

Brooklyn Law Review

Volume 63

Issue 1

SYMPOSIUM:

The Path of the Law 100 Years Later: Holme's
Influence on Modern Jurisprudence

Article 2

1-1-1997

Foreword

Richard A. Posner

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Richard A. Posner, *Foreword*, 63 Brook. L. Rev. 7 (1997).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol63/iss1/2>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

FOREWORD: HOLMES*

Richard A. Posner[†]

A century and a half after his birth and two-thirds of a century after his retirement, Holmes remains the towering figure of American law. I think it is reasonably easy to explain why he towers so and also why there is unprecedented scholarly interest, illustrated by this conference, in him. But those are two *easy* questions about Holmes. The difficult questions are three, and they are interpretive, causal, and evaluative, respectively. The first is, what exactly does Holmes “stand for”—what is the meaning of his career, what is the structure, unity, or development of his thought? The second question is, why did he hold the views he did? And third, now that we have a fairly long perspective from which to appraise him, how should we rate him—as the greatest judge and legal scholar in our history or as something less, even as something bad? I shall offer tentative answers to all five questions in the hope of providing a framework in which to evaluate the subsequent presentations at the conference. My answers will be brief and dogmatic, rather than elaborately reasoned and substantiated. They are intended merely to stimulate thought.

Part of the reason that Holmes remains the towering figure of American law is that he was literally a towering figure—a tall and striking man with a famous name and a heroic war record. But this is only a small part. I mean no disrespect to Byron White to point out that White is another brilliant lawyer who was a Supreme Court Justice and who has a heroic war record and is tall and striking. And if he does not have a famous family name he has something better in our

* ©1997 Richard A. Posner. All Rights Reserved.

† Chief Judge, U.S. Court of Appeals for the Seventh Circuit, and senior lecturer, University of Chicago Law School. This is the lightly revised text of my keynote address to the conference on “*The Path of the Law 100 Years Later: Holmes’s Influence on Modern Jurisprudence*,” held at Brooklyn Law School on November 15, 1996. I thank the participants at the conference, and Martha Nussbaum, for their helpful comments.

times—athletic distinction. But he will never tower as Holmes towers. The difference lies in professional accomplishment. Although White was a competent judge and before that a competent practitioner and distinguished Deputy Attorney General, Holmes wrote the most important book in the history of American legal scholarship, *The Common Law*, and one of the most important articles, *The Path of the Law*.¹ He wrote a number of other influential articles as well. He topped off these academic achievements by becoming one of the most influential Supreme Court Justices in history, who left a profound imprint on the law of free speech, habeas corpus, federalism, substantive due process, and on the concept of judicial self-restraint. He wrote the most famous dissents in the history of the American judiciary; and he was the best *writer* that American law has produced, with a gift for the memorable epigram. He was also immensely prolific. I believe (without being certain) that he wrote more opinions than any other U.S. Supreme Court Justice, even though he was over sixty when appointed to the Court; and when you add the opinions he wrote for the Supreme Judicial Court of Massachusetts he probably wrote more published opinions than any judge in United States history—not to mention more than ten thousand letters, most of publishable quality. Apart from their rhetorical brilliance, his opinions are shot through with philosophical and even economic insights. His influence and achievement surpass that of any other figure in the history of American law, and would be hardly less noteworthy or noted, at least within the academic and legal professions, had he lacked those features of personal history that he shares with Justice White.

That there should be considerable scholarly interest in a figure of such importance to the law is natural. But the recent surge in that interest is, I believe, largely a result of developments internal to academic law, and to social thought more generally, having little to do with Holmes *per se*. One development is the greater theoretical emphasis of modern academic law, which deflects the interest of many academic lawyers from commentary on current legal problems to history, biography, ideology, politics, judicial behavior, the relations of

¹ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

law to other fields, and jurisprudence—all areas to which the study of Holmes might contribute. Another development, possibly a belated effect of the Freudian revolution in psychology (explicitly so, in the case of Morton Horwitz's recent irresponsible speculations about the psychological foundations of *The Path of the Law*),² is the American public's avidity for the revelatory biography, an avidity increasingly shared by the legal profession, including its academic branch. We want to know what made Holmes tick; we hope it might be something to do with sex, and the publication of his letters to Clare Castletown quickened that hope. Sheldon Novick's recent, essentially baseless conjecture that Holmes had a homosexual relationship with Henry James in 1865 represents the *reductio ad absurdum* of this approach.³

