MR. JUSTICE HOLMES: SOME MODERN VIEWS

This symposium was prompted by the recent publication of the second volume of Mark DeWolfe Howe's biography of Mr. Justice Holmes* and of the Howe edition of The Common Law.** It was thought that the appearance of these works offered an excellent opportunity for a critique of Holmes' contributions to American jurisprudence.


THE JUDGE AS SPECTATOR

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I

To think about Mr. Justice Holmes is to fall under the spell of a favorite of the gods. Among judges he was granted a "preferred position": in his family background, his appearance, his powers of mind, his physical stamina and in the years that were allotted to him. Nor did his good fortune end when he died. His reputation has been the special concern of two men of extraordinary ability, for he attracted Mr. Justice Frankfurter as a follower and Professor Howe as his biographer.¹ Howe's second volume is exemplary; Morris Cohen never

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¹ It is emblematic of New England's best qualities that it was Howe's father who wrote the most interesting book about Holmes' father. Howe, Holmes of the Breakfast Table (1939).
fulfilled his prophetic role better than when he said, "I think men with genius for biography will be richly rewarded if they turn to the life of Justice Holmes." Unusual diligence and judgment inform Howe's conclusions; a classic clarity and grace enhance them. It is possible, in fact, to repeat the comparison Professor Kurland made in a review of Howe's first volume, for the second is equally distinguished by "a style of which Holmes could have been proud." Howe is writing one of those rare works that satisfy the highest standards both of history and of literature. Accordingly, it establishes entirely new standards for judicial biography.

The book begins in 1870 with Holmes' twenty-ninth year and it takes him through his appointment, in 1882, to the Supreme Judicial Court of Massachusetts. During this period Holmes edited the American Law Review, lectured on constitutional law and jurisprudence at Harvard College, issued the twelfth edition of Kent's Commentaries, practiced law and briefly held a professorship at the Harvard Law School. Most important of all, he delivered the lectures that became The Common Law.

Howe wisely decided to cover only twelve years in his second volume, and to "place a book, rather than a living person, at the center of the stage." (Howe's analysis of The Common Law takes up 117 of his 283 pages.) By 1881 Holmes had completely worked out a comprehensive and integrated way of looking at the world. From that perspective, he had achieved, in the most important book on law ever written by an American, a general statement of the common law conceived as a system resting on relatively few principles. It is not surprising that in the succeeding fifty years he often repeated the same positions and even the same sentences. The period is exceptionally important precisely because it is inaccurate to say that Holmes was one of those men who "like Einstein and Socrates . . . continue as long as they live . . . to revise mistaken views." Both as an aphorist and as a judge, Holmes rarely changed his mind. In part Holmes' later judicial reactions were poised and certain because in this period he had already worked out a system of basic principles.

It is interesting to notice, specifically, how Holmes applied those principles in his Supreme Court decisions, for he characteristically solved constitutional law problems by using common-law formulas. Consider,

2 COHEN, Oliver Wendell Holmes, in THE FAITH OF A LIBERAL 31 (1946).
for instance, Holmes' emphasis, in the Northern Securities case, on the meaning of a monopoly at common law, and, in Bailey v. Alabama, on the consequences of a breach of contract. Because the clear and present danger standard is a particularly good example, it is worth exploring here briefly, although a full account cannot be given. The defendants in the Schenck case, it will be recalled, were prosecuted for writing and distributing a circular. The statute under which they were charged was not, however, directly aimed at speech or at writing, but rather prohibited particular interferences or attempted interferences with the war. The standard suggested by Holmes derived from the analysis he had given of the law of attempts in 1881. In Schenck, "clear and present danger," "a question of proximity and degree" bridged the gap between the defendant's acts of publication and the "interferences" that the statute prohibited. This connection was strikingly similar to the Holmesian analysis of the requirement of "dangerous proximity to success" that, in the law of attempts, bridges the gap between the defendant's acts and the completed crime. In either context, innocuous efforts are to be ignored. Holmes had been distinctive in this approach to the law of attempts. The accepted analysis had required a specific intent to bring about a result that is an element of the crime. For Holmes, on the other hand, intent was significant only because it indicated the probability of external acts and actual harm. He was, therefore, able to reduce the law of attempts

6 Northern Sec. Co. v. United States, 193 U.S. 197 (1904).
7 219 U.S. 219 (1911).
10 249 U.S. 47, 52-53.
11 Hyde v. United States, 225 U.S. 347, 388 (1912) (dissenting opinion); cf. Holmes, The Common Law 56 (Howe ed. 1963) (hereinafter cited as Holmes). See also Commonwealth v. Peastee, 177 Mass. 267, 59 N.E. 55 (1901). For example in Commonwealth v. Kennedy, 170 Mass. 18, 20, 48 N.E. 770 (1897), Holmes said: "[A]s the aim of the law is not to punish sins, but is to prevent certain external results, the act done must come pretty near to accomplishing that result before the law will notice it."

In "modifying" the clear and present danger doctrine, Learned Hand to some extent reconstituted its original elements. Holmes referred to "the nearness of the danger, the greatness of the harm, and the degree of apprehension felt." Holmes 56. Compare "whether the gravity of the 'evil' discounted by the improbability . . . ." United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1951) (Hand, J).

12 For example, Austin had taken a position exactly opposite to Holmes. Austin had said that in attempt, we punish because of the intention and require an act as evidence of a firm intention. Austin, Jurisprudence 441 (5th ed. 1865); Holmes 54, citing 1 Bishop, Criminal Law § 735 (6th ed. 1877).

13 Holmes acknowledged one class of cases, interrupted acts, where it might be necessary to demonstrate that the actor actually intended to go on to complete the crime. However, here also, "[T]he accompanying intent in that case renders the otherwise innocent act harmful, because it raises a probability that it will be followed by such other acts and events as will all together result in harm. The importance of
to a measure of "objective" probability. It exemplified his proposition that an external standard of liability should govern the criminal law and torts. Holmes' overriding view was that the criminal law aimed to deter undesirable behavior, and he concluded, in a *non sequitur*, that it should draw an "external" line and punish anyone who, for whatever internal reason, overstepped that line. The law was concerned not with internal but with external compliance. The observable was not to be regarded as mere evidence of some internal phenomenon; it was itself the very criterion of legal decision. This conception of the criminal law is objectionable on many grounds. The problems it raises are, however, particularly acute in the law of attempts, and it is generally agreed that Holmes was importantly mistaken.

It has been noticed that Holmes' discussion of attempts is the source of his clear and present danger test. What has not been noticed, however, is the extent to which that doctrine continued to bear the marks of its common-law origins and reflected Holmes' conception of the criminal law. Indeed, both its virtues and its defects can be traced to these origins. It is worth observing that the liberal and politically attractive aspects of the doctrine are intimately—and paradoxically—consequences of Holmes' mistaken views in the law of attempts. It is precisely the exaggerated emphasis on actions and potential harm (as opposed to purposes) that can be both desirable and liberal when applied to problems involving the freedoms of expression. In the political area there are the familiar strong arguments against references to what Holmes called "internal phenomena of conscience." Quite simply, we want to avoid punishing only thoughts.

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the intent is not to show that the act was wicked, but to show that it was likely to be followed by hurtful consequences." HOLMES 56; see also id. at 62.

He repeated this position in Swift & Co. v. United States, 196 U.S. 375 (1905). This idea became important in Holmes' *Abrahms* dissent because of the requirement there of a specific intent to interfere with the war against Germany.

14 See text accompanying note 44 *infra*.
15 *Ibid*.


18 HOLMES 88. Thus, to approach the law of attempts in terms of "the dangerousness of the actor's personality," Wechsler, James & Korn, *supra* note 16, at 587, is to take
On the other hand, many of the analytic difficulties that arose in applying the doctrine also go back to its origins. An analysis in terms of "proximity" presupposes that a problem contains the main elements typically found in attempts cases. The usefulness of that kind of analysis therefore diminishes when those elements are absent. For example, a legislature is subject to constitutional limitations when, as in *Gitlow* and *Dennis*, it prohibits the advocacy of a specific doctrine, but the question is not one of measuring "proximity" to a specified act. Since the legislature has itself designated the point at which words become unlawful, the question is no longer how close words come to achieving certain consequences. In *Gitlow*, Holmes was confronted by, and evaded, the difficulty of applying his *Schenck* remark without modification to this different kind of problem. In the law of attempts Holmes could think of a match approaching a stationary haystack, but in constitutional adjudication the haystack is moving as well. Here a court may have to establish—to locate—the importance (or the legitimacy) of forbidding the completed act. The important questions may well be which "evils" a legislature may prohibit, or the extent to which government, in pursuing legitimate ends, may impede the exercise of constitutionally protected rights. Certainly, these questions are not answered by asking about "proximity." A perfectly fair and sensible anti-littering ordinance may incidentally affect the mode of distributing political leaflets. In upholding the ordinance, how would an adherent of the doctrine specify the "danger"? It is not necessary to invoke foul play to explain the demise of the doctrine. Its innate faults were readily revealed as the doctrine was applied far beyond the sphere of its potential usefulness.

Thus, because of Holmes' reliance on his earlier analysis, *The Common Law* has more than an historical significance. In his exposition, Howe shows that two main themes run throughout the book. First,
Holmes emphasized the German as against the Roman elements in the common law. Second, Holmes used early German law to help him ward off later German metaphysics. That is, when German theorists, among whom Savigny was preeminent, analyzed a Roman system, they found certain universally applicable principles. Following Kant or Hegel, they ultimately justified any legal action by referring to a voluntary expression of an individual's will. Howe describes with great clarity how Holmes resisted the tendency of his time to apply this theory to the common law.

However, before discussing this "will" theory, it should be noted that Howe has made an important contribution in reminding us of what we had largely forgotten, that The Common Law reflects its time in its emphasis upon Germanic origins. A generation of English and American historians believed that English constitutional and legal institutions, the framework of liberty, went back to Teutonic rather than Roman institutions. They believed that "politics is the real life of society’’; that politics meant political and legal institutions; and that those institutions evolved through history in a continuous pattern. They therefore traced the "germs" of American institutions first to English institutions, and then to the early folk life of the "Teutonic race.”

24 Consider the paradoxes involved in Holmes, an American, using early Teutonic law against the Romanism and the universal principles of Savigny, the founder of the historical school. For Savigny “law” is its history. It develops out of the common consciousness of a particular people, through “silent, inner forces,” and expresses their peculiar character: their “innermost nature.” However, in Germany those silent, inner, organic forces, in what Savigny himself called a “most remarkable feat,” had by the 16th Century received the modern Roman law. Writing in the first half of the century, Savigny saw no likelihood of an adequate native German law, and argued that Germany was not yet ready for a code. He devoted himself to the Roman law which he took for granted rather than to the indigenous Teutonic legal materials that Holmes investigated. Professor Carl J. Friedrich has pointed this out, saying: "Savigny was by no means ready to treat all national legal forms as equivalent. On the contrary, the Roman law stood for him above all other legal systems as an example and a norm. His main work was devoted to the ‘purification’ of medieval Roman law from the ‘admixtures’ of a later time. This is philosophically paradoxical, since these admixtures were the very notions by which the national spirit of the Germanic peoples (if it existed) must have become manifest.”. FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 139 (1963).

25 Adams, Historical Work of Herbert Tuttle, 1894 ANNUAL REPORT OF AMERICAN HISTORICAL ASSOCIATION 30.

26 For example, Herbert Baxter Adams simultaneously showed Darwinian influences and stated this Teutonic "germ" theory when he said, "The science of biology no longer favors the theory of spontaneous generation. Wherever organized life occurs, there must have been some seed for life. . . It is just as improbable that free local institutions should spring up without a germ along American shores as that English wheat should have grown here without planting. Town institutions were propagated in New England by old English and Germanic ideas," Germanic Origins of New England Towns, 1 JOHNS HOPKINS STUDIES IN HISTORY AND POLITICAL SCIENCE 8 (1883). Their racism was relatively benign and inclusive. The Anglo-Saxon people were thought to have inherited their political "genius" or "spirit" from the Teutonic race, which was,
"fundamental principles of American history" listed in a standard work included the notion that "our institutions are Teutonic in origin" and that "the general government can be understood in the light of . . . early history." If Holmes was not "involved in the essentially romantic issue whether the democracy of the town meeting was traceable to the forest of Germany," he did believe that "the clearest waters of the common law were traceable to 'an original reservoir of Teutonic law.'" In taking up this position Holmes was particularly influenced by Henry Adams, who had said in 1876 that "the student . . . who now attempts to trace, through two thousand years of vicissitudes and dangers, the slender thread of political and legal thought, no longer loses it from sight . . . but follows it safely and firmly back until it leads him out upon the wide plains of Northern Germany."

