HOLMES'S HERITAGE: LIVING GREATLY IN THE LAW

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I say—and I say no longer with any doubt—that a man may live greatly in the law as well as elsewhere; that there as well as elsewhere . . . he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable.¹

Admirers and critics alike concede that Holmes was a great man and a great jurist. One hundred years after the publication of The Path of the Law,² this classic article, and Holmes’s heritage in general, are very much alive. The Path is indeed an amazing piece. In less than twenty pages, Holmes sets out in his dazzling way the skeleton of his thought about the nature of law, its role in social life, the way it in fact develops and how it should be developed, the nature and importance of theorizing about law, and the way working within law fits in with a person’s broader aspirations.³ Despite the brilliance of the piece, however, we would not be celebrating it today had it not been written by Holmes. The Path of the Law is important because it gives us a condensed look into the thought of a person who is a giant, maybe the

³ I share what I see as Horwitz’s joy in speculating that this great achievement might be attributable to Holmes’s excitement over a new love relationship. See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: CRISIS OF LEGAL ORTHODOXY 142-43 n.A (Oxford 1992) (describing how Holmes’s correspondence with Lady Castleton, whom he met in Ireland, fostered an amorous relationship beginning shortly before Holmes wrote The Path of the Law).
giant, of American legal culture. In this essay I try to understand the reasons for this stature. I argue that Holmes's greatness is the result of the combination of his scholarship, his judicial opinions, his life, and the wealth of documentation of his readings, doings, thoughts, observations, and feelings in diaries and letters. The totality of these materials presents a complex personality, combining passion and detachment, enthusiasm and skepticism, romanticism, and realism. The same complexity inspires Holmes's work as a whole, and Holmes's great talents and broad education, together with the delicate tensions between these components of his personality and work, are the reasons for Holmes's unique endurance as a hero.

It is not uncommon that stature brings attention, and that attention creates the kind of familiarity that breeds both admiration and contempt. This has clearly happened to Holmes. Holmes's persistent and growing fame, despite serious critiques, creates a puzzle. A person usually becomes a cultural hero because he stands for something deemed valuable. With Holmes, it is not always clear what he stood for. There are serious tensions both within his works, sometimes even within the same piece of work, and between his work and his judicial opinions. His famous oracular style means that it is possible to find contradictory statements, sentiments, and attitudes within his works and life. This in itself may be a devastating critique for a thinker or mentor. Perhaps more troubling still, some of the things Holmes does seem to stand for, such as glorification of war and the endorsement of the legitimacy of policies aiding the survival of the fittest, are extremely objectionable and seem dangerous, especially in the aftermath of World War II. Finally, some of Holmes's tastes and preferences—especially his arrogance, elitism, apparent lack of interest in many of the implications of the value of equality, and his objection to natural rights rhetoric—seem highly unattractive to many. Choosing Holmes as a hero, despite these critiques, may therefore require justification.

We may paraphrase and say that we can know a person, and a culture, by knowing who their heroes (and villains) are. Should we participate in the tributes to Holmes today and thus contribute to the perpetuation of what might have been a grave mistake? Or should we seek to give the kind of bal-


anced account that will tend to take Holmes down from his pedestal, leaving us free to objectively view his work on its merits.6 Holmes suggested that survivals are often unfair and undeserved,7 and he would probably have said that attempts to deliberately change the verdict of history are bound to be futile. I agree with his assessment, and am glad that history treated him the way it did: Despite many weaknesses, Holmes is an exceptional hero. Many parts of his heritage are still meaningful, relevant, and useful today. It is possible, of course, to address our practical concerns without invoking him. But it is stimulating, enlightening, and fun to consult what he had to say.

I will argue that the justified verdict of history does not depend mainly on the truth of Holmes's insights about law, or on the adequacy of describing him as a progressive, a democrat, or a liberal spirit. Holmes captivates our imagination because, first and foremost, he embodies, in the totality of his life and work, a way of living greatly in the law. In part, Holmes's achievement is based on his insistence that all greatness requires a combination of passion and detachment, and that in the law greatness can be reached only if one constantly moves between working in the law, accepting it as given and binding, and looking at it from the outside, seeing it as a reflection of wishes to achieve social goals, and putting law in the broadest contexts possible. The variety and richness of his thought about the law and things legal are thus not just an accident. They follow from his conception of the good life, which required him to articulate attitudes about the meaning of life and its choices, about the distinctive nature of law, its social functions and its limits, about the nature of different ways of working within the law and the relationships between working within the law and other human pursuits. Furthermore, in his own work within the law, Holmes practiced what he preached: He mastered the craft of the law, theorized about it on many levels, and acted on the insights he gained throughout his judicial career. There is an impressive wholeness and comprehensiveness found in Holmes's life achievements, unrivaled by the careers of most jurists.

With this breadth of scope and ambition, Holmes sets the enterprise of

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6 This seems to be Grey's recommendation, after a long, comprehensive, detailed and on-the-whole, very fair account of Holmes. See Thomas C. Grey, Holmes and Legal Pragmatism, 41 Stan. L. Rev. 787, 863 (1989) [hereinafter Grey, Legal Pragmatism].

7 See Oliver Wendell Holmes, John Marshall, In Answer to a Motion that the Court Adjourn, on February 4, 1901, the One Hundredth Anniversary of the Day Which Marshall Took his Seat as Chief Justice, (Feb. 4, 1901) Speeches 87, 88-89 (1913), reprinted in The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters and Judicial Opinions 382, 383-84 (Max Lerner, ed., 1943). Although Holmes attributes Marshall's survival to the accident of being present when great decisions needed to be made, Holmes celebrated the historical immortality realized by Descartes and Kant. See Holmes, The Path of the Law, supra note 2, at 478, 78 B.U. L. Rev. at 715 (expressing joy that Descartes and Kant have survived and remain much more influential than Napoleon Bonaparte).
working within the law in a much more satisfying way than most accounts. Holmes would have survived just for that, even if we had rejected—as many do—many of his positions and sentiments on life, society, law, legal theory, and adjudication. My reading of Holmes, however, finds less to criticize and reject than is commonly found. While there are details of his thought that are now generally regarded as wrong or confused or exaggerated, and others that are considered truisms, many of his more basic intuitions about law and its development have stood the test of time, and are still serious contenders in contemporary debates. Holmes was a very wise man, and his work is full of deep insights and “diamonds.” Moreover, many of the apparent tensions or contradictions in his work are not a result of sloppiness or inattention; rather they reflect deep complexities in the subject matter Holmes is addressing. Holmes used to his advantage the fact that he was not a “professional” philosopher or scholar. His insights are not parts of a comprehensive theory, and they should not be regarded as such. We should not read Holmes’s provocative statements as attempts to provide full and accurate answers to carefully-put questions. Instead, Holmes’s theories exist as general reminders of an elusive and complex reality, dictated by perceived weaknesses of other attitudes or trends. Viewed in this light, his insights take on a fresh and attractive wholeness. This wholeness does contain tensions and apparent contradictions, but their absence, says Holmes rightly, is not the fate of man—especially not men as complex as Holmes.

My reading of Holmes’s justified survival dictates the emphasis of this paper. I will stand The Path of the Law on its head. The Path of the Law consists of a number of parts, with uneasy relationships among them: (1) the prediction theory of law, advocating a separation in both vocabulary and substance between law and morality; (2) the analysis of how the law develops, and good and bad ways of developing it; (3) the role of jurisprudence and legal scholarship in aiding the practice and study of law; and (4) the mystical, romantic, cryptic invocation of theory, ideals, the meaning of life,

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8 See generally Yosel Rogat, The Judge as a Spectator, 31 U. CHI. L. REV. 213, 213 (1964) [hereinafter Rogat, The Judge] (criticizing Holmes); Yosel Rogat, Mr. Justice Holmes: A Dissenting Opinion, 15 STAN. L. REV. 3 (1962) (critiquing Holmes’s general thinking as a judge and his response to legal problems). Part III of this article also discusses some of these comments and criticisms.


10 For analyses of the complexity of The Path of the Law and tensions within it, see William W. Fisher, Interpreting Holmes, 110 HARV. L. REV. 1010-1011 (1997) (characterizing three different perspectives presented in The Path of the Law); Grey, Plotting The Path, supra note 5, at 22-51 (identifying the distinct parts of The Path of the Law); Thomas A. Reed, Holmes and The Path of the Law, 37 AM. J. LEGAL HIST. 273, 278-279 (illustrating the four distinct ideas in The Path of the Law).
and the infinite and universal law.

The first parts of *The Path of the Law* have received the more sustained study and scrutiny. Many think that the fourth part does not really belong, and that it was a cheap trick Holmes played on his audience.\(^{11}\) I will argue that this part is a central element of Holmes's life and thought and is the key to the way in which the different strands in Holmes's life and work integrate into the whole that charms us. In Part I of this Article, I will discuss Holmes's positions on what gives meaning and significance to human life. In Part II, I return to Holmes's observations about law, as offered in the first parts of *The Path of the Law*. I will argue that Holmes does not really offer a "definition" of law that he seeks to defend. Rather, he offers us a series of insights about law and its functions and about legal reasoning and the ways law develops. He reaches these insights in his attempt to make sense of the discipline within which he has been working in different capacities, in part by connecting the discipline to the more general themes of the quest for a meaningful life. These insights indeed do fit within his larger picture of human and social life. In addition, different parts of these accounts have implications, although not always clear and determinate, to both the description and the evaluation of different ways of working within the law. Following Holmes's hints, I will distinguish between three main modes of working within the law: judging, counseling-cum-litigating, and scholarship-cum-teaching. All share a connection to the single discipline of law, but nonetheless represent different ways of working within it. Finally, in Part III I will rely on this description of Holmes's positions on human life and ways of working in the law to explain, justify and celebrate his survival.

I. LIVING GREATLY

Holmes ends *The Path of the Law* with a resounding affirmation of the fact that dealing with theory in the practice of law is the way to find meaning in it.\(^{12}\) He begins the final section of the Essay by explaining why, in talking about the study of law, he has said almost nothing about the details and sources of such study, about the materials students are in contact with.\(^{13}\) The reason, says Holmes, is that his subject is theory, which is "the most important part of the dogma of the law." To Holmes, theory is practical, because "it simply means going to the bottom of the subject."\(^{14}\) There is a serious danger that able people, with practical minds, should "look with indifference

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\(^{12}\) See Holmes, *The Path of the Law*, supra note 2, at 476, 78 B.U. L. Rev. at 714 (indicating the importance of theory in the law).

\(^{13}\) See id at 477, 78 B.U. L. Rev. at 715. ("Theory is my subject, not practical details.").

\(^{14}\) Id. (qualifying this statement by acknowledging that to the incompetent, an interest in general ideas means a lack of any particular knowledge).
or disgust upon ideas the connection of which with their business is remote." Although Holmes concedes that money is a legitimate object of desire, he claims that the only enduring achievement is "the command of ideas." Holmes echoes Bentham's idea that we all want happiness, but broadens it to include more than a good corporate job with a decent salary.

The remoter and more general aspects of the law are those which give it universal interest. It is through them that you do not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.

That "happiness," the big prize of human existence, requires more than financial success, that it involves meaning, is a frequent and consistent theme in Holmes's writings. He applies it to war, seeking to explain the importance of Memorial Day in that it is a day that "embodies in the most impressive form our belief that to act with enthusiasm and faith is the condition of acting greatly."

It was given to us to learn at the outset that life is a profound and passionate thing. While we are permitted to scorn nothing but indifference, and do not pretend to undervalue the worldly rewards of ambition, we have seen with our own eyes, beyond and above the gold fields, the snowy heights of honor, and it is for us to bear the report to those who come after us. This report is not borne by argument or reason, but by contagion, by the exhibition of feelings: "feeling begets feeling, and great feeling begets great feeling." And Holmes generalizes: "But, above all, we have learned that . . . the one and only success which it is [man's] to command is to bring to his work a mighty heart." It is not surprising to see similar themes in Holmes's words honoring the 50th anniversary reunion of his 1861 class.

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15 Id. at 478, 78 B.U. L. Rev. at 715 (expressing concern for those who might never consider general ideas).

16 See id. ("And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars.").

17 Id.

18 Oliver Wendell Holmes, Memorial Day, (May 30, 1884), SPEECHES 1 (1913), reprinted in THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS 9, 10 (Max Lerner ed., 1943) [hereinafter Holmes, Memorial Day].

