Holmes and the Judicial Figure*

Robert A. Ferguson†

I. INTRODUCTION

The forgotten element in judging is expression. Consider that judges, alone in American officialdom, explain every action with a distinct and individual writing, which then becomes the measure of their performance. They are, in consequence, practicing literary craftsmen in ways that executive leaders and legislators are not. Of course, their product, the judicial decision, is heavily prescribed by custom, procedure, and professional expectations, but these elements often disguise levels of creativity that are better faced and understood. This essay seeks to examine that creativity through the career and writings of Oliver Wendell Holmes, Jr., Associate Justice of the Supreme Court of the United States from 1902 to 1932. Holmes' mastery of the judicial opinion as literary genre is unmatched in the twentieth century,¹ and, more than any other modern figure, he knowingly shapes the concept of the American judge.² The combination is important. Holmes takes on paradigmatic significance not just because of felicity or timeliness or even power of expression but because his writings respond so directly to the problematic role of the judicial figure in American life.

An analysis of judicial rhetoric should be of particular interest at a time when disputes over the judicial process are generating uncertainty and controversy. In Ronald Dworkin's words, "we lack the essentials of a decent apparatus for intelligent and constructive

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† Andrew W. Mellon Professor in the Humanities, The University of Chicago. Richard A. Posner and Cass R. Sunstein made valuable suggestions in their readings of an earlier draft of this essay.

¹ Virtually every commentator notes Holmes' "felicitous way with words," his "dazzling skills that left his more pedestrian colleagues in the shade," his prodigious productivity, and his style. "His opinions are a breath of fresh air." "Holmes made the dullest case a literary adventure." See David P. Currie, *The Constitution In The Supreme Court: 1910-1921*, 1985 Duke L.J. 1111, 1161; David P. Currie, *The Constitution in the Supreme Court: Full Faith and the Bill of Rights, 1889-1910*, 52 U.Chi.L.Rev. 867, 899-900 (1985).

² For Holmes' careful management of his own career, see Felix Frankfurter, *Of Law and Men* 162 (1956). "It would be difficult," observes Frankfurter, "to conceive a life more self-conscious of its directions."

criticism of what our judges do."³ Or, to take Frederic R. Kellogg's recent summary, "the writings of such major theorists of fundamental law as Lon Fuller, the late Alexander Bickel, John Hart Ely, and Ronald Dworkin—all have failed to lead to any widely agreed upon explanation of where judges may derive meaning in interpreting broad constitutional language . . . . [C]onstitutional theory [is] in greater disarray than at any other time in our nation's history since *Marbury v. Madison* (1803)."⁴

Rhetorical analysis will not settle controversy, but it can bring a fresh perspective to uncertainties about what judges do and where they derive meaning in language. One cause of uncertainty, growing distrust of the very idea of neutrality or objectivity in legal expertise, also puts us in a better position to understand the vitality of language in the judicial opinion. A healthy skepticism, Judge Richard A. Posner explains, carries a reader beyond "the dogmatic style, pretense of humility, and ostentatious abnegation of will that characterize judicial opinions."⁵ The question is not, as Herbert Wechsler presents it in his famous defense of neutral principles, *between* "an exercise of reason" and "an act of willfulness or will,"⁶ but rather in how these matters necessarily join in a ruled but unruly combination of mind, language, and expression. The judicial opinion, like every other written text, thrives upon the integration of ideas *within* a volatile series of choices about persona, point of view, description, narration, style, tone, symbol, and so on.

II. THE JUDGE AS CULTURAL FIGURE

At issue are the cultural lines of force that inform the judge's literary act, the self-definition of the judge as writer, and the actual craft of judicial rhetoric. We can begin by recognizing that judges in American culture face two extremes when they render a

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³ Ronald Dworkin, *Law's Empire* 11 (1986).

⁴ Frederic R. Kellogg, *Learned Hand and the Great Train Ride*, 56 *American Scholar* 471, 473 (1987). For the specific nature of current controversies, see Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind.L.J.* 1 (1971); John Hart Ely, *Democracy and Distrust* (1980); Michael J. Perry, *The Constitution, The Courts, and Human Rights* (1982); William J. Brennan, Jr., *The Constitution Of The United States: Contemporary Ratification*, 27 *S.Tex.L.Rev.* 433 (1986). These controversies have become fierce political debates with the nomination of Robert Bork to the Supreme Court and subsequent Senate rejection of that nomination in the summer and fall of 1987. See, in particular, Ronald Dworkin, *The Bork Nomination*, *N.Y.Rev.of Books* 3-10 (Aug. 13, 1987).

⁵ Richard A. Posner, *The Jurisprudence of Skepticism*, — *Mich.L.Rev.* — (forthcoming).

⁶ Herbert Wechsler, *Toward Neutral Principles Of Constitutional Law*, 73 *Harv.L.Rev.* 1, 11 (1959).

decision. Great expectations concerning the courtroom decision compete with a correspondingly deep suspicion of the figure deciding.⁷ The double perspective is understandable. Americans give unique weight to the sitting judge as a symbol of national identity, and yet the judicial figure is a curious anomaly in democratic culture. Judges, after all, pursue their assigned tasks in very undemocratic ways. No other civil official in American society serves a life term, operates from a raised platform, silences opposition with the most peremptory of gestures, demands strict ceremonial deference at all times, wears a distinctive uniform, and retreats so pointedly to private chambers in making decisions.⁸

Thus, if an independent judiciary is the signature of a free American society, the expressions of that independence often appear alien to the larger enterprise. And the greatest expression easily becomes the most alien. Judicial review can seem particularly inconsistent with democratic theory: "a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like."⁹ Whether or not the democratic progression in American society compounds these discrepancies and the potential for distrust remains an open question. More certain is the fact that disagreements about judicial performance explode into ideological conflict precisely because the judge is such a problematic figure in American life. Just as clear is the need for the writing judge to take the whole legal-democratic spectrum into account. For the judicial opinion to perform all of its functions, it must resolve the contradictory images of its author; the central symbol of republican lore must counter the suspect master of courtroom prerogatives.

The most obvious strategy has been to subsume the negative image into the positive through hyperbole. Dworkin's pivotal claim in *Law's Empire*—"The courts are the capitals of law's empire, and judges are its princes"—illustrates the tendency perfectly. In

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⁷ See, for example, Erwin Griswold's comparison of the British and American judiciaries on this point. In Great Britain, where "[p]ublic criticism of the work of the judges is virtually unthinkable," judges remain "in the professional stream, and they partake frequently and as a matter of course in professional discussion with active practitioners." In America, "the Supreme Court is inevitably an isolated and remote body . . . in a marble palace" but also "a sort of public whipping boy." Erwin S. Griswold, Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold, 74 Harv.L.Rev. 81, 81-82 (1960).

⁸ These anti-democratic tendencies, together with appointment instead of election to office, form what is often termed "the counter-majoritarian difficulty" of the judicial branch of government. See Alexander Bickel, *The Least Dangerous Branch* 16-28 (1962).

⁹ Ely, *Democracy and Distrust* 4-5 (cited in note 4).

flaunting the importance of the judge as symbol, his metaphor ignores a very real cultural uneasiness (and control) over the hierarchical implications of judicial performance. Dworkin, it should be noted, understands and even emphasizes the relevance of egalitarian considerations.¹⁰ Nevertheless, the immediate question remains: how helpful or appropriate can it be to speak of princes—and now princesses—at work in the courtrooms of a democratic republic?

Mystifications of this sort complicate misunderstandings about the judiciary. Even conventional imagery creates problems. When Lawrence M. Friedman distinguishes the Supreme Court from similar institutions elsewhere as “a kind of council of elders—nine wise men who represent the ‘sober second thoughts’ of the community,”¹¹ he reiterates what many have said, but the cliché conveys more than the actual situation will bear. On some occasions and on given issues, at certain junctures and in strict context, the Supreme Court may represent communal thought at its best with something of the unanimity of the proverbial wise men. Still, a court that tried to live by these premises would soon find itself in serious trouble. Even a court that chooses carefully—most obviously, the Supreme Court in the 1954 segregation case of *Brown v. Board of Education*—pays a considerable price for its moments of communal assertion.

The point of departure from Dworkin and Friedman should not be misunderstood. Language has a life of its own. Hyperbole or inflation of the judicial figure is a function of ideological context rather than of individual or critical misapprehension. We are interested in how intellectual circumstance encloses language and gives it form. Hence, it is worth emphasizing that the central circumstance of American jurisprudence, the doctrine of judicial review, magnifies the judge and brings an additional literary dimension to law in general. The prospect of its use turns the American courtroom into an unprecedented forum, and analysts of the doctrine, in reaction, bring unbounded hopes and demands to those who wield its unique power. The far-reaching implications of judicial review also guarantee a general reading audience for major decisions and informed criticism of every application. The possibilities are great, and much is expected of them.

Justice Frankfurter's renowned summary of qualifications for

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¹⁰ Dworkin, *Law's Empire* at 407 (cited in note 3). For an extended treatment of democratic considerations see, in particular, *id.* at 355-399.

¹¹ Lawrence M. Friedman, *Law and Society* 87 (1977).

judicial review deserves another look in this regard. "A judge whose preoccupation is with such matters," Frankfurter writes in 1954, "should be compounded of the faculties that are demanded of the historian and the philosopher and the prophet."¹² In a biographical sketch of Justice Benjamin Cardozo a year later, he elaborates on the nature of these faculties:

Immense learning, deep culture, critical detachment, intellectual courage, and unswerving disinterestedness reinforced imagination and native humility, and gave him in rare measure the qualities which are the special requisites for the work of the Court to whose keeping is entrusted no small share of the destiny of the nation.¹³

Critical detachment and unswerving disinterestedness aside,¹⁴ no commentator is likely to challenge the goal or the importance of the educated and balanced Supreme Court Justice that this passage calls for. But every commentator should also recognize the self-sustaining rhetoric of a writer who consciously assumes his own place in Friedman's pantheon of wise men.

In praising Cardozo, Frankfurter celebrates the judge as cultural figure—an exercise that conflates the judicial role, communal destiny, and, by implication, the writer who also happens to be a judge. Cardozo emerges as both the ideal and an existing type. The qualities enumerated in the passage, while extraordinary, are more than aspirations. They are "requisites" or requirements, available credentials for measuring the successful judge in the courtroom, and they exist because "the destiny of the nation" somehow depends on their effective presence. Exaggerated importance, in effect, becomes a function of the presumed task at hand. One should also note Frankfurter's stylistic ease and confidence of address. In the twentieth century at least, it is rare for public officials to claim quite so much for a colleague in a serious scholarly analysis.¹⁵ American judges are the exception; they regularly perform and publish acts of mutual celebration in this manner. We are in the

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¹² Frankfurter, *Of Law and Men* at 39 (cited in note 2).

¹³ *Id.* at 200.

¹⁴ For commentators who might question just these elements see, in general, David Kairys, ed., *The Politics of Law* (1982); Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise*, in Gerald L. Geison, ed., *Professions and Professional Ideologies in America* 70 (1983); Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (1977); Robert M. Cover, *Justice Accused* (1975).

¹⁵ Frankfurter's essay on Cardozo was written originally for Robert Livingston Schuyler, *Dictionary of American Biography* 93 (1940 & 1958 Supp.II).

presence of a distinct, recognizable genre. Similar testimonials abound in a hagiographical tradition that supports the judicial figure through two centuries of legal history.¹⁶

Not for nothing does Ronald Dworkin name his own courtroom ideal "Judge Hercules," after the most popular and widely worshipped of Greek heroes—the one hero, Hesiod tells us, to transcend the mortal condition and live forever on Olympus.¹⁷ Dworkin plays with the parallel. His "lawyer of superhuman skill, learning, patience, and acumen" in *Taking Rights Seriously* takes on the additional sobriquet of "Hercules on Olympus" when elevated to the Supreme Court in *Law's Empire*.¹⁸ The evocation is meant to amuse, of course, but it is also a thoughtful and prolonged portrayal of judicial prowess across part of one book and all of another. Taken seriously, this intellectual model should give pause.¹⁹ Justice Hercules really does live on Olympus in splendid isolation from the community he serves. Engagement never disrupts his prescriptive clarity. Something has gone terribly wrong in Dworkin's attempt to provide the perfect model. For most troublesome of all, the very qualities that make Hercules the judicial ideal—skill, learning, patience, and acumen—have somehow undermined his humanity. The original Hercules is the greatest man possible; this modern version is curiously disembodied, only half himself.

