Justice Holmes and the Art of Biography

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BOOK REVIEW

JUSTICE HOLMES AND THE ART OF BIOGRAPHY


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The difficulty about biography is that no one sees a life as a whole except the person who lives it. The biographer therefore must make a choice—to penetrate that private reality and write a book that gives some sense of the life as it was lived, or to write some other sort of book, a commentary from the outside.

To gain a true sense of a life as it was lived is not always possible. The data may not be there; the world in which the life was lived, the context that gave it meaning, may have vanished beyond recall. But when the critical details of ordinary life can be reconstructed, there is a sensibility, almost a separate sense, that one may use to understand the subjective existence of another person. We use this sensibility to understand, almost without speech, people we care for, and so writing a life is a little like falling in love. One need not like or even admire the subject of a life, but one must be able to use this particular sensibility.

Holmes lived intensely, and seen inwardly, two strong impulses dominated his life. The first was the kind of limitless ambition that is born of violent rivalry: he wanted not to be good, but to be best. Even sexual passion was for him a mode of achievement, and his thought was fundamentally combative. He wished, intensely, to be remembered as the greatest legal thinker who had ever lived—sometimes he omitted the qualifying "legal." At times he seemed to be trying to penetrate the barriers of thought.

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itself, to get beyond language to the wordless speech of the absolute. His ambition was an act of faith: he wanted to find and describe the rational foundations that he was sure lay beneath morality and history. He had a horror of death, of dying before he had had his chance to "outreach[,] the flaming bounds of the possible."

Set against this ambition was an equally stern devotion to duty. He felt obliged to expose himself to three years of infantry combat in the Civil War, and what was perhaps more difficult, to the humbling duties of a middle class Bostonian. He was obliged to earn his living, and choosing law as the only suitable profession, Holmes found himself enclosed by a quotidian routine hostile to abstract thought. A lawyer's and a judge's work were anonymous and soon forgotten. His fights were on behalf of others. To Holmes's great credit he extracted from this unpromising career in a provincial town the materials of philosophy—of original, systematic thought of a high order. By a relentless force of application, he managed to impress himself upon the history of thought through the very intensity of his self-effacement. Holmes is remembered as the champion of judicial self-restraint, as a judge whose dispassionate objectivity was impersonal and almost inhuman. This paradoxical reconciliation of ambition and duty rested on a carefully constructed and deeply felt philosophy, a complete and highly personal system of metaphysics.

Liva Baker has not chosen to write a life of this sort. She has instead written a long and interesting commentary on the events and circumstances of Holmes's career as a judge, many of which she herself has uncovered. Such a book must have a thesis, and Baker's is given in her title: Holmes was the representative of a class.

I. Holmes in the Framework of History

Baker has written other books on legal history—a youthful biography of Felix Frankfurter and a mature and admirable book

on the *Miranda* case. Accordingly, although she is not a lawyer, she is no stranger to the law, and her readings of Holmes's opinions are often illuminating. She writes clearly and well, and her images are sometimes striking:

An imaginary photograph album [of the Civil War] in which he had pasted the mental pictures of fallen comrades, the smoke of guns, men up to their knees in mud, bloodstained blankets . . . seemed to have lain open across his lap nearly all the time for the rest of his life.

But there are very long stretches of clumsy exposition, as if Baker had not always got her ideas clear before writing them down. The language is often careless. Sometimes Baker is led into wild statements by a weakness for strong effects. She says that

[a]long with Jackson genes, Holmes as judge had inherited the legal traditions of Grandfather Jackson's early-nineteenth-century court. . . . [T]he memories of that long-ago bench were as much a part of the younger man's judicial baggage as were the heavy leather-bound volumes that had belonged to his grandfather.

I am not sure what this means—surely judicial traditions are not passed on in the germ plasm?—except that Baker wants us to believe that Holmes was somehow influenced by his grandfather's work as a judge. (Baker never tells us anything about that work, by the way.) I do not believe this is true, and Baker gives no evidence for it. So far as I know, Holmes politely avoided the subject of his grandfather's writings, but he did often express a general contempt for the primitive reasonings of the Massachusetts judges of the early nineteenth century.

Baker says that Holmes "examined the briefs and records of a case for the first time during oral argument," but I do not think she means to be understood literally. She knows too much about law and courts to think that this could be possible; but what she did mean is not clear.

Baker's account is not primarily a literary effort, however, and to dwell on the style is perhaps unfair. Baker has written a

8. BAKER, supra note 3, at 154.
9. Id. at 280.
10. See, e.g., MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 16 (1963) (describing Holmes's criticism of Chancellor James Kent's *Commentaries*).
11. BAKER, supra note 3, at 382.
treatise. About half of The Justice from Beacon Hill is devoted to Holmes's years on the Court, and in a certain sense the whole book is a commentary on his Supreme Court opinions. As the opening chapter makes clear, she set herself the task of understanding and explaining why certain of those opinions have seemed politically "liberal," while Holmes's thought in general, and most of his opinions, were distinctly conservative. Baker concluded that Holmes's conservative philosophy was a product of class prejudice, while Holmes's seemingly liberal opinions, to Baker the valuable part of his work, she ascribed to healthy if erratic rebellions against his upbringing:

It is not possible to reduce [Holmes's] work to any one system. . . . An unarticulated but nonetheless real ambivalence about his heritage stalked Holmes lifelong. His natural inclination was to look at the world from the perspective of a typical nineteenth-century provincial Bostonian, to apply the standards of the genteel tradition. . . . Emotionally, he clung to the introverted world his forebears had created; intellectually, he was questing, catholic, adventurous.

Holmes, I think, would have put it differently. He freed himself from his provincial origins early on. He did not think Boston, even the Boston of Beacon Hill, was especially genteel, and he looked elsewhere for his models, notably to London and to the literature of chivalry. When he wrote a poem about his ideal of himself, the image he chose was Sir Walter Raleigh, not Governor Bradstreet. He would have been saddened to think that his life's intellectual work was taken for no more than a tolerant willingness to set aside the prejudices of Beacon Hill and to let the trade unions have their turn, as Baker seems to believe when she writes that "[Holmes's] concept of law was based on the principle that economic, political, and social premises—all life—were in a constant state of flux and required matching changes in the law, which was an expression of that life."

This is not much to show for an ambition to be the greatest legal thinker ever to have lived. I suppose the subject of a commentary after all may not be an accurate judge of his own

12. Id. at 9-11.
13. Id. at 11-16.
15. Id.
work. He may be unconscious of his own motives, he may be rationalizing or lying to himself, or he may be the victim of a "false consciousness." The commentator fits her subject into a framework of history of which the subject himself may not have been aware, and claims a superior wisdom.

Baker's framework is the rise of the New Deal. The English have "Whig history," an unflattering phrase that describes winner's history. Whig history is the tale of English liberty growing steadily with the power of Parliament. In this country, we have no similarly understood phrase, but we have our own equivalent pious history. It is the tale of the rise of the federal government as the defender of civil rights, what we might call "New Deal history."

Of course, it is easy to make fun of this sort of pietistic history, but there is a good deal of truth in it. The federal government can rise above regional enthusiasms, and Baker shows very well how Holmes's detachment, his disciplined disregard of consequences, occasionally made him the champion of civil rights.17

The thing can be overdone, however. Baker describes Theodore Roosevelt as Franklin's cousin, an enthusiastic trust-buster, a sort of early New Dealer.18 The crusty born-again federalist, John Marshall Harlan, becomes "a premature New Dealer."19 What is more worrisome is that there are only two parts in the play. Every character must be on either the federal side—that is, a thorough democrat, a champion of the little guy—or a plutocrat.

