

THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR EDITED BY STEVEN J BURTON [Cambridge University Press, 2000. xiv + 354 pp (including Index). Hardcover: £42.50].

IT might seem odd, to say the least, to devote a whole book to an article that was published over a century ago. It is even odder when that book is graced by some of the more prominent names in American legal academia. But that article was not simply another learned essay. It did, in many ways, catalyze literally a sea-change in the legal profession as well as legal academia in America in both theoretical as well as practical ways. The article was in fact the text of an address delivered by that great American judge, Oliver Wendell Holmes, Jr (then of the Supreme Judicial Court of Massachusetts, later of the Supreme Court of the United States of America) at the dedication of the new hall of the Boston University School of Law on 8 January 1897 – aptly entitled (as it later turned out) “The Path of the Law”, and first published in (1897) 10 Harvard Law Review 457. Its importance is underscored by the fact that it has been republished very many times since and a chronology of some of the more significant republications is to be found at p 333 of the present work; indeed, the entire essay has been republished as an Appendix in the present work (with the appropriate pagination from each of the aforementioned republications reproduced at appropriate places in the text itself). “The Path of the Law” embodies, *inter alia*, a trenchant attack on legal normativity and logic as well as the endorsement of the prediction theory of law. Not surprisingly, Holmes himself is traditionally considered as one of the founding fathers of American Realism: a legal philosophy that has had a profound impact on American law and the American legal system.

This book comprises several critical essays that are each accompanied by no less perceptive commentaries. The spectrum of topics dealt with is amazingly broad (a flavour of which I attempt to give below). Indeed, on occasion at least, there is a sense in which the present reviewer felt that the author concerned had read too much into the text and/or philosophy of “The Path of the Law”. But even if this is so, the erudite learning and analysis that were thereby prompted are themselves

real contributions to the legal literature on legal philosophy in general and the thought of Holmes in particular.

There is an excellent introduction by the editor of the book, Steven Burton, which (in the short span of six pages) brings the reader up to speed with the general substance as well as enterprise of the work itself. There follows an excellent and thought-provoking chapter by the eminent legal historian, Robert Gordon, on the role of "The Path of the Law" in the context of an explication of the lawyer's vocation and calling: particularly as thinker or scientist. David Luban's commentary is interesting, not least because he does himself elaborate on related themes: for instance, his attempt to demonstrate that Holmes's positivism may be more apparent than real.

Martha Nussbaum's essay is interesting but seems, to the present reviewer at least, to bear the least substantive linkage to "The Path of the Law" itself. It is nevertheless an interesting essay on the need for ethical theory, although (in this regard) religious theories appear to be excluded. Dan Kahan's commentary, which argues in favour "of anti-theory's power to expose contentious norms to public scrutiny and attack" is not unpersuasive but does neglect the natural law alternative: a point to which I shall briefly return in the concluding part of this review.

Scott Brewer's essay argues for the interaction of logic and experience and, in this regard, argues against what he perceives as Holmes's "anti-logic". Indeed, he exhaustively explores the various senses of the concept of logic he perceives in "The Path of the Law" in the process of explicating his views and argues, *inter alia*, for the role of logic in what he terms "the principle of rational articulation" which constitutes the threshold requirement for the justification of legal decisions. Thomas Grey argues, however, that Holmes was not really "anti-logic" in legal theory: whilst noting the role of logic, Holmes thought that it ought to be supplemented by other relevant criteria. Also interesting is Grey's reconciliation of the apparent contradiction between Holmes's endorsement of both abstract systematization of the law as well as the proposition that general principles do not decide concrete cases.

Stephen Perry's essay is very interesting inasmuch as he attempts, amongst other things, to demonstrate that Holmes's concept of the bad man is not inconsistent with Professor HLA Hart's concept of the internal point of view. This is, of course, contrary to the received understanding and hence makes for very interesting reading, although Scott Shapiro's views to the contrary also bear close scrutiny.

