Judge Holmes' Life Plan: Confronting Passion, Ambition and Powerlessness

G. Edward White
HOLMES'S "LIFE PLAN": CONFRONTING AMBITION, PASSION, AND POWERLESSNESS

G. EDWARD WHITE*

INTRODUCTION

The long history of the literature on Justice Oliver Wendell Holmes has taken yet another turn. With the publication of Gary Aichele's Oliver Wendell Holmes, Jr.1 and Sheldon Novick's Honorable Justice,2 two new one-volume biographies of Holmes have surfaced. They are the first such volumes to have the advantage of significant developments in Holmesian scholarship in the 1980s, including the outpouring of "revisionist" work precipitated by (and coincidental to) the centennial of The Common Law's publication and the microfilm dissemination in 1985 of Harvard Law School's collection of Holmes's Papers.3 An account of those developments would be interesting in itself, but that is not this Article's purpose. Nor does the Article undertake a detailed review of the Aichele and Novick volumes, both of which have received attention.4

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1 G. Aichele, Oliver Wendell Holmes, Jr.—Soldier, Scholar, Judge (1989).
3 In this Essay, all citations to unpublished letters in the Microfilm Edition of the Oliver Wendell Holmes, Jr. Papers (University Microfilm Publications 1985) are hereinafter referred to as Holmes Papers. Copies of cited letters in that collection are on file at the New York University Law Review.
Rather, this Article is prompted by a Book Note of Novick's biography that argues that he "fails to explain adequately the relationship between Holmes's private life and Holmes's life as a jurist" and concludes by stating that "the future scholar will have to explore for herself the degree to which Holmes's noteworthy private life connects to his influential public work." A starting premise of this Article, which attempts to articulate such a connection, is that this assessment is essentially correct with regard to both Novick's and Aichele's biographies, although some have thought otherwise.

There are many ways in which one might draw a link between a man's public and private life. This Article attempts to demonstrate one significant connection between Holmes's private and public personae. My effort is to show that both the central concerns of Holmes's professional career and the chief pursuits of his private life emanated from an overriding "life plan," an integrated view of what constitutes a life well spent. Accordingly, although much of my attention will be devoted to personal dimensions of Holmes's life, such as his nonprofessional friendships, notably that with Clare Castletown, my interest is in deriving from those personal data an explanation of Holmes's conception of the significance of his career in the law. The primary goal of the Article, however, is not to show how Holmes's specific jurisprudential ideas followed from the central personal themes of his life, but rather to demonstrate how the persona Holmes adopted for himself as a jurist was the creation of—and an integral part of—his "life plan."
The first part of this Article attempts to defend my criticism of Novick and Aichele by demonstrating how their indiscriminate perpetuation of stereotypes about the relationship between Holmes and his father prevents them from seeing that relationship as the source of a life plan that would serve to define and structure Holmes's public and private aspirations. I then turn to my central argument, which rests on four related propositions. The first is that Holmes constructed a life plan to confront central driving forces within him and to harness them to achieve fame and power. The second proposition is that this life plan was remarkably successful on the surface, enabling Holmes to secure professional accomplishment and personal satisfaction. The third proposition is that, despite its apparent effectiveness, the plan generated considerable personal stress, with respect to both his professional and private lives. As he executed his plan, Holmes came to see that professional recognition and personal intimacy, two of its central goals, were double-edged and therefore also capable of resulting in professional obscurity and personal vulnerability. The fourth proposition is that Holmes ultimately came to understand the ambivalence of his life plan in terms of a fundamental ambivalence in the human condition, consisting of power-seeking and powerlessness, and that the arresting fashion in which he expressed that ambivalence provides the core explanation for the enduring interest in the man, his life, and his work.

I

AICHELE, NOVICK, AND THE INTEGRATION OF HOLMES'S PUBLIC AND PRIVATE LIVES

The two developments in Holmesian scholarship previously mentioned have opened up new opportunities for prospective biographers. The revisionist scholarship of the 1980s suggests that Holmes remains a sufficiently ubiquitous and complex figure to interest scholars with a wide variety of methodological and political perspectives. At the same time, the dissemination of the Holmes Papers on microfilm has provided scholars with a more manageable and accessible archival research base than

Hist. Soc'y 98.

the original Harvard Law School collection.11

Both Aichele and Novick have sought to take advantage of these developments, albeit in different ways. Aichele was commissioned to write a biography designed for students and nonspecialist scholars, with an emphasis on brevity, synthesis, and accessibility.12 Novick's book is aimed at a trade audience and emphasizes events in Holmes's life, especially the latter portion, which had not received biographical treatment for more than forty years.13 Novick's conceded focus is on "the story of Holmes's life as a man" rather than on "Holmes's elusive, tantalizing ideas" or even on Holmes's judicial career,14 a focus that might seem consistent with the volume's intended audience. But despite their different aims, the two authors share an unwillingness to draw explicit links between Holmes's career and his personal life. While both volumes are replete with note and bibliographical citations to the Holmes Papers and to recent scholarly literature discussing Holmes's ideas and professional career, perhaps because they felt constrained by their chosen formats, Aichele and Novick have missed opportunities to use newly accessible materials to present a fresh and interesting portrait of Holmes's personal and professional life.

This flaw is evidenced particularly by both authors' reliance on the standard account of one of the major themes of Holmes's life: his relationship with his father, Oliver Wendell Holmes, Sr., the poet, physician, lecturer, man of letters, and late nineteenth-century household word.15 The standard account, which emerged with the publication of Francis Biddle's Mr. Justice Holmes16 in 1942, and which received a further

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11 Mark DeWolfe Howe, one of Holmes's former clerks, was Holmes's first authorized biographer and had exclusive access to his unpublished letters and diaries. Before his death, Howe completed two of four planned volumes, covering the years 1841 to 1882. M. Howe, Justice Oliver Wendell Holmes: The Proving Years 1870-1882 (1963) [hereinafter M. Howe, Proving Years]; M. Howe, Justice Oliver Wendell Holmes: The Shaping Years 1841-1870 (1957) [hereinafter M. Howe, Shaping Years]. Grant Gilmore, a law professor at Yale, was then given exclusive access to the Holmes papers, but he died before completing any additional work on the biography. In 1985, Harvard Law School made public the Holmes Papers. See Freund, supra note 4, at 503.

12 The book is in the Twayne Biographies series, which is designed to produce short, synthetic biographies for students.

13 See C. Bowen, Yankee from Olympus (1944). The Bowen biography includes some imagined conversations and descriptions of events. See id. at 430.

14 S. Novick, supra note 2, at xviii. Elsewhere in his preface, Novick writes that he had "not tried to evaluate Holmes's contribution to present-day law in any systematic way," that he "refer[s] the reader to Mark Howe's admirable writings" for an assessment of Holmes's early work, and that "[a]s to Holmes's work as a judge and Supreme Court justice, the daunting task remains to be done." Id. at xvi-xviii.

15 On Holmes, Sr., see the authorized biography by John T. Morse, Jr., Life and Letters of Oliver Wendell Holmes (1896); see also M. Howe, Holmes of the Breakfast-Table (1939); E. Tilton, Amiable Autocrat (1947). There is no modern biographical treatment of Holmes, Sr.

16 F. Biddle, Mr. Justice Holmes (1942).
boost from Catherine Drinker Bowen’s *Yankee from Olympus* in 1946, stereotypes Holmes, Sr. and Holmes, Jr. as having had a highly charged, intensely competitive, and not generally amicable relationship. Subsequent scholarship on this relationship, however, indicates that Holmes, Jr. was not estranged from his father and that the relationship was in fact deep and complex.

Aichele, however, chooses to repeat the original stereotype in a particularly bald fashion. He asserts that “an intense rivalry...developed between [Holmes, Sr. and Holmes, Jr.], a struggle of such emotional intensity that it dwarfed all others”; that “Dr. Holmes seemed intent on undermining his son’s self-confidence at every turn”; and that Holmes, Jr. “felt closer to Emerson, ‘Uncle Waldo,’ than to his own father.” In support of these assertions, he cites the Biddle and Bowen books, neither of which provides documentation for their interpretations of the relationship between Holmes, Sr. and Holmes, Jr., as well as a letter Holmes, Jr. wrote to Sir Frederick Pollock in 1930 which states that “[t]he only fire-brand of my youth that burns to me as brightly as ever is Emerson.”

The problem with Aichele’s treatment is not that it is wholly unsupported. Evidence of tensions between the two men exists. For example, Aichele quotes an 1873 letter from William James to his father, Henry James, Sr., written after an evening at the senior Holmeses (where Holmes, Jr. and his wife, Fanny Bowditch Dixwell, were living at the time), reporting that “no love is lost between W. père and W. fils.” He

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17 C. Bowen, supra note 13.
18 See F. Biddle, supra note 16, at 26-30; C. Bowen, supra note 13, at 122-23, 180-82.
19 See Hoffheimer, supra note 9, at 100-11. The Hoffheimer essay may well have been published too late, and its discussion may have been too overtly psychological, for Aichele to take note of it. But Aichele cites Arnold Goldsmith’s Oliver Wendell Holmes: Father and Son, 48 J. Crim. Law, Criminology & Pol. Sci. 394 (1957), an earlier account of the Holmes, Sr.-Holmes, Jr. relationship, so he was clearly aware that some scholars had been interested in exploring the relationship in depth. See also M. Howe, Shaping Years, supra note 11, at 11-12, 15, 18-20, 27-28, 130-31, 150-51, 285.
20 G. Aichele, supra note 1, at 2.
21 Id.
22 Id. at 17.
23 Letter from Oliver W. Holmes, Jr. to Sir Frederick Pollock (May 20, 1930), reprinted in 2 Holmes-Pollock Letters 264 (M. Howe ed. 1961) [hereinafter Holmes-Pollock Letters]. Biddle mentioned this letter, F. Biddle, supra note 16, at 24, and went on to say that “[H]olmes, Jr.’s] father and Mr. Emerson were very different sorts of men,” id. at 25, but nowhere suggested that Holmes, Jr. felt closer to Emerson than to his father. At another place in his biography Biddle suggested that “[t]he good doctor had a habit of deprecating his boy, long after the boy was grown to manhood” and that Holmes, Sr. “could never get away from treating this particular son as a child, perhaps because he felt the sense of rivalry.” Id. at 28, 29. He gave no support for those claims, however. Bowen’s *Yankee from Olympus* had as one of its major themes the relationship between Holmes, Sr. and Holmes, Jr., and similarly painted it as competitive and sometimes disagreeable. See C. Bowen, supra note 13, at 180.
24 Letter from William James to Henry James, Sr. (Mar. 18, 1873), reprinted in M. Howe,
is also aware of a question put by Dr. Holmes to the same Henry James, Sr., quoted in a James family reminiscence, as to whether James was under the impression that James’s sons despised him, as Holmes evidently thought his own sons did him.25

The problem, rather, is that Aichele so overstates this facet of the relationship that any positive link between father and son is obscured. Even a determined belief that there was continual tension between them hardly merits the treatment of the relationship offered by Aichele. Consider this passage:

Wendell looked forward to the days the family spent in Cambridge, visiting Grandmother and Uncle John. He would often go to see his teacher, Mr. Dixwell; together they would take walks along the river, discussing whatever happened to be on the young boy’s mind. It was upon these two men that Wendell depended for the love and support his father seemed peculiarly unable to provide, and together, they guided the boy’s inquisitive mind, assuring him through their affection that he was going to be a fine young man.

The time Wendell did spend alone with his father was infrequent and generally difficult for both of them. Perhaps because they were too much alike, the father wanted always to be right, and the son chafed at always being wrong. Undoubtedly, Dr. Holmes loved his son, but his straight-laced New England manners and nearly constant criticism contributed significantly to his son’s discontent.26

In support of the generalizations in these paragraphs, Aichele cites Bowen’s biography,27 the first volume of Howe’s authorized biography,28 and an article by Arnold Goldsmith in the Journal of Criminal Law, Criminology, and Political Science entitled “Oliver Wendell Holmes, Fa-

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25 The comment was recounted in the journal of Alice James, the sister of Henry James, Jr. and William James. See Alice James: Her Brothers, Her Journal 122 (A. Burr ed. 1934) [hereinafter Alice James Journal]. Alice James’s reminiscence has been widely cited by scholars. See, e.g., M. Howe, Shaping Years, supra note 11, at 11. Aichele alludes to the comment. See G. Aichele, supra note 1, at 17.

26 G. Aichele, supra note 1, at 23-24.

27 C. Bowen, supra note 13.

28 M. Howe, Shaping Years, supra note 11.
ther and Son,” which Aichele calls “a provocative view of the father-son relationship.”

None of those sources provides adequate support for Aichele’s claims. The cited page from Bowen’s book merely states that Holmes liked to row on the river with his father and that in later life he felt that his father had convinced him “that he . . . was really ugly.” The pages cited in the Howe volume discuss many of the same issues that Aichele mentions in the passage, but in a quite different fashion. Howe quotes an 1882 letter from Holmes, Jr. to E.S. Dixwell, then his father-in-law, in which Holmes wrote that they took walks together “and talk[ed] of all topics” when Holmes was attending Dixwell’s grammar school, but there is no mention of Wendell Holmes’s dependence on Dixwell “for the love and support his father seemed peculiarly unable to provide.” While Howe’s general discussion of the father-son relationship acknowledges that “[t]he evidence of strain [between the two Holmes men] is too clear to permit the belief that their considerable similarities of conviction, taste, and style overcame fully the antagonism of disparate temperaments,” Howe also suggests, after quoting a humorous and affectionate letter written by Holmes, Sr. to his son, that “it is hard to think that a relationship, colored by such gaiety, was intensely strained.” Finally, the Goldsmith article is principally devoted to advancing the thesis that Holmes, Sr. was an “intellectual influence” on his son. It emphasizes the two men’s common intellectual interests and common scholarly language; it is not concerned with strains in their relationship.

In short, Aichele’s claim that Holmes “chafed” under his father’s “straight-laced New England manners and nearly constant criticism,” and that he depended on his Uncle John Holmes and E.S. Dixwell rather than his father for “love and support,” amounts to a largely unsubstantiated repetition of the stereotype. Indeed, Aichele even embellishes upon the stereotype by emphasizing the purported importance to Holmes of older male role models who compensated for his dissatisfaction with his relationship with his father. Such claims may make for dramatic biographical narrative, but they also serve as barriers to a complex understanding of historical figures.

Novick’s treatment of the father-son relationship is even less bal-

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29 Goldsmith, supra note 19.
30 G. Aichele, supra note 1, at 175.
31 C. Bowen, supra note 13, at 110.
32 M. Howe, Shaping Years, supra note 11, at 6.
33 Id. at 27.
34 Id. at 28.
35 Goldsmith, supra note 19, at 394.
36 See id. at 394-98.
anced. One might have anticipated this from the tone of Novick’s preface, which asserts that “Justice Holmes proved to be a shadowed figure, marked by the bigotry and sexism of his age, who in personal letters seemed to espouse a kind of fascist ideology. He was a violent, combative, womanizing aristocrat whose contribution to the development of law was surprisingly difficult to define.”37 None of these assertions is documented by Novick in his biography. Novick merely establishes that Holmes, like virtually all of his Victorian- and Edwardian-educated contemporaries, had attitudes toward racial and gender issues that contemporary educated Americans no longer find acceptable.38 This fact demonstrates nothing unique or revealing about Holmes. Moreover, while Holmes in some correspondence expressed Malthusian views of population propagation and ultrapositivist conceptions of the power of those representing the state,39 in other correspondence he portrayed himself as a strong believer in “the safeguards in bills of rights” and an opponent of collectivism.40 Even considering the subjective element in Novick’s characterization of Holmes, Jr. as someone who “seemed to espouse a Fascist ideology,”41 it appears to be one-sided.42

Not surprisingly, then, Novick’s portrayal of the father-son relation-

37. S. Novick, supra note 2, at xvii.
38. See, e.g., S. Novick, supra note 2, at 127 (referring to Holmes’s “detached tone” in writing about events in South following Civil War).
40. See Letter from Oliver W. Holmes, Jr. to Sir Frederick Pollock (Sept. 19, 1919), reprinted in 2 Holmes-Pollock Letters, supra note 23, at 24-25.
41. S. Novick, supra note 2, at xvii.
42. In addition, Novick’s narrative does not portray Holmes as personally violent. It only hints that he may have been attracted, in an abstract fashion, to some forms of organized violence, such as war or dangerous sports. See S. Novick, supra note 2, at 75 (discussing Holmes, Jr.’s enthusiasm for his Civil War regiment); see also Address by Oliver W. Holmes, Jr., The Soldier’s Faith (May 30, 1895) [hereinafter The Soldier’s Faith] (“high and dangerous action teaches us to believe as right beyond dispute things for which our doubting minds are slow to find words of proof”), reprinted in The Occasional Speeches of Justice Holmes 73 (M. Howe ed. 1962) [hereinafter Occasional Speeches]; id. (“I rejoice at every dangerous sport which I see pursued.”), reprinted in Occasional Speeches, supra, at 80.

Nor can Novick’s narrative fairly be said to support his characterization of Holmes as “womanizing,” at least in the current meaning of that term. Novick offers no evidence that Holmes had an extramarital affair, even with Lady Clare Castletown, who was the recipient of more than 100 “love letters” from Holmes between 1896 and 1927, see Monagan, The Love Letters of Justice Holmes, Boston Globe Mag., Mar. 24, 1985, at 15, several of which are quoted by Novick; see S. Novick, supra note 2, at 211-19, 221, 229. Finally, Novick’s statement that Holmes’s “contribution to the development of law was surprisingly difficult to define,” read in the context in which it appears, could be taken as a suggestion that Holmes’s contributions were obscure or perhaps overrated. But, as noted, Novick’s biography does “not tr[y] to evaluate Holmes’s contribution to present-day law in any systematic way.” Id. at xvii.

“As to Holmes’s work as a judge and Supreme Court justice,” Novick admits, “the daunting task remains to be done.” Id. at xviii.
ship is equally one-sided and undiscerning, as the following passages illustrate:

Dr. Holmes, although very liberal in his own views, kept the children to a strict orthodoxy in behavior . . . . He chastised young Wendie . . . regularly.43

. . . .

'Melia and Ned [Holmes's siblings] talked loudly, but the doctor's attention was most often turned to his eldest son. Father and son had begun their rivalry . . . .

As Wendie grew older, he learned to hold his ground; but he was always under assault. . . .

[The exchanges between father and son were] not always fair. The doctor teased Wendie about his appearance, especially his boyish, long thin neck . . .

Wendell, with his thin neck, would never make an orator or a lawyer, his father said. Wendell became sensitive about his appearance, and the doctor could not resist teasing him about it.44

. . . .

