THE AMERICAN NIETZSCHE? FATE AND POWER IN THE PRAGMATISM OF JUSTICE HOLMES

Seth Vannatta and Allen Mendenhall*

ABSTRACT

Richard Posner is one of the few legal minds to have noticed the affinity between the philosophies of Oliver Wendell Holmes, Jr., and Friedrich Nietzsche. This article examines that affinity, showing how Holmes's pragmatism both comports with and departs from Nietzsche's existentialism. Holmes's pragmatism shares with Nietzsche's existentialism a commitment to skepticism, perspectivalism, experiential knowledge, and aesthetics, as well as an abiding awareness of the problematic nature of truth and the fallibility of the human mind. We demonstrate here that Holmes was familiar with Nietzsche's writings and that the two thinkers turned away from Christian ethics and glorified the life struggle in distinctly evolutionary terms. Both men celebrated the individual capacity to exercise the will for purposes of personal autonomy, greatness, and creative or aesthetic achievement. Nietzsche, however, did not share Holmes's belief in the pragmatic potential of meliorism, which marks the distinction between their notions of fate. The thinking of Nietzsche and Holmes converges in the person of Ralph Waldo Emerson, who was a manifest influence on both Holmes and Nietzsche and whose thinking on fate and power, inflected as it is by aesthetic pragmatism, shapes our understanding not only of Holmes and Nietzsche in isolation but also of Holmes and Nietzsche as paired, ambitious philosophers concerned about the role of fate and power in human activity.

Fate, inevitability, and destiny make strange conceptual bedfellows with pragmatism and existentialism. Pragmatists tend to value the use of instrumental reason to meliorate the felt problems of their environment, emphasizing possibility over necessity. Existentialists tend to stress radical freedom amid life's tragic circumstances to take ownership of personal action and imbue life with meaning. Nonetheless, a pragmatist, Oliver Wendell Holmes, Jr., and an existentialist, Friedrich Nietzsche, both employ working notions of fate in their

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Seth Vannatta (M.A., Ph.D.) is the Interim Chair of the Department of Philosophy and Religious Studies and Associate Professor at Morgan State University. He is the author of *Conservatism and Pragmatism in Law, Politics, and Ethics* (2014). Allen Mendenhall (M.A., J.D., LL.M., Ph.D.) is an Assistant Attorney General in the State of Alabama Office of the Attorney General, an adjunct professor at Faulkner University and Huntingdon College, and author of *Literature and Liberty* (2014). Visit his website at AllenMendenhall.com.

philosophies. This makes them peculiar figures within pragmatism and existentialism. Perhaps even stranger is the appellation of Justice Holmes as the "American Nietzsche," a label conferred by Judge Richard Posner.[1] Judge Posner likens Holmes's study of the common law to the Nietzschean project of genealogy and sees in both men a "will to power," which, he says, manifests itself in Holmes's "fondness for war, struggle, and eugenic breeding of human beings (i.e., man as animal)."[2] More than any other jurist or academic, Judge Posner has identified curious elements of Nietzsche in Holmes's jurisprudence—elements that were overlooked or ignored by scholars even during the 1990s when Nietzsche's work seemed "to support the growing interest in non-foundational approaches to law, namely, legal pragmatism and critical legal studies."[3]

In this essay we examine the merits of the designation "American Nietzsche" for Holmes, as well as the similarities between Holmes and Nietzsche, to ascertain the meaning of the important and problematic concept of fate for these two schools of philosophy. This approach will depict Holmes as a pseudo-Nietzschean and will add new dimensions to our understanding of his notions of truth, aesthetics, energy, and the aboriginal struggle of human beings to employ organizing rules and concepts for themselves and their posterity. It also explains the seeming paradox in Holmes's thought that has long baffled scholars: the prizing of faith and doubt simultaneously.[4] In keeping with Nietzsche's own views, Holmes affirms that stoicism remains after the perspectival, derivative, and contingent qualities of truth are exposed and that neither logic nor intelligence but, instead, material representation—perhaps even aesthetics—drives our self-constituting immersion in social activity. Also at stake here are the origins and the role of fate in philosophies stressing melioristic possibility on the one hand and radical freedom on the other. To that end, we introduce the one thinker with a well-documented influence on both Holmes and Nietzsche: Ralph Waldo Emerson. Reading Holmes's philosophy as influenced by the Emersonian models of "fate" and "power" brings fresh insight into the literature on Holmes while giving rise to telling interplays between pragmatism and existentialism. One question remains: is Holmes the "American Nietzsche"? We conclude that the two men share some enticing and shocking kinships.

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[1] Richard A. Posner, *Introduction*, *in* THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR., xviii (Richard Posner, ed., Univ. of Chicago Press 1992) [hereinafter THE ESSENTIAL HOLMES]; *see* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 239-42 (1993) [hereinafter THE PROBLEMS OF JURISPRUDENCE]; *see also* ALBERT ALSCHULER, LAW WITHOUT VALUES THE LIFE AND LEGACY OF JUSTICE HOLMES 20 (2000) (arguing that Holmes is, among other things, an existentialist and therefore a Nietzschean).

[2] Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 886 (1988).

[3] Douglas Litowitz, *Nietzsche's Theory of Law: A Critique of Natural Law Theory*, 18 LEGAL STUD. F. 393, 393 (1994).

[4] *See, e.g.*, Mathias Reimann, *Why Holmes?* 88 MICH. L. REV. 1908, 1916 (1990).

Nietzsche, however, dismisses meliorism wholesale whereas Holmes, differing in temperament, maintains a judge's allegiance to retail meliorism. Whether either of these schools of philosophy knows how to wrestle with the inevitable and fated natures of our existence we leave to future discussion.

Louis Menand incorporated Justice Holmes into the tradition of American pragmatism.[5] Other commentators, such as the editor of his collected works, Sheldon M. Novick, tried to distance Holmes from pragmatism. Judge Posner treats Holmes as his gateway into legal pragmatism and gives a fitting defense of Holmes as a pragmatist. Albert Alschuler agrees with Judge Posner that Holmes is a Nietzschean but denies that he is a pragmatist. Both Novick and Alschuler draw their conclusions in part from the fact that Holmes called James's *Pragmatism* "an amusing humbug."[6] These references, alongside other arguments we will not elucidate here, seem to treat pragmatism as a finite school of philosophy with distinct and specific theses: apparently, Jamesean, anti-realistic, and optimistic. Instead of deciding beforehand which metaphysical or temperamental positions demarcate pragmatism, we should recognize pragmatism as an attitude and a method,[7] one which Holmes practices and embodies in his approach to judicial reasoning. This is the more traditional take on Holmes. Susan Haack has stated, "though recently it seems to have been Rorty's style of neo-pragmatism that has been most warmly welcomed by legal commentators, traditionally it is Oliver Wendell Holmes who has been seen as the originator of the pragmatist tradition in legal theory."[8] Holmes's pragmatism shows itself in an opening line to *The Common Law*: "It is the merit of the common law that it decides the case first and determines the principle

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[5] Louis Menand begins three recent works, PRAGMATISM (1997), THE METAPHYSICAL CLUB (2001), and AMERICAN STUDIES (2002), on the pragmatist tradition and American intellectual history with excerpts from and chapters on Justice Holmes.

