Holmes went on to discuss the special consequences attached to these special facts. The answer to the consequences question must have seemed obvious to Holmes after his analysis of promise, for he simply identified the consequences without any preliminary argument. “If the promised event does not come to pass,” Holmes said, “the [promisor’s] property is sold to satisfy the damages, within certain limits, which the promisee has suffered by the failure.”<sup>167</sup> This identification of the consequences after the promised event does not come to pass allowed Holmes to go back to the time the promise was made and identify “the immediate legal effect of what the promisor does.”<sup>168</sup> The immediate

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164 *Id.*

165 *Id.* at 230.

166 *Id.* at 235.

167 *Id.*

168 *Id.*

legal effect, said Holmes, is that the promisor "takes the risk of the event, within certain defined limits, as between himself and the promisee."<sup>169</sup> This description of the immediate legal effect applies equally to "a binding promise that it shall rain tomorrow"<sup>170</sup> and a binding promise that the promisor will deliver a bale of cotton, since the consequences of a binding promise at common law are not affected by the degree of power that the promisor possessed over the promised event.<sup>171</sup>

Holmes said that one of the advantages from stating the common-law meaning of promise and contract in terms of taking the risk of the event is that it "free[s] the subject from the superfluous theory that contract is a qualified subjection of one will to another, a kind of limited slavery."<sup>172</sup> Holmes believed that his identification of the consequences of a legally binding promise refutes that form of the will theory. "The only universal consequence of a legally binding promise is," Holmes said, "that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses."<sup>173</sup> To those who would raise the specific performance remedy as an argument against this position, Holmes had three answers. First, his is a theory of the common law of contract and specific performance is an equitable remedy that is not available in every case because it is not, strictly speaking, part of the common law. Second, the specific performance remedy does not force the breaching party to do precisely what he promised, because it is only available after the defendant has breached the contract by failing to do what he promised at the promised time. Third, even in specific performance, the court does not make the defendant fulfill his promise—it just puts him in jail if he does not obey the court's order to do so.<sup>174</sup>

This summary of Holmes's elements lecture allows us to appreciate Holmes's accomplishment. In the teeth of case law adopting offer and acceptance as requisites for a valid contract and in the teeth of Pollock's persuasive argument that offer and acceptance embodied the mutual common intention form of the will theory, Holmes dispensed with offer and acceptance altogether. Instead of offer, acceptance, and consideration as the elements, Holmes has promise and

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169 *Id.*

170 *Id.*

171 *See id.*

172 *Id.*

173 *Id.* at 236.

174 *See id.*

consideration. Although promise is defined as an “*accepted* assurance that [an] event . . . shall come to pass,”<sup>175</sup> it turns out that the assurance is accepted not by the expression of consent but simply by the act of providing the consideration called for by the promisor.

Holmes thus presented the elemental law of contract as a positive law of antecedence and consequence. The antecedents were promise, consideration, and failure of the promised event; the consequence was a court order to the promisor to pay damages to the promisee, which, if not obeyed, led to the consequence that the promisor's property is taken and sold, pursuant to the judicial judgment, to satisfy the damages. Each of the elements was reduced to a description of observable physical acts, eliminating all reference to the subjective wills of human actors. A promise is an accepted assurance that an identified event will happen, where the observable communicative conduct of the promisor identifies whether an assurance is made, the conduct of the promisee called for in return for the promise, and the assured event. Acceptance is determined by observable phenomena—whether the called-for consideration is in fact given. Consideration is what is designated as the conventional inducement for the promise by the observable conduct of the parties. Failure of the assured event is an observable fact. The step-by-step consequences are also observable phenomena. A court orders the promisor to pay damages; if the promisor does not pay as ordered, his property is seized to satisfy the judgment.

From this law of antecedence and consequence, Holmes derived the immediate “legal consequence” of the contracting conduct of promise and consideration.<sup>176</sup> This legal consequence is based on the prediction of fact one can make from knowing the relevant law of antecedence and consequence. If you promise (and the promisee gives) the called-for consideration, you will be ordered by a court to pay damages to the promisee if the assured event does not occur. This prediction, based on a scientific law of antecedence and consequence, is the foreknowledge that the positivist says is all we can know and all we need to know. Moreover, the immediate legal consequence of entering into a contract—that the promisor takes upon himself the risk that the assured event will not occur—does not require that the promisor intended to take that risk, as the “consequence” is simply another way of stating the prediction of fact one may make scientifically after observing certain phenomena to which a known scientific law of antecedence and consequence applies.

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175 *Id.* at 235 (emphasis added).

176 *See id.*



Holmes's purely objective analysis of the contract elements eliminates the traditional moral terminology, with its whiff of the theological or metaphysical stages of thought, from the core of contract law. Promise as redefined has the moral neutrality of a weather forecast: it is not, after all, a promise to do something, but just an accepted assurance that a certain event will happen. A direct corollary of the redefined promise is that the term "breach," with its moral connotations of breach of promise, is replaced by the morally neutral "failure of the promised event." Consequently, the morally significant reliance on another's fulfilling his contractual promise is replaced by the morally neutral reliance on the judicial remedy in case the assured event fails to occur. Finally, although Holmes is careful not to say it, the immediate consequence of entering a contract, for Holmes, is not that one has a legal and moral "duty" to perform one's contractual obligation. The only consequence is that one has assumed the risk that the assured event will not occur. This foreshadows what Holmes made clear later in *The Path of the Law*: "[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court."<sup>177</sup>

Holmes explicitly banished from his description of the elements of contract any reference to the subjective wills or intentions of the parties. Given the positivist antipathy to explanations of phenomena by invoking the wills of living beings, this feature of Holmes's description seems thoroughly positivist as well.

The methodologies Holmes used in the elements lecture were clearly positivist. Throughout, Holmes employed a reductive methodology, reducing all theological and metaphysical terms to descriptions of phenomena or laws of antecedence and consequence. Moreover, in Holmes's analysis of promise he employed the positivist least-common-denominator methodology, looking for that which each member of a set of phenomena has in common with all the other members of that set. Some enforceable promises are not promises to do something, but simply assurances that something will happen; all promises to do something can be recharacterized as assurances that something will happen. Therefore, "an assurance that something will happen" is the appropriate, least-common-denominator characterization because it fits *all* contractual promises.

The theory of contract Holmes elaborated in his second contract lecture thus has all the features of a Comtean positivist theory. It is positivist in its substance, which reduces contract law to a scientific law

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<sup>177</sup> Holmes, *The Path of the Law*, *supra* note 25, at 458, *reprinted in* HOLMES, COLLECTED LEGAL PAPERS, *supra* note 25, at 167, 169.

of antecedence and consequence. It is positivist in its methodology, which reduces theological and moral terms to phenomena and laws of antecedence and consequence and, wherever possible, determines significant attributes of a class by determining what all the members of that class have in common. Finally, it is positivist in its results, as the theory empties the basic contract terms "promise," "breach," and "duty" of their traditional moral content and further defines an enforceable contract without reference to the subjective intentions of the contracting parties.

### C. *Void and Voidable Contracts*

In each of his first two lectures on contract, Holmes seemed to target for demolition a separate theory of Pollock's. In lecture one, Holmes took dead aim at Pollock's notion that Maine's evolutionary theory could be applied to the common law of contract. In lecture two, Holmes took dead aim at Pollock's notion that offer and acceptance, understood in terms of Savigny's mutual common intention version of the will theory, were central to any understanding of the requisites to a valid contract at common law.

What was left in Pollock's work to demolish was the entire last half of his treatise,<sup>178</sup> in which he discussed the doctrines of mutual mistake, fraud, misrepresentation, coercion, and undue influence as "subjective conditions" for a valid contract.<sup>179</sup> And Pollock explained each of these doctrines by reference to the will theory: if a party's consent to an agreement is not true, full, and free, the contract is not binding on that party.<sup>180</sup> These chapters in Pollock's treatise were very persuasive: coercion or undue influence means the consent was not free; mistake, misrepresentation, or fraud means that consent given in ignorance of a material fact was not true or full.<sup>181</sup> Pollock's thorough, sophisticated analysis seemed to make of these topics a stronghold for the mutual common intention theory.

Moreover, the underlying doctrines themselves seemed peculiarly resistant to positivist reformulation. Take the doctrine of mutual mistake, which holds that a contract is void if the contracting parties were mutually mistaken about a matter of fact central to the agreement. On the face of it, it seems impossible even to state the rule without referring to the subjective intentions or understandings of the contracting parties. Or take the doctrine of fraud in the inducement,

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178 See POLLOCK, *supra* note 7, at 355-545.

179 See *id.* at 355-56.

180 See *id.* at 356.

181 See *id.*

which holds that a party induced to enter an agreement by the other party's knowing false statements of material fact could either avoid the contract or enforce it, as she chose. On its face, this rule suggests that the agreement is binding on the defrauder because his consent was knowing, but not binding on the defrauded because her consent was based on ignorance.

Holmes's third lecture can be seen as an ingenious response to the challenge posed by Pollock's analysis of these "subjective condition" doctrines. Holmes shifted the initial focus away from the individual doctrines. He focused instead on the judicial remedies and categorized those cases as void contracts or voidable contracts. He attempted to show that a contract was void only when one of the objective elements of a contract was missing.<sup>182</sup> He attempted to show that a contract was voidable only for failure of an express or an objectively implied condition in the contract.<sup>183</sup>

This reading of the third lecture shows it following the pattern set in Holmes's first two lectures on contract. The coverage and content of the third lecture provide additional reasons to believe Holmes aimed to provide a positivist alternative to Pollock's "subjective condition" doctrinal analysis. First, there is the coverage argument. Holmes's treatment of void and voidable contracts covered all of the ground covered by Pollock's analysis of the "subjective condition" doctrines, even though some of Pollock's doctrines (undue influence and coercion, for example) are covered only by entailment without specific discussion. Moreover, the extra topics covered by Holmes and not by Pollock—conditions, implied conditions, warranties, and dependent and independent promises—are all outside the scope of the title of the lecture, which was "void and voidable contracts," and seem to be included because they are all necessary to carry out Holmes's central analytical move to explain all voidable contract cases as cases involving failure of express or objectively implied conditions. Second, there is the content argument. The theories of void and voidable contracts that Holmes developed are in fact wholly positivist alternatives to the subjective-consent explanations by Pollock. Moreover, in the details, as we shall see, Holmes continued to tee up Pollock's positions for subsequent attack.

## 1. Void Contracts

Holmes stated his basic thesis about void contracts at the beginning of the third lecture:

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182 See HOLMES, *supra* note 6, at 241.

183 See *id.* at 246.

When a contract fails to be made, although the usual forms have been gone through with, the ground of failure is commonly said to be mistake, misrepresentation or fraud. But I shall try to show that these are merely dramatic circumstances, and that the true ground is the absence of one or more of the primary elements, which have been shown, or are seen at once, to be necessary to the existence of a contract.<sup>184</sup>

Holmes presented three kinds of cases to support this thesis: cases in which an offer is made to an unauthorized agent; cases in which a proper name, understood differently by the two contracting parties, is used to identify the subject matter of the agreement; and cases in which the terms of the contract seem to be consistent but in fact contradict themselves on a matter fundamental to the bargain. In each of these cases, Holmes argued, there was no contract in the first place.

In the case of an offer "accepted" on behalf of a principal by an unauthorized agent, there is no contract because the promise offered to the alleged principal was not accepted by him, and the alleged principal gave no consideration. "In such a case," said Holmes, "although there is generally mistake on one side and fraud on the other, it is very clear that no special doctrine need be resorted to, because the primary elements of a contract explained in the last Lecture are not yet present."<sup>185</sup>

In discussing the second kind of case, Holmes focused on the famous *Raffles v. Wichelhaus* case,<sup>186</sup> where a contract identified the subject matter by a single proper name differently understood by the parties as identifying two different things, each called by the same proper name. The contract was for a cargo of cotton "to arrive ex Peerless from Bombay"; there were two different ships called "Peerless"; one party meant one and the other meant the other.<sup>187</sup> Holmes began his analysis by setting out the will-theory reasoning of Pollock:<sup>188</sup> "It is commonly said that such a contract is void, because of mutual mistake as to the subject matter, and because therefore the parties did not consent to the same thing."<sup>189</sup> Holmes rejected that explanation. "The law," he said, "has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by

184 *Id.* at 241.

185 *Id.*; see also POLLOCK, *supra* note 7, at 356-57.

186 159 Eng. Rep. 375 (Ex. D. 1864).

