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# COMMENTS

## COMMENT ON FREDERICK SCHAUER'S PREDICTION AND PARTICULARITY

GERALD LEONARD\*

Ignorance of the law is generally no excuse. I say generally because the century since the publication of *The Path of the Law* has brought a small but increasing number of exceptions to the rule. In Oliver Wendell Holmes's day, however, exceptions to the rule were nearly nonexistent, much to Holmes's satisfaction.<sup>1</sup> In *The Common Law*, Holmes said that the law requires persons "at their peril to know the teachings of common experience, just as it requires them to know the law."<sup>2</sup> He did not, of course, actually think that common experience was perfectly knowable or judicial interpretation perfectly predictable, but that did not undercut for him the authority of the judge to require that persons know and obey.<sup>3</sup> Holmes's firmness on this matter and his subsequent characterization of law as prediction in *The Path of the Law* imply further that judges must require everyone to know the mechanisms and categories of legal prediction, as well as those lessons of economics and other social sciences that inform the policy decisions that judges unavoidably make when they make and apply the law.<sup>4</sup> All of the considerations that ultimately influence a court in its statement of a legal rule are in fact the very law that every person is required to know and obey, even

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mann and Hugh Baxter for comments.

<sup>1</sup> "[E]very one must feel that ignorance of the law could never be admitted as an excuse, even if the fact could be proved by sight and hearing in every case." Oliver Wendell Holmes, *THE COMMON LAW* 48 (1881).

<sup>2</sup> *Id.* at 57.

<sup>3</sup> *See, e.g., id.* at 48. Holmes writes:

It is no doubt true that there are many cases in which the criminal could not have known he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.

*Id.*

<sup>4</sup> *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897), *reprinted in* 78 B.U. L. REV. 699, 708 (1998); Holmes, *supra* note 1, at 35-36.

amid an indeterminacy recognized by Holmes more than a century ago and since elaborated upon by so many commentators.<sup>5</sup>

But how are persons to know all of these things that are necessary to predict a judicial decision? How are they to know what the reliable categories of prediction are, which lessons of economics, black-letter law, and common experience will produce a particular decision. Frederick Schauer's *Prediction and Particularity* takes up these inquiries and finds an unlikely prophet in Holmes's comical character, the Vermont Justice of the Peace ("JP"). Holmes ridicules the JP for the latter's importation of a pre-legal category (the churn) into the process of making a legal decision, but Schauer's paper detects a measure of prescience in the JP's conduct. It is not that Schauer would really bet on the (admittedly possible) proposition that the JP recognized in churns in late nineteenth-century Vermont one of those pre-legal categories that really ought to make a difference in an adjudication for property damage. But Schauer, by imbuing this character with a little more vision than Holmes's anecdote really affords him, engagingly illuminates the intractable problem of specifying reliable mechanisms and categories for legal prediction. As I've suggested, Holmes did recognize this problem when he argued that judicial decisionmaking is inevitably driven by policy choices<sup>6</sup> and thus called for lawyers—whose job it is to predict the decisions of courts<sup>7</sup>—to become masters of economics and the like, not just masters of the arcane, sometimes obsolete, rules of the Common Law.<sup>8</sup> Schauer, however, illuminates the problem and expands it beyond the terms in which Holmes explicitly recognized it. He does so by setting up a rehabilitated version of the JP, one who understands the perhaps increasing utility of pre-legal categories like "churn" to predicting legal outcomes, against a Holmes who trusts only established legal categories as aids to understanding the law. This opposition opens the way to an enlightening discussion of the main contenders in the debate over what, if any, sorts of categories can reliably predict legal outcomes.

Needless to say, though, the yarn about the JP and the churn as told by Holmes is open to more than one reading. The reading I will suggest here is more hospitable than is Schauer's to the notion that Holmes recognized the predictive importance of what Schauer calls pre-legal categories. But it also refocuses the problem of identifying the most predictive categories by emphasizing the related question of whose perspective the decision-maker

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<sup>5</sup> See, e.g., Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 791 (1989), which argues throughout that Holmes adhered to the pragmatist insight that all knowledge is contextual and the "quest for certainty" chimerical. See *id.* at 791. And see Holmes's own famous observation that "certainty is generally illusion, and repose is not the destiny of man." Holmes, *supra* note 4, at 466, 78 B.U. L. REV. at 705.

