

# Some Reflections on Oliver Wendell Holmes, Jr.

*Grant Gilmore*

For the last 15 years of his life, Grant Gilmore carried an uneasy mantle as the authorized biographer of Oliver Wendell Holmes, Jr. Gilmore succeeded Mark DeWolfe Howe, who had produced two prize-winning volumes on Holmes's prejudicial career and was beginning a third when he died suddenly. Howe's reverential work did not easily mesh with the view of Holmes that Gilmore developed, and the difficulties may have allowed Gilmore to distract himself from his task with top-to-bottom revisions of an important contracts casebook and with two series of lectures, all published within a decade of his appointment as Howe's successor. Gilmore died in 1982 without finishing the biography or publishing any work in progress. In fact, his only sustained public statement about Holmes, as far as we know, came in a lecture delivered in the Spring 1980 semester at the University of Illinois College of Law in Champaign under the auspices of the David C. Baum Memorial Lectures on Civil Liberties and Civil Rights. The annual report of the college's chancellor announced that the lecture "will be published in a forthcoming issue of the Law Forum," but Gilmore's death prevented the manuscript from ever reaching a publishable state. The unfinished manuscript is archived with Gilmore's other papers in the Harvard Law School Library. With the generous permission of the Law School, we are publishing the text for the first time. We have made changes and added footnotes to the original lecture at points where Gilmore's marks indicated a need for them.

– *The Editors*

**H**OLMES IS THE ONLY man of law who ever became a folk hero. The process of making him larger than life began around the time of the First World War and continued through the 1920s. The celebration

of his ninetieth birthday in 1931 was the occasion for an extraordinary tribute. On the popular level there was a nation-wide radio broadcast (at which Holmes himself spoke with the moving felicity that was his never-

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*Grant Gilmore was Sterling Professor of Law Emeritus at Yale Law School when he prepared this lecture. Thanks to David Warrington, Librarian for Special Collections at the Harvard Law School Library, for permission to publish the lecture, and to Michael Austin, Manuscripts Assistant at the Library, for assistance in identifying the lecture and Gilmore's notes regarding edits and footnotes. The lecture is in *The Grant Gilmore Papers*, Harvard Law School Library, Box 3, Folder 29, and the notes are in Folder 30.*

failing trademark).<sup>1</sup> On the professional level, an issue of the *Harvard Law Review* was devoted entirely to his work. Following his retirement from the Court in 1932 and his death in 1934, the chorus of adulation went on for a number of years. He became the *Yankee from Olympus* – the title of the best-selling biography by Catherine Drinker Bowen that was dramatized and had a huge success on Broadway. But the professionals – judges, law professors, practitioners – outdid even Mrs. Bowen in the garlands that they composed to lay at the tomb of our greatest jurist.<sup>2</sup>

As we can now see, the period during which Holmes was taken not only as the embodiment of the American dream but also as the brightest star in the firmament of American jurisprudence was bounded by the two World Wars.

## I

Before World War I he was known to the public and known within the professions principally as the author of a difficult book on *The Common Law*, published thirty years earlier and no longer read. He had served obscurely for twenty years on the Supreme Judicial Court of Massachusetts before being appointed to the Supreme Court of the United States in December 1902 by Theodore Roosevelt, who had little enthusiasm for the choice in the first place and soon came to

regret having made it at all. Holmes had, it is true, endeared himself to the leaders of the Progressive Movement by his dissents in the cases in which the majority of the Court invalidated so-called “social legislation” in the name of freedom of contract and due process.<sup>3</sup> But, at most, his reputation was a modest one: he was better-known as an accomplished after-dinner speaker than as a judge.

Since World War II Holmes has been forgotten by the public, which is not surprising. But the gleaming marble in which his symbolic figure had been set, apparently for all time, has been chipped away at by numerous detractors who have gone about their iconoclastic work with an enthusiasm that rivals or surpasses that of his admirers in the 1920s and 1930s. What surprises me most about the anti-Holmes reaction is not that it should have taken place – that was inevitable – but that it should have been carried out with such passion. Who would devote so much energy to flogging a dead horse – let alone a dead judge?

The people who led the anti-Holmes crusade after World War II were, it should be noted, the same type of people who had led the movement to deify Holmes after World War I. That is, they were people who self-consciously identified themselves as liberals, humanitarians, seekers of social justice. The heroic Holmes of the inter-war period was the Great Dissenter from the reactionary opinions of a hidebound Court, the guardian of

1 Even at this late point in his life Holmes expressed his life's spirit by asking the public not to evaluate life yet where there was still so much to be done. “To live is to function. That is all there is in living.” Radio address on occasion of a national celebration of his ninetieth birthday, March 1931, reprinted in *THE MIND AND FAITH OF JUSTICE HOLMES* 451 (Lerner ed. 1943).

2 Compare 44 *HARV. L. REV.* 677-796 (1931), with Bowen, *YANKEE FROM OLYMPUS* (1944). So great was the passion for Holmes that the scholars of 1931 credited his thoughts as the focal point for their academic debates. Intermixed with the dedications and articles cited in the 44th volume of the *Harvard Law Review* was Dean Roscoe Pound's *The Call for a Realist Jurisprudence*, at p. 697; see also Karl N. Llewellyn's *Some Realism About Realism – Responding to Dean Pound*, 44 *HARV. L. REV.* 1222 (1931).

