Formalism and Pragmatism in American Law

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Introduction

This book was launched when Prof. Philip Huang contacted me offering to arrange translation and Chinese publication of a selection of my articles. I did wonder whether my writings, mostly about American law, could have much to say to a Chinese audience. But given Prof. Huang's intimate involvement with both legal systems throughout his distinguished scholarly career, I accepted his flattering judgment that they might, and I am very grateful to him for making the necessary arrangements. The result is this selection from my writings, for which I agreed to write this introduction.

Prof. Huang's 2007 article "Whither Chinese Law?"[1] helped me understand why he thinks Chinese law students and legal academics might be interested in these writings of mine. That article provides a lively summary of the struggle between Westernizers and proponents of indigenous tradition in the course of Chinese jurisprudence over the last century, illustrated by a number of instructive case studies. It then answers the question posed by its title by urging acceptance of the coexistence of the competing schools rather than the triumph of any one of them as the best way into the future for Chinese law. In support of this recommendation, Prof. Huang offers an analogy to what he sees as a comparable development in modern American legal thought and practice. "If the essence of modernity in American law is indeed the coexistence of its classical orthodoxy with legal pragmatism, then the essence of China's modernity lies perhaps in the coexistence of Western formalism with Chinese practical moralism."[2]

Much of my own scholarly career has been devoted to writing about classical orthodoxy and pragmatism in 19th and 20th century American legal thought. In two of the articles included here, "Langdell's Orthodoxy" (1983) and "Holmes and Legal Pragmatism" (1989),[3] I have tried to provide accounts of these jurisprudential tendencies that were accurate and as sympathetic as possible. Viewed as tendencies, they are readily seen in tension with each other, so that the history of modern American legal thought is a narrative of their ongoing struggle.

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1 33 *Modern China* 1 (2007).

2 *Id*. at 29.

3 **1983, 1989.** See Bibliography of Principal Publications, at end, where articles are identified by bolded dates, followed by full citations. I use the bolded dates as citations in these footnotes, inviting readers seeking original sources to look to the Bibliography.

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At the same time, I argue that legal pragmatism, understood as the theory of law articulated by Oliver Wendell Holmes Jr., in harmony with the general pragmatist philosophy of John Dewey, is a jurisprudence that supports what Prof. Huang describes as the "essence" of modern American law—that is, the "coexistence" of the classical tendency with the practical and flexible pragmatic tendency. To avoid terminological confusion, I prefer to keep the term "legal pragmatism" for this overarching jurisprudential account, which makes space for both of the competing tendencies. I label the tendencies themselves formalist and legal realist. Classical orthodoxy is then a jurisprudence that attempts to subject the whole domain of law to the formalist tendency. (I believe Chinese law may have felt the influence of something like this jurisprudence at the time of the adoption of the German Civil Code, one of the great embodiments of classical European legal science.) In my view, such a universal formalism cannot be a successful general account of law, though the tendency which animates it, the drive to make law coherent and predictable, is a necessary aspect of any successful legal system.

The heart of legal pragmatism as I understand it, following Holmes, is a view of law as an enterprise that is practical in two senses. First, it is "constituted of practices—contextual, situated, rooted in shared expectations;" second, it is "instrumental, a means for achieving socially desired ends, and available to be adapted to their service."[4] The first sense, emphasizing practice, suggests the historical school of jurisprudence; the second, emphasizing practicality, suggests the analytical-utilitarian school. These were regarded as rival jurisprudential approaches in the 19th century, but it was Holmes's insight that they were partners rather than rivals, each stating important but partial truths about law. Thus Holmes promoted legal pragmatism as a "both-and" rather than an "either-or" theory—a synthesis of historical and analytical jurisprudence, law as both guided by past practice and looking forward in a practical spirit to future consequences.

The historical school urged that law is founded in customs and community social norms, which represent the collective wisdom of experience, and are unlikely to be improved by rationalist schemes of legal reconstruction. The analytical school saw law as the articulate command of a present legislative sovereign, with the power and the duty to shake off the dead hand of the past and consciously shape law to achieve the present and future greatest happiness of the greatest number. A characteristic aphorism of Holmes's captured his synthesis of the two approaches, emphasizing the descriptive power of the historical school and the normative force of analytical utilitarianism: "historic

4 **1989** at 805.

continuity with the past is not a duty, it is only a necessity."[5] Especially in a time of rapid historical change, conscious reform is an essential corrective to increasingly outmoded traditions; but the complexity of social life makes it impossible to rebuild a whole system of law from the ground up.