Wendell was sixteen years old, and ready for college, when his father became the famous Autocrat of the Breakfast Table, displaying in each month's *Atlantic* the doctor's wit and his son's frailty.45

. . . .

[Upon his mustering out of his Civil War regiment] Holmes was joyously welcomed by [his] family, their two servants, and a few neighbors who had stayed in town. The doctor perhaps was a little reserved, keeping Holmes at a distance with his cheerful talk.46

. . . .

At the tea table, Holmes and the doctor carried on their dialogue. The doctor, to be sure, did most of the talking; Holmes was watchful, guarded.47

In these passages, Holmes, Sr. appears the dogmatic, overbearing father whose primary interest in his son is as an object for ridicule, while Holmes, Jr. appears the reserved but resentful son, chafing under the garrulous presence of his celebrity father. Although this portrait is consistent with and rounds out the stereotype created by Biddle and Bowen and perpetuated by Aichele, Novick offers little support for any of his above-quoted assertions or insinuations about the men's relationship. Indeed, the only piece of evidence Novick presents relevant to these characterizations is a letter the eighty-five-year-old Holmes, Jr. wrote to Felix Frankfurter remembering his father "drooling over the physical short-

43 S. Novick, supra note 2, at 10.
44 Id. at 13-14.
45 Id. at 20.
46 Id. at 94.
47 Id. at 140.
comings of himself and his son."  

I have chosen to focus on the treatment of Holmes's relationship with his father in the Aichele and Novick biographies because this relationship is appropriately a central theme of the literature on Holmes's life. Holmes was the famous son of an arguably even more famous father, and his own search for fame was intertwined with his father's prominence. A clarification of the relationship could provide some important clues to the motivation behind several decisions Holmes made in his life, such as volunteering to serve in the Civil War (his father's reaction to Abolitionism was far less enthusiastic than his), entering into the legal profession (his father had briefly attended Harvard Law School, only to abandon the law for medicine), foresaking his initial interest in writing poetry and literary essays once he entered the legal profession (his father had continued in those media after becoming a doctor), and even growing a handlebar mustache (his father was clean-shaven). By merely repeating and embellishing upon stereotyped views of that relationship, Aichele and Novick have missed a wealth of opportunities not only to understand Holmes's personal life, but also to begin to integrate the private and the public Holmes.

In fact, a re-examination of Holmes's relationship with his father reveals that, whatever the tensions between the two, Holmes, Jr. took from his father a plan for his own life; a plan that explicitly sought to integrate his public work with his private life. In the organization of his own life, Holmes, Sr. offered his son an effective blueprint for becoming famous and for preserving that fame while simultaneously securing a sheltered and self-absorbed existence.

To his son, the senior Holmes's life may well have seemed worthy of emulation. After becoming a youthful celebrity with the publication of the poem, "Old Ironsides," Holmes, Sr. entered a profes-

48 Letter from Oliver W. Holmes, Jr. to Felix Frankfurter (May 21, 1926) (emphasis added), in Holmes Papers, supra note 3, quoted in M. Howe, Shaping Years, supra note 11, at 27. Novick surmises that the shared "physical shortcoming" to which Holmes, Sr. referred was the thinness of the Holmes men's necks. See S. Novick, supra note 2, at 14. This may be accurate: Biddle, who was Holmes's law clerk in 1912, writes in an imagined narrative that young Wendell "didn't think [his father] was fair when he said that Wendell would never make a great speaker because his neck was too thin." F. Biddle, supra note 16, at 27. Novick quotes an "Autocrat of the Breakfast-Table" essay by Holmes, Sr. in which he describes "[t]he stately neck" as "manhood's manliest part," suggesting that Holmes, Sr. regarded thin necks as a physical deficiency. See S. Novick, supra note 2, at 14 (quoting O.W. Holmes, Sr., The Autocrat of the Breakfast-Table, in 1 The Collected Works of Oliver Wendell Holmes 1, 7 (1891)). But since photographs of Holmes, Sr. suggest that he shared his son's tendency toward lean-ness in the neck area, the criticism could have been made of himself as well as of his son.

49 See text accompanying notes 104-24 infra.

50 On the mustache and other themes of the father-son relationship, see Hoffheimer, supra note 9, at 100-100.

51 See S. Novick, supra note 2, at 5. The poem was written and published in September
sion,\textsuperscript{52} engaged in original, and ultimately renowned, professional scholarship,\textsuperscript{53} and accepted a professorship at Harvard University.\textsuperscript{54} His primary public renown, however, was for his works of literature, for which Holmes, Jr. thought his family had "a strong bent."\textsuperscript{55} With that fame secured, Holmes, Sr. continued his association with Harvard but devoted more and more time to his novels, essays, and literary enterprises. His private life was structured with his public role as a famous literary personage in mind. His household was organized around himself, with his wife, Amelia Jackson, and his children assuming supportive roles.\textsuperscript{56} After Amelia's death in 1888, her role was adopted by his daughter Amelia and subsequently by his daughter-in-law Fanny Dixwell.\textsuperscript{57} Thus, from Holmes, Sr.'s first moment of unquestioned fame in 1857, when the "Autocrat" essays appeared, to his death in 1894, he lived and worked in a household whose principal caretaker was a woman relative devoted wholly to him. Moreover, the members of the household, as well as his professional pursuits, provided material for his literary offerings.\textsuperscript{58}

Thus, from at least his sixteenth year on, Holmes, Jr. was exposed to a famous father with a quite discernible way of conducting his personal and professional life. It can thus hardly be coincidental that after Holmes, Jr. became a different sort of youthful celebrity as a thrice-wounded Civil War survivor,\textsuperscript{59} he would enter a profession, undertake original, and ultimately renowned, professional scholarship, and accept a professorship at Harvard University. It is perhaps also not coincidental that Holmes, Jr.'s public "fame," in the sense of the far wider public engagement with his life and career than with other eminent members of the legal profession, cannot be linked to any of those accomplishments

\textsuperscript{1830.} 
\textsuperscript{52} Holmes, Sr. entered Harvard Medical School in 1830. He began to practice medicine in 1836, working at the Boston Dispensary. See E. Tilton, supra note 15, at 67-68, 142.
\textsuperscript{53} See, e.g., Holmes, Sr., The Contagiousness of Puerperal Fever, reprinted in E. Tilton, supra note 15, at 172 (originally published in New Eng. Q.J. Med. & Surgery (1843)). On the reception of Holmes, Sr.'s essay on puerperal fever, see E. Tilton, supra note 15, at 176. In 1914, Holmes, Jr. wrote Clara Stevens that "[his father's] early medical work . . . really was big (the puerperal fever business)." Letter from Oliver W. Holmes, Jr. to Clara Stevens (July 26, 1914), quoted in M. Howe, Shaping Years, supra note 11, at 19.
\textsuperscript{54} See E. Tilton, supra note 15, at 189.
\textsuperscript{55} M. Howe, Shaping Years, supra note 11, at 76.
\textsuperscript{57} See id. at 373, 376.
\textsuperscript{58} See, e.g., O.W. Holmes, Sr., The Autocrat of the Breakfast-Table, in 1 The Writings of Oliver Wendell Holmes Sr. 230-33 (Riverside ed. 1891) [hereinafter Writings of Holmes, Sr.]; O.W. Holmes, Sr., The Poet at the Breakfast-Table, in 1 Writings of Holmes, Sr., supra, at 147; O.W. Holmes, Sr., The Professor at the Breakfast-Table, in 1 Writings of Holmes, Sr., supra, at 94-95; see also S. Novick, supra note 2, at 129-30 (on Holmes, Sr.'s use of family in writing The Poet at the Breakfast-Table).
\textsuperscript{59} See text accompanying notes 72-79 infra.
but instead to what might be called "literature": the memorable language of his judicial opinions and extrajudicial writings. Further, it seems not mere coincidence that Holmes, Jr.’s private life was also organized around himself and his work. After his marriage to Fanny Dixwell in 1872, his professional pursuits were also the focus of her life. The domestic arrangements of his life were made by others, and his leisure time was spent on activities that he chose.

Yet if the form of Holmes, Jr.'s life mirrored that of his father's, its content reflected a more complex legacy. In a history of the two men's relationship, themes of opposition can be emphasized as fully as those of similarity. Holmes, Sr. was of short stature and unprepossessing appearance; his son was tall and striking. Holmes, Sr. did not like legal study and abandoned it; Holmes, Jr. wrote William James that he had come to like the law above all other pursuits. Holmes, Sr. was at first a skeptic and later a strong enthusiast of the Union cause in the Civil War; Holmes, Jr. was at first a strong enthusiast and then a skeptic of the same cause. In the flowering of his professional success, Holmes, Sr. was the very model of the versatile, educated Bostonian, equally comfortable in medicine, literature, lyceum lecturing, and current events; Holmes, Jr. directed his professional energies toward narrowing and refining his field of study, abandoning literature and philosophy along the way.

Contemporaries of Holmes, Sr. remarked on his vivaciousness, loquacity, and sociability; contemporaries of Holmes, Jr., especially during his

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See Letter from Oliver W. Holmes, Sr. to Phineas Barnes (Mar. 25, 1831), quoted in E. Tilton, supra note 15, at 69.


See M. Howe, Proving Years, supra note 11, at 88 (arguing that Holmes, Sr. "could not bring himself, before the war, to condemn the slaveholders of the South"); M. Howe, Shaping Years, supra note 11, at 24-25 (Holmes, Sr. referred to himself as "an 'unconvinced' conservative or I might say as well a sceptical radical"); E. Tilton, supra note 15, at 227 (describing Holmes, Sr.'s ambivalence toward abolitionists).

See Holmes, Sr., The Inevitable Trial, in Mechanism in Thought and Morals, 8 Writings of Holmes, Sr., supra note 58, at 78, 90-91. For more discussion of Holmes, Sr.'s views on the Union cause, see also M. Howe, Shaping Years, supra note 11, at 145, and E. Tilton, supra note 15, at 228.

See M. Howe, Shaping Years, supra note 11, at 49, 65; see also E. Wilson, Patriotic Gore: Studies in the Literature of the American Civil War 747 (1962) ("Perhaps no one had enlisted at the beginning of the war with a more devoted ardor than Holmes.").

See E. Wilson, supra note 64, at 749-54; Letter from Oliver W. Holmes, Jr. to Amelia Jackson Holmes (June 7, 1864), reprinted in Touched with Fire: Civil War Letters and Diary of Oliver Wendell Holmes Jr. 1861-1864, at 143 (M. Howe ed. 1946) [hereinafter Touched with Fire]; Letter from Oliver W. Holmes, Jr. to Dr. and Mrs. Oliver W. Holmes, Sr. (May 16, 1864), reprinted in Touched with Fire, supra, at 121-23.

See M. Howe, Shaping Years, supra note 11, at 13.

See id. at 203-07, 260-62.

See, e.g., J. Morse, Jr., supra note 15, at 247-48 ("Perhaps no man ... has given ... a
late twenties and thirties, remarked on his self-preoccupation and singlemindedness.\textsuperscript{69} Nonetheless, it would be a mistake to read these unquestioned differences in temperament and belief as evidence of mutual estrangement. Indeed, one might surmise that the departures from his father's example that Holmes, Jr. made in his own career largely reflected a conscious adaptation of his father's framework (within which his father had structured a famous life) to his own character and disposition. One might surmise that Holmes, Jr.'s life plan was a product of the discernible similarity between the men's goals of achieving a certain kind of successful life and the discernible difference in their temperaments.

If this view of the relationship between Holmes, Sr. and Holmes, Jr. is adopted, it becomes clear that it was in fact more complex than the stereotype perpetuated by Aichele and Novick. Thus, before discussing Holmes, Jr.'s life plan in detail, I want to offer an example of how the experiences of his life in the 1860s, in which he fought in the Civil War and entered the legal profession, might be reconsidered in light of a more complex understanding of the father-son relationship.

Holmes, Jr.'s Civil War experience has been justly singled out by commentators as a decisive one in his life. He left Harvard College before graduating to enlist in the Fourth Battalion of the Massachusetts Militia. When it became clear that the Fourth Battalion would not be sent into battle, he secured a commission in the Twentieth Regiment of Massachusetts Volunteer Infantry.\textsuperscript{70} After reluctantly returning briefly to Harvard to take his final examinations in June 1861, he arrived with the Twentieth Regiment outside Washington, D.C. in September and saw his first military action on October 23, 1861.\textsuperscript{71} Within the first hour of action, Holmes was severely wounded in the chest and was sent home on leave.\textsuperscript{72} He returned to service in March 1862\textsuperscript{73} and remained on active duty until September 17, 1862, when he was again wounded, this time in the back of his neck.\textsuperscript{74} He returned to service in November 1862 after again convalescing at home.\textsuperscript{75} Holmes then contracted dysentery,
was hospitalized in Falmouth, Virginia, and then released on sick leave in Philadelphia. By late January 1863, he had recovered sufficiently to return to active service and spent several months in Falmouth preparing for an offensive against the Confederate Army near Fredericksburg. That offensive began on May 2, 1863, and Holmes was wounded in the heel that same day.

This time his recovery was prolonged; he did not return to active duty until January 3, 1864. In the meantime, he had learned to ride horseback and was thus qualified to serve as a temporary staff officer in another corps that would remove him from the infantry line of fire. On January 29, he accepted the position, which he occupied for the remainder of his military service. On July 17, 1864, his original three-year term of enlistment in the Twentieth Regiment expired, and he mustered out of service rather than reenlist for another three-year period, having previously decided to leave service at the first opportunity. As he put it to his mother in June of 1864, “I can do a disagreeable thing or face a great danger coolly enough when I know it is a duty—but a doubt demoralizes me as it does any nervous man.” He also told her that he had waived promotion in his original regiment, opting to stay on as a staff officer. “The ostensible and sufficient reason [for waiving promotion],” he said, “[i]s my honest belief that I cannot now endure the labors and hardships of the line.” But his principal reason for mustering out, he confessed to his mother, was that “now I honestly think the duty of fighting has ceased for me—ceased because I have laboriously and with much suffering of mind and body earned the right . . . to decide for myself how I can best do my duty to myself.”

The war experience was obviously a terrible ordeal for Holmes. Commentators have contrasted the intellectual ideal that motivated him to join the war effort—a chivalric sense of duty toward the antislavery cause—with the horror, tedium, and arbitrariness of his actual exper-

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76 Id. at 141.
77 Id. at 146.
78 Id. at 149.
79 Id. at 154.
80 Id. at 139.
81 Id.
82 Id. at 155-61.
83 Id. at 174-75; see Letter from Oliver W. Holmes, Jr. to Amelia Jackson Holmes (June 7, 1864), supra note 65.
84 Letter from Oliver W. Holmes, Jr. to Amelia Jackson Holmes (June 7, 1864), supra note 65 (emphasis in original).
85 Id.
86 Id. (emphasis in original).
87 See, e.g., Letter from Oliver W. Holmes, Jr. to Charles Eliot Norton (Apr. 17, 1864), quoted in Touched With Fire, supra note 65, at 122 ("[I]f one didn't believe that this war was
It has been said that the war experience nurtured Holmes's skepticism and forged philosophical views which contrasted with those of his father's generation. He did, in fact, subsequently describe his own generation, which had encountered the war, as "touched with fire" and his father's as having "a certain softness of attitude toward the interstitial miracle.

Nonetheless, to see Holmes, Jr.'s Civil War experience as reinforcing an estrangement from his father would be to ignore two central features of that experience. First, Holmes, Jr.'s military service did not consist of long years in active combat, during which he could communicate with his family only by letters; rather, it consisted of sporadic service interspersed with periods of convalescence at home. During his three years of official service, Holmes spent about eighteen months, approximately half his time, in the Boston area, either preparing for combat or recuperating. And when he left the service, nearly a year before the war's end, he returned to the home of his parents, where he continued to live while attending Harvard Law School.

Holmes thus did not suffer the drastic separation from his parents that the war imposed upon many of his contemporaries. Nor, on balance, did his war experience separate him intellectually or emotionally from Holmes, Sr. To be sure, there is evidence in Holmes, Jr.'s letters of irritation with his father's views of the war. In a December 20, 1862, letter to Holmes, Sr., he complained that "I never... have shown, as you seemed to hint, any wavering in my belief in the right of our cause—it is my disbelief in our success by arms in which I differ from you," and he added, "I think in that matter I have better chances of judging than you... I think you are hopeful because (excuse me) you are ignorant." In a May 30, 1864, letter, Holmes, Jr. noted that he had received a letter "from dad, stupid—I wish you'd take the trouble to read my letters before answering." This comment was followed up by a letter in which Holmes warned that "Father'd better not talk to me about opinions at a crusade, in the cause of the whole civilized world, it would be hard indeed to keep the hand to the sword.")

See, e.g., Touster, In Search of Holmes from Within, 18 Vand. L. Rev. 437, 463-65 (1965).
See, e.g., E. Wilson, supra note 64, at 743, 745, 781.
Memorial Day Address by Oliver W. Holmes, Jr. (May 30, 1884), reprinted in Occasional Speeches, supra note 42, at 15.
See M. Howe, Shaping Years, supra note 11, at 178, 196, 204.
Letter from Oliver W. Holmes, Jr. to Oliver W. Holmes, Sr. (Dec. 20, 1862), reprinted in Touched with Fire, supra note 65, at 79-80.
Letter from Oliver W. Holmes, Jr. to Dr. and Mrs. Oliver W. Holmes, Sr. (May 30, 1864), reprinted in Touched with Fire, supra note 65, at 135.
home & here—On the staff one can form a far better opinion of the particular campaign than one at home.”

But these remarks must be placed in context. In the December 20, 1862, letter, after venting his annoyance with his father’s views on the war effort, Holmes added, “At any rate dear Father don’t, because I say these things imply or think that I am the meaner for saying them.” In the May 16, 1864, letter, which had prompted his father’s “stupid” response, Holmes had written that “[s]till your letters are the one pleasure and you know my love.” On June 5, after the May 30 outburst, he wrote, “Rec[eive]d a n[umber] of delightful letters from you . . . Many thanks—A thousand loving thoughts this Sunday Morn[in]g.” And on June 7 he wrote that “[t]hese days of comparative rest though constant loss allow my thoughts to turn longingly & lovingly homeward again—which they couldn’t—as I told you—in the wear and tear of alternate march and fight.”

