

Louisiana Law Review

Volume 63 | Number 1
Fall 2002

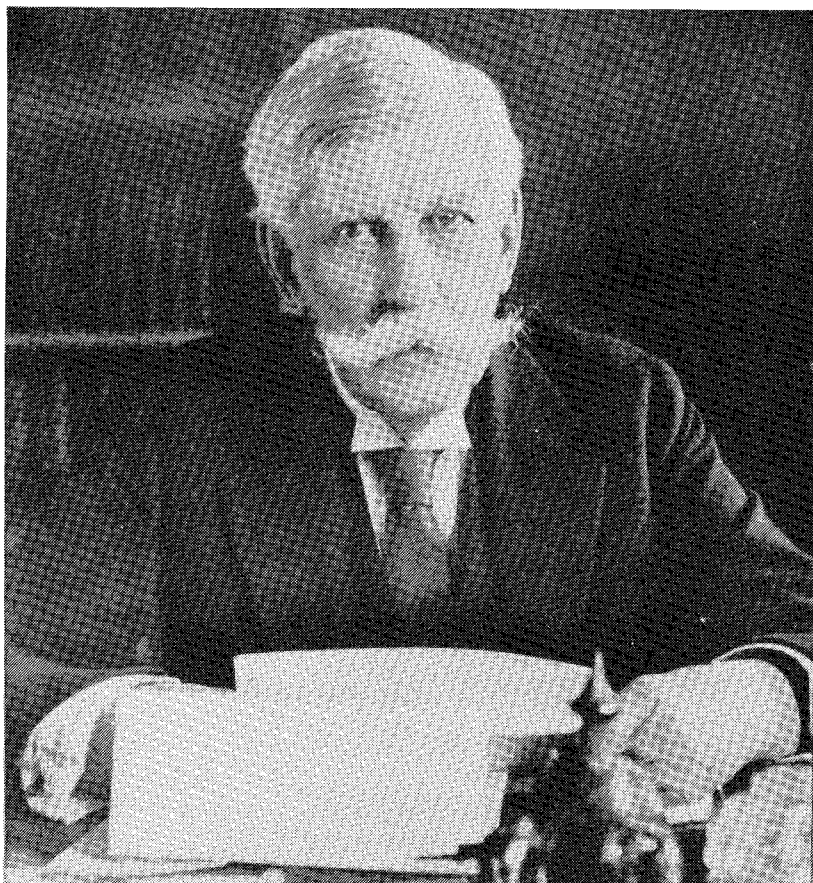
Holmes and Honors Law at LSU - From the Great Hall to La Maison Française

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Repository Citation

Paul R. Baier, *Holmes and Honors Law at LSU - From the Great Hall to La Maison Française*, 63 La. L. Rev. (2002)
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Arthur Holmes

Frontispiece, THE MIND AND FAITH OF JUSTICE HOLMES

Holmes and Honors Law at LSU—From the Great Hall to *La Maison Française**

Paul R. Baier**

I think one of the best things an older man can do for younger men is to tell them the encouraging thoughts his experience has taught him. It is better still if he can lift up their hearts—if after many battles which were not all victories, the old soldier still feels that fire in him which will impart to them the leaven of his enthusiasm.

— Oliver Wendell Holmes, Jr.¹

ADVOCATES OF LSU HONORS COLLEGE:—“At every feast it is well to have a skeleton. At every gathering of the elect, the doubting spirit must be allowed to ask his question.”²

This from a ghost of the law I venture to conjure up at a banquet of LSU Honors College Advocates.

I mean Oliver Wendell Holmes, Jr., of Boston, sometime student of the law at Harvard Law School, Civil War Captain, Twentieth Massachusetts,³ later Mr. Justice Holmes of the Supreme Court of the United States.

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* Speech at LSU Honors College Advocates Banquet, Grand Salon, La Maison Française, Louisiana State University, Baton Rouge, Louisiana, (April 26, 2002). Professor Baier has annotated his speech for publication in the *Louisiana Law Review*.

** George M. Armstrong, Jr., Professor of Law, Paul M. Hebert Law Center, Louisiana State University. Member of the Louisiana Bar. Judicial Fellow, Supreme Court of the United States, 1975-76; Executive Director, Louisiana Commission on the Bicentennial of the United States Constitution, 1987-91; Scholar in Residence, Louisiana Bar Foundation, 1990-92.

1. Oliver Wendell Holmes, Jr., Anonymity and Achievement, Remarks at a Dinner of the Alumni of the Boston University Law School, (June 3, 1890), in *The Occasional Speeches of Justice Oliver Wendell Holmes* 59, 61 (Mark DeWolfe ed., 1962).

2. Oliver Wendell Holmes, Jr., The Use of Colleges, Speech at a Dinner of the Alumni of Yale University, Boston (Feb. 3, 1891), in *Occasional Speeches*, *supra* note 1, at 62.

3. Holmes, age 20, enlisted in the Federal Army in July, 1861. He served for two years in the Twentieth Massachusetts Volunteer Infantry. He was wounded three times, taking a Confederate ball through the back of the neck at the Battle of Antietam, September 17th—Constitution Day—, 1862.

Antietam broke the Twentieth's proud boast that Massachusetts troops had never been hit in the back: “We have stood side by side in a line—we have charged and swept the enemy—and we have run away like rabbits,” Holmes told the Regimental Association thirty years later. Holmes was hit in the back of the neck while he was “bolting” as fast as he could, which was “all right—but not so good for the newspapers.” Liva Baker, *The Justice From Beacon Hill: The Life and Times of Oliver Wendell Holmes* 132 (1991).

