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BOOK REVIEWS

PORTRAIT OF THE JURIST AS A YOUNG MIND

PHILIP B. KURLAND†

Justice Oliver Wendell Holmes: The Shaping Years, 1841–1870. By Mark DeWolfe Howe. Cambridge: Harvard University Press, 1957. Pp. xii, 330.

Contrary to the prediction made in an earlier volume of this *Review*,¹ Mr. Justice Holmes is today in greater danger than ever of becoming a legend, or more accurately, the subject of several diverse and contradictory legends. His stature in American law, indeed in American thought,² has become so monumental that almost everyone claims him for his own. There is, of course, the exception of those who require obeisance to the tenets of Aquinas as a condition of grace. But whether as “the Yankee strayed from Olympus”³ or as the devil’s disciple,⁴ the descriptions of Holmes tend no longer to reveal him as a human figure but as something larger or smaller.

The present danger is somewhat different from an earlier one which called for the romanticizing of Holmes, not for the sake of a cause but for the sake of a story. Catherine Drinker Bowen’s *Yankee from Olympus*,⁵ for example, provided a charming and entertaining volume in which she gave full vent to her great imaginative powers in order to fill the gaps that the lapse of time and the

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¹ Hamilton, On Dating Mr. Justice Holmes, 9 U. of Chi. L. Rev. 1 (1941). Prognostication about Holmes’s place in American history has always been a difficult enterprise, even for the most agile minds. See, e.g., Cohen, The Faith of a Liberal 21 (1946).

² See, e.g., Commager, The American Mind, c. XVIII (1950); White, Social Thought in America: The Revolt against Formalism, passim (Beacon Press ed., 1957).

³ Sergeant, Justice Touched with Fire, in Frankfurter, ed., Mr. Justice Holmes, 183 (1931).

⁴ See, e.g., Ford, The Fundamentals of Holmes’ Juristic Philosophy, in Phases of American Culture 51 (1942); Lucey, Natural Law and American Legal Realism, 30 Geo. L. J. 493 (1942); Kennedy, Portrait of the New Supreme Court, 13 Ford. L. Rev. 1 (1944); Palmer, Hobbes, Holmes and Hitler, 31 A.B.A.J. 569 (1945); Palmer, Defense against Leviathan, 32 A.B.A.J. 328 (1946); Lucey, Holmes, Liberal—Humanitarian—Believer in Democracy?, 39 Geo. L. J. 523 (1951); Palmer, Totalitarianism of Mr. Justice Holmes, 37 A.B.A.J. 809 (1951). There nevertheless developed a tender friendship between Holmes and Canon Sheehan, an Irish parish priest “odd as it seems that a saint and a Catholic should take up with a heathen like me. . . .” Frankfurter, Mr. Justice Holmes, in *Of Law and Men* 158, 163 (Elman ed., 1956).

⁵ (1943). The zenith was probably reached in the recent publication of a biography of Holmes written for children. See Judson, Mr. Justice Holmes (1956).

absence of records necessarily create. She made of Holmes a figure all too human, one well suited for portrayal by a motion picture "character actor." The contemporary threat is treatment which makes him the epitome of good or evil and the danger is not the less from his self-appointed friends than from his enemies. Every journalist with a smattering of ignorance about the Justice feels free to draw his portrait.⁶ It is not without significance that so temporal a journal as *The New Yorker* should feature an article on Holmes, not in the form of a "profile" it is true, but in the guise of a review of this first volume of Professor Howe's biography.⁷ Nor is it unusual that Richard Rovere, the reviewer, who like most of us could hardly have known Holmes except through hearsay and cursory reading, undertook to reveal the true spirit of the Justice, a picture in blacks and whites. Rovere writes of Holmes's "most inconsequential opinions" as if he had read them and finds in them all "a liveliness and tension and rub." He writes of a Holmes who "was never stupid and never foolish. And never, above all, banal. No platitude was ever known to cross his lips. He never committed a soggy sentence." Thus does a man who never knew Holmes write of a Holmes who could never have existed. And yet Rovere criticizes Howe, who became Holmes's secretary in 1933 after Holmes had already retired from the Supreme Court, for not adequately exploiting his "having seen Holmes in the ancient flesh," though the Holmes of this volume (1841-70) could hardly have been known to Howe who was born in 1906. Francis Biddle tells us that "Holmes would have been amused—I don't think often annoyed—by these half-baked generalities which tried to catch and pin him down, a museum piece in a glass case for the crowd to gaze at."⁸ But Holmes's amusement is not to the point. As those who knew Holmes dwindle in number the danger increases: there will soon be few who can distinguish of their own knowledge between the true and the fictive. The time has certainly arrived for an objective study of the man and mind whose impact has been so broadly felt. This long-heralded Howe biography thus adds a quality of timeliness to its many other values, values called for by Sir Sidney Lee as essential to good biography: "to avoid unfit themes and to treat fit themes with scrupulous accuracy, with perfect frankness, with discriminating sympathy and with resolute brevity."⁹

Those who prefer anecdotal biographies will be disappointed in this one, though it is not wanting in revealing anecdotes. Howe has underplayed personality and concentrated on his subject's intellectual development. The reason he gives for treating this early period in Holmes's life in a distinct volume and in a distinct form is an equally persuasive call for this emphasis: "His years of education were years in which his convictions and his doubts took their per-

⁶ See, e.g., Rodell, *Nine Men* (1955).

⁷ *The New Yorker*, April 16, 1957, 145.

⁸ Mr. Justice Holmes, in Dunham and Kurland, eds., *Mr. Justice 3* (1956).

⁹ Lee, *Principles of Biography*, 54 (1911).

manent shape" (pp. v-vi). What then does this young Holmes of "The Shaping Years" look like to Professor Howe?¹⁰

I

Holmes was born an aristocrat in the only sense in which this country ever had a true aristocracy. He was heir, not to great wealth, though he hardly represents the Horatio Alger tradition; nor to distinction, for he had to earn his own place in the firmament; but to an environment of thought in which his mind could be brought to full flower under the most favorable circumstances. From today's perspective, it borders on fantasy to think of Holmes growing up at the Autocrat's table, knowing the talk of Ralph Waldo Emerson, Louis Agassiz, James Russell Lowell, Henry Wadsworth Longfellow, William H. Prescott, John Greenleaf Whittier, Nathaniel Hawthorne (the list could be extended almost without limit), enjoying youth with the Adamses, Charles Francis, Henry and Brooks, and the Jameses, Henry and William. To young Holmes, the flowering of New England was almost a personal affair.

In the tradition of his family, Holmes was a great talker almost from the very beginning of his life. "At twenty-six months the child was 'able to say almost anything' . . ." (p. 1). At the age of six, his school report indicated that he "[t]alks too much" (p. 2). Good talk flowed in such abundance at the Holmes family table that it became a matter of the survival of the fittest, with young Wendell holding his own even against the enormous capacities of the head of the household.¹¹ "Holmes's younger brother testified that Holmes found ways of competing: 'Wendell,' he said, 'ends every sentence with a "but" so as to hold the floor till he can think of something else to say' " (p. 21). This was fortunate, for it is quite clear that his education was dependent at least as much on the opportunities for good talk and good books at his home as on his formal instruction.