Statements in Holmes’s wartime correspondence such as “I am not the same man (may not have quite the same ideas) & certainly am not so elastic as I was and I will not acknowledge the same claims upon me under those circumstances that existed formerly,” or “I started in this thing a boy I am now a man and I have been coming to the conclusion for the last six months that my duty has changed,” should be taken more as efforts to affirm his independence from his father than as evidence of estrangement from him. In that vein, his moving back into his parents’ house after mustering out of the service, and his decision to attend law school, which he later claimed was at his father’s insistence, may have qualified any belief that after the war he was in a position not to “acknowledge the same claims upon me . . . that existed formerly.”

95 Letter from Oliver W. Holmes, Jr. to Dr. and Mrs. Oliver W. Holmes, Sr. (June 24, 1864) (emphasis in original), reprinted in Touched with Fire, supra note 65, at 148.

96 Letter from Oliver W. Holmes, Jr. to Oliver W. Holmes, Sr. (Dec. 20, 1862), supra note 93.

97 Letter from Oliver W. Holmes, Jr. to Dr. and Mrs. Oliver W. Holmes, Sr. (May 16, 1864), supra note 65.

98 Letter from Oliver W. Holmes, Jr. to Dr. and Mrs. Oliver W. Holmes, Sr. (June 5, 1864) (emphasis in original), reprinted in Touched with Fire, supra note 65, at 140.

99 Letter from Oliver W. Holmes, Jr. to Amelia Jackson Holmes (June 7, 1864), supra note 65.

100 Letter from Oliver W. Holmes, Jr. to Dr. and Mrs. Oliver W. Holmes, Sr. (May 30, 1864), supra note 94 (emphasis in original).

101 Letter from Oliver W. Holmes, Jr. to Amelia Jackson Holmes (June 7, 1864), supra note 65.

102 See Letter from Oliver W. Holmes, Jr. to Nina Gray (Apr. 30, 1905) (indicating that he was “kicked into the law by [his] father”), quoted in M. Howe, Shaping Years, supra note 11, at 176.

103 Letter from Oliver W. Holmes, Jr. to Dr. and Mrs. Oliver W. Holmes, Sr. (May 30, 1864), supra note 94.
If there is a compelling theme of Holmes, Jr.'s life on his return from the Civil War, it is that of a burning desire to secure independence through professional accomplishment. Given the circumstances of his return, it is not difficult to equate professional accomplishment with a desire to distance himself from his father's influence. Holmes, Sr. may have been the source of his son's bed and board after his return from the war, and the force initially propelling him toward law, but Holmes, Sr. could not control his son's career as a lawyer. As noted, Holmes, Sr., who had himself begun law school and abandoned it for medicine, may have been a professional and literary personage, but he was not a legal one. By making law his career, Holmes, Jr. chose for himself a professional world where his father's presence would necessarily be muted.

But Holmes's journey toward professional independence was initially rocky. He stopped going to law school lectures after December 1865, and in April 1866 left for an extensive trip to Europe, paid for by his father, who arranged to secure him letters of introduction from several of Holmes, Sr.'s contemporaries. The summer after his first year of law school Holmes read "[n]o end of poetry" and continued his undergraduate interest in philosophy, striking up a friendship with William James. Judging from correspondence, his sense of commonality with James, who left to study in Europe in the spring of 1867, was particularly intense from 1866 to 1868, and the source of this commonality was philosophy rather than law. During that time, Holmes was preparing to take a bar examination, and he noted in his diary that "[t]his week I haven't felt very well and debauched on Mill accordingly, by way of removing an old incubus before endeavoring to immerse myself in the law completely—which [George Otis] Shattuck [in whose law office Holmes was reading for the Massachusetts bar] says a man must at some period of his career if he would be a first rate lawyer—though of being that I despair."

By the end of 1869, however, Holmes had clearly "immersed [him-}

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104 See note 102 supra.
106 See M. Howe, Shaping Years, supra note 11, at 223-24.
107 Little, The Early Reading of Justice Oliver Wendell Holmes, 8 Harv. Libr. Bull. 163, 171 (1954). This notation appears in Holmes's 1866 diary, in which he listed his readings for 1865 and 1866. A portion of that diary was published in the Little essay.
109 M. Howe, Shaping Years, supra note 11, at 260 (Nov. 24, 1866, diary entry).
In 1867 he had started contributing book reviews to the *American Law Review*, a journal started by his friends John C. Ropes and John Chipman Gray, and was to succeed to the editorship of that journal in 1870.110 In 1867, after passing the Massachusetts bar examination, he had begun with the firm of Chandler, Shattuck & Thayer in Boston; he argued his first case before the Supreme Judicial Court of Massachusetts that November. Late in 1869 he entered into an agreement to assist James Bradley Thayer in the twelfth edition of James Kent's *Commentaries on American Law*, an enterprise that occupied him for the next three years and required him to master all of the common law subjects Kent treated.111

Holmes's professional immersion in the late 1860s was noted and commented upon by contemporaries. Arthur Sedgwick, who was to become Holmes's co-editor of the *American Law Review*, wrote Henry James in early 1870 that Holmes “knows more law than anyone in Boston of our time, and works harder at it than anyone.”112 A year earlier, John Ropes had told William James that “he had never known of anyone in the law who studied anything like as hard as Wendell.”113 And William James himself, whose friendship with Holmes had changed as the latter spent less and less time on philosophy after 1868,114 viewed Holmes's professional self-absorption from a different perspective. He wrote Henry James in October 1869 that “[t]he more I live in the world the more the cold-blooded, conscious egotism and conceit of people afflict me . . . . All the noble qualities of Wendell Holmes, for instance, are poisoned by them . . . .”115

There is no evidence that Holmes was aware of these reactions by his contemporaries to his early professional pursuits. But one reaction, to which he surely was privy, may have encouraged him to double the intensity of his efforts. After the first case he argued before the Supreme

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110 See id. at 264.
111 Id. at 273, 275.
114 See Letter from Oliver W. Holmes, Jr. to William James (Apr. 19, 1868), supra note 61, in which Holmes wrote that

[s]ince I wrote in December I have worked at nothing but the law. Philosophy has hibernated in torpid slumber . . . . It has been necessary,—if a man chooses a profession he cannot forever content himself in picking out the plums with fastidious dilettantism . . . . but must eat his way manfully through crust and crumb . . . . I now go on with an ever increasing conviction that law as well as any other series of facts in this world may be approached in the interests of science and may be studied, yes and practised, with the preservation of one's ideals.

Judicial Court of Massachusetts, one of the justices of that court, Ebenezer Hoar, wrote a letter to Holmes, Sr. describing Holmes, Jr.'s performance. Hoar wrote that

[I] have just had the pleasure of hearing your son make his first argument before our court—and found it very curious to notice the general Jackson style and manner . . . with your expression now and then coming over it or out of it. He made a very creditable appearance . . . and I rather think will in the long run shew that the materials of a good lawyer which Judge Jackson's grandson inherits have not been crowded out of his composition by your poetry and anatomy . . . .

Holmes, Sr. undoubtedly showed this letter to his son, since it also contained a veiled allusion to the court's reception of Holmes, Jr.'s argument, which Hoar characterized as "a little savoring of experimental philosophy." On reading the letter, the younger Holmes certainly would have noticed that at least one senior member of the Boston legal community continued to identify him not only with his maternal grandfather, Charles Jackson, who had served as an associate justice on the Supreme Judicial Court of Massachusetts, but with his father. The associations with Jackson might have seemed natural enough for Justice Hoar, who was acquainted with "the materials of a good lawyer," but Hoar had gone on to note Holmes, Sr.'s apparent influence on his son's style of argument. And while Hoar's prediction that Holmes, Jr.'s inherited legal skills would probably not be "crowded out of his composition" by his father's "poetry and anatomy" could have been taken as the polite badinage one employs when complimenting a father on his son, the issue posed by that prediction was not a light one for Holmes, Jr. By entering law practice in Boston, would he continue to be overshadowed by his father? Would observers be prone to recognize his father's "expression" in his legal arguments and even associate him primarily with Holmes, Sr.'s accomplishments in "poetry and anatomy"? Would he be able, by completely immersing himself in the law, to become something his father could never be—"a first rate lawyer"?

The link between Holmes's Civil War experiences and his single-minded absorption in law in the years immediately after the war can therefore be found in the considerable difficulty he had in distancing himself from his father and the structure of his father's life. Part of this difficulty, as the Hoar letter suggests, was the ubiquity of Holmes, Sr.'s presence in the relatively small community of Boston intellectuals and professionals of which both Holmes men were part. Holmes, Jr.'s emula-

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116 Letter from Ebenezer R. Hoar to Oliver W. Holmes, Sr. (Nov. 14, 1867), quoted in M. Howe, Shaping Years, supra note 11, at 275-76.
117 Id.
118 See M. Howe, Shaping Years, supra note 11, at 177-83.
tion of his father, whom he later described as having "taught me a great deal and [done] me a great deal of good,"\textsuperscript{119} formed another part of the difficulty. Thus, the problem of gaining independence from his father was compounded for Holmes, Jr. because there was much of his father's personal and professional personae that he desired to duplicate in himself.

The intensity with which Holmes approached his legal studies in the 1860s and 1870s suggests that he had concluded that those studies were a crucial part of the process of detaching himself from his father. He seems to have emphasized two features of the intellectual process of detachment. One was the idea of working in a solitary fashion so that he could take sole credit for his accomplishments. The other was concentrating his energies on a single professional subject, abandoning literature, philosophy, and other academic pursuits to immerse himself in the law.

That Holmes associated those features of the detachment process with independence from his father can be seen in his later characterizations of his own achievements and those of his father. For himself, an integral dimension of his life plan was the idea of professional ambition as a solitary intellectual adventure whose ultimate reward was the "secret . . . joy of the thinker,"\textsuperscript{120} whose pride in achievement was accentuated by the understanding that he had created his accomplishments alone.\textsuperscript{121} It goes without saying that for Holmes "alone" not only meant without the scholarly aid of others but also referred to a professional arena in which Holmes, Sr. was disabled from helping his son.

In that vein, one characterization by Holmes in 1914 of his father's accomplishments is suggestive. Holmes said of his father:

I think my father's strong point was a fertile and suggestive intellect. I do not care as much as he would have liked me to for his novels and poetry—but I think he had the most penetrating mind of all that lot. After his early medical work, which really was big (the puerperal fever business) I think 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, which perhaps is saying if he had been a different man he would have been less popular, but he might have produced a great work.\textsuperscript{122}

\textsuperscript{119} Letter from Oliver W. Holmes, Jr. to Felix Frankfurter (May 21, 1926), supra note 48.
\textsuperscript{120} Lecture by Oliver W. Holmes, Jr. to Undergraduates of Harvard University, The Profession of the Law (Feb. 17, 1886), reprinted in Occasional Speeches, supra note 42, at 31; see text accompanying note 125 infra.
\textsuperscript{121} See text accompanying notes 125-33 infra.
\textsuperscript{122} Letter from Oliver W. Holmes, Jr. to Clara Stevens (July 26, 1914), supra note 53.
In many respects the portrait sketched here resembles Holmes himself: a "fertile and suggestive intellect," a "penetrating mind," the author of "aperçus." But there is a notable contrast: Dr. Holmes had not "concentrate[d] all his energy on a single subject." In his son's view, that lack of "patience" may have gained him more public accessibility and popularity, but it had deprived him of the chance to "produce[] a great work." When Holmes wrote this assessment of his father, he was well aware that many thought his own book, *The Common Law*, to be just such a work. *The Common Law* represented the culmination of Holmes's efforts, begun in the 1860s, to concentrate his energy on a single subject.

In the years after the Civil War, however, Holmes had done more than immerse himself in a profession. He had implicitly resolved to structure his life so as to achieve the twin goals of detachment from his father and professional recognition for himself. Although these were not the only goals of his life as it evolved, they were the overriding ones of his early career. In the pursuit of these goals he was to borrow heavily from the example of his father's life, a life in which fame had been consciously sought and carefully preserved.

There was, however, an important difference in the manner in which Holmes, Sr. and Holmes, Jr. structured their lives toward the end of achieving professional success and recognition. Once Holmes, Sr. turned decisively from medicine to literature with the publication of his "Autocrat of the Breakfast-Table" essays in 1857, he fostered his career by immersing himself in the world around him. His neighbors, his acquaintances, and even his children became models for his stories, essays, and novels: Holmes, Jr. himself was the subject of an *Atlantic Monthly* essay, "My Hunt After ‘The Captain,’" in which Dr. Holmes narrated his journey south to reconnoiter with his son after Holmes, Jr.'s neck wound in 1862.\(^\text{123}\) In contrast, Holmes, Jr. fostered his career by withdrawing from the world of his friends and companions and pursuing his legal studies in what he called "a black gulf of solitude."\(^\text{124}\) Thus, while Holmes, Sr.'s life plan required engagement with others, if only for his literary purposes, Holmes, Jr. assumed that his early professional pursuits required an isolation from others. This difference was to create a central tension within Holmes's life plan, to which this Article now turns.


\(^{124}\) Lecture by Oliver W. Holmes, Jr., supra note 120, reprinted in *Occasional Speeches*, supra note 42, at 31.
II

HOLMES'S "LIFE PLAN"

A. The Adventure of Intellectual Ambition

On February 17, 1886, Holmes delivered a lecture to undergraduates at Harvard, the conclusion of which he printed in a volume of speeches published five years later. A long and deservedly oft-quoted passage from that lecture reveals Holmes's preoccupation with the relationship of intellectual ambition to fame.

I know that some spirit of fire will feel that his main question has not been answered. He will ask, What is all this to my soul? . . . How can the laborious study of a dry and technical system, the greedy watch for clients and practice of shopkeepers' arts, the mannerless conflicts over often sordid interests, make out a life? Gentlemen, I admit at once that these questions are not futile, that they may prove unanswerable, that they have often seemed to me unanswerable. And yet I believe there is an answer. They are the same questions that meet you in any form of practical life. If a man . . . has the soul of an idealist, he will make—I do not say find—his world ideal. Of course the law is not the place for the artist or the poet. The law is the calling of thinkers. But to those who believe with me that not the least godlike of man's activities is the large survey of causes, that to know is not less than to feel, I say—and I say no longer with any doubt—that a man may live greatly in the law as well as elsewhere; that there as well as elsewhere his thought may find its unity in an infinite perspective; that there as well as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable. . . .

Perhaps I speak too much the language of intellectual ambition. I cannot but think that the scope for intellectual, as for physical adventure, is narrowing. I look for a future in which the ideal will be content and dignified acceptance of life, rather than aspiration and the passion for achievement. I see already that surveys and railroads have set limits to our intellectual wildernesses—that the lion and the bison are disappearing from them, as from Africa and the no longer boundless West. But that undelightful day which I anticipate has not yet come. The human race has not changed, I imagine, so much between my generation and yours but that you still have the barbaric thirst for conquest, and there is still something left to conquer. . . .

. . . No man has earned the right to intellectual ambition until he has learned to lay his course by a star which he has never seen—to dig by the divining rod for springs which he may never reach. In saying this, I point to that which will make your study heroic. For I say to you in all sadness of conviction, that to think great thoughts you must be heroes as well as idealists. Only when you have worked alone—when you have felt around you a black gulf of solitude more isolating
than that which surrounds the dying man, and in hope and in despair have trusted to your own unshaken will—then only will you have achieved. Thus only can you gain the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought—the subtile rapture of a postponed power, which the world knows not because it has no external trappings, but which to his prophetic vision is more real than that which commands an army. And if this joy should not be yours, still it is only thus that you can know that you have done what it lay in you to do—can say that you have lived, and be ready for the end.¹²⁵

When Holmes delivered the address he had realized the fruits of his early efforts to distinguish himself in the field of legal scholarship. The address is thus a revealing summary of his interpretation of the meaning of those efforts two weeks before his forty-fifth birthday. He had combined scholarship with law practice for fourteen years, working nights and weekends, increasingly cutting himself off from his circle of formerly close friends. By 1886, *The Common Law* had appeared, Harvard Law School had offered him a professorship, and he had been appointed to the Supreme Judicial Court of Massachusetts, the court on which his maternal grandfather had sat. He might have felt, as he spoke to Harvard undergraduates twenty-five years after his own graduation from Harvard, that while their immediate future would be characterized by aspiration, his immediate present already was characterized by achievement.

If Holmes did feel a sense of self-satisfaction, however, he did not dwell upon it in the address. Rather, his emphasis was on the intensity of his efforts to achieve recognition. He began by raising a question he had put to himself: how could one satisfy one's "soul" in the law? His answer, for all its elegance, was pat: the "idealist" will make "any form of practical life" an exercise in idealism. Of greater significance was Holmes's next comment, that idealism in the law was to be equated with intellectual ambition. The law was "not the place for the artist" (perhaps a thought inspired by his wife Fanny Dixwell, who had exhibited her embroideries in Boston and New York in 1880¹²⁶), "or the poet," (his father had regularly written poetry,¹²⁷ and he himself had been Class Poet at Harvard¹²⁸), but was "the calling of thinkers." This did not make it an inferior vocation: "to know [was] not less than to feel."

Thus, living "greatly" in the law was possible through the adventure

¹²⁵ Id., reprinted in Occasional Speeches, supra note 42, at 28-31.
¹²⁶ See M. Howe, Proving Years, supra note 11, at 254.
¹²⁷ See E. Tilton, supra note 15, at 374-75.
¹²⁸ See M. Howe, Shaping Years, supra note 11, at 75.
of intellectual ambition. The images through which Holmes described this ambition reflect physical robustness: "wreak[ing] [oneself] upon life," drinking "the bitter cup of heroism," "wear[ing] [one's] heart out after the unattainable." They also conveyed a sense of danger and disappointment, of great striving after rewards that might prove elusive. Life was like an ice floe, or like a quest for a golden chalice—the adventurer could exhaust himself or the cup might prove bitter. To embark on the adventure of intellectual ambition was to lay one's course "by a star which [one] has never seen" or to "dig by the divining rod for springs which [one] may never reach." The metaphors sought to capture the vast, and at the same time the quixotic,\textsuperscript{129} nature of the enterprise.

There was, however, an even more distinctive characteristic of the heroic adventure of intellectual ambition: it was an experience that left the adventurer profoundly isolated from others as a necessary prerequisite to the rewards of the adventure: achievement, knowledge, and power. Holmes expressed both the solitude and potential greatness of "heroic" efforts to "think great thoughts" in what at first blush appears to be eccentrically overstated language. He found the isolation of the "heroic" thinker even greater than that of a dying man. And the power of the thinker is more real than that possessed by one who commands an army. For the successful thinker "knows" that men will be marching to the measure of his thought a hundred years after his death. Moreover, these already provocative comparisons are rendered even more hyperbolic when one considers the experience upon which Holmes was drawing.

