

Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457 (1897)

“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.” (Holmes 4).

Holmes begins by stating that people seek the help of lawyers to predict the outcomes of cases so they know what their risks are, thus, law becomes a business in which lawyers can predict their clients are to face that risk. The object of this article is the study of prediction, and Holmes believes that predictions are based on past results-to study predictions, one must study past case law and rules. The goal of a lawyer should not be merely to make predictions, but to make precise predictions and then to be able to generalize them to be applied throughout the legal system. Therefore, predictions are to be based solely on relevant law and only “the facts of legal import”, and facts dramatizing the client’s story are irrelevant.

Holmes introduces the idea of the “bad man”, and distinguishes between law and morality, stating that both the good and bad man have reason for wanting to avoid the courts. To know the law, Holmes suggests, you must look at it from the view of the “bad man”, caring only for material consequences of his actions, enabling him to predict and act based on the predicted consequences. He advocates for keeping law and morality separate, noting that rights in a moral sense differ from the rights in the constitution and the law. There really is not much of a danger from keeping law and morality separate, because if a law were to go against morality, there would be community rebellion. As such, the drive to create moral laws is not driven by morality itself but by the desire to avoid public rebellion.

The view of the bad man is solely a desire to know what the courts will in fact do, and predictions are what the courts will do in fact, and that is what Holmes means by law - predictions are the law. To make predictions, it makes sense to focus on generalities of legal outcomes, and not the exceptions - the focus should be on making predictions based on liabilities commonly imposed by law.

Holmes also notes that someone can be liable even if there is not malevolent motive at all. In using the word malicious (for instance, in pleadings) Holmes does not take this to suggest that the word malicious confers any ideas towards the defendant’s intent, solely that the defendant’s actions caused harm to the plaintiff. Holmes notes that one of pitfalls in the path of legal doctrine is confounding law and morality. Morality confused legal doctrine and the study of predictions, so legal doctrine may be better off if morality and words of moral significance were banished from the law and replaced by words solely within the law. In every legal system, there are reasons and principles to be found as to why a law was created, so even if a law was created by some despotic emperor, one should be focused on prediction, and in discovering some time of order or rational explanation for the growth of the rules that have been laid down.

Law is more rational and civilized when the desired end is. To know why a rule of law has taken a particular shape, we must look to tradition. History is necessary to the rational study of law because it helps to know and understand the precise scope of rules, however, we must be

careful not to amplify the role of tradition. The role of history should be limited, and we should only look to the past to see how it has shaped the present.

Holmes also suggests that if political economy and the law were less divided, then there would be a better philosophical understanding of jurisprudence (since political economy facilitates a cost-benefit analysis of legislation). Law most generally is jurisprudence, and the mark of a great lawyer is being able to see the application of the broadest rules. One can master law by seeing through dramatic case specific facts to figure out the prediction, as well as the basis for the prediction.

How to make predictions:

“Follow the existing body of dogma to its highest generalization by the help of jurisprudence; next to discover from history how it has come to be what it is; and finally, so far as you can, to consider the ends which the several rules seek to accomplish, the reasons those ends are desired, what is given up to gain them, and whether they are worth the price.”

Anthony D'Amato, *A New (and Better) Interpretation of Holmes's Prediction Theory of Law*, (2008), Faculty Working Paper 163

Analyzing Holmes's argument:

- The main role of lawyers is to predict what judges will do → predictions = law
- Law does not exist in the present - it is what the judge decides
- The prediction theory led to the legal realism movement
 - It is the duty of law schools to teach students (future lawyers) to make precise predictions, which would enhance their chances of winning
 - If this is the goal, schools should also expand the curriculum to include courses that could explain what motivates judges (i.e. policy making and social welfare)

Quantum Interpretation

- The “bad man” only cares about what the court will decide, as that informs what he will do in the present
- Holmes could have avoided the whole “bad man” theory in saying:
 - The content of the law in the present is a prediction of what courts will decide in the future
 - An allegedly applicable rule of law in the present is the probability that the rule will be affirmed by a court in the future
- The whole world consists of probabilities, not solid matter
 - E.g. You do not see a chair, but the possibility of the chair
 - The effect of the observation of the chair creates the image of the chair
 - We will know exactly where an electron is the moment it is measured → we cannot know exactly what the law is in the present when factoring it into the decision of if or how to act BUT we can assign a numerical prediction right now as to what a court will likely decide thus treating the prediction as the law
 - Holmes argued that the probability of law constituted present reality → the law has probabilistic existence
 - Degree of probability the law has must exist in the present -- a judge's later measurement should not affect what the law was
 - E.g. judge's decision in t1 (present) → a judge's decision at T2 should not affect what the law was at T1
 - Dilemma: if Judge in T1 makes a decision on a case with many factual similarities to the case the Judge in T2 is about to decide, what law should the judge in T2 apply?
 - Judges typically apply the most recent precedent to the case before them even if the precedent to be applied occurred after the facts of the case before them
- Legal realism was founded on a mistaken interpretation of Holmes's prediction theory

- Advocates for a quantum interpretation, which would focus legal study on the attorney's prediction of law rather than focusing on judges and the facts that will affect their rulings.

