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## Justice Holmes's Philosophy

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# ARTICLES

## JUSTICE HOLMES'S PHILOSOPHY

SHELDON M. NOVICK\*

### I. SUMMARY

The memory of Justice Oliver Wendell Holmes has been recruited by nearly every movement or school of jurisprudence since his death in 1935, and as a result confusion lingers over what his ideas were, and what value they might have for us now. The most persistent effort has been to portray Holmes as a pragmatist, although his views are best described as "scientific realism," the direct opposite—if pragmatism can have an opposite.

Some of the confusion has arisen because Holmes described ordinary lawyers and judges as pragmatic; he thought the common law they fashioned was an instrument of social policy, the result of experimentation. But Holmes, as scholar and judge, held himself aloof from these ordinary values. He thought a judge's duty was to preside over the great peaceful conflicts of the marketplace, and to decide fairly who and what would prevail in the struggle for life—to choose between pragmatisms, as it were.

The two codes of duty—the rules of conduct imposed on the crowd, and the special duties of the gentleman judge—seem to be in conflict, and this is the tension that commentators on Holmes have often found in his work. But Holmes harmonized the two codes of duty to his own satisfaction in a larger, personal philosophy that he called "mystical materialism," a faith in the ultimate ends of an evolving, material world. The judge's duty was to serve the process of evolution, even though this might require him to condemn his own society as unfit.

Holmes's jurisprudence reflected his philosophy. The common law

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\* Scholar in Residence, Vermont Law School. The author is grateful for assistance from the Permanent Committee on the Oliver Wendell Holmes Devises; from the Harvard Law School library and their generously helpful staff for access to the Holmes papers and permission to quote from them; to Claire Reinhardt and Karen McLaughlin; and to Judge Richard A. Posner and Professor Albert W. Alschuler, for helpful comments and suggestions. The author alone is responsible for the views expressed in this article, however.

was the deposit of an evolving society, moving toward self-awareness and conscious control of its own further evolution. The Constitution, however, embodied only relatively fundamental principles in which Holmes found the judge's duty to ensure that the struggle for life was carried out peacefully and fairly.

Holmes expressed his ideas obscurely, which is surprising, because his ambition was to be remembered as a thinker. He told Anna Lyman Gray that he would not have done much more than walk across the street to be promoted from Justice to Chief Justice, but that he wanted to be remembered as the greatest legal thinker who had ever lived.<sup>1</sup> It was a complex ambition, for he wished also to be an artist and a gentleman, as if to combine Sir Philip Sydney and Baruch Spinoza, whose qualities he believed ordinarily were incompatible.

To reconcile them, Holmes chose to embed his philosophical discoveries in forms acceptable to polite society. Poetry, he found, was not his medium, but he was a brilliant conversationalist; and so, odd as it seems, he spun out his theories in sparkling talk and courtly letters to young women—which for the most part have never been published. Later he set these theories in more precisely faceted, formal addresses, delivered to surely somewhat startled audiences in rural New Hampshire and Massachusetts. He presented nicely bound copies of his *Speeches*<sup>2</sup> to English women from good families; and, eventually, his most carefully tested ideas could be seen moving beneath the surface of his judicial opinions.

This method precluded anything so dull and underbred as an explanation—not that there was any secret about his ideas. “Spinoza is the boy,” he wrote to Felix Frankfurter, “. . . he sees the world as I see it—and he alone of all the old ones that I know.”<sup>3</sup> But Spinoza's quasi-mathematical deductions, like all formal systems, were boring and vulnerable to attack. To the philosopher Morris R. Cohen, whom he greatly admired, Holmes wrote in his best swordsman's manner: “Systems are forgotten—only a man's aperçus are remembered. I used to say, extravagantly of course, that Kant could have told his main points to a young lady in ten minutes after dinner.”<sup>4</sup>

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1. Letter from Oliver W. Holmes to Anna L. Gray (Dec. 2, 1910), in Oliver Wendell Holmes, Jr., Papers, Harvard Law School Library B32 F5 [hereinafter Holmes Papers].

2. OLIVER W. HOLMES, *SPEECHES* (5th ed. 1913).

3. Letter from Oliver W. Holmes to Felix Frankfurter (Feb. 15, 1929), in Holmes Papers, *supra* note 1, at B29 F12.

4. Letter from Oliver W. Holmes to Morris R. Cohen (Aug. 31, 1920), in LEONORA C. RO-

So Holmes never made any systematic presentation of his thought. He labored patiently at technical philosophy—in a hotel room with no books available, he wrote out a careful outline of Kant's *Critique of Pure Reason*<sup>5</sup> for Mrs. Gray—but he did not emulate the academic philosophers. Impact, not dead pull, did the job, he liked to say. He found and carefully polished a few images that conveyed his meaning, but were highly resistant to analysis or refutation. He compared these images to a complicated mechanism that had gradually been refined into a single, smooth, oddly shaped brass part.

In my biography of Justice Holmes<sup>6</sup> it seemed proper to let him have his effects. But explanation also has its part to play, if only below decks; so while Holmes lightly touches the helm, we may now trudge down to the engine room and have a look at the machinery. Most revealing of Holmes's thought have been his earliest law writings, published anonymously and until recently not identified as his, and the thousands of his still unpublished letters that I have reviewed as Holmes's biographer and as editor of the first edition of Holmes's collected works.

## II. EARLY INFLUENCES

Holmes's father, the doctor, for whom he was named, was an eighteenth century man, an optimist, and an admirer of Leibniz; we must imagine him debating the ideas of the Age of Reason with his young son. The doctor's, *The Autocrat of the Breakfast Table*, published in 1858, began with a combative exchange over Leibniz between the Autocrat and a "divinity student"—a transparent disguise for his serious, seventeen-year-old son.<sup>7</sup>

The doctor believed in reason, and was something of a skeptic in religion. But he liked to reserve a little green-room for free will, and kept an

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SENFIELD, PORTRAIT OF A PHILOSOPHER: MORRIS R. COHEN IN LIFE AND LETTERS 327-28 (1962) [hereinafter HOLMES-COHEN LETTERS].

5. Holmes Papers, *supra* note 1.

6. SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES (1989).

7. OLIVER W. HOLMES [SR.], THE AUTOCRAT OF THE BREAKFAST TABLE (Boston, Ticknor & Fields eds., 1858). Six years later, in 1864, Wendell, by then an infantry officer in the Union Army in winter quarters, triumphantly concluded the debate by showing that  $1 + 1 = 2$  was *not* necessarily true in all imaginable worlds—and then characteristically refuting his own argument. Letter from Oliver W. Holmes to his father (Apr. 18, 1864) and undated fragment of second letter, in OLIVER W. HOLMES, TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL HOLMES, JR. 1861-1864 at 95-97 (Mark DeW. Howe ed., 1946).

open mind on spiritualism and whether Bacon wrote Shakespeare. As the son said later:

[T]here was with him as with the rest of his generation a certain softness of attitude toward the interstitial miracle . . . that I did not feel. The difference was in the air, although perhaps only the few of my time felt it. The Origin of Species I think came out when I was in college—H. Spencer announced his intention to put the universe into our pockets—I hadn't read either of them to be sure, but as I say it was in the air. I did read Buckle<sup>8</sup>—now almost forgotten—but making a noise in his day. . . . Emerson and Ruskin were the men that set me on fire. Probably a sceptical temperament that I got from my mother had something to do with my way of thinking. Then I was in with the abolitionists, some or many of whom were sceptics as well as dogmatists. But I think science was at the bottom.<sup>9</sup>

The scientific atmosphere was a wind sweeping in from Germany. Holmes's friends Henry and William James, and Henry and Brooks Adams, made their pilgrimages to German universities. Ralph Waldo Emerson and Henry James, Sr. joined the St. Louis Philosophical Society, which sought to combine Hegel and American transcendentalism.<sup>10</sup> "Science" in this world meant two things. First, as in socialist countries, "science" meant the study of hidden, fundamental forces or principles of history. Emerson said:

Beside all the small reasons we assign, there is a great reason for the existence of every extant fact; a reason which lies grand and immovable, often unsuspected, behind it in silence. The Times are the masquerade of the Eternities; trivial to the dull, tokens of noble and majestic agents to the wise; the receptacle in which the Past leaves its history; the quarry out of which the genius of to-day is building up the Future.<sup>11</sup>

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8. Henry Thomas Buckle's, *HISTORY OF CIVILIZATION IN ENGLAND* (1857-61) had an immense impact on English Liberal thought. Buckle attempted to frame a science of history, showing the development of civilization in response to "laws" of climate and geography.

9. Letter from Oliver W. Holmes to Morris R. Cohen (Feb. 5, 1919), in *HOLMES-COHEN LETTERS*, *supra* note 4, at 321. Holmes's diaries for the period 1864-1872 show that he had read Spencer. *See infra* note 29. Compare the very similar statement, in less personal terms, by John Acton, Holmes's English contemporary: "Expressions like: the growth of language, physiology of the State, national psychology, the mind of the Church, the development of Platonism, the continuity of law—questions which occupy half the mental activity of our age—were unintelligible to the eighteenth century—to Hume, Johnson, Smith, Diderot." John Aston, *quoted in* MICHAEL OAKESHOTT, *RATIONALISM IN POLITICS AND OTHER ESSAYS* 152 n.1 (1962). Oakeshott properly adds that these concepts have since become unintelligible again.

10. Richard Hyland, *Hegel: A User's Manual*, 10 *CARDOZO L. REV.* 1735, 1763 (1989). I am indebted to Joanne Ertel for calling this article to my attention.

11. Ralph W. Emerson, 1 *The Times*, in *THE COMPLETE WRITINGS OF RALPH WALDO EMERSON* 80, 80 (1929).

Seventy years later, Holmes, reflecting on his own career, said, "My chief interest in the law has been in the effort to show the universal in the particular—That has kept me alive."<sup>12</sup> In this view, Plato and Kant were figures in the history of science.

Second, science meant evolution. Scientific inquiry into the spirit of the time showed that the world was developing, progressing, through the struggle of contending ideas. Both Emerson and Carlyle inspired Holmes with their vivid pictures of history as evolution, as the embodiment of advancing ideas, and with their implicit call to heroic accomplishment. As to Carlyle, Holmes read and admired both *The French Revolution* and *Sartor Resartus*. When his father asked him the parlor-game question—what book he would take with him to a desert island—Holmes answered, "*The French Revolution*."<sup>13</sup>

But Emerson was the great inspiration of Holmes's development. One cannot trace particular ideas in Holmes's later works to Emerson, but the older man certainly inspired Holmes to write, and confirmed in him the attitudes and assumptions that were the context of his work. In the 1850s, when Holmes was in his teens, he saw Emerson on the other side of the street. He ran over and said, "If I ever do anything, I shall owe a great deal of it to you."<sup>14</sup> In middle life, when he had written the first article setting out his mature philosophy of law, he sent a copy to Emerson:

It seems to me that I have learned, after a laborious and somewhat painful period of probation, that the law opens a way to philosophy as well as anything else, if pursued far enough, and I hope to prove it before I die. Accept this little piece as written in that faith, and as [a] slight mark of the gratitude and respect I feel for you who more than anyone else first started the philosophical ferment in my mind.<sup>15</sup>

Near the end of his life, Holmes said, "The only firebrand of my youth that burns to me as brightly as ever is Emerson."<sup>16</sup>

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12. Letter from Oliver W. Holmes to Morris R. Cohen (Aug. 31, 1920), in HOLMES-COHEN LETTERS, *supra* note 4, at 328.

13. Letter from Oliver W. Holmes to Canon Patrick A. Sheehan (Oct. 27, 1912), in HOLMES-SHEEHAN CORRESPONDENCE: THE LETTERS OF JUSTICE OLIVER WENDELL HOLMES AND CANON PATRICK AUGUSTINE SHEEHAN 51 (David H. Burton ed., 1976) [hereinafter HOLMES-SHEEHAN LETTERS].

14. *Id.*

15. Letter from Oliver W. Holmes to Ralph W. Emerson, in Emerson Papers, Houghton Library, Harvard; Holmes Papers, *supra* note 1, at B42 F20; quoted in NOVICK, *supra* note 6, at 149.

16. Letter from Oliver W. Holmes to Frederick Pollock (May 20, 1930), in 2 OLIVER W. HOLMES, HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR

Emerson encouraged Holmes to exercise his individual judgment and to test all tradition by his own measure; he embodied the solitary search for principle that to Holmes was the scientific method. He also introduced Holmes to Plato, another lasting influence in manifold ways. Holmes—who was always a good example of Harold Bloom's anxiety of influence—reacted by opposing Plato's and Emerson's idealism, but he bore the marks of their method all his life. He became especially committed to the Socratic techniques of investigation—the *reductio ad absurdum* above all. This became his characteristic test of arguments, in law as in philosophy. Rights, for instance, were not ultimate, because taken to their extremes they were absurd; only the power of the state could be extended without limit and without contradiction.

Holmes summarized his understanding of this world view in two essays, which he wrote during the summer following his junior year at college. In an essay on Plato, he described philosophy as a search for empirical principles in the material world, and Plato as an early, outmoded scientist.<sup>17</sup> In a simultaneous essay on Dürer, he used his understanding of scientific principles to describe the development of art, as shown in the evolution of engraving technique and subject matter.<sup>18</sup> In this remarkable essay, Holmes treated works of art—as he would later treat judicial opinions—as unconscious expressions of the mentality of their time. The scientific historian, studying these data, rather than the artist, could see the principles being revealed.

From his mother, Holmes acquired what he called a skeptical temperament, by which he seemed to mean a sense of acceptance of what was immediately given and doubt of anything that did not seem obvious. He also acquired from her a rigid sense of duty, a sense of obligation to accomplish something definite in each twenty-four hours. She smiled on his abolitionism, and for his twentieth birthday, on the eve of the Civil War, she gave him a life of Sir Philip Sydney, the chivalric model of a gentleman. Holmes believed in scientific evolutionism as the latest stage in the development of philosophy, and so he believed that science would find a new justification for morality and duty. He was two generations removed from orthodox Christianity; his table of duties was taken not from the Bible, but from the code of chivalry. Like many in his time and

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FREDERICK POLLOCK 1874-1932, at 264 (Mark DeW. Howe ed., 1941) [hereinafter HOLMES-POLLOCK LETTERS].

17. Oliver W. Holmes, *Plato*, 2 UNIV. L.Q. 205 (1860).

18. Oliver W. Holmes, *Notes on Albert Durer*, 7 HARV. MAG. 41 (1860).

circumstances, the manners of a gentleman were his true morality; however, he had more candor and self-awareness in this matter than most.

