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125TH ANNIVERSARY ESSAY

In October 1872 the Boston University School of Law opened its doors. In its twenty-fifth year, on January 8, 1897, the school dedicated its new home at 11 Ashburton Place. Justice Oliver Wendell Holmes delivered an address entitled The Path of the Law on that occasion. This 125th Anniversary Essay reclaims Holmes's speech as part of the history of Boston University School of Law.

HOLMES'S PATH

DAVID J. SEIPP*

The most important event in American legal history to have taken place at Boston University School of Law was the delivery, by Oliver Wendell Holmes, Jr., of a speech entitled *The Path of the Law*.¹ He was an Associate Justice of the Massachusetts Supreme Judicial Court at the time. The occasion was the dedication of a new building for the School of Law, a building the school would occupy for sixty-seven years. Holmes delivered the speech on January 8, 1897, one hundred years ago.

The speech was first published by Boston University in pamphlet form² and appeared again, under the title *The Path of the Law*, in the short-lived *Boston Law School Magazine* in February 1897.³ Subsequently it

* Professor of Law, Boston University School of Law. I thank all who have helped me after reading this Essay or hearing me deliver it, particularly Carol F. Lee, W. Hamilton Bryson, Ronald Cass, Thomas Grey, Pnina Lahav, Aviam Soifer, Mark Tushnet, William Twining, and Michael Wells. I dedicate this Essay to J.L. Barton of Merton College, Oxford, who taught me to read *The Path of the Law* and other classics of jurisprudence in a fresh light.

[Editor's Note: Citations in this Essay appear in the form that the author requested. In some instances, they do not conform to the *Bluebook*.]

¹ Holmes did not give any title to the speech in its initial printing. See *infra* note 2 and text accompanying note 239. He described it in several different ways in his letters, see *infra* text accompanying notes 240-42, and published it under a different title in Scotland, see *infra* note 5.

² OLIVER WENDELL HOLMES, ADDRESS DELIVERED AT THE DEDICATION OF THE NEW HALL OF THE BOSTON UNIVERSITY SCHOOL OF LAW, JANUARY 8, 1897 (Boston 1897) [hereinafter Pamphlet].

³ Oliver Wendell Holmes, *The Path of the Law*, 1 BOSTON L. SCH. MAG., Feb. 1897, at 1 [hereinafter BLSM].

was published in the *Harvard Law Review*,⁴ in the *Juridical Review* of Edinburgh, Scotland,⁵ and in Holmes's *Collected Legal Papers*.⁶ Since 1897 this speech has impressed generations of law students.⁷ Generations of legal scholars have proclaimed it as a forerunner of their own work.⁸ Holmes himself, however, would be deeply disappointed to find that *The Path of the Law* is seen today as a sober, classic text. Holmes meant for *The Path of the Law* to shock American lawyers, and it no longer shocks us. It is worthwhile to see why.

* * *

A reader familiar with Holmes's earlier writings would find several old themes in *The Path of the Law* and a few entirely new ones. Holmes's main targets in *The Path of the Law* were what he saw as two pervasive fallacies in lawyers' thinking: the fallacy of confusing law with morality and the fallacy of confusing law with logic.

To show how to disentangle law from morality, Holmes invoked two ideas in *The Path of the Law* that have become famous. One is the "prediction" metaphor: that law is nothing but the prediction of what a court will do.⁹ The point was to show that law should not be regarded as a pre-existing body of rules grounded in ethical principles. The other idea is the "bad man" model: that in order to distinguish law from morality, we should look at law from the perspective of the "bad man." Holmes's "bad man" cared nothing for the ethical norms embodied in a legal rule. He only wanted to know what the court would do to him.¹⁰

To demonstrate how this perspective would differentiate law from morality, Holmes used the example of a breach of contract. From an ethical perspective, the primary duty imposed by law is the duty to carry out

⁴ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (issue dated Mar. 25, 1897) [hereinafter HLR].

⁵ [Oliver Wendell Holmes,] *Law and the Study of Law*, 9 JURIDICAL REV. 105 (1897) (published anonymously).

⁶ OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167 (1920) [hereinafter CLP].

⁷ See *infra* text accompanying notes 264-65.

⁸ See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* 253-60 (1930) (discussing the influence of Holmes's speech on legal realists); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 818 (1989) (same); Morton J. Horwitz, *The Place of Justice Holmes in American Legal Thought*, in THE LEGACY OF OLIVER WENDELL HOLMES, JR. 31, 53 (Robert W. Gordon ed., 1992) (stating that Holmes's speech was the "original inspiration" for Wesley Hohfeld's 1913 article challenging the natural rights foundation of American law); Richard Posner, *The Path Away from the Law*, 110 HARV. L. REV. 1039, 1042-43 (1997) (stating that Holmes's speech foresaw, inter alia, the rise of economics in law and broader interdisciplinary transformations of legal scholarship).

⁹ Pamphlet at 3-4, BLSM at 1-2, HLR at 458-59, CLP at 167-69.

¹⁰ Pamphlet at 5-8, BLSM at 2-4, HLR at 459-61, CLP at 170-73.

one's promise. But from the "bad man's" perspective, the only duty the law imposes when a court awards damages is the duty to pay for the consequences of not carrying out one's promise. The "bad man" viewed a contract, therefore, as an option to perform or to pay damages. The "bad man" would "commit a contract" with the same disregard of mere ethical duty with which he would commit a tort.¹¹

In the second half of the speech, Holmes turned to the confusion of law with logic. He attacked the idea that law could be worked out like mathematics, that judges' decisions could be demonstrably right or wrong.¹² Judicial over-reliance on history, he added, was as objectionable as judicial over-reliance on logic.¹³ Behind judicial syllogism and reliance on precedent lay simply a "judgment as to the relative worth and importance of competing legislative grounds."¹⁴ Holmes rejected both logic and history as guideposts. He urged judges to make clear the policy grounds on which they decided, and advised lawyers to master economics and statistics.¹⁵

Some of these themes had appeared before in Holmes's writings.¹⁶ Holmes had been debunking the logic of the law since 1880 when he penned the famous aphorism: "The life of the law has not been logic, it has been experience."¹⁷ He first explored the "law as prediction" metaphor in 1872: "The only question for the lawyer is, how will the judges act?"¹⁸ What was new and shocking, even to those familiar with Holmes's earlier writings, was the introduction of the "bad man."¹⁹ This paper examines the setting of Holmes's *The Path of the Law*. A number of events in Holmes's life in the three years before 1897 contributed themes to the speech and moved Holmes to play the "bad boy," to shock the distinguished professors, practitioners, and judges who had gathered

¹¹ Pamphlet at 9, BLSM at 5, HLR at 462, CLP at 175. Holmes was disregarding, of course, the remedy of specific performance. See *infra* text accompanying notes 83, 90-91.

¹² Pamphlet at 12-14, BLSM at 7-8, HLR at 465-66, CLP at 180-82.

¹³ Pamphlet at 17-18, BLSM at 10-11, HLR at 469, CLP at 186-87.

¹⁴ Pamphlet at 13, BLSM at 8, HLR at 466, CLP at 181.

¹⁵ Pamphlet at 18, 24, BLSM at 11, 15, HLR at 469, 474, CLP at 187, 195.

¹⁶ Many of the themes in Holmes's speech are traced through his writings in Thomas A. Reed, *Holmes and the Paths of the Law*, 37 L. & HIST. REV. 273 (1993).

¹⁷ [Oliver Wendell Holmes,] Book Review, 14 AM. L. REV. 233-35 (1880) (reviewing C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (2d ed. 1879)); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Boston, Little, Brown, & Co. 1881).

¹⁸ [Oliver Wendell Holmes,] Book Notice, 6 AM. L. REV. 723-24 (1872) (reviewing *The Law Magazine and Review* for April 1872); see M.H. Fisch, *Justice Holmes, the Prediction Theory of Law, and Pragmatism*, 39 J. OF PHIL. 85, 92-94 (1942).

¹⁹ The nearest approach to the "bad man" in Holmes's previous writings is a sentence he wrote in 1881 on conditions precedent in contracts—hypothesizing "one who had no scruples." See *infra* text accompanying note 70.

to hear him address the assembled law students. Among these events figure a bicycle, a love affair, an unpopular dissent, and a short story about an evil lawyer that may have provoked Holmes to invent the "bad man."

DEATH OF THE AUTOCRAT, OCTOBER 7, 1894

Holmes's father, a grand old man of American letters, died on October 7, 1894, when Holmes was fifty-three years old. Holmes was the only surviving member of the family. His brother had died in 1884, his mother in 1888, and his sister in 1889.²⁰ Holmes and his wife Fanny had no children. His father's line continued only in himself and a nephew, Edward Jackson Holmes, then a student at Harvard College.

Holmes's relationship with his father is explored in G. Edward White's recent biography.²¹ Holmes was truly a celebrity child. He bore the same name as his father, and for all of Holmes's life, his father remained more widely known to the general public than he.²² Already a poet popular on the lecture circuit when Holmes was born, his father put young Holmes into his writings. Beginning when Holmes was sixteen, his father's regular articles in *The Atlantic Monthly*, entitled *The Autocrat of the Breakfast-Table*, put a light, humorous version of their family's daily conversation before the American reading public. The articles were collected in a series of immensely popular books.²³ The serious, idealistic young "divinity student" and later the "young astronomer" and "the counselor" were easily identifiable as Holmes himself. When Holmes was wounded in combat at Antietam, the second of three wounds he received in the Civil War, his father took readers of *The Atlantic Monthly* along with him in *My Hunt After "The Captain."*²⁴ Holmes was a recurring, comic character in the most popular of his father's works. This was quite a legacy to overcome.

His father's death must have meant for Holmes a chance to struggle free from his father's celebrity. He could prove himself a great man in his own right, a new man for a new time. In *The Path of the Law*, Holmes called for a massive reconsideration of the methods of legal education, legal practice, and judicial reasoning passed down from prior generations.

²⁰ SHELDON M. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* 178, 183, 186 (1989).

²¹ G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 9-14 (1993).

²² *Id.* at 465-66 (noting Holmes, at ninety years of age, still competing with his father), 483.

²³ See OLIVER WENDELL HOLMES, *THE AUTOCRAT OF THE BREAKFAST-TABLE: EVERY MAN HIS OWN BOSWELL* (1858); *THE PROFESSOR AT THE BREAKFAST-TABLE* (1860); *THE POET AT THE BREAKFAST-TABLE* (1872); *OVER THE TEACUPS* (1891).

²⁴ Oliver Wendell Holmes, *My Hunt After "The Captain,"* 10 *ATLANTIC MONTHLY* 738 (1862).

"Most of the things we do we do for no better reason than that our fathers have done them" and "the same is true of a larger part than we suspect of what we think."²⁵ Holmes demanded "a better answer than that we do as our fathers have done."²⁶ Writing of his own father in 1914, Holmes was critical:

If he had had the patience to concentrate all his energy in a single subject, which perhaps is saying if he had been a different man, he would have been less popular, but he might have produced a great work.²⁷

Holmes had written his own great work, *The Common Law*, in 1881 and he was certainly a different man from his father. He had concentrated all his energy on the law. He had taken unpopular positions. But when he was nominated to the United States Supreme Court at age sixty-one, newspapers still identified Holmes as the son of *The Autocrat of the Breakfast-Table*.²⁸

And so on the morning after Holmes delivered *The Path of the Law*, it was his deceased father, not himself, who was quoted on the front page of the *Boston Post*, in a typically whimsical paragraph about ungrateful coughs, used to advertise Angler's Petroleum Emulsions.²⁹

THE SOLDIER'S FAITH, MAY 30, 1895

On Memorial Day in 1895, Holmes addressed the Harvard College graduating class. Holmes spoke not as a judge, not as a lawyer, and not as a scholar, but as a soldier of the Civil War, three times wounded in battle. His address, entitled *The Soldier's Faith*, invoked the ideals of military patriotism. Holmes professed a faith in ideals that depended not on any intellectual convictions but on a romantic identification with an impersonal glory.

Holmes denounced the new false gods of commerce and wealth personified by "Vanderbilt."³⁰ He condemned "the revolt against pain"—the social reformers' notion "that suffering is a wrong which can be and ought to be prevented."³¹ He proclaimed that "combat and pain still are the portion of man," and that patriotism and honor still required one "to give one's life rather than to suffer disgrace."³² Holmes professed a cosmic skepticism with one fixed point:

²⁵ Pamphlet at 16-17, BLSM at 10, HLR at 468, CLP at 185.

²⁶ Pamphlet at 19, BLSM at 11, HLR at 470, CLP at 188.

²⁷ Letter from Oliver Wendell Holmes to Clara Stevens (July 26, 1914), in WHITE, *supra* note 21, at 15.

²⁸ LIVA BAKER, *THE JUSTICE FROM BEACON HILL* 354 (1991).

²⁹ *Kill the Wolf!*, BOSTON POST, Jan. 9, 1897, at 1.

³⁰ OLIVER WENDELL HOLMES, *The Soldier's Faith*, in SPEECHES 56 (1913).

³¹ *Id.* at 57.

³² *Id.* at 58, 59.

I do not know what is true. I do not know the meaning of the universe. But in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt . . . and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the use.³³

Holmes continued in this vein, quoting snatches of poetry and invoking images of battle lines drawn up on Boston Common. War, he reminded the undergraduates, is “the business of youth,” and they would have to “keep the soldier’s faith against the doubts of civil life.”³⁴

Holmes continued to display his identity as a soldier more than thirty years after the War’s end. He retained a straight-backed military bearing and a soldier’s flamboyant moustache. He was very proud of his speech, *The Soldier’s Faith*. He very clearly meant it to appeal to the heart, not the head. He was quite put out when it was not printed in the very next issue of the *Harvard Graduates’ Magazine*,³⁵ an omission corrected in December 1895.³⁶

Holmes hoped that his speech would have an important, dramatic impact, and he had some reason to believe that it did. Wendell Garrison, a classmate of Holmes, criticized the speech as “sentimental jingoism” in the *New York Evening Post* and in *The Nation* magazine.³⁷ Edward Atkinson, a Boston businessman and prominent pacifist, told Holmes, “I don’t like it. It’s bad morals and bad politics.”³⁸ Theodore Roosevelt, then New York City Police Commissioner, wrote to Henry Cabot Lodge, “By Jove, that speech of Holmes was fine; I wish he could make Edward Atkinson learn it by heart and force him to repeat it forwards and backwards every time he makes a peace oration.”³⁹ Roosevelt sent Holmes his congratulations and offered to meet with him in Boston.⁴⁰ Seven

³³ *Id.* at 59.

³⁴ *Id.* at 62, 64.

³⁵ Holmes wrote two very snippy letters to the magazine’s editor. Letters from Oliver Wendell Holmes to William R. Thayer (Aug. 29, 1895), (Aug. 31, 1895). Unless otherwise noted, all correspondence cited in this Essay can be found on file with the *Boston University Law Review*.

³⁶ Oliver Wendell Holmes, *The Soldier’s Faith*, 4 HARV. GRADUATES’ MAG. 179 (Dec. 1895).

