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WHEN PATHS DIVERGE: A RESPONSE TO ALBERT ALSCHULER ON OLIVER WENDELL HOLMES

*James Gordley**

"God forgive me if I'm wrong."[1]
—Oliver Wendell Holmes, Jr.

Like Albert Alschuler, I believe that Holmes' positivism was wrong. I do not see how it helps to look at law as a bad man would, or to think of it as mere prediction of what courts will do, or to imagine that terms such as right, duty, fault, and intention have some fundamentally different meaning for a good man deciding what to do than for a judge evaluating what someone has done. Alschuler has shown with even more clarity and force than Lon Fuller and Henry Hart why that sort of thinking leads nowhere.[2] There is a point in any debate when everything that needs to be said is said. I surely could not convince those who are not persuaded by Fuller, Hart, or Alschuler.

Like Fuller and Hart, however, Alschuler has described the dark side of Holmes. It is there, and, I agree, it has tainted intellectual life in this century for those who care about law. But no cynic is honored purely for what he denies. Perhaps some people have followed Holmes the way children might follow a fire truck: to see something burn. But others saw a positive program for the future that could only be realized by an emancipation from the immediate past. I would like to examine that program, which, in broad outline, was a good one. The difficulty was not the program but finding a place for it in the modern intellectual world. Holmes himself could not do so. Indeed, the program was inconsistent with his own view of the relationship of law and morality.

In *The Path of the Law*, Holmes said he had two objectives. One was to determine "the limits of the law."[3] He claimed to have done so by showing that law was merely the sort of prediction a bad man might

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1. Oliver W. Holmes, Jr., *Diary, Ball's Bluff, in* TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL HOLMES, JR. 1861-1864, at 28 (Mark D. Howe ed., 1969) [hereinafter *Holmes' Diary*].

2. *See* LON L. FULLER, THE LAW IN QUEST OF ITSELF 62-63 (1940) (discussing Holmes and realism); *id.* at 106-07, 117-18 (discussing Holmes and positivism); Henry M. Hart, Jr., *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929 (1951).

3. Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 464 (1897).

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make as to what a court might do to him. His second goal was to describe "the forces that determine its content and its growth."[4] To do so, he outlined a program that is far from cynical, a program by which law, "one of the vastest products of the human mind," could realize "what seems to me the ideal of its future."[5]

The program was to move by rational enquiry from decided cases and particular rules to still more general rules, and then to the ends served by those rules and the reasons why these ends are desirable. By so doing, one could understand, criticize, and reformulate the rules themselves. "Jurisprudence," according to Holmes, "is simply law in its most generalized part. Every effort to reduce a case to a rule is an effort of jurisprudence."[6] A "great lawyer" will see in a case "the application of the broadest rules."[7] As Robert Gordon observed, Holmes thought that "the proper role of the jurist, the role that Holmes is himself performing, is to develop a method to extract from legal materials the regularity and order that is already present inside them, not to impose, by a creative act of interpretation, a new order upon them."[8]

According to Holmes, the jurist does so by looking at the historical development of rules and asking what ends the rules have served. The pursuit of these ends is often "inarticulate and unconscious"[9] and rules grow up without any "systematic questioning of their grounds."[10] The jurist must make a "deliberate reconsideration of the worth of those rules."[11] Sometimes he will find that a rule once served a purpose but no longer does so,[12] or does so imperfectly.[13] Sometimes, he can identify a purpose it still serves.[14] As Gordon notes, Holmes uses history in both of these ways in his book *The Common Law*.[15] Sometimes "the exposure of a weird antique origin disqualifies a rule from contemporary use."[16] Sometimes the "tracing of a rule from its origins to the present shows the logic, or teleology, of its evolutionary development, the trend-line one can use to argue how [the rule] should be

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4. *Id.* at 464-65.
5. *Id.* at 473-74.
6. *Id.* at 474.
7. *Id.*
8. Robert W. Gordon, *Holmes'* Common Law *as Legal and Social Science*, 10 HOFSTRA L. REV. 719, 726 (1982) (footnote omitted).
9. Holmes, *supra* note 3, at 466.
10. *Id.* at 468.
11. *Id.* at 469.
12. *See id.* at 465.
13. *See id.* at 469.
14. *See id.* at 466-67.
15. Gordon, *supra* note 8, at 733.
16. *Id.*

developed in the future."[17] As he said in *The Path of the Law*, one uses history to "get the dragon out of his cave" and then one can either "kill him, or . . . tame him and make him a useful animal."[18]

To the extent the jurist succeeds, "every rule [the law] contains is referred articulately and definitely to an end which it subserves, and . . . the grounds for desiring that end are stated or are ready to be stated in words."[19] Often a rule represents a compromise or "weighing" of the importance of "competing" ends.[20] Then the jurist must determine what we are giving up and what we get in return.[21] As Holmes summarized his program, it is

> to follow the existing body of dogma into its highest generalizations by the help of jurisprudence; next, to discover from history how it has come to be what it is; and, finally, so far as you can, to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price.[22]

In *The Path of the Law* and in his other writings, he presents this program as an alternative, on the one hand, to the traditional particularism of Anglo-American lawyers, and, on the other, to the conceptualism of continental jurists. He argues, and I think quite rightly, that his program is better.

Anglo-American lawyers began to escape particularism only in the century before Holmes was born. Before Blackstone, the common law was not studied in universities. Lawyers did not think in terms of larger categories such as contract and tort but in terms of writs and the particular rules that had grown up around them. As A.W.B. Simpson has pointed out, there was little literature outside of the reports of decided cases.[23] The first treatise on the common law of contract was written in 1796.[24] In the 19th century, law schools opened and many more treatises were written. For some time, however, they looked less like a modern treatise and more like an assemblage of particular rules.

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17. *Id.* (footnote omitted).

18. Holmes, *supra* note 3, at 469.

19. *Id.*

20. *Id.* at 466-67.

21. *Id.* at 474.

22. *Id.* at 476.

23. A.W.B. Simpson, *Innovation in Nineteenth Century Contract Law*, 91 LAW Q. REV. 247, 250-51 (1975).

24. *See generally* JOHN J. POWELL, ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS (1796).