His mother was pleased when he enlisted in the Union Army; at first, his father, who was not an abolitionist, was not pleased. But, when the war had begun in earnest, the doctor became quite ruthless. After three years of infantry combat, thrice wounded and often ill, Holmes wished to leave the army. Both his parents then urged him to reenlist until the war's end, although that seemed to him to mean almost certain death. He began the war with a sense that duty meant ultimate self-sacrifice, Tennyson's "do and die," and at first he was willing, but he could not continue. He grew weary, and he grew older. In the third year of combat he left his regiment—one of its few surviving officers—for a safer staff position. In the winter of 1863-1864, at relative leisure in staff headquarters, he talked compulsively with fellow officers. He composed a series of essays, trying to make philosophic sense of his experiences in battle. Apparently, he was trying to understand and explain the duty to sacrifice oneself, which he increasingly viewed in the abstract, and from a distance.

He destroyed nearly all of these notebooks, but enough can be gathered from the remaining fragments and his letters of that time to show he came out of the army a thorough materialist, and a mechanist, who thought that human beings acted largely on unconscious impulses. The war taught him that government was founded on violence. Like the veterans of a later war, he ended with a deep-seated existentialist conviction that there was no external or absolute moral order and that he was free to be what he chose.

In the end, he came to feel that his true duty was in the development of these philosophical ideas, rather than in the anonymous death which awaited him in the army. With this rationale to comfort him, he left the war after his first term of enlistment had ended, and his regiment had ceased to exist.

### III. EARLY WRITINGS

Despite Holmes's determination to pursue philosophy (and art), his father made it plain that he would have to earn a living, and Holmes trained for the bar. But law school was a perfunctory affair then and Holmes's diaries and letters of the time show that he was principally immersed in philosophy.



No record of Holmes's conversation and only a few of his letters from this period exist today. His diaries contain a list of his readings,<sup>19</sup> but it is unlikely that Holmes was ever deeply influenced by a book. The reading list is a record, not of influences, but of a preconceived program of study which suggests both his interest and, apparently, the conclusion he hoped to reach. He read the utilitarian writers, principally Austin and Mill, but nearly all the reading was historical or on the theory of evolution. He read a number of histories of philosophy: the Hegelian historian of law, von Savigny; the French anthropologist of ancient law, Fustel de Coulanges; Henry Maine's evolutionist account, *Ancient Law*; and Stirling's *Secret of Hegel*. He read Herbert Spencer's *First Principles* of evolutionary philosophy and Chauncey Wright's approving review of Spencer's works in the *North American Review*. Holmes warmly recalled Wright's influence, who confirmed his belief that logical arguments were not absolute. As he had told his father, one could not say "necessary" to the cosmos. Holmes probably also read and heard Chauncey Wright arguing that consciousness resulted from material, mechanistic evolution.<sup>20</sup>

In addition to history and evolution, Holmes read a good deal of Kant, and of post-Kantian investigations into the structure of language and thought. He reread Hamilton's version of Kant, and Mill's commentary on Hamilton's Kant. Holmes read Alexander Bain on the psychological basis of logic, and Pictet's study in French of *Indo-European Origins: An Essay in Linguistic Paleontology*. He seemed to be heading toward an evolutionary account of the basic ideas or structures of thought; something like Herbert Spencer's *Principles of Sociology*, published serially in the 1870s, which described among many other things the evolution of "primitive ideas" of animistic societies. He seemed to be heading, in fact, for *The Common Law*.

In 1866, he visited England to complete his education. All of his complex ambition was excited and confirmed on this journey. In the first of the many London seasons in which he would swim, he found himself at home among the gentry, and in a parlor-game described himself as a sort of Sir Walter Raleigh.<sup>21</sup> During two weeks of climbing in the Alps he formed a long and intimate friendship with Leslie Stephen, and certainly

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19. Published with very helpful annotations by Eleanor Little, *The Early Reading of Justice Oliver Wendell Holmes*, 8 HARV. LIBR. BULL. 163 (1954).

20. See Chauncey Wright, *Evolution of Self-Consciousness*, 116 N. AM. REV. 245 (Apr. 1873).

21. See NOVICK, *supra* note 6, at 112-13.

had his philosophical readings confirmed.<sup>22</sup> Stephen, nine years his senior and a gifted teacher, had himself embarked on a long struggle to replace his lost religion with a belief in Darwinist evolution.<sup>23</sup>

There was an intermission in Holmes's philosophic studies from 1867 to 1872, while he served as an editor of the new *American Law Review* and edited the twelfth edition of Chancellor James Kent's *Commentaries on American Law*.<sup>24</sup> He brought a historical, philosophic perspective to his writings on the law; by 1873, in *The Gas-Stokers' Strike*,<sup>25</sup> Holmes gave an explicitly Darwinist description of law. He said that law was always an expression of the self-interest of the dominant forces in the community. Any other law, and indeed any other social institution, would be extinguished by the force of natural selection. If law was simply the rule of the temporary victor in the struggle for survival, he noted, then it was not consistent with the Liberal, utilitarian assumption of the "solidarity of society." There was no greatest good of the greatest number for law to serve, only the survival interests of the strongest faction, tempered by a civilized sympathy.

As his very frequent citations to Maine, Savigny, and Jhering attested, there was nothing distinctively his own about this evolutionism, which in Holmes's scheme was very awkwardly married to a system of arrangement of the law according to duties.<sup>26</sup> Holmes was struggling, as yet unsuccessfully, toward a study of law on scientific principles that would be similar to his brief study of Dürer's engravings. He had learned an immense amount about the common law, and he had achieved critical insights about the nature of law and how judges did their work. The law was what judges did, in particular circumstances. No one, not even the judges, could consciously state the principles on which they were acting at the time. Only after study of numerous decisions could one expose the unconscious forces at work.<sup>27</sup> The scholar was a scientist, delving into the fossilized remains of the law, trying to trace the lines of its

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22. *Id.* at 108-10.

23. See generally, NOEL ANNAN, *LESLIE STEPHEN: THE GODLESS VICTORIAN* (1984). Lord Annan's classic evocation of the intellectual world in which Stephen moved is immensely helpful for an understanding of Holmes.

24. JAMES KENT, *COMMENTARIES ON AMERICAN LAW* (Oliver W. Holmes ed., 12th ed. 1873).

25. 7 AM. L. REV. 582 (1873).

26. See Oliver W. Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870); *The Arrangement of the Law—Privity*, 7 AM. L. REV. 46 (1872).

27. Holmes, *supra* note 26.

evolution.<sup>28</sup>

There was a further intermission in his studies after he married, while he devoted himself to the practice of law. But in 1876, Holmes returned to scholarly studies. With his characteristic method, he began a new quarto-sized notebook in which he recorded his systematic reading; a record that eventually was reduced to a simple list of books he read every summer, but which at first included detailed pages of notes and citations arranged by topic. During the next five years he continued his reading in the evolution of philosophy, anthropology, and language. He read Herbert Spencer's new books, and the newer German historical studies of law by Jhering. For the first time he read extensively on ethics, studying Kant's ethics, and Wake's two-volume *Evolution of Morality*. He read with great care, and took detailed notes on, *Essays in Anglo-Saxon Law*, edited by Henry Adams and written by his students.<sup>29</sup> These essays enriched Holmes's historical knowledge of the law, and encouraged him by tracing a line of development from the institutions of "primitive" Germanic tribes to the law of his own day. Prominent among the headings in this new notebook once again were Jhering, Savigny, Fustel de Coulanges. The British utilitarians had all but vanished.

Holmes began a new series of articles in 1876, beginning with *Primitive Notions in Modern Law*.<sup>30</sup> These articles were the basis for the Lowell Lectures he gave in Boston, in the winter of 1880-1881, and which were quickly adapted for his one great sustained theoretical work, *The Common Law*, published in 1881. As one might expect from his systematic studies, in these essays and lectures Holmes described the law as the fossilized deposit of an organic, evolving society. Law was the record of the evolving morality of society, its development traceable in the changing contours of unconscious elements or structures of thought and language.

With completion of *The Common Law* in 1881, and his appointment to the bench the following year, Holmes's systematic studies were ended for a time. In the 1890s, he undertook a new course of reading in political economy, which would confirm his belief that nations and classes were engaged in a Malthusian struggle for survival.

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28. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

29. See Oliver W. Holmes, *Essays in Anglo-Saxon Law*, 11 AM. L. REV. 327 (1877) (book review). Holmes's notes are in his research notebook, known as the "Black Book," in the Harvard Law School Library; several copies are with the Holmes Papers, *supra* note 1. For a reproduction of one page of Holmes's notes on *Essays in Anglo-Saxon Law*, see the illustrations in MARK DEW. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 1870-1882, 148 (1963).

30. 10 AM. L. REV. 422 (1876).

In those difficult years, his wife was chronically ill. She suffered a recurrence of the grave rheumatic fever that had struck her shortly after their marriage. Although she survived and recovered, her appearance for a time was badly altered; her hair was shorn, and her behavior became markedly eccentric. Both Holmes's parents and his two siblings died. His own health was not good; and, in his mid-fifties, it appeared that his career was ending in obscurity. *The Common Law* was forgotten by all but a handful of scholars, and Holmes's path to promotion was blocked by vigorous men only slightly older than himself. Holmes's letters during this time are filled with his struggle to accept his circumstances and his duty, and with his fear of an anonymous death.

In the midst of these difficulties, however, he added an important new component to his thought. His ten years' experience on the bench, and perhaps also his greater maturity, helped him to dredge up from the depths of his difficulties an important addition to his thinking. Beyond the common law, the result of the judges' decisions, was the duty of the judge himself. Setting aside everything that was merely personal and temporary, as well as setting aside the special interests of his own class, the judge decided fairly who should be the victor in the peaceful, honorable struggle for life under the rule of law.<sup>31</sup> Although he did not say so, this was a dramatic alteration in his thinking. Instead of being solely an instrument of the victorious force, the judge in a civilized system of law determined which of the contending forces would be the winner; the judge consequently would help to determine the ultimate fitness of a society as a whole to survive. This final complex addition to Holmes's jurisprudence was eventually the core of some of his most famous and important opinions on the freedom of speech.<sup>32</sup>

#### IV. HOLMES'S PERSONAL PHILOSOPHY RESTATED

##### A. *Metaphysics*

Holmes was a realist. Like modern realist philosophers, he assumed the existence of an external world because its existence was the premise of all thought and speech.

At the outset of our philosophy we take the step of supreme faith—we admit that we are not God. When I admit you, I announce that I am not

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31. See Oliver W. Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894).

32. See Sheldon M. Novick, *The Unrevised Holmes and Freedom of Expression*, SUP. CT. REV. (1992) (forthcoming).

dreaming the universe but am existing in it as less than it.<sup>33</sup>

If one thinks at all, one must think about a real world that is to some extent amenable to understanding. However, this belief in a reality independent of thought cannot be justified by reason, and so it is an act of faith. "I have always said that every wise man was at bottom a mystic, but one must get one's mysticism like one's miracles in the right place—right at the beginning or end."<sup>34</sup>

There was a strong flavor in this of the spirit of acceptance, the foundation of New England's Calvinist spirit, that Holmes had acquired from his mother. He always contrasted his own philosophy with that of egoists, who shook their fists at the sky, and with that of William James, who, Holmes said, turned down the lights to give miracles a chance.<sup>35</sup>

All that he knew was a material world, and so he was a materialist. There was no need to assume that matter had limits, however. Matter evidently could think; why imagine a mystery? Holmes evolved for himself or learned from his reading and talking something very similar to Spinoza's monism: the one Substance contained both matter and form, extension and thought. Holmes's address, *The Use of Colleges*,<sup>36</sup> is a rough paraphrase of Spinoza, and his lifelong affinity for the realist philosophers George Santayana and Morris R. Cohen shows the persistence of these views. After reading George Santayana's preface to Spinoza's *Ethics*, Holmes wrote that he felt as he had in his youth: "How much nearer my view of the world is to Spinoza's than it is to, I don't know but I may say, any other—leaving the machinery and the would-be mathematically conceived reasoning out."<sup>37</sup>

33. DEAN ACHESON, *MORNING AND NOON* 63 (1965) (transcript of Holmes's conversation with a young law clerk).

34. Letter from Oliver W. Holmes to Lucy Clifford (Nov. 17, 1924), in *Holmes Papers*, *supra* note 1, at B39 F25. Holmes went on, as he often did when in this vein, to contrast himself with William James, who kept an open mind on spiritualism—miracles in the wrong place.

35. *Id.*

36. In *HOLMES*, *supra* note 2, at 49.

37. Letter from Oliver W. Holmes to Harold Laski (Jan. 13, 1923), in 1 *OLIVER W. HOLMES, HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935*, at 474 (Mark DeW. Howe ed., 1953) [hereinafter *HOLMES-LASKI LETTERS*]; see also *HOLMES-LASKI LETTERS* (Feb. 5, 1923), *supra* at 478. Frederick Pollock, Holmes's dear friend, wrote a commentary that was important in the Spinoza revival of his generation; while Holmes seems not to have read Pollock's work until the 1890s, Spinoza, like the German idealists, was in the air.

## B. Epistemology

To Holmes, personal consciousness was just an intersection of rays making white light where they crossed; phosphorescence on a wavelet in the sea; a crossroads with an electric light.<sup>38</sup>

The human mind is perfectly mechanical even when it feels most spontaneous. I have probably told you before, how, when I had a wound in my heel, I would see man after man, as he approached, irradiated with the same self-congratulative smile, and then would follow a reference to *Achilles*.<sup>39</sup>

There was no difficulty about gaining knowledge of a kind. People had awareness that made them fit to survive. This awareness told them the world was a coherent, evolving world with orderly laws. From Chauncey Wright, Holmes acquired the idea that the primitive awareness of simple living things had evolved into the self-awareness of human beings, and finally the awareness-of-awareness that was consciousness.<sup>40</sup> The knowledge acquired by limited consciousness was no better than a guess or bet, however.

Chauncey Wright[,] a nearly forgotten philosopher of real merit, taught me when young that I must not say *necessary* about the universe, that we don't know whether anything is necessary or not. So I describe myself as a *bettabiliarian*. I believe that we can *bet* on the behavior of the universe in its contact with us.<sup>41</sup>

Time, space, logic, and cause were categories of human thought, and one could not get outside them to see if they were absolute. "I surmise that our modes of consciousness [are] not fundamental to the universe, if there is one."<sup>42</sup> This was taken from Kant, from whom Holmes also took the phrase *Ding an Sich*, the thing in itself.<sup>43</sup> Holmes constantly

38. Letter from Oliver W. Holmes to Lady Castletown (May 26, 1898), in *Holmes Papers*, *supra* note 1, at B39 F12. Cf. HARRY A. WOLFSON, *THE PHILOSOPHY OF SPINOZA: UNFOLDING THE LATENT PROCESSES OF HIS REASONING* 60-61 (1934).

39. Letter from Oliver W. Holmes to Lady Castletown (Jan. 18, 1898), in *Holmes Papers*, *supra* note 1, B39 F12.

40. See Wright, *supra* note 20.

41. Letter from Oliver W. Holmes to Frederick Pollock (Aug. 30, 1929), in 2 *HOLMES-POLLOCK LETTERS*, *supra* note 16, at 252.

