The Path of the Law and Its Influence

The Legacy of Oliver Wendell Holmes, Jr.

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

robert w. gordon*

In Louisa May Alcott's *Eight Cousins*, first published in 1875, a young woman called Rose is being given a conventional girl's upbringing by her aunts, in a dark and stuffy old mausoleum of a house. Then Uncle Alec becomes Rose's new guardian. He strides into the house, throws open the curtains and the windows, and hustles his ward into the outdoors. He throws out her old confining clothes and buys her new ones, changes her diet, and, with his vigorous scientific intellect, begins helping her to clear her mind of received opinions. With the very first sentence of *The Path of the Law* – "When we study law we are not studying a mystery but a well-known profession" – we know Uncle Alec has arrived and that the old Victorian mansion will never be the same again.

I. The Nineteenth-Century Vocational Address

Holmes's speech is all the more visibly iconoclastic because it fits into a familiar nineteenth-century form. The lawyers of Victorian America cherished the vocational address. At law school commencements, gatherings of the bar, or memorial services for colleagues, the lions of bench and bar improved the occasion with speeches on the lawyer's calling and his duty to that calling. Alien though these hundreds of orations are to the modern ear, repellent at times in their self-importance and hypocrisy, they reveal something admirable, too: a profession struggling to span the abyss between its high-sounding ideals and what so often seem its dull, trivial, and even sordid quotidian practices, to express an idea of law as a calling that could lead a man to honor, social usefulness, and self-respect.

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The standard address points the novice toward a high road of practice and warns him off a low road. Law, as ideally practiced, was a science of principles. Principles were generated by induction from particulars, decided cases, which vaguely partook – by proximity as it were – of the traditional authority of top–down natural law principles, as well as of the authority of modern science. Cases also drew their authority from the common law, that slow, organic growth that gradually adapts to changing social needs and circumstances. Science was to be enhanced by liberal learning: the ideal lawyer was educated both in broader legal fields, for comparative and historical perspective – the civil law, the Roman law, and the law of nations – and in liberal studies outside the law: classics, literature, the history of ancient and modern republics.

Besides learning, the upright lawyer possessed character acquired by experience, especially the experience of being entrusted with his clients' money and secrets, and the responsibility of counseling people in trouble and perplexity. "He sees domestic tragedies and domestic comedies – the effects of prosperity and adversity – the home countenance and the mask of society – the open and closed chambers in men's bosoms."[1] These personal attainments translate into social virtues. By training and experience, the lawyer is peculiarly fitted to assume the role of trustee of the basic framework of society – the system of rules that protects individual rights, and the system of legal relations and duties that protects organic social bonds. As an advocate, the lawyer helps clients to vindicate their legal rights. But the lawyer also represents the law, the system of principles, rules, rights, and obligations that holds the social order together. "This leadership of the lawyer is not accidental nor enforced, but natural and resulting from his relations to society. That which binds society together, and makes possible its successes and its blessings, is the mystic force which we call 'law.'"[2] He educates and guides clients in the performance of their legal obligations. He is an expert adviser to the judiciary in the interpretation of the laws and (through law reform movements and institutions) to the legislature. Through judicial review the private lawyer is connected with the highest functions of statesmanship, even the bringing of majority will before the altar of Constitutional principle.[3]

The lawyer might well crown his career by becoming a judge himself and was of all professionals most likely, as well as most fitted, to become a legislator; but even as a private lawyer, he was a statesman. "[W]hile lawyers, and because we are lawyers, we are statesmen."[4] In his key social roles – vindicator of rights and upholder of social order – the ideal lawyer is a mediator between extremes of ideology and faction. As a private lawyer, he protects the rights of individual property and liberty from the overbearing forces of the state and other private interests. As a statesman – judge, legislator, official adviser to courts, legislatures and officials, civic activist, and counselor to clients – his job is to ward off the twin dangers of populism (leveling and redistributive impulses) and special interests (demands by the powerful on the state for monop-

olies, privileges, subsidies and exemptions, and corruption of courts and officials to obtain them) that threaten those rights.[5] He is a conservator of legal institutions and principles, but not a reactionary; a reformer equipped to adapt law to keep pace with changing social needs and views, but not a radical. Above all – by virtue of his ability to see matters from all sides but remain independent from all partisan factions and interests – the lawyer may serve as a peacemaker and compromiser, a calmer of personal and social passions, who counsels overexcited clients to avoid litigation and overheated social movements to refrain from destroying the organic social bonds of custom, reinforced by law, that hold the social fabric – and the national union – together.

