

## THE PATH OF THE LAWYER

*Robert W. Gordon\**

In Louisa May Alcott's *Eight Cousins*, first published in 1875, a young woman called Rose is being given a conventional girl's upbringing by her aunts in a dark and stuffy old mausoleum of a house. Then Uncle Alec becomes Rose's new guardian. He strides into the house, throws open the curtains and windows, and hustles his ward into the outdoors. He throws out her old confining clothes and buys her new ones, changes her diet, and with his vigorous scientific intellect begins helping her to clear her mind of received opinions. With the very first paragraph of *The Path of the Law*, we know Uncle Alec has arrived and that the old Victorian mansion will never be the same again.

What was that older world? Nineteenth-century lawyers liked to speak of law sitting "in the bosom of God, her voice the harmony of the world."<sup>1</sup> Lawyers had, as they saw it, a direct line to God's mind through their knowledge of the principles of legal science, which at their most abstract harmonized with the principles of morals and natural justice, as well as with tradition-derived principles of the common law. It was such knowledge of constitutional and private-law principles that supposedly equipped lawyers to be statesmen and social trustees, who could vindicate the rights of clients and the people at large and also steer them in the performance of their duties.

In *The Path of the Law*, Holmes, swinging his modernizing broom, seems impatient to sweep away all this piety as so much cobwebs. Law is not "a mystery but a well known profession" — *whisk*. A profession is just a job "people will pay" others to do — *whisk*. What lawyers are paid for is the "business" of showing clients how to avoid "danger" from the state — *whisk whisk*. He is at special pains to demystify the law by de-moralizing it — to arrive at what he calls a "business-like understanding of the matter." "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict . . ." "I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether." *Whisk whisk whisk*.

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<sup>1</sup> Richard Hooker, *Of the Laws of Ecclesiastical Polity*, in 1 *WORKS OF RICHARD HOOKER* 197, 285 (John Keble ed., 7th ed. 1888).

Once law's claims to be a moral science are out in the trash, next to go are its claims to being a "logical" one — that if we were "doing [our] sums right," we would get right answers. In fact, "[m]ost of the things we do, we do for no better reason than that our fathers have done them or that our neighbors do them, and the same is true of a larger part than we suspect of what we think." The main product of this delusion, that the habitual is the logical, turns out to be the most cherished object in the entire mausoleum, the fundamental law of the Constitution. What nineteenth-century judges had been elaborating as doctrines emanating from basic principles of liberty and property, Holmes contemptuously describes as "the comfortable classes of the community[']s] fear of socialism, "generalized into acceptance of the economic doctrines which prevailed about fifty years ago."

History and tradition are the next to go. For Holmes, the main reason to study history is that it *disabuses* us of tradition, by revealing that traditional forms are often irrational "survivals" of practices rooted in the power politics and dominant assumptions of past times — perpetuated into our own by blind imitation, distortion, and overgeneralization, and above all by spurious rationalization. History is a rubbish-clearing enterprise.

But if everything musty in the old house is to go, how will it be refurbished? The most obvious candidates to replace the lawyer as moralist and curator of worn-out traditions were clearly these: the lawyer as neutral predictor of the output of courts and the lawyer as policy analyst and utilitarian social engineer. Thus at any rate have most subsequent generations — with varying degrees of approval and horror — read the message of *The Path of the Law*.

Probably the most common reading of the speech is that it sets forth a purely positivist theory of law — a deflated, de-moralized, "disenchanted" view (to use Max Weber's term) of the legal system. To those who like this view, the "bad man" is just the rational man — *Homo law-and-economicus* — who treats all legal rules as prices on conduct. To less approving eyes, Holmes recommends that the lawyer regard the legal system in a wholly alienated and instrumental fashion — not as a set of norms established for common membership in a political community, nor an attempt to realize (however imperfectly) ideals of justice or social integration, but simply as random and arbitrary outputs of state force, which are opportunities for or obstacles to realizing his client's self-interested projects. To Holmes's fiercest critics, he seems to be arguing that state-enforced Might is Right.