42. Letter from Oliver W. Holmes to Anna L. Gray (Aug. 26, 1905), in *Holmes Papers*, *supra* note 1, at B31 F17.

43. Holmes seemed to identify his Great Swell with Kant's *Ding an Sich*: "[M]odes of consciousness [are] not fundamental to the universe, if there is one. I think there are grounds for the further surmise that Kant's *ding an sich* is not quite empty—that there is a somewhat, too closely predicated even by that phrase, as to which we can't talk." Letter from Oliver W. Holmes to Anna L. Gray (Aug. 26, 1905), in *Holmes Papers*, *supra* note 1, at B31 F17.

peered through the curtain, trying to get a glimpse of the Great Swell, of things as they were in themselves. He read compulsively to discover whether someone else had found the secret or heard a faint rustle. For instance, Maeterlinck gave him the illusion of an “echo from behind phenomena.” He was almost persuaded that he did hear the clang of the ultimate in Fabre’s *Souvenirs Entomologiques*. After skimming those volumes during the summer of 1912, when he wanted to express his faith in the ultimate purpose of evolution, Holmes would speak of the grub that blindly prepared a chamber for the winged thing it had never seen but was to be.<sup>44</sup>

A strong hint of rebellion often surfaced in his writings, the struggle of his ambition against the weight of his sense of dutiful acceptance; he expressed the same frustration with the inscrutable cosmos that he felt when Lord Davey silenced debate with, “That is not the law of England.”

You have in England a type unknown to us, of men who sufficiently account for themselves by transmitting a name. I sometimes wonder, as I dare say I have said before now, whether the cosmos may not be like them, too great a swell to have significance, leaving that to the finite, and finding it enough to say “I’m ME,” if it takes the trouble to say anything—which after all is not so remote from prevailing theological notions translated into other words.<sup>45</sup>

As he grew older, the Great Swell became the central metaphor in a highly compressed, frequently repeated summary of his philosophy:

If I am in the universe, not it in me, I am in something that contains intellect, significance, ideals. True, I surmise, I bet, that these all are expressions of the finite, and that they are as unlikely to be cosmic categories as they are to apply to a prince with a genealogy of 1000 years. He doesn’t live by his wits—He simply is.<sup>46</sup>

Holmes always pictured the Great Swell as exercising the arbitrary power of a great king or the Old Testament’s deity. The apparent regularity of causal laws in the natural world was simply one of the Great Swell’s whims: the Cosmos was not bound by logic. Nor could logic alone produce knowledge of the Cosmos. Holmes adopted Mill’s attack on Aristotelian logic, perhaps because he had a fundamental mistrust of

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44. *Law and the Court*, in HOLMES, *supra* note 2, at 98.

45. Letter from Oliver W. Holmes to Lady Castletown (Oct. 17, 1896), in *Holmes Papers*, *supra* note 1, at B26 F9.

46. Letter from Oliver W. Holmes to Felix Frankfurter (Feb. 16, 1912), in *Holmes Papers*, *supra* note 1, at B29 F2.

deductive, syllogistic reasoning. Mill had argued that a syllogism did not produce new knowledge, because its conclusion was already contained in the premise; Holmes made this one of the pillars of his thought. Especially in his early writings,<sup>47</sup> he expressed the greatest contempt for purely deductive reasoning—the conclusion was always concealed in the premises. As he famously proclaimed, a judge's decision depended on an unconscious or inarticulate premise, "a judgment or intuition more subtle than any articulate major premise."<sup>48</sup> *The Common Law* is one long attack on purely deductive, logical systems of arguments like those of the utilitarians and modern Hegelians, and on the humbler rationalizations of ordinary judges' opinions.

The thing to bet on was an induction, a conclusion from known particulars. Philosophy, which meant scientific thought, was just the accumulation of particulars, and the gradual development of more and more general statements about them. Holmes thought this accumulation of knowledge was progressive, so that the primitive thoughts of the Greeks had been thoroughly displaced by modern science,<sup>49</sup> but knowledge was never better than a probability. In Holmes's favorite paradox, the Great Swell, the arbitrary cosmos, was a "jumping spontaneity taking an irrational pleasure in a momentary rational sequence."<sup>50</sup>

Rational sequence was important. Deductive logic was not a method for discovering new truths, but it was a necessary characteristic of truth once obtained. All experience showed, and all talk and argument about the world in general assumed, that its parts were related in an orderly causal way that could be summarized in scientific laws. Logic, therefore, was a necessary but not a sufficient condition of truth. The cosmos was not limited by the rules of logic; it had thought, but perhaps more than thought, in it. Contradictory positions, logically derived from true premises, might both be true. The antinomies of thought were familiar to Holmes, just as they were to his friends William James<sup>51</sup> and Louis Bran-

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47. After 20 years as a judge, however, Holmes appears to have conceded that deductive reasoning could be creative in a modest way, by extending existing principles to new sets of facts and so developing new law. See *Stack v. New York, N.H. & Hartford R.R.*, 58 N.E. 686, 687 (Mass. 1900) ("We do not forget the continuous process of developing the law that goes on through the courts, in the form of deduction.").

48. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

49. Letter from Oliver W. Holmes to Alice S. Green (Oct. 1, 1901), in *Holmes Papers*, *supra* note 1, at B43 F12.

50. See, e.g., Letter from Oliver W. Holmes to Alice S. Green (Mar. 29, 1908), in *Holmes Papers*, *supra* note 1, at B43 F12.

51. See 1 RALPH B. PERRY, *THE THOUGHT AND CHARACTER OF WILLIAM JAMES* 719 (1935).



deis.<sup>52</sup> Perhaps Holmes had encountered them originally in Kant—his favorite example was the infinity of consciousness, trapped within the finite limits of a skull—or indirectly through Coleridge, who had made Kant's argument familiar to the doctor's generation, and a truism to Holmes's.<sup>53</sup> Antinomies, vividly pictured, became one of Holmes's conversational gambits:

I have often done my part to amuse a bored god by trying to imagine how many universes might be existing in the same space at the same time without conflicting. Where we are sitting now a tyrannosaurus may be locked in a death struggle with some unnamed creature of another sphere from ours.<sup>54</sup>

Truths in such a world were both personal and objective. One could know truths only from within the system of one's own personal limitations, without external confirmation. This did not make them less true; they were only not absolute. One lived one's life—did one's job, in Holmes's frequent image—"without waiting for an angel to assure us that it is the jobbest job in jobdom."<sup>55</sup> Philosophy was a solitary and dangerous business, like life itself.

Holmes's philosophy therefore rested on a demonstration of the inadequacy of reason; indeed, one of his frequently repeated paradoxes was that truth was just the system of his limitations. In his famous "can't help," he believed what he could not help believing, and his tastes and morals were what he could not help having. "All I mean by truth is the path I have to travel."<sup>56</sup>

This was not relativism; still less was it pragmatism. To Holmes, personal truths were true enough; a fact was part of the real, external world, and if one was wrong about a fact, it might kill him. In the process of surviving one learned truths. Such truths were relative only in the sense that they were partial, and in a cosmos that insisted upon, but was not bound by, logic, there might be other true but contradictory systems of

52. See ACHESON, *supra* note 33, at 83.

53. "Plato . . . leads you to see that propositions involving . . . contradictory conceptions are nevertheless true; and which, therefore, must belong to a higher logic—that of ideas. They are contradictory only in the Aristotelian logic . . ." Samuel T. Coleridge, *Table Talk*, quoted in RICHARD ELLMANN, OSCAR WILDE 237 (1988).

54. ACHESON, *supra* note 33, at 63 (transcript of Holmes's conversation with a young law clerk).

55. Letter from Oliver W. Holmes to Morris R. Cohen (May 27, 1917), in HOLMES-COHEN LETTERS, *supra* note 4, at 316.

56. Letter from Oliver W. Holmes to Alice S. Green (Oct. 1, 1901), in Holmes Papers, *supra* note 1, at B43 F12.

thought. "Everything seems an illusion relative to something else—as green relatively to vibrations—" and so on, until one came to the Great Swell, the unknowable cosmos; yet, "The cell has its life as well as the larger organism in whose unity it has a part—and our subrealities are no doubt part of all the reality there is."<sup>57</sup>

Other people, with their own presumably different sets of personal limitations, allowed one to calibrate one's beliefs. As a judge, Holmes rarely dissented alone, because he thought it important to verify one's ideas by comparing them with other's perceptions of the common, external reality.

If I think that I am sitting at a table I find that the other persons present agree with me; so if I say that the sum of the angles of a triangle is equal to two right angles. If I am in a minority of one they send for a doctor or lock me up; and I am so far able to transcend the to me convincing testimony of my senses or my reason as to recognize that if I am alone probably something is wrong with my works.<sup>58</sup>

This is not the pragmatists' social test of truth by agreement. Holmes, the solitary observer, was simply checking or triangulating his observations by reference to other points of view in whose existence he could not help believing.

Kant is again visible here, as the common point of origin of both Holmes's realism and William James's pragmatism. To Holmes, complex ideas, like the sum of the angles of a triangle, were built into the structure of one's thought because evolution had taught the organism to make ideas that corresponded to qualities of the external world.<sup>59</sup> Yet complex ideas, like finite and infinite, although true, as we have seen could be mutually contradictory. Differences among sane observers therefore were fundamentally matters of taste or character. "[T]wenty men of genius looking out the same window will paint twenty canvases, each unlike all the others, and every one great."<sup>60</sup> People of similar background had similar views. Generally, moral, aesthetic, and practical values were different aspects of national character at a particular time. Each "race" or nation engaged with the ultimate in its own way, and

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57. Letter from Oliver W. Holmes to Alice S. Green (Oct. 14, 1911), in *Holmes Papers*, *supra* note 1, at B43 F13.

58. Oliver W. Holmes, *Natural Law*, 32 HARV. L. REV. 40, 40 (1918).

59. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897).

60. *The Class of '61*, in *HOLMES*, *supra* note 2, at 95, 96.

equally expressed its values in art or in law.<sup>61</sup>

The contradictions among perspectives were real and could not be resolved by discourse; one was obliged to choose, or, where choice was not possible, to accept that one was helpless to transcend one's limitations.

[P]roperty, friendship, and truth have a common root in time. One cannot be wrenched from the rocky crevices into which one has grown for many years without feeling that one is attacked in one's life . . . . But while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else.<sup>62</sup>

Despite the need to gain objectivity by comparing one's ideas to others', philosophy was a solitary activity. In the end, short of killing the other fellow, there was no way to settle fundamental disagreements. So the cosmos sorted out the greater truths from the lesser, in the only way that had any objective meaning—by extinguishing the lesser.

I think that values like truth are largely personal. There is enough community for us to talk[, but] not enough for anyone to command . . . . Whether you take sugar in your coffee or not you are equally up against an ultimate dogma, which as arbitrary you have no call to impose, unless indeed you care enough about it to kill the other man, which I admit is the logical outcome—you can't refute him.<sup>63</sup>

The chief claim of civilization was that it had substituted, however partially, an orderly process of peaceful discourse for this violent evolution. Politics and law, like the natural sciences, provided laboratories in which to test the correspondence of ideas to reality. But the laboratory was only a surrogate for reality; the test of civilization would ultimately be its success in subordinating itself to the Great Swell, the brutal and uncaring Cosmos: "I do not believe that a shudder would go through the sky if our whole ant heap were kerosened."<sup>64</sup>

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61. This is the attitude of ERICH AUERBACH, *MIMESIS: THE REPRESENTATION OF REALITY IN WESTERN LITERATURE* (1953); and also, I think, of Holmes's friend Henry James.

62. Holmes, *supra* note 58, at 40-41.

63. Letter from Oliver W. Holmes to Alice S. Green (Aug. 20, 1909), in *Holmes Papers*, *supra* note 1, at B43 F12.

64. Letter from Oliver W. Holmes to Morris R. Cohen (May 27, 1917), in *HOLMES-COHEN LETTERS*, *supra* note 3, at 316. But this was too definite an assertion about the cosmos, so Holmes immediately added: "But then it might—in short my only belief is that I know nothing about it." *Id.*

### C. *Ethics*

Holmes insisted there was no such thing as ethics.

I said to a lady at dinner the other night that morals were a contrivance of man to take himself seriously, which means that the philosophers instead of making them merely one of the conveniences of living to be talked about no more than money, make them an end in themselves, an absolute matter, and so an excuse for their pretention to be on the ground floor and personal friends of God.<sup>65</sup>

In the end, Holmes reconciled science and morals by saying that there were no ethics, only manners.<sup>66</sup> Not that he took manners lightly; he always said that a gentleman was someone who would die for a point of honor. It was most gentlemanly, as in the Tennyson poem, to die for a *senseless* point of honor; this was the purest exhibition of an instinct implanted by nature for its own evolutionary purposes. Holmes felt that he could no more help having a sense of duty, than he could help believing in an external, material world. His address *Memorial Day*<sup>67</sup> was the first in the slim volume of speeches in which he encapsulated his philosophy. It was a paean to the courage and idealism of young soldiers on both sides of the war, who had given their lives to their respective and mutually contradictory causes, both of which logically could not be worthy of sacrifice, but which, like the north and south poles of a magnet, seemed to be part of some larger whole.

On 1913, on the eve of World War I, he closed the book with *Law and the Court*,<sup>68</sup> a declaration of faith in the unknown future of evolution, to which duty required such sacrifices.

## V. POLITICAL ECONOMY

Holmes was an evolutionist, what is now loosely called a Social Darwinist, but of a peculiar sort, explicable in a man who grew up in a world where evolution and chivalry were both taken for granted.

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65. Letter from Oliver W. Holmes to Alice S. Green (Feb. 7, 1909), in *Holmes Papers*, *supra* note 1, at B43 F12.

66. See Thomas L. Shaffer, *Holmes' Honorable Style*, 11 CHRISTIAN L. SOC'Y Q. 26 (Fall 1990) (book review). Holmes did not believe in the reality of ethics, in the Kantian or Christian sense of absolute standards of behavior. This, I think, is the central objection in some of the criticism of Holmes as a person and as a thinker. See, most recently, Patrick J. Kelley, *The Life of Oliver Wendell Holmes, Jr.*, 68 WASH. U. L.Q. 429, 482-83 (1990) (reviewing SHELDON M. NOVICK, HONORABLE JUSTICE (1989)).

67. In HOLMES, *supra* note 2, at 1.

68. *Id.* at 98.

### A. *Evolutionism*

Holmes, who called himself an evolutionist,<sup>69</sup> believed that his ideas were derived from Darwin, but Holmes had not read Darwin's books and his ideas actually reflected an older version of evolution, most strongly influenced by Hegel.<sup>70</sup>

Without making too much of Hegel the reader may wish to use his name simply as a convenient summary of German Idealism as it arrived in Boston in Holmes's youth. Even then, the name may be no more than a short-hand term for the mentality of his time. Holmes lived in a post-Cartesian, post-Kantian world, but it may be that Frederick the Great and Napoleon had as much to do as Descartes, Kant, or Hegel, with the romantic picture of history as a clash of cultures, led by heroes, that Holmes absorbed.