³⁷ [Wendell Garrison,] *Sentimental Jingoism*, N.Y. EVENING POST, Dec. 16, 1895, reprinted in 61 NATION 440 (Dec. 19, 1895).

³⁸ Letter from Oliver Wendell Holmes to Frederick Pollock (Dec. 27, 1895), in 1 HOLMES-POLLOCK LETTERS 66, 67 (Mark DeWolfe Howe ed., 1941).

³⁹ Letter from Theodore Roosevelt to Henry Cabot Lodge (1895), in SILAS BENT, JUSTICE OLIVER WENDELL HOLMES: A BIOGRAPHY 250 (1932).

⁴⁰ Letter from William Sturgis Bigelow to Oliver Wendell Holmes (undated). Bigelow, a mutual friend, offered Holmes a dinner with Roosevelt. See WHITE, *supra* note 21, at 84. Edward Avery Harriman, a young contracts scholar who corresponded

years later, Roosevelt appointed Holmes to the United States Supreme Court.

In late 1895, just as *The Soldier's Faith* appeared in print, the United States was taking an aggressive diplomatic posture toward Great Britain in its dispute with Venezuela over the western boundary of British Guiana.⁴¹ On December 17, 1895, President Grover Cleveland delivered a message to Congress invoking the Monroe Doctrine to threaten Britain that the United States would "resist by every means in its power" British appropriation of Venezuelan territory.⁴² Many thought war was imminent, and Theodore Roosevelt wrote gleefully of conquering Canada.⁴³ Holmes wrote to a friend in Ireland:

I heard a story the other day. . . . It is absurd, I mean really and truly utterly absurd, that I was the remote cause of our Venezuela trouble—that the President read my speech called *The Soldier's Faith* and that it fired his heart!! What I suppose really is true is that he was stirred by it—but probably at a later date—[Richard] Olney (Sec. of State) told me the Presdn. began to read it aloud to him and was stopped by emotion—which pleased me.⁴⁴

Holmes knew Richard Olney well, and knew that his speech had not come close to provoking war between the United States and Britain, but it pleased him to think that it might have—that an obscure state court judge could have affected global events.

Holmes republished *The Soldier's Faith* himself in a second printing of his collected *Speeches* in 1896. He handed out copies of the *Speeches* to friends and acquaintances, and particularly recommended that they read *The Soldier's Faith*. He told one friend that in this speech "you will understand that there is high ambition and an ideal in this externally dull routine and much of the passion of life."⁴⁵

On a ship returning from England in August 1896, Holmes made the acquaintance of another old soldier, W. Gordon McCabe of Richmond, Virginia. McCabe was a veteran of the opposing side, but in McCabe's

with Holmes, see *infra* text accompanying notes 66-89, wrote to his old teacher Melville Madison Bigelow, a longtime friend of Holmes, at the outset of the Spanish-American War, "Civilization . . . has not succeeded in abolishing the barbarous desire for personal combat. It is curious to read the gushing essays of a man like Theodore Roosevelt, or the defence of war by Mr. Justice Holmes." Letter from Edward Avery Harriman to Melville Madison Bigelow (Apr. 14, 1898) (in Bigelow Papers, on file with Boston University Special Collections).

⁴¹ See GERALD G. EGGERT, RICHARD OLNEY: EVOLUTION OF A STATESMAN 200-27 (1974).

⁴² See *id.* at 221-22.

⁴³ *Id.* at 222-23 (citing a letter from Theodore Roosevelt to William Sheffield Cowles (Dec. 22, 1895)).

⁴⁴ Letter from Oliver Wendell Holmes to Clare Castletown (Nov. 9, 1896).

⁴⁵ Letter from Oliver Wendell Holmes to Clare Castletown (Sept. 5, 1896).

stories of Confederate battlefield glory Holmes found a reflection of his own ideals. McCabe wrote to Holmes that *The Soldier's Faith* was "a noble speech—beautiful with the chaste beauty of the eloquence that comes from a valiant heart," a speech that could not have been written by one who "had never looked a man in the face, who was shooting at him."⁴⁶ Holmes's invocation of honor and war blew "clear through the fetid atmosphere of 'civilization' as these damned pinch-back, peace-at-any-price, practical 'mud-sills' call it."⁴⁷

What is most striking about *The Soldier's Faith* is the high value that Holmes the soldier placed on senseless death, on giving one's life for a reason one does not understand.⁴⁸ Six weeks before he gave his address at Boston University, Holmes delivered some remarks on this theme at a dinner in honor of Rudolph C. Lehmann, an English barrister turned Harvard's rowing coach.⁴⁹ Holmes told of a man who died plummeting over Niagara Falls in a boat he constructed for the attempt. A woman, Holmes said, had called it "a pure waste of life." "I replied, Madam, on the contrary precisely because it was not useful it was a perfect expression of this male contribution to our common stock of morality." Men's actions in pursuit of an ideal are characterized by their uselessness. For Holmes, such daring stunts—"what boys used to call doing a stump"—were no different from what nations do when they send polar expeditions to probable death, or what soldiers do when they march into enemy fire. "This uselessness is the highest kind of use."⁵⁰ Holmes concluded that "to be enduring and disciplined and brave is not less an end of life than to shine in the stock market and to be rich."⁵¹

The deeper theme in both of these speeches is the profession of an ideal to be pursued in the absence of intellectual certainty, or even of common sense. In *The Path of the Law* as well, Holmes invoked "an ideal which as yet our law has not attained," the ideal of the future of law, "the business to which my life is devoted."⁵² But again the ideal was not intellectual certainty. "[C]ertainty generally is illusion, and repose is not the destiny of man."⁵³ "No concrete proposition is self-evident."⁵⁴ "Such

⁴⁶ Letter from W. Gordon McCabe to Oliver Wendell Holmes (Sept. 15, 1896).

⁴⁷ *Id.*

⁴⁸ Lon Fuller pointed out the connection between the soldier's obedience to senseless orders and the legal positivism espoused in *The Path of the Law*. LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 105-07 (1940).

⁴⁹ MARK DEWOLFE HOWE, *SEMI-CENTENNIAL OF THE TAVERN CLUB, 1884-1934*, at 74 (1934).

⁵⁰ Oliver Wendell Holmes, *Rudolph C. Lehmann, Remarks at a Tavern Club Dinner* (Nov. 24, 1896), in *OCCASIONAL SPEECHES* 90 (Mark DeWolfe Howe ed., 1962).

⁵¹ *Id.* at 91. "The more useless the more ideal." Letter from Oliver Wendell Holmes to Clare Castletown (Apr. 10, 1897) (paraphrasing his remarks at the Lehmann dinner).

⁵² Pamphlet at 5, 23, BLSM at 2, 14, HLR at 458, 473, CLP at 169, 194.

⁵³ Pamphlet at 15, BLSM at 8, HLR at 466, CLP at 181.

matters really are battle-grounds where the means do not exist for determinations that shall be good for all time."⁵⁵ On the battle-grounds of the law, one must pursue a shadowy, unspecified ideal in the knowledge that no answers are final.

A second theme that opened *The Soldier's Faith* and closed Holmes's tribute to Rudolph Lehmann is his rejection of pursuit of wealth.⁵⁶ That theme also concluded *The Path of the Law*:

The object of ambition, power, generally presents itself nowadays in the form of money alone. Money is the most immediate form, and is a proper object of desire. . . . [But] [t]o an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas. . . . And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food besides success.⁵⁷

The closing words of Holmes's speech bespoke an idealism that is at odds with the "bad man" perspective of its opening pages. He called the young lawyer to "become a great master in your calling," to "catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law."⁵⁸ This was an echo of the soldier's call to arms.

THE BICYCLE, AUGUST 11, 1895

Holmes's encounter with the bicycle is best told in his own words. On August 7, 1895, Holmes wrote from his summer cottage at Beverly Farms to a friend in Cambridge, Massachusetts:

This morning I went over to Miss Perkins' just after breakfast to see her take a bicycle lesson and consider whether I would join the ring—but the man didn't come. It may have been a turning point in my destiny.⁵⁹

Bicycling became a popular pastime after Holmes had reached maturity. By 1895 it was a craze, but he was a fifty-four-year-old state supreme court justice. Neither his dignity nor his age recommended learning to cycle.

Yet Holmes proved a master of his destiny, at least in this respect. Four days later he wrote to friends in England:

⁵⁴ Pamphlet at 17, BLSM at 8, HLR at 466, CLP at 181.

⁵⁵ *Id.*

⁵⁶ In his letters, Holmes admitted a certain indulgence in "the pleasures of avarice" himself. Letter from Oliver Wendell Holmes to Clare Castletown (Nov. 21, 1896). "I like to be a little richer at the end of the year . . . which generally I manage." Letter from Oliver Wendell Holmes to Clare Castletown (June 18, 1897).

⁵⁷ Pamphlet at 28-29, BLSM at 18, HLR at 478, CLP at 201-02.

⁵⁸ Pamphlet at 29, BLSM at 18, HLR at 478, CLP at 202.

⁵⁹ Letter from Oliver Wendell Holmes to Nina Gray (Aug. 7, 1895).

I have taken one lesson on the bicycle and I am stiff from it this morning and I feel as if I never should learn. Violent exercise upsets an old sportsman who has done nothing more vigorous than a quick toddle for years.⁶⁰

Holmes persevered, and a month later he wrote to his Cambridge friend:

My routine has not changed much except for the, to me, astounding experience of learning the bicycle—I do not say that I have learned—far from it—but I have got over the first general black and blue color of my person—my ankle and wrist are no longer twisted, to speak of, and after I have got on, which I do not do with infallible ease and grace I powder [sic] ahead at a comfortable judicial speed which gives me much pleasure. I take about five miles of an afternoon—get pretty warm over it and feel like a bird. It is no slight thing for an old gentleman to learn that he can tumble off and not break. I was pleased as a boy at the discovery. It is curious what glee such a physical outlet gives one—I mean outlet for bodily effort, not to speak of outlet in the way of space—as it enlarges one’s horizon.⁶¹

He reported to his English friends that he had overcome the thought that his new pastime was undignified:

I have shared the common lot and begun to learn the bicycle. I haven’t had such a gleam of boyish joy for years as I get from my little runs of 5 miles or so, all that I have ventured as yet. Even tumbling off was a pleasure—to find that I could do it and not break! A Catholic lawyer told me that the Pope had been consulted as to the propriety of a clergyman doing it, and hinted a question as to a judge of the Supreme Court. I told him it depended on the shape of the judge.⁶²

These letters convey Holmes’s great enthusiasm for his new physical outlet. His bicycle, an expensive, American-made Humber model, gave him independence and freedom of movement.⁶³ It fought off, for a time, his feelings of growing old and of becoming encrusted in his judicial role.

⁶⁰ Letter from Oliver Wendell Holmes to Georgina Pollock (Aug. 11, 1895), in 1 HOLMES-POLLOCK LETTERS, *supra* note 38, at 58, 59.

⁶¹ Letter from Oliver Wendell Holmes to Nina Gray (Sept. 2, 1895).

⁶² Letter from Oliver Wendell Holmes to Georgina Pollock (Sept. 13, 1895), in 1 HOLMES-POLLOCK LETTERS, *supra* note 38, at 61-62. Her husband replied, “We have judicial authority for cycling here too.” Sir Francis Jeune, a High Court judge two years younger than Holmes, could be seen cycling about London with his wife. Letter from Frederick Pollock to Oliver Wendell Holmes (Nov. 13, 1895), in 1 HOLMES-POLLOCK LETTERS, *supra* note 38, at 63.

⁶³ Two years later Holmes wrote from Beverly Farms, “the wheel gives me a feeling of not being confined too closely which in other days I have felt here.” Letter from Oliver Wendell Holmes to Clare Castletown (June 24, 1897).

In *The Path of the Law*, Holmes was again defying the expectations of what a distinguished, middle-aged state court judge should say and do. He was flouting morality, logic, and tradition with the insouciance of a free-wheeling adolescent. Holmes could learn new tricks.

THE YOUNG BOSTON UNIVERSITY GRADUATE, JANUARY 4, 1896

Holmes's connection with Boston University was never a very strong one. His friend Nicholas St. John Green was a lecturer when the school opened in 1872 and was Acting Dean when he died at age 46 in 1876. Another friend, Melville Madison Bigelow, remained on the faculty from 1872 through 1921. Holmes complimented him in the speech,⁶⁴ but they were not as close in the 1890s as they had been in the 1870s. Holmes and Bigelow apparently wrote no letters to each other between 1894 and 1898.⁶⁵ Brooks Adams, a more frequent correspondent with Holmes in the 1890s, had lectured at Boston University School of Law for a few years before 1887 and did so again after 1903.

What prompted Holmes to choose Boston University as the place to tell lawyers how to separate law from morality, how to take the "bad man's view," and how to "commit a contract"? It was most likely a law review article written by Edward Avery Harriman.⁶⁶ Harriman graduated from Boston University School of Law in 1893 and moved to Chicago, where he was hired by Northwestern University School of Law. In 1896, he was a Professor of Law and the Secretary of the Northwestern law faculty. Harriman published the first chapter of his forthcoming treatise on contracts as an article entitled *The Nature of Contractual Obligation* in the December 1895 issue of the *Northwestern Law Review*. The piece drew upon some of Holmes's ideas about contract law, and Harriman sent a copy to Holmes.

Holmes had propounded two novel views about contract law in *The*

⁶⁴ Pamphlet at 23, BLSM at 14, HLR at 474, CLP at 194. "Mr. Bigelow here" has "made important contributions" to the study of legal history "which will not be forgotten." Bigelow's principal work, *PLACITA ANGLO-NORMANNICA: LAW CASES FROM WILLIAM I TO RICHARD I PRESERVED IN HISTORICAL RECORDS* (Boston, Little, Brown, & Co. 1879), has been largely forgotten.

⁶⁵ Letter from Oliver Wendell Holmes to Melville M. Bigelow (Feb. 1, 1894) (asking a question about a waiver doctrine); Letter from Oliver Wendell Holmes to Melville M. Bigelow (Apr. 16, 1898) (in Bigelow Papers, on file with Boston University Special Collections); Letter from Melville M. Bigelow to Oliver Wendell Holmes (Apr. 30, 1898) (on the death of Bigelow's son). A brief undated letter from Bigelow to Holmes in the Holmes Papers may have been written in 1897, a few weeks after Holmes's speech at Boston University, but makes no reference to it. It appears to refer to Holmes's statement "Temptation is not always invitation" in *Holbrook v. Aldrich*, 168 Mass. 15, 16, 46 N.E. 115 (1897).

⁶⁶ Edward Avery Harriman, *The Nature of Contractual Obligation*, 4 Nw. L. REV. 97 (1895).

