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A number of fortuitous circumstances made William Blackstone the principal teacher of law to American lawyers of the revolutionary generation and the early republic.[1] Daniel Boorstin said of Blackstone's *Commentaries*, "In the history of American institutions, no other book—except the Bible—has played so great a role."[2] Yet Blackstone's jurisprudence is widely regarded today as ponderous, formal, conceptual, deductive, mechanistic, naïve, and hopelessly unrealistic. A revolt against formalism led by Oliver Wendell Holmes is said to have given us a better, more flexible, more adaptive concept of law.

Liva Baker, one of Holmes's biographers, voiced the conventional understanding:

> American legal scholarship. . . was ripe for the kind of corrective surgery Holmes was about to perform. The traditions of the natural law—the law of nature transmitted by divine will—as explicated by Blackstone. . . its roots running deep into the soil of ancient Greece and Rome, had outlived its usefulness. Its immutable principles comforted. Its abstract and logical nature satisfied. Its simplicity, certainty, and reasonableness continued to be appealing. But its inertia kept it from dealing with the disorder and changefulness and

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1. *See* Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 4–19 (1996).

2. DANIEL J. BOORSTIN, *Preface* to THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S *COMMENTARIES* SHOWING HOW BLACKSTONE, EMPLOYING EIGHTEENTH-CENTURY IDEAS OF SCIENCE, RELIGION, HISTORY, AESTHETICS, AND PHILOSOPHY, MADE OF THE LAW AT ONCE A CONSERVATIVE AND A MYSTERIOUS SCIENCE (Beacon 1958). Boorstin commented, "In the first century of American independence, the *Commentaries* were not merely an approach to the study of law; for most lawyers they constituted all there was of the law." *Id.* at 3.

> all the other complexities of nineteenth-century life. The traditionalists "discovered" law which was deduced from the unchanging nature of things. . . . That the law's development might have been progressive was not generally recognized.[3]

A few pages later, Baker offered this serenade to Holmes's achievement:

> [Holmes] had broken new intellectual trails, using history to guide him. He had given the law a vitality it never before had possessed. He had wrested legal history from the aridity of syllogism and abstraction and placed it in the context of human experience, demonstrating that the corpus of the law was neither ukase from God nor derived from Nature, but. . . a constantly evolving thing, a response to the continually developing social and economic environment.[4]

The goal of this brief article is to persuade you that this conventional wisdom is backwards—or, to put the matter less delicately, that the twentieth century and the twenty-first century so far have been a mistake.

I begin with Blackstone's concept of natural law. He wrote in the age of Newton and compared the laws governing human conduct to the laws of motion:

> [A]s God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature. . . and gave him also the faculty of reason to discover the purport of those laws. . . .
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> . . . These are the eternal, immutable laws of good and evil. . . . Such among others are these principles: that we should live honestly, should hurt nobody, and should render to every one his due; to which three general precepts Justinian has reduced the whole doctrine of law.[5]

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3. LIVA BAKER, THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES 249 (1991).

4. *Id.* at 258.

5. WILLIAM BLACKSTONE, 1 COMMENTARIES *39–40.

Since at least the thirteenth century, people have complained that the term natural law has too many meanings.[6] The term sometimes is used to refer to the objectivism about morality associated with most religious faiths. Natural law comes from God; it comes from the top down. A second meaning treats moral truths as truths about human nature. Natural law proceeds from the bottom up. Rather than choose between these uses, Blackstone endorsed both. He maintained that the study of God and the study of human nature led to the same understanding.

Natural law came from God, and God, "a being of infinite power," might "have prescribed [for humanity] whatever laws he pleased," however "unjust or severe."[7] As "a being of infinite wisdom," however, God had "inseparably interwoven the laws of eternal justice with the happiness of each individual."[8] Happiness could be attained only by observing the law of nature, and obedience to this law could not fail to produce human happiness.[9] You can discover natural law by reading your Bible,[10] but you can also figure it out by asking whether an action tends to man's real happiness or is destructive of man's real happiness.[11]

Did this mean that judges could deduce answers to all or most legal questions from natural law? No one has ever said that they could, and Blackstone was emphatic on the point. Most positive law concerned the "great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits."[12] As Blackstone

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6. *See* DOM ODON LOTTIN, LE DROIT NATUREL CHEZ SAINT THOMAS D'AQUIN ET SES PRÉDÉCESSEURS 23 (2d ed. 1931) (quoting JEAN LE TEUTONIQUE, GLOSSA ORDINARIA D.I.c.7 (1215)).

