1

'The hypostasis of a prophecy': legal realism and legal history

CHARLES DONAHUE, JR*

'[F]or legal purposes a right is only the hypostasis of a prophecy – the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it.' So Oliver Wendell Holmes, Jr, in a brief essay called *Natural Law* that appeared in the *Harvard Law Review* in 1918.[1] This is a somewhat more elegant version of the aphorisms that he had pronounced twenty years earlier in the *Path of the Law*: 'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.'[2] And again, in the same essay: 'The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.'[3] Although Holmes can be regarded as a legal realist only in an extended sense, his predictive theory of the law became an article of faith among the American legal realists, with the exception of those who became complete sceptics.[4] It is also an article of faith among American legal academics today, including those who are far from the tradition of legal realism, such as the members of the 'law-and-economics school'.

My concern here is not with the philosophical or jurisprudential bases of this theory, which include American pragmatism, a total rejection of

* This chapter was originally delivered as the opening lecture of the conference. I have decorated it with a few footnotes but have not attempted to change it from its original form as a lecture, and so have preserved a certain informality of language.

[1] (1918) 32 *Harvard Law Review* 42. [2] (1897) 10 *Harvard Law Review* 461.

[3] *Ibid.*, at 457.

[4] e.g., J. Frank, 'A Conflict With Oblivion: Some Observations on the Founders of Legal Pragmatism' (1954) 9 *Rutgers Law Review* 447–9, cited in D. H. Moskowitz, 'The Prediction Theory of Law' (1966) 39 *Temple Law Quarterly* 413. For legal realism generally see W. W. Fisher, M. J. Horwitz and T. Reed (eds.), *American Legal Realism* (New York: Oxford University Press, 1993).

German, or any other form of, idealism; a quite extreme form of positivism, and a view of the legal process that reminds one of the Frenchman's idea of hell: *le gouvernement des juges*. Nor is my concern with how this theory relates more generally to Holmes's thought: his objectivism long before Ayn Rand, his pessimism worthy of Thomas Hobbes without the saving possibility of Leviathan, or of Augustine, Luther, and Pascal, without the saving possibility of divine grace.[5] My concern here, rather, is with the implications of this theory for legal history, and, more particularly, with its implications for the legal history of procedure.

Before we get there, however, we have to say something about the relationship between the predictive theory of law and procedure more generally. If we accept the predictive theory of law, even in its weaker forms, then we cannot separate substantive law from procedure. The most obvious illustration of this proposition is in the area of remedy. It is not just that public force will be brought to bear; it is what public force will do that defines the right. In most instances, if you do not perform your lawful contract with me, you will be compelled, by an elaborate procedure that goes under the heading 'execution of judgments', to pay me the money that I can show that I have lost as a result of your failure to perform that contract. A contractual right, then, is not a right to have the contract performed, it is a right either to have the contract performed or to obtain money damages qualified by what is sometimes called 'the duty to mitigate', and the choice between the two rests with the obligor. If, by contrast, you take possession of land that I am entitled immediately to possess, public force will frequently be brought to bear to put you off the land and put me back on it.[6] Hence, my right to immediate possession of land is, in most circumstances, the right, once more employing the procedure of execution, to have an officer of the state remove from that land someone who does not have my permission to be there.

The two rights that I have just described are really quite different, and, at least from the point of view of the predictive theory of law, the difference does not principally lie in the fact that the contractual right is sometimes called a personal right and the property right a real one. Both rights, as

[5] The dark side of Holmes's thought may be explored in A. W. Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* (University of Chicago Press, 2000).

[6] Hence, the right to property in land (with many qualifications) may be defined as the legal realist Felix Cohen initially defines it: 'That is property to which the following label can be attached: "To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private citizen. Endorsed: The state".' F. Cohen, 'Dialogue on Private Property' (1954) 9 *Rutgers Law Review* 374.

I have described them, only arise when I am prepared to take someone to court, and at this stage of the proceedings both rights are eminently personal. What differentiates the two rights is that one is a right to money damages calculated in a particular way, and the other is a right to have an officer of the state physically do something to someone on the land. We can argue about how important this difference is. I think that most of us would agree that it is quite important. We can certainly argue about whether this difference should exist. There are those who have argued that it should not.[7] The point, however, is that until one sees the difference, one cannot even ask the normative question.

