

INTERPRETING HOLMES

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The Path of the Law offers readers three perspectives on the American legal system. In the first, law is depicted as an "instrument of . . . business." The viewers through whose eyes it is seen are an ordinary client and his lawyer. The client's main interest is to "keep . . . out of court." The lawyer's job, consequently, is to predict the circumstances under which the client will be obliged to go to court and suffer undesirable consequences. To make such "prophecies," Holmes argues, the lawyer must know not merely the pertinent rules and precedents and the "logic" that ostensibly links them, but also the beliefs — the attitudes, "often . . . inarticulate and unconscious," concerning "the relative worth and importance of competing" policies — that are likely to affect the deliberations of judges and juries in particular cases. The lawyer does not himself evaluate or participate in these judgments; his job is only to foretell them.

In the second perspective, the viewer is a judge or, more vaguely, a "master" of the law. Instead of predicting "the incidence of the public force through the instrumentality of the courts," he seeks directly or indirectly to control it. His job is not merely to identify the "considerations of social advantage" that will affect others' judgments, but also to weigh those considerations. Armed with an understanding of statistics and economics, he should try to resolve such questions as whether a system of workmen's compensation would be superior to the present tort regime or whether criminal sanctions are effective in deterring undesirable behavior — and then use his conclusions to reform the law.

In the third perspective, the law is seen as a repository of wisdom — a chronicle of the "moral development of the [human] race" or, better still, an embodiment of superhuman values. The viewer is neither a shrewd operator nor a confident shaper of the system, but a humble and grateful parishioner. In this vein, Holmes argues that contact with the law — ordinary legal practice — is uplifting and "tends to make good citizens and good men." More sustained study of legal doctrine and theory promises even greater rewards:

The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.

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Though not logically incompatible, these three perspectives are in some tension with one another. The first two are realist in spirit; the third is romantic. The first and third posit viewers who have little or no control over the object viewed; the second posits a viewer who sees himself the "master" of the object viewed. Seen from the second angle, the law is a "dragon" — dangerous and old, who must be tamed or killed; seen from the third, the law deserves respect, even worship.

How might we make sense of these conflicting perspectives? The most conventional analytical strategy would be to use them to illuminate Holmes's psyche (and vice versa) by tracing each of the three to some aspect of his personality or biography. The cynicism and fatalism of the first perspective, for example, might plausibly be connected to the deep psychic wounds that Holmes sustained in the Civil War.¹ The hubris and antidemocratic cast of the second perspective might equally plausibly be linked to his patrician heritage. The piety of the third perspective, and the associated sense that "the infinite" can at best be only "glimpse[d]," might more speculatively be traced to the Calvinism of Holmes's Puritan ancestors.² Musing of this sort might enable us to get to know better Holmes the man.

Alternatively, following Quentin Skinner's lead,³ we might seek to clarify Holmes's intentions by exploring the ways in which he drew upon and occasionally transcended the vocabularies and belief systems in general circulation in the United States at the time he wrote. For example, much of the imagery of the first perspective (emphasizing "battles" among individuals and interest groups for dominance and survival) echoes the language of Social Darwinism — an outlook that, from independent sources, we know attracted Holmes.⁴ That observation, in turn, suggests that when he remarked offhandedly near the end of the essay, "the weak and foolish must be left to their folly," Holmes meant something more general than that legal education should not cater to "incompetent" students. The second of the three perspectives might in similar fashion be linked to Mugwumpery and incipient progressivism in politics and to pragmatism in philosophy.⁵ Finally, following Thomas Grey, we might interpret the third perspective — and, in particular, the paean (quoted above) with which

¹ For provocative speculations concerning the character and effects of those wounds, see G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 49–86 (1993).

² See MARK DEWOLFE HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870–1882*, at 282–83 (1963); Adam J. Hirsch, *Searching Inside Justice Holmes*, 82 VA. L. REV. 385, 397 & n.75 (1996).

³ See, e.g., Quentin Skinner, *Meaning and Understanding in the History of Ideas*, in *MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS* 29 *passim* (James Tully ed., 1988).

⁴ See WHITE, *supra* note 1, at 290–91, 324; Robert W. Gordon, *Holmes' Common Law as Legal and Social Science*, 10 HOFSTRA L. REV. 719, 739–40 (1982).

⁵ See SHELDON M. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* 156 (1989); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 788–89 (1989).

Holmes closes the essay — as in part an effort to locate, in the law, a source of certainty and spirituality — a solace made precious by the increasing anomie, rootlessness, and secularism of postbellum American culture.⁶ A byproduct of an analysis of this general sort would be an enhanced appreciation of the variety of alternative discourses “in the air” at the close of the nineteenth century.⁷

Finally, we might ignore the historical contexts out of which the essay grows and ask: how, if at all, do Holmes’s three perspectives speak to issues that interest or trouble us today?⁸ For example, we could juxtapose the resolute legal positivism of the first perspective (manifested most sharply in the famous “bad man” theory of the law) with Ronald Dworkin’s nonpositivist jurisprudence (expressed perhaps most crisply in the essay “Hard Cases”⁹) and ask which approach is more insightful or persuasive. A less straightforward application of this interpretive approach would begin by noting a homology between the trichotomous outlook of *The Path of the Law* and the tensions that, in the late twentieth century, have characterized American civil rights activism and scholarship. Is the federal Constitution a repository of wisdom or a chronicle of oppression?¹⁰ Do antidiscrimination laws advance the cause of liberation or, by reinforcing the hegemonic liberal discourse of rights, retard it?¹¹ In general, should a person committed to racial justice strive to be a “master” reformer or a global critic? Insider/outsider. Enthusiast/skeptic. What might contemporary participants in the legal struggles for civil rights (and the academic commentary thereon) learn from the way that Holmes dealt with analogous choices? Perhaps that success (and enduring fame) are reserved to lawyers and scholars capable of straddling such divides? Or perhaps that such a deliberately compromised stance is also conducive to complicity and egotism?

⁶ See Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 37 (1983).

⁷ The approach outlined in this paragraph blends the methodologies developed by contemporary intellectual historians under the umbrellas of “Contextualism” and “New Historicism.” For more general discussion of these (and other) approaches, see William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. (forthcoming May 1997).

⁸ For more general discussion of intellectual history in this vein, see Fisher, cited above in note 7, at Part II.C.

⁹ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81–130 (1977).

¹⁰ See, e.g., Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 1–5 (1987).

¹¹ See, e.g., Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1335 (1988).