19 Id. at 16.

20 Id. at 11.

21 Id. at 16.

22 "[P]leasures do not make happiness and . . . the root of joy as of duty is to put out all one's powers toward some great end. . . . Life is a roar of bargain and battle, but in the very heart of it there rises a mystic spiritual tone that gives meaning to the whole. . . .
threads appear in his talks on The Law and The Profession of the Law. He sounds similar themes when he is talking about all intellectual pursuits, not just the practice and study of law.

For Holmes, this quest for happiness, in the broad sense, is both descriptive and normative: People should act this way to gain a meaningful life, and this is the only life worth living. Many people, from all walks of life, in fact live this way, and feel empty and frustrated when they think their lives are meaningless. Nonetheless, on the descriptive side, Holmes seems to oscillate between thinking, on the one hand, that the quest for meaning is uni-

It reminds us that our only but wholly adequate significance is as part of the unimaginable whole. It suggests that even while we think that we are egotists we are living to ends outside ourselves. Oliver Wendell Holmes, The Class of '61, At The Fiftieth Anniversary of Graduation, (June 28, 1911) SPEECHES 95 (1913), reprinted in THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS 25, 27 (Max Lerner ed., 1943).

See Oliver Wendell Holmes, The Law, Address at Suffolk Bar Association Dinner (Feb. 5, 1885) SPEECHES 16 (1913), reprinted in THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS 29 (Max Lerner ed. 1943). Holmes describes the law as a mistress who can be won only by "straining all the faculties by which man is likest to a god." Id. at 30. Holmes views grappling with legal problems akin to adding a "new feature to the unfolding panorama of man's destiny upon this earth." Id. Holmes asserts that the history reflected in the law should be no less than "the moral life of [man's] race." Id. Holmes sees the lawyer's work as ending only when "by the farthest stretch of human imagination, he has seen as with his eyes the birth and growth of society, and by the farthest stretch of reason he has understood the philosophy of its being." Id.

See Holmes, The Profession of the Law, supra note 1, at 32 (explaining how to live greatly in the law and exhibiting many of the same ideas referred to in the last section of The Path of the Law); see also discussion supra note 12 (discussing the last section of The Path of the Law). In speaking to law students, Holmes urges them to gain an understanding of the law that is deep enough to influence people long after the thinker is gone. He consoles: "And if this joy should not be yours, still it is only thus that you can know that you have done what it lay in you to do—can say that you have lived, and be ready for the end." Holmes, The Profession of the Law, supra note 1, at 33. Here we can see the strand of Holmes's self-perceived duty to try to live greatly. See id. "[N]ot to have lived" seems the worst condemnation Holmes can conceive of. Id. Cf. Holmes, Memorial Day, supra note 18, at 10 ("[A]s 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.").

See Oliver Wendell Holmes, Speech at Brown University Commencement (1897), in THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS 35, 36-37 (Max Lerner ed. 1943) ("[T]he difference between the great way of taking things and the small—between philosophy and gossip—is only the difference between realizing the part as a part of a whole and looking at it in its isolation as if it really stood apart.").

See discussion supra notes 10-25 (discussing the importance Holmes places on living a meaningful life).
versal, and, on the other, that most people in fact do not lead meaningful lives or seek them.

It is not very clear what may give human life significance, what this "happiness" is. Clearly, in these passages, Holmes is sounding themes about the deep meaning of "happiness" in diverse philosophical traditions. His conception is a far cry from Bentham's welfare, more connected to the Greek idea of excellence, the idea of a profound satisfaction with one's life. At times it appears that greatness in life is one way of gaining meaning, but it is not clear what constitutes "greatness." It may mean a high degree of professional competence, mastering one's calling. It may also mean just a passionate and determined dedication to whatever pursuit one chooses or happens to be in, including fighting a war.27 Or, if we take the part of connectedness to "the universe" and "the infinite" more seriously, significance is gained by the acceptance of one's place in the universe. While religion and a sense of holiness serve as sources of meaning for some, secular souls need a different mode of pursuing meaning. Seeking honor, fearing disgrace, says Holmes, are not bad ways of doing this.28

So in some senses, the possibility of living greatly is open to all individuals, in all pursuits, and requires neither education nor contemplation. But the kinds of examples Holmes gives to greatness, and the kinds of qualities required for achieving it, suggest that greatness is going to be the prize of the very few, and that even the peace of knowing that one tried hard and thus lived belongs to a small elite.29 Moreover, Holmes is quite aware that education to greatness may be inconsistent with egalitarianism, and he is very explicit that some such elitism is justified and important.30 On the other hand,

27 Holmes prefers "Whosoever thy hand findeth to do, do it with thy might" to what he terms "the vain attempt to love one's neighbor as one's self." Oliver Wendell Holmes, Speech at a Dinner Given to Chief Justice Holmes by the Bar Association of Boston (Mar. 7, 1900) SPEECHES 82, 85 (1913), reprinted in THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS 40, 42 (Max Lerner ed. 1943).

28 See Oliver Wendell Holmes, On Receiving the Degree of Doctor of Laws, Yale University Commencement, (June 30, 1886) SPEECHES 26, 26-27 (1913), reprinted in THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS 33, 33-34 (Max Lerner ed. 1943) (describing the total exertion necessary in the quest for honor at the risk of noble loss).

29 See Oliver Wendell Holmes, The Use of Law Schools (Feb. 15, 1913), in SPEECHES 28, 29-30 (1913) [hereinafter Holmes, The Use of Law Schools] ("But you can not make a master by teaching. He makes himself by aid of his natural gifts."). Holmes's private descriptions of "common people" are among those that do not endear him to democrats and reformers. He dislikes their company and regards their lives as not deserving respect. He is not consumed with a passion to educate them so they as well could see the light of the depth of the quest for meaning, nor to structure social arrangements in such a way that all individuals will be able to share in his quest.

30 See Holmes, The Use of Law Schools, supra note 29, at 30-31 ("[M]en learn that bustle and push are not the equals of quiet genius and serene mastery."). Holmes describes
there is a great human humility in Holmes’s position. People, however accomplished, should not see themselves as semi-gods. They do not control most aspects of their lives, and the significance of their existence lies in their acceptance of their very small place within a cosmos much greater than themselves.

It is noticeable that Holmes’s heroic figures, the people he often mentions as great, are philosophers, scholars, artists, soldiers, and explorers. While there is a tension here between thinkers and doers, it seems no accident that Holmes does not count in the moralist, the person who articulates specific visions of the good life. Holmes exhibits a familiar phenomenon; while his explicit meta-ethic seems to be extremely relativistic and skeptical, he sees that moral beliefs are central elements in one’s humanity, and justifies—indeed values and glorifies—people’s willingness to fight and die to enforce them. This willingness in itself is a way of living greatly. For Holmes, the

the tendency not to distinguish between people by achievement and Mastery as being “ignobly wrong,” and he urges the Harvard Law School to strengthen its commitment to “teach law in the grand manner, and to make great lawyers.” Id. at 30.

31 See id. (“Modesty and Reverence are no less virtues of freemen than the democratic feelings which will submit neither to arrogance nor servility.”).

32 The sense of humility may well be related in part to the war experience, where men met with no distinction of education or rank and were all equal before death. See Letter from Oliver Wendell Holmes to Harold Laski (Dec. 15, 1926), in The Essential Holmes, supra note 4 at 77, 77 (“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 I might have looked down upon had not experience taught me to look up.”). In addition see his opening remarks in Oliver Wendell Holmes, The Fraternity of Arms (Dec. 11, 1897), in The Essential Holmes, supra note 4 at 73, 73 [hereinafter Holmes, The Fraternity of Arms] (“It made us citizens of the world and not of a little town. It made us feel the brotherhood of man.”).


34 The tension may seem superficial because it is true only for the short term. On the one hand, thinkers are presented as those seeking knowledge for its own sake while on the other hand, doers are the ones that rule the world but yet “all thought is social,[and] is on its way to action.” Oliver Wendell Holmes, John Marshall (Feb. 4, 1901), in Speeches supra note 7, at 91. The latter view connects thinkers and doers, making thinkers the ultimate doers. However, despite this primacy of thinkers, Holmes’s preference of a judgeship meant he decided to be a more direct doer, in the special way a judge is a doer.

35 See Oliver Wendell Holmes, Natural Law, 32 Harv. L. Rev. 40, 43 (1918) (“I see no basis for a philosophy that tells us what we should want.”).

36 See Holmes, Natural Law, supra note 35, at 41-42 (“[W]e all, whether we know it or not, are fighting to make the kind of world that we should like—but that we have learned to recognize that others will fight and die to make a different world, with equal sincerity or belief.”).
fact that people are social beings, and thus have to live in society, is one of the few basic assumptions of the human condition. Inevitably, the meaning of the life of individuals is colored by the social arrangements in which they live.

Despite Holmes's protected and fortunate childhood, his conception of life is not that of an easy, secure existence. This, too, is only in part a result of his early meeting with war and death. It is also the result of his analysis of human life and social arrangements mainly in terms of scarcity, conflict, struggle, power, and survival. From very early on Holmes rejects, as false and misleading, idealized visions of society as based on harmony and convergence of interests. He is quite skeptical about the possibility that progress will lead to the end of all wars and the need to fight them. He also sees quite well that the strong will tend to use their power not only to perpetuate their privilege, but also to hide the fact that they are using it for this purpose. While he does not have a vision of social justice requiring serious changes in this order of the world (and he probably distrusts attempts to make revolutionary changes), he accepts quite fully that the underprivileged should be allowed to try to change the rules in their favor. If the underprivileged succeed, Holmes would object to an attempt by the controlling powers to stop the process by invoking historical rights. Ultimately, he

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37 Other assumptions include the need to eat in order to survive and the need to enjoy some limited security. See id. ("[P]eople wish to live [and in order to do so] . . . they must eat and drink. That necessary is absolute. It is a necessity of less degree but practically general that they should live in society. If they live in society, so far as we can see, there are further conditions."). His analysis is similar to H.L.A. Hart's notion of the minimal content of natural law.

38 See Richard Posner, Introduction to THE ESSENTIAL HOLMES, supra note 4 at ix; see also Max Lerner, Introduction to THE MIND AND FAITH OF JUSTICE HOLMES, supra note 7, at xxii.

39 See Letter from Oliver Wendell Holmes to Lewis Einstein (Oct. 12, 1914), in THE ESSENTIAL HOLMES supra note 4, at 101 (stating that the first World War disproves this hope, and there will always be cases in which the only choice is to fight for the things one believes in).

40 See e.g., Holmes, Natural Law, supra note 35, at 42.

41 Furthermore, this struggle must be "carried on in a fair and equal way," so that workers should be allowed to form associations to negotiate with employers. See Vegelahn v. Guntner, 167 Mass. 92, 108 (1896) (Holmes, J., dissenting).

42 His reference to the point in Holmes, The Path of the Law, supra note 2, at 466-7, 78 B.U. L. Rev. at 706, is neutral. In other places he is much clearer in voicing objection to the morality and prudence of fighting against political changes by invoking interpretations of the constitution that embodies old economic doctrines. His dissent in Lochner v. New York is a famous example, but the line is recurrent. See Lochner v. New York, 198 U.S. 45, 75 (1905). His dissent in Truax v. Corrigan, 257 U.S. 312 (1921), exemplifies this point. "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experi-
concedes that there may be a time when the only way to solve a deep dispute is by force.\textsuperscript{43} He is not eager to reach this point,\textsuperscript{44} and he sees law as a prime way of reaching solutions that will decrease the need for resolving disputes by force.\textsuperscript{45} However, law may do this only to a limited degree, and if one lives in a period when law collapses, one should be willing to join the forces fighting for what is right. Holmes is thus worried that the willingness of people to fight for what they believe, and to respect those who have done so in the past, is weakened by theories suggesting that it is always better to refrain from war.\textsuperscript{46}

Coloring all of this is Holmes's deep awareness of the fact that sincerity and certitude are not sure signs of universal values or truth.\textsuperscript{47} Holmes is not a skeptic in the sense that he does not care and "anything goes." Instead, he offers explanations as to the determination of what people care about: that it is mainly a matter of temperament, history, and early associations,\textsuperscript{48} and truth is more a series of "can't helps" than a "true" picture of some reality.\textsuperscript{49}

\textsuperscript{43} See Letter from Oliver Wendell Holmes to Sir John Pollock (Feb. 1, 1920), in 2 Holmes-Pollock Letters 36, 36 (Mark DeWolfe Howe ed., 1953) ("I believe that force, mitigated so far as may be by good manners, is the ultimate ratio, and between two groups that want to make inconsistent kinds of world I see no remedy except force.").