In the Civil War, Holmes had been surrounded almost constantly by rituals of death. He had written his parents late in that service that "nearly every Regimental officer I know or cared for is dead or wounded"\textsuperscript{130} and had given as a reason for declining to stay on as an

\textsuperscript{129} In an omitted portion of the lecture, Holmes had contrasted the "soul of an idealist" with the soul of Sancho Panza. Lecture by Oliver W. Holmes, Jr., supra note 120, reprinted in Occasional Speeches, supra note 42, at 28. The Holmesian hero in the metaphors thus appears to have been Don Quixote himself. Holmes's attraction to Cervantes can be seen as part of a larger fascination with chivalry and its idealized codes of social and political behavior by elite American intellectuals from the Civil War through the end of the nineteenth century. For more on this subject, see generally J. Fraser, America and the Patterns of Chivalry (1982); W. Taylor, Cavalier and Yankee (1961). A particularly evocative symbol of chivalry for some Eastern elite intellectuals was the American cowboy, presented as a Western knight errant by Owen Wister in his highly successful novel, The Virginian, originally published in 1902. See G. White, The Eastern Establishment and the Western Experience 138-43 (1989) (discussing reshaping of cowboy's image by Wister and other late nineteenth-century Eastern elite intellectuals). Owen Wister and Holmes were friends and regular correspondents, although not chronological contemporaries. The Holmes Papers contain correspondence between Holmes and Wister spanning the years 1886 to 1934.

\textsuperscript{130} Letter from Oliver W. Holmes, Jr. to Dr. and Mrs. Oliver W. Holmes, Sr. (May 16, 1864), supra note 65.
infantry officer his inability to "endure the labors & hardships of the line." Holmes was keenly aware that his dying comrades passed into forgotten oblivion, and he no doubt feared that the same might happen to him. He also knew firsthand of the power of army commanders to determine whether their soldiers lived or died. He had seen his fellow soldiers marching—often toward death—to the measure of their leaders' commands. Holmes's comparison of intellectual isolation and the power achieved by "the thinker" of "great thoughts" thus carried all the more weight because of his own awareness of death, power, and the impact of command in a military setting. Since the omnipresence of death and the random consequences of command decisions had impressed and demoralized Holmes enough to drive him out of soldiering, he could only have meant by his comparisons to elevate the significance of the adventure of intellectual ambition. The isolation, power, and knowledge of future influence with which Holmes identified that adventure were truly vast. Indeed, Holmes concluded, "only" by engaging in the lonely effort to "think great thoughts" could one say that he had lived.

The superficial eccentricity of Holmes's description of the process of intellectual ambition thus furnishes a clue to the intensity of his investment in that process. One might be tempted to read those passages as a series of rationalizations. Perhaps in describing the isolation of the thinker as greater than that of the dying man Holmes was expressing his fears that he might not be able to distinguish himself as a scholar, fears that now seemed comparable to those which he had experienced in seeing his soldier-colleagues die around him. It is possible that his attribution of "secret joy" and "subtile rapture" to "the thinker," and his claim that the power of the thinker could be "more real" than that of the army commander, were devices to reassure himself that his intellectual efforts were significant even though they had "no external trappings" in the form of popular recognition. And it is possible that Holmes was far less confident about the immortality of great thinkers than his language suggested. Their joy was "secret," their power "postponed," and only in their own "prophetic" vision was their influence "more real" than that of army commanders.

Thus, one could read the concluding portions of Holmes's 1886 address as an effort to convince himself that, in the process of producing original scholarship, he was confronting and surviving risks comparable in magnitude to those he had refused to continue to confront as a soldier. One could also read those portions more straightforwardly, as making the extremely bold claim that an engagement in the adventure of intellec-

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131 Letter from Oliver W. Holmes, Jr. to Amelia Jackson Holmes (June 7, 1864), supra note 65.
tual ambition would result in vast powers for those who succeeded and a sense of "having lived" even for those who did not. Under either interpretation, however, intellectual ambition is invested with almost cosmic significance.

Equally important was the idea that intellectual achievement is linked to the "unshaken will" of one who works alone and endures the attendant isolation. The adventure is ultimately a process in which self-control and self-trust is paramount. Indeed the most striking aspect of Holmes's Harvard address is its language of controlled emotion. To know is not less than to feel. The law is not the place for the artist or the poet, but for the thinker. To think great thoughts one must be a hero, and heroes rely upon their unshaken will while surrounded by black gulfs of solitude. The joy, rapture, and power they experience on having achieved are "secret," "subtile," and "postponed" states of being, not fully realized or revealed to others. Intellectual ambition is an adventure, a manifestation of a "barbaric thirst for conquest," of a "passion for achievement," but that thirst and passion are channeled toward concrete intellectual goals. "Unshaken will" and singleminded, solitary work are the prerequisites of achievement.

The centrality of the quoted passage from Holmes's 1886 lecture to the argument of this Article now may be apparent. Holmes, guided by his father's example of how to achieve and perpetuate a famous life, and at the same time reacting against that example, fashioned a "life plan" whose purpose was to secure him comparable fame in his own right and at the same time to reflect his intuitive sense of his own temperament. The essence of the plan—like the essence of the speech—was control. In part, Holmes associated control with the version he had witnessed in his father's life; that is, control of one's professional interests and control of the relationship between one's public and private lives. But Holmes's life plan was also uniquely designed for another version of control, a response to what he saw as pitfalls in his own temperament. Holmes sought in particular to control his "passion"—a passion which he regarded as potentially the most destructive feature of his character.

As in all such efforts at control, whether conscious or unconscious, the plan broke down in both small and large respects, producing frustrations in its architect. While this Article discusses some of those frustrations, particularly those connected with Holmes's efforts to control "passion" in his intimate relationships, its purpose is as much to emphasize the extraordinary success of Holmes's life plan as to note its failures. Holmes's life was conspicuous for its close approximation to the ideal he

described in his Harvard lecture. By its close he was seriously able to envisage the possibility that a hundred years after his death people might still move to the measure of his thought. The vast power he had sought he might yet achieve; the exalted ambition of his life's plan, given the conspicuousness of his professional success and the fortune of his continued health and longevity, appeared more real than quixotic. It is the apparent success of Holmes's life plan, the prospective power that it secured for him, that makes his conviction that he, and other humans, were ultimately powerless to control their lives all the more arresting.

B. Confronting and Channeling Passion

In his Harvard address, Holmes had spoken of “aspiration and the passion for achievement.” I have noted the evidence of his intellectual and professional achievements in his late twenties and thirties. But there is also evidence that those achievements were the product of his channeling certain features of his temperament in the direction of his work, features that were encapsulated by his use of the word “passion.” Once characterized by an early schoolmaster as “docile” and “amiable,” by the time he finished college Holmes had begun to exhibit the intensity that was typical of his years as a young lawyer and legal scholar. He greatly enjoyed the company of young women, writing to one that he “like[d] to be on as intimate terms with as many [women] as I can.” He was chastised by the Harvard faculty for “repeated and gross indecorum” in the class of Professor Francis Bowen, whose deep commitment to moral absolutes in philosophy Holmes found provoking. The outbreak of the Civil War engaged him as had nothing else in his college life, and, as noted, he precipitously left Harvard to volunteer in the Fourth Battalion, hoping to engage in combat. Even after the numbing experience of his wartime service, he retained his intensity, writing William James letters which included passages such as “how have I yearned after thee all this long time,” and “[h]ow I have admired those brave, generous and magnanimous traits of which I will not shame thee by speaking.” He also referred in one of those letters to the “not infrequent times when . . . a girl of some trivial sort can fill the hour for me.”

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133 See text accompanying notes 107-18 supra.
134 Letter from T. Russell Sullivan to Epes Sargent Dixwell (Sept. 29, 1851), reprinted in M. Howe, Shaping Years, supra note 11, at 5.
135 Letter from Oliver W. Holmes, Jr. to Lucy Hale (May 21, 1858), in Holmes Papers, supra note 3.
136 See Letter from Cornelius Felton, President of Harvard College, to Oliver W. Holmes, Sr. (Apr. 23, 1861), reprinted in M. Howe, Shaping Years, supra note 11, at 69.
137 Letter from Oliver W. Holmes, Jr. to William James (Dec. 15, 1867), supra note 108.
138 Letter from Oliver W. Holmes, Jr. to William James (Apr. 19, 1868), supra note 61.
In short, Holmes seems to have been well aware of the passionate elements in his temperament. If so, there is abundant evidence that in the years immediately after his marriage to Fanny Dixwell in 1872 he resolved to control and channel that "passion" exclusively into intellectual and professional achievement. There are two particularly helpful clues. One, already discussed, is Holmes's characterization of intellectual exploration as a heroically intense activity. In his 1886 Harvard address he characterized "think[ing] great thoughts" as comparable to hunting lions or bison, embarking on a quest, or climbing over an ice floe. In another one of his well-known addresses, "The Soldier's Faith," an 1895 reflection on his Civil War experiences, Holmes also linked physical activity of a demanding sort to intellectual growth. "[H]igh and dangerous action," he said, "teaches us to believe as right beyond dispute things for which our doubting minds are slow to find words of proof. Out of heroism grows faith in the worth of heroism."

The second clue lies in the apparent disappearance of Holmes's zest for nonintellectual adventure that coincided with his marriage. In July 1872, a month after she and Holmes were married, Fanny Dixwell suffered a serious and debilitating attack of rheumatic fever, which left her bedridden until at least October of that year. Even during Wendell's courtship of Fanny, their relationship had not been particularly intense; the two had known one another since Wendell was eleven and had been identified as a couple as early as 1858. When Holmes finally

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139 See text accompanying note 125 supra.
140 The Soldier's Faith, supra note 42.
141 Holmes came to his marriage to Fanny Dixwell as a person who not only enjoyed physical adventures—he had gone on an Alpine climbing expedition while on an 1866 trip to England and the Continent—but social adventures as well. In the second volume of his biography of Holmes's early and middle years, Mark Howe, in commenting on that 1866 trip, referred to the "gayety, romanticism, and zest for living" that Holmes had demonstrated on his travels and speculated that "these were strong elements in his nature—elements so dangerously strong, perhaps, that he dared not give them any play while he sought the eminence which ambition had chosen." M. Howe, Proving Years, supra note 11, at 96.
142 Holmes apparently never made this illness public. Confirmation of its existence can be found in two letters written by Holmes, Sr. to Thornton Hunt, an English acquaintance of his. See Letter from Oliver W. Holmes, Sr. to Thornton Hunt (Oct. 4, 1872) ("my daughter-in-law has not yet got downstairs") (available at Keats House, Hampstead, England); Letter from Oliver W. Holmes, Sr. to Thornton Hunt (July 16, 1872) ("my daughter-in-law is down with rheumatic fever") (available at Keats House, Hampstead, England); see also Letter from Oliver W. Holmes, Jr. to John Chipman Gray (June 1, 1907) (confirming that Fanny had had "two rheumatic fevers," second of which occurred in 1890s), in Holmes Papers, supra note 3. Dr. Holmes had two daughters-in-law at the time, Holmes's brother Edward having married Henrietta Wigglesworth in 1870, but because the Edward Holmeses were traveling in Europe in the summer of 1872, the daughter-in-law spoken of must have been Fanny.
143 William James said in 1866 that for eight years "that villain Wendell Holmes has been keeping [Fanny Dixwell] all to himself out at Cambridge." M. Howe, Shaping Years, supra note 11, at 199 (quoting William James).
HOLMES'S "LIFE PLAN"

did resolve to marry Fanny, he was almost immediately confronted with the frightening possibility that his wife faced a future as a permanent invalid and might even have a shortened lifespan.

Shortly after his marriage to Fanny, Holmes's interest in physical and social adventures apparently was subordinated to an intense preoccupation with his scholarly efforts, a transformation not lost on his friends. William James, who in 1869 had said that Holmes was "composed of at least two and a half different people rolled into one" and had marveled at "the way he keeps them together in one tight skin,"144 characterized Holmes in 1876 as "a powerful battery, formed like a planing machine to gouge a deep self-beneficial groove through life."145

In one sense, Holmes's self-preoccupation and immersion in intellectual "adventures" during his early thirties complemented Fanny's inclinations. She was a willing partner in his work efforts, reading proof on his edition of James Kent's *Commentaries on American Law*,146 which appeared in 1873,147 despite having had difficulties with her eyes before her marriage.148 In addition, she was disinclined to engage in social activity. Holmes once described her as "a very solitary bird, [who,] if her notion of duty did not compel her to do otherwise, . . . would be an absolute recluse."149 Holmes himself had no apparent difficulty with a reclusive lifestyle in the 1870s and 1880s. He wrote Sir Frederick Pollock in 1879 that "[w]hen I have accumulated enough material I shall hope to rewrite [his early articles] in the form of a book. But I can assure you it takes courage and perseverance to keep at a task which has to be performed at night and after making one's living by day."150 A year later he noted that he had been "very hard driven with work, day and night,"151 and in March of 1881, when *The Common Law* finally appeared, he wrote that he had "failed in all correspondence and . . . abandoned pleasure . . . for a year"152 to produce the volume.

In another sense, however, Holmes recognized that in her reclusive-

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144 Letter from William James to Henry James (May 22, 1869), supra note 113.
145 Letter from William James to Henry James (July 5, 1876), supra note 69.
146 J. Kent, Commentaries on American Law (O.W. Holmes ed. 1873).
147 See O.W. Holmes, Jr. Diary (unpublished reading list), in Holmes Papers, supra note 3; see also Little, supra note 107, at 186 (reproducing portion of diary).
148 See Letter from Oliver W. Holmes, Jr. to William James (Dec. 15, 1867), supra note 103 (Fanny "has suffered a good deal for some time past with her eyes").
149 Letter from Oliver W. Holmes, Jr. to Lady Ethel Scott (Jan. 6, 1912), quoted in Howe, Proving Years, supra note 11, at 103.
150 Letter from Oliver W. Holmes, Jr. to Sir Frederick Pollock (July 16, 1879), reprinted in 1 Holmes-Pollock Letters, supra note 23, at 12.
151 Letter from Oliver W. Holmes, Jr. to Sir Frederick Pollock (June 17, 1880), reprinted in 1 Holmes-Pollock Letters, supra note 23, at 14.
152 Letter from Oliver W. Holmes, Jr. to Sir Frederick Pollock (Mar. 5, 1881), reprinted in 1 Holmes-Pollock Letters, supra note 23, at 16.
ness Fanny was "a queer contrast" to him and that, because of this, his attempts to stay within "one tight skin" would not be fully satisfactory. Particularly after becoming a judge, Holmes began to increase his social contacts, writing Pollock in 1883 that on a Sunday afternoon he was planning on "mak[ing] a call," although he had "pretty well given up dining out." By his forty-third birthday in 1884, Holmes announced that "I don’t mind growing older for I think that I have found life as vivid as most people and have had my share so far of action and passion." But he continued to long for his "share" of those experiences. Three years later, he complained to Pollock that "[m]y work is so hard that I don’t dare attempt outside things," and "[w]hen a few days leisure comes I want to fall to . . . but my wife comes down on me with a picture of death as imminent if I do." He continued: "So I fill such moments with talk about life, and reading poetry aloud, and French novels to myself. . . . Half of the pleasure of life consists of the opportunities one has neglected."

One "neglected" opportunity during Holmes’s early and middle years as a lawyer, scholar, and judge in Boston had been travel to Europe. In 1874 he and Fanny had taken an extended trip to England, to which she had a mixed reaction. There is evidence that she may have felt excluded from Wendell’s intellectual male friendships and that she had not particularly relished a social atmosphere that Holmes once described as requiring one to be "gay, tender, hard-hearted when something misses fire, [to] give your best, and all with lightness." The Holmeses had traveled again to Europe eight years later, with Wendell again visiting the academically oriented friends whom he had met during his previous trips. When Holmes proposed to Fanny that they return to England in the summer of 1889, she declined to go. And when Holmes traveled alone to England that year, and subsequently in 1896 and 1898, a change occurred in the manner in which he confronted the passion in his temperament. Perhaps this change was spurred by signs of age; in the summer of

153 Letter from Oliver W. Holmes, Jr. to Lady Ethel Scott (Jan. 6, 1912), supra note 149.
154 Letter from Oliver W. Holmes, Jr. to Sir Frederick Pollock (Mar. 25, 1883), reprinted in Holmes-Pollock Letters, supra note 23, at 21.
155 Letter from Oliver W. Holmes, Jr. to Sir Frederick Pollock (Mar. 9, 1884), reprinted in Holmes-Pollock Letters, supra note 23, at 24.
157 Id.
158 See M. Howe, Proving Years, supra note 11, at 96-103.
159 See id. at 102-03 (quoting entry in Fanny’s diary to that effect).
160 Letter from Oliver W. Holmes, Jr. to Lady Winifred Burghclere (Sept. 17, 1898), reprinted in M. Howe, Proving Years, supra note 11, at 100-01.
161 See M. Howe, Proving Years, supra note 11, at 272-73.
1886 he started wearing eyeglasses, his mother’s health began to deteriorate, and he wrote Pollock that his father “somehow seem[ed] much more distinctly an old man than heretofore.”162 These developments caused Holmes to “realize . . . that I have got well into middle life.”163 Perhaps because of this realization, he soon abandoned any attempt to repress his instincts for sociability and seems to have decided instead to divide his life into “work” and “play” environments, with, for the most part, Boston symbolizing the former and London and its environs the latter.

It was on his trips to England that the image of Holmes as a “great ladies’ man” came most sharply into focus.164 Fanny’s diary entries from the 1874 trip had already noted instances in which Wendell had been “off on the rampage” in search of “charmer[s].”165 In her absence, during his solo trips to London, an older aspiration of Holmes’s resurfaced: he sought to channel his passion not into the “high and dangerous action” of war or intellectual adventures, but into becoming “on as intimate terms with as many women as I can.”166

In preparation for his 1889 trip, Holmes wrote to a number of the English friends he had made on his previous visits. He also wrote his longtime friend Henry James, then living in London, who passed on the news of Holmes’s prospective arrival to his sister Alice, who also resided in England at the time.167 Alice noted in her diary that

H. writes that he has received an affectionate! letter from W.H., a marvel explained by his near arrival in London. They say he has certainly broken loose and is flirting as desperately as ever. There is something so grim as to be out of nature in that poor woman’s life and character. What is there but ugliness in any relation between two beings which doesn’t work to soften their hearts and open their minds to their kind?168

The timing of the entry indicates that Holmes had not yet arrived in London, so Alice James’s reference to his flirtations must have been based on information supplied to her by others. Since William James was a passenger on the same ship that brought Holmes to England in

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162 Letter from Oliver W. Holmes, Jr. to Sir Frederick Pollock (Dec. 21, 1886), reprinted in Holmes-Pollock Letters, supra note 23, at 29.
163 Id.
165 M. Howe, Proving Years, supra note 11, at 99 (quoting entry in Fanny’s diary).
166 See note 135 and accompanying text supra.
167 See Alice James Journal, supra note 25, at 75-80.
168 Id. at 93 (entry for June 16, 1889).
1889, the "they" alluded to in the diary entry may well have been her brothers. The entry indicates that close acquaintances of the Holmeses perceived Wendell's and Fanny's relationship as isolated and self-preoccupied, and held both partners accountable. It also suggests that in the James family, at least, a tendency in Wendell Holmes toward "flirting ... desperately" had been identified and linked to the state of Wendell's and Fanny's marriage.

