

## **The Nihilist**

Raff Donelson

If nothing else is true about him, Justice Oliver Wendell Holmes, Jr. was skeptical about morality.<sup>i</sup> In his most famous dissent, *Lochner v. New York*, Justice Holmes can be heard admonishing his colleagues for mistaking their views of political morality for a self-evident truth. He began his dissent saying, “This case is decided upon an economic theory which a large part of the country does not entertain.”<sup>ii</sup> The economic theory in question was *laissez-faire* economics. While his colleagues thought they knew that liberty, the liberty protected by the Fourteenth Amendment, required legislatures to adopt a *laissez-faire* approach to economic issues, Holmes was far less sure.<sup>iii</sup> The fact that many people thought otherwise was even more reason for caution and judicial restraint. Though Holmes has largely been lauded for the *Lochner* dissent,<sup>iv</sup> for his general skepticism, Holmes has drawn ire from many, and some have labeled him a “nihilist,”<sup>v</sup> a “Nietzschean,”<sup>vi</sup> or both.<sup>vii</sup>

This chapter demonstrates that Holmes was no Nietzschean nihilist. Such an accusation is triply mistaken. Holmes was no nihilist, nor was he a Nietzschean, and there is no such thing as a “Nietzschean nihilist” because Nietzsche was no nihilist either.

This chapter begins with offering a definition of “nihilism” that will serve as a touchstone for the proceeding discussion. Only with the definition of “nihilism” fixed can we have a productive conversation about whom should have the label. After this preliminary work, I turn to the three main tasks of the chapter: showing that Holmes was no nihilist, that he was no Nietzschean, and that Nietzsche and Holmes are both anti-nihilists. On the first task, I not only offer textual support for a non-nihilist reading of Holmes, but I also try to explain why some

commentators have erroneously called Holmes a nihilist. On the second task, I argue that the differences between Holmes and Nietzsche are too great – and the similarities too few and commonly found – for it to make sense to call Holmes a Nietzschean. The final task of the paper aims to show that both Nietzsche and Holmes are anti-nihilists. As I show, those commentators who label Nietzsche a nihilist are making a similar kind of error as those who call Holmes a nihilist. Both kinds of critics miss the fact that both Holmes and Nietzsche are *in different ways* responding to nihilism. Thus, the final section of this chapter serves to underscore the message of the first two: Holmes is not a Nietzschean precisely because he is a different kind of anti-nihilist.

### Defining Nihilism

Like “realism,” “positivism,” “pragmatism,” and so many other philosophical terms, “nihilism” has come to refer to more than one idea. In what follows, I distinguish between two senses of the term, what I call *nihilism*<sub>1</sub> and *nihilism*<sub>2</sub>. With the distinction drawn, we see what Holmes’s commentators must have had in mind, for only one of these names a full-fledged philosophical position that can be the subject of agreement, disagreement, or scorn.

To grasp what it is to be a nihilist<sub>1</sub>, consider the following. We are all nihilists<sub>1</sub> about witches, phlogiston, and the ether. What do those things have in common? We do not believe they exist. To deny that *x* exists is to be a nihilist<sub>1</sub> with respect to *x*. With that said, it should be clear that one cannot be a nihilist<sub>1</sub> *simpliciter*. One can be a moral nihilist<sub>1</sub> (denying the existence of moral properties), a theological nihilist<sub>1</sub> (denying the existence of deities), a doxastic nihilist<sub>1</sub> (denying the existence of beliefs), or a nihilist<sub>1</sub> about any other purported property or object, but to be a nihilist<sub>1</sub>, one has to deny the existence of something in particular.

Even if one denies the existence of everything, that is, even if one holds global nihilism<sub>1</sub>, the *global* modifier is still needed.<sup>viii</sup>

To be a nihilist<sub>2</sub> is to hold the view that life is somehow meaningless, hollow, or not worth living. Put this way, it would seem that nihilism<sub>2</sub> is just a form of nihilism<sub>1</sub>, one on which the adherent denies the existence of “meaningfulness in life.” This characterization of nihilism<sub>2</sub> misses something: nihilism<sub>2</sub> involves a negative practical attitude toward life.<sup>ix</sup> In the cultural imagination, the melancholy nihilist<sub>2</sub> may arrive at her nihilist<sub>2</sub> stance because she holds a nihilist<sub>1</sub> view about morality or gods, but these kinds of nihilism are distinct. For instance, it is possible to reject theological nihilism<sub>1</sub> while continuing to deny that life is worth living; one might have this combination of views because one thinks life, as the plaything of an omnipotent being who expects one’s obedience, is a hollow, worthless experience. Alternatively, it is possible to accept moral nihilism<sub>1</sub> while continuing to see life as fully worth living; one might have this combination of views because one finds the metaphysics of morality wholly irrelevant to our practical lives.<sup>x</sup>

It is widely believed that Holmes was a nihilist<sub>1</sub> about certain things, but, in calling him a *nihilist*, some of his various interpreters were saying more than that.<sup>xi</sup> They thought he was a nihilist<sub>2</sub>. This is the right reading of these interpreters for several reasons.<sup>xii</sup> The most important of which is the grammatical reason suggested above. Interpreters write things like, “The filaments of [Holmes’s] thought are astonishing in their variety... One can find pragmatism, atheism... nihilism.”<sup>xiii</sup> If we understand this commentator as claiming that Holmes was a nihilist<sub>1</sub>, he has to be saying something too incomplete to be meaningful or something entirely trivial. Either commentator has left out the object of Holmes’s denial, which leaves the reader

entirely in the dark, or the commentator merely meant to say that there is *something* that Holmes does not believe in, which is trivial because everyone denies the existence of something.<sup>xiv</sup>

The preceding argument should be dispositive. Thus, our debate concerns whether Holmes (or Nietzsche) is rightly called a nihilist.<sup>xv</sup>

### Holmes is not a Nihilist

To see Holmes as a nihilist is to see him as a man who denies the existence of objective moral principles, who denies the existence of God, who denies that the Universe has any grand plan for human beings, and who, on the basis of these denials, detaches from life and becomes depressed. Such depression may express itself alternatively as melancholy or reckless abandon, but both attitudes stem from the practical stance that life is not worth living.

