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Plotting *The Path of Law*

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Everyone agrees that Oliver Wendell Holmes was a greatly influential figure in the history of American law, but opinions differ about his contribution to legal philosophy. Roughly speaking, there are three views: first, that he made interesting but modest additions to the positivist jurisprudence he inherited from his English predecessors;[1] second, that though a notable personality and literary talent, he was an inconsistent and confused thinker who had nothing serious to say about legal theory;[2] and, third, that he was a major theoretical innovator who brought American pragmatism to jurisprudence.[3]

The debate over Holmes's importance as a legal thinker is made more difficult to resolve by his unsystematic approach to jurisprudence. He left no integrated statement of his theoretical views—for the reason, among others, that he thought philosophical system-building was a waste of time. As he once put it in a letter, "[t]he great philosophers have had a fine insight that could be stated in two minutes. They then

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[1] Thorough treatments of Holmes as a positivist can be found in a series of articles by Patrick V. Kelley, *A Critical Analysis of Holmes's Theory of Torts*, 61 WASH. U. L.Q. 681 (1983); *Oliver Wendell Holmes, Utilitarian Jurisprudence, and the Positivism of John Stuart Mill*, 30 AM. J. JURIS. 189 (1985); *The Life of Oliver Wendell Holmes, Jr.*, 68 WASH. U. L.Q. 429 (1990); and in H.L. POHLMAN, JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE (1984).

[2] The best overall case for this view of Holmes is made out *passim* in the prize winning biography G. EDWARD WHITE, OLIVER WENDELL HOLMES: LAW AND THE INNER SELF (1993).

[3] Older versions of this view can be found in MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 59-75 (2d ed. 1957); PHILIP WIENER, EVOLUTION AND THE FOUNDERS OF PRAGMATISM 172-89 (1965); for my own interpretation along these lines, see Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989).

have constructed systems that posterity willingly forgets, but in which their insights are tucked away. The latter are all that we want . . . ."[4]

Holmes followed his own prescription. His one book, *The Common Law,* was not a systematic theoretical work, but rather a synthesis of Anglo-American private law doctrine, supplemented by a good bit of legal history and a few now-famous jurisprudential observations. A half-century after its publication, he mentioned to a friend "the possibility of writing a little book embodying my views on the ultimates of the law, . . . " but then his expositional creed as well as his age and infirmity intervened, and he concluded "I have expressed them *passim*. . . ."[5] The nearest thing we have to that unwritten summary is *The Path of the Law*, and it is to this famous essay that we must turn first when we try to understand and evaluate Holmes's contribution to legal theory.

The Path offers plenty of support for all three views of his jurisprudence. On the side of Holmes as positivist, the essay has the best known formulation of his so-called prediction theory of law. Further, it dramatizes the association of his legal positivism with his moral skepticism by way of the "bad man," who is interested only in the law's material consequences for himself. Holmes was undoubtedly influenced by Hobbes, Bentham and Austin, and if we restrict *The Path* to its positivist elements, we see that he added certain significant (if not transformative) features to legal positivism—a heightened focus on prediction, on the importance of judges, and on civil as opposed to criminal law.

But when we read beyond the early pages of *The Path*, we find more than refinements of English legal positivism. Holmes portrays law not only as a business in which counselors forecast judicial actions for clients, but also as a reflection of

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[4] THE HOLMES-EINSTEIN LETTERS 272 (James Peabody ed., 1964) [hereinafter HOLMES-EINSTEIN]; *see also*, HOLMES & FRANKFURTER: THEIR CORRESPONDENCE, 1912-1934 at 53 (Robert M. Memel and Christine L. Compston eds. 1996) [hereinafter HOLMES-FRANKFURTER]; 1 HOLMES-POLLOCK LETTERS, 261 (Mark DeWolfe Howe ed., 1941) [hereinafter HOLMES-POLLOCK]; 2 HOLMES-LASKI LETTERS 869 (Mark DeWolfe Howe ed., 1953) [hereinafter HOLMES-LASKI]; *Letters to Dr. Wu, in* JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 186 (Harry Shriver ed., 1936) [hereinafter *Wu Letters*].

[5] 2 HOLMES-POLLOCK, *supra* note 4, at 307.

the moral experience of the human race, an instrument for the achievement of social welfare, and an inspiring branch of knowledge worth pursuing for its own sake. Because he says these apparently disparate things quite vividly, and yet without connecting them to each other, a reader might well conclude that Holmes was only a legal litterateur, unconcerned with consistency and willing to say anything to achieve an aphorism. Finally, if the theoretical variety of *The Path* represents not just a jurisprudential grab bag, but the articulation of mutually consistent perspectives, that would fit with the view of Holmes as a sophisticated, if eclectic, theorist—a legal pragmatist. To decide among these possibilities, we have to look at the essay as a whole and try to discern its underlying structure, if it has one.

When I first carefully studied *The Path*, I noticed that it fell into distinct parts, which said different and possibly conflicting things. But I reread and taught from it many times before I finally understood how those parts were related to each other. The underlying structure of the essay is obscured by its theoretical subject matter; it is organized not around an analytical framework, but around a plot. And the plot is a dramatic one, emphasizing the discontinuities and clashes between the themes, rather than revealing their rational order and mutual consistency. Here as elsewhere, Holmes was presenting his insights with more care for making them memorable than for making their interrelations clear.

The Path was published without internal divisions, but it is evident from its transitional passages that Holmes constructed it in five parts: an introduction, three main divisions, and a conclusion. Let me now describe this surface structure, briefly summarizing the contents of each part.[6]

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[6] I describe the structure of *The Path of the Law* by the arrangement of its thirty-four paragraphs, so my account can be followed by someone reading any of the several published versions of the essay. *The Path* appears in full at 10 HARV. L. REV. 457 (1897); OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 167 (1920); 3 THE COLLECTED WORKS OF JUSTICE HOLMES 391 (Sheldon M. Novick ed., 1995); 110 HARV. L. REV. 991 (1997). Assuming the last of these to be the version accessible to the most readers, I also give page citations to it. The version of *The Path* in Judge Posner's handy anthology THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. (Richard A. Posner ed., 1992) is slightly abridged, and has only thirty-three paragraphs.

Then I will go on to note the apparent incongruities among the separate theses; to explain the literary and rhetorical strategy that links them together; to review the arguments again and in more detail, this time in light of their rhetorical context; and finally to argue that the separate theses are logically compatible and indeed mutually supporting.

I. THE FIRST TOUR

The initial four paragraphs introduce the essay, beginning with the observation that law is "not . . . a mystery but a well known profession,"[7] and adding that lawyers are in the business of selling clients forecasts of how courts will direct the use of state force. The Introduction concludes in the fourth paragraph with a framing statement of two overall purposes guiding the essay: first, to give some practical advice to law students; and second, to redirect scholarship and pedagogy toward "an ideal which as yet our law has not attained."[8]

Paragraphs five through fourteen constitute Part I, the first substantive section, which might be subtitled "The Limits of Law." Here Holmes furthers a "business like understanding" of the lawyer's work by dispelling "a confusion between morality and law."[9] In the best known passages of his essay, Holmes expands on the prediction theory he sketched in the Introduction, illustrates it through the figure of the "bad man," and concludes with the strikingly formalistic suggestion that the confusion might be cured by replacing the law's morally-tinged vocabulary of "right," "duty," "malice," "negligence" and the like with a new artificial terminology designed to "convey legal ideas uncolored by anything outside the law."[10]

At this point, Holmes abruptly states "[s]o much for the limits of the law," and passes without further transition to Part II, a consideration of "the forces which determine [law's] content and its growth."[11] This part, which might be subtitled "Not Logic But Experience," takes up paragraphs fifteen

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[7] Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 991 (1997).

[8] *Id.* at 992.

[9] *Id.*

[10] *Id.* at 997.

[11] *Id.*

through twenty. Here Holmes warns against a second fallacy, the view that "the only force at work in the development of the law is logic."[12] He attacks the orthodox supposition that the content of a working legal system "can be worked out like mathematics from some general axioms of conduct."[13] This supposition gains its strength from the fact that legal judgments are conventionally stated in deductive form, which assuages the "longing for certainty and for repose which is in every human mind."[14]

But, he says, the content as distinguished from the form of many legal judgments is determined by an assessment, often "unconscious," of "the relative worth and importance of competing legislative grounds."[15] Such matters are "battle grounds" engaging the passions and interests of conflicting social groups, and incapable of exact determination. Judges, misled by the orthodox deductive account of legal judgment, fail to realize how much of their work involves "weighing considerations of social advantage."[16] One result of this self-deception has been excessive judicial activism, as judges have unconsciously let their own class-based fears provoke them into common law and constitutional decisions that fail to maintain proper judicial impartiality between the competing claims of capital and labor.[17]

Now again Holmes makes an abrupt shift of focus: "So much for the fallacy of logical form." Without more, he turns to "the present condition of the law as a subject for study, and the ideal toward which it tends."[18] This introduces Part III, the third and longest section of *The Path*, comprising paragraphs twenty-one through thirty-three, which we might call "The Ideal of Instrumental Reason." Here is the formula: "[A]

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[12] Holmes, *supra* note 7, at 997.

[13] Holmes, *supra* note 7, at 998.

[14] Holmes, *supra* note 7, at 998.

[15] Holmes, *supra* note 7, at 998.