Common Law in 1881. One was an "objective theory" of contractual liability, rejecting the then-prevailing view of contract as the subjective consent of the parties.⁶⁷ The other was a redefinition of contractual promises as options or wagers, conditional duties to pay monetary compensation in the event of non-performance.⁶⁸ In *The Common Law*, Holmes wrote that the common law saw no distinction between a binding promise that the promisor will perform and a binding promise that an event will occur over which the promisor had no control. "The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass."⁶⁹ Holmes returned to this point in his discussion of void and voidable contracts and of conditions precedent and subsequent:

If we look at the law as it would be regarded by one who had no scruples against doing anything which he could do without incurring legal consequences, it is obvious that the main consequence attached by the law of a contract is a greater or lesser possibility of having to pay money. The only question from a purely legal point of view is whether the promisor will be compelled to pay.⁷⁰

This 1881 passage is as close as Holmes had come in his prior publications to the "bad man" of 1897. In December 1895, Harriman had followed Holmes in propounding an objective theory of contract, but had not taken the next step of viewing promises as options.⁷¹

On December 28, 1895, Holmes started a long letter to Harriman restating his objective theory and advocating his view of promises as options, but he did not post it. Holmes instead sent a short note to Harriman referring to the "somewhat lengthy discourse" on contract theory that he had not sent. Harriman wrote back, professing his aim to "embody your ideas on this point in a systematic treatment of the theory of Contracts" and begging Holmes to send him the lengthy comments.⁷² Holmes sent the long letter on January 4, 1896, and a draft is preserved in the Holmes Papers at Harvard Law School Library.⁷³

Holmes wrote to Harriman that his objective theory meant that "all contracts are formal." C.C. Langdell had been led astray by his preoccu-

⁶⁷ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 273 (Boston, Little, Brown, & Co. 1881) (stating that "[c]onsideration is a form as much as a seal" although "we do not notice it").

⁶⁸ *Id.* at 299.

⁶⁹ *Id.* at 301.

⁷⁰ *Id.* at 317.

⁷¹ Harriman, *supra* note 66, at 107.

⁷² Letter from Edward Avery Harriman to Oliver Wendell Holmes (Jan. 2, 1896).

⁷³ Letter from Oliver Wendell Holmes to Edward Avery Harriman (Jan. 4, 1896) (the date of Dec. 28, 1895, is crossed out and replaced with Jan. 4, 1896; the draft letter is unsigned). Part of this letter is quoted in 2 MARK DEWOLFE HOWE, *JUSTICE OLIVER WENDELL HOLMES* 232-33 (1963).

pation with subjective consent. "There never was a more unfortunate expression used than 'meeting of minds.' It does not matter in the slightest degree whether minds meet or not." Holmes quoted and cited some of the Massachusetts cases in which he had tried to implement his objective theory of contract.⁷⁴

Holmes then encouraged Harriman to incorporate his view of promises as options in Harriman's forthcoming book on contract law. Holmes explained that his passage on promises as options in *The Common Law* "has been misunderstood by very intelligent men":

I do not mean of course that when a man contracts that a future event shall happen, he adds to the primary assurance or contract a second one that he will pay if the primary one is broken. The liability to pay is the consequence attached by the law to his act—When he commits a tort the liability is absolute—When he commits a contract the liability is defeasible for the happening of an event. As I put it in *Brown v. Eastern Slate Co.*, a contract at common law is nothing but a conditional liability to pay damages, defeasible by performance.⁷⁵

Here was Holmes's "commit a contract" formula, one year before he expressed it in *The Path of the Law*. In *The Common Law*, Holmes had acknowledged that equity took a very different view of promises, and he had cautiously speculated how the law of contractual remedies would look "[i]f a breach of contract were regarded in the same light as a tort."⁷⁶ In his letter to Harriman, Holmes made this point far more forcefully than he had in *The Common Law*. In the same fashion, he later transformed the "one who had no scruples" in *The Common Law* into the "bad man" of *The Path of the Law* and used the character not to illustrate a point about conditions precedent in a contract, but to ground a novel view of the whole of law.

Harriman wrote back on January 7, 1896, carefully expressing "interest" in Holmes's "suggestions."⁷⁷ He wrote that he did not think it necessary, in expressing the objective theory of contract, to use the term "formal" to describe simple contracts. He politely pointed out that the newly published *History of English Law* by Pollock and Maitland⁷⁸ "g[a]ve the common law credit for more equitable ideas of the nature of contractual

⁷⁴ See, e.g., *O'Donnell v. Clinton*, 145 Mass. 461, 463, 14 N.E. 747, 751 (1888) ("Assent in the eye of the law is a matter of overt acts . . .").

⁷⁵ Letter from Oliver Wendell Holmes to Edward Avery Harriman (Jan. 4, 1896) (citation omitted).

⁷⁶ HOLMES, *supra* note 67, at 301 (emphasis added).

⁷⁷ Letter from Edward Avery Harriman to Oliver Wendell Holmes (Jan. 7, 1896).

⁷⁸ FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *A HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* (1895). This work, which soon eclipsed *THE COMMON LAW* as a classic text of legal history, drew faint praise from Holmes in his speech. "[It] has lent the subject an almost deceptive charm." Pamphlet at 23, BLSM at 14, HLR at 474, CLP at 194.

obligation than you are willing to admit; and in that regard I have felt compelled to follow their views" rather than Holmes's view of promises as options.⁷⁹ Harriman published his treatise on *Elements of the Law of Contract* in 1896, and Holmes read it at once. Harriman sent it to Frederick Pollock, who clearly disagreed with the objective theory that Harriman had taken from Holmes. Pollock wrote to his friend Holmes that Harriman "tries to make out that consent is quite immaterial. . . . Applying this to informal contracts leads him, of course, into fictions quite as violent as any that he avoids."⁸⁰

In *The Path of the Law*, Holmes reiterated that "all contracts are formal" and do not depend on any "meeting of the minds."⁸¹ He also put forward his view of contracts as options, even more forcefully than he had in his letter to Harriman a year before. At Boston University, he said:

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. If you commit a tort you are liable to pay a compensatory sum. If you commit a contract you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference.⁸²

This view of promises as options, Holmes conceded, "stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can" and to perpetuate the confusion of legal with moral ideas.

To make this point so forcefully, Holmes had to reduce the remedy of specific performance to insignificance. He did this by distinguishing common law from equity, by asserting that specific performance would be ordered in "relatively few" cases, and by insisting that "general theory" should not be shaped by "the exception."⁸³ In front of his audience at Boston University, Holmes referred to its alumnus Harriman and "his very able little book upon Contracts" but said that, with reference to the "bad man" view of contract, Harriman "has been misled, as I humbly think, to a different conclusion."⁸⁴ He also mentioned Harvard's Dean James Barr Ames, who was present in the audience and whose recent article found an equitable—hence moral—origin for common law doctrines of contractual liability.⁸⁵ Ames's history did not support Holmes's amoral version of contract law, provoking Holmes to warn of the "danger

⁷⁹ Letter from Edward Avery Harriman to Oliver Wendell Holmes (Jan. 7, 1896).

⁸⁰ Letter from Frederick Pollock to Oliver Wendell Holmes (May 29, 1896), in 1 HOLMES-POLLOCK LETTERS, *supra* note 38, at 69, 70.

⁸¹ Pamphlet at 11, BLSM at 6, HLR at 463-64, CLP at 177-78.

⁸² Pamphlet at 9, BLSM at 5, HLR at 462, CLP at 175.

⁸³ Pamphlet at 9, BLSM at 5, HLR at 462, CLP at 175-76. Holmes wrote an opinion ordering specific performance of a contract just three days before he gave the speech. See *Polson v. Stewart*, 167 Mass. 211, 213-17, 45 N.E. 737, 738 (1897).

⁸⁴ Pamphlet at 9, BLSM at 5, HLR at 462, CLP at 175.

⁸⁵ James Barr Ames, *Specialty Contracts and Equitable Defences*, 9 HARV. L. REV. 49, 58 (1895).

of making the rôle of history more important than it is."⁸⁶

Holmes sent the speech to Harriman in Chicago. Harriman complimented Holmes on his "vigorous expression of original thought" which "is as heartily welcome as it is unfortunately rare."⁸⁷ But the young Boston University graduate was still not convinced:

With you I long for the time when reason shall supersede research in the explanation of dogma. When that time comes it will more clearly appear, I trust, what conception of contractual obligation must be accepted. Historically there are arguments on both sides, and my expectations of the future may have influenced my ideas of the past.⁸⁸

Harriman taught at Northwestern until 1901, then moved to Connecticut where he taught at Yale Law School from 1906 to 1917. After serving in World War I, he practiced and taught in Washington, D.C.⁸⁹

Holmes also sent the speech to Frederick Pollock in England. Pollock's first response to Holmes, by postcard, was a gentle rebuke. "I suppose you are aware that in Germany specific performance is treated as the rule and damages as the exception."⁹⁰ A later letter from Pollock made clear that he too did not accept Holmes's point about "committing a contract." He again pointed out that the German Civil Code favored specific performance as "the normal remedy" rather than damages, as did the oldest English writs for contractual liability.⁹¹

Pollock asked, "if the obligation is, as you maintain, only alternative, how can it be wrong to procure a man to break his contract, which would then be only procuring him to fix his lawful election in one way rather than another?"⁹² Pollock was referring to Holmes's own issuance of an injunction, in a much publicized case, to prohibit striking workers from persuading third parties to break their contracts with the employer.⁹³ Holmes's view of promises as options conflicted with too many decided cases, Pollock said, to be useful "except in the Langdellian ether of a

⁸⁶ Pamphlet at 21, BLSM at 13, HLR at 472, CLP at 191. Holmes added, "I do not suppose that Mr. Ames would disagree with what I suggest." *Id.*

⁸⁷ Letter from Edward Avery Harriman to Oliver Wendell Holmes (Mar. 9, 1897).

⁸⁸ *Id.* Harriman's reference is to Holmes's statement, "I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them." Pamphlet at 23-24, BLSM at 14-15, HLR at 474, CLP at 195.

⁸⁹ WHO'S WHO IN LAW 403 (J.C. Schwarz ed., 1937).

⁹⁰ Postcard from Frederick Pollock to Oliver Wendell Holmes (Feb. 24, 1897).

⁹¹ Letter from Frederick Pollock to Oliver Wendell Holmes (Sept. 17, 1897), in 1 HOLMES-POLLOCK LETTERS, *supra* note 38, at 78, 79.

⁹² *Id.* at 80.

⁹³ *Vegeahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077 (1896). For a discussion of the case and Holmes's dissent, see *infra* text accompanying notes 144-78.

super-terrestrial Common Law where authority does not matter at all." Thirty years later, Pollock was still writing to Holmes, "No doubt it might be the law in some other planet."⁹⁴ Seventy-five years after Holmes gave his speech, the view of contracts set forth in *The Path of the Law* would be embraced in just such an ethereal region, and renamed "efficient breach."⁹⁵

HISTORY AND HENRY IV, MARCH 5, 1896

In *The Path of the Law*, Holmes joined to his long-standing attack on logic a newer attack on history as a justification for judicial decisions:

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.⁹⁶

These are memorable lines, and have been quoted frequently, as Holmes meant them to be. What is odd is that Holmes himself was far more likely to cite fifteenth-century Year Book decisions from England than were any of his contemporaries on the bench.

Holmes's attack on history in *The Path of the Law* comes out of the blue. *The Common Law* searched for the deep historical underpinnings of legal liability, and he counted on it to make his scholarly reputation as America's foremost legal historian.⁹⁷ In their ongoing debate on the nature of contract law, Holmes and his opponents alike relied on historical investigations.⁹⁸ What prompted Holmes to take pot shots at history in general and Henry IV's judges in particular was a case that was argued before him in the Supreme Judicial Court on January 27, 1896, and decid-

⁹⁴ Letter from Frederick Pollock to Oliver Wendell Holmes (June 13, 1927), in 2 HOLMES-POLLOCK LETTERS, *supra* note 38, at 200, 201. Holmes had written to Pollock, "You have always regarded my notion of contract as a pardonable eccentricity." Letter from Oliver Wendell Holmes to Frederick Pollock (May 30, 1927), in 2 HOLMES-POLLOCK LETTERS, *supra* note 38, at 199, 200.

⁹⁵ See, e.g., RICHARD A. POSNER, *THE ECONOMIC ANALYSIS OF LAW* 55-60 (1st ed. 1972); see also John H. Barton, *The Economic Basis of Damages for Breach of Contract*, 1 J. LEGAL STUD. 277, 291-92 (1972); Robert L. Birmingham, *Breach of Contract, Damages Measures, and Economic Efficiency*, 24 RUTGERS L.J. 273, 284-86 (1970); Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties, and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COL. L. REV. 554, 558-77 (1977).

⁹⁶ Pamphlet at 18, BLSM at 11, HLR at 474, CLP at 195.

⁹⁷ See, e.g., Morris R. Cohen, *A Critical Sketch of Legal Philosophy in America*, in 2 LAW: A CENTURY OF PROGRESS 266, 293 (1937) ("Holmes was by far the greatest legal historian that this country has produced and one to be counted among the foremost masters of all countries.").

⁹⁸ Pamphlet at 21, BLSM at 13, HLR at 472, CLP at 187 ("[I]f we consider the law of contract we find it full of history.").

ed on March 5, 1896.⁹⁹ In that case, Holmes was confounded by a "technical rule" of the criminal law, a doctrine for which even Holmes could not imagine a reason.¹⁰⁰

Commonwealth v. Rubin was a prosecution for larceny of a horse. The horse was found in the defendants' possession in Middlesex county. The defendants were indicted in that county and tried there. At the trial, it appeared that a delivery boy turned over the horse to the defendants in Norfolk county, relying on their promise to deliver to the purchaser for him. The defendants' lawyer argued that they should have been indicted in Norfolk county and tried there, because by law their intent to convert the horse "related back" to the moment it was delivered into their possession. This was the so-called doctrine of "trespass *ab initio*."¹⁰¹

Holmes found no reason to reverse the conviction, despite this long-standing rule as to when a conversion of property took place. To uphold the conviction, he persuaded his fellow justices of the Supreme Judicial Court to disregard two prior Massachusetts decisions and a solid line of English cases dating back to 1410, the eleventh year of the reign of Henry IV. Holmes asserted that trespass *ab initio*, in its origin, was merely an evidentiary presumption, not a doctrine of substantive law.¹⁰²

It is time to say a few kind words in favor of a rule of law laid down in the time of Henry IV. The decisions of that reign were no more or less "revolting" than those on which Holmes relied so often in *The Common Law*, in his opinions on the Supreme Judicial Court, and in other passages of *The Path of the Law*.¹⁰³ In the anonymous Year Book case to which Holmes was referring,¹⁰⁴ the judges had to determine when an entry with permission or authority into another's house became a trespass,

⁹⁹ *Commonwealth v. Rubin*, 165 Mass. 453, 43 N.E. 200 (1896), cited in Pamphlet at 18, BLSM at 11, HLR at 469, CLP at 187.

¹⁰⁰ *Id.* at 455-56, 43 N.E. at 201.

¹⁰¹ *Id.* at 455, 43 N.E. at 200. Another issue posed in *Commonwealth v. Rubin* was the distinction between larceny and embezzlement, an "ancient anomaly" that survived in Massachusetts law. *Id.* at 454, 43 N.E. at 200. This feature of the case, which also implicated the doctrine of trespass *ab initio*, is discussed in Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 WM. & MARY L. REV. 19, 29 (1995). Court files for this case could not be located in the Supreme Judicial Court Archives.

¹⁰² *Rubin*, 165 Mass. at 456, 43 N.E. at 201.