Albert Alschuler gives melodramatic voice to this understanding of Holmes. Alschuler reads Holmes as someone who found life meaningless and intermittently cared about nothing or advocated for reckless abandon. Alschuler draws attention to the fact that in Holmes's diary, he devoted one word to discuss his wedding that day, "Married."<sup>xvi</sup> Alschuler even points out that Holmes did not take a honeymoon as further proof that Holmes was a gloomy nihilist.<sup>xvii</sup> Other supposed proof is the fact that Holmes "rarely supported charities or political causes."<sup>xviii</sup> In one place, Alschuler writes, "Holmes had the courage of his nonconvictions."<sup>xix</sup> On the reckless abandon variety of nihilism, Alschuler cites "[Holmes's] frequent glorification of the death of soldiers committed to causes they do not understand."<sup>xx</sup>

Alschuler is not alone in seeing Holmes as a nihilist. While others avoid the specific term, they too read Holmes as a nihilist, whose skepticism went too far for his own good. One 1940s commentator summarized Holmes's thinking thusly: "Mr. Justice Holmes pursued truth

with vigor. ... there is something pathetic in the man's life-long search for... 'an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.' It was a search that ended where it began, in the gloomy labyrinth of doubt and skepticism."<sup>xxi</sup> This same commentator wrote, "A dark sunless thing is Holmes' conception of man."<sup>xxii</sup>

Though I disagree with the "nihilist" label, Holmes's critics do get a few things right. He was no firm believer in deities or true moral values, but, as Holmes himself noted, "it does not follow that, without such absolute ideals we have nothing to do but to sit still and let time run over us."<sup>xxiii</sup> In other words, Holmes saw his skepticism as no reason to become depressed. Holmes was not nihilistic. He greeted life with a good deal of optimism and energy, maybe even too much optimism, as some commentators have said.<sup>xxiv</sup> In one place he wrote, "We all, the most unbelieving of us, walk by faith. We do our work and live our lives not merely to vent and realize our inner force, but with a blind and trembling hope that somehow the world will be a little better for our striving."<sup>xxv</sup> Holmes, like many of us, by turns chose to look away from our own inevitable demise and to think happy thoughts. As he once told a friend, "I dare say that the best way is not to bother about death until it comes, but just crack ahead."<sup>xxvi</sup> Consider also how Holmes spoke about growing old: "as soon as a corner is turned the road stretches away again and ambition to go farther returns."<sup>xxvii</sup> If he really were committed to the thought that life was not worth living, if he really thought that life was but a "gloomy labyrinth," what should we make of this ambition to go farther?

To sum up the discussion thus far, some critics of Holmes call him a nihilist because they make a certain inference. They infer nihilism from Holmes's skepticism, atheism, and supposed moral nihilism. Holmes outright said that this is a bad inference. Samples from Holmes's writings also reveal that he did not hold the relevant practical stance toward life that nihilism

requires. I have not yet explained why Holmes found the inference bad, that is, why Holmes did not come to hold a negative practical stance toward life, given his other commitments. Below I explain this and, in the course of that explanation, demonstrate that Holmes was more than a non-nihilist, he was an anti-nihilist.<sup>xxviii</sup> Before that discussion, however, I explain why Holmes is no Nietzschean.

### Holmes is not a Nietzschean

Several commentators compare Holmes and Nietzsche and conclude that these two shared quite a bit intellectually.<sup>xxix</sup> In this section, I consider two lists of supposed similarities between Holmes and Nietzsche. One list comes from Alschuler, the other from Posner. Alschuler has an impressive list of similarities that is worth setting out in full:

Holmes and Nietzsche were born three years apart and had much in common. [1] Both viewed life as a struggle for power; [2] both were antireligious [small qualification omitted]; [3] both saw ethics as lacking any external foundation; [4] both could fairly be regarded as existentialists; [5] both saw the suffering and exploitation of some as necessary to the creative work of others; [6] both were personally ambitious and had a strong work ethic (possibly reflecting their Protestant heritage); [7] both had a strong sense of personal destiny; both viewed the disciplined, creative life as an ideal; [8] both often seemed indifferent to the feelings of those around them; [9] both found in their wartime experiences a metaphor for the universe at large; and [10] both had military-style moustaches.<sup>xxx</sup>

Posner adds a few more items.<sup>xxx1</sup> While I review Posner's list of similarities below, first I examine that of Alschuler.

Alschuler's ten points of comparison, when taken together, seem to make a strong case for Holmes being a Nietzschean (or Nietzsche a Holmesian). On closer inspection, of those points of comparison that are actually true, these traits are far too common to say anything significant. For instance, items (1), (2), and (3) on the list are true of Holmes and Nietzsche and arguably true of Marx, Darwin, and Freud as well. My point is not "therefore, we should conclude that Holmes is just as much a Nietzschean as he is a Marxist, Darwinian, or Freudian." Instead, I am pointing out that (1), (2), and (3) were *au courant* ideas among radicals during the latter half of the Nineteenth Century. Many of the most famous thinkers from that era espoused those things; thus, mentioning these similarities between Holmes and Nietzsche should not move us very far toward the thought that they shared a comprehensive philosophical outlook. Item (4) is false because Holmes is not an existentialist, but proving this will have to come later. Item (5) is true, but believing that some people's creative work depends on others' exploitation is commonplace. From the pyramids of Giza to the American transcontinental railroad, there are few great engineering feats that did not require many people's suffering, and everybody knows this.<sup>xxxii</sup> Items (6) and (7) are true, but those traits characterize many highly successful people, and, regrettably, the same is true of the trait mentioned in (8). Item (9) is true of many who participate in war, and with (10), Alschuler is merely making a joke. In sum, if I can show that Alschuler is mistaken about (4), we have a very underwhelming case. Rather than having shown that Holmes was Nietzschean, Alschuler merely points out that Holmes was a Nineteenth Century *maître de soupçon* with some personality traits shared by other geniuses the world over.

