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# THE FUNDAMENTALS OF HOLMES' JURISTIC PHILOSOPHY

REV. JOHN C. FORD, S.J.†

*"The genesis, the growth, the function and the end of law—the terms seem general and abstract, too far severed from realities, raised too high above the ground, to interest the legal wayfarer. But believe me it is not so. It is these generalities and abstractions that give direction to legal thinking, and sway the minds of judges, that determine, when the balance wavers, the outcome of the doubtful lawsuit. Implicit in every decision where the question is, so to speak, at large, is a philosophy of the origin and aim of law, a philosophy which, however veiled, is in truth the final arbiter. . . . Often the philosophy is ill coördinated and fragmentary. Its empire is not always suspected even by its subjects. Neither lawyer nor judge, pressing forward along one line or retreating along another, is conscious at all times that it is philosophy which is impelling him to the front or driving him to the rear. None the less, the goad is there."*—CARDOZO.

## I.

THERE seems to be unanimity on one point with regard to Oliver Wendell Holmes, Jr., the late Justice of the Supreme Court of the United States. No one man has had greater influence than he on the ethico-legal tendencies of our generation. He made his first deep impression on jurisprudence when he published his classic *The Common Law* in 1881, and the years that have passed since then have only deepened his influence and strengthened his position in the eyes of the legal world generally.

Felix Frankfurter says, "The waters of law are unwontedly alive. New winds are blowing on old doctrines, the critical spirit infiltrates traditional formulas, philosophic inquiry is pursued without apology as it becomes clear that decisions [of the courts] are functions of some juristic philosophy." And again, "He [Holmes] above all others has given the directions of contemporary jurisprudence. He wields such a powerful influence upon today because his deep knowledge of yesterday enables him to

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In this article the following abbreviated citations will be used. HOLMES, COLLECTED LEGAL PAPERS (1921) will be cited as C.L.P.; HOLMES, HIS BOOK NOTICES and UNCOLLECTED PAPERS (Shriver, ed. 1936) will be cited as H.B.N.; HOLMES-POLLOCK LETTERS (1941) will be cited as H.-P.L.; HOLMES, SPEECHES (1900) will be cited as H.S.; and HOLMES, THE COMMON LAW (1881) will be cited as H.C.L.

extricate the present from meaningless entanglements with the past and yet to see events in the perspective of history."<sup>1</sup>

Other leading thinkers deliver like encomiums. Roscoe Pound says, Holmes "has done more than lead American juristic thought of the present generation. Above all others he has shaped the methods and ideas that are characteristic of the present as distinguished from the immediate past."<sup>2</sup> Sir Frederick Pollock says, "What Holmes has done for the Common Law, taking it broadly and apart from obvious technical differences is much like what Savigny did for modern Roman law."<sup>3</sup> And Benjamin Cardozo: "He is today for all students of the law and for all students of human society the philosopher and the seer, the greatest of our age in the domain of jurisprudence and one of the greatest of the ages."<sup>4</sup>

If it is true that the decisions of the courts are ultimately based on some juristic philosophy, as Frankfurter says, and if this philosophy is in such large measure the philosophy of Holmes, it will be interesting to examine as well as we can what that philosophy is, at least in its fundamentals. The present paper will aim at expounding, therefore, some of Holmes' principal juristic views—his views on the nature of law, of right, of morality, of truth, and of man's place in the cosmos. For the most part I shall try to let Holmes speak for himself.

## II.

According to Holmes the essence of law is physical force. In maintaining this proposition he is earnest and consistent throughout his writing. Law is merely "a statement of the circumstances in which the public force will be brought to bear upon men through the courts."<sup>5</sup> The object of the study of law is "prediction, the prediction of the incidence of the public force through the instrumentality of the courts."<sup>6</sup> "A legal duty so-called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; and so of a legal right."<sup>7</sup> "Sovereignty is a form of power, and the will

1. Frankfurter, *The Early Writings of O. W. Holmes, Jr.* (1931) 44 HARV. L. REV. 717, 723.

2. Pound, *Judge Holmes' Contributions to the Science of Law* (1921) 34 HARV. L. REV. 449.

3. Pollock, *Ad Multos Annos* (1931) 31 COL. L. REV. 349.

4. Cardozo, *Mr. Justice Holmes* (1931) 44 HARV. L. REV. 682, 684.

5. H.B.N. 157 (in a letter to Dr. Wu). Cf. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 356 (1909).

6. C.L.P. 169.

7. C.L.P. 169.

of the sovereign is law because he has power to compel obedience or punish disobedience and for no other reason. 'The limits within which his will is law then, are those within which he has, or is believed to have power to compel or punish.'<sup>8</sup> It is a mere fiction philosophically and legally to say that the rules enforced by courts are law because they issue from the will of the sovereign *as law*.<sup>9</sup> From his earliest writings in the *American Law Review*, through his judicial decisions, and legal papers, and down to his latest letters to Pollock and Wu, Holmes has maintained this fundamental principle: that the essence of law is physical force—(although he would not be likely to use the word *essence*).<sup>10</sup>

From this doctrine it is logically only a step to the proposition that might makes right, or at least that might makes legal right. And Holmes was too consistent a thinker not to take the step. He says, "for legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear on those who do things said to contravene it. . . ."<sup>11</sup> Sir Frederick Pollock wrote and asked him in 1928 what he meant by the phrase "hypostasis of a prophecy"—saying he had never seen the word hypostasis used except in theological teaching. Holmes replied:

" . . . as to hypostasis—I don't remember ever using it but once; at first as an intentionally magniloquent and pedagogical answer to Pound's question: What is a right? And then in an article, as a real reduction of a right to its rudiments. It starts from my definition of law (in the sense in which it is used by the modern lawyer) as a statement of the circumstances in which the public force will be brought to bear upon men through the courts: that is the prophecy in general terms. Of course the prophecy becomes more specific to define a right. So we prophesy that the earth and sun will act towards each other in a certain way. Then we pretend to account for that mode of action by the hypothetical cause, the force of gravitation, which is merely the hypostasis of the prophesied fact and an empty phrase. So we get up the empty substratum *a right*, to pretend to account for the fact that the courts will act in a certain way. . . . I think our morally tinted words have caused a great deal of confused thinking."<sup>12</sup>

