

THE ESSENTIAL
HOLMES • *Selections from the Letters,
Speeches, Judicial Opinions, and Other Writings of*
OLIVER WENDELL HOLMES, JR.

Edited and with an Introduction by
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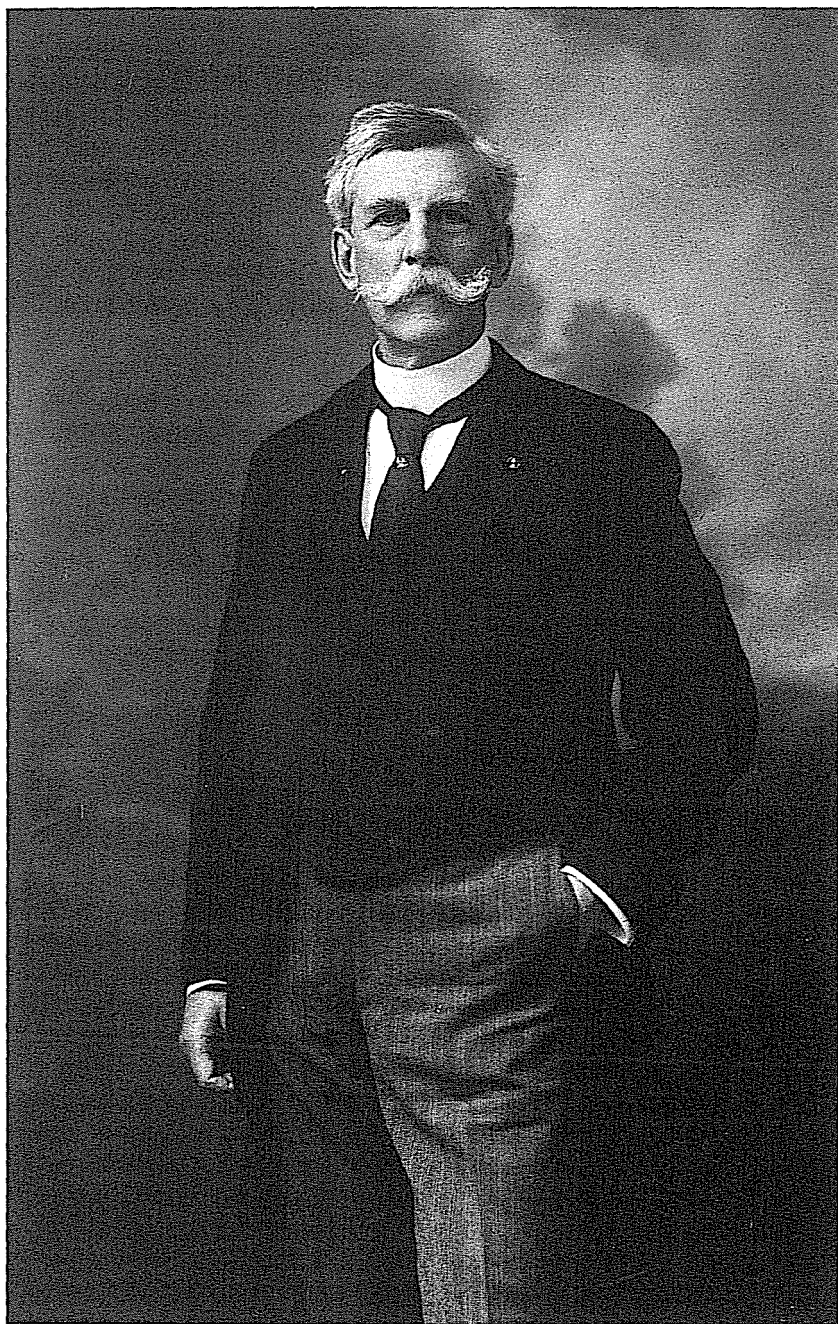
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INTRODUCTION

Oliver Wendell Holmes¹ is the most illustrious figure in the history of American law. He is also, to an extent no longer fully appreciated, a major figure in American intellectual and cultural history generally.² It is high time that his essential writings (both judicial and nonjudicial, including epistolary and belletristic), which are widely scattered, were brought together in a single volume.³ My goal in this Introduction is to introduce the reader to Holmes and to explain the principles of selection and arrangement that inform this anthology.

Born in 1841, Holmes was the eldest son of Dr. Oliver Wendell Holmes, the famous physician, poet, and man of letters—author of *The Autocrat of the Breakfast-Table*, “Old Ironsides,” “The Deacon’s Masterpiece” and other works. On his mother’s side, the future Supreme Court justice came from families (the Wendells and the Jacksons) that had played a distinguished role in the history, including legal history, of Massachusetts. Raised in Boston, a childhood friend of William and Henry James and Henry Adams and (through his father) acquainted with Emerson, Holmes first displayed literary gifts as a student at Harvard College, becoming class poet. The Civil War erupted in his senior year. A fervent abolitionist, Holmes sought and obtained a commission in the Twentieth Massachusetts Volunteers, a regiment that was to distinguish itself in the war, suffering enormous casualties in the process. Holmes served with courage, rising to the temporary rank of lieutenant-colonel, but he did not reenlist when his three years were up. He had been seriously wounded three times; the first two wounds—

1. He was born “Oliver Wendell Holmes, Jr.,” but, as was customary in those days, dropped the “junior” when his father died in 1894. I include “Jr.” in the subtitle of this book, not because the selections are confined to things he wrote before his father’s death (they are not), but to distinguish him from his father.

2. See, for example, Edmund Wilson, *Patriotic Gore: Studies in the Literature of the American Civil War*, ch. 16 (1962).

3. The only previous anthology of judicial and nonjudicial writings by Holmes is *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters and Judicial Opinions* (Max Lerner ed. 1943). Compiled in the first decade after Holmes’s death, it presents the materials from an outdated point of view and contains too few selections to convey a rounded picture of Holmes’s thought. *Justice Holmes ex Cathedra* (Edward J. Bander ed. 1966) is an amusing collection of snippets from Holmes’s opinions and of anecdotes by and about Holmes.

shots through the chest and the neck, received at Ball's Bluff and Antietam, respectively—missed killing him by fractions of an inch. He had had his fill of war.

Returning to Cambridge, Holmes entered Harvard Law School and received his LL.B. in 1866. For the next fifteen years he combined the practice of law in Boston with legal scholarship, though only at the very end of this period did he have a full-time academic appointment. He was an active participant in the broader intellectual life of Boston and Cambridge (and England, which he visited frequently until his last visit in 1913), as part of a circle that included Charles Sanders Peirce, William James, and other founders of philosophical pragmatism. Although Holmes was a competent and respected legal practitioner, his bent was academic. Considering that most of his working time was devoted to practice, his scholarly output during this period was prodigious: a distinguished edition of Kent's *Commentaries*, the leading legal treatise in America; many articles, brief notes, and book reviews; and finally *The Common Law* (1881)—widely considered the best book on law ever written by an American.

A brief stint as a professor at the Harvard Law School ended, shortly after *The Common Law* was published, with Holmes's appointment to the Supreme Judicial Court of Massachusetts in 1883. He served for twenty years on that court, the last three as chief justice. From this period come several speeches that figure largely in this volume (not all of them on legal subjects), and among them—to complement his achievement in *The Common Law*—what may be the best article-length work on law ever written, "The Path of the Law," published in the *Harvard Law Review* in 1897.

