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HOLMES ON NATURAL LAW

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My dear Laski,

Your remark about the “oughts” and system of values in political science leaves me rather cold. If, as I think, the values are simply generalizations emotionally expressed, the generalizations are matters for the same science as other observations of fact. If, as I sometimes suspect, you believe in some transcendental sanction, I don’t. Of course, different people, and especially different races, differ in their values—but those differences are matters of fact and I have no respect for them except my general respect for what exists. Man is an idealizing animal—and expresses his ideals (values) in the conventions of his time. I have very little respect for the conventions in themselves, but respect and generally try to observe those of my own environment as the transitory expression of an eternal fact . . .¹

SO the eighty-eight year old Oliver Wendell Holmes wrote to Harold Laski on September 15, 1929, just weeks before the stock market crashed plunging the world into depression.

What are we to make of Holmes’s statements? “Values,” he says, are merely “generalizations emotionally expressed.”² As such, they are “matters for the same science as other observations of fact.”³ They have no “transcendental sanction.”⁴ Of course, different people, and, especially, different peoples (what Holmes calls “races”), “differ in their values.”⁵ These differences are mere “matters of fact,” and deserve no particular

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1. Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Sept. 15, 1929), in *THE ESSENTIAL HOLMES*, at 116 (Richard A. Posner ed., 1992) [hereinafter Laski Letter].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

respect beyond the respect owed to “what exists.”⁶ That is, the acknowledgment that it exists—the acknowledgment that things are as they are. “Man is an idealizing animal,”⁷ Holmes says. Man expresses his ideals in “conventions.”⁸ The “conventions” themselves are not worthy of any particular regard, but it makes sense for people generally to observe the conventions of their environment as an “expression,” albeit a “transitory” one, of “an eternal fact.”⁹

What is Holmes affirming and what is he denying? In asserting that “values” are “generalizations emotionally expressed,”¹⁰ I take Holmes to be denying that there are objective truths about what it is ultimately reasonable to want and to consider worthy of acting to realize, attain, preserve, promote and participate in. “Values” are subjective, according to Holmes, inasmuch as they are given by emotion, which varies from person to person and from culture to culture, and are not susceptible of rational evaluation. People act in light of their values; but values provide merely emotional, and not rational, motivation.

Thus it is that values are, according to Holmes, matters for “the same science as other observations of fact,” that is to say, *positive* science—the science of “what exists.”¹¹ Holmes disbelieves in the possibility of *normative* science or rationality—the use of intellectual faculties to ascertain objective truths about what one *ought* to want, what is *worth* wanting and what is not. Hitler’s hatred of Jews, or ancient Rome’s quest for glory in the conquest and domination of other peoples, are, or were, expressions of subjective values. Under Holmes’s view, they are intrinsically neither more nor less rational than the opposing values of others—say Mother Teresa and the Quakers. Of course, reason—positive science—can inquire whether Hitler *really* hated Jews, and, if he did, *what caused* his hatred; it can inquire whether the Romans *really* sought glory in conquest and domination, and, if so, *why*. But reason is, according to the account Holmes provides, powerless to judge the rightness or wrongness of Hitler’s values or Rome’s, whatever they were; nor can it identify the values of Mother Teresa as rationally superior to Hitler’s, or the values of the Quakers as more reasonable than those of the Romans.

From the point of view of rational inquiry, according to Holmes, people’s values are just facts.¹² They are ethically neutral facts—about the world—like the fact that sharks kill and eat seals, or that a hurricane struck southern Florida, or that AIDS is ravaging sub-Saharan Africa. We may, according to our own “value system,” deplore Hitler’s values; indeed,

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *See id.* (“[D]ifferent races, differ in their values—but those differences are matters of fact . . .”).

we may, in light of our own subjective values, be willing to fight and die to frustrate Hitler's ends. But, according to the perspective adopted by Holmes, our ultimate values are, from the point of view of rational inquiry, neither more nor less rational than, say, Hitler's. Our values, too, are mere facts about the world. All that rational inquiry can do is to record them as facts, and, perhaps, explore possible psychological and sociological causes of their existence. "Ethics" or "moral philosophy," considered in Platonic and Aristotelian fashion as disciplines of rational inquiry into putative truths about what is *worth* having and doing—*what is right and what is wrong*—are mere pseudo-sciences. They futilely seek what Holmes refers to, with evident derision, as "some transcendental sanction"—some standard by which to judge rationally the meaningfulness and significance of facts about which the universe is ultimately indifferent.¹³