187 See *id.* at 375.

188 See POLLOCK, *supra* note 7, at 373-74, 386-89.

189 HOLMES, *supra* note 6, at 242.

externals, and judge parties by their conduct.”<sup>190</sup> For Holmes, then, “[t]he true ground of the decision was not that each party meant a different thing, . . . but that each said a different thing. The plaintiff offered one thing, the defendant expressed his assent to another.”<sup>191</sup> This is so because a proper noun, in common usage, means “one individual thing, and no other.”<sup>192</sup>

In discussing the third case, in which essential terms are, in fact, inconsistent, Holmes used as an example a case in which a contract was for “these barrels of mackerel,” when the designated barrels in fact contained salt.<sup>193</sup> Again, Holmes began his analysis by setting out Pollock’s will-theory explanation: “It is commonly said that the failure of the contract in such a case is due to the fact of a difference in kind between the actual subject-matter and that to which the intention of the parties was directed.”<sup>194</sup> Holmes rejected that explanation and offered another:

It is perhaps more instructive to say that the terms of the supposed contract, although seemingly consistent, were contradictory in matters that went to the root of the bargain. For, by one of the essential terms, the subject-matter of the agreement was the contents of certain barrels, and nothing else, and, by another equally important, it was mackerel, and nothing else; while, as a matter of fact, it could not be both, because the contents of the barrels were salt. As neither term could be left out without forcing on the parties a contract which they did not make, it follows that *A* cannot be required to accept, nor *B* to deliver either these barrels of salt, or other barrels of mackerel; and without omitting one term, the promise is meaningless.<sup>195</sup>

Holmes then proceeded to apply this principle of repugnancy to a number of different cases. First, he concluded that not just any inconsistency in contractual terms would serve to make the contract void. “The repugnant terms must both be very important,” he said, “so important that the court thinks that if either is omitted, the contract would be different in substance from that which the words of the parties seemed to express.”<sup>196</sup> Second, Holmes concluded that the repugnant terms had to be in the contract itself, either expressly or by

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190 *Id.*

191 *Id.*

192 *Id.*

193 *See id.* (citing *Gardner v. Lane*, 98 Mass. 517 (1868)).

194 *Id.* at 243; *see also* POLLOCK, *supra* note 7, at 373–74, 391–97.

195 HOLMES, *supra* note 6, at 243.

196 *Id.* at 244.

a supportable construction of the agreement. This conclusion was supported by Holmes's objective theory of contract formation:

Where parties having power to bind themselves do acts and use words which are fit to create an obligation, I take it that an obligation arises. If there is a mistake as to a fact not mentioned in the contract, it goes only to the motives for making the contract. But a contract is not prevented from being made by the mere fact that one party would not have made it if he had known the truth.<sup>197</sup>

Holmes ended this discussion of void contracts with this summary conclusion:

I think that it may now be assumed that, when fraud, misrepresentation, or mistake is said to make a contract void, there is no new principle which comes in to set aside an otherwise perfect obligation, but that in every such case there is wanting one or more of the first elements which were explained in the foregoing Lecture. Either there is no second party, or the two parties say different things, or essential terms seemingly consistent are really inconsistent as used.<sup>198</sup>

Holmes made it as clear as he could, then, that his theory of void contracts was tied directly to his objective theory of contract formation. Insofar as Holmes's explanation of contract formation was purely positivist, then, his explanation of void contracts would be purely positivist, too. In order to support this reductive thesis about void contracts, Holmes had to establish that cases in which courts deemed a contract void on grounds apparently unrelated to the elements of contract formation were better understood as cases in which a valid contract was not made in the first place. And Holmes proceeded to establish exactly that in his analysis of misrepresentation of an agent's authority and mutual mistake.<sup>199</sup>

Holmes's first example was an easy case. If a person claiming to be an agent of another misrepresents his authority and enters into a contract with a third party on behalf of his purported principal, courts hold that contract void. Under any theory of contract formation, these facts would lead to the conclusion that the contract is void because the purported principal never entered into an agreement. So, Holmes could easily explain this as a failure to fulfill his objective elements. The example also gave Holmes the opportunity to attack Pollock's attempt to categorize fraud cases analytically as cases of mistake induced by fraud. "In such a case," said Holmes, "although there is generally

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197 *Id.* at 246.

198 *Id.*

199 *See id.* at 241-42, 252-54.

mistake on one side and fraud on the other, it is very clear that no special doctrine need be resorted to, because the primary elements of a contract . . . are not yet present."<sup>200</sup>

Holmes explained mutual mistake cases, too, as cases in which a contract was never formed because an objective element was missing.<sup>201</sup> So he explained *Raffles* in purely conduct-based terms: in that case, although each party used the same proper name, the parties in fact said different things. This is so, Holmes argued, because under our language convention any formal use of a proper name is univocal.<sup>202</sup> Each party, therefore, is entitled to insist on his meaning for the word as used by him, although he is not entitled to insist on his meaning for the word as used by the other party. When one uses a proper name, then, it is like pointing to a single thing with that name. In *Raffles*, the parties said different things because they each pointed to a different thing. Holmes, therefore, seemed to deliver on his promise to explain *Raffles* by reference only to the externals of the parties' conduct.

Holmes limited his explanation of *Raffles* to cases in which each party uses the same proper noun, but each party, in fact, refers to a different thing.<sup>203</sup> He re-interpreted all other mutual mistake cases as cases of repugnancy between essential terms.<sup>204</sup> Holmes's repugnancy theory seems clearly positivist, for repugnancy can be determined solely on the basis of external facts: the language of the contract itself and the state of affairs at the time the contract was entered into. Thus, in a contract to sell "these barrels of mackerel," when the designated barrels in fact contained salt, the case can be decided without inquiring into the subjective state of the parties' minds or the "subject-matter . . . to which the intention of the parties was directed."<sup>205</sup> One can tell simply from the language of the contract that both "these barrels" and "of mackerel" are essential terms. But, in light of the actual state of affairs at the time the contract was entered into, these two essential terms are contradictory. The repugnancy conclusion can

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200 *Id.* at 241. The example Holmes used is a special case of fraud, however, in which the fraudulent misrepresentation concerns the authority or capacity of a party to enter into a contract on behalf of another. Holmes did not claim, either here or later in the chapter, that all fraud results in a void contract. Pollock uncharacteristically misinterpreted Holmes on this question. See POLLOCK, *CONTRACTS*, 3d ed., *supra* note 156, at xviii.

201 See HOLMES, *supra* note 6, at 241-42.

202 See *id.*

203 See *id.* at 242.

204 See *id.* at 243.

205 *Id.*

thus be drawn solely from the objective, external facts. "As neither term could be left out without forcing on the parties a contract which they did not make," Holmes said, "it follows that *A* cannot be required to accept, nor *B* to deliver either these barrels of salt, or other barrels of mackerel; and without omitting one term, the promise is meaningless."<sup>206</sup>

Thus, Holmes seemed to have succeeded in his attempt to reduce all cases of void contracts to cases in which one of the objectively discernible elements of a valid contract is not present. Insofar as his descriptive theory of contract formation is purely positivist, then, his theory of void contracts is equally positivist. And Holmes had achieved the seemingly impossible feat of explaining mutual mistake cases purely by reference to the external conduct of the parties without reference to their subjective intentions or understandings.

## 2. Voidable Contracts

In his discussion of voidable contracts, Holmes set out his basic thesis clearly:

When a contract is said to be voidable, it is assumed that a contract has been made, but that it is subject to being unmade at the election of one party. This must be because of the breach of some condition attached to its existence either expressly or by implication.<sup>207</sup>

To establish this broad thesis, Holmes needed to elaborate a general theory of contractual conditions, which he proceeded to do. Here Langdell's *Summary* again became important for Holmes, who used its extensive treatment of conditions as a summary of the relevant law and as a foil against which to elaborate his own theory.

Langdell's central definition was that "[a] covenant or promise is conditional when its performance depends upon a future and uncertain event."<sup>208</sup> Holmes's central definition was that "a condition properly so called is an event, the happening of which authorizes the person in whose favor the condition is reserved to treat the contract as if it had not been made."<sup>209</sup> There are two fundamental differences between the two definitions. The first difference is the standpoint of the definer. Langdell stands at the time a promise to perform is made and focuses on the condition in that promise that makes its performance contingent on a future event. Holmes stands at the time the condition is not fulfilled and focuses on that event and its legal conse-

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206 *Id.*

207 *Id.* at 246.

208 LANGDELL, *SUMMARY*, *supra* note 8, at 31.

209 HOLMES, *supra* note 6, at 249.



quences. With these different standpoints, Langdell and Holmes define different things: Langdell defines a conditional promise, Holmes defines a condition. The second difference is the nature of the event that is the condition. Langdell takes the ordinary view that the condition is an event whose happening makes the promise to perform unconditional or absolute. Holmes exactly reverses the ordinary view. The event for Holmes is what makes the promise to perform "non-binding." Holmes's condition therefore is the *nonfulfillment* of Langdell's condition.

Important consequences follow from these fundamental differences. Since Langdell stands at the time of the promise, the condition for him is a future and uncertain event. Since Holmes stands at the time after the event he identifies as the condition has occurred, the condition for him is simply a given—a past event. By defining condition as an event rather than a contractual provision referring to an event, Holmes can state his definition as a positive law of antecedence and consequence. The condition, which is an event, is invariably followed by legal consequences—the person in whose favor the condition is reserved is authorized either to enforce the contract or to treat the contract as if it had not been made.<sup>210</sup>

Holmes thus achieved a scientific, reductive definition of a condition. His definition, moreover, was applicable to voidable contract cases as well as to breach of condition cases. In voidable contract cases, after all, an event—fraudulent misrepresentation, coercion, or undue influence—has the legal consequence of authorizing the defrauded, coerced, or unduly influenced party to choose whether to affirm or avoid the contract. The only difference between a conditional contract and a voidable contract lies in something outside the parameters of Holmes's definition: whether the event was explicitly included as a condition in the promisor's promise.

Holmes next disposed of the difficulty posed by this difference, by turning from conditions created by the words of the contract to conditions that arise by construction. In explaining conditions by construction, Holmes simply assumed that voidable contract cases are cases of conditions by construction, since they fit his description of the nature of constructive conditions:

The nature of the conditions which the law thus reads in needs explanation. It may be said, in a general way, that they are directed to

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210 Later, Holmes made clear that the legal authority conferred by the event is the authority not just to treat the contract as if it had not been made, but to choose either to treat the contract as not having been made or to treat the contract as enforceable. *See id.* at 249.

the existence of the manifest grounds for making the bargain on the side of the rescinding party, or the accomplishment of its manifest objects. But that is not enough. Generally speaking, the disappointment must be caused by the wrong-doing of the person on the other side; and the most obvious cases of such wrong-doing are fraud and misrepresentation, or failure to perform his own part of the contract.<sup>211</sup>

Holmes's argument here seems flawed. He developed a scientific description of a condition after drawing certain analytical distinctions from cases clearly decided on breach of condition grounds. When he moved on to describe constructive conditions generally, he included cases of contracts voidable for fraud or misrepresentation in the set of cases he used to form that general description. Since he had used these cases in developing his general description, it is not surprising that that description later turned out to fit the contracts-voidable-for-fraud cases perfectly.<sup>212</sup> That is always the case when you assume your conclusion.

We can save Holmes from this criticism if we fill in the steps that he left out, or left to implication:

- (1) Based on a scientific, reductive analysis of traditional conditional contract cases, we can define a condition scientifically as *an event that legally authorizes the person in whose favor the condition is reserved to either affirm or avoid the contract.*<sup>213</sup>
- (2) The legal consequences in a voidable contract case are exactly the same: one of the parties is legally authorized to either affirm or avoid the contract. What gives rise to this consequence in every case is "an event," for example, fraudulent inducement.
- (3) From a scientific point of view, therefore, traditional conditional contract cases are indistinguishable from voidable contract cases: the scientific definition of a condition applies equally to both kinds of cases.
- (4) Since the event that authorizes a party to choose to either affirm or avoid the contract in a voidable contract case is, therefore, a condition of the contract that is not expressed in the contract itself, it must be a constructive condition read into the contract by the courts.
- (5) In exploring the grounds for constructive conditions, it makes sense, then, to include not only the judicial grounds for construc-

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211 *Id.* at 251-52.

212 *See id.* at 253-54.

213 *See id.* at 249.

tive conditions that the courts explicitly say are conditions, but also the judicial grounds for holding a contract voidable.

(6) That exploration supports the conclusion that

“[t]he nature of the conditions which the law thus reads in . . . [are, in general, (a)] directed to the existence of the manifest grounds for making the bargain on the side of the rescinding party, or the accomplishment of its manifest objects . . . [and (b)] generally speaking, the disappointment must be caused by the wrong-doing of the person on the other side; and the most obvious cases of wrong-doing are fraud and misrepresentation, or failure to perform his own part of the contract.”<sup>214</sup>

Once we have filled in the steps, we can see how Holmes probably got from his expressed position in step one to his expressed conclusion in step six. As reconstructed, of course, the argument is not obviously circular. Because of the persistent methodological importance of objective legal consequences in this reconstructed chain of reasoning, it seems to be clearly positivist.

