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THE TRIAL OF OLIVER WENDELL HOLMES

A PLAY BY RODNEY A. SMOLLA*

ACT I

Scene i

[John Carver is lying in a hospital bed, in a coma. His wife, Pauline Lewis, is at his bedside. His daughter Megan Carver enters. She rushes to the bed, sees her father, and then turns to embrace her mother.]

MEGAN: I rushed here as soon as I heard.

PAULINE: They just brought him out of surgery. He's in a coma. The Doctor said the next hours would be critical.

MEGAN: How bad is it?

PAULINE: I don't know. I couldn't really focus on what the Doctor was saying. I'm not sure I heard it all.

MEGAN: Do you know anything about the accident?

PAULINE: It was a head-on collision. He hit a truck in the opposite lane. The truck driver was hurt badly, too.

MEGAN: My God. I just can't believe this. *(pausing)* Today should have been Daddy's greatest triumph. We won the St. George case.

PAULINE: I know. It was all over the t.v.

MEGAN: He didn't call to tell you?

PAULINE: No. He wouldn't call.

MEGAN: We had a big celebration afterwards. The whole law firm shut down for the afternoon. Dad must have had too

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much to drink.

[Enter Christa Jacobs, the attending physician.]

PAULINE: *(to Jacobs)* Doctor Jacobs, this is my daughter Megan.

JACOBS: *(shaking hands)* Hello Megan. I'm Christa Jacobs.

MEGAN: What can you tell us?

JACOBS: He's stable for the moment. He's in a coma. The next few hours will be telling. It may turn on how hard he fights to stay alive.

MEGAN: How can he fight, if he's unconscious?

PAULINE: —We can't talk to him, can we? I mean, he can't hear us, right?

JACOBS: Probably not. At least, if he comes out of his coma, he probably won't have any memory of what we are saying. But no one really knows whether some part of him, somewhere, is able to listen or able to summon up the will to fight. I can only say that when I have patients in this condition, it often seems to me as if there is a force inside them. Some of my patients really do seem to fight their way through. Others seem to just surrender.

MEGAN: Dad's always been a fighter.

JACOBS: Has he been depressed recently?

MEGAN: Depressed? Never. He's never had a depressed day in his life. For the last two weeks he's been running on pure adrenaline—you probably know—he's been the lawyer for Frankie St. George.

JACOBS: Oh yes. We know all about your father. We heard on the news that St. George was acquitted.

MEGAN: We were holding a victory party. Daddy must have celebrated too hard, after all the stress of the trial. I should have driven him home myself.

JACOBS: You were at the party?

PAULINE: —Megan's a lawyer too, Doctor. She works at John's firm. *(pausing, and speaking quietly, almost as if to herself)* I

think John wanted it to be "Carver, Carver, and Brown" someday.

JACOBS: Megan, did you see him drinking at the party?

MEGAN: I didn't pay that much attention. But everyone was drinking. Champagne corks were popping all over the place.

JACOBS: We found no alcohol in his system. (*pausing*) Have the police talked to you at all about what happened?

PAULINE: An officer came by while John was in surgery. He said he might need to talk with me later, but that it could wait. Why? What is there?

JACOBS: The other driver was badly hurt.

MEGAN: How badly?

JACOBS: I don't think he'll make it. (*pausing*) You should probably know, there are some questions about the accident. Apparently there are witnesses. It was a four-lane highway, divided by a grassy median. I understand your father's car suddenly swerved out of its lane, crossed the median, and ran directly into the oncoming truck.

MEGAN: There must be an explanation. Something must have gone wrong with the car.

PAULINE: Doctor, is there anything we can do to help him? Is it best for us to be here, or should we let him rest alone?

JACOBS: I guess most doctors would tell you that he doesn't really know you're here, and that you should get something to eat, try to get some rest. But I don't know, really. I think it might help to have someone near him whom he loves, and who loves him. There is a lot we don't understand. You could take shifts.

[*Doctor Jacobs exits.*]

Scene ii

[*John Carver is lying in his hospital bed. Megan is in a chair, holding vigil near his bed. She is only dimly visible to the audience and does not take her eyes off the hospital bed in*

this scene or witness any of the action that occurs.]

[The scene begins with the entrance of Oliver Wendell Holmes. As Holmes enters, Carver gets up from the bed and walks over to greet Holmes, shaking hands.]

CARVER: Justice Holmes! I can't tell you what an honor this is.

HOLMES: Nonsense, the honor is all mine. I need a courtroom master, and you're the very best the country has to offer. I hope to convince you to take my case.

CARVER: Your case?

HOLMES: I am on trial for my immortality.

CARVER: On trial before whom?

HOLMES: Before the immortals. The question is whether I am to have positive or negative immortality. I am to be accorded due process of law—which is why I need a lawyer.

CARVER: I am deeply honored, Justice Holmes. This will be my greatest case. My crowning achievement.

HOLMES: It will be if you win. That is what most interests me.

CARVER: Who will prosecute? Who will preside? Who will serve as jury?

HOLMES: Under the rules of the immortals, we are never permitted to learn the identities of the judge and jurors, though I am told that we will feel their presence. Only the prosecutor will be known to us.

CARVER: Has the prosecutor been appointed?

HOLMES: Yes. The immortals have selected Socrates.

CARVER: Socrates? *Socrates!* My God—the *challenge* of it! But why *him*? I mean it's great—to go against *Socrates*, of all people—but how does it figure?

HOLMES: The immortals have their reasons, presumably. But they have not shared them with me.

CARVER: *(sealing the agreement with a handshake)* I will be honored to take your case. You've got yourself a lawyer.

HOLMES: Splendid, then! My immortality is now in your hands.

Scene iii

[John Carver is lying in his hospital bed. Now Pauline has replaced Megan in the chair, holding vigil near his bed. Once again, Pauline is only dimly visible to the audience and does not take her eyes off the hospital bed in this scene or witness any of the action that occurs. (This device is followed whenever either Megan or Pauline is holding vigil next to Carver's bed.)]

[The scene begins with the entrance of Frankie St. George. As St. George enters, Carver gets up from the bed and walks toward him. He does not extend his hand.]

CARVER: What the hell are you doing here? I told you this afternoon that my representation of you had terminated.

ST. GEORGE: Johnny, c'mon. Who ya talkin' to here? It's *Frankie*. I heard about the accident and came right over. Tough break, kid. But you'll pull it outta the fire. You always pull it outta the fire, Johnny boy. Which is why I pay you so much.

CARVER: Today was the last installment.

ST. GEORGE: Why this attitude all of a sudden? This is no way to treat a friend.

CARVER: I was your lawyer, not your friend. What the hell possessed you to invite Sherry Kellog to the victory party, Frankie? Did you think that was cute?

ST. GEORGE: Hey, she won the goddamn case for us didn't she? Don't kid yourself—it was her testimony that did it, not all your fancy-ass legal maneuvers. The least I could do was offer her a little champagne for her trouble.

CARVER: Is that all you offered her, Frankie? A little champagne?

ST. GEORGE: Listen, John. Somethin's the matter here. You're wiped out from the trial—that's it. Hey, you're entitled! Only natural. Then you go and get yourself racked up like this.

That's why I'm here. To help you out. I wanna save your neck for once, like you saved mine so many times. This business with the truck driver has a bad look to it. I can help with it.

CARVER: Sherry Kellog talked to me, Frankie. At the party. Talked to me like I knew what was going on.

ST. GEORGE: I don't know what you're talkin' about, counselor. I mean, Sherry is a fuckin' fruitcake, you know that. She is very highly capable of misunderstanding a situation. So what we got here is a misunderstanding. (*St. George pauses as if waiting for a reply, but Carver is silent*) Listen to me, counselor. Sherry Kellog is nothin' to us. She's nothin'! But you and I, counselor, we got a relationship. And we also got a situation here. (*pausing*) Now you got to keep our situation here in mind before you say things. (*pausing*) See, you are my lawyer, and you have your responsibilities to me. And I am your friend, and I have my responsibilities to you. Now you got yourself in some trouble, and I want to help.

CARVER: I don't want your help.

ST. GEORGE: You got a certain reputation to maintain, counselor. The winner of lost causes, the defender of the downtrodden.

CARVER: The defender of the despicable is more like it.

ST. GEORGE: Before you say anything more that you might find yourself someday to regret, I want you to listen to me very closely. (*pausing*) I say this from the bottom of my heart, which is breaking over this language I am hearing. (*pausing*) You got more than yourself to think about, counselor. You also got to bear in mind the best interests of your beautiful wife Pauline, and your wonderful daughter Megan. (*pausing*) You know what I'm saying here? You better reflect a little on your own life, my friend, and your situation. You cool down, and we'll talk later. I'm only trying to help.

Scene iv

[*John Carver is lying in his hospital bed. Megan is once again in the chair, holding vigil near his bed.*]

[In the "courtroom," there is an empty chair for the witness, a chair on one side for Socrates, and two chairs on the other side for Holmes and Carver. As the scene begins, Carver gets up from his hospital bed and moves to his chair next to his client, Holmes.]

SOCRATES: I call Carrie Buck to the stand.

[Carrie Buck enters and stands in front of the witness chair.]

SOCRATES: Do you promise by all that is immortal to tell the whole truth, and nothing but the truth?

BUCK: I do. *(sitting down)*

SOCRATES: Please state your name, and tell us when and where you were born.

BUCK: My name is Carrie Buck. I was born in 1906, in Charlottesville, Virginia.

SOCRATES: When you were a young woman, were you taken into custody by the Commonwealth of Virginia, and placed in an institution known as the State Colony for the Epileptics and the Feeble-Minded?

BUCK: Folks just called it "the Colony." It was in Lynchburg.

SOCRATES: Do you know why you were committed?

BUCK: They said I was feeble-minded.

SOCRATES: Who said this, Carrie? Who was it that had you committed?

BUCK: It was Mr. J.T. Dobbs that started it. Him and his wife. Then they got the doctors from the Colony all involved, 'specially Doctor Albert Priddy.

SOCRATES: Who was J.T. Dobbs?

BUCK: He was 'sposed to be my legal guardian. Except he never brought me nothin' but grief. He and Mrs. Dobbs, they were my foster parents. When I was fourteen, the state took my momma away. Her name was Emma, and she was a fine lady. But the State said *she* was feeble-minded, and they took her

to the Colony. That's when they put me up to stay with the Dobbses.

SOCRATES: Why did Mr. Dobbs think you were feeble-minded?

BUCK: There wasn't nothin' wrong with my mind, and Mr. Dobbs knew it. He just wanted to put me away, 'cause he couldn't stand the embarrassment.

SOCRATES: What embarrassment?

BUCK: (*quietly, reluctantly*) I was pregnant. And I didn't have no husband. That was part of the evidence they put up against me to have me committed. They said I was *immoral*, and couldn't take proper care a' myself.

SOCRATES: Did you have a child?

BUCK: I had a precious little girl, name a' Vivian. And there weren't nothin' wrong with her at all. And there weren't nothing wrong with me in takin' care a' that child.

SOCRATES: Did they let you keep Vivian?

BUCK: They tried to take her from me. They said I wasn't suitable to take care a' her. And they said they didn't want me to have no more children, and they said they gonna have to fix me with an operation so I can't.

SOCRATES: Who said this to you? The people who ran the asylum?

BUCK: Yeah. Doctor Priddy an' all.

SOCRATES: Did you understand what they were attempting to do to you?

BUCK: They called it a salpinmey, or something. To cut my tubes.

[*Carver stands up to make a point.*]

CARVER: The defense will stipulate to the procedure. It was a salpingectomy, a well-accepted and safe medical operation, in which the fallopian tubes are cut between the ovaries and the womb, and tied at the ends near the womb. The procedure does not impair the general health of the patient, or interfere with sexual desires or enjoyment. It merely prevents repro-

duction.

BUCK: That's what they said. They got to cut my tubes to sterilize me.

SOCRATES: Did you want to have this operation?

BUCK: *No!* I didn't want no operation.

SOCRATES: Did the people at the Colony conduct a hearing to determine if you should be sterilized, and did a lawyer represent you at that hearing?

BUCK: Yes sir, they had a hearing. A real bang-up of a hearing. And a lawyer name of Mr. Irving Whitehead took my case.