I move now to the more difficult questions, which I called interpretive, causal, and evaluative. Given Holmes's enormous written output, which amounts to tens of thousands of pages of essays, opinions, and letters, it might seem that only patient diligence is required in order to determine his stance on every issue in jurisprudence and politics, and whether it was consistent over his long lifetime, and what therefore might be described as his dominant bent or bents, his "mentality." Despite Horwitz's argument to the contrary, there is (and here I draw on the authority of Professor Thomas C. Grey, whom I consider the foremost student of Holmes's thought) very little evidence that Holmes changed his basic outlook over his long life;⁴ there is not an early Holmes and a late Holmes in the way there is an early and a late Wittgenstein or even an early and a late Harry Blackmun and George Kennan, let alone the dizzy gyrations that one encounters in the thought of Bertrand Russell. And yet there is unending debate over whether Holmes is better described as a formalist or a realist, a pragmatist or a logical positivist, a liberal or a reactionary, a Puritan or a Social Darwinist.

² MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 142 n.* (1992) (discussed in my book *OVERCOMING LAW* 280-83 (1995)).

³ See SHELDON M. NOVICK, *HENRY JAMES: THE YOUNG MASTER* 110 (1996).

⁴ See, e.g., Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 *WM. & MARY L. REV.* 19 (1995).

I do not think the debate can be resolved (and only partly because of the vague contours of some of these terms); therefore I think it is futile. The debate presupposes that the average person, and even more clearly the exceptional person, is synchronically although not necessarily diachronically consistent—that he or she is a unity at every point in time and indeed over substantial intervals, but not necessarily over the life span. A person is allowed to have phases; normally just two—early and late—but occasionally three—early, middle, and late. He is also or instead allowed to develop in a more or less linear or at least continuous fashion. But he is not permitted to hold contrary views at the same time or otherwise than in accordance with phases or a line of development. This is a psychologically unrealistic model. A highly imaginative and intellectual person, such as Holmes, is apt to resemble Leopold Bloom in Joyce's *Ulysses* in having a mind that is a buzzing hive of thoughts shooting off in different directions. If his career involves writing, he will endeavor to make a consistent selection from the hive. But suppose that for one reason or another he writes down almost everything that floats through his mind. Then an attempt to reconstruct his "thought," his stance or "take," will just reproduce the hive. This is almost the situation in which Holmes found himself. As a judge, he had to write up his thoughts on a vast number of cases whether or not the particular case fit some program of exposition that he might have devised. He had to *react* to each case as it came along, and because he was an impatient worker, the firstlings of his thought were pretty much the firstlings of his writing hand, if I may be permitted to garble *Macbeth*. Meanwhile he had to, or more precisely wanted to, answer the numerous letters that he received from his pen pals. He did not make copies of the letters, and may not have expected them to be retained, let alone published, but they have been published (more precisely, they are being published—only a small fraction have been published as yet); and the dignity of print makes them specimens of his thought level with his opinions. The opinions are more polished; often a thought first appears in a letter, and later in more polished and pithy form in an opinion or article. Holmes wrote one book and a number of articles, and these (the book especially) were probably his most deliberate compositions. But he also gave a

number of after dinner and ceremonial speeches—rightly called “occasional” because the occasion shapes both form and substance. One is constrained, in speaking at a memorial service, an honorary-degree ceremony, or a gathering of veterans, in what one says, as well as how and how long one says it.

The book, the articles, and the “occasional” speeches round out, together with some better or worse substantiated anecdotes, the diverse, the enormous, and naturally, the inconsistent corpus of Holmes’s thought. How could one expect consistency in such a vast miscellany, much of it consisting of hasty thoughts elicited by highly specific occasions, whether judicial, epistolary, or declamatory?

