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THE MUNICIPAL IDEAL AND THE UNKNOWN END: A RESOLUTION OF OLIVER WENDELL HOLMES

MICHAEL F. DUGGAN, PH.D.*

*I think that the sacredness of human life is a purely municipal ideal of
no validity outside the jurisdiction.¹*

*If I were dying, my last words would be have faith
and pursue the unknown end.²*

I. INTRODUCTION: THE HOLMESIAN BIFURCATION: DARWIN, MALTHUS AND THE “MUNICIPAL IDEAL”

The article on Oliver Wendell Holmes in *The Oxford Companion to the Supreme Court* frames a well-known tension in his thought that at first glance would seem impossible to reconcile.³ In fact, the underpinnings of

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Those who write on Holmes tend to approach him from a philosophical perspective (or from the history of philosophy) or from the law (or legal history) or as a hybrid of these (e.g., legal philosophy). Although I discuss aspects of his legal thought below, my approach to Holmes is from philosophy—more analytical than continental—and from a perspective within the history of ideas. The practical lawyer who reads this may grow impatient by the lack of case citations and what may seem to be an excess of theoretical speculation. I think this sort of approach to a topic related to the law has the potential for both insights and pitfalls, and only hope that my article will prove to be satisfactory to the modern heirs of the practical attorneys to whom Holmes first read *The Path of the Law*, 110 years ago.

1. OLIVER WENDELL HOLMES, *The Path of the Law*, in THE ESSENTIAL HOLMES 102 (Richard A. Posner ed., Univ. of Chi. Press 1992).

2. Letter from Oliver Wendell Holmes to Mr. Wu (Jan. 27, 1925), in JUSTICE HOLMES TO DR. WU: AN INTIMATE CORRESPONDENCE 1921-1932, at 24 (Central Book Co. 1947).

3. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 410 (Kermit L. Hall ed., Oxford Univ. Press 1992). The relevant text reads:

To Holmes, life was a continual clash for groups—nations, races, classes—representing great conflicting principles, struggling for survival in a world of limited resources. The Constitution required only that the domestic struggle be fair and peaceful. The tack of the judge was to choose fairly between contending forces. Political truth was to be worked out in the competition of the marketplace and not imposed by armies or police.

The inconsistency in Holmes’s ideas of the judge’s role became more marked as he grew older. His Darwinist, quasi-scientific system called for judges to serve, in the

Holmes's philosophy are based on an apparent bifurcation amounting to a powerful contradiction: On the one hand is his frequently stated belief in a harsh Darwinian or Malthusian naturalism, a respect for often coercive, external power and an amoral, pragmatic approach to the law. On the other hand, is a view of the law suggesting a commitment to duty, balance, fairness, reason and moderation.⁴ When we factor in Holmes's affable personality, his verve, and his romantic approach to life with the latter mode, and the dark skepticism found in some of his letters with the former, this gap becomes even wider, the poles more incongruous. This dichotomy—seemingly exclusive to the point of self-negation—is the central problem with Holmes's view of the law and of life.

A born skeptic, Holmes's general outlook was influenced by evolutionary theory and nineteenth century positivism.⁵ As a youth, he had a streak of idealistic rebelliousness, but his service in the Civil War transformed this into something harder.⁶ Although he never subscribed to

end, the survival of their own class or nation. Yet in the chivalrous system of the law Holmes described, the judge must set aside his personal loyalties and views, deciding cases fairly even when that would mean death to the existing order.

Holmes's self-denying sense of duty, his loyalty to the future of humanity rather than its present order, apparently was founded on faith in something outside of the evolutionary system of law. It could not be reconciled with Holmes's system and indeed seemed to contradict it. As he grew older, Holmes's sense of duty came to predominate, so that his opinions seemed to be the impersonal voice of duty itself.

4. *See id.*; *see also infra* note 9 and accompanying text.

5. For an overview of Holmes's philosophical influences, see PHILIP P. WIENER, *EVOLUTION AND THE FOUNDERS OF PRAGMATISM 172-79* (Harvard Univ. Press 1949). *See also* Sheldon M. Novick, *Holmes's Philosophy and Jurisprudence: Origin and Development of Principal Themes*, in 1 COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES 18, 18-73 (Sheldon M. Novick ed., Univ. of Chic. Press 1995). Other insightful overviews of Holmes's life and thought include DAVID H. BURTON, *OLIVER WENDELL HOLMES, JR.: WHAT MANNER OF LIBERAL?* (Robert E. Krieger Pub'g Co. 1979), and MAX LERNER, *THE MIND AND FAITH OF JUSTICE HOLMES 1-6* (Little, Brown & Co. 1943).

6. Neither Holmes's skepticism nor his romanticism was the result of his experiences in the war, but both were altered and brought to maturity by it. In a letter to Morris Cohen dated February 5, 1919, Holmes claims to having inherited from his mother a "skeptical temperament." Letter from Oliver Wendell Holmes to Morris Cohen (Feb. 5, 1919), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 110. He also mentions his early support of abolition and a belief in Emersonian Transcendentalism here. *Id.*

The values Holmes embraced as a young man included chivalry, idealism, and an emerging belief in duty. Duty is what a person commits to and what guides his or her actions in situations with a lack of certainty. It is a commitment to grand strategy with only a tactical perspective. Oliver Wendell Holmes, *Natural Law*, in *THE ESSENTIAL HOLMES*, *supra* note 1, at 183. Holmes's duty, therefore, is strangely like faith—a word that we must use in a qualified sense with him.

Since Holmes believed that our knowledge of things is modest and incomplete, the virtues that he valued—loyalty, duty, courage, etiquette—were also modest and not deontological absolutes. They comprise a simple system of belief for a man who thought that anything more ambitious or optimistic was unfounded. For a discussion of this perspective, see Catherine Pierce

the undisciplined, wholesale evolutionism of Herbert Spencer or the vitalism of Hegel, he did believe that evolution could be meaningfully applied to the development of the law, which, along with the general growth of human knowledge, is among the few, non-biological spheres in which evolutionary explanations based on natural selection are appropriate.⁷ Holmes's unsentimental view embraced the idea that the struggle for survival in nature was also a part of the human condition and therefore manifest in civilization at large. After all, people are a subset of nature and not the other way around.

In spite of his bluster and didacticism characterizing adjudication as “playing the game by its rules,” and his dismissal of morality as etiquette—manners to ameliorate pure force—and nothing more objective than “the human point of view,”⁸ Holmes believed that some solutions in the law

Wells, *Old-Fashioned Postmodernism and the Legal Theories of Oliver Wendell Holmes, Jr.*, 63 BROOK. L. REV. 54, 59-85 (1997).

In one of his occasional speeches, Holmes evoked a scene of a soldier's grave in juxtaposition to the activity of the thinking man of consequences. Both exist in the cosmos where “the truth of truth” is not certain, and both men are men of action in very different ways. *Holmes's Walbridge Abner Field Speech of November 25, 1899*, in THE ESSENTIAL HOLMES, *supra* note 1, at 213. The soldier dies to help make the kind of world in which he would want to live. Likewise, the philosopher will never know if he was right, but acts nonetheless by advancing his ideas, “knowing that he could go no further.” *Id.* This would seem to be the basis of Holmes's idea of an existential allegiance to duty to what one believes without knowing. And it is this commitment that defines much of his outlook.

7. After the publication of *The Origin of Species* in 1859, some evolutionists like Herbert Spencer, attempted to show how the theory could be applied to many aspects of human activity and even civilization as a whole. Holmes's friend, philosopher of science and moderator of the Metaphysical Club, Chauncey Wright, strongly opposed such non-scientific applications of the theory and said so in his article *The Philosophy of Herbert Spencer*. Chauncey Wright, *The Philosophy of Herbert Spencer*, 100 N. AM. REV. 423, 424 (1865).

Having said this, there seem to be some areas outside of biology where a framework of natural selection can be appropriately applied. The law as a naturally adaptive process is one example, and Holmes suggests this in the opening paragraphs of Lecture I of *The Common Law*. Oliver Wendell Holmes, *The Common Law*, in THE ESSENTIAL HOLMES, *supra* note 1, at 237. Likewise, Karl Popper notes that the growth of scientific knowledge, through the factoring out of incorrect ideas in light of new and rigorously tested information is another example. *See generally* Karl R. Popper, *Evolution and the Tree of Knowledge*, in OBJECTIVE KNOWLEDGE 256 (Clarendon Press 1972). More recently, physicist Lee Smolin has also made a cosmological argument on the development of the physical universe based on a model that is akin to natural selection. *See generally* LEE SMOLIN, *THE LIFE OF THE COSMOS* (Oxford Univ. Press 1997).

8. Letter from Oliver Wendell Holmes to Frederick Pollock (Aug. 30, 1929), in THE ESSENTIAL HOLMES, *supra* note 1, at 108. For Holmes's view of morals as “only a check for varying intensity upon force,” see Letter from Oliver Wendell Holmes to Harold Laski (July 23, 1925), in THE ESSENTIAL HOLMES, *supra* note 1, at 140-41. In the same letter, he also writes “I always have said that the rights of a given crowd are what they will fight for.” *Id.* And yet, despite his minimizing the basis of morality, Holmes was susceptible to human emotions related to the consequences of his actions. For instance, in his letter of November 9, 1913, to Alice Stopford Green, he expresses guilt over the frankness of his opinions following the death of his friend and correspondent Canon Patrick Sheehan, an Irish clergyman. Letter from Oliver Wendell Holmes to Alice Stopford Green (Nov. 9, 1913), in THE ESSENTIAL HOLMES, *supra* note 1, at 22-24.

were preferable to others (something especially true in a process governed or guided by rules and experience), and embraced a commitment to reason; furthermore, an intuitive understanding of fairness and moderation seem to have been an unspoken part of his equation, or a part of his own nature.⁹ This is witnessed by the force and reasoning of his better opinions.¹⁰ Despite his skepticism of absolute solutions and “slapdash universals,”¹¹ he believed that some answers were clearly better than others—more accurate, more compelling, more plausible, more in keeping with the Constitution—which is evident not only from the brilliant minority opinions from which his famous moniker “the Great Dissenter” is derived, but also from many of his majority decisions.

As with some modern linguistic skeptics and relativists, Holmes’s analogy of the law to a game might have been meant to suggest that it is nothing more than a logical exercise or clever word play requiring a certain aptitude guided by specific rules. Modern-day originalism, with its reliance on precedent and the logical extension of rules to specific cases is an example of the law as logic and rule-following. And yet, Holmes generally opposed such narrow views, and in spite of his early efforts to systematize the law, disapproved of attempts to make the great “ragbag” into a formal

If Holmes did not believe that some answers were better than others, then his dissent in *Northern Securities* makes no sense. In this case, Holmes parted company from the powerful administration that had put him on the bench only two years before. *N. Sec. v. United States*, 193 U.S. 197, 364 (1904) (Holmes, J., dissenting). It seems unlikely that Holmes would have provoked Theodore Roosevelt over a dissent if he did not think it was right.

9. Holmes was not a moderate in the political sense meaning one who tries to steer a middle course between extremes—he was probably too independent a thinker to have subscribed to such a rote position. Rather, Holmes’s moderation stems from his realism; he had a dark view of the cosmos, of nature, and of human nature. As an avenue of interest and power, Holmes saw the law as a means of resolving problems in lieu of violence and brute force. In this sense, the law was a mitigating element on force.

Holmes was rational in the Popperian sense of demonstrating willingness to chance one’s mind in light of critical discussion and especially in the face of more compelling arguments to the contrary. See Letter from Oliver Wendell Holmes to Frederick Pollock, in *THE ESSENTIAL HOLMES*, *supra* note 1, at 108; see also KARL R. POPPER, *THE MYTH OF THE FRAMEWORK* 181 (M.A. Notturmo ed., Routledge 1996). In a similar sense, Holmes’s First Amendment opinions show that he believed that even bad ideas deserved serious consideration if for no other reason than to show them for what they are. See *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting); *Schenck v. United States*, 249 U.S. 47, 53 (1919); *Gitlow v. New York*, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting). Regarding Holmes’s personal moderation and liberality, see Richard A. Posner, *Introduction* to *THE ESSENTIAL HOLMES*, *supra* note 1, at xxviii-xxix.

10. See *Abrams*, 250 U.S. at 624-31; *Shenck*, 249 U.S. at 47; *United States v. Schwimmer*, 279 U.S. 644, 653-55 (1929) (Holmes, J., dissenting).

11. Letter from Oliver Wendell Holmes to Lewis Einstein (July 23, 1906), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 58.

deductive system.¹² He also observed that general principles do not decide specific cases and disdained not only the view of law as pure logic, but had a skeptic's disapproval of older formalistic views that looked to deontological, metaphysical or moral principles for their grounding.¹³

Even with jury instructions, rules of court, and sentencing guidelines, there is a large primordial element of judicial decision-making that is more closely related to aesthetic creativity and the vagaries of the social sciences which includes innate human qualities like judgment, discretion, intuitive fairness and the subjective weighing of elements of a case that are not reducible to simple game-like rules. Holmes's famous declaration in *The Common Law*, that "[t]he life of the law has not been logic: it has been experience," and his references to the "intuitions of public policy" and the "felt necessities of the time," suggests that he was aware of this.¹⁴

The problem is that this most self-evident, mysterious and human element of the law—intuitive fairness—is something that Holmes downplays or even fails to mention as a part of his own formulation. This, as well as his intrinsic professional and personal balance and reason, is at odds with the amoral elements of his stated philosophy of the law and of life. Also at odds with Holmes's skepticism, so it would seem, is his romantic embracing of duty and faith in pursuing the unknown end. Before this apparent contradiction can be resolved, it is imperative to understand where the conflicting ideas fit into the body of his thought. In doing so, a fuller picture of Holmes's philosophy must first be fleshed out.

12. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). Holmes refers to an overly rationalist view of the law—which would include the reduction of law to pure logic and presumably modern textualism—as “the fallacy of logical form,” adding that “logical certainty is an illusion.” “The fallacy to which I refer is the notion that the only force at work in the development of the law is logic.” *Id.* Regarding the reliance on precedent for its own sake, he writes:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Id.

Far from the self-evident tenets of logic or natural law, Holmes believed that rights were human constructs that were asserted and which had to be enforced and defended if they were to exist at all in a practical sense. Letter from Oliver Wendell Holmes to Harold Laski (July 23, 1925), in THE ESSENTIAL HOLMES, *supra* note 1, at 142. Holmes asserts that he takes “no stock in abstract rights.” *Id.* at 142.

13. See *Lochner v. New York*, 198 U.S. 45, 75 (1904) (Holmes, J., dissenting) (“General propositions do not decide concrete cases.”); see also Letter from Oliver Wendell Holmes to Harold Laski (Feb. 19, 1920), in THE ESSENTIAL HOLMES, *supra* note 1, at 38.

14. Oliver Wendell Holmes, *The Common Law*, in THE ESSENTIAL HOLMES, *supra* note 1, at 237.

The second part of this article, therefore, will look at three distinct modes or manifestations of Holmes's thought—the skeptical and the romantic, and where the two overlap, the evolutionary realist and result-oriented judge that will be referred to as the Newtonian Holmes. It is between such disparate sources as the former two and within the third that the primary tension in Holmes's overall views arises, and by examining them, where we might chance to reconcile them. Part III will provide a discussion of Holmes's legal philosophy, arguing that the intricate composite description of the law stated in brief in the beginning of *The Common Law* is of more significance and lends greater insight than the more limited instrumentalist model also developed in that treatise and more succinctly spelled out in *The Path of the Law*.¹⁵ Finally, Part IV will examine the convergence of the two seemingly irreconcilable aspects of Holmes's legal thought within the context of his general outlook. Key to this understanding is the relationship between evolution and Holmes's asserted endorsement of the importance of civilization and his equation of the good or "higher" life, an existence that interacts with complexity and which is intellectually engaging. Just as important is Holmes's existential commitment to the simple values of honor and duty as is his naturally gregarious personality. Such an understanding will include Holmes's social Darwinism and Malthusianism within the context of his times and possibly a more sophisticated view of evolution both in biological and philosophical terms.

II. THE THREE WORLDS OF OLIVER WENDELL HOLMES: A VENN DIAGRAM

A. THE PROBLEM WITH HOLMES

Holmes is among the most problematic figures of the American intellectual canon in terms of classification. Throughout his long life and over the seven decades since his death, he has been called everything from a philosophical pragmatist¹⁶ to a political fascist,¹⁷ liberal,¹⁸ humanist,

15. Holmes also makes an instrumentalist argument in *The Common Law* in his theories of civil and criminal liability. *Id.* at 237-64; see also Henry Cohen, *Oliver Wendell Holmes Jr., Life and Philosophy*, FED. LAW., Jan. 2004, at 23-25.

16. Paul L. Gregg, *The Pragmatism of Mr. Justice Holmes*, 31 GEO. L. REV. 262, 295 (1943).

17. See generally Ben W. Palmer, *Holmes, Hobbes and Hitler*, 31 A.B.A. J. 569, 570-72 (1945). For a more balanced critical view of Holmes, see Yosel Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 254, 254 (1963).

18. See BURTON, *supra* note 5, at 2. In this volume, see particularly the essay by Charles E. Wyzanski entitled *The Democracy of Justice Holmes*. *Id.* at 61-72.

libertarian¹⁹ and conservative.²⁰ In numerous biographies and in uncounted periodical treatments of his ideas, one finds such labels as utilitarian,²¹ Malthusian or Darwinian evolutionist,²² scientific positivist,²³ mystic,²⁴ aristocrat and existentialist, as well as a host of more general terms such as skeptic, cynic,²⁵ realist, romantic,²⁶ materialist,²⁷ modernist, relativist,

19. Sheldon M. Novick, *The Intractable Justice*, AM. LAW., Dec. 1999, at 77-78.

20. See BURTON, *supra* note 5, at 6.

21. See HARRY L. POHLMAN, *JUSTICE OLIVER WENDELL HOLMES & UTILITARIAN JURISPRUDENCE* 5 (Harvard Univ. Press. 1984) [hereinafter POHLMAN, *UTILITARIAN JURISPRUDENCE*]. Pohlman's claim that a fair measure of utilitarian thought found its way into Holmes's thought whether he admitted it or not. *Id.* at 5. His counterargument to Holmes's stated position on utilitarianism is found in chapter one. *Id.* at 5-10. The problem with calling Holmes a utilitarian is the fact that, despite some analytical resemblance, Holmes actually comes out and says that he is not a utilitarian and gives his Darwinian reasons for saying so. Oliver Wendell Holmes, *The Gas Stokers' Struggle*, in *THE ESSENTIAL HOLMES*, *supra* note 1, at 121-22.

22. This is of course supported by any number of Holmes's writings, biographies and analyses of his outlook. See, e.g., WIENER, *supra* note 5, at 172-89.

23. Mark DeWolfe Howe, *The Positivism of Mr. Justice Holmes*, 61 HARV. L. REV. 529, 531 (1951).

24. Maria C. Royle, *Climbing the Beanstalk: Justice Holmes and the Search for Reconciliation*, 22 VT. L. REV. 559, 569-83 (1998).

25. WIENER, *supra* note 5, at 36. Some of Holmes's own statements betray a perspective very much like existentialism. As he wrote in text for his speech to the bar association, "[l]ife is an end in itself, and the only question as to whether you have enough of it." Oliver Wendell Holmes, *At a Dinner Given by the Bar Association of Boston* (Mar. 7, 1900), in *SPEECHES* 86 (Little, Brown & Co. 1934) (1891). Likewise, in his 1899 law review article, *Law in Science and Science in Law*, he writes, "[b]ut to make up your own mind at your peril upon a living question, for purposes of action, calls upon your whole nature." Oliver Wendell Holmes, *Law in Science and Science in Law*, in *THE ESSENTIAL HOLMES*, *supra* note 1, at 191.

26. See generally Anne C. Dailey, *Holmes and the Romantic Mind*, 48 DUKE L. J. 429, 429-510 (1998). Many of Holmes's public utterances suggest a temperamental romantic lifestyle. As he wrote in the Memorial Day Address, "I think that, as life is action and passion it is required of a man that he should share the passion and action of his time at peril of being judged not to have lived." Oliver Wendell Holmes, *Memorial Day*, in *SPEECHES*, *supra* note 25, at 1. Another example of this gusto for life—and sounding a little like Theodore Roosevelt in *The Strenuous Life*—is from the *Law in Science and Science in Law*, where Holmes writes "[b]ut after all, the place for a man who is complete in all his powers is in the fight." *THE ESSENTIAL HOLMES*, *supra* note 1, at 191.

27. Sheldon M. Novick, *Justice Holmes's Philosophy*, 70 WASH. U. L.Q. 703, 712 (1992). Novick correctly notes that Holmes was a realist, at least by faith. He also writes "[a]ll that he [Holmes] knew was a material world, and so he was a materialist." *Id.* at 714.

This does not necessarily follow. Holmes certainly believed in ideas, which cannot be reduced to a material existence. Also, it would have been more accurate to describe the world as "physical" rather than "material." Modern physics deals with space, fields and energy—all of which have physical characteristics, but none of which is material per se. Even atoms—the "building blocks" of matter—are mostly "nothing" rather than "something" and the something is more like fields and energy than what we intuitively think of as matter. Holmes's letter of August 8, 1925, to Frederick Pollock shows that Holmes was aware of the new discoveries of quantum mechanics. Letter from Oliver Wendell Holmes to Frederick Pollock (Aug. 8, 1925), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 108-09. Although there is no evidence that he was convinced of their truth, it would be safer to describe Holmes as a physicalist. *Id.*

rationalist and an American version of Friedrich Nietzsche.²⁸ His skepticism of religious, mystical, and utopian programs, as well as the unproved in metaphysics and any ideas based on unsupported optimism, has led some to call him an atheist, and cynic, often in moralizing tones.²⁹ Others have noted that his romantic approach to life and especially his commitment to duty actually require a blind faith of their own—something born out in the occasional speeches given to his fellow veterans.³⁰ In keeping with the times, it should come as no surprise that at least one scholar has even noted

28. For comparisons of Holmes to Nietzsche, see *THE ESSENTIAL HOLMES*, *supra* note 1, at vxiii-xx, xviii. See also Cohen, *supra* note 15, at 25; ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 19-20* (Univ. of Chi. Press 2000). Holmes read a number of Nietzsche's writings and although his letters suggest a mixed opinion of him, there is a resemblance between some of their positions (*e.g.*, embraced an aristocratic ethos and equated the Good Life with intellectual pursuits).

In a letter to Lady Pollock, Holmes writes "I have been reading some philosophy . . . which I don't feel bound to take to seriously . . . although [Nietzsche] said some things worth remembering." Letter from Oliver Wendell Holmes to Lady Pollock (July 31, 1902), in *HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932*, at 101 (Mark DeWolfe Howe ed., 1961). Howe also notes in a footnote, that Holmes had read volumes x and xi of Nietzsche's collected works including *The Case of Wagner*, *On the Genealogy of Morals*, *The Antichrist* and *Poems*. *Id.* n.3. See also Letter from Oliver Wendell Holmes to Harold Laski (Aug. 31, 1924), in 1 *HOLMES-LASKI LETTERS* 653 (Mark DeWolfe Howe ed., Harvard Univ. Press 1953).

Both Holmes and Nietzsche also believed that the law had roots in an atavistic human desire for revenge or outright anger. WIENER, *supra* note 5, at 180; FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* 45 (Oxford Univ. Press 1996) (1887).

It is also important to note that despite their similarities there are also important distinctions. Most notable of these is the fact that Nietzsche expresses contempt for the empiricist tradition on the first page of the first essay of *On the Genealogy of Morals*, especially as a means of addressing the complexities of human psychology. He saw this approach, presumably to include utilitarianism, positivism, pragmatism, and the less rigorous forms of evolutionism, to be a superficial approach that never got to the bottom of things. Holmes by contrast is clearly a part of this tradition, although he also had an appreciation for the depth and complexity of things. See *id.* at 11 (providing an example of the extent of Nietzsche's dislike of the "English psychologists").

Holmes was also a great believer in the theories of population expressed by Thomas Robert Malthus, where Nietzsche writes in *The Twilight of the Idols*, "we must not confound Malthus for nature." *THE WORKS OF FRIEDRICH NIETZSCHE* 173 (Alexander Tille, ed., MacMillan Co., 1924). Holmes lived long enough to straddle the naturalist and modernist traditions—his circle in Cambridge in the 1860s-1870s were a part of the former, but Holmes's thought embodies a sense of irony that gives him an affinity to the modernists. Nietzsche is often regarded as the first modernist, and his writings stand in contrast to the more naturalistic ideas of his friend and associate, Paul Rée. See generally PAUL RÉE, *BASIC WRITINGS* (Robin Small ed., Univ. of Ill. Press 2003). See also Michael F. Duggan, *Paul Rée, All-Too Human*, 9 *J. GRADUATE LIBERAL STUD.* 107, 112-15 (2003) (book review).

It should also be mentioned, that Nietzsche seems to have toyed with a pragmatic approach to science, and the Nietzsche scholar and biographer, Walter Kaufmann, believes that he would have approved of pragmatism's roots in Kant and Darwin. Kaufmann is silent on pragmatism's inheritance from positivism. WALTER KAUFMANN, *NIETZSCHE: PHILOSOPHER, PSYCHOLOGIST, ANTICHRIST* 87-89 (4th ed. 1974).

29. See generally Palmer, *supra* note 17, at 570-73.

30. See generally LERNER, *supra* note 5, at 5-6. See also Oliver Wendell Holmes, *The Soldier's Faith*, in *SPEECHES*, *supra* note 25, at 56.

the conceptual affinity of the pragmatic ideas and relativism of Holmes to the more recent concepts of postmodernism.³¹

Writers on Holmes have also tended to generalize about him in ethical terms of good and bad, and he has inspired powerful passions in supporters and detractors alike. There is precious little middle ground in the literature on him, something that led Professor Harry Pohlman to note that critics often reduce their subject to Holmes of the “black hat” and presumably Holmes of the white.³² People tend to see in Holmes what they want, making him a sort of philosophical Rorschach test.

Because of this, Holmes still evokes strong emotions in people and to introduce his name into informed discussion is to risk a fight. Progressive consequentialists and members of the Law and Economics School will come to his aid, as will some conservatives who view the law as deterrence. Rawlesian liberals and conservative originalists will go for the throat, while conceding Holmes’s continuing influence on legal thought. Virtually no one will defend every aspect of Holmes, but admirers and apologists will frame him with intellectual charity in his historical context.

In light of the many characterizations of Holmes, one may reasonably ask how it is possible for anyone, especially one as consistent in his general

31. Catherine Pierce Wells, *Old-Fashioned Postmodernism and the Legal Theories of Oliver Wendell Holmes, Jr.*, 63 BROOK. L. REV. 59, 59-85 (1997).

32. HARRY L. POHLMAN, JUSTICE OLIVER WENDELL HOLMES: FREE SPEECH AND THE LIVING CONSTITUTION 1-2 (N.Y. Univ. Press 1991) [hereinafter POHLMAN, FREE SPEECH]. It is difficult to fully appreciate the richness of Holmes’s thought without examining these influences—something often missed by Holmes scholars. As Pohlman astutely notes “[o]nly when we place Holmes in the right century, only when we understand his legal philosophy as product of nineteenth century traditions of thought, will we avoid the problems of anachronisms, eulogies and obloquies.” POHLMAN, UTILITARIAN JURISPRUDENCE, *supra* note 21, at 3.