When the great Hopkinson portrait of Holmes was unveiled at the Court—it was painted from life—this is what Justice Holmes, a Doubting Spirit himself, said of Mr. Hopkinson's portrait. Holmes was nearing his ninetieth birthday at the time.

I quote him:—"It's not me, but it's a damn good thing the American people think it's me!"⁴

You will see His Honor Holmes with your own eyes in a moment "live and in person," so to speak, preserved in National Archives nitrate negatives dug up and featured in a little film I made while working inside Mt. Olympus. Do I have your attention?

"Court Reports" premiered a quarter of a century ago in the Great Hall of the Supreme Court of the United States. Chief Justice Burger arranged a black-tie feast celebrating the founding of the Supreme Court Historical Society. I conspired behind his back to project the ghost of Holmes onto the scene.⁵ It worked out well.⁶

I propose to bring the same JUSTICE HOLMES & CO. from the Great Hall of the Supreme Court to the Grand Salon of the French House. My aim is to answer the doubting spirit's question, "Why Holmes, Why Honors Law at LSU?"

II.

I put this question in the negative myself to Dean Billie Seay of LSU Honors College the day I met him. Our chance encounter followed a brown bag lunch at the Law Center, where I heard then Chancellor William Jenkins tell the Law Faculty that LSU Honors College—and here I quote him precisely—"is just like Oxford." He spoke of top students, small seminar rooms, and an aura of inspired teaching.

4. Holmes's remark may be apocryphal, but it certainly is of a piece with Holmes's inestimable wit. I have read it somewhere in the vast iconography of the Magnificent Yankee, but I cannot find it in any of the volumes of my standby Holmes Shelf, including Edward J. Bander's, *Justice Holmes Ex Cathedra* (1966) and Harry Shriver's, *What Gusto: Stories and Anecdotes About Justice Oliver Wendell Holmes* (1970), both of which are delightful Sunday reading.

5. My co-conspirator was Chief Justice Charles Evans Hughes's daughter Elizabeth Hughes Gossett, Founding President of the Board of Trustees of the Supreme Court Historical Society, May 1976. It was Mrs. Gossett's idea to show "Court Reports" as a surprise to guests gathered in the Great Hall. The film features Chief Justice Hughes in chambers with Justice Holmes on Holmes's 90th birthday, March 8, 1931. Our conspiracy required messing up an elegant setting of china and flora with a 1940's motion picture projector and screen. Chief Justice Burger barked out loud, "What is all this?" To which Mrs. Gossett replied: "You are Chief Justice of the United States. I am President of the Historical Society. You sit down and be quiet."

6. See text accompanying *infra* note 52.

I heard William Jenkins's proud bugle boast: "LSU Honors College is the crown jewel of the University."

William Jenkins, as life unfolds, is now President of our University. He, too, is an Honors College Advocate. His enthusiasm sparked in me a desire to see this diamond for myself. Thus it was that I closed in on Dean Seay's door. All I had to do was cross the street, just as Holmes passed the crowd⁷ on 1st Street, N.E., Washington, D.C., to reach the Library of Congress. To my disappointment, I could find not one stitch of law in the Honors College Bulletin.

"Why *not* Holmes? Why *not* Honors Law at LSU?" I asked Dean Seay.

An advocate, I am sure LSU Honors Advocates know, aims at persuasion. According to Justice Frankfurter, another ghost at our banquet, an advocate is "a practitioner in the art of persuasion."⁸ I made one argument to Dean Seay. It was made in all apparent seriousness: "Mr. Dean, I assume you have heard of Princeton University." His Deanship nodded yes, as of course I knew he would.

Next, I followed up with unanswerable advocacy: "Princeton University does not have a law school, but it has a Department of Jurisprudence. You should teach law in LSU Honors College." Dean Seay, thinking nothing of Holmes, I am sure, but rather eyeing an eager resource, asked me in turn, "Do you have any ideas?"

I filed a seven-page syllabus with the Honors College's overseers. Honors 3031, Baier & Hardy, has been on the Dean's Docket Sheet ever since. Two fat volumes of cases and materials,⁹ an Appendix of Writing Samples¹⁰ (mainly Baier & Hardy, say it softly), two

7. "Holmes Passes" is a vignette featured in "Court Reports": A Film by Paul R. Baier (1976), showing Mr. Justice Holmes exiting the United States Capitol, where the Court sat, and walking briskly along 1st St., N.E., Washington, D.C., overcoat and hat in place. When I retrieved this bit of Universal Newsreel from the Motion Picture and Sound Recording Division of the National Archives, I thought from the caption "Holmes passes" on a sparse Archives index card that I had unearthed footage of Holmes's funeral. Not at all!

8. Frederick Bernays Wiener, Briefing and Arguing Federal Appeals 281 (1967).

9. Paul R. Baier & James D. Hardy, Jr., *The Constitution and American Civilization, Cases and Materials*, with a *Foreword* by Justice Catherine D. Kimball Vol. I, pp. vi, 323; Vol. II, pp. iv, 290 (4th ed. 2002).