SOCRATES: How did you get Mr. Whitehead to take your case? And how did you pay him for his services?

BUCK: I never paid him, 'cause I didn't have no money to pay him. He just showed up and said he'd been 'pointed to help me.

SOCRATES: And Mr. Whitehead in fact did represent you in the hearing and in the courts, didn't he? He took your case all the way to the United States Supreme Court. Isn't that right?

BUCK: I remember when Mr. Whitehead first came to the Colony to meet me. First time he sees me, he says, "Carrie, you gonna be famous, 'cause your case is goin' all the way to the S'preme Court." Mr. Whitehead got himself all excited about that.

SOCRATES: And do you know what happened in the Supreme Court?

BUCK: *God almighty yes I know what happened!* They called me *a imbecile!* Mr. Justice *Oliver Holmes* called me a imbecile! (*pointing at Holmes in anger*) And he said my *momma* was a imbecile, and *my child* was a imbecile. And he said they oughta give me the operation so I wouldn't make no more imbeciles! But he didn't *know me!* Oliver Holmes didn't know me! He didn't know *nothin'* 'bout me 'cept what them doctors said, and the Dobbsses, and they were *all lyin'!* And Mr. Irving Whitehead *knew* they was lyin! But he didn't say nothin' to help me. And S'preme Court shoulda stood up for my rights, and for justice and righteousness! But the S'preme Court and Oliver Holmes didn't care nothin' 'bout the rights of the likes

a' Carrie Buck! Mr. Holmes said go ahead and cut Carrie up!
Go ahead and *cut out her tubes*!

SOCRATES: Did the Doctors at the Colony then sterilize you?

BUCK: They took me and put me to sleep and did the operation.

SOCRATES: Did you go back to live in the Colony after that?

BUCK: For awhile. Then they finally let me go. They musta decided I wasn't such a imbecile after all. 'Cause I could read, and I could talk to people just fine, and take perfect care a' myself and mine.

SOCRATES: What kind of life did you have after you left the hospital?

BUCK: I got married. I stayed married to my first husband twenty-four years, 'till he died. Then I got married again. I always had a hard life. We were always real poor. But we took care of ourselves, and lived like upstandin' people. I sang in the Methodist Choir. And I liked to read lots a' books, everybody was always talkin' about all the books I read, and how I was well informed about things, and how I liked to talk to people. I had a job takin' care a' nice old couple. I lived to be seventy-six.

SOCRATES: What happened to your daughter, Vivian?

BUCK: She wasn't no imbecile, like Mr. Holmes accused her. She went to school and did real good. Her teachers said she was a real bright child. She even made the honor roll! But she never got to prove herself. She died from an infection when she was eight years old.

SOCRATES: Thank you, Carrie. I have no further questions at this time.

[Socrates sits down and Carver stands and approaches the witness stand to cross-examine Buck.]

CARVER: Carrie, now I have to ask you a few questions, but I promise not to take too long, okay? Just a few questions. *(pausing, as Carrie nods)* First, Carrie, can you tell us how old you were when you had your baby, Vivian?

BUCK: I was seventeen.

CARVER: Who was the father of Vivian?

[*Socrates rises to object.*]

SOCRATES: Mr. Carver, I think you should leave this business alone.

CARVER: If you are going to attempt to vilify Justice Holmes for the decision he rendered in Ms. Buck's case, then it is only fair to bring out the full record as it was presented to Justice Holmes.

SOCRATES: Carrie Buck has been through enough, Mr. Carver. I'm warning you that this is dangerous ground.

CARVER: (*to Socrates*) I'll take my chances. (*turning to face Buck on the stand*) Let me ask you again, Ms. Buck. Who was Vivian's father?

BUCK: I don't remember and it ain't none a' your business.

CARVER: You weren't married when you had Vivian, were you?

BUCK: No. I wasn't married.

CARVER: Carrie, I want to ask you some things about the hearing they conducted to determine if you should be sterilized. There was testimony at that hearing that you had the mental age of a nine-year-old, isn't that true? And didn't eight witnesses from your neighborhood come forward to testify that you had social problems? And didn't several experts explain how your mental condition could be passed on to your children, such as Vivian?

BUCK: They said a lotta things about me in the hearing, Mr. Carver. But that don't mean they was true. And my lawyer Mr. Whitehead knew a lot of it was lies, and he didn't do nothin' about it. They had doctors testify who hadn't never examined me. They had a doctor from New York say I was a prostitute and that I was immoral. But I wasn't no such thing, and he never even met me! He never even came to Virginia! He just relied on what Doctor Priddy told him. And they had people from the neighborhood sayin' things who never even knew me at all. They coulda had my teachers come, who always promoted me up to the next grade, and gave me good

marks in school. But none a' them were there. The hearing never got out *the truth!* It all got hushed up. And Mr. Whitehead, he coulda stopped it, but he didn't try!

CARVER: Well, Justice Holmes cannot be blamed for the failures of your lawyer, can he? And maybe your lawyer knew, and the doctors knew, what was really best for you, Carrie. Surely Justice Holmes had no reason to believe that you were not a proper case for sterilization.

BUCK: They treated me like a *animal on the farm*. And Justice Holmes *let 'em do it*. He let 'em do it to me and a whole lotta people after me.

CARVER: That's all I need from you, Carrie. Thank you for your testimony. You can step down now.

[*Socrates rises quickly and gestures at Carrie to stay seated.*]

SOCRATES: No, Carrie, I am afraid you can't go quite yet. (*looking angrily at Carver*) Mr. Carver, I warned you to stay away from this. (*turning back toward Buck on the stand*) Carrie, I am sorry. (*pausing*) Carrie, when you were first housed at the Colony, do you remember the name of the building they put you in?

BUCK: It was called the Whitehead building.

SOCRATES: Whitehead? The same name as your lawyer?

BUCK: I found out after my operation that Irving Whitehead had been one of the people that started up the Colony.

SOCRATES: How did you learn that about Mr. Whitehead?

BUCK: A newspaper reporter told me, years later. He was doin' a story on the Colony, he said, and its history an' all.

SOCRATES: And what did he tell you about Mr. Whitehead and the Colony?

BUCK: He told me some things I knew already, and some things I didn't know. There was three people in cahoots who started up the Colony, and who had the idea of usin' it as a place to sterilize people.

SOCRATES: And those three people were Aubrey Strode, the

politician who wrote the laws that created the Colony and that authorized the Colony to sterilize people, and Doctor Albert Priddy, the man who ran the Colony and had you committed, and Irving Whitehead, the man who was supposed to be your lawyer. Isn't that right, Carrie?

BUCK: That's right. I couldn't believe it when the reporter told me. Irving Whitehead had grown up on the farm next to Strode, and they were life-long buddies in everything. When the Colony got started up, Strode saw to it that Whitehead was on what they call the Colony's board of directors—the people in charge of it. And it was *Whitehead* who convinced the board of directors that it was a good idea to sterilize people. And Whitehead and Strode and Priddy *all helped each other write the law that they used to do it!* But they was afraid a' gettin' sued in court for all this sterilizing, so they decided they needed to find somebody to test the law on in the S'preme Court, so that the S'preme Court would say it was okay.

SOCRATES: Did the reporter explain why they were afraid of getting sued?

BUCK: Yeah. Because they'd already been doin' some sterilizing at the Colony, and they were runnin' into trouble.

SOCRATES: Did you know about that trouble?

BUCK: Some, yeah. Lots a' folks knew about it. They was takin' poor people, and people that was accused a' being prostitutes and such, and havin' 'em arrested and committed to the Colony, and sterilized. There was one man named George Mallory, who came from Richmond, that raised a stink. He was off workin' in a sawmill over at Hanover County one time when they came and arrested his wife and one of his daughters. They took 'em to the Colony and sterilized 'em. So Mallory protested the business to Doctor Priddy, and tried to sue Doctor Priddy and the Colony in court, and Doctor Priddy shut him up.

SOCRATES: Shut him up?

BUCK: Doctor Priddy told the judge that the Mallory woman was what he called a "deficient," and was incapable of living a clean and proper life, and the judge agreed and threw out the

lawsuit. And Doctor Priddy told George Mallory that if he didn't stop his protesting he'd have George arrested and put in the Colony and fixed too. And George Mallory had to take that serious, because the Colony had been known to do castrations.

SOCRATES: How do you know this?

BUCK: We all knew that sometimes with the men's sterilizations, they just did a simple operation. But if the man was a case that the Doctors decided was 'specially undesirable, then they might cut his organs off. And the reporter who interviewed me told me he found records of that, and he asked me about it too. And I told the reporter I'd heard all about it. And then the reporter explained that Whitehead and Priddy and Strode decided they needed to get it all settled in the courts that this was okay, *and that's why they got Whitehead to be my lawyer, see?* Whitehead was really workin' for the *other side*. And the reporter said that after Justice Oliver Holmes made his decision, they started sterilizing people all over the country. And that they ended up sterilizing *sixty thousand people*.

SOCRATES: Now Carrie, I'm afraid we need to go back over one more thing. The truth is, Carrie, that you *do* know the name of the person who got you pregnant when you were seventeen, back when you were living with the Dobbs family, don't you?

BUCK: Yes.

SOCRATES: Please tell us his name.

BUCK: Buddy Dobbs.

SOCRATES: Who was Buddy Dobbs?

BUCK: He was the nephew of my foster parents. The nephew of J.T. Dobbs.

SOCRATES: Was Buddy Dobbs your boyfriend?

BUCK: *No!* Buddy Dobbs was a *beast!* Buddy Dobbs *raped* me! He *raped me and got me pregnant!* And J.T. Dobbs didn't want no scandal. And he didn't want Buddy to go to jail! So they had me committed to put me away, and get rid a' the whole mess! They *raped* me, then they said I was a *imbecile*, then they *cut me up!* And Mr. Whitehead helped them do it!

And so did fancy Oliver Holmes and his fancy S'preme Court a' Justice! It was *rape!* (*pointing at Holmes*) You understand me *now?*! It was rape! It was rape *the whole way through!*

SOCRATES: How did you feel when you found out that Mr. Whitehead had actually helped fix the case against you?

BUCK: I wanted 'em to do a operation on *him!* And Oliver Holmes too!

Scene v

[*John Carver is lying in his hospital bed. His wife and daughter are by his bedside.*]

PAULINE: It's strange how he looks to me, lying there unconscious.

MEGAN: I know. It seems like I've never seen him when he's not in motion, not creating a tumult of some kind.

PAULINE: To me the strangeness is elsewhere. (*pausing*) As much inside me, I think, as him. (*pausing*) Megan, can you believe that at this second, watching him lying there, he seems more alive to me than he has seemed in years? And I feel as if I love him in a way I haven't loved him in years.

MEGAN: What do you mean?

PAULINE: Seeing him lying there so peacefully allows me to remember him how he once was. Before the law took over his life. (*pausing*) It was different with you. You were the center of his universe from the moment you were born. His adoration for you never diminished.

MEGAN: I'm not sure of that.

PAULINE: You should be. He loves you as much today as he ever did.

MEGAN: Then *why*, mother? It looks like he tried to kill himself! *Why?*

PAULINE: Because of the demons inside him. But not because he stopped loving you.

MEGAN: I think he came to love me more as an idea than as a

real person. He loved the idea of this wonderful daughter he had, who became a lawyer, who went to work in his firm. (*pausing*) Sometimes I just wanted to be his little girl again.

PAULINE: He had a mistress, you know. (*pausing, as Megan gasps*) Oh, don't be shocked. I mean the *law*. The law was his one *true* lover. He cheated on you and me, but never her.

MEGAN: But she cheated him.

PAULINE: You think she did?

MEGAN: She betrayed him. Things began to happen in the office, in his cases.

PAULINE: There was something in the Frankie St. George case, wasn't there?

MEGAN: Maybe. Probably. Who knows? Daddy didn't let anyone else help much when Frankie was involved. Frankie always got special handling.

PAULINE: Frankie's a bastard.

MEGAN: I don't understand why Dad was Frankie's lawyer. It never made sense to me.

PAULINE: Because every man deserves his day in court, with due process of law, and the assistance of counsel. Isn't that what you lawyers say? And your father was the best lawyer money could buy. That's the kind of lawyer the Frankie St. Georges need. And the Frankie St. Georges have the money it takes to buy them.