\textsuperscript{44} See Holmes, The Soldier's Faith (May 30, 1895), in SPEECHES, supra note 1, at 56, 62 [hereinafter Holmes, The Soldier's Faith] (commenting that war is horrible and dull). See also Letter from Oliver Wendell Holmes to Lewis Einstein, supra note 44; Letter from Oliver Wendell Holmes to Sir John Pollock, supra note 39.

\textsuperscript{45} Another way to avoid the need to go to war over commitments is the dissemination of the belief that values are relative. One can glimpse Holmes's approach to war and to attitudes towards it in his dissent in U.S. v. Schwimmer, 279 U.S. 644, 653-54 (1929), where he wanted to invalidate a decision not to admit petitioner as a citizen due to her pacifism. Holmes said that while he does not share her optimism that wars will soon end, he knows well that most of those who encounter war think it horrid and would be very happy if peace won. See id.

\textsuperscript{46} See Holmes, The Soldier's Faith, supra note 44, at 56-57.

\textsuperscript{47} See Holmes, Natural Law, supra note 35, at 40 ("Certitude is not the test of certainty. We have been cock-sure of many things that were not so.").

\textsuperscript{48} See id. at 41. ("What we most love and revere generally is determined by early associations. I love granite rocks and barberry bushes, no doubt because with them my earliest joys that reach back through the past eternity of my life.").

\textsuperscript{49} These themes recur in Holmes' writings. See e.g., Oliver Wendell Holmes, Ideals and Doubts, 10 ILL. L. REV. 1, 2 (1915), reprinted in THE MIND AND FAITH OF JUSTICE HOLMES, supra note 1, at 18, 23 ("But as there are many thing that I cannot help doing that the universe can, I do not venture to assume that my inabilities in the way of thought are inabilities of the universe. I therefore define the truth as the system of my limitation.").
This awareness does not take away the love or the reverence. These may be so great as to justify a war. But even a war is quite consistent with admitting that the other side’s claims are just as good as ours. Holmes realizes that this vision of the status of values in the world is unsettling. He returns to his theme of accepting one’s place in the universe as an existential way out of this dilemma:

We still shall fight—all of us because we want to live, some, at least, because we want to realize our spontaneity and prove our powers, for the joy of it, and we may leave to the unknown the supposed final valuation of that which in any event has value for us. It is enough for us that the universe has produced us and has within it, as less than it, all that we believe and love. If we think of our existence not as that of a little god outside, but as that of a ganglion within, we have the infinite behind us. It gives us our only but our adequate significance.

Against this background, it is not surprising that many of Holmes’s aspirations for a good life belong on the side of honor, complexity, richness, aesthetic values, rather than on equal justice for all. He sees the latter goal as both unrealistic and possibly impoverishing. But his skepticism goes

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50 See Holmes, Natural Law, supra note 35, at 41 (“Deep-seated preferences can not be argued about—you can not argue a man into liking a glass of beer—and therefore, when differences are sufficiently far reaching, we try to fill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as appears, his grounds are just as good as ours.”); id. (“But while one’s experience thus makes certain preferences dogmatic for oneself, recognition of how they can to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else.”). It is not clear how far-reaching this skepticism is. The essay, Natural Law, which is the source of many of these observations was written during World War I. Holmes wants his side to win, but reflects that the way people will see the War in the future depends to a large extent the identity of the winner. See also Letter from Oliver Wendell Holmes to Lewis Einstein, supra note 39, at 101. He glorifies the Civil War and justifies it, among other things, by the fact that many thought it was time to abolish slavery, but he is unwilling to condemn the vision of the confederates. Moreover, he sees this as an important way to give Memorial Day a significance that may unite North and South despite the different ways in which they view the war. See Oliver Wendell Holmes, Memorial Day, supra note 18, at 1. In some texts, Holmes seems a consistent relativist, reducing all moral statements to statements about moral beliefs of some people. However, he also exhibits the attitudes that are used by scholars like Michael Moore to justify their claim that our thought and language presuppose the realism of morality. See generally Michael S. Moore, Moral Reality Revisited, 90 Mich. L. Rev. 2424 (1992).

51 Holmes, Natural Law, supra note 35, at 43-44.

52 See Letter from Oliver Wendell Holmes to Harold Laski (Aug. 1, 1925), in THE ESSENTIAL HOLMES supra note 4, at 142 (“I equally fail to respect the passion for inequality.”).

53 See Holmes, The Soldier’s Faith, supra note 44, at 20 (“But who of us could endure a world, although cut up into five-acre lots and having no man upon it who was not well
further and deeper. The dreams of reformers and union leaders seem misleading to him because they are based, he believes, on an inadequate economic analysis. While he thinks that strikes are legitimate tools in the struggle for better wages, he criticizes the rhetoric suggesting that they may give labor, as a group, a larger part of capital’s pie. The gains of stronger workers are at the expense of weaker ones. Similarly, he insists that social arrangements are dictated by power, not by morality or justice. He resents attempts to present political agendas and social requirements in normative terms of “rights” and “duties.” He would rather present them as attempts to use the public force of the community to promote what people in power want. Like today’s critical thinkers, he reminds us that normative terms are often used to signify that those advocating them do believe that the arrangements thus described are just, and they would like to make others see things the same way. But, says Holmes, this is in fact very different from a real identification of a preexisting right—“A dog will fight for his bone.”

Holmes’s insistence that social arrangements are dictated by power does not mean that he either thinks these arrangements are necessarily immoral, or that it does not make sense, or is not important, to evaluate or criticize them in moral terms. Men are motivated by a combination of moral and prudential reasons that lead those in power to show charity and consideration. Economies thrive only if the multitudes have enough money to consume what producers make. The multitudes may well mobilize enough political power, in part with the help of moral rhetoric, to implement reforms that will make societies more just. As we saw, Holmes would object to attempts to undo such reforms by describing them as unconstitutional. In other words, Holmes is not glorifying brute force as against the aspirations of morality. Rather, he insists that we should not confuse reality with wishful thinking, disregard the basic constraints of human nature and the rules of human societies, or disre-

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55 See id. (“Organization and strikes may get a larger share for the members of the organization, but, if they do, they get it at the expense of the less organized and less powerful portion of the laboring class.”). But see Holmes, Ideals and Doubts, supra note 49, at 2 (“Probably I am too skeptical as to our ability to do more that shift disagreeable burdens from the shoulders of the stronger to those of the weaker.”).
56 See Holmes, Natural Law, supra note 35, at 42 (“But for legal purposes a right is only the hypothesis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it . . . . No doubt behind these legal rights is the fighting will of the subject to maintain them, and the spread of his emotions to the general rules by which they are maintained; but that does not seem to me the same thing as the supposed a priori discernment of a duty or the assertion of a preexisting right.”). These are persistent themes in Holmes’s thought. See, for example, his discussion of the criminal law in chapter two of The Common Law.
gard the possible social costs of superficially compelling ideals such as egalitarianism.

Holmes realizes that individuals do not control much of their lives or their fates, and that they do not choose their beliefs or their values. The human lot is to act from the knowledge of this fact and from an acceptance of it. Yet this acceptance, for Holmes, should not lead to hedonism or indifference. To the contrary, it is this sober acceptance that permits human greatness by creating duties that transcend necessities. Greatness and meaning are thus combinations of choices and skills, hard work and passion, persevering effort and luck. They require a constant moving and interaction between investing all that one has in the business of life—and reflecting on it while knowing that its secrets are beyond human knowledge.

II. LIVING GREATLY IN THE LAW

A. Law and Living in the Law

So we now know that for Holmes, a good life, a life worth living, is a life that seeks greatness. Holmes knows that a person may live a worthy life in many pursuits, and his upbringing and family background inclined him toward philosophy or the arts. Yet he decided to study the law very early, just after he graduated and before he joined in the war. Initially, he was not sure that a career in law indeed had potential as a way to live greatly. But by the time he published The Common Law, he was a convert to the love of law. He found working within the law challenging and meaningful. He liked the practical side of law, the fact that solving problems within the law puts one in touch with life in all its complexities and hardships. He had also found in the law as good a starting point as any to developing an understanding of human nature and to formulating the most imaginative generalizations about it.

In this Part of the Essay, I will show that Holmes’s contributions to legal theory and to the articulation of various ways of living greatly in the law fit well within his more general interest in forms of living greatly, and that his attitudes toward law, and ways of living greatly within it, are informed by the same combination of realism and romanticism that inspires his general approach to life.

Clearly, “living in the law” is an instance of “living.” Yet how may one determine the contour of this special subset of “living?” One obvious answer

57 See THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS, supra note 1, at 59 (reporting that upon returning home from the War, Holmes contemplated his career path, considering philosophy and literature before settling on law).

58 See Holmes, The Law, supra note 23, at 29 (asking rhetorically which other profession allows one to “plunge so deep in the stream of life—[to] share its passions, its battles, its despair, its triumphs, both as witness and actor?”).
may be that the identification of living in the law should depend on the prior articulation of some conception of law. Indeed, natural languages and the existence of special schools devoted to the study of law, and of professional groups, mainly lawyers and judges, whose special craft is that of using the law, suggests that all people working in the law “are united . . . in the abstraction called the Law.” However, Holmes’s most famous conception of the law defines it in terms of predictions as to the actual activities of courts. Holmes here echoes a persistent controversy in theorizing about the law: should we let “the law,” usually characterized as some set of norms guiding behavior, define the realm of study and interest, or should we start from some actual human or institutional activity, and derive insights about law from it?

Either attitude may have advantages and costs. The practices of people working within the law and its institutions appear to be better subjects for study, since they are more tangible than abstract concepts. Learning about law from what people who invoke it actually do seems a better way of getting an adequate account of law. Most observers agree, however, that even paradigmatic legal activities, such as judging or litigating, may involve many elements and features that are either clearly extra-legal or are of questionable legality—for example, the considerations involved in a decision whether or not to settle, or who gets custody of the children. Consequently, discerning which parts of the activities involved are related to law, and in what way, will itself necessitate a prior judgment about the identifying marks of law. The identification of these marks is itself a theoretical question, which will be decided by, among other things, the theoretical utility and the practical implications of alternative answers. Let me therefore start with Holmes’s answers to theoretical questions about law and show how they color different ways of acting in the law.

B. Holmes’s Theorizing About the Law

Returning to the puzzle noted above: To identify the elements of Holmes’s thoughts about law and to distinguish them from his thoughts on other subjects, we need a conception of law and of what should be included in theorizing about it. However, for our purposes—the organization of Holmes’s thoughts about the nature of law—we need not decide this question. We want as broad a characterization as possible, so that our conception of a legal theory does not exclude relevant parts of Holmes’s thought. I shall therefore include in my account statements made by Holmes about the definition of

59 Id.


Law, its functions, the relationships between law and morals, ways to identify the legal arrangements of particular systems at given times, and factors affecting the growth of the law and its development. I shall also include what he has to say about law’s normative aspects.

Holmes offers us observations and insights about most of these questions, but he is not always careful about distinguishing among them. I shall argue that Holmes does not offer a comprehensive and systematic answer to any of these questions, and that understanding this fact is an important part of reading his theoretical statements about the law. The literature about these jurisprudential issues, and about Holmes’s contribution to them, is huge. Many of the questions Holmes addressed are still central to contemporary debates. As indicated above, I believe that on most of them, Holmes’s positions are still relevant and illuminating. Rather then try to provide even skeletal support for these contentions, my main concern will be to show how the holistic and integrated reading of Holmes’s attitude toward law colors his observations about legal theory and contributes to its lasting influence.

The first part of The Path of the Law, often called the “bad man” part or the prediction theory of law, is probably Holmes’s most frequently discussed (and criticized) attitude toward law. Many consider it his proposed “theory” or “definition” of law. They cannot be faulted. “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law” does sound very much like a definition. But in the same piece, Holmes offers at least two more “definitions” of law: “[the] body of dogma or systematized prediction which we call the law,” and “[t]he law is the witness and external deposit of our moral life.” According to the first of the alternative descriptions, Holmes sees “the law” as the body of rules (rather than prophecies) enunciated in statutes and in previous decisions—a rather conventional positivistic “definition” of law. The second characterization, offered as a corrective against the apparent cynicism of the prediction theory, suggests that the law is not a neutral body of rules identified solely by pedigree. The three definition-like statements taken together indicate that

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62 See, e.g., THE PROBLEMS OF JURISPRUDENCE, supra note 66, at 220-28 (describing Holmes’s contributions to the juiciest, ontological question in jurisprudence: the question of what law is”); Grey, PLOTTING THE PATH, supra note 5.