10. *Id.*, Appendix: Writing Samples, pp. iii, 69, including a Holmes book notice, 12 Am. L. Rev. 354 (1878), a Holmes comment, *The Legal Tender Cases of 1871*, 7 Am. L. Rev. 768 (1870), Cardozo's essay, *Law and Literature* (1925), in *Law and Literature and Other Essays and Addresses* 3 (1931), and Colonel Frederick Bernays Wiener's triumphant Petition for Rehearing in *Reid v. Covert*, 354 U.S. 1, 77 S. Ct. 1222 (1957), the only case on record of the Supreme Court of the United States changing its mind in the same case, after a published adverse opinion, without a controlling change in membership of the Court. "The lawyer's

paperbacks, Max Lerner's engaging *The Mind and Faith of Justice Holmes*¹¹ Benjamin Cardozo's immortal classic, *The Nature of the Judicial Process*,¹² lectures delivered at Yale University in 1921, constitute the *corpus juris* of the course.

"And so LSU has its first Honors College offering in Law: 'The Constitution and American Civilization,' featuring Holmes and Cardozo, and aimed at LSU's brightest aspirants for law school and the legal profession."¹³ This from Justice Catherine "Kitty" Kimball's Foreword to Volume I of our cases and materials. Justice Kimball, the first woman elected to the Louisiana Supreme Court, joins your company as a proud LSU Honors College Advocate. She is one of us.

I remember my own beginnings at LSU both as an undergraduate and as a law student, pouring over the books and walking the great halls of the Old Law School, where few women, at that time, accompanied me. One never knows what the future holds, but a path must be blazed. I am glad to add a word of encouragement and hope to Baier and Hardy's enthusiastic experiment. Why hasn't this been done before?¹⁴

III.

My teaching colleague in the Honors College, Jim Hardy, is a delight. He is a scholar of Milton's hermeneutic journey in poetry,¹⁵

dream come true," according to Colonel Wiener. See *infra* note 38.

11. Originally published in 1943 by Little, Brown, and Company. Honors 3031 uses the Transaction Publishers paperback, *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters, and Judicial Opinions*, selected and edited, with a new preface and afterword by Max Lerner (1989), a book that should be part of every law student's personal library. Lerner, a brilliant journalist and student of the Court, says of Holmes: "He will probably leave a greater effect on English style and on what young men dream and want than upon American constitutional law." Max Lerner, *Holmes: A Personal History*, in *The Mind and Faith of Justice Holmes* at xlvii. "The greatness of Holmes will survive the vested interests and their constitutional bolstering. It will stand up as long as the English language stands up, as long as men find life complex and exciting, and law a part of life, and the sharp blade of thought powerful to cleave both." *Id.* at xlvi.

12. Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921).

13. Catherine D. Kimball, *Foreword* to Paul R. Baier & James D. Hardy, Jr., *The Constitution and American Civilization*, Vol. I, at i (1st ed. 1999).

14. *Id.*

15. *Vide* Gale H. Carrithers, Jr. & James D. Hardy, Jr., *Milton and the Hermeneutic Journey* (1994). Jim Hardy's interests also include baseball, particularly the New York Giants. His radiant history, *The New York Giants Baseball Club: The Growth of a Team and a Sport* (1996), is intellectually linked in our Honors 3031 course to Cardozo's essay, *The Game of Law and Its Prizes*, last on the syllabus, along with Holmes's opinion in *Federal Baseball Club of*

as I am of Holmes's in law. Cross-pollination of our respective fields at LSU Honors College convinces us that Holmes was wrong—we say *Holmes was wrong*—to exclaim, in all apparent seriousness, in a speech to Harvard undergraduates on the profession of the law:—“Of course the law is not the place for the artist or the poet. The law is the calling of thinkers.”¹⁶

Holmes, Jr.'s remark was aimed, under the table, so to speak, at his father, Dr. Holmes, poet, essayist, author of *The Autocrat of the Breakfast Table*,¹⁷ who wondered out loud how law “could be worthy of the interest of an intelligent mind.”¹⁸ The son answered the father:

My way has been by ocean of the Law. On that I have learned a part of the great lesson, the lesson not of law but of life. There were few of the charts and lights for which one longed when I began. One found oneself plunged in a thick fog of details—in a black and frozen night, in which were no flowers, no spring, no easy joys. Voices of authority warned that in the crush of that ice any craft might sink. One heard Burke saying that law sharpens the mind by narrowing it. One heard in Thackeray of a lawyer bending all the powers of a great mind to a mean profession. One saw that artists and poets shrank from it as from an alien world. One doubted oneself how it could be worthy of the interest of an intelligent mind. And yet one said to oneself, Law is human—it is part

Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922), and Justice Harry A. Blackmun's canvassing of the history of baseball in *Flood v. Kuhn*, 407 U.S. 258 (1972). LSU Baseball Giant, Coach “Skip” Bertman, adds life to our last Honors class. He joins our students and echoes Cardozo: “I come back to my metaphor of a game, a game which exacts skill, but which, like every game worth playing, exacts something more important, and that something is the sportsman's spirit, which is only another word for character.” Cardozo, *supra* note 10, at 168-69.

16. The Profession of the Law, Conclusion of a Lecture Delivered to Undergraduates of Harvard University, (Feb. 17, 1886), in *Speeches* by Oliver Wendell Holmes, Junior 22 (1891).

