

HOLMES AND THE ROMANTIC MIND

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ABSTRACT

Oliver Wendell Holmes, Jr. is perhaps best known for his “tough-minded” jurisprudence based on objective standards of reasonableness. Scholars have traditionally understood Holmes’s jurisprudential outlook as fundamentally behavioristic. Professor Dailey challenges that understanding, revealing the importance of Romantic psychology in Holmes’s major writings. His outlook, she argues, was shaped by his belief in unconscious motivations, imagination, irrationality and instinctual drives. Rather than simply characterize Holmes as a “Romantic,” Professor Dailey draws out the conflict in his thought, illuminating his struggle to develop an empirical approach to law that could also account for the depth and complexity of human nature.

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A keen, slender, stridulous vibration—almost too fine for the hearing, weaving in and out, and in the pauses of the music dividing the silence like a knife—pierces my heart with an ecstasy I cannot utter. Ah! what is it? Did I ever hear it? Is it a voice within, answering to the others, but different from them—and like a singing flame not ceasing with that which made it vocal?¹

INTRODUCTION

The jurisprudence of Oliver Wendell Holmes, Jr. is not usually associated with the poetry of Wordsworth, Shelley and Coleridge, the novels of Goethe, or the philosophy of Fichte, Schelling, and Carlyle. In fact, eighteenth-century Romanticism² seems directly at odds with the scientific empiricism of Holmes's professional writings: the "bad man" view of lawyering,³ the positivist definition of law as prediction;⁴ the enthusiasm for the "master of economics" and

1. Letter from Oliver Wendell Holmes, Jr. to William James (Apr. 19, 1868), *quoted in* RALPH BARTON PERRY, *THE THOUGHT AND CHARACTER OF WILLIAM JAMES* 92-93 (Harvard Univ. Press, briefer version 1948) (1935).

2. The use of the term "Romanticism" in this Article is discussed in Part III.A. Briefly, the term "Romantic" is used here to denote the counter-Enlightenment ideas about human nature present in the work of a wide and varied group of writers, critics and philosophers across France, Germany and England during the late eighteenth and early nineteenth centuries. As explained below, Romantic psychology stressed the powers of intuition and imagination, subjective experience, psychic conflict, irrationality, nature and inner transcendence. *See infra* notes 283-95 and accompanying text.

This Article assesses the place of Romantic ideas about human nature in Holmes's jurisprudential work. The focus here is on his early theoretical writings, speeches, and correspondence, and not on his later decisions as a Supreme Court Justice. Although it is my belief that Holmes's Romantic psychology played a role in his later decisions, including his post-World War I First Amendment opinions, I do not develop that thesis here. For an example of a Holmes opinion that uses language reflecting a Romantic view of the unconscious, see *Chicago B. & Q. Ry. Co. v. Babcock*, 204 U.S. 585, 598 (1907) (stating that the reasoning of an administrative body expresses "an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions . . . which may lie beneath consciousness without losing their worth").

3. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) [hereinafter *The Path of the Law*], reprinted in 3 THE COLLECTED WORKS OF JUSTICE HOLMES 391, 392 (Sheldon M. Novick ed., 1995) [hereinafter COLLECTED WORKS] ("You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law.").

4. *See, e.g., id.* at 460-61 ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

quantitative decisionmaking;⁵ and the external standard of liability.⁶ Even the discovery of Holmes's romance with Lady Castletown⁷ has done little to alter the views of a legal world long accustomed to the idea of Holmes as a "tough-minded," unsentimental legal thinker.⁸ Yet as this Article explains, the central tenets of Romantic psychology occupied an important place in Holmes's jurisprudence. Taken together, Holmes's published writings, speeches and correspondence offer a view of human nature strongly reminiscent of eighteenth-century Romantic literature and philosophy. Like the Romantic writers he read most frequently—notably, Wordsworth, Coleridge, Carlyle and Goethe—Holmes asserted the existence of such fundamental and nonempirical psychological concepts as unconscious motivations, instinctual desires, inner conflict, irrationality, imagination and transcendent faith in "the infinite."⁹ His two most important jurisprudential works, *The Common Law* and *The Path of the Law*, incorporate a view of individuals as intuitive beings whose rational faculties can be overcome by deep-seated instincts and unconscious passions. His letters, speeches, journals and reading lists document his abiding interest in the idea of an active and creative mind endowed with native faculties and capable of intuitive insight. Alongside his celebrated enthusiasm for empirical science lay

5. See, e.g., *id.* at 469 ("For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.").

6. See, e.g., OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 108 (Boston, Little, Brown & Co. 1881) [hereinafter *THE COMMON LAW*] ("The law considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that.").

7. In 1985, a trove of letters written by Holmes to Lady Clare Castletown, the wife of an Irish Baron, was discovered. Written over a three-year period from 1896 to 1899, the letters reveal Holmes, 55 years old and married at the time, to have been passionately and somewhat impulsively in love. See David J. Seipp, *Holmes's Path*, 77 B.U. L. REV. 515, 534-37 (1997) (excerpting several of the 103 letters from Holmes to Lady Castletown that have been preserved).

8. The term "tough-minded" as applied to scientific empiricism comes from William James. See WILLIAM JAMES, *PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING* 262-63 (1907). In a letter to James written after receiving a copy of *Pragmatism*, Holmes conceded: "You would say that I am too hard or tough-minded." Letter from Oliver Wendell Holmes, Jr. to William James, quoted in David A. Hollinger, *The "Tough-Minded" Justice Holmes, Jewish Intellectuals, and the Making of an American Icon*, in *THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 216, 218 (Robert W. Gordon ed., 1992).

9. *The Path of the Law*, *supra* note 3, at 459, reprinted in 3 *COLLECTED WORKS*, *supra* note 3, at 392 ("I do not say that there is not a wider point of view from which the distinction between law and morals becomes of secondary or no importance, as all mathematical distinctions vanish in presence of the infinite.").

an irrepressible Romantic appreciation for the hidden depths of human experience.

Holmes's interest in the study of human nature dates from his earliest years. He never doubted that legal thinkers with philosophical ambitions must master many disciplines.¹⁰ "If your subject is law," Holmes admonished, "the roads are plain to anthropology, the science of man, to political economy, the theory of legislation, ethics, and thus by several paths to your final view of life."¹¹ Holmes read widely in the area of philosophical psychology¹² and many of his closest associates, including William James, were themselves psychologists.¹³ The record he kept of his reading shows that Holmes pursued the study of psychology throughout his life; in addition to general philosophical texts on psychology, Holmes read influential psychology treatises by Alexander Bain, Henry Mansel, and Henry Maudsley.¹⁴ Holmes was especially interested in the commentary generated by Sir William Hamilton's critique of associationist psychology and John Stuart Mill's famous reply.¹⁵ In the two decades following the publication of *The Common Law*, Holmes read books on psychology by Paul Bourget, Lloyd Morgan Conway, Richard von

10. See OLIVER WENDELL HOLMES, JR., *The Profession of the Law* [hereinafter *The Profession of the Law*], in 3 COLLECTED WORKS, *supra* note 3, at 471, 472 ("To be master of any branch of knowledge, you must master those which lie next to it; and thus to know anything you must know all.").

11. *Id.*

12. See Eleanor Little, *The Early Reading of Justice Oliver Wendell Holmes*, 8 Harv. Libr. Bull. 163, 170-72 (1954) (listing the following among Holmes's readings: John William Draper, *A History of the Intellectual Development of Europe*; George Henry Lewes, *Biographical History of Philosophy from Its Origins in Greece Down to the Present Day*; David Masson, *Recent British Philosophy: A Review, with Criticisms; Including Some Comments on Mr. Mill's Answer to Sir William Hamilton*; John Daniel Morell, *An Historical and Critical View of the Speculative Philosophy of Europe in the Nineteenth Century*; and Albert Schwegler, *History of Philosophy*).

13. See PERRY, *supra* note 1, at 181.

14. See Little, *supra* note 12, at 172, 175 (noting that Holmes read the following works: Alexander Bain, *The Emotions and the Will*; Henry Mansel, *Prolegomena Logica: An Inquiry into the Psychological Character of Logical Processes*; and Henry Maudsley, *The Physiology and Pathology of the Mind*).

15. In addition to reading Hamilton's *Metaphysics* and John Stuart Mill's *An Examination of Sir William Hamilton's Philosophy*, Holmes also read the following works commenting on that debate: James Hutchison Stirling, *Sir William Hamilton: Being the Philosophy of Perception*; David Masson, *Recent British Philosophy: A Review, with Criticisms; Including Some Comments on Mr. Mill's Answer to Sir William Hamilton*; James McCosh, *An Examination of Mr. J.S. Mill's Philosophy*; and Herbert Spencer, *The Test of Truth*. See *id.* at 171-74.

Krafft-Ebing, Emile Laurent, Morton Prince and William James.¹⁶ Holmes's lifelong interest in psychology reflected his belief that the "rational study of law" must take into account "the nature of man's mind," a source, he emphasized, even "further back than the first recorded history."¹⁷

The psychological concept most salient in Holmes's early legal writings was the notion of the unconscious. From the first pages of *The Common Law*, Holmes developed a model of legal decision-making founded on the idea of "unconscious" factors and dedicated to the process of identifying those factors no longer serving socially useful ends.¹⁸ As Holmes argued, legal decisionmakers, including legislators, must take responsibility for uncovering these hidden factors when fashioning legal rules.¹⁹ The view of the unconscious as encompassing ideas and feelings not readily accessible to awareness was not the entire picture, for Holmes viewed the unconscious in dynamic terms as well. Instinctual drives such as revenge, possession, sexual satisfaction and self-preservation color the pages of Holmes's early jurisprudential works²⁰ and relate to his idea of unconscious forces directing individual behavior in hidden, conflicting, and seemingly irrational ways.

The notion of the creative imagination also occupied an important place in Holmes's legal thought, particularly with respect to his understanding of the source of moral values in law and his professional ideal of heroism.²¹ Holmes is somewhat misleadingly famous for his description of the "bad man" lawyer,²² which has led many, if not most, commentators to the mistaken conclusion that

16. See Notes of Mark DeWolfe Howe, Holmes's Reading List (Years 1890-1902) (on file with the Harvard University Law School Library) [hereinafter Notes of Howe, Holmes's Reading List].

17. *The Path of the Law*, *supra* note 3, at 477, reprinted in 3 COLLECTED WORKS, *supra* note 3, at 405.

18. See THE COMMON LAW, *supra* note 6, at 1.

19. See *infra* notes 49-51 and accompanying text.

20. See *infra* notes 81-86 and accompanying text.

21. See *The Profession of the Law*, *supra* note 10, at 472-73 ("For I say to you in all sadness of conviction, that to think great thoughts you must be heroes as well as idealists."). These ideas are more fully explored *infra* Part III.C. For a discussion of the creative imagination in Romantic thought, see JAMES ENGELL, THE CREATIVE IMAGINATION: ENLIGHTENMENT TO ROMANTICISM (1981). For an examination of the Romantic conception of judging as reflected in nineteenth-century judicial biography, see Susanna Lynn Blumenthal, *Law and the Creative Mind*, 74 CHI.-KENT L. REV. (forthcoming 1998).

22. See *The Path of the Law*, *supra* note 3, at 459, reprinted in 3 COLLECTED WORKS, *supra* note 3, at 392; THE COMMON LAW, *supra* note 6, at 17, 110.

Holmes maintained strictly amoral views of both law and lawyering.²³ Yet as Holmes emphasized many times, his theory of the bad man lawyer was simply a heuristic device for predicting how courts will decide cases.²⁴ By utilizing the idea of the bad man, Holmes did not mean to deny the ethical claim that there exists “a wider point of view from which the distinction between law and morals becomes of secondary or no importance, as all mathematical distinctions vanish in presence of the infinite.”²⁵ Indeed, the bad man’s image is overshadowed by an ideal of professional heroism to which Holmes himself openly aspired. For Holmes, heroic greatness inhered in the lawyer’s ability to harness his imaginative powers in pursuit of transcendent insight.²⁶ Heroism, a central Romantic concept, counters the moral relativism of the bad man lawyer by locating the source of moral truth in the creative and unconscious processes of the individual mind. Holmes’s ideal of professional heroism resonates with a psychology that emphasizes imagination over reason, unconscious over conscious processes, and intuition over empirical truth.

Holmes’s struggle to reconcile his Romantic view of human nature with his more “tough-minded” belief in the relevance of empirical science to social policy became a central dynamic in his jurisprudential writings. This struggle was also a central characteristic of the Romantic thinkers Holmes admired. Romanticism celebrated the individual as well as the whole, imagination as well as reason, revolution as well as tradition, autonomy as well as determinism, free will as well as duty. As one critic has observed, “These contradictions cannot be simply charged to the factional divisions within the romantic movement, for they are endemic to every genuinely romantic thinker; rather, they should be seen as a manifestation of the ‘contradictoriness, dissonance and inner conflict of the Romantic

23. See, e.g., Yosai Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 225-26 (1964) (discussing Holmes’s “detachment” from morality). Compare Mark DeWolfe Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529 (1951) (addressing the criticisms of Professor Lon Fuller and others who concluded that Holmes espoused an amoral view of the law) with Henry M. Hart, *Holmes’ Positivism—An Addendum*, 64 HARV. L. REV. 929, 930 (1951) (stating that Howe’s view “just does not wash”).

24. See *The Path of the Law*, *supra* note 3, at 459, reprinted in 3 COLLECTED WORKS, *supra* note 3, at 392 (“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict . . .”).

25. *Id.*

26. See *infra* Part III.C.

mind.’”²⁷ Conflict rather than synthesis marks the Romantic temperament, and in this regard especially Holmes revealed his Romantic sensibilities. With respect to legal issues, Holmes often managed this conflict by staking out different positions in response to different legal questions. His belief that common law liability should turn upon the consequences of objective behavior rather than subjective motivation²⁸ appealed to him in part because he knew that human motivations are often the product of unconscious and irrational feelings. Rather than reflecting a behaviorist view of human nature, one that ignores questions of consciousness altogether,²⁹ the external standard likely resulted from Holmes’s appreciation for the dynamic depths of human experience. In discussing other topics, such as the human instinct for revenge or his ideal of legal professionalism, Holmes emphasized the importance of going beyond external behavior to consider the inner realm of unconscious desires and subjective motivations.³⁰

The Romantic elements in Holmes’s work have not gone entirely unnoticed by commentators.³¹ His biographer, Mark DeWolfe Howe,

27. Dmitri N. Shalin, *Romanticism and the Rise of Sociological Hermeneutics*, 53 SOC. RES. 77, 80 (1986) (quoting Isaiah Berlin, *Preface* to H.G. SCHENK, *THE MIND OF THE EUROPEAN ROMANTICS* at xxii (1969)).

28. See THE COMMON LAW, *supra* note 6, at 38 (“[W]hile the terminology of morals is still retained, . . . the law . . . is continually transmuted these moral standards into external or objective ones . . .”).

29. Consciousness is irrelevant to the pure behaviorist thinker:

Psychology as the behaviorist views it is a purely experimental branch of natural science. Its theoretical goal is the prediction and control of behavior. Introspection forms no essential part of its methods, nor is the scientific value of its data dependent upon the readiness with which they lend themselves to interpretation in terms of consciousness.

John B. Watson, *Psychology as the Behaviorist Views It*, 20 PSYCHOL. REV. 158, 158 (1913); see also DANIEL N. ROBINSON, *AN INTELLECTUAL HISTORY OF PSYCHOLOGY* 340 (3d ed. 1995) (“The behaviorism of John B. Watson was no less than the insistence that a scientific psychology must concern itself *only* with behavior and must abandon all interest in consciousness, mental states, introspection, unconscious processes, and other ‘ghosts.’”).

30. See THE COMMON LAW, *supra* note 6, at 41-42 (arguing that the law should gratify the community’s passion for revenge).

31. See MARK DEWOLFE HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS: 1841-1870*, at 53-59 (1957) [hereinafter HOWE, *SHAPING YEARS*]; RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 463 (1990) [hereinafter POSNER, *JURISPRUDENCE*] (mentioning the Romantic elements in Holmes’s thought); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 857-58 (1989) (mentioning aspects of Emersonian Romanticism in Holmes’s thought); Michael H. Hoffheimer, *The Early Critical and Philosophical Writings of Justice Holmes*, 30 B.C. L. REV. 1221, 1227-28 (1989) (examining Holmes’s early idealism); David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 464-88 (1994) (drawing a connection between Nietzsche and

acknowledged Holmes's early interest in Platonism and neo-Classical aesthetics; while he was at Harvard College, Holmes published essays on both Plato and Albert Durer that revealed his early interest in philosophical idealism.³² Along with these essays, his relationships with Emerson and his father, his sporadic references to the "infinite"³³ and the "universe,"³⁴ and his notion of heroic greatness have from time to time prompted critics to question the degree of Holmes's commitment to scientific empiricism. Howe concluded that Holmes's early interest in philosophical idealism reflected "a moderation in his empiricism which time and experience were to destroy."³⁵ Others have resolved the apparent inconsistency in Holmes's views by concluding that Holmes adopted a stance of scientific empiricism in his professional writings but relegated his philosophical interests to "a sphere of personal life."³⁶ More recently, critics have attempted to resolve the perceived tension in Holmes's work by reconceiving his ideas as "neo-pragmatist."³⁷ Overall, the Romantic elements in Holmes's writings have been at worst ignored, and at best treated as youthful or minor lapses from a mature commitment to the late-nineteenth-century scientific worldview.³⁸ Even the more moderate view of Holmes as a neo-pragmatist fails to take full account of the undeniably Romantic elements in his work:

Holmes); Ruth Gavison, *Holmes's Heritage: Living Greatly in the Law*, 78 B.U. L. REV. 843, 844 (1998) (mentioning Romanticism as an aspect of Holmes's life and work). For an interesting discussion of Romanticism in law and literature, see RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 137-55 (1988).

32. See, e.g., HOWE, *SHAPING YEARS*, *supra* note 31, at 53-56. See generally Hoffheimer, *supra* note 31.

33. See, e.g., Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 463 (1899), reprinted in 3 COLLECTED WORKS, *supra* note 3, at 406, 420 [hereinafter *Law in Science*]; *The Path of the Law*, *supra* note 3, at 459, reprinted in 3 COLLECTED WORKS, *supra* note 3, at 392.

34. See OLIVER WENDELL HOLMES, JR., *The Use of Colleges* [hereinafter *The Use of Colleges*], in 3 COLLECTED WORKS, *supra* note 3, at 483, 483; OLIVER WENDELL HOLMES, JR., *The Soldier's Faith* [hereinafter *The Soldier's Faith*], in 3 COLLECTED WORKS, *supra* note 3, at 486, 487.

35. HOWE, *SHAPING YEARS*, *supra* note 31, at 55-56.

36. Hoffheimer, *supra* note 31, at 1227.

37. Grey, *supra* note 31, at 789; see also sources cited *infra* note 42.

38. The exceptions here are POSNER, *JURISPRUDENCE*, *supra* note 31, at 239-44 and Luban, *supra* note 31, at 464-68, both of whom emphasize the Nietzschean element in Holmes's thought. Professor Luban concludes that both Holmes and Nietzsche exhibited a "repudiation of subjectivity and the importance of our conscious thoughts." Luban, *supra* note 31, at 465 n.41; see also POSNER, *JURISPRUDENCE*, *supra* note 31, at 240-41 (describing Holmes and Nietzsche as "sub- or antimentalists"). This Article argues, to the contrary, that Holmes's Romanticism lay in his appreciation of subjective experience and the importance of unconscious processes.

his emphasis on inwardness, the unconscious, conflict, irrationality, intuition, inner transcendence and heroic greatness.

The study of Holmes's psychology is not undertaken here for the simple purpose of reconceptualizing Holmes as a Romantic rather than a utilitarian, pragmatist or other kind of thinker. While this Article does clarify an important and overlooked dimension in his work, the examination of Holmes's Romantic psychology actually does more to draw out the conflict in his thought than to synthesize his ideas within a single philosophical framework. The point of this study is to show how the presence of Romantic ideas in Holmes's work reflected his struggle to develop a satisfying empirical approach to law that also accounted for the depth and complexity of human nature. Holmes remained openly skeptical regarding the ability of empirical science, and more importantly law, to comprehend the "unfathomable" meaning of man's inner life and its relationship to the universe.³⁹ In the end, he rebelled against what he called the "insufficiency of *facts*":⁴⁰ the inability of empirical science to explain fully the unconscious depths, passionate drives and imaginative impulses in human nature.

Given the current enthusiasm for behaviorist and quantitative theories of human nature, Holmes's appreciation for the mysteries of the human mind may seem somewhat outdated and naive, or even, given his tough-minded reputation, sentimental. Yet it is likely that Holmes remains a living figure in the law today in part because he wrote with forceful eloquence about the dynamic complexities of human nature, including his own. Holmes recognized that individuals do not always behave in rational and transparent ways,⁴¹ and that law must come to terms, in whatever ways possible, with the existence of unconscious forces lying beneath the surface of rational awareness. The Romantic vision in Holmes's work brought psychological depth to his empirical outlook by challenging the illusion of the rational, transparent self, an illusion that still prevails, after more than a century, in law and legal philosophy.

39. See *The Path of the Law*, *supra* note 3, at 478, reprinted in 3 COLLECTED WORKS, *supra* note 3, at 406.

40. Letter from Oliver Wendell Holmes, Jr. to William James (Dec. 15, 1867), quoted in PERRY, *supra* note 1, at 89, 90 (emphasis added).

41. For a recent philosophical exploration of this point, see JONATHAN LEAR, OPEN MINDED: WORKING OUT THE LOGIC OF THE SOUL (1998).

I. THE PSYCHOLOGY OF HOLMES'S JURISPRUDENTIAL WRITINGS

With the publication of *The Common Law* in 1881, just months before his fortieth birthday, Holmes brilliantly realized his youthful aspiration of bringing speculative thought to bear on American law. Yet over a century later the nature of Holmes's philosophical endeavor still remains open to dispute.⁴² Missing altogether from the debate over Holmes's philosophical outlook is an understanding of the importance of psychological ideas to his thinking about the common law. While Holmes's contribution as an historian, philosopher and social scientist to the study of law is well-recognized, what is less well-understood is the extent to which Holmes was also a student of psychology. Holmes devoted the entire first chapter of *The Common Law* to the proposition that all liability is rooted in the human instinct for revenge, and the theme remains dominant throughout the rest of the book.⁴³ The theme of revenge serves to introduce the richly introspective psychology that permeated Holmes's late-nineteenth-century jurisprudential writings.

The psychological ideas central to Holmes's legal thought refute the prevailing view of Holmes as a behaviorist or other strictly empirical observer of human nature. Holmes developed a view of human nature centered around two basic Romantic concepts: instinctual drives and unconscious motivations. This Part explores the significance of these psychological concepts in his two most important jurisprudential works, *The Common Law* and *The Path of the Law*. Holmes believed that legal decisionmakers should limit the role of unconscious factors in the development of law; he was also clear that law must take account of the reality of unconscious drives in human behavior. His belief in external standards—that common law liability should turn on the consequences of external behavior

42. Many scholars now characterize Holmes's particular blend of historicist and instrumentalist views as "neo-pragmatist." Grey, *supra* note 31, at 789; *see also* Robert W. Gordon, *Introduction to THE LEGACY OF OLIVER WENDELL HOLMES, JR.*, *supra* note 8, at 9 (opining that Grey "convincingly reconciled" "Holmes's positivist-formalist-conceptualist projects" with his historicism "through imputing to Holmes a pragmatic motive"); Catharine Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541 (1988) (linking Holmes to the nineteenth-century pragmatism of Charles Peirce and William James). *But see* H.L. POHLMAN, *JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE* 163-64 (1984) (discussing the "weak" link between Holmes and pragmatism); Patrick J. Kelley, *Was Holmes a Pragmatist? Reflections on a New Twist to an Old Argument*, 14 S. ILL. U. L.J. 427 (1990) (arguing against Grey's classification of Holmes as a pragmatist and instead linking Holmes with the positivists).

43. *See* THE COMMON LAW, *supra* note 6, at 5.

rather than on subjective intent—may be the most well-known example of his deep-seated concern with the unknowability of human motivation.

A. *Instincts and Evolution*

It certainly may be argued, with some force, that it has never ceased to be one object of punishment to satisfy the desire for vengeance.⁴⁴

As already noted, Holmes began his “rational study” of the common law by positing revenge as the principal motivating force behind the development of legal liability. “My aim and purpose,” he explained, “have been to show that the various forms of liability known to modern law spring from the common ground of revenge.”⁴⁵ By focusing on revenge, Holmes was pursuing a theme already popular in nineteenth-century legal literature.⁴⁶ Many scholars of the period addressed their attention to revenge when discussing the retributive aspect of criminal punishment.⁴⁷ Yet Holmes’s interest in revenge went well beyond the standard nineteenth century debate over criminal punishment. He postulated the psychological need for revenge as the primary cause for the development of all forms of legal liability. “It is commonly known,” Holmes declared in the first lecture of *The Common Law*, “that the early forms of legal procedure were grounded in vengeance.”⁴⁸ He inferred the existence of the revenge motive from the materials of law, anthropology and history, as well as from his own intuition about why individuals act as they do.

By tracing the origins of legal liability to the instinctual need for revenge, Holmes underscored the importance of understanding legal rules by reference to their historical development. Historical analysis, Holmes explained, would reveal the public policy considerations—

44. *Id.* at 40.

45. *Id.* at 37.