7. 1 BLACKSTONE, *supra* note 5, at *40 (emphasis omitted).

8. *Id.* (emphasis omitted).

9. *Id.*

10. Blackstone observed that if human reason were always clear and perfect, the criterion of "real happiness" would be a sufficient guide to the laws of nature. *Id.* at *41. "[I]n compassion to the frailty, the imperfection, and the blindness of human reason," however, providence had supplemented reason with "an immediate and direct revelation" of divine law in scripture. *Id.* at *41–42.

11. Emphasizing the close "connection of justice and human felicity," Blackstone declared that the

> [Creator] has not perplexed the law of nature with a multitude of abstracted rules and precepts . . . as some have vainly surmised; but has graciously reduced the rule of obedience to this one paternal precept, "that man should pursue his own happiness." This is the foundation of what we call ethics, or natural law.

Id. at *40–41.

12. *Id.* at *42.

observed, God was not concerned with whether English law forbade or permitted the export of wool.[13] Blackstone wrote that "things in themselves indifferent... become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life."[14]

Here is an illustration of the limited scope that Blackstone accorded natural law:

> [O]ur own common law has declared, that the goods of the wife do instantly upon marriage become the property and right of the husband... yet that right... ha[s] no foundation in nature; but [is] merely created by the law, for the purposes of civil society.[15]

Defenders of patriarchal institutions are likely to see them as grounded on fundamental differences between the sexes,[16] but Blackstone declined to characterize a husband's power over his wife's goods as anything more than a convenient, pragmatic, alterable legal arrangement—an arrangement having "no foundation in nature."[17]

Similarly, Blackstone wrote that people might "conceive at first view" that the natural right to property included a right to inherited property.[18] He insisted, however, that all inheritance rules were "creatures of the civil or municipal laws."[19] Laws allowing bequests of property might be "wise and effectual," but there was "certainly... no injustice done to individuals, whatever be the path of descent marked out by the municipal law."[20] Blackstone noted the tendency to "mistake for nature what we find established by long and inveterate custom."[21]

If you cannot deduce answers to difficult legal questions from natural law, what good is it? Rather than deduce things from natural law, you can *obey* it. When lawgivers do obey it, the laws they issue can foster a sense of security, mutual concern, and reciprocity. These laws can promote the real

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13. *Id.* at *43.
14. *Id.* at *55.
15. *Id.*
16. *See, e.g., In re* Goodell, 39 Wis. 232, 245 (1875) (declaring that admitting women to the bar would be not only a "[departure] from the order of nature" but "treason against it").
17. 1 BLACKSTONE, *supra* note 5, at *55.
18. 2 BLACKSTONE, *supra* note 5, at *11.
19. *Id.* at *12.
20. *Id.* at *211.
21. *Id.* at *11.

happiness of humankind. Blackstone claimed no greater role for natural law than that.

The claim that Blackstone saw law as static and unchanging—something that judges found and never made—is a calumny. Blackstone wrote that "the Romans, the Picts, the Saxons, the Danes, and the Normans" had all contributed to the development of the English common law, "thereby in all probability improving the texture and wisdom of the whole by the accumulated wisdom of diverse particular countries."[22] He titled his final chapter, "Of the Rise, Progress, and Gradual Improvements, of the Laws of England."[23] He complained that the defects of English law were often attributable to "too scrupulous an adherence to some rules of the antient common law, when the reasons have ceased upon which those rules were founded."[24] He urged many law reforms—including the creation of a system for recording wills and deeds,[25] expansion of the right to counsel,[26] restriction of the death penalty,[27] abolition of the doctrine that the bloodline of a felon is corrupted,[28] and the reform of England's game laws,[29] inheritance laws,[30] and poor laws.[31]

Oliver Wendell Holmes added nothing new to law when he proclaimed, "The life of the law has not been logic: it has been experience."[32] Blackstone and writers before him[33] certainly understood that changing human experience shaped law. Moreover, the evolutionary character of law was a point of pride for Americans from the beginning. The words of John Dickinson to the Constitutional Convention of 1787 look like a paraphrase of Holmes, but they anticipated Holmes by a century: "Experience must be our only guide. Reason may mislead us."[34] James Madison similarly

22. 1 BLACKSTONE, *supra* note 5, at *64.