These addresses admonish as well as celebrate. They point the finger at the all too prevalent departures from the ideal, the lawyers who bring the bar into deserved disrepute. The regular villains fall into three types. (1) the unscientific lawyer, incapable of statesmanship because epistemologically challenged: the mere "case lawyer" or "book lawyer, the man of forms, and cases, and black-letter lore, and of nothing else,"[6] who can argue only by close analogy and pile up citations favoring his partisan cause – unable even to perceive the broader principles at issue in his cases. (2) The lawyer who is in the profession only to make money. Lawyers' "obligations as citizens, professional dignity, personal character, the refinements of society and home – of what value are they to those whose life, whose passion, whose God, is GOLD, and the political emolument and sensual pleasures which it secures?" asked the New Jersey lawyer Joseph Jackson in 1859. "Avarice, more than all other causes combined, defeats justice, impairs the usefulness of the bar, and sinks too many of its followers almost to the level of Satan himself."[7] (For instructive contrast, the speakers pointed with lugubrious relish to lawyers who amassed fortunes but left no record of accomplishment, unlike lawyers who cared little for money and died poor but acquired honor and reputation.) (3) Finally – and perhaps most surprising, to the modern ear – the lawyer is reproached who allows himself to become the mere unthinking instrument of clients' passions and partisan ends, however senseless or unworthy. Lawyers who argued that the private bar served justice and other important public purposes by vindicating their clients' private rights had, of course, to deal with the reality that some clients seek to avoid justice or wreak injustice upon others. The dominant solution of modern lawyers to this dilemma, the doctrine of unswerving partisan loyalty, was roundly rejected. The famous admonition of Lord Brougham to the effect that the lawyer must fight for his client, heedless of any other interest in the universe,[8] was often quoted, but invariably with disapproval. Lawyers were much more likely to agree with Simon Greenleaf:

> While our aid should never be withheld from the injured or the accused, let it be remembered, that [. . .] our duties are not concentrated in conducting an appeal to the law; – that we are not only lawyers, but citizens and men; – that our clients are not always the

best judges of their own interests, – and that having confided these interests to our hands, it is for us to advise to that course, which will best conduce to their permanent benefit, not merely as solitary individuals, but as men connected with society by enduring ties.[9]

No one argued that lawyers were morally unaccountable for clients' conduct. On the contrary,

If his client presses [the lawyer] . . . [to] direct him as to future conduct, he must, as a moral and accountable being, point that client's feet into paths that lead to justice, not toward wrong and oppression . . . Should he [. . .] favor the unjust schemes of a bad client, he becomes equally guilty with him; as much as if they two had originally conspired in malicious scheming.[10]

The stakes, as pictured in these addresses, were extremely high, the alternatives stark. If law was not practiced as an "elevated science" and social trusteeship, it was a "pernicious and driving trade."[11] "Better than any other . . . position or business," said Rufus Choate, in one of the best-known and most-quoted speeches, the lawyer's "profession enables him to *serve the State*," and it is this and only this that

raises [law] from a mere calling by which bread, fame and social place may be earned, to a function by which the republic may be served. It raises it from a dexterous art and a subtle and flexible science – from a cunning logic, a gilded rhetoric, and an ambitious learning, wearing the purple robe of the sophists and letting itself to hire – to the dignity of almost a department of government – an instrumentality of the State for the well-being and conservation of the State.[12]

To be sure, the power of these vocational addresses to command a modern reader's sympathy has its limits. Some of them are the wails of wounded aristocrats fallen among a democratic people who are inexplicably unimpressed with polish and refinement; or of wounded intellectuals among a commercial people who want law to help them get on with business, without much caring about its theory and history; or just of elite lawyers anxious to differentiate their status from – and deflect public criticism onto – lower-order practitioners. And one often suspects that the reform effort too often begins and ends with the ceremonial speeches themselves; that is, that they are Sunday sermons for wealthy Anglicans, uplifting the worshipers by the reminder that they are vaguely connected to a higher world of thought and action but need take no action except to savor the connection.[13] More subtly still, one could see the vocational addresses as performing the function that Perry Miller attributed to Puritan jeremiads, which were

more than a hypocritical show, more than a rhetorical exercise. They were necessary releases, they played a vital part in the social evolution because they ministered to a psychological grief and a sickness of the soul that otherwise could find no relief . . . They were social purgations, enabling men to make a public expiation for sins that they could not avoid committing, freeing their energies to continue working with the forces of

change. [. . .] [The people] knew inwardly that they had betrayed their fathers, or were betraying them; they paid homage to them in the ceremony of humiliation and thus regained something of their self-respect, though paradoxically they had to acquire it by confessing their iniquities.[14]

II. Holmes the Destroyer

The Path of the Law is also a vocational address, but one in which Holmes makes it clear he has come to clean house. Swinging his modernizing broom, Holmes attacks the older tradition as so many cobwebs. Law is "not a mystery but a well-known profession" – *whisk.* A profession is just a job "people will pay" others to do[15] – *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 "businesslike understanding of the matter."

A legal duty so called is nothing but a prediction that if a man does, or omits certain things he will be made to suffer in this or that way by judgment of the court – and so of a legal right . . . 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.[16]

He goes out of his way to endorse the view of "our friend, the bad man":

I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law. ("Path," 393)

and to express outright hostility to the use of moral language to define legal liabilities:

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. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can. (394)

I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether . . . We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought. (396)

Whisk, whisk, whisk.

Once the law's claim to be a moral science is out in the trash, next to go is its claim to be a logical one – "the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct," that "if [we were] doing [our] sums right," we would get right answers (396). In fact, "[m]ost of the things we do, we do for no better reason than that our fa-

thers 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" (398). "Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding" (397). 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 fear of "socialism" felt by "the comfortable classes of the community . . . generalized into acceptance of the economic doctrines which prevailed about fifty years ago" (398).

History and tradition are the next to go. For Holmes, the main reason to study history is that it disabuses us of our reverence for 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 – the invention and reinvention of novel policy rationales for outdated doctrines. Holmes recommends the study of history primarily to cure the bar of its backward-looking orientation. "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" (399). Once we are rid of blind reverence for the past, he looks forward to the time when "the part played by history in the explanation of dogma shall be very small" (402–3).