One problem is that Holmes seems so modern, so contemporary which may account in part for the many labels scholars have affixed to him. Along with his naturally skeptical temperament—and there is a certain timelessness to skepticism—and his experience in the Civil War, significant and often overlooked influences on Holmes’s thought include the Scottish realists. Moreover, Holmes had early on been inculcated with the nineteenth century resurgence of chivalry that abounded in the wake of the novels of Sir Walter Scott. This, as well as his holding up Sir Philip Sidney as the paragon of chivalry, might to some degree account for his sense of duty.

Another early philosophical influence on his thought was the American positivist, Chauncey Wright, whose ideas, although startlingly original, were influenced by John Stuart Mill and Charles Darwin (Wright, was also one of the first Americans, if not the first to be fluent in Darwin’s ideas on evolution). Holmes was a realist and said so in a number of letters and published writings. As with Wright—also a realist positivist—Holmes believed in the existence of the physical world, but shied away from assessments regarding its fundamental nature or the logical or empirical necessity of it. He believed in biological evolution by natural selection which presumes a realist epistemology. He also believed, along with the positivists, that all knowledge of the external world is experiential. If we could not hope to know objectively, we must rely on the next best thing—predictive results. Taken further, this philosophy becomes pragmatism.

outlook as Holmes,³³ to bear such contradictory epithets as positivist/skeptic, liberal/conservative, or humanist/fascist. A seemingly nonsystematic commentator on life and a practitioner in a pragmatic profession, Holmes does not wear labels well when examined closely. Every Holmes scholar of any depth knows that for each pithy quote or aphoristic turn of phrase that places him solidly in one camp or another, there is a line in a letter, speech or law review of his that will contradict it or at least bring it into question.³⁴ Although Holmes's thought matured early and his core ideas changed little over his long career, he was famously, or rather notoriously, flexible in his expressed views. As he wrote in a letter to the British socialist, Harold Laski, "[a]ll isms seem to me silly"³⁵ and his skepticism for the "melodramatic completeness of simple formulas,"³⁶ systems, "general propositions," formal programs of belief, cosmological necessary and the philosophical foundations that called for them, was itself rigorous, if not complete.³⁷

33. Although Holmes's outlook is eclectic and unsystematic, his most characteristic qualities—skepticism and hardheadedness—were as much in place just after the Civil War as they were sixty years later.

34. See, e.g., Oliver Wendell Holmes, *The Path of Law*, in THE ESSENTIAL HOLMES, *supra* note 1, at 160 ("[T]he object of our study is prediction."). "I do not accept any prophecy with confidence. The unforeseen is generally what happens." Letter from Oliver Wendell Holmes to Harold Laski (Aug. 1, 1925), in THE ESSENTIAL HOLMES, *supra* note 1, at 142.

35. Letter from Oliver Wendell Holmes to Harold Laski (Apr. 13, 1929), in THE ESSENTIAL HOLMES, *supra* note 1, at 113. Holmes admits to belief, although his modest "soldier's faith" toward the unknown is both asserted and tenuous. By contrast, as Henry Cohen notes, Holmes doubted dogma which he regarded as an intellectual form of totalitarianism, even when advocating idealistic, benevolent or egalitarian ends. Cohen, *supra* note 15, at 23-24. Holmes believed that such rigidity and commitment to belief, regardless of aims, was a primary cause of human conflict. *Id.* at 24. Certainly, programs aimed at the perfectibility of mankind have not had an illustrious record. Holmes even opposed atheism as an affirmative statement of belief. Letter from Oliver Wendell Holmes to Harold Laski (May 30, 1929), in THE ESSENTIAL HOLMES, *supra* note 1, at 13.

36. Oliver Wendell Holmes, *Speech at the Phi Alpha Delta Club: Reflections on the Past and Future* (Sept. 29, 1912), in THE ESSENTIAL HOLMES, *supra* note 1, at 5; see Oliver Wendell Holmes, *Natural Law*, in THE ESSENTIAL HOLMES, *supra* note 1, at 181 ("[C]ertitude is not the test of certainty."); see also *Lochner v. New York*, 198 U.S. 45, 74 (1904) (Holmes, J., dissenting) (providing his view of general propositions); Letter from Oliver Wendell Holmes to Harold Laski (Feb. 19, 1920), in THE ESSENTIAL HOLMES, *supra* note 1, at 37-38 (indicating a case cannot be settled with general propositions). Ironically, regarding one of his favorite thinkers, Holmes writes "[i]n short I believe in Malthus—in the broad—not bothering about details," which sounds something like an endorsement of a general (albeit a non-deontological) principle. *Id.* at 115.

Holmes also criticized the over-generalized "slap-dash universals" of Christianity. Letter from Oliver Wendell Holmes to Lewis Einstein (July 23, 1906), in THE ESSENTIAL HOLMES, *supra* note 1, at 58. It would be interesting to analyze Holmes's own "simple formulas" to see if they qualify as "general propositions."

In every document of Holmes, we must remember to consider the context. Many of his most pointed replies on the social struggle polemic reactions to the young socialists with whom he corresponded. Holmes generally talked tougher than he acted.

37. As Hume noted, complete skepticism is self-negating and a person with such a perspective would have to be skeptical about his or her own skepticism and thus their position

Holmes disdained the confident absolutes of his own time, and it follows that if the world could not be reduced to the parameters of a specific system or set of absolute rules, then it would have been folly for him to have subscribed to a single school or system of thought advocating such truths. Holmes despised superlatives and was skeptical if not hostile to what he saw as a self-dramatizing human need for them.³⁸ His apparent delight in disillusioning people of genteel fictions, although urbane and polite, is something that sets him off from more optimistic positivists of his own time. This debunking of ideas with both stern realism and great tact is telling and lends insight. Despite his realism and faith in science, all truth was tentative and the idea of objective truth was illusory in his estimation and was therefore to be relegated to the same ash heap as the metaphysics of legal and ethical formalism. What is shocking to some modern scholars is how his view of the law is void from modern social theory and there is a sort of hostility toward programs intended to improve society or human nature.³⁹

While practical and realistic, this hostility towards systems also makes him difficult to pin down, something aggravated further by his lack of status as a professional philosopher like his early associates from the Metaphysical Club, especially William James, Charles Sanders Peirce and Chauncey Wright.⁴⁰ Complicating all of this even more is the fact that Holmes consciously cultivated his legacy as an intellectual chameleon every bit as much as his Olympian public image and he glides effortlessly between frequently problematic positions. Simply put, most things that one

would be “reduc’d to nothing.” DAVID HUME, *A TREATISE OF HUMAN NATURE* 182-83 (L.A. Selby-Bigge ed., Oxford Univ. Press 1978) (1888).

38. Holmes mentions the human need for absolutes and superlatives in a number of places. *E.g.*, Letter from Oliver Wendell Holmes to Lewis Einstein’s Daughter (May 6, 1925), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 75-76.

39. See Yorsal Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 256 (1964) (noting Holmes’s indifference to civil liberties for example); Palmer, *supra* note 17, 570-72.

40. Holmes had sense as well as insight and rather than attempt to scrape out a tenuous living as an academic philosopher, like Peirce, and possibly add little to formal thought, he transformed our understanding of the law with a hybrid philosophical-naturalistic approach. He chose to live as a man of affairs, as well as of ideas and knew that he would be remembered for both. Holmes proved to be one of those rare individuals whose ideas are both interesting in an abstract sense and had a powerful impact in the world of social activity. WIENER, *supra* note 5, at 188-89. As Holmes wrote to Frederick Pollock in a letter dated March 5, 1881,

I have to make my living by my profession and therefore have been compelled to approach philosophy through the door of a specialty, but all roads lead to Rome and I don’t doubt that a man who had a philosophic craving would find stuff to work upon if he were a hatter.

THE ESSENTIAL HOLMES, *supra* note 1, at 236. Mark DeWolfe Howe also comments on Holmes’s choice of a practical profession as a means to pursue philosophy. MARK DEWOLFE HOWE, *JUSTICE HOLMES: THE SHAPING YEARS* 256 (Oxford Univ. Press 1957) [hereinafter DEWOLFE HOWE, *THE SHAPING YEARS*].

can say about Holmes are probably true in one context or another. Equally problematic is the fact that many of Holmes's views seem so modern that it is easy and even tempting to take him in a contemporary context rather than in his own.⁴¹ It is therefore most sensible to treat Holmes as a unique phenomenon of the American canon with many affinities and affiliations of varying strengths, rather than a representative of a singular school or outlook.

Still, there is a human need, more pronounced in academics, to call even the most elusive of birds something, and one could build a career by assigning or projecting a convincing new label onto Holmes. This section attempts to outline a sort of unifying theory of Holmes's thought, showing that many—but not all—of the various Holmesian labels are in fact quite correct given their relative framework or context within the Holmes *weltanschauung*.⁴² By doing this the Holmesian contradiction can then be examined in order to determine whether there is, in fact, a basis for a cohesive philosophy at all.

The logical extension of saying that Holmes belongs to numerous perspectives is to say that there is no consistent singular current or philosophy in his work, or to say that by endorsing many things according to situational dictates, he believed in nothing in a more permanent or circumspect sense. Nothing could be farther from the truth and it could be added that there are three distinct yet related modes of thought in Holmes's canon that are consistent with their constituent ideas based on the context in which they are written.

These three modes or strata coalesce in an ordered hierarchy and develop in a process of emergence in the same way that psychology emerges from biology and biology emerges from chemistry and chemistry emerges from physics. In such a scheme, each level is incumbent on the previous level but retains unique aspects that cannot be explained or understood entirely in terms of the a priori category. In other words, each stratum, in an emergence scheme embodies necessary influence, similarity

41. As a figure of intellectual history, Holmes, like Leibniz, Nietzsche, Freud, Jung and Adler (not to mention, Heraclitus, Parmenides, Protagoras, and Zeno) is in the interesting position of being regarded as a historical thinker and a philosopher whose ideas are still productive and the objects of ongoing discussion. Because of this, the scholar has the luxury of treating Holmes as a man of the past when his ideas seem dated or as a commentator whose work is of continuing significance. Much of Holmes still strikes us as fresh and modern, and more than seventy years after his death, even startling. It is sometimes easy to forget that he was, chronologically at least a nineteenth and early twentieth century man. As with Nietzsche, Holmes was part of a generation writing in the wake of Darwin who helped liberate values from a deontological base. The ethical problems posed by naturalism led to modernism and to conundrums over which we still struggle in the study of values and the law.

42. German for "world outlook."

and distinction, and development. These incarnations all grow out of a conflict between a deep-seated skepticism, an asserted realist faith bolstered by his belief in Darwinian evolution, and an existential endorsement of duty even without decisive proof of the validity of the asserted cause. It is notable however, that Holmes's skepticism is present in one form or another at all three levels.

All doctrinal claims to Holmes's ideas must be predicated on his writings, utterances, and actions and not extrapolations of the supposed consequences of his ideas much less on conceptual resemblances to more extreme ideas or ones that have merely fallen out of fashion. Interestingly, some of his ideas often change from level to level; just as a scientist may apply theories based on relativity, quantum mechanics or even Newtonian physics to describe physical reality based on different levels of scale, so must one approach the ideas of Holmes.

With Holmes, the three levels or modes are: (1) an inner cosmology of dark skepticism and an asserted belief in amoral evolutionary realism and conditional subjective definitions of truth—things that all of his other views either arise out of or must take into account; (2) the public world of the legendary and romantic Holmes persona and man of action that is to a large degree based on a belief that all causes were ultimately unknowable. Here he asserts his belief in “a soldier's faith” of duty, courage and which melds a combination of a popular Victorian notion of chivalry with what seems to be an existential outlook.⁴³ As one Holmes scholar notes, we should be

43. TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL HOLMES, JR. 1861-1864, at 23-24 (Mark DeWolfe Howe ed., Harvard Univ. Press 1946) [hereinafter TOUCHED WITH FIRE]. In the diary entry, Holmes writes that he asked himself what Sir Philip Sidney would have done in an instance (while being evacuated with the wounded across the Potomac River following the Union rout at Ball's Bluff) when gallantry and selflessness were pitted against pragmatic self-interest and possibly a chance for survival. *Id.* at 24. Sidney was for Holmes an early paragon of chivalric behavior:

When I had got to the bottom of the Bluff the ferry boat (the scow,) had just started with a load—but there was a small boat there—Then, still in this half conscious state, I heard somebody groan—Then I thought “Now wouldn't Sir Philip Sidney have that other feller put into the boat first?” But the question, as the form in which it occurred shows, came from a mind still bent on a becoming and consistent carrying out its ideals of conduct—not from the unhesitating instinct of a still predominant & heroic will—I am not sure whether I propounded the question but I let myself be put aboard.

See id. (quoting Holmes's diary).

It is of the greatest importance to realize that some of Holmes's closest friends during the war—notably Henry Livermore Abbott and William F. Bartlett—were war Democrats who opposed Holmes's abolitionist stance yet fought with remarkable courage out of a sense of duty (only a few of his friends who served, notably Norwood Penrose Hallowell and Robert Gould Shaw, shared his abolitionist leanings). Some of these men would reemerge as the “ghosts” of Holmes's speeches to veterans and former regimental comrades. Holmes eventually came to oppose righteous zealotry, believing it to be a cause of war and embraced a more limited faith in duty. A youthful idealist, he became over time more like the duty-driven “copperhead”

careful to distinguish between Holmes the soldier who is still in danger of being killed on the battlefield and Holmes the retrospective and therefore more romantic and speculative survivor. This affirmative mode seems to emerge from Holmes's naturally sunny personality. The third level or mode is a quasi-objective phenomenal world for rational and practical endeavors like positive science and the law that is a synthesis of the first two modes and which is darker than the public face but less fatalistic than the darker, inner core. At this "Newtonian" level, evolutionary processes dominate and civilization proceeds with fairness, moderation, and reason as elements of the law. Activity at this level requires action, results, rules, and reason as tools for achieving the moderation necessary for civilization and the life of complexity and interest that Holmes endorses. The Newtonian Holmes then, is a synthesis, a result or even a practical byproduct of the other two. It should be noted that these categories characterize tendencies and are not impermeable absolutes.

B. THE TWO HOLMES AND A THIRD

"The two Holmes," does not refer to the frequently strained relationship between Oliver Wendell Holmes, Junior and Senior. Rather, it suggests another way of looking at Holmes, the younger, in terms of emergence and to think of him as two people (number 1 and 2 from the above designation): an inwardly brooding, skeptical man of ideas who found it possible to doubt most things in an epistemological sense, to include, ironically, even his own skepticism, and an extrovert, a disillusioned romantic and outer public man of action typified by charm, moderation and verve. Holmes himself concedes this dichotomy in his letter of May 6, 1925, to the daughter of Lewis Einstein.⁴⁴

Democrats in the Twentieth Regiment, Massachusetts. See DEWOLFE HOWE, *THE SHAPING YEARS*, *supra* note 40, at 80-133; LOUIS MENAND, *THE METAPHYSICAL CLUB* 42 (Farrar, Strauss & Giroux 2001). Howe's account of Holmes's war years and tensions and political views in the Twentieth Massachusetts in *Justice Holmes: The Shaping Years* is especially outstanding.

One of the best analyses of Holmes's wartime experiences is the Honorable Hiller B. Zobel's *The Three Wars of Oliver Wendell Holmes* which appeared in the Boston Bar Journal in late 1982 and early 1983. Zobel is careful to distinguish Holmes's writings on his experiences in the war between the "Holmes the soldier" writing about the "war as fact/contemporary relation," "Holmes the survivor" writing about the "war in retrospect/secondary civil war experience," and the more toned down private correspondent.

Those interested in how the war transformed Holmes should also look at his occasional speeches. The regimental history of Holmes's unit, *The Twentieth Regiment of Massachusetts Volunteer Infantry 1861-1865*, is a fairly generic account and is of mixed value and accuracy. See generally *THE TWENTIETH REGIMENT OF MASSACHUSETTS VOLUNTEER INFANTRY 1861-1865* (George A. Bruce ed., Houghton, Mifflin & Co. 1906).

44. Letter from Oliver Wendell Holmes to Lewis Einstein's Daughter (May 6, 1925), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 75-76.

Where the two Holmes overlap—like the overlay or set intersection of a two-circle Venn diagram—is the third Holmes, the worldly wise correspondent (although Holmes certainly wrote his share of darkly skeptical letters as well, one finds all three modes in his correspondences). He is the judge and man of affairs who exists in the everyday realm where ideas clash with considerations of the material world and where actions and results matter. Since action is necessary even in a world where perfect information is impossible, we must rely on the next best thing—predictable results (although ideally, descriptive or structural explanatory theories are preferable to consequentialist instruments). In all three stages (or spheres), Holmes was an astute skeptical commentator on life and of what he perceived to be reality, and one's view of him depends largely on the Holmes with which one is most familiar. To a considerable degree, this accounts for his multiple reputations, and the apparent contradictions show up when the Holmes of one context is pitted against another.

At the most fundamental and abstract level, the “inner Holmes” was based on an outlook that blends cosmological realism and cognitive skepticism, or rather one that embodies a tension between these two views that is inevitable in realist positivism. In this mode he asserts a belief in the external world—that there is an underlying noumena beyond the phenomenon that we perceive—but doubts our intellectual ability (and perhaps our sensory ability) to know it with anything approaching objective certainty. This gloomy doubt, imposed on a realistic premise, is the “real” Holmes in an intellectual sense, the “ironical in the back” of his heart.⁴⁵

In stark contrast to the inner skeptic is the Holmes of the public occasion, the legendary Holmes, the oracular mentor and advice giver, the brave and chivalrous, abolitionist youth, the good soldier and hearty companion, the white-haired Olympian and “Magnificent Yankee.” This is also the “touched with fire” Holmes of the “Memorial Day” and “Ipswich” address and “The Soldier's Faith,” the Civil War survivor and comrade, the lover of loyalty and believer in unquestioning subservience to duty toward unknown ends. This level is probably reflective of what Holmes means in his letter to Lewis Einstein's daughter when he refers to the “enthusiasm in the front of your heart”—the eternally romantic youth who chased after fire engines late into life and on seeing an attractive young woman while strolling with Benjamin Cardozo at an advanced age is alleged to have

45. *Id.* at 76. In this letter, Holmes suggests that the real man is the fatalist and skeptic in the back of the mind. *Id.* And yet the “irrepressible high spirits” that Max Lerner speaks of in the introduction to *The Mind and Faith of Justice Holmes* and his “naturally vigorous and original mind,” are equally parts of the real Holmes. LERNER, *supra* note 5, at xlvii, 365.

quipped “oh, to be seventy again!”⁴⁶ It should be noted that this romantic public face is even more life affirming than the fair and balanced judge, which the *Oxford Companion* juxtaposes against the skeptic.

Even within the optimistic persona of his public face, Holmes conceded life’s unfairness and lack of intrinsic meaning, other than what one cannot help believing; we choose our vision and act accordingly. Still, even with such a realization, he existentially asserted the merits of living with passion. At the age of ninety he spurred himself onward by noting that “[t]he race is over, but the work is never done while the power to work remains . . . [f]or us to live is to function. That is all there is in living[.]” and adds the Roman admonition, “Death plucks my ears and says, Live!—I am coming.”⁴⁷

The final stratum, an intermediate amalgam of the first and second, is the one that most scholars see and most often confuse and controvert and it is here that both the Holmesian bifurcation and its resolution most clearly exist. Holmes, like Immanuel Kant and some of the positivists of the nineteenth century, realized that despite our cognitive doubts, as well as the limitations of the senses, we must live and function in the real world.⁴⁸ Consequently, our day-to-day philosophy must be reflective of and accommodate this reality; in many cases it is better to act with imperfect or incomplete knowledge than not to act at all.⁴⁹

This level includes such disparate and seemingly exclusive elements as recognition of fairness within the law and an endorsement of Darwinian natural selection in biology (the two reconciled within Holmes by a strongly asserted endorsement of civilization, which will be discussed later). Even at this work-a-day “Newtonian” level, Holmes cannot entirely let go of his

46. Several versions of this anecdote exist in which Holmes’s age is variously given in his eighties or nineties. In *Bartlett’s Familiar Quotations*, the line is merely attributed to him. BARTLETT’S FAMILIAR QUOTATIONS 70 (17th ed., Little, Brown and Co., 2002).

47. Oliver Wendell Holmes, *Radio Address*, in THE ESSENTIAL HOLMES, *supra* note 1, at 20-21.

48. Wiener quotes Kant on the necessity of action:

The physician must do something in the case of a patient who is in danger, even if he is not sure of the disease. He looks out for symptoms and judges, according to his best knowledge, that it is a case of phthisis. His belief is even in his own judgment only a contingent one . . . I call such contingent belief which still forms the basis of the actual use of means for the attainment of certain ends, *pragmatic belief*.

WIENER, *supra* note 5, at 23. Action-oriented philosophy is generally referred to as consequentialism and includes utilitarianism, neutral monism, and instrumentalism. Another outlook that concedes the problematic nature of reality yet endorses action is that of the existentialists.

49. There is a perception that Holmes’s externalization of the law comes at the expense of fairness. See Royle, *supra* note 24, at 583; see also Maria C. Royal, *Climbing the Beanstalk: Justice Holmes and the Search for Reconciliation*, 22 VT. L. REV. 559, 605-07 (1998) (providing a discussion of Holmes’s sense of fairness).

skepticism—his view of the law is austere and even stark by later standards—but here it has a functional positivist tinge (the externalization of the law, for example), and he applies it in his professional writings and activities with moderation and reason.⁵⁰ This is Holmes the worldly realist, the Darwinian evolutionist and Malthusian naturalist, the atheist, the moderate but shocking skeptic. This is, of course, also the stratum of Holmes the legal thinker and judge.

It is also at this level at which scholars have painted him—mistakenly, I believe—in broad strokes as a thoroughgoing pragmatist⁵¹ and an immoderate power-obsessed Hobbesian and evolutionary eugenicist.⁵² In fact, this is the Holmes of *The Common Law*, and *The Path of the Law*. This level is actually a realistic synthesis of the brooding skeptic and the romantic legendary Holmes of the second level.

The third part of this article will deal with Holmes's base cosmology. It will be shown how the third Holmesian mode's views synthesize what is generally perceived as the central flaw or inconsistency within his thought.

1. *Holmes the Skeptic: Short Formulas, Intellectual Limitations and the Ironical at the Back of the Heart*

How is it possible for a person to be a skeptic, a romantic, and a realistic blend of the two and still maintain a coherent outlook? For Holmes, like Immanuel Kant before him, it began with a leap of faith positing an external world with other rational minds that exist independently and similarly to his own.

Before considering the synthesis of Holmes's disparate fonts, his base philosophy and world view must first be determined. The researcher confronting him finds numerous facets of the man, many of which are contradictory, and one can hardly be certain about which views are representative of the "real" Holmes or what view was the real larger picture he embraced. Only occasionally, does he completely let down his guard to reveal his true outlook.

50. See *supra* note 9 and accompanying text.

51. Holmes regarded James' all-encompassing immaterialist pragmatism "as an amusing humbug." Letter from Oliver Wendell Holmes to Lewis Einstein (June 17, 1908), in THE ESSENTIAL HOLMES, *supra* note 1, at 69-70.

52. For a perspective that regards Holmes to be the intellectual kin of extremists and monsters, see generally Palmer, *supra* note 17, at 573. For a more thoughtful view of the problems associated with power as a basis of truth, see WIENER, *supra* note 5, at 172.

Wiener believes Holmes's amorality to be closely related to Wright's "metaphysical nihilism." Given the general similarity of Holmes's view to the epistemology of Wright, this would seem to be the case. WIENER, *supra* note 5, at 36.

In his letter to Lewis Einstein's daughter dated May 6, 1925, Holmes shows that behind the gusto, *joie de vivre* and romanticism of his outer life, was a gloomy skepticism regarding abstractions and absolutes as reflections of objective reality, cosmic necessity, and what we can hope to know about the objective world.⁵³ Here, he expressed an outlook that borders on the fatalistic, nihilistic, and even anti-intellectual. In response to what was apparently a fundamental question about the cosmos, Holmes writes:

I think it futile to ask what it does all amount . . . and to one who thinks as I do, there is no answer except that it is not our business to inquire. It is a question of the significance of the universe, when we do not know even whether that is only a human ultimate quite inadequate to the I-know-not-what of which we are a part.⁵⁴

Later in the same letter, he provides a rare and uncharacteristically unguarded glimpse into his own psyche that would tend to explain much of the confusion that prevails in Holmesian scholarship: "One of my old formulas is to be an enthusiast in the front part of your heart and ironical in the back. It is true that some people can't do their best, or think they can't unless they are cocksure."⁵⁵

Here then, by his own admission, are two Holmes, the brooding skeptic who doubted the very possibility of authentic knowledge and the appropriateness of merely asking the larger questions, and the enthusiastic but contrived commentator on life, or in his own terms, the Holmes of the front of the heart and Holmes of the back. Still, as Hume notes, "reason is . . . the slave of the passions"⁵⁶ one cannot help but think that the "enthusiast" (despite the fact that it seems contrived) is, in fact, reflective of certain of his innate inclinations and personality traits, while the skeptic is more of an intellectual position. Either way, there is seldom a clear cut distinction between a person's emotional and rational nature—both are real parts of the man and existed within him in an oddly complimentary way rather than in a state of ambivalence or neurosis.⁵⁷

53. Letter from Oliver Wendell Holmes to Lewis Einstein's Daughter (May 6, 1925), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 75-76.

54. *Id.*

55. *Id.*

56. HUME, *supra* note 37, at 415.

57. The temperament of a genuine pessimist like Jonathan Swift seems more consistent with a dark worldview, and yet Swift is far more eccentric and misanthropic than either Holmes's outlook or personality. Holmes characterizes Swift's tendency to dwell on the base or fallen nature of humanity as "incipient insanity in the intensity on the baseness as on the banality of man." *HOLMES-POLLOCK LETTERS*, *supra* note 28, at 114.

As Max Lerner writes of the Holmesian split,

One can see the basis for this ironic dichotomy (the unique positivist blend of optimism about relationships and action in the phenomenal world, and pessimism regarding knowledge of the underlying noumena substrata that underlies such relationships) even more clearly in two of Holmes's letters to Harold Laski from 1929 and in a law review article he published in 1915 entitled *Ideals and Doubts*.⁵⁸ These are also among the most succinct expressions of his beliefs on the nature of the universe—his “short formulas”—and our knowledge of it. In *Ideas and Doubts*, he wrote:

[A]lthough I cannot prove that I am awake, I believe that my neighbor exists in the same sense that I do, and if I admit that, it is easy to admit also that I am in the universe and not it in me.

