

CONNECTING WITH CULTURE  
**The Transformation of American Law**  
Dr. Herbert Titus



“The life of the law,” wrote Oliver Wendell Holmes, Jr. in 1881, “has not been logic; it has been experience.” (1) With this simple sentence, Holmes began a legal revolution in America that continues to this day. Prior to the rise of Holmes, American law rested on God’s revelation.

In 1798, Jesse Root, Chief Justice of the Superior Court of Connecticut, wrote that Anglo-American “common law was derived from the law of nature and of revelation – those rules and maxims of immutable truth and justice, which arise from the eternal fitness of things.” (2) Less than one hundred years later, Holmes, soon to be appointed to the Supreme Judicial Court of Massachusetts, countered:

The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy...even the prejudices of judges...have had more to do than the syllogism in determining the rules by which men should be governed. (3)

Holmes’s sources of law diametrically opposed those identified by Root who explained:

...[L]aw is the perfection of reason, arising from the nature of God, of man, and of things...It is universal...It is in itself perfect, clear and certain: it...cannot be changed or altered...it is superior...all positive laws are to be construed by it, and wherein they are opposed to it, they are void. (4)

Root’s proposition that law was unchanging and unalterable contradicted Holmes who claimed:

The law embodies the story of a nation’s development through many centuries, and cannot be dealt with as if it contained only axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. (5)

Root insisted that law did not come from men and civil society, but from “all the works and ways of God,” including the created order, and, most especially, the Holy Scriptures:

The dignity of ... [the] original [law], the ... perpetuity of its precepts, are most clearly made known and delineated in the book of divine revelations; heaven and earth may pass away and all the systems and works of man sink into oblivion, but not one jot or tittle of this law shall ever all. (6)

Root understood that Biblical law was not limited to “religious” matters. Rather, he knew that Biblical law comprehended all “the rights and duties of man,” including property ownership, contract rights and obligations, torts (wrongs to others), crimes (wrongs against the State), and domestic and civil relations. No wonder Toot called the Bible “the Magna Charta of all our natural and religious rights and liberties – and the only solid basis of our civil constitution and privileges.” (7)

Holmes would have none of this “religious stuff.” To him, law was “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.” (8) Law, he continued, must therefore be understood from the perspective of a “bad man” – one who care nothing about maxims, ethics or reason, but does care about “getting caught.” (9)

In sum, Holmes perceived law to be what is practiced by men, disconnected from God. He measured law by its utility, not by its “rightness” or “wrongness.” Thus, he argued that it would be “a gain if every word of moral significance could be banished from law altogether.” (10) Holmes’ view that law is a pragmatic instrument, fashioned by men to meet the needs of society, dominates law today. God’s law has been firmly rejected; judge-made “law” has taken its place. The Genesis account of creation has been thoroughly discredited; a neo-Darwinian conception of human evolutionary progress has become the driving force of legal thought. The Biblical revelation of a God-created world order has been discarded; legal analysis is now shaped by a tightly shut system of naturalistic premises.

### **God’s Law Rejected**

At the time of America’s founding, her legal statesmen received God’s law as law. They understood God’s rules to be, as Jesse Root put it, “most energetic and coercive, for every one who violates its maxims and precepts are [sic] sure of feeling the weight of its sanctions.” (11)

This view of God’s law followed that of Sir William Blackstone who wrote that [l], in its most comprehensive sense, signifies a rule of action ... which is most prescribed by some superior, and which the inferior is bound to obey.” (12) Blackstone’s views, in turn, mirrored the Genesis account of creation in the Holy Scriptures:

Man, considered as a creature, must necessarily be subject to the laws of his creator, for he is entirely a dependent being. A being, independent of any other, has no rule to pursue, but such as he prescribes to himself; but a state of dependence will inevitably oblige the inferior to take the will of him, on whom, he depends, as his rule of conduct. (13)

Blackstone and his contemporaries understood God's law to be a self-sanctioning system of rules. God did not need civil society in order to reward those who obeyed His law or to punish those who disobeyed. The consequences of obedience and disobedience were built into the very created order.