23. 4 BLACKSTONE, *supra* note 5, at *400–43.

24. *Id.* at *3.

25. *Id.* at *342–43.

26. *Id.* at *355–56.

27. *Id.* at *17–19.

28. 2 BLACKSTONE, *supra* note 5, at *256.

29. 4 BLACKSTONE, *supra* note 5, at *16.

30. 2 BLACKSTONE, *supra* note 5, at *233.

31. 1 BLACKSTONE, *supra* note 5, at *365.

32. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (Dover 1991) (1881).

33. *See, e.g.*, MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 39 (Charles Gray ed., 1971) (declaring a century before Blackstone that laws are "accommodated to the Conditions, Exigencies and Conveniences of the People . . . as those Exigencies and Conveniences do insensibly grow upon the People").

34. 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 278 (rev. ed. 1966) (1911). Dickinson added:

anticipated Holmes when he wrote in the *Federalist Papers*: "Is it not the glory of the people of America, that... they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?"[35]

> The Pennsylvania Supreme Court explained in 1813:
> When our ancestors emigrated from England, they took with them such of the English principles as were convenient for the situation in which they were about to place themselves. It required time and experience to ascertain how much of the English law would be suitable to this country. By degrees, as circumstances demanded, we adopted the English usages, or substituted others better suited to our wants, till at length, before the time of the revolution, we had formed a system of our own . . . .[36]

There could be no clearer statement that judges make law as well as find it and that they take account of changing human circumstances and needs.

St. George Tucker offered a memorable evolutionary metaphor in his 1803 American edition of Blackstone's *Commentaries*.[37] He wrote that a community's law might begin as a seedling oak, advance with civilization, and put forth "innumerable branches till it covers the earth with an extensive shade."[38] Every year might be "the parent of new branches or the destroyer of old ones."[39] Nevertheless:

> [A] superficial observation of [the] exterior... [will not] suffice; the roots may be decayed, the trunk hollow, and the monarch of the forest ready to fall with its own rottenness and weight, at the

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> It was not Reason that discovered the singular & admirable mechanism of the English Constitution. It was not Reason that discovered or ever could have discovered the odd & in the eye of those who are governed by reason, the absurd mode of trial by Jury. Accidents probably produced these discoveries, and experience has given a sanction to them.

Id.; *see also* Barwell v. Brooks, 99 Eng. Rep. 702, 703 (K.B. 1784) ("As the usages of society alter, the law must adapt itself to the various situations of mankind.").

35. THE FEDERALIST NO. 14, at 72 (James Madison) (Michael Lloyd Chadwick ed., 1987).

36. Guardians of the Poor v. Greene, 5 Binney 554 (Pa. 1813).

37. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA (St. George Tucker ed., The Lawbook Exchange, Ltd. 1996) (1803).

38. *Id.* at xv.

39. *Id.*

> moment that its enormous bulk, extensive branches, and luxuriant foliage would seem to promise a millennial duration.[40]

Tucker recognized the need for constant growth, constant pruning, and occasional uprooting in a forest of evolving law.

Oliver Wendell Holmes offered nothing new when he noted the adaptive nature of law. The jurisprudential revolution that his generation accomplished was swift and thorough, but it did not consist of recognizing that law can respond to what Holmes called "the felt necessities of the times."[41] It consisted of saying that there was no *more* to law than that. The felt necessities of the times were all there was. The achievements of the Holmesian revolution were negative. Holmes and his contemporaries did not bring something bold, new, and sexy to law. They took something away—the idea that, even as law adapts to changing circumstances, it can adhere at its core to immutable principles of justice.[42] The jurisprudential revolution of the late nineteenth century was not a revolt against formalism. It was a revolt against natural law.[43]

Holmes and his supposed nemesis Christopher Columbus Langdell agreed far more than they differed,[44] and what Robert Gordon wrote of Langdell and his followers was equally true of Holmes:

> [They] agreed that [legal] science should be a positive science based on observable facts. . . . [T]his commitment expressed an attitude—a "masculine" readiness to look brute reality unblinkingly in the face, to throw off the crutches of religion, moral sentiment, and the stale formulae of conventional professional wisdom, and to embark upon the strenuous, tough-minded, intellectual path.[45]

Holmes made no bones about it. "I take no stock in abstract rights," he said, and "equally fail to respect the passion for equality."[46] He wrote to one

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40. *Id.*

41. HOLMES, *supra* note 32, at 1.

42. *See, e.g.*, ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE OLIVER HOLMES 1 (2000).