Let us then examine the point about existentialism. Alschuler contends that Holmes was an existentialist. On a standard understanding of their view, existentialists first “maintain that there is no God of any sort, and no absolutes in the realms of value and morality. There are only men and things. Men find themselves thrown into a cold and hostile world.”<sup>xxxiii</sup> But the story does not end there, for the existentialist also maintains that humans create value.<sup>xxxiv</sup> Thus, according to the existentialist, the absence of gods and preexisting moral values should not be a cause of despair; rather, it is an opportunity to exercise one’s freedom. If this common understanding of existentialism is the view Alschuler ascribes to Holmes,<sup>xxxv</sup> he has made a poor interpretation of Holmes (and maybe Nietzsche too).<sup>xxxvi</sup>

It is true that Holmes doubts the existence of gods and objective moral values like existentialists do; however, Holmes differs from them in not accepting voluntarism. As I understand them, existentialists are eager to deny that values are “transcendent givens independent of human subjectivity,” or in other words, they deny that values are “irreducible” to human wills.<sup>xxxvii</sup> On the existentialist view, values are really there, but some of us have wrongly understood them as things to be found instead of made. Holmes, on the other hand, had different things to say about value. In one place he wrote, “We all have cosmic destinies of which we cannot divine the end, if the unknown has ends.”<sup>xxxviii</sup> Instead of repudiating the thought that there are values ontologically independent of human wills, Holmes admitted this possibility but denied that we know about such things. Holmes followed up that sentence with this: “Our business is to commit ourselves to life, to accept at once our functions and our ignorance and to offer our heart to fate.”<sup>xxxix</sup> While the beginning of this passage (“Our business is to commit ourselves to life”) might remind one of an existentialist, imploring us to engage in radical choice and to create value, Holmes was saying something else. He instructed us to carry on in spite of



“our *ignorance*” about the ontology of values. We should not be bothered with the ontology of values, claimed Holmes. This would prove to be a common refrain in his thought: “I think it futile to ask what does it all amount to. One may ask that about all human activities; and to one who thinks as I do, there is no answer except that it is not our business to enquire.”<sup>xi</sup> As I explain below, Holmes’s indifference with respect to the ontology of morals is a central component of his pragmatism. Pragmatism and existentialism are, at bottom, different philosophical outlooks.<sup>xli</sup>

The foregoing should make it clear that Holmes was no existentialist. Therefore, whatever one wants to say about Nietzsche, existentialism is not an outlook he shared with Holmes. With that, it should be clear that Alschuler has not offered much to substantiate the claim that Holmes is Nietzschean. Next, I turn to Posner’s list of similarities between Holmes and Nietzsche.<sup>xlii</sup>

For Posner, the points of similarity are (a) use of genealogy, (b) exposing contingent systems of values for the contingencies they are, (c) skepticism about reason, (d) anti-mentalism, (e) illiberalism, and (f) non-nihilism. This list is far more interesting than that of Alschuler because the items on Posner’s list are idiosyncratic. If Holmes and Nietzsche did share a number of idiosyncratic traits, there is a better case to be made that Holmes was, as Posner put it, “the American Nietzsche.”

On (a), Posner is largely right. Nietzsche employed genealogy as did Holmes, though Holmes used it to a lesser extent. Genealogy seeks to show that the causes for a phenomenon (e.g. that a population has a particular set of moral beliefs or that a social institution has particular features) sharply diverge from the rationales moderns give for that phenomenon.<sup>xliii</sup> For example, “genealogical analysis shows that the concept of liberty is an ‘invention of the

ruling classes' and not fundamental to man's nature or at the root of his attachment to being and truth."<sup>xliv</sup> One can accept this supposed showing about the concept of liberty or not. The general point remains, namely that genealogical analysis seeks undercover the true existence and persistence conditions for "those things that continue to exist and have value for us."<sup>xlv</sup> The genealogist sets out the real reasons for our convictions and ways of life, not the post-hoc rationalizations we settle on later. Nietzsche famously provided a genealogy of morality.<sup>xlvi</sup> In his book, *The Common Law*, Holmes aimed to do much the same for law. As he wrote,

A very common phenomenon, and one very familiar for the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career.<sup>xlvii</sup>

In this long passage from Holmes, we see him making two genealogy-friendly points, first that our legal rules have backstories of which we are unaware and second that our modern justifications for our rules are not the reasons for which we follow them. Posner is thus right about (a) and about (b) too. However, Holmes does not employ genealogical methods in much of his work outside of *The Common Law*. Genealogy figures in two of Nietzsche's major works, but in Holmes's other works, genealogy does not make an appearance. For instance, in his great

essay, “On the Path of the Law,” Holmes provided an ahistorical theory about the nature of the law and about several doctrinal areas of law.<sup>xlviii</sup> In Holmes’s opinions as an appellate judge in Massachusetts and on the United States Supreme Court, his decisions are known to be pithy and not great pieces of historical scholarship. This is to say, while Nietzsche was *the* genealogist, Holmes was just an occasional fellow-traveler.