46. See PETER GAY, *THE CULTIVATION OF HATRED* 133-41 (1993).

47. See *THE COMMON LAW*, *supra* note 6, at 14 (citing CLAUDE-JOSEPH TISSOT, 2 *LE DROIT PENAL: ETUDIE DANS SES PRINCIPES, DANS LES USAGES ET LES LOIS DES DIVERS PEUPLES DU MONDE*, 615 (1860)); *id.* at 41, 51, 73 (citing JAMES FITZJAMES STEPHEN, *A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND* (1865)). Thinkers as “opposed” as Bishop Butler and Jeremy Bentham, Holmes noted, argued “not only that the law does, but that it ought to, make the gratification of revenge an object [of the criminal law].” *Id.* at 41.

48. *Id.* at 2.

such as the gratification of revenge—that underlie all legal rules. “[History] is a part of the rational study [of law],” he asserted, “because it is the first step toward an enlightened scepticism, that is, towards a deliberate reconsideration of the worth of those rules.”⁴⁹ However pessimistic Holmes may have been at times about the possibility of raising the human condition and, as we shall see, however Romantic he may have been in his assessment of human nature, he was vigorously optimistic about the prospect for improving the system of law. His historical methodology fused with a scientific zeal for reforming what he referred to as “one of the vastest products of the human mind.”⁵⁰ History was the method by which the parameters and justifications for legal rules would be opened up for conscious revision by decisionmakers informed by the study of other disciplines,⁵¹ including, we might infer, psychology.⁵²

Thus it was that Holmes began the first lecture of *The Common Law* with a comprehensive history of revenge in the early law. As he explained, the individual’s instinct for revenge originally manifested itself in violent self-help,⁵³ but eventually evolved into a system of legal rules aimed at punishing blameworthy actors. He drew a direct connection between the instinct for revenge and early subjective

49. *The Path of the Law*, *supra* note 3, at 469, *reprinted in* 3 COLLECTED WORKS, *supra* note 3, at 399; *see also* *Law in Science*, *supra* note 33, at 452, *reprinted in* 3 COLLECTED WORKS, *supra* note 3, at 412 (“History sets us free and enables us to make up our minds dispassionately whether the survival which we are enforcing answers any new purpose when it has ceased to answer the old.”). Holmes hoped that the need for historical analysis, so pressing at that moment, would eventually diminish. “I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them.” *The Path of the Law*, *supra* note 3, at 474, *reprinted in* 3 COLLECTED WORKS, *supra* note 3, at 402-03.

50. *The Path of the Law*, *supra* note 3, at 473, *reprinted in* 3 COLLECTED WORKS, *supra* note 3, at 402.

51. *See, e.g.*, THE COMMON LAW, *supra* note 6, at 37 (mentioning anthropology); *id.* at 1 (discussing history and theories of legislation); *The Path of the Law*, *supra* note 3, at 469, *reprinted in* 3 COLLECTED WORKS, *supra* note 3, at 399 (discussing history, economics, and statistics); *id.* at 474, *reprinted in* 3 COLLECTED WORKS, *supra* note 3, at 403 (discussing jurisprudence).

52. *See infra* note 91 and accompanying text (quoting *The Path of the Law*, *supra* note 3, at 477, *reprinted in* 3 COLLECTED WORKS, *supra* note 3, at 404-05). It should not come as a surprise that Holmes did not refer explicitly to psychology: psychology as an independent discipline was in its infancy, and many, perhaps including Holmes himself, would still have considered psychology a branch of philosophy. *See infra* notes 144-45 and accompanying text.

53. *See* THE COMMON LAW, *supra* note 6, at 161 (“[I]n the main the law started from those intentional wrongs which are the simplest and most pronounced cases, as well as the nearest to the feeling of revenge which leads to self-redress.”).

standards of moral wrongdoing.⁵⁴ Subjective standards of liability satisfied the instinct for revenge because they derived “from a moral basis, from the thought that some one was to blame.”⁵⁵ Holmes described how personal trespass “started from the notion of actual intent and actual personal culpability”⁵⁶ and how third-party liability “also had its root in the passion of revenge.”⁵⁷ With most of the first lecture devoted to showing how the liability of inanimate objects fit within his revenge theory, Holmes addressed the situation of “a tree which falls upon a man, or from which he falls and is killed.”⁵⁸ In “primitive” times, the tree itself might have been delivered up to the suffering relatives “or chopped to pieces for the gratification of a real or simulated passion.”⁵⁹ Animism thus explained how liability for harm caused by animals and inanimate objects fell within Holmes’s theory that revenge was the universal source of legal liability.⁶⁰

The human need for vengeance produced an early legal system that focused, said Holmes, on “the actual internal state of the individual’s mind.”⁶¹ As the common law evolved, however, moral standards were eventually replaced by objective rules aimed at controlling socially harmful behavior rather than punishing bad motivations. Drawing upon “materials for anthropology,”⁶² Holmes insisted that existing moral standards in law were mere “survivals”⁶³

54. “Vengeance imports a feeling of blame, and an opinion, however distorted by passion, that a wrong has been done. It can hardly go very far beyond the case of a harm intentionally inflicted: even a dog distinguishes between being stumbled over and being kicked.” *Id.* at 3.

55. *Id.* at 37.

56. *Id.* at 4.

57. *Id.* at 5.

58. *Id.* at 11.

59. *Id.*; see also *id.* at 8 (“If a beast killed a man, it was to be slain and cast beyond the borders. If an inanimate thing caused death, it was to be cast beyond the borders in like manner, and expiation was to be made.”).

60. See *id.* at 37; *id.* at 10-11:

[I]t may be asked how inanimate objects came to be pursued in this way, if the object of the procedure was to gratify the passion of revenge. Learned men have been ready to find a reason in the personification of inanimate nature common to savages and children, and there is much to confirm this view.

61. *The Path of the Law*, *supra* note 3, at 463, reprinted in 3 COLLECTED WORKS, *supra* note 3, at 395.

62. THE COMMON LAW, *supra* note 6, at 37.

63. *Id.* (“[I]n large and important branches of the law the various grounds of policy on which the various rules have been justified are later inventions to account for what are in fact survivals from more primitive times”); see also *id.* at 5 (“The customs, beliefs, or needs of a primitive time establish a rule or formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains.”).

from that earlier period when the “forms of legal procedure were grounded in vengeance.”⁶⁴ Subjective standards, such as “malice” and *mens rea*, he argued, actually turned on external behavior and not bad intent.⁶⁵ Moral views were embedded in the social policies justifying legal rules,⁶⁶ he agreed, but individual moral culpability had been eliminated as a basis for imposing legal liability.⁶⁷ “[W]hile the law does still and always, in a certain sense, measure legal liability by moral standards, it nevertheless, by the very necessity of its nature, is continually transmuting those moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated.”⁶⁸ Holmes devoted the remainder of *The Common Law* to detailing how a primitive concern with punishing moral blameworthiness had evolved into a modern regime “wholly indifferent to the internal phenomena of conscience.”⁶⁹

The evolution Holmes charted—from violent self-help, to subjective standards of intentional wrongdoing, to external standards of behavior—reflected his historicist approach to understanding modern legal rules. Yet Holmes made clear that the evolution from subjective to external standards did not come about as a result of a corresponding reduction in the instinct for revenge. Legal standards had evolved over time, but what had *not* changed was the human instinct for vengeance. We may assume, Holmes commented at the beginning of *The Common Law*, “that the earliest barbarian whose practices are to be considered, had a good many of the same feelings and passions as ourselves.”⁷⁰ In describing the primitive law of surrender, under which the offending animal or slave was given over to the injured party, Holmes noted that “[t]he desire for vengeance may be felt as strongly against a slave as against a freeman, and it is not without example nowadays that a like passion should be felt

64. *Id.* at 2.

65. *See, e.g., id.* at 76 (arguing that malice and intent are criminal elements because they increase the likelihood that an act will cause harm).

66. *See The Path of the Law, supra* note 3, at 459, *reprinted in* 3 COLLECTED WORKS, *supra* note 3, at 392 (“The law is the witness and external deposit of our moral life.”).

67. The only morality remaining in modern law, according to Holmes, attached to the prevailing standard of reasonableness: “The reference to the prudent man, as a standard, is the only form in which blameworthiness as such is an element of crime, and what would be blameworthy in such a man is an element” *THE COMMON LAW, supra* note 6, at 76.

68. *Id.* at 38.

69. *Id.* at 110.

70. *Id.* at 2.

against an animal.”⁷¹ Particularly in cases where monetary compensation is not available, one of the objects of punishing criminal offenders “is to gratify the desire for vengeance.”⁷² In these cases, “[t]he prisoner pays with his body.”⁷³ Primitive self-help had evolved into the more “civilized” form of monetary compensation, but the underlying human need remained the same.⁷⁴

Taken by itself, Holmes’s psychology of revenge might seem strangely at odds with his more general historical and empirical views, and at least one commentator has directly accused Holmes of relying on a reductionist and ahistorical psychology.⁷⁵ It is certainly true that Holmes’s theory of revenge emphasized a view of what is instinctual, universal and historically constant about human nature. Yet as Freud’s work would later vividly illustrate, there is nothing inherently reductionist about recognizing the importance of instinctual drives in human affairs.⁷⁶ To acknowledge that some human feelings and desires—in particular, sexuality and aggression, and perhaps also the urge for self-preservation⁷⁷—are constant features of the human condition hardly qualifies as a simplistic or grossly materialist view of man. One might with some justification

71. *Id.* at 15.

72. *Id.* at 41.

73. *Id.*

74. *See id.* at 40 (questioning whether the desire for revenge “is still accepted either in this primitive form, or in some more refined development”).

75. *See* Robert W. Gordon, *Holmes’ Common Law as Legal and Social Science*, 10 *HOFSTRA L. REV.* 719, 730-31 (1982).

76. *See* SIGMUND FREUD, *Instincts and Their Vicissitudes* (1915), in 14 *THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 117 (James Strachey ed. & trans., 1957) [hereinafter *THE COMPLETE WORKS OF FREUD*]. The existence of human instincts, moreover, is itself a complex psychological phenomenon that cannot be equated with simple biological urges. *See id.* at 118-20. As Freud explained, except perhaps in situations of extreme physical deprivation or reflexive physical response, human instincts operate on the boundary between somatic functions and psychic experience:

If now we apply ourselves to considering mental life from a *biological* point of view, an ‘instinct’ appears to us as a concept on the frontier between the mental and the somatic, as the psychical representative of the stimuli originating from within the organism and reaching the mind, as a measure of the demand made upon the mind for work in consequence of its connection with the body.

Id. at 121-22 (citations omitted); *see also* Hans W. Loewald, *On Motivation and Instinct Theory*, in *PAPERS ON PSYCHOANALYSIS* 102, 119 (1980) (arguing that instincts are “constituent of the stream of mental life, and not a biological stimulus operating upon that stream”).

77. Holmes also identified the instinct for possession. *See* *THE COMMON LAW*, *supra* note 6, at 213. In contrast, Freud focused on two basic drives—libido and aggression. *See* SIGMUND FREUD, *THE EGO AND THE ID* 30 (James Strachey ed. & Joan Riviere trans., W.W. Norton & Co. 1960) (1923).

criticize Holmes's idea that all forms of legal liability can be traced back to the instinct for revenge on the ground that it presents an overly simplistic account of the origins of law, but his belief in revenge and its important role in shaping human affairs is not manifestly deficient. When taken with the rest of his ideas about human nature, his theory of revenge constitutes one piece of a rich and comprehensive psychological understanding of human behavior and feeling.

Holmes did not identify what he believed to be the biological source of the desire for revenge, and it is difficult to conjecture what biological need the revenge motive would serve.⁷⁸ Given his fondness for Darwinian ideas,⁷⁹ Holmes may have thought that the drive for self-preservation played a role in stimulating the impulse for revenge, although his references to revenge as a "passion" suggest that he understood the often irrational and self-destructive aspects of this instinctual response;⁸⁰ a biological drive toward aggression seems a better candidate. In any event, revenge, as used by Holmes, was not merely a biological stimulus but also a fundamental motivational force shaping individual and social behavior.

Revenge is the most prominent of the instincts discussed in *The Common Law*, but Holmes did consider three other instincts as relevant to the study of law: the sexual instinct,⁸¹ the instinct for self-preservation,⁸² and the instinct for possession.⁸³ When discussing legal possession, for example, Holmes observed that "man, by an instinct which he shares with the domestic dog, and of which the seal gives a most striking example, will not allow himself to be dispossessed,

78. See Charles Brenner, *Psychoanalysis: Classical Theory*, in 13 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 1, 4 (David L. Sills ed., 1990) ("[T]he somatic sources, if any, of aggression (the aggressive drive) are less clear than those of the erotic drive.").

79. See PHILIP P. WIENER, *EVOLUTION AND THE FOUNDERS OF PRAGMATISM* 172-89 (1949).

80. Revenge may be understood in purely biological terms as a somatic stimulus to survival—a physical response to harm that serves to protect the individual against future aggressions—but revenge could also be viewed in many situations as an irrational passion antithetical to survival.

81. See *THE COMMON LAW*, *supra* note 6, at 41; see also *infra* note 86 and accompanying text.

82. See *id.* at 44 ("If a man is on a plank in the deep sea which will only float one, and a stranger lays hold of it, he will thrust him off if he can.").

83. See *The Path of the Law*, *supra* note 3, at 477, reprinted in 3 COLLECTED WORKS, *supra* note 3, at 405 ("A thing which you have enjoyed and used as your own . . . takes root in your being and cannot be torn away without your resenting the act . . .").

either by force or fraud, of what he holds, without trying to get it back again.”⁸⁴ Instinctual behavior is in part what connects man to the animal world, but the mastery of instinctual needs is also what sets man apart. In this important respect, Holmes recognized the fixity of instinctual needs while at the same time recognizing the plasticity of their social expression and gratification. The instinct that once drove men to violent retaliation is now typically gratified through criminal punishment.⁸⁵ In a similar vein, Holmes quoted Sir James Fitzjames Stephen, an essayist, judge and close friend, for the idea that “the criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite.”⁸⁶ The sexual instinct, expressed psychologically as romantic and erotic love, is gratified through the laws of marriage; the instinct of revenge is gratified through criminal punishment; and the instinct of self-protection is gratified through protection of property. Holmes appeared to view the development of law in large part as an evolving mechanism for the satisfaction—and control—of these instinctual needs.

Thus Holmes saw that the task of mastering human instincts had been given to law, and rightly so in his view. He concluded that any viable system of justice must be deliberately designed with this end in mind:

The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong. If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution.⁸⁷

Legal rules must accommodate the instinctual needs of human nature as a matter of good, even necessary, public policy. Thus, while

84. THE COMMON LAW, *supra* note 6, at 213.

85. *See id.* at 41-42.

86. STEPHEN, *supra* note 47, at 99, *quoted in* THE COMMON LAW, *supra* note 6, at 41. Holmes may have discovered Stephen’s observation by reading Alexander Bain. *See* ALEXANDER BAIN, MENTAL SCIENCE; A COMPENDIUM OF PSYCHOLOGY, AND THE HISTORY OF PHILOSOPHY 267 n.* (New York, D. Appleton & Co. 1868) [hereinafter BAIN, MENTAL SCIENCE].

87. THE COMMON LAW, *supra* note 6, at 41-42; *see also id.* at 213 (“As long as the instinct remains, it will be more comfortable for the law to satisfy it in an orderly manner, than to leave people to themselves.”); Oliver Wendell Holmes, Jr., *Possession*, 12 AM. L. REV. 688, 719 (1878). There is a difference between mastering and satisfying instincts. In this passage, Holmes seemed to focus on satisfying instinctual needs, while at other times he suggests the importance of mastering them.

Holmes believed that the rational study of law should be carried out by “the man of statistics and the master of economics,”⁸⁸ he also made clear that “an understanding of economics” was not the only way “to get to the bottom of the subject” of law.⁸⁹ Holmes highlighted economics as an important branch of the growing social sciences, but he never slighted the importance of psychological knowledge:⁹⁰

Sir Henry Maine has made it fashionable to connect the archaic notion of property with prescription. But the connection is further back than the first recorded history. *It is in the nature of man's mind.* A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. *The law can ask no better justification than the deepest instincts of man.*⁹¹

While Holmes believed that society may subordinate individual needs, and even individual lives, to social welfare,⁹² he concluded that the desirable social policy regarding the instinct of revenge was to satisfy it.⁹³ Otherwise, he suggested, social order would be threatened as the passion for vengeance would lead individuals to resort to violent self-help.⁹⁴ Holmes did qualify his views by noting that “this passion is not one which we encourage, either as private individuals or as law-makers.”⁹⁵ Nevertheless, good law reform for Holmes meant that the innate psychological needs of human beings must be taken into account in designing a practical and effective system of legal rules.

88. *The Path of the Law*, *supra* note 3, at 469, *reprinted in* 3 COLLECTED WORKS, *supra* note 3, at 399.

89. *Id.* at 476, *reprinted in* 3 COLLECTED WORKS, *supra* note 3, at 404.

90. See MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS: 1870–1882, at 280 (1963) [hereinafter HOWE, PROVING YEARS].

91. *The Path of the Law*, *supra* note 3, at 477, *reprinted in* 3 COLLECTED WORKS, *supra* note 3, at 404-05 (emphasis added).

92. See THE COMMON LAW, *supra* note 6, at 43 (“No society has ever admitted that it could not sacrifice individual welfare to its own existence.”).

93. See *supra* note 87 and accompanying text.

94. Cf. Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 41 (1918), *reprinted in* THE ESSENTIAL HOLMES 180, 181 (Richard A. Posner ed., 1992) (“Deep-seated preferences can not be argued about . . . and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way.”).

95. THE COMMON LAW, *supra* note 6, at 42.

B. Unconscious Ideas and Legal Rules

Behind the logical form [of law] lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.⁹⁶

In Holmes's view, the most harmful characteristic of the legal system and, consequently, that most in need of reform, was the influence of unconscious factors on legal decisionmaking. Legislators and judges, Holmes believed, were "largely unconscious" of the subjective process by which they developed legal rules.⁹⁷

Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, *the unconscious result of instinctive preferences and inarticulate convictions*, but none the less traceable to views of public policy in the last analysis.⁹⁸

Once these unconscious motivations—the hidden public policy justifications, as Holmes called them—were revealed, legal decisionmakers would then be in a position to decide whether to reject or revise particular legal rules. Historical study, then, would allow the influence of unconscious factors on law to be replaced by the conscious, rational consideration of social aims. Instrumental reason would prevail over passion and instinct, the legal analogue to Freud's famous maxim: "Where id was, there ego shall be."⁹⁹

The idea of the unconscious was thus central to Holmes's theory of legal decisionmaking. His use of the concept, moreover, clearly

96. *The Path of the Law*, *supra* note 3, at 466, *reprinted in* 3 COLLECTED WORKS, *supra* note 3, at 397.

97. Holmes wrote:

[H]itherto this process [of legal evolution] has been largely unconscious. It is important, on that account, to bring to mind what the actual course of events has been. If it were only to insist on a more conscious recognition of the legislative function of the courts . . . it would be useful . . .

THE COMMON LAW, *supra* note 6, at 36; *see also* *The Path of the Law*, *supra* note 3, at 467-68, *reprinted in* 3 COLLECTED WORKS, *supra* note 3, at 397-98 (maintaining that lawmakers are often unconscious of the extent to which various factors influence their decisions); *cf.* *Law in Science*, *supra* note 33, at 452, *reprinted in* 3 COLLECTED WORKS, *supra* note 3, at 411-12 (tracing the "evolutionary process" of the law of torts).

98. THE COMMON LAW, *supra* note 6, at 35-36 (emphasis added).

99. SIGMUND FREUD, NEW INTRODUCTORY LECTURES ON PSYCHO-ANALYSIS 112 (W.J.H. Spott trans., 1933).

meant more than simply “hidden” or “implicit” in the common sense of the term. Holmes also used “unconscious” to describe the process of legal decisionmaking; judges, lawyers and legislators were unconscious of the true grounds for their own decisions. The grounds were *hidden*, but also, Holmes implied, the decisionmakers were *unaware*. Judges had a duty to search out the underlying motivations for their legal decisions:

I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said.¹⁰⁰

To the extent he saw legal decisionmakers as having the responsibility to search out the true grounds for legal rules, his vision of legal reform drew on an ideal of judicial self-awareness. The rational study of law would come to be carried out in part by historical analysis and in part by personal self-reflection; judges were not to be content with the traditional justifications for legal rules, but were to search for the deeper reasons influencing their decisions.¹⁰¹

While Holmes may have been the first legal thinker to utilize the idea of the unconscious, by the late nineteenth century the concept itself was nothing new.¹⁰² The meaning of the term tended to vary depending on the perspective of the thinker, but all conceptions of the unconscious from the period shared the notion of ideas or psychological processes not present in immediate awareness. This core meaning of the term can be traced back to the work of the seventeenth-century German philosopher Leibniz, the first to address explicitly the notion of the unconscious.¹⁰³ Leibniz conceived of

100. *The Path of the Law*, *supra* note 3, at 467, *reprinted in* 3 COLLECTED WORKS, *supra* note 3, at 398.

101. *See Law in Science*, *supra* note 33, at 455, *reprinted in* 3 COLLECTED WORKS, *supra* note 3, at 415. This is perhaps why, in Holmes's view, judicial reliance upon simple catchphrases such as “taking the risk,” and “invitation and trap,” had its pitfalls. “It is . . . the tiresome repetition of inadequate catch words upon which I am observing,—phrases . . . which, by their very felicity, delay further analysis for fifty years.” *Id.*

102. *See* HENRI F. ELLENBERGER, *THE DISCOVERY OF THE UNCONSCIOUS* 311-12 (1970); EDUARD VON HARTMANN, *PHILOSOPHY OF THE UNCONSCIOUS* (William Chatterton Coupland trans., Harcourt, Brace & Co. 1931) (1868).

103. *See* R.S. Peters & C.A. Mace, *Psychology*, *in* 7 *THE ENCYCLOPEDIA OF PHILOSOPHY* 1, 11 (Paul Edwards ed., 1967) (noting that Leibniz “prepared the ground for the concept of

mental life as comprised of infinitesimal units of force, called monads, which exhibited both material and spiritual properties and which existed on a continuum from perception (unconscious) to apperception (consciousness).¹⁰⁴ Johann Herbart, an early experimental psychologist,¹⁰⁵ expanded upon Leibniz's idea of the unconscious by developing a more dynamic theory of inhibited ideas: those ideas which reside in the unconscious and which may pass the "limen of consciousness" into full awareness.¹⁰⁶ By the "limen of consciousness," Herbart meant the border that an idea crossed in moving from a state of inhibition into a state of conscious awareness.¹⁰⁷ The basic notion of unconscious inference was also an integral part of the physiological psychology pioneered by German physiologists in the mid-nineteenth century.¹⁰⁸

In addition to this core meaning of ideas not present in consciousness, the term "unconscious" also carried in Holmes's work, as it did in Herbart's, a rudimentary dynamic aspect. To begin with, Holmes clearly conceived of the unconscious as the seat of powerful instinctual emotions. He captured this aspect of the unconscious in his famous metaphor of the dark cave: he likened unconscious motivations to a dragon which, once dragged from his dark cave into the light of consciousness, can be killed or tamed, but while hidden in

unconscious mental processes which was to prove so important in nineteenth century thought").

104. See EDWIN G. BORING, *A HISTORY OF EXPERIMENTAL PSYCHOLOGY* 168 (2d ed. 1950).

105. See BORING, *supra* note 104, at 250; ELLENBERGER, *supra* note 102, at 312.

106. See BORING, *supra* note 104, at 256-57 (discussing Herbart's *Lehrbuch zur Psychologie*); see also J.A.C. BROWN, *FREUD AND THE POST-FREUDIANS* 18 (1961) ("The concept of the unconscious plays an important part in the works of the psychologist Herbart, . . . in the writings of Carl Gustav Carus, . . . [and] in Eduard von Hartmann's *Philosophy of the Unconscious*—not to mention the philosophies of Schopenhauer and Spinoza.").

107. See BORING, *supra* note 104, at 256. Herbart's dynamic theory clearly foreshadowed Freud's concept of repression.

108. See *id.* at 308-11. In the 1860s, Helmholtz explained unconscious inference as follows:

The psychic activities, by which we arrive at the judgment that a certain object of a certain character exists before us at a certain place, are generally not conscious activities but unconscious ones. In their results they are equivalent to an *inference*, in so far as we achieve, by way of the observed effect upon our senses, the idea of the cause of this effect, even though in fact it is invariably only the nervous excitations, the effects, that we can perceive directly, and never the external objects. Nevertheless, they thus appear to be differentiated from an inference, in the ordinary sense of this word, in that an inference is an act of conscious thinking.

BORING, *supra* note 104, at 309 (quoting and translating HERMANN VON HELMHOLTZ, *HANDBUCH DER PHYSIOLOGISCHEN OPTIK* (1866)).

the cave remains a savage, fantastical force in human nature.¹⁰⁹ That he viewed the unconscious as the realm of innate passions is evident from the general portrait of human nature that emerges from his writings, one in which individuals are governed in significant ways by “feelings and passions” beyond their rational control.¹¹⁰ Vengeance, possession, self-preservation, and sexual desire were elemental passions exerting their tremendous influence over the actions of men and women. “Primitive” men and children were particularly ruled by unconscious impulses,¹¹¹ but so, as Holmes put it, were “full-grown civilized Europeans.”¹¹² Quoting George Grote, Holmes described how “the force of momentary passion will often suffice to supersede the acquired habit, and even an intelligent man may be impelled in a moment of agonizing pain to kick or beat the lifeless object from which he has suffered.”¹¹³ Holmes’s writing is full of passages depicting man at his most emotionally elemental: thrusting the stranger off the plank in the deep sea,¹¹⁴ filled with the rage of revenge,¹¹⁵ stubbornly holding onto acquired possessions,¹¹⁶ and ravishing virtuous women.¹¹⁷ Like man’s innate passion for vengeance, Holmes saw the egoistic drive as unrelenting in its raw brutishness.¹¹⁸ Holmes’s idea of the unconscious seemed to present

109. See *The Path of the Law*, *supra* note 3, at 469, *reprinted in* 3 COLLECTED WORKS, *supra* note 3, at 399:

When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.