43. *See id.*

44. *See id.* at 86–90, 97–100.

45. Robert W. Gordon, *Legal Education and Practice: The Case for (and Against) Harvard*, 93 MICH. L. REV. 1231, 1240 (1995).

46. Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Aug. 1, 1925), *in* 1 HOLMES–LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916–1935, at 769 (Mark DeWolfe Howe ed., 1953) [hereinafter HOLMES–LASKI LETTERS]. Holmes also observed

of his correspondents, "You respect the rights of man—I don't, except those things a given crowd will fight for."[47] On another occasion, he observed, "All my life I have sneered at the natural rights of man."[48]

While a Justice of the Supreme Court, Holmes wrote an article on natural law in the *Harvard Law Review*.[49] Asserting that a right was natural or innate, he said, was like insisting that one's lady was the fairest, rather than simply a very nice girl.[50] A right, in Holmes's view, was "only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it."[51] Holmes earlier had observed, "[A]ll law means I will kill you if necessary to make you conform to my requirements."[52]
Holmes's dismissal of natural law reflected his deep skepticism about most things:

> [M]y bet is that we have not the kind of cosmic importance that the parsons and philosophers teach. I doubt if a shudder would go through the spheres if the whole ant heap were kerosened.[53]
>
> I see no reason for attributing to a man a significance different in kind from that which belongs to a baboon or to a grain of sand.[54]
>
> I wonder if cosmically an idea is any more important than the bowels.[55]
>
> I think that the sacredness of human life is a purely municipal ideal of no validity outside the jurisdiction. I believe that force,

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that "the passion for equality . . . seems to me merely idealizing envy." Letter from Oliver Wendell Holmes, Jr. to Harold Laski (May 12, 1927), *in* 2 HOLMES–LASKI LETTERS, *supra*, at 942.

47. Letter from Oliver Wendell Holmes, Jr. to Harold Laski (June 1, 1927), *in* 2 HOLMES–LASKI LETTERS, *supra* note 46, at 948.

48. Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Sept. 15, 1916), *in* 1 HOLMES–LASKI LETTERS, *supra* note 46, at 21.

49. Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40 (1918).

50. *Id.*

51. *Id.* at 42.

52. Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Sept. 7, 1916), *in* 1 HOLMES–LASKI LETTERS, *supra* note 46, at 16.

53. Letter from Oliver Wendell Holmes, Jr. to Lewis Einstein (Aug. 19, 1909), *Introduction* to RICHARD A. POSNER, THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. xxv–xxvi (Richard A. Posner ed., 1992).

54. Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock (Aug. 30, 1929), *in* 2 THE HOLMES–POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874–1932, at 252 (Mark DeWolfe Howe ed.) (Harvard Univ. Press, 1941) [hereinafter HOLMES–POLLOCK LETTERS]; *see also* Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Jan. 11, 1929), *in* 2 HOLMES–LASKI LETTERS, *supra* note 46, at 1125 ("I regard [man] as I do the other species . . . having for his main business to live and propagate, and for his main interest food and sex. A few get a little further along and get pleasure in it, but are fools if they are proud.").

55. *See* Harold R. McKinnon, *The Secret of Mr. Justice Holmes*, 36 A.B.A. J. 261, 264 (1950) (quoting a letter from Holmes to Pollock).

> mitigated so far as may be by good manners, is the *ultima ratio*. . . . [E]very society rests on the death of men. . . .[56]

Holmes had values, or at least he said he did. He called these values his "can't helps":

> As I probably have said many times before, all I mean by truth is what I can't help believing—I don't know why I should assume except for practical purposes of conduct that [my] *can't help* has more cosmic worth than any others—I can't help preferring port to ditch-water, but I see no ground for supposing that the cosmos shares my weakness. . . . [I] demand. . . of my philosophy simply to show that I am not a fool for putting my heart into my job.[57]

Holmes observed that "moral and aesthetic preferences" are "more or less arbitrary. . . . Do you like sugar in your coffee or don't you?. . . So as to truth."[58] He said on another occasion, "Our tastes are finalities."[59]

And so, port over ditch-water and sweet coffee over bitter, Holmes had his "can't helps," yet it was difficult to determine what they were.[60]

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56. Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock (Feb. 1, 1920), *in* 2 HOLMES–POLLOCK LETTERS, *supra* note 54, at 36. Holmes added, "I should be glad . . . 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." *Id*; *see also* Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Jan. 14, 1920), *in* 1 HOLMES–LASKI LETTERS, *supra* note 46, at 232 ("I repeat my old aphorism that everything is founded on the death of men—society, which only changes the modes of killing—romance, to which . . . generations, of dead, or the memorial tablets of a great war, are necessary.").

