

## *Chapter Five*

# **The Natural Law Theorist**

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Michael Hoffheimer has argued that the prevailing scholarly assumption that Holmes did not believe in natural law in any form was misguided. He claims that Ralph Waldo Emerson's transcendentalism encompassed a kind of natural law that influenced Holmes, and that Holmes rejected only specific strands—rather than the entire field—of natural-law theory. “Notwithstanding his forceful criticism of natural law,” Hoffheimer submits, “Holmes retained an interest throughout his life in the champion of transcendentalism,”<sup>1</sup> namely Emerson, whose exhilarating philosophy and lyrical prose anticipate elements of Holmes's writing.

This chapter investigates Holmes's skepticism of natural law and explores the kind of natural law that he represents: a curious form of Emersonian transcendentalism. Although there is no name for this type of natural law,<sup>2</sup> which, because of its inherent flux and fluidity, defies classification, it might be described as pragmatic in the sense in which that term refers to seminal features of an American literary tradition that includes Emerson, William and Henry James, George Santayana, Wallace Stevens, Gertrude Stein, and Robert Frost.<sup>3</sup> Its transcendentalist premises involve radical subjectivity and individuality as necessary conditions for the spontaneous order that emerges through the superintending forces of nature.

Figures as diverse as Harold Bloom, Richard Poirier, Louis Menand, Joan Richardson, and Jonathan Levin have examined this American literary tradition for its pragmatic qualities and effects.<sup>4</sup> Situating Holmes's transcendentalist rhetoric and affinities within this literary tradition illuminates the Emersonian characteristics of his oft-unnoticed natural-law tendencies. Standing against the derivative “over-influence”<sup>5</sup> of scholarly consensus, this chapter heeds Emerson's rousing imperative “never imitate”<sup>6</sup> by striving for originality in the marriage of literary and legal scholarship to explore Holmes's

overlooked but subtle support for a certain paradigm of natural law. It also corrects growing misconceptions about the purportedly absolute divide between natural law and positive law that are the result of tendentious twentieth-century theorizing.<sup>7</sup> Studying Holmes's relationship to Emersonian transcendentalism reveals the embeddedness of normative principles and natural-law reasoning in the textual deposit of cases and customs.

### HOFFHEIMER'S DISRUPTION OF THE SETTLED CONSENSUS ON HOLMES AND NATURAL LAW

Little has changed since Hoffheimer wrote, in 1992, that "Holmes remains considered almost universally as a utilitarian, positivist, pragmatist, or realist in his basic theory."<sup>8</sup> Researchers continue to agree that Holmes "was not a proponent of natural law in any form" and to "assume that continental rationalist and idealist strains of thought—and American proponents like Emerson—had no important influence on [his] mature theory."<sup>9</sup> Related conjecture accepts as given that Holmes's "intellectual development was achieved by a radical break with the transcendentalist views that he held in his early adulthood."<sup>10</sup>

Holmes may have broken from the transcendentalism of his youth,<sup>11</sup> but its influence remained. He acknowledged as much by claiming to have been enamored of Emerson throughout his life. He once wrote that the "only firebrand of my youth that burns as brightly as ever is Emerson."<sup>12</sup> In a different letter with a similar tone, he stated:

You put it much too strongly when you say that I had no sympathy with Emerson. When he was breaking and I was still young, I saw him on the other side of the street and ran over and said to him: "If I ever do anything, I shall owe a great deal of it to you," which was true. He was one of these who set one on fire—to impart a [thought] was the gift of his genius.<sup>13</sup>

These lines declare and represent Emerson's sway. The figurative use of "fire" recalls Emerson's reference in "The American Scholar" to those "concentrated fires" that "set the hearts of their youth on flame."<sup>14</sup> Genius, of course, was a superlative concept central to Emerson's thought, and in calling Emerson a genius Holmes conceivably tied him as well to such notions as "absolute truth"<sup>15</sup> that are connected to the moral and normative claims of natural-law theory. At the time of his death, Holmes's book collection contained 24 volumes of Emerson's work, a fact that demonstrates at a minimum his ongoing fondness for the Sage of Concord and, in light of his early writing to and about Emerson, a probable familiarity with Emerson's numerous essays and teachings.<sup>16</sup>

Stylistic similarities between Emerson and Holmes have long been recognized, and the influence of Emerson on Holmes has been discussed and debated at length. Mark DeWolfe Howe, the first expert on Holmes, noticed many decades ago that Emerson had affected Holmes.<sup>17</sup> Francis J. Mellen Jr., a practicing attorney, in the late 1970s, contributed a most insightful piece about Holmes and Emerson, arguing that “a fundamental change in American aesthetic thought in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries heralded a corresponding change in other intellectual disciplines, including law, in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries; and that . . . Holmes[,] whose aesthetic beliefs had been strongly influenced by . . . Emerson, was a leader in the change in legal doctrine because he, sooner than most of his contemporaries, understood and accepted the change.”<sup>18</sup> What has not been sufficiently examined, despite Hoffheimer’s groundbreaking work, is the link between Emerson and Holmes in terms of natural law and transcendentalism.

Hoffheimer has determined that Holmes’s early writings were less hostile to natural law, or at least to doctrines representative of natural law, than were his later writings.<sup>19</sup> He found that Holmes retained the transcendentalism of his youth in his non-legal writings but avoided it in his professional or legal writings such as case opinions.<sup>20</sup> Moreover, he observed that, as Holmes matured as a jurist he grew increasingly impatient with substantive propositions rooted in natural law, which he associated with a version of horizontal federalism whereby federal courts justified their intervention into state matters through appeals to philosophical abstraction involving rights claims.<sup>21</sup>

Holmes could nevertheless practice what he purported to repudiate. His earliest arguments against natural law were limited in scope and lacked the strong language that characterized his essay “Natural Law.”<sup>22</sup> Mindful, perhaps, that “[a] foolish consistency is the hobgoblin of little minds,”<sup>23</sup> he “shared important doctrines and ideas with the legal philosophy”—i.e., natural law—“that he sought to destroy.”<sup>24</sup> He once employed natural-law reasoning to challenge natural-law premises, going so far as to invoke philosophical absolutes as markers of legal authority.<sup>25</sup> In this, Holmes established an improbable rapprochement between positivist and natural-law paradigms, one that recalls transcendentalism in its ability to synthesize ostensibly incompatible methods and principles.

Holmes scrupulously accomplished an unlikely Emersonian synthesis between airy intuitive romanticism and proto-positivist instrumentalism in his early essays such as “Plato.”<sup>26</sup> Only through the ever-open, all-receptive forces of vigorous transcendentalism could his seemingly irreconcilable modes of thought come together in an operative fusion. Holmes’s apparent contradictions may represent, not confusion or ignorance, but transcendentalist synthesis. One recalls Walt Whitman’s suggestive quip: “Do I contradict myself? / Very well then . . . I contradict myself; / I am large . . . I contain multitudes.”<sup>27</sup>

Hoffheimer does not definitively establish or adequately describe what elements of Holmes's jurisprudence signal transcendentalism. I take his conclusion to be that Holmes did not renounce natural law per se so much as he disavowed ways of knowing and discovering natural law.<sup>28</sup> On this view, Holmes's chief concern was epistemological, not ontological or metaphysical.

Unlike classical natural-law theory, which generally holds that moral norms articulated as legal principles are discernable by, and conformable to, right reason, Holmes's jurisprudence was skeptical of the ability of the fallible human mind, with its limited knowledge and selective memory, to ascertain and exercise right reason.<sup>29</sup> He believed that knowledge about the law was necessarily social and embedded in evolving historical conditions and standards with concrete manifestations in cases, statutes, and other legal documents.<sup>30</sup> This premise does not exclude right reason and moral absolutes as indicia of truth that correspond with the natural or normative order of society; rather, it considers reason and morality to be intelligible only through mediated networks of language and discourse and learned through collective contestation, not individual revelation. One may proclaim a truth, but only after several qualified minds evaluate and verify the truth-claim will it gain currency. A truth must establish itself as such for societies to profess it.

Regrettably, Hoffheimer's treatment of the transcendentalist properties of Holmes's jurisprudence is thin on details and substance. There is thus a felt need in the academic literature to pick up where Hoffheimer left off and fill in what he left out.

### DETACHED SKEPTICISM OF NATURAL LAW IN "NATURAL LAW"

A brief and preliminary overview of the conceptions of natural law attributed to Holmes will help to satisfy this felt need. Because an exhaustive or comprehensive synopsis of the numerous studies of Holmes and natural law is not feasible here, I will focus on the essay "Natural Law" from which most commentators derive their understanding of Holmes's relationship to natural-law theory.

"Natural Law" opens with the suggestion that an innate human drive for the superlative probably accounts for "the jurist's search for criteria of universal validity which he collects under the head of natural law."<sup>31</sup> A critique of "universal validity" as a touchstone of natural law appears odd if it is predicated on an assertion of universal validity, to wit, the notion that "[t]here is in *all* men a demand for the superlative."<sup>32</sup> Holmes seems to be articulating a natural law in these first lines of an essay generally agreed to be

antithetical to natural-law theory. Could it be that his essay is more complex and nuanced than commentators have allowed?

Recalling the value pluralism of William James as exemplified in “The Varieties of Religious Experience,” as well as James’s theories of truth in “Pragmatism” and “The Meaning of Truth,” Holmes states that “our test of truth is a reference to either a present or an imagined future majority in favor of our view.”<sup>33</sup> He expresses with these words a consensus-based mode of knowing and understanding: If a proposition is true, it must satisfy not only the individual thinking or uttering it (after all, “[c]ertainty is not the test of certainty”)<sup>34</sup> but also a broad community—a majority—of critical thinkers. A lack of consensus calls into question the validity of the truth claim. It would hardly seem reasonable to call something natural that nobody else believed in or about which there was much controversy and disagreement. Could there be a natural law that no one followed or acknowledged, that existed independently of any human mind? If so, it could not be apprehended, there being no brain equipped or willing to recognize it.