It seems to me that Holmes's reference to "some transcendental sanction" ought not to be taken merely as an expression of religious skepticism, though it certainly includes that. I do not think he was worried about Harold Laski getting religion. The skepticism it pleased Holmes to assert was comprehensive. It denied the possibility of reason's functioning (in the practical or prescriptive domain) as anything more than Hume's "slave of the passions," that is to say, a faculty for identifying how to get what we want, but not one capable of identifying what is intelligibly *wantable*, what is rationally *worth wanting*.¹⁴

Is this because man has no nature that can serve as the ultimate criterion for distinguishing reasonably between what is fitting and unfitting, noble and base, right and wrong? Well, plainly Holmes doesn't think that anything, including human nature, provides such a criterion. But just as plainly he believes in a more or less determinate human nature. Indeed, he says something about his understanding of human nature in the fragment I quoted from the letter to Laski. "Man," he asserts, "is an idealizing animal."¹⁵ In other words, it is characteristic of human beings—it is our nature—to *have* values considered precisely as "generalizations emotionally expressed."¹⁶ Human beings in all times and all places have values. It is a fact about us. Hitler had values; so did Mother Teresa. Similarly, human cultures constitute, promote and express a sharing of values. The Romans had values; so did the Quakers.

13. *Id.*

14. See DAVID HUME, A TREATISE OF HUMAN NATURE 266 (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2000) (1740) ("Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them."); see also Jeffrey Goldsworthy, *Fact and Value in the New Natural Law Theory*, 41 AM. J. JURIS. 21, 45-60 (1996) (offering contemporary defense of Hume's position and discussing arguments of Germain Grisez, John Finnis and Joseph Boyle). For a critical reply to Goldsworthy, see ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 17-30 (1999) (discussing Goldsworthy article in depth).

15. Laski Letter, *supra* note 1, at 116.

16. *Id.*

But, of course, the fact that man is an idealizing animal—a being that characteristically has values—is merely a fact about man, in Holmes’s view. It does not imply or entail anything about putatively objective ethical duties. It is a truth that is attained by positive observation of human beings and cultures and inquired into more deeply in the disciplines of psychology and sociology. And these inquiries reveal that while “having values” is a constant fact of human existence, values themselves vary from person to person, and, especially, from culture to culture. Reason has no power to adjudicate these differences. They, too, Holmes insists, are just “facts.” The respect they deserve is merely the respect owed to “what exists,” as he put it, whether it is a shark, a typhoon, a virus, a hatred, a belief in the glory of conquest—that is, the demand that facts be recognized as and for what they are.¹⁷

Holmes’s final point in the fragment concerns social conventions. There is, of course, a sense in which conventions, as such, are more than merely subjective. They are shared. But, again, as such, neither are they objective in any meaningful sense. They are, one might say, intersubjective. Moreover, conventions do not *have to be* what they are, by virtue of anything, including norms of rationality. For example, in our culture, it is a convention for men to wear tuxedos to certain sorts of social events. This convention provides a way of expressing certain values, which, while widely shared, are, Holmes would insist, necessarily subjective. Where there is a sharing of values, however, conventions arise precisely to express these shared values. It is not as if shared values are capable of being expressed in some way apart from conventions. Still, conventions cannot be any more objective than the shared subjective values they express. Indeed, they are, despite being shared, *arbitrary*. There are countless alternatives to the tuxedo that would serve just as well to express the shared values that wearing tuxedos to certain functions expresses. But someone who genuinely shared those values would not express what he wanted to express if he attended such a function dressed in, say, a toga—even a particularly elegant toga. Of course, it is not as if togas are intrinsically incapable of expressing the values expressed for us by tuxedo-wearing. It is merely that, as a matter of contingent historical and sociological fact, in our culture togas don’t express these shared values. Tuxedos, not togas, are the convention. A fellow who shows up at a formal wedding wearing a toga is expressing something, to be sure, but he is not expressing the shared values that the other men present are expressing by wearing their tuxedos.

