

Michigan Law Review

Volume 88 | Issue 6

1990

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Recommended Citation

Mathias Reimann, *Why Holmes?*, 88 MICH. L. REV. 1908 (1990).

Available at: <https://repository.law.umich.edu/mlr/vol88/iss6/42>

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WHY HOLMES?

*Mathias Reimann**

HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES. By *Sheldon M. Novick*. Boston: Little, Brown. 1989. Pp. xxi, 519. \$24.95.

More than half a century after his death, the interest in Oliver Wendell Holmes is unabated. With over a dozen books and more than a hundred articles and essays published about his person, life, ideas, and writings, it seems almost impossible to say anything new. Yet Holmes has proved to be an inexhaustible subject, and no end to the flood of writings about him is in sight.¹

Honorable Justice is an important book about Holmes despite all this competition because it is the first full-fledged biography of Holmes to be completed.² While fictitious and anecdotal accounts were published early on,³ several authors failed in their attempts to complete a reliable, comprehensive biography. Felix Frankfurter's and Grant Gilmore's efforts never got near the publication stage,⁴ and Mark DeWolfe Howe's masterful work remains unfinished.⁵ Thus Sheldon Novick⁶ is the first to tell the Holmes story on the basis of careful research, from the cradle to the grave.

The lack of a complete biography may seem surprising in light of the long list of publications about Holmes, but it is no accident. The very reasons for the abundance of Holmes literature also explain the erstwhile lack of a scholarly biography: the length and diversity of his

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1. For a bibliography, see pp. 386-400; see also H. SHRIVER, WHAT JUSTICE HOLMES WROTE AND WHAT HAS BEEN WRITTEN ABOUT HIM (1978). Even since Novick's *Honorable Justice* went to press, new writings about Holmes have been published. See, e.g., J. COHEN, CONGRESS SHALL MAKE NO LAW: OLIVER WENDELL HOLMES, THE FIRST AMENDMENT, AND JUDICIAL DECISION MAKING (1989); Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989). A volume of new essays on Holmes is forthcoming at Stanford University Press with Robert Gordon as editor.

2. A competitor is now G. AICHELE, OLIVER WENDELL HOLMES, JR. (1989).

3. See S. BENT, JUSTICE OLIVER WENDELL HOLMES (1932); C. DRINKER BOWEN, YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY (1944).

4. Novick describes their failures at pp. xvi-xvii.

5. M. DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS 1841-1870 (1957) [hereinafter THE SHAPING YEARS]; M. DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 1870-1882 (1963).

6. Novick is an attorney who has worked in private practice as well as for the federal government. He worked on *Honorable Justice* while a scholar in residence at the University of Vermont Law School. He has written two nonlegal books, as well as a book on environmental protection.

life and the complexity of his thought are fertile fields for studies of individual aspects of Holmes' persona, but they also make a survey of the whole terrain a daunting challenge.

I. BIOGRAPHY AS CHRONOLOGY

How could Sheldon Novick succeed at a task that scholars of much greater distinction have failed to master? Aside from greater endurance, a better starting position, and more luck,⁷ the answer is mainly that Novick aims lower than his predecessors. He pursues a more limited plan, and he carries it out with modesty.

Novick's plan is limited because *Honorable Justice* is not an intellectual biography. Novick makes clear at the outset that he does not attempt a grand synthesis of Holmes' life and thought (pp. xvii-xviii). This made his task infinitely easier than the one Frankfurter and Gilmore envisaged and that Howe partially accomplished. The book does not focus on Holmes' legal philosophy, leaving untouched questions of its origins, connections with contemporary trends, significance, or weaknesses. The various influences on Holmes' thought are mentioned only in passing, and milestones of his intellectual career are presented briefly and without depth or originality. For example, Novick discusses *The Common Law* in fewer than seven pages (pp. 148-49, 152-53, 157-60), *The Path of the Law* in one (pp. 223-24), and Holmes' first amendment opinions in about six (pp. 326-32). Thus *Honorable Justice* is no competition for Howe's study, which delves deeply into the background of Holmes' ideas and shows with great insight how his work fit into the intellectual climate of his era. This is not necessarily a flaw in Novick's biography. Unlike his personal life, Holmes' ideas have been thoroughly explored throughout the decades, and a final account, or a search for overall consensus, may well be pointless.

Instead, Novick has endeavored to write a personal biography, "the story of Holmes' life as a man" (p. xviii). Even in the pursuit of this more limited goal,⁸ however, Novick's ambition — and accordingly his accomplishment — is modest. To a personal biographer, Holmes presents two major challenges. The vast amounts of material documenting a life that spanned several eras of American history must be reviewed and summarized. And the multitude of facts must be filled with meaning so that Holmes' greatness, or at least his fame, can

7. Frankfurter abandoned the project after his appointment to the Supreme Court, Howe died before completing his work, and Gilmore died before he could even begin to write his intended Holmes biography. Novick acknowledges that he benefited greatly from and builds on the work of these predecessors. Pp. xvii, xix, 383.

8. To say that Novick's goal is more limited is not to belittle the difficulty of writing a personal biography of Holmes. But writing the story of Holmes' life is still a more limited task than drawing a full portrait of the man as an intellectual.

be understood. Novick meets the first of these challenges, but fails to take on the second.