Holmes advocates intellectual modesty and tolerance in light of his conviction that preferences are necessarily experiential.<sup>35</sup> One who has immersed himself in a field of discourse to the exclusion of another field of discourse will naturally favor the former over the later. One who has grown up in a culture with discernable normative codes may find foreign normative codes to be strange, and thus must overcome his ingrained predilections to respect or understand the foreign way. Attachments to childhood and youthful associations—for Holmes, these would be his “earliest joys” such as “granite rocks and barberry bushes”—form entrenched biases upon which one constructs an identity and worldview.<sup>36</sup> To a certain extent, one cannot help but value those ideas he has studied to a far greater degree than he values unfamiliar concepts. “It is true,” Holmes says to this end, “that beliefs and wishes have a transcendental basis in the sense that their foundation is arbitrary. You can not help entertaining and feeling them, and there is an end of it.”<sup>37</sup> This grasp of the experiential basis of preference-making accounts, in Holmes’s view, for the universalizing motivations of natural-law theorists. “The jurists who believe in natural law,” he says, “seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.”<sup>38</sup>

Just because Holmes considers conceptions of “rights and duties” and other such categories of natural-law theory to be socially conditioned and discursively formed<sup>39</sup> does not mean he believes the objects of those categories (i.e., the things that constitute a right or a duty) to be nonexistent or unreal. Holmes is not concerned with the ontological or metaphysical properties of rights, duties, or law but with epistemology, or the modes and methods by which we apprehend laws or their subsidiaries such as rights and duties.

The distinction is important: maybe natural laws exist as real phenomena in the material world, but in any case our knowledge of them is not a priori.

Holmes never says rights are not real or do not exist. He says, rather, that not just for *any* purposes, but specifically “for *legal* purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it—just as we talk of the force of gravitation accounting for the conduct of bodies in space.”<sup>40</sup> Holmes is careful not to enter into philosophical debate here regarding the existence or essence of universal natural laws. He limits his discussion to the legal context, perhaps because judges are not philosophers: they lack the equipment and training to undertake complex philosophical reasoning or to derive conclusions in the manner of scientists. His most categorical and unqualified assertion—one that provokes the ire of his opponents—is that the “most fundamental of the supposed preexisting rights—the right to life—is sacrificed without a scruple not only in war, but whenever the interest of society, that is, of the predominant power in the community, is thought to demand it.”<sup>41</sup> Even this bold statement, I think, is meant to apply to the legal community only and not to humanity writ large because Holmes follows it by mentioning a “very tender-hearted judge” who would choose to allow a fire to kill a man (i.e., who would abstain from acting to extinguish the flames) if doing so would save precious cargo from burning.<sup>42</sup> Accordingly, Holmes expresses skepticism regarding the ability of a jurist to divine absolute natural law and points to philosophical disparities as a reason for the need to tolerate antagonistic views.

Holmes is thus arguing for viewpoint toleration; he cannot simultaneously advocate intolerance towards conceptions of natural law. His message, then, is cautionary and directed at judges whose operative rulings bind the populace within the subject jurisdiction, and perhaps at jurisprudents or others who champion hermeneutical modes of judging. When you inhabit an official position with the authority to control the lives and actions of others, his warning runs, you must not confuse your personal wants with a body of controlling rules backed by the coercive powers of the state. “Men to a great extent believe what they want to,” he remarks, “although I see in that no basis for a philosophy that tells us what we should want to want.”<sup>43</sup> This statement impliedly cautions against conflating extant rules with absolute, universal, and inevitable norms.

Then Holmes turns to the celestial. “Now when we come to our attitude toward the universe,” he muses, “I do not see any rational ground for demanding the superlative—for being dissatisfied unless we are assured that our truth is cosmic truth, if there is such a thing—that the ultimates of a little creature on this little earth are the last word of the unimaginable whole.”<sup>44</sup> Before the religious scholar of natural law takes these lines about intellectual

humility as antithetical to natural-law theory, he might recall these words of the prophet Isaiah: "For as the heavens are higher than the earth, so are my ways higher than your ways and my thoughts than your thoughts."<sup>45</sup> Holmes, in the passage I have just quoted, is no more a "positivist" than Isaiah. The conditional phrase "if there is such a thing" reveals his openness to the possibility of cosmic truth, a concept that surely comprises natural law.

Although modesty was not a distinguishing feature of his personality, it was a defining attribute of his philosophy and jurisprudence. Elsewhere I have attributed this modesty to his feeling that the Civil War—and the death and carnage it produced—represented the tragic consequence of an uncompromising spirit of certainty possessed by adversarial ideological camps that were totally convinced not only of the absolute rightness of their cause but also of the necessity for violence in the face of opposition.<sup>46</sup>

Also noticeable here is Holmes's echo of Emerson's essay "Nature," in particular section III in which Emerson refers to beauty as "an ultimate end."<sup>47</sup> Just as a human for Holmes is merely a little creature on a little earth, so beauty for Emerson "is not ultimate" but "must stand as a part, and not as yet the last or highest expression of the final cause of Nature."<sup>48</sup> Holmes's troping of Emerson in these lines seems to go beyond the borrowing of diction; it signals, to me, the idea, central to Emerson, that the constituent elements of an abstract and universal "whole" are meaningful only insofar as they communicate with, and participate in, that "wholeness."<sup>49</sup> Holmes's personal book collection, it should be noted, contained two volumes of Emerson's "Nature," one published in 1836 (probably a first edition) and the other in 1849;<sup>50</sup> thus, it is plausible he was reiterating Emersonian points and themes from "Nature" either consciously or subliminally.

Holmes does not loudly and proudly celebrate skepticism or cynicism. In light of his troping of "Nature," where Emerson is concerned about the unattainability of representational perfection,<sup>51</sup> Holmes seems cautious and reticent about his own values. He does not dismiss values out of hand. He criticizes French skeptics "for getting upon a pedestal and professing to look with haughty scorn upon a world in ruins."<sup>52</sup> He is thus not a delighted nihilist bent on the destruction of thought systems or inherited and longstanding ideas. Actually, his reading habits and reverence for the common law suggest that, in fact, he was a keen observer and longsuffering student of centuries of law, literature, philosophy, and political theory. He was not interested in the total annihilation or demolition of cherished principles. He claimed that people may, for unknown reasons, believe "that significance, consciousness and ideals are more than marks of the finite."<sup>53</sup> Such unreasoned convictions make people humble and modest in the acceptance of their intellectual limitations and experience. "The real conclusion," Holmes says, "is that the part can not swallow the whole—that our categories are not, or may not be, adequate to formulate what we can not know."<sup>54</sup> Here again he

calls for humility and discreetly cautions against assuming that, because one favors something and categorizes it according to his own preferences, it must be universally true and good for everyone else as well. This call channels Section III in "Nature" where Emerson states that the human soul seeks beauty for unknown reasons.<sup>55</sup> For Emerson, nature is a "final cause" and beauty is "one expression for the universe,"<sup>56</sup> but what constitutes nature and beauty defies complete comprehension and can be only incompletely understood. An inability to fully comprehend nature or beauty, however, does not mean that nature and beauty are nonexistent or unreal, just as the inability to totally ascertain natural laws through right reason does not mean natural laws are merely empty words and fictions.

Holmes is talking about more than the law at this point. His vision is cosmic in scope, hence his axiom that, "[i]f we believe that we come out of the universe, not it out of us, we must admit that we do not know what we are talking about when we speak of brute matter."<sup>57</sup> He does not recommend ideational capitulation or angst: Although "the universe has in it more than we understand," humans as acting agents need not be paralyzed, disempowered, or meaningless in our life pursuits.<sup>58</sup> Rather, most humans embrace life, pursue the ideas they prize and enjoy, and defend causes for which they are passionate. "We still shall fight," Holmes says, "all of us because we want to live, some, at least, because we want to realize our spontaneity and prove our powers, for the joy of it, and we may leave to the unknown the supposed final valuation of that which in any event has value to us."<sup>59</sup> The suggestion Holmes has been building is that humans are unqualified and unsuited to evaluate the ultimate merits of their hierarchy of values in their own moment and space. Assessment of our ideas and actions is best left to the test of time as carried out by subsequent generations of probing minds seeking constructive consensus about right conduct and belief.

The unnamed targets of Holmes's critique of natural law apparently place themselves before the universe, as though their passions and motivations were the vital and inevitable drivers of the universal natural order of all life and existence. Holmes may have derived this critique from Emerson, who said, "Man is conscious of a universal soul within or behind his individual life, wherein, as in a firmament, the natures of Justice, Truth, Love, Freedom, arise and shine."<sup>60</sup> Emerson is not criticizing but acknowledging what he considers to be a fact about modest human involvement within the manifold circuits of life in the measureless cosmos. He reverses the priority of man and nature, stating that the latter owns or possesses the former: "This universal soul he calls Reason: it is not mine, or thine, or his, but we are its; we are its property and men."<sup>61</sup> Holmes articulates a similar position in "Natural Law": "It is enough for us that the universe has produced us and has within it, as less than it, all that we believe and love."<sup>62</sup>



This similarity involves submission to natural forces that are greater than those possessed by conditioned human minds; to know and understand, a human must not seek to impose his or her socially acquired values on the universe but must remain open and receptive to the facts and data the universe makes manifest. Emerson and Holmes treat humans as one slight piece of the “multitude of uses that enter as parts into [the final cause of the world].”<sup>63</sup> “If we think of our existence not as that of a little god outside, but as that of a ganglion within,” Holmes says, “we have the infinite behind us. It gives us our only but our adequate significance.”<sup>64</sup> Emerson likewise calls “man” an “analogue” who “studies relations in all objects.”<sup>65</sup> Man, he claims, “is placed in the centre of beings, and a ray of relation passes from every other being to him.”<sup>66</sup> So conceived, human ideational significance depends upon its ties and connections to other things, not in isolated, disconnected, or closed modes of thought, even if man is spatially central in and to the known universe. Only in this transcendental context does Holmes’s mention of “the vision of ourselves as parts inseverable from the rest” begin to make sense.<sup>67</sup> Emerson himself said that “[w]e live in succession, in division, in parts, [and] in particles” while “within man is the soul of the whole.”<sup>68</sup> For both Holmes and Emerson, then, the sum of one person’s knowledge is the whole of that person, yet the whole of that person is not the whole of The Whole, although it contributes to and thus remains indispensable to the composition of The Whole.