<sup>6</sup> See Holmes, *supra* note 1, at 35-36.

<sup>7</sup> See Holmes, *supra* note 4, at 457, 78 B.U. L. REV. at 699.

<sup>8</sup> See *id.* at 469, 78 B.U. L. REV. at 708.

should adopt in identifying (predicting) the applicable law. Schauer's reading pits Holmes and his JP against each other in order to raise the question of which categories of prediction are the best: the pre-legal, the legal, or some others. In contrast, my reading emphasizes the fact that Holmes singled out as his poster boy for legal mal-prediction not a lawyer whose opinion letter misleads a client, but a judge, whose supposed incompetence at legal prediction nevertheless yields a decision that will be enforced.

For Holmes, I don't think the fact that the predictor is a judge raises the difficulty that some have noted; that is, since judges cannot readily be said to predict the very decisions they actually make, law cannot really be prediction.<sup>9</sup> After all, in the sort of pragmatist mode in which Holmes liked to argue, judicial decisions would not likely be characterized as law but rather as orders only; the categories and rhetorical mechanisms used to justify the decisions would be the law, because those categories and mechanisms constitute an authoritative statement of the legal categories that are to be predictive of future decisions.<sup>10</sup> Instead, the difficulty for Holmes that is created by the JP's status as a judge is that that judge's prediction seems a flagrant changing of the law. It brings into doubt the basic faith that law is predictable, both because it produces a decision that seems to have been unpredictable before its rendering and because it undermines the faith that this judge's new prediction of future decisions will itself prove reliable.

Thus the question raised by this JP story, where emphasis is laid less on the JP's revealing himself to be a bad lawyer and more on the JP's status as a judge with the power to decide, is how to respond to the inevitable measure of unpredictability in legal institutions and their decisions. Should indeterminacy be met with an insistent refusal to consider a defendant's ignorance of law and a bald declaration that judicial decisions are predictable enough? Or should it be met with some indulgence for a litigant's claim that a judge's decision was not predictable? If laypersons and even legal practitioners sometimes cannot predict judicial decisions that, by their nature, purport to be predictable, then what should the doctrinal response to such indeterminacy in the law be? Among the judges, the lawyers, and the laity, whose perspective should rule? Whose prediction should be the law?

Twentieth-century courts have struggled with this question and have sometimes afforded ignorance-of-law defenses when a law has appeared wholly unpredictable from the perspective of the ordinary, law-abiding defendant. But to Holmes, this is the wrong approach. Revolting as it may be to submit to an unpredictable decision just because it is announced by some clown in the position of a JP (or just because it might have been so decided in the time of Henry IV<sup>11</sup>), Holmes would not fail to recognize the decision

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<sup>9</sup> See Schauer, *Prediction and Particularity*, 78 B.U. L. REV. 773, 773-4 n.3 (1998) and works cited.

<sup>10</sup> Cf. RONALD DWORKIN, *LAW'S EMPIRE* 36 (1986).

<sup>11</sup> See Holmes, *supra* note 4, at 469, 78 B.U. L. REV. at 708.

as a product of law, as a prediction by the constituted authority of the categories of prediction that will count from now on. And the arbiters of the mechanisms of prediction could not be those on whom the law acts, no matter how reasonable their predictions, because law's subjects must be required to know and obey some higher authority if society is to stave off the disintegration threatened by indeterminacy. Instead, the exclusive arbiters of those categories must be the judges who are authorized to make the ultimate decisions. Holmes did, of course, condemn the JP, because, in departing so far from the practices of the good lawyer, the JP's decision threatened Holmes's defense of judicial decisions as generally predictable to some community of discourse, whether lawyers or social scientists or the general population. As much as he sought to imbue law with good policy and predictability, however, Holmes probably considered maintenance of constituted authority even more important. He thus had to insist that the law for any case was always what the judge now predicts it to be for future cases, and that no failure to predict accurately is an excuse—even when the Vermont JP is on the bench.