Holmes wrote many fine opinions as a state court judge, some of which foreshadow the themes of his Supreme Court years. Yet he did not, during those many years on the Massachusetts court, make anything like the impression on the law that Chief Justice Lemuel Shaw of his court had made before him or that Judge (later Chief Judge) Benjamin Cardozo of the New York Court of Appeals was to make after him. It was only with his appointment by President Theodore Roosevelt to the United States Supreme Court at an age when most men would have been preparing for retirement—he was about to turn sixty-two when he took his seat on the Court in 1903—that Holmes fully found himself as a judge. He served almost thirty years on the Court, and while most of the opinions that he wrote either have been overtaken by events or engage the interest only of legal specialists, a number of them made a durable contribution at a more general level.

Holmes continued to do some occasional writing during his years on

the Supreme Court. He retired in 1932 (with a nudge from his colleagues—for although his mind remained sharp, he could no longer handle his share of the Court's workload and, God be praised, the modern practice of having law clerks ghostwrite opinions had not yet caught on). He died three years later, days before his ninety-fourth birthday.

It is conventional to divide Holmes's career into three phases. The first, or scholarly, phase (for no one has been much interested in Holmes the practicing lawyer) dominated until his appointment to the Massachusetts court in 1883, but did not end then; the high points are *The Common Law* and "The Path of the Law," the latter written many years after he became a judge. Book and article are similar in theme as well as in distinction. Together they supplied the leading ideas for the legal-realist movement (more accurately, the legal-pragmatist movement)—the most influential school of twentieth-century American legal thought and practice—although backslidings to formalism are evident in a number of Holmes's judicial opinions and other writings.⁴

The pragmatist method is well illustrated by Holmes's treatment of contractual obligation. There is, he suggests, no duty to perform a contract, as such. Since the usual remedy for breach of contract is simply an order to pay the promisee his damages, the promisor's practical legal obligation is to perform *or* pay damages, and the promisee's practical entitlement is to performance or damages, at the promisor's option. Thus Holmes, consistent with the pragmatist program, tried to shift the focus of inquiry from the duty to keep one's promises to the consequences of breaking them. Holmes's famous prediction theory of law (law is merely a prediction of what judges will do with a given case), announced in "The Path of the Law," is a fruit of his pragmatic preference for analyzing law in terms of consequences rather than of morally charged abstractions such as "right" and "duty." Likewise his contention that law concerns itself only with behavior rather than with inner states and his attempt to trace the origins of law to revenge—both prominent themes of *The Common Law*. Finally, in Holmes's denial of a legal duty to perform promises as such, we see the severance of law from morals—the "bad man" theory of law (law viewed from the standpoint of persons who care nothing for moral duty) that is a basic element of Holmes's jurisprudence. The bad man is interested only in the consequences of violating the law; it is from his standpoint that the obli-

4. See my discussion of Holmes's jurisprudence in *The Problems of Jurisprudence* (1990), esp. Introduction and ch. 7. "Formalism" refers to the style of legal argumentation that purports to derive conclusions by logical or quasi-logical processes and thus to minimize politics and personality in judicial decision-making. For present purposes it may be considered the opposite of pragmatism or realism.

gation of a contract is merely to perform or pay damages for nonperformance, rather than to perform, period.

The third phase of Holmes's career, in the usual view, is his service on the U.S. Supreme Court—his service on the Massachusetts court (the second phase) being viewed as interlude and preparation, a lull having no great interest in itself. His major contributions as a Supreme Court justice were in four areas.

1. In the *Lochner*⁵ dissent and other famous opinions opposing the use of the due process clause of the Fourteenth Amendment to prevent social and economic experimentation by the states, Holmes created the modern theory of federalism, the theory of judicial self-restraint (though here he was borrowing heavily from James Bradley Thayer), and the idea of the “living Constitution”—the idea that the Constitution should be construed flexibly, liberally, rather than strictly, narrowly. A better metaphor for Holmes's own view of the Constitution, however, is not that it is alive, but that it should not be allowed to kill the living polity in obeisance to the dead hand of the past. Since interpretation is a two-edged sword—a license for judicial intervention as much as for judicial forbearance—there is a latent tension between Holmes's emphasis on judicial restraint and his emphasis on flexible interpretation. And although he wrote pathbreaking opinions in defense of flexible interpretation (see chapter 9), he also wrote a well-known essay on interpretation, reprinted in that chapter, that has provided ammunition to the advocates of strict interpretation. The sheer bulk of Holmes's oeuvre evidently precludes complete consistency, which may make the skeptical reader wonder whether there is, as my title posits, an “essential” Holmes.

2. In his opinions in *Schenck, Abrams*, and *Gitlow*, which launched the “clear and present danger” test and the “marketplace of ideas” conception of free speech,⁶ Holmes laid the foundations not only for the expansive modern American view of free speech but also for the double standard in constitutional adjudication that is so conspicuous a feature of modern constitutional law: laws restricting economic freedom are scrutinized much less stringently than those restricting speech and other noneconomic freedoms. Here, as in the case of interpretation, we again find Holmes seeming to work both sides of the street—rejecting the protection of economic freedom in *Lochner*, insisting upon the protection of freedom of expression in *Abrams* and *Gitlow*. If it is a crooked

5. *Lochner v. New York*, 198 U.S. 45 (1905).

6. *Schenck v. United States*, 249 U.S. 47 (1919); *Abrams v. United States*, 250 U.S. 616 (1919); *Gitlow v. New York*, 268 U.S. 652 (1925). In both *Abrams* and *Gitlow*, Holmes's opinion was a dissent.

path, still it is one that most judges and mainstream legal scholars have been content to walk with him. He could have argued that freedom of speech had a solid textual grounding in the Constitution than freedom of contract; but, consistent with his general although not uniform preference for flexible interpretation, he did not so argue.

3. Holmes mounted an influential challenge to the idea that federal courts in diversity of citizenship cases (cases that are in federal court because the parties are citizens of different states, rather than because the case arises under federal law) should be free to disregard the common law decisions of state courts and make up their own common law principles to decide the case. The challenge succeeded, shortly after Holmes's death, in the *Erie* decision, which ended "general" federal common law.⁷

4. And finally, in his dissent in *Frank v. Mangum*⁸ and his majority opinion in *Moore v. Dempsey*,⁹ Holmes established the principle that state prisoners convicted in violation of the Constitution could obtain a remedy by way of federal habeas corpus. Although Holmes's conception of the scope of habeas corpus for state prisoners was far more circumscribed than the modern view,¹⁰ it was an expansive interpretation of the Habeas Corpus Act of 1867, under which these state prisoner cases were (and are) brought.

In all four categories, the primary vehicles of Holmes's innovations were dissenting opinions that, often after his death, became and have remained the majority position. Holmes's success in dissent made the dissenting opinion a popular and prestigious form of judicial expression. His majority and dissenting opinions alike are remarkable not only for the poet's gift of metaphor that is their principal stylistic distinction, but also for their brevity, freshness, and freedom from legal jargon; a directness bordering on the colloquial; a lightness of touch foreign to the legal temperament; and an insistence on being concrete rather than legalistic—on identifying values and policies rather than intoning formulas. The content is sometimes formalistic, the form invariably realistic, practical. Unfortunately, Holmes's principal legacy as a writer of judicial opinions was not to make well-written opinions

7. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). The precursors are Holmes's dissents in *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349 (1910), and (especially) *Black & White Taxi Co. v. Brown & Yellow Taxi Co.*, 276 U.S. 518 (1928).

8. 237 U.S. 309 (1915).

9. 261 U.S. 86 (1923). All of the opinions by Holmes that I have cited, except *Kuhn*, are reprinted in this volume.