## EMERSON AND TRANSCENDENTAL NATURAL LAW

In light of the foregoing, transcendentalist associations between Holmes and Emerson should be apparent. Yet how does Emerson’s transcendentalism pertain to the law? What themes or other elements of his work involve natural law, and what does natural law look like in the transcendentalist paradigm? This section sheds light on these questions and expounds the seminal elements of a school of jurisprudence that might be denominated as transcendentalist, although the impetus of transcendentalism is to resist rigid labels and accept flux and flow as, paradoxically, the spontaneous order that organizes known experience.

Two elements of transcendentalism, as I conceive it, act upon natural-law legal theory or jurisprudence: the concept of a universal order or ultimate unity and the idea of history as a guiding force behind the distinctly human capacity for creativity and originality. That the new springs from the old is another sign of transcendentalism. It recalls the axiom that nothing exists in a vacuum or that something cannot come from nothing. The rules and principles in the common-law system that Holmes adored are likewise rooted in custom and, the theory goes, traced to time out of mind or time immemori-

al,<sup>69</sup> making their transmission over the generations similar to that which marks ideas and creativity according to Emersonian transcendentalism.

### **Natural Law, Classification, and Unified or Universal Order**

To be “natural” means to be caused or existent in nature, the tangible and physical phenomenon that is the starting point of Emerson’s philosophy of law. In fact, the natural world and moral laws mirror one another in Emerson’s thinking: “The laws of moral nature answer to those of matter as face to face in a glass.”<sup>70</sup> Emerson elsewhere names “these two facts, namely, that the mind is One, and that nature is its correlative,” thereby suggesting that laws inhere in the union of mind and nature.<sup>71</sup> To this point, moreover, he adds that “[t]he axioms of physics translate the laws of ethics,”<sup>72</sup> and that “a law of one organization . . . holds true throughout nature.”<sup>73</sup> To the extent that the laws of moral nature and ethics amount to natural law, Emerson suggests that nature and the natural world display and comprise laws, or a system of rules and principles. “Nature,” he posits, “is an endless combination and repetition of a very few laws.”<sup>74</sup>

Discussing Emerson’s views of natural law is difficult, however, because he considered the properties and meaning of nature to be incommunicable, its material forms external to, and hence mediated by, fallible human sensations and faculties. “We know more from nature than we can at will communicate,” he writes. “Its light flows into the mind evermore, and we forget its presence.”<sup>75</sup> Here he implies that knowledge of nature comes as a spark of recognition that may quickly vanish. Elsewhere he says that “the mind opens and reveals the laws which traverse the universe and make things what they are, then shrinks the great world at once into a mere illustration and fable of this mind.”<sup>76</sup> The point of these statements, I think, is to highlight “our imperfect apprehension” of the “outrunning laws” that “traverse the universe.”<sup>77</sup> On this view, flashes of brilliance or genius may spontaneously impress themselves upon open minds, revealing the universal and moral laws, or traces and shadows of those laws, yet any full understanding eludes us because of the innate limitations of the human mind. Therefore, although he believes that universal and moral laws are real and present, he does not name or describe them with precision.

Emerson’s discourse on nature can seem vague, there being a “mystery”<sup>78</sup> to his subject that is “full of a sublime family likeness throughout her works.”<sup>79</sup> One must exercise faculties to transform the vague into the familiar, and in reading Emerson we witness the processes of his mind as he does just that, working through ambiguities and training them into familiar ideas or concepts. We follow along as he seeks to show the manner in which the faculties take in sensible objects and then settle into opinion or beliefs about their apparent truths. The incommunicable characteristics of nature that com-

prise law involve sensory impressions or spontaneous feelings: things which require sustained contemplation before they can be classified or arranged in such a manner as to reveal underlying patterns of likeness that suggest continuity or universality.

Classification is key to understanding the laws of nature, Emerson suggests in the “Discipline” section of “Nature.” In “The American Scholar,” he includes “law” in his definition of classification, which is, he says, “the perceiving that these objects [i.e., the phenomena in nature] are not chaotic, and are not foreign, but have a law which is also the law of the human mind.”<sup>80</sup> The process of training the mind through classificatory methodology aims at discerning the natural law, or that part of nature which corresponds with human thought. Disciplined and pensive individuals labor to account for the laws that are intrinsic to external data. “The ambitious soul,” Emerson says of these individuals, “sits down before each refractory fact; one after another reduces all strange constitutions, all new powers, to their class and their law, and goes on forever to animate the last fibre of organization, the outskirts of nature, by insight.”<sup>81</sup>

One struggles to disambiguate Emerson’s statement that “[t]he law of nature is, Do the thing, and you shall have the power.”<sup>82</sup> What is *the* thing? And what is *the* power? It may have something to do with Emerson’s emphasis on the working powers of the human mind, which, in his paradigm, should remain ever active and animated lest it fall into a disabling state of stasis. “It seems as if the law of the intellect,” he maintains, referring to the human mind, “resembled that law of nature by which we now aspire, now expire breath; by which the heart now draws in, then hurls out the blood—the law of undulation.”<sup>83</sup> Here the law of undulation might refer to mobility or energy: features of a dynamic mind that generates, originates, and creates. Still his meaning is vague. He is clearer in his assertion that the “relation between the mind and matter”<sup>84</sup> match or correspond such that “the universe becomes transparent, and the light of higher laws than its own shines through it.”<sup>85</sup> Conforming the mind to nature is, accordingly, the key to understanding the law; understanding the law is not immediate, however. It is a gradual process of growing and becoming that begins with spontaneous impressions of nature that later refine and perfect themselves through the purposeful development of rigorous thought.

Holmes said that “[a]ll law is directed to conditions of things manifest to the senses,”<sup>86</sup> a proposition that squares with Emerson’s notion of moral law, which “lies at the centre of nature[,] radiates to the circumference”<sup>87</sup> and “traverse[s] the universe and make[s] things what they are.”<sup>88</sup> This moral law begins with the immediate opening of the human mind<sup>89</sup> to external data and only later systematizes into categories and taxonomies. Belief in the “absolute existence of nature” is “instinctive,”<sup>90</sup> in this view, and materializes whenever the faculties achieve harmony with the forms, outlines, and rules of

nature. Yet prudence, a cultivated or learned trait, moves matter “after the laws of matter,”<sup>91</sup> i.e., exercises mental powers to create new material from existing material and conform events to one’s will.<sup>92</sup> Though the law as manifest in nature can be knowable without hesitancy and though our untaught understanding of it may precede conscious deliberation, the effort to classify disciplines the mind to apprehend truths.<sup>93</sup> Apprehending truths of nature thus involves an influx of revelation, spontaneous and intuitive, but it also involves the cataloging and grouping of sensory impressions, a sign of intellectual maturity.

“To the young man,” Emerson remarks of this process of classification, which furnishes the mind with gradual discernment, “every thing is individual, stands by itself. By and by, it finds how to join two things and see in them one nature; then three, then three thousand; and so, tyrannized over by its own unifying instinct, it goes on tying things together, diminishing anomalies, discovering roots running under ground whereby contrary and remote things cohere and flower out from one stem.”<sup>94</sup> One might imagine putting an eye to the dirt to examine an ant up close, then standing up and surveying the ant in its broader environment, then moving upward and outward, further and further, until the ultimate significance of the particular ant—its minor yet vital role on the planet—becomes increasingly perceptible while at the same time increasingly subsumed into the general workings of the vast physical order.

Classification thus aids perspicuity of thought by sloughing off and weeding out irrelevant or useless data, allowing one to observe the beautiful harmony—or the universal law—that inheres in nature. And it places any remaining or residual data into constructive context, allowing one to distinguish the important and significant from the unimportant and insignificant. This process of contextualization and classification according to Emerson runs like this: Initial sensory impressions about external data, as well as the inchoate testimonies of excited feelings, generate introspection, which leads in turn to the integrating tendencies of rigorous examination and the concomitant categorization of organized facts. “Every property of matter is a school for the understanding,” Emerson submits as his starting point;<sup>95</sup> then sustained investigation of the properties of matter empowers inductive faculties from which derive insights into general and universal forms; at length, ideas about matter and matter itself achieve a state of accord.<sup>96</sup> Through this complex process, extant phenomena increasingly become more harmonized or integrated as they prove themselves to be agreeable to reason.<sup>97</sup>

Substituting Holmes’s notion of undeveloped society or “primitive time”<sup>98</sup> for “young man” in Emerson’s statement about classification (“To the young man . . .”) reveals how closely Holmes’s understanding of maturing rules or formulas in a common-law system track Emerson’s musings regarding a developing perspective about ultimate unities. “The customs,

beliefs, or needs of a primitive time establish a rule or a formula,” says Holmes.<sup>99</sup> “In the course of centuries,” he continues, “the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds”—here I must mention that Emerson, too, thought genius involved the kind of classification that enables understanding of generals out of particulars<sup>100</sup>—“set themselves to inquire how it is to be accounted for.”<sup>101</sup>

Holmes, like Emerson, believed that knowledge of the past contextualizes the particulars and facilitates insight into the general. “As a first step towards a generalization,” he explains, “it will be necessary to consider what is to be found in ancient and independent systems of law.”<sup>102</sup> The chief difference between Holmes and Emerson on this score is that the latter saw in expository generalities workings of divine knowledge.<sup>103</sup> But both men saw law first as something to be observed and only later to be classified and arranged; law is natural, in this regard, because it is pre-political, prior to any person’s reflection on it. Reflection provides taxonomies and vocabularies for that which is immanent in nature or the given state of the world. The past supplies important context for understanding how those taxonomies and vocabularies came into existence and achieved wide acceptance. Knowledge of the past shows, in Holmes’s conception, that rules occupying a certain time and space consist in a more general orderliness; it may be difficult in the instant to apprehend the successive order in which the rules live. But taking the long view affords us the opportunity to analyze the career of laws, attentive to their patterns and precedents over time. A closer look at how historical awareness features in both Holmes and Emerson reveals additional commonalities regarding their views pertaining to natural law.