3 See *Lochner v. New York*, 198 U.S. 45 (1905); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Abrams v. United States*, 250 U.S. 616 (1919); *Truax v. Corrigan*, 257 U.S. 312 (1921); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); and *Bartels v. Iowa*, 262 U.S. 404 (1923).

our liberties, the seer who had told us that “the life of the law has not been logic: it has been experience;”<sup>4</sup> that the 14th Amendment did not enact Mr. Herbert Spencer’s *Social Statics*;<sup>5</sup> that courts must and do legislate; that the common law is not a brooding omnipresence in the sky.<sup>6</sup> The anti-hero of the next generation of liberals was, we were told, the prototypical fascist who would no doubt have been, had he lived a few years longer, a supporter of Hitler.<sup>7</sup> He was insensitive to the rights of minorities and aliens.<sup>8</sup> He was encased in the rigidly conservative traditions of his own Brahmin caste.<sup>9</sup> Worst of all, from the point of view of a generation that put great store in the ideas of community, sharing,

and participation, he did not care. He did not, as Holmes himself might have – and frequently did – put it, give a damn.<sup>10</sup> The final irony in the Holmes legend is that during the 1970s, he has been adopted as a lineal ancestor – adoption being a two-way street – by the laissez-faire economists and their legal acolytes who have set aside a special shrine for him in the pantheon that they maintain in the holy city of Chicago.<sup>11</sup>

I do not come to set the balance straight; I do not propose to give you a middle-of-the-road Holmes. Whatever else he may have been, Holmes was not a middle-of-the-road man. My own thought is that the Holmes who was celebrated after World War I was a

4 Holmes, *THE COMMON LAW* 5 (Howe ed. 1963) (hereafter, *THE COMMON LAW*).

5 *Lochner*, 198 U.S. at 74, 75-76 (Holmes, J., dissenting).

6 *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221, 222 (1917).

7 Holmes conceived of law as the exertion of society’s power through the use of force. See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897). Perhaps it was Holmes’ persistent atheism which brought him to exemplify his thoughts with the statement about Henry VIII that “if his desire overrides his inhibitions, then his will becomes law, though it leads More to the scaffold.” James O’Shaughnessy, *Justice Holmes and Chancellor More*, 3 CATH. U. L. REV. 145, 147 (1953).

8 It is often pointed out in this respect that Holmes three times denied a stay of execution in the Sacco and Venzetti case. For an analysis of Holmes’ treatment of minorities, see Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 3 & 254 (1963).

9 See generally, Volume 2 of Mark DeWolfe Howe’s biography of Holmes, *THE PROVING YEARS 1870-1882* (1963) (hereafter, *THE PROVING YEARS*). Mark DeWolfe Howe was not only the author of *THE PROVING YEARS*, and *THE SHAPING YEARS 1841-1870* (1957) (the first volume of Howe’s biography of Holmes, hereafter, *THE SHAPING YEARS*), but he was also editor of Holmes’ personal papers. His analytic biography ends, chronologically, with the appointment of Holmes as an Associate Justice to the United States Supreme Court. His work is both compassionately bound to the man, and meticulously fashioned from the raw cloth of which Holmes’ life was woven. Professor Howe was the prior official Holmes historian and takes a positive view of Holmes’ attitudes.

10 For an understanding of turns in Holmes’ reputation over time, see White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51 (1971). White theorized that, in the 1950s, people could not comprehend how Holmes’ faith in reason could apply given the taint of W.W.II. It is this writer’s belief that Holmes did, in fact, have little concern for the human situation as it has been stressed by Cardozo or the 1950s’ California Supreme Court. Lasswell’s review tends to support this point that Holmes’ concerns were limited by a jealous insistence on intellectual priority and argues that “the Justice was holding back the intensity of his distaste for democracy, and his opposition to a conception of morality or legality that would hamper the strong for the benefit of the weak.” See Lasswell, 73 Yale L.J. at 535. This goes a bit far by imputing malice when, again, it must be stressed that Holmes did not give a damn.

11 See generally, positions taken in the *Journal of Legal Studies* under the direction of Richard Posner. Holmes’ strict definition of boundaries of liability, stress on the introduction of scientific and economic considerations to legal questions, and lack of social welfare consciousness have induced economists, and lawyer-economists, at the University of Chicago to claim Holmes as one of their own.

mythical creation who was made possible only by ignoring the darker aspects of his thought. His more recent vilifiers and defenders may have come closer to the truth.<sup>12</sup> But I share the predispositions of neither the 1950s' and 60s' do-gooders nor the 1970s' new conceptualists.<sup>13</sup>

## II

What do we know about the man and his thought? The record is detailed up to the day in 1882 when, being then in his forty-second year, he was sworn in as a member of the Supreme Judicial Court of Massachusetts. From that day on it is as if a veil had been drawn across all the significant aspects of his life. Holmes was one of the most prodigious letter-writers of all time. From the sheer bulk

of his correspondence, it seems that he must have spent the greater part of his time scribbling out, in a scrawl which became increasingly indecipherable as he grew older, letters to his many correspondents – writing as faithfully to those who were obscure and have since been forgotten as to the illustrious and famous. The point about this almost insensate correspondence is how impersonal it was. There is gossip about the weather and about his state of health, discussion, with his professional friends, about legal matters, and a great deal about his omnivorous reading. But nothing more. Indeed Holmes' best biographer, Mark DeWolfe Howe, comments that it would have made no difference if a letter to an Irish lady whom Holmes addressed as "Beloved Hibernia" had been mis-sent to Sir Frederick Pollock.<sup>14</sup> It was Holmes' practice to

12 See Pollock, *Mr. Justice Holmes*, 52 *LAW SOCIETY'S GAZETTE* 349, 350 (1955):

[I]t would be as well to remember that there is more in Holmes than meets the eye: he was an iconoclast, and it is better to recognise this with his detractors than to miss it with his friends, for his greatness lay in the searing integrity of his thought that brooked no sentimental concession to the accepted and the respectable.

13 See White, *The Rise and Fall of Justice Holmes*, 39 *U. CHI. L. REV.* 51. Mr. White has attempted to characterize views of Holmes' reputation by time period, arguing that Holmes' ideas were of little interest in the happy days of the 1950s. He would have us believe that the 1960s found Holmes' ideas being received with a mounting distaste and considered inapplicable. We must assume that this belief is based on an understanding of critical law review literature that had revealed Holmes' anti-libertarianism-egalitarianist views. To think that law review literature reflects popular conceptions disregards the theory that extreme views create notoriety. Like most people, students – indeed even students of the law – have gone no farther in their education about Holmes than the heroic descriptions in high-school textbooks of our "Great Dissenter" for the causes of free speech and social welfare. The late 1960s and early 1970s, with their social revolutions, in large part revitalized the myth. It is quite true that a man who has put as much to paper as Holmes has could be cited for almost any proposition. In this sense our study of precedent is one of art more than science. The "new conceptualists" that arise will, like every preceding generation, find their ideas based in the roots, in relation to which they are branches. Holmes could hardly protest as our nation's foremost manipulator of *The Common Law*. See note 11.

