Introduction

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Oliver Wendell Holmes, Jr., is, as Thomas Grey put it, "[t]he great oracle of American legal thought."[1] More than any other figure, he lived greatly in the law.

- As a justice of the U.S. Supreme Court for thirty years, he was the "Great Dissenter," whose opinions in *Lochner, Schenk,* and other important cases became and remain the law.
- Some call his 1881 book, *The Common Law,* "[t]he best book on law ever written by an American."[2]
- *The Common Law* opens with the most famous American legal quotation: "The life of the law has not been logic, it has been experience."[3]
- Holmes later developed this theme theoretically in his 1897 essay, *The Path of the Law*.[4] Some call this essay "[t]he best article-length work on law ever written."[5] Others disagree but do not doubt its importance in shaping American legal thought in the twentieth century.

This volume focuses on *The Path of the Law* and its legacy, with due attention to both its context in history and the contemporary relevance of its themes. Thus, some of our contributors place this essay in the intellectual climate of its time; some trace its influence; others discuss one or another of its themes in the light of current thinking.

This volume does not dwell on biography, interesting as Holmes's life was. (Three biographies of him, including an acclaimed one by G. Edward White,[6] have been published in recent years.) Nor do we focus on Holmes's product on the bench or his fascinating correspondence. Our main concern is with the ideas in *The Path of the Law* and their current relevance: to what extent are we, and should we continue to be, Holmesians?

Holmes used an epigrammatic style in *The Path of the Law*, and it is through his epigrams that we can preview the richness of the essay. In many ways it elaborates on the opening passage in his earlier work, *The Common Law,* which contains the most famous Holmes quotation of all:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[7]

Holmes's foil here is Christopher Columbus Langdell's then-dominant legal formalism, with its devotion to logic and the syllogism.[8] John M. Zane later described this legal approach in a much-quoted passage:

> The judicial power can only adjudicate. It can render a judgment upon a particular concrete set of facts. Every judicial act resulting in a judgment consists of a pure deduction. The figure of its reasoning is the stating of a rule applicable to certain facts, a finding that the facts of the particular case are those certain facts and the application of the rule is a logical necessity. The old syllogism, "All men are mortal, Socrates is a man, therefore he is mortal," states the exact form of a judicial judgment.[9]

In opposition to legal formalism, Holmes (by the most common, though controversial readings) offered both critical and constructive thoughts.

On the critical side, *The Path of the Law* may be most notable for its attack on logic:

> [T]he logical method and form flatter that longing for certainty and repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. (466)

To the extent that we too reject formalism, we dwell in Holmes's intellectual shadow. The legal realists did. The critical legal studies movement did. The law-and-economics movement does. To a large extent, then, we are Holmesians.

Holmes's critique, however, sweeps far more broadly than legal formalism. He grounds his attack on a general philosophical claim. Logic, which is necessary to legal formalism, itself cannot be "the life of the law." It cannot determine the law's evolution. He said:

> [Logic] is outside the law of cause and effect, and as such transcends our power of thought, or at least is something to or from which we cannot reason. (465)

Here, I think, Holmes expects logic to do something no one should expect it to do.[10] Logic is not something "to or from which" we reason; it is something *with* which we reason, and without which we do not. Perhaps I am drawing too fine a line. But, I think, partly because of Holmes's eloquence on the subject, many of us today suspect logic as such. If so, we are Holmesians.

Holmes deploys a similar skepticism about law's conduct-guiding (normative) content and function:

> For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether. (464)

We should, in his words, "wash [our moral notions] with cynical acid" (462).[11] To a considerable extent, today, we doubt moral claims as such; we think they are relative to culture, or expressions of taste or convention, or situational – and nothing more.[12] To the extent that moral skepticism infuses our thinking about law, again, we are Holmesian.

Consequently, Holmes advanced his famous "bad man" theory:

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct . . . in the vaguer sanctions of inner conscience. (459)

For example,

> The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it – and nothing else. (462)

So even a promise – a central paradigm of moral obligation – creates no rights or duties. To the extent that today we respect "efficient" contract breaches and the like, we are Holmesian.