Baker insistently fits everyone and everything into this mold, occasionally with silly results. The first two hundred pages of the book are a long essay demonstrating that Holmes himself was a "Brahmin," by which Baker means a member of the supposed hereditary ruling class of Boston who lived on Beacon Hill. The Justice's father, Dr. Holmes, put the term "Brahmin" into current use, and meant by it not a ruling class, but rather a class of genteel intellectuals, a priestly class.20 Baker, however, uses the word to mean a kind of economic oligarchy, whose wealth and power had passed down from the first English settlers.

17. Id. at 387-88.
18. Id.
19. Id. at 398.
20. OLIVER WENDELL HOLMES, Bread and Newspapers, in 8 THE COLLECTED WORKS OF OLIVER WENDELL HOLMES 9 (Boston, Houghton Mifflin, 1892) (complaining that critics incorrectly think a "Brahmin" is an aristocrat).
This business of a hereditary class on Beacon Hill sounds a little odd today; on this topic alone Baker seems to have absorbed the subjective view of the Victorians. As Baker herself shows, Holmes actually came from a family of modest means.\footnote{Baker, supra note 3, at 48.} His mother’s father, Charles Jackson, had inherited wealth from the old seacoast trading towns destroyed by the War of 1812; but none of this wealth, except the modest income from a trust, ever reached Holmes’s family.\footnote{Id.}

Largely through the royalties on his father’s books, and a saving habit, Holmes died a rich man; but he was not raised in luxury. Holmes’s father worked for a living all his life, first as a physician, and then as a writer and lecturer.\footnote{Id. at 15.} His father was a minister, and his father’s family, at least on the paternal side, were Connecticut farmers, descended from Scottish dissenters.\footnote{Id. at 24-26.} The Wendells were Dutch merchants and seamen; a great grandfather was prosperous, but the fortune did not survive him. Many forebears were less distinguished, by Boston’s standards. A grandmother was Irish, and a family tradition, which Justice Holmes liked to repeat to jog his snottier friends, maintained that the Wendells were originally Dutch Jews.\footnote{Novick, supra note 2, at 318.} The “Oliver” commemorated by Holmes’s baptismal name was a great-great-grandmother, who in turn was connected by marriage to descendants of the Bradstreets.\footnote{Baker, supra note 3, at 24-25.} The story of unbroken, distinguished Brahmin descent from English gentry was a fantasy that Dr. Holmes had fathered upon his fictional alter ego, the Autocrat of the Breakfast Table.\footnote{See Oliver Wendell Holmes, The Autocrat of the Breakfast Table: Every Man His Own Boswell 23-26 (Boston, Tinker & Fields, 1866).}

This fantasy reached the status of myth in Catherine Drinker Bowen’s Yankee from Olympus.\footnote{Catherine Drinker Bowen, Yankee from Olympus: Justice Holmes and the Family (1944).} Written in wartime and published in 1944, Bowen’s fictionalized story of the Holmes family was her contribution to the war effort. It turned the Holmeses into English people and made Justice Holmes purely and simply an expression of his genteel Volk. Baker entered wholeheartedly into this myth, even as she recited the facts of Holmes’s Scots-
Irish and Dutch belongings. Her enthusiastic adoption of Victorian language, her repeated references to good or bad "blood," occasionally make one squirm: "The royal blue blood not only of Olivers, Wendells, and Holmeses flowed through his veins, but also that of Quincys, Cabots, Jacksons, Lees, Eliots, and Bradstreets. . . . [Sarah Wendell's] marriage to Abiel Holmes amalgamated the blood of the three families and guaranteed acceptance of the Connecticut Holmeses into Boston's aristocracy."29

Poor old Abiel, Holmes's paternal grandfather, a rather mild and tolerant man with a small church in then still rural Cambridge, whose tolerance got him in trouble with both sides of his divided congregation,30 becomes a sort of Calvinist oligarch.

In this odd way Baker gives New England a hereditary ruling class and enrolls the Holmeses in it.

Wealth—commercial, cultural, and charitable—was consolidated in the same hands, or, as one commentator put it, Boston institutions were a self-perpetuating series of "interlocking directorates." . . .

These Bostonians were as orthodox as they were clannish. In the seventeenth century, they had accused dissenters of witchcraft and had sent Roger Williams and his Quakers packing. They had regarded the War of 1812 as an inconvenient interference with local shipping. . . . [They defended slavery and they] supported not only as sound economics but also as sound morals the twelve-hour day for workers in the textile mills.31

There are only two classes in Baker's scheme, the rich and the poor, which makes the analysis much simpler. When one draws with such broad strokes, the same "they" can be guilty of every sin, from the witchcraft trials to the Satanic Mills of Lowell. The good guys, of course, are the poor, the more recent immigrants, and all oppressed minorities—who also are lumped together in a single class.

The need to put all the good guys in one camp and the bad guys in another leads to some absurdities. Charles Jackson's comfortable three-story house is called a "mansion."32 A photograph of Holmes and Brandeis on the steps of the capitol is

29. BAKER, supra note 3, at 15, 27.
30. Id. at 26.
31. Id. at 23.
32. Id. (fourth page of photographs).
captioned, "Holmes the *Mayflower* aristocrat and Brandeis the son of immigrant Jews." Holmes as we have seen was the son of farmers and modest professionals far more than of inherited wealth. Brandeis's parents, on the other hand, indeed were Jewish immigrants, but they were the sort of immigrants who traveled with servants and a grand piano. Holmes assumed aristocratic values, and Brandeis spoke for the little guy; but both men are diminished by the odd implication that their views were simply class prejudices.

Every now and then Baker admits that there is a middle class, even that there was an "intellectual" as well as mercantile Boston, and that her own data put Holmes into this middle reach, this complex and inconsistent majority. But she ignores her own data and clings to the Olympian myth.

It is easy to see how she and others have been misled. Holmes was indeed an aristocrat, but an aristocrat of a very American kind; he was a self-made aristocrat. Like his good friend Henry James, he adopted a European standard, and without abandoning loyalty to his middle-class origins, he became a gentleman. But to tell this story, Holmes's own story, one would have to abandon the whole apparatus of class conflict and the march of history into a shining Progressive future.

II. The Data

Baker has read widely in primary sources and makes good use of them. She seems to have read thousands of Holmes's manuscript letters and all of his more than two thousand signed judicial opinions. She gives excellent, if usually too brief, quotations from hundreds of these documents.

But the account of Holmes's life that Baker gives is rarely surprising; we seem to have read it all before. This is not because she is writing a commentary; Lytton Strachey, who might be credited with inventing this modern form of biography, was nothing if not surprising. No one can think of Florence Nightingale, Cardinal Manning, or Queen Victoria in quite the same way after reading Strachey. But Baker's Holmes does not surprise. She

33. *Id.* (sixteenth page of photographs).
34. See, e.g., *id.* at 57-58.
35. See, e.g., *id.* at 48.
36. See *Lytton Strachey, Queen Victoria* (1921); *Lytton Strachey, Eminent Victorians* (1918).
gives us the Brahmin myth from *The Autocrat of the Breakfast Table* and *Yankee from Olympus*—Beacon Hill and all that. Baker also gives us a familiar Civil War. After three years in combat, Baker solemnly tells us, Holmes was so traumatized that ever after his emotions were deadened; he lacked real feeling and viewed other human beings coldly. This is a thesis developed in some detail by Yosal Rogat, Saul Touster, and Hiller Zobel over the past thirty years, who used it to explain what they thought was a pathological lack of compassion in Holmes’s opinions.