The entry also suggests that Holmes may have regarded his journeys to England as a form of breaking loose; a release from the strains of reclusiveness. In the 1890s, Holmes wrote two letters to Englishwomen describing the impact that London social life had made upon him. In the earlier of the two, written to the wife of his close friend Sir Frederick Pollock, he said that

while I was taking my [bicycle] lesson two friends of mine walked by and with them a girl with a roving eye who seemed to take more notice than the usual tame bird. So the next day . . . I strolled up to my friend's house and soon was at it hammer and tongs with m'mselle. Of course she had been brought up in London . . . . You may say what you like about American women—and I won't be unpatriotic—but English women are brought up, it seems to me, to realize that it is an object to be charming, that man is a dangerous animal—or ought to be—and that a sexless bonhomie is not the ideal relation . . . . What imbecilities for an old fellow to be talking. But if one knows his place and makes way for younger men when he isn't sure, it is better perhaps not quite to abandon interest in the sports of life.

In the other letter he said that

I always feel twice the man I was, after I visit London. Personality there is in higher relief than in my world here with its limited experience and half culture. . . . I have been so bored . . . by the assumption that various of my acquaintances must be thinking something tremendous because they said nothing, and I that I could not be serious because I said a lot, that I have come to loathe the very expression "reserved power." You have to pay your way in London. No one takes you on faith—and I love it. You must be gay, tender, hard-hearted when something misses fire, give your best, and all with lightness. London Society is hard to get into, not from any requirement of 16 quarterings, but because . . . there are too many interesting people in London. You must interest, and must interest people who, being in the

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169 See S. Novick, supra note 2, at 187 (quoting Letter from William James to Henry James (May 12, 1889)).
170 Id.
center of the world, have seen all kinds of superlatives.\footnote{Letter from Oliver W. Holmes, Jr. to Lady Winifred Burghclere (Sept. 17, 1898), supra note 160.}

In these two letters the recurrent themes of Holmes’s London appear to be charming women and stimulating conversation. He confessed to being entranced by the fact that Englishwomen consider man “a dangerous animal” and relationships based on “a sexless bonhomie” not “ideal”; he even admitted, to a woman who had met his wife, that when a young girl looked him over he was inclined to visit her the next day. He recognized his age, but dismissed it in those cases where “sure” of a young woman’s interest. He also equated London with “gay, tender, hard-hearted” and “light” talk—talk that “interests” as much because of its style as its content. Particularly suggestive is his comment that to survive in London one must be “hard-hearted when something misses fire”: that is, as quick to disapprove of a socially inept comment as to entertain an “interesting” one.

It therefore seems fair to conclude that Holmes approached his 1889 trip to England with an implicit agenda: to recover the feeling of being “twice the man I was” that he associated with participation in the conversations and “flirtations” of English society. A letter written by the young Holmes about the company of women, however, suggests that he had a definition of flirtation that entailed a much greater emotional or psychological investment than that term now implies. In that letter, as noted, Holmes had written that he “admire[d] and love[d] ladies’ society and like[d] to be on intimate terms with as many women as I can.”\footnote{See Letter from Oliver W. Holmes, Jr. to Lucy Hale (May 21, 1858), supra note 135; text accompanying note 135 supra.} He then spelled out what he meant by intimacy by fashioning a distinction:

So long as I write to you like a donkey I never can hope you’ll have any real confidence in me but if I write in other terms than those of a silly flirtation I know that you at least could have a good influence on me—When you honestly speak to yourself don’t you feel that these flatterers are not those that you would ever speak to about what you really deeply felt?\footnote{Letter from Oliver W. Holmes, Jr. to Lucy Hale (May 21, 1858), supra note 135.}

Holmes distinguished his conversation with “ladies” as more profoundly personal than that of “donkey[s]” or “flatterers”; his discourse was not that “of a silly flirtation.” His professed goal was to secure “real confidence” from a woman so that she might be “a good influence” on him and she might reveal to him what she “really deeply felt.” The letter then continues: “In the little [time that] I [have] seen you I tell you frankly that you seemed to me to have a good deal of capability as yet
In this early letter arguably lie clues to the meaning of intimacy and the role of "flirtations" with women in Holmes's adult life. To be sure, there are echoes of a conventional Victorian male perception of women—a "good influence" on the "dangerous [male] animal"—but there are also some uniquely Holmesian reactions. Holmes seems to have been announcing his technique for becoming intimate with women: do not engage in "silly" conventional "flirtation," flattering women in the manner of "a donkey," but instead encourage women to speak about what they "really deeply feel." In the process of expressing deep emotions, a woman's sexuality emerges; her "capability" for feeling can be "aroused."

A search for intimacy with women could thus combine Holmes's desire to engage in "interesting" conversation ("talk about life") with his love for "ladies' society." The emotional side of his passion, checked in his marriage and suppressed by his stance of self-imposed isolation, would be allowed a carefully circumscribed outlet in London society, where it would not interfere with his professional or married life.

Holmes's search for intimacy would find its intended object in Emily Ursula Clare St. Leger Fitzpatrick, Lady Castletown, whom he had first met on his 1889 trip. Eight years after that meeting, Holmes wrote Clare Castletown that "time has only made our intimacy more settled, more certain. Is it not so?" A year later he would write to her again: "Oh my dear what joy it is to feel the inner chambers of one's soul open for the other to walk in and out at will."

Much has been written on the relationship between Holmes and Clare Castletown. In re-examining this subject, my purpose is to show

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175 Id.
176 Letter from Oliver W. Holmes, Jr. to Lady Pollock (Aug. 11, 1895), supra note 171.
177 Letter from Oliver W. Holmes, Jr. to Clare Castletown (May 7, 1897), in Holmes Papers, supra note 3.
178 Letter from Oliver W. Holmes, Jr. to Clare Castletown (Sept. 5, 1898), in Holmes Papers, supra note 3.
179 Despite the attention given to the Holmes-Castletown relationship, see, e.g., J. Monagan, supra note 164, at 71-94; S. Novick, supra note 2, at 207-19, comparatively little effort has been made to reconstruct the social circles in which Holmes and Clare Castletown first became acquainted and in which their relationship was grounded. The interaction of two upperclass circles, the "Souls" and the "Ascendancy," formed the background for Holmes's friendship with Clare Castletown. The "Souls" circle, a group of politically and culturally active aristocrats, was one of the points of entry for Holmes during his visits to London in 1889, 1896, and 1898. One of the leaders of the "Souls" was Ethel Grenfell, the niece of Henry Cowper, one of Holmes's closest friends from his 1866 trip to England. See S. Novick, supra note 2, at 185. The "Souls" circle also included Arthur Balfour, later to become Prime Minister of England, who had been a contemporary at Eton and Oxford of Bernard Fitzpatrick, Clare's husband. See A. Lambert, Unquiet Souls at xvi (1984); S. Novick, supra note 2, at 211. Fitzpatrick (Lord Castletown) and Clare St. Leger were members of landed Protestant families living in
how Holmes’s structured, yet ultimately unrequited, pursuit of intimacy with Clare reflected a conscious attempt to experience passion and feeling with a woman on terms compatible with the rest of his life plan.

But by charting the course of the Holmes-Castletown relationship, I also wish to emphasize that, in significant ways, Holmes’s search for intimacy ended in failure. He never did achieve the closeness he had decided to pursue. His relationship with Clare Castletown marks an instance in which Holmes came to realize that the goals of his life plan were dependent upon, and capable of frustration by, those around him.

Holmes initiated the relationship after first meeting Clare in 1889 by sending her a copy of his book of addresses, *Speeches*, when it was published in 1891. Clare responded that she was “much pleased to receive your little book . . . and . . . quite flattered at your remembering my existence” and invited Holmes to call on her and her husband in London the next time he visited.

In 1896, Holmes accepted that invitation, Ireland, whose circle was known as the “Ascendancy.” See M. Bence-Jones, Twilight of the Ascendancy 13-19 (1987).

Members of both the “Souls” and the “Ascendancy” regularly rented flats in London for the summer social season, spanning the months of June and July. See M. Bence-Jones, supra, at 63-64. Given Bernard Castletown’s acquaintance with Arthur Balfour, and Bernard’s participation in politics (in 1880 he had been elected as a Member of Parliament from the district in Ireland where his family owned an estate), the likelihood of Clare Castletown’s crossing paths with members of the “Souls” circle during the London season was considerable. Novick suggests that in the summer of 1889 Holmes saw Clare Castletown “[a]t a picture gallery” and “contrived to be introduced.” S. Novick, supra note 2, at 188. Novick offers no evidence to support that claim, but it is apparent that Holmes did meet Clare Castletown that summer, since he sent her a copy of the first edition of his book, *Speeches*, in 1891, the year in which it was published. See text accompanying note 180 infra.

Two features of the mores of the “Souls” and “Ascendancy” circles are relevant to an understanding of the relationship between Holmes and Clare Castletown. One is the extremely rigid taboo placed by both circles on divorce, which was virtually precluded by domestic relations law and social ostracism, and the corresponding tolerance of extramarital affairs, provided they were not flaunted or made a basis for threatening marital stability. See A. Lambert, supra, at 73, 77-78. The other is the tacit acceptance by the “Souls,” but not necessarily by the “Ascendancy,” of women as serious contributors to intellectual and cultural discourse. Id. at 74. Social gatherings in the “Souls” circle were notable for the emphasis placed on stimulating conversation involving both sexes. Id. In contrast, Bernard and Clare Castletown, while sharing some activities over the course of their lives, frequented social circles in which men and women often were tacitly segregated from one another. See generally M. Bence-Jones, supra (discussing “Ascendancy” circle); L. Castletown, *Ego* (1923) (detailing Bernard Castletown’s life); A. Lambert, supra (discussing “Souls” circle).

Letter from Clare Castletown to Oliver W. Holmes, Jr. (Feb. 19, 1892), in Holmes Papers, supra note 3. The very few surviving letters from Clare Castletown to Holmes were found along with letters from Bernard Castletown to Holmes in the original collection of the Holmes Papers in the Harvard Law School Library. The Castletowns’ letters were handwritten. In contrast, all the letters from Holmes to Clare Castletown in the collection are typewritten.

The existence and character of the two sets of letters raise some questions. In Holmes’s letters to Clare Castletown, he repeatedly mentioned that he was burning letters she sent to
traveling alone to England and leaving his card at the Castletowns’ London flat.

Holmes’s return to England followed several eventful years. In 1894 his father had died, and sometime thereafter Fanny had experienced another attack of rheumatic fever. For most of the time he had “been a recluse,” as he put it to Sir Frederick Pollock in 1894 and Lady Pollock in 1895. He had written two of his most memorable works, “Privilege, Malice, and Intent” and the address titled “The Soldier’s Faith.” He had received an LL.D. from Harvard, “too late for me to care much for it except negatively.” In the same year in which he received that degree, he “thought that . . . [he] might get over” to England the next summer, when he would be released from summer circuit duties. By May 1896, he had resolved to return to England that

him and expecting that she would do the same. Yet he apparently could not or did not burn a few of her letters, which were written in a distinctive hand and were either signed “C” or unsigned. Holmes, or someone else after his death, may have grouped these few letters from Clare in a batch of correspondence from Bernard. Even John Monagan, who first published Holmes’s letters to Clare, see Monagan, supra note 42, at 15, did not discover Clare’s letters, believing that no letters from Clare to Holmes had survived. See J. Monagan, supra note 164, at 72.

The originals of many of Holmes’s letters were in the possession of Lady Doneraile, a cousin of Clare Castletown who had come from New Zealand with her husband to live in the Castletowns’ home, Doneraile Court (in then County Cork, Ireland), on Bernard’s death in 1937. See M. Bence-Jones, supra note 179, at 282-84. Lady Doneraile arranged the gift of the typescripts of Holmes’s letters to Clare Castletown to Harvard Law School in 1967. Lady Doneraile died in 1975; it is not clear where the original letters from Holmes to Clare are currently located. See J. Monagan, supra note 164, at 90-91.

182 The timing of that attack is difficult to discern. The only direct evidence of its occurrence comes from a letter from Holmes to Lady Pollock (July 20, 1897), reprinted in 1 Holmes-Pollock Letters, supra note 23, at 75, in which Holmes wrote that “my wife . . . hasn’t by any means got back to where she was before her rheumatic fever.” Novick places the letter “shortly after . . . [Holmes, Sr.’s] death, some time in late summer or fall of 1894.” S. Novick, supra note 2, at 445 n.34. There are some intuitive grounds for Novick’s judgment, such as the fact that Fanny may have worn herself down around the time of Holmes, Sr.’s death in the spring of 1894.

Holmes’s decision to travel to England during the summer of 1896 suggests that Fanny suffered the attack before the spring of that year. It is highly unlikely that if Fanny had been seriously ill he would have made the trip. On the other hand, it is more likely that he would have been more inclined to go to England if she had still been recovering from illness, if his decision to go abroad alone in 1889 may be taken as a guideline.

183 Letter from Oliver W. Holmes, Jr. to Sir Frederick Pollock (Apr. 2, 1894), reprinted in 1 Holmes-Pollock Letters, supra note 23, at 51.

184 Letter from Oliver W. Holmes, Jr. to Lady Pollock (Aug. 11, 1895), supra note 171 (“I am a recluse. Yours is one of the very few voices that reach me from outside my cavern.”).

185 8 Harv. L. Rev. 1 (1894).

186 See note 42 supra.

187 Letter from Oliver W. Holmes, Jr. to Lady Pollock (July 2, 1895), reprinted in 1 Holmes-Pollock Letters, supra note 23, at 57.

188 Letter from Oliver W. Holmes, Jr. to Lady Pollock (Sept. 13, 1895), reprinted in 1 Holmes-Pollock Letters, supra note 23, at 62.
summer. 189

Once in London, Holmes called and wrote a number of friends and acquaintances, including Clare Castletown. Clare responded to Holmes’s card by asking him to “come to luncheon one of these days? perhaps Wed[nesday]?” 190 Eventually, Holmes accepted her invitation, 191 and this visit began a pattern of frequent encounters. 192 Holmes ultimately received an invitation to stay with Clare in Doneraile Court in August, after the London season ended. 193 He arrived to find three other houseguests but apparently found time to be alone with Clare, 194 and by the time he left Doneraile for Boston on August 22 was sufficiently taken with her to write that “I can only cling to your hand for a moment until the earth puts its shoulder between us . . . my heart aches to think of how long it may be.” 195

Although in due time Holmes would come to believe that he had found, in his relationship with Clare Castletown, the intimacy he had apparently missed during his years as a “recluse” in Boston, it is worth noting that Holmes’s search for intimacy on his 1896 visit to London was neither confined to Clare nor immediately realized. In an April 1897 letter to Lady Pollock, written in the midst of his relationship with Clare, Holmes noted that on the same 1896 visit to England he had courted “Lady Nina Campbell at whose feet I somewhat vainly laid the devotion of an ever faithful heart.” 196 He added that he and Nina Campbell “had some charming moments together, but my back once turned she lapsed into silence.” 197 What seemed particularly important for Holmes during

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189 See Letter from Sir Frederick Pollock to Oliver W. Holmes, Jr. (May 29, 1896), reprinted in 1 Holmes-Pollock Letters, supra note 23, at 70.
190 Letter from Clare Castletown to Oliver W. Holmes, Jr. (July 4, 1896), in Holmes Papers, supra note 3.
191 Holmes listed Saturday, July 11, as the date of his first visit to Clare Castletown’s flat in his 1896 diary of his trip to England. 1896 Holmes Diary (July 11 entry), in Holmes Papers, supra note 191. Bernard Castletown apparently was not present during any of the visits Holmes made to Clare’s residences during that summer, since Holmes met Bernard for the first time in 1898. See 1898 Holmes Diary (July 11 entry), in Holmes Papers, supra note 3.
192 See, e.g., 1896 Holmes Diary, supra note 191 (entries for July 22, July 27, and Aug. 17).
193 See Letter from Oliver W. Holmes, Jr. to Clare Castletown (Sept. 17, 1896) (referring to August visit and fact that other houseguests had been invited to Doneraile Court), in Holmes Papers, supra note 3.
194 See, e.g., Letter from Oliver W. Holmes, Jr. to Clare Castletown (Sept. 5, 1896) (indicating that they had spent time alone by stating “I still carry in my pocket a handkerchief . . . with it I once rubbed away a—Do you remember?”), in Holmes Papers, supra note 3.
195 Letter from Oliver W. Holmes, Jr. to Clare Castletown (Aug. 22, 1896), in Holmes Papers, supra note 3.
196 Letter from Oliver W. Holmes, Jr. to Lady Pollock (Apr. 11, 1897), reprinted in 1 Holmes-Pollock Letters, supra note 23, at 73. Holmes’s diary for 1896 indicates that he visited Nina Campbell, whom he had first met in 1889, at her home outside London. See 1896 Holmes Diary, supra note 191 (July 14 entry).
197 Letter from Oliver W. Holmes, Jr. to Lady Pollock (Apr. 11, 1897), supra note 196.
that 1896 summer was some close relationship with a woman. He had perhaps altered his stance toward "flirtation[s]" somewhat from the posture he described in his 1858 letter to Lucy Hale,\textsuperscript{198} but was still interested in being "on as intimate terms with as many [women as he could]."\textsuperscript{199}

Moreover, Holmes still appeared to be defining intimacy as essentially evanescent shortly after he had met Clare. On July 17, 1896, he wrote his old friend Nina Gray about London society:

\begin{quote}
I have been whirling about in this place for 20 days. . . . A wonderful romantic place to an outsider momentarily let-inside . . . . One is pretty sure that his neighbor at dinner will have a lot of psychologic small change at her command, enough to secure admission to the interior of the building. So an endless procession of possibilities streams before one's eyes which once in awhile realizes itself and you swear eternal friendship and forthwith vanish. I think one gets enough of the whole business in a month. After all one is not of it— . . . It is play not what one wants to do for life. . . . I shall be rushing about here till the end of the month then make a few short visits in the neighborhood—and then wind up at two or three Irish places and sail August 22.