Novick has reviewed, and now summarizes, formidable quantities of records concerning Holmes' life and career. He draws heavily on primary sources — letters, diaries, contemporary accounts, memoirs, and public records.⁹ He refrains from speculation and marks any conjectures as such. In doing so, he manages to present a detailed, reliable, and well-documented account. *Honorable Justice* traces Holmes' life from his New England boyhood under the dominating influence of his father through his college years at Harvard and on to his experience as a Union soldier in the Civil War. It then shows him as a law student, as a young practitioner and beginning scholar, briefly as a Harvard law professor, and at greater length as a common law judge on the Massachusetts Supreme Judicial Court. And it finally presents him as "The Master of his Art" (p. 239) on the U.S. Supreme Court. Throughout all these years, we see Holmes in many roles and often through his own eyes — as the son of the "Autocrat of the Breakfast-Table"¹⁰ and the husband of his eccentric wife, as an officer in the famous Twentieth Massachusetts Regiment and a friend of great contemporaries, as a lawyer at the Boston bar and the author of essays on legal history, as a traveler to England and a speaker at festive occasions. The reader shares his defeats as well as his triumphs, his petty concerns as well as his great ambitions.

To the Holmes novice, most of this is interesting; to the Holmes aficionado, at least some of it is new. Many aspects of Holmes' life, such his work as a common law judge (pp. 169-75, 183-85, 231-32), his friendship with Teddy Roosevelt (pp. 235-36, 261-63, 270-72, 277-78, 288, 290-91), and his relationship with his Supreme Court contemporaries (pp. 241-376), are better illuminated than before. Perhaps the most intriguing novelty is the revelation of Holmes as a womanizer. Holmes' flirtations and popularity with the other sex have long been known, but knowledge of his particular affairs is new. Novick shows that Holmes was seriously enamored for many years with Lady Castletown, a married English noblewoman, and probably with other English ladies as well. While the reader with a prurient interest in detail will remain unsatisfied, it is clear that Holmes' relationships were not always platonic. His extramarital adventures make some of his trips to England appear in a new light, and not merely as journeys to the birthplace of the common law, as is generally believed; they were inspired less by thirst for legal knowledge than by hunger for erotic adventure (pp. 188-90, 208-19, 226-27, 233-34).

9. For a bibliography, see pp. 406-07.

10. Holmes' father, Dr. Oliver Wendell Holmes, became famous as the author of a series of essays published under the title of "The Autocrat of the Breakfast-Table" in *The Atlantic Monthly*. See p. 19.

But while Novick presents a rich account of the facts of Holmes' life, he seems to lack the ambition to go beyond that. He is content with presenting these facts to the reader as pure information without interpretation. The organization of the book illustrates this vividly. *Honorable Justice* clings to a rigid chronological construction from which there are few deviations. Events are strung together in piecemeal fashion according to their sequence in time, regardless of their internal connection or their relative importance. On one page, for example, Novick describes Holmes' friend John Gray courting one Minny Temple, mentions the Holmes family's search for a new house in Boston, writes about Holmes' flirtations with said Minny Temple, suddenly turns to Holmes' work and concern about his health, and finally discusses Holmes' correspondence with Leslie Stephen (p. 120). Novick then returns to related matters throughout the next 200 pages whenever they come up in Holmes' life. As a result, reading the narrative is frequently exhausting and dull because the reader must shift her attention quickly and often to follow the staccato of topics. In the end, the reader is left with the suspicion that she cannot see the forest for the trees.¹¹

These flaws are at first glance merely stylistic; nevertheless, they indicate a much more serious shortcoming of the book. Apparently, Novick sticks to his rigidly chronological order because he has no other criteria for organizing the facts. He is wonderful at collecting facts, but is ultimately left adrift because he fails to connect and group them thematically in a way that could give these facts meaning. *Honorable Justice* rarely suggests to the reader what significance certain events or experiences had for Holmes. For example, Novick describes the authoritarian character of the elder Holmes (pp. 10, 14), but does little to explain how this affected young Wendell. He deals at length with Holmes' Civil War experience (pp. 34-89), but he does not explain why this should matter. He refers to Holmes' ambition (pp. 163-66), but does not show what it meant and how it drove him.

In a personal biography, restraint of interpretation is, to a certain extent, a virtue, because it leaves the reader room for her own views. But a biography must let the reader discern in the multitude of facts the grand themes of a life. *Honorable Justice* makes no such effort. Whatever the grand themes in Holmes' life were — war and law, doubt and faith, ambition and detachment,¹² to name just a few possibilities — Novick does not show any of them at work. Without unifying themes, the thousand parts of the great mosaic of a life form no

11. This feeling is aggravated by Novick's often awkward selection of facts. For example, it would be important to report how widely Holmes read (such as German and French works, often in their original language), but Novick barely mentions it. On the other hand, we learn the details of the dinner menu on his father's seventieth birthday. Pp. 156-57.

12. See *infra* Part III.

contours. Thus, a picture of Holmes as a man and as a lawyer does not emerge from Novick's book.

Without such a picture, *Honorable Justice* fails to accomplish the ultimate goal of a personal biography — to let the reader understand what made its protagonist a great, or at any event an extraordinary, person. Novick himself introduces Holmes as “one of the best-known and most honored Americans in this country's history” (p. xv), but he presents only a man who led a long and diverse life and who did a lot of unrelated things rather well. After reading 400 pages and learning only the facts, the reader is still left with her original question: Why Holmes?