After the war, Holmes struggled for six years to form an original philosophy from the materials of Boston law practice; this work can be found in a series of anonymous articles written for the *American Law Review* and incorporated in his first synoptic work on the common law, his edition of Kent’s *Commentaries*. Baker says almost nothing about this period, important as it was, perhaps because almost nothing has been written about it before.

Holmes married Fanny Dixwell in 1872, and while Fanny thereafter subordinated herself to Holmes’s career, Holmes for his part gave up the life of scholarship that he had hoped to pursue, and entered the commercial practice of law. Baker has little to say about any of this, and very little to say about Fanny. *The Common Law* was written in the years of law practice, rather than the years of independent scholarship, which Holmes later came to think was an advantage, but Baker does not quite catch this point.

Holmes was freed from commercial practice by a long-sought appointment to the Supreme Judicial Court, and Baker is generally good on his years as a Massachusetts judge. She has read the opinions, and while she restricts herself once again to topics that others have written on before, she marshalls her data effectively. As she shows, Holmes continued to pursue his quasi-

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42. BAKER, *supra* note 3, at 223, 231.
scientific investigations of the common law, writing his results into the law of Massachusetts; and his Olympian detachment began to earn him a reputation as a dangerous man.\textsuperscript{44}

The bulk of Baker's book, however, is devoted to Holmes's Washington years. He was appointed to the Supreme Court in 1902, when he was sixty-one years old; and so, at an age when many are thinking of retirement, he and Fanny moved to Washington and began a thirty-year career. Baker tells the story of these years well.\textsuperscript{46} She knows Washington and the Supreme Court intimately; and the mass of detail collected in this portion of the book is useful for anyone who wants to understand the constitutional law of the first half of the twentieth century. But here again, one is—I was—disappointed. The cases are familiar ones, intelligently collected by Max Lerner fifty years ago,\textsuperscript{46} and despite the wealth of detail, I had the sense that little was new.

She may have been right to follow Lerner's selection of cases—it would be difficult to improve upon. But Lerner and the law review commentators who followed him have not studied Holmes's unpublished papers as Baker has, and so it is really disappointing and surprising to find Baker limiting herself to what others have said.

The prime example, perhaps, is Holmes's First Amendment opinions, to which Baker quite properly devotes the larger part of two chapters.\textsuperscript{47} These are certainly the most important of Holmes's opinions, as expressions of his mature constitutional jurisprudence and in their impact on modern law. Yet there is hardly a word in Baker's account that is not based on previously published material; indeed, with little change she gives Gerald Gunther's well known history,\textsuperscript{48} with some additions by later commentators.

There were two sets of Holmes's opinions on freedom of speech. In a series of opinions written for a unanimous Court in the spring of 1919, Holmes upheld criminal convictions of a group of Socialists who had spoken or written against the draft. The first of these opinions, \textit{Schenck v. United States},\textsuperscript{49} stated the famous

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\textsuperscript{44} See, e.g., \textit{Baker, supra} note 3, at 335 (describing the apprehension of “Boston gentlemen” at Holmes's decisions in labor disputes).
\textsuperscript{45} Id. at 339-635.
\textsuperscript{46} \textit{Max Lerner, The Mind and Faith of Justice Holmes} (1943).
\textsuperscript{47} \textit{Baker, supra} note 3, at 511-47.
\textsuperscript{49} 249 U.S. 47 (1919).
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doctrine that speech may be punished when it poses a "clear and present danger," the First Amendment notwithstanding. In a second group of cases, beginning with Abrams v. United States, in the fall of 1919, the Court again affirmed convictions of wartime dissidents, but Holmes dissented in these cases, writing a series of powerful dissenting opinions (in which Brandeis alone concurred) that are now often cited as authoritative precedent.

The two sets of opinions have a markedly different quality and spirit. Schenck is ritually cited by prosecutors, while Abrams is the most eloquent statement of the principle of free speech in American jurisprudence.

Commentators have had some trouble reconciling the two sets of opinions, and in recent years a "revisionist" account has grown popular. Holmes, in this view, did not feel very strongly about freedom of speech and wrote Schenck without much reflection. In the summer of 1919, after Schenck was announced, the argument goes, some young friends, notably Judge Learned Hand, persuaded him to change his position. Professor Gerald Gunther has been the leading advocate of this view, which Baker repeats. She adds some embellishments, but only those that other commentators have suggested: for instance, she suggests Brandeis helped change Holmes's mind, a theory that is oddly reminiscent of the gossip of the day that Holmes was in thrall to Brandeis's Hebraic wiles.

Gunther's account has the advantage of squaring with Baker's overall thesis, and vice versa. The revisionist version gives us an initially unreflective, conservative Holmes, who eventually rises a little above himself, with some help from his Progressive friends.

This is not the place to review the huge literature on Holmes's First Amendment opinions. Baker gives the consensus view. But, surely it is surprising, indeed almost incredible, that a judge of Holmes's experience, who had already written a series of opinions for a unanimous Court, should change his mind about a fundamental question after casual conversations with men forty years his junior.

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50. Id. at 52.
51. 250 U.S. 616 (1919).
52. See Gunther, supra note 48.
54. Id. at 522, 526-27.
Holmes already had complained about such misunderstandings in his lifetime, and in private letters (which Baker does not quote), he strenuously denied them. As evidence that his views had not changed between Schenck and Abrams, Holmes referred to an unpublished dissent that he had written before any of the other cases were decided, in which he spoke as strongly for freedom of speech as he ever did.5

What is striking about Baker's account is that, although she adds some new quotations from Learned Hand's papers,6 and some details she attributes to a personal communication from Gerald Gunther, who is Hand's biographer,7 on this topic she seems not to have looked into Holmes's papers at all. She does not refer to his letters of this time, and she certainly does not refer to the suppressed dissent.

As it happens, however, Holmes kept a copy of the dissent, with notes showing the circumstances. The case was Baltzer v. United States.8 The defendant had been convicted of attempting to obstruct the draft by writing letters to public officials, and evidently the full Court had voted to affirm.9 On December 3, 1918, several weeks before Schenck was argued, Holmes circulated a memorandum to the other Justices which he proposed to publish as a dissent:

> Real obstructions of the law, giving real aid and comfort to the enemy, I should have been glad to see punished more summarily and severely than they sometimes were. But I think that our intention to put out all our powers in aid of success in war should not hurry us into intolerance of opinions and speech that could not be imagined to do harm, although opposed to our own. It is better for those who have unquestioned and almost unlimited power in their hands to err on the side of freedom. We have enjoyed so much freedom for so long that perhaps we are in danger of forgetting that the bill of rights which cost so much blood to establish still is worth fighting for, and that no tittle of it should be abridged.10

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55. Novick, supra note 2, at 474 (citing Letter from Oliver Wendell Holmes to Alice Stopford Green (March 26, 1919) (on file at Holmes Papers, Harvard Law School Library)).
56. See, e.g., Baker, supra note 3, at 739 (citing letter from Learned Hand to Oliver Wendell Holmes (June 22, 1918) (on file at Hand Papers, Harvard Law School Library)).
57. Id. (citing Letter from Gerald Gunther to Liva Baker (Aug. 21, 1989)).
58. 248 U.S. 593 (1918) (order reversing and remanding the case on motion of the Solicitor General).
60. Oliver Wendell Holmes, Jr., Papers, Harvard Law School Library. The full text of this dissent will be published in Novick, supra note 59.
Holmes's dissent was so disturbing in its attack on the majority, at a time when they feared growing civil unrest, that Chief Justice Edward Douglass White asked the Court to delay issuing any decision; and the Justice Department, apparently having learned of the dissent—perhaps from the Chief Justice or Brandeis, who was close to President Wilson—confessed error and withdrew. The following month, White assigned the opinion in Schenck to Holmes, in the hope of securing a unanimous Court, albeit a more moderate one.