110. THE COMMON LAW, *supra* note 6, at 2.

111. See Oliver Wendell Holmes, Jr., *Primitive Notions in Modern Law*, 10 AM. L. REV. 422, 429 (1876), *reprinted in* 3 COLLECTED WORKS, *supra* note 3, at 3, 9 (arguing that “the savage mind well represents the childish stage”).

112. *Id.*

113. *Id.* (quoting George Grote without identifying original source).

114. See THE COMMON LAW, *supra* note 6, at 44.

115. See *supra* notes 58-60 and accompanying text.

116. See *The Path of the Law*, *supra* note 3, at 477, *reprinted in* 3 COLLECTED WORKS, *supra* note 3, at 405.

117. See *Law in Science*, *supra* note 33, at 453, *reprinted in* 3 COLLECTED WORKS, *supra* note 3, at 413. Holmes here is refreshingly sensitive to many women’s reluctance to report rape, although he does use the term “virtuous” in the Victorian manner. His view of women here is interesting to contrast with the view he expressed in the opinion of the Court in *Buck v. Bell*, 274 U.S. 200 (1927), a decision upholding the forced sterilization of a retarded woman: “Three generations of imbeciles are enough.” *Id.* at 207.

118. See, e.g., Letter from Oliver Wendell Holmes, Jr. to Lewis Einstein (May 21, 1914), in THE HOLMES-EINSTEIN LETTERS 93 (J.B. Peabody ed., 1964):

aggression and egoism as important, if not the principal, motivating forces in human nature.

The meaning of “unconscious” as emotions or ideas influencing behavior but not subject to direct knowledge or observation was present in the work of many philosophers and writers known to Holmes, including his own father.¹¹⁹ Among the most important writers who promoted this idea of the unconscious, and who were read by Holmes in the years leading up to the publication of *The Common Law*, were Plato, Kant, Carlyle, Coleridge, Emerson, Hegel, Spinoza, and Henry and William James.¹²⁰ Emerson, for example, a close friend of Holmes’s father, had described the unconscious in overtly theological terms: “The world proceeds from the same spirit as the body of man. It is a remoter and inferior incarnation of God, a *projection of God in the unconscious*.”¹²¹ Oliver Wendell Holmes, Sr., a widely-known physician and writer, also believed that “[u]nconscious activity is the rule with the actions most important to life.”¹²² Present in the work of all these writers was a

Disgust is ultimate and therefore as irrational as reason itself—a dogmatic datum. The world has produced the rattlesnake as well as me; but I kill it if I get a chance, as also mosquitos, cockroaches, murderers, and flies. My only judgment is that they are incongruous with the world I want; the kind of world we all try to make according to our power.

119. C.P. OBERNDORF, *A HISTORY OF PSYCHOANALYSIS IN AMERICA* 31 (1953). Peter Gay writes that, “by the Age of the Enlightenment, some perceptive students of human nature had recognized the existence of unconscious mentation,” including Lichtenberg, Goethe, Schiller, Schopenhauer and Nietzsche. PETER GAY, *FREUD: A LIFE FOR OUR TIME* 127-28 (1988) [hereinafter GAY, FREUD].

120. See Little, *supra* note 12, at 174-90; Hoffheimer, *supra* note 31, at 1224-26.

121. RALPH WALDO EMERSON, *Spirit, reprinted in 2 THE COMPLETE WORKS OF RALPH WALDO EMERSON* 167 (London, Bell & Daldy 1866) (emphasis added).

122. OLIVER WENDELL HOLMES, *Mechanism in Thought and Morals, An Address Delivered Before the Phi Beta Kappa Society of Harvard University (June 29, 1870)*, in *PAGES FROM AN OLD VOLUME OF LIFE* 260, 277 (5th ed. 1883). The elder Holmes described a process almost identical to Freud’s theory of the unconscious and free association:

The more we examine the mechanism of thought, the more we shall see that the automatic, unconscious action of the mind enters largely into all its processes. Our definite ideas are stepping stones; how we get from one to the other, we do not know; something carries us; we do not take the step.

Id. at 284-85. For Holmes’s father’s views on the unconscious, see *THE PSYCHIATRIC NOVELS OF OLIVER WENDELL HOLMES* (Clarence P. Oberndorf ed., 1943). Unlike his father, Holmes did not view the unconscious as a manifestation of a higher order:

I believe that we are in the universe, not it in us, that we are part of an unimaginable, which I will call a whole, in order to name it, that our personality is a cosmic ganglion, that just as when certain rays meet and cross there is white light at the meeting point, but the rays go on after the meeting as they did before, so, when certain other streams of energy cross, the meeting point can frame a syllogism or wag its tail. I never forget that the cosmos has the power to produce consciousness, intelligence, ideals, out of a like course of its energy, but I see no reason to assume that these

dynamic conception of unconscious ideas and motivations influencing human behavior in unknown ways.

Holmes emphasized the direct influence of the unconscious on legal decisionmakers, but his conception of the unconscious was relevant to his ideas about legal doctrine as well. Holmes's enthusiasm for external standards of liability may in part have been driven by his appreciation for the role of unconscious motivation in human affairs.¹²³ It is possible that Holmes was willing to sacrifice subjective culpability because actual motivation was not readily accessible to conscious perception. Subjective intent was driven by unconscious passions and impulsive emotional reactions that obviously did not lend themselves to the "quantitative" measurement Holmes aspired to in law. In *The Common Law*, Holmes raised this problem of subjective motivation:

The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason. In the first place, *the impossibility of nicely measuring a man's powers and limitations* is far clearer than that of ascertaining his knowledge of law . . .

. . .¹²⁴

ultimates for me are cosmic ultimates. I frame no predicates about the cosmos. I suspect that all my ultimates have the mark of the finite upon them, but as they are the best I know I give them practical respect, love, etc., but inwardly doubt whether they have any importance except for us and as something that with or without reasons the universe has produced and therefore for the moment has sanctioned. We must be serious in order to get work done, but when the usual Saturday half holiday comes I see no reason why we should not smile at the trick by which nature keeps us at our job.

Letter from Oliver Wendell Holmes, Jr. to Dr. John C.H. Wu (May 5, 1926), in JUSTICE HOLMES TO DR. WU: AN INTIMATE CORRESPONDENCE, 1921-1932, at 35-36 (n.d.) [hereinafter JUSTICE HOLMES TO DR. WU] (reprinting letters originally published in TIEN HSIA MONTHLY, Oct. 1935, with the permission of John G. Palfrey, executor of the Holmes estate); see also Letter from Oliver Wendell Holmes, Jr. to William James (Mar. 24, 1907), quoted in PERRY, *supra* note 1, at 301 ("It seems to me that the only promising activity is to make *my* universe coherent and livable, not to babble about *the* universe . . ."). As explained later in this Article, Holmes's views mirrored the Romantic emphasis on the individual's subjective experience of transcendent ecstasy and despair. See *infra* notes 332-46 and accompanying text.

123. See THE COMMON LAW, *supra* note 6, at 110:

Notwithstanding the fact that the grounds of legal liability are moral to the extent above explained, it must be borne in mind that law only works within the sphere of the senses. If the external phenomena, the manifest acts and omissions, are such as it requires, it is wholly indifferent to the internal phenomena of conscience.

124. THE COMMON LAW, *supra* note 6, at 108 (emphasis added).

On its face, this passage suggests that Holmes viewed the problem with subjective standards as, in part, one of proof.¹²⁵ He raised this same evidentiary concern in another passage in *The Common Law* having to do with the law of trespass, in which he noted that “the defendant’s knowledge or ignorance of the plaintiff’s title is likely to lie wholly in his own breast, and therefore hardly admits of satisfactory proof.”¹²⁶ While the problem of legal proof certainly concerned Holmes, his skepticism regarding the ascertainment of subjective intent likely ran much deeper. The concern was not only that subjective motivations might be intentionally concealed from legal decisionmakers, but that they might be unknown even to the individual actor. Because these subjective motivations cannot be known directly—because human behavior often turns on unconscious intentions—legal liability must limit itself to knowable behavior. Ironically, the most compelling justification for external standards likely rests on Holmes’s deep appreciation for the internal realm of unconscious motivations and desires.¹²⁷

Holmes’s insistence on a legal standard “wholly indifferent to the internal phenomena of conscience”¹²⁸ thus did not rule out the importance of ideas like revenge and the unconscious to the study of law. Because it imposes liability for harmful behavior rather than for bad intent, the external standard mistakenly has been taken to reflect a positivist bias in Holmes’s legal thinking.¹²⁹ This positivist view has

125. See POHLMAN, *supra* note 42, at 16.

126. THE COMMON LAW, *supra* note 6, at 87, 99. Holmes noted that centuries earlier it had been established that a “defendant’s state of mind ‘cannot be construed.’” *Id.* at 107 (quoting Y.B. 21 Hen. 7, pl. 5 (1506)).

127. See Oliver Wendell Holmes, Jr., *Trespass and Negligence*, 14 AM. L. REV. 1, 21 (1880), reprinted in 3 COLLECTED WORKS, *supra* note 3, at 76, 90. While there is no direct evidence apart from the cited passages that Holmes based his external standard on a theory of the unconscious, the important point here, as explained in the following pages, is that Holmes’s belief in the external standard did not necessarily derive from a behaviorist view of human nature. Indeed, at least early in his career, Freud appears to have shared Holmes’s view that “judging” should be limited to an examination of external behavior. See SIGMUND FREUD, *The Interpretation of Dreams* (1900), reprinted in 5 THE COMPLETE WORKS OF FREUD, *supra* note 76, at 621:

Actions and consciously expressed opinions are as a rule enough for practical purposes in judging men’s characters. Actions deserve to be considered first and foremost; for many impulses which force their way through to consciousness are even then brought to nothing by the real forces of mental life before they can mature into deeds.

128. THE COMMON LAW, *supra* note 6, at 110.

129. See Grey, *Holmes and Legal Pragmatism*, *supra* note 31, at 795; Gordon, *supra* note 75, at 730-31. Limiting the application of legal rules to observable behavior is understood by some commentators as furthering Holmes’s goal of eliminating moral values from the law.

been further reinforced by Holmes's reference to the "bad man, who cares only for the material consequences" of legal rules.¹³⁰ Yet any inconsistency between his introspective psychology and his behaviorist legal standard disappears once we understand that Holmes believed that an appreciation of the role of the unconscious in shaping human behavior was essential to fashioning optimal legal rules, even while the rules themselves should apply only to external behavior.

The external standard and the bad man theory helped Holmes to illustrate his idea "that law only works within the sphere of the senses"¹³¹—his belief that the application of legal rules should be limited to observable behavior.¹³² While some commentators have taken Holmes's bad man theory as "the signpost which so many have followed straight down the path to the deadly bog of behaviorism,"¹³³ this view misreads the meaning of Holmes's rejection of subjective

Along with his prediction theory of law, see *The Path of the Law*, *supra* note 3, at 460, reprinted in 3 COLLECTED WORKS, *supra* note 3, at 393 ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."), the external standard is taken to represent a commitment to "reducing vague and value-laden questions to clear and factual ones," Grey, *supra* note 31, at 795; see also POHLMAN, *supra* note 42, at 135-36 (arguing that "the utilitarians adhered to an objective moral standard that reduced morality to a matter of fact").

130. "A man may have as bad a heart as he chooses," Holmes asserted in open defiance of the analytic philosophers, "if his conduct is within the rules." THE COMMON LAW, *supra* note 6, at 110. More than 130 years before Holmes published his "bad man" theory in the pages of the *Harvard Law Review*, Samuel Johnson allegedly took a very similar position in remarking on Rousseau. As reported by James Boswell, these remarks were as follows:

Boswell. . . "My dear Sir, you don't call Rousseau bad company. Do you really think him a bad man?" *Johnson*. "Sir, if you are talking jestingly of this, I don't talk with you. If you mean to be serious, I think him one of the worst of men; a rascal who ought to be hunted out of society, as he has been. Three or four nations have expelled him; and it is a shame that he is protected in this country." *Boswell*. "I don't deny, Sir, but that his novel may, perhaps, do harm; but I cannot think his intention was bad." *Johnson*. "Sir, that will not do. *We cannot prove any man's intention to be bad*. You may shoot a man through the head, and say you intended to miss him; but the Judge will order you to be hanged. An alleged want of intention, when evil is committed, will not be allowed in a court of justice."

JAMES BOSWELL, LIFE OF JOHNSON 359 (R. Chapman ed., 1970) (1791) (emphasis added). We know that Holmes read part of Johnson's biography in 1874, see Little, *supra* note 12, at 187, although there is no direct record of Holmes having read this particular passage. Nevertheless, it is likely that Holmes, like Johnson, believed that the law should not take subjective intent into account, and it is also likely that Holmes believed so in part for the same reason Johnson did: because "[w]e cannot prove any man's intention to be bad."

131. THE COMMON LAW, *supra* note 6, at 110.

132. See *id.* at 307 ("[T]he making of a contract does not depend on the state of the parties' minds, it depends on their overt acts.").

133. Henry M. Hart, Jr., Comment, *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929, 932 (1951).

motivation as a standard for imposing legal liability. Given his emphasis on the psychological and moral underpinning of legal rules, the most that can be said about Holmes is that he was a rule behaviorist. Holmes's enthusiasm for external standards certainly reflected his conviction that "[a]ll law is directed to conditions of things manifest to the senses,"¹³⁴ but he explicitly recognized the relevance of psychology to the development of those standards. As explained earlier,¹³⁵ psychology, and more broadly morality, were still vitally relevant "for the purpose of drawing a line between such bodily motions and rests as [the law] permits, and such as it does not."¹³⁶

The theory of unconscious motivations that most likely led Holmes in the direction of the external standard of liability also prompted him to argue that the legal system must in certain circumstances accommodate these instinctual drives. Man's capacity for reason, in Holmes's view, was always vulnerable to defeat by the instinctual depths of unconscious life. Law might regulate human behavior, but it could never fully suppress these potentially dangerous passions. As he described, "if the law did not [permit people to gratify the passion for revenge], the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution."¹³⁷ In his weighing of the private need for revenge against the need for social order Holmes elaborated a basic conflict between unconscious instinctual drives—aggression and egoism in particular—and the broader needs of the society. Although Holmes was quite clear that the conflict between individual instincts and social needs must often end in the sacrifice of the individual,¹³⁸ he believed that the opposite was also sometimes true. In Holmes's view, law must satisfy at some minimum level the aggressive and egoistic instincts of man or else lose its claim to authority:

It may be the destiny of man that the social instincts shall grow to control his actions absolutely, even in anti-social situations. But they have not yet done so, and as the rules of law are or should be based upon a morality which is generally accepted, no rule founded on a

134. THE COMMON LAW, *supra* note 6, at 49.

135. See *supra* notes 61-69 and accompanying text.

136. THE COMMON LAW, *supra* note 6, at 110.

137. *Id.* at 41-42.

138. See, e.g., *id.* at 43 ("No society has ever admitted that it could not sacrifice individual welfare to its own existence.").

theory of absolute unselfishness can be laid down without a breach between law and working beliefs.¹³⁹

Holmes saw the relationship between the innate drives of the individual and the general welfare of the community as one of conflict rather than adaptation. Law could thus lay claim to being an important, if not original, site of reconciliation between inner needs and external reality.¹⁴⁰

Holmes's ideas about instinctual drives, unconscious feelings, and conflict reflected his strong interest in the questions being raised by nineteenth-century psychologists and philosophers. The answers he gave, however, reflected a greater affinity with the ideas of the eighteenth-century Romantics than with the empirical approach to the study of human nature that prevailed in his time. Later in his life, he would refer back to his early interest in the realm of unconscious feelings and motivations in a letter to Ethel Scott:

You speak of your reading *The Unconscious Mind*. As I look on myself as a cosmic ganglion—a manifestation of the unknown substratum—that we call energy—or might as well call it X— . . . I regard it as somewhat accidental how far the processes of X emerge into consciousness. When we were both young, before all this later talk I used the image of a row of bricks (to Wm. James) on two inclined planes. [Diagram of bricks in a line, down one plane and up the other.] You tip the first brick and the row goes down, the first and the last above the line of consciousness and more may be.¹⁴¹

As we shall see, the unconscious was not the only psychological concept that Holmes and William James discussed in their early years, a time when each was struggling to evaluate the usefulness of empirical science for their respective disciplines. The following Part examines the way in which Holmes's view of human nature related to, but ultimately diverged from, each of the prevailing schools of late-nineteenth-century empirical psychology.

139. *Id.* at 44 (discussing these aggressive and egoistic instincts in the historical development of England); see also *The Path of the Law*, *supra* note 3, at 477, reprinted in 3 COLLECTED WORKS, *supra* note 3, at 405 (“The law can ask no better justification than the deepest instincts of man.”).

140. The significance of the point that conflict rather than adaptation defined Holmes's relationship between the individual and the social group is discussed in greater detail below. See *infra* notes 267-70 and accompanying text.

141. Letter from Oliver Wendell Holmes, Jr. to Ethel Scott (Mar. 9, 1923), quoted in SHELDON M. NOVICK, *THE HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* 427 n.8 (1989).

II. EMPIRICAL FOUNDATIONS AND THEIR LIMITS

However exceptional his intellectual gifts, Holmes was nevertheless very much a man of his time,¹⁴² and his ideas about human nature were no exception. By all accounts, he came of age during a time of extraordinary interdisciplinary ferment as philosophy, biology and physics all converged on the study of the human mind.¹⁴³ Philosophers had long been preoccupied with epistemological issues,¹⁴⁴ but now, under the ever-widening influence of Newtonian

142. Holmes was born on March 8, 1841, in Boston, the son of Amelia Jackson and Oliver Wendell Holmes, Sr., the latter a professor of anatomy at the Harvard Medical School and a well-known poet and writer. Holmes began his studies at Harvard College in 1857, and entered Harvard Law School in 1864. During the three years before entering law school he fought, and was nearly killed, in the Civil War. He engaged in the private practice of law in Boston from 1866 until January 1882, when he taught for a short time at Harvard Law School. Holmes was appointed to the Massachusetts Supreme Judicial Court in December 1882 and became Chief Justice in 1899. Apart from trips to Europe, Holmes continued to live in Boston with his wife Fanny until his appointment to the United States Supreme court in 1901. See NOVICK, *supra* note 141, app. A at 379-82. See generally HOWE, SHAPING YEARS, *supra* note 31 (presenting a biography of Holmes' education and experiences before his appointment to the Supreme Court).

143. The historian Peter Gay aptly characterized the nineteenth century as "the psychological century par excellence." GAY, FREUD, *supra* note 119, at 129. See generally CHARLES TAYLOR, SOURCES OF THE SELF 305-90 (1989) (discussing the influence of nature and naturalism upon the study of mental life).

144. Gary Hatfield notes that "[v]irtually all histories of psychology echo Ebbinghaus's remark that psychology has had a 'brief history' but a 'long past.'" GARY HATFIELD, THE NATURAL AND THE NORMATIVE: THEORIES OF SPATIAL PERCEPTION FROM KANT TO HELMHOLTZ 8 (1990). The long past refers to the history of the study of the mind within philosophy—a study that dates as far back as Aristotle—and to the history of the study of the mind within physiology. See *id.* at 8 & n.9. Immanuel Kant took the position that psychology could not be a rational science based on *a priori* mathematical principles nor an experimental science based on *a posteriori* objective methods of observation. See IMMANUEL KANT, CRITIQUE OF PURE REASON 25-42 (Norman Kemp Smith trans., Random House, abridged edition 1958) (1781); see also HATFIELD, *supra*, at 67-68; David E. Leary, *Immanuel Kant and the Development of Modern Psychology* [hereinafter Leary, *Kant and Modern Psychology*], in THE PROBLEMATIC SCIENCE: PSYCHOLOGY IN NINETEENTH-CENTURY THOUGHT 17, 21-23 (William R. Woodward & Mitchell G. Ash eds., 1982) [hereinafter PROBLEMATIC SCIENCE]. Because the study of the human mind defied quantitative methods and mathematical laws, the best psychology could hope to be was, in Kant's view, a "merely empirical" science, that is, a descriptive science focused on the structure and functioning of the human mind. See IMMANUEL KANT, METAPHYSICAL FOUNDATIONS OF NATURAL SCIENCE 3-17 (James Ellington trans., Bobbs-Merrill Co. 1970) (1786); see also PATRICIA KITCHER, KANT'S TRANSCENDENTAL PSYCHOLOGY 11-14 (1990) (discussing Kant's view of psychology as a science); David E. Leary, *The Historical Foundation of Herbart's Mathematization of Psychology*, 16 J. HIST. BEHAV. SCI. 150, 151 (1980) [hereinafter Leary, *Herbart's Mathematization of Psychology*] (describing how, in Kant's view, "merely empirical" knowledge—knowledge that is "a posteriori, contingent, or probable"—could not be truly scientific because "it would be neither certain nor necessary"). Kant's critique of rational

physics, the study of mental life had become the province of the natural sciences as well.¹⁴⁵ Holmes, the son of a physician and a committed intellectual, was bound to be affected by these contemporary developments, which we know he studied carefully. This Part examines nineteenth-century empirical psychology to assess the impact of these intellectual currents on Holmes's own developing psychology. By this analysis, I hope not only to expose how these intellectual forces may have shaped Holmes's psychological views, but more importantly to draw out the stark difference between Holmes's views and those of his empirical contemporaries. Holmes, unlike others of his generation, never renounced the psychological insights of Romanticism.

Any examination of nineteenth-century empirical psychology must begin with the work of German physiologists, who, in the early part of the century, turned their attention to the mechanisms by which the human mind takes in information from the world. Relying on the empirical methods of observation and induction, these early

psychology set the stage for the early-nineteenth-century shift away from philosophical psychology to the empirical science of the mind, despite the fact that Kant reintroduced rational principles into his empirical psychology, *see infra* note 155, and, with his principle of transcendentalism, ultimately reinforced Cartesian dualism within psychology, *see BORING, supra* note 104, at 249.

145. *See* HATFIELD, *supra* note 144, at 25-26. Beginning in 1860, a veritable explosion of activity occurred both abroad and in the United States as empirical psychology struggled for disciplinary independence against its traditional sovereign—philosophy. *See* William R. Woodward, *Introduction: Stretching the Limits of Psychology's History* [hereinafter Woodward, *Stretching the Limits*], in PROBLEMATIC SCIENCE, *supra* note 144, at 1-3.

Wilhelm Wundt established the first full-fledged experimental laboratory devoted exclusively to psychological research at the University at Leipzig in 1879, *see BORING, supra* note 104, at 323-24; while in the United States, William James had an informal demonstrational laboratory as early as 1875, *see id.* at 509, and G. Stanley Hall established the first American experimental psychological laboratory in 1883, *see id.* at 520. Alexander Bain published the first psychological journal, entitled *Mind*, in England in 1876. *See id.* at 236. The following year, G. Stanley Hall founded the *American Journal of Psychology*, the first such journal in the United States. *See id.* at 520.

These years also witnessed the academic institutionalization of psychology as an independent discipline both in Europe, *see* R. Steven Turner, *Helmholtz, Sensory Physiology, and the Disciplinary Development of German Psychology*, in PROBLEMATIC SCIENCE, *supra* note 144, at 148-51 ("In the German university system until the last quarter of the nineteenth century psychology did not exist as an independent discipline, but rather as a subfield of general philosophy."), and in the United States, *see* EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 16 (1973) (describing how Chicago and Cornell established departments of psychology in 1892). *See generally* Mitchell G. Ash, *Epilogue: Reflections on Psychology in History*, in PROBLEMATIC SCIENCE, *supra* note 144, at 359-64. As the discipline developed, professional roles were also delineated. *See* Woodward, *Stretching the Limits, supra*, at 5.

physiologists saw the experimental study of perception and sensation—in particular, reflexes, optics and acoustics—as the key to unlocking the mysteries of the human mind. Although empirical psychology never completely severed its relationship to philosophy,¹⁴⁶ the overall goal was to understand human consciousness in scientific rather than speculative terms.¹⁴⁷ While very few psychologists in the nineteenth century went so far as to embrace purely materialist theories of human nature, almost all can be said to have adopted an empirical approach to the study of the mind.¹⁴⁸

Nineteenth-century empirical psychology had three main attributes that distinguished it from the tradition of philosophical psychology: first, its methods were *experimental* rather than speculative; second, it was a psychology of *consciousness* as well as the material brain and nervous system; and third, it was *experiential* rather than nativist when it came to the sources of human knowledge and behavior. The experimental nature of the new psychology officially began with the establishment in 1879 of Wilhem Wundt's laboratory in Leipzig, the first laboratory in the world devoted exclusively to psychological research.¹⁴⁹ Wundt and his colleagues adapted the experimental methods developed for the natural sciences, which included observation and hypothesis, to the study of consciousness, perception and movement. Yet while the *methods* of the natural sciences were considered germane to the new psychology, the subject of psychological study exceeded the merely physical.¹⁵⁰ Beginning with Wundt, the experimental psychologists studied the physiological processes of movement, perception and sensation, but

146. See Leary, *Kant and Modern Psychology*, *supra* note 144, at 35-37; Turner, *supra* note 145, at 150.

147. Wilhelm Wundt, the founder of experimental psychology, called the new field "physiological psychology," and "taught his vast school that experimentation upon the model laid down by sensory physiology is what differentiates the new psychology from the older philosophical tradition." Turner, *supra* note 145, at 150-51.