63 Holmes, PATH OF THE LAW, supra note 2, at 461, 78 B.U. L. REV. at 702 (emphasis added).

64 Id. at 458, 78 B.U. L. REV. at 700 (emphasis added).

65 Id. at 459, 78 B.U. L. REV. at 700.

66 Holmes’s second “definition” could very well be accepted by H.L.A. Hart, while the “prediction” definition is criticized by Hart as an example of “rule-skepticism.” See H.L.A. HART, THE CONCEPT OF LAW 20 (Oxford 1960).

67 See Holmes, PATH OF THE LAW, supra note 2, at 459, 78 B.U. L. REV. at 700. The sentence preceding the definition is “I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism.” Id.
Holmes's conception of the law would not be considered very unique today among sophisticated positivists: He stresses, like most theorists of law, that what is special about it is a complex relationship between force and normativity. When one fights against theories that seem to deny this relationship, one is naturally attracted to emphasizing the neglected element. Holmes felt that, in his time, the ethical elements of law were over-emphasized. He therefore wanted to stress that in articulating a comprehensive account of the law, neglecting reality, force, and sanctions is as dangerous as neglecting the obvious connection to the law of notions of binding authority and moral ideals.68

We would do well, therefore, not to recite the weaknesses of the prediction theory of law, considered on its own. It is a bad theory of law if it is seen as an answer to the question of what makes law a distinct social institution, either as a theoretical matter or for practical purposes. For instance, the theory belies the experience of appellate judges, or all judges, who seek to apply the law, not to predict how they will decide.69 Rather, we should as-

68 See Holmes, Natural Law, supra note 35, at 40-42 (pointing out the perceived weaknesses in the natural law approach to living with others); Holmes, The Path of the Law, supra note 2, at 459, 78 B.U. L. REV. at 700 (“A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.”). In the many years that elapsed since Holmes’s writings, these themes were developed by many theorists of law. In fact, the complex relationship between law and morals, and its connection to our definition of law are among the most persistent problems of legal theory. See generally, Ruth Gavison, Natural Law, Positivism, and the Limits of Jurisprudence: A Modern Round, 91 YALE L.J. 1250 (1982) (reviewing JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS IN LAW AND MORALITY (1979) and JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980)) (comparing the opposite theories explored by the two books).

69 See Richard A. Posner, The Path Away from the Law, 110 HARV. L. REV. 1039, 1041 (1997) (noting that judges in the highest courts cannot use the prediction theory in deciding cases). While this conception may still be useful for lower court judges, this may be so only because they are trying to predict how the higher court will decide, not how they themselves will or should decide. But the coherence of a conception is not enough, as there may well be judges who think that they ought to apply the law as they read it, despite the fact that they can predict that the higher court is likely to overrule them, and that they may well pay a price for their decision. See, e.g., GERALD GUNThER, LEARNED HAND: THE MAN AND THE JUDGE 154-61 (1994) (relaying Judge Learned Hand’s advocacy of his approach to the “clear and present danger” test, illustrated in Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917), over that of the Supreme Court). See also Oliver Wendell Holmes, Law and the Court, Speech at a Dinner of the Harvard Law School Association of New York (Feb 15, 1913) SPEECHES 98 (1913), reprinted in THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS 387 (Max Lerner, ed. 1943) (expressing regret to see such accusations leveled against one who “spends all the energies of one’s soul in trying to do good work, with no thought but that of solving a problem according to the rules by which one is bound”). Even if Holmes and
sess it by evaluating the sentiments about law and its study that Holmes was trying to impart, and the dangers he was trying to avoid.

It is important to note that Holmes “imports” this ambiguity into his account of the prediction theory. The definition is given, at least in part, as a response, on behalf of the “bad man,” to definitions of the law in terms of deductions from principles of ethics or reason “which may or may not coincide with the decisions.”70 Holmes wants to point out that definitions of law in terms of rules may mislead, because deductions from the rules are not always the same as the decisions actually reached. The difference is explained precisely by the fact that both legislative judgments and judicial opinions are reflections of perceived moral necessities, not of logical derivations.71 In other words, to predict what the court is likely to decide, knowledge of its moral beliefs is no less important than familiarity with previous decisions and statutes and with canons of logical derivation. Law is the reservoir of our moral life just as it is the reality of what courts actually decide.

Holmes’s account is supposed to show the fallacies of accounts such as Langdell’s, for whom law is a conceptually and ethically coherent system of norms that dictates judicial decisions.72 Holmes emphatically denies that law was, or should be presented as, a preexisting consistent and eternal system, whose general arrangements, and specific decisions within it, were identified by deduction from its axioms. He thought of law as a man-made attempt to solve social problems and conflicts. He believed consistency in the law was an ideal that its practitioners strove to achieve, but could never attain, in part because of the nature of legal development; that is, its evolution by specific decisions of legislators and courts, each driven by a host of considerations having nothing to do with logic or universal principles, depending to a large extent on which cases got to the court or what circumstances triggered legislation.

Holmes’s insistence that to understand law we must concede its “social fact” aspect and that we must distinguish between the law as it is and the law as it should be is common to all positivistic and realist theories of law. Not surprisingly, this “separation of law and morals” thesis is the part of Holmes’s work that received the most extensive critical appraisals, as a part of a

Hand are wrong, we should prefer a linguistic framework that allows us to discuss their claims, possibly in order to refute them, to one that makes their claims unintelligible.

70 Holmes, The Path of the Law, supra note 2, at 460, 78 B. U. L. REV. at 701.

71 OLIVER WENDELL HOLMES, THE COMMON LAW, reprinted in THE MIND AND FAITH OF JUSTICE HOLMES, supra note 1, at 51 (“The life of the law has not been logic: it has been experience.”). This may be Holmes’s most quoted insight. He follows this by noting that the necessities of the time are the “prevailant moral and political theories” and the values in fact informing and inspiring the judiciary. They are not morality in an ideal realistic sense. Id.

72 See generally Thomas C. Grey, Langdell’s Orthodoxy, 45 U. PITI. L. REV. 1 (1983) (discussing Cristopher Columbus Langdell’s “classical orthodoxy” which stood in direct contradiction to Holmes’s belief of law as experience and not logic).
general attack against positivism after World War II. Many have argued that the dangers of confusing legal and moral ideas were very small when compared to the dangers that materialized under a climate stressing that the law should be obeyed without heed to its possible immorality. If only the Nazis had had less of a positivistic approach to law, it was claimed, if only they had accepted that law is "the witness and the deposit of our moral life," things might have been different. I have my doubts about this, but I cannot enter this fascinating debate here.

When statements are taken out of context, there are almost no limits to what they can be made to support. The careful reader of *The Path of the Law* will readily observe that Holmes is not talking (as Hart and Fuller are) about the relationships between the definition or the identification of law and the obligation—real or perceived—to obey it. His concern is that advocates may be misled by their conceptions of law not to give individuals adequate legal advice, preferring their own ethical deduction from legal norms to the prediction of what a court of law will in fact decide. Similarly, Holmes is worried that judges themselves will be misled into wrong or bad decisions if they give terms such as "intent," "duty," or "malice" a moralistic interpretation. In other words, Holmes is talking about "internal" problems, faced by practitioners within the legal system, of correctly identifying the law, not with the general, external, problem of the moral evaluation of the law. It is true that the Hart-Fuller debate concerns the connection between identification and evaluation, with Fuller seeking to claim that only directives meeting some structural moral criteria should be identified as law. But this is not the question addressed by Holmes in *The Path of the Law*.

A related but different criticism of Holmes concerns his claim that all legal terms should be "washed with acid" to remove their moralistic overtones. We should note that Holmes is talking here about a variety of different issues, without always distinguishing between them. On one level, Holmes is

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74 See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 615-21 (1958) (recounting the experience of Gustav Radbruch, who was a positivist until the tyranny of Nazi Germany caused him to recant that school of thought); see also Lon L. Fuller's response in Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 639 (1958).

75 I say more about this in my review of JOSEPH RAZ, *The Authority of Law*, supra note 68.

76 See, e.g., Holmes, *The Path of the Law*, supra note 2, at 459, 78 B.U. L. REV. at 700 ("When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law.").

77 See id. at 460, 78 B.U. L. REV. at 701 (cautioning that it is easy to "take these words in their moral sense, at some stage of the argument, and so to drop into fallacy").

78 See id. at 462, 78 B.U. L. REV. at 702 (pointing out that the "notion of duty shrinks and at the same time grows more precise when we wash it with cynical acid and expel everything except the object of our study, the operations of the law").
referring to the English distinction between rights and remedies. He wants us
to derive rights from remedies, not remedies from rights, so that we stay
close to the reality of decisions, not to normative claims, which may not
have a real basis in actual decisions.\textsuperscript{79} But the theoretical questions of
the adequate "definition" of a legal duty or the debate whether "right," "duty"
or "sanction" should have primacy in our presentations of the law—on which
there are strong, though not conclusive, arguments for Holmes's position—
are quite different from the question whether a person's actual attitudes and
motives should be an element of legal liability. Whatever our theoretical de-
cision about the desirable account of the concept of a legal right or duty or
about the more illuminating way to describe judicial decisions, there is a
policy debate about whether we should impose a duty and a sanction for its
breach—and enforce it so that its enforcement may be predicted—only on
those with actual foresight and wish (intent in the strict sense) or also on
those who were merely negligent. Similarly, the question whether a contract
requires a meeting of minds, actually inquiring into the intentions of the par-
ties, or just a meeting of "external" declarations is a policy question of legal
liability, not a conceptual question about the nature of contracts or the es-

tence of legal liability.

We would expect Holmes to be very clear and careful about these distinc-
tions, and at times he is. At other times, especially when he seeks to capture
broad developments, the picture is less clear.\textsuperscript{80} Holmes sometimes suggests
that the progression of the law to "external" (i.e. non-subjective) standards
follows necessarily from law's nature. This is a conceptual claim about law
in all places and at all times. At other times the claim is simply historical—in
fact, the law moved from revenge to external standards. As a matter of de-
scription, one can question whether this was indeed the trend and seek the
reasons for this development. If these reasons are deeply embedded in facts
about human nature and human society, the trend may indeed be universal. If
not, it may be a contingent phenomenon limited to a particular legal system
at a particular time. At still other times Holmes presents the questions as
matters of policy. On the policy issue, he sometimes takes a clear position in
favor of external standards in all fields of law. At other times he advocates a

\textsuperscript{79} See P.S. Atiyah, Pragmatism and Theory in English Law 18-26 (1987)
(discussing the distinction in English Law between rights and remedies); see also P.S. A-

tiyah, The Legacy of Holmes Through English Eyes, in Holmes and the Common Law: A
Century Later 27 (1983) (reconciling Holmes's rejection of morality in the law with his
desire for policy-oriented law).

\textsuperscript{80} For a typical ambiguous paragraph, see The Common Law, at the end of Chapter 1:
"It remains to be proved that, while the terminology of morals is still retained, and while
the law does still and always, in a certain sense, measure legal liability by moral stan-
dards, it nevertheless, by the very necessity of its nature, is continually transmuting those
moral standards into external or objective ones, from which the actual guilt of the party
concerned is wholly eliminated." The Mind and Faith of Justice Holmes, supra note 1,
at 56.
more differentiated approach, and anyway concedes that the question cannot be answered once and for all in all contexts.\(^{81}\)

Many have criticized Holmes’s views on this issue, noting his inattention to the distinction between the description of developments and their evaluations, as well as the weaknesses of both his historical and his normative claims.\(^{82}\) For my purposes, however, the important point is the distinction between Holmes’s views on the bases of legal liability, existing or desirable, his conception of the nature of law and the preferred conception of basic legal terms, and the fact that Holmes himself would see these questions as distinct.

