HOLMES'S 'PATH OF THE LAW' AS NON-ANALYTIC JURISPRUDENCE

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I INTRODUCTION

According to Mark Twain's classic definition, a classic is 'something that everybody wants to have read and nobody wants to read.' By that measure 'The Path of the Law' [1] is not a classic. Its relative brevity (take note law professors) and six footnotes (take note student editors) have surely helped to keep it read and discussed one hundred and twenty years after its publication. It is, perhaps, a classic in a different sense, in the sense that, say, 'The Problem of Social Cost' is not. Though possibly more 'influential', one does not need to read Coase's essay to get its main ideas; in fact, as what is now known as the Coase theorem is not stated explicitly in it, it is probably easier to understand Coase's essay and appreciate its significance, by learning the theorem before reading it.[2] With 'Path', a large part of what makes it worth reading is the way it is written.

But the very same things that make 'Path' worth reading also make it difficult to pin down. For all of the article's fame, what does it stand for? Though widely read, its 'thesis' remains elusive; superficially it is not even apparent that it has one. It is easy to read 'Path' as a series of loosely-jointed thoughts that move, sometimes within the space of a single paragraph, from the breathtakingly abstract to the most technically concrete. In this fairly short 'discourse'[3] Holmes talks about history, economics, philosophy, psychology, and criminology; he makes references to Roman, English and American law; he discusses doctrines from contract, tort, and criminal law. Together with the brilliant aphorisms the effect is dazzling upon first encounter, but does all this add up to a clear and coherent thesis?

Anyone who wishes to answer this question today is not aided by any of the trappings of contemporary academic writing. There is no abstract, no divisions into sections, no signposting ('Part I will show; then in part II I will argue'), no real attempt to place the piece within existing literature. Those who have read the article often struggled to find a consistent view that reconciles the no nonsense 'positivism' of the essay's opening pages with the 'metaphysical' reflections of its peroration. The very first words of the essay — 'When we study the law we are not studying a mystery but a well known profession'[4] — seem at odds with the rather mysterious words of the final sentence, that it is only by looking into the 'remoter and more general aspects of the

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1 O W Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457. Though this is the most familiar citation, it is not the essay's first publication. 'Path' was first published in issue 4 of volume 1 of the *Boston Law School Magazine* (dated February 1897), a few weeks prior to its reprint in issue 8 of volume 10 of the *Harvard Law Review* (dated 25 March 1897). That this was the first publication is confirmed in a letter from O W H to Clare Castletown (11 February 1897) at 1.

2 Coase himself stated that he did not notice the full significance of his article until some time after its publication. See R H Coase, 'The Institutional Structure of Production' (1992) 82 *American Economic Review* 713, 717.

3 Holmes, above n 1, 472.

4 Ibid 457.

law' 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'.[5]

'The Path of the Law' has been the subject of extensive (and widely divergent) commentary,[6] and I do not expect this essay to end the conversation about it. What I will try to do in this essay is to present 'The Path of the Law' as an essay with a thesis, that makes sense of 'Path' *as an essay* and reconciles many of its apparent tensions. To do that may be seen as an attempt at clipping an angel's wings. 'Path' is a classic (that word again) of the 'English' essay, the seemingly effortless extempore, part of whose charm lies precisely in eschewing a clear thesis.[7] But it would be wrong to think that Holmes thought of this piece as a casual collection of bon mots. Holmes's private correspondence shows he considered the essay an important statement on the law.[8] He would have been less than justified in thinking that, and we should have been far less interested in it today, if 'Path' had been just a series of interesting thoughts.

II THE ARGUMENTATIVE PATH OF 'THE PATH OF THE LAW'

As I read it, Holmes's argument consists of three steps. In the first Holmes seeks to dispel some myths about the relationship between legal and moral obligation; in the second he challenges a view nowadays known as 'formalism'; and in the third he proposes an alternative approach to legal thought. But the first two steps are not just a correction of an error, they are also two stages in the development, or 'path', of the law. Since much of the argument has been, I think, shrouded in several misunderstandings, it is important to begin with a presentation of what the argument in each of the steps says. Then, in the next section, I explain the sense in which the parts of the essay correspond to the three resting points along the path of the law.

A *The First Step: The Misunderstood Bad Man*

The state has power to bring about what it wants, and the law is a collection of information from which we can predict when this power is likely to be exercised. Lawyers are people who have acquired expertise in that information and whose

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5 Ibid 478. For one example of such puzzlement see Henry M Hart, Jr, 'Holmes' Positivism—An Addendum' (1951) 64 *Harvard Law Review* 929, 929–31. Not being able to reconcile the different parts of the essay, and repulsed by what he thought Holmes said in the beginning, Hart thought the only possible solution was 'rejecting what Holmes said in the first part of the speech' (931).

6 In 1997, the article's one hundredth anniversary, *Harvard Law Review*, *Brooklyn Law Review*, and *Boston University Law Review* published symposium issues on the article. Another symposium was published as Steven Burton (ed), *The Path of the Law and its Influence* (2000). And there are numerous other articles dedicated to this essay and to Holmes's thought. Not all of it is by any means favorable. For examples of critical work on Holmes see Albert W Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* (2000); Yosal Rogat, 'Mr. Justice Holmes: A Dissenting Opinion' (1962-3) 15 *Stanford Law Review* 3, 254; Hart, above n 5; Louise Weinberg, 'Holmes' Failure' (1998) 96 *Michigan Law Review* 691.

7 See Neil Duxbury, 'When Trying Is Failing: Holmes's Englishness' (1997) 63 *Brooklyn Law Review* 145, 151, 158. Interestingly, Holmes uses British spelling ('defence', 'programme') throughout the essay, although not entirely consistently (he also writes 'labor').

8 See Letter from O W H to Clare Castletown (Jan 11, 1897) at 2 (calling it 'my long projected discourse on the law').

business it is to provide that information to others. This is Holmes's starting point and it seeks to disabuse his hearers from thinking of law in grander terms. So understood law is not exactly power: it is information about the likely ways power is going to be exercised.