Holmes’s statement about having very little respect for conventions “in themselves” is meant, I believe, to say that he recognizes the ultimately arbitrary nature of social conventions. At the same time, his point about “trying to observe” the conventions of his own culture (“environment”) as “the transitory expression of an eternal fact,” is meant to show his appreci-

17. *See id.* (noting that differences in values are matters of fact and that Holmes has “no respect for them except [his] general respect for what exists”).

ation of the indispensable social function of conventions for “idealizing animals” for whom a certain sharing of values makes society possible. To repeat: Conventions are needed to express shared values; yet particular conventions are contingent and, in that sense, arbitrary. Still, once conventions are established, the sensible person realizes that it is irrational to defy them unless one’s intention is in fact to signal one’s personal dissent from the shared values expressed by conforming to the conventions.

It seems to me that what Holmes says about the historical and sociological contingency and, in a sense, arbitrariness of social conventions is true. There are, no doubt, natural psychological limits to what forms dress, speech, and behavior can express. Yet, ordinarily social conventions could be otherwise than as they are, while still fulfilling their social function perfectly well.

Further, I think that Holmes is right about the role and importance of social conventions. Across the range of dimensions in which human life is lived, and certainly across human cultures, conventions play an indispensable role. They make possible things (e.g., the formality of a wedding) that would not be possible without them. Very, very often, it makes sense to follow a convention because the convention, as a matter of fact, enables one’s personal goals, or the goals of a group of which one is a member, to be achieved, despite the fact that a different convention would have worked just as well had *it* been (as a matter of contingent historical and sociological fact) the convention in place for the purpose.

It would, perhaps, not particularly please Holmes to know that an important dimension of these basic ideas about the role and importance of social conventions was elaborated skillfully by Thomas Aquinas in his discussion of the relationship of positive to natural law. Famously, Aquinas held that all just positive law is derived, in some sense, from natural law.¹⁸ Of course, natural law, for Aquinas, was nothing like Holmes’s caricature of a “brooding omnipresence in the sky,”¹⁹ but more on that point in a moment. The point here is that, as Aquinas understands the matter, the task of the legislator is to give effect to relevant principles of right order and natural justice in the shape of positive laws for the common good of society. However, the legislator accomplishes this task, according to Aquinas, in two distinct ways.²⁰

Natural law, on Aquinas’s understanding of the matter, is the body of principles, including moral norms, providing practical reasons, that is to

18. See ST. THOMAS OF AQUINAS, *SUMMA THEOLOGIAE* I-II, Q. 95, Art. 2 (Fathers of the English Dominican Province trans., 1948) (“ . . . every human law has just so much of the nature of law, as it is derived from the law of nature.”).

19. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (“The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . .”).

20. See AQUINAS, *supra* note 18, at Q. 95, Art. 2 (“ . . . something may be derived from the natural law in two ways: first, as a conclusion from premises, secondly, by way of determination of certain generalities.”).

say, reasons for action and restraint.²¹ Some positive laws such as those prohibiting murder, rape, theft and other grave injustices, are derived from the natural law by a process akin to the deduction of demonstrable conclusions from general premises in mathematics and the sciences.²² Other positive laws, however, cannot be derived from the natural law in so direct and straightforward a fashion. Where law is required to solve a coordination problem, it is often the case that a variety of possible solutions, each having its own advantages and disadvantages, are rationally available as options. One solution must, however, be authoritatively chosen if the problem is to be solved.

Consider the regulation of highway traffic. From the basic principle of natural law that identifies human health and safety as goods to be preserved, together with the empirical fact that unregulated driving—even among motorists of goodwill—places these human goods in jeopardy, it follows that a scheme of coordination (and, thus, of legal regulation) is necessary for the common good. Yet, typically, different reasonable, but incompatible, schemes are possible. For the sake of the common good, then, the relevant authority must stipulate *one* from among the different possible schemes. In selecting the scheme, the lawmaking authority operates not by any process analogous to the deduction of demonstrable conclusions from premises, but rather by a process of choosing between reasonable, yet incompatible, options—a process that Aquinas refers to as *determinatio*.²³

