

THE PATH OF THE LAW: A TRIBUTE TO HOLMES*

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The life of a dean is much taken up with responding on behalf of faculty to draft policies on various matters issued by the central administration of the University—often, on human resources matters, by our host tonight and Master of University House, Professor John Richards. Some recent examples spring to mind: positioning A.N.U. for the future, academic promotion, performance and planning reviews, retirement age policy, the academic calendar, flexible pathways for students to progress through their degrees, and so on. One that has been on my mind is the draft policy on plagiarism—i.e., the use of another person’s work without proper acknowledgment—a tricky issue given how much we unconsciously absorb the ideas of others.

Sometimes, however, the borrowing is conscious. Composers of classical music have frequently incorporated themes from other composers they admire; these unacknowledged quotes are a kind of tribute to a hero figure, a kind of homage to a predecessor, if not to a whole tradition or body of past work. Brahms, when it was pointed out to him that part of his First Symphony sounded very much like the great theme from Beethoven’s Ninth, is said to have retorted: “Any fool can see that!”¹

Tonight, I am guilty of plagiarism in the same sense. I have stolen the title of my talk, and I have stolen it from one of my heroes in the law. On January 8, 1897, Oliver Wendell Holmes, Jr., who was then a Justice of the Supreme Judicial Court of Massachusetts, gave an address as part of the dedication of a new hall at the Boston University School of Law. He entitled the address *The Path of the Law*,² and it is a brilliant forerunner of a movement called “American legal realism” that swept the United States in the 1920s and 1930s,³ with an impact that is still being felt today, not only

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1. MALCOLM MACDONALD, *BRAHMS 247* (1990).

2. OLIVER WENDELL HOLMES, JR., *The Path of the Law*, in COLLECTED LEGAL PAPERS 167 (1920) [hereinafter *HOLMES, Path*].

3. For an outstanding overview of the American legal realist movement, see Tony Blackshield, *Realism*, in THE OXFORD COMPANION TO THE HIGH COURT OF AUSTRALIA 582 (Tony Blackshield et al. eds., 2001).

in the United States but also in other common law countries such as Australia.⁴ Indeed, although the debate may no longer be in the terms or use the language of the American legal realists, it is in truth at the core of our contemporary debate about judicial activism and the proper role of judges, especially the role of the court at the apex of the hierarchy, the High Court of Australia. It also has implications—not often perceived and even less often engaged—for legal education. Tonight, I want to share with you some thoughts about law and legal education, drawing in part on the inspiration of Oliver Wendell Holmes.

Let me tell you first a little about the man. He had an astonishing career, no doubt assisted by—though not necessarily contingent on—its remarkable longevity. Born on March 8, 1841, he fought in the early 1860s as a young soldier in the American Civil War, being wounded three times, twice seriously;⁵ yet, some seventy years later—in the 1930s—he was still sitting as a Justice of the Supreme Court of the United States.⁶ When he delivered his seminal address, *The Path of the Law*, in 1897, he was already fifty-five and had not yet been appointed to the United States Supreme Court, although he had served on the Massachusetts court for nearly fifteen years and was to do so for twenty.⁷ Some six years later, at the relatively advanced age of sixty-one, he was appointed to the United States Supreme Court by President Theodore Roosevelt, taking up his seat on December 8, 1902;⁸ he retired from the Supreme Court, after nearly thirty years of service, on January 12, 1932, just two months before his ninety-first birthday;⁹ and he died on March 6, 1935, just two days before what would have been his ninety-fourth birthday.¹⁰

I digress for just a moment to note how chance plays a role in the unfolding of personal careers and the course of public life. The seat on the Supreme Court to which Holmes was appointed in 1902 looked as if it would become vacant in 1901, when Justice Horace Gray fell ill.¹¹ Justice Gray was from Massachusetts, and, in accordance with the geographical criteria that were informally applied at the time, it was expected that his successor would also come from Massachusetts.¹² President McKinley had settled upon one Alfred Hemenway; an offer of nomination was communi-

4. In this Essay, I do not attempt to trace any of the direct connections, of which there appear to be few, between Holmes and Australia. However, one intriguing example is that Andrew Inglis Clark—one of the framers of the Australian Constitution, a frequent visitor to the United States and devotee of the United States Constitution, and a friend and admirer of Holmes—is said to have installed in his Battery Point home in Hobart, Tasmania, a window from Holmes's house in Boston. See John Williams, *Inglis Clark, Andrew*, in THE OXFORD COMPANION TO THE HIGH COURT OF AUSTRALIA, *supra* note 3, at 341.

