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## A LAW STUDENT'S GUIDE TO MR. JUSTICE HOLMES\*

JULIUS J. MARKE\*\*

When I was invited to speak to you this evening, the first question I asked myself was what can I say of value to law students about Oliver Wendell Holmes, Jr.

My main difficulty in preparing this talk was the realization that so much has been written on Holmes that it is quite a feat to be original in interpreting the man or even commenting on his place in the American legal scene. To suggest my problem, I could not even conjure up an original title reflective of my thinking. As you probably are aware, the literature on Holmes is so extensive and the titles so exhaustively detailed, that every time I tried to create one I was thwarted by the fact that it had already been used.

For example, a splendid title I could use for this occasion would be "Mr. Justice Holmes Revisited." Unfortunately, this has been preempted.<sup>1</sup> Then there were these possibilities: "Oliver Wendell Holmes: The Great American Judge"; "The Democracy of Mr. Justice O. W. Holmes"; "Holmes: The Historian"; "Oliver Wendell Holmes, The Jurist"; "Legal Philosophy of Justices Holmes and Brandeis"; "Justice Holmes — A Judge with Imagination"; "Justice Holmes, Liberal"; "Yankee from Olympus"; "The Mind and Faith of Justice Holmes"; and, "The Legacy of Holmes and Brandeis." All these, however, are already a matter of record.<sup>2</sup>

The life story of Holmes as a great American, has been investigated and popularized in biographies and even depicted on the stage in *The Magnificent Yankee*.<sup>3</sup>

In my presentation, I shall be governed by Andre Gide's well-known epigram: "Everything has been said already, but as no one listens, we must always begin again."<sup>4</sup> Holmes was a prodigious letter writer. The thought

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1. Broughton, *Mr. Justice Holmes Revisited*, 2 *PORTIA L.J.* 177 (1966).

2. Redlich, *Oliver Wendell Holmes: The Great American Judge*, in *MR. JUSTICE HOLMES* 173 (F. Frankfurter ed. 1931); Wyzanski, *The Democracy of Mr. Justice O. W. Holmes*, 7 *VAND. L. REV.* 311 (1954); Plucknett, *Holmes: The Historian*, 44 *HARV. L. REV.* 712-16 (1931); Jones, *Oliver Wendell Holmes, The Jurist*, 36 *AM. L. REV.* 710 (1902); Hamilton, *Legal Philosophy of Justices Holmes and Brandeis*, 33 *CURRENT HISTORY* 654-60 (1931); Follansbee, *Mr. Justice Holmes — A Judge with Imagination*, 11 *AM. LAWYER* 7-10, 66-68 (1903); A. LIEF, *REPRESENTATIVE OPINIONS OF JUSTICE HOLMES* 1931; Berle, *Justice Holmes, Liberal*, 24 *SURVEY GRAPHIC* 178 (1935); C.D. BOWEN, *YANKEE FROM OLYMPUS* (1944); M. LERNER, *THE MIND AND FAITH OF JUSTICE HOLMES* (1943); S. KONEFSKY, *THE LEGACY OF HOLMES AND BRANDEIS* (1956).

3. E. LAVERY, *THE MAGNIFICENT YANKEE* (1945).

4. H. CAIRNS, *LEGAL PHILOSOPHY FROM PLATO TO HEGEL* 551 (1949).

occurred to me that I might analyze some of his letters with the purpose of commenting on how they reflect his personality and his thinking as a judge and a philosopher, and then interweave this analysis with his philosophy as discussed in court decisions and in his writings. I shall also take into account the three versions of "John" described by Holmes's famous father in the *Autocrat at the Breakfast Table*: (1) what John was really made like by God; (2) what John thinks of himself ideally, and (3) what Thomas thinks of John.<sup>5</sup> Since I am talking to law students, I shall keep returning to the spirit in which Holmes pursued the law. "Law is a business to which my life is devoted," he once stated, "and I should show less than devotion if I did not do what in me lies to improve it, and when I perceive what seems to me to be the ideal of its future, if I hesitated to point it out and press toward it with all my heart."<sup>6</sup>

Several years after Holmes's death in 1935, Francis Biddle, a great lawyer himself, suggested in a brief biography of the Justice, that his place in American history was secure. Thirty years later he concluded that he was more than convinced that Holmes would rank among those Americans who are accepted as national heroes — Washington, Jefferson, Lincoln, Grant, Whitman, and Mark Twain. He then continued that this was curious to him, because Holmes's qualities were not those that would "capture the allegiance of the crowd."<sup>7</sup> It is even more curious to me, because Holmes has, in a sense, become a controversial character and in the last thirty years has been subject to revisionist critiques in the legal literature.<sup>8</sup> Holmes himself, I can assure you, could not have cared less what either side thought of him.

When Holmes was being considered by President Theodore Roosevelt for appointment to the Supreme Court, he was both extravagantly praised and bitterly criticized in the press and elsewhere, depending on how the writer felt about Holmes's philosophy and record on the bench. Holmes deplored both approaches, viewing them as extremely distasteful and insulting. He wanted to be recognized not as a partisan, but as a judge, independent and philosophically sound.

Writing to his old friend, Sir Frederick Pollock, he complained:

5. O.W. HOLMES, *AUTOCRAT AT THE BREAKFAST TABLE* 53 (1891).

6. O.W. HOLMES, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 194 (1920); J. MARKE, *THE HOLMES READER* 79 (1955).