10. Holmes to Harold J. Laski, Aug. 18, 1927, in *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski 1916-1935*, vol. 2, at 971 (Mark DeWolfe Howe ed. 1953).

fashionable—a change that would require a revolution in the legal and political culture of the United States, which disdains good writing and even articulateness—but to make dissent fashionable. Modern judges are quick to dissent in the hope of being anointed Holmes's heir, but they lack Holmes's eloquence and civility. Most of them do not realize that the power of Holmes's dissents is a function in part of their infrequency; he was careful not to become a broken record.

If all Holmes had been was an influential legal scholar and, later in his life, an eloquent and (in the fullness of time) highly influential Supreme Court justice, that would be plenty; but there is much more. Only after Holmes's death did it become widely known that he had conducted for upwards of half a century a voluminous, erudite, witty, zestful, and elegant correspondence with a diverse cast of pen pals. Several volumes of this correspondence have been published; the vast bulk, however—amounting I am told to more than ten thousand letters—remains unpublished. The published letters reveal that Holmes was a voracious, indeed obsessive, reader, of extraordinarily eclectic tastes, in five languages;¹¹ a loving collector of prints; an astute student of human nature—in short a versatile, cultivated intellectual. Only recently has a set of love letters seen the light of day, addressed to one of Holmes's English friends, Lady Castletown.¹² Holmes may have been America's premier letter writer.¹³

A tall, commanding figure, his looks flawed only (and slightly) by his too-long neck (for which his father liked—nastily—to tease him), Holmes had the unusual good fortune to grow more handsome with age, becoming a magnificent octagenerian. He was also a considerable wit, like his father, and although he had no Boswell to memorialize his table talk, a number of his best sallies appear to have been repeated in the letters; others are in the Bander volume (note 1). One of the most famous is apocryphal. Holmes did *not* say of Franklin Delano Roosevelt, “A second-class mind, but a first-class temperament.” As many let-

11. English, French, German, Latin, (ancient) Greek. But, by his own admission, Holmes was no linguist. He read works in foreign languages laboriously, with frequent resort to ponies.

12. Excerpts have appeared in Sheldon M. Novick's fine biography of Holmes (*Honorable Justice: The Life of Oliver Wendell Holmes* [1989]), and more will appear in G. Edward White's forthcoming biography of Holmes.

13. All the letters reprinted in this volume have been published previously, with the exception of the letters to Alice Stopford Green, which were transcribed by Mark DeWolfe Howe. Apart from the Green letters, kindly drawn to my attention by Philip Kurland, I have not attempted to explore Holmes's voluminous unpublished correspondence—most of which remains, untranscribed, in Holmes's virtually indecipherable handwriting.

ters make clear, this was Holmes's opinion of Theodore Roosevelt, though it is not clear that he ever stated it so pithily.

Holmes lived to a great age with remarkably little decline in intellectual zest and power, and faced the indignities and deprivations of old age—"wreck of body, / Slow decay of blood, / Testy delirium / Or dull decrepitude, / Or what worse evil come— / The death of friends, or death / Of every brilliant eye / That made a catch in the breath"¹⁴—with great courage and gallantry, so that his last years completed a circle with the military heroism of his youth and earned Frankfurter's description of Holmes's great natural gifts as having been "accentuated by his long, dashing career which enveloped him as though in a romantic aura."¹⁵ Holmes was childless, so left no proofs of the regression phenomenon; and notwithstanding his (apparently harmless, i.e., noncoital) flirtations, his marriage of sixty years to Fanny Dixwell remains a monument to the institution of companionate marriage. Not only was Holmes a great jurist, a great prosodist, a great intellectual; he was a great *persona*, a great American, a great life.

Legal scholarship being inveterately and indeed obsessively political (and that regardless of the point on the political compass from which it comes), Holmes's reputation has fluctuated with political fashion, though never enough to dim his renown. Although many of his opinions took the liberal side of issues, the publication of his correspondence revealed—what should have been but was not apparent from his judicial opinions and his occasional pieces—that, so far as his personal views were concerned, he was a liberal only in the nineteenth-century libertarian sense, the sense of John Stuart Mill and, even more, because more *laissez-faire*, of Herbert Spencer. He was not a New Deal welfare state liberal, and thought the social experiments that he conceived it to be his judicial duty to uphold were manifestations of envy and ignorance and were doomed to fail. He had, moreover, a hard, even brutal, side, conventionally ascribed to his Civil War experience, that is found in few of the English libertarians (none of them soldiers). It is the side shown by his friend James Fitzjames Stephen (of which more shortly), a critic of Mill. Hostile to antitrust policy, skeptical about unions, admiring of big businessmen, Holmes was a lifelong rock-ribbed Republican who did not balk even at Warren Harding. His "objectively" liberal efforts as a Supreme Court justice to loosen the federal judicial hold over state legislation, and his advocacy of judicial self-restraint generally, have less appeal to liberals of all stripes today, to whom many con-

14. W. B. Yeats, "The Tower," pt. 3 (1927).

15. Felix Frankfurter, "Foreword," in *Holmes-Laski Letters*, note 10 above, vol. 1, at xiv.

temporary state legislative innovations seem retrogressive—and repressive—as in the occasional attempts to restore the sexual morality of the nineteenth century by banning pornography and abortions. Holmes's advocacy of free speech has set him on a collision course with the efforts of today's feminists and spokesmen for minority groups to repress sexist and racist expression. And habeas corpus and *Erie* are old hat, and Holmes's role in them largely forgotten.

Nor has Holmes a secure following among conservatives, although they are happy enough to quote those snippets of his prose which support their agenda—the snippets endorsing judicial restraint and strict construction. Atheist, Darwinian, eugenicist, moral relativist, aesthete, and man of the world, Holmes is not a figure with whom modern social conservatives, whether of the Moral Majority or of the *Commentary* variety, can feel entirely comfortable; and those who like his libertarian economic views are prone to dislike the decisions in which he dissented from the judicial imposition of those views on the states. Legal realism and pragmatism are alive and well but most of their practitioners are modern liberals, who are not comfortable with Holmes's views of social policy. (Most conservatives, having forgotten that Sidney Hook was a socialist, consider pragmatism a socialist creed.) Although still a deeply respected and even venerated figure, Holmes today lacks a natural constituency among lawyers and others interested in legal and public policy, while to the broader public he is only a name.

It is natural to suppose that Holmes's place in history depends on the magnitude, soundness, and durability of his contributions to law and to thinking about law. Perhaps it does, but this volume has been constructed on a different premise, or rather premises: that Holmes's true greatness is not as a lawyer, judge, or legal theorist in a narrowly professional sense of these words, but as a writer and, in a loose sense that I shall try to make clear, as a philosopher—in fact as a “writer-philosopher”; and that his distinction as a lawyer, judge, and legal theorist lies precisely in the infusion of literary skill and philosophical insight into his legal work.

I anticipate two objections. The first is to an aesthetic perspective on law, a perspective implicit in assigning a big role in the evaluation of a judge or legal thinker to his skill at writing. I imply by “aesthetic” a suspension of ethical or political judgment. A review by Peter Teachout of a previous book of mine¹⁶ takes me to task for praising the rhetoric of Holmes's much criticized opinion in *Buck v. Bell*¹⁷ (“Three generations

16. Peter Read Teachout, “Lapse of Judgment” (Review of *Law and Literature: A Misunderstood Relation*), 77 *California Law Review* 1259, 1293–1295 (1989).

