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Oliver Wendell Holmes, Jr.

The Path of the Law

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"The Path of the Law" was originally an oration in the sense that term bore when it could be used without irony or hint of disparagement. It was indeed, in the language of the time, an elegant oration. The date was January 8, 1897; the occasion was the dedication of a new building of the Boston University School of Law. Holmes was then fifty-five and had been a member of the Supreme Judicial Court of Massachusetts for fourteen years. Some five years later President Theodore Roosevelt appointed him to the Supreme Court of the United States, where he served for thirty years. It has truly been said of him that he is the only American jurist who competes with John Marshall for the superlative. There can be no doubt that the most familiar summing up of his thought is to be found in "The Path of the Law."

The course of Holmes's intellectual development prior to "The Path of the Law" makes it plain that "The Path" is best understood as a reaction against two strains of legal thought current in Holmes's time which he found thoroughly uncongenial.

The first of these reveals its influence quite plainly in the animadversions against "logic" with which Part II of "The Path" is sprinkled. During the period from about 1870 to 1920, it was quite common to encounter in legal discussions statements like these: An offer is by its very nature revocable. It would be a violation of logic to permit a person who is not a party to a contract to sue on it. The legal nature of a claim to

damages does not permit an assignment of it. Holmes himself once described this method by saying that the schools "take their premises on inspiration and then use logic as the only tool to develop the results."

The other object of Holmes's intellectual aversion lay in the "will theory," a theory that tended to rest legal responsibility not on what a defendant did, but on what he "willed." Thus, a contractual promisor was held to his promise because he "willed" to be held, or a criminal was punished because he "willed" an evil act. Holmes saw in this kind of reasoning a confusion of morality and law, and he set about in Part I to remove that confusion.

A remarkable amalgam of abstract logic and the will theory can be found in the writings of Christopher Columbus Langdell, Dean of the Harvard Law School from 1870 to 1895. In Langdell's day it had been pretty well established, for sound commercial reasons, that the posted acceptance of an offer to enter a contract is effective at the moment of posting, and before it reaches the mind, or even the mail slot, of the offeror. Since this rule imposed a contract on the parties before their wills had been brought together by a completed circuit, Langdell condemned the rule as a violation of proper legal reasoning. In response to an argument that the rule in question best served "the purposes of substantial justice, and the interests of contracting parties as understood by themselves," Langdell replied, "The true answer to this argument is, that it is irrelevant," though, to be sure, he continued with a half-hearted and highly abstract attempt to demonstrate that the rule in question did in fact serve badly the needs of commerce.

To the mental torment that such an argument was certain to inflict on Holmes, there was added another dimension. Having taught himself German, Holmes became exposed to the Teutonic version of Langdellian logic. In this version, what might in an American have been dismissed as an innocent naiveté, appeared now clothed with a cosmic profundity that made it doubly offensive to one of Holmes's skeptical temper.

One influence that probably shaped Holmes's thought affirmatively was the positivistic philosophy of science associated with the names of Bacon, Comte, Mach, Poincaré, and Pearson. There is certainly a close affinity between Holmes's predictive theory of law and a view that asks of the scientist not that he understand nature, but that he simply set about observing and charting her regularities. Holmes himself, after reading Pearson's Grammar of Science, *wrote to Pollock that it "hits my way of thinking better than books of philosophy." But this acquaintance with*

Pearson came some nine years after "The Path of the Law." Since there is no evidence that Holmes was ever a close student of the philosophy of science, it seems likely that we are dealing not with anything like a direct influence, but with independent expressions of a generally prevailing intellectual mood.

It was no accident that Holmes seized the occasion he did for presenting the thoughts of "The Path of the Law." A friend, Melville M. Bigelow, had been a leading figure in the creation of the Boston University School of Law. With Holmes he shared a tough, Darwinian approach to social phenomena. Bigelow's general conception of law was expressed in 1906 in a book with a curious but significant title, Centralization in the Law. This book urged a "scientific method in law and education." It declared:

> The conception of law which the Faculty of the Boston University Law School stands for is that the law is the expression, more or less deflected by opposition, of the dominant force in society. . . . It follows from the view that law is the resultant of actual, conflicting forces in society, that the notion of abstract, eternal principles as a governing power, with their author the external sovereign, must go.

The transition from this passage to Holmes's own words is an easy one.

I

WHEN we study law we are not studying a mystery but a well known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. The reason why it is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of

"The Path of the Law" first appeared in print as an article in the *Harvard Law Review*, X (1897), 457 ff. As it appears here it has been abridged by about one half. Commentators have remarked that the article is really divided into two distinct parts; Roman numerals have been inserted to make this division plain. In Holmes's own words, the first part deals with "the limits of the law," the second with "the forces which determine its content and its growth."

coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.