[16] Holmes, *supra* note 7, at 999.

[17] Here Holmes certainly had in mind Massachusetts decisions from which he had dissented, notably Commonwealth v. Perry, 155 Mass. 117 (1891) (invalidating statute prohibiting withholding textile weavers' pay for defects in their work on freedom of contract grounds), and Vegelahn v. Guntner, 167 Mass. 92 (1896) (enjoining peaceful picketing by workers on ground that intent to cause economic injury to employer rendered it tortious).

[18] Holmes, *supra* note 7, at 1000.

body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words."[19]

Holmes tells us that contemporary law study is too historically oriented, too caught up in tracing legal doctrines back to their origins. History should be used mainly as a critical device to serve reform, allowing the jurist to identify for modification or replacement doctrines, whose original bases in policy no longer hold. Constructive reform should be based on explicit policy analysis. "[T]he man of the future is the man of statistics and the master of economics. 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."[20] After giving a number of examples of doctrines he thinks anachronistic and ripe for reform, Holmes adds that the jurist's arsenal should include not only skeptical historical inquiry and rational policy science or economics, but also jurisprudence, which he conceives as the analysis and classification of legal doctrines so as to best illuminate their subject matter and the policies that animate them.

The single long and final thirty-fourth paragraph serves as Holmes's Conclusion, where he defends both descriptive and normative idealism about the law. Holmes first tells us that legal theory is not impractical because, as a descriptive matter, ideas have important consequences. "Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house," and Descartes and Kant have accordingly done more to shape the practical world (including its working law) than has Napoleon.[21] Then comes a final sudden shift, veering altogether away from practical concerns into an elevated normative idealism. Holmes reminds us that "we all want happiness," and urges that the law offers its practitioners happiness not mainly in the form of money, or even in the form of the power of ideas over events that he has just reaffirmed, but rather by the opening it provides from practical affairs into the intrinsic satisfactions of the world of thought. The "universal interest"

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[19] Holmes, *supra* note 7, at 1000-01.
[20] Holmes, *supra* note 7, at 1001.
[21] Holmes, *supra* note 7, at 1008-09.

of law lies in its "remoter and more general aspects." These offer to lawyers things that are very grand and entirely intangible—"an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law."[22]

II. APPARENT INCONGRUITIES

When *The Path of the Law* is thus analyzed into its component parts, three incongruities emerge. First is the dramatic contrast of tone between the introduction to the essay and its conclusion. Holmes starts by demoting law from a morals-infused "mystery"[23] to a hard headed "business"[24] based on clients' willingness to pay for expert forecasts of what the state will do through the courts. He ends with an echo of the infinite and a hint of the universal law. Nowhere does he say how a single phenomenon can be at once so reduced and so exalted.

The second incongruity appears in the transition from the formalist Part I to the sociologically realist Part II. In the first part, Holmes emphasizes the autonomy of law from moral and social life, and concludes with the bold recommendation of a purely technical legal vocabulary purged of all evaluative connotations. By contrast, in the second part he repeats the message of *The Common Law* that the formal deductive presentation of legal judgments—major premise (rule) plus minor premise (facts) entail conclusion (outcome)—conceals their underlying legislative and instrumental substance. Difficult legal questions are contested because they engage clashes of value. But, the reader naturally asks, would not the underlying substantive and normative character of legal decision be further concealed if legal rules were stated, as Holmes has just recommended, in a purely formal language stripped of all hints of public morality? Part I has set out a way to focus on "the law and nothing else,"[25] a body of law that is isolated and autonomous, and now Part II seems to contradict that by telling the

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[22] Holmes, *supra* note 7, at 1009.
[23] Holmes, *supra* note 7, at 991.
[24] Holmes, *supra* note 7, at 992, 993.
[25] Holmes, *supra* note 7, at 993.

same student that the (same?) law draws its nourishment from the society around it, and can only adequately be understood as an outgrowth of that society.

The third incongruity is between the apparent moral skepticism of Part I and the Progressive moralism of Part III. In the first part, Holmes seems to imply that might makes legal right, and that law is best understood from the point of view of a "bad man" who cares nothing for morality. In Part II, morality comes back in, but only as an external phenomenon, with the emphasis on how the sociological divisions of the community and the historical movements of public moral opinion influence the content of the law. By contrast, in Part III, Holmes becomes vehemently moralistic in his own voice, denouncing the law's "blind imitation of the past" as "revolting,"[26] and proclaiming a "devotion" to the law that makes him "press . . . with all [his] heart"[27] toward the ideal of a "rational" and "civilized" legal order.[28] In reading *The Path*, it is easy to focus on Part I and its "bad man" and prediction theory, and then to ignore the fact that the longest part of the essay is an outburst of hope and optimism about the possibilities of rational legal reform in service of the public interest. Holmes himself has invited the distorted reading by his own apparent inconsistency.

In sum, while the Introduction and Part I of *The Path* together fit the thesis that Holmes was a strict legal positivist and a fatalistic moral skeptic, the remaining parts of the essay—the descriptively historical and sociological Part II, the Progressive utilitarian Part III, and the soaringly idealist peroration—seem to point in three very different directions. When the positivist reading fostered by an exclusive focus on the early passages in the essay is thus cast into doubt, the natural next step is to conclude that Holmes was a merely literary eclectic, someone who had no consistent jurisprudence at all, but was willing to champion any doctrine that might attract momentary attention and for which he could find a pleasing form of words.

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[26] Holmes, *supra* note 7, at 1001.
[27] Holmes, *supra* note 7, at 1005.
[28] Holmes, *supra* note 7, at 1000.

III. THE QUEST NARRATIVE

Plausible as is the view of *The Path* as a series of disconnected observations, I have come to believe that the essay has a carefully plotted structure. Holmes intended the impression of contrast between and among the separate parts, and suppressed anything that might suggest the mutual compatibility of his several theses. His aim was to enliven his potentially bland pragmatist approach to legal theory, and so to strengthen his jurisprudence in its rhetorical competition with more simple and extreme (and therefore exciting) theories, particularly the classical legal science of Langdell.

He arranged the elements of the essay to fit a familiar generic narrative plot, the quest story. The hero of a quest romance begins in the middle of things, as an apparently ordinary person, sometimes marked by portents of special potential. He is then thrown or deliberately descends into misfortune or degradation. Finally, by virtue of what he learns in this fall out of the ordinary, he is able to attain stature far above his beginning point, in true knowledge or self-realization.

Thus in Dante's *Divine Comedy*, the poet, wandering confused in a dark wood in the middle years of his life, is summoned by a great departed predecessor to descend and confront the horrors of Hell. These prepare him for the cleansing ascent up the mountain of Purgatory, from whence finally, purified by his trials of the distractions of earthly existence, he sees Paradise and achieves enlightenment. Similarly, in the standard plot of the Bildungsroman, a young man from an ordinary small-town or country background comes to the city, descends into dissipation and despair, and then struggles upward to full self-consciousness, emerging as the mature artist who writes his own story. And in the traditional Christian sermon, so many of which Holmes heard in his youth, the preacher strips the churchgoers of their conventional respectability by condemning them as miserable sinners, so that through recognition of their fallen state they might throw off their distracting worldliness, see God, and be saved.[29]

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[29] Barbara Fried suggested this comparison to me.

Finally, and perhaps most importantly for Holmes, the standard account of the rise of modern science has the shape of a quest narrative. The human mind starts out in the middle of things, trapped by the beguiling conventional wisdom of common sense. Then the critical scientific spirit strips the richness, color and meaning from the particulars of ordinary experience, reducing them to their bare observable and measurable terms. Ultimately, reflection and experimentation on these reduced and impoverished data lead the scientific inquirer's ascending way to a new and uniquely powerful understanding of the permanent regularities that underlie the everyday flux—to Holmes's "hint of the universal law."

Holmes's essay follows this plot line, as he invites his audience to join him on a jurisprudential pilgrimage along the path of the law. He begins in the middle of things, with law conceived in conventional Blackstonian terms as an impressive "mystery" that somehow manages at the same time to direct state power, embody common morality, and operate according to its own internal logic. After barely evoking this conventional jurisprudence, Holmes immediately reduces the law, in the Introduction and Part I, to a clearly defined but socially isolated and normatively meaningless set of phenomena, a business in which counselors are paid to predict what remedies judges will grant. After this drastic reduction, Holmes constructs the rest of essay as a long ascent, by way of a series of steps each of which elevates the portrayal of his subject matter. First, the law is restored to its social and historical context in the largely descriptive Part II; next, it has its normative significance renewed in the utilitarian reformist Part III; and finally, as a result of the new knowledge attained through the whole process of reduction and refiguration, it achieves philosophical grandeur in the Conclusion.

The strongest clue that Holmes intended to adopt this descent-ascent structure is the stark contrast between the way the law is portrayed at the beginning and the end of the essay. Holmes was an accomplished writer, and always conscious of literary effects. He well understood the heightened impact that is made on the reader by the beginning and end of any text.[30]

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[30] "An epitome of (my) life: my first book ends (designedly) with the word 'explained' — my last with the word 'unknown' . . . I close the gates." 2 HOLMES-

It is most unlikely to have been an accident that the account of law with which he began the essay was the most deflationary one he ever gave, and the account with which he concluded it was perhaps the most elevated.