17. Oliver Wendell Holmes, *The Autocrat of the Breakfast Table* (Boston, 1858). The *Autocrat's* reader is invited to attend a docile group of listeners gathered about the breakfast table of a Boston boarding house while the “autocrat” pours forth his views, occasionally, but not often, permitting others to speak. Dr. Holmes had earlier abandoned his law studies at Harvard for medicine in which he achieved great distinction. The *Autocrat* was followed in turn by *The Professor at the Breakfast Table* (Boston, 1860), *The Poet at the Breakfast Table* (Boston, 1890), and *Over the Teacups* (Boston, 1890). “The genial autocrat lived to the age of 86 and died on October 7, 1894 in the city which he loved and playfully ridiculed.” Harriet Lloyd Fitzhugh & Percy K. Fitzhugh, *Concise Biographical Dictionary* 305 (1935).

18. Oliver Wendell Holmes, Jr., Commencement Address, Brown University, (June 17, 1897), in *Occasional Speeches*, *supra* note 1, at 97, 98.

of man, and of one world with all the rest. There must be a drift, if one will go prepared and have patience, which will bring one out to daylight and a worthy end.¹⁹

Civilization, no doubt, is a worthy end. And true it is, that the human enterprise of Law tends, by differences of degree, to make the world civilized. Between us "and the simple universality of the rules in the Twelve Tables or the Leges Barbarorum, there lies a culture of two thousand years."²⁰

But, contrary to Holmes, we say the artist or the poet may find her place in the Law. The general clauses of the Constitution, "Liberty," "Equality," "Due Process," are not self-defining terms. At its highest, constitutional hermeneutics requires the artistry of the poet.

Baier & Hardy, take note, are doubting spirits themselves.

And here the poetic spirit of Cardozo²¹ comes to life at *La Maison Française*, as a sharp foil to Holmes. "No one shall be deprived of liberty without due process of law. Here is a concept of the greatest generality,"²² says Cardozo. "Yet it is put before the courts *en bloc*. Liberty is not defined. Its limits are not mapped and charted. How shall they be known?"²³ Cardozo's answer is to see the notion of modern liberty as a "fluid and dynamic conception,"²⁴ which "must also underlie the cognate notion of equality."²⁵ "From all this, it results that the content of constitutional immunities is not constant, but varies from age to age."²⁶

Like Napoleon's Code, America's Constitution is seen as a living document. Portalis—*le Père du Code Civil* (the Father of the Civil Code)—puts it this way: "The Codes of nations are the *fruit of the passage of time*; but *properly speaking*, we do not make them."²⁷ Or, in Chief Justice John Marshall's immortal aperçu, "we must never

19. *Id.* at 97-98.

20. *LeRoy Fibre Co. v. Chicago, Milwaukee & St. Paul Ry.*, 232 U.S. 340, 354, 34 S. Ct. 415, 418-19 (1914) (Holmes, J., partially concurring).

21. Asked how a judge knows when one interest outweighs another, a question at the heart of the judicial process, Cardozo answers: "I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself." Cardozo, *supra* note 12, at 113. "He must learn it for himself as he gains the sense of fitness and proportion that comes with years of habitude in the practice of an art." *Id.* at 114.

22. *Id.* at 76.

23. *Id.*

24. *Id.* at 81.

25. *Id.* at 82.

26. *Id.* at 82-83.

27. *The Preliminary Discourse of Portalis* (Shael Herman, trans.), quoted in Alain Levasseur, *Code Napoleon or Code Portalis?*, 43 Tul. L. Rev. 762, 773 (1969) (emphasis in original).

forget, that it is *a constitution* we are expounding.”²⁸ Judges of Cardozo’s School, our Honors students know, are entrusted to interpret with “*le sens évolutif*.”²⁹

“The Constitution and American Civilization” is aimed at spirits of fire who would make out a life for themselves through such a door as the law. It is through the door of the law that America has civilized herself, as we see it. The Supreme Court, we all know, ended apartheid in America by the stroke of the Constitution.

“Well, it was the most difficult adjustment I had ever made in my life, before or since. I’ve always thought that perhaps the most lonesome day I ever had in my life, was the day I arrived at the Supreme Court.”³⁰

Earl Warren was not an artist, he was not a poet, before coming to the Court. Yet the Warren Court’s vision of America’s Constitution, explained in plain and simple lines, is poetic—as Milton’s *Paradise* is poetic.

Our students get an edge up on the first year of law school, as they follow in Holmes’s footsteps, digesting cases in the United States Reports, knocking off a book notice, and composing a comment on some burning issue of law.

Todd Keator, one of our prize alumni, will graduate from LSU Law Center, Class of 2002, with a published comment on the Establishment Clause in the *Louisiana Law Review*³¹—his first case of “lead poisoning,” as Holmes used to describe it, hand in hand with his first professional employment at a premier law firm, Thompson, Knight, LLP, Dallas, Texas. One of our students, poor soul, is off to the Harvard Law School.³²

Jim Hardy and I are very proud of our Honors 3031 troops. “A teacher affects eternity; he can never tell where his influence stops.”³³ To paraphrase Justice Holmes only slightly, “It is the crowning glory of LSU Honors College that it has kindled in many a heart an inextinguishable fire.”³⁴

28. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

29. “The President of the highest French Court, M. Ballot-Beaupré, explained, a few years ago, that the provisions of the Napoleonic legislation had been adapted to modern conditions by a judicial interpretation in ‘*le sens évolutif*.’” Cardozo, *supra* note 12, at 84, quoting Munroe Smith, *Jurisprudence* 29-30 (1909).

30. Chief Justice Warren’s remark is captured, *viva voce*, in “Court Reports,” *supra* note 7, a scene showing Earl Warren, hat in hand, arriving at the Court at the opening of the October Term, 1953, and waving to the crowd with the news cameras rolling.