One or two sketches of last time I am filling in with a little (water) color—but by growing more familiar everything becomes more nearly finite.\textsuperscript{200}
\end{quote}

The tone of this letter is consistent with that of two written to Lady Pollock, juxtaposing oaths of "eternal friendship" against "forthwith vanish[ing]" in the same manner that he juxtaposed "the devotion of an ever faithful heart" against "silence" once "my back . . . turned."\textsuperscript{201} At the time Holmes wrote the letter to Gray, Clare had apparently invited him to visit Ireland. Thus, the reference to a "sketch" being "fill[ed] in with a little (water) color" may have been to her. If so, his comment about familiarity and finitude could be taken as suggesting—to a native of Boston who knew Fanny Dixwell Holmes well—that romantic "possibilities" evolved into more prosaic friendships as the parties grew more familiar with one another.

However, by the time Holmes left Doneraile for Queenstown and ultimately Boston, his attitude toward his friendship with Clare Castletown had changed. Evidence of the change is abundant in his letters to Clare, beginning with an August 22 letter from the hotel in Queenstown\textsuperscript{202} and continuing in virtually the same tone through the

\textsuperscript{198} See note 135 and accompanying text supra.
\textsuperscript{199} See id.
\textsuperscript{200} Letter from Oliver W. Holmes, Jr. to Nina Gray (July 17, 1896), in Holmes Papers, supra note 3.
\textsuperscript{201} See text accompanying notes 196-97 supra.
\textsuperscript{202} Letter from Oliver W. Holmes, Jr. to Clare Castletown (Aug. 22, 1896), supra note 195
spring of 1899. As the letters have been quoted in detail elsewhere, I will not quote from them extensively here. Two from shipboard set the tone: an August 27 missive proposing a structure for the correspondence and one the next day professing Holmes's qualified devotion. In the first, Holmes advised Clare that "[i]f, as I asked, you have written to me don't answer this . . . but wait for my answer and then write—so will a regular order be established." He then alluded to the complications of a long-distance extramarital correspondence: "[W]rite you must. No one sees your letters and they shall be destroyed if you prefer." In the second he noted that "I have seen but little of any women on board except possibly the young lady whom my southerner [acquaintance] has in his charge—she sits with us and talks with us (not with me alone)." To make his point clear, he continued, "[n]othing has touched the freshness of the impressions under which I went off—Oh what a lot of things I want to say—but hardly to write."

A week after arriving, Holmes finally heard from Clare, and the tone of her letter prompted him to remove one more layer of reserve from his endearments:

I have this moment received your most adorable letter. It is what I have been longing for and is water to my thirst. You say and do everything exactly as I should have dreamed. I shall keep it and when I am blue and you seem far away I shall take it out and read it and be happy again. Do I often come back? I love your asking it... Oh yes indeed I do and shall. I do not forget easily, believe me—and your letter was all that was wanting to assure me that we should abide together.... Possibly one thing more—an assurance that you too do not forget easily when the moment is past. (Later. Tell me this for I have been thinking and thinking about it.) If you say it I shall believe it. I still carry in my pocket a handkerchief (one of my own) with a little infinitesimal dark smear upon it—with it I once rubbed away a—Do you remember? Isn't that a fool thing for a serious Judge?

Holmes then shifted roles, becoming the "serious Judge," and assured

("I can only cling to your hand for a moment until the earth puts its shoulder between us... my heart aches to think of how long it may be.")

203 See, e.g., J. Monagan, supra note 164, at 72-87; S. Novick, supra note 2, at 211-19.
204 Holmes wrote brief notes to Clare each day he was on ship, from Sunday, August 23, through Friday, August 28, and mailed them in the form of one letter upon his arrival in Boston on the morning of Saturday, the 29th of August.
205 Letter from Oliver W. Holmes, Jr. to Clare Castletown (Aug. 27, 1896), in Holmes Papers, supra note 3.
206 Id.
207 Letter from Oliver W. Holmes, Jr. to Clare Castletown (Aug. 28, 1896) (emphasis in original), in Holmes Papers, supra note 3.
208 Id.
209 Letter from Oliver W. Holmes, Jr. to Clare Castletown (Sept. 5, 1896), supra note 194.

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Clare he would communicate with her in that role as well:

By the by, I ordered the 2nd imprint of my speeches to be sent to you as soon as I arrived. Read them again and the 2nd memorial day one which you have'nt [sic] seen, love them a little, for I put my heart into the accidental occasion—just enough that is to say to one who cares, you will understand that there is high ambition and an ideal in this externally dull routine and much of the passion of life. The last sentence in the one [speech] on Wm. Allen is me.210

In this letter the themes raised earlier in this Article are once more evident. Holmes stakes out a claim for intimacy with Clare. He has been "longing" for her letter, he speaks of "thirst," "dream[s]," and feeling "blue"—the language of the passionate lover. He confesses a "fool thing": he carries in his pocket a handkerchief with one of her tears smeared on it. All of this gives him slight pause, first as a correspondent lover and then as a "serious Judge." He wants "one thing more" before concluding definitively that he and Clare are intimate, an assurance that "we should abide together," that she is not the sort who could "forget [him] easily when the moment is past." And he wants Clare to continue to read his "serious" writing as well as his letters.

Accordingly, he has dispatched the second edition of Speeches to her, and he calls her attention to "The Soldier's Faith" address. That speech and the others testify to his belief that inside the "externally dull routine" of judging are opportunities for "high ambition" and for experiencing "much of the passion of life." Ambition and passion are again joined in a sentence by "an ideal."

In this letter, then, Holmes is expounding nothing less than his life plan. Admittedly, he is cautious about stating that ideal too directly. He had written Clare earlier of "the compound twist" of life, the "union of irreconcilables, of enthusiasm and irony,"211 and so he hesitates to make an unvarnished statement of ultimate belief lest his strong sense of irony make a caricature of his equally strong enthusiasm. He thus alludes to a passage about someone else in a speech Clare has not yet read, the last sentence in his tribute to William Allen, a fellow judge on the Supreme Judicial Court of Massachusetts. Yet, if Clare eventually read that sentence, she would have found "[s]uch men are to be honored, not by regiments moving with high heads to martial music, but by a few others, lonely as themselves, walking apart in meditative silence, and dreaming in their turn the dream of spiritual reign."212

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210 Id.
211 Letter from Oliver W. Holmes, Jr. to Clare Castletown (Aug. 24, 1896), in Holmes Papers, supra note 3. This letter is part of the multi-entry letter sent by Holmes to Clare on August 29 upon his arrival in Boston. See note 204 supra.
212 Address by Oliver W. Holmes, Jr., William Allen: Answer to Resolutions of the Bar
Holmes begins the sentence with a distinction between military honors and the honor bestowed by “a few others.” While he is the honorer in the sentence, he is also the aspiring honoree, and the distinction concedes that he cannot be honored as a soldier: he did not possess the soldier’s faith and thus both survived and abandoned that field of glory, terror, and death. He is, in contrast, one of the “others, the lonely,” one of those whose very praise he values most. But he is not referring to all others, only a “few”: those that walk apart not simply because they are not entitled to be part of the soldiers marching with “high heads” and lack of guilt, but because their “silence” is “meditative.” They have their own faith, “the dream of spiritual reign.”

Holmes’s dream, his “ideal,” as expressed to Clare, is thus that of power, the vast power of a monarch. But the “reign” is “spiritual.” It is the secret joy and the subtle rapture of the thinker restated on an even grander scale. It may be “postponed power,” but it is it is “reign.” In this sentence he reveals to Clare his ultimate aspiration. “I often sing it over to myself,” he confesses to Clare. After referring to the Allen address, Holmes writes in the next sentence of his September 5 letter, “[b]ut it is wholesome and a correction to fool’s paradise to come in contact with one of your huge mundane successes in the law,” and goes on to talk about “men . . . who have made a great fortune and a great name” whose “notions are not dreams and the world has paid for them.”

Thus one could argue that, by early September 1896, Holmes was prepared and eager to achieve a version of intimacy with Clare, an intimacy to talk about what one “really deeply felt,” the central themes and concerns of one’s being. But he still doubted whether she held a comparable view of their relationship, and time was to prove that she did not. Indeed, even while Clare had entertained Holmes at Doneraile Court she had received letters from one Percy La Touche, another member of her “Ascendancy” circle. One letter, dated August 17, 1896, the second day of Holmes’s visit to Doneraile, read in part:

Don’t work too hard and don’t flirt with Mr. Holmes and don’t let him flirt with you but remember that I love you with all my heart and soul, that I want you to be all and only mine, and that I would like to murder every man that dares to look at you or that you look at. Be good Dearest and remember.

I don’t feel at all inclined to laugh about your Bostonian and fairly hope he will go out shooting. How long is he going to stay? If he

(Sept. 15, 1891), reprinted in Occasional Speeches, supra note 42, at 68. Holmes’s tribute to Allen, who had died earlier in September of 1891, could not have been included in the first edition of Speeches, which had been published in February of that year.

213 See text accompanying note 125 supra (quoting from 1886 Harvard Address).

214 Letter from Oliver W. Holmes, Jr. to Clare Castletown (Sept. 5, 1896), supra note 194.
wasn’t going to be at Doneraile on Friday I would come . . . and see you but I don’t want to see him . . . . I don’t like his being there alone with you at all and I am sure you will find plenty to do with him and a great deal that I shouldn’t like at all, and I don’t know how much you will do or how far you will go and I am not happy but jealous.215

The content and timing of this letter reveals something about the posture from which Clare approached her blossoming friendship with Holmes. First, subsequent evidence confirms that at the time of the jealous letter La Touche, though married, was “a friend and clearly a lover” of Clare’s.216 Second, the date of the letter reveals that Clare had given La Touche prior notice of Holmes’s visit and had at the same time given La Touche the impression that she might be inclined to “flirt with Mr. Holmes.” Third, despite anything Clare might have said to evoke Percy’s jealous response, she apparently had treated Holmes’s visit lightly, since La Touche took pains to dissuade her that he might be “inclined to laugh about your Bostonian.” In sum, at least in the days preceding Holmes’s visit to Doneraile, Clare Castletown had not acted like a person who reciprocated Holmes’s great desire for intimacy with her.

To be sure, there was a time after the August 1896 Doneraile visit in which Clare had ceased to regard Holmes as merely an amusement. Percy La Touche was quickly made to appreciate that fact. On August 31, nine days after Holmes’s departure, La Touche received two letters

215 Letter from Percy La Touche to Clare Castletown (Aug. 17, 1896) (emphasis in original), in The Castletown Papers, Bisbrooke Hall, Leicestershire, England [hereinafter Castletown Papers] (Author’s notes on file at New York University Law Review). That these letters from La Touche to Clare Castletown would wind up in the Bisbrooke Hall Collection probably was not contemplated by either of the correspondents. One of Clare’s closest female friends in the “Ascendancy” circle was Doty Bandon, the wife of the Earl of Bandon, who lived on an estate in County Cork not far from Doneraile Court. The Bandons’ estate house, Castle Bernard, was burned by members of the Irish Republican Army in 1921 as part of ongoing hostilities triggered by the 1916 Irish Rebellion. Shortly after the burning of Castle Bernard, the Bandons left Ireland permanently for England, and Lord Bandon died shortly thereafter. After his death, Doty Bandon settled in Bisbrooke Hall, the Leicestershire home of her family, the Cadburys, also members of the “Ascendancy,” who had lived in County Cork. When Doty Bandon left Ireland for England she carried with her a number of Clare Castletown’s personal papers, including the La Touche correspondence. Why Clare retained that correspondence and entrusted it and a number of other documents (including routine correspondence about household affairs) to Doty Bandon remains one of those secrets of family history that is unlikely ever to be revealed. See M. Bence-Jones, supra note 179, at 209-14, for a description of the Bandons under siege.

216 J. Monagan, supra note 164, at 72. My own review of a sample of letters from La Touche to Castletown in the Castletown Papers supports Monagan’s assessment. I would like to acknowledge the cooperation of John Monagan and Dr. A.P.W. Malcolmson of the British Public Records Office in facilitating my own research in the Castletown Papers, as well as that of George and Robert Boyle in giving me access to Percy La Touche’s letters to Clare Castletown.
from Clare, one of which he described as "sweet and gentle," but the other of which "hurt like anything."\footnote{Letter from Percy La Touche to Clare Castletown (Aug. 31, 1896), in Castletown Papers, supra note 215.} Clare apparently had been thinking of Holmes after his departure and had admitted as much to Percy. "Do you recognize how heartlessly cruel it was to undeceive me about those thoughts when I had deceived myself and given you my sympathies?" he asked. "[T]hat letter of yours—well it is burnt but its cruel words are burnt into my heart—I do not ask you not to think but why why why must you tell of your thoughts?"\footnote{Id.}

By September 18, having not seen Clare since Holmes's departure, Percy was afraid he might be displaced as the central object of Clare's extramarital affection:

I can't help thinking it would make you happier (& me infinitely more happy) if you would acknowledge to yourself that you cared for me & that with my whole heart within your breast there was no more room, there never could be any room, for the heart of another man. I have often likened you to a snake . . . but I wish there was a little more of the deaf adder about you so that you would not unfold your lovely coils at the voice of a charmer (with an American accent). . . . I try & tell myself . . . that I am too strong to fear any foe however formidable & however insidious, that I can win you back & that I will do so. But I don't know—my heart aches with distrust. I have played for the highest stake for which ever man gambled & I almost dread seeing you for fear I may have lost it.\footnote{Letter from Percy La Touche to Clare Castletown (Sept. 18, 1896) (emphasis in original), in Castletown Papers, supra note 215.}

When Clare received this letter, very likely about the same time she received Holmes's letter of September 5,\footnote{In an October 7, 1896 letter to Clare, Holmes indicated that a letter she had sent him on September 25 had arrived in Boston on October 4. See Letter from Oliver W. Holmes, Jr. to Clare Castletown (Oct. 7, 1896), in Holmes Papers, supra note 3. Mail went by steamship, and his journey from Queenstown, near Doneraile, to Boston in August 1896 had taken seven days. So, if a letter between the correspondents was fortunate enough to catch a boat in a timely fashion, it could pass in fewer than 10 days. It thus appears that a September 18 letter from Percy La Touche, in an adjoining county in Ireland, would have reached Clare Castletown in Doneraile about the same time as a September 8 letter from Wendell Holmes in Boston. See id. (indicating that letter she wrote him on September 25 had reached him on October 4).} she did not conclude that practical wisdom favored selecting the geographically closer of the two competitors for her extramarital intimacy. Instead, she pursued her relationship with Holmes—judging from his end of the correspondence—rather vigorously. She wrote him three letters between his departure and September 25, each "adorable" in his view.\footnote{In an October 7, 1896 letter to Clare, Holmes indicated that a letter she had sent him on September 25 had arrived in Boston on October 4. See Letter from Oliver W. Holmes, Jr. to Clare Castletown (Oct. 7, 1896), in Holmes Papers, supra note 3. Mail went by steamship, and his journey from Queenstown, near Doneraile, to Boston in August 1896 had taken seven days. So, if a letter between the correspondents was fortunate enough to catch a boat in a timely fashion, it could pass in fewer than 10 days. It thus appears that a September 18 letter from Percy La Touche, in an adjoining county in Ireland, would have reached Clare Castletown in Doneraile about the same time as a September 8 letter from Wendell Holmes in Boston. See id. (indicating that letter she wrote him on September 25 had reached him on October 4).} In the last of these letters she apparently expressed her piquedness at his writing "as if [he] thought
we were casual acquaintances.” \(^{222}\) While her comment may have astonished Holmes in light of his September 5 letter, he quickly sought to reassure Clare of his devotion. From Clare’s point of view, the manner in which he expressed that reassurance may have been troublesome. In an October 7 letter Holmes wrote:

All I meant was to reproduce my first feeling that one cannot assume at once from the fact that one has talked with open heart that the other is doing more than yielding for a moment to a fancy of the moment and showing an intimacy by which she may not be prepared to abide. We both were very loud in our profession of familiarity with somewhat cynical views of life. But thank the Lord we neither of us are cynical at bottom and my guards are down long ago. I believe in you seriously and sincerely and it would be a deep grief to me to dream it possible that anything could interrupt our affection. My life is in my wife and my work—but as you see that does not prevent a romantic feeling which it would cut me to the heart to have you repudiate. \(^{223}\)

Holmes’s “reassurances” probably revealed too much. Ironically, in exposing to Clare the carefully compartmentalized components of his life plan, he may have made its achievement impossible. In any event, shortly after sending this letter Holmes received a series of letters from Clare in which, as he put it in response to one, “I feel a little cool breath of transitoriness.” \(^{224}\) His October 7 letter had clarified—perhaps too well—his conception of intimacy, a state of being that allowed one to “talk[ ] with open heart,” to nurture a “romantic feeling” toward the other, but that at the same time did not interfere with the structure of one’s life. Holmes’s life was “in my wife and my work”; the intimacy he was proposing was “play not what one wants to do for life.” \(^{225}\)

Perhaps not surprisingly, then, between the middle of October and December of 1896, Clare’s attention appeared to drift away from Holmes back to La Touche. In the October 17 letter noting her “cool” disposition, Holmes chided Clare for “exaggerat[ing] a little the part which whim plays in your life,” suggesting that “[i]t has an airy swaggering sound to say that one follows the fancies of the moment.” \(^{226}\) In that same letter he said that he “should like to know the name of the gentleman who knows mine and who I fear flatters me by his malevo-

\(^{222}\) See id. (in which Holmes appears to respond to Clare's use of phrase “casual acquaintances”).

\(^{223}\) Letter from Oliver W. Holmes, Jr. to Clare Castletown (Oct. 7, 1896), supra note 220. The letter also revealed that Clare had received and read the second edition of Holmes's *Speeches* since Holmes indicates that she spoke of “the touch of isolation” in them. See id.

\(^{224}\) Letter from Oliver W. Holmes, Jr. to Clare Castletown (Oct. 17, 1896), in Holmes Papers, supra note 3.

\(^{225}\) Letter from Oliver W. Holmes, Jr. to Nina Gray (July 17, 1896), supra note 200.

\(^{226}\) Letter from Oliver W. Holmes, Jr. to Clare Castletown (Oct. 17, 1896), supra note 224.
On October 23, he wrote that he “long[ed] for a word from you like the first 3—no matter—you did write those.” On November 9, he finally heard from her and replied, “Please don’t let it be so long again.” And on November 21, his exasperation surfaced forcefully:

[Y]ou do take a malicious satisfaction in hinting at transitory tragedies in your wanderings—and at a frame of mind not unlike some of those portrayed in Lettres de Femmes . . . . If we did not both of us appreciate that frame of mind we should not have become intimate so easily—but if we did not both feel something a good deal deeper than that we should not have been intimate at all. . . . For my part I hate the thought of anyone except me being admitted to know anything about your real feelings (some of your hints make me wonder almost if I know anything about you.) . . . .