When I say that a thing is true, I mean that I cannot help believing it. I am stating an experience as to which there is no choice. But as there are many things that I cannot help doing that the universe can, I do not venture to assume that my inabilities in the way of thought . . . [a]re found to stand in quantitatively fixed relations to earlier phenomena.⁵⁹

This assertion of realist faith is echoed and developed in a famous letter to Harold Laski dated January 11, 1929:

I suppose you know my short formulas—I have repeated them often enough in talk and print. I begin by an act of faith. I assume that I am [not] dreaming, although I can't prove it—that you exist in the same sense that I do—and that gives me an outside world of some sort (and I think the *Ding an sich*)—so I assume that I am in the world not it in me. Next when I say that a thing is true I only

[t]here was in him a deep conflict between skepticism and belief, between mind and faith, between a recognition that men will act in terms of a cold calculation of interests, and a recognition also that they are moved by symbols which, if you squeeze the life and energy out of them, become merely tinsel and rag. He tried to construct a legal theory, as he tried to construct a philosophy of life for himself, which would allow him to take account of both strains. He was not whole successful logically in the attempt, but he made a going concern out of it. And because he did, he leaves us the sense of a full-statured person far more than do those who sought to trim their energies to the narrow confines of one or the other partial view.

LERNER, *supra* note 5, at 373.

Holmes's outlook splits not only between skeptic and romantic, but also between the private man and the public figure. This it would seem to be a fairly common thing to do. On the one hand, we have the private man Samuel Clemens, on the other is the larger-than-life Mark Twain. The poet Dylan Thomas also seems to have had a witty but contrived public persona known as “instant Dylan.” CONSTANTINE FITZGIBBON, *THE LIFE OF DYLAN THOMAS* 51-51 (Readers Union, J.M. Dent & Son LTD, 1965).

58. Oliver Wendell Holmes, *Ideas and Doubts*, in *THE ESSENTIAL HOLMES*, *supra* note 1, at 117-19.

59. *Id.* at 180.

mean that I can't help believing it—but I have no grounds for assuming that my can't helps are cosmic can't helps and some reason for thinking otherwise. I therefore define truth as the system of my intellectual limitations—there being a tacit reference to what I bet is or will be the prevailing can't helps of the majority of that part of the world I count. The ultimate, even humanly speaking is a mystery. . . . that truth is a mirage.⁶⁰

Although this is a statement of belief about the world, an admitted leap of faith rather than a formula for accessing objective knowledge, there is no reason not to take him at his word that he believed tenuously and non-dogmatically in an external reality. He was therefore a realist positivist by faith, but did not make the leap into objective certainty based on the perception of phenomena. The reality he believed in was physical—being more than a dream, thought, or idea—but he also believed that our knowledge of the underlying noumena or our ability to know it was necessarily less than certain. He believed in the thing-in-itself—the noumena or real substrata that underlay perceived phenomena⁶¹—indeed, as a young man he had seen too many minie balls⁶² slam into human bodies (including his own) to doubt their physical existence.⁶³ What he doubted,

60. Letter from Oliver Wendell Holmes to Harold Laski (Jan. 11, 1929), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 107.

61. *Id.* at 107-08.

62. Minie balls were conical bullets used as ammunition for rifle muskets during the Civil War. JAMES M. MCPHERSON, *THE BATTLE CRY OF FREEDOM* 474 (Oxford Univ. Press 1988); U.S. ARMY ORDNANCE DEP'T, *REPORTS OF EXPERIMENTS WITH SMALL ARMS FOR MILITARY SERVICE* 11-17 (A.O.P. Nicholson, Public Printer 1856); J. G. BENTON, *A COURSE OF INSTRUCTION IN ORDNANCE AND GUNNERY* 311-13 (D. Van Nostrand, 2d ed. 1862).

63. *See generally* *TOUCHED WITH FIRE*, *supra* note 43, at 13, 64-66, 92-93. Even though by his own admission he believed that he could not philosophically prove the existence of an external reality, it is reasonable to assume that as an officer in the Union Army, Holmes had sufficient reason to affirm the existence of a world external and independent of his own consciousness. Indeed, Holmes was himself seriously wounded three times. He also made a leap of faith based on the assumptions that he was not clever enough to dream up an entire universe that was more complex than he and in which he was a fairly marginal part. It is equally understandable how after his participation in the Virginia Peninsular Campaign, the battles of Antietam and Chancellorsville and Grant's horrific 1864 campaign against Lee, why one might not cling to absolute abstract values, a benevolent God and a deontological view of ethics.

In one respect or another, most people believe in some kind of reality, and even phenomenalist empiricists in the mold of Berkeley and Mill or idealists in the tradition of Plato or the difficult ontology of Leibniz must function realistically in the world around them. As Holmes admits, it is possible that what one thinks is reality may be a solipsistic dream, but to subscribe to this idea would be to believe in one of the least plausible options, for although it is virtually impossible to disprove such a view, it is even more difficult to honestly believe it. As Stephen Hawking has noted, nobody acts on solipsism and that it is in fact "a waste of time." STEPHEN HAWKING, *BLACK HOLES AND BABY UNIVERSES AND OTHER ESSAYS* 44 (1993). And, of course, life enjoins action. *See id.* (explaining that life requires a presumption of the existence of an external reality). In a similar sense, realism is also irrefutable. KARL R. POPPER, *OBJECTIVE KNOWLEDGE* 38 (Clarendon Press 1979).

was our ability to know the fundamental nature of objective reality with anything approaching certainty. This quotation is an encouraging start that resembles the leap of faith upon which much of modern philosophies of critical rationalism and sophisticated realism are based—the assertion of an objective external world and the existence of other rational minds.⁶⁴

But Holmes defined truth not in the modern sophisticated realist sense as the quality of a statement that corresponds with what it purports to describe in the external world,⁶⁵ or the theory-laden characteristic of accurate correlation between subject and object, but rather in the personal psychological terms of “what I cannot help believing.” Since our perception of reality or necessity is often not reflective of cosmic reality or necessity, Holmes suggested that we might do well to limit the truth of what seems to be true to our experience of it with a conscious awareness of such limitations. Therefore, to Holmes, truth is not to be defined in terms of the universal or objective, but in the subjective terms of irresistible belief impressed on us. This notion resembles Alexander Bain’s definition of belief as what a person is willing to act upon,⁶⁶ as well as the related

Sophisticated realism, by contrast is still the most compelling explanation for what we perceive to be reality, although at the scale and speed of human existence, it is easy to believe in a more simple or naïve form of realism and that the external world as we perceive it through our senses and interpret it though common sense is an accurate representation of reality. At the same level, however, it is just as intuitive to believe in Newtonian physics—the primary reason why these ideas dominated the physical sciences for two hundred years, and why they still work so well as rules of thumb in the day-to-day world.

But a person living in the twenty-first century cannot reasonably build a cosmology or claim to have a true picture of things based on Newtonian physics. The smaller reaches of physical reality are dominated by quantum randomness and macro scale of stellar or planetary gravity is ruled by relativity. Still, we live and must function in the misleading Newtonian world between the micro and the macro. Holmes lived here too, and his workaday philosophy reflects the Newtonian dictates of that realm, which often lend themselves to instrumentalist solutions.

64. The mutually corroborating statements—asserting other rational minds and an external objective reality—are an encouraging start that resembles the initial leaps of faith of such modern philosophers of science, Karl Popper and the school of Critical Rationalism.

What is odd about Holmes’s views of reality and truth is that he takes a step forward into something that sounds deceptively like modern epistemological realism, then doubting our ability to know it to a degree approaching what may be regarded as scientific truth, he steps backwards into pragmatic conditionality and a positivist doubt of foundational knowledge. Simply put, he offers an objective model, but then rejects the possibility of objective knowledge about the external world. Moreover, rather than affirm universal “necessities” (instances of complete deterministic predictability) Holmes harks back to his mentor, Chauncey Wright, and the latter’s “Betabilitarianism” or the idea that one can “bet” on the behavior of the universe with a high degree of intersubjective corroboration.

65. “A true sentence is one which says that the state of affairs is so and so, and the state of affairs indeed is so and so.” ALFRED TARSKI, *LOGIC, SEMANTICS, METAMATHEMATICS* 155 (Oxford Univ. Press 1956). This definition of truth as a quality or characteristic of a statement is similar to the one stated by Aristotle in *Metaphysics*. *Id.* at 155 n.2.

66. It is also ironic that *Ideas and Doubt* purports to be an attack on Kantian idealism given that Holmes’s model of an objective cosmos that is not amenable to human analysis (save for a

Peircean equation of meaning to reasonable expectation.⁶⁷ It is an instrumental rule of thumb, a heuristic stopgap, and not a definition of truth or how we come to know the ultimate reality of things much less a truth criterion. This is also a manifestation of truth as coercion by external power that typifies Holmes's outlook.⁶⁸ It should be noted that just as Holmes sometimes defined truth in terms of power, one could argue the inverse, that truth often has a compelling and coercive power of its own.

Restated, Holmes forays into cosmological realism, and then immediately falls back with cognitive skepticism into something similar to, but more skeptical than, Kant's representational realism (although he ironically expressed this view in an article opposing "Neo-Kantians"), Chauncey Wright's positivism, as well as the modern philosophy of Hillary

probability one can "bet" on), is a close paraphrase of Kant's quasi-pragmatic view of a largely inaccessible but probabilistic universe. See WIENER, *supra* note 5, at 23.

67. In his essay, *Critical Common-Sensism*, Peirce restates what he calls his pragmatic maxim, the celebrated "principle of Peirce" as "[c]onsider what effects that might *conceivably* have practical bearings you *conceive* the objects of your *conception* to have." Charles S. Peirce, *Critical Common-Sensism*, in PHILOSOPHICAL WRITINGS OF PEIRCE 290, 290 (1955). This, then, is the idea that "we should limit that conception of the real-world behavior the object will exhibit under all conditions." Under Peirce's definition, the thing's identity lay in its characteristics and functions in any and all circumstances. Comprehensive knowledge of all the possible functions of a thing produced conceptual clarity of cause and effect or what Peirce would call meaning (as opposed to epistemological or metaphysical truth).

The most famous illustration of this is Peirce's own example of hardness as not a physical or theoretical property but rather the totality of what hard things do. While clever, this definition may be no more than a sterile and anti-intellectual tautology. It also highlights how the result-oriented aspect of pragmatism may come at the expense of deeper understanding.

Rephrased, what this definition says is that "a hard object is something that does what hard objects do" or, more simply "hardness is what hardness does." But this does not expand our knowledge or tell us anything new about the physical quality of hardness. Nor does it tell us anything about the measurable hardness of an object like a diamond or the object itself. Moreover, this definition says nothing useful about the criteria of hardness, the nature of the reality in which hardness exists, or how we came to know what we know about hard objects like diamonds or the quality of hardness. For knowledge to grow in a meaningful way, what is needed is a more precise definition or measurement of an object's characteristics than this Pragmatist definition lends. This is because Peirce's definition assumes that we already know everything about the quality which we are describing and that we are merely applying the general concept to the specific case.

Using his definition we are presented with the problem of how we came to know what we know in the first place. The question then becomes, how do we go about investigating new qualities about which we know very little or nothing at all? Such a definition of hardness actually precludes further investigation of this quality as a thing to be explained, and suggests that the quality itself is a mere tool against which to measure specific examples of hardness (which limits our investigation to what is known as opposed to what can be examined or discovered). It also would seem to preclude the discovery of categories of previously unknown qualities. Rather than add to the discussion or expand our knowledge of an object or quality in question, the principle of Peirce may have the practical effect of precluding investigation. A modern sophisticated realist investigation of a diamond by contrast would be less concerned with the totality of characteristics of hardness than with its atomic, molecular and crystalline substructure that causes it.

68. See generally WIENER, *supra* note 5, at 172-89.

Putnam.⁶⁹ It should not be confused with the idealist phenomenism of Berkeley, the phenomenist positivism of Mill, or the mathematical idealism of Leibniz.

Truth to Holmes, in one respect, was nothing more than the highly problematic common sense formula of a “system of my own limitations,” the acceptance of the self-evident or what one could not help believing. But even here, Holmes had no illusions and more astutely recognized that the subjectivist perception of truthful necessity of the individual should not be mistaken for objective cosmic necessities.⁷⁰ Rather, the corroborating observations, limitations and “can’t helps” of the majority of other rational minds created a cohesive intersubjectivity or a sort of de facto quasi-objective framework in which day-to-day rational (and even positivistic) activities of civilization and progress like science and the law could proceed with more or less uniform results.

This notion resembles the Peircean/Jamesian idea of truth as the mean or dominant belief of rational minds in the aggregate, although some scholars have suggested that Holmes is merely devising a more modest sort of rational/empirical triangulation or intersubjectivity of observed phenomena as a useful but non-objective means of verification.⁷¹ This idea of truth

69. In some ways, Holmes’s view is antithetical to the ideas expressed in the immaterialist phenomenism of Berkeley and Mill, as well as William James’s conceptually related idea of neutral monism. Holmes postulates a physical reality that is more than a dream, but doubts our ability to know it with certainty especially in terms of long-range prediction—“the unforeseen is generally what happens,” and therefore like Kant relies on short-term prediction and contingent belief. Mill, James et al., by contrast doubt the reality of the external world, but believe that certain conclusions could be reasonably expected. Rather than seeking better ways of better testing our ideas, pragmatism and related instrumentalist approaches seeks the reduction of science to a collection of interrelated pragmatic formulae or instruments. In our own time, theoretical scientists tend to favor realist explanations, while applied scientists and engineers often prefer an instrumentalist approach.

70. In this sense Holmes’s outlook was similar to the philosophy of Chauncey Wright. The rejection of “necessity” in both Holmes and Wright marks a point of departure with earlier forms of realism. Holmes’s cosmology overall is more closely related to that of Wright than to the other members of the Metaphysical Club. Wright’s view tends to be more subtle and nuanced than those of staunch pragmatists like William James. See Michael F. Duggan, *Chauncey Wright and Forward-Looking Empiricism* (2002) (Ph.D. dissertation, Georgetown University) (on file with author). For Wright’s ideas, see generally EDWARD H. MADDEN, *CHAUNCEY WRIGHT AND THE FOUNDATIONS OF PRAGMATISM* (Univ. of Wash. Press 1963). MENAND, *supra* note 43, at 201-03, 216 (providing other overviews of Wright and the Metaphysical Club); WIENER, *supra* note 5, at 31, 36, 39. For Wright’s criteria and certificates of truth, see generally Duggan, *supra* note 70, at 199-227.

71. See Letter from Oliver Wendell Holmes to Harold Laski (Apr. 6, 1920), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 115 (“Truth is the unanimous consent of mankind to a system of propositions.”); see also Oliver Wendell Holmes, *Natural Law*, in *THE ESSENTIAL HOLMES*, *supra* note 1, at 180.

Hopefully Holmes was making a modest argument for truth as intersubjectivity as a sort of “triangulation” by multiple observers—as with modern peer review in the academy—and is not forwarding the pernicious idea of actual truth as consensus or intellectual conformity. Sheldon M.

as a majority opinion—although more understandable in a sociological sense—is just as problematic as his common sense standard for individual belief. Besides, the idea of truth as rational consensus would be a rather ironic position to take by a man known for his minority opinions as “the Great Dissenter.” This idea, a sort of sociological definition of truth as the coercion of mere rational or educated agreement over shared perceptions is another—albeit a more dubious—standard of Holmes.

With a repertoire of perceptions, experience, and linked knowledge, a person could then act. Rather than affirm the universal necessity of the external world, Holmes again harkens back to the pragmatic Kantian notion shared by Chauncey Wright—the American philosopher of science and moderator of Metaphysical Club of whom Holmes, James and Peirce were members—that one could “bet” certain outcomes when observing phenomena in the universe.⁷² As Holmes wrote to Frederick Pollock in a letter dated August 30, 1929:

Chauncey Wright, a nearly forgotten philosopher of real merit, taught me when I was young that I must not say *necessary* about the universe, that we don’t know whether anything is necessary or not. So I describe myself as a *betabilitarian*. I believe that we can bet on the behavior of the universe in its contact with us. We bet we know what it will be.⁷³

This whimsical sounding “*betabilitarian*” outlook illustrates the means by which Holmes accommodates both his intellectual skepticism and his

Novick sees it as the former (“triangulation” is his word) and not the pragmatist’s social test of truth by agreement. SHELDON M. NOVICK, 1 THE COLLECTED WORKS OF JUSTICE HOLMES 27 (Univ. of Chicago Press 1995).

The idea that truth is merely a consensus of rational experts is a dangerous philosophical notion; to the contrary, human agreement or the individual or collective desire for something to be true has no bearing on factual truth. Just because something is agreed upon does not make it true in a factual sense and there was a time when the world’s best minds agreed that the world was the flat center of the universe. On an interesting related note, Winston Churchill once devised argument of how something could be tested without any human observer. See KARL R. POPPER, OBJECTIVE KNOWLEDGE 42-43 (Oxford Univ. Press 1972) [hereinafter POPPER, OBJECTIVE KNOWLEDGE].

Although peer review may be a necessary part of the scientific method, it is neither the strongest part of the method nor is it sufficient by itself.

72. The definition of epistemological truth as the consensus of informed rational opinion is also spurious on its face given the history of the growth of scientific knowledge. The list of ideas or opinions that were almost universally believed to be true, but which were later shown to be untrue is a long one. For instance, it was once the rational consensus of informed rational opinion that the Earth was the flat center of the universe. Moreover, there are large areas of academia, to include the physical sciences, in which there is little if any consensus. Although this view of knowledge might make sense in a sociological sense, in a hard epistemological sense it is worthless.

73. HOLMES-POLLOCK LETTERS, *supra* note 28, at 252.

rational need to function both in the world generally, and in a profession which some ideas and arguments are to be judged as better or more pertinent than others (some scenarios are more likely, some conclusions more fair). It is the segue from doubt to functionality.

Betting implies probability, and meaningful betting on the behavior of the external world suggests a probabilistic view of science or at least reasonable expectation of certain outcomes. But probability in the older scientific tradition of Laplace optimistically assumes that we are proceeding from correct (Newtonian) physical laws but with incomplete information about the specific case.⁷⁴ Holmes, however, was skeptical about declarations of certitude regarding human knowledge and believed that such confidence was often betrayed by actual results. In many ways, Holmes was a skeptic who forayed out of necessity into a nineteenth century pragmatic approach to problem-solving, but was probably too intelligent to believe it wholeheartedly and therefore lapsed into skeptical realism with some practical and limited predictive aspects.

It is difficult to tell whether Holmes is advocating a Laplace-like form of Newtonian determinism in which we can come to fill in the blanks of our ignorance with laws of probability, or if he is endorsing Kant's modest pragmatism—"betting" may just be an informal way of saying "reasonably expecting" or intuiting a likely conclusion in the Peircean sense. Given Holmes's innate skepticism, it would seem to be the latter. Probability, though a staple of a sort of vulgar early nineteenth century philosophy of science, is not a sound means by which to approach science in practice.⁷⁵

74. See L. PEARCE WILLIAM, *THE ORIGINS OF FIELD THEORY* 30-31 (Random House, Inc. 1966) (providing a brief overview of Laplace's approach to science).

75. Probabilistic and related pragmatic approaches to science were common in the nineteenth century and embodied a sort of naive scientific realism that was based on the success or failure of results using probability. This perspective saw science incorrectly as an inductive statistical probability machine.

A modern Critical Rationalist approach would say that science does not proceed from either commonsense or un-theory-laden (direct) observations, much less a consensus of human opinion, but by the formulation and testing (corroboration or refutation through falsification) of bold conjectures; great scientists smash paradigms of existing opinion rather than shore them up.

All observation is theory-laden and therefore there is no such thing as unmediated observation; Popper notes that just by looking at something means that we already have ideas and opinions about it. Scientific knowledge progresses through inspired hypotheses falsified through deductive experimentation and then by critical discussion. Science advances by correcting our mistaken assumptions and by smashing "paradigms," and not by shoring them up with supportive evidence.

Popper believes that we begin with a conjecture or hypotheses, which is as much the result of creativity as it is of reason or empirical observation. We then devise a controlled test—an experiment—with the risk of disproving the conjecture if it is in fact untrue, thus corroborating it if it is true (experiments do not "prove" conjectures since all knowledge is tentative and open to greater refinement or disproving). The findings of the test are then written up and submitted to peer review and the steps of the experiment are outlined so that other people—including those

Modern science, like Laplace, uses probability as a means of accounting for what was not known—in our own time this would include methods in physics that deal with quantum randomness—but it is not the means of discovery that he believed it to be.

In spite of his deep-seated skepticism, Holmes, like Kant, believed that it was better to act with imperfect knowledge (i.e., that which he could not help believing, that which most rational actors would generally agree on, and results that could be reasonably expected).⁷⁶ Significantly, this outlook works much better in the physical sciences where predictions can be made about phenomena governed by physical laws. Human behavior, by contrast, is guided by that rational and irrational aspects of volition and attempts to further perceived interests and not by anything nearly as predictable as the laws of gravitation, motion, or electromagnetism. Even when human behavior is directed by rational choice, our prediction of outcomes in no way approaches the reliability of the physical sciences.

Holmes believed in an ultimate reality as an asserted article of faith, but what we knew of it was filtered through the distorting prisms of the senses. Therefore, truth was what we could not help believing in a system of our own limitations. The fact that we could not know reality objectively kept his skepticism intact despite his want to believe in a greater reality and his need to function as a judge.

2. “*The Passion of Life to its Top:*” *The Romantic Holmes*

Man is born a predestined idealist, for he is born to act. To act is to affirm the worth of an end, and to persist in affirming the worth of an end is to make an ideal. The stern experience of our youth helped to accomplish the destiny of fate. It left us feeling through

who do not agree with the conjecture can replicate it. If a conjecture survives this process, it can be regarded as a conditional truth until further refined or disproved. See generally KARL R. POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* (Basic Books, Inc. 1959) (1934); Karl R. Popper, *Science: Conjectures and Refutations*, in *CONJECTURES AND REFUTATIONS* (Routledge Classics, 2d ed. 1963) [hereinafter POPPER, *CONJECTURES*].

Commonsense and probabilistic approaches by contrast tend to reinforce our prejudices and mistaken ideas while often blinding us to true but counterintuitive ideas and solutions. See POPPER, *supra* note 71, at 32-105 (referring to chapter two which discusses arguments against “commonsense theory of knowledge” and for “commonsense realism”). It is striking that the two greatest discoveries in modern physics—relativity and quantum mechanics—are both counterintuitive and would have never been discovered by methods appealing to common sense and unaided observation. Probability is still useful in science, not as a tool of discovery, but as a means of eliminating randomness.

76. Other advocates of this approach in the years prior to the publication of *The Origin of Species* include Sir John Herschel and Buckel. WIENER, *supra* note 5, at 3.

*life that pleasures do not make happiness and that the root of joy as of duty is to put all one's powers toward some great end.*⁷⁷

Of all American historical public figures—for example, Theodore Roosevelt—it is Oliver Wendell Holmes who best embodies an amalgam of the man of ideas, action, and public affairs. This combination along with his Olympian persona renders him an almost legendary character that sometimes confounds scholarly investigation. The enthusiastic advocate of action is the second mode of Holmes. This is the quotable and aphoristic philosopher of life, the stern optimist and romantic.

Holmes frequently coupled his skepticism of absolutes with the need to act in our daily lives with courage and faith toward unknown ends. In the letter of May 6, 1925, to Miss Einstein in which Holmes pours out his darkest ideas on what we cannot know about the universe, he also adds that life enjoins action and therefore salvages the possibility of meaning.⁷⁸ More than a superficial construct, the Romantic Holmes has worth and merit as a philosopher of life who offers an asserted existential commentary affirming life in the absence of intrinsic meaning. Still, he has no illusions, and believes that the inclination to seek and act is part of human nature:

It is enough for us that it [the universe] has intelligence and significance inside of it, for it has produced us, and that our manifest destiny is to do our damndest because we want to and because we have to let off our superfluous energy just as the puppies you speak of have to chase their tails. It satisfies our superlatives and it seems to me unnecessary to demand of the cosmos an assurance that to it also our best is superlative. It is so in our world and that is as far as we can go.⁷⁹

Seldom in American letters have intellectual doubt and affirmation run so hard together in a single document. Holmes knew all too well that in the absence of absolute morality—the deontological ethics postulated by traditional morality and natural law—we must assert our own values. Still, Holmes's view here only amounts to a sort of dark agnosticism about authentic knowledge of the bigger questions of cosmology and even epistemology. Implicit in this quote is the idea that questions on the fundamental nature of the universe, as with bold assertions of cosmic necessity by positivistic philosophers, were possibly just projections of

77. Oliver Wendell Holmes, *The Class of '61*, in SPEECHES, *supra* note 25, at 96-97.

78. Letter from Oliver Wendell Holmes to Lewis Einstein's Daughter (May 6, 1925), in THE ESSENTIAL HOLMES, *supra* note 1, at 75-76.

79. *Id.* Some of the ideas expressed in this letter are echoed in his 1918 law review article. Oliver Wendell Holmes, *Natural Law*, in THE ESSENTIAL HOLMES, *supra* note 1, at 180-83.

human limitations and therefore potentially not pertinent or relevant. Consequently, the most profound speculations may be little more than the trivial product of human tendencies. Although he is talking about formal knowledge here, he is also speaking of human nature and his view also applies to questions of “why” in both a meaningful sense, as well as in a causal sense. Since there is apparently no objective or an external grounding for such standards, they are the moral equivalent of what one “cannot help believing,” something even more apparent in his occasional speeches.

Other writers and thinkers of a modernist bent have addressed problems of ethics, meaning, and how to live in a world without intrinsic meaning, and have come up with answers congenial to Holmes’s outlook. With Hemingway, the asserted premise upon which other values were predicated was the courage and dignity with which one faced a world without intrinsic meaning. For Nietzsche, it was heroic aristocratic values, the will of the great individual, and an aesthetic dialog between the *Dionysian* and the *Apollinian* that denoted the superior individual and superior life and those higher activities and capabilities that make us distinctly human.⁸⁰

Holmes’s value system is akin to both of these views—he was certainly taken with and endorsed duty, civilization, a version of the Good Life, and he embodied the values of an urbane and gregarious natural aristocrat. The means were reason, moderation (although Holmes would have certainly bristled at the latter), a strong interest in the deepest ideas and questions, and the law as externally enforced rules of the game. Through his own example and asserted values, Holmes endorsed a life of romantic vigor and gusto, but kept a firm grounding in skepticism about final answers and absolute truth.

In the real world of relative values, the views that clash are between individuals and groups trying to “make the kind of world” in which each wants to live. According to Holmes, the reasons why men go to war are often abstract or even ideal and are bound up in competing visions of civilization. Although some soldiers may feel a simple urge to hate a caricatured enemy, this is not necessarily the case and there is often respect between

80. Regarding Nietzsche’s dichotomy of the *Dionysian* and the *Apollinian*, see generally *On the Birth of Tragedy*. Nietzsche discusses the differences between the ethos of the knight and the priestly (and slave) in the first essay of *On the Genealogy of Morals*, although some of the ideas are developed in *The Gay Science* and *Beyond Good and Evil*. See generally FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* (Walter Kaufmann trans., Vintage Books 1974) (1887). Nietzsche’s discussion of the superior human qualities of the artist, saint and philosopher is found in the essay *Schopenhauer as Educator*. Friedrich Nietzsche, *Schopenhauer as Educator*, in *UNTIMELY MEDITATIONS* 125-94 (R.J. Hollingdale trans., Cambridge Univ. Press 1983); see WALTER KAUFMANN, *NIETZSCHE, PHILOSOPHER, PSYCHOLOGIST, ANTICHRIST* 152, 164, 172, 175-76, 196, 252, 280-281, 285, 312, 322 (Princeton Univ. Press, 4th ed. 1974).

soldiers in opposing armies. This led Holmes to conclude with moral relativity and Nietzschean clarity that one does not have to think ill of a man in order to kill him in battle.⁸¹ To Holmes it makes little difference whether the values that one dies for are personal assertions or believed to be the word of God. Both are matters of faith.