31. Note, *Tale of the Monkey Trials: Chapter Three*, 62 La. L. Rev. 673 (2002).

32. Jordan Abshire, Honors 3031, Spring Term 2000.

33. Henry Adams, *The Education of Henry Adams* 300 (1931).

34. Oliver Wendell Holmes, Jr., *The Use of Law Schools, Oration Before the*

IV.

A touch of the necromancer's art and I am through.

I want to share with you a few "chance utterances of faith and doubt,"³⁵ drawn from Justice Holmes's collection of speeches, a book first published by Little, Brown, and Company, Boston, 1891.³⁶

"If not a Bible, still a book of most uncommon prayer."³⁷

This is how Colonel Frederick Bernays Wiener, an old soldier of the law,³⁸ described the book at a black-tie dinner in his honor at LSU Law School some twenty years ago. He, in turn, took his audience back fifty years to the Harvard Law School of 1929, one eyewitness away from Holmes himself. Listen for yourself:

Now for me, this little book was, if not quite a Bible, still a book of most uncommon prayer. And one speech in that collection afforded me through many weeks and many months

Harvard Law School Association, at Cambridge on the 250th Anniversary of Harvard University, (Nov. 5, 1886), in *Occasional Speeches*, *supra* note 1, at 34, 47.

35. *Speeches*, *supra* note 16 ("THESE chances utterances of faith and doubt are printed for a few friends who will care to keep them.").

36. In each new edition of *Speeches*,—1896, 1900, and 1913—Holmes added a few speeches he had delivered in the interim. He was highly selective; of the twenty-four addresses that were not included but have survived in some version, most were of publishable quality. 3 *The Collected Works of Justice Holmes* 461 (Sheldon M. Novick ed., 1995).

37. Frederick Bernays Wiener, *Speech at LSU Law Center Dinner* (Oct. 1979).

38. Colonel, United States Army; Harvard Law School, Class of 1930; sometime Assistant Solicitor General, United States Department of Justice; Professorial Lecturer in Law, George Washington University School of Law; author of *Effective Appellate Advocacy* (1950), a book that was so popular it was literally stolen off library shelves; *Uses and Abuses of Legal History: A Practitioner's View* (1962); and *Briefing and Arguing Federal Appeals* (1967). Frederick Bernays Wiener, Esq., late of the District of Columbia Bar, is the only lawyer in the history of the Supreme Court of the United States to lose a case, with a published adverse opinion against him, only to win the very same case on rehearing without a controlling change in membership of the Court. This is *Reid v. Covert*, 351 U.S. 487, 76 S. Ct. 880 (1956) [*Covert I*—Defeat] and 354 U.S. 1, 77 S. Ct. 1222 (1957) (on rehearing) [*Covert II*—Victory], holding that Congress has no constitutional power to subject to trial by court-martial Army wives who accompany their soldier-husbands overseas in time of peace, only to murder them on military bases. All of which is brilliantly recounted in Colonel Wiener's *Meisterstück*, *Civilians Under Military Justice* (University of Chicago Press, 1967). Colonel Wiener appears on the Honors 3031 Syllabus, "Lawyers in the Great Tradition," and comes to class via a television interview, "Experiences in Advocacy" (P.R. Baier, Producer, W.L.S.U. T.V., 1979). He died October 1, 1996. *The Washington Post*, (Oct. 13, 1996, Sunday, final ed.), at B-4. Colonel Wiener is buried at the foot of Thunder Mountain, at Fort Huachuca, a United States Army Post, Sierra Vista, Arizona. *Requiescat in pace*, F.B.W.

that were full of trial and pressure great comfort and much reassurance.

And that was the talk made to the Boston Bar Association in early 1900, just after Holmes had become Chief Justice of the highest court of Massachusetts.

I read and re-read that talk times uncounted. And then, right at the beginning of my third year, and that's exactly fifty years ago this month, I met a Boston lawyer who had actually been present when that talk was delivered. This was Mr. George R. Nutter, who had been one of the editors of Volume I of the Harvard Law Review and who later became a partner of Mr. Louis D. Brandeis, because just before the latter became Mr. Justice Brandeis, the firm name had been Brandeis, Nutter & McClennen.

So I asked Mr. Nutter, "What was the reaction of those present when the Chief Justice's talk was concluded?" And he replied, "There really wasn't any. They were so moved and really too stunned even to applaud."

I want to share with you the closing sentences of Oliver Wendell Holmes's 1900 address to the Boston Bar because they so very accurately express my own feelings here tonight:

I will add but a word. We are all very near despair. The sheathing that floats us over its waves is a compound of hope, faith in the unexplainable worth and sure issue of effort, and the deep, sub-conscious content which comes from the exercise of our powers. In the words of a touching negro song—

‘Sometimes I’s up, sometimes I’s down,
‘Sometimes I’s almost to the groun’;

but these thoughts have carried me, as I hope they will carry the young men who hear me, through long years of doubt, self-distrust, and solitude. They do now, for, although it might seem that the day of trial was over, in fact it is renewed each day. The kindness which you have shown me makes me bold in happy moments to believe that the long and passionate struggle has not been quite in vain.³⁹

Hearing Colonel Wiener that night and for the first time listening in on Holmes's *Speeches*, struck my soul. The next day, the logic of

39. Oliver Wendell Holmes, Jr., Speech At a Dinner Given to Chief Justice Holmes By the Bar Association of Boston (Mar. 7, 1900), in *Occasional Speeches*, *supra* note 1, at 122, 126.

events led to my discovering the original, Little, Brown 1891 edition on the open stacks of the LSU Law Library.