### **The Common Law, Creative Destruction, and the Transmission of Influence over Generations**

Holmes portrayed the common law as an evolutionary system engrained in custom that develops in stages over time.<sup>104</sup> It involved, he said, “the struggle for life among competing ideas,”<sup>105</sup> “the ultimate victory and survival of the strongest,” and “the struggle for existence between competing ideas and forms.”<sup>106</sup> He claimed the history of the law of torts revealed “another evolutionary process which Mr. Herbert Spencer has made familiar to us by the name of integration.”<sup>107</sup> Maintaining that “the law is always approaching, and never reaching, consistency,”<sup>108</sup> he looked back, as a legal historian as well as a jurist, over the long, stadal course of rules and principles in the Anglo-American legal tradition, which, he said, “is forever adopting new principles from life at one end” while always “retain[ing] old ones from history at the other, which have not yet been absorbed or sloughed off.”<sup>109</sup> This organic, filtering tradition will, he determined, “become entirely consis-

tent only when it ceases to grow.”<sup>110</sup> One gets the distinct impression, though, that he believed the common-law system would never cease to grow, or if it would, the resulting stasis would come at considerable expense, removing from the common law the plasticity and malleability that are its essential features.

If the common law evolves by slow degrees, then knowledge of its past is key to understanding its present state and conditions, Holmes believed.<sup>111</sup> “The history of what the law has been is necessary,” he claimed, “to the knowledge of what the law is.”<sup>112</sup> Sustained study of legal history therefore reveals through-lines and continuities.

In a short piece in the *American Law Review*—incidentally, the forum in which he first employed the famous phrase about the life of the law being logic, not experience—Holmes wrote that “[t]he form of continuity [in the law] has been kept up by reasonings purporting to reduce everything to a logical sequence; but that form is nothing but the evening dress which the new-comer puts on to make itself presentable according to conventional requirements.”<sup>113</sup> This line about current law representing the repackaging or rearticulating of extant principles—a recurring theme in Holmes—recalls similar declarations by Emerson, who in various ways propounded the evolutionary notion that the new always springs from the old, or that the old must give way to make room for the new.

“What are called new views here in New England,” Emerson wrote in an essay that was delivered as a lecture in 1842, “are not new, but the very oldest of thoughts cast into the mould of these new times.”<sup>114</sup> “We are stung by the desire for new thought,” he mused, “but when we receive a new thought it is only the old thought with a new face.”<sup>115</sup> Speaking of the history of religious institutions and religious expression, he said, “[L]et the breath of new life be breathed by you through the forms already existing. For if once you are alive, you shall find they shall become plastic and new.”<sup>116</sup> “The introduction of these elements,” he wrote of technology and innovation, “gives new resources to existing proprietors.”<sup>117</sup> Of art, he stated: “[T]he artist must employ the symbols in use in his day and nation to convey his enlarged sense to his fellow-men. Thus the new in art is always formed out of the old.”<sup>118</sup> “The new position of the advancing man,” he remarked in another essay, “has all the powers of the old, yet has them all new. It carries in its bosom all the energies of the past, yet is itself an exhilaration of the morning.”<sup>119</sup>

“New arts destroy the old,”<sup>120</sup> still another essay proclaims. Such destruction is both the source of and the condition for *construction*. This Emersonian model of growth through demolition anticipates the capitalist economic theory of creative destruction, coined by Joseph Schumpeter,<sup>121</sup> which holds, in short, that the “process of industrial mutation . . . incessantly revolutionizes the economic structure *from within*, incessantly destroying the old one, inces-

santly creating a new one.”<sup>122</sup> Creative destruction is a driving force behind the spontaneous order described by F. A. Hayek, who proposed that, “[i]f old truths are to retain their hold on men’s minds, they must be restated in the language and concepts of successive generations. What at one time are their most effective expressions gradually become so worn with use that they cease to carry a definite meaning.”<sup>123</sup> Holmes had his own pronouncements regarding creative destruction, namely in the context of what he called the “doctrine of survival.”<sup>124</sup>

The connection between Emerson, Holmes, and Hayek is pregnant with possibility and requires more treatment than this short piece can provide. Suffice it to say that in their evolutionary paradigm the processes of creative destruction generate order out of replacement, subdual, and obliteration. If, as Emerson believed, human knowledge and its successive transmission reflected the processes of nature, then evidence of creative destruction in nature—i.e., evidence of *natural* law—might include the fact that fire can stimulate the seeding and germination of forests, or that snakes shed their old skin to strengthen and renew their new skin.

In fact, Emerson turns to natural metaphors to explain how creative destruction operates. I quote at length because this passage demonstrates so well the parallels Emerson envisions between the rejuvenating operations of both nature and the human mind, the latter presented in the ideal of the poet:

Nature, through all her kingdoms, insures herself. Nobody cares for planting the poor fungus; so she shakes down from the gills of one agaric countless spores, any one of which, being preserved, transmits new billions of spores tomorrow or next day. The new agaric of this hour has a chance which the old one had not. This atom of seed is thrown into a new place, not subject to the accidents which destroyed its parent two rods off. She makes a man; and having brought him to ripe age, she will no longer run the risk of losing this wonder at a blow, but she detaches from him a new self, that the kind may be safe from accidents to which the individual is exposed. So when the soul of the poet has come to ripeness of thought, she detaches and sends away from it its poems or songs—a fearless, sleepless, deathless progeny, which is not exposed to the accidents of the weary kingdom of time; a fearless, vivacious offspring, clad with wings (such was the virtue of the soul out of which they came) which carry them fast and far, and infix them irrevocably into the hearts of men. These wings are the beauty of the poet’s soul. The songs, thus flying immortal from their mortal parent, are pursued by clamorous flights of censures, which swarm in far greater numbers and threaten to devour them; but these last are not winged. At the end of a very short leap they fall plump down and rot, having received from the souls out of which they came no beautiful wings. But the melodies of the poet ascend and leap and pierce into the deeps of infinite time.<sup>125</sup>

Notice how nature, so conceived, is self-regulatory, seemingly with an agency of its own as it selectively eliminates that which holds it back, confines its powers, and suppresses its potential. Notice, too, that nature is an analogue of the human mind, which creates language and lyrics that rise above the fray of criticism and separate themselves from their less fit, less durable challengers.

Might Holmes have had such lines in mind when he wrote of obsolete principles being “sloughed off,”<sup>126</sup> suggested that “old implements” can be “adjusted to new uses,”<sup>127</sup> or emphasized that “[t]he doctrine of contract has been so thoroughly remodeled to meet the needs of modern times”?<sup>128</sup> If not Emerson’s precise language, Holmes at least may have recalled the concepts that language articulated. Was it not Holmes, after all, who, borrowing the nature metaphor, stated, “The development of our law has gone on for nearly a thousand years, like the development of a plant, each generation taking the inevitable next step, mind, like matter, simply obeying a law of spontaneous growth. It is perfectly right and natural that it should have been so.”<sup>129</sup> He drove this point home in his essay “Law in Science and Science in Law,” where he repeatedly asserted that the legal community circulated lexica and doctrines (e.g., the “uninstructive and indolent use of phrases to save the trouble of thinking closely”<sup>130</sup>) absent any knowledge or awareness of the principles from which they arose.<sup>131</sup>

Jonathan Levin, a scholar of Emerson, has described the hard-to-identify moment when the creator repurposes the old for the new as transitional.<sup>132</sup> This is also the moment when the poet overcomes the anxiety of influence, Harold Bloom’s seminal concept, to break into new aesthetic territory. Bringing together Bloom’s and Emerson’s views on influence and inspiration, Levin refers to the “poetics of transition” to describe the move from a settled state or stasis to one of mobility and energy. Levin attributes this theory to Emerson, but its manifestation in the common law, where it appears less in the form of aesthetics than in the form of creative modification or application of extant rules and precedents, is astonishing.

“No truth is so sublime but it may be trivial to-morrow in the light of new thoughts. People wish to be settled; only as far as they are unsettled is there any hope for them,”<sup>133</sup> Emerson said. Imagine this statement in terms of the common law, in which settled case precedents embody the right rule—the truth—that new circumstances and technologies disrupt, thereby forcing creative judges to articulate the rule in novel ways, which is to say, to unsettle what was settled to supply hope for future rulings. The judge who in these circumstances imaginatively repurposes extant principles in light of changed conditions realizes the poetics of transition, at least the judicial equivalent to it. “Heaven forbid that I should find fault with an expression because it is new,” Holmes remarked of legal vocabularies he found inadequate.<sup>134</sup> He went on to say that “[j]udges commonly are elderly men, and are more likely to hate at sight any analysis to which they are not accustomed, and which



disturbs repose of mind, than to fall in love with novelties.”<sup>135</sup> Holmes concludes this line of thought with an Emersonian axiom: “Every living sentence which shows a mind at work for itself should be welcomed.”<sup>136</sup> These lines suggest that Holmes contemplated the poetics of transition in some form in the common-law system.

Of course, Emerson’s poetics of transition are more assertively and extravagantly exclaimed than is appropriate for, or germane to, judicial modes and practices. For example, a judge may not strictly speaking “cast away in this new moment all [his or her] once hoarded knowledge, as vacant and vain.”<sup>137</sup> A judge, rather, must operate within statutory and constitutional frameworks and, in a common-law system, from established and recognized case precedents. Nevertheless, the spirit or essence of Emerson’s message—that the creator must break free from the restraints of the past to realize the right rule or principle for the current moment—can animate and enthuse the common-law judge. In fact, the past supplies the conditions and precedents that inspire and necessitate its own displacement, the new past; thus, the settling of past paradigms is, paradoxically, requisite to the cultivation of new forms. A judge may use prior cases to forge a new direction in the pattern of precedents, giving the law an interior logic and heritability to accompany his or her originality and innovation.