Examples of Holmes's romantic mode are legion and well-known, and his public utterances are too numerous to outline here.⁸² Suffice it to say, the central premise of the Romantic Holmes is the idea of "a soldier's faith."⁸³ Life, and by extension the cosmos at large, is the mighty campaign of which we can only see a small part and we have a poor and limited vantage point by which to appraise the totality of things. We each seek to help actualize the vision with which we most agree but without comprehending the whole or even knowing if our perceptions about it are correct.

In a general sense then, Holmes believes that this is the faith on which all action relying on incomplete information is based, making it conceptually akin to pragmatism (it also sounds like a more modest version of religious faith). This is interesting in that even at his most romantic, Holmes did not pull back from his dark view about the ultimate nature of things. What saves him here is his austere soldier's faith, or the moral equivalent to

81. Letter from Oliver Wendell Holmes to Lewis Einstein's Daughter (May 6, 1925), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 75-76. "As long ago as when I was in the Army I realized the power that prejudice gives a man; but I don't think it necessary to believe that the enemy is a knave in order to kill him." See Ernst Jünger, *THE STORM OF STEEL* ix (Basil Creighton trans., Chatto & Winds 1929). Ernst Jünger (1895-1998) the German novelist and the last recipient of the *Pour le Merite* (the "Blue Max") expressed a similar respect and admiration for his former enemies in the "The Author's Preface to the English Edition" to *THE STORM OF STEEL* (New York: Howard Fertig, 1996 [reprint of 1929 edition], page ix), his account of his experiences in the First World War. Recognition for the humanity of one's enemy is perhaps best expressed in Thomas Hardy's famous 1902 poem about the Boer War entitled *The Man He Killed*.

Of course, a respect for one's enemies is one of the core beliefs of Nietzsche's *On the Genealogy of Morals*, and is the basis for the ethos of the noble. When we cease to respect a worthy enemy, we ourselves become ignoble or as bad as we imagine them to be.

82. See generally Oliver Wendell Holmes, *The Class of '61*, in *SPEECHES*, *supra* note 25, at 96-97; Oliver Wendell Holmes, *The Soldier's Faith*, in *SPEECHES*, *supra* note 25, at 56; Oliver Wendell Holmes, *The Fraternity of Arms*, in *THE ESSENTIAL HOLMES*, *supra* note 1, at 73-74; Oliver Wendell Holmes, *Memorial Day*, in *SPEECHES*, *supra* note 25, at 1.

83. Oliver Wendell Holmes, *The Soldier's Faith*, in *SPEECHES*, *supra* note 25, at 56. Or, see any of his occasional speeches on martial themes, especially those to his fellow veterans. Notable among his speeches on martial themes are his *Memorial Day* address, from May 30, 1884, *The Fraternity of Arms*, from December 11, 1897, and *The Class of '61*, from June 28, 1911.

In light of Holmes's "front of the mind" reference in his letter to Miss Einstein, it would be tempting to write of these public addresses as instances of superficial crowd-pleasing rhetoric. However, there is real philosophy in them, and their call to action, with the realization of the intrinsic meaninglessness of life comes across as a sort of romantic existentialism. Holmes often seems preoccupied with the existential problem of action and concludes that we act through commitment despite imperfect moral knowledge, rather than because of it.

his betabilitarian epistemology that gives life meaning thus avoiding nihilism.

It is especially telling that although Holmes believed in Darwinian evolution, a Malthusian view of population, and played the game of the law dispassionately by its rules, he also asserted values for living that are congenial to the existence of civilization and which embrace and in fact require a basis in reason, cooperation and balance.⁸⁴ Even in his most optimistic moments, Holmes's thought is never far from the abyss, and he takes an almost perverse joy in disillusioning formalists and other traditionalists with admonitions that affirm life while acknowledging the void and the tenuous nature of things. It is almost as if without an objective meaning to life and without the expectation of an external afterlife, life became more valuable to him in terms of temporality and therefore scarcity.

There is a temptation to dismiss Holmes's enthusiastic romantic mode as a secondary and less serious public face or pose, especially in light of his "front of the heart" comment to Miss Einstein. In spite of what he wrote in this letter, it would be a mistake to write off the Romantic Holmes as a just superficial public pose. His romanticism was something that he embraced as a personal prescription for living and endorsed as a path for others. If the Skeptic was the real Holmes as a thinker, then the Romantic is the real Holmes as a person.

It is also significant that Holmes took duty very seriously, and as a young man put his life on the line for his beliefs and nearly died several times for his effort.⁸⁵ He risked all for belief and duty in spite of his doubts

84. See Oliver Wendell Holmes, *At a Dinner Given by the Bar Association of Boston, in SPEECHES*, *supra* note 25, at 82 (praising the Good Life allowed by modern civilization). The paragons of human civilization that he mentions (and which exist because of cooperative human society) are "the artist, the poet, the philosopher, and the man of science." *Id.* at 85.

85. Holmes was commissioned as an officer in the Twentieth Regiment of Massachusetts Volunteers on July 23, 1861 (having left school to enlist in April of that year) and was mustered out at Petersburg, Virginia on July 17, 1864. MARK DEWOLFE HOWE, *JUSTICE HOLMES: THE SHAPING YEARS* 80, 174 (Belknap Press of Harvard Univ. Press, 1957). He was shot through the chest at the Union defeat at Ball's Bluff on October 21, 1861, was shot through the neck at Antietam on September 17, was hospitalized with dysentery at Fredericksburg in December 1862, and was badly wounded in the heel at Chancellorsville on May 2, 1863. *TOUCHED WITH FIRE*, *supra* note 43, at 64-66, 74, 92-93.

Holmes, a young man with abolitionist views saw slavery as a stain on civilization and a chapter that truly civilized nations had outgrown. He had grown jaded by the numerous Union defeats and at times questioned whether the war was winnable. Letter from Oliver Wendell Holmes to Oliver Wendell Holmes, Sr. (Dec. 20, 1862), *in TOUCHED WITH FIRE*, *supra* note 43, at 80. Immediately after the major Union defeat at Fredericksburg for instance, Holmes seems agnostic on his father's (and his own) view that the North represented civilization and offers a Darwinian-sounding explanation that if the system of the Union was superior to that of the Confederacy, then civilization and progress will prevail regardless of whether the war was fought. *Id.* He does affirm his commitment to duty here. *Id.* This can hardly be seen as a statement of Holmes's ideas on civilization and the winning out of beneficial ideas. The tone of this letter may

(the war undermined his faith in all *dogmatic* belief which he later ascribed as a cause of conflict, even when well meaning). The willingness to die for a value like duty toward unseen and poorly understood ends, is a secular version of faith. His “soldier’s faith” in duty, although generally affirmed with gusto is in fact asserted and tenuous rather than passionate, ideological, and dogmatic, and is very similar to his postulated belief in an external reality.

3. *The Newtonian Holmes*

Where the Skeptical Holmes overlaps with the Romantic or Olympian Holmes, we find Holmes the philosophical judge, the realist that must exist in the world intermediate to pure ideas and popular sentiment and on a scale in which most of life—to include the law—transpires. This is the level at which we live and where we must implement ideas, where the optimistic ego meets dark reality.

At this level, he is still skeptical and thoughtful although as a professional, he is working in the real world where real answers and results are necessary (even the most jaded of solipsists believe in the reality of daily life at one level or another and look both ways before crossing busy intersections). This is the practical, day-to-day world, and our understanding of it at our scale of existence is almost Newtonian in terms of the limits of how we can know its mechanics via our unaided senses. Like Newtonian physics, our “common sense” understanding of things is useful if not true in a cosmological sense. In a social sense, this positivist outlook also provides the basis for Holmes’s rationalism of playing the game amorally by the rules within the law. In the law, in philosophy and in life, Holmes had to settle for workable rather than objective standards.⁸⁶

Because this mode is comprised of the overlap of the other two modes, much of it is a reconciliation of the disparate elements of the Skeptical and Romantic Holmes. Therefore, the Newtonian Holmes is a synthesis of the pessimist and the qualified optimist—a softer version of the Skeptic or a

not only reflect the defeat (the Union had lost about 13,000 men in a single day through a number of pointless frontal assaults) and death of friends, but also his attitude toward his father. He had recently been in the hospital with a bad case of dysentery that was so severe as to keep him out of the battle. Holmes—a northern boy—also noted the extreme cold, something also underscored in the writings of his fellow New Englander, Joshua Lawrence Chamberlain. TOUCHED WITH FIRE, *supra* note 43, at 79-81; Joshua L. Chamberlain, BAYONET! FORWARD! MY CIVIL WAR REMINISCENCES 1-15 (Stan Clark Military Books 1994).

86. See generally Oliver Wendell Holmes, *The Path of the Law*, in THE ESSENTIAL HOLMES, *supra* note 1, at 160-77; Letter from Oliver Wendell Holmes to Frederick Pollock (Aug. 30, 1929), in THE ESSENTIAL HOLMES, *supra* note 1, at 108; HOLMES-POLLOCK LETTERS, *supra* note 28, at 251.

harder version of the Romantic. Here we see his affable temperament acting as a moderating factor on his often more extreme intellect in a classic synthesis of heart and head. Thus, despite some opinions that are stern by contemporary standards, Holmes the moral relativist never devolved into a perspective akin to Hobbes, much less Hitler. Although Holmes did not like a fanatical commitment to ideology, he also shied away from words like “moderation” and “fairness.” And yet, rules have to be guided by something, and it is undeniable that there is balance in Holmes’s opinions, and balance precedes moderation and fairness. He may have tweaked Laski for the “delicacy” of his feelings saying that “I think your morals . . . are not the last word but only a check for varying intensity upon force[.]” but there is also something that moderates Holmes and his notion of truth as power.⁸⁷

In Holmes’s Newtonian realm, there are several closely related strains of thought that give form to his philosophy. The first is a positivist-like embracing of science and rational programs as the most productive way of approaching problems. Again, even if one is a realist, and if there is no way to access true knowledge of reality beyond the senses, then we must limit ourselves to the next best thing—result and action-oriented philosophy and the empirical sciences.⁸⁸

The second is a complex view of the law as a naturalistic phenomenon that is both evolutionary and empirical. This view is briefly described in the opening pages of *The Common Law*. The third facet—really a subset of the first two—is spelled out in his classic 1897 graduation speech (also

87. Letter from Oliver Wendell Holmes to Harold Laski (July 23, 1925), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 140.

88. Popper shows fairly conclusively, that the empirical view that all knowledge can be traced back to sensory observation is incorrect and in fact leads to an infinite regress. Karl Popper, *Knowledge Without Authority*, in *POPPER SELECTIONS* 46, 46-57 (David Miller ed., Princeton Univ. Press 1985). In fact most people learn from reading about ideas in science and philosophy by reading about them rather than by personal observation or by replicating every experiment. *See id.*

An instrumentalist approach is only preferable to a realistic structural description or explanation only when the latter is not possible for whatever reason, or when the former can be used more conveniently in situations where practicality is required over absolute truth. *See supra* text accompanying notes 53 and 61. There are many ideas that are useful to people in practical terms but which may be untrue as matter of epistemological fact. These include Newtonian physics, ideas associated with natural law, moral rationalism, and deontological ethics (the Bill of Rights, for example). With these things we have engineering, the rights and constitutional basis for practical republican government, and a common public morality respectively. With them as instruments or guidelines—although not facts—we have the basis of modern civilization (this shows how something can produce desirable results without being factually true).

Generally speaking, however, structural realist explanations tend to explain more and produce more reliable results and are therefore better than pragmatic explanations even using pragmatic criteria. We believe that the Earth revolves around the Sun not because it fits out models, but because the heliocentric model of the solar system is closer to what it purports to describe than the terracentric Ptolemaic model.

published in the Harvard Law Review), *The Path of the Law*. This espouses a predictive view of the law both in regard to advocacy and from the perspective of the “Bad Man.” The “Bad Man” is the calculating potential perpetrator who amorally weighs his options in anticipation of the application of external public force in response to an infraction. As one might expect, Holmes saw the job of the attorney as also being predictive in that he or she must anticipate the direction of the path of law in order to best advise clients. Holmes’s closely related view of the law as an external manifestation of power is the overarching idea behind the “Bad Man” theory and is among the most well-known of his general positions on the law. This, too, is conceptually related to both his evolutionary outlook and the consequentialist aspect of his view of the law. In both philosophy and the law, the Newtonian Holmes gropes for an objective standard or at least a workable one. As a legal theorist, he did this by externalizing the law.

The final facet is the reconciliation of the amoral and result-oriented Darwinian/Malthusian aspects of the law, which is typical of the skeptical, with a characteristic fairness, reason, and balance, and which underscores the problems with a legal or ethical system based solely on result-oriented criteria. The synthesized answer is given in his 1915 law review article *Ideas and Doubts*.⁸⁹

Holmes believed that modest prediction was appropriate in the law and yet his concern that “the unexpected is generally what happens” shows that he believed that human behavior was not predictable in any meaningful way, especially over the long-term. His idea of prediction is a short-term rule-of-thumb adumbrate based on experience and not on the abstractions of rational response and probabilistic prediction such as that endorsed by some believers in the school of Law and Economics, who ironically are commonly regarded to be the intellectual heirs to Holmes. On this score, Holmes is probably closer to the mark than his intellectual progeny at the University of Chicago. Anyone who honestly believes that the phenomena supposedly represented by statistics used in predicting human behavior are anything akin to the frequency ratios guided by objective rules in physics is fooling him or herself.⁹⁰

89. Oliver Wendell Holmes, *Ideas and Doubts*, in THE ESSENTIAL HOLMES, *supra* note 1, at 117-19.

90. In order to believe in a science-like use of probability in the prediction of human behavior, one would have to subscribe to the startling belief that, not only are people primarily rational in most of their choices, but that our rationality is as dependable as the laws of physics. How can people be held to be rational in their choices? After all, the tastes and predilections that underlie our choices are given—our tastes choose us more than we choose them—and we certainly do not choose them in any rational sense.

Holmes's middle level is characterized by a view of the law that is reflective of the problematic non-theoretical nature of life. In some ways it may even be a metaphor for life and for civilization that is split between an evolutionary empiricism and reasonable fairness. It is a synthesis of an irreducible and composite field of endeavor and a more narrow predictive view of the law in terms of both advocacy and external deterrent. In personal terms, these elements serve as a synthesis of the extremes of his personality and subsequent poles of his general philosophical outlook.

In the next section, the various strains of Holmes's Newtonian mode will be reviewed independently. Then, a discussion of how the two fonts of Holmes's legal philosophy and commentary on life may be reconciled with his larger view of the amorality of nature and the world will follow. Holmes's overview of the law was also largely evolutionary—he saw it as both a naturally adaptive system and as an agent of evolution in a larger biological sense. Within Holmes's philosophy of the law there are two key concepts. This, along with his view of the predictive function of the law, comprises the two prongs of his legal theory.

III. HOLMES'S LEGAL PHILOSOPHY

A. THE COMMON LAW: A COMPOSITE ENTERPRISE

*I have tried to see the law as an organic whole.*⁹¹

*The life of the law has not been logic: it has been experience.*⁹²

In spite of the fact that the law exists as formulations in an ideational sense, it is what we say it is and then it becomes what we interpret it to be subjectively. It does not have an objective external and independent physical existence as with matter, gravity, or electromagnetism or the laws that govern these things. Therefore, like all interpretive activities much of the process of the law is interminable debate over meaning, often between competing ideas or versions of events and fact patterns. Holmes knew this and opposed the formalism that had dominated legal scholarship before him and chose to interpret the law in terms of practical philosophy and result orientation.⁹³

91. Oliver Wendell Holmes, *Twenty Years in Retrospect*, in THE ESSENTIAL HOLMES, *supra* note 1, at 151.

92. Oliver Wendell Holmes, *The Common Law*, in THE ESSENTIAL HOLMES, *supra* note 1, at 237.

93. *Id.*

In terms of historical importance then, Holmes's primary legacy is that he helped precipitate the demise of the age where philosophers sought to reduce ethics to the parameters of rational ethical systems—enterprises of enlightenment political, legal, and social theory that is typified in the writings of Locke and Kant—and the general outlook of natural law.⁹⁴ In the wake of Newton, moral philosophers of the seventeenth and eighteenth centuries posited the idea that if the workings of the cosmos imply a rational God, then there must also be a similarly rationalist set of moral values.⁹⁵

A century and a half later, with the undirected order suggested by Darwin and unrelated problems with the Newtonian model of the cosmos revealed by discoveries in field theory, the assumptions of an elegant and orderly universe fell into question as did assumptions of rationalist morality. With such ideas abounding as a student and then as a young philosophically-minded attorney, Holmes was on the vanguard of a naturalist or even modernist approach to the law looking to history and biology for its sources.

To be human is to have a stand on ethics—even amorality is an ethical position—but this does not mean that rights exist as a priori facts. Holmes and others on the vanguard of the new views held that the law exists because we say it exists and not because of logical, empirical, deontological or providential necessity.⁹⁶ In this sense, the law was external in a social sense (i.e. enforcement and consequences), although not in an ontological sense.

The Common Law is without a doubt the most important treatise in the American legal canon. Among the key ideas developed in this book are: (1) a recognition of the historical origins of the law; and, (2) it is where Holmes develops the idea of an external standard of the law, which in turn will provide the basis for his predictive theory of the law that would become the basis for his 1897 law review article, *The Path of the Law*.⁹⁷ Rather than rehash Holmes's account of the origins of the common law in the mists of

94. The ideas of John Rawls would be a modern example of moral rationalism. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (The Belknap Press of Harvard Univ. Press, 1971).

95. For example, see generally, JOHN LOCKE, *TWO TREATISES ON GOVERNMENT AND A LETTER CONCERNING TOLERATION* (Ian Shapiro ed., Yale Univ. Press 2003); Thomas Paine, *Common Sense*, in *THE SELECTED WORK OF TOM PAINE* 3-41 (Howard Fast ed., Carlton House 1945). For a rich discussion of deism, see generally HENRY F. MAY, *THE ENLIGHTENMENT IN AMERICA* (Oxford Univ. Press 1976).

96. For an in depth treatment of the evolution of the law from a moral to a realistic paradigm, see generally JAMES E. HERGET, *AMERICAN JURISPRUDENCE 1870-1970* (Rice Univ. Press 1990).

97. Oliver Wendell Holmes, *The Common Law*, in *THE ESSENTIAL HOLMES*, *supra* note 1, at 237-53.

the German plains or the idea of the law as external, objective, and predictive, the most noteworthy part of *The Common Law* may be his description of what the law is on the first page.⁹⁸

Holmes begins *The Path of the Law* with the observation that the law is not a mystery but a ubiquitous profession with prediction at its heart; by contrast, he begins *The Common Law* more broadly by noting the multifarious nature of the law and its remote human origins—that its story and process are ones of experience, history, normative ethics, and psychology rather than purely syllogistic deduction.⁹⁹ It is telling that Holmes associates the law with life, whose situational complexities disallow the predictive solutions of logic by itself (and presumably deductive activities like the probabilistic prediction of human behavior). As Holmes notes, “[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer’s Statics.”¹⁰⁰ He reinforces this view with his admonition that the law has more to do with the life of nations rather than with pure deduction.¹⁰¹ In prose seldom matched in legal writing for its beauty and economy, he then gives a brief but general outline that only hints at the immense naturalistic intricacy of the law as a whole.¹⁰²

Unlike the philosophy of more singular deductive activities that deal with closed sets such as logic, mathematics, experimentation in the physical sciences, and even certain non-closed subjective philosophical topics like psychology and aesthetics, the law is primarily concerned with utility and practical results. Consequently, the more abstract and theoretical the philosophy of law becomes, the less useful it is in practical terms.¹⁰³ The law is an organic whole that is irreducible to a single system, program, or activity. As a wag once put it, “the law is like bad mathematics”—it is a set

98. *Id.* at 237.

99. *See id.* (“The life of the Law has not been logic: it has been experience.”); *see also* Oliver Wendell Holmes, *The Path of the Law*, in *THE ESSENTIAL HOLMES*, *supra* note 1, at 160.

100. *Lochner v. New York*, 198 U.S. 45, 75 (1904) (Holmes, J., dissenting).

101. Oliver Wendell Holmes, *The Common Law*, in *THE ESSENTIAL HOLMES*, *supra* note 1, at 237. “The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.” *Id.*

102. All of my references to *The Common Law* are to the first two pages of that book. Holmes’s view of the law as an evolutionary organic whole based on experience is more reflective of his large outlook than the more limited model of the law as prediction and consequences; most scholars are more preoccupied with the latter.

103. Holmes states in *The Path of the Law* a belief that we need more theory in the law, and no doubt that was probably true when he wrote it in 1897. Today, by contrast, with thousands of new law review articles published every year, arcane theory of questionable merit threatens to take over what Holmes also describes as a primarily practical enterprise. Much of the postmodern language theory that has crept into legal academic writing seems obsessed with linguistics and stylistics often at the expense of substance is a good example of theory clouding a practical endeavor.

of rules, but there is a wider range of interpretation and even disagreement about what the rules mean.¹⁰⁴ If given an equation in non-theoretical mathematics, mathematicians with the most diverse backgrounds will arrive at the same answer. Yet nine justices from the same culture and the same politically moderate system often give numerous fractured opinions rendered from the same fact pattern and similar baseline assumptions.

In the Holmesian model, the law is a composite of diverse elements and involves processes with determinate and indeterminate elements that contain both analytical and social (to include political) considerations. Likewise, legal interpretation in this view has no singular or central methodological concept as with falsification in the hard sciences. Consequently, the law is not reducible to an analytical process with anything resembling the consistency and rigor of science. It is comprised of rules and exceptions, fairly universal values and legal hairsplitting, tried-and-true formulations and new rules, rule following and rule making, consistency and contradictions—all of which allow it to grow through the formation of new rules, statutes, and decisions. To Holmes the law is activity—the law *is* what the law *does* and not what it *ought* to be. It is both the formal black-letter expression of dusty old books and the practical day-to-day activity of resolving conflicts and redressing grievances and restoring damages; the law is what we do in civil society to settle things in the absence of violence, it is a practical avenue for power that establishes a relationship of mutual advantage among parties *that allows for civilization*. As a means of resolving problems with force behind it, the law more closely resembles a piecemeal means of sorting out issues rather than a formal system of analysis.

As a system of analysis, by contrast, the law is limited, disjointed and hopelessly flawed in comparison to purely deductive activities such as those found in geometry, logic, and even the experimentalism of the physical sciences. It is an ad hoc process and patchwork of historical precedent. Like the physical sciences, it may include critical discussion, but unlike systems of formal truth, the law must deal with human situations that are not so easily reduced or resolved, and it must change as attitudes, behaviors and “felt necessities” change. Most often the law embodies discretionary, rather than pure, logic.

In a sense the law more closely resembles an adaptive organic process than a singular and discrete system of analysis per se. It consists of a series of endless dialogues and debates whose conclusions are always subject to

104. The analogy of law to “bad mathematics” was made by Peter S. Shoenfeld in an informal conversation.

revision and reversal. In another sense, however, as a system of ideas, it also purports to have an analytical truth-seeking function. In this sense it is like a less strict version of science, although its initial conditions, assumptions, and models cannot be expressed, stated, or tested with the precision and rigor of science, and its predictive ability is far weaker. As with science, the law, at its best, embodies processes of criticism and arguments within a logical framework that allows for assumptions and consequences. Both involve persuasive force. Unlike science at its best—that is, when done honestly and rigorously—vigorous advocacy towards a given conclusion figures more prominently into the everyday activity of the law, and to a larger extent (as with instrumentalist models of science), certain consequences are often desired rather than the truth of the matter, and some attorneys defend positions regardless of the truth. By contrast, a scientist knows to do this would be universally derided, while a lawyer who won a case for his or her client when legally in the wrong, might be celebrated as having successfully represented that client. Here, a particular result is the means of success rather than the truth of the matter.

There are areas of the law that emulate or actually employ the scientific method. Evidence and measurement are very often based on pure and applied scientific methods and analysis. Exculpatory genetic evidence, for example, actually embodies the classic scientific method of falsification—corroboration through experimentation or else showing something to be untrue if in fact it is untrue and therefore eliminating it as a possibility. This, however, is an actual instance of the law using science, rather than a structural emulation of its method.

In most instances, however, deduction in the law is not nearly this strong and more often embodies a clash of competing views, theories, or arguments. In the physical sciences, we can test and eliminate theories where in the law the most compelling argument generally prevails. The problem is that “most compelling” and “most persuasive” are not synonymous with “most true” (although the truth often embodies great persuasive force of its own). In this sense, the primary weakness of the law is a problem of induction—that evidence can be found to *support*, *confirm*, or *verify* virtually any position, if that is all that we are trying to do.¹⁰⁵ Science, by contrast tests theories through negative reason, disproving theories if untrue via deduction rather than induction. If the law was pure deduction, there would be no need for judges, only logicians.

As a multifarious enterprise, Holmes believes that the law borrows from any number of disciplines and human activities, both formal and

105. See POPPER, CONJECTURES AND REFUTATIONS, *supra* note 75, at 36.

informal. Likewise, his understanding of the law is based on a broad realism that in turn takes into account the amorphous parameters of human nature. His thought also embodies a deep skepticism of legal formalism and the asserted values of natural law and deontological ethics—a recurring theme in Holmes’s thought is cautionary against the equation of the law with morality.¹⁰⁶

Holmes realized that as a system, the law is an intricate mixture of elements and it involves processes that rely on such things as precedent, logic, creative inspiration (in the case of judicial decisions), intuitive fairness, common sense, power struggles, and other forms of social activity and expression. It reflects the many facets of the community at large, as well as individual actions, and the ability of the judge to apply, follow, and enforce rules, although the rules are often flexible and allow room for growth, development, maneuver, and reversal. At a bare minimum, the law requires a structure of codified rules, general compliance on the part of the public, and external enforcement by the political authority. As a practical matter, if any one of these three elements is missing, the law ceases to exist. It is an arm of politics, an avenue of power and a pragmatic means of problem-solving. One might even say that the use, practice, structure, and history of the law—practical and otherwise—reflects and embodies the complexities of human relations and subsequent attempts at problem-solving in a formal sense.

The Holmesian view of the law as a composite enterprise evokes a balancing act of these independent, constituent elements, characteristics and methodological aspects, especially those of tradition, precedent, and logic—the first two are primary and are subsumed under human experience. Significantly, because of the constantly shifting and competing nature of the elements of the law, Holmes saw it as an evolutionary system, like a living organism, a system guided by human rules, but not by fixed objective or external rules of a general nature to be applied to the specific case. Like an adaptive system in nature, the path of the law is to a large degree indeterminate, and Holmes was skeptical of those who believed that it was guided by inexorable laws and metaphysical absolutes. To him, the law was guided only by precedent and the “felt necessities of the time,” and as

106. In many instances the law allows or even provides cover for immoral behavior; the First Amendment allows us to lie, and the Fourth Amendment gives us the privacy to commit a whole range of activities that might be variously regarded to be immoral.