The rest of the chapter, equal in length to the discussion up to that point, was given over to conditions by construction related to representations of fact.<sup>215</sup> Holmes divided this discussion into three parts: those conditions by construction related to representations of fact not contained in the contract, those related to representations of fact contained in the contract, and those related to representations in the contract that certain facts will be true—contractual promises, under Holmes’s definition.<sup>216</sup>

Holmes began his discussion of constructive conditions related to representations outside the contract with an analysis of misrepresentation outside the contract that leads to the contract but that is not fraudulent.<sup>217</sup> He asked whether that misrepresentation authorizes rescission of the contract.<sup>218</sup> That was the question that Pollock, beguiled by the will theory, had labored so mightily to answer in the affirmative.<sup>219</sup> Holmes’s analysis was short and unequivocal. He recognized that a promisor relying on the misrepresentation to his detriment could argue that he was harmed just as much when the

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214 *Id.* at 251–52.

215 *See id.* at 252–64.

216 *See id.*

217 *See id.* at 252.

218 *See id.*

219 *See id.*

promisee believed the representation was true as when the promisee knew the representation was false.<sup>220</sup> Holmes continued,

But it has been shown, in an earlier Lecture, that the law does not go on the principle that a man is answerable for all the consequences of all his acts. An act is indifferent in itself. It receives its character from the concomitant facts known to the actor at the time. If a man states a thing reasonably believing that he is speaking from knowledge, it is contrary to the analogies of the law to throw the peril of the truth upon him unless he agrees to assume that peril, and he did not do so in the case supposed, as the representation was not made part of the contract.<sup>221</sup>

Holmes recognized that the law was different when the misrepresentation leading to but not contained in the contract was fraudulent. In that case, the defrauded party may rescind the contract. Holmes admitted that this seems to be at odds with his objective theory of contract.<sup>222</sup> Fraudulent misrepresentations that induce another to enter the contract seem to relate only to the subjective motive for making the contract when they are not included in the contractual language. Those representations, therefore, do not seem relevant to the objective acts that form the elements of a valid contract. They do not affect the interpretation of the contractual language. Moreover, because the words of the contract do not incorporate the misrepresentations, the words are not repugnant. How then is the general rule about fraud in the inducement consistent with Holmes's theory? Holmes's answer was simple: "It is no doubt only by reason of a condition construed into the contract that fraud is a ground of rescission."<sup>223</sup> And the substance of that condition, for Holmes, is not that the representations leading to the contract are true, "but that the promisee has not lied to [the promisor] about material facts."<sup>224</sup>

Holmes's position that a contract is voidable for fraud in the inducement because the fraud violates a constructive condition entails a corollary position. The corollary, as stated by Holmes, is this: "Parties could agree, if they chose, that a contract should be binding without regard to truth or falsehood outside of it on either part."<sup>225</sup> That is, if fraud in the inducement just violates a constructive condition, the parties, by explicit language, could block this constructive condition, just

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220 *See id.*

221 *Id.*

222 *See id.* at 252.

223 *Id.* at 253.

224 *Id.* at 254.

225 *Id.* at 253.

as they can block with explicit language any other constructive condition.

Holmes then turned to three possibilities posed by representations of fact contained in a bilateral contract, but without language explicitly making the truth of the representation a condition.<sup>226</sup> The first two were simple cases Holmes treated cursorily. If the representation is false because of a mistake about a fact that has no bearing on the bargain, the falsity of the representation has no legal consequences. If the representation is fraudulent and misled the other party, the contract would be voidable "on the same principles as if the presentation had been made beforehand."<sup>227</sup> Holmes paid the most attention to the third possibility, in which the representation of fact is deemed a warranty, even though it was not fraudulent. Holmes said the question of whether the representation is a warranty "is . . . to be determined by the court on grounds of common sense, looking to the meaning of the words, the importance in the transaction of the facts which the words convey, and so forth."<sup>228</sup> Also, Holmes said that when a judge decides that a representation is a warranty, he really means that the party using the words of description "binds himself to answer for their truth," and that "their truth is a condition of the contract."<sup>229</sup> Holmes's analysis thus subsumed all warranty cases under his constructive condition category.

Holmes himself, however, had a problem with including certain warranty cases in the constructive condition category. When the warranty touches "the present condition of the subject-matter of the contract,"<sup>230</sup> as in the leading case of *Behn v. Burness*,<sup>231</sup> Holmes would characterize the breach of warranty as one of repugnant essential terms. In *Behn*, the contract was for lease of the plaintiff's ship, described in the agreement as then in the port of Amsterdam, but which did not arrive in Amsterdam until four days later.<sup>232</sup> Under Holmes's prior analysis, then, the contract would be void for repugnant essential terms rather than voidable for breach of warranty.

So Holmes was faced with a puzzle: why would courts in cases like *Behn* hold the contract voidable instead of holding it void, as Holmes's repugnancy theory would suggest? After rejecting explanations in terms of the time of passage of title or the distinction between "mat-

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226 See *id.* at 256.

227 *Id.*

228 *Id.* at 256-57.

229 *Id.* at 257.

230 *Id.* at 260.

231 122 Eng. Rep. 281 (Ex. Ch. 1863).

232 See *id.* at 281.

ters of history" and "words of description," Holmes concluded without elaboration that "the true solution is [probably] to be found in practical considerations."<sup>233</sup> After apparently dropping the matter, Holmes went on to use his repugnancy analysis of *Behn* to develop further his theory of repugnancy, in an open invitation to courts to treat cases like *Behn* as cases in which the contract is void because of repugnant essential terms:

[T]he fact is that the law has established three degrees in the effect of repugnancy. If one of the repugnant terms is wholly insignificant, it is simply disregarded, or at most will only found a claim for damages. . . . If . . . both are of the extremest importance, so that to enforce the rest of the promise or bargain without one of them would not merely deprive one party of a stipulated incident, but would force a substantially different bargain on him, the promise will be void. There is an intermediate class of cases where it is left to the disappointed party to decide. But as the lines between the three are of this vague kind, it is not surprising that they have been differently drawn in different jurisdictions.<sup>234</sup>

Holmes's analysis is not wholly convincing. He seems to have been driven to apply his repugnancy theory to warranties by the logic of his position. When you have reduced a mutual mistake about a matter essential to the contract to repugnant essential terms in the contract, you have shifted the focus from the reason for including a mistaken description of an essential term to the simple fact that a mistaken description of an essential term is included in the contract. Once that is your focus, mutual mistake cases seem indistinguishable from breach of warranty cases because those cases, too, involve a mistaken essential term. So Holmes was forced, by the logic of his reductive theory, to raise the question why contracts based on mutual mistake about an essential fact are void, while a breach of warranty only makes the contract voidable. And there is no real answer to that question in Holmes's theory.

At the end of the lecture, Holmes turned to constructive conditions related to the representation in a contract that certain facts shall be true in the future.<sup>235</sup> This was the familiar question of when performance of a promise on one side is a condition to the obligation of the contract on the other. This question had been faced many times by common-law courts; almost all constructive condition cases decided by the courts were cases where the question was the required order of

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233 HOLMES, *supra* note 6, at 259.

234 *Id.* at 259–60.

235 *See id.* at 260.

performance in bilateral contracts where the contract itself was silent on the question. Langdell had dealt with the doctrines and the cases extensively in his treatise under the heading "dependent and independent covenants and promises."<sup>236</sup>

Holmes followed the broad outline of Langdell's treatment of the topic while suggesting a policy-based, practical approach to the issue instead of Langdell's narrowly technical and conceptual approach. Holmes made a sensible point, supported by the case law, in his criticism of Langdell's treatment of these cases. The question of whether performance of one party's promise should be a condition for the obligation of the contract on the part of the other party was generally determined by the courts by the process of construction. That is, the courts looked on it as a question of what the parties must have intended or would have decided, given basic assumptions of fair dealing and good faith, in light of all the rest of the contract. In that process, as Holmes pointed out, "[i]t will be found that decisions based on the direct implications of the language used, and others based upon a remoter inference of what the parties must have meant, or would have said if they had spoken, shade into each other by imperceptible degrees."<sup>237</sup>

We may now be in a position to understand Holmes's achievement in his analysis of voidable contracts. Voidable contracts as a category posed a serious problem for any positivist theory, for voidable contracts seemed to undermine all of Holmes's positivist analysis in the elements lecture. The category itself includes contracts voidable for a number of different reasons: fraud in the inducement, fraudulent terms, duress, and undue influence. In each of these different cases, all three of Holmes's objective elements seem to be present.

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236 LANGDELL, SUMMARY, *supra* note 8, at 134.

237 HOLMES, *supra* note 6, at 261. Here, Holmes's inchoate objective general theory of construction found an appropriate field for explaining judicial decisions. It may be possible to elaborate intermediate principles of construction based on recurrent fact patterns, such as Langdell's preferred principles of equivalency or dependence, but those intermediate principles should not be treated as rules of law or overriding principles. In each case, the inquiry concerns what the parties intended or would have intended on this question in light of all the relevant circumstances. Holmes thus appropriately criticized Langdell's tendency to elevate intermediate principles of construction into overriding rules of law. Holmes's treatment of all this was right on target. For Holmes, the principles of equivalence and dependence are aids to construction, drawn from recurrent forms of agreement or words chosen, but the principles are always subordinate to the basic task of construction, which is to determine, for this contract and in this context of social custom and tradition and meaning conventions, what the parties must have intended on this question or would have intended had they focused on it.

There may be a promise, consideration, and failure of the assured event, yet the court may refuse to enforce the contract if, for example, there were fraud in the inducement and the defrauded party elects to treat the contract as void. Moreover, the validity of the underlying contract depends not on whether the objective elements of contract are present initially, but on the subsequent decision of the defrauded, coerced, or unduly influenced party, whose choice will retroactively make the contract enforceable or void. Voidable contract doctrines thus seem to undermine Holmes's attempt to reduce contract law over its whole range to laws of antecedence and consequence, for in the voidable contracts category, all the ordinary antecedents may be present, yet the ordinary consequence may or may not follow, depending on the unpredictable subsequent choice of one of the parties.

Moreover, the various subcategories of voidable contracts all seem to be based on moral judgments about whether one of the parties to a contract "defrauded," "coerced," or "unduly influenced" another. So any attempt to reduce the subcategories to scientific laws of antecedence and consequence would seem to be frustrated by the necessity to make a subjective judgment about the subjective moral character of an actor's allegedly defrauding, coercing, or unduly influencing conduct.

Holmes discovered ingeniously positivist solutions to these technical problems. Central to Holmes's analysis of voidable contracts was his contention that contracts are voidable only because of a constructive condition read into them by the courts. Characterizing voidable contracts cases as constructive condition cases allowed Holmes to set out plausible, positivist answers to the puzzles posed by the voidable contracts cases.

The puzzle posed by the contingent validity of voidable contracts was solved by the constructive condition formulation in the following way. The event that Holmes defines as the constructive condition is the antecedent; the consequence is that the person in whose favor the condition operates is legally authorized to either affirm or avoid the contract.<sup>238</sup> One might argue that legal authority is not an objective fact, but this does not undermine the positivist character of Holmes's solution because legal authority can be reduced to descriptions of the overt conduct of the authorized party: if he acts in ways understood as affirming the contract, then certain consequences follow; if he acts in ways to avoid the contract, then other consequences follow.

Under Holmes's constructive condition formulation, the process of implying a condition into a contract can be seen as purely objective



and scientific. Although Holmes himself did not expressly state it in *The Common Law*, one can see an inchoate objective process of construction, consistent with Holmes's overall positivist commitments, in what Holmes did in his analysis of constructive conditions. The process embedded in Holmes's analysis looks like this: One looks at the words of the contract, which are objective facts, in light of both the surrounding circumstances, which are also objective facts, and the manifest object of the contract, which can be inferred as a fact from the words of the contract and the surrounding circumstances. In light of the words, the circumstances, and the manifest object of the contract, one can determine scientifically what conditions the parties would have agreed to had their attention been drawn to it at the time of contracting. One can do that by examining the experience of mankind to see what people ordinarily do in such circumstances—that is, by discovering a scientific law of antecedence and consequence.