8. Holmes, Book Review (1871) 6 AM. L. REV. 593, reprinted in (1931) 44 HARV. L. REV. 788.

9. *Ibid.*

10. Cf. Frank, *Mr. Justice Holmes and Non-Euclidian Legal Thinking* (1932) 17 CORN. L. Q. 570; Cohen, *Justice Holmes and the Nature of Law* (1931) 31 COL. L. REV. 352, 357; Wu, *The Juristic Philosophy of Justice Holmes* (1923) 21 MICH. L. REV. 523, 530; Frankfurter, *Mr. Justice Holmes and the Constitution* (1927) 41 HARV. L. REV. 121, 157: "Jurisdiction rests ultimately on power but there may be moral restraints upon its abstract scope." See also H.B.N. 187.

11. C.L.P. 313; Wu, *loc. cit. supra* note 10, at 531. Wu agrees with Holmes.

12. 2 H.-P.L. 212.

In a subsequent letter Sir Frederick agreed that this was the proper analysis of juridical right.<sup>13</sup> Roscoe Pound also praises him for seeing through the "pseudo-concept of 'a right',"<sup>14</sup> as does Wu.<sup>15</sup>

Holmes was always the enemy of absolute rights of any kind.<sup>16</sup> When, as Chief Justice of the Supreme Court of Massachusetts he was called upon to answer Resolutions of the Bar on the death of Justice W. A. Field, he remarked incidentally, by way of disagreement with the juristic thought of the deceased, ". . . he seemed to me to conceive of the law as ideally, at least, embodying absolute right."<sup>17</sup> In a United States Supreme Court

13. *Id.* at 214.

14. Pound, *loc. cit. supra* note 2, at 452.

15. Wu, *loc. cit. supra* note 10, at 531.

16. C.L.P. 310; Laski, *The Political Philosophy of Mr. Justice Holmes* (1931) 40 YALE L. J. 683. The following excerpt from Laski is a good summary of Holmes' attitude toward absolutist ideas, and of his general philosophy of law:

"The keynote of Mr. Justice Holmes' political outlook is a rejection of absolutist concepts. All principles are true in merely a relative way. The individual is not a subject of rights which the state is not entitled to invade. Men are social animals; and what they are entitled to do is a matter of degree, born of experience in some particular time and place. Man may be an end to himself; to society, he is but a means likely enough to be used for purposes he may passionately deny. We are not entitled to formulae of any kind for the simple reason that the things we cannot help believing to be true are not necessarily the inescapable laws of the universe. Our code of behavior, for him, is simply 'a body of imperfect social generalizations expressed in terms of emotion,' adequate only as they are capable of quantitative tactical confirmation. [HOLMES, COLLECTED LEGAL PAPERS (1921) 306.] There is never in any society a single body of agreed desires, but always conflicting purposes usually attainable only by inconsistent means. At the bottom of social life there lies always this inescapable battle of human wills; and the decision is reached by the power which one set of men uses to vindicate its superiority over another set. There is, in short, in Mr. Justice Holmes a Spinoza proclaiming that might gives to right its letters of credit; and that realism refuses the admission of ultimates as attainable in political philosophy.

"So he rejects the idea of natural law. [*Ibid.* 301 ff.] It is no more than man's restless craving for the superlative, and, at bottom, it means no more than the system which has become so fully a part of our intellectual climate that we cannot work our institutions successfully except upon its assumptions. And with the idea of natural law there goes also the idea of rights which, a little scornfully perhaps, he has defined as the 'hypostasis of a prophecy.' Rights, for him, are claims of which the validity is proved by their capacity to realize themselves. They state our desires; they leave behind them no more than what he has called 'the fighting will of the subject to maintain them.' [*Ibid.* 313.] He rejects, accordingly, any attempt at a *priorism*. Rights are not the postulates of a pre-existing framework within which law must work. They are the product of law, maintained as the possession of citizens because that part of the community which has the power to maintain them is prepared to fight to that end. Law, therefore, becomes the expression of the will of the stronger part of society; and the state is the organization of the institutions which give form and coherence to the expression so maintained." *Id.* at 685-686.

17. H.S. 78.

opinion<sup>18</sup> he remarked that "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy. . . ."<sup>19</sup> Cardozo says of him, "No one has labored more incessantly to demonstrate the truth that rights are never absolute, though they are ever struggling and tending to declare themselves as such."<sup>20</sup> The closest he comes to maintaining an absolute right is in the case of free speech—but even that is limited by the necessity of preserving public order and preventing bloodshed.<sup>21</sup> And Holmes logically would not declare it to be an "almost absolute" right, but would simply maintain that in his opinion it ought to be almost absolute. And the reason why so-called rights are not absolute is the fundamental one that *force* makes legal rights. He says, "Just so far as the aid of the public force is given a man he has a legal right, and this right is the same whether his claim is founded in righteousness or iniquity."<sup>22</sup>

### III.

It is clear that in a system in which law and rights are based essentially on physical power the divorce between the legal order and the ethical or moral order is complete. We do not have to make this inference in the case of Holmes, for he states it himself explicitly and makes it a cardinal point of his juristic philosophy. He calls attention to the many "evil effects of the confusion between legal and moral ideas".<sup>23</sup> "I think it desirable at once to point out and dispel a confusion between morality and law, which sometimes rises to the height of conscious theory. . . ."<sup>24</sup>

"If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. The theoretical importance of the distinction is no less, if you would reason on your subject aright. The law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly before our minds. The law talks about right, and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say,

18. *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355 (1908).

