

# Article

## **The Judge as Mentor: Oliver Wendell Holmes, Jr., and His Law Clerks**

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### I. INTRODUCTION

The pioneering legal realist Jerome Frank once characterized Justice Oliver Wendell Holmes, Jr., as “The Completely Adult Jurist.”<sup>1</sup> By this he meant that Holmes had progressed beyond the “childish” search for absolutes in the law to the recognition that experience, rather than logic, was the proper lodestar for a judge to

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1. JEROME FRANK, *LAW AND THE MODERN MIND* 253 (1930).

follow.<sup>2</sup> There is another sense, though, in which Holmes demonstrated his maturity: As an associate Justice of the Supreme Court from 1902 through 1932, and as a retired Justice until his death in 1935, he served as mentor to a series of young Harvard Law School graduates who were paid by the United States Government to serve as his legal assistants, or to use today's term, his "law clerks." As a group, these men achieved extraordinary levels of professional success, particularly in the fields of legal academia and government service, and clerking for Holmes played a large part in that success. This fact was not lost on the clerks themselves. Alger Hiss, Holmes's clerk for the 1929-30 term, remarked that "[i]t was probably the greatest emotional [and] intellectual experience any of us ever had . . . . I think Holmes was the single greatest influence on me."<sup>3</sup>

While Hiss's career is hardly representative of his fellow clerks', his clerkship experience was similar to theirs in important ways, not the least of which was the veneration for Holmes that it instilled in him. He would have certainly agreed with Charles K. Poe, the very first of Holmes's protégés, who wrote to the Justice on the occasion of his ninetieth birthday and thanked him for "upset[ting] the notion that 'no man is a hero to his valet.'"<sup>4</sup> In reality, Poe and his successors were much more than "valets" for Holmes. They were his social and intellectual companions. It is this fact that makes Holmes a key figure in the transformation of law clerking from the primarily administrative institution it had been prior to the turn of the century into what can be termed a "noble nursery of humanity,"<sup>5</sup> wherein a young lawyer's intellectual curiosities could be awakened and valuable social and professional skills could be acquired. While Holmes did not invent the practice of hiring the top graduates of elite law schools to serve one-year terms as sounding boards in the chambers of federal judges (that distinction belongs to Horace Gray), his enormous popularity in the elite legal community enabled him to institutionalize the practice and to define the parameters of the law clerks' experience.<sup>6</sup>

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2. *See id.*

3. KATIE LOUCHHEIM, *THE MAKING OF THE NEW DEAL* 25, 31 (1983) (quoting Alger Hiss).

4. Letter from Charles K. Poe to Oliver Wendell Holmes (Mar. 4, 1931), in OLIVER WENDELL HOLMES, JR., *PAPERS* (Microfilm Edition) Reel 42 [hereinafter *HOLMES PAPERS*].

5. This is a term that Ben Jonson used to describe the Inns of Court in sixteenth- and seventeenth-century England. *See* Anton Hermann-Chroust, *The Beginning, Flourishing and Decline of the Inns of Court: The Consolidation of the English Legal Profession After 1400*, 10 *VAND. L. REV.* 79, 100 (1956).

6. For a discussion of the relative contributions of Horace Gray and Oliver Wendell Holmes, Jr., to the founding and institutionalization of the one-year "elbow clerkship," see Paul R. Baier, *The Law Clerks: Profile of an Institution*, 26 *VAND. L. REV.* 1125 (1973); and

Broadly speaking, that experience can be characterized as an intergenerational bargain in which wisdom, advice, and a certain amount of social capital are exchanged by an elderly judge for the companionship and affection of an ambitious young lawyer. In the particular case of Holmes and his clerks, this bargain fostered intense bonds of loyalty between young men at the start of promising legal careers in the Progressive era, and an aging icon of the late-Victorian period who was concerned about the future of the legal profession and about his own reputation as a judicial figure. By adopting the posture of mentor towards his young apprentices, Holmes instilled in them a particular view—best described as anti-materialistic—of the lawyer's role in society and a vision of himself as a heroic American that his apprentices would one day project to the public and to posterity.

For an understanding of precisely how Holmes succeeded in establishing himself as a mentor to his law clerks—during an age when the personal apprenticeship was giving way to more institutional forms of legal education, such as the three-year law school—we are fortunate to have the diary of Chauncey Belknap, Holmes's tenth law clerk.<sup>7</sup> Belknap served with the Justice in Washington from October 1915 to April 1916, before embarking upon a successful career as a partner in a New York City law firm and as President of the New York State Bar Association. While he is not the most well known of Holmes's ex-clerks (a group that includes Thomas Corcoran and Francis Biddle of New Deal fame, as well as Alger Hiss), he profited from his association with the Justice as much as they did. Although at least one other Holmes clerk kept a diary during his term of service with the Justice, Belknap's chronicle is particularly illuminating because it depicts the Holmes clerkship in mid-passage, at a moment when its contours had been fully developed by the Justice and his nine previous law clerks and when the regime of work and learning had not yet been compromised by Holmes's advancing age.<sup>8</sup> Unlike the diary kept by Mark DeWolfe

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Chester A. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 OR. L. REV. 299 (1961).

7. The diary was obtained from the law library of Patterson, Belknap, Webb, and Tyler, successor in interest to the firm that Chauncey Belknap co-founded in 1921 [hereinafter Belknap Diary]. Not only is the diary physically inaccessible to the public at this point, but it is written in Pitman shorthand, a method of transcription no longer in widespread use.

8. While the image we have of Holmes as an octogenarian is that of an energetic man seemingly impervious to the ravages of age, some of Holmes's later clerks expressed concern about the impact of his age on their own experience. Reflecting on the Justice's diminishing capacities, H. Chapman Rose, his secretary for the 1931-32 Term, complained of a "residual feeling that the year has little to offer a prospective lawyer." Letter from H. Chapman Rose to Felix Frankfurter (Mar. 31, 1932), in FELIX FRANKFURTER PAPERS (Microfilm Edition) Container 145, Reel 91 [hereinafter FRANKFURTER PAPERS]. Holmes expressed a similar concern to Frankfurter a day earlier, confessing "I feel as if I ought not let a young lawyer

Howe, Holmes's clerk from 1933-34 (after the Justice had retired from the bench), Belknap's journal captures Holmes in his prime (if one can say this about a seventy-four-year-old man), and was recorded at the height of the Justice's capacity to function as a mentor.<sup>9</sup> For this reason, the diary stands as a unique source of information about how a very bright young man and a very wise old one came to fashion a middle ground between youth and experience in Holmes's noble nursery.<sup>10</sup>

By examining this 140-page document as well as the correspondence that Holmes and his clerks exchanged throughout the last three decades of his life, this Article explores how the Holmes model of judicial clerking developed and how it functioned as a form of institutionalized mentorship with very tangible benefits for both mentor and protégé. Supplementing this material with a careful reading of the testimonials written by Holmes's clerks later in their lives, I argue that Holmes deployed mentorship as a weapon in his campaign to enhance his judicial reputation, and in so doing inspired other American judges at the state and federal levels to do the same. By inviting his law clerks into his noble nursery of humanity rather than the stale, bureaucratic environment in which nineteenth-century legal assistants such as Melville's fictitious but representative character, Bartleby the Scrivener, "preferred not" to work, Holmes secured the loyalty of his protégés, and imbued the institution of law clerking with a cultural power that has been overlooked by historians of the institution to date.<sup>11</sup>

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waste his time in being my intelligent valet." Letter from Oliver Wendell Holmes to Felix Frankfurter (Mar. 30, 1932), in HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912-1934, at 283 (Robert M. Mennel & Christine L. Compston eds., 1996) [hereinafter HOLMES-FRANKFURTER CORRESPONDENCE].

9. The Howe Diary is available to the public as part of The Mark DeWolfe Howe Papers at the Harvard Law School Library.

10. What we presently know about Holmes and his law clerks comes largely from memoirs and recollections published by clerks many years after their service with him. For examples of this genre, see FRANCIS BIDDLE, MR. JUSTICE HOLMES (1942), written 30 years after Biddle's clerkship; and ALGER HISS, RECOLLECTIONS OF A LIFE (1988), published after twice as much time had elapsed. It is not only the passage of time that dilutes the value of these reminiscences for the historian, but the fact that they were written for public consumption and hence are concerned more with dramatizing the clerkship experience than with precisely reconstructing it. Biddle's book was so dramatic in tone that it became the basis of a Broadway play about Holmes's life entitled *The Magnificent Yankee*. The play, in turn, was adapted for cinema in 1950, and for television in 1964. For information on the play and its connection to Biddle's biography, see I. Scott Messinger, *Legitimizing Liberalism: The New Deal Image Makers and Oliver Wendell Holmes, Jr.*, 1995 J. SUP. CT. HIST. 57.

11. There has been a spate of law review articles in recent years (as well as one full-length book) that discuss the institution of law clerking from historical and current perspectives. For a collection of the most recent articles on this subject, see *Law Clerks: The Transformation of the Judiciary*, 3 LONG TERM VIEW: A JOURNAL OF INFORMED OPINION (1995). This volume contains articles by fifteen prominent judges, academics, politicians, and journalists. For a book-length work, see JOHN B. OAKLEY & ROBERT S. THOMPSON, LAW CLERKS AND THE JUDICIAL PROCESS (1980). Unfortunately, these efforts have all focused on the relatively

I begin my examination of the judicial mentor-in-action in Part Two of this essay, with a detailed description of the Holmes model of law clerking and a discussion of the historical context in which that model developed. I pay particular attention in this section to two related cultural developments that were profoundly disconcerting to men of Holmes's class and generation: what historians of the late-nineteenth and early-twentieth centuries have depicted as a crisis of masculinity, and what sociologists and legal historians have characterized as a crisis of the legal profession. Both of these crises, I maintain, influenced Holmes's interactions with his protégés, and had long-lasting implications for the nature of law clerking as an institution.

In Part Three, I shift from a general discussion of Holmes's approach to mentoring to a look at one law clerk's experience with the Yankee from Olympus. While the Belknap diary contains a great deal of information that might be useful to Holmes scholars, such as the Justice's impressions of his colleagues on the Supreme Court,<sup>12</sup> I restrict myself here to a discussion of Belknap's experience as a clerk, and of Holmes's contribution to that experience. The portrait that emerges is one that might not be familiar to those who have observed and commented on the law clerk's function in the modern American judiciary. But it will make sense in light of the various factors influencing relations among legal elites earlier in the century, which are discussed in Part Two.

In Part Four, the essay shifts back from the particular to the general, with a discussion of how Holmes's clerks repaid their mentor for the valuable education and social capital he bequeathed them. A brief survey of the published articles, speeches, and books about Holmes written by his former "law secretaries" demonstrates that these men used their public and not-so-public positions to construct an exalted image of a jurist whose reputation was, at times, in need of rehabilitation. In the final Section of the essay, I suggest that the type of reputation crafting described in Part Four has not

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narrow question of the impact law clerks have on the judicial process. Without exception, the existing literature on the subject consists either of attacks on the alleged delegation of decision-making responsibility from judges to law clerks or explicit denials of such allegations—usually written by judges and former clerks themselves. For typical attacks on the development of the institution of law clerking for its alleged usurpation of Article III functions, see RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 102-19 (1985); Wade H. McRee, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777 (1981); and William H. Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. NEWS AND WORLD REPORT, Dec. 13, 1957, at 74-75. For defenses of the institution, see Alex Kozinski, *Making the Case for Law Clerks*, 3 THE LONG TERM VIEW 55 (1995); *Critical Discourse in Chambers: An Interview with Judge Patricia M. Wald*, 3 *id.* at 45; and Alexander Bickel, *The Court: An Indictment Analyzed*, N.Y. TIMES, Apr. 27, 1958, at VI.16.