17. 274 U.S. 200 (1927).

of imbeciles are enough") while criticizing the reasoning and result. To Teachout, rhetoric is intrinsically moral, making it a contradiction in terms to call an opinion good (i.e., beautiful) rhetoric but bad law or morals.¹⁸ This is semantic quibbling. There is no reason the word "rhetoric" cannot be attached to writing or speech viewed, evaluated, as an instrument to a given end—the persuasion, edification, mystification, entertainment, or whatnot, of its audience. The quality of "rhetoric," so defined, has nothing to do with the merits of the rhetorician's end. And that is the offense: to those whose bent is strongly ethical—a common American tendency, puritanism and philistinism being salient features of our culture—the aesthetic conception of rhetoric is not only unworthy but insidious, a seductive art at the disposal equally of good and evil. These solemn moralizers will never appreciate Holmes, or credit such distinction as they are willing to grant him to his writing skill. I in contrast have no compunctions about separating the moral and aesthetic dimensions of expression and seeing in Holmes one of our greatest writers, however much one may disagree with the content of some of his finest prose.

I go further. I claim that some of Holmes's best opinions, notably the *Lochner* dissent, possibly the most famous and influential of all his opinions, owe their distinction to their rhetorical skill rather than to the qualities of their reasoning; often they are not well reasoned at all.¹⁹ In part at least, Holmes was a great judge *because* he was a great literary artist. And in part because he was a philosopher—a suggestion that invites a second objection to my argument that Holmes's distinction as a jurist derives mainly from his being a writer-philosopher. This objection is that law, surely, is an autonomous discipline, practical in character, and not a parasite on other disciplines, especially one as nebulous as philosophy. Many lawyers, at least, will think it denigrates Holmes to associate him with so dubious an academic activity, surely little better than navel-gazing, as philosophizing.

I shall try to indicate what I think Holmes's work in law owed to his being a philosopher, but I must first explain what I mean by calling him that, what his philosophy was, and, indeed, what philosophy is. "Philosophy" is a collection of problems and suggested (but often, as it now appears, deeply inadequate) solutions found in a body of texts that

18. "To say that a 'poorly reasoned' and 'vicious' opinion also represents 'a first-class piece of rhetoric' impoverishes immeasurably our sense of what is meant by rhetoric and by excellence in rhetoric." Teachout, note 16 above, at 1294. The interior quotations are from my book *Law and Literature: A Misunderstood Relation* 289 (1988).

19. *Law and Literature: A Misunderstood Relation*, note 18 above, at 281–288, discussing *Lochner*; cf. Richard A. Posner, *Cardozo: A Study in Reputation*, ch. 7 (1990).

(setting aside the important but fragmentary contributions of Heraclitus and other pre-Socratic philosophers) begins with the works of Plato and the nonscientific works of Aristotle and culminates, or perhaps peters out, in the specialized and often hideously technical and obscure writings of present-day professors of philosophy. The problems that define works as philosophical tend to be of a general and fundamental character, not amenable to systematic empirical investigation; and the suggested solutions tend, therefore, to be quasi-theological, aspiring to final and comprehensive, but empirically untestable, understanding. The ambitions of the philosophical system-builders regularly provoke a skeptical backlash, so that the history of philosophy is the history both of the philosophical problem-solvers and of the antiphilosophers nipping at their heels. We have philosophers and antiphilosophers, and together they make up philosophy.

Among the fundamental questions that philosophy worries are questions about the meaning and purpose of human life, including the meaning and purpose of human life in a cosmos from which God has departed. Nietzsche, a contemporary of Holmes, said that God is dead. (*Dead for us*: Nietzsche was making a sociological rather than a metaphysical observation.) God had been killed among the thinking class by physics, geology, the "higher criticism" of the Bible, and the theory of evolution—systems of thought that had undermined Christianity's appeal to the rational intellect—and had been badly wounded among the common people by the growth of security and prosperity, which had shifted people's attention from the next world to this one. Christianity had been the foundation of Western civilization. Its disappearance as a living source of metaphysical certitude and ethical foundations was the crisis of modernity. Holmes agreed; and by the depth and eloquence of his belief he became part of a diverse cast of moderns that includes (in addition to Nietzsche and Holmes) Heidegger, Kafka, Gide, Camus, Sartre, Wittgenstein (in his later work), and, among our own contemporaries, Richard Rorty. All these thinkers have been concerned with the personal and social implications of taking seriously the definite possibility that man is the puny product of an unplanned series of natural shocks having no tincture of the divine, and they have been suspicious of efforts to smuggle in God by the back door (perhaps by renaming him Progress, or Science, or Technology, or History, or the Class Struggle) in order to recreate the certitude and the sense of direction that Christianity had provided. Pragmatism and existentialism are characteristic, and related, manifestations of this influential current in modern thought, the first typically American, the second typically European.

It is no accident that a majority of the persons in my list were not profes-

sors of philosophy and that all, even those who were not literary artists, had literary or artistic interests and, with the possible exception of Heidegger, wrote with great distinction (present tense, of course, in the case of Rorty). For when we speak of “the meaning of life” we speak of a topic about which literary artists seem to have more to say than philosophers. When modern secular intellectuals seek consolation for a loss, for aging, for the indifference, immensity, and caprice of the universe, or for the cruelty of man, it is to literature rather than to philosophy that they turn. It should come as no surprise that the most penetrating insights into the philosophical topic that I am calling “the meaning of life” come from individuals who fuse philosophical and literary attributes, writing in a form equally remote from academic philosophizing and imaginative literature: notably Nietzsche and Wittgenstein, but also, though in a minor key, Holmes. It is a matter not of sheathing philosophical analysis in graceful language but of aesthetizing philosophy—of seeing in it the materials for conceiving of a life on the model of a work of art.²⁰ Holmes, most like Nietzsche in this regard, was, then, a “writer-philosopher.”

There are affinities in content as well as in form between these great contemporaries. I shall not explore those here.²¹ I have tried to explain how I think Holmes ought to be approached, and the arrangement of materials in this volume is intended to assist the reader in taking that approach. I leave it to the reader to discover what is to be found at the end of the journey.²² The filaments of his thought are astonishing in their variety (I have touched on a few already). One can find pragmatism, atheism, (nineteenth-century) liberalism, materialism, aestheticism, utilitarianism, militarism, biological, social, and historical Darwinism, skepticism, nihilism, Nietzschean vitalism and “will to

20. Cf. Alexander Nehamas, *Nietzsche: Life as Literature* (1985).

21. I discuss them in *The Problems of Jurisprudence*, note 4 above, at 239–241.

22. The scholarly literature on Holmes is impressive in sophistication as well as bulk. Places to begin include the two volumes of Mark DeWolfe Howe's uncompleted biography: *Justice Oliver Wendell Holmes: The Shaping Years 1841–1870* (1957), and *Justice Oliver Wendell Holmes: The Proving Years 1870–1882* (1963); the endnotes in the Novick biography, note 12 above; and several recent essays: Patrick J. Kelley, “Was Holmes a Pragmatist? Reflections on a New Twist to an Old Argument,” 14 *Southern Illinois University Law Journal* 427 (1990); Thomas C. Grey, “Holmes and Legal Pragmatism,” 41 *Stanford Law Review* 787 (1989); G. Edward White, “The Integrity of Holmes' Jurisprudence,” 10 *Hofstra Law Review* 633 (1982); White, “Holmes's ‘Life Plan’: Confronting Ambition, Passion, and Powerlessness,” 65 *New York University Law Review* 1409 (1990); Robert W. Gordon, “Holmes' Common Law as Legal and Social Science,” 10 *Hofstra Law Review* 719 (1982); and Mark Tushnet, “The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court,” 63 *Virginia Law Review* 975 (1977). For my own, distinctly more favorable view of Holmes, see index references to Holmes in *The Problems of Jurisprudence*, note 4 above, and *Law and Literature: A Misunderstood Relation*, note 18 above; also the scattered discussions of Holmes in *Cardozo: A Study of Reputation* (1990), esp. pp. 138–140.

power," Calvinism, logical positivism, stoicism, behaviorism, and existentialism, together with the explicit rejection of most of these "isms" and a sheer zest for living that may be the central plank in the Holmesian platform. Whether the elements of his thought coalesce to form a coherent philosophy of life I doubt—because I range Holmes in the ranks of the antiphilosophers—but leave to the reader to decide. What I do not doubt is that the variety of intellectual influences that played upon Holmes's subtle and receptive intellect, together with his power of articulation and the daring with which he brought his intellectual storehouse and rhetorical imagination to bear on his professional tasks, makes Holmes a central figure in the intellectual history of this nation, and one who deserves to be more widely and appreciatively read than he is.