To generalize, in Holmes's legal world

> 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, and so [too] of a legal right. (458)

Holmes's denial of law's normativity – of law as a provider of legal or moral rights and duties, of legal or moral reasons for acting one way or another (whether "goodly" or badly) – appears to have been thorough.[13] How many of us, today, deprivilege a judicial opinion's statements and applications of legal rules or principles, its talk of rights and duties? How many of us look to them only as bases for predicting future legal events? I do not know. But, to the extent that we do, we are Holmesian.

Holmes's critiques of legal formalism and law's normativity, without more, could easily be dismissed as nihilistic. Holmes, however, was too much the Establishment Yankee for that. He offers constructive thoughts toward the end of his essay, suggesting that law should be a study of causes and effects, and that legislators should pursue that study in order to formulate effective policies.

Holmes's commitment to theories of cause and effect was philosophical – not a proposal for one perspective on law to accompany other perspectives. He wrote, again philosophically,

> The postulate on which we think about the universe is that there is a fixed quantitative relation between every phenomenon [including law] and its antecedents and consequents. (465)

Recall Holmes's reason for rejecting logic – that it lies outside the laws of cause and effect and therefore transcends our power of thought. Can he really mean that thought directed to any end but causal explanation is not rational?

Here is a related thought, couched in sexist language:

> For the rational study of the law, the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.[14] (469)

For many of the legal realists (surely not solely because of Holmes), the law is a social phenomenon. We observe it. We describe it and identify the causes of legal events. We are scientists. Thus, realists advocated empirical methods for the study of law. Such methods are now employed, often to great advantage, by the interdisciplinary fields of law-and-society, law-and-history, law-and-psychology, law-and-anthropology, law-and-economics. Chief Judge Richard Posner is the grand man of economic analysis. Holmes's portrait hangs in his office.

There are normative ways of doing economics – and other things, too. Perhaps Holmes would not approve. He seemed to think that we should explain the evolution of the law – the path of the law – through history. We should observe "the life of the law" from experience. Marked from our day, Holmes's prediction about statistics and economics looks prophetic. Such interdisciplinary studies greatly enhance our understanding of legal events.

Holmes, may have thought, however, that actors, like judges and legislators, should see their acts solely as causes of consequences:

> [A] body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated. (469)

Empirical studies can help judges, for example, more effectively implement the goals they have adopted. But what would Holmes consider the grounds for endorsing a goal? His skepticism about justice and morals seems to disqualify any notion of better or worse grounds. Rather, "a decision can do no more than embody the preference of a given body in a given time and place" (466). For Holmes, such preferences or desires ground legal policy that, acting on a stage set by tradition, moves the law out from under the dead hand of the past.

Law here seems deeply political – political in the sense of exercising power. To what extent, then, are today's adherents of "critical legal studies," "feminist legal theory," and "critical race theory" – perhaps all of us – in this way Holmesian?

Of course, Holmes was a conservative, whose politics might well have led him to the right, not the left. More important, however, can Holmesians of any political stripe argue in good faith that their views are better or more just than their rivals'? For Holmes, questions like these call for answers based on "our" desires, our clients' desires, or the community's desires, and nothing else.

If so, to return to the beginning of *The Path of the Law*, perhaps law must be a matter of prediction. Accordingly, he wrote what may be the main thesis of the essay:

> The prophecies of what courts will do, and nothing more pretentious, are what I mean by the law. (461)

If law is a matter of cause and effect, one would think that predictions are possible. If logic and morals are irrational or irrelevant, because they do not bear on "the life of the law," what else can we do but predict the course? Note that, again, Holmes's grounds are philosophical.

As Robert Gordon reminds us in Chapter 1 of this volume, *The Path of the Law* was delivered as a vocational address at the dedication of Boston University's then-new law-school building. Perhaps Holmes was describing legal practice for future lawyers, who were certain to make lots of predictions. But, ironically, the essay gives no arguments based on experience. It offers, instead, an apparently general and exclusive definition of law. Moreover, of the pages contained in the law books, Holmes wrote: "In these sibylline leaves are gathered prophecies of the past upon the cases in which the axe will fall" (457). Here, it seems, legal rules and principles, in statutes and cases, are not justifications for official action, nor do they prescribe conduct, inside or outside the courthouse. Rather, they are guides to help hired guns shoot straighter, whatever their clients' desires. Nothing else. If this seems implausible, consider these words:

> It is to make the prophecies easier to be remembered and to be understood that the teachings of the decisions of the past are put into general propositions and gathered into textbooks, or that statutes are passed in a general form. (458)

For many today, for example, judges' opinions do not even contain prophecies of what later courts will do. Opinions are epiphenomena, rationalizations, just rhetoric or ritual – safe to ignore. To the extent that we believe this, yet again we are Holmesian.