12. See, e.g., Belknap Diary, *supra* note 7 (entry of Jan. 4, 1916) (discussing at length Holmes's impressions of Justices Fuller, McKenna, Peckham, and Harlan).

been a practice unique to Holmes's protégés or to Supreme Court law clerks in general, for that matter. In fact, I argue that the practice has been ubiquitous among law clerks at every level of the American judiciary. I conclude with some thoughts about the implications of this under-examined aspect of the law clerk's function.

## II. THE HOLMES MODEL OF LAW CLERKING

It is impossible to make sense of Chauncey Belknap's diary without understanding several things about the Holmes clerkship experienced by all thirty of its alumni. First, the Justice did not refer to them as "law clerks," as those who became judicial assistants later in the twentieth century would come to be called, or as "stenographers," as they were referred to in the federal legislation of 1886 that appropriated funding for each Supreme Court Justice to hire an assistant.<sup>13</sup> Rather, he called them his "law secretaries," a term that might confuse the modern reader who has a particular notion of what it is that secretaries do. This was more than a matter of nomenclature. It was a reflection of Holmes's view that the primary function of a judicial assistant was not to dispense advice on legal matters or to help draft opinions, as today's law clerks are expected to do. Nor was it simply to take dictation, as the term "stenographer" implies. Rather, it was to serve as the Justice's confidant and to minister to his needs in a wide variety of private and professional matters.<sup>14</sup> Such duties might be as pedestrian as helping Holmes to balance his checkbook, but they could also be as interesting as providing him with a live audience for his opinions about his fellow Justices or about the politics of the day—opinions that the cloistered nature of the judicial profession prohibited him from voicing elsewhere.<sup>15</sup>

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13. Act of Aug. 4, 1886, ch. 902, 24 Stat. 222. Unlike the elite Harvard graduates who would come to occupy Holmes's "noble nursery," the early "stenographic assistants" were typically drawn from the law schools and bar of the District of Columbia, or obtained by the Justices through friends and relatives. See OAKLEY & THOMPSON, *supra* note 11, at 15-16.

14. Unlike his brethren, Holmes wrote each of his judicial opinions in longhand and thus had no use for the stenographic help provided for in the 1886 legislation. He was free, therefore, to innovate with his use of assistants and to redefine the position so that it became more attractive to the graduates of elite law schools. While Justice Brandeis imitated Holmes's practice of using his "stenographic assistants" for non-stenographic purposes as soon as he joined the Court in 1916, the other Justices could not afford to do so until 1920, when Congress made an additional appropriation so that each Justice could hire both a "stenographic clerk" and a more highly paid "law clerk." Act of May 20, 1920, ch. 214, 41 Stat. 631, 686-87. An exception was Chief Justice Edward Douglass White, who hired a law clerk and paid him out of his own pocket until the 1920 legislation went into effect. See ALEXANDER M. BICKEL, *THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-1921*, at 82 n.323 (1984).

15. For a sense of some of the more mundane chores handled by Holmes's assistants, including "fill[ing] out the checks for household bills and keep[ing] a running account in his checkbook," see HISS, *supra* note 10, at 40. Augustin Derby, the Justice's secretary for the

As opposed to a mere stenographic assistant, moreover, a law secretary in the Holmesian mold was someone familiar with recent cultural and intellectual developments, at least such developments as were discussed in Cambridge. As he wrote to Frederick Pollack in 1923, Holmes liked the “young chaps from the Law School” because they helped him to “know the fashions.”<sup>16</sup> He also enjoyed being the object of hero worship, as he often was to the younger men with whom he surrounded himself.<sup>17</sup> Yet the secretaries were more to Holmes than a pipeline to the new ideas floating around at Harvard Law School and more than a doting chorus of praise. The Justice relished what Francis Biddle described as “the sense of resistance that youth sometimes gives to age.”<sup>18</sup> By this he meant that Holmes enjoyed the gentle prodding his secretaries gave him about the assumptions underlying his philosophies and the daily conversations in which he could test his long-held views on a variety of subjects against the fresh ideas of the younger generation.<sup>19</sup>

If the companionate function Holmes demanded of his law secretaries was one aspect that distinguished their job from the stenographer’s, so was the duty of loyalty implicit in the position. According to a widely circulating handbook published in 1916 entitled, *The Personal Secretary: The Duties and Opportunities of the Position*, a secretary was someone who “will [not only] rise to the defense of his chief if disparaging remarks are made about him, [but] indeed . . . will attempt to make known his chief’s excellence.”<sup>20</sup> As I will demonstrate, Holmes was well aware of the long-term benefits of having a highly-educated and ambitious young lawyer willing to “make his excellence known,” and he consciously used the term “secretary” to ensure that his protégés understood that this was one

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1906-07 Term, described the sounding-board function of a Holmes clerk as follows: “[Holmes] took his secretaries into his confidence. Not that he revealed any secrets of the court, but he expressed his opinions freely about persons and events, and with a great deal of color.” Augustin Derby, *Recollections of Mr. Justice Holmes*, 12 N.Y.U. L. Q. REV. 345, 351 (1935).

16. Letter from Oliver Wendell Holmes to Frederick Pollack (Jan. 25, 1923), in 2 THE HOLMES-POLLACK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLACK 1874-1932, at 110 (Mark DeWolfe Howe ed., 1946).

17. Holmes was straightforward about what it meant to him to be admired by the younger generation. In a letter to Irving Dillard in 1928 he wrote “[o]ld age has its discouragements but also its encouragements. And none is greater among the latter than to be told by young men that one’s life has not been in vain.” Letter from Oliver Wendell Holmes to Irving Dillard (Oct. 9, 1928) in FRANKFURTER PAPERS, *supra* note 8, at Container 145, Reel 91.

18. BIDDLE, *supra* note 10, at 148.

19. As to the personal qualities Holmes liked in his clerks, Alger Hiss fit the bill. Holmes described him as “a very pleasant companion, doing his work well and having just enough of modernist aesthetics to add interest to his talk.” Letter from Oliver Wendell Holmes to Felix Frankfurter (Nov. 5, 1929), in HOLMES-FRANKFURTER CORRESPONDENCE, *supra* note 8, at 243.

20. EDWARD JONES KILDUFF, *THE PERSONAL SECRETARY: THE DUTIES AND OPPORTUNITIES OF THE POSITION* 36 (1916).

of their responsibilities.

A second general characteristic of the Holmes clerkship is that it took place in the Justice's home at 1720 I Street in Washington and not, as today's Supreme Court clerkships do, at the Supreme Court itself. Actually, there was no Supreme Court building at all until 1935; prior to this, the Justices had convened in the Senate chamber in the south wing of the Capitol. Since there were no chambers for the individual Justices at this location, each of them maintained an office in his home for himself and his assistant.<sup>21</sup> For a Holmes secretary, this meant spending work days in an office adjoining the Justice's on the second floor of his home, with a large sliding door (always kept open) between them. Besides muting the hierarchy implicit in a relationship between a member of the Supreme Court and a recent law school graduate, the domestic space in which Holmes and his secretaries interacted fostered an atmosphere that blurred the lines between the personal and the professional. As such, Holmes's private affairs became his secretaries' "business," and two distinct generations of legal actors came to share an intimacy foreign to today's Justices and clerks who work in the lavish, but hardly domestic, chambers of the "marble palace."<sup>22</sup>

It was much more than the domestic surroundings, however, that produced the kind of affection captured by Alger Hiss's proclamation that he "had a love affair with this great man,"<sup>23</sup> and by Holmes's own assertion that he had "become deeply attached [to Mark DeWolfe Howe] during their daily intimacy" in 1934.<sup>24</sup> In fact, Holmes took a conscious step towards engendering this intimacy by instituting a "no-marriage" rule when it came to selecting his secretaries. In requiring his young assistants to be bachelors during their term of service, Holmes sought to create, and did in fact create, a homosocial world—a world that can, in certain respects, be analogized to the "Female World of Love and Ritual" that Carroll Smith-Rosenberg identifies as characterizing relations between middle-class women in the nineteenth century.<sup>25</sup> Just as the latter brought "late adolescent girls under the supervision of their mothers and older female relatives and thus tied the generations together in shared skills and emotional interaction,"<sup>26</sup> the "no-marriage" rule

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21. See BICKEL, *supra* note 14, at 81-82.

22. The secretaries' office is described by Belknap in his diary entry of October 8, 1915. The spatial dynamics were unchanged as of 1929, when Hiss described them in the same way. See LOUCHHEIM, *supra* note 3, at 27.

23. *Id.* at 25 (quoting Alger Hiss).

24. Letter from Oliver Wendell Holmes to Arthur Hill (Oct. 27, 1934), in FRANKFURTER PAPERS, *supra* note 8, at Container 145, Reel 91.

25. See Carroll Smith-Rosenberg, *The Female World of Love and Ritual*, 1 SIGNS 1 (1975).

26. *Id.* at 16.



assured Holmes that his protégés would devote themselves to him completely and would experience no conflict of loyalties while they were under his tutelage. Holmes offered the following explanation for his stipulation against marriage in a letter to Felix Frankfurter written in 1915, the very year that Frankfurter replaced John Chipman Gray as the professor at Harvard Law School to whom Holmes delegated the task of selecting his secretaries:

I put the case of the married man to my wife. She reinforced my unwillingness as it means a major interest outside his work. It is true that the work is not very much but if baby has the megrims, papa won't have the freedom of mind and spirit that I like to find.<sup>27</sup>

Yet this explanation is incomplete given that Holmes stipulated against marriage and not simply fatherhood when it came to hiring his secretaries. It was not simply "babies with megrims" that Holmes feared would distract his secretaries from their intellectual engagement with him, but the specter of a domestic life which might compete with the one he had fashioned in his "noble nursery." As Holmes was certainly aware, a new conception of masculinity had been emerging since the end of the nineteenth century that was leading middle-class men away from the fraternal rituals that had previously monopolized their leisure time and towards more companionate family relations.<sup>28</sup> As another letter to Frankfurter indicates, Holmes did not want his boys' education to be compromised by the lure of what historians have referred to as "masculine domesticity."<sup>29</sup> Dismayed that his secretary for the 1924-25 term, W. Barton Leach, had not revealed to him that he was married when he accepted the position, Holmes admitted, "I would not have taken Leach had I known earlier that he was married. . . . I want a free man, and one who may be a contribution to society."<sup>30</sup>

While, in Holmes's view, married men were less likely to make a contribution to society, masculine domesticity was only one aspect of a broader, gender-based crisis that elite male professionals like Holmes were experiencing at the turn of the century. As a leading

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27. Letter from Oliver Wendell Holmes to Felix Frankfurter (Dec. 19, 1915), in HOLMES-FRANKFURTER CORRESPONDENCE, *supra* note 8, at 40.

