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THE PATH AWAY FROM THE LAW

*Richard A. Posner**

Among the questions that came to mind when I reread Holmes's famous article for this memorial, two are salient: why it is *so* famous, and whether it has anything to say to us or is merely a museum piece. The first question is easier to answer. The striking aphorisms (such as, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law"; "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"; "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") are part of the answer. Another part of the answer is just who Holmes *is* — not who he was in 1897, a state supreme court judge, but what he was fifty years later and still is: the preeminent figure in the history of American law. And there is more to explain the article's fame: the beauty of its prose, the striking combination of breadth and brevity, and most of all, perhaps, the root-and-branch attack on formalism — Holmes's most thoroughgoing and memorable; an attack that set the agenda for legal realism and for postformalist legal thought more generally.

The more difficult question is whether the article speaks to *us*. (If it does not, why reprint it in a law review, as distinct from a journal of legal history, to mark its centenary?) Not all famous law review articles do. An article in the *Harvard Law Review* that has been cited even more frequently than *The Path of the Law* — Wechsler's article on neutral principles¹ — does not.² Anyway, a mature science is supposed to forget its founders. Well, law is not a mature science, if it is a science at all, and I think we can still learn from *The Path of the Law*.

From a perspective shaped by the dramatic recent changes in legal practice and legal thought, we can now see that Holmes's article mounted an even more radical challenge to accepted thinking about

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¹ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). For the citation count, see Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 767 tbl.1 (1996). Wechsler's article is in second place, Holmes's in fifth—but Holmes's was published 62 years earlier. The other three articles that outrank Holmes are even more recent. See *id.* *The Path of the Law* is thus the most cited law review article published before 1959.

² See RICHARD A. POSNER, *OVERCOMING LAW* 70–80 (1995).

law than he, or at least his audience, could have realized.³ The article advances what I shall call the “supersession thesis.” This is the thesis that law as Holmes knew it, and as we largely know it still, is merely a stage in human history. It followed revenge, historically, and it will be succeeded at some time in the future by forms of social control that perform the essential functions of law but are not law in a recognizable sense, although they are latent in law, just as law was latent in revenge.

Law in the recognizable sense, the sense that will eventually be superseded, is continuous with morality. It enforces a subset of moral duties that is determined by considerations of feasibility and by the cost and efficacy of alternative methods for securing compliance. So it enforces some but not all promises and punishes deliberate and careless injuries but not, for example, failures to be a good Samaritan and rescue people in danger. Still, law is saturated with moral terms. And the morality with which it is continuous is Christian or Kantian, and so gives primacy to intentions and other mental states bearing on culpability, rather than focusing, as the ancient Greeks did, primarily on results. Law is also traditional — today we would say “path dependent.” The judges have a duty to enforce the political settlements made in the past. A related point is that law is “logical,” meaning that new doctrines can be created only by derivation, whether by deduction, analogy, or interpretation, from existing doctrines.

This traditional conception of law, which is as orthodox today (I might have been paraphrasing Dworkin’s legal theory) as it was a century ago, Holmes seems to have regarded as epiphenomenal, dispensable, obscurantist, and transitory. This is the argument of *The Path of the Law* as I see it: People care what the law is because judges have been empowered to decree the use of overwhelming force, and a prudent person wants to know how to avoid getting in the way of that force. From this standpoint all that matters is being able to predict

³ One mustn’t be fooled by Holmes’s old-fashioned appearance and “Boston Brahmin” heritage. He was a futurist, an evolutionist, an iconoclast, and an optimist:

I think it not improbable that man, like the grub that prepares a chamber for the winged thing it never has seen but is to be—that man may have cosmic destinies that he does not understand. . . . I was walking homeward on Pennsylvania Avenue near the Treasury, and as I looked beyond Sherman’s Statue to the west the sky was aflame with scarlet and crimson from the setting sun. But, like the note of downfall in Wagner’s opera, below the sky line there came from little globes the pallid discord of the electric lights. And I thought to myself the Götterdämmerung will end, and from those globes clustered like evil eggs will come the new masters of the sky. It is like the time in which we live. But then I remembered the faith that I partly have expressed, faith in a universe not measured by our fears, a universe that has thought and more than thought inside of it, and as I gazed, after the sunset and above the electric lights there shone the stars.