148. See HATFIELD, *supra* note 144, at 16. What I refer to here as "materialism" is the belief that mind can be understood entirely by reference to its physical properties. Materialist psychology falls within the broader category of empirical psychology or science—encompassing modern neuropsychology—which posits the mind as operating according to a set system of laws analogous to physics.

149. See *supra* note 145. The English philosophers Alexander Bain and Herbert Spencer in their popular textbooks of psychology had successfully integrated the old philosophical psychology with the new physiological physiology, but they did not themselves engage in experimental research. See BAIN, *MENTAL SCIENCE*, *supra* note 86; HERBERT SPENCER, *THE PRINCIPLES OF PSYCHOLOGY* (3d ed. 1926).

150. See HATFIELD, *supra* note 144, at 25-26.

they also studied emotions, memory, dreaming, imagination, and attention.¹⁵¹ The new psychology was an integrative science studying the nervous system, consciousness and behavior together.¹⁵²

Finally, the new psychologists were united in their opposition to nativist theories of human nature. Instead they generally adhered to the experiential view that mental ideas and beliefs are acquired during the individual's lifetime rather than given prior to experience.¹⁵³ As Helmholtz explained, the experiential view "seeks to demonstrate that at least no other forces are necessary for their origin beyond the known faculties of our minds, even though these forces themselves may remain entirely unexplained."¹⁵⁴ Following Helmholtz, the new psychologists were all, to some degree, committed to the experiential position that ideas and beliefs are acquired during the lifetime of the individual rather than innately given.¹⁵⁵

151. See ROBINSON, *supra* note 29, at 280. English psychologists from this period did not engage in experimental research, but they were no less students of consciousness than their German counterparts. For example, Alexander Bain included chapters on intellect, ideas, emotions, and will, along with the traditional physiological subjects of sensation and movement in his treatise on psychology. See generally BAIN, *MENTAL SCIENCE*, *supra* note 86.

152. Daniel Robinson argues that Wundt's commitment was neither to radical materialism nor to radical idealism, but instead "to the psychology of *consciousness*, a science of mind as mind," which included "the facts of consciousness, itself, which established that significant human actions proceed from volition, and that volition was not explainable in terms of neural events." ROBINSON, *supra* note 29, at 309. Beneath Wundt's physiological psychology lay a theory of volition or will in human nature. For discussion of the idealist element in Wundt's thinking, see David E. Leary, *German Idealism and the Development of Psychology in the Nineteenth Century*, 18 J. HIST. PHIL. 299, 313 (1980) [hereinafter Leary, *German Idealism*].

153. "German philosophical psychology had stressed intuitionism—that is to say, the doctrine of innate ideas, of *a priori* judgments, of native categories of the understanding. British psychology was built about empiricism, the doctrine of the genesis of the mind through individual experience." BORING, *supra* note 104, at 304.

154. *Id.* at 305. Helmholtz referred to the experiential view as "empirism." When Helmholtz drew his famous distinction between empirism and nativism, he was engaged in a debate over the causal origins of visual perception. See *id.*

155. The work of some early experimental physiologists such as Müller and Lotze, see *id.* at 261-70, retained strong elements of nativism and thus openly straddled the divide between traditional philosophical psychology and the new experimental psychology. David Leary explains how many of the ideas of German idealism influenced the new psychology, in Leary, *Kant and Modern Psychology*, *supra* note 144, at 30-37.

Kant had set the empirical agenda for modern psychology; his theory of mental functioning was, in his own terms, "transcendental," see KITCHER, *supra* note 144, at 14-15; it posited innate categories of understanding that served to organize information derived from the senses. According to Kant, the geometric axioms and such physical axioms as causation, time and space are examples of the mind's *a priori* faculties. See BORING, *supra* note 104, at 305. When it came to psychology, therefore, it would appear that Kant was confusedly both an *empiricist* and a *nativist*. Gary Hatfield argues that we can reconcile Kant's empiricism and

The remainder of this Part provides a more detailed exploration of Holmes's relationship to three main empirical schools of psychology: German physiological psychology, British associationism, and American functionalism. Each of these schools made their presence felt in the intellectual life of educated Americans in the mid- to late-nineteenth century, and each may be said to have influenced Holmes's psychological views. However, Holmes ultimately refused to accept that the basic tenets of empirical psychology were sufficient to explain the deeper dimensions in human nature.

While Holmes's view of human nature incorporated some aspects of empirical psychology, the most important being an emphasis on mental experience over philosophical speculation, his idea of the unconscious ultimately cannot be squared with late-nineteenth-century approaches to empirical psychology nor with the utilitarian and pragmatic philosophies that often relied upon them. This Part explores how his belief in unconscious motivations and their effect on human behavior—their irrational, passionate, driven, unknowable quality—distinguishes Holmes from the empirical psychologists and legal thinkers of his day.

A. German Physiological Psychology

Nineteenth-century empirical psychology began in earnest with German scientists¹⁵⁶ working in the areas of physiology, physics and astronomy.¹⁵⁷ These scientists did not think of themselves as psychologists, nor did they consider their subject matter to be psychology; there would be no self-styled psychologists in Germany or elsewhere until after 1860.¹⁵⁸ Nevertheless, the discovery by

transcendentalism by viewing the former as a product of his naturalist psychology and the latter as a product of his rationalist philosophy. See HATFIELD, *supra* note 144, at 77-87. For the most part, the empirical psychologists viewed Kant's nativism as sheer metaphysics. Helmholtz directly challenged Kantian nativism in a series of papers arguing that the geometric axioms are not innate but are arrived at by way of individual experience. See BORING, *supra* note 104, at 306.

156. In the second half of the nineteenth century, "psychology was a Germanic science, and Germany was the heart of the empire." Peters & Mace, *supra* note 103, at 20. The roots of empirical psychology might be traced back as far as Aristotle. See ROBINSON, *supra* note 29, at 51 (describing Aristotle's psychology as a combination of empirical, associationist and behaviorist principles). *But see* HATFIELD, *supra* note 144, at 22 (arguing that Aristotle's psychology was not empirical).

157. See BORING, *supra* note 104, at 31 (arguing that early-nineteenth-century students of psychology considered themselves to be "psychologists, physicists or astronomers").

158. See *id.*

Charles Bell and Francois Magendie of the anatomical distinction between sensory and motor nerves,¹⁵⁹ the formulation of the law of specific nerve energies by Bell and Johannes Müller,¹⁶⁰ and Hermann von Helmholtz's theory of the conservation of energy¹⁶¹ are three examples of the work carried out in the early to mid-nineteenth century by this group of brilliant German scientists—a group which also included Gustav Fechner, Wilhelm Wundt, G.E. Müller, Ernst Brücke, Emil du Bois Raymond, and Carl Ludwig, among others.¹⁶² The appointment, in 1833, of the philosopher Johannes Müller to the first chair in physiology “marked the recognition of physiology as an independent sphere of science,” and launched the field of experimental physiology.¹⁶³ The most prominent physiologist of his day,¹⁶⁴ Müller formulated the law of specific nerve energies, the doctrine “that the quality of experience is determined not by the features of the objective stimulus but by the particular nerves responding to it.”¹⁶⁵ Müller himself never fully surrendered his idealist beliefs, but his work was followed by a generation of

159. See *id.* at 31-32. Bell in 1811 and Magendie in 1822 separately discovered that “the sensory fibers of a mixed nerve enter the spinal cord at a posterior (dorsal) nerve root, whereas the motor fibers of the same nerve leave the cord by an anterior (ventral) root.” *Id.* at 27. The Bell-Magendie law was important to psychology because it elevated confidence in the experimental approach to the study of sensation and behavior and established the structural basis for reflex formation. See ROBINSON, *supra* note 29, at 274.

160. Bell anticipated the law of specific nerve energies, but Müller is given credit for its formal specification. For an explanation of the law, see ROBINSON, *supra* note 29, at 274-75.

161. Hermann von Helmholtz gave his famous paper discussing the principle of the conservation of energy in 1847. See BORING, *supra* note 104, at 299.

162. The earlier generation of experimental physiologists, collectively known as the Helmholtz School, has been called “one of the most remarkable groups of scientific workers the world has ever seen.” BRETT'S HISTORY OF PSYCHOLOGY 635 (R.S. Peters ed., 1962). As Turner noted:

[The] physiological results [of the German school] so enriched the domain of sensory psychology that they tempted many to believe that the future of psychology lay in a more intimate connection with physiology and a greater reliance upon the experimental method, which had obviously produced such important results for physiology itself.

Turner, *supra* note 145, at 149.

163. BRETT'S HISTORY OF PSYCHOLOGY, *supra* note 162, at 632. Prior to 1833, physiology had been taught as a branch of medicine. See Peters & Mace, *supra* note 103, at 19.

164. See ROBINSON, *supra* note 29, at 274 (stating that Müller's *Handbuch der Physiologie des Menschen* “was the most authoritative work of the period”).

165. *Id.*

experimental physiologists who openly embraced empirical naturalism.¹⁶⁶

Müller's work directly inspired the great physicist Hermann von Helmholtz and his young assistant, Wundt, the founder of the first experimental psychology laboratory. Following von Helmholtz, whom he assisted in the physiology institute at Heidelberg from 1858 to 1864,¹⁶⁷ Wundt was committed to banishing the element of biological vitalism present in the work of Müller.¹⁶⁸ By the mid-nineteenth century, psychologists in England and in the United States were travelling to Germany to study with Helmholtz, Wundt, du Bois Raymond and others, and their work was heavily influenced by the experimental successes coming from Germany at this time.¹⁶⁹

German physiological psychology did not adopt a completely materialist attitude toward mind, focused exclusively on anatomical, chemical and neurological factors. Wundt and his colleagues were more broadly interested in the relationship between physiological processes and consciousness; they studied reflexes and visual perception as well as emotions, attention and memory.¹⁷⁰ Physiological psychology, both in Germany and abroad, studied the causal relationship between bodily processes and mental states. Moreover, Wundt's work included an emphasis on concepts such as creative

166. As Daniel Robinson points out, Müller's work on the law of specific nerve energies, while it reflected the subjectivism of his Kantian idealism, nevertheless "placed the qualitative and quantitative aspects of experience in the nerves, that is, in *nature*," *id.* at 275, thereby opening the door to empirical psychological research, *see supra* note 155.

167. *See* Turner, *supra* note 145, at 154.

168. *See* ROBINSON, *supra* note 29, at 278-79. Boring tells us that in 1845 four young, enthusiastic and idealistic physiologists, all pupils of the great Johannes Müller, all later to be very famous, met together and formed a pact to fight vitalism. *See* BORING, *supra* note 104, at 34. "They were, in order of age, Carl Ludwig, who was then twenty-nine, Emil du Bois-Reymond, Ernst Brücke and Hermann von Helmholtz, then twenty-four. They were joining forces to fight vitalism, the view that life involves forces other than those found in the interaction of inorganic bodies." *Id.* at 708. Boring has been criticized for overplaying the successes of experimental psychology and understating the idealism present in Wundt's psychology. *See* Kurt Danziger, *Wundt and the Two Traditions of Psychology*, in WILHELM WUNDT AND THE MAKING OF A SCIENTIFIC PSYCHOLOGY 73 (R.W. Rieber ed., 1980) [hereinafter THE MAKING OF A SCIENTIFIC PSYCHOLOGY].

169. *See* Peters & Mace, *supra* note 103, at 20. G. Stanley Hall and William James, the founding fathers of American psychology, both traveled to Germany. Hall went from 1878 to 1880, and he "lived next door to Fechner, studied physiology in Ludwig's laboratory, and became Wundt's first American student in the year of the founding of the Leipzig laboratory." BORING, *supra* note 104, at 519. For an account of James's travels, *see infra* notes 186-94 and accompanying text.

170. *See supra* note 150 and accompanying text.

synthesis and social psychology that reflected some continuity with the tradition of German philosophical idealism dating back to Kant.¹⁷¹ Physiological psychology adopted the methods of empirical science, but many of its greatest proponents incorporated some idealist elements into their empirical work.¹⁷² As we shall see, Holmes's Romantic psychology may claim an affinity with the integrative approach of nineteenth-century German physiological psychology.

While Holmes never directly referred in his writings to the experimental psychology being embraced by German scientists, we know he was aware of it. To begin with, some of his Cambridge contemporaries, including William James, traveled to Leipzig and Berlin during the 1860s and 1870s to study experimental psychology with Wundt and his colleagues.¹⁷³ The work of British and American psychologists well known to Holmes had been influenced by the ideas emanating from Germany, and German psychology was being written and talked about in the intellectual circles in which Holmes traveled. His personal relationships with William James and Chauncey Wright in the 1860s and 1870s, both of whom were enthusiastic about the physiological studies being done in Germany, would alone have been sufficient to have kept Holmes abreast of the major developments in nineteenth-century psychology. Holmes occasionally joined James, Wright, Charles Peirce and others who met regularly during 1871 and 1872 to discuss matters of philosophy,¹⁷⁴ and the members of the Metaphysical Club, as it is now called, certainly discussed the significance of physiology for the domain of psychology.¹⁷⁵ While there is no direct evidence that Holmes was present when the members of the Metaphysical Club debated physiological psychology, the ideas were clearly in the Cambridge air at that time.

171. See *supra* notes 151-53 and accompanying text.

172. See generally Leary, *German Idealism*, *supra* note 152. Revisionist historical studies have highlighted the idealist element in Wundt's thinking. See, e.g., Arthur L. Blumenthal, *Wilhelm Wundt and Early American Psychology*, in *THE MAKING OF A SCIENTIFIC PSYCHOLOGY*, *supra* note 168, at 118.

173. See *infra* notes 192-93 and accompanying text.

174. See WIENER, *supra* note 79, at 18-30. In 1927, Holmes remembered that "in those days I was studying law and I soon dropped out of the band, although I should have liked to rejoin it when it was too late." Max H. Fisch, *Alexander Bain and the Genealogy of Pragmatism*, 15 J. HIST. IDEAS 413, 414 n.6 (1954).

175. "Wright articulated an early stimulus-response theory of behavior, Peirce carried out the first psychological experiments in the new world, and James laid the foundations of American psychology with his book *Principles of Psychology* (1890)." THOMAS HARDY LEAHEY, *A HISTORY OF PSYCHOLOGY: MAIN CURRENTS IN PSYCHOLOGICAL THOUGHT* 248 (2d ed. 1987).

Moreover, in 1867 Holmes read *The Correlation and Conservation of Forces*,¹⁷⁶ a collection of essays edited by Edward Youmans that explored the issue of dynamic force, or *vis viva*, in psychology as well as in the natural sciences. Leibniz had posited the existence of primitive monads possessing a dynamic force—the *vis viva*—common to all nature.¹⁷⁷ Included among the essays in the Youmans volume is one by Helmholtz, entitled *On the Interaction of Natural Forces*, which contains his famous idea on the conservation of force as “a new and universal natural law” in physics, biology, astronomy and physiology.¹⁷⁸ The concept of *vis viva*, or “living force,” was used by Helmholtz in the mid-nineteenth century to “arrive at the conclusion that Nature as a whole possesses a store of force which cannot in any way be either increased or diminished.”¹⁷⁹ Helmholtz’s law of the conservation of force deeply influenced German physiological psychologists, and, although his article does not directly address psychology, the idea of *vis viva* as a constitutive element in mental life is one of the general themes of the book.

The same year he read the Youmans book, Holmes also read *The Physiology and Pathology of the Mind*, by the British physiologist Henry Maudsley.¹⁸⁰ An influential proponent of physiological psychology,¹⁸¹ Maudsley was a militant materialist who

176. See *infra* note 188.

177. See *supra* note 104 and accompanying text. According to Leibniz, as well as his followers such as Herbart, all ideas had a given amount of momentum or force and were always in the process of either gaining or losing strength. See Leary, *Herbart’s Mathematization of Psychology*, *supra* note 144, at 150. This dynamic mental process occurred in accordance with the laws of the conservation of force, and took place on a continuum from the unconscious to conscious awareness. “As mental phenomena gain in intensity (relative to the intensities of other concurrent mental phenomena), they ‘rise’ to the peak of consciousness; as they lose their intensity, they ‘sink’ toward and sometimes below the threshold of consciousness.” *Id.* at 153-54.

178. H.L.F. Helmholtz, *On the Interaction of Natural Forces*, in *THE CORRELATION AND CONSERVATION OF FORCES* 211, 211 (Edward L. Youmans ed., New York, D. Appleton & Co., 2d ed. 1869) [hereinafter *CORRELATION AND CONSERVATION*].

179. *Id.* at 227. Because of its connection to the law of the conservation of energy, *vis viva* allowed philosophers to believe, as Kant did not, that the laws of mental force could be established in a mathematical and certain way. See Leary, *Herbart’s Mathematization of Psychology*, *supra* note 144, at 154.

180. See Little, *supra* note 12, at 175. Maudsley was “largely responsible for the creation of out-patient facilities in mental hospitals,” ROBINSON, *supra* note 29, at 307, and was well-known for his powerful defense of the medical model of mental illness, see Kurt Danziger, *Mid-Nineteenth-Century British Psycho-Physiology: A Neglected Chapter in the History of Psychology*, in *PROBLEMATIC SCIENCE*, *supra* note 144, at 119, 137-38.

181. See Danziger, *supra* note 180, at 135 (calling Maudsley “an extremely influential figure in his profession [of psychology] over a period of nearly half a century”).

took reflex action to be the basic paradigm for the functioning of all levels of the nervous system, including volitional action.¹⁸² Holmes was also familiar with the work of Alexander Bain, whom he met in England in 1866 and on whose work he explicitly relied in his own writings.¹⁸³ While known principally for his contribution to associationist psychology, Bain was an early proponent of physiological psychology as well. In a letter he wrote to John Stuart Mill in 1851, Bain remarked that “[t]here is nothing I wish more than so to unite psychology and physiology that physiologists may be made to appreciate the true ends and drift of their researches into the nervous system.”¹⁸⁴ The importance of physiology and the study of the nervous system to the “science of man” would have been apparent to Holmes from reading both Maudsley and Bain.

Most important, however, was Holmes’s friendship with psychologist William James, a relationship which flourished during the period in which he was formulating his ideas for *The Common Law* but which cooled considerably in later years.¹⁸⁵ During the winter of 1866-67, the friendship between Holmes and William James was at its most intimate, and James’s biographer tells us that the two “wrangled” by the hour during the evenings over metaphysical issues. In particular, we are told, Holmes and James were preoccupied by the question of *vis viva*. James left for Germany in April 1867, and wrote to Holmes from Berlin “inquiring after the results of his ‘study of the *vis viva* question, and referring familiarly to their ‘dilapidated old friend the Cosmos.’”¹⁸⁶ Holmes replied on December 15, in a letter that reveals a sentimental side not always apparent from his published writings:

Oh! Bill, my beloved, how have I yearned after thee all this long time. How I have admired those brave, generous and magnanimous traits of which I will not shame thee by speaking. I am the better that I have seen thee and known thee,—let that suffice May this

182. See *id.* Years after he published *The Physiology and Pathology of the Mind*, Maudsley would write: “The conscious is but a superficial wave moving over the silent depths of the unconscious.” HENRY MAUDSLEY, *THE PHYSIOLOGY OF MIND* 446 (London, MacMillan 1876).

183. See *infra* notes 210-13 and accompanying text.

184. Letter from Alexander Bain to John Stuart Mill, *quoted in* ROBINSON, *supra* note 29, at 273.

185. The two became close friends for a period when both were pursuing studies at Harvard: Holmes in law and James in medicine. See PERRY, *supra* note 1, at 89.

186. Letter from William James to Oliver Wendell Holmes, Jr. (Sept. 17, 1867), *quoted in* PERRY, *supra* note 1, at 89.

get to you in time to wish you a Happy New Year. By Heaven I do,—*vis viva* must wait. There are stickers I can't answer. *But I rather think you found difficulty—at least I did—in the insufficiency of facts.*¹⁸⁷

It is not insignificant that the question of *vis viva* so occupied the attention of Holmes and James from 1866 to 1868.¹⁸⁸ *Vis viva* was thought to provide a mechanistic explanation for activity in both the natural and the mental spheres; it opposed vitalistic doctrines that attributed a transcendent life force or anima to all living beings.¹⁸⁹ Not surprisingly, Holmes's devout father had openly rejected the mechanistic doctrine of *vis viva* in favor of a metaphysical view of the divine origin of mental forces:

187. Letter from Oliver Wendell Holmes, Jr. to William James (Dec. 15, 1867), *quoted in* PERRY, *supra* note 1, at 90 (emphasis added). Holmes's comment to James was strikingly similar to the diary entry he made after meeting Alexander Bain two years earlier: "Excellent for facts and criticism but not open to the infinite possibilities—Eh?" HOWE, SHAPING YEARS, *supra* note 31, at 228.

188. From his diaries, we do know a bit about the level of agitation Holmes experienced in the spring of 1867 in connection with *vis viva*. As Mark DeWolfe Howe describes:

On March 27 Holmes had begun his evening by reading Adams on *Equity*, but dropped his studies to call on the Jameses in Cambridge, where he passed the time 'with Bill who has been at work on measure of vis viva and imparted the ferment to me.' From that evening until April 23 Holmes pursued his quarry: on April 4 he had "talk with Bill, highly satisfactory as to vis viva"; on April 10 he read essays on the same subject in Youmans' *Correlation and Conservation of Forces*; on April 21 he "fiddled with vis viva" till he thought he would "go crazy"; again on the 22nd he went to the Athenaeum "looking up v.v." and then rushed to Cambridge "to see C. Wright on vis viva—he wasn't in so went to H. James." On the 23rd the chase was over: "End of vis viva I hope for the present. Understand some of my difficulties at least. Evening . . . wrote in my note book as to vis viva."

HOWE, SHAPING YEARS, *supra* note 31, at 255-56 (quoting Diary of Oliver Wendell Holmes, Jr.). Holmes's chase did not, in fact, end at that time. Several months later Holmes wrote to James in Berlin that "since seeing you I have written three long letters to you at different intervals on *vis viva*, each of which I was compelled to destroy because on reflection it appeared either unsound or incomplete." Letter from Oliver Wendell Holmes, Jr. to William James (Dec. 15, 1867), *quoted in* PERRY, *supra* note 1, at 89.

189. Even the nineteenth-century physiologists most committed to the idea of *vis viva* combined the mechanical law of the conservation of force with idealist or theistic thinking, especially when it came to positing the ultimate source of this living force in nature. Helmholtz concludes his discussion of the dynamics of living force in astronomy, physics, biology and physiology with the following passage:

Thus the thread which was spun in darkness by those who sought a perpetual motion has conducted us to a universal law of nature, which radiates light into the distant nights of the beginning and of the end of the history of the universe. To our own race it permits a long but not an endless existence; it threatens it with a day of judgment, the dawn of which is still happily obscured. As each of us singly must endure the thought of his death, the race must endure the same. But above the forms of life gone by, the human race has higher moral problems before it, the bearer of which it is, and in the completion of which it fulfils its destiny.

The autocrat of the breakfast table taught his medical students that mechanical force—the *vis viva* of Descartes, Leibnitz, and Helmholtz—“is only the name for the incomprehensible cause of certain changes known to our consciousness, and assumed to be outside of it. For me it is the Deity himself in action.”¹⁹⁰

In contrast to his father, Holmes seemed troubled that *vis viva*, while a desirable refutation of his father’s metaphysical views, was nevertheless an insufficient account of mental processes.¹⁹¹

James spent the winter of 1872 in Berlin, where he attended lectures on physiology by Emil Du Bois-Reymond, an important member of the Helmholtz School; these lectures left James lamenting that he had no “firm and thoroughly familiar *basis* of knowledge” in the sciences of “mathematics, physics, chemistry, logic, and the history of metaphysics.”¹⁹² James expressed his enthusiasm for physiological psychology in a letter to his father:

I think now of going to Heidelberg. There are two professors there, Helmholtz and Wundt, who are strong on the physiology of the senses, and I hope I shall be well enough to do some work in their laboratory My ultimate prospects are pretty hazy. If I only had been well and could have got out here a year or two earlier to one of these physiological laboratories, the way of life would have been singularly simplified for me. At present my health is so uncertain that I cannot look forward to teaching physiology. As a central point of study I imagine that the border ground of physiology and psychology, overlapping both, would be as fruitful as any, and I am now working on to it.¹⁹³

James returned to Cambridge and, despite his ill health, began in 1872 to teach courses in anatomy and physiology at Harvard, and in

Helmholtz, *supra* note 178, at 247. Helmholtz’s reference to “destiny” in this passage reminds us that the mechanical laws of natural force were not always part of a mechanical or despiritualized worldview. See Edward L. Youmans, *Introduction* to CORRELATION AND CONSERVATION, *supra* note 178, at xi.