MEGAN: But they couldn't buy his soul, Mother. I will never believe that. It was not for sale.

PAULINE: I know what you feel, darling. (*pausing*) You must understand, I don't hate your father. I never hated him. I only hated the absence of connection. The void. Real hate might have been welcome, compared to the void. (*pausing*) It didn't happen all at once. It just slipped away between us. And I think that happened with the law, too. You're right—he didn't sell his soul. Not consciously. Not in one deliberate moment. It just slipped away. He borrowed against it, little by little. And one day he must have realized it was gone, mortgaged entirely to all the Frankie St. Georges, and the debt was too much to bear.

[Pauline exits. Megan again takes up the bedside vigil as the scene ends.]

Scene vi

[John Carver is still lying in his hospital bed. Megan is still in the chair, holding vigil.]

[In the courtroom there is an empty chair for the witness, a chair on one side for Socrates, and two chairs on the other side for Holmes and Carver. As the scene begins, Carver again gets up from his hospital bed and moves to his chair next to his client, Holmes.]

SOCRATES: I call Eugene Debs to the stand.

[Eugene Debs enters and stands in front of the witness chair.]

SOCRATES: Do you promise by all that is immortal to tell the whole truth, and nothing but the truth?

DEBS: I do. *(sitting down)*

SOCRATES: Please state your name, and tell us when you were born.

DEBS: My name is Eugene Victor Debs. I was born in 1855.

SOCRATES: You were a leader of the American labor movement in its early years, were you not?

DEBS: I went to work on the railroad at age 15. I was disgusted by how the railroads treated their workers. They just used men up and threw them away. For wages too meager to sustain a life. So I vowed to change things and dedicated my life to working men and women. I founded the American Railway Union in 1893.

SOCRATES: Were you ever sent to jail for your activities as a labor leader?

DEBS: Many times. It began in 1894, in Chicago. I led the Pull-

man strike.

SOCRATES: You eventually went beyond the labor movement, and into national politics, isn't that right?

DEBS: In 1896 I campaigned for Williams Jennings Bryan in his run for President. After that I helped found the Socialist Party of America.

SOCRATES: Were you a presidential candidate yourself?

DEBS: I ran for President of the United States five times, I am proud to say, on the ticket of the Socialist Party. When I ran in 1920 I got nearly a million votes, even though I was in jail at the time.

SOCRATES: I'd like to talk to you about why you were in jail and who put you there, and—

DEBS: —I'll tell you right now who put me there! (*pointing angrily at Holmes*) The great Oliver Wendell Holmes! Champion of freedom of speech!

SOCRATES: You were in jail for protesting America's entry into World War I, isn't that correct?

DEBS: I was invited to speak in Canton, Ohio, to address the Socialist Convention. I knew there were federal agents in the crowd watching me, so I tried to choose my words carefully.

SOCRATES: What was your speech about?

DEBS: I was talking to the working people of Canton, and to fellow socialists. I'd just come back from the neighborhood workhouse where three of their comrades were in jail for opposing the war. I told the crowd I was proud of their jailed comrades—proud of them standing tall and fighting for better conditions.

SOCRATES: Did you talk about socialism and capitalism?

DEBS: That is virtually all I talked about in those days. I simply told them the truth. Unvarnished. But the country didn't want to hear my truths, Socrates, anymore than the people of Athens wanted to hear your truths. My fate was much the same as yours.

[*Carver rises to object.*]

CARVER: I object to these allusions by the witness to the trial of Socrates. That is not what we are about here, and it bears no relevance.

SOCRATES: (*to Carver*) The jury will decide that, Mr. Carver. But I will abide by your wishes. (*turning back to Debs*) Let me ask you to focus, Mr. Debs, on precisely what you said to that crowd in Canton.

DEBS: I told them that the master class has always declared the war, and that the subject class has always fought the battles.

SOCRATES: Was that your view of World War I?

DEBS: World War I was to be the "war to end all wars." Let history be the judge of that canard. The workers had nothing to gain, and everything to lose, including their lives.

SOCRATES: Did you say that in Canton?

DEBS: That is exactly what I said. (*rising in his chair and gesturing, as if delivering his speech to the crowd*) "You, the people, furnish the corpses! But you have never been given a voice in declaring a war necessary! You are fit for something better than slavery and cannon fodder!"

SOCRATES: Did you counsel *treason*, Mr. Debs?

DEBS: I counseled *against* treason. Against treason to the soul. (*again rising in his chair and gesturing*) "Do not worry about the charge of treason to your masters," I told them. "Worry about the treason to your self!"

SOCRATES: Were you arrested for making this speech?

DEBS: Arrested and tried, for obstructing the draft and attempting to incite insubordination, disloyalty, and mutiny in the war effort.

SOCRATES: Who was your defense lawyer?

DEBS: I refused the services of a lawyer. Though many outstanding attorneys volunteered. Like you, Socrates, but unlike Mr. Holmes here, I chose to defend myself.

[*Carver rises to object.*]

CARVER: Again I object! It is entirely unfair to bring in these references and attacks on the right of every person to the assistance of counsel.

SOCRATES: (*addressing Carver*) If it is unfair, Mr. Carver, the immortals will discern the unfairness, and discount for it. (*pausing, and then turning back toward Debs*) I would like to know how you conducted your defense, Mr. Debs. Did you deny the charges against you? Did you renounce your philosophy to save yourself?

DEBS: To the contrary. I said to the jurors, in my final argument to them: (*rising in his chair and turning, as if speaking to the jury in his own trial*) "I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would oppose the war if I stood alone."

SOCRATES: Were you convicted?

DEBS: I was.

SOCRATES: And sentenced?

DEBS: Sentenced on two counts, to ten years in prison.

SOCRATES: Did you actually serve time in jail?

DEBS: I served two years, and then was released when President Warren G. Harding commuted my sentence in 1921. But my American citizenship was never restored.

SOCRATES: I have no more questions.

[Socrates takes his chair, and Carver rises and approaches the witness stand to cross-examine Debs.]

CARVER: Mr. Debs, do the names Wagenknecht, Baker, and Ruthenberg mean anything to you?

DEBS: They were the three socialists imprisoned in Canton.

CARVER: They were convicted of inducing a man to avoid the draft, isn't that correct?

DEBS: Yes.

CARVER: And you told the crowd in Canton that you were proud of them?

DEBS: Yes, I said that. And I remain proud of them.

CARVER: What about the name Kate Richards O'Hare? Who was she?

DEBS: A distinguished socialist activist.

CARVER: Was she also convicted of obstructing the draft?

DEBS: Yes.

CARVER: And didn't you tell the crowd in Canton that O'Hare had been convicted on trumped-up charges, through the use of perjured testimony, and that you would never have believed the conviction could happen, had you not had prior experiences yourself with federal courts?

DEBS: That's what I said. I always told the people the truth.

CARVER: Who was Rose Pastor Stokes?

DEBS: She was another socialist persecuted by the government for opposing the war. I also talked about her in my speech.

CARVER: In fact, she was also convicted of obstructing the draft, wasn't she?

DEBS: Precisely.

CARVER: And you told the crowd in Canton that Stokes had done no more nor less than you had done, and that if she was guilty, you were guilty. Isn't that accurate?

DEBS: That is what I said.

CARVER: The simple truth of the matter, Mr. Debs, is that you *fully intended* to encourage those socialists in the audience to go out and obstruct the war effort. That's why you praised these criminals who were serving time in jail. That's why you identified yourself with them.

DEBS: I said what I said. I never told anyone to obstruct the draft, or to refuse to report for induction.

CARVER: *Come on*, Mr. Debs. It's not what you said that matters. It's what you *meant*. What you *intended*. How you were *understood*. Did you or did you not oppose the war?

DEBS: Of course I opposed it—we've already been over that. Is that a crime?

CARVER: It is a crime to exhort American citizens to break the

law, and to avoid their duty to serve their country when called. (*pausing*) Look, Mr. Debs, you mentioned earlier that you knew there were agents in the crowd, and thus you tried to choose your words carefully. Indeed, didn't you actually tell the crowd that you had to be prudent, and might not be able to say all you thought?

DEBS: I did tell them that, yes.

CARVER: Were you willing to go to jail for what you believed in?

DEBS: I did go to jail.

CARVER: But you tried to avoid it. You tried to have things both ways. You let everyone in the audience know that what *you really wanted* was for them to go out and break the law, obstruct the draft and the war. But you tried to protect yourself by cleverly choosing your words! Let others go to jail, while Eugene Debs makes speeches! In the end, *you were no Socrates at all*, were you, Mr. Debs? At least Socrates had the integrity to accept his punishment with honor, and with the courage of his convictions intact.

DEBS: I dedicated my life to what I believed in. Who are *you* to impugn that? What have you ever been dedicated to?

CARVER: (*holding his palms out toward Debs, as if telling him to stop, or pushing him away*) I merely ask the questions that need to be asked, Mr. Debs. You may step down.

Scene vii

[*John Carver is still lying in his hospital bed. Pauline is once again in the chair, holding vigil near his bed.*]

[*As the scene begins, Holmes enters and Carver gets up from his hospital bed to converse with him.*]

HOLMES: How did you get yourself into this mess?

CARVER: What mess? Representing you?

HOLMES: No. This coma you're in. You're losing your life, you know. You have to fight harder. (*pausing*) Have you ever been

near death before?

CARVER: Once. In Vietnam. Megan was eight years old when I was drafted. I was lying in a rice paddy, the blood oozing out of my gut. And all I could see were Megan and Pauline.

HOLMES: You made it out of that rice paddy because you fought to get yourself out. So why aren't you fighting now?

CARVER: None of that shrapnel cut my spirit.

HOLMES: What's cutting your spirit now? You have everything to live for. More money than you'll ever need—today's fee from Frankie St. George alone is probably more than most people earn in a lifetime. Your family, your clients, your colleagues, all admire you.

CARVER: Money and admiration. (*pausing*) You know, Justice Holmes, when I was in law school, I admired *you*.

HOLMES: You studied law after the war?

CARVER: Yeah—traded in one set of drill sergeants for another. Some of the professors back then were mean bastards. They all claimed to use the Socratic method. I thought of it as the sadistic method. (*chuckling*) In fact, I remember being questioned once by a professor about a passage you wrote. He was attacking the passage, and I was defending you.

HOLMES: Excellent—you will have plenty of practice when Socrates tries it himself.

CARVER: Can I be candid?

HOLMES: If you wish—though I have always thought candor the prelude to deception.

CARVER: (*pausing*) I'm not sure I believe in you anymore. Not like I did in those law school days.

HOLMES: You no longer have the privilege of doubt. I'm your client now.

CARVER: And you think lawyers must believe in their clients?

HOLMES: Ah, interesting question. I remember my mother-in-law once pronounced a certain famous lawyer to be a really good man because he never took a case that he didn't believe in. I don't think she had it quite right. He simply believed in every case he took.

CARVER: What do you expect *me* to believe in, Justice Holmes? That is the core of my problem, you see? I don't really believe in anything anymore—except what my client needs me to believe.

HOLMES: You talk as if lawyers must be moral eunuchs. But you're still a human being, with beliefs and prejudices, values and morals, friendships and loyalties, hatreds and loves. You should not confuse those things with the business at hand.

CARVER: Curious you should mention that—the business at hand. (*pausing*) You know, I remember—I remember sitting in class that day in law school. We were talking about *the business at hand* then. The professor was focusing on a passage in one of your essays. You were talking about the difference between law, on the one hand, and morality, on the other. You wrote that if you want to have a *business-like* understanding of the matter, you must be careful never to confuse the two. "If you want to know the law and nothing else," you wrote, "you must look at it as a *bad man*."

HOLMES: John, I chose *you* for this case. Picked you out among the thousands. Have you wondered why? (*pausing*) Because I have wondered. Wondered what it is that attracted me to you. (*pausing*) You know, our lives have certain parallels. Like you, I was a soldier before I was a lawyer. I fought in the Civil War, with the Army of the Potomac. I was wounded three times. Shot through the neck at Antietam. Hit twice at Ball's Bluff. (*pausing*) The worst was Ball's Bluff. (*pausing*) After the war, I went to law school at Harvard. But I never forgot the war. The war shot the romance right out of me. All those high ideas about justice and truth. Those notions that the law treats every person as an end in himself, as a unique being with special dignity. (*pausing*) That is not the way of the world, or the path of the law. We march a conscript to the front lines at bayonet point to die for a cause he doesn't believe in. That's the real law.

