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# When Trying is Failing: Holmes "Englishness"

Neil Duxbury

# WHEN TRYING IS FAILING: HOLMES'S "ENGLISHNESS"*

*Neil Duxbury*†

Seule une expression qui ne cherche pas à faire effet en produit un et fait preuve.[1]

## INTRODUCTION

I should like to begin with an observation which could very easily be interpreted as a condemnation of English academic lawyers but which is, in fact, offered as an attempt to highlight a difference between them and their American counterparts. If one were randomly to select a dozen or so academic lawyers from an English university and ask them to summarize their views on the accomplishments of Blackstone, Austin, Dicey, Bryce, Maitland, Maine or any other eminent English jurist, it is most likely that only one or two of them would have anything much to say. It is difficult to imagine an American law professor, on the other hand, who did not have his or her particular "take"—no matter that it may be unoriginal, uninformed or otherwise unsatisfactory—on Holmes, *Lochner*, *Brown*, Langdellianism, the realists, the New Deal or any other figure, theme or event which is commonly considered to be at the core of the history of American legal thought. The

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† Professor of Law, University of Manchester, United Kingdom. This paper formed the basis of a talk presented to the conference on "*The Path of the Law* 100 Years Later: Holmes's Influence on Modern Jurisprudence," held at Brooklyn Law School on November 15, 1996. I was not able to attend the conference and so my colleague, Martin Loughlin, presented the paper on my behalf. I am grateful to him not only for doing this but also for offering critical comments on an earlier draft. For other helpful suggestions, I am indebted to Peter Goodrich, Robert Gordon, Laura Kalman, Richard Posner, Mike Redmayne and David Sugarman.

[1] PAUL VEYNE, LE PAIN ET LE CIRQUE: SOCIOLOGIE HISTORIQUE D'UN PLURALISME POLITIQUE 679 (1976). For translation and discussion of this quote, see *infra* page 151.

English are frequently stereotyped as reticent, Americans as forthright and brash; and one could be forgiven for detecting such stereotypes at work here. However, the difference to which I am pointing is, I think, not quite so simple. While reserve, or rather lack of it, may indeed sometimes explain why American academic lawyers speak where their English counterparts do not, there are certain other significant factors which may account for our rather different academic personae. I should like briefly to reflect upon two such factors.

First, there is a difference in jurisprudential culture. The links between jurisprudence and society in England are fewer and generally more tenuous than those which can be established on this side of the Atlantic. While, for example, it seems very difficult to determine the influence of the creation of the welfare state on English jurisprudential thought, the picture is very different when we consider, say, the similarities between New Deal and realist legal outlooks[2] or the influence of events of the 1960s on the emergence of critical legal studies.[3] Furthermore, while the English generally appeal to their liberties to protect them from the law, Americans look to law as the source of their liberty. One consequence of this difference is that the basic issues with which American legal theorists concern themselves are social issues. How judges should reason their decisions, how the Constitution should be interpreted, how the limits of individual liberty ought to be determined—these and other such matters are more than merely the staple of much American jurisprudential literature and debate. They are discussed by Americans generally. For better or for worse, the American citizenry thrives on rights-discourse.[4] Constitutional issues are the food of talk shows and

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[2] *See* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 149-58 (1995) [hereinafter DUXBURY, PATTERNS], though the argument there is that the similarities to which I refer are to some extent more apparent than real.

[3] *See* GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 63-68 (1995). Modern social change in America has, of course, been by and large more dramatic than it has in England—there is nothing quite akin, say, to the New Deal or the civil rights movement from which English legal theorists have been able to draw inspiration—and so it may well be, contrary to what I am arguing here, that English jurisprudential thought is, in its own way, just as much a servant to social trends as is American jurisprudential thought, the real difference being that, in England, those trends have been generally less striking (and, in consequence, not quite so obviously inspirational).

[4] For the argument that this is something to be lamented, see MARY ANN

radio phone-ins.[5] English jurisprudential culture is different. The issues with which modern English legal theorists concern themselves cannot be characterized quite so straightforwardly as issues of general social concern.[6] Perhaps, once, English jurisprudence could be seen to connect with wider social commentary; today, however, it generally "fail[s] to communicate its ideas to those outside its own caste."[7] This is not to claim that—because, comparatively speaking, it may seem rather elitist—English jurisprudential culture ought to be considered somehow inferior to American jurisprudential culture. Rather, I am offering a very simple speculation: that, as compared with their English counterparts, American academic lawyers tend to be more jurisprudentially opinionated because they are generally less inclined to regard and perhaps have less reason to regard—the stuff of legal theory as the preserve of specialists.

A second reason for the difference to which I refer is that in England, as compared with America, law tends not to be intellectualized—for want of a better word—with quite the same intensity.[8] Our law faculties, even our best and most diverse law faculties, do not have among their ranks people

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GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

[5] In this context, consider the delightful story recounted by GLENDON, *id.* at 7-8. In the United Kingdom, by contrast, "the constitution" seems only to get raised as a matter for public discussion when some crisis or other concerning the royal family emerges. Perhaps the fact that British constitutional controversies do not have quite the same jurisprudential resonance as they do in the United States goes some way to explaining why, traditionally, modern British constitutional lawyers have tended not to be especially interested in legal (as opposed to political) theory.