The second *Path* is more active and constructive than the task of predicting the-law-as-it-is: the task of making conscious and articulate the social purposes that legal rules have been fashioned to serve, to assess through study of actual effects how effectively those purposes are served, and to reform the law to make it serve those purposes more efficiently. Liberal Progressives took this as encouragement to

expose the reactionary and obsolete social and economic theory ("Mr. Herbert Spencer's *Social Statics*," in the memorable phrase of Holmes's *Lochner* dissent<sup>2</sup>) lurking in constitutional principles and as support for their program of redistributive social legislation. More recently, neoclassical legal economists have taken it as prefiguring their program of restating the latent functions of law as promoting "efficiency" and reforming such law as is inefficient.

Yet the neutral predictor and policy engineer are only pieces of a complex whole. Holmes in *The Path* is not putting forward a theory of law, but rather (to paraphrase Wallace Stevens) thirteen ways of looking at law — sketches of approaches to the legal system that will present it in a new light.

Take the "bad man" and the "prediction theory." This can't possibly be a theory that law has no moral content. "The law is the witness and external deposit of our moral life," Holmes says in *The Path*, and elsewhere makes it clear that the law of any age is saturated with "prevalent moral and political theories" as well as "[t]he felt necessities of the time."<sup>3</sup> No, he is inviting his audience to adopt a perspective for a limited purpose: when analyzing legal doctrine, disregard all the moral-sounding phrases in legal language — "malice," "fault," "intention," "right," "duty." Dig beneath those phrases to find what circumstances trigger the liability and what remedies actually attach; then redescribe the rule in language that avoids the imprecision of the moralistic phrasing. The "bad man" turns out to be one of Uncle Alec's practical jokes — a deliberate provocation, a device to shock the audience out of complacency and into an enquiring state of mind.

So too with the trashing of tradition. Is Holmes really a modernizing iconoclast, ready to bury the dead past to build a brave new utilitarian present? Hardly: as a judge he was slow to innovate, believing that the existing law "has the final title to respect that it exists, that it is not a Hegelian dream, but a part of the lives of men." Holmes as proto-Posnerian lawyer-economist is more plausible than Holmes as Progressive-liberal. For Progressives, policy science was a means of mastering necessity, understanding the structural determinants of poverty, vice, urban squalor, alcoholism, prostitution, political corruption, monopoly power, and "wasteful competition," in order to conquer them as public health science had conquered epidemic disease. For Holmes, however, science pointed chiefly in the opposite direction, to recognition of the limits necessity imposes. There is perhaps no theme Holmes sounds more often than that science teaches hard lessons of scarcity and the limits of social intervention. Like the judges he made fun of, Holmes was echoing "the economic doctrines [of] fifty years ago," in this case those of Thomas Malthus.

<sup>2</sup> *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

<sup>3</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881).

Yet *The Path of the Law* as a manifesto for Chicago efficiency engineers is not wholly convincing either. To be sure, Holmes gave much thought and energy to a utilitarian project, the reform of tort law. But he was only sporadically a utilitarian. Unlike modern economists, he did not see the common law or social life generally as the outcome of efficiency-enhancing evolution. Legal history was a long record of struggle among contending power blocs, activated as much by irrational instincts, ideals, ideologies, religions, and the will to power as by rational self-interest. Even more important, though committed to working for gradual improvements in the rationality of the legal system — Holmes was scornful of the dream of rational social happiness. His greatest enthusiasm was reserved for the irrational, reckless quest for the unattainable.

And it's in celebration of that quest that *The Path of the Law* concludes. The tough talk that opens the speech is meant to bring listeners back down to reality, have them feel the hard and dirty ground under them for a moment — but then to raise their eyes to a farther horizon:

How can the laborious study of a dry and technical system, the greedy watch for clients and practice of shopkeepers' arts, the mannerless conflicts over often sordid interests, make out a life? . . . If a man has the soul of Sancho Panza, the world to him will be Sancho Panza's world; but if he has the soul of an idealist, he will make — I do not say find — his world ideal.<sup>4</sup>

He fought against the reduction of the goal of law practice to making money: “[H]appiness . . . 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.” To the extent that *The Path of the Law* is a vocational address, its real subject is that of the lawyer in the exercise of the higher faculties of his calling as thinker or scientist.

A “business-like understanding of the matter” teaches that law is about predictions of the incidence of public force, and not about morality. Yet by the end, Holmes is telling us that he venerates the law as a calling of *thinkers*, who by grasping the “remoter and more general aspects of the law” may become “master[s] [of their] calling,” and “connect [their] subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.”