14 *THE SHAPING YEARS*, at p. 254. It has been hinted to us by Professor Howe that Holmes may have gone to great lengths to control his own history by deciding which materials, effects, and letters would be preserved. This can, however, be interpreted as the methodical acts of a man who relished only what he deemed to be relevant, or the legitimate sphere of privacy one may command upon death. In Holmes' correspondence with Sir Frederick Pollock, they addressed each other as "Dear Holmes" and "Dear Pollock" for nearly sixty years. There is an embarrassing moment in the Laski correspondence when Laski proposes that from now on they should address each other by their first names. That proposal having been met by a freezing silence, the correspondence continues as "Dear Mr. Justice" and "Dear Mr. Laski."

write the same letter over and over again, varying the verbal embroidery to suit the taste of the individual addressee.

Holmes also kept, over a great many years, a list of the books he had read. I have never been sure how much faith and trust we should put in the book list. Suppose I kept such a list and had spent a day indulging myself in detective stories or risqué French novels. When I came to make my entry the thought might cross my mind that, *vis-à-vis* posterity, I would look better if I had spent the day reading Greek philosophy or the latest book on the forms of action in the early common law. And in any event “reading a book” is a tricky concept. I can leaf through a large volume in half an hour, picking out a phrase here and a phrase there, or I can spend days poring over a short text. There can be no doubt that Holmes was as prodigious a reader as he was a letter-writer – it is hard to see how he had any time left over for working on his cases and writing his opinions.<sup>15</sup> But we have no way of knowing how Holmes read or what his reading meant to him.

Thus, from the beginning of his long tenure as a judge we know nothing about Holmes except what he chose to tell us – and, of

course, what we can deduce from the thousands of opinions. We do know a good deal about the younger Holmes – and arguably the only things that count in your life are the things that happen to you or that you cause to happen before you are forty. Holmes himself believed that a man who does not have some great accomplishment to his credit before he is forty will never thereafter accomplish anything.<sup>16</sup>

For several years in the early 1870s he was close to William James and the James family – who were themselves great letter-writers. The impression he made on the Jameses was that of a young man, obviously of remarkable intelligence and high, even noble, character who was intense, passionate, and ambitious (for fame, not money) – like a carpenter’s tool sharpened to “gouge a deep, self-beneficial groove through life.”<sup>17</sup>

Holmes, William James and several other young men formed a discussion group, which they called the Metaphysical Club, that met for two or three years, also in the early 1870s. A somewhat older member of the group was a man named Charles Peirce who, unknown and a failure in his lifetime, has been rediscovered, since his death, as one of the most inno-

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15 Brevity and promptitude are perhaps two thirds of popularity. In this respect, Holmes was both artist and critic:

At first a good many such applications were made in my cases – the fact that the decision was written at once being regarded as evidence of inadequate consideration. Such humbugs prevail! If a man keeps a case six months it is supposed to be decided on “great consideration.” It seems to me that intensity is the only thing. A day’s impact is better than a month of dead pull. Meantime there is a pile of applications to be looked over in other men’s decisions.

1 HOLMES-POLLOCK LETTERS, Holmes to Pollock, April 4, 1909, at p. 154-55 (Howe ed. 1961) (hereafter, HOLMES-POLLOCK LETTERS).

16 Holmes wrote reminiscently to a friend: “I have by my side a champagne cork drawn ... when my work *The Common Law* came out and marked ‘First copy of book, March 3, 1881’ (I remember that I hurried to get it out before March 8, because then I should be 40 and it was said that if a man was to do anything he must do it before 40.)” Letter to Mrs. Charles S. Hamlin, October 12, 1930, cited in *THE PROVING YEARS*, at p. 135.

17 Letter of William James to Henry James, July 5, 1876, in Perry, I *THE THOUGHT AND CHARACTER OF WILLIAM JAMES* 371 (1935). A hard worker when he was preparing the 12th edition of Kent’s *Commentaries on American Law*, Holmes prompted Mrs. Henry James to comment in an 1873 letter to her son Henry that his “pallid face, and this fearful grip upon his work, makes him a melancholy sight.” Perry, I *WILLIAM JAMES*, at p. 519; *THE PROVING YEARS*, at p. 10.

vative philosophical minds of the nineteenth century. But we have no idea what Holmes brought to or took from the meetings of the Metaphysical Club. After the Club broke up, his relationship with his former associates, even his close friendship with William James, lapsed – as Holmes began his lifelong retreat from humanity. James' death in 1910, Holmes wrote to Pollock, "cuts a root for me that went far into the past, but of late, indeed for many years, we had seen little of each other and had little communication."<sup>18</sup> As to Peirce – and it has been suggested that there are significant parallels between the thought of Holmes and Peirce<sup>19</sup> – there is, in the immense correspondence with Pollock, a single riddling reference. In 1923 Holmes wrote: "I read only *belles lettres*, etc. in the summer – bar Charles Peirce, *Chance, Love and Logic*, edited by my friend the real philosopher M. Cohen." Does that mean that Morris Cohen was a "real philosopher" but that Charles Peirce was not?<sup>20</sup>

Holmes, having served as a field officer through most of the Civil War (he was wounded three times), studied law at Harvard – at his father's urging and initially with considerable reluctance. He practiced law in Boston for fifteen years with little enthusiasm and no conspicuous success. His energies, throughout the period, were devoted to scholarly work, mostly historical and jurisprudential. He edited the 12th edition of Kent's *Commentaries*, which appeared in 1872. This was by no means a labor of love. Holmes wrote to John Norton Pomeroy: "[Kent] has no general ideas, except wrong ones – and his treatment of special topics is often confused to the last degree."<sup>21</sup> Having finished with Kent, Holmes undertook his own education, pain-

fully teaching himself to read German so that he could cope with nineteenth century German jurisprudence on its own terms. He read avidly, occasionally taught courses at Harvard College, and wrote a great many learned articles that were published in the *American Law Review*, which for a time he edited.