If I read Prof. Huang rightly, it is possible to see those who would draw primarily on indigenous sources to develop Chinese law as the heirs of the historical school, while those who would mainly look to the West for legal progress might remind us of the utilitarian reformers who followed Jeremy Bentham. If that much is conceded, then Prof. Huang's exhortation of Chinese lawyers to accept and indeed welcome the coexistence of both these approaches can remind us of Holmes, the advocate of "both-and" over "either-or."

My articles on Langdell and Holmes represent my attempt to construct from historical materials two ideal types of legal thought, the pure formalism of classical orthodoxy, and the inclusive practicality of legal pragmatism.[6] The other three articles in this book are efforts to examine some of the larger conceptual structures of three of the main divisions of law: constitutional law, property law, and tort law.

In "Do We Have an Unwritten Constitution?"[7] I argue that though the conventional answer to the question posed would be No (the British have an unwritten constitution, Americans have a written one), an affirmative answer better fits the realities of American practice. Of course we Americans do live under the written constitution adopted in 1789 and amended twenty-seven times since, and we regard it as what it declares itself to be, "the supreme law of the land."[8] But supplementing the supreme written constitution, we also have an unwritten constitution, authorized or at least tolerated by the founding document, and developed by our courts through a kind of common-law process over more than two centuries.

The unwritten constitution shows itself most dramatically when American courts strike down statutes on the ground that they violate fundamental rights, even rights that have never been formally articulated and protected through original constitutional adoption or later amendment. Examples are the rights of privacy and freedom of choice in matters of sexual intimacy, nowhere declared in the constitution, but over the last half century invoked

5 *Id.* at 807.

6 Other articles of mine addressing Holmes's pragmatism are **1992, 1995, 1997,** and **2000b**; others addressing legal pragmatism apart from Holmes's thought are **1991c, 1996b,** and **2003.**

7 **1975.**

8 U.S. Const., Art. VI.

by the courts to invalidate laws prohibiting contraception, abortion, and gay sexual relations.

This article (and others of mine pursuing the theme of the unwritten constitution)[9] harmonize with pragmatist legal theory in their critique of universalized formalism and their emphasis on practice and practical reason as sources of fundamental legal norms. The formalist approach to American constitutional law over the last half century has been embodied in the linked ideas of textualism and originalism. Textualists believe that the only legitimate source of constitutional norms is enacted constitutional text. Originalism adds that the meanings of broad and potentially flexible constitutional provisions are fixed by how their original framers and ratifiers understood them.

Posed against these are two persistent practices, judicial articulation and enforcement of unenacted constitutional limitations, and adaptive interpretation of broadly phrased constitutional provisions, both carried on though evolutionary common-law-style adjudication. A recurrent practical case for this common-law "living constitution" is that something like it is required if constitutional government in the United States is to be workable. The country and its constitution are old, formal constitutional amendment is extremely difficult, and times and circumstances change, so there must be some leeway for constitutional development through interpretive adaptation as well as amendment.

This said, the thrust of my writings on the unwritten constitution is not that its legitimacy is beyond question; the arguments between broad adaptive interpretation and strict construction of the constitution recur in every generation. One of our best-established practices is that these opposed interpretive attitudes coexist with each other in continuing tension.

"The Disintegration of Property"[10] argues that one of the great subdivisions of law in both the common and civil law worlds, the law of property, is losing its coherence through its internal logical tensions, exacerbated by economic and technological developments characteristic of advanced capitalism and the information age. This loss of coherence means the decline of property as an operative concept central to our legal system.

In its classical stage, property law was organized around the paradigm of absolute ownership, famously described by Blackstone as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the

9 See **1978, 1984, 1988a, 1988b.**

10 **1980a.**

universe."[11] This reflected a popular conception of property which still has considerable force—it's mine, not yours or his, and that means I can do with it what I want.

In an 18th century economy of small farmers and shopkeepers, much or even most property might come roughly under this description. But both the "sole and despotic dominion" and the "external things" in Blackstone's definition create problems for the internal coherence of conception of property founded on ownership.