Nothing in the Baltzer dissent is inconsistent with Holmes's opinion in Schenck, but it certainly casts doubt on Gunther's revisionist story. Holmes's strongly held views on the First Amendment had prompted him to write a dramatic dissent well before the Schenck cases were argued, and Holmes, by the strength of his views, moved the Court a long way toward his own position in Schenck—a position he had first stated in Baltzer, and then restated so passionately in Abrams, when the Court again went farther than he was willing to go.

There are other difficulties, from a biographer's point of view, with the Gunther version. What is important here, however, is not the correctness of the story Baker tells but what seems to me a characteristic failing in her book, and perhaps of her method generally. Baker has not really based her account on the primary data—Holmes's letters and opinions—but on apparently authoritative accounts in the law reviews.

Baker is highly respectful of authority, and there is hardly a Holmes chestnut that does not get into her pages, so long as it has been sanctified by print. Alexander Woolcott's amusing stories are certainly made up—by him or by his apparent source Harold Laski. Woolcott never knew the Holmeses, but he quotes verbatim conversations between them on intimate topics. Baker quotes such stories without comment. Laski, who was a friend of Holmes, was also a famous romancer, and he too made up stories about Holmes that Baker uses freely.

Most of the anecdotes are harmless and entertaining—like Laski's story that after Holmes's nationally broadcast radio ad-

61. See Baltzer, 248 U.S. 593; Novick, supra note 59.
62. See Novick, supra note 2, at 474 (citing Letter from Oliver Wendell Holmes to Alice Stopford Green, supra note 55).
64. Baker, supra note 3, at 136, 151.
65. Id. at 133.
dress on his ninetieth birthday, he said (to Laski alone, when no one else was present), "I wish that my father could have listened tonight for only two or three minutes. Then I could have thumbed my nose at him."\(^6\)

Baker repeats the silly rumor that Holmes was impotent,\(^6\) a whisper we had all heard but to which no scholar had attended before. Sexual gossip seems to surround all prominent people. The source of this particular rumor, John T. Morse, told other remarkably bitter and improbable tales, often gingered up with the most extraordinary antisemitism, only after Holmes was dead; but Baker, quoting Morse, ruminates on the unconfirmed rumor for pages.\(^6\) She does not evaluate the source, nor does she really look at the evidence. Quite aside from Holmes's perfectly ordinary, if not always admirable, behavior toward women, there are his wife Fanny's surviving letters. Fanny expressed intense jealousy of Holmes's jaunts to New York to see other women, and reminded Holmes that he had a wife "once a week" at home in Boston.\(^6\) This cannot really be misunderstood.

Baker has pegged Holmes as a rather cool and even pathologically detached character, so she ignores contrary evidence or fails to ask questions when she should. She seems not to be aware that Holmes and Fanny raised an orphaned niece, Dorothy Upham, from childhood.\(^7\) In several surviving letters, Holmes talked about the apartment he and Fanny had built for her in their Washington house,\(^7\) and he and Fanny talked about Dorothy's education, marriage, and childbirth; so it is hard to see why Baker missed this relationship.

Baker seems not to be aware that Fanny herself came down with a serious chronic illness, rheumatic fever, shortly after her marriage, and was physically ill for years thereafter, so that Holmes spent much of his adult life tied by affection and duty to a semi-invalid. Letters referring to this illness were first published in 1989,\(^7\) two years before Baker's book appeared.

Nor does Baker miss only evidence of emotional warmth and health. She also fails to note bleak, sometimes appalling, evidence.

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66. Id. at 6.
67. Id. at 228-30.
68. Id.
69. NOVICK, supra note 2, at 264.
70. Letter from Oliver Wendell Holmes to Clara Stevens (March 6, 1908) (on file at Holmes Papers, Harvard Law School Library).
71. Id.
72. See NOVICK, supra note 2, at 133.
Previous biographers have foundered on the difficulty of coming to terms with or even making any sense of Holmes's blackest moods. He seems to have believed in a particularly brutal sort of Malthusianism. Holmes opposed any private or government efforts to alleviate the lot of the poor and frequently remarked that the discoveries of “scientific” anthropology suggested to him that capital punishment should be employed more widely.73 Relentlessly logical, he often repeated his view that when science had advanced far enough it would be possible to execute—instantly and painlessly—infants with undesirable traits.74

Not just the highlights, therefore, but also the shadows are missing from Baker's book. Her Holmes is a rather mild bird; a stodgy Beacon Hill intellectual, with an independent streak, interesting but not remarkable.

Baker seems ill at ease when required to make a judgment of her own, based on the evidence, and nearly always ends by deferring to authority. She does not look for contrary evidence and seems uncomfortable when she finds it. The Holmes she presents is the Holmes familiar to readers of the law reviews.

A commentary may be a valuable addition to our literature. The dense and compact masses of life as it is lived are hard to handle. They can be dissected at leisure in commentaries, and all sorts of lessons may be learned from the skeletons and stomach contents. But one must begin with data, with the facts of the life itself. A commentary in the air, so to speak, is a dangerous thing, for it misleads. It is filled with citations and quotations of living voices, but one is hearing only the echoes of a distant lecture room.

III. Holmes's Reputation

I should think that the first topic for a commentary would be the question of Holmes's remarkable and growing fame. On what, exactly, is it based?

His reputation as judge and scholar is unique. A recent study showed that more than fifty years after his death, law reviews still mentioned Holmes more than any other judge (except living Supreme Court Justices).75 References to his name show only a

73. See Novick, supra note 4.
74. Id.
75. Richard A. Posner, Cardozo: A Study in Reputation 76 (1990). Table I shows the number of times judges' names are mentioned in law reviews in the Lexis database.
part of Holmes’s presence. Holmes’s opinions have entered not just legal literature but the fabric of legal language. A search in April, 1992, found the phrase “clear and present danger” in nearly nine hundred opinions in the federal courts alone since 1919.76 Holmes’s images, of the “marketplace of ideas,”77 of no “limit but the sky,”78 of “shouting ‘fire!’ in a theater,”79 and of the “penumbra” cast by provisions of the Constitution,80 are all equally pervasive.81

One of the oddities of Baker’s biography is that it does not give us any hint of why this should be so. She finds it remarkable in a man of his class to have been tolerant of radical views, and so it was; but surely that does not account for his impact on lawyers, on judges, and on the law. Holmes’s ideas on constitutional law were very similar to Chief Justice Melville Fuller’s; indeed, that is one of the reasons Fuller assigned so many opinions to Holmes. But Fuller, although he was Chief Justice, is all but forgotten, while Holmes’s reputation continues to grow.

