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Howe: Justice Oliver Wendell Holmes: The Proving Years 1870-1882

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The Proving Years describes the period between 1870 and 1882 when the outgoing and sociable elements of Holmes's personality vanished behind an austere screen of zealous scholarship and busy private practice. Why did Holmes devote himself so persistently at this time to demonstrating his intellectual excellence? How can we account for the specific characteristics of his contribution to jurisprudence? The climax was the Lowell lectures on The Common Law delivered in November and December of 1882. In December of that year Holmes was appointed Associate Justice of the Supreme Judicial Court of Massachusetts, and rather precipitately slammed the door on his new colleagues at the Harvard Law School.

When we try to explain why the young man stayed out of politics and business and dedicated himself to intellectual achievement, it is not enough to point out that Holmes was reared in the family of a famous literary Bosonian and professional man, and that he had a lawyer grandfather. The same path was not taken by other members of the family. It is hardly conclusive to say that as a young lawyer he belonged to a circle of questing friends who believed that "the drift of a lawyer's accomplishment need not be towards the traditional successes of the profession, but could be towards a larger achievement." It is impressive to realize that the circle included young lawyers, like John C. Gray and John C. Ropes, and philosophers, like William James and Chauncey Wright, who undoubtedly influenced Holmes and were influenced in return. But Holmes touched many lives. How do we interpret his predilection for these particular friends?

There are many indications why the intellectual life, at first, appealed to Holmes. We sum up by saying that the scholar's role was a compromise between an intense craving for power and Holmes's continuing doubt of his adequacy as a man. At first Holmes was attracted by the singular power that comes to the successful thinker, "the subtle rapture of a postponed power." In the eighties he celebrated "the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought. . . ."

Holmes was, however, unwilling to settle permanently for the secret rapture of orchestrating future conduct. During a decade of private research and practice, Holmes became conscious of the lure of the judiciary, and encouraged

1. P. 4.
2. P. 5.
his friends to put in a good word for him. Although the gratifications of the judicial role are relatively immediate, they also afford scope to the questing mind.

That Holmes’ drive for power, for a voice in the significant decisions of the community, was partially restrained, even as it was covertly fed, by self-distrust is a hypothesis that requires more documentation than the present volume gives. It is not definitive to learn that Holmes was unwilling to rear a family or that a recurring theme was manly struggle, as when he justified accepting a judgeship in these words: “... I felt that if I declined the struggle offered me I should never be happy again—I should feel that I had chosen the less manly course.”

Professor Howe has not made the theme of self-distrust and masculine struggle a fully articulate part of his analysis. He has, however, perceptively characterized the situation at many points. For instance, “That Holmes saw his partnership with Shattuck and Munroe and his completion of the Commentaries as the mark, as it were, of his transition to man's estate is indicated by the fact that in October of 1873 he purchased a summer place. ...” The biographer rightly records that Holmes accepted and stressed Darwin’s doctrine of struggle; he also observes an undertone of admiration for the “fierce” and “powerful philistine of insight,” the successful man of wealth and power.

Most perceptive of all is the choice of The Proving Years as the title.

The problem of understanding Holmes is especially complex when we examine the details of his intellectual development. His first contribution to jurisprudence was an article on “Codes, and the Arrangement of the Law.” From this he moved to a full scale reappraisal of the leading doctrines of the common law, relying mainly on the results of historical research. Holmes made articulate a view of the interplay between legal form and social process that set the subsequent tone of progressive jurisprudence in this country.

If Holmes’ role in the context of scholarship is to be understood it is essential to see it as part of the usual process by which intellectual innovations launched at the great centers of cultural creativity are diffused, restricted or embellished by scholars who work at the periphery of the culture area. The United States was peripheral to Europe and Great Britain. However, by 1870 Cambridge-Boston was sufficiently developed as a sub-center of the higher learning to provide opportunities to scholars who had studied abroad, or who were in contact with the great universities of Britain and the continent. The following prediction might have been made about Holmes and other Americans of his generation who would make reputations in jurisprudence: They will emphasize Teutonic rather than Roman contributions to Anglo-American law; they will work out their theoretical position in varying degrees of reaction to Kant and Hegel, but especially to Bentham

3. P. 8, n.17.
5. P. 23.
6. P. 111.
and Austin, the precocious systematizers of the English legal system.

The innovative springs on the continent were able to cut fresh channels in the United States because by the time Holmes began his career American legal institutions were in a state of flux and of partially acknowledged confusion. As Professor Howe puts it, Bentham had successfully dissolved the ancient procedures of Anglo-American law.