His early schooling, at a time when Horace Mann was still a radical innovator and John Dewey's theories on education were unconceived, was not untypical for a boy of his time and circumstances. Initiated at a Dame's school, it was followed by attendance at a boy's school conducted in a church basement by T. Russell Sullivan, a Unitarian divine who, it would appear, expected each of the written exercises to be terminated by an appropriate biblical quotation. Then to the Latin school presided over by his future father-in-law, Epes Sargent Dixwell. Charles Francis Adams thought Dixwell's training was that of a "classical grind-mill" (p. 5). Others spoke more highly of it, but its limitations

¹⁰ Howe's "expertise" is attested by the Holmes-Pollock Letters (1942); *Touched with Fire* (1946); and the Holmes-Laski Letters (1953), all edited by Howe. See also Howe, *The Positivism of Mr. Justice Holmes*, 64 Harv. L. Rev. 529, 937 (1951).

¹¹ Leslie Stephen once described Holmes, père, as "a very jolly, chirpy little man, whose principal fault is that when he has once got started in talking, I doubt if even [Henry] Fawcett could get a word in." Maitland, *Life & Letters of Leslie Stephen* 116 (1906). And later: "He is a most jolly, cheery little man, full of talk, and very clever talk too." *Id.*, at 205.

were primarily caused by its objective: to prepare students for the Harvard examiners who were interested only in Latin, Greek, Ancient History and Mathematics. Dixwell's curriculum—in advance of its time—also contained courses of instruction in German, French, English and Modern History.

"If Mr. Dixwell and Mr. Sullivan endeavored to confine the minds of their pupils to the narrow channels of classical scholarship and Unitarian morality there were, after all, broader rivers of literary experience available to those whose enthusiasm and curiosity were lively" (p. 11). Young Holmes, like so many after him, fell under the spell of Sir Walter Scott's romances, a spell which was never dissipated. And if his reading included Lamb's *Dramatic Poets*, it also ran to the thrillers of the day bearing such titles as *Rifle Rangers and Scalp Hunters*. Nor was it easier to persuade Holmes to accept the religious doctrine tendered to him, even one so unconfining as that of the Unitarian Church. His religious skepticism, which came early in life and apparently deepened with time, Holmes attributed to his mother. Dr. Holmes¹² had rejected the more stringent tenets of his clergyman-father's Calvinism to embrace the new Unitarianism. "The general insufficiency of Dr. Holmes's emancipation from inherited pieties might have disappointed or irritated any rebellious member of the younger generation" (p. 17). That there was a broad range of disagreement and conflict between father and son is beyond speculation. But Howe's evaluation of the evidence seems far more realistic than that kind which would build on the Oedipus myth the explanation of "the completely adult jurist."¹³ "[I]t would be easy to construct a thesis that there was an antipathy of the son to the father so intense that the son's character and achievements were molded by its influence. The subtleties of family relationships, however, are such as to make hasty acceptance of the thesis as inappropriate as dogmatic denial of its validity. Undoubtedly there were occasions, perhaps seasons, in the son's youth when antipathy was strong, but it was surely neither the first nor the last time that family life has produced such tension" (pp. 11-12).

Certainly if there is much of Holmes's thinking which may be attributed to his conflicts with his father, there is at least as much resulting from acceptance of ideas which he must first have heard from the Doctor's lips. Even the creator of the myth of the "completely adult jurist" came around to this view in his later years.¹⁴ Indeed, there was a time when Judge Frank was proposing the thesis that the Doctor was the more profound thinker. Not the least of the ideas shared by the two was that it "is the intelligent man's responsibility to

¹² "The habit of speaking and writing of 'Mr. Emerson,' 'Mr. Lowell,' 'Mr. Longfellow,' and, even—in circles with a long tradition—of 'Miss Austen,' stood the wear of many years, but that of designating Holmes as 'Dr. Holmes' or 'the Doctor' extended even farther towards the present day—and, I dare say, not wholly for the purpose of distinguishing him from 'the Judge.'" Mark A. DeWolfe Howe, *Holmes of the Breakfast Table* 156-157 (1939).

¹³ Frank, *Law and the Modern Mind* 253 (1930).

¹⁴ See, e.g., Frank, *A Conflict with Oblivion: Some Observations on the Founders of Legal Pragmatism*, 9 *Rutgers L. Rev.* 425, 442 n. 86, 443 n. 87 (1954).

look beneath the surface of words, and their accumulated connotations, to the ideas which they represent" (p. 23). And one can trace from father to son the repeated decisions "to take no part in 'causes,'¹⁵ the same instinctive preference for the independent decision to the co-operative action characterized the view of the two men" (p. 25). The "father and son" also "shared a willingness to ask questions which their contemporaries were reluctant to consider" (p. 25). And Howe suggests the last line of "The Wonderful One-Hoss Shay": "'Logic is logic, That's all I say,' as the condensed forerunner of the son's most famous utterance: 'The life of the law has not been logic; it has been experience'" (p. 26). These are but samples of the areas of agreement shared by Holmes, Sr. and Holmes, Jr.

Holmes's rejection of the religion of the Puritans was not accompanied by a rejection of the secular values which are so often associated with that group: "Seriousness, industry, and direction of effort" (p. 21) were for Holmes, early and late, duties which must be met. He was very young indeed when he started toward membership in the imaginary Society of Jobbists which he founded but which has been best described by its incumbent President, Judge Learned Hand:

It is an honest craft, which gives good measure for its wages, and undertakes only those jobs which the members can do in proper workmanlike fashion, which of course means no more than that they must like them. Its work is very various and indeed it could scarcely survive in these days, if the better known unions got wind of it, for quarrels over jurisdiction are odious to it. It demands right quality, better than the market will pass, and perhaps it is not quite as insistent as it should be upon standards of living, measured by radios and motor-cars and steam-heat. But the working hours are rigorously controlled, because for five days alone will it labor, and the other two are all the members' own. These belong to them to do with what they will, be it respectable or not; they are nobody's business, not even that of the most prying moralists.¹⁶

II

Harvard's pre-eminence among the colleges of this country¹⁷ must already have been attained by 1857, when Holmes entered as a freshman. The Adams brothers and other students of their time, however, were not much impressed. "Henry Adams said that although Harvard College 'taught little, and that little ill,' it none the less 'left the mind open, free from bias, ignorant of facts,

¹⁵ That at one time some causes could move Holmes is attested to by his activities on behalf of the Abolitionist speakers while he was still at college. Some might find here a devotion to the rights of freedom of speech rather than the cause urged by Wendell Phillips and Emerson. See pp. 65-68.

¹⁶ Mr. Justice Holmes, 43 Harv. L. Rev. 857, 860 (1930); reprinted in Frankfurter, ed., Mr. Justice Holmes 126, 132 (1931), and Hand, *The Spirit of Liberty* 57, 62 (2d ed., 1953). Howe quotes "Holmes's fullest descriptions of his imaginary Society of Jobbists," p. 227, n. a., but it doesn't measure up to Judge Hand's.

