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Honorable Justice: The Life of Oliver Wendell Holmes

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BOOK REVIEW

HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES. By Sheldon M. Novick.

Boston, Massachusetts. Little, Brown &
Company. 1989. Pp. 376 plus
Appendixes, Notes and Index.

REVIEWED BY DOUGLAS HEIDENREICH†

Oliver Wendell Holmes, Jr., the prolific,¹ pragmatic, crusty relic of the nineteenth century who, in the first third² of our now fast-waning twentieth century, wrote pithy, sometimes harsh opinions, often dissenting but often speaking for a united Court, remains the subject of scholarly curiosity and comment.³ Many of the Holmes papers and letters have been published;⁴ popular novels and plays have been written about him.⁵ *Honorable Justice*, however, is the first successful one-volume scholarly biography of this fascinating and enigmatic giant of American legal theory.

In preparing this delightful and compelling work, Mr. Novick had access to material assembled by Holmes's authorized biographers, none of whom completed the monumental task of producing a complete biography.⁶ Yet, the Justice Holmes that emerges from these pages remains an elusive fig-

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1. Novick, in his Preface, claims that Holmes wrote more opinions than any other United States Supreme Court justice. NOVICK, *HONORABLE JUSTICE* xvii (1989).

2. Holmes served on the Court from December 1902 until January 1932.

3. Novick's bibliography lists at least twenty articles published during the past ten years about Holmes and his legal theories.

4. Among the more notable collections of Holmes's correspondence are *Holmes—Pollock: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock 1874-1932*, 2 vols. (1941) and *Holmes—Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski 1916-1935*, 2 vols. (1953). Both are edited by Mark DeWolfe Howe and published by the Harvard University Press.

5. See, e.g., C.D. BOWEN, *YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY* (1944) (novel).

6. Mark DeWolfe Howe wrote, in addition to a number of articles about Holmes, two volumes of biography: *Justice Oliver Wendell Holmes: The Shaping Years, 1841-1870* (1957) and *Justice Oliver Wendell Holmes: The Proving Years, 1870-1882* (1963). Professor Howe died before he could complete the work. Professor Grant

ure. Mr. Novick has painted this complicated man in cubist style: he shows us sharply etched, colorful planes of character that overlap and intersect, often seeming to clash.

The reader who tries to classify Holmes is doomed to failure. Holmes was a pragmatist, yet a romantic. He was a nationalist, yet unwilling to ignore the Constitution to stifle those who spoke against war and the class of which Holmes was a member. He was the great dissenter on a conservative Court, yet his quaint attire and flowing handle-bar moustache marked him as a nineteenth century Brahmin. To Holmes, chivalry was not dead—perhaps not even sleeping. Duty and honor were not merely romantic notions; they were solid values that shaped his everyday personal and professional life.

More than anything else, his service in the United States Civil War molded Holmes and shaped the remaining seventy years of his life. Holmes, a young officer just out of Harvard College, fought in several famous battles. During his three years of active service, he was wounded at Ball's Bluff, Antietam and Chancellorsville. Holmes led his troops by example, scorning cowardice and fear. Yet he grew to hate the blood and muck and misery. When his term of enlistment ended, he left the Army, though the war had not yet ended, feeling that he had done his duty—as indeed he had.

Although Mr. Novick generally avoids the temptation to psychoanalyze Holmes or to attribute to him thoughts or feelings that he can not know, Novick does suggest that Holmes never got over the notion that his parents had sent him off to the Civil War to die—to be sacrificed to the Union and the cause of abolition. The author suggests that Lieutenant Holmes's notions of duty and his sense of being a living sacrifice who, though scarred, was spared, lay, at least in part, behind Mr. Justice Holmes's terse, brutal opinion upholding the involuntary sterilization of an allegedly mentally retarded young woman.⁷

Whatever the reason, Holmes's streak of harshness, border-

Gilmore, Howe's successor, worked on the project for some years but produced no book.

7. The famous case, of course, is *Buck v. Bell*, 274 U.S. 200 (1927). Novick says, "The regular reappearance in his writings of the theme of necessary sacrifice of children, and the links he makes to the sacrifices made in war, suggests that Holmes unconsciously was repeating his parents' having sent him to war." NOVICK, HONORABLE JUSTICE 478 n.65 (1989).

ing on cruelty, shows through the veneer of aristocracy at unexpected moments.⁸ Similarly, however, he unexpectedly exhibits an understanding of and appreciation for the plight of the factory worker.⁹ Furthermore, Holmes, a product of a closed, snobbish society, sitting on a Court, some of the members of which were blatantly anti-Semitic, welcomed Jews into his home and enjoyed long and close relationships with Jewish colleagues and friends, among them Brandeis and Frankfurter.¹⁰

Holmes, though devoted in his own way to an eccentric, nearly reclusive wife,¹¹ enjoyed the company of other intelligent, charming, graceful women. He often went into society alone and made several trips to England where he developed close relationships, at least one of which appears to be a romantic attachment—romantic in several senses of the word. Mr. Novick, a bit coy about the exact nature of the Holmes-Lady Castletown relationship, lets Holmes's letters speak for themselves. In fact, it is here that the story bogs down. After finishing reading the several pages of extracts from the letters Holmes sent nearly daily to his "Beloved Hibernia," the reader heaves a sigh of relief. This is Lancelot writing to Guinevere: the knight errant writing flowing, poetic prose to the ethereal, unreachable flower of his heart. He behaves like a smitten schoolboy and wears, awkwardly, the token (a tie pin) that was her gift to him.