Curiously, *The Path of the Law* ends with inspiring, even mystical, passages. Chief among these, for me, are those expressing suspicion about tradition. Consider:

> It is revolting to have no better reason for a rule of law than that, "so it was laid down in the time of Henry IV." It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past. (469)

Moreover, Holmes's advice to the law students at Boston University has stood the test of a century well.

> The way to gain a [sound] view of your subject is . . . to get to the bottom of the subject itself. The means of doing that are, in the first place, to follow the existing body of dogma

into its highest generalizations by the help of jurisprudence; next, to discover from history how it has come to be what it is; and, finally, so far as you can, to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, and what is given up to gain them, and whether they are worth the price. (476)

Read liberally, this is a grand view of legal study, the vision of a great mind, realized in Holmes's long lifetime as in no other American's. He advises students of the law – including professors, practitioners, judges, and observers – to aim high, knowing we will fall short of perfection.

For some of us, the fun and satisfaction of learning suffice to motivate. For others, however, Holmes concludes his essay with more Holmesian advice: "To an imagination of any scope, the most far-reaching form of power is not money, it is the command of ideas" (478). No American's legal ideas have been more far-reaching than Holmes's. This volume pays tribute to him in his most coveted currency.

Notes

1 Thomas C. Grey, "Holmes and Legal Pragmatism," *Stanford Law Review* 41 (1989):787, 787.
2 Richard A. Posner, "Introduction," in *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.,* ed. Richard A. Posner (Chicago: University of Chicago Press, 1992), x.
3 O. W. Holmes, Jr., *The Common Law,* ed. M. Howe (Boston: Little, Brown, [1881] 1963), 5.
4 Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review* 10 (1897):457–78 (cited hereafter parenthetically in the text by page number). The text of the essay is reprinted in the Appendix with star paging to the original article and two modern editions.
5 Posner, "Introduction."
6 G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York: Oxford University Press, 1993).
7 Holmes, *Common Law.*
8 See Thomas C. Grey, "Langdell's Orthodoxy," *University of Pittsburgh Law Review* 45 (1983):1.
9 M. Zane, "German Legal Philosophy," *Michigan Law Review* 16 (1918): 288, 337–38.
10 For an intense analysis of this issue, see Scott Brewer's essay, Chapter 5 of this volume.
11 Brian Leiter explores Holmesian "realism" in Chapter 13 of this volume.
12 Martha C. Nussbaum responds to this Holmesian concern in her essay, Chapter 3 of this volume.
13 See H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), and the essays by Stephen Perry (Chapter 7) and Catharine Peirce Wells (Chapter 9) in this volume.
14 Clayton P. Gillette's essay (Chapter 11 of this volume), lies in this Holmesian tradition.

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Law as a Vocation: Holmes and the Lawyer's Path

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In Louisa May Alcott's *Eight Cousins,* first published in 1875, a young woman called Rose is being given a conventional girl's upbringing by her aunts, in a dark and stuffy old mausoleum of a house. Then Uncle Alec becomes Rose's new guardian. He strides into the house, throws open the curtains and the windows, and hustles his ward into the outdoors. He throws out her old confining clothes and buys her new ones, changes her diet, and, with his vigorous scientific intellect, begins helping her to clear her mind of received opinions. With the very first sentence of *The Path of the Law* – "When we study law we are not studying a mystery but a well-known profession" – we know Uncle Alec has arrived and that the old Victorian mansion will never be the same again.