¹⁷ Unbelievers may find confirmation in *The Chicago Tribune*, p. 1, col. 1 (April 21, 1957).

but docile' " (p. 36). Charles Francis "spoke of the Harvard methods of instruction in the fifties as 'simply beneath contempt' " (p. 36).¹⁸ But, as Mrs. Bowen has written of Coke's Oxford: "It is possible to love one's college though one has gained there little that the world outside could not teach."¹⁹ And Holmes's poem written for the sophomore banquet speaks of love of alma mater, as all such poems must, but with some foresight he used the future tense to describe his amatory feelings, anticipating the nostalgia of the alumnus rather than evaluating the realities of the student.²⁰

The College—in the Oxford-Cambridge tradition²¹—was a citadel of orthodoxy, where discipline and compulsory attendance at chapel received primary attention and the intellectual development of young minds was an incidental by-product. It is not surprising that Holmes's rebellion took the form not only of rejection of the dogmas offered by the faculty but of breaches of the parietal rules of a kind which appears to have been so common among those who have ultimately attained judicial eminence.²² Holmes was not alone in this behavior. "For the future health of the College it was fortunate that its students did not, for the most part, submit meekly to discipline" (p. 38).

Holmes, not unlike many students of today, however, advanced his education while at college, if not because of his professors then in spite of them. Perhaps the school deserves more credit: "In stimulating the young man's revulsion it had, to be sure, encouraged his intellectual independence and had,

¹⁸ See also Brooks, *The Flowering of New England* 38 (1936).

¹⁹ *The Lion and the Throne* 58 (1957).

²⁰ Cf. Pope-Hennessy, Monckton Milnes, *The Years of Promise* 12 (1949): "It was only in retrospect that he romanticized his undergraduate career."

²¹ A better example was available: Edinburgh University at the turn of the century, where the faculty "were not only profound scholars and men of high and noble minds; they were born teachers, 'exciters of youth' in Cockburn's vivid phrase." Hawes, Henry Brougham 20 (1957).

²² See, e.g., Mason, Harlan Fiske Stone 38-39 (1956). One of the more amusing of such instances is recounted by Lord Campbell about the future Lord Thurlow who "was summoned before the dean of his college—a worthy man, but weak and formal—for non-attendance at chapel, and had an imposition set him—to translate a paper of the 'Spectator' into Greek. He duly performed the task, taking considerable pains with it; but instead of bringing his translation (as he well knew duty required) to the *imposer*, he intimated to him that he had delivered it to the college tutor, who had the reputation of being a good Grecian. This Mr. Dean construed into an unpardonable insult, and he ordered the delinquent, as in cases of the gravest complexion, to be summoned before the Master and Fellows of the College. The charge being made and proved, Thurlow was asked what he had to say in defense or extenuation of his conduct? 'Please your worships,' said he, 'no one respects Mr. Dean more than I do; and, out of tenderness to him, I carried my exercise to one who could inform him whether I had obeyed his orders.' This plain insinuation that the Dean was little acquainted with the Greek tongue was the more galling as being known to be well-founded, and was considered by him an enormous aggravation of the original injury." It should be added that Thurlow was dealt with leniently and was "permitted to remove his name from the college books. . . ." VII Campbell, *Lives of the Lord Chancellors* 10-11 (7th ed., 1878). Compare Gore-Brown, Chancellor Thurlow 6 (1953).

perhaps, hastened his effort to find a tentative formulation of his ideals" (p. 78). Of course, there were exceptions among the faculty, which included Evangelinus Apostolides Sophocles,²³ Asa Gray, and Jeffries Wyman. But the larger group was typified by Frances Bowen who preached salvation—or at least possible avoidance of damnation—for believers even in his course in political economy.²⁴ Indeed, the Harvard College of the time was apparently the paragon of all those things which Buckley, of *God and Man at Yale*²⁵ notoriety, would consider desirable.

Holmes's reading and writing prove that his learning was not unduly inhibited by his attendance at the College. His interest in philosophy, which was reflected in his reading of Plato's *Dialogues*, Lewes's *Comte's Philosophy of the Sciences* and *Biographical History of Philosophy*, Fichte's *Contribution to Mental Philosophy*, Butler's *Ancient Philosophy*, Vaughan's *Hours with the Mystics*, and Spencer's *Scientific Essays*, was undoubtedly stimulated by the opportunity of exchanging ideas with Emerson. The two well-known stories of advice from Emerson to Holmes on reading Plato are repeated here. The first, when Holmes took up Plato in the expectation of finding there the answer to all of life's important secrets: "Hold him at arm's length. You must say to yourself: 'Plato, you have pleased the world for two thousand years: let us see if you can please me' " (p. 54). The second, after Holmes had written a prize-winning essay on Plato, was a comment which "must have been a little discouraging to his youthful admirer. 'I have read your piece. When you strike at a king, you must *kill* him' " (p. 54). Though not yet fully committed, it was already apparent from what Holmes was writing that he was prepared to join the empiricists, despite or because of Professor Bowen's violent opposition.²⁶ And if his interest in philosophy, which was to persist throughout his life, made a good beginning at Harvard, so too did his equally permanent dedication to the appreciation of art, also without stimulation from any member of the faculty. His essay on Dürer, since characterized by Wolfgang Stechow as superior to that of Ruskin, and a later essay on the pre-Raphaelites, provide ample evidence of the beginning of a deep and

²³ It may well be that the students were no more put upon than were the members of the faculty as these stories of Howe would indicate: "Apparently Sophocles found the academic regulations unsound, for when it was reported to him that a student had been caught cheating in one of his examinations he replied, 'It make no matter. I nevere look at his book anyway.' His judgment of the qualifications of applicants for admission to college was, evidently, somewhat jaundiced. 'X and Y were among the candidates for admission examined in a group, and *viva voce*, as was the custom then. The next day X asked for his grade. 'Passed,' said old Sophy. 'And Y?', said X, though certain that his friend had failed. 'Passed,' was the reply: 'It is unfair to discriminate. You all do know nothing' " (p. 41).

²⁴ See 2 Dorfman, *The Economic Mind in American Civilization* 825-44 (1946).

²⁵ (1953).

²⁶ Bowen's violent feelings about positivism are perhaps best reflected in his attack on Harriet Martineau, 79 *North American Review* 200 (1854). This dislike was one of the ideas he shared with Mill. See Packe, *The Life of John Stuart Mill* 321 (1954).

abiding commitment. That the Dürer essay called forth attack from the faculty would hardly have discouraged Holmes, especially in light of his father's testimonial in the first issue of the *University Quarterly* warning students of the difficulties they were likely to face—and indeed did face—by reason of the publication of ideas which were not likely to be approved by the faculty: "A venerable President will shake his head, and the little Olympus of little pismires over which he presides will tremble to its foundations" (p. 60).