¹⁰³ For instance, Holmes was delighted to find that Edward Coke agreed with his view of contractual promises as options in *Bromage v. Genning*, 1 Rolle 368, 81 Eng. Rep. 540 (K.B. 1616). "It was good enough for Lord Coke . . . and here, as in many other cases, I am content to abide with him." Pamphlet at 9, BLSM at 5, HLR at 462, CLP at 175; see also Letter from Oliver Wendell Holmes to Edward Avery Harriman (Jan. 4, 1896). Holmes omitted to say that Coke was embarked on an unsuccessful challenge to Chancery jurisdiction. See Benjamin Kaplan, *Encounters with O.W. Holmes, Jr.*, 96 HARV. L. REV. 1828, 1834 & n.43 (1983).

¹⁰⁴ Y.B. Trin. 11 Hen. 4, pl. 16, fol. 75b (C.P. 1410).

either because one's permission to remain was withdrawn or because one exceeded one's authority. Wrongful "entry" was a recognized offense within the categories of the law, but wrongful "remaining" was not so easy to fit into those categories.

The question was fairly presented in a dispute in 1410 between a tenant and a landlord who entered the house in the tenant's absence to inspect for damage (rightfully) but who stayed the night (wrongfully). John Hill, a Justice of the Court of Common Pleas, said "the reason for the landlord's coming into the house will be understood now to have been to remain there all night, not to inspect for damage."¹⁰⁵ Hill said that the defendant's entry into the house would be "adjudged wrongful" if the defendant's presence there became wrongful. This case, however, had nothing to do with evidentiary presumptions, as Holmes fancied, because the whole argument took place in the context of a demurrer, on admitted facts.

Holmes simply had to dispose of an inconvenient line of cases in order to keep two horse thieves in jail. It is unlikely that his colleagues on the Supreme Judicial Court questioned his interpretation of the old case. They deferred to Holmes's ability to decipher and translate such authorities. Indeed, a bit of doggerel from Judge Barker, who joined Holmes's opinion in *Commonwealth v. Rubin*, poked fun at Holmes's preference for Year Book disquisition over constitutional interpretation:

When round this table we do sit
 And constitutions are discussed
 And 'tis inquired of what the Fathers writ,
 Holmes says, says he, that he'll be cussed
 If for all that he cares a single bit.

 But when the topic's trover
 Or replevin as 'tis called,
 Then like a bee among the clover
 From ancient flower to flower he flits
 That bloom upon the Year Book's pages
 And swears that here's the wisdom of ages.¹⁰⁶

Holmes himself wrote to his friend Pollock, one of England's leading legal historians, questioning the line of authority he proposed to jetti-

¹⁰⁵ *Id.*

¹⁰⁶ Or the revolting nonsense of the ages, as the case may be. These verses by Judge James Madison Barker were found in his locker at the Supreme Judicial Court after his death in 1905 and were sent to Oliver Wendell Holmes on Mar. 10, 1918.

son.¹⁰⁷ If Holmes had left his rewriting of the 1410 case in the pages of the *Massachusetts Reports*, it would have drawn very little attention. Instead, Holmes chose to cite the case in *The Path of the Law* as a prime example of why judges should not rely on the rules laid down in old cases when they could no longer understand the reasons for those rules.¹⁰⁸ The force of Holmes's rhetoric led him to make a far stronger point than he probably meant to make.

Professor James Bradley Thayer of Harvard, who was in the audience at Boston University that Friday afternoon,¹⁰⁹ was appalled. He wrote to Holmes on Monday, strongly urging him to change in the printed version what he said about history. "[C]onsider what would happen," Thayer wrote, "if the mob of judges who know so little" should follow Holmes's lead and cut themselves loose from long-standing precedents because they could not understand the sense of them.¹¹⁰ Thayer told Holmes, "What I deprecate is that you who know how much there is to learn and how enormously" historical investigation helped judicial decisions, "should seem to play into the hands of the rash ignoramuses." He closed the letter: "Pray consider this danger."

Holmes promised to consider Thayer's warning.¹¹¹ A month later, however, he wrote again to Thayer that he decided not to make any changes:

I anxiously considered your kind suggestion but I could not think that a reader (as distinguished from a hearer) would misapprehend my views—moreover I couldn't quite think what to do as the B.U. printed the thing, unless to append a note "the writer is not responsible for any of the opinions expressed herein." I have rather a feeling that a speech sh[oul]d be printed as she is spoke.¹¹²

It is curious that blind obedience to duty "in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the use" was the essence of Holmes's "soldier's faith,"¹¹³ while the same slavish obedience to stare decisis seemed to him

¹⁰⁷ The letter is missing, but we can glean its substance through Pollock's response. See Letter from Frederick Pollock to Oliver Wendell Holmes (May 29, 1896), in 1 HOLMES-POLLOCK LETTERS, *supra* note 38, at 69-70.

¹⁰⁸ Pamphlet at 18, BLSM at 11, HLR at 469, CLP at 187.

¹⁰⁹ Holmes asked Edmund H. Bennett, the Dean of Boston University, for an invitation for Thayer. Letter from Oliver Wendell Holmes to Edmund H. Bennett (Jan. 7, 1897). Letters to Bennett are in Boston University Special Collections.

¹¹⁰ Letter from James Bradley Thayer to Oliver Wendell Holmes (Jan. 11, 1897); see also Jabez Fox, *Law and Morals*, BOSTON L. SCH. MAG., Mar. 1897, at 1, 7 ("I hope the learned judge does not mean by his reference to the time of Henry IV that under the new régime we are to cut loose from precedent altogether.").

¹¹¹ Letter from Oliver Wendell Holmes to James Bradley Thayer (Jan. 12, 1897).

¹¹² Letter from Oliver Wendell Holmes to James Bradley Thayer (Feb. 11, 1897).

¹¹³ HOLMES, *supra* note 30, at 56, 59.

so “revolting.”

HOLMES IN LOVE, JULY 8, 1896 ET SEQ.

Holmes was fifty-five years old, married for twenty-five years to Fanny Dixwell, when he fell in love with Clare Castletown—Emily Ursula Clare St. Leger, daughter of Viscount Doneraile, wife of Bernard Barnaby Fitzpatrick, Baron Castletown of Upper Ossory. Holmes went to England in July of 1896, his fifth trip across the Atlantic. He met Lady Castletown in London, probably on July 8th and called on her at 101 Eaton Place on the 11th, 15th, 17th, 22nd, and 27th of July.¹¹⁴ On August 16, he sailed from England to Ireland to stay at Lady Castletown’s family home, Doneraile Court in County Cork.¹¹⁵ Holmes stayed at Doneraile with Lady Castletown from the 17th of August to the 22nd, when he sailed for home.¹¹⁶

Holmes wrote his first love letter to Lady Castletown a few hours after he left Doneraile.¹¹⁷ He wrote to her again on the voyage home. As soon as he returned, he sent her his photograph and another copy of his *Speeches* with his new *The Soldier’s Faith*, and wrote “love them a little, for I put my heart into the accidental occasion.”¹¹⁸ Holmes wrote Lady Castletown 103 letters that survive, fourteen between his return to Boston in September 1896 and his speech at Boston University on January 8, 1897. These letters give us a remarkable view of his thoughts and emotions during the weeks when he was composing his famous speech.¹¹⁹

From Holmes’s letters to Lady Castletown, we know that he was writing *The Path of the Law* in September and October of 1896. On September 17, 1896, he wrote, “Tonight I ought to go to work on a discourse on Legal Education—but I like it a might better sitting here at home with you [her photograph] looking at me.”¹²⁰ A month later, he wrote:

¹¹⁴ Oliver Wendell Holmes Diary for 1896.

¹¹⁵ Holmes’s old friend Henry James saw him off for Ireland. *Id.* Sheldon Novick has suggested that Holmes and Henry James might have been lovers in April 1865 when James lived in Ashburton Place, Boston. SHELDON M. NOVICK, *HENRY JAMES: THE YOUNG MASTER* 109-10 (1996).

¹¹⁶ Oliver Wendell Holmes Diary for 1896. In this vest-pocket diary, Holmes used the early pages to list names and addresses of those he met on his trip. Holmes wrote Lady Castletown’s name or address another nine times there, along with the following limerick: “There was a young lady of Joppa / Who came a society cropper / She went to Ostend / With a military friend / The rest of the story’s not proper.” *Id.*

¹¹⁷ Letter from Oliver Wendell Holmes to Clare Castletown (Aug. 22, 1896).

¹¹⁸ Letter from Oliver Wendell Holmes to Clare Castletown (Sept. 5, 1896). Holmes also wrote in his first letter from Boston: “I still carry in my pocket a handkerchief . . . with a little infinitesimal dark smear upon it—with it I once rubbed away a—Do you remember? Isn’t that a fool thing for a serious Judge.” *Id.*

¹¹⁹ Professor Horwitz has drawn attention to this correspondence and its importance for understanding *The Path of the Law*. Horwitz, *supra* note 8, at 70-71.

¹²⁰ Letter from Oliver Wendell Holmes to Clare Castletown (Sept. 17, 1896).

My discourse on the Theory of Legal Study has come on well these last few days, as I have had a little leisure. I should not despair of interesting you with it, were you within reach as I would you were. Ah my dear friend how much I think of you. How many things I should like to say and ask were we face to face.¹²¹

On February 11, 1897, Holmes send Lady Castletown the speech itself:

I now have dispatched my address about the law to you and lay it at your feet. Look out or it will kiss them. The Boston University printed it—I think rather decently though I should prefer brown covers to the virgin white put on in my honor. But what's the use of being good if it is not signaled by appropriate symbols!¹²²

The Path of the Law is not usually thought of as a love letter, but it seems to have served that purpose at least in Holmes's mind.

Lady Castletown was forty-three years old when she met Holmes. Holmes begged her for more letters. He complained to her about "your eternal non-committal 'I like you.'"¹²³ She tantalized him with hints of "other men," provoking him to expressions of jealousy in his replies.¹²⁴ He rationalized, "My life is in my wife and my work—but as you see that does not prevent a romantic feeling which it would cut me to the heart to have you repudiate."¹²⁵ Holmes and Lady Castletown met again in the summer of 1898, but he suffered some sort of nervous collapse shortly afterward, and their letters became far less frequent and far less passionate.¹²⁶ Lady Castletown died in 1927.¹²⁷

In the autumn of 1896, when *The Path of the Law* was written, his romantic feeling was at its height and asserted itself in many respects.

¹²¹ Letter from Oliver Wendell Holmes to Clare Castletown (Oct. 17, 1896).

¹²² Letter from Oliver Wendell Holmes to Clare Castletown (Feb. 11, 1897).

¹²³ Letter from Oliver Wendell Holmes to Clare Castletown (June 18, 1897). Holmes began to close every letter with "I kiss your hands" in October 1896. Letter from Oliver Wendell Holmes to Clare Castletown (Oct. 7, 1896). He began to write "I love you still the same" in March 1897. Letter from Oliver Wendell Holmes to Clare Castletown (Mar. 26, 1897).

¹²⁴ Holmes wrote, "Will you remember me when the other amusements begin?" Letter from Oliver Wendell Holmes to Clare Castletown (Sept. 1896); "I hate the thought of anyone except me being admitted to know anything about your real feelings," Letter from Oliver Wendell Holmes to Clare Castletown (Nov. 21, 1896); "as usual my head whirls with the hint of all manner of new men," Letter from Oliver Wendell Holmes to Clare Castletown (Jan. 11, 1897); "I notice that for a long time I have heard no more of the substantial *other*. . . . Is he still in statu quo? Whatever that may have been?" Letter from Oliver Wendell Holmes to Clare Castletown (May 7, 1897).

¹²⁵ Letter from Oliver Wendell Holmes to Clare Castletown (Oct. 7, 1896).

¹²⁶ John S. Monaghan, *The Love Letters of Justice Holmes*, BOSTON GLOBE MAG., Mar. 24, 1985, at 14.

¹²⁷ BAKER, *supra* note 28, at 599.

Holmes had long indulged in flirtation with young women of his acquaintance.¹²⁸ “One needs at times,” he wrote to Lady Castletown, “the unspecialized interest which women bring to conversation and the greater personal warmth which is present, however unconscious, in the most Platonic relations with them.”¹²⁹ Part of Holmes’s standard conversational gambit with young women was a mocking of traditional morality, especially of sexual morality, guaranteed to provoke blushes. As he wrote to another friend:

With most of the ladies whom I see from time to time my relations are painfully free—or paternal. I talk on themes of high culture and get the necessary vermilion out of an impertinence toward the Cosmos or a latitude with regard to current theories of morality which you view with just and proper scorn.¹³⁰

To Lady Castletown, he wrote of exchanging observations—“not always omitting profanity”—with his “excellent middle aged virgin” typist at the Court,¹³¹ of meeting a visiting Englishman who “shares the prevailing doubts about ‘the existence of God and sexual morality,’”¹³² and of telling a chance acquaintance that “man was a dangerous animal that destroyed the lower creatures and amused himself with women.”¹³³

To Lady Castletown, he recommended “improper French books” that he found “light, wicked, and amusing,”¹³⁴ and “iniquitous funny little work[s]” that “degrade the soul a little.”¹³⁵ He indulged in the same flirtatious improprieties in his letters to her:

What a charm is added to life, and to the person, by the experiences which make us subtle and untrustworthy.¹³⁶

A flirtation with two generations would be easily possible. I wonder if any one ever did it with three. [A character in a French book] speaks of love with his supposed own daughter but I don’t think he gets to grand-daughters.¹³⁷

The parsons tell us that all we have to do is to obey our consciences,

¹²⁸ See *id.* at 312 (noting that although Holmes’s flirtations had been “harmless adventures [in] which he seemed to have done nothing more compromising than quote poetry and offer amusing conversation,” his predilection for the company of young women affected his wife so much that she feared opening his letters from Europe “lest she discover a hint of some philandering to distress her”).

¹²⁹ Letter from Oliver Wendell Holmes to Clare Castletown (Mar. 12, 1897).

¹³⁰ Letter from Oliver Wendell Holmes to Nina Gray (Jan. 22, 1897).

¹³¹ Letter from Oliver Wendell Holmes to Clare Castletown (Feb. 11, 1897).

¹³² Letter from Oliver Wendell Holmes to Clare Castletown (Jan. 15, 1897).

¹³³ Letter from Oliver Wendell Holmes to Clare Castletown (June 24, 1897).

¹³⁴ Letter from Oliver Wendell Holmes to Clare Castletown (Nov. 9, 1896).

¹³⁵ Letter from Oliver Wendell Holmes to Clare Castletown (Dec. 19, 1896).

¹³⁶ Letter from Oliver Wendell Holmes to Clare Castletown (Oct. 17, 1896).

¹³⁷ Letter from Oliver Wendell Holmes to Clare Castletown (Dec. 18, 1896).

but the trouble is, our consciences don't answer our questions.¹³⁸

But Holmes also confided to her that this cynicism, this "bad man" perspective, was just a pose:

We both were very loud in our profession of shared familiarity with somewhat cynical views of life. But thank the Lord we neither of us are cynical at bottom and my guards are down long ago.¹³⁹

My friend, of all humbugs the greatest is the humbug of indifference and superiority. Our destiny is to care, to idealize, to live towards passionately desired ends.¹⁴⁰

Holmes could appear a hardened, cynical rascal to the rest of the world, so long as his few intimates appreciated his sincere, soft, romantic, inner feelings.