He seems to have been searching for a unifying principle which would make it possible to reduce to a logical order what he perceived as the chaos and wasteland of the common law. He worked through and rejected the ideas of the German theorists as too greatly influenced by the Kantian and Hegelian metaphysics that Holmes and his associates in the Metaphysical Club had all rejected. He worked through and rejected as meaningless the work of John Austin. He was tempted by the idea that the theories of the natural sciences could be profitably applied to the rationalization of a legal system – but that idea bore no fruit. Through fifteen years of arduous labor he seems to have picked up and, after scrutiny, discarded all known approaches to the problem of constructing a coherent theory of law – either as a description of what the law is or as a description of what the law should, ideally, become.

An invitation to deliver a series of lectures at the Lowell Institute in Boston in 1880 gave Holmes the opportunity, or faced him with the necessity, of formulating whatever it was he had come to believe in. He took the assignment with utmost seriousness: it represented his last chance to achieve greatness within his self-imposed deadline. As things turned out, he was never again to make a comprehensive statement of his beliefs.

We are told that the lectures were received with enthusiasm, which, if they were

18 1 HOLMES-POLLOCK LETTERS, Holmes to Pollock, September 1, 1910, at p. 167.

19 Miller, *Holmes, Peirce, and Legal Pragmatism*, 84 YALE L.J. 1123 (1975).

20 2 HOLMES-POLLOCK LETTERS, Holmes to Pollock, October 12, 1923, at p. 122. Morris Cohen, a famous scholar and former Professor Emeritus of Philosophy at College of the City of New York, wrote *THE FAITH OF A LIBERAL* (1946).

21 Quoted in *THE PROVING YEARS*, at p. 16.

delivered in anything like the form in which they were subsequently published, is a mind-boggling idea. Published in 1881 as *The Common Law*, the lectures were, deservedly, acclaimed as a profoundly original contribution to the jurisprudential literature. Within a few months, his friends and admirers had raised the money to endow a chair for him at the Harvard Law School, which Holmes accepted. When he promptly resigned the chair to go on the Massachusetts Court, his new-found colleagues in Cambridge were distinctly displeased.

*The Common Law* is a strange book. I will go further: it is the strangest of books. In *The Common Law* Holmes achieved a paradox: while denying all the received ideas of his time, he articulated the most fundamental beliefs of the society in which he was imprisoned. What makes *The Common Law* such a difficult book is that it is at war with itself. Holmes cut across the grain of his century at the same time that he became its most representative figure.

Holmes had arrived at a tragic view of the human condition. In the life of an individual as in the life of a society there is nothing but force, violence, and a never-ending struggle for bare survival.

If a man is on a plank in the deep sea which will only float one, and a stranger lays hold of it, he will thrust him off if he can. When the state finds itself in a similar position, it does the same thing.<sup>22</sup>

For individuals and states to pursue their own advantage, at whatever cost to others, is not only natural and inevitable, it is right. Our

constant pursuit of our own interests reflects "a justifiable self-preference." "Justifiable" is a word worth pondering. And just as individuals and states pursue exclusively their own interests, so do groups within a society. This firmly-held belief, along with the idea that the state should not intervene to prevent such inter-group conflicts, accounts for Holmes' celebrated tolerance of "social legislation." If the working-class were acquiring economic and political power, which he assumed to be the case, it was entirely right and proper for working-men to try to carve out for themselves, by any means available, a bigger slice of the pie at the expense of their natural enemies, their employers.<sup>23</sup>

Nowhere in anything that Holmes ever wrote is there the slightest suggestion that the struggle for survival leads to anything – at least to anything good. We are foredoomed to defeat, failure, and death. The only consolation that he had to offer, to himself or to us, was the idea that there is (or can be) something noble about the struggle itself – no matter what cause one may be fighting for. Thirty years after the Civil War he found it possible, in a Memorial Day address at Harvard College, to say:

I do not know what is true. I do not know the meaning of the universe. But in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, that no man who lives in the same world with most of us can doubt, and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the use.<sup>24</sup>

22 THE COMMON LAW, at p. 38.

23 "Holmes saw the function of the law as simply to channel private aggression in an orderly, perhaps in a dignified, fashion . . . . The law effectuates the will of the dominant majority (what Holmes meant by 'The Community') and must arrange to carry it out with, as we might say, due process. Otherwise society would out its popular prejudices privately." Gilmore, AGES OF AMERICAN LAW 49 (1977).

24 Holmes, SPEECHES, at p. 76.

To twentieth-century ears that passage has, I dare say, an embarrassing ring. But Holmes was a nineteenth-century man.

Except for his service in the Civil War, which encompassed much death, destruction, squalor and filth, there is nothing in the outward circumstances of Holmes' life to explain the despairing view of the universe to which he came as a young man and from which he never departed.

Holmes has often been classed with those followers of Charles Darwin who were known as Social Darwinists.<sup>25</sup> This hypothesis is, I think, mistaken. Holmes did indeed hold Darwin in high regard – no other writer of English, he once said, had done so much to affect our whole way of thinking about the universe.<sup>26</sup> But both in Darwin's formulation of the principle of natural selection as applied to the development of species and in Herbert Spencer's rephrasing of the principle as the survival of the fittest, there was incorporated the idea of progress, improvement, amelioration. In that belief both Darwin and Spencer were, of course, in the mainstream of the intellectual currents of their century. Holmes, in this important respect, was not. It was here that he cut, most dramatically, across the grain of his own time.

### III

In this universe of conflict and chaos, in this time of doubt and the collapse of creeds, what role did Holmes propose for the law? To that

question there is no clear and simple answer. There were, I think, unresolved tensions in his thought. At the heart and center of his construct there was a pervasive ambiguity that he never clarified – certainly not for us, perhaps not for himself – which is why it has been possible for succeeding generations to have discovered or invented so many different Holmeses.