7. JUSTICE HOLMES, *EX CATHEDRA VII* (Bander ed. 1966).

8. Holmes's philosophy has been attacked as totalitarian, sceptical, and unconcerned with the influence of morality on law. These attacks have been met by many defenders of Holmes. See generally F. BIDDLE, *JUSTICE HOLMES, NATURAL LAW, AND THE SUPREME COURT* 27-49 (1961); Hart, *Holmes' Positivism — An Addendum*, 64 *HARV. L. REV.* 929 (1951); Howe, *Holmes' Positivism — A Brief Rejoinder*, 64 *HARV. L. REV.* 937-39 (1951); Howe, *The Positivism of Mr. Justice Holmes*, 64 *HARV. L. REV.* 529 (1951); Krislov, *Oliver Wendell Holmes: The Ebb and Flow of Judicial Legendry*, 52 *Nw. U.L. REV.* 514 (1957); Lucey, *Holmes — Liberal — Humanitarian — Believer in Democracy?*, 39 *GEO. L.J.* 523-62 (1951); McKinnon, *The Secret of Mr. Justice Holmes: An Analysis*, 36 *A.B.A.J.* 261, 264, 342 (1950); Palmer, *Hobbes, Holmes and Hitler*, 31 *A.B.A.J.* 569 (1945); Rodell, *Justice Holmes and His Hecklers*, 60 *YALE L.J.* 620 (1951); *Mr. Justice Holmes: Some Modern Views* (a symposium), 31 *U. CHI. L. REV.* 213 (1964).

It makes one sick when he has broken his heart in trying to make every word living and real to see a lot of duffers, generally I think not even lawyers, talking with the sanctity of print in a way that at once discloses to the knowing eye that literally they don't know anything about it . . . . The legal periodicals are generally in vacation. I hope some of them may have an intelligent word, but you can understand how at a moment of ostensible triumph I have been for the most part in a desert—when I hoped to see that they understand what I meant . . . .<sup>9</sup>

Years later, he continued in this vein in another letter to Pollock that his main purpose in life had been “to make a few competents like you say that I had hit the *ut de poitrine* in my line . . . .”<sup>10</sup>

Holmes's name, I believe, will survive as that of a great American for other reasons—his personality, style, wit and *joie de vivre*. His friend, Arthur Dehon Hill, stated it well in describing Holmes as “a great human figure.” Hill noted that “Holmes's greatest service as a lawyer was that he showed to all men that the law need not be a dreary competition of sordid interests and that a ‘man may live greatly in the law as well as elsewhere.’”<sup>11</sup> Holmes said it even more succinctly when he told Harvard law students: “Every calling is great when greatly pursued.”<sup>12</sup>

Despite the great age he reached, Holmes was eternally youthful. He had a real community of interest with the young because of his consummate sense of the joy of life. Moreover, Holmes understood the beauty of life. On one occasion he told Dean Acheson: “If that ceiling should open, and through the opening should come the voice of God saying, ‘Wendell, you have five minutes to live,’ I should reply, ‘Very well, Boss, but I wish it were ten.’”<sup>13</sup>

To Holmes, life was action; to live is to function. In a speech to the Bar Association of Boston on his 59th year (he was then Chief Justice of the Massachusetts Supreme Court), Holmes developed this theme:

We cannot live our dreams. . . . [T]he joy of life is to put out one's power in some natural and useful or harmless way . . . . The rule of joy and the law of duty seem to me all one. . . . [T]he end of life is life. Life is action, the use of one's powers . . . . Life is an end in itself, and the only question as to whether it is worth living is whether you have enough of it.<sup>14</sup>

9. Letter dated Feb. [Sept.] 23, 1902, I HOLMES-POLLOCK LETTERS 106 (2d ed. M. Howe ed. 1961).

10. Letter dated June 20, 1921, II HOLMES-POLLOCK LETTERS 71 (2d ed. M. Howe ed. 1961).

11. F. BIDDLE, MR. JUSTICE HOLMES 3, 4 (1942).

12. “And what a profession it [Law] is! No doubt everything is interesting when it is understood and seen in its connection with the rest of things. Every calling is great when greatly pursued. But what other [calling] gives such scope to realize the spontaneous energy of one's soul? In what other does one plunge so deep in the stream of life—to share its passions, its battles, its despairs, its triumphs, both of witness and actor?” *The Law*, in THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 21 (M. Howe ed. 1962).

13. D. ACHESON, MORNING AND NOON 37-38 (1965).

14. *Speech at a Dinner Given by the Bar Ass'n of Boston, Mar. 7, 1900*, in THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 123-26 (M. Howe ed. 1962).

Holmes's friend, William James, was greatly disappointed by his speech. James wrote to another friend that Oliver Wendell Holmes seemed "unable to make any other than that one set speech which comes out on every occasion. It was all right for once to celebrate more vital excitement, *joie de vivre*. But to make it systematic, oppose it to other duties, was to prevent it especially when one is a Chief Justice." To James, this was "childish." "Mere excitement was an immature ideal unworthy of the Supreme Court's official endorsement."<sup>15</sup>

Yet to Holmes's friend, Morris Raphael Cohen, the philosopher, this childish quality enriched Holmes's personality. In his *Meaning of Human History*, Cohen refers to Holmes, along with Einstein and Socrates as men "who never [outgrew] a childish curiosity about the universe and continue, as long as they live, to ask questions of the world and to revise mistaken views."<sup>16</sup>

A favorite Holmes story is revealing in this context. He told Whitney North Seymour in 1932, that as a boy, he was very much influenced by Ralph Waldo Emerson. When he was fifteen and preparing to read Plato, he asked Emerson, "Mr. Emerson, I'm about to read Plato. Have you any advice for me?" Emerson replied, "Yes, Oliver, I have. You pick him up in your hand and you look him in the eye, and you say 'Plato, you've been dead for 2,000 years and I'm alive today. *What have you got to say to me?*'"<sup>17</sup>

Throughout his life, Holmes stressed that "man is born a predestined idealist, for he is born to act." Life was action and "[t]o act is to affirm the worth of an end, and to persist in affirming the worth of an end is to make an ideal . . . . Life is a roar of bargain and battle, but in the very heart of it there rises a mystic spiritual tone that gives meaning to the whole. . . . It suggests that even while we think that we are egotists we are living to ends outside ourselves."<sup>18</sup>

Replying by letter to a senior at Harvard, Oswald Ryan, whom he had met and who had expressed to him how much he had been stirred by Holmes's speeches, Holmes wrote:

I am glad you got some good out of my speeches, and am obliged for your telling me so. Life is a romantic business. It is painting a picture, not doing a sum, but you have to make the romance, and it will come to the question how much fire you have in your belly . . . ."<sup>19</sup>

Holmes had great personal charm. He was in appearance serene and confident. Holmes was also a man of humility and very much a skeptic. He

15. F. BIDDLE, *supra* note 11, at 99.

16. M.R. COHEN, *MEANING OF HUMAN HISTORY* 175 (1947). See also *Holmes-Cohen Correspondence*, 9 J. HIS. IDEAS 3 (1948).

17. *Law and the Liberal Arts: A Symposium*, 1 LEARNING & THE LAW 65, 106 (Fall 1974) (emphasis original).