Evolution by successive transition is *natural*, an organic and ongoing process that unfolds in inevitable phases. “In nature,” Emerson submits, “every moment is new; the past is always swallowed and forgotten; the coming only is sacred. Nothing is secure but life, transition, the energizing spirit.”<sup>138</sup> In “Circles,” his exposition of creative destruction is couched in metaphorical language about nature, suggesting that the most important law of nature is the very fluidity of the laws of nature.<sup>139</sup>

Holmes directly links the evolution of the law to the organic, transitional processes of nature.<sup>140</sup> Putting his own mark on the *natural* law of inevitable, animating transition, he attributes an organic process to the common-law system, which reflects bottom-up orderings derived from custom and reworked or adapted for present exigencies and technologies: “Some ground of policy is thought of, which seems to explain [the reason that gave rise to the rule] and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.”<sup>141</sup> Accordingly, natural law in the Emersonian and Holmesian transcendentalist paradigm is not teleological or immutable; still it could be universal in light of the coherence that emerges, paradoxically, out of the incoherence of the natural order; the transcendentalist sees in dynamic evolution the ultimate unity and interrelatedness of all knowable phenomena.

Holmes like Emerson possessed a strong sense of history. This historical knowledge, again paradoxically, was indispensable to their resistance of historical forces that wed us to customs that are demonstrably unfit or disadvantageous. "The past gives us our vocabulary and fixes the limits of our imagination; we cannot get away from it," Holmes explained of the role history must play in our present calculations.<sup>142</sup> "There is, too," he continues, "a peculiar logical pleasure in making manifest the continuity between what we are doing and what has been done before," a fact he knew well, having mapped continuities within the Anglo-American legal tradition in *The Common Law* and having edited James Kent's *Commentaries on American Law*, which traced legal history.<sup>143</sup> "But," he concludes, "the present has a right to govern itself so far as it can; and it ought always to be remembered that historical continuity with the past is not a duty, it is only a necessity."<sup>144</sup> Fidelity to history, on this view, requires the repurposing and revision of history. To be faithful to history requires reworking it for the present.

Natural law, too, is plugged into historical networks and channels, transmitted through discursive formalities, and mediated by human minds attuned to their own time and place. It may be knowable by the exercise of reason, but the basis and form of that reason are circumscribed by historical forces and factors. A proper understanding of natural law, in Holmes's paradigm, must therefore be pragmatic, which is to say, tested by experience in light of practical effects and proven successes in concrete circumstances.

### HOLMES'S EMERSONIAN PRAGMATIC NATURAL LAW

Emerson and Holmes were indisposed to assert exactly what they believed natural laws to be or consist of. They were content merely to describe the methodical and ideational processes by which natural laws are divined or apprehended. Holmes even ridiculed those who moved beyond these processes and assumed as operative and vital their own cherished assumptions about natural law that others did not share. Given Emerson's and Holmes's deliberate vagueness, or their focus on mental methods and processes rather than the final attainment of definite rules, it is not possible to reduce their belief in natural law to fixed, unassailable doctrines, formulas, or decrees. Much can be made, however, of the probable effects that Emerson's personalized, individual, and interior sense of natural law had on Holmes.

The strangeness of Emersonian natural law involves its claims of radical individuality as a basis of universal "oneness." Nowhere is this curiosity more apparent than in his essay "Self-Reliance." Here he celebrates "the law in his person"<sup>145</sup> and "a law of his own,"<sup>146</sup> i.e., the qualia and sentience that guide human attitudes and actions and remain antecedent to corrupting social influences. "No law can be sacred to me but that of my nature," he says,

adding that “[g]ood and bad are but names very readily transferable to that or this: the only right is what is after my constitution; the only wrong what is against it.”<sup>147</sup> A few years later he expanded on this theme in “Politics,” stating, “For any laws but those which men make for themselves are laughable. If I put myself in the place of my child, and we stand in one thought and see that things are thus or thus, that perception is law for him and me.”<sup>148</sup>

If the laws of nature inhabit individual minds working in isolation, then an individual following his conscience does not transgress against those inner laws. In Emerson’s words, “no man can violate his nature. All the sallies of his will are rounded in by the law of his being.”<sup>149</sup> This law of absolute subjectivity is *natural*, even constitutive of nature: “a true man belongs to no other time or place, but is the centre of things. Where he is, there is nature.”<sup>150</sup> But if the natural law is interior to the individual, and utterly subjective, then how can it become systematized as a governing scheme? Does it represent some variety of Nietzschean perspectivalism?<sup>151</sup> How can the sprawling government, which consists of and controls numerous people within its wide jurisdiction, embody natural-law principles that are essentially and necessarily personal?

The answer to these questions encapsulates the transcendentalist position on natural law. It consists of four discernable steps. First, law exists in nature; second, the human mind apprehends the laws of nature in moments of inspired revelation; third, the human mind—the reflective one, anyway—organizes and classifies those laws according to known and lived experience; fourth, as humans interact, sharing their apprehension of those laws as organized and classified, their views become aggregated into a wider system of organization and classification. Each step in this process emanates from personal revelation or truth.<sup>152</sup>

Notice that these steps do not involve the precise naming or describing of the content of natural law. What is natural, for Emerson as for Holmes, is the organic *process* of law, which adapts to changing features of human experience. Although certain general concepts tend to be fixed—the prohibition of murder, for instance—the details within those concepts always change: killing may be broken down into differing degrees of homicide according to altering notions of safety or culpability.<sup>153</sup> A better example may be found in private-property rights, which Emerson believed to be protected by a “higher law” as humans invariably return to it even after experimentation with different property arrangements.<sup>154</sup> This example shows, as well, Emerson’s recognition that positive law may not always comport with higher law, but that higher law would always inevitably win out in the end.<sup>155</sup>

Such focus on the process-oriented, evolutionary features of law enables Emerson to claim universalism out of mutable particulars.<sup>156</sup> The constituent parts of the general whole are never the same, but together they always add up to concepts that represent something permanent and perennial in the hu-

man condition. Although numerous people, prejudiced by their unique experiences, possess disparate understandings of the laws of nature that are mediated through their fallible human minds, their discursive transmission of competing ideas and their clashing views organize themselves into systems of behavior and principles. A natural order of rules thus emerges from ostensible chaos and incoherence through regular processes of transition and creative destruction. Individual activity within systems of behavior and principles (i.e., within governing structures) is directed at increasingly higher forms of order that prove themselves, over time, to be self-organizing and self-replicating—to be infinite or universal.

The process just described clarifies Emerson's claim that thoughts about the "infinite relations" that make up "outrunning laws . . . have been the entertainment of the human spirit in all ages."<sup>157</sup> It illuminates Holmes's remark about ideals, which, he says, "furnish us our perspectives and open glimpses of the infinite."<sup>158</sup> The rare person who sees in the common particulars indispensable elements of the infinite whole grasps "the higher law,"<sup>159</sup> which Emerson equated with the moral nature of man.<sup>160</sup>

Nature, in short, is governed by its own laws; it is evolutionary. A feature of the laws of nature is the adaptability of living organisms and the heritability of their given traits. So it is with laws that regulate humans, as recorded, for example, by the bottom-up, organic ordering of the common law that has been passed down over centuries. The law of supply and demand is, according to Emerson, one such natural law of political economy that tends towards equilibrium if it is left to its own devices rather than tinkered with through legislative interference.<sup>161</sup> "The basis of political economy," Emerson states, "is non-interference."<sup>162</sup> Hence, his imperative: "Do not legislate."<sup>163</sup>

The common law is pre-political and prior to legislation.<sup>164</sup> It reflects deep-rooted customs and possesses an internal filtering mechanism that resembles teleonomy. Purposive human behavior does, of course, impact the content of the common law, but that content embodies aggregated human purposes within the jurisdiction, not merely the purposes of a single acting agent. Rules and principles in the common-law system are transmitted through forces like those of natural selection.<sup>165</sup> And the system itself is malleable within permanent paradigms and parameters such as, for example, rules against theft or assault.

## CONCLUSION

Hoffheimer determined that "there is room to doubt how thoroughly and consistently Holmes truly rejected the central tenets of natural law."<sup>166</sup> This chapter, which considers the scientific elements of transcendentalism, in particular as they pertain to the laws of nature or natural law, ought to leave

wider room for doubt. It may even inspire confidence that, in fact, Holmes gravitated towards one type of natural law while dismissing the dominant attitudes and ideals of his contemporary proponents of natural-law theory. His judicial restraint signals a type of “hands-off” attitude that was comfortable with, even confident in, the ability of local political communities such as states to organize themselves apart from the controls of centralized or nationalized government structures.

I have not defended the transcendentalist account of natural law, which, I think, raises more questions than it answers. I have, rather, illustrated certain features of it to propound its probable manifestation in Holmes’s legal writings. Emerson and Holmes were content to adumbrate the controlling processes of their theories of history and law without depicting the particulars that were being processed. Holmes, for instance, was satisfied that his duties as a justice were fulfilled by allowing the political processes of election and legislative enactment on local levels to run their course without intervention by the federal judiciary. The vagueness of transcendentalist natural-law theory reflects their conception of rules and principles as primarily private and individualized and only secondarily as systematized, from the bottom up, into an integrated body that governs groups of people and institutions. Both men were thrilled by the powers of human faculties but skeptical of large-scale attempts to translate collective consensus into binding mandates to be imposed from the top down. Both men were curious, complicated thinkers whose transcendentalist views of the law warrant more attention.