190. WIENER, *supra* note 79, at 173-74 (quoting O.W. HOLMES, *MEDICAL ESSAYS 1842-1882*, at 219 (5th ed. 1888)). Philip Wiener concludes that, unlike his father, “[y]oung Holmes regarded *vis viva* or the conservation of energy as in no need of divine concurrence,” *id.* at 174, although his conclusion may somewhat misleadingly undervalue the difficulty Holmes had with the doctrine.

191. See *supra* notes 187-88 and accompanying text.

192. Letter from William James to Thomas W. Ward (Nov. 7, 1867), *quoted in* PERRY, *supra* note 1, at 84.

193. Letter from William James to Henry James, Sr. (Dec. 26, 1867), *quoted in* PERRY, *supra* note 1, at 85.

1875 began teaching a graduate course entitled “The Relations Between Physiology and Psychology.”¹⁹⁴ While James ultimately abandoned physiological psychology,¹⁹⁵ his goal to develop a “new psychology” that combined scientific observation with speculative thought could not have escaped Holmes’s attention at the time. However absorbed Holmes may have been in editing Kent’s *Commentaries on American Law*,¹⁹⁶ he continued to associate regularly with James during the period that James was lecturing on physiology and setting up the country’s first psychological laboratory at Harvard.¹⁹⁷

The short-lived friendship between Holmes and James during these few years was formed not in spite of their differences—James the tender-minded philosopher and Holmes the tough-minded lawyer—but at least in part because of a shared philosophical aversion to absolute idealist philosophies.¹⁹⁸ James’s lifelong effort to instill a more pluralistic idealism into physiological psychology came surprisingly close, in form if not in substance, to Holmes’s mature views. Although Holmes would later criticize James’s tender-minded attitude, it is not at all clear that Holmes disagreed with the notion that human nature can only be fully comprehended in nonempirical terms. Later in his life Holmes reflected on James’s “great keenness in seeing into the corners of the human heart . . . a great psychologist—not a great philosopher, I always have thought him.”¹⁹⁹ James eventually left much of his skepticism behind for a more overtly

194. PERRY, *supra* note 1, at 182-83.

195. See WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE* (1902) [hereinafter JAMES, *VARIETIES OF RELIGIOUS EXPERIENCE*]. “The new German mechanistic physiology had powerfully impressed him intellectually, but oppressed him spiritually with its deterministic philosophical implications.” RAYMOND E. FANCHER, *PIONEERS OF PSYCHOLOGY* 252 (3d ed. 1996).

196. See Letter from Mrs. Henry James to Henry James, Jr. (Feb. 28, 1873), *quoted in* PERRY, *supra* note 1, at 98-99:

Wendell Holmes dined with us a few days ago. His whole life, soul and body, is utterly absorbed in his *last* work upon his Kent. He carries about his manuscript in his green bag and never loses sight of it for a moment . . . His pallid face, and this fearful grip upon his work, makes him a melancholy sight.

197. See PERRY, *supra* note 1, at 98-99; 182-83.

198. Each of them “abhorred traditional systems of static law and absolutist metaphysics.” WIENER, *supra* note 79, at 172; see also Letter from William James to Oliver Wendell Holmes, Jr. (May 15, 1868), *quoted in* PERRY, *supra* note 1, at 94 (“The fact is, my dear boy, that I feel more as if you were my ally against what you call ‘the common enemy’ than anyone I know.”).

199. Letter from Oliver Wendell Holmes, Jr. to Morris R. Cohen (Feb. 16, 1925), *in The Holmes-Cohen Correspondence*, 9 J. HIST. IDEAS 1, 43 (Felix S. Cohen ed., 1948).

religious metaphysics,²⁰⁰ while Holmes—always less speculative and more pessimistic than James—chose to maintain his distance from religious or absolutist thinking.²⁰¹ The intellectual bond between Holmes and James in these early years captures something of Holmes's early, yet sustained, dissatisfaction with scientific empiricism.²⁰²

Some insight into the complicated influence of James's psychology on Holmes may also be found in the fact that, in 1892, eleven years after he published *The Common Law*, Holmes read three books by the German philosopher-psychologist Hermann Lotze, including *Outlines of Psychology*.²⁰³ The precipitating factor behind Holmes's reading of Lotze seemed to be the publication of James's abridged version of the *Principles of Psychology*, for James considered Lotze to be the "deepest philosopher" of the day.²⁰⁴ Holmes also read at this time Josiah Royce's recently published *The Spirit of Modern Philosophy*, whose author had spent two years in Germany studying with Lotze at Gottingen.²⁰⁵ In the century since Lotze's death,²⁰⁶ this once-prominent philosopher has become an obscure figure in the history of psychology; Holmes's reading of Lotze was not even commented on by Mark De Wolfe Howe nor, it seems, by any other scholar of Holmes's work. Nevertheless, Holmes's interest in the German philosopher suggests that Holmes had a much more sophisticated knowledge of the psychological literature of his time than the commentary on Holmes would lead one to believe. Lotze expounded a three-part program for the development of a "scientific psychology": (1) descriptive or empirical psychology, (2) explanatory, mechanical or metaphysical psychology, and (3) ideal or speculative psychology, the last of which provided an account of the spiritual essence of the soul.²⁰⁷ The fact that Holmes

200. See PERRY, *supra* note 1, at 330.

201. See *infra* note 316.

202. See Mark DeWolfe Howe, Introductory Notes, The Letters of Henry James to Mr. Justice Holmes (unpublished manuscript, on file with the Harvard Law School Library) [hereinafter Howe, Introductory Notes, The Letters of Henry James] (making reference to William James and Holmes, and noting the "considerable similarity in their ultimate beliefs").

203. The two others were *Outlines of Practical Philosophy* and *Outline of Metaphysics*. See Notes of Howe, Holmes's Reading List, *supra* note 16, at Year 1892.

204. PERRY, *supra* note 1, at 329.

205. See FREDERICK COPLESTON, 8 A HISTORY OF PHILOSOPHY 268 (1966).

206. Lotze died in 1881. See BORING, *supra* note 104, at 262.

207. See OUTLINE OF PSYCHOLOGY: DICTATED PORTIONS OF THE LECTURES OF HERMANN LOTZE 119-28 (George T. Ladd ed. & trans., Ginn & Co. 1886) (1881).

developed a theory of the unconscious at odds with physiological materialism and more akin to the work of James and Lotze is itself indicative of the extent to which Holmes was in fact committed to the nonempirical element—the “imaginative impulse”—in human nature.

Given Holmes’s reading, his relationship with James, and the general intellectual *zeitgeist* of the day, it seems reasonable to conclude that Holmes was aware of the basic ideas constituting the new physiological psychology. He never broached in writing the subject of physiological psychology, and there is no reason to believe that his view of human nature was directly shaped by the work of this German school. Nevertheless, the indirect influence on Holmes certainly existed; physiological psychology had a formative influence on psychologists such as James who did directly influence Holmes. Physiological psychologists were drawing attention to the concept of unconscious processes, and their ideas likely provided intellectual fodder for Holmes’s own theory of unconscious life. In the following passage on the unconscious, Holmes borrows from the language of late-nineteenth-century physiological psychology:

[T]he logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, *and yet the very root and nerve of the whole proceeding.*²⁰⁸

Despite the reference to “root and nerve” here, Holmes, like James, did not adopt the materialist view that unconscious elements of the mind were actually constituted by emotional stimuli produced by the body’s nervous system. Holmes’s reference to unconscious nervous stimuli here served as a metaphor for legal decisionmaking, not as a physiological explanation. Holmes appreciated the causal relationship between “consciousness” and “nerve tissue”—“the total is the datum,” as he put it²⁰⁹—but his idea of the unconscious went far

208. *The Path of the Law*, *supra* note 3, at 466, reprinted in 3 COLLECTED WORKS, *supra* note 3, at 397 (emphasis added).

209. In later years, Holmes expressed the view—in language that the nineteenth-century German physiologists would have used—that “I don’t perceive why there is any more right to think away consciousness than there is to think away nerve tissue—the total is the datum.”

beyond that of German physiological psychology to encompass the realm of unconscious feelings, irrational desires, and inner transcendence.

B. *British Associationist Psychology*

In the spring of 1866, after receiving his degree from Harvard Law School,²¹⁰ the young Holmes traveled to Europe. On one of his last evenings in London, he had dinner with John Stuart Mill, “with whom was Mr. Bain, psychologist.”²¹¹ At the time, Alexander Bain was a forty-eight year old Scottish philosopher who held the chair in logic at the University of Aberdeen. Bain is best known for his contribution to British associationist psychology, although his influence was felt in the fields of physiological and functionalist psychologies as well.²¹²

Bain provides a useful point of departure for understanding Holmes’s relationship to British associationist psychology for two reasons. First, the meeting with Bain obviously made an impression on the youthful Holmes. Bain’s *The Emotions and the Will* was among the first works that Holmes read upon his return from Europe, and Holmes explicitly relied upon Bain’s *Mental Science* in the first lecture of *The Common Law*.²¹³ Second, an understanding of

Letter from Oliver Wendell Holmes, Jr. to Morris R. Cohen (July 21, 1920), in *The Holmes-Cohen Correspondence*, *supra* note 199, at 19.

210. See HOWE, SHAPING YEARS, *supra* note 31, at 204.

211. Diary of Oliver Wendell Holmes, Jr. (June 11, 1866), *quoted in* HOWE, SHAPING YEARS, *supra* note 31, at 228.

212. See, e.g., Fisch, *supra* note 174, at 417-19, 425-27. Bain’s work, which was heavily weighted in the direction of physiology, was particularly important to Holmes’s contemporaries Charles Peirce and William James. See *id.* at 426. Chauncey Wright referred to Bain as “the greatest of living psychologists,” *id.* at 430, and Wright’s work was closely associated with Bain’s by several scholars, see *id.* at 431 & n.76. Moreover, both Wright and James used Bain’s books in their courses on psychology. See *id.* at 429, 432.

There is no reason to believe that Bain ever read the early German physiologists, see BORING, *supra* note 104, at 238, and he never engaged in experimental work. Nevertheless, his physiological ideas developed contemporaneously with German physiological psychology, although it was notably more philosophical and, perhaps for that reason, more influential in the United States.

213. See THE COMMON LAW, *supra* note 6, at 11. When Holmes met Bain in 1866, the Scottish philosopher had already published his great two-volume treatise on psychology: *The Senses and the Intellect* in 1855 and *The Emotions and the Will* in 1859, published together in abridged form under the title *Mental Science* in 1868. See BORING, *supra* note 104, at 235; Fisch, *supra* note 174, at 417-18. In 1870, the Holmeses borrowed Bain’s *The Emotions and the Will* and *The Senses and the Intellect*, along with James Mill’s *Analysis of the Phenomenon of the Human Mind* from the Athenaeum Library. See Fisch, *supra* note 174, at 426. Fisch also notes that among the books from Holmes’s library which are now in the Library of Congress

Bain's ideas will help to clarify in what way Holmes's thought cannot be squared with the psychological premises of nineteenth-century utilitarian jurisprudence.²¹⁴ Bain was an associationist psychologist with close personal ties to the utilitarian philosophers, particularly John Stuart Mill,²¹⁵ and a consideration of his work helps to explain what led Holmes to reject the central tenets of the associationist theory of ideas upon which classical utilitarian philosophy rested.²¹⁶

Briefly summarized, associationism was a theory of mind that understood all mental phenomena as the product of simple impressions received from the senses.²¹⁷ In the associationist view, simple sense impressions were received by the mind and combined in mechanical ways according to the laws of similarity and contiguity to form complex ideas.²¹⁸ Associationist doctrine did not originate with Bain; the phrase "association of ideas" was first used by John Locke,²¹⁹ and the concept was also prominent in Hume's philosophy.²²⁰ Within the history of psychology, however, David Hartley is

are Bain's *Logic and Mental and Moral Science*. See *id.* at n.54. They appear not to have been read; the leaves were never cut apart. See *id.*

214. David Luban, discussing Holmes's rejection of basic utilitarian principles, provides the following useful summary of classical utilitarian thought:

U.1. Actions should be assessed according to their consequences.

U.2. The relevant consequences are those pertaining to human welfare.

U.3. Human welfare is assessed by summing the welfare of all affected individuals.

U.4. In performing this addition, each one counts for one and none for more than one.

Luban, *supra* note 31, at 518. As Luban explains, the "classical hedonistic utilitarians identified welfare with happiness or pleasure." *Id.*

215. Bain developed a close working relationship with the younger Mill, and his associationist ideas deeply influenced Mill's own work, especially *A System of Logic*, the final draft of which Bain helped to revise. See POHLMAN, *supra* note 42, at 124; George E. Davie, *Alexander Bain*, in 1 THE ENCYCLOPEDIA OF PHILOSOPHY 243, 243 (Paul Edwards ed., 1967).

216. For a full discussion of the contribution of associationist psychology to utilitarian thought, see POHLMAN, *supra* note 42, at 116-26.

217. See Woodward, *Stretching the Limits*, *supra* note 145, at 96-98; POHLMAN, *supra* note 42, at 119.

218. See HOWARD C. WARREN, A HISTORY OF THE ASSOCIATION PSYCHOLOGY 3-9 (1921).

219. See JOHN LOCKE, *Of the Association of Ideas*, in 1 AN ESSAY CONCERNING HUMAN UNDERSTANDING 527 (Alexander Campbell Fraser ed., Oxford, Clarendon Press 1894) (1690). The idea had distant roots in Aristotle's laws of the association of remembered images and sensations. See WARREN, *supra* note 218, at 4.

220. See ELIE HALÉVY, THE GROWTH OF PHILOSOPHIC RADICALISM 9 (Mary Morris trans., 1928); ROBINSON, *supra* note 29, at 177-78 (citing DAVID HUME, A TREATISE OF HUMAN NATURE (L.A. Selby-Bigge ed., Clarendon Press 1973) (1740)).

the recognized founder of the modern principle of association.²²¹ Hartley's *Observations on Man* was the first psychological work to synthesize Newtonian physics and sensory physiology within the framework of associationism.²²² Hartley's theory of associationism exerted a considerable influence on utilitarian thought, for he assumed, "as Hume and every cobbler in England did, that pleasure and pain are the glue that binds our associations."²²³ Bentham referred to Hartley's work in his *Introduction to the Principles of Morals and Legislation*, where Bentham acknowledged that he learned from Hartley "to treat happiness as a sum of simple pleasures, united by association."²²⁴

Associationist psychology was formally introduced into utilitarian philosophy by James Mill,²²⁵ whose 1829 work, *Analysis of the Phenomena of the Human Mind*, marked the historical highpoint of associationist psychology. Associationist psychology appealed to utilitarian philosophers such as the Mills and Bain in part because it provided a scientifically empirical account of mental phenomena: to the extent that the mind mechanically associated certain sensations with pleasure and others with pain, an empirical psychological foundation for utilitarian ethics was established. By reducing mental life to its simplest empirical elements, associationism established a positivist and inductive scientific foundation from which the utilitarians could launch their political reforms. From the associationist viewpoint, the determination of "the greatest happiness of the greatest number" could be made strictly on empirical and quantitative grounds.²²⁶

Alexander Bain and John Stuart Mill, each in their own way, adopted the framework of associationist psychology developed by James Mill while rejecting its mechanical and passive view of mental processes.²²⁷ Bain's emphasis on mental activity surmounted the worst mechanistic tendencies of James Mill's associationism by integrating

221. See HALÉVY, *supra* note 220, at 7.

222. See ROBINSON, *supra* note 29, at 250-51. Hartley "reduced the explanation of the facts to the simplest possible terms, and brought all associations under the single heading of association by contiguity." HALÉVY, *supra* note 220, at 8.

223. ROBINSON, *supra* note 29, at 251.

224. HALÉVY, *supra* note 220, at 8 (citing Bentham). Bentham also defined the important influence of habit as involving the operation of the principle of the association of ideas. See *id.*

225. See POHLMAN, *supra* note 42, at 116.

226. See *id.* at 12.

227. In fact, Bain assisted John Stuart Mill in revising Mill's *System of Logic* in 1842. See Davie, *supra* note 215, at 243.

a volitional component into psychological processes, although volition itself was a concept that appeared to violate the utilitarian rejection of “will” as a fictitious entity.²²⁸ As Max Fisch observed, “Bain sets out to maintain and to elaborate the doctrine of the association of ideas, but he quite transforms it by introducing a physiological basis and more especially by appealing to the ‘inherent activity of the system.’”²²⁹ By focusing attention on the physiology of will, which constituted the fourth and final book in his treatise *The Mental Science*, Bain’s work seemed to bridge the divide between traditional associationism and the new empirical psychology.

While Bain sought to introduce a conception of human volition into associationist psychology, his ideas did not appear to satisfy the young Holmes. In his diary, Holmes described himself as being “struck with the absence of imaginative impulse, especially in Mr. Bain—excellent for facts and criticism but not open to the infinite possibilities—Eh?”²³⁰ Holmes appreciated associationist psychology for its defiance of metaphysical psychology and for its empirical approach to mental life, but he also appeared inclined to think that associationism—as represented by its most important contemporary spokesperson—was limited to “facts and criticism.” What was missing in associationist thought for Holmes was the “imaginative impulse” capable of entertaining “infinite possibilities.” Holmes appeared to share William James’s dissatisfaction with associationism’s reduction of mind to elements lacking any animating principle—an imaginative impulse, for example—uniting those elements into a unified whole.²³¹

Directly upon his return from Europe, Holmes read the second volume of Bain’s two-volume work, *The Emotions and the Will*.²³² The fact that Holmes chose to read this particular volume suggests that he

228. See POHLMAN, *supra* note 42, at 113-14; COPLESTON, *supra* note 205, at 93-94. See also BORING, *supra* note 104, at 236 (“[Bain] represented the culmination of associationism and the beginning of its absorption into physiological psychology.”); BRETT’S HISTORY OF PSYCHOLOGY, *supra* note 162, at 459 (noting that Bain, having “restat[ed] with remarkable fullness and completeness the whole doctrine of Associationism. . . . actually transgressed his own limits as he advanced”).

229. Fisch, *supra* note 174, at 419. The element of activity in Bain’s idea of mental processes would become the basis for his definition of belief, and an important influence on pragmatist philosophers. See *infra* notes 232-35 and accompanying text.

230. Diary of Oliver Wendell Holmes, Jr. (June 11, 1866), *quoted in* HOWE, SHAPING YEARS, *supra* note 31, at 228.

231. See PERRY, *supra* note 1, at 195.

232. See Little, *supra* note 12, at 172.

had decided—perhaps on the advice of Bain or Mill—to search for evidence of the “imaginative impulse” in Bain’s work; the first volume of Bain’s treatise focused on sense, movement, instinct and intellect, the core subjects within traditional associationist thought,²³³ but the second volume that Holmes read upon his return went beyond traditional associationist psychology to discuss affective and volitional components of mental life such as feelings, motives, belief and will.²³⁴ Nevertheless, if Holmes had been searching for evidence of the imaginative impulse in this volume, he would have been disappointed since Bain’s concept of volition remained, as discussed above, physiological.²³⁵

If the only evidence of Holmes’s criticism of associationism was this brief remark on Bain in his travel diary, we should hesitate to say more, especially because Holmes clearly admired Bain’s effort to develop an empirical psychology: he read Bain’s work, he cited to it in *The Common Law*, and he expressly referenced associationist psychology.²³⁶ Holmes also advanced an argument for criminal deterrence that is consistent with utilitarian thought and thus, to some minds, suggests that he held associationist views.²³⁷ It is also

233. This volume—entitled *Movement, Sense, and Intellect*—was primarily a physiological study and established the important link between associationist psychology and the work being done by German physiologists. See *supra* notes 156-72 and accompanying text. The second volume—*The Intellect*—was a straightforward explication of the processes of association.

234. See BAIN, *THE EMOTIONS AND THE WILL* (New York, Appleton & Co. 3d ed. 1888). While Holmes may not have found in this volume the “imaginative impulse” he had found lacking in Bain personally, he did find the discussion of revenge that he later relied upon in *The Common Law*. See BAIN, *MENTAL SCIENCE*, *supra* note 86, at 260-67. He would also have run across the definition of “belief” so influential with his intellectual contemporaries in Cambridge. See *id.* at 371-85.

235. Bain even went so far as to criticize Wilhelm Wundt, the founder of experimental psychology, for “the treatment of Association, as almost exclusively an affair of motives.” Alexander Bain, *On “Association” Controversies*, 12 *MIND* 161, 180-81 (1887).

236. See *The Law in Science*, *supra* note 33, at 447, reprinted in 3 *COLLECTED WORKS*, *supra* note 3, at 408-09 (“The early law embodied hatred for any immediate source of hurt, which comes from the association of ideas and imperfect analysis.”). Bain’s introduction of physiology into psychology was considered a crucial step in the development of a mental science that involved a unified study of the mind as both consciousness and matter. See *Introductory Notice*, in BAIN, *MENTAL SCIENCE*, *supra* note 86, at 5, 5-6. Hume had first sought to create “a cataloguing of mental phenomena, in order to uncover the elements of the mind, together with an attempt to discover universal principles, or general laws, that account for the combinations and dynamic relations among the mental elements.” HATFIELD, *supra* note 144, at 26. Hume, like Bain, found these laws in the concept of association. See *id.*

237. See *THE COMMON LAW*, *supra* note 6, at 48-49. In support of his view that Holmes was an associationist thinker, H.L. Pohlman argues that Holmes’s theory of “can’t helps” was an associationist concept:

certainly true that his emphasis on innate self-preference resembled the psychological hedonism of nineteenth-century utilitarian thought, and his support for subordinating private interests to the public welfare resembled the utilitarian goal of promoting “the greatest happiness of the greatest number.”²³⁸ Nevertheless, Holmes clearly was not a strict utilitarian in the nineteenth-century tradition of Bentham and Austin.²³⁹ He explicitly rejected the greatest happiness principle, preferring instead to base law on the Darwinian belief in the survival of the fittest.²⁴⁰ More significant for the present discussion, Holmes’s thought conflicted with at least two central tenets of the “mental science” that informed nineteenth-century utilitarian thought: the doctrine of anti-nativism and the denial of unconscious mental processes.

With respect to the doctrine of anti-nativism, Holmes did not adhere to the experiential view that all ideas derive from the senses. The emotion of revenge, for example, which most associationist psychologists would have viewed as the product of experience, Holmes described as an instinctual force whose elemental origins transcend individual experience. Utilitarians, too, described human beings in instinctual terms, but their associationist psychology tended to reduce innate faculties to the desire for pleasure and the avoidance of pain.²⁴¹ Instincts arose as a stimulus to pleasure; the need for revenge, for example, was less an instinct than a result of an experience by which vengeance became associated with pleasure.²⁴² In

The psychological laws of the human mind turn truth into a system of ‘can’t helps’ and therefore a set of intellectual limitations. . . . Each person was therefore trapped in the associations of his personal experience; what he believed revealed more concerning the limitations of his experience than the nature of reality.

POHLMAN, *supra* note 42, at 127. Although Holmes did seem open to the idea that some beliefs are arrived at by way of association, there is nothing necessarily associationist about Holmes’s “can’t helps”—compelled beliefs might just as easily come to one by way of transcendental insight or intuition.

238. JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 3 (J.H. Burns & H.L.A. Hart eds., Cambridge Univ. Press 1988) (1977). The first edition of Bentham’s work was published in 1776 as an introduction and commentary to Blackstone’s *Commentaries*.

239. See Luban, *supra* note 31, at 517-23.

240. See Oliver Wendell Holmes, Jr., *The Gas-Stokers’ Strike*, 7 AM. L. REV. 582, 583 (1873), reprinted in 1 COLLECTED WORKS, *supra* note 3, at 323, 325.

241. Bain in fact defines instinct as limited to the rudimentary abilities of the infant—reflex actions, primitive movements, expressions of joy or anger or sorrow—and the “germs of volition,” which include the instinct for “self-conservation” and the desire for acquisitions. See BAIN, MENTAL SCIENCE, *supra* note 86, at 68-81.

242. See *id.* at 260-61 (discussing revenge as a form of “irascible emotion” resulting from the “pleasure of malevolence” associated with inflicting harm on others). James Mill does not even address the topic of instincts in his comprehensive treatise on associationist psychology.

contrast, Holmes depicted the individual as a being subject to the vicissitudes of innate passions such as revenge.²⁴³ Unlike associationist thinkers, Holmes did not view the mind in passive and mechanical ways operating in response to the experience of pleasure and pain. He did acknowledge the role that habit played in mental life, particularly with respect to the survival of traditional ways of thinking.²⁴⁴ But however important, habit was not the only, or even among the major, psychological processes at work. In his discussions of psychological animism and revenge, Holmes depicted the human mind as possessing dynamic elements of its own. The primitive desire for revenge, Holmes suggested, arises from within and motivates the individual to act.

Second, Holmes, as we have seen, was very much interested in the realm of unconscious thoughts and feelings. In contrast, associationists studied the phenomenon of consciousness; the idea of the unconscious did not mesh well with empirical psychologies favoring observable phenomena and verifiable laws. The utilitarian antipathy to the unconscious emerged full-blown in the philosophical exchange between John Stuart Mill and Sir William Hamilton over the existence of the unconscious, an exchange in which Holmes appeared to take a particular interest.²⁴⁵ A Scottish philosopher who borrowed from German idealism,²⁴⁶ Hamilton had set out his theory of “unconscious modifications” in his *Lectures on Metaphysics and Logic*, to which John Stuart Mill wrote a well-known reply, *An Examination of Sir William Hamilton’s Metaphysics*.²⁴⁷ Mill, drawing

See JAMES MILL, ANALYSIS OF THE PHENOMENA OF THE HUMAN MIND (John Stuart Mill ed., 1869).