Other areas of the law are divorced from morality altogether, such as with utility or safety-based traffic laws, aesthetics-based anti-graffiti laws, and sanitation-based laws enjoining dog owners to clean up after their pets. Many laws under the Nazi and Soviet regimes were immoral by most standards, but nobody denies the fact that they were laws.

such, any viable legal system had to make allowances for changes in attitudes over time.¹⁰⁷ As Holmes himself wrote in *The Path of the Law*, the worst reason for a judge to uphold an opinion was that out of historical habit; the best judges have an intuitive grasp for the laws' direction and development.¹⁰⁸

But the law is not pure logic, and is not always perfectly uniform, consistent, or even fair (conversely, just because the law deals with power and interest does not mean that it cannot be generous, humanistic, and liberal-minded). Holmes knew that the law is an activity closely related to politics and that it sometimes takes on political baggage. The direction of the law is reflective of the "conscious and unconscious" outlooks and agendas of persons in positions allowing them to influence the system: grandstanding legislators, prosecutors with political ambitions, judges presiding over important or popular cases, zealous politicians, angry juries, young crusaders fighting the good fight, etc.

One might even say that politics and the law are a part of the same overarching enterprise concerning power, perceived interest, and human intention that in its more extreme form also includes war, and Holmes knew this.¹⁰⁹ This unflinchingly realistic view holds that power is a subtext and currency of human interaction and that politics is the imposition of the will on others. Although this may be done democratically, with consent, fairness, civility, liberality, and for high-minded purposes, we must never let this obscure the fundamental identity of the beast.¹¹⁰ It is in this regard where Holmes's honesty and forthrightness about the law are likely to shock.

The law according to Holmes is how we manage things through civil means, meaning in lieu of outright violence. It also provides a context—an arena—in which conflict may be ameliorated therefore allowing civilization to exist and generally includes fairness as a component. This is also where we see the contradiction in Holmes—the idea that the law is evolutionary,

107. Oliver Wendell Holmes, *The Common Law*, in THE ESSENTIAL HOLMES, *supra* note 1, at 237.

108. Oliver Wendell Holmes, *The Path of the Law*, in THE ESSENTIAL HOLMES, *supra* note 1, at 170. "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." *Id.*

109. Other avenues of power include economics and foreign policy. The idea that a wide range of military and non-military activities are avenues of power is an old concept recognized by the Romans, Machiavelli, and Nietzsche and realists throughout history. Karl von Clausewitz expressed a version of this when he wrote that war is policy "by other means." KARL VON CLAUZEWITZ, ON WAR 119 (Dorset Press 1991). In the modern state, this would include politics, policy, and the law, as well as a wide range of financial, fiscal, and other economic activities.

110. See generally Oliver Wendell Holmes, *The Path of the Law*, in THE ESSENTIAL HOLMES, *supra* note 1, at 160-65 (showing Holmes's view of the law as being non-moral).

an avenue of power, but also containing fairness as one of its constituent parts. And yet without fairness, the law would not work and therefore neither would human civilization (which poses an interesting question about whether civilization is fundamentally at odds with nature).

Holmes also saw the law as an arena or marketplace in the model of Mill in which perspectives and interests clash and an arena for a vulgar sort of Darwinism of policy and practical ideas. If an idea won out in court, but was not beneficial in evolutionary terms, it would eventually be factored out in the marketplace. If not, then the law and society of which it was a part was not successfully adaptive in that instance and was therefore in peril. Our government and legal system, like a creature in nature, was a unique experiment whose survival was by no means assured. But the violent reconciliation of ideas was presumably even more dangerous to civilization than the possible survival of bad ideas via the comparatively peaceful means of the law.

This moral relativism of Holmes is still upsetting to many people who would like to think of values and rights as universals or absolutes. Rights and laws exist because we say that they exist; they do not exist by logical nor empirical necessity. If we attempt to flout gravity without a technological countermeasure, we are quickly reminded of our error. If the government violates our Fourth Amendment rights, nature makes no such correction. But the fact that laws and morals are not objective does not diminish their importance; it just makes them ontologically less solid and therefore problematic. Morality and the law still exist, but if their relative status renders them more precarious and non-universal it could be argued that it also makes them more precious. As Holmes wrote to Miss Einstein, people sometimes need to feel “cocksure” in order to act.¹¹¹

111. Letter from Oliver Wendell Holmes to Lewis Einstein's Daughter (May 6, 1925), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 76.

B. ACTION WITH IMPERFECT KNOWLEDGE: PREDICTION AND *THE PATH OF THE LAW*, AN IRONIC READING¹¹²

*The primary rights and duties with which jurisprudence busies itself are nothing but prophecies.*¹¹³

*I do not accept any prophecy with confidence.
The unforeseen is generally what happens.*¹¹⁴

*I hear occasionally echoes of William James's Pragmatism
which I regard as an amusing humbug.*¹¹⁵

The second and more narrowly tailored prong of Holmes's legal philosophy involves aspect of the law as the prediction of likely outcomes. To a considerable degree, the label of "Holmes the pragmatist" finds its source in the theory of law as prediction of what will happen "in fact," as outlined in his famous law review article, *The Path of the Law*.¹¹⁶ As such, this theory has two distinct manifestations. The first is his prescription for the role of the attorney as predicting the likely outcome of a case and acting appropriately in accordance with such knowledge. The second is the "Bad Man" who predicts the application of public force in response to his commission of an infraction and therefore may be deterred. This example illustrates the distinction of Holmes's view of the law with the idea of law as morality.

While there is a pragmatic and action-oriented element to Holmes's thought as a means to externalize the law—the fact that we can "bet" on the behavior of the universe suggests a consequentialist component to his outlook more generally—it would be simplistic and misleading to attempt to reduce an eclectic and unsystematic thinker like Holmes to the parameters of a single program like pragmatism. This said, many of Holmes's ideas certainly fall within the larger positivist tradition that includes

112. The idea behind the ironic reading of *The Path of the Law*, was suggested to me by Law Librarian David Isenbergh in 1998.

113. Oliver Wendell Holmes, *The Path of the Law*, in THE ESSENTIAL HOLMES, *supra* note 1, at 160.

114. Letter from Oliver Wendell Holmes to Harold Laski (Aug. 1, 1952), in THE ESSENTIAL HOLMES, *supra* note 1, at 142.

115. Letter from Oliver Wendell Holmes to Lewis Einstein (June 17, 1908), in THE ESSENTIAL HOLMES, *supra* note 1, at 70.

116. See generally Oliver Wendell Holmes, *The Path of the Law*, in THE ESSENTIAL HOLMES, *supra* note 1, at 160-77.

pragmatism.¹¹⁷ Although Holmes outlines a rich and multifaceted evolutionary view of the law in the beginning of *The Common Law*, it is the modest pragmatic account found in *The Path of the Law* for which he is most often remembered.¹¹⁸ Even here, to limit Holmes to a purely instrumentalist view of the law would be both narrow and selective.

Here then, we reach one of the central issues of the Holmesian bifurcation, which in a broader sense reflects a tension found in all result-oriented ethical and legal programs. Much of the problem comes from the fact that the law has a large rational component while ethics are based on a primarily intuitive and non-rational social intelligence. The difference between the two is largely one of type.

Significantly, the other major theme of *The Path of the Law* is the Austinian¹¹⁹ idea that it is the “whole power of the state” and not morality which lies behind the law and what makes it work (or rather the prediction of this force: “The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the

117. WIENER, *supra* note 5, at 172-89.

118. Holmes restates his definition of the law as prediction in his letter of January 19, 1928, to Frederick Pollock. HOLMES-POLLOCK LETTERS, *supra* note 28, at 212. Here he defines the law “as a statement of the circumstances in which the public force will be brought to bear upon men through the courts: that is the prophecy in general terms.” *Id.* This encapsulation of Holmes’s predictive view of the law more than thirty years after the publication of *The Path of the Law*, and almost half a century after *The Common Law* also shows how little some of his ideas changed over time.

Holmes has often been criticized for the realist view of human nature behind his external theory of the law. This would seem to be unfair. Even as central a constitutional authority as James Madison commented on the necessity of using the law and the structure of republican government to accommodate the less benevolent side of human nature. ALEXANDER HAMILTON ET AL., THE FEDERALIST PAPERS 322 (Nal Penguin Inc. 1961). As Madison notes in *The Federalist Papers*, “[i]f men were angels, no government would be necessary[.]” and yet although this almost Hamiltonian-sounding statement shows Madison to be a realist about human nature, he is seldom regarded as a cynic. *Id.* The United States system of government is split between the Lockean/Jeffersonian model that celebrates the individual and assumes good things about human nature, and the Hume/Montesquieu/Hamiltonian model that assumes that although people are capable of higher motivations, they are essentially self-serving and practical government must be structured to balance powers and pit ambition against ambition.

A more recent expression of the idea that modern human beings are born savages to be contained and civilized via education and institutions can be found in PETER VIERECK’S CONSERVATISM REVISITED 46-50 (The Free Press 1949) (1962). For literary expression of the idea that people are savages at heart that can revert to barbaric behavior under primitive circumstances, see generally William Golding’s THE LORD OF THE FLIES (Coward, McCann & Geoghegan 1954) and Norman Mailer’s THE NAKED AND THE DEAD (Rhinehart 1948).

119. Far from finding its origins in the deontological absolutes of natural law, John Austin believed that the basis of the law was in power as manifest through the command of a sovereign. See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 129 (Weidenfeld & Nicolson 1965) (1832). For a critique of Austin, see generally H.L.A. HART, THE CONCEPT OF THE LAW 18 (Clarendon Press 2000). It should also be noted that the phrase “the command of the sovereign” was not coined by Austin, but appears in the *Leviathan*. THOMAS HOBBS, LEVIATHAN 90 (Oxford Univ. Press 1998).

courts”).¹²⁰ But despite its coercive influence, power by itself is value-neutral, and the factors and considerations that govern decisions may vary from judge to judge, and the facts of a case may be weighed with varying emphasis. With Holmes, the law, to a large measure, is the rules of the game and the sovereign authority to enforce them, and although we may agree on what the rules are, our construction and application of them may and do in fact vary widely. It is in the interpretation and application of rules that the less reducible aspects of judgment come into play.

We can only assert that unstated here are his own endemic qualities such as moderation, reason, and a faith in civilization and progress, as well as his ability to compartmentalize his role as a judge and keep it distinct from his more general views. Holmes was so preoccupied with divorcing the law from morality that his own balance is implied, overshadowed, guarded, and consequently never stated outright as an element of adjudication. His wont to shock makes the adjective “moderation” seem misplaced in describing him and is a word that Holmes himself would not have liked or used. Although it is unfortunate to psychoanalyze a thinker in this way, he leaves us no choice and such moderation can be inferred from many of his First Amendment opinions, his urbane personality, and the generous way in which he lived his life. Actions speak louder than denials.

Still, the backdrop of *The Path of the Law* is not prediction by itself, but rather the idea that law is authority—the tempered raw power of the state—whose application is to be anticipated. This force is Austin’s “command of a sovereign,” which Holmes correctly characterizes as the authority of the whole of the official state (even in a republic, where the elements of the sovereign are divided over the branches of government and by extension, the electorate, in a similar way that in a pre-modern government it would have been divided between the different estates); the judge is an agent of the sovereign with some discretion in applying the state’s authority.¹²¹ On a broader note, all of Holmes’s definitions of truth as consequences also involve issues of power.¹²² The implication is that in practical terms, where the law is not enforced, the law ceases to exist.

120. Oliver Wendell Holmes, *The Path of Law*, in THE ESSENTIAL HOLMES, *supra* note 1, at 160.

121. See G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 221 (Oxford Univ. Press 1993).

122. Holmes’s outlook embodies a classic dichotomy of truth and power. On the one hand, he believed power to be the underlying basis of all human interaction and one that manifested itself as coercive force or the expectation of such force, and in a personal sense, that which is impressed upon us by what we cannot help believing. He also believed that discovery and truth are the aims of investigation. Truth is to a large degree impressed upon us, it has its own power,

The conventional interpretation of *The Path of the Law*, is that the “Bad Man” is a tool to illustrate the difference between morality and the

that of persuasion, and although no conclusion is ever final, greater truth tends to win out, at least it has in the physical sciences. Even here, there are exceptions although they may be temporary.

For example, the cosmology derived from the physical laws of Newton is intuitive and easily demonstrable while that of the Monadology of Leibniz is difficult and counterintuitive. Despite the fact that modern physicists now agree that Leibniz’s outlook is more in keeping with the observations of quantum mechanics, the intuitive power (the “can’t helps”) of Newton’s commonsensical system dominated for over 200 years.

Holmes’s view has also been interpreted as an expression of a definition of truth as power or force. Wiener sees three irreconcilable concepts of truth in Holmes’s writings, all of which are related to power. WIENER, *supra* note 5, at 187-88. These are “the can’t helps of the self, the public force of custom and convention, the cosmos in its infinite perspective.” *Id.* Restated, these models are: “Betabillitarianism,” or rather an “individualist, subjective theory” that is pragmatic in its predictive aspect and the “social, objective” or rather, intersubjective view of the truth that seems similar to Peirce’s view of truth as the consensus of the majority of rational investigators. *Id.*

The intersubjective mode, if intended as nothing more than a sort of peer review in the marketplace of ideas and not a formal definition of truth—the majority or reasonable people once believed in a terra-centric model of the universe—makes good sense as it does as a sort of informal triangulation or instrument when better tests are not available. Oliver Wendell Holmes, *Natural Law*, in THE ESSENTIAL HOLMES, *supra* note 1, at 180. It is possible however, that Holmes meant it in the stronger Peircian sense.

There is another sense by which power and truth are related—the power of that which is manifest in its results. Truth is external and impressed itself upon us, and yet Holmes still considered it to be subjective. It was the “can’t helps” of the individual and the intersubjective group. The aggregate of “can’t helps” formed a cohesive intersubjectivity that in turn functioned as truth in a quasi-objective reality in which science, engineering, empiricism, generally, and the law reigned. As Holmes wrote to Laski in a letter dated April 6, 1920, “[t]ruth is the unanimous consent of mankind to a system of propositions.” Letter from Oliver Wendell Holmes to Harold Laski (Apr. 6, 1920), in THE ESSENTIAL HOLMES, *supra* note 1, at 115. In this he sounds like Peirce.

The coercive power of practical results regardless of the real truth of the matter is a central flaw of all consequentialist programs and underscores why realistic explanations are preferable when possible. Power is a characteristic of truth rather than a synonym. All truth is powerful but not all power is truth.

Some critics of Holmes, including Wiener, have disparaged his models of truth based on internal or external coercion—that which the world imposes on us, the consensus of rational opinion and what we cannot help believing, and that which external authority imposes on us. To be sure, there are serious flaws with each of these ideas, and are problems of which Holmes must have been aware. Since we could never really know the truth of the matter, we had to look at results and other more limited criteria—not as certificates of truth—but as a useful rule of thumb. This accounts for his positivism and the positivistic pragmatism of his legal theories as the bad man theory of the law as the threat of external force and the law as prediction. Like Kant he believed in intuitive necessity in order to function, but like Chauncey Wright and William Hamilton, he did not believe that human necessity extended to absolutes in the objective world. This ruled out the representative realism—a position intermediary to simple or direct realism and immaterialist phenomenalism.

Holmes also dismissed immaterialist (idealist phenomenalism of Berkley) and unlike the phenomenalism of Mill, his positivism was realist in nature. Letter from Oliver Wendell Holmes to Harold Laski (Jan. 11, 1929), in THE ESSENTIAL HOLMES, *supra* note 1, at 107. As with Wright, he usually refused to play the phenomenalist word game of “phenomena” and “noumena” when speaking of their own philosophy. What remained was a sort of skeptical realism or the idea that reality exists but we have no way to be certain in an absolute sense. His externalization of the law is an attempt to come up with an objective standard or at least a workable one.

external or objective nature of the law by saying that the legal authority acts against a calculating morally pragmatic individual and does not care why he obeys the rules, so long as he does. In morality, belief in ethical precepts and conviction necessarily precede action, and therefore the ethics of a “moral” person whose actions do not follow from their stated beliefs should be held in serious doubt. A “Bad Man” by contrast, who does not believe in the law or the ethos that may or may not underlie it, may still be a law-abiding citizen so long as he does not violate it in an external sense. In this way, he may act completely legally without being a moral individual. The law thus enjoins compliance, not belief, although in a republic, where legislators are popularly elected, one would expect the laws to reflect a public or normative morality to a fairly high degree, and therefore although not identical, the law has a certain proximity to a generalized public ethos.¹²³

Holmes’s pragmatic temperament in *The Path of the Law* distances the law from morality (a view generally known as legal positivism), but he concedes this proximity to a public morality and the moral history of a nation’s development.¹²⁴ In this sense we can see in the law both the values a culture embraces and despises.¹²⁵ But beyond this reflection it is clear that Holmes regarded morality to be “a dangerous means of judging.”¹²⁶

Although Holmes concerns himself primarily with the external aspects of the law—authority/enforcement, statute, compliance, and deterrence, the internal aspect of a crime is only important in terms of furtherance of the crime as an actual act. Having broken the law and having been apprehended, a suspected perpetrator’s state of mind or mens rea may be important in establishing motive (or vice versa) in ensuring that a transgression was in fact a crime and not a justifiable act or accident. As Holmes also

123. Oliver Wendell Holmes, *The Path of the Law*, in THE ESSENTIAL HOLMES, *supra* note 1, at 160-61.

124. Oliver Wendell Holmes, *The Path of the Law*, in THE ESSENTIAL HOLMES, *supra* note 1, at 160-61. Holmes concedes in *The Path of the Law* that “[t]he law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race.” *Id.* at 161. Here too we find the word “external,” which is how Holmes underscores once again that the law is not morality. *Id.* at 165. It is important to recognize that although Holmes is known to have read Hobbes during the war years (and according to Liva Baker was walking back from the Athenaeum Library with the book when he received word of his commission as a lieutenant), and his view of justice as having a proximity to a normative morality is similar to a view stated in Hume’s *Treatise*. HUME, *supra* note 37, at 498.

125. Friedrich Nietzsche makes the compelling point that the law tells us less about what people advocate, and more about what they despise. NIETZSCHE, *supra* note 80, at 109 (“What laws betray.”). In aphorism 459 of *Human All Too Human*, he also notes that far from being precise, rational and scientific, the law, when it strays from the familiar and traditional—i.e., when it becomes modern law—it becomes a set of forced command and therefore will embody arbitrary elements.

126. Letter from Oliver Wendell Holmes to Alice Stopford Green (Oct. 1, 1901), in THE ESSENTIAL HOLMES, *supra* note 1, at 111.

notes in *The Common Law*, “even a dog distinguishes between being stumbled over and being kicked.”¹²⁷ This is important in that Holmes probably exaggerates the external nature of the law to make a point while being fully cognizant that the internal element of intent is what distinguishes a crime from an accident.¹²⁸

On its face, *The Path of the Law* seems to be an endorsement of a sort of legal pragmatism.¹²⁹ If we look at the essay more closely, examining not only the audience, the circumstances of its presentation, and historical context, but also reading between the lines, we come away with a somewhat different impression.

The essay was first presented as an occasional speech at the dedication of a new building at Boston University Law School on January 8, 1897.¹³⁰ For the most part, the young soon-to-be attorneys from BU were not going to be federal judges or academics, much less Supreme Court justices, but rather, hard-nosed mainstream practitioners—bread and butter lawyers toiling in the real world of the law. Therefore, Holmes was probably not speaking of mysterious or arcane legal theory, but of the non-judicial “well known profession” from an attorney’s point of view. The essay is about the law as the activity of advocates, of practice and not of theory, legislation, or adjudication.

Admittedly, Holmes does describe the role of the advocate in pragmatic terms and his idea of “what the courts will do in fact”¹³¹ bears a distinct resemblance to Peirces’ “pragmatic maxim.”¹³² But “pragmatic” as it is used here is the way a layman would use the word and not necessarily in the sense of a formal school of consequentialist philosophy. The difference is that Holmes’s predictive theory is not a meaning criterion, as

127. Oliver Wendell Holmes, *The Common Law*, in THE ESSENTIAL HOLMES, *supra* note 1, at 238.

128. One place where Holmes seems to contradict himself is in regard to intent. Although Holmes is quite clear about the law being concerned with only with the external—actions—he also writes that “[a]n actual intent . . . is necessary to constitute an attempt.” *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting). This might suggest that the Bad Man theory is an exaggeration to make his view of the law as primarily externally clear. As a former Brandeis clerk and Holmes protégé, Dean Acheson once noted, it is sometimes helpful to state things in such a way as to make the facts more clear than they really are. Some of Holmes’s critics believe that he exaggerates the external nature of the law. *See, e.g.*, Rogat, *supra* note 39, at 221.

129. *See generally* Oliver Wendell Holmes, *The Common Law*, in THE ESSENTIAL HOLMES, *supra* note 1, at 1.

130. SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 223-24 (Little, Brown & Co. 1989).

131. Oliver Wendell Holmes, *The Path of the Law*, in THE ESSENTIAL HOLMES, *supra* note 1, at 163.

132. *Critical Common-Sensism*, in PHILOSOPHICAL WRITINGS OF PEIRCE 290 (Justus Buchler ed., Dover Publications, Inc. 1955) (1940).

is Peirces' principle, but rather practical advice calling for short-term adumbrate as a means of streamlining a frequently cluttered profession so as to best serve the interests of clients. It is acting on imperfect information, and in this sense, he is not advocating a theoretical approach but rather a heuristic one, embracing common sense and a street-wise intuition or feel for the direction of the law. It is in fact, a perspective quite free from theory, ideology, and possibly even the truth of the matter at hand. After all, the business side of the law involves a great deal of prediction and dead reckoning, "betting," so to speak on probable outcomes. Thus, the law, like all enterprises in a professional marketplace embodies a narrow sort of pragmatism as result-oriented realism. In other words, prediction in the law in a Holmesian sense does not presuppose a hard underlying theoretical or rational track for the law, merely educated guesses based on knowledge and experience.

This ironic reading of *The Path of the Law* seems further warranted by the fact that it was written and delivered during the latter part of what is sometimes called the Gilded Age, a time when crass result-oriented materialism was at its height in American culture.¹³³ The almost tongue-in-cheek tone to what Holmes is saying is at least ironic, and possibly sarcastic. The "Bad Man" theory might well be a parody of legal pragmatism from the perspective of the perpetrator—the law as compliance in the face of external force and devoid of any sort of morality.

The point is that any description of the law as a practical professional activity must have some pragmatic elements. If this essay were compared to the robust and multifarious perspective outlined in the beginning of *The Common Law*, it is apparent that the latter is his more complete characterization of the law. *The Common Law* is also broader and far more generalized. *The Path of the Law* is significant in that it shows Holmes's concern with description rather than prescription in his writings—the concern of the attorney, client, and potential perpetrator is what the court will actually do, what *is* or *will be*, rather than what *ought* to be.¹³⁴ It also

133. Although generally accepted by historians, the term the "Gilded Age" comes from the title and subject of the 1873 novel by Mark Twain and Charles Dudley Warner. It refers to the moral shoddiness and corruption of the federal government and the excesses of unregulated capitalism during the late nineteenth century. Some historians have used this label broadly to characterize the period from the end of the Civil War to the beginning of the First World War. It more accurately reflects the period from the mid-1860s to about 1900, or rather the period from the Civil War to the Theodore Roosevelt Administration. See generally MARK TWAIN, THE GILDED AGE (Herbert Van Thal ed., Cassell & Co. Ltd. 1967) (providing a collection of period writings entitled *The Gilded Age*).

134. William Twining, *Other People's Power: The Bad Man and English Positivism, 1897-1998*, 63 BROOK. L. REV. 189, 195 (1997).

illustrates his preoccupation with power while at the same time it might be poking fun at the cynical result-orientation of the profession and the times.

It should also be noted that Holmes both advocated and was suspicious about prediction, as the need for action and expectation in the world of the Newtonian Holmes ran up against Holmes the Skeptic; the world according to Holmes was too complex to know in absolute terms, making prediction the next best thing. His conclusion that “the unexpected is generally what happens” may not only be reflective of his general skepticism, but also suggests that most human behavior is fundamentally unpredictable in any meaningful way, especially over the long-term. His prediction is a rule of thumb meant for the short term in an analysis of a micro-level and with a subject who is assumed to be rational (a fairly dubious assumption in criminal law, and one that would be meaningless as prediction generally is at the macro-level).

This can hardly be seen as the basis for a strongly rationalistic approach to the law, and Holmes is certainly not advocating the absurdity of attempting to apply probability or frequency ratios as a predictive tool in the social sciences as one might do in a hard science like physics. Human reason is a fairly dicey affair in day-to-day life, and Holmes is not advocating a “Law and Economics” approach to the law. Pragmatism and probability, and their limited non-structural definitions of truth, are poor substitutes for judgment in terms of fairness ethics and are just as limited in their models of truth. As Philip K. Wiener notes, Holmes’s subjective definition of truth does not answer the question of how people arrive at this truth, and some of his critics have also pointed out that his predictive view of the law does not give us a model for how judges arrive at their decisions.¹³⁵

Holmes’s view of ethics is both complex and understated. He minimizes human morality, both inborn and acculturated, as a form of etiquette peculiar to an advanced social animal, which is important to our social structure. Still, outside of the “municipal” jurisdiction of human social life, morality or the value of human life held no objective or necessary claim.

135. Some Holmes scholars—notably Yosai Rogat—have suggested that *The Path of the Law* gives little insight into how judges actually decide cases since they are not trying to predict how they will decide a case. Rogat, *supra* note 39, at 248-49. G. Edward White believes that it does offer a philosophy of adjudication in that judges too should be cognizant of the direction of the law. White, *supra* note 121, at 219-20.

In his letter of April 21, 1932, to Frederick Pollock, Holmes restates this predictive view of the law, prefacing it as “the definition of law in the lawyer’s sense.” Letter from Oliver Wendell Holmes to Frederick Pollock (Apr. 21, 1932), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 21. This was written thirty-five years after *The Path of the Law* was published and shows that some of Holmes’s positions changed remarkably little over the years.

The modern version of this view (sociobiology) holds that the bases for morality are inborn prejudices, predilections and preferences that we embrace and hold up as ideals. These values are shaped by social and historical factors that are gathered up in packages that comprise the ethical (as opposed to the cosmological) claims of traditional religion.

Holmes's perspective is congenial to modern sociobiology and the idea that human morals are based on a complex interplay of biology and acculturation, and therefore it has the effect of downplaying traditional moral notions—those views that the majority “cannot help” believing in—while accentuating the external force of the law and anticipation thereof. Still, when as a judge, Holmes applied reason and balance; he rendered some of the most memorable decisions in United States history, which stand as great documents of American civilization and contain phrases that have become truisms and terms of art.¹³⁶ Conversely, when Holmes applied evolutionary expediency towards a pragmatic end, he came up with the well-intended atrocity that was *Buck v. Bell*.¹³⁷ Ideology makes for bad law. This presents the primary contradiction in Holmes's philosophy of the law, between survival of the fittest, and the more moderate aspects of the law.