## NOTES

1. Michael H. Hoffheimer, *Justice Holmes and the Natural Law* (New York: Garland Publishing, 1992), 15.

2. R. H. Helmholz articulates the traditional understanding of natural law: “Natural law theory . . . began . . . with an assumption of congruence between law and basic features of man’s nature as they are thought to have existed from the beginning of time. God himself was natural law’s source. In creating the world, He had instilled in all of his creatures a knowledge of certain principles. Most of them were known by instinct.” R. H. Helmholz, *Natural Law in Court* (Cambridge, Massachusetts and London England: Harvard University Press, 2015), 2. Helmholz then summarizes a different account of natural law: “Natural law also meant, in what was sometimes called its secondary sense, congruence with natural reason, with which God had also imbued his creatures. Men and women knew right from wrong without any special training. . . . Right reason had led to its recognition in every age of human history. The Bible and the great texts of Western law provided additional proof of this principle’s hold on human thought and action. So stated, it did not change over time, although it might vary in the details of its application to human life, as the conditions of society themselves required. The underlying principle, it was assumed, would always matter in practice, particularly in doubtful cases. Its observance would promote the rule of justice in human life.” Helmholz, *Natural Law in Court*, 2–3. The transcendentalism known to Holmes would not have foreclosed these views of natural law, but it might have downplayed the emphasis on creation or design and focused on the impersonal, spontaneous ordering of the material world by natural forces working to preserve general principles through evolutionary processes. F. A. Hayek describes such a form of natural law, distinguishing it from positive law as follows: “One of the chief sources of confusion . . . is

that all theories which oppose legal positivism are alike labelled and lumped together under the misleading name of ‘natural law,’ though some of them have nothing in common with each other except their opposition to legal positivism. This false dichotomy is now insisted upon mainly by the positivists, because their constructivist approach allows only that the law should be either the product of the design of a human or the product of the design of a super-human intelligence. But . . . the term ‘natural’ was used earlier to assert that law was the product not of any rational design but of a process of evolution and natural selection, an unintended product whose function we can learn to understand, but whose present significance may be wholly different from the intention of its creators.” F. A. Hayek, *Law, Legislation and Liberty*, Vol. 2 (Chicago and London: University of Chicago Press, 1976), 59. The natural law to which Holmes was open might run along these lines: individual judges responding to concrete cases each exercise reason to resolve disputes, and in that sense they are “doing” natural law, but without total knowledge of the aggregate effects of the resolution of that particular case on the sum of the law, i.e., on the actual content of the natural law. The sum of the laws expressed in cases may reflect a transcendental universalism that cannot be directly or wholly known to any one person or group of people; it exists independently of a judge’s opinion about what the natural law is, and the several opinions of numerous judges together represent merely evidence of the transcendental principles that make up the natural law.

3. See Allen Mendenhall, *Oliver Wendell Holmes Jr., Pragmatism, and the Jurisprudence of Agon* (Lewisburg, PA: Bucknell University Press, 2017), xvi, xx, 45.

4. Mendenhall, *Oliver Wendell Holmes Jr., Pragmatism, and the Jurisprudence of Agon*, xvi, 45–54.

5. Ralph Waldo Emerson, “The American Scholar,” in *The Essential Writings of Ralph Waldo Emerson*, ed. Brooks Atkinson (New York: Modern Library, 2000), 47.

6. Ralph Waldo Emerson, “Self-Reliance,” in *The Essential Writings of Ralph Waldo Emerson*, ed. Brooks Atkinson (New York: Modern Library, 2000), 150.

7. “In my view, the stark jurisprudential dichotomy between natural law and positive law is itself a twentieth century positivist creation that has kept us from seeing the way in which all legal structures inevitably embody normative positions.” Morton J. Horwitz, “History and Theory,” *Yale Law Journal* 96 (1987): 1834.

8. Hoffheimer, *Justice Holmes and the Natural Law*, 5.

9. Hoffheimer, *Justice Holmes and the Natural Law*, 7. Holmes’s classmate at Harvard, William A. Holbrook, accused Holmes of airing “a dreamy, transcendental, artistic religion” in Holmes’s essay “Notes to Albert Dürer.” See Mark DeWolfe Howe, *Justice Oliver Wendell Holmes: The Shaping Years, 1841–1870* (Cambridge, MA: Belknap Press, 1957), 59.

10. Hoffheimer, *Justice Holmes and the Natural Law*, 7.

11. Mendenhall, *Oliver Wendell Holmes Jr., Pragmatism, and the Jurisprudence of Agon*, 115; see also Hoffheimer, *Justice Holmes and the Natural Law*, 29. Regarding transcendentalism’s influence on the young Holmes, see Hoffheimer, *Justice Holmes and the Natural Law*, 31–43.

12. Quoted in Mendenhall, *Oliver Wendell Holmes Jr., Pragmatism, and the Jurisprudence of Agon*, 14.

13. Quoted in Mendenhall, *Oliver Wendell Holmes Jr., Pragmatism, and the Jurisprudence of Agon*, 14.

14. Ralph Waldo Emerson, “The American Scholar,” 49.

15. Ralph Waldo Emerson, “The American Scholar,” 47 (“The one thing in the world, of course, is the active soul. This every man is entitled to; this every man contains within him. . . . The soul sees absolute truth and utters truth, or creates. In this action it is genius”).

16. Oliver Wendell Holmes Jr., John G. Palfrey (1875–1945) Collection of Oliver Wendell Holmes Jr. Papers, 1715–1938, Family and Personal Material, Personal: Box 61, Folder 5, List of OWH’s books, 1935, seq. 11, <http://nrs.harvard.edu/urn-3:HLS.Lib:8268117?n=11>; Oliver Wendell Holmes Jr., John G. Palfrey (1875–1945) Collection of Oliver Wendell Holmes Jr. Papers, 1715–1938, Family and Personal Material, Personal: Box 61, Folder 5, List of OWH’s Books, 1935, seq. 13, <http://nrs.harvard.edu/urn-3:HLS.Lib:8268117?n=13>. Note: seq. 12 consists of a blank page.

17. Mark DeWolfe Howe, *Justice Oliver Wendell Holmes: The Shaping Years*, 44, 54–55, 58–59, 203–4.
18. Francis J. Mellen Jr., “Ralph Waldo Emerson, Mr. Justice Holmes and the Idea of Organic Form in American Law,” *New England Law Review* 14 (1978–1979), 148.
19. Hoffheimer, *Justice Holmes and the Natural Law*, 18.
20. Hoffheimer, *Justice Holmes and the Natural Law*, 17.
21. Hoffheimer, *Justice Holmes and the Natural Law*, 18; see also 19 (“Natural law judging did not offend him because of its results but rather because of its philosophical postulates”) and 21 (referring to Holmes’s “hostility to the creation of legal rights from claims of moral obligations”).
22. Hoffheimer, *Justice Holmes and the Natural Law*, 8.
23. Ralph Waldo Emerson, “Self-Reliance,” 138. “With consistency,” Emerson added, “a great soul has simply nothing to do.”
24. Hoffheimer, *Justice Holmes and the Natural Law*, 25.
25. Hoffheimer, *Justice Holmes and the Natural Law*, 25.
26. Hoffheimer, *Justice Holmes and the Natural Law*, 40 (Holmes “sought to harmonize aspects of idealism and empiricism by associating each with different intellectual activities”).
27. Section 51 of Walt Whitman, “Song of Myself,” in *The Portable Walt Whitman*, ed. Mark Van Doren (New York: Penguin Books, 1973), 96.
28. Hoffheimer, *Justice Holmes and the Natural Law*, 90–91.
29. Hoffheimer, *Justice Holmes and the Natural Law*, 90–91.
30. Hoffheimer, *Justice Holmes and the Natural Law*, 91. Consider these famous lines from *The Common Law*: “The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development. . . . In order to know what it is, we must know what it has been, and what it tends to become. We must alternatively consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every age.” Oliver Wendell Holmes Jr., *The Common Law* (Chicago: ABA Publishing, [1881] 2009), 1.
31. Oliver Wendell Holmes Jr., “Natural Law,” *Harvard Law Review* 32 (1918–1919), 40.
32. Holmes, “Natural Law,” 40 (italics added).
33. Holmes, “Natural Law,” 40.
34. Holmes, “Natural Law,” 40.
35. Holmes, “Natural Law,” 41.
36. Holmes, “Natural Law,” 41.
37. Holmes, “Natural Law,” 41.
38. Holmes, “Natural Law,” 41.
39. “I see no *a priori* duty to live with others and in that way, but simply a statement of what I must do if I wish to remain alive. If I do live with others they tell me that I must do and abstain from doing various things or they will put the screws on to me. I believe that they will, and being of the same mind as to their conduct I not only accept the rules but come in time to accept them with sympathy and emotional affirmation and begin to talk about duties and rights.” Holmes, “Natural Law,” 42.
40. Holmes, “Natural Law,” 42, italics added.
41. Holmes, “Natural Law,” 42.
42. Holmes, “Natural Law,” 42.
43. Holmes, “Natural Law,” 43.
44. Holmes, “Natural Law,” 43.
45. Isaiah 55:9.
46. Mendenhall, *Oliver Wendell Holmes Jr., Pragmatism, and the Jurisprudence of Agon*, xxi, 83–84, 98–99, 111, 113–16, 126.
47. Ralph Waldo Emerson, “Nature,” in *The Essential Writings of Ralph Waldo Emerson*, ed. Brooks Atkinson (New York: Modern Library, 2000), 13. Holmes echoed Emerson before. His essay “Books” represents a copy of Emerson’s essay by the same title. See Allen Menden-

hall, "Oliver Wendell Holmes Jr. Is the Use of Calling Emerson a Pragmatist: A Brief and Belated Response to Stanley Cavell," *Faulkner Law Review* 6 (2014), 224–26.

48. Ralph Waldo Emerson, "Nature," 13.

49. Ralph Waldo Emerson, "Nature," 13 ("Nothing is quite beautiful alone; nothing but is beautiful in the whole. A single object is only so far beautiful as it suggests this universal grace").

50. Oliver Wendell Holmes Jr., John G. Palfrey (1875–1945) Collection of Oliver Wendell Holmes Jr. Papers, 1715–1938, Family and Personal Material, Personal: Box 61, Folder 5, List of OWH's Books, 1935, seq. 13, <http://nrs.harvard.edu/urn-3:HLS.Lib:8268117?n=13>.

51. See Emerson's discussion of language as signs of natural facts in Ralph Waldo Emerson, "Nature," 13–19.

52. Holmes, "Natural Law," 43.

53. Holmes, "Natural Law," 43.

54. Holmes, "Natural Law," 43.

55. Ralph Waldo Emerson, "Nature," 13 ("No reason can be asked or given why the soul seeks beauty").

56. Ralph Waldo Emerson, "Nature," 13.

57. Holmes, "Natural Law," 43.

58. Holmes, "Natural Law," 43.

59. Holmes, "Natural Law," 43.

60. Ralph Waldo Emerson, "Nature," 14.

61. Ralph Waldo Emerson, "Nature," 14.

62. Holmes, "Natural Law," 43–44.

63. Ralph Waldo Emerson, "Nature," 7.

64. Holmes, "Natural Law," 44.

65. Ralph Waldo Emerson, "Nature," 14.

66. Ralph Waldo Emerson, "Nature," 14–15.

67. Holmes, "Natural Law," 44.

68. Ralph Waldo Emerson, "The Over-Soul," *The Essential Writings of Ralph Waldo Emerson*, ed. Brooks Atkinson (New York: Modern Library, 2000), 237.