Holmes disapproved. "When I began," he said in 1911, "the law presented itself as a ragbag of details."[25] He could only "envy the felicity" of the present generation who could now "see their subject as a whole" including "its broadest generalizations."[26] In *The Path of the Law*, he claimed that "[t]he most important improvements of the last twenty-five years are improvements in theory."[27] But there was still "too little theory in the law rather than too much."[28] He joked about a Vermont justice of the peace, so lost among particulars that he found in favor of a man accused of breaking a churn because he had looked through the statutes and found nothing about churns.[29] According to Holmes, "[t]he same state of mind is shown in all our common digests and text-books. Applications of rudimentary rules of contract or tort are tucked away under the heads of Railroads or Telegraphs. . . ."[30] Moreover, these rules were taken for granted without any effort to discern their purpose. "It is revolting," Holmes said, "to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[31] His program would change that.

His program was also an alternative to the conceptualism of continental writers. Before the 19th century, under the influence of rationalism, the jurists of the natural law school had begun to write as though law were like mathematics. Starting with axioms about man and morals, they tried to arrive at rules by formal proofs. An example was Christian Wolff.[32] In Germany, Kant and the jurists of the 19th century *Pandektenschule* thought this effort was hopeless. They broke with it in different ways. Kant asked what law a rational being would freely choose to obey. He thus arrived at the "categorical imperative": one must act only by those rules that one could will to be universal law. The *Pandektists*, as the leading school of German jurists was called, did not try to arrive at rules from universal concepts such as rationality or freedom. They did try to abstract general concepts from the Roman legal texts then in force in Germany, and to work out their implications.

Despite the differences, the late natural lawyers, Kant, and the *Pandektists* had one trait in common. They tried to understand rules in

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25. Oliver W. Holmes, Jr., *Introduction to the General Survey by European Authors in the Continental Legal Historical Series, in* COLLECTED LEGAL PAPERS 298, 301 (1920) [hereinafter *Introduction to the General Survey*].
26. *Id.* at 301-02.
27. Holmes, *supra* note 3, at 477.
28. *Id.* at 476.
29. *Id.* at 474-75.
30. *Id.* at 475.
31. *Id.* at 469.
32. *See* CHRISTIAN WOLFF, IUS NATURAE METHODO SCIENTIFICA PERTRACTATUM (1764).

terms of abstract concepts without asking what ends the rules serve. For example, Wolff proved that a promisee could demand performance of a promise by defining it in terms of the transfer of a right to require performance.[33] Kant argued that one could not will as a universal law that promises be broken since they would then be idle words.[34] The *Pandektists* assumed without argument that contracts were enforceable. They then defined contract in terms of the manifestation of the will of the parties, and tried to infer rules of contract law from this definition.[35] All of them reasoned not only from definitions, but from definitions that ignored the purposes of enforcing a contract.

Holmes again disapproved. In *The Path of the Law*, he criticized those who think "that the only force in the development of law is logic, . . . that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct."[36] He may have been thinking of the late natural lawyers, Kant, and the *Pandektists* all at once. In a later essay on Natural Law he seems to have had them all in mind.[37] He also may have been thinking of his former colleague at the Harvard Law School, Christopher Columbus Langdell.[38] In any event, as Matthias Reimann has pointed out, he made the kind of argument his contemporary Rudolph von Jhering was making in

33. *See id.* §§ 361-363.

34. *See* IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 45 (James W. Ellington trans., 3d ed. 1993).

35. *See* JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 162-63, 168-70, 190-98, 204, 209-12 (Tony Honoré & Joseph Raz eds., 1991).

36. Holmes, *supra* note 3, at 465.

37. *See* Oliver W. Holmes, Jr., *Natural Law*, *in* COLLECTED LEGAL PAPERS 310 (1920) [hereinafter *Natural Law*].

38. Nevertheless, I do not think Mathias Reimann is correct that the reason Holmes attacked the Germans was to attack Langdell covertly. *See* Mathias W. Reimann, *Holmes's* Common Law *and German Legal Science*, *in* THE LEGACY OF OLIVER WENDELL HOLMES, JR. 72, 106 (Robert W. Gordon ed., 1992). It is true, as Reimann points out, that Holmes thought that Langdell was also guilty of conceptualism, and that when he wrote *The Common Law*, he wanted an appointment at Harvard, and therefore had a reason to avoid a direct attack. But it does not follow that Holmes' attack on continental writers was a smoke-screen. In his day, the German Pandektists had developed the most rigorous and systematic approach to law in the world. As Reimann observes, Holmes learned German in the mid-1870s and read their works in the original. *Id.* at 80. He went on criticizing them long after he would have lost any fear of Langdell. As Reimann also notes, many of them were as guilty as Langdell, and, indeed, rather more guilty, of the conceptualism that Holmes disliked. *See id.* at 83-84, 109-10. As Reimann says, the fact that he attacked them without mentioning other Germans who were attacking them as well—such as the "Germanists" and Jhering—produced a distorted picture of German scholarship. *See id.* at 104-06. But that only shows that Holmes had unacknowledged allies, not a different adversary.

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Germany.[39] The ends that the law serves are "the very root and nerve of the whole proceeding."[40] Rules rest on a judgment of the "relative worth and importance" of these ends.[41] Such judgments are made differently in different times and places,[42] and, indeed, often raise "debatable and . . . burning questions."[43] One can only make sense of the law in terms of the purposes it serves.

Holmes' program, then, has two aspects. On the one hand, we need not "a ragbag of details,"[44] but the "highest generalizations,"[45] the "broadest rules,"[46] and more theory. On the other, we need careful attention to the purposes the law serves. In our century, these two aspects of Holmes' program have seemed antithetical. We contrast the formalism of Samuel Williston with the anti-formalism of Karl Llewellyn. We forget that both of them took inspiration from Holmes.

Scholars who study Holmes sometimes try to resolve the tension by disregarding one aspect of Holmes' program or the other. For Grant Gilmore, Holmes is simply a conceptualist like Langdell. "[His] accomplishment was to make Langdellianism intellectually respectable[,] . . . to construct a unitary theory which would explain all conceivable single instances and thus make it unnecessary to look with any particularity at what was actually going on in the real world."[47] If so, one wonders, why did Holmes quarrel with Langdell and conceptual jurisprudence?