The remainder of this review attempts to answer this central question by examining Holmes' roles both as hero of the legal profession and as idol of a broader public. In doing so, it aims to offer an interpretive context from which Novick's treasure trove of historical data might gain greater meaning.

II. THE HERO OF AMERICAN LEGAL CULTURE

Every culture has its heroes, men or women who personify its idealized image and who seem larger than life. The automobile industry has Henry Ford; jazz, Louis Armstrong; Hollywood, Marilyn Monroe; and baseball, Babe Ruth. American law has Oliver Wendell Holmes. Others may have been more successful attorneys, more thorough scholars, or more responsible judges, but as a symbol of the American legal culture, Holmes stands alone. What was it that made Holmes, rather than Marshall, Story, Cardozo, Brandeis, or Llewellyn, the virtual personification of American law? I believe Holmes became the favorite of the legal culture for two major reasons: he was uniquely qualified as a hero by an unmatched combination of powerful credentials, and he used these credentials to glorify the legal profession with unprecedented eloquence and credibility.

His many credentials become visible as soon as the facts of his life are organized. They include background and education, personal experience and professional record, beliefs and talents, character, appearance, and longevity. The list of Holmes' credentials is long and almost perfect; unfortunately, Novick fails to assemble these credentials into the contours of a portrait.

His personal background was that of a social aristocrat. The Holmeses were a respected and influential Boston family. Coming from old New England stock of ministers, soldiers, and judges, his father was a well-known doctor and famous writer (pp. 3-8, 18-20). This background endowed Holmes with social prestige and made him confident that he was destined for great intellectual accomplishment.

His education left nothing to be desired by the standards of the time. He went to Harvard College and Law School and later benefited

from and contributed to Harvard's growing reputation. The Boston of his youth was America's intellectual center, a place where Emerson, Louis Agassiz, the Jameses, and Henry and Brooks Adams were his company, and where Melville and Hawthorne lived close by (pp. 13, 20-28, 101-02). Holmes was versed in literature, philosophy, history, and science, and he traveled to Europe to breathe the air of its old culture and to learn about its new ideas (pp. 103-13). But Holmes was not a bookish weakling. He experienced the harsher side of life in the battles of the Civil War, where he served with distinction. He fought fearlessly (and on the victorious side), survived two near-mortal wounds and returned a hero (pp. 43-89). In later years, his many comparisons between war and law were rife with implicit references to his own adventures and underscored by his recognized valor.

His record as a lawyer was equally distinguished. He was a serious scholar of legal history, a talented attorney in a respected Boston law office, the famous author of one of the greatest books on jurisprudence, a Harvard law professor, a capable common law judge, and the most influential Supreme Court Justice of his time. As a result, Holmes enjoyed the respect of virtually every segment of the legal profession.

Holmes' ideas and beliefs reflected the great intellectual trends of his era. He combined the ideas of Darwin, Malthus, Spencer, and Mill, and partook in the development of modern pragmatism.¹³ Living in a time of great epistemological reorientation, he praised modern science but professed belief in man's need for traditional, ethical ideals.¹⁴ From all these ingredients, he brewed a personal and legal philosophy that appealed to many of his contemporaries, even where it seemed at first novel or shocking.

Holmes had the talent to present his ideas in a powerful and attractive manner. He was eloquent, and skillfully embellished his ideas with references to literature, science, and the arts. He drew on the imagery of war and scientific expedition and thus linked the law to the heroes of his time, the soldier and the arctic explorer. And he had the ability to convey ideas concisely, vividly, and poignantly, often articulating with blinding clarity what many others vaguely felt.

His character was straightforward. He was controversial but never gave reason to doubt his honesty. He cautiously avoided the traps into which many public figures have fallen. He never took sides with a political faction, kept his financial record clean, obeyed the law, and avoided social scandals.¹⁵

13. See Grey, *supra* note 1.

14. See, for example, the famous final paragraph of *The Path of the Law*, in O.W. HOLMES, COLLECTED LEGAL PAPERS 200-02 (1920) [hereinafter PAPERS], and *The Bar as a Profession*, in *id.* at 158-59.

15. Holmes was careful not to break the law even in trivial matters. See p. 174. He even conducted his extramarital affairs in safely distant England. See *supra* Part I.

Personally, Holmes was handsome and charming. He maintained his tall and proudly erect stature well into old age, and his full hair and broad mustache gave him an even greater air of dignity when they turned white. His clear, gray eyes never lost their alertness. And he was, by all accounts, a brilliant conversationalist, chatting with ease and wit, and always full of anecdotes and aperçus.

Finally, Holmes led an unusually long and rich life. He fought for Abraham Lincoln and advised Franklin D. Roosevelt (p. 376). In his youth, a trip from coast to coast was by stagecoach; in his old age, transcontinental air travel was commonplace. He ascended to the U.S. Supreme Court almost at retirement age and after more than two decades on the Massachusetts bench, but he still served under four U.S. Chief Justices.¹⁶ As he grew older, Holmes spoke increasingly with the authority of age and with an aura of time-honored wisdom.