[6] OLIVER WENDELL HOLMES, *Holmes to Lewis Einstein (June 17, 1908), in* THE ESSENTIAL HOLMES, *supra* note 1, at 70. We do not see how the fact that Holmes's suspicion of James's position concerning spiritualism renders inoperative his pragmatism. Dewey seemed equally suspicious of some of James's positions, and we do not fail to characterize him as a pragmatist. C.S. Peirce was so skeptical of James's positions that he renamed "pragmatism" as "pragmaticism" to distinguish himself from James, yet both men are considered progenitors of pragmatism and, indeed, as two of the classical pragmatists.

[7] On pragmatism as a method, see SETH VANNATTA, CONSERVATISM AND PRAGMATISM: IN LAW, POLITICS, AND ETHICS 106 (2014). *See also* Allen Mendenhall, *Pragmatists versus Agrarians?*, THE UNIVERSITY BOOKMAN (June 1, 2013), http://www.kirkcenter.org/index.php/bookman/article/pragmatists-versus-agrarians/ (reviewing JOHN J. LANGDALE, SUPERFLUOUS SOUTHERNERS: CULTURAL CONSERVATISM AND THE SOUTH, 1920–1990 (2012)) ("[T]he pragmatism of Peirce and James is not about sociopolitical or socioeconomic advancement. It is a methodology, a process of scientific inquiry… It is … a vehicle to an end, not an end itself. Peirce and James viewed it as a technique to ferret out the truth of an idea by subjecting concrete data to rigorous analysis based on statistical probability, sustained experimentation, and trial and error.").

[8] Susan Haack, *On Legal Pragmatism: Where Does "The Path of the Law" Lead Us?*, 50 AM. J. JURIS. 71, 77 (2005).

afterwards."[9] The adduction of principle to the decision "flatter[s] [our] longing for certainty and for repose."[10] This is pragmatic reasoning, reflecting James's idea of the "sentiment of rationality"[11] and his notion of true ideas—and by analogy the operative rule derived in cases within the adaptive common-law system—as "those that we can assimilate, validate, corroborate, and verify."[12] This reasoning also resonates with the literary or aesthetic tradition of pragmatism that scholars have traced to Emerson.[13] Such a tradition labors against ideational and aesthetic repose and underscores momentum and meliorism as conceptual vehicles for intellectual progress.[14]

Richard Poirier and Jonathan Levin first drew attention to the pragmatic aesthetics of transition in their respective works, *Poetry and Pragmatism* and *The Poetics of Transition*. The former weaved the poetic strands of the pragmatism of Emerson, William James, Robert Frost, Gertrude Stein, and Wallace Stevens and other literary moderns; the latter expounded upon Poirier and adumbrated a theory of "transition" whereby writers reconstructed and repurposed the writing of their poetic precursors in language at once mimetic and novel. According to Poirier, the poetic pragmatists resorted to superfluities of language to overcome linguistic skepticism or the anxiety that words and language cannot fully represent felt sensation or lived experience.[15] Levin accepted Poirier's premise

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[9] OLIVER WENDELL HOLMES, *Codes and the Arrangement of the Law, in* THE COLLECTED WORKS OF JUSTICE HOLMES 212, 212 (Sheldon M. Novick ed., Univ. of Chicago Press 1995) [hereinafter THE COLLECTED WORKS OF JUSTICE HOLMES].

[10] OLIVER WENDELL HOLMES, *The Path of the Law*, *in* PRAGMATISM: A READER 154 (Louis Menand ed., 1997).

[11] *See* WILLIAM JAMES, *The Sentiment of Rationality*, *in* THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY 63 (Longmans, Green, and Co., 1912).

[12] WILLIAM JAMES, *Pragmatism's Conception of the Truth*, *in* WILLIAM JAMES: WRITINGS 1902-1910 573 (Bruce Kuklick ed., 1987).

[13] The line of scholarship on Emerson and pragmatism runs from Kenneth Burke, Russell B. Goodman, Giles Gunn, Richard Poirier, Cornel West, and Joan Richardson to James M. Albrecht. *See* Allen Mendenhall, *Oliver Wendell Holmes Jr. Is the Use of Calling Emerson a Pragmatist: A Brief and Belated Response to Stanley Cavell*, 6 FAULKNER L. REV. 197, 200-12 (2014) (tracing the history of scholarship on Emerson and pragmatism); *see also* Allen Mendenhall, *Dissent as a Site of Aesthetic Adaptation in the Work of Oliver Wendell Holmes Jr.*, 1 BRIT. J. AM. LEGAL STUD. 517, 519 (2012) (examining Holmes as an Emersonian pragmatist).

[14] *See* Allen Porter Mendenhall, Common Law and Aesthetic Dissent: Oliver Wendell Holmes, Jr., Pragmatism, and the Jurisprudence of Agon (Aug. 15, 2015) (unpublished Ph.D. dissertation, Auburn University) (on file with author and Auburn University Library).

[15] Nietzsche shared this anxiety about language as an inadequate form of representation. Regarding truth and language, he said, "Truth, too, is only desired by human beings in a similarly limited sense. They desire the pleasant, life-preserving consequences of truth; they are indifferent to pure knowledge if it has no consequences, but they are actually hostile towards truths which may be harmful and destructive. And, besides, what is the status of those conventions of language?" [Earlier in the essay Nietzsche refers to language—a way of designating things—as the first step on the road toward assuming laws of truth.] Are they perhaps products of knowledge, of the sense of truth? Is there a perfect match between things and their designations? Is language the full and adequate expression of all realities?" Friedrich Nietzsche, *On Truth and Lying in a Non-Moral*

and used it to map an evolutionary, revisionary tradition of American aesthetics. Poirier and Levin viewed aesthetic pragmatism as open and fluid, dependent on the past traditions from which it was breaking in order to instantiate meliorism through media such as poetry and poetic prose. The oft-celebrated literary qualities of Holmes's writing involve such meliorist pragmatism.[16]

In addition to his pragmatic aesthetics, Holmes has a pragmatic understanding of truth. The decision's correctness is a result of its "fit" with the entire set of unarticulated cultural assumptions that give moral credence.[17] Absolute certainty is "illusory,"[18] absolute truth a matter of discursive and majority consensus, but truth serves as an unattainable ideal for which to strive. "I used to say, when I was young," Holmes mused, "that truth was the majority vote of that nation that could lick all others."[19] Looking back he thought this "statement was correct in so far as it implied that our test of truth is a reference to either a present or an imagined future majority in favor of our view."[20] Holmes defined truth as "the system of my (intellectual) limitations," "what gives it objectivity is the fact that I find my fellow man to a greater or less extent (never wholly) subject to the same *Can't Helps*."[21] Truth, therefore, was simply what one could not help but believe, i.e., one's *can't helps*. Echoing Charles Sanders Peirce's notion of truth as a belief "unassailable by doubt,"[22] Holmes explained, "When I say that a thing is true, I mean that I cannot help believing it. I am stating an experience as to which there is no choice."[23] Because truth on this view is experiential and personal, Holmes hesitated to abstract from it absolute guides for moral conduct.[24] "I do not venture to assume," he declared to this end, "that

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Sense, *in* THE NORTON ANTHOLOGY OF THEORY AND CRITICISM 876 (Vincent B. Leitch et al. eds., 2001) [hereinafter *On Truth and Lying*].