18. *The Class of '61*, in *THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES* 162 (M. Howe ed. 1962).

19. F. BIDDLE, *supra* note 11, at 138-39. In his speech to the Class of '61, Holmes repeated: "[Life] is painting a picture, not doing a sum." See note 18 *supra*.

was aware of his own limitations and certainly of the world around him and of the people inhabiting the earth.

This characteristic of Holmes has been highly criticized by the natural law philosophers and reminds me of the story of the Justices of the High Court who were addressing a petition to Queen Victoria on the opening of the Royal Courts of Justice in 1882. "We, your majesty's Judges, conscious as we are of our manifold defects," they started, when Lord Bowen interrupted: "Aren't we being hypocritical to suggest that we are conscious of our shortcomings?" "Well how would you rephrase it," he was asked, and he replied, "It would be more appropriate to write: Conscious as we are of the manifold defects of each other."<sup>20</sup>

Holmes's humility, in a sense, was also reflected in his scepticism and refusal to accept ultimates and absolutes, legal or philosophic. He did not believe in natural law, which he considered reflected a naive state of mind of those who did so believe. He accepted man's attempt to generalize what was good and true and beautiful, but these generalizations had no claim to the ultimate standards. When Wu, the young Chinese student who wrote frequent letters to Holmes, said that this is the best possible world, Holmes replied that this was a mere speculation *in vacua* on Wu's part. This was "[c]hurning the void to make cheese." He then confessed to Wu, "I do not know whether our ultimates such as good and bad, ideals, for the matter of that, consciousness, are cosmic ultimates or not. They seem to me to bear marks of the human and the finite."<sup>21</sup> He then added that forms are useful only to present their contents, "just as the only use of a pint pot is to present the beer (or whatever lawful liquid it may contain) and infinite meditation upon the pot will never give you the beer."<sup>22</sup> His own belief, he wrote to Wu, was that: "[W]e are in the universe, not it in us . . . . Because the cosmos may produce intelligence out of the course of its energy, there is no reason to suppose that for me this marks any ultimate. I suspect that all my ultimates have the mark of the finite upon them, but as they are the best I know, I give them practical respect, love, etc., but inwardly doubt whether they have any importance except for us and as something that with or without reasons the universe has produced and therefore for the moment has sanctioned. . . ."<sup>23</sup>

In a letter to Cohen, in 1917, when Cohen was a young teacher of philosophy, he repeated that: "[M]an cannot swallow the universe. I at least go on very comfortably without the belief that I am in on the ground floor with God or that cosmos, whether it wears a beard or not, needs me in order to know itself." Then he added the awesome prophetic insight of such significance to us today:

20. There are a variety of accounts of this incident. See, e.g., R. MEGARRY, MISCELLANY-AT-LAW 9 (1955).

21. Letter dated July 26, 1923, JUSTICE HOLMES TO DR. WU, AN INTIMATE CORRESPONDENCE 14 (1947).

22. Letter dated Sept. 20, 1923, *supra* note 21, at 16.

23. Letter dated May 5, 1926, *supra* note 21, at 35.

[B]ut I do not believe that a shudder would go through the sky if our whole ant heap were kerosened. But then it might — in short my only belief is that I know nothing about it. Truth may be cosmically ultimate for all I know. I merely surmise that our last word probably is not the last word, any more than that of horses or dogs. It is our last word nonetheless. And I don't see why we shouldn't do our job in the station in which we were born without waiting for an angel to assure us that it is the jobbest job in jobdom.<sup>24</sup>

To Holmes, humanity and Holmes too, of course, were in the belly of the Cosmos and not the Cosmos in humanity and him. As the "Grand Panjandrum" he referred to as the deity had failed to disclose to him the plan of campaign, if indeed there was one, as a true soldier, he carried on.

Holmes was born on March 8, 1841 in Boston, Massachusetts, to Dr. Oliver Wendell Holmes and Amelia Lee Jackson Holmes. Dr. Holmes's poetry and prose contributed to the "Flowering of New England"; his scientific writing advanced American medicine. In 1861, Holmes received a Bachelor of Arts Degree from Harvard College. From 1861 to 1864 he served as a lieutenant and captain in the Civil War. He was wounded three times in battle and never forgot those wounds. They were memorable to him. In a letter to Harold Laski dated October 22, 1922, he wrote "Ball's Bluff, 61 years ago yesterday," referring to his first wound received in battle.<sup>25</sup> He was mustered out as a captain, brevet colonel. Holmes frequently alluded to his war experiences and the mystique of dying for causes not fully understood.

In appearance, "as he grew older Holmes grew even better looking" according to Dennis Brogan and "there remained to the end something pre-eminently military, something Gascon, in that mustache and that spare soldierly figure."<sup>26</sup> His complexion was pink and white, and he featured a bristling white cavalry mustache. He was tall, erect, and had pleasing features. The War gave him a "Soldier's Faith," the title he gave to an address on Memorial Day in 1895, when he said:

I do not know what is true. I do not know the meaning of the universe. But in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, that no man who lives in the same world with most of us can doubt, and that is that the faith 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.<sup>27</sup>

Holmes was graduated from Harvard Law School in 1866, admitted to the Massachusetts Bar in 1867, and began to practice law. From 1870-1871, he

24. *Holmes-Cohen Correspondence*, *supra* note 16, at 9-10. Holmes coined the word "jobbits." The "jobbest job in jobdom" meant doing your job in the grand manner and accepting its effect on you and society.