5. See generally G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 1-86 (1993) (discussing Holmes's early years and Civil War experiences).

6. See *id.* at 466-72.

7. See *id.* at 218-24.

8. See *id.* at 299-311.

9. *Id.* at 467.

10. WHITE, *supra* note 5, at 471.

11. *Id.* at 299.

12. *Id.*

cated to Hemenway; and Hemenway had indicated that he would accept it.¹³ However, on September 6, 1901, McKinley was assassinated.¹⁴ Roosevelt, McKinley's successor, did not feel bound to proceed with the nomination of Hemenway and had been much impressed by a speech that Holmes had given in 1895.¹⁵ Had Hemenway secured the nomination, it is unlikely that the Massachusetts seat would have become vacant again at a time when Holmes, already sixty, would have been young enough to have been considered seriously for appointment.¹⁶ So the assassin's bullet had an unexpected impact on the course of the law in America and, through Holmes' signal contribution to the work of the highest court in the land, on our insights, throughout the common law world, on the nature and operation of the judicial process.

Could I indulge in one further digression, this time for the sake of irony rather than chance? Had Holmes been a Justice of the High Court of Australia today, he would have had to retire at the age of seventy, just as he was hitting his straps. In 1977, in one of the few successful referendums to amend our Constitution (and indeed the last successful one), we introduced a retiring age for federal judges. I am not suggesting that this was inappropriate—that is entirely another debate—but it discloses a double irony. First, about the only argument raised against the referendum proposal at the time was the example of Oliver Wendell Holmes. The proposal would deprive us, so it was said, of a judge like Holmes, who blossomed into greatness in his seventies and eighties. Of course, there was no shortage of examples to the contrary, including not a few from Australia, with some particularly uncomfortable examples of judges, the diminution of whose mental powers appeared to have affected not only the discharge of their judicial duties but also their ability to make a sensible decision about when they should retire. In the end, in Australia in 1977, the fear of geriatric senility trumped the hope of octogenarian late flowering.

The second irony is that, since the referendum in 1977, attitudes appear to have changed in relation to age retirement. As part of the extension of the anti-discrimination laws of the 1970s and 1980s, most jurisdictions in Australia have now legislated to abolish mandatory age retirement. We are only just now grappling with the implications of that here at the A.N.U. But having inserted compulsory retirement for federal judges into the Constitution in 1977, we now cannot remove it without a referendum. Given our referendum record to date, the most recent rejection being that of the republic proposal in 1999, we should not hold our breath for any imminent change. There have been and will continue to be many fine judges on the High Court of Australia—but there will not be an Oliver Wendell Holmes in the foreseeable future.

13. *Id.*

14. *Id.*

15. WHITE, *supra* note 5, at 299.

16. *Id.*

Why is Holmes one of my heroes? I do not have a large number of heroes—most of us, however impressive our careers, turn out to have feet of clay—so I should explain. I think there are two main reasons.

The first lies in Holmes's elegant and incisive writing style. His prose is at once both arresting in the immediacy of its insights, yet elusive in the terseness of its epigrams. It is not surprising that Holmes was literate; his father, Oliver Wendell Holmes, Sr., was a well-known writer and literary figure in New England, and he mixed in a circle that included Henry James, William James, John Ruskin, Henry Wadsworth Longfellow, and Ralph Waldo Emerson. Books of quotations are heavily populated with his pithy observations and striking aphorisms, often coloured with some military allusion, no doubt stemming from his Civil War experience.

I wish I had time tonight to share with you my full list of favorite Holmes quotations.¹⁷ I content myself at this point with just two, though both connect with what I want to say later about law and legal education in an Australian context.

The first is what Holmes's biographer Ted White has rightly described as "one of the most celebrated passages in the history of American legal writing."¹⁸ In 1881, Holmes published a book called *The Common Law*,¹⁹ comprising a series of lectures he had given at Harvard University the previous year.²⁰ In Lecture I of the book, Holmes wrote:

The object of this book is to present a general view of the Common Law. To accomplish the task, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In

17. A useful compilation may be found in FRED R. SHAPIRO, *THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS* (1993). For a fuller selection of Holmes's writings, see *THE ESSENTIAL HOLMES* (Richard A. Posner ed., 1992).