With this diversity and wealth of credentials, Holmes was especially attractive to an unusually broad spectrum within the legal profession. He appealed to people with all kinds of backgrounds and preferences — social and intellectual aristocrats and Civil War veterans, positivists and idealists, the philosophically ambitious and the practically minded, traditionalists and innovators. And he had something to say to all branches of the profession — scholars, teachers, attorneys, judges, and even to students.¹⁷

And yet, this array of qualifications was only a necessary, but not a sufficient condition, for his becoming a hero of American legal culture. Had he been a silent, introverted, and modest man, even with his impressive credentials he may have been overlooked, or quickly forgotten. Holmes, however, took great care not to let that happen. He constantly employed all his credentials to celebrate the law and the legal profession, and, with them, himself. Throughout his career, Holmes glorified in his speeches and writings the law in general and the common law in particular. He elevated the law from a mere set of technical rules to a "great anthropological document,"¹⁸ incorporating the precious heritage of the past and the awesome challenge of the future into a "magic mirror" reflecting human life.¹⁹ To master its difficulty required, like war, utmost heroic courage and strength, but it also promised, like victory, great glory.²⁰

16. Holmes served under Chief Justices Fuller, White, Taft, and Hughes.

17. Holmes spoke regularly before law school faculty, at bar association meetings and dinners, and to student bodies. See O.W. HOLMES, *PAPERS*, *supra* note 14; O.W. HOLMES, *SPEECHES* (1913) [hereinafter *SPEECHES*].

18. O.W. HOLMES, *Law in Science and Science in Law*, in *PAPERS*, *supra* note 14, at 210, 212.

19. O.W. HOLMES, *The Law*, in *PAPERS*, *supra* note 14, at 25, 26.

20. O.W. HOLMES, *The Profession of the Law*, in *PAPERS*, *supra* note 14, at 29, 32; see also O.W. HOLMES, *Brown University Commencement 1897*, in *PAPERS*, *supra* note 14, at 164 (comparing the lawyer to the arctic explorer).

Holmes' immense popularity as a speaker at bar dinners and law school celebrations illustrates how much lawyers liked to hear what he said. They liked to hear it because it fulfilled one of their greatest needs. In the postbellum period and with the rise of modern capitalist enterprises, the leaders of the legal profession came to power and wealth. But they still lacked the academic standing and the social dignity of the established humanities and new sciences. Law was still considered more a trade than an art or science, and large parts of the legal profession consequently suffered from a complex of intellectual inferiority.²¹ Holmes helped them to overcome it. He assured them that law was not only an art and a science, but a great calling. He maintained that "of all secular professions" legal practice "has the highest standards."²² He portrayed the profession as intellectually equal or superior to other disciplines, and as practically more important than most.²³

Of course, many others said similar things, but Holmes said them with peerless eloquence, complete conviction, and — because of his outstanding credentials — with unrivaled credibility. After all, he was living proof that a jurist could be a commanding and sweeping thinker. Thus, he succeeded in making the legal profession believe what it wanted to believe, but what many (including, once upon a time, he himself) had doubted — "that a man may live greatly in the law"²⁴

Today, the legal profession has perhaps more self-confidence than is desirable, and less need to be assured of its intellectual status. Nevertheless, lawyers have continued to like to listen to Holmes. That is understandable because we all like to hear that we are part of a socially important, intellectually dignified, and at times even glorious profession. Like no other American lawyer, Holmes gave the legal culture an opportunity to feel good about itself.²⁵

In recognition of his long list of qualities, and in return for his service as a panegyrist of the profession, the legal culture recognized

21. Holmes' ubiquitous assurances in his talks and writing of this period that law is a science attest more to the legal community's widespread self-doubt rather than to any generally shared belief in the law's intellectual equality with other academic disciplines.

22. O.W. HOLMES, *The Law*, in PAPERS, *supra* note 14, at 25.

23. O.W. HOLMES, *The Profession of the Law*, in PAPERS, *supra* note 14, at 29; *see also* O.W. HOLMES, *The Use of Law Schools*, in PAPERS, *supra* note 14, at 35, 38-39

24. O.W. HOLMES, *The Profession of the Law*, in PAPERS, *supra* note 14, at 30.

25. While all professions strive for a positive self-image, lawyers may find that goal more difficult to achieve than do other professionals, and thus have a greater need to be assured of their dignity in, and utility to, society. Aside from the widespread hostility of laypeople toward lawyers, the reason for the doubts about their own calling may be that the benefits of their activity, if any, are less tangible than those produced by most other professions. Thus deep down inside, lawyers perhaps do not understand why they get paid so well for what they do. Holmes was helpful in this regard as well. He told them that money was not really what the practice of law was all about. O.W. HOLMES, *The Path of the Law*, in PAPERS, *supra* note 14, at 167, 202.

Holmes as its leading representative. This was not only an act of homage and gratitude, it was also an appropriate, though hardly conscious, tactical move. A better qualified candidate, or a more vociferous spokesperson for the law, is hard to find.

To say that Holmes' status as the leading symbol of the legal culture depended in large part upon his personal attributes and his glorification of his own calling is not to deny the importance of his substantive contributions to the law. They may in and of themselves warrant considering Holmes the greatest American jurist of all times; that is a decision for scholars of legal history, jurisprudence, common, and constitutional law. But his fame in the legal profession at large, and among the broader public, hardly rests on the substance of his scholarship and opinions. They are as little understood by most who extol Holmes as is the relativity theory by most of those who consider Einstein the ultimate scientist.

III. AN IDOL OF THE PUBLIC

Holmes' heroism extended well beyond the American legal profession. In his later years, and particularly after his death, he became well known and highly venerated among the general public. Holmes is perhaps the only lawyer as such who has become a symbol of American culture.