In short, by November of 1896 Holmes and La Touche had again changed places. For his part, La Touche had the satisfaction of writing a May 1897 letter to Clare that recalled “all the moments of last autumn that I love to remember & none that I long to forget.” Four days before La Touche wrote that letter, Holmes had written Clare that he “notice[d] that for a long time I have heard no more of the substantial other—the same I suppose who wanted to kill me etc. Will you kindly advert to him.” Clare apparently did not respond to that inquiry, since in August of 1897 Holmes wrote, “you never speak of that other man—who was the dark horse earlier in our correspondence. Why? You will pass this question in silence & I shall remember & regret.” Finally, by December 1897 Holmes expressed his suspicion “that you have vouchsafed me at last... that you have been up to mischief and doing damage . . . . During the last year you have kept me pretty well at the point of your rapier.”

227 Id. As late as 1915, Holmes wondered about La Touche, whose name he apparently had been told by then and which he could “never keep . . . in mind.” Letter from Oliver W. Holmes, Jr. to Clare Castletown (Jan. 10, 1915), in Holmes Papers, supra note 3. The La Touche-Castletown liaison may have been known within the “Ascendancy” circle. See M. Bence-Jones, supra note 179, at 178 (describing Clare as Percy La Touche’s “old flame” and quoting a letter from him to her in the Castletown Papers).

228 Letter from Oliver W. Holmes, Jr. to Clare Castletown (Oct. 23, 1896), in Holmes Papers, supra note 3.

229 Letter from Oliver W. Holmes, Jr. to Clare Castletown (Nov. 9, 1896) (emphasis in original), in Holmes Papers, supra note 3.

230 Letter from Oliver W. Holmes, Jr. to Clare Castletown (Nov. 21, 1896), in Holmes Papers, supra note 3.

231 Letter from Percy La Touche to Clare Castletown (May 11, 1897), in Castletown Papers, supra note 215.

232 Letter from Oliver W. Holmes, Jr. to Clare Castletown (May 7, 1897), supra note 177 (emphasis in original).

233 Letter from Oliver W. Holmes, Jr. to Clare Castletown (Aug. 19, 1897), supra note 39.

234 Letter from Oliver W. Holmes, Jr. to Clare Castletown (Dec. 17, 1897), in Holmes Pa-
It is hard to come to any conclusions about the motivation behind Clare's coquetry with Holmes and La Touche, but, taking Holmes's side of the correspondence as a rough guide to the tone of Clare's side, it appears that the degree of her intimacy with him first intensified and then diminished quite noticeably after her first probings about the nature of their intimacy. When Holmes resolved to return alone to England in the summer of 1898 and to visit Clare, his letters suggested that he had reflected about the possibility that he might know nothing about her. He wrote her in January of that year, "You have been such a dear lately—all your kindest best self." But at the same time he asked, "Do you swear that I should see a great deal of you if I come? [O]r would it depend on chances which I will not seek to analyze more precisely?"

Thus, by the beginning of 1898, Holmes may have become fearful that his carefully cultivated intimacy with Clare was in danger of breaking down. Indeed, it was in greater disarray than he may have realized. For, notwithstanding Holmes's determination to fit his relationship with Clare Castletown into his structured conception of extramarital intimacy, he found her personally irresistible. After a second rendezvous in London in July 1898, where he also met Bernard Castletown, and a second visit to Doneraile in August of 1898, where Clare again entertained him and others in the absence of Bernard, Holmes wrote letters to Clare even less like his typically controlled prose than were the 1896 letters. One asked whether "now . . . you think that you can meet time and distractions and still care for me as much?"; mused about opening "the inner chambers of one's soul . . . for the other to walk in and out at will"; and referred to letters of Sir William Knollys, which Holmes had been reading, in which Knollys had said "how much he would like to make many a mother if his existing encumbrances only might be gathered away." Another illustrated the almost desperate reaches to which Holmes's "romantic feeling" toward Clare had extended:

Now I go partly on faith—need I tell you how deep the faith is? Whatever you say or don't say I believe in you and trust you and love you dearly. I long long long for you and think think think about you.

pers, supra note 3.
235 Letter from Oliver W. Holmes, Jr. to Clare Castletown (Jan. 18, 1898), in Holmes Papers, supra note 3.
236 Id.
237 Holmes had met Bernard Castletown for the first time in the summer of 1898. See Letter from Oliver W. Holmes, Jr. to Lady Winifred Burghclere (Sept. 17, 1898), supra note 160 ("[lady] Castletown—and since my last stay in Ireland I may add [lord] C.—I have known well for some years.").
238 Letter from Oliver W. Holmes, Jr. to Clare Castletown (Sept. 5, 1897), in Holmes Papers, supra note 3.
You would be satisfied I think.\textsuperscript{239} Holmes's uncontrolled, clichéd language in this final excerpt, coupled with his suggestion in its last sentence that Clare's greatest satisfaction in the relationship was in enticing him to depart from the qualified manner in which he expressed his devotion to her, indicates that he found Clare sufficiently infatuating to evoke passions beyond his control. The letter is all the more intriguing given that at this stage of the relationship Holmes's intensity was not reciprocated by Clare, if an excerpt from one of her letters to Holmes around the same time can be taken as representative. To Holmes's references to her as "dear Clare" (in one case, merely in the salutation), Clare responded:

Please—I don't admire this way of beginning your epistles—it gives me a shiver & chill. I don't know why—I \textit{do} like to be given my name by you but not in that bald sort of way! You will say it is dreadful foolery but I don't care... So... keep Clare up your sleeve & only let it fall accidentally & tenderly & as if it meant more than just a formal approach to a letter—you know what I mean...\textsuperscript{240}

The sensations Clare describes as stimulated by Holmes's use of her first name are consistent with the coquetry and ambivalence Holmes attributed to her in his earlier correspondence. On the one hand she describes the use of her first name as "bald": an unsubtle advertisement by Holmes that they are on intimate terms. On the other hand she complains that by placing "Clare" in the portion of a letter designated as its "formal approach," Holmes is not exhibiting the kind of spontaneity and gentleness she expects from him in the relationship. It is thus unclear whether her concern is that, by addressing his letters "Dear Clare," Holmes is presuming too much about the relationship or not taking it seriously enough. This uncertainty is all the more striking in light of the fact that in an earlier letter Holmes had admitted that "whatever you say or don't say I... love you dearly."\textsuperscript{241} Holmes's relationship with Clare Castletown apparently lost its intensity shortly after Clare sent her response to the "Dear Clare" letter. While the precise circumstances of the relationship's denouement are difficult to reconstruct because of a gap in the correspondence from 1899 to 1914, it is clear that the fortunes of Holmes and Clare took quite different paths. Holmes was appointed to the Supreme Court of the United States, moved to Washington, D.C., developed a new circle of friends, and, as we will see, altered his attitude toward extramarital female relationships.

\begin{flushright}
\textsuperscript{239} Letter from Oliver W. Holmes, Jr. to Clare Castletown (Sept. 16, 1898), in Holmes Papers, supra note 3.
\textsuperscript{240} Letter from Clare Castletown to Oliver W. Holmes, Jr. (May 19, [n.d.]), in Holmes Papers, supra note 3.
\textsuperscript{241} Letter from Oliver W. Holmes, Jr. to Clare Castletown (Sept. 16, 1898), supra note 239.
\end{flushright}
Clare suffered some physical and financial setbacks, left England for a substantial period, and witnessed her circle of “Ascendancy” families become increasingly beleaguered after the 1916 Easter Rebellion in Ireland, in which Anglo-Irish stateholders became targets for unrest and violence.\(^{242}\) To get a sense of the relative situations of the two friends, one might compare letters written by both in the early 1920s. In one from Holmes to Sir Frederick Pollock in 1922, he said, “I have had some letters and one or two notices in the papers that . . . have said what I longed to hear said and would almost willingly have died to hear twenty years ago.”\(^{243}\) One year later, Clare, by contrast, wrote Holmes that she found life “utterly futile & hopeless & generally disgusting.”\(^{244}\) And, after 1914, Holmes’s letters to Clare lost their previous ardor and approximated those written to any of his correspondents at the time, male or female.\(^{245}\)

Thus, whatever intimacy Holmes and Clare shared by her death in 1927\(^{246}\) was far different from that which they had shared as late as the spring of 1899. But even during the most intense periods of his relationship with Clare, Holmes had sought to define the terms of the relationship according to his existing conceptions of intimate relationships, placing it into the part of his life that was left over after “his wife and his work,” namely, that part that involved “play.”\(^{247}\) Perhaps because of his interest in attaining his own version of intimacy with Clare, Holmes had

\(^{242}\) Clare suffered a severe eye injury in a riding accident in late May or early June of 1899, from which she never completely recovered; the Castletowns embarked for South Africa during the Boer War, constraining communication between Clare and Holmes between 1899 and 1901; the Castletowns suffered financial reverses before the First World War, causing them nearly to lose their Irish estates; and they gradually lost their political and social power and often feared for their lives, a common fate of the “Ascendancy” families during a lengthy period ushered in by the Easter Rising of 1916. See M. Bence-Jones, supra note 179, at 190-214. By 1923, Clare was writing Holmes about “the merry days that we used to have . . . 100 years ago when all the world was young & warmer & one didn’t shiver in June,” and confessing that “the longer one lives the less one likes living.” Letter from Clare Castletown to Oliver W. Holmes, Jr. (June 14, 1923), in Holmes Papers, supra note 3. For more detail on Clare Castletown’s life after 1899, see White, Holmes As Correspondent, 43 Vand. L. Rev. 1707, 1739-42 (1990), and sources cited therein. See also M. Bence-Jones, supra note 179, at 174-243, for details on Irish political history after the 1916 Easter Rising.

\(^{243}\) Letter from Oliver W. Holmes, Jr. to Sir Frederick Pollock (Mar. 29, 1922), reprinted in 2 Holmes-Pollock Letters, supra note 23, at 92.

\(^{244}\) Letter from Clare Castletown to Oliver W. Holmes, Jr. (June 14, 1923), supra note 242.

\(^{245}\) See, e.g., Letter from Oliver W. Holmes, Jr. to Clare Castletown (July 26, 1917) (“I have written to you once or twice since answering your last but I forget what I have told you. . . . I read books, toddle about and drive, trying to keep my body and mind in good shape for the next spell of work . . . .”), in Holmes Papers, supra note 3.

\(^{246}\) In a letter to Harold Laski, mentioning Clare’s death, Holmes described her as “one of my oldest and most intimate friends.” Letter from Oliver W. Holmes, Jr. to Harold Laski (Apr. 29, 1927), in 2 Holmes-Laski Letters, supra note 39, at 938.

\(^{247}\) See text accompanying notes 223-25 supra.
not fully understood Clare’s motivation in entering into the relationship; perhaps he had not truly understood her at all. He had wanted her to know his deepest feelings and ambitions, his “secret joy,” his dreams of professional eminence. In return he had wanted to be the only man privileged to know her real feelings. He had achieved the former goal but could hardly have expected to achieve the latter.

However, neither Holmes’s failure or success in achieving his goal of physical intimacy with Clare nor his failure to discern fully her motivation for entering into a relationship with him is particularly relevant to an understanding of his life plan. He may not have seen the inner chambers of her soul to the extent that she had seen his, but his principal motivation in seeking intimate extramarital relationships on his trips to England after 1889 was to open up those chambers to an attractive woman who was not his wife and who did not frequent his native professional or social world. He wanted the kind of intimacy he had described to Lucy Hale, focused and deepened in intensity by maturity and by the trials of his marriage, by his self-imposed reclusiveness, and possibly by lingering frustrations about his professional recognition. He wanted to channel his passion and to have respite from the stresses of his ambition. If Clare Castletown made a fool of him in the 1890s, he was, at one level, a willing fool. Hers was the kind of intimacy that suited his life plan. That it occasionally caused him to lose control of his emotions as well as his prose only demonstrated that there were limits on even Holmes’s ability to channel his passion.

C. Eminence, Friendships, and Powerlessness

In the same letter in which he had suggested to Lady Pollock that a “sexless bonhomie is not the ideal relation,” Holmes had said that his being given an honorary degree from Harvard Law School in 1895 had come “too late for me to care much for it except negatively.” At fifty-four he had been a judge for nearly fifteen years, published two editions of his extrajudicial addresses, and received a fair amount of attention in scholarly circles for The Common Law. In his own mind, however, the intensity of his professional ambition had not been matched by a corre-

248 Nowhere in his correspondence with Clare Castletown does Holmes refer to a physical dimension of their intimacy. On the other hand, for a variety of reasons, not the least of which was his strong Victorian disinclination (albeit one not shared by his contemporary, Percy La Touche) to commit descriptions of explicit sexual encounters to print, it is very likely that Holmes would not have employed such language even if he and Clare had been physically intimate. My view is that the question of their physical intimacy is irrelevant for the argument of this Article.

249 See note 135 and accompanying text supra.

250 This theme is discussed in more detail at text accompanying notes 277-80 infra.

251 Letter from Oliver W. Holmes, Jr. to Lady Pollock (Aug. 11, 1895), supra note 171.
sponding degree of professional recognition. One might compare the expectations of his 1886 Harvard Address, with its allusions to the secret joy of the thinker and the subtile rapture of postponed power, with his suggestion that the Harvard LL.D. was "too late" to constitute a genuine or worthwhile recognition of his accomplishments.

Holmes's belief that he had not obtained a professional standing commensurate with his effort and ambition is vividly captured in a September 1902 letter he wrote to Lady Pollock.252 At the time the letter was written, Holmes had been nominated to be an associate justice on the Supreme Court of the United States. That nomination was largely fortuitous, owing to the coincidental retirement of Massachusetts native Justice Horace Gray, which freed up a "Massachusetts seat" on the Court, the assassination of President William McKinley before he finalized the appointment of someone else to replace Gray, and the close friendship between Massachusetts Senator Henry Cabot Lodge and both Holmes and McKinley's successor, Theodore Roosevelt.253 Holmes, however, did not take his nomination as a piece of luck; he saw it, as he wrote Lady Pollock, as "a reward for much hard work."254

That comment was followed by a more considered reaction, in a September 23, 1902, letter to Pollock. The day after the nomination was announced, the New York Evening Post characterized him as "more brilliant than sound,"255 and the Boston Evening Transcript said that "[h]is striking originality of mind will help . . . when it does not hinder."256 Holmes took these and other comments on his nomination to heart, prompting him to write Pollock "a line of unreasoning—rage I was going to say—dissatisfaction is nearer."257 That "line" went as follows:

There have been stacks of notices of me all over the country and the immense majority of them seem to me hopelessly devoid of personal discrimination or courage. They are so favorable that they make my nomination a popular success but they have the flableness of American ignorance. I had to get appreciation for my book in England before they dared say anything here except in one or two quarters. . . . And now as to my judicial career they don't know much more than that I

252 Letter from Oliver W. Holmes, Jr. to Lady Pollock (Sept. 6, 1902), reprinted in 1 Holmes-Pollock Letters, supra note 23, at 105.
254 Letter from Oliver W. Holmes, Jr. to Lady Pollock (Sept. 6, 1902), supra note 252.
255 N.Y. Evening Post, Aug. 12, 1902, at 4 (editorial), quoted in S. Novick, supra note 2, at 236.
256 Boston Evening Transcript, Aug. 12, 1902, at 6, quoted in S. Novick, supra note 2, at 237.
257 Letter from Oliver W. Holmes, Jr. to Sir Frederick Pollock (Sept. 23, 1902), reprinted in 1 Holmes-Pollock Letters, supra note 23, at 106.
took the labor side in *Vegelahn v. Guntner* and as that frightened some money interests, and such interests count for a good deal as soon as one gets out of the cloister, it is easy to suggest that the Judge has partial views, is brilliant but not very sound, has talent but is not great, etc., etc. It makes one sick when he has broken his heart in trying to make every word living and real to see a lot of duffers, generally I think not even lawyers, talking with the sanctity of print in a way that at once discloses to the knowing eye that literally they don't know anything about it . . . . [Y]ou can understand how at a moment of ostensible triumph I have been for the most part in a desert—when I hoped to see that they understood what I meant, enough not to bully me with Shaw, Marshall and the rest. If I haven't done my share in the way of putting in new and remodeling old thought for the last 20 years then I delude myself. Occasionally some one has a glimpse—but in the main damn the lot of them.

If one considers the context of this letter—Holmes had been nominated to be a Supreme Court justice and the reaction to his nomination was, as Holmes himself put it, “so favorable [as to] make my nomination a popular success”—the “unreasoning rage” he expressed to Pollock appears both paradoxical and perverse. Holmes had suggested regularly that his work was directed at the elite; that he was not interested in common praise. Yet he purportedly has “broken his heart in trying to make every word living and real,” and “sick[ens] when “a lot of duffers” comment on his work “in a way that at once discloses to the knowing eye” that they don’t understand it. While on the one hand he besmirching speaks of the “flabbiness of American ignorance,” on the other hand he complains that the newspapers don’t know enough about his judicial career, and therefore either follow “the money interests” in characterizing him as “brilliant but not very sound,” or simply don’t understand “what I meant.”

One wonders what sort of comments would have satisfied Holmes, and one wonders, particularly, why he characterizes himself as “in a desert” and “damn[8] the lot” of those who commented favorably on his

258 167 Mass. 92, 104, 44 N.E. 1077, 1079 (1896) (Holmes, J., dissenting). Holmes’s dissent in this case, perhaps his most visible state court opinion, affirmed the right of workers to organize unions.

259 Letter from Oliver W. Holmes, Jr. to Sir Frederick Pollock (Sept. 23, 1902), supra note 257.

260 See, e.g., Letter from Oliver W. Holmes, Jr. to Sir Frederick Pollock (Apr. 10, 1881) (“the only reward . . . is that a few men will say well done”), reprinted in 1 Holmes-Pollock Letters, supra note 23, at 17.

261 Holmes’s comments may have reminded Pollock that *The Common Law* was not appreciated in America until its merits had been noted by English reviewers. The principal early reviews of the book were by Pollock in the *Saturday Review*, a London periodical, and Albert Dicey in *The Spectator*, also based in London. See M. Howe, Proving Years, supra note 11, at 249-50.
nomination. A clue can be found in the critical comments Holmes singles out. He notes that some commentators have said he “has partial views,” others that he “has talent but is not great.” Then he particularizes: those who have failed adequately to understand his contributions as a judge “bully me with Shaw, Marshall and the rest.” Those judges were “sound”: solid presences whose jurisprudential views were fully developed and thus reliable and predictable. Summoning up their images amounts to “bullying” more finely-edged “brilliant” types.