But the most dramatic contrast between *The Path of the Law* and the standard vocational speech is not in what is mocked but what is missing. Nowhere here is there any reference to the lawyer as minister of justice or trustee for his clients or for society at large – the lawyer as protector of rights, as force for conservative order or as far-seeing legal statesman, as mediator between classes or between capitalism and democracy. After everything Holmes has said of the law's empty chatter about morals and rights and duties, its purported sanctification by tradition and the teleology of progress, and its purported rational content as a deduction from conceptual axioms, this omission is hardly surprising. He would seem to have shredded all of the fancy costumes in which nineteenth-century lawyers tried to dress up their profession.

III. Holmes the Creator

But if everything musty in the old house is to go, how will the house be refurnished? When Uncle Alec has finished clearing Rose's mind of cant, what does he encourage her to learn instead? The most obvious candidates to replace the lawyer as moralist and curator of worn-out traditions, as mouther of high-sounding but imprecise generalizations, as unselfconscious retailer of outmoded prej-

udices and policies, 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, demoralized, "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, risks of sanctions to be discounted by the probability of enforcement, data for cost–benefit analysis. On this reading, Holmes anticipates the great shift – not completed until nearly our own time – in professional self-conceptions from exemplary character and social trusteeship to instrumental expertise.[17] 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 as 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.

A second interpretation views *The Path of the Law* as promoting a more active and constructive task than that 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 in actuality, 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) lurking in Constitutional principles and as support for their program of redistributive regulation. 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 although the neutral predictor and policy engineer are obviously elements of Holmes's vision, they are only pieces of a complex whole. Holmes in *The Path of the Law* 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 present it in a new light.

Take the "bad man" and the "prediction theory." The latter cannot 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 of the Law* (392), and elsewhere makes 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 . . . intuitions of public policy, avowed or unconscious, even the prejudices which judges

share with their fellow-men."[18] Nor can this plausibly be supposed to be a realist's description of law practice. The lawyer as neutral predictor is too neutral for belief. He may not be a moralist, but he is not an advocate or strategist either. As Holmes, who had practiced law for fourteen years, must have been aware, the corporate lawyer of the 1880s and 1890s was, even less than his present-day counterpart, a passive analyst of the law: he was an active shaper of it, a drafter of bills favoring his clients and a lobbyist to push them through legislatures; a bargainer with regulators, flatterer of judges, seducer of juries; a skilled artificer of law and fact, crafting narratives and arguments to influence interpretations; a strategic manipulator of procedural tactics designed to inflict costs and delays on adversaries.[19]

More fundamentally, the "bad man" may be amoral himself, but the lawyer hoping to advise him cannot, as a practical matter, ignore the fact that the legal system incorporates many moral norms and judgments and that legal decision makers may be morally outraged by the bad man's conduct – that a jury may see his case as an occasion to "send corporate America a message" or treat a deliberate and opportunistic breach of contract as more reprehensible and requiring a severer sanction than an inadvertant breach. To the extent that the legal positivist aims at an accurate description of the content of the legal system, he must ignore the positivist who wants to separate law from morals. If he tries to "understand the law and nothing else," he will never understand the law in operation.

It makes more sense to read Holmes as recommending a heuristic for a very limited purpose: when analyzing legal doctrine, which is only part of a modern lawyer's job, disregard all of the moral-sounding phrases in legal language – "malice," "fault," "intention," "right," "duty"; dig beneath those phrases to find out what for each rule is the set of circumstances that triggers the liability and what sanctions 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 a complacent and into an enquiring state of mind.

IV. *The Path of the Law* and the Profession Today

In our own day, of course, a wholly de-moralized view of the lawyer's role has achieved wide currency. In this view, which began to creep into professional rhetoric around 1900 but was not firmly established until very recently, the practice of law is almost completely privatized, shorn of all of its public functions save a thin residue of the "officer-of-the-court" duty of candor to tribunals. Law as a system of public values is no longer supposed to concern private lawyers in their ordinary work: those public aims are relegated to the specialized province of policymakers and judges. It concerns private lawyers only in their optional after-hours *pro bono* efforts. Lawyers and their work are often evalu-

ated by a strictly commercial metric. Public boasts made by managers of great law firms, assessments of lawyers by the legal press, surveys of lawyers asking which have the highest status in the profession – all rank firms by the income they generate for partners, and rank lawyers by the status of their clients and by their wins for clients, regardless of how dubiously achieved and of damage to others and the public.

But it would be wrong to identify Holmes with the privatized and commercialized ethic of (a significant segment of) today's profession. The tough talk that opens *The Path of the Law* means to puncture the pompous balloons of a rhetorical tradition, but not for the purpose of disenchanting the lawyer's calling, of which, as we shall see, Holmes actually held a highly romantic, indeed Quixotic, view. The initial deflation is meant to bring listeners back down to reality, have them feel the hard and dirty ground beneath them for a moment – but then to raise their eyes to a farther horizon. Holmes's ultimate purpose is not to deflate, but, no less than the tradition he mocks, to exalt the lawyer's calling – to point to a mode and spirit of engagement with law that lifts it above the humdrum and sordid. This was one of his abiding preoccupations.