The mystery is greater because Holmes’s continuing reputation does not depend on the high regard of academic professionals, the law review writers who might be assumed to value his openness of mind. Frequent citations of his name by law professors do not necessarily indicate a high regard. Although professors praised Holmes during his lifetime, at least since the 1940’s, many of the articles on Holmes were attacks on his reputation, and for at least the last twenty years more law review articles have been negative than positive. One reason may be that Holmes did not cultivate the professors, and, except for a rare mention of his friend John Chipman Gray, he did not cite their articles in his opinions as Brandeis and Cardozo did. When the details of his life began to appear in the 1940’s, it quickly became known

between 1982 and 1989. Id. Holmes is listed third, after Chief Justice Rehnquist and Justice Brennan, then just completing his career. (If Posner had included his own name in the rankings, however, his name would have appeared above Holmes’s.) Judge Posner makes various adjustments in Tables II and III to take account of names that are also common words (Black) or otherwise used (Brandeis University), that do not seem relevant to the first three names on the list, but which he applied to all the names. Id. at 76-77. On all three lists, Holmes is in the first half dozen and is still ranked with the living.

77. See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
81. They also have their own subliterature of commentary. See, e.g., Burr Henly, “Penumbra”: The Roots of a Legal Metaphor, 15 HASTINGS CONST. L.Q. 81 (1987).
that he had resigned a professorship at Harvard after only half a term, without stopping to say goodbye, that he had advised Felix Frankfurter to resign from teaching in favor of a judgeship, and that in public addresses he had referred contemptuously to professors who fostered intellectual ability "at the expense of their total life." 23 "But after all the place for a man who is complete in all his powers is in the fight. The professor, the man of letters, gives up one-half of life that his protected talent may grow and flower in peace." 23

This was not calculated to endear Holmes to the gatekeepers of reputation. Furthermore, his conservative political views have long been out of fashion in the academy, and his most important opinions, those on freedom of speech, have been offensive to many professors since the 1960's, as they did not give a clearly favored position to expressive behavior. Law students today, in their three years of law school, read only two or three of his opinions (and perhaps an excerpt from The Common Law in torts class), and, except for Holmes's dissent in Lochner v. New York, 24 these are unfavorably contrasted with opinions by other judges. His essays and addresses have long been out of print.

Yet Holmes's name is better known to the general public than, I would venture, that of any other judge. His face adorns a postage stamp, and his reputation is very high among practicing lawyers and judges. For the American lawyer, "he is the beau ideal, and the lawyer quotes his aphorisms as the literate layman quotes Hamlet." 25 One cannot read very far in any area of law without encountering Holmes or his writings. Even his severe critics count him as the single most influential legal writer, 26 and rate The Common Law as "the most important book on law ever written by an American." 27 His admirers called him the greatest judge in the English-speaking world. 28 His stature shows no signs

82. OLIVER WENDELL HOLMES, George Otis Shattuck, in SPEECHES 70, 73 (1913).
83. Oliver Wendell Holmes, Law in Science and Science in Law, 12 HARV. L. REV. 443, 452 (1899).
84. 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).
86. "Holmes's name is uniquely weighty. To describe his commanding stature and influence apparently requires language both oracular and portentous." Rogat, supra note 85, at 4-5.
88. See, e.g., ALEXANDER M. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS
of lessening and evidently does not depend on scholarly appraisal.

It is a popular reputation, and so one must account for this Anglicized man of elitist tastes and inaccessible thoughts having become America's "first citizen," a major public figure, rivaled in his sphere only by Chief Justice John Marshall. Holmes held no position of power and worked no great changes in American institutions. Alone among American national heroes, he is celebrated for his intellectual achievements.

Holmes's extrajudicial writings plainly have very little to do with his modern reputation. *The Common Law*, because of the obscurity of its argument, was nearly forgotten in his lifetime, and would be entirely forgotten now, I venture to say—the overheated praise and blame that Holmes seems to prompt notwithstanding—if it were not for his celebrity as a judge. The book itself now has little reputation of its own, except as a seminal work in the law of torts.

Nor is Holmes's work on the Massachusetts Supreme Judicial Court very well known. The obscurity of his opinions in his first twenty years as a judge is partly owing to the narrowness of questions dealt with in a state court, and partly to the difficulty of retrieving, by author, state court opinions published before 1890. But Holmes had not yet hit his stride in those years—most of the opinions we now quote, remarkably, were written after Holmes passed his seventieth year. His careful adherence to precedent, his reluctance to innovate, deprived most of Holmes's Massachusetts opinions of anything very distinctive, except a highly individual style of expression; only when one follows the line of his thought through a sequence of cases can one see his ideas at work. He did not, like Cardozo or Hand, write "leading cases."

Nor was he a public man, outside his work. He did not usually give interviews, and after he joined the Supreme Court, with

241 (1957); cf. Benjamin Cardozo, *Mr. Justice Holmes*, 44 Harv. L. Rev. 682, 691 (1931) ("the great overlord of the law and its philosophy"). A page of such effusions was collected by Yosal Rogat in Rogat, supra note 85, at 4 n.4 (such as "he is the summit of hundreds of years of civilization, the inspiration of ages yet to come").

89. From an anonymous sketch of Holmes on his retirement in 1932, reprinted in *Vanity Fair: Selections from America's Most Memorable Magazine* (Cleveland Amory & Frederic Bradlee eds., 1960); see also K.N. Llewellyn, *Holmes*, 35 Colum. L. Rev. 485, 490 (1935) ("America's most distinguished citizen").

90. The Lexis and Westlaw state databases begin with cases decided in 1890. West Publishing Company's *Northeastern Reporter* begins with cases decided in 1885.
rare exceptions, he refused all invitations to speak or write outside the courtroom. He did not cultivate reporters or give anonymous assessments of the work of the Court, as some of his colleagues have always done. He declined all but one invitation to speak on the radio.

We therefore must turn to Holmes's work as a Justice of the Supreme Court of the United States to understand his celebrity and his place in history. His reputation—and the fact that many of his later opinions are still important in widely scattered areas of law—plainly owes a great deal to chance. He was appointed to the Supreme Court on the strength of a personal acquaintance and an affinity of political views with Theodore Roosevelt. The assassination of President McKinley, which made Roosevelt president just as the "Massachusetts" seat on the Court fell vacant, was critical. Even the timing was fortunate. By Roosevelt's second term, Holmes would have been too old.

Holmes's success on the Court also owes something to the good luck of his longevity and his steadying presence there during the turmoil of the 1920's. Baker rightly credits Holmes's detachment as an important factor at a time when the Court had become strongly partisan. His success also owes something to his knack for getting along with Chief Justices and his immense appetite for work, which together account for an unusually large number of cases having been assigned to him to write. He wrote 873 opinions for the Court, more than any other Justice, even including those with longer tenures. This is a remarkable accomplishment. Modern Justices, with staffs of four clerks each, write separate concurring or dissenting opinions in nearly all major cases but do not write so many opinions for themselves as Holmes did for the Court majority. He has been called the "workhorse" of the Court, but there is something more to his

91. BAKER, supra note 3, at 7.
92. Holmes's 90th birthday radio address has been reprinted many times. See, e.g., id. at 5-6.
93. Id. at 345-49.
94. Id. at 633.
95. See ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES 101 (1978). Holmes also published 30 concurring opinions and 72 dissents while on the Supreme Court, id. at 144, and wrote many of the per curiam opinions toward the end of Melville Fuller's term as Chief Justice in 1909 to 1910, and again when Holmes himself was acting Chief in 1929.
reputation than good luck, hard work, and the opportunity to write a lot of opinions.