[6] David Sugarman has claimed that, from the late nineteenth century through to the 1940s, the impetus to establish a sociological or realist jurisprudential agenda was as much in evidence in Germany and England as it was in the United States. However, with regard to England, Sugarman presents no real evidence to support this claim. *See* David Sugarman, *'A Hatred of Disorder': Legal Science, Liberalism and Imperialism*, *in* DANGEROUS SUPPLEMENTS: RESISTANCE AND RENEWAL IN JURISPRUDENCE 34, 62-63 (Peter Fitzpatrick ed., 1991). My suspicion is that, during the early part of this century, there emerged in England something akin to a quasi-realist tradition in legal scholarship, epitomized by the works of, among others, Harold Laski, Ivor Jennings and Otto Kahn-Freund. But Sugarman does not cast any light on this tradition and, even if he had, I suspect that it would to be very different from the realist jurisprudential tradition which evolved in the United States.

[7] RICHARD A. COSGROVE, SCHOLARS OF THE LAW: ENGLISH JURISPRUDENCE FROM BLACKSTONE TO HART 214 (1996).

[8] *See* DUXBURY, PATTERNS, *supra* note 2, at 321-22.

comparable with, say, Roberto Unger, Margaret Radin, Richard Epstein or Catharine MacKinnon. This is not to suggest that we do not have ambitious and accomplished legal scholars. Of course we do. But their ambitiousness and accomplishments are somehow different. When writing about law, English academic lawyers tend to steer clear of theories and accounts which are, in one way or another, grandiose, experimental, highly controversial or marked by what George Bush called "the vision thing."[9] Those English legal academics who are receptive to such theories usually end up on the faculties of law schools in the United States, Canada or Australia. The point is that the English are by and large less inclined, in their legal writings, to go out on a limb. As a consequence, we often seem narrower in outlook, less self-reflective, but also less self-indulgent than many of our American counterparts.

Of course, in England, we do not have the phenomenon of the student-edited law school review; and, in the past, I have assumed that this difference between us is crucial in explaining the more general difference which I am trying to highlight here. Yet the law review phenomenon seems to be of distinctly limited explanatory value. Even though "[e]very [American] law school sports its own law review, and many have several,"[10] Richard Posner has commented, these reviews "are not well-equipped to select, and through editing to improve, articles outside of the core of legal doctrinal analysis."[11] The upshot of this, according to Posner, is that "[s]ome crazy stuff is

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[9] There are, of course, instances which do not support the distinction which I am drawing. Recent work by Cass Sunstein—emphasizing both the unsatisfactory nature of high-level theories of adjudication (such as Dworkinian idealism) and the virtues of casuistic approaches to decision-making—reads like a classic English defense of the ad hoc, improvisational quality of the common law. *See* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996); and, for a classic defense of common law incrementalism, compare 3 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 267-69 (1765). On the other hand, Peter Goodrich's recent, historico-psychoanalytical attempt to excavate that which he considers to have been repressed within the common law tradition is marked by the sort of theoretical ambition which I think is far more common to the United States (where, indeed, a good deal of his most recent work has been published). *See* PETER GOODRICH, OEDIPUS LEX: PSYCHOANALYSIS, HISTORY, LAW (1995).

[10] RICHARD A. POSNER, OVERCOMING LAW 100-01 (1995) [hereinafter POSNER, OVERCOMING LAW].

[11] Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 779 (1987).

being published in law reviews nowadays."[12] In England, law journals are fewer in number (even taking into account how few law schools we have as compared with America), shorter in length and usually peer reviewed. Academic lawyers in England who produce crazy stuff—and, indeed, lengthy stuff—are likely to have difficulty getting their articles published. The system favours caution and brevity.

While what I have said so far might provide some explanation as to why the English approach legal scholarship in the way that they generally do, it does not cast any light on the American side of the story. As the number of American law schools grew in the 1950s, so too did the number of law reviews.[13] What I do not understand, however, is why the American law school review has generally expanded so much in terms of sheer size. Comparing the current volume of the *Harvard Law Review* with that in which *The Path of the Law* appears is like comparing the waistlines of the younger and the older Elvis Presley. What happened? The standard answer to this question among American law professors is that law reviews have expanded because the ability to encourage brevity, and to edit ruthlessly when such encouragement fails, are skills which, generally, law students do not possess—indeed, the modern footnote glut is often considered to demonstrate as much.[14] This answer, however, seems unconvincing.[15] If it were correct, we would have no reason to expect volume ten of the *Harvard Law Review* to be any less concise than volume 110. Furthermore, we would expect a similar lack of economy

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[12] POSNER, OVERCOMING LAW, *supra* note 10, at 101.

[13] *See* ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S at 271 (1983).

[14] On which, see Arthur D. Austin, *Footnotes as Product Differentiation*, 40 VAND. L. REV. 1131 (1987); and, for the classic antifootnote—indeed, antilaw review—tirade, see Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936). *See generally* Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926 (1990).