Catherine P. Wells, *Holmes on Legal Method: The Predictive theory of Law as an Instance of Scientific Method*, Southern Il. Univ. L. J. 18 (1994) (329-345)

- Holmes says the role of lawyers is to predict the actions of judges
- Holmes rejected the idea that law consisted simply of a collection of legal precedent
 - Legal precedent = a coherent logical system whose underlying structure could be uncovered by patient legal analysis
 - The logic of law is tied to the context of legal decision making
 - The structure of common law was the result of a historically contingent set of decision making practices → judges developed a repetitive structure for dealing with conflicting legal claims
 - Law involved the progressive use of reason to order human affairs and progressive reason required that rules for human conduct should be revisable in light of changing social conditions
 - Acknowledges that legal logic played only a part in decision making

If legal method is empirical, what is law “empirical about”? What are the facts or the data upon which an empirical science of law should be based?

- Holmes believed that knowledge of the social sciences was essential to sound legal decision making
 - Judges should be concerned with the practical effects of their judgments
 - But how does law itself proceed in accordance with a scientific method?
 - Holmes’s work is missing an account of how the legal decision making process can be regulated by the methodology of empirical science.
- The Scientific method
 - observation → generalization → theory (to explain the observed regularities)
 - Forms of logical reasoning used:
 - Induction of generalizing the data
 - Abduction in forming a hypothesis to explain the data
 - Deduction in using the hypothesis to predict future occurrences
 - Observation → observing the empirical facts
 - Beings with reported cases (which Holmes said were the oracles of law)
 - In reading cases, the lawyer focuses on particular aspects of the case (i.e. observing that a particular court has rejected a particular claim in a particular factual circumstance)
 - These observations will form the data that will serve as the basis for legal analysis
 - Generalization → Analyzing the data into general categories
 - Studying cases and placing them into general categories
 - If categories are too broad or narrow, it will be difficult to reconcile cases

- I.e. thinking about contract cases too broadly may prove difficult when thinking about the mailbox rule
- Hypothesis → to explain the observed data
 - Legal scholars may seek to reconcile cases once cases are grouped into general categories
 - Search for recurring themes → formulate a hypothesis that will unify and explain a wide range of legal outcomes
 - This allows cases to be distinctly described in legal terms and abstract conceptions (i.e. rights and privileges) and factor them into the analysis
 - These conceptions represent a creative effort to posit explanations for seemingly disparate data
 - I.e. a right = theoretical move designed to explain certain observed regularities in legal decision making
 - Rights are explanations → rights explain outcomes by generalizing them and making them easier to understand and remember
 - They are NOT and CANNOT function as justification of those outcomes
- Using the Hypothesis to making predictions and to observe whether predictions will come true
 - For Holmes, the point of formulating hypotheses is to facilitate the predictability in legal decision making
 - The reason to define rights and duties is so that the court's future actions can be predicted
 - If legal outcomes can be explained by supposing a right, then it would make sense to proceed in the future assuming that such a right exists
 - If this right is widely accepted, then it will affect future decision making
- When lawyers/students apply principles to the decision of new cases (the second step of the case method) they are making predictions about what a court will do when confronted with a particular circumstance
- The basis for understanding Holmes's predictive theory of law is through his conception of legal method as empirical science
- Holmes's scientific doctrine
 - Derives from scientific reading of cases
 - Does not derive from an a priori logical system
 - Legal doctrine is the means by which real world controversies can be translated into expected legal outcomes
 - As an empirical theory of law, the theory is only correct in as far as it can serve to explain and accurately predict the observed behavior of real world decision makers
 - Legal doctrine forms the basis of Holmes's claim that law must be predictive

- Law is predictive by formulating legal doctrine that enables lawyers to formulate prophecies/predictions

Under the predictive theory, what should judges do when they have to decide a case? Do they decide the case by prediction their own decisions?