243. See *supra* notes 53-60 and accompanying text.

244. See *The Path of the Law*, *supra* note 3, at 469, reprinted in 3 COLLECTED WORKS, *supra* note 3, at 398-99.

245. Having read both Hamilton and Mill just prior to his trip to Europe in 1866, Holmes was certainly aware of this early debate over the unconscious, and it is not unlikely that his view of the effect of unconscious thoughts and feelings on conscious behavior came directly from Hamilton’s treatise. Around this time, Holmes also read the following works directly addressing the “Hamilton v. Mill” debate, as Holmes referred to it: David Masson, *Recent British Philosophy: A Review, With Criticisms; Including Some Comments on Mr. Mill’s Answer to Sir William Hamilton*; James McCosh, *An Examination of Mr. J.S. Mill’s Philosophy*; Herbert Spencer, *The Test of Truth*. See Little, *supra* note 12, at 171-74.

246. See BRETT’S HISTORY OF PSYCHOLOGY, *supra* note 162, at 448.

247. Hamilton asked “[w]hether the mind exerts energies, and is the subject of modifications, of neither of which it is conscious.” SIR WILLIAM HAMILTON, *Lecture XVIII*, in 1 LECTURES ON METAPHYSICS AND LOGIC 338 (Rev. H.L. Mansel & John Veitch eds., Edinburgh, William Blackwood & Sons 7th ed. 1882). He answered the question in the affirmative. See *id.* at 347-48. Mill quoted passages which capture Hamilton’s theory in its full:

on associationist psychology, rejected Hamilton's belief in the unconscious out of hand.²⁴⁸ At most, Mill was willing to concede the possibility of unconscious physiological processes, such as might occur in visual perception when a wheel of seven colors spins and creates the impression of a solid eighth color.²⁴⁹ To Mill, unconscious ideas or feelings simply did not exist.

Hamilton's theory of the unconscious to which Mill so vehemently objected was notably like the theory of the unconscious presented by Holmes in *The Common Law*. In language strikingly similar to that which would be used by Holmes, Hamilton maintained his belief in "mental modifications,—*i.e.* mental activities and passivities, of which we are unconscious, but which manifest their existence by effects of which we are conscious."²⁵⁰ Nevertheless, while Holmes shared Hamilton's belief in the unconscious, he clearly did not share Hamilton's more general criticism of scientific empiricism.²⁵¹ It cannot be denied that Holmes was an ally of the

"[T]he sphere of our conscious modifications is only a small circle in the centre of a far wider sphere of action and passion, of which we are only conscious through its effects." JOHN STUART MILL, AN EXAMINATION OF SIR WILLIAM HAMILTON'S PHILOSOPHY 345 (London, Longmans, Green & Co. 6th ed. 1889) (quoting HAMILTON, *supra*, at 349). In his book, Mill devoted an entire chapter, which he entitled "Sir William Hamilton's Doctrine of Unconscious Mental Modifications," *id.* at 341, to respond to Hamilton's argument; he referred to Hamilton's position as "in opposition to most English philosophers," *id.*

248. Mill argued:

And [physiology] may be the source of many of those states of internal or mental feeling which we cannot distinctly refer to a prototype in experience, our experience only supplying the elements from which, by this kind of mental chemistry, they are composed. The elementary feelings may then be said to be latently present, or to be present but not in consciousness. The truth, however, is, that the feelings themselves are not present, consciously or latently, but that the nervous modifications which are their usual antecedents have been present, while the consequents have been frustrated, and another consequent has been produced instead.

MILL, *supra* note 247, at 357.

249. See *id.* at 357 n.*. John Stuart Mill came close to developing a theory of mental creativity, but his notion of synthesis—which sounded so promising—remained a largely mechanistic theory of mental creativity. See Danziger, *supra* note 180, at 80-81.

250. 1 HAMILTON, *supra* note 247, at 347. Hamilton went even further than approving unconscious mentations: "I do not hesitate to maintain, that what we are conscious of is constructed out of what we are not conscious of,—that our whole knowledge, in fact, is made up of the unknown and the incognisable." *Id.* at 348.

251. Writing to H.H. Brownell in 1865, Holmes commented:

Law, of which I once doubted, is now my enthusiastic pursuit. I am up to my ears in it all the time. One good thing about it is that it makes play of what otherwise would be work, e.g. Metaphysics. Such spongy stuff as Sir William Hamilton, for instance, after a little pile of Contingent Remainders or Pleading goes down like macaroni. You give a little suck, and pwip!! you've swallowed it and never known it.

Letter from Oliver Wendell Holmes, Jr. to Henry Howard Brownell (Oct. 31, 1865), *quoted in* HOWE, SHAPING YEARS, *supra* note 31, at 203.

nineteenth-century utilitarian philosophers insofar as they opposed the metaphysical idealism that Hamilton's philosophy represented. Yet unlike the classical utilitarian philosophers, who might legitimately be criticized for reducing human nature to a hedonistic psychology of pleasure and pain, Holmes did not embrace associationism as a satisfactory account of mental life. He drew upon associationism in developing his ideas about the importance of habitual ways of thinking in legal decisionmaking. Nevertheless, his idea of the unconscious is perhaps the clearest indication that Holmes rejected the empirical limitations of associationist psychology and, consequently, the classical utilitarian philosophy that drew upon it.

C. American Functionalism

The influence of German physiological psychology on the early development of American psychology, or "functionalism," cannot be overstated. Some of the country's most important psychologists came from Germany, and many others traveled to Germany to study with Wundt at his laboratory in Leipzig.²⁵² G. Stanley Hall established the first formal psychological laboratory at Johns Hopkins in 1883, modeled on the Leipzig laboratory.²⁵³ But however similar in appearance, American psychology asserted its distinctness early on with its enthusiasm for Darwinian theory.²⁵⁴ Primarily the offspring of William James and John Dewey,²⁵⁵ American psychology understood human consciousness to be an evolutionary adaptation to man's changing environmental circumstances; in the functionalist view, consciousness had evolved to help man meet the more complex

252. See BORING, *supra* note 104, at 505. William James expressed a desire to study with Hermann von Helmholtz and Wilhelm Wundt during his travels to Germany, but he only got as far as Dresden and Berlin. See Letter from William James to Thomas W. Ward (Autumn, 1867), *quoted in* PERRY, *supra* note 1, at 181.

253. See BORING, *supra* note 104, at 20.

254. See Letter from William James to Charles Eliot (Dec. 2, 1875), *quoted in* WIENER, *supra* note 79, at 98 n.*:

A real science of man is now being built up out of the theory of evolution and the facts of archeology, the nervous system and the senses. It has already a vast material extent, the papers and magazines are full of essays and articles having more or less to do with it.

255. John Dewey was the organizing force behind the Chicago school of functional psychology in the late nineteenth century. See BORING, *supra* note 104, at 552. He published a textbook entitled *Psychology* in 1886, a philosophical treatise on the new psychology that reflected the Hegelian views of his early years. See ALAN RYAN, JOHN DEWEY AND THE HIGH TIDE OF AMERICAN LIBERALISM 74 (1995).

problems posed by civilized society.²⁵⁶ James was the first to formulate a functional theory of consciousness, and his psychological ideas provided an empirical foundation for the pragmatist philosophy he spawned.²⁵⁷ James emphasized individual will as a fact of human nature that served to unify mental processes by reference to functional ends. The pragmatists rejected the atomistic elementalism of associationist psychology in favor of a unified consciousness oriented toward practical consequences.

In contrast to the German system, which was primarily a descriptive science aimed at discovering the general structure of mental processes, American psychology was a study of the mind in use.²⁵⁸ Structural psychologists, represented in the nineteenth century by both the physiological psychology of Wundt and the associationist psychology of Bain, were more interested in describing mental processes than in understanding them. Functionalist psychologists shared with dynamic psychologists, whose most famous representative was Freud, an interest in the question of *why* human beings act and think in particular ways. Freudian psychology explained human behavior in terms of subjective motivation whereas American functionalism focused on consequences, but both were purposive psychologies interested in the meaning of human behavior. With their particular emphasis on evolutionary adaptation, Americans "changed the pattern of psychological activity from the description of the generalized mind to the assessment of personal capacities in the successful adjustment of the individual to his environment."²⁵⁹ By 1934, Joseph Jastrow, writing for the *Encyclopaedia of the Social Sciences*, could assert that in the United States "substantially all current psychology is functional in scope and purpose."²⁶⁰

Darwinian ideas were not the only addition American psychologists made to the basic experimental framework imported from

256. See BORING, *supra* note 104, at 551.

257. "American psychology [in the late nineteenth century] went functional, assessing mind and mental activity in terms of use and survival value. William James was the first to see psychology this way. John Dewey supported him. Together they brought functional gospel into philosophy as pragmatism." BORING, *supra* note 104, at 243. As Boring explains, "With all this in mind we can see meaning in what otherwise would seem a paradox, that James could in 1876 offer the first course on physiological psychology in America and also use as a text Spencer's *Principles of Psychology*." *Id.*

258. See *id.* at 506.

259. *Id.* at 507.

260. Joseph Jastrow, *Psychology*, in *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES* 588, 593 (Edwin R.A. Seligman & Alan Johnson eds., 1934).

Germany. Although Americans were not predisposed toward the mechanism and elementalism of British associationism, Alexander Bain's theory of belief did have a formative influence on the psychological ideas of pragmatist philosophers such as Charles Peirce and William James. In a famous reference to Bain, Peirce described Bain's definition of "belief" as "that upon which a man is prepared to act," a definition from which "pragmatism is scarce more than a corollary."²⁶¹ James Mill had defined "belief" as the product of "indissoluble association,"²⁶² a classic associationist concept appealing to mechanical mental processes. Bain moved beyond Mill's definition by appealing to "the inherent activity of the system";²⁶³ he concluded that our beliefs exist in relation to our willingness to act upon them. In the 1868 edition of Bain's *Mental Science*, which Holmes read in preparation for writing *The Common Law*, the chapter on belief is revealingly located in the section of the book entitled "The Will." Volition, or activity, was the defining element of Bain's system of belief, and it was the defining element of the pragmatists' functionalist psychology, too.

In many ways, Holmes's psychology exhibited some distinctively American characteristics. To begin with, Holmes—like Darwin—was a nativist. He viewed mind as constituted by native elements, in particular instinctual passions and desires. His belief in the instinct for self-preservation and his description of man's innately aggressive and vengeful nature have elements of the Darwinian orientation of functionalist psychology. Like James, who developed a complex theory of instincts, which he believed numbered over thirty,²⁶⁴ the functionalists posited the biological origin of certain human traits and capabilities.²⁶⁵ In contrast to the mechanical processes of associationism and the physiological processes of the German school, Holmes described human beings as acting on inner psychological forces: revenge, self-protection, sexual desire.²⁶⁶ This concept of mental activity was shared by the functionalists, who tied mental activity to the human organism's drive to survive and who premised belief on the individual's willingness to act.

261. 5 CHARLES SANDERS PEIRCE, COLLECTED PAPERS: PRAGMATISM AND PRAGMATICISM 7 (Charles Hartshorne & Paul Weiss eds., 1934).

262. MILL, *supra* note 242, at 368.

263. Fisch, *supra* note 174, at 419.

264. See WIENER, *supra* note 79, at 112.

265. See PERRY, *supra* note 1, at 195.

266. See *supra* Part I.A.

Holmes shared with functionalist psychologists a view of the mind in action, but his conception of mental activity could not have been more opposed to that of the pragmatic philosophers. While adaptation was the *raison d'être* of mental activity in the functionalist view, conflict was the defining characteristic of Holmes's psychology. Central to Holmes's theory was the idea that the egoistic needs of human beings are in conflict with their social needs, and that the purpose of law is to keep men from satisfying their egoistic needs at the expense of the social good.²⁶⁷ In this respect, Holmes's psychology clearly differed from the functional psychology developed by Peirce, James and Dewey.²⁶⁸ There is very little in Holmes's written work to suggest that he viewed man's emotional life primarily as an adaptive response to his environment; to the contrary, Holmes was aware of the extent to which law must bend to innate psychological needs.²⁶⁹ While it is true that Holmes perceived the plasticity of instinctual expression—the idea that the form of instinctual gratification changes over time—he seemed convinced that instinctual needs basically remain constant.²⁷⁰ It was this element of innate conflict that rendered Holmes's view of human nature so much more pessimistic than the American functionalists' more optimistic belief in the unfolding of human adaptation.

Finally, Holmes's psychology differed from functionalism in its basic orientation. As described above, functionalism—the psychological arm of pragmatism—was a practical science oriented to the study of mind in use. In contrast, Holmes was interested in the issue of dynamic motivation: *The Common Law* was, at bottom, a study in revenge as the motivational source of law. Functionalism explains mental processes by reference to their consequences,

267. Freud would explain this conflict in intrapsychic terms as a conflict between the id and the ego. See FREUD, THE EGO AND THE ID, *supra* note 77, at 35-37.

268. Holmes' psychology also prefigured—in broad outline—the dynamic psychology of Freud. See *infra* notes 381-83 and accompanying text. While it might be possible to adopt the functionalist view that mental activity serves the end of helping the individual adapt to his or her environment, and yet still acknowledge the conflict that attends that process, I do not believe that there is any evidence that Holmes held this more moderate view. Instead, Holmes consistently emphasized the individual's selfish and aggressive instincts, the Malthusian principle of social domination, and an often callous disregard for the less fortunate participants in man's struggle for survival. See *infra* notes 369-71 and accompanying text.

269. See HOWE, PROVING YEARS, *supra* note 90, at 214 ("In connection with problems of possession he emphasized the same consideration which had moved him towards his central conclusions with respect to criminal law—the necessity, as he saw it, that the law accept human nature as it finds it.").

270. See *supra* notes 70-74 and accompanying text.

whereas Holmes's psychology was more often concerned with the subjective causes of human behavior. Holmes was instrumental when it came to designing a workable system of law, but he did not view human nature entirely in terms of the consequences of behavior. And although he advocated banishing subjective motivation from legal scrutiny,²⁷¹ thereby enshrining behaviorism as the standard of legal liability, he did not share the behaviorist antipathy toward introspective theories of mind.²⁷² To the contrary, Holmes's basis for rejecting subjectivism as a legal standard reflected his awareness of the dynamic and often opaque complexities underlying human behavior. The clear trend in American psychology in the late nineteenth century was against dynamic theories in the direction of functional and, eventually, behaviorist approaches.²⁷³ Holmes resisted this development by focusing on the motivational forces—both conscious and unconscious—in human nature. This dynamic element in his thinking, which so presciently anticipated Freud's creation of psychoanalytic psychology, sharply distinguished Holmes from the prominent American psychologists of his day.

Although Holmes's views on human nature did not conform to any of the three major schools of empirical psychology, it would be a mistake to conclude that late-nineteenth-century empirical psychology as a whole did not leave its mark on Holmes's work. Holmes brought an empirical, rather than logical or rationalist, temperament to all his spheres of inquiry, and psychology was no exception. As we have seen, empirical psychology had much to offer Holmes regarding the association of ideas, *vis viva*, the unconscious, instincts, and human purposiveness. With his enthusiasm for the external standard of liability, Holmes confirmed that empirical—indeed, behaviorist—approaches are desirable, if not sometimes

271. See *supra* notes 61-69 and accompanying text.

272. See, e.g., J.B. Watson, *Psychology as the Behaviorist Views It*, in *A SOURCE BOOK IN THE HISTORY OF PSYCHOLOGY* 507, 513-14 (Richard J. Herrnstein & Edmund G. Boring eds., 1965) (promoting a psychology that would "never use the terms consciousness, mental state, mind, content, . . . imagery, and the like").

273. Functionalism started off interested in the use to which subjective thoughts and ideas were put, but the focus on activity soon led American psychologists in the direction of the study of behavior proper. Eventually, functional psychology, which began as an introspective psychology of the mind, gave way to the study of the observable effects of mind on human behavior, or behaviorist psychology. See BORING, *supra* note 104, at 506. Paradoxically, to the extent that functional psychology was in some ways the natural precursor of both the objective science of behaviorism and the subjective science of dynamic psychology, it stressed both observable activity and purposive behavior. See *id.*

necessary, in law. The empirical determination of how an individual acts is all that should matter, in Holmes's view, in the *application*, although not formulation, of legal rules. While Holmes clearly believed in the importance of facts, he eventually concluded that more than facts were needed to understand the full range of subjective human experience. The inability of empirical psychology to comprehend the imaginative, irrational and unconscious elements of individual experience is what drove Holmes to develop a nonempirical psychology constructed neither from the theology of his father nor from the rationalism of the philosophers, but from the era of Romantic literature and philosophy.

III. ROMANTIC HORIZONS

To reconcile oneself to life—to dimly apprehend that this dream disturbing the sleep of the cosm is not the result of dyspepsy, but is well—to suspect some of the divine harmonies, though you cannot note them like a score of music—these things, methinks, furnish vanishing points which give a kind of perspective to the chaos of events.²⁷⁴

For the few short years it lasted, Holmes's friendship with William James reflected a kinship of mind and spirit. In a letter dated December 15, 1867 to James, Holmes confided that “[i]n spite of my many friends I am almost alone in my thoughts and inner feelings,”²⁷⁵ a loneliness alleviated by the thought of James's companionship. The condition of inner solitude would burden Holmes throughout his career, but was also, to his mind, the price one must pay for “intellectual ambition.”²⁷⁶ Along with solitude, the themes of heroism, faith, will, nature, imagination, and dangerous action would form the Romantic core of Holmes's view of human nature and give content to his endeavor to make the study of law “heroic,” an endeavor that appeared to begin where the rational study of law left off.²⁷⁷ This Part explores the Romantic view of human nature present in Holmes's writings, although no claim is made that Holmes was a Romantic

274. Letter from Oliver Wendell Holmes, Jr. to William James (Apr. 19, 1868), *quoted in* PERRY, *supra* note 1, at 92.

275. Letter from Oliver Wendell Holmes, Jr. to William James (Dec. 15, 1867), *quoted in* PERRY, *supra* note 1, at 90.

276. *The Profession of the Law*, *supra* note 10, at 472.

277. Speaking to Harvard undergraduates in 1886, Holmes said, “I point to that which will make your study heroic.” *Id.*

generally. Rather, the more modest aim here is to illuminate the important influence of eighteenth-century Romantic ideas about human nature on Holmes's thought, and to show how these ideas mediated, as well as complicated, his general enthusiasm for scientific empiricism in law.

A. *German and English Romantic Influences*

The swift rise of empirical psychology in the second half of the nineteenth century was an extraordinary development, but one not without its critics. Most contemporary observers took the work being done by the new experimental psychologists to be valuable, but some were also dismayed by the failure of empirical psychology to develop a meaningful account of motivational sources and mental activity.²⁷⁸ Critics such as William James returned to religious thinking in order to escape empiricism's inevitable reduction of mind to its material or behavioral properties. Others, however, brought a different challenge to empirical psychology,²⁷⁹ a challenge that culminated in Freud's revolutionary effort to penetrate the empirical surface of consciousness and behavior in order to reach the region of unconscious fantasies and irrational desires beyond.²⁸⁰ Holmes wrote his most important philosophical works before Freud published *The Interpretation of Dreams* in 1899, but Holmes's view of human nature had strong overtones of the Romantic attitude that, in its secularized version,²⁸¹ would provide strong intellectual impetus for Freudian psychoanalytic psychology. Writing in the last four decades of the nineteenth century, Holmes expressed an ambivalence about empirical psychology that mirrored the despair many felt over the Enlightenment effort to reduce mind to its logical and material elements,²⁸² a despair first and most eloquently voiced by the late eighteenth and early nineteenth century Romantic poets and philosophers.

278. See *supra* Part II.

279. See ELLENBERGER, *supra* note 102, at 110-81 (discussing mesmerism and hypnotism, including the work of Charcot and Bernheim).

280. See GAY, FREUD, *supra* note 119, at 119 ("Freud developed his program within the framework of contemporary psychology, but broke through that framework at point after decisive point.").

281. See SUZANNE R. KIRSCHNER, THE RELIGIOUS AND ROMANTIC ORIGINS OF PSYCHOANALYSIS 150-78 (1996).

282. See *supra* notes 142-55 and accompanying text; *infra* note 284 and accompanying text.

“Romanticism” is a notoriously ambiguous word, and its meaning as used in this Article is intentionally broad. Arthur Lovejoy argued over half a century ago that there was not one Romanticism, but several different Romanticisms with varied and conflicting themes.²⁸³ Keeping in mind the danger of reducing such a broad range of philosophical and literary work to a single genre, the following generalizations will be made about the constellation of ideas associated with the term “Romantic.” In Germany and England in the late eighteenth and early nineteenth centuries, Romanticism arose in rebellion against the Enlightenment faith in reason and science as illuminating the path of social progress.²⁸⁴ The Romantic attitude toward human nature varied over time and among different writers, but its essential features included: (1) the supplementation of empirical knowledge with knowledge gained through intuition or imagination; (2) the focus on subjective experience or “inwardness”; (3) the emphasis on the limitations of intellect and reason; (4) the idea of conflict as inherent in human nature; (5) the acceptance, and even celebration, of the irrational; and (6) the view of nature as the

283. See Arthur O. Lovejoy, *On the Discrimination of Romanticisms*, in *ESSAYS IN THE HISTORY OF IDEAS* 228, 232 (1948) (“The word ‘romantic’ has come to mean so many things that, by itself, it means nothing. It has ceased to perform the function of a verbal sign.”); see also TAYLOR, *supra* note 143, at 368 (referring to “romanticism” as a “conceptual muddle”). Lovejoy’s view has not been accepted by those scholars who prefer a more loosely-defined use of the word. See, e.g., E.D. HIRSCH, JR., *WORDSWORTH AND SCHELLING: A TYPOLOGICAL STUDY OF ROMANTICISM* 2-3 (1971); TAYLOR, *supra* note 143, at 368-69. The cultural historian M.H. Abrams, for example, uses the word

as an expository convenience to specify . . . “some of the striking parallels, in authorial stance and persona, subject matter, ideas, values, imagery, forms of thought and imagination, and design of plot or structure” which are manifested in a great many important English and German writers, in a great variety of literary, philosophical, and historical forms, during those three or four decades after the outbreak of the French Revolution which, following common historical usage, I call the Romantic era . . .

M.H. Abrams, *Rationality and Imagination in Cultural History: A Reply to Wayne Booth*, *CRITICAL INQUIRY*, Spr. 1976, 447, 450-51 (quoting M.H. ABRAMS, *NATURAL SUPER-NATURALISM* 11-12 (1971)). Others have joined Abrams in repudiating the effort to define “Romanticism” with greater precision and in utilizing the word in self-consciously general terms. In their anthology of Romanticism, Harold Bloom and Lionel Trilling come to the sensible conclusion that “[t]he discrimination between Romanticisms generally ends in a hopeless jumble, and none will be attempted here.” HAROLD BLOOM & LIONEL TRILLING, *Romantic Poetry*, in *ROMANTIC POETRY AND PROSE* 3, 4 (Harold Bloom & Lionel Trilling eds., 1973); see also KIRSCHNER, *supra* note 281, at 153-58 (agreeing with Abrams’s resistance to any effort to define “Romanticism” more precisely).

284. See 2 PETER GAY, *THE ENLIGHTENMENT: AN INTERPRETATION—THE SCIENCE OF FREEDOM* 98-125 (1969); KIRSCHNER, *supra* note 281, at 150-53. Kirschner observes that Peter Gay has pointed out that the *philosophes* “were not as simplistically optimistic about the nature and effects of progress as is sometimes alleged.” *Id.* at 151.

inner source of transcendent meaning in the universe.²⁸⁵ The Romantic writers were, in varying guises and to varying degrees, opposed to the mechanistic and reductionist approach of the empirical psychologists who sought to apply the methods and laws of the natural sciences to the human mind.²⁸⁶ The high Romantics were dismayed by what they viewed as the disenchantment of the world brought about by the rationalist-empiricist ideals of the Enlightenment. "Against the classical stress on rationalism, tradition, and formal harmony, the Romantics affirmed the rights of the individual, of the imagination, and of feeling."²⁸⁷ Unlike the Enlightenment *philosophes*, who considered irrationalism a dark enemy to be vanquished by the light of reason, the Romantics typically proclaimed the need to integrate the irrational with the consciously rational elements in human nature.²⁸⁸

What most distinguished Romantic psychology from empirical schools of thought was its insistence on the importance of the inwardness of experience,²⁸⁹ of insight, and of imagination. This aspect of Romanticism had roots in Kant's conception of innate mental faculties. According to Kant, the mind is possessed of intuitive faculties such as causality, substance, necessity and existence that give order and meaning to knowledge gained through experience.²⁹⁰ For Kant, "[t]he term 'transcendental' designated the

285. This loose definition has been derived primarily from the following studies of Romanticism: M.H. ABRAMS, *NATURAL SUPERNATURALISM*, *supra* note 283; ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS* (Henry Hardy ed., Alfred A. Knopf, Inc. 1991) (1990); BLOOM & TRILLING, *supra* note 283; 4 PETER GAY, *THE BOURGEOIS EXPERIENCE—VICTORIA TO FREUD; THE NAKED HEART* (1995) [hereinafter GAY, *THE NAKED HEART*]; KIRSCHNER, *supra* note 281, at 149-66; TAYLOR, *supra* note 143; ROMANTICISM AND CONSCIOUSNESS (Harold Bloom ed., 1970); M.H. Abrams, *English Romanticism: The Spirit of the Age*, in ROMANTICISM AND CONSCIOUSNESS, *supra*, at 90 [hereinafter, Abrams, *English Romanticism*]; Lovejoy, *supra* note 283.