The quality of his work has several components. First was the principal job that he did, which was to decide cases; second was the ancillary task, to write opinions. Both Holmes's decisions and the opinions he wrote to explain them had special qualities which helped to account for the force of their impact. Holmes's decisions were consistent with each other and with a coherent body of jurisprudence and were beautifully expressed in his opinions. But there was something further. Holmes made himself an embodiment of an ideal, and this ideal of the judge, although a limited one, was widely shared and deeply felt. Holmes projected it through the resistant medium of judicial opinions and across generations. This ideal, a vivid image of aristocratic American virtue, is still what draws us to him.

IV. THE QUALITY OF HOLMES'S DECISIONS

It is difficult to get at the essence of a judge's work—his decisions. A vote is opaque. Only a pattern of votes discloses anything individual, and the pattern is hard to see without a thorough knowledge, not only of the cases that were decided, but of the aspects of the cases that were important to the judges. But Holmes taught us that it was the judge's decisions, and not the reasons he gave, that mattered. And so one must somehow evaluate Holmes's judgments, more than two thousand in all.

This commentary is not the place to do that, but some examples may be helpful. Holmes's decisions on freedom of speech are among his best known and most important and have a number of lessons to teach us concerning his work as a judge.

Let us begin at a little distance. Holmes wrote only a half-dozen opinions on copyright law, and this area of law has undergone substantial changes since his time, yet judges still cite several of his decisions. His opinion for the Court in *Bleistein v. Donaldson Lithographing Co.* still defines the modicum of "originality" required for copyright. Holmes's prescient, concur-

98. 188 U.S. 239 (1903).
ring opinion in *White-Smith Music Publishing Co. v. Apollo Co.* is more remarkable. The case concerned the question whether punched-paper music rolls for player pianos were infringing "copies" of a musical composition. Seeing the case in its fundamental aspect, Holmes judged that copyright protection should extend to copies in any medium, even when the copy was made by new technology and was not directly comprehensible to human readers. This opinion provided important arguments for securing copyright protection for electronic databases and computer programs in the 1970's and accordingly is still good law.

In *Bleistein*, Holmes wrote for a divided Court, while in *White-Smith* he was alone, but no one now doubts that Holmes had the better view in each case.

One hesitates to say that Holmes judged rightly, as if there were some general agreement on what answers were right. Yet my impression is that Holmes's decisions for the Court and his dissents have a very high prestige among lawyers and judges at least in part because they are perceived as likely to be correct. They have a quality of intellectual authority that is difficult to explain.

Holmes's relatively infrequent dissents do occasionally seem clairvoyant; they have been followed more often than the majority opinions from which he differed. While on the Supreme Court, Holmes published seventy-two dissents and thirty concurring opinions which were usually expressions of views that differed from those of the Court. Roughly half of these 102 separate opinions concerned a single broad question, one that we might characterize as the content of the language of constitutional guarantees of liberty; or perhaps as the degree of deference the Court owed to other branches and agencies of government. In nearly all these cases, we would now accept Holmes's results, rather than those of the changing Court majorities.

100. 209 U.S. 1, 18 (1908) (Holmes, J., concurring).
101. Id. at 20.
103. And accordingly concurred, although his reasoning pointed to a dissent from the Court's holding that the music rolls were not protected under copyright laws. *White-Smith*, 209 U.S. at 18.
104. BLAUSTEIN & MERSKY, supra note 95, at 144.
105. The remainder range from tax to admiralty and are difficult to characterize as a group. Most of these opinions would be accepted as good law today, in some cases almost a century after they were written. Holmes was able to achieve this remarkable record partly because he was reluctant to dissent and chose his moments. Although he wrote more opinions for the Court than any other Justice, at least ten other Justices wrote more dissents. See id. at 102.
Another reason for Holmes's reputation is his faithfulness to the principles he so often announced on behalf of the Court. His fundamental ideas had been formed before he joined the Court, and he rarely departed from them to secure a preferred result. Even his decisions that have not been followed, with occasional exceptions, are at least consistent. Holmes, for all his vindication of the judge's legislative power, respected precedent deeply. He occasionally overturned statutes, but he rarely voted to overrule settled precedent, even when he believed the precedent to have been decided wrongly. Holmes voted to reverse the precedents of his own Court that had allowed the Postmaster General to exercise prior restraint on the contents of letters, for instance, but he was reversing only his own earlier vote. Deeply as he disagreed with and campaigned within the Court against the doctrine of *Swift v. Tyson*, in his most stinging dissents he did not argue for overruling the case itself, but only for narrowing the interpretations that had been put upon it. He expressed his Burkean respect for the past in characteristically skeptical terms:

> [W]e have a great body of law which has at least this sanction that it exists. If one does not affirm that it is intrinsically better than a different body of principles which one could imagine, one can see an advantage which, if not the greatest, at least, is very great—that we know what it is. For this reason I am slow to assent to overruling a decision. Precisely my skepticism, my doubt as to the absolute worth of a large part of the system we administer, or of any other system, makes me very unwilling to increase the doubt as to what the court will do.

Even when judges were obliged by their interpretation of the Due Process Clause to apply substantive standards to legislation, Holmes believed that they should consult, not their own secular preferences, but the relatively fundamental principles discernible in the common law itself. This was the common strand in

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Holmes’s dissents: deference and restraint. Accordingly, although Holmes argued that judges necessarily would consult views of social policy as well as precedent, he himself treated this as a last resort. Judges' ignorance was the great law reformer; but the better and more learned the judge, the less frequently he would be thrown back on policy. Holmes regularly chastised his colleagues for relying on their views of social policy when principles of law might have been allowed to govern; and it is difficult to point to cases in which Holmes himself was reduced to saying that precedent and legal principle did not supply a rule of decision. The only clear example of this is *Olmstead v. United States,*¹ in which Holmes chose as his principle of social policy, that the government should not behave ignobly.

This relentless conservatism is visible in all Holmes’s decisions, including some we may now think wrongly decided. Perhaps the only important opinion that seems just plain wrong by Holmes’s own criteria was *Giles v. Harris,*¹¹ in which he held for a divided Court that the Civil War Amendments did not give federal courts authority to enforce what had been called “political” rights, including the right of African-Americans to vote on an equal footing with other citizens of the United States.