What should one make of this supposedly shared skepticism about reason, the trait mentioned in (c)? It is true that both Holmes and Nietzsche were humbler about what reason could achieve than others. Nietzsche, for instance, was skeptical of those philosophers who “wanted to supply a rational foundation for morality.”<sup>xlix</sup> He seems to have thought that all we could do is describe the mores of particular peoples or stump for mores that we like. Rational reflection will not enable us to discover the *right* mores. Holmes thought similarly about morality and about ‘natural’ legal duties. He ultimately held these were preferences and that “[d]eep-seated preferences can not be argued about.”<sup>l</sup> Holmes is also famous for having said, “The life of the law has not been logic: it has been experience.”<sup>li</sup> Relatedly, he called a fallacy “the notion that the only force at work in the development of the law is logic.”<sup>lii</sup> Again, we hear that *logic*, or rational reflection, will not enable us to discover much about morality or the law. So far, this skepticism about reason is just another way of stating (3) from Alschuler’s list, namely that Holmes and Nietzsche are skeptical about foundations for values. Do Holmes and Nietzsche go further in decrying reason? This is doubtful. Nietzsche, insofar as he engaged in genealogical critique, employed and presumed that others would employ reason. Genealogical critiques are arguments that seek to undermine one’s conviction by showing that the process by which one came to hold the conviction was not responsive to the reasons that would validate that conviction. To make such critiques is to reason, and to expect others to appreciate such critiques

is to believe that they too can reason. Nietzsche thus had a *limited* skepticism about reason. Much the same is true of Holmes. Holmes, while denying that reason could help us discover the right laws or mores, thought that reason helped elsewhere. For instance, Holmes once wrote, “Reason working on experience does tell us, no doubt, that if our wish to live continues, we can do it only [by obeying society’s standards].”<sup>liii</sup> In this passage, Holmes was saying that reason can help one to make good inductive inferences for one’s personal benefit. He had other roles for reason to play too, for he happily noted that “the man of the future is the man of statistics and the master of economics.”<sup>liv</sup> Here Holmes claimed that reason facilitates good inductive inferences for societal benefit. It is thus an overstatement to allege that Holmes and Nietzsche were reason skeptics. They saw a more modest role for reason than their excessively rationalist contemporaries.

Let us now turn to (d). Specifically, Posner writes that “both are sub- or antimentalists.”<sup>lv</sup> In claiming that both Holmes and Nietzsche were anti-mentalists,<sup>lvi</sup> Posner puts forward something that is technically correct but highly misleading. Posner’s neologism is an umbrella term, wide enough to cover two very different positions. Holmes discouraged using mental states as elements for certain legal causes of action. For instance, he thought that we should not understand contracts as requiring a meeting of the minds; rather he thought that we should require some non-mental-state objective criterion. Holmes argued for this way of arranging the law because it would lead to more predictable legal outcomes. While it is hard to prove that someone had a particular mental state, it is far easier to prove that someone took a particular action. If one understands *mentalism* as a commitment to using mental states as elements of legal causes of action (which is not an unreasonable understanding of the term), then, sure, Holmes is an anti-mentalists. This understanding has nothing to do with Nietzsche though.

Nietzsche thought that conscious mental states do little or nothing to explain action. If one understands *mentalism* as a commitment to explaining lots of phenomena by reference to individuals' conscious mental states (which is not an unreasonable understanding), then, sure Nietzsche is an anti-mentalist. In a sense, Posner is making an equivocation. Formally speaking, we can interpret away the formal problem of equivocation, for, if anti-mentalism is a disjunctive view that includes the positions of both Holmes and Nietzsche, there is no equivocation. But any such fix makes Posner's comparison weak. Instead of showing that Holmes and Nietzsche shared some significant, idiosyncratic view, he will have shown that they held different views that we can lump together in an entirely *ad hoc* way, which affords no explanatory gains.

On (e), Posner is right that Holmes and Nietzsche are both illiberal, but this commonality is less interesting than it appears. In fact, that this attribution looks like an interesting point says more about us than it says about Holmes or Nietzsche. Being illiberal is far stranger now than it was before. Plato, Aristotle, Aquinas, Machiavelli, Hobbes, Marx, and Schmitt are all illiberal. It is only now with the modern ascendancy of liberalism that someone's illiberalism is an oddity. In the time of Holmes and Nietzsche, this ascendancy was not yet complete. Vestiges of feudalism and aristocratic values still had place, and these Holmes and Nietzsche both embraced.

Discussing Holmes's and Nietzsche's reactions to nihilism takes up the space of the next section, so I defer thinking about point (f) until then. Even with that task deferred, it is worth taking stock of the long and meandering conversation, comparing Nietzsche and Holmes. I have sought to closely consider two commentaries, which claim that Holmes is a Nietzschean. Alschuler had a ten-point list of similarities, and I argued that this list contained too many commonplaces to sustain the notion that Holmes and Nietzsche shared anything too deep. The only substantial and idiosyncratic trait on the Alschuler's list, namely existentialism, is not

shared after all. Posner had a shorter list, but one with more promise because of its idiosyncratic traits. I argued that while none of the supposed commonalities proved to be flat-out wrong, they ultimately showed less than they promised. The foregoing should lead one to think that calling Holmes a Nietzschean is not so much incorrect as unhelpful.

### Nietzsche and Holmes as Anti-Nihilists

In this last substantive section of the chapter, I show that Holmes and Nietzsche were anti-nihilists but of different stripes. Holmes was a pragmatist, and this led him to take issue with the reasons for which people adopt nihilism. Nietzsche actually approved of the reasons for people adopt nihilism but still thought it presented a problem. Organizationally, first I explain what it would mean to call Holmes a pragmatist. Next, I offer evidence that Holmes endorsed pragmatism. Then, I show how pragmatism functions as a kind of anti-nihilism. Finally, I contrast this kind of anti-nihilism with the variety on offer from Nietzsche.