> How can the laborious study of a dry and technical system, the greedy watch for clients and practice of shopkeeper's arts, the mannerless conflicts over often sordid interests, make out a life? . . . They are the same questions that meet you in any form of practical 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.[20]

Holmes fought against the reduction of the goal of law practice to making money by his characteristic method of frankly acknowledging the prevalence and even the validity of commercial motives but then appealing to something beyond them:

> The object of ambition, power, generally presents itself nowadays in the form of money alone. Money is the most immediate form, and a proper object of desire. "The fortune," said Rachel, "is the measure of the intelligence." That is a good text to waken people out of a fool's paradise. But, as Hegel says, "It is in the end not the appetite, but the opinion, which has to be satisfied." To an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas . . . We cannot all be Descartes or Kant, but we all want happiness. 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 foods besides success.[21] ("Path," 405–6)

The problem for Holmes is that, as we have seen, he has placed skeptical roadblocks across all of the generally recommended paths for those who would seek meaning and value in the lawyer's work. For him, the notion that the search for universal scientific laws will ultimately reveal a cosmic moral order is a pathetic anthropomorphic conceit. "We are in the universe, not it in us." Nor can

legal principles, rightly understood, be regarded as organic social bonds holding society together: rather, they express conflicting forces locked in perpetual struggle. Rights are only what significant social blocs, "the crowd," are "willing to die for." Legal tradition is not a source of experience perfected or principles maturing over time, but a mass of survivals maintained through fictions and confusions, at best worth keeping only because people have come to rely on them. There seems little scope in such a world for the lawyer-statesman.

V. The Lawyer's Vocation

Nevertheless, in *The Path of the Law* and other speeches and writings Holmes consistently advances quite a redemptive view of the lawyer's calling in a disenchanted world. He puts forward two broad ideal conceptions of the calling, envisioning the lawyer as (1) the soldier, or "jobbist," to use Holmes's own term, and (2) the "thinker," or scientist, exploring new territory. The second category must be broken down into several others: the "abstract" or "impractical" student of the law, on the one hand, and several "practical" kinds of thinker, on the other, including the legal-doctrinal theorist, the critical legal historian, and the master of social science (or the "science of legislation," to use a term then in general use). Finally, there is the superthinker, or great speculative philosopher, who, ironically, ultimately exercises the greatest practical influence of all.

A. The Soldier or Jobbist

The soldier, or "jobbist," is a familiar figure out of the Puritan ethic, the man who labors humbly in his calling, subordinating himself to the *techne* (specialist craft ethic) of that calling. ("Jobbist" is Holmes's own coinage, from his "imaginary society of the jobbists, who were free to be egotists or altruists in the usual Saturday half-holiday provided they were neither while at work."[22]) His is what Hegel called "the heroism of dumb service," like that of the soldier who finds a secret existential satisfaction in the meticulous performance of the most trivial details of army routine. Holmes liked to quote the Anglican poet George Herbert: "Who sweeps a room as [in] Thy [cause] / Makes that and the action fine."[23]

> It seems to me . . . that the rule for serving our fellow-men . . . that the beginning of self-sacrifice and of holiness – is to do one's task with one's might. If we do that, I think we find that our motives take care of themselves. We find that what may have been begun as a means becomes an end in itself; that self-seeking is forgotten in labors . . . ; that our personality is swallowed up in working [to] ends outside ourselves.[24]

Holmes famously made this jobbist ethic into the keystone of his conception of the judge as "the supple tool of power" whose job is to serve existing precedent "simply because it exists"; "if my fellow-citizens want to go to Hell I will help

them"[25] by faithfully carrying out their foolish and self-defeating legislation.[26] The practitioner's connection to the ideal is through his participation in "the body of our jurisprudence . . . to which the least may make their contribution and inscribe it with their names. The glory of lawyers, like that of men of science, is more corporate than individual. Our labor is an endless organic process."[27]

> You argue a case in Essex. And what has the world outside to do with that, you say. Yet you have confirmed or modified or perhaps have suggested for the first time a principle which will find its way into the reports and from the reports into the text books and so into the thought of the common law, and so into its share into governing the conduct of civilized men.[28]

Of course if, like Holmes, you are convinced that the "endless organic process" is a Darwinian struggle of powers, interests, and unconscious instincts clawing at one another for dominance and survival, the value of being part of the process consists only in being a living link in the food chain, chewing or being chewed. It is one thing to aspire to be Darwin; it is another to aspire to be one of Darwin's specimens. Holmes repeatedly seems to confuse the two. While praising a well-known Boston railroad lawyer for sticking to his profession instead of seeking a wider fame in public service, he observes:

> The external and immediate result of an advocate's work is but to win or lose a case. But remotely what the lawyer does is to establish, develop or illuminate rules which are to govern the conduct of men for centuries; to set in motion principles and influences which shape the thought and action of generations which know not by whose command they move. The man of action has the present, but the thinker controls the future; his is the most subtile [subtle], the most far-reaching power. His ambition is the vastest, as it is the most ideal.[29]

B. The Thinker or Scientist

"The men whom I should be tempted to commemorate would be the originators of transforming thought. They often are half obscure, because what the world pays for is judgment, not the original mind."[30] One cannot help but suppose that this curious composite, the lawyer who works on little cases but thinks transforming thoughts about them, fits one lawyer only: Holmes himself, condemned to a state-court docket of trivial miscellaneous causes, almost unknown outside Massachusetts, save to a handful of cosmopolitan intellectuals in England and Germany who give him his due as an original legal thinker and historian.