I said "intellectual history of *this nation*"—not of the world, and I want now to explain this qualification. Holmes's thought, and the fundamentals of his literary style, were pretty much fixed by the time *The Common Law* appeared. Indeed, the most famous sentence he ever wrote—"The life of the law has not been logic: it has been experience"—graces the opening paragraph of that book. And in Holmes's formative years America was, intellectually, a province of England. How likely is it, then, that Holmes was an *original* thinker and writer? I think his was a syncretic rather than a profoundly original mind, and that is why I used the word "minor" when comparing him to Nietzsche and Wittgenstein. I suspect that he borrowed greatly and to great advantage from the people he met in England as a young man, notably John Stuart Mill and James Fitzjames Stephen, and that by doing so he helped to make American thought cosmopolitan and (paradoxically) to liberate American jurisprudential thought from slavish adherence to English models. He did more than translate English into American. He enriched where he borrowed; his creative imitation was a species of greatness, like that of Shakespeare though on a much smaller scale.

Mark DeWolfe Howe, in his uncompleted biography of Holmes, discussed Holmes's intellectual debts in great detail. But so deferential was Howe toward his subject that he downplayed Holmes's indebtedness to predecessors lest he be thought to be accusing him of lack of generosity toward them—but that *was* one of Holmes's sins, although a venial one. Among Holmes's creditors was, as I have said, James Fitzjames Stephen,²³ a prolific English jurist of the generation before Holmes,

23. Howe, *Justice Oliver Wendell Holmes: The Shaping Years*, note 22 above, at 213, 227, 267–268. For illustrative works by Stephen—who incidentally was the (elder) brother of Leslie Stephen, and thus Virginia Woolf's uncle—see *Liberty, Equality, Fraternity* (R. J.

whom Holmes met shortly after beginning his own legal career. To the extent that Stephen is remembered today it is for his book *Liberty, Equality, Fraternity*, first published in 1873, an attack on James Stuart Mill notable for its advocacy of using law to shape morals. This might seem to place Stephen at the antipodes from Holmes. Not so. Stephen was a Benthamite, a skeptic, a tough-minded, no-nonsense antisentimentalist, and a master of plain, forceful prose enlivened with apt metaphor. I imagine that Holmes learned much from Stephen—especially how to write English English, which is to say good English, rather than American English, which in Holmes's formative years and indeed long after was, with a few notable exceptions such as that of Lincoln (but was not Lincoln's English the English of the King James Bible?), bad English. Stephen advocated the use of law to back up the moral teachings of Christianity because he thought supernatural sanctions alone were not enough to coerce good behavior. His ground, then, was utilitarian, and his whole approach to law was practical, instrumental. The germ of Holmes's "bad man" theory is in Stephen, who disparaged Mill for the hints of egalitarianism, and for what Stephen considered the overvaluation of liberty, in Mill's later writings. Also like Holmes, Stephen emphasized the importance of revenge in shaping the criminal law. Stephen was unwilling to abandon *all* belief in the Judeo-Christian God, however, and in this he differed from Holmes. A related difference is that Stephen was untouched by Darwin. Holmes was the more thoroughgoing skeptic, was far more influenced by science and, in a word, far more modern. Yet if the philosophy of life of Holmes and of Stephen had each to be summarized in three words, it would be the same three words: Calvinism without God. "Nirvana," Stephen wrote "always appeared to me to be at bottom a cowardly ideal. For my part I like far better the Carlyle or Calvinist notion of the world as a mysterious hall of doom, in which one must do one's fated part to the uttermost, acting and hoping for the best and trusting" that somehow or other our admiration of the "noblest human qualities" will be justified.²⁴

How well this sums up Holmes's view of life I hope this volume will make clear. I do not suppose he took it from Stephen or any other one person. It must have welled up from the depths of his being; it was the interaction of his temperament with his social and intellectual environment. He did borrow ideas, metaphors, even perhaps poses from

White ed. 1967), and *Essays by a Barrister* (1862), especially the essay "Doing Good," in *id.* at 78.

24. From a letter quoted in Leslie Stephen, *The Life of Sir James Fitzjames Stephen* 458–459 (1895).

Stephen as from others, but he formed them into a personal philosophy and system of jurisprudence unmistakably his own, and by doing so he made, incidentally, a far greater impact on the law than Stephen had done through his voluminous writings and his judicial opinions (Stephen was a judge of the English High Court for twelve years). As one acquaints oneself with Holmes's predecessors, surprise at finding many of Holmes's insights and even expressions anticipated gives way to awe at the power and ingenuity with which Holmes synthesized, reformulated, and extended the ideas and expression of those who had gone before him.

I have been emphasizing literary flair and philosophical insight. But there is more to Holmes's achievement than this. The functional, evolutionary, policy-saturated perspective of *The Common Law* was a considerable innovation in legal scholarship. Nor should we neglect his proficiency as a working judge. He was a deep student of the common law and a skillful legal analyst, and—much like Learned Hand, the greatest lower-court judge in the history of the federal judiciary—he had a considerable intuitive feel for the economic and other policy implications of legal doctrine. His sterling judicial character—serenely and steadfastly detached from the parochial values of his class and the political fashions and pressures of the time—is an underemphasized dimension of his distinction. His detachment has often been confused with coldness. There were indeed times when he seemed to look at his fellow man through the wrong end of the telescope. In a letter quoted at greater length below, he wrote, “My bet is that we have not the kind of cosmic importance that the parsons and philosophers teach. I doubt if a shudder would go through the spheres if the whole ant heap were ker-ensened.” But in his judicial opinions as in his letters, warmth, charm, even sweetness are conspicuous.

Holmes's judicial performance exhibits great variance, owing in part to the impatience with which he attacked judicial assignments; and recent legal scholarship, having cast off the exaggerated, almost hagiographic, deference of Howe's generation, focuses on the vulnerable aspects. Then too, much of any judge's work, even that of a justice of the Supreme Court, is ephemeral—indeed, when viewed from the distance of a half century or a century, a bore. Yet I think a careful and (if such a thing is possible) disinterested study of Holmes's opinions would produce a sharp upward revaluation of his judicial performance. This is not the place to attempt such a study, but I have included in this volume a few of Holmes's less famous opinions to indicate the scope and vitality of his judicial oeuvre.