I shall attempt to disentangle one of the diverse strands of Holmesian jurisprudence. I think that this is one of the central strands, but I do not deny that there are others which, if we picked them out, would lead us in quite different directions.

The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.

That sentence appears in a discussion about what we should conceive the basic purpose of the criminal law to be.<sup>27</sup> Is it vengeance? Retribution or punishment for wrong-doing? Deterrence or prevention of undesirable social behavior? Holmes settles for the "preventive theory." He deals light-heartedly with the philosophical objections to such a theory (which he attributes to Hegel and Kant): that the theory is immoral ("because it overlooks the ill-desert of wrong-doing"), that it conflicts with the sense of justice, and that it violates the "fundamental principle of all free communities, that the members of such communities have equal rights to life, liberty, and

25 Perhaps the most resounding appearance of Holmes' views are his comments on engineering pertaining to the feeble and criminal in *Buck v. Bell*, 274 U.S. 200, 207 (1926):

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. (Citation omitted). Three generations of imbeciles are enough.

26 1 HOLMES-POLLOCK LETTERS, Holmes to Lady Pollock (July 2, 1895), at p. 58.

27 THE COMMON LAW, at pp. 36-37.



personal security.”<sup>28</sup> Holmes’ answers are that the law is not concerned with morality or, for that matter, justice and that the principle of equality is a myth whether you are talking about the rights of individuals against the state (“No society has ever admitted that it could not sacrifice individual welfare to its own existence. If conscripts are necessary for its army, it seizes them, and marches them, with bayonets in their rear, to death.”) or you are talking about the rights of individuals among themselves (ending with the passage that I earlier invited you to ponder about the “justifiable self-preference” that entitles me, if I am strong enough, to thrust you off the plank into the sea). Although all of this comes up in a discussion of criminal law, Holmes follows it with the comment that “the general principles of criminal and civil liability are the same”<sup>29</sup> – and the succeeding lectures on torts and contract are designed to prove that identity.

Let us return to the sentence we started with, which I once described as “reducing all of jurisprudence to a single, frightening statement:” “The first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong.”<sup>30</sup>

I once rephrased the idea, I think accurately, this way: “Law reflects but in no sense determines the moral worth of a society.”<sup>31</sup> To Holmes, and to me, law has no role to play in the remaking or bettering of a society. Law is a mechanism for the resolution of disputes in the light of whatever standards a community may have adopted. It is not for the servants of the law to question or evaluate those stan-

dards,<sup>32</sup> which are revealed to them through popular assemblies and the working of the political process in times of peace and through military force and mob-rule in times of war and revolution. Any body of law that does not reflect the current balance of force within the relevant community is, as Holmes suggested, “unsound.”

What anti-Holmesians find most shocking is the proposition, which Holmes restated hundreds of times, that the law has no concern with morality. In his lecture on the criminal law he pointed out, with equanimity, that under the theory that he espoused we frequently end up punishing those who are guilty of no moral wrongdoing while letting those whose moral behavior is outrageous go free: all that counts is the convenience of the community. With respect to civil liability he argued, in the lecture on elements of Contract, that “In every case [the law of contract] leaves [the contract-breaker] free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses.”<sup>33</sup> Nearly twenty years later, in an address on *The Path of the Law*, he returned to the same idea. Referring approvingly to a case in which Lord Coke is reported to have said that no one should ever be compelled to perform a promise through what we would call a decree of specific performance, Holmes stated:

The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it – and nothing else ... . [S]uch a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they

28 *Id.* at p. 37, citing Wharton, CRIMINAL LAW § 7 (8th ed.).

29 THE COMMON LAW, at pp. 37, 38.

30 GILMORE, AGES OF AMERICAN LAW, at p. 49.

31 *Id.* at p. 110.

32 This statement is strongly reminiscent of the language used in The Memorial Day Address at Harvard College cited in note 24. Glory is therein equated with the submission to authority and effectuation of function.

33 THE COMMON LAW, at p. 236.

can. It was good enough for Lord Coke, however, and here, as in many other cases, I am content to abide with him.<sup>34</sup>

In primitive systems of law, liability is imposed on moral grounds; as a system matures, the moral content of the liability rules is progressively diluted; in a completely mature system (which no society will ever achieve) the moral content would disappear completely. Thus, at least in this context, Holmes does seem to have believed in the possibility of progress – although in a direction that most people would no doubt consider retrograde.

The rules of criminal liability and the rules of civil liability are, according to Holmes, the same. Just as the criminal law punishes certain types of behavior not because they are morally wrong but simply because they are socially inconvenient, so we would expect to find, and do find, that the civil law imposes liability in tort or in contract not because the tortfeasor or contract-breaker is guilty of wrong-doing but simply because social convenience requires

that certain types of injurious activity be discouraged by forcing the actors to pay fines to the state or damage awards to their victims. This line of thought will lead you, as it led Holmes, to the conclusion that the sanctions for a tortious act or for breach of contract should be minimal: no more than is necessary to discourage the defendant and people like him from doing the same thing again. The other side of the medal is that, to the greatest extent that is consistent with the presumed needs of the community, all action should be privileged and not subject to legal sanctions quite without regard to the loss or injury that the action may cause to others.<sup>35</sup>

Holmes made his most original contribution to our jurisprudence by restructuring the law of contracts. In recent years, people who think of themselves as defenders of Holmes have sought to show that there was nothing in the least original in Holmes' theory of contract.<sup>36</sup> They are wrong.<sup>37</sup> In the first place, and in a way that no earlier writer on Anglo-

34 Holmes, *The Path of the Law*, 10 HARV. L. REV. at 462, citing *Bromage v. Genning*, 1 Rolle 368 (K.B. 1616).

35 See THE COMMON LAW, at p. 42, in the lecture on the Criminal Law. Holmes there enters a discussion pointing out that a preventive theory applies equally in civil liability cases where blameworthiness can be characterized by objective standards that can be used to encourage conformity with societally determined standards of conduct. This objective of the law, more than just compensation of victims, is central to Holmes' theory on tort liability. This interpretation of Holmes' theory of tort liability is discussed in Gilmore, THE DEATH OF CONTRACT (1974), starting at p. 15 (hereafter, THE DEATH OF CONTRACT).