In his constructive condition formulation, Holmes can describe in objective, phenomenal terms the event that is the constructive condition by reducing moral terminology to a description of voluntary acts done with knowledge of certain surrounding circumstances, just as Holmes had done in his criminal law and torts lectures. For example, using his objective process of construction, Holmes had identified the constructive condition underlying the rule that fraudulently induced contracts are voidable: “[not that certain facts are true] but that the promisee has not lied to [the promisor] about material facts.”<sup>239</sup> The standard for determining whether the promisee lied, moreover, is a purely external one: “If a man makes a representation, knowing facts which by the average standard of the community are sufficient to give him warning that it is probably untrue, and it is untrue, he is guilty of fraud in theory of law whether he believes his statement or not.”<sup>240</sup> According to Holmes, the standard for determining whether the false statement concerned “material facts” is also objective: whether “a belief in their being true is likely [based on ordinary experience] to have led to the making of the contract.”<sup>241</sup>

Holmes's analysis of objective conditions thus provided plausible, satisfying responses to the technical problems the voidable contract category posed for any positivist theory of contract. Most importantly, after clearing away these technical problems confronting the voidable contract category, Holmes could use his resulting objective theory of constructive conditions to redescribe, without reference to subjective

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239 *Id.* at 254.

240 *Id.* at 253–54.

241 *Id.* at 254.

consent, all the doctrines Pollock had included in his "subjective conditions" analysis. Under Holmes's redescription, fraud, coercion, and undue influence allow a contracting party to avoid her contractual obligation, not because these things undermine the full, free, and true consent necessary to a contractual obligation, but because that conduct breaches an implied condition in the contract.

Holmes immediately used his objective analysis of voidable contracts to devastate Pollock's theory-driven attempt to reform the law of innocent misrepresentation. Pollock had focused on the resulting mistake present in both fraud and innocent misrepresentation. He saw that the mutual common intention theory would treat cases of innocent misrepresentation the same as cases of fraud.<sup>242</sup> In both cases, the mistake of fact by one of the parties means that his consent is not true and full. Pollock therefore labored mightily to mold some recent equitable cases into a solid base for changing the legal rule about innocent misrepresentation.<sup>243</sup> Holmes's objective, external standard of fraud allowed him to account for many of the cases that might have supported Pollock's suggested trend because an objective standard could support a finding of fraud even though the defrauding party was subjectively innocent. In addition, Holmes's policy argument favoring freedom of speech as long as the speaker believes that what he says is true provided a persuasive basis for the traditional rule denying relief for harm caused by objectively innocent misrepresentations.<sup>244</sup> Here, too, Holmes turned to his use of what Pollock had treated, in effect, as a test case.

*D. Positivist Features Missing from Holmes's Contract Theory: The Dog That Didn't Bark?*

Holmes's unified theory of tort and criminal law contained a description of the evolution of liability rules consistent with the positivist theory of the progression of human thought, as well as a plausible formulation of a public policy basis for the prevailing liability standards. These two clearly positivist elements are missing from Holmes's theory of contract. Do these missing elements compel the conclusion that Holmes's theory of contract was not really a positivist theory after all?

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242 See POLLOCK, *supra* note 7, at 464.

243 See *id.* at 464-67 (stating that *Fane v. Fane*, 1875 W.N. 161 (Eng. V.C.), was "distinctly decided on the principle that a material statement of that which is untrue, though innocently made, is ground for avoiding a contract").

244 See HOLMES, *supra* note 6, at 252.

## 1. Evolution of Liability Rules

In his unified theory of tort and criminal law, Holmes sketched the evolution of liability rules from purely subjective standards based on personal moral fault through an intermediate stage in which liability is based on the moral blameworthiness of a hypothetical ordinary reasonable person to the final end state, not yet fully attained, in which liability standards dispense with moral blameworthiness altogether and become purely objective rules, relating the facts of a defendant's conduct to legal consequences. This legal evolution tracked remarkably well with the positivists' three stages of human thought on any subject, from the theological through the metaphysical to the final positivist phase.

Holmes did not identify a similar three-stage evolution in the law of contract. Does this mean that Holmes's theory of contract was not thoroughly positivist? I think not, for the following interrelated reasons.

Holmes's contract theory was more of a reactive theory than his unified tort and criminal law theory. There were good reasons for this. As we have seen, the contract treatises published before 1880 were much more sophisticated than the treatises on torts.<sup>245</sup> The best contract treatises were organized analytically and had coherent, sophisticated theoretical bases. They gave Holmes plenty to react to. Holmes was also under a degree of deadline pressure for his contract lectures. The lectures were scheduled for late fall of 1880. Holmes did not start writing his contract lectures until that summer. Holmes had to start from scratch for his contract lectures, and time was running out. He had left for last the one topic he had not previously written on. Not surprisingly, then, Holmes's positivist contribution to our understanding of the evolution of contract—his devastating attack on Maine's evolutionary theory—was reactive.

Moreover, there was a real impediment to any positivist description of the evolution of contract law: the history of the common law of contract did not lend itself easily to positivist redescription. In this, too, the common law of contract differed from the common law of tort. The rise of the negligence cause of action in the early nineteenth century, with its metaphysical-sounding standard—the conduct of the ordinary reasonable man—made the history of tort law peculiarly ripe for a positivist redescription. The early history of contract, involving the forms of action for debt and *assumpsit*, is much less tractable. Most importantly, perhaps, the movement of the law in the

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<sup>245</sup> See A.W.B. SIMPSON, *Contract: The Twitching Corpse*, in *LEGAL THEORY AND LEGAL HISTORY*, *supra* note 59, at 321, 324–25.

nineteenth century by judges schooled in the prevailing will theory might be seen by a thorough-going positivist as a regressive movement back toward theological modes of thought. So Holmes could have plausibly believed that his positivist reduction of the law of contract to morally-neutral laws of antecedence and consequence was, itself, the most significant event in the evolution of contract law toward a purely positivist form.

## 2. Policy Grounds

Toward the middle of his second lecture on tort law, Holmes explained the public policy justification for the objective standard of tort liability:

It is [not] for the purpose of improving men's hearts, but . . . 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.<sup>246</sup>

The objective standard of tort liability perfectly reconciles these two important public policies. By imposing liability only for harm caused by conduct that the experience of mankind has shown to be dangerous, tort law deters only the conduct that we need to deter to keep people safe; it leaves people free to pursue all other conduct without the threat of liability. When tort law is fully reduced to a set of specific rules identifying exclusively the conduct that will lead to liability should it cause harm, the law will be even more effective in achieving its dual goals of deterring dangerous conduct while leaving beneficial conduct, not known to be dangerous, undeterred.

In his contract lectures, on the other hand, Holmes did not elaborate an explicit policy justification for the purely objective liability standards to which he had reduced the common law of contract. Did Holmes, then, believe there was no policy justification for his objective contract standards? That would be inconsistent with his theory that every judicial decision and judicial rule was ultimately justified by a policy, that is—the consequences for the community. Further, that would seem to be a drastic change from his unified tort and criminal law theory, in which Holmes clearly identified the combination of policies that justified the objective standards of tort liability. It seems likely, then, that Holmes had a definite policy justification in mind as he wrote his contract lectures, even though he did not spell it out for his readers.

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246 HOLMES, *supra* note 6, at 115.

If we read Holmes's lectures looking for a policy justification for his objective contract standards, we find nothing explicit. But if we read those lectures carefully, in context, Holmes's policy may reveal itself by implication.

In discussing the elements of contract, Holmes said in passing, "Contracts are dealings between men, by which they make arrangements for the future."<sup>247</sup> It may be helpful to read this comment in the context of the positivist's basic thesis about knowledge and power. According to Mill and Comte,

[t]he knowledge which mankind, even in the earliest ages, chiefly pursued, being that which they most needed, was *foreknowledge* . . . . When they sought for the 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 phænomena, and power over them, depend on knowledge of their sequences. . . . All foresight, therefore, and all intelligent actions, have only been possible in proportion as men have successfully attempted to ascertain the succession of phænomena.<sup>248</sup>

If contracts are dealings by which men "make arrangements for the future," therefore, it is peculiarly important that men learn the laws of antecedence and consequence embedded in the law of contract. Only then will they be able to predict what conduct will lead the courts to say there was a valid contract and what judicial consequences will follow if the contractual assurances do not come true. The objective, positivist theory of contract, by reducing contract law to a scientific law of antecedence and consequence, enables one to make accurate predictions about these practically important matters. It therefore enables individuals to make more effective arrangements for the future and to make more rational choices about whether to enter into a contract and whether to breach a contract. Scientific knowledge of the laws of antecedence and consequence in the field of contract, therefore, gives individuals greater power to control and predict the future. This, in turn, may encourage socially beneficial activity, as those who can predict and control the consequences of contract-producing behavior are more likely to enter into contracts, and, as Holmes stated in his tort theory lectures, "the public generally profits by individual activity."<sup>249</sup>

This policy justification for an objective, positivist law of contract is peculiarly thin. The policy goals would seem to be equally served by

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247 *Id.* at 239.

248 MILL, *supra* note 18, at 292-94.

249 HOLMES, *supra* note 6, at 77.

the positivist reduction of any substantive law of contract, whatever the original substantive law. Holmes, however, seemed to derive a general substantive principle from this policy justification for an objective law of contract. The principle was this: contract law should be formulated so as to maximize the contracting individual's ability to control the legal consequences of the contract. Thus, under Holmes's theory of voidable contracts, the parties, by express terms, could preclude the courts from reading in the implied conditions on which the law of voidable contracts rests. And Holmes's implicit justification for Justice Willes's *Nettleship* rule, which limits special consequential damages in contract cases to those risks which the defaulting party fairly assumed when entering the contract, depends on the desirability of giving the parties themselves effective control over the extent of damages recoverable in the event of a breach.<sup>250</sup>

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250 Holmes's scientific characterization that the immediate consequence of a binding promise—that the promisor took on himself the risk that the assumed event would not occur—was not a description of the promisor's intentions or his conscious understanding of the consequences of his promise. Holmes made that clear at the start of the discussion of consequential damages: “[T]he statement that the effect of a contract is the assumption of the risk of a future event does not mean that there is a second subsidiary promise to assume that risk, but that the assumption follows as a consequence directly enforced by the law, without the promisor's co-operation.” *Id.* at 237. But if that is true, *any* legal rule about recoverable consequential damages would be consistent with Holmes's formal theory that the immediate legal effect of a binding promise is the assumption of the risk of a future event. The *Nettleship* position that the extent of recovery for special consequential damages depends on the assumption of that risk somehow entering into the contract as a matter of fact, *see* *British Columbia Saw-Mill Co. v. Nettleship*, 3 L.R.-C.P. 499, 509 (1868), is not entailed in Holmes's theoretical claim that every binding promise is an assumption of the risk of the promised event. Under Holmes's theory, the risks of the event, as well as the limits of those risks, are defined by reference to the foreseeable judicially-imposed damages in the event of failure of the promised event. How can Holmes, then, go on to argue that Willes's position in *Nettleship* “falls in with the true theory of contract under the common law”? HOLMES, *supra* note 6, at 238.

The answer, I think, is this: one can support the Willes test of recoverable consequential damages only by bringing in a principle that is not the same as or deducible from Holmes's scientific description of the immediate legal effect of a promise as the assumption of the risk of the promised event. And Holmes in fact brings in that principle: “As the relation of contractor and contractee is voluntary, the consequences attaching to that relationship must be voluntary.” *Id.* at 237. This is not true as a matter of purely scientific description, and Holmes's seeming suggestion that it is true, in the immediately following analogy between “what the event contemplated by the promise is,” and “what consequences of the breach are assumed,” is unconvincing, for the very reason that Holmes himself recognized just a paragraph earlier: “[W]hen people make contracts, they usually contemplate the performance rather than the breach.” *Id.*

This understanding of the implicit policy justification for Holmes's objective law of contracts tends to explain a puzzling feature of Holmes's theory. The puzzle is this: if Holmes's objective theory of contract formation was a deliberate rejection of the prevailing will theory, why is it that his fully-elaborated theory gave the objectively-announced intentions of the parties more control over the judicial consequences of a contract than the theory of a committed will theorist like Pollock? The answer points to Holmes's particular historical situation. The contract law that Holmes set about to reduce to laws of antecedence and consequence was the nineteenth-century common law of contract that had, according to our historians,<sup>251</sup> adopted new rules based on the prevailing will theory. Chief among those new rules were contract formation by offer and acceptance and a reworked, minimized doctrine of consideration more in keeping with the will theory. Not surprisingly, then, even in its reduced form, the new nineteenth-century law of contract carried with it its justification in will theory. That theory, in Holmes's positivist redescription, was merely translated from a normative principle justifying the rules of contract law into a social policy achieved by those rules. In the translation, the focus of the will theory was changed from the joint wills of the contracting parties as the basis for the contractual obligation to a simple policy of allowing an individual to effectuate his own will. We may put this a different way: the most plausible policy ground for the nineteenth-century law of contract, once it was reduced to a positivist

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There is a plausible interpretation of all this that supports the conclusion that Holmes elaborated an internally coherent theory. That interpretation would focus on what Holmes meant by "the true theory of contract under the common law." That "true theory" may be, like Holmes's "true explanation" of tort liability, *see id.* at 115, a theory that focuses on the social policy that the law of contract tends to achieve. Holmes did not set that policy out explicitly, but his emphasis on the voluntary nature of contractual relationships and the conclusion of his argument here suggest he had in mind the following policy ground. The law of contract encourages productive action by making fixed, definite, and certain the consequences of a particular relationship voluntarily entered into to control the future. The purpose of that law is not to enforce the parties' wills, but to enable individuals to fulfill their personal desires through adroit use of the contract conventions. If courts determine the extent of recoverable consequential damages by construction of the parties' intentions, even when there is no specific intention on this question, contracting parties in the future will have maximum effective control over the legal consequences of their conduct. Moreover, the courts will also eliminate a potential deterrent to entering into contracts, in the form of surprising and potentially catastrophic consequential damage awards not remotely foreseeable by the promisor.