But it is not for his gifts of legal reasoning (narrowly understood) or

judicial temper that he is, or should be, chiefly renowned as a judge, let alone as a scholar. It is for the general principles, such as legal positivism and judicial self-restraint and freedom of speech, that his opinions and his pre-judicial and extrajudicial writings helped to shape, and for the unequalled literary power in which he articulated and applied those principles. And—to return at last to my suggestion concerning the springs of his greatness—he owed those principles not to legal texts or other traditional sources of law but to the possession of a philosophical mind that saw the Darwinian struggle, for example, instantiated in the labor movement, the social-welfare movement, and even communist agitation; that insisted on subjecting legal doctrine to the pragmatic test of meaning; that built judicial restraint and freedom of speech on the surprisingly robust foundations of skepticism, relativism, and pragmatism; that distinguished with unprecedented clarity between legal positivism and natural law.

Nor should Holmes's literary skill be thought merely a bright coat of verbal paint on a philosophical chassis that does all the real work in enduing his judicial opinions with depth and resonance. Remember that I called him a writer-philosopher. Language is the gate of perception, and its masters therefore see farther than the rest of us. The insight that invests Holmes's judicial work with depth and resonance is literary as well as philosophical, the writer-philosopher being at work in his opinions as well as in his extrajudicial writings. To the literary side of Holmes we owe the poetic concreteness, the metaphoric vividness, of his opinions; to his philosophical side, the sense of the general in the particular—the sense that Holmes “had one foot on the finite and the other on the infinite” (unpublished letter to Alice Stopford Green, June 18, 1911).

Given my aims, the reader will not be surprised to discover that the selections are not grouped by genre (letters, occasional writings, judicial opinions, etc.); do not attempt a representative sampling of Holmes's writings (for example, I have included almost nothing that Holmes wrote before *The Common Law*); are not in chronological sequence; and are minimally annotated. The groupings are broadly thematic, and the general movement of the volume is from general to specific, so that the selections dealing with the life struggle and other metaphysical topics precede those dealing with the social struggle, politics, and personalities, with law bringing up the end. But as I have not wanted to split up individual works, placing a fragment in one part of the book and another fragment elsewhere, there are many departures from the sequence just outlined. To avoid solemnizing the man, I have included some selections for their charm and zip rather than for their

depth and have rather loaded them toward the front of the volume, under such headings as “Joie de Vivre” and “Aging and Death” (an exhilarating bunch of letters—don’t be put off by my chapter title!). To enhance readability, I have indicated ellipses only when something of substance (as distinct from a citation, cross-reference, bibliographical footnote, “yours truly,” or other triviality) has been omitted, and I have also surreptitiously, though very slightly, modernized Holmes’s punctuation and corrected an occasional misspelling or typographical error.²⁵

The impossibility of arranging Holmes’s writings in watertight subject-matter compartments without damaging their flavor by breaking them into fragments stems from the kaleidoscopic variety and succession of subjects in a single document. The tendency is especially pronounced in the letters, as two examples (not printed elsewhere in this volume) will illustrate:²⁶

Beverly Farms, September 15, 1916

My dear Laski,

. . . I should drop pragmatic and pluralistic. Perhaps I am the more ready to say so because after honest attention I don’t think there is much in either of those parts of W. James’s philosophy. But in any event, though Pound also talks of pragmatism, the judging of law by its effects and results did not have to wait for W.J. or Pound for its existence, and to my mind it rather diminishes the effect, or checks the assent you seek from a reader, if you unnecessarily put a fighting tag on your thought. So as to the other word. As to the thing last involved I don’t know that I could do more than repeat what I have said or im-

25. Primarily in papers and opinions that he wrote before the 1890s, there are commas in odd places (such as before the direct objects of verbs and before dashes), which I have deleted. The letters contain an eccentric number of dashes, which I have pruned slightly, following Howe’s lead. Apart from these changes and those noted in the text above, the letters appear exactly as in the published volumes from which I have taken them; I do not vouch for the accuracy of the editors’ transcriptions of Holmes’s scrawl. This is not a critical edition of Holmes’s works, in which the editor tries to establish an authoritative text. In this regard I should note that there are numerous although mostly minor discrepancies between opinions by Holmes published in the official reports of the Massachusetts Supreme Judicial Court or the United States Supreme Court and the same opinions as published in unofficial, but normally highly reliable reports, such as the *Northeastern Reporter* or the *Lawyers’ Edition* of U.S. Supreme Court decisions. I have used the official reports except where the version in the unofficial report appeared to be more accurate. I have also, as with the other materials reprinted in this volume, taken some liberties with capitalization, punctuation, and spelling, in order to eliminate archaisms.

26. The first letter is to Harold Laski and is reprinted from the Holmes-Laski correspondence, note 10 above, vol. 1, at 20; the second is to Lewis Einstein and is reprinted from *The Holmes-Einstein Letters: Correspondence of Mr. Justice Holmes and Lewis Einstein 1903–1935* 49 (James Bishop Peabody ed. 1964).

plied before. The scope of state sovereignty is a question of fact. It asserts itself as omnipotent in the sense that it asserts that what it sees fit to order it will make you obey. You may very well argue that it ought not to order certain things, and I agree. But if the government of England or any other first class European power, or, under a changed Constitution, the Congress of the U.S., does see fit to order them, I conceive that order is as much law as any other—not merely from the point of view of the Court, which of course will obey it—but from any other rational point of view—if as would be the case, the government had the physical power to enforce its command. Law also as well as sovereignty is a fact. If in fact Catholics or atheists are proscribed and the screws put on, it seems to me idle to say that it is not law because by a theory that you and I happen to hold (though I think it very disputable) it ought not to be . . . All my life I have sneered at the natural rights of man—and at times I have thought that the bills of rights in Constitutions were overworked—but these chaps remind me if I needed it, and I am not sure that Croly doesn't, that they embody principles that men have died for, and that it is well not to forget in our haste to secure our notion of general welfare . . .

Turning to your letter, I hadn't been aware of a difference between us concerning H. Spencer but if I should take you literally should feel quite sure that you didn't do him true justice. I think myself that he was something of an originator, but at all events his great influence as a *vulgarisateur* may not be realized by you, coming after the accomplishment of the results. A great many things that he said were very far from commonplace when he said them, although I have no doubt they would seem pretty thin now. When I remarked that concerning *The Scarlet Letter* to W. James he replied, of course it does—it was an original book . . .

Beverly Farms, August 19, 1909

My dear Einstein,

. . . Before he came I also had read Henry James's *The Ambassadors*. All the characters as usual talk H. James, so that I regard it rather as a prolonged analysis and description than as a drama. It brought up Paris to me; but more especially, by a kind of antagonism that it provoked, made me reflect, contrary to Münsterberg's book (*The Eternal Values*), how personal are our judgments of worth. If a man debates for half an hour whether to put his right or left foot forward while he stands in a puddle, he will think me stupid when I prefer to brusquer the decision. For all I know the fate of the cosmos may hang on it, but I think him stupid as to the growth of ideas, or the law, or whatever my hobby may be. I was struck as usual by the exclusiveness of his criteria and interests. He lives in what seems to me rather a narrow world of taste and refined moral vacillations; but in them he is a master. I can't help preferring him in description and criticism, but he has a circle that thinks him great as a novelist. My general attitude is relatively coarse: let the man take the girl or leave her. I don't care a damn which. Really, I suppose, he, like his brother and the parsons, attaches a kind of transcendental value to personality; whereas my bet is that we

have not the kind of cosmic importance that the parsons and philosophers teach. I doubt if a shudder would go through the spheres if the whole ant heap were kerosened. Of course, for man, man is the most important theme; but it makes a difference whether one thinks one is a relation or not with the absolute. As I probably have written before I define truth as the system of my limitations, and don't talk about the absolute except as a humorous bettabilitarian (one who treats the Universe simply as bettable). Man of course has the significance of fact; that is he is a part of the incomprehensible, but so has a grain of sand. I think the attitude of being a little god, even if the great one has vanished, is the sin against the Holy Ghost. Like other grounds of salvation this one is intellectual not moral. Man is damned, and I should like to see him executed for being inadequate . . .