The Path of the Law was written by a fifty-five-year-old man on the upswing of a romantic infatuation. Holmes wrote to an old friend before he left for England, "Perhaps it is well for a recluse to realize the charms of the world the flesh and the devil—a moral advantage which London offers in its plenitude."¹⁴¹ After his return, he wrote to the same friend, "I wound up with a week at an Irish place where I had an enchanting finish to a generally rejuvenating experience. It blows out the mind and makes one take more liberal views of life."¹⁴² Holmes felt unconventional and daring; he meant to be provocative and a little naughty both in his dinner table banter and his more intellectual efforts:

[M]any I dare say, because I have a light way, and like to talk to women, find it harder to suppose me a serious person than if I looked august, wore black, and thought only about business and going to church. I do love the insouciance of real intellect that just chucks down an idea, wriggling, and takes it or leaves it—instead of rigging up an image with a bogus sword and masonic jewels.¹⁴³

Holmes did not suppose, in 1897, that he would be taken so seriously, that his bold and witty sallies against the legal status quo would be taken for sober orthodoxy a century later. In *The Path of the Law*, he was chucking down lively, wriggling ideas calculated to shock the respectable, conventional traditions of the Boston bar. Take them or leave them.

¹³⁸ Letter from Oliver Wendell Holmes to Clare Castletown (Jan. 11, 1897).

¹³⁹ Letter from Oliver Wendell Holmes to Clare Castletown (Oct. 7, 1896). "The ironic reaction is good for the moment of leisure—for Sunday afternoon . . . but it doesnt [sic] count for much while you are busy." Letter from Oliver Wendell Holmes to Clare Castletown (Sept. 17, 1896).

¹⁴⁰ Letter from Oliver Wendell Holmes to Clare Castletown (June 24, 1897).

¹⁴¹ Letter from Oliver Wendell Holmes to Nina Gray (June 16, 1896).

¹⁴² Letter from Oliver Wendell Holmes to Nina Gray (Oct. 2, 1896).

¹⁴³ Letter from Oliver Wendell Holmes to Clare Castletown (Mar. 5, 1897).

THE *VEGELAHN* DISSENTER, OCTOBER 26, 1896

A workplace dispute in October 1894 led to a strike in November 1894 and a suit by the employer against the striking workers and trade unions in December 1894. Upholsterers asked for a nine-hour day and higher wages.¹⁴⁴ Their employer, Frederick Vegelahn, refused and fired their representative, George Guntner.¹⁴⁵ The workers went on strike and arranged for teams of picketers during business hours to discourage new job applicants. Vegelahn asked the court for an injunction prohibiting picketing in front of his factory.

Earlier that same year, a similar injunction issued in Chicago drew nationwide publicity. A May 1894 strike at the Pullman Palace Car Company broadened in June to a boycott of Pullman cars on all railroads.¹⁴⁶ Railroad companies, with the assistance of United States Attorney General Richard W. Olney, asked federal judge Peter S. Grosscup for an injunction against Eugene V. Debs and other boycott leaders preventing them from obstructing interstate commerce and the mails.¹⁴⁷ Judge Grosscup, coincidentally one of Boston University's first law graduates in 1873, issued the injunction that same day. On July 4, 1894, President Cleveland sent federal troops to Chicago to keep order.¹⁴⁸ Federal authorities prosecuted Debs and others for criminal conspiracy and for contempt of court. Debs was jailed on the contempt charge.¹⁴⁹ The United States Supreme Court upheld Judge Grosscup's injunction and contempt order on May 27, 1895.¹⁵⁰

Back in Massachusetts, five days later, Vegelahn's petition for a permanent injunction came before Holmes, sitting as a single justice, on June 1, 1895.¹⁵¹ Holmes ruled that "persuasion and social pressure" by the striking workmen to discourage prospective replacement workers from accepting jobs was lawful.¹⁵² He refused an injunction against picketing for these purposes. He granted an injunction only against "threats of personal injury or unlawful harm" and "persuasion to break existing contracts."

Vegelahn appealed, and the parties argued *Vegelahn v. Guntner* before the full bench on March 24, 1896, before Holmes's trip to England. The decision was issued on October 26, 1896, after his return. Charles Allen,

¹⁴⁴ *Vegelahn*, 167 Mass. at 93, 44 N.E. at 1077.

¹⁴⁵ See NOVICK, *supra* note 20, at 222 (explaining *Vegelahn*).

¹⁴⁶ See Leon Stein & Philip Taft, *Introduction* to THE PULLMAN STRIKE at v-vii (Leon Stein & Philip Taft eds., 1969).

¹⁴⁷ *In re Debs*, 158 U.S. 546, 570 (1895).

¹⁴⁸ GROVER CLEVELAND, THE GOVERNMENT IN THE CHICAGO STRIKE OF 1894, at 27 (1913), reprinted in THE PULLMAN STRIKE, *supra* note 146.

¹⁴⁹ See Stein & Taft, *supra* note 146, at v-vii.

¹⁵⁰ *In re Debs*, 158 U.S. at 564.

¹⁵¹ Massachusetts Supreme Judicial Court Archives, *Vegelahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077 (1896) (No. 194-Equity).

¹⁵² *Vegelahn*, 167 Mass. at 95, 44 N.E. at 1077.

the senior Associate Justice, wrote for the majority that the injunction should extend as far as Vegelahn had originally requested. Picketing was unlawful in all instances. A combination to do injurious acts to an employer was unlawful. A conspiracy "to prevent persons from entering into his employment" was just as unlawful as a conspiracy to breach existing contracts.¹⁵³ An employer's right to engage new employees at whatever wage they mutually agreed was protected by the Constitution.¹⁵⁴

Chief Justice Field and Justice Holmes dissented, in separate opinions. Field noted that injunctions against picketing had not been issued before 1888, and had only been issued by Massachusetts courts when violence had been threatened.¹⁵⁵ Peacefully informing prospective job applicants of the strikers' case did not seem illegal, Field wrote, and should not be enjoined.¹⁵⁶ Field's dissent was longer than Allen's majority opinion. Holmes's dissent was longer than either.

Holmes first apologized, because the practice of the Supreme Judicial Court discouraged dissents, but wrote that "whatever the true result may be, it will be of advantage to sound thinking to have the less popular view of the law stated."¹⁵⁷ He insisted that the only point of disagreement was whether interference with prospective contractual relations, without any threat of force, could be enjoined.

Holmes's dissent then turned more generally to the "judicial reasoning" of the majority:

The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof.¹⁵⁸

Nobody would dispute, Holmes wrote, that a person could lawfully set up a business with the expectation and intent to ruin another person's established business. "[T]he policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interference with a man's business" so long as force was not employed.¹⁵⁹

What one person could lawfully do, Holmes thought, a combination of persons could also do. "Combination" on an ever increasing scale was inevitable, and it was futile for judges to oppose it. Combination of capi-

¹⁵³ *Id.* at 99-100, 44 N.E. at 1078.

¹⁵⁴ *Id.* at 99, 44 N.E. at 1077.

¹⁵⁵ *Id.* at 100, 44 N.E. at 1078 (citing *Sherry v. Perkins*, 147 Mass. 212, 17 N.E. 307 (1888)).

¹⁵⁶ *Id.* at 103, 44 N.E. at 1079.

¹⁵⁷ *Id.* at 104, 44 N.E. at 1079-80.

¹⁵⁸ *Id.* at 106, 44 N.E. at 1080.

¹⁵⁹ *Id.*, 44 N.E. at 1081.

tal was "patent and powerful." Combination on the side of labor was necessary "if the battle is to be carried on in a fair and equal way."¹⁶⁰ Holmes sided with the "intelligent economists and legislators" who no longer thought strikes wicked, and with the good sense of Chief Justice Lemuel Shaw in *Commonwealth v. Hunt*, fifty-five years before.¹⁶¹

In dissent, Holmes put forward his own economic views in support of his legal position and invited his readers to uncover the economic views underlying the majority's opinion. This was a more effective assault on his colleagues because it subverted the majority's method of judicial reasoning. Holmes talked a new judicial language of inevitable economic trends and the value of free competition.

Holmes knew that his dissent would be unpopular among Boston's moneyed class. A young neighbor, Arthur Hill, remembered that Holmes told him, "I have just handed down an opinion that shuts me off forever from judicial promotion."¹⁶² He complained in a letter that his dissent provoked "the abuse of a good many fools and incompetents including some newspapers."¹⁶³ When he heard that a majority of prominent Bostonians "condemned me as a very dangerous man," he predicted, "I dare say I may have to pay for it, practically, before I die."¹⁶⁴

On the other hand, Holmes found that his dissent "gets the adhesion of some who know what they are talking about."¹⁶⁵ The *Harvard Law Review* applauded his reasoning and discerned the roots of his dissent in his article *Privilege, Malice, and Intent* of 1894.¹⁶⁶ At Boston University, however, Professor Bigelow approved of the Court's decision and criticized Holmes's dissent.¹⁶⁷

The *Vegetahn* decision came down just eight days before the election pitting William McKinley against William Jennings Bryan. Bryan was the champion of labor and Boston's Democratic newspapers rejoiced at Holmes's powerful dissent.¹⁶⁸ Holmes himself, a loyal Republican, feared that Bryan would combine farmers and workers into an electoral

¹⁶⁰ *Id.* at 108, 44 N.E. at 1081.

¹⁶¹ *See id.* at 109, 44 N.E. at 1082 (citing *Commonwealth v. Hunt*, 45 Mass. (4 Metc.) 111 (1842)).

¹⁶² CATHERINE DRINKER BOWEN, *YANKEE FROM OLYMPUS* 331 (1943) (quoting Arthur Hill's comments to Bowen).

¹⁶³ Letter from Oliver Wendell Holmes to Clare Castletown (Nov. 13, 1896).

¹⁶⁴ Postscript from Oliver Wendell Holmes to Clare Castletown (Nov. 22, 1896) (to a letter dated Nov. 21, 1896).

¹⁶⁵ Letter from Oliver Wendell Holmes to Clare Castletown (Nov. 13, 1896).

¹⁶⁶ Note, "Picketing"—*Injunctions against Strikers*, 10 HARV. L. REV. 301, 301-02 (1896) (citing Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 7-8 (1894)).

¹⁶⁷ MELVILLE MADISON BIGELOW, *THE LAW OF TORTS* 240-41, 249, 251 n.2 (8th ed. 1907). The 1901 edition made no mention of the case.

¹⁶⁸ *Patrol under Ban*, BOSTON DAILY GLOBE, Oct. 26, 1896, at 1; *Can't Patrol*, BOSTON DAILY GLOBE, Oct. 27, 1896, at 1; *Three Opinions*, BOSTON DAILY GLOBE,

victory. Employers used pressure of all sorts to ensure McKinley's election.¹⁶⁹ When McKinley won, Holmes wrote of his great relief and added, "the great body of people who voted for Brian [sic] did not want to destroy society any more than I do. They only thought that salvation lay along a different path."¹⁷⁰

The *Vegeahn* decision and the surrounding furor must have been fresh in the minds of Holmes's audience at Boston University on January 8, 1897. When Holmes explained the fallacy of confusing law with logic, he too had in mind the reactions to his *Vegeahn* dissent:

I once heard a very eminent judge say that he never let a decision go until he was absolutely sure that it was right. So judicial dissent often is blamed as if it meant simply that one side or the other were not doing their sums right, and if they would take more trouble agreement inevitably would come.¹⁷¹

Logical forms concealed "battle-grounds" of contending judicial preferences. Holmes brought *Vegeahn* to mind again:

I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. . . . When socialism first began to be talked about, the comfortable classes of the community were a good deal frightened. I suspect that this fear has influenced judicial action both here and in England, yet it is certain that it is not a conscious factor in the decisions to which I refer.¹⁷²

Holmes predicted that if law schools led students "to consider more definitely and explicitly the social advantage" of competing rules, they would be less confident about the proper result.¹⁷³

In a letter of November 13, 1896, eighteen days after his dissent, Holmes commented on the newspaper reactions and added, "but that is almost ancient history now."¹⁷⁴ He was wrong. For the next three decades, during which Holmes was an active justice deciding new cases, his dissent in *Vegeahn* was a primary datum predicting his vote in the most politically contentious cases, more important than any of his speeches and articles. When he was named Chief Justice of Massachusetts in 1899, *Vegeahn* was the case by which he was known. Chief Justice Holmes restated his *Vegeahn* position, again in dissent, in *Plant v. Woods* in

Oct. 27, 1896, at 3 (reprinting Holmes's dissent); *Liberty Endangered*, BOSTON DAILY GLOBE, Oct. 27, 1896, at 1.

¹⁶⁹ See NOVICK, *supra* note 20, at 221.

¹⁷⁰ Letter from Oliver Wendell Holmes to Clare Castletown (Nov. 9, 1896).

¹⁷¹ Pamphlet at 13, BLSM at 8, HLR at 465, CLP at 180.

¹⁷² Pamphlet at 15-16, BLSM at 9, HLR at 467, CLP at 184.

¹⁷³ Pamphlet at 16, BLSM at 9-10, HLR at 468, CLP at 184.

¹⁷⁴ Letter from Oliver Wendell Holmes to Clare Castletown (Nov. 13, 1896).

1900.¹⁷⁵ When Theodore Roosevelt appointed him to the Supreme Court in 1902, Roosevelt knew his judicial record primarily from *Vegeahn* and *Plant*, and Holmes's perceived sympathy with labor branded him a radical in elite circles.¹⁷⁶ Holmes cited *Vegeahn* again in his well-known dissent in *Coppage v. Kansas*.¹⁷⁷ In the early 1930s, law students still knew Holmes as the radical dissenter who "supported labor against capital" in *Vegeahn* and *Plant v. Woods*.¹⁷⁸ Holmes first tried on his identity as the great radical dissenter in the fall of 1896. The same upswing of romantic, liberated exuberance that helped shape *The Path of the Law* may have moved Holmes to depart from court custom and to take new risks in drafting his sharp dissent in *Vegeahn*.

A LITERARY SOURCE FOR HOLMES'S "BAD MAN"

"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."¹⁷⁹ The "bad man" is such an odd and problematic figure in Holmes's writing that the little fellow demands an origin. Nothing in Holmes's letters, in the "black book" where he recorded titles he had read,¹⁸⁰ nor in receipts from his Boston booksellers indicates that Holmes read *The Strange Schemes of Randolph Mason* in 1896,¹⁸¹ but this book of short stories may well have provoked Holmes to invent his "bad man."

In 1896, Melville Davisson Post, a young West Virginia lawyer, published *The Strange Schemes of Randolph Mason*. The book contained seven stories about a mysterious New York lawyer who advised clients how to commit murder and other crimes without legal consequences. Post set out to improve the detective story by devising plots in which the criminals did not seek to escape detection, but rather sought to escape punishment.¹⁸² He wrote in the book's introduction that

¹⁷⁵ 176 Mass. 492, 504-05, 57 N.E. 1011, 1015-16 (1900).