Morton Horwitz thinks that Holmes' opinions changed. *The Common Law*, written in 1881, was "deeply rooted in formalism."[48] *The Path of the Law*, written in 1897, was "decisively antiformalist."[49] The *Path* meant "the collapse of his search for immanent rationality in customary law."[50] It "proclaimed the death knell of legal doctrine."[51] Horwitz observes that no one has previously noticed this contrast.[52] That in

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39. *See id.* at 101-03.
40. Holmes, *supra* note 3, at 466.
41. *Id.*
42. *Id.* at 466-67.
43. *Id.* at 468.
44. *See supra* note 25 and accompanying text.
45. *See supra* note 26 and accompanying text.
46. *See supra* note 7 and accompanying text.
47. GRANT GILMORE, THE AGES OF AMERICAN LAW 56 (1977).
48. Morton J. Horwitz, *The Place of Justice Holmes in American Legal Thought*, *in* THE LEGACY OF OLIVER WENDELL HOLMES, JR. 31, 68 (Robert W. Gordon ed., 1992).
49. *Id.*
50. *Id.* at 70.
51. *Id.* at 51.
52. *See id.* at 32.

itself is remarkable. Holmes was usually rather good at getting his point across.

Horwitz relies on the passages in which Holmes explains the implications of looking at the law in terms of purposes. When we do so, as Holmes says, history is only a starting point "toward an enlightened scepticism, that is, towards a deliberate reconsideration of the worth of . . . rules."[53] History gets the dragon from his cave, and then we either "kill him" or "tame him."[54] Horwitz concludes that "policy—the analytic—virtually obliterates history."[55] But couldn't not Holmes simply mean that we can discover the purposes of rules through history, and, knowing these purposes, we can either discredit a rule or reformulate it so it better serves its purposes? That is how Holmes used history in *The Common Law*. Similarly, Holmes points out that once we look at law in terms of purposes, we must recognize that legal questions cannot be "settled deductively, or once for all."[56] Legal solutions often will be trade-offs, and so we must "set the advantage we gain against the other advantage we lose."[57] According to Horwitz, "[t]he main message of 'The Path of the Law' is that there is no basis in reason for deciding which of two contradictory legal doctrines is correct."[58] But couldn't he simply mean that in law, unlike mathematics, there is rarely one right solution and there often are trade-offs? Holmes said that workers' compensation law reflects "a concealed, half conscious battle on the question of legislative policy."[59] According to Horwitz, Holmes thought "law is merely politics," that "law is merely a 'battleground' over which social interests clash."[60] But, again, Holmes didn't say that.

Horwitz's unstated minor premise is that once one understands the law in terms of purposes, one cannot believe there is "immanent

53. Holmes, *supra* note 3, at 469.
54. *See id.*
55. Horwitz, *supra* note 48, at 68.
56. *See* Holmes, *supra* note 3, at 467.
57. *Id.* at 474.
58. Horwitz, *supra* note 48, at 67.
59. Holmes, *supra* note 3, at 474.
60. Horwitz, *supra* note 48, at 70. Similarly, Holmes said that "for the rational study of law, the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics." Holmes, *supra* note 3, at 469. For Horwitz, this remark is the "death knell of legal doctrine." Horwitz, *supra* note 48, at 51. It doesn't simply mean that legal doctrine can be better illuminated by statistics and economics than by parsing the black letters. In *The Path of the Law*, Holmes distinguished law from morality as he had in *The Common Law*. But, according to Horwitz, the meaning "has dramatically changed" because Holmes mentions that "the logical method" satisfies "a longing for certainty and repose." Horwitz, *supra* note 48, at 68 (quoting Holmes, *supra* note 3, at 466). It is no wonder other scholars have missed the dramatic change. To see it one has to read so much between the lines.

rationality" in the case law. One can have no use for legal doctrine. One will see law as "merely politics," "merely a 'battleground' over which social interests clash."[61] I understand that some people associated with the Critical Legal Studies movement take that view. But one cannot assume that Holmes did. To do so, one has to ignore what he said about the importance of doctrine. In *The Path of the Law*, as we have seen, he said that "[e]very effort to reduce a case to a rule is an effort of jurisprudence,"[62] and that a "great lawyer" will see in a case "the application of the broadest rules."[63] He urged us to "follow the existing body of dogma into its highest generalizations by the help of jurisprudence."[64] He claimed that "[t]he most important improvements of the last twenty-five years are improvements in theory."[65] But there was still "too little theory in the law rather than too much."[66] That isn't a death knell. It is a call to arms. As Thomas Grey recognized, in *The Path of the Law*, Holmes restated his commitment to systematic doctrine in the strongest terms.[67]

Grey reconciled this commitment with Holmes' attack on conceptualism and his concern about purposes by saying Holmes wanted doctrine to be systematized for reasons that are "practical" and "heuristic."[68] Robert Gordon accepted this explanation: Holmes wanted system "for the sake of making the lawyer's task of finding and applying doctrine easier."[69] I don't believe it. Holmes said that a "great lawyer" will seek the "broadest rules."[70] To Holmes, greatness could not have meant devising useful classificatory systems to assist busy practitioners. When, as a young man, he found the law a "ragbag of details," he feared, not that time would be wasted, but that law would not be "worthy of the interest of an intelligent man."[71] In 1899, he said there was probably no "more exalted form of life than that of a great abstract thinker" who works "simply to feed the deepest hunger and to use the greatest gifts of his soul."[72] He had just finished praising the "generalizing principle"

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61. Horwitz, *supra* note 48, at 70.
62. Holmes, *supra* note 3, at 474.
63. *Id.*
64. *Id.* at 476.
65. *Id.* at 477.
66. *Id.* at 476.
67. *See* Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 817 (1989).
68. *See id.* at 823.
69. Robert W. Gordon, *Introduction: Holmes's Shadow*, *in* THE LEGACY OF OLIVER WENDELL HOLMES, JR. 1, 9 (Robert W. Gordon ed., 1992).
70. Holmes, *supra* note 3, at 474.
71. *Introduction to the General Survey*, *supra* note 25, at 301.
72. Oliver W. Holmes, Jr., *Law in Science and Science in Law*, *in* COLLECTED LEGAL

that had produced a law of torts where once there had been only a list of particular actions and "no one dreamed . . . that the different cases of liability were, or ought to be, governed by the same principles throughout."[73] He did suggest another reason the generalizing principle might prevail: "because of the ease of mind and comfort which it brings."[74] But he did not mention saving the practitioners' time.

We should recognize that, as Mathias Reimann observed, Holmes sought "the reformation of the common law through the search for its truly basic principles and their rational arrangement."[75] But he also wanted the principles to reflect the ends the law serves, and he wanted self-conscious reflection on those ends and why they are desired. That is what he said he wanted.