To show that Holmes was a pragmatist, first I must make clear what will and will not suffice as a showing. Some who are convinced that Holmes was *not* a pragmatist are happy to rest their hats on the fact that Holmes had few kind words to say about William James, one of the classical pragmatists.<sup>lvii</sup> Others are content to note that Holmes eschewed the label *pragmatist*.<sup>lviii</sup> These points, however, will not suffice. Charles Sanders Peirce, the founder of pragmatism, also disliked James's philosophy and also eschewed the label. We have to dig a little deeper.

One might think that espousing the pragmatist theory of truth is the *sine qua non* of pragmatism, but espousing that thesis is sufficient but not necessary. Peirce denied it,<sup>lix</sup> and so

have many other famous pragmatists.<sup>lx</sup> As I explain below, Holmes denied it too, but that should not count him out.

For our purposes, Holmes will count as a pragmatist if he holds that the goal of inquiry is practical. More precisely, Holmes was a pragmatist, if he thought that we should test various propositions against practical criteria – such as whether accepting a given proposition will help us to cope with the world or whether accepting the proposition satisfies certain desires we have. Someone is a pragmatist if she tests propositions by such practical criteria and not by purely descriptive criteria, such as whether we are accurately tracking mind-independent facts.

Having set a standard for how to tell if Holmes was a pragmatist, let us examine the evidence. It is well-known that Holmes made critical remarks about Williams James. On one occasion, he wryly summed up James as having claimed that “by yearning we can modify the multiplication table.”<sup>lxi</sup> Holmes was caricaturing James, but Holmes the lampoonist himself once wrote that “Thinking is an instrument of adjustment to the conditions of life.”<sup>lxii</sup> This sounds mighty pragmatist, for it suggests that the criteria by which to appraise our thinking is by how well it enables us adjust to the conditions of life, not by how accurately thought represents the world as it is.<sup>lxiii</sup> If this interpretation is right, the ridicule of James can appear in new light. Perhaps Holmes was saying the following. We should not modify the multiplication tables just because we so yearn; we will not be well-adjusted to the conditions of life, if we act like that.

I am suggesting that Holmes adopted an instrumentalist understanding of inquiry, which is sufficient (but perhaps not necessary)<sup>lxiv</sup> for pragmatism. This instrumentalist understanding of inquiry is not identical to holding the pragmatist theory of truth. According to the pragmatist theory of truth, a proposition is true if and only if believing or accepting that proposition satisfies some practical end of some set of agents. The instrumentalist understanding of inquiry differs

from the pragmatist theory of truth in that the former tells us how to inquire while the latter tells us about the metaphysics of truth. One might adopt the former because one already adopts the latter, but these are conceptually distinct. Holmes, contrary to what some commentators contend,<sup>lxv</sup> did not espouse the pragmatist theory of truth. In fact, he likely espoused a more traditional correspondence theory of truth, which claims that a proposition is true if and only if that proposition corresponds to how the world is. Holmes's skepticism can be summed up as the idea that "truth serves as an unattainable ideal."<sup>lxvi</sup> Why is truth unattainable? Holmes thought both that we cannot capture the world as it is and that the truth means capturing of the world as it is. Therefore, his skepticism presupposes the correspondence theory.

Looking to Holmes's most famous pronouncement on truth, we find no contradiction with my reading. Famously and frequently, Holmes proclaimed, "all I mean by truth is what I can't help thinking."<sup>lxvii</sup> Despite appearances, this is no claim about the metaphysics of truth. This claim is epistemic. Holmes was voicing his familiar skepticism. He claimed that those propositions he called true were just those that he could not help believing. Holmes was thus admitting that he had no justification for those beliefs other than that he had come to hold them and hold them so strongly that he could not believe otherwise. Holmes thought we are all in this epistemic situation. He thereby opposed two kinds of anti-skeptics. He opposed the typical anti-skeptic, the person who claims an ability to fit her beliefs to the cosmos. As he said, "the universe has in it more than we understand."<sup>lxviii</sup> Holmes also opposed the idealist anti-skeptic, the person who thinks that the cosmos must fit her beliefs. Holmes explicitly denied that the limits of his scheme of beliefs are "necessarily limits to [the cosmos]."<sup>lxix</sup>

Once we see Holmes's pragmatism, his anti-nihilism becomes more discernible too. Holmes was skeptical about moral truth and the existence of gods, but he did not succumb to



nihilism due to his pragmatism about morality and other matters. Nihilism, marked by a negative attitude toward life, is an inference people draw from moral nihilism (or skepticism, atheism, some other lack that can frustrate someone's hopes). For Holmes, such hopes are the seeds of nihilism. The proto-nihilist aims to discover, *inter alia*, the true moral values, but, according to Holmes, when we are trying to determine what to do, our task is *not* to track such values but rather to settle on a course of action that works, that helps us to adjust to the conditions of life. After we deliberate and arrive at our best answers to practical questions, it is "unnecessary to demand of the Cosmos an assurance that to *it also* our best is superlative," said Holmes.<sup>lxx</sup> The proto-nihilist wants such assurance and becomes a full-fledged, depressed nihilist when she judges that the Cosmos will not give it to her. It is likely his skepticism that led Holmes to suggest that we give up on the task of tracking moral (and other) truths, but whatever his reasons, once we do abandon that task, we must abandon it completely and no longer worry about moral ontology and epistemology writ large. This is why Holmes kept saying that it was not our business to inquire about the source and true nature of morality or to wonder whether our values are the true ones. We have seen how Holmes avoided nihilism for himself, why the absence of moral values did not lead *him* to infer that "we have nothing to do but to sit still and let time run over us."<sup>lxxi</sup> We can also see that Holmes went further. He was someone who decried nihilism. He thought that falling into nihilism was to make an important mistake, to think that our task as humans is something that it isn't.<sup>lxxii</sup> As he once put it, "Having made up your mind that you are not God don't lie awake nights with cosmic worries."<sup>lxxiii</sup> Ultimately, Holmes thought nihilism was a foolish, arrogant misapprehension of the point of human life.