286. See WALTER JACKSON BATE, *FROM CLASSIC TO ROMANTIC: PREMISES OF TASTE IN EIGHTEENTH-CENTURY ENGLAND* 129 (1946):

It is an ironic commonplace of intellectual history that one of the major sources of the romantic stress on feeling was ultimately the mechanistic psychology of the seventeenth and eighteenth centuries. Empiricism, having disposed of the mind as a strictly rational instrument, was increasingly forced to fall back on the immediate feeling of the individual.

287. TAYLOR, *supra* note 143, at 368.

288. See KIRSCHNER, *supra* note 281, at 151 n.4.

289. See PAUL ROAZEN, *FREUD: POLITICAL AND SOCIAL THOUGHT* 55 (1968).

290. See KANT, *CRITIQUE OF PURE REASON*, *supra* note 144, at 65-91, 102-119; IMMANUEL KANT, *ANTHROPOLOGY FROM A PRAGMATIC POINT OF VIEW* 9-97 (Mary J. Gregor trans., Martinus Nijhoff 1974) (1797).

fundamental conceptions, the universal and necessary judgments, which transcend the sphere of experience, and at the same time impose the conditions that make experience tributary to knowledge."²⁹¹ Kant's transcendental psychology—his view of mind as possessing *a priori* forms of knowledge²⁹²—greatly influenced the psychological ideas of later German Romantics such as Johann Gottlieb Fichte and Friedrich Wilhelm Joseph von Schelling.²⁹³ Fichte promoted a form of absolute idealism that posited will as the ultimate source of meaning, whereas Schelling emphasized the primacy of creative imagination and the union of subjective self with objective nature.

Few nineteenth-century Americans actually struggled to master the works of the German philosophers,²⁹⁴ but educated Americans were acquainted with their ideas through the literary writings of the German novelists and English poets and writers. Along with Fichte and Schelling, Goethe is the most widely known of the German Romantics; Wordsworth, Coleridge and Carlyle are the best known of the English literary Romantics from this period.²⁹⁵ The ideas of the German Romantics were also made known in the United States through the work of Ralph Waldo Emerson and the American Transcendentalists, who studied Kant, Fichte and Goethe in addition to the English Romantics.²⁹⁶ As expressed in the work of these writers, Romantic psychology emphasized intuitive and imaginative faculties, the mind in action, innate and conflicting instinctual drives, and the "chaos" of emotional irrationality that occasionally bordered on madness. The psychology of Romanticism extolled mind as dynamic, expressive, dualist, creative, regressive, instinctual, transcendent and, although often captured in the beauty of verse, depraved and driven to despair.

Through his early studies, the education received from his father, and the intellectual circles he traveled in, Holmes—like most educated Americans—was well-versed in the literature of European

291. OCTAVIUS BROOKS FROTHINGHAM, *TRANSCENDENTALISM IN NEW ENGLAND: A HISTORY* 12-13 (Univ. of Penn. Press 1959) (1876).

292. For a recent discussion of Kant's psychology, see KITCHER, *supra* note 144.

293. See GARDNER MURPHY & JOSEPH KOVACH, *HISTORICAL INTRODUCTION TO MODERN PSYCHOLOGY* 45-46 (3d ed. 1972).

294. See FROTHINGHAM, *supra* note 291, at 51-52.

295. This list does not begin to do justice to the European Romantic writers, among whom could be included William Blake, Rousseau, Shelley, Keats, Byron and Nietzsche.

296. See ENGELL, *supra* note 21, at 188-89.

Romanticism and American Transcendentalism. Holmes's personal affection for Emerson is well known.²⁹⁷ His reading list and writings from his early years reveal that he was especially familiar with the works of Goethe,²⁹⁸ Carlyle,²⁹⁹ and Coleridge.³⁰⁰ At Harvard as an undergraduate, Holmes twice withdrew from the library *Modern Philosophy* by Victor Cousin,³⁰¹ whose idealism exerted a strong influence on American Transcendentalism.³⁰² During his college years Holmes read Fichte's *Contribution to Mental Philosophy*³⁰³ and his earliest writings expressed a youthful idealism.³⁰⁴ Contrary to the prevailing view, his interest in the Romantic writers did not end in youth:³⁰⁵ his reading list records that throughout the 1880s and 1890s Holmes repeatedly read Shelley,³⁰⁶ Keats,³⁰⁷ Carlyle,³⁰⁸ Goethe,³⁰⁹ Wordsworth,³¹⁰ and Coleridge.³¹¹ Although in adulthood Holmes openly defected from the religious idealism of his father's generation,³¹² his conversion to the secular faith of science was never complete. Despite his interest in evolutionary and scientific ideas, Holmes never lost the sense of the mystery of the universe and the longing for human connectedness—"the oceanic feeling of awe, in Freud's terms"—that define the essence of religious (and Romantic)

297. See Hoffheimer, *supra* note 31, at 1227.

298. See Little, *supra* note 12, at 170 (*Faust* 1865), 190 (*Faust*, in German, 1875).

299. See *id.* at 188 (*Sartor Resartus* 1874).

300. See *id.* at 190 (1875); see also Oliver Wendell Holmes, Jr., *Notes on Albert Durer*, 7 HARV. MAG. 41, 45 (1860), reprinted in 1 COLLECTED WORKS, *supra* note 3, at 153, 155 [hereinafter *Notes on Albert Durer*] (discussing Coleridge's criticism of English poets).

301. See HOWE, SHAPING YEARS, *supra* note 31, at 53.

302. See COPLESTON, *supra* note 205, at 262.

303. See HOWE, SHAPING YEARS, *supra* note 31, at 53.

304. See Oliver Wendell Holmes, Jr., *Books*, 4 HARV. MAG. 408 (1858), reprinted in 1 COLLECTED WORKS, *supra* note 3, at 139; Oliver Wendell Holmes, Jr., *Plato*, 2 U.Q. 205 (1860), reprinted in 1 COLLECTED WORKS, *supra* note 3, at 145; *Notes on Albert Durer*, *supra* note 300, at 41, reprinted in 1 COLLECTED WORKS, *supra* note 3, at 153. See also Hoffheimer, *supra* note 31 at 1225-28 (discussing idealism in Holmes's earliest works).

305. See Hoffheimer, *supra* note 31 at 1227-28.

306. See Notes of Howe, Holmes's Reading List, *supra* note 16, at Year 1894.

307. See *id.* at Year 1882.

308. See *id.* at Year 1884.

309. See *id.* at Years 1885, 1898, 1899.

310. See *id.* at Years 1887, 1889 (aloud).

311. See *id.* at Year 1900.

312. See Letter from Oliver Wendell Holmes, Jr. to Morris Cohen (Feb. 5, 1919), quoted in NOVICK, *supra* note 141, at 412 n.11 ("My father . . . [and] the rest of his generation [possessed] a certain softness of attitude toward the interstitial miracle . . . that I did not feel."); Howe, *The Positivism of Mr. Justice Holmes*, *supra* note 23, at 533-35.

experience.³¹³ Holmes continued late in life, as he would say in a letter to James, to “sympathize deeply” with the aim of “justif[ying] the idealizing impulse.”³¹⁴

Notwithstanding his own “soldier’s faith,”³¹⁵ Holmes remained skeptical about religious dogma,³¹⁶ and for that reason this Article refers to Holmes’s psychology as Romantic rather than Transcendentalist. The American Transcendentalists retained a religious outlook that was less dominant in the work of European Romanticism, particularly in the literary form that seems to have influenced Holmes the most. This is not to say that religious meaning was lacking from nineteenth-century Romantic thinking, nor, for that matter, from Holmes’s philosophy either. To the contrary, many Romantics saw the natural order in Christian terms; M. H. Abrams has described the Romantics as attempting “in diverse degrees and ways, to naturalize the supernatural and to humanize the divine.”³¹⁷

313. PETER GAY, *A GODLESS JEW: FREUD, ATHEISM, AND THE MAKING OF PSYCHOANALYSIS* 16 (1987). In descriptive terms that come eerily close to Freud’s, Holmes said in 1891:

Somebody once said to me, “After all, religion is the only interesting thing,” and I think it is true if you take the word a little broadly, and include under it the passionate curiosity as well as the passionate awe which we feel in face of the mystery of the universe. This curiosity is the most human appetite we have. We alone of living beings yearn to get a little nearer and ever a little nearer toward the unseen ocean into which pours the stream of things,—toward the reality of the phantasmagoria which dance before our eyes for threescore years and ten.

The Use of Colleges, *supra* note 34, at 483.

314. Letter from Oliver Wendell Holmes, Jr. to William James (May 24, 1896), in 2 RALPH BARTON PERRY, *THE THOUGHT AND CHARACTER OF WILLIAM JAMES* 458 (Greenwood Press 1974) (1935); see also Hoffheimer, *supra* note 31, at 1227 (“[Holmes’s] mature writings did not reject totally the transcendentalism of his early work; even at the end of his life he continued to admire Emerson.”).

315. *The Soldier’s Faith*, *supra* note 34, at 486. For discussion of Holmes’s *Soldier’s Faith*, its element of inner transcendence, and its connection to Romanticism, see *infra* notes 352-55 and accompanying text.

316. In a typical expression of his views toward religion, Holmes wrote to Lewis Einstein in 1909:

[William James] is eternally trying to get devout conclusions from sceptical premises, which I think very possible, but I think he takes the wrong road. He believes in miracles if you will turn down the lights . . . I think scepticism should be humble and be content with saying the universe has consciousness, significance, etc. *inside* of it, for it has *us*; but the chances are that it transcends them in some unimaginable way. All of which no doubt I have said before twenty times.

Letter from Oliver Wendell Holmes, Jr. to Lewis Einstein (Sept. 27, 1909), in *THE HOLMES-EINSTEIN LETTERS*, *supra* note 118, at 52-53.

317. ABRAMS, *NATURAL SUPERNATURALISM*, *supra* note 283, at 68; see also KIRSCHNER, *supra* note 281, at 149 (placing Romantic thinking “in the context of other secular systems that have been influenced by Biblical history and inner light mysticism”).

Eighteenth-century and nineteenth-century Romantics, like Holmes, still recognized the universal meaning underlying the apparent chaos of nature and mind, although access to this universal meaning was increasingly had through subjective experience.³¹⁸ Nevertheless, the connection between Transcendental philosophy and New England Unitarianism was more direct than that between Christian doctrine and Romanticism; Emerson, the most influential of the American Transcendentalists and certainly the one closest to Holmes next to his own father, was at one time a Unitarian minister.³¹⁹ Although Emerson's influence on the young Holmes was great, and Holmes himself acknowledged in later years that it was "Emerson [who] set me on fire,"³²⁰ it was possibly, and perhaps likely, the strong religious overtones to American Transcendentalism that distanced Holmes from Emerson's views. However much he admired Emerson, the latter, like William James,³²¹ was primarily engaged in speculative thought for religious ends. For many Romantics, in contrast, nature rather than God served to provide a transcendent source of meaning in the world.

"Romantic" seems an apt term for Holmes's psychology for another reason as well. Holmes's dissatisfaction with empirical psychology was part of the reaction against reason and rationality begun by Romantic observers of human nature. In this respect, Holmes's originality lay in his application of the ideas of a subordinate, and even subversive, philosophical tradition to the study of the law. He did not follow through on the radical implications of Romantic psychology for law reform;³²² the best he could do was to

318. "The source of unity and wholeness which Augustine found only in God is now to be discovered within the self." TAYLOR, *supra* note 143, at 362.

319. See COPELSTON, *supra* note 205, at 262.

320. Letter from Oliver Wendell Holmes, Jr. to John T. Morse, Jr. (Nov. 8, 1926), *quoted in* HOWE, SHAPING YEARS, *supra* note 31, at 54. When Holmes finished his essay on *Primitive Notions in Modern Law*, which would eventually constitute the first chapter of *The Common Law*, he sent it to Emerson. See HOWE, SHAPING YEARS, *supra* note 31, at 203 & n.61.

321. See, e.g., JAMES, VARIETIES OF RELIGIOUS EXPERIENCE, *supra* note 195 (collecting lectures on religious questions such as "The Value of Saintliness" and "The Religion of Healthy-Mindedness").

322. The implications of unconscious motivations and irrationality for common law doctrine in the areas of criminal law, contracts, and torts, as well as constitutional doctrine in the areas of freedom of speech and economic liberty, were obviously far-reaching. Although Holmes maintained a lifelong appreciation for the unconscious, see *infra* text accompanying note 380, it was later thinkers, like Jerome Frank and Harold Lasswell, who would explore the implications of psychoanalytic ideas in law and politics, see, e.g., JEROME FRANK, LAW AND THE MODERN MIND (1930); HAROLD D. LASSWELL, PSYCHOPATHOLOGY AND POLITICS (1930).

advocate an external standard of liability that sidestepped the question of rationality and motivation altogether. But the Romantic themes of inwardness, unconscious passions, inner conflict, irrationality and secular transcendence in Holmes's work—the essence of his psychology and the foundation for his vision of heroism in law—he left for future generations to explore.

B. Seeing Through the Heart and Will

Four months after Holmes had written to William James in Germany about his unsolved problems with *vis viva*, his next letter to James burst “like a meteor into the sphere of a planet.”³²³ Written in the early spring of 1868,³²⁴ Holmes's letter is worth quoting at length:

Dear Bill,—

The icy teeth have melted out of the air and winter has snapped at us for the last time. Now are the waters beneath my window of a deeper and more significant blue than heretofore. Now do the fields burn with green fire—the evanescent hint of I know not what hidden longing of the earth. Now all the bushes burgeon with wooly buds and the elm trees have put on bridal veils of hazy brown. Now to the chorus of the frogs answers the chorus of the birds in antiphony of morning and evening. Now couples, walking round Boston Common Sundays after sunset, draw near to each other in the dark spaces between the gas lights and think themselves unseen. . . . Spring is here, Bill, and I turn to thee,—not with more affection than during the long grind of the winter, but desiring if it may be to say a word to thee once more.

Since I wrote in December I have worked at nothing but the law. Philosophy has hibernated in torpid slumber, and I have lain “sluttishly soaking and gurgling in the devil's pickle,” as Carlyle says. It has been necessary,—if a man chooses a profession he cannot forever content himself in picking out the plums with fastidious dilettantism and give the rest of the loaf to the poor, but must eat his way manfully through crust and crumb—soft, unpleasant, inner parts which, within one, swell, causing discomfort in the bowels. Such has

323. Letter from William James to Oliver Wendell Holmes, Jr. (May 15, 1868), *quoted in* PERRY, *supra* note 1, at 93.

324. Holmes had received his degree from Harvard Law School and was serving as an apprentice in the Boston law firm Chandler, Shattuck & Thayer. See HOWE, SHAPING YEARS, *supra* note 31, at 245.

been my cowardice that I have been almost glad that you weren't here, lest you should be disgusted to find me inaccessible to ideas and impressions of more spiritual significance but alien to my studies. Think not, however, that I distrust the long enduring of your patience. I know that you would be the last of all to turn away from one in whom you discerned the possibility of friendship because his vigils were at a different shrine, knowing it was the same Divinity he worshipped. And the winter has been a success, I think, both for the simple discipline of the work and because I now go on with an ever increasing conviction that law as well as any other series of facts in this world may be approached in the interests of science and may be studied, yes and practised, with the preservation of one's ideals. . . . To finish the search of mankind, to discover the *ne plus ultra* which is the demand of ingenuous youth, one finds is not allotted to an individual. To reconcile oneself to life—to dimly apprehend that this dream disturbing the sleep of the cosm is not the result of a dyspepsy, but is well—to suspect some of the divine harmonies, though you cannot note them like a score of music—these things, methinks, furnish vanishing points which give a kind of perspective to the chaos of events. . . .

. . . .

. . . There is a new fire in the earth and sky. . . . I feel the mighty quickening of the spring.

The larches have sprouted.

I saw a butterfly today just loosed from the bondage of winter, and a bee toiling in sticky buds half opened.

O! passionate breezes! O! rejoicing hills! How swells the soft full chorus—for this earth which slept has awakened, and the air is tremulous with multiplied joyous sound.

Sing, sparrow—kissing with thy feet the topmost tassels of the pines.

Cease not thy too much sound, O! robin. Squirrels grind thy scissors in the woods, Creak, blackbirds. Croak, frogs, Caw, high-flying crows, who have seen the breaking of the ice in northern rivers and the seaward moving booms.

A keen, slender, stridulous vibration—almost too fine for the hearing, weaving in and out, and in the pauses of the music dividing the silence like a knife—pierces my heart with an ecstasy I cannot utter. Ah! what is it? Did I ever hear it? Is it a voice within, answering to the others, but different from them—and like a singing flame not ceasing with that which made it vocal?

Dear Bill, to whom should I vent this madness but to you?³²⁵

Holmes need not be placed squarely among the Romantics for us to see their undeniable influence on him. As James remarked in reply, the letter “runs through the whole circle of human energy, Shelley, Kant, Goethe, Walt Whitman, all being fused in the unity of your fiery personality.”³²⁶ For Romantics like Schelling, whose *naturphilosophie* directly influenced English Romantics such as Coleridge,³²⁷ nature symbolized the source of the individual’s sense of oneness with the world.³²⁸ Holmes read the work of Coleridge and referred to him in an early essay,³²⁹ it is also possible, if not likely, that Holmes read the famous essay on Coleridge by John Stuart Mill³³⁰ describing Coleridge’s concept of intuitive knowledge that transcends the senses. In language reminiscent of the view of nature taken by Coleridge and the English poets, Holmes describes fields as “burn[ing] with green fire—the evanescent hint of I know not what hidden longing of the earth;” “a new fire in the earth and sky;” “a voice within, answering to the others, but different from them—and like a singing flame not ceasing with that which made it vocal.” The symbol of the flame and the description of nature in such ecstatic, secular and transcendent terms carry the distinct mark of Romanticism.³³¹

325. Letter from Oliver Wendell Holmes, Jr. to William James (Apr. 19, 1868), *quoted in* PERRY, *supra* note 1, at 92-93.

326. *Id.* at 93-94.

327. See *Introduction*, in S. T. COLERIDGE, 1 *BIOGRAPHIA LITERARIA* at *k-kxxii* (J. Shawcross ed., 1907). Surprisingly, Coleridge at one time expressed his belief in associationist psychology. See COPLESTON, *supra* note 205, at 151.

328. See TAYLOR, *supra* note 143, at 371.

329. See *Notes on Albert Durer*, *supra* note 300, at 45, *reprinted in* 1 *COLLECTED WORKS*, *supra* note 3, at 155.

330. See JOHN STUART MILL, *Coleridge*, in 1 *DISSERTATIONS AND DISCUSSIONS* 405 (London, Longmans, Green, Reader & Dyer 3d ed., 1875).

331. See TAYLOR, *supra* note 143, at 374. It is no coincidence that, confessing that he had “worked at nothing but the law” all winter, Holmes deferred to Carlyle, the great Romantic essayist, for the reference to legal study as “the devil’s pickle.” Letter from Oliver Wendell Holmes, Jr. to William James (Apr. 19, 1868), *quoted in* PERRY, *supra* note 1, at 92.

Holmes's letter offers the flame as a symbol for "a voice within" which is indistinguishable from the voice of nature.³³² What Holmes developed here was a particular Romantic view that Charles Taylor has called "expressivist": the idea of nature as an inner source of meaning.³³³ Unlike the earlier religious view of nature as a reflection of divine order, the Romantic conception viewed nature "as an inner impulse or conviction which tells us of the importance of our own natural fulfillment and of solidarity with our fellow creatures in theirs."³³⁴ Nature as experienced subjectively provided access to the deepest truths and connected the individual to a universal meaning; it expressed the universal through the particular, an attitude that Holmes would apply to himself many years later.³³⁵

At the time Holmes wrote his letter to James, his effort to step away from an objectively given divine order in the direction of a subjective and naturalized conception of meaning in the universe represented a radical break with orthodoxy. This break with orthodoxy had a strong psychological dimension to the extent that the subjective contemplation of nature required the mental faculty of creative imagination. The "imaginative impulse" Holmes found lacking in Alexander Bain³³⁶ was tied to this Romantic vision of the mind's creative power to seize meaning from the world in intuitive and imaginative ways. The imaginative faculty was what endowed the individual with the power to grasp meaning in nature, and it is therefore not surprising that the ideal of the creative artist became the Romantic equivalent of the Creator.³³⁷ Although the Romantic imagination for some writers bordered on madness,³³⁸ for most the

332. TAYLOR, *supra* note 143, at 357-58 (describing Rousseau's work in which "nature is likened to a voice within").

333. *See id.* at 368.

334. *Id.* at 369-70.

335. *See* Letter from Oliver Wendell Holmes, Jr. to Dr. Wu (June 16, 1923), *reprinted in* JUSTICE HOLMES TO DOCTOR WU, *supra* note 122, at 13.

336. *See supra* text accompanying note 230.

337. *See* TAYLOR, *supra* note 143, at 378 (quoting Herder for the idea that "[t]he artist is become a creator God").

338. *See* BERLIN, *supra* note 285, at 233-34. The Romantic attack upon the world of appearances cleared the way

for Schopenhauer's world tossed hither and thither by a blind, aimless, cosmic will, for Dostoevsky's underground man, and Kafka's lucid nightmares, for Nietzsche's evocation of the *Kraftmenschen* condemned in Plato's dialogues—Thrasymachus, or Callicles—who see no reason against sweeping aside the cobwebs of laws and conventions if they obstruct their will to power, for Baudelaire's "Enivrez-vous sans cesse!"

intuitive power represented a higher, but supplemental, power of perception. For Holmes this power was still linked to the idea of a cosmic plan or design, but the power of creative imagination would evolve in the twentieth century into the individual's need to make, rather than find, meaning in the world. The belief in the inwardness of experience, which included the opacity and conflict of human motivations, was central to the Romantic movement and is also what serves to relate Holmes's thought to the development of modern notions of self and subjectivity. The emphasis on inner expression as opposed to objective perception was the first step in the development of modern notions of privacy and autonomy,³³⁹ notions that have come to play such a significant role in the law.

For Holmes, as for the Romantics, the process of imaginative perception operated indirectly, or as Holmes was fond of saying, by way of a "glimpse" or "hint" or an "echo"³⁴⁰ of some inaccessible and unfathomable meaning.³⁴¹ As already discussed, Holmes, like the Romantics, regarded reason as a valuable but insufficient tool for understanding the world. Some Romantics were skeptical of analytic

Id.

339. See TAYLOR, *supra* note 143, at 375. Peter Gay draws the connection between the recognition of "the elemental power of passionate desires" in human nature and the rise of inwardness and self-reflection that marked the nineteenth century:

For centuries, . . . as such names as Plato and Saint Augustine and Montaigne attest, men had probed the workings of the passions in their inner lives. . . . The nineteenth century was the psychological century par excellence. It was a time when confessional autobiographies, informal self-portraits, self-referential novels, intimate diaries and secret journals, grew from a trickle to a stream, and when their display of subjectivity, their purposeful inwardness, markedly intensified. What Rousseau in his painfully frank *Confessions* and the young Goethe in his self-lacerating and self-liberating *Sorrows of Young Werther* had sown in the eighteenth century, the decades of Byron and Stendhal, of Nietzsche and William James, reaped in the nineteenth. Thomas Carlyle perceptively spoke of "these Autobiographical times of ours." But this modern preoccupation with the self was no by means pure gain. "The key to the period," Ralph Waldo Emerson said late in life, "seemed to be that the mind had become aware of itself." With the "new consciousness," he thought, "the young men were born with knives in their brain, a tendency to introversion, self-dissection, anatomizing of motives." It was an age of Hamlets.

GAY, FREUD, *supra* note 119, at 129 (quoting THOMAS CARLYLE, SARTOR RESARTUS, book II, ch. 2; Ralph Waldo Emerson, *quoted in* JEROME HAMILTON BUCKLEY, THE TURNING KEY: AUTOBIOGRAPHY AND THE SUBJECTIVE IMPULSE SINCE 1800, at 4 (1984)).

340. See *The Path of the Law*, *supra* note 3, at 478, *reprinted in* 3 COLLECTED WORKS, *supra* note 3, at 406.

341. American Transcendentalists were described by F.O. Matthiessen in similar terms, as believing that "reality could be caught only tangentially, and conveyed obliquely." ROAZEN, *supra* note 289, at 52 (quoting F. O. MATTHIESSEN, AMERICAN RENAISSANCE 57-58 (1941)). In the words of Emerson, "Everything in the universe goes by indirection." *Id.* (quoting Ralph Waldo Emerson, *quoted in* MATTHIESSEN, *supra*, at 57-58).

reasoning altogether, a position most famously captured by Wordsworth's poem "The Tables Turned":

Sweet is the lore which Nature brings;
Our meddling intellect
Mis-shapes the beauteous forms of things:
We murder to dissect.³⁴²

Holmes's skepticism about empirical psychology came closer to the views of Romantic writers such as Coleridge, who believed that "scientific and critical understanding" needed to be supplemented, rather than displaced altogether, by "intuitive reason."³⁴³ For Holmes as for the Romantics, natural science and empirical methods were but a point of departure for the intuitive process that reveals the deeper meaning immanent in subjective experience. Schelling, too, considered science "nothing but a collection of facts"³⁴⁴ in need of completion by the imaginative powers. Holmes's broad enthusiasm for scientific empiricism and the project he called "the rational study of law" suggest the extent to which he found reason a useful tool in understanding the world: he was in many, if not most, ways a child of the Enlightenment. But he was an unruly child with respect to his ideas about human nature, a domain where Holmes found the direct rational methods of scientific observation insufficient. Holmes explained in a speech to the Bar Association of Boston in 1900:

We all are very near despair. The sheathing that floats us over its waves is compounded of hope, faith in the unexplainable worth and sure issue of effort, and *the deep, sub-conscious content* which comes from the exercise of our powers.³⁴⁵

342. William Wordsworth, *The Tables Turned*, reprinted in ROMANTIC POETRY AND PROSE, *supra* note 283, at 129.

343. COPLESTON, *supra* note 205, at 152; *see also* BERLIN, *supra* note 285, at 234 ("Neither Hoffman nor Tieck sets out . . . to deny the truths of science, or even those of common sense, at their own level—that is, as categories required for limited purposes, medical or technological or commercial.").