36 See Gordley, *The Death of Contract*, 89 HARV. L. REV. 452 (1975) (book review). Close examination of this piece will teach you of the dangers of historicism. Gordley cites certain quotes of Holmes as being similar to, or borrowed from, Pollock. Closer examination of the Pollock citations reveals that the quotes Gordley argues are borrowed therefrom appear only in later editions of those works, editions that went to print long after *The Common Law* was written.

37 In THE PROVING YEARS, Mark DeWolfe Howe commented (at p. 245), with respect to "the thesis which inspired the three lectures on contract," that "one must recognize that he was urging a revolutionary change in legal thought." Professor Howe's analysis of the "revolutionary" nature of Holmes' contract theories emphasizes the Holmesian "paradox" that there is no moral duty to perform a contractual obligation (see text at note 35; THE PROVING YEARS, at 233 *et seq.*) and Holmes' insistence on an "objective" as opposed to a "subjective" approach to the problem of contractual liability (see text at the beginning of the following Lecture; THE PROVING YEARS, at 243 *et seq.*). The epithet, as I have been attempting to show, seems no less apt when applied to the bargain theory of consideration. On the non-historical or ahistorical nature of *The Common Law*, see Professor Howe's sensitive and perceptive introduction to his 1963 edition: "*The Common Law* is not primarily a work of legal history. It is an endeavor in philosophy – a speculative undertaking in which the author

American law had done, Holmes sharply distinguished between contract and tort – vastly expanding the domain of contract at the expense of tort. In the second place, he argued that contractual liability had nothing to do with either benefits conferred on the defendant or with losses suffered by the plaintiff – benefit to the promisor-defendant or detriment to the promisee-plaintiff having been the twin poles of pre-Holmesian contract theory.<sup>38</sup> In the third place, having disposed of benefit and detriment, he proposed to put in their place, as the sole ground for contractual liability, the accomplishment by the contracting parties of certain required formalities: principally that the reciprocal undertakings be set off, in the agreement, as exchanged for each other. We know this as the bargain theory of consideration,<sup>39</sup> but Holmes makes quite clear that he is talking not about an actual exchange of value but about a formal statement (whose truth is not to be inquired into) in the agreement that A's obligation is being exchanged for, or set off against, B's obligation. Consideration, as he liked to remark, is as much form as a seal.

A formalistic theory of contract must also

be an objective theory of contract. Pre-Holmesian theory, in the European systems vaguely derived from the Roman law as well as in the Anglo-American system, assumed without question that the institution of contract depended on the subjective intent of the contractors: the concurrence of their wills, the meeting of their minds.<sup>40</sup> But, as any theologian knows, salvation can be achieved only through the performance of the rituals recognized by the church. Holmes, a competent theologian, incorporated in his theory the idea that contract has nothing to do with the subjective intent of the contractors. Rather, it is only the external manifestations of their conduct, which are to be judged in the light of the standards accepted in the community, that matter.

Holmes erected the concept of externality, or objectivity, into a principle as fundamental as the idea that the moral content of liability rules becomes progressively diluted as a legal system approaches maturity. In the same way, the more mature a legal system is, the less attention it will pay to the subjective intent of any actor; he will be judged, as criminal or tortfeasor or contract-breaker, only on the

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sought to find in the materials of legal history data which would support a new interpretation of the legal order." (p. xx). Holmes, like any revolutionary, merely sought to sugar over his more startling heresies with a frosting of antique learning.

38 See *THE COMMON LAW*, at pp. 227-30, and the discussion of these points in *THE DEATH OF CONTRACT*, starting at p. 19.

39 As pointed out in *THE DEATH OF CONTRACT*, at p. 21:

There is never any point in arguing with a successful revolution. What Holmes told the young lawyers who flocked to his lectures in the spring of 1881 promptly became the truth – the indisputable truth – of the matter for his own and succeeding generations. The "bargain" theory of consideration, proposed by Holmes, is enshrined in the definition of consideration in § 75 of the original *Restatement of Contracts* ... and is indeed carried forward in the current tentative drafts of the second *Restatement*."

40 Still a popular concept in the laws of Sales and Contracts, great respect has naturally been given to those terms upon which the parties agree. But a system of rules and form based on the subjective intent of the parties is entirely useless in effectuating a determination of intent. Still, Article 2 of the Uniform Commercial Code provides that a contract shall exist where the parties intended to make one (§ 2-204), and, when parties submit their own written proposals for a contract, but neither writing is agreed to, the U.C.C. incorporates those terms common to both writings in dispute into the "contract" it shall enforce (§ 2-207).

deductions that can reasonably be drawn from his observable conduct. Virtue and vice are both, legally speaking, irrelevant. Here, perhaps, it is worthwhile to present Holmes in his own words:

It is not intended to deny that criminal liability, as well as civil, is founded on blameworthiness. Such a denial would shock the moral sense of any civilized community; or, to put it another way, a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear. It is only intended to point out that, when 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. The conclusion follows directly from the nature of the standards to which conformity is required. These are not only external, as was shown above, but they are of general application. They do not merely require that every man should get as near as he can to the best conduct possible for him. They require him at his own peril to come up to a certain height. They take no account of incapacities, unless the weakness is so marked as to fall into well-known exceptions, such as infancy or madness. They assume that every man is as able as every other to behave as they command. If they fall on any one class harder than on another, it is on the weakest. For it is precisely, to those who are most likely to err by temperament, ignorance, or folly, that the threats of the law are the most dangerous.<sup>41</sup>

As I explained earlier, there is a pervasive ambiguity at the heart and center of Holmes' construct. That ambiguity goes to the question whether he thought that his propositions on the amorality, formalism, and externality of the law held true for all legal systems, at all

times, and in all places, or whether he thought that they simply happened to be true in Massachusetts in 1880 or in the United States in the second half of the nineteenth century.