28. See ROBERT L. GRISWOLD, *FATHERHOOD IN AMERICA: A HISTORY* 88-89 (1993).

29. See Margaret Marsh, *Suburban Men and Masculine Domesticity, 1870-1915*, 40 AM. Q. 165 (1988).

30. Letter from Holmes to Frankfurter (Jan. 6, 1925), in HOLMES-FRANKFURTER CORRESPONDENCE, *supra* note 8, at 178. In his own reflections on the situation, Leach recalled that "[i]t really irked [Holmes] that I had been so inconsiderate as to get married." W. Barton Leach, *Recollections of a Holmes Secretary* (1931) (unpublished manuscript, on file with the Harvard Law School Library, W. Barton Leach File, Miscellaneous, Vol. I., 1921-54, Document 23).

historian of American masculinity has argued, “the real threat to the male culture of the public world . . . came from aspiring female professionals who sought to open male enclaves like law and medicine to both sexes.”<sup>31</sup> This was more than a matter of a few women taking jobs that otherwise would have gone to men. It was a challenge to the traditionally male culture of the middle-class workplace, one that produced a vigorous male defense of gender turf across a broad spectrum of occupations.<sup>32</sup> The threat that women allegedly posed to male culture and authority was particularly acute in the legal profession, which had been a masculine preserve throughout most of the Victorian era, but which was reluctantly opening its doors to women by century’s end.<sup>33</sup>

As Michael Grossberg has shown in his history of the legal profession, nineteenth-century lawyers had decreed the bar a masculine domain by translating the ideals of the larger society into professional beliefs and practices. In his discussion of how circuit riding in the early republic imparted a sense of brotherhood and conviviality to the profession and how later development of the case method of legal education further inculcated in law students a sense of masculine competitiveness, Grossberg demonstrates that older lawyers around the turn of the century had been socialized into a thoroughly masculine profession.<sup>34</sup> However, as circuit riding gave way to less convivial forms of legal practice, and as the threat, if not the reality, of an emerging class of women lawyers posed a challenge to the cherished legal fraternity, it is little wonder that men of Holmes’s class and generation sought to create homosocial institutions in which male professional culture could continue to thrive.<sup>35</sup> Holmes’s “noble nursery” was precisely that kind of institution, one that recruited exclusively from the all-male Harvard Law School and perpetuated a legal education devoid of female influence.<sup>36</sup>

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31. E. ANTHONY ROTUNDA, *AMERICAN MANHOOD: TRANSFORMATIONS IN MASCULINITY FROM THE REVOLUTION TO THE MODERN ERA* 212 (1993).

32. *See id.* at 209.

33. Despite decisions by the U.S. Supreme Court and state supreme courts in the 1870s denying women the right to practice law, most states had guaranteed women access to the bar before the end of the century. *See id.* at 213. Nevertheless, as late as 1910, the proportion of women in the bar as a whole had barely reached one percent. *See* CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* 4 (1981).

34. *See* Michael Grossberg, *Institutionalizing Masculinity: The Law as a Masculine Profession*, in *MEANINGS FOR MANHOOD: CONSTRUCTIONS OF MASCULINITY IN VICTORIAN AMERICA* 113 (Mark C. Carnes & Clyde Griffen eds., 1990).

35. All of Holmes’s law clerks were male, as were all other Supreme Court clerks until Justice William O. Douglass retained Lucille Lomen for the 1944 Term. *See* Barrett McGurn, *Law Clerks: A Professional Elite*, in 1980 SUPREME COURT HISTORICAL SOCIETY YEARBOOK 98, 100.

36. Harvard Law School did not admit women until 1950. *See* JOEL SELIGMAN, *THE HIGH*

Just as homosociality was one key component of the Holmesian model of law clerking, so was the requirement that his protégés be recent graduates with little or no experience as practicing lawyers. While more seasoned attorneys would have been indisputably more useful to Holmes as legal resources, it is equally clear that the Justice wanted to surround himself with neophytes precisely because they were more susceptible to his influence and more likely to embrace the kind of mentoring he offered. Indeed, there was an explicit understanding on the part of each secretary that he was choosing to forego the opportunity to get started in his career in exchange for an extra year of education. Thomas Corcoran, future New Dealer and Holmes's secretary for the 1926-27 term, expressed this understanding in a letter to Frankfurter after he had finally accepted a job with a law firm in 1928, writing, "I have wandered from the beaten path for two delicious years—with false prophets wailing woe—and lo I have lost nothing."<sup>37</sup>

While Corcoran viewed his decision to clerk both for Holmes and later for another judge as unconventional, the extended education that clerking represented was not out of step with the view held by major psychologists of the day that such prolongation could help resolve the perceived crisis of masculinity. G. Stanley Hall, for example, warned about what he called "the dementia of arrested development" that resulted when young men abandoned their mentors and elders before "the highest plane of completeness is achieved."<sup>38</sup> Speaking in Darwinian language with which Holmes certainly would have felt comfortable, Hall made the case for delayed youth even more starkly, claiming that "as we proceed from barbaric to civilized man, the stage of adolescence, or the childhood of man's higher nature, has been lengthened, and wedlock comes later."<sup>39</sup>

Like Hall, Holmes found the connection between early wedlock

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CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL 7 (1978).

37. Letter from Thomas Corcoran to Felix Frankfurter (1928), in HOLMES PAPERS, *supra* note 4, at Reel 42. Mark DeWolfe Howe was another Holmes secretary who discovered after his clerkship that his "eagerness to practice law in the usual way is a diminishing emotion." Having "lost almost all of the feeling that I should get started," Howe told Frankfurter that he was considering either clerking for another federal judge or returning to law school for more study. See Letter from Mark DeWolfe Howe to Felix Frankfurter (Jan. 1, 1934), in FRANKFURTER PAPERS, *supra* note 8, at Container 145, Reel 91. He eventually decided to work at the law firm of Hill, Barlow, Goodale & Wiswall in Boston, but left to become a law professor at the University of Buffalo in 1937.

38. G. Stanley Hall, *Feminization in School and Home: The Undue Influence of Women Teachers*, 16 WORLD'S WORK 10,240 (1908). Hall expressed similar sentiments in 1900 when criticizing Harvard's elective system, claiming that it could lead to "premature independence [which] is always dangerous and tempts to excess." KIM TOWNSEND, MANHOOD AT HARVARD 131 (1996) (quoting Hall).

39. Hall, *supra* note 38, at 10,240.

and a precocious maturity disturbing. Echoing the dominant society's "embrace of boyhood,"<sup>40</sup> he expressed concern that Day Kimball, his secretary from 1920-21, "is so damned polite that I suspected him at first,"<sup>41</sup> and that "he is so damned civil that I look to see if there is a cat under the meal, i.e., a cold critic in the garb of a disciple. . . ."<sup>42</sup> Here, too, there is an echo of Biddle's quip about Holmes valuing the sense of resistance that youth gives to age.<sup>43</sup> Yet Holmes's embrace of boyishness and his favoring of an extended education for promising young men was rooted in a deeper concern than his preferences regarding the personality of his companions or the development of his protégés. He was profoundly concerned about the state of the legal profession, and his approach to mentoring reflects this concern. As historian Richard L. Abel has shown, entry barriers that had formerly restricted the practice of the law to "gentlemen" had by the turn of the century been progressively lowered, a shift that continued to alarm Holmes and other members of the legal aristocracy for several decades thereafter.<sup>44</sup> Holmes bemoaned both the crass materialism that he felt accompanied this development and the degradation of the scholar-thinker produced by the increasing stratification of the bar along axes of specialty and ethnicity.<sup>45</sup> He voiced these concerns in vocational addresses throughout his life, but perhaps most eloquently in his famous *Path of the Law* speech in 1897, in which he proclaimed that "[a]n intellect great enough to win the prize needs other food besides success. The remoter and more general aspects of the law are those which give it universal interest."<sup>46</sup> In a recent symposium on the *Path of the Law*, legal historian Robert Gordon summarized the speech as the Justice's fight "against the reduction of the goal of law practice to making money."<sup>47</sup>

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40. ROTUNDA, *supra* note 31, at 255.

41. Letter from Oliver Wendell Holmes to Harold J. Laski (Dec. 17, 1920), in 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935, at 234 (Mark DeWolfe Howe ed., 1953).

42. Letter from Oliver Wendell Holmes to Harold J. Laski (Oct. 3, 1920), in 1 *id.* at 234.

43. See BIDDLE, *supra* note 10, at 148.

44. See RICHARD L. ABEL, AMERICAN LAWYERS 85-90 (1989). Abel pays particular attention to how the composition of the bar was altered, albeit temporarily, by an influx of foreign-born lawyers in the early decades of this century.

45. Holmes was no leveler when it came to his chosen profession. In a speech he gave in 1886, for example, he criticized "the passion for equality [in the law]" when it "attacks the lines of Nature which establish orders and degrees among the souls of men." Oliver Wendell Holmes, The Use of the Law Schools, Address Before Harvard Law School Association (Nov. 5, 1886), in 3 THE COLLECTED WORKS OF JUSTICE HOLMES 474 (Sheldon Novick ed., 1995) [hereinafter HOLMES COLLECTED WORKS].

46. Oliver Wendell Holmes, *Path of the Law*, Address Before the Boston University School of Law (Jan. 8, 1897), reprinted in 3 *id.* at 391.

47. Robert W. Gordon, *The Path of the Lawyer*, 110 HARV. L. REV. 1013, 1016 (1997).

This attitude towards the practice of law was more than philosophical fodder for Holmes's graduation orations, however. The Justice went to great lengths to instill in his Harvard protégés a sense of the non-material rewards that a life in the law could offer. Nor was he alone in his effort to plant a healthy distrust of the "bitch-goddess success" in the minds of the young men graduating from Harvard. The term, in fact, was coined by one of Holmes's lifelong friends, William James, who taught philosophy at the college.<sup>48</sup> Indeed, as the historian Kim Townsend shows, Harvard educators like James routinely sought to instill a particular kind of manhood in their students, with oft-repeated warnings about the corrupting influence of both money and women as an explicit part of their pedagogy until 1910, and an implicit one thereafter.<sup>49</sup> Given that at least one-third of Holmes's thirty secretaries were undergraduates at Harvard, and that all of them (except for the very first) attended the law school in Cambridge, it is likely that many, if not all, of them were familiar with the kind of lectures on manhood and professionalism that they received from Holmes before they began their year with him.<sup>50</sup>

We shall see precisely how Holmes imparted his "non-materialist" message to his clerks when we examine Belknap's diary in the next section, but that such a message was received by Belknap's fellow clerks is clear. Consider, for example, the words of James Nicely, Holmes's secretary for the 1923-24 term, thanking the Justice for "the zeal for high endeavor with honor in a graceful, sympathetic life which you stiffened in me,"<sup>51</sup> and those of Francis Biddle in a letter written just after his own clerkship had ended: "You have stimulated me to broader conceptions and higher ideals . . . You have made me look at life differently."<sup>52</sup> Mark DeWolfe Howe was even more pointed about the content of Holmes's instruction in an article that appeared in *The New York Times* in 1951:

Those young men who went to Holmes, in the example of their employer, learned that professional capacity achieves the highest fruitfulness only when it is combined with energy of

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48. See TOWNSEND, *supra* note 38, at 39.