To make his point Holmes invoked the bad man, and if there ever was a misunderstood idea, this is it. Holmes anticipated the misunderstanding and attempted to thwart it:

> I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism. The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men.[9]

This warning was to no avail. Holmes and his bad man have become shorthand for an amoral, even immoral, view of law and society.[10] Holmes may well have had some unusual views about these matters, but they have little to do with the bad man. By invoking him Holmes made two interrelated points, one substantive and the other epistemic. The substantive point is that it does not matter what lawyers say or even believe about the law, if those beliefs are not accompanied by action. This is most obvious in the case of laws that are 'on the books' but not enforced. The second point was more subtle, and it is relevant even for those cases in which the law is enforced.

Consider Holmes's notorious claim that a contract is an option to perform or pay damages.[11] Imagine you responded to Holmes saying 'you are wrong, Mr Holmes, because there is a legal principle that says that contracts should be performed'. For effect you add that Latin maxim '*pacta sunt servanda*' and say it is a familiar legal principle recognized in numerous legal materials. Would this have impressed Holmes? Not at all. He would have replied: 'Imagine I did breach the contract, despite this principle, what would the law's response be?' The reply would be: 'you would have to pay damages'. What Holmes says here is not that breaches of contract are sometimes desirable; his view is entirely consistent with the idea that *all* breaches of contract are morally wrong. Rather, it is the claim that even if this is the case, and even if 'the law says' that one should never breach one's contracts, this *in fact* has no legal effect.

This view is sometimes criticized with the argument Holmes's view ignores the fact that the existence of a legal norm may lead some people to behave differently, because they respect the law. Holmes's point is false, it is argued, because such people will behave in one way if the law says that it is wrong to breach a contract and in another if the law says that one has a choice between performing and paying damages.

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9 Holmes, above n 1, 459.

10 Alschuler, above n 6, 134–35; Hart, above n 5, 932 ('to see law truly we must look at it the way a bad man does. Why that helps, unless to make us more effective counsellors of evil, I have never understood.'); Ben W Palmer, 'Hobbes, Holmes, and Hitler' (1943) 31 *ABA Journal* 569; cf Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685, 1773 ('The certainty of individualism is perfectly embodied in the calculations of Holmes' "bad man," who is concerned with the law only as a means or an obstacle to the accomplishment of his antisocial ends.').

11 Holmes, above n 1, 462.

Stephen Smith, for instance, wrote that 'the law presents itself as a normative institution — as an institution that tells citizens how they ought to behave…[and t]here are legal rules specifying that contracts should be performed….'.[12] And this, he added in another essay, is a good thing even from a utilitarian perspective, because the mere fact that some people obey the law because it is the law, will change their behaviour depending on the message sent by the law.[13]

How 'the law presents itself' is how lawyers present it, and it is not obvious to me that this is how all lawyers present the law. Many very prominent lawyers, including judges (Holmes, let us not forget, was one) do not present it in this way; so I am not sure on what basis Smith says that 'the law presents itself' as demanding that 'contracts should be performed'. But even assuming Smith is right, this cuts no ice against Holmes. Holmes need not deny — in fact he accepted — that the law has all kinds of effects on people's behaviour. Holmes himself says that familiar lawyer jokes notwithstanding ('in spite of popular jests'), the practice of law 'tends to make good citizens and good men'.[14] What matters is that not everyone is so affected by the law, and that it makes no practical difference for those uninfluenced by it whether breaches of contract are considered wrongs because *as a matter of fact* the real-world effect of breach makes it indistinguishable from an option to breach. Put another way, some people will treat the law as imposing obligations requiring contract performance; *but those who do not will not be legally worse off as a result*. For this reason this view gives a more accurate account of what the law actually requires.

So understood Holmes's claim is not meant to be a claim about the 'nature' of contractual obligation or promises in the abstract. (I very much doubt Holmes would have thought it made much sense to speak of such things). We can imagine a legal system in which breaches of contract, or at least intentional breaches, are criminalized and punished by imprisonment. As even in such a regime contractual breaches remain an option, the real alternative would be the case in which the state actively makes sure contracts are being performed and uses its force to enforce compliance. In fact, as Holmes points out, equity does do something like that, but as it happens, this was the exception rather than the rule.[15] Holmes's point, then, is empirical: The common law as it actually was in his day (and largely as it is today) treated contractual obligation as a choice between performance or the payment of damages.

The bad man plays a useful analytical role in reaching this conclusion. He is an *epistemic device* for knowing what the law requires. Holmes made it quite clear when he said:

> When I emphasize the difference between 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, and it is for that that I ask you for the moment to imagine yourselves indifferent to other and greater things.[16]

As defined, the bad man is completely self-interested, and therefore does not want to incur the wrath of the law. Precisely for this reason he is useful. If we looked at how

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12 Stephen A Smith, 'The Normativity of Contract Law' (2011) 31 *Oxford Journal of Legal Studies* 215, 221.

13 Stephen A Smith, 'Duties, Liabilities, and Damages' (2012) 125 *Harvard Law Review* 1727, 1733–34.

14 Holmes, above n 1, 459.

15 Ibid 462.

16 Ibid 459.

the good man behaved we could never be sure from his behaviour what the law required, for we could never tell whether he acted in the way he did because he believed it to be morally wrong (even though not illegal), or because he refrained from doing it because he was acting out of fear of legal sanction. There is no such risk with the bad man. Having no moral compunctions, his imagined actions are a better guide for knowing what the law requires. In the language of contemporary social science, to know what the law requires, we need to 'control' for the possible influence of other norms. To do that we need to look for someone who sees himself as a calculating promoter of his self-interest,[17] someone who is not swayed by any other norms. Thinking about the law through the eyes of the bad man helps with that goal. On the assumption that the bad man always acts with an eye to the promotion of his interests, it is by looking at his actions that we can learn the real content of the law and nothing but the law. To be sure, the other ways in which the law influences the behaviour of some people is no less real when it happens, but that is (in a way) a positive side effect. It is only when legal institutions respond to certain actions, that we can talk about what the law 'does'.