The perfect model may fail because the American judge is by definition a compromise of contending considerations that is easier to describe than to order. In this sense, the prince, the olympian, the communal elder, and the historian-philosopher-prophet are variations on a theme, glosses of the same contradictions. Justice Holmes' own facetious description of the ideal judge—a "combination of Justinian, Jesus Christ, and John Marshall"²⁰—confirms

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¹⁶ For other relevant examples of the judicial testimonial, see William W. Story, ed., *The Miscellaneous Writings of Joseph Story* 781-828 (1852); Oliver Wendell Holmes, *Collected Legal Papers* 266-71 (1920); Felix Frankfurter, ed., *Mr. Justice Holmes* (1931); *Learned Hand, The Spirit of Liberty* 24-29, 57-65, 129-33, 166-79, 201-24, 263-73 (3d ed. 1960); Henry J. Friendly, *Benchmarks* 196-234, 285-324 (1967).

¹⁷ See N.G.L. Hammond and H.H. Scullard, eds., *The Oxford Classical Dictionary* 498-499 (2d ed. 1976); Hesiod, *The Theogony* Lines 950-955, in Hugh G. Evelyn-White, *Hesiod: the Homeric Hymns and Homeric* 148-151 (1914).

¹⁸ Ronald Dworkin, *Taking Rights Seriously* 105, 105-130 (1977); Dworkin, *Law's Empire* at 379-81 (cited in note 3).

¹⁹ Two scholars already have worried about Justice Hercules as an ideal. See Frank I. Michelman, *Forward: Traces of Self-Government*, 100 *Harv.L.Rev.* 4, 76-77 (1986); Anthony T. Kronman, *Living in the Law*, 54 *U.Chi.L.Rev.* 835, 864 (1987).

²⁰ Quoted from Henry J. Abraham, *The Judicial Process* 55 (5th ed. 1986).

the problem. His solution, like the others, is a compound of apparent discrepancies. Wit lies in the exaggeration of an exaggeration and in a game of levels, though entirely within the tradition of elaborate capacities assigned to the judicial figure. Put another way, the language is all in jest but ideologically in earnest, and, as in Dworkin's model, it draws attention to its own inconsistency. Plainly, the divisions within the constructed character of the American judge run deep.

III. THE FIGURE DIVIDED

Republican ideology clarifies the nature of these divisions. We can appreciate the point by turning a familiar epithet into a question. What, exactly, does it mean to speak of "a government of laws and not of men"?²¹ Oft-repeated and time-honored in every definition of the republic, the idea nonetheless is ontologically vague in its deliberate movement from the concrete toward the abstract, from the commonplace of *men acting* to the more difficult intellectual perception of *active law*. Cognition, in fact, insists upon the separation of image from idea, and the nature of that insistence continues to complicate perception. How does one actually see and comprehend such a government at work?

The conventional answer, one not without ironies, has been to re-conflate idea and image. A government of laws is the record of those men and women who govern in its name.²² They govern, but not in the usual sense as men and women. They are "of the law" in that they are said to place the law first or above interest, advantage, passion, favor, or circumstance. Communal perception of this

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²¹ The phrase "a government of laws and not of men" becomes important in American ideology with the Revolution, although variants are central to the republican tradition well before then. See, in particular, James Harrington's references to "an empire of laws and not of men" and then to a commonwealth as "a government of laws and not of men" in James Harrington, *The Commonwealth of Oceana*, in J.G.A. Pocock, ed., *The Political Works of James Harrington* 155, 170-182 (1977). John Adams incorporates the phrase into official institutional arrangements when he drafts *The Constitution of Massachusetts* for 1780. See *Mass.Const.* of 1780 prt. 1, art. XXX, in Charles Kettleborough, ed., *The State Constitutions* 658 (1918).

²² The phrase "a government of laws and not of men" has undergone an intellectual migration of paradigmatic proportions since James Harrington's original understanding of the term. A seventeenth-century Englishman would have thought of a government of laws primarily in terms of political equals expressing their freedom through deliberative processes in an act of collective self-determination. In America, the focus has been instead upon the dangers of discretionary power or upon the need for accountability in governmental action. This focus has been particularly sharp in the twentieth century with the emergence of the activist nation state. For a discussion of some of these differences, see Michelman, 100 *Harv.L.Rev.* at 41-44 (cited in note 19).

act of placement explains why the sitting judge is such a symbol in the republic of laws. Every other official and expert, it is understood, will invoke interest, advantage, passion, favor, and circumstance as occasional tools in the struggles of governmental checks and balances or in the conflicts of the advocacy system. Judges alone always place the law first. They alone, as formal guardians of the law, are presumed to keep themselves relatively insulated from the interests of the pressure groups, advocates, parties, witnesses, and functionaries who appear before them.²³

The implications of these assumptions are as unavoidable as they are uncomfortable in current studies of law. In America at least, a government of laws *requires* the notion of a disinterested judiciary.²⁴ How well and how often judges accept the mysterious (because thoroughly internalized) mental discipline of disinterestedness determines when and where there is a government of laws. Familiar phrases like "strict construction" and "judicial restraint" operate, in this vein, as code words for the personal intellectual rigor of the judge who, it is presumed, remains aloof while deciding a case. Predictably, debate over these words has increased as the related (but distinct) idea of neutral legal expertise has come under attack. Not every critic accepts the most sweeping contemporary challenge to traditional jurisprudence: namely, the assertions of the critical legal studies movement that "[l]aw is simply politics by other means" and that legal reasoning is a myth.²⁵ But here, as is often the case, radical commentary touches upon a more general apprehension. Critics within the mainstream have explored their own rejection of judicial formalism for a generation, and, within that time, "[i]ntellectual disinterestedness in a judge" has ceased to be the controlling assumption that it once was in interpretation.²⁶

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²³ For an interesting discussion of these last points, see G. Edward White, *The American Judicial Tradition* 369-375 (1976).

²⁴ To say that a government of laws requires a disinterested judiciary is not to say that a disinterested judiciary is the equivalent of such a government. The qualification is important if only because Ronald Dworkin's emphasis upon the judiciary has been read in just this fashion as "court-fetishism" or "judicial self-government." See Michelman, 100 *Harv.L.Rev.* at 72-76 (cited in note 19).

²⁵ See, for example, David Kairys, *Introduction*, and Kairys, *Legal Reasoning*, in Kairys, ed., *The Politics of Law* at 1-17 (cited in note 14).

²⁶ Disinterestedness still is important but no longer controlling. For an example of a critical exchange from the last generation that does make intellectual disinterestedness the explicit, unquestioned value of judicial interpretation, see Griswold, 74 *Harv.L.Rev.* at 91-94 (cited in note 7); Henry J. Friendly, *Reactions Of A Lawyer—Newly Become Judge*, 71 *Yale L.J.* 218, 230-234 (1961). For more recent general works that express skepticism about the whole philosophical premise of objectivity, see Richard J. Bernstein, *Beyond Objectivism*

In what can the idea of a judge's disinterested stance be said to consist today? Recent answers tend to restate the problem.²⁷ The question usually fosters an exchange about the presumed capacities of the judicial figure. The terms of debate about judicial decision making may change—from formalism versus realism to activism versus self-restraint, to interpretivism versus noninterpretivism, for example—but the central arguments always seem to come down to implicit or explicit assumptions about what judges are thought to be capable of doing in the act of decision. "Are Judges Human?" Jerome Frank, the realist, asks in 1931, concentrating on the relations between process and personality.²⁸ Judges *are* human, John Hart Ely, the interpretivist, responds fifty years later in his repeated warnings against the pitfalls of trusting to "fundamental values."²⁹

The human perspective, unfortunately, is one more gloss in this context. The assignation of decision-making capacities to the judicial figure must contend with the compound of conflicting elements that make up that figure. Then, too, any attempt at a theory of disinterestedness sinks under the many different ways in which observers express those divisions. A judge might speak of "a contradictory position" or "the antinomy at the basis of a judge's work" through a series of distinctions about liberty and order, justice and law, initiative and precedent.³⁰ A student of American civilization might concentrate more on the incompatibility of the office of the judiciary within a democratic theory of government.³¹ The historian of ideas can distinguish between the intellectualism

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and Relativism (1983); Thomas Nagel, *The View From Nowhere* (1986).

²⁷ Anthony T. Kronman suggests, for example, that "a good judge is distinguished by his capacity for sympathetic detachment." The oxymoron, in effect, summarizes the difficulty at stake. How do we accept the objective judgment of one who, as some would argue, is inevitably involved? And yet Kronman's result-oriented definition accurately gauges the social need for a disinterested standard. The disinterested judge seeks "to preserve the bonds of community that legal conflict often strains . . . by searching out solutions that make it possible for the parties, and those who identify with them, to live on amicable terms." See Kronman, 54 *U.Chi.L.Rev.* at 864, 864-865 (cited in note 19).

²⁸ Jerome Frank, *Are Judges Human?*, 80 *U.Pa.L.Rev.* 17-53, 233-267 (1931). See also Jerome Frank, *Law and The Modern Mind* 100-117 (1930), and *Courts on Trial* 146-155 (1950). More generally, see Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law* 124-128 (rev.ed. 1974).

²⁹ Ely, *Democracy and Distrust* at 44-72 (cited in note 4). Note that Ely's adversaries, the noninterpretivists, often rely on functionalist arguments that assume the question of judicial capacities. See, in particular, Perry, *The Constitution, the Courts, and Human Rights* at 7, 91-145, 164 (cited in note 4).

³⁰ Hand, *The Spirit of Liberty* at 109, 130 (cited in note 16).

³¹ White, *The American Judicial Tradition* at 370 (cited in note 23).

of the jurist and the basic anti-intellectualism of American life.³² Social anthropologists stress communal-organizational tensions and the lines of force between domination and autonomy, power and authority.³³ A political theorist will discover that the hegemonic apparatus of government, particularly republican government, is especially sensitive and vulnerable in the judicial branch.³⁴ Alternatively, a literary critic might turn to the multivalence of language and the tensions between a created stratification and a natural heteroglossia of meanings in any juristic attempt to impose an authoritative or unitary discourse.³⁵ Furthermore, each would be accurate.

There is even a common element in these viewpoints. The judicial figure is *unavoidably* divided, and judicial wisdom begins with that dynamic. The judge as figure or symbol is a strategy for encompassing situations of conflict and is constructed to resolve or contain them.³⁶ This strategy of mediation both inflates and disembodyes the strategist. Judges are in but not of the world.³⁷ They are and are not the individuals that they appear to be. They solidify a culture, to borrow one commentator's terminology, by instinctively rising above it in "the appearance of genuine detachment and restraint."³⁸ Critics have railed against the artifice in "appearance," denying "the 'austerity theory' of the judicial process" and urging that commentators bring their subjects back "down to earth."³⁹ But to do so is to ignore an intrinsic characteristic of judging.

The issue has to do with how language works within the structured situation of the judicial decision. By definition, "the authoritative word is located in a distanced zone, organically connected with a past that is felt to be hierarchically higher."⁴⁰ In the iconography of decision making, the judge must rise above the level of dispute under consideration. This requirement, irresistibly

³² Richard Hofstadter, *Anti-intellectualism in American Life* 430-432 (1963).

³³ Sally Falk Moore, *Law As Process* 26-27, 210 (1978).

³⁴ Antonio Gramsci, *The Modern Prince*, in Louis Marks, trans., *The Modern Prince and Other Writings* 186-187 (1957).

³⁵ M.M. Bakhtin, *Discourse in the Novel*, in Caryl Emerson and Michael Holquist, trans., *The Dialogic Imagination* 271-278, 294, 329, 343-350 (1981).

³⁶ For a general discussion of how symbols operate as cultural strategies, see Clifford Geertz, *The Interpretation of Cultures* 126-141 (1973).

³⁷ This language borrows from the Puritan notion of "living in the world with weaned affections." See Perry Miller and Thomas H. Johnson, *The Puritans* 281-290 (1938).