The elimination of artificialities meant, however, the casting aside of the one element which provided a degree of order in the English legal system. While the forms of action prevailed it was possible for lawyers, though doubtless impossible for philosophers, to see structure in the English legal system.7

Holmes was provided with opportunity to examine the legal system as a whole when he agreed to assist in preparing the twelfth edition of Kent's Commentaries. Material too long for inclusion in the Commentaries was published in the American Law Review.

In the early publications Holmes gave ample evidence that he was well on the way to clearing his own path through the wilderness of traditional law, that “chaos with a full index,” in the phrase of T. E. Holland.8 Of great interest are his deviations from Austin on the nature of law. Holmes declared that a “command” is not sufficient to distinguish lawful from other norms. The point is, rather, that a “… political superior secures obedience to his commands by his courts.”9 Holmes went on to assail the command conception, arguing that if, as Austin asserted, custom is a “motive,” the words of a statute can also be seen as motives which may or may not be sufficiently strong to justify a legal advisor in predicting “the law”—that is, predicting how judges will act.10

By focussing upon the “real” judge rather than the fictive command, Holmes brought the legal process firmly into the social process. He pressed this further by analyzing the factors that impinge upon the public official. In Professor Howe’s summary:

... he saw that the ultimate issue of where sovereignty resides turns upon the answer to a question of fact. The lawmakers, whether they be judges or members of a legislature, must always seem to calculate the existing allocation of power and, having made their calculation, give effect as law, to the demands of that group which, as survivor in the Darwinian struggle, has proved itself to be the fittest. Sympathy and the moral virtues may lead either the dominant group or the judge to alleviate the tyranny of power.11

7. P. 65.
8. P. 63.
9. P. 70.
10. P. 74. If Holmes had been less court-oriented he would have extended the analysis to treat the verbal response of the court as contributing “motes” to the subsequent flow of decision throughout the social process, and redefined “the law” accordingly.
Holmes' search for a more factual view of the legal process than the Austinian model led him to prefer a presumably less "subjective" standard than Bentham, Austin, or the German idealists were disposed to support. He thought he had found an alternative in the view that law is designed to affect "conduct" rather than to appraise subjective states. This was a principal theme throughout Holmes's great lectures on The Common Law. He held, for instance, that the purpose of criminal law is "to induce external conformity to rule"; hence the wicked mind (mens rea) ceases to count. Holmes carried his point further by asserting that the essentials of liability were the same in torts and in criminal law. He was not able to adhere strictly to the external criterion when he dealt with possession.12 "Yet Holmes was willing to give more effect to a generalized actual intent than were Savigny and his disciples."13 His consideration of the obligation of contracts "... favored the concentration of analytic attention upon the formal and objective aspects of obligation and a reduced concern for the subjectivities of assent."14

When we look at Holmes' jurisprudence as a whole it is impossible not to admire his flashes of originality, and the craftsmanlike ingenuity with which he wove the newer insights of historical and anthropological learning in support of law as "experience" transcending "syllogism." But Holmes's jurisprudence is a truncated and ambiguous torso. Evidently something was held back. At some point Holmes chose to allow impressionistic, paradoxical and oracular utterances to serve in place of clear, systematic analysis. If our hypothesis is correct, his rather undignified rush to accept his first judicial appointment was much more than an opportune seizure of power. It also provided an escape from the scholar's duty of candor and clarity. As a full-time legal scholar the inner and outer pressures toward systematic and open disclosure would have gained in strength. Once on the bench Holmes could plausibly refrain from putting the finishing touches on his work, and fail to provide an appropriate foundation. As a judge Holmes could carry off the role of an enigmatic authority of advancing seniority and accumulating prestige.

What was Holmes holding back? The answer is not too deeply concealed in the panorama that Professor Howe unrolls before us. It is tempting to emulate the Justice himself by phrasing the disclosure in a Shavian style that appears to deny its serious purport (such as "Holmes the deceptive oligarch"). Laying this temptation to one side and putting the hypothesis in more pedestrian fashion, the Justice was holding back the intensity of his distaste for democracy, and his opposition to a conception of morality or legality that would hamper the strong for the benefit of the weak. Holmes cannot be supposed to have been oblivious to the damage that would be done to his career

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12. Actually, the criterion of externality was inapplicable in every case. The choice of terms to designate words, gestures and deeds as comprising patterns of conduct is a complex exercise that calls for assumptions about "internal" perspectives as well as "external" operations.
if he gave systematic and full disclosure of his basic orientation in politics, law and ethics.