Holmes was primarily concerned, however, not with Germanic origins as such, but with counteracting the emphasis on the subjective individual will. In order to understand Holmes' reaction it is first necessary to understand something of the nature of this emphasis. For by Holmes' time jurisprudence had gone as far as possible, and sometimes farther, in relating legal rules to voluntary individual choice, in attempting to state the entire law in terms of willed intentions. The legal order was "to impose no duties except in order to effectuate the will or to reconcile the will of one with the will of others by a universal law." Liability arose only if someone accepted an obligation or was "at fault." Savigny, for example, could define law as "the rules" whereby "the boundaries" between men are determined so that "the existence and activity of each individual gains a secure free opportunity." Each individual could consult a rationally calculable body of rules, act on the basis of foreseeable consequences and fulfill his reasonable expectations. The law could, therefore, in all fairness, hold him responsible for his choice. To illustrate, punishment cancelled a wicked exercise of the will. By punishing, it obliterated the past. The law imposed civil liability only if someone was at fault or had voluntarily "held himself out" as responsi-

\[\text{in turn, part of the general Aryan family. These geneological inquiries by Englishmen into their Germanic connections would soon be animated by the desire to establish exogenous rather than consanguineous relations.}\]

27 A. B. Hart, Methods of Teaching American History, in Methods of Teaching History 3 (1886).
28 2 Howe 146.
29 Id. at 211, quoting Fifoot, History and Sources of the Common Law: Tort and Contract 158 n.28 (1949).
30 Adams, Essays in Anglo-Saxon Law 1 (1876).
32 1 System des Heutigen Römischen Rechts § 52 (1840), quoted in Pound, Outlines of Lectures on Jurisprudence 65 (5th ed. 1942).
The law of property rested on an exercise of the will over a thing. The language of contracts offers perhaps the most striking expression of this "subjective" view. Contracts were regarded as enforcing actual willed intentions and a literal consensus. The law applied these "subjective" contractual concepts widely, just as it thought of a "trust in terms of the intent of the settlor, ... and of a public utility in terms of ... professing a public calling ...".

Holmes rejected this way of looking at the law. He argued that, whatever the case may have been in Roman law, the common law did not, and should not, accept as conclusive, claims based on the individual will. In every instance, when Holmes argued that the common law had not borrowed from Roman law but had developed from native sources, he wanted to do more than establish its historical distinctiveness; he wanted to establish its "objectivity" as against "subjective" theories. For example, Holmes discussed primitive processes against offending "things"; he then went on to advance a theory of criminal liability. He argued that an earlier period, which had first imputed moral blame to an offending "thing" and then required personal fault for liability, gave way to a later "mature" stage which punished those who were not necessarily personally at fault. Again, Holmes discussed Teutonic procedures protecting the possessory rights of the bailee; he then went on to object to Savigny's Kantian thesis that the possessor is protected "because he has that will to make [the object] his, and it has thus become a part of his very self, the external manifestation of his freedom".

Holmes argued that the master's liability for his servants survived from his

33 Or if fault could be implied, as in the case of master and servant. To illustrate, proof of a criminal purpose—a specific criminal intent—was required even in the case of crimes against property or business dealings, and a reasonable mistake of fact often constituted a defense. Hurst, Law and the Conditions of Freedom 18 (1956). In stressing "individualism" and "the release of energy," Professor Hurst has provided the best analysis of the ways in which the philosophical emphasis on "will" suited American conditions.

34 Savigny went so far as to believe that notice of a revocation of an offer must not only be received by the offeree, but must be read by him. See, Savigny's analysis of agreement, Appendix I to Pollock, Contracts 553 (3d ed. 1950).

For example, "[I]f it be the law that, in order to make a contract, the two minds must be in agreement at some one time, ... how is it possible that when the person to whom the offer has been made knows that the person who has made the offer has sold the property to someone else, and that in fact he has not remained in the same mind to sell it to him, he can be at liberty to accept the offer and thereby make a binding contract. It seems to me that would be simply absurd." Dickinson v. Dodds, 2 Ch. D. 463, 474 (1876).

35 "[T]he courts ... gave a contract emphasis to relations of employment, agency and lease." Hurst, op. cit. supra note 33, at 13.


37 Quoted in 2 Howe 219.
earlier liability for his slaves; he then went on to deny that vicarious liability could be justified by the remote fault of the master in choosing the servant. He traced the requirements of consideration back to the requirements for maintaining debt and assumpsit; he then went on to argue that a contract resulted from the coincidence of external formal expressions and not of internal private meanings.

In reacting against the prevailing "subjective" view, Holmes took up his exaggeratedly objective "external standard" theory. He asserted that the law did not, and should not, care whether someone actually intended or actually foresaw harm. At times he implied that the law could not care; that in the law words ordinarily designating mental phenomena referred only to "bodily motions and rests." Nor should the law ask what could have been expected of this particular person, with his individual characteristics and history. Holmes said it should ask instead what a "prudent man . . . [whose] conduct under given circumstances is theoretically always the same" would have done. He said, "the reference to the prudent man as a standard, is the only form in which blameworthiness as such is an element of crime . . ."  

Howe finds the roots of the "external standard" doctrine in Holmes' desire for certainty, which he calls "the key to the first four lectures." He also, of course, points to the "will" theory as the background for Holmes' reaction, and, in addition, refers to Holmes' belief that punishment was justified by its preventive function. I believe that these explanations are inadequate; they do not sufficiently explain why Holmes was singular in advocating such an extreme degree of "externality," nor why he was obsessed with that objective. The difficulty of establishing mental facts was not the reason Holmes argued they should be ignored.

Leaving aside the questions raised by the meaning and the role of "certainty" in the criminal law, it is true that difficulty of proof diminishes certainty. We therefore increase certainty by eliminating "mental" requirements or any other requirements that can be difficult to prove, and by requiring only what is easy to prove. We could, for example, "punish" anyone whom the police find in a building an hour or less after a crime has been reported to them. Or, going further, we could simply say that "guilt" follows from official accusation. But certainty is not the only end of the law. Preferring such rules would not necessarily indicate an unusual concern for certainty. It could indicate an unusual lack of concern for other goals. There is no evidence that Holmes valued certainty more than the rest of his generation did. Rather, he

38 Holmes 89.
39 Id. at 62.
40 2 Howe 197.
minded less the unjust consequences of externality. A group of men may all agree that it is especially important for the law to do more to prevent forgery. If only one man in that group argues that it should be punished capitally, it is accurate, but inadequate, to say that he did so because he wanted to prevent forgery. It is especially inadequate if the rest of the group are equally anxious to prevent it. In that case, it is not his desire to deter that is noteworthy, but his desire to impose capital punishment to deter. He must mind capital punishment less than the others, or regard it as a unique deterrent. It is not as noteworthy that Holmes desired certainty as it is that he relished “externality” as a means to that end.

Nor was Holmes distinctive in the nineteenth century in justifying punishment because it prevented harm. It is especially difficult to follow Howe when he discusses Holmes’ idea that such a justification leads to the external standard. Since Howe seems to share that idea, he does not distinguish the proposition that Holmes thought he saw a connection between the two from the proposition that such a connection exists. The first is true, the second false. Howe says, “Holmes made it clear that the predominant if not the single purpose served by punishment was prevention of dangerous conduct,” and that:

> It was highly unlikely that one who saw the state’s self-preference as a legitimate and dominant interest secured by the criminal law should let that interest be endangered by the actions of high-minded and pure-hearted defendants. Furthermore, the preventive as contrasted with the reforming and retributive purposes of punishment suggests, if it does not necessitate, a considerable public indifference to the temper of an offender’s mind.

But there is simply no reason for a “preventive purpose” to suggest (let alone “necessitate”) ignoring a defendant’s plea that he lacked the power or the chance to avoid harm. Such a purpose does not make it necessary to agree (let alone to share his pleasure) when Holmes says “a man might have to answer with his life for consequences... he neither intended nor foresaw.”

Professor Hart has discussed Holmes’ idea of the implications of justifying punishment by the prevention of harmful crime. He has said:

> On this basis Holmes seeks to prove that there can be no reason why the law should concern itself with the actual state

41 Id. at 178.
42 Ibid.
of the offender's mind or inquire into his actual capacity to do what the law requires. His proof is that since the law only requires outward conformity to its prescriptions and does not care, so long as the law is obeyed, what were the intentions or motives of those who obeyed or whether they could have done otherwise, so it should equally disregard these subjective matters in dealing with the offender when the law has been broken. This is, of course, a non sequitur. Even if the general justification of punishment is the utilitarian aim of preventing harm . . . it is still perfectly intelligible that we should defer to principles of justice or fairness to individuals and not punish those who lack the capacity or fair opportunity to obey. It is simply not true that such a concern with the individual only makes sense within a system of retribution . . . .

As Professor Hart suggests, it is unfair and unjust to treat alike someone who intends or, at least foresees, harm, and someone who does neither. In justifying the institution of punishment in terms of future consequences it is not necessary also to justify such unfairness. Howe implies that Holmes greatly desired a uniform application of the law. But it is an odd concern for uniformity that would ignore the difference, deeply built into our perception of human conduct, between my deliberately stepping on your foot and my accidentally stepping on your foot. As Holmes himself said in a different context, "even a dog distinguishes between being stumbled over and being kicked." 45

It is important to stress what is at issue. For Holmes the case for externality was stronger in the criminal law than in torts: "[W]hen we are dealing with that part of the law which aims more directly than any other at establishing standards of conduct, we should expect there more than elsewhere to find that the tests of liability are external and independent of the degree of evil in the particular person's motives or intentions." 46 Holmes therefore reduced "intent" to "foresight of consequences" and "foresight" to what a "man of reasonable prudence would have


45 Holmes 7. Acknowledging this difference does not depend on the idea that the law should punish only "morally wrong" acts. During prohibition someone may fairly be punished if he voluntarily does an act, e.g., buys liquor, that is forbidden by law. But the sense in which that punishment is fair is independent of the moral quality of the act. We might even, in exceptional circumstances, prevent him from proving that he really thought it was cough syrup. But that would still fall far short of a total failure to distinguish intentional from unintentional actions. I believe that Howe in his discussion fails to take this distinction into account. 2 Howe 2, 180-81.

46 Holmes 42-43.
foreseen.” Holmes' standard would convert a requirement of a deliberate and premeditated intention to kill into a requirement of a very great risk of death. His example was “a newly born child . . . laid naked out of doors, where it must perish as a matter of course. This is none the less murder, that the guilty party would have been very glad to have a stranger find the child and saye it.” Apparently, Holmes would ignore the difference between someone who wants the child to die and a health faddist who thinks the cold air will be good for it. Furthermore, notice the way in which Holmes' example is odd. If someone hoped that a stranger would save the child why would he increase the chances of its dying by leaving it “naked”? If the detail that the child is “naked” contributes to the power of Holmes' suggestion that the defendant ought to be treated as a murderer, it does so by suggesting an intention to kill.

Nevertheless, it is true that Holmes believed that a preventive theory led to externality. But there are more fundamental reasons for his emphasis on externality; it should not be thought of as deriving from a simple willingness to accept the necessary implications of a preventive theory. Holmes obviously liked the external standard apart from “preventive” purposes; he never failed to deny a relation between law and morals wherever he thought he saw one. To understand not only why Holmes thrust the prevailing doctrines away, but also why he then embraced such questionable alternatives, it is necessary to consider Holmes' basic legal ideas, and, in particular his reasons for emphasizing the independence of laws and morals.