49. See *id.* at 39-41.

50. The following is a list of Holmes's secretaries who received bachelor's degrees from Harvard College: Leland B. Duer, Erland B. Fish, Day Kimball, Robert M. Benjamin, Laurence Curtis, Barton Leach, James Rowe, Francis Biddle, Stanley Clarke, and Mark DeWolfe Howe. This information was obtained from obituaries and from *Who's Who in America*. Charles K. Poe, who served as Holmes's law secretary during the 1902-03 term, was a graduate of George Washington College and Law School in Washington, D.C.

51. Letter from James Nicely to Oliver Wendell Holmes (Mar. 7, 1925), in HOLMES PAPERS, *supra* note 4, at Reel 15.

52. Letter from Francis Biddle to Oliver Wendell Holmes (June 29, 1912), in *id.* at Reel 28.

character and breadth of learning. For the first time, in other words, they saw their professional competence in perspective, and in so doing discovered those relationships between knowledge, character, and intelligence which are so seldom revealed to young men and women in our institutions of higher learning.<sup>53</sup>

One must be careful, however, to distinguish between the content of Holmes's anti-materialistic message and its actual effect on his protégés. Whatever advice Holmes may have given him, Chauncey Belknap did not become a philosopher, and as we shall see, he actually spent the bulk of his career as a corporate attorney. Does this fact, and the fact that several of Holmes's protégés chose to worship Mammon instead of Aristotle, undermine the significance of Holmes's efforts as a mentor? Robert Gordon hints as much, claiming that despite the Justice's advice to law school graduates to pursue a life of ideas he is "strangely disappointing" as a vocational guide. According to Gordon, Holmes actually encouraged young lawyers "to defer to power even more than their role requires, to be passive instruments of society's or clients' ends rather than active forces to help refigure and transform those ends."<sup>54</sup>

If mentorship in the context of a profession is understood strictly as a means by which experienced members of a guild seek to shape the career choices of its new entrants, then perhaps one can agree with Gordon that Holmes's message to young lawyers was ambivalent, if not occasionally ignored. If, however, mentoring is viewed as a more subtle device by which elders seek to influence the way they are perceived by the young, then it is arguable that Holmes's comments to his clerks about the unseemliness of the lawyer-as-businessman were received and understood precisely as Holmes intended them. That is to say, Holmes may have cared less about whether his legal offspring became corporate lawyers or philosophers than about whether they viewed him as a man of ideas, and it is possible that his system of tutelage was designed, in part, to project that image. Viewed in light of the other features of the Holmes model of law clerking designed to breed loyalty in his clerks, such as the bachelors-only rule, the explicit use of the term "secretary," and the domestic environment in which the model functioned, it is indeed likely that Holmes's vocational advice to his protégés was part of a mentoring strategy aimed at both purifying a

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53. Mark DeWolfe Howe, *Mr. Justice Holmes and His Secretaries*, N.Y. TIMES, Apr. 8, 1951, at VI.15.

54. Gordon, *supra* note 47, at 1018.

profession and forging his own reputation.<sup>55</sup> For purposes of describing the self-interested mentor, there are few sources as rich as the diary to which I now turn.

### III. PORTRAIT OF THE LAW CLERK AS A YOUNG MAN

On October 8, 1915, Chauncey Belknap presented himself at the house of Justice Holmes for the first time, was ushered into the study by a "negro messenger," and was greeted by the man about whom he had heard so much at Harvard. The Justice was wearing a purple velvet jacket and smoking a long cigar. To the star-struck twenty-four-year-old recently arrived in Washington for his clerkship, Holmes "look[ed] more like a cavalry captain than the popular conception of a jurist."<sup>56</sup> This was clearly an image that Holmes sought to project, for as we shall see, he was more interested in leading Belknap in an assault on the mysteries of life than in subjecting him to the intricacies of legal doctrine. Setting the tone for the year to come, Holmes did not burden his new companion with work or with an orientation about his duties on his first day. Instead, Belknap received a tour of Holmes's personal library, an introduction to his wife, and a casual lecture on Holmes's theory of economics.<sup>57</sup>

Four days later, after thirty-six holes of golf with a friend from his undergraduate days at Princeton, dinner with Holmes and his wife at "The Willard" (a Washington tavern), and a leisurely Monday spent observing a case argued before the Supreme Court, Belknap discovers a pile of records and briefs on his desk and concludes that "work had begun." He describes his job at this point as "submit[ting] report[s] of the facts and arguments to the Justice who thus avoids the necessity of wading through a chaotic mass of words to get at the essence of the dispute."<sup>58</sup> This rather dull task remained Belknap's primary responsibility for the balance of the year. If he had any illusions about having a greater impact on the judicial

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55. Lest the reader be skeptical about Holmes's actual motives, consider the harsh words of William James, who described his friend as "'a terrible battery, formed like a planing machine to gouge a deep self-beneficial groove through life.'" TOWNSEND, *supra* note 38, at 60 (quoting James).

56. Belknap Diary, *supra* note 7 (entry of Oct. 8, 1915).

57. As paraphrased by Belknap, Holmes's theory included the following critique of capitalism: "My first doubts about the regime of private property were experienced when I read of Andrew Carnegie's endowment of a public library. By affecting his property to a non-productive enterprise of this sort, he was failing to fulfill his public function." Belknap Diary, *supra* note 7 (entry of Oct. 8, 1915). In light of this view, one wonders what Holmes would have thought about the use to which his highly publicized bequest of \$250,000 to the United States Government was put. (It was used to fund the Oliver Wendell Holmes Devise History of the Supreme Court of the United States.)

58. Belknap Diary, *supra* note 7 (entry of Oct. 12, 1915).

process, they were quickly dispelled. Reflecting on the first month and a half of his clerkship, he writes, "I read over a couple of unimportant opinions of the Justice's. This duty has been a pure formality so far. Even if there were doubts in my mind, I should have to get myself into the state of mind of a court overruling a jury before venturing to differ."<sup>59</sup>

According to his diary, Belknap never did "venture to differ" with the Justice, but this is not to suggest that he was too timorous for the job. Whatever one's position on the current controversy about the extent and propriety of law clerks' "ghosting" for judges,<sup>60</sup> it is clear that Holmes never considered delegating his Article III functions to a young man who was neither appointed by the President nor confirmed by the Senate. This reticence does not reflect a distrust on Holmes's part of the intelligence or abilities of his secretaries, for as Belknap was pleased to report, "he is wonderful, [he] talks over his decisions as if I were on an equal plane of learning and powers."<sup>61</sup> Yet these discussions were not meant to assist the Justice in disposing of his caseload but to give him a live audience before which he could hammer out his own ideas. Belknap illustrates this distinction, noting that "[t]he Justice had just finished his opinion when I reached his house . . . . [He] insisted that I sit down while he stood at his desk reading . . . . I told him I had not realized how strong the side could be made and he seemed pleased."<sup>62</sup>

Occasionally, Holmes would share his thoughts with Belknap before he had actually finished an opinion. He might even ask for the secretary's view on how he should handle a particular matter. Invariably, though, the Justice had already made up his mind. The diary entry for December 13 reflects this reality:

The Justice is puzzled over a case in which the Court was asked to issue a mandamus to a Mass[achusetts] Circuit Court judge who refused to [grant?] access to depositions sealed from a previous suit. He sent me to work on examining the authorities. . . . He is determined to give an order and read me a vigorous opinion covering all but the procedural point. "Do you think there is anything discourteous or uncivil to the judge below" he said. "He will know he made a mistake," I replied. "Well, I think I'll lay it on the boys and see if they swallow it,"

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59. *Id.* (entry of Nov. 19, 1915).

60. There has been a steady stream of criticism about the alleged assumption of judicial decision-making and opinion-writing responsibilities by law clerks since the mid-1950s. *See, e.g.,* John G. Kester, *The Law Clerk Explosion*, 9 LITIG. 20 (1983); Rehnquist, *supra* note 11, at 74.

61. Belknap Diary, *supra* note 7 (entry of Oct. 13, 1915).

62. *Id.* (entry of Oct. 19, 1915).



he said with a twinkle.<sup>63</sup>

Holmes's "determination" to issue the mandamus in this case did not deter him from soliciting Belknap's opinion, but his secretary's concern about the propriety of that course of action did not dissuade the Justice from taking that course. It is clear that unlike today's law clerks, whose legal and political instincts are often a valuable resource for the Justices to use in deciding cases, Belknap was not viewed this way by Holmes.<sup>64</sup> Only once in the entire diary does the young clerk suggest that Holmes actually took his advice to heart. That moment came on February 3, 1916, when the Justice allegedly "accept[ed] some of my modifications of his first draft." The fact that Belknap describes Holmes as "generous" to do so, however, highlights the degree to which this isolated incident is an exception that proves the rule.<sup>65</sup>

While court watchers a decade or so later were noting with alarm the docket crisis that seemed to imperil the ability of the understaffed Supreme Court to dispense justice, Holmes seemingly had no problem handling his workload without the direct assistance of his clerk.<sup>66</sup> This does not mean that he did not need his secretaries for other reasons, however, for if the Belknap diary has little to say about the legal functions its author performed, it is long on his extra-legal functions. Foremost among these was the young man's duty to simply "be there" when Holmes wished to try out an idea, a philosophy, or even a clever phrase, before he communicated it to a wider or a more mature audience.

Holmes was quite conscious of using Belknap in this fashion. On New Year's Eve, 1915, at the height of the European conflict, the Justice wrote to Frankfurter, expressing his view that the men "in the trenches . . . might find gaiety in the miasmatic mist of misery."<sup>67</sup> Whatever he meant by this bit of alliterative philosophy, Holmes admits that Frankfurter was not the first person with whom he

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63. *Id.* (entry of Dec. 19, 1915).

64. For a look at how the Justices of the current Supreme Court rely, to a disturbing degree, upon the judgment of their law clerks in deciding cases, see EDWARD LAZARUS, *CLOSED CHAMBERS* (1998).

65. The testimony of other Holmes clerks confirms that the Justice always wrote his own opinions. See, for example, the comment by W. Barton Leach that "[Holmes] had a great pride in his highly individual literary style and any measure of ghost writing would have been abhorrent to him. However, when he finished an opinion it was his habit to hand it to me with the direction, 'please embellish this with citations from my favorite author.' Meaning, of course, his own opinions." W. Barton Leach, *Recollections of a Holmes Secretary* (1940) (unpublished manuscript, on file with the Harvard Law School Library, W. Barton Leach File, Miscellaneous, Vol. II).