It is not surprising, therefore, that Holmes failed to take honors at his graduation, much to the Doctor's annoyance not at his son but at the College. This failure must be attributed, however, not only to Holmes's inability to conform to the standards of the faculty, and to the many demerits for misbehavior which were undoubtedly well earned, but in large measure to his departure in the middle of his final year for service with the Fourth Battalion. Holmes's college years coincided with the tragic times leading to the Civil War. The Boston community, like many others, was sharply and violently divided, and Holmes's commitment, such as it was, was on the side of the Abolitionists, led in part by his cousin, Wendell Phillips, and his mentor, Emerson. It was not unexpected, therefore, that Holmes would choose to join up immediately after the explosion at Fort Sumter. "No contemporaneous record indicates what impulses and what convictions were of dominant importance in Holmes' decision to join the military forces before the conclusion of his academic course. Doubtless the hatred of slavery which drew him into the camp of Wendell Phillips played its part, as did the desire to preserve the Union from rebellion. Time cooled his capacity to dedicate enthusiasm to causes and led him to feel something approaching shame for his early abolitionist faith. Yet he never lost his confidence that the corruption of Southern manners by slavery had been profound" (p. 70). "Certainly it was not this dislike for the Southern type which led Holmes to go to war, but it was not unlikely that his abolitionist mood found some reassurance in the conviction that the institution of slavery had played a major part in breeding a civilization which seemed more primitive than that in which he had grown up and in which his roots of inheritance were planted. . . . One who had already in published writings committed himself to a romantic faith in 'manly and heroic conduct' could scarcely have postponed effective action until the calendar of academic days had run its course" (p. 71).

The failure of the Fourth Battalion to be sent into action gave Holmes the opportunity to return to college to take his examinations and to deliver the class poem. Meanwhile he had applied for a commission in one of the volunteer regiments in the course of formation by the Governor. He successfully invoked the assistance of his cousin, Colonel Henry Lee, and was commissioned a first lieutenant in the Twentieth Regiment, Massachusetts Volunteers. Looking ahead, he had stated in his autobiographical sketch for the class album: "'If I survive the war I expect to study law as my profession or at least for a starting point'" (p. 76).

III

Holmes's war record, like that of his regiment, was a distinguished one. How much his war experiences contributed to his philosophy and what effect they had is a matter of dispute. Holmes's disparagers point to his glorification of war, especially in the American Legion-type speech "The Soldier's Faith,"²⁷ as evidence of his belief in force as an appropriate means of resolving social conflicts and as an explanation of his refusal to equate ethics and law. Mr. Justice Frankfurter draws a different conclusion. He writes that Holmes "harbored no romantic notions about war. He saw too much of it. Indeed, he shocked patriotic sentimentalists by speaking of war as an 'organized bore' just as later he was to offend those whom he regarded as social sentimentalists by his insistence that war is merely a phase of that permanent struggle which is the law of life."²⁸

In an earlier volume, Howe found the available materials insufficient to afford a basis for judgment as to the immediate effect of the war on Holmes's thinking.²⁹ Now, on further reflection, but in reliance on the same sources, Howe is of the opinion that the "war did not make any fundamental change in Holmes's character" (p. 102). This conclusion rests largely on a diary entry dealing with Holmes's thoughts after his near-fatal wounding at Ball's Bluff. "As an account of the response of the young mind to the tests which sudden disaster had put upon philosophy, it is an extraordinarily vivid piece of autobiography. Holmes left behind him no other writing which speaks with such simplicity of the relation of conduct and faith, of practice and of theory" (p.

²⁷ Speeches 5b (1934). Delivered on Memorial Day, 1895, at a meeting called by the graduating class of Harvard University.

²⁸ Of Law and Men 161 (1956). Mr. Justice Frankfurter continues, after quoting from "The Soldier's Faith": "These are the convictions he took out of the Civil War. These were the convictions that dominated him for the long years to come—for the Civil War probably cut more deeply than any other influence in his life. If it did not generate it certainly fixed his conception of man's destiny. 'I care not very much for the form if in some way he has learned that he cannot set himself over against the universe as a rival god, to criticize it, or to shake his fist at the skies, but that his meaning is its meaning, his only worth is as a part of it, as a humble instrument of the universal power' (*Collected Legal Papers*, p. 106). 'Life is a roar of bargain and battle, but in the very heart of it there rises a mystic spiritual tone that gives meaning to the whole' (*Speeches*, p. 97). 'It is enough for us that the universe has produced us and has within it, as less than it, all that we believe and love. If we think of our existence not as that of a little god outside, but as that of a ganglion within, we have the infinite behind us. It gives us our only but our adequate significance. . . . If our imagination is strong enough to accept the vision of ourselves as parts inseverable from the rest, and to extend our final interest beyond the boundary of our skins, it justifies the sacrifice even of our lives for ends outside of ourselves' (*Collected Legal Papers*, p. 316)." *Id.*, at 161-62. Cf. White, *Social Thought in America 172-79* (Beacon Press ed., 1957).

²⁹ "Much, if not all, of the contemporaneous meaning which the War had for him is indicated in the letters to his parents and in the diary of his last two months of military service. The contemporaneous meaning, however, is not the only significant meaning and it may well be that of the two wars, the war in fact and the war in retrospect, it was the latter which was dominantly formative of his philosophy. That question, however, could not profitably be discussed on the basis of the materials in this volume alone." *Touched with Fire* vii (Howe ed., 1946).

102). Pain, the contemplation of suicide, thoughts of hell and damnation are all tellingly recorded. His religious skepticism survived the acid test: “. . . can I recant if I want to, has the approach of death changed my beliefs much? & to this I answered—No. Then came in my Philosophy—I am to take a leap in the dark—but now as ever I believe that whatever shall happen is best—for it is in accordance with a general law—and *good & universal* (or *general law*) are synonymous terms in the universe. (I can now add that our phrase *good* only means certain general truths seen through the heart & will instead of being merely contemplated intellectually. I doubt if the intellect accepts or recognizes that classification of good and bad)’” (pp. 105–6). Speculation on the contents of this remarkable document, of which only a very small part has been quoted here, can lead to many diverse conclusions. Even natural law votaries might find something to sustain them. Howe offers these conclusions, among others: “To assert that Holmes was seeking to prove that the standards of an aristocracy had, as it were, an aesthetic value in a democratic society would be to interpret his conduct in terms which did not occur to him. Yet it well may be that his admiration for the unadvertised gallantry of the gentleman, and his confidence that fortitude might be derived from other sources than religion, reflected the hope that those who stood outside their society, isolated from its effusive vulgarities and its sentimental comforts, might ultimately be its leaders. . . . He endeavored to prove by conduct that his standards and those of his friends were self-sufficient and shone with the same vitality whether nurtured by the faith of religion or by the rationalism of science. If there was danger of arrogance in this aristocracy of breeding and this aristocracy of doubt there was pride and dignity” (pp. 110–11).