Nietzsche, like Holmes, went beyond non-nihilism and adopted a kind of anti-nihilism. However, Nietzsche had a different complaint to lodge against nihilism. By turns, he called it

“the danger of dangers”<sup>lxxiv</sup> and “pathological.”<sup>lxxv</sup> Because nihilism is an equivocal term, one might wonder whether, in making these claims, Nietzsche relied on the same understanding as I have in our discussion. Indeed, he did. He not only understood the phenomenon in the same sense, but he also understood the etiology the same. For Nietzsche, nihilism is a negative attitude toward life brought on by a recognition that morality and divinity are not as one has long suspected. Nietzsche hoped that we would supersede this attitude. In one place, he wrote longingly, “This man of the future, who will redeem us not only from the hitherto reigning ideal [Christianity and its attendant focus on God and absolute moral values] but also from that which was bound to grow out of it, the great nausea, the will to nothingness, nihilism... *he must come one day.*”<sup>lxxvi</sup>

Nietzsche claimed that nihilism is dangerous. To my knowledge, he does not define this danger. In calling nihilism pathological and by analogizing it to nausea, he seems to have suggested that nihilism is painful for its adherent. Whatever the precise danger, danger is the heart of Nietzsche’s worry. This differs markedly from Holmes. Holmes, again, held that the nihilist is a fool who misunderstands the purpose of human life. While Nietzsche would likely agree with that sentiment, his worry centers on the danger that nihilism presents. The misunderstanding that nihilism entails was just not as worrisome for Nietzsche. In fact, Nietzsche, unlike Holmes, thought that nihilism was a necessary, transitory stage toward enlightenment.<sup>lxxvii</sup> Nihilism “was bound to grow out of” the collapse of the “reigning ideal.” Holmes, by contrast, did not think nihilism was necessary. For him, nihilism is an unforced error.

## Conclusion

This chapter has sought to show that Holmes was not a ‘Nietzschean nihilist.’ When they accused him of nihilism, Holmes’s commentators were claiming that Holmes adopted a negative attitude toward the project of life, brought on by finding out that the world lacks something that he wished were there, such as absolute moral values or deities. Holmes was not a nihilist so understood because he was a fairly optimistic man who thought that the presence or absence of moral values and deities should have no effect on one’s spirits. Holmes was also not a Nietzschean. The differences between the two are several, and the commonalities are ultimately too commonplace to draw any interesting inferences. One commonality between the two is that they both were anti-nihilists, that is, they both thought that nihilism is a grave error. But even in this similarity, Holmes and Nietzsche differed. Holmes was a pragmatist, someone who understood our task as humans to be one of striving, coping, adjusting ourselves to the conditions of the world. As a result, Holmes thought we should be unconcerned with the metaphysical questions that occasion nihilism. Nietzsche, on the other hand, saw no problem with having metaphysical concerns. He even thought that nihilism was an inevitability, if one paid attention to the world and noticed its deficits (e.g. that there is no God). Nietzsche’s problem with the nihilist is that she poses a danger. Nietzsche hoped that those of us who recognize the death of God will move on and supersede the dangerous state of mind that nihilism is. Nietzsche thought he had, and thus ‘Nietzschean nihilist’ is an oxymoron. All the more reason why Holmes was no such thing.

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<sup>i</sup> I thank Seth Vannatta and Steven Heyman for reading drafts of this chapter and offering insightful feedback.

<sup>ii</sup> *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

<sup>iii</sup> I mean that literally. Holmes was personally quite opposed to anything that sounded like socialism. In one place he wrote, "I see no right in my neighbor to share my bread. I mean moral right of course." "23 July 1925 Letter to Harold Laski," in *The Essential Holmes*, ed. Richard A. Posner (Chicago: University of Chicago Press, 1992), 141. Again: "I may add that class for class I think the one that communism would abolish is more valuable – contributes more, a great deal more, than those whom communism exalts." Holmes, "21 May 1927 Letter to Harold Laski," in *The Essential Holmes*, 144. However, he denied that he knew what would be best or if there were a fact of the matter of that kind.

<sup>iv</sup> For praise of the *Lochner* dissent, see Roscoe Pound, "Liberty of Contract," *Yale Law Journal* 18, no. 7 (1909): 464; Felix Frankfurter, "The Constitutional Opinions of Justice Holmes." *Harvard Law Review* 29, no. 6 (1916); Richard Posner, introduction to *The Essential Holmes*, by Oliver Wendell Holmes, ed. Richard Posner (Chicago: University of Chicago Press, 1992), xvii. But see Cass Sunstein for criticism. Sunstein agrees with the reading offered here that Holmes's "skepticism about normative argument [is one of] the very personal building blocks for his enthusiasm for judicial deference" in *Lochner*, but Sunstein goes on to defend the *Lochner* majority against Holmes. "Lochner's Legacy," *Columbia Law Review* 87, no. 5 (1987): 880.

<sup>v</sup> Posner claims that one can find traces of nihilism in Holmes. Posner, introduction, xix. However, Posner does not think that Holmes is a nihilist full-stop. "Holmes is not a nihilist after all, at least not a consistent one." *The Problems of Jurisprudence* (Cambridge, MA: Harvard University Press, 1990), 242.

<sup>vi</sup> Burrows claims that Holmes's "celebrations of war, intensity of life, heroism, and will" are "Nietzschean." "Holmes in His Intellectual Milieu," in *The Legacy of Oliver Wendell Holmes, Jr.*, ed. Robert W. Gordon (Palo Alto: Stanford University Press, 1992), 29. Posner calls Holmes "the American Nietzsche." Introduction, xxviii. Elsewhere, Posner stresses some similarities between Holmes and Nietzsche. *The Problems of Jurisprudence*, 239-244. For some pushback, see Seth Vannatta and Allen Mendenhall, "The American Nietzsche? Fate and Power in the Pragmatism of Justice Holmes," *UMKC Law Review* 85, no. 1 (2016): 187-205.