IV. HYPERBOLE AND PARADOX

I will show in more detail how *The Path of the Law* enacts the literary structure of the quest plot, but first I must draw attention to some characteristic features of Holmes's celebrated prose that can distort the interpretation of his work. He did not write in the plain style, nor was he given to careful qualification or modest Anglo-Saxon understatement. What he praised in the writers he most admired was not care, clarity, or accuracy, but the qualities of "intensity"[31] and "magnificence"[32] they were able to achieve.

In pursuit of similar effects in his own writing, he was particularly drawn to the rhetorical devices of hyperbole and paradox. In the statements for which we best remember Holmes he tended to pronounce in unequivocal and often exaggerated terms. "The life of the law has not been logic: it has been experience";[33] "[t]he common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign";[34] "a constitution is not meant to embody a particular economic conception . . . [i]t is made for people of fundamentally differing views";[35] "the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty";[36] "[w]e do not inquire what the legislature meant; we ask only what the statute means."[37]

LASKI, *supra* note 4, at 876.

[31] 2 HOLMES-LASKI, *supra* note 4, at 605.

[32] THE HOLMES-SHEEHAN CORRESPONDENCE 71-72 (David H. Burton ed., 1976) (Carlyle, who "reached the highest point in the language").

[33] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 5 (Mark Howe ed., 1963) (1881) [hereinafter HOLMES, THE COMMON LAW].

[34] Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

[35] Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).

[36] OLIVER WENDELL HOLMES, *The Soldier's Faith, in* MARK DEWOLFE HOWE, THE OCCASIONAL SPEECHES OF OLIVER WENDELL HOLMES 73, 76 (1962) [hereinafter HOLMES, *Soldier's Faith*].

[37] OLIVER WENDELL HOLMES, *The Theory of Legal Interpretation, in* COLLECTED LEGAL PAPERS, 203, 207 (1920).

A pattern explicit in many of these statements and implicit in the rest of them is: some contested subject matter, X, is *not* Y (as convention would have it), but *is only* Z, which is by implication inconsistent with Y. But when we examine Holmes's overall views on the subject matter of any of these pronouncements, we find them to be more qualified than a literal reading of the familiar one-liners suggests. He turns out to generally regard X as *both* Y *and* Z, a synthesis of the two supposedly warring qualities.

Thus he knew very well that the life of the common law had been an unstable mixture of instrumental problem-solving conditioned by habit (experience) and the effort to achieve an overall articulate coherence (logic).[38] The general Anglo-American common law whose very existence he seemed to deny had in fact been the subject of his most famous book, which sought to display the intrinsic conceptual order of that quite real body of law.[39] He was well aware that a constitution depends for its survival on a significant level of background consensus among those who live under it—and that the American constitutional consensus included economic matters, such as strong protections of private property.[40] While he admired the soldier's passionately blind commitment, he was also a cosmopolitan intellectual committed to the questioning mind and the progressive supplanting of parochialism by civilization.[41] And

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[38] "It is something to show that the consistency of a system requires a particular result, but it is not all." HOLMES, THE COMMON LAW, *supra* note 33, at 5. "What has been said will explain the failure of all theories which consider the law only from its formal side . . . . The truth is, that the law is always approaching, and never reaching, consistency." HOLMES, THE COMMON LAW, *supra* note 33, at 32. "The law constantly is tending towards consistency of theory." Hanson v. Globe Newspaper Co., 159 Mass. 293, 302 (1893) (Holmes, J., dissenting).

[39] As Holmes wrote in an 1879 letter to James Bryce, his purpose in *The Common Law* was to "analyze what seem to me the fundamental notions and principles of our substantive law, putting them in an order which is a part of or results from the fundamental conceptions." MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1882, at 25 (1963) [hereinafter HOWE].

[40] *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

[41] "To have doubted one's own first principles is the mark of a civilized man." OLIVER WENDELL HOLMES, *Ideals and Doubts*, *in* COLLECTED LEGAL PAPERS, 303, 307 (1920). *See also* OLIVER WENDELL HOLMES, *The Use of Law Schools*, *in* COLLECTED LEGAL PAPERS, 35, 48 (1920) (praise of those who are "passionate as well as reasonable"); 1 HOLMES-POLLOCK, *supra* note 4, at 73 (ideal mixture is "to be capable, though a complex and civilized man, to lark like a boy and to rejoice over

finally, on the question whether statutes should be read for their verbal meaning or their underlying intent, he has an equally quotable one-liner on the other side: "it is not an adequate discharge of duty for courts to say [to the legislature]: We see what you are driving at, but you have not said it, and therefore we shall go on as before."[42]

Not every strong Holmesian aphorism is qualified elsewhere in his writings in this way—for example, we find no qualification to the zestful enthusiasm for eugenics expressed in "[t]hree generations of imbeciles are enough."[43] But a point made in unequivocal terms usually turns out to be qualified somewhere else. Much of Holmes's thought was essentially middle-of-the-road,[44] but his instinct for literary effect warned him against hedging his views forth with the appropriate qualifications. So he would call something black when he really wanted only to paint it a darker gray, and later call the same thing white in another context where he thought convention made its gray too dark. And, believing that explicit and systematic exposition of theory was as boring as a duly qualified statement, he left it to his readers to sort out the resulting apparent contradiction. (How can the same thing be both black and white?)

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a bellyful of blubber"); HOLMES-EINSTEIN, *supra* note 4, at 239 (advice to young woman to "be an enthusiast in the front part of your heart and ironical in the back").

[42] Johnson v. United States, 163 F. 30, 32 (CA 1, 1908). Holmes's mature "theory" of statutory interpretation, reconciling the two opposed aphorisms, was that statutory meaning was indeed an objective phenomenon, but it was to be ascertained with full attention to context. And context served to bring in everything that others might treat as evidence of the subjective intention of the legislature. "It is not necessarily true that income means the same in the Constitution and the act. A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used . . . ." Towne v. Eisner, 245 U.S. 418 (1918).

[43] Buck v. Bell, 274 U.S. 200, 207 (1927).

[44] There are important exceptions. I have already mentioned Holmes's virtually unqualified enthusiasm for eugenics, *see id.* His approach to judicial decision was also extreme; unlike all other judges, and most theorists of adjudication, he sharply separated decision according to existing rules from adjudication of cases not settled by existing law, which he treated as occasions for free legislative choice by the judge. *See* Thomas Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice,* 37 WM. & MARY L. REV. 19 (1995).

To him, these were not contradictions, but stimulating paradoxes. "There is nothing like a paradox to take the scum off your mind,"[45] he once wrote, and his letters are filled with them. Here's a short selection: "[M]ore and more I am inclined to belittle the doings of the philosophers while I think philosophy the end of life."[46] "I didn't believe in Hell but was afraid of it."[47] The human being is "a spontaneity taking an irrational pleasure in a moment of rational sequence. . . ."[48] "The excellence of an ideal generally depends on its being unrealizable."[49] "[T]he joy of life consists in the neglect of opportunities."[50] "I view a tendency toward industry as one of my most sinister traits, having long said that those who make the most of themselves don't make much." [51]"The sin against the Holy Ghost is self respect."[52] "[I]f my fellow citizens want to go to Hell I will help them. It's my job."[53]

Take the last quote, which supplies a good example of Holmes using hyperbole to produce paradox. He speaks of helping his fellow citizens to Hell if they want to go there. This gets the reader's attention by apparently flouting the norm that judges should serve justice and the common good. But he doesn't mean to deny the conventional view;[54] his point is only that the judge is supposed to pursue justice and the common

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[45] 1 HOLMES-LASKI, *supra* note 4, at 389.

[46] 1 HOLMES-POLLOCK, *supra* note 4, at 122.

[47] 1 HOLMES-LASKI, *supra* note 4, at 153.

[48] 2 HOLMES-POLLOCK, *supra* note 4, at 22.

[49] 2 HOLMES-POLLOCK, *supra* note 4, at 22.

[50] 1 HOLMES-LASKI, *supra* note 4, at 243.

[51] HOLMES-EINSTEIN, *supra* note 4, at 198.

[52] HOLMES-FRANKFURTER, *supra* note 4, at 88. What Holmes meant by this cryptic paradox becomes clearer in an expanded version:

> The Emperor [Franz Josef] not only did not entertain, he did not surmise the ideas that make life worth living to me; what he did believe I loathe, yet he was a gentleman and a hero. He is a perfect illustration of my old saying that no gentleman can be a philosopher and no philosopher a gentleman: To the philosopher everything is fluid — even himself. The gentleman is a little God over against the Cosmos.

2 HOLMES-POLLOCK, *supra* note 4, at 238-39. The gentleman, that is, indulges in self-respect--the sin of pride, but at the same time a heroic virtue.

[53] 1 HOLMES-LASKI, *supra* note 4, at 249.

[54] "The practice of [the law], in spite of popular jests, tends to make good citizens and good men." Holmes, *supra* note 7, at 99. "The attacks up on the Court are merely an expression of the unrest that seems to wonder vaguely whether law and order pay." OLIVER WENDELL HOLMES, *Law and the Court, in* THE OCCASIONAL SPEECHES OF OLIVER WENDELL HOLMES 168, 169 (1962).

good by enforcing the law, and this sometimes means enforcing a law that the judge would not favor as a legislator. Put that way, though, the point is a boring platitude. Holmes's exaggeration makes it more memorable—and more likely to be misunderstood.