19. Frankfurter, *The Constitutional Opinions of Justice Holmes* (1923) 29 HARV. L. REV. 683, 687.

20. Cardozo, *loc. cit. supra* note 4, at 687.

21. Cardozo, *id.*, at 688.

22. H.C.L. 213, 214.

23. C.L.P. 168.

24. *Id.* at 169.

more common in legal reasoning, than to take these words in their moral sense, at some stage of the argument, and so to drop into fallacy. For instance, when we speak of the rights of man in a moral sense, we mean to mark the limits of interference with individual freedom which we think are prescribed by conscience, or by our ideal, however reached. Yet it is certain that many laws have been enforced in the past, and it is likely that some are enforced now, which are condemned by the most enlightened opinion of the time, or which at all events pass the limit of interference as many consciences would draw it. Manifestly, therefore, nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law. No doubt simple and extreme cases can be put of imaginable laws which the statute-making power would not dare to enact, even in the absence of written constitutional prohibitions, because the community would rise in rebellion and fight; and this gives some plausibility to the proposition that the law, if not a part of morality, is limited by it. But this limit of power is not coextensive with any system of morals. For the most part it falls far within the lines of any such system, and in some cases may extend beyond them, for reasons drawn from the habits of a particular people at a particular time. 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. A statute in such a case would be empty words, not because it was wrong, but because it could not be enforced. No one will deny that wrong statutes can be and are enforced, and we should not all agree as to which were the wrong ones."<sup>25</sup>

Holmes substantiates this view of the separation of law and morality by many examples,<sup>26</sup> of which the best perhaps is his idea of the duties involved in a contract. He says:

"Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so-called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else. If you commit a tort you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference [between the two]. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can. It was good enough for Lord Coke, however, and here, as in many other cases, I am content to abide with him."<sup>27</sup>

"I hope that my illustrations have shown the danger, both to speculation and to practice, of confounding morality with law, and the trap which legal language

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25. *Id.* at 171.

26. *Id.* at 172 *et seq.*; H.C.L. 5, 37, 38, 130, 324.

27. H.C.L. 301; C.L.P. 174, 175.

lays for us on that side of our way. For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in clearness of our thought."<sup>28</sup>

But Holmes wants to make it clear to those whom he is addressing that his divorcing morality utterly from the law is not meant to be a disparagement of morality or of the part it has played in the formation of the law.

"I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism. The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men. 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. For that purpose you must definitely master its specific marks, and it is for that I ask you for the moment to imagine yourselves indifferent to other and greater things."<sup>29</sup>

Now the greater things to which Holmes refers here, are, of course, morality, ethics, conscience. After teaching us that the law itself is sheer physical force, and that all moral concepts must be eliminated from it, let us see what Holmes teaches us as to the nature of this morality which is so rigidly excluded from the juridical order. What is it? And what is its value?

According to Holmes there is no such thing as morality in the traditional sense of that word, because there is no omnipotent personal God whose will could be the basis of what we know as moral obligation. But even leaving God out of it, Holmes does not admit any morality in the sense of an imperative oughtness which has any absolute or objective validity. The moral *ought* is just as much a fiction for him as the concept of a legal right. For he admits no natural law of any kind. He wrote his essay "Natural Law" in 1918 to show that the idea of natural law was a product of mere wishful thinking.<sup>30</sup> This essay is not merely cynical

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28. C.L.P. 179. Tufts disagrees with Holmes' separation of law and morals in Tufts, *Legal and Social Philosophy of Mr. Justice Holmes* (1921) 7 A. B. A. J. 362. Frank compares Holmes with Machiavelli in this regard, praising them both. Frank, *loc. cit. supra* note 10, at 568.

29. C.L.P. 170.

30. C.L.P. 310.



bravado. It is perfectly consistent with the views of his whole life. He refers young Dr. Wu to it as one of the starting points of his whole philosophy.

He says:

"The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."<sup>31</sup> "It is not enough for the knight of romance that you agree that his lady is a very nice girl—if you do not admit that she is the best that God ever made or will make, you must fight. There is in all men a demand for the superlative, so much so that the poor devil who has no other way of reaching it attains it by getting drunk. It seems to me that this demand is at the bottom of the philosopher's effort to prove that truth is absolute and of the jurist's search for criteria of universal validity which he collects under the head of natural law."<sup>32</sup>

To the possible objection that at least there are some fundamental interests which must be regarded as natural rights, or institutions which must be regarded as demanded by natural law, Holmes says:

"No doubt it is true that, so far as we can see ahead, some arrangements and the rudiments of familiar institutions seem to be necessary elements in any society that may spring from our own and that would seem to us to be civilized—some form of permanent association between the sexes—some residue of property individually owned—some mode of binding oneself to specified future conduct—at the bottom of all, some protection for the person. But without speculating whether a group is imaginable in which all but the last of these might disappear and the last be subject to qualifications that most of us would abhor, the question remains as to the *Ought* of natural law.

"It is true that beliefs and wishes have a transcendental basis in the sense that their foundation is arbitrary. You can not help entertaining and feeling them, and there is an end of it. As an arbitrary fact people wish to live, and we say with various degrees of certainty that they can do so only on certain conditions. To do it they must eat and drink. That necessity 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. Reason working on experience does tell us, no doubt, that if our wish to live continues, we can do it only on those terms. But that seems to me to be the whole of the matter. I see no *a priori* duty to live with others and in that way, but simply a statement of what I must do if I wish to remain alive. If I do live with others they tell me that I must do and abstain from doing various things or they will put the screws on to me. I believe that they will, and being

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31. *Id.* at 312.

32. *Id.* at 310.

of the same mind as to their conduct I not only accept the rules but come in time to accept them with sympathy and emotional affirmation and begin to talk about duties and rights. . . . No doubt, behind . . . 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 pre-existing right. A dog will fight for his bone.