Holmes says: "The law is the calling of thinkers."[31] But of course the ordinary lawyer is not a thinker. Holmes's own practice experience gave him a distaste for any but the most intellectual aspects of an ordinary lawyer's work. "I hate business and dislike practice, apart from arguing cases."[32] His advice on

connecting law practice with the ideal rarely permitted the lawyer just to labor humbly in his calling. It required a more heroic intellectual commitment. To the extent that *The Path of the Law* is a vocational address, that higher aspiration is its major theme: the lawyer as thinker or scientist.

Holmes's strongest praise, as David Luban has stressed in his fascinating essay on Holmes and Nietzsche,[33] was always reserved for activities directed toward no practical end (an embarrassment to those who would like to portray Holmes as primarily a utilitarian policy wonk). As he says in another of his major speeches, "Law in Science and Science in Law,"

> I by no means share that morality which finds in a remoter practice the justification of philosophy and science. I do not believe that we must justify our pursuits by the motive of social well-being . . . The man of science in the law is not merely a bookworm . . . I doubt if there is any more exalted form of life than that of a great abstract thinker, wrapt in the successful study of problems to which he devotes himself, for an end which is . . . simply to feed the deepest hunger and use the greatest gifts of his soul.[34]

One way of pursuing the legal vocation in the grand manner, therefore, is as a disinterested scientist, studying the law historically, as a "great anthropological document," to "discover what ideals of society have been strong enough to reach that final form of expression . . . to study it as an exercise in the morphology and transformation of human ideas."[35] Holmes himself had spent all of his spare time in his years of practice on just such an "impractical" project, the historical sections of his book *The Common Law.* But the moment he issues this ringing scholar's manifesto, he takes some of it back – just as he resigned his post as a Harvard Law School professor a few months after taking it up, in order to accept a judgeship:

> But after all the place for a man who is complete in all his powers is in the fight. The professor, the man of letters, gives up one-half of his life that his protected talent may grow and flower in peace. But to make up your mind at your peril upon a living question, for purposes of action, calls upon your whole nature . . . [Though I appreciate the disinterested scientific study of the law,] of course I think, as other people do, that the main ends of the subject are practical.[36]

G. Edward White's fine biography of Holmes has plausibly speculated that he was impelled to describe the activity of judging – which most practicing lawyers regard as somewhat removed from the fray – as a life of action on the battlefield because he felt guilty about surviving the Civil War and quitting his term of service early, while many of his friends died.[37] Perhaps he felt impelled as well to justify quitting practice and its battlefields, the clash of adversary advocates and business rivals, for the more contemplative work of the judge. Whatever may have been his personal motives, he insisted repeatedly that most of the forms of intellection applied to law are highly practical ones.

As noted, there are (at least) three types of practical lawyer-thinker in *The*

Path of the Law: the legal-doctrinal theorist, the historian, and the scientific policy analyst, to list them in the chronological order in which they dominated Holmes's own persona in the evolution of his ideas. The job of the doctrinal theorist is to organize and rationalize the body of existing common law doctrine into as broad generalizations as can be found. "Jurisprudence, as I look at it, is simply law in its most generalized part. Every effort to reduce a case to a rule is an effort of jurisprudence . . . One mark of a great lawyer is that he sees the application of the broadest rules" ("Path," 403). The reason why the lawyer must expel moral concepts from legal analysis and must shun merely "dramatic" classifications of rules such as those for "Railroads or Telegraphs" (403) in favor of more fundamental conceptions is that the narrow categories hinder, rather than help, the lawyer to predict the consequences of legal rules. "[M]orals are imperfect social generalizations expressed in terms of feeling, and . . . to make the generalizations perfect we must wash out the emotion and get a cold head."[38] Unlike his contemporary C. C. Langdell, Holmes did not think that law was a "science" in the sense that once one has induced the general laws or principles one can then deduce from them all possible applications: for Holmes law was historically contingent and changing, shot through with conflicting and contradictory lines of precedent and principle. But he did believe in generalization as a pragmatic aid to prediction – and that both lawyers and judges would be better at their jobs (getting the law "right," in the sense of achieving consistency with other applications) if they made more and better use of the tools of theory:[39]

> Theory is the most important part of the dogma of the law, as the architect is the most important man . . . in the building of a house . . . [Theory] is not to be feared as unpractical, for, to the competent, it simply means going to the bottom of the subject. ("Path," 405)

The second lawyer-thinker, the historian, is better employed at the disinterested or impractical study of the law as a "great anthropological document" – and Holmes was a great admirer of modern scientific historians of law such as Heinrich Brunner and F. W. Maitland, who were so employed. But the practical use of history is merely auxiliary, a "helpmeet" to the true masters of modern law, the social scientists. Holmes's essay "Law in Science" makes the point most effectively:

> From a practical point of view . . . [history's] use is mainly negative and skeptical . . . [I]ts chief good is to burst inflated explanations. Every one instinctively recognizes that in these days the justification for a law for us cannot be found in the fact that our fathers have always followed it. It must be found in some help which the law brings toward reaching a social end which the governing power of the community has made up its mind that it wants. And when a lawyer sees a rule in force he is very apt to invent, if he does not find, some ground of policy for its base . . . Many [laws] might as well be different, and history is the means by which we measure the power which the past has had to gov-

ern the present in spite of ourselves, so to speak, by imposing traditions which no longer meet their original end. History sets us free and enables us to make up our minds dispassionately whether the survival which we are enforcing answers any new purpose when it has ceased to answer the old.[40]

The example here is an exception to the hearsay rule, admitting earlier statements of complainants in trials for rape. Although this doctrine had recently been fitted out with a policy rationale – to Holmes the very implausible one that a "virtuous" woman who has been raped will want to disclose the crime as soon as possible – historical research reveals that the exception originated in the early procedural requirement that felony victims must raise the "hue and cry."[41] The use of history here is thus negative and critical, arguing for the elimination of a rule by exposing its source in a context now archaic or irrelevant.