Holmes chose to present his analysis as an historical study of the common law. We are, over and over again, taken back to the Yearbooks containing the earliest recorded English common law cases and, from the discussion, it frequently appears that the fourteenth-century judges were closer to the "right" liability rules than some nineteenth-century judges. Indeed current cases are most often brought into the discussion in order to be cavalierly dismissed; too many nineteenth-century judges had evidently allowed themselves to become mired in the swamps of subjectivism and moralism.<sup>42</sup> If we take the historical overlay seriously, we are left with the astonishing idea that the common law of England, correctly understood, had been of a piece for five hundred years.

Whether we are meant to take the historical overlay seriously is another question. I am by no means the first to make the point that Holmes used his historical material selectively and tendentiously – and it is, of course, true that the further you go back in time, the less you know about what really happened, the more plastic the truth becomes in the shaping hands of the historian. Holmes himself seemed to suggest in a brief, enigmatic introduction that he provided when *The Common Law* lectures were published, that the historical detail was largely irrelevant; at least that is one way of reading the introduction. Perhaps he had created a fantasy fourteenth century from which the liability rules appropriate to the nineteenth century could be deduced with every appearance of inexorable logic and scientific precision.

<sup>41</sup> THE COMMON LAW, at pp. 42-43 (footnote omitted).

<sup>42</sup> This presumes that Holmes, as a judge, saw great necessity for establishing consistency in the law based on his perception of the failings of other members of the bench and the need to bind them by invoking rules and order.

The preposterous idea that the common law had remained static and frozen for half a millennium is made to go in double harness with the idea that, because the common law, like any legal system, merely reflects current community standards, the law changes as those standards change and as the balance of power within the community shifts, and, consequently, that the law in 1780 or in 1880 or in 1980 is to be regarded as an unstable mass in precarious equilibrium.<sup>43</sup> But these hints about the necessary instability of law are never, so to say, followed up. We might expect, but do not get, discussions of how the profound changes brought about by the industrial revolution had affected our theories of liability, of how the rise of the business corporation had affected our theories of ownership and property, of how the railroads and factories had affected the rapidly developing law of torts, or even of how the technology of ship construction, as steam replaced sail, had called into existence an entirely new body of law on maritime liens. But Holmes, resurrecting yet another case from the Yearbooks, seems to be telling us: *Plus ça change, plus c'est la même chose.*

After the holocaust of the Civil War, Holmes lived out his life in the longest period of peace and prosperity that has yet fallen, and that may ever fall, to the lot of any industrialized society. And for half a century or more following the Civil War it may be that we came closer to achieving a consensus within our society than we, or anyone else, ever has before or since. One of the things about us that baffled European socialists around 1900

was why the socialist movement did not make any headway here as, according to theory, it should have but as, according to observation, it obviously did not. They came to visit us; they went to Pittsburgh and Chicago and Detroit; they reported back that things were not working out as they were supposed to. Holmes had read both Karl Marx and Proudhon, the nineteenth-century anarchist who may be best remembered today for his lapidary formula: Property is theft. Holmes preferred Proudhon – “a man of insights,”<sup>44</sup> “a man of ideas,” who had exposed Marx as a “plagiarist,” a “humbug,” a “charlatan.”<sup>45</sup> Perhaps the truth about Holmes is that, at bottom, he was an anarchist, but, to be sure, a very conservative anarchist.

Holmes may have meant his propositions about amorality, formalism and externality to be taken as constants in one somewhat peculiar sense. Granted that the world is a tragic place in which everything is ultimately submitted to the brutal arbitrament of force; nevertheless there are good times and bad times – or, at any event, better times and worse times. Arguably, the United States in the late nineteenth century was enjoying one of its better times. In such times it may be possible to believe that there is, or soon will be, enough to go around – enough food, enough shelter, even enough happiness. In such times a society can indulge itself in allowing its citizens to do whatever it is they want to do without fear of retribution or sanctions – and will be wise to do so. Holmes does seem to have treasured the idea of individual freedom: the privilege to

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43 This is the basic philosophy underpinning Holmes' discussion in *The Path of the Law*. It is, essentially, a recognition that the law may, of necessity, operate along parallel lines with the evolution of society. It also operates as a warning to the quixotic spirit within us that we over-reach the popular conception of truth at our own peril. Still, Holmes did this himself for several years before the majority of the United States Supreme Court began citing his dissents for their *ratio decidendi*.

44 1 HOLMES-POLLOCK LETTERS, Holmes to Pollock, August 2, 1912, at p. 199. The quote ends: "... who ends by boring you as all men with isms and panaceas in their heads do, especially if you think you know the answer."

45 1 HOLMES-POLLOCK LETTERS, Holmes to Pollock, March 24, 1916, at p. 235.

think, to talk and to act without external restraint or coercion.<sup>46</sup> On the other hand, if a society must cope with a time of scarcity and shortage in which there is not and will not be enough to go around, a time in which tragic choices must be made, then of necessity the range of privileged activity will be sharply cut back. Retribution and sanctions will be invoked in the vain hope of making us all better than we were meant to be. In this sense Holmesian jurisprudence states the unchanging goals of the law while it allows the substantive rules of the law to vary through time.

#### IV

We deal with Holmes in our successive generations as the blind men dealt with the elephant.

His own contemporaries seem to have been satisfied with the manifest content of the dream. From the 1830s through the 1920s there was in this country an outpouring of works of legal scholarship of the highest, indeed of unprecedented, quality. The authors of the great treatises accepted without question the proposition that the study of law aims at the unifying principles in whose light broad areas of the substantive law can be reduced to what Holmes had called "a philosophically continuous series."<sup>47</sup> Holmes himself had demonstrated, with the master's touch, how this

could be done across the entire spectrum of criminal and civil liability. It is not an exaggeration to say that the multi-volume treatises of the next generation did little more than fill in the details of the outlines that Holmes had sketched. But in accepting from Holmes both the unifying principles and the restrictive liability rules that he proposed, they found it necessary, or prudent, to ignore the disturbing aspects of his thought. His insistence on the amoral nature of law and his repeated reminders that all systems of law are unstable either fell on deaf ears or were politely passed over in silence as the vagaries of an otherwise great man.<sup>48</sup>

The deification of Holmes during the interwar period was carried out on both the popular and the professional level. The success of the operation on the popular level is not surprising. Except in sports, authentic heroes were in short supply during the 1920s, the decade of Harding and Coolidge. Holmes, in his commanding presence, represented, in a shoddy time, all that was good and noble in the history of the Republic. And in a country that was unconsciously preparing itself for the triumph of liberalism and the New Deal, Holmes could be mistaken for a true liberal who had in lonely dissents kept the faith alive in harsh times.