18. WHITE, *supra* note 5, at 149.

19. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881) [hereinafter HOLMES, *COMMON LAW*].

20. Interestingly, the book—which has never since been out of print, despite being difficult, obscure, and now very much out of date—was published just five days before Holmes's fortieth birthday, which was greatly to his relief, as he firmly believed at that stage of his life (ironically, as it turned out) that if one was to achieve anything in life, it had to be before the age of forty.

order to know what it is, we must know what it has been, and what it tends to become.²¹

The most celebrated part of that celebrated passage is the statement that “the life of the law has not been logic: it has been experience.”²² Yet, the passage foreshadows a respect for history and continuity, which needs to be balanced against “the felt necessities of the time.”²³ For me, this is captured most arrestingly in a passage from an after-dinner speech entitled *Learning and Science* that Holmes gave at Harvard in 1895.²⁴ This is what he said:

Learning, my learned brethren, is a very good thing. I should be the last to undervalue it, having done my share of quotation from the Year Books. But it is liable to lead us astray. The law, so far as it depends on learning, is indeed, as it has been called, the government of the living by the dead. To a very considerable extent no doubt it is inevitable that the living should be so governed. The past gives us our vocabulary and fixes the limits of our imagination; we cannot get away from it. There is, too, a peculiar logical pleasure in making manifest the continuity between what we are doing and what has been done before. But the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity.²⁵

“Historic continuity with the past is not a duty, it is only a necessity.”²⁶ What a brilliant, paradoxical juxtaposition! As Holmes himself said on another occasion, a word is but “the skin of a living thought.”²⁷ The living thoughts rolled up in that striking juxtaposition could occupy Ph.D. students for generations.

Holmes’s observation about the shackles of the past leads me to my second reason for elevating him to hero status. During his time on the United States Supreme Court, he was a frequent dissenter. In the law, and especially as legal advisers, we generally want to know only what the ma-

21. *Id.*

22. *Id.*

23. *Id.*

24. This was not the speech referred to earlier that so impressed President Roosevelt. The latter was *The Soldier’s Faith*, given on May 30, 1895 (Memorial Day), at a ceremony at Harvard, at which Holmes received an honorary degree. See MAX LERNER, *THE MIND AND FAITH OF JUSTICE HOLMES* 18 (1943). *Learning and Science* was given a month later, on June 25, 1895, at a dinner at Harvard in honour of Dean Christopher Columbus Langdell, to whom the modern casebook approach to teaching law is generally attributed and against whose logical method Holmes was in part reacting in *The Common Law*. See generally HOLMES, *COMMON LAW*, *supra* note 19.

25. HOLMES, *Learning and Science*, in *COLLECTED LEGAL PAPERS*, *supra* note 2, at 138-39 [hereinafter HOLMES, *Learning and Science*].

26. *Id.* at 139.

27. “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, 425 (1918).

majority view is, as that represents “the law.” The views of dissenters are inevitably put to one side, as at best irrelevant to the outcome of a case or to the legal doctrine employed by the majority to produce that outcome, or at worst self-indulgent. Yet, the dissenter appeals, as Chief Justice Charles Evan Hughes of the United States Supreme Court once put it, “to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.”²⁸ The brooding spirit of the law was kind to Holmes. As the caselaw of the United States Supreme Court unfolded over the course of the twentieth century, his heterodoxy turned into orthodoxy. In the early part of the century, the majority consistently struck down socially progressive legislation, such as a New York statute limiting work in a bakery to ten hours per day, on the ground that freedom of contract was a fundamental right given by the common law. In his dissents, Holmes attacked this kind of judicial activism based on social Darwinism and laissez-faire economics. He observed in the New York bakery case—decided in 1905—that “a constitution is not intended to embody a particular economic theory It is made for people of fundamentally differing views.”²⁹ It was not until 1937, after a dramatic confrontation between the Court and President Franklin Roosevelt over Roosevelt’s “New Deal” legislation (including a threat by Roosevelt to pack the Court with judges sympathetic to the legislation), that Holmes’s dissents in this area began to be vindicated. He also dissented in a number of free speech cases,³⁰ showing a tolerance for political dissent that fell on deaf ears during his lifetime but resonated with the Court’s later, more robust approach to civil liberties.