How does Holmes reconcile the proximity to ethics in law with pragmatism and evolution? The answer, more implied than explicit, is through moderation, reason, an asserted faith in progress, scientifically-derived knowledge, and civilization as both doing what comes naturally and as the highest manifestation of a natural process. And it is the Newtonian Holmes that affects this synthesis.

Holmes actually gives us a hint toward a possible reconciliation on the last page of *The Path of the Law*. After pages of text dealing with the expectation of public force, calculating “Bad Man” and amoral predictions of expected outcomes, Holmes chastises ambition for monetary reward noting

136. Holmes's opinions have a number of memorable phrases. See, e.g., *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“a clear and present danger”); *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (“Great cases like hard cases make bad law.”); *Compania de Tabacos de Filipinas v. Collector*, 275 U.S. 87, 100 (1904) (Holmes, J., dissenting) (“Taxes are what we pay for civilized society.”); *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“General propositions do not decide concrete cases.”); *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (“Upon this point a page of history is worth a volume of logic.”); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (“It [the Constitution] is an experiment, as all life is an experiment.”); *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (“The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi sovereign that can be identified.”); *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting) (“The power to tax is not the power to destroy while this Court sits.”).

137. 274 U.S. 200 (1927); *THE ESSENTIAL HOLMES*, *supra* note 1, at 103-05.

that “[t]o an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas.”¹³⁸

C. “THE FLOWER OF OUR THOUGHT”: MODERATION, REASON, AND PROGRESS: A FOUNDATION

The largely unspoken and therefore ignored elements in the formulation of Holmes’s philosophy are the more elusive personal characteristics behind his judicial duty of applying the law according to the rule. These factors are not only subjective, but are very difficult to define or outline systematically although they usually can be demonstrated—we know them when we see them and are aware when they are absent. Given the supposed amorality of Holmes’s external model of the law, these internal elements of judgment might be the most important (and least frequently discussed) components of the Holmesian puzzle. Their importance is especially clear when one considers that it is such ameliorating elements that preempt the Holmes model of the law from devolving into an extremist position.

Holmes well knew the limits of reason as a philosophical foundation and yet he is a rationalist in the more modest sense of the word, characterizing one who believes that it is simply better to be reasonable than unreasonable.¹³⁹ Holmes may have believed that truth was difficult to establish, but he had strong opinions about what he believed to be untrue—natural law, a deontological basis for the law and morality, legal formalism and the assertions of revealed religion.

The question remains, why apply reason and moderation at all in a world devoid of absolute morals? Despite his skepticism of absolutes, Holmes had a great belief in progress and civilization and within limits had faith in the use of reason. He was a strong believer in the Western rational tradition, which he regarded to be the most progressive enterprise of human civilization. As he wrote to Harold Laski on June 1, 1919:

138. Oliver Wendell Holmes, *The Path of the Law*, in THE ESSENTIAL HOLMES, *supra* note 1, at 177.

139. Popper holds that a rationalist in the wider sense of the term is someone who simply believes that it is better to be reasonable than unreasonable, but who may also believe that human nature is fundamentally irrational. See POPPER, CONJECTURES & REFUTATIONS, *supra* note 75, at 6. Holmes seems to have been a rationalist of this type. In contrast to soft rationalism or critical rationalism are hard dogmatic rationalists like John Locke, libertarians, Marxists, and adherents to the Law and Economics School. Such individuals would make the surprising claim that people are fundamentally reasonable. When Holmes wrote to Franklin Ford that “[m]an believes what he wants to, and is moved only a little by reason [W]hen I read Malthus I thought he had ripped the guts out of some humbugs—but humbugs have not guts and are living happily without them a century later,” he indicates where he stands on the power of reason to persuade, and that he is not a hard realist. Letter from Oliver Wendell Holmes to Franklin Ford (Dec. 29, 1917), in THE ESSENTIAL HOLMES, *supra* note 1, at 114.

[I]f anything is plain it is that during the period that counts—from Pericles to now —there has been a gradual advance and that our view of life today is more manifold and more profound than it has ever been before. When the Europe and Asia man said Europe has given us the steam engine, Asia every religion that ever commanded the reverence of mankind—I answered I bet on the steam engine. For the steam engine means science and science is the root from which comes the flower of our thought.¹⁴⁰

Here we see in Holmes a belief in the demarcation between epistemological endeavors and metaphysics or rather between the manifest superiority of the hard reason of science and subsequent progress over the untestable assertions of religion, which despite their broad appeal lay beyond the scope of experience and empirical investigation. Implicit here is the understanding that the beliefs of the various religions do not progress and despite the illusion of progress through occasional structural or doctrinal reforms, we know no more of the truth or falsity of their claims than we did a thousand years ago. Moreover, there is no rational basis for assuming that any religion is truer than any other.

Although Holmes “bets” on science and rational expectation here, ten years later in response to a letter from Frederick Pollock, he forcefully championed rationality and his skepticism of absolutes turns against science as anything more than truth as his own limitations. After an initial misgiving or acknowledgment of the potential limits of human reason, Holmes ended up endorsing rational explanation over the empirical intuitions of his “can’t helps” including a belief in causation itself:

I don’t understand your seeming inclination to controvert my *can’t helps*. I see nothing behind the force of reason except that *ich kann nicht anders*—and I don’t know whether the cosmos can or not. I do not see what more there is in your law of contradiction, except to assert that the universe can’t make nonsense sense. . . . I can’t imagine it—but I hardly think that a measure of the possible.

If there is anything that has been supposed to be compulsory upon us short of not affirming nonsense I should think it was that every phenomena must have a cause. Yet I find scientific men suggesting nowadays (*e.g.*[,] Eddington) that there are phenomena for which no causes can be discovered and seemingly believing that they are outside of the category of cause and effect. I am far from

140. Letter from Oliver Wendell Holmes to Harold Laski (June 1, 1919), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 109.

believing with them, but I am entirely ready to believe it on proof.¹⁴¹

This is one of the classic expressions of Holmes's truth as a system of "my intellectual limitations."¹⁴² It is also an expression of the common sense assumptions of daily life colliding with the difficult and less-than-obvious abstract nature of reality as suggested by modern physics. The first paragraph also provides an example of Holmes's hardheaded rationalism and common sense conflicting with his strong belief that human absolutes were not necessarily cosmic absolutes. Interestingly, his reason still dominates at the end even if it leads him to ends that common sense would declare to be absurd. Here, too, Holmes concedes the power of rational-empirical explanation. On the one hand, he does not know whether reason reflects what cosmic necessity, while on the other he is willing to accept something that sounds unreasonable on the basis of the best scientific evidence.

The reference to Arthur Stanley Eddington in the second paragraph shows that Holmes was aware of modern particle theory and was even willing to accept the counterintuitive pronouncements of quantum mechanics "on proof" (presumably scientific corroboration via experimentation or technologically-enhanced observations) despite their *prima facie* absurdity. After all, common sense—the basis for what we cannot help believing—by itself tends to reinforce our prejudices and blinds us to true but counterintuitive solutions. This shows that Holmes believed that we came to know certain truths through rational means despite their apparent absurdity and that the "can't helps" of scientifically-aided reason override the "can't helps" of common sense. It is also a beautiful demonstration of a mind that came into its own in the mid-nineteenth century that was able to keep itself open to the difficult and counter-instinctual scientific ideas of the twentieth century. Holmes's openness to modifying his position in light of compelling new arguments is very close to the definition of rationality given by Karl Popper in the *Myth of the Framework*.¹⁴³

141. HOLMES-POLLOCK LETTERS, *supra* note 28, at 251-52.

142. Letter from Oliver Wendell Holmes to Harold Laski (Jan. 11, 1929), in THE ESSENTIAL HOLMES, *supra* note 1, at 107.

143. See Karl R. Popper, *Myth of the Framework*, in DEFENSE OF SCIENCE AND RATIONALITY 181 (M.A. Notturmo ed., Routledge 1994) (defining rationality as a personal attitude is the attitude of readiness to correct one's beliefs).

Holmes also read and kept an open mind about the newest in literature, and read Hemingway's *The Sun Also Rises* and Joyce's *A Portrait of the Artist* as a young man. See Letter from Oliver Wendell Holmes to Lewis Einstein (July 28, 1928), in THE ESSENTIAL HOLMES, *supra* note 1, at 53-54; HOLMES-POLLOCK LETTERS, *supra* note 28, 226-27 (referencing Hemingway).

Holmes's Aristotelian sounding teleological argument for causation, that "every phenomena must have a cause," which he advances here, had been dismissed or at least brought into question, not only by scientists, but also by philosophers and logicians such as Bertrand Russell.¹⁴⁴ Although Holmes shunned strong foundations in philosophy, he settled on a flexible sort of reason as a fundamental but weak foundation. The upshot of the Pollock letter is that Holmes believed reason to be both a basis and an example of his "can't helps," as well as a means of criticizing and going beyond it.

IV. THE HOLMESIAN BIFURCATION AND SYNTHESIS

Up to now, we have seen the dichotomy of "Holmes the Skeptic" and "Holmes the Romantic" and where the two overlap, the subsequent hybrid of the "Newtonian" real-life judge. The split between the first two models may well be reflective of a contradiction internal to Holmes himself, as well as in his philosophy. This conflict may be between his innate temperamental skepticism and an equally temperamental lust for life, but it is also manifest between his well-known belief in Darwinian/Malthusian naturalism—an intellectual position—on the one hand, and the belief that when dealing with specific legal questions, some answers are "better" (more fair, more logically arrived at, more consistent with precedent etc.) than others, another intellectual position.

We have seen how the division manifests itself in his practical endeavors, especially the law. The missing part of the equation then, is his naturalistic philosophy and how it fits in with his other ideas.

Holmes believed in the struggle for survival in nature was something that spilled over in a modified sense in human nature, and by extension, society at large. Society and social constructs (such as the law and formalized ethical codes) mitigate but do not eliminate the competition for survival among humans. Consequently, in his controversial decision in *Buck v. Bell*, Holmes wrote that the sterilization of individuals with what was believed to be a hereditary form of mental handicap was a viable constitutional

144. Despite the obvious intuitive pull of the teleological argument ("from design"), Bertrand Russell notes that the assumption that the universe must have a beginning has more to do to with "the poverty of our imagination," than the truth of the matter, or in other words, just because we cannot imagine something without a beginning, does not mean that there is a beginning. BERTRAND RUSSELL, *WHY I AM NOT A CHRISTIAN* 7 (Simon & Schuster 1957). Russell's rejection of the teleological argument sounds like Holmes's idea that what philosophers declare to be necessity may only be a projection of human limitations. Recent questions on biological phenomena that cannot be explained by natural selection (such as the human psycholinguistic matrix and our capacity for syntax), have revived interest in teleological positions, notably the ideas of the so-called "Intelligent Design" theory.

option for the state (actually, the state of Virginia).¹⁴⁵ The idea—which is extra-constitutional—was that natural selection as manifested in society tended to kill off persons who were then believed to be genetically flawed or predisposed toward violent criminal behavior.¹⁴⁶

Despite this and his analogy of the law to a game, Holmes's opinions and writings in general are suggestive of a view that fairness and normative standards are components of legal equations.¹⁴⁷ Many laws are value neutral or at least unclear in forwarding a distinct moral precept, and one might just as easily play the game by its rules with a Draconian or even a fascistic temperament or interpretation and without moderate normative standards. At least Holmes's interpretation and application of the rules were well within the ethos of his times and cognizant of the historical development of the law and related customs. The problem is that concepts like fairness, as well as the more formalized aspects of justice, seem to be squarely at odds with the brutality of natural selection as it is usually characterized.

A. EVOLUTION AND CIVILIZATION

1. *Outside of the Jurisdiction: What Mode of Darwinism?*

Although we must be cautious when leaping from a thinker's world-view and epistemology to his or her social views, most of Holmes's social positions are closely tied to his larger perspective and philosophy. One can see the linkages between the cores of his belief at each of the three levels. Except for his beliefs in naturalistic explanations, Holmes's legal thought is strangely lacking in social theory.¹⁴⁸

According to the best genetic and paleontological information, human beings are naturally-evolved creatures, and therefore nature is an a priori category to our existence.¹⁴⁹ Even in Holmes's time, the idea of natural

145. *Buck v. Bell*, 250 U.S. 200, 207-08 (1927); THE ESSENTIAL HOLMES, *supra* note 1, at 103-05.

146. THE ESSENTIAL HOLMES, *supra* note 1, at 103-05.

147. Oliver Wendell Holmes, *The Path of the Law*, in THE ESSENTIAL HOLMES, *supra* note 1, at 160-77. "The law is the witness and external deposit of our moral life. It's the history of the moral development of the race." *Id.* at 161.

148. Letter from Oliver Wendell Holmes to Lewis Einstein's daughter (May 6, 1925), in THE ESSENTIAL HOLMES, *supra* note 1, at 75-76; Letter from Oliver Wendell Holmes to Lewis Einstein (May 21, 1914), in THE ESSENTIAL HOLMES, *supra* note 1, at 114; Letter from Oliver Wendell Holmes to Franklin Ford (Dec. 29, 1917), in THE ESSENTIAL HOLMES, *supra* note 1, at 114.

149. Having said this, the human basis for abstract language is still unexplainable in evolutionary terms. As Noam Chomsky writes:

selection—without the benefit of later findings in genetics to corroborate it—secured a powerful grip over much of the scientific community, and sparked a number of heated controversies in Britain and the United States.

A common problem with the views of early followers of Lamarck, Malthus and Darwin is the fact that some of them—Herbert Spencer, for example—attempted to apply these ideas outside of the more narrowly tailored area of biology for which they were intended.¹⁵⁰ With the exceptions of the development of scientific and technological ideas and perhaps the law itself, evolutionary models do not fit well into accounts of civilization (sexual selection and the existence of the human psycholinguistic matrix have both been difficult to explain purely in social-evolutionary terms or even in terms of fortuitous mutations by themselves).

As many scientists and philosophers of science are quick to point out, even in biology, evolution via natural selection is not a purely scientific theory, but rather a collection of conjectures and observations—an organon or metatheory—that accounts for and describes a natural historical sequence via a biological process. It does, however, have certain scientific elements (laws of heredity and the existence of random mutations have been observed or otherwise corroborated through scientific falsification). It is a descriptive program and not a predictive one.

Even if applied to behavior within a single species, we must be wary not to reduce a complex array of theories to a heavy-handed tautological principle of “survival of the fittest.” A sophisticated take on evolution shows that natural brute force and amorality is often mitigated within species, especially in regard to higher animals—among mammals for instance, parents generally do not intentionally playoff their offspring against each other to determine which is the strongest. Although the cosmos and nature writ large may be amoral, certain higher mammalian species seem to have a sort of social intelligence that is related to the human capacity for ethical behavior. This might bestow upon them a modest degree of moral agency.

[I]t is almost universally taken for granted that there exists a problem of explaining the “evolution” of human language from systems of animal communication. However, a careful look at recent studies of animal communication seems to me to provide little support for these assumptions rather, these studies simply bring out even more clearly the extent to which human language appears to be a unique phenomenon, without significant analogue in the animal world.

NOAM CHOMSKY, LANGUAGE AND MIND 59 (Harcourt, Brace & World, Inc. 1968).

150. CHAUNCEY WRIGHT, *The Philosophy of Herbert Spencer*, in PHILOSOPHICAL DISCUSSIONS 43 (1877). Wright was a friend to Holmes and the moderator of the Metaphysical Club. This article attacks Spencer’s application of evolutionary theory to areas outside of the bounds of biology. It originally appeared in *The North American Review* in April, 1865. *Id.*

Evolution in biology presumes a physicalist epistemology, as well as an assumption of a cosmos that is amoral and thus indifferent to the unfairness and suffering in the lives of individual creatures. We must be careful in damning Holmes as being an authoritarian or villain just because he was a moral relativist and a social Darwinist. Likewise, we must also not overestimate Holmes's rhetoric on social evolution, but rather balance the ideas embodied in *Buck v. Bell* against the legion of opinions based on moderate reason, simple fairness, or at least a tolerance of views with which he disagreed. In a public career of almost seventy years, we should expect to find some contradictions—consistency, or simply not being a hypocrite in regard to what one professes to be is one of the most difficult challenges in life and is probably an impossibility—and Holmes's outlook is intricate and embodies some inconsistencies. Still, one would hope that the central tension in Holmes is resolvable. Despite the prejudices and dictates of our own time we must not summarily conclude that moral relativism, evolution, and an aristocratic perspective are exclusive from high-minded purposes or that they necessarily lead to illiberal ends.

There are several possible modes of thought related to Holmes's philosophy that could possibly reconcile or accommodate the split in his views. The first is the traditional and somewhat simplistic social Darwinism in which ideas clash and where unsound ones are factored out. The second model—which is mostly conjectural—recognizes a more sophisticated form of evolution characterized as nuanced and complex. Although Holmes's thought shows an appreciation for the complexity of things, such ideas are more modern and it seems unlikely that he could have anticipated them. The third explanation deals with evolution in a more purely philosophical light in which survival is subservient to what Holmes characterizes as the "higher life"—an intellectual Good Life contingent on the success of civilization and therefore on fairness and rules.

Perhaps the simplest answer to the Holmesian bifurcation is the fact that Holmes was simply able to compartmentalize his role as a judge away from his larger views, that he saw his role in very narrow terms that did not include modern social theory. Finally, no matter which of these may in fact be true, it is important to realize that even Holmes's liberal critics believe that he saw his role as a judge in extremely narrow, restrained, and legalistic terms.

In his 1964 law review article, *The Judge as Spectator*, Yosal Rogat blames Holmes for a lack of passion in embracing a greater purpose for the law and not trying to consciously remedy wrongs through his decisions and

quotes Brandeis's criticisms that Holmes did not go beyond the relevant facts of a case.¹⁵¹ The view of the law behind such criticisms represents the exact type of passionate advocacy, politics and emotionalism that Holmes sought to avoid.¹⁵² Just as justice and fairness are not synonyms, neither is fairness and sympathy, and as a matter of form, he wanted to avoid prejudicial facts and assumptions even when well intended. To some, this appeared to be the intellectual exercise of a cold and aloof judge unconcerned with the real human implications of his conclusions. In fact he sought—and his external standard supports the fact that—to address the objective matter at hand, since emotionalism could cut both ways. He was not an activist, but a judge who saw his role as applying the law rather than a judicial social reformer, or a politician trying to implement a social ideal. This narrowly focused view of the role of the judge is also the very essence of playing the game by its rules.

a. Theory # 1 “A Donkey’s Right to Drool:”
Simple Malthusianism and Social Darwinism

*Three generations of imbeciles are enough.*¹⁵³

Having said all of this, the question remains: what exactly is Holmes’s understanding of natural selection and do legal and ethical notions of fairness and balance necessarily conflict with Darwin’s survival of the fittest? Given that evolution necessarily involves the often horrible suffering and deaths of individual creatures, and that their survival is based on favorable but random mutations over which they have no control, fairness would not seem to be a part of Darwin’s general outline (although within some species, especially mammals, there is kindness, affection, compassion, mercy and cooperation, when possible). Humans are animals that are still evolving, and it stands to reason that such natural processes must necessarily continue even in modern society. The question then becomes to what is the role of society as an engine of such change?

151. Rogat, *supra* note 39, at 243-56.

152. Holmes believed that in both life and the law, passion was often a cause of problems. In his letter of October 1, 1901, to Alice Stopford Green, he writes: “A moral view is a dangerous means of judging.” Letter from Oliver Wendell Holmes to Alice Stopford Green (Oct. 1, 1901), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 111. Looking back on his own experiences in a letter dated August 24, 1927, to Harold Laski, he writes: “I always appreciated the difficulty in getting a dispassionate verdict when everyone was as excited as everyone was in those days.” Letter from Oliver Wendell Holmes to Harold Laski (Aug. 24, 1927), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 329. In the same letter he refers to a book written by Felix Frankfurter about the Sacco Vanzetti case as “generous knight-errantry.” *Id.*

153. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

Even in a context of vulgar Darwinism, it seems likely that Holmes believed that he could afford to be fair in the vast majority of his opinions since, even on a level playing field, the stronger (or at least the more compelling) position will generally prevail—assuming the “stronger” to mean in terms of argument as opposed to the relative power of the parties involved. Any observer of the law knows all-too well that the stronger will often win even when legally wrong, through superior representation.

In this explanation, Holmes looked at things evenhandedly and honestly, and held that the social engineering of which he personally disapproved (notably the progressive social programs advocated by Theodore Roosevelt and two decades later, his cousin, Franklin’s New Deal¹⁵⁴) were to be upheld on the grounds that they were constitutionally permissible. The Constitution thus functioned as the basis for a rule-based arena for selective contests guided by its own rules rather than by the external dictates of nature (interestingly, although random mutations are internal mechanisms of biological change, the undirected order of natural selection is an external aspect with some conceptual resemblance to Holmes’s view of the law as outlined in *The Path of the Law*).

But Holmes also believed that the law was evolutionary and therefore, in a phrase as Jeffersonian-sounding as it is Darwinian, the Constitution itself “is an experiment, as all life is an experiment.”¹⁵⁵ If an idea was constitutional, but still a bad idea—if it ran contrary to survival of the fittest, or if it was merely unworkable in practical terms—it would be factored out regardless of its status. In this sense he seems to have combined evolution with a version of Mill’s marketplace of ideas.¹⁵⁶ Holmes explained away the upholding of bad or misled ideas by asserting that he was playing by the rules, to include “upholding the right of a donkey to drool”¹⁵⁷ (although to a thoroughgoing evolutionist, sensible survival would

154. See THE ESSENTIAL HOLMES, *supra* note 1, at 66, 140-42 (providing examples of Holmes’s view on social engineering in letters to Harold Laski (July 23, 1925) and Lewis Einstein (Oct. 28, 1921 & Nov. 24, 1912)). A perusal of any of Holmes’s letters on topics from antitrust laws to socialism show him to be a conservative in regard to government-sponsored social engineering. See generally Oliver Wendell Holmes, *The Gas Stokers’ Strike*, in THE ESSENTIAL HOLMES, *supra* note 1, at 120-48. During the early 1870s, when he wrote *The Gas Stokers’ Case*, Holmes was clearly a primitive Darwinist of the first generation, and he favored the use of the law to advance the naturally fitter. His views seem to have matured and mellowed after that.

155. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

156. WIENER, *supra* note 5, at 177. More than Darwin, and Mill, Holmes believed in the inexorable pressures exerted by population growth as characterized by Malthus. On an interesting side note, Wiener notes that social evolution “favored gradual rather than revolutionary change.” *Id.* Given that Holmes had a low regard for revolutionary ideologies, it is little surprise that he would be attracted to a gradualist approach.

157. Letter from Oliver Wendell Holmes to Lewis Einstein dated (July 11, 1925), in THE ESSENTIAL HOLMES, *supra* note 1, at 322. He echoes the view of his job to be merely upholding

be preferable to the upholding of potentially harmful rights). The larger implication here is that if the Constitution, and therefore our entire system, is just one more experiment, it would succeed or fail based on its compatibility with evolution writ at large.¹⁵⁸

There is much in Holmes's writing that would seem to support the simple evolutionary view, especially in his early writings on the subject such as that in *The Gas Stokers' Case*.¹⁵⁹ We must not underestimate the fact that he was also a political conservative of sorts who opposed social experimentation and sentimentalism. Still, this winning out of the most compelling idea is actually a threat to "the survival of the fittest," in a more literal sense, which means that Holmes put a greater premium on the simple virtue of duty and the faith it implies rather than on the inexorable advance of amoral nature.

There are numerous problems with a simplistic and less complete take on evolution. Given what is now known about evolution, much of the unsophisticated and atavistic market reasoning that characterizes evolution in the popular imagination is spurious on its face, especially when applied to human social institutions. In business, natural selection is illusory in that even the most fervent advocates of "survival of the fittest" tend to defend their own interests even when they are no longer fit or competitive or in instances where they are less fit but merely advantaged. Likewise, the stronger legal position or argument is not the same thing as "the fittest" in a biological evolutionary sense and in a truly fair system, the "fittest" would lose every time they were culpable under the law. Yet, if society upheld the position of the "unfit" when legally in the right, then it too would eventually fail, thereby threatening one of Holmes's asserted goods—civilization as a social basis and framework for the higher life.¹⁶⁰ Laws that consciously upheld the position of the weak would either have to be repealed in light of their inevitable failure or else allowed to threaten the whole system. Still, most laws are blind to one's evolutionary status as "fit" or "unfit" and are only concerned with culpability, liability, guilt, or innocence.

Despite the numerous problems with *laissez faire* forms of arena Darwinism, it is well-known that Holmes actually rendered a decision based

the law when he writes "[i]f my fellow citizens want to go to Hell, I will help them, it's my job." *Id.*

158. "[The Constitution] is an experiment, as all life is an experiment." *Abrams*, 250 U.S. at 630.

159. Oliver Wendell Holmes, *The Gas Stokers' Strike*, in *THE ESSENTIAL HOLMES*, *supra* note 1, at 120-23.

160. Oliver Wendell Holmes, *At a Dinner Given by the Bar Association of Boston*, in *SPEECHES*, *supra* note 25, at 82.

on a naturalistic view of survival that made the State of Virginia an agent of nature. This is, of course, his infamous opinion in *Buck v. Bell*,¹⁶¹ and is without a doubt the worst decision he ever wrote, even in purely logical terms and actually involves a non-sequitur of unparallel reasoning.¹⁶²

What many people who come across this opinion often fail to realize is that, at the time it was issued, *Buck* was a progressive decision and was opposed by a single Justice, the conservative, Pierce Butler.¹⁶³ During the early part of the twentieth century eugenics was regarded as a humane and liberal idea and had been championed by such notable social progressives as Theodore Roosevelt and Louis D. Brandeis (a signer of the majority opinion in *Buck*).¹⁶⁴

As Darwinism was catching on in political circles, the nature/nurture pendulum was tending toward the former extremity. Consequently, one common view of the time was that certain forms of criminal behavior came from mental defects that were passed down genetically from generation to generation.¹⁶⁵ People like Holmes believed that social conditions or society itself killed off such “unfit” individuals either during the commission of risky crimes, through punishment or even starvation.¹⁶⁶ If such persons, so the logic goes, were prevented from reproducing, then society would be twice improved in that it would no longer be preyed upon by genetically flawed criminals and such persons would themselves be spared miserable lives and deaths. Some persons might have made a further argument about the general merit of ridding the gene pool of flawed individuals. This coupled with Holmes’s strong Malthusian views on population seem to have made his conclusions in *Buck* irresistible.

161. 274 U.S. 200 (1927).

162. G. Edward White notes that Holmes’s “the greater includes the lesser” argument—i.e., if the state can call upon its best citizens to sacrifice their lives in time of war, then it can certainly call upon people regarded as burdens on society to make lesser sacrifices—is predicated on flawed reasoning. White, *supra* note 121, at 405-06. White points out that the comparison of “[c]ompulsory military service, of course, was not the equivalent of “call[ing] on the best citizens for their lives” and therefore “the greater includes the lesser” argument used here is not valid reasoning. *Id.*

163. LIVA BAKER, *THE JUSTICE FROM BEACON HILL* 602 (HarperCollins Publishers 1991). Although Butler’s dissent does not appear in the United States reports, it is noted in *Buck*. *Buck*, 274 U.S. at 208. See DAVID J. DANIELSKI, *A SUPREME COURT JUSTICE IS NOMINATED* 3-19 (Random House 1964) (providing a biographical sketch of Justice Butler).