251 *See* ATIYAH, *supra* note 124, at 399-453; GORDLEY, *supra* note 124, at 161-213; SIMPSON, *supra* note 59, at 181-83.

law of antecedence and consequences, was the effectuation of autonomous individual choice.

#### IV. EVALUATION AND CRITIQUE

##### A. *The Success of Holmes's Theory of Contract*

A thoroughgoing positivist like Mill or Comte would consider Holmes's theory of contract a considerable success. Holmes entered a field where the common law had been influenced for over seventy years by the will theory of contract, a theological theory if ever there were one. Holmes entered a field already thoroughly discussed by a number of sophisticated, nonpositivist treatise writers. He nevertheless succeeded in elaborating a wholly positivist theory, reducing all of the law of contract to scientific laws of antecedence and consequence, banishing from his descriptive theory both the subjective intentions of the contracting parties and the moral terminology used to judge the subjective morality of the parties' conduct. Perhaps the most impressive thing about Holmes's theory was how completely positivist it was over the whole range of challenging topics that he addressed, including the formation of contract, mutual mistake, fraud, and misrepresentation. Holmes the positivist should have been proud.

But unlike his theory of torts, Holmes's theory of contract did not become the lens through which subsequent theorists saw this area of the law. From the start, Holmes was just one of many voices in the ongoing sophisticated dialogue on the theory of contract. That meant that Holmes's theory of contract as a whole, positivist package did not set the subsequent theoretical agenda the way his theory of torts did. Many parts of Holmes's theory of contract were neither widely accepted nor influential. Subsequent lawyers, judges, and contract theorists largely ignored Holmes's redefinition of mutual mistake as objectively repugnant terms in the contract,<sup>252</sup> and they largely ignored his redefinition of voidable contracts as constructive condition cases.<sup>253</sup> Other parts of Holmes's theory, however, immediately en-

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252 Nowhere in his discussion of mutual mistake does the author of the current authoritative treatise on contract discuss Holmes's theory that mutual mistake cases are ordinarily just cases of objectively repugnant terms. 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 9.3, at 569-82 (2d ed. 1998).

253 Neither in any of his extensive discussions of voidable contracts nor in his separate, extensive discussions of implied conditions does the author of the current authoritative treatise on contracts mention Holmes's theory that voidable contracts are really constructive condition cases. 1 *id.* § 4.4, at 424-27 (minor), § 4.7, at 439-40 (mental incompetence), § 4.15, at 472-76 (misrepresentation), § 4.19, at 490-91 (duress); 2 *id.* at §§ 8.2-7a, at 392-447 (conditions), §§ 9.3-4, at 569-95 (mistake).



tered the ongoing dialogue over the Anglo-American theory of contract. Holmes's explanation of consideration achieved wide influence,<sup>254</sup> and his objective theory of contract formation anchored one pole of a continuing dialectic between subjective and objective theories.<sup>255</sup> Similarly, Holmes's amoral, objective theory of contract breach anchored one pole of a continuing dialectic between moral and amoral theories.<sup>256</sup> Some of Holmes's critical, reactive analysis seems to have carried the day completely. No one after Holmes tried to force the Anglo-American history of contract law into Maine's hypothesized evolutionary pattern from formal to consensual contracts. Almost all that remains of Langdell's method of purified doctrinalism is Holmes's devastating critique of it.<sup>257</sup> And, after Holmes's critique of his position, Pollock himself publicly renounced his flirtation with innocent misrepresentation as grounds for voiding a contract.<sup>258</sup>

If we use subsequent influence as a measure of success, the failure of Holmes's theory as a whole and the success or partial success of individual parts of that theory raise some interesting questions. All of Holmes's contract theory was objective, reductive, and positivist. It can be seen as a coherent, positivist whole. Why, then, were some parts of the theory influential and other parts not? What is it about the influential parts that accounts for their influence? What is it about the completely successful parts that accounts for their success? The answer to these last two questions cannot be their positivist character, for equally positivist portions of Holmes's contract theory were neither successful nor influential. What is it, then?

We can, perhaps, derive a negative condition for success from a feature that seems to be common to all the unsuccessful parts of Holmes's theory. In each of these parts, Holmes's reductive analysis had called for the abolition or total redefinition of an established legal doctrine. Thus, Holmes's analysis of mutual mistake asked his reader to throw out the category "mutual mistake" altogether and see these either as cases of mutually repugnant essential terms or inconsistent usage of a single proper noun. Holmes's analysis of voidable contracts asked his reader to throw out the category "voidable contract"

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254 See 1 *id.* §§ 2.2–4, at 73–80.

255 See 1 *id.* § 3.6, at 192–96.

256 Compare RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 105–14 (3d ed. 1986) (championing amoral "efficient breach" theory), with Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1 (1989).

257 Langdell's most consistent disciples, James Bart Ames, Samuel Williston, and Joseph Beale, are possible exceptions. Cf. Grey, *supra* note 97, at 32–39 (recognizing extensive influence of Langdell's "classical orthodoxy").

258 See POLLOCK, *CONTRACTS*, 3d ed., *supra* note 156, at xviii–xix.

and see these as constructive condition cases. Those who share Holmes's overriding commitment to reductive, positivist methodology may accept Holmes's invitation to discard these traditional doctrinal categories and see just the underlying phenomena and their laws of antecedence and consequence, but it may be asking too much of those who do not share that commitment.

The parts of Holmes's contract theory that were successful or influential did not ask his reader to throw out established doctrinal categories. Instead, these parts seemed to present just a different way of looking at the established doctrine. Holmes's contract theory became a partial success as a theoretical explanation of existing contract law, including the existing doctrinal categories, and Holmes's theories seemed to be most successful where the alternative theories were the weakest. To appreciate why some of Holmes's theories were successful, then, we must identify both the weaknesses of the theories he was reacting against and the strength of Holmes's theory in comparison.

It is easy to explain the success of Holmes's critique of the application of Maine's evolutionary theory to the common law of contract. Maine had analyzed the evolution of ancient Roman contract law. He generalized from that, simply assuming that the Roman progression was part of the evolution of all Western contract law, either because that law began with the developed Roman law of consensual contracts and therefore incorporated in its history the Roman progression from formal to informal contract, or because the development of contract law in any other ancient society would probably follow the evolution from formal to consensual contract that he saw in ancient Roman law. Maine argued for a parallel evolution in other ancient societies, not from any historical facts, but from his assumption that the Roman evolution was natural and reasonable: "[F]rom the absence . . . of everything violent, marvellous, or unintelligible [in the Roman evolution], . . . it may be reasonably believed that the history of Ancient Roman contracts is, up to a certain point, typical of the history of this class of legal conceptions in other ancient societies."<sup>259</sup>

Given Maine's reasoning, his evolutionary theory would apply to the common law if the common law at some point adopted the developed Roman law of consensual contracts. If the common law did not adopt the Roman law of consensual contracts, however, the only thing supporting the conclusion that the common law evolved from formal to consensual contract is Maine's argument that all legal orders would naturally progress from formal to consensual contract. But the actual progression in any particular society would be a matter of fact to be

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259 MAINE, *supra* note 48, at 328.

determined by studying the history of contract law in that society. When that history is accessible, Maine's evolutionary thesis seems to be just a speculation about what that history will show. The application of Maine's evolutionary thesis to the common law, which was based on two alternative assumptions of historical fact, was thus vulnerable to Holmes's argument that neither assumption was correct. The common law of contract, Holmes argued, did not adopt the developed Roman law of consensual contracts; the early development of the common law of contract, Holmes argued, does not show an evolution from formal to consensual contract.

Holmes's history was just the thing to stop the attempt by Pollock and others to apply Maine's evolutionary thesis to the common law. The ultimate success of Holmes's attack was foreshadowed by the immediate response of Frederick Pollock, an early, ardent follower of Maine. In the introduction to the third edition of his treatise, Pollock analyzed in detail Holmes's arguments on the history of the common law of contract. In conclusion, Pollock confessed that "the effect of Mr. Holmes's investigation as a whole is to shake one's belief in the distinction between formal and informal contracts as a material point of archaic or semi-archaic law."<sup>260</sup>

Why was Holmes's objective theory of contract formation at least partially successful? At first glance, Holmes's theory seems to be an improvement only over an unsophisticated will theory of contract formation, in which a contract is said to be formed only when the subjective wills of the parties in fact agree. Once a will theorist like Pollock<sup>261</sup> recognizes that internal subjective states can be conveyed, or evidenced, only by external actions, that theorist can plausibly accept Holmes's external theory of contract formation, up to a point. He can say that the external behaviors that Holmes points to as the basis for a contract are simply the external acts that the courts look to as evidence of the internal, subjective wills of the parties.

What possible explanatory advantage does Holmes's purely external theory then have over the "objective-evidence-of-an-internal-state" will theory of contract formation? The answer, I think, is this: in some ways, Holmes's purely external theory is more consistent with the common law of contract than the objective-evidence will theory, which has problems that Holmes's theory does not. Since the will theory assumes that external conduct of the parties gives rise to an enforceable contract *because* that conduct indicates a mutual common subjective intention by the parties, it has no satisfactory answer to the

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260 POLLOCK, *CONTRACTS*, 3d ed., *supra* note 156, at xvi.

261 See POLLOCK, *supra* note 7, at 10-19.

question why the law deems certain external conduct to be sufficient evidence, and other conduct, which seems equally reliable as proof of subjective intent, is not deemed sufficient. It is not clear, for instance, why my offer to pay you ten dollars if you paint my fence next Tuesday could not be accepted, forming an enforceable contract, by your written statement that you agree to paint my fence next Tuesday for ten dollars.

Another problem facing the objective-evidence will theory was suggested by Pollock's problem with the common-law rule about innocent misrepresentation. The objective-evidence will theory has difficulty explaining why an objectively provable unilateral mistake does not vitiate the contract at common law. The objective-evidence will theory also has difficulty explaining why objectively provable, mutually common, subjective intentions do not create an enforceable contract in the absence of consideration. Holmes, whose purely external theory purports to be purely descriptive, need not answer any of these questions that bedevil the objective-evidence will theory. Insofar as the will theory's answers to these questions are unconvincing, Holmes's cleaner, thinner theory seems more attractive.

Holmes's critique of Langdell's peculiar scientific methodology was successful because that methodology was inconsistent with the way common-law judges, then and now, decide cases. Judges do not seek to discover the true meaning of the legal terms that judges had used in explaining their prior decisions;<sup>262</sup> judges do not, then, decide cases before them by applying those legal meanings to achieve a purified doctrinal consistency over a range of cases, regardless of the specific claims of justice in an individual case.<sup>263</sup> Holmes's specific criticisms of Langdell's discussion of acceptance by mail and of Langdell's analysis of dependent and independent promises were persuasive and successful because Holmes argued for an alternative approach consistent with the courts' concerns for practical, workable decisions consistent with justice in the individual case and the parties' likely intentions under the circumstances. Holmes's general critique of Langdell's methodology, which he elaborated in his review<sup>264</sup> of Langdell's *Summary* and repeated as a general introduction to *The*

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262 See, e.g., *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916) (meaning of "inherently dangerous product" exception to privity rule reinterpreted); *Scott v. Shepherd*, 96 Eng. Rep. 525 (K.B. 1773) (broadly recharacterizing causal relationship to fit "direct causation" requirement of trespass).

263 See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 62-92 (1960).

264 See Book Notices, 14 *Am. L. Rev.* 233 (1880).

*Common Law*,<sup>265</sup> was directly on target. Most of us recognize the famous sentence from that critique: "The life of the law has not been logic; it has been experience."<sup>266</sup> Its poetic charm serves as a fitting epitaph for the methodology it buried so deeply that most lawyers and judges know of its epitaph.