The principal inconsistencies are between rather than within genres. As Professor Grey has shown, the Holmes of the opinions is more formalistic and positivistic, especially in contract cases and in matters of interpretation and stare decisis, than the Holmes of the book and the articles (notably *The Path of the Law*), though there are a number of exceptions—dissents generally, such as *Abrams v. United States*⁵ and especially *Olmstead v. United States*,⁶ but also the “three generations of imbeciles” opinion (*Buck v. Bell*),⁷ the attractive nuisance opinion (*United Zinc & Chemical Co. v. Britt*),⁸ and a number of other majority opinions as well. The “liberal” Holmes that so entranced the New Deal generation is found mainly in the opinions, where his private views are usually masked (again, *Buck v. Bell* is a conspicuous exception). The letters and early speeches are where we find the “reactionary” Holmes—the militarist, the my-country-right-or-wrong nationalist, the Social Darwinist, the eugenicist, the Republican who votes for Warren Harding, the admirer of the robber barons, the laissez faire economist who thinks the Sherman Act, in his word, a “humbug.” The letters and articles are the principal site of the philosophical Holmes, but no consistent philosophy is discernable—his philosophical writings (jottings or fragments would be a more accurate description)

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

⁶ 277 U.S. 438, 469 (1928) (Holmes, J., dissenting).

⁷ 274 U.S. 200, 205 (1927).

⁸ 258 U.S. 268, 274 (1922).

are a fog through which now a Nietzschean lightning flash, now a Peircian, now a Wittgensteinian, now a Sartrean, now a Calvinist, now a Pyrrhonian can be glimpsed. We get occasional glimpses of the philosophical Holmes in the opinions as well, as in the paraphrase of Peirce in the *Abrams* dissent.⁹

Two things that mislead readers of Holmes are, first, the difference in writing styles between his generation and ours and, second, the tendency of a gifted writer to overstate. To the modern ear, the prose of the nineteenth century often sounds at once militant, brusque, and flowery, inviting misleading psychological inferences. I think Holmes's biographers, in reading his letters to Lady Castletown, mistake passionate style for sexual content. As for the tendency to overstate, I sense that Holmes was sometimes carried away by the sheer pleasure of writing arresting, even shocking, aphoristic prose: he could not resist a line like "Three generations of imbeciles are enough."¹⁰ He did not always pause to think whether such formulas exactly (let alone tactfully) expressed what he meant. He was a self-indulgent writer—for which those of us who have an aesthetic outlook are grateful.

I turn now to the causal question. Why did Holmes hold the views he did? Anterior to that question is a selection from among those views of the ones that the questioner considers most significant, most interesting, or most tenaciously held, which are likely to include Holmes's Social Darwinism, his scientism (and atheism), his legal positivism, and his legal realism. The most popular explanation for this cluster is Holmes's war service—three years as an infantry officer in America's bloodiest war, three serious wounds (two that were life-threatening), followed by a decision not to re-enlist. Although Holmes was very young, and most young people are very resilient, and life was harder and early death more common in the nineteenth century than it is today, it is certainly plausible that the experience he went through left a deep mark on his thought and character. But this is no more than plausible. As with many historical and biographical counterfactuals, it is impossible to confirm. Holmes's mature views were common enough among persons who avoided

⁹ *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

¹⁰ *Bell*, 274 U.S. at 207.

military service in the Civil War (often by hiring substitutes to fight in their stead). Civilians who get into positions where they can order out the troops are often notably bellicose, as we learned during the Vietnam War, and ex-soldiers are often pacific—which Holmes was not.

The second most popular explanation for Holmes's mature view is his character (which may, of course, have been influenced by his wartime experiences). He is commonly said to have been cold, ambitious, rivalrous, possibly soured by the declining influence of the "aristocratic" caste to which he belonged (especially on his mother's side), preternaturally detached, "Olympian," Puritanical, possibly even sexless—so that his childlessness is deemed the result of deliberate choice or a concomitant of his character, rather than, as it probably was, the result of his wife's contracting rheumatic fever shortly after their marriage. Ambitious for distinction he was, and rivalrous with his father and his boyhood friends (such as William and Henry James), but for the other lineaments in the character portrait that I just sketched there is no evidence. The picture that emerges from those thousands of pages of writings, and from the recollections of people who knew Holmes personally—with a suitable discount applied to the disparaging comments by those rivalrous friends, notably William James—is quite different. This Holmes, especially in the letters and in the reports by people who knew him, is warm, humorous, playful, epicurean, cultured, slightly off-color, tolerant, courteous, optimistic, curious, young in spirit, commonsensical, susceptible to flattery, witty, anecdotal, gallant, and kindly. Most of his letters date from his old age, yet the animating spirit of the letters is a *joie de vivre* inconsistent with the picture of the grim Civil War survivor and penny-pinching Yankee that some of Holmes's critics and biographers have tried to peddle.