If one adopts the predictive theory of law, it is not only the remedy that must be incorporated into the statement of substantive rights and duties, it is the entire procedural system. Even if we confine ourselves, as Holmes did, to law enforced by courts, we need to know how cases are brought in those courts. What are the rules in the various courts about personal and subject-matter jurisdiction? What are the rules about pleading and proof? What are the mechanisms of review, if any? And finally, what are the procedures for execution of judgments? In short, rather than imagining that the law consists of abstract rights and duties that apply to the world outside the institutions of the legal system, we should imagine that the abstract rights and duties only apply once the legal system has gone through a process that may or may not reflect what happened in the world outside of the system and has come to the conclusion on the basis of what it has determined by employing its procedures that public force will be brought to bear.

But if we go this far, why should we confine ourselves just to the institutions as they are conceived and the rules of procedure as they are stated? If I am going to make a prediction that public force will be brought to bear, should I not also consider factors that are not explicitly recognised by the system but that likely, or perhaps certainly, are going to affect the result? Rather than raising the thorny issue of the role that politics, broadly conceived, plays in the operations of the legal system, let me mention one such factor that I think we can all agree plays a role in the actual results: cost. If the way that costs are structured in the system is such that only some members of the society can afford it, then our statement of right must be that public force will be brought to bear only on behalf of someone who can afford it if that person can demonstrate in

[7] G. Calabresi and D. Malamed, 'Property Rules and Liability Rules: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089–1128.

accordance with the procedural system that something has been done to contravene the right. That is, of course, a far less elegant statement of the aphorism but it is more realistic in both the technical and the non-technical senses of the word 'realistic'.

We have already said something that is of relevance to legal history. It is sometimes said that expressing law in a casuistic form is the most primitive form of legal expression: 'If a person damages the genital organ, let him pay him with three person-prices' (Aethelbert's Code [c. 600], c. 64).[8] Apodictic laws are more sophisticated and come next chronologically. 'Heirs shall be married without disparagement' (Magna Carta [1215], c. 6).[9] The most sophisticated laws of all are those that define rights and duties abstractly and generally. 'Property is the right of enjoying and disposing of things in the most absolute manner, provided they are not used in a way prohibited by the laws or statutes' (Napoleonic Code [1804], § 544).[10] From the point of view of the predictive theory of law, however, the order of sophistication should be reversed. The general statement of the right of property in the Napoleonic Code tells us very little. It states an abstract right without any indication of who might have the corresponding duty, much less what the remedy might be if the duty were breached. Or, perhaps more accurately, it states a Hohfeldian privilege tautologically: 'The property-holder has the privilege of enjoying and disposing of the property except where s/he has a duty not to do so', with no indication of who has the correlative no-right or right and, again, with no indication of remedy. The provision in Aethelbert's Code is the most sophisticated. Although there is much that we would like to know that it does not tell us, at least it sets a baseline remedy for a quite specific offence. The apodictic law of Magna Carta lies someplace in the middle. Out of context it tells us little. In context, it constitutes a specific commitment by the King not to do something that he probably had been doing. However, what the remedy might be if the King violated his commitment took, to put it mildly, quite a while to work out.

Now what does all this mean for legal history more generally? First, and perhaps most important, something that it does not mean. It does not mean that legal historians should be engaged in predicting what courts will, or should, do in the future, or, more broadly, what the legal

[8] L. Oliver (ed. and trans.), *Beginnings of English Law* (University of Toronto Press, 2002), 75.
[9] C. Stephenson and F. Marcham (ed. and trans.), *Sources of English Constitutional History* (rev. edn, New York: Harper & Row, 1972) i, 116–17, n. 44.
[10] *Code Napoleon; or, The French Civil Code. Literally Translated from the Original and Official Edition* (London: William Benning, 1827), 150.

system will, or should, do in the future. History is about the past. When a historian predicts the future, he or she is not being a historian. I would argue – and I am not alone in so arguing – that historians should not predict the future. History is about context, and if we have learned anything from our study of the past it is that contexts change. The person, group or society that uses yesterday's solutions to solve present problems is engaged in a hopeless exercise, because contexts change. Writing yesterday's history with today's problems in mind will almost certainly result in anachronistic, 'presentist' history. The historian must distance him- or herself; otherwise, he or she cannot make impartial judgments.