But most of Holmes’s opinions that now may be open to criticism were at least consistent with existing precedent and his own general views. In *United Zinc & Chemical Co. v. Britt,*¹² a case with distressing facts—a child had died in an unfenced pool of poisonous chemicals—Holmes maintained the old rule that a railroad company had no duty to trespassers. In *Baltimore & Ohio Railroad Co. v. Goodman,*¹³ Holmes repeated what he had said innumerable times on the Massachusetts bench, that a person at a grade crossing was obliged to stop and make sure that no train was approaching.¹⁴ Both opinions were contributions to

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¹². 189 U.S. 475 (1903).
¹³. 258 U.S. 268 (1922).
¹⁴. See, e.g., Merrigan v. Boston & A. R. Co., 28 N.E. 149 (Mass. 1891); Johanson v. Boston & M. R. Co., 26 N.E. 426 (Mass. 1891); Donnelly v. Boston & M. R. Co., 24 N.E. 38 (Mass. 1890). The facts in *Goodman,* the 1927 “Stop, look, and listen” case, were compelling from the plaintiff's side, but the rule was not based on preference for the railroad: Holmes had applied his rule on plaintiffs' as well as defendants' behalf in Massachusetts. In *Johanson,* Holmes held that evidence the injured children had stopped to look for a train was sufficient to overturn a directed verdict for the defendant, *Johanson,* 26 N.E. at 427, and in *Merrigan* he held for the plaintiff, *Merrigan,* 28 N.E. at 150.
sound learning," according to Frederick Pollock, Holmes's mentor in the common law.\footnote{Frederick Pollock, Mr. Justice Holmes, 44 Harv. L. Rev. 693, 695 (1931).}

In Bailey v. Alabama,\footnote{219 U.S. 219 (1910).} Holmes said he would have upheld an Alabama statute that set criminal penalties for violations of labor contracts and that had been used to create a form of peonage for African-Americans.\footnote{Id. at 245 (Holmes, J., dissenting).} Holmes's argument was that the Thirteenth Amendment, prohibiting involuntary servitude, was, like other provisions of the Constitution, to be construed in light of the common law.\footnote{Id. at 246-49.} In Massachusetts he had upheld the constitutionality of imprisonment for debt,\footnote{In re Brown, 53 N.E. 998 (Mass. 1899).} and he could see no basis for saying that the former slave states were subject to fundamental legal principles that did not apply in the northern states.

Baker's discussion of this case is particularly interesting. Like most modern commentators she is critical of Holmes's dissent.\footnote{BAKER, supra note 3, at 443-46.} She rightly suggests, however, that Justice Hughes's opinion for the majority, asserting that the statute in question would be struck down in New York as in Alabama, was disingenuous.\footnote{Id. at 446.} The Court's opinion was result-oriented; its real aim, which Baker approved and in an odd way I think Holmes did also, was to further the reconstruction of the South. Holmes was glad that statesmen like Hughes and White, who weighed policy questions, were on the Court. For himself, however, he could not vote, even to banish the peonage that he had so nearly given up his life in fighting, unless he could find a frank basis in law for his decision.

This judicial conservatism poses a conundrum. What is greatness in a conservative judge? By definition he makes no innovations. He holds himself bound by precedent, and so far as possible sets aside everything that is merely personal or temporary when making his decision. The passage of time will obliterate his decisions, bound as they are to the past. Judges like John Marshall and Benjamin Cardozo are known for their innovations, for their willingness to use legal materials to arrive at results dictated by social policy. Holmes in his scholarly writings certainly justified their work. But Holmes as a judge set a different standard for himself. His devotion to his craft, and his temperament, closed off the opportunity for greatness in this sense; in his opinions, he announced no new principles.

\begin{footnotes}
\footnote{Frederick Pollock, Mr. Justice Holmes, 44 Harv. L. Rev. 693, 695 (1931).}
\footnote{219 U.S. 219 (1910).}
\footnote{Id. at 245 (Holmes, J., dissenting).}
\footnote{Id. at 246-49.}
\footnote{In re Brown, 53 N.E. 998 (Mass. 1899).}
\footnote{BAKER, supra note 3, at 443-46.}
\footnote{Id. at 446.}
\end{footnotes}
of tort or contract law, and even in constitutional law was as
deverential to precedent and the legislatures as it was possible
to be. This conservatism led Holmes's admirer, Morris R. Cohen,
himself a proponent of reform, and writing at the height of an
era of reform, to make this assessment of Holmes's place in
history:

[H]e has not so far exerted any highly effective influence on
the law and life of our country. He has not, like Marshall or
Taney, changed the current of our constitutional law, nor for
that matter has he left any permanent impress on any other
branch of our law, as lesser men, like Story, did in admiralty
or conflict of laws. Holmes was a lone, though a titanic figure,
and the currents of our national life have swept by and around
him.122

Yet lawyers and judges admire Holmes now, not for his char-
acter alone, but for his qualities as a judge. The conservatism
itself is not very unusual, nor is Holmes's rigorous consistency.
Justice Edward Sanford, to take one example, was rigorously
consistent and faithful to precedent, without being very much
celebrated now.

In addition to all the other factors that contributed to Holmes's
reputation, one is fundamental and concerns the substance of the
ideal to which he was faithful. Holmes touched on this in his
First Amendment opinions. In his famous dissent in Abrams, for
instance, he said that government rested on truth and that truth
was to be determined by the competition of the marketplace.123
Government was not to intervene by force into the rivalry of
ideas.

Holmes had a characteristic Malthusian argument on behalf of
this theory of the First Amendment, but I should say that what
carries across the generations is not his hard-minded, faintly
crackpot, evolutionism—his notion that free speech had survival
value. What we admire is Holmes's submission to a dignified and
bleak sense of duty. He spoke most truly and most spontaneously
in his first free speech opinion, the unpublished dissent in Baltzer:

It is better for those who have unquestioned and almost unlim-
ited power in their hands to err on the side of freedom. We
have enjoyed so much freedom for so long that perhaps we
are in danger of forgetting that the bill of rights which cost
so much blood to establish is still worth fighting for.124

“It is better,” not wiser or more prudent or more progressive; only better. For a moment the reality of the man comes through, and we acknowledge being touched in a way that is not easy to articulate.

A great judge, it appears, is one who reaches down to a fundamental insight, one to which later judges will recur, not necessarily for doctrine, but for reassurance. In this still obscure but profound sense we feel Holmes's decisions were more often right than those of other judges.

V. Holmes's Opinions

However high the quality of Holmes's judgments, we should have known nothing about them if they had not been embedded in memorable opinions. In this sense, Holmes's place in history depends on his qualities as a writer of opinions. Here again, Baker has little to say. She devotes a couple of paragraphs to Holmes's style, in which she says that he tried to be brief and valued niceties like the distinction between "shall" and "will." She makes the important point that Holmes wrote his opinions to be read aloud and took care to make them sound well, but she goes on to explain that they were often obscure, and I do not think that on balance she likes them.

Others have said that Holmes's opinions are so often cited simply because they are well written. This is a somewhat belittling explanation. As a prose stylist, Holmes's accomplishment seems to me modest and hardly adequate to account for his reputation. Of course he wrote very well for a judge, who must put other considerations foremost; but this is not very high praise. Edmund Wilson ranked him with Walter Pater, a minor Victorian author; and this estimate seems just. It is an impressive accomplishment in a judge but hardly seems adequate to account for his towering reputation.

Holmes's style is certainly notable. He brought the precision of classical forms to the rhythms of American speech. Speaking of the "dirty business" of illegal wiretapping by government agents, for instance, Holmes said that evidence obtained by this means should not be allowed in court:

126. Id.
If [the Government] pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.129

The compact density of meaning in this passage depends on precise contrast of verb tenses—"for having got... for getting," "pays... will pay"—which is an echo of the Latin poetry men of Holmes's generation memorized and learned to write. These classical structures, in which Holmes displays like little gems his informal vocabulary and his colloquialisms—"dirty business," "I do not see," "it may as well," "I can attach no importance," "I think"—make for easy, personal, and frank talk of high precision. It is a style that is Holmes's own, a synthesis of table-talk and the oral opinions of English judges. It is not an easy style, and Holmes's opinions, dense and aphoristic, are difficult to follow, but in their own way they are perfect.