[15] Another answer which I have received in the past—that the increased length of law review articles is attributable to word-processing—also does not seem convincing. While word processing has most likely made the production of lengthy studies much easier, the fact of the matter is that the American law review expanded before the advent of the word processor. Indeed, many of the classic examples of mammoth law review articles would not have been word processed. For one example, see Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943).

from student-edited law journals in countries other than the United States—journals such as the *Sydney Law Review* and the *Melbourne University Law Review* in Australia or the *Alberta Law Review* and the *Manitoba Law Journal* in Canada. Yet those journals are exemplars of brevity compared with the vast majority of American law school reviews. Indeed, the answer which I cite simply raises a deeper, and I think more interesting, question: have American law professors developed a grandiose approach to legal scholarship because, since Holmes's era, law reviews have been able and prepared to expand, or have law reviews accommodated expansion because, since that era, American law professors have developed a grandiose approach to legal scholarship? My suspicion is that American law school reviews, while being the recipients (some might even say the victims), are not actually the cause of what is a distinctively American style of legal scholarship. Of course, if this suspicion is correct, the question remains: why did you become what you are?[16]

## I. HOLMESIAN STYLE

Although this paper does not provide an answer to this question, the issue rests at its core. For whatever reasons, American legal scholars and scholarship are very distinctive. And I would like to think that the reasons that I offer to try to account for the differences between American and English academic lawyers in particular go some way to explaining why the English have never produced—and probably could never produce—a figure like Holmes. Yet, explaining the influence of Holmes, and of *The Path of the Law* in particular, requires, I think, that we recognize, among many other things, what might very crudely be termed the man's "Englishness." There

[16] Possibly the law reviews originally expanded in length because of the massive growth in the actual amount of law during the New Deal era. Certainly perusal of the library stacks suggests that it was during the 1930s that the American law reviews began to expand (though I confess that this observation is derived from casual inspection carried out in the university library at Manchester, which carries only a dozen or so American law school reviews). Since most law review writing has traditionally been doctrinal in orientation, and since the New Deal marked the massive growth of, among other things, legal doctrine, is it not more or less inevitable that the law reviews should have expanded at this time?

runs throughout American society a celebratory ethos which the English generally do not share, or certainly do not exhibit to the same degree. Americans are very good at producing and revering heroes and at applauding grand achievements, and Holmes surely epitomizes heroism and achievement as much as, if not more than, any other American lawyer. But Holmes's influence on twentieth century American law, I want to argue, is attributable largely (though, of course, not exclusively) to the peculiarly "English" manner in which he wrote.

Holmes's brilliance as an aphorist may well be an important consideration here. Yet, in talking about his written style, I wish to focus on something else—something which I think is captured by the quotation from Veyne at the beginning of this essay. On the face of it, Veyne's observation—that only the expression not contrived to produce an impression in fact succeeds in making one—is contradicted by the writings of Holmes. After all, Holmes produced many statements which seem to have been designed to make—and, indeed, have made—an impression. More generally, we know that Holmes was very much concerned with impressing others.[17] Yet I think that when we read Holmes's essays—rather than focus on the aphorisms or on his behaviour—we often encounter somebody who wrote as if not especially interested in what sort of impression his words might have on others and who, by virtue of this, managed to capture and convey that strange, elusive quality of effortless superiority. His style is, I would suggest, Macaulayesque—the style of the Victorian patrician and man of letters. Intrinsic to this style is the notion that it would be somehow ungentlemanly—an affront to one's audience—to present one's thoughts too clearly, emphatically or elaborately. The style is primarily aesthetic rather than didactic: the point of it is not instruction but the appreciation that can come from lack of instruction, that is, from being treated as sufficiently intelligent to make sense for oneself of mystery and ambiguity.

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[17] In this context, see, for example, SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 163-77 (1989).

Some commentators have emphasized Holmes's disinterest in and detachment from social realities.[18] His lack of involvement with the life of his society, Rogat famously argued, explained his indifference to civil liberties.[19] Bound up with that detachment, perhaps, is the peculiar Holmesian style which I am trying to articulate here. In short, Holmes tends to be undemonstrative, unemphatic, casual, insouciant even. It is a style which exemplifies (even though Holmes may not have intended) Ovid's maxim, *ars est celare artum*—the art is to conceal the art. Holmes, indeed, seems to recognize that—as with enlightenment, laughter, forgetting and belief—impressing others is an example of a state which is essentially a by-product, of something which cannot be willed.[20] It is as if, in order to impress others, he makes little or no effort to impress others: thus it is that, through his writings, he can appear harsh, scandalous, aloof, unfashionable, cryptic, fatalistic and self-contradictory, and yet also be perceptive, challenging, inspired and inspiring.

Holmes, I think, wants to give the impression that anyone who wishes, as he put it, "to keep to the real and the true,"[21] ought to have scant regard for presenting their ideas strategically or even elaborately. For truth should not be in need of strategy and elaboration. Thus it is that he writes, first and foremost, not in praise of the rhetorician, but of the "great abstract thinker, wrapt in the successful study of problems to which he devotes himself, for an end which is neither unselfish nor selfish . . . but is simply to feed the deepest hunger and to use the greatest gifts of his soul."[22] Holmes himself intended to write in a fashion which conveys the sense that ideas are seeking him out, rather than he them. Drifting from one theme to another—as if not planned out in any way but dictated by *amor fati*—his writing is sometimes infuriatingly, even tedious-

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[18] *See, e.g.*, G. EDWARD WHITE, INTERVENTION AND DETACHMENT: ESSAYS IN LEGAL HISTORY AND JURISPRUDENCE 87-88 (1994) [hereinafter WHITE, INTERVENTION AND DETACHMENT].

[19] Yosal Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213 (1964).

[20] On states that are essentially by-products, see JON ELSTER, SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY 43-108 (1983).

[21] Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899).