[16] "Holmes modeled his style on that of the best contemporary English prose writers." RICHARD POSNER, OVERCOMING LAW 262 (1995). According to Judge Posner, "law is a rhetorical discipline, and the judicial opinions of some of the greatest judges, such as Oliver Wendell Holmes, have literary merit and repay literary analysis." RICHARD POSNER, LAW AND LITERATURE xi (3rd ed. 2009). "One of the few points on which all commentators agree is Holmes' greatness as a prose stylist." Thomas C. GREY, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 787 (1989).

[17] Menand, *Introduction*, *in* PRAGMATISM: A READER, *supra* note 10, at xxi.

[18] *See* Oliver Wendell Holmes, *The Path of the Law*, *in* PRAGMATISM: A READER, *supra* note 10, at 154.

[19] Oliver Wendell Holmes Jr., *Natural Law*, 32 HARV. L. REV. 40, 40 (1918) [hereinafter *Natural Law*].

[20] *Id.*

[21] *Id.*

[22] Charles Sanders Peirce, COLLECTED PAPERS OF C.S. PIERCE 3905 (1998) https://colorysemiotica.files.wordpress.com/2014/08/peirce-collectedpapers.pdf.

[23] OLIVER WENDELL HOLMES, *Ideals and Doubts*, *in* COLLECTED LEGAL PAPERS 304 (1920) [hereinafter *Ideals and Doubts*].

[24] *See* WILLIAM JAMES, *The Meaning of Truth*, *in* WILLIAM JAMES: WRITINGS 1902-1910, *supra* note 12, at 928. (Compare William James on pragmatism and abstractions: "The pragmatist himself has no objection to abstractions. Elliptically, and 'for short,' he relies on them as much as anyone, finding upon innumerable occasions that their comparative emptiness makes of them useful substitutes for the overfulness of the facts he meets with. But he never ascribes to them a higher grade of reality. The full reality of a truth for him is always some process of verification, in which

my inabilities in the way of thought are inabilities of the universe. I therefore define truth as the system of my limitations, and leave absolute truth for those who are better equipped. With absolute truth I leave absolute ideals of conduct equally on one side."[25] These remarks recall Nietzsche's assertion that only by forgetfulness—by self-deception—can "human beings ever entertain the illusion that they possess the truth."[26]

Holmes is difficult to label politically precisely because he was a pragmatist. He had no *a priori* objections to any political positions, rejecting those such as socialism that he thought did not *work*.[27] Holmes's politics were cosmic or planetary in scale and took the long view rather than embracing contemporary political parties or fleeting ideological fashions. "Now when we come to our attitude to the universe," he said, "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."[28] Holmes, accordingly, had a pragmatic ethics that refused to exaggerate the facility and capability of the human intellect, which Nietzsche decried for its fallibility in light of the enormity of the knowable cosmos: "Someone could invent a fable like this [i.e., a fable about how animals invented cognition and then perished] and yet they would still not have given a satisfactory illustration of just how pitiful, how insubstantial and transitory, how purposeless and arbitrary the human intellect looks within nature; there were eternities during which it did not exist; and when it has disappeared again, nothing will have happened."[29] Nietzsche demeaned the "proud philosopher" who "wants to see, on all sides, the eyes of the universe trained, as through telescopes, on his thoughts and deeds."[30] Holmes appears to have responded in kind, saying, "If the world were my dream, I should be God in the only universe I know. But although I cannot prove that I am awake, I believe that my neighbors exist in the same sense that I do, and if I admit that, it is easy to admit also that I am in the universe, not it in me."[31]

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the abstract property of connecting ideas with objects truly is workingly embodied.").

[25] *Ideals and Doubts*, *supra* note 23.

[26] *On Truth and Lying*, *supra* note 15, at 876. Nietzsche proffered his own eloquent definition for truth: "What, then, is truth? A mobile army of metaphors, metonymies, anthropomorphisms, in short a sum of human relations which have been subjected to poetic and rhetorical intensification, translation, and decoration, and which, after they have been in use for a long time, strike a people as firmly established, canonical, and binding; truths are illusions of which we have forgotten that they are illusions, metaphors which have become worn by frequent use and have lost all sensuous vigor, coins which, having lost their stamp, are now regarded as metal and no longer as coins." *Id.* at 878.

[27] Oliver Wendell Holmes, *Holmes to Lewis Einstein (November, 24 1912)*, *in* THE ESSENTIAL HOLMES, *supra* note 1, at 66.

[28] *Natural Law*, *supra* note 19, at 43.

[29] *On Truth and Lying*, *supra* note 15, at 874. We have selected this version of the essay because of the quality of its translation.

[30] *Id.* at 875.

[31] *Ideals and Doubts*, *supra* note 23.

Although a modest statement about epistemology, this is also Holmes's way of warning us against, in Nietzsche's words, inferring "from the fact of the nervous stimulation that there exists a cause outside us."[32] Counterintuitively, the existential limitations of the human mind and the illusory nature of truth as a meaningful category of discourse and thought are (or can be) enabling rather than disabling. Holmes points out that "it does not follow that without such absolute ideals" as truth "we have nothing to do but sit still and let time run over us."[33] On the contrary, "[c]onsciously or unconsciously we all strive to make the kind of world that we like,"[34] until some of us achieve what Nietzsche called "the rule of art over life."[35]

Holmes avoided appeals to moral principles too far removed from the particulars of experience. Pragmatic ethical principles, including Holmes's concept of duty, are contingent, reflecting the material, social, and historical conditions of one's culture, and they often emerge from aesthetic experience rather than rational reflection.[36] Holmes agreed with Aristotle, who envisioned life as "painting a picture not doing a sum, that specific cases can't be decided by general rules, and that everything is a question of degree."[37] Theory for Holmes and other pragmatic ethicists does not cultivate character—*praxis* does.[38] He thus stated, "Life, not the parson, teaches conduct," a proposition that exudes pragmatist ethics.[39]

I. HOLMES AND NIETZSCHE

Holmes read Nietzsche's *On the Genealogy of Morals* in 1902 along with William James's *Varieties of Religious Experience* and Josiah Royce's *The World and the Individual*.[40] Of this experience Holmes wrote to Lady Pollock, the wife of Sir Frederick Pollock, "I have been reading philosophy which I don[']t believe by Wm James and Royce and which I do by Forde (?) — and which I don[']t feel bound to take too seriously by Nietzsche although the [last

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[32] *On Truth and Lying*, *supra* note 15, at 876. By "nervous stimulation" Nietzsche is referring to language. Immediately preceding this remark, Nietzsche says, "What is a word? The copy of a nervous stimulation in sounds." *Id.*

[33] *Ideals and Doubts*, *supra* note 23, at 3.

[34] *Id.*

[35] *On Truth and Lying*, *supra* note 15, at 883.

[36] RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 52 (2003).

[37] OLIVER WENDELL HOLMES, *Holmes to Lewis Einstein (July 23, 1906)*, *in* THE ESSENTIAL HOLMES, *supra* note 1, at 58.

[38] Compare this commentary about Holmes's ethics with that of John Dewey's. *See* GREGORY PAPPAS, JOHN DEWEY'S ETHICS: DEMOCRACY AS EXPERIENCE 176-77 (2008).