<sup>vii</sup> On the very same page, Albert Alschuler calls Holmes both a Nietzschean and an adherent of "noble nihilism." *Law without Values: The Life, Work, and Legacy of Justice Holmes* (Chicago: University of Chicago Press, 2000), 20.

<sup>viii</sup> Of course, in a conversation, a modifier might be understood (in the grammatical sense).

<sup>ix</sup> See Tracy Llanera, "The Deep Personal Resonance of Nihilism," *Journal of Philosophy of Life* 7, no. 1 (2017).

<sup>x</sup> For an explicit statement of such a view, see Raff Donelson, "Ethical Pragmatism," *Metaphilosophy* 48, no. 4 (2017): 383-403. As we see below, Holmes also endorsed a view like this.

<sup>xi</sup> See, e.g., John Ford who claimed that Holmes denied the existence of God, moral values, and truth. "Fundamentals of Holmes' Juristic Philosophy," *Fordham Law Review* 11 no. 3 (1942): 255-78. Paul Gregg said much the same about Holmes: "Truth, man, the common good, even God, are nothing." "Pragmatism of Mr. Justice Holmes," *Georgetown Law Journal* 31, no. 3 (1943): 294. These statements explicitly aim to paint a melancholy picture of Holmes, which indicate that they view Holmes as a nihilist<sub>2</sub>. But see, Steven J. Heyman, "The Dark Side of the Force: The Legacy of Justice Holmes for First Amendment Jurisprudence," *William and Mary Bill of Rights Journal* 19, no. 3 (2011): 661-723, for a theorist whose main disagreement with Holmes is his moral nihilism<sub>1</sub>.

<sup>xii</sup> We might also think that those interpreters who call Holmes a nihilist are referring to nihilism<sub>2</sub> because of how they support the nihilism accusation. I explain this further below when I rebut the charge of nihilism<sub>2</sub>.

<sup>xiii</sup> Posner, introduction, xix.

<sup>xiv</sup> Moreover, this would be redundant because the commentator already said that Holmes is an atheist.

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- <sup>xv</sup> For economy, I henceforth abandon the subscripts; generally, nihilist (and its cognates) will mean nihilist<sub>2</sub> (and its cognates) unless context indicates otherwise.
- <sup>xvi</sup> Alschuler, *Law without Values*, 34.
- <sup>xvii</sup> Alschuler, *Law without Values*, 34.
- <sup>xviii</sup> Alschuler, *Law without Values*, 38.
- <sup>xix</sup> Alschuler, *Law without Values*, 30.
- <sup>xx</sup> Alschuler, *Law without Values*, 20.
- <sup>xxi</sup> Gregg, “Pragmatism of Mr. Justice Holmes,” 263 (second ellipsis in the original).
- <sup>xxii</sup> Gregg, “Pragmatism of Mr. Justice Holmes,” 274.
- <sup>xxiii</sup> Holmes, *The Essential Holmes*, 118.
- <sup>xxiv</sup> Susan Haack, “On Legal Pragmatism: Where Does ‘The Path of the Law’ Lead Us?” *The American Journal of Jurisprudence* 50, no. 1 (2005): 92.
- <sup>xxv</sup> Holmes, “Address at Ipswich,” *The Essential Holmes*, 74.
- <sup>xxvi</sup> Holmes, “14 October 1911 Letter to Alice Stopford Green,” in *The Essential Holmes*, 3.
- <sup>xxvii</sup> Holmes, “30 January 1921 Letter to Morris Cohen,” in *The Essential Holmes*, 34.
- <sup>xxviii</sup> If the contrast between the non-nihilist and the anti-nihilist is unclear, consider a similar contrast between the non-smoker and the anti-smoker. While the non-smoker simply does not smoke cigarettes, the anti-smoker campaigns against the use of cigarettes.
- <sup>xxix</sup> These scholars include Alschuler, Posner, Vannatta and Mendenhall, as well as David Luban. For reasons of space, I focus on the remarks of Posner and Alschuler.
- <sup>xxx</sup> Alschuler, *Law without Values*, 19.
- <sup>xxxi</sup> See Posner, *The Problems of Jurisprudence*, 239-244.
- <sup>xxxii</sup> Perhaps Alschuler wanted to make the following stronger point. Not only did both Holmes and Nietzsche think that exploitation made certain creative work possible but they also approved of such exploitation on that basis. This is a less commonly held belief. Hurka claims that Nietzsche held that view in his “Nietzsche: Perfectionist,” in *Nietzsche and Morality*, eds. Brian Leiter and Neil Sinhababu (Oxford: Oxford University Press, 2007), 17-20. It is possible that Holmes did as well.
- <sup>xxxiii</sup> Richard Schacht, “On ‘Existentialism’, Existenz-Philosophy and Philosophical Anthropology,” *American Philosophical Quarterly* 11, no. 4 (1974): 291.
- <sup>xxxiv</sup> As Sartre put it, “human reality is that by which value arrives in the world.” *Being and Nothingness: A Phenomenological Essay on Ontology*, trans. Hazel Barnes. (New York: Washington Square Press, 1956), 144.
- <sup>xxxv</sup> And it looks like it is. Alschuler writes, “existentialism can be regarded as the belief that human life is meaningless except insofar as it is invested with meaning through personal acts of will.” *Law without Values*, 19.
- <sup>xxxvi</sup> For the claim that existentialism as I have described it does not apply to Nietzsche, see Schacht, “On ‘Existentialism’,” 292.
- <sup>xxxvii</sup> Sartre, *Being and Nothingness*, 796.
- <sup>xxxviii</sup> Holmes, “Reflections on the Past and the Future,” in *The Essential Holmes*, 6.
- <sup>xxxix</sup> Holmes, “Reflections on the Past and the Future,” 6.
- <sup>xl</sup> Holmes, “6 May 1925 Letter to Marguerite Einstein, 11th Marchioness of Tweeddale,” in *The Essential Holmes*, 75.
- <sup>xli</sup> Even Alschuler admits this. He thinks we have to choose between seeing Holmes as a pragmatist or as an existentialist. *Law without Values*, 20.
- <sup>xlii</sup> See Posner, *The Problems of Jurisprudence*, 239-244.
- <sup>xliii</sup> I take this characterization to be completely in line with the one given by Brian Leiter in his *Nietzsche on Morality* (New York: Routledge, 2002), 166-170.
- <sup>xliv</sup> Michel Foucault, “Nietzsche, Genealogy, History,” in *The Foucault Reader*, Ed. Paul Rainbow. Trans. Donald F. Bouchard and Sherry Simon. (New York: Pantheon Books, 1984), 78-79.
- <sup>xliv</sup> Foucault, “Nietzsche, Genealogy, History,” 81.
- <sup>xlvi</sup> See Friedrich Nietzsche, “Part Five: Natural History of Morals,” in *Beyond Good and Evil: Prelude to a Philosophy of the Future*, trans. Walter Kaufmann (New York: Vintage Books, 1966); Friedrich Nietzsche, *On the Genealogy of Morals*, trans. Walter Kaufmann and R.J. Hollingdale (New York: Vintage Books, 1967).
- <sup>xlvii</sup> Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown, and Company, 1881), 50.
- <sup>xlviii</sup> Oliver Wendell Holmes, “The Path of the Law,” *Harvard Law Review* 10, no. 8 (1897): 457-78.
- <sup>xlix</sup> Nietzsche, “Natural History of Morals,” 97.
- <sup>1</sup> Oliver Wendell Holmes, “Natural Law,” *Harvard Law Review* 32, no. 1 (1918): 41.
- <sup>li</sup> Holmes, *The Common Law*, 1.