[22] *Id.* at 451-52.

ly, gadfly.[23] Yet this apparent lack of planning is more often responsible for generating the impression that his writing is inspired rather than derivative (even when it is derivative). Coupled with this lack of planning there is Holmes's renowned brevity. Happily, it seems, he would take the risk of appearing mystical or inconsistent rather than try to elaborate ideas and arguments. Ironing out potential ambiguities, after all, would betray a sense of trying to impress, which would be unimpressive.[24]

Perhaps the most important point to stress about Holmes's written style is that it is very different from anything that we find in the writings of American academic lawyers certainly from the realist era onwards. The style is more English—more the traditional style of the Oxbridge don[25]—than anything else. Robert Gordon has recently observed that British legal theorists tend to view American jurisprudence "with something between indifference and amused complacency."[26] Leaving aside the fact that British academic lawyers have produced their fair share of serious scholarship about American jurisprudence,[27] what Gordon seems not to appreciate is that British legal theorists in general treat American legal theory much as they treat all forms of theory. Basically, he fails to pick up on what I think is a traditionally and predominantly British (or certainly English) academic literary style—a style which, as it

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[23] While Holmes's writings can be "incredibly rich in insights," Robert Gordon has remarked, "outside the famous coloratura passages [those] insights require much patience to be noticed." Robert W. Gordon, *Holmes' COMMON LAW as Legal and Social Science*, 10 HOFSTRA L. REV. 719, 746 & n.172 (1982).

[24] Hence, as White has remarked, while we sometimes find judges endeavouring to explain their decisions in such a way as to communicate their concerns to anyone who might return to the same problems in the future, "Holmes' explanations rarely sought to communicate in so extended a fashion. Indeed when Holmes retreats to the kind of language he used to explain his results . . . one gets the impression that his tongue is in his cheek; that he is using the convention deference to cut off communication rather than to open it up." WHITE, INTERVENTION AND DETACHMENT, *supra* note 18, at 98-99.

[25] On the anti-instrumentalist view of teaching and research commonly held by early nineteenth century Oxford dons in particular, see, for example, A.J. ENGEL, FROM CLERGYMAN TO DON: THE RISE OF THE ACADEMIC PROFESSION IN NINETEENTH-CENTURY OXFORD 47-48 (1983).

[26] Robert W. Gordon, *American Law Through English Eyes: A Century of Nightmares and Noble Dreams*, 84 GEO. L.J. 2215, 2215 (1996).

[27] For two outstanding examples, see STEVENS, *supra* note 13; and WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (rev. ed. 1985).

manifests itself in legal and other forms of scholarship, is likely to seem to some Americans to be rather languid, unenthusiastic and possibly dismissive.[28]

That we can detect something of this style in the writings of Holmes is perhaps not surprising. Educated Bostonians of Holmes's generation would often look to England for enlightenment and inspiration in matters cultural.[29] For Holmes himself, England—and upper class London in particular—was a place which periodically provided solace and a sense of release, an environment in which he was content to be less of an aspirant and in which he enjoyed opportunities for dalliance.[30] Besides being acquainted with Dicey, Bryce, Pollock, Leslie Stephen and other English political and legal thinkers of the late

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[28] Richard Posner identifies something akin to the style which I am describing in the writings of Ronald Coase. According to Posner, Coase's Englishness goes some way to explaining his disparaging attitude towards mathematical economics. POSNER, OVERCOMING LAW, *supra* note 10, at 416-17.

It is interesting to note Posner's comment in the same book that Sir James Fitzjames Stephen was "[f]orceful, pithy, aphoristic . . . a magnificent prose stylist in the English tradition of brook-no-disagreement plain speaking." POSNER, OVERCOMING LAW, *supra* note 10, at 260. Posner detects some of Stephen's "qualities of style and thought" reflected in the writings of Holmes and describes Stephen's style of writing as "so different from American writing of any era yet so similar to Holmes's style." POSNER, OVERCOMING LAW, *supra* note 10, at 261. Elsewhere, Posner surmises that Holmes "learned much from Stephen—especially how to write English English, which is to say good English, rather than American English, which in Holmes's formative years and indeed long after was . . . bad English." Richard A. Posner, *Introduction* to THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR., ix-xxxi, xxi (Richard A. Posner ed., 1992) [hereinafter Posner, *Introduction*]; *see also* J.W. Burrow, *Holmes in His Intellectual Milieu*, *in* THE LEGACY OF OLIVER WENDELL HOLMES, JR. 17-30 (Robert W. Gordon ed., 1992). I would highlight also the work of James Fitzjames Stephen's brother and biographer, Leslie Stephen, with whom Holmes had first become acquainted in 1863. Like his brother, Leslie Stephen was an exemplary English essayist, a man whom, as one historian has observed, "revelled in (indeed almost parodied) his own gruff Englishness." STEFAN COLLINI, PUBLIC MORALISTS: POLITICAL THOUGHT AND INTELLECTUAL LIFE IN BRITAIN, 1850-1930, at 327 (1991). It has been suggested also that Leslie Stephen shared with Holmes a peculiar willingness to treat certain states as essentially by-products. *See* J.W. Burrow, *Holmes in His Intellectual Milieu*, *in* THE LEGACY OF OLIVER WENDELL HOLMES, JR. 30 (Robert W. Gordon ed., 1992).