Although Holmes's critique buried Langdell's peculiar methodology, much of Langdell's substantive analysis lived on in Holmes's contract theory. Comparing Holmes's three lectures on contract with Langdell's *Summary*, we can see that Holmes used Langdell extensively. Holmes explicitly used Langdell's analysis as a foil against which to develop his analyses of acceptance by mail,<sup>267</sup> conditions precedent and subsequent,<sup>268</sup> and dependent and independent promises.<sup>269</sup> Moreover, there are notable similarities between some of Langdell's other discussions and Holmes's treatments of the same topics. These similarities suggest that Holmes borrowed, without attribution, Langdell's doctrinal insights that were consistent with Holmes's positivism. There are at least four of these similarities. First, Langdell questioned the applicability of Maine's category of consensual contract to common-law contracts whose breach is redressible in assumpsit, for in each case there must be consideration for the contract to be enforceable and the consideration is a formal requirement.<sup>270</sup> Holmes said that consideration was as much a form as the seal.<sup>271</sup> Second, Langdell pointed out that acceptance as an independent element of an enforceable contract is not really important in either unilateral or bilateral contracts, for those contracts are not enforceable until the consideration called for by the offer is provided, and providing the consideration in and of itself supplies sufficient evidence of acceptance.<sup>272</sup> Holmes left out acceptance as an essential element of contract because giving consideration evidenced acceptance and acceptance without consideration did not make a contract. Third, Langdell relegated the will theory of contract formation to a legal fiction and insisted that the contract was made not by the subjective wills of the parties but by their physical acts.<sup>273</sup> Holmes insisted that contracts were made by the overt acts of the parties, not their

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265 See HOLMES, *supra* note 6, at 5.

266 *Id.*

267 See *id.* at 239-40.

268 See *id.* at 247-48.

269 See *id.* at 261-64.

270 See LANGDELL, SUMMARY, *supra* note 8, at 129-30.

271 See HOLMES, *supra* note 6, at 215.

272 See LANGDELL, SUMMARY, *supra* note 8, at 2.

273 See *id.* at 243-44.

subjective intent. Fourth, in his discussion of consideration, Langdell argued that detriment to the promisee was sufficient, even without a benefit to the promisor.<sup>274</sup> He argued that the consideration must be the inducement for the promise only in contemplation of law<sup>275</sup> and need not be the inducement in fact, and he argued that the initial offer conclusively designates the called-for consideration.<sup>276</sup> Holmes defined consideration as what is designated by the parties as the conventional inducement for the promise. Altogether, these similarities suggest that Holmes may have borrowed heavily from Langdell on these four issues.

Holmes's theory of consideration, which he seems to have borrowed in large part from Langdell, was probably the most successful of Holmes's contract theories in terms of acceptance and influence. Holmes's theory of consideration seems to have had an impact almost immediately. Holmes's analysis of consideration probably influenced Pollock to put a similar definition of consideration into the third edition of his contract treatise, published in 1881.<sup>277</sup> And the bargained-for exchange theory traceable ultimately to Holmes seems to be the

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274 See *id.* at 82.

275 See *id.* at 77-79.

276 See *id.* at 83.

277 In his third edition, Pollock added the following two sentences at the end of a revised first paragraph in his chapter on consideration:

An act or forbearance of the one party, present or promised, in [sic] the price for which the promise of the other is bought, and the promise thus given for value is enforceable. An informal and gratuitous promise, however strong may be the motives or even the moral duty on which it is founded, is not enforced by English courts of justice.

POLLOCK, *CONTRACTS*, 3d ed., *supra* note 156, at 179.

This formula is remarkably similar to Holmes's bargain theory of consideration, shorn of Holmes's notion that whether something is given in exchange for the promise is to be determined solely from the language of the contract itself. The only place where this bargained-for exchange idea was discussed in Pollock's first edition was in Pollock's discussion of adequacy of consideration. See POLLOCK, *supra* note 7, at 155. By bringing this into the first paragraph of the chapter on consideration in the third edition and adding a sentence about the unenforceability of gratuitous informal promises, Pollock elevated the idea from one of subsidiary importance in the explanation of a minor subtopic to one of the greatest importance in the very definition of consideration.

Pollock's third edition was published after Pollock had read Holmes's book. Pollock wrote in the introduction to the third edition that

my own chapters on Form of Contract and Consideration were already revised and in type when I read Mr. Holmes's on the history and elements of contract. Being unable, therefore, to take account of his results, otherwise than by a few notes added as an afterthought, I will say a word of them here.

*Id.* at xi.

regnant theoretical explanation of consideration today.<sup>278</sup> What accounts for the success of Holmes's theory of consideration? In the eighteenth century, "consideration" was the good reason for the promisor's promise that was the basis for the moral obligation to fulfill that promise.<sup>279</sup> Our historians of the common law of contract all agree that, in the nineteenth century, the requirement of consideration to support an enforceable contract was successively emptied of its eighteenth-century significance as the very basis for the contractual obligation.<sup>280</sup> In the nineteenth century, consideration became a vestigial form as the law was reformulated to recognize a new basis for the contractual obligation—the mutually concurring wills of the contracting parties. The role of consideration was therefore reduced, but it still remained as a requirement. The requirement was easily met, however, because the courts refused to examine independently the adequacy of the consideration and presumed that any consideration that was accepted in exchange for the promisor's promise was adequate.

Consideration thus posed a serious problem for contract theorists toward the end of the nineteenth century. The logic of the will theory seemed to support the abolition of consideration as an element of contractual liability altogether, yet the courts, even after reformulating contract law to adopt the will theory's offer and acceptance as elements, still retained consideration as an element. The theorists before Langdell and Holmes flailed around. Stephen Leake said consideration was evidence of the seriousness of the promise;<sup>281</sup> William

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Were the two sentences Pollock added to the first paragraph of the consideration chapter part of those "few notes added as an afterthought"? There is good reason to believe they were. Once something was in type in the days before computers, the easiest place to add something was at the very beginning or at the very end, without footnotes. Significantly, there are no changes in Pollock's chapter on consideration at the end, and these two added sentences at the beginning were not footnoted. Moreover, there is an uncharacteristic typographical error in the first added sentence. The sentence read "an act or forbearance . . . *in* the price," when Pollock really meant "an act or forbearance . . . *is* the price." This error, corrected in later editions, suggests a late, hurried addition after the book was in type. Finally, Pollock did not exactly adopt Holmes's objectively-determined bargain theory of consideration. He just brought up from his discussion of adequacy of consideration an idea that he now, perhaps as an "afterthought," saw was crucial to understanding consideration in general.

278 See, e.g., 1 FARNSWORTH, *supra* note 252, § 2, at 61.

279 See ATIYAH, *supra* note 124, at 139–54.

280 See *id.* at 448–54; GORDLEY, *supra* note 124, at 165–75.

281 See STEPHEN MARTIN LEAKE, *THE ELEMENTS OF THE LAW OF CONTRACTS* 10 (London, Stevens & Sons 1867).

Markby dismissed consideration as simply a form;<sup>282</sup> and Pollock retreated into a fog of disjointed discussions of particular applications of the consideration requirement.<sup>283</sup>

Holmes's refinement of Langdell's insight was the right explanation at the right time. Holmes's explanation of consideration appeared to be simply descriptive. It avoided the problem of giving an adequate rationale for the consideration requirement by simply not asking the question in the first place. Moreover, as descriptive theory it seemed to save the cases where any will-theory explanation of consideration could not. Consideration, as any detriment to the promisee that was designated by the parties in the contract as consideration for the promise, seemed to cover the nineteenth-century cases perfectly, including the troublesome unknown reward cases and past-executed consideration cases. This descriptive power was enhanced by Holmes's use of the facts in *Coggs v. Bernard*<sup>284</sup> as his principal example, cut loose from the opinion in *Coggs* itself. This allowed Holmes to reinterpret as a simple application of his theory a troublesome precedent,<sup>285</sup> which had seemed to allow for enforcement of gratuitous promises without consideration. Finally, Holmes's theory of consideration would appeal to the will theorists themselves, for the ultimate consequences of Holmes's theory, although not the theory itself, seemed consistent with the will theory of contract. That is because Holmes's theory allows the parties themselves to mutually designate, in the contract itself, what is to count as consideration. A committed will theorist like Pollock, then, could easily adopt a version of Holmes's bargained-for exchange theory without accepting Holmes's positivist twist.<sup>286</sup>

We can detect a common pattern running through each of the cases where a part of Holmes's theory became influential. Holmes's analysis was in some way more consistent with the law—the facts to be explained or more deeply understood by theory—than the competing theories. In each of these cases, readers could accept Holmes's theory over the competing theory, not because it was positivist, but because it was more consistent with the facts forming the basis for any theory.<sup>287</sup>

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282 See WILLIAM MARKBY, *ELEMENTS OF LAW CONSIDERED WITH REFERENCE TO PRINCIPLES OF GENERAL JURISPRUDENCE* 310 (Oxford, Clarendon Press 3d ed. 1885).

283 See POLLOCK, *supra* note 7, at 147–65.

284 92 Eng. Rep. 107 (K.B. 1704).

285 See ATIYAH, *supra* note 124, at 186–89.

286 See *supra* note 277.

287 The only possible exception to this pattern is Holmes's theory of efficient breach, the logical corollary of his notion that "the immediate legal effect of what the promisor does" in a contract is to "take the risk of the event, within certain defined



## B. *Weaknesses in Holmes's Theory of Contract*

### 1. Methodological Critique of Holmes's Theory

The first methodological problem with Holmes's theory of contract is a problem for all social science theories that simply look for what is common to each component of a field comprised of social phenomena.<sup>288</sup> The problem is this: you can apply the least-common-denominator methodology only to a select set of social phenomena. But there is no basis in that methodology to justify the choice of one set over another. The resulting theory will be skewed by the pre-theoretical choice of a field within which to search for commonalities. So, here, Holmes's theory is skewed by the pre-theoretical acceptance of the field of "assumpsit-based contract" within which to conduct his reductive scientific analysis. The acceptance of contract as the field for theorizing is not supported by any theoretical analysis. It may well be that the broader fields of all civil liability or all tort and contract liability, or the narrower fields of bilateral contracts or unilateral contracts are more appropriate fields for theorizing. Ironically, Holmes himself in his lecture on the history of contract gave a tort rationale for early contractual liability in assumpsit,<sup>289</sup> a rationale that could plausibly have been extended to support a unified theory of tort and contract liability. And later on, in his letters to Pollock, Holmes compared committing a tort to committing a contract.<sup>290</sup>

If we look at *The Common Law* as a whole, we can, perhaps, see why Holmes treated contract as a distinct field for theorizing separate and apart from the field of tort. Holmes organized his discussion in *The Common Law* by using the categories he had developed in his early foray into analytical jurisprudence. Thus, torts are treated separately from contracts because tort law deals with duties of all to all, while

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limits, as between himself and the promisee." HOLMES, *supra* note 6 at 235. This notion was specifically criticized by both Anson and Pollock immediately after publication of *The Common Law*. See WILLIAM R. ANSON, *PRINCIPLES OF THE ENGLISH LAW OF CONTRACT* 8-10 (Oxford, Clarendon Press 2d ed. 1882); POLLOCK, *CONTRACTS*, 3d ed., *supra* note 156, at xix-xx. The efficient breach idea gained a toehold in contract theory only after Holmes's consequences-based, public policy approach to the law itself gained a stronger following.

288 For a lucid critique of this methodology, see FINNIS, *supra* note 1, at 4-6.

289 See HOLMES, *supra* note 6, at 219-20.

290 See Letter from Oliver W. Holmes to Frederick Pollock (Mar. 12, 1911), in 1 HOLMES-POLLOCK LETTERS, *supra* note 120, at 177; Letter from Oliver W. Holmes to Frederick Pollock (May 30, 1927) in 2 HOLMES-POLLOCK LETTERS 199, 200 (Mark DeWolfe Howe ed., 1944); Letter from Oliver W. Holmes to Frederick Pollock (Dec. 11, 1928) in 2 HOLMES-POLLOCK LETTERS, *supra*, at 233. Holmes used this comparison as well in *The Path of the Law*, *supra* note 25, at 485.

contract law deals with duties of parties to others in special relationships with them.<sup>291</sup> This, however, seems inadequate. The identification of an analytical category does not itself justify the decision to search for a theory only within that category.