This fact poses considerable problems for historians who also happen to be trained as lawyers. Whether or not we accept the predictive theory of law as a jurisprudential matter, prediction is certainly an important part, indeed perhaps the most important part, of what lawyers the world over do. It is hard, then, for the lawyer legal historian to discard something that is so much a part of his or her training, when doing legal history. And when we go to history to solve contemporary legal problems, our historian colleagues are likely to accuse us of presentism – and they will be right.[11]

That does not mean, however, that we should totally abandon the method of prediction. As a jurisprudential statement about what law is, Holmes's predictive theory may be controversial. But as an empirical statement about what lawyers do, it can, as I have just suggested, hardly be denied. Not only that, but as I will try to argue shortly, it has been a dominant technique for lawyers in Europe since at least the thirteenth century. What the lawyer legal historian can do then is get into the minds of lawyers in the past to understand how their behaviour can be explained by what their probable predictions were of what the courts would do in a particular case. I am not saying that the legal historian whose primary discipline is history cannot do this too. A number of them do so quite successfully, but in this regard and as a general matter the lawyer legal historian may have a comparative advantage, just as the historian legal historian may have a comparative advantage when it comes to making connections between what is happening inside the legal system and what is happening outside it.

[11] For a recital of these difficulties and an attempt to get around them in the context of a specific problem, see C. Donahue, 'A Crisis of Law? Reflections on the Church and the Law Over the Centuries' (2005) 65 *The Jurist* 1–30.

The modern legal historian also has an advantage over the lawyers in the past who were making the predictions: frequently, we know whose predictions proved to be accurate and whose did not. We might be particularly interested in the latter. Some time ago Professor Milsom suggested that we should listen to losing arguments in cases.[12] They show us what was thinkable in any given period, and they also show the forks in the road that were not taken.

With these generalities out of the way, I would like to devote the rest of this chapter to exploring just one question: granted how important procedure is for any predictive theory of law, and granted how much prediction is a part of every lawyer's equipment, how is it that procedure is sometimes forgotten? How is it that legal discourse, particularly in the academy, frequently focuses on substantive rights and duties, and ignores the procedure? That statement is less true of the American legal academy than it is of that in England, and it is less true of England than it is of that on the Continent of Europe, but the substance/procedure distinction exists in all three places. How did it come about? Perhaps if we can sketch out an answer to that question, that could serve as a historical introduction to the topic of this volume.

It is sometimes said that the substance/procedure distinction derives from Roman law. It would not be said as often as it is if there were not some truth to it, but there is only some truth to it. The very first Roman law of which we have the text states, 'If the plaintiff calls the defendant to court, let him go'. It then goes on to say what is to happen if he does not go.[13] The Romans of 450 BC were legal realists. When did they stop being legal realists? I am not sure that they ever did. What did happen was that the Roman jurists of the middle and late classical periods, roughly 100 to 230 of our era, developed a method of teaching law that distinguished among the law of persons, the law of things (roughly the substantive rights and duties of the civil law) and the law of actions. This last we can call procedure without too much anachronism. We first see these distinctions operating in the teaching programme in Gaius's *Institutes* of roughly 160 AD. Gaius's *Institutes* formed the backbone of Justinian's *Institutes*, and from there they passed on to the medieval and early modern West.

[12] S. F. C. Milsom and J. H. Baker (eds.), *Sources of English Legal History: Private Law to 1750* (London: Butterworths, 1986), v.

[13] 'Si in ius vocat, [ito.] Ni it, antestamino: igitur em capito.' XII Tables (450 BC), Table I.1, in S. Riccobono (ed.), *Fontes Iuris Romani Antejustiniani* (2nd edn, Florence: G. Barbèra, 1941) i, 26 (my translation).