Paradox can be explicit, as in Holmes's remarks about philosophy (futile, and yet the main point of life), rationality (our irrational pleasure in it), and Hell (he disbelieves in it but fears it). Or it can be implicit, as in his remarks about judges helping their fellow citizens to Hell, about the "sin" of self-respect (conventionally a virtue), about the joy of life consisting in neglect of opportunities (conventionally a bad thing), and so on. In these aphorisms, he uses hyperbole to achieve an implicit paradox—thus instead of just saying that the point of an ideal is to make us stretch our capacities, he makes us notice the counterintuitive implications of the commonplace by saying that the excellence of an ideal resides in its very unrealizability. This is paradoxical in implicit conjunction with another truism on the same subject: that an ideal cannot successfully inspire someone for whom it is too far out of reach. We would misinterpret Holmes if we thought he actually wanted to deny the latter truism, rather than neglecting it for the sake of heightened rhetorical effect.

We find most of Holmes's more striking uses of explicit paradox in his letters. In sober public pronouncements, his own sense of decorum, sometimes amplified by judicial colleagues' more restrictive demands, chastened him considerably.[55] Thus we do not find among his legal writings anything quite as playful or provocative as "I always say the chief end of man is to form general propositions—adding that no general proposition is worth a damn."[56] But exaggeration of controversial points was a favorite device of Holmes's, in his judicial opinions (particularly dissents) and his jurisprudential pronouncements, as well as his letters.[57] Examples include the

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[55] "The boys generally cut one of the genitals out of mine, in the form of some expression that they think too free." 1 HOLMES-POLLOCK, *supra* note 4, at 258.

[56] 2 HOLMES-POLLOCK, *supra* note 4, at 13.

[57] Good examples of hyperbolic Holmesian judicial rhetoric are to be found in the famous free speech dissents, *e.g.*,: "I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless . . . an immediate check is required to save the

many juristic statements of the form I have noted—"X is not Y but Z"—when orthodoxy treated X as all or mostly Y, and when Holmes himself elsewhere made clear that he believed it to be both Y and Z.

These rhetorical habits of Holmes's help us better understand what he was up to in *The Path of the Law*. Once we grasp that he was aiming at a specific literary effect in the way he structured the essay, and in particular that he meant it to have the shape of a quest story, we can understand the apparent incongruities in the tone and content of its different parts. The drama is heightened if the stages of the story are abruptly marked off from each other. These transitions are emphasized by Holmesian hyperbolic paradox—exaggeration of the features of each part that most clash with the others. In a quest romance, the hero's movement from one stage of the story to another is meant to be noticeable and dramatic; Earth, Hell, Purgatory and Paradise are very different from each other.

The structure of the quest plot, and Holmes's device of making the movement of the story discontinuous and even vertiginous, explain features of *The Path* that would remain unintelligible as long as we considered it only as an analytical and expository essay. Let me review some of these features, going through *The Path* a second time, now in more detail and with attention to its rhetorical strategy and tactics.

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country." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); "if . . . the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting); "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate." United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting). These celebrated passages were certainly never intended as analytical statements of legal doctrine; they were meant to establish a tone and exhort to an appropriate general attitude with which to approach questions involving freedom of speech.

V. A SECOND TOUR: THE INTRODUCTION AGAIN

The first four paragraphs of the essay do not at all serve the normal expository purpose of an introduction, which is to give a balanced sketch of the argument to follow. Instead, Holmes plunges directly into stating the prediction thesis of Part I, and immediately brings out some of its more reductive aspects. In the third paragraph he approvingly summarizes the conceptualist legal pedagogy associated with his jurisprudential rival Langdell, that the content of the law can be stated in relatively few principles.[58] Only with the last sentence of the Introduction does Holmes glancingly anticipate the latter parts of the essay, with his reference to "an ideal which as yet our law has not attained."[59] This alludes to his argument for utilitarian law reform in Part III; the historicist and sociological thesis of Part II, and the elevated idealism of the conclusion, are not foreshadowed at all.

This is an odd way to introduce an essay on legal philosophy, but a natural and effective way to begin a story. Holmes's intent is not to give an orienting survey of the questions he will address and the arguments he will make, but to launch the reader down the sharply descending path the law takes as it is recast away from the impressive "mystery"[60] of conventional Blackstonian jurisprudence. According to that familiar account, law is at once both a technical and difficult body of arcane material, and at the same time the very perfection of reason in the ordering of human affairs.[61] No, Holmes says, law is neither of these impressive things—it is rather a "well-known profession,"[62] a "business,"[63] devoted to nothing more

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[58] "Law, considered as a science, consists of certain principles or doctrines . . . . If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number." 1 CHRISTOPHER COLUMBUS LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS viii-ix (2d ed. 1879).

[59] Holmes, *supra* note 7, at 992.

[60] Holmes, *supra* note 7, at 991.

[61] Holmes later wrote that what launched him on his career as a legal theorist was "the passionate demand that what sounded so arbitrary in Blackstone, for instance, should give some reasonable meaning—that the law should be proved, if it could be, to be worthy of the interest of an intelligent man." 1 HOLMES-LASKI, *supra* note 4, at 429-30.

[62] Holmes, *supra* note 7, at 991.

[63] Holmes, *supra* note 7, at 992, 993.

grand or mysterious than providing a useful paid service, advice on how clients can avoid disagreeable consequences that might be imposed on them by the courts.

Law is reduced, but also clarified; its sediment of pretense precipitates out, and an important subject is revealed for critical examination. In the same way, human nature in Dante's *Inferno* has none of its earthly complexity and mystery; it is reduced to a catalog of sins. While this frightens us, it also stimulates, and prepares our freshly cleared minds for enlightenment.

VI. PART I AGAIN: HOLMES'S POSITIVISM

Turning to Part I, we find Holmes putting his personal stamp on the legal positivist jurisprudence that he had learned from Bentham and Austin. There are three novelties in Holmes's positivism, each one a development of the idea that law and morals must be analytically separated. Bentham and Austin taught that traditional jurisprudence had confused understanding by blurring the distinction between what the law was (a question of fact) and what it ought to be (a question of value).

Holmes enlivens this teaching with the figure of the "bad man," who cares only about law's predictable material consequences for himself. He adds substance as well by modifying Austin's definition of laws as general commands of the sovereign, directives backed by threats, which create legal rights and duties. Holmes shifts the focus from commands, rights, and duties to remedies. If the law says, "You have a right to flood your neighbor's land, providing only that you pay him the lost value if you do," that is the same to the "bad man" (concerned only with material consequences) as if it said "You have a duty not to flood your neighbor's land, and we will make you pay him the lost value if you do." The law's real language is the language of remedies, and where the remedy (here compensatory damages) is the same, the black-letter law is the same, independent of what the lawmaker may think or say about whether the action to which that remedy is attached is desirable or undesirable, prohibited or permitted. Holmes's varia-

tion of positivism is particularly suited to the analysis of private civil law, where the typical remedy is compensatory damages, whereas Austin had taken the criminal statute as his legal paradigm.

The "bad man's" perspective also dramatizes Holmes's second innovation, his focus on prediction. The sovereign may have issued any number of verbal commands, but the "bad man" has no antiquarian interest in past commands; his only concern is anticipating future actions: what will be done and in what circumstances. Holmes's third innovation shifts the emphasis of positive legal analysis from the legislature to the courts. Jurisprudence is the theory of the work of a "well known profession,"[64] lawyering, and the "bad man" needs a lawyer because lawyers have a state-granted monopoly on the business of appearing in *court* and advising clients what *courts* are likely to do. Direct dealings with the sovereign, or legislature, by contrast, do not require a lawyer—for this the "bad man" can hire a lobbyist, who doesn't need a law license. Bringing the three novel Holmesian elements together, statements of law are predictions of what the *courts will do*—"courts" (not "legislatures"), "will" (not "have") "do" (not "say").

Holmes concludes Part I with his suggestion of a reform of terminology to help cure the law-morals confusion that positivist jurisprudence has diagnosed. Morally tinged words like "right," "duty," "intent," "malice," "negligence" and the like could be eliminated from the language of the law, and a purely technical and uncolored vocabulary substituted, presumably one that simply attached prescribed remedies to factual states of affairs. The law could with some profit speak the "bad man's" language.

Holmes waxes especially hyperbolic in Part I in order to shock his readers, and so to gain and hold their attention. Thus his deployment of the figure of the "bad man" implies that while morality is for good people, law is only for bad people. The effect of this implication is so strong that Holmes does not entirely dispel it even when he explicitly disclaims it by saying: "The practice of [the law] . . . tends to make good citizens and good men. When I emphasize the distinction between

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[64] Holmes, *supra* note 7, at 991.

law and morals, I do so with reference to a single end, that of learning and understanding the law. For that purpose you must definitely master its specific marks . . . ."[65]

By "specific marks" he means whatever it is that differentiates legal rules from other norms. That defining feature turns out to be that legal rules (as distinguished from moral rules, social rules, and customs) attach a judicial remedy to an action or state of affairs. Legal rules need not (though they may and generally tend to) express the shared moral opinion of the community or of a social group. Nor do they necessarily (though again they may) correspond to an underlying moral reality.

That much is common to positivists generally, but one of Holmes's innovations is his focus on prediction. He exaggerates the importance of this focus in what is probably the most frequently quoted sentence of *The Path*: "[t]he prophecies of what the courts will do in fact, *and nothing more pretentious*, are what I *mean by* the law."[66] The emphasized words seem to say that the prediction theory *defines* the law, describes its essential nature.