Nevertheless, it is understandable that so many scholars have had difficulty taking Holmes at his word. Holmes' program seems to be radically inconsistent with the features of his thought that Alschuler describes as "Holmesian positivism."[76] The program is not positivist. Actually, in basic outline, it is the program of the classical natural lawyers who wrote in the Aristotelian tradition before the rise of rationalism. I would like to describe that earlier program and the assumptions that lay behind it. As we will see, though their program was like that of Holmes, their underlying assumptions were not. If Holmes had shared these assumptions, he would have been in close agreement with Alschuler.

The natural law tradition that I will discuss began with the rebirth of interest in Aristotle in the late 12th and early 13th centuries and ended with the rise of rationalism in the 17th and 18th centuries. It could be illustrated by the work of Thomas Aquinas in the 13th century, Cajetan, Domenico Soto, or Richard Hooker in the 16th century, or Leonard Lessius, Hugo Grotius, or Jean Domat in the 17th century. For purposes of simplicity, and to avoid the problem of modern influences, I will use Aquinas as a paradigm example.

The hallmark of this pre-rationalist natural law tradition was that, like Holmes, the natural lawyers thought that law was a systematic body of principles corresponding to purposes. Each legal institution, like each organ of a body or each part of a machine, was defined in terms of its

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PAPERS 210, 224 (1920) [hereinafter *Law in Science and Science in Law*].

73. *Id.* at 223.

74. *Id.*

75. Reimann, *supra* note 38, at 111.

76. *See* Albert W. Alschuler, *The Descending Trail: Holmes'* Path of the Law *One Hundred Years Later*, 49 FLA. L. REV. 353, 355 (1997).

purpose. Their accounts of law looked less like mathematics and more like biology or engineering.[77]

They had taken this approach from Aristotle. He wanted to analyze almost everything the way one would a couch, discovering its purpose or what it does, and the contribution that each of its parts makes to this purpose.[78] In the 13th century, Aquinas began his commentary on Aristotle's *Nicomachean Ethics* by noting that there are two basic types of order: the order of part to whole, and the order of means to ends. The second, he said, is based on the first.[79] The parts of the couch such as the back, arms or legs each have a purpose which itself is a means to the ultimate end of the couch. That is why they count as parts. Each part has the structure it does so that, working in harmony with the other parts, it can serve this ultimate end. One can discover the purpose of each part and of the couch as a whole by examining how it is built. The purposes are implicit in the structure.

Like Holmes, then, the writers in the Aristotelian tradition wanted to understand law in terms of "the ends, which the several rules seek to accomplish [and] the reasons why these ends are desired."[80] Just because they agreed on this critical point, they would have agreed with much else that Holmes said because, quite often, Holmes was merely explaining the consequences of thinking about law in terms of purposes. They saw these consequences as well as he did.

For example, they would have agreed that the law cannot "be worked out like mathematics from some general axioms of conduct."[81] As Aquinas observed, law deals with practical matters that "are individual and contingent," and "therefore human laws cannot have that inerrancy that belongs to demonstrative science."[82] They would have agreed that sometimes, there is no single right legal solution. Given the ends to be sought, several courses of action can be equally sensible. The lawmaker simply has to choose.[83] They would have agreed that even a good solution might not be valid for all times and places. If new circumstanc-

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77. In describing their program, I will be summarizing points made at length in GORDLEY, *supra* note 35, at 10-23, 69-111. *See also* James Gordley, *Tort Law in the Aristotelian Tradition, in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW: A COLLECTION OF ESSAYS 131 (David Owen ed., 1995).

78. ARISTOTLE, PARTS OF ANIMALS I.i. 641ᵃ (T.E. Page et al. eds. & A.L. Peck trans., 1938).

79. THOMAS AQUINAS, COMMENTARY ON THE NICOMACHEAN ETHICS lib. 1, lec.1 (C.I. Litzinger trans., 1964).

80. Holmes, *supra* note 3, at 476.

81. *Id.* at 465.

82. THOMAS AQUINAS, SUMMA THEOLOGIAE I-II, Q. 91, a. 3 ad 3 (Thomas Gilby trans., 1966) [hereinafter SUMMA THEOLOGIAE].

83. *See id.* I-II, Q. 95, a. 2.

es arise, a rule might no longer serve its end.[84] As an example, Aquinas quoted Augustine: "If a people have a sense of moderation and responsibility, and are most careful guardians of the commonwealth, then it is a rightly enacted law for them to appoint their own magistrates for their public governance." But that law could be changed "if, as time goes on, they become so corrupt as to sell their votes and entrust the government to scoundrels and criminals."[85]

In Germany, after Rudolph von Jhering wrote a book entitled *Purpose in Law*, a reader cited to him passages in which Aquinas' approach resembled his own. Jhering was surprised. Aquinas, he said,

> already exactly understood the concrete, social and historical significance of the moral order. . . . I asked myself with astonishment how it was possible that such truths, after they had once been formulated, could have so completely fallen into disregard. . . . The fundamental ideas with which I have been so much preoccupied are expressed and formulated by this powerful thinker concisely and with complete clarity.[86]

We don't know what Holmes' reaction would have been. To agree with Jhering, he would have had to overcome his conviction that there was little to be learned from old books.[87] Yet it is not surprising to find these parallels. They are consequences of seeing the law in terms of principles that serve ends.

The natural lawyers, however, were considerably clearer than Holmes or Jhering about the underlying assumptions that made this approach to law viable. They believed that some purposes were ultimately more worthwhile than others, and, although human beings could be mistaken, they had the ability to see which ones were more worthwhile.

84. *See id.* I-II, Q. 97, a. 1.

85. *Id.* I-II, Q. 97, a. 1 (quoting AUGUSTINE, DE LIBERO ARBITRIO I.vi.).

86. 2 RUDOLPH VON JHERING, LAW AS A MEANS TO AN END 161 (Isaac Husick trans., 1921).

87. "[T]he greatest works of intellect soon lose all but their historic significance. The science of one generation is refuted or out-generalized by the science of the next; the philosophy of one century is taken up or transcended by the philosophy of a later one. . . ." Oliver W. Holmes, Jr., *Montesquieu*, *in* COLLECTED LEGAL PAPERS 250, 250 (1920). Similarly, when his friend Canon Sheehan suggested that he read the *Tractus de legibus* written in 1612 by Francisco Suarez, he answered: "You will not quite share my point of view, but I regard pretty much everything, and especially the greatest things, in the way of books, as dead in fifty, nowadays in twenty years." Letter of July 17, 1909, *in* HOLMES-SHEEHAN CORRESPONDENCE 27 (David H. Burton ed., 1976). I owe the reference to Patrick Brennan.