Some further justification is needed. Perhaps the reason Holmes gave at the beginning of his torts lectures for excluding civil liability for breach of contract from the relevant field for theorizing may also serve to justify excluding tort liability from the relevant field for theorizing here. In the torts lecture, Holmes 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, while there is no such prior consent to tort liability.<sup>292</sup> This attempted distinction, however, is unpersuasive. For one thing, Holmes's developed theory of contract vigorously excluded all references to subjective consent of the parties. Moreover, unless there is 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 things. First, the defendant made a legally binding promise—he assured the plaintiff that certain events would occur. Second, courts order parties who make legally binding promises to pay for the damages caused by failure of the assured event. If this is the basis for inferring prior consent to pay damages for breach of contract, however, prior consent can be inferred in all tort cases as well. We could say, for example, that we can infer that one who keeps a wild animal consents to pay for all damages caused by the creature because he kept a wild animal and because

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291 See HOLMES, *supra* note 6, at 63, 227. This survival of Holmes's earlier work in analytical jurisprudence in the formal organization of *The Common Law* caused an internal inconsistency. The basis for Holmes's classification of the law was different kinds of duties. By the time Holmes wrote *The Common Law*, however, he was well on his way to his subsequent position, in *The Path of the Law*, that "legal duty" was an analytically empty metaphysical notion reducible to "a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court." Holmes, *The Path of the Law*, *supra* note 25, at 458. In fact, we have seen here that in his lectures on contract, the last-written lecture, Holmes dispensed with the notion of legal duty altogether, and simply identified in the field of contract the law of antecedence and consequence that would enable one to predict courts' decisions in contract cases.

292 See HOLMES, *supra* note 6, at 63.

courts order keepers of wild animals to pay for all damages they cause.<sup>293</sup>

Holmes's contract theory suffers from a second methodological problem. Holmes's attempt to reduce the law of contract to a scientific law of antecedence and consequence required that he redescribe the contract-forming elements of promise and consideration as observable phenomena. He achieved this by focusing on the observable physical conduct of the contracting parties. A *promise* is the accepted assurance that a future event will happen; *consideration* is what is identified by the terms of the agreement as that which is given and accepted as the inducement for the promise. The subjective motives and the subjective intentions of the parties are banished from Holmes's theory. As Holmes said at the end of his elements lecture, "[T]he making of a contract does not depend on the state of the parties' minds, it depends on their overt acts."<sup>294</sup>

But the "overt acts" that are the observable phenomena on which the making of a contract depends are communicative acts—written or oral statements by the contracting parties. And the relevant content of the communication, on Holmes's own theory, is what it says about the party's subjective intentions or subjective motives. The promisor intends, by his conduct, to "assure" another that a future event will occur, and the parties, by the terms of the agreement, identify something as the thing that has "induced" the promisor to make his promise. Holmes may not, then, have formulated a purely phenomenal theory completely divorced from the subjective states of the parties. He may have just distanced his theory from those subjective states by one step. Ultimately, those subjective states may still be controlling, as the overt acts will be effective to form a contract, under Holmes's own theory, only insofar as they adequately establish a particular intention on the part of each of the parties to the alleged contract. Holmes's purely objective theory thus seems to be just a confused form of the "objective-evidence-of-internal-states" will theory of contract formation. In our day, Holmes's theory has been attacked by Patrick Atiyah, the leading English contract theorist, on precisely this ground.<sup>295</sup>

However, this apparent problem with Holmes's theory is not an internal inconsistency. Holmes clearly set out to reduce the elements of contract to observable phenomena; he clearly believed that he had

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293 A similar argument seems behind Holmes's later letters to Pollock comparing committing a tort with committing a contract. See *supra* note 290 and accompanying text.

294 HOLMES, *supra* note 6, at 240.

295 See P.S. ATIYAH, *Holmes and the Theory of Contract*, in *ESSAYS ON CONTRACT* 57, 66-67 (1988).

reduced promise and consideration to purely phenomenal elements. The question is whether the reduction works when the phenomena are human communication and human discourse. Holmes did not address or answer that question in *The Common Law*. What he needed was an objective, positivist theory of human communication, or at least an objective, positivist theory of interpretation. Holmes came close to presenting such a theory in his analysis of the process of reading conditions into a contract by construction and in his critique of Langdell's theory of dependent and independent promises.<sup>296</sup> But the theory of interpretation he seemed to be using was not explicitly stated.<sup>297</sup> Moreover, he did not reference this inchoate theory where it was needed most, as an explanation of how one can look on the contracting parties' communications as purely objective phenomena.<sup>298</sup>

The third methodological problem is a flaw in Holmes's implied positivist argument in favor of treating voidable contract cases as implied condition cases. The problem is with where you start. Holmes started with conditions and formulated a general reductive definition of conditions. He then established that voidable contracts can be reduced to the same definition. But once you have reduced conditional contracts and voidable contracts to the same thing, there is no reason to say thereafter that this is the definition of a condition. If you had started with voidable contracts, you could equally well have said that this was a reductive definition of voidable contracts, and that conditional contracts are really just voidable contracts. The sensible thing to do in this circumstance is to use a neutral term—say, "muffin"—to designate the general category that includes the sub-categories of "conditions" and "events authorizing voidability of a contract." And if we were talking about muffins rather than conditions, it would not be obvious that the muffin should be directed in some way to the manifest grounds for making the contract or should in all events be within the control of the parties by explicit contractual provisions. Those predicates might apply only to the muffins that belong to the subcategory of conditions.

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296 See HOLMES, *supra* note 6, at 254–58, 261–64.

297 For an attempt to elaborate that inchoate theory, see *supra* text following note 237.

298 Faced with a barrage of cases involving questions of interpretation as a judge on the Massachusetts Supreme Judicial Court, Holmes developed a more explicit objective theory of interpretation, which he reported in an 1899 article in the *Harvard Law Review*. See Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899), reprinted in HOLMES, COLLECTED LEGAL PAPERS, *supra* note 25, at 203.

This can be put another way. Holmes's definition of a condition is not itself a scientific law of antecedence and consequence. It is, instead, a *general form* of a set of laws of antecedence and consequence. Each member of that set could have a completely different policy justification, and each different member will almost always have at least a slightly different policy justification, since the consequences of different things are rarely the same. It would not be surprising, therefore, if the members of the subset "conditions" would have, in general, different policy grounds than the members of the subset "events authorizing voidability."

There are methodological problems with both parts of Holmes's attempt to reduce the law of mutual mistake to objective form. Holmes explained the *Raffles* case in purely conduct-based terms, as a case where the parties *said* different things. This seems problematic. When one party said "Peerless" he *meant* the ship by that name that sailed in October, and when the other party said "Peerless" he *meant* the ship by that name that sailed in December. The case therefore seems to be about parties who said the same thing but subjectively intended to refer to different things by that same proper name.

Holmes's argument for his position is not persuasive. He based that argument on the language convention that any formal use of a proper name is univocal. We may agree that that is our language convention. Under that convention, when one uses a proper name, it is like pointing to a single thing with that name. But a proper noun is part of our language, so use of a proper noun is not exactly the same thing as a physical gesture. When there is more than one thing with the same name, and the context does not indicate which of the things is referred to, the language convention leads to an ambiguity, which cannot be resolved by reference either to the convention or to the external physical acts of the speaker. Which one he meant depends on which one he intended to designate. That intended meaning, however, may not be determinable from observing the party's external conduct. That was, after all, the problem in the *Raffles* case. Because each party used the same proper name, the other party could not tell from his conduct that he intended to point to a different ship. Holmes's position that each party *said* a different thing, therefore, necessarily extends the notion of external, observable conduct to include, for speech acts, the intended meaning of the words used.<sup>299</sup>

In the second part of his treatment of mutual mistake, Holmes says that the mutual mistake cases that do not involve a *Raffles*-type

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299 Here, again, to support this reductive claim, Holmes needed what was missing from *The Common Law*: an objective, positivist theory of interpretation.

problem are really cases of repugnant fundamental terms. But his analysis of repugnant terms has both an analytical and a theoretical problem. The analytical problem is this: in every case in which Holmes's repugnancy analysis applies, there will either be fraud or mutual mistake. So, in those cases in which essential terms are repugnant but there is no fraud, the repugnant terms will have been included only because the parties were mutually mistaken about an essential fact. Once fraud is ruled out, repugnancy simply proves mutual mistake. Repugnancy and mutual mistake are, then, just two alternative ways of describing exactly the same set of facts.

Which of the two descriptions is better? That would seem to depend on the reason the courts would provide a remedy in these cases. Is the remedy provided because essential terms are repugnant or because the parties are mutually mistaken about an essential fact? The answer to that question becomes significant only when the parties are mutually mistaken about an essential fact, but that mistake is not embodied in any term of the contract. Holmes's external repugnancy test would seem to support recognition of a contract in that case because there are no repugnant terms. The law, both then and now, seems to be different.<sup>300</sup> Holmes thus faced a problem: his purportedly descriptive theory seemed inconsistent with the cases.

Holmes faced this problem directly. In some cases, Holmes said, a representation of fact left out of the contract may appropriately be read into the contract by construction.<sup>301</sup> An example of this is a contract insuring a designated building against fire, based on statements about its usage included in the insurance application but not included in the contract. Except for cases like that, Holmes said, a mistake about an essential fact, based on a representation by the other party, should not make the contract void:

Where parties having power to bind themselves do acts and . . . use words which are fit to create an obligation, I take it that an obligation arises. If there is a mistake as to a fact not mentioned in the contract, it goes only to the motives for making the contract. But a contract is not prevented from being made by the mere fact that one party would not have made it if he had known the truth.<sup>302</sup>

This defense essentially changed the subject, for Holmes here is talking about unilateral mistake, where the common-law rules are different from the common-law rules for mutual mistake of fact. Perhaps he could make his theory consistent with the cases by claiming that

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300 See 2 EARNSWORTH, *supra* note 252, § 9.3, at 569–82.

301 See HOLMES, *supra* note 6, at 245.

302 *Id.* at 246.

every time a court would find that a fact not included in the contract was essential to the contract, Holmes would conclude that a court should include it by construction as an implied term of the contract to which Holmes would apply his repugnancy test. The problem is that, to determine whether a fact is essential, the courts have looked outside the bare language of the contract itself to its factual context and to the ultimate purposes of the parties.<sup>303</sup> To focus on the ultimate purposes of the parties, however, Holmes might have to abandon his claim to a purely objective theory based solely on the conduct of the parties.<sup>304</sup>

We have seen that Holmes was driven to apply his repugnancy theory to breach of warranty cases by the logic of his reductive methodology. By reducing mutual mistake to repugnant essential terms in the contract, Holmes shifted the focus from the reason for inclusion of a mistaken essential term to the simple fact that a mistaken essential term was included. Mutual mistake cases are then indistinguishable from breach of warranty cases because those cases, too, involve a mistaken essential term.

Once you put back in what Holmes's reductive theory leaves out, however, the differences between the legal consequences of mutual mistake of fact and breach of warranty become understandable. What is important is precisely how those terms (or implied terms) got into the contract. If both parties simply assumed, mistakenly, that a crucially important fact essential to the bargain was true, the courts will say they have failed to make a contract. If, on the other hand, one party represented to the other that an essential fact is true, and that party relied on the representation in entering the contract, that reliance leads the court to give the relying party the choice whether to proceed with the contractual exchange, once the relied-on representation turns out to be false, or generally, where rescission is not an eligible remedy, to treat a failure of the relied-on representation like a breach of a contractual promise. The logic of Holmes's reductive theory, however, forced him away from any kind of explanation based on the source of the mistaken term. Reductive logic thus led Holmes again to a position on a matter of contract law, pre-eminently law about interaction and cooperation between parties, that in important respects ignored the particular interactions between the parties.

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303 Cf. *id.* at 245-46. This, too, seems relevant to Holmes's inchoate theory of interpretation.

304 Here, too, however, a thoroughly objective, positivist theory of interpretation, which seems to be missing in *The Common Law*, might save Holmes's theory.

## 2. Substantive Critique of Holmes's Theory

The substantive problems with Holmes's theory of contract are all directly traceable to his commitments to positivist assumptions. Because of those assumptions, Holmes banished from his theory everything but observable phenomena and scientific laws of antecedence and consequence. Because of those assumptions, he excluded from the set of possible justifications for judicial decisions everything but the ultimate consequences for society.

Holmes presented this as a descriptive theory of the law of contract. As Finnis would point out, however, "the law of contract" refers in one way or another to a set of human actions, institutions, experiences, and patterns of discourse, which are already illuminated by the self-understanding of those concerned to act utilizing either our society's contracting conventions or our society's institutional arrangements for remedying or preventing breaches of contract.<sup>305</sup> Holmes excluded those understandings from his theory and took the external point of view, utilizing a seemingly scientific least-common-denominator methodology. In doing so, however, Holmes systematically ignored the judgments about centrality, significance, or paradigm status that anyone concerned to act within our contracting conventions and remedial institutions would automatically make.<sup>306</sup> Similarly, Holmes excluded from his descriptive explanations any human purposes that would invoke what he considered unreal theological or metaphysical entities, such as justice between the parties, justifiable reliance on another's honoring his promise, and wrongful breach of a promise. By excluding so much of the reality we look to a descriptive theory to illuminate, Holmes wound up with a theory so divorced from the manifold of human experiences that it purports to explain that it does not seem to be about human experiences at all.