First, it seems that Blackstone's dominion if it is to be despotic must include full freedom of disposition, partial as well as complete. An owner can keep and use his property, or sell it, give it away, or abandon it. But he may find it convenient to dispose of some rather than all of his ownership rights. He can lease it, in effect selling his right of possession and use for a limited time. He may also want to sell off rights to particular uses, grazing rights to his land, or rights to the minerals under the ground. He may want to sell off half his ownership, or transfer that ownership to a partnership or corporation, with himself a partner or stockholder. Reflection suggests that an owner's full freedom of disposition allows for a virtually complete fragmentation of the ownership of the object over time, among uses, and among different stakeholders. From this insight emerges the "bundle-of-rights" conception of property offered by the American realists, no longer sole dominion over a thing by its owner, but rights and duties among persons with respect to a thing. How much of the bundle constitutes ownership? It seems that any answer must be arbitrary, and the ideal of full ownership thereby loses some of its hold.

Second, why must property right apply only to "things," material objects? In a mature market economy more and more property becomes intangible: "shares of stock in corporations, bonds, various forms of commercial paper, bank accounts, insurance policies" as I enumerated these in 1980. At the time, I added as an afterthought "not to mention more arcane intangibles such as trademarks, patents, copyrights . . ." The extraordinary growth of the information economy in the last few decades has made intellectual property not arcane at all, but increasingly one of the most important forms of wealth.

A consequence of this loss of centrality to the "thing-ownership" paradigm has been the fragmentation of property discourses among legal specialists, who now distinguish property rights from other rights in a variety of ways, detailed in my article. These conflict with each other, and mostly display little resemblance to sole and despotic dominion over things. This multiple

11 **1980a** at 75.

fragmentation of the concept makes it a fair question whether we might not just as well do away altogether away with "property" as one of the master terms of our legal discourse.

One of my last articles, and the only one I wrote on a subject that I taught for the full length of my academic career, "Accidental Torts" analyzes the emergence of tort as a fundamental legal category in the common-law world in the late 19th century. This piece illustrates two important features of legal pragmatism: first, contrary to what many legal realists contend, the conceptual architecture of the law has real practical importance; and, second, that architecture, once generally accepted and used as the framework within which law is taught, can come to seem inevitable, the only rational way to arrange our knowledge of the law. But often this is not the case. Torts, universally recognized today as a major subdivision of law, is a good example of this; it might never have become a basic legal category, and in the future it might well no longer be one. Legal architecture is more historical and conventional than it is natural and eternal.

In the article, I examine the period 1870–1890, a time when American and English civil procedure had recently been reformed to do away with the archaic common-law forms of action. The forms of action had long been used as the main organizing categories for legal knowledge. Their abolition prompted the best legal minds of that period to set to work creating a new taxonomy of substantive law categories. These categories would identify the subjects of introductory law study, and provide organizing titles under which indexers could classify authoritative legal materials and commentators could identify and organize the doctrine expounding those materials. Lawyers would then come to think of law as naturally falling into those subdivisions.

A consensus gradually emerged that criminal law, property, and contracts would be basic categories; these were installed as first-year courses in the leading American law schools. There were already recognized treatises on these subjects, and casebooks were quickly assembled as teaching tools. Torts was a candidate to join them as a fundamental department of the law, but its status was seen as more debatable.

Holmes was one of the young intellectual lawyers who took an interest in the project of providing a conceptual doctrinal structure for the substantive law. He regarded the project as practical, but also what he called "philosophical;" the best scheme of categories would classify the law in the way that best revealed its nature and content. At first he rejected the idea that torts would be one of the basic divisions, writing that tort was "not a proper subject for a law book."[12] But he changed his mind, and two years later published an article

12 **2001** at 1232.

entitled "The Theory of Torts," outlining a conceptual structure for the field, most of which we still use to this day.

Analogies from Roman and civil law favored making torts a basic category, but the analytical jurisprudence of Bentham and Austin, which Holmes and his young contemporaries considered the most advanced form of legal thought, pressed against this conclusion. Torts could not be fundamental because it was not a substantive law category but only a remedial one, covering wrongful acts for which an award of compensatory damage was the law's response. But not all such wrongful acts; contract law supplied substantive law defining the wrong of breach of contract, and then providing compensatory damages as the standard remedy. That left tort as an ungainly catch-all category apparently lacking coherence or practical significance: the law of civil liability for those wrongs not arising out of contract.