CARVER: What happened to you at Ball's Bluff?

HOLMES: It was typical of the war. We were mostly lead by officers who were incompetent, stupid, or drunk.

CARVER: In Vietnam it was sometimes all three.

HOLMES: Our commander at Ball's Bluff was Colonel Edward D. Baker. Baker was a romantic. He liked to quote *poetry* while under fire. His only two qualifications for command were that he had been a United States Senator from Oregon, and a friend of Abraham Lincoln. Baker was shot and killed early in the battle. At first we thought that was a break for our side.

CARVER: But his replacement turned out to be worse?

HOLMES: He never was replaced. We had no leadership at all. The Confederate troops fought under the cover of the woods, and from the strategic high ground. We were in complete disarray, and our regiment was routed. (*pausing*) At twilight, we tried to retreat by scrambling down the bluff. The Rebels wouldn't let us. Bullets were flying at our backs. I will never forget. (*pausing*) At the bottom of the ravine were four small boats. Not enough to carry us all across the river, but we had no choice. One of the boats was so badly overloaded it capsized. I watched a tangle of men tumble into the icy water, with rebel shot reigning down on them. The river became clogged with their bodies and blood.

CARVER: How were you hit?

HOLMES: The first bullet was spent, and just knocked the wind out of me. Like a goddamn fool I went racing back to the front line, and got hit again.

CARVER: That's about how it happened to me. First I got nicked in the shoulder, but like a dumbass I kept moving. We were trying to get back to the chopper when I took it full in the gut.

HOLMES: What did you think about when you knew you'd been hit?

CARVER: I thought about Pauline, about Megan. Almost as if they were there, witnessing the scene. I wanted to calm them. I wanted to let them know that they needed to view the matter like I was viewing it—with clinical detachment. (*pausing*) That's how I felt. Detached from myself. I was perversely *curious* about what was happening to me. I knew I wanted to survive. But I was not afraid, for some reason. I thought I could *feel* the bullet inside me, and I was strangely fascinated by it.

HOLMES: I remember that. I remember exactly that. (*pausing*)

At first I felt as if a horse had kicked me and knocked me over. Our first sergeant caught me and pulled me to the rear. He opened my shirt, and told me there were two holes in my chest, and a bullet that was visible. He pulled the bullet out and handed it to me. I felt this sickening feeling wash over my face, like I was being doused in water. Next to me a non-commissioned officer was lying on the ground, shot through the head and covered with blood. I asked myself, was I shot through the lungs? I spit, and blood came out. Yes, through the lungs. I knew from my experience in the field that hemorrhaging through the lungs was an agonizing death. I reached into my waistcoat for a bottle of laudanum. But then I decided not to take it. I wasn't ready to give up.

CARVER: Did you think you were dying?

HOLMES: By the time they got me down off the bluff and to a surgeon, I'd lost a lot of blood. I asked the surgeon to tell me my chances. He said I had two holes in my lungs and was bleeding from the mouth, and the chances were against me. I was really tempted then, to take the laudanum and just let go. But I didn't.

CARVER: Did you ever lose consciousness?

HOLMES: I went in and out. I had this dreamlike debate with my father, who kept appearing to me in the haze. The question was whether I should pray to God, to call on his forgiveness and mercy. I decided not pray. It seemed cowardly.

CARVER: You were right. I have the same plan. If God exists, why should he believe me now anyway? My sentence was passed long ago. I'm heading for lawyers' hell: an eternity of pointless due process.

HOLMES: What about your wife and daughter? They don't want you to die.

CARVER: I'm already dead to them. I haven't been alive for Pauline or Megan in a long time. Not in any way that matters.

HOLMES: You know, John, I am beginning to wonder if you are really up to defending me in this case. Perhaps I should look

for a different lawyer.

CARVER: No! I won't have it! I have never let my personal problems interfere with my duties as a lawyer, and I don't intend to start now. Look, Holmes, you have nothing to worry about. The client always comes first with me. (*pausing*) Just ask Megan and Pauline.

HOLMES: Have you got a strategy?

CARVER: We neutralize the witnesses against you. What honest judge doesn't have people who hate him? Particularly if he ruled against them.

HOLMES: That's it? That's your strategy?

CARVER: First we neutralize. Then we attack. That's the key: Attack! Always attack!

HOLMES: Along what lines?

CARVER: We shoot at Socrates. At his philosophy. At his method.

HOLMES: Are you sure that's wise? To prosecute the prosecutor? Why don't we just play it safe? There are thousands of lawyers, judges, and scholars who would happily attest to the integrity of my character and thought.

CARVER: We don't need a thousand witnesses, Justice Holmes. Only one. You.

HOLMES: John, listen, don't you think—

CARVER: —That's how Socrates played it, get it? In his own trial. He handled his own defense. He didn't recant. He didn't retreat. When you retreat they get you, Holmes! We both know that. Socrates stood his ground and attacked his attackers. He made them look foolish. We'll do the same. We'll use the Socratic method to beat the Socratic rap.

HOLMES: I don't know about this.

CARVER: Listen, Holmes, you're on trial for your immortality. Who better to defend your own philosophy than you?

HOLMES: Just remember: Socrates lost. The jurors of Athens ruled that he was guilty, and they made him drink the hemlock.

CARVER: He may have lost the trial. But in doing so, he won

his immortality.

Scene viii

[John Carver is lying in his hospital bed. Megan has again replaced Pauline in the chair, holding vigil near his bed.]

[The scene begins with the entrance of Frankie St. George. As St. George enters, Carver gets up from the bed and walks toward him.]

ST. GEORGE: Too bad about the truck driver you hit.

CARVER: What about him?

ST. GEORGE: You haven't been told? He died.

[Carver staggers to his chair, stunned by the news.]

CARVER: Well I might as well follow him now. It's not right for me to live, really. Not right at all. Not anymore. *(pausing, and then laughing strangely)* There's a lawyer's irony for you! Even if I survive this they'll charge me with murder.

ST. GEORGE: That's why I'm here. I want to make sure you stay around. You'd be hard to replace.

CARVER: Is that really how you figure it, Frankie? Or would you be better off if I were dead? Then you'd be absolutely sure that your secrets are safe.

ST. GEORGE: Oh, I know my secrets are safe with you counselor—what with your having Megan and Pauline to think about.

CARVER: I'm guilty of murder, Frankie. Guilty of murder! But I guess you know how that feels.

ST. GEORGE: No, I can't imagine. I've never been guilty of murder. Never spent a day in jail for any crime, in fact. You've seen to that. And you're not guilty either, counselor. That's just your coma talkin'.

CARVER: I *am* guilty. And I admit it.

ST. GEORGE: I don't believe it. The John Carver I know would

beat this rap in a nick.

CARVER: You wanna play lawyer, Frankie? So what's my defense?

ST. GEORGE: Your defense is that you had no malice, no intent, no depraved or wanton heart. This was a car accident, that's all. A tragedy, to be sure, but no crime. Let your insurance pay the damages to the driver's family. Sweeten the pot a little yourself. Money is no object to you. You can pay the family what your insurance won't pay. Pay 'em double, pay 'em triple, whatever it takes. You got plenty a' room to maneuver here.

CARVER: I taught you well.

ST. GEORGE: Damn straight you did. (*pausing*) You know, lately I have come to see the law with great clarity, counselor. And I owe it all to you.

CARVER: Maybe we can't buy ourselves out of this one, Frankie. There's a lot of people out there who'd be very happy to bring me down. Hell—they got a right! I did a very evil thing.

ST. GEORGE: But you were *crazy* when it happened. That's obvious. *Temporary insanity*. No sane person does this. And people believe that you got this streak a' decency in you. John Carver would never intentionally hurt anyone. He couldn' a' planned to hit that truck. He couldn' a' figured somebody else would die.

CARVER: So I was aiming for a tree. When I hit the curb, I lost control. I never saw the truck.

ST. GEORGE: Now you're talkin'! You *are* innocent!

CARVER: I am if the jury believes it.

ST. GEORGE: We need a motive.

CARVER: Why do we need a motive if we're claiming insanity?

ST. GEORGE: What I mean is, we need an *explanation*.

CARVER: For what?

ST. GEORGE: For why you flipped out. For what caused this burst of insanity. What was the trigger? What set you over? The jury's gonna wonder. You know how you always explained it to me, counselor. You got to provide the jury with a story

they can believe in.

CARVER: What if the trigger had something to do with your case, Frankie? What if my conversation with Sherry Kellog was what triggered it?

ST. GEORGE: I would call that very unfortunate.

CARVER: I thought you might.

ST. GEORGE: Yes counselor, that could be very detrimental to your situation, and of course to the situations of Megan and Pauline. (*pausing*) Listen, you need your rest, Johnny boy. I feel we've made real progress here. I want you to take some time and reflect. That's the kinda advice you always give me. Rest and reflect.

ACT II

Scene i

[John Carver is lying in his hospital bed. Megan is once again in the chair, holding vigil near his bed.]

[There is an empty chair for the witness, a chair on one side for Socrates, and two chairs on the other side for Holmes and Carver. As the scene begins, Carver gets up from his hospital bed and moves to his chair next to his client, Holmes.]

SOCRATES: I call Oliver Wendell Holmes to the stand.

[Holmes rises and walks to the front of the witness stand.]

SOCRATES: Do you promise by all that is immortal to tell the whole truth, and nothing but the truth?

HOLMES: I do. (*sitting down*)

SOCRATES: Justice Holmes, do you believe in God?

HOLMES: Whether man created God in man's image and likeness, or vice-versa, I really don't know.

SOCRATES: So in truth you really don't believe in God.

HOLMES: In truth I refuse to answer the question.

SOCRATES: You are on trial before the immortals.

HOLMES: So you say—though none of them have come forward to identify themselves.

SOCRATES: So you don't believe in the immortals either?

HOLMES: I believe in the reality of this trial.

SOCRATES: Will you at least tell us if you ever belonged to a religion?

HOLMES: I generally resisted organized religion.

SOCRATES: Weren't you a Unitarian?

HOLMES: Does that count? I guess you could say I was a nominal Unitarian, if such a thing is possible. Religion meant more to Fanny, my wife, than to me. In Boston in those days you had to be something, and Unitarian was the least I could be.

SOCRATES: Do you believe in anything cosmic or universal?

HOLMES: I think my religion is my business.

SOCRATES: Do you believe in the dignity of man?

HOLMES: I believe that individual men and women have what dignity they make for themselves. But if you mean by "the dignity of man" anything more pretentious than good manners, I must say I do not believe in it.

SOCRATES: Indeed, isn't it true that you once wrote to a friend that it was not an absolute principle that human beings should always be treated with dignity?

HOLMES: Yes, I wrote that letter.

SOCRATES: And didn't you also say in the letter that "morality is only a check on the ultimate domination of force, just as politeness is a check on the impulse of every pig to put his feet in the trough?"

HOLMES: Yes, I said that. And I do not regret it.

SOCRATES: So human beings are just animals to you, aren't they? Successful competitors in Darwin's survival of the fittest. But not elevated. Not sacred. Not possessed of any distinctive dignity or soul.

HOLMES: I have never thought that meaning in one's life re-

quires assurance that one's values govern the universe.

SOCRATES: In fact, didn't you once say that you "had no reason to believe that a shudder would go through the sky if the whole ant heap were kerosened?"

HOLMES: You must remember that I was a soldier in one of the bloodiest wars of history. Such an experience has a tendency to overwhelm the speculations of philosophy.

SOCRATES: You are referring to your service in the Civil War?

HOLMES: I am indeed. I took my public duties seriously.

SOCRATES: But where did your sense of public duty come from? What sense of duty can compel a man who does not believe in anything? (*Socrates pauses, but Holmes says nothing. Socrates continues.*) It was after the war that you went to Harvard law school, correct?

HOLMES: Yes.

SOCRATES: Why did you make that choice?

HOLMES: The law offered the chance to plunge deeply into the stream of life. It offered drama, passion, battle, triumph, despair. I felt a soldier could be at home there.