69. Most scholars date the common law back to Henry II's rule in the twelfth century.

70. Ralph Waldo Emerson, "Nature," 17.

71. Ralph Waldo Emerson, "History," *The Essential Writings of Ralph Waldo Emerson*, ed. Brooks Atkinson (New York: Modern Library, 2000), 130.

72. Ralph Waldo Emerson, "Nature," 17.

73. Ralph Waldo Emerson, "Nature," 23.

74. Ralph Waldo Emerson, "History," 119.

75. Ralph Waldo Emerson, "Nature," 16.

76. Ralph Waldo Emerson, "An Address," *The Essential Writings of Ralph Waldo Emerson*, ed. Brooks Atkinson (New York: Modern Library, 2000), 63.

77. Ralph Waldo Emerson, "An Address," 63.

78. Ralph Waldo Emerson, "An Address," 63.

79. Emerson, "History," 119.

80. Ralph Waldo Emerson, "The American Scholar," 45.

81. Ralph Waldo Emerson, "The American Scholar," 45.

82. Ralph Waldo Emerson, "Compensation," *The Essential Writings of Ralph Waldo Emerson*, ed. Brooks Atkinson (New York: Modern Library, 2000), 165.

83. Ralph Waldo Emerson, "Intellectual," *The Essential Writings of Ralph Waldo Emerson*, ed. Brooks Atkinson (New York: Modern Library, 2000), 266.

84. Ralph Waldo Emerson, "Nature," 17.

85. Ralph Waldo Emerson, "Nature," 18.

86. Holmes, *The Common Law*, 33.

87. Ralph Waldo Emerson, "Nature," 21–22.

88. Ralph Waldo Emerson, "An Address," *The Essential Writings of Ralph Waldo Emerson*, ed. Brooks Atkinson (New York: Modern Library, 2000), 63.

89. Emerson, "An Address," 63.



90. Ralph Waldo Emerson, "Nature," 25.

91. Ralph Waldo Emerson, "Prudence," *The Essential Writings of Ralph Waldo Emerson*, ed. Brooks Atkinson (New York: Modern Library, 2000), 215.

92. Emerson insists that humans may learn this creative skill at a young age: "From the child's successive possession of his several senses up to the hour when he saith, 'Thy will be done!' he is learning the secret that he can reduce under his will not only particular events but great classes, nay, the whole series of events, and so conform all facts to his character." Emerson, "Nature," 21.

93. Emerson says, "Nature is a discipline of the understanding in intellectual truths. Our dealing in sensible objects is a constant exercise in the necessary lessons of difference, of likeness, of order, of being and seeming, of progressive attainment; of ascent from particular to general; of combination to one end of manifold forces." Emerson, "Nature," 19. Here the purposeful development of truth attained through classificatory methodology is evident.

94. Ralph Waldo Emerson, "The American Scholar," 45.

95. Ralph Waldo Emerson, "Nature," 19.

96. "The understanding [of the solidity or resistance, inertia, extension, figure, and divisibility of matter] adds, divides, combines, measures, and finds nutriment and room for its activity in this worthy scene. Meantime, Reason transfers all these lessons into its own world of thought, by perceiving the analogy that marries Matter and Mind." Ralph Waldo Emerson, "Nature," 19.

97. Hoffheimer was aware of this penchant for classification as an element of his transcendentalism as it pertains to the law. "There is," he says, "the problem of the vision behind *Natural Law*—expressed, perhaps, in its style, too—that meaning derived from connection to a greater whole that was known to be, even if known to be unknowable in its details." Hoffheimer, *Justice Holmes and the Natural Law*, 13.

98. Holmes, *The Common Law*, 3.

99. Holmes, *The Common Law*, 3–4.

100. Ralph Waldo Emerson, "History," 118 ("Genius studies the casual thought, and far back in the womb of things sees the rays parting from one orb, that diverge, ere they fall, by infinite diameters. Genius watches the monad through all his masks as he performs the metempsychosis of nature. Genius detects through the fly, through the caterpillar, through the grub, through the egg, the constant individual; through countless individuals the fixed species; through many species the genus; through all genera the steadfast type; through all the kingdoms of organized life the eternal unity").

101. Holmes, *The Common Law*, 4.

102. Holmes, *The Common Law*, 5.

103. "Generalization is always a new influx of the divinity into the mind." Emerson, "Circles," 256.

104. See generally Allen Mendenhall, "Oliver Wendell Holmes Jr. and the Darwinian Common Law Paradigm," *European Journal of Pragmatism and American Philosophy*, 7, no. 2 (2015). See also Oliver Wendell Holmes Jr., "Law in Science and Science in Law," *Harvard Law Review* 12 (1899), 447 ("We have evolution in this sphere of conscious thought and action no less than in lower organic stages, but an evolution which must be studied in its own field").

105. Oliver Wendell Holmes Jr., "Law in Science and Science in Law," 449.

106. Oliver Wendell Holmes Jr., "Law in Science and Science in Law," 450.

107. Oliver Wendell Holmes Jr., "Law in Science and Science in Law," 450.

108. Holmes, *The Common Law*, 25.

109. Holmes, *The Common Law*, 25.

110. Holmes, *The Common Law*, 25.

111. "History sets us free and enables us to make up our minds dispassionately whether the survival [of rules or traditions] which we [judges] are enforcing answers any new purpose when it has ceased to answer the old." Oliver Wendell Holmes Jr., "Law in Science and Science in Law," 452.

112. Holmes, *The Common Law*, 25. He also claimed that, "to understand their [the seemingly self-sufficient propositions of law] scope fully, to know how they will be dealt with by

judges trained in the past which the law embodies, we must ourselves know something of that past.” Holmes, *The Common Law*, 25.

113. Mark DeWolfe Howe, Research Materials Relating to Life of Oliver Wendell Holmes Jr., 1858–1968, MDH Research Materials, Holmes—Uncollected Essays, Vol. IV, January 1873–January 1880: Box 32, Folder 31, [Book Notice] A Selection of Cases on the Law of Contracts, with a Summary of the Topics Covered by the Cases, *American Law Review* 14 (March 1880), 233, seq. 2–3, <http://nrs.harvard.edu/urn-3:HLS.Lib:8527870>.

114. Ralph Waldo Emerson, “The Transcendentalist,” in *The Essential Writings of Ralph Waldo Emerson*, ed. Brooks Atkinson (New York: Modern Library, 2000), 81.

115. Ralph Waldo Emerson, “Intellect,” in *The Essential Writings of Ralph Waldo Emerson*, ed. Brooks Atkinson (New York: Modern Library, 2000), 270.

116. Emerson, “An Address,” 78.

117. Ralph Waldo Emerson, “English Traits,” in *The Essential Writings of Ralph Waldo Emerson*, ed. Brooks Atkinson (New York: Modern Library, 2000), 545.

118. Ralph Waldo Emerson, “Art,” in *The Essential Writings of Ralph Waldo Emerson*, ed. Brooks Atkinson (New York: Modern Library, 2000), 275.

119. Ralph Waldo Emerson, “Circles,” in *The Essential Writings of Ralph Waldo Emerson*, ed. Brooks Atkinson (New York: Modern Library, 2000), 261.

120. Emerson, “Circles,” 253.

121. See Allen Mendenhall, “Oliver Wendell Holmes Jr. Is the Use of Calling Emerson a Pragmatist: A Brief and Belated Response to Stanley Cavell,” *Faulkner Law Review* 6 (2014), 215–16.

122. Joseph Schumpeter, *Capitalism, Socialism and Democracy* (London: Routledge, [1943] 1994), 83.

123. F. A. Hayek, *The Constitution of Liberty*, ed. Ronald Hamowy (Chicago: University of Chicago Press, [1960] 2011), 47.

124. Oliver Wendell Holmes Jr., “Law in Science and Science in Law,” 454. He says, e.g.: “At that time there were few rules of evidence. Later our laws of evidence were systematized and developed. But the authority of Lord Hale has caused his dictum to survive as law in the particular case, while the principle upon which it would have to be justified has been destroyed. The exception in other words is pure survival, having nothing or very little to back it except that the practice is established.” Oliver Wendell Holmes Jr., “Law in Science and Science in Law,” 453. Interestingly, Hoffheimer talks about transcendentalism in Holmes’s thought as if it were itself subject to the doctrine of survival, i.e., as if it were a holdover or survival from Holmes’s early years. Hoffheimer, *Justice Holmes and the Natural Law*, 17.

125. Ralph Waldo Emerson, “The Poet,” in *The Essential Writings of Ralph Waldo Emerson*, ed. Brooks Atkinson (New York: Modern Library, 2000), 297.

126. Holmes, *The Common Law*, 25.

127. Holmes, *The Common Law*, 25.

128. Holmes, *The Common Law*, 167.

129. Oliver Wendell Holmes Jr., “The Path of the Law,” 10 (1896–97), 468.

130. Oliver Wendell Holmes Jr., “Law in Science and Science in Law,” 461.

131. See also his concern about phrasing taking the place of real reasons. Oliver Wendell Holmes Jr., “Law in Science and Science in Law,” 459.

132. Jonathan Levin, *The Poetics of Transition: Emerson, Pragmatism & American Literary Modernism* (Duke University Press, 1999), ix.