Perhaps because he does not always adequately consider those basic ideas, Howe sometimes fails to offer explanations in terms of ideas at all. He says, for example, “perhaps it was combination of a liking for paradox and a longing for universality of principle which encouraged Holmes to formulate his risk theory of contract.” Again, it seems correct to conclude, as Howe does, that “it would not be a fruitful enterprise . . . to search out those traits of character and mind which led Holmes to seek a single standard of liability . . . ” But one nevertheless wants to say that there is something wrong in formulating the issue this way. General “traits” seem less relevant than concrete “ideas,” particularly Holmes' ideas about shaking legal terms loose from their original moral contexts. I believe that Holmes’ stress on “acts” rather than “thoughts” can be understood when seen as one part of his general attempt to separate law and morals, deriving from his most basic jurisprudential ideas. Since I

47 Id. at 45.
48 Ibid.
49 2 Howe 238.
50 Id. at 195.
apparently differ with Howe about the nature of those ideas, it is necessary to indicate how I conceive of them.

Holmes put forward a fundamentally impoverished account of legal phenomena. He did not sufficiently distinguish a crude system of social control, resting on naked power, from a distinctively legal method of control. Seemingly, he tried to assimilate the two.\(^5\) He never seems to have perceived, and certainly never acknowledged, the extent to which general commitments to fairness, generality and neutrality are built into the idea of legality and constitute part of its meaning. Nor did he recognize that in a fully developed legal system the authority of a decision could vary with the force of the reasons that supported it. Holmes spoke as if a legal system were simply a mechanism to enforce, by whatever means, the desires of the dominant group.

Holmes concentrated, therefore, on eliminating obstacles to the fulfillment of those desires. It was not only futile, but also dangerous, to attempt to create such obstacles. Thus judges might inaccurately measure the power of a social group. By reflecting the desires of a descending rather than ascending group, judges (like economists' "sticky factors") could prevent a necessary adjustment, could stop up a boiling kettle. A judge risked that danger whenever he associated legal rules with moral ideas. By attributing to moral ideas a legal relevance independent of the sovereign's desires, he could arrive at a distorted interpretation of those desires. It was necessary to understand that legal rules were merely "statements of the circumstances under which the public force"\(^6\) would be applied; that presupposed understanding the morally neutral character of legal words. But it is hard to separate legal words completely from their habitual moral meanings. For this reason Holmes sometimes contemplated a situation in which "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."\(^7\) Meanwhile he put forward particular devices intended to achieve the same difficult objective. He suggested that we lift ourselves up by our own malevolence, and look at the law through the eyes of the "bad man." He also, and here we have arrived at the external standard, advanced his "objective" view of the law. Both ideas help to exclude from the law the moral references that certain critical words ordinarily carry with

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\(^5\) "Law means force," Holmes-Cohen 17; cf. "[A]ll law means I will kill you if necessary to make you conform to my requirements." 1 Holmes-Laski Letters 16 (Howe ed. 1958) (hereinafter cited as Holmes-Laski).

\(^6\) 2 Holmes-Pollock Letters 212 (Howe ed. 1946) (hereinafter cited as Holmes-Pollock).

\(^7\) Holmes, The Path of the Law, in Collected Legal Papers 167, 179 (1920) (hereinafter cited as Papers).
them. It is this entire outlook and not his desire for certainty that best explains Holmes' external standard. It is necessary to consider in the same light Holmes' theory that the law does not impose a duty to perform a contract, but only to pay damages for not performing. He specifically said that he intended that theory (which leaves out of account that people would not make contracts if they did not generally expect them to be performed) to exclude "ethics": "[it] stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can." That theory of contracts, it should be said, stands in a peculiar relation to the institution of contract. Furthermore, Holmes' prediction as well as his "bad man" theory stands in the same peculiar relation to a legal system. In each case Holmes' success in securing adoption of his theory might substantially eliminate the institution that he seeks to understand.

There is a particular consequence of this outlook worth noticing; it could not be less "totalitarian." The critics who, searching for the worst epithet, settled on "totalitarian" have been singularly beside the point. Nothing is less totalitarian than Holmes' lack of concern about internal phenomena, or his assertion that each person rightly prefers his own self-interest. (In this sense, the "liberal" aspects of the clear and present danger doctrine were not accidental.) Totalitarianism minimizes the importance of the act itself and stresses motivation and the nature of the actor. It sees a legal system as a method of prophylaxis based on knowledge of what patients are likely to do. But Holmes wants us merely to match an external act to a rule, to attach too high a price to each act. Holmes' systematic exaggeration of the toughness and amorality of the common law should at least protect him against being called "totalitarian." To be sensible, reservations about Holmes must center, not on a supposed fanaticism, but on his detachment. For example, Holmes' saying, "if my fellow citizens want to go to Hell I will help them" suggests that he was not humanitarian. But it also suggests that he was free of any totalitarian desire to control men and force them into a heaven on earth. Totalitarians are horrified by men as they are, and obsessed with the desire to transform them. But Holmes is fundamentally antithetical in his detached acceptance and detached rejection of men as he saw them.

54 Holmes on many occasions advanced this theory. See 2 Howe 235.
55 The Path of the Law, in Papers 167, 175.
56 I am not trying to present the arguments against Holmes' odd variety of positivism, but to show that his emphasis on "externality" was related to that positivism.
58 Holmes 38.
59 1 Holmes-Laski 249.
I have indicated above my differences with Howe’s interpretation of Holmes’ thought. However, I have nothing but admiration for Howe’s balanced and thorough historical account. The fifth chapter is particularly outstanding, as Howe summarizes the historical background of The Common Law. Throughout the book, Howe brings to light many interesting facts that have not been known before. For example, Holmes had already said, in an unsigned book review, “the life of the law has not been logic; it has been experience.” The substance of that review, which attacked Christopher Columbus Langdell, as “the greatest living legal theologian,” whose only ideal was the logical integrity of the law, helps to clarify what Holmes meant by his famous aphorism. Again, Howe demonstrates that we can better understand Holmes’ paradoxical theory of contracts if we restrict “duty” to a narrow meaning that Holmes at an earlier time had insisted on; he had wanted to use it only when the law had an “absolute wish” to compel certain conduct, and would not permit anyone to pay money as an alternative. Throughout the book one is aware of Professor Howe’s patient and arduous labor. Quiet sentences show that what Howe hoped to find was sometimes not there. (E.g., “The published records and a large number of file papers which have been searched do not reveal anything of significance.) But even these “negative results” save future scholars a repetition of his labors.

Turning to Holmes’ personal life, Howe emphasizes Holmes’ isolation. Holmes expressed his native tendencies by concentrating on work. Holmes’ single minded desire for excellence often made him resentful of criticism, anxious for recognition, and insensitive to the interests of others. In this period he almost totally excluded important personal relations. (“In his years of full maturity” Holmes “had but few friends of his own age.”) The book records few important human contacts and

60 I should like to make a small additional objection. It is misleading to say of Austin, “Austin had built his jurisprudence in the pre-Darwinian age and . . . tended, accordingly, to look upon the legal order as a scheme fixed for all times and all places by the categories of reason.” 2 Howe 67. It is often forgotten that Austin, a utilitarian, and hence a reformer, refers for example, to “the childish fiction employed by our judges that . . . common law is not made by them, but is a miraculous something made by nobody.” 2 Austin, Jurisprudence 634 (5th ed. 1885).

61 2 Howe 156.
62 Id. at 236.
63 Id. at 109.

64 Henry James was told that Holmes worked harder than anyone in the law. Howe, Justice Oliver Wendell Holmes, The Shaping Years 273 (1957) (hereinafter cited as 1 Howe).

65 E.g., 2 Howe 137, 230-31.
66 E.g., id. at 67-68, 71-72, 84-85, 246.
67 E.g., 1 Howe 232; 2 Howe 15, 268.

68 2 Howe 256. Holmes’ social ties may not have been quite as impoverished as
less human warmth. Howe remarks of Holmes' marriage "it seems likely that it was understood by his wife that he would not permit the conventional burdens of marriage to distract him from his search for the goals of achievement..." and "it is hard to believe that Fanny Dixwell did not realize that, at least for those years [before forty], his striving would be far more for an accomplishment of a public mind than for an achievement of a private devotion." And Howe says of Holmes' involvement with his own family "there are no indications that Holmes and his sister were close to one another, or that Holmes followed with any special sympathy the misfortunes of his younger brother..." Twice Holmes and Mrs. Holmes went to Europe and entered London's social and intellectual world, but in this country they "set themselves almost wholly apart from the world around them." Holmes obviously (and uncharacteristically) referred to his emotional experience when he said that a necessary condition of original thought was "a black gulf of solitude more isolating than that which surrounds the dying man..." It is, then, more than a metaphor to say that Holmes was set apart from other men. But he was not only set apart, he was different. And that difference was always observed. By the end of the period covered in Howe's second volume, Holmes unmistakably possesses the elements that he would use to help construct his legend. He needs only the cooperation of history to assume his "consecrated authoritative role." But what was the source of Holmes' distinctiveness? And can that source be located by considering how he was set apart? Was Holmes' withdrawal an isolated event, or was it partly an individual reaction to the general experience of his generation? This can best be answered by comparing Holmes with two of his contemporaries, who were also "set apart," Henry Adams and Henry James. While Holmes did not withdraw precisely as James and Adams did, he did withdraw from the same social world. Now that we possess partially completed biographies of these three contemporaries they appear, as Howe has been scrupulous about going no farther than existing documentation permits. But there can be no doubt about the general pattern.  

69 Among judges, only Holmes has received the ultimate American accolade of a movie based on his life. It, but not Howe's book, can be recommended to those who need to see Holmes as Mr. Chips.

70 2 Howe 8.
71 Id. at 9.
72 Id. at 255. Holmes' brother died at thirty-eight. Certain physical symptoms which Holmes "mistook for a funeral knell" (id. at 258) would seem to have coincided with his brother's illness as well as with the publication of The Common Law.
73 Id. at 253.
74 The Profession of the Law, in Papers 29, 32.
75 Wilson, Patriotic Gore 795 (1962).
76 Edel, Henry James: The Untried Years (1962) (hereinafter cited as 1 Edel);
(Adams was three years Holmes' elder, James two years his junior), we are for the first time in a position to initiate such an investigation.

To consider Holmes, James and Adams together (and from this point on it will be necessary to consider Holmes' career as a whole) is to be struck, to begin with, by the ways in which they touched one another's lives, especially when they were young. Howe has reminded us that "when Charles William Eliot turned Harvard over 'like a flapjack,' Holmes and Henry Adams found themselves companions in the frying pan."77 ("The two New England minds of his own generation78 with

77 2 Howe 26.
78 It is important to remember that the James family settled permanently in Cambridge after the war, and became New Englanders by adoption as well as by legend. James spoke of the time when he "called in Charles St. for news of O.W.H., then on his last flushed and charming visit to England . . . and got the news, of all his London, his general English, success and felicity, and vibrated so with the wonder and romance and curiosity and dim weak tender (oh tender!) envy of it, that my walk up the hill, afterwards, up Mt. Vernon St., and probably to the Athenaeum was all coloured and gilded, and humming with it." The Notebooks of Henry James 219-20 (Mathiessen & Murdock eds. 1955). It seems to be difficult to consider one of Mr. Howe's volumes without referring to this passage. See Kurland, supra note 57, at 221. And, as F. W. Dupee points out: "Holmes' adventures had been preceded by the even more remarkable ones of another member of the Boston circle, Henry Adams, who had been his father's secretary while the latter was minister to England during the strenuous war years, and who was later to assist James in becoming acquainted there." Dupee, Henry James 69 (1951). Holmes and Adams both studied at the Private Latin School established by Mr. Dixwell, whose daughter (greatly admired by William James, who was for a time, as is well known, a very close friend of Holmes) Holmes married; and it was the Adams family to whom Holmes turned for "aid and guidance" (1 Howe 225) on his first London visit. Holmes and Adams became part of the Harvard faculty at the same time, both belonging to "'The Club,' that group of 'clever, ambitious, young fellows' in the Harvard community who dined with regularity in each other's company." (2 Howe 142). Henry James predicated then that Holmes would rise to eminence "in a speciality, but to a high degree." 2 Edel 20.