SOCRATES: So you entered law for *the action*, is that it? Not to serve the world. Not to defend morality, or fight for justice, or pursue a virtuous life. Law for you was just another form of combat.

HOLMES: My goal was *to live greatly in the law*. And I tried to the best of my ability to do that. I don't claim perfection. But at least I was in the arena. Like Teddy Roosevelt, I opted for the strenuous life.

SOCRATES: But strenuous in the service of what?

HOLMES: Why do you feel so driven to connect human actions to universals? Don't get me wrong—I am not against using one's mind to ponder the great mysteries. Even in the study of law, I believe it is possible to seek out glimpses of the universe, to pursue what I once called "the echo of the infinite." But life is not philosophy.

SOCRATES: An "echo of the infinite?" What meaning could that possibly have to you? Or do you use words merely to dazzle

and adorn, like linguistic confetti? You once wrote, did you not, that law must be kept distinct from morality? That to understand the law, you must learn to look at it like a bad man? Is that what it means to you to "live greatly in the law?"

HOLMES: That passage is often misinterpreted. I never intended it as the language of cynicism.

SOCRATES: Of what then? You were divorcing law from morality.

HOLMES: No. Separation is not divorce. The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. When I emphasized the difference between law and morals I did so to clear the minds of law students and lawyers, so that they could better understand the business of being a lawyer.

SOCRATES: Precisely! And the business of being a lawyer, in your eyes, is like the business of the *Consiglieri* to the Godfather. Your card ought to read: "Oliver Wendell Holmes, Attorney-at-Law. How much justice can you afford?"

HOLMES: The majesty of the law comes not from romance, but realism. The law for me was a mirror in which I saw reflected all of life itself, its struggle, its spark, its spontaneous energy. If you think my vision of the law, and my life, were somehow dirty and debased because I was unable to connect with your lofty philosophical abstractions, so be it. But I refuse to recant.

Scene ii

[John Carver is lying in a hospital bed, in a coma. Megan is sitting in the chair beside the bed, holding vigil.]

[As the scene opens, Carver gets out of his bed and walks over to his chair in the courtroom. He picks up legal papers from the Holmes trial and begins to examine them. His wife, Pauline Lewis, enters.]

PAULINE: Hello John. How is your trial going?

CARVER: (*surprised to see her*) Pauline! Hello. I'm surprised you would ask.

PAULINE: I know I don't usually take an interest in your cases. But this is the big one, isn't it?

CARVER: Ah, Pauline. (*pausing*) Yes, perhaps as you say—the big one. I'm fighting for immortality.

PAULINE: You must be proud.

CARVER: Oh sure.

PAULINE: Proud of your triumphs. Proud of Megan. Proud of your whole life.

CARVER: You've always been the *best*, Pauline. You know that? Hell, Socrates and Holmes got *nothin'* on you. Whenever I come across some tough son-of-a-bitch in the courtroom, I gather strength thinking of you. It could be *Pauline* you're facing, I tell myself—count your blessings!

PAULINE: Is that how you think of me, John? As another player in the courtroom of life?

CARVER: You ask me if I'm proud when you know I'm ashamed.

PAULINE: Why are you ashamed? You've had a wonderful run. You became all you wanted.

CARVER: I became all I wanted and nothing else.

PAULINE: What do you want for Megan, John? Do you want her to turn out like you?

CARVER: What do *you* want for Megan, Pauline? What more do you want me to give her? What more do you want me to give *you*, for that matter?

PAULINE: (*angrily*) Nothing! Forget it, John! We don't need a goddamn thing from you. Just die and leave us in peace. Just die!

CARVER: (*softly*) I'm sorry, Pauline. I really am sorry—I didn't mean that. (*pausing*) But I can't turn the clock back three decades. I can't unlive my life.

PAULINE: But you can come back, John. You can come back to *us*.

CARVER: I don't think so. I don't think it's possible. And even if it were, why would you want me?

PAULINE: For Megan. And for the *dignity* of it, John. Yours, Megan's, *mine*. There is no dignity when the struggle stops. No honor, no affirmance, no hope, no humanity. There was once a man inside you that I could love. I think he's still there, somewhere.

CARVER: I don't know, Pauline. I don't know if there is anything left.

PAULINE: (*very tentatively, she moves closer*) Will you hold me, John? I want to try to imagine the man I once knew.

CARVER: Close your eyes.

[Pauline closes her eyes. Carver comes to her. With her eyes shut she feels his hands, grabs the legal papers from him, and drops them to the ground. They embrace.]

Scene iii

[John Carver is lying in his hospital bed. Megan is still in the chair, holding vigil near his bed. She is only dimly visible to the audience, and does not take her eyes off the hospital bed in this scene or witness any of the action that occurs.]

[Holmes is still in the witness stand. Socrates is hovering near him, ready to resume questioning. As the scene begins, Carver rises from his hospital bed and moves to his chair in the courtroom. Socrates then resumes his examination.]

SOCRATES: Justice Holmes, the most significant part of your life in the law was your tenure on the Supreme Court of the United States. You served for some thirty years, did you not?

HOLMES: Yes. I was appointed to the Court by Teddy Roosevelt in 1902. I served until 1932.

SOCRATES: Do you agree that during that tenure, it was your duty to dispense justice?

HOLMES: No. I wouldn't put it that way. It was my duty to interpret and apply the Constitution and the laws of the Unit-

ed States.

SOCRATES: But you bore the title of "Justice." And you sat on your nation's highest court of justice. And the constitution and laws of a nation exist to allot justice, do they not?

HOLMES: You are playing your usual icy games with words, Socrates. You call the Supreme Court the highest court of justice. I might just as easily call it the highest court of law.

SOCRATES: Why are you being so cantankerous? My question is simple.

HOLMES: Your question is sinister.

SOCRATES: Surely, as a Supreme Court Justice, you had an obligation to do justice, to the best of your ability. Why quibble with me? I remind you that earlier in your testimony today, you repeated lines you had once written, stating that "law is the witness and external deposit of our moral life."

HOLMES: I didn't say that morality *was* law. And I certainly didn't say that *all laws are moral*.

SOCRATES: Is the United States Constitution a moral document?

HOLMES: The Constitution, when it was written, reflected the moral sensibilities of the time.

SOCRATES: So your answer is yes. The Constitution is a moral document.

HOLMES: The Constitution embodies many admirable moral aspirations. But it also ratified slavery, an institution with which you were familiar, Socrates. And for that, hundreds of thousands were slaughtered in the Civil War. Many before my own eyes.

SOCRATES: Then as a Supreme Court Justice, was it not your duty to make up for such moral failings? To apply corrections to the Constitution when the Constitution is found wanting?

HOLMES: The Constitution was made for people of fundamentally differing views. Who is to say what is a moral failing? I know that you are no great fan of democracy, Socrates. But in a democracy the answer is that the *people* must ultimately provide the morality. I sat on the Court to interpret and apply

the Constitution that the people *created*. It did not come from Olympus. It was not graven through some miracle, like the tablets of Moses. Don't you see? There are no higher laws, hovering above us like some brooding omnipresence in the sky. The Constitution, like all law, is the creature of men.

Scene iv

[John Carver is lying in his hospital bed. Pauline has again replaced Megan in the chair, holding vigil near his bed.]

[The scene begins with the entrance of Megan and Frankie St. George. They are having some sort of animated discussion. Megan has a briefcase. As St. George and Megan enter, Carver gets up from the bed and walks toward them.]

MEGAN: (*gesturing to Carver*) Dad, I want you to leave this to me.

CARVER: (*pointing to St. George*) Why is he with you? What is this about?

ST. GEORGE: Megan here has gotten all uppity, John. I just came by to transact some business. No offense, Megan, but I'd like to talk to your father in confidence.

MEGAN: I am representing my father in this matter, Mr. St. George. And I am instructing my client to remain quiet unless and until I advise him otherwise.

CARVER: She's pretty good, isn't she Frankie? I believe I will follow my lawyer's advice. Whatever you've got to say to me you can say to her.

[Megan opens her briefcase and removes a tape recorder.]

ST. GEORGE: This is bullshit, John! Ridiculous! Now listen while I—

MEGAN: —I'm going to turn this tape recorder on, Mr. St. George. (*presses button to record*) There. Now you should know that my father, Mr. Carver, has authorized me to inform

you that he has chosen to terminate his services as your attorney. Nothing you say in this conversation to Mr. Carver or to me will be kept confidential. And we won't hesitate to use it against you.

ST. GEORGE: Fine. If that's the way you wanna play it, that's just fine. And I won't hesitate to use this little farce against *you*, Miss Carver. Or against your father. Or your *mother*. Actions have consequences. You're about to learn that.

[*St. George exits in anger.*]

CARVER: What the hell was that all about?

MEGAN: You know, don't you? You know what it was all about.

CARVER: The truck driver. The man I killed.

MEGAN: Yes, the truck driver. But what else? What has Frankie St. George got on you, Dad? I need to know the truth if I'm going to defend you.

CARVER: You need to know the truth? What truth do you need to know? The truth as my lawyer, or the truth as my daughter?

MEGAN: The real truth will do.

CARVER: Megan, Frankie St. George is a very bad man.

MEGAN: (*sarcastically*) I'm shocked.

CARVER: And for many years I have been his lawyer. Now, is that a lawyer's truth or a daughter's truth? I don't know. I only know I've come to the end of it.

MEGAN: It's not the end unless you make it so.

CARVER: I know what you want. And I have always tried to please you. It would be easy to just say, "yes, yes, Megan dear, yes, I'll try. I promise I will."

MEGAN: Damnit, Dad! Just say what you feel! Just tell the truth.

CARVER: Megan, I've lived a life of splits. A life of splitting hairs, splitting fees, splitting realities, and splitting people. I can't tell the truth because I can't find it anymore.

MEGAN: We all have a life inside our head that we never show

the world, Dad. There is a part of us that no one else ever enters, not completely. We lie, we cheat, we betray. We live lives full of fractures and fissures.

CARVER: But my fissures ran too deep. They cracked my foundation. First the lawyer split from the human being and then the human being split asunder. I tried to kill myself, Megan. And instead I killed another man. I can't live with that.

MEGAN: This is Frankie St. George's fault! *Goddamn* him! We have to fight him! Let me help you fight him!

CARVER: I wish it were Frankie's fault. It's not. Frankie will burn in hell, no doubt. But they will save the hotter flames for me. I made Frankie possible.

MEGAN: I don't know if you made Frankie possible or not. I imagine you helped. But you are *not* the same as Frankie. When you defended him you thought you were doing the right thing, doing what your profession required, doing what society expected.

CARVER: I crossed the line.

MEGAN: Okay! Maybe you did. Maybe you're guilty! And maybe you *will* burn in hell for it! Or maybe you'll be redeemed. Or forgiven. You've lived a great life in the law, father. The law *assumes* the fallibility of man. We wouldn't need lawyers and judges and courts if people never sinned. But the law also assumes that wrongs can be righted, victims can be compensated, criminals can pay their debts and be rehabilitated, wounds can be healed. Your life has not all been fakery and facade. I've *seen* the good you've done. Seen people you've touched and made better. Seen you argue lost causes and make them winning causes. Seen you inspire others to strive for a more humane and tolerant and decent world.

CARVER: I appreciate your oratory, Megan. And your devotion. That is a wonderful summation. I only wish you had the evidence to back it up.

MEGAN: I have the evidence. Right here. (*pounding her fist to her chest*) The evidence is *me*. Damn you, Father! Open your eyes! Look at me! Look at me, and the part of you that's in me, the part of you that will live on. Look at me and be proud

of that! Don't be ashamed! Don't make *me* ashamed.

Scene v

[John Carver is lying in his hospital bed. Pauline is now in the chair, holding vigil near his bed.]

[Holmes is still in the witness stand. Socrates is hovering near him, ready to resume questioning. As the scene begins, Carver rises from his hospital bed and moves to his chair in the courtroom. Socrates then resumes his examination.]

SOCRATES: Justice Holmes, earlier in the trial, as you listened to the testimony of Carrie Buck, did you feel remorse for what you did to her?

HOLMES: I did not do anything to her.

SOCRATES: You had her fallopian tubes cut!

HOLMES: The doctors and officials employed by the Commonwealth of Virginia had her fallopian tubes cut.