164. Progressives who championed the idea of eugenics included Margaret Sanger, and it also found support among major philanthropic foundations. It should also be noted that some social Darwinists advocated eugenics as a means of maintaining racial purity and population control. See HARRY BRUNIUS, *BETTER FOR ALL THE WORLD: THE SECRET HISTORY OF FORCED STERILIZATION AND AMERICA’S QUEST FOR RACIAL PURITY* 3-6 (Alfred A. Knopf 2006).

165. *Id.* at 6-7.

166. *THE ESSENTIAL HOLMES*, *supra* note 1, at 103-05.

Buck was the instance where Holmes put forth a rule affirmatively designed to aide an evolutionary process via policy.¹⁶⁷ Rather than act as an active agent of natural selection, he was usually content to help provide a neutral arena. This arena allowed superior ideas and individuals to emerge through an otherwise unaided process of competition.

While it is true that Holmes was an advocate of an intellectual aristocracy, cultivated his own image as an aristocrat and may have at times privately looked down upon the “thick-fingered clowns we call the people,” he genuinely seems to have liked people individually and believed that talent and intellect existed in many diverse forms at all levels of society, something he apparently came to appreciate during his service in the Army.¹⁶⁸ Holmes belonged to a fairly small circle of elite associates and acquaintances, who knew that no class of people had a lock on the truth and that talent and ability were found among people at all levels of society. He was not a great military man and realized that in some respects, many of the

167. Sheldon Novick notes that Holmes wrote other opinions based on Malthusian economic theories. NOVICK, HONORABLE JUSTICE, *supra* note 130, at 452 n.11.

168. Holmes, like later commentators of an aristocratic bent such as George F. Kennan, seems to have been ambivalent about ordinary people, at least as a young man. His “thick fingered clowns” comment comes from a letter dated November 11, 1862. It should be pointed out that this was expressed in a private correspondence to a British aristocrat, and Holmes might have been posing. Holmes’s December 12, 1862 letter to his mother from the field hospital near Falmouth, Virginia ends on a similarly crass note. TOUCHED WITH FIRE, *supra* note 43, at 78. It should be noted that both of these comments come from personal letters written within a month of each other when Holmes was still in his early twenties.

As Mark DeWolfe Howe notes in *Justice Holmes: The Shaping Years*, Holmes’s unit was known as the “Harvard Regiment,” but was in fact quite eclectic—more so than most Massachusetts regiment who were bonded by loyalty to town and county. DEWOLFE HOWE, THE SHAPING YEARS, *supra* note 40, at 81. Some of the officers who led the unit were Harvard-educated Brahmins, but many of the soldiers were Nantucket fishermen and Worcester County farmers. *Id.* at 81-82. Howe also points out that “[t]wo other companies, B and C, were made up entirely of German immigrants, commanded originally by their compatriots.” *Id.* at 82. Needless to say, there was resentment in the regiment not only based on hometown loyalties and ethnicity, but also on class and education. *Id.* at 82-85. This internal tension lasted for about a year and a half according to Howe. *Id.* at 85. It is possible that Holmes’s condescending remarks are themselves reflective of this tension.

By contrast, in a letter to Laski dated December 15, 1926, an older and more circumspect Holmes writes: “The army taught me some great lessons . . . to know that however fine [a] fellow I thought myself in my usual routine there were other situations alongside and many more in which I was inferior to men that might have looked down upon had not the experience taught me to look up.” Letter from Oliver Wendell Holmes to Harold Laski (Dec. 15, 1926), in THE ESSENTIAL HOLMES, *supra* note 1, at 77. As a fairly typical record of combat experience, Holmes’s letters from the war suggest that he saw the best and worst of human nature in all classes while under fire. In his April 14, 1921 letter to Laski, he praises Melville for his noble portrayal of ordinary people in *Moby Dick*. Letter from Oliver Wendell Holmes to Harold Laski (Apr. 14, 1921), in THE ESSENTIAL HOLMES, *supra* note 1, at 61-61. It might or might not come as a surprise to modern Americans that there are negative references to ordinary people in the writings of such prominent members of the founding generation as John Adams, Nathaniel Greene, George Washington, and even Thomas Jefferson. See GORDON WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 27-28 (Alfred A. Knopf, Inc. 1992).

men he led were as good if not better than he. Every competent combat officer knows this.

Moreover, if Holmes felt so strongly about the survival of the fittest, why did he not write more opinions that would have specifically benefited society's "fittest," its natural aristocrats, as many of his brethren of the bench were content to do during the business cases of the late nineteenth and early twentieth century? Why did he not help evolution along a little more, given that in a truly fair system where the relative strengths of the strongest were leveled they were likely to lose when legally in the wrong—a constraint not found in nature? Why was he fair in weighing interests for and against evolutionary interests when a true agent of natural selection would know no such evenhandedness? Why would he put rules of a man-made game above the dictates of nature? Was it just the rules of the game that forced his hand as a detached agent? Was it that applying the rules posited by the Constitution allowed him to maintain an amoral pose while in fact acting moderately and reasonably?

By contrast, we must ask why he often sided with individual rights at a time when so many jurists used "the rules" to support the interests of their own class?¹⁶⁹ Was it simple honesty, as is implied in his colorful quote, "when people of the various states wanted to do something and I can't find anything in the Constitution expressly forbidding them to do it, I say, whether I like it or not: Goddamn it, let'em do it[.]"¹⁷⁰ or was it a determinist evolutionary belief (something of an oxymoron) in the inevitability of the survival of the fittest?¹⁷¹

The Constitution provided a framework for Holmes to apply his moderation, reason, and fairness without stating these ideas directly, and allowed him the room to disavow opinions with which he disagreed, but which were constitutionally permissible—again, the donkey's right to drool.¹⁷² Likewise, the civility allowed by civilization was a sheltered harbor from the violence and brutality that typified much of history and whose atavistic foundation was found even in civilized man. The clashing

169. Holmes's reputation as a pro-labor justice was not as good as more consciously progressive justices like Louis Brandeis. NOVICK, HONORABLE JUSTICE, *supra* note 130, at 452 n.11. His free speech cases show that he did uphold the rights of unpopular minorities when the fact supported their position under the First Amendment.

170. *Hearings before the Subcomm. on Separation of Powers of the Comm. on the Judiciary*, 90th Cong. 7 (1968) (statement of Oliver Wendell Holmes).

171. By an oxymoron, I simply mean that a process that has random elements cannot be fully determinist. Rather than a determinist statement, "survival of the fittest" by itself is a tautology. Observe: Q. Who survives? A. The fittest. Q. Who are "the fittest"? A. Those who survive."

172. Letter from Oliver Wendell Holmes to Lewis Einstein (July 11, 1925), in THE ESSENTIAL HOLMES, *supra* note 1, at 322.

of interest could still take place, but it was ameliorated by the civil and controlled arena of constitutionalism. It was as if the legal system was to be a somewhat fairer version of conflict with winners and losers, in the same way that sports are like a metaphor for conflict or life in which rules are enforced. If Holmes asserts an existential commitment to duty, it is for the greater purpose of civilization that allows for the higher life he loved and cherished.

As we have seen, Holmes's legal philosophy is notable for its dearth of social or political theory and he famously upheld large scale social experimentation that he disagreed with when it was not constitutionally prohibited and was therefore permissible. If they were bad or unsound ideas, they would die natural deaths along the evolutionary path of the law regardless of their constitutionality, or else society would die as the result of their preservation. As such, the marketplace of ideas would become a social arena for evolution, or what some have called "controlled evolution."¹⁷³ Still, a belief that the strong would inevitably succeed sounds at the very least like a tautology and possibly a form of determinist historicism, a model of history on which Marxism—a position Holmes strongly opposed—is based.¹⁷⁴ This view of social Darwinism is similar to the naïvely understood free-market Darwinism that is held by some businessmen, or rather, the idea of a neutral arena of conflict and competition in which all parties are subject to the same conditions and elements. In fairness, there is a naturalistic sorting out of things as regards policies, programs, and laws based on effectiveness—we can learn greatly from our mistakes through trial and error and the simple model of social Darwinism is very close to the modern democratic idea of piecemeal social engineering.¹⁷⁵

Although a marketplace model can be partially accommodated in Holmes's synthesis of his evolution and fairness, the explanation would equally have to come from a sense of moderation and a belief in reason. After all, one would have to embrace the Constitution to begin with and, despite his strong statements about evolution, he frequently sided with liberality and it is possible that he realized that the only thing worse than a vulgar utopian was a vulgar Darwinist. What this suggests is that there may be another way of thinking about evolution that embraces reason,

173. See Novick, *supra* note 27, at 722-23.

174. The fact is that there are no inexorable external laws in Darwinian evolution. KARL R. POPPER, *THE POVERTY OF HISTORICISM* 105-19 (Harper & Row 1964) [hereinafter *POVERTY OF HISTORICISM*].

175. See generally KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* (5th ed., Princeton Univ. Press 1966).

moderation, and even high-mindedness. In short, none of this rationalist attempt to reconcile the disparate part of Holmes should ignore the fact that temperamentally, he was a balanced and moderate person. Holmes was affable and belonged to numerous social circles. He made life-long friends and kept up several notable correspondences—that with Sir Frederick Pollock lasted over half a century.¹⁷⁶

It should be noted that the simplistic view of Darwinism is now known to be inaccurate even within the biological realm with which it is more commonly associated. Aside from the fact that in logical terms the unelaborated idea of evolution as “the survival of the fittest” is virtually a tautology, it often works out that the fittest do not always survive at all, while at times the less fit prevail.¹⁷⁷ It would be equally erroneous to conclude that it is therefore the *strongest* that always survive. After all, the largest dinosaurs were among the most powerful creatures in all of natural history and yet it is the frail but more ancient newt that survives sixty million years after their extinction. Sometimes “advantaged” is more important than “fitness.” It is worth noting that in other respects natural selection is purely random, capricious, wasteful, and not “selective” at all. Likewise, what may be seen as “the fittest” may be merely advantaged or even lucky.¹⁷⁸ Quite simply, there is much we do not understand about the mechanisms of evolution, and there are many confidently asserted misunderstandings about it. It would be folly to base a social system on the belief that we sufficiently understand evolution as a complete outline.

Simple or vulgar Darwinists hold that in a neutral arena or marketplace the fittest would prevail. This view of human civilization as a crucible is apparently supported by Holmes’s seemingly amoral tolerance of all behavior specifically not forbidden by the Constitution. Still, his belief in a

176. HOLMES-POLLOCK LETTERS, *supra* note 28, at xxiii, xxiv (noting that the correspondence lasted from 1874 until 1932).

177. See *Interstate Consol. St. Ry. Co. v. Mass.*, 207 U.S. 79, 79 (1907) (providing an example of the weaker winning).

178. For eye-opening examples of the wastefulness of evolution in nature, see generally Annie Dillard, *Pilgrim at Tinker Creek* 159-81 (Harper & Row, Publishers, Inc. 1974).

For an example how sometimes the fittest do not survive, consider: there is a bird that lives in the Galapagos Islands with the unfortunate name of the *masked booby* that lays two eggs per year several days or a week apart. Assuming that both chicks hatch, the one that is born earlier usually kills the second. The older one survives, not because of any genetic superiority, but solely because it is slightly older and therefore more powerful. The younger chick is often not genetically inferior, only disadvantaged and in some cases, the younger chick may actually be superior to its older sibling. Even in cases where the younger bird is more “fit,” it will be killed by the elder. Boobys apparently have a low hatching rate and the second egg/chick is a spare of sorts in order to beat the odds. However, raising two chicks puts a heavy burden on nesting pairs over the long run. Adult birds that raise two chicks have a considerably lower survival rate over a period of a couple of years. *Scientific American Frontiers: Voyage to the Galapagos* (PBS television broadcast Oct. 5, 1999).

law-based state shows that his view is not synonymous with a libertarian or anarchist outlook (his view of human nature is too dark to believe in such optimistic programs), which would allow the strongest to survive but which would prove too chaotic for advanced civilization to progress. After all, cooperation is more important to civilization than lawless competition.

Finally, it is ironic that Holmes's single allegiance to social theory would be the source of the greatest stain on his reputation. Relative to the most notable judge-theorists to follow him for the next half century—Pound, Llewellyn, Brandeis, Cardozo, Brennan—Holmes's jurisprudence is almost absurdly devoid of contemporary social theory.¹⁷⁹ Later scholars who believe that the law should serve a conscious purpose have actually held Holmes's restraint against him.¹⁸⁰ They might do well to see *Buck* as a cautionary example of good intentions.

Holmes saw the role of a judge as a referee in a game whose rules were constantly developing rather than as a player or advocate. He believed that allegiance to ideas beyond the facts of the case and the rules that governed them got one into trouble and was beyond the purview of the jurist. When Holmes did what his idealistic critics prescribe—act on ideology—and against his own inclinations, he got into trouble.

b. Theory #2: Sophisticated Darwinism

It is now apparent that evolution in the natural world is a mixed bag full of subtleties, caveats, and contradictions many of which are still poorly understood and which vary greatly within individual species. Besides, it does not logically follow that because nature is often cruel so must we be. It is well documented that within given species there is frequently behavior that runs counter to individual self-preservation. In some primate species, for example, elderly individuals who would certainly die if left to their own devices are cared for by other members of the social group thereby putting added pressure on the group as a whole. Parents in higher mammalian species do not typically pit siblings against each other, although weaker ones may die naturally through competition over scarce resources. It is well known that some chimps in species of all types make better parents than

179. Yosai Rogat, among other scholars has noted a lack of modern social theory in Holmes's legal thought. See generally Rogat, *supra* note 39, at 231-56. His dislike of socialism and communism is especially well-known. See THE ESSENTIAL HOLMES, *supra* note 1, at 115, 116, 142-44 (providing samples of Holmes's opinions on these things in his letters to Harold Laski dated May 24, 1919, Dec. 9, 1921, May 21, 1927, & Sept. 15, 1929).

180. See generally Rogat, *supra* note 39, at 244-256.

other beings of the same species.¹⁸¹ The point is that there are plenty of such exceptions that vary with circumstances and between individual species, and it would be simplistic to assume that the only tenet of evolution is survival of “the fittest” (or worse, “the strongest”).

Ironically, and despite its manifest brutality, elements of the Darwinian jungle can at times be more nurturing or at least more nuanced than the simplistic Hobbesian “nasty, brutish and short” free-for-all of the natural human condition.¹⁸² Still, it is not clear if Holmes appreciated this complexity or if he did, to what degree. Certainly, there is no way he could have known what we know today with our own incomplete understanding about survival in the natural world.

Holmes himself saw morality as “etiquette” endemic and perhaps unique to our species and therefore both a natural part of what we are and the product of evolution, suggesting a somewhat sophisticated evolutionary view. The law, by contrast, was an external system of rules that was externally enforced. Both were mitigating factors on pure force, therefore allowing for higher civilization. To Holmes, morality was best understood in terms of social behavior—a form of social intelligence that developed naturally over the eons. As such, to conform to natural predilections like fairness is probably just conforming to what is “hardwired” into our psychological matrix in a similar way to which our linguistic ability is. In this sense, fairness is doing what comes naturally and therefore a part of an evolutionary scheme.

Holmes’s view of both the law and adjudication as expressed in *The Common Law* was complex and not limited to philosophy, biology, or social theory. It is unclear how sophisticated Holmes’s view of evolution as a biological process was. Holmes may have realized that evolution and the population-related phenomena characterized in the ideas of Malthus—like the rest of the physical cosmos—may not be as self-evident as it might appear. To accept popular versions of these ideas uncritically and as being final would be inconsistent with his skepticism and the balance of his philosophy and worldview more generally. Moreover, if Holmes was doubtful of all human knowledge, how could he have put much faith in a largely untestable idea like evolution?

Despite the complexity of Holmes’s social philosophy, it is unlikely that he had something akin to a modern nuanced view of evolution. By his own admission, he never actually read Darwin when he was in college, and

181. See generally SARAH BLAFFER HRDY, *MOTHER NATURE: A HISTORY OF MOTHERS, INFANTS, AND NATURAL SELECTION* (Pantheon Books 1999).

182. HOBBS, *supra* note 119, at 84.

his most pungent naturalistic references are to the pre-Darwinian, Malthus.¹⁸³ He had been a member of the celebrated Metaphysical Club, and he was fluent in the evolutionary ideas of his day. His belief in group evolution further suggests an incomplete or pre-twentieth-century understanding of Darwin's ideas.¹⁸⁴ Holmes's outlook then, was most likely a simpler form of naturalism coupled with a commitment to duty that was typical of his time and class (and very much in keeping with the outlook of the Harvard Brahmin veterans of his Civil War regiment), and a belief in the philosophical good life in which the joy of life came from staying busy, through work, ideally through self-actualization by the exercising of one's faculties to the fullest.¹⁸⁵

183. In a letter to Morris Cohen dated February 5, 1919, Holmes states that although evolutionary ideas were "in the air" in Cambridge during the 1860s, he had not read *On the Origin of Species* during that time. Letter from Oliver Wendell Holmes to Morris Cohen (Feb. 5, 1919), in THE ESSENTIAL HOLMES, *supra* note 1, at 110. Through his discussions with the famous Metaphysical Club, whose members were on the cutting edge of the Darwinian Controversy of the 1860s and 1870s, Holmes would have become fluent with evolutionary ideas even if he had never read the actual texts. Holmes refers to Malthus in his letter to Miss Einstein, as well as to Franklin Ford and Harold Laski. See, e.g., Letter from Oliver Wendell Holmes to Franklin Ford (Dec. 29, 1917), in THE ESSENTIAL HOLMES, *supra* note 1, at 114 (referring to when Holmes read Malthus). Oliver Wendell Holmes, *The Gas Stokers' Case*, in THE ESSENTIAL HOLMES, *supra* note 1, at 120-23. This is perhaps his most forthright, if nascent, view of evolution and the law. Although he refers to the mitigation of "sympathy, prudence and . . . moral qualities," the law "like every other device of man or beast, must tend in the long run to aid the survival of the fittest." *Id.* at 122. This rather bold precocious statement is an advocacy of vulgar evolutionism. His later views are more tempered.

184. OXFORD COMPANION, *supra* note 3, at 410.

185. This idea is very similar to Nietzsche's view of the Good Life. See Kaufman, *supra* note 28, at 174. To be sure, human beings, like other animals have innate drives and predilections. Sometimes it is necessary and even desirable to surrender to urges that arise from the primitive, almost reptilian, part of the brain—the brain stem—other times, it is not. Those qualities and abilities that distinguish humanity from the rest of the natural world—cognitive ability, aesthetics, and abstract language and ideas—and the most noteworthy human achievements are the result of the most highly developed part of the brain, the neo-cortex.

As Holmes and Nietzsche both well knew, any animal might survive to pass on its genes on instinct alone or as the result of non-rational urges such as those to reproduce. But to live interestingly and greatly as a human being, we must do more than just survive or reproduce, we must live well. To do that we require civilization, and civilization requires rules, compliance, and enforcement. See generally Oliver Wendell Holmes, *At a Dinner Given by the Bar Association of Boston*, in SPEECHES, *supra* note 25, at 86. It is probably no exaggeration to say that Nietzsche may have believed that it was better not to live at all if one could not live well.

The fact that humans are the only animals in the history of life on earth who devise and work with abstract (syntactic) language and ideas, and that many of the most successful animals are the most cognitively primitive, then it makes sense that consciousness, much less reason is not a prerequisite for survival. Its rarity would suggest that it may even be an evolutionary fluke that currently defies plausible explanation within a frame of natural selection by itself.

If we expand our view of evolution to include genetic changes that are the result, not of just the accretion of serendipitous error and random mutations—which do explain simple changes very well—but also to include an internal factor such as the shifting of the position of genes relative to one another and with huge consequences related to environmental mechanisms, complex changes

c. Theory #3: “Fighting Beliefs” and “the Higher Life”—
Holmes, Nietzsche and some Philosophical Implications
of Darwinism

There need be no contradiction in the Holmesian canon if we broaden our view of evolution to include philosophical interpretations and implications, and couple these ideas with Holmes’s endorsement of civilization and the higher life. Nietzsche—a philosopher and contemporary of Holmes’s early career, and a thinker with whom he read and with whom he is sometimes compared—claimed that no person of quality and taste, even a Darwinian, would ever settle for mere survival, but rather would choose to live well. “Survival of the fittest,” in Nietzsche’s opinion, guaranteed nothing but the survival of ‘mediocrities’ and ‘bigger and better brutes’ representing little more than vulgarity that is unbecoming of a superior civilized person.¹⁸⁶

Human superiority, therefore, lay in human transcendence or in an ideal and not in the lowbrow terms of pecuniary or political success, much less mere animal survival. Nietzsche held that the superior human being was the best example of the species and not just a survivor, and believed that it is better to live well than to just live. It meant being the best at those things that set humans apart from other animals. To Nietzsche, evolution meant change to a potentially superior future rather than the brutal struggle of the natural past. His philosophical vision was of evolution as positive change and not as the success of the merely fit in which mediocrities, in terms of those qualities that distinguishes human beings from other animals, would almost certainly fare better than more noble types who put their minds to higher purposes.

Holmes, the romantic, natural aristocrat embracing life with gusto, concurs with Nietzsche on this point. Moreover, if Holmes had only been a simple Darwinist, he probably would have made more of an effort to reproduce, which is the true criterion and surest measure of biological

like the development of the chordate eye (and perhaps even human language) make a lot more sense given the timeframe of natural history on Earth.

186. Eventually, biology using evolutionary theory will probably be able to adequately explain the development of the most complicated physical and neurological features found in nature, but the upshot may be that evolution is not as completely random as we thought or that it is not just limited to the random mutations of natural selection (besides, if it was a completely random process, why are there so many parameters such as symmetry?). This fuller model of evolution—one that combines the randomness of Darwin’s natural selection with an almost Lamarckian view based on gene shifts related to environmental factors—has already been suggested in recent decades in regard to help explain the development of corn from related forms of wild grass.

success. Admittedly, the reasons for why he and his wife did not have children remain unknown.¹⁸⁷

Certainly, Holmes's putting himself intentionally in harm's way as a young man, his existential commitment to the great "plan of campaign," the "unimaginable whole,"¹⁸⁸ and his life-long advocacy of duty, often in life-threatening situations, hardly seems conducive to self-preservation. Additionally, when he spoke and wrote of comrades killed in the war, it was in glowing terms as heroes and superior men dedicated to the highest virtue of duty—our best examples—and not of as individuals factored out by risky choices.¹⁸⁹

Holmes's logically unparallel defense of forced sterilization in *Buck* juxtaposes the sacrifices of the nation's best with what those he regarded to be genetically flawed.¹⁹⁰ As it can be seen, his beloved notion of unquestioning duty conflicts with vulgar Darwinism to an even higher degree than does fairness in the law. Beyond practical considerations, even Holmes's choice of a profession and the way he practiced it seems to have been made with a concession to a Nietzsche-like appreciation of the good life in its relationship with philosophy and the possibility for him to live greatly, rather than mere success and possibility of material gain.

Although Holmes styled himself as a social aristocrat, and was certainly an aristocrat of merit, he was never rich.¹⁹¹ He was born into an old Massachusetts family that was intellectually, socially, and educationally elite, but financially closer to the professional middle class.¹⁹²

187. The reason or reasons why Justice and Mrs. Holmes remained childless is a matter of speculation, although Fanny's delicate health, or infertility on the part of one or the other is the most likely possibility. Still, Holmes's cryptic reply to Learned Hand, "[t]his is not the kind of world I want to bring anyone else into," and his statement "I am so far abnormal . . . that I am glad I have none [children]" have provided fodder for broader speculation. BAKER, *supra* note 163, at 228. For a discussion of this speculation by the major Holmes biographers of why the Holmeses remained childless and of their relationship, see generally WHITE, *supra* note 121, at 87-111. See also BAKER, *supra* note 163, at 227-29.

188. Oliver Wendell Holmes, *The Class of '61*, in SPEECHES, *supra* note 25, at 97; Oliver Wendell Holmes, *A Soldier's Faith*, in SPEECHES, *supra* note 25, at 59.

189. Oliver Wendell Holmes, *Memorial Day*, in SPEECHES, *supra* note 25, at 1. See especially his "Memorial Day" address. For a sociobiological account of courage as self-sacrificing altruism, see EDWARD O. WILSON, ON HUMAN NATURE 149-53 (Harvard Univ. Press 1978).

190. See *supra* note 152 and accompanying text.

191. It is fairly clear from the way he presented himself, his numerous friends who were bona fide aristocrats, and his references to aristocracy in his writing, that Holmes thought of himself as an aristocrat. Regarding Holmes's early association with Brahmin Boston, see generally WHITE, *supra* note 121, at 20-23. On Holmes's upbringing being financially less than upper class, see also NOVICK, HONORABLE JUSTICE, *supra* note 130, at 5-8, and BAKER, *supra* note 163, at 48.

192. NOVICK, HONORABLE JUSTICE, *supra* note 130, at 5-8.

In his speech to the Bar Association of Boston given on March 7, 1900,¹⁹³ Holmes expresses a view that is remarkably similar to the Nietzschean endorsement of the good life taking precedence over mere survival. It is here that Holmes endorses an existence of pursuing intellectual interests, personal meaning, and complexity that he calls the higher life.¹⁹⁴ In order for this complexity to exist, there must first be a foundation of civilization which requires laws and therefore fairness.¹⁹⁵ To Holmes, as with the existentialism of Nietzsche, life is what we make of it, “an end in itself and the only question as to whether it is worth living is whether you have enough of it.”¹⁹⁶ Holmes, like Nietzsche, believed that human civilization was the pinnacle of evolutionary development thus far, its highest example writ large (which is possibly why in his letter to Harold Laski of June 19, 1919 he “bet” on the progress of the West over the metaphysics of the East).¹⁹⁷

It was the often messy sorting out of the law that allowed for the peaceful resolution of conflicts that made civilization possible. Since humans are naturally evolved animals, perhaps the law as “history of a nation’s moral development,” was itself a record of a sociobiological tool of evolution. We must never forget that it was, after all, abolition as a manifestation of “the cause of civilization” (and later just out of “duty”) that Holmes fought for between 1861 and 1864.

If Holmes’s goal was to use the law as a selective device to improve society—albeit in a limited and functional way—or to further natural trends, then what better means than through both the clashing of ideas and the employment of ideals like fairness. Holmes’s disdain of socialism shows a dislike for holistic programs dedicated to the perfection of humanity, but he seems to have believed in gradualistic, piecemeal approach in which quality would rise to the top.

The fact that Holmes chose the law as a modest and piecemeal vehicle for human change and betterment, rather than violence, in itself says something (although he believed that violent conflict was an inevitable part

193. Oliver Wendell Holmes, *At a Dinner Given by the Bar Association of Boston*, in SPEECHES, *supra* note 25, at 82.

194. *Id.* at 86.

195. *Id.* at 85-86.

196. *Id.* at 86. Holmes’s equation of happiness to meaningful occupation is echoed by his near-contemporaries, Theodore Roosevelt and Mark Twain. Twain writes “[t]o be *busy* is man’s only happiness.” ALEX AYRES, *THE WIT AND WISDOM OF MARK TWAIN* 96 (Penguin 1989). Twain and Roosevelt are usually regarded as nineteenth century naturalists in their outlook, and yet the idea that life is defined by one’s activities is existential.