It is not surprising, in any case, that Holmes believed in a particular sort of evolution, an evolution that proceeded through the contest of nations or races, each representing a distinct principle or mode of life. This was a perfectly conventional pre-Darwinian view, embedded in the history and anthropology of the day.<sup>71</sup> Once Darwin's great work was published the notion of natural selection was assimilated very easily to it. Holmes and many of his contemporaries believed that natural selection operated on whole races or societies, determining which should survive,<sup>72</sup> rather than, as we should say now, affecting relative frequencies of genes.

Holmes also followed the conventional wisdom of his day (and ours) in believing that evolution had a direction, from the simple to the complex.

69. See, e.g., Justice Oliver W. Holmes, *The Path of the Law*, Address of the Dedication of the new hall at Boston University School of Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 468 (1897).

70. When Holmes finally read Hegel in the 1890s, with much muttering and complaint, he obliquely acknowledged the indirect influence:

The beast has insights but these are wrapped up in such a humbugging method and with so much that is unintelligible or unreal or both that you have to work your way. Such good as Hegel did I am inclined to think was mainly at second hand through his influence on people who wrote and talked outside his system and even then he has been a blight on juridical thoughts in Germany.

Letter from Oliver W. Holmes to Lady Castletown (Oct. 7, 1896), in Holmes Papers, *supra* note 1, at B26 F9. See also Michael H. Hoffheimer, *Holmes, L. Q. C. Lamar, and Natural Law*, 58 MISS. L.J. 71 (1988), citing Roscoe Pound, *The Revival of Natural Law*, 17 NOTRE DAME LAWYER 287, 333 (1942).

71. For an account of evolutionist theories growing out of history and anthropology before Darwin, see generally, J.W. BURROW, *EVOLUTION AND SOCIETY: A STUDY IN VICTORIAN SOCIAL THEORY* (1966).

72. See, e.g., A.R. WALLACE, *The Origin of the Human Race*, JOURNAL OF THE ANTHROPOLOGICAL SOCIETY OF LONDON, II (1864), quoted in BURROW, *supra* note 71, at 114-15 n.2 (1966).

His own society he thought more highly evolved, more advanced in some fundamental way, than any that had come before. Organisms became larger and more highly specialized, and he believed that social institutions also became larger and more specialized over time. The "increasing organization of the world," the creation of monopolies and empires, with the concomitant organization of society into cadres of specialists, seemed to him patent and inevitable. But he did not welcome the future that this foretold. "Before the war it seemed to me that the trades unions and the trusts pointed to a more despotic regime. So long as efficiency is an ideal their tendency would seem to be enhanced by the war. I am not particularly in love with it."<sup>73</sup>

He was particularly dismayed at the increasing specialization this higher degree of organization entailed—not the specialization of knowledge, which he thought the route to truth, but the quasi-physiological specialization of social roles. The university professor was a favorite example: "[T]hose who have spared themselves this supreme trial [of battle], and have fostered a faculty at the expense of their total life."<sup>74</sup>

But it would not do to shake one's fist at the sky, so Holmes cheerfully accepted the inevitability of higher degrees of organization and specialization. Once again, this is a view of Herbert Spencer, but it was so much in the air that it would be wrong to attribute it to any particular influence; to a large degree Holmes's observations were correct, although we would not now attribute them to "evolution" in any modern sense of the word.

One principal sign and mechanism of increasing complexity was the development of self-awareness, to which Holmes thought he had contributed importantly. Modern thinkers had learned to see themselves seeing, and modern philosophy was like a room with mirrors at both ends. Legal philosophy, in particular, through Holmes, had become self-aware. He announced, "The time has gone by when law is only an unconscious embodiment of the common will. It has become a conscious reaction upon itself of organized society knowingly seeking to determine its own destinies."<sup>75</sup>

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73. Letter from Oliver W. Holmes to Harold Laski (July 28, 1916), in 1 HOLMES-LASKI LETTERS, *supra* note 37, at 8.

74. *George Otis Shattuck*, in HOLMES, *supra* note 2, at 70, 73.

75. Oliver W. Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 9 (1894).

### B. *Malthusian Economics*

It was universally assumed among Holmes's peers—wrongly, one should now say—that the mechanism of natural selection was violent competition among races for limited means of subsistence. The image was fundamentally Hegel's account of the battle of Salamis, a great clash of rival civilizations embodying competing principles. For Holmes, the image was the clash of North and South in the American Civil War. The motive for this rivalry was supposed to have been explained by Malthus, to whose books and ideas Holmes referred with increasing frequency as he grew older. It was an article of faith to Holmes, embedded in all the political economy of his day, that the growth of population would always exceed the increase in available resources.<sup>76</sup> The means of subsistence therefore would always be inadequate and the loser in the struggle for life would perish.

In considering his views, one should recall Holmes's three years in combat, as well as the brutal quality of life for the majority of people in Holmes's day. In Massachusetts, as late as 1890, the average life expectancy at birth of a male was only forty-two years.<sup>77</sup> Women died in childbirth in what now seems incomprehensible numbers—perhaps as many as one percent of all women of childbearing age died in childbirth each year.<sup>78</sup>

Infant mortality, which averaged nearly one in five, was even worse in working class families. Every summer, epidemics of typhoid and diarrhea swept through the cities, causing tremendous mortality among children in a few weeks of August and September.<sup>79</sup> Not surprisingly, Holmes believed that in peacetime, as in the war, the weak did perish, and that all the resources available to society were not adequate to produce any other result. People were poor because there was not enough

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76. Leslie Stephen claimed that the whole school of classical economics was formed on Malthus, although economists liked to give lip service to Adam Smith. 2 LESLIE STEPHEN, *THE ENGLISH UTILITARIANS* 239 (1900).

77. BUREAU OF THE CENSUS, *UNITED STATES LIFE TABLES, 1890, 1901, 1910, & 1901-1910*, at 132 (1921).

78. BUREAU OF THE CENSUS, *MORTALITY STATISTICS 1900-1904*, at clxxxiv (1906) (mortality of women of child-bearing age is estimated from the proportion of all women dying).

79. *Id.* at xxii to xxxv. Doctor Holmes's household was more aware of these events than most. "The evenings grow cooler in August, but there is mischief abroad in the air. Heaven fills up fast with young angels in this month and in September." *The Seasons*, in OLIVER W. HOLMES [SR.], *PAGES FROM AN OLD VOLUME OF LIFE: A COLLECTION OF ESSAYS 1857-1881*, at 156 (Cambridge, Riverside Press 1891).

wealth in total to maintain a decent average. The rich had no fund of luxuries large enough to alter the prevailing standard. In a speech at Williams College as late as 1912, Holmes said, "I was informed that 85 percent of the total product here and in England was consumed by people with not over \$1000 (£200) a year—the whole expenses of government and the moderate luxuries of the many coming out of the remaining 15 percent."<sup>80</sup>

The problem was particularly acute because the world was filling up, with the last unsettled regions becoming populated. "[T]here is so much forest, coal, etc[.] so much even atmosphere—and no more. I wonder if it might not be possible that those who are withdrawing nitrogen from the latter might in time be found to be doing a deadly thing."<sup>81</sup>

Holmes viewed life as a zero-sum game, as we say now. The free market was not so much desirable as inevitable; it was pointless and self-defeating to try to reverse the verdict of free competition. Just as fights always ended with a victor, competition ended with a monopoly. Although political regulation of the power of monopolies was justified and even necessary, prices reflected the intensity of the public's competing desires for different forms of consumption—what we would now call opportunity costs—rather than competition among producers.<sup>82</sup> Similarly, wages were determined by competition between groups of workers; any advantages achieved by trade unions were secured at the expense of unorganized workers.<sup>83</sup> There was no significant surplus accumulated by capital and withheld from the working class.<sup>84</sup> Because national accounts had not yet been invented when Holmes began to preach his doctrine, he resorted to images, principally the image of a "stream of products," by which he meant roughly what is now called the gross national product. Quite certain that the stream of products was consumed by the large mass of people, he believed that proportionately very little was diverted to the pleasures of the wealthy.

Therefore, proposals to undo the results of competition and redistrib-

80. Letter from Oliver W. Holmes to Canon Patrick Sheehan (July 5, 1912), in HOLMES-SHEEHAN LETTERS, *supra* note 14, at 45. The text of the talk has not survived.

81. Letter from Oliver W. Holmes to Harold Laski (Feb. 28, 1919), in 1 HOLMES-LASKI LETTERS, *supra* note 37, at 187-88.

82. See *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373, 412 (1911) (Holmes, J., dissenting).

83. See, e.g., *Plant v. Woods*, 57 N.E. 1011, 1016 (Mass. 1900) (Holmes, C.J., dissenting).

84. Oliver W. Holmes, *Are Great Fortunes Great Dangers?* COSMOPOLITAN, Feb. 1906, reprinted as *Economic Elements*, in OLIVER W. HOLMES, COLLECTED LEGAL PAPERS 279 (1920).



ute wealth seemed to Holmes merely contemptible demagoguery. With great relish he told his young socialist friend Harold Laski: "When I read Malthus I thought he had ripped the guts out of some humbugs—but they are as alive as ever today. Humbugs have no guts—and live all the better without them."<sup>85</sup> He told Frankfurter that he wished God would write in letters of fire on the sky:

The Crowd has all there is  
The Crowd pays for everything.<sup>86</sup>

Life was a struggle over inadequate means; however, the struggle was not so much among individuals as it was between races. "I incline to believe . . . that before our clamorers for eight hours (with which clamor I rather sympathize) know it, the Chinese with their endless gluttony for work, their honesty and their imperturbable patience will cut the white races out in the markets of the world."<sup>87</sup>

### C. *Race and Gender; Eugenics*

Both "race" and the relations between the sexes were entwined with political economy in Holmes's ideas.

As to race, we have to make an imaginative effort to recover the context of the Victorian age. In Holmes's formative years, the mechanism of genetics, revealed in Brother Mendel's pea plants, had not yet been rediscovered. Nearly all scientists, including Darwin, believed that acquired

85. Letter from Oliver W. Holmes to Harold Laski (Dec. 26, 1917), in *HOLMES-LASKI LETTERS*, *supra* note 37, at 122.

86. Letter from Oliver W. Holmes to Felix Frankfurter (Aug. 10, 1916), in *Holmes Papers*, *supra* note 1, at B29 F4. Perhaps even letters of fire would not have been enough. In Frankfurter's 30 page chapter on *Property and Society*, in *MR. JUSTICE HOLMES AND THE SUPREME COURT* (2d ed. 1961), he hinted heavily that Holmes was sympathetic to movements to redistribute the wealth of society. As to Holmes's stream-of-products argument, Frankfurter said only, obscurely, that Holmes subscribed to the "wage fund" theory. Frankfurter did not explain this reference to John Stewart Mill's contemptuous name for a doctrine supposedly held by classical economics, that total wages were limited to a fixed share of the national product, but never clearly stated except by Mill himself when he abandoned it. Max Lerner, in his otherwise acute *THE MIND AND FAITH OF JUSTICE HOLMES* (1943), also muddled Holmes's straightforward image of the gross national product by calling it a "wage fund" theory. *Id.* at 117. Samuel J. Konefsky, in his influential *THE LEGACY OF HOLMES AND BRANDEIS* (1956), devoted a full five pages to sneering at Holmes's supposed belief in the wage fund theory. Konefsky thought it a sufficient rebuttal to say, "Organized labor has always regarded this doctrine as both fallacious and reactionary." *Id.* at 23. These writers apparently used "wage fund" as a sneering shorthand for classical economics, which they assumed had been exploded.

87. Letter from Oliver W. Holmes to Canon Patrick Sheehan (Sept. 17, 1907), in *HOLMES-SHEEHAN LETTERS*, *supra* note 14, at 18-19.

characteristics were inherited in some way. Reinforcing this view were the huge disparities in nutrition and sunlight received by the different economic classes, which resulted in well-to-do and poor that were physically quite different. The workman, stunted with rickets, looked as if he were of a different race from his taller, healthier employer. The descriptions of "racial" differences among the classes, so common in Henry James and other novelists of the time, did not rest on prejudice, but were realistic accounts. The candor with which racial stereotypes were applied is shocking now; but, in Holmes's generation study and discussion of "races" was not only acceptable, it was considered progressive and scientific. The premise of progressive thinking was that better hygiene and education would improve the racial stock of inferior classes.

The struggle for survival was understood as a test of racial fitness; here, Holmes's ideas developed into brutal notions of racial hygiene. He accepted the validity of the "scientific anthropology" of his day, which promised to identify inheritable criminal traits through measurements of skull dimensions and the like. Referring to Cesare Lombroso's scientific anthropology,<sup>88</sup> which purported to show that criminals were distinctive physiological types, a form of degeneration or atavism, Holmes said: "The Italians have begun work upon the notion that the foundations of the law ought to be scientific, and, if our civilization does not collapse, I feel pretty sure that the regiment or division that follows us will carry that flag."<sup>89</sup> Holmes concluded with relentless logic that a revival of extensive capital punishment for crime might be needed.

If the typical criminal is a degenerate, bound to swindle or to murder by as deep seated an organic necessity as that which makes the rattlesnake bite, it is idle to talk of deterring him by the classical method of imprisonment. He must be got rid of; he cannot be improved, or frightened out of his structural reaction.<sup>90</sup>

Holmes did not view capital punishment as necessarily inhumane. The unfit were bound to perish by one means or another. "I always say that

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88. For a brief summary of the Italian school of scientific anthropology in the 1890s, see RUTH HARRIS, *MURDERS AND MADNESS: MEDICINE, LAW, AND SOCIETY IN THE FIN DE SIÈCLE* 80-85 (1989). For a more extensive discussion of Lombroso's thought and its wide impact on views of social evolution, see DANIEL PICK, *FACES OF DEGENERATION: A EUROPEAN DISORDER, C. 1848-1918*, at 109-52 (1989).

89. *Learning and Science*, in HOLMES, *supra* note 2, at 67, 68.

90. Holmes, *supra* note 69, at 470. Holmes went on to note the contrary view of the French school, that the physical causes of crime were environmental. However, he concluded that in either case the criminal was organically malformed, and hence could not be deterred or reformed.

society is founded on the death of men—if you don't kill the weakest one way you kill them another."<sup>91</sup> Holmes never put any external limits on the power of a nation to seek its own survival, and he made no real distinction between law enforcement and war. "[C]lasses as well as nations that mean to be in the saddle have got to be ready to kill to keep their seat."<sup>92</sup> It followed that even violent eugenic measures were within ordinary police powers.<sup>93</sup>

In addition to capital punishment, Holmes seems to have imagined, under a more advanced science, infanticide of those otherwise doomed to lingering misery and death: "I can imagine a future in which science shall have passed from the combative to the dogmatic stage, and shall have gained such catholic acceptance that it shall take control of life, and condemn at once with instant execution what is now left for nature to destroy."<sup>94</sup>

Holmes seemed to feel that this was the only real alternative to war, and that it was preferable. "I should be glad, to speak Hibernianly, if it could be arranged that the death should precede life by provisions for a selected race, but we shall not live to see that."<sup>95</sup>

In retrospect, clearly, the "scientific" anthropology and evolutionism upon which Holmes rested his opinions were wrong; indeed, at this distance they seem dangerously foolish. Holmes was not to know this, but it is odd that this man, who prided himself on his skepticism of utopias and nostrums, and on his suspicion of purely logical arguments, accepted second-hand accounts of evolutionary science with so little question. While Holmes was not obsessed with the fears of racial degeneration which were common in his day, the ease with which he talked of capital punishment and infanticide is disturbing and seems to call for a psychological explanation.

