
Preface

A preface typically tries to say what a book is about; sometimes it also serves to express acknowledgments. In my case, these purposes converge.

What is the book about? Well, I suppose I could describe it as an inquiry into the recurring complaint that provides the title for the first chapter—the complaint that accuses the vast, solemn outpourings of lawyers and judges of being “just words.” But that sort of preview would be opaque—and potentially embarrassing. (“You actually wrote a book—a whole book—about whether law is just a lot of words? Have you no sense of irony? Nothing more worthwhile to do with your time?”) Desperate to give the book greater dignity, I might overcorrect and say that it’s about the metaphysics of law, or about how our understanding of law has deteriorated due to our wanton neglect (or, rather, our systematic suppression) of its ontological dimensions. But that sort of theme, baldly stated and standing alone, would be merely misleading and also, in the current climate of opinion, alienating. Who today has any use for “metaphysics” or “ontology”? Who has any clear notion of what, if anything, those terms even mean?

So for now, I can better express what this book is trying to do more obliquely, by offering two sets of acknowledgments. The first is to several generations of mentors who lived and wrote just a little before my time and, probably, yours. (I once met Lon Fuller, actually, but he was well past his prime.) A half-century or a century ago, it was possible to write about jurisprudence in a way that even the most celebrated legal thinkers of our own era—Ronald Dworkin, for example, or Richard Posner—no longer manage, and probably no longer aspire to. I have in mind three particular works: Oliver Wendell Holmes’s essay “The Path of the Law,” Karl Llewellyn’s *The Bramble Bush*, and Lon Fuller’s *The Law in Quest of Itself*. Given the choice be-

tween any of these writings and, say, a good novel, I suppose that even hardened professors of jurisprudence would choose the novel. So would I, probably. Even so, these writings manage to convey arresting insights in a way that is accessible, enjoyable, and even enriching in a general sense.

These writings are not “academic” in either the honorific or pejorative sense of the term. Perhaps because the writings began as public lectures, their authors present themselves as actual *persons*; they do not hide behind the numbing, homogenized, pseudo-objectivism that academic conventions often insist on. Their diction can be idiosyncratic, can sometimes even border on barbarous (especially in Llewellyn’s case). In discussing a thinker or theory, they may resort to simplifying caricatures—caricatures that distort but that can also illumine the essence of a thinker or theory in a way that more ponderous description cannot.

Most importantly, Holmes, Llewellyn, and Fuller work on the assumption—one that today might seem close to preposterous—that, as Fuller puts it, “[jurisprudential q]uestions . . . affect the fundamental bent of our lives.” Thus, Llewellyn explains that his lectures seek to be at once a primer on law—useful for beginning law students—and an expression of “some of the more passionate convictions which motivate his living.” And in the last sentence of “Path,” Holmes describes (with perhaps a touch of grandiloquence) his aspiration to “connect [the] subject with the universe and catch an echo of the divine.”

To put the point a bit differently, these writings of the early twentieth century have a kind of multiple *openness*—openness to readers both specialists and laypersons, openness in revealing the authors’ personal commitments and not merely their professional positions and, even more important, openness to the connections between law and the larger issues of life.

With few exceptions, such openness is scarcely discernible in even the best jurisprudential writing in recent decades. Indeed, I suspect that most legal scholars today would be embarrassed if these qualities were detectable in their work—as if they had been caught in the performance of some private function. Jurisprudential thinking in this respect has followed a familiar course. In many disciplines, it seems, periods of zestful, insightful innocence give way to periods . . . not so much of decline, exactly, as of professional virtuosity. Of scholasticism. Eminences of the later period—the virtuosos, the scholastics—may look back on their predecessors with a mixture of respect and condescension: they may view those predecessors as gifted novices. In this spirit, contemporary legal philosophizing is no doubt more sophis-

ticated—more methodical, more technically proficient—than Holmes’s, Llewellyn’s, and Fuller’s writings were. And yet . . . these jurisprudential virtuosos and their productions may prompt the same reaction that *Paradise Lost* provoked in Samuel Johnson: it is “one of those books which the reader admires, lays down and forgets to take up again. Its perusal is a duty rather than a pleasure.”

Here is an instance: I recall how, the first time I taught a jurisprudence class at the University of Colorado, I assigned the students to read H. L. A. Hart’s *The Concept of Law*. I later asked the class what they had thought of the book. One student (who seemed bright but, obviously, not duly acculturated) spat out his answer as if reacting to a piece of rotten meat. “I think it’s pathetic,” he said, “that an intelligent person would spend his life writing stuff as obscure and pointless, and *dead*, as this.” Taken aback, I explained that Hart’s book is widely regarded as a classic and a model of clear thinking and writing. What I said about the book was—is—true. Still, I have to admit that I can understand—maybe even sympathize with—the student’s reaction. And if this stinging criticism can be made of Hart—well, there is an *a fortiori* lurking in the vicinity. So it is hardly surprising if, as I am told, student interest in jurisprudence is on the wane. Nor is the decline limited to students; it includes professors—even, I strongly suspect, professors of jurisprudence.

So then, is it possible to resist the flow of history, and thus to write about law with the same sort of openness sometimes achieved in an earlier period? To talk about law in a way that speaks to both specialists and the laity, and that “connects the subject to the universe and catches an echo of the divine”? I’m not sure, but this book is an effort to do that. So I have tried to take “Path” and *Bramble Bush* and *Quest*—not *The Concept of Law* and its ever more meticulously ponderous successors—as models. (I have fallen short, of course, in a whole variety of ways and for a whole variety of reasons.)