197. Letter from Oliver Wendell Holmes to Harold Laski (June 19, 1919), in *THE ESSENTIAL HOLMES*, *supra* note 1, at 109-10.

of the human condition). The charge that he used the detached application pragmatically to serve his own purpose of the higher life would seem to be baseless, since civilization with its normative ethics are parts of that end. Besides, if the fittest would usually win anyway, then why force the issue? Since the last point is equally powerful reasoning in favor of Holmes as an amoral evolutionist, we must then ask what accounts for his powerful dissents in favor of fairness in cases of individual rights and when the majority opinion would have furthered the interests of the strong more directly, thus speeding up the process of evolution? Why play the game by the rules if the game is contrary to nature even in the short term? On this score the answer seems to be no more complicated than to say that Holmes was rational, moderate and balanced in his judgment and that he was able to keep his role as a judge distinct from his general outlook.

B. TOWARD THE UNKNOWN END: A FINAL DEFENSE

*I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism.*¹⁹⁸

As cautioned at the beginning of the discussion on evolution, we must be wary about unduly allowing the prejudices of our own time to creep into our interpretations of Holmes's moral relativism, social Darwinism, and aristocratic persona. We have already seen that during the first three decades of the twentieth-century, eugenic theories were championed by both social progressives and racial hygienists. Many people who held these ideas did so with the honest intent of preventing suffering and with the goal of social betterment in mind.¹⁹⁹ As with many of his time, Holmes may have believed that it was also an institutional means of hastening natural inevitability. Even if Holmes did succumb to a form of simple Darwinism at times, such ideas were not only the vanguard of thought for much of his life, but they still exist today in a modified and more refined form. To automatically equate moral relativism and Darwinism with an extreme position is more of an indictment of the chauvinism and presentism of our own time and the intervening events that shaped them, than it is of Holmes. As modern as he might seem, we cannot fault him for not being a man of the twenty-first century.

As unpopular as it may sound, even more than sixty years after the horrible genetic experiments of the Nazis, tinkering with evolution has

198. Oliver Wendell Holmes, *The Path of the Law*, in THE ESSENTIAL HOLMES, *supra* note 1, at 161.

199. BRUINIUS, *supra* note 164, at 6-7.

often been seen as being based on good intentions and even as a means for social betterment. Such activities in fact constitute an increasingly important thrust of modern science, medicine, and agriculture. We just do not call it eugenics anymore and try not to notice the very real similarities.

We are rightfully horrified and disgusted when we read accounts of Nazi eugenics but are somewhat less indignant when conceptually related but socially beneficial programs under the names of genetics, genomics, genetic engineering, gene therapy and biotechnology show promise in cloning organs or curing Alzheimer's disease, and cancer. Nor do we seem to mind that the family dog, the cultivars of garden flowers, the wheat in our bread, and the beef on our table are all the products of long-term human genetic tampering that would quickly die out in the wild or else revert back to less familiar forms.²⁰⁰ In this sense they are artificial and inbred genetic freaks, the results of thousands of years of selective breeding. The sensitive observer is quick to see that our daily lives are far more involved in eugenics than was Holmes or his time, and we should guard against unwarranted moralizing; the worst we can say about his view of evolution is that it is based on an outdated understanding and that it led to a very bad result in his *Buck v. Bell* opinion.²⁰¹

Opposition to Holmes's realistic view of human nature, moral relativism, social Malthusianism and the component of the law as external coercion has even led to charges ranging from the merely illiberal to allegations of moral kinship with Hitler.²⁰² In light of his composite view of the law in which normative ethics are the basis of one estate—the electorate—of the sovereign, as well as his view of the law as reflective of a common morality, recent suggestions that Holmes's outlook is based on or leads inexorably to a view of people solely “as rapacious, selfish beasts,” are probably overstatements.²⁰³ A more circumspect view of the multitudes of Holmes would suggest that he saw the law as being morally neutral and not

200. On the unnaturalness of cultivated crops, for example, see DILLARD, *supra* note 178, at 164.

201. *Buck v. Bell*, 274 U.S. 200, 200 (1927).

202. Palmer, *supra* note 17, at 572-73. One could make a compelling argument that because the Nazi regime only lasted twelve years it was therefore a failure by any evolutionary measure.

203. See Linda Ross Meyer, Note, *Just the Facts?*, 106 Yale L.J. 1269, 1298 (1997). It is arguable that Holmes believed that beneath the polish and vainer of civilization, there lurked an atavistic savage in the human heart; Holmes is often said by critics to have had a dark view of people. And yet, for example, the fact that so many ordinary people followed Hitler tends to corroborate such a view. The fact that one of the most influential philosophers of the twentieth century, Martin Heidegger—a scion and heir to the best that German culture could offer, as well as the Western humanist and philosophical tradition—would be attracted to a program like Nazism in the first place must give us pause, and lends credence to Holmes's skeptical view of human beings.

based on a transcendent or deontological template. This makes him tough-minded and probably right, but not a fascist.

It is a huge leap from a person like Holmes, whose record as a judge supports the claim of his being balanced and fair, to the excessive but essentially reasonable moral realism of Hobbes and his subsequent endorsement of rational authoritarianism. It is an even larger leap from the simplistic and overstated political realism of Hobbes to the strange—even phobic—endorsement of an irrational, murderous, self-destructive, unscientific, neurotic tribalism, racial mythology and ethnic warfare of Hitler; Holmes's views are complex and nuanced, whereas the Nazis seem to have stood for little else than hatred. It is a specious logical argument to say that a vague conceptual resemblance somehow makes fundamentally dissimilar things similar. By a similar logic of more literal resemblance, one could say that Gandhi, like Hitler, had two eyes a nose and a mouth, but it does not follow from this that Gandhi was therefore a Nazi.

The fact of the matter is that Holmes's views never devolved into a position much less a program even remotely resembling those of Hitler, and his foray into eugenic social engineering can be explained in historical terms that are as politically progressive as they are philosophically Malthusian. Holmes believed in progress, civilization, reason, and the good life with intellectual complexity as a criterion if not a synonym for the good. *Buck* was a mistake, and a bad one, but it was the act of a mistaken but well-meaning judge and not a deviant or criminal.

Although Holmes believed that we all contribute to making the kind of world we wanted to live in, he was openly skeptical of the consciously idealistic efforts of well meaning people. As his friend and contemporary, Henry Adams wrote of Robert E. Lee, “[i]t’s always the good men who do the most harm in the world.”²⁰⁴ Holmes himself believed that if not most of the world’s political problems come from programs and prescriptions attempting to perfect human nature and that war was the result of passion regardless of its intentions, and he saw cynicism and fulsome altruism as being about equally off of the mark.

204. GEOFFREY C. WARD, *THE CIVIL WAR: AN ILLUSTRATED HISTORY* 284 (Alfred A. Knopf, Inc. 1990) (quoting Henry Adams). Interestingly, on the topic of evolution, Adams also muses in *The Education* that

two thousand years after Alexander the Great and Julius Caesar, a man like Grant should be called—and should actually and truly be—the highest product of the most advanced evolution, made evolution ludicrous. One must be as commonplace as Grant’s own commonplaces to maintain such an absurdity. The progress of evolution from President Washington to President Grant, was alone evidence enough to upset Darwin.

THE EDUCATION OF HENRY ADAMS 266 (Henry Cabot Lodge ed., Random House 1918).

Where Holmes relies on his own reasoning rather than other people's programs, that is to say when he relies on his intrinsic sense of fairness, balance, and reason, his opinions are legendary. When he used judgment to act as a Malthusian agent, he blundered.²⁰⁵ Rather than a proto-fascist, he has a better and more direct claim to the title of being the morning star of modern American liberal jurisprudence. If naturalism is the basis for Holmes's view of the human condition, then duty is the central concept of Holmes's mature view of the law and what kept him going in a potentially meaningless world. It was the active principle of his faith. There is something both consistent and admirable about a man who believes in civilization but who also believes that beneath the surface of a civilized human was a savage, and the desire to preserve the human enterprise through the moderating influence of the law.

If anything, Holmes saw civilization as a brake on natural processes or at least a moderating filter and an engine for change of which Nietzsche spoke (and which might be compared to the way sports moderate physical competition through the enforcement of fairness and codified rules). In such a scheme, bad ideas would be culled if they proved to be unsound and good ideas would be culled and honed. It also provides the opportunity for the best examples of humanity to fulfill their potential. Society could thus progress in a piecemeal and not a utopian or totalitarian way, like Stalinist Marxism or Nazism, or in an unrealistically rationalist way as with socialism or libertarianism. As such, Holmes probably gave Mill's marketplace of ideas its due as a kind of social arena of ideational evolution. He saw the law as allowing for civilization and by declension, the good life. Holmes correctly believed that the law is necessary for civilization.²⁰⁶ To him, civilization was an asserted good that allowed for a more interesting and therefore meaningful life.²⁰⁷

"[M]ore complex and intense intellectual efforts mean a fuller and richer life. They mean more life. Life is an end in itself, and the only question as to whether it is worth living is whether you have enough of it."²⁰⁸ No

205. See, e.g., *Buck v. Bell*, 274 U.S. 200, 207-08 (1927).

206. As we have seen in both *The Common Law*, and *The Path of the Law*, Holmes believed that the law was actually a naturalistic part of a nation's history and development. Oliver Wendell Holmes, *The Common Law*, in *THE ESSENTIAL HOLMES*, *supra* note 1, at 237; Oliver Wendell Holmes, *The Path of the Law*, in *THE ESSENTIAL HOLMES*, *supra* note 1, at 160-65. It is also clear from the concluding paragraphs of his speech to the Boston Bar Association of March 7, 1900, that he regarded civilization as a necessary prerequisite for the Good Life. Oliver Wendell Holmes, *At a Dinner Given by the Bar Association of Boston*, in *SPEECHES*, *supra* note 25, at 85.

207. Oliver Wendell Holmes, *At a Dinner Given by the Bar Association of Boston*, in *SPEECHES*, *supra* note 25, at 85.

208. *Id.* at 86.

matter what one may think about his ideas, it is undeniable that Holmes was a moderate and careful person, and made his decisions based on such things, even if he could not reduce them to a concise philosophical system.

IV. CONCLUSION: HOLMES, HUME AND HARDY

*[I]t does not follow that without such absolute ideals
we have nothing to do but to sit still and let time run over us.
As I wrote many years ago, the mode in which the inevitable comes to
pass is through effort. Consciously or unconsciously we all strive
to make the kind of a world that we like.²⁰⁹*

We all, the most unbelieving of us walk by faith.²¹⁰

The larger question surrounding the Holmesian bifurcation is whether it is contradictory or even possible for a person with a sunny disposition to embrace a bleak philosophy or outlook. Those who have tended to focus on the dark side of Holmes's ideas and their supposed implications have sometimes done so with historical allusions and alliteration in coupling him with Hobbes and even Hitler.²¹¹ There are historical comparisons to be made to Holmes, and to be both accurate and to give him his due, his outlook and personality much more closely resemble the dark worldviews and upbeat personalities of the equally alliterative duo of David Hume and Thomas Hardy.

Just as the realms of the psychological and the ideational are not synonymous, so may temperament vary greatly from professed ideology within the same person. There may be both overlap and distinction between personality and outlook, and the distinction may be both broad and deep. A person may be happy in disposition while honestly acknowledging the darkness around him or her.

David Hume outlined his empirical philosophy in his masterpiece *A Treatise of Human Nature*,²¹² which logically arrives at a conclusion of epistemological skepticism. In the conclusion of Book I of the *Treatise*, we see Hume's surprised and anguished reaction to his unexpected and honestly derived results that could very easily lead one to solipsism, nihilistic doubt or dark despair—the danger of a commitment to intellectual honesty

209. Oliver Wendell Holmes, *Ideas and Doubts*, in THE ESSENTIAL HOLMES, *supra* note 1, at 118.

210. Oliver Wendell Holmes, *Address at Ipswich* (July 31, 1902), in SPEECHES, *supra* note 25, at 92-93.

211. Palmer, *supra* note 17, at 572-73.

212. HUME, *supra* note 56, at 263-74.

and courage to follow our ideas wherever they may take us.²¹³ And yet, by all accounts, Hume was wonderful company and an affable companion in conversation and backgammon. Perhaps his attitude explains the despair he felt over the rationally-arrived-at conclusions of *A Treatise of Human Nature*.

Hume, like Holmes recognized that the center of the universe might very well be moral and epistemic darkness, and yet both were yea-sayers to life. Rather than a contradiction, there is something courageous and monumentally admirable about this, and it has more to do with temperament than with outlook. As with the precocious Hume (who wrote his *Treatise* while still in his twenties), Holmes was disillusioned at an early age, and therefore was able to adjust to such realizations in a way that someone who realized the darkness and pathos of life later in life—Twain is a good example—might not.²¹⁴

Even among skeptics, Holmes and Hume are not absolute. One can imagine a spectrum of thought ranging from hard rationalists like Marx and Locke, who believe that people are fundamentally reasonable and benevolent to cynics like Hobbes who see human beings as entirely self-serving. Hume and Holmes would be in between, tending more toward Hobbes than toward Marx. This is what makes them skeptics and not cynics, for although Hume and Holmes believed that people were self-serving, they also believed in higher motivations, like love, courage, charity etc.

Similarly, Thomas Hardy wrote some of the most darkly realistic novels in English literature, something that has led critics to note that, other than his subject matter, his outlook sometimes seems more like that of a nineteenth century Russian novelist or an ancient Greek tragedian rather than a Victorian Englishman.²¹⁵ Holmes and Hardy were commentators and almost exact contemporaries, who realistically acknowledged and often focused on the dark side of life, or on what the poet Laurence Binyon called its “implanted crookedness.” Both, Hardy and Holmes, along with Nietzsche, stand out perhaps even more, because they began their careers during the late nineteenth century, when there was a strong current of

213. *Id.* at 263.

214. The comparison of Holmes with Hume goes beyond a generalized view of life. It is more than just an interesting side note that although Holmes read Hobbes early on, his view of the law bears a close resemblance to the view of justice developed by Hume in Book III, Part II of the *Treatise*. *Id.* at 477.

215. STANLEY J. NUNITZ & HOWARD HAYCRAFT, *BRITISH AUTHORS OF THE NINETEENTH CENTURY* 278 (The H. W. Wilson Co. 1936).

general optimism and a faith in progress in European and American thought.²¹⁶

Holmes once illustrated the superiority of Greek ethics to those of Christianity with the pithy observation that “life is painting a picture, not doing a sum,”²¹⁷ and it seems something valid in comparing life to the work of an artist, even in ways that go beyond Holmes’s analogy. Optimists see life selectively as a picture with only bright colors; pessimists see the darker hues. Both do violence to the complexity of the true picture.

One could make a Holmesian argument that a complete outlook must necessarily recognize the darkness along with the light, and that life may be painted in general tones and perhaps they are the ones people see the most readily, but it is also about complexity and detail. Although it may sound cliché, life is a complex rendering that is not easily reduced and requires both bright colors and dark shades to offset them and give them definition and form. By themselves, darkness and light are incomplete and both not only imply their opposite but require them for definition and contrast. If one only sees only one or the other, then the picture is simplified and incomplete; the brightness of optimists is blinding and the darkness of fatalists is deadening, and photos that are over or underexposed, although sometimes interesting, are generally judged to be inferior or at least less representational of what they depict.

Life is about realism and meaningful abstraction, and the real by itself spans the spectrum of hues and shades. To be a complete optimist or pessimist is to live with an incomplete philosophy. Holmes acknowledged what he believed to be the real darkness of the world, while living richly in the lighter side that life could offer. He flatly rejected the rank misanthropy of a true temperamental pessimist Jonathan Swift, and his “incipient insanity in the intensity . . . on the baseness as on the banality of man.”²¹⁸

Bertrand Russell writes that there is no necessary contradiction in being a happy pessimist or dour optimist, and Holmes was certainly the former. Rather than excessively focusing on what seems to some to be a contradiction, we should celebrate the honesty of his beliefs, the clarity of his

216. The two men with whom Holmes had his most famous correspondences were great admirers of Thomas Hardy. When pressed about Hardy, Holmes mentions having read some of his early novels as a young man (he did not read *Tess of the d'Urbervilles* or *Jude the Obscure*), finding his pessimism to be off-putting. Laski writes of having met Hardy toward the end of his life and also found him to be dour. See HOLMES-LASKI LETTERS, *supra* note 28, at 566-67; HOLMES-POLLOCK LETTERS, *supra* note 28, at ii, 295.

217. Letter from Oliver Wendell Holmes to Lewis Einstein (July 23, 1906), in THE ESSENTIAL HOLMES, *supra* note 1, at 58.

218. Letter from Oliver Wendell Holmes to Frederick Pollock (Feb. 24, 1923), in THE ESSENTIAL HOLMES, *supra* note 1, at 217.

perception, his realism, as well as the courage of his attitudes. Rather than shore-up the pleasant fiction that values are absolutes by devising another rational ethical system, we should appreciate Holmes's unflinching honesty, and the strength of character necessary to retain his outgoing personality.

And so what if Holmes had an appreciation for the fact that life had a dark side? As Thomas Hardy writes about criticism of his own work:

That these impressions have been condemned as 'pessimistic'—as if Were a wicked adjective—shows a curious muddled-mindedness. It must be obvious that there is a higher characteristic of philosophy than pessimism, or than meliorism, or even than the optimism of these critics—which is truth. Existence is either ordered in a certain way or it is not so ordered, and conjectures which harmonize best with experience are removed above all comparison with other conjectures which do not harmonize. So that to say that one is worse than other views without proving it erroneous implies the possibility of a false view being better or more expedient than a true view; and no pragmatic proppings can make that *idolum specus* stand on its feet, for it postulates a prescience denied to humanity.²¹⁹

It may well be that those who we regard to be pessimists are just people who see things more clearly.

One comes away from the three worlds of Oliver Wendell Holmes with the impression that he, like Leibniz, had two philosophies, one for public consumption, and a gloomy and skeptical inner perspective.²²⁰ Where the two overlap, in practical matters, we see an amalgamated outlook that was optimistic, realistic, and quasi-pragmatic with result-oriented elements. Here, Holmes is practical, tough-minded, agnostic, and occasionally romantic as a commentator on life (save for his unsentimental view of the underlying human nature in evolutionary terms). At this level he synthesizes skepticism and duty. Like many existentialists and consequentialists, Holmes seemed to believe that although life has no intrinsic meaning, it is imperative that we act. In private, in the back of his mind, Holmes was a

219. THOMAS HARDY, *JUDE THE OBSCURE* 517-18 (Alfred A. Knopf ed., 1992) (1895). Russell, among others, believed that "one 'may be a cheerful pessimist or a melancholy optimist.'" BERTRAND RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* 286 (Simon & Schuster, 1945). Likewise, there is not contradiction in having a dark view of life and yet espousing moderation. Certainly nobody would accuse the Marquis de Sade of having a rosy outlook, and yet his opposition to the death penalty is well-known. Russell also notes that "[t]he belief in either pessimism or optimism is a matter of temperament, not of reason." *Id.* at 759.

220. BERTRAND RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* 581 (Simon & Schuster 1945); see also G.W. LEIBNIZ, *MONADOLGY: AN EDITION FOR STUDENTS* 3-16 (Nicholas Rescher ed., Univ. of Pittsburgh Press 1991).

dark and brooding pessimist. Holmes therefore embodies two poles: the optimistic, pragmatic, hardheaded realist, and the gloomy skeptic who believes that human institutions are hopelessly frail and inadequate to the challenge of knowing reality.

When looking at the man and his ideas, we cannot divorce Holmes's warm and engaging personality from the equation. Perhaps it was Holmes's personality that allowed him to make an existential commitment to the unknown end. One of the best attempts to reconcile Holmes and his thought comes at the end of Richard Posner's introduction to *The Essential Holmes* and looks at the person beyond the ideas.²²¹ Judge Posner notes that Holmes's views and personal conduct seemed within the mainstream and are even high-minded.²²² Despite his aristocratic persona, he was devoid of much of the snobbery, imperialist leanings and anti-Semitism so common at the time. Rather, his life was characterized by cosmopolitanism, tolerance, and friendship with both political liberals and women. Regarding women, Posner rightly notes that Holmes "valued their conversation to a degree unusual in his day"—something apparent in his letter to Lewis Einstein's daughter, arguably the most revealing epistle he wrote.²²³ We should also note that although Holmes's statement about the steam engine in his letter to Pollock indicates a belief in the progress and technical superiority of the West, he conspicuously lacked the simplistic evolutionary racism of the period.²²⁴

As one might expect of an existentialist, Holmes saw value in life itself and at the end of July, 1902 wrote to Georgia Pollock famously that, "on the whole, I am on the side of the unregenerate who affirm the worth of life as an end in itself as against the saints who deny it."²²⁵ These are not the values of a nihilist and in fact seem more fresh and robust than that which he criticizes.

The answer to the split in Holmes's thought must be temperamental as much as intellectual, if not more so. The answer must lie in part in his character. It is in some ways an issue feeling versus thinking. The romantic is grounded in the optimism in the front of his heart, while his skepticism—

221. THE ESSENTIAL HOLMES, *supra* note 1, at xxviii-xxx.

222. *Id.* at xxviii-xxix.

223. *Id.*

224. In *The Life and Times of Theodore Roosevelt*, Richard H. Harbaugh writes that "Roosevelt was too sophisticated a Reform Darwinist to believe blatantly in racial supremacy." WILLIAM H. HARBAUGH, THE LIFE AND TIMES OF THEODORE ROOSEVELT 213 (Collier Books eds., The MacMillan Co. 1963). On this point it is probably fair to say that Holmes was a more subtle and sophisticated thinker than Roosevelt.

225. Letter from Oliver Wendell Holmes to Georgina Pollock (July 31, 1902), in HOLMES-POLLOCK LETTERS, *supra* note 28, at 100-01.

the basis of his darker philosopher—is at the back. The Holmes familiar to all is a hybrid.

The resolution to the Holmesian bifurcation then lays in psychology more than philosophy. Without psychologizing our subject, it is fair to speculate that Holmes's personality is the romantic in the front of the heart, the skepticism that is the basis of his philosophy at the back. The worldly Holmes is a hybrid. Holmes's outlook has as much to do with temperament as philosophy and in this he was divided.

Although deductive programs such as science and logic permit no contradictions, human psychology seems to require them, and both life and the law deal with subjects that are primarily human. Some readers may find this reconciliation of Holmes and his ideas to be unconvincing or at least unsatisfying. Whether his ideas run contrary to one another will no doubt be fodder for debate as long as the history of American legal thought is studied. Whitman's views is that it is fundamentally unrealistic to expect people to act consistently and at one level or another, we are all tangles of contradiction, something true and often especially obvious about people who embody complex ideas.²²⁶ As Whitman famously writes, "Do I contradict myself? Very well then . . . I contradict myself; I am large . . . I contain multitudes."²²⁷ Holmes too was large—indeed, what figure in the tradition of American legal philosophy is larger—and his public life spanned seven decades; if we can excuse Whitman for his multitudes, then we can certainly forgive Holmes. In the end, many of Holmes's contradictions can in fact be accommodated, others, as with all human contradiction must just be accepted. As with Whitman, Hume and Hardy, Holmes contains multitudes.

In order for existentialism to be meaningful, it must allow for asserted, attainable goals to which one can aspire. It must require action toward an end, which is something that the philosophy of Holmes does. This is how a man with such skepticism could also write that "[m]an is born a predestined idealist, for he is born to act."²²⁸ Without an asserted (as opposed to deontological) meaning—which is an unsatisfying basis to live by for people brought up on God-given commandments or eternal rights—there is nothing but nihilism and the abyss. Throughout his corpus, Holmes asserts his meaning and avoids the alternative.

226. WALT WHITMAN, *LEAVES OF GRASS* 85 (Malcolm Cowley ed., Viking Penguin Inc. 1959) (1855).

227. *Id.*

228. Oliver Wendell Holmes, *The Class of '61*, in *SPEECHES*, *supra* note 25, at 96.

It is possible that, in his heart of hearts, Holmes thought that it is all pointless, and therefore that there was nothing to loose by acting in the best way possible (or the worst for that matter). Possible, but not compelling in that such moral relativism would probably result in opportunism rather than a belief in duty.

Both the Romantic and the Newtonian Holmes, the *bon vivant*, and “unregenerate” man of affairs saw not only life but the Good Life and life writ large or civilization as an end, an existential goal in itself. Like Nietzsche, he believed that our highest examples, the pinnacles of human intellectual development, were manifestations of uniquely human characteristics that set us apart and made life the texture that makes it meaningful. Although by no means an objective standard, it is a satisfying reply to the modernist void that followed in the wake of Darwin. Holmes’s list of the highest human characteristics and those who possess them are strikingly similar to those of Nietzsche, and the sentiment is the same—an endorsement of the higher life made possible by civilization and the rules on which it was based.²²⁹ Moreover, all of the interesting intellectual and aesthetic aspects of life, and a good deal of its fascinating complexity are the products of human civilization. This would seem to confirm that Holmes subscribed to a benevolent Nietzschean-Modernist view of evolution that allowed for fairness in the law, civilization and therefore the intellectually aristocratic good life and not a vulgar free market version, even less a utopian model as with those of Marxism and Nazism.

In his speech given to the Bar Association of Boston on March 7, 1900, Holmes makes these points clear: Civilization is an asserted good because its “chief worth” is “that it makes the means of living more complex” and presumably more interesting (a virtual synonym for “good” in this context).²³⁰ “Because more complex and intense intellectual efforts mean a fuller and higher life. Life is an end in itself and the only question as to whether it is worth living is whether you have had enough of it.”²³¹ This would seem to be the very pith of what reconciles the Skeptic and the Romantic, philosophy, and temperament. He concluded this very public moment with a concession to the very private skeptic in the back of his heart and show how he was able to live in the front:

229. In his Speech to the Bar Association of Boston on March 7, 1900, Holmes identifies “the artist, the poet, the philosopher and the man of science” as pinnacles of civilization, but adds that even more, civilization allows the opportunity for intellectual complexity. Oliver Wendell Holmes, *At a Dinner Given by the Bar Association of Boston*, in SPEECHES, *supra* note 25, at 85. Compare Holmes’s paragons of civilization with Nietzsche’s “artist, saint and philosopher” of the *Untimely Meditations*.

230. *Id.*

231. *Id.* at 86.

I will add but a word. We are all very near despair. The sheathing that floats us over its waves is compounded of hope, faith . . . and the deep sub-conscious content which comes from the exercise of our powers . . . but these thoughts have carried me, as I hope they will carry the young men who hear me, through long years of doubt, self-distrust, and solitude. They do now, for, although it might seem that the day of trial was over, in fact it is renewed each day. The kindness which you have shown me makes me bold in happy moments to believe that the long and passionate struggle has not been quite in vain.²³²

Are these the words of a nihilist or cynic? As one can see, civilization and a chance to live the good life of complexity were the “great end” toward which Holmes worked for the better part of seven decades.²³³ Given his belief in action and results, this would hardly seem to be the career of a nihilist.

232. *Id.*

233. See Oliver Wendell Holmes, *The Class of '61*, in SPEECHES, *supra* note 25, at 97.