Laws that come into being as *determinationes*, according to Aquinas, have their binding force not from reason alone, but also from having been laid down by valid lawmaking authority.²⁴ But for the law's enactment, no one would be under any general moral duty to behave as it requires. Indeed, despite the fact that the lawmaking authority could, compatibly with natural law, have selected a different rule or scheme of regulation, "its directiveness derives not only from the fact of its creation by some recognized source of law (legislation, judicial decision, custom, etc.) but also from its rational connection with some principle or precept of morality."²⁵

Now, mention of custom in this regard links us back to Holmes's points about convention. For even where custom lacks the status or force of law—where, that is to say, it is *merely* a social convention—it can provide a reason, indeed, a conclusive reason, for compliance—even where the

21. For a careful explanation of the meaning of natural law in Aquinas, see generally JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* (1998) (examining meaning of natural law according to Aquinas).

22. See AQUINAS, *supra* note 18, at Q. 95, Art. 2.

23. See FINNIS, *supra* note 21, at 266-74 (discussing just and unjust laws with authority and obligation); see also, Robert P. George, *Kelsen and Aquinas on "The Natural Law Doctrine"*, 75 NOTRE DAME L. REV. 1625, 1637-39 (2000) (referencing most materials that text draws from).

24. See AQUINAS, *supra* note 18, at Q. 104, Art. 1.

25. FINNIS, *supra* note 21, at 267.

custom or convention could be different from what it is and still fulfill its valuable social function. Of course, Holmes's underlying moral skepticism and non-cognitivism cause him to treat compliance with law, custom, convention or any other norm as merely a matter of hypothetical imperatives. Anyone holding, as Aquinas does (and I do), a contrary metaethical position will see the matter differently. Often, that is to say, (not always, but often) one will have conclusive moral reasons to contribute to the realization of ends and achievement of goals that a custom or convention serves. And where compliance with the custom or convention provides in practice the unique way of making that contribution (as it often will—think of tuxedo wearing) then one's strict moral obligation is to comply with the custom or convention. Because the imperative is categorical, rather than hypothetical, one can truly say that one's moral obligation is to comply—again, despite the fact that the custom or convention could have been otherwise than it is without substantial loss—and even, perhaps, with gain.

Holmes's insistence on the purely hypothetical nature of imperatives is fully on display in the only essay of which I am aware in which he squarely confronts the doctrines of natural law. It appeared in the *Harvard Law Review* in 1918 under the title *Natural Law*. There he argued as follows:

It is true that beliefs and wishes have a transcendental basis in the sense that their foundation is arbitrary. You can not help entertaining and feeling them, and there is an end of it. As an arbitrary fact people wish to live, and we say with various degrees of certainty that they can do so only on certain conditions. To do it they must eat and drink. That necessity is absolute. It is a necessity of less degree but practically general that they should live in society. If they live in society, so far as we can see, there are further conditions. Reason working on experience does tell us, no doubt, that if our wish to live continues, we can do it only on those terms. But that seems to me the whole of the matter. I see no *a priori* duty to live with others and in that way, but simply a statement of what I must do if I wish to remain alive. If I do live with others they tell me that I must do and abstain from doing various things or they will put the screws on to me. I believe that they will, and being of the same mind as to their conduct I not only accept the rules but come in time to accept them with sympathy and emotional affirmation and begin to talk about duties and rights.²⁶

Holmes makes it clear that there is all the difference in the world between, on the one hand, the psychological phenomenon of coming to accept and approve social rules initially complied with merely as condi-

26. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41-42 (1918-19).

tions of achieving one's ends (including, preeminently, the end of staying alive), and, on the other hand, what he describes as "the supposed *a priori* discernment of a duty or the assertion of a preexisting right."²⁷ He summarizes the matter in one of his famous aphorisms: "A dog will fight for his bone."²⁸

Well, yes: the psychological phenomenon of approving and accepting rules is not the same thing as having—nor is it very good evidence for believing that there are—*good reasons* that are not reducible to mere emotions for valuing those ends (whatever they are) that the rules are designed to procure or protect. By the same token, of course, the rejection of the rules by some, or the willingness of people to comply merely under threats or as a means of achieving their goals, or the diversity of beliefs and practices within a society or across cultures, does not establish the non-existence (or non-obtaining) of such reasons. Values may be objective even if nobody considers them to be so, and even if lots of people, or indeed, everyone, does not accept or hold them. Differences of wants, or of beliefs about what people should want, do not negate the possibility that people can have reasons to want things even if they happen not to want them, or the possibility that people can have reasons not to want things that they happen to want.