Yet as most critical readers of *The Path* notice, the prediction theory is clearly inadequate if intended as a general definition of law. To take only the most familiar objection, a judge on the highest court of a state recognizes a duty to follow the law in deciding cases, but obviously does not view the law to be followed as a prediction. For the judge, the law is at least sometimes a set of norms, a source of guidance for decision. Holmes of course knew that, and said a lot about judges' duty to defer to authoritative legal rules and precedents. None of his writing on how judges should do their job even alludes to the prediction theory, much less treats it as an all-purpose definition of law. He clearly did not mean it as such.[67]

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[65] Holmes, *supra* note 7, at 992.

[66] Holmes, *supra* note 7, at 994 (emphasis added).

[67] Holmes's most comprehensive general statement of his view of the judicial role can be found in OLIVER WENDELL HOLMES, *Twenty Years in Retrospect, in* THE OCCASIONAL SPEECHES OF OLIVER WENDELL HOLMES 154, 156 (1962) [hereinafter HOLMES, *Twenty Years*]. *See generally* on Holmes's theory of judging, Grey, *Molecular Motions, supra* note 44.

Indeed in Part I of *The Path* itself, Holmes tells us that his positivist claims, including the prediction theory, are meant only for heuristic purposes; they are useful for understanding the "law as a business with well understood limits, a body of dogma confined within definite lines." From other perspectives "the distinction between law and morals becomes of secondary or no importance."[68] But the flourish of Holmes's pronouncement that he means by law the prediction of judicial action "and nothing more pretentious" overrides the disclaimer, and leaves the reader thinking that this is a jurisprudential, definition warranted good for all purposes.

Holmes resorts to hyperbolic positivism throughout Part I, as for example when he says that "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.*"[69] He suggests that "*every* word of moral significance could be banished from the law *altogether*" and replaced by a vocabulary "uncolored by *anything* outside the law."[70] This helps bring out the point that, along with the oft-criticized amoral positivism, Holmes has also infused Part I with a strongly formalistic jurisprudence that treats law as autonomous, separate from other social phenomena.

VII. PART II AGAIN: HOLMES'S REALISM

Concluding the first part of the essay on this exaggeratedly formalistic note highlights its discontinuity—and apparent inconsistency—with Part II, where paradox is piled upon hyperbole. Still purporting to offer useful advice to the student, Holmes begins Part II by shifting, without noticeable transition, from his formalist proposal for a new legal vocabulary to

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[68] Holmes, *supra* note 7, at 993.

[69] Holmes, *supra* note 7, at 995 (emphasis added). *Cf.* Holmes, *supra* note 7, at 992 ("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.") (emphasis added). Holmes later back-handedly concedes that this point applies even in its limited heuristic sense only when criminal law and equitable remedies (and he might have added punitive damages) are left out—it is really a way of looking at compensatory damages as the law's charging a price for an action. *See* Holmes, *supra* note 7, at 994 ("Leaving the criminal law on one side . . . "); Holmes, *supra* note 7, at 995 (discussing equity and injunctions).

[70] Holmes, *supra* note 7, at 997 (emphasis added).

a stern warning against legal formalism! The second fallacy against which he wants to guard the student (after Part I's fallacy of confusing law and morals) is the belief that legal judgments are simply a matter of deduction—"worked out like mathematics from some general axioms of conduct."[71] He tells us that the orthodox form of legal judgment, in which a conclusion is presented as deduced from a major premise (legal rule) and minor premise (facts of the case), covers up a "judgment as to the relative worth and importance of competing legislative grounds."[72] Such a judgment is founded upon "some belief as to the practice of the community or of a class, or . . . some opinion as to policy."[73] Legal judgments thus rest on ground that is both social and contested, incapable of resolution by exact reasoning. The deductive form is preserved to "flatter that longing for certainty and for repose that is in every human mind." But it is false flattery, for "certainty generally is illusion and repose is not the destiny of man."[74]

That makes a good example of Holmesian hyperbolic paradox. As any student of his jurisprudence and judicial practice knows, Holmes placed a very high value on making and keeping law predictable. He thought judges should almost always defer to precedent and legislation because, as he wrote a few years after *The Path*:

> we have a great body of law that at least has the sanction that it exists . . . . [O]ne can see an advantage, that, if not the greatest, at least, is very great — that we know what it is. For this reason I am slow to assent to overruling a decision. Precisely my skepticism [about more substantive values] makes me very unwilling to increase the doubt as to what the court will do.[75]

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[71] Holmes, *supra* note 7, at 998.

[72] Holmes, *supra* note 7, at 998.

[73] Holmes, *supra* note 7, at 998.

[74] Holmes, *supra* note 7, at 998.

[75] *See* HOLMES,*Twenty Years*, *supra* note 67, at 156; *see also* OLIVER WENDELL HOLMES, *Law in Science and Science in Law*, *in* COLLECTED LEGAL PAPERS, 210, 239 (1920). [hereinafter HOLMES, *Law in Science*]; OLIVER WENDELL HOLMES, *Holdsworth's English Law*, *in* COLLECTED LEGAL PAPERS, 285, 289 (1920). ("[A]lmost the only thing that can be assumed as certainly to be wished is that men should know the rules by which the game will be played."); OLIVER WENDELL HOLMES, *Ideals and Doubts*, *in* COLLECTED LEGAL PAPERS, 303, 307 (1920) (judge's "first business is to see that the game is played according to the rules whether I like them or not").

As part of his project of making the law knowable, Holmes waged a lifelong campaign both as a commentator and a judge to replace the standard of reasonable care in the law of accidental injury with a set of more specific rules defining properly safe conduct.[76] How does all this sit with "certainty" as "illusion"?

The answer is that in Part II Holmes was really only making the relatively modest point that law cannot achieve universal certainty, because even the clearest rule has a penumbra of doubtful applications. But if he had said this in so many words, it would not read as memorably as the famous one-liner about certainty and repose. So he exaggerates, and says that certainty is generally illusion. And he maintains the hyperbolic tone throughout Part II, stressing all the features that do indeed make doubtful cases doubtful, implying that their outcome is determined not by the rule that the judge pronounces in support of the decision, but by unconscious policy factors.

All this sociological realism strains our sense of consistency, as we remember what Holmes has said in Part I about law, prediction, and the desirability that students should focus on learning the law and nothing but the law. At the same time, the law-and-society rhetoric well serves Holmes's narrative strategy. The positivist formalism of Part I stripped the law of all its connection to society, portraying it as an entirely autonomous logical code. We were invited to contemplate the exciting new clarity this brought to legal study, the ability to state more exactly the contents of legal doctrine,[77] while at the same time as we felt deprived by the severing of law's roots in history and social life. Now the plant is back in the ground, and indeed Holmes insists on its organic and inseverable nature.

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[76] HOLMES, THE COMMON LAW, *supra* note 33, at 97-102 ("it is very desirable to know as nearly as we can the standard we shall be judged at a given moment."); *see also* HOLMES, *Law in Science, supra* note 75, at 232-37; B. & O. R.R. v. Goodman, 275 U.S. 66 (1927).

[77] "You see how the vague circumference of the notion of duty shrinks and at the same time grows more precise when we wash it with cynical acid and expel everything except the object of our study, the operations of the law." Holmes, *supra* note 7, at 995.

There is intellectual drama in the contrast, but the price of drama is misunderstanding, as becomes apparent when we come to the end of Part II. Here Holmes says that the unavoidably legislative character of legal judgment implies a serious critique of the judges of his time—they "have failed adequately to recognize their duty of weighing considerations of social advantage."[78] It is natural for us to read Holmes here as recommending that judges should aggressively and candidly put their political views to work in deciding cases, along the lines of the liberal judicial activists of the post-Realist era. If appellate cases generally turn on legislative considerations, as Holmes seems to say throughout Part II, would he not want judges to freely decide on the basis of their honestly stated policy views?

But the lesson Holmes wants to teach is precisely the opposite. He thinks that increased judicial attention to considerations of social advantage might have prevented the rash of anti-labor judicial decisions handed down by conservative judges in the 1890s. If "the training of lawyers led them habitually to consider . . . the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions."[79] He is actually preaching deference and restraint. Yet if Holmes were a postrealist judicial activist of the sort the rhetoric of Part II suggests, he would believe that most contested cases turn on debatable issues of policy, so that judges cannot in good faith avoid taking sides on such issues. In that event, we would expect him to recommend that judges with conservative views (which he himself generally shared) should make and candidly justify antilabor decisions, believing as good conservatives that collective action by workers was against the public interest.

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[78] Holmes, *supra* note 7, at 999.

[79] Holmes, *supra* note 7, at 1000. Holmes has in mind decisions like Commonwealth v. Perry and *Vegelahn v. Guntner*, *see supra* note 17, in his own court, and Temperton v. Russell, 1 Q.B. 715 (1893), in England. *See* OLIVER WENDELL HOLMES, *Privilege, Malice, and Intent*, *in* COLLECTED LEGAL PAPERS, 117, 127 (1920).