Holmes, James and Minny Temple, whom James called "the heroine of our common scene" (1 Edel 223) and who more than any other actual person inspired the creation of Isabel Archer and Milly Theale, were part of the same Boston, Cambridge and Newport group of young people, as was Marian Hooper, later Mrs. Henry Adams, who was admired by James and regularly taken for Sunday walks by Holmes. "Clover" Hooper—whom he later referred to as a "Voltaire in petticoats" (3 Edel 29)—and Minnie Temple were the two examples that James cited in a letter of the peculiar intellectual grace and moral spontaneity possessed by American girls (1 Edel 322). Marion Hooper's father was one of Holmes' father's closest friends, and it was her sister, Ellen Hooper, who alone was named by Holmes as having permission to read a letter wrote home from the Peninsula Campaign (1 Howe 122). Holmes, who seems to provide the links with the young ladies of the group (he saw quite a bit of Mary Adams, Adams' sister), visited Minny Temple often, although Howe found no basis for Edel's reliance (1 Edel 235) on John Chipman Gray's statement that Holmes...
whom [James] ... most enjoyed friendship"79 were Adams and Holmes.) The three knew one another's closest friends and future wives. And they often affected one another's most important decisions. James himself traced his crucial decision to live in Europe to his reaction to Holmes' English success, and Howe concluded, as we saw, that "Holmes' inquires would not have led him to The Common Law had not Adams persuaded him that new approaches to English legal history might have significant consequences."80

More relevant, however, than these personal connections, are certain attitudes that they shared. Completely individual as they were, they resembled one another in their preoccupation with the theme of the observer—the spectator—or in acting out that role. Each, to some extent, had stepped out of life. Their participation in public, and perhaps even in private, experience had an attenuated quality, and they withdrew, perhaps consciously, from important areas of shared human experience. By detaching himself, each rejected the most widely noted American characteristics. Each rejected enthusiasm for sophistication, impatience for acquiescence, moral judgments for aesthetic judgments and doing for watching. American intellectuals, such as Hawthorne, Melville and Thoreau, had often defended themselves through withdrawal and concealment. But the withdrawal of Adams, James and Holmes had a different quality and significance. It depended essentially on the special nature of what they had expected to begin with. Going to the edge is different when one starts in the center.

II

When Henry Adams in his poem "Buddha and Brahma" wanted to characterize his fundamental attitude toward the world he chose the term "Brahman" that Holmes' father had been the first to apply to the New England aristocracy. "Buddha" stood for those who entirely left the world, and "Brahman" for those who were both attached and detached, who could observe society as outsiders while they acted within it. The Brahman did not try to change the world. He accepted it at arm's length ("Content to tolerate what I cannot mend"), and preserved his own private identity by withdrawing behind a public mask. There is a good deal of Holmes as well as of Adams in the words:

"loved" her (1 Howe 202). Edel has also suggested, more persuasively (1 Edel 236), that James, in one of his first stories, described his humiliation when he and Minny Temple were joined on an outing in the New Hampshire hills by the thrice wounded Lieutenant-Colonel (and by John Chipman Gray). It is hardly necessary to add that Holmes was still in uniform.

80 2 Howe 146.
But we, who cannot fly the world, must seek
To live two separate lives; one, in the world
Which we must ever seem to treat as real;
The other in ourselves, behind a veil . . . .

American society in the last part of the 19th century showed clearly
that a social elite can be marginal to its society. The Phi Beta Kappa
lecture at Harvard in 1876 was entitled “The Alienation of the Educated
Classes from Politics.” Certain historical conditions will accentuate any
personal predisposition toward withdrawal. Estrangement is always
estrangement from some specific situation. Holmes’ postwar generation,
which had aspired to the best republican traditions of political idealism
and public conscience, encountered the Gilded Age, which flaunted the
worst examples of political cynicism and private venality. Henry Adams’
hyperbolic statement of the shock that he and his family felt on returning
to America after the Civil War, tells us more about Adams than about
the society, but still reveals the nature of that encounter: “Had they
been Tyrian traders of the year B.C. 1000, landing from a galley fresh
from Gibraltar, they could hardly have been stranger on the shore of a
world, so changed from what it had been ten years before.”

The society of the Robber Barons could have sat for a portrait drawn
by as crude a Social Darwinist as Holmes himself. At its worst, and there
was a good deal of that, the commercial society that emerged from the
Civil War matched the popular image of Darwin’s jungle in ruthlessness
and surpassed it by far in blatancy and sham. It may be true that, as
Karl Llewellyn said, “Holmes should have been an Adams.” But it is
more relevant that in this period Adamses were rebuffed and displaced.
(Two of Henry Adams’ brothers failed of election to the Massachusetts
legislature just before Adams finally left Boston for Washington to
observe what has been called the dreariest chapter in American political
history.) Adams may not have been typical in the degree to which he
considered himself a dispossessed anachronism like “the Indians or the
buffalo who had been ejected from their heritage by his [Adams’] own
people,” but he certainly was not unique. New styles of competition
began to govern the great contests for social power, and the very qualities

81 5 YALE REV. 88 (new series 1916).
82 124 NORTH AMERICAN REV. 156 (1877).
83 ADAMS, THE EDUCATION OF HENRY ADAMS 237 (1931) (hereinafter cited as
EDUCATION).
84 LLEWELLYN, JURISPRUDENCE 519 (1962).
85 2 SAMUELS 7 (1958).
that set Holmes' acquaintances apart also set them back. Some could compromise shrewdly, like Henry Cabot Lodge, whose patrician sensibilities did not prevent him from supporting Blaine in 1884. But that Lodge was the postwar counterpart of the Adamses, of Webster and of Sumner, itself suggests New England's diminished national importance. Scruple of mind and refinement of manner still opened doors. But these doors were often only entrances to ivory towers.

The members of Holmes' generation and world occupied a social position that was preeminent but nonetheless ambiguous. At this time, American society neither excluded nor accepted the idea of an aristocratic group. The members of Holmes' circle were still perceived as a kind of aristocracy, but they were given few of the privileges that had often been part of that status. And their equivocal social position helped to make equivocal the nature and quality of their participation in society. Raised as if they exercised social and political power, Holmes and his contemporaries learned that they would have to struggle to acquire it, and that, indeed, it was often priced beyond their moral and emotional means. In England personal responsibilities still followed from one's place in the established social order, and inherited functions could largely define personal identity. But that had never been the case in a society pledged to reward individual merit, nor in a region obsessed with anxiety to find (or produce) evidence bearing on membership in a Calvinist Elect. In such a society, a special status acquired solely by virtue of birth could never be simply enjoyed; it had to be striven for and justified. Tocqueville speaks of "the great advantage of the Americans . . . that they are born equal instead of becoming so." The opposite may be said of this group; its members were distinguished by birth but nevertheless had to achieve distinction. One directed his most strenuous efforts to demonstrating that he deserved whatever he had acquired without effort, to prove that he really was what he was universally acknowledged to be. This tension produced Holmes, who combined great ambition and relentless habits of work with a fastidious withdrawal from society.

Facing a world radically different from the one they preferred (Adams said, "Grant's administration is to me the dividing line between what we hoped, and what we have got."), Adams, James and Holmes each had to decide how to react to that discordance. Harmony, and a full engagement with American society, was not possible. The only question was the degree of estrangement and the form it would take. James left America.

88 2 De Tocqueville, Democracy in America 101 (1945).
Adams also spent many years out of the country. Holmes differed from them less in his reaction than in the way that he manifested it. He went through a similar process of withdrawal, but he found means of expressing his personal detachment in his public role. Through a kind of internal emigration, he occupied an isolated vantage point. He could fulfill great public responsibilities while withdrawing inwardly to his private constituency, his private concerns and his private standards. The point is not simply that despite his office he remained a detached spectator; it is that he succeeded in making that perspective the very basis of judicial greatness.

Holmes, James and Adams differ so from one another, as each does, for that matter, from any one else, that there is no danger of obscuring these striking differences by noting certain resemblances. Sons of notable fathers, they were childless themselves. The most eminent men of the day were household presences, and the elder Holmes and James pursued wide ranging forms of intellectual effort with a diffuseness, and perhaps a certain lack of intensity, that contrasted sharply with their namesakes' focused concentration on a single craft. If their fathers attained distinguished stature in a natural and almost inevitable way, one feels a tense summoning of the will in Holmes and James. They drew back, and were, at the same time, pulled forward. They absolutely had to achieve greatness, and they pursued distinction with what Howe, in speaking of Holmes, has called a "fervent sense of urgency." Adams, on the other hand, pitched the terms of success so high that he himself was certain to feel that he had failed, while maintaining publicily that he was a non-competitor for fear that others might accept his statement of failure. Standing aside is one way of standing out. Adams may have been four generations removed from conventional Calvinism, but he wrote to Holmes, on the latter's appointment to the Massachusetts Supreme Court: "The world is made up of very few real people, only a few score, I think; and anything which encourages in the hope that we are one of these realities is the highest encouragement." Holmes' and James' paternal grandfathers, governed by what Holmes' father called the "iron of Calvinism" would probably have spoken simply of being chosen for Salvation. Whether or not one sees the overwrought iron of Calvinism in Holmes, James and Adams, they certainly could not have been less "Buddha-like."

90 2 Howe 9. Holmes who, when he was 39, delivered the lectures that became The Common Law, often said "If a man was to do anything, he must do it before forty." 2 Howe 8. Cf. James' saying, after the success of The Portrait of a Lady, "I shall be forty years old in April next. . . . I must make some great efforts during the next few years . . . I shall have been a failure unless I do something great." 8 Edel 73.

91 2 Samuels 217.

92 1 Howe 14.
In each case withdrawal was accompanied by, or perhaps provided the necessary condition for, prodigious productive powers. And they displayed those powers until a very late age.

Their ambition and their estimation of their own work led them to feel that they were "not sufficiently appreciated" by American society. Each of them coupled his deprecating assessment of that society with his conception of the place that he should have properly occupied within it. While each refused to acknowledge that most people were "real" at times, each, despite his denials, wanted to be appreciated by them. Although it may provide more of a measure of Holmes' sensitivity and of his "strenuous eagerness for achievement," than of any actual lack of recognition, one may cite Holmes' well-known expression of injury at suffering the ignominy of being appreciated for the wrong reasons. At sixty-one he thought that the comment on his appointment to the Supreme Court was:

[H]opelessly devoid of personal discrimination . . . . It makes one sick when he has broken his heart trying to make every word living and real to see a lot of duffers . . . talking . . . in a way that at once discloses . . . that literally they don't know anything about it. . . .

If I haven't done my share in the way of putting in new and remodeling old thought for the last 20 years then I delude myself. Occasionally someone has a glimpse—but in the main damn the lot of them.95

At the same time Holmes also acknowledged: "[T]he depth of gloom in which [he] was plunged for a time . . . . [T]he feeling of success or failure does depend a good deal on what is said—and a little adverse or cold comment will pull down more than reams of praise will build up . . . ."96 And at eighty-one he would write Pollock that: "They have said what I longed to hear said and would almost willingly have died to hear twenty years ago."97

Each of them sensed the proverbial provinciality of New England. Each felt the degree to which Holmes' father's designation of Boston as "the thinking center of the continent"98 was accepted unironically, and each reached out to what he considered to be a higher society; Adams

93 Id. at 284.
94 2 Howe 85.
95 1 Holmes-Pollock 106.
96 1 Howe 284.
97 2 Holmes-Pollock 92. At the age of seventy-five he had heard, for example, "He wears his wisdom like a gorgeous plume . . . ." Lippmann, Men of Destiny 243 (1927).
98 1 Edel 191.
to Washington and James and Holmes to England. Howe has helped us to appreciate the ways in which Holmes "was . . . in many respects, an Englishman,"99 saying:

[T]he aspects of American life which concerned him most were more representative of contemporary England than of contemporary America. As time passed Holmes discovered that certain of his achievements received a more discriminating recognition in England than they did in his own country. It disheartened him that this was so, but that it was indicates how deeply he was committed to the English tradition. That commitment set him out of the central stream of American life.100

The similarities among them extended to the substance of their thought. They entered an age of great changes in which previously unquestioned beliefs were challenged. They themselves no longer retained any compelling faith, but they certainly did not take for granted the consequences of that loss. Adams as well as Holmes often seemed to suspect the validity of every particular belief because he could not find a complete system of thought that rested on a demonstrated basis—"a fixed point"101—of absolute belief. Because they could not accept any absolute measure, they stressed that every part of the universe remained equally insignificant. Adams said, "you know my badge . . . . 'Nothing matters much.'"102 Holmes, more brutally, saw "no reason to believe that a shudder could go through the sky if the whole ant heap were kerosened."103 And Adams came close to Holmes' habitual language in writing William James: "We can't prove even that we are."104 Perhaps James also reflected that same background of thought in suggesting, at times, that there was no actuality against which to measure "the point of view."