What must be emphasised is that although this may have been the way in which the jurists taught, at least how they taught first-year law students, it is not how they did their jobs. The fundamental question that juristic casuistic literature asks is what form of action is available, granted that this is what has happened. A large part of the commentary literature is devoted to explicating word-by-word the edicts of the judicial magistrates, particularly the urban praetor. Those edicts are built around a series of promises by the magistrate, that if such-and-such has happened, 'I will give an action'. Even the commentaries on the civil law generally are built around the actions available at civil law.[14]

It must be admitted that this juristic focus on what could be expected of the Roman judicial magistrate, particularly the urban praetor, is not quite a focus on prophecies that public force will be brought to bear. And this is for two reasons, of which the first is probably the more important: Classical Roman civil procedure came, for the most part, in two parts: proceedings before the magistrate, called proceedings *in ius*, and proceedings before the judge, called proceedings *apud iudicem*. The plaintiff's claim and the defences were incorporated in a written formula that was sent to the judge, who was not a state official, for what we would call trial: 'If you find these facts, condemn the defendant; if you do not, absolve.' The decision of the judge was final; there was no appeal. The professional competence of the Roman jurists did not extend to proceedings *apud iudicem*. Proceedings *apud iudicem* were the responsibility of orators, not jurists. As a result there was no law about proceedings *apud iudicem* other than the law contained in the formula. There were no rules of evidence. Proceedings *apud iudicem* were a kind of black box. The judge came up with an answer following whatever procedure he chose to adopt. The judge's motives for his judgment were inscrutable.[15]

The second reason why the work of the Roman jurists does not quite fit the model of prophecies of when public force will be brought to bear is that classical Roman law seems to have made relatively little use of public force in civil proceedings. All civil judgments were, ultimately, money judgments, and if the defendant did not pay, the ultimate sanction was an authorisation from the praetor to the successful plaintiff to seize the

[14] For these distinctions among types of juristic literature, see F. Schulz, *History of Roman Legal Science* (Oxford: Clarendon Press, 1953).

[15] An accessible introduction to classical Roman civil procedure may be found in H. F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law* (3rd edn, Cambridge University Press, 1972), 191–232.

defendant's goods. How the plaintiff accomplished this if the defendant was a strong man whose goods were well guarded, we do not know. That we do not know is in itself quite amazing. The question should occur to anyone who has even mild tendencies in the direction of legal realism.[16]

Before we conclude, however, that the Roman juristic enterprise was not a realistic one, we should remember that the principal source of our knowledge of what the jurists wrote is Justinian's *Digest*; this was compiled some three centuries after the death of the last classical jurist, and shortly after this the procedural system changed. There were no longer separate proceedings *apud iudicem*. The entire civil process was conducted before a state-appointed judge. The formulae were no longer used, and appeal was possible.[17] Quite understandably, the compilers of the *Digest* tended to leave out material in their sources that dealt with problems that were unique to the classical formulary procedure. Indeed, they left out so much that it was not until the discovery of an almost complete text of Gaius's *Institutes* in the early nineteenth century that we understood many of the basics of how the classical formulary system worked.

The state of our sources about Roman law thus combines with the undeniable fact that the classical institutional treatises make a sharp distinction between substance and procedure to give the impression that such a distinction is inevitable. The compilers probably got as much procedure out of the *Digest* as they could. They were interested in the classical substance, not in the classical procedure. What the *Corpus Iuris Civilis* says about the later procedure – and it is not nearly enough – is, for the most part, in the *Code* and the *Novels*, not in the *Digest*. Thus, with some exaggeration, the *Corpus Iuris Civilis* offers us substance without procedure for the classical period and procedure without substance for the post-classical period. For a legal realist that is incoherent. For the Western jurist trying to make sense of the *Corpus* in a later age, the message is that procedure and substance are in two different worlds.

The history of Western law next went into a long period that begins with the so-called barbarian codes of the sixth and later centuries and ends with the so-called revival of legal studies in the twelfth century. The sources for this long period are thin, diverse and quite intractable. It is

[16] A question trenchantly raised in J. M. Kelly, *Roman Litigation* (Oxford: Clarendon Press, 1966).