Actually, we know that in his approach to judging, Holmes was not this kind of all-law-is-politics realist.[80] He thought most cases could and should be decided neutrally by reference to established legal rules, and that judges should choose between conflicting policies only in the rare cases that arose in the gaps left by a developed structure of legal doctrine. He said this often and explicitly enough[81]—but not in Part II of *The Path*, where we find no advice to defer to precedent and statute, no insistence on the occasional and "interstitial" character of judicial legislation. Such a qualification would have diminished the contrast between the rigorous but sterile formalism of Part I and the life-infused sociological and historicist realism of Part II, slowing the reader's pilgrimage along the path of the law.

VIII. PART III AGAIN: HOLMES'S UTILITARIANISM

The sense of movement accelerates as we pass on to Part III, the longest part of *The Path*. Here we find ourselves far removed from the perspective adopted in Part I, where we were counseled to look through the eyes of the "bad man" at "the law and nothing else," a "body of dogma enclosed within definite lines."[82] Part II has already introduced history and sociology to explain the content of law, though the normative lesson drawn has been one of judicial deference—a lesson that goes naturally with the positivism and formalism of Part I. Now as students of the law we are encouraged to free ourselves from the shackles, not only of Part I's narrow but clarifying logic, but also of Part II's rich but merely animal and unconscious experience.

If the life of the law has been experience, in the sense of habit and the unconscious pursuit of policy, Holmes now preaches that the future life of the law should be enlightened instrumental reason. We are to ascend toward the ideal of a

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[80] Neither for that matter were the actual Legal Realists of the 1920s and 1930s, all of whom strongly opposed what we call "judicial activism."

[81] *See supra* note 75 and accompanying text. *See also* Southern Pac. R.R. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) ("I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motion.").

[82] Holmes, *supra* note 7, at 993.

law, all of whose doctrines have been thoroughly subjected to "deliberate, conscious, and systematic questioning of their grounds." Our goal, which we are as yet "far from," is to achieve a "rational" and "civilized" body of law in which "every rule . . . is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that are stated or is ready to be stated in words."[83]

Holmes proposes reforms in various doctrines that he diagnoses as founded on historical accident or misunderstanding, or based on an originally sound but now obsolete policy. He suggests their replacement by rules calculated to satisfy widely shared contemporary social desires in a more rational way. Throughout, he sounds like a latter day Jeremy Bentham, a rationalist efficiency expert proposing a wholesale utilitarian renovation of the law.

Bentham's spirit comes through the best known lines from Part III:

> 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. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[84]

And as he sums up after his catalog of proposed reforms: "I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them." He adds, as a practical step in that direction, that "every lawyer ought to seek an understanding of economics."[85]

But when we look at the totality of his views, we see that Holmes was very far from a Benthamite. Two years before *The Path of the Law*, he had delivered his famous speech *The Soldier's Faith*, in which he was much less enthusiastic about instrumental rationality.[86] And two years later, in *Law in Sci-*

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[83] Holmes, *supra* note 7, at 1000-01.

[84] Holmes, *supra* note 7, at 1001.

[85] Holmes, *supra* note 7, at 1005.

[86] Holmes stated:

> [W]ho of us could endure a world, although cut up 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 passion of knowledge outreaching the flaming bounds of the possible, without ideals the essence of

ence and Science in Law, he would sharply qualify Benthamite expressions similar to those in *The Path*[87] by noting that "the worth of the competing social aims" between which law must decide "cannot be reduced to number and accurately fixed."[88] And he forecast that "with all the help that statistics and every modern appliance can bring us there will never be a commonwealth in which science is everywhere supreme."[89]

Even in *The Path*, Holmes begins Part III with a perfunctory qualification of his Benthamite program. He notes that most of what we do is based on blind habit rather than rational deliberation, and unavoidably so, because "our short life gives us no time" to do better. But he insists that this limitation does not excuse each of us from "try[ing] to set some corner of his world in the order of reason," and leaves it to us all collectively to "carry reason as far as it will go throughout the whole domain."[90] The general tone is one of great confidence in the power of instrumental reason to supplant the slow, experiential evolution described in Part II. Part III of *The Path of the Law* is Holmes's most optimistic statement of belief in legal and social reform through utilitarian policy science.

There is no reason to suppose that when he wrote *The Path* in 1897, Holmes had temporarily abandoned the urbanely fatalistic skepticism that otherwise consistently restrained his enthusiasm for remaking society through utilitarian legislative reforms.[91] Two years before, in *The Soldier's Faith* he had

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which is that they can never be achieved?

HOLMES, *Soldier's Faith*, *supra* note 36, at 73, 76. *See also* OLIVER WENDELL HOLMES, *The Profession of the Law*, *in* COLLECTED LEGAL PAPERS, 29, 31 (1920) (the "undelightful day" when "the ideal will be content and dignified acceptance of life" instead of "aspiration and the passion for achievement" as manifested in "the barbaric quest for conquest.").

[87] "The true science of the law . . . consists in the establishment of its postulates . . . upon accurately measured social desires." HOLMES, *Law in Science*, *supra* note 75, at 225-26.

[88] HOLMES, *Law in Science*, *supra* note 75, at 231.

[89] He added that the pursuit of scientific law was "an ideal" that like many ideals had the merit of being "unattainable," which meant it "keeps forever before us something more to be done, and saves us from the ennui of a monotonous perfection." HOLMES, *Law in Science*, *supra* note 75, at 242-43.

[90] Holmes, *supra* note 7, at 1000.

[91] Thus he spoke of his "unconvinced conservatism," OLIVER WENDELL HOLMES, *Holdsworth's English Law*, *in* COLLECTED LEGAL PAPERS, 285, 289 (1920); noted his belief that we "rarely could be sure that one [rule] tends more distinctly than its opposite to the survival and welfare of the society where it is practiced,"

expressed himself equally far to the extreme irrationalist side, preaching the virtues of exuberantly existential leaps of blind commitment in the face of the unpredictable future of an unknowable universe.[92] Two years later in *Law in Science* he would strike a more even balance between his competing commitments to faith and reason.[93]

I believe that his actual beliefs were the same all along. Stated prosaically, they were: that we can know some things, but not nearly all we need to justify the practical decisions required of us; and that we can improve our condition by systematic inquiry and deliberate reform—but not much. And all along he knew that simply stating these moderate views in correspondingly measured terms would not win him the audience he desired.

Holmes pushed his rationalist optimism to its outer limits in *The Path of Law*, probably because doing so allowed him to most effectively extend the ascending line of the quest plot around which he had organized the essay. The exaggerations of Part III fit into his general plan of highlighting the contrasts among the way—stations along the path. Nothing he ever wrote carried such a tone of fatalistic amoralism as the "bad man" passage at the beginning of the essay; and, correspondingly, nothing else had such a tone of optimistic progressive uplift as Part III.

IX. THE CONCLUSION AGAIN: HOLMES'S IDEALISM

The motive of achieving dramatic contrast along the narrative line likewise explains the purple passage with which Holmes ends *The Path*. After first pursuing the theme of the practical importance of theory for action, he suddenly launches into his few sentences of peroration in praise of law's capacity to lead students on to the pursuit of knowledge for its own

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HOLMES, *Twenty Years*, *supra* note 67, at 156; and (in the less inhibited forum of private correspondence) he wrote: "I don't believe much in anything that is, but I believe a damned sight less in anything that isn't." Letter from Oliver Wendell Holmes to John Henry Wigmore (Dec. 4, 1910), *quoted in* MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 1870-1882 at 193 (1963).

[92] *See supra* note 86, and for Holmes's own consciousness that he was divided between clashing impulses toward rationalism and mysticism, see *supra* note 30.

[93] *See supra* notes 87-90 and accompanying text.

sake, offering "an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law."[94]

Law's connection to science and philosophy was a familiar theme of Holmes's, and this connection marked the highest point of ascent that his scheme of values permitted to the lawyer. So he takes up this theme to conclude his essay, where its unabashed idealism provides the greatest possible contrast with the reductive and behaviorist materialism of the Introduction and Part I. This is the Paradise for which the traveler along law's path has finally been prepared, first by the descent to clarifying but amoral and socially disconnected positivism, and after that by the subsequent purgative ascent through the stages marked by sociological and historicist descriptive realism, followed by normatively constructive progressive utilitarianism.

Though the peroration does its job of stretching to the summit the line of the quest plot, it does not strike me as representing Holmes's best writing. His prose labors when he reaches for the "magnificence" he so admired in Carlyle.[95] There is a certain forced intensity and high-sounding vagueness about these hints and glimpses of the ineffable, as there is with other Holmesian excursions in pursuit of the sublime. He was a master of English prose, but his best moments

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[94] Holmes, *supra* note 7, at 1009.

[95] *See supra* note 32.

as a writer tended to come when he was being ironic, blunt, and low,[96] or when he was summarizing a complex pattern of ideas in an evocative sentence or two,[97] or describing a physical object or a scene.[98]

Style aside, there is something else rhetorically wrong with the conclusion of *The Path*—Holmes has not prepared us for it. The paean to the possibilities of law study as an exalted pursuit of truth concludes an essay otherwise devoted entirely to practicalities. Even most of the long concluding paragraph is taken up with arguing that jurisprudential ideas have important practical consequences. When in the very last sentences, the focus suddenly shifts to the intrinsic satisfactions of studying law, the new theme seems tacked on—too little and too late.