Responding to their age, both Holmes and Adams were dominated by a conception, different for each, of power, or simply of force. Whether or not force ruled society, as Holmes thought, his conception of force certainly ruled him. In "the universal struggle of life"105 force settled everything, and nothing was settled. "The ultima ratio, not only regum, but of private persons, is force . . . ."106 "[T]he ultimate question is what

99 1 Howe 243.
100 Id. at 244.
101 Education 454.
102 Letters 213.
103 1 Holmes-Laski 351, and see Holmes-Cohen 43.
104 2 Samuels 232.
106 Holmes 38. "Strength was what Holmes really prized and admired . . . ruthless men of power won his admiration." 2 Pusey, Charles Evans Hughes 287 (1951).
do the dominant forces of the community want . . . ."107 And for Adams, "the whole social, political and economical problem was the resultant of . . . power."108 "[T]o historians the single interest is the law of reaction between force and force . . . ."108 If one considers James' concern with questions of personal power, it can be said that each of the three was fascinated by authority, domination and power.110

Furthermore, there was a passive aspect to the view of power that they held. Holmes said, "I see the inevitable everywhere,"111 and his fatalism, his stress on forces destined to have their way, has been widely noted.112 Many forms of speculation and action seemed to Holmes to fall into the category of "shaking one's fist at the sky."113 He himself said that he made a "rough equation between isness and oughtness,"114 and his assumption of cosmic predetermination has been described by Morris Cohen as a "desolating idolatry" of "all that inevitably happens."115 Again there are affinities between Holmes and both Adams and James. Adams in particular often used the very same terms in stressing the inexorable power, or force, or energy, of recurrent historical forces as against the inefficacy of conscious human intelligence.116 Generalizing from his own experience, Adams said, "In degree as the historian grows old he sees in the world . . . less chance and more fate."117 And, as if to prove the correctness of that assertion, he ended by often giving himself up to the construction of a comprehensive theory of history that expressed, in the unyielding and inappropriate language of physics, man's helpless relation to outside forces.118 An exact parallel should not be suggested in James' case, as it is important to remember T. S. Eliot's

109 Education 493.
110 DOMINATIONS AND POWERS (1951) were also preoccupations of that mostspectatorial of philosophers, William James' student, colleague and somewhat ambivalent friend, George Santayana.
111 2 HOLMES-POLLOCK 230.
112 Howe speaks, for example, of Holmes' "fatalistic analysis of legal history." 2 Howe 175.
113 E.g., 2 HOLMES-LASKI 822; Brown University—Commencement 1897, in PAPERS 164, 165; 2 HOLMES-POLLOCK 163.
114 2 HOLMES-LASKI 948; cf. Brandeis' saying, "The irresistible is only that which is not resisted." Quoted in BERLIN, HISTORICAL INEVITABILITY 78 n.1 (1954).
116 "Forces grasped his (man's) wrists and flung him about as if he had hold of a live wire or a run away automobile . . . ." (EDUCATION 494).
117 Quoted in 2 SAMUELS 480 n.17.
observation that James had "a mind so fine that no idea could violate it." Nevertheless, James had his own kind of fatalistic strain. He could admire and find poignant the courage to choose (the "illusion of freedom"). More often, however, he conveyed a sense of destiny beyond control. It was Isabel Archer's misfortune, according to James, that she had been taught to "affront her destiny." In general, James underscored the dangers of ignoring those predetermined restrictions that are inherent in one's heredity and circumstances, of permitting oneself desires that are incommensurate with those binding and limiting necessities.

On an immediate practical level, none of them had any real belief in the efficacy of politics—a fact which is most striking in the case of a Supreme Court Justice. It was one of the important conclusions, for example, of Adams' novel, Democracy, that American political life could not accommodate a person of moral sensibility. And James clearly considered the insensitivity of public life a threat to private values and personal freedom. Such a view was quite congruent, of course, with their spectator's role. If they had thought it less difficult to improve society by conscious human effort they might have had to justify not joining in those attempts. Members of a displaced generation who feel an absence of power because they were brought up to exercise it can easily arrive at a passive world-view: To feel displaced by a cosmic law rather than by "the masses" is at least to dignify the cause of one's displacement. Feelings of social powerlessness can lead to a stress on great historical and social forces that limit any attempts to apply intelligence to society.

Furthermore, adopting the position of observer itself often involves a personal reaction to power. Sometimes men who are very sensitive to power can keep from competing for it only by making themselves secure against its uses. A feeling of helplessness toward history need not be extended to personal encounters. Withdrawal may make someone feel that he is safe in his immediate environment, that he has guarded against defeat by choosing a small battlefield. By succeeding in the manoeuvre of detachment, one can become less vulnerable. Furthermore, an extraordinary desire to know, and to understand, can reflect a belief that safety consists in knowing what lies behind one, e.g., what really lies behind the facade, what lies behind in time and what literally lies behind one.

Quoted in Dupee, Henry James 23 (1951).

Compare with Adams' runaway automobile, James' acknowledgement that, "I regard the march of history very much as a man placed astride of a locomotive, without knowledge or help, would regard the progress of that vehicle." 2 Encl. 165-66.

Of course, it need not. A powerless social position can lead to very different attitudes, just as a stress on great historical forces can be combined, as in Marxism, with an attempt to apply intelligence to society.

In James "evil" or "horror" is so often spoken of as lying behind someone: e.g., Maggie Verver's "The horror of the thing hideously behind."
It is possible to think that complete knowledge insures complete safety.\textsuperscript{123} James' understanding of the anxieties inherent in a condition of incomplete knowledge was part of his special ability to create an atmosphere of horror. We are reminded that Holmes at ninety was still driven to read the books on his list by a feeling of responsibility that was as oppressive to him as it is impressive to us; of the intensity of Adams' desire to understand the growth and decline of power; and that life to James seems to have been primarily a process of increasing one's awareness, of developing a more subtle consciousness. It was ultimately a question of seeing.\textsuperscript{124}

But while they wanted to see, to know, and to be widely, or at least highly, regarded, they did not want to be fully known. They wanted to look through one-way glass. James' burning of his personal papers has become a well-known event, and Edel has said that James had a "kind of rage of privacy."\textsuperscript{125} But Holmes and Adams were also devoted to privacy; they, too, went to great pains to destroy all papers bearing on their personal lives.\textsuperscript{126} They wanted people to look at what they presented, but not at anything else. In their concern to protect themselves from the public view, they differed from a traditional aristocracy. Even their remarkable prose styles can be understood in terms of that intense desire for privacy.\textsuperscript{127} Each wanted to be read but not fully understood, and each interposed his style between himself and the world. Adams' "treacherous irony,"\textsuperscript{128} James' "weaving and swathing of language,"\textsuperscript{129} and Holmes' "terse" and "cryptic"\textsuperscript{130} opinions, present notorious barriers. Of course, Holmes' decisive style provides a sharp contrast to Adams' uncertainties and to James' reticences; the contrast is between never allowing a penultimate draft to be seen, and insisting that every work is unfinished.\textsuperscript{131} Whereas Adams and James close the cover on

\textsuperscript{123} "For archaic man, doing and daring are power, but knowing is magical power. For him all particular knowledge is sacred knowledge—esoteric and wonder-working wisdom, because any knowing is directly related to the cosmic order itself." Huizinga, Homo Ludens 105 (1949).

\textsuperscript{124} They each seriously studied either drawing or painting.

\textsuperscript{125} 1 Edel 17.

\textsuperscript{126} 1 Howe vi; 1 Samuels X.

\textsuperscript{127} In its effectiveness Holmes' style can stand the comparison even with James.

\textsuperscript{128} Wilson, Patriotic Gore 667 (1962).

\textsuperscript{129} Id. at 665.

\textsuperscript{130} "Mr. Justice Holmes spoke for the Court, in most instances tersely and often cryptically . . . ." Mr. Justice Frankfurter in Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481, 523 (1958) (dissenting opinion).

\textsuperscript{131} Edmund Wilson suggests a relation that is surely too simple between the complexity of James' style and his not having participated in the war. More persuasively, he relates the decisiveness of Holmes' style to his wartime experiences. Wilson, op. cit. supra note 128, at 665. Certainly, Holmes differs sharply from James
uninvited readers by overqualifying and overcomplicating, Holmes does so by doing exactly the opposite. He chisels out terse, granitic ellipses, and has the courage to omit qualifications and to simplify magnificently. But they are all three alike in interposing their styles between themselves and the world. Their characteristic tropes (irony and paradox) and narrative devices (“the point of view”) pivot upon and jar conventional expectations. Rhetorically, they compliment those who understand, and draw a privileged few closer. But psychologically, those devices create distance, and conceal the author’s actual self. The person remains private behind the carapace of style.

Of the three, James could most naturally make the position of the observer a basis for his life and work. There is, of course, a general sense in which any novelist occupies an observer’s role. But something more specific than that is at issue in James’ case, and more specific still than the extent to which being a novelist was James’ life. It is the way in which James converted into the materials of artistic fulfillment his feelings of estrangement and powerlessness (of being “lamed” and “merely on the verge of completion”) and his conviction of worldly inexperience.
He turned what he himself called his "passion of observation"\textsuperscript{138} ("I keep up a devil of an observing")\textsuperscript{134} to the greatest advantage by emphasizing the importance of "seeing" and problems of the point of view. The theme of the observer is itself important to him, and one of his most characteristic creations is the observer who treats the world as if it is primarily material for reflection and analysis, and is passionate mainly in the pursuit of self-knowledge. ("The contemplator of inner experience resembles the onlooker in society in so far as neither has an immediate approach to life but perceives reality only if it is reflected.")\textsuperscript{135} James, who, like Holmes and Adams, had a mind that was "intensely watchful of its own acts and shapings,"\textsuperscript{136} saw the potential corruption of such passivity. At the same time, especially in the early novels, he revealed that there was more of him in certain of his characters who had withdrawn, as he thought he had done, and had substituted acute observation of life for participation in it.\textsuperscript{137} He emphasized not only the sadness and isolation of those who are civilized and perspective, but also their weariness. In James, one must suffer enlightenment. His pale and reticent heroes are disabled by the very complexities of insight and scruples of conscience that mark their moral superiority. His "poor shabby" gentlemen, so widely noted, quiver with an etiolated sensibility and withdraw to the pained pleasures of renunciation, doubly intense because only partially communicable. At times renunciation and withdrawal seem less noble modes of defeat than they do magnetic emblems of success. And James' involuted style itself reflected his muffled and oblique manner of dealing with the world. His late style is as personal in its ceremoniousness and indirectness, in its elaborateness and opacity, as it is in its consequent poetic suggestiveness.\textsuperscript{138} James kept devising new ways of hiding the story teller behind the story, and the attention necessary to apprehend his meaning makes it difficult to apprehend him.\textsuperscript{139} James'
work records his increasing consciousness of the ways in which he could use his spectator's role to exercise power through art.

By contrast, it takes little analysis to establish that Henry Adams thought of and explicitly referred to himself as a "bystander."

Attention might, in fact, be better directed at resisting some part of his insistent claim that he had so little at stake in his time. However, even if Adams' spectator's pose does not exhaust all of him, it may well exhaust all of us, and leave us with a sense of a diffident man pretending to be a confident man pretending to be a diffident man. He seemed to claim at times that he viewed politics and history as performances that were put on for his edification or even amusement. In a sense, however, it was misleading for Adams to speak of himself, as he so often did, as merely part of the audience. When someone is terribly drawn by the center of the stage, but is unwilling to be seen, he will inevitably move to the wings or even to the prompter's box. Adams did just that. He was always attracted by the very power-centers he claimed to disdain, and stood and watched, relishing his own superiority, from the fringes of power. Since he was both attracted and repelled, he could come remarkably close to great events without becoming engaged in them. But in his general withdrawal, he became more conscious of withdrawing and more conscious of his extravagant self-consciousness. His gift for self-dramatization made it easier to include his own actions in the events he observed as performances. It was said that "Adams was the only man in America who could sit on a fence and watch himself go by."