- lii Holmes, "The Path of the Law," 465.
- liii Holmes, "Natural Law," 42.
- liv Holmes, "The Path of the Law," 469.
- lv Posner, *The Problems of Jurisprudence*, 240.
- lvi "Anti-mentalistic" is my shorthand for Posner's more tortured phrase "sub- or antimentalistic."
- lvii See, e.g., Alschuler, *Law without Values*, 18.
- lviii See, e.g., Ford, "Fundamentals," 266.
- lix On Peirce's theory of truth,  $p$  is true if and only if  $p$  would be believed at the end of inquiry. Charles Sanders Peirce, "How to Make Our Ideas Clear" in *Charles Peirce: Selected Writings (Values in a Universe of Chance)* ed. Philip P. Wiener (New York: Dover, 1958), 133.
- lx For instance, Richard Rorty, the late 20th Century pragmatist, was a deflationist about truth, a view that is inconsistent with the inflationary pragmatist theory of truth. Rorty wrote that truth "is just the nominalization of an approbative adjective." "Feminism and Pragmatism," in *Truth and Progress* (Cambridge: Cambridge University Press, 1998), 226.
- lxi Holmes, "29 March 1917 Letter to Harold Laski," in *The Essential Holmes*, 37.
- lxii Holmes, "6 September 1920 Letter to Morris Cohen" in *The Essential Holmes*, 105.
- lxiii Of course, one might think that only by making accurate representations of the world will one be effective in adjusting to the conditions of the world. That might be the case, but these two criteria would still be conceptually distinct. And the latter condition, which is practical, is the one Holmes in fact invoked.
- lxiv Grey, who shares my instrumentalist reading of Holmes, contends that that instrumentalism is a necessary component of pragmatism. See his "Holmes and Legal Pragmatism," *Stanford Law Review* 41, no. 4 (1989): 787-870. I errantly endorsed that view in the past; I see little reason to argue about this now.
- lxv Vannatta and Mendenhall, "The American Nietzsche?" 191; Ben W. Palmer, "Hobbes, Holmes, Hitler," *American Bar Association Journal* 31, no. 11 (1945): 571.
- lxvi Vannatta and Mendenhall, "The American Nietzsche?" 191.
- lxvii Holmes, "17 June 1908 Letter to Lewis Einstein," in *The Essential Holmes*, 70.
- lxviii Holmes, "Natural Law," 43.
- lxix Holmes, "17 June 1908 Letter to Lewis Einstein," 70.
- lxx Holmes, "6 May 1925 Letter to Marguerite Einstein, 11th Marchioness of Tweeddale," 75-76. Emphasis added.
- lxxi Holmes, "Ideals and Doubts," in *The Essential Holmes*, 118.
- lxxii This imputation of mistake resembles how Llanera understands Richard Rorty's opposition to nihilism. See her "Rethinking nihilism," 941-45.
- lxxiii Holmes, "8 February 1931 Letter to Lewis Einstein," in *The Essential Holmes*, 17.
- lxxiv Friedrich Nietzsche, *The Will to Power*, ed. Walter Kaufmann, trans. Walter Kaufmann and R. J. Hollingdale (New York: Vintage Books, 1968), §69n39. I was relatively unfamiliar with Nietzsche's *nachlass* before writing this chapter. I was helped immeasurably by reading Schacht's "Nietzsche and Nihilism," *Journal of the History of Philosophy* 11, no. 1 (1973): 65-90.
- lxxv Nietzsche, *The Will to Power*, §13.
- lxxvi Nietzsche, *Genealogy of Morals*, 96.
- lxxvii Nietzsche, *The Will to Power*, §13.