Catherine Pierce Wells's essay attempts to locate parallels between "The Path of the Law" and the normative views of the pragmatic philosopher, William James. This is an unorthodox (albeit interesting) interpretation, as is Sanford Levinson's piece, which is not so much a commentary on Wells's essay as an alternative attempt to locate parallels with the work of author, poet and philosopher, Ralph Waldo Emerson, instead.

Clayton Gillette focuses on "the path dependence of the law": in particular, the strict adherence to tradition in general and precedent in particular – and Holmes's reaction against it. Whilst acknowledging the merits of Holmes's critique, Gillette nevertheless attempts to demonstrate that such path dependence (and consequent lock-in) are not necessarily undesirable. Gillian Hadfield's commentary, on the other hand, argues against what she perceives to be the predominantly economic analysis contained in Gillette's essay and argues, instead, that Holmes was involved, in "The Path of the Law", in a rhetorical (as opposed to an analytical) project.

Brian Leiter argues that Holmes was in fact "the first classical realist in legal theory". His essay also embodies a comprehensive survey of classical

realism which eschews normative theorizing and emphasizes, instead, the descriptive as well as the “generally unattractive” facts about human beings as well as human nature. He also argues that the economics (which Holmes endorsed) “has proved an unlikely torchbearer for classical realism”. Jody Kraus’s commentary, however, argues forcefully that Holmes’s attachment to economics should not be dismissed.

Whilst this book is an extremely informative and thought-provoking one, I wonder whether the infusion of a radically different normative perspective might have made it a more textured and nuanced work. American Realism (with its seminal manifestation in “The Path of the Law”) deals (in the final analysis) with particulars, facts and details; in other words, it is mired in the realm of the descriptive (one notes, in particular, its roots in scientific naturalism: see Purcell, *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (1973)). It does not, however, offer us a perspective that is equally (if not more) important: a *normative* theory. Indeed, part of the reason why American Realism ultimately ran aground was precisely because it did not furnish us with a normative way forward (see generally *eg*, Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (1992)).

It is clear that one cannot divorce fact from value, the universal from the particular. Simply put, having fact without value leads one perilously down the road of subjectivity and relativity and, quite probably, the ‘black hole’ of nihilism (though *cf* Leiter’s essay). The insistence on values, but only in a purely subjective sense, is a contradiction in terms as even philosophers such as Professor Ronald Dworkin have recently pointed out (see *eg*, Dworkin, “Law, Philosophy and Interpretation” (1994) 80 *Archiv für Rechts-und Sozialphilosophie* 463, especially at 474-475 and “Objectivity and Truth: You’d Better Believe It” (1996) 25 *Philosophy & Public Affairs* 87), and this is also reflected (implicitly at least) in Nussbaum’s essay. On the other hand, to insist on value without facts is to indulge oneself in the rarefied (but ultimately useless) realm of abstract theory. The whole point of a theory is, of course, to guide action in the realm of the particular, that sphere of everyday life as we know it.

It seems to me that legal theories premised on reason – and reason alone – cannot furnish us with a satisfactory guide to particular action (though *cf* Nussbaum’s approach in this book). Further, such theories themselves are in need of justification. The answer, it is suggested, lies in a sphere that, whilst not discarding reason, goes beyond it. It is only from the perspective of the transcendent that satisfactory answers begin to suggest themselves. Natural law, much maligned in the twentieth century, now appears to be making a comeback of sorts, particularly in the light of the despair engendered by postmodernist theories of law, such as Critical Legal Studies. Indeed, one may without exaggeration point to American Realism as being one of the root causes for the rise of postmodernist perspectives in the law. I have argued elsewhere that a natural law approach is not simply some ‘pie in the sky’ but may be supported, as far of course as probabilities will take us, by reasoned as well as historical arguments (see generally Phang, “Security of Contract and the Pursuit of Fairness” (2000) 16 *JCL* 158). Holmes’s “Path of the Law”, therefore, only told half of the story and, with respect, misled many to think that that was the whole. What is now required is a radical turn towards the realm of the universal (and, I suggest, transcendent), but a turn that will return us (properly equipped) to the realm of particular application.

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