He expressed the sense that he always felt of standing aside from even his own actions when he said, "my ideal of authorship would be to have a famous double with another name, to wear what honors I could win."

breadth of consciousness it attributed to a single, and hence a limited, perspective. Accordingly, he made it harder to see the author.

2 Samuels 285. His wife's suicide contributed, of course, to his withdrawal, but it did not so much create the attitudes in question as confirm, accentuate and make it permissible for him to act on them. Similarly, the suicide of the lady who was closest to James, Constance Fenimore Woolson, may have accentuated James' "rage for privacy." (At the time it made him fear that his letters to her would be read by strangers.) See 3 Edel 356-75.

Quoted in 2 Samuels 285: "When one cares for nothing in particular, life becomes almost entertaining. I feel as though I were at a theatre—not a first class, but a New York theatre." "He could at least act as audience... He felt quite well satisfied to look on, and from time to time he thought he might risk a criticism of the players..." Education 323. And, "[W]e must play our little parts to the end, as we were paid to do at beginning per contract." Letters 258.

As when Adams expressed displeasure, covering considerable pleasure, by saying, "My triumvirate friends—Roosevelt, Hay and Lodge—who are running our foreign affairs and have a way of running them in my house at the cost of my comfort." 2 Letters of Henry Adams (1892-1918) 860 (Ford ed. 1938).

2 Samuels 96.
How I should enjoy upsetting him at last by publishing a low shameless essay with smutty woodcuts in his name." And the heights of coyness—the combination of evasiveness and self-revelation, that Adams achieved in his relations to his readers did, in fact, come close to that bizarre ideal. He surrounded his publications with disparagements and intrigues, with anonymity and pseudonymity. Most of Adams' later writings were anonymous, privately distributed, ostensibly incomplete, or a combination of the three. It was as if a great swimmer had set out to swim only at dawn, because he did not want to be seen, allowed that fact to become known in a way that made an audience inevitable, and then exhausted that audience by his skittishness about putting his toes in the water.

And it was his bystander's role that itself produced his most questionable perceptions. He practiced a kind of democracy of the mind which found everything almost equally interesting (and almost equally unpleasant). Felix Frankfurter's perception of the discrepancy between curiosity and concern in Holmes is even more applicable to Adams, "very early his curiosities far transcended his emotional attachments." Adams risked subordinating moral categories by exalting aesthetic connoisseurship. Considerable despair lay beneath his nervous whimsicality, his inconclusive mystification and his distracting archness. The world did not yet seem to him, in the last, strangely un-ironic, words of the Education, a "world that sensitive and timid natures could regard without a shudder." Certainly both James and Holmes negotiated more graceful and relaxed terms with the corruption that they saw in their time, and could temporarily put that question to rest as Adams never seemed to be able to do. Adams read his non-climactic characteristics

144 Id. at 205.
145 See Newton Arvin's comments in Letters xiii. Adams published his political novel, Democracy, anonymously, listening to comments about it, as he was later to stand anonymously and listen to tourists commenting on St. Gaudens' Rock Creek Memorial to his wife. He published his second novel, Esther, pseudonymously, requiring that it not be advertised. He printed privately Tahiti: Memoirs of Arii Taimai. He did the same with Mont Saint-Michel and the Education, giving copies of each to 100 of his friends. Adams never considered the Education finished. He sent it out only in proof, along with a request for suggestions and corrections, and it was published publicly only after his death.
147 Education 505. The lack of irony has been noticed by Levenson, op. cit. supra note 108, at 347 et seq.
148 T.S. Eliot said that Adams was "perpetually busy with himself" (The Atenaeum, May 23, 1919, p. 361); cf. the remark made of Holmes: "[T]he trouble with Wendell is that he likes to play with his mind." 1 Howe 255. Eliot's review of the public edition of The Education is remarkable because of the degree to which Eliot sees Adams as Prufrock.
as spectator into the performance that he watched. Uncommitted, he concluded that the time made commitment impossible. Bewildered, he concluded that the time in which he lived was bewildering, and that the past, in which he had not lived, was harmonious. Adams justified his own state of mind by pointing to the world outside, and ended with a vested interest in puzzlement.

III

This brings me to the problems presented by Holmes. For Holmes retreated into participation; he withdrew into public responsibilities. This paradox is the basis of his strength and of the qualities that led to his renown. It is also the basis of his limitations. A novelist or historian who primarily observes is one thing; a judge who does so is quite another. Holmes left the world of thought for the world of action, for judges directly affect the course of events. It is true that we associate detachment with the judicial function, and require a minimum of neutrality. But Holmes more strikingly than any other judge invites a question that is rarely asked: Whether a minimum of involvement is not also required. Holmes was certainly sufficiently detached. Was he, however, sufficiently engaged?

In *The Poet at the Breakfast Table* Holmes' father modeled a character upon his son. The Young Astronomer (Howe uses him very imaginatively) was a "strange unearthly being; lonely, dwelling far apart from the thoughts and cares of the planet on which he lives." Howe goes on to say that "Doctor Holmes wrote not only of the Astronomer's ambitions and his solitude but of his almost studied search for heartlessness." Dr. Holmes reproaches the Astronomer (before Holmes' marriage, it should be said) "for his prolonged failure to warm his hands, 'just for a little while in a human consciousness.'" Most relevantly, Dr. Holmes wrote, "I fear that he is too much given . . . to looking at life as at a solemn show where he is only a spectator." Holmes can best be understood by seeing the importance of that characterization. For his unusual distance from the life of his time led him to define his judicial role in a manner that was equally unusual. Ultimately, Holmes was set apart by the way in which he conceived his vocation.

149 James at any rate turned his spectator's position entirely to advantage in his work. I do not mean to endorse any part of Van Wyck Brooks' thesis that James' work suffered when he became an expatriate. Brooks, *The Pilgrimage of Henry James* (1925).

150 2 Howe 5.

151 *Id.* at 6.


153 *Id.* at 7.
It was as if a group of pony express riders had to undertake a dangerous and exhausting series of rides in order to insure the survival of the city. The one among them who rode hardest was not motivated by the city's survival, by the purpose of the enterprise. Rather, he executed the assignment simply because he had undertaken it and, less important, to bring back a map of the terrain. That rider could concentrate remarkably well on the technical problems of doing what had to be done precisely because these problems were intrinsically interesting to him, and did not require justification by, or concern for, some larger purpose. "Why do I desire to win my game of solitaire? A foolish question, to which the only answer is that you are up against it. Accept the inevitable and do your damnedest." In the remainder of this essay, I should like to consider the signs and the implications of this difference in motivation.

Certain indications of Holmes' detachment have been widely noted. It has generally been assumed, for example, that Holmes was not only being charming but also truthful in writing Pollock that: "I never know any facts about anything and always am gravelled when your countrymen ask some informal intelligent question about our institutions or the state of politics or anything else."

And the same quality is revealed when Holmes, who never read a newspaper, complains petulantly that Brandeis urged him to visit factories and to read dull books in "the domain of fact." On meeting Holmes in 1870 Bryce, who was later to write on Why the Best Men Do Not Go Into [American] Politics, was "puzzled to find that [Holmes] 'cared so comparatively little' for 'the ample and stimulating drama' of politics." And Howe expresses the same puzzlement by asking, "If Henry Adams, teaching medieval history, found that the true center of his concern was the American political scene, how could Holmes, teaching American Constitutional Law, remain largely indifferent to the public affairs of his times?"

A good part of "politics" falls between gossip and history, and Holmes' indifference becomes crucial only if it reflects a deeper indifference. But in Holmes' case that conclusion has generally been avoided. Thus, Felix Frankfurter intended to praise much more than to blame when he said

154 2 Holmes-Laski 958.
155 1 Holmes-Pollock 118.
156 2 id. at 13.
157 Bryce, The American Commonwealth 69-76 (1894). In the preface Bryce thanks Holmes for his help.
158 2 Howe 31.
159 Ibid. In his first volume Howe had said that "It is noticeable that in a city where 'good works' were a traditional obligation of the elect, Holmes gave, so far as one can discover, no time or interest to civic or charitable activities." 1 Howe 274.
that "unlike the great men on the Court before him, Mr. Justice Holmes had been singularly outside the current of public affairs or of interest in them."\(^{160}\)

For this reason, widespread interest in Holmes' "Olympian" qualities has not led to an understanding of the seriousness of his detachment. In fact, Frankfurter's remark suggests that it may be hard to appreciate its seriousness precisely\(^ {\text{because}}\) it has been partially understood. (Attenuated forms of an important insight can often immunize against its full impact.) In actuality, it is because Holmes' interest in the development of the law was not sustained by any larger interest in improving society that he largely ignored social, political or economic realities. They attracted his attention only when they filtered through the lens of the legal instrument that he had mastered, and he concentrated on whatever came into view of that lens not so much for what it revealed about those realities, as for what it told about the structure and quality of the instrument.\(^ {161}\)

It is important not to misunderstand Holmes' disinterest. For example, it is necessary to distinguish taking "consequences" into account in arriving at a decision, as Holmes is widely supposed to have done, from caring one way or the other about those "consequences." Someone can respond solely to the intrinsic technical difficulties of a problem; for example, he can make a decision by appealing to a Utilitarian consideration of consequences without caring one way or the other about the happiness of human beings. Someone who stands apart can try to take "as given" the purposes and the interests of the participants in a complex institution, and can try to make it work well. On the one hand, he would be\(^ {\text{disinterested.}}\) He could see well the general and abstract elements of a situation, as they would not be clouded by the pressures of particular involvements. On the other hand, he would also be\(^ {\text{uninterested.}}\) He would risk brushing aside unique details felt to be most important by those involved. We could expect these ambiguous results of distance if the Big Ten rules committee turned for advice to Robert

\(^{160}\) Frankfurter, MR. JUSTICE HOLMES AND THE SUPREME COURT 24 (1939).

Maynard Hutchins, or if the Ecumenical Council asked Bertrand Russell to apply symbolic logic to disputes about statutory construction.162

Although the oddness of Holmes' position was not necessarily of that degree, it was very much of that kind. Holmes did not have to exert effort to attain the condition of distinterestedness that, in at least one sense of that word, is the paramount judicial requisite; he started with a kind of primal, organically grounded equivalent of that condition. In his Northern Securities dissent Holmes discussed this very question of involvement and said, in words that have since become well known:

Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure . . . before which even well settled principles of law will bend.163

Holmes was preeminently entitled to say this.164 “Accidents of immediate . . . interest” were rarely disturbing and never “overwhelming.” Holmes was likely to react more intensely to the intrinsic intellectual interest of cases noteworthy primarily for their nice “academic” points, e.g., Hanson v. Globe Newspaper Co.165 or Hyde v. United States166 than to the politically exciting aspects of cases, e.g., the Insular Cases,167 that draw the most public attention.168 Mr. Justice Frankfurter tried harder to be “judicial” when he knew that a decision had momentous political con-


163 Northern Securities Co. v. United States, 193 U.S. 197, 400 (1904) (dissenting opinion). Oddly enough this case constitutes one of the exceptions to Holmes' detachment. Holmes was moved to a completely uncharacteristic display of feeling by “the Sherman Act, which I loathe and despise.” 1 Holmes-Laski 719. See Handler, Anti-trust in Perspective 13-17 (1957), for a criticism and complete summary of Holmes' record in anti-trust cases.

164 Just as he was preeminently entitled to say of Brandeis “I told him long ago that he really was an advocate rather than a Judge. He is affected by his interest in a cause, and if he feels it he is not detached . . . .” Quoted in Bickel, The Unpublished Opinions of Mr. Justice Brandeis 222 (1957).

165 159 Mass. 293, 34 N.E. 462 (1893). See 1 Holmes-Pollock 46; 2 id. at 19, 29, 30.