66. See, e.g., FELIX FRANKFURTER & JAMES LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1927).

67. Letter from Oliver Wendell Holmes to Felix Frankfurter (Dec. 31, 1915), in *HOLMES-FRANKFURTER CORRESPONDENCE*, *supra* note 8, at 42.

shared it, noting in the same letter that "I repeat what I said to my secretary [Belknap], as it rather pleased me."<sup>68</sup> This was not the only time, moreover, that Holmes tested a phrase on his law clerk before releasing it to what was a potentially more discerning critic. One day, for example, after the Justice had re-read *Hamlet*, Belknap quotes him as saying "What I like in [Shakespeare] is his song and tall talk."<sup>69</sup> The very same language appears in a letter Holmes sent to Frankfurter four days later, in which he writes, "[t]he principal products of leisure are a formula for Shakespeare: Song and tall talk."<sup>70</sup>

There was plenty of time for "song and tall talk" during Belknap's clerkship. Indeed, at one time he notes, "I am the master of a magnificent leisure . . . ."<sup>71</sup> It is unfathomable that a law clerk for one of the current Justices would make such a comment, given the hectic work schedules that they endure. Yet the disparity in the lifestyles of law clerks early in the century and now is not simply a product of rising caseloads as one might expect. If it were, the fact that today's Justices have four law clerks, while in Holmes's era they only had one, would negate the effect of that development on those clerks. In fact, Belknap's "magnificent leisure" was a product of Holmes's view of how a bright young lawyer could best serve him, and of how that lawyer could best prepare himself for a successful career. The Justice actually encouraged Belknap to spend his time golfing, attending the theater, socializing with friends, and most importantly, reading.<sup>72</sup>

One of Holmes's prized possessions was his "black book," the 162-page notebook in which he recorded the titles of all the books he read from 1881 until 1935.<sup>73</sup> As books were so crucial a part of Holmes's life that they received this sacramental treatment, it is little wonder that his secretaries were encouraged to consume them as voraciously as he did. Belknap read well over thirty books during the six months he spent with Holmes. The scope of his readings was vast, ranging from Shakespeare's *King Lear*, to Oscar Wilde's *Lady Windemere's Fan*, to Lester Frank Ward's *Dynamic Sociology*, to Holmes's own masterpiece, *The Common Law*. He also found the

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68. *Id.*

69. Belknap Diary, *supra* note 7 (entry of Nov. 26, 1915).

70. Letter from Oliver Wendell Holmes to Felix Frankfurter (Nov. 30, 1915), in HOLMES-FRANKFURTER CORRESPONDENCE, *supra* note 8, at 39.

71. Belknap Diary, *supra* note 7 (entry of Nov. 9, 1915).

72. By my count, Belknap attended seven theater productions during his six months with Holmes, played four rounds of golf, took four day-long hikes in Maryland and Virginia, and spent several days observing Congress in session. He also was a frequent guest of the Holmes's as they entertained celebrities from the world of politics and academia, as well as a guest of several families in the D.C. area with whom he had family connections.

73. According to Alger Hiss, the black book was "the nearest thing to a diary" that Justice Holmes kept. See HISS, *supra* note 10, at 32.

time to teach himself French, to delve into the history of philosophy, and to keep up to date with the political theorizing of Graham Wallas and Herbert Croly. Belknap discussed many of these books with Holmes, and these discussions became one of the primary vehicles by which Holmes imparted wisdom to his protégé.

A good example of how literature functioned as a heuristic device for Holmes appears in Belknap's diary entry for October 16, in which he recounts a discussion of Plato's *Symposium* that he had that afternoon with the Justice. Apparently, Holmes told the diarist that "the dominant factor in [the book's] greatness is that here Plato, first of all men, points out the interest of a life of ideas rather than of action."<sup>74</sup> Given Holmes's contempt for the way early-twentieth-century legal culture privileged business over intellectual pursuits, it is clear that this comment was as much a lesson for Belknap about how lawyers should behave as it was an attempt to interpret Plato. Yet what was not explicitly discussed by Holmes and Belknap about this famous Greek dialogue, or at least not recorded, is important to an understanding of Holmes's role as a mentor.

*The Symposium*, one will recall, is the philosopher's depiction of a series of speeches given by Socrates and several of his friends on the subject of Eros, or Love. Of course, the kind of love of which Plato's cast of characters speak is that *between men* in a society that did not marginalize homosexuality. It is not my intention to suggest that a homosexual framework contributes to an understanding of the relationship between Holmes and his law clerks. What is relevant to a discussion of Holmes as a mentor, however, is the way the Greeks depicted in *The Symposium* conceived of love as the consideration for a bargain struck between ethical and intellectual teachers and young men or boys in the role of students, and the way this same bargain fostered and defined the all-male relationships that developed inside Holmes's noble nursery.<sup>75</sup> The nature of this bargain is most clear in the speech given by Pausanias, in which he delivers a message that Holmes may have intended Belknap to receive:

When the lover realizes that he is justified in doing anything for a loved one who *grants him favors*, and when the young man understands that he is justified in *performing any service* for a

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74. Belknap Diary, *supra* note 7 (entry of Oct. 16, 1915).

75. See PLATO, *THE SYMPOSIUM*, at xv (Alexander Nehemas & Paul Woodruff eds., 1989). For a discussion of the historically differential shapes of male and female homosociality from Plato's day through the early twentieth century, see EVE KOSOFSKY SEDGWICK, *BETWEEN MEN: ENGLISH LITERATURE AND MALE HOMOSOCIAL DESIRE* (1985). Sedgwick makes explicit reference to *The Symposium* as a model of same-sex mentoring that fostered enduring inequalities of power between men and women. *Id.* at 4-5.

lover who can make him wise and virtuous—and when the lover is able to help the young man become wiser and better [then] the young man is eager to be taught and improved by his lover.<sup>76</sup>

Substituting the term “mentor” for “lover” and the term “protégé” for “loved one” in this passage, leaves us, I believe, with a perfect description of the kind of relationships Holmes sought to cultivate with his young clerks. By reading and discussing Plato with Chauncey Belknap (and it is likely that he did so with his other secretaries as well),<sup>77</sup> Holmes established the terms of the bargain that defined his clerkship model. That is, he promised to make his youthful companions wise and virtuous, and they, in turn, agreed to “grant him favors” and to “perform any service” for him.<sup>78</sup> Turning to the rest of Belknap’s diary, it is possible to explore the particular notions of wisdom and virtue that Holmes bequeathed to his secretaries, and to see what kinds of favors and services he expected in return.

The advice that Belknap received from his mentor was generally of a broad, philosophical nature, although Holmes was not beyond giving him more practical advice, as he did when he warned the young lawyer about the perils facing an unprepared advocate in court,<sup>79</sup> or when he gave him instructions on how “to fish in the pond of judicial language.”<sup>80</sup> Perhaps the most interesting part of Belknap’s diary, however, at least in terms of understanding how Holmes conducted himself as a mentor, is his response to Belknap’s “introduc[ing] the subject of beginning practice” on November 20. According to Belknap, the Justice responded to this request for vocational advice with a plea that the young man worry about ideas rather than business, telling him “I can’t believe the place a man starts or the position he attains has much to do with his happiness in

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76. PLATO, *supra* note 75, at 18 (italics added).

77. According to Francis Biddle, Holmes read the *Symposium* in its original Greek sometime between sometime between 1910 and 1911. See FRANCIS BIDDLE, JUSTICE HOLMES, NATURAL LAW, AND THE SUPREME COURT 5-6 (1961). Since he was still discussing it with Belknap five years later, it is reasonable to infer that the book resonated powerfully with the Justice.

78. Holmes was not alone among his contemporaries in adopting this exchange-based model of mentorship based on the Greek example. Charles W. Eliot, the President of Harvard College from 1869 to 1908, and the man who convinced Holmes to join the Law School Faculty in 1882, was such a firm believer that the younger generation owed a debt to their mentors for the education they received that he made this point explicitly in his inaugural address as President, exhorting his young audience to “[c]herish the natural sentiment of personal devotion to the teacher who calls out your better powers. It is a great delight to serve an intellectual master. . . . If ever in after years you come to smile at the youthful reverence you paid, believe me, it will be with tears in your eyes.” TOWNSEND, *supra* note 38, at 132 (quoting Eliot).

79. Belknap Diary, *supra* note 7 (entry of Oct. 20, 1915).

80. *Id.* (entry of Mar. 25, 1916).

life if he philosophizes well.”<sup>81</sup> Perhaps Holmes was aware that this was idealistic advice to be giving a young man like Chauncey Belknap, but, as I have argued, Holmes was at least as interested in being seen and portrayed as a man uninfluenced by the sordid world of business as he was in guiding his protégés away from that world.

This was not the only image that Holmes sought to project, moreover, for as the testimony of Belknap and other clerks suggests, he was also interested in portraying himself to them as a Civil War hero. Typically, this portrayal would take place in the course of the leisurely strolls through the streets of Washington which Holmes and his secretaries shared. Belknap refers specifically to more than a dozen of these walks in his diary, and invariably they became vehicles for the Justice to reminisce about his role in the Civil War. Not only did Belknap hear repeatedly about Holmes’s woundings at Antietam and Ball’s Bluff, and about his alleged encounter with President Lincoln at Fort Stevens, but on one late-fall afternoon the young secretary records how he and the Justice “blocked the traffic on the Avenue as the old gentleman traced out the lines of the contending forces on the pavement.”<sup>82</sup> That a Justice of the United States Supreme Court would make such a public spectacle of himself is hard to imagine, except when one considers it in the context of Holmes’s effort to create a mythical image of himself. It is this effort, as well as the pleasure that Holmes took in the companionship of bright young men that made strolling with Holmes such a crucial part of the clerkship experience.<sup>83</sup>

Holmes’s preaching to his secretaries about the virtues of conducting oneself with honor and grace, and of adopting a philosophical outlook towards the legal profession, was of a piece with his effort to glorify his role in the Civil War. Both should be seen as the means by which an aging lawyer sought to endear himself to a rising generation of legal elites. So was his pristine “code of conduct,” summarized by Alger Hiss about a decade ago as “spartan devotion to duty,” “high-mindedness in personal relations,” “moral and physical courage,” “fierce independence of spirit,” and “a lively feeling for community and country.”<sup>84</sup> While Holmes may or may not have abided by this code in his own life, he certainly wanted the

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81. *Id.* (entry of Nov. 20, 1915).

82. *Id.* (entry of Dec. 21, 1915).

83. W. Barton Leach, the Justice’s secretary for the 1924-25 Term, described this aspect of his job: “My most regular duty was to take him to walk from five to six, after his return from the Court. . . . It was on these walks that he unburdened his mind of whatever was in it—about the cases—about people, or about life in general.” See W. Barton Leach, Notes for a Talk on O.W.H. (1931) (unpublished manuscript, on file with the Harvard Law School Library, W. Barton Leach File, Miscellaneous, Vol. I, 1921-54, Document 7, 3).