This was evident from the beginning, in the account of the Garden where Adam and Eve were rewarded for their obedience and punished for their disobedience without aid of any civil ruler. (14) And so it has been "outside the garden," from the time of the first recorded murder in Genesis 4 to date. (15)

While this system of rewards and punishments may not be apparent to most people today – even to professing Christians – it was self-evident to all Americans in the founding era. What made it self-evident was their knowledge of God. In the words of Blackstone, they knew that

...the Creator...infinite [in] power...[and in] wisdom...has laid down only such laws as were founded in those relations of justice, that existed in the nature of things antecedent to any positive precept... [And] the Creator...in his infinite goodness...has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and if the former be punctually obeyed, it cannot but induce the latter. (16)

This view of the effectual reign of God's law continued to be held and espoused well into the nineteenth century. For example, John Austin in his 1832 treatise on jurisprudence reiterated that God's rules were binding and enforced, for "God is emphatically the superior of Man. For his power affecting us with pain, and of forcing us to comply with his will, is unbounded and resistless." (17)

Three years before Austin wrote his treatise, Justice Joseph Story of the United States Supreme Court delivered his inaugural oration as Dane Professor of Law in Harvard University, reminding his listeners that "[t]here never has been a period, in which the Common Law did not recognize Christianity as lying at its foundations." (18)

In 1842, Justice Story put into practice what he preached. In his famous opinion in *Swift v. Tyson* 19 he ruled that "law" and a court opinion are not one and the same, but that law is the "true" and "just" rule furnished by universal principles binding on all men everywhere. Such was Blackstone's understanding when he wrote that "no human laws are any validity, if contrary to [God's law] and such of them as are valid derive all their force and all their authority, mediately or immediately from this original." (20)

In 1857, Theodore Sedgwick, an eminent New York lawyer and a Jeffersonian Democrat, repeated with approval Blackstone's definition of law and restated the Blackstonian proposition that all men are bound by the law of God:

Man, in whatever situation he may be placed, finds himself under the control of rules of action emanating from an authority to which he is compelled to bow, -- in

other words, of LAW. The moment he comes into existence, he is the subject of the will of God, as declared in what we term the laws of nature. (21)

From this foundational proposition, Sedgwick proceeded to itemize other laws governing the affairs of men, including the moral law, the municipal or civil law, and the laws of nations. He then offered this summary to his reader:

These codes are variously enforced, but each has its own peculiar sanction. They are curiously interwoven together and in their combination tend to produce that progress and improvement of the race which we believe Christianity teaches... Thus, the law of nature (the will of God), the moral law, the municipal law, and the law of nations, form a system of restraints before which the most consummate genius, the most vehement will, the angriest passions, and the fiercest desires, are compelled to bend, and the pressure of which the individual is forced to acknowledge his incapacity to resist. (22)

Even as late as 1884, Thomas Cooley, Jay Professor of Law at the University of Michigan and a noted constitutional scholar, wrote in his introduction to a new edition of Blackstone's Commentaries:

Even when convened to consider what shall be the terms of their government the people are not without law... The law of God precedes their action; the immutable principles of right and justice are over and about them, and cannot rightfully be ignored." (23)

Placed against this nineteenth century backdrop, Holmes's statements divorcing law from morality, and limiting law to nothing more than "[t]he prophecies of what courts will do in fact," are startling. (24) But Holmes was not alone. Nor did he pioneer the abrupt departure from America's founding legal heritage.

### **Judicial Opinions Substituted**

Prior to Holmes's 1881 book on the common law and his 1897 lecture on the nature of law generally, Christopher Columbus Langdell promoted the same views as Dean of the Harvard Law School. Langdell assumed that post in 1870. In 1871, he published his teaching materials on contracts. In the preface to that book, entitled *Cases on Contracts*, Langdell laid out his philosophy of law:

Law consists of certain principles and doctrines...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...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. (25)

Implicit in Langdell's concept of law is that law is made by judges. What had been implicit in Langdell's new case method of teaching law, Holmes made explicit in his writings and lectures

on law. What Holmes began, his Harvard colleague, John Chipman Gray finished in his 1909 Carpenter Lectures at Columbia University. Published under the title, *Nature and Sources of Law*, Gray debunked all sources of law except one, judges:

[T]he law is made up of rules for decision which courts lay down; that all such rules are Law; that rules for conduct which courts do not apply are not Law; that the fact that the courts apply rules is what makes them Law; that there is no mysterious entity The Law” apart from these rules; and that the judges are rather the creators than the discoverers of the Law. (26)

As Gray trumpeted his view of law in the legal academy, Holmes continued his crusade from the bench, now the United States Supreme Court to which he had been appointed in 1902. In 1910, he dissented from Justice John Marshall Harlan’s opinion that the federal courts were free to decide a state’s common law independently from state court opinions. Holmes responded:

The law of a state does not become something outside of the state court, and independent of it, by being called the common law. Whatever it is called, it is the law as declared by state judges, and nothing else. (27)

Seven years later, again in dissent, Holmes coined a phrase that became a favorite of his followers:

The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified... (28)

Holmes’s persistent dissents bore fruit twenty years later in *Erie R. Co. v. Tompkins* 29 that overruled Justice Story’s ruling in *Swift v. Tyson* discussed above. Ardent Holmes disciple, Justice Felix Frankfurter, explained the significance of the Court’s reversal:

In overruling *Swift v. Tyson*...*Erie R. Co. v. Tompkins*...did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare... Law was conceived as a “brooding omnipresence” of Reason, of which decisions were merely evidence and not themselves the controlling formulations. 30

What is remarkable about Frankfurter’s statement is that he transposed Holmes’s revision of Story’s understanding of law as if it were Story’s. This kind of misrepresentation of America’s founding legal philosophy has become commonplace. Modernists simply cannot conceive that men like John Marshall, for example, really believed that law had been revealed by God and that judges discovered that law rather than made it up. (31) Thus it is that man has become his own standard, with court opinion weighed against court opinion to determine the law, without the transcendent legal compass of Biblical law.

## Jurisprudential Autonomy

Even modern conservative jurists, like Chief Justice William Rehnquist, have adopted the Holmesian premise that there is no law apart from courts and their opinions. As Hadley Arkes has written, Mr. Rehnquist has come to the conclusion that judgments of right and wrong are “simply products of personal belief” and have no authoritative or binding effect on others “until they are in some way given the sanction of law.” (32)

If that is all that law is, then it has become no more and no less than the will of judges. For it is they, and they alone, who are empowered to foist their personal values and policy preferences on the rest of society in the name of law. This did not come about by accident, but was well planned and executed beginning in the early twentieth century with a new generation of Harvard-trained lawyers engineering the *coup de grace*.

1. O.W. Holmes, *The Common Law 1* (1881)
2. J. Root, “government and Laws in Connecticut,” reprinted in *The Legal Mind In America*, 33 (P. Miller, ed. Cornell: 1962)
3. Holmes, *supra* note 1, at 1
4. Root, *supra* note 2, at 34-35
5. Holmes, *supra* note 1, at 1
6. Root, *supra* note 2, at 35
7. *Ibid.*, at 35-36
8. Holmes, “the Path of the Law,” reprinted in Holmes, *Collected Legal Papers*, 169 (1922)
9. *Ibid.*, 172-73
10. *Ibid.*, 179
11. Root, *supra* note 2, 35
12. I. W.. Blackstone, *Commentaries On The lses Of England*, 38 (U. Chicago reprint: 1765)
13. *Ibid.*, at 39
14. *Genesis 3*
15. *Psalms 3*
16. I. Blackstone, *supra* note 12, at 40
17. J. Austin, *The Province Of Jurisprudence Determined* (1832) reprinted in Cohen and Cohen’s *Readings In Jurisprudence and Legal Philosophy* 22 (Little Brown: 1979)
18. J. Story, “Discourse Pronounced Upon the Inauguration of the Author as Dane Professor of Law in Harvard University (Aug. 25, 1829) reprinted in *The Legal Mind In America*, 178 (Cornell: 1962)
19. 16 Pet. (U.S.) 1, 18-19 (1842)
20. I. Blackstone, *supra* note 12, at 41
21. T. Sedgwick, “A Treatise on the rules Which Govern the Interpretation and Application of Statutory and Constitutional Law” (New York: 1875) reprinted in *the Legal Mind In America*
22. *Ibid*
23. Blackstone, *Commentaries On The Laws Of England*, ix (Cooley ed. 1884)
24. Holmes, “The Path of the Law,” *supra* note 8, at 173

25. C. Langdell, *Cases On Contracts* (1871). An account of the role of Langdell as dean and the complete preface to his casebook may be found in Titus, "God, Evolution, Legal Education, and Law," *Journal of Christian Jurisprudence* 11 (1986)
26. J.C. Gray, *Nature and Sources Of Law*, Sec. 2669 (Columbia U.: 1909)
27. *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910)
28. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222, (1917)
29. 304 U.S. 64 (1937)
30. *Guaranty Trust Co. v. York*, 326 U.S. 99, 101-02 (1945)
31. See Titus, "Moses, Blackstone and the Law of the Land," *Christian Legal Society Quarterly* 5 (Fall 1980).
32. H. Arkes, *Beyond The Constitution* 15-16 (Princeton: 1990)

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