167 Holmes participated in Hawai'i v. Mankichi, 190 U.S. 197 (1903) and Dorr v. United States, 195 U.S. 138 (1904).

168 As he himself described it, “[My] keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law.” 2 Howe 108.
sequences. But Holmes did not have to try hard; he often seemed simply untouched by those "hydraulic pressures." For example, completely apart from the substance of Holmes' position on the Sacco-Vanzetti case, he seemed literally unable to understand why (or even that) it was thought to be important. He was so far from the intense feelings generated by the trial that he found it "curious that the Sacco and Vanzetti business has left such deep prejudices."\(^{169}\)

It is also Holmes' distance that explains his ability to formulate compendious solutions to new situations. He could rely on the comprehensive abstractions that he had long before worked out because he was not interested in the individual and particular aspects of a situation. As Brandeis put it, "It's all been thought out. His work is a chemical composition and not a conglomerate. He has said many things in their ultimate terms, and as new instances arise they just fit in."\(^{170}\) Once again, Holmes, who like James and Adams, was remarkably self-conscious, best described his own characteristics. He said, "[H]e [Brandeis] always desires to know all that can be known about a case whereas I am afraid that I wish to know as little as I can safely go on,"\(^{171}\) and, "I long have said there is no such thing as a hard case. I am frightened weekly but always when you walk up to the lion and lay hold the hide comes off and the same old donkey of a question of law is underneath."\(^{172}\) This ability to stand off and discern a few central and governing issues—to see "the same old donkey"—helps to explain not only the brevity of Holmes' opinions, but also his quite remarkable speed in writing them. ("A case doesn't generally take more than two days if it does that.")\(^{173}\) That facility was related to the way in which he was so far from Brandeis' belief in the "controlling vitality of facts";\(^{174}\) far, that is, from Brandeis' belief that "knowledge is essential to understanding; and understanding should precede judging."\(^{175}\) If Brandeis exemplifies judging by immer-

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\(^{169}\) 2 HолMES-LASKI 1396. He also said, "The further I get from the [Sacco and Vanzetti] case the more I am convinced that it was hardly the occasion for kicking up a row . . . ." Id. at 993; "He [Frankfurter] is convinced of their innocence—but I was not convinced that too much talk had not been made on the theme." Id. at 1118. And, "I see no adequate available reasons for the world outside the U.S. taking up the matter and I think your public and literary men had better have kept their mouths shut." Id. at 974.

\(^{170}\) Quoted in BICKEL, op. cit. supra note 164, at 231.

\(^{171}\) Id. at 230.

\(^{172}\) 1 HolMES-POLLOCK 156.

\(^{173}\) KING, MELVILLE WESTON FULLER 291 (1950). It was Holmes' custom to ask for more cases. He occasionally annoyed other Justices by asking if he could write cases already assigned to them.


\(^{175}\) Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 520 (1924) (dissenting opinion).
sion in a particular factual context, Holmes exemplifies judging by stripping special circumstances away. Holmes was justifiably proud of his ability to "pretty well reconstruct . . . the fish from a bone and a scale."176 His remark in Lochner, "it does not need research,"177 stems, at least in part, from his disdainful feeling that mere facts were not only inessential but also grubby, petty and mean. Seemingly, that brusque and impatient aside was provoked not by Peckham's majority opinion, or by the substantive question, but by the painstakingly factual aspects of Harlan's dissent, by Harlan's reliance on what (in one of the many senses of that much abused concept) is often thought to stand for "experience" rather than "logic."

Holmes expressed in many ways his distaste for the particular aspects of individual events. For example, he believed that in order to attain greater certainty, courts should endeavor to harden flexible standards into definite rules. He applied his position even to negligence, believing that there, too, general elements were more significant than unique incidents. Despite the vast variety of specific circumstances leading to accidents, Holmes thought that a court should designate certain recurrent features as legally decisive, and should state a prospective guide to conduct as concretely as possible. As he said in his well-known Goodman opinion (stop, get out, look and listen), a clear standard of conduct, a rule, "should be laid down once for all by the Courts."178

Holmes shows his detachment even in his most influential contribution to jurisprudence, his statement that "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."179 Holmes put this forward after having been a judge for thirteen years. Yet, it is not a judge's way of looking at the law and it does not touch on a judge's problems of decision. Apart from the entire question of whether Holmes' point of view can ever be helpful (to a litigant? a lawyer? a "bad" litigant? a "bad" lawyer?)180 it does not help a judge. When Holmes in a particular case had to answer the question "what is

176 Quoted in 2 Howe 278-79.
178 Baltimore & O.R.R. v. Goodman, 275 U.S. 66, 70 (1927). In The Common Law he said: "If the whole evidence . . . was that a party . . . stood on a railway track, looking at an approaching engine until it ran him down, no judge would leave it to the jury . . . . If the whole evidence was that he attempted to cross a level track, which was visible for half a mile each way, and on which no engine was in sight, no court would allow a jury to find negligence . . . . [T]he limit of safety . . . could be determined almost to a foot by mathematical calculation." HOLMES 128.
179 The Path of The Law, in PAPERS 167, 173.
180 See, e.g., FULLER, THE LAW IN QUEST OF ITSELF 93-94 (1940); Hart, Holmes' Positivism—An Addendum, 64 HARV. L. REV. 929, 932 (1951).
the law?” or “what should the law be?” could he, as his statement seems to claim, actually mean “nothing more” by the law than “what am I likely to do in fact?” No “prophecy” could help him, for he could apply his view of the law and prophesy only when he had already solved his problem as a judge and knew what he was “likely” to do. As a judge he did not only have to understand how law developed, he had to take part in that development. He said, “The only limit I can see to the power of the law maker is the limit of power as a question of fact. . . . When I talk of law I talk as a cynic. I don’t care a damn if twenty professors tell me that a decision is not law if I know that the courts will enforce it.” But he did not consider whether the reasons that the twenty professors had for opposing the decision might not affect its authority and viability. The problem is ultimately, therefore, not only Holmes’ distance from a judge’s perspective, but his distance from those reasons and from the purposes behind them.

Earlier I neglected to discuss certain questions which arise when one says that a disinterested technician can take an institution “as given.” He may want to take it simply as given. Nevertheless, by acting on some conception, explicit or implicit, of just what it is that he is accepting, he will choose among competing ideas about the nature of the institution to be preserved. Holmes, however, often gives the impression that the judiciary can take as given whatever “the crowd” outside wants, and can concentrate solely on enhancing the integrity of its own institutions. The “crowd’s” desires (or his rather simplified conception of them) settled basic questions, and he thought the judiciary could implement those decisions in particular cases without re-evaluating those questions. Paradoxically, Holmes, who contributed to our understanding of the importance of “making” law as against “finding” it, seemed able to receive his basic evaluations from the crowd. He tried, in fact, to avoid exercising what he himself called, in a rather unfortunate phrase, “the sovereign prerogative of choice.” And his success contributed to the nature of his opinions, to his remarkable style. By replacing his own “inarticulate premise” with the crowd’s articulate commands, he faced only the technical problem of spelling out the implications of those commands. He seemed to think that in his day numbers (i.e., the legislature) equaled power, and he saw no alternative to accepting the crowd’s desires, no matter how wrong he thought them. As Holmes disarmingly said of himself, “In my epitaph they ought to say, here lies the supple tool of

181 1 Holmes-Laski 115.
182 It is not without significance that few who call a majority a “crowd” believe that it should have what it wants.
183 Holmes, Law in Science and Science in Law, in Papers 210, 239 (1920).
Ideally, judges simply transformed social power into legal rights. Holmes' aloofness uniquely equipped him to attempt this solution. He expressed his distance, as we saw, by writing, "if my fellow citizens want to go to Hell I will help them. It's my job." This comic statement contains an element of seriousness making it more than a picturesque way of endorsing Thayer's position on judicial review. His comment stresses his inability as a judge to bridge the gap between what the people, in some sense, needed, and what they seemed to want. But a constitutionalist need not think that the Court can always (or even often) create the conditions for an appeal from "the people drunk to the people sober" in order to question whether a judge would say "oh go on, have another." Was it really Holmes' job to "help"? This is not at all the classical liberal question whether society should act to prevent an individual from "going to Hell" in his own way. It is the completely different issue of the constitutional role of the Supreme Court in enforcing constitutional requirements, including the most basic liberal protections.

This statement reflects my belief that Holmes could fail to apply constitutional limitations; that he thought of the Supreme Court as more of an instrument for implementing the "irresistible demands of the dominant forces in society" than as a potential check on those desires. Many able students of constitutional law would disagree with such a view. But everyone, whether he thinks that Holmes desired too much, or just the right amount of, judicial "restraint" agrees that Holmes' espousal of "self-restraint" was of great historical importance. Yet, there is no agreement on exactly why Holmes did not impose his own views upon legislatures. Why did a judge who generally disapproved of regulatory laws emphasize a doctrine that upheld them? The question is often answered, or evaded, by assuming that Holmes' philosophical scepticism weakened the hold of his beliefs, and led him to consider that he might be wrong and the legislature right; for example, "Oliver Wendell Holmes brought to the Supreme Court . . . two striking qualities, scepticism and intellectual humility." But such an explanation rests on confusion

184 Holmes to Hughes, Pusey, Charles Evans Hughes 287 (1951).
185 1 Holmes-Laski 249.
186 2 Howe 57.
187 This perplexing question has drawn some equally perplexing answers. Some have simply been wrong (e.g., that Holmes used self-limitation as a "shrewd Yankee . . . strategy" to achieve the policies that he really desired. Lerner, Ideas Are Weapons 65 (1939)). And some have been, at best, unhelpful (e.g., that "being rid of . . . a strict father, he [could] afford not to use his authority as if he himself were a strict father." Frank, Law and the Modern Mind 259 (1930)).
188 Mendelson, Mr. Justice Holmes—Humility, Skepticism and Democracy, 36 Minn. L. Rev. 343 (1952).
surrounding the notion of scepticism. That Holmes was a sceptic of a sort is attested by his assertion that everything might be an "illusion," or a "dream," or that everything thought "true" might be "false." However, Holmes' kind of scepticism did not as a matter of fact affect his exercise of judicial review: To paraphrase Mae West, scepticism had nothing to do with it.

It is very important to specify what Holmes was and was not sceptical about. Far from being someone whose "all-encompassing scepticism" led him to say "maybe" or "I don't know, but" or to turn all his periods into question marks, Holmes was the least hesitant of men. It is difficult to think of anyone who expressed fewer qualifications or occupied fewer half-way positions. For example, he had the most definite and dogmatic social and economic views; he was as convinced as any other adherent of Malthusian or Darwinian or Eugenicist doctrines. He "knew," just as William Graham Sumner "knew," that social legislation "violated" Darwinian natural laws, that in some sense passing a factory act was like "falling up." Holmes was not "sceptical" of anything in saying, "I never read a Socialist yet from Karl Marx down . . . that I don't think talked drool." Nor did Holmes' scepticism affect his conviction that he was right about, for instance, legal history, legal doctrine or his view of a specific legal decision. He may have said that nothing was true once and for all, but on any particular occasion in making any particular decision he was convinced that he was right. Furthermore, one can ask why only opposing legislative views, and not the opposing views of a majority of the Court, should make Holmes hesitate and think that perhaps he was wrong. Certainly no such doubts weakened his dissents. In short, Holmes was not sceptical about any of the practical issues involved in judicial decision.

189 1 HOLMES-POLLOCK 122.
190 E.g., Natural Law, 52 HARV. L. REV. 40 (1918); 2 HOLMES-LASKI 1124.
191 And perhaps logically could not affect it.
192 BICKEL, op. cit. supra note 164, at 222.
193 1 HOLMES-LASKI 96.
194 Depicting Holmes as a "sceptic" is not always helpful, but depicting him as philosophically close to Dewey can be downright misleading. Yet he is often described almost as if his views and those of Dewey were interchangeable. Thus Professor Morton White has referred to his influential book SOCIAL THOUGHT IN AMERICA (rev. ed. 1957) as a defense of "the outlook of Dewey and Holmes" (id. at xi), and speaks of "the point of view that Dewey and Holmes share" (ibid.), of "the philosophical attitudes and tenets that united Dewey and Holmes" (ibid.), of "the main ideas of Dewey and Holmes" (id. at 247) and of "the work of Dewey and Holmes" (id. at 265).