³⁸ White, *The American Judicial Tradition* at 5, 146 (cited at note 23).

³⁹ Max Lerner, *Ideas Are Weapons* 65-69 (1939).

⁴⁰ Bakhtin, *Discourse in the Novel* at 342 (cited in note 35).

couched in terms of ascendancy, magnification, or distance, gives a fixed but fuzzy edge to the enlarged or elevated decision maker. Among judges, Learned Hand best captures the phenomenon in all of its visual implications:

[A judge's] authority and his immunity depend upon the assumption that he speaks with the mouth of others: the momentum of his utterances must be greater than any which his personal reputation and character can command . . . . He must pose as a kind of oracle, voicing the dictates of a vague divinity—a communion which reaches far beyond the memory of any now living, and has gathered up a prestige beyond that of any single man.⁴¹

Typical of insider explanations of judicial performance, the passage translates intellection into dramatic physical metaphors of spectacle and performance. The direction of those metaphors illustrates, once again, why the identity of a judge is so problematic. To "speak with the mouth of others," or to "pose as a kind of oracle," or to "voice the dictates of a vague divinity," or to "reach beyond the memory of any now living," or to enlist "a prestige beyond that of any single man" is, in every case, to enhance authority, but each action also directly diffuses the concrete image of the person who acts. Inevitably, what diffuses can also disperse. A judge who speaks with the mouth of others, though heard, cannot be seen. There is a confusion of purposes in Hand's language of spectacle; he repeatedly raises the prospect of sight only to take it away again in a potpourri of images that redound upon each other.

To summarize, American judges are respected but suspected figures. They both embody and face major contradictions in their society, and these contradictions are further complicated by the hyperbole and jargon that they and others bring to their situation. Their task, resolving disputes with clarity and justice, forces them to be many things at once. The sitting judge copes with a variety of personae as part of a compounded public image. That composite image is a central source of authoritative statement, but it also leaves the person on the bench with the problem of constructing a coherent individual identity within the public language of

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⁴¹ Hand, *The Spirit of Liberty* at 130 (cited in note 16). The oracular pose of the judicial figure is part of a long tradition in descriptions of the office. Hand consciously plays upon that tradition, represented most famously in William Blackstone's words: "[Judges] are the depositories of the laws; the living oracles, who must decide all cases of doubt." William Blackstone, 1 *Commentaries* *69.

judgment.

The contribution of Oliver Wendell Holmes lies in his understanding of these matters and his use of them in an extraordinary act of self-creation. "He is unsurpassed in the depth of his penetration into the nature of the judicial process and in the originality of its exposition," writes Frankfurter, still the most perceptive student of "Holmes' claim to pre-eminence."⁴² One way to think about this penetration and originality is to realize that Holmes solves the problem of imagery in the judge's claim to authority. Frankfurter's own language comes close to the mark in a double image that explains how "the thinker and artist are superbly fused" in Holmes. "In deciding cases," Frankfurter observes, "his aim was 'to try to strike the jugular.' His opinions appear effortless—birds of brilliant plumage pulled from the magician's sleeves."⁴³

The strange juxtaposition of warrior and magician, yet another compound, implies the two-fold nature of every judicial decision as much as it celebrates Holmes.⁴⁴ Between the open but deadly blow (philosophical integrity in the act of deciding) and the sorcerer's sleight of hand (public justification of the decision reached) comes a vital shift in skill and direction. Holmes is master of the seeming incongruity. Blood may flow, but it never spills to the plumage on display! A precise hand knows how and when to substitute the image that will dazzle every observer. As with the magician, we see what the Supreme Court Justice wants us to see. Frankfurter's explicit language of spectacle, like that of Learned Hand, also communicates a more general truth. Judicial discourse is a tribal rite that reaffirms when properly rendered and perceived. The warrior-magician knows this and more. An always distinct clarity in action turns Justice Holmes into the perfect cultural totem—a venerated object that serves among a people as the emblem of ancestral connection and continuing cohesion.⁴⁵

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⁴² Frankfurter, *Of Law and Men* at 182 (cited in note 2).

⁴³ *Id.* at 177.

⁴⁴ Metaphors of magic seem especially compelling in the law. See, for example, Frank, *Courts on Trial* at 62-79 (cited in note 28).

⁴⁵ For critical definitions of totem and totemism, for an analysis of the way in which totems resolve difference, and for the relevance of totemic analogies in contemporary life, see Claude Lévi-Strauss, *Totemism* 1-18, 92-104 (1963) and *The Savage Mind* 96, 214, 256 (1966). See, as well, S.G.F. Brandon, *Origins of Religion*, in Philip P. Wiener, ed., 4 *Dictionary of the History of Ideas* 96-97 (1973).

IV. THE APOTHEOSIS OF JUSTICE HOLMES

Veneration is the appropriate term here. In a profession that welcomes the encomiastic mode, superlatives regarding Justice Holmes transcend every limit in a ceremony of faith. Justice Frankfurter calls Holmes Plato's "philosopher become king," "a significant figure in the history of civilization and not merely a commanding American figure," one who "has written himself into the slender volume of the literature of all time."⁴⁶ "To quote from Mr. Justice Holmes' opinions," he adds, "is to string pearls."⁴⁷ For Judge Learned Hand, Holmes is not just "the example of the accomplished judge" but also "the premier knight of his time."⁴⁸ In Jerome Frank's developmental construct of law in the modern mind, Holmes is the one "completely adult jurist."⁴⁹ Harold Laski finds the equivalent of Chief Justice John Marshall in law and of Edmund Burke and Samuel Johnson in conversation.⁵⁰ The popularizer of Holmes' writings, Max Lerner, describes "perhaps the most complete personality in the history of American thought."⁵¹ Dean Acheson, later Secretary of State, appears overwhelmed by "a grandeur and beauty rarely met among men;" "his presence entered a room with him as a pervading force; and left with him, too, like a strong light put out."⁵²

According to Frankfurter, Justice Cardozo "always spoke of Holmes as 'the Master,'" as "the profoundest intellect who had ever dispensed Anglo-American justice."⁵³ Cardozo's own writings refer to "the great overlord of the law and its philosophy," and to "the philosopher and the seer . . . one of the greatest of the ages." "I point the challenger to Holmes," he intones, ". . . distrust is shamed and silenced by the vision of a great example . . . There are things one takes for granted in those who stand upon the heights . . . He gives us glimpses of the things eternal."⁵⁴ Such passages do indeed propose a totem. They explain just how, in Frankfurter's words, "Holmes, the fundamentally solitary thinker,

⁴⁶ Frankfurter, ed., *Mr. Justice Holmes* at 54, 118 (cited in note 16); Frankfurter, *Of Law and Men* at 159-160 (cited in note 2).

⁴⁷ Frankfurter, ed., *Mr. Justice Holmes* at 85 (cited in note 16).

⁴⁸ Hand, *The Spirit of Liberty* at 29, 25 (cited in note 16).

⁴⁹ Frank, *Law and the Modern Mind* at 253-260 (cited in note 28).

⁵⁰ Harold J. Laski, Introduction, in Alfred Lief, ed., *Representative Opinions of Mr. Justice Holmes* ix, xviii (1931).

⁵¹ Max Lerner, ed., *The Mind and Faith of Justice Holmes* vii (1943).

⁵² Dean Acheson, *Morning and Noon* 62 (1965).

⁵³ Frankfurter, *Of Law and Men* at 201, 278 (cited in note 2).

⁵⁴ Benjamin N. Cardozo, *Mr. Justice Holmes*, 44 *Harv.L.Rev.* 682, 691, 684, 682 (1931).

[could] become a pervasive and intimate national possession."⁵⁵

The combinations in Holmes' career do encourage admiration. Among the most visible are the cultured legacy and education of the Boston Brahmin; the already famous name, which passes from father to son in that legacy; the military record and sacrifice of the thrice-wounded Civil War hero; the contribution to intellectual and legal history of a classic book, *The Common Law*, in 1881; the rich and varied correspondence and speeches of the social figure; and, most of all, a half century of distinguished judicial service, extending through Holmes' ninetieth year, on first the Supreme Judicial Court of Massachusetts and then the Supreme Court of the United States. These combinations confirm a series of cardinal virtues: self-confidence and a firm sense of social obligation (more negatively, an aloof sense of caste), great intellectual energy and a love of ideas, physical courage and stoicism, and, not least, a survivor's tenacity and acceptance of concrete realities or experience. Holmes' virtues, in turn, point to major stances in the life: a lasting faith in the military code, the support of legal realism and judicial restraint over objective formalisms of all kinds, a more general intellectual testing of universals against "the felt necessities of the time,"⁵⁶ reliance upon social darwinism (survival of the fittest) for scientific explanation, and a commitment to public life that is almost biblical in its longevity.⁵⁷

The difficulty with a ledger of virtues and accomplishments is that it does not explain the additional level of adulation that the career has inspired. Adding to this difficulty are the criticisms of later generations, which tend to qualify Holmes' achievements.⁵⁸ The strongest supporters long have recognized an important limitation: "[r]arely has so vast an influence been built upon so slight a body of legal writing."⁵⁹ Today, under scrutiny, the writings themselves seem less impressive than they once appeared. *The Common Law*, while still acknowledged to be rich in insight, has become "a book at war with itself" and "a monument to . . . contradiction" in

⁵⁵ Frankfurter, *Of Law and Men* at 183 (cited in note 2).

⁵⁶ O.W. Holmes, Jr., *The Common Law* 1 (1881).

⁵⁷ For still the definitive record of Holmes' life, see the two volume biography by Mark DeWolfe Howe, *Justice Oliver Wendell Holmes: The Shaping Years 1841-1870* (1957) ("1 Justice Holmes"), and *Justice Oliver Wendell Holmes: The Proving Years 1870-1882* (1963) ("2 Justice Holmes").

⁵⁸ For a general examination of the puzzles in Holmes' career, see David H. Burton, ed., *Justice Oliver Wendell Holmes, Jr.—What Manner of Liberal?* (1979). See particularly therein Harold R. McKinnon, *The Secret of Mr. Justice Holmes*, in id. at 91-105, and Daniel J. Boorstin, *The Elusiveness of Mr. Justice Holmes*, in id. at 129-134.

⁵⁹ Lerner, ed., *The Mind and Faith of Justice Holmes* at 367 (cited in note 51).

ways that Holmes never understood.⁶⁰ Even the presumed lucidity of the legendary opinions has been questioned. "If clarity, precision, and 'reasoned elaboration' can be said to be the ideals of judicial opinion writing," runs one modern commentary, "Holmes appears to have eschewed these goals in the pursuit of terseness and ambiguity. His opinions have been called as difficult to understand as they are easy to read."⁶¹ But if the scholar and judge seem less capacious today, it does not follow, as some have claimed, that "the apotheosis of Holmes defeats understanding."⁶²

The harmonies in the career deserve special attention. Testimonials to Holmes invariably reach for metaphors of completion, connection, and integration. He is the "*completely* adult jurist," "the most *complete* personality," the "*great* example," the one who creates "*organic connection*" where others find only "discrete instances."⁶³ "Who else," asks Cardozo, "has been able to pack a *whole* philosophy of legal method into a fragment of a paragraph . . . ?"⁶⁴ This excitement over holistic patterns flows from a recognition of unities. From the beginning Holmes understands the combinations that must be made to serve, and he uses them to shape an answer to inherent divisions in the judicial figure.

The contours of the career are already there in the Harvard senior's autobiographical sketch from 1861:

All my three names designate families from which I am descended . . . . Some of my ancestors have fought in the Revolution; among the great-grandmothers of the family were Dorothy Quincy and Anne Bradstreet ("the tenth Muse"); and so on . . . . The tendencies of the family and of myself have a strong natural bent to literature, etc., at present I am trying for a commission in one of the Massachusetts Regi-

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⁶⁰ Robert W. Gordon, *Holmes' Common Law As Legal and Social Science*, 10 Hofstra L.Rev. 719, 720-721, 742, 746 (1982).