It might still be objected that the 'confusion' of law and morals is a good thing, for it guarantees that people see the law in a good light. If many people started thinking like the bad man in order to discover what the law requires, that could have negative consequences. To the extent that the prediction theory did give a normative prescription, it seems to encourage not compliance with the law, but an attempt to get away with breaking the law, where that might be possible.[18] But once again, this charge assumes that the bad man is a guide to action, whereas it is only meant as a guide for clearing one's thought about the limits of the law, as set by its limited powers. Holmes made it clear when he told his listeners he was asking them only 'for the moment to imagine [them]selves indifferent to other and greater things', in order to help them to 'understand [law's] limits'.[19]

This, I believe, is the entire role Holmes gave the bad man. It is a minimalist, disarming reading of this idea. It differs from those who have found in the bad man the kernel of far more contentious claims: I do not think that Holmes 'claims that it is unintelligible to assert that there is a duty to behave in a particular way, unless one is simply asserting that the failure to behave as described will be attended by certain consequences.'[20] It is perfectly intelligible to think of people who feel an obligation to act in certain ways regardless of consequences. Holmes, in fact had the highest regard for those individuals who acted out of a sense of obligation they could not explain,

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17 Cf Diego Gambetta, *Codes of Underworld: How Criminals Communicate* (2009) 31 ('Criminals embody *homo economicus* at his rawest, and they know it. In keeping with the evidence that people who are untrustworthy are also more likely to think that others are untrustworthy, criminals are more inclined to distrust each other than ordinary people.') (footnote omitted).

18 Michael C Dorf, 'Prediction and the Rule of Law' (1995) 42 *UCLA Law Review* 651, 687 ('The prediction model, if widely accepted, would breed disrespect for law by encouraging the people to act like Holmes' bad man, understanding the law as imposing an obligation not to get caught, rather than an obligation to conform to a norm.'); David Luban, 'The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's "The Path of the Law"', 72 *New York University Law Review* 1547, 1573–74.

19 Holmes, above n 1, 459.

20 John C P Goldberg and Benjamin C Zipursky, 'The Restatement (Third) and the Place of Duty in Negligence Law' (2001) 54 *Vanderbilt Law Review* 657, 693.

who were committed to a cause that had no discernable consequence (positive or otherwise).[21] Likewise, I do not think Holmes believed 'all human beings are, ultimately, bad men' in the sense that they act 'only on the basis of reasons of prudential self-interest'.[22] Holmes may have had a rather sinister view of life, but as just mentioned he clearly recognized people acting for motives other than self-interest. It may even be that Holmes's admiration for those who dedicated themselves to pointless activities for no apparent personal gain and to those who died in battle defending causes they did not believe in, was because these people showed him that for all his cynicism humans were capable of other-regarding acts. In any event, I do not think the bad man was meant as a commentary on human nature.

If I am right about this, then most arguments levelled at the 'bad man' do not address Holmes's point at all. Holmes does not want to create laws for the bad man[23] — such a suggestion does not make sense, because the bad man simply looks to existing laws, whatever their content, and adjusts his behavior to them — nor does Holmes invoke the bad man to show us the way to create good law.[24] All he says is that in finding out what the law requires, it is important not to confuse what the law requires with other non-legal norms. This may sound obvious, even tautological ('if you want to know what the law requires, you'd better find out what the law requires, not what other norms require'), but Holmes suggested that the similar terminology of law and morality can make this task rather difficult. He suggested the bad man test as a way of addressing it.

While a useful idea in the modest way described above, the bad man idea should not be taken too literally. If one tries, its limitations immediately become evident: many real-life bad men have other norms that they abide by, so we would not be able to make a confident inference from his actions to what the law requires; the bad man may on occasion follow the law for self-interested reasons (such as maintaining a certain reputation); or he may be willing to break the law whenever he estimates the probable benefits of the crime to be higher than its probable costs. If our bad man is realistic enough, he will have to incorporate into his calculations and thinking the fact

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21 'I do not know the meaning of the universe. But in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, that no man who lives in the same world with most of us can doubt, and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has little notion, under tactics of which he does not see the use.' Oliver Wendell Holmes Jr, 'The Soldier's Faith' in *Speeches* 56, 59 (1913).

22 Stephen R Perry, 'Holmes versus Hart: The Bad Man in Legal Theory' in Steven J Burton (ed) *The Path of the Law and its Influence* (2000) 158, 172.

23 See Leslie Bender, 'A Lawyer's Primer on Feminist Theory and Tort' (1988) 38 *Journal of Legal Education* 3, 31 ('we do not need to follow Justice Holmes' advice and write laws for the "bad man"'); Alschuler, above n 6, 144 ('Holmes' bad man was not a lawyer; he was a consumer of law. Holmes' definition of law was for him.').

24 This is the reading suggested in Marco Jimenez, 'Finding the Good in Holmes's Bad Man' (2011) 79 *Fordham Law Review* 2069. Crucial to Jimenez's argument is the following sentence: 'The practice of [law], in spite of popular jests, tends to make good citizens and good men' (Holmes, above n 1, 459). Jimenez takes Holmes to say that law is and should be designed to turn people into good people. But all Holmes is saying here is that as a matter of fact the *practice* of law, membership and work within the legal profession, tends to create good people. On the basis of this reading Jimenez goes on to argue, for example, that 'as a descriptive matter, the Learned Hand formula brilliantly captures how the bad man actually behaves': at 2123. But that cannot be true: Holmes's bad man seeks to minimize his legal liabilities. The bad man will follow the Hand formula only if the courts adopt it as their standard for tort liability.

that enforcement is never perfect.[25] So the bad man will not just look at what courts do, but also at what other law-enforcement agencies do.[26]

All these well-known criticisms are significant only if we take the bad man as a guide to action, which quite clearly was not Holmes's intention. Somewhat surprisingly, the bad man idea may be problematic even for the modest role Holmes gave it but for the opposite reason from the one usually thought. The bad man will not lead people to immorality, but neither will it help in clarifying what the law requires. Here is why: In order for the bad man to know what the law requires he will have to take into account the social and moral attitudes of legal officials. Holmes stressed in numerous writings throughout his life, including in 'Path,' that the content of law is determined by much more than texts: 'We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind'.[27] That is why it is a mistake to attribute to Holmes the view that 'law is something entirely separate from morals'.[28] Law is constantly affected by prevailing moral norms. Significantly, this connection between law and prevailing social norms does not depend on the existence of 'moral phraseology'[29] in legal texts. Even without any moral term in a contract, '[y]ou can always imply a condition in a contract',[30] and when you do so it is 'because of some opinion as to policy, or…because of some attitude of yours upon a matter not capable of exact quantitative measurement'.[31]

