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Book Review

Honorable Justice: The Life of Oliver Wendell Holmes

By S. Novick

Reviewed by James J. Fishman†

Oliver Wendell Holmes is the Babe Ruth of American law. Without question, he is the most famous American judge, recognized far beyond the legal profession. His name is as synonymous to the law as the Sultan of Swat is to baseball. Holmes was a brilliant legal scholar, a great judge whose dissents on civil liberties have been read by generations of law students, an eloquent and polished writer, and a man with wide ranging intellectual interests. In his ninety-four years Holmes experienced much of American history. As a child he knew veterans of the Revolutionary War. He lived through Franklin Delano Roosevelt's first term. Oliver Wendell Holmes is an icon of the American experience, and in this wonderful book Sheldon Novick informs us why.[1]

Curiously, there has been no full length biography of Holmes since his death in 1935. Catherine Drinker Bowen wrote *Yankee From Olympus*,[2] a best selling fictional biography of the Holmes family. A series of authorized biographers, academic luminaries such as Felix Frankfurter, Mark A. DeWolfe Howe, and

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1. S. Novick, Honorable Justice: The life of Oliver Wendell Holmes (1989).
2. C. Bowen, Yankee From Olympus (1944).

HeinOnline -- 10 Pace L. Rev. 625 1990

Grant Gilmore, all labored unsuccessfully. Part of the problem was the mass of documents relating to Holmes's long life. He wrote more than 2000 opinions, three books, essays, and an extraordinary number of letters. His first authorized biographer, Professor Mark DeWolfe Howe, assembled 36,000 documents![3] At last, we are fortunate to have a biography which enables us to learn why Holmes was considered so great by his contemporaries and thereafter. More than that, *Honorable Justice* presents a portrait of this mythic American as a man.

Holmes's life was the stuff of television mini-series. In fact, in 1951 he was depicted in a stage play and television movie, *The Magnificent Yankee*, which charmed Eastern audiences. He was born into an established family descended from Puritan stock on both sides. Holmes was a Boston Brahmin, a member of an elite descended from the original settlers in the new world; a caste wherein membership was based not on wealth, but on social class.[4] The Holmes household was a virtual salon of the pre-Civil War literary elite. Regular visitors were the publishers William Ticknor and James Fields, the historian William O. Prescott, the poets James Russell Lowell and Henry Wadsworth Longfellow, and essayist-poet Ralph Waldo Emerson, affectionately known to Holmes as Uncle Waldo.[5] William and Henry James were childhood friends.

His father, Dr. Oliver Wendell Holmes, was a popular writer and essayist. A raconteur and constant talker, Dr. Holmes would argue with anyone, particularly his son. Between them were continued verbal jousts. In monthly essays in the *Atlantic* which were collected in *The Autocrat of the Breakfast Table*,[6] Dr. Holmes used his son as a foil for his wit.[7]

One wonders about the psychological effect of this on the younger Holmes. Perhaps this explains his introspective cold manner, his complexity and multi-dimensional personality, but that is not Novick's tack. This biography is good old-fashioned narrative history, a pleasure to read. The author focuses upon

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3. S. NOVICK, *supra* note 1, at xvi-xvii.

4. Dr. Oliver Wendell Holmes, Sr. had first coined the phrase "Boston Brahmin" in his novel *Elsie Venner*. O.W. HOLMES, ELSIE VENNER (1861).

5. S. NOVICK, *supra* note 1, at 16.

6. O. W. HOLMES, SR., THE AUTOCRAT OF THE BREAKFAST TABLE (1858).

7. S. NOVICK, *supra* note 1, at 20.

HeinOnline -- 10 Pace L. Rev. 626 1990

Holmes as a man in his epoch, rather than creating psycho-historical babble. Young Holmes entered Harvard at sixteen. He had literary skills and pretensions and was elected class poet, but did not stay to graduate. The Civil War intruded.

Holmes and his friends went to war with the ardor and anticipation of a long-awaited spring college weekend. Along with his classmates, he joined the Twentieth Massachusetts Volunteer Infantry in which he was commissioned a captain. Novick's description of Holmes's Civil War experience is riveting. In today's technological age, war and its attendant destruction have an almost antiseptic quality. Not so the Civil War, where fighting was hand-to-hand and particularly gruesome.