Arrogance, pride and dignity, these certainly are attributes of the Holmes revealed by the two chapters on the Civil War as they were by the letters and diary of Holmes republished in *Touched with Fire*. These were characteristics of the man at least from this period and throughout the remainder of his life, an arrogance only later to be justified by achievement. Resources of courage, however, were proved beyond doubt by his actions in this period of his life. Thrice wounded, three times he returned to his regiment, seldom far from the immediate scenes of bloody conflict.

Most of Howe's chapters on the war are devoted to evidence of Sherman's dictum about war.³⁰ The Massachusetts Twentieth, in the line in almost every important engagement of the War, suffered casualties at a rate which must have paralleled those of the Marines in the Pacific landings in what might hopefully be described as the last great war. And, like soldiers of a later day, Holmes, who started with a consciousness of the justice of the cause for which he was fighting, ended with a doubt whether the price was worth the objective. “It is abundant-

³⁰ According to Bartlett's: “I am tired and sick of war. Its glory is all moonshine. It is only those who have neither fired a shot nor heard the shrieks and groans of the wounded who cry aloud for blood, more vengeance, more desolation. War is hell.”

ly clear, however, that as the experience of war engulfed him his greatest loyalty and his greatest admiration were given to those associates who made gallantry their ideal and who cared little for the constitutional and moral cause for which they fought" (p. 84).

In the convalescent interims spent in Cambridge, Holmes reverted to a display of those qualities already apparent in his college days, a devotion to feminine pulchritude,³¹ the enjoyment of good wine and good cigars, a commitment to the intellectual stimulation offered by serious writers and, of course, the engagement in good talk. It must have been difficult to forsake for the misery of the front lines these civilities which 19th century war permitted in areas far behind the lines. But there is no record of hesitation to fulfill the commitment made on receipt of the commission. Nevertheless, when his three-year term of service expired, the brevet Lt. Colonel chose to return to civil life, though the War was far from resolution. "A sufficient reason for Holmes's decision may well have been his physical and nervous exhaustion. . . . The medical officer at the Sixth Corps in June told Holmes that he was keeping himself going not by the strength of his constitution but by the daily pressure of necessity" (pp. 172-73). But there can be little doubt that disillusionment with the Union cause contributed to the decision. "Holmes had joined the Union forces not merely because he believed it was his duty to do so but because the community of which he was a part had established the measure of his responsibility. After three years of service, however, Holmes felt that he had earned the right—perhaps even inherited the obligation—to decide for himself the scope of his duty. A boy's humility and a boy's conviction had combined in 1861 to make Holmes a volunteer. A man's responsibility and a man's doubts led him three years later to reconsider and redefine his duty" (p. 173).

IV

Holmes's prognosis that if he were to survive the War he would study law came to fruition in the fall of 1864 when he registered at the Harvard Law School. The profession of law was not one wholly alien to his family. Dr. Holmes had exposed himself to the Law School for a short time in 1829-30. Holmes's maternal grandfather, Charles Jackson had been a distinguished judge of the Supreme Judicial Court of Massachusetts. Emerson, Longfellow, and Lowell "had each in his youth studied law" (p. 177). Whether any of these circumstances affected Holmes's decision to go to law school can never be known. Holmes chose to repeat, later in life, that paternal pressure was responsible for the decision, though the pressure was motivated as much by the desire to keep young Holmes out of the profession of medicine as to see him in the law. The one thing certain is that Holmes's commitment to law was a tentative one, made

³¹ It may well be that the title of this review should have been borrowed from Dylan Thomas rather than from James Joyce, i.e., "A Portrait of the Justice as a Gay Young Dog."

with the knowledge that it did not foreclose a literary career or one dedicated to philosophy.

Howe reports that the Harvard Law School of the day was administered "as if it were a graduate school for men of responsible maturity" (p. 185). If this is so, it attained heights never since reached by any law school in this country. But its achievement on this score was more than counterbalanced by its curriculum, for innovation was as foreign to the Law School of the '60's as it had been to the College of the '50's. Its three-man faculty, Theophilus Parsons, former Chief Justice of New Hampshire, Emery Washburn, former Governor of Massachusetts, and Joel Parker, the prolific producer of mediocre legal texts, all followed closely on the paths marked out earlier by Joseph Story. The function of the faculty was to communicate the true legal principles to the students by means of lectures. The students were to secure the knowledge of their subject by attending lectures and participating in moot court arguments. Oh happy day: there were no examinations. The suggested first-year curriculum—the entire curriculum was expected to cover two years, but no courses or sequence of courses were prescribed—was an extremely full one: Agency, Pleading, Equity, Constitutional Law, Blackstone's *Commentaries*, Kent's *Commentaries*, Contracts, Evidence, the Law of Nations, Real Property, Arbitration, Wills and Criminal Law. The lectures on these subjects were to be supplemented by large doses of prescribed treatises.

The common law, in all its perfected glory, was the subject of the lectures and none permitted the intrusion of Benthamite criticisms or suggestions of legislative codification. The common law represented "the ingenious and graceful artificiality of a legal system conceived in reason and nourished on logic" (p. 191). "Blackstone's complacency continued to set the tone of legal scholarship" (p. 190). "Maitland's aphorism concerning legal education in the later Middle Ages might, without distortion, be applied to the Harvard curriculum in law: 'it was not academic, it was scholastic' " (p. 191). Though Holmes had previously dipped into Austin, and his reading list indicates a perusal of Bentham's *Defense of Usury*, Walker's *American Law* and Maine's *Ancient Law*, there was no indication of the spirit of independence and rebellion which had characterized his rejection of the pap offered by his college mentors. Conformity rather than conflict seemed more characteristic of the year at school which followed so hard on his military service.

If the rewards of scholarship were not great, there were adequate compensations. His friendship with Fanny Dixwell, the future Mrs. Holmes, flourished.³² His affinity to the persons and ideas of William and Henry James was in the course of development. And he continued to devote time to his still primary

³² Howe's tribute to Mrs. Holmes is charming: "When New England breeds women of intelligence and reserve it occasionally brightens those qualities with a dash of wit, and humor, and ashamed to admit it, softens them with sentiment. The surmise that Cambridge had bred such a girl in Fanny Dixwell seems justified" (p. 200).

interests of writing and philosophy. By the time he was ready to return for his second year at law school his doubts had been temporarily resolved: "Law, of which I once doubted, is now my enthusiastic pursuit. I am up to my ears in it all the time. One good thing about it is that it makes play of what otherwise would be work, e.g. Metaphysics. Such spongy stuff as Sir William Hamilton, for instance, after a little pile of Contingent Remainders or Pleadings goes down like macaroni. You give a little suck, and pwip!! you've swallowed it and never known it'" (p. 203). The somewhat strange result of his commitment to the law was the abandonment of law school in the midst of his second year in order to enter "the office of Robert M. Morse, a young member of the Boston Bar with whom Holmes's friend, John C. Ropes, had shared an office" (p. 204). This did not prevent Harvard from a display of extraordinary prescience in awarding Holmes his LL.B. by reason of "three terms of unrequired and, therefore, casual attendance at lectures" (p. 204).