Holmes is also ambiguous on the implications of his conception(s) of law to working within it as judges, lawyers, or teachers. On the one hand, he seems to propose a very narrow, professionalized, “internal,” “purified,” and realistic perspective on the study of law. On the other hand, he seems to argue that teaching law and practicing it cannot be “great” without expanding the scope of study and understanding. Holmes’s criticism of the habit of studying Roman Law\(^{83}\) and his definition of theory as the more generalized part of law, as the attempt to arrange the existing legal materials of one’s legal system in the most accessible way\(^{84}\) support the first view. The reading of The Common Law as an elaborate exercise in describing American law as

\(^{81}\) See Holmes, The Path of the Law, supra note 2, at 463, 78 B.U. L. Rev. at 704. I am not sure Horwitz is right in his stimulating claim, see Morton J. Horowitz, The Transformation of American Law, 1870-1960: Crisis of Legal Orthodoxy ch. 4 (Oxford 1992), that there was a change of mind here, and that there are two Holmeses, an earlier one supporting just external standards, and a later one who sees this cannot be done, and that the change is related to a disappointment from a hope that tradition and development could be integrated in the common law, and from a later development of the stance of judicial deference to legislation. I tend to think that Holmes himself did not change his mind on the interrelationships between law and politics, and that he had always been an advocate of deference to legislative will. Since most of his seemingly-absolute statements are written in this way to be clear and provocative, I do not read his more nuanced approach to objective standards as a change of mind or heart, but as a reflection of the need, in that context, to emphasize the dangers of presenting policy questions as dictated by necessities.


\(^{83}\) Holmes, The Path of the Law, supra note 2, at 474-5, 78 B.U. L. Rev. at 712-13 (observing that the problem with Austin’s efforts a general jurisprudence were that he did not know enough English law and that studying Roman law is not useful for understanding the different subject of American law).

\(^{84}\) See id. at 474, 78 B.U. L. Rev. at 712.
it stood at the time leads in the same direction. Yet, the other strands in *The Common Law*, and Holmes's own observations about the importance and indispensability of external and theoretical perspectives about law, go in the other direction.

The unclarity in implications, to which we will return below, follows from the complexity of Holmes's characterization and identification of law that we noted above. It is reflected very well in Holmes's description of three different senses, or stages, of seeking to understand one's legal system. In the first, one uses jurisprudence to follow existing dogmas into their highest generalizations. In the second, historical studies are used to understand how the law got to be the way it is. Third, and finally, is the attempt to evaluate the success of the various rules in attaining their goals.85

The three stages stand on both sides of the divide between specific and general jurisprudence. On the one hand, all these studies may be centered around a given legal system at a given time. Existing dogma, the way it got there, and the goals that rules are designed to serve are all "empirical," that is contingent. But "the highest generalities," on both description and evaluation, often do apply to all human societies at all times. Thus, when Holmes emphasizes that the purpose of his theoretical choice in the prediction theory is to take account of the fact that bad men are as interested in legal sanctions as are moral men, he is talking of all people in all legal systems, not just about the "bad guys" in his own United States. Similarly, Holmes illustrates his claim that there are in fact limitations on the power of legislatures, stemming from the limits of public acceptance, with an example from Germany.86

The three stages similarly stand in an unclear position concerning the internal-external divide. Clearly, the identification of the law on a given question (Stage 1) is the paradigmatic activity of actors within a given system of law. At least in some senses, understanding the way the law got to be what it is, and clearly evaluating it, are very different, and are governed by different disciplines. The lawyer, as such, has no special competence in such activities. However, in actual or idealized accounts of adjudication, is it really the case that we can draw these distinctions so clearly? Let's take the test case of the situation in which we identify the law (Stage 1), understand how it was developed (Stage 2), but reach the decision (at Stage 3) that the rule, for historical or other reasons, is a "bad" rule. Are we bound to say that the present law is bad and should be changed in the proper ways? Or do we in fact collapse the three stages into one, identifying the law in part on the basis of our evaluative judgments? Holmes, together with most judges and scholars, oscillates between the two attitudes, depending on his vantage point and his role.

85 See id. at 476, 78 B.U. L. REV. at 714.
86 See id. at 460, 78 B.U. L. REV. at 701 ("I once heard the late Professor Agassiz say that a German population would rise if you added two cents to the price of a glass of beer.").
It should be stressed that Holmes’s analysis of the law as a tool that should be judged by its ability to achieve human and social goals does not affect his “definition” of law in terms of prediction or his skepticism about the limits of human knowledge to identify goals and the right means to achieve them. His estimate is that the actual development of the law, both via the common law and through legislation, has been on the whole good—law’s history “is the history of the moral development of the race.”87 Nonetheless, there are still many instances in which the law as it exists may be improved. He also thinks people working in the law should seek to improve it and has his own version of what this improvement should look like.88 While Holmes is very aware of, and not always clear about, the constraints judicial development of the law imposes, he is quite clear about the explicit and deliberate social basis of legislative reforms. These are simply the reflections of the perceived interests of the groups which have social power.89 Luckily, these interests

87 See id. at 459, 78 B.U. L. REV. at 700. I take Holmes’s usage of “moral” here to refer to ideal morality, not merely to the moral conventions of his age. To me, this expression is one of the many contexts in which he forgets the constraints of his alleged moral skepticism and lapses into realistic talk about morality. The passage, however, makes sense even if we read it to mean only that the law develops in ways that reflect the moral sensibilities of the time and if we abstain from evaluating these sensibilities from the outside.

88 A candid self-description is the 1915 paper Ideals and Doubts. See Holmes, Ideals and Doubts, supra note 49. Holmes admits that he leaves ultimate values on the side, concedes that we should seek to make the world more like we desire, expresses serious doubts about the ideas of social reform vented in his day and their chances, and recommends a more cautious improvement of utility where we agree on the values and goals of legal reform. See id. at 393-94. The mixture between conservative, skeptic and romantic remerges in the statement that the real hope for change lies not in “tinkering with the institution of property” but in “taking in hand life and trying to build a race.” See id. at 393. This naturally sounds very ominous indeed to post-World War II generations, but Holmes’s wish to improve “the race” was “universalistic” and applied to humanity, or at least the United States citizenry, as a whole. Clearly, the idea was not that one particular race was superior and may exterminate others, or even should seek to make all others in its image. Holmes adds in Ideals and Doubts: “The notion that with socialized property we should have women free and a piano for everybody seems to me an empty humbug.” Id. We see here the same ambivalence between skepticism and the substantive endorsement of values and ways of promoting them characterizing much of Holmes’s thought.

89 Horwitz is of course correct in saying that Holmes treats judge-made law and legislation as different processes. See Horwitz, supra note 81, at 125-28 (discussing Holmes’s rejection of strict liability). While judge-made law is an interesting combination of logic, tradition, and the wish to reach desirable results—both social and in the instant case—legislation is a conscious and deliberate attempt at self-regulation. I think Horwitz is wrong to conclude that the awareness that legislation by both courts and legislatures involves social goals entails that the distinction between law and politics collapses or that Holmes thought so. See id. at 128. Although Holmes saw the similarities between legislative and judicial lawmaking and objected to systemic efforts to deny them, he also stressed the differences
include some showing of sympathy, some concern to protect the welfare of the weak, an interest in creating general affluence to maintain peace, stability and growth. But, as we saw, Holmes saw the world as a place of conflicts and struggles, and he is very distrustful of attempts to change this situation radically by invoking the validity of ideal moral principles. This is why he is skeptical of notions such as “natural rights” and their claim to universal validity.

On the other hand, Holmes is quite aware that people may be willing to fight (in the broad sense) for what seems important and good to them.90 Indeed, we saw that this willingness to fight, and to obey while fighting, is one way to achieve greatness. Consequently, people’s conception of the good may triumph when it is combined with the required political power. It is important to see that while Holmes’s descriptive theory of legislation emphasizes realities and power, it does not reduce all human motivations to material interests. To the contrary, not only is the willingness to fight for what one believes in—even if one also believes that one’s own ideals are not necessarily valid—a primary way to greatness, Holmes consistently gives the pursuit of non-material goals a central place in a meaningful and civilized existence, and he criticizes contemporary tendencies to value men of money over people of nobler pursuits.

Not surprisingly, for a moral skeptic, Holmes’s normative theory of legislation is more elusive. He seems to share, without much enthusiasm and hope, something like Bentham’s vision of a law reflecting the best cost-benefit analysis of social policies. In this sense, the person of the future is the economist.91 But this is a hope for the goals we share, where we debate about the proper means to reach them. In principle, under such circumstances, we are all interested in efficiency (at least within some constraints).92 Holmes is almost silent on a substantive, normative, theory of

90 See Holmes, The Path of the Law, supra note 2, at 460, 78 B.U. L. REV. at 701 (“No doubt simple and extreme cases can be put of imaginable laws which the statute-making power would not dare to enact . . . because the community would rise in rebellion and fight . . . .”).

91 See id. at 478, 78 B.U. L. REV. at 715 (“[T]he man of the future is the man of statistics and the master of economics.”); see also Oliver Wendell Holmes, Learning and Science, Speech at a Dinner of the Harvard Law School Association in Honor of Professor C.C. Langdell, (June 25, 1895) SPEECHES 67 (1913), reprinted in THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS 387, 388 (Max Lerner, ed. 1943) (“An ideal system of law should draw its postulates and its legislative justifications from science.”). In Law in Science and Science in Law, Holmes tries to illustrate how more rational examination may improve the legal system. See Oliver Wendell Holmes, Law in Science and Science in Law, 12 HARV. L. REV. 443, 462 (1899).

92 In Ideals and Doubts, Holmes concludes that questions of legal reform usually involve questions of values and questions of the means used to attain the goals and that logic does not help much with the former. Legislation and adjudication often overlook the ques-
legislation. He is very explicit that the kinds of constraints based on an expansive reading of "natural rights" and "freedom of the will" seem to him confused and wrong. He is not a supporter of the idea of "rights as trumps"; "rights"—benefits the law gives individuals—should not defeat the welfare of society, and it is not true that society does not, and should never, sacrifice individuals.\(^93\) On the other hand, he is quite willing, at times, to advance arguments that support a social decision to protect liberty in a given area, believing that such protection does serve the welfare of society at large. Such protection may well require or justify the recognition that the legislature does not have the power to impose certain legal sanctions on behavior that the constitution sought, for social welfare reasons, to permit.\(^94\)

C. *Implications of Holmes's Conceptions of Law For Ways of Working in the Law*

We saw that Holmes's integrated vision of law, its development, and its functions is much richer and more complex than a narrow reading of the prediction theory of law suggests. There is law as the body of dogma, which is identified as "the law" by students and scholars. There is the social institution, which is deeply embedded in both tradition and morality and which is a central tool in the self-government of society. This social institution is constituted, at any given moment in time, by the body of dogma and by the activities of legal actors. These legal actors, in turn, are not of the same sort and do not perform the same functions. All of them act in ways that relate in complex ways to the body of preexisting dogma. Members of all three groups—judges, lawyers, and teachers-cum-scholars—may make important contributions to the development and the application of law. Indeed, Holmes stressed that these contributions may be interrelated in important ways. One such way is the fact that in all legal pursuits, knowing the law in the first sense—the preexisting norms and the canons of interpretation and adjudication—is a necessary, though not sufficient, condition of greatness in the

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\(^93\) This is a consistent position with Holmes, appearing first in *The Common Law* where he comes out against Kant's ideas that people should not treat others as means. See OLIVER WENDELL HOLMES, *THE COMMON LAW reprinted in THE ESSENTIAL HOLMES, supra* note 4, at 248-49 ("No society has ever admitted that it could not sacrifice individual welfare to its own existence."). He repeats this idea in *Ideas and Doubts*. See Holmes, *Ideas and Doubts, supra* note 49, at 392. In 1915, Holmes notes with approval the return to a quest for the "ultimate question of worth," but doubts del-Vecchio's neo-Kantian approach. See *id*.

\(^94\) I claim that this is the basis of Holmes's protection of free speech. He does indeed offer a rationale for the right different from the one offered by Brandeis. Cf. Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 451 (1988).
law.95 "Knowing the law," though, is itself ambiguous. Some think it is important to know the detailed content of statutes and cases; some think the generalizations are the more important part of law. Holmes's guidelines here are not always clear. On the one hand, he congratulates the move from the teaching of principles, advocated by Langdell, to the teaching of cases in which the principles are applied.96 The change signifies to him the revolt against formalism, which he supports wholeheartedly. On the other hand, particular cases are relatively unimportant. What is exciting is the high generalization, where things may acquire some general interest. And these high generalizations, in their turn, are not only a way of gaining meaning in life, but also the part of the law that should be seen as most important. So even on the basic idea of "knowing the law" as a part of working within it, the picture is less clear than some would like.