This implies that the bad man who wishes to avoid the force of the law directed at him will have to study the values of the judges (and other legal officials) and incorporate those into his thinking in order to know what the law requires. Indeed, if the bad man ignored these moral attitudes in seeking to determine what the law required, he would occasionally err in his predictions about the likely use of state force. Moreover, the bad man who tries to identify the requirements of the law in this way may have to go through the same reasoning processes as the good man. The self-interested bad man will simply try to estimate what *other people think* morality requires, rather than attempt to figure out what morality actually requires, but doing the former will often require more than merely parroting accepted social norms. In cases where the law is unclear, the bad man will have to try and predict the way judges will use certain moral concepts. Therefore, in order to predict the law, the bad man will have to incorporate the values he predicts the judge will employ, and will thus have to take into account and rely on the same 'confusions' of law and morals that judges (or other officials) commit. If this challenge is successful, the result will be that the bad man will not be able to identify the distinct normative impact of the law.

There are two answers to this challenge. The first is that even in the world in which judges and others blur the boundary between legal and moral norms, there was still a difference between what the good man thinks the law requires and what it

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25 Holmes was surely aware of this, given his emphasis on the future significance of statistics and economics to the study of law (above n 1, 469).

26 See Alschuler, above n 6, 145–46; William Twining, 'The Bad Man Revisited' (1973) 58 *Cornell Law Review* 275, 283, 289–91.

27 Holmes, above n 1, 466.

28 Hart, above n 5, 932.

29 Holmes, above n 1, 463.

30 Ibid 466.

31 Ibid 466.

actually requires. Even if you believe that a contract entails an obligation to perform the contract (because you believe contracts are grounded in promises, and it is immoral to break one's promises), this will not make a difference unless the legal system takes certain actions *to prevent* contract breaches (or treats some contract breaches differently from others). Here, it may be nothing more prosaic than the lack of resources that makes it impossible to police contract performance, or the slowness of the judicial process, that may thwart such a view from becoming legal reality. But all this does not matter: there is still a difference between what a good man may say the law requires, and what a bad man (even one who incorporates accepted moral values) will see the law enforces.

The second response is that Holmes actually thought that the confusion of legal and moral language is undesirable because it can lead to bad law. This may sound odd, even vile — how could moral laws be bad? — but it is less menacing than it sounds. As this is one of the themes of the third part of Holmes's essay, I will keep the discussion of this point for later.

B *The Second Step: Dismantling Langdell's Theology*

In the second part of his essay Holmes turns to the question of knowing the law's content and its development. And here Holmes targets 'a second fallacy',[32] which is the view that to know what the law requires is an internal conceptual inquiry, what Holmes calls 'logic', a view nowadays known as 'formalism'. But Holmes's views cannot be understood unless we distinguish between two quite distinct views for which the label is often attached.

Of the various ideas often associated with formalism, let me focus on two: autonomy and deduction. The former relates to the question whether law is largely autonomous of other disciplines and other normative systems; whether, if you wish, it is 'open' or 'closed'. By autonomous I mean that law's content can be (and ought to be) determined largely by reference to legal materials alone. The other idea is that the answer to every legal question is arrived at by deduction from general principles to particular cases. Here, the question is whether legal thought is (ideally) 'top-down' or 'bottoms-up'. Though formalists are thought to hold both, and some do, the two are logically independent. Keeping them apart allows us to identify two 'formalist' positions and two anti-formalist ('realist') positions:

	Top-down	*Bottoms-up*
Open	Scientific legal realism (Felix Cohen)	Traditional legal realism (Llewellyn)
Closed	Conceptualism (German *Begriffsjurisprudenz*)	Doctrinalism (Langdell?)

One view, what Germans call *Begriffsjurisprudenz* and we can call 'conceptualism', is the view that we can derive the outcomes to particular cases deductively from certain abstract concepts. The other view, which I call 'doctrinalism', avoids the metaphysical abstractions of the conceptualists in favor of a detailed analysis of cases from which general conclusions are derived. Though different from conceptualism in this regard, its proponents still maintain that law is (relatively) autonomous. The two views still exist today, and though sometimes aligned together in their opposition to interdisciplinary approaches to law, they are rather different from each other. A rough and ready way of distinguishing between the two is the frequency of citations to cases.

[32] Ibid 465.

Conceptualists rarely cite cases, and even when they do, use them only to illustrate ideas whose normative force is completely independent of their endorsement in legal sources. Doctrinalists are the 'black-letter lawyers' who explicitly derive their account of the law from their mastery of hundreds of the fine details of the law.[33]

Holmes did not distinguish between the two views, but clearly thought both positions were wrong. There is no question that in his many attacks on those who grounded law in 'logic'[34] he targeted the conceptualists.[35] In a subsequent essay Holmes criticized '[t]he jurists who believe in natural law', because, he said, they 'seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere'.[36] These conceptualists do not realize that what they present as universal, timeless truths are nothing more than what they are familiar with. Doctrinalists are on firmer ground, because the law (or at least the common law) always starts with cases and develops general principles later. At the same time doctrinalists are also mistaken if they think that legal materials provided a complete explanation of the law's development, that the law and its progress are fairly autonomous. The charge that 'our law is open to reconsideration upon a slight change in the habit of the public mind'[37] is a challenge to 'closed' views of law whether legal principles originate in the cases or in pure reason.[38]

Which of the two remaining approaches was Holmes's? The answer is, in a way, both. To put the matter briefly, he saw the law of his time as derived from the cases, which themselves reflected the changing moral values of a community (the 'history [of law] is the history of the moral development of the race').[39] That puts him in the category I call 'traditional legal realism'. It is traditional in the sense that in terms of its practice it seeks to retain the common law in its fairly familiar form, but it acknowledges (and even celebrates) external influences into the law. Many legal realists, most notably Karl Llewellyn, adopted this view.[40] This 'openness' is usually derived from a view of the foundations of the authority of law. Llewellyn was quite

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33 For a further discussion see Dan Priel, *Formalism, Doctrinalism, Realism: An Essay on the Philosophy of Legal Doctrine* (unpublished manuscript). To make the distinction concrete: Ernest J Weinrib, *The Idea of Private Law* (1995) is an example of conceptualism; Robert Stephens, *Torts and Rights* (2007) is an example of doctrinalism.