Here, I think, is the crux of Holmesian skepticism. The question is whether our basic wants are mere subrational, emotional, *givens*. At the end of the day, is it that we necessarily want whatever we happen to want, and that our reason has no power to criticize our wants? Holmes states his view clearly in the *Natural Law* article: "I see . . . no basis for a philosophy that tells us what we should want to want."²⁹ This is central among the views that qualify Holmes, in Richard Posner's approving judgment, as "the American Nietzsche."³⁰

But is there a basis for a philosophy—and Holmes's claims, however skeptical, are plainly philosophical—that tells us that there is no possibility of rationally adjudicating among wants—in other words, a philosophy that tells us that there are no fundamental (in the sense of non-instrumental or more-than-*merely*-instrumental) reasons for wanting things? What could that basis be? What would be the status of the philosophy on which it is built?

The problem that Holmesian (like Humean, and, for that matter, Nietzschean) philosophy faces is retorsion with its threat of self-refutation. Any philosophy worth entertaining must be capable of providing an intelligible (coherent, internally consistent, plausible) account of itself. Its

27. *Id.* at 42.

28. *Id.*

29. *Id.* at 43.

30. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 239-42 (1990) ("[Holmes] enforced the lesson of ethical relativism, thereby turning law into dominant public opinion in much the same way that Nietzsche turned morality into public opinion.").

claims must square with its own premises, other claims and implications. This is true of skeptical philosophies, as much as non-skeptical ones. And the problem is not simply logical, though logical inconsistency, if proven, is damning to any philosophical claim. For the canons of reasoning include elements that go beyond the demand for logical consistency. If, for example, a philosopher lays claim on our attention to consider a proposition he is asserting, we are entitled to count it against his assertion that the claim itself, even if internally consistent, is being asserted, not as true, but as, say, merely his opinion, where he has detached the idea of “opinion” from the concept of truth, such that his opinion is put forward as something other than an opinion about the truth of what he is asserting. Similarly, we need not, and should not, credit a claim being asserted as something other than a proposition we ought to hold because the reasons for holding it are, all things considered, sound, or, at least, sounder than the reasons, if any, for not holding it.

Now back to Holmes. He runs a couple of arguments against belief in natural law that are easily disposed of. First, he claims that believers in natural law draw an unwarranted inference from the merely familiar to the natural, in the sense of the morally good and right.³¹ “The jurists who believe in natural law,” he protests, “seem to me to be in the naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.”³² But this is plainly a false charge. It certainly does not apply to Aquinas or his most influential forbears and successors in the tradition of natural law theorizing. Indeed, as Leo Strauss observed in *Natural Right and History*, it is the diversity of human practices and moral opinions that *motivates* the philosophical quest to discover principles of natural law or natural right that provide criteria for their moral-critical evaluation.³³

Holmes’s second charge is that natural law theorists confuse their own certitude with certainty. “We have been,” he says, “cock-sure of many things that were not so.”³⁴ Well, yes, of course we have been. But this fact, if anything, should strengthen our resolve to be self-critical and practice intellectual humility. It should make us more aware—dare I say more certain, more cock-sure?—of our own fallibility. And this applies to everyone, not just natural law theorists. (Indeed, it strikes me as defamatory to assert that it applies with any special force to natural law theorists. Consider that St. Thomas sets forth, “sympathetically and plausibly,” as John Finnis says in his fine new book on Aquinas, “more than 10,000 objections to the

31. See Holmes, *supra* note 26, at 41 (discussing perceived fallacies of natural law proponents).

32. *Id.*

33. See LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 10 (1953) (“[R]ealization of the variety of notions of right is *the* incentive for the quest for natural right.”); see also HEINRICH ROMMEN, *THE NATURAL LAW* 4 (1947) (examining origins of natural law).