[29] *See* VAN WYCK BROOKS, NEW ENGLAND: INDIAN SUMMER, 1865-1915, at 415, 450-54 (E.P. Dutton ed., 1941).

[30] *See* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 97-98, 101-02, 224, 226-29, 478, 484 (1993) [hereinafter WHITE, LAW AND THE INNER SELF].

Victorian era,[31] Holmes participated in high-society London intellectual life.[32] "Though Holmes as soldier had learned that the Bostonian was an American," one of his biographers has commented:

> [A]s traveler he had discovered that he was also, in many respects, an Englishman.... In literary matters the tastes of Boston's intellectuals and of London's were essentially the same. In so far as Holmes had pursued the study of law he had kept within the framework of the English tradition.[33]

I would add that his written style is very much that of the accomplished late-nineteenth century English prose-writer. And we can detect something of this style, I think, in *The Path of the Law*.

## II. HOLMESIAN STYLE AND *THE PATH OF THE LAW*

The first thing to note about *The Path of the Law* is its length: twenty-two pages. Richard Posner has ventured that *The Path of the Law* "may be the best article-length work on law ever written."[34] Yet chances are, as he well knows, that some American law reviews today would not consider the essay to be article-length.[35]

Even by the 1890s, some American academic lawyers had developed a taste for writing massive law review articles—although, in those days, such articles tended to be published in segments rather than *en bloc*. Volume ten of the *Harvard Law Review* contains, for example, the concluding part of Christopher Columbus Langdell's delightfully titled *A Brief*

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[31] *See generally* 1 MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS 1841-1870 at 223-44 (1957).

[32] *See* WHITE, LAW AND THE INNER SELF, *supra* note 30, at 228-29.

[33] HOWE, *supra* note 31, at 243; *see also* POSNER, OVERCOMING LAW, *supra* note 10, at 261-62; Letter from Oliver Wendell Holmes to Lewis Einstein (Oct. 12, 1914), *in* THE ESSENTIAL HOLMES: SELECTIONS FROM LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 101 (Richard A. Posner ed., 1992) ("I believe in 'my country right or wrong,' and next to my country my crowd, and England is my crowd.").

[34] Posner, *Introduction*, *supra* note 28, at x.

[35] Posner has told the story of how Cass Sunstein's study, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993) was labelled "Commentary" by the editors of that journal, apparently because they did not consider a fifty-page essay to constitute a fully-fledged legal article. *See* POSNER, OVERCOMING LAW, *supra* note 10, at 518 n.36.

*Survey of Equity Jurisdiction*—an article which is comprised of eight installments, takes up over two hundred pages and spans the first ten issues of the journal.[36] It also contains the first two installments of a scholarly but rather leaden three-part article by John Henry Wigmore on the legal significance of the pledge.[37] Of course, at this time such studies were the exception rather than the rule. Generally, and very much unlike today, law review articles rarely strayed over thirty pages, and often took up fewer than twenty. And so, in context, the length of *The Path of the Law* is unremarkable.

What is remarkable about *The Path of the Law*, however, is that Holmes manages to be economical with words and yet offer insights into a multitude of themes. No doubt the principal reason for this is that *The Path of the Law* was written as an address, and is therefore something of an exercise in painting with a broad brush.[38] The thematic ambition is still striking, nevertheless, when one considers essays of a similar length which were being published in American law school reviews at that time. Most law review articles of this period were very dry, technical, doctrinal, and often narrowly focused. One cannot imagine the *Yale Law Journal* today, for example, publishing an article on *The Law of Icy Sidewalks in New York State*.[39] Most of these articles, furthermore, tended to eschew ambition. Even if not so headed, they very often read as if their titles ought to have begun with the words "Some Thoughts about," or "Some Reflections on," or "Some Problems

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[36] *See* Christopher C. Langdell, *A Brief Survey of Equity Jurisdiction*, 1 HARV. L. REV. 55, 111, 355 (1887); 2 HARV. L. REV. 241 (1889); 3 HARV. L. REV. 237 (1890); 4 HARV. L. REV. 99 (1890); 5 HARV. L. REV. 101 (1891); 10 HARV. L. REV. 71 (1896).

[37] John H. Wigmore, *The Pledge-Idea: A Study in Comparative Legal Ideas*, 10 HARV. L. REV. 321 (1897); 10 HARV. L REV. 389 (1897); 11 HARV. L. REV. 18 (1897).

[38] Many, if not all, of the themes which Holmes addresses in *The Path of the Law*, furthermore, had already emerged in Holmes's writings and speeches over the previous quarter century. *See* Mark DeWolfe Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529, 539-40 (1951).

[39] Loran L. Lewis, *The Law of Icy Sidewalks in New York State*, 6 YALE L.J. 258 (1897).

in"; not surprisingly, such words sometimes did feature in the titles.[40] The mystical, Taoistic title alone betrays the boldness of Holmes's essay.