In the crucial ending paragraph of The Path of the Law, Holmes talks about the highest quest for meaning as an activity uniting all legal pursuits. He succeeds in showing how they are all united in a shared reference to "the law."97 He consistently claims that legal professionalism, in all its forms, must be combined with being "civilized."98 And he shows how the various roles interact: Teachers should aid in producing the kind of lawyer they think desirable, and litigators should seek to persuade judges to decide in the ways that they think are good.

In the following Part, I will seek to connect what Holmes said about these ways of working in the law to his integrated vision of law. My emphasis is on the internal richness and complexity of Holmes's thought, rather than on the way it may fare in contemporary debates.

1. Implications to Adjudication

Despite the interrelatedness of contributions of all kinds of lawyers to the law, American legal culture is known for its singling out of, and its preoccu-

95 In The Law, Holmes relates with approval the different morsels of wisdom proffered to him by two wise and able lawyers. The first said it was important that he should not know too much law; the other said that the business of the lawyer is to know law. See Oliver Wendell Holmes, The Law (Feb. 5, 1885), reprinted in THE ESSENTIAL HOLMES supra, note 4, at 221, 223.
96 See id. at 222-23.
97 See Holmes, The Path of the Law, supra note 2, at 478, 78 B.U. L. REV. at 715 ("The remoter and more general aspects of the law are those which give it universal interest.").
98 Here is how Holmes describes the essence of "being civilized": "[T] is most desirable . . . that he should have laid in the outline of the other sciences, as well as the light and shade of his own; that he should be reasonable, and see things in their proportion. Nay, more, that he should be passionate, as well as reasonable — that he should be able not only to explain, but to feel; that the arduous of intellectual pursuit should be relieved by the charms of art, should be succeeded by the joy of life become an end in itself." Holmes, The Law, supra note 95, at 224.
portion with, judges—especially the Justices of the Supreme Court. This elevation of judges is reflected in the fact that most American legal theories define law through the activities of judges. This may go back to the Tocquevillian insight that one of the defining marks of the American political community is that, sooner or later, all major public questions reach the courts. I have no doubt that Holmes’s endurance owes much to the fact that he spent the last third of his life as a Supreme Court Justice, despite the fact that it may well be that his judicial decisions are not the most valuable component of his heritage. The prestige of Justices is of special interest because, in a way, all other legal actors reinforce it: Legal scholars who are not themselves judges generate court-based legal theories, and those who make Justices into heroes are, again, not judges themselves.

Holmes and other scholars explain this primacy of judges among legal actors: Only they are the vehicles of the authoritative use of political force. Only courts can issue binding decisions in particular cases. It is their articulation of general norms, whether declarative or legislative, that affects the development of the law and its symbolic and educational visibility.

Holmes shared his compatriots’ preoccupation with adjudication, both before and after he became a judge. For 50 years he was writing decisions while at the same time reflecting on what he and his colleagues were and should have been doing. In fact, it is often argued that there is a deep inconsistency between his theories about how judges should decide, and his own decisions, especially his consistent attitude of self-restraint when called upon to review primary legislation.

The inconsistency claim is based on the fact that, on the one hand, Holmes has always insisted that judicial development of the law is “legislative” in at least two senses. First, judicial decisions “change” the law; after they are made the law is not the same as it had been. Second, decisions are driven

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99 H.L.A. HART, American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream, 11 GA. L. REV. 969, reprinted in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 123, 123 (observing that this preoccupation goes almost to the point of obsession).
100 See id. at 123-24 (quoting Holmes, John Chipman Gray, and Karl Llewellyn).
101 See id. at 124 (“In de Tocqueville’s famous words, ‘scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.’”).
102 See OLIVER WENDELL HOLMES, THE COMMON LAW ch. 1, 35-36 (1881):

[I]n substance, the growth of the law is legislative. And this in a deeper sense than that what the courts declare, to have always been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apolo

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by, among other things, the wish to achieve social goals. This is a fact even though judges rarely concede it in their opinions, and when they do, they seem to be apologizing. The implication seems to be that judges should be aware of their reliance on social goals, and that they should make their “legislative” activity explicit and deliberate.103 This way, it would be easier to identify and evaluate the kind of reasoning used by judges and to help the law conform to its underlying goals. On the other hand, when faced with constitutional decisionmaking, Holmes is usually arguing against an explicit judicial decision on the merits, preferring an almost sacred deference to legislative will. The only exception to this stand is his defense of the “the rules of the game” and the ability of players to have a fair play, be it in the form of a free marketplace of ideas or a permission to form trade unions to make negotiations with employers more effective.104

I believe that, in this case, the claim of inconsistency is not justified. Holmes’s position on the judicial role is quite intelligible and coherent when seen against the background of his theorizing about social life, the role of law, and the special tasks of judges as legal actors. The distinction between the common law and legislation is central in Holmes’s thinking about the law, and his theory of legal development. The division of labor in the responsibility for such development is a part of his general analysis of human society and the different ways individuals can work within it.

H.L.A. Hart noted that theories of adjudication tended to take one of two extreme positions, which he dubbed “the nightmare” and “the noble dream.” The “nightmare” vision, in its extreme, is the view that legal rules do not (and possibly cannot) bind, and that judges are political decision-makers disguising their politics by “rights”-rhetoric.105 The “noble dream” is the view that judges never make law, they are only the “mouthpieces” of those who

practices and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.

103 See Holmes, The Path of the Law, supra note 2, at 465-66, 78 B.U. L. Rev. at 705-06 (calling for “a more conscious recognition of the legislative function of the courts”).

104 I believe this analysis permits seeing most of Holmes’s decisions as consistent. It explains the habeas corpus decisions, the free speech and labor-union cases, and his rejection of all forms of lynching in Frank v. Mangum, 237 U.S. 309 (1915) (Holmes, J. dissenting). However, Holmes was pleased about his decision in Buck v. Bell, 274 U.S. 200 (1927), not simply because he upheld legislation he thought was reasonable. He thought it was a good idea to “improve the race.” On the other hand, despite his expression of hope that he did not decide against the Sherman Act because he thought it was stupid, the decision is hard to square with his general position of self-restraint.

105 See H.L.A. HART, American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream, supra note 99, at 126-32 (explaining how, under this view, judges do not decide cases impartially).
have made the laws. These theories are usually presented as both
descriptions and ideals, reflecting the fact that judges usually seek to do what they
sincerely think they ought to be doing. Naturally, the controversy about the
accuracy and the validity of these theories is a persistent part of contempo-
rary jurisprudential debate.

Holmes came to the debate first as a practitioner then as a judge. His po-

tion on these issues was influenced by the climate in which he was acting:
Holmes was reacting against Langdell’s version of the noble dream, so natu-

rally he joined M.R. Cohen in stressing that judges must often use “the pre-

rogative of choice.” Holmes did not share the extreme critical picture of the
judge as arbitrary and political, however, and he was offended by allegations
that he and his colleagues were in fact in the service of particular political
visions and parties. In other words, and as could be expected from his
complex attitudes to tradition and precedents, Holmes took a middle position
on the descriptive question of judicial discretion: Laws can bind, and usually
they do. We can ordinarily identify what the law requires. Very often, judges
in fact enforce these requirements of law. Mostly, these decisions present no
great hardship or serious conflict between the requirement of the law and the
perceived requirements of justice. In other cases, the law is not clear, or it
leads to an unacceptable result, and the court “legislates.” It should be em-
phazized that in most cases of common law “legislation,” there is no tension
among the result reached, the norms articulated, and the moral judgments

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106 See id. at 132-44 (explaining how, under this view, impartial judges adhere to ex-
isting law).

107 The occasion for Hart’s paper was the emergence of a new American version of the
noble dream theory expounded by Ronald Dworkin and the powerful, sophisticated articu-
lation of the “nightmare” vision by scholars in the CLS school, notably Duncan Kennedy.

108 In his Law and the Court speech, Holmes complains that he gets letters accusing
him and his colleagues of being corrupt and tools of the corrupt money power. See
Oliver Wendell Holmes, Law and the Court, Speech at a Dinner of the Harvard Law School
Association of New York (Feb 15, 1913) SPEECHES 98, 99 (1913), reprinted in THE MIND
AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS
387, 388 (Max Lerner, ed. 1943). He adds, “I admit that it makes my heart ache. It is
very painful, when one spends all the energies of one’s soul in trying to do good work,
with no thought but that of solving a problem according to the rules by which one is
bound, to know that many see sinister motives and would be glad of evidence that one was
consciously bad.” Id. He continues, true to himself, “But we must take such things philo-
sophically and try to see what we can learn from hatred and distrust and whether behind
them there may be some germ of inarticulate truth.” Id.

109 Occasionally, however, enforcing the letter of the law would cause serious in-
just. In such cases, judges should decide whether it is better to modify the law to permit a
just result, or to create injustice in the case in order to maintain the integrity of the law.
Holmes’s detailed analyses of cases in The Common Law contain numerous examples in
which judges did one or the other, and in which Holmes criticized or applauded their deci-
sions.
perceived. In fact, Holmes argues, persuasively, that the driving force of such decisions is precisely the wish to meet the perceived necessities and moral sentiments. Formally, even this kind of "judicial legislation" may require justification, but it is very easy, and sensible, to assume an inherent power vested in the courts to make the adaptations in the law that do not raise divisive social issues. Consequently, in most of these cases, no serious issues of legitimacy are raised. Nonetheless, because of the constraints of judicial rhetoric, even such decisions will often be justified only by reference to the preexisting norms, disguising the features that in fact dictated the decision.

Holmes seems to be ambivalent about these constraints, and the resulting lack of candor in judicial reasoning. As a judge in common law cases, he very rarely goes into the kind of functional analysis he offers in The Common Law or in his other critical essays. And his criticisms are sometimes directed at the results, while at other times they are directed at the style and structure of the reasoning offered. He usually distinguishes between the two kinds of problems with absence of judicial candor: The first relates to insufficient attention to the means-ends relationship and the social costs of judicial decisions, and applies to all cases; the second deals specifically with the liberty taken by judges, under the cover of vague norms, to make substantive and controversial decisions which are then presented as the inevitable application of preexisting law. This criticism applies only to the cases where real issues of legitimacy are raised, and in which Holmes, believing that to attempt to frustrate political power is futile and viewing the judge as the protector of the "rules of the game" and the will of the people, argues for self-restraint and deference. The judge's role is even more difficult to define when the law is fluid, and when its interpretation is contested by rival political camps. These are the situations in which, no matter what the court decides, a part of the population will feel wronged. These are the cases in which there is no law, because the political battle has not ended. In these cases, Holmes warns against a premature judicial decision that is likely to seem wrong to the part of the population still waging the battle against it.110

In other words, self-restraint in constitutional adjudication is a way to avoid direct policy discussions by judges because these discussions should be

110 See generally Oliver Wendell Holmes, Law and the Court, Speech at a Dinner of the Harvard Law School Association of New York (Feb. 15, 1913), SPEECHES 98 (1913), reprinted in THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS 387 (Max Lerner, ed. 1943). Holmes is aware that when the law is unclear, it is inevitable that the disappointed side will feel wronged. When parties come to a court to ask a favor, and the court decides against them, the parties call the decision wicked. Holmes complains that the judge often "forgets that what seems to him to be first principles are believed by half his fellow men to be wrong." See id. at 390. It may come as no surprise that Holmes thought that judicial review over Congressional legislation was not essential, and that the court only needed the power to determine the contours of federalism so that the states would not undermine the necessary functions of the Union.
conducted and decided elsewhere. In common law cases, where judicial decisions must be based, in the final analysis, on considerations of expediency as well as on those of tradition and logic, Holmes’s position is more ambiguous. He clearly wants much more functional analysis by scholars, much more awareness to this aspect of decisions, and to the limits of science, by judges. In both his theory and practice he is less clear on his guidelines for judicial opinion writing, and usually he prefers the justification of result by “form” and logic, and not by “substance” or policy.

