

# *THE PATH OF THE LAW AND ITS INFLUENCE*

The Legacy of  
Oliver Wendell Holmes, Jr.

Edited by  
STEVEN J. BURTON

CAMBRIDGE STUDIES IN  
PHILOSOPHY AND LAW

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and Its Influence

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Oliver Wendell Holmes, Jr.

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University of Iowa



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## *The Path of the Law* and Its Influence The Legacy of Oliver Wendell Holmes, Jr.

Oliver Wendell Holmes, Jr. (1841–1935), is arguably the most important American jurist of the twentieth century. His essay *The Path of the Law*, first published in 1898, is the seminal work in modern American legal theory. In it, Holmes detailed his radical break with legal formalism and created the foundation for the leading contemporary schools of American legal thought. He was the dominant source of inspiration for the school of legal realism, and his insistence on a practical approach to law and legal analysis laid the basis for the realists' later concentration upon the pragmatic and empirical aspects of law and legal procedures.

This volume brings together some of the most distinguished legal scholars from the United States and Canada to examine competing understandings of *The Path of the Law* and its implications for contemporary American jurisprudence. For the reader's convenience, the essay is reprinted in the Appendix.

The book will be of interest to professionals and students in law and the philosophy, history, economics, and sociology of law.

Steven J. Burton is William G. Hammond Professor of Law at the University of Iowa.

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Steven J. Burton  
Iowa City, Iowa

*The Path of the Law* and Its Influence



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# Introduction

STEVEN J. BURTON

Oliver Wendell Holmes, Jr., is, as Thomas Grey put it, “[t]he great oracle of American legal thought.”<sup>1</sup> 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.”<sup>2</sup>
- *The Common Law* opens with the most famous American legal quotation: “The life of the law has not been logic, it has been experience.”<sup>3</sup>
- Holmes later developed this theme theoretically in his 1897 essay, *The Path of the Law*.<sup>4</sup> Some call this essay “[t]he best article-length work on law ever written.”<sup>5</sup> 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,<sup>6</sup> 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.<sup>7</sup>

Holmes's foil here is Christopher Columbus Langdell's then-dominant legal formalism, with its devotion to logic and the syllogism.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> 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).<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> How many of us, today, deprive 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.<sup>14</sup> (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 text-books, 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.



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

ROBERT W. GORDON\*

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.