I could tell from the circulation card inside the back cover that the book had never been checked out. It has been in the Baier Rare Book Room at the LSU Law Center ever since, dutifully checked out on permanent loan.

Each Spring Term, on the last day of class, our Honors College students hear excerpts of Holmes's speech, *The Profession of the Law*:

AND NOW, perhaps, I ought to have done. But I know some spirit of fire will feel that his main question has not been answered. He will ask, What is all this to my soul? What have you said to show that I can reach my own spiritual possibilities though such a door as this? Gentlemen, I admit at once that these questions are not futile, that they may prove unanswerable, that they have often seemed to me unanswerable. And yet I believe there is an answer. They are the same questions that meet you in any form of practical life. If a man has the soul of Sancho Panza, the world to him will be Sancho Panza's world; but if he has the soul of an idealist he will make—I do not say find—his world ideal.

Of course, the law is not the place for the artist or the poet. The law is the calling of thinkers. But to those who believe with me that not the least godlike of man's activities is the large survey of causes, that to know is no less than to feel, I say—and I say no longer with any doubt—that a man may live greatly in the law as well as elsewhere; that there as well as elsewhere his thought may find its unity in an infinite perspective; that there as well as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear out his heart after the unattainable.

But do not think that I am pointing you to flowery paths and beds of roses,—to a place where brilliant results attend your work, which shall at once be easy and new. No result is easy which is worth having. Your education begins when what you call your education is over,—when you no longer are stringing together the pregnant thoughts, the “jewels five words long,” which great men have given their lives to cut from the raw material, but have begun yourselves to work upon the raw material for results which you do not see, cannot predict, and which may be long in coming⁴⁰

40. Speeches, *supra* note 16, at 24.

Jim Hardy and I give a copy of this speech, folded in thirds as was Holmes's style,⁴¹ to students of Honors Law at LSU—a bookmark for their future.

V.

We reach the summit of Mount Olympus. Or, if you will, Nansen at the pole.

"Most men of the college-bred type in some form or other have to go through that experience of sailing for the ice and letting themselves be frozen in."⁴² He must learn "that one is safe in trusting to courage and to time."⁴³ "He must start for the pole."⁴⁴

"Court Reports" captures the history of the Supreme Court from John Jay's bust in the Old Senate Chamber of the United States Capitol; to the laying of the cornerstone of the Marble Temple,⁴⁵ with President Hoover, John W. Davis, and "FAMOUS MODERNS ON THE COURT" in view; to the day Chief Justice Earl Warren arrived at the Court—"JUSTICE THE GUARDIAN OF LIBERTY." You will see Chief Justice Earl Warren at the opening of the October Term, 1953, hat in hand, waiving to the crowd as the news cameras rolled.⁴⁶

41. On formal occasions such as Holmes's "Memorial Day Address": He had the speech set up in type beforehand and gave copies to the Boston newspapers, a practice he followed for all major addresses. On less formal occasions he would write out the speech, usually on one or two sheets of paper, and then fold it in thirds, with the topic or occasion written on the back like a legal paper. He would give the address from memory, however.

The Collected Works of Justice Holmes, *supra* note 36, at 461.

42. Oliver Wendell Holmes, Jr., Commencement Address, Brown University, (June 17, 1897), in *Occasional Speeches*, *supra* note 1, at 97, 98.

43. *Id.*

44. *Id.*

45. Justice Holmes did not live to see the Court's new temple, which was completed in 1935, but he remarked about its older chamber in the United States Capitol: "I had only one glimpse of the Supreme Court when I went on to argue a case before it, which is already ancient history. I remember thinking that it needed only a black boy with gold bangles, holding a leash of greyhounds at one end of the bench, to be a living picture by Paul Veronese." Oliver Wendell Holmes, Jr., *Twenty Years in Retrospect*, Speech at a Banquet of the Middlesex Bar Association, (Dec. 3, 1902), in *Occasional Speeches*, *supra* note 1, at 154, 155.

46. "The day of my induction as Chief Justice of the United States was for me at once the most awesome and the loneliest day of my public career." Chief Justice Earl Warren, *The Memoirs of Earl Warren* 275 (1977) (Part IX, The Supreme Court Years). "The Court convened at noon in those days, and on the fourth day of October, 1953, I went to the Court building about 10 A.M." *Id.* at 276. Warren was obliged to wear an extra long robe borrowed from the Court's robing-room for his swearing-in.

I was then conducted to the seat of the Chief Justice, a high-backed

To complete the feast, you will see and hear our banquet's Doubting Spirit, Holmes himself, at ninety, March 8th, 1931. We catch a glimpse of the law's Prometheus unbound.

By way of contrast, I have also brought along a losing lawyer by the name of Albert Lévitte, Esquire, sometime Professor of Law at the University of North Dakota School of Law, later United States District Court judge for the Virgin Islands⁴⁷—surely a striking example of a split geographic personality. He was regarded by some as an odd ball of the law and an eccentric,⁴⁸ but I will let you judge for yourself. Judge Lévitte will put his case against Justice Black taking his seat on the Supreme Court. He will explain a certain motion he filed at the beginning of the October Term, 1937.⁴⁹

chair in the center of the raised bench. It was here that I almost created a major incident by stepping on the overlength robe. Thrown off balance, I tripped over the step up to the bench. It was enough to be noted and commented on by the press, so I suppose it could be said that I literally stumbled onto the bench.