⁶¹ G. Edward White, *The Rise and Fall of Justice Holmes*, 39 U.Chi.L.Rev. 51, 54 (1971). See, as well, Currie, 52 U.Chi.L.Rev. at 900 (cited in note 1); Currie, 1985 Duke L.J. at 1161 (cited in note 1). While Currie gives Holmes much credit, he also notes that "for all their stylistic appeal, the constitutional opinions of Holmes' first years [on the Supreme Court] are substantively not very satisfying" or "uniformly impressive." His opinions contain "unsupported conclusions." They "substitute epigrams for analysis," and the writer behind them can be "cavalier, superficial, and inattentive" to basic values.

⁶² Yosel Rogat, *The Judge As Spectator*, 31 U.Chi.L.Rev. 213, 256 (1964).

⁶³ Frank, *Law and the Modern Mind* at 253 (cited in note 28)(emphasis added); Lerner, ed., *The Mind and Faith of Justice Holmes* at vii (cited in note 51)(emphasis added); Cardozo, 44 Harv.L.Rev. at 682 (cited in note 54)(emphasis added); Frankfurter, *Of Law and Men* at 165 (cited in note 2)(emphasis added).

⁶⁴ Cardozo, 44 Harv.L.Rev. at 682 (emphasis added).

ments, however, and hope to go south before very long. If I survive the war I expect to study law as my profession or at least for a starting point.⁶⁵

The complex tradition of the Boston Brahmin, the essential cameo appearance of the soldier, the vocational decision for law, and the larger aspiration of the writer all appear as components in the passage. Of special interest are the three qualifications that the youthful Holmes raises about their conjunction: the soldier's sensible question about survival, the additional question of whether the law can be more than "a starting point" in the larger combination, and last, the more subtle concern in the word "however" over whether a vaguely feminized "bent to literature" can accord with the life of responsible action.

The career develops through careful responses to each uncertainty in the combination of aristocrat, soldier, lawyer, and writer. It succeeds in the ensuing creation of a single image that is true for Holmes in life and then magnified beyond life in other Americans' perception of his ideological importance. The noted Justice is the successful soldier, lawyer, and aristocrat, and he can claim much from each experience in his exercise of the judicial function. Moreover, the source of cohesion in this complex image lies in Holmes' definition of himself as a writer fulfilling a writer's duties. The centrality of the writer in the creation of the unified judicial figure cannot be overestimated.⁶⁶ Writing is what Holmes *does* as a judge, and it is how he thinks of himself and his accomplishments. In his own words, "[t]he thing I have wanted to do and wanted to do is to put as many new ideas into the law as I can, to show how particular solutions involved general theory, and to do it with style."⁶⁷ Putting new ideas, showing particular solutions through general theory, and doing so with style are all functions of the writing process.

Judicial opinions fail without a writerly skill. The business of deciding the law is difficult enough, but Holmes finds a greater problem in the effective use and proper understanding of language. "[I]deas are not difficult," he tells one friend, ". . . the trouble is

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⁶⁵ Holmes' complete entry in *Album of the Harvard College Class of 1861* is reprinted in Lerner, ed., *The Mind and Faith of Justice Holmes* at 6-8 (cited in note 51).

⁶⁶ For a general argument that the role of the writer supplies the best analogy for thinking about a working judge, see Cover, *Justice Accused* at 126-130 (cited in note 14).

⁶⁷ Quoted in David H. Burton, Introduction, in Burton, ed., *Oliver Wendell Holmes, Jr.—What Manner of Liberal?* at 1 (cited in note 58).

in the words in which they are expressed.”⁶⁸ Trouble, in this sense, comes in three forms. First, audiences frequently misunderstand a decision by failing to see a judge’s “way of putting in new and remodeling old thought.”⁶⁹ Holmes refers to his own opinions as a matter of “preparing small diamonds for people of limited intellectual means.”⁷⁰ Those opinions, in effect, must sparkle like diamonds if they are to be seen at all. Second, the best language constantly loses meaning and vitality. Holmes, heavily influenced by Ralph Waldo Emerson, knows that “any idea that has been in the world for twenty years and has not perished has become a platitude although it was a revelation twenty years ago.”⁷¹ He also knows that routinization destroys the essence of meaningful thought: “[t]o rest upon a formula is a slumber that, prolonged, means death.”⁷² The judge, no less than the creative writer, must find ways to renew language.

Third and last in the writer’s difficulties, a language that truly communicates is hard to achieve. “To arrange the thoughts so that one springs naturally from that which precedes it,” writes Holmes of his opinions, “and to express them with a singing variety is the devil and all.”⁷³ Merely to report thought in language is to lose it. Holmes assumes the much higher duty of making thought “spring” and language “sing.” On the bench he is one who “has broken his heart in trying to make every word living and real.”⁷⁴ Claims of this sort should not be mistaken for poetic effusions; a famous statement from the presiding judge underlines their philosophical integrity. “The common law is not a brooding omnipresence in the sky,” writes Holmes in *Southern Pacific Co. v. Jensen*, “but the articulate voice of some sovereign or quasi-sovereign that can be identified.”⁷⁵ Reducing the law to human scale places additional burdens on the language of the lawgiver. The conditions within Holmes’ assertion—an *articulate* voice and a sovereign that *can be identified*—foreshadow the writer’s task, the need to create voice and identity in a claim of authority.

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⁶⁸ Quoted in Lerner, *The Mind and Faith of Justice Holmes* at 421 (cited in note 51).

⁶⁹ Mark DeWolfe Howe, ed., 1 *Holmes-Pollock Letters* 106 (1941). Holmes understands his own opinions to be misunderstood in just this way in the letter in question.

⁷⁰ Howe, ed., 2 *Holmes-Pollock Letters* at 173.

⁷¹ Quoted in Lerner, *The Mind and Faith of Justice Holmes* at 399-400 (cited in note 51). For Emerson’s influence on Holmes, see Howe, 1 *Justice Holmes* at 44, 54, 59, 203 (cited in note 57).

⁷² Holmes, *Collected Legal Papers* at 306 (cited in note 16).

⁷³ Quoted in Frankfurter, *Of Law and Men* at 177-78 (cited in note 2).

⁷⁴ Howe, ed., 1 *Holmes-Pollock Letters* at 106 (cited in note 69).

⁷⁵ 244 U.S. 205, 222 (1917)(Holmes dissenting).

V. THE MAN OF LETTERS

Holmes' ability to convert the writer's difficulties into strengths is the true source of his genius. He manages to turn a personal search for voice and identity into a general expression of the times. His accomplishment, as Frankfurter explains, moves beyond "a coherent judicial philosophy, expressed with pungency and brilliance" to one "reinforced by the *Zeitgeist*, which in good part was itself a reflection of that philosophy."⁷⁶ Brilliance and coherence join in something larger than themselves: the representative figure. When Holmes uses the components of his life to solve problems in the writer's career, those problems and their solutions are ones that absorb the age.

The possibilities of the representative figure first emerge in the successful soldier. The gentleman officer, like the Union itself, is proud of both his immediate endurance and his ultimate survival; success reinforces his own superior sense of place, not to mention a certain contempt for the common in life.⁷⁷ Others have demonstrated how the Civil War forms a permanent frame of reference, reinforcing a patrician stoicism and the belief that "the struggle for life is the order of the world" or that "[man's] destiny is battle."⁷⁸ Holmes uses this frame to picture himself in the boldest terms. When a cousin who remains a civilian jokingly asks how it is that Holmes grows a thicker mustache, the latter's response is without humor and often repeated: "[m]ine was nourished in blood."⁷⁹ The oversized mustache, a conventional symbol of manly visibility and assertion, is tangible proof of what Holmes calls "[t]he bloody birthright of heroic days."⁸⁰

The soldier's experience has two literary dimensions that inform the later judicial figure. In a brilliant analysis of the war diaries and letters, Saul Touster explains how the trauma of battle initiates a permanent "disassociation between mind and feeling" in

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⁷⁶ Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U.Pa.L.Rev. 781, 784 (1957).

⁷⁷ See Holmes' Civil War letters and diaries, in Mark DeWolfe Howe, ed., *Touched With Fire* 27-28, 54, 60, 64, 71, 142-43, 149 (1969).

⁷⁸ Mark DeWolfe Howe, ed., *The Occasional Speeches of Justice Oliver Wendell Holmes* 75 (1962). See, as well, Edmund Wilson, *Patriotic Gore* 743-796 (1962); George M. Fredrickson, *The Inner Civil War* 168-171, 218-222 (1965).

⁷⁹ Howe, 1 *Justice Holmes* at 8 (cited in note 57).

⁸⁰ Oliver Wendell Holmes, *The Class of 1861: A Poem*, in Lerner, ed., *The Mind and Faith of Justice Holmes* at 8 (cited in note 51). For the best extended comment on how the Civil War transformed Holmes and his comrades in arms ("It made us citizens of the world and not of a little town"), see Oliver Wendell Holmes, *The Fraternity of Arms*, in Howe, ed., *Occasional Speeches* at 100-101 (cited in note 78).

Holmes' perspective. A defensive "deadening of sympathetic feelings" takes the form of an "Olympian aloofness." Holmes assumes "the spectator view" to "gain *distance* from the world." The returning soldier does not see less, but his "way of looking" is from above or afar. His perspective is not of men fighting but of the battle fought.⁸¹ Commentators trace the same traits in the "austerely solitary life" of the judge.⁸² Holmes welcomes "the secret isolated joy of the thinker . . . the subtle rapture of a postponed power . . . more real than that which commands an army."⁸³ The comparison is a telling one. Holmes instinctively prefers the aloof intellectuality, the detached stance, and the view from above that the judge will use to mediate conflict. The undemocratic nature of these preferences could hardly bother the aristocrat, but the judge wields them as strategies with supreme self-confidence, even impunity, because of the soldier's earlier experience. The problematic judicial figure easily resolves back into the man of action who once risked everything for his country—and succeeded.⁸⁴

The war also frees Holmes from the literary framework of Oliver Wendell Holmes, Sr. In a dramatic reversal of the norm, the son uses experience to claim ascendancy over an eminent father. "I have better chances of judging than you," writes Holmes in their exchanges over the war effort, ". . . I think you are hopeful because (excuse me) you are ignorant."⁸⁵ In context, Holmes, Sr. gives a more accurate account of respective military strengths than the soldier in the front lines. Nonetheless, the soldier's absolute right to speak, his right to be the *authoritative* teller, easily relegates the father to silence. We see this much and more in Holmes, Sr.'s ambivalent description of the soldier home on furlough and

⁸¹ Saul Touster, *In Search of Holmes from Within*, 18 Vand.L.Rev. 437, 464, 470, 459 (1965)(emphasis in original). For two separate descriptions by Holmes of the Battle of Fredericksburg, descriptions that Touster uses to show how "the rhetoric of his later years is moulded," see Howe, ed., *Touched With Fire* at 76-77 (cited in note 77), and Howe, ed., *The Occasional Speeches* at 11-12 (cited in note 78).

⁸² Charles E. Wyzanski, Jr., *The Democracy of Justice Oliver Wendell Holmes*, 7 Vand.L.Rev. 311, 322 (1954); Howe, 2 *Justice Holmes* at 4, 253-256 (cited in note 57).

⁸³ Howe, ed., *Occasional Speeches* at 31 (cited in note 78).

⁸⁴ The symbiotic relation of soldier and judge, of concrete patriotic action sustaining abstract intellectual judgment, does not begin in Holmes. In describing John Marshall's "outlook in judicial action," Felix Frankfurter argues "that Marshall's experience at Valley Forge was not without decisive influence in the work of the great Chief Justice." See Frankfurter, *Of Law and Men* at 9 (cited in note 2). As for Holmes, at seventy-one, he still thinks of judicial controversy as "the rolling fire of the front" and his own position as "on the firing line." See Howe, ed., *Occasional Speeches* at 168 (cited in note 78).

⁸⁵ Howe, ed., *Touched With Fire* at 79-80 (cited in note 77). This comment is part of a pattern rather than an isolated phenomenon. See as well, id. at 67, 86, 91, 123, 148.

surrounded by admiring visitors: "I envy my white Othello, with a semicircle of young Desdemonas about him listening to the often told story which they will have over again."⁸⁶ Freighted with jealousy, the passage is complex, but it conveys how completely Holmes, Sr. has been cut off from his natural function as the leader of discussion. The greatest conversationalist of antebellum culture has lost his audience.