[17] On this procedure, called the *extraordinaria cognitio*, see Jolowicz and Nicholas, *Historical Introduction*, at 395–404, 439–50.

obviously difficult to generalise about them. We have to say something, however, because the main argument of this chapter is going to be that what happened in the twelfth century was quite different and that it set us on the road to where we are today. There is some procedural material in the early sources, particularly in the practice documents. We hear of inquests; accusers and witnesses; oaths and battles and ordeals. One can construct a model of early medieval procedure, even if one cannot be sure how much of it may have been in effect in various places at various times.[18] It is striking, however, how much of this material consists of casuistic or apodictic statements shorn of procedure. Except for remedies, of which we hear a great deal, there is no procedure at all in Aethelbert's Code.

The laws of the Anglo-Saxon kings constitute a particularly remarkable series. Beginning with Aethelbert in the late sixth or early seventh century, various English kings up to and including Cnut in the eleventh century promulgated a large body of law with numerous substantive provisions about what was to be done in particular cases. The late Patrick Wormald put together a compendium of all the known records of Anglo-Saxon cases, approximately 200 in all.[19] Not a single one of them cites any provision of the Anglo-Saxon codes, even where there is a provision that is obviously relevant to the case and could have been known to the participants in the case. A few cases can be shown to reach results contrary to what the relevant code provision dictates. The predictive theory of law may or may not work in such a context, but it is pretty obvious that the written law would not be a good basis for making one's predictions.

This situation obviously causes problems for anyone who has even mild tendencies to positivism. If what purports to be a law is not enforced by the state, is it law? The problem goes deeper than that. If we are speaking of Aethelbert's Kent or Cnut's England, what is the state? If one takes the view that it is illegitimate to speak of the territorial nation state before the sixteenth century, then the problem will continue, even after the major change that we will argue occurred in the twelfth century. I cannot solve the problem of the committed positivist. If your definition of law is that it must be enforced by the state, then you are going to have to find another word to describe the Anglo-Saxon laws. I would suggest 'wal', which is 'law'

[18] For a remarkably successful attempt to do so with regard to methods of proof, see M. Macnair, 'Vicinage and the Antecedents of the Jury' (1999) 17 *Law and History Review* 537–71.

[19] P. Wormald, 'A handlist of Anglo-Saxon lawsuits' (1988) 17 *Anglo-Saxon England* 247–81.

spelled backwards, because the Anglo-Saxon laws certainly look like what we call law, and there is evidence, at least in some periods, that people were manipulating them in ways that we typically associate with law.[20] They just were not applying them to actual disputes. As we have already seen in the case of Rome, however, we do need to modify Holmes's definition of law, if we are to apply it to much of history. We need to take out the word 'public'. The Romans had a distinction between public and private, but they do not seem to have made much use of their public force in the area of civil law. The Anglo-Saxons did not have an express distinction between public and private, and the distinction between public and private force took a long time to work out. It was certainly not clearly present in the twelfth century.[21] If we wish, we can substitute 'legitimate' for 'public' in the definition, so long as we remember that for a long period what was legitimate force was controversial.

What was new in the twelfth century was a renewed commitment to the proposition that what was stated in the law should determine the results in cases. This commitment is evident whether we are talking about the development of the central royal courts in England or the remarkable revival of legal studies, both canonic and civilian, that is traditionally associated with Bologna. Let me begin with Bologna, both because it seems to be just a bit earlier than England and because, ultimately, it was to have more effect on our story.

Many would trace the beginnings of the modern European legal professions to the teachers of Roman and canon law of the twelfth century, who are called glossators. A remarkable book by Professor Brundage makes this point quite powerfully.[22] England may have been a little later and was less influenced by the teaching of Bologna. By the end of the thirteenth century, if not before, there were lawyers in every country of Western Europe who were making their living by advising and representing clients in courts. As I suggested earlier, if one is going to do that, one has to make predictions as to what the courts are going to do, and such predictions must include the relevant procedure.

[20] For pursuit of this argument over a rather wide expanse of history, see C. Donahue, 'Private Law Without the State and During its Formation' (2008) 56 *American Journal of Comparative Law* 541–66, reprinted in N. Jansen and R. Michaels (eds.), *Beyond the State: Rethinking Private Law* (Tübingen: Mohr Siebeck, 2008), 121–43.

[21] See most recently T. N. Bisson, *The Crisis of the Twelfth Century: Power, Lordship, and the Origins of European Government* (Princeton University Press, 2009).

[22] J. A. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts* (University of Chicago Press, 2008).