I. The Nineteenth-Century Vocational Address

Holmes's speech is all the more visibly iconoclastic because it fits into a familiar nineteenth-century form. The lawyers of Victorian America cherished the vocational address. At law school commencements, gatherings of the bar, or memorial services for colleagues, the lions of bench and bar improved the occasion with speeches on the lawyer's calling and his duty to that calling. Alien though these hundreds of orations are to the modern ear, repellent at times in their self-importance and hypocrisy, they reveal something admirable, too: a profession struggling to span the abyss between its high-sounding ideals and what so often seem its dull, trivial, and even sordid quotidian practices, to express an idea of law as a calling that could lead a man to honor, social usefulness, and self-respect.

* I am grateful for the comments of Thomas Grey, David Luban, Mark Osiel, Tanina Rostain, and Richard Thornburgh on earlier versions of this essay, for Martha Nussbaum's advice on Stoic ideas in the formation of nineteenth-century professional identity, for Wendie Schneider's help in unearthing vocational speeches, and for the criticism and encouragement of participants in the conference "The Path of the Law in the Twentieth Century" at the University of Iowa College of Law in January 1997.

The standard address points the novice toward a high road of practice and warns him off a low road. Law, as ideally practiced, was a science of principles. Principles were generated by induction from particulars, decided cases, which vaguely partook – by proximity as it were – of the traditional authority of top–down natural law principles, as well as of the authority of modern science. Cases also drew their authority from the common law, that slow, organic growth that gradually adapts to changing social needs and circumstances. Science was to be enhanced by liberal learning: the ideal lawyer was educated both in broader legal fields, for comparative and historical perspective – the civil law, the Roman law, and the law of nations – and in liberal studies outside the law: classics, literature, the history of ancient and modern republics.

Besides learning, the upright lawyer possessed character acquired by experience, especially the experience of being entrusted with his clients' money and secrets, and the responsibility of counseling people in trouble and perplexity. "He sees domestic tragedies and domestic comedies – the effects of prosperity and adversity – the home countenance and the mask of society – the open and closed chambers in men's bosoms."[1] These personal attainments translate into social virtues. By training and experience, the lawyer is peculiarly fitted to assume the role of trustee of the basic framework of society – the system of rules that protects individual rights, and the system of legal relations and duties that protects organic social bonds. As an advocate, the lawyer helps clients to vindicate their legal rights. But the lawyer also represents the law, the system of principles, rules, rights, and obligations that holds the social order together. "This leadership of the lawyer is not accidental nor enforced, but natural and resulting from his relations to society. That which binds society together, and makes possible its successes and its blessings, is the mystic force which we call 'law.'"[2] He educates and guides clients in the performance of their legal obligations. He is an expert adviser to the judiciary in the interpretation of the laws and (through law reform movements and institutions) to the legislature. Through judicial review the private lawyer is connected with the highest functions of statesmanship, even the bringing of majority will before the altar of Constitutional principle.[3]

The lawyer might well crown his career by becoming a judge himself and was of all professionals most likely, as well as most fitted, to become a legislator; but even as a private lawyer, he was a statesman. "[W]hile lawyers, and because we are lawyers, we are statesmen."[4] In his key social roles – vindicator of rights and upholder of social order – the ideal lawyer is a mediator between extremes of ideology and faction. As a private lawyer, he protects the rights of individual property and liberty from the overbearing forces of the state and other private interests. As a statesman – judge, legislator, official adviser to courts, legislatures and officials, civic activist, and counselor to clients – his job is to ward off the twin dangers of populism (leveling and redistributive impulses) and special interests (demands by the powerful on the state for monop-

olies, privileges, subsidies and exemptions, and corruption of courts and officials to obtain them) that threaten those rights.[5] He is a conservator of legal institutions and principles, but not a reactionary; a reformer equipped to adapt law to keep pace with changing social needs and views, but not a radical. Above all – by virtue of his ability to see matters from all sides but remain independent from all partisan factions and interests – the lawyer may serve as a peacemaker and compromiser, a calmer of personal and social passions, who counsels overexcited clients to avoid litigation and overheated social movements to refrain from destroying the organic social bonds of custom, reinforced by law, that hold the social fabric – and the national union – together.