Indeed, what is striking about Holmes the person is that there is no evidence of neurosis, war-induced or otherwise. He seems to have been a psychologically normal person of unusual physical health, intellectual ability, family circumstance, and luck (except possibly in the matter of children—about which he said he did not care that he was childless, but that may have been the fox without the tail talking). The effort at

psychobiography seems, in his case, bound to fail.¹¹ I am struck by the naiveté of the psychological speculation about Holmes. The idea that people whose cast of mind is skeptical, Darwinian, and atheistic (I pass on the question of whether skepticism and atheism are actually consistent), rather than spiritual and redemptive, are personally bleak and cold, or the converse—that philosophies of uplift are characteristically produced or embraced by sweeties—does not correspond to my own experience of people.

And *was* Holmes's philosophy in fact bleak and cold? That is the conventional view, but I do not think it is right. His was, or at least he pretended it was, a no-nonsense scientific outlook, one that denied that the universe has a purpose or that we are the wards of a deity or that death is not oblivion. But the scientific outlook is not typically, or in Holmes's case, pessimistic; the roots of the cultural pessimism of a Henry Adams, or a Spengler, or, to use a contemporary legal example, a Bork, are not in science. The scientific outlook does not reject the possibility of awe, wonder, and thrilled anticipation. Geological, biological, technological, and social evolution, after all, mindless as these processes are (even, to a significant extent, the technological and the social), have produced many wonders; they will produce many more. Holmes in fact was an optimist, and while I resolved to make this a different kind of paper about Holmes by not larding it with quotations from my eminently quotable subject, I do want to give you one quotation, from the end of one of his after dinner speeches, that I think will cinch my point:

I think it not improbable that man, like the grub that prepares a chamber for the winged thing it never has seen but is to be—that man may have cosmic destinies that he does not understand. And so beyond the vision of battling races and an impoverished earth I catch a dreaming glimpse of peace.

The other day my dream was pictured to my mind. It was evening. I was walking homeward on Pennsylvania Avenue near the Treasury, and as I looked beyond Sherman's Statue to the west the sky was aflame with scarlet and crimson from the setting sun. But,

¹¹ A point made in Adam Hirsch's critical review of G. Edward White's biography of Holmes. See Adam J. Hirsch, *Searching Inside Justice Holmes*, 82 VA. L. REV. 385, 400, 406 (1996) (reviewing G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* (1993)).

like the note of downfall in Wagner's opera, below the sky line there came from little globes the pallid discord of the electric lights. And I thought to myself that *Götterdämmerung* will end, and from those globes clustered like evil eggs will come the new masters of the sky. It is like the time in which we live. But then I remembered the faith that I partly have expressed, faith in a universe not measured by our fears, a universe that has thought and more than thought inside of it, and as I gazed, after the sunset and above the electric lights there shone the stars.¹²

That word "faith" is a clue to the fact that one can be a *warm* tough-talking atheist. I am put in mind, as I often am when reading Holmes, of Nietzsche's remark in *Thus Spoke Zarathustra*: "[m]an is a bridge and no end: proclaiming himself blessed in view of his noon and evening, as the way to new dawns."¹³ Louis Menand, in an interesting recent article, stresses Holmes's sense of the pervading uncertainty of the world;¹⁴ but for a person of optimistic bent, that uncertainty is a joy; it magnifies possibilities.

The most plausible, though strikingly uninteresting, explanation for Holmes's dominant or characteristic ideas is that from his father, a distinguished scientist as well as a poet, family friends such as Emerson (who influenced Nietzsche), the books Holmes read as a student at Harvard College, his English friends such as James Fitzjames Stephen, and the friends of his youth such as Peirce and William James, he picked up the exciting new ideas of the second half of the nineteenth century, many of which were also the exciting new ideas of the first half of the twentieth century, and he used them in the law. Holmes was not an original thinker. His philosophical significance—and I think he does have philosophical significance—comes from the memorable aphorisms in which he articulated and to some extent merged into interesting new combinations the ideas of his *Zeitgeist*, and from his ability to work some of those ideas into the law. I think he particularly

¹² Oliver Wendell Holmes, *Law and the Court*, in *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.* 145, 148 (Richard A. Posner ed., 1992).