I should note one crucial qualification to what I have just been saying. Although I have taken Holmes and Llewellyn and Fuller as mentors in what you might call their “open” or “human” orientation to the subject, I have not followed their substantive teachings on the nature of law. On the contrary. On the level of jurisprudential substance, these predecessors are more nearly opponents than mentors, or perhaps mentors from whom I—and, I believe, *we*—need to break away. Holmes and his successors operated in an era that was determined to purge itself of “metaphysics” (whatever that is). And they thought that in doing this they were acknowledging, and advanc-

ing, a sort of inexorable movement of history. Holmes and Llewellyn were zealous for the movement; Fuller acquiesced in it. Everything these men and their contemporaries say about law is tinged with, if not permeated by, this anti-metaphysical animus.

A similar attitude still dominates the legal academy—and still, in my view, paralyzes our efforts to understand law. But the older assumptions about the inevitable course of history have by now been largely falsified, and it may be possible to take a fresh look at the world—and at law, and at how law relates to and reflects the world. Possible and also urgently *necessary*, because the “Path” that Holmes pointed to and that generations of his dutiful followers have trod, have trod, have trod has led to a jurisprudential dead end. That is why, I believe, the quality of openness sometimes apparent in our predecessors is now more opportune than the currently prevailing virtuosity that seeks mainly to restate, analyze, criticize, and extend their various claims with methodical care and ever greater sophistication. We need to emulate our distinguished predecessors’ *qualities of mind* precisely so that we can get beyond their *substantive philosophies*.

This observation leads to a second, briefer set of acknowledgments, which I owe to a remarkable group of former colleagues at the University of Colorado. When I moved to Colorado in 1987, Bob Nagel was already there, and the next year Pierre Schlag arrived, and later Paul Campos and Richard Delgado and Jean Stefancic and Rebecca French and Curt Bradley joined the collection. (“Family” would emphatically not be the right word.) “Crits” all—in a catholic and nonpolitical sense of the term. (I hope that none of them is offended by the description.) Though these people differed tremendously from each other in their philosophies, politics, interests, temperaments, and life situations, they were all intellectually engaged and also iconoclastic in one way or another that made for endless and interesting conversations. Perhaps the Colorado environment—its mountains, its frontier innocence and remoteness from the sophisticated centers of high civilization, maybe even its peculiar politics incongruously situating “the People’s Republic of Boulder” in the state that became famous for the anti-gay rights “Amendment 2”—contributed to the distinctive atmosphere. In any case, it seemed possible there to raise questions—*really* to raise them, all sorts of questions, about law and the Supreme Court and the legal academy and the modern Western worldview—that somehow could not be taken as seriously at other more self-consciously respectable institutions where I have studied or taught.

That freedom did not lead to uniform conclusions, of course. Quite the reverse. For example, I am sure that Pierre Schlag influenced me (or “corrupted” me, as a conservative friend wistfully told me) far more than I influenced him, such that many of my views (including many expressed in this book) by now probably owe much to Pierre even when I am no longer conscious of the debt. But in the end our outlooks were fundamentally different. Pierre seemed constitutionally incapable of viewing what I will simply call “faith” as a live option; and so for him critical openness was always a path to despair. (Or at least to what in my view amounted to despair; but Pierre did not see it this way.) For me, conversely, and for better or worse, it seems that faith was and is inescapable, even though it is an ongoing and at times frustrating struggle—for me as for many others—to articulate the basis and content of that faith. Nor can this struggle be divorced from the effort to understand law: hence this book.

These collegial differences made the exchanges all the more valuable, for me at least. In any case, this book is an expression of years of such discussions with Bob, Pierre, Paul, Richard, Jean, Rebecca, and Curt, to all of whom I am deeply indebted. We have all moved on; but the book seemed worth doing, among other reasons, as a sort of memoir of a decade of cordially combative conversations.

Others have helped me with the book in more direct and usual ways. A number of friends and associates generously read and commented on all or part of the book: Brian Bix, George Wright, Chris Eberle, Larry Solum, Gail Heriot, Paul Campos, John Garvey, David Brink, Richard Delgado, Laurie Claus, Emily Sherwin, Mike Ramsey, Patrick Brennan, Mike Rappaport, Sai Prakash, Tom Smith, Dan Rodriguez, Rick Garnett, Chris Wonnell, Richard Posner, and Maimon Schwarzschild. Larry Alexander and Michael Perry deserve my special thanks for giving both substantial comments and also encouragement and moral support along the way; such friends are one of life’s larger blessings. Another good friend, Joe Vining, returned the manuscript with a barrage of marginal comments that, alas, I was unable on the whole to assimilate adequately into the book; but the comments were so perceptive and provocative that I almost wish they could have been printed along with the book. I also benefited from questions and challenges in presentations of parts of the book to the law faculties at Arizona State University, Emory University, and the University of San Diego. Much of the book was written while I was on the faculty of Notre Dame Law School, and I appreciate the support of the dean and faculty there. As always, I especially appreciate the

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Although none of the chapters here have previously been published, I have in places borrowed and adapted passages and sections of three articles with the permission of the original journals: “Believing Like a Lawyer,” 40 *B.C. L. Rev.* 1041 (1999); Copyright © 1999 Boston College Law School; “Expressivist Jurisprudence and the Depletion of Meaning,” 60 *Md. L. Rev.* 506 (2001), used with the permission of the Maryland Law Review; “Nonsense and Natural Law,” 4 *S. Cal. Interdisc. L.J.* 583 (1995), used with the permission of the Southern California Interdisciplinary Law Journal.

I also thank the Princeton University Press for permission to quote from Joseph Vining, *From Newton’s Sleep* (1994).

LAW'S QUANDARY