25. Letter dated Oct. 22, 1922, 1 HOLMES-LASKI LETTERS 456 (M. Howe ed. 1953).

26. D. BROGAN, *AMERICAN THEMES* 173 (1947).

27. *The Soldiers Faith*, in *THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES* 76 (M. Howe ed. 1962).

was an instructor in constitutional law at Harvard College and later lectured at the Law School and subsequently was appointed Professor of Law. From 1870-1873 he was the editor of the *American Law Review*, a leading legal journal of the period. Many of his contributions to this publication show the seeds of a style and thought that are found later in his Supreme Court opinions.

In 1872, he married Fanny Bowditch Dixwell. No children were born to this marriage. To some degree Holmes's law clerks were a substitute for a family.<sup>28</sup> In 1873, his edition of Kent's *Commentaries* (12th) was published.<sup>29</sup> Professor Thayer of the Harvard Law School originally invited Holmes to collaborate on this publication, but as Holmes did all the work, he took the credit, to Thayer's great annoyance.<sup>30</sup> From 1873-1883, he was a partner in the Boston law firm of Shattuck, Holmes and Monroe.

Despite all this activity, Holmes led an isolated life. Brandeis once reminisced that "when Holmes was a member of the law firm, he never met any of the clients of the firm." Holmes, however, justified this practice by noting that "only the thinnest veneer of civilization distinguishes man from brute."<sup>31</sup>

In 1880, he became a lecturer on common law at the Lowell Institute, Boston. His lectures there eventually evolved into that magnificent scholarly analysis of our legal system, *The Common Law*, which was published in 1881.<sup>32</sup> Professor Paul A. Freund notes that this work was quickly recognized in the United States as well as in England "as a seminal and important study, reflecting exceptional learning in the Germanic and medieval English sources and even more uncommon power and originality in arguing his organizing ideas."<sup>33</sup> The opening statement on page one of *The Common Law* has achieved historic and scholarly importance:

The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. . . . The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.<sup>34</sup>

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28. The play, *THE MAGNIFICENT YANKEE*, by Emmet Lavery reflects how Holmes treated his law clerks as members of his family.

29. J. KENT, *COMMENTARIES ON AMERICAN LAW* 4v (Editorial notes and Preface to 12th ed. by O.W. Holmes, Jr.) (1873).

30. See M. HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 1870-1882* 11-15 (1963).

31. Lyons, *The Lyons Den*, N.Y. Post, Oct. 16, 1971, at 25, col. 4.

32. The most recent printing of *The Common Law* was published by the Belknap Press of Harvard University in 1963 with Mark DeWolf Howe as editor.

33. Freud, *Oliver Wendell Holmes*, 3 *THE JUSTICES OF THE U.S. SUPREME COURT 1775* (L. Friedman & F.L. Israel, eds. 1969).

34. For the significance of *THE COMMON LAW* as a repudiation of Kantian and Hegelian



After a year at Harvard as Weld Professor of Law, Holmes resigned in 1883 to become an Associate Justice of the Massachusetts Supreme Judicial Court. In 1899 he was appointed Chief Justice of the Massachusetts Supreme Judicial Court, and on December 8, 1902, President Roosevelt appointed Holmes Associate Justice of the United States Supreme Court.

The Boston Bar gave Holmes a farewell dinner before he left for Washington to take his seat on the bench. As he left the banquet hall, someone attempted to compliment Holmes by calling out, "Now Justice will be administered in Washington." To this Holmes is supposed to have replied, "Don't be too sure. I am going there to administer *the law*."<sup>35</sup>

Charles Butler, who was a Reporter for the Supreme Court, told the story that just as Holmes went on the Bench to take the oath, he handed Butler a telegram to be sent to the Governor of Massachusetts, containing his resignation as Chief Justice of the Supreme Judicial Court of Massachusetts.<sup>36</sup> Holmes obviously took no chances, perhaps because of the circumstances surrounding his appointment by Roosevelt.

When Holmes took his seat on the Supreme Court, the Court was 112 years old. Interestingly, between Chief Justice Marshall who was appointed in 1801 and Fuller, who was Chief Justice in 1902, there had been but three Chief Justices. President Theodore Roosevelt selected Holmes because he believed he would reflect the President's antitrust views on the Court. Although a conservative, Holmes was still prepared to test alternatives and was also a pragmatist. He had written in 1873 that "it is no sufficient condemnation of legislation that it favors one class at the expense of another, for much or all legislation does that; and nonetheless, when the *bona fide* object is the greatest good of the greatest number." The most that should be expected of legislative reform, he maintained, "is that legislation should easily and quickly, yet not too quickly, modify itself in accordance with the will of the *de facto* supreme power in the community, and that the spread of an educated sympathy should reduce the sacrifice of minorities to a minimum."<sup>37</sup>

Theodore Roosevelt had reservations about Holmes. He was concerned that he was too ready to concede the argument against his own interest. Why did he then appoint Holmes? It is interesting to note his reasons for they reflect the criteria our Presidents have applied in appointing Supreme Court justices. Lincoln, for example, appointed Chase Chief Justice because of public respect for Chase's abilities and because "we wish for a Chief Justice

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metaphysics of law and as a response to the case method of instruction then introduced by Dean Langdell of Harvard Law School, see Freud, *supra* note 33, at 1775-76.