The speech thus reenacts the narrative of Holmes's own journey — perhaps in the battlefields of the Civil War, perhaps earlier — from loss of faith in ideals and morals toward a newfound faith of the scientist and the soldier. Talking about law as an expression of or means

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<sup>4</sup> Oliver Wendell Holmes, *The Profession of the Law*, Lecture to Undergraduates of Harvard University (Feb. 17, 1886), *reprinted in* 3 *THE COLLECTED WORKS OF JUSTICE HOLMES* 471, 471–72 (Sheldon M. Novick ed., 1995).

of enforcing moral standards is delusive cant: understood socially, law is a resultant of power, instinct, and need; understood historically, law has for centuries been disposing of its notionally moral content in favor of "objective standards"; for the practicing lawyer with clients to serve, law is simply predictions of where and when the public axe will fall. But this disillusioned, de-moralized view leads on not to cynicism but to glory: "If we think of our existence not as that of a little god outside, but as that of a ganglion within, we have the infinite behind us. It gives us our only but our adequate significance."<sup>5</sup> The tough-minded scientific naturalist who is willing to stare brute facts — such as the fact of human insignificance — fully in the face is a Stoic hero. Holmes liked to compare him (himself, really) with the great Arctic explorers: "if he is a man of high ambitions he must leave even his fellow-adventurers and go forth into a deeper solitude and greater trials. He must start for the pole. In plain words he must face the loneliness of original work."<sup>6</sup> He is a hero not just because he can face the cold, unfeeling universe without flinching, but also because he can use his intelligence to investigate the larger whole, to "catch . . . a hint of the universal law." Ultimately the "abstract speculation[ ]" of great thinkers like Descartes or Kant is the most practical activity of all, because of its power of "controlling the conduct of men" for centuries to come.

Holmes's is a grand ambition. Yet my reaction to it is something like Max Beerbohm's to the ant: "The ant sets an example to us all; but not a good one."<sup>7</sup> Holmes is most inspiring, and useful, in his endorsement and demonstration of the practical role of theory, the critical and emancipating uses of history, and the importance of understanding and evaluating doctrines, decisions, and legislative reforms in terms of their likely costs and consequences. He seems (to me anyway) a much more accurate and penetrating observer of society and the legal system than either his Progressive or his lawyer-economist acolytes — much more acutely aware of the pervasiveness of power relations and coercion in social life, and of the fact that people fight and oppress and rise up for ideals as often as for material interests. Moreover, though fastidiously repelled by the philistine business and political cultures of post-bellum America and most at home in English intellectual circles, he made his career among Boston practical men, lawyers and businessmen who distrusted any show of intellectual intensity. He remained in the public world, rather than withdrawing to become a pessimistic Cassandra like his friend Henry Adams, or an expatriate-aesthete like his friend Henry James and contemporary

<sup>5</sup> Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 43-44 (1918).

<sup>6</sup> Oliver Wendell Holmes, Address at Brown University Commencement (1897), *reprinted in* 3 COLLECTED WORKS, *supra* note 4, at 517, 518.

<sup>7</sup> DAVID CECIL, MAX 345 (1964) (quoting a notebook kept by Max Beerbohm around the time of World War I) (internal quotation marks omitted).

George Santayana. He was spared such a withdrawal and impelled to a life of social usefulness by his aristocratic and Puritan sense of duty — as well I think by Victorian masculinity and the cult of the strenuous life.

Still, as a guide to law as a vocation — though certainly far superior to the promoters of the unabashedly privatized profit-seeking ethic that emerged in Holmes's time and dominates ours — Holmes is strangely disappointing. Though acknowledging that legal actors and decisionmakers have discretion to choose, more often than not he urges them to defer to power even more than their role requires, to be passive instruments of society's or clients' ends rather than active forces to help refigure and transform those ends. He discards the traditional roles for lawyers as seekers of justice, social mediators, and curators of the legal framework; and although he substitutes for those roles an undoubtedly valuable role as consequentialist policy analyst, he doesn't expect lawyers to do much with the role except temper the ambitions of reform movements. His ultimate ethic is one of isolated acts of heroic intellectual achievement. But if there is to be spring-cleaning in the Heartbreak House of the law, it will have to come from efforts both more collaborative and more engaged.