In part, Holmes' fame resulted from his leading role within the legal profession itself; given the traditional importance of law in American society, it is no wonder that the law's ultimate personal symbol should also find himself in the public limelight. And yet, to the general public, Holmes was not only the supreme lawyer and judge, but also simply a great man because he was, particularly as a Supreme Court Justice, charismatic. To understand Holmes' role as an idol of the public, one must first understand the public's fascination with him. Much of it was due to qualities already mentioned: his background and war record, his eloquence and epigrammatic style, his personal appearance, and his long life. But that is hardly all. Beyond these traits, there was something special about Holmes.

Holmes was fascinating because he embodied two diametrically opposed elements of human life — faith and doubt — and because in embracing both he showed a fundamental fearlessness that gave him enviable force and serenity. Faith and doubt were perhaps the two most important themes in his life. The role of doubt for Holmes is obvious throughout his speeches and writings. He carefully cultivated the image of a skeptic, and when he wrote that "[t]o have doubted one's own first principles is the mark of a civilized man,"²⁶ he implicitly offered himself as the prime example. Personally, he was skeptical

26. O.W. HOLMES, *Ideals and Doubts*, in *PAPERS*, *supra* note 14, at 303, 307.

of philosophical *a priori*s and moral dogmas;²⁷ as a scholar and judge, he distrusted and resolutely challenged the general concepts and abstract propositions to which many of his colleagues blindly subscribed.²⁸

The importance of faith for Holmes is less obvious. But his beliefs were at least as strong as his doubts, though he propagated them less forcefully. Personally, he was a great believer in many virtues, such as ambition, courage, and endurance, and in the human need for ideals.²⁹ As a scholar and judge, he expressed his many convictions in bold terms. The most famous passages of *The Common Law* radiate their author's confidence in their truth.³⁰ And in his judicial opinions, there is a multitude of propositions, many far from self-evident, as to which Holmes confessed to have "no doubt."³¹

Both his doubt and his faith had been shaped on the battlefield. Holmes himself was explicit in attributing his skepticism to Civil War experience.³² Fighting for his own beliefs, he had been forced to admit "that others, poor souls, [were] equally dogmatic about something else" and that they "will fight and die to make a different world, with equal sincerity or belief."³³ But much of his faith also had its roots in his soldier years. He saw the virtues at work, in himself and in others, that he admired throughout his life — valor, determination, quest for honor — and he understood that life is poor without ideals and passion (pp. 176-77). Holmes also realized vividly on the battlefield that the stronger will have their way regardless of any moral principles.

Holmes' doubt and faith were each attractive, albeit for different

27. O.W. HOLMES, *Ideals and Doubts*, in PAPERS, *supra* note 14, at 304-05; O.W. HOLMES, *Natural Law*, in PAPERS, *supra* note 14, at 310.

28. For example, Holmes' insight that "[g]eneral propositions do not decide concrete cases," *Lochner v. New York*, 198 U.S. 45, 76 (1904) (Holmes, J., dissenting), has become commonplace.

29. O.W. HOLMES, *The Class of '61*, in SPEECHES, *supra* note 17, at 95, 97; O.W. HOLMES, *Memorial Day*, in THE MIND AND FAITH OF JUSTICE HOLMES 9 (M. Lerner rev. ed. 1989); O.W. HOLMES, *The Soldier's Faith*, in *id.* at 18.

30. O.W. HOLMES, THE COMMON LAW 5, 8, 31-33, 36-40, 63-67, 76-78, 128-29 (M. Howe ed. 1963).

31. He did "not doubt for a moment" that "the questions of law . . . in the cases of *Schenck*, *Frohwerk* and *Debs*, were rightly decided," and that the power of the state to punish "is greater in time of war than in time of peace . . ." *Abrams v. United States*, 250 U.S. 616, 627-28 (1919) (Holmes, J., dissenting) (citations omitted). He had "[n]o doubt" that "the great body of private relations usually fall within the control of the State," *Missouri v. Holland*, 252 U.S. 416, 434 (1920), that the Sunday laws "would be sustained by a bench of judges, even if every one of them thought it superstitious to make any day holy," *Otis v. Parker*, 187 U.S. 606, 609 (1903), and even that "in the great majority of instances . . . justice will be done," *Blinn v. Nelson*, 222 U.S. 1, 7 (1911). A survey of his opinions shows that Holmes mentions doubt mostly in order to deny it.

32. O.W. HOLMES, *Memorial Day*, in THE MIND AND FAITH OF JUSTICE HOLMES, *supra* note 29, at 9. Again, Novick quotes the relevant parts of Holmes' speech (p. 176) but does not give the reader any indication of its significance.

33. O.W. HOLMES, *Natural Law*, in PAPERS, *supra* note 14, at 311-12.

reasons. His skepticism made him an engaging man and a model judge. Holmes appealed to many people because he openly expressed what they dimly felt, namely that "[e]very year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge."³⁴ He helped them to accept that inescapable experience because instead of deploring it he presented it as something that Americans have traditionally cherished — as a challenge requiring strength and courage. Moreover, with the rise of science during his lifetime, a critical, inquisitive attitude was increasingly considered desirable by American intellectuals. In his position as a judge, Holmes' skepticism was attractive because it led to a "blinding clarity and intellectual honesty with which he approached the judicial process."³⁵ And, more importantly, it generated the tolerance which Jerome Frank praised as "the mark of high maturity."³⁶ His most famous dissents rest on this openmindedness — toward social experiments in *Lochner v. New York*,³⁷ or toward the political beliefs of others in *Abrams v. United States*.³⁸ In the American culture, tolerance, Holmes' most celebrated quality, is not only a judicial virtue, but also a civic ideal.