35. C. BUTLER, A CENTURY AT THE BAR OF THE SUPREME COURT OF THE U.S. 50-51 (1942). There are a number of similar stories. Biddle refers to Charles P. Curtis' LAW AS LARGE AS LIFE, in which Curtis relates that Justice Hand once teased Holmes after a walk they had had together. Holmes was leaving to attend a Supreme Court session and Justice Hand said, "Well, sir, goodbye. Do Justice!" Holmes replied sharply, "This is not my job. My job is to play the game according to the rules." F. BIDDLE, JUSTICE HOLMES, NATURAL LAW, AND THE SUPREME COURT 71 (1960).

36. W. KING, MELVILLE WESTON FULLER 286-87 (1950).

37. Holmes, *The Gas-Stokers' Strike*, 7 AM. L. REV. 583 (1873), reprinted in, 44 HARV. L. REV. 795 (1931).

who will sustain what has been done in regard to emancipation and the legal tenders. We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore, we must take a man whose opinions are known."<sup>38</sup> As have other Presidents, Lincoln looked for a man of integrity and legal ability, but, most importantly, he hoped to appoint a judge "who would be a correct and faithful expositor of the principles of his administration and policy after his administration shall have closed."<sup>39</sup>

Feeling similarly about Supreme Court appointments, Roosevelt asked Senator Lodge to find out whether Judge Holmes was in sympathy with the views of his administration. As a strong point in Holmes's favor, Roosevelt noted:

[Holmes's labor decisions had] been criticized by some of the big railroad men and other members of large corporations. The ablest lawyers and the greatest judges are men whose past has naturally brought them into close relationship with the wealthiest and most powerful clients, and I am glad when I can find a judge who has been able to preserve his aloofness of mind so as to keep his broad humanity of feeling and his sympathy for the class from which he has not drawn his clients . . ."<sup>40</sup>

Roosevelt contended that he was not seeking a judge for the Supreme Court who was "partisan" nor a "politician" in "the ordinary and low sense which we attach to the words," but he insisted that "in the higher sense, in the proper sense, he is not in my judgment fitted for the position unless he is a party man, a constructive statesman, constantly keeping in mind his adherence to the principles and policies under which this nation has been built up and in accordance with which it must go on . . ."<sup>41</sup>

Holmes was appointed and, as Roosevelt suspected, joined what Roosevelt considered a reactionary minority in the *Northern Securities* case, a decision the government won by a narrow margin. In his dissenting opinion, Holmes wrote that famous line: "Great cases like hard cases make bad law."<sup>42</sup> At first, Roosevelt barred Holmes from the White House, but he

38. C. WARREN, *THE SUPREME COURT IN U.S. HISTORY* 123 (1922).

39. *Id.* at 126. The desire to appoint Supreme Court Justices who will continue a President's policies long after the appointing President's term has expired can be seen in another historical incident. When Taft turned over the White House to Wilson in 1913, he held a news conference and he candidly admitted that he had told the judges he had appointed to the Supreme Court, "Damn you, if any of you die, I'll disown you." 2 H. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 854 (1939). It is also interesting to note that Taft stayed on as Chief Justice, despite the debilitating effects of his age, because he was concerned about President Hoover's liberal tendencies. Taft felt he had to check these tendencies and "prevent the Bolsheviks from getting control." *Id.* at 967.

40. Letter of President T. Roosevelt to Senator Lodge, 1 *SELECTIONS FROM THE CORRESPONDENCE OF THEODORE ROOSEVELT AND HENRY CABOT LODGE* 517-18 (1925), reprinted in part in F. FRANKFURTER, *MR. JUSTICE HOLMES AND THE SUPREME COURT* 21-22 (1938).

41. *Id.*

42. His dissent continued: "For great cases are called great not by reason of their real importance in shaping the law of the future but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These

later relented.<sup>43</sup>

Holmes was quite a charmer—apparently a highly attractive conversationalist. “His conversation and bearing,” wrote Morris R. Cohen, “were like rare music that lingers in one’s memory.”<sup>44</sup> He particularly preferred the company of attractive women who were also intelligent.<sup>45</sup> Holmes came from the ruling caste of New England, and the conservation of his famous father and the atmosphere of his home were scientific and literary. The cultural dominance of New England was at its height when Holmes grew up, and it was reflected often in his conversation. Although Holmes was loyal to the values of his cultural heritage, he could appreciate others. I suspect, too, that Holmes somewhat resented the fact that his father dominated the Boston scene during the first 50 years of Holmes’s life. Andrew Lang, noted for his power as a conversationalist, once insolently said to Holmes on meeting him, “‘So you are the son of the celebrated Oliver Wendell Holmes.’ ‘No,’ replied Holmes promptly, ‘He was my father.’”<sup>46</sup>

Holmes believed in a strong and healthy body. In order to get everything out of life, one had to be prepared not only mentally but physically as well. Francis Biddle tells the story that when he first reported to Holmes in 1911 to be his secretary, Holmes told him what he told all the other new secretaries: “My son, my philosophy is divided into two parts, each equally important. The first, keep your bowels open and the second, well the second is somewhat more complex and a part of your duties is to hear it during the next nine months.”<sup>47</sup>

I would now like to comment on Holmes’s legal style, his reading habits and the judicial philosophy reflected in his thinking as “The Great Dissenter.” Holmes was not only a great wit, but according to Biddle, “[t]hings he said had the rare quality of tempered irony. His words were feathered arrows, that carried to the heart of the target from a mind that searched and saw.”<sup>48</sup> In addition to law, he read books on economics, philosophy, sociology, and belles-lettres. He read Hegel and Marx many times, not because he was convinced of their worth, but because Hegel (“The Old Beast”) had such

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immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful and before which even well-settled principles of law will bend.” Northern Securities Co. v. United States, 193 U.S. 197, 400-01 (1903).

43. This episode in Holmes’s life is delightfully and sensitively related in C.D. BOWEN, *YANKEE FROM OLYMPUS* (1944).

44. *Holmes-Cohen Correspondence*, *supra* note 16, at 3.

45. I HOLMES-POLLOCK Letters xxviii-xxix (2d ed. M. Howe ed. 1961).

46. *Id.* at xxx-xxxi.