84. HISS, *supra* note 10, at 48-49.

young men whom he invited into his nursery to believe that he did. Moreover, to the extent that Holmes's clerks internalized his code, they embarked upon their careers with tools that virtually guaranteed success to men of their pedigree. Belknap acknowledged how bright his future looked about ten years after his clerkship had ended, telling the Justice about his "increased appreciation of what my year as secretary meant, and is going to mean."<sup>85</sup>

Like most of his fellow clerks, Chauncey Belknap enjoyed a great deal of professional success in the years following his apprenticeship with Justice Holmes. After serving in the infantry during World War I, and becoming an aide to General Pershing, Belknap returned to civilian life in New York City, where in 1921 he helped to found a law firm—the successor to which survives to this day. As a lawyer, he represented a host of wealthy clients, including John D. Rockefeller, and became such a well-known figure within legal circles that he was elected President of the New York State Bar Association in 1960.<sup>86</sup> While it is clear that some of his success can be attributed to the cachet associated with clerking for a Supreme Court Justice, it is also the case that Belknap was endowed with a fair amount of social capital before hitching his wagon to Holmes's star. Although he was orphaned at an early age and brought up by relatives, he was raised in Rochelle, New Jersey, a wealthy suburb of New York City. He attended Princeton University, graduating in 1912 as the class valedictorian, with high honors in History, Politics, and Economics. At Princeton, he not only distinguished himself academically, but also served as managing editor of the prestigious campus newspaper, *The Daily Princetonian*.<sup>87</sup>

If attendance at an elite American college or university in the early decades of the twentieth century is any guide, Belknap's privileged background was similar in important ways to that of the other young men fortunate to spend a year with Holmes. While it is worth noting that at least three of Holmes's secretaries were Jewish (Irving Olds, Robert Benjamin, and Lloyd Landau), and several were Irish (Thomas Corcoran, H. Chapman Rose, and James Rowe), these men were hardly prototypical immigrants. Like Belknap, they were all born in the United States and were sufficiently assimilated so as not only to be admitted into, but thrive in the most traditional bastions

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85. Letter from Chauncey Belknap to Oliver Wendell Holmes (Mar. 6, 1926), in HOLMES PAPERS, *supra* note 4, at Reel 15.

86. See Rockefeller Gift Waits on Report: Lawyer is Returning From Cairo with Information on the Negotiations, N.Y. TIMES, Feb. 16, 1926, at 25:1. See also Chauncey Belknap Gets State Bar Nomination, N.Y. TIMES, Jan. 8, 1960, at 17:2.

87. This biographical information was obtained from the alumni office at Princeton University, and from a memorandum written by one of the lawyers at the firm Belknap co-founded, dated Sept. 23, 1994 (on file with author).

of American higher education. The list of institutions from which they earned their undergraduate degrees includes Yale, Williams, Brown, Chicago, Johns Hopkins, Wesleyan, and George Washington, as well as Harvard and Princeton—all of which were prestigious, elitist, and anything but parochial.

It is fair, therefore, to cast the effect of the Holmes clerkship on Belknap's résumé as representative of his fellow secretaries, and to maintain that his experience as a clerk was as profound an event for him as it was for the others. Nor is it surprising, given the nature of that experience, that most of Belknap's fellow clerks felt indebted to their mentor, and sought ways to repay that debt throughout their careers. A brief examination of how successful the products of Holmes's noble nursery became, and of precisely how they repaid the man who hosted them for one precious year, suggests that the institution of law clerking can do much more for the savvy judge than ease the pressure on his or her docket.

#### IV. LAW CLERKS AND THE CRAFTING OF JUDICIAL REPUTATION

Judging from their ubiquity in the pages of *Who's Who in America*, the law secretaries to Oliver Wendell Holmes, Jr., formed an extraordinarily accomplished group. Over two-thirds of them appeared repeatedly in that publication, a remarkable figure when one considers that none of the first five secretaries were so honored—a likely consequence of the fact that it took a few years for the Holmes clerkship to acquire its career-enhancing prestige.<sup>88</sup> What is striking about Holmes's secretaries is not so much the overall success that they enjoyed, however, but the wide range of careers and disciplines in which that success occurred. Of the Justice's thirty secretaries, eleven became founders or partners of prestigious law firms,<sup>89</sup> nine achieved some prominence in the world of politics,<sup>90</sup> five

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88. Of the twenty-one ex-clerks who do have entries in *Who's Who*, all but one are described specifically in those entries as having been a law secretary to Justice Holmes. The lone exception is Charles Denby, secretary for the 1925-26 Term. It is interesting to note that whereas all of Holmes's other secretaries appear in every volume of *Who's Who* from the date of their first appearance until the year of their death, Alger Hiss has entries in the 1948-49 and 1950-51 editions, but he never appears again. His purging from these annals of fame coincides exactly with his exposure as an alleged communist spy by Whittaker Chambers.

89. Charles K. Poe (Poe, Falknor & Emory in Seattle); Howard Stockton (Warren, Garfield, Whiteside & Lamson in Boston); Leland Duer (Duer & Taylor in New York); Chauncey Belknap (Patterson, Belknap & Webb in New York); Vaughn Miller (Miller, Martin, Hitching & Tipton in Chattanooga); Lloyd Landau (Root, Clark, Bruckner, & Ballantine in New York); Robert Benjamin (Parker, Duryee, Benjamin, Zunino & Malone in New York); John E. Lockwood (Milbank, Tweed, Hadley & McCloy in New York); Robert Wales (Miller, Gorham, Wescott & Adams in Chicago); Horace Chapman Rose (Jones, Day, Reavis & Pogue in Washington, D.C.); and Donald Hiss (Alger's brother) (Covington & Burling in Washington, D.C.).

90. Erland F. Fish (President of Massachusetts State Senate); Frances B. Biddle (Attorney

garnered lofty perches in the academy,<sup>91</sup> and four became influential businessmen.<sup>92</sup> (One, Shelton Hale, died three years after his clerkship.)

As one might guess, the degree to which fame accompanied success for Holmes's secretaries varied as well. Yet while some of them carved out careers that landed them regularly in the pages of the nation's newspapers, such as Francis Biddle (Attorney General), Tommy Corcoran (key draftsman of New Deal legislation), and Irving Olds (President of the United States Steel Corporation), the others were equally accomplished, if not quite as recognizable. Harvey H. Bundy, for example, served as Assistant Secretary of State from 1931-33, while Laurence Curtis served as a Republican Congressman from Massachusetts from 1952-62. Others, like Mark DeWolfe Howe, who became a Harvard law professor and one of America's leading authorities on constitutional law and legal history, distinguished themselves within the academic community.

No matter the arena in which they prospered, or the amount of prosperity that they enjoyed, Holmes's secretaries attributed their success to their mentor. Sometimes this attribution came early in an ex-clerk's career, as when Corcoran, only two years after leaving the clerkship, came to realize "the pricelessness of the education" Holmes had given him,<sup>93</sup> or when Biddle proclaimed, "I know that my career will be more valuable because on its threshold I had the privilege of a year under you."<sup>94</sup> More often, however, the acknowledgments of gratitude came later in life, after the benefits of a youthful association with Holmes had become more clear.

Reflecting upon the influence of the Justice on his life in 1961, for example, Biddle wrote that "after my winter with Holmes I would never shrink back into the bundle of small class platitudes and prejudices with which I left Harvard."<sup>95</sup> Alger Hiss was more direct

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General, United States, 1941-45); Harvey H. Bundy (Assistant Secretary of State, 1931-33); Day Kimball (Justice, Supreme Court of Bermuda); Laurence Curtis (U. S. Congressman from Massachusetts, 1952-62); Charles Denby, Jr. (Assistant Administrator, Lend Lease Administration (WWII)); Thomas Corcoran (key draftsman for Federal Housing Act of 1933, Securities Exchange Act of 1934, Utility Holding Company Act of 1935, and Fair Labor Standards Act of 1938); Alger Hiss (Department of State official, 1936-46); James Henry Rowe (Assistant Attorney General, United States, 1941-43).

91. Augustin Derby (Professor of Law, Harvard); Stanley Morrison (Lecturer in Law, Stanford, 1924-55); W. Barton Leach (Professor of Law, Harvard, 1929-69); Arthur E. Sutherland (Professor of Law, Harvard, 1950-70); Mark DeWolfe Howe (Professor of Law, Harvard, 1945-67).

92. Irving S. Olds (President, U.S. Steel Corporation); Stanley Clarke (Trustee, Assoc. Gas & Electric Co.); George L. Harrison (President, Chairman of the Board, RCA, 1941-54); James M. Nicely (Vice President, First National City Bank, 1948-59).

93. Letter from Thomas Corcoran to Oliver Wendell Holmes (Mar. 6, 1928), in HOLMES PAPERS, *supra* note 4, at Reel 31.

94. Letter from Francis Biddle to Oliver Wendell Holmes (June 29, 1912), in *id.* at Reel 28.

95. FRANCIS BIDDLE, A CASUAL PAST 291 (1961).



about what he owed his mentor in 1988, claiming that “[n]o other honor or piece of good fortune has been such a source of delight for me as was that enchanted year I spent with Holmes beginning in October 1929. And no other relationship has had deeper or more lasting influence.”<sup>96</sup>

Whether the rewards were personal or professional, whether they flowed directly from the lessons that the Justice imparted or from the ex-clerk network that functioned as a large and supportive family, Holmes’s secretaries had every reason to be grateful to their mentor.<sup>97</sup> Grateful they were, and Holmes capitalized on this sentiment in important ways. He not only basked in the immediate glow of his secretaries’ admiration and affection, but he deployed them as a battalion of reputation crafters in a campaign to enhance his stature as a judicial figure. While it is not quite the case that Holmes directed his law clerks to construct a particular image of himself, he was certainly aware that this was a function they could, and would, perform. This was a lesson that he had learned from his father.

While much has been made about the cool relations that existed between the Justice and his father, Dr. Oliver Wendell Holmes, the younger Holmes was taught to understand the value of mentoring by the famous author and protagonist of *The Autocrat of the Breakfast Table*.<sup>98</sup> In fact, while the son would one day come to symbolize “The Completely Adult Jurist”<sup>99</sup> in his approach to both deciding cases and nurturing his protégés, some of the credit for fashioning that symbol belongs to the Autocrat. The following verses from a poem delivered by Dr. Holmes to the Boston Bar Association at a dinner honoring his son in 1883 speak to this issue:

Ah, life has many a reef to shun  
 Before in port we drop our anchor,  
 But when the course is nobly run  
 Look aft, for there the work was done.  
 Life owes its headway to the Spanker.  
 . . . . .  
 If ere aggrieved, attacked, accursed,

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96. HISS, *supra* note 10, at 32.

97. The career of James H. Rowe, secretary for the 1934-35 term, provides a good example of how this network functioned. In 1939 he was chosen to be an executive assistant to President Roosevelt at the recommendation of Thomas Corcoran, and later he was hired by Francis Biddle to be assistant to the Attorney General. See *Roosevelt Names Three New Aides*, N.Y. TIMES, July 13, 1939, at 3:7; *J.H. Rowe to be Biddle Aide*, N.Y. TIMES, Nov. 18, 1941, at 14:6.

98. OLIVER WENDELL HOLMES, *THE AUTOCRAT OF THE BREAKFAST TABLE* (London, 1858).

99. See FRANK, *supra* note 1, at 253.

A sire may claim a son's devotion  
 To shield his innocence abused  
 As old Anchises freely used  
 His offspring's legs for locomotion.<sup>100</sup>

These verses express a view of intergenerational relationships that is based on mutual obligation. In exchange for the "headway" provided by the firm hand of the older generation, the "offspring" owes his sire both "devotion" and "locomotion." At least in this case, the Holmes son was quite attentive to what his sire had to say about the proper posture of the younger generation *vis à vis* the older one. Though the younger Holmes cannot be characterized as a "spanker" of his legal offspring, as he was more apt to employ the carrot than the stick, he did see that an intergenerational alliance could assist the younger party in "shunning" undesirable "reefs" while "shielding" the older party's "innocence" from "abuse."