These law school years seem to have made little, if any, impression on Holmes's thinking.³³ "From his explorations in the Law School's grab bag of details Holmes had made himself familiar with the shape of the law. He had, presumably, developed the capacity to think as lawyers traditionally had thought" (p. 206). But he had not yet shown a capacity to think as the lawyers who were to follow the trail so largely marked by him would be expected to think.

V

"An education for Dr. Holmes's children was not complete until they had observed the European scene" (p. 223). And so it was that the young Holmes set sail for England in April of 1866. But the "European voyage was not simply the journey of a young Bostonian. It was the pilgrimage of a maturing mind which had already found its tendencies" (p. 208). A pilgrimage not so much in the sense of a voyage to a shrine as a journey to the source of ideas which would ultimately help reshape our concept of law.

The "tendencies" were those of his intellectual comrades: William James, John Fiske, Chauncey Wright, Henry and Brooks Adams. Holmes had, after law school, returned to an interest which had previously been evident in his college days but which had been subordinated in the interim: "a predominant interest in works of a positivistic and scientific character" (pp. 209-10). Comte he got, not directly but through George Henry Lewes, and Bentham, distilled through John Stuart Mill. The distillation was especially important in the latter instance, for the "positivists of Mill's generation, with his hearty support, grasped one weapon which Bentham had never taken in hand. They had come to see, as Holmes was later to put it, that 'a page of history is worth a volume of logic'" (p. 215). Not only Comte and Bentham but Spencer and Humboldt;

³³ That law teachers are not always so ineffectual, especially when they are dealing with lesser minds, see Paschal, Mr. Justice Sutherland, in Mr. Justice 69, 116, 126, 139, 140 (Dunham & Kurland, eds., 1956).

it was the new age when "science" was going to provide answers which theology and metaphysics could not afford. "It was the century of history, evolutionary biology, psychology and sociology, historical jurisprudence and economics; the century of Comte, Darwin, Hegel, Marx, and Spencer."³⁴ The three in the middle had not yet, however, shown upon Holmes's reading list.³⁵ And it would fall to Holmes fully to bring historical jurisprudence to the fore, at least in the United States.

It matters not, for purposes of this biography, that "Bentham and Comte were mistaken in thinking that they had found a clear foundation for morals, religion, and legislation, to the exclusion of all ultimate cosmological principles"; that on "the surface, their pet doctrines are just as liable to sceptical attack as metaphysical dogmas ever were"; that they "gained nothing in the way of certainty by dropping Plato and religion."³⁶ For "[m]ost of what has been practically effective, in morals, in religion, or in political theory,"—and in jurisprudence—"from their day to this, has derived strength from one or the other of these men. Their doctrines have been largely repudiated as theoretical foundations, but as practical working principles they dominate the world. On the whole, their influence has been democratic."³⁷ Nor does it matter, for the purposes of this volume, that Holmes's "curiously definite idea about science [was] an utterly erroneous one" (p. 222) or that Holmes's positivism ultimately surrendered to his skepticism.³⁸ It matters only that here is the starting point of Holmes's contribution to legal thought: the rejection of theology was an early attribute; doubts about Plato and metaphysics are already to be found in his college essays; the dedication to positivism is the latest if not the last step in the development. Comte's theory of the three stages through which human society was obliged to pass on its way to enlightenment may lack validity as an historical thesis; it is nevertheless an adequate description of Holmes's early thought. It would appear that at this stage of his development, Holmes was committed to the doctrine "that all problems with which the mind of man is confronted should be considered scientifically. This demand meant not only that the objective method—verification by the tests of sensible experience—

³⁴ White, *Social Thought in America* 11 (Beacon Press ed., 1957). Howe, apparently paraphrasing Lewes, suggests that Hegel does not belong on the list: "The metaphysics of the modern world are best represented, if not caricatured, by Hegel who made logic the sole test of truth and thus applied subjective standards to the objective world in the happy assurance that the objects of the world around us are moved as we are" (p. 211).

³⁵ *Das Kapital*, of course, didn't appear until 1867. For later unfavorable and rather amusing comments of Holmes on Marx and Hegel, see I Howe, ed., *Holmes-Pollock Letters* 44, 188, 199, 235 (1942); II *id.*, at 71, 75, 152. As might be expected, the Holmes-Laski correspondence is peppered with references to these two writers.

³⁶ Whitehead, *Adventures of Ideas* 48 (1933).

³⁷ *Id.*, at 46.

³⁸ This is not Howe's view: "Holmes never weakened in his loyalty to the axioms of positivism. They lay at the foundation of his works of scholarship and gave structure to his thought when he filled the office of judge" (p. 258).

should be followed, but that the motives of inquiry should be purified. No longer should man's quest for truth be prompted by the hope that a true theology or a valid metaphysics might provide mankind with reassurance" (p. 211).

"Holmes's pilgrimage, accordingly, was not merely a voyage in the discovery of a significant past but a venture in appreciation of an imposing present" (p. 223). "Like all other travelers Holmes could look at Shakespeare's tomb or wander through the Louvre, but few other young Americans could set forth with the expectation that they might dine with John Stuart Mill, or talk with Herbert Spencer and Alexander Bain" (p. 223). Herbert Spencer proved inaccessible, but dine with Mill he did, not once but twice, thanks to a letter of introduction from John Lothrop Motley. On the first occasion the dinner company included Baron Bramwell and James Fitzjames Stephen. Stephen took Holmes on a post-prandial walk about London and apparently had a good talk, for the next day he sent Holmes copies of his *Essays of a Barrister and Defense of Dr. Williams*. The former, at least, struck a sympathetic chord; Stephen had not yet moved away from his utilitarian bias. The second repast taken with Mill was in the company of Bain. Holmes was not unduly impressed, so far as the contemporary record reveals: "I was struck with the absence of imaginative impulse, especially in Mr. Bain—excellent for facts and criticism but not open to the infinite possibilities—Eh?" (p. 228).

Henry Adams, serving as secretary to his father who was then the American Ambassador at the Court of St. James, provided entree even to the company of the Prime Minister. Holmes first met Gladstone at a reception where the valiant wounded war hero was forced to sit while the Prime Minister stood and spoke with him. At this same soiree he met Roundell Palmer and Lord Houghton.³⁹ And he later had breakfast with Gladstone in the company of Charles Francis Adams, the Duke and Duchess of Argyll, Lord Houghton and Lord Lytton, and enjoyed much good talk and apparently even silently listened to some. At Oxford, he stayed at Balliol and took his morning meal with Jowett. Lord Chancellor Cranworth had him to dinner and on the next day invited Holmes to join him on the bench as he held court at Lincoln's Inn, probably the first time that Holmes enjoyed such a lofty vantage point. And the aged Lord Wensleydale, better known as Baron Parke, also entertained the young man. No, this was not the ordinary tourist's view of England which was accorded Holmes. These highlights of his stay in London were impressive but not more gracious than the welcome afforded him by lesser luminaries. Once again, the record reveals that the dazzling nature of the company he kept did not dim his eye for feminine charms, whether in the person of the daughter of the American Ambassador, the daughter of Tom Hughes, the author of *Tom Brown's School Days*, or the daughter of the Duke of Argyll.