The reversal allows Holmes to adjust more rapidly to changing definitions of the writer. Holmes, Sr. is *The Autocrat of the Breakfast Table*, a mid-nineteenth-century man of letters who questions, satirizes, punctures, and amuses from within an assumed moral and social framework. His goal is cultivation through intellectual display, and his vehicles are the novel of ideas, the occasional essay and light poem, all of which reinforce the gentlemanly status of a commentator on the times.⁸⁷ The son, in very different times, must look elsewhere. Belletrism is a source of derision in the war journals. "The 20th [Holmes' regiment] have no poetry in a fight," the son proudly reports to his father. "It's very well [for you]," he adds, "to recommend theoretical porings over Bible & Homer—One's time is better spent with Regulations & the like."⁸⁸ Later, Holmes would criticize the lack of cohesiveness and force in Holmes, Sr.'s writings: "he contented himself too much with sporadic aperçus—the time for which, as I used to say when I wanted to be disagreeable, had gone by. If he had had the patience to concentrate all his energy on a single subject . . . he might have produced a great work."⁸⁹

These criticisms carry a double message. Holmes rejects the specific legacy, but he lives within the encompassing tradition. Father and son differ over the nature of literature, not its importance. The greatest sustained intellectual effort of Holmes' life, his book *The Common Law*, is the work of a Boston Brahmin succeeding in the 1870s and 1880s. The difference lies in timely considerations: the son's insistence upon "a single subject" and his need to bring an overarching order to the writing process. As the writer of *The Common Law* puts these matters:

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⁸⁶ Quoted in Howe, 1 Justice Holmes at 112 (cited in note 57).

⁸⁷ For the characteristics of Oliver Wendell Holmes, Sr.'s literary career, see Martin Green, *The Problem of Boston* 74-75, 115, 169-170, 186-187 (1966); Wilson Sullivan, *New England Men of Letters* 224-242 (1972); Peter Gibian, An "Inner Civil War": Style And Stance From Senior To Junior (unpublished conference paper, Stanford University, March 5-6, 1985, on file at the Stanford Humanities Center).

⁸⁸ Howe, ed., *Touched With Fire* at 90-91 (cited in note 77).

⁸⁹ Quoted in Howe, 1 Justice Holmes at 19 (cited in note 57).

my articles though fragmentary in form and accidental in order are part of what lies as a whole in my mind—my scheme being to analyse what seem to me the fundamental notions and principles of our substantive law, putting them in an order which is a part of or results from the fundamental conceptions.⁹⁰

Although Holmes handles the seeming circularity of this “scheme” by involving both theme and method in the search for order, something greater also intervenes. The writer’s thirst for connection matches a similar yearning of the times. His immediate readers are peculiarly receptive to his kind of answer. “The remoter and more general aspects of the law are those which give it universal interest,” Holmes easily convinces a law school audience. “It is through them that you not only become a great master in your calling, but connect your subject with the universe.”⁹¹

The soldier-judge forges literary unities where others find only complication in postbellum America. War plunges Holmes into realist notions that will dominate discussions of literary endeavor for his lifetime. Early on, he knows that he must create his own sense of consistency amidst the indifferent forces and apparent chaos of a dangerous world. On the other hand, the proliferation and democratization of magazines and newspapers, also by-products of the war, have lowered the social caste of a writer for journals. To remain the writer as gentleman, as Boston Brahmin, the younger Holmes must engage in what John Gross, in *The Rise and Fall of the Man of Letters*, has labelled “the higher journalism.” He must self-consciously insist upon a coherent intellectual level of commentary beyond mere observation and critical insight.⁹² Meanwhile, in yet another turn, growing aesthetic strictures in conventional poetry and fiction, generally known as “the genteel tradition,” are forcing polite literature (and the socially prominent writer) away from harsher realities and common experience.⁹³

Contending considerations push Holmes toward intellectual prose and away from *belles lettres*, toward the creation of framework and away from loose discourse or the imaginative treatment

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⁹⁰ Quoted in Howe, 2 Justice Holmes at 25 (cited in note 57).

⁹¹ Holmes, Collected Legal Papers at 202 (cited in note 16).

⁹² John Gross, *The Rise and Fall of the Man of Letters* 62-97 (1969).

⁹³ The phrase “the genteel tradition,” coined to indicate a high-minded but false separation between aesthetic value and energetic realities, comes originally from George Santayana. See Douglas L. Wilson, ed., *The Genteel Tradition: Nine Essays By George Santayana* 38-64 (1967). For a relevant analysis of the impact of the genteel tradition on postbellum American writers, see John Tomsich, *A Genteel Endeavor* (1971).

of episode. The general effect is to leave him somewhere *between* Carlyle's hero as the man of letters and the final stage of *On Heroes and Hero-Worship*, the hero as political leader and "missionary of Order." Holmes must write—it is the worthiest human enterprise—but he must do so as "[t]he man of intellect at the top of affairs."⁹⁴ While many writers of the post-bellum period falter under these tensions, Holmes thrives.⁹⁵ The life of the judge supplies every answer. The need for a sense of service in an intellectual forum, the assertion of caste, the demonstration of style, the exercise of authority and command, the insistence upon lofty vision within a field of practicality, the rendition of a coherent philosophy in prose, and the underlying realism of the context—these are the contingencies of Holmes on the bench.

VI. THE JUDGE AS WRITER

Two popular writings from mid-career—"The Path of the Law" and "Law and the Court"—reveal Holmes in full appreciation of the judge's blended literary powers.⁹⁶ Thematically, the first essay is a plea for more empirical standards and legal realism, but Holmesian rhetoric discloses a more celebratory agenda. "The Path of the Law" begins with an assertion of judicial importance: "the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees." Much that follows reinforces this importance. Judges, in consulting reports, treatises, and statutes, are oracular figures gathering "the scattered prophecies of the past" from "sibylline leaves." The most important effort in legal thought, "nearly the whole meaning," is "to make these prophecies more precise, and to generalize them into a thoroughly connected system," a judicial function. "The prophecies of what the courts will do in fact," runs Holmes' disarming summary, "and nothing more pretentious, are what I mean by the law." Manifestly, judges decide what courts will do. In the largest view, however, the statement is pretentious. Holmes leaves out the whole vast panoply of state and federal executive, legislative, administrative, and police powers that also exercise law in American culture.

⁹⁴ Thomas Carlyle, *On Heroes, Hero-Worship and the Heroic in History* 249, 316, 328, 266, 274 (1841).

⁹⁵ See Tomsich, *A Genteel Endeavor* at 186-195 (cited in note 93). The most talented writer to fail under these burdens is Richard Henry Dana, Jr. See Robert A. Ferguson, *Law and Letters in American Culture* 241-272 (1984).

⁹⁶ Holmes, *Collected Legal Papers* at 167-202, 291-297 (cited in note 16). For the quotations, in order, in this paragraph from "The Path of the Law," see *id.* at 167-168, 173.

The appeal of the statement rests in Holmes' conviction that judges clarify the system. "The Path of the Law" has to do with the need to "dispel a confusion between morality and law."⁹⁷ Judges ultimately explain these related levels of discourse. They make the "body of law . . . more rational and more civilized" by referring every rule "articulately and definitely to an end which it subserves" and by making sure that "the grounds for desiring that end are stated or are ready to be stated in words." Two premises in "The Path of the Law" turn this mechanical task into a literary adventure of heroic proportions. Holmes believes that the law can be "reduced to a system" through the recognition of "some first principles." And he also believes, despite his stress on "the law as a business with well understood limits," that "the most far-reaching form of power . . . is the command of ideas." Elsewhere, he elaborates on the basic duality that informs this analysis: "the law may keep its every-day character and yet be an object of understanding wonder and a field for the lightning of genius."⁹⁸ The fact that Holmes often dwells on the subject of judicial restraint should not blind us to a larger act of creation. In Holmesian rhetoric, judicial figures are the mediating forces between mundane fact and extraordinary possibilities. They are the primary source of genius in the republic of laws.

"Law and the Court" offers one of many creative objectifications of this genius. Since judgment requires an end to dispute in the name of resolution, a judiciary necessarily trades in answers rather than questions. The robed figure on the bench is the image of success in this enterprise, the speaker of the final word, the repository of social and cultural wisdom. "Law and the Court" in 1913, is especially instructive because it appears in response to criticisms of judicial wisdom and at a time when, scholars now agree, "judicial interpretations . . . were major obstructions to the adaptation of law to the needs of the weaker segments of the community in an urban and industrial society."⁹⁹ Holmes understands the pressure for change, but he argues that "attacks upon the Court are merely an expression of the unrest that seems to wonder vaguely whether law and order pay." Real change requires development rather than reform: "[f]or most of the things that properly

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⁹⁷ For the quotations, in order, from "The Path of the Law" in this paragraph, see id. at 169, 186, 169, 170-171, 201.

⁹⁸ Id. at 276-277.

⁹⁹ Archibald Cox, *The Court and the Constitution* 134 (1987). See, more generally, White, *The American Judicial Tradition* at 178-229 (cited in note 23).

can be called evils in the present state of the law I think the main remedy, as for the evils of public opinion, is for us to grow more civilized."¹⁰⁰ These assertions seem thin in themselves. Holmes gives weight by objectifying them in his own person as the authoritative representative and speaker of civilization.

The conclusion to "Law And The Court" is worth quoting in its entirety:

And so beyond the vision of battling races and an impoverished earth I catch a dreaming glimpse of peace.

The other day my dream was pictured to my mind. It was evening. I was walking homeward on Pennsylvania Avenue near the Treasury, as I looked beyond Sherman's Statue to the west the sky was aflame with scarlet and crimson from the setting sun. But, like the note of downfall in Wagner's opera, below the sky line there came from little globes the pallid discord of the electric lights. And I thought to myself the *Götterdämmerung* will end, and from those globes clustered like evil eggs will come the new masters of the sky. It is like the time in which we live. But then I remembered the faith that I partly have expressed, faith in the universe not measured by our fears, a universe that has thought and more than thought inside of it, and as I gazed, after the sunset and above the electric lights there shone the stars.¹⁰¹

Holmes, as cultural symbol, can depend upon the associations in the passage to carry beyond themselves. The vested authority of official position in Pennsylvania Avenue near the Treasury building, the encapsulation of the Civil War in Sherman's statue, the extended reference to Wagner by the cultivated man of letters, the entitlement to closure in the aging judge as he walks homeward into a setting sun (Holmes is seventy-one)—these elements resonate in a larger claim of cultural standing.

Just as important is the orchestration of perspectives at work in the passage. The peroration begins with the overriding image of the judge as philosopher king, the figure of authority who holds "a dreaming glimpse of peace" after conflict. Next, the persona within the frame appears, strolling down the avenue and resolving conflict (from pallid discord to faith in the universe) in one version of the larger dream ("my dream was pictured in my mind"). Least obvious is the dinner speaker delivering his address, the mustachioed

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¹⁰⁰ Holmes, *Collected Legal Papers* at 292, 296.

¹⁰¹ *Id.* at 296-297.

dignitary who enthralls a group of gentlemen much like himself and who receives confirmation in their support. Last but also first is the writer in recollection, the author of the written piece who reaches for the permanence of those fixed stars.

This is what is meant by putting oneself on the page. We recognize the carefully entrenched and reinforced figure in part because of its many-sided insistence upon itself but also because of primal unities and a consistency of tone. The language used by Holmes in this passage borrows from established patterns of ideological confirmation in the culture. When critics refer to a public voice in American literature that is "aristocratic, legalistic, encyclopedic, forensic, habitually expressing itself in the mode of an eloquent wisdom," they could describe Oliver Wendell Holmes as well as Jefferson and Lincoln.¹⁰²

VII. PORTRAIT OF THE JUDGE

We see the act of self-creation most clearly in a more literal rendition of the judicial image. When Charles Hopkinson paints Holmes' portrait in 1929, Holmes' complex reactions show how carefully he thinks about himself as judge. The portrait as such, a different medium, also enables another kind of examination of the judicial figure and a test of critical implications.