According to them, an end is worth pursuing because of the contribution it makes to an ultimate end that belongs to a person just because he is a human being.[88] Like the ultimate end of an animal or a machine, this end is the way a human being lives when all of his parts are working properly and in harmony with each other. It is a manner of life in which his human potential is most fully realized. Living this life constitutes goodness or happiness for a human being. In the *Ethics*, Aristotle described the different human virtues, including justice and prudence, as different powers that enable a person to live this distinctively human life.[89] In the *Politics*, he said that "the form of government is best in which every man, whoever he is, can act best and live happily."[90]

A person decides what will contribute to this ultimate end and what will obstruct it, not by deductive logic, but by a faculty which they called the virtue of prudence.[91] Through prudence, one decides what trade-offs to make when all one's ends cannot be achieved. As Aquinas said, "[A]ny prudent person will accept a small evil in order not to obstruct a great good."[92] Lawmaking requires "legislative prudence."[93]

Despite some musings about the ultimate end of law,[94] Holmes did not share these assumptions. Because the natural lawyers did, they would have agreed with much of Alschuler's critique of Holmesian positivism. They would have agreed with him about the relationship of law and morality. The two are not identical since law does not command every good act.[95] But law should help people toward their ultimate end of living a truly human life.[96]

They would have agreed with Alschuler that even good people need law.[97] Aquinas gave two reasons why they did. First, in certain matters,

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88. ARISTOTLE, NICOMACHEAN ETHICS I.vii. 1097^{b}-1098^{a}.

89. *See id.* at V.vii.

90. ARISTOTLE, POLITICS VII.i 1324^{a}.

91. ARISTOTLE, NICOMACHEAN ETHICS VI.v.; SUMMA THEOLOGIAE, *supra* note 82, at II-II, Q. 47, a. 4, obj. 1; Q. 49, a. 8; Q. 51, a. 8, ad. 1.

92. THOMAS AQUINAS, DE VERITATE Q. 5, a. 4, ad 4, *in* 9 THOMAS AQUINAS, OPERA OMNIA 5 (P. Fiaccadori ed., 1859).

93. SUMMA THEOLOGIAE, *supra* note 82, at II-II, Q. 50, a. 1 ad 3.

94. Holmes at one point suggested that the ultimate end of law might be "the survival of a certain type of man." Oliver W. Holmes, Jr., *Holdsworth's English Law*, *in* COLLECTED LEGAL PAPERS 285, 288-89 (1920) [hereinafter *Holdworth's English Law*]. Presumably, he meant that the law should not only enable such a man to survive, but to flourish. Even if it were so, he said, "we should have made very little way toward the founding of a scientific code" because we don't know what rules or procedures would be appropriate. *See id.* at 289.

95. SUMMA THEOLOGIAE, *supra* note 82, at I-II, Q. 96, a. 3.

96. *See id.* at I-II, Q. 92, a. 1.

97. *See* Alschuler, *supra* note 76, at 376-78.

the lawmakers might have a greater degree of prudence and hence a better idea of how one should act.[98] Second, even though different rules can be equally prudent, sometimes we all must follow the same rule in order to coordinate our actions. Law can specify a rule.[99] Alschuler suggests that even Mother Teresa might not stop at an intersection if the authorities had posted no stop sign there.[100] Aquinas' two reasons explain why she would stop if they had. Those who posted the sign might better understand the danger of the intersection, and the sign coordinates her driving with that of others who will expect her to stop.

If obedience to a good law helps a good person toward his end, so obedience to a bad law can thwart it. Aquinas therefore agreed with Alschuler that sometimes, a person should disobey.[101] In that sense, he would have agreed with Alschuler's inversion of Holmes' definition of law: it "consists of those societal settlements that a good person should regard as authoritative."[102] He also would have agreed that there is no neat formula to tell one when to disobey, and that the decision can be difficult. It requires prudence.

The natural lawyers also would have agreed that the boundaries the law sets to what people can do are based on a kind of reciprocity. Their conception of reciprocity, however, differed from that of Alschuler. In Alschuler's account, some people—saints—want nothing for themselves; others—bad men—want whatever they can get; and most of us are somewhere in the middle.[103] We will stay within the bounds the law sets, but we want to be assured that others are doing so as well. In contrast, in the Aristotelian account, those who want to lead a good life want what is truly best for themselves. Those who do not will hurt themselves. Part of living a genuinely human life is to help others to live one as well. Those who do not help others deprive themselves of that part which is intrinsically more valuable than an arm, let alone a new car. One can test the intuitive force of this proposition by asking which of two people one would choose to be: a vindictive or grasping person with both arms intact and a new car to drive, or someone who is kind and generous but carless and incapacitated.

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98. SUMMA THEOLOGIAE, *supra* note 82, at I-II, Q. 95, a. 1, ad 2; *id.* at Q. 95, a. 2.

99. *See id.* at I-II, Q. 95, a. 2.

100. Alschuler, *supra* note 76, at 377.

101. *See* SUMMA THEOLOGIAE, *supra* note 82, at I-II, Q. 96, a. 4; Alschuler, *supra* note 76, at 395.

102. *See* Alschuler, *supra* note 76, at 393. Aquinas' definition was that law is "a rule of reason for the common good made by him who has care of the community and promulgated." SUMMA THEOLOGIAE, *supra* note 82, at I-II, Q. 90, a. 4.

103. *See* Alschuler, *supra* note 76, at 378.

Aristotle and Aquinas recognized that people also need material resources to live a genuinely human life. Thus they spoke of distributive justice. For them, however, distributive justice was not a compact in which each person keeps his greed from overstepping certain bounds in return for a like promise by others. It was an attempt, insofar as possible, to give each person what he needs to live the sort of life he should.

They also spoke of commutative or corrective justice, which preserves the resources that belong to each citizen. Elsewhere, I have described how, beginning in the 16th century, the first systematic theory of contract and tort law was built by using the Aristotelian idea of commutative justice as a starting point for thinking about Roman law.[104] Many of their conclusions were adopted by Hugo Grotius and spread throughout Europe even by jurists who had rejected Aristotle and accepted rationalism, possibly because they did not yet see its full implications.