Holmes was seriously wounded three times. The first was at Balls Bluff, where he was hit in the stomach and chest. The next year he returned to duty, but in September 1862 was wounded at Antietam — shot through the neck. Later Holmes caught dysentery. In May 1863 he was wounded in the heel at Fredericksburg. Still he fought on — in the battles of the Wilderness and Spotsylvania, among others. By the end of the war most of Holmes's Harvard peers, as well as his youth, were dead. Holmes was not a professional veteran. He rarely wrote or spoke of his experiences, nor did he like to read about the Civil War.[8] Yet, his world view was forever altered. In many ways Holmes was a Puritan in his methods, temperament, mind, and lack of empathy. However, his Civil War ordeal did not return him to the Puritan God of his forefathers, but made him a nonbeliever for the rest of his life.[9]

Later, Holmes also divorced himself from current events. He did not read the newspapers. Despite a voracious appetite for learning, he seems to have missed the waves of the post-war industrial revolution. He had neither an interest in nor an understanding of business. Despite his decisions in favor of labors right to assemble, he had little enthusiasm for the working classes and absolutely none for the plight of blacks. The war left Holmes a hard man, distant from his fellow beings, interested in getting on with his life. To this end he pursued his future with

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8. E. WILSON, PATRIOTIC GORE: STUDIES IN THE LITERATURE OF THE AMERICAN CIVIL WAR 753-54 (1962).

9. *Id.* at 745-47.

HeinOnline -- 10 Pace L. Rev. 627 1990

discipline, perseverance, and selfish motivation. In October 1864 he entered Harvard Law School. It is surprising he selected the law, for he was most interested in philosophy. His father upon graduation had pushed him, a fact for which history can be grateful.

Holmes entered private practice, which bored him, and then began to contribute to *The American Law Review*. He turned to scholarship full time in 1869 when he grabbed the opportunity to revise Kent's *Commentaries on American Law*,[10] the most famous and widely read law text of the nineteenth century. Rather than merely adding the new cases as prior editors had done, Holmes prepared a whole new commentary. At this time, he also lectured on constitutional law at Harvard Law School. He threw himself into his work and after the twelfth edition was published in December 1873, he returned to practice.

In his writing, Holmes began to outline an evolutionary theory of the development of the law. He adapted Sir Henry Maine's method of historical analysis and applied a scientific logical approach found in the works of Jeremy Bentham.[11] Holmes freed the law from its dependence on a particular political theory and defined it as the decisions of courts. Through induction one could read appropriate legal principles. Behind the courts lay an invisible presence — "the force of collective instinct, of the common passions and prejudices of those who ruled."[12] Holmes's view of the law was that it expressed the dominant will of any considerable social group.[13]

Holmes's interest in the law was anthropological, sociological and philosophical. This approach was unique at the time. Novick writes: "[t]he scholarship of the effort was impressive. The result was brilliant, original — and useless."[14] Holmes's system, although founded on history and logic, remained disconnected from modern law. In 1879 Holmes was invited to give the Lowell lectures, from which came his masterpiece, *The Common Law*.[15] The book remains in print today, albeit largely unread, if

10. J. KENT, COMMENTARIES ON AMERICAN LAW (O.W. Holmes 12th ed. 1873).
11. *See generally* J.W. HURST, JUSTICE HOLMES ON LEGAL HISTORY (1964).
12. S. NOVICK, *supra* note 1, at 159.
13. E. WILSON, *supra* note 8, at 766.
14. S. NOVICK, *supra* note 1, at 134.
15. O.W. HOLMES, THE COMMON LAW (M. Howe ed. 1963).

HeinOnline -- 10 Pace L. Rev. 628 1990

now even readable.[16] Holmes's contributions to legal scholarship were largely unrecognized until he became acknowledged as a great judge. Novick capably takes us through Holmes's ascension to the Massachusetts Supreme Court, and in August, 1901, at the age of sixty, to the United States Supreme Court.

The author attempts to strip the myths from his subject. Holmes was always self-centered and driven by ambition. His law partner and friend, James Bradley Thayer, whom Holmes had shouldered aside as a named editor of Kent's *Commentaries*, said that "in spite of his 'attractive qualities and solid merits,' Holmes was 'wanting sadly in the noblest region of human character, — selfish, vain, thoughtless of others . . . .' "[17] A real shock is that this austere, distant, and cold individual was a passionate flirt and lover of women. At the age of thirty-two he married Fanny Dixwell, a somewhat eccentric and plain woman who was bedeviled by poor health. Mrs. Holmes chose not to accompany her husband on his frequent trips to England. There, Holmes sowed his oats and entered into a number of relationships with English women, most notably with Ursula Emily Clare St. Leger, Lady Castletown. Holmes's florid correspondence — many letters were penned while he was sitting on the Massachusetts Supreme Court — suggest to this reader that there was fire as well as smoke. We often are shocked and dismayed when our mythic heroes display such common failings.[18] Yet, one should look at such peccadillos as a reaffirmation of their humanity. As great as our heros are, they are still human with ordinary failings.