[39] OLIVER WENDELL HOLMES, *Holmes to Lewis Einstein (July 23, 1906)*, *in* THE ESSENTIAL HOLMES, *supra* note 1, at 43.

[40] Mark DeWolfe Howe, *Research materials relating to life of Oliver Wendell Holmes, Jr., 1858-1968: Finding Aid, OWH Reading list, 1881-1902*, http://nrs.harvard.edu/urn-3:HLS.Libr:8534637 seq. 43.

named gent] said some things worth remembering. On the whole I am on the side of the unregenerate who affirms the worth of life as an end in itself as against the saints who decry it."[41] Holmes reiterated this reading list in a letter to Nina L. Gray.[42] His remarks suggest an affinity with Nietzsche but a reluctance to categorize himself as Nietzschean.

Holmes and his friends and correspondents were frequently writing about Nietzsche in their missives to one another, and Holmes's regard for Nietzsche appears to have grown over time. In 1923, John Ching Hsiung Wu dashed off the following lines to Holmes: "I have discovered that your philosophical temper is akin to that of Nietzsche. Both of you 'write with blood.' Dr. J. N. Figgis' *The Will to Freedom* is a good commentary upon Nietzsche. Figgis says that Nietzsche goes 'by pure intuition. This does not mean that he took up notions at random; rather that he went through the long psychical process of weighing and reconsidering, and then, [when the whole] seemed clear, he kicked away the ladder, ending by thinking it a bore, a waste of time, to discuss the grounds.'"[43] In a letter to Holmes in 1924, Morris Cohen enclosed a copy of William Mackintire Salter's commentary on Nietzsche that Cohen called "uncommonly conscientious" because it did "more justice to Nietzsche than most enthusiastic disciples or opponents manage to do."[44] Holmes responded to Cohen shortly thereafter, stating,

> Dear Cohen,
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> By this mail the Nietzsche is returned to you—the others will follow later. You always enrich me by your sendings and this book is no exception. I am very glad to have read it. There is much that I have long believed, after or independently of him—much that I don't care for. He never, it seems to me, got away from his theological start—and must see man as a little god to be happy—and, perhaps because of his nerves, he is in such a touse about his beliefs—I prefer more serenity. But he had real

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[41] Mark DeWolfe Howe, *Research materials relating to life of Oliver Wendell Holmes, Jr., 1858-1968: Finding Aid, Complete set of typescripts, interfiled, 1896-1902*, http://nrs.harvard.edu/urn-3:HLS.Libr:8550600 seq. 61-2.

[42] Mark DeWolfe Howe, *Research materials relating to life of Oliver Wendell Holmes, Jr., 1858-1968: Finding Aid, Major Correspondence: Gray, Nina L., correspondent, August 17, 1902 - February 15, 1903*, http://nrs.harvard.edu/urn-3:HLS.Libr:8284203 seq. 2.

[43] Mark DeWolfe Howe, *Research materials relating to life of Oliver Wendell Holmes, Jr., 1858-1968: Finding Aid, Wu to OWH, 1921-1923*, http://nrs.harvard.edu/urn-3:HLS.Libr:8397432 seq. 16-7.

[44] Mark DeWolfe Howe, *Research materials relating to life of Oliver Wendell Holmes, Jr., 1858-1968: Finding Aid, Cohen, Morris Raphael, 1909-1934*, http://nrs.harvard.edu/urn-3:HLS.Libr:8351812 seq. 15.

> insights and it is pleasant and instructive to read so conscientious a study of him.
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> Sincerely Yours,
> O W Holmes[45]

Pleased, Cohen wrote back: "I am especially delighted with your appreciation of Salter's book on Nietzsche. That book caused me to revise my estimate of Nietzsche in several regards and it is a pleasure to find that you also found it seriously worth while."[46] Holmes then wrote to Laski about Salter's Nietzsche:

> Since finishing War & Peace and Butler's Way of All Flesh wh. I think I have mentioned, and Pounds little book that I know I did, I have read a careful study of Nietzsche by W. M. Salter. (qu. is he a gent. mentioned in philosophic circles?) which without changing my conviction that he made too much row about himself, and that he tells me little that didn[']t know, nevertheless moves some sympathy in me. Before I knew him if not before him I used to say that equality between individuals, as a moral formula, was too rudimentary—If you said equality between human foot pounds I could understand it. In that case if a philosopher and a fool were at the two ends of a plank at sea, the former might say Tommy I am more than you, therefore let go—I do not say that Tommy would be bound by the consideration, as I don[']t think morals quite so important in the world as philosophers teach—(as an anchor for other dogmatisms). I suppose Nietzsche wrote in or at least came from a more theological atmosphere than ours—and so got that tiresome tone of fluttering the dovecotes and was himself so fluttered—I think he might have died silent and the world not have been appreciably worse off.[47]

According to Laski, "Salter's Nietzsche is much the best thing about that queer, tortured soul, a great poet who could not resist the impulse. Noncomformists sometimes give way to when they are approached by ladies of easy virtue in Leicester Square. If I am not mistaken Salter lives in Cambridge. Mass. and has,

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[45] *Id.* at seq. 17.

[46] Mark DeWolfe Howe, *Research materials relating to life of Oliver Wendell Holmes, Jr., 1858-1968: Finding Aid, Cohen, Morris Raphael, 1909-1934*, http://nrs.harvard.edu/urn-3:HLS.Libr:8351812 seq. 19.

[47] Mark DeWolfe Howe, *Research materials relating to life of Oliver Wendell Holmes, Jr., 1858-1968: Finding Aid, Major Correspondence: Laski, Harold, correspondent, July-August 1924*, http://nrs.harvard.edu/urn-3:HLS.Libr:8288458 seq. 30.

or had, some connection with the Ethical Culture Society."[48] This same year Sir Frederick Pollock informed Holmes that "[a] score of years ago I made up my mind that I had no use for Nietzsche as a serious philosopher. But 'Also sprach Zarathustra' is a mighty fine prose-poetic rhapsody and the best German since Heine."[49]

Holmes was therefore receiving commentary on Nietzsche from a variety of trusted sources. Years later Laski would again write to him about Nietzsche, this time on the occasion of Laski's visit to France: "There is, I must add, a tremendous interest in Nietzsche; the shops are full of translations and commentaries. That, I believe, is a good sign for Nietzsche was cosmopolitan and it is a great thing for Frenchmen to shake off their insularity."[50] However unacknowledged as a source of inspiration or insight for Holmes, Nietzsche was a seminal figure in Holmes's intellectual development—a force to be reckoned with. Holmes's correspondents drew him into deeper readings and considerations of Nietzsche. Regardless of whether he proclaimed himself Nietzschean, Holmes was clearly influenced by Nietzsche.

Characteristic of existentialism, Nietzsche viewed modern humanity, in the face of the sociological decline of Christian morality, as thrown back onto itself, relying solely on its own resources in order to give life meaning. In *The Genealogy of Morals*, Nietzsche characterizes Christian morality as an expression of rancor by the weak toward the strong.[51] He describes the Christian notion of conscience as an expression of sickness, decaying our power and vitality which reveal a more original and authentic understanding of the *good* as the *noble*[52] and the *active*.[53] Furthermore, and in connection with Holmes, Nietzsche turns to the aesthetic concept of style to generate norms for action.[54] These aesthetically-oriented norms give character to our vital drives, unfettering and directing our will to power. While existentialism generally holds to radical freedom, Nietzsche focuses on the deconstruction of that which restrains our will, thereby giving rise to our existential freedom. If morality is the herd instinct of

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[48] Mark DeWolfe Howe, *Research materials relating to life of Oliver Wendell Holmes, Jr., 1858-1968: Finding Aid, Major Correspondence: Laski, Harold, correspondent, September-November 1924*, http://nrs.harvard.edu/urn-3:HLS.Libr:8288459 seq. 5.