While the natural lawyers were clear about their assumptions, Holmes was not. Modern scholars have wondered where Holmes supposed that the purposes the law serves actually come from. As Jan Vetter observed, the question was critical and Holmes gave no satisfactory answer. "In the face of widespread if not general agreement that legal reasoning should, and could be supported in some way, he slipped into irrelevance on the subject."[105] As Thomas Grey says, "Holmes' predicament, then, was to be an instrumentalist without an adequate system of ends."[106]

Holmes said that the law serves "social end[s] which the governing power of the community has made up its mind that it wants."[107] That isn't very informative. It would be surprising if the law served ends that the governing power had decided it did not want. Moreover, if the law is to be extracted from the decided cases, then the ends of the "governing power" include those "inarticulate[ly] and unconscious[ly]"[108] expressed in hundreds of thousands of judicial decisions. Also, Holmes seemed to count any end he could find in the case law as "social" just because it was there. For example, he traced the rules governing possession back to an instinct by which a "thing which you have enjoyed and used as your own for a long time . . . takes root in your

104. *See* GORDLEY, *supra* note 35, at 69-111.

105. Jan Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CALIF. L. REV. 343, 348-49 (1984).

106. Grey, *supra* note 67, at 850.

107. *Law in Science and Science in Law*, *supra* note 72, at 225.

108. Holmes, *supra* note 3, at 466.

being and cannot be torn away without your resenting the act and trying to defend yourself."[109] A social end could be rather unsocial. Why, however, are some ends to be pursued rather than others?

Holmes sometimes sounded as if he thought that it does not matter which ends are pursued as long as the governing power wants them. He who has power has his own ends reflected in the law whatever they may be. Thrasymachus told Socrates that justice is the right of the stronger. Grant Gilmore thought that Holmes agreed. He quotes *The Common Law*: "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."[110] Some scholars such as Jan Vetter and Robert Gordon think that Holmes spoke this way because he bought into Social Darwinism.[111] They quote a passage from an unsigned essay he wrote in 1873 essay on "The Gas-Stoker's Strike":

> The struggle for life . . . does not stop in the ascending scale with the monkeys, but is equally the law of human existence. . . . The more powerful interests must be more or less reflected in legislation; which, like every other device of man or beast, must tend in the long run to aid the survival of the fittest.[112]

But granted that Holmes thought that law serves the purposes of the dominant group, it doesn't follow that he thought that law was merely a tool to keep this group in power. In *The Common Law*, the law is usually protecting people in general against, for example, criminals or the hasty and awkward. As Vetter notes, the "supreme power" whose desires the law reflected seems to be merely "the ordinary prudent and intelligent person."[113] Though he lived in a period of intense class struggle, Holmes thought capitalism benefitted workers. The amount that capitalists consumed was a small price to pay for interesting them in the efficient management of their enterprises.[114] Moreover, granted that Holmes thought the law responds to "the actual feelings and demands

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109. *Id.* at 477.

110. GILMORE, *supra* note 47, at 49.

111. *See* Vetter, *supra* note 105, at 362-67; Gordon, *supra* note 8, at 740; J.W. Burrow, *Holmes in His Intellectual Milieu*, *in* THE LEGACY OF OLIVER WENDELL HOLMES, JR. 17, 28-29 (Robert W. Gordon ed., 1992).

112. *See* Vetter, *supra* note 105, at 365; Gordon, *supra* note 8, at 739-40 (quoting Oliver W. Holmes, Jr., *Summary of Events: The Gas-Stoker's Strike*, 7 AM. L. REV. 582, 583 (1873) (unsigned essay, *reprinted at* 44 HARV. L. REV. 795 (1931)).

113. Vetter, *supra* note 105, at 366.

114. *See* Oliver W. Holmes, Jr., *Economic Elements*, *in* COLLECTED LEGAL PAPERS 279, 279-80 (1920).

of the community right or wrong," it doesn't follow that Holmes thought right and wrong merely meant the feelings or demands of the community. The "final and most important question in the law," he said, is whether the ideals and beliefs upon which it is based have "worth in a more far-reaching sense than that of expressing the *de facto* will of the community for the time."[115] If Holmes had really thought that the law was merely the instrument of greed, or of beliefs and ideals ultimately incompatible with his own, he would not have described law as one of the "vastest products of the human mind."[116] Nor would he have devoted his life to it.

Some scholars think he was a utilitarian. They note correctly that Holmes was concerned with policy and with the effects of rules on society. They then leap too readily to the conclusion that he conceived of these effects as a utilitarian would.[117] Once, Holmes said that the worth of an end depended upon the "intensity" of the "desires" for it which vary "with the varying ideals of the time."[118] He thought that we "only occasionally can reach an absolutely final and quantitative determination" of the worth of an end.[119] But that doesn't mean he thought an end was worthwhile only because it satisfied people's desires. Moreover, he rejected the idea that the law should serve the greatest good of the greatest number, whether arrived at by a utilitarian calculus of the intensity of individual desires, or in any other way. "Why should the greatest number be preferred? Why not the greatest good of the most intelligent and most highly developed? The greatest good of a minority of our generation may be the greatest good of the greatest number in the long run."[120] I can imagine him making similar remarks if Richard Posner were to tell him that the law is supposed to maximize the satisfaction of individual preferences backed by cash.

Some scholars such as Thomas Grey have thought that Holmes was a pragmatist in the philosophical sense of the term. It is true that, in his youth, Holmes belonged to the Metaphysical Club along with such

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115. *Holdworth's English Law, supra* note 94, at 288.

116. Holmes, *supra* note 3, at 473.

117. H.L. POHLMAN, JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE 12 (1984); Patrick J. Kelley, *Oliver Wendell Holmes, Utilitarian Jurisprudence, and Positivism of John Stuart Mill*, 30 AM. J. OF JURISPRUDENCE 189, 205 (1985); Patrick J. Kelley, *A Critical Analysis of Holmes's Theory of Torts*, 61 WASH. U. L.Q. 681, 704 (1983). Similarly, to prove Holmes was a utilitarian, Kelley shows that Holmes held other beliefs shared by utilitarians and non-utilitarians alike: for example, that the law gives people incentives to avoid certain actions, and that people should be able to know what the law is, which Kelley calls "essential utilitarian commitments." Kelley, *Utilitarian Jurisprudence, supra*, at 208.