The letters hop around in the liveliest possible fashion from topic to topic (the two letters just quoted—and not in their entirety, either—touch on character, personalities, philosophy, religion, law, literature, and the nature of originality), depending on what is on Holmes's mind at the moment or on the topics mentioned in the letter to which he is responding, or both. It is impossible to assign such letters to one department of Holmes's thought.

I do not share all of Holmes's beliefs, philosophical and otherwise, and I do not think that the most important thing about a judicial opinion is that it be well written. But I would not have undertaken this volume if I did not think that there was much of permanent value in what I am calling Holmes's philosophy of life. The rise of the ghostwritten judicial opinion and the ghostwritten judicial speech or article marks a sad declension in the quality as well as the eloquence of American law, just as ghostwriting and television have combined to debase political rhetoric generally. All educated Americans, and especially American lawyers in all branches of this alarmingly powerful profession, have much to learn from Holmes, and my overriding aim in this volume has been to make the learning easier.

The selections represent only a small sample of a corpus that includes more than two thousand judicial opinions as well as thousands of letters and about a hundred articles, speeches, and notes; only *The Common Law* and the occasional speeches are generously sampled. But because Holmes repeated himself a lot, because many of the early articles are in effect reworked in *The Common Law*, and because many of the letters and opinions deal with ephemera, the title I have chosen for this anthology can be defended. I hope, though, that the reader will be stimulated to search out the other riches in Holmes's writings, especially the letters, of which my sample is particularly meager.²⁷ Perhaps this

27. The best of the letters, in my opinion, are in the Holmes-Laski correspondence. The other collections of published letters from which I have borrowed are *Holmes-Pollock*

volume will even encourage progress toward an edition of the *complete* works of Holmes, encompassing all the opinions and all the letters, including the unpublished ones. Meanwhile, the vastness of the corpus makes a book like this essential (so my title has a double meaning) for bringing Holmes before that larger public, within as well as outside the legal profession, that has not taken much interest in him.

At a minimum, these selections should persuade the unprejudiced reader not to dismiss Holmes as a man not of our time. The impulse to do so is evident in a stream of belittling, at times hysterical, criticisms of the man and his ideas that has flowed steadily since the publication in 1945 of "Hobbes, Holmes and Hitler."²⁸ Much of the early criticism was by Catholic jurists writing in the natural law tradition²⁹ and is readily explained by their instinctive antipathy to Holmes's legal positivism. Holmes's enthusiasm for eugenics, evident in *Buck v. Bell* and in his correspondence, is offensive not only to Catholics (who to

Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock 1874–1932 (Mark DeWolfe Howe ed. 1941) (also two volumes); *The Holmes-Einstein Letters*, note 26 above; "The Holmes-Cohen Correspondence," 9 *Journal of the History of Ideas* 3 (Felix S. Cohen ed. 1948); *Progressive Masks: Letters of Oliver Wendell Holmes, Jr., and Franklin Ford* (David H. Burton ed. 1982); *Holmes-Sheehan Correspondence: The Letters of Justice Oliver Wendell Holmes and Canon Patrick Augustine Sheehan* (David H. Burton ed. 1976). The principal articles are in Oliver Wendell Holmes, *Collected Legal Papers* (1920), and the principal speeches in Oliver Wendell Holmes, *Speeches* (1913). Those speeches and more appear in *The Occasional Speeches of Justice Oliver Wendell Holmes* (Mark DeWolfe Howe ed. 1962), while a number of the very early articles, which do not appear in *Collected Legal Papers*, are reprinted in *The Formative Essays of Justice Holmes: The Making of an American Legal Philosophy* (Frederic Rogers Kellogg ed. 1984). The University of Chicago Press is soon to publish a four-volume collection, edited by Sheldon Novick, of all of Holmes's articles and speeches plus *The Common Law*. A number of Holmes's opinions for the Massachusetts Supreme Judicial Court are reprinted (and others excerpted) in *The Judicial Opinions of Oliver Wendell Holmes: Constitutional Opinions, Selected Excerpts and Epigrams as Given in the Supreme Judicial Court of Massachusetts (1883–1902)* (Harry C. Shriver ed. 1940). And a number of Holmes's opinions for the U.S. Supreme Court appear in *The Dissenting Opinions of Mr. Justice Holmes* (Alfred Lief ed. 1929), and *Representative Opinions of Mr. Justice Holmes* (Alfred Lief ed. 1931). Novick's biography of Holmes, note 12 above, at 400–407, contains a complete bibliography of Holmes's published writings.

28. Ben W. Palmer, "Hobbes, Holmes and Hitler," 31 *American Bar Association Journal* 569 (1945). "If totalitarianism comes to America . . . it will come through dominance in the judiciary of men who have accepted a philosophy of law that has its roots in Hobbes and its fruition in implications from the philosophy of Holmes." *Id.* at 573.

29. A good example is Harold R. McKinnon, "The Secret of Mr. Justice Holmes: An Analysis," 36 *American Bar Association Journal* 261 (1950). McKinnon takes Holmes to task for failing to recognize that "the foundation of our law" is "the recognition that it is a father-controlled world in the sense that infinitely above the strivings of men is the Providence of God." *Id.* at 346 (*italics in original*). Holmes would have been nauseated by this passage.

their great credit opposed the movement for sterilizing the unfit that gave rise to the statute upheld in *Buck*) but also to those who remember eugenic sterilization as one of the policies of Hitler's Germany.³⁰ Holmes's military experience supplied metaphors for his writing that grate on the sensibilities of the modern intellectual, as do his "my country right or wrong" patriotism, his Social Darwinism, and his hostility to most social reform outside of the field of eugenics. Holmes's most recent biographer has found it necessary to apologize to his reader for Holmes's sexism, racism, and other affronts to contemporary sensibilities.³¹ I daresay my suggestion, even duly qualified, that Holmes is the American Nietzsche³² will not endear him to those for whom Nietzsche is the philosopher of Nazism—nor even to those for whom Nietzsche is the philosopher of postmodernism.

The picture of Holmes as a reactionary monster is an enormous distortion. It is true that he held basically conventional views—today regarded by some as vicious—of women, and in particular that he sometimes belittled their intellectual capacities; yet he also valued their conversation to a degree unusual in his day. Nor can it all have been flirtation or small talk because a number of his letters to women have the same intellectual content as his letters to men, as the letters to Alice Stopford Green that I reprint in this volume show. It is true that after his youthful abolitionist phase he displayed no marked sympathy for black people; but he was remarkably unprejudiced for his time. He had none of the snobbism, the anti-Semitism, and the contempt for American culture and institutions held by his childhood friends Henry James and Henry Adams; it is impossible to imagine him an expatriate. Steadfast in his belief in capitalism (a belief that is seeming rather prescient at the moment), he nevertheless was utterly willing to allow socialist experimentation, abhorred "red scares," had a soft spot for unions, and cultivated the friendship of Jewish radicals (as they appeared to proper

30. Forcefully denounced (don't be put off by the bland title) in "Sterilization Law in Germany: Statistical Survey concerning Obligatory Sterilization in Germany," 95 *Ecclesiastical Review* 50 (1936). See also Ingo Müller, *Hitler's Justice: The Courts of the Third Reich*, ch. 13 (1991).