In Paris Holmes acted more in the fashion of the ordinary traveler. Though

³⁹ Lord Houghton was the leader of the social and literary set which favored the cause of the North during the American Civil War; see Pope-Hennessy, Monckton Milnes: *The Flight of Youth* 165-68 (1951).

the sights he visited were Parisian—and the Louvre did hold a fascination for him—the company he kept was American, made up primarily of proper Bostonians. In Switzerland, his mountain climbing was done largely in the company of Leslie Stephen, whom he had first met in Boston. The long friendship between the two is partially recorded in Stephen's letters to Holmes, published in Maitland's biography of Stephen.⁴⁰ When Holmes returned to Great Britain from the Continent he eschewed the city life in favor of that of the country gentleman, first at the Devonshire estate of Sir John Kennaway, where "[e]verything smacked deliciously of feudalism" (p. 240) and then, after a visit to Stratford and Kenilworth, at Inverary Castle, where he was the guest of the Duke of Argyll. "The glimpse which one has of Holmes's visit at Inverary shows the figure of a gay and attractive young man, capable of finding satisfaction in the simplicities (if somewhat expensive) of country life" (p. 241).

He set sail for home on the first of September, after some four months abroad. "Jacksons, Perkinses, Gardners, and Lowells were his fellow passengers" (p. 243). This was the first of a long series of visits to England⁴¹ to which his friendships tied him more and more. Howe's conclusion may be slightly overdrawn: "As time passed Holmes discovered that certain of his achievements received a more discriminating recognition in England than they did in his own country. It disheartened him that this was so, but that it indicates how deeply he was committed to the English tradition. That commitment set him out of the central stream of American life" (p. 244).

Howe does not dwell on the Boston to which Holmes returned, but to some it seemed that Boston, too, was "out of the central stream of American life":

Boston lost its confidence; and it was soon evident that the promise of American life—so near in New England—was not to be fulfilled for a while. As Boston lost its leadership in trade to New York and its intellectual isolation to the whole continent

⁴⁰ The Life and Letters of Leslie Stephen 180–85, 186–89, 194–98, 199–203, 212–16, 217–18, 224–25, 230–32, 297–98, 303–304, 310–11, 331–32 (1906). (The index does not provide access to these letters.) It would be interesting to learn whether the letters in the other direction have been preserved.

That the friendship between Leslie Stephen and Holmes proved firmer than that between Fitzjames and Holmes might be deduced from the absence of any mention of Holmes in Fitzjames' biography, written by Leslie. See Stephen, *Life of Sir James Fitzjames Stephen* (2d ed., 1895).

⁴¹ This visit would seem to have had broader consequences than anyone could imagine: "I can't help, either, just touching with my pen-point (here, here, only here) the recollection of that (probably August) day when I went up to Boston from Swampscott and called in Charles St. for news of O. W. H., then on his 1st flushed and charming visit to England, and saw his mother in the cool matted drawingroom of that house (passed, *never*, since, without the *sense*) and got the news, of all his London, his general English, success and felicity, and *vibrated* so with the wonder and romance and curiosity and dim weak tender (oh, tender!) envy of it, that my walk up the hill, afterwards, up Mt. Vernon St. and probably to the Athenaeum was all coloured and gilded, and humming with it, and the emotion, exquisite of its kind, so remained with me that I always think of that occasion, that hour, as a sovereign contribution to the germ of that inward romantic principle which was [to] determine, so much later on (ten years!), my own vision-haunted migration." Matthiessen and Murdock, eds., *The Notebooks of Henry James* 319–20 (1955).

of North America, it shrank culturally and endeavored to preserve the achievements with which it had started.

The new generation of the Boston of 1870 felt lost; it did not know its own ground as something safely under it; and looked elsewhere helplessly. "Then the values of England resumed their sway, as nature abhors a vacuum." Symptomatic of the return was the literature produced by Henry James, excellent in craftsmanship yet none the less mere novels of British nostalgia written by a provincial expatriate. Boston slowly became what it has continued to be to the present day: a pioneer imitation of what it supposes England is. . . .⁴²

VI

On October 11, 1866, Holmes returned to Robert Morse's office for one week until a place could be made for him with the firm of Chandler, Shattuck & Thayer. George Shattuck was one of the leading trial lawyers at the Boston bar and to him Holmes has acknowledged a debt which it is hard for later generations to comprehend. "Young men in college or at the beginning of their professional life are very apt to encounter some able man a few years older than themselves who is so near to their questions and difficulties and yet so much in advance that he counts for a good deal in the shaping of their views or even of their lives" (p. 250). "I owe to Mr. Shattuck more than I have ever owed to anyone else in the world, outside my immediate family" (p. 248). "Quite probably the ardor of his admiration was intensified by the fact that his own qualities were essentially different from Shattuck's. When Holmes estimated the talent of men of his own type—persons of a speculative inclination—he was quickly aware of their limitations. When he assessed the capacities of forceful men of affairs who made no pretensions to a scholar's mind or a philosopher's attitude he gave them every benefit of the doubt and tended, perhaps, to give them a larger credit than on balance was their due" (p. 249). James Bradley Thayer, the junior member of the firm, never received such encomiums from Holmes, though the outsider would think him more worthy of them. The sole evidence of obligation here, on which speculation may be based, are Thayer's writings on Constitutional Law. These come so close to enunciating the doctrines which Holmes was to announce in his opinions on the Supreme Court of the United States, that it must have been that Thayer had a powerful influence on Holmes's thinking, or that Holmes had had a significant effect on Thayer's thought, or that the two of them had arrived at the same conclusions by way of mutual exchange of ideas or by reason of similar but independent reflection. Nevertheless, Howe concludes with Holmes that "Shattuck was the partner whose influence on Holmes was most important" (p. 248). What that influence was is not quite clear. "From Shattuck Holmes did not gain a wider understanding of the universe; he did, however, gain an appreciation of those capacities which found their fulfillment in the practice of the law" (pp. 249-50). "[B]y some means he taught Holmes that the lawyer's most important talent is that

⁴² Feibleman, *An Introduction to Peirce's Philosophy* 7 (1946).

of dealing with the actualities of daily life, the capacity 'to think under fire—to think for action upon which great interests depend' " (p. 250).

Holmes plunged into the law with a will and determination to become its master and not, as he later suggested, to submit to it as his mistress. Nevertheless, he continued those pursuits which had characterized him since his college days. He still wooed Philosophy, with all the opportunities offered by the companionship of William James, Chauncey Harris, and Charles S. Peirce.⁴³ "The temperamental differences which worked, over the years, to produce antagonisms of attitude between Holmes and James had not yet marred the affectionate relationship between the two young men" (p. 256). What was not developed through good talk was explored through the library.⁴⁴ And he still wooed the ladies, not one but several, though Miss Dixwell seems to have had a first claim on his interests.