SOCRATES: You sound like the defendants in the Nuremberg trials.

CARVER: I object! *(rising to his feet)* The comparison is ludicrous!

SOCRATES: Let me refresh your memory, Justice Holmes, on exactly what you wrote in your Supreme Court opinion in Carrie Buck's case. I quote:

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.

HOLMES: You had no need to refresh my memory. I recall those words well. I also pointed out, in that opinion, that society often calls on its best citizens for their lives. Since you never fought in any of the noble wars of Athens during your time,

Socrates, you might not understand that lesson.

SOCRATES: What does the drafting of a soldier to fight a war have to do with sterilizing Carrie Buck?

HOLMES: If society can order its best citizens to face death in battle, it can also call on persons such as Carrie Buck, who already sap the strength of the state, for the lesser sacrifice of sterilization. Otherwise we may find ourselves swamped with incompetence.

SOCRATES: But as you saw in this trial, Carrie Buck was not incompetent. Nor was her daughter, Vivian.

HOLMES: You are no expert on those issues, Socrates, and neither am I. A Supreme Court Justice does not hear testimony, does not examine witnesses. The record before me in Ms. Buck's case indicated that she was a proper candidate for sterilization, and that she had received due process of law.

SOCRATES: Due process of law?! She was raped! Committed to an asylum on a trumped-up case with a lawyer who was working for the other side!

HOLMES: I had know way of knowing that. And the facts of her particular case are less important than the principles at issue. The sterilization program was perfectly sound social policy.

SOCRATES: But the implications are repulsive! Tantamount to genocide! Indeed, isn't it true that you wrote in your opinion that one of the social benefits of this policy is that persons such as Carrie Buck can be safely turned out into the general population once they are sterilized, in order to make room for more people at the hospital to undergo the same operation?

HOLMES: I was explaining why this law did not discriminate against people in institutions. It was maintained that this law was somehow unfair, because it permitted institutionalized persons such as Carrie Buck to be sterilized, but not other similar persons who were not in such state colonies. To which I replied that getting these operations done on persons such as Carrie Buck would only open spots in the asylum to others, so that the equality aimed at would be more nearly reached.

SOCRATES: Justice Holmes, I mentioned the Nuremberg trials. What is your view of those proceedings?

CARVER: Again I object! (*rising to his feet*) The Nuremberg trials have no relevance.

SOCRATES: The war crimes and crimes against humanity for which the Nazis were prosecuted included matters relating to eugenics and the purification of the race! Hitler's Sterilization Law and Virginia's Sterilization Law were both based on the Model Eugenical Sterilization Law, which had been proposed in 1922 by the American eugenicist, Harry Laughlin! So I would say there is *quite* a connection.

CARVER: Socrates, your own disciple and chronicler, Plato, was obsessed with eugenics. Let me read *you* a quote for a change. This is from *your* student, Socrates. In the *Republic*. Plato writes that the state should arrange breeding so "*that the best men cohabit with the best women in as many cases as possible and the worst with the worst in the fewest,*" so as to make the flock "*as perfect as possible.*"

SOCRATES: I have already had my trial, Mr. Carver. Today we are trying Justice Holmes. And it is important to find out if he believed that the allies had the legal right to put German Nazis on trial for such crimes against humanity.

HOLMES: I will answer your question. Of course they had the right. The might made the right.

SOCRATES: That is not a satisfactory response. At times you remind me of the sophists, Justice Holmes.

HOLMES: Actually, I rather like the sophists. I've always thought them quite sophisticated.

SOCRATES: That's how you've always avoided the hard issues, isn't it? With *a line*. But you can't always dodge the hard truths, Justice Holmes. And the hard truth here is that your views of law and morality ultimately lead to things like the Holocaust, don't they? The Nazi's simply carried your philosophy to its natural conclusions.

CARVER: I object, and I instruct my client not to answer. The notion that Oliver Wendell Holmes could in any sense share complicity in the atrocities of the Nazis is too outlandish to require a response. What you fail to grasp, Socrates, is that Justice Holmes believed in *democracy*. When he took the view

that he as a Supreme Court Justice had no right to challenge the actions of the state, he was deferring not to a dictatorship, but to the people themselves, who are ultimately sovereign in a democracy.

SOCRATES: (*angrily*) I am engaged in examining this witness! This is not the time for you to make speeches attacking me!

HOLMES: You compare me to the Nazis and expect me to take it in good humor? You cannot begin to understand my philosophy, Socrates, because you cannot begin to understand democracy.

SOCRATES: I understand it well. I lived in the world's first great democracy.

HOLMES: But you were no friend to it, were you? That's the real reason the Athenians put *you* on trial. For thousands of years you've basked in a holy martyrdom you didn't deserve. Twice your disciples participated in rebellions that overthrew the Athenian democracy! And Plato, with his bizarre utopia, created a philosophy in which the future dictators of the ages could always take comfort. If there is a link to the Nazis in this trial, Socrates, it is you!

SOCRATES: You and your lawyer are playing an ancient game. If you don't like the message, attack the messenger.

CARVER: (*rising once again to intervene*) So do you renounce the writings of Plato, or do you endorse them?

SOCRATES: Plato was my student. But his renderings of me were not always accurate—

CARVER: —So you do renounce Plato.

SOCRATES: No, I didn't say that. Plato took many of my thoughts and pushed them to extremes that I would not have accepted. But I don't disown Plato—not at all. I am most proud of that sublime prince. For at least Plato stood for *something*. Unlike the great Oliver Wendell Holmes here, (*pointing aggressively toward Holmes*) Plato believed that certain absolute values and ideals *do* exist.

HOLMES: But the modern mind will not accept Plato's idealism. And I am on trial here for daring to confront the law with the modern mind.

SOCRATES: Plato gave men a perfection to strive for. He held out a belief in the universal, without which life has no meaning.

HOLMES: Between Plato's philosophy and mine lies the culture of two thousand years.

SOCRATES: Well I trust the immortals will agree with me that you have not improved upon it. You and your glorious democracy. I don't think Carrie Buck or Eugene Debs thought much of it!

HOLMES: In a democracy there will be winners and losers, just as in a dictatorship. At least in a democracy, there is some fairness to the process.

SOCRATES: The process is a sham! And you helped perpetrate the sham! Eugene Debs was sent to jail because he dared speak the truth to the state. And you, Justice Holmes, were the agent of the state responsible for sending him there.

HOLMES: Your equations are simplistic, Socrates.

SOCRATES: You see, Holmes, you were always part of the establishment. You can't understand how Debs felt, or how Carrie Buck felt. *But I can.* I understand what Eugene Debs went through when he dared to challenge popular wisdom. I was not *politically correct* in Athens. Because I was not politically correct, I was hauled before what amounted to the Committee on Un-Athenian Affairs, and sentenced to death for preaching views that would corrupt the Athenian youth.

HOLMES: It's a good thing you died as you did. Otherwise you'd be a lost page in history. You became the patron saint of freedom of thought—though few people ever bothered to notice that little of your thought was worth thinking about.

SOCRATES: Now we see your true colors. You didn't think much of the thought of Eugene Debs, either, did you Holmes? Or any of the other socialists and antiwar protestors whom you helped incarcerate.

CARVER: (*rising to his feet to interject*) I think the record should show that shortly after the Debs case, Justice Holmes wrote his famous dissenting opinion in *Abrams v. United States*, in which he eloquently defended freedom of expression, and the

marketplace of ideas.

SOCRATES: Oh yes. We all know that Oliver Wendell Holmes later became a great defender of freedom of speech. Why did you change your views on that issue, Holmes?

HOLMES: I did not change my views.

SOCRATES: You completely changed sides! In cases like *Debs* you were the great oppressor, and then later in *Abrams* and other cases, you were the great emancipator.

HOLMES: My actions in all these cases were perfectly consistent. Eugene Debs was a dangerous man, with many followers. His speeches could well have shackled the war effort. He deserved the sentence he received. But in the *Abrams* case the defendants were five Russian immigrants who dropped leaflets in English and Yiddish from a tenement building in New York. The leaflets were the usual diatribe. They were poor and puny anonymities. It was silly to believe they could influence the war.

SOCRATES: So freedom of speech, for Oliver Wendell Holmes, is protected only when it doesn't matter.

HOLMES: Freedom of speech, like most everything else in law or in life, is not an absolute. The freedom one enjoys always depends on the context.

SOCRATES: Isn't the real truth here much more simple than that? You were stung by the intellectuals' fierce criticism of what you did to Debs. You only switched positions to improve your image.

HOLMES: The accusation is ludicrous! Do you think I would let public opinion influence how I ruled in cases? Good God! People's lives were at stake.

SOCRATES: No they weren't. Not really. You knew that it made no difference how you voted or what you said when these dissidents came before you. A majority of your colleagues on the Supreme Court were going to send the agitators to jail whether you dissented or not. So without actually changing the outcomes of any cases, you were able to portray yourself as a great champion of liberty.

CARVER: (*rising to object*) I object—this entire business is non-

sense. Justice Holmes decided hundreds of cases. Many of them involved difficult judgments of fact and law, cause and effect. Is his immortality to turn on whether now, looking back decades later, we agree with every verdict?

SOCRATES: These were not routine decisions. These were *defining moments*. Justice Holmes has a legacy as a defender of free expression. The question is whether that legacy is deserved. You might be more sensitive to this inquiry if you had experienced what I experienced in Athens. Then you would know what it means to be persecuted for the expression of opinions.

HOLMES: Isn't that exactly what you are doing to me right now? Attempting to persecute me for my opinions?

SOCRATES: There is no persecution here, just prosecution. Your opinions are being tested in the very marketplace you defended, the marketplace of history.

HOLMES: Then I have faith that the truth will win out.

SOCRATES: And why do you have such faith? Why do you think the marketplace so sacred? Your ideas about the marketplace have had a pernicious impact on American culture since you left the Supreme Court.

HOLMES: Certitude is not the test of certainty, Socrates, and snideness is no substitute for evidence. Your opinions are twisted. I am proud of my influence—proud that Americans ultimately came to embrace the idea of an open society in which even the most loathsome expression is tolerated. Toleration of dissent has become, I believe, the very identity of America itself. I am gratified that I was able to play a part in forming that identity.

SOCRATES: Your legacy is not the legacy of tolerance, but *intolerance*! You preached that to understand the law, you must view it "as a bad man." Well now your theory of law is the law of the bad man—law of the bad, for the bad, by the bad. Your theories have made it safe for Nazis to march through Jewish neighborhoods in Skokie, Illinois, causing survivors of the Holocaust to relive their horrors. Your theories have made it safe for hoodlums to sneak into the backyard of a black family and burn a cross in the middle of the night, scarring the

hearts and minds of the children inside. Your theories have made it safe for the Ku Klux Klan to go on television with white sheets and nooses chanting "Send the nigger back to Africa! The Jew to Israel!" No wonder so many of the young people in the nation's law schools, including the young professors, are disgusted with your philosophy of the market, Justice Holmes! Their revolution will be the market's own revenge.

Scene vi

[John Carver is lying in his hospital bed. Pauline is still in the chair, holding vigil near his bed.]

[As the scene begins, Megan and St. George are in the middle of a confrontational discussion at center stage.]

ST. GEORGE: It's time for you to grow up, Megan. You can't be daddy's little girl all your life.

MEGAN: You said you had an offer, Frankie. Spit it out.

ST. GEORGE: Sometimes your father is too good a lawyer for his own good. Something he said earlier has been wearing on me, and now he's managed to change my mind.

MEGAN: Get on with it Frankie.

ST. GEORGE: He's the master of that, you know. Plant a little thought in the jury's mind, just a little seed, at the right moment, and let it germinate and grow at its own pace.

MEGAN: I don't have time for this, now—

ST. GEORGE: —Live or die? (*loudly*) Live or die. (*more softly*) That's the most important question. More important than guilty or not guilty, when you get right down to it. Here I was, trying to figure out how to help your dad beat this murder problem, when out of his own mouth, pops the ultimate question. Would Frankie St. George be better off with your father alive, or with him dead? And of course, my first instinct, borne of my natural sense of humanity, and my loyalty and devotion to a friend who has done so much for me, is that we've got to

fight to keep your father alive! Bolster his spirits! Pump him up! Be there for him in his time of trial, as he has always been there for me.