So, encapsulating my second reason for being such a great admirer of Holmes, I would say that it is a remarkable quality to be able to lift oneself out of the milieu of one’s time, out of the dominant mode of thinking, and to anticipate future developments. It is part of a broader theory I have that most significant advances in human history—such as in music—come through breaking the existing rules. Of course, Holmes was lucky. History vindicated him. When he penned his words of wisdom, this outcome could not be said to have been inevitable; we can make that claim for something only after it has happened. But in his case it did happen, and by and large—though his reputation has waxed and waned³¹—Holmes’ reputation is secure.

28. CHARLES EVAN HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 68 (1928); see also Lawrence Baum, *Dissent*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 229 (Kermit L. Hall et al. eds., 1992); Andrew Lynch, *Dissenting Judgments*, in *THE OXFORD COMPANION TO THE HIGH COURT OF AUSTRALIA*, *supra* note 3, at 216-18.

29. *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).

30. See, e.g., *Abrams v. United States*, 250 U.S. 616 (1919).

31. For recent criticism, see Ramesh Ponnuru, *Judging Holmes*, *NAT’L REV.*, May 14, 2001, at 47 (reviewing ALBERT ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK AND LEGACY OF JUSTICE HOLMES* (2001)). White’s biography gives a very balanced account, and includes an extensive and penetrating survey of the literature. See WHITE, *Bibliographical Essay*, in *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF*, *supra* note 5, at 591-609.

In *The Path of the Law*, Holmes challenged the predominant view of law as a set of abstract, general rules, which, in disputed cases, yielded a single right answer, or at least would do so if only the adviser or judge had the requisite technical skill. Having used the metaphor of the “bad man” to distinguish law from morality—the bad man eschewing morality and wanting to know only the material consequences of his actions—Holmes asked, “What constitutes the law?” He answered his own question thus:

You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.³²

Holmes here expressed a scepticism that was decades ahead of his time. Resonating with the passage I quoted earlier from *The Common Law*, he again attacked the notion that a legal system could be worked out like mathematics from a few general axioms of conduct:

I once heard a very eminent judge say that he never let a decision go until he was absolutely sure that it was right. So judicial dissent often is blamed, as if it meant simply that one side or the other were not doing their sums right, and, if they would take more trouble, agreement inevitably would come.

This mode of thinking is entirely natural. The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because

32. HOLMES, *Path*, *supra* note 2, at 172-73.

of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. 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. No concrete proposition is self evident, no matter how ready we may be to accept it³³

Holmes's exposure of what he called the "fallacy of logical form,"³⁴ and his subversive view of law, not as a series of logical deductions from pre-existing rules, but merely as the prediction of what the courts were likely to hold in fact, was and remains unsettling.³⁵ If stating the law were merely a matter of prediction, what guidance could a critic give on the question of what the law should be? Was there no external standard by which a judge's decision could be viewed as right or wrong?

As was later to become characteristic of his allusive and epigrammatic style on the United States Supreme Court, Holmes hinted at answers to these questions without engaging them fully. But he did offer some thoughts in *The Path of the Law*:

I think that the judges themselves have failed adequately to recognise their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said. When socialism first began to be talked about, the comfortable classes of the community were a good deal frightened. I suspect that this fear has influenced judicial action both here and in England, yet it is certain that it is not a conscious factor in the decisions to which I refer . . . I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly 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.³⁶

33. *Id.* at 180-81.

34. *Id.* at 184.

35. Referring to Holmes's "legal modernity," Sandy Levinson and Jack Balkin observe that "in particular . . . his most iconoclastic work, *The Path of the Law*, . . . still contains the power to startle." Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597, 1647 (1991).