Novick suggests that Holmes's views of the world were of a fascist nature before the term became fashionable. They reflected the attitudes of his class, and to put it mildly, were not very nice. His own view of life was sketched in a letter to his long-time correspondent, Sir Frederick Pollock:

> I loathe war . . . . But I do think that man at present is a predatory animal. I think that the sacredness of human life is a purely

16. O.W. HOLMES, THE COMMON LAW (1881).

17. E. WILSON, *supra* note 8, at 756.

18. *See generally* F. BRODIE, THOMAS JEFFERSON, AN INTIMATE HISTORY 185-245 (1974); H. PARMET, JACK, THE STRUGGLES OF JOHN F. KENNEDY 88-94, 258-60, 299-300 (1980).

HeinOnline -- 10 Pace L. Rev. 629 1990

> municipal ideal of no validity outside the jurisdiction. I believe that force, mitigated so far as may be by good manners, is the *ultima ratio*, and between two groups that want to make inconsistent kinds of world, I see no remedy except force. I may add what I no doubt have said often enough, that it seems to me that every society rests on the death of men . . . .[19]

In that same letter he suggests that the only possibility for human improvement is to envisage some process of breeding a "selected race."[20] This is the voice of social Darwinism and Herbert Spencer. Holmes was a man of his time.

How ironic that so deeply a conservative man, with such a pessimistic view of human nature, should become in the 1920s a hero to liberals on the issues of labor and free speech. Holmes had little sympathy for the labor movement or the poor. Novick writes that mass democracy threatened the aristocracy of which Holmes was so much a part, and that the art, gentility, and aspirations, in which he so believed, depended upon the existence of a leisure class.[21] Though the trade union movement threatened an end to his class, labor still deserved an opportunity to peacefully present its arguments. That was the lesson of the common law and how class conflict could be channeled into more peaceful means.[22] This sympathetic approach to labor had its origins while Holmes was on the Massachusetts Supreme Court.[23] His dissents relating to due process and the first amendment have placed him forever in the judicial firmament. Still, Holmes refused to uphold the voting rights of southern blacks[24] and affirmed the right of the Commonwealth of Virginia to sterilize poor women in institutions.[25]

Holmes's dissents in the area of free speech made him a favorite of those with whom he had little in common. In later years he developed a circle of younger followers and admirers

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19. Letter from Oliver Wendell Holmes to Sir Frederick Pollock (Feb. 1, 1920), *reprinted in* 2 HOLMES-POLLOCK LETTERS 36 (M. Howe 2d ed. 1961).

20. *Id.*

21. S. NOVICK, *supra* note 1, at 199.

22. *Id.* at 203.

23. *See, e.g.*, Vegelahn v. Guntner, 167 Mass. 92 (1896) (Holmes, J., dissenting).

24. *See* Giles v. Harris, 189 U.S. 475 (1903). Novick believes the opinion was a bad one, perhaps Holmes's worst both in retrospect and in the context of the time. S. NOVICK, *supra* note 1, at 458 n.15.

25. Buck v. Bell, 274 U.S. 200 (1927).

HeinOnline -- 10 Pace L. Rev. 630 1990

who recognized him as a great judge, a scholar, and a renaissance man. Holmes was basically an intellectual. He was a voracious reader. Imagine reading Hegel, Marx, Spinoza, and other daunting volumes in the fields of history, philosophy, and literature for sheer pleasure. To the end of his life Holmes kept lists of the books he had read. Perhaps this demonstrates that one can reject his Puritan past but not escape it.

Sheldon Novick has written a superlative book about a great man. Oliver Wendell Holmes was a man of honor and courage who pursued his vision of truth and justice. This volume deserves a readership far beyond the legal profession, just as Holmes was a symbol to all Americans. The book is well edited. One could only wish that the footnotes, a treasure trove in and of themselves, were at the bottom of the page.

HeinOnline -- 10 Pace L. Rev. 631 1990