57. Letter from Oliver Wendell Holmes, Jr. to John Chipman Gray (Sept. 3, 1905), *quoted in* SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 283 (1989).

58. Letter from Oliver Wendell Holmes, Jr. to Lady Pollock (Sept. 6, 1902), *in* 1 HOLMES–POLLOCK LETTERS, *supra* note 54, at 105.

59. Oliver Wendell Holmes, Jr., *Address of Chief Justice Holmes at the Dedication of the Northwestern University Law School Building* (Oct. 20, 1902), *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES 530 (Sheldon M. Novick ed. 1995) [hereinafter THE COLLECTED WORKS OF JUSTICE HOLMES].

60. *See* GARY J. AICHELE, OLIVER WENDELL HOLMES, JR.: SOLDIER, SCHOLAR, JUDGE 93 (1989) (noting that "[n]o record remains to indicate any interest in politics, civic, or charitable activities," that "there is no record that Holmes ever represented the oppressed or downtrodden of Boston," and that "if [the members of his law firm] had a social conscience, their practice did not reveal it"). Borrowing the sentiment from an acquaintance of Holmes, Edmund Wilson described Holmes as "[h]aving rarely, so far as is known, given a penny to a cause or charity, indifferent to the improvement of others while preoccupied with the improvement of himself." EDMUND WILSON, PATRIOTIC GORE: STUDIES IN THE LITERATURE OF THE AMERICAN CIVIL WAR 796 (1962).

Blackstone contended that everyone had a right to life, including a right to "a supply sufficient for all the necessities of life."[61] Holmes maintained:

> As to the *right* of citizens to support and education I don't see it. It may be a desirable ideal to aim at, but I see no right in my neighbor to share my bread. I mean moral right of course—there is no pretense of any other, except so far as he in combination has power to take it.[62]

Although Holmes was committed to living passionately, he disparaged most passionate commitments:

> I never read a socialist yet from Karl Marx down. . . that I didn't think talked drool.[63]
>
> The notion that we can secure an economic paradise by changes in property alone seems to me twaddle.[64]
>
> When [my law clerk] talks of more rational methods [of resolving international disputes], I get the blood in my eye and say that war is the ultimate rationality.[65]
>
> [I]f you think that I am going to bother myself again before I die about social improvement or read any of those stinking upward and onwarders—you err. I mean to have some good out of being old.[66]

Holmes apparently could not envision any basis for political, social, or personal action other than self-interest. He wrote, "[T]he condition of others is primarily their business and certainly is beyond our power. Whence the futility of the command to love one's brother as oneself."[67] He also observed:

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61. 1 BLACKSTONE, *supra* note 5, at *127.

62. Letter from Oliver Wendell Holmes, Jr. to Harold Laski (July 23, 1925), *in* 1 HOLMES–LASKI LETTERS, *supra* note 46, at 762.

63. Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Aug. 6, 1917), *in* 1 HOLMES–LASKI LETTERS, *supra* note 46, at 96. As Holmes put the matter on another occasion, "The notion that with socialized property we should have women free and a piano for everybody seems to me an empty humbug." Oliver Wendell Holmes, Jr., *Ideals and Doubts*, 10 U. ILL. L. REV. 1, 4 (1915), *reprinted in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 59, at 443.

64. Oliver Wendell Holmes, Jr., *Introduction* to *Rational Basis of Legal Institutions*, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 59, at 450.

65. Letter from Oliver Wendell Holmes, Jr. to Felix Frankfurter (Mar. 27, 1917), *in* HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912–1934, at 70 (Robert M. Mennel & Christine L. Compston eds., 1996) [hereinafter HOLMES AND FRANKFURTER].

66. Letter from Oliver Wendell Holmes, Jr. to Harold Laski (June 1, 1922), *in* 1 HOLMES–LASKI LETTERS, *supra* note 46, at 430.

