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The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes

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THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES. By *Liva Baker*. New York: HarperCollins. 1991. Pp. xiv, 783. \$29.95.

Justice Oliver Wendell Holmes was remarkable in many aspects; he lived a very long time¹ and enjoyed enduring friendships with a great many people of historical significance in their own right.² Holmes' outstanding aspect, however, was his intellectual integrity. Both as a judge³ and as a legal theorist,⁴ Holmes never wavered in his view that the law inevitably reflects the development and practices of society. When writing from the bench, Holmes usually deferred to legislative judgments,⁵ and frequently reached results inconsistent with his own political philosophy. Consequently, both in his time and in ours, Holmes has been misunderstood: his support of social reform legislation stemmed from his opposition to judicial activism rather than from an ideological sympathy with the legislation's supporters (pp. 9-10).

Liva Baker,⁶ in her biography of Holmes, *The Justice From Beacon Hill*, demonstrates an awareness not only of Holmes' integrity, but also of his complexities, emphasizing that "he *was* a man. Not a myth" (p. 11). The challenge of piercing that myth is formidable; the great events in the life of a judge occur in the intellectual realm and are less accessible than those that occur in the public battles of a statesman. The moments in Holmes' life most important to history are not those when he gave a speech or took some public action, but rather when, in the privacy of his own study, he set pen to paper. Baker's careful documentation of the man who committed these private acts of thinking and writing makes her book valuable to anyone interested in Holmes.

To understand what shaped Holmes' view of the law — and to distill such an understanding from his written opinions, scholarly writ-

1. 1841-1935.

2. A sampling of those with whom Holmes was, at various times in his life, intimate includes William and Henry James, *see* pp. 173-75, Sir Frederick Pollock, *see* p. 233, and Felix Frankfurter, *see* pp. 454-55.

3. *See, e.g.,* *Lochner v. New York*, 198 U.S. 45, 96 (1905) (Holmes, J., dissenting). Opinions such as this wrongly gained Holmes a reputation as a great friend of the labor movement. Pp. 419-20.

4. *See, e.g.,* OLIVER W. HOLMES, JR., *THE COMMON LAW* 1 (1880) ("The life of the law has not been logic: it has been experience.").

5. An important exception is his opinion in *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) (stating that the exigencies of war alone do not justify Congress' infringement on freedom of speech).

6. Liva Baker has previously authored *FELIX FRANKFURTER* (1969) and *MIRANDA: CRIME, LAW AND POLITICS* (1983).

ings, and his voluminous and varied correspondence⁷ — is indeed a challenge. The first half of Baker's book rises to this challenge, tracing the sustained scholarly inquiry into the nature of law that dominated Holmes' life prior to his appointment to the bench. The second half of the book recounts Holmes' efforts to put his theories into practice, first as a judge on the Massachusetts Supreme Judicial Court, and later as a Justice on the U.S. Supreme Court. Throughout, Baker nicely balances a one-volume biography's demand for brevity against the reader's desire for detail about how Holmes thought about the law.

Baker aptly captures Holmes' origins in the title of her book; he never escaped his Beacon Hill upbringing. Born of a formidable Brahmin lineage (each of his three names represented an important and powerful Boston family) (pp. 24-25), Holmes lived his entire life as a member of America's closest approximation to European aristocracy (pp. 21-24). In fact, during the first of Holmes' many visits to Europe in 1866, holders of title and property welcomed him as one of their own (pp. 177-87). His father, professor of anatomy at the Harvard Medical School, was a well-known literary figure in his day (pp. 30-35). Holmes' wife, Fanny, the daughter of his old school master, was one of the small circle of young Brahmins with whom Holmes grew up (pp. 219-22). Baker is at her best as she describes Holmes' early intellectual turmoils, fomented by, among other things, his reading of Plato, which he discussed with Emerson (pp. 89-90), and his intense friendship with William James (pp. 173-74). She thus adroitly paints the picture of a man whose world view and ambitions were firmly shaped by upper-class morés.