But Holmes was also attractive because he held strong beliefs. In an American judge as well as in a citizen, skepticism must not lead to nihilism, and tolerance must not engender stupor. Holmes avoided both. He was a professed idealist, not scorning the comforts of modern life, but asking for goals beyond it. He preached the ideals of the white males who shaped public opinion (most of whom had the good fortune never to have to live up to these ideals) — "the divine folly of honor . . . the senseless passion for knowledge,"³⁹ heroic achievement, and stoic endurance of the loneliness that it requires.⁴⁰ He talked of life as battle, and of danger and death as "a price well paid for the breeding of a race fit for leadership and command."⁴¹ It is no wonder that these sentiments made him popular among his many compatriots who believed in America's manifest destiny as leader of the world.⁴² Here, finally, was a lawyer who said the right things. And here, too,

34. *Abrams v. United States*, 250 U.S. at 630.

35. Atiyah, *The Legacy of Holmes Through English Eyes*, in *HOLMES AND THE COMMON LAW* 68 (1983); see also Hurst, *Who is the "Great" Appellate Judge?*, 24 *IND. L.J.* 394, 398 (1949).

36. J. FRANK, *LAW AND THE MODERN MIND* 274 (Anchor Books ed. 1963).

37. 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

38. 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

39. O.W. HOLMES, *The Soldier's Faith*, in *THE MIND AND FAITH OF JUSTICE HOLMES*, *supra* note 29, at 20.

40. O.W. HOLMES, *The Profession of the Law*, in *PAPERS*, *supra* note 14, at 31-32.

41. O.W. HOLMES, *The Soldier's Faith*, in *THE MIND AND FAITH OF JUSTICE HOLMES*, *supra* note 29, at 23.

42. Holmes' definition of truth as "the majority vote of that nation that could lick all others," O.W. HOLMES, *Natural Law*, in *PAPERS*, *supra* note 14, at 310, sounded very appealing indeed to

was a judge who, despite his tolerance, could put his convictions into action swiftly and decisively and without too much ado about legal complexities.

Most captivating, however, was that Holmes could live with both his doubt and his faith at the same time, and in peace. As a matter of personal philosophy, he was convinced that these qualities must, and ought to, coexist. He realized that “[w]e have been cock-sure of many things that were not so”⁴³ and was ready to leave “absolute truth for those who are better equipped” than he, but he also insisted “that without such absolute ideals we have nothing to do but to sit still and let time run over us.”⁴⁴ Instead, Holmes urged, we must still pursue our ideals, unattainable as they may be. On the bench, Holmes artfully combined his skepticism and belief to form his judicial philosophy. He distrusted his brethren’s and his own ability to decide what is good for society, and was for this very reason convinced that the majority of the people must be allowed to make such choices.⁴⁵ For this reason, although he had his doubts about the wisdom of a minimum-wage statute, he was “absolutely free from doubt” as to the power of Congress to enact it.⁴⁶

Like his faith and doubt, Holmes’ readiness to accept their coexistence was forged in combat. There he had recognized that “when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way,” but he also came to accept this inclination as “perfectly consistent with admitting that, so far as appears, his grounds are just as good as ours.”⁴⁷ From his war experience, Holmes learned what was perhaps his greatest lesson: there is no absolute truth (only a majority view), but we still cannot live without faith in our convictions. We must always be ready to doubt, but we must never give up our ideals, and we must fight for the latter despite the former.

Of course, Holmes’ critical and yet idealistic attitude was appealing because it united the attractive aspects of both skepticism and belief in one person so that Holmes was liked by many people for many reasons. But the whole was more than the sum of its parts. To live, as Holmes did, at peace with the coexistence of faith and doubt has a

those who believed that that nation was theirs, although Holmes simply meant to say that there is no absolute truth in the abstract.

43. O.W. HOLMES, *Natural Law*, in PAPERS, *supra* note 14, at 311.

44. O.W. HOLMES, *Ideals and Doubts*, in PAPERS, *supra* note 14, at 305; *see also* O.W. HOLMES, *Natural Law*, in PAPERS, *supra* note 14, at 315-16.

45. Albeit only within widely drawn limits of reasonableness and within the fundamental principles of the common law tradition. *See* *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

46. *Adkins v. Children’s Hosp.*, 261 U.S. 525, 567 (1923) (Holmes, J., dissenting).

47. O.W. HOLMES, *Natural Law*, in PAPERS, *supra* note 14, at 312.

fascination of its own because it attests to a fearlessness toward life and its inevitable paradoxes.

Holmes showed this fearlessness in his willingness to admit uncertainty while standing by his beliefs. He calmly faced the limits of human knowledge and the impossibility of moral certitude, but simultaneously strove to do his best and pursue his ideals. In some cases, this fearlessness made him a great judge because he was frank about his own convictions and yet let others live by their own. His demand for freedom of thought, not only "for those who agree with us but freedom for the thought that we hate,"⁴⁸ was deeply touching because he strongly believed in the necessity of war but was tolerant of pacifism.