Holmes was at first convinced by this argument, but he came to recognize that there were civil suits based on substantive law not covered by criminal law, contracts, or property: those involving personal injury or property damage accidentally caused by one person to another. His insight was that there was a single legal concept around which a coherent body of law governing accidental injury could be built, the concept of negligence, or failure to exercise ordinary care.

Previously, writers on tort had tended to center the subject around the action for trespass, which governed suits for assault and battery. These intentional torts were mostly also crimes, and the substantive law governing these concepts was in effect already provided by criminal law. But negligence, while considered a kind of wrongdoing, was the least culpable form of faulty conduct, rarely treated as criminal. Suits for compensatory damage provided the normal remedy for injury caused by ordinary negligence. The tort concept of negligence as Holmes formulated it was not a blameworthy subjective state of mind, carelessness, but rather was any conduct that fell below the standard of reasonable safety.

Holmes then placed this objective concept of negligence at the center of the field of tort law, covering the great mass of cases. It was flanked by two less important subcategories of torts. On the more culpable side were the intentional torts like assault and battery, serious wrongdoing that was usually criminal as well as tortious and that justified punitive as well as compensatory damages in civil suits. On the less culpable side was a category that Holmes created, drawing on a scattering of common-law precedents, namely strict liability for extrahazardous activities. Thus storing explosives in a town was not per se negligent, but for reasons of public policy an explosion would subject the defendant to tort liability for injuries even no particular failure of reasonable care could be shown.

Holmes's idea of building tort law around negligence came to be generally adopted, at least in part because of a practical factor that he did not mention in his own writings on the subject. Liability for negligently caused accidental injury had existed for centuries, but had produced only a scattering of cases. However the industrial revolution meant that in the period in which Holmes was writing, accidental injuries involving solvent defendants were becoming much more numerous as the rapid growth of railroads, streetcars, and machine-driven factories took an increasing toll on passengers, travelers, and workers, stimulating an equally rapid growth in the number of lawyers who made their living bringing or defending suits for these injuries.

There is no evidence in any of Holmes's early writings on tort law that he was motivated to build the subject around the negligence cause of action by the upsurge of industrial accidents. Indeed he may not even have been aware of this social phenomenon. Throughout his long career, Holmes often bemusedly noted in his extensive correspondence that he did not know much about what was going on in the world of business and politics around him; he did not even read the newspapers.

Rather he was driven by a passion to devise an intellectually satisfying classification for the substantive law, one that could meet his need to win renown for philosophically significant work in the very worldly profession he had stumbled into. In that quest, his imaginative centering of tort law around the problem of accidental injury happened to coincide with an extraordinary growth of those injuries that he may not even have been aware of. Torts might not have become a basic category of our law without this coincidence; as I argue in my article, there were plausible alternative ways of classifying substantive law during this period that did not include torts as a basic category. Today tort law appears to many law students to be naturally and necessarily a basic category of our law, but it may have stumbled into that status in the first instance as Holmes stumbled in the law—by accident.

I have discussed the five articles selected for this book in what seems to me a logical order. The first two articles begin with the most abstract question—should classical orthodoxy or pragmatism be our favored account of basic legal method? Having argued in favor of pragmatism, I then go on to consider three high-level conceptual questions that arise within the working law: does the United States have an unwritten constitution? is property still viable as a central organizing concept in our legal system? and, how did torts become a major legal category? Answers: yes, decreasingly so, to a surprising extent by accident. In each case, I accept that the contrary answer is fairly arguable, so that a full account of existing law must include the arguments for that position.

Dealing with legal issues at this level of abstraction assumes that conceptual and categorical issues like these are of enough practical importance to make them worth debating. Legal pragmatism is often conflated with legal realism, but on this issue they differ. Pragmatists think the conceptual architecture of the law is of real practical importance, even if the relatively abstract categories and concepts lawyers use lack the geometric properties ascribed to them by classical orthodoxy. Holmes certainly thought so; his famous book *The Common Law* is organized around the categories of crime, tort, contract, and succession, and in that book and other writings he contributed significantly to the doctrinal foundations of those subjects. By contrast, legal realists see doctrinal disputation at the level of high-level principles and basic categories as insignificant, not affecting concrete results, a waste of time.[13]

So I think connecting the five articles selected to form this book in the way I have just outlined can add to the understanding of American legal pragmatism. But in the book, these articles are placed, not in the logical sequence in which I have treated them here, but rather in the chronological order of their publication. I originally selected these five articles, not as an exposition of my views on legal pragmatism, but as representative selection from my whole body of scholarly work, revealing its development over time.