34 Holmes, above n 1, 465.

35 For the argument that a central theme of *The Common Law* is a critique of German legal science, or what I call 'conceptualism', see Matthias W Reimann, 'Holmes's "Common Law" and German Legal Science' in Robert W Gordon (ed), *The Legacy of Oliver Wendell Holmes, Jr* (1992) 72, 85.

36 See Oliver Wendell Holmes, 'Natural Law' (1918) 32 *Harvard Law Review* 40, 41.

37 Holmes, above n 1, 466.

38 In the popular legal imagination Langdell was a conceptualist. This characterization has been disputed by various scholars, who argued that he derived legal principles from the cases. See, eg, Reimann, above n 35, 107–08. The paucity of Langdell's theoretical writings makes it difficult to be certain, and it may be that he himself shifted between the two positions. In any event, to the extent that he adopted a 'closed' approach, he was a target of Holmes's criticisms.

39 Holmes, above n 1, 459.

40 I assert here what I defend at length in Dan Priel, *Legal Realisms* (unpublished manuscript).

clear that the law is justified to the extent that it is derived from 'the people', and he was correspondingly quite critical of attempts to turn law into a science.[41]

This view was very different from the view of a different group of legal realists, of which Felix Cohen is the best-known exponent. This group was sceptical of the existing methods of the law and thought the only path to improving the law necessitated the adoption of the methods of the natural sciences. These 'scientific legal realists' have expressed greater confidence in experts (and not the people) as those who should be entrusted with deciding important questions of social choice.

These distinctions explain Holmes's judicial practice. Many who read Holmes's judgments have been surprised to discover in them a formalist streak of affirming decisions in a rather unimaginative fashion by following past cases.[42] The distinction between the two senses of formalism and the two senses of realism helps us understand Holmes's position and why he was less contradictory than is often thought. There is no contradiction between the famous Holmesian slogans that '[t]he life of the law has not been logic; it has been experience' and 'a page of history is worth a volume of logic'[43] and his general practice of faithfully following precedent. As an observer of legal practice, Holmes could explain why both the top-down and the bottoms-up formalist approaches were mistaken, because both minimized the role of prevailing values in fixing the content of the law. In the terminology used earlier, both had a 'closed' vision of law, when in fact law was 'open': legal doctrine was always influenced by ideas that came from outside of the law. But as a judge, Holmes did not think it was his role to pass judgment on those values, he simply upheld their legal implications. To the extent that past cases reflected the values of the community, it was his job to affirm those value judgments embedded in the law, even if those differed from his own. On other occasions, the law had to make a more-or-less technical choice between two possibilities, and here too there was no point in disturbing existing rules whenever they existed. This was a central component in Holmes's approach to adjudication, and he derived it from his belief that his own convictions were no more justifiable than those of others, a view he translated to a rather minimalist understanding of the role of a judge in a democracy. This was not just Holmes's attitude to following precedent. It was at the foundation of his justification for democracy (as a mechanism for different ideas held by different groups to try and win the day), the central role he gave to freedom of speech (and his justification for it in terms of a marketplace of ideas), his *Lochner*[44] dissent and his generally minimalist approach to judicial review[45] — all fit this general outlook. It is precisely because the law reflected prevailing values (and did

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41 The clearest statement is in K N Llewellyn, 'American Common Law Tradition and American Democracy' (1942) 1 *Journal of Legal and Political Sociology* 14. For further evidence see Dan Priel, 'Conceptions of Authority and the Anglo-American Common Law Divide' 69 *American Journal of Comparative Law* (forthcoming 2016/17), *available at* http://ssrn.com/abstract=2769302, at 22–25.

42 See, eg, Robert W Gordon, 'The "Common Law" as Legal and Social Science' (1982) 10 *Hofstra Law Review* 719, 726–29; Neil Duxbery, *Patterns of American Jurisprudence* (1995) 32–46. My remarks should not be taken to suggest that everything Holmes ever wrote was entirely consistent.

43 Coming, respectively, from O W Holmes, Jr, *The Common Law* (1881) 1; *New York Trust Co v Eisner* (1921) 256 U.S. 345, 349.

44 *Lochner v New York* (1905) 198 U.S. 45, 74–76 (Holmes J, dissenting).

45 This approach is best captured in a striking phrase he once spelled out in a letter to Laski: 'if my fellow citizens want to go to Hell I will help them. It's my job.' (Letter from Oliver Wendell Holmes, Jr to Harold J Laski (Mar. 4, 1920) in Mark DeWolfe Howe (ed) *Holmes-Laski Letters: The Correspondence of Mr Justice Holmes and Harold J Laski, 1916–1925* (1953), vol 1, 248, 249.

not answer its own 'logic') that Holmes could justify many of his 'formalist' (ie, non-interventionist, precedent-following) decisions.

C *The Third Step: From Historicist Doctrinalism to Cost-Benefit Analysis*

One way of looking at the two fallacies Holmes attacks is as two opposite positions: the first blurs the distinction between law and morals; the second seeks to avoid this confusion by eliminating all ties between law and morality by trying to reduce all legal reasoning to logic. Holmes rejects these two extremes and in the third part of the essay proposes a (limited) solution. The solution comes in two flavours, one that explains the present, another which is a prescription for the future. The present approach avoids the two extremes by turning to doctrine, in effect by way of a form of historical analysis. In this approach history plays a *positive* role in telling us what the law is: since law is the repository of the values of the community, and since those values are central to determining the law, it is through the analysis of the 'scattered prophecies of the past' that we can know 'the cases in which the axe will fall'.[46]

When I say that at this stage history has a positive role in explaining the law I mean that through the analysis of certain historical facts (the outcomes of past cases), we determine how cases should be decided, what the content of the law should be. Holmes's prediction was that in the future history would play a more negative role: History will remain indispensable for examining the circumstances in which a certain law was made, which in turn will be important for determining whether it should still be retained when circumstances have changed. But in the future history will no longer play a positive role in determining what the law should be. Holmes thus predicted (rather accurately) that backward-looking doctrine will decline in significance in shaping of law and that forward-looking policy will assume a more prominent place in legal justification. Holmes described this memorably with the following evocative image:

> History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, toward a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.[47]

Getting the dragon out of the cave is history's negative role, it is the one that will help us see the social circumstances that existed when a legal rule was adopted and consider whether they are still in place. But this is not enough for taming or killing the dragon, i.e. for finding an alternative to it. For this task the law in the future will rely

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[46] Holmes, above n 1, 457.

