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SYMPOSIUM

THE PATH OF THE LAW 100 YEARS LATER: HOLMES'S INFLUENCE ON MODERN JURISPRUDENCE

INTRODUCTION

Anthony J. Sebok[†]

On November 15, 1996, Brooklyn Law School held a conference commemorating the one hundredth anniversary of Oliver Wendell Holmes's landmark essay, *The Path of the Law*. The conference, entitled *The Path of the Law: One Hundred Years Later*, brought together a distinguished group of legal scholars from across North America and the Atlantic to evaluate Holmes's influence on jurisprudence in the United States and Europe. The *Brooklyn Law Review* is honored to publish the conference presentations in this special symposium issue. This collection of articles offers extraordinary insight into the jurisprudential mind of Oliver Wendell Holmes.

The Path of the Law, originally delivered as a speech on January 8, 1897, is generally considered to have heralded the beginning of the modern era of American jurisprudence. When Holmes delivered this address in Boston he had just passed the midpoint of what would turn out to be a remarkable life.

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Holmes, who lived from 1841 to 1935, was a unique figure in American law. He came of age in the Jacksonian era, he fought in the Civil War as a young soldier, and before he died he had witnessed both the birth of the New Deal in America and fascism in Europe. After an illustrious career as a lawyer, professor, and a state supreme court justice in Boston, Holmes served on the United States Supreme Court for thirty years, where he wrote over 2,000 opinions, including some of the Court's most famous and prophetic dissents. Clearly, Holmes was more than a witness to history. He was one of those important figures who brought law into the twentieth century, both through his work as a judge and as a theorist.

Throughout his long career, Holmes left a lasting legacy in his tough-minded and path breaking studies of the history and philosophy of law. Holmes has been called the patron saint of a wide range of the most influential jurisprudential movements of our time, from legal realism, to pragmatism and law and economics. The articles in this symposium reflect the diversity of Holmes's audiences and influences.

The first article, based on the conference's keynote address by Chief Judge Richard Posner of the Seventh Circuit Court of Appeals, offers five questions about Holmes. Judge Posner offers these questions as a framework within which to organize our judgements about Holmes's life and thought. He asks us to recognize that Holmes was a complex thinker whose brilliance sometimes led him to profound yet inconsistent conclusions. Judge Posner asks the modern reader to resist the temptation to judge Holmes according to contemporary political and social tastes. Holmes, argues Judge Posner, must be measured "with reference to his own contemporaries." According to Judge Posner's test, Holmes remains one of America's greatest judges and legal theorists.

The next four articles are based on presentations from the first half of the conference, which focused on Holmes's influence on American jurisprudence. In *Plotting "The Path of the Law,"* Professor Thomas C. Grey of Stanford Law School reads Holmes's essay as a work of literature, with a plot and a complex rhetorical structure. By applying the tools of law and literature, Professor Grey discovers in Holmes's essay a thematic structure that argues for a philosophically sophisticated form of legal pragmatism. Thus, by approaching

The Path of the Law as a Bildungsroman, Professor Grey identifies three separate and mutually supportive theses in the essay. For Professor Grey, Holmes is a subtle and gifted literary stylist whose writings possess many of the same qualities as a great work of fiction.

In *Old-Fashioned Postmodernism and the Legal Theories of Oliver Wendell Holmes, Jr.*, Professor Catharine Pierce Wells of Boston College Law School argues that there are many similarities between Holmes's early twentieth century pragmatism and the new forms of postmodern pragmatism that have influenced contemporary legal theory. Professor Wells closely examines the pragmatism of Charles Pierce, and finds a similar form of "viewpoint dependency" in both Pierce and Holmes. Professor Wells then argues that lessons from classical pragmatism may help contemporary postmodernists answer recurring and difficult questions about subjectivity, power, and pluralism. Thus, for Professor Wells, Holmes's brand of philosophical skepticism may help to resolve some of the problems confronting jurisprudence today.

In *Revisiting Substantive Due Process and Holmes's Lochner Dissent*, Professor G. Edward White of the University of Virginia argues that Holmes's dissent in *Lochner v. New York*¹ has been misunderstood by modern scholars. According to Professor White, Holmes's position, which later scholars would come to describe as a rejection of "substantive due process," was quite idiosyncratic. Rather than representing the winning side of the debate resolved by *West Coast Hotel Co. v. Parrish*,² Holmes's approach to the Due Process Clause did not become part of mainstream constitutional discourse until after the New Deal. For Professor White, Holmes is a strikingly modern figure who anticipated the temper of an America which had not yet been born.