To allow a defense of ignorance or mistake of law, on the other hand, is to suppose officially that the predictions of the law-abiding person, rather than the judge, may constitute law and that law changes arbitrarily at the hands of judges. In New Jersey, the legislature has decided that if (1) you carefully investigate the law and conclude (predict) that it will not reach certain conduct of yours and (2) a prudent law-abiding person would reach the same conclusion, but (3) the courts reach the opposite conclusion, then you have a good defense.<sup>12</sup> That is, the law for you is what you and your lawyer predicted it would be if it is also what a law-abiding person would have predicted it to be. But the court, insofar as it retains the capacity to influence what a law-abiding person would predict, has now changed the law for everybody else by declaring that the prediction that saved you is wrong. Furthermore, the legislature—far from insisting with Holmes that allegedly unpredictable judicial behavior be characterized and defended doctrinally as predictably grounded in law—sanctions this unpredictable law-changing as a legitimate exercise of judicial authority. The legislature thus seems to suggest that the indeterminacy and unpredictability of knowledge and law do not require an insistence on the predictability of judicial interpretations in order to shore up courts' authority. Rather, that indeterminacy requires vindication of the predictions of the hypothetical "law-abiding person" as independent and

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<sup>12</sup> See N.J. STAT. ANN. § 2C:2-4(c) (West 1995).

A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when:

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(3) The actor . . . diligently pursues all means available to ascertain the meaning and application of the offense to his conduct and honestly and in good faith concludes his conduct is not an offense in circumstances in which a law-abiding and prudent person would also so conclude.

*Id.*

distinguishable from those of the judge and as the true test of law.

Similarly, the United States Supreme Court has in this century read the defense of ignorance or mistake of law into a handful of federal statutes and into the Constitution itself. Where conduct is "apparently innocent,"<sup>13</sup> like a felon's failure to register her presence in a city with the local police<sup>14</sup> or a businessman's failure to conform to federal regulations regarding the exchange of food stamps<sup>15</sup> or a person's structuring of his bank transactions to avoid reporting requirements,<sup>16</sup> the Court has sometimes shown itself willing to allow the defendant to argue that she or he did not know that the conduct was reached by the relevant statute. Like the New Jersey legislature, the Court, overriding Holmesian dissents, has supposed that the hypothetical law-abiding person, perhaps assisted by the lawyers and social scientists whom Schauer surveys, might be set in opposition to the Vermont JP (or other judges and legislatures) and be approved as the authoritative identifier of mechanisms and categories of prediction at the expense of the JP's claim to exclusive authority.

If Holmes had really thought the Vermont JP's decision was inconsistent with his notion of law as prediction, then he would have been driven to the New Jersey position, but it is hard to imagine Holmes taking that position. The JP's decision provides a comical illustration of the indeterminacy of law, as Schauer's tale of the pre-legal determinants of West Virginia decisions in coal cases does less comically. Holmes's response to such indeterminacy was at least two-fold. By ridiculing the Vermont JP, he pressed the idea that law has a professional method that can minimize, although not eliminate, unpredictability. Lawyers should master not only black-letter law, but also economics and, taking the lessons of Schauer's paper to heart, maybe even whatever science of law or human behavior there may be that could have predicted the JP's discovery of churn law. Even if the professional community of lawyers learned such lessons well, however, they would never fully escape the occasional arbitrary, unpredictable decision, a phenomenon that would always threaten the legitimacy of any social order.

The remaining step then was to choose a response to that threat. New Jersey might admit the unpredictability of judicial decisions in the name of individual fairness and thus, in Holmes's view, encourage those subject to the law to denigrate its institutions as arbitrary and to exploit its uncertainties. But for Holmes, to sacrifice the individual, "law-abiding" person in the

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<sup>13</sup> *Liparota v. United States*, 471 U.S. 419, 426 (1985).

<sup>14</sup> See *Lambert v. California*, 355 U.S. 225 (1957).

<sup>15</sup> See *Liparota*, 471 U.S. at 419. The majority opinion in *Liparota* insists that it is not authorizing a mistake-of-law defense, see *id.* at 426 n.9, but I agree with the dissent that to read in a mens rea requirement with respect to a "legal element in the definition of the offense," *id.* at 426 n.9, is in fact to authorize a mistake-of-law defense. See 471 U.S. at 441 (White, J., dissenting).

<sup>16</sup> See *Ratzlaf v. United States*, 510 U.S. 135 (1994).

name of the law was characteristic of, not inconsistent with, law. And after a long, professional day of disparaging the legal abilities of those who brought their pre-legal churn or telegraph fetishes to court, Holmes no doubt took a perverse delight in the fact that the moral man and the great lawyer might become nothing more than sacrifices before the Vermont JP, sacrifices to the necessary principle that failure to predict the law is no excuse.