Holmes, for his part, often uses painterly images in his writings; the power of portraiture to capture life is a recurring theme.¹⁰³ He particularly admires the full-length portrait by Hopkinson during Holmes' eighty-ninth year. "As I see the result emerging I am very glad," he writes, posing for the artist, "for [Hopkinson] not only has made an admirable likeness but a very vivid one, as it seems to me."¹⁰⁴ Two days later, he is, if anything, more enthusiastic: "Hopkinson has a gift for catching a likeness and for vividness I think—and I am quite proud of his results."¹⁰⁵ The finished product, Holmes subsequently reports, "pleased me mightily."¹⁰⁶ He has known from the beginning that the portrait is to hang "as the pendant to one of Marshall" in the new library reading room of the Harvard Law School, "the handsomest compli-

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¹⁰² William K. Wimsatt, Jr. and Cleanth Brooks, *Literary Criticism* 74 (1967).

¹⁰³ See, for example, Howe, ed., *Occasional Speeches* at 41, 151, 9, 161 (cited in note 78); Lerner, ed., *The Mind and Faith of Justice Holmes* at 451 (cited in note 51).

¹⁰⁴ Howe, ed., 2 *Holmes-Pollock Letters* at 253 (cited in note 69).

¹⁰⁵ Mark DeWolfe Howe, ed., 2 *Holmes-Laski Letters* 1188 (1953).

¹⁰⁶ Howe, ed., 2 *Holmes-Pollock Letters* at 268.

ment that they could pay.”¹⁰⁷ But each of these comments must be understood against another with a vital qualification. “That isn’t me,” Holmes says of the finished portrait, “but it’s a damn good thing for people to think it is.”¹⁰⁸

The differences in these statements disappear in Holmes’ acute understanding of the judicial figure as symbol. “We live by symbols,” he explains in his own literary portrait of John Marshall, “and what shall be symbolized by any image of the sight depends upon the mind of him who sees it.”¹⁰⁹ The point of the statement is a complicated one. “It is most idle to take a man apart from the circumstances which, in fact, were his,” Holmes observes earlier in the essay. At the same time, people will see only that part of the circumstance that interests them. Accordingly, to be successful, a general celebration of someone like Marshall must incorporate the multifaceted nature of the life into a single figure that all accept despite each separate understanding. “It is all a symbol, if you like,” Holmes concludes, “but so is the flag.” As in the flag, a powerful identification will override every difference.

The portrait by Hopkinson, to use Holmes’ terms, is just such an image of the sight to be collectively symbolized by the minds of those who see it. The problem is to foster a common perception. The portrait must overcome differences for Holmes to become a symbol alongside of Marshall. Just as political rhetoric reconciles differences by making sure “that the same utterance will simultaneously perform a diversity of linguistic functions,”¹¹⁰ so the successful political image must lend itself to a comparable reconciliation of perceptions. “Vividness” reaches for this common understanding through a dramatic confirmation of realities.¹¹¹ In applying the term to the portrait, Holmes distinguishes mere “likeness” from larger representation and thereby welcomes the crucial role of artifice in the creation of an image. He reasons that greater

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¹⁰⁷ Id.; Howe, ed., 2 *Holmes-Laski Letters* at 1183. At different times, Holmes, Felix Frankfurter, and Learned Hand, among others, have gloried in the parallelism between the Holmes portrait and the portrait of John Marshall by Chester Harding (1829) across from each other in the north colonnade of Langdell Hall at the Harvard Law School—a parallelism unwittingly destroyed when, in the 1970s, the School moved the Holmes portrait to its current location in the courtyard entrance of Roscoe Pound Hall. See Frankfurter, *Of Law and Men* at 182 (cited in note 2); Hand, *The Spirit of Liberty* at 58 (cited in note 16).

¹⁰⁸ Quoted in Catherine Drinker Bowen, *Yankee From Olympus* 408 (1944).

¹⁰⁹ For the quotations in this paragraph, see, in order, Holmes, *Collected Legal Papers* at 270, 267-68, 271 (cited in note 16).

¹¹⁰ J.G.A. Pocock, *Politics, Language and Time* 17 (1973).

¹¹¹ For a biographical comment on Holmes’ sense of vividness, see Howe, 1 *Justice Holmes* at 26-27 (cited in note 57).

numbers will share in a perception if the portrait is a vivid one. To use his own language, he accepts a likeness that "isn't me" because more people will "think it is."

Turning to the portrait itself on page 533,¹¹² we can see that Charles Hopkinson has brought together the different elements of Holmes' career in a larger statement of the judicial function. Holmes stands well above the viewer's perspective in judicial robes that open to reveal the morning suit, winged collar, watch chain, and rosette or lapel pin of the aristocratic gentleman. The thick mustache, first badge of military service, is now white. Holmes' left hand rests, though not for support, upon the back of a chair that is partially obscured and that faces away from view into an unseen inner chamber. The right hand holds a document of legal size. Holmes appears to emerge from his chambers with judicial opinion in hand. He is, in other words, in the exact moment of transition between the privacy of a decision reached and the publicity of a decision announced.

To underscore the theatricality and tension in that transition, Hopkinson frames his subject in curtains and places Holmes astride a divide in the carpet that separates inner and outer rooms. Legal document, watch chain, lapel pin, and the left epaulette of the judicial robe form a continuous curve that points back to those private chambers, but the figure counters this possibility by facing directly out of the painting and blocking all thought of another's entrance. The left foot moves decisively forward in a rejection of inward invitation. Everything about the painting conveys the certainty and superiority of a decision reached. Holmes carries no pen for emendations, and the expression with which he greets the viewer is utterly free of solicitation. His mind is made up on both the substance and form of the matter in hand. Judgment, we recall, offers only answers, and Holmes needs no further assistance in making this one.

Artistic shadings modulate these themes. Hopkinson, wrapping the body of Holmes in a nimbus of light, adds a negative halo or darkened circle for the head to contrast with the white of hair and collar. The general effect is to insure reverence but for a secular figure. The painting itself is extremely dark with little color to relieve the proper gravity and officialdom of theme and subject. Contrasting light from an undisclosed source floods the foreground

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¹¹² Permission for photographic reproduction of Charles Hopkinson's portrait of Oliver Wendell Holmes, oil on canvas and 95 inches x 59 and 1/2 inches, has been granted by the Harvard Law Art Collection.

Oliver Wendell Holmes. Oil on canvas, 95" × 59.5", by Charles Hopkinson. From the Legal Portrait Collection, Harvard Law School.

Reproduced by permission of the HARVARD LAW ART COLLECTION.

to Holmes' right, bathing that side of his face and the legal document in that hand. A viewing of the painting begins with this lighted emphasis upon head and text. The device creates a first impression in which the intellectuality of the judge's undertaking confirms the legality of his writing.

Spatially, Holmes enters into the lighted area to deliver judgment. The same device naturally leaves the left side of his face—the side closest to the mystery of the inner chamber—in shadow. The contrast might have troubled but for the artist's compensatory deployment of the strongest of all judicial metaphors. Hopkinson instinctively mutes the tensions that he has raised in a series of balances. The prominent hands at each side indicate a certain symmetry, and the left leg, slightly forward, receives the same illumination as the right side of the face. Holmes is in perfect equilibrium, the necessary posture for forensic wisdom.

Basic distortions also contribute to Holmesian vividness. Hopkinson's canvas is extremely large, virtually five by eight feet. Even so, and making every allowance for scale, the body of the figure in the painting is enormous. Hopkinson arranges the flowing judicial robe to suggest a more impressive physique than Holmes can possibly possess in his eighty-ninth year. Magnification serves several purposes. The Darwinian in Holmes likes to emphasize that "force . . . is the *ultima ratio*."¹¹³ "The foundation of jurisdiction is physical power," he announces in the courtroom.¹¹⁴ Hopkinson's massive figure literalizes this side of the judge's philosophy. Holmes can only be pleased by a representation that looks as if it could enforce its own decrees. There is, however, a more subtle dynamic also at work in the image. Power and authority can either coordinate or contend in the judicial function. Coordination involves a complex interplay and requires what Holmes thinks of as "this double view of life," the real source of intellectual or judicial balance.¹¹⁵ Appropriately, then, intellectuality and the authoritative text are radiant with light in Hopkinson's painting, but they are also extensions of the darker strength in the robed figure.

A second distortion shapes the head of the portrait. Minimal lining, a slight extension of the jaw, and the highlighted vigor of

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¹¹³ Howe, ed., 2 Holmes-Pollock Letters at 36 (cited in note 69).

¹¹⁴ *Ex Parte Indiana Transportation Co.*, 244 U.S. 456, 457 (1917).

¹¹⁵ Holmes, *Collected Legal Papers* at 274 (cited in note 16). The double view combines morality and practicality, heroic aspiration and economic security, change and tradition; in sum, "the twofold direction of man's desires." See, as well, *id.* at 169-170, 225-226, and, more generally, 248.

mustache and eyebrows combine to suggest a man who is old but not elderly; the face is eternal rather than aged. Neither is the conceit an entirely fanciful one. Holmes in maturity encompasses the whole telling of the republican experience. From the young soldier whose grandmother remembers the evacuation of Boston at the beginning of the Revolution to the old judge who advises President Franklin D. Roosevelt, he is the true American witness. Holmes regards this longevity with pride and goes to some pains to record it.¹¹⁶ When Hopkinson captures the same elements visually, he harnesses them to the legitimating rhetoric of Anglo-American law. The figure on the canvas belongs to a long line that expounds the ancient constitution from time immemorial.¹¹⁷

Not surprisingly, the artist's tools for presenting the formal figure are themselves conventions within the genre of the judicial portrait—conventions that everyone, including the artist's subject, knows and exploits. The luminous foreground against a somber subject, the studious accoutrements (book, desk, or chair), the prominent hands and rich carpeting appear in the companion portrait of John Marshall painted by Chester Harding in 1829.¹¹⁸ But Hopkinson, exactly a hundred years later, understands that conventions are to be used and not just followed. His variations—the hidden study, the written opinion, the divided carpet, the complex lighting—are significant. They suggest the *created* figure that Holmes has made of himself as judge.

The portraitist can turn idea into image so successfully because it has been one all along. Hopkinson is only the last of many, beginning with Holmes himself, to articulate value in visual terms. In 1919 Holmes writes, "I now look forward to what impressed my childhood as most wonderful—to being carried in a civic procession as a survivor;" in the same year, Dean Acheson converts Holmesian "grandeur" and "presence" into "strong light" and "pervading force."¹¹⁹ The survivor whose strength and official identity are enhanced by light is familiar to all concerned. Ten years

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¹¹⁶ See Harry C. Shriver, *What Gusto* 23, 29 (1970); Harry C. Shriver, ed., *Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers* 200 (1936). "I am now the oldest judge who ever has remained sitting on our Bench," Holmes writes to John Wu in 1928. "I now have lived longer than Taney, C.J. who until last month was the oldest. This is a perfectly external trifle and yet in a small way it pleases me."

¹¹⁷ For a discussion of the prevalence and importance of this kind of rhetoric in Anglo-American law, see Pocock, *Politics, Language and Time* at 202-272, particularly 230-231 and 240-241 (cited in note 110).

¹¹⁸ See Andrew Oliver, *The Portraits of John Marshall* 75 (1977).

¹¹⁹ Howe, ed., *2 Holmes-Pollock Letters* at 11 (cited in note 69); Acheson, *Morning and Noon* at 62 (cited in note 52).

before the fact, we already have the controlling terms of Hopkinson's portrait.

VIII. THE WRITER AS JUDGE

It remains to trace Holmes' strategies of self-creation in courtroom decisions. The goal of such an investigation is neither to confirm nor to deny conventional professional readings of judicial opinions but rather to explicate the writer as judge. The difference should be clear. The lawyer's professional search for holdings extracts the essence and relevance of a judicial decision, but insofar as that methodology ignores the general appeal of a text, it cannot explain the overall impact of Holmes' opinions. Three Supreme Court opinions—*Lochner v. New York* (1904), *Frank v. Mangum* (1915), and *Abrams v. United States* (1919)—can be used to illustrate the range of the writer's craft. While each involves a minority view, each also refigures the judicial image in a striking, general claim of authority. Indeed, the power and variety of these claims inform a gift for dissent that has puzzled students of the judicial philosophy. How does a judge who rejects many of the philosophical implications of dissent develop such a "power of constructive negation?"¹²⁰ The answer lies in the literary scope of the minority opinion in the hands of a master stylist. If Justice Holmes is most memorable in dissent, it is because his customary ability to see himself clearly is a primary requisite of that genre.