36. HOLMES, *Path*, *supra* note 2, at 184.

Interestingly, and perhaps at first blush paradoxically, this is where Holmes saw an important role for the study of history. Now, you might intuitively associate historical analysis in the law with conservatism, precedent, and the following of what has gone before. But for Holmes, history was liberating rather than constraining:

The rational study of law is still to a large extent the study of history. 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, towards 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 . . . 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.³⁷

Despite this clear recognition of the value of studying history, Holmes did go on to contrast it with, and warn against, the “pitfall of antiquarianism”:

We must beware of the pitfall of antiquarianism, and must remember that for our purposes our only interest in the past is for the light it throws upon the present. 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.³⁸

There is some hint here, perhaps, of what Holmes meant by that enigmatic statement I quoted earlier, that “historic continuity with the past is not a duty, it is only a necessity.”³⁹ In any event, Holmes was not averse to the study of the so-called rules of the legal system—indeed, he recommended to students a threefold approach in order to “get to the bottom of the subject”:

The means of doing that are, in the first place, to follow the existing body of dogma into its highest generalizations by the help of jurisprudence; next, to discover from history how it has come to be what

37. *Id.* at 186-87.

38. *Id.* at 194-95.

39. HOLMES, *Learning and Science*, *supra* note 25, at 139.

it is; and, finally, so far as you can, to consider the ends which the several rules seek to accomplish

We have too little theory in the law rather than too much, especially on this final branch of study

. . . 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.⁴⁰

Jumping an entire century and leaping from the end of the nineteenth century to the beginning of the twenty-first, what are the implications of Holmes's ruminations in 1897 for what we are doing at the A.N.U. law school in 2002? Are we on the same path as Holmes in 1897? Should we be?

The jump of a whole century is obviously a very large one, and the twentieth century saw dramatic developments in the law, in legal systems, and in modes of legal thought. In particular, legislation—in range and volume—supplanted the common law as the dominant mode of law-making; the common law had been Holmes's main concern, although he clearly foresaw the impact of legislation. Nevertheless, important tasks remain for the judges in interpreting statutes, including that special statute called the Constitution, and in developing the common law. Moreover, the "fallacy of logical form,"⁴¹ as Holmes had described it, had a stronger grip on Anglo-Australian jurisprudence, and for a longer time, than it did in America, so Holmes's insights remain, for us, correspondingly fresh. But where do they lead?

If we took literally Holmes's proposition that the law is simply a prediction of what the courts will in fact hold, we might simply study those disciplines that would assist us in making the prediction: psychology, sociology, and, perhaps, history. But, the rules of law, and the logical deductions from those rules, do have a life of their own—if only because lawyers, including judges, believe they do. What Holmes really exposed was the choice judges have in identifying, selecting, framing, and applying the rules.⁴² But the choice is not at large. It may not be compelled, but it is constrained.⁴³ It is constrained by tradition, by broadly shared values, by professional ethics and mores, by shared understandings of the limits of interpretation, and by the combined weight of informed criticism, one of the key elements in judicial accountability.⁴⁴ Some of the early American realists, dazzled by Holmes' penetrating insights, embraced and celebrated his exposure of the

40. HOLMES, *Path*, *supra* note 2, at 198-200.

41. *Id.* at 184.

42. For a comprehensive exposition, see JULIUS STONE, *LEGAL SYSTEM AND LAWYERS' REASONINGS* (1964).

43. See especially Kenneth Jacobs, *Lawyers' Reasonings: Some Extra-Judicial Reflections*, 5 SYDNEY L. REV. 425 (1967).

44. See Michael Coper, *Accountability*, in *THE OXFORD COMPANION TO THE HIGH COURT OF AUSTRALIA*, *supra* note 3, at 3.

fallacy of the logical form, but traded it for the equal and opposite fallacy of the irrelevance of objective, external standards. Today, we have a more sophisticated appreciation, I think, of the fact that, just because general rules and principles may not *compel* particular outcomes, it does not follow that they may not provide *guidance* towards those outcomes.