One passage is particularly striking. In a love letter to Clare

91. Letter from Oliver W. Holmes to Frederick Pollock (Feb. 26, 1922), in 2 HOLMES-POLLOCK LETTERS, *supra* note 16, at 90.

92. Letter from Oliver W. Holmes to Lewis Einstein (Oct. 12, 1914), in OLIVER W. HOLMES, THE HOLMES-EINSTEIN LETTERS: CORRESPONDENCE OF MR. JUSTICE HOLMES AND LEWIS EINSTEIN 1903-1935, at 101 (James B. Peabody ed., 1964) [hereinafter HOLMES-EINSTEIN LETTERS].

93. See *Buck v. Bell*, 274 U.S. 200 (1927) (compulsory sterilization for "mental defectives" does not violate constitutional due process, as long as procedural fairness is preserved).

94. *The Soldier's Faith*, in HOLMES, *supra* note 2, at 56, 58.

95. Letter from Oliver W. Holmes to Frederick Pollock (Feb. 1, 1920), in 2 HOLMES-POLLOCK LETTERS, *supra* note 16, at 36. To "speak Hibernianly" is a reference to the derogatory term, "Irish Bull," for a self-contradictory expression.

Castletown, Holmes spoke of reading a book by the socialist writer Edward Bellamy. As always, the mention of socialism set him off:

The socialists so far as I know shut their eyes to matters of population or tell you in an airy way that Henry George has refuted Malthus and Darwin. I could discourse on this theme but won't. But until you substitute artificial selection for natural [selection] by putting to death the inadequate, or get the whole world to limit procreation to the visible means of support, I do not believe you will see socialism successful. Existing society is founded on the death of men. While I write in this abstract way I am thinking of you until you seem almost present—and I can hardly go on.<sup>96</sup>

Similarly brutal passages within very affectionate letters were not unusual for Holmes. While they began in the 1890s they continued through much of his life. Twenty years after this letter to Lady Castletown, Holmes wrote in almost identical terms of his contempt for “all socialism not prepared to begin with life rather than with property and to kill everyone below the standard.”<sup>97</sup>

There is an odd disconnectedness, an unexplained gap, between the brutal talk of killing and the warm expressions of affection that followed immediately thereafter. Without trying to delve too deeply into an unconscious mind that long ago escaped questioning, a couple of thoughts suggest themselves.

First, in the Civil War, Holmes's parents urged him to enlist and reenlist in the army at a time when he, and perhaps they as well, feared that this meant his death. His duty as an officer was principally to whip his men into standing up to being shot. Consequently, he emerged from the war persuaded that morality, honor, and duty meant willingness to die in service to high principles. Thereafter, it seemed understandable, even right, to him that people would be asked to die for society's inscrutable aims, and he became annoyed when they objected. His fantasies of scientific infanticide also hint at an unconscious belief that his parents sent him to war to die.<sup>98</sup>

Another strand to his feeling, perhaps related to the first, was coiled at

96. Letter from Oliver W. Holmes to Lady Castletown (Aug. 19, 1897), in *Holmes Papers*, *supra* note 1, at B39 F2.

97. Letter from Oliver W. Holmes to Lewis Einstein (Aug. 6, 1917), in *HOLMES-EINSTEIN LETTERS*, *supra* note 92, at 145. In this, as in other ways, the letters that Holmes wrote to young men when he was past 70 were very much like his middle-aged letters to young women.

98. Holmes's Civil War experience may be the source of Michael Hoffheimer's intuition that Holmes's mother was absent. See Michael Hoffheimer, *Justice Holmes: The Search for Control*, *SUP. CT. HIST. SOC'Y Y.B.* 58 (1989).

its core. Holmes viewed all human relations as forms of power and combat. This was particularly marked in his feelings toward women.

One of Holmes's chestnuts was that the moral quality of society was an "empirical mixture" of the masculine and feminine qualities. "Empirical mixture" was an image borrowed from his father's description of the atmosphere, and Holmes used it to describe morality, "which is really a compromise between two irreconcilable sexes." Man's contribution to the mixture was, "the ideal drawn from conflict—doing a stump, as the boys say."<sup>99</sup> The female contribution was not so clearly spelled out, but one gathers from his letters that if Holmes had to define the female ideal in equally simple and essential terms that he would have defined it as the mother, infinitely accepting and reassuring.

The complete separation of the sexes into distinct roles, and the identification of the male role with combat and competition, led to a bleak picture of life. Holmes opposed the vote for women, precisely because government was founded on force, and therefore politics was ultimately a business of the bludgeon and the bayonet to which women were not suited. The relation of men and women was itself a form of government founded ultimately on force. Most likely Holmes would have agreed with the modern, feminist, assessment:

We are not accustomed to associate patriarchy with force. So perfect is its system of socialization, so complete the general assent to its values, so long and universally has it prevailed in human society, that it scarcely seems to require violent implementation. . . . And yet . . . control in patriarchal society would be imperfect, even inoperable, unless it had the rule of force to rely upon, both in emergencies and as an ever-present instrument of intimidation.<sup>100</sup>

In personal relations, as in law, the foundation of civility and chivalry, was self-restraint. To Ellen Curtis he wrote:

In the matrimonial market virtue seems to be in the hands of the bears just now. It will come up again as most men like a naiveté which they rarely emulate. The talk of equality in such matters singularly fails to move my enthusiasm—I can't see any rights about it—but powers—and generosities.<sup>101</sup>

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99. Letter from Oliver W. Holmes to Lady Castletown (Apr. 10, 1897), in *Holmes Papers*, *supra* note 1, at B39 F1.

100. Susan Koppelman, *Letter to Dear Friends*, *AM. VOICE* 50, 58 (Winter 1990) (quoting Jane Caputi who was quoting Kate Millet).

101. Letter from Oliver W. Holmes to Ellen Curtis (May 15, 1901), in *Holmes Papers*, *supra* note 1.

In this little fragment, sexual relationships were described in the same terms Holmes used when speaking of law and government, and ending with the same result, that "rights" were dependent on self-restraint by the dominant power.

These were not unusual sentiments in a man of Holmes's time and place. Indeed, Holmes was the model for Basil Ransome, the type of conventional, chivalrous masculinity portrayed in his friend Henry James's *The Bostonians*. Holmes's relations with the opposite sex do not seem to have been unconventional in any way. He preferred the company of women to that of men, and his letters to women were more open and more interesting than those addressed to men. His letters to Alice Stopford Green,<sup>102</sup> for instance, are far more revealing of his thought and feelings than his letters to, say, Felix Frankfurter.<sup>103</sup>

He also had conventional prejudices and blindness. He did not like women's writing to be sexually suggestive: "Perhaps because we know, though the older literary tradition is the other way, that they take less interest in the business than we do."<sup>104</sup> Noting the senseless brutality of the rule that a rape victim must report the crime promptly, he nevertheless described it as a meaningless survival of the ancient hue-and-cry, without seeming to consider that it might reflect something worse.<sup>105</sup> Holmes and his wife had a vigorous if somewhat routinized sexual life, as surviving letters between them clearly indicate. Like Basil Ransome's marriage to Verena Tarrant at the conclusion of *The Bostonians*, it was a troubled, somewhat unequal relationship, that was profoundly conventional.

Holmes had a good deal of sexual energy, and the intensity and speed with which he worked (as a Massachusetts judge he tried to write opinions in the evening after oral arguments had been heard) was at least partly intended to keep his weekends and summers free for trips to New York and London, and the courtly flirtations that energized his work. Although one can never know what happened behind closed doors, it appears likely that on some occasions when his wife, Fanny, was too ill to perform her conjugal duties (I think that is how both of them thought of

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102. Holmes Papers, *supra* note 1.

103. Holmes Papers, *supra* note 1.

104. Letter from Oliver W. Holmes to Frederick Pollock (June 20, 1928), in 2 HOLMES-POLLOCK LETTERS, *supra* note 16, at 223.

105. Oliver W. Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 453 (1899).

it) he had affairs. Holmes's love letters to Lady Castletown,<sup>106</sup> for instance, do not reveal the secrets of the bedroom, but they leave no doubt about the fundamental nature of their relationship.

There is no reason to think Holmes was promiscuous or exploitive in his relationships with women. He consciously made use of his abundant sexual energy by sublimating it in his work—the traditions of chivalry, especially of courtly love, were particularly congenial to the Victorians on this score.<sup>107</sup> Some of the power of his writing is due to his ability consciously to harness these energies.

In short, his relations with women were consistently conventional. Perhaps there is no need to look for reasons in his own history for his apparent feeling that the relations between the sexes, like all other human relationships, were ultimately a struggle for survival. Holmes's world was a rather bleak one; and after the Civil War, he was not a reformer. He was aware of the injustices of class and gender, if not acutely sensitive to them, but he accepted the existing order and did not blame anyone for it. He believed that the only hope for ameliorating the fundamental source of injustice, the lack of adequate means, was to limit the size of the population.

#### D. *The Priority of Honor*

We now return to the difficult question of Holmes's views on eugenics. Holmes's relationships with women inevitably affected, and to some degree explained, his brutal approval of "artificial selection;" but, a few words more are needed before leaving this topic. If in his views of class and gender he was simply a man of his time, his views on eugenics were a different matter. One cannot read Holmes's phrase, "putting to death the inadequate," uttered so casually, without profound disquiet. This goes well beyond the conventional views on eugenics of his day. And it is worse than wrong, it is evil.

Therefore, I must explain why, in the end, I find Holmes better than his ideas. To do this I must lapse into biography.

Although the evidence is limited, it appears that Holmes faced the implications of his evolutionism in the early 1890s. In that decade, as we

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106. Holmes Papers, *supra* note 1.

107. For instance, the sustained imagery of his toast to "our mistress, the Law." See also *The Law*, in HOLMES, *supra* note 2, at 16. See generally *Courtly Love*, in NOVICK, *supra* note 6, at 178; Hoffheimer, *supra* note 98, at 105-09. Hoffheimer's psychoanalytic study is marred by his peculiar assumption that Holmes's references to chivalry were jokes.

have seen, his mother, brother, sister, and father died, leaving only a nephew and himself as the survivors of his name. At the same time, his wife sank back into the chronic illness that Holmes believed had left them childless.

Holmes was troubled at this time by the temptation to leave his childless marriage, and by the thought that it was his duty to do so, to ensure the survival of his line. There was a common feeling in his day that such duties were owed to the nation. The census of 1890 showed the relative decline of New Englanders of British origin, and Holmes was certainly aware of the much heated talk of "race suicide" that followed. For instance, Theodore Roosevelt made frequent references in his speeches and letters to "race criminals," who refused to perform their duty to procreate: "The man . . . who has a heart so cold as to know no passion and a brain so shallow and selfish as to dislike having children, is in effect a criminal against the race and should be an object of contemptuous abhorrence by all healthy people."<sup>108</sup>

Holmes's letters show that he considered whether it was his duty to have children. However, in the end he decided to stand by his wife. While this was both a duty to her, and his personal inclination, the evidence on the subject is limited. Holmes, while open about his own feelings with friends, was very protective of his wife's privacy. Both his father's and his own papers relating to her illness were destroyed, and friends of the family seem to have cooperated. In one letter that has survived Holmes discussed their childlessness:

Once at dinner in England old Sir Fitzroy Kelly on hearing that we had no children said, "Le bon temps viendra." But I am so far abnormal that I am glad I have none. It might be said that to have them is part of the manifest destiny of man, as of other creatures, and that he should accept it as he accepts his destiny to strive—but the latter he can't help—and part of his destiny is to choose. I might say some sad things but I won't. Whatever I may think of life, the last years of mine have been happy and are so now. Of course, if I should break down before I die it would be awkward as there is no one to look after me as a child would—but I daresay my nephew and my friends would cook up something.<sup>109</sup>

Holmes seemed to be saying that he chose between duties, and that, in retrospect, from the age of seventy-seven, he was not sorry at the choice

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108. T. DYER, *THEODORE ROOSEVELT AND THE IDEA OF RACE* 152 (1980).

109. Letter from Oliver W. Holmes to Lewis Einstein (Aug. 31, 1928) in *Holmes Papers*, *supra* note 1; quoted with some alterations in punctuation, in *HOLMES-EINSTEIN LETTERS*, *supra* note 67, at 289; excerpted in *HOWE*, *supra* note 29, at 8 n.17 (1963).



that he had made.<sup>110</sup> But the choice was deeply painful. At first, Holmes reassured himself that his nephew, Ned Holmes, would carry on the Holmes name. But, it gradually became apparent that Ned, too, had a childless marriage, and from the 1890s onward, Holmes talked somewhat bleakly of the extinction of his family.

At the same time, the nation was going through a severe depression and the beginnings of violent class struggle. As a judge, Holmes began to face his first cases involving organized labor, which to him seemed an enemy not only of the existing order, but of everything he found valuable in life.

Holmes extracted from these cases, and from the extinction of his family, the same lesson that he had extracted with so much pain from the Civil War. He did not feel much personal sympathy for the trade unions and the new races that would displace his own, but it was his duty to sacrifice himself, and for his race to perish, if that was what honor and duty required. In the early 1890s, he began dissenting from the decisions of his court, on behalf of the right of the state legislature to make experiments in direct democracy and socialism.<sup>111</sup> This was a difficult step for him, since he did not like to dissent, especially alone; furthermore, although he did not like to admit that this was a factor, his dissents were likely to cut off the prospect of eventual advancement to the Supreme Court, the only ambition that remained to him. But in 1894, he wrote *Privilege, Malice, and Intent*,<sup>112</sup> in which he argued that it was the duty of judges to set aside their own personal interests, and even their fears of extinction, in order to preside fairly over the struggle for life.

From the depths of his worst time, Holmes extracted something admirable, if tragic. He turned to self-sacrifice as the fundamental moral principle. He wrote to Ellen Curtis, describing a conversation he had had with Fanny:

[A] recent exposition I gave . . . with an excursus on suicide as the ideal expression of that illusory personal spontaneity or independence which exhibits itself in less marked forms as consideration for the weak, charity to the poor, drunkenness, going to the play, painting pictures, etc., in short,

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110. Mark DeWolfe Howe rather oddly interpreted the letter quoted in the text to mean that Holmes had imposed a childless marriage on Fanny Dixwell in order to further his career, *see id.*, but Howe was not aware of Fanny's illness.