[49] Mark DeWolfe Howe, *Research materials relating to life of Oliver Wendell Holmes, Jr., 1858-1968: Finding Aid, P to H, rec'd. March 1940, May 1898-April 1925*, http://nrs.harvard.edu/urn-3:HLS.Libr:8550589 seq. 46.

[50] Mark DeWolfe Howe, *Research materials relating to life of Oliver Wendell Holmes, Jr., 1858-1968: Finding Aid, Major Correspondence: Laski, Harold, correspondent, February 4 - April 2, 1927*, http://nrs.harvard.edu/urn-3:HLS.Libr:8388527 seq. 33.

[51] *See* FRIEDRICH NIETZSCHE, THE BIRTH OF TRAGEDY & THE GENEALOGY OF MORALS 207 (Francis Golffing trans., Anchor Books, 1956).

[52] *See* FRIEDRICH NIETZSCHE, THE BIRTH OF TRAGEDY AND THE GENEALOGY OF MORALS 11 (Keith Ansell-Pearson ed., Carol Diethe trans., Cambridge Univ. Press 2007).

[53] *See id.* at 21.

[54] FRIEDRICH NIETZSCHE, THE GAY SCIENCE 232 (Walter Kaufmann trans., Random House 1974) (1882) [hereinafter The Gay Science].

the individual, then we must replace it with the will to power, which breaks out of the slavish mentality.[55] In lieu of Christian morality with its appeal to the transcendent good and in place of a Kantian notion of autonomy, which subsumes the will under a universal law, Nietzsche reconfigures our autonomy to be a radical affirmation of vitality channeled by aesthetic norms.

Thus our comparison of Holmes and Nietzsche begins with their turn away from a traditional Christian grounding of ethics. Holmes declared, "[We should] invert the Christian saying and hate the sinner but not the sin. Hate being a personal emotion naturally falls on the obstacles to our making the kind of world we like. It imports no judgment."[56] Holmes naturalizes our emotions, but his rejection of religion usually takes a pragmatist, not an overtly Nietzschean, inversion. Christian morals, for Holmes, do not seem to get us where we want to go, as they are not true to what motivates action or cultivates character. He thought Aristotle's ethics superior to "ordinary Christian morality with its slapdash universals [such as]'never tell a lie' [and] 'sell all thou hast and give to the poor.'"[57] Holmes saw in these universals internal contradictions, as did Nietzsche, who claimed, "'Pity for all'—would be hardness and tyranny toward *you*, my dear neighbor!"[58] But more so Holmes saw in these universals the failure to make us act better, which is gained by habituation and self-cultivation. He did see a danger in dogmatism, which religions can exhibit. But he did not see in Christianity the slave ethics or impotence that Nietzsche envisaged. According to Holmes we can use our superfluous energy in many directions,[59] and this valued pluralism of temperaments includes the charitable saint, who, for Nietzsche, represents slave ethics and societal decay.

But Holmes and Nietzsche were both overtly anti-religious. Nietzsche goes so far as to say there are no moral phenomena, only a moral interpretation of phenomena;[60] Holmes says something similar on the surface but diverges subtly and significantly. We need not ask muddled, speculative questions about the morality of the Cosmos, he maintains, but we do know that it has intelligence and significance "inside it" because it produced us. Accordingly, he reasons, we must do our damndest to let off our superfluous energies like the rest of nature because doing so "satisfies our superlatives. . . .and demands of the Cosmos an assurance that to it our best is also superlative."[61] Phenomena are moral, in Holmes's view,

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[55] *Id.* at 175.

[56] OLIVER WENDELL HOLMES, *Holmes to Lewis Einstein (May 21 1914)*, *in* THE ESSENTIAL HOLMES, *supra* note 1, at 114.

[57] OLIVER WENDELL HOLMES, *Holmes to Lewis Einstein (July 23, 1906)*, *in* THE ESSENTIAL HOLMES, *supra* note 1, at 58.

[58] FRIEDRICH NIETZSCHE, BEYOND GOOD & EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE 81 (Walter Kauffman trans., 1966) (1886). [hereinafter BEYOND GOOD & EVIL].

[59] OLIVER WENDELL HOLMES, *To Lewis Einstein's Daughter (May 6, 1925)*, *in* THE ESSENTIAL HOLMES, *supra* note 1, at 75.

[60] BEYOND GOOD & EVIL, *supra* note 58, at 85.

[61] OLIVER WENDELL HOLMES, *To Lewis Einstein's Daughter (May 6, 1925)*, *in* THE ESSENTIAL

because they are experienced as such. The Cosmos produced us, and our experience is intellectually significant and moral in character.

Holmes and Nietzsche both glorified the life struggle. Holmes wrote, "I know of no true measure of men except the total of human energy which they embody—counting everything, with due allowance for quality . . . the final test of this energy is battle in some form."[62] This reminds us of Nietzsche's claim that to be whole humans means to be whole beasts, igniting the "fireworks of spirit and corruption," exuding a "strength of spirit."[63] Holmes seems to follow this line of thought when he characterizes the whole man as "a predatory animal. . . . I believe that force, mitigated so far as may be by good manners, is the *ultimata ratio*, and between two groups that want to make inconsistent kinds of world I see no remedy except force...every society rests on the death of men.... "[64] Yet he pulls back and states that "it is a good thing if we can unite forces to put down avoidable displays of force."[65] Holmes allows for the code of chivalry and gentlemanly manners to take the form of duty and act as the counterbalance for the darker side of the evolutionary life struggle. Nietzsche claims that this type of good manners, refraining from injury and violence, is only acceptable between two men of equal physical strength and, if extended further, becomes a principle of decay and disintegration.[66] "[T]he intellect," according to Nietzsche, "shows its greatest strength in dissimulation, since this is the means to preserve those weaker, less robust individuals who, by nature, are denied horns or the sharp fangs of a beast of prey with which to wage the struggle for existence."[67] Holmes, like Nietzsche, displays this penchant for evolutionism, which carries with it a tendency to view human violence—insofar as it is as continuous with natural violence—as inevitable.

Just as Holmes and Nietzsche reject a top-down approach to guiding action, each has a unique respect for the creative and aesthetic dimension of self-striving.[68] Action originates from something more primary than formal ethics,

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HOLMES, *supra* note 1, at 75-76.

[62] OLIVER WENDELL HOLMES, *Holmes to George Otis Shatuck (1897), in* THE ESSENTIAL HOLMES, *supra* note 1, at 97.

[63] BEYOND GOOD & EVIL, *supra* note 58, at 202.

[64] OLIVER WENDELL HOLMES, *Holmes to Frederick Pollock (February 1, 1920)*, THE ESSENTIAL HOLMES, *supra* note 1, at 102-03.

[65] *Id.* Of note is the fact that both of these thinkers experienced war first-hand, Holmes as a Union soldier, wounded three times in the Civil War (1861-1865), and Nietzsche as a medical orderly in the Franco-Prussian War (1870-1871).