His biographer remarks that Holmes "... never formulated either a political or legal theory of sovereignty ..." and correctly underlines the important place that Holmes ascribed to effective power. Holmes was strongly attracted by the view that effective power is all-compelling: hence there can be no significant degree of reciprocity between "might" and "right." If the norms of legality and ethics are fully conditioned by effective power, norms are impotent, unable in turn to influence effective power. Holmes could never quite bring himself publicly to commit himself to the implications of the position that legal doctrines are no more, or very little more, than decorations of the mailed fist. In short, Holmes could not develop the systematics of his jurisprudence without damaging his power position as a judge. As a Justice he continued to have at his disposal the language of legal technicality which could be used to obscure and soften the reality of what he thought he was doing.

The following are a few hints of what Holmes was covering up:

"[I]n the last resort a man rightly prefers his own interest to that of his neighbors."16
"The objection to class legislation is not that it favors a class, but either that it fails to benefit the legislators, or that it is dangerous to them because a competing class had gained power, or that it transcends the limits of self-preference which are imposed by sympathy."17
"[T]ruth [is] the majority vote of that nation that could lick all others."18
"Writing to Bryce on September 17, 1919, Holmes acknowledged that he came 'devilish near to believing that might makes right.' "10

"Stephen, the Englishman, could speak in public more frankly of the American character than could Holmes, but I wonder whether the Brahmin streak in Holmes's nature did not relish Stephen's reflections on the 'success' of equality in the United States."20

It is worth noticing, too, that Holmes was not altogether unaware of a certain lack of empathy and sympathy in his character. "I reproach myself a little for not loving my fellowmen in general enough."21 Holmes's egocentric outlook was rooted in a character structure which in present day terms can be recognized as relatively authoritarian. His jealous insistence on intellectual priority is revealing. And the comment by Professor Thayer is not unique: "... with all his attractive qualities and his solid merits [Holmes is] wanting sadly in the noblest region of human character—selfish, vain, and thoughtless of others."22

15. P. 45.
16. P. 44.
17. P. 45.
22. P. 268.
In the absence of a systematic exposition by Holmes of the goals of a legal system, Professor Howe falls back on the suggestion that "stability" was the underlying thrust of Holmes's approach. A traditional label of this kind, however, aids chiefly in perpetuating the deception which this gifted thinker and judge was able to maintain during his long years of participation in the decision process of a body politic whose institutions and aspirations were in many ways unacceptable to his philosophy and incompatible with his character. In a scholar such a double life is not condoned. In a judge?

Professor Howe's volume deserves the accolade proper to an accomplished historian. His interpretations are carefully grounded; and his data are good enough to provide nourishment for alternative and supplementary ways of accounting for Holmes the thinker, the judge, and the man.

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FRANCIS BACON: THE TEMPER OF A MAN. By Catherine Drinker Bowen.


Francis Bacon, in a will afterwards revoked, gave his name "to the next ages, and to foreign nations." The legacy has been distributed and redistributed; the curious thing about it is that nobody wants it. Bacon is repeatedly acclaimed as a giant in somebody else's specialty.

In biographical outline he is above all a contradiction. He was a brilliant thinker, a scheming politician, a judge who took bribes, and a lawyer who disliked the practice of law. Even after impeachment for misuse of his judgeship, he was asked by the king for advice on legal reform. Carlyle found him earthy but beautiful, and his defenders, Mrs. Bowen says, have not been lawyers and judges, but "scholars, clergymen, whose lives were blameless and devoted." He kept his defenders and his royal favors after his disgrace, but he never had any friends.

Bacon admitted that his progress in the Elizabethan body politic came about by a "commixture of good and evil arts." The "good arts" he mastered included a book of euphuistic Elizabethan phrases, designed to embroider a vain monarch's pretentious court. The "evil arts" found expression in a dedicated

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1. P. 194.
3. P. 211; Bowen, The Lion and the Throne 431 (1957) [hereinafter cited as The Lion and the Throne].
4. P. 15.
5. Ibid.
6. P. 46.
7. P. 82. Bacon called this Promus of Eligancies.