¹³ FRIEDRICH NIETZSCHE, *THUS SPOKE ZARATHUSTRA: A BOOK FOR ALL AND NONE* 198 (Walter Kaufmann trans., 1966).

¹⁴ Louis Menand, *Bet-tabilitarianism: The Principles (Sort of) of Oliver Wendell Holmes*, *THE NEW REPUBLIC*, Nov. 11, 1996, at 47.

helps us to see that pragmatism is always constrained by what he called one's "can't helps," one's bedrock intuitions; so that the fewer or further apart these are—the more skeptical, open, or uncertain one is—the more pragmatic one will be. Even the dogmatist is pragmatic, only within narrower limits.

I come finally to the evaluative question: how high should we rate Holmes? He has not lacked for strong detractors, ever since Wigmore denounced him for the dissent in *Abrams*, which Wigmore thought naive and unpatriotic. At a recent conference I heard a law professor rate Holmes below Warren and Brennan—and in fact say he was not a good judge. Yet his rating by the legal profession as a whole remains high.

I think the reason Holmes is criticized so much is related to my earlier point about the lack of consistency in his thought. If you take position X and also position not X, you open yourself to criticism both by the Xers and by the antiXers. But the deeper reason why Holmes is a target of criticism is that most people who write about law are highly political and cannot easily distinguish political disagreement from moral or professional deficiency. Before about 1940, Holmes was generally to the left of the political center of the legal profession and was criticized mainly by those to the right, including super patriots like Wigmore, freedom of contract buffs, and Catholic natural lawyers. From then until about 1960, which I would guess was the high-water mark of Holmes's reputation, he occupied the center; and in that period, a period of ideological quiescence, the center was very broad. Since 1960, the center of the profession, especially its academic branch, swung sharply to the left, leaving Holmes well to the right and so attracting criticisms from what became a large left wing of professional and academic opinion. Just as the left did not want Robert Bork to be on the Supreme Court because he was such a prestigious and articulate conservative, so the left wants to dethrone Holmes, a far more prestigious and articulate "conservative," though a conservative only in the sense in which today's superegalitarians are "liberal." Holmes was a classical liberal in the mode of John Stuart Mill but without Mill's lapses (as they would have seemed to Holmes) into socialism and feminism.

Holmes is the victim also of political correctness, or what might alternatively be called in this context (in a phrase for which I am indebted to Stephen Holmes) "temporal parochialism." Applied to history and biography, political correctness requires that people who lived in different times from our own must nevertheless be held accountable for having failed to anticipate the sensitivities of today. T.S. Eliot is being tarred and feathered for sharing the anti-Semitic views of tens of millions of other residents of Great Britain during the period between the World Wars. The authors of the Bible are criticized for endowing the deity with male gender. (The gender of the twelve apostles must be a *prima facie* violation of Title VII.) Such criticisms give us moderns the comfortable sense of being morally superior to almost every one of the billions of people who predeceased us, though those who make the criticisms are generally not independent thinkers and had they lived in earlier times would share the prejudices and insensitivities of those times. Because Holmes wrote so much, often (particularly in his letters) with his guard down, it is easy to find many instances in which, particularly on matters of race and sex, he failed to display a 1990s sensibility, though on the whole his outlook was remarkably tolerant and indeed cosmopolitan by the standards of his generation (he was born in 1841).

If you want to take the measure of a person, you should do so with reference to his contemporaries, rather than with reference to us. And you should set to one side your political disagreements with the person, recognizing that political agreement is not a criterion when evaluating professional, scientific, or artistic achievement. At some point political disagreement does shade into just condemnation, but that point is not reached with Holmes. His political views that the left finds so unpalatable are for the most part the views of a Millian liberal, and are as worthy of respectful consideration today as they were when he expressed them. When we set aside our temporal parochialism, we see what a previous generation saw—that Holmes was the greatest legal thinker and greatest judge in our history.