Nevertheless, the question remains, once the existence of choice has been established, of how that choice should be exercised. Holmes argued, as we have seen, that the judges should address explicitly the underlying policy considerations—the question of “ends” and “social advantage.” This has been very attractive, in America and Australia, to those who argue that the “logical form” merely disguises the influence of policy considerations, and that honesty demands that those considerations be explicitly acknowledged by the judges and thus subjected to scrutiny and debate. Yet, this opens up a problem of a different kind: From whence do judges get a mandate (let alone the expertise) to decide cases according to policy rather than law? That, surely, is the job of our elected law-makers. There is a dilemma here, which I have described in earlier writings as the “intractable dilemma of the judicial process”:⁴⁵ for the judges to rely exclusively on the spurious compulsion of strict logic is incomplete and unconvincing; yet, for them to go beyond it is to threaten the very legitimacy of their role as judges.⁴⁶

Tonight is not the occasion to attempt to resolve this dilemma—a dilemma which arises most acutely for the highest appellate courts in any system—but you can see immediately how the persistent controversy about judicial activism in Australia relates to it.⁴⁷ As the judges are more activist, they are criticized for stepping beyond their proper role; as they show more restraint, they are criticized for failing in their duty to keep the law relevant, up-to-date, and socially responsible.

The dilemma also creates a problem for legal education. Should we teach the students the “rules” of the legal system, thereby creating a quite false impression of certainty, stability, and logical coherence, and correspondingly diminishing their ability to give wise and useful counsel to their future clients, or should we instill in them Holmes’s sense of “enlightened scepticism,” thereby potentially understating the importance of rigorous logical analysis and encouraging lazy and half-baked assessments of the relative worth or “justice” of competing outcomes?

The truth is that we have to pursue these goals, and others,⁴⁸ simultaneously. Law is about rules and principles, but it is not *just* about them. It is

45. See, e.g., MICHAEL COPER, ENCOUNTERS WITH THE AUSTRALIAN CONSTITUTION 419-22 (1987); Michael Coper, *Interpreting the Constitution: A Handbook for Judges and Commentators*, in LEGAL CHANGE: ESSAYS IN HONOUR OF JULIUS STONE 52, 60-65 (Tony Blackshield ed., 1983); Michael Coper, *The High Court and the World of Policy*, 14 FED. L. REV. 294, 298-301 (1984).

46. For instructive perspectives on these issues, see Stephen Gageler, *Legalism*, and Anthony Mason, *Policy Considerations*, in THE OXFORD COMPANION TO THE HIGH COURT OF AUSTRALIA, *supra* note 3, at 429, 535 respectively.

47. On “activism” as a simplistic label, see Ronald Sackville, *Activism*, in THE OXFORD COMPANION TO THE HIGH COURT OF AUSTRALIA, *supra* note 3, at 6.

48. See Michael Coper, *What Should Students Get from Law School?*, Address to Law Students at

about understanding the dynamics of those rules and principles; how they operate in a living, breathing, complex and subtle legal system; how they adapt and change; their role in the governance of our society; and, indeed, how they retard and advance human civilization. It is inevitably about the role of judicial discretion. I gasp at the stereotypes I have encountered about law as a discipline—generally that it is a “professional” or “vocational” discipline and, therefore, concerned primarily with the content of rules. The study of law, of the philosophy of law, and of the role of law in society, takes its proper place alongside the study of any of the wide range of cognate disciplines in the humanities and social sciences; but, even for the professional, law cannot just be a study of the content of rules. The professional lawyer will be ill-equipped to discharge his or her professional role without the insights and reflectiveness inspired by Oliver Wendell Holmes, who, after all, devoted his entire career, apart from a brief period as a professor at Harvard Law School, to the practice of his profession, initially as a practitioner and then, for a total of some fifty years, as a judge.

Holmes recognized the essential unity of the intellectual discipline of law, whether as the subject of academic or practical study, and I conclude my talk with the way in which Holmes concluded his address to the Boston University School of Law in 1897. Having conceded that, for lawyers, the pursuit of material wealth was “a proper object of desire,” Holmes drew his address to a close thus:

To an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas. If you want great examples, read Mr. Leslie Stephen's *History of English Thought in the Eighteenth Century*, and see how a hundred years after his death the abstract speculations of Descartes had become a practical force controlling the conduct of men. Read the works of the great German jurists, and see how much more the world is governed to-day by Kant than by Bonaparte. We cannot all be Descartes or Kant, but we all want happiness. And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food besides success. 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.⁴⁹

John XXIII College, Australian National University (May 13, 1999).

49. HOLMES, *Path, supra* note 2, at 201-02.

Ladies and gentlemen, I wonder if the last few lines of Holmes' address moved his audience in 1897 as they move me when I read them over 100 years later in 2002. They bear repeating as a final coda:

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.⁵⁰

50. *Id.* at 202.