Of course, it is always possible to find some points of agreement between any two thinkers, no matter how different their main tenets: Aquinas and Russell both believe in the existence of universals; Bentham and Burke both appeal to the principle of utility; Marx and Ricardo both rely on the labor theory of value. But by emphasizing
Yet there is at least a hint of a supposed connection between Holmes' "restraint" and his "scepticism" even in Felix Frankfurter's "eleven nearly the similarities between Holmes and Dewey, one risks blurring fundamental and irreconcilable differences. One of the keystones of Dewey's thought is that propositions may be more or less reliable (i.e., reasonable) according to the methods of inquiry that produce them, and he is concerned to extend the use of intelligence to the reconciliation of disagreement, the resolution of social problems, and the control of nature. Holmes' views are diametrically opposed to this. Holmes holds that disagreements are bound to become quickly irreconcilable, that reason cannot greatly affect social decision, and that it is futile for men to try to change this and achieve control of their destinies.

To elaborate, Holmes starts with a much narrower view of what falls within the competence of reason. His scepticism rests ultimately on an undiscriminating demand for absolute certainty. He often talks as if propositions must be either establishable with the kind of inescapable necessity associated with mathematical proofs or must be completely arbitrary. Consequently, he sees sheer fiat behind the widest variety of judgements, indeed behind the use of "reason" itself. He would say that he preferred "reason" but if challenged could not justify that preference (Holmes-Cohen 127); or "I do not see what more there is in your law of contradiction, except to assert that the universe can't make nonsense sense. Even to that I should simply say I don't know. I can't imagine it—but I hardly think that a measure of the possible." 2 Holmes-Pollock 251-52.

The contrast between Holmes and Dewey is striking here. Holmes draws from the view that there are no certain reasons the conclusion that there are no good reasons at all. Dewey insists that there are degrees between these alternatives. Dewey's concept of "warranted assertibility" is meant precisely to avoid Holmes' kind of dualism, as well as Holmes' kind of "scepticism." Dewey says that a judgment deserves a degree of confidence proportional to the rigour of the tests of inquiry that it survives, even though it may eventually have to be rejected. His conception of reason, therefore, is broader than Holmes', and is furthermore applicable to an array of problems that Holmes considers beyond the range of reason. While arguing against what he calls the "ejaculatory" theory of value-expression, Dewey rules out Holmes' position that "moral and aesthetic preferences" are: "[M]ore or less arbitrary . . . Do you like sugar in your coffee or don't you? . . . So as to Truth." 1 Holmes-Pollock 105. In contrast, Dewey stresses everywhere that means were rationally connected with ends in "a continuum." Dewey, Theory of Valuation 40 (1939).

Dewey's social thought can be seen as a plea for going farther in applying intelligence to social problems. "All intelligent thinking means . . . an emancipation from chance and fatality." Quoted in Nagel, Sovereign Reason 40 (1954). Holmes, on the other hand, continually insists on the inevitability of historical patterns, and on the inadequacy of human intelligence. ("[A]s I grow older I realize how limited a part reason has in the conduct of men. They believe what they want to . . . .) 1 Holmes-Laski 122.) The view that reason only glosses an arbitrary will underlies Holmes' particular position in ethics, politics and jurisprudence alike. For him the mind is a bribed witness, and unlike Dewey, Holmes refuses to accept its testimony.

Consider the profound implications of this difference. It is accurate to say that in social matters Dewey's main objective was to keep us talking in order to find a way of avoiding fighting. But no one (Gumplovicz? Ratzenhofer?) stresses more than Holmes that soon it is necessary to stop talking and start fighting. Since he regards all beliefs as vitiated by an essential arbitrariness, he is quick to see disagreement as ultimate and irreconcilable. ("[W]ar not only is not absurd but is inevitable and rational." 2 Holmes-Pollock 230. "[W]hen men differ in taste as to the kind of world they want the only thing to do is to go to work killing." 1 Holmes-Laski 116.) Yet White nevertheless links "Holmes and Dewey," even though he says that "Dewey in his later writings tended to identify the intelligent solution of a social problem with one
perfect pages" on Holmes. After brilliantly describing the role of the Supreme Court, Frankfurter writes of Holmes:

[T]olerance and humility in passing judgment on the experience and beliefs expressed by those entrusted with a duty of legislating, emerge as the decisive factors in constitutional adjudication. . . . He reached the democratic result by the philosophic route of scepticism—by his disbelief in ultimate answers to social questions. Thereby he exhibited the judicial function at its purest.

But if humility were actually a "decisive factor in constitutional adjudication," Holmes would tie for last with General DeGaulle. His "scepticism" did not in any way undermine his self-assurance. Holmes, after all, wrote of his work on the Court, "I am very hard at work . . . preparing small diamonds for people of limited intellectual means."

In fact, a stress on "scepticism" or "humility" conveys a misleading impression of Holmes' position. It suggests that Holmes, unlike the majority, thought "but then I might be wrong, and the legislature right, about the wisdom of wages and hours legislation." But of course

that dispenses altogether with the use of force, and often seems to imply that the application of scientific intelligence to social and political situations could never yield the conclusion that it was desirable to apply force." White, op. cit. supra at 253.

Pairing two men who specifically and fundamentally disagree can only obstruct understanding. Of course, both were products of the same Darwinian age. Both oppose certain "absolutisms" and share certain assumptions. Both see change as fundamental, think of man as part of nature, and dispense with the idea of a supernatural being. But on this very general basis, we can as easily link Holmes with Marx. (More easily, I suppose, considering Holmes' view of law as an epiphenomenon of social forces.)

It is true that Holmes had the highest praise for Dewey's writing. E.g., 2 Holmes-Laski 901, 918, 1144, 2 Holmes-Pollock 287. Perhaps Holmes sensed an affinity with Dewey because he reacted only to the very general "post-Darwinian" ideas that he had once heard discussed by members of the "Metaphysical Club," 1 Howe 269. We may, on the other hand, regard as significant the difference (a difference that Holmes himself did not stress, perhaps because he misunderstood Dewey) between them that Holmes notes when he says that, "Also [John Dewey] indicates emotional attitudes . . . . He talks of the exploitation of man by man—which always rather gets my hair up. . . . [A]ll society rests on the death of men. If you don't kill 'em one way you kill 'em another . . . ." 1 Holmes-Laski 431.

Incidentally, it should be noticed that Dewey's concern with relations that are neither necessary nor arbitrary involves a conception of reason that fits the common law. It is easy to understand why he greatly influenced Legal Realism. Consider Dewey's idea that the authority of a finding varies with the methods of inquiry. The common law exemplifies Dewey's idea of problem solving; it applies a criterion to a decision that then affects progressively self-corrective statements of that criterion.


196 Dictionary 423. I am bypassing the question whether Holmes can be said to be "democratic" in any sense.

197 2 Holmes-Pollock 173.

198 E.g., Adkins v. Children's Hosp., 261 U.S. 525 (1922).
Holmes "knew" that the legislature was wrong. He upheld legislation not because he was uncertain about the merits but because he deemed his view of the merits to be irrelevant. He did not urge judges to question their own social and economic views, and to consider that the legislature might be right; he merely said they should not impose their views on the legislature, even when they strongly disagreed with it.\textsuperscript{199} As Frankfurter said, "Probably no man who ever sat on the Court was by temperament and discipline freer from emotional commitments compelling him to translate his own economic or social views into constitutional commands."\textsuperscript{200}

It is necessary to reject "humility" and "scepticism" as answers. But why then was Holmes "freer"? An explanation of this attitude is to be found, I believe, in Holmes' fatalism, in his attitude toward power, and finally, in his detachment. When those who understand Holmes so well speak of his "scepticism," they are reacting to something very real. But it is better described as detachment.

One must start with Holmes' belief that it was a mistake to pass social legislation, but not his job to correct that mistake. Further, he thought that it would in any case be futile to resist legislative decisions expressing the desires of the dominant power in society. "[T]he majority is strong enough to have a clear power to enforce its will, and intends to do so, the courts must yield ... because the foundation of Sovereignty is power ...."\textsuperscript{201}

"[T]he crowd," he said, "if it knew more wouldn't want what it does—but that is immaterial."\textsuperscript{202} It was immaterial because Holmes believed that government should reflect the desires of the dominant power, no matter how unwise those desires were:

What proximate test of excellence can be found except correspondence to the actual equilibrium of force in the community—that is, conformity to the wishes of the dominant power. Of course, such conformity may lead to destruction, and it is desirable that the dominant power be wise. But wise or not, the proximate test of a good government is that the dominant power has its way.\textsuperscript{203}

Holmes often speaks as if the question of "good" government is simply

\textsuperscript{199} Lochner v. New York, 198 U.S. 45, 75 (1905) (dissenting opinion): "[M]y agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law."

\textsuperscript{200} \textit{Dictionary} 423.

\textsuperscript{201} 2 Howe 40-41; \textit{cf.} "If the welfare of the living majority is paramount, it can only be on the ground that the majority have the power in their hands." 2 Howe 47.

\textsuperscript{202} 1 \textit{Holmes-Pollock} 163.

\textsuperscript{203} \textit{Montesquieu}, in \textit{Papers} 250, 258.
the question of what government is inevitable. Like Hobbes, Holmes stresses the notions of order and a final authority. But, unlike Hobbes, he does not regard them as something to be sought after, but as something to be acquiesced in. "Should," confusingly, often means "must." "The more powerful interests must be more or less reflected in legislation" because government "like every other device of man or beast, must tend in the long run to aid the survival of the fittest." Holmes said that, "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." But he did not consider that government, and that his very decision as a Supreme Court Justice, could affect the destiny of those beliefs. He reverses the relation; it is the potential success of the beliefs which requires giving them a "chance."

It was finally immaterial to Holmes because of his detachment. To a remarkable degree, Holmes simply did not care. He was far from certain that his kind of world would last. Precisely because he thought that "the crowd" was unwise, he expected them to destroy the way of life that he preferred. But he would have thought it immature to be deeply concerned about that imminent destruction.

"But as you know some of your yearnings I don't sympathize with and almost believe noxious—but the crowd is with you rather than with me and I dare say you will smash a good deal that I should like to keep." Holmes would "bow to the way of the world." He would also, it should be added, continue to watch. Someone who only observes society's aspira-

204 2 Howe 45.
206 2 Holmes-Laski 1144.
207 2 id. at 1071.
208 2 id. at 950.
tions and efforts will not be deeply affected when he comes privately to disapprove of them. When an insistence on the pointlessness and insignificance of human effort is coupled with a desire to play a part fully and well, life becomes finally, as Gilbert Murray said of Stoicism,

like a play which is acted or a game played with counters. Viewed from outside, the counters are valueless; but to those engaged in the game their importance is paramount. What really and ultimately matters is that the game shall be played as it should be played . . . . If a village in your district is threatened by a band of robbers, you will give your life if necessary. But suppose, after all, you arrive too late and find the inhabitants with their throats cut and the village in ruins. Why should you mind? You know it does not matter a straw whether the villager's throats are cut or not cut . . . .

In considering Holmes it is necessary, no less than in James' case, to refer to "The Legend of the Master." Primarily interested in the common law, as a judge Holmes greatly influenced only constitutional law. Remarkably dogmatic, Holmes exemplifies "humility." Fatalistic, mistrustful of reason, obsessed with the ubiquity of force, Holmes is nevertheless classified with John Dewey. Generally indifferent to civil liberties interests, Holmes is regarded as their champion. Unconcerned with contemporary realities, Holmes inspired a school of legal "realists." Uninvolved with the life of his society, Holmes affected it profoundly. The apotheosis of Holmes defeats understanding. Just as it is possible to take another view of those traits that have been held to be the source of Holmes' greatness, so it is possible to take another view of the praise intended by Holmes' most distinguished follower: "[T]he significance of his genius would evaporate in any analysis of specific decisions."

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209 Murray, The Stoic Philosophy 43, 45 (1915).

210 Holmes did not significantly add to the received resources of the law. Yet the most creative judges, for instance Cardozo and Hand, spoke of Holmes as master. And Mr. Justice Frankfurter at times assumed a disciple's role despite his own stature and the extraordinary thoroughness with which he worked out his own deep understanding of the judicial role.


212 Frankfurter, Mr. Justice Holmes and the Supreme Court 29 (1939).