- Holmes would say that judges do not make their decisions by predicting them
 - Judges are deciding rather than using doctrine to predict
 - For example, Holmes's judicial opinions were typically short and to the point, based not as much on legal doctrine as on the practical appraisal of the facts and case at hand
 - Judicial decision making under a predictive theory would necessarily entail a kind of formalism
 - Holmes believed legal decisions are not produced on legal doctrine and reason alone but that the decisions come first and that doctrine and reason follow (doctrine and reason follow as an ex post facto justification for the decisions)
 - Thus, judges could not predict their own decisions
 - Law = science
 - One cannot pursue science by generating self-fulfilling prophecies
 - Judges cannot pursue law by generating their decisions based on their own predictions → it would be backwards for a judge to try to make a decision that conforms to their own prediction
 - The decision itself is the way in which a prediction can and should be evaluated
 - Judges are not free from common law constraints when making decisions → legal doctrine and legal rules dictate how judges will decide → understanding legal doctrine helps predict outcomes BECAUSE common law judges are not free agents, but instead bound by the common law
- Holmes would suggest that judges make decisions that meet two standards:
 - 1. Decision must be fair and practical in the particular circumstances
 - 2. It must be consistent with the common law and with its underlying purposes of stability, justice and the promotion of human prosperity
- Holmes's prediction theory/scientific theory of law is not a form of extreme realism, it is actually a middle ground between formalism and realism
 - Legal doctrine was a theory of judicial decision making, offering tentative explanations for legal outcomes that could be used to predict future decisions
 - UNLIKE realism because Holmes saw legal doctrine as central to the legal enterprise
 - UNLIKE formalism, Holmes did not think legal doctrine were decision rules for legal cases

- For Holmes, law could be scientific even though there were cases that could not be predicted -- it is useful even if it only increases the likelihood of predicting how a court will decide

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** See Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. Rev. 651 (1995) (for a analysis of Hart's critique of the prediction theory of law as incoherent as applied to judges making predictions of their decisions)

- The prediction theory is an incomplete account of law because it only considers the lawyer's perspective
- A judge on a court of last resort does not predict how she will decide a case - this would be pointless - the prediction model is thus incomplete
- Sources of information relevant to a lower court's judgement under the prediction model:
 - Written opinions, concurrences and dissents of current/sitting justices → this provides evidence of how the individual justices sitting on the current will decide the case -- but data is not limited to these published opinions
 - Also consider non-judicial writings, speeches and their ideological commitments, even reflecting on casual conversations of justices

See generally, The Path of Law and Its Influence: The legacy of Oliver Wendell Holmes Jr., Steven J. Burton (ed) (2000) (for a collection of works on Holmes's Path of Law)

- Edited by the University of Iowa's Steven Burton, who would probably be a good resource for this project as well. *Please let me know if you would like me to look into specific works listed in the table of contents.*
- I have found pieces of the book online (the Gordon article) but not access to the entire book. If there are select pieces you think would speak to the prediction theory and your research, I could look into finding the book or the articles you want.

Robert W. Gordon, *The Path of the Lawyer*, 110 Harv. L. Rev 1013 (1997)

- Lawyers are paid for engaging in the business of showing client's how to avoid danger from the courts
- To demystify law, Holmes demoralizes it - to understand law, you must look at it with morals aside
 - However, the "bad man" and the "prediction theory" cannot possible be theories that law has no moral content
 - What Holmes must really be suggesting is that when analyzing legal doctrine, lawyers must disregard all moral sounding phrases, like malice, rights, duty etc.
 - What is actually important is the circumstances underlying those phrases that give rise to some sort of liability and what remedies attach
 - Law is not about morality but about predictions of the incidence of public force
- For Holmes, grasping the remote, general aspects of the law, lawyers can be masters of the law and connect their cases with the universe
- Law is simply predictions of where and when the public axe will fall

Criticism of Holmes

- Urges legal actors and decision makers to somewhat defer their power to be passive instruments of society's or a client's end rather than active forces of the law → how much power do judges have if what they should do can be predicted by lawyers
- Lawyers are not seekers of justice under Holmes's theory, he is merely a means to their client's end → lawyer's don't do much with their role except temper with the ambitions of reform movements
- Making accurate predictions is of heroic intellectual achievement for lawyers

David Luben, *The Bad Man and The Good Lawyer: A Centennial Essay on Holmes's 'The Path of Law'*, 72 N.Y.U. L. Rev. 1547-1583

- Holmes believes that the lawyer's role is as the paid counselor to the bad man
- Holmes demolishes the law's claims to the moral or logical high ground
- The value of lawyers is actually in their role as doctrinal systematizer, critical historian, and the economically minded policy analyst
 - But these are jobs not really occupied by lawyers, they are typically occupied by scholars and judges
- The study of law is the study of a well-known profession - not a mystery

****This Article talks a great deal on morality (more-so than it seems to on the prediction theory) and its connection to Holmes's theory. I know you were also interested in ethical concerns so I could be happy to go further into this if you would like.**