¹⁷⁶ Letter from Oliver Wendell Holmes to Frederick Pollock (Sept. 23, 1902) in 1 HOLMES-POLLOCK LETTERS, *supra* note 38, at 106; BAKER, *supra* note 28, at 354; WHITE, *supra* note 21, at 291-92, 306. Theodore Roosevelt also had Holmes's pro-labor decisions in mind when he appointed him. See BAKER, *supra* note 28, at 335; WHITE, *supra* note 21, at 300.

¹⁷⁷ 236 U.S. 1, 27 (1915).

¹⁷⁸ Kaplan, *supra* note 103, at 1836 (explaining of Holmes that Kaplan and his fellow students "knew his radical credentials").

¹⁷⁹ Pamphlet at 6, BLSM at 3, HLR at 459, CLP at 171.

¹⁸⁰ On file with the *Boston University Law Review*. Holmes's "black book" does not record short stories.

¹⁸¹ MELVILLE DAVISSON POST, *THE STRANGE SCHEMES OF RANDOLPH MASON* (New York, G.P. Putnam 1896) [hereinafter STRANGE SCHEMES].

¹⁸² See *id.* at 12 ("The book-stalls have been filled to weariness with tales based on plans whereby the *detective*, or *ferreting* power of the State might be baffled. But, prodigious marvel! no writer has attempted to construct tales based on plans where by the *punishing* power of the State might be baffled.").

if one knows well the technicalities of the law, one may commit horrible wrongs that will yield all the gain and all the resulting effect of the highest crimes . . . in such a manner that although the criminal is known and the law holds him in custody, yet it cannot punish him.¹⁸³

Such plots required a fictional lawyer with "[a]n intellect, keen, powerful, and yet devoid of any sense of moral obligation."¹⁸⁴ Post did not have the typical lawyer in mind:

No attorney, unless he were a superlative knave, could be presumed to suggest the committing of wrongs entailing grievous injury upon innocent men. On the other hand, no knave vicious enough to resort to such wrongs could be presumed to have learning enough to plan them, else he would not be driven to such straits. Hence the necessity for a character who should be without moral sense and yet should possess all the requisite legal acumen. Such a character is Randolph Mason, and while he may seem strange he is not impossible.¹⁸⁵

Post's character "found holes in the law through which his clients escaped," and "pointed out methods by which they could evade obnoxious statutes, by which they could comply with the apparent letter of the law and yet violate its spirit, and advised them well in that most important of all things, just how far they could bend the law without breaking it."¹⁸⁶

The similarity between Post's Randolph Mason and Holmes's "bad man" is striking. Holmes's character "cares nothing for an ethical rule which is believed and practiced by his neighbors" but does "care a good deal to avoid being made to pay money, and will want to keep out of jail if he can."¹⁸⁷ To advise such a man, Holmes told his audience, lawyers must "imagine yourselves indifferent" to morality.¹⁸⁸ The "bad man" "cares only for the material consequences" which his legal "knowledge enables him to predict."¹⁸⁹ Holmes's "bad man" must be a lawyer himself, or else a lawyer who undertakes to advise him must become as bad as he. Post's evil freak may have been the inspiration for Holmes's. Post had to make the case in his book that Randolph Mason was psychologically possible. Holmes, by far the better writer, simply plunked his "bad man" down on the page and brought him to life with the power of his words.

In the first and best known story of Post's book, entitled *The Corpus Delicti*, Mason instructs a New York social climber in how to murder a

¹⁸³ *Id.* at 15.

¹⁸⁴ *Id.* at 16.

¹⁸⁵ *Id.* at 15-16.

¹⁸⁶ MELVILLE DAVISSON POST, *The Corpus Delicti*, in STRANGE SCHEMES, *supra* note 181, at 24, 24-25.

¹⁸⁷ Pamphlet at 5, BLSM at 2, HLR at 459, CLP at 170.

¹⁸⁸ Pamphlet at 5, BLSM at 3, HLR at 459, CLP at 170.

¹⁸⁹ Pamphlet at 6, BLSM at 3, HLR at 459, CLP at 171.

blackmailing wife so he can marry a wealthy heiress.¹⁹⁰ The plot involves dissolving the woman's corpse in sulfuric acid.¹⁹¹ The murderer is tried under an assumed name and Mason moves for an acquittal on the ground that the proof of a death by criminal agency (the "corpus delicti") cannot be established by circumstantial evidence.¹⁹² The judge is forced to agree that "under the laws of New York the prisoner cannot be punished" and, though "morally certain of the prisoner's guilt," the jury must find him not guilty.¹⁹³ Post cited the New York precedents that established this loophole in the criminal law.¹⁹⁴

Post led off with murder, but six of the seven stories told how to gain large sums of money without criminal or civil liability. By the last story in the book, Randolph Mason's advice has earned him "vast sums of money."¹⁹⁵ New York "was filled with shrewd, desperate men, who feared nothing under high heaven but the law," and if a felon "could have had Mr. Mason plan his crime for him he need never have been punished."¹⁹⁶ Mason's clerk, even less scrupulous than his employer, encourages a prospective client:

"This world is a fighting station. . . . The one intention of the entire business world is robbery. The man on the street has no sense of pity; he grows rich because he conceives some shrewd scheme by which he is enabled to seize and enjoy the labor of others. His only object is to avoid the law. . . . The word 'crime' . . . was invented by the strong with which to frighten the weak; it means nothing."¹⁹⁷

In the final pages of the book, Randolph Mason is pictured "in an invalid chair . . . grim, emaciated, and rigidly ugly," his body "worn out utterly long ago."¹⁹⁸ But he is not punished. He cannot be punished. He has committed no crime.

Post's stories provoked much attention and some criticism.¹⁹⁹ In his introduction, though he claimed that his motive was law reform, he admitted that "[t]he formula for every wrong in this book is as practical as the plan of an architect and may be played out by any skillful villain."²⁰⁰

¹⁹⁰ See POST, *supra* note 186, at 27, 44.

¹⁹¹ See *id.* at 51-56.

¹⁹² See *id.* at 65-67.

¹⁹³ *Id.* at 71.

¹⁹⁴ See STRANGE SCHEMES, *supra* note 181, at 19 (citing *Ruloff v. People*, 18 N.Y. 179 (1858); *People v. Bennett*, 49 N.Y. 137 (1872)).

¹⁹⁵ MELVILLE DAVISSON POST, *The Animus Furandi*, in STRANGE SCHEMES, *supra* note 181, at 262.

¹⁹⁶ *Id.* at 261.

¹⁹⁷ *Id.* at 263.

¹⁹⁸ *Id.* at 288.

¹⁹⁹ See CHARLES A. NORTON, MELVILLE DAVISSON POST: MAN OF MANY MYSTERIES 72, 75 (1973).

²⁰⁰ See STRANGE SCHEMES, *supra* note 181, at 17.

In May and June of 1897, two murderers tried to dispose of their victims in roughly the manner described in *The Corpus Delicti*, but both were convicted.²⁰¹ *The Strange Schemes of Randolph Mason* sold well enough to cause Post's New York publisher to request another volume of Randolph Mason stories. In November 1897, Post published *The Man of Last Resort, or the Clients of Randolph Mason*. In a preface, Post mentioned that his first book "has provoked a large discussion" and that "[a] few gentlemen of no inconsiderable legal learning" had pronounced *The Strange Schemes of Randolph Mason* "dangerous."²⁰²

Holmes might have seen the brief review of Post's book in the October 1896 issue of *The Green Bag*, a magazine of entertainment for lawyers published in Boston.²⁰³ He might have heard the stories described by a friend. The disposal of the body and the point of law involved in *The Corpus Delicti* brought to mind the famous trial of Professor John Webster in the Supreme Judicial Court for the murder and dismemberment of Dr. George Parkman.²⁰⁴ That happened in Boston in 1850, when Holmes was nine years old. Holmes's father, who testified at the trial and whose chair at Harvard Medical School had been donated by the murder victim, had been a teaching colleague of the murderer.²⁰⁵ Post's shocking stories may have inspired Holmes to see how his point about separating law from morality could be more effectively made not with an abstract generalization but with a personification of the amoral perspective, a "bad man."

BOSTON UNIVERSITY'S BIG DAY, JANUARY 8, 1897

Temperatures fell below freezing on Friday, January 8, 1897.²⁰⁶ Skies were overcast. Snow was on the way. At noon, Holmes went to Trinity

²⁰¹ Adolph L. Luetgert was convicted in Chicago of killing his wife, while Martin Thorn was convicted in New York of killing his wife—apparently after cutting up her body and disposing of the pieces in various locations throughout the city. See NORTON, *supra* note 199, at 236 n.20.

²⁰² MELVILLE DAVISSON POST, *THE MAN OF LAST RESORT, OR, THE CLIENTS OF RANDOLPH MASON* at vi (1897).

²⁰³ Book Notice, 8 *GREEN BAG* 436, 436 (October 1896). "Mr. Post has hit upon a most ingenious scheme for enlisting the reader's interest in legal matters. . . . Randolph Mason, a shrewd but unscrupulous lawyer, devotes his great abilities to the task of showing his clients how they may commit the most flagrant wrongs, and yet through the technicalities of the law escape the slightest punishment."

²⁰⁴ *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295 (1850). Several books have been written about the case, among them ROBERT SULLIVAN, *THE DISAPPEARANCE OF DR. PARKMAN* (1971).

²⁰⁵ JAMES W. STONE, *REPORT OF THE TRIAL OF PROF. JOHN W. WEBSTER* 59, 153 (Boston, n.p., 1850).

²⁰⁶ See *BOSTON EVENING TRANSCRIPT*, Jan. 8, 1897, at 4 (reporting 28 degree temperatures at noon, and predicting increasing cloudiness, probably followed by rain or snow).

Church to attend the funeral of General Francis Amasa Walker,²⁰⁷ President of the Massachusetts Institute of Technology, a “man of statistics” and “master of economics.”²⁰⁸ The funeral drew delegations from universities, colleges, learned societies, museums, libraries, clubs, and many other institutions.²⁰⁹ The Supreme Judicial Court convened as usual, Holmes not present, and the other six justices issued nineteen opinions.²¹⁰

At 2:00 p.m., the formal dedication ceremonies were to commence for Isaac Rich Hall, the former Mt. Vernon Church and new home of Boston University School of Law, at 11 Ashburton Place.²¹¹ At 2:30 p.m., the ceremonies got underway.²¹² Judge Edmund H. Bennett, Dean of the School of Law, opened the ceremonies to warm applause. Dr. William Fairfield Warren, President of Boston University, gave the invocation to the “Universal Law-Giver.” The Law School Glee Club sang a selection. Alden Speare, one of the University’s Trustees, asked for money. William V. Kellen, an 1876 graduate and a former Reporter of the Massachusetts court, gave a speech about the history of the School, the improvements in its teaching methods, and the distinctions achieved by its alumni.²¹³ The Law School Glee Club sang another selection, “thereby relieving the program of any possible monotony.”²¹⁴ Finally it was

²⁰⁷ See *Funeral of Gen. Walker*, BOSTON EVENING TRANSCRIPT, Jan. 8, 1897, at 1; see also Letter from Oliver Wendell Holmes to Clare Castletown (Jan. 11, 1897).

²⁰⁸ Holmes said in his speech later that day: “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.” Pamphlet at 18, BLSM at 11, HLR at 469, CLP at 187. Walker had been president of both the American Statistical Association and the American Economic Association. Holmes had shown Walker his draft of the speech. Letter from Oliver Wendell Holmes to Clare Castletown (Jan. 11, 1897). He may have intended this sentence as an indirect tribute to his friend.

²⁰⁹ See *Funeral of Gen. Walker*, *supra* note 207, at 1; *Simple and Impressive Ceremonies*, BOSTON DAILY GLOBE, Jan. 9, 1897, at 5. The articles mention that Louis D. Brandeis represented the Municipal League at the funeral, but do not mention Judge Holmes.

²¹⁰ See 167 Mass. 290-364 (1897). Two newspapers reported that Chief Justice Field and the other Associate Justices attended the Boston University School of Law dedication. See *Judge Holmes the Orator*, BOSTON HERALD, Jan. 9, 1897, at 6; *Law School Dedicated*, BOSTON EVENING TRANSCRIPT, Jan. 8, 1897, at 3. But Chief Justice Field’s letter to Dean Bennett suggests that they did not. See Letter from Walbridge A. Field to Edmund H. Bennett (Jan. 6, 1897).

²¹¹ See *Religion to Law*, BOSTON DAILY GLOBE, Jan. 8, 1897 (evening edition), at 5; *The Law School Dedication*, 22 UNIVERSITY BEACON 99-100 (1897).

²¹² *Law School Dedicated*, *supra* note 210, at 3.

²¹³ See William V. Kellen, *Legal Training in Boston University*, 1 BOSTON L. SCH. MAG., April 1897, at 6.

²¹⁴ *The Law School Dedication*, *supra* note 211, at 100 (reporting that the Glee Club performed several selections during the course of the event); see also *Religion to Law*, *supra* note 211, at 5 (reporting that the Glee Club performed directly before Holmes’s address).

Holmes's turn to speak.

Holmes described the scene in the main lecture room of Isaac Rich Hall to Lady Castletown:

On Friday I fired off my long projected discourse. . . . [T]he room was crowded, the air not too good—and I was preceded by more than an hour of prayer and discourse on the finance of the institution (a relatively new Law School) and summaries of the little glories achieved by graduates until I saw the listeners' eyes begin to roll with poisoned slumber.²¹⁵

In order to finish his speech within an hour, he decided to read it verbatim although "to read instead of speaking is bad for the hearers." "I started sadly enough," Holmes continued, "but to my great satisfaction I had them all wide awake pretty soon and kept them so." It was an "unexpected success."²¹⁶

Who heard Holmes's speech? Newspapers reported that the third-floor lecture room had a seating capacity of 500²¹⁷ in 3750 square feet²¹⁸ and was "crowded to the doors" with "numerous students and past students."²¹⁹ The Boston *Daily Globe* named 253 persons in attendance, apart from the six or seven on the platform. Three federal judges, the Massachusetts Attorney General, a few state judges and a clerk of the Supreme Judicial Court, Dean James Barr Ames and five other Harvard Law School faculty members (not including former dean C.C. Langdell), eighteen Boston University faculty members, and 215 members of the Massachusetts bar, nearly all of them Boston University alumni, are named.²²⁰ They included four female graduates,²²¹ at least two African-American graduates,²²² future Chief Justice Arthur P. Rugg, and future financier Owen D. Young.

If the *Globe's* list is accurate, more than half the audience were not law students but practicing lawyers, professors, and judges. Ushers "were selected from the senior class"²²³ and the eight Glee Club members were all

²¹⁵ Letter from Oliver Wendell Holmes to Clare Castletown (Jan. 11, 1897).

²¹⁶ *Id.* In a later letter to Nina Gray, Holmes observed that his speech "seemed to please them." Letter from Oliver Wendell Holmes to Nina Gray (Jan. 22, 1897).

²¹⁷ See *New Building for Students*, BOSTON POST, Jan. 8, 1897, at 8 (describing the building's floorplan).