133. Emerson, “Circles,” 261.

134. Oliver Wendell Holmes Jr., “Law in Science and Science in Law,” *Harvard Law Review* 12 (1899), 455.

135. Oliver Wendell Holmes Jr., “Law in Science and Science in Law,” *Harvard Law Review* 12 (1899), 455.

136. Oliver Wendell Holmes Jr., “Law in Science and Science in Law,” *Harvard Law Review* 12 (1899), 455.

137. Emerson, “Circles,” 261.

138. Emerson, “Circles,” 261.

139. Emerson, "Circles," 252–63: "There are no fixtures in nature. The universe is fluid and volatile. Permanence is but a word of degrees. Our globe seen by God is a transparent law, not a mass of facts. The law dissolves the fact and holds it fluid. Our culture is the predominance of an idea which draws after it this train of cities and institutions. Let us rise into another idea; they will disappear. The Greek sculpture is all melted away, as if it had been statues of ice; here and there a solitary figure or fragment remaining, as we see flecks and scraps of snow left in cold dells and mountain clefts in June and July. For the genius that created it creates now somewhat else. The Greek letters last a little longer, but are already passing under the same sentence and tumbling into the inevitable pit which the creation of new thought opens for all that is old. The new continents are built out of the ruins of an old planet; the new races fed out of the decomposition of the foregoing."

140. "I confess that such a development as that fills me with interest, not only for itself, but as an illustration of what you see all through the law—the paucity of original ideas in man, and the slow, coasting way in which he works along from rudimentary beginnings to the complex and artificial conceptions of civilized life. It is like the niggardly uninventiveness of *nature in its other manifestations*, with its few smells or colors or types, its short list of elements, working along in the same slow way from compound to compound until the dramatic impressiveness of the most intricate compositions, which we call *organic life*, makes them seem different in kind from the elements out of which they are made, when set opposite to them in direct contrast." Oliver Wendell Holmes Jr., "Law in Science and Science in Law," 446–47.

141. Holmes, *The Common Law*, 4.

142. Oliver Wendell Holmes Jr., "Learning and Science," *North Carolina Law Review* 24 (1946), 103 (reprint of an 1895 address Holmes delivered for the Harvard Law School Association).

143. Oliver Wendell Holmes Jr., "Learning and Science," 103.

144. Oliver Wendell Holmes Jr., "Learning and Science," 103.

145. Emerson, "Self-Reliance," 141.

146. Emerson, "Self-Reliance," 141.

147. Ralph Waldo Emerson, "Self-Reliance," 135.

148. Ralph Waldo Emerson, "Politics," in *The Essential Writings of Ralph Waldo Emerson*, ed. Brooks Atkinson (New York: Modern Library, 2000), 386.

149. Emerson, "Self-Reliance," 138.

150. Emerson, "Self-Reliance," 140.

151. For a treatment of the Nietzschean elements of Holmes's jurisprudence, see Seth Vannatta and Allen Mendenhall, "The American Nietzsche? Fate and Power in the Pragmatism of Justice Holmes," *UMKC Law Review* 85 (2016). It is notable that Emerson is the one thinker who had a demonstrative influence on both Holmes and Nietzsche.

152. A person's "fidelity to new revelations of the incessant soul" and "faithfulness to his truth" make up the law that "writes the laws of cities and nations"—i.e., the law which "it is in vain to build or plot or combine against." Ralph Waldo Emerson, "Compensation," 157–58. See also Ralph Waldo Emerson, "Prudence," 218 ("Let a man keep the law—any law—and his way will be strown with satisfactions. . . . If you think the senses final, obey their law. If you believe in the soul, do not clutch at sensual sweetness before it is ripe on the slow tree of cause and effect").

153. See Emerson, "Compensation," 159 ("Crime and punishment grow out of one stem. Punishment is a fruit that unsuspected ripens within the flower of the pleasure which concealed it. Cause and effect, means and ends, seed and fruit, cannot be severed; for the effect already blooms in the cause, the end preëxists in the means, the fruit in the seed").

154. See, e.g., Ralph Waldo Emerson, "Politics," 381–82 ("The law may do what it will with the owner of property; its just power will still attach to the cent. The law may in a mad freak say that all shall have power except the owners of property; they shall have no vote. Nevertheless, by a higher law, the property will, year after year, write every statute that respects property. The non-proprietor will be the scribe of the proprietor. What the owners wish to do, the whole power of the property will do, either through the law or else in defiance of it").

155. *Ibid.*

156. See, e.g., Ralph Waldo Emerson, "The Over-Soul," 237.

157. Emerson, "An Address," 63.

158. Oliver Wendell Holmes Jr., "Law in Science and Science in Law," 462–63. This remark comes on the heels of Holmes's brief aside about knowledge of generals depending upon understanding of the particulars of which they consist. See Oliver Wendell Holmes Jr., "Law in Science and Science in Law," 461 (discussing "the danger of reasoning from generalizations unless you have the particulars which they embrace in mind"). Here Holmes states that a "generalization is empty so far as it is general. Its value depends on the number of particulars which it calls up to the speaker and the hearer."

159. Emerson, "Nature," 38 ("The invariable mark of wisdom is to see the miraculous in the common. What is a day? What is a year? What is summer? What is woman? What is a child? What is sleep? To our blindness, these things seem unaffecting. We make fables to hide the baldness of the fact and conform it, as we say, to the higher law of the mind. But when the fact is seen under the light of an idea, the gaudy fable fades and shrivels. We behold a higher law. To the wise, therefore, a fact is true poetry, and the most beautiful of fables").

160. Emerson, "An Address," 73–74.

161. Ralph Waldo Emerson, "Conduct of Life," in *The Essential Writings of Ralph Waldo Emerson*, ed. Brooks Atkinson (New York: Modern Library, 2000), 631–32.

162. Ralph Waldo Emerson, "Conduct of Life," 631.

163. Ralph Waldo Emerson, "Conduct of Life," 631.

164. See, e.g., F. A. Hayek, *The Constitution of Liberty*, 310–15 (on the rule of law working as a limitation on legislation).

165. For the most profound expression, in my view, of the evolutionary nature and characteristics of the common-law system, see Allan C. Hutchinson, *Evolution and the Common Law* (Cambridge: Cambridge University Press, 2005).

166. Hoffheimer, *Justice Holmes and the Natural Law*, 13.

## BIBLIOGRAPHY

- Emerson, Ralph Waldo. *The Essential Writings of Ralph Waldo Emerson*. Ed. Brooks Atkinson. New York: Modern Library, 2000.
- Hayek, F. A. *The Constitution of Liberty*. Ed. Ronald Hamowy. Chicago: University of Chicago Press, [1960] 2011.
- . *Law, Legislation and Liberty, Vol. 2*. Chicago and London: University of Chicago Press, 1976.
- Helmholz, R. H. *Natural Law in Court*. Cambridge, MA: Harvard University Press, 2015.
- Hoffheimer, Michael H. *Justice Holmes and the Natural Law*. New York: Garland Publishing, 1992.
- Holmes Jr., Oliver Wendell. John G. Palfrey (1875–1945) Collection of Oliver Wendell Holmes Jr. Papers, 1715–1938, Family and Personal Material, Personal: Box 61, Folder 5, List of OWH's books, 1935, seq. 11, <http://nrs.harvard.edu/urn-3:HLS.Lib:8268117?n=11>;  
 Oliver Wendell Holmes Jr., John G. Palfrey (1875–1945) Collection of Oliver Wendell Holmes Jr. Papers, 1715–1938, Family and Personal Material, Personal: Box 61, Folder 5, List of OWH's Books, 1935, seq. 13, <http://nrs.harvard.edu/urn-3:HLS.Lib:8268117?n=13>.  
 Note: seq. 12 consists of a blank page.
- . John G. Palfrey (1875–1945) Collection of Oliver Wendell Holmes Jr. Papers, 1715–1938, Family and Personal Material, Personal: Box 61, Folder 5, List of OWH's Books, 1935, seq. 13, <http://nrs.harvard.edu/urn-3:HLS.Lib:8268117?n=13>.
- . *The Common Law*. Chicago: ABA Publishing, [1881] 2009.
- . "Natural Law." *Harvard Law Review* 32 (1918–19).
- . "Law in Science and Science in Law." *Harvard Law Review* 12 (1899).
- . "Learning and Science." *North Carolina Law Review* 24 (1946).
- Horwitz, Morton J. "History and Theory." *Yale Law Journal* 96 (1987).
- Howe, Mark DeWolfe. *Justice Oliver Wendell Holmes: The Shaping Years, 1841–1870*. Cambridge, MA: Belknap Press, 1957.

- . Research Materials Relating to Life of Oliver Wendell Holmes Jr., 1858–1968, MDH Research Materials, Holmes—Uncollected Essays, Vol. IV, January 1873 – January 1880: Box 32, Folder 31, [Book Notice] A Selection of Cases on the Law of Contracts, with a Summary of the Topics Covered by the Cases, *American Law Review* 14 (March 1880), 233, seq. 2–3, <http://nrs.harvard.edu/urn-3:HLS.Lib:8527870>.
- Hutchinson, Allan C. *Evolution and the Common Law*. Cambridge: Cambridge University Press, 2005.
- Levin, Jonathan. *The Poetics of Transition: Emerson, Pragmatism & American Literary Modernism*. Durham, NC: Duke University Press, 1999.
- Mellen Jr., Francis J. “Ralph Waldo Emerson, Mr. Justice Holmes and the Idea of Organic Form in American Law.” *New England Law Review* 14 (1978–79).
- Mendenhall, Allen. *Oliver Wendell Holmes Jr., Pragmatism, and the Jurisprudence of Agon*. Lewisburg, PA: Bucknell University Press, 2017.
- . “Oliver Wendell Holmes Jr. Is the Use of Calling Emerson a Pragmatist: A Brief and Belated Response to Stanley Cavell.” *Faulkner Law Review* 6 (2014).
- . “Oliver Wendell Holmes Jr. and the Darwinian Common Law Paradigm.” *European Journal of Pragmatism and American Philosophy*. Vol. 7, no. 2 (2015).
- Schumpeter, Joseph. *Capitalism, Socialism and Democracy*. London: Routledge, [1943] 1994.
- Vannatta, Seth and Allen Mendenhall. “The American Nietzsche? Fate and Power in the Pragmatism of Justice Holmes.” *UMKC Law Review* 85 (2016)
- Whitman, Walt. “Song of Myself.” *The Portable Walt Whitman*. Ed. Mark Van Doren. New York: Penguin Books, 1973.