MEGAN: Frankie, just go away. I don't want to hear any more of this.

ST. GEORGE: We all gotta grow up someday. Just like we all gotta die. (*pausing*) Now it's your daddy's time. Be better for everybody, don't you see? Unhook him and let him go, and I'll never pester you again.

MEGAN: You bastard! Get the hell out of here!

ST. GEORGE: Think about it sweetheart. (*laughing*) I know you'll see things my way. You may not be daddy's little girl anymore, but you're still a chip off the old block.

MEGAN: (*screaming*) Leave! I'll call security! Leave!

ST. GEORGE (*as he exits*) Do you really think you can keep me away, Megan? You can't save him, sweetheart. You can't save him from me. I don't even think you can save him from himself.

Scene vii

[John Carver is lying in his hospital bed. Pauline is still in the chair, holding vigil near his bed.]

[Holmes and Socrates are in the "courtroom," awaiting the verdict of the jury. As the scene begins, Carver rises from his hospital bed and moves to where Holmes and Socrates are waiting.]

CARVER: The jury is out. Now the waiting begins.

SOCRATES: I don't think it will take them long. (*pausing*) You should never have assaulted me, you know. That will not wear well with them.

HOLMES: You don't handle criticism well, do you Socrates? Never did, really.

SOCRATES: Just making idle talk while we wait. Carver here blundered, botched the defense, that's all.

CARVER: You're a self-righteous hypocrite. Driving in that point was no blunder.

SOCRATES: You don't really understand, do you? Not even now. (*pausing*) You see, all things have their essence. You have your essence. Holmes has his essence. This trial has its essence. The essence of things cannot be avoided.

CARVER: Save it, Socrates. The jury's out already.

SOCRATES: Think about the essence of this trial, Carver. One advocate to another. Now here we have Oliver Wendell Holmes, (*gesturing to Holmes*) a much-admired icon. A towering figure. A Supreme Court Justice, learned in the law. Now how can *he* be brought to trial? What could he possibly have ever done that would merit prosecution? What is there to try him for? Why bother?

HOLMES: We shouldn't have!

SOCRATES: Except that Justice Holmes, on further examination, turns out to be a very troublesome figure. He is, in many respects, a lawyer's lawyer, that is true. But is that good or bad? We find that he is a lawyer without a cause, or at least without a transcendent cause. He is a lawyer and Justice who ultimately does not believe in law or justice. Justice is whatever result the battle produces, and the lawyer, like a good soldier, simply fights the battle for his client, and does not reason why.

CARVER: You're the one who is ingenious at making the better cause appear the worse.

SOCRATES: Whether my ideas were always right or wrong is not what is important, Carver. At least I *believed* in right and wrong.

CARVER: Did you? Or did you revel in argument for its own sake? Don't forget that I was taught by law professors who thought they were using your method. For every proposition you can pose a counterproposition. For every question asked you have five questions to ask back.

SOCRATES: See how you fell into my trap! In attacking me, you and Holmes stooped to the very practice for which he has been indicted. A thing of beauty, really. Your form fell victim to my

function. You'll stoop to anything to win a case, won't you John Carver? You'll even try to smear the venerable Socrates.

HOLMES: The truth is not a smear. The people are with me, Socrates. No matter what you say, the people are with me. They're not with you, that's for damn sure. Your Plato imagined a world of philosopher-kings. But I imagined a world of democracy. That's the vision of the America I helped create.

SOCRATES: Immortality will not look kindly upon your creation, Holmes. Your America has no moral compass. The needle spins randomly. You created a nation of laws, but no spirit. You created a society, but not a community. Your America has a vision of the hustler but no vision of the healer. Your America has a sense of the bad man but no sense of the good one.

CARVER: (*loudly*) Listen! What's that sound?

HOLMES: The jury door!

SOCRATES: The verdict is coming!

[*Carver tugs at the sleeve of Holmes.*]

CARVER: Justice Holmes, I need to see you in private a moment.

SOCRATES: (*Socrates hears Carver and gestures toward them in a conciliatory way*) Go ahead, you have time—it will take the jury a few moments to assemble. I'll leave you in peace.

[*Socrates exits.*]

CARVER: You still carry that vial of laudanum with you?

HOLMES: Why? Are you going to do like Socrates, and swallow the poison rather than fight?

CARVER: Holmes, I feel so low.

HOLMES: I can see that.

CARVER: I just feel I've made such a muck of it all. With Pauline. With Megan. With my life in the law.

HOLMES: You've been in the muck before. You were in the

muck in Vietnam. Same muck I was in at Ball's Bluff. Same muck, same blood, same shot and shell, war after war. But you pulled yourself out.

CARVER: I don't want Megan to turn out like I did.

HOLMES: Maybe she won't. Maybe you won't turn out like you did either. You haven't turned out until you stop turning.

CARVER: Do you care?

HOLMES: What do you mean?

CARVER: About me. About how I turn out. About Megan and Pauline. About my life. Does any of that interest you?

HOLMES: Yes. I do care. I care very much.

CARVER: Why? Where does your caring come from?

[Megan Enters. Holmes is the first to see her.]

HOLMES: Ah! (*gesturing toward Megan*) What a pleasant surprise! Your lovely daughter.

MEGAN: I'm sorry, Father. I didn't realize you were with a client—

HOLMES: —No, no, that's quite alright. (*holding out his hand to Megan*) You must be Megan. I am Oliver Wendell Holmes.

MEGAN: (*shaking hands*) It's an honor, Justice Holmes.

CARVER: Megan, perhaps you could give Justice Holmes and I just a moment longer to—

HOLMES: —No need for that, John. You were asking me a question about caring, weren't you? Megan may be interested in that herself.

[Carver seems ready to insist that Megan leave, but then resigns himself to letting her stay. After a moment he addresses Holmes.]

CARVER: You said you cared for me. For my life, for my family. Why? Why do you care? Where do those feelings come from?

HOLMES: You care about *me*, don't you? About my immortality? You want me to win my case.

CARVER: All lawyers want to win their cases.

HOLMES: Let me ask the question differently. Do you like me?
Am I just a client to you, or also a friend?

CARVER: I've tried to train myself not to become friends with my clients. It impairs my judgment.

HOLMES: Are you able to keep that separation?

CARVER: Not always.

HOLMES: What about my case?

CARVER: (*pauses a moment*) I feel we are friends.

HOLMES: I agree. We have a kinship.

MEGAN: Justice Holmes, there is something I'd like to ask you, if you will forgive my impertinence. (*looking to Carver*) Father, do you mind?

HOLMES: (*gesturing at Carver*) No, he doesn't mind. Ask me anything you like. (*laughing*) I will consider myself still to be under oath.

MEGAN: In law school, we studied your writings. I mean no disrespect, you understand, but I could never tell for sure where you were coming from. Or for that matter, where all my law professors, with their Socratic method, were coming from.

HOLMES: Perhaps you can sharpen your question a little, Megan.

MEGAN: Let me ask it this way. I know that you liked to lecture lawyers that it was their job to try to predict what judges would do, and marshall arguments that would be effective in influencing them. I know you taught that lawyers should not confuse law and morality. But as a *judge*, when you got yourself up in the morning, and went to the courtroom, and heard the evidence and the arguments, and then had to make a ruling, how did *you* decide what to rule? How did Oliver Wendell Holmes decide his own cases?

HOLMES: (*a bit fumbling and unsure*) Well—I mean, I don't know exactly where to begin. I would read the briefs, of course, and listen to the arguments, and—

MEGAN: —No, you don't understand me. Look—in your writ-

ings, you place so much faith in the marketplace, and you talked about law as a realist. The law school I went to really reflected those values. Classes were endless critique, debate, argument, and more critique. *As if critique is all there is.* But if critique is all there is, where do convictions come from?

[*Socrates enters, moving briskly toward Holmes and Carver.*]

SOCRATES: —I am sorry to interrupt, but the immortals are about to announce their verdict.

[*Holmes puts a hand around Megan and moves her toward Socrates.*]

HOLMES: (*gesturing toward Socrates*) Socrates, I am pleased to introduce you to John Carver's daughter, Megan.

SOCRATES: (*nodding impatiently toward Megan*) Yes, pleased to meet you, I'm sure. (*gesturing to Holmes and Carver*) We must prepare to receive the verdict.

[*Holmes puts up his hand, as if to slow Socrates down.*]

HOLMES: Socrates, Megan just asked me a question that you can perhaps answer better than I. I'm sure the immortals will wait—they have all the time in the world. How again were you putting the question, Megan?

MEGAN: Is critique *all there is*?

SOCRATES: Did Holmes answer you, Megan?

MEGAN: Well, he began, but I don't think he completely understood what I—

SOCRATES: —Well *I* understand, and will respond. The answer is no. Critique is not all there is.

MEGAN: Then how do you explain the Socratic method?

SOCRATES: When I taught in Athens, I never taught that argument and debate are ends in themselves. Justice Holmes never grasped that point. Anymore than your father ever grasped that there is more to being a lawyer than winning.

[St. George enters just as Socrates is ending.]

CARVER: Frankie! What are you doing—

MEGAN: —I warned you to stay away, Frankie! I'm going to call the guards and have you—

HOLMES: —No! Please let him stay! *(turning to St. George)* Mr. St. George, I have heard much about you. The word is that you are a very bad man.

SOCRATES: Well then, he is in good company.

[St. George grabs Megan by the hand and tries to pull her away from the others.]

ST. GEORGE: I'm sorry, gentlemen, but I really don't have the time. *(to Megan)* We have a deal to discuss, and I need an answer now.

[Carver pulls at Megan's other arm. Holding her back from St. George.]

CARVER: What deal? What is this, Frankie? Megan? What's going on?

[A messenger enters briskly and brings a document to Socrates, in a sealed envelope.]

SOCRATES: The verdict is here!

Scene viii

[Pauline and Megan are beside Carver's bed. Carver opens his eyes.]

CARVER: Pauline. Megan.

MEGAN: Daddy! *(She bends over and kisses him)*

PAULINE: Megan, hurry! Go get Doctor Jacobs! *(putting her*

hands tenderly on Carver's face, and kissing him) Hello, John.
We're here.

CARVER: How long have I been unconscious?

PAULINE: Nearly two days. (*pausing*) What happened, John?
What happened in the accident?

CARVER: I hit bottom, Pauline. I couldn't face it anymore.

PAULINE: Do you want to face it now, John? Face it with me?
And with Megan?

CARVER: I've been gone a long time, haven't I? A lot longer
than two days.

PAULINE: Yes. (*pausing*) Do you want to come back, John?
Really want to?

CARVER: Yes, Pauline. It's time to come back.

[*Pauline bends over the bed to kiss Carver. Megan enters.*]

MEGAN: I reached Doctor Jacobs. She's on her way. (*embracing
Carver again*) Oh, Dad!

CARVER: When I was in the car . . . I hit someone, didn't I? In
a truck?

PAULINE: He died, John. The man you hit is dead.

MEGAN: It was an accident, Father! I know it wasn't your fault.
We can make it up to his family, and—

CARVER: —I can never make it up to them, Megan. Not really.
But I can accept my punishment. It was no accident, Megan. I
tried to kill myself. That was deliberate. And instead I killed
another man.

MEGAN: But you didn't try to kill another man. That much of it
was not your fault.

CARVER: It's okay Megan. (*pausing*) I want to face it.

PAULINE: And what of the scandal, John? And your law prac-
tice?

CARVER: I've tried my last case.

PAULINE: This is all connected to Frankie St. George, isn't it?

CARVER: Connected? Yes, Frankie was the connection. Frankie

was the ultimate connection . . . but he wasn't the cause.

MEGAN: Dad, you're not making sense. You need your rest.

CARVER: Frankie was the symptom, not the disease. (*pausing*)

By the way, has Frankie come by to pay his respects?

MEGAN: He tried. He wanted to talk to me about the accident.

Said he could fix things for you. I made him go.

CARVER: Good girl! I never want to see him again.

PAULINE: That's good John. We don't need him. We can face him and beat him.

CARVER: You're gonna be the lawyer in the family now, Megan.

Make me proud, okay? Proud of my daughter.

MEGAN: I'll try. (*pausing*) At least you won your last case!