Oliver Wendell Holmes, *Law and the Court*, Speech at a Dinner of the Harvard Law School Association of New York (Feb. 15, 1913), in *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.* 145, 148 (Richard A. Posner ed., 1992).

how the judges will rule given a particular set of facts, and this is why people consult lawyers. Statutes and judicial opinions provide the materials for the prediction. The predictions of what the courts will do is really all there is to law. Morality is neither here nor there. A bad man cares as much about keeping out of the way of state force as a good man. And because law and morality are frequently discrepant, the law's use of moral language is a source merely of confusion and it would be good to banish all such language from the law. For example, while both law and morals use the word "duty" a lot, the legal duty to keep a promise is merely a prediction that if you don't keep it you'll have to pay any damages that your promise-breaking imposes on the promisee. The law doesn't care about intentions or other mental states. It enforces contracts if the parties signify assent, whether or not they do assent. And words like "intent" or "negligence" as used in the criminal law denote degrees of dangerousness, nothing more. The moral and mentalistic baggage of the law is connected with the fact that the basis of most legal principles is tradition. This is to be regretted; the only worthwhile use of history in law is to debunk outmoded doctrines by showing them to be literally vestigial. Judges should understand that the only sound basis for a legal rule is its social advantage, which requires an economic judgment balancing benefits against costs. If the law submitted to instruction by economics and the other social sciences, we might find the tort system replaced by a system of social insurance, and the system of criminal law, which is based on a belief in deterrence, replaced by a system in which the methods of scientific criminology would be used to identify and isolate (or even kill) dangerous people.

Holmes pauses in places to reassure his audience that he is not being cynical or disrespectful about the law. But, revealingly, the "final title to respect" of the law in his view is not that it is good but merely that "it exists," which connects up with the invocation of force with which the article began. The law is merely a system of force, and the force should be directed with a view to the maximum social advantage. There is nothing more to law than this but the barnacles.

I think that this brief summary will show that critics of Holmes are wrong to argue that the prediction theory of law is incomplete or incoherent because the judges of the highest courts cannot use it to make their own decisions. They cannot; that is true. But in Holmes's view as articulated or implied in *The Path of the Law*, what judges do is not law in any sense that the legal professional will recognize. What judges do is sometimes mindless standpattism and sometimes voting their fears, but sometimes, and ideally, it is weighing costs and benefits, though doubtless with some regard (much emphasized in Holmes's judicial opinions) for avoiding rapid changes of front that

would make it difficult for lawyers to predict the outcomes of new cases.

Was Holmes correct that what we think of as law is just a mask that may confuse the wearer but that has no social function in modernity? A skin that ought to be stripped away to reveal a policymaking apparatus that could be improved if only it were recognized for what it is? That is a large question to which I cannot begin to do justice in so short a space; but for what it is worth I think that Holmes was largely but not entirely right. There is a lot of needlessly solemn and obfuscatory moralistic and traditionary blather in judicial decision-making and legal thought generally, and it is extremely helpful in dealing with legal issues always to try to peel away the conventional verbiage in which the issues come wrapped and look concretely at the interests at stake, the purposes of the participants, the policies behind the precedents, and the consequences of alternative decisions. But Holmes overlooked two important points. The first is that the more law conforms to prevalent moral opinions, including the moral opinions of relevant subcultures such as the commercial community, the easier it is to understand and comply with. The people subject to the law can avoid coming into conflict with it just by acting the part of well-socialized members of their community. The second point, which Holmes could not have understood because it is a lesson of totalitarianism, is that the maintenance of a moral veneer in the law's dealing with the people subject to it, especially the antisocial people subject to it, offers a first line of defense against excesses of official violence. It is not healthy to treat even disgusting criminals as animals, an idea Holmes toyed with in the *The Path of the Law* when he said, "If the typical criminal is a degenerate, bound to swindle or to murder by as deep seated an organic necessity as that which makes the rattlesnake bite, it is idle to talk of deterring him by the classical method of imprisonment. He must be got rid of . . ." Excluding a class of human beings from the human community can become a habit and spread from criminals to ne'er-do-wells to the sick and the aged and the mentally disturbed or deficient. ("Three generations of imbeciles are enough."⁴) By this route, civilization can unravel.

But it would be wrong to end on a negative note. *The Path of the Law* retains a remarkable freshness, brimming with insights that illuminate today's legal system as much as or more than that of the nineteenth century. The evolution that Holmes foresaw is far from complete, but it is well in train. The growth of bureaucracy in all phases of law; the rise of economics in law and the broader interdisciplinary transformations of legal scholarship; the unmasking of legal pretensions by legal realism and successor movements; increased specialization and use of technology, both auguring the demise of a gen-

⁴ *Buck v. Bell*, 274 U.S. 200, 207 (1927) (Holmes, J.).

eral legal culture; and the movement toward the deregulation of legal services and the concomitant deprofessionalizing of the practice of law and the rise of law firms modeled on business corporations — all these developments can be seen, through the lens supplied by *The Path of the Law*, as way stations toward a future that Holmes first glimpsed. He thought lawyers were in the business of making “prophecies”; his article is a prophecy, and it is coming true.