By the time that he wrote *The Path of the Law*, Holmes had come around to the view that chance could sometimes be tamed through the adoption of rational strategies.[41] Indeed, this insight rests at the heart of his predictive perspective on law. Law is not "a mystery but a well known profession" because lawyers are in the business of finding out when people ought to fear the "risk of coming against what is so much stronger than themselves."[42] Appreciating the law in this way—having "a business-like understanding of the matter"[43]—requires that one does not "drop into [the] fallacy" of "assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law."[44] Thus it is that *The Path of the Law* opens—with a vision of law as prophecy (this being "the view of our friend the bad man")[45] and a warning that "confounding morality with law" impedes "the clearness of our thought."[46]

As openings to essays go, this introduction is particularly striking and purposeful. Indeed, it is surely not at all surprising that some people, when they discuss *The Path of the Law*, should concern themselves almost exclusively with the first half-dozen pages.[47] For it is in those first few pages that Holmes conjures up a remarkable combination of positivism and predictivism which would, in time, challenge and inspire many an American lawyer—most notably, of course, those who came to be identified with legal realism. Yet, even in the open-

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[40] *See, e.g.*, Francis R. Jones, *Some Problems in Overdue Paper*, 11 HARV. L. REV. 40 (1897); Henry DeForest Baldwin, *Some Questions Relating to the Measure of Damages in Street Opening Proceedings in New York City*, 6 YALE L.J. 263 (1897).

[41] *See* Jan Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CAL. L. REV. 343, 367-68 (1984).

[42] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

[43] *Id.* at 459.

[44] *Id.* at 460.

[45] *Id.*

[46] *Id.* at 464.

[47] *See, e.g.*, David H. Moskowitz, *The Prediction Theory of Law*, 39 TEMP. L.Q. 413 (1966).

ing pages of his address, Holmes has already begun to throw in qualificatory asides. He states that he "take[s] it for granted"[48] that his effort to differentiate law from morality will not be mistaken for cynicism.[49] Not only is it the case that "[t]he law is the witness and external deposit of our moral life"[50]—a wonderfully suggestive yet rather ambiguous claim—and that the history of law reflects the history of our moral development, but Holmes's sole reason for distinguishing law and morality is to help his audience learn and understand the law. There seems, in fact, to be not all that much substance to what Holmes is saying here; but then it is so often the case that the effectiveness of his observations rests not so much in what he says as how he says it. Indeed, dismantling Holmes's prose is rather like stripping down a 1932 Rolls Royce Silver Shadow and declaring it to be little more than metal, glass and rubber. What it is important to note about Holmes's style is the mixture of the laconic and the lapidary: it should go without saying, he observes, that these are not the sentiments of a cynic (as if anyone would ever accuse Holmes of cynicism!), for it is obvious that the law is . . . cue aphorism. The style often crumbles under careful scrutiny. Holmes is not always all that concerned with analytical precision, eschewing *non sequiturs* or creating the impression that he is seriously developing a theme or following through an idea. He is happy to leave us to wrestle with ambiguities and fill in gaps. But that, of course, is one of the reasons that *The Path of the Law* appeals so. He gives the impression of not really trying. Indeed, he engages in what I think is a traditionally very English academic convention of assuming an intelligent audience or readership with a common

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[48] Holmes, *supra* note 42, at 459.

[49] Which, of course, it eventually would be. For a discussion of some of the relevant literature, see Neil Duxbury, *The Reinvention of American Legal Realism*, 12 LEGAL STUD. 137, 159-64 (1992). I find interesting Holmes's occasional statement to the effect that nobody should assume him to be a cynic, that he venerates the law, and so on. When one reads Holmes's lectures and addresses as opposed to his judicial opinions, it seems that, while he did not generally try to impress, he often did attempt to dress up some of his more uncompromising arguments so as to make them more palatable, or at least less shocking, to a legal audience.

[50] Holmes, *supra* note 42, at 459.

educational background—an audience or readership which does not need, and would not especially welcome, having too much spelled out to it.

Consider, in this regard, the footnotes in *The Path of the Law*. Excepting the opening note—which records the provenance of the essay—there are only six of them. This is meagre even by the standards of law review articles of that period.[51] One imagines that this general lack of footnotes must look very odd—and is probably very refreshing—to those American lawyers who nowadays perceive footnoting to be something of an academic power-game.[52] The principal point of significance here, however, is not the number of footnotes in *The Path of the Law*, but their content. Holmes is patently not interested in providing citation detail. One can imagine, indeed, what the reaction of a student law review editor today would be if confronted with a footnote asserting: "See also Ferri, 'Sociologie Criminelle,' *passim*. Compare Tarde, 'La Philosophie Pénale.'"[53] In *The Path of the Law*, Holmes seems to treat footnotes as a hindrance, a distraction with the potential to detract from the aesthetics of and ideas within the corpus text. His message, I would suggest, is: "surely you can trust me—as I can trust you—to know what it is I am talking about."

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[51] *Cf.* J.H. Beale, Jr., *Dicey's "Conflict of Laws,"* 10 HARV. L. REV. 168 (1896). It is worth noting that, when articles appeared in American law reviews around this time without any footnotes at all, they were often authored by English lawyers. *See, e.g.*, J.E.R. Stephens, *The Growth of Trial by Jury in England*, 10 HARV. L. REV. 150 (1896); F.W. Maitland, *The Origin of Uses*, 8 HARV. L. REV. 127 (1894).

[52] On footnotes as power-game in modern American academic legal culture, see Austin, *supra* note 14; Abner J. Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647 (1985); Arthur D. Austin, *The Rise and Fall (We Hope) of Footnotes*, 69 A.B.A. J. 255 (1983); and J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989). Law professors, it should be noted, are not the only American academics playing this game. *See* ANTHONY GRAFTON, THE FOOTNOTE: A CURIOUS HISTORY (forthcoming Dec. 1997); JON WIENER, PROFESSORS, POLITICS AND POP 339-47 (1991).