[47] Holmes, above n 1, 469. In a later essay Holmes was less metaphorical: 'From a practical point of view, as I have illustrated upon another occasion, [history's] use is mainly negative and skeptical.' Oliver Wendell Holmes, 'Law in Science and Science in Law' (1899) 12 *Harvard Law Review* 443, 452. This is almost certainly an oblique reference to 'The Path of the Law'.

on a different approach. In words appearing immediately after the words just quoted, Holmes famously wrote: 'For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics'.[48]

Holmes not only predicted this change, he also 'look[ed] 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'.[49] Several commentators have noticed that Holmes did not always follow up this hope with action. His judicial practice often reveals a tendency to justify outcomes with references to past cases, showing little willingness to examine whether the rationale for the doctrine justified maintaining it.

Some said that when Holmes delivered his address he was too old, or perhaps too lazy, to adapt to this new way of doing law.[50] Holmes indeed professed himself bored by matters of fact,[51] but once again, there is no inconsistency in the two views. As mentioned before, Holmes thought it wrong to impose his own value preferences on a public that may have had other value preferences. The shift toward the scientific approach is one such value preference, and as such it should first be accepted by the public, before it can be adopted by the judiciary. In his capacity as a public intellectual Holmes could attempt to use the marketplace of ideas to persuade people to turn to this new approach, but it was an abuse of his role as a judge to adopt it beforehand.

Still, this last step may seem surprising given Holmes's overall sceptical tendencies. Holmes did not think there was any rational way of winning a debate over ends. Holmes said as much in 'Path' when he explained that 'an evolutionist' such as himself 'will hesitate to affirm universal validity for his social ideals'.[52] How, then, could statistics and economics help us answer these questions? Holmes made two distinct points. The first is that economics teaches us that 'for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect'.[53] One bad consequence of '[t]he present divorce between the schools of political economy and law'[54] and the tendency to think of law in moralistic and historicist terms is the mistaken view that areas like tort law are the embodiment of moral principles. Much of this area of law, says Holmes, has its origins in 'ungeneralized wrongs, assaults, slanders, and the like', where 'damages might be taken to lie where they fell by legal judgment'.[55] But the reality is that tort law was becoming a mechanism for transferring costs to the public, and the question lawyers had to think about is the extent to which the public should bear that, 'how much the public should insure the safety of those whose work it uses'.[56] This new approach will require calculating 'the value of a life to the community'[57] and limit recovery to those lives worth saving. Here, Holmes suggests, the confusion of law and morals could be thought as not just leading lawyers

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48 Holmes, above n 1, 469.
49 Holmes, above n 1, 474.
50 See, eg, Thomas C Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 837.
51 See, eg, 'Letter from O W Holmes to Frederick Pollock (May 26, 1919)' in Mark DeWolfe (ed) *Holmes-Pollock Letters: The Correspondence of Mr Justice Holmes and Sir Frederick Pollock, 1874–1932* (1942), vol 2, 13, 13–14.
52 Holmes, above n 1, 468.
53 Ibid 474.
54 Ibid 474.
55 Ibid 467.
56 Ibid 467.
57 Ibid 467.

to misperceive the limits of the law's powers, but to actually promote bad laws. For the confusion of law and morals, Holmes suggested, tended to incorporate deontological ideas into the law, specifically the idea that duties should not be broken no matter what. And this, Holmes thought, was a mistake: social choice requires the balancing of costs and benefits, not the peddling of moral absolutes.

Holmes's second point is a distinction between ends and means: 'a 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'.[58] Ends may not be the subject of rational deliberation, but means definitely are; and economics, Holmes thought, is the science of means.[59]

And it is here that we can understand the essay's concluding pages. In one sense what Holmes says there is rather familiar, and in the context the essay was first delivered, to be expected. Holmes's speech was a specimen of the vocational address given by a grey eminence to those about to embark onto a life in the law. The straightforward reading of these pages is that in them Holmes finally gave his audience some of the banalities demanded by the occasion. And though undoubtedly something Holmes genuinely believed in, nothing is more banal than a reminder to young people that there is more to life than making money.

Even here, however, Holmes delivered this familiar message in a rather unusual way. One should seek more than money, he said, because it was ideas that ruled the world. And so those who seek power, should seek the power of ideas. We can make some sense of it when considering it against what came before: The great sin committed by those who wanted to reduce law to 'logic' was that they unmoored it from life; the concluding pages are, in a way, the same point, only pushed further. There are no cosmic answers to the questions of right and wrong and to the meaning of life, but there is value in the effort expended in trying to answer them, and in fighting to have them win the day. And it is here that we find the key through which Holmes's audience of future lawyers may 'catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law':[60] It is by thinking and challenging ourselves and our values that we give meaning to law, to life, and to life in the law.

III 'THE PATH OF THE LAW' AS LEGAL THEORY

I suggested a reading of Holmes's essay that makes it in certain respects less alarming: the bad man is not a model for behaviour, it is not the person legislators should have in mind when thinking about what to legislate. Holmes's call for

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58 Ibid 469.

59 Holmes thus seems to have rejected the view, adopted a generation later by Felix Cohen, that science could provide an answer even to the question of ends. See Felix S Cohen, 'The Subject Matter of Ethical Science' (1932) 42 *International Journal of Ethics* 397. But even here, matters are not entirely clear, for Holmes also accepted the idea that the foundations of certain moral and legal norms lies in human nature. The idea of property, he said, 'is in the nature of man's mind' (Holmes above n 1, 477, also 468). Whether this is a sound basis for a science of ends is not a topic Holmes discusses, nor will I.