It was, however, the law to which he was most devoted.⁴⁵ He performed for the Chandler firm the same sort of services which even today thousands of associates in law offices are carrying on for their seniors. Library research occupied a great deal of his time, in search for precedents and arguments to fill the arsenals of Shattuck and Thayer. Nor were the problems then assigned very different from the questions still asked: "What is the appropriate measure of damages when a common carrier fails to deliver flour with reasonable speed and the market value of the flour has fallen between the date when delivery should have occurred and the actual date of delivery?" (pp. 261-62). He carried the partners' brief cases into the court rooms where he was an astute observer of what went on. He ran errands. And in preparation for the bar examiners he read the appropriate volumes of law, such as *Fearne on Contingent Remainders* and *Adams on Equity*.

He was admitted to the bar on March 4, 1867, after oral examinations by Asaph Churchill and Charles W. Huntington. His diary entry will revive memories of many lawyers: "Read 10 Allen. Bought a chair of Smith—\$9.50. (Pd.

⁴³ The Metaphysical Club was still a few years off: "It was in the earliest seventies that a knot of us young men in Old Cambridge, calling ourselves, half-ironically, half-defiantly, 'The Metaphysical Club'—for agnosticism was then riding its high horse, and was frowning superbly on all metaphysics—used to meet, sometimes in my study, sometimes in that of William James. It may be that some of our old-time confederates would today not care to have the wild-oats-sowings made public, though there was nothing but boiled cats, milk and sugar in the mess. Mr. Justice Holmes, however, will not I believe, take it ill that we are proud to remember his membership. . . ." This statement of Peirce's is quoted in Frankfurter, *The Early Writings of O. W. Holmes, Jr.*, 44 Harv. L. Rev. 717, 721 n. 5 (1931).

⁴⁴ Included among his non-legal readings for the period were Bain's *The Emotions and the Will*; Youman's *Correlation and Conservation of Forces*; Mill's *Political Economy*; Mill's *Logic*; Humboldt on Government; Locke's *Essay on Human Understanding*; Stirling's *Secret of Hegel*; Tyndall on Radiation; Kant's *Critique of Pure Reason*; and Schultz' *Eclairissements sur la Critique*.

⁴⁵ "It is noticeable that in a city where 'good works' were a traditional obligation of the elect, Holmes gave, so far as one can discover, no time or interest to civic or charitable activities" (p. 274).

6th). The rush of clients postponed on account of weather" (p. 264). After admission he continued to write for the *American Law Review*, then edited by his friends John C. Gray and John C. Ropes. His first contribution had been a review of Roscoe's *Digest of the Law of Evidence in Criminal Cases*, in which he relied heavily on views expressed by Fitzjames Stephen in his *General View of the Criminal Law of England*. It was apparently not then Holmes's persuasion, as it was later, that Stephen "knows nothing, it seems to me, of the scientific aspects of the history of law, and is to my mind rather a model of a fine old 18th century controversialist than a philosopher" (pp. 248-49 n. b). His review of Redfield's edition of Story's *Commentaries on Equity Jurisprudence* was similarly grounded in Maine's *Ancient Law*. Again, a more mature Holmes was to take a more critical look than did the earnest young student. "Of Sir Henry Maine Holmes said that 'He seems to have been impatient of investigation himself and I do not think will leave much mark on the actual structure of jurisprudence, although he helped many others [Holmes?] to do so'" (p. 248 n. b). The *Law Review* was the recipient of more and more of his time and contributions as his days at the bar passed. (He was to succeed to the editorial chair with Arthur G. Sedgwick in 1870.)

This total immersion in the law is explained by Howe as "a Puritan's feeling of responsibility that no moment should be wasted" (p. 282). Others thought that ambition for place was the real driving force. "That some persons of retiring sensitivity⁴⁶ found Holmes's ambitions excessive is not surprising and it is probably true that he longed so eagerly for new challenges of his capacities that he seemed ruthless in his aspirations" (p. 282). Holmes was fond of writing in his later years of his disdain for place. To Cardozo, " 'I always have thought,' he writes, 'that not place or power or popularity makes the success that one desires, but the trembling hope that one has come near to an ideal!'"⁴⁷ "Writing to Learned Hand in 1922, he said: 'I assume that your ambition like mine, cannot be satisfied by office or anything resting in the will of others but only by the trembling hope that you have hit the *ut de poitrine*' " (pp. 280-81). That these were the expressions of one who had already achieved his place seems clear; what is equally clear is that the thing that always counted most was that "his achievement was recognized as distinguished by the few who, in his judgment, were qualified by learning and imagination to estimate his accomplishment" (p. 283). "Praise by the indiscriminating might please Holmes's vanity but it could not satisfy his ambition" (p. 283).

⁴⁶ This reference is to William James who "believed that Holmes allowed his passion for achievement to blunt his human nature. 'The more I live in the world,' James wrote to his brother Henry in 1869, 'the more the cold-blooded, conscious egotism and conceit of people afflict me. . . . All the noble qualities of Wendell Holmes, for instance, are poisoned by them. . . .'; and to James Bradley Thayer, who was to write a few years later that Holmes was "wanting sadly in the noblest region of human character,—selfish, vain, thoughtless of others'" (p. 282).

⁴⁷ Cardozo, Mr. Justice Holmes, 44 Harv. L. Rev. 682, 691 (1931).

On December 5, 1869, "William James wrote to his brother, Henry, reporting that 'O.W.H. Jr. whom I have not seen for three weeks has accepted the \$2000 (but two years of hard work) job of annotating Kent's Commentaries' " (p. 314 n. 88). "The prologue was over and the performance was about to begin" (p. 286).

This is an inadequate sketch drawn from the large-scale portrait made by Howe. Like all copies it cannot really convey the spirit of the original. Since it is only a sketch, it must omit the myriad of details which are so important to the whole. Since it is not drawn by the artist but by a copyist, it is necessarily if not consciously a distortion. It is meant only to whet the appetite of those who are interested in the subject, certainly not to satiate it.

What Howe has accomplished is an extraordinary volume devoted almost wholly to the development of the mind rather than the personality of the young man who was to become Mr. Justice Holmes. It is in all senses an intellectual biography of an excellence which has never before been attained in the field of judicial biography.

A short time ago, the editors of *Mr. Justice* were chastised by Mr. Justice Frankfurter for suggesting that "It may well be that the eleven pages on Holmes in the *Dictionary of American Biography*⁴⁸ reveal more about what he was and why he was what he was than will even the eagerly anticipated 'authoritative' biography by Professor Howe."⁴⁹ The Justice, in an extraordinary display of modesty, erroneously thought this was meant as an unfavorable reference to Howe's work rather than a tribute to his own. Without again venturing on the danger of comparisons, suffice it to acknowledge here that Howe's first volume is an exemplar of objective and exhaustive analysis of the early influences on a mind whose thought has been so important to the lives of those who have followed his, revealing the deep insights of the author as often as those of the subject, and a style of which Holmes could have been proud.

⁴⁸ Charles P. Curtis, Jr., characterizes them as "eleven nearly perfect pages." *Lions Under the Throne* 360 (1947).

⁴⁹ Mr. Justice vii (Dunham & Kurland, eds., 1956).