These addresses admonish as well as celebrate. They point the finger at the all too prevalent departures from the ideal, the lawyers who bring the bar into deserved disrepute. The regular villains fall into three types. (1) the unscientific lawyer, incapable of statesmanship because epistemologically challenged: the mere "case lawyer" or "book lawyer, the man of forms, and cases, and black-letter lore, and of nothing else,"[6] who can argue only by close analogy and pile up citations favoring his partisan cause – unable even to perceive the broader principles at issue in his cases. (2) The lawyer who is in the profession only to make money. Lawyers' "obligations as citizens, professional dignity, personal character, the refinements of society and home – of what value are they to those whose life, whose passion, whose God, is GOLD, and the political emolument and sensual pleasures which it secures?" asked the New Jersey lawyer Joseph Jackson in 1859. "Avarice, more than all other causes combined, defeats justice, impairs the usefulness of the bar, and sinks too many of its followers almost to the level of Satan himself."[7] (For instructive contrast, the speakers pointed with lugubrious relish to lawyers who amassed fortunes but left no record of accomplishment, unlike lawyers who cared little for money and died poor but acquired honor and reputation.) (3) Finally – and perhaps most surprising, to the modern ear – the lawyer is reproached who allows himself to become the mere unthinking instrument of clients' passions and partisan ends, however senseless or unworthy. Lawyers who argued that the private bar served justice and other important public purposes by vindicating their clients' private rights had, of course, to deal with the reality that some clients seek to avoid justice or wreak injustice upon others. The dominant solution of modern lawyers to this dilemma, the doctrine of unswerving partisan loyalty, was roundly rejected. The famous admonition of Lord Brougham to the effect that the lawyer must fight for his client, heedless of any other interest in the universe,[8] was often quoted, but invariably with disapproval. Lawyers were much more likely to agree with Simon Greenleaf:

> While our aid should never be withheld from the injured or the accused, let it be remembered, that [. . .] our duties are not concentrated in conducting an appeal to the law; – that we are not only lawyers, but citizens and men; – that our clients are not always the

best judges of their own interests, – and that having confided these interests to our hands, it is for us to advise to that course, which will best conduce to their permanent benefit, not merely as solitary individuals, but as men connected with society by enduring ties.[9]

No one argued that lawyers were morally unaccountable for clients' conduct. On the contrary,

If his client presses [the lawyer] . . . [to] direct him as to future conduct, he must, as a moral and accountable being, point that client's feet into paths that lead to justice, not toward wrong and oppression . . . Should he [. . .] favor the unjust schemes of a bad client, he becomes equally guilty with him; as much as if they two had originally conspired in malicious scheming.[10]

The stakes, as pictured in these addresses, were extremely high, the alternatives stark. If law was not practiced as an "elevated science" and social trusteeship, it was a "pernicious and driving trade."[11] "Better than any other . . . position or business," said Rufus Choate, in one of the best-known and most-quoted speeches, the lawyer's "profession enables him to *serve the State,*" and it is this and only this that

raises [law] from a mere calling by which bread, fame and social place may be earned, to a function by which the republic may be served. It raises it from a dexterous art and a subtle and flexible science – from a cunning logic, a gilded rhetoric, and an ambitious learning, wearing the purple robe of the sophists and letting itself to hire – to the dignity of almost a department of government – an instrumentality of the State for the well-being and conservation of the State.[12]

To be sure, the power of these vocational addresses to command a modern reader's sympathy has its limits. Some of them are the wails of wounded aristocrats fallen among a democratic people who are inexplicably unimpressed with polish and refinement; or of wounded intellectuals among a commercial people who want law to help them get on with business, without much caring about its theory and history; or just of elite lawyers anxious to differentiate their status from – and deflect public criticism onto – lower-order practitioners. And one often suspects that the reform effort too often begins and ends with the ceremonial speeches themselves; that is, that they are Sunday sermons for wealthy Anglicans, uplifting the worshipers by the reminder that they are vaguely connected to a higher world of thought and action but need take no action except to savor the connection.[13] More subtly still, one could see the vocational addresses as performing the function that Perry Miller attributed to Puritan jeremiads, which were

more than a hypocritical show, more than a rhetorical exercise. They were necessary releases, they played a vital part in the social evolution because they ministered to a psychological grief and a sickness of the soul that otherwise could find no relief . . . They were social purgations, enabling men to make a public expiation for sins that they could not avoid committing, freeing their energies to continue working with the forces of