60 Holmes, above n 1, 478.

recognition of the costs of social choices, including the cost of a life, is now a commonplace.[61] Does this make the essay so tame that it no longer holds any interest for contemporary readers beyond the purely antiquarian? At least in one sense the essay remains relevant — even challenging — to present-day readers, and that is by presenting an alternative to dominant views in contemporary jurisprudence. One sense in which the essay is out of step with contemporary jurisprudence is with its embrace of a jurisprudence that adopts the external point of view. The dominant view among legal philosophers is that such an approach is necessarily faulty. I believe such claims are mistaken, but explaining why is probably better left for another occasion. Instead, I want to consider a different sense in which the essay poses a challenge to prevailing approaches to legal philosophy, namely in presenting an evolutionary account of law.

Though 'Path' is still a fairly common staple in courses on jurisprudence, its underlying view on jurisprudence is very much out of step from the dominant approaches to legal philosophy today. Holmes was quite clear that he found the kind of questions Austin was interested in, the kind of questions that are now gathered under the banner of 'the nature of law', as having no bearing on the questions he was asking: 'You may assume, with Hobbes and Bentham and Austin, that all law emanates from the sovereign, even when the first human beings to enunciate it are the judges, or you may think that law is the voice of the Zeitgeist, or what you like. It is all one to my present purpose'.[62] A comment made a few pages later suggests this was more than just indifference to a question irrelevant to his inquiries. Holmes apparently believed the whole enterprise foolhardly: 'Sir James Stephen is not the only writer whose attempts to analyze legal ideas have been confused by striving for a useless quintessence of all systems, instead of an accurate anatomy of one'.[63] And not just, I venture to suggest, because it was useless, but because there was no such thing.[64]

In a definition difficult to improve upon Holmes said that '[j]urisprudence…is simply law in its most generalized part'.[65] But it is a mistake to confuse this statement with the view that jurisprudence is concerned with what is true of all law at all times and places. Holmes presented instead an account of the development of law through time. Early in *The Common Law* Holmes wrote that '[t]he law embodies the story of a nation's development through many centuries….In order to know what it is, we must know what it has been, and what it tends to become.'[66] And it is not just particular legal doctrines that can only be understood in evolutionary terms; it is true of the phenomenon of law generally. Though 'Path' is organized around two debunked fallacies about law and a suggestion for its improvement, the three parts can be read as reflecting three stages in the development of law: The essay is, after all, called 'The Path of the Law'. The three parts of the essay can be seen to reflect what might be called Holmes's three ages of law.

In the first, law is intuitive, it does not have any underlying theory and the distinction between law and social norms is blurry: 'It seems to me well to remember', Holmes once wrote, 'that men begin with no theory at all, and with no such

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61 Cf Cass R Sunstein, *The Cost-Benefit State: The Future of Regulatory Protection* (2002), ix, *passim*.

62 Holmes, above n 1, 465.

63 Holmes, above n 1, 475.

64 I agree that 'it was Holmes's genius as a philosopher to see that the law has no essential aspect'. Louis Menand, 'The Principles of Oliver Wendell Holmes' in *American Studies* (2002), 31, 35. For my defense of this claim see Dan Priel, *The Misguided Search for the Nature of Law* (unpublished manuscript), available at <http://ssrn.com/abstract=2642461>.

65 Holmes, above n 1, 474.

66 Holmes, above n 43, 1.

generalization as contract.'[67] The origin of law and its justification are usually given to supernatural causes. To the outside observer, however, law at this stage is 'natural' in the sense that it reflects human emotions such as revenge. In law's second age law is increasingly rationalized in the sense that legal justification is no longer emotive but rather based on elaborate doctrines. Though these are grounded in the moral ideals, the law is now perceived as 'a finite body of dogma'.[68] Typically, the law at this stage becomes elaborate and complex, but its grounds remain largely unquestioned. It is filled with 'doctrines which for the most part still are taken for granted without any deliberate, conscious, and systematic questioning of their grounds'.[69] The law at this stage is more artificial in the sense that it acquires a certain technicality that requires learning and mastery, that makes it less immediately accessible to all individuals (this is Coke's 'artificial reason of the law'), but it is still natural in one sense. The justification of law at this stage is historicist and imitatative. This, says Holmes, is 'perfectly right and natural': 'Most of the things we do, we do for no better reason than that our fathers have done them or that our neighbors do them.' Though it is rational to behave this way, 'because our short life gives us no time for a better…it is not the best',[70] Holmes predicted a second transition away from law as a historical inquiry and toward law as a scientific one. This move from the second to the third age will be the law's great transformation, for it is at this point that law will cease to be natural and become fully artificial — and all the better for that.[71] It is at this stage that societies use law to shape their fate with an eye to improving their lot.

In this evolutionary story the three ages of law very roughly represent the law's past, present, and future (although Holmes's call for the elimination of moral language from the law amounts to an admission that even the transition from the first to the second stage has not been completed).

The origin of these three ages may have come to Holmes from Auguste Comte, either directly, or more likely through his reading of John Stuart Mill.[72] Comte described the development of humanity in three stages: the theological, the metaphysical, and the scientific. In the first explanations are attributed to gods, in the second they are attributed to the essences of things, and in the third they are explained

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67 Holmes, above n 47, 448; cf (unsigned but written by Oliver Wendell Holmes), 'Codes, and the Arrangement of Law' (1870) 5 *American Law Review* 1, 1 ('It is the merit of the common law that it decides cases first and determines principles afterwards').

68 Holmes, above n 1, 458.

69 Ibid 468.

70 Ibid.

71 Later Holmes aligned himself more explicitly with 'those of us who believe […] in the superiority of the artificial to the natural'. Oliver Wendell Holmes, 'Holdsworth's English Law' (1909) 25 *Law Quarterly Review* 412, 414.