Although the reader may find some of Baker's speculations excessive, most of her discussion is interesting and useful. She insightfully focuses on certain complications in Holmes' psyche. For example, Oliver Wendell Holmes Jr. and Sr. enjoyed an ambivalent relationship. Baker's claim that the son strove mightily to escape his father's shadow is convincing; the most simple evidence of this is that he did not drop the "Jr." from his name until the age of fifty-three, when Oliver Wendell Holmes, Sr. died (p. 307). She also emphasizes the influence Holmes' Civil War experiences had on his life; he spoke of them often in his old age, and professed their influence on him (pp. 497, 624, 637).

Baker crosses the line, however, in her speculations about Holmes' relations with women. He and Fanny were both past thirty when they married, and remained childless. Holmes was known to be flirtatious and throughout his life was friendly with many women (pp. 181-82). The most significant of these friendships was a long relationship with Lady Clare Castletown, his "beloved hibernia," whom he met in Ire-

7. See Richard A. Posner, *Introduction, in THE ESSENTIAL HOLMES* xiv (Richard A. Posner ed., 1992) (discussing Holmes' voluminous writings).

land (pp. 325-28). Reading these passages in which Baker discusses Holmes' sex life, or possible lack thereof, one is reminded of Holmes' advice to a friend to ignore questions of illegitimacy in a biography of Abraham Lincoln (p. 581).

While the motivation behind this advice may have been Victorian prudery, it nonetheless may be well taken. Illustrative of Baker's speculations is her conclusion that Holmes and Clare Castletown could not have engaged in sexual relations because their principal meeting place was a glass-enclosed conservatory (p. 328). Whether Holmes consummated his marriage or any other of his relationships, and the possibility of his impotence, are questions whose answers are unavailable to the biographer and arguably irrelevant to the biography. There is no evidence that Holmes' sexual experiences, or lack thereof, shaped his views as a legal thinker.

* * *

From the outset of his legal career Holmes wished both to think about the law and to influence it in ways unimagined by the ordinary practicing attorney. He seized on the opportunity to publish articles in the *American Law Review*, which his friends John Ropes and John Gray had established shortly after the Civil War (pp. 197-98). Holmes' bent for intense labor manifested itself in his first sustained scholarly effort, his revision of Chancellor Kent's *Commentaries*, published in 1873.⁸ Baker explains that Holmes was not satisfied merely to collect and collate recent cases, but turned this "menial chore . . . into his own individual commentary on the origins of the law" (p. 211).

Holmes aspired to achieve something great by the time he was forty. Given Baker's explanation of his great ambitions and yen for scholarly labor, *The Common Law* seems the natural culmination of Holmes' first forty years. Furthermore, as Baker explains, "American legal scholarship in the 1870s was ripe for the kind of corrective surgery Holmes was about to perform" (p. 249). While Langdell's case method was then in its infancy (p. 208), the notion of law consisting of formal rules derived from immutable principles harkened back to Blackstone (p. 170). Holmes, who thought that law could not be divorced from culture and society, believed that Langdell's method represented the "powers of darkness" (p. 209).

Baker's book thus makes clear that authorship of *The Common Law* was an inevitable achievement in Holmes' life, even though he nearly decided to forgo the effort. Holmes was to present his work as a series of lectures at Harvard Law School. He was nervous about the reception he would get, and about comparisons to his father, a well-

8. See JAMES KENT, COMMENTARIES ON AMERICAN LAW (1st ed. 1826); JAMES KENT, COMMENTARIES ON AMERICAN LAW (O. W. Holmes ed., 12th ed. 1873).

known lecturer (p. 252). Even if Holmes had declined the invitation to lecture, however, Baker's account leaves one convinced that he would have made some contribution to legal scholarship tantamount to *The Common Law*.