Fearlessness toward life is sometimes innate, but it is more often, as in Holmes' case, the mark of those who have faced mortal danger, realized that they can remain calm and composed in the face of annihilation, and survived. Holmes was such a survivor (pp. 48-51). "[T]he incommunicable experience of war"⁴⁹ taught him that he was strong enough to do his duty even in the face of death. He had been "touched with fire" and he realized that the experience was a "good fortune."⁵⁰

A life without fear of death and despair is fascinating because it is marked by a peculiar quality which Ernst Jünger, borrowing from the French, called "désinvolture."⁵¹ Perhaps the closest English term is "ease," but it must be taken in a dual sense — as the opposite of difficulty and as the opposite of pain.

In the first sense, a fearless life is marked by ease because it is (relatively) "easy." The survivor has already passed the worst test, and he knows that by comparison the remainder of life, tough as it may be, is clearly manageable. Holmes had this confidence. He wanted to master the law and found the task very hard, but he felt that he could succeed because he had already succeeded at the harder task of doing his duty under fire. The law, however important and difficult, was always less awesome than war — "when once the ghosts of the dead fifers of thirty years since begin to play in my head, the laws are silent."⁵²

In the second sense, a fearless life is marked by "ease" because it is characterized by serenity. To the survivor, having been through the

48. *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

49. O.W. HOLMES, *The Soldier's Faith*, in *THE MIND AND FAITH OF JUSTICE HOLMES*, *supra* note 29, at 24.

50. O.W. HOLMES, *Memorial Day*, in *THE MIND AND FAITH OF JUSTICE HOLMES*, *supra* note 29, at 16.

51. Jünger, *Zur Désinvolture*, in *9 SÄMTLICHE WERKE: DAS ABENTEUERLICHE HERZ* 260 (1979).

52. O.W. HOLMES, *Learning and Science*, in *PAPERS*, *supra* note 14, at 138.

worst already, there remains little of which to be deeply afraid. Having escaped the war alive, Holmes was fundamentally at peace with himself and the world, "a man who was content enough with life. . . ."⁵³ The only remaining major worry was whether he would become, and be recognized as, a great legal thinker.⁵⁴ Thus, he was concerned about his health not so much for fear of death as such, but because he dreaded dying before he could accomplish his work and receive credit for it (p. 182). When he had succeeded and was recognized in later years, this worry also ended, and he lived, and faced death, serenely (pp. 342, 364-65, 368, 374-76).

"*Désinvolture*" contains both these senses of "ease." It is the combination of power and peace that results from fearlessness.⁵⁵ It is charismatic because it is infinitely enviable, since it can yield a life of gain without pain. Particularly as a Supreme Court Justice, Holmes had "*désinvolture*." His judging was light yet powerful, and his opinions reflect an awesome self-confidence. Where his colleagues struggled long and hard, he decided swiftly and easily. And where others got lost in the mire of doctrinal detail, he hammered out the underlying problem in a few strokes of the pen and offered a courageous solution. Holmes was idolized by many people because they felt that by living and working with such ease and success Holmes embodied happiness.

With his fearlessness, serenity, and success, Holmes was, so to speak, the opposite of a tragic person. We identify and sympathize with Hamlet and Faust who, plagued by conflict, brood on the unanswerable questions of life, but deep down inside we envy Alexander who, with "*désinvolture*," simply cut the Gordian knot.

IV. A MIRROR OF VALUES

Heroes and idols reflect, as well as shape, the values of the culture which chooses them and of the public which admires them. By studying their lives and personal profiles, we can learn something about the group which they represent, the culture that elevated them, and if we are part of that group, as lawyers are in the case of Holmes, we can learn something about ourselves.

Holmes' credentials made him the leading hero of the legal culture because they exemplified the traditional virtues of the ideal American judge — respectable family background, good education, intrepidity,

53. Lerner, *Preface* to O.W. HOLMES, *THE MIND AND FAITH OF JUSTICE HOLMES*, *supra* note 29, at xlvii.

54. Holmes was relentlessly ambitious and always wanted to "beat the whole crowd." Letter from Oliver Wendell Holmes, Jr., to Clara Sherwood Stevens (Nov. 18, 1906), *quoted in* THE SHAPING YEARS, *supra* note 5, at 283.

55. Jünger describes it as "the irresistible grace of authority" ("die unwiderstehliche Anmut der Macht") and as "a special form of serenity" ("besondere Form der Heiterkeit"). Jünger, *supra* note 51, at 261.

broad and rich legal experience, a sense for the great ideas of one's time, eloquence and poignancy, integrity of character, handsomeness and charm, and the wisdom of a long, successful life. These values were certainly crucial in Holmes' era, and they have, by and large, continued to dominate America's legal culture.⁵⁶ Because Holmes had them all, he was the ultimate American judge.

Similarly, Holmes became a public idol because he mirrored many of the preferences of a wider American audience. Many of his virtues as a lawyer also counted as virtues as a citizen and person. Beyond those, Holmes was admired for his frankness about doubt, for the tolerance it engendered, and for his concomitant adherence to traditional American ideals. His ability to accept both faith and doubt attested to a fascinating fearlessness that gave him an aura of enviable personal power and peace.

But the long list of qualities that made Holmes the hero of the legal culture and an idol of the public is interesting not only for what it contains, but also for what it omits. As a lawyer, Holmes felt about himself, and often acted, as if he were still on the battlefield. As a result, he showed a soldier's virtues but lacked many traits that battle failed to foster. As a soldier, he had learned that battles were decided by strength, not by the merit of the combatants' causes or moral ideals. Trust in the notion of justice as the grand goal of the legal process was therefore not Holmes' mark. Whatever that notion may mean to an individual, to Holmes it meant virtually nothing. Moreover, battle is, almost by definition, the opposite of the search for a middle course. Holmes was convinced that conflict must be fought out to the point of victory or defeat, *i.e.*, until there is a clear loser and a winner who takes all. Belief in compromise is conspicuously absent among Holmes' qualities.