[66] BEYOND GOOD & EVIL, *supra* note 58, at 203

[67] *On Truth and Lying*, *supra* note 15, at 875.

[68] Holmes's style has already been noted in this piece. Nietzsche's aesthetics pertain to his self-constituting and self-affirming notions of truth: "Nietzsche cultivates above all by means of style. For Nietzsche, contra Plato and a long philosophical and metaphysical tradition, it is not that we become truly human by acquiring truths, but rather that truths become lively when their utterance is inflected by an individuated personality. Philosophy is primarily a matter of tone, attitude, style, and stance, and what matters most in an argument is how it is said. But because Nietzsche emerges from the experience of the eternal return having affirmed egoic illusion rather than dissolved it, the

from one's tastes, desires, and temperaments. Nietzsche puts it plainly by stating that "two men with the same principles probably aim them at something basically different."[69] Holmes would agree in that he told his fellow justices that he could take a given principle and argue the case from both sides. What governs our aims, then, are tastes and preferences. Holmes likened "moral and aesthetic preferences to a taste for sugar," and he stated that "our tastes are finalities."[70] Nietzsche's taste seemed to be for the will to power, and he spurned the efficacy of ideals, asking, "What? A great man? I always see only the actor of his own ideal."[71] But Holmes saw our aesthetically-emergent ideals as having enormous cash value. He wrote, "I accept the motives of vanity, ambition, altruism, or whatever moves us as a fact."[72] Holmes thought that men could reach the same result as those acting as they were instruments of the divine, when they acted under the "illusion of self-seeking."[73] It seems that where Nietzsche sees hypocrisy in men sacrificing themselves for the sake of their good reputations,[74] Holmes perceives the opportunity for meliorism in his application of self-striving, which emanates from our Dionysian and creative energies.[75] Nietzsche also stressed these concepts, but with a more provocative temperament and less hope that they will serve to ameliorate human suffering or social ills.

This brings us to their philosophies of fate. Holmes said that we all have cosmic destinies whose end we cannot predict. Nevertheless, we must commit ourselves to life by accepting our function amid our ignorance.[76] Holmes wrestled with the existential questions of philosophy, but his answers were pragmatic and beautifully simple. He often compared life to playing solitaire or rowing in a boat race.[77] No one ever questions the importance of either. The point is that you are up against it, so "do your damdest."[78] Holmes argued that

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philosophical voice that he constructs is heroic and, it must be said, severe, caustic, and imperative." Frederick M. Dolan, *Nietzsche's Gnosis of Law*, 24 CARDOZO L. REV. 757, 766 (2003).

[69] BEYOND GOOD & EVIL, *supra* note 58, at 81.

[70] ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 24 (2000).

[71] BEYOND GOOD & EVIL, *supra* note 58, at 83.

[72] OLIVER WENDELL HOLMES, *To Lewis Einstein's Daughter (May 6, 1925)*, *in* THE ESSENTIAL HOLMES, *supra* note 1, at 75-76.

[73] OLIVER WENDELL HOLMES, *Yale University Commencement (June 30, 1886)*, *in* THE ESSENTIAL HOLMES, *supra* note 1, at 96.

[74] BEYOND GOOD & EVIL, *supra* note 58, at 83.

[75] Holmes did say of himself, "I am neither an optimist or a pessimist." OLIVER WENDELL HOLMES, *Holmes to Alice Stopford Green (Oct. 1 1901)*, *in* THE ESSENTIAL HOLMES, *supra* note 1, at 111. This contradicts the claim of his pessimism cited by Alschuler, Anne Dailey, *Holmes and the Romantic Mind*, 48 DUKE L.J. 429, 483 (1998), *in* LAW WITHOUT VALUES: THE LIFE AND LEGACY OF JUSTICE HOLMES 18 (Chicago: University of Chicago Press 1997).

[76] *See* OLIVER WENDELL HOLMES, *Remarks at the Dinner of the Alpha Delta Phi Club, Cambridge, (Sept. 27, 1912)*, *in* THE ESSENTIAL HOLMES, *supra* note 1, at 4-6.

[77] *See* OLIVER WENDELL HOLMES, *Letter from Oliver Wendell Holmes to Lewis Einstein (Feb. 8, 1931)*, *in* THE ESSENTIAL HOLMES, *supra* note 1, at 17.

[78] OLIVER WENDELL HOLMES, *Letter from Oliver Wendell Holmes to Harold Laski (July 1, 1927)*, *in* THE ESSENTIAL HOLMES, *supra* note 1, at 44.

"whatever is, is right—but not necessarily will be for thirty seconds longer."[79] He worshiped the inevitable, but he elevated man's ability "to deny the actual and to perish."[80] In this ability he saw the beauty of life because every joy that inspires life moves us to death.[81] Holmes viewed the rule of duty and the rule of joy as the same aesthetic experience.[82] His version of fate is uplifting. It breeds an idealist, who acts to affirm ends and derives happiness out of stern experiences.[83]

Contrast this hopeful notion with Nietzsche's more power-ridden sense of destiny: "Now I love every destiny—who feels like being my destiny?"[84] Power-relations permeated Nietzsche's thinking. It must be said that Holmes did not shy away from the concept of power either. His early formulations of the law described power as an instrument of the will of the ruling class.[85] Natural selection eliminated any legal system that failed to affirm that ruling power. However, in his later works, Holmes held up the duty of the fair judge as an ideal, one which mediated between the competing forces of society, ensuring that the game is played by the rules, whether he liked them or not.[86]

The question here, however, is of fate. Scholars of Nietzsche debate whether eternal recurrence was a metaphysical doctrine that Nietzsche took seriously or a mythological attempt to affirm and redeem one's life and will. But its acceptance affirms the will. Nietzsche cannot be properly called a pessimist either. He viewed Schopenhauer's pessimism as in line with other Western traditions which "subordinated existence to morality," punishing the will for its choice of resignation over affirmation.[87] Accordingly, both Holmes and Nietzsche affirm life, accept fate, and construe human existence as infused with

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[79] OLIVER WENDELL HOLMES, *Letter from Oliver Wendell Holmes to Patrick Sheehan (Oct. 18, 1912)*, *in* THE ESSENTIAL HOLMES, *supra* note 1, at 7. This is a play on Alexander Pope's *Essay on Man*.

[80] OLIVER WENDELL HOLMES, *Letter from Oliver Wendell Holmes to Morris Cohen (Jan. 30, 1921)*, *in* THE ESSENTIAL HOLMES, *supra* note 1, at 34.

[81] OLIVER WENDELL HOLMES, *Address at the Dedication of the Northwestern Law School Building (Oct. 20, 1902)*, *in* THE ESSENTIAL HOLMES, *supra* note 1, at 98.

[82] OLIVER WENDELL HOLMES, *Speech at a Dinner Given to Justice Holmes by the Bar Association of Boston (Mar. 7, 1900)*, *in* THE ESSENTIAL HOLMES, *supra* note 1, at 79.

[83] OLIVER WENDELL HOLMES, To the Class of 61 at the Fiftieth Anniversary of Graduation (June 28, 1911), *in* THE ESSENTIAL HOLMES, *supra* note 1, at 95.