34. Holmes, *supra* note 26, at 40.

positions he proposes and defends” in the *Summa Theologiae* alone.³⁵) Skepticism has no better record than any other philosophy on this count. Ditto for pragmatism, Darwinism, utilitarianism and other philosophies that impressed Holmes in various ways. Holmes himself was a man of many certainties of belief—certainties, often rooted deeply in his philosophical skepticism, that appear highly dubious today.³⁶ In the very discussion of certitude, in the course of making his point against the natural law theorists, he asserts without qualification or the slightest shade of doubt that “[w]hat we most love and revere generally is determined by early associations.”³⁷ Really? Now, there is a claim which, if interpreted in such a way as to raise it above the level of the banal, is highly questionable, to say the least.

Now, back to the problem of retorsion and self-refutation. Holmes asserts his skeptical claims as true, or, at least, rationally warranted. His criticism of natural law theory and other cognitivist accounts of ethical obligation are assertions that their claims are wrong, or, at least, rationally unwarranted. He thinks that people who hold false, incorrect or, at least, unwarranted opinions on these matters ought to change them. They ought to replace them with the contrary opinions which Holmes himself asserts as true, correct or, at least, uniquely warranted from the rational viewpoint. For example, the claim about the general determination of what we most love and revere is put in place to set the stage for a distinction that is meant to have the practical impact of causing people to change their views in order to conform them to what Holmes thinks ought to be believed. “[W]hile one’s experience . . . makes certain preferences dogmatic for oneself,” he says, “recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else. And this again means scepticism.”³⁸ But if this is true, if this really warrants skepticism, indeed, if it makes any real sense to assert it and urge the adoption of moral skepticism, then it means that a fundamental belief—indeed a belief of great practical significance—can be changed by reasoning, and it *ought to be changed*, fundamental desires and emotions to the contrary notwithstanding. A practical implication of the assertion is that people *ought* to embrace the skeptical position, desires and emotions to the contrary, again, *notwithstanding*, because it is true, correct, warranted, and the contrary positions are false, erroneous, unwarranted. And this, in turn, appeals implicitly but inescapably to the practical reasonableness of acting and believing on the basis of what is sound, correct, true—in other words it treats truth (or, at least, warranted belief)

35. See FINNIS, *supra* note 21, at 10 (“Like no one before him and not many since, Aquinas takes the academic ‘comprehensive textbook’, keeps or even enhances its coherence and coverage, but re-creates it in disputation form.”).

36. See, e.g., *Buck v. Bell*, 274 U.S. 200, 207 (1927) (making infamously controversial statement “[t]hree generations of imbeciles are enough”).

37. Holmes, *supra* note 26, at 41.

38. *Id.*

as providing a valid practical reason, an *objective value*, something with a claim on us that transcends our wishes and emotions, and thus, in precisely the sense Holmes himself derided (if I understand him correctly), a transcendental sanction.

Holmes's position is not saved from a retorsive or self-referential argument along these lines by his claim that one's recognition of the validity of skepticism will leave in place (or, at least, need not displace) "one's belief or love."³⁹ First, this is problematic in itself. Recognition that a "belief or love" one thought to be rationally and morally warranted or even required is, in truth, a mere subjective emotion, with no objective rational or moral warrant, is unlikely to leave that belief or love unaffected even in respect to the emotional intensity with which one holds it. Second, and much more importantly, whether or not one's belief or love stays in place, Holmes's argument asserts a skeptical position which does not sit easily with his own assertions that skepticism is true or, at least, uniquely warranted from the rational viewpoint, and should *therefore* be embraced even by those who wish it were otherwise.

Holmes says that "[d]eep-seated preferences can not be argued about—you can not argue a man into liking a glass of beer—and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as appears, his grounds are just as good as ours."⁴⁰ But the issue I am raising is not about a glass of beer. There really is not a reason to like a glass of beer if one happens not to like it. One likes it or one does not, and there, as Holmes would say, is the end of it. The issue is whether people ought to believe and act on the basis of what is true, correct, sound, warranted; Holmes's assertion of his view presupposes that they should, and, thus, presupposes that people can and should grasp the point—the basic, more-than-merely-instrumental, point and value—of truth, knowledge, reasonableness, rationality. But, if they can, then it is a mistake to suppose that all values are subjective, and it is time to launch, or continue, the quest to distinguish mere matters of taste (a glass of beer) from those aspects of human well-being and fulfillment (such as practical and theoretical knowledge of truth) that have objective worth and, thus, standing as principles of "natural law."

39. *Id.*

40. *Id.*