47. F. BIDDLE, *supra* note 11, at 7. Holmes thought that the process of actually living, functioning, and continuing life by eating, procreation, and rest could possibly be more important than striving for ideas and ultimates. “I wonder,” he wrote to Pollock, “if cosmically an idea is any more important than the bowels.” Biddle exclaims, “The bowels! No wonder Father Lucey called Holmes ‘an animal man’—a designation which would have mightily pleased our Judge—and added that Holmes’s concept of democracy embodied ‘a strong jungle odor.’” See F. BIDDLE, *JUSTICE HOLMES, NATURAL LAW, AND THE SUPREME COURT 47* (1960).

48. F. BIDDLE, *supra* note 11, at 1-2.

“penetrating apercus,”<sup>49</sup> that Holmes wanted to be able to state articulately “why one doesn’t believe them.”<sup>50</sup>

That “childish curiosity” of Holmes noted by Cohen, was really an intellectual curiosity. He dug deep intellectually, reading Aristotle, Marcus Aurelius, Spinoza, Tarde, James, Flaubert, Santayana, Dante, Fabre, Proust, and Anatole France. For lighter moments he enjoyed Sherlock Holmes and P.G. Wodehouse.

He corresponded with Sir Frederick Pollock for 50 years. Holmes also had dialogues with Professor Morris Raphael Cohen, Howard Laski, Felix Frankfurter, Lewis Einstein, and Dr. John C.H. Wu about the books he read and on many other matters, such as law, politics, philosophy, and personalities of the day. His letters are highly literate, but I suspect, although casual, still with a certain polish that would lead one to believe that he was writing for posterity.

Holmes had an irresistible urge for books, even those that he considered boring and that reflected views he objected to or criticized. He was concerned that by not reading them he would be missing something. He pursued these habits to his last days, studying, reading, looking for new light. One day, when Holmes was 90, a friend found him reading Plato. “Still studying at your age?” asked the friend. “I’m preparing for the final examination,” explained Holmes.<sup>51</sup> His letters were all written by hand, at home at his stand-up desk and often in court. He read the briefs of counsel in advance and analyzed them thoroughly. Hence, when they argued points he understood he would write his letters instead of concentrating on the argument. This gave him, he used to say, an undeserved reputation for attention and industry.<sup>52</sup>

In the tradition of the English Bench, Justice Holmes reached his decision in most cases after hearing oral arguments. Objecting to extensions of the one hour oral argument rule of the Supreme Court, Holmes firmly believed that a properly organized and developed appellate argument required no more than a half hour.<sup>53</sup> Chief Justice Fuller appreciated Holmes’s legal style and logic to such an extent that “whenever a new opinion by Holmes was brought to the Chief Justice, he would stop whatever he was doing and read it aloud with such exclamations as ‘Isn’t that marvelous?’ ‘Doesn’t he write superbly?’ . . .”<sup>54</sup>

Biddle noted in his Oliver Wendell Holmes Devise Lectures that “Holmes used to tell his secretaries that the only ‘prime’ authority was found first in his opinions in the Supreme Court of the United States; second, in his opinions on the Massachusetts Court; and, of much less importance, in the opinions of

49. Letters to Dr. Wu dated April 1, 1923, Aug. 26, 1926, JUSTICE HOLMES TO DR. WU, AN INTIMATE CORRESPONDENCE 10, 37 (1947).

50. This theme is repeated many times in Holmes’s letters to Pollock, Laski, Wu, and Cohen.

51. See JUSTICE HOLMES EX CATHEDRA 209 (Bander ed. 1966). Bander notes that this anecdote appeared in the Boston Globe, February 22, 1960, editorial page.

52. D. ACHESON, MORNING AND NOON 58 (1965).

53. Beck, *Justice Holmes and The Supreme Court*, 1 FED. BAR. ASS’N. J. 36, 37 (1932).

54. W. KING, *supra* note 36, at 296.

his brethren on the United States Court.”<sup>55</sup> If some other precedent had to be cited, a reference at most was enough. Quotations he considered to be padding.

Holmes wrote his opinions within a day or two after the oral argument. He was thoroughly familiar with the briefs of counsel and after analyzing them would immediately write and deliver his opinion. As a result, word spread, to the consternation of Holmes and his colleagues, that there was not sufficient review of the case on his part. He therefore changed his routine. He wrote the opinion just as quickly as before but did not deliver them until some months had gone by. This put a stop to those rumors and, as he later stated, allowed him to “acquire the reputation for mellow judgment and judicial restraint.”<sup>56</sup>

In this context, Holmes had little sympathy with judges reserving judgment after the oral argument. Writing to Pollock in 1909 he referred to the procedure of the Supreme Court that permitted petitions for rehearing and filing briefs:

I think it an abuse. I suppose it comes from the habit in some states. Latterly I have escaped except in cases where a crank was sure to ask it if the case was decided against him. At first, a good many such applications were made in my cases — the fact that the decision was written at once being regarded as evidence of inadequate consideration. Such humbugs prevail! If a man keeps a case six months it is supposed to be decided on “great consideration.” It seems to me that intensity is the only thing. A day’s impact is better than a month of deal pull.<sup>57</sup>

The language of the law is undeniably dull. Yet, lawyers can appreciate the sparkle, irony, and style that occasionally pop up in legal opinions and other legal literature. Holmes was such an exception. Cardozo, who was quite literate himself, was highly appreciative of Holmes’s literary style.