The dissent in *Lochner v. New York* has been called "the most famous opinion of our most famous judge" and "the greatest judicial opinion of the last hundred years."¹²¹ Holmes disagrees with the majority's use of the fourteenth amendment (construing a violation of freedom of contract as a deprivation of liberty without due process of law) to invalidate a New York statute that limits the working day in bakeries to ten hours or less. His immediate difficulty is that of every dissenting judge. He must find a way to privilege language that, by definition, lacks authority. Holmes

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¹²⁰ For the phrase in quotation and a brief discussion, see David H. Burton, Oliver Wendell Holmes, Jr. 143-145, 105-107 (1980). In general, Holmes' predilection for dissent has been overstated. Majority opinions and concurrences outnumber dissents more than eight to one, a record that supports Holmes' own courtroom contention that "I think it useless and undesirable, as a rule, to express dissent." *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904). See as well, Alfred Lief, ed., *The Dissenting Opinions of Mr. Justice Holmes ix-x* (1929).

¹²¹ Richard A. Posner, *Law and Literature: A Misunderstood Relation* ch. 7 (forthcoming 1988). My reading of *Lochner* has been influenced by Judge Posner's compelling analysis of the technical weaknesses and rhetorical strengths of Holmes' opinion.

solves the problem of prerogative by creating an independent persona to speak for him as the one true judge. His opening sentence, set off alone, refers to the self no less than five times: "I regret sincerely that *I* am unable to agree with the judgment in this case, and that *I* think it *my* duty to express *my* dissent."¹²² The continuing parade of first-person pronouns and possessives in the next paragraph—seven more in two sentences—contrasts sharply with a topical assertion cast in objective terms ("This case is decided upon an economic theory which a large part of the country does not entertain.").

The opinion, fewer than six hundred words in all, does not elaborate on either claim or theory. Instead, it juxtaposes both against the higher wisdom of the created persona, the "I" of the opinion. The scholar who once argued that the lawyer of the future "is the man of statistics and the master of economics"¹²³ now turns his back on economics altogether. The true judge will rise above every opinion on the subject since "my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law." By implication, the judges of the majority opinion are partisans who "share" or "embody convictions or prejudices" in their attempt to "enact Mr. Herbert Spencer's *Social Statics*."¹²⁴ Holmes lectures them from above:

a constitution is not intended to embody a particular economic theory . . . [A]nd the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

The verb "to embody" beats like a drum through this section of the opinion, and Holmes uses it, in a play on words, to warn that "[e]very opinion tends to become a law." Judges, through their opinions, are the ultimate embodiment of the law as the dissent itself proves. Holmes closes with a quick review of the issues in *Lochner*, one that carries through an increasingly problematic series of reliable observers. We move from the "rational and fair man" to the "reasonable man" to "[m]en whom I certainly could

¹²² *Lochner*, 198 U.S. 45, 74-75 (1904)(Holmes dissenting)(emphasis added). For the quotations in this paragraph and the next two from the Holmes' opinion, see *id.* at 74-76.

¹²³ Holmes, *Collected Legal Papers* at 187 (cited in note 16).

¹²⁴ For the multiple ironies in this accusation by the member of the Court who comes closest to a Spencerian position, see Cass R. Sunstein, *Lochner's Legacy*, 87 *Colum.L.Rev.* 873, 879-880 (1987).

not pronounce unreasonable." There is wit in this declension, but Holmes is also interested in depicting the difficulty of the judge's role in dealing with standards in a fallen world. In rising above, the true judge does not merely weigh "the natural outcome of a dominant opinion" through general propositions. The complexity of concrete cases requires much more than that. In the most ignored aspect of this famous opinion, Holmes responds with a one sentence summary of the true judge at work. "The decision," he writes, "will depend on a judgment or intuition more subtle than any articulate major premise." Here, if anywhere, is the master craftsman that Holmes knows himself to be.

Frank v. Mangum in 1915 evokes a very different set of talents in the writer of dissents.¹²⁵ The trial and later murder of Leo Frank comprise one of the most notorious miscarriages of justice in the history of the republic. Frank, a young New Yorker who manages his uncle's pencil factory in Atlanta, Georgia, is tried and convicted of the murder of a fourteen-year old employee, Mary Phagan, on the flimsiest of evidence and amidst public tumult. His appeals to higher tribunals are turned down on the ground that procedural due process has been complied with. When a firm majority of the Supreme Court refuses to look beyond the ruling of the District Court, Holmes dissents. He argues that substance, in this case a rampant communal hostility, may have reduced procedure to "an empty form," "an empty shell." Left without legal remedy, Frank soon becomes the permanent victim of anti-Semitism, sectional fears, class hatred, and communal hysteria; he is dragged from prison and lynched by a town mob in the summer of 1915.¹²⁶

Holmes sees that the dramatic facts of the Frank case can speak for themselves. Since these facts are precisely what the majority refuses to consider, he adopts the role of storyteller. His dissent opens with a graphic account of intimidation "in a court packed with spectators and surrounded by a crowd outside, all strongly hostile to the petitioner." A "stamping of feet and clapping of hands" and "roar of applause" punctuate both the original trial and Holmes' description of it, and that fusion welds the

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¹²⁵ For the quotations in this paragraph and the next two from Holmes' opinion, see *Frank v. Mangum*, 237 U.S. 304, 345-49 (1915).

¹²⁶ For a description of the circumstances surrounding *Frank v. Mangum*, see Arthur Garfield Hays, *Trial By Prejudice* 296-315 (1933). For an account of only the most recent dramatic rendition, see John J. O'Connor, *Murder of Mary Phagan* on NBC, N.Y. Times 20 (Jan. 22, 1988).

reader to Holmes' version of events. "We are not speaking of mere disorder, or mere irregularities in procedure," Holmes concludes, "but of a case where the processes of justice are actually subverted." The art of this language transcends strategy. Walter Benjamin distinguishes between story and other channels of information. "[A story] preserves and concentrates its strength and is capable of releasing it even after a long time." So with the storyteller: "he is the man who could let the wick of his life be consumed completely by the gentle flame of his story . . . . The storyteller is the figure in which the righteous man encounters himself."¹²⁷ Holmes does more than describe. He renders an event of permanent power, and, once again, he finds a device for dramatic self-inclusion.

The thematic twist in Holmes' version occurs in his substitution of judge for defendant, expert for victim. This shift, to use Benjamin's metaphor, equates flame and wick; it empowers Holmes to enter his own story as the representative of the righteous man. In his own words:

we must look facts in the face. Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere. And when we find the judgment of the expert on the spot, of the judge whose business it was to preserve not only form but substance, to have been that if one jurymen yielded to the reasonable doubt that he himself later expressed in court as the result of most anxious deliberation, neither prisoner nor counsel would be safe from the rage of the crowd, we think the presumption overwhelming that the jury responded to the passions of the mob.¹²⁸

This description reduces everything to judicial expertise. The failure of the trial judge to maintain a crucial connection in procedure between form and substance is an error in performance that other judges can see and best answer. The dissent feeds upon a vital corollary. Holmes writes as the next "expert on the spot" in a proper sequence that leads back to his counterpart in the trial. He is the righteous man with the knowledge to correct the tragedy in Atlanta.

Holmes' dissent in *Abrams v. United States* carries the writer as judge to another level or beyond the generic confines of the judi-

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¹²⁷ Walter Benjamin, *Illuminations* 90, 108-109 (1968).

¹²⁸ Frank, 237 U.S. at 349.

cial opinion. Or so it has been read. Judge Charles Wyzanski thinks of this contribution to the doctrines of free speech as not only an "immortal opinion" but "haunting poetry," and he places it with just two other speeches in the entire democratic tradition, Pericles's Funeral Oration and Lincoln's Gettysburg Address.¹²⁹ The same words, for Max Lerner, supply "the greatest utterance on intellectual freedom by an American, ranking in the English tongue with Milton and Mill."¹³⁰ These and other testimonials concentrate on the final paragraph of Holmes' opinion:

when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.¹³¹

The passage builds upon the familiar rhetoric of American politics, but, as peroration, it also unfolds *within* generic considerations that are the real source of its power. If the legal machinations of that power are clear and often noted, its literary aspects remain relatively unexplored.¹³² The omission is a curious one. For Holmes' concerns in *Abrams* are literary in scope, and he assumes the guise of critic to make his argument.

The opinion turns on Holmes' presumed ability to separate language that matters from language that does not. The majority in *Abrams* determines that five political activists (sentenced under espionage and sedition acts for distributing leaflets against the decision to send American troops into Russia after the Revolution of 1917) have not been deprived of their freedom of speech under the Constitution.¹³³ Holmes, dissenting, asks two straightforward legal questions about the language at issue. Did the defendants *intend* their language to hinder the American war effort with Germany, as the Espionage Act of 1917 would require? And did that language give rise to a clear and present danger that this unlawful objective would be accomplished, as the test for limiting free speech of

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¹²⁹ Wyzanski, 7 Vand.L.Rev. at 318-319 (cited in note 82).

¹³⁰ Lerner, *The Mind And Faith Of Justice Holmes* at 306 (cited in note 51).

¹³¹ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes dissenting).

¹³² For one of many analyses of the legal and political considerations of *Abrams*, see Samuel J. Konefsky, *The Legacy of Holmes and Brandeis* 202-210 (1956).

¹³³ *Abrams*, 250 U.S. at 616-624.

Schenck v. United States stipulates?¹³⁴ By arrangement, however, Holmes' negative answers thrive upon a much looser rhetorical claim. Over and over again, on a variety of levels, Holmes proves that the defendants' words simply do not count in the larger scheme of things.

The efficacy of language as theme permits a strange and, in the end, poignant reversal. The opening pages of the dissent are given over almost entirely to the defendants' pamphlets. Holmes' clear purpose is to trivialize their meaning and importance. His level, descriptive tones humorously deflate the brag and bounce of radical pamphleteering. Selected passages from the defendants' writings suffer in that contrast. In Holmes' terms, these excerpts are "pronunciamentos" and "usual tall talk."¹³⁵ The first pamphlet is "a silly leaflet by an unknown man," and the two together amount to "poor and puny anonymities." As for the authors, they avow "a creed that I believe to be the creed of ignorance and immaturity when honestly held." Holmes' peroration, which follows immediately, further marginalizes the defendants as literary incompetents, but it also reinforces a more substantive message. Readers of the opinion can safely leave the views of the defendants to a "free trade in ideas" because those views, in their pronounced ignorance and immaturity, will surely fail in "the competition of the market."

Eloquence notwithstanding, there is a catch to this logic that Holmes turns magically to use. Seeing himself with characteristic clarity, Holmes realizes that his own words have failed in the free market place of ideas. Seven colleagues, the overwhelming majority of the Court, have just rejected the suasion and fluency of his opinion. His conclusion exchanges more fine language for an affecting admission: "I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States." Modesty is not a Holmesian virtue, and the writer is quite aware of how impressive his language has been. His purposes here are restorative.

The closure of *Abrams* invests both subject and writer with another level of meaning. The trivialized defendants receive a new and higher dignity as communal members unjustly punished for

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¹³⁴ 249 U.S. 47, 52 (1919). In *Schenck*, Holmes himself creates the clear and present danger test for a unanimous Court just eight months before *Abrams*.