Id. at 279.

47. 1 Who's Who in Law 550 (J. C. Schwartz ed., 1937); 5 Who Was Who in America, with World Notables 428 (1973).

48. Lévitte was near the end of the line of assistant professors of law who served as the fourth faculty member at Washington and Lee School of Law from 1924 to 1927. "Years later, few alumni could remember much about most of these men. But everyone remembered Albert Lévitte. Lévitte was likely the most unusual, colorful, and, some would contend, eccentric law teacher in the history of Washington and Lee." "Albert Lévitte (1887-1968)," Washington and Lee University School of Law, Faculty Biographies (Chronological, 1849-), available at <http://law.wlu.edu/faculty/history/levitt.htm> (last visited Mar. 25, 2002) (on file with *Louisiana Law Review*). "Lévitte's method of underscoring casebooks was well known to all at W & L. He would underline the facts in blue, the questions in yellow, the holdings in red, and the reasons in green." *Id.* "There was apparently a personality clash between Lévitte and Dean Moreland. When Lévitte's contract expired in 1927, it was not renewed." *Id.*

49. Lévitte is seen crossing 1st St., N.E., Washington, D.C., with the Library of Congress and the Supreme Court building in the background. He approaches waiting reporters, cameras flashing and rolling, and is asked by Walter Winchell:

"Judge Lévitte you just told newspaper men that you just cleared the first hurdle in a race. What do you mean by that?"

"What I mean is that, uh, speaking technically, the Court has accepted the motion, which I have given to them, to allow me to file a petition, which petition shows the reasons why Hugo L. Black is ineligible to serve as an Associate Justice of the United States Supreme Court."

"In my opinion there are two reasons primarily. The first is, that the law which permitted any justice of the United States Supreme Court to retire was passed during the time that Mr. Black was a Senator. The Constitution prevents any Senator from being appointed to the office which was created, or the profits of which were increased, during the time for which he was elected. The second reason is, that there is no vacancy on the Supreme Court bench to which Mr. Black could have been appointed by President Roosevelt."

It is enough that I tell you that the Supreme Court of the United States, the very next day, denied Mr. Lévitte's motion for lack of "standing to sue," which is polite lawyer's talk for saying, "This is none of your business."⁵⁰

ADVOCATES OF LSU HONORS COLLEGE: As a member of your Company at LSU, may I say I am deeply grateful for the honor of your call to the French House. In turn, I bring you HOLMES & CO.—From the Great Hall to *La Maison Française*.

"Who could resist the inspiration of the magic by which light and sound [are] converted into some other essence, instantaneously transported, and made permanent on a tiny celluloid strip?"⁵¹ Presenting "Court Reports":—

Universal Newsreels—WASHINGTON, D.C., Old Supreme Court Chamber, U.S. Capitol: Eagle and clock, Chief Justice's chair, curtains and bench, busts of Chief Justices—John Jay, first Chief Justice.

"Have you any feelings against Mr. Black?"

"I have no personal feelings whatever against Mr. Black. I do not know Mr. Black and I have never met him."

"What do you think the Court's going to do about it?"

"I do not know."

At this point Walter Winchell is heard telling reporters, "That's enough, isn't it," and the spotlight on Lévitte vanishes. As for the Court's reaction, *see infra* note 50.

50. *Ex Parte Lévitte*, 302 U.S. 633, 58 S. Ct. 1 (1937). Motion for leave to file a petition for an order requiring Mr. Justice Black to show why he should be permitted to serve as an Associate Justice of this Court. Decided October 11, 1937.

Per Curiam: The grounds of this motion are that the appointment of Mr. Justice Black by the President and the confirmation thereof by the Senate of the United States were null and void by reason of his ineligibility under Article I, Section 6, Clause 2, of the Constitution of the United States, and because there was no vacancy for which the appointment could lawfully be made. The motion papers disclose no interest upon the part of the petitioner other than of a citizen and a member of the bar of this Court. That is insufficient. It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public. *Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 406, 21 S. Ct. 206; *Southern Railway Company v. King*, 217 U.S. 524, 534, 30 S. Ct. 594; *Newman v. U.S. ex rel. Frizzell*, 238 U.S. 537, 549, 550, 35 S. Ct. 881; *Fairchild v. Hughes*, 258 U.S. 126, 129, 42 S. Ct. 274, 275; *Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S. Ct. 597, 601. The motion is denied. *Mr. Albert Lévitte, pro se*.

302 U.S. at 633-34, 58 S. Ct. 1.

51. Learned Hand, Address To the Harvard Law Alumni Association (1936), in *The Spirit of Liberty* 111, 113 (Irving Dilliard ed., 1960).

Oral argument, crowded courtroom, onlookers, lawyers, first photograph ever taken of the Justices in session, Chief Justice Hughes presiding, Justice Brandeis.

SUPREME COURT PAYS TRADITIONAL OPENING VISIT TO WHITE HOUSE, *ca.* 1930, Oliver Wendell Holmes, Jr., Chief Justice Hughes, Brandeis in top hat, Hughes whispers in Holmes's ear.

HOOVER DEDICATES NEW EDIFICE BUILDING FOR SUPREME COURT, 1932, Brandenburg Concerto, band playing, Justices march to dais, Benjamin Nathan Cardozo, blond hair, President Herbert Hoover and John W. Davis, Esq., Chief Justice Hughes, Justice Van Devanter, Justice McReynolds lurches in seat.