111. *See* Opinions of the Justices, 160 Mass. 586, 593 (1894) (referendum, and votes for women); Opinions of the Justices, 155 Mass. 598, 607 (1892) (municipally owned coal yards); *Commonwealth v. Perry*, 155 Mass. 117, 123 (1892) (regulation of wage withholding).

112. Oliver W. Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894).

uneconomic expenditures of force—the final judgment on which by nature is death—but which in moderate doses is the consolation and glory of man.<sup>113</sup>

Holmes's sad and generous courage, his determination to perish in the fight rather than fight dishonorably; his determination to accept the inevitable, and, as Spinoza advised, to act well and joyously; these things, and not his conventional prejudices or his brutal talk of racial hygiene, are the core of the man and the inheritance we are entitled to receive from him.<sup>114</sup>

## VI. HOLMES AND PRAGMATISM

From the time of Holmes's personal crisis in the 1890s, there were clearly two components of his thought: (1) the hard-minded view that everything in human society was ultimately the product of natural selection; and (2) a sense of higher duty that appeared to contradict his understanding of what evolution required.

His ideas developed in opposition to those that are now called pragmatism. In 1867, wrangling with William James, Holmes took the materialist position he had formulated while in winter quarters with the Union Army in 1863 and 1864. James, who had stayed at home during the war, was at the time a doubting idealist. Holmes tended to lump together William James's idealism and his father's religion. Thus, when Holmes had difficulty answering one of William's objections to materialism, he said, "What a passion your father has in writing and talking his religion! Almost he persuadeth me to be a Swedenborgian, but I can't go it so far—will see whether the other scheme [materialism] busts up first, I think."<sup>115</sup>

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113. Letter from Oliver W. Holmes to Ellen Curtis (Jan. 7, 1901), in *Holmes Papers*, *supra* note 1.

114. Since writing this I have seen John Casey's *PAGAN VIRTUE: AN ESSAY IN ETHICS* (1990), his effort to treat virtues like Holmes's, traced back to Classical roots, as an ethical system. Although I sympathize with the effort, I venture no farther here than to say that Holmes's code is a part of our Western tradition, a cautious respect for which is not a duty, as Holmes would say, but only a necessity.

115. Letter from Oliver W. Holmes to William James (Dec. 15, 1867), in *James Papers*, Houghton Library; reprinted in PERRY, *supra* note 51, at 507. The difficulty Holmes had was with *vis viva*, the then mysterious quality of mechanical force. The recently discovered principle of conservation of energy had increased the impression that force was not explicable in materialist terms, but had independent existence. This is rather like the mystery that absorbed the previous generation, of the manner in which gravity seemed to act at a distance with no material agency. Holmes was well aware of both debates, and frequently compared the concepts of "rights" to the then mysterious

As illustrated in Part III above, the other scheme never busted up. Holmes came to think that materialism could encompass all of the phenomena of life and thought. One could not speak of “brute” matter; “a certain complex of energies can wag its tail and another can make syllogisms.”<sup>116</sup>

On the other hand, James eventually abandoned idealism for a new doctrine, pragmatism, which was his effort to get beyond the terms of the debate with Holmes on the one side and his father on the other. But Holmes never saw anything more in pragmatism than the old weakness for subjectivity that he despised.

I now see . . . that the aim and the end of the whole business [James’s pragmatism] is religious. . . . [J]ust as an automatic sweetheart wouldn’t work (the illustration is his) an automatic universe won’t—or not so well as one that has a warm God behind it, that loves and admires us. But for that conclusion I don’t think we ever should have heard from him on the subject, taking that as the significance of the whole business I make it my bow.<sup>117</sup>

William James’s pragmatism might have been an effort to reconcile himself to his father’s religion without surrendering to it. Holmes, however, was very plain about his own position; he was a realist, equally opposed to James’s early idealism and James’s later effort through pragmatism to rise above the debate.

Richard Rorty has suggested that the terms of the philosophical discussion in English speaking countries have not much changed since Holmes’s and William James’s debates:

Philosophers in the English-speaking world seem fated to end the century discussing the same topic—realism—which they were discussing in 1900. In that year, the opposite of realism was still idealism. But by now language has replaced mind as that which, supposedly, stands over and against “reality.”<sup>118</sup>

Because Holmes is on the realist side of the debate, we should probably assess him in relation to modern antirealism and pragmatism. But first, we must rescue Holmes from the embrace of the pragmatists. Despite

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“force” of gravitation, words which did no more than rectify an imagined explanation for the behavior of the data. *See, e.g.*, Letter from Oliver W. Holmes to Frederick Pollock (Jan. 19, 1928), in 2 HOLMES-POLLOCK LETTERS, *supra* note 16, at 212-13.

116. Oliver W. Holmes, *Natural Law*, 32 HARV. L. REV. 40, 43 (1918).

117. Letter from Oliver W. Holmes to Frederick Pollock (July 6, 1908), in 1 HOLMES-POLLOCK LETTERS, *supra* note 16, at 140.

118. RICHARD RORTY, OBJECTIVITY, RELATIVISM, TRUTH 2 (1991).

Holmes's own evident realism, which he endlessly insisted upon, and his contempt for William James's pragmatism, many have persistently attempted to portray Holmes as a pragmatist.

### A. *Pragmatism and Liberalism*

There were two sources of the mistaken effort to portray Holmes as a philosophic pragmatist. The first was a simple misunderstanding about his place in the development of law. The most common judgment is that he was one of the leaders of the supposed "revolt against formalism"—a shift from the systematic natural law of the eighteenth century to the empirical science of the twentieth.

Holmes viewed the law in which he was educated as unsystematic and informal to the last degree. Blackstone was long forgotten, and the reality of law in the mid-nineteenth century was that it was a trade. Even the best of the scholarly judges had little interest in systematic thought. In his day, Holmes's predecessor on the Supreme Court, Horace Gray, was considered one of the great judges. Yet, Mark De Wolfe Howe's description, from Holmes's perspective is enlightening:

In cast of mind he was not unlike Chancellor Kent and Mr. Justice Joseph Story, learned, in the traditional fashion of lawyers, clearheaded, after the manner of able judges, he was a man of considerable force and capacity. Yet his most ardent admirers admitted that his intelligence was not philosophical and that his inclination to write opinions of inordinate length deprived them of any semblance of artistry.<sup>119</sup>

The opinions of the courts lacked formality of thought or expression. The law itself was a miscellaneous collection of unrelated details, justified by judges and commentators alike as expressing an unsystematic sense of natural justice. In American legal history, Holmes is more properly described as assisting in the rise of formalism in judicial opinions, an insistence on neutral principles and systematic thought, than in its overthrow.

The confusion apparently began with Holmes's famous attack on "logic" when he said, "The life of the law has not been logic, it has been experience."

Chancellor Kent's *Commentaries*, and the state court cases of the 1850s and 1860s, which provided Holmes's education in the common law, were not especially logical in the sense of being systematic. While there was a good deal of talk about natural law and the principles of

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119. HOWE, *supra* note 29, at 116-17.

justice, the law was a mass of unrelated details, and rested on nothing more formal than common sense and familiar custom. Blackstone's quasi-scientific systematization of the common law had long since vanished from American awareness. In Holmes's day, one rarely saw even a reference to Blackstone unless it was an attack. When Holmes launched his famous aphorism, he was criticizing English and German commentaries (and Dean Langdell of the Harvard Law School), not American law. More importantly, he was also criticizing the judges' habit of rationalization, of finding seemingly logical, but unsystematic, reasons for rules whose true explanation was historical and legislative. He criticized, in short, the practice of supplying a veneer of deductive logic to explain conclusions that in truth had been arrived at on other grounds.

In 1944, Felix Frankfurter's brief biography of Holmes was published in the *Dictionary of National Biography*. For fifteen years this remained the only authoritative account of Holmes's early work. Regarding Holmes's writings, Frankfurter said that Holmes rejected "a view of the law which regarded it as a merely logical unfolding."<sup>120</sup> This was easily misunderstood. In 1944, Catherine Drinker Bowen wrote a fictionalized group biography of Holmes and his family, in which she gave a similar account, emphasizing the clash of progressive, modern social criticism with the supposed dry logic of the past.<sup>121</sup>

Naturally then, in 1947, when Morton White published *Social Thought in America: The Revolt Against Formalism*, Holmes appeared as a major protagonist, somewhat improbably linked with Thorstein Veblen in a supposed attack on classical economics and formal systems of legal thought. Works based on secondary materials continue to repeat this judgment.<sup>122</sup> Scholars imagine Holmes as a sort of Woodrow Wilson of the law, smashing the highly formalized study of written constitutions and natural law, and replacing it with an empirical, fundamentally progressive study of social policy.

This confusion was nourished by a parallel development, a conscious effort to portray Holmes as a political liberal. John Dewey struck the

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120. FELIX FRANKFURTER, *Oliver Wendell Holmes, 1841-1935*, in *DICTIONARY OF NATIONAL BIOGRAPHY*, reprinted in FELIX FRANKFURTER, *MR. JUSTICE HOLMES AND THE SUPREME COURT* 1, 11 (2d ed. 1961).

121. CATHERINE D. BOWEN, *YANKEE FROM OLYMPUS* 280-83 (1944).

122. See, e.g., GARY J. AICHELE, *OLIVER WENDELL HOLMES, JR.* 112-23 (1989); G. EDWARD WHITE, *PATTERNS OF AMERICAN LEGAL THOUGHT* 223 (1978).

keynote in a remarkable article, *Justice Holmes and the Liberal Mind*.<sup>123</sup> In the work, Dewey seemingly played on the ambiguity of the word "liberal" to hint that Holmes's tolerance for intellectual experiments was actually political liberalism, or at least a sanction for it. This article was reprinted in the *Harvard Law Review* in April, 1931. In this issue, which was largely dedicated to Justice Holmes's ninetieth birthday celebration, Cardozo and Frankfurter also referred to Holmes as a "liberal." Frankfurter went to some trouble in his article to portray Holmes as a pragmatist, quoting from then unpublished papers of pragmatist Charles S. Peirce, and listing Holmes's early publications, but omitting those before 1870. Thus, by either error or design, Frankfurter conveyed the impression that Holmes's first original work was influenced by discussions with William James and Charles Peirce in the 1870s.

After Holmes's death, Felix Frankfurter continued the effort to portray Holmes as a pragmatic liberal. In 1938, then-Professor Frankfurter gave a series of public lectures on Holmes at Harvard, later publishing them as a slim book.<sup>124</sup> About to join the Supreme Court himself, Frankfurter combined great forensic abilities and high stature as a legal scholar with a well known, intimate twenty-year friendship with Holmes. Frankfurter's word was taken as authoritative. In his lectures, he gave a selective view of Holmes; he portrayed Holmes's tenure as a period of class struggle in which the Court principally regulated the relations of government and business. He barely mentioned any of Holmes's opinions for the Court. Instead, Frankfurter largely concentrated on Holmes's dissents in cases where the majority had struck down progressive legislation. He skipped past Holmes's conservative views on politics and economics,<sup>125</sup> and hinted heavily that Holmes favored the "redistribution of wealth." Finally, Frankfurter concluded that in 1937, when the Court began upholding New Deal legislation more regularly, "the old views of Mr. Justice Holmes began to be the new constitutional direction of the Court."<sup>126</sup>

By 1941, with the Court dominated by Roosevelt appointees, Robert H. Jackson wrote, "Justices such as Holmes and Brandeis have not only

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123. 53 NEW REPUBLIC 210 (1928), reprinted in MR. JUSTICE HOLMES 33 (Felix Frankfurter ed., 1931).

124. FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT (1938).

125. Except for a single sentence: Frankfurter said that Holmes "personally 'disbelieved all the popular conceptions of socialism,' and came dangerously close to believing in the simplicities of the wage fund theory." *Id.* at 44. This hardly seems an adequate exposition of Holmes's views.

126. *Id.*

furnished the highest expression but they have been the very source and the intellectual leaders of recent liberalism in the United States."<sup>127</sup>

The picture of Holmes as a politically liberal pragmatist, alluded to by Frankfurter and Jackson, was drawn in full colors by Philip P. Wiener, whose well-received 1949 book, *Evolution and the Founders of Pragmatism*, devoted a chapter to Holmes. Wiener described Holmes as one of the founders of philosophic pragmatism. He said that Holmes's "liberal hope for reform" made him a sort of godfather to the New Deal. This portrait was, again, reinforced by Catherine Drinker Bowen's best-selling book,<sup>128</sup> in which she simply invented accounts of Holmes's meetings with the actual founders of pragmatism, Charles Peirce and William James, complete with dialogue in which the new philosophy was invented.<sup>129</sup>

The political effort to portray Holmes as a liberal, in the sense of a

127. ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 312 (1941); see also MAX LERNER, *IDEAS FOR THE ICE AGE* 100-01 (1941); quoted in SAMUEL J. KONEFSKY, *THE LEGACY OF HOLMES AND BRANDEIS* 7 (1956).

128. BOWEN, *supra* note 121.

129. *Id.* at 220-21. The shred of fact on which all these accounts were based, which Frankfurter had exhumed from the Peirce papers in 1930, was Charles S. Peirce's description, late in his unhappy life, of a "Metaphysical Club," at one of the regular meetings at which Peirce claimed to have read a paper introducing pragmatism for the first time to William James, Holmes, and other lesser lights who thereafter followed up on the central idea. Max Fisch accepted this account, and put Holmes among the founders of pragmatism, on the theory that he had been present at the early meetings of the Metaphysical Club. M.H. Fisch, *Justice Holmes, The Prediction Theory of Law, and Pragmatism*, 39 J. PHIL. 85 (1942). Bowen then dramatized these supposed meetings of the club in her book in 1944. See BOWEN, *supra* note 121. Finally, Philip P. Wiener organized his influential book, *EVOLUTION AND THE FOUNDERS OF PRAGMATISM* (1949), around the image of the meetings of the Metaphysical Club. As Wiener himself noted, however, there is no evidence in the voluminous papers of the others involved that there was such a club or that Peirce read such a paper. There were occasional meetings of friends in William James's house in Cambridge, beginning in the spring of 1870, but Holmes stopped visiting James very shortly thereafter, and the others had not yet in fact developed any of the ideas which later came to be called pragmatism. Holmes first encountered pragmatism in William James's writings of the 1890s, when he thought very little of it. The facts are not in dispute. See WIENER, *supra*, at 18-25; NOVICK, *supra* note 6, at 27 n.4; Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 app. at 864-70 (1989). Morton White, Wiener, Grey, and most other commentators do not rest any of their weight on the historical accuracy of Peirce's story, but use it as a convenient image:

The most significant fact for the historian of thought is that Peirce brought together in his account of the genesis of pragmatism a historically important group of persons who really lived in the same place and time, moved in the same intellectual atmosphere, and influenced each other in ways that shaped the growth of certain pervasive ideas current in our thinking today.