67. Letter from Oliver Wendell Holmes, Jr. to Lewis Einstein (Dec. 19, 1910), *in* THE HOLMES–EINSTEIN LETTERS: CORRESPONDENCE OF MR. JUSTICE HOLMES AND LEWIS EINSTEIN 1903–1935,

> I don't see why we mightn't as well invert the Christian saying and hate the sinner but not the sin. Hate... imports no judgment. Disgust is ultimate and therefore as irrational as reason itself—a dogmatic datum. The world has produced the rattlesnake as well as me; but I kill it if I get a chance, as also mosquitos, cockroaches, murderers, and flies. My only judgment is that they are incongruous with the world I want; the kind of world we all try to make according to our power.[68]

Holmes's "can't helps" did not include religious belief or even moral principles:

> 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... 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.[69]

The first "unalienable" right articulated by the Declaration of Independence was life, but the founders' self-evident truths were not among Holmes's "can't helps." In 1929, Justice Holmes dissented from the Supreme Court's ruling that Rosika Schwimmer, a well known pacifist, could not be a citizen of the United States.[70] Schwimmer had refused to swear that she would bear arms in case of war. As a letter by Holmes recounted her lawyer's argument, Schwimmer "wouldn't do what the law wouldn't let her do."[71] A federal statute demanded a pledge to "support and

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at 59 (James Bishop Peabody ed., 1964) [hereinafter THE HOLMES–EINSTEIN LETTERS].

68. Letter from Oliver Wendell Holmes, Jr. to Lewis Einstein (May 21, 1914), *in* THE HOLMES–EINSTEIN LETTERS, *supra* note 67, at 93.

69. Letter from Oliver Wendell Holmes, Jr. to Alice Stopford Green (Feb. 7, 1909), *quoted in* Sheldon M. Novick, *Justice Holmes's Philosophy*, 70 WASH. U. L.Q. 703, 721 (1992).

70. United States v. Schwimmer, 279 U.S. 644, 653 (1929) (Holmes, J., dissenting). For brief biographies of Schwimmer and her pioneering lawyer Olive Rabe, see Ronald K.L. Collins and David L. Hudson, Jr., *Remembering 2 Forgotten Women in Our Free Speech History, Part 1* (May 27, 2008), http://www.firstamendmentcenter.org/analysis.aspx?id=19957, and Ronald K.L. Collins and David L. Hudson, Jr., *To the High Court: Olive Rabe Representing Rosika Schwimmer, Part 2* (May 26, 2008), http://www.firstamendmentcenter.org/analysis.aspx?id=19995.

71. Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Apr. 13, 1929), *in* 2 HOLMES–LASKI LETTERS, *supra* note 46, at 1146.

defend the Constitution. . . against all enemies, foreign and domestic," and the majority read this statute to preclude Schwimmer's naturalization.[72]

Holmes's dissent spoke eloquently of "freedom for the thought we hate."[73] Then, commenting on Schwimmer's pacifism in a letter, Holmes revealed how much he did hate the thought: "What damned fools people are who believe things. . . . All 'isms seem to me silly—but this hyperaethereal respect for human life seems perhaps the silliest of all."[74]

Holmes had addressed the same subject in a letter to Dean Wigmore:

> Doesn't this squashy sentimentality of a big minority of our people about human life make you puke? [That minority includes] people who believe there is an onward and upward—who talk of uplift—who think that something in particular has happened and that the universe is no longer predatory. Oh bring in a basin.[75]

Someone who adopts a skeptical posture may find it difficult to affirm a belief in any cause. Confronting the plausible "sez whos"[76] of others diminishes the ability to fire "sez whos" oneself, and Holmes eliminated the obvious candidates from a list of "can't helps." Still, Holmes's list was not empty. He stood squarely for the glory of struggle and war. "[W]hen men differ in taste as to the kind of world they want the only thing to do is to go to work killing," he said.[77] He wrote on another occasion, "[W]ar not only is not absurd but is inevitable and rational."[78]

And, oh yes, Holmes had one more cause or "can't help"—his "starting point for an ideal for law":

> I believe that the wholesale social regeneration which so many now seem to expect, if it can be helped by conscious, co-ordinated human effort, cannot be affected appreciably by tinkering with the institution of property, but only by taking in hand life and trying to

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72. *Schwimmer*, 279 U.S. at 646.

73. *Id.* at 655 (Holmes, J., dissenting).

74. Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Apr. 13, 1929), in 2 HOLMES–LASKI LETTERS, *supra* note 46, at 1146.

75. Letter from Oliver Wendell Holmes, Jr. to John. H. Wigmore (Nov. 1915), *quoted in* Novick, *supra* note 69, at 469 n.11.

76. *See* Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1230 (1979).

77. Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Dec. 3, 1917), *in* 1 HOLMES–LASKI LETTERS, *supra* note 46, at 116; *see also* Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Aug. 5, 1926), *in* 2 HOLMES–LASKI LETTERS, *supra* note 46, at 862 ("Pleasures are ultimates and in cases of difference between oneself and another there is nothing to do except in unimportant matters to think ill of him and in important ones to kill him.").

78. Letter from Oliver Wendell Holmes, Jr. to Sir Frederick and Lady Pollock (Sept. 20, 1928), *in* 2 HOLMES–POLLOCK LETTERS, *supra* note 54, at 230.

> build a race. That would be my starting point for an ideal for the law.[79]

Especially in light of later history, many of Holmes's statements about race building seem chilling. He wrote of "substitut[ing] artificial selection for natural by putting to death the inadequate"[80] and of his contempt for "socialisms not prepared. . . to kill everyone below the standard."[81] Holmes declared, "I can imagine a future in which science. . . shall have gained such catholic acceptance that it shall take control of life, and condemn at once with instant execution what now is left for nature to destroy."[82] He spoke of the possibility of a future civilization "with smaller numbers, but perhaps also bred to greatness and splendor by science."[83]

In a letter to Felix Frankfurter, Holmes expressed irritation with Francis Philbrick, a reviewer of his *Collected Legal Papers*:

> [Philbrick] says, "whatever that may mean" when I say that I don't think you can do much by tinkering with property without taking in hand life. I meant what I suppose he would think horrible—restricting propagation by the undesirables and putting to death infants that didn't pass the examination, etc. etc.[84]

Holmes then grumbled, "I suspect that Mr. Philbrick believes in some ism."[85]

In 1941, Father Francis E. Lucey noted one of Holmes's statements concerning eugenics. Holmes had said, "I shall think socialism begins to be entitled to serious treatment when and not before it takes life in hand and

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79. Oliver Wendell Holmes, Jr., *Ideals and Doubts*, 10 U. ILL. L. REV. 1, 4 (1915), *reprinted in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 59, at 443.

80. Letter from Oliver Wendell Holmes, Jr. to Clare Fitzpatrick, Lady Castletown (Aug. 19, 1897), *quoted in* Novick, *supra* note 69, at 729.

81. Letter from Oliver Wendell Holmes, Jr. to Lewis Einstein (Aug. 6, 1917), *in* THE HOLMES–EINSTEIN LETTERS, *supra* note 67, at 145. Note that this statement followed the one cited in the preceding footnote by twenty years.

82. Oliver Wendell Holmes, Jr., *The Soldier's Faith*, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 59, at 487.

83. Oliver Wendell Holmes, Jr., *Law and the Court*, *in* 3 THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 59, at 505, 507.

84. Letter from Oliver Wendell Holmes, Jr. to Felix Frankfurter (Sept. 3, 1921), *in* HOLMES AND FRANKFURTER, *supra* note 65, at 125.

85. *Id.* at 126.

prevents the continuance of the unfit."[86] Lucey remarked that "[i]f recent reports are true" the socialist state in Germany appeared to satisfy Holmes's standard for serious treatment.[87]

Richard Posner has noted that "belief in human eugenics was a staple of progressive thought in Holmes's lifetime."[88] He added that, although people now consider Holmes's eugenic enthusiasms shocking, "with the renewed interest. . . in euthanasia, and with the rise of genetic engineering, we may yet find those enthusiasms prescient rather than depraved."[89] Yet, as Holmes biographer Sheldon Novick observed, Holmes's position went "well beyond the conventional views on eugenics of his day."[90]

Many Americans of Holmes's generation favored the forced sterilization of "imbeciles." Indeed, thirty states ultimately enacted laws requiring it,[91] and Holmes's opinion for the Supreme Court in *Buck v. Bell*[92] upheld the constitutionality of one of these laws. The opinion spoke of the danger of "being swamped with incompetence" and proclaimed, "Three generations of imbeciles are enough."[93]