The means of the study are a body of reports, of treatises, and of statutes, in this country and in England, extending back for six hundred years, and now increasing annually by hundreds. In these sibylline leaves are gathered the scattered prophecies of the past upon the cases in which the axe will fall. These are what properly have been called the oracles of the law. Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalize them into a thoroughly connected system. The process is one, from a lawyer's statement of a case, eliminating as it does all the dramatic elements with which his client's story has clothed it, and retaining only the facts of legal import, up to the final analyses and abstract universals of theoretic jurisprudence. The reason why a lawyer does not mention that his client wore a white hat when he made a contract, while Mrs. Quickly would be sure to dwell upon it along with the parcel gilt goblet and the sea-coal fire, is that he foresees that the public force will act in the same way whatever his client had upon his head. It is to make the prophecies easier to be remembered and to be understood that the teachings of the decisions of the past are put into general propositions and gathered into text-books, or that statutes are passed in a general form. The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies. One of the many evil effects of the confusion between legal and moral ideas, about which I shall have something to say in a moment, is that theory is apt to get the cart before the horse, and to consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward. But, as I shall try to show, 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. . . .

I wish, if I can, to lay down some first principles for the study of this body of dogma or systematized prediction which we call the law, for men who want to use it as the instrument of their business to enable them to prophesy in their turn, and, as bearing upon the study, I wish to point out an ideal which as yet our law has not attained.

The first thing for a business-like understanding of the matter is to

or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some stage of the argument, and so to drop into fallacy. For instance, when we speak of the rights of man in a moral sense, we mean to mark the limits of interference with individual freedom which we think are prescribed by conscience, or by our ideal, however reached. Yet it is certain that many laws have been enforced in the past, and it is likely that some are enforced now, which are condemned by the most enlightened opinion of the time, or which at all events pass the limit of interference as many consciences would draw it. Manifestly, therefore, nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law. No doubt simple and extreme cases can be put of imaginable laws which the statute-making power would not dare to enact, even in the absence of written constitutional prohibitions, because the community would rise in rebellion and fight; and this gives some plausibility to the proposition that the law, if not a part of morality, is limited by it. But this limit of power is not coextensive with any system of morals. For the most part it falls far within the lines of any such system, and in some cases may extend beyond them, for reasons drawn from the habits of a particular people at a particular time. I once heard the late Professor Agassiz say that a German population would rise if you added two cents to the price of a glass of beer. A statute in such a case would be empty words, not because it was wrong, but because it could not be enforced. No one will deny that wrong statutes can be and are enforced, and we should not all agree as to which were the wrong ones.

The confusion with which I am dealing besets confessedly legal conceptions. Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. 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.

Take again a notion which as popularly understood is the widest

conception which the law contains;—the notion of legal duty, to which already I have referred. We fill the word with all the content which we draw from morals. But what does it mean to a bad man? Mainly, and in the first place, a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money. But from his point of view, what is the difference between being fined and being taxed a certain sum for doing a certain thing? That his point of view is the test of legal principles is shown by the many discussions which have arisen in the courts on the very question whether a given statutory liability is a penalty or a tax. On the answer to this question depends the decision whether conduct is legally wrong or right, and also whether a man is under compulsion or free. Leaving the criminal law on one side, what is the difference between the liability under the mill acts or statutes authorizing a taking by eminent domain and the liability for what we call a wrongful conversion of property where restoration is out of the question? In both cases the party taking another man's property has to pay its fair value as assessed by a jury, and no more. What significance is there in calling one taking right and another wrong from the point of view of the law? It does not matter, so far as the given consequence, the compulsory payment, is concerned, whether the act to which it is attached is described in terms of praise or in terms of blame, or whether the law purports to prohibit it or to allow it. . . .

Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. 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. . . .

I have spoken only of the common law, because there are some cases in which a logical justification can be found for speaking of civil liabilities as imposing duties in an intelligible sense. These are the relatively few in which equity will grant an injunction, and will enforce it by putting the defendant in prison or otherwise punishing him unless he complies with the order of the court. But I hardly think it advisable to shape general theory from the exception, and I think it would be

better to cease troubling ourselves about primary rights and sanctions altogether, than to describe our prophecies concerning the liabilities commonly imposed by the law in those inappropriate terms. . . .

. . . Morals deal with the actual internal state of the individual's mind, what he actually intends. From the time of the Romans down to now, this mode of dealing has affected the language of the law as to contract, and the language used has reacted upon the thought. We talk about a contract as a meeting of the minds of the parties, and thence it is inferred in various cases that there is no contract because their minds have not met; that is, because they have intended different things or because one party has not known of the assent of the other. Yet nothing is more certain than that parties may be bound by a contract to things which neither of them intended, and when one does not know of the other's assent. Suppose a contract is executed in due form and in writing to deliver a lecture, mentioning no time. One of the parties thinks that the promise will be construed to mean at once, within a week. The other thinks that it means when he is ready. The court says that it means within a reasonable time. The parties are bound by the contract as it is interpreted by the court, yet neither of them meant what the court declares that they have said. In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs,—not on the parties' having *meant* the same thing but on their having *said* the same thing. . . .

II

So much for the limits of the law. The next thing which I wish to consider is what are the forces which determine its content and its growth. You may assume, with Hobbes and Bentham and Austin, that all law emanates from the sovereign, even when the first human beings to enunciate it are the judges, or you may think that law is the voice of the Zeitgeist, or what you like. It is all one to my present purpose. Even if every decision required the sanction of an emperor with despotic power and a whimsical turn of mind, we should be interested none the less, still with a view to prediction, in discovering some order, some rational explanation, and some principle of growth for the rules which he laid down. In every system there are such explanations and principles