WIENER, *supra*, at 25-26. I should have thought "the most significant" fact about Peirce's story, for any sort of historian, was that it was substantially untrue.

social democrat, collapsed in the 1940s. A backlash from liberals themselves began soon after the first volumes of Holmes's letters were published, in 1943, in which Holmes's true views of politics and economics began to appear. In 1951, the Supreme Court's decision in *Dennis v. United States*<sup>130</sup> dealt another heavy blow. The Court relied on Holmes's opinion in *Schenck v. United States*<sup>131</sup> to affirm criminal convictions of the leaders of the Communist Party of the United States, and seemed to ratify the Red Scare of the 1940s and 1950s, with all its excesses. It became increasingly difficult to carry Holmes at the head of the New Deal parade.

Holmes's liberal credentials were finally withdrawn, as it were, by Samuel Konefsky, in an influential book, *The Legacy of Holmes and Brandeis*, published in 1956. Konefsky assumed that Holmes and Brandeis were responsible for the new thinking in the Supreme Court after 1937, "The constitutional ideology to which the Supreme Court as reorganized by Franklin D. Roosevelt was heir."<sup>132</sup> But, Konefsky easily showed that Holmes's private views contradicted the policies of the New Deal. Since Holmes's influence on the later Court, as in the First Amendment cases, at times was mediated by Brandeis's opinions, Konefsky argued that Holmes had no real ideas of his own, in any case, only unreflective prejudices. For instance, Holmes's views on economics were supposedly just unexamined prejudices carried forward from his youth; "clear and present danger" was just a casual remark, a rationalization to uphold criminal convictions, that did not become a rationale for protecting freedom of speech until Brandeis lent his "powerful support."<sup>133</sup>

There was a heavy air of suggestion about the study that Brandeis was the true source of the ideas and the dissents from which Frankfurter had fashioned his portrait of Holmes.<sup>134</sup>

The criticism of Holmes continued. Judge Learned Hand, who gave the Holmes Lectures at Harvard in 1958,<sup>135</sup> devoted part of one lecture to attacking Holmes's version of the clear and present danger, comparing

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130. 341 U.S. 494 (1951).

131. 249 U.S. 47 (1919).

132. KONEFSKY, *supra* note 127.

133. *Id.* at 202.

134. David Rabban amplified this suggestion into a fully developed theory that a cabal of liberal law professors manipulated Holmes. David M. Rabban, *The Emergence of First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1211 (1983). *But see* Novick, *supra* note 32.

135. Judge Learned Hand, Lecture at Harvard University (1958), in *THE BILL OF RIGHTS* (1958).



it unfavorably with his own objective test of incitement.<sup>136</sup> Justice William O. Douglas, in a separate opinion, objecting to the majority's revival of Holmes's clear and present danger doctrine in *Brandenburg v. Ohio*, approvingly cited Hand's book as authority for the violent attack on Holmes's standard that has continued to this day.<sup>137</sup>

The effort to make Holmes a pragmatic liberal therefore seems to have self-destructed. The original puffery and the later revisionism have effectively canceled each other out.

A more authentic effort has emerged in recent years, without any apparent political agenda, to show that Holmes's jurisprudence, rather than his overall philosophy, is consistent with some forms of pragmatism.

Holmes believed that law was an instrument of social purposes; that lawyers like scientists tried to predict behavior (of judges); and that judges necessarily looked outside the law for useful grounds of decision. These aspects of Holmes's thought are certainly consistent with some forms of pragmatism, and one can hardly argue with the proposition that Holmes is one of the founders of legal pragmatism, in this limited sense.<sup>138</sup>

Henry Steele Commager, in *The American Mind*, gave a very clear account of Holmes's approval of legal "pragmatism," in the sense of social experimentation. Commager emphasized that Holmes's personal philosophy was quite different from the one he saw working itself out in the law.<sup>139</sup> Perry Miller and Edmund Wilson both categorized Holmes as one of those who introduced "scientific" or evolutionary thinking into what was eventually termed the social sciences. This seems a fair enough appraisal, consistent with the view that Holmes fostered legal pragmatism, as long as too much actual resemblance between Holmes's thinking and the biology of evolution is not required.

Richard A. Posner has also viewed Holmes as a founder of modern legal pragmatism. By legal pragmatism, Judge Posner means "a future-oriented instrumentalism that tries to deploy thought as a weapon to enable more effective action."<sup>140</sup> Not unlike what Holmes said a judge

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136. *Id.* at 58-61. There was a certain irony in this. In *Dennis*, the Court relied on Hand's own statement of the clear-and-present-danger standard to affirm the convictions of the Communist leaders. *Dennis v. United States*, 341 U.S. 494 (1951).

137. *Brandenburg v. Ohio*, 395 U.S. 444, 454 (1969).

138. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 26-30, 221-25 (1990).

139. HENRY S. COMMAGER, *THE AMERICAN MIND* 359 (1950).

140. See POSNER, *supra* note 138, at 28 (quoting Cornel West's description of philosophic pragmatism in *THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM* 5 (1989)).

went through when deciding a case, this milder, eclectic pragmatism has replaced notions of hard science, as something law can aspire to, in the thinking of those who believe that law is or should be an instrument of social purpose. To this extent, it is in accord with Holmes's views and can legitimately claim him as a forebear.

But it is important to remember, if we are to understand his opinions and not just *The Common Law*, that Holmes was not a philosophic pragmatist. Professor Thomas C. Grey, however, in an important and lengthy article,<sup>141</sup> argued that Holmes's personal philosophy was a pragmatism like John Dewey's.

Grey anchors his argument in the genuine contradiction in Holmes's writings, between Holmes's view that law was only an instrument of social policy, and the uneconomic idealism that Holmes recommended in his addresses to young lawyers. Grey called this a conflict between the "witness" and the "actor" in Holmes, echoing Rogat's criticism of Holmes as a "spectator."<sup>142</sup>

Professor Grey's terms are a little judgmental, especially when he frankly sided with the pragmatist common law of Holmes's youth and commented that the Olympian judge of his old age was a failure. But Grey did notice the apparent contradiction between Holmes's own practice and the qualities Holmes ascribed to the ordinary lawyer and judge.

Grey said, reasonably enough, that Holmes tried to reconcile these qualities—the transcendent point of view required of the theoretician, and the perspective of the actor in the struggle who must take sides. Holmes, as discussed above, reconciled them by saying that each was an expression of something more fundamental: the evolution of the human species. Grey asserted that Holmes's efforts to reconcile the contradiction were just a weak anticipation of Dewey's pragmatism.<sup>143</sup> Although this may be true, it is a question of how one understands Dewey.<sup>144</sup>

141. Grey, *supra* note 129.

142. Yosai Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213 (1964).

143. Grey wrote that when Holmes read Dewey's *EXPERIENCE AND NATURE* he reacted with "unmediated enthusiasm" and "wrote at once to Laski, 'I thought [it] truly a great book.'" *Id.* at 868-70. As the letter to Pollock quoted in the text illustrates, this slightly exaggerates Holmes's reaction, who at first disliked the book and had to be urged to read it again and to give it another chance.

144. Dewey's followers differ radically among themselves as to what Dewey meant to say. Grey, for instance, adopted a representational theory of truth. Grey, *supra* note 129, at 803-04. However, Rorty claimed this was the antithesis of his own philosophy (and I would have thought it inconsistent with any sort of pragmatism). Rorty rejected the "scientific, method-worshipping side" of Dewey that Grey admired. *Id.*; Grey, *supra* note 129, at 803-04. Rorty, on the other hand, said that

Unlike more recent pragmatists, Dewey advanced a metaphysics in which there was a suggestion of objective reality lying behind the phenomena of experience; and Holmes heard in this an echo of his old friend the Cosmos. As Holmes wrote to Frederick Pollock,

But although Dewey's book [*Experience and Nature*] is incredibly ill written, it seemed to me after several rereadings to have a feeling of intimacy with the inside of the cosmos that I found unequalled. So methought God would have spoken had He been inarticulate but keenly desirous to tell you how it was.<sup>145</sup>

To Holmes, the inductive methods of natural science gave the only true knowledge, and behind them he heard a hint of the ultimate. This seems to be what Holmes found in Dewey; but in any case there is no real doubt about Holmes's own ideas. Grey wanted Holmes to understand Dewey as he and Richard Rorty did, however, as denying to natural science any favored position, rejecting its claim to have a preferred method for arriving at truth, and rejecting any belief in an ultimate reality. Rorty puts the position this way:

[P]ragmatists would like to drop the idea that human beings are responsible to a nonhuman power. We hope for a culture in which questions about the "objectivity of value" or the "rationality of science" would seem equally unintelligible. Pragmatists would like to replace the desire for objectivity—the desire to be in touch with a reality which is more than some community with which we identify ourselves—with the desire for solidarity with that community. They think that the habits of relying on persuasion rather than force, of respect for the opinions of colleagues, of curiosity and eagerness for new data and ideas, are the *only* virtues which scientists have. They do not think that there is an intellectual virtue called "rationality" over and above these moral virtues.<sup>146</sup>

Nothing in Holmes's writings directly supports such a view. The following is more characteristic: "When the . . . man said Europe has given us the steam engine, Asia every religion that ever commanded the reverence of mankind—I answered I bet on the steam engine. For the steam engine means science and science is the root from which comes the

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he and his teacher Sidney Hook also differed fundamentally in their reading of Dewey. RORTY, *supra* note 118, at 17 n.30.

145. Letter from Oliver W. Holmes to Frederick Pollock (May 15, 1931), in 2 HOLMES-POLLOCK LETTERS, *supra* note 16, at 287.

146. RORTY, *supra* note 118, at 39. This is plainly Grey's version of pragmatism as well, see Grey, *supra* note 129, at 789-91. I quote the Rorty passage, which was published after Grey's article, as a succinct and authoritative statement of the school to which he seeks to assimilate Holmes.

flower of our thought."<sup>147</sup> Overall, it is difficult to imagine a more direct and violent contrast than that between Holmes's philosophy of scientific realism, his utter acceptance of the nonhuman power of the material world, and Rorty's pragmatism, the gentle pragmatism Professor Grey found in John Dewey. However one feels about this pragmatism, Holmes did not share it.

## VII. HOLMES'S PLACE IN INTELLECTUAL HISTORY

Holmes, like Leslie Stephen, was a principal figure in the Victorian attempt to invent a rationalist morality, a scientific replacement for religion.<sup>148</sup>

Holmes believed that "science"—by which he meant inductive reasoning, as opposed to revelation—was the only route to truth. Holmes's project, like Stephen's, was to find a scientific explanation for duty. In his earliest writings<sup>149</sup> he said that it was the task of his generation to do so. He said later that his transition to adult thinking was marked by reading R. A. Vaughan's *Hours With the Mystics*, an evolutionary account of religion.<sup>150</sup> From the time of his Civil War notebooks, he believed that moral principles were only another aspect of the fundamental laws of the material world:

Of course when I thought I was dying the reflection that the majority vote of the civilized world declared that with my opinions I was *en route* for Hell came up with painful distinctness—Perhaps the first impulse was tremulous—but then I said—by Jove, I die like a soldier anyhow—I was shot in the breast doing my duty up to the hub—afraid? No, I am proud. . . . Then came in my Philosophy—I am to take a leap in the dark—but now as ever I believe that whatever shall happen is best—for it is in accordance with a general law—and *good & universal* (or *general law*) are synonymous terms in the universe.<sup>151</sup>

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147. Letter from Oliver W. Holmes to Harold Laski (June 1, 1919), in 1 HOLMES-LASKI LETTERS, *supra* note 37, at 210. It is possible to interpret "science" to mean only what Rorty means. However, I think the more natural reading is that the steam engine is like Samuel Johnson's kick at a stone in a similar context: "I refute him *thus*."

148. See ANNAN, *supra* note 23.

149. Holmes, *supra* note 17; Holmes, *supra* note 18.

150. See NOVICK, *supra* note 6, at 28.

151. OLIVER W. HOLMES, TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL HOLMES, JR., 1861-1864, 27-28 (Mark DeW. Howe ed., 1946). This account of Holmes's injury at the battle of Ball's Bluff, in October 1861, was written in one of Holmes's pocket diaries, probably during the time when he had become an *aide de camp* and was at leisure in winter quarters, during the winter of 1863-64, when Holmes was trying to extract philosophy from the

Emerson provided inspiration for this quest for the good and universal. Holmes's whole career of study of the common law, which he believed was the record of evolving morality, was a search for the underlying principles of history and hence of the good. Holmes was proudest of his thinking when it arrived at results substantially the same, he imagined, as "prevailing theological notions." He regularly described his own views as a sort of advanced religion.<sup>152</sup> He admired the Japanese, in part, because he thought that Shinto and Bushido were moral codes, like his own, freed from belief in a personal god. He gave his eschatology in a memorial for his friend and mentor George O. Shattuck. In the eulogy he spoke also of himself:

Sooner or later the race of men will die; but we demand an eternal record. We have it. What we have done is woven forever into the great vibrating web of the world. The eye that can read the import of its motion can decipher the story of all our deeds, of all our thoughts. To that eye I am content to leave the recognition and the memory of this great head and heart.<sup>153</sup>

In this rationalist Calvinism, a sort of scientific Buddhism, Holmes felt that he had found fundamental principles that would explain and reconcile him to duty. Henry Adams, in his similar quest for the fundamental principles of human life, looked to physics for analogies, and tried to work through a calculus of energies that would explain the pattern of history. Holmes, like Leslie Stephen, looked to evolution. Stephen had studied the history of philosophy itself, and the biographies of the great thinkers, in a vain search for the deeper principles of the universal. Holmes used the data of the law, the decisions of the judges, in the same way, to expose the evolution of language and thought. But, unlike Ad-

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periences of the war. He added after the quoted passage: "I can now add that our phrase *good* only means certain general truths seen through the heart & will instead of being merely contemplated intellectually." *Id.* at 28.

152. In a letter to Alice S. Green, Holmes wrote:

I felt ashamed of my own egotisms—not too much, because I [am] too sincerely sceptical not to see them as a bait with which nature gets work out of men. Real skepticism builds all its arrogance on humility and I think with only a seeming paradox might be said to be the most religious of attitudes.

Letter from Oliver W. Holmes to Alice S. Green (Feb. 7, 1909), in Holmes Papers, *supra* note 1, at B43 F12.

"No doubt I have said before that I think a real sceptic ([Holmes himself,] who hasn't reserved a little Godhood for himself) may come nearer to what I should call religion than most if not all of those who go to church." Letter from Oliver W. Holmes to Frederick Pollock (Dec. 7, 1927), in 2 HOLMES-POLLOCK LETTERS, *supra* note 16, at 207-08.

153. George O. Shattuck, in HOLMES, *supra* note 2, at 70, 74.

ams or Stephen, Holmes felt that he had succeeded in finding principles that, if not ultimate, were true, and as nearly universal as the thought of his own time was capable of achieving.