Holmes then reported to one of his correspondents, "I wrote and delivered a decision upholding the constitutionality of a state law for sterilizing imbeciles the other day—and felt that I was getting near to the first principle of real reform."[94] He wrote to another that it "gave me pleasure, establishing the constitutionality of a law permitting the sterilization of imbeciles."[95] After the decision in *Buck v. Bell*, more than eighteen thousand Americans were sterilized. Few had been sterilized earlier, for state courts generally had held forced sterilization unconstitutional.[96] Support for the sterilization of people believed to have genetically transmissible defects marked the outer limit of the eugenics

86. Letter from Oliver Wendell Holmes, Jr. to J.C.H. Wu (July 21, 1925), *in* JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES, UNCOLLECTED LETTERS AND PAPERS 181 (Harry C. Shriver ed., 1936).

87. Frances E. Lucey, *Jurisprudence and the Future Social Order*, 16 SOC. SCI. 211, 214–15 (1941).

88. POSNER, *supra* note 53, at xxix.

89. *Id.*

90. Novick, *supra* note 69, at 732.

91. *See* IAN DOWBIGGIN, KEEPING AMERICA SANE: PSYCHIATRY AND EUGENICS IN THE UNITED STATES AND CANADA, 1880–1940, at 78 (1997).

92. 274 U.S. 200 (1927).

93. *Id.* at 207. According to Saul Touster, Holmes' language "was already modified, at the insistence of his brethren, from an even more brutal original draft." Saul Touster, *Holmes a Hundred Years Ago: The Common Law and Legal Theory*, 10 HOFSTRA L. REV. 673, 678 (1982).

94. Letter from Oliver Wendell Holmes, Jr. to Harold Laski (May 12, 1927), *in* 2 HOLMES–LASKI LETTERS, *supra* note 46, at 942.

95. Letter from Oliver Wendell Holmes, Jr. to Lewis Einstein (May 19, 1927), *in* THE HOLMES–EINSTEIN LETTERS, *supra* note 67, at 267.

96. *See* DOWBIGGIN, *supra* note 91, at 78.

movement in America. No notable figure other than Holmes wrote approvingly of killing "everyone below standard" and of "putting to death infants that didn't pass the examination." Eugenics, moreover, was the *only* progressive movement Holmes favored.[97]

I offer three points in conclusion:

First, lawyers and law teachers should stop beating an imaginary deductive-formalist bogeyman alleged to haunt all pre-twentieth century law. He never existed. Apart from William Blackstone's embrace of natural law, he looks very much like a modern lawyer. Neither Blackstone nor anyone else has claimed the ability to deduce all law from the brow of Zeus.

Second, the jurisprudential revolution that began in the late nineteenth century was a revolt against natural law, not a revolt against formalism. Although the ethical skepticism that came to dominate American intellectual life need not lead to positions like Holmes's on eugenics, the belief that human beings devise their own values to serve their selfish interests makes monstrous moves like Holmes's easier.[98]

Third, it all happened for no good reason. Disillusionment after the Civil War probably had something to do with it,[99] and a book published by Charles Darwin in 1859 certainly had something to do with it.[100] Nevertheless, people like Holmes hardly ever offered argument or analysis to support their skeptical stands. When Holmes said that he sneered at the rights of man, he described both his method and his position. Skeptics are as likely to rely on assertion as believers. A person's convictions concerning the most important issues in life often seem to hang by a thread. They appear to depend on the believer's or skeptic's mood or on his allocation of the lawyer's burden of proof.

Holmes saw more clearly than many later skeptics the implications of his position. He did not claim to believe in much. Unlike some of his heirs, he had the courage of his nonconvictions. Blackstone, however, understood the natural law foundation upon which genuine ethical conviction can rest.

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97. *See* ALSCHULER, *supra* note 42, at 29.

98. So does the view that values are merely the product of genetic mutations that furthered some distant ancestors' reproductive success. *Contra* RICHARD DAWKINS, THE GOD DELUSION 1–2, 286 (2006) (asserting that "absolutism nearly always results from strong religious faith" and that a world without religion would be a world without suicide bombers, 9/11, Crusades, witch-hunts, and the persecution of Jews as "Christ killers").

99. *See* ALSCHULER, *supra* note 42, at 41–51.

100. *See* CHARLES DARWIN, ON THE ORIGIN OF SPECIES (1859); *see also* ALSCHULER, *supra* note 42, at 49, 52–67, 86–87.