Law in the hands [of Holmes] has been philosophy, but it has been literature too. If anyone has ever been sceptical of the transfiguring power of style, let him look to these opinions. They will put scepticism to flight. How compact they are, a sentence where most of us would use a paragraph, a paragraph for a page. What a tang in their pointed phrases; what serenity in their placed depths; what a glow and a gleam when they become radiant with heat. One almost writhes in despair at the futility, too painfully apparent, of imitation or approach.<sup>58</sup>

Holmes developed his style of writing comparatively early. During his days on the Massachusetts court, he wrote many gems. For example, when

55. F. BIDDLE, *JUSTICE HOLMES, NATURAL LAW, AND THE SUPREME COURT* 66-67 (1960).

56. Cooke, *Journalists Who Make History*, 204 *ATLANTIC MONTHLY* 156 (Nov. 1959).

57. Letter dated April 4, 1909, I *HOLMES-POLLOCK LETTERS* 154 (2d ed. M. Howe ed. 1961). An interesting story on the subject of delay in judicial decision making concerns Lord Eldon, the Lord Chancellor of England in the early 19th century. Lord Eldon was guilty of unjustifiable delays, such as in the case of *Collis v. Nott*, which was argued in 1817. When in 1823 Lord Eldon was pressed for a decision in this case, it was found that “he had entirely forgotten it” and it had to be reargued. 9 *Hansard* (N.S.) Col. 745 (1823), quoted in R. MEGARRY, *A SECOND MISCELLANY-AT-LAW* 5 (1973).

58. B. Cardozo, *Mr. Justice Holmes*, 44 *HARV. L. REV.* 682, 689 (1931).

the mayor of a city was sued for dismissing a policeman because of his political views, Holmes remarked that the "petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."<sup>59</sup> Holmes also wrote, "If it is a bad rule, that is no reason for making a bad exception to it."<sup>60</sup> This one I love: "A boy who is dull at fifteen probably was dull at fourteen."<sup>61</sup>

He had a distrust for maxims and generalities. Be wary he warned: "General maxims are oftener an excuse for the want of accurate analysis than a help in determining the extent of a duty or the construction of a statute."<sup>62</sup>

The greatest danger . . . is that of being misled by ready-made generalizations, and of thinking only in phrases to which as lawyers the judges have become accustomed, instead of looking straight at things and regarding the facts in all concreteness as a jury would do.<sup>63</sup>

General propositions do not decide concrete cases. The decisions will depend on a judgment or intention more subtle than any articulate major premise.<sup>64</sup>

Writing to Wu, the young Chinese law student, Holmes objected to Wu's propensity for using long philosophical words. "The great thing," Holmes stressed, "is to have an eye for the essential. If a boy gets his fingers pinched between two inward revolving wheels, it probably will only distract attention and bore the reader to describe the machinery."<sup>65</sup> Finally he wrote, "No generalization is wholly true — not even this one."<sup>66</sup>

Note his irony and humor. Writing to Pollock with reference to a book by Vinogradoff, *Outlines of Historical Jurisprudence* (1920), which he had just read, Holmes commented: "I took another flying glimpse at your man Vinogradoff's new book. It gave me the impression of the Chinaman who ran three miles to jump over a hill — but I just looked, yawned and passed on."<sup>67</sup> The following examples show the Holmesian style, his succinctness, epigrammatic quality, and questioning skepticism.

The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified.<sup>68</sup>

59. *McAuliffe v. New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).

60. H.C. SHRIVER, *JUDICIAL OPINIONS OF OLIVER HOLMES* 288 (1940).

61. *Id.*

62. *Id.* at 286.

63. *Id.* at 289.

64. *Lochner v. New York*, 198 U.S. 45, 76 (1904).

65. Letter dated December 2, 1922, JUSTICE HOLMES TO DR. WU, AN INTIMATE CORRESPONDENCE 6 (1947). See also F. FRANKFURTER, *REMINISCES* 198 (1960). Holmes commented that many lawyers are prone to handing out generalities. "But the point that matters," said Holmes, "is whether the boy got his finger pinched." *Id.*

66. O. WISTER, *ROOSEVELT, THE STORY OF A FRIENDSHIP* 131 (1930).

67. Letter to Pollock dated Feb. 9, 1921, II *HOLMES-POLLOCK LETTERS* 63 (2d ed. M. Howe ed. 1961).

68. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917).

For the rational study of the law the black letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.<sup>69</sup>

A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.<sup>70</sup>

[Wiretapping] is such dirty business.<sup>71</sup>

The 14th Amendment does not enact Mr. Herbert Spencer's Social Statistics.<sup>72</sup>

To rest upon a formula is a slumber that, prolonged, means death.<sup>73</sup>

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.<sup>74</sup>

Professor Hart has noted that "Holmes was sometimes clearly wrong, but when this was so he was always wrong clearly."<sup>75</sup>

Although Holmes was highly influential in developing constitutional law principles pertaining to business and commerce, he was basically an economic conservative. He was different in this respect from Brandeis who wanted to shape economic forces and to build a new economic world. He hated these cases because they usually were based on "lumpy facts," and Holmes hated facts. As Biddle has noted, "one of the many contradictions of [Holmes's] personality was his fastidious disrelish for facts as such, coupled with a corresponding distrust for generalities."<sup>76</sup> In fact, he did not read newspapers, because they were full of information which bored him.<sup>77</sup>

Writing to Pollock, Holmes complained: "I never know any facts about anything and always am gravelled when your countrymen ask some informal intelligent question about our institutions or the state of politics or anything

69. O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 187 (1920).

70. *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

71. *Olmstead v. United States*, 277 U.S. 438, 470 (1928).

72. *Lochner v. New York*, 198 U.S. 45, 75 (1904).

73. O.W. HOLMES, *Ideas and Doubts*, in COLLECTED LEGAL PAPERS 306 (1920).

74. *Buck v. Bell*, 274 U.S. 200, 207 (1927). Professor Powell of Harvard read the opinion in class and then wittingly added, "Mr. Justice Butler, dissenting." See JUSTICE HOLMES, *EX CATHEDRA* 194-95 (Bander ed. 1966).

75. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

76. F. BIDDLE, *supra* note 11, at 87.

77. In a letter to Pollock, dated Aug. 27, 1921, Holmes wrote: "I am tempted to read nothing but light literature for a time, but I find it hard to do, just as I can't read the newspapers—I feel as if I were wasting time." Letter dated Aug. 27, 1921, II HOLMES-POLLOCK LETTERS 77-78 (2d ed. M. HOWE ed. 1961).

else. My intellectual furniture consists of an assortment of general propositions which grow fewer and more general as I grow older."<sup>78</sup>

But there was a great redeeming feature about Holmes's ignorance of economic principles. He did not let it affect his judicial review of legislation. He did not insist on applying his own moral theories to others. Holmes once burst out to Curtis, "about 75 years ago, I learned that I was not God. And so, when the people . . . want to do something I can't find anything in the Constitution expressly forbidding them to do, I say whether I like it or not, 'Goddamit, let 'em do it!'"<sup>79</sup>

Even though he did not agree with the economic theories advanced by the legislation, and even doubted whether they could effectively be implemented, he still supported them. This was the liberal side of Holmes, one who believed in the free exchange of ideas in the market place. What saved him was that unlike others, he recognized his own ignorance. True, he preferred ideas to facts, but he was able to look at himself objectively and recognize his weakness.

Writing to Pollock he told the following story, which is quite illustrative:

Brandeis the other day drove a harpoon into my midriff with reference to my summer occupation. He said you talk about improving your mind, you only exercise it on the subjects with which you are familiar. Why don't you try something new, study some domain of fact. Take up the textile industries in Massachusetts and after reading the reports sufficiently you can go to Lawrence and get a human notion of how it really is. I hate facts. I always say the chief end of man is to form general propositions — adding that no general proposition is worth a damn. Of course a general proposition is simply a string for the facts and I have little doubt that it would be good for my immortal soul to plunge into them, good also for the performance of my duties, but I shrink from the bore — or rather I hate to give up the chance to read this and that, that a gentleman should have read before he dies. I don't remember that I ever read Machiavelli's *Prince* — and I think of the Day of Judgment. There are a good many worse ignorances than that, that ought to be closed up.<sup>80</sup>

78. Letter dated Sept. 24, 1904, I HOLMES-POLLOCK LETTERS 118 (2d ed. M. Howe ed. (1961)).

79. CURTIS, *LIONS UNDER THE THRONE* 281 (1947). Mason gives another version in his book on Brandeis. One day a friend asked Holmes if he had ever worked out any general philosophy to guide him in the exercise of the judicial function. "Yes," he replied, "long ago I decided that I was not God. When a state came in here and wanted to build a slaughter house, I looked at the Constitution and I couldn't find anything in there that said a state couldn't build a slaughter house. I said to myself, if they want to build a slaughter house, God-dammit, let them build it!" A. MASON, *BRANDEIS, A FREE MAN'S LIFE* 572-73 (1946).

80. Letter dated May 26, 1919, II HOLMES-POLLOCK LETTERS 13-14 (2d ed. M. Howe ed. 1961). Footnote 2 on page 18 volume II reveals that Holmes did try to read the *Report on the Strike of Textile Workers in Lawrence* that summer, but he gave up. In his letter to Pollock, dated June 27, 1919, he explained his failure by relating the story of the "Catholic lady who on a fast day called for bass, then terrapin — not forthcoming — and then said, 'Bring me a mutton chop. God knows I have tried for fish.' If I am destined to lapse from facts back into ideas, God knows I have tried for the facts." Letter dated June 27, 1919, II HOLMES-POLLOCK LETTERS 17-18 (2d ed. M. Howe ed. 1961).



Because he did believe in judicial restraint and was quite sophisticated as to his own ignorance, Holmes retained his judicial objectivity, to the extent that he voted to uphold legislation of which he disapproved. He expressed his philosophy in this context in a letter to Pollock in 1910.

Of course I enforce whatever Constitutional laws Congress or anybody else sees fit to pass — and do it in good faith to the best of my ability — but I don't disguise my belief that the Sherman Act is a humbug based on economic ignorance and incompetence, and my disbelief that the Interstate Commerce Commission is a fit body to be entrusted with rate-making, even in the qualified way in which it is entrusted. The Commission naturally is always trying to extend its power and I have written some decisions limiting it (by construction of statutes only). However I am so sceptical as to our knowledge about the goodness or badness of laws that I have no practical criterion except what the crowd wants. Personally I bet that the crowd if it knew more wouldn't want what it does — but that is immaterial.<sup>81</sup>

This appears to have been the touchstone of Holmes's judicial philosophy.

I would very much like to discuss Holmes — The Dissenter. Actually, he did not dissent in so many cases. He joined in thousands of majority opinions and during his 30 years on the Supreme Court; yet only 175 of his opinions were dissenting. "In only one of those did he stand alone; all others were in concert with one or more of his conferees. During this period, in the 5,950 cases in which individual opinions were delivered, there was a total of 1,806 minority opinions, an average of 201 per Justice. Thus, Holmes in fact dissented 13% less often than that of his brother Justices."<sup>82</sup>

What is significant is the effectiveness of his dissents and how they influenced the development of American Constitutional law. But that is another story time does not permit at present.

Thus, we have the paradox of Mr. Justice Holmes, a sceptical conservative with little or no interest in social reform, yet so influential in its metamorphosis. He felt that Supreme Court Justices should not write their own economic notions into the Constitution or interfere with social experimentation.

His disciple, Mr. Justice Frankfurter, summed this up well when he wrote:

[Holmes] scrupulously treated the Constitution as a broad charter of powers for the internal clashes of society, and did not construe it as though it were a code which prescribed in detail answers for the social problems of all times. Thus, the enduring contribution of Mr. Justice Holmes to American history is his constitutional philosophy. He gave it momentum by the magic with which he expressed it.<sup>83</sup>

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81. Letter dated April 23, 1910, I Holmes-Pollock Letters 163 (2d ed. M. Howe ed. 1961).

82. Broughton, *Mr. Justice Holmes Revisited*, 2 PORTIA L.J. 177, 179 (1966).

83. F. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 28 (1938).