In his commentary, *The Dragon in the Cave*, Professor Gary Minda of Brooklyn Law School responds to Professors Grey, Wells, and White. Professor Minda notes that the professors' articles present the reader with a contradictory set of choices: was Holmes a pragmatist, a classical/old-fashioned postmodernist, or a modernist? Professor Minda argues that

¹ 198 U.S. 45 (1905).

² 300 U.S. 379 (1937).

Holmes would find the confusion surrounding our attempts to find ourselves in him quite predictable. Holmes, Professor Minda suggests, would think that if we were really to emulate him, we should look at our past—including Holmes's work itself—more critically.

The last four articles are based on presentations made during the second half of the conference, which focused on Holmes's relationship with English and German jurisprudence. In *When Trying is Failing: Holmes's "Englishness,"* Dr. Neil Duxbury of the University of Manchester argues that the extraordinary influence of *The Path of the Law* is a consequence of the style with which Holmes presented his ideas. Dr. Duxbury argues that the essay holds the attention of the modern American reader because Holmes adopted what might be called an "English" style of argument. According to Dr. Duxbury, the English style of legal scholarship is laconic, free of jargon, and lightly footnoted. By focusing on Holmes's "Englishness," Dr. Duxbury gives us another perspective on Holmes's genius while also letting us see ourselves in a new light.

In *Holmes and Carl Schmitt: An Unlikely Pair?*, Professor David Dyzenhaus of the University of Toronto argues that Holmes's positivism shares a common foundation with the authoritarian jurisprudence of Carl Schmitt. Carl Schmitt, who taught law during both the Weimar and Nazi eras, used his considerable intellectual talents to defend the legitimacy of Hitler's political and legal systems. Professor Dyzenhaus draws Holmes and Schmitt together by relating both to Thomas Hobbes. Hobbes's solution to the problem of the state of nature requires that individuals accept the authority of a sovereign who could impose order through law. According to Professor Dyzenhaus, legal positivism cannot escape its Hobbesian origins and hence the positivist must accept the legitimacy of evil sovereigns as well as good ones. Therefore, Professor Dyzenhaus suggests that we think carefully about how much of Holmes's positivism we want to embrace.

In *Other People's Power: The Bad Man and English Positivism, 1897-1997*, Professor William Twining of University College London argues that the "bad man"—Holmes's famous rhetorical device in *The Path of the Law*—has been a badly misunderstood feature of modern legal positivism. Professor

Twining exposes four ways in which the metaphor of the “bad man” has been read uncharitably by Holmes’s critics, and he then offers a corrective reading. He also argues that Holmes’s “bad man” still has a salutary role to play in contemporary jurisprudence, since positivism can help scholars to analyze how power is distributed in a complex legal system. For Professor Twining, Holmes’s “bad man” is a vital and useful tool for the modern analytical and sociological legal theorist.

In his commentary, *Style and Skepticism in The Path of the Law*, Professor John C.P. Goldberg of Vanderbilt University School of Law responds to Dr. Duxbury and Professors Dyzenhaus and Twining. Since Professor Goldberg agrees almost entirely with Professor Twining’s argument, Professor Goldberg’s article focuses mostly on the arguments of Dr. Duxbury and Professor Dyzenhaus. Professor Goldberg questions the very possibility of separating style from substance, and he argues that the somewhat negative picture of Holmes that Dr. Duxbury produces does not match the agnostic tone of his argument. Professor Goldberg next argues that Professor Dyzenhaus’s attempt to link Holmes and Schmitt is based on the erroneous assumption that all legal positivists must be moral skeptics. Professor Goldberg argues that there is no necessary connection between positivism and moral skepticism, and, furthermore, that Holmes’s “modest skepticism” should not be misunderstood as moral skepticism.

As the above synopses demonstrate, the organizers of this symposium were very lucky. The extraordinary scholars who we brought together chose to write about the same deep and important questions. As a result, the articles in this symposium speak across the pages to each other. In this sense, these printed words capture the spirit of the conference held on November 15, 1996, which was marked by a rich and full discussion between the symposiasts and a very lively and engaged audience. I am very proud to have been associated with this project, and I would like to thank the authors for their hard work and patience during the editing process. I would also like to thank Dean Joan G. Wexler and Brooklyn Law School for providing the support—financial, moral, and intellectual—that made the conference possible. Finally, I would like to thank the members of the *Brooklyn Law Review* in Volumes 62 and 63 for their diligence and professionalism.