MARBLE TEMPLE COMPLETED, 1935, The Supreme Court is open for business, tourists climbing front steps.

FAMOUS MODERNS ON COURT, James Clark McReynolds, grimaces, gazes up; West Pediment, sculpted figures, John Marshall, William Howard Taft, Chief Justice Hughes, Sculptor Robert Aitken.

CHIEF JUSTICE HUGHES, whiskers, motor car, coachman, *ca.* 1940.

HOLMES'S HOME, 1720 I Street, N.W., Washington, D.C., door pops open, out steps O.W.H., Jr., law clerk on his arm, trots down steps, climbs into waiting coupe, off to Court.

JUSTICE HOLMES PASSES, Holmes exits U.S. Capitol, white moustache, overcoat, walks briskly along sidewalk.

HOLMES'S NINETIETH BIRTHDAY, March 8, 1931, in chambers with Chief Justice Hughes.

EX PARTE ALBERT LÉVITT, 1937, 1st St., N.E., Washington, D.C., Library of Congress, Supreme Court Building, motor car passes, newspaper men, cameras flashing, Walter Winchell: "Judge Lévit, you just told newspaper men, that you just cleared the first hurdle in a race. What do you mean by that?"

"What I mean is that, uh, speaking technically, the Court has accepted the motion which I have given to them, to allow me to file a petition, which petition shows the reasons why Hugo L. Black is ineligible to serve as an associate justice of the United States Supreme Court."

SUPREME COURT BENCH, *ca.* 1952, Chief Justice Vinson, Felix Frankfurter, Hugo L. Black, smiling, Stanley Reed, William O. Douglas, Wiley Rutledge, Frank Murphy, bushy eyebrows, America's Advocate Robert Jackson, Harold Burton.

CHIEF JUSTICE VINSON DIES OF HEART ATTACK, Supreme Court building, flag at half-staff.

CHIEF JUSTICE EARL WARREN ARRIVES AT COURT, October Term, 1953, hat in hand, waiving to crowd: "Well, it was the most difficult

adjustment I had ever made in my life, before or since. I've always thought that perhaps the most lonesome day I ever had in my life, was the day I arrived at the Supreme Court."

The day after my little film premiered in the Great Hall of the Supreme Court, a messenger delivered a hand-written note to me from the Chief Justice of the United States. Warren E. Burger's little keepsake reads, "Dear Paul, the film clips from Archives were great. I can see why Mrs. Gossett wanted to keep it a surprise. It should serve to remind us of the importance of preserving the present which will some day be the past!"⁵²

VI.

AND SO our feast ends as it began, with a skeleton in the corner mumming his silent part. "I have come to believe that he is necessary," said Holmes, "to make the scene complete. Without despair there is no triumph: without death the poignancy departs from life."⁵³ Here is the ultimate lesson of Honors 3031, not of law, but of life itself. And so we end with the words of Mr. Justice Holmes, his ninetieth birthday address, "The Race Is Over," March 8th, 1931, delivered live on the radio while an earlier generation of eager youth listened in:

In this symposium my part is only to sit in silence. To express one's feelings as the end draws near is too intimate a task. But I may mention one thought that comes to me as a listener-in. The riders in a race do not stop short when they reach the goal. There is a little finishing canter before coming to a standstill. There is time to hear the kind voice of friends and to say to one's self: "The work is done."

But just as one says that, the answer comes: "The race is over, but the work never is done while the power to work remains." The canter that brings you to a standstill need not be only coming to rest. It cannot be, while you still live. For to live is to function. That is all there is in living.

And so I end with a line from a Latin poet who uttered the message more than fifteen hundred years ago: "Death plucks my ear and says, 'Live—I am coming.'"⁵⁴

52. Note from Warren E. Burger to Paul R. Baier (May 20, 1976) (copy on file with *Louisiana Law Review*).

53. Oliver Wendell Holmes, Jr., Arthur P. Bonney and Frederic T. Greenhalge, Answer to Resolutions of the Bar, Lowell, (Apr. 21, 1896), in *Occasional Speeches*, *supra* note 1, at 87, 89.

54. Oliver Wendell Holmes, Jr., *The Race Is Over*, Radio Address to the

HONORS ADVOCATES: "Every morning the bugles blow the reveille anew."⁵⁵ It would be Holmes's wish that as advocates of LSU Honors College, as carriers of its sacred fire, you set forth with a pennon—a little Honors Company flag—, as well as with the sword of your achievement, in Law or elsewhere.

In the long battle that is renewed each day, our Honors Captain Holmes bids us keep before our eyes "the little flutter that means ideals, honor, yes, even romance, in all the dull details."⁵⁶

Nation, (Mar. 8, 1931), Motion Picture and Sound Recordings Division, The National Archives, Washington, D.C. Holmes's hand-written manuscript of his radio address is reproduced in Occasional Speeches, *supra* note 1, opposite page 178. The Latin poet quoted by Holmes is Horace. *Ex rel.* Boris Kozolchyk, James D. Hardy, Jr., Honors 3031, (Apr. 11, 2002), Tucker Room, Paul M. Hebert Law Center, Louisiana State University.

55. Oliver Wendell Holmes, Jr., Remarks to the Essex Bar, *in* Occasional Speeches, *supra* note 1, at 48, 50.

56. Oliver Wendell Holmes, Jr., Address At the Dedication of the Northwestern University Law School Building, Chicago, (Oct. 20, 1902), *in* Occasional Speeches, *supra* note 1, at 139, 145.