CARVER: No, actually, I lost it. But perhaps I saved my immortality.

[*Carver falls asleep, exhausted from the conversation.*]

MEGAN: I think he's falling asleep.

PAULINE: I'm sure he needs his rest, darling. And so do we.

[*Megan and Pauline embrace.*]

MEGAN: We've got him back, Mother. We've got him back.

PAULINE: (*quietly*) Do we? You see, Megan, for me it's not a matter of having him or not having him, and it shouldn't be for you, either. We don't *have* the ones we love—not really. We don't possess them or control them. And no matter what the poets say, we are not *one* with them, we don't think their thoughts or feel their feelings. What we have is only a relationship.

MEGAN: And that's what we have now, Mother. The chance for a renewed relationship.

PAULINE: Fine, that's fine, if you put it in those terms, Megan. But understand it's only a chance. Your father will need to prove to me that he is someone I really can love again. And the proof will be in our relationship, and in what we make of

it—the patterns of our existence, the habits of honesty or deceit, mercies or mendacities, loyalties or betrayals. And your relationship to him, and your relationship to your profession, will be what you make of it.

[Megan and Pauline continue to hold each other in a comforting hug. Carver rises from his bed and walks to the courtroom chairs, as Holmes enters. Megan and Pauline continue to embrace and do not witness this action.]

HOLMES: Well John, it is finished.

CARVER: Have you accepted the verdict?

HOLMES: What choice do I have but to accept it? It could have been worse. I've been found guilty, but my sentence suspended, and remanded to the custody and supervision of my lawyer. My immortality is not lost forever, it is merely dangling in limbo for awhile.

CARVER: You know, we do have a kinship. We've come out of this with that much.

HOLMES: Megan asked us if critique is all there is. Perhaps, in the end, kinship is all there is.

CARVER: When you talk I sometimes hear an echo. Like I'm listening to my own soul.

HOLMES: Let's hope that in the end, it is an echo of the infinite.

THE END

APPENDIX

The Trial of Oliver Wendell Holmes was performed at the College of William and Mary by students of the Marshall-Wythe School of Law on April 4, 1994. The following excerpts are taken from the playbill to that performance:

FROM THE PLAYWRIGHT . . .

The Director asked that I say a few words in this space about how and why I came to write this play. The *how* is easy. Last summer I had the great privilege to be invited to deliver a lecture at the UCLA Law School in honor of Melville Nimmer. Professor Nimmer was one of the towering figures in the history of free speech thinking in America. More than that, he was the father of Becca Nimmer Marcus, my very dear friend. So I wanted to do something special for the lecture, which turned out to be not doing a lecture at all, but rather writing this play—which was performed at UCLA in November.

My faculty colleagues at William and Mary were most gracious in inviting me to stage the play here at home. I thank the members of the Faculty Enrichment Committee, and Jayne Barnard and Paul Marcus in the Dean's Office, for their support. I was very flattered to be asked and very appreciative to find such an enthusiastic and delightful group of students to do such an excellent job.

Why did I write it? Perhaps you in the audience should attempt to decipher that. Certainly, I wanted to put Oliver Wendell Holmes on trial. But as I hope you will see, in putting Holmes on trial we put ourselves on trial—ourselves as modern thinkers and modern lawyers. The central character, John Carver, is attempting to find an anchor to his life, through his wife, his daughter, his clients, and ultimately, through the visions that appear to him in the darkness. It represents the type of trial we all go through. I guess I wrote the play to see how it might end.

For its publication in the *William and Mary Law Review*, Professor Smolla added the following "Notes to the Playbill":

The characters John Carver, Pauline Carver, Megan Carver, Frankie St. George, and Christa Jacobs are all fictional creations. Four of the characters, however, are real: Carrie

Buck,¹ Eugene Victor Debs,² Oliver Wendell Holmes, Jr.,³

1. The terrible injustice done to Carrie Buck discussed in the play has drawn the attention and condemnation of many thoughtful scholars. See, e.g., Robert J. Cynkar, *Buck v. Bell: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418 (1981); Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833 (1986); Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30 (1985); Richard A. Estacio, Note, *Sterilization of the Mentally Disabled in Pennsylvania: Three Generations Without Legislative Guidance Are Enough*, 92 DICK. L. REV. 409 (1988); Stephen J. Gould, *Carrie Buck's Daughter*, NATURAL HIST., July 1984, at 14; *Recent Cases*, 39 HARV. L. REV. 767, 770 (1926) (commenting on the decision of the Supreme Court of Appeals of Virginia in *Buck v. Bell*); *Recent Decisions*, 27 COLUM. L. REV. 870, 873 (1927) (commenting on the Supreme Court of the United States decision in *Buck v. Bell*).

I also would like to thank Professor Kenneth Karst of the UCLA School of Law, for sharing with me the teaching materials on *Buck v. Bell* that he distributes each year to his constitutional law class—materials that document much of the action described in the play.

2. For an excellent account of Deb's life, see NICK SALVATORE, *EUGENE V. DEBS: CITIZEN AND SOCIALIST* (1982); see also BERNARD J. BROMMEL, *EUGENE V. DEBS: SPOKESMAN FOR LABOR AND SOCIALISM* (1978); MCALISTER COLEMAN, *EUGENE V. DEBS: A MAN UNAFRAID* (1930); HAROLD W. CURRIE, *EUGENE V. DEBS* (1976); RAY GINGER, *THE BENDING CROSS: A BIOGRAPHY OF EUGENE VICTOR DEBS* (1949); DAVID KARSNER, *TALKS WITH DEBS IN TERRE HAUTE* (1922); DAVID KARSNER, *DEBS: HIS AUTHORIZED LIFE AND LETTERS* (1919); H. WAYNE MORGAN, *EUGENE V. DEBS: SOCIALIST FOR PRESIDENT* (1962); DEBS (Ronald Radosh, ed.) (1971); ANNE TERRY WHITE, *EUGENE DEBS: AMERICAN SOCIALIST* (1974); SOCIALIST SOCIETY, U.S.A., *EUGENE VICTOR DEBS (1855-1955): THE CENTENNIAL YEAR* (1956).

3. See generally G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* (1993) [hereinafter *INNER SELF*]; GARY J. AICHELE, *OLIVER WENDELL HOLMES, JR.—SOLDIER, SCHOLAR, JUDGE* (1989); LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* (1991); SILAS BENT, *JUSTICE OLIVER WENDELL HOLMES: A BIOGRAPHY* (1969); FRANCIS BIDDLE, *JUSTICE HOLMES, NATURAL LAW AND THE SUPREME COURT* (1961); FRANCIS BIDDLE, *MR. JUSTICE HOLMES* (1943); CATHERINE D. BOWEN, *YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY* (1945); DAVID H. BURTON, *POLITICAL IDEAS OF JUSTICE HOLMES* (1992); DAVID H. BURTON, *OLIVER WENDELL HOLMES, JR.—WHAT MANNER OF LIBERAL?* (1979); *THE SUPREME COURT AND ITS JUSTICES* (Jesse H. Choper ed. 1987); JEREMY COHEN, *CONGRESS SHALL MAKE NO LAW: OLIVER WENDELL HOLMES, THE FIRST AMENDMENT, AND JUDICIAL DECISION-MAKING* (1989); FELIX FRANKFURTER, *MR. JUSTICE HOLMES AND THE SUPREME COURT* (1939); *THE LEGACY OF OLIVER WENDELL HOLMES, JR.* (Robert W. Gordon ed. 1992); MICHAEL H. HOFFHEIMER, *JUSTICE HOLMES AND THE NATURAL LAW* (1992); MARK D. HOWE, *JUSTICE OLIVER WENDELL HOLMES* (1957); SAMUEL J. KONEFSKY, *THE LEGACY OF HOLMES AND BRANDEIS: A STUDY IN THE INFLUENCE OF IDEAS* (1956); JULIUS J. MARKE, *THE HOLMES READER* (1964); SHELDON M. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* (1989); H.L. POHLMAN, *JUSTICE OLIVER WENDELL HOLMES: FREE SPEECH AND THE LIVING CONSTITUTION* (1991); H.L. POHLMAN, *JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE* (1984); *WHAT JUSTICE HOLMES*

and Socrates.⁴ The reader may want to know more than the historical fact that these various characters existed. When the play is read or performed, I find that among the common

WROTE, AND WHAT HAS BEEN WRITTEN ABOUT HIM: A BIBLIOGRAPHY 1866-1976 (Harry C. Shriver ed. 1978); David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97 (1982); G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CAL. L. REV. 391 (1992); G. Edward White, *Holmes's "Life Plan": Confronting Ambition, Passion, and Powerlessness*, 65 N.Y.U. L. REV. 1409 (1990). For a discussion of Holmes' Civil War service, see INNER SELF, *supra*, at 49-86 (recounting the four major campaigns in which Holmes was wounded in battle three times); TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL HOLMES, JR. 1861-1864 (Mark D. Howe ed., 1969) (capturing Holmes' vivid descriptions of his wartime experiences and revealing his attempts to explain how they affect his overall philosophy).

Among Holmes' many famous opinions as a Supreme Court Justice are the cases described in this play: *Buck v. Bell*, 274 U.S. 200 (1927) (authorizing the sterilization of Carrie Buck), and *Debs v. United States*, 249 U.S. 211 (1919) (upholding the conviction of Eugene Debs for attempting to obstruct the draft).

The play also makes passing reference to Holmes' two most famous jurisprudential essays, Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897) and Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40 (1918), as well as Holmes' dissent in *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting) (arguing in favor of freedom of speech). Holmes' dissent in *Abrams* introduced the concept of a "marketplace of ideas." See *id.* at 627-31. For further discussion of this concept, see generally David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97 (1982); William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1; Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 451 (1988); Jan Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CAL. L. REV. 343 (1984); G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CAL. L. REV. 391 (1992); Christopher T. Wonnell, *Truth and the Marketplace of Ideas*, 19 U.C. DAVIS L. REV. 669 (1986); Michael J. Mannheimer, Note, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527 (1993). For a broad discussion of Holmes' influence on First Amendment theory, see JEREMY COHEN, CONGRESS SHALL MAKE NO LAW: OLIVER WENDELL HOLMES, THE FIRST AMENDMENT, AND JUDICIAL DECISION MAKING (1989); SAMUEL J. KONEFSKY, THE LEGACY OF HOLMES AND BRANDEIS: A STUDY IN THE INFLUENCE OF IDEAS (1956); H.L. POHLMAN, JUSTICE OLIVER WENDELL HOLMES: FREE SPEECH AND THE LIVING CONSTITUTION (1991); RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 97-100 (1992).

4. Little is known of the actual historic Socrates because his thought has been memorialized largely through the writings of others. See PLATO, GORGIAS (Terence Irwin trans., 1979); PLATO, PROTAGORAS (C.C.W. Taylor trans., 1976); PLATO, PHAEDRUS (R. Hackforth trans., 1972). For a provocative and fascinating account of Socrates' thought in the context of his defense in his own trial, see ISIDOR F. STONE, THE TRIAL OF SOCRATES (1988).

reactions are, "How much of it is *real*?" or "How much of it *really happened*?" My answer is that it is *all* real, and it *all* really happened, in the sense that the events depicted are faithful to the historical record to the extent that I can decipher it, and the dialogue and motivations of the characters are authentic to the extent that I can honestly imagine them.⁵

As to the more important question: "What does it all *mean*?" I am more circumspect. It seems to me a bad idea for someone who writes a play to then write an essay on what the play means. I should hope that it means different things to different people, and that the readers or playgoers "in the jury box" would struggle over the appropriate verdict for Holmes. I would reveal only this: Although it is called "*The Trial of Oliver Wendell Holmes*," and is in many respects a battle between Holmes and Socrates, the most important battle is the battle being fought in the mind of John Carver, and it is John's effort to make sense of his life as a lawyer, and more importantly, his life with Megan and Pauline, that in the end most matters.

5. For an exploration of the artistic, historical, and legal legitimacy of such fictional portrayals of the real people and events, see Rodney A. Smolla, *Harlot's Ghost and JFK: A Fictional Conversation with Norman Mailer, Oliver Stone, Earl Warren, and Hugo Black*, 26 SUFFOLK U. L. REV. 589 (1992).