The need for such an alliance became apparent to Holmes in the early twentieth century. As he surveyed the legal landscape, he found that his attack on formalistic reasoning in the law and his call for deference by judges to legislative prerogatives was subjecting him to a great deal of criticism.<sup>101</sup> Holmes was not the first Justice to sense that his stature as a judicial figure was threatened by abusive critics. Yet, as Robert Ferguson has argued, he was a pioneer in that he actively challenged those who depicted his posture of disinterestedness, detachment, and isolation from everyday passions as dangerous by attempting to fashion a public persona that exalted the very qualities that were under attack.<sup>102</sup> While Ferguson focuses on the rhetorical strategies of self-creation that Holmes employed to resolve his "crisis of judicial authority,"<sup>103</sup> such as his written opinions and "deeper structures of language," he neglects the role played by the Justice's law clerks in the apotheosis of their mentor.

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100. The poem was published in *The Boston Advertiser* in January 1883, but it is also indexed as part of the FRANKFURTER PAPERS, *supra* note 8, at Container 145, Reel 91.

101. Holmes's article, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894), and his dissenting opinion in *Vegeahn v. Guntner*, 44 N.E. 1077 (Mass. 1896) (denying that labor unions violated the Sherman Act), were particularly controversial and Holmes was well aware that his views were not yet widely accepted. He expressed his personal crisis in a letter to Lady Castletown on October 7, 1896: "You speak of my touch of isolation in some of my speeches. It has reference to my work. One cannot cut a new path as I have tried to do without isolation. I have felt horribly alone." Morton J. Horwitz, *The Place of Justice Holmes in American Legal Thought*, in THE LEGACY OF OLIVER WENDELL HOLMES, JR. 31, 71 (Robert W. Gordon ed., 1992).

102. See Robert A. Ferguson, *Holmes and the Judicial Figure*, in THE LEGACY OF OLIVER WENDELL HOLMES, JR., *supra* note 101, at 155.

103. Robert W. Gordon has referred to this crisis as "the conflicts inevitably inhering in the judicial role." See Robert W. Gordon, *Introduction* to THE LEGACY OF OLIVER WENDELL HOLMES, JR., *supra* note 101, at 13.

If the published and unpublished writings of Holmes's secretaries provide insight into the nature of their experiences as law clerks, they also reflect the part they played in constructing an exalted image of the Justice both during and after his lifetime. The published works are particularly worth exploring in this regard, for they were the primary vehicles by which a salutary image of Holmes was projected.<sup>104</sup> As Holmes's "authorized biographer," the secretary to whom the Justice's executor gave his papers, it is not surprising that Mark DeWolfe Howe was at the forefront of the campaign to venerate his mentor. His two-volume biography depicts the Justice's past in almost mythical terms, especially when it comes to Holmes's role in the Civil War.<sup>105</sup> While Howe never finished the third and final volume of this biography, which would have dealt with Holmes's life on the bench, he did publish a host of articles in both scholarly and non-scholarly fora that cast him as a heroic judge.

Interestingly, Howe's efforts in this regard are most discernible in the 1940s and 50s, when Holmes's reputation was suffering at the hands of certain critics who had been linking his pragmatic jurisprudence to the moral relativism of the Nazi regime. The vilification of Holmes was led by a group of Jesuit scholars that included Father Francis E. Lucey, a regent of Georgetown University, and Father Paul L. Gregg, a professor of jurisprudence at Creighton University, both of whom attempted to expose Holmesian jurisprudence as a form of totalitarianism. In 1941 Lucey likened judicial pragmatism, which Holmes helped to spread, to "the theme song of the Nazi storm troopers."<sup>106</sup> Less than two years later Gregg predicted that "[i]f totalitarianism ever becomes the form of American government, its leaders, no doubt, will canonize as one of the patron saints Mr. Justice Holmes."<sup>107</sup>

According to one legal historian, this attack on Holmes's reputation coincided with the publication of the *Holmes-Pollack Letters*, a collection of particularly candid correspondence between

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104. According to the research done by one bibliographer, there were at least 31 books, articles, and reviews about Holmes published by his ex-clerks as of 1976. See HARRY C. SHRIVER, WHAT JUSTICE HOLMES WROTE AND WHAT HAS BEEN WRITTEN ABOUT HIM: A BIBLIOGRAPHY 1866-1976 (1978). I suspect that there are even more.

105. See MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS: 1841-1870 (1957); MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS: 1870-1882 (1963). Despite some evidence that it was actually General Horatio Wright who shouted at Abraham Lincoln to "get down you damn fool, before you get shot" during the President's visit to Fort Stevens in 1864, Howe's biography tends to corroborate Holmes's own account of the event—that it was the future Justice who blurted out the impetuous order—referring to that account as "the most reliable version." See HOWE, THE PROVING YEARS, *supra*, at 168.

106. Francis E. Lucey, *Jurisprudence and the Future Social Order*, 16 SOC. SCI. 213 (1941).

107. EDWARD A. PURCELL JR., THE CRISIS OF DEMOCRATIC THEORY 168 nn.39 & 42 (1973) (citing Paul L. Gregg, *The Pragmatism of Mr. Justice Holmes*, 31 GEO. L.J. 294 (1943)).

the Justice and his English friend in which the former expressed his harsh Social Darwinism and a “complete disregard for absolute truths and formal logic.”<sup>108</sup> Interestingly, it was Mark DeWolfe Howe who edited this correspondence, and he was not unaware of the inferences which unsympathetic readers might draw from the Justice’s own words. In what was clearly an attempt to shield his mentor’s reputation from the attacks of ethical absolutists, Howe, who was then dean of the law school at the University of Buffalo, gave a lengthy speech less than three months after the Holmes-Pollack correspondence was published. In this talk, delivered to an organization of legal intellectuals known as the “Thursday Club,” Howe sounded the themes that were to dominate his more widely disseminated writings about the Justice in the 1950s. Namely, he sought to reconcile the Justice’s skeptical and pragmatic approach to judging with a system of values and to impress upon his audience that Holmes possessed a faith that enabled him to “avoid the pitfalls of cynicism.” Admitting that “[a]s a sceptic he [Holmes] could not but doubt the cosmic significance” of certain ideals, Howe maintained nevertheless that “as a realist [Holmes] felt compelled to acknowledge the existence not only of the ideals but of humanity’s feeling that those ideals have value.”<sup>109</sup>

Howe’s efforts in the early 1940s, however, clearly were not enough to stem the rising tide of criticism to which his mentor’s reputation was subjected as the decade progressed. While the Jesuit attack continued—with the publication of articles like those authored by Father John C. Ford, a professor of moral theology at Weston University, in which he denounced Holmes and declared that “his ultimate philosophy of law and life was a crude form of totalitarianism”—more secular critics joined the chorus as well.<sup>110</sup> In 1945, for example, Ben W. Palmer, a lawyer and a lecturer at the University of Minnesota, published a now-famous article titled “Holmes, Hobbes and Hitler”<sup>111</sup> in the official journal of the American Bar Association. As if the message were not clear enough from the title, Palmer sought to disabuse those who assumed that such an effete and patrician figure as the Yankee from Olympus could not possess a “philosophy of force.”<sup>112</sup> Palmer insisted that “[t]he fact that Holmes was a polished gentleman who did not go

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108. *Id.* at 167.

109. Mark DeWolfe Howe, Mr. Justice Holmes, Address Before the Thursday Club (Mar. 13, 1941), in HOLMES PAPERS, *supra* note 4, at Reel 56, at 9.

110. PURCELL, *supra* note 107, at 168 n.43 (citing John C. Ford, *The Totalitarianism of Justice Holmes*, CATH. WORLD, May 1944, at 159).

111. See Ben W. Palmer, *Holmes, Hobbes and Hitler*, 31 A.B.A. J. 569 (1945).

112. *Id.* at 571.

about like a storm-trooper knocking people down and proclaiming the supremacy of the blonde beast should not blind us to his legal philosophy that might makes right, that law is the command of the dominant social group.”<sup>113</sup>

Responding to what he could only have viewed as defamatory attacks on the man who had nurtured his career and fired his intellect and imagination, Howe stepped up the campaign to rehabilitate his hero in 1951, with an article published in the *Harvard Law Review*.<sup>114</sup> Perceiving the crisis of judicial authority that imperiled Holmes’s reputation, Howe defended the morality of the detached and deferential judge, stating that “Holmes did not deny that a primary source of law is the realm of moral standards in which society has its being, and that he considered the first responsibility of the lawyer and the judge to be that of bringing the law into conformity with those moral standards.”<sup>115</sup>

While Howe was clearly the most active of Holmes’s secretaries when it came to projecting judicial and non-judicial images of the Justice to the lay and scholarly publics, other law clerks who became academics joined in on the act. Arthur E. Sutherland, for example, who taught law at Cornell from 1945 to 1950, and at Harvard from 1950 to 1970, wrote that “much of the greatness of Justice Holmes was a detachment from prejudice, an aloofness from vulgar passion, an aristocracy so complete that it disdained ordinary emotional partisanship.”<sup>116</sup> Though it came four years earlier than Howe’s law review article, Sutherland’s defense of Holmes’s “detachment” and “aloofness” mirrors his fellow law clerk’s attempt to elevate Holmes’s judicial reputation by rescuing him from charges of immorality.

It was not solely those ex-clerks who became academics who participated in campaigns to resolve the crisis that threatened Holmes’s standing in the pantheon of American judges. While the lay audience was perhaps not quite as attuned to debates about the virtues and pitfalls of Holmesian legal positivism as were those who read law review articles, Frances Biddle was aware that the American public expected its judges to read the public’s morality into the Constitution rather than their own. Thus, as early as 1932, Biddle’s review of a recently published collection of Holmes’s

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113. *Id.*

114. Mark DeWolfe Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 539 (1951).

115. *Id.* at 544.

116. Arthur E. Sutherland, Book Review, 32 CORNELL L. Q. 617 (1947) (reviewing *TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL HOLMES, JR., 1861-1864* (Mark DeWolfe Howe ed., 1946)).

opinions was intended to help “laymen and lawyers” understand that “Holmes cannot be classified . . . in terms of his personal convictions.”<sup>117</sup> While this attempt to extol the virtues of his mentor cannot be viewed as an attempt to rescue the Justice from association with the still nascent totalitarian movements of Europe, later comments by Biddle, such as those made almost thirty years later, can be seen as such. “Because Holmes rejected static and revealed concepts,” Biddle wrote in his autobiography, “this did not mean that he did not cherish his own set of moral values.”<sup>118</sup> The ex-Attorney-General made a similar point in a series of lectures he gave in December of 1960, which were published as a book in 1961. Specifically challenging the “criticism of the Justice by Catholic Scholars,” Biddle chose to “stress the spiritual and moral side of Justice Holmes, because he is attacked for being a frank cynic, a materialist without morals, caring for nothing but force.” As if to leave no doubt that his mentor had never wandered from the path of righteousness, Biddle asked rhetorically, “was not Holmes, in truth the last of the Puritans?”<sup>119</sup>

While the writings of Howe, Sutherland, and Biddle represent only a fraction of the literature on Holmes written by his ex-clerks, they do convey the basic thrust of the larger body of work: that Holmes was a heroic American whose jurisprudence was both morally defensible and properly restrained. To the extent that Holmes is widely viewed as one of the great American judges, and that his detached, dispassionate approach to deciding cases remains the model by which the public and scholarly communities rate American judges, it can be said that his law clerks did a great deal to mediate the conflicts inhering in the judicial role. This contribution, in turn, is arguably the product of Holmes’s efforts as a mentor. He not only gave a personal demonstration to his protégés that judges could be both human and Olympian, but he instilled a sense of loyalty in them that assured their complicity in broadcasting that message.