¹³⁵ For the quotations from *Abrams* in the rest of this paragraph and the next, see, in order, 250 U.S. at 626, 628, 629, 629, 630, 631 (Holmes dissenting).

their beliefs. Meanwhile, the judge's truest mission is his answer in defeat. By accepting the power of thought as the best test of truth, he commits himself to an incessant search for more impressive language. All of Holmes' integrity lives in this definition of the judge as wordsmith. As he argues in another case, "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."¹³⁶ The judge's salvation is the writer. Next time and with the proper effort, the writer can hope that word, use, and circumstance will combine in the true power of thought and that the new combination will reach those who currently remain unconvinced. Certainly, the judge agrees to try. In Holmes' words, "the main excitement of life is the gradual weaving of one's contribution into the practical system of the law."¹³⁷

IX. CONCLUSION

We have learned that Holmes' acts of self-creation fit within a larger symbolic construction of authority. If others picture Holmes vividly, it is because he already has seen and then placed himself so clearly. His success is one more indication, to use the language of cultural anthropology, "that legal thought is constructive of social realities rather than merely reflective of them."¹³⁸ Holmes shows his own instinctive appreciation of the distinction when he credits John Marshall with "the rise of a new body of jurisprudence, by which guiding principles are raised above the reach of statute and State, and judges are entrusted with a solemn and hitherto unheard-of authority and duty."¹³⁹ His own career represents the exercise of this authority through cases "which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."¹⁴⁰ As early as 1865, while still at the Harvard Law School, Holmes seems to have understood that he would create a dynamic intellectual autobiography in the law. "What he cared about," explains Felix Frankfurter much later, "was transforming thought."¹⁴¹

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¹³⁶ *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

¹³⁷ *Howe*, 2 *Justice Holmes* at 282 (cited in note 57).

¹³⁸ Clifford Geertz, *Local Knowledge* 5, 232 (1983).

¹³⁹ Holmes, *Collected Legal Papers* at 270 (cited in note 16).

¹⁴⁰ *Id.* at 269.

¹⁴¹ Frankfurter, *Of Law and Men* at 176 (cited in note 2). Holmes' first admission of writing his autobiography in law goes to none other than Ralph Waldo Emerson. See *Howe*, 1 *Justice Holmes* at 203 (cited in note 57).

These comments stress the construction of a reality. They do not qualify or obscure Holmes' contributions to judicial moderation, but neither should they be understood entirely under a rubric of restraint. To recognize the extent of Holmes' creativity is to realize that assumptions about traditional constraints may be overstated in discussions of judicial performance. The implications of correcting that imbalance are far-reaching. Obviously, creativity and constraint both obtain; the need for the latter cannot be overemphasized in a republic. But the nature of the judicial function demands a greater awareness of the creativity that judges bring to the process. The notion that a vague respect for tradition will somehow control ill-defined tendencies is a faulty one. Safety lies in articulation.

The greatest danger in the judicial figure is when it becomes its own explanation or when explanations are no longer given. Reverence for the law as a separate enterprise encourages a kind of fetishism in this regard. To take the accepted definition, "fetishism occurs when the mind ceases to realize that it has itself created the outward images or things to which it subsequently posits itself as in some sort of subservient relation."¹⁴² Thus, in a republic of laws, the fetishist forgets that law and the judicial figure are created projections and not universal truths. We have seen how the figure of Holmes, or rather how the veneration in which it is held, contributes to these tendencies. Among other things, a careful understanding of the constructed figure is a safeguard in controlling patterns of emulation.

Even Holmes occasionally forgets that *he* is the magician at work. As he tells the Suffolk Bar Association:

What a subject is this in which we are united—this abstraction called the Law, wherein, as in a magic mirror, we see reflected, not only our own lives, but the lives of all men that have been! When I think on this majestic theme, my eyes dazzle. If we are to speak of the law as our mistress, we who are here know that she is a mistress . . . only to be won by straining all the faculties by which man is likeliest to a god.¹⁴³

These sentiments indicate how easily Holmes' mastery of the law enables him to represent a knowledge beyond his own and how readily others accept that representation as the ultimate standard

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¹⁴² David Simpson, *Fetishism and Imagination* xiii (1982). For a short, theoretical account of the concept, see W.J.T. Mitchell, *Iconology* 190-196 (1986).

¹⁴³ Howe, ed., *Occasional Speeches* at 21 (cited in note 78).

of larger realities.

The mirror of the law is magic because the viewer constructs what it reflects. Holmes, looking into this glass, sees that "[t]he hated capitalist is simply the mediator, the prophet, the adjuster according to his divination of the future desire."¹⁴⁴ He sees that "the crowd now has substantially all there is, that the luxuries of the few are a drop in the bucket, and that unless you make war on moderate comfort there is no general economic question."¹⁴⁵ He also *fails* to see any special cause for turmoil over the trial of Sacco and Vanzetti; those who do "have lost their sense of proportion."¹⁴⁶ In each instance, the mirror of the law confirms a very particular knowledge of the moment. Another viewer, then as now, will easily find a different reflection in the same glass.

In our recognition of relativity there is much to question in Holmes. His tenure as a judge, from 1883 to 1932, corresponds almost exactly with that period when American courts used government by injunction, a restrictive use of antitrust law, and rigid enforcement of the right of contract to protect corporate and other propertied interests against fair labor practice and the rights of minorities. Holmes brings an ambiguous ideology and a mixed court record to these issues, and, in the process, he can appear to be everything from romanticist, idealist, and mystic to positivist, realist, Darwinist, skeptic, and cynic.¹⁴⁷ The master craftsman and inspiring philosopher can also be the narrowest and most unattractive of tacticians. "I hate justice," he tells Learned Hand, ". . . That is not my job. My job is to play the game according to the rules."¹⁴⁸ But the job and the rules are not so clear in many of Holmes' decisions. As the *Abrams* dissent demonstrates, the patrician is not above ridiculing the people whose rights he must protect.¹⁴⁹

¹⁴⁴ Holmes, *Collected Legal Papers* at 294 (cited in note 16).

¹⁴⁵ Howe, ed., 1 *Holmes-Pollock Letters* at 124 (cited in note 69).

¹⁴⁶ Howe, ed., 2 *Holmes-Laski Letters* at 999, 974-976, 993 (cited in note 105).

¹⁴⁷ For a summary of these ambiguities and of Holmes' mixed record in decisions, see White, 39 *U.Chi.L.Rev.* at 51-77 (cited in note 61). White uses these ambiguities to indicate how Holmes can be all things to all people.

¹⁴⁸ Quoted in Shriver, *What Gusto* at 10 (cited in note 116).

¹⁴⁹ The standard example of Holmes' insensitivity is *Buck v. Bell*, 274 U.S. 200 (1927). Writing for the majority of the Court, Holmes affirms a lower court ruling that enforces a statute for the sterilization of inmates in institutions for the mentally retarded. The opinion dwells on the need to "prevent our being swamped with incompetence" and to "prevent those who are manifestly unfit from continuing their kind." *Id.* at 207. After a perfunctory glance at the lineage of the plaintiff in error, Holmes brusquely concludes that "[t]hree generations of imbeciles are enough." *Id.*

How, then, do the career and writings attain their timeless appeal or, better, their worthiness? When scholars answer with Holmes' legal realism (the judge's role in intuitive policy choices), his insistence upon judicial deference to "representative" decision making, and his "distinctively arresting style," style is the lost element of explanation.¹⁵⁰ We have learned that the merit of Holmes' opinions has much to do with the forgotten element of expression first noted—expression meaning the largest articulation of judicial identity, vitality, and meaning and not just the surfaces of language. Properly understood, the deeper structures of language provide the discrete system of signs that *make* identity.¹⁵¹ For Holmes, in the language of the law, the policy making identity of the judge and the intuitive act of writing cohere in a designated spokesman who reaches for words that all are meant to hear and obey.

To the extent that Holmes, the realist, rejects the judicial opinion as a simple reflection of preexistent legal principles and, conversely, accepts that same opinion as the text for settling conflicting ideas about public policy, he commits himself to a very creative or responsive use of language. Judge Wyzanski describes the overall goal of this judge as designated spokesman:

the opinions of the Supreme Court have been a text unto the people. Read in the daily press, studied in the common school, knotted into the rope of enduring history, they may well be the largest single contribution to the philosophy of the American way of life.¹⁵²

These words must be understood against a negative addendum: namely, the realization that "specialized knowledge can give neither structure nor direction to the conception of a general culture."¹⁵³ The unavoidable tension between the people's text and

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¹⁵⁰ For the best, succinct appraisal of these elements in the Holmesian legacy, see G. Edward White, *The Integrity of Holmes' Jurisprudence*, 10 Hofstra L.Rev. 663, 665-671 (1982). Even so, this appraisal, like so many others, tends to think of style only in minimalist terms. "But can one remember Holmes as more than the author of arresting epigrams?" asks G. Edward White in summarizing his discussion of the issue. *Id.* at 666.

¹⁵¹ The term of the moment to describe this process is "ethnographic self-fashioning." Thus, Stephen J. Greenblatt discusses "an increased self-consciousness about the fashioning of human identity as a manipulable, artful process." Stepehn Greenblatt, *Renaissance Self-Fashioning* 2 (1980). "The fashioned, fictional self," adds James Clifford, "is always located with reference to its *culture* and coded modes of expression, its *language*." James Clifford, *The Predicament of Culture* 94 (1988). See generally, *id.* at 92-113, particularly at 93-95.

¹⁵² Charles E. Wyzanski, Jr., *Atlantic Portrait: Brandeis*, *Atlantic Monthly* 66, 67 (Nov. 1956).

¹⁵³ Magali Sarfatti Larson, *The Production of Expertise and the Constitution of Expert*

the encroachment of specialized knowledge is perhaps the greatest burden in a rule of law. Moreover, the size of the burden grows daily in Judge Jerome Frank's claim that "the average judicial opinion is so worded that, at best, only lawyers can comprehend it."¹⁵⁴

Holmes responds to this problem as no other figure. His opinions attract because the legal exchanges of today—cast in the bureaucratic jargon of the law clerk—lack every vitality of language and therefore of real communication. No wonder we hear cries for a "new law talk," "a new language of power that does justice to the aspirations for justice of our fellow citizens."¹⁵⁵ For all of his aristocracy of vision, Holmes works within the saving value of common language. He reaches for the largest audience, and he insists upon a connection between professional knowledge and general explanation. Among the first to encourage an "army of specialists" in the law, he still expects language to reduce the most complex case to simple, manageable terms.¹⁵⁶ His book, *The Common Law*, may be the last scholarly legal text in American culture to seek the general reader in a collective act of recognition. His judicial opinions attract every reader into the enterprise.

This legacy is not as simple as it may first sound. For a judge to write a universal prose in this way requires the firmest sense of literary and cultural purpose. Holmes is committed to the belief that ruler and ruled must meet in a crucial moment of intellectual comprehension. "The first requirement of a sound body of law," he explains in *The Common Law*, "is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."¹⁵⁷ Language that fails to tap this essential correspondence, that fails to communicate, is wasted. "A generalization," he writes in "Law In Science—Science In Law," "is empty so far as it is general. Its value depends on the number of particulars which it

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Power, in Thomas L. Haskell, ed., *The Authority of Experts* 28, 51 (1984).

¹⁵⁴ Frank, *Courts on Trial* at 258 (cited in note 28).

¹⁵⁵ See Bruce A. Ackerman, Foreword: Law in an Activist State, 92 *Yale L.J.* 1083, 1084-1085, 1099 (1983). Ackerman's "new form of power-talk" actually seeks a more particular specialization of professional language, but it assumes a similar failure in current modes of address.

¹⁵⁶ Holmes, *Collected Legal Papers* at 38, 47-48, 248 (cited in note 16). Holmes put the matter most succinctly in a letter to John Wu on May 14, 1923: "a thousand times I have thought that I was hopelessly stupid and as many have found that when I got hold of the language there was no such thing as a difficult case." Lerner, ed., *The Mind and Faith of Justice Holmes* at 421 (cited in note 51).

¹⁵⁷ Holmes, *The Common Law* at 41 (cited in note 56).

calls up to the speaker and the hearer."¹⁵⁸

Speaker *and* hearer create meaning in the particularity and concreteness of language. Holmes understands the problem that this gives the professional spokesman, but anything less than "the eternal pursuit of the more exact" is "intellectual indolence or weakness." This pursuit is a joint enterprise. The writer's determination to find the best language is a struggle for all to share. We share it by seeing and comprehending the writer, in this case the judicial figure, within prose designed for that purpose. Holmes makes the point in a characteristic combination of thought, persona, adventure, and stylistic concision. "Every living sentence which shows a mind at work for itself," he tells us, "is to be welcomed."¹⁵⁹

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¹⁵⁸ Oliver Wendell Holmes, *Law in Science—Science in Law*, 12 *Harv.L.Rev.* 443, 461 (1899).

¹⁵⁹ For the quotations in this paragraph, see *id.* at 455.