"The most fundamental of the supposed pre-existing rights—the right of life—is sacrificed without a scruple not only in war, but whenever the interest of society, that is, of the predominant power in the community, is thought to demand it. Whether that interest is the interest of mankind in the long run no one can tell, and as, in any event, to those who do not think with Kant and Hegel, it is only an interest, the sanctity disappears."<sup>33</sup>

From this passage and others we see that for Holmes morality in the sense of imperative obligation has no objective validity at all.<sup>34</sup> He says by way of definition: "Our system of morality is a body of imperfect social generalizations expressed in terms of emotion."<sup>35</sup> And later in a letter to Pollock he says that ethics is a set of imperfect social generalizations expressed in terms of emotion.<sup>36</sup> Morris Cohen sums it up. In Holmes' view—and Cohen seems to agree with him:

"Our most fundamental beliefs are the expression of our inborn character and limited experience. Some of these, like the principles of morality, may have tremendous emotional sanctions; but intellectual honesty compels us to admit that such first principles must in the nature of the case be literally *prejudices*, i.e., judgments in advance of experience." "When our fundamental preferences conflict sufficiently it may be my life against yours."<sup>37</sup>

It comes down to this: "Morally good" and "morally bad" merely mean ultimately, "I like it" and "I don't like it", and have the same objective worth as a statement which expresses a like or a dislike for a glass of beer. Writing to Lady Pollock, Holmes tells her of a book he had been reading which apparently dealt with Lesbian practices. He says that however much we may deprecate such things, in the last analysis it is a matter of taste. Some people like sugar in their coffee, others don't. That

33. *Id.* at 312.

34. H.C.L. 38, 219. Cf. 1 H.-P.L. 157: "The *Inferno* postulates that sin is a fundamental reality, that men by their free will choose it, that God hates them, and that we are quite right in spitting on them and lying to them. As one doesn't look at things in quite that way one reads with a dilettante appreciation only, as the alternative to loathing. . . ."

35. C.L.P. 306.

36. 2 H.-P.L. 3.

37. Cohen, *Justice Holmes* (1921) 25 NEW REPUBLIC 294.

is the end of it. Approving or disapproving of Lesbianism has the same objective value ultimately as liking or not liking sugar in coffee.<sup>38</sup> And writing to Dr. Wu in 1926 he says:

"I don't believe that it is an absolute principle or even a human ultimate that man always is an end in himself—that his dignity must be respected, etc. We march up a conscript with bayonets behind to die for a cause he doesn't believe in. And I feel no scruples about it. Our morality seems to me only a check on the ultimate domination of force, just as our politeness is a check on the impulse of every pig to put his feet in the trough. When the Germans in the late war disregarded what we called the rules of the game, I don't see there was anything to be said except: we don't like it and shall kill you if we can. So when it comes to the development of a *corpus juris* the ultimate question is what do the dominant forces of the community want and do they want it hard enough to disregard whatever inhibitions may stand in the way."<sup>39</sup>

#### IV.

So far then, we have learned from Holmes that the essence of law is physical force, that might makes legal right, that law must be regarded as divorced from all morality, and that there is no such thing as traditional morality anyway. There is merely a set of emotional prejudices, some of which seem so important to us that we will kill others to maintain them.

Now let us see something of what he has to say about the nature of truth and of the Cosmos.

Just as there are no absolute rights, whether legal or moral, so there is no such thing as absolute truth. It is all relative, and subjective.

"Certitude is not the test of certainty. We have been cock-sure of many things that were not so. . . . What we most love and revere generally is determined by early associations. . . . But while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else. And this again means scepticism. Not that one's belief or love does not remain. Not that we would not fight and die for it if important—we all, whether we know it or not, are fighting to make the kind of a 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. 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 kill the other man rather than let him have his way. But that is perfectly consistent

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38. 1 H.-P.L. 105.

39. H.B.N. 187.

with admitting that, so far as appears, his grounds are just as good as ours."<sup>40</sup>

Not only is truth relative but what value it has is largely constituted by the physical force behind it. Holmes says:

"I used to say, when I was young, that truth was the majority vote of that nation that could lick all others. Certainly we may expect that the received opinion about the present war [World War I] will depend a good deal upon which side wins (I hope with all my soul it will be mine), and I think that the statement was correct in so far as it implied that our test of truth is a reference to either a present or an imagined future majority in favor of our view. If, as I have suggested elsewhere, the truth may be defined as the system of my (intellectual) limitations, what gives it objectivity is the fact that I find my fellow man to a greater or less extent (never wholly) subject to the same *Can't Helps*. If I think that I am sitting at a table I find that the other persons present agree with me; so if I say that the sum of the angles of a triangle is equal to two right angles. If I am in a minority of one they send for a doctor or lock me up; and I am so far able to transcend the to me convincing testimony of my senses or my reason as to recognize that if I am alone probably something is wrong with my works."<sup>41</sup>

Thomas Vernor Smith admires this sceptical attitude of Holmes, and finds in it (the majority opinion part):

"[the] formal charter for democracy. The formal democratic demand is for majority rule. 'Our test of truth,' he [Holmes] adds as the permanent value of his earlier bravado definition of truth 'is a reference to either a present or an imagined future majority in favor of our view.' Now from one who finds nothing sacred about even an individual life, you will certainly not expect to find anything sacred about a majority. . . . But there is something singularly convenient about a majority. . . . Justice Holmes finds convenience next to godliness, roughly identifying the law therewith. Now the first convenience of the majority is that it is powerful; and even if we sharply distinguish might and right, as we have seen the Justice does not, nothing so adds to the dignity of right as power enough to make itself triumphant. 'If the welfare of the living majority is paramount,' he admits, 'it can only be on the ground that the majority have the power in their hands.'<sup>42</sup>

To Holmes truth is merely the system of his own intellectual limitations. Truth is "merely my *can't help*, which has validity for my world—but which I can't assert concerning *the* world if there is one."<sup>43</sup> He

40. C.L.P. 311.

41. *Id.* at 310. Compare 2 H.-P.L. 255.