One should not seek a direct connection between Holmes’s views on the law, his general theory of adjudication and his particular decisions, however. In fact, Holmes would probably say that these possible connections are exaggerated and that adjudication has a certain “autonomy” or an art-like quality. This is because of Holmes’s often reiterated belief that “general propositions do not decide concrete cases.”111 This is true for major legal premises, and it is true a fortiori for theories of law or adjudication. Yet here, again, we need to caution ourselves. We can interpret this insight as a support for the rule-skepticism interpretation of Holmes’s legal theory. Taken literally, this statement means that, as a matter of logic, no rules can bind, so that adjudication is always a matter of choice, and the “nightmare” vision, with the collapse of the law-politics distinction, recurs. But we also saw that this not what Holmes “really” thought, and this is not the way he perceived his actions. A quote from his famous dissent in Lochner may resolve and dissolve the puzzle:

But a constitution is not intended to embody a particular economic theory. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.112

While in constitutional adjudication, deference to clear legislative judgment seems quite consistent with Holmes’s analysis of the social production of law, the picture in common law areas is more complex. Here the main

112 Id.
questions are those of submission to logic and of deference to traditions and precedents. While Holmes objects to Langdell's formalism,\textsuperscript{113} he is clearly not a supporter of illogical or irrational adjudication. He objects to the allegation that results inevitably follow from general premises, but he does not reject the idea that laws can bind, and that often they should be followed even if their rationale is not too clear, simply because there is—and should be—a presumption in favor of tradition. Holmes has a great respect for traditions, and is aware of the fact that "The past gives us our vocabulary and fixes the limits of our imagination: we cannot get away from it."\textsuperscript{114} On the other hand, he believes strongly that "the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity."\textsuperscript{115} Thus there is a weak presumption in favor of following rules, especially if we are not sure that changing them will be an improvement.

When one holds a theory of adjudication of this sort, greatness in judging is the combination of discretion, knowledge and intuition that tells a judge how to identify the law, how to avoid letting hard cases make bad law, how to weigh the right balance between respecting traditions and precedents and modifying the law to meet changing needs and new moral sensitivities, how to identify the fundamental principles that should be invoked to defeat congressional legislation, and how to distinguish them from one's own intuitive judgments. This is not very clear guidance for concrete cases, but it does what Holmes's vision of law and adjudication requires: It puts a large part of the responsibility for judicial decisions on the judges themselves.

Holmes was interested in the daily work of judges and made observations about various aspects of judging. He admired Shaw, Brandeis and White for their sense of judgment, their ability to know what the "right" decision was, both in terms of legal development and in terms of the social meaning of the result. In general, he trusted judges more with reaching the right decisions than with articulating the right reasons, and keeping to the proper level of generality.\textsuperscript{116} He believed that it was important for judges, especially on the Supreme Court, to have experience in public affairs. Holmes's opinions were

\textsuperscript{113} See, e.g., Oliver Wendell Holmes, Book Review, 14 Am. L. Rev. 233, 234 (1880) (reviewing Langdell's \textit{SUMMARY OF THE LAW OF CONTRACTS} and coining the now-famous slogan, "[t]he life of the law has not been logic; it has been experience"); Letter from Oliver Wendell Holmes, Jr., to Sir Frederick Pollock (Apr. 10, 1881), in 1 Holmes-Pollock Letters 16-17 (Mark DeWolfe Howe ed., 1941) ("[Langdell's] explanations and reconciliations of the cases would have astonished the judges who decided them.").

\textsuperscript{114} Oliver Wendell Holmes, Learning and Science, Speech at a Dinner of the Harvard Law School Association in Honor of Professor C.C. Langdell (June 25, 1895), \textit{Speeches 67, 67} (1913), \textit{reprinted in THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS} 34, 35 (Max Lerner, ed. 1943).

\textsuperscript{115} See \textit{id.}

\textsuperscript{116} See Holmes, \textit{The Path of the Law}, supra note 2, at 467, 78 B.U. L. Rev. at 707.
usually quite short and represented a justification for the result, no more. He rarely indulged in either historical research into the origin of rules or in scholarly presentations, and quotes from prior judgments are almost nonexistent in his writings.\footnote{Holmes thought that long dicta, especially of the scholarly sort, did not belong in judicial opinions. See Letter from Oliver Wendell Holmes to Harold Laski (Jan. 16, 1918), in 1 Holmes-Laski Letters, 1916-1935, at 128 (Mark DeWolfe Howe ed., 1941) (criticizing Brandeis for including an historical review in an opinion). A rare exception to this principle can be found in Holmes’s dissent in \textit{Plant v. Woods}, 176 Mass. 492, 504 (1900) (Holmes, J., dissenting).} Although known for many of his dissents, Holmes usually refrained from dissenting. When a majority of the court rejected his opinion, he believed a judge must usually accept the majority view and leave reform, if necessary, to the legislature.\footnote{See \textit{Plant v. Woods}, 176 Mass. 492, 504 (1900) (Holmes, J., dissenting) (“When a general question has been decided by the court, I think it proper, as a general rule, that a dissenting judge, however strong his conviction may be, should thereafter accept the law from the majority and leave the remedy to the Legislature, if that body sees fit to interfere”). In \textit{Commonwealth v. Perry}, 155 Mass. 117, 123 (1891), one of his infrequent dissents while on the Massachusetts state court, Holmes carefully explained his reasons for writing an opinion to support his dissent.} Finally, Holmes applied to adjudication his maxim about doing mightily whatever it is that you happen to be doing: He took his work seriously, he worked hard and conscientiously at it, and wanted very much to make the kinds of contributions that he thought a judge could and should make.

Many of these positions are not connected in any meaningful way to Holmes’s conception of law and its functions, but some are. In one piece, Holmes describes the role of the judge as the person whose job it is to enforce the rules of the game, whether or not he likes them.\footnote{Holmes, \textit{Ideals and Doubts}, supra note 49, at 2 (noting that a judge’s “first business is to see that the game is played according to the rules whether I like them or not”).} He saw the judgeship, in a way, as analogous to the soldier’s duty: The commitment to do things despite the fact that one does not always understand their sense and reason. The judge, more than any other legal practitioner, must accept the law from the legal point of view and must develop toward it an attitude of respect. This willing obedience, as we saw, does not preclude, and at times it may even require, a decision that seems to defy, at least superficially, what legal dogma requires. The identification of the cases and situation in which such creativity is required, and the choice of the doctrinal basis for this creativity, are the signs of greatness in adjudication.

2. Implications For Lawyering

The large majority of those who are working in the law are lawyers of various sorts. Holmes is of course aware of the bad name lawyers have. He nonetheless thinks of lawyering as a mission, as a practice that tends to make good people. He expresses misgivings about the fact that some people
working as advocates seem more interested in money than in ideas and causes. He laments the fact that lawyers want to be “smart” rather than “wise,” or “great.” But throughout he supports the judgment that one can live greatly in advocacy, and that in fact advocacy is a very good avenue to a meaningful life. In addition, advocacy, both as counseling and in litigation, is an interesting pursuit which may well serve public ends and which is as good an avenue as any for connection with ideas and the infinite.120 Holmes is candid that practicing the law may well seem boring and petty, not the pursuit able to “make out a life.”121 But he argues that this is a problem facing all those in practical life, and that one’s life is what one makes of it.

For Holmes, advocacy had the advantage that it connected general problems with the excitement and the urgency of the “here and now.” Litigating cases in court had the additional advantage of a battle-like effort, the ultimate in enlisting all of one’s energies for a task. Holmes concedes that this dealing with the here-and-now of clients and cases is not the kind of activity that often makes one a hero for later generations, no matter how accomplished one’s professional career is. But his existentialism makes him affirm that in some sense, their contribution to the fabric of life may be greater than that of a poet who utters a happy phrase from a protected cloister.122

While judges make the decisions, Holmes believes that lawyers’ responsibility for the development of the law is greater than that of judges, since lawyers aid the judges in reaching their decisions.123 The litigator’s task is to persuade the jury and the court of the case of his client. Litigators need to be good with juries, and they need to know how to present their case to the judge, especially if the letter of the law seems to go against them. In this sense, the lawyer as litigator is, as Holmes suggests, the judge’s partner in

120 See Oliver Wendell Holmes, Sidney Bartlett, Answer to Resolutions of the Bar, Boston (Mar. 23, 1889), reprinted in THE ESSENTIAL HOLMES, supra note 4, at 220 (expressing pleasure that Bartlett was content to remain an advocate to the end, and saying that if one does one’s task with one’s might, he is on the road to fulfilling the “mysterious ends of the universe”); Holmes, The Law, supra note 95 (stating that “every calling is great when greatly pursued” but that lawyering is the best way “to plunge . . . deep in the stream of life . . . share its passions, its battles, its despair, its triumphs, both as witness and as actor”); Holmes, The Use of Law Schools, supra note 29 (presenting law as a branch of human knowledge “which is more immediately connected with all the highest interest of man than any other which deals with practical affairs”).

121 Holmes, The Profession of the Law, supra note 1 (“How can the laborious study of a dry and technical system, the greedy watch for clients and practice of shopkeepers’ arts, the mannerless conflicts over often sordid interests, make out a life?”).

122 See Oliver Wendell Holmes, George Otis Shattuck, Answer to Resolutions of the Bar, Boston (May 29, 1897), SPEECHES 56, 70-74 (1913), reprinted in THE MIND AND FAITH OF JUSTICE HOLMES, HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS 37 (Max Lerner, ed. 1943).

123 See Holmes, The Law, supra note 95 (“The law is made by the Bar, even more than by the Bench.”).
the task of identifying the law and developing it. Clearly, for Holmes, the
collection of lawyers is not exhausted by the representation of clients. The
Brandeis brief, for example, signified an invitation to courts to concede the
relevance and importance of facts and social realities in adjudication. This is
an operative counterpart to Holmes’s call for the awareness of social conse-
quences in deciding cases and developing the law. Lawyers have the re-
ponsibility of providing the court with the information and the background
necessary to decide a case.

The centrality of advocates in Holmes’s thinking may also be illustrated by
the frequent observation that his prediction theory was articulated from the
perspective of counselors—a different type of advocate than litigators—not of
judges. Counselors are the ones who provide service to individuals who want
to plan their behavior so as not to conflict with the law. In this capacity, one
may need to know the law, to predict when a case will get to the court and
what the court might decide. One need not have the swiftness of sharp cross-
examination or the rhetorical ability required in the courtroom, but good
counseling may require traits that a good litigator does not have to master.
All lawyers know, for example, that the decision to litigate must be based on
more than the state of the law. A good lawyer will not encourage her client
to litigate, even if she will likely win, if the costs of litigation (broadly
speaking) will exceed those of negotiating in the shadow of law or just letting
the loss lie.

As in the case of judges, greatness for lawyers requires knowledge of the
law and much more. A high level of professionalism, for example, includes
the elements that will make a person a good counselor or litigator. As Hol-
mes’s thought exemplifies, these are elements that go beyond knowledge of
the law.

3. Implications For Legal Academic Work

We saw that lawyering involves at least two different occupations: coun-
seling and litigation. Similarly, academic work in the law combines two oc-
cupations: teaching and scholarship. Clearly, our theory of law, and our
picture of what it means to understand it, will affect our attitude to legal
scholarship and education.

Again, Holmes seems less concerned with dogma than with greatness. Of
course students should be taught “the law,” but it is more important that they
should be taught in the grand manner, so that they want to become great

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124 See Holmes, The Path of the Law, supra note 2, at 467, 78 B.U. L. Rev. at 707
noting judges’ failure to recognize their duty to weigh considerations of social advantage.
125 As noted above, however, Holmes was not always clear about the implications of
law as a social science to actual litigation and adjudication. In addition to his general dis-
taste for facts, it is notable that Holmes’s dissent in Lochner v. New York, 198 U.S. 45
(1905) (Holmes, J., dissenting), unlike that of the other dissenters, did not rely on social
facts. If one does not need to show research, one may not need a Brandeis brief.
lawyers. This will be achieved by taking as teachers the people “producing the best work of that generation.” By example they will teach their students to want greatness and seek “real things.” Presumably, the best work should include all efforts seeking to increase knowledge about the law, in all its forms.

Thus, Holmes has a great admiration for the achievement of Story, who has succeeded in stating the law in an orderly and illuminating way. Nonetheless, he thinks that the days of greatness as the clear and illuminating exposition of doctrine are gone. Legal scholarship, and legal education, are spreading to cover philosophy, history, economics and ethics. Holmes sees this process as both desirable and inevitable. He is also happy that teaching legal doctrine has taken the form of stressing cases and applications rather than principles, echoing his criticism of Langdell’s formalism.