Holmes was a fighter as well as a lover. The other side of chivalry appears in his famous 1895 address entitled *The Soldier's Faith*. Chauvinistic and thought by some to glorify war, the address is a splendid, yet oddly chilling, example of

8. One reason for the notoriety of Holmes's *Buck v. Bell* opinion is the abruptly cruel statement, "Three generations of imbeciles are enough." *Buck v. Bell*, 274 U.S. 200, 207 (1927). However, language found in the rest of the opinion is even more chilling. Consider: "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." *Id.*

9. Although uneasy at the prospect of an end to the aristocracy, Holmes is depicted as being understanding and sympathetic towards one radical (for the time) labor union leader, Frank Foster. See NOVICK, *HONORABLE JUSTICE* 198-99 (1989).

10. Frankfurter, for example, for many years recommended to Holmes young men to serve as his secretaries, people we would now call law clerks. See A. HISS, *RECOLLECTIONS OF A LIFE* 31, 32 (1988).

11. Upon her death, Holmes wrote, "For sixty years she made life poetry for me . . ." NOVICK, *HONORABLE JUSTICE* 368 (1989) (quoting letter to Frederick Pollock dated May 24, 1929).

Holmes's compelling rhetoric: "[T]he faith," he says, "is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the use."¹²

Novick's book is divided into twenty-five short chapters. The early chapters quickly dispose of Holmes's birth and early education. The senior Oliver Wendell Holmes, physician, poet, essayist, lecturer, the famous "Autocrat at the Breakfast Table," was not short on ego. His first child and namesake could have been overwhelmed by the Doctor's dominant personality—a personality faintly tinged with malice—but Wendie, as young Holmes came to be called, early exhibited the independence and personal strength that were to make him a great judge and splendid writer.

Much of the book deals with the bloody Civil War and Holmes's part in it. The war was with him to the end of his life when, as an old man, he received in his home the newly elected president, Franklin D. Roosevelt. Roosevelt asked Holmes whether he had any advice. The bushy-browed, grandly mustachioed nonagenarian is said to have replied, "Form your battalions, and fight, sir."¹³

In his last years, Holmes likened himself to "a ghost on the battlefield with bullets flying through me."¹⁴ Years after the events, he marked the anniversaries of the battles in which he had fought and occasionally visited the site of one of the Confederate incursions that nearly reached Washington.¹⁵

The chapters on Holmes's law school years and early life at the bar describe a young man, bent on success, anxious to reach each milestone. Holmes produced his magnum opus, *The Common Law*, just before his self-imposed deadline: his fortieth birthday. The publication of this work, among the more enduring and famous works on the subject, caused only modest ripples in circles of legal scholarship. Yet, Holmes lived to see his work increasingly respected and admired. Today, of course, all lawyers and law students, though they may not

12. *Id.* at 205 (quoting address by Holmes).

13. *Id.* at 376.

14. *Id.*

15. For a discussion of Holmes's frequent use of military metaphors, see A. HISS, *RECOLLECTIONS OF A LIFE* 41-44 (1988).

know who said it and where, know the phrase: "The life of the law has not been logic: it has been experience."¹⁶

The discussion of Holmes's years on the Court is particularly fascinating. We see Holmes, courtly yet crusty, quick yet patient, thorough yet incisive, eagerly shouldering more than his share of the workload. Courteous to all, Holmes was conscious always of his duty to the law and to the Court, writing his opinions with grace and style, even a touch of humor—and, on rare occasions, with a disconcerting harshness. As age gradually stole his physical vigor, his mental acuity remained, until the end, unimpaired. He diligently reviewed the briefs and records and, even after apparently dozing for a few minutes in conference, could summarize the salient points of a case and bring the issues into focus like no one else.

Even as he aged, his enthusiasm for all manner of books remained undimmed. Fanny, Holmes's wife for fifty-seven years, died in 1929. For many years, she had read aloud to him in the evenings. His secretaries soon began to fill the role of reader. In preparing for the evening's reading, Holmes sometimes would say to Alger Hiss, the first of his secretaries to serve this function, "Shall we have murder—or shall we improve our minds?"¹⁷ Holmes remained a voracious and catholic reader until his last days.¹⁸

Honorable Justice is, all in all, a splendid work. Its series of photographs alone fascinate the reader. The book will delight lawyers, whatever their ages, not because it explains what made this complex and enigmatic man tick, but because it gives the reader a feeling for the life and times of this most remarkable of Supreme Court justices. The book lets the effervescent spirit of this luminous star in the firmament of the law shine forth for all of us to admire and wonder at. It is, after all, Holmes's personality and legal acumen that fascinate so many of us.

16. HOLMES, *THE COMMON LAW* 1 (1881), *quoted in* NOVICK, *HONORABLE JUSTICE* 158 (1989).

17. NOVICK, *HONORABLE JUSTICE* 372 (1989).

18. Holmes recorded in his *Black Book* each book that he read. For examples of the variety of books enjoyed by Holmes, see A. HISS, *RECOLLECTIONS OF A LIFE* 41-44 (1988).