42. SMITH, CREATIVE SCEPTICS ETC. (1934) 221. *Cf. id.* at 193.

43. 1 H.-P.L. 122.

reiterates this theme endlessly.<sup>44</sup> And it is this sceptical attitude that gives him standing with some of his modern admirers.<sup>45</sup> They quote over and over again with delight his aphorism: "To have doubted one's own first principles is the mark of a civilized man."<sup>46</sup>

Holmes' relativistic, or subjective, or sceptical view of truth is one of the characteristics of his writings at all periods. The following excerpt from a letter to Lady Pollock, though written in 1901, is typical and summarizes his views. He says:

"[I have read] some mystical works of men seeking to lift themselves by the slack of their own breeches, and demanding that the final compulsions under which we reason, love, etc. should be admitted as of cosmic validity. I stop short of that. All I mean by truth is the road I can't help travelling. What the worth of that *can't help* may be I have no means of knowing. Perhaps the universe, if there is one, has no truth outside of the finiteness of man."<sup>47</sup>

Holmes would not call himself an idealist, or a pragmatist according to the mind of his friend William James. He characterized James' pragmatism and most of his other writing as *humbug*—a word which was often on his lips.<sup>48</sup> But he would call himself a sceptic, and his scepticism comes close to being universal, for he does not even admit the validity of the principle of contradiction as absolute.<sup>49</sup>

His scepticism shows itself in his view of the law and his view of the Cosmos.

It is his scepticism that appeals to men like Frankfurter, Wu, Jerome Frank, Thomas Vernon Smith. Frankfurter says of Holmes that because "his mind is scrupulously sceptical, he has escaped sterile dogma and romantic impressionism."<sup>50</sup> And again: "For Mr. Justice Holmes 'principles' are rarely absolute. Usually they are sententious expressions of conflicting or at least overlapping policies."<sup>51</sup> Tufts compares Holmes to William James and explains their sceptical attitude by the fact that they came to maturity at a time when evolutionary theory was upsetting the

44. *Id.* at 126, 139, 140; 2 H.-P.L. 25; also C.L.P. 304, 305.

45. FRANK, *LAW AND THE MODERN MIND* (1930) 245.

46. C.L.P. 307.

47. 1 H.-P.L. 99-100.

48. *Id.* at 138, 140, 168, 180, 191, 192; 2 H.-P.L. 19. *Cf.* SMITH, *op. cit. supra* note 42, at 198.

49. 2 H.-P.L. 250.

50. Frankfurter, *loc. cit. supra* note 1, at 723.

51. Frankfurter, *loc. cit. supra* note 10, at 133; Frankfurter also shows a similarity of philosophic outlook between Holmes and Santayana, in Frankfurter, *loc. cit. supra* note 19, at 699.

certainties of the ages. They were both intent on shaking off authority and exposing the fallacies of absolutism.<sup>52</sup> Holmes speaks of Malthus more than once as a sad example of how a man can tell people the truth and prove it to them, but not convince them because they prefer not to hear what is unpleasant.

Holmes' scepticism made him look upon the idea of certainty in the law as an illusion.<sup>53</sup> The fruits of his philosophy appear in writers like Jerome Frank who tell us that the basic myth in legal thinking has been that there can be or should be certainty in the law. "The modern mind is a mind free of childish emotional drags—a mature mind."<sup>54</sup> It is free of the longing for father-authority and certainty in the law.<sup>55</sup> Holmes is the completely adult jurist, the inventor of non-Euclidian legal thinking.<sup>56</sup> Holmes has been telling us for fifty years in effect, says Frank, that (in legal matters) "the Golden Rule is that there is no Golden Rule."<sup>57</sup>

As to the Cosmos, as far back as 1895, in a Memorial Day address he spoke as follows:

"[Science] has shaken established religion in the minds of very many. It has pursued analysis until at last this thrilling world of colors and sounds and passions has seemed fatally to resolve itself into one vast network of vibrations endlessly weaving an aimless web, and the rainbow flush of cathedral windows, which once to enraptured eyes appeared the very smile of God, fades slowly out into the pale irony of the void."<sup>58</sup>

And in 1925 in a letter to Pollock:

"I think the proper attitude is that we know nothing of cosmic values and bow our heads—seeing reason enough for doing all we can and not demanding the plan of campaign of the General—or even asking whether there is any general or any plan. It is enough for me that this universe can produce intelligence, ideals, etc.—*et superest ager*. It seems to me most probable that our ultimates are not cosmic ultimate but something less."<sup>59</sup>

52. Tufts, *loc. cit. supra* note 28, at 359.

53. *Id.* at 359, 360.

54. Frank, *op. cit. supra* note 45, at 252.

55. *Id.* at 252, 260.

56. Frank, *loc. cit. supra* note 10, at 571, 572-579.

57. Frank, *op. cit. supra* note 45, at 260. Holmes did not believe in the Golden Rule of the Gospel either. See H.B.N. 178 (in a letter to Wu).

58. H.S. 57, an excerpt from a Memorial Day address to Harvard graduates in 1895.

59. 2 H.-P.L. 163; H.S. 45, 80, 81 and *passim*. Cf. Smith, *op. cit. supra* note 42, at 203: "War" writes he [Holmes] in terrible earnestness, 'when you are at it is horrible and dull. It is only when time has passed that you see its message is divine.' For either it or 'some teacher of the kind,' he goes on to declare, 'we all need. . . . We need it everywhere and at all times. For high and dangerous action teaches us to believe as right beyond dispute

To Dr. Wu in 1923 he wrote:

"I don't believe or know anything about absolute truth. I hinted at my generalities in 'Ideals and Doubts' and 'Natural Law' in the same book. I noticed once that you treated it as a joke when I asked how you knew that you weren't dreaming me. I am quite serious, and as I have put it in an article referred to above, we begin with an act of faith, with deciding that we are not God, for if we were dreaming the universe we should be God so far as we knew. You never can prove that you are awake. By an act of faith I assume that you exist in the same sense that I do and by the same act assume that I am in the universe and not it in me. I regard myself as a cosmic ganglion—a part of an unimaginable and don't venture to assume that my *can't helps* which I call reason and truth are cosmic *can't helps*. I know nothing about it. . . ."60 "The only cosmic possibilities that I know anything about are the actualities. I do not know whether our ultimates such as good and bad, ideals, for the matter of that, consciousness, are cosmic ultimates or not. They seem to me to bear marks of the human and the finite. All that I know is that they are ultimates for us."<sup>61</sup>

In 1924 he wrote—at the age of eighty-three: "If I were dying my last words would be: Have faith and pursue the unknown end."<sup>62</sup> And in 1929, a few years before his death:

"I may work for a year or two but I cannot hope to add much to what I have done. I am too sceptical to think that it matters much, but too conscious of the mystery of the universe to say that it or anything else does not. I bow my head, I think serenely and say, as I told someone the other day, O Cosmos—Now lettest thou thy ganglion dissolve in peace."<sup>63</sup>

## V.

Holmes' general scepticism and materialism lead him to take a view of man and human life which does not flatter the egotism of human nature. "It seems to me probable that the only cosmic significance of man is that he is part of the cosmos but that seems to me enough."<sup>64</sup> And in another letter to Pollock when he was eighty-eight years old: "I see no reason for attributing to man [in the cosmos] a significance different in kind from that which belongs to a baboon or a grain of sand."<sup>65</sup> In a letter to Dr. Wu written when he was eighty-five he says:

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things for which our doubting minds are slow to find words of proof.'" It is Smith's opinion that these sentiments differ radically from those of a Hitler, a Stalin, a Mussolini.

60. H.B.N. 165. Cf. C.L.P. 304, 315; H.S. 23.

61. H.B.N. 166.

62. *Id.* at 175.

63. *Id.* at 202.

64. 2 H.-P.L. 13.

65. *Id.* at 252. In this letter Holmes seems to deny free will.

"I believe that we are in the universe, not it in us, that we are part of an unimaginable, which I will call a whole, in order to name it, that our personality is a cosmic ganglion, that just as when certain rays meet and cross there is white light at the meeting point, but the rays go on after the meeting as they did before, so, when certain other streams of energy cross, the meeting point can frame a syllogism or wag its tail. I never forget that the cosmos has the power to produce consciousness, intelligence, ideals out of a like course of its energy, but I see no reason to assume that these ultimates for me are cosmic ultimates. I frame no predicates about the cosmos. I suspect that all my ultimates have the mark of the finite upon them, but as they are the best I know I give them practical respect, love, etc., but inwardly doubt whether they have any importance except for us and as something that with or without reasons the universe has produced and therefore for the moment has sanctioned. We must be serious in order to get work done, but when the usual Saturday half holiday comes I see no reason why we should not smile at the trick by which nature keeps us at our job. It makes me enormously happy when I am encouraged to believe that I have done something of what I should have liked to do, but in the subterranean misgivings I think, I believe that I think sincerely, that it does not matter much. This is private talk, not to be quoted to others, for one is shy and sensitive as to one's inner convictions, except in those queer moments when one tells the world as poets and philosophers do."<sup>66</sup>

In the same year writing to Pollock:

"I often say over to myself the verse 'O God be merciful to me a fool,' the fallacy of which to my mind (you won't agree with me) is in the 'me,' that it looks on man as a little God over against the universe, instead of as a cosmic ganglion, a momentary intersection of what humanly speaking we call streams of energy, such as gives white light at one point and the power of making syllogisms at another, but always an inseverable part of the unimaginable, in which we live and move and have our being, no more needing its mercy than my little toe needs mine. It would be well if the intelligent classes could forget the word sin and think less of being good. We learn how to behave as lawyers, soldiers, merchants or what not by being them. Life, not the parson, teaches conduct."<sup>67</sup>

He believes thoroughly that behavior, or functioning (or life *in actu secundo* as we should say) is the thing that counts. The question as to whether life is worth living depends entirely on how much you have lived, i.e., acted, or functioned. Philosophizing on victuals, procreation, sleep, etc. in a letter to Pollock he writes: ". . . life is an end in itself. Functioning is all there is—only our keenest pleasure is in what we call the

66. H.B.N. 185. Cf. 1 H.-P.L. 182; C.L.P. 315, 316.

67. 2 H.-P.L. 178; cf. *id.* at 152.



higher sort. I wonder if cosmically an idea is any more important than bowels."<sup>68</sup> And again in a speech on the death of his law partner George Otis Shattuck: "I know of no true measure of men except the total of human energy which they embody. . . . The final test of this energy is battle in some form."<sup>69</sup>

The idea of battle struggle, force, is most prominent. "For my own part, I believe that the struggle for life is the order of the world, . . . Sooner or later we shall fall; but meantime it is for us to fix our eyes upon the point to be stormed, and to get there if we can."<sup>70</sup> The doctrines of Malthus appeal to him: "Malthus pleased me immensely—and left me sad. A hundred years ago he busted fallacies that politicians and labor leaders still live on."<sup>71</sup> He would "let Malthus loose" on those who contribute neither "thought nor beauty to life."<sup>72</sup>

To Holmes the sanctity of human life is much overrated.

"I hardly think of man as so sacred an object as Laski seems to think him. I believe that Malthus was right in his fundamental notion, and that is as far as we have got or are likely to get in my day. Every society is founded on the death of men. In one way or another some are always and inevitably pushed down the dead line. I think it a manifest humbug to suppose that even relative universal bliss is to be reached by tinkering with property or changing forms of government so long as every social improvement is expended in increased and unchecked propagation. I shall think socialism begins to be entitled to serious treatment when and not before it takes life in hand and prevents the continuance of the unfit."<sup>73</sup>

As to regarding man as an end in himself:

"I confess that I rebel at once [against the Kantian injunction to regard every human being as an end in himself and not as a means]. If we want conscripts we march them up to the front with bayonets in their rear to die for a cause in which perhaps they do not believe. The enemy we treat not even as a means but as an obstacle to be abolished, if so it may be. I feel no pangs of conscience over either step. . . ."<sup>74</sup>

He believes, therefore, that man is a means, at least as far as the state is concerned.

68. *Id.* at 22.

69. H.S. 73.

70. H.S. 58.

71. 1 H.-P.L. 219.

