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STRAYING FROM THE PATH

Tracy E. Higgins*

What common ground can be found between modern feminist legal theory and a century-old essay advocating understanding the law from the perspective of the “bad man”? The question admits of no simple answer. Feminists, including myself, might agree with some irony that “[i]f you want to know the law and nothing else, you must look at it as a bad man” but would add that *this* is precisely the problem. Of course, Holmes does not use the concept of the bad man in a feminist sense to suggest that the law empowers the bad man at the expense of women. Indeed, except for a passing reference to Mrs. Quickly’s misplaced interest in headwear, he does not mention women at all. Nonetheless, this essay reveals common ground between Holmes’s thought and feminist legal theory that is both wide and significant. Feminism’s departures from *The Path* — and there are many — reveal just as readily our different destination.

A generous feminist reading of Holmes’s essay suggests that feminist legal theorists, particularly radical feminists, share some of Holmes’s assumptions about the content and functioning of law, if not his aspirations for it. For example, *The Path* reflects Holmes’s view that power shapes the content of the law. Quoting Professor Agassiz’s observation that “a German population would rise if you added two cents to the price of a glass of beer,” Holmes notes that “[a] statute in such a case would be empty words, not because it was wrong, but because it could not be enforced.” Thus, for Holmes, law is coextensive not with any particular moral vision, but with the will and capacity of the sovereign to enforce it. As a descriptive matter, most feminists would agree with his characterization of law as a manifestation of social power. Indeed, feminist critiques of legal doctrine often begin by exploring the relationship between law and patriarchal distributions of power. Yet many feminists would disagree with Holmes’s suggestion that “[t]he first requirement of a sound body of law is, that it *should* correspond with the actual feelings and demands of the community, whether right or wrong.”¹ Such deference to political will leads as readily to Holmes’s opinion in *Buck v. Bell*² as to his dissent in *Lochner v. New York*.³ Moreover, feminists would argue that the relationship between political power and law is not purely instrumen-

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¹ OLIVER WENDELL HOLMES, *THE COMMON LAW* 36 (Mark DeWolfe Howe ed., Little, Brown & Co. 1963) (1881) (emphasis added).

² 274 U.S. 200 (1927).

³ 198 U.S. 45 (1905).

tal: law also operates to shape and reinforce the distribution of power and can be criticized on those terms as well.

Moving from substance to method reveals another line of continuity between Holmes and feminist legal theory. Holmes's discussion of the fallacy of logical form resonates with feminist legal theory, as well as with legal realism and Critical Legal Studies. Like Holmes, feminists have had little use for the idea that "a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct," particularly in light of the fact that women have been systematically excluded from the equation.

Many feminists and other critical legal thinkers also join Holmes in stressing the role of history in understanding the scope and meaning of legal principles. More importantly, for feminists as for Holmes, history is not merely an interpretive tool, but a critical one, providing "the first step toward an enlightened scepticism." Thus, most feminists readily agree with Holmes that the fact of historical pedigree is not a justification for a legal rule — that "[i]t 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."

Perhaps the most striking continuity between *The Path* and modern feminist legal theory is a shared appreciation of the situatedness or contingent character of law. For Holmes, this recognition flows from his rejection of the fallacy of logical form and his emphasis on the role of power in shaping the contours of law. Acknowledging indeterminacy of a sort, Holmes writes, "[y]ou can give any conclusion a logical form." He rejects the distortion generated by the assumption that law is governed by an internal logic. Instead, he suggests that matters of legal interpretation "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." Formalist reasoning confounds the problem by concealing the political character of such decisions.

Emphasizing the contingency of knowledge and the importance of perspective, feminists too have been skeptical of right answers for all time. We have argued against viewing legal categories — particularly gender-based categories — as inevitable, natural, or stable over time. In Holmes's terms, we have attempted to unveil the "concealed, half conscious battle[s]," and like Holmes, we would argue that these battles are better fought openly.

If feminists can find points of agreement with Holmes concerning law's logic, its contingent character, and its reflection of social power, most feminists would nevertheless disagree with the methodological prescription Holmes offers in *The Path*. Criticizing the conflation of moral and legal reasoning, Holmes observes that "the vague circumference of the notion of duty shrinks and at the same time grows more

precise when we wash it with cynical acid." Yet having rejected both logic and morals as foundations for law, Holmes must either locate an alternative standard for evaluating legal conclusions or retreat to positivism. In the second part of *The Path*, Holmes considers the possibility that social science can provide such a standard. As a means of structuring "a study of the ends sought to be obtained and the reasons for desiring them," social science represents for Holmes a possibility of preserving something (though not very much) for the realm of legal reasoning as such.

This methodological resolution is one most feminists have found profoundly unsatisfying for several reasons. First, in light of the general antipathy between feminist legal theory and law and economics, many feminists lament the prescience of Holmes's suggestion that "the man of the future is the man of statistics and the master of economics." Feminists have witnessed Holmes's "man of the future" deploy social science primarily against inefficiency rather than injustice. Second, the usefulness of social science as a guide to law and policy depends on the validity of its underlying assumptions about human nature and human behavior. For Holmes, these assumptions were largely unexamined. Yet the very contrast between Holmes's atomistic and amoral "bad man" and feminism's idea of the self in relationship reveals these underlying assumptions as contested and profoundly political. More generally, feminists who have been influenced by postmodernism, including myself, reject altogether Holmes's suggestion that the solution to the fallacy of logical form can be found in the apolitical prescriptions of social science. Having experienced a paradigm shift or two, we no longer see social science or even natural science as free from ideology.

For me, and I think for other progressive legal scholars, the cynical acid bath Holmes describes (and prescribes) is both more and less powerful than it was for him. It is more powerful because it strips away not only the language of morals and our faith in logical form, but also our confidence in economics, statistics, and social science. Washed with this more powerful cynical acid, Holmes's own theory of law seems, at best, too limited in its aspiration that law become "more rational and more civilized" by coordinating means and ends. At worst, it is simply a positivist description of the functioning of law and leaves us with little respect or esteem for law that is a mere manifestation of power. Yet the acid bath is also less devastating for us, because by eliminating altogether the vague circumference of duty, it restores moral language, ethics, political theory, history, and social science as equal aids in recreating law for our generation.

One hundred years later, it is appropriate to acknowledge not only our jurisprudential debts to Holmes, but also our departures from his path. As Holmes himself reminds us, "one may criticise even what one

reverses" — and, we might add, revere even what one criticizes. Marking the distance we have come and the detours we have made along the way toward our destination is at least as important as locating our shared origins. To paraphrase Holmes's eloquence, as feminists we should show less than devotion if we did not do what in us lies to improve our legal tradition, and having perceived the ideal of its future, point it out and press toward it with all of our hearts.