344. Leary, *German Idealism*, *supra* note 152, at 301.

345. Oliver Wendell Holmes, Jr., Speech Before the Bar Association of Boston (Mar. 7, 1900), in 3 COLLECTED WORKS, *supra* note 3, at 498, 500 (emphasis added).

Holmes's theory of the unconscious reflected a Romantic view of the inability of scientific thought to comprehend the hidden and chaotic depths of subjective life.³⁴⁶

The idea of conflict as an essential element in human nature also tied Holmes's thinking to Romanticism. The Romantics were notoriously attached to the psychological idea of a fundamental opposition between good and evil. Charles Taylor describes the Romantics' "resistance to a one-dimensional picture of the will and their recovery of the sense that good and evil are in conflict in the human breast."³⁴⁷ The celebration of human greatness and depravity were deeply interconnected: if anything, the Romantics had a tendency to overindulge their affection for the base in human nature. Holmes's "bad man" could be viewed in these terms, as a recognition of the potential for moral depravity lurking in every law-abiding citizen's breast, but the depiction of the instinct for revenge that runs throughout *The Common Law* more fully captures Holmes's view of the conflicting drives that constitute human nature at the most primitive and unconscious levels. Romanticism is often associated with periods of political upheaval,³⁴⁸ a fact that recalls Holmes's Civil War experience. Critics Harold Bloom and Lionel Trilling have commented that Romanticism "is the literary form of the Revolution, which began in America and the West Indies, flowered in France, and spread from France through space and time into the continuing world upheaval of our century."³⁴⁹ Traditional histories date the beginning of Romanticism with the French Revolution and associate the spirit of Romanticism with radical rebellion of political, philosophical, artistic and psychological sorts.³⁵⁰ Without venturing too far into

346. See TAYLOR, *supra* note 143, at 380 ("The old idea of a rationally evident harmony of natures gives way to a new one of a current of love or life, which is both close to us and baffles understanding."). The Romantic conception of hidden emotions and conflicts—referred to as "chaos"—has been understood by some commentators as later giving rise to psychodynamic theories of the unconscious. See Madeleine Vermorel & Henri Vermorel, *Was Freud a Romantic?*, 13 INT'L REV. PSYCHO-ANALYSIS 15, 20 (1986) (discussing Freud's view of the unconscious in relation to the ideas of the Romantics).

347. TAYLOR, *supra* note 143, at 355.

348. See, e.g., Abrams, *English Romanticism*, *supra* note 285, at 91-92.

349. BLOOM & TRILLING, *supra* note 283, at 5.

350. See Alfred Cobban, *The Revolt Against the Eighteenth Century*, in ROMANTICISM AND CONSCIOUSNESS, *supra* note 285, at 133:

Now to be in revolt against [the eighteenth] century was essentially to be in revolt against a theory of the mind—that superficial psychology of sensations [i.e., Associationism] . . . It is in their revolt against the psychological school founded by Locke that Burke, Rousseau and Kant find a principle of union, and it would not be untrue to say that they were all three inspired less by the scientific weakness of this theory

biographical speculation, it may be that Holmes's Civil War experience helped to inform his Romantic view of human nature. Holmes was no rebel, to be sure, and he fought valiantly on the side of the Union. Yet for all his seeming intellectual skepticism and emotional detachment, Holmes's experience in war seemed to bring him into touch with the raw antinomies of good and evil lying beneath the surface of conscious awareness and rational intellect.

Recalling his close brush with death during the war, Holmes wrote about his contemplation of a "deathbed recantation" of his unbelief:

Besides, thought I, can I recant if I want to, has the approach of death changed my beliefs much? & to this I answered—No. Then came in my Philosophy—I am to take a leap in the dark—but now as ever I believe that whatever shall happen is best—for it is in accordance with a general law—and *good & universal* (or *general law*) are synonymous terms in the universe. (I can now add that our phrase *good* only means certain general truths seen through the heart & will instead of being merely contemplated intellectually. I doubt if the intellect accepts or recognizes that classification of good and bad).³⁵¹

In this brief account, we find a clear presentation of one of the central tenets of Romantic philosophy: that truth comes to the individual "through the heart & will" rather than being "merely contemplated intellectually." Holmes referred to his version of Romantic philosophy as "the soldier's faith,"³⁵² a divine message that arises from the subjective confrontation with death.³⁵³

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

than by its inability to satisfy the eternal demand of the human spirit for a sense of reality.

351. Civil War Diary of Oliver Wendell Holmes, Jr., *quoted in* HOWE, SHAPING YEARS, *supra* note 31, at 105-06.

352. *The Soldier's Faith*, *supra* note 34, at 490.

353. And perhaps also, in Holmes's view, from the experience of motherhood: "The ideals of the past for men have drawn from war, as those for women have been drawn from motherhood." *Id.* at 487.

. . . If, in short, as some, I hope many, who hear me, have known, you have known the vicissitudes of terror and of triumph in war, you know that there is such a thing as the faith I spoke of. You know your own weakness and are modest; but you know *that man has in him that unspeakable somewhat* which makes him capable of miracle, able to lift himself by the might of his own soul, unaided, able to face annihilation for a blind belief.³⁵⁴

The image of the soldier symbolizes the transcendent element in Holmes's psychology: the innate "unspeakable somewhat"—the "flame" that burns within—whose worldly form is heroism and whose spiritual nature connects the individual to a universal meaning.³⁵⁵

A final link between Holmes's Civil War experience and his Romantic outlook on human nature was his poetic writing from that period in his life. Both the choice of expressive form—the poetic verse—as well as the content of the expression resonate deeply with the Romantic temper. M. H. Abrams describes "the recurrent emotional pattern" in which poems "turn on the theme of hope and joy and the temptation to abandon all hope and fall into dejection and despair."³⁵⁶ In a poem for Henry Abbott who died in the war, Holmes took up this theme:

H.L.A.

Twentieth Massachusetts Volunteers

He steered unquestioning nor turning back,
 Into the darkness and the unknown sea;
 He vanished in the starless night, and we
 Saw but the shining of his luminous wake.
 Thou sawest light, but ah, our sky seemed black,
 And all too hard the inscrutable decree.

354. *Id.* at 487-88.

355. In a speech given at the 50th anniversary of the graduation of Harvard's class of 1861, Holmes concluded with these words:

Life is a roar of bargain and battle, but in the very heart of it there rises a mystic spiritual tone that gives meaning to the whole. It transmutes the dull details into romance. It reminds us that our only but wholly adequate significance is as parts of the unimaginable whole. It suggests that even while we think that we are egotists we are living to ends outside ourselves.

Oliver Wendell Holmes, Jr., Address before the Class of 1861 on the Fiftieth Anniversary of its Graduation (June 28, 1911), in 3 COLLECTED WORKS, *supra* note 3, at 504, 505.

356. Abrams, *English Romanticism*, *supra* note 285, at 108.

Yet, noble heart, full soon we follow thee,
Lit by the deeds that flamed along thy track.
Nay, art thou hid in darkness, shall we say,
Or rather whisper with untrembling lips;
We see thee not, yet trust thou art not far,
But passing onward from this life's eclipse
Hast vanished only as the morning star,
Into the glory of the perfect day.³⁵⁷

We can also hear the poetic quest in the lines of the letter Holmes wrote to James in the spring of 1868.³⁵⁸ Given the emotional detachment that characterizes many of Holmes's later judicial decisions, we often forget that Holmes was an occasional poet whose Romantic vision survived—admittedly in scaled-down form—in his view of human nature.³⁵⁹ The Romantic in Holmes could be, and often was, overshadowed by his own clear enthusiasm for the rational study of law and for the usefulness of the empirical social sciences. Nevertheless, the usefulness of science had limitations for Holmes. He took comfort in the symbol of the soldier because he believed that the subjective faith which moves individuals to heroism and connects the individual to the universe arises in the active confrontation with the possibility of one's own death—or the pursuit of “dangerous action,” as he called it. The following discussion explores Holmes's idea of “dangerous action” and its connection to the Romantic psychology that underlies his ideal of heroism in the law.

C. Heroism in the Law

The concept of mental activity was a source of heated debate within nineteenth-century psychology. For associationist psychologists, mental activity was understood, when it was acknowledged at all, as akin to chemistry and thus as explainable in terms of physiological stimuli and mechanical processes. In reaction to the

357. Oliver Wendell Holmes, Jr., *H.L.A.*, EVENING TRANSCRIPT (Boston), Oct. 17, 1864, at 2, reprinted in HOWE, SHAPING YEARS, *supra* note 31, at 165.

358. See *supra* text accompanying note 325.

359. Holmes's other published poems were *Alma Mater*, 7 HARV. MAG. 48 (1860), reprinted in 1 COLLECTED WORKS, *supra* note 3, at 157, and *How Fought Our Brothers*, HARVARD COLLEGE CLASS OF 1861, FIRST TRIENNIAL REPORT (Cambridge, privately printed 1864), reprinted in 1 COLLECTED WORKS, *supra* note 3, at 172.

mechanistic model of associationism, late-nineteenth-century physiological psychologists proposed the idea of a reflex arc for understanding mental activity. The concept of the reflex arc represented mental activity in three stages: “sensory stimulus, central activity (or idea), and motor discharge or response.”³⁶⁰ Rejecting both associationist and physiological views, John Dewey published a critical review of the reflex arc theory in which he developed the functionalist conception of mental activity.³⁶¹ According to Dewey, the three stages of the reflex arc are really a single integrated act in a series of related acts that constitute human behavior.³⁶² Mental activity is never simply a response to a stimulus received from the world, but a way of interacting with the world.³⁶³ For functionalists such as Dewey, mental activity was viewed in terms of its useful consequences.

Holmes shared the functionalists’ rejection of action as reflex arc, but he did not share entirely their pragmatic concept of mental activity. Action was most valuable for Holmes when it was dangerous, not useful.³⁶⁴ Holmes explained the connection between “dangerous action” and his soldier’s faith:

For high and dangerous action teaches us to believe as right beyond dispute things for which our doubting minds are slow to find words of proof. Out of heroism grows faith in the worth of heroism. The proof comes later, and even may never come. Therefore I rejoice at every dangerous sport which I see pursued. The students at Heidelberg, with their sword-slashed faces, inspire me with sincere respect.³⁶⁵

It should come as no surprise that the man who attributed the origins of the common law to the instinct for revenge gazed upon the students of Heidelberg “with sincere respect.” The German student duel, or *Mensur* as it was called, was a nineteenth-century event

360. H.S. Thayer, *John Dewey 1859-1952*, in *AMERICAN PHILOSOPHY* 69, 76 (Marcus G. Singer ed., 1985).

361. See John Dewey, *The Reflex Arc Concept in Psychology*, 3 *PSYCHOL. REV.* 357 (1896).

362. See *id.* at 366-67.

363. See *id.* at 368.

364. See Letter from Oliver Wendell Holmes, Jr. to Morris R. Cohen (Feb. 5, 1919), in *The Holmes-Cohen Correspondence*, *supra* note 199, at 15 (“The useless is the ideal expression of man.”); see also Howe, *Introductory Notes, The Letters of Henry James* *supra* note 202 (describing “the enthusiasm with which Holmes accepted a romantic faith that the justification of action was not to be found in its purpose but in its vitality and its heroism”).

365. *The Soldier’s Faith*, *supra* note 34, at 489.

popular among the university elite.³⁶⁶ In the words of a contemporary German critic, the *Mensur* was a brutal reminder of “the savage instincts” that lurk beneath the “starched shirts” of civilized German life, a dramatic display of man’s innate aggression masquerading in the name of honor.³⁶⁷ The respect Holmes felt for the students had nothing to do with their defense of honor; it was their heroism—their willingness to face the terror of the duel and to walk away alive but scarred—that appealed to Holmes.

In contrast to useful action, which reflects the individual’s effort to adapt to the world, dangerous action is individualistic and inward-looking. Functionalist psychologists such as Dewey understood mental activity in social terms: the focus was on the relationship between ideas and the world, and the individual’s ability to adapt to his or her environment.³⁶⁸ In contrast, Holmes viewed action as the route to an inner faith; its value lay in its subjective meaning rather than its objective consequences. Useful action was rational, whereas dangerous action was often irrational and useless, or, as was the case with the Heidelberg students, brutal and senseless sport.³⁶⁹ Any dangerous activity, whether sport or war, sufficed to tap into the individual’s unconscious will to triumph over fear and death. “I gaze

366. See GAY, *THE CULTIVATION OF HATRED*, *supra* note 46, at 9-33.

367. *Id.* at 12. The student duels, staged like a modern wrestling match, were bloody and sordid dramas:

While the duel lacks all tension or charm, “the whole interest is centred in watching the wounds. They come always in one of two places—on the top of the head or the left side of the face.” And they provide an appalling spectacle. “Sometimes a portion of hairy scalp or section of cheek flies up into the air, to be carefully preserved in an envelope by its proud possessor, or, strictly speaking, its proud former possessor, and shown round on convivial evenings.” As one might expect, from every wound there “flows a plentiful stream of blood. It splashes doctors, seconds, and spectators; it sprinkles ceilings and walls; it saturates the fighters, and makes pools for itself in the sawdust. At the end of each round the doctors rush up, and with hands already dripping with blood press together the gaping wounds, dabbing them with little balls of wet cotton wool,” but inevitably, as soon as the duelists begin the next round, “the blood gushes out again, half blinding them, and rendering the ground beneath slippery.” The combatants’ appearance grows more and more bizarre. “Now and then you see a man’s teeth laid bare almost to the ear, so that for the rest of the duel he appears to be grinning at one half of the spectators, his other side remaining serious; and sometimes a man’s nose gets slit, which gives to him as he fights a singularly supercilious air.”

Id. at 11 (quoting JEROME K. JEROME, *THREE MEN ON THE BUMMEL* 205-06 (A. Sutton 1982) (1900)).

368. See RYAN, *supra* note 255, at 367 (criticizing Dewey for his “unconcern with the private world”).

369. See Letter from Oliver Wendell Holmes, Jr. to Morris R. Cohen (Feb. 5, 1919), in *The Holmes-Cohen Correspondence*, *supra* note 199, at 321 (referring to “the useless,” such as “going to the North Pole,” as “the ideal expression of man”).

with delight upon our polo players,” Holmes said. “If once in a while in our rough riding a neck is broken, I regard it, not as a waste, but as a price well paid for the breeding of a race fit for hardship and command.”³⁷⁰ While he expressed genuine sorrow over the loss of friends in the war, as in his tribute to Henry Abbott, Holmes’s aristocratic regard for those heroic individuals who display courage in the midst of danger is indisputable. Holmes was egalitarian when it came to the opportunity to enter the race of life, but he believed in winning and expressed no sympathy for those unfortunate individuals unable or unwilling to compete.³⁷¹

Holmes became convinced that the soldier’s faith could be found through the study of law.³⁷² In a lecture delivered to Harvard students in 1886, Holmes said:

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 and in 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 never heard of him will be moving to the measure of his thought,—the subtle 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 that you have done what it lay in you to do,—can say that you have lived, and be ready for the end.³⁷³

370. *The Soldier’s Faith*, *supra* note 34, at 489.

371. See *THE COMMON LAW*, *supra* note 6, at 50-51.

372. Speaking to students at Harvard, Holmes voiced this view:

But to those who believe with me . . . that to know is not less than to feel, I say—and I say no longer with any doubt—that a man may live greatly in the law as well as elsewhere; that there as well as elsewhere his thought may find its unity in an infinite perspective; that there as well as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable.

The Profession of the Law, *supra* note 10, at 472.

373. *Id.* at 472-73.

Through the solitude of study, Holmes believed that the legal thinker would, like the soldier, reach that state of inner transcendence “more isolating than that which surrounds the dying man” and which, in language recalling Fichte, leads the individual to trust in his “own unshaken will.” The true solitude of the legal thinker is itself a kind of dangerous action that puts the individual in touch with innate and unconscious capacities and ideas: the inner voice of nature, the flame that burns within, that “unspeakable somewhat.” The “imaginative impulse” that Holmes found lacking in empirical psychology was both the irrational and the sublime element in human nature:

But I doubt if there is any more exalted form of life than that of a great abstract thinker, wrapt in the successful study of problems to which he devotes himself, for an end which is neither unselfish nor selfish in the common sense of those words, but is simply to feed the deepest hunger and to use the greatest gifts of his soul.³⁷⁴

As expressed by Holmes, the Romantic view that unites the soldier and the solitary thinker elevates feeling and will over rational intellect, subjective faith over empirical truth, unconscious faculties and emotions over conscious perception.

Holmes went a long way toward developing a rational study of law that emphasized empirical methods and social sciences, but the rational study of law, like empirical psychology, was never sufficient. He admonished Harvard students to be “heroes as well as idealists,”³⁷⁵ and credited both James and Dewey, pragmatists who appreciated mind as a useful tool for making things work, for their idealism.³⁷⁶ Holmes was also far more pessimistic than the evolutionary social scientists and functional psychologists of his day. By temperament, Holmes was closer to the pessimism of the early-eighteenth-century Romantics than the optimism of the late-eighteenth-century pragmatists and social scientists.³⁷⁷ He never

374. *Law in Science*, *supra* note 33, at 451-52, *reprinted in* 3 COLLECTED WORKS, *supra* note 3, at 412.

375. *The Profession of the Law*, *supra* note 10, at 472.

376. See Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (May 15, 1931), *in* 2 HOLMES-POLLOCK LETTERS 286-87 (Mark DeWolfe Howe ed., 1941) (praising Dewey's idealism); Letter from Oliver Wendell Holmes, Jr. to William James (Mar. 24, 1907), *quoted in* 2 PERRY, *supra* note 314, at 459-61 (praising James's idealism).

377. While heroism and individualism were both themes of high Romanticism, see GAY, THE NAKED HEART, *supra* note 285, at 38, 157-70, the beauty of their lyrical verses could not mask the Romantic obsession with the irrational and the depraved in human nature.

claimed to want to change the world, or to reform human nature; rather, he believed law could be made to fit better the conditions of human struggle and the innate drives of human nature.

The Romantic view of human nature that runs through Holmes's published writings and speeches had clear implications for his ideas about law. There is the strong likelihood, discussed earlier, that Holmes's conception of unconscious motivations led him to reject subjective standards of liability as too speculative for legal decisionmaking. In addition, the notion that individuals are governed by innate passions, such as revenge, over which they have little control, was to Holmes a psychological truth that must be taken into account by legal decisionmakers when formulating social policy. But Holmes's ideas about human nature were not limited to the study of legal rules and law reform. As we have seen, he also drew upon his psychological theory in the process of developing a vision of professional life. Holmes often portrayed the lawyer as a servant to the "bad man," whose task was to predict how judges would actually decide particular legal issues. From the standpoint of Holmes's prediction theory, the lawyer facilitates the client's wishes by predicting the legal consequences of behavior. But the view of the lawyer as technician was never the whole picture, for Holmes also promoted, in the ideal of the solitary hero, a Romantic account of lawyering that redeemed the lawyer-philosopher from moral relativism.³⁷⁸

Holmes's struggle to construct a Romantic view of human nature took place at a time when many nineteenth-century thinkers were engaged in an effort to find meaning in a world increasingly secularized by the magnificent successes of the new experimental sciences. The Romantic ideas that informed Holmes's jurisprudence, however, need not be taken to deny that Holmes valued empirical knowledge. His appreciation for scientific empiricism itself had roots

378. See Luban, *Judicial Restraint*, *supra* note 31, at 467 (quoting OLIVER WENDELL HOLMES, JR., *Commencement Address, Brown University*, in OLIVER WENDELL HOLMES, JR., COLLECTED LEGAL PAPERS 164, 164 (1920); *The Profession of the Law*, in COLLECTED LEGAL PAPERS, *supra*, at 29, 30; *The Path of the Law*, in COLLECTED LEGAL PAPERS, *supra*, at 167, 202):

Importantly, Holmes found that the profession of law, which he initially regarded as "a thick fog of details—in a black and frozen night, in which were no flowers, no spring, no easy joys," was actually a region in which "thought may find its unity in an infinite perspective," in which you can "connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law."

in the Romantic tradition, for, as discussed earlier, most Romantic writers and philosophers viewed the faculty of creative imagination as a higher, but supplemental, power to that of reason. For the Romantics, the Enlightenment *philosophes* had made a tragic mistake of *emphasis*: they erred in believing that reason and science were the only important means for understanding the world. In contrast, many Romantics used verse and prose to harness the chaotic and transcendent power of the imagination to the boundaries of reason. Holmes certainly never lost faith in the usefulness of science and reason, but rather attempted to enrich his understanding of the empirical world with a deeper and more meaningful vision of the human beings who inhabit it.

CONCLUSION

The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.³⁷⁹

In his biography of Holmes, Mark DeWolfe Howe tells us that Harold Laski asked an elderly Holmes to describe how he had come upon the idea of comparative historical work that resulted in *The Common Law*. Holmes replied in a revealing passage: "You ask me what started my book. Of course I can't answer for unconscious elements. . . . I think the movement came from within—from the passionate demand that what sounded so arbitrary in Blackstone, for instance, should give some reasonable meaning" ³⁸⁰ Even late in life, long after he had finished his most important jurisprudential writing, Holmes's appreciation for the way in which unconscious elements and inner passions direct human beings in their affairs remained strong. It may be asking too much of intellectual history to forge a connection between this Romantic strain in Holmes's work and the psychoanalytic psychology developed by Freud during the

379. *The Path of the Law*, *supra* note 3, at 478, reprinted in 3 COLLECTED WORKS, *supra* note 3, at 406.

380. Letter from Oliver Wendell Holmes, Jr. to Harold J. Laski (June 1, 1922), in 1 HOLMES-LASKI LETTERS 429-30 (Mark DeWolfe Howe ed., 1953), quoted in HOWE, THE PROVING YEARS, *supra* note 90, at 148-49.

same period.³⁸¹ Yet one close friend of Holmes drew just this connection. In a letter to Holmes written in 1929, Sir Frederick Pollock aptly observed that “[t]he sound foundation of Freud’s (if his followers don’t wrong him) crazy sky-scraper seems to have been discovered by you long ago.”³⁸² Pollock was right to note that Holmes’s work foreshadowed, in rough outline at least, fundamental aspects of Freud’s psychology, particularly the notions of instinctual drives, unconscious passions, conflict and irrationality.³⁸³ Nevertheless Holmes belonged more to the generation of early-nineteenth-century Romantics than to the generation of Freudian psychologists who came of age in the early twentieth century. Unlike Freud, who considered himself a scientific observer of the unconscious mind, Holmes seemed content to conceive of the unconscious in imaginative and transcendental terms.

We are left to ponder the fact that the century’s most eloquent and influential advocate of the reasonable man standard was also an irrepressible Romantic when it came to human nature. As suggested in this Article, Holmes most likely advocated the external standard of liability because he believed that subjective motivations are not easily accessible to legal proof. Unfortunately, Holmes’s belief in the external standard has contributed to a behaviorist orientation in law that downplays or ignores altogether the importance of unconscious forces in human affairs. In contrast to Holmes, contemporary legal scholars seem largely oblivious to the existence or importance of unconscious influences on human behavior.³⁸⁴ The debate over

381. Two years after Holmes published *The Path of the Law*, Freud launched his brilliant assault on the idea of rationality and free will, with *The Interpretation of Dreams*.

382. Letter from Sir Frederick Pollock to Oliver Wendell Holmes, Jr. (Aug. 16, 1929), in 2 HOLMES-POLLOCK LETTERS, *supra* note 376, at 251.

383. Holmes read *The Interpretation of Dreams* in 1914. He commented on it in a letter to Einstein:

I am engaged with Freud on *The Interpretation of Dreams* of which I have heard talk. I think it must suffer very severely even in the substance of the argument from translation, but it is interesting. Ladies should be warned not to tell very innocent sounding dreams in public. An umbrella, unlike its behaviour in day life, generally is an instrument capable of begetting offspring. And going upstairs—well—there you are. The remoteness of the pictures from what Freud says they mean is amazing. He is a doctor, I think of great experience, and I don’t doubt knows what he is talking about, but his statements and arguments in the translation, it seems to me, have to be taken a good deal on faith.

Letter from Oliver Wendell Holmes, Jr. to Lewis Einstein (July 20, 1914), in THE HOLMES-EINSTEIN LETTERS, *supra* note 118, at 98.

384. For an important exception, see ROBERTO MANGABEIRA UNGER, PASSION: AN ESSAY ON PERSONALITY (1984).

individual autonomy, for example, which occupies the attention of so many constitutional and political theorists, remains for the most part devoid of psychological understanding. Holmes understood the importance of psychology to the study of law, and this insight, along with his Romantic ideas about human nature, remain a vital part of his legacy.