Holmes, because of the nature of his quest, was an important spokesman for the realist side in the great philosophical debate of his age. He hoped that philosophical investigation would ultimately justify his faith in the material world and the purposes of the cosmos, but he tried to set aside his merely personal needs during the investigation. He stuck as rigorously as possible to the evidence, and tried to see arguments in a dry light. Accordingly, today one still finds in Holmes's abstract thought the fundamental impulse of realist philosophy, the "human need to stand outside all needs," the need for "transcendence," that Richard Rorty quite properly said was the enemy of pragmatism.<sup>154</sup> It was a chivalric quest that, in itself, as Holmes was perfectly aware, represented a deep European tradition.

Holmes's philosophy required him to try to escape the limits of subjectivity, to escape the "illusion" of self, and to assume the perspective of the cosmos as far as possible. This involved him in the same problems and paradoxes as his effort, as a judge, to stand outside the evolution of the law.

To examine this double perspective more closely: Holmes believed there were two sorts of duty, the duties imposed on everyone, even on a bad man, by the power of the State; and the self-imposed duties of a gentleman.<sup>155</sup> He did not like to use terms like "duty" in discussing law because he did not want to confuse these two senses of the word.

Stating this division of duties in such a blunt way, one correctly gives Holmes's view, and at the same time understands that he could not have spoken in the same blunt terms. A gentleman was not to speak of money or personal morals; and it would hardly have been polite or tactful to contrast his own standards with those of the "crowd." As it was in nearly every one of his speeches, the point had to be made gracefully.

Addressing Harvard seniors, Holmes described the dominant forces in the community of his day, the makers of law, and contrasted their code with the idealism of the gentleman:

The society for which many philanthropists, labor reformers, and men of fashion unite in longing is one in which they may be comfortable and may

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154. RORTY, *supra* note 118, at 8.

155. See Holmes, *supra* note 69, in which he recommended to his audience of presumed gentlemen the higher path of autonomous duty.

shine without much trouble or any danger . . . . Most of my hearers would rather that their daughters or sisters should marry a son of one of the great rich families than a regular army officer, were he as beautiful, brave, and gifted as Sir William Napier . . . .

Who is there who would not like to be thought a gentleman? Yet what has that name been built on but the soldier's choice of honor rather than life? . . . who of us could endure a world, although cut up into five-acre lots and having no man upon it who was not well fed and well housed, without the divine folly of honor, without the senseless passion for knowledge out-reaching the flaming bounds of the possible, without ideals the essence of which is that they never can be achieved?<sup>156</sup>

Law was the expression of an evolving morality, imposed by the dominant forces in society on all. The records of the law showed that this mass morality had progressed from unconscious, subjective impulses such as the territorial instinct and the impulse to take revenge for injuries, to a more highly evolved, conscious instrumentalism that aimed for the survival of "racial" values, within the limits imposed by precedent and enlightened sympathy.<sup>157</sup>

The gentleman's duty evidently was of a higher order than these minimal standards meant to apply to all. The gentleman's duty was to advance his ideals through frankly uneconomic expenditures, risking death or failure in warfare, science, art, or jurisprudence. If a judge was a gentleman, he sat above the struggle for life, setting aside his own loyalties, and helped in small ways to advance the purposes of cosmic evolution. This self-sacrificing idealism was implanted by the evolutionary process itself, of course, just as the humbler, prudential sort of duty had been, although Holmes could not divine its purpose.

Analyzing these ideas in more modern terms, it is helpful to compare them to Michael Oakeshott's, which are similar in some ways. Oakeshott also described two distinct moral systems, reflected in two distinct ideas of the state, each embedded in European language and thought. Modern European states resemble one of these forms, which Oakeshott called an "enterprise association." The enterprise association is a voluntary association of persons who agree to submit themselves to the power of the state. Its purpose is to achieve some common goal of the persons who form it. In its British and American versions it some-

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156. *The Soldier's Faith*, in HOLMES, *supra* note 2, at 59.

157. This evolutionist morality was different in detail, but not in spirit, from the other scientific morality of Holmes's day, utilitarianism, which also tried to discover the mechanism that had translated private self-seeking into public codes of behavior.

what resembles a corporation organized to exploit the natural resources within its territory, for the common benefit of its members. The state as enterprise association educates and commands its citizens to follow rules of behavior whose purpose is to attain their common goal.

The second idea of the state is the civic association. In Oakeshott's view the civic association does not presently exist; it is an ideal based to some extent on qualities of the old regimes. While it is also a voluntary association, the persons who form a civic association do not agree to surrender their freedom. The purpose of this state is to maintain a different sort of law, a set of rules that mediate the dealings among its citizens in such a way as to resolve disputes and facilitate "conversation," the complex interaction of free persons, without depriving them of autonomy.

The two forms of association correspond to the two conflicting themes in Holmes's writings. The enterprise association looks very similar to Holmes's realm of ordinary law, the society of prudent, bad men. The instrumental rules through which enterprise associations exercise their power are similar to the instrumental common law that Holmes described. Oakeshott erred when he expressly criticized Holmes's view that judges make law.<sup>158</sup> He seems to believe that judges need do no more than interpret the words of a statute in a new setting. However, with that qualification, which does not alter anything that is central to Oakeshott's ideas,<sup>159</sup> Holmes's view of the rules of behavior created by the common law appears identical to Oakeshott's view of the enterprise association.

On the other hand, Holmes's fundamental principles of the Federal Constitution are a set of essentially moral rules that require fair adjudication of disputes and that protect open discourse among free individuals. These rules look remarkably like an example of Oakeshott's civic association, his idealized "rule of law."

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158. Michael Oakeshott, *The Rules of Law*, in *ON HISTORY AND OTHER ESSAYS* 119, 147 (1983), misquoting Holmes's *Law in Science and Science in Law*, *supra* note 105, at 461: "[J]udges are called upon to exercise the sovereign prerogative of choice." Oakeshott has "arbitrary choice."

159. It is essential to Oakeshott that in the rule of law, judges only interpret law that has been previously enacted by a process agreed upon among the members of the civic association. Therefore, judges may not make law in the sense that they do in the enterprise association, by choosing in accordance with social policies. In the civic association, as in Holmes's Federal Constitution, however, it seems perfectly reasonable that judges would build up a body of precedent interpreting the fundamental principles of enacted law, as well as the enactments themselves. As a result, they would make law in Holmes's sense but still act in accordance with agreed upon principles of the constitution and hence with Oakeshott's requirements.



Finally, Holmes's view of his own duty as a judge is like Oakeshott's description of a judge in the idealized civic association, who resolves disputes in accordance with enacted law,<sup>160</sup> without regard to himself or the practical interests of the parties.<sup>161</sup>

In his most comprehensive presentation of these ideas,<sup>162</sup> Oakeshott repeatedly insisted that the two systems were incompatible: membership in an enterprise association was inconsistent with membership in a civic association. The qualities that lead a person to join one association or the other, and the purposes of the two types of association, are incompatible. This may be true, but Oakeshott's earlier writings, which were more detailed in this area, hinted at how the two systems might coexist, and indeed might depend on each other.

The most interesting of Oakeshott's works for a student of Holmes is his account of Thomas Hobbes's writings.<sup>163</sup> The Leviathan is the prototypical enterprise association. People associate themselves out of weakness, to end the state of perpetual war and to achieve their common purposes. The association is prudent, and while it deprives citizens of the excitement of victory it provides the more moderate pleasures supplied by peace. Leviathan is based on

the morality of the tame man, the man who has settled for safety and has no need of nobility, generosity, magnanimity or an endeavour for glory in order to move him to behave justly. And, in so far as this was Hobbes's view, he has been recognized as the philosopher of a so-called 'bourgeois' morality.<sup>164</sup>

This passage is very similar to Holmes's description of bourgeois society, which he contrasted with the gentleman's idealism, in his address to

160. Here again the question of whether judges may make law appears. In the civic association, unlike the enterprise association, the rule of law is a system of moral principles. In my view, the fundamental principles Holmes found in the common law and the Constitution are such a system. While Oakeshott's judge makes law only in the sense of establishing rules for new situations, he need not reach outside the system of principles found in previously enacted law; and Holmes rarely, if ever, did.

161. This brief summary does not do justice to the richness of Oakeshott's ideas or to the many points of similarity in Holmes's writings. It is interesting to note that Oakeshott, who is certainly no stranger to the common law tradition, has also said that the "civic association" is most clearly described by "Bodin, Hobbes, Spinoza, Kant, Fichte, and Hegel," the same writers, except Fichte, whose direct or indirect influence was most important to Holmes. MICHAEL OAKESHOTT, *ON HUMAN CONDUCT* 252 (1975).

162. *Id.*

163. Michael Oakeshott, *The Moral Life in the Writings of Thomas Hobbes*, in *RATIONALISM IN POLITICS AND OTHER ESSAYS* 248 (1962).

164. *Id.* at 293.

Harvard seniors. Oakeshott, too, further contrasted the morality of the tame man with an "aristocratic"<sup>165</sup> morality. Quoting Hobbes, he said that the latter is the morality of the "just" man, who subscribes to law, not out of weakness but out of disdain for personal consequences. "That which gives to human actions the relish of justice," as opposed to mere prudence, "is a certain Nobleness or Gallantness of courage (rarely found), by which a man scorns to be beholden for the contentment of life, to fraud or breach of promise. This justice of Manners, is that which is meant, where justice is called a virtue."<sup>166</sup>

The just man, the man of pride, is certainly also the free individual, the man who knows how to be his own friend, who joins in a civic association to preserve his autonomy. His laws are the higher order "rule of law" that resemble Holmes's own code.

Oakeshott believes that the just man, the man of aristocratic virtue, is Hobbes's own ideal. Just as Oakeshott showed an apparent contradiction between Hobbes's private morality and his prescriptions for the state,<sup>167</sup> one must face the similar conflict in Holmes.

Although Oakeshott stated the two codes of morality are fundamentally inconsistent, and cannot be held by the same person, he hinted that they might coexist in the same society. In his essay on the rule of law, for instance, he seemed to accept that a national or federal government might be a civic association governed by the rule of law, while smaller units or local "governments" might be enterprise associations devoted to specific purposes.<sup>168</sup>

Another, even more interesting, hint was his suggestion that the just man is needed to form any kind of voluntary association. If the social

165. *Id.* at 294.

166. *Id.* at 290-91 (quoting Hobbes's *Leviathan*).

167. Oakeshott really gave two answers to the apparent contradiction (rejecting, as unlikely, a third, that Hobbes was simply careless in this thinking). The first, which is not discussed in the accompanying text, is that Hobbes advanced two doctrines, only one of which he thought was true. In this view, Hobbes was a propagandist for the existing order of his day; and hence *Leviathan* was written in an idiom likely to be familiar to his intended audience. But Hobbes had a second purpose, to explore the implications of his own philosophy; and the result was a set of writings that embodied two doctrines, one open, and the other purposely hidden from all but the initiated. *Id.* at 286-88. Oakeshott noted that some will have difficulty accepting the premise that Hobbes had an esoteric doctrine inconsistent with his open meaning. I decline to address this question, because Oakeshott also hinted that the two may not be in conflict, as discussed in the accompanying text. In such a case, then, there is no reason, other perhaps than tact, for one to be hidden.

168. See Oakeshott, *supra* note 158, at 163. Oakeshott insisted that local authorities should not be called "governments" at all, and that local "rates" proportioned to the benefit provided should not be confused with "taxes" to support a general government.

contract is to have legitimate authority, it must be possible at least to imagine its coming into being through voluntary agreement. It is hard to imagine the weak, fearful, ordinary man for whom it is created voluntarily undertaking the risks necessary to bring it into being. Oakeshott hinted that the just man, the man of pride rather than fear, is needed to make even the enterprise association conceivable.<sup>169</sup>

Now, certainly, Holmes's Federal Constitution is a great deal like Oakeshott's rule of law. This is not to suggest that the actual federal government in Holmes's day resembled Oakeshott's ideal civic association, but only that the fundamental principles which Holmes thought were embodied in the Constitution were themselves an ideal order like the one Oakeshott described.

State and local governments, on the other hand, with their instrumental purposes, were like Oakeshott's local authorities. The flourishing of all these lower levels of society, with their prudent concerns and their striving for the mediocre, depended on protection of their freedom by a higher order of government. In this order, freedom and autonomy are valued more than all the other aims of legislation, more than the existence of the federal government itself.

Holmes was not quite clear how or why evolution should have produced this higher standard of morality. He simply accepted that, like everything else, it was a product of the natural world. In the end, Holmes accepted his own morality, as well as the prudence of the bad man, as a necessary part of the world, no more explainable or accountable for than a taste for beer, but no less real.

The conflict in his thought, which he resolved with a faith in the cosmos that he could not justify, was created solely by the machinery of the evolutionary process as he understood it. If laws were made by a dominant power, considered as an entity, a sort of collective organism or "race," natural selection would favor the power whose laws were best calculated to ensure survival. Laws and lawmakers that did not ensure the survival of the fittest would be swept away. There was no place in this system for a judge who *decided* which power would prevail, and so sat outside the struggle for life.

But today, scientists do not believe that biological evolution proceeds in this way, as a contest between races. If an analogous evolution of competing cultures does exist, we have no hint as yet of how it operates;

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169. Oakeshott, *supra* note 163, at 294-300.

and there is no particular reason to think that it works as Holmes imagined. He was unable to remove himself from his own picture of the struggle for survival, only because this conventional view was seared into the fabric of his thought by the Civil War.

Today, we are more familiar with arguments that altruistic traits might have evolved through natural selection. Modern genetics suggests that an individual might very well sacrifice himself for the sake of others who carry the same genes; his sacrifice on behalf of others might increase the frequency of a particular gene in the population. Indeed, even in Holmes's day, if he had not been so blinded by the picture of warring races, it might have occurred even to this lonely, childless man that a self-sacrificing sense of duty was simply the instinct of a parent.

Therefore, instead of being too greatly troubled by the apparent contradiction in Holmes's thought, we may evaluate his system of duties for what it was: a moral code based on a life devoted to duty. The code was an elitist, paternalistic morality, but Holmes was no snob. He thought that only the poverty caused by the excess of population over resources kept the majority of people from attaining the same heights as the fortunate minority. But the minority's good fortune did allow them to rise to heights of idealism on which, paradoxically, the whole of society depended. Refusing to believe in the institutions of peerage and monarchy, he showed in his later opinions that he thought America's open, democratic society, with its complex federal system, its political experiments in the insulated chambers provided by the states, was the most highly evolved social organism yet to appear; but an elite corps was an essential part of it. "I have read Plato's *Laws* [Holmes remarked]—unreal atmosphere with some real flashes of lightning. They had clear notions of what a gentleman should be."<sup>170</sup>

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170. Letter from Oliver W. Holmes to Frederick Pollock (July 27, 1931), in 2 HOLMES-POLLOCK LETTERS, *supra* note 16, at 293.