So – to quote one of the most famous passages in *The Path of the Law*,

History . . . is a part of the rational study [of the law] because it is the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is in his strength. But to get him out is only the first step. The next is either to kill him, or tame him and make him a useful animal. ("Path," 399)

Holmes then introduces his deus ex machina, the most mysterious character in the entire menagerie, the practical lawyer-scientist:

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. (399)

This is the policy analyst, who is needed because neither doctrinal theory nor history can supply an adequate rational justification for deciding cases – or for fashioning broad legal principles or legislative policies – one way instead of another. "Behind the logical form" of doctrinal reasoning "lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding" (397). This is the voice of the antiformalist Holmes, who held that decisions in hard cases were decisions on (usually inarticulate) policy grounds, that rational judges would either make the grounds more articulate or, seeing that debatable matters of policy were at stake, refrain from "[generalizing] into [Constitutional principles] acceptance of the economic doctrines which prevailed about fifty years ago" (398). This Holmes, in his own time, was a hero to Progressive reformers and legal realists, and in ours to law-and-economics scholars, the Holmes who carried forward the project of Bentham and Mill to rationalize and reform the body of law according to utilitarian criteria.

From much excellent work on this aspect of Holmes,[42] it is clear that the Progressives' sense of kinship with Holmes was largely misplaced, for he thought most of their reform agenda twaddle, though they were clever at appropriating

his authority for that agenda.[43] His deference as a judge to dominant community opinion, as reflected in legislation or the discretionary decisions of local officials, led him to vote more frequently even than his "conservative" brethren to sustain grossly illiberal legislative and administrative acts – practically the sole exceptions being the free-speech cases of his post-1919 U.S. Supreme Court career.[44] Holmes as utilitarian or proto-lawyer-economist has fared somewhat better than Holmes as Progressive-liberal, though here too there are some reasons for skepticism – most obviously, Holmes's scorn for the merely practical and his dream of rational utopias. "[W]ho of us could endure a world, although cut into five-acre lots and having no man upon it who was not well fed and well housed, without the divine folly of honor, without the senseless . . . knowledge out-reaching the flaming bounds of the possible, without ideals the essence of which is that they never can be achieved?"[45] That is not a question you are going to find in the *Journal of Law and Economics.* Holmes reserved his greatest enthusiasm for quests for the unattainable.[46]

What does Holmes think is the role of policy analysis in the practical work of lawyers? Most often, despite the military metaphors, the policy man is rather removed from the thick of battle (on the intelligence staff, as it were), engaged in the "study" of the law. From such a vantage point the thinker may retheorize entire fields of law with a view to recommending legislative change. The example Holmes gives us is a core issue of penal policy: "Does punishment deter?" If "crime, like normal human conduct, is mainly a matter of imitation, punishment . . . may . . . keep it out of fashion." If, on the other hand, "the typical criminal is a degenerate, bound to swindle or to murder by . . . organic necessity" then deterrence is useless; he must be incapacitated or destroyed ("Path," 400). Despite Holmes's skepticism about the limits of rational understanding, he shared with most intellectuals of his time a striking confidence that "science" would be able to answer such questions.

But he also recommends policy analysis to those in the front lines of legal action – chiefly, it appears, to law reformers. He recommends it to judges – "[I]nasmuch as the real justification of a rule of law . . . is that it helps to bring about a social end which we desire, it is no less necessary that those who make and develop the law should have those ends articulately in their minds"[47] – but only to a very limited extent. Usually judges should not "undertake to renovate the law," because the stability of existing law is important. But in hard cases where principles and precedents conflict, "the judges are called on to exercise the sovereign prerogative of choice."[48] And "as a step toward the ideal" of "study of the ends sought to be attained [by law] and of the reasons for desiring them," "every lawyer ought to seek an understanding of economics. The present divorce between our schools of political economy and law seems to me an indication of how much progress in political economy needs to be made" ("Path," 408). Thus "every lawyer" ought to some extent to be involved in the public enterprise of the rational reformation of the law.

Yet the big dilemma for Holmesians is this: if you think social ideals are just strongly held preferences – or unconscious instincts – that get into the law because at a given time they have enough force behind them, how is the policy analyst supposed to weigh these values – to "determine . . . the relative worth of our different social ends"? Of course, if his historian-helper has demonstrated that a legal rule is a mere survival, expressing an obsolete policy that nobody believes in any more, the policy expert simply purges that rule. And if a policy has triumphed with such overwhelming force that it is supported by an unchallenged consensus, the only debates are technical ones about how to carry the policy out. But what of the situation that Holmes believes to be the common one, that policies are debatable because opposing forces are locked in struggle? Holmes suggests a range of approaches.

