*CHAPTER 1: Political Jurisprudence* 27

*"The prophecies of what the courts will do in fact . .   
are what I mean by the law."*

1.4 THE PATH OF THE LAW

*Oliver Wendell Holmes, jr.*

Holmes was Justice, Massachusetts Supreme Judicial Court, 1882-1899;   
Chief Justice, Massachusetts Supreme Judicial Court, 1899-1902;   
and Associate Justice, U.S. Supreme Court, 1902-1932.

When we study law we are not studying a mystery but a well known profession. We are studying what we shall want in order to appear before judges, or to ad­vise people in such a way as to keep them out of court. The reason why it is a pro­fession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is entrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circum­stances and how far they run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the in­cidence of the public force through the instrumentality of the courts.

The means of the study are a body of reports, of treatises, and of statutes, in this country and in England, extending back for six hundred years, and now in­creasing annually by hundreds. In these sibylline leaves are gathered the scat­tered prophecies of the past upon the cases in which the axe will fall. These are what properly have been called the oracles of the law. Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalize them into a thoroughly connected system. The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies. One of the many evil effects of the confusion between legal and moral ideas, about which I shall have some­thing to say in a moment, is that theory is apt to get the cart before the horse, and to consider the right or the duty as something existing apart from and in­dependent of the consequences of its breach, to which certain sanctions are added afterward. But, as I shall try to show, a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; and so of a legal right.

The first thing for a business-like understanding of the matter is to under­stand its limits, and therefore I think it desirable at once to point out and dispel

From 10 *Harvard Law Review* 39 (1897). Copyright 1897, Oliver Wendell Holmes, Jr.

28 *PART owe: The Nature of Judging*

a confusion between morality and law, which sometimes rises to the height of conscious theory, and more often and indeed constantly is making trouble in detail without reaching the point of consciousness. You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practiced by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.

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. 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.

I do not say that there is not a wider point of view from which the distinc­tion between law and morals becomes of secondary or no importance, as all mathematical distinctions vanish in presence of the infinite. But I do say that that distinction is of the first importance for the object which we are here to con-sider,—a right study and mastery of the law as a business with well understood limits, a body of dogma enclosed within definite lines. I have just shown the practical reason for saying so. If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanc­tions of conscience. The prophecies of what the courts will do in fact, and noth­ing more pretentious, are what I mean by the law.

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. . . In every system there are such ex­planations and principles to be found. It is with regard to them that a second fallacy comes in, which I think it important to expose.

The fallacy to which I refer is the notion that the only force at work in the development of the law is logic. In the broadest sense, indeed, that notion would be true. The danger of which I speak is not the admission that the prin­ciples governing other phenomena also govern the law, but the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct. This is the natural error of the schools, but it is not confined to them. I once heard a very eminent judge say that he never let a de­cision go until he was absolutely sure that it was right.

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

*CHAPTER 1: Political Jurisprudence* 29

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 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 it: not even Mr. Herbert Spencer's Everyman has a right to do what he wills, provided he interferes not with a like right on the part of his neighbors.

I think that the judges themselves have failed adequately to recognize 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.

So much for the fallacy of logical form. Now let us consider the present condition of the law as a subject for study, and the ideal toward which it tends. The development of our law has gone on for nearly a thousand years, like the development of a plant, each generation taking the inevitable next step, mind, like matter, simply obeying a law of spontaneous growth. It is perfectly natural and right that it should have been so. Limitation is a necessity of human nature. 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, and the same is true of a larger part than we suspect of what we think. The reason is a good one, because our short life gives us no time for a better, but it is not the best. It does not follow, because

we all are compelled to take on faith at second hand most of the rules on which we base our action and our thought, that each of us may not try to set some cor-

ner of his world in the order of reason, or that all of us collectively should not aspire to carry reason as far as it will go throughout the whole domain. In

30 PART ONE: *The Nature of Judging*

regard to the law, it is true, no doubt, that an evolutionist will hesitate to affirm universal validity for his social ideals, or for the principles which he thinks should be embodied in legislation. He is content if he can prove them best for here and now. He may be ready to admit that he knows nothing about an ab­solute best in the cosmos, and even that he knows next to nothing about a per­manent best for men. Still it is true that 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.

At present, in very many cases, if we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all, we go to tradition. We follow it into the Year Books, and perhaps beyond them to the customs of the Salian Franks, and somewhere in the past, in the German forests, in the needs of Norman kings, in the assumptions of a domi­nant class, in the absence of generalized ideas, we find out the practical motive for what now best is justified by the mere fact of its acceptance and that men are accustomed to it. The rational study of law is still to a large extent the study of history . . 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. 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. 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.

"We *cannot transcend the limitations of the ego . . ."*

1.5 THE NATURE OF   
THE JUDICIAL PROCESS

*Benjamin N. Cardozo*

Benjamin N. Cardozo was Judge, New York Court of Appeals, 1918-1926;   
Chief Judge, New York Court of Appeals, 1926-1932; and Associate   
Justice, U.S. Supreme Court, 1932-1939.

The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be