## V. CONCLUSION

Writing to Holmes in 1926, Chauncey Belknap thanked the Justice for the clerkship experience that he chronicled so carefully in his diary, and expressed his hope that “youth and gaiety are still the companions of wisdom and insight.”<sup>120</sup> Had he asked Thomas

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117. Francis Biddle, *Mr. Justice Holmes*, NEW REPUBLIC, Sept. 7, 1932, at 105 (reviewing THE REPRESENTATIVE OPINIONS OF MR. JUSTICE HOLMES (Alfred Lief ed., 1931)).

118. BIDDLE, *supra* note 95, at 286.

119. BIDDLE, *supra* note 77, at 21.

120. Letter from Chauncey Belknap to Oliver Wendell Holmes (Mar. 6, 1926), in HOLMES

Corcoran, who became Holmes's secretary seven months later, he would certainly have been reassured, for Corcoran described his own experience with the Justice as that of a "boy, plugging through the thicket blindly . . . lifted by gentle hands to the tops of high mountains and shown the far off end of the way."<sup>121</sup> The alliance between youth and experience that defined the clerkship model established by Holmes proved to be a rewarding one not only for the Yankee from Olympus and his protégés, but for other judges and clerks who adopted that model. As I will discuss in a forthcoming work, famous judges such as Louis Brandeis at the Supreme Court and Learned Hand of the U.S. Court of Appeals for the Second Circuit imported certain features of Holmes's clerkship model into their own chambers, and helped to popularize a model of how judges and law clerks should interact that remained vital for several decades. Like Holmes, moreover, these and many other famous American jurists of the twentieth century owe at least a portion of their celebrity to the efforts of their law clerks to repay their mentors with public praise.

In light of the reputation-crafting function of law clerks that this Article has sought to expose, it may be useful to apply some of the theoretical work of literary critics and others who have studied reputation more generally, to reconceptualize the nature and function of law clerking as an institution. Charlotte Templin, for example, has argued that reputation is "a contingent phenomenon, emergent from social relations and related to particular historical and institutional contexts."<sup>122</sup> Her work shows how the reputations of various authors were constructed by what she calls "evaluative communities," that is, "a group of agents who, to an important degree . . . share determinate meanings of a cultural object and value the object similarly."<sup>123</sup> What this suggests is that it is possible to conceive of a judge's law clerks as just such a community, and to see their function as more than simply "legal" or "administrative."<sup>124</sup>

Just as the literary canon has been shaped by the explicit

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PAPERS, *supra* note 4, at Reel 15.

121. Letter from Thomas Corcoran to Oliver Wendell Holmes (Mar. 6, 1928), in *id.* at Reel 31.

122. CHARLOTTE TEMPLIN, *FEMINISM AND THE POLITICS OF LITERARY REPUTATION* at ix (1995).

123. *Id.* at 36.

124. Critical Legal Historians have been arguing for some time that law has "symbolic" as well as "instrumental" uses, in an effort to drive home their larger point about how law structures consciousness, but they have adopted a surprisingly narrow definition of law and legal forms in doing so. See, e.g., Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 111 (1984). As the foregoing examination of one particular aspect of the American judiciary indicates, it is not just statutes and judicial opinions that are constitutive of social relations and cultural meanings, but legal institutions as well.

marketing efforts of the friends, mentors, and protégés of various authors, so, it seems, has the pantheon of American judges been constructed, in part, by ex-law clerks functioning as evaluative communities.<sup>125</sup> Given his intense effort to mentor and secure the loyalty of the young men who would one day help to forge his reputation, it is little wonder that the place of Oliver Wendell Holmes, Jr., in that pantheon is secure. In the most well-known and comprehensive rating of American Supreme Court Justices, Holmes ranked fifth as of 1972 and second, behind only John Marshall, as of 1993.<sup>126</sup> While it is hard to know how much of his reputation is the product of his law clerks' machinations, there is little doubt that Holmes's noble nursery of humanity enriched his image as well as the careers of its tenants. While future studies should reveal the degree to which other American judges have benefited from the bargain-based model of law clerking that Holmes popularized, it is important to realize that such a model has potential benefits that extend beyond the interests of individual judges.

Since judges at every level of the federal judiciary employ ambitious law school graduates for terms of one or two years, and since most state court judges now do so as well, it may not be claiming too much to assert that the institution of law clerking has emerged as an internal mechanism by which the American court system can maintain its integrity and defend itself from attack. In a nation whose judiciary has suffered periodically from the wrath of angry critics, and has occasionally been the target of intense reform efforts ranging from jurisdiction stripping to judicial recall, the existence of an in-house public relations firm comprised of loyal ex-clerks is an important, if overlooked, weapon in the arsenal of the "least dangerous branch." Of course, given the intergenerational bargain between judges and law clerks that this essay describes, the weapon is only useful if enough judges hold up their end of the bargain by conscientiously mentoring the bright law school graduates who agree to spend a year or two in their chambers.

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125. For works that discuss the forging of authorial reputation by such communities, see JOHN RODDEN, *THE POLITICS OF LITERARY REPUTATION: THE MAKING AND CLAIMING OF "ST. GEORGE" ORWELL* (1989); LAWRENCE H. SCHWARTZ, *CREATING FAULKNER'S REPUTATION* (1988); and Gladys Engel Lang, *Recognition and Renown: The Survival of Artistic Reputation*, 94 AM. J. SOC. 79 (1988). Those who have studied judicial reputation have, on the whole, neglected the role played by reputation crafters, and focused, instead, on such factors as a particular judge's longevity of service, intellectual ability, ideology, impact on legal development, personal characteristics, and writing style. See, e.g., RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* (1990); William G. Ross, *The Ratings Game: Factors that Influence Judicial Reputation*, 79 MARQ. L. REV. 401 (1996).

126. See Albert P. Blaustein & Roy M. Mersky, *Rating the Supreme Court Justices*, 58 A.B.A. J. 1185 (1972). For an updated version of their rankings, published in 1993, see Ross, *supra* note 125, at 445. The Blaustein and Mersky study was based on a poll of more than one hundred judges, scholars, and lawyers.



The prospects for the survival of this kind of mentoring in the chambers of American judges are not good, however, given what scholars have referred to as the "bureaucratization of the federal judiciary."<sup>127</sup> One aspect of this bureaucratization is the appropriation of money by Congress so that federal judges can hire more and more clerks to assist with what is perceived to be an overwhelming volume of litigation. Coupled with the trend towards hiring full-time staff attorneys in federal courts to do more and more of the work that judges once performed with the assistance of a single law clerk, there is a real possibility that the Holmes model of law clerking, along with its extra-legal benefits, will disappear from the judicial landscape. But given that the "caseload explosion" responsible for the bureaucratization of the judiciary is overstated (at least according to Stanford law professor Gerald Gunther, who clerked for both Learned Hand and Earl Warren in the late 1950s),<sup>128</sup> it may still be possible to preserve the model in something close to the form that has emerged over the course of a century.

For those who appreciate the role that law clerks have played in shaping the reputation of American judicial figures, and who value their role in buttressing the integrity of the American judicial system, the threat to the survival of the Holmes model of law clerking, based on the hiring and mentoring of a small number of bright, young law students for a finite period of time, is unsettling, and calls for efforts to preserve the essential components of that model. There is, however, at least one survival of Holmes's model that can, and should, be jettisoned: the continued practice by judges, and particularly by Supreme Court justices, of hiring white males from elite law schools in numbers that are vastly disproportionate to their percentage of the population, and to their percentage in law schools.<sup>129</sup>

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127. Gerald Gunther has critiqued the "personnel explosion" in federal courts, emphasizing particularly how the increasing number of judicial assistants has severed the traditionally close relationships between judges and their law clerks. See Gerald Gunther, Judge Learned Hand: The Man and the Judge, Address Before the California State Bar Association (Oct. 12, 1998, C-SPAN television broadcast on Jan. 25, 1997). For an attack on the increasing use of staff attorneys in federal courts, see Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 787-88 (1981).

128. See Gunther, *supra* note 127.

129. Seventy-six percent of Supreme Court law clerks who served between 1990 and 1995 are white men, a number which is actually an improvement on the figures for the decade of the 1960s in which ninety-nine percent of these prestigious positions were held by white men. See Gwen Daye Richardson, *Court's Clerk Tally Is Not Race Based; It's School Based*, USA TODAY, Oct. 5, 1998, at 15A. Of course, there are those, like Richardson, who maintain that these figures reflect nothing so much as the biased admission policies of the elite law schools from whom the pool of Supreme Court law clerks has traditionally been drawn, but others have blamed the Justices themselves for refusing to expand this pool by hiring clerks who attended law schools other than Harvard and Yale. See, e.g., Sam Fullwood III, *For Supreme Court Clerks, The Majority Rules*, L.A. TIMES, Oct. 4, 1998, at A18.

Of the thirty-four clerks hired by the Justices of the Supreme Court in 1998 term, only one is a minority. Moreover, since 1972, less than two percent of the 428 clerks selected by the nine sitting Justices have been African American, four percent have been Asian-American, one percent have been Latino, and none have been Native American. In addition, only slightly more than a quarter of these clerks have been women.<sup>130</sup> Outraged by the historic and continued domination of clerk positions by white males, a thousand civil rights activists assembled for a rally on the steps of the Court on this past October 5, and nineteen of the protesters, including the President of the NAACP, Kweisi Mfume, were arrested for attempting to hand resumes of qualified minority candidates to the Chief Justice.<sup>131</sup> Given that Justice Rehnquist has refused to grant a meeting to the leaders of the Coalition of Bar Associations to discuss the issue of minority law clerk hirings, however, it seems unlikely that any changes in this area are imminent.<sup>132</sup> In a world where equality of opportunity has become a widely accepted goal, if not a reality, it is no longer tolerable for members of the Judiciary, the individuals most responsible historically for ensuring that equality, to reserve their choicest bit of extra-legal largesse—the clerkship experience—for the most privileged members of our society.

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130. Michael A. Fletcher, *As Term Opens, Lack of Diversity is Decried*, WASH. POST, Oct. 6, 1998, at A3. At the time of writing, Justices Rehnquist and Scalia have never hired an African-American law clerk, and even Justice Thomas, the only sitting African-American Justice, has only hired one out of the thirty-three clerks that he has had since joining the Court in 1990. *See id.* The problem is not confined to the conservative justices, however. Justice Brennan, who retired from the court in 1990 with a reputation for being a strong supporter of affirmative action programs and of equal employment rights for women, hired a mere six female law clerks out of a total of 103 during his thirty-three year tenure on the Court. The reasons for this hypocrisy are the subject of a future article by this author.

131. Zerline A. Hughes, *Civil Rights Activists Arrested in Protest of Law Clerk Hirings*, L.A. TIMES, Oct. 6, 1998, at A16.

132. *See* Fullwood, *supra* note 129, at A18.