²¹⁸ See *With Befitting Ceremonies*, BOSTON DAILY GLOBE, Jan. 8, 1897 (morning edition), at 7.

²¹⁹ *Judge Holmes the Orator*, *supra* note 210, at 6.

²²⁰ See *Religion to Law*, *supra* note 211, at 5.

²²¹ See *id.* (listing A.E. Marcy ('92), Anna C. Bartlett ('92), Lizzie A. Smith ('93), and Clara L. Power ('93)). Holmes wrote to Dean Bennett the day before the speech, "I assume that women will not be there, unless it be female law students." Letter from Oliver Wendell Holmes to Edmund H. Bennett (Jan. 7, 1897).

²²² See *id.* (listing B.P. Wilson ('84) and Edgar P. Benjamin ('94)).

²²³ See *Law School Dedicated*, *supra* note 210, at 3.

law students.²²⁴ After the alumni and guests were seated, the students, who numbered 375 that year,²²⁵ “marched in and took the empty seats that were left in various parts of the hall, but many were obliged to stand during the ceremonies,”²²⁶ and many, no doubt, could not squeeze in at all.

Holmes may have been the featured speaker, but the day belonged to Edmund H. Bennett. Judge Bennett was seventy-two years old, in the midst of his twenty-fifth year of teaching at Boston University, his twenty-first year as dean. Alumni applauded to recognize and honor his achievement in building up the school and in moving it to such grand new quarters. Friends wrote to Bennett, after the event, that the expressions of loyalty, love, and warmth “shown at every reference to your services,”²²⁷ met an “instant re-echo in the hearts of everyone present.”²²⁸ At the time of the dedication, alumni were contributing several thousand dollars to commission an oil portrait of Judge Bennett by Théobald Chartran, a portrait that now hangs in the school’s library.²²⁹ Judge Bennett died on January 2, 1898, less than a year after the dedication.²³⁰

After Holmes sat down, the Glee Club sang once more, and Dr. Warren delivered the benediction. The guests were then invited to inspect the lecture halls, recitation rooms, and recreation rooms in the new law school building. Dr. Warren, the Boston University President, recounted what happened next:

It was extremely annoying to us that just at the time when we proposed to conduct our guests through the Building the electric lights failed us. It was a slight mitigation of our disappointment to discover that the failure was not in anything connected with our often tested apparatus but nearer the Power House in a street cable. Next time we have guests of honor I hope we may be more fortunate.²³¹

Some things never change. Boston University’s Trustees met on Monday, January 11, and voted to thank Holmes for “his fresh and brilliant ad-

²²⁴ See *New Building for Students*, *supra* note 217, at 5.

²²⁵ See *id.* at 8; *Judge Holmes the Orator*, *supra* note 210, at 6.

²²⁶ *Law School Dedicated*, *supra* note 210, at 3.

²²⁷ Letter from Arthur Gilman to Edmund H. Bennett (Jan. 9, 1897).

²²⁸ Letter from William V. Kellen to Edmund H. Bennett (Jan. 15, 1897).

²²⁹ See *Memorial to Dean Bennett*, BOSTON DAILY GLOBE, Oct. 27, 1896, at 8; *New Building for Students*, *supra* note 217, at 8; Letter from Orrison S. Marden to Samuel C. Bennett (Jan. 19, 1897).

²³⁰ See *Recent Deaths—Judge Edmund H. Bennett*, BOSTON EVENING TRANSCRIPT, Jan. 3, 1898, at 5.

²³¹ Letter from William Fairfield Warren to Oliver Wendell Holmes (Jan. 12, 1897). The sun set at 4:30 p.m. on Jan. 8, 1897. *Miniature Almanac*, BOSTON DAILY GLOBE, Jan. 8, 1897 (evening edition), at 12.

dress" and to "request a copy for publication."²³²

Within hours after Holmes finished speaking, the *Boston Herald, Daily Globe*, and *Evening Transcript* all published the same abstract of the speech, under one thousand words in length.²³³ Half of the abstract compressed Holmes's main points quite well—two sentences on the prediction theory, one on the "bad man," two on the confusion of law and morality, and so forth. The other half of the newspapers' abstract printed most of Holmes's final paragraph verbatim.

Holmes had already written to Dean Bennett about publishing the full speech:

I had thought of printing in the Harv. Law Rev. but should not do it without hearing further from you. I rather want to keep the copy right because one of these days I want to make a volume of essays and addresses [and] one likes to have the usual rights.²³⁴

The Holmes Papers at Harvard Law School Library contain no draft of *The Path of the Law* in Holmes's handwriting, probably because the copy he sent to Boston University President Warren on January 13, 1897, was Holmes's original.²³⁵

Holmes spoke what he had written,²³⁶ and he printed what he had spoken.²³⁷ The text published in the *Boston Law School Magazine* differed from the first printed version only in the addition of some punctuation. The *Harvard Law Review* added more punctuation and changed only one word.²³⁸ Law review authors will say that student editors knew their place a hundred years ago. Student editors will say that law review authors a hundred years ago wrote like Oliver Wendell Holmes.

Holmes first published his speech without any title. He wrote to Boston University President Warren, "as the occasion was that of the Law School, that alone should appear on the title page without any special indication of the address."²³⁹ In letters before the event, Holmes had

²³² Vote of the Boston University Board of Trustees, recorded by William Nast Brodbeck, Secretary (Jan. 11, 1897).

²³³ *Judge Holmes the Orator*, *supra* note 210, at 6; *Law School Dedicated*, *supra* note 210, at 3; *Religion to Law*, *supra* note 211, at 5.

²³⁴ Letter from Oliver Wendell Holmes to Edmund H. Bennett (Jan. 9, 1897).

²³⁵ Letter from Oliver Wendell Holmes to William Fairfield Warren (Jan. 13, 1897). Letters to Warren are in Boston University Special Collections.

²³⁶ Letter from Oliver Wendell Holmes to Clare Castletown (Jan. 11, 1897) ("I had so much to say that I read it in order to get it inside an hour.").

²³⁷ Letter from Oliver Wendell Holmes to James Bradley Thayer, Professor, Harvard Law School (Feb. 11, 1897) (noting that "a speech sh[oul]d be printed as she is spoke").

²³⁸ *Compare* Pamphlet at 28; BLSM at 17 ("To the incompetent"), *with* HLR at 477; CLP at 201 ("For the incompetent").

²³⁹ Letter from Oliver Wendell Holmes to William Fairfield Warren (Jan. 21, 1897).

called it variously “Legal Education,”²⁴⁰ “The Theory of Legal Study,”²⁴¹ and “The Principles of Legal Study.”²⁴² Newspaper accounts of the dedication ceremonies called the speech *The Value of a Legal Education*²⁴³ and a Boston University newsletter called it *Fundamental Questions on the Law and their Relation to the Law*.²⁴⁴ The *Juridical Review* of Edinburgh later published it as *Law and the Study of Law*.²⁴⁵ It only became *The Path of the Law* when it was published by Boston University law students in the *Boston Law School Magazine* in February.

Why the “path” of the law? One recent biographer has speculated that Holmes must have been familiar with Taoism and its Bushido—“The Way of the Warrior,”²⁴⁶ but no such suggestion appears in Holmes’s letters. The title is reflected in the speech itself:

[W]hat I am trying to do now is only by a series of hints to throw some light on the narrow path of legal doctrine, and upon two pitfalls which, as it seems to me, lie perilously near to it.²⁴⁷

The pitfalls on each side of the law’s narrow path are the two fallacies of confounding law with morality and confusing law with logic.

To Holmes, the law was not a broad boulevard that many could travel with ease. In a letter to Lady Castletown on October 7, 1896, that perhaps prefigured Holmes’s choice of the title, he pictured his journey as a lonely one:

You speak of the touch of isolation in some of my speeches. It has reference to my work. One cannot cut a new path as I have tried to do without isolation. I have felt horribly alone. But the result has been far more immediate than I have dared dream of its being and the real danger perhaps is that when one has been for a moment in the lead, he should wrap himself in his solitude and sit down, and before he knows it instead of being in advance the procession has passed him and his solitude is in the rear.²⁴⁸

In his own pursuit of the law, Holmes did not travel with the mainstream of the profession. He was cutting a new path; he saw himself in the vanguard of enlightenment. But was anybody following behind?

²⁴⁰ Letter from Oliver Wendell Holmes to Clare Castletown (Sept. 17, 1896).

²⁴¹ Letter from Oliver Wendell Holmes to Clare Castletown (Oct. 17, 1896).

²⁴² Letter from Oliver Wendell Holmes to Edmund H. Bennett, Dean, Boston University School of Law (Dec. 12, 1896).

²⁴³ *New Temple*, BOSTON POST, Jan. 9, 1897, at 5; *Religion to Law*, *supra* note 211, at 5.

²⁴⁴ *The Law School Dedication*, *supra* note 211, at 99.

²⁴⁵ *Law and the Study of Law*, *supra* note 5, at 105.

²⁴⁶ NOVICK, *supra* note 20, at 451 n.9. For that matter, the name for Islamic law, Shariah, means literally “the way” or “the path.”

²⁴⁷ Pamphlet at 11-12, BLSM at 7, HLR at 464, CLP at 178.

²⁴⁸ Letter from Oliver Wendell Holmes to Clare Castletown (Oct. 7, 1896).

"I sometimes grind my teeth in secret rage at the public ignorance of the difference between the first rate and the second rate."²⁴⁹ Holmes had been on the Massachusetts Supreme Judicial Court for fourteen years when he delivered *The Path of the Law*. His path to advancement was blocked by sixty-three-year-old Massachusetts Chief Justice Field and sixty-eight-year-old Justice Horace Gray in the "Massachusetts seat" on the United States Supreme Court. On the bench, he could incorporate his grand generalizations only on an incremental basis, opinion by opinion, "gradually weaving one's contribution into the practical system of law," but as he neared his fifty-sixth birthday, "all that there is to say after six months or when another year has passed is so much more done in pursuit of an unattainable end."²⁵⁰ Holmes told Lady Castletown:

[A]ll the speculation or generalizing part of one's work finds its echo first in text writers and in the mind of the younger generation. But the text writers are pretty frequently men who have not succeeded in the fight for the first place and when one runs across the great fighting successes [at the bar] somewhat older than himself, . . . he often finds of course that they are utterly unaffected by ideas which he deems fundamental, and that makes one hesitate over the value of his stock of fancy goods.²⁵¹

Holmes's stock of fancy goods was his arsenal of "bad man" perspectives—provocative generalizations, challenges to orthodoxy, and impertinent questions, all "wash[ed] with cynical acid."²⁵² "What have we better than a blind guess to show that criminal law in its present form does more good than harm?"²⁵³ "Does punishment deter?"²⁵⁴ He set off a series of

²⁴⁹ Letter from Oliver Wendell Holmes to Clare Castletown (May 28, 1897).

²⁵⁰ Letter from Oliver Wendell Holmes to Clare Castletown (Mar. 5, 1897). His next letter states: "My birthday was the 8th and a man of 56 ought to be indifferent to everything but ambition, avarice and whatever Sunday qualities he affects, I suppose. But one doesn't always feel so." Letter from Oliver Wendell Holmes to Clare Castletown (Mar. 12, 1897).

²⁵¹ Letter from Oliver Wendell Holmes to Clare Castletown (Oct. 7, 1896). Holmes referred in this passage to Sir Horace Davey, a House of Lords judge whom he had met in London. Lord Davey is the "very eminent English judge" whose hide-bound view of tort liability Holmes quoted in *The Path of the Law*. See Pamphlet at 20-21, BLSM at 13, HLR at 471-72, CLP at 191. To Lady Castletown, Holmes wrote "it is wholesome and a correction to fool's paradise to come in contact with one of your huge mundane successes in the law, men like Lord Davey." Letter from Oliver Wendell Holmes to Clare Castletown (Sept. 5, 1896); see also Letter from Oliver Wendell Holmes to a Judge Baldwin (Feb. 16, 1897).

²⁵² Pamphlet at 8, BLSM at 5, HLR at 462, CLP at 174.

²⁵³ Pamphlet at 19, BLSM at 11, HLR at 470, CLP at 188. In 1908, Holmes said that this and similar questions that he had asked "in a speech to lawyers" long ago were "thought of doubtful propriety then." Letter from Oliver Wendell Holmes to Franklin Ford (Feb. 8, 1908).

²⁵⁴ Pamphlet at 19, BLSM at 12, HLR at 470, CLP at 189.

rhetorical bombs in *The Path of the Law* to provoke, perhaps at last, a public recognition of his greatness. Holmes was "the bad man."

DELAYED REACTIONS

Did Holmes get the reaction he was hoping for? In the weeks and months that followed, he was neither tarred and feathered²⁵⁵ nor proclaimed philosopher-king.²⁵⁶ Law school teaching, legal practice, and judicial decision-making carried on much as before. A Boston University faculty member, Judge Jabez Fox, wrote a rebuttal to Holmes's "recent striking address" in the next issue of the *Boston Law School Magazine*, entitled *Law and Morals*.²⁵⁷ Fox considered that Holmes was knocking down a few straw men. Lawyers and law students all appreciated that words like "malice" have a special legal meaning, and that legal duties did not have exactly the same scope as moral duties, but surely "it cannot be doubted that the law still expresses the moral sense of the community."²⁵⁸ As a descriptive matter, and as a basis for prediction, Holmes's separation of law from morals was simply incorrect. Judge Fox wrote:

I do not see any indication that the law has cut loose from the moral standards of society, or that the lawyer, in studying the grounds for predicting future judgments, can safely assume that future judges will be unmindful of moral considerations.²⁵⁹

Decades later, Lon Fuller and Henry Hart would make the same point, that advising the "bad man" required a close attention to the moral perceptions of judges.²⁶⁰

Judge Fox saw another straw man in the second half of Holmes's speech. Lawyers well appreciated that logic did not decide cases. Judges already "decide cases according to their ideas of the general good."²⁶¹ Reformers should recognize that

the judges, with all their respect for precedent, have managed somehow to keep up with the times. . . . It cannot be doubted that in matters of business morality they have done much to educate public opinion. . . . To keep in the swim, at the same time to preserve a

²⁵⁵ Vilification came later, after Holmes's death in 1935. See *infra* notes 266-77 and accompanying text.

²⁵⁶ Canonization came later too, after Holmes's eightieth birthday. See Felix Frankfurter, *Twenty Years of Mr. Justice Holmes' Constitutional Opinions*, 36 HARV. L. REV. 909, 919 (1923) ("He is a philosopher become king.").

²⁵⁷ Fox, *supra* note 110, at 3.

²⁵⁸ *Id.* at 3-4.

²⁵⁹ See *id.* at 5 (discussing the interaction of morals with criminal and tort law).

²⁶⁰ See *infra* notes 267-70, 283-85 and accompanying text (recounting the argument that because judges blend morality with law, the "bad man" must take morality into account to predict what a court will do).

²⁶¹ *Id.* at 6.

degree of uniformity, or at least of continuity, in their judgments as to make their administration of justice seem like the enforcement of law, has been no simple task. It would have been an impossible task if they had not at all times mixed their morality with their law.²⁶²

Under Holmes's proposed regime, by contrast, "one judge might take John Stuart Mill for his guide, another Herbert Spencer, another Karl Marx."²⁶³ Such a system would soon give way to a resurgence of *stare decisis*.