[53] Holmes, *supra* note 42, at 471 n.1. Knowing very little about how American student-edited law reviews in fact operate, I actually have no idea as to how such a footnote would be dealt with today. I assume that, if the footnote were authored by a modern-day Holmes (were a lawyer of such stature to exist), the editors would do their level best to fill in the gaps for themselves. But then, I have come across some quite bizarre stories concerning what passes for proper scholarly convention in American law school reviews. Consider, for example, one recounted in Peter Goodrich, *Sleeping with the Enemy: An Essay on the Politics of Critical Legal Studies in America*, 68 N.Y.U. L. REV. 389, 413 n.89 (1993).

Such insouciance could very easily be interpreted as arrogance. And yet there is, I think, something about the Holmesian style that makes us feel as it were, complimented. He assumes that his audience has intelligence, that digressions and the occasional rhetorical flourish will not stop them from following the plot. Instructive here, I think, are Holmes's two comments in *The Path of the Law* on the value of economic thought to lawyers. Holmes's first comment on this subject is memorable and oft-quoted. The study of history, he begins, is integral to "the rational study of law" because it encourages those who examine and apply legal rules to adopt an attitude of "enlightened scepticism" towards those rules.[54] Holmes seems to recognise that this claim could benefit from elaboration, and so he develops it a little—but not, I think, in a way that anyone else would. He continues:

> When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal. For the rational study of 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.[55]

The study of law through the lens of history should get the dragon out its cave and enable us to see its strength; but such an endeavour—the work of the black-letter lawyer—cannot help us to channel that strength or to quell it where it poses a threat. That is the task of someone other than "the black-letter man." Holmes, it seems to me, is making us do a great deal of work for ourselves here. The passage is wonderfully allusive, but not explanatory. It is not clear, in particular, why we should consider "the man of the future" to be "the man of statistics and the master of economics."

But Holmes does not stop there. Five pages on, he returns to the matter of how lawyers might learn from economics. Reiterating his view that the study of the past is useful primarily "for the light it throws upon the present," he states that he hopes, one day, that history will play a smaller part in legal explanation, and that instead lawyers will focus on "the ends

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[54] Holmes, *supra* note 42, at 469.
[55] Holmes, *supra* note 42, at 469.

sought to be attained" through law "and the reasons for desiring them."[56] If such a switch of focus is to occur,

> it seems to me that every lawyer ought to seek an understanding of economics. The present divorce between the schools of political economy and law seems to me an evidence of how much progress in philosophical study still remains to be made.[57]

In almost the same breath, Holmes exhorts and laments. But what he still has not done is explain how the study of economics might benefit lawyers. Before turning his attention to a different theme, he gets to the heart of the matter. The study of political economy, he states, requires us

> to consider and weigh the ends of legislation, the means of attaining them, and the cost. We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect.[58]

Holmes saw that, in law as elsewhere, choices impose prices. He recognised also that law is a vital medium through which we confront and determine the choices which we have to make. These insights are, I believe, integral to modern legal-economic analysis.[59] We all know just how much contemporary American legal scholarship is obsessed with these insights, how much modern American academic lawyers are concerned with the ways in which law accommodates trade-offs, tragic choices, incommensurabilities, double-binds.[60] I would not myself regard Holmes as the grandfather of law and economics.[61] But I

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[56] Holmes, *supra* note 42, at 474.

[57] Holmes, *supra* note 42, at 474.

[58] Holmes, *supra* note 42, at 474.

[59] *See* DUXBURY, PATTERNS, *supra* note 2, at 381-419.

[60] For representative literature on these themes, see RISK VERSUS RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT (John D. Graham & Jonathan B. Wiener eds., 1995); GUIDO CALABRESI & PHILIP BOBBIT, TRAGIC CHOICES (1978); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994); MARGARET JANE RADIN, CONTESTED COMMODITIES 123-30 (1996). We all know, too, that lawyers do not address these themes exclusively, and that economists in particular have done most of the preparatory work. For an historical study of how economists have treated choices as imposing prices, see JAMES M. BUCHANAN, COST AND CHOICE: AN INQUIRY IN ECONOMIC THEORY (1969).

[61] *Cf.* William P. LaPiana, *Victorian from Beacon Hill: Oliver Wendell Holmes's Early Legal Scholarship*, 90 COLUM. L. REV. 809, 833 (1990) ("If [Holmes] is the ancestor of any branch of current American legal thought, those who should erect

do think that he expresses the essence of the relationship between the two disciplines with remarkable acuity. Here, again he lets his readers, or his audience, do most of the work. He does not try to elaborate or impress us with his understanding of that relationship; indeed, he expresses his understanding of the relationship in just one sentence. He does not care to proselytise or emphasise or even organise his thoughts. Rather, he pays us the compliment of assuming that we will neither need nor want to be hit over the head with an idea. In short, he makes great use of understatement. And it is for this reason, among others, that his words prove so resonant.

It is not my claim that Holmes was some sort of ingénue. I do not know whether his adoption of the style which I have tried to identify was spontaneous or strategic. All I am claiming is that there is a peculiar style to be discerned in many of his writings, that this style is especially in evidence in *The Path of the Law* and that this explains in part why the essay continues to inspire, invigorate and provoke us.