1. **mysterious quantification.** "Law in Science" gives the fullest rendering of the problem. Science consists of the "substitution of quantitative for qualitative measure":

> [In] the law we only occasionally can reach an absolutely final and quantitative determination, because the worth of the competing social ends which respectively solicit a judgment for the plaintiff or the defendant cannot be reduced to number and adequately fixed. The worth, that is, the intensity of the competing desires, varies with the varying ideals of the time, and, if the desires were constant, we could not get beyond a relative decision that one was greater and one was less. But it is of the essence of improvement that we should be as accurate as we can.[49]

What is to be our method for improving our accuracy? Translating "worth" into "intensity" does not solve the problem, because Holmes's theory of value is based on power. He cannot use something like "willingness to pay" in markets or shadow markets, because he is just as or more impressed by willingness to kill or sacrifice in blood to obtain what one wants. Liability for industrial accidents "is really the question how far it is desirable that the public should insure the safety of those whose work it uses . . . [T]he economic value even of a life to the community can be estimated, and no recovery, it may be said, ought to go beyond that amount" ("Path," 398). That is Holmes in his utilitarian mood. But the Darwinian Holmes recognizes that the value of a life to the community is a fighting issue and that the answer depends on who has the power to do the estimating.

2. **arbitrary rules and lines.** The aim of turning judgments of quality into judgments of quantity therefore rarely produces a metric for resolving socially contested policy disputes. If courts cannot duck such disputes (that is, follow the policy of abstention I take up next), it is best if they simulate scientific exactness by drawing arbitrary lines, turning vague standards such as "duty of care" or "reasonable notice of dishonor" into bright-line rules.

3. **abstention, or the passive virtues.** For judges, the practical result of Holmes's scientific policy–analytic approach to law is to restrain them from acting at all, if they need not:

> As law embodies beliefs that have triumphed in the battle of ideas and then have translated themselves into action, while there still is doubt, while opposite convictions still keep a battle front against each other, the time for law has not come; the notion destined to prevail is not yet entitled to the field.[50]

The applications that made him famous, of course, were his dissents in Fourteenth Amendment cases once he had reached the Supreme Court. When the policy analyst uncovers as the real basis of a doctrinal formula (e.g., "liberty of contract") a hotly contested policy debate – "the economic doctrines of fifty years ago" or "Mr. Herbert Spencer's Social Statics" versus doctrines of the present – Constitutional courts should stay out of the fight.

4. **activism, or leveling the playing field.** On rare occasions, Holmes as policy-conscious judge took a more actively innovative role, urging courts help to level the playing field so that forces in social combat could fight on more equal terms, or at least less encumbered by arbitrary handicaps or advantages imposed by the legal system. The important occasions – all dissents – are his Massachusetts labor opinions[51] and his federal free-speech opinions. In the state cases, he thought it wrong for his court to grant injunctions against picketing workers in order to protect employers' "property," because all economic struggle harmed some people's property and much of this harm (like that inflicted by competition) was "privileged" and uncompensated. Believing that his court was deciding a policy issue on nothing stronger than prejudice, Holmes thought that it should abstain and let capital and labor fight it out in the marketplace and legislature. The more dramatic occasions are the great free-speech dissents,[52] in which Holmes believed that the government was impermissibly interfering in the struggle for dominance in the marketplace of ideas, in violation of a Constitutional norm promoting that struggle as "the best test of truth."

5. **restraint in the promotion of causes.** Holmes says: "I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they were confident, and see they were taking sides upon debatable and often burning questions" ("Path," 398). The context indicates that Holmes is still talking about judges here ("a tribunal of lawyers"), and surely this is so, for it is the *business* of lawyers to "take sides on debatable and often burning questions."

But there are payoffs for immersion in policy science for lawyers too – chiefly, it seems, for lawyers for social-reform movements. In the 1880s and

1890s, professionals formed the vanguard of the Mugwump and Progressive movements, and lawyers were active, as never before, as agents of social improvement. Policy science, for them, was a means of mastering necessity, of 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 that necessity imposes. Holmes sounds no theme more often than that science teaches hard lessons of scarcity and the limits of social intervention; the implication is clear that the lawyer trained in science usually has to tell his clients, especially if they are workers fighting for minimum or higher wages or for increased accident compensation or for redistribution through progressive taxation, that they cannot get these things, except at what may be an unacceptably high price.[53]

> Probably I am too skeptical as to our ability to do more than shift disagreeable burdens from the shoulders of the stronger to those of the weaker . . . To know what you want and why you think that such a measure will help it is the first but by no means the last step towards intelligent legal reform. The other and more difficult one is to realize what you must give up to get it, and to consider whether you are ready to pay the price.[54]

One can see why Holmes's views appeal to present-day conservative legal economists; even more than theirs, his was a bleak Malthusian negative-sum view of reform: *any* redistributions would impair production incentives or be eaten up by population increases or otherwise add to the burdens of those who sought to benefit.[55] But to give him credit, though he mostly thought it was labor unions and social democrats who stood in need of education, he also thought wealthy interests and their lawyers needed prudential counseling informed by consequentialist analysis to tell them when repressive tactics that had usually worked for them were likely to backfire. The scientifically trained lawyer could tell clients when their own or their group's desires were likely to be self-defeating. In that role there is at least a minimalist theory of socially responsible law practice.

Holmes's view of the policy analyst is in a way an updated version of Tocqueville's view of lawyers as ingrained conservatives, who serve as a counterforce to democratic excess by braking the momentum of popular majorities. It is a considerable irony, therefore, that Holmes's views – that private-law doctrines are saturated with policy judgments that lawyers should explicitly articulate, criticize, and rationalize – should have most inspired the practice of several generations of Progressives, who quoted those views as manifestoes for their social-reform activism.