72 That Holmes was much influenced by Mill (as evidenced also by his extensive reading of his writings) is argued in Patrick J Kelley, 'Oliver Wendell Holmes, Utilitarian Jurisprudence, and the Positivism of John Stuart Mill' (1985) 30 *American Journal of Jurisprudence* 189, 193–94. Mill may also have influenced Holmes's thinking about the superiority of the artificial to the natural. See John Stuart Mill, 'Nature' in J M Robson (ed) *The Collected Works of John Stuart Mill: Essays on Ethics, Religion, and Society* (1969), 373, 381. ('All praise of Civilization, or Art, or Contrivance, is so much dispraise of Nature; an admission of imperfection, which it is man's business, and merit, to be always endeavouring to correct or mitigate').

in scientific terms.[73] The three parts of 'Path' identified in the previous section roughly correspond to these three stopping points on the path of the law. In the first age of the law, it is conflated with higher law given to us from the gods; in the second, there is an attempt to rationalize the law in terms of the internal essence ('logic') of certain concepts; in its final stage of development, the law will shed these earlier errors and become a scientific endeavour.

If there is something surprising about that last stage in the law's development it is that it will require paying more rather than less attention to the question of value. Until its great transformation, the law simply sought to address certain disturbances in a rather ad hoc way (it was the law of 'ungeneralized wrongs, assaults, slanders, and the like'). Its underlying values were the ones largely accepted in society. But this kind of law was giving way to the law that, inevitably, passes judgment on what counts as the good life. We can thus read the concluding pages of the essay not just as a general claim about values in the law, but as an exhortation to the lawyers of the future, those who may live in the third age of the law, to recognize that law so conceived will *require* them to consciously think of 'the remoter and more general aspects of the law'.[74]

Historical narratives of this sort were popular in the nineteenth century, both in general historical writing and in jurisprudence. The preeminent English-language legal specimen of this approach is Henry Maine's *Ancient Law*, but it was by no means the only one.[75] Such accounts have fallen on hard times during the second half of the twentieth century. Among legal philosophers, the influence of Hart (and Kelsen) on twentieth-century jurisprudence reoriented legal philosophy away from history and towards conceptual investigations that were seen as entirely independent of history.[76] As a result 'Path' was read, despite Holmes's explicit words to the contrary, as an attempt at offering a theory of the timeless 'nature' of law. For their part, historians too found the kind of history Holmes was practicing problematic albeit for a different reason. The rise of 'professional' history meant that earlier historians' grand narratives now appeared amateurish and overly simplistic. Historicism, the view that human history proceeds to the tune of some inexorable deterministic path, was discredited as mythical and even dangerous. Good history meant a detailed micro-history based on primary, archival sources. Historical truth, if it existed at all, lay in minute details, not in sweeping claims spanning centuries.

It seems that the time is ripe for giving more serious attention to the kind of historicist, evolutionary, legal theory of the kind Holmes attempted. The barrenness of conceptual jurisprudence has many sources, but one of them is its unselfconscious, untroubled pre-Darwinism, its continued search for explaining human practices in terms of unchanging, timeless essences. Within legal philosophy the tide may finally be turning with more writers expressing dissatisfaction with the explanatory value, and even the very plausibility, of this approach. On the historiographical front, recent trends suggest a more sympathetic approach to Holmes's approach. Many historians seem to be warming up to the formerly discredited macro-history. Shorn of Hegelian

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73 See Peter Stein, *Legal Evolution: The Story of an Idea* (1980), 76–77. Kelley also suggested the likely influence of Comte (possibly via Mill) on Holmes. See Kelley, above n 72, 208–12.

74 Holmes, above n 1, 478.

75 For general discussions of the history of evolutionary thinking in law see Stein, above n 73; E Donald Elliott, 'The Evolutionary Tradition in Jurisprudence' (1985) 85 *Columbia Law Review* 38.

76 See, eg, H L A Hart, 'Introduction' in H L A Hart (ed) *John Austin, The Province of Jurisprudence Determined* (1954), vii, xv ('Analytical and historical inquiries provide answers to different questions not different answers to the same questions').

pretensions, this kind of history has been enjoying some renewed respect.[77] Though 'Path' has never been out of print, these changing intellectual climates may make a new generation of readers more receptive to its intellectual commitments.

IV CONCLUSION

Holmes, we are told, was not a very nice person. He was aloof, self-centred, obsessed with his place in history. Though friendly with young liberals whose adulation he enjoyed, his own views seem to have been quite far from theirs. Not entirely without justification, readers identified certain fascistic tendencies in his thought. This has led many to read 'The Path of the Law' as a bleak, cynical piece. But I do not think it is the most compelling way of reading it. Holmes seemed to have been in conflict with himself on all the questions he talked about in 'Path'.[78] He was a moral sceptic, but was not entirely indifferent to the fate of humanity: He was actually keen on its improvement, with the help of eugenics if necessary.[79] Perhaps it was due to the occasion, or the appreciation of being invited to give the talk, but I think in 'Path' we see Holmes in his optimistic mood, someone who is seeing in the law 'the moral development of the race'[80] and presents the path the law needs to take in order to continue to serve the needs of humanity against a changing environment.

Such a positive, optimistic, view of the law is not obvious. It is quite an understatement to say that lawyers do not enjoy the best of reputations, that they exert a negative influence on society. And with barely an exception, lawyers do not make up the best individual human minds. And yet the combined efforts of middling individuals have created 'one of the vastest products of the human mind'.[81] It is easy (and necessary!) to decry the law for all its complexity, pomposity, confusions, and mediocrity, until one sees what happens to complex societies whose legal institutions break down. This too, I think, is part of the message of 'The Path of the Law'.

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77 See, eg, David Armitage and Jo Guldi, 'Le retour de la longue durée : Une perspective anglo-américaine' (2015) 70 *Annales* 289; David Christian, 'The Return of Universal History' 40 *History and Theory* (December 2010), 6.

78 Those conflicts are on fine display in Holmes, above n 71, 414, where in a single long paragraph, Holmes touches on all the themes found in 'Path,' demonstrating how they could be taken in different directions.

79 This duality is more explicit in Oliver Wendell Holmes, 'Ideals and Doubts' (1915) 10 *University of Illinois Law Review* 1.

80 Holmes, above n 1, 459.

81 Holmes, above n 1, 473.