If Holmes' authorship of *The Common Law* was inevitable, his appointment to the bench was not. Baker helps the reader feel how intensely he desired a judicial appointment (p. 196). Holmes' ambitions arose partly from his desire to influence the law through the power of the judicial opinion, which then, as now, shaped the law more than the average law review article. Thus, in 1882, when Holmes was on the verge of returning to Harvard to teach,⁹ he was instead delighted that Massachusetts Governor John Davis Long appointed him to the Massachusetts Supreme Judicial Court (pp. 266-67). Holmes had previously been passed over for both federal and state judgeships, (pp. 241-42, 266), and was by no means certain of getting this one (pp. 265-67). Once the Governor offered him the post, Holmes had no doubts about what to do, though accepting the appointment meant slighting Harvard. As Baker puts it, the judgeship was "the next earthwork to be taken" (p. 267).

Once on the bench, Holmes reveled in the opportunity to influence the law and took all the work the Chief Judge could give him (p. 279). Baker's greatest accomplishment emerges as she explains the various legal issues before the Massachusetts court and Holmes' approach to them. Typical was Holmes' tendency to uphold the burgeoning field of labor regulation, including workmen's compensation and regulation of the length of the work-day (pp. 317-20). Holmes perceived law as a response to social conditions, and, though he was not sympathetic to labor's cause, his opinions as a state judge ironically gained him a reputation as labor's friend, a reputation that his dissenting opinion in *Lochner v. New York*¹⁰ later reinforced.

Perhaps no other judge in the history of the United States has been as resistant to political trends and influences as Holmes. President Theodore Roosevelt appointed Holmes to the Supreme Court only after subjecting him to a thorough inquisition into his views on law and politics (p. 349). Moreover, after his confirmation, the Holmeses became social intimates of the President and his wife (pp. 390-91). None of this prevented Holmes from disappointing the President with a dissent in *Northern Securities Co. v. United States*.¹¹

Though Holmes disliked reformers in general, and the Sherman Act in particular, he dissented in *Northern Securities* because he thought the challenged "financial arrangements . . . were entirely com-

9. In addition to the Lowell lectures, which became *The Common Law*, Holmes taught constitutional law at Harvard Law School in the early 1870s. Pp. 206-08.

10. 198 U.S. 45 (1905).

11. Pp. 401-02. For Holmes' dissent, see 193 U.S. 197, 400-10 (1904).

patible with the antitrust law" (p. 403). The lawyers on both sides had argued about competition, but for Holmes it was enough that the case presented no unlawful restraint of trade; the law said nothing about competition (p. 403). Baker explains that the most significant aspect of Holmes' dissent may have been the courage it took, as it greatly angered the President who had appointed him (p. 405).

What emerges from Baker's thorough account of Holmes' work on the bench is Holmes' faithful adherence to his understanding of the law. This understanding did evolve in certain instances; Baker concisely documents Holmes' changing understanding of the First Amendment, prompted in part by correspondence with Judge Learned Hand and others during the era of the post-World War I speech cases.¹² On the whole, however, Holmes was immune from political pressures.

Moreover, Baker makes clear that anyone who appreciates Holmes for his supposed liberal or progressive political views is far off the mark; one of the few times when Holmes expressed his real political feelings from the bench was when he declared in *Buck v. Bell*¹³ that "[t]hree generations of imbeciles are enough." Unlike *Lochner* and its ilk, this was a case in which Holmes could defer to a legislature while in full agreement with it; he was a firm believer in the eugenics theory that justified the sterilization of unfortunates such as Carrie Buck, who in fact, Baker informs us, was known to display "substantial intelligence" (p. 603).

It is a tribute to Baker's depiction of Holmes that the reader smiles inwardly as she describes his periodic declarations that he would soon retire (pp. 446-47). By the end of the book, one knows that such declarations of old age and the imminence of death were fully consonant with Holmes' character, but also that it was typical that he did not retire from the Court until his infirmities absolutely forced him to do so (pp. 628-30). By this time he had outlived all his old friends, with the notable exception of Louis Brandeis, and replaced them with new ones, such as Felix Frankfurter. One feels no sadness reading Baker's account of Holmes' last years; to the end, he performed with dignity. And in reading of a life as full as that of Oliver Wendell Holmes, one can only feel a sense of completeness.

— Charles A. Bieneman

12. Pp. 514-35. See *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

13. 274 U.S. 200, 207 (1927).