Compassion and sensitivity are also missing from Holmes' personality. The war dulled to the point of nonexistence whatever more delicate feelings for his fellow humans he may once have had (pp. 73, 141). It fostered indifference toward human suffering, for in the bloodbaths of its battles compassion would have driven a man to madness. After the war, Holmes never regained a more sympathetic attitude. His harshness is notorious and sometimes shocking.⁵⁷ It also extended to society as a whole for whose well-being Holmes showed

56. Family background is certainly less important today than it was in Holmes' times. Other legal cultures, even Western ones, subscribe to only some of these values. On the European continent, for example, a sense for the great ideas of one's time, eloquence, intrepidity, or breadth of legal experience would not be considered to be highly important qualities of a judge, while reliability, restraint, and technical expertise in law count for a lot.

57. He felt "no pangs of conscience" over conscripts being marched to death or enemies being killed, O.W. HOLMES, *Ideals and Doubts*, in PAPERS, *supra* note 14, at 304, and his infamous opinion in *Buck v. Bell*, 274 U.S. 200 (1927), speaks for itself: "Three generations of imbeciles are enough." 274 U.S. at 207.

no deep concern. Surrounded by social struggle and amid the forebodings of the great catastrophes of the twentieth century, he felt a Spenglerian pessimism about the fate of his own civilization and calmly accepted the prospect of its decline (pp. 306, 309).

In the end, a complete picture of Holmes shows a man who was unable to care much about anything but himself.⁵⁸ He was a veteran whose physical wounds had healed, but whose soul the war had crippled forever. Indeed, his deeply ingrained indifference to the fate of others underlay even those qualities that most distinguished him, his fearlessness, force, and serenity.

His fearlessness, true and admirable as it was, was not the result of any pitched battle between fear and courage, but of a lack of fear in the first place. He did not fear anything but his own failure because he did not care for anything but his own success. He professed faith in great ideals, but his faith was, as he himself said, blind.⁵⁹ Nor did the force of his landmark Supreme Court opinions result from hard struggle with conflicting arguments in the great issues before him. Instead, it rested in large part on his pervasive indifference. Since Holmes had no sympathy with the parties and did not care personally about the result,⁶⁰ he could reach his decision unhindered by personal feelings and with a swiftness and ease that suggested a touch of genius. His serenity attested not to the acceptance of the pain of conflict, but to the painlessness of utter detachment. This is evident in his private life as well, where he noted the deaths of his family and friends without signs of deep grief.⁶¹

It sheds an interesting light on the American legal culture and on American society at large that they have chosen a retired warrior as

58. Holmes was decidedly egocentric and everything but modest. To be sure, he avoided embarrassing directness when he praised himself. But whenever he celebrated the men of the Twentieth Massachusetts Regiment, or the greatness of the law, he made sure that the audience understood that he had contributed to it. See, e.g., O.W. HOLMES, *Brown University Commencement 1897*, in PAPERS, *supra* note 14, at 164-66 (discussing Holmes' contribution to the law); O.W. HOLMES, *The Soldier's Faith*, in THE MIND AND FAITH OF JUSTICE HOLMES, *supra* note 29, at 24-25 (where Holmes speaks mostly of himself and "our regiment").

59. Again, his ideals and images came from the war. For Holmes, the ultimate faith was that "which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which does not see the use." O.W. HOLMES, *The Soldier's Faith*, in THE MIND AND FAITH OF JUSTICE HOLMES, *supra* note 29, at 20. Such praise of "blind belief," *id.* at 21, and of "obedience to superior command" leading "to certain and useless death," O.W. HOLMES, *Memorial Day*, in THE MIND AND FAITH OF JUSTICE HOLMES, *supra* note 29, at 14, is hardly the mark of a man who has gotten "rid of the need of a strict father . . ." J. FRANK, *supra* note 36, at 276. Holmes' dependency on paternal authority is also amply illustrated by his constant preoccupation with duty. "The rule of joy and the law of duty seem[ed] all one." O.W. HOLMES, *Speech at a Bar Dinner*, in PAPERS, *supra* note 14, at 247.

60. "The importance of the things we have to deal with makes me shudder from time to time but I don't lie awake over them." Letter from Oliver Wendell Holmes, Jr. to Nina Gray (May 3, 1903), quoted at p. 259.

61. The deaths of his father, his friend William James, and even his wife seemed to leave him virtually unmoved. Pp. 201, 301, 367.

both hero and idol.⁶² Does this choice indicate that respectable background and elitist training, martial valor and personal dauntlessness, eloquence and decisiveness are the crucial cultural values, while belief in justice and compromise, compassion and concern for others count for little? Once upon a time, as Holmes himself recognized, Western law had emerged as a substitute for the violence of society's internal wars.⁶³ Perhaps this heritage lives on more strongly in America than is generally perceived.

62. He was not the only veteran in that role. Karl N. Llewellyn, a survivor of World War I, preached equally harsh views of the law. K. LLEWELLYN, *THE BRAMBLE BUSH* 122 (Oceana Publications ed. 1960).

63. O.W. HOLMES, *supra* note 30, at 6-7.