Holmes may have felt this thematic imbalance himself, for two years later, when he wrote his other substantial jurisprudential essay, *Law in Science and Science in Law*, he divided his focus evenly between the practical and the impractical, devoting the whole first half to a consideration of law as on object of study for its own sake (law in science). Only in the second half did he take up the practical advantages of law study and jurisprudential theory for the working of legal insti-

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[96] "[E]ven a dog distinguishes between being stumbled over and being kicked." HOLMES, THE COMMON LAW *supra* note 33, at 7. "I was repining at the thought of my slow progress — how few new ideas I had or picked up — when it occurred to me to think of the total of life and how the greater part was wholly absorbed in living and continuing life — victuals — procreation — rest and eternal terror. And I bid my self accept the common lot; an adequate vitality would say daily: 'God — what a good sleep I've had.' 'My eye, that was dinner.' 'Now for a rattling walk—'; in short realize life as an end in itself." 2 HOLMES-POLLOCK, *supra* note 4, at 22.

[97] "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified . . . ." Southern Pac. R.R. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). "I got a similar impression from four paintings of a haystack, by the famous French impressionist, I can't think of his name — Monet, it comes to me — I am old — which simply by the changes of light seemed to say: You want incident? Isn't the infinite enough?" 1 HOLMES-EINSTEIN, *supra* note 4, at 307. "I am afraid I also should find it hard to get on with the Greeks. We want the infinite, which Livingstone says they disliked. We want the reflection of the reflection, the looking-glass at both ends of the room." 1 HOLMES-EINSTEIN, *supra* note 4, at 93.

[98] "I pause to remark that I have a scarf pin that gives me immense pleasure — it looks so like a cockroach hiding in a corner with a gleam of light upon his back." 1 HOLMES-LASKI, *supra* note 4, at 304.

tutions (science in law).

How might Holmes have ended *The Path* in a way that was appropriately elevated, and yet maintained the essay's thematic focus on the practical side of law? He was addressing students, and his subject was what the study of law might finally mean to them. He began by demoting their subject to a narrow focus on rules, divorced from society and morality. He then brought society back in by noting that social desires give content to the rules, and in close cases even influence their application. And next he recuperated morality with the challenge of law reform aimed at fulfilling those desires at the least cost.

If he thought the reformist utilitarianism of Part III could not provide enough inspiration to practicing lawyers, or law reform was not an activity sufficiently available to them, why didn't Holmes say something about the more accessible higher satisfactions of practice? Legal knowledge and skill make it possible for an advocate to see to it that justice is done in an individual case, or if it is doubtful where justice lies, simply to do a some social work for a needy fellow creature. For many lawyers, this is the inspiration that keeps them going.

But Holmes had not found that kind of human satisfaction in private practice; rather he had experienced it as a "greedy watch for clients and practice of shopkeepers' arts," involving "mannerless conflicts over often sordid interests."[99] What made him believe that "a man may live greatly in the law as well as elsewhere" was the external intellectual possibilities of the profession, the way law could lead outside its own narrow boundaries to "anthropology, the science of man, to political economy, the theory of legislation, ethics, and thus by several paths to your final view of life."[100] And he was frank that this was not a special justification for taking up the law as distinguished from some other line of work; "[i]t would be equally true of any subject" that could be systematically studied.[101]

That last concession leaves Holmes's justification for entering on the path of the law rather weak, but in its very weak-

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[99] OLIVER WENDELL HOLMES, *The Profession of the Law, in* COLLECTED LEGAL PAPERS, 29, 29 (1920).

[100] *Id.* at 30.

[101] *Id.*

ness it reflects his own experience. He had felt no special vocation to be a lawyer, but rather had been "kicked," "thrown," and "shoved" into the profession by the need to make a living, when his real interests were speculative and philosophical.[102] In 1915, after almost half a century in the law and more than thirty years as a judge, he would still write to a young friend, the philosopher Morris Cohen, that "I am glad that a philosopher is interested in the law—I hardly should be interested in it—if it did not open a wide door to philosophizing . . . ."[103]

There is then something autobiographical about *The Path of the Law*. The descent at its opening corresponded to a real falling-off in Holmes's own personal experience of law practice. And the subsequent ascent reflected his private redemption through intellectual effort and achievement. Reflection upon the more sordid aspects of legal work had actually helped him to a more scientific understanding of his subject. He had learned from Bad Men, (or from morally indifferent business clients) that the law's central operation is the granting of judicial remedies, and that its dogmas are formulated in large part to help its practitioners predict judicial action for the benefit of those who purchased their services.

We can see the ascent which followed as corresponding to Holmes's researches during his years as an apprentice scholar and practitioner.[104] These were marked by the discovery that practical law study led on, first to the social dimension, revealed by anthropology and history, and then to the normative disciplines of political economy, the theory of legislation, and ethics. Looking back from the summit of this long pedagogical ascent, the mature jurist could draw on his own experience to advise his young audience that their subject was not only a

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[102] Letter from Oliver Wendell Holmes to Mrs. John C. Gray (Apr. 30, 1905), *quoted in* MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS, 1841-1870 at 176 (1957); *Wu Letters, supra* note 4, at 167; 1 HOLMES-LASKI, *supra* note 4, at 205.

[103] And he went on to repeat his familiar "chestnut" that "the chief end of man is to frame general ideas — and that no general idea is worth a straw." *The Holmes-Cohen Correspondence, in* LEONORA ROSENFIELD, PORTRAIT OF A PHILOSOPHER: MORRIS R. COHEN IN LIFE AND LETTERS 313, 314 (1962)

[104] HOWE, *supra* note 39, at 2-26, 220-21.

practical one. Inquiry guided by the motive of better understanding the law's practical workings could lead (because in his case it *had* led) beyond the practicalities into the only really satisfying world—the great world of ideas.

X. HOLMES'S PRAGMATISM

I have so far not tried to answer the critic who argues that Holmes was not a serious legal theorist, but only a "literary feller"[105] who used the law as an excuse to strike off epigrams and aphorisms. I disagree with this criticism, because I believe that Holmes was the primary founder of legal pragmatism, and that this perspective lends both coherence and importance to his theoretical writing. Without getting into whether legal pragmatism really is a distinctive or interesting philosophy of law, I want simply to argue that the apparently disparate and incongruous theses that Holmes advanced in *The Path* were indeed consistent with each other, and with a plausible version of pragmatist jurisprudence.

I have argued that Holmes had literary motives in writing as he did. He wanted to set forth his jurisprudential insights in a way designed, not to display their mutual relations or conceptual structure, but rather to tell an interesting story, the story of the legal initiate as romantic hero or pilgrim, ascending along the difficult but ultimately rewarding path of the law. I have also described how he used hyperbole and paradox to vivify his ideas, and noted how these rhetorical tendencies might incline him to display his theoretical points in such a way as to make them seem very distinct, even at the cost of concealing their mutual relations. For theater's sake, he might even deliberately create an appearance of incongruity among mutually consistent ideas. In fact I think he did just that in *The Path*, whose themes and arguments can be fitted together

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[105] When Holmes was nominated to the U.S. Supreme Court in 1902, the *Boston Evening Transcript* editorialized: "Judge Holmes has not been a great judge. He has been more of a literary feller than one often finds on the bench, and he has a strong tendency to be brilliant rather than sound . . . .", *quoted in* LIVA BAKER, THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES 353 (1991). For Holmes's "unreasoning . . . rage" at this assessment, see 1 HOLMES-POLLOCK, *supra* note 4, at 106.

and seen to correspond to the main tenets of legal pragmatism.

John Dewey supplied a useful summary of the substance of pragmatist legal theory in 1941 when he was asked, along with a number of distinguished jurists, to state "My Philosophy of Law."[106] Dewey described legal pragmatism as a synthesis of the two leading jurisprudential movements of the nineteenth century, the historical and analytical schools. The historicists understood the law of a society in mainly descriptive terms, as deriving from the informal norms and practices structuring human interaction in that society. On the normative side, historicism generally confined itself to praise for the virtues of experience and warnings against codification and other rationalistic schemes of law reform. By contrast, the analytical jurists saw law in descriptive terms of whatever was enacted according to duly certified legislative procedures, an account that clarified how law can be more dynamic than custom, but that underemphasized social origins of legal content. On the evaluative side, their utilitarianism gave them a stronger basis for criticism of inherited legal traditions than the historicists could provide.

The two schools treated each other as rivals and competitors through the nineteenth century, and it was the special insight of the legal pragmatists at the end of that century to see that each school had erected a useful perspective into a general theory that tended to obscure the insight of the other. The legal pragmatist synthesis was, as Dewey summarized it, descriptively historicist and sociological and normatively utilitarian or functionalist. Holmes, whose writings undoubtedly influenced Dewey's formulation, fit the model. His was a jurisprudence practical in two senses—it treated law as arising out of collective practices, and it submitted legal rules and institutions to the practical test of whether their consequences were humanly satisfying.[107]

The bias of pragmatist theorizing, exemplified by both Holmes and Dewey, is at once eclectic and instrumental. The pragmatist expects different theories to arise in different contexts when the object of theorizing is viewed from different

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[106] JOHN DEWEY, MY PHILOSOPHY OF LAW 73 (Julius Rosenthal Foundation ed., 1941).

[107] See the more extended account in Grey, *supra* note 4, at 805-15.

perspectives; and those theories are to be judged not primarily by their elegance, simplicity, or evident coherence, but by their tendency to improve the relevant practices.