72. Smith, *op. cit. supra* note 42, at 191.

73. H.B.N. 181. *Cf.* C.L.P. 306; 2 H.-P.L. 41.

74. C.L.P. 304, 314; 1 H.-P.L. 221; H.B.N. 187; H.C.L. 43.

"The dogma of equality [that the members of all free communities have equal rights to life, liberty and personal security] makes an equation between individuals only, not between an individual and the community. No society has ever admitted that it could not sacrifice individual welfare to its own existence. If conscripts are necessary for its army, it seizes them, and marches them, with bayonets in their rear, to death."<sup>75</sup>

And even between individuals the dogma of equality can be applied only within the limits of ordinary dealings in the common run of affairs.

"It seems to me clear that the *ultima ratio*, not only *regum*, but of private persons, is force, and that at the bottom of all private relations, however tempered by sympathy and all the social feelings, is a justifiable self-preference. If a man is on a plank in the deep sea which will only float one, and a stranger lays hold of it, he will thrust him off if he can. When the state finds itself in a similar position, it does the same thing."<sup>76</sup>

These words were written in 1881. He had not changed his mind in 1920. Writing to Pollock in that year he says:

"I loathe war. . . . But I do think that man at present is a predatory animal. I think that the sacredness of human life is a purely municipal ideal of no validity outside the jurisdiction. I believe that force, mitigated so far as may be by good manners is the *ultima ratio*, and between two groups that want to make inconsistent kinds of world I see no remedy except force. . . . It seems to me that every society rests on the death of men. . . ."<sup>77</sup>

And in the following letter Pollock agrees with him: There is too much fuss about the sanctity of human life.

## VI.

It would be an injustice to Holmes if I were to leave my readers with the impression that the above excerpts represent his whole philosophy.<sup>78</sup> He had a way of life as well as a philosophy of law. And he had a philosophy of judicial decision, standards of judicial conduct, standards of Constitutional interpretation, all of which would have to be analyzed by one who wanted a complete picture of the man. After all he was a great

75. H.C.L. 43.

76. *Id.* at 44.

77. 2 H.-P.L. 36, 41.

78. At times I have set down side by side, without indicating the dates, excerpts from Holmes which are very distant from one another chronologically. But the result, it is hoped, has not been an unfair or distorted summary of his fundamental philosophy. He was singularly consistent in most of these fundamentals from the beginning—even before he wrote *THE COMMON LAW*.

judge, the champion of free speech and of social reform legislation. After all he was a human character who apparently inspired the deepest esteem and respect of those who came in contact with him. After all he was an incredibly well read scholar, a hard consistent thinker, and a sincere, honest man.

But it did not come within the scope of the present paper to present the more particular aspects of his philosophy of life;<sup>79</sup> his reactions to existing institutions, to particular religions;<sup>80</sup> or his views on other philosophers past and present.<sup>81</sup>

It did not seem advisable either to enter into that vast field, the philosophy of our Constitutional law.<sup>82</sup> When you read his opinions and dissents

79. See for example H.S. 82 *et seq.* After groping for a philosophy of life you find: ". . . the triune formula of the joy, the duty, and the end of life. . . . The joy of life is to put out one's power in some natural and useful or harmless way. There is no other. The rule of joy and the law of duty seem to me all one. I confess that altruistic and cynically selfish talk seem to me about equally unreal. With all humility, I think 'Whatsoever thy hand findeth to do, do it with thy might' infinitely more important than the vain attempt to love one's neighbor as one's self. If you want to hit a bird on the wing you must have all your will in a focus, you must not be thinking about yourself, and, equally, you must not be thinking about your neighbor; you must be living with your eye on that bird. Every achievement is a bird on the wing. The joy, the duty, and I venture to add the end of life. I speak only of this world, of course, and of the teachings of this world. I do not seek to trench upon the province of spiritual guides. But from the point of view of the world the end of life is life. Life is action, the use of one's powers. . . . Life is an end in itself and the only question as to whether it is worth living is whether you have enough of it. I will add but a word. We all are very near despair . . . but these thoughts have carried me, as I hope they will carry the young men who hear me, through long years of doubt, self-distrust, and solitude." And see Smith, *op. cit. supra* note 42, at 305: "'I rejoice at every dangerous sport which I see pursued. The students of Heidelberg with their sword-slashed faces inspire me with sincere respect'. If this seems barbaric to you, my peaceful reader, just remember that Holmes like his friend James in 'The Moral Equivalent of War' sees war permanently necessitated *on moral grounds*. . . ." See also Smith, *op. cit. supra* note 42, at 181, for the influence of Holmes' Civil War experience on his philosophy of life; and *id.*, at 216 for a summary of his philosophy.

80. Smith says that in Holmes' writings there are few echoes of God, freedom, immortality, and similar ideas. "He was relatively insensitive to these even when as youths he and James discussed high things." *Id.*, at 213. Various passages in the *Holmes-Pollock Letters* indicate his reactions to religious things; for example, 1 H.-P.L. 62, 77, 152, 161, 185, 243; 2 H.-P.L. 8, 207, and *cf.* 1 H.-P.L. 174. See also H.B.N. 178, 160; H.S. 27, 50.

81. For some of his opinions of philosophers see, for example, 1 H.-P.L. 188; 2 H.-P.L. 8, 26, 27, 132, 141, 152, 283, 287. In H.B.N., at 159 and 192 (letters to Wu) he shows his recognition of Spinoza's influence, and has great praise for the philosophy of John Dewey. In H.S. 21, he testifies to a dislike of the Puritan philosophy—the future lay with Bacon, Hobbes, Descartes, not with John Milton.

82. The works by Frankfurter mentioned in the bibliography, especially FRANKFURTER, *Mr. Justice Holmes and the Supreme Court* (1938), make a good starting point for a study in this field.

you do not often come across applications of his fundamental philosophy with which you have to disagree. He arrives at conclusions which recommend themselves to common sense—that is one of the features of his quasi-pragmatic philosophy: he can make it work in the society in which we live. But I prefer to leave it to some expert in Government and American Constitutional Law to discuss the bearing of his fundamental juristic tenets on his decisions there. The most notable trait is, of course, his implacable enmity for the absolute in any form. He does show this in his decisions a thousand times over.<sup>83</sup> And this goes hand in hand with his exaltation of public policy as the only principle that is worth anything.