[84] BEYOND GOOD & EVIL, *supra* note 58, at 84.

[85] *Summary of Events: The Gas-Stokers' Strike*, 7 AM. L. REV. 582, 583 (1873) (unsigned but written by Holmes) ("legislation . . . should modify itself in accordance with the will of the de facto supreme power in the community. . . The more powerful the interests must be more or less reflected in legislation, . . . which should 'aid the survival of the fittest.'").

[86] *See* OLIVER WENDELL HOLMES, *Ideals and Doubts*, *in* COLLECTED LEGAL PAPERS, *supra* note 23, at 307 (1920). For instance, Holmes argued that labor and capital both have the right to combine to get as much for their labor and return respectively, and that labor organization is just a form of a price war. Vegelahn v. Guntner, 44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J., dissenting).

[87] Douglas L. Berger, *Nietzsche Contra Schopenhauer: The Construal of Eternal Recurrence*, SCHUYLKILL: A CREATIVE AND CRITICAL REVIEW FROM TEMPLE UNIVERSITY, Vol. 4, Fall, 1999, 47.

power relations. Regardless of whether Nietzsche's eternal recurrence is a metaphysical doctrine or a postulate to redeem life in this world, Holmes would consider it to be another attempt of philosophers to act like "little gods," who see the universe in them, not them in it. This is a philosophical difference between the two men. The more significant difference, however, is temperamental. Holmes's remarks on joy and duty, for instance, exemplify his meliorism, which is lacking in Nietzsche.

Let us turn to the historical connections between Emerson, Holmes, and Nietzsche and then compare their understandings of fate. Nietzsche read Emerson enthusiastically and cites him in *The Gay Science*, whose title may have been influenced by Emerson's use of the phrase "Joyous Science" in the "The Scholar" in 1876.[88] As for Holmes, when he was young, he saw Emerson on the other side of the street and ran over to him and said, "If I ever do anything, I shall owe a great deal of it to you."[89] He sent a copy of his first mature work on the philosophy of law to Emerson. In it he wrote that law opens the path to philosophy as much as anything else.[90] Emerson was the one "firebrand" who "burned as brightly" in Holmes's adulthood as he did in his youth.[91] Holmes borrowed Emersonian themes throughout his public speeches and personal letters. Holmes's aesthetic ideal of himself resounds of Emerson's "Man Thinking," balancing the scholarly and contemplative with the physical and active life.[92] Both thinkers seem to inherit Emerson's critique of the impassive academic as anemic and one-sided.[93]

But again we return to the question of fate. The wedge that drives Nietzsche away from Emerson and Holmes is the naturalism running through Emerson's and Holmes's thought, which is less significant in Nietzsche.[94] Nature provides the discipline of fate. We cannot outrun its pace. Our fate is that of the grub worm and the withering leaf. The fate which nature determines in Emerson's thought corresponds to Holmes's proclamations about fate, filtered through a Darwinian lens. Novick describes how Holmes's experience fighting

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[88] A discussion of this connection is in Walter Kaufmann's introduction. THE GAY SCIENCE, *supra* note 54, at 10.

[89] OLIVER WENDELL HOLMES, *Letter from Oliver Wendell Holmes to Patrick Sheehan (Oct. 27, 1912)*, *in* THE ESSENTIAL HOLMES, *supra* note 1, at 64.

[90] THE COLLECTED WORKS OF JUSTICE HOLMES, *supra* note 9, at 20.

[91] OLIVER WENDELL HOLMES, *Letter from Oliver Wendell Holmes to Frederick Pollock (May 20, 1930)*, *in* THE ESSENTIAL HOLMES, *supra* note 1, at 16.

[92] RALPH WALDO EMERSON, *The American Scholar*, *in* THE PORTABLE EMERSON 53 (Carl Bode & Malcolm Cowley eds., 1981).

[93] *See generally* Allen Mendenhall, *Pragmatism on the Shoulders of Emerson: Oliver Wendell Holmes Jr.'s Jurisprudence as a Synthesis of Emerson, Peirce, James, and Dewey*, 48 S.C. REV. 93 (2015) (in-depth analysis on the Emersonian elements of Holmes's jurisprudence).

[94] Nietzsche is at times extremely critical of a scientific naturalism. *See, e.g.*, THE GAY SCIENCE, *supra* note 54, at 239; BEYOND GOOD & EVIL, *supra* note 58, at 19. However, there is significant scholarship claiming that Nietzsche should be read as a "naturalistic" thinker. *See* Richard Schacht, *Nietzsche's Naturalism*, 43 J. OF NIETZSCHE STUDIES 185, 185 (2012).

for the Union in the Civil War and being wounded three times forged his development of a "materialist, evolutionist philosophy,"[95] which emphasized conflicts between nations and races for survival. This evolutionism is important in our understanding of Holmes as a naturalist who comments on the continuity in nature and society of competition, success and failure, survival and death. The discipline that nature provides demarcates our limitations and our fatedness.

In Emerson's second series of essays, most notably in "Fate," his tone shifts from the seemingly unlimited optimism about human perfectibility in many of his earlier essays to an utterly realistic view of human limitations. Emerson still holds that we can affirm individual liberty, duty, and character, but these must be reconciled with our "irresistible dictation," Fate.[96] Furthermore, in attempting to navigate our human "polarity,"[97] between "power and circumstance,"[98] Emerson situates circumstance in nature: "Circumstance is Nature."[99] He writes that nature is "that negative power," which is a "tyrannous circumstance, [...] necessitated activity; violent direction."[100] He sums up: "The book of Nature is the book of Fate."[101]

This dialectic between fate and power does not collapse into a naïveté concerning free will and determinism. Power and fate are inextricable. Much as Emerson referred to those "men, who [...] lead the activity of the human race,"[102] whose magnetism causes "immense instrumentalities [to] organize around" them, Holmes described the moral terms of good and bad as being of "real significance only for the future where our effort is one of the instrumentalities that bring the inevitable to pass."[103] Emerson attempted a similar resolution of this polarity when he wrote, "If Fate is ore and quarry, if evil is good in the making, if limitation is power that shall be, if calamities, oppositions, and weights are wings and means—we are reconciled."[104] In Emerson's thought, nature is morally

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[95] Novick gets the evolution right and the materialism wrong. We would argue that Holmes is a naturalist but not a metaphysical materialist in any way. The former position stresses continuity and the latter posits an unintelligible something as the cause of our experience. Holmes begins with experience and emphasizes the continuity with nature, and this is in part why he praised John Dewey's 1 EXPERIENCE AND NATURE, LATER WORKS (Ed. Jo Ann Boydston) (Carbondale: Southern Illinois University Press, 1990). Holmes claimed that Dewey's "view of the universe came home closer to me than any other I know." Oliver Wendell Holmes, *Letter from Oliver Wendell Holmes to Pollock, July 26, 1930, in* The Essential Holmes, *supra* note 1 at 102.

[96] RALPH WALDO EMERSON, *Fate, in* EMERSON: ESSAYS AND LECTURES 943 (1983) [*hereinafter Fate*].

[97] *Id.*

[98] *Id.* at 949.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] RALPH WALDO EMERSON, *Power, in* EMERSON: ESSAYS AND LECTURES 971 (1983) [*hereinafter Power*].