I actually did not formulate the account of legal pragmatism set out in the 1989 Holmes article until after I had written the three articles on the constitution (1975), on property (1980), and on classical orthodoxy (1983). When I wrote the last of these, I was already launched on a comparison of Langdell's jurisprudence with Holmes's, but I did not see the links between Holmes's legal theory and philosophical pragmatism, particularly Dewey's version of it, until the middle years of the 1980s, when I read extensively in pragmatist philosophy, first Richard Rorty and then Dewey himself.

Going further back, I had studied Anglo-American analytical philosophy as an undergraduate at Stanford and Oxford, and I went to law school at Yale at a time when Ronald Dworkin was teaching there. I was intrigued by his insistence that American constitutional law could be studied partly as an exercise in applied moral and political philosophy. When I joined the faculty at Stanford in 1971, I taught both constitutional law and jurisprudence, the latter a traditional course in analytical philosophy of law. My first published article was a review-essay of the analytical moral philosopher John Rawls's then-new book

13 For more on Holmes's conceptualism see **1989** at 816–826, and for a more detailed treatment, see **2000b.** Other important American pragmatist legal thinkers like Roscoe Pound and Benjamin Cardozo shared Holmes's interest in the conceptual architecture of the law.

A Theory of Justice; it was meant to serve as a kind of introduction to Rawls for academic lawyers.[14]

My early work on the unwritten constitution was stimulated by my interest in public welfare law; I had taken a course in the subject at Yale, and briefly taught a similar course for a few years at Stanford. This was during the short period when there was a flurry of interest in interpreting the Equal Protection Clause of the US Constitution to support movements in the direction of judicially enforceable constitutional social rights in the United States, comparable to those included in a number of post-World-War-II European constitutions. Rawls's book argued for material guarantees as a matter of justice, while Dworkin argued that philosophical argument about justice should inform constitutional interpretation. I wrote a law review article myself framing a philosophical argument somewhat different from Rawls's for material guarantees, and briefly noting that it might translate into constitutional law.[15]

In the late 1970s my interests in legal theory moved away from analytical philosophy, as I was influenced by the interpretive turn in American legal scholarship, and also by the work of critical legal scholars. I had planned a book on the historical development of the unwritten constitution throughout American history, but abandoned it as I found myself less drawn to this kind of doctrinally oriented historical scholarship. The 19th century development of unwritten constitutional doctrine was devoted in large part to constitutional protection of property rights, and the combination of my historical researches on that period with the influence of critical writers led to "The Disintegration of Property." In the following years, I wrote two more pieces on constitutional law that moved away from my earlier doctrinal orientation, one, influenced by social theory, a perspective on emerging protections of sexual freedom, and the other, influenced by philosophical hermeneutics, working through the analogy between theories of constitutional and scriptural interpretation.[16]

In this same period, the early eighties, I reconstituted my Jurisprudence course, oriented toward analytical philosophy, into a new course called Modern American Legal Thought,[17] organized chronologically and emphasizing writings by lawyers and law teachers rather than philosophers. It was out of my preparation for this course that "Langdell's Orthodoxy" emerged, as well as my engagement with the thought of Holmes. That led to study of the

14 **1973.**

15 **1976.**

16 **1980b, 1984.**

17 Later summarized in **1996d.**

American pragmatist philosophers, especially Dewey, and thus to "Holmes and Legal Pragmatism."

I've given this brief account of the twists and turns in my scholarly interests and the influences on my work that culminated in my writings on legal pragmatism so that a reader of the five articles that make up this book will not unduly be surprised at the shifts in tone and intellectual style from one of them to another. History and philosophy have been the two outside disciplines that have in varying ways shaped my work on the law, and while my interest in philosophy tempts me toward a logically coherent retroactive account of my work, history, the narrative of human events, reminds me to give fair weight to the illogical, arbitrary, and personal factors. The law itself is also an amalgam of order-seeking philosophy on the one hand, and disorderly one-damned-thing-after-another history on the other. I have found that, for me at least, pragmatism as a philosophy of law has best been able to make sense of the coexistence of these two aspects of human life.