118. *Law in Science and Science in Law, supra* note 72, at 231.

119. *Id.*

120. Holmes, *supra* note 112, at 584.

founders of American Pragmatism as William James and Charles Pierce, and that in his old age, he read Dewey's book, *Experience and Nature*, and said that its "view of the universe came home to me closer than any other that I know."[121] Grey claims that Holmes, like the pragmatists, pulled together two ideas: that law is contextual, "rooted in custom and shared expectations," and that it is a means for achieving social ends.[122]

As we have seen, however, for Holmes, an end seems to have counted as "social" simply because the law pursued it. Moreover, the fact that Holmes thought that rules could be extracted from case law does not mean that he had a pragmatist theory of knowledge. If it did, all American jurists today would be pragmatists in the philosophical sense. So would many Europeans. Moreover, Holmes called William James' philosophy "humbug."[123] He said of James (and Bergson): "I certainly can't bring my mind to believe that either of them has advanced speculation very much except perhaps as an extreme protest against Hegel's attempt to make a syllogism wag its tail, or, more plainly, to get life out of logic chopping."[124] And, indeed, his vision of theory was not that of a pragmatist. As we have seen, he praised the "exalted life" of "a great abstract thinker" who works "simply to feed the deepest hunger and to use the greatest gifts of his soul."[125] He called for "the broadest generalizations" and for "more theory."[126] That doesn't sit well with Grey's characterization of a pragmatist. As Grey notes: "The payoff of pragmatist philosophy is . . . more often in the critique than in the construction."[127] "Pragmatism rejects the maxim that you can only beat a theory with a better theory."[128] The helpful theories will not be "elegant" but "messy, complex, and unlovely."[129] It is hard to imagine Holmes' thinking that such a theory fed the deepest hunger of his soul.

We have to remember that Holmes was a jurist and not a philosopher. He spent his life solving legal problems, and he did so from the

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121. Letter of July 26, 1930, *in* 2 HOLMES-POLLOCK LETTERS 272 (Mark D. Howe ed., 1941).

122. Grey, *supra* note 67, at 805.

123. Letter of June 17, 1908, *in* 1 HOLMES-POLLOCK LETTERS, *supra* note 121, at 139. Grey has collected a number of such passages. Grey, *supra* note 67, at 866-88.

124. Letter of April 16, 1913, *in* HOLMES-SHEEHAN CORRESPONDENCE, *supra* note 87, at 63 (adding "this without prejudice to W. James's psychology").

125. *Law in Science and Science in Law*, *supra* note 72, at 224.

126. *See supra* notes 26 & 28 and accompanying text.

127. Grey, *supra* note 67, at 814.

128. *Id.*

129. *Id.* at 815.

ground up, mining the case law for hints of what might be important, rather than starting with an idea of what was ultimately important and working downward. That doesn't make him a pragmatist. But it means that as long as he found the ideals of the law in rough correspondence with his own, he could do his job without answering questions about what was ultimately important.

Was he skeptical about whether anything was ultimately important? As we have seen, he thought that "the final and most important question in the law" was whether the beliefs and ideals on which the law rests have "worth in a more far-reaching sense than that of expressing the *de facto* will of the community for the time."[130] Yet he said, "When I say that a thing is true, I mean that I cannot help believing it. . . . I therefore define the truth as the system of my limitations. . . ."[131] He made the same statement when asked by his friend Canon Patrick Sheehan whether he believed in "objective truth."[132] He made a similar statement to his friend Sir Frederick Pollock to explain why he disagreed with William James.[133] It sounds as though he is saying: "I believe what I believe with conviction and passion, but I am uncertain whether anything I believe is really true."

It is a short step from there to mysticism. This unfathomable universe has somehow conjured up people who must and should believe in ideals, and yet, of the universe itself and of the truth of their beliefs nothing can be said. I think Holmes did believe something like that. It is what he seems to be saying in his essay *Natural Law* and elsewhere.[134] I think it explains the last words of *The Path of the Law*:

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130. *Holdworth's English Law, supra* note 94, at 288.

131. Oliver W. Holmes, Jr., *Ideals and Doubts, in* COLLECTED LEGAL PAPERS 303, 304-05 (1920).

132. *See* Letter of August 14, 1911, *in* HOLMES-SHEEHAN CORRESPONDENCE, *supra* note 87, at 42-44.

133. Letter of June 17, 1908, *supra* note 123, at 139.

134. For example:

> Now when we come to our attitude toward the universe I do not see any rational ground for demanding the superlative—for being dissatisfied unless we are assured that our truth is cosmic truth, if there is such a thing—that the ultimates of a little creature on this little earth are the last word of the unimaginable whole.

Natural Law, supra note 37, at 314-15. "[T]he part can not swallow the whole . . . our categories are not, or may not be, adequate to formulate what we cannot know." *Id.* at 315. Similarly, he wrote to Sheehan: "I look at a man as a cosmic [insignificance], having neither merit nor demerit except from a human and social point of view, working to some unknown end or no end, outside himself and having sufficient reasons, easily stated, for doing his best." Letter of April 1, 1911, in HOLMES-SHEEHAN CORRESPONDENCE, *supra* note 87, at 41. And similarly:

Gordley: When Paths Diverge: A Response to Albert Alschuler on Oliver Wend

> An intellect great enough to win the prize needs other food besides success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.[135]

If Holmes had believed that the human mind could grasp this universal law and its connection to human law, he would have been a natural lawyer. Instead, his universal law seems to have been "infinite," "unfathomable," something of which we can say nothing definite but of which we catch glimpses, hints, and echoes in the law we study. As Burrow observed, these words remind one of Holmes' description, written years before, of his thoughts as he lay wounded after the Battle of Ball's Bluff thinking he might die.[136] He wondered whether his soul

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> I don't even speak of purposes or designs which for all I know are inadequate to the foundation of all, but I am content to believe that probably I do not see the ultimate significance of things (to speak in human terms) and to crack at it, without inquiring too curiously what if any that ultimate significance may be.

Id. at 50 (Letter of Oct. 18, 1912).

> I do not know whether our ultimates such as good and bad, ideals, for the matter of that, consciousness, are cosmic ultimates or not. They seem to me to bear marks of the human and the finite. All that I know is that they are ultimates for us.