VI. Holmes as a Public Professional

Holmes and many of his contemporaries at the Boston bar faced a common situation and responded to it in interestingly different ways. They were liberally

educated gentlemen in a world that no longer valued their skills or deferred to their learning, virtue, or class position – a businessman's world, competitive, ruthless, relentlessly philistine, and, in this period, especially corrupt; and a politician's world dominated by ethnic urban machines rather than patrician elites. Many of the old elites simply made their peace with the new conditions and also made a lot of money. Many famous ones dropped out – Henry James quit after a year at Harvard Law School to live in Europe and write out his alienation from the American scene; Henry and Brooks Adams, after a fling with muckraking and reform politics, became professional Cassandras, committed to long-run deterministic theories of the degradation of society; John Jay Chapman became a political agitator and radical social critic. For my purposes, the most interesting lawyers were those who stuck with law and chose a strategy of engagement. One strategy was to convert the old elites from a class with pretensions to universal virtue into another political party; this was the strategy of the "Best Men," the Mugwump reformers who sought to reclaim politics from the corrupt business-ethnic-machine alliances. Another strategy, typified by the railroad reformer Charles Francis Adams, Jr., was to try to shift decision making out of democratic political arenas and into institutions that professional elites had a better shot at dominating – either the judiciary or (for Progressives) a professional civil service and administrative commissions.

The two most activist lawyers of Holmes's Boston provide an instructive contrast. Moorfield Storey (1845–1929), a president of the American Bar Association, was a corporate lawyer whose clients included the Union Pacific Railroad and the United Fruit Company. He was also a committed abolitionist and radical Reconstructionist, served as Charles Sumner's secretary, and later became counsel and first president of the National Association for the Advancement of Colored People. His commitment to the core beliefs of classical-liberal legalism – to the protection of a sphere of formally equal individual rights for every person – was one he applied with rigorous consistency, leading him to oppose most forms of regulation of business and legislative protection for workers and nearly all concerted labor union actions. It also led him to campaign against American imperialism (because it treated foreign subjects as lesser breeds with less than the full complement of rights), the racist and anti-Semitic admissions policies of Harvard and the American Bar Association, and, most determinedly, all forms of subordination of black persons, including segregation, restrictive covenants, employers' cheating on sharecropper contracts, disenfranchisement of voters, and lynching. His primary credo for lawyers was that they should be "independent," that is, avoid identification with clients, in order to play the role of social mediator, to "keep the community orderly and peaceful . . . and adjust the disputes which arise among its members."[56]

Louis D. Brandeis (1856–1941) was also one of Boston's leading corporate lawyers and, like Storey, active in public causes. He was a spearhead of Boston Progressive reformers' campaigns for anticorruption legislation and regulatory control of public utilities. He is best known as the progenitor of modern "pub-

lic-interest" law, as the "Lawyer for the People," who argued cases on behalf of diffuse constituencies such as women and consumers, designed novel approaches to rate regulation, and served as a public intervenor and mediator in labor disputes. He carried his public perspectives into much of his activity as a private lawyer, taking a quasi-judicial perspective on his clients' problems and helping his business clients find structural solutions to systemic social problems such as workers' insecurity and seasonal unemployment. His main social project was the attempt, through antitrust policy and democratizing the governance of decentralized collectives such as companies and unions, to enable individuals to realize the republican ideals of self-development and self-government in a modern industrial polity by decentralizing the economy. Like Holmes, Brandeis thought the lawyer should be a policy analyst, armed with a knowledge of social fact and social science. Unlike Holmes, who thought social struggle was often a zero-sum game and that the best use of science was to dampen the ardor of reformers by showing them they could not get what they wanted, Brandeis believed (like other Progressives) that lawyers trained in social science could serve the cause of social improvement by recommending to warring parties and factions solutions that would improve the position of all.[57]

What would Holmes have thought about such approaches to the lawyer's vocation as Storey's and Brandeis's? One thing is clear: after the Civil War, he was no longer a man of social causes. He had no taste for any of the reform enthusiasms that swept up many lawyers in contemporary Boston. In general, the firm of Shattuck Holmes & Munroe represented the "dominant interests in its community, not the oppressed of Boston or New England," said Mark Howe, adding drily: "If any of the partners had a social conscience his practice did not reveal it."[58] Toward Storey's long crusade for the civil rights of blacks, Holmes on the bench proved indifferent or hostile. As a U.S. Supreme Court justice, he voted more regularly even than his conservative colleagues to deny petitions of blacks claiming violations of their civil rights;[59] generally he deferred to state legislatures and local authorities, with whose "political" judgments he was unwilling to interfere. In most cases involving race, the lessons of "experience" were, apparently, that if the white South, as the "de facto dominant power in the community," wanted to subordinate its black citizens under the thinnest cover of formally legal equal treatment, there was nothing the federal courts could or should do about it.[60] Though Holmes admired Brandeis personally for his intelligence and intensity, he was scathing about most projects of social improvement (except eugenics), describing them as futile or self-defeating. Holmes's tough-minded scientific naturalism led him almost to relish the brutality of quasi-natural forces – such as race domination and the expansion of large-scale corporate capitalism – and to be very skeptical about the capacity of legal controls to soften the impact of natural necessity.

Yet although he gave up on social causes, Holmes did not withdraw from the world of ordinary occupations and become a pessimistic Cassandra, like his