But the fact that physical force is at the bottom of everything for him does not lead him to approve of murder and violence “within the jurisdiction”. The sanctity of human life may be only a “municipal ideal”, but it is protected by the municipal law under which we live—and as a judge he applies that law. And so of other things. Nothing could be farther from the truth than the impression that on the bench, with a case before him, he was a radical innovator, or a friend of physical force. It is superfluous really to point this out. We are all familiar with examples of philosophers who do not reduce to practice their speculations, or are able to evade the logical implications of what they teach when it comes to actual life.

It remains true however that in his fundamental jurisprudence, in the more general aspects of his philosophy of law, violence is the *ultima ratio*. And it is in these more fundamental aspects that I am interested—his final word on the nature of law, and of rights, and of morality, and of truth, and of human personality. Because I agree with Holmes that it is ideas that count in the long run. He quotes Hegel: “It is in the end not the appetite but the opinion, which has to be satisfied”; and then continues:

“To an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas. If you want great examples, read Mr. Leslie Stephen’s *History of English Thought in the Eighteenth Century*, and see how a hundred years after his death the abstract speculations of Descartes had become a practical force controlling the conduct of men. Read the works of the

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83. Frankfurter, *loc. cit. supra* note 1, at 724: “The philosopher’s stone which Mr. Justice Holmes has constantly employed for arbitrament is the conviction that our constitutional system rests upon tolerance and that its greatest enemy is the Absolute.

“In a thousand instances he has been loyal to his philosophy. Thereby he has resolved into comprehending larger truths the conflicting claims of state and nation, of liberty and authority, of individual and society.” See also Laski, *op. cit. supra* note 16.

great German jurists, and see how much more the world is governed today by Kant than by Bonaparte."<sup>84</sup>

Holmes recognizes "that most subtle and intoxicating authority which controls . . . the future from within by shaping the thoughts and speech of a later time".<sup>85</sup>

There can be no doubt about it. In the long run "decisions [of the courts] are functions of some juristic philosophy."<sup>86</sup> And Holmes "above all others has given the directions of contemporary jurisprudence."<sup>87</sup>

Holmes is the present god of the lawyers and legislators of the United States. The Law Schools worship at his shrine. No doubt many of those who lavish their praises upon him are thinking of his decisions with which they agree, rather than of his ultimate philosophy of which they are ignorant, or which they think can be taken with a grain of salt. But the great chorus of adulation comes from the thinkers in modern law. From Cardozo,<sup>88</sup> from Pollock,<sup>89</sup> and Wu,<sup>90</sup> from Walter Lippmann,<sup>91</sup> James H. Tufts,<sup>92</sup> Thomas Vernon Smith,<sup>93</sup> Learned Hand,<sup>94</sup> Clyde B. Aitchison,<sup>95</sup> Hessel Yntema,<sup>96</sup> Charles Evans Hughes,<sup>97</sup> Jerome Frank,<sup>98</sup> Morris Cohen,<sup>99</sup> John Dewey,<sup>100</sup> Roscoe Pound,<sup>101</sup> and many others. For the most part these men praise him as a philosopher of the law. And there are not many dissenters.<sup>102</sup>

84. C.L.P. 201. See also *id.* at 264, 281.

85. H.S. 54.

86. Frankfurter, *op. cit. supra* note 1, at 717.

87. *Id.* at 723.

88. See note 4, *supra*.

89. See note 3, *supra*.

90. Wu, *loc. cit. supra* note 10, at 523. And see the letters to Wu, *passim*, in H.B.N.

91. LIPPMANN, *MEN OF DESTINY* (1928).

92. Tufts, *loc. cit. supra* note 28, at 363 *ad fin.* But Tufts has some reservations to make especially on the question of the separation of law and morality.

93. Smith, *op. cit. supra* note 42, at 177 *et seq.*

94. Hand, *Mr. Justice Holmes* (1930) 43 HARV. L. REV. 857.

95. Aitchison, *Justice Holmes and the Development of Administrative Law* (1933) 1 GEO. WASH. L. REV. 166.

96. Yntema, *Mr. Justice Holmes' View of Legal Science* (1931) 40 YALE L. J. 696.

97. Hughes, *Justice Holmes at Ninety* (1931) 83 REVIEW OF REVIEWS 69 and Hughes, *Mr. Justice Holmes* (1931) 44 HARV. L. REV. 677.

98. Frank, *op. cit. supra* note 45, *passim*, and *op. cit. supra* note 10 at 568, especially 599.

99. Cohen, *Justice Holmes* (1935) 82 NEW REPUBLIC 206 and *op. cit. supra* note 37, at 294. Cohen does not approve, however, Holmes' views on the dignity of man.

100. Dewey, *Justice Holmes and the Liberal Mind* (1928) 53 NEW REPUBLIC 210.

101. See note 2, *supra*.

102. Lucy, S.J., Francis E., *Jurisprudence and the Future Social Order* (1941) 16 SOCIAL SCIENCE 211. This article calls attention to the totalitarian trend in Holmes' legal philos-

Let us quote Frankfurter again; he voices the sentiments of many of the others: "Through the essays [the essays from which I have extracted most of his teaching] a more rational direction, a healthier tone was given to legal science."<sup>103</sup> "He [Holmes] is a philosopher become king."<sup>104</sup> "For centuries men to whom he will be among the great, and men who never heard of him 'will be moving to the measure of his thought.'<sup>105</sup>

And let me summarize again the thought to whose measure we are going to move: The essence of law is physical force. Might makes legal right. The law is to be divorced from all morality. There is no such thing as a moral *ought*—it is a mere fiction. Ultimately there is only the physical necessity of behaving or being killed. There is no absolute truth. Man is a cosmic ganglion. His ideas probably have no more cosmic value than his bowels. He himself has no more cosmic significance than a baboon or a grain of sand. There is too much fuss about the sanctity of human life. To the state man is a means to be sacrificed if necessary in the interest of the state. The ultimate arbiter of all life is physical force. The ultimate *ratio decidendi* when men disagree is this, in Holmes' words: "We don't like it and shall kill you if we can."<sup>106</sup>

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