Pollock was the first of many<sup>307</sup> to point out this problem in Holmes's theory. In the introduction to the third edition of his treatise, Pollock criticized Holmes for taking theory to such an extreme that it loses touch with common understanding:

Mr. Holmes, going farther in the same line of thought, endeavors to reduce the essence of contractual promises in general to the taking of a risk, a view which he prefers to the current one that the essence of obligation is the partial subjection of one free agent's will to an-

305 See FINNIS, *supra* note 1, at 3-4.

306 See *id.* at 298-308; Govert Den Hartogh, *A Conventionalist Theory of Obligation*, 17 LAW & PHIL. 351 (1998).

307 See, e.g., WILLIAM ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT 10 (Oxford, Clarendon Press 2d ed. 1882).



other's. As a dialectical exercise there is nothing to be said against this; but it is something too remote, as indeed Mr. Holmes half admits, from the substance of men's affairs. A man who bespeaks a coat of his tailor will scarcely be persuaded that he is only betting with the tailor that such a coat will not be made and delivered to him within a certain time. What he wants and means to have is the coat, not an insurance against not having a coat. Nor is Mr. Holmes's ingenious way of putting the matter seriously aided by the fact that after all the law cannot make people perform their contracts. In the last resort, it is true, the law cannot make them do that or anything whatever; it can only punish them if they fail or disobey. But the conduct of life, even in the most strictly legal point of view, is something else than a perpetual wager with the State, with liberty and civil rights for the stake.<sup>308</sup>

The problem is not limited to that part of Holmes's theory that Pollock so eloquently criticized. Over the whole range of Holmes's theory, his reductive methodology led him to positions radically at odds with the pre-theoretical understanding of one concerned to act within our institutions of contract. The problem undermines Holmes's explanations of the formation of contracts, the consequences of a contract, and the legal limitations on the enforcement of seemingly valid contracts.

Using his least-common-denominator methodology, Holmes determined that a contractual promise is just an accepted assurance that an event will happen, and not a promise to do something. A practically-reasonable person concerned to act within our contracting conventions, however, would say that this kind of a promise is a

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308 POLLOCK, *CONTRACTS*, 3d ed., *supra* note 156, at xix. In the introduction to his second edition of his treatise, Anson repeated Pollock's argument, changing the coat in Pollock's example to boots:

Nor again do the parties to a contract contemplate, as anything but a remote feature in the promise, the liability to pay damages in the event of breach. If I order a pair of boots to be delivered this day week and paid for on the ordinary terms of credit, I expect the boots and the bootmaker expects the price. The transaction, according to Mr. Holmes, must be taken to present itself to the parties in the following light. I bet that the boots will not be delivered, but that if delivered they will be paid for; the bootmaker bets that they will be delivered, but that I shall either not accept them or not pay for them; the stakes are, on his side, damages for non-delivery, on mine, the price *plus* the costs of an action in the county court.

It is well to fix our minds on the legal consequences of conduct and thus to escape so far as may be from confusing law with ethical speculation; but we cannot afford to disregard altogether the aspect in which men view the transactions with which they have to do.

ANSON, *supra* note 306, at 10.

peripheral, unusual case. The central case of a contractual promise,<sup>309</sup> he would say, the case that most clearly defines what we mean by a contractual promise, is the promisor's commitment to do something that the promisee has in some way paid him to do. Under our contracting conventions, this commitment is one that the promisee may legitimately rely on, so the promisor should know that the promisee will in fact rely on the promisor's commitment.

Holmes's reductive methodology led him to characterize the practical consequences of a contract in terms of a scientific law of antecedence and consequence. If the assured event does not occur, the courts will order the promisor to pay the promisee a sum of money. All that the promisee can foresee, scientifically, from the formation of the contract, therefore, is that either the assured event will happen or the promisor will be ordered to pay the promisee a certain sum of money. This reductive, amoral description of the practical consequences of a contract differs in important ways from the ordinary understanding of one concerned to act within the society's contracting conventions. Returning again to the focal or central case of a contractual promise, one would say that the practical consequence of a contract is that the promisee has a legitimate moral claim that the promisor fulfill his commitment by doing what he promised to do. The moral claim arises in this way: under the contracting conventions, the promisor's voluntary conduct has led the promisee to believe he has made a serious promise upon which the promisee is entitled to rely. The promisor, therefore, should know that the promisee will in fact rely on it. If the promisor fails to fulfill his contractual commitment—if he fails to do what, in fact, he promised to do in fact—he has wronged the promisee. The promisee may then sue for this wrongful breach of the contract. If the contract and the breach are proven, the court may order the breaching promisor to pay damages to redress the wrong his breach has done the promisee. It is clear from our understanding of this focal case, however, that the contracting promisee relies on the promisor's performance, not the court's remedy in case the promisor wrongfully fails to perform. This understanding of the practical consequences of a contract is embodied in the ordinary meaning of the traditional, morally-charged language of contract—"promise," "performance," and "breach." Holmes, of course, redefined "promise" in morally neutral terms and thereafter banished "performance" and "breach" from his reductive theory altogether.

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309 John Finnis makes the case for using this focal or central case methodology in FINNIS, *supra* note 1, at 9–11.

Holmes's theory of voidable contracts is at odds with the ordinary understanding that contracts are voidable when one party has induced the other party to enter a contract by conduct, such as fraud, coercion, or undue influence, that violates the moral limits we as a society place on the use of the contracting conventions. In our ordinary understanding, it would make no sense to say that the parties could explicitly provide that fraud would not make the contract voidable.<sup>310</sup> Extending Holmes's theory to cases of contracts voidable for duress or undue influence leads to equally incongruous assertions that the parties could agree that coercion or undue influence leading to the contract would not result in voidability. None of these hypothetical cases could ever arise, however. No one who understood the provision would agree that it was all right with her if the other party had defrauded her, so any provision like that in a contract induced by fraud would be voidable for fraud as well. The coercion or undue influence inducing one to enter a contract would also likely induce one to agree that coercion or undue influence would not affect its enforceability. So there will never be a test case to prove Holmes right or wrong on this. Who is to say, therefore, that Holmes is wrong?

It all depends on your method. Holmes's explanation of voidability for fraud as a constructive condition is plausible unless one takes the internal point of view of a practically reasonable person concerned to act within our legal institutions.<sup>311</sup> From that point of view, the answer seems clear. The rules that a contract is voidable for fraud in the inducement, coercion, or undue influence are not based on some plausible construction of the parties' agreement, but on the moral limits we as a society set to the use of the contract conventions. From that standpoint, the question of why judges allow a defrauded, coerced, or unduly influenced party to avoid the resulting contract has a simple, clear answer: to prevent one from wrongfully using the contract conventions to benefit himself and injure another.

By focusing here just on fraud in the context of contract law, as a basis for holding a contract voidable, Holmes stacks the deck in favor of his conclusion that no-fraud is a distinctly contractual expectation. But fraud is the basis for a tort action and a ground for a restitution or

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310 Pollock criticized Holmes's position on this issue: "I cannot see my way to admitting as a proposition of law that contracting parties are free to condone deliberate fraud beforehand. Certainly a conventional term *ne dolus praestetur* would not have been good in Roman law." POLLOCK, CONTRACTS, 3d ed., *supra* note 156, at xviii (citing "Celsus, quoted and approved by Ulpian D. 50.17 de reg. iuris, 23").

311 John Finnis makes the case for adopting the standpoint of a practically reasonable person concerned to act within a particular social institution. See FINNIS, *supra* note 1, at 11-18.

quasi-contract action as well. This suggests that people's expectations that others will not defraud them are not distinctively contractual but are based on a broader social convention that forbids injurious fraud in relations between members of the community. The different judicial remedies for fraud in tort, contract, and quasi-contract actions are all based on that central social convention which members of a society rely on in dealing with others in all sorts of transactions. Here again, Holmes seems to turn an initial choice of limited subject matter into a theoretical argument, without theoretical justification for the initial choice.

There is a final, deep inconsistency between Holmes's theory of contract and our ordinary understanding of contracting conventions and the law relating to them. As we suggested above,<sup>312</sup> under Holmes's theory the most plausible policy justification for the law of contract is that it encourages socially desirable action by individuals by making clear to them the legal consequences of certain contract-making or contract-breaching conduct. The justification looks to the actions of the individual contracting party, not to the coordinated actions of the contracting parties. This seems to be an extraordinarily solipsistic explanation of contract law, which is, after all, about specific agreements, one of the ways that we have found to reliably coordinate our conduct with the conduct of others to our mutual advantage. Also, it leads to an extraordinarily legalistic law of contract. Under Holmes's theory, the purpose of contract law is neither to redress private wrongs nor to encourage good faith and fair dealing between contracting parties. It is, on the contrary, to ensure reliable, predictable legal consequences of particular actions—both contract-making and contract-breaching actions. The premium in Holmes's theory is therefore on consistent, predictable application of legal rules formulated in purely phenomenal terms without reference to traditional moral judgments. On this view, contracting seems to be a zero-sum game that you can win if you know the legal rules better than your contracting adversary.<sup>313</sup>

#### CONCLUSION

Brilliantly, Holmes overcame the multiple challenges facing him as he wrote his three lectures on contract. He turned to his advantage the sophisticated contemporary contract treatises by Pollock and

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312 See *supra* Part III.D.2.

313 Holmes himself later characterized contracting parties as "adversaries." See Holmes, *supra* note 298, at 419, *reprinted in* HOLMES, COLLECTED LEGAL PAPERS, *supra* note 25, at 203, 206.

Langdell. Pollock's careful, subtle application to the common law of Savigny's will theory of contract provided a solid target to shoot at to undermine the prevailing will theory. Langdell's brilliant analysis of individual contract doctrines provided him, alternatively, with foils against which he could develop more thoroughly positivist theories and with seemingly already-vetted, objective descriptions of doctrine that Holmes, with just a slight twist, could plug into his positivist analysis.

Also, Holmes succeeded in elaborating a thoroughly positivist descriptive theory of contract, a field where the theological will theory had influenced the development of the common law for over half a century. Holmes used his lecture on the history of contract to undermine the historical theory that seemed to buttress the will theory of contract: Maine's theory that contract law evolved from formal, objective contracts to informal, consensual contracts. Holmes used his lecture on the elements of contract to reduce the basic law of contract to a scientific law of antecedence and consequence. Also, Holmes used his lecture on void and voidable contracts to reduce those seemingly intractable morality-based rules to laws of antecedence and consequence.

Although Holmes's theory of contract on its own terms as a fully positivist theory must be deemed an unqualified success, the theory has had less influence than Holmes's theory of torts, which set the parameters for all subsequent American tort theories. Holmes's contract theory entered an ongoing sophisticated dialogue over contract theory, and only bits and pieces of his theory were widely accepted: his attack on the application of Maine's evolutionary theory to the common law of contract and his objective bargained-for exchange theory of consideration. Other parts of Holmes's theory anchor one pole in a continuing dialogue: his purely objective theory of contract formation and his objective analysis of the consequences of breach, leading to the conclusion that there is no "duty" to perform a contractual promise, and its correlative theory of efficient breach. Some parts of Holmes's theory have had little or no influence: his theory that contracts are voidable because of a constructive condition read into the initial agreement and his explanation of mutual mistake cases as cases of mutually repugnant fundamental terms or inconsistent usage of a single proper noun. In general, the parts of Holmes's theory that were not influential were those that required the reader to throw out an established legal doctrine or legal category in order to accept a reductive replacement. In general, those parts of Holmes's theory that were wholly successful were better as descriptive theory than com-

peting theoretical explanations because they better fit the phenomena.

The ultimate problem with Holmes's contract theory as a whole is its positivist character. Holmes rigorously excluded all "theological" and "metaphysical" notions from his theory. So there is nothing in Holmes's theory about one's duty to fulfill one's contractual obligation, or about justifiable reliance on another's fulfilling his contractual promise, or about wrongful breach of contract. For Holmes, all these things are unreal, or at least unknowable. The positivist scientist dealing with what we can know must therefore exclude all reference to those notions from his scientific descriptive theories. He must stick to what we can know—phenomena and the laws of antecedence and consequence. But we cannot be scientists in the way that Holmes thought we could. We cannot simply observe from the outside the phenomena of human action, human cooperation, and human discord.<sup>314</sup> We have inside information because we are human beings. We participate in human institutions, human cooperative action, and human discord. Based on those experiences, we know the reality of contractual obligations, justifiable expectations based on contractual promises, and wrongful breach. We also know, then, that Holmes's theory explains a different world than the one in which we live.

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314 See FINNIS, *supra* note 1, at 3–19; see also JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* 20–51 (1998).