31. "Justice Holmes proved to be a shadowed figure, marked by the bigotry and sexism of his age, who in personal letters seemed to espouse a kind of fascist ideology. He was a violent, combative, womanizing aristocrat." Novick, note 12 above, at xvii. Novick has gone overboard. Every substantive term in his list—"bigotry," "sexism," "fascist," "ideology," "violent," "combative," "womanizing," and "aristocrat"—is imprecise and misleading as applied to Holmes; and it is apparent from the title of Novick's book and much else besides that Novick's own view of Holmes is altogether more favorable than the use of these terms implies.

32. *The Problems of Jurisprudence*, note 4 above, at 239–242.

Bostonians) such as Brandeis, Frankfurter, and Laski. Tolerance, largeness of spirit, scientific curiosity, and liberalism in its most cosmopolitan form: these are the abiding characteristics of Holmes's thought, along with that fundamental and, I think, deeply creative and energizing sense of existential commitment that he shared with James Fitzjames Stephen. Holmes was no pacifist or one-worlder—quite the contrary—but I cannot recall anywhere in his writings an expression of enthusiasm for American imperialism, gunboat diplomacy, or “the white man's burden.” His devotion to civilization, democracy, free speech, and the rule of law gives the lie to attempts to find affinities between his thought and the ideology of totalitarian or authoritarian thinkers—which is not to deny that at a sufficient level of generality such affinities exist. (Define “fascist” broadly enough, and we are all fascists.) We may find Holmes's eugenic enthusiasms shocking, although with the renewed interest (stimulated by modern medicine's ability to keep people alive in a vegetative state) in euthanasia, and with the rise of genetic engineering, we may yet find those enthusiasms prescient rather than depraved. We should remember that belief in human eugenics was a staple of progressive thought in Holmes's lifetime;³³ for example, it was one of the motivations behind the Planned Parenthood movement.³⁴ The fact that Holmes thought war necessary will not endear him to the modern intellectual, but we must remember that the particular war he thought necessary was our Civil War, that there is at least one more necessary war in our recent past, World War II, and that at this writing we have just finished another war that most people in this country think just. Holmes believed in blind commitment, and in this we can see folly if we like, or an echo of Kierkegaard and an anticipation of Sartre and Camus, or merely an admission of human fallibility: all our commitments must be blind because we are blind.

For those whose only heroes and heroines are men and women who think just like themselves, who refuse to make allowances even for *autres temps autres moeurs*, nothing I have said will mitigate the charges against Holmes. For those of less confined and parochial tastes, Holmes should satisfy Hamlet's description of his father: “He was a man, take him for all in all,/ I shall not look upon his like again.” We are more skeptical than the Elizabethans, and to our ear it sounds as if “take him for all in all” is an acknowledgment of human frailties rather than the simple superlative that Shakespeare apparently intended (“the [best] man of all”). Holmes was human, and had frailties, though not those

33. See, for example, Bertrand Russell, *Marriage and Morals*, ch. 18 (1929).

34. Linda Gordon, *Woman's Body, Woman's Right: A Social History of Birth Control in America* 274–290 (1976).

conventionally or anachronistically ascribed to him. He was catty about prominent contemporaries of his, notably the James brothers (who reciprocated) and Charles Sanders Peirce; he exaggerated the originality of his ideas; in this and other ways he was rather unscrupulously ambitious in his youth; he was susceptible to flattery; he wrote judicial opinions too quickly, and with insufficient research; in his later years especially, he leaned too heavily on Brandeis for guidance in technical cases; a related point is that he overstayed his welcome on the Supreme Court by at least three years—although he wrote some splendid opinions in that period, as you will see. So, he wasn't perfect; he was only great. His massive distinction has not been dented by his many detractors.

A word, now, on how to read this book. The selections from *The Common Law* and from Holmes's articles, speeches, and judicial opinions should be self-explanatory, and it has but rarely been necessary to drop a footnote to explain a reference for readers unschooled in law or in the particulars of Holmes's thought. To minimize clutter, I have indicated the source of those articles and speeches first published in Holmes's *Collected Legal Papers* (1920), or in his *Speeches* (1913), or in Professor Howe's expanded edition of the speeches (see note 27 above), as *CLP*, *S*, and *OS*, respectively, together with the page number. Where the article or speech had been published previously, normally in a law review, I have used the first-published text.

The letters that I have reprinted were written to Frederick Pollock (or his wife), Harold Laski, Lewis Einstein (or his daughter), Morris Cohen, Patrick Sheehan, Franklin Ford, or Alice Stopford Green. Pollock was an approximate contemporary of Holmes and a distinguished English legal scholar. Laski, a much younger man, was an English socialist who had some legal training (at the Harvard Law School), wrote on legal as well as social and economic matters, taught for many years at the London School of Economics, and eventually became a leading member of the British Labour Party. Einstein was an American diplomat. Cohen taught philosophy at City College in New York. Sheehan was an Irish priest whom Holmes met on one of his British jaunts, and who died in 1913. Ford was a journalist-savant-crank interested in social credit and news gathering. Green was an English historian and the wife of another English historian. Holmes visited the Greens in England, and they visited the Holmeses at Beverly Farms, Massachusetts (north of Boston), the Holmeses' summer residence.

Equipped with the addresses and date of each letter, the reader can easily find the full text in the appropriate volume in Holmes's corre-

spondence cited in note 27, except the letters to Mrs. Green (see note 13). After moving to Washington to serve on the Supreme Court, Holmes summered in Beverly Farms and I have retained his address when he was writing from there because the change of locale is a frequent topic in the letters. The reader should also know that Holmes had a protracted hospital stay in the summer of 1922 (for a prostate operation), to which several of the letters allude.

In reading the selections, do not forget the advanced age at which Holmes wrote so many of them. He turned seventy in 1911, eighty in 1921, ninety in 1931. The quality of some of the work he turned out in his eighties and even nineties is remarkable.

I want in closing to thank Lawrence Lessig, Cass Sunstein, G. Edward White, and two anonymous readers for the University of Chicago Press for their helpful comments; Paul Freund, Philip Kurland, and Stephen Holmes for advice and encouragement; and my wife, Charlene, for editorial assistance. I acknowledge permission generously granted to reprint writings of Holmes in which copyright still subsists: Selections from *The Occasional Speeches of Justice Oliver Wendell Holmes*, edited by Mark DeWolfe Howe, are reprinted by permission of the publisher, Harvard University Press, © 1962 by the President and Fellows of Harvard College. Selections from *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski 1916-1935*, edited by Mark DeWolfe Howe, are reprinted by permission of the publisher, Harvard University Press, © 1953 by the President and Fellows of Harvard College. Selections from *Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock 1874-1932*, edited by Mark DeWolfe Howe, are reprinted with the permission of the publisher, The Belknap Press of Harvard University Press, © 1941, 1961 by the President and Fellows of Harvard College. Selections from *Progressive Masks: Letters of Oliver Wendell Holmes, Jr. and Franklin Ford*, edited by David H. Burton, are reprinted by permission of Associated University Presses. Selections from "The Holmes-Cohen Correspondence," 9 *Journal of the History of Ideas* 3 (1948), edited by Felix S. Cohen, are reprinted with the permission of the *Journal*. Selections from *The Holmes-Einstein Letters: Correspondence of Mr. Justice Holmes and Lewis Einstein 1903-1935* (1964), edited by James Bishop Peabody, are reprinted with the permission of Macmillan (London) and St. Martin's Press (New York), © 1964 by James Bishop Peabody. Holmes's unpublished letters to Alice Stopford Green, transcribed by Mark DeWolfe Howe, are reprinted from the Oliver Wendell Holmes, Jr., Papers in Harvard Law School Library, with the permission of the librarian.