[103] OLIVER WENDELL HOLMES, *Letter from Oliver Wendell Holmes To Alice Stopford Green (Oct. 1, 1909), in* THE ESSENTIAL HOLMES, *supra* note 1, at 111.

[104] *Fate, supra* note 96, at 960.

charged by virtue of the Over-soul, and "fate involves the melioration."[105] In Holmes's thinking, the good and bad are tools which produce the inevitable.

In Emerson's essay "Power," we can see his clear influence on Nietzsche as well. Nietzsche's genealogical account of aristocratic, warrior values is foreshadowed by Emerson's description of the value of health, strength, and vivacity. Consider Emerson's claim: "The first wealth is health. Sickness is poor-spirited."[106] Nietzsche's description of the conditions which gave rise to the emergence of a slavish morality can be seen in Emerson's assertion that "health [...] answers its own ends, and has to spare, runs over, and inundates the neighborhoods and creeks of other men's necessitates."[107] Emerson continues, "Vivacity, leadership, must be had, and we are not allowed to be nice in choosing."[108] But, soon after, in "Power," Emerson pulls back and claims that "where there is a great amount of life," "it has its own checks and purifications, and will be found at last in harmony with the moral laws."[109] Here, Emerson, contra Nietzsche, does not question, conduct a genealogy, or attempt a transvaluation of these moral laws which infuse nature. This and other differences between Emerson and Nietzsche, however, collapse in the person of Holmes, who aspired to live greatly by utilizing intellectual power to realize personal ambition. G. Edward White claims that "[p]owerlessness and power...became the final, and perhaps the organizing, themes of Holmes's life plan,"[110] which involved "the idea of professional ambition as a solitary intellectual adventure whose ultimate reward was the 'secret ... joy of the thinker,' whose pride in achievement was accentuated by the understanding that he had created his accomplishments alone."[111] Holmes fashioned his own version of the will to power and "expressed both the solitude and potential greatness of 'heroic' efforts to 'think great thoughts.'"[112] What mattered, for Holmes, was the heroic ambition and ability to choose one's fate and shape one's intellectual course,[113] and that is why he adopted an approach to judging that was, like

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[105] *Id.*
[106] *Power, supra* note 102, at 972.
[107] *Id.*
[108] *Id.* at 974.
[109] *Id.* at 975.
[110] G. Edward White, *Holmes's "Life Plan": Confronting Ambition, Passion, and Powerlessness*, 65 N.Y.U. L. REV. 1409, 1474 (1990).
[111] *Id.* at 1428.
[112] *Id.* at 1432.
[113] Holmes advised young law students in 1886 that "a man may live greatly in the law as well as elsewhere" and may "drink the bitter cup of heroism." G. EDWARD WHITE, LAW AND THE INNER SELF 211 (1993). He went on to say the following: "No man has earned the right to intellectual ambition until he has learned to lay his course by a star which he has never seen—to dig by the divining rod for springs which he may never reach. In saying this, I point to that which will make your study heroic. For I say to you in all sadness of conviction, that to think great thoughts you must be heroes as well as idealists. Only when you have worked alone—when you have felt around you a black gulf of solitude more isolating than that which surrounds the dying man, and in hope

Nietzsche's perspectivalism, mindful of the proliferating variety of human motivation.[114]

Attending to the commonalities between Holmes and Nietzsche occasions a pragmatic transition of the kind described by Poirier and Levin, especially in light of the aesthetic elements in both Holmes and Nietzsche. It has the potential to marry the now divergent fields of classical pragmatism and neopragmatism while incorporating the study of pragmatic aesthetics emanating from Emerson. Colin Koopman recently celebrated the transitional qualities of pragmatism in *Pragmatism as Transition* while rehabilitating Nietzsche's notion of genealogy as a constructive hermeneutic and methodology with flexibly pragmatic imputations. Further comparison of Holmes and Nietzsche and their application of genealogical methodologies and historiography might accomplish Koopman's goal: "to loosen pragmatism up so that it can do even more work and do that work better," and to "open pragmatism out onto opportunities and potentialities yet underexplored."[115]

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and despair have trusted to your own unshaken will—then only will you have achieved. Thus only can you gain the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who have never heard of him will be moving to the measure of his thought—the subtile [sic] rapture of a postponed power, which the world knows not because it has no external trappings, but which to his prophetic vision is more real than that which commands an army. And if this joy should not be yours, still it is only thus that you can know you have done what it lay in you to do—can say that you have lived, and be ready for the end." *Id.* On Holmes, heroism, and the lawyer-hero, see Robert W. Gordon, *Law as a Vocation: Holmes and the Lawyer's Path, in* THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR. 27-28 (Steven J. Burton ed. 2000).

[114] Such perspectivalism is encapsulated in the following lines from *The Natural Law*: "But while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else. And this again means skepticism. Not that one's belief or love does not remain. Not that we would not fight and die for it if important—we all, whether we know it or not, are fighting to make the kind of a world that we should like—but that we have learned to recognize that others will fight and die to make a different world, with equal sincerity or belief. Deep-seated preferences cannot be argued about—you cannot argue a man into liking a glass of beer—and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as appears, his grounds are just as good as ours." *Natural Law*, *supra* note 19, at 41.

[115] COLIN KOOPMAN, PRAGMATISM AS TRANSITION: HISTORICITY AND HOPE IN JAMES, DEWEY, AND RORTY 1 (2009). Consider, as well, the following comments by Judge Posner: "Nietzsche teaches us that historical illusions can be empowering, can free us from the dead hand of the past. The legal profession's use of history is a disguise that allows the profession to innovate without breaking judicial etiquette, which deplores both novelty and a frank acknowledgment of judicial discretion and likes to pretend that decisions by nonelected judges can be legitimated by being shown to have democratic roots in some past legislative or constitutional enactment. Since the most convincing deceptions are those rooted in self-deception (because then the deceiver is not in danger of giving himself away), one is not surprised that many lawyers and judges think of law as the application to the present of the lessons of the past as reflected in statutes, reported decisions, and other materials created in the past to govern the future. Yet the truth is that, for the most part, these past settlements of disputes frame and limit, but do not dictate, the outcome of today's cases." Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67

We have tried to reveal some enticing similarities between Justice Holmes and Nietzsche. Both Holmes and Nietzsche argued against Christian morality and metaphysical first principles as grounding right action; each valued the power that invigorates our life struggle; each turned to aesthetic experience to generate normativity; and each embraced a problematic concept of fate. Holmes, however, rejected Christianity for different reasons than Nietzsche. The manner in which fate and power interact in Holmes's philosophy, as in Emerson's, allows for moral language to emanate from aesthetically-oriented ideals. We may employ these norms to make the future such as we desire it. Most of all, Holmes's temperament is different from Nietzsche's. As a jurist who spent his entire career trying to make the right decision, he embraces retail meliorism while Nietzsche discards it wholesale. But in taking these two figures seriously as representatives of pragmatism and existentialism, we are thrown back on the problem of fate. What philosophical tools do they provide to make meaning of life amid its features of inevitability and destiny? We hope our comparison of Holmes and Nietzsche supplies a starting point for this discussion.

U. CHI. L. REV. 573, 581 (2000). Posner goes on to contextualize Holmes's historiography as "corrective historicism. History is used to explain the existence of doctrines that have become vestigial; for once they are recognized as mere survivals, the path for reform is clearer." *Id.* at 587.