## CONCLUSION

Trying to take stock of Oliver Wendell Holmes is like counting leaves on a tree: very easily one loses sight of just how far one has progressed. Occasionally, I feel that I have some understanding of Holmes—that I am familiar with his ideas, or that I have gained some sort of insight into his psychology and circumstances. Yet this feeling never lasts. Possibly, this is because there are too many aspects, interpretations, revisions and even revisions of revisions of Holmes for any one person properly to comprehend. In the literature on the man, we encounter Holmes as soldier, scholar, judge, liberal, reactionary, utilitarian, positivist, pragmatist, Darwinist, eugenicist, existentialist, formalist, realist—it almost goes without saying that this list is not exhaustive. Some of this literature is ill-conceived, poorly executed or disingenuous in one way or another; very little of it is as succinct, and perhaps none of it is

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his shrine are the advocates of law and economics. In Holmes they can find a thinker who knew that society and its law should be organized along the lines dictated by the 'science' of economics. All they must do is ignore his appreciation for the role the irrational plays in the life of the law.").

as thought-provoking, as *The Path of the Law*. Indeed, more generally, I think that if one reads articles appearing in American law reviews today and considers them in the light of *The Path of the Law*, one can very easily and fairly persuasively conclude—as Ronald Coase did when contemplating the bicentenary of the publication of the *Wealth of Nations*[62]—that, over time, scholarly endeavour has not really advanced us very far.

Yet we ought to be wary of such a conclusion. I have tried to argue, with particular reference to *The Path of the Law*, that one of the many reasons for Holmes's influence rests in the fact that his work sometimes conveys a style of expression which we do not encounter in modern American legal scholarship.[63] I have called this style English. The style is unemphatic, unelaborate and seems unforced (although it may well be that Holmes was actually trying to appear not to be trying).[64] It is, in short, a style very different from the styles of legal scholarship which we produce and encounter today; and part of our attraction to the work of Holmes is, I think, our attraction to that difference. Indeed, I suspect that for many contemporary American academic lawyers in particular, reading *The Path of the Law* must be rather like taking a holiday and being

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[62] R. H. COASE, ESSAYS ON ECONOMICS AND ECONOMISTS 94 (1994) ("The *Wealth of Nations* is a work that one contemplates with awe. In keenness of analysis and in its range it surpasses any other book on economics. Its preeminence is, however, disturbing. What have we been doing in the last two hundred years? Our analysis has certainly become more sophisticated, but we display no greater insight into the working of the economic system and, in some ways, our approach is inferior to that of Adam Smith.").

[63] It is tempting to assert that it is no longer to be encountered in English legal scholarship either. However, I would not be too sure about this. For one English essay, published not too long ago, which, stylistically at least, bears numerous affinities with *The Path of the Law*, see J.A.G. Griffith, *The Political Constitution*, 42 MOD. L. REV. 1 (1979).

[64] It is worth noting, in this regard, Richard Posner's characterization of Holmes's judicial writing style as "impure" (i.e., candid and colloquial) as opposed to "pure" (i.e., polished and impersonal). I imagine that Posner is correct when he observes that

> [p]aradoxically . . . impure judicial stylists generally take more pains over style than the pure stylists do. Unless one is a particularly gifted writer, it takes much effort to make an opinion seem effortless! The pure style, despite its artificiality, comes more easily to a legally trained person than the impure style.

Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1430-31 (1995).

able to call it work. Of course, it is a very cultured holiday, a learning experience—like visiting the major European cities rather than soaking up the sun on Miami Beach or gambling in Las Vegas. But it is a holiday, all the same: a break from reading the sort of legal literature that, nowadays, everybody seems to write.

My point, however, is not that we should lament the passing of the good old days—as if there were such a thing—when legal writing was more inspired and less overbearing. I would not make such a generalization and indeed, even with specific regard to Holmes, would not venture that his legal talent was somehow superior to that which we find among the best American jurists today. Nostalgia sometimes makes us distort the past and, without justification, resent the present.[65] Holmes's literary style was certainly different from anything that we encounter in contemporary legal writing. But my claim is merely that we are attracted to that difference, not that Holmes was a better legal writer than are any of our contemporaries. What mainly survives of Holmes, above and beyond his literary style, is his capacity to inspire and impassion. Whatever their other faults, even the worst studies of his accomplishments tend not to be routine or unengaged. If, as Flaubert remarked, there rests within every lawyer the debris of a poet,[66] Holmes has without doubt instigated the recovery of some fascinating debris.

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[65] *See* Neil Duxbury, *History as Hyperbole*, 15 OXF. J. LEGAL STUD. 477 (1995); Neil Duxbury, *The Narrowing of English Jurisprudence*, 95 MICH. L. REV. 1990 (1997).

[66] GUSTAVE FLAUBERT, MADAME BOVARY 311 (Garnier-Flamarrion edn., 1979) (1857) ("[C]haque notaire porte en soi les débris d'un poète."). Perhaps this is a comment with which Holmes would not have concurred. *See* Oliver Wendell Holmes, Jr., *The Profession of the Law (Conclusion of a Lecture Delivered to Undergraduates of Harvard University, February 17, 1886), in* THE ESSENTIAL HOLMES: SELECTION FROM LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITING OF OLIVER WENDELL HOLMES, JR. 218 (Richard A. Posner ed. 1992) ("Of course, the law is not the place for the artist or the poet. The law is the calling of thinkers.").