It is more puzzling that the professionals accepted the popular myth. The Legal Realists

46 See *Abrams*, 250 U.S. 616; *Gitlow v. New York*, 268 U.S. 652 (1925); and Wallace Mendelson's *The Influence of James B. Thayer Upon the Work of Holmes, Brandeis and Frankfurter*, 31 VAND. L. REV. 71 (1978), in which Mendelson argues that Holmes inherited the concept of deference to the legislature, except where it directly contradicts the Constitution or the principles upon which the foundations of our democratic ideals are based, from Thayer.

47 THE COMMON LAW, at p. 104.

48 See THE COMMON LAW, at p. 32:

What has been said will explain the failure of all theories that consider the law only from its formal side, whether they attempt to deduce the *corpus* from *a priori* postulates, or fall into the humbler error of supposing the science of the law to reside in the *elegantia juris*, or logical cohesion of part with part. The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.

of the 1930s claimed Holmes as one of themselves. Holmes was, said Karl Llewellyn, the one truly adult jurist.<sup>49</sup> So he may have been, but it remains true that Llewellyn's own not insignificant contribution to our jurisprudence is at the opposite pole from Holmes' contribution. For Llewellyn, broad, general, unifying principles should be scrapped in favor of what he called "narrow issue" thinking: the law should be particularized, fragmented, atomized. Moreover, Llewellyn had no use for the ideas of formality, externality, and objectivity that were at the heart of Holmes' theory of contractual obligation. For Llewellyn, making a contract should be as easy as rolling off a log. See, for example, the sequence of so-called "general contract" provisions in Llewellyn's codification of Sales law in Article 2 of the Uniform Commercial Code. Nor did Llewellyn accept the idea that law merely reflects community standards right or wrong. In Llewellyn's vision, the law was a mighty engine for achieving social justice, even for restoring social harmony (as, he fantasized, the law of the Cheyenne Indians once did). Finally, Llewellyn and his friends were passionate social reformers. With the coming of the New Deal, the world would soon be a better place; indeed they – the Realists – would see that it was made so.

Surely the Realists must have come to bury Holmes and not to praise him. But just as the preceding generation had borrowed from Holmes without acknowledging the negative aspects of his thought, so the Realists used

Holmes while ignoring all its positive aspects. The Realists were out to destroy what has been called Langdellian jurisprudence (which had, in truth, been largely created in Holmes' image) but to have their manipulation masked by claimed conformity. What they intended to put in its place was a sort of mirror-image of Langdellianism: values reversed, substance unchanged. They made a selective use of some of the more corrosive epigrams (not logic but experience, not a brooding omnipresence in the sky, and so on) while totally ignoring what Holmes had meant by them.

The anti-Holmes crusaders of the 1950s and 60s constituted, in this century, the third generation of practicing so-called, or self-styled, "liberals." (Scratch a liberal and inside you will find a conservative screaming to get out.) It was their turn to rebuild the great cathedral which had, once again, unaccountably collapsed. This they proposed to do with the bright, new tools of empirical research that the social scientists had provided. They believed in World Peace through Law, the Great Society, the War on Poverty, brotherhood, unity, consensus, and many other quaint old-fashioned things. They reread Holmes, which is much to their credit, and, quite properly, found his ideas as repulsive as he would have found theirs ludicrous. The counts in their indictment of Holmes are all true; the question is whether they add up to an indictable offense. Since I am not (and never was) a 1950s liberal, I would unhesitatingly grant a motion to dismiss.

Holmes has now found a resting-place in

49 See Frank, *LAW AND THE MODERN MIND* 253 (1930). Karl Nickerson Llewellyn (1893-1962) was one of the most interesting and original figures in twentieth-century American jurisprudence. A graduate of the Yale Law School, he practiced law briefly in New York City in the early 1920s, and from then until his death, served on the faculties of the Columbia and the University of Chicago Law Schools. On Llewellyn and his time, see Twining, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973), and the review of that book, Gilmore, *Philosophy of the Law*, 22 *AM. J. COMP. L.* 812 (1974). I tried to give my own appreciation of Llewellyn in an obituary notice that appeared as *In Memoriam: Karl Llewellyn*, 71 *YALE L.J.* 813 (1962). For his books, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1961), and *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960), and his role as orchestrator of The Uniform Commercial Code (and drafter of Article 2) he shall live on as one of our greatest minds.

the arms of the neo-conservatives.<sup>50</sup> They state and restate his rules of liability – quite correctly, which is to their credit – and praise them to the skies. What they overlook is that Holmes never claimed that his rules were right, morally, philosophically or economically; they were simply what he thought the times required or could tolerate. In harsher times more would be required and less would be tolerated. Holmes was no more the conservative he was mistaken to be in the 1970s than he had ever been the liberal he was mistaken to be in the 1920s.

Holmes is a figure worthy of study in interesting times such as ours – not the liberal Holmes, not the conservative Holmes, not even my anarchist Holmes, and certainly not the real Holmes, whom we shall never know. He knew how to reduce an idea to its bare bones in a single flashing phrase; we have little enough of that in the law. He will not show you the easy road to salvation; there is none. But he has much to say about what it is like to live in the midst of doubt and in the collapse of creeds. He is a good man for bad times. *GB*

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<sup>50</sup> Judge Richard Posner has been an influential spokesman for this point of view. See his *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); also, his book, *ECONOMIC ANALYSIS OF LAW* (1973). For a critical review of the book, see Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1973).