Letter to Dr. John Wu, July 26, 1923, *in* OLIVER WENDELL HOLMES, JR., SOME UNPUBLISHED LETTERS OF JUSTICE HOLMES 263 (Reprinted from the T'ien Hsia Monthly 1935).

135. Holmes, *supra* note 3, at 478.

136. *See* Burrow, *supra* note 111, at 24. Burrow also speaks of Holmes' "mysticism." *See id.* He also notes the resemblance to Emerson. *See id.* (quoting Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 853 (1989)). They seem to share a "conception of a wisdom in nature's evolutionary processes, even when they appear to be most ruthless in eliminating the unfit." *Id.* A personal acquaintance with Emerson made a strong impression on Holmes when he was young. *See* MICHAEL H. HOFFHEIMER, JUSTICE HOLMES AND THE NATURAL LAW 31-36 (1992). A few years before his death, spoke of him as "the only firebrand of my youth that burns to me as brightly as ever. . . ." Letter of May 20, 1930, *in* 2 HOLMES-POLLOCK LETTERS, *supra* note 121, at 264. And Emerson sometimes spoke of his "Over-Soul" as "the Highest Law" or "absolute law." *The Over-Soul*, *in* 1 THE WORKS OF RALPH WALDO EMERSON 171, 182 (Tudor Pub. Co, N.Y.). But there the resemblance ends. Emerson thought he was enlightened by the Over-Soul. *See id.* at 181 ("For this communication is an influx of the Divine mind into our mind."). He thought that many people were similarly enlightened and were therefore in some sense right whatever the contradictions in what they said. *Id.* (The Over-Soul was there in "[t]he trances of Socrates, the "union" of Plotinus, the vision of Porphyry, the conversion of Paul, the aurora of Behmen, the convulsions of George Fox and his Quakers, the

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was in jeopardy because he did not believe in God. He decided that a last minute conversion would be an act of cowardice and that, in any case, he was incapable of one.

> 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—(I can now add that our phrase *good* only means certain general truths seen through the heart & will instead of being merely contemplated intellectually—I doubt if the intellect accepts or recognizes that classification of good and bad).[137]

If he died, Holmes thought, his death was for the best because it was in accord with an unfathomable general law. If the unfathomable could do that, then the unfathomable could make the life of an "abstract thinker" to be the "deepest hunger of his soul" and yet set him to discover truths that were merely self-limitations and to think thoughts that, at best, were echoes of the ultimately real and utterly unknowable. He must have felt like a soldier who can see his own mission but has no idea why it has been assigned him or how it is related to the larger course of the war or even what the war is all about.[138] And, indeed, in his Memorial Day speech of 1895, he said:

> But who of us could endure a world . . . without the divine folly of honor, without the senseless passion for knowledge outreaching the flaming bounds of the possible, without

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illuminations of Swedenborg. . . .) Consequently, he was less worried about the ultimate truth of what he believed. *See id.* at 180 ("We know truth when we see it, let sceptic and scoffer say what they choose.") Holmes mysticism was of a different sort. Holmes did not think that the universe or universal law enlightened him. If he could, finally, hear an echo, it was because of hard application of his natural faculties. Despite the problems that I think he had with the law of non-contradiction, he still regarded his conclusions, at least in human terms, as bets which he might lose. If his horse lost, he would not have told his bookie that in some transcendental sense, all the horses had really won. And his belief that the ultimate was truly unknowable worried him.

137. *Holmes' Diary, supra* note 1, at 28.

138. He uses that metaphor in his essay on "Natural Law":

> That the universe has in it more than we understand, that the private soldiers have not been told the plan of campaign, or even that there is one, rather than some vaster unthinkable to which every predicate is an impertinence, has no bearing upon our conduct. We still shall fight . . . .

Natural Law, supra note 37, at 315-16.

> ideals the essence of which is that they never can be achieved. I do not know what is true. I do not know the meaning of the universe. But . . . there is one thing that I do not doubt . . . and that is that the faith is true and adorable that leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the use.[139]

That statement has made some people wonder if Holmes was a mature and self-directed individual.[140] I can't think why. It is just the way a person would see his situation if he thought the point of his life was to pursue goodness and truth in a world in which whatever is ultimately good or true is unknowable.

My objection is that Holmes is violating the most universal law that governs human thought: the law of non-contradiction. Suppose our beliefs contradict. Suppose that neither of us can help believing as we do. If truth is whatever we cannot help believing, then I must acknowledge that your belief is true even though I believe it to be false. Or suppose I could not help believing one thing yesterday, but now, after rethinking the matter or finding some new evidence, I cannot help believing something different. If truth is whatever I cannot help believing, then both beliefs are true. How curious that I changed my mind.

If Holmes had agreed with me on that point, he might have asked himself whether the purposes the law serves are genuinely worthwhile. He couldn't answer that they are worthwhile although no one can know whether they really are, or that they are although worthwhile means only Holmes' idea of the worthwhile. If he answered yes, some purposes really are worthwhile, then presumably he would have agreed that although human beings can be mistaken, they have an ability to see what these purposes are. Those, as we have seen, were the assumptions of the classical natural lawyers. And as we have seen, on those assumptions, Holmes' program makes sense, but his view of the relationship of law and morality does not. Alschuler is right. It does not make sense to look at the law as a bad man would. We should look at it like good people who respect the law if and to the extent that the purposes it serves are good.

But we can ask a similar question of Alschuler. Is a good person genuinely good? If we hold Alschuler to the same rules as Holmes, he

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139. Oliver W. Holmes, *The Soldier's Faith*, *in* SPEECHES BY OLIVER WENDELL HOLMES 56, 59 (Boston, 1913).

140. Reimann, *supra* note 38, at 75 n.11.

cannot answer that a good person is good although ultimately he may not be any better than anyone else, or that good means only Alschuler's idea of the good.

If he answered no, a good person is not really good, then it is hard to see why he defines law as the societal settlements that a good person should regard as authoritative. If he answered yes, then he might take us within hailing distance of the classical natural lawyers. If we agree with him, we may find it hard to think about a good person without thinking about a good life and what contributes to it. That is close to speaking of an end to human life to which one's activities should contribute. We might then think that we have some ability, other than a capacity for deductive logic, to see what a good life entails. For want of a better word, we might call that ability "prudence." At any rate, we will have entered a different intellectual world, one in which "Shall we discuss the nature of virtue?" is an invitation to a dialogue rather than a conversation stopper.