The greater impact of *The Path of the Law* had to wait more than thirty years. Benjamin Kaplan described student days at Columbia Law School in 1930, the heyday of Legal Realism:

Realism claimed inspiration and derivation from Holmes, and the professors gave emphasis to the point by making Holmes' striking essay *The Path of the Law* required reading for us as we started out. The essay took hold of our imaginations, because peering through the text was our image of the man himself. Here was a wounded veteran of the Civil War who could double as radical and aristocrat. We democratic socialists knew his radical credentials. In dissent as a justice of the Massachusetts court, had he not supported labor against capital? . . .

The Path of the Law, then, came to us with special appeal. . . . [I]t came through to us mainly as advice, in substance as follows. . . . You are not to confuse morality with law. To maintain this distinction, think of law cynically, as the bad man does who is interested only in the precise consequences for him of given choices of action: expel all but the operations of the law. . . .

This advice, with its sprinkling of Holmes' "cynical acid," was very acceptable to a young audience in the second year of the Great Depression. In style it was beguiling, the work of a writer who was obviously incapable of committing a soggy sentence. From the moment we put down the mimeograph of the essay—those were the days when traditional casebooks were being discarded, and, as one wag put it, everything mimeographed was good—we felt a filial relation, a filial connection with Holmes.²⁶⁴

The influence of Holmes's writings generally and of *The Path of the Law* in particular increased enormously during the 1930s. In 1897, it was a striking address, but not one that law professors would particularly draw to their students' attention. By 1930, a new generation of law professors captured the attention of law students in the only sure way. *The Path of the Law* was "on the exam."

²⁶² *Id.* at 7.

²⁶³ *Id.*

²⁶⁴ Kaplan, *supra* note 103, at 1836-37 (footnotes omitted).

In one of the first book-length appreciations of Holmes, Max Lerner wrote:

The fact is that Holmes's "bad man" standard, his rejection of natural law, and his definition of the law as what the courts will in fact do, were all congenial to the mood and quality of a pragmatic America in whose practical business life the realm of fact had elbowed out the norms of morality.²⁶⁵

A decade later, World War II had begun, Holmes had died, cynicism was temporarily out of fashion, and the "bad man" came under attack. Robert M. Hutchins, President of the University of Chicago, reflected on his law school days from the perspective of 1940:

In law school I learned that law was not concerned with reason or justice. Law was what the courts would do. Law, says Hitler, is what I do. There is little to choose between the doctrine I learned in an American law school and that which Hitler proclaims.²⁶⁶

Lon L. Fuller, in his 1940 book *Law in Quest of Itself*, took specific aim at Holmes's conception of the "bad man."²⁶⁷ The "bad man" cared nothing for the morality of his conduct. He cared only about what the judge would do to him. But Fuller pointed out that Holmes never asked *how* the "bad man" would determine what the judge would do. To predict the legal consequences accurately, to go through the same analysis that the judge would go through in his case, the "bad man" would have to take the morality of his conduct into account precisely as the judge would evaluate it.

In the end, our bad man cannot escape having to decide a question of morality. He will have to ask, "How would I myself view my conduct if I were not interested in it? How would it be viewed by a disinterested third party? Would it seem to him to be good or evil?"²⁶⁸

Particularly if judges followed the advice Holmes gave in the second half of his speech, the "bad man" and his lawyer would have to predict the judges' "weighing [of] considerations of social advantage," inescapably normative factors.²⁶⁹ Thus the "bad man," Fuller concluded, "will have to learn to look at the law through the eyes of a good man."²⁷⁰

Beginning in 1942, a group of Catholic natural law scholars broadened

²⁶⁵ Max Lerner, *Men and Ideas, in THE MIND AND FAITH OF JUSTICE HOLMES* 367, 369 (Max Lerner ed., 1943).

²⁶⁶ Robert M. Hutchins, *What Shall We Defend?*, 6 *VITAL SPEECHES OF THE DAY* 547, 549 (1940) (convocation address delivered June 11, 1940). Hutchins studied at Yale Law School from 1921 to 1925.

²⁶⁷ LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 92-95 (1940).

²⁶⁸ *Id.* at 94.

²⁶⁹ Pamphlet at 15, BLSM at 9, HLR at 467, CLP at 184.

²⁷⁰ See FULLER, *supra* note 267, at 95 .

the attack on Holmes. Using selective quotations from his newly published letters and from *The Path of the Law*, they sought to show and by showing to condemn Holmes's moral relativism, his identification of law with physical force, his rejection of natural rights and his fundamental skepticism.²⁷¹ Francis Lucey of Georgetown took Holmes's "bad man" a step further into criminal law:

For Holmes the law does not say that a man ought not or should not commit murder, or rape or burglary, or fraud or trespass or slander or libel, etc. The law does not say that these things are wrong or bad. Ought, should not, wrong and bad are moral concepts. The law has nothing to do with morals as morals. What does the law say? The law merely says that if a man does not refrain from murder, rape, trespass, fraud, etc., through fear of force, then applied force will punish him by deprivation of life, liberty or property.²⁷²

For these critics, such views were better suited to Nazi Germany than to American law.²⁷³ Paul Gregg of Creighton summed up: "If totalitarianism ever becomes the form of American government, its leaders, no doubt, will canonize as one of the patron saints Mr. Justice Holmes."²⁷⁴

Ben Palmer, a Minnesota lawyer, continued the natural law assault on Holmes through the end of the war. His series of articles in the *American Bar Association Journal* began with the provocatively titled *Hobbes, Holmes and Hitler*.²⁷⁵ One of Palmer's complaints was that Holmes won over adherents not because he was right, but because he wrote so damna-

²⁷¹ See, e.g., FRANCIS P. LeBUFFE & JAMES V. HAYES, *THE AMERICAN PHILOSOPHY OF LAW* 20, 218-19 (1947) (citing Holmes's various works that display moral relativism and fundamental skepticism); John C. Ford, S.J., *The Fundamentals of Holmes' Juristic Philosophy*, in *PHASES OF AMERICAN CULTURE* 51, 57-58 (1942) (citing a passage from *The Path of the Law* as evidence of relativism and fundamental skepticism), reprinted in 11 *FORDHAM L. REV.* 255, 259-60 (1942); Francis E. Lucey, *Holmes—Liberal—Humanitarian—Believer in Democracy?* 39 *GEO. L.J.* 523, 542-43 (1951); Francis E. Lucey, *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 *GEO. L.J.* 493, 500 n.14, 503 n.19 (1942) (citing *The Path of the Law*) [hereinafter Lucey, *Natural Law*]; John C. Ford, S.J., *The Totalitarian Justice Holmes*, 159 *CATH. WORLD* 114, 118 (1944) (quoting Holmes).

²⁷² Lucey, *Natural Law*, *supra* note 271, at 514.

²⁷³ On the ascription of "positivism" to judges of the Third Reich, see INGO MÜLLER, *HITLER'S JUSTICE* 219-25 (Deborah Lucas Schneider trans., 1991).

²⁷⁴ Paul L. Gregg, *The Pragmatism of Mr. Justice Holmes*, 31 *GEO. L.J.* 262, 294 (1943). On the context of this critique of legal realism in general, and Holmes in particular, from 1936 to 1945, see EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY* 159-72 (1973).

²⁷⁵ Ben W. Palmer, *Hobbes, Holmes and Hitler*, 31 *A.B.A. J.* 569 (1945); see also Ben W. Palmer, *Defense Against Leviathan*, 32 *A.B.A. J.* 328, 328 (1946); Ben W. Palmer, *The Totalitarianism of Mr. Justice Holmes: Another Chapter in the Controversy*, 37 *A.B.A. J.* 809, 809 (1951).

bly well.²⁷⁶ Newspaper columnist Westbrook Pegler, in 1950, reduced the attack on Holmes to the level of personal abuse. Holmes was a “cynical and senile brutalitarian” with “no more morals than a pig,” “a vicious influence” who had become “the god of an evil cult.”²⁷⁷

At this point, Holmes’s “official” biographer Mark deWolfe Howe came to his defense.²⁷⁸ Howe did not deign to answer Pegler’s attack or the “theological” critique of the Catholic scholars. He deemed only Lon Fuller’s criticisms worthy of reply. Howe admitted that Holmes was a skeptic in matters of religious faith and morality, but blamed his moral skepticism on his harrowing Civil War experience.²⁷⁹ Howe regarded Holmes’s “bad man” as a mere device to “dramatize the suggestion,” for a student audience, that law should be distinguished from morality.²⁸⁰ He conceded Fuller’s point that the “bad man” had to take a good man’s view to understand the law. “[I]t is inconceivable,” Howe wrote, that Holmes could have meant to “ask lawyers to leave out of their predictions of what courts might be expected to do . . . all attention to the influence of morality on the minds of judges and jurors.”²⁸¹ He begged readers to accept at face value Holmes’s disavowal of cynicism. “[P]ossibly the dramatic image of the bad man was bound to distract the attention both of the speaker and the audience” but if so Holmes was guilty merely of an “artistic failure” to make himself clear.²⁸² Skepticism was not the same as cynicism.

Henry Hart responded to Howe’s article.²⁸³ The second half of *The Path of the Law* made sense to him, but the first half did not:

The conclusion there [in the first part of the talk] is that law is something entirely separate from morals, and that to see law truly we must look at it the way a bad man does. Why that helps, unless to make us more effective counsellors of evil, I have never understood. Do not lots of good men obey the law, even though they might not be caught, and is not that fact important? Could the law maintain

²⁷⁶ Palmer, *Hobbes, Holmes and Hitler*, *supra* note 275, at 570.

²⁷⁷ Westbrook Pegler, *Fair Enough*, BOSTON AMERICAN, Dec. 18, 1950, at 34, 45. Pegler’s column for the Hearst newspapers’ King Features Syndicate reached a wide readership. See OLIVER PILAT, PEGLER: ANGRY MAN OF THE PRESS 190, 278 (1963). In earlier columns, Pegler had attacked “the invisible government of the Harvard Law pro-Communist anti-American cult.” *Id.* at 17-18.

²⁷⁸ Mark deWolfe Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529 (1951).

²⁷⁹ *Id.* at 536-38.

²⁸⁰ *Id.* at 540.

²⁸¹ *Id.* at 542.

²⁸² *Id.* at 543.

²⁸³ Henry M. Hart, Jr., *Holmes’ Positivism—An Addendum*, 64 HARV. L. REV. 929 (1951).

itself if the fact were otherwise?²⁸⁴

"If law is simply the prediction of what the courts will do," Hart reasoned, then so long as judges continue to confuse law with morals, "must not the lawyers, to be good prophets, confuse law and morals too?"²⁸⁵ Holmes's "bad man" had to stop being bad as soon as he started figuring out how to predict what courts would do.

Howe wrote a rejoinder to Hart, seeking to demonstrate that "Holmes' path of the law does not any more lead them to destruction than it did the pathmaker."²⁸⁶ According to Howe, Holmes used the figure of the "bad man" in the first half of his speech to challenge the grip of traditional notions of absolute morality on the language of the law, and then in the second half, urged courts and lawyers to engage in "critical consideration of the human and variable purposes which society seeks to achieve through law." Hence, in Howe's view, the two halves of *The Path of the Law* could be reconciled in a proper reading of the work as a whole.²⁸⁷

From time to time in the past half century, interest in Holmes's "bad man" has resurfaced in various quarters. In the early 1970s, William Twining proposed that *The Path of the Law* might provide a starting point for a dialogue between the emergent jurisprudence of the radical left and the "bourgeois jurisprudence" that had dominated American legal thought since Holmes.²⁸⁸ A decade later, in the *Cornell Law Review*, William Wilcox subjected the "bad man" to the most sustained philosophical analysis to date.²⁸⁹ Members of the Law and Economics movement, for their part, have embraced the "bad man's" view of breach of contract as a model of rational behavior.²⁹⁰ Most recently, the one hundredth anniversary of Holmes's speech has provided a renewed occasion for examination of the "bad man" and his significance in legal thought.²⁹¹

²⁸⁴ *Id.* at 932.

²⁸⁵ *Id.* at 932-33.

²⁸⁶ Mark deWolfe Howe, *Holmes' Positivism—A Brief Rejoinder*, 64 HARV. L. REV. 937, 939 (1951).

²⁸⁷ *Id.* at 937-38.

²⁸⁸ William Twining, *The Bad Man Revisited*, 58 CORNELL L. REV. 275, 299-300 (1973).

²⁸⁹ William H. Wilcox, *Taking a Good Look at the Bad Man's Point of View*, 66 CORNELL L. REV. 1058 (1961).

²⁹⁰ See *supra* note 95. Judge Richard Posner has written that *The Path of the Law* "may be the best article-length work on law ever written." Richard A. Posner, *Introduction to THE ESSENTIAL HOLMES IX-X* (Richard A. Posner ed., 1992).

²⁹¹ See Symposium, *The Path of the Law After One Hundred Years*, 110 HARV. L. REV. 989 (1997). Other commentaries are in press. *E.g.*, THE PATH OF THE LAW IN THE TWENTIETH CENTURY (Steven J. Burton ed., forthcoming 1998); Symposium, 63 BROOK L. REV. (forthcoming 1997).

CONCLUSION

Holmes had another career on the United States Supreme Court and lived thirty-eight more years after writing *The Path of the Law*. He never repudiated his creation, the “bad man.”²⁹² He did not know the authority that his writings would acquire after his death, or the seriousness with which his brave sallies would be taken. He did not foresee the uses to which others would put his “bad man.”

Holmes’s famous “bad man’s view” has been one of the most influential and controversial ideas in *The Path of the Law*. Ironically, it is also the part of the speech least likely to have been meant to be taken seriously. Holmes’s willingness to shock, his playful cynicism, his flouting of conventional morality, his frustration with the stolid mediocrity he saw around him, and even his romantic idealism combined to escalate his rhetoric to new heights. But on the cold, flat printed page, stripped of the rich contextual flavor of the historical moment, irony is not always perceived for what it is. Holmes had his joke. And the joke is on us.

²⁹² Holmes revisited his “old friend the bad man” in 1915. In *American Banana Company v. United Fruit Company*, 213 U.S. 347 (1909), Holmes wrote for a unanimous Supreme Court. In the course of holding that the Sherman Anti-Trust Act had no application to United Fruit’s activities in Costa Rica, Holmes observed, “Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts. But the word commonly is confined to such prophecies or threats when addressed to persons living within the power of the courts.” *Id.* at 356-57. Here was the “law as prediction” theme from *The Path of the Law* and Holmes’s earlier writings. Commenting on the case in a letter to then-Professor Felix Frankfurter, Holmes added:

If you don’t want to mix up law with morals etc., (as you may, *qua* philosopher, but may not *qua* lawyer), you should approach it with a cynical mind—be a bad man and say I don’t care a damn about your approval or disapproval. All I want to know is what will happen (through the courts) if I do so and so.

Letter from Oliver Wendell Holmes to Felix Frankfurter (Nov. 4, 1915), in HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912-1934, at 37 (Robert M. Mennel & Christine L. Compston eds., 1996).