Now it time to return to the question whether a consistent pragmatist jurisprudence underlies the dramatic unity of the quest tale Holmes tells in *The Path*. Initially, it's worth noting that Holmes does not leave the apparently clashing positivist, realist, and functionalist themes of his essay entirely unrelated to each other. In Part III, he briefly unites them while setting forth his recommended course of law study. The student, he says, should first "follow the existing body of dogma into its highest generalizations by the help of jurisprudence"; next "discover from history how it has come to be what it is"; and finally take up ethics and political economy "to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price."[103] These elements of law study correspond to the separate themes of Parts I, II, and III of *The Path*, and Holmes presents them not as rival theories about the nature of law, but rather as successive perspectives on a single complex set of phenomena, arranged in a pedagogically effective sequence.

Jurisprudence as Holmes understands it is the analytical study of legal doctrine. Its purpose is to state the legal rules and arrange them under broad principles and concepts so as to perspicuously display their contents, purposes, and interrelationships. Along with this conceptual project of generalization and taxonomy, the analytical enterprise can clarify the substance and operation of legal rules by washing them in the positivist cynical acid that strips away moralistic terminology, and including the standard focus on rights and duties to ask the operational question of what judicial remedies will attach to what states of affairs. This perspective is recommended in the first instance to the beginning law student who wants to learn what the rules of law provide, and also to the professional counselor whose business it is to give legal advice to a client.

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[103] Holmes, *supra* note 7, at 1007.

In addition to students and practitioners, the legislator can profit from the focus on prediction and remedies. People go to lawyers to get advice about what the law will do in response to different courses of conduct, and the positivist "bad man" approach emphasizes the importance of making the law predictable in its application. Holmesian positivist analysis also reminds the legislator that behavior responds to the incentive effects provided by remedies. A legislator who cares a lot about holding people to their promises should subject breach of contract to criminal penalties, punitive damages, or injunction, not just compensatory damages. Along the path of the law, the remedial walk should keep step with the doctrinal talk.

Turning to Part II, we find that history and sociology are necessary for law students and counselors facing the inevitable doubtful cases that are not settled by established rules. Decisions are always justified by reference to a rule, but the choice between competing rules, and the exact framing of the chosen rule in close cases, are determined by the same legislative forces that give content to the rules in the first place—the largely unconscious amalgam of habit and desire that Holmes calls "experience." This point is important to the judge, who approaches the law as a set of norms rather than predictions (as in the case of the counselor), but who must also understand that the judicial role in difficult cases has a lawmaking component. Recognizing that gaps in the law make judicial legislation necessary can discourage the more insidious and ambitious kind of activism that imposes controverted policies in the guise of deductions from established principles.

Holmes recommends the functional perspective of Part III to the student concerned with the future of the law, and professionally to legislators and the jurists who advise them. Here the analytical and descriptive approaches of Parts I and II are inappropriate; we want to know what the law should be, not just what it is, so that we can change it for the better. We also want to understand the factors that distort law from the service of human needs, such as the inertial tendency to preserve old rules out of habit while inventing spurious present policy justifications in support of them.

Let us now review the three incongruities that appeared

upon our first reading of *The Path*. We find that there are actually no logical inconsistencies among them once Holmes's doctrines are stated soberly and with proper attention to the limitations of scope implied by context. First, there is no inherent conflict between the positivist analytical approach of Part I and the sociological approach of Part II once they are seen as alternative perspectives that serve different purposes. To pragmatists, analytical positivists and historical jurists aren't in disagreement. Law at any time is mostly what it has been before, which in turn has been shaped unconsciously by what people have wanted. There is no inconsistency between taking account of this tendency, and advising that the student or lawyer can best learn the basics of a new area of law by concentrating on a clear arrangement and formulation of the rules as they presently guide judges in granting remedies; thus requiring that they be temporarily abstracted from their history and social origins, and leaving the merits to one side. Blackletter law has its place.

Holmes notes that official statements of the rules will contain words with moral connotations, and advises the lawyer to check whether the narrowly legal meaning of those words correspond with their moral meaning—because it often does not. When a lawyer counseling a client determines that the established rules of the system do not clearly settle a legal issue facing the client, the sociological insight of Part II comes into play, and the lawyer must take into account that judicial policy preferences are likely to determine the issue if it comes to litigation.

Second, the apparent conflict between the amoralism of Part I and the reformist moralism of Part III turns out to be illusory. Holmes has made it explicit that the "bad man's" perspective is adopted for a limited purpose, that of learning the rules and forcing the student and lawyer to focus on what those rules actually provide by way of remedy. There is no inconsistency between this and the normative utilitarianism of Part III. Bentham and Austin, the original diagnosticians of the confusion of law with morality, were themselves utilitarians. The sense that Part I somehow implies amoralism or ethical skepticism about law is a rhetorical artifact, a conse-

quence of Holmes's choice of the figure of the "bad man" to dramatize the emphasis he thinks lawyers should place on courts, remedies, and prediction.

Finally, we have already seen how the low view of law implied in the beginning of *The Path* can be reconciled with the exalted view found at the end. Again, the positivism of Part I is not really a theory of law in the usual sense. Rather it is a heuristic device enabling the lawyer to understand the actual operations of the formal law, and thus the incentives it adds to human action in supplementing social custom and morality. Holmes takes care to say this explicitly, and we have no reason to disregard his stipulation.[109]

There is also no general theory or account of law set out in the Conclusion. Holmes does not expect the working counselor advising a client or the judge deciding a difficult case to be dominated by thoughts of how the great tapestry of the law implies an echo of the infinite. The perspective that connects law to science and philosophy is, like the other perspectives Holmes recommends, a partial one. The busy practitioner or judge can sample contemplative satisfactions in passing during the work day, or after hours, without disregarding the practical operations of the system or the material concerns of clients or of society.

The substantive theses Holmes advances in the three parts of *The Path* are not only consistent with each other, but with pragmatist jurisprudence generally. Part I takes up the perspective of someone engaged in the practice of law in order to formulate a theoretical insight, the special importance of prediction and remedies in the lawyer's law. Parts II and III respectively summarize the historicist and the utilitarian elements that legal pragmatists like Holmes and Dewey were concerned to synthesize.

To the extent we find the separate parts of the essay at war with each other, this is because in writing it Holmes was motivated more by the desire to be remembered than to be understood. The actual message he preached, in its broad outlines, was to become the mainstream orthodoxy of American legal thought after his day, Progressive legal pragmatism, the theory later disseminated under the name of Sociological Juris-

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[109] *See supra* note 64 and accompanying text.

prudence by Roscoe Pound.[110] In Pound's many writings expounding this pragmatist jurisprudence, there is little danger of finding contradiction or obscurity. There is not much hope of finding tension or drama either, of course, and one doubts whether there will be many symposia such as this one on the centenary of any of Pound's articles.

Holmes achieved what he wanted; his words are still read a hundred years after he wrote them. Maybe this is only time's unjust reward for writing well, a meretricious immortality won by mastery of rhetorical tricks. I don't doubt that Holmes was sometimes no more than a skilled performer at play—and often something of a showoff. *The Path of the Law* is a virtuoso performance, and such virtuosity naturally creates suspicion that there is less substance to the performance than meets the eye.

On the other side, though, we should remember what Holmes said (with characteristic immodesty) against the claims to superiority of the plain style: "I do not regard perfect luminosity as the highest praise. An original mind really at work is hardly likely to attain it."[111] Writing that is direct, literal, and clear is not always the best representation of thought, and what it sometimes fails to capture is what Holmes forces his readers to apprehend—the dialectical drama of the struggle between incommensurably conflicting (but not mutually contradictory) ideas.

Most legal writers since Holmes have used the metaphor of balancing to describe the process of reaching judgment in the face of ideological conflict. But where competing policies and principles are genuinely incommensurable, and particularly where they represent uneasily coexisting world views and ways of life, the balancing metaphor tends to denature and domesticate judgment, rendering it as more routine and commonplace than it really is.

Holmes did not generally use the balancing metaphor, with its implication that the values in conflict have weights that are discernibly independent of the process of choice. He tended to portray ideological conflict as unstable and not ame-

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[110] Roscoe Pound, *The Need for a Sociological Jurisprudence*, 31 A.B.A. REP. 911 (1907).

[111] HOLMES-EINSTEIN, *supra* note 4, at 21; *cf.* 2 HOLMES-LASKI, *supra* note 4, at 904.

nable to rational solution, and a legal judgment in conditions of ideological struggle as a command decision on a battlefield—an exercise of choice by a human being responsible for the consequences, but aware of unmeasurable needs and desires in conflict, with much at stake and almost everything uncertain.[112] In the many contexts where legal actors cannot really do much better than this, though the official story says that they can and must, Holmes's romantic and martial rhetoric is not only more lively and memorable, but also more accurate, than its conventional rivals. The organization of *The Path of the Law* around a storyteller's plot rather than a philosopher's conceptual structure in many ways makes it an appropriate medium for its message.

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[112] See, for an example of Holmes's refusal of the balancing metaphor and his assertion of personal responsibility for choice in a situation of ideological conflict, his dissenting opinion in Olmstead v. United States, 277 U.S. 438 (1928):

> [W]e must consider the two objects of desire, both of which we cannot have . . . . It is desirable that criminals should be detected, and to that end that all available evidence should be used. It is also desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained . . . . We have to choose, and for my part I think it a lesser evil that some criminals should escape than that the government should play an ignoble part.

Id. at 470.