To have an original style, and to write as well as Walter Pater, is something; no other American judge has merited appraisal by a critic of Wilson's stature, let alone merited ranking among the minor Victorian writers. Still, it is for the larger perspective his writings open, and not for his style, that we remember Holmes. This is as Holmes would have wished. As he wrote to a close friend in 1911, when he felt at the peak of his form:

[T]he thing to aim at is to see and feel as much as one can the great forces behind every detail—a wavelet of the Atlantic Ocean is different from one of Buzzard's Bay. Therefore after a man has a working knowledge of his job—at least if he is a judge—I would advise him not to be eternally reading late cases but to let in the streams of philosophy, sociology, history, economics, etc. etc. I guess it tells. I was more pleased than I can say by a letter on my 70th birthday from our leading law writer quoting a French remark... and applying it to my decision—that he had one foot on the finite and the other on the infinite. It pleased me that anyone should see my intent—to look at the particular in the light of the universal.130

130. Letter from Oliver Wendell Holmes to Alice Stopford Green (June 18, 1911) (on file at Holmes Papers, Harvard Law School Library).
When people praise Holmes's style, I think they sometimes have this quite different thing in mind; which is all the more remarkable, considering the form of expression that he chose.

As Baker notes, Holmes conceived of an opinion, not as a printed document, but as talk delivered from the bench.\textsuperscript{131} He paid careful attention both to the writing and to his style of delivery, to ensure their impact. When Justice Sanford submitted one of his first opinions for approval, Holmes, with the freedom of an elder, gave him some advice: "Non obstant the effective and powerful example of Brandeis to the contrary I don't think opinions should be written in the form of essays with notes—they are theoretically spoken."\textsuperscript{132}

The model for this form was the English judge: a gentleman rather than a professional.

I don't believe in the long opinions which have been almost the rule here [on the Supreme Court]. I think that to state the case shortly and the ground of decision as concisely and delicately as you can is the real way. That is the English fashion and I think it civilized.\textsuperscript{133}

Holmes's opinions accordingly were brief and well written enough to be read aloud, and they were written so quickly, and with so little revision, as to seem, like the opinions of English judges, to have been extemporized from the bench. They were fundamentally dramatic; their impact was almost physical. This was the quality for which Holmes strove in all his opinions, but often was able to achieve only in dissent. In a letter to Alice Stopford Green, the historian, Holmes talked about this aspect of his writing:

two dissents that I wrote with gaiety of heart, in a railroad and a telegraph case\textsuperscript{134} that I was pleased to have decided as

\textsuperscript{131} Baker, supra note 3, at 380.
\textsuperscript{132} Letter from Oliver Wendell Holmes to Justice Edward T. Sanford (Jan. 1, 1925) (on file at Sanford Papers, University of Tennessee, Knoxville). I am indebted to Liva Baker for placing a copy of this letter among the Holmes Papers at Harvard.
\textsuperscript{133} Letter from Oliver Wendell Holmes to Anna Lyman (Nina) Gray (Mar. 2, 1903) (on file at Holmes Papers, Harvard Law School Library), quoted in Novick, supra note 2, at 256.
\textsuperscript{134} Presumably, Western Union Telegraph Co. v. Kansas, 216 U.S. 1, 52 (1910) (Holmes, J., dissenting) and Pullman Co. v. Kansas, 216 U.S. 56, 75 (1910) (Holmes, J., dissenting). The Court invalidated, as an unconstitutional burden on interstate commerce, fees imposed on the telegraph and railroad companies for the privilege of doing business in the state, because the fees were based on the total capital of the companies, including their out-of-state facilities, and were not related directly to the intrastate business within Kansas. Holmes said a fee based on the size of the company was perfectly reasonable.
they were, but in which I couldn't swallow the pretense at logic of Harlan and White. If they'd just brusqué the thing and said: Logic for law-school—this is business—and when a railroad has a right to come into a state it comes in with all its roots, I probably should have grinned and shut up. My form of expression evidently is modelled on what I heard an actress saying—that if she should recommend a play to Mr. Frohman he would read it politely and return it and say "That is literachoor —what we want is drayma."\(^{135}\)

Holmes's opinions often swept his colleagues into agreement and continue to carry us along. His opinions seem to defy logical analysis; they move us at quite another level of thought and feeling. They convey, not just Holmes's ideas, but the force of his personality.

The ideas and the man himself were fused by the same principle that had led him to his form of expression from the outset: His ideas and attitudes were those of a gentleman, what we should now call an aristocrat. There is nothing so attractive to Americans, so in keeping with our picture of ourselves, as a native aristocrat—a Yankee from Olympus, in Elizabeth Sargent's inspired image.\(^{136}\) The late George Olshausen, in a perceptive article, accounted for Holmes's appeal by comparing him with a "medieval knight," and compared him to de Tocqueville's famous description of the aristocratic virtues: "'[F]eudal honor . . . imperiously commanded men to subdue themselves; it decreed forgetfulness of self. It prescribed neither humanity nor gentleness. . . . Foremost among virtues the nobles of the Middle Ages put military valor. . . .' [T]he aristocracy dealt in the grand manner with abstract ideas and theories."\(^{137}\)

But one more element must be mentioned. Holmes was no mere clotheshorse for traditional forms; he was an intensely energetic, passionate man, who like other popular figures—one thinks of Presidents Kennedy and Reagan, in their different ways—managed to convey the grace, the ambition, the optimism, and energy of youth. Richard Rovere summed it up nicely: "The chivalrous assumptions, the pleasure he took in the stuff of life,

\(^{135}\) Letter from Oliver Wendell Holmes to Alice Stopford Green (Feb. 8, 1910) (on file at Holmes Papers, Harvard Law School Library).


and the reaching for high C combined to give us a great jurist, a great sage, and a gay and gallant and cheerful companion."

This is the personality Holmes constructed for himself and managed to put right through his opinions; his ideas were embodied in his persona as much as in the specific words. Which is not to say that the opinions are not also logical; with patience and knowledge of the context one can always parse the opinions out in logical sequence. But it is not the logic that persuades, it is the fundamental insight transmitted in dramatic form.

Holmes, in other words, was an artist of a high order. The careful, logical arguments were there, in the underpainting, as it were; in the surface they were reduced to essentials. As he described his own work:

Did I ever tell you of Corot—the painter—that I heard once that he began as most careful draughtsman working out every detail and came to his magisterial summaries at the end? I have thought of that in writing opinions latterly. Whether the brethren like it I don't know. Of course—the eternal effort of art even the art of writing legal decisions is to omit all but the essentials—'The point of contact' is the formula. The place where the boy got his fingers pinched—the rest of the machinery doesn't matter. So the Jap. master puts five dots for a hand—knowing they are in the right place.

His opinions indeed remind one of the paintings of Matisse, or the poems of Wallace Stevens. They are often criticized for undue brevity, for lack of the stepwise exposition one finds in ordinary opinions. But Holmes's opinions transmit conviction as by an electric current. One might apply to Holmes what Matisse said of his own work: "When a master works simply, with broad relationships—it is because his feeling rejects complicated things that do not come to him directly and do not go directly to the feelings of others. What is sometimes mistaken for a defect, for a lack, thus becomes an essential quality."

Holmes is not important to us now as a great originator of ideas, but because he expressed a part of the spirit of his country in vivid form: In a nation that generally does not honor poets,
Holmes was our Tennyson, our Hugo, our Gorky. If he was flawed and shadowed, still there was something great in his spirit that we now fear to lose. And it is exactly this greatness that is missing from Baker's book.