Another implication of Holmes’s legal theory to legal scholarship and education concerns traditions and precedents. We saw that Holmes’s guidance to judges in this respect was not clear, but it has implications to legal education and scholarship: To act on the presumption that precedents should be followed, we need to be able to identify the law. But to decide whether the presumption should be rebutted, we need to know the outcome of the change and agree on its evaluation. According to the broad conceptions of law and legal understanding Holmes advances, legal academics should have a large responsibility in these fields.

In legal scholarship, too, Holmes has his own heroes. Not surprisingly, they are scholars of great breadth, who can indeed generalize and put law within its social and moral contexts. They are the people who in their work touch on the threads connecting legal dogma to history, human nature and the mysteries of existence. The relevance of their work to actual working in the law is, however, indirect: as we saw, these themes may participate in the actual decisions made by judges and lawyers. Nonetheless, in the explicit patterns of their activities, these realms will rarely find explicit presence.

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126 See Holmes, The Path of the Law, supra note 2, at 467, 78 B.U. L. REV. at 707 (discussing Story and stating that “he has done more than any other English-speaking man in this century to make the law luminous and easy to understand”).

127 See, e.g., Oliver Wendell Holmes, Law in Science and Science in Law, 12 HARV. L. REV. 443 (1899); Holmes, The Use of Law Schools, supra note 29, at 35.


129 See Oliver Wendell Holmes, Holdsworth’s English Law, 25 L.Q. Rev. 412 (1909), in which Holmes expresses appreciation for Holdsworth’s scholarly achievements and his skepticism about the ability of science to provide information about complex social processes. Due to a lack of information about complex social processes, it is both inevitable and justifiable for courts and individuals to follow existing rules (even those with a weak justification) until they know more about their ideals.
III. HOLMES TODAY

Holmes did succeed, more than many of his contemporaries in the legal profession, in sending a spark down the generations. He brought to his life's work a rare combination of talents and skills. He was a thoughtful observer of man, society and law. He expressed his profound insights in elegant, short and memorable lines. I find Holmes rewarding, insightful, stimulating and basically right on many issues relating to all three areas of his contribution to living in the law: his judicial stance; his position as a scholar speculating about law, its origins, its nature, and its functions; and his willingness to undertake the position of public mentor, affirming the human need to live a meaningful life, while accepting that sources of meaning can be many and diverse. It takes a man of Holmes's talents to pull off this combination of enthusiasm and skepticism, of romanticism and blunt realism in a credible way. Anyone could be content to present in such forceful form just one component of the complex that Holmes offers. And Holmes practiced everything he preached: He fought bravely in a just war, risking life and limb for an important cause; he was a professional of the highest standards in all three ways of working in the law; he had a life-long commitment to learning and knowledge, and was a paradigm of "the civilized professional;" he worked hard at his job and produced many decisions that are still among the cornerstone of American jurisprudence; in his work, he exhibited his broad education, his combination of detachment and passion, his wisdom and his sense of justice.

It is probably Holmes's own sense of himself, coupled with his idealist-romanticist part, that led him to ignore realism when he was talking about greatness in the law. It is hard enough to find a person who can attain real greatness in any of the ways of working in the law. But many of these ways take different talents, and some of these tend to be inconsistent. As a result, it is extremely unlikely that the best scholar will also be the person who can excite his students to a life of commitment and competence. Similarly, the person who can be very persuasive with judges can be less compelling with juries, and both cannot have the kind of wisdom and empathy that makes people good counselors. In talking about ways of working greatly in the law, Holmes is also ignoring the inner tensions involved in such work that his own observations about the law highlight: What should law-teachers, who believe that judges are just rationalizing, do? What should a judge do if the law, as it is, will create what to him is a very grave injustice? How should a cause lawyer deal with the tension between her knowing the law is effective, if seen as neutral and "objective," and her wish to use the law to promote social justice? Some will say that Holmes's generalizations are not serious

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130 In fact, he wrote what many consider the greatest American work of legal scholarship when he was a full-time lawyer.

131 For a powerful account of this tension, see CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuart Scheingold,
precisely because he does not address these hard and central issues. I have tried to argue that his observations and life represent a way in which he himself, because of his exceptional combination of traits and talents, could live a life that was fuller because it contained in an impressive and an illuminating way these imminent inner tensions of the law and working within it.

Holmes's critics concede most of what I have said so far. They criticize our choice of Holmes as a hero because of his supposed detachment and arrogance, and because of conservative, aristocratic and militaristic decisions, positions and sentiments. On the other hand, some of his fans may fault me for not emphasizing enough his progressive liberalism, reflected in his pro-labor, habeas corpus, and free speech cases. The fact that both these observations, in part inconsistent, may be credibly made about the same person are yet another proof that Holmes's main attraction is some complex wholeness in what he stands for. But here my point is Holmes's enduring relevance for us.

Holmes is not just a giant from the past. Most of the questions he addressed—jurisprudential as well as social and political—are still hotly debated in our times. His words are always relevant, often compelling. Clearly, we are not going to benefit from "silencing" the parts of his thought that we find shocking or offensive. He would be the first to say that we have the freedom, possibly even the duty, to deviate from those of his decisions we find unacceptable. He would even justify us in thinking that, if his vision of the world is inconsistent with ours, and there is no way to progress peacefully towards our goals, that our fighting people holding his opinions may be justified. But I think he would have been very troubled to see the extent to which "political correctness" is hindering our ability to discuss openly major issues of the day. The opinions he is criticized for today were not popular in his days either, and he often expressed awareness of this fact. Nonetheless, he did not shy away from expressing his views, and to me this is an indication of the truly liberal element in his personality—his strong belief that people should be allowed to be free spirits in their explorations and in their ideas. As many other great activities which Holmes admired, this exploration may well be a lonely one. For Holmes, freedom of thought and speech are not granted because ideas are harmless: "Every idea is an incitement." 132 Freedom of thought is part of the essence of a person's integrity and dignity and expressing his opinions, especially if they are unpopular and even shocking, is a way of making a public service to his community.

We all admire him for deciding, often in a minority, that progressive legislation should not be invalidated. Many of us tend to forget that he said that because he believed it is not the business of courts to impose their values on Congress. He was consistent with this position in *Buck v. Bell*, 133 but we dis-

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133 274 U.S. 200, 207 (1927) (Holmes, J., dissenting).
regard this. He probably would not have joined the majority in *Roe v. Wade*. In other words, we persist in applauding the results we like, not the judicial stance that produced them.

I disagree. I take the results with the judicial stance, because I accept its validity, fully realizing that its consequences depend on the nature of legislation and the way democracy is going to work. I agree with Holmes that there is a difference between the ways of working in the law, and that one of the unique features of judges is that they do not have direct responsibility for "legislating" social norms. I do not agree with all the reasons Holmes would probably give for judicial deference, or with the details of his picture of social life, but many of the elements of his argument seem to me powerful and valid today. Among them is the fact that judges are granted tenure and insulation from public pressure in order to act independently in the application of law to concrete cases, and they should not use their power to undermine the considered wishes of legislative majorities in matters of ideology. And the fact is that judges, even if they are very civilized specialists, are trained in the law and not in public affairs, and do not have the knowledge, the tools, nor maybe even the temperament and the competence to make the kinds of factual and social judgments that constitutional adjudication requires.

In other words, I believe Holmes preferred to be a legal doer, all his life, and mostly a judge, because he felt this was the role in which he could be at his best. He did not aspire to be a man of politics. He did not even want to be an activist cause-lawyer. On the other hand, the structured detachment of academic life did not suit his temperament. Maybe because of his skepticism and maybe because of his conservatism, maybe because of his intellectual curiosity and his need to be part doer, part detached observer, Holmes chose to act in the world of affairs without making, as part of his role, systemic political judgments. He understandably refused to let others' conceptions of adjudication make him play a game he did not think was right for either him or the society in which he lived. The responsibility he was willing to take, and that he criticized other judges for not taking, was that of acknowledging the fact that judges legislate interstitially, and that this legislation should be undertaken with accountability and awareness. This kind of role hardly justified, in his view, judicial invalidation of statutes imposing minimum wages or maximum hours, which were passed as the result of the considered judgment about the public good made by elected legislatures. Many people object to this "narrow" conception of adjudication, but even they should concede that the fact that great judges like Holmes and Hand endorsed them is a fact that needs to be reckoned with. Furthermore, I have yet to see the arguments that successfully rebut Holmes's approach to constitutional adjudication, without undermining the special grounds for judicial legitimacy, so different from the legitimacy grounds of the political branches.

Holmes's judicial stance, even if not popular, is at least respectable. One

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cannot say the same about his attitude toward war. It is quite possible to find passages in which Holmes glorifies it. Worse, he is willing to see it as a noble pursuit even if the soldiers are not sure why they are fighting, and he sounds almost callous when he affirms the power of the state to send its citizens to fight and die for it. In fairness, Holmes did not witness America participating in a war which many thought was superfluous and unjustified. I do not read Holmes on war as an ominous sign of a fascist mind. My reading is that Holmes disliked the waste and death of war as much as anyone else, maybe more so because of his own war experience. But he was also afraid of the national make-up of a people that made the reluctance to fight an ideal. Maybe Holmes should not have been afraid, since America is lucky in the sense that its routine existence does not involve a permanent military threat. The United States is perhaps the only country in the world in which the systemic cultivation of forms of greatness other than the willingness to go to war and excel at it is possible. But even that does not seem true. Many feel that the United States should have joined the first and second World Wars earlier than it did. And Americans still tend to choose leaders who had distinguished military careers.

In any event, most countries are not as fortunate as the United States. I for one come from a country that has had five or six wars in fifty years and remains under a constant threat of war. In my part of the world, the dangers of unjust and unnecessary wars are very real. Clearly we cannot afford to take on faith leaders who will lock us into a continued vicious circle of violence. On the other hand, the quest for peace must be undertaken from a position of military strength, and it may well be that Israel will have to fight in self-defense, or in order to maintain the way of life she deems desirable and just. Against this background, I find Holmes's admonitions relevant and moving. While there is nothing I would like more than to have peace with my neighbors, it is much too early for us to disarm. We all observed with satisfaction the weakening of militarism and collectivism in Israel over time. With Hirschman we believed that people who are interested in their standards of living will be less interested in perpetuating a military conflict. Encouragingly, many people in the top echelons of Israel's army are among those most committed to a political solution of the conflict. But they, too, are struggling with the immense difficulty of encouraging a free and peace-loving society in circumstances in which the need to fight is always present. Here Holmes, because of his aversion to absolutist moral rhetoric, has an important message: He never feels the need to hate or despise his enemies. To the contrary, he gives them the dignity of people sharing in the soldier's faith. It may well be that the development of this kind of an attitude toward those with whom one is in conflict is a better route to peace and reconciliation than the feeling that one is representing the forces of light, fighting a holy war against the forces of evil, people who need to be conquered and

vanquished.

Similarly, I read Holmes’s conservative doubts about redistribution of wealth as much less damaging to him as a person than many others do. We should remember again that Holmes did not choose to be a politician or even a political philosopher. He did not fight publicly for liberal or for conservative policies. In his judicial decisions he exhibited an impressive ability to practice what he preached—in at least some of those decisions, the progressive statutes he upheld were statutes he would not have voted for had he been a member of Congress. Holmes’s doubts about the possibility and desirability of aiming at some forms of equal distribution are still echoed forcefully by thoughtful thinkers today. More importantly, his fear that claims of equality may be invoked in ways that will discourage excellence and high achievement does not seem unfounded. It is important that our choice of progressive political measures will take such positions and costs into account. Once Holmes’s words are not read as threatening political platforms supported by big money, or as a well considered comprehensive theory of political justice, but as contributions to “the marketplace of ideas,” made as the reflections of a concerned individual who is watching what is happening in his society—I read them as interesting and powerful, and I enjoy the need to struggle with them and persuade myself that on this particular issue he was wrong.

Holmes seems right, however, that particular opinions or decisions are not what really counts when we assess a person’s life and work. It’s the combination of passion, curiosity, alertness of mind, the breadth of perspective, the depth of insight, the perseverance, the vision, the aspiration, the clarity, the brilliance, the originality, the provocativeness, the elegant mastering of the profession and of language, and the variety of roles within the law, culminating in fifty years on the bench—thirty of those on the Supreme Court—that, together, make Holmes so special. It is a combination hard to rival.

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