In the letter, then, Holmes describes himself as misunderstood and unappreciated, and his career up to that point as consequently unfulfilling. As he had admitted in an earlier letter to Lady Pollock to a “perversity of temperament” that could make him “very blue” in the midst of triumph, his “unreasoning rage” seems genuine. It appears to be the rage of someone who felt that he was truly one of the elect—one with the capacity not only to benefit from his genetic and cultural advantages but to exceed them—but who somehow, in part because of his attraction to the “loneliness of original work” over the more conventional and prosaic concerns of lawyering and judging “outside the cloister,” had not been treated as such. At the time of his Supreme Court nomination he was still thought of as the son of a famous father, as “more of a ‘literary feller’ than one often finds on the bench.”

But Holmes was to live long enough and to make sufficient use of his new professional opportunities to gain eminence. This is not the place to detail his career on the Supreme Court, nor to devote much attention to the process by which Holmes’s career came to be taken as a blueprint for enlightened judging by a group of early twentieth-century reformist intellectuals, the most prominent of whom was Felix Frankfurter, who can fairly be described as Holmes’s mythmakers. What is significant here is Holmes’s concern for eminence as part of his life plan. Holmes’s renewed concern for professional eminence manifested itself in a partial resurrection of the young Holmes, who had set about to organize his life toward the goal of achievement. Yet age and the passage of time now

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262 Letter from Oliver W. Holmes, Jr. to Lady Pollock (Sept. 6, 1902), supra note 252.

263 N.Y. Evening Post, supra note 255, quoted in 1 Holmes-Pollock Letters, supra note 23, at 103-04 n.1.

264 Cf. G. Gilmore, The Ages of American Law 48-49 (1977) (“the picture” of Holmes as “the tolerant aristocrat, the great liberal, the eloquent defender of our liberties, the Yankee from Olympus” was “a myth, concocted principally by Harold Laski and Felix Frankfurter”). According to Gilmore, “[t]he real Holmes was savage, harsh, and cruel, a bitter and lifelong pessimist.” Id. I find these comments overstated. See generally White, Gilmore’s History (Book Review), 6 Revs. Am. Hist. 7 (1978). But Gilmore’s claims that Laski and Frankfurter contributed significantly to fostering an idealized image of Holmes and that the origins of that image were “about the time of World War I” are essentially accurate. For more detail, see White, The Rise and Fall of Justice Holmes, 39 U. Chi. L. Rev. 51, 56-65 (1971).
added a strongly quixotic element to this quest, largely absent from its
earlier incarnation. Whereas Holmes at one time may have viewed he-
roic effort as guaranteeing eternal recognition, he now had come to be-
lieve that it assured, at best, eminence in the eyes of a generation that
would outlive, and thus could choose to discard, all that he had done.
Despite all his efforts, Holmes's life plan would have to rest on the plans
of others.

Abundant evidence suggests that both Wendell and Fanny Dixwell
Holmes regarded his appointment to the Supreme Court of the United
States as a major turning point in their lives. Holmes wrote friends in
1903, the year that the Holmeses first bought a house in Washington,
that "I long for the day that I shall be in a house of my own," and that
it was "heavenly joy . . . for the first time in one's life to see what one
has." For her part, Fanny temporarily abandoned her reclusiveness
and prepared to renew social contacts by hostessing open houses, a cus-
tom practiced by the wives of Cabinet members and Supreme Court jus-
tices. In the same month that he was sworn in, Holmes wrote the
following comment on his new work:

[S]ince I have been here the novelty solemnity and augustness of the
work has made my past labors seem a closed volume locked up in a
distant safe. Thoughts of self are almost forgotten and it just a concen-
trated effort to do one's part as a wheel in a tremendous machine.

The themes sounded in that comment were to recur in Holmes's
early characterizations of his work on the Court. The legal questions
were varied and novel; they involved "great affairs" and a "mighty
panorama of cases from every part of our great empire"; his previous
career seemed like "a finished book," with a "new and solemn volume
opening" to replace it. Moreover, "[t]he men here may not be very
strong on the philosophy or history of the law, but the able ones admin-
ister it as statesmen governing an empire." The Court was "a center of

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265 Letter from Oliver W. Holmes, Jr. to Clara Stevens (Mar. 6, 1903), in Holmes Papers, supra note 3.
266 Letter from Oliver W. Holmes, Jr. to Lewis Einstein (Nov. 23, 1903), in Holmes-Ein-
stein Letters, supra note 164, at 6.
267 See J. Monagan, supra note 164, at 52.
268 Letter from Oliver W. Holmes, Jr. to John G. Palfrey (Dec. 27, 1902), in Holmes Pa-
pers, supra note 3.
269 Letter from Oliver W. Holmes, Jr. to Sir Frederick Pollock (Dec. 28, 1902), reprinted in
1 Holmes-Pollock Letters, supra note 23, at 109.
270 Letter from Oliver W. Holmes, Jr. to Ellen Curtis (Dec. 21, 1902), in Holmes Papers,
supra note 3.
271 Letter from Oliver W. Holmes, Jr. to Sir Frederick Pollock (Dec. 28, 1902), supra note
269.
272 Letter from Oliver W. Holmes, Jr. to Clara Stevens (Jan. 10, 1903), in Holmes Papers,
supra note 3.
great forces,” and “you must be powerful on a world scale to weigh her [the country].”\textsuperscript{273} In these comments there is a hint of an older uneasiness that more solid, “statesman”-like judges might be better suited for the vastness of the enterprise, being more comfortable with “power . . . on a world scale.”

Some of the bitterness that surfaced when Holmes reacted to comments on his nomination may thus have been internalized in the form of self-doubt as he assumed his new post and sensed the different nature of his work and the power of the “statesmen” he was encountering as colleagues. “For the first time in my life,” he wrote one friend, “I have had flashes of a sense of responsibility. . . . [T]hings here are so solemn and tremendous that the thought will break in at times.”\textsuperscript{274} But “[t]houghts of self” were only “almost forgotten”;\textsuperscript{275} before long he wrote that “I am beginning to gain confidence,” and “I feel as if [my circulated draft opinions] should count for more than merely one vote.”\textsuperscript{276}

In the sequence from initial outrage, to delight in the work, to underconfidence, to reassurance, came the predictable next stage of Holmes’s reaction: the work on the Court, while more absorbing than his previous work as a judge, was still not yielding him the recognition he coveted. Whereas in a March 1903 letter he was still enraptured by the augustness of his new position,\textsuperscript{277} one year later a different mood surfaced. He wrote that “I have been rather lonely at moments in a legal way,” and that “when the newspapers begin to drivel . . . they reduce one to confusion so far as to make him wonder whether everything he ever did was done in vain and whether some other kind of man is wanted.”\textsuperscript{278} By January of 1909, he thought it relevant to repeat that “[m]y friend and colleague White . . . told me the other day that there was no man in the U.S. whose reputation so little corresponded to what he had done.”\textsuperscript{279} In anticipation of his sixty-eighth birthday in March of that year, he wrote, “I have not as much recognition as I should like.”\textsuperscript{280}

\begin{footnotes}
\item[273] Letter from Oliver W. Holmes, Jr. to Nina Gray (Jan. 4, 1903), in Holmes Papers, supra note 3.
\item[274] Letter from Oliver W. Holmes, Jr. to Ellen Curtis (Dec. 21, 1902), supra note 270.
\item[275] Letter from Oliver W. Holmes, Jr. to John G. Palfrey (Dec. 27, 1902), supra note 268.
\item[276] Letter from Oliver W. Holmes, Jr. to Nina Gray (Jan. 4, 1903), supra note 273.
\item[277] See Letter from Oliver W. Holmes, Jr. to Ellen Curtis (Mar. 21, 1903) (“[f]or the first time in my life I am up against a greatness that comes from outside”; “[n]ow it is the simple grandiose—the external fact of feeling a vast world vibrate to one’s determinations”), in Holmes Papers, supra note 3, quoted in S. Novick, supra note 2, at 262 n.36.
\item[278] Letter from Oliver W. Holmes, Jr. to John G. Palfrey (Apr. 1, 1904), in Holmes Papers, supra note 3.
\item[279] Letter from Oliver W. Holmes, Jr. to Clara Stevens (Jan. 6, 1909), in Holmes Papers, supra note 3.
\item[280] Letter from Oliver W. Holmes, Jr. to Clara Stevens (Mar. 6, 1909), in Holmes Papers, supra note 3.
\end{footnotes}
Meanwhile, a change had also occurred in the marital and intimate spheres of Holmes's life. As noted, with the move to Washington and the Holmeses' required immersion in official society, Fanny seems to have shed some of her reclusiveness, and Holmes seems to have taken some pleasure in her new role. At the same time, the protocol of the relatively formal patterns of entertaining among persons with official positions dictated social partners, constraining Holmes's opportunities to seek out the company of attractive women. The character and demands of Holmes's new social environment, coupled with the great importance he attached to his work on the Court, resulted in a metamorphosis in the nature of his close female relationships. His closeness to Fanny, never fully submerged despite the "desperate flirting" of his later years in Boston and his involvement with Clare Castletown, seems to have become accentuated; the degree of his intimacy with Clare seems to have receded; he looked upon extramarital flirtations with an altered perspective; and he put more time and energy into correspondence, rather than meetings, with women.

Several of Holmes's letters during his early years in Washington provide support for this characterization of his change in attitude. In letters written shortly after the Holmeses arrived in Washington in 1902, he remarked that the women in official circles there "have got up a good deal of formalism as to calling," and spoke of Fanny's "rushing about madly returning calls on people she doesn't know." He told a friend that Fanny "has been a great success .... Mrs. [Henry Cabot] Lodge said she wrote to Boston the other day that my wife was It." He also noted his new reticence about socializing: "A dinner is a terror to the host if there are a lot of officials present," and he had heard "of one Senator's wife who was offended that I didn't ask to be presented to her."

At the same time, he wrote Nina Gray, one of his oldest and closest female friends in Boston, that "I don't see the wom[e]n—I don't see the chance—I don't feel the inclination—not to speak of .... It is strange how small a part the society of women plays in my life here—Apart from

281 See Alice James Journal, supra note 25, at 93 (entry for June 16, 1889) (referring to Holmes "flirting . . . desperately").
282 Letter from Oliver W. Holmes, Jr. to Ellen Curtis (Dec. 21, 1902), supra note 270.
283 Letter from Oliver W. Holmes, Jr. to Nina Gray (Feb. 15, 1903), in Holmes Papers, supra note 3.
284 Letter from Oliver W. Holmes, Jr. to Ellen Curtis (Feb. 7, 1903), in Holmes Papers, supra note 3.
285 Id.
286 Letter from Oliver W. Holmes, Jr. to Ellen Curtis (Jan. 12, 1903), in Holmes Papers, supra note 3.
This letter should be considered together with one he wrote to Nina Gray from Doneraile Court in 1903, where he was visiting Clare Castletown for the second time since 1898. Holmes had described his first visit with the Castletowns in 1901 as "the most complete time of all my times." He added, however, that the visit left him with "a kind of resentment... at continuing the pursuits of pleasure" and made him "gladder than ever before to be an American." It is unclear what he may have meant by those allusions (he told Nina Gray, to whom his comments were directed, that he would supply her with "[p]articulars in small bills when we meet"), but his 1903 visit to Doneraile prompted a less opaque reaction:

"It is impossible to write a decent letter in the row of a houseful of people with a garden party in prospect—how I hate such disturbances of a quiet life!... Everything, pretty nearly, has gone according to one's wishes except the incursion of a lot of people when one longs for quiet. You would think it a boon and want 'em all—but I prefer the quiet corner out of the wind.

I cannot help a sort of amusement—I won't say that, it is too wicked—but the men I have known here turn up so far as they have not run off with their neighbor's [sic] wives or otherwise disposed of themselves... and it is not without a tragic side to come to places and think how more than possible it is that it is for the last time.

Two weeks earlier he had written Nina Gray, from Bernard Castletown's estate, Granston Manor, that "I realize I am older... it is time to be old—to take in sail."

In these letters Holmes makes it clear that the "wonderful romantic" atmosphere of English society that he had found so stimulating in the 1890s was now a source of "disturbances," a "row" from which one retreated to a "quiet corner out of the wind," having "take[n] in sail." Clare Castletown had been a product of that atmosphere; Holmes may have been retreating from his intimacy with her as well. In any event, Holmes had come to perceive even other potential intimates differently after his move to Washington. In 1904 he told Nina Gray that

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287 Letter from Oliver W. Holmes, Jr. to Nina Gray (Feb. 15, 1903), supra note 283.
288 Letter from Oliver W. Holmes, Jr. to Nina Gray (Sept. 15, 1901), in Holmes Papers, supra note 3.
289 Id.
290 Id. Evidence of Holmes's 1901 trip to London and Ireland comes from this letter, a July 15, 1901 letter he wrote to Mrs. Gray, and his travel diary for 1901, all included in Holmes Papers, supra note 3.
291 Letter from Oliver W. Holmes, Jr. to Nina Gray (Sept. 2, 1903), in Holmes Papers, supra note 3.
I somehow found myself talking to a very pretty girl whom I failed to get my wife to introduce me to the other evening and we gave each other notice of hostile intentions and that we were out for scalps & she told me I might play in her backyard if I didn't play with other girls . . . But I fear the tragedy ends there, as I don't have time to play in backyards. . . . I am hoping to read some philosophy or some law in my breathing spells—that does me more good than playing in backyards.293

Coupled with an earlier comment that he had found Washington to be a "center of gossip," in which he "heard . . . at once" of "one call of politeness [I made] on Sunday afternoon,"294 this letter suggests that Holmes was not being facetious when he told another of his female correspondents in 1903 that he planned to "close out that department, and be a kindly cynic . . . and . . . a survivor."295

That conclusion is reinforced by the dramatic growth of Holmes's correspondence with women after 1902, as he began to write some of his Boston female friends as well as ones he had encountered in England and Europe. In many of the letters he engaged in the kind of pseudo-intimate exchanges he had identified with the discourse of London society, where, as he said to Nina Gray, "[y]ou mark no points—and bid an eternal adieu by walking off in the middle of a casual sentence."296

Finally, it is noteworthy that in 1907, when Holmes planned once more to visit England, he wrote John Chipman Gray that "[a]s I grow older the notion of leaving my wife weighs on me more, and I do not believe I ever shall do it again."297 A letter that Fanny Dixwell wrote to Holmes, describing his parting from her to take on that 1907 trip, conveys a far different picture of their relationship than that drawn by Alice James in 1889:298

My dearest dearest Dearest—
Please—please—You did not think I did not care. I was in a maze and shall be till heavenly September comes—I wanted to throw myself away when you went out of sight—Why could my wings not have sprouted and carried me into your stateroom for five minutes . . . when I got down here your poor face all filled with love and grief as I saw it

293 Letter from Oliver W. Holmes, Jr. to Nina Gray (Feb. 8, 1904), in Holmes Papers, supra note 3.
294 Letter from Oliver W. Holmes, Jr. to Nina Gray (Feb. 5, 1903), in Holmes Papers, supra note 3.
295 Letter from Oliver W. Holmes, Jr. to Anna Codman (Feb. 15, 1903), in Holmes Papers, supra note 3.
296 Letter from Oliver W. Holmes, Jr. to Nina Gray (July 15, 1901), in Holmes Papers, supra note 3.
297 Letter from Oliver W. Holmes, Jr. to John Chipman Gray (June 1, 1907), supra note 142.
298 See Alice James Journal, supra note 25, at 93.
The letter does contain two sentences ("[y]ou did not think I did not care," and "[d]on't ever think I am rough or cold") which suggest that something of the grimness attributed to Fanny by Alice James may have sometimes come through in her relationship with Wendell. But, more importantly, it tends to confirm that the Holmeses' relationship during their first decade in Washington was far from being distant or estranged.

Thus, in his early years on the Supreme Court, fueled by the persistent belief that his professional contributions had not fully been appreciated, Holmes once again set about structuring his life so as to channel his intensity into his work. His increased emphasis on correspondence friendships in place of "firitations" and his renewed closeness with Fanny were consistent with this strategy. As in the early years of his marriage, he sought to control the remaining pursuits of his life so that he could fulfill his monumental aims as a Supreme Court justice. In 1910 he wrote to Nina Gray that he was "confin[ing] my aspirations to being the greatest legal thinker in the world," and to Canon Patrick Sheehan that "my only ambition... is to do the best work that can be done." Around the same time he told Sheehan that "my wife has made my whole life a path of beauty. She... has devoted all her powers to surrounding me with enchantments."

Yet, as he re-immersed himself in professional pursuits, Holmes also rediscovered loneliness, the underside of his self-preoccupied ambition. In the early-twentieth century, however, this loneliness was heightened and complicated by Holmes's recognition of his advancing age. One can see this new version of loneliness in two letters written to Canon Sheehan at about the time Holmes was confessing his exalted ambitions to Nina Gray:

Sadness comes with age—or ought to, I suppose. I sometimes try to force myself to feel worse than I do remembering that my next birthday will make me 70. When you speak of infirmities and my

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299 Letter from Fanny Dixwell Holmes to Oliver W. Holmes, Jr. (June 11, 1907), in Holmes Papers, supra note 3, quoted in S. Novick, supra note 2, at 285-86.
300 Id.
301 Letter from Oliver W. Holmes, Jr. to Nina Gray (Dec. 2, 1910), in Holmes Papers, supra note 3.
302 Letter from Oliver W. Holmes, Jr. to Canon Patrick Sheehan (Aug. 14, 1910), reprinted in Holmes-Sheehan Correspondence 32 (D. Burton ed. 1976) [hereinafter Holmes-Sheehan Correspondence]. Holmes first met Canon Sheehan in 1903 on a visit to the Castletowns at Doneraile Court. Sheehan was the parish priest of the Catholic church at Doneraile and had a considerable reputation as a novelist and man of letters.
303 Letter from Oliver W. Holmes, Jr. to Canon Patrick Sheehan (Apr. 1, 1911), reprinted in Holmes-Sheehan Correspondence, supra note 302, at 41.
friends here die, I really do feel gloomy, but my interest in life is still so keen, I still want to do so much more work, that in the main I feel pretty cheerful. Especially candor compels me to admit when I am led to think that my work is valued as I should like it to be. . . .

At the writing of this letter, Holmes's "sadness" at advancing age is quickly dispelled by his recognition that he still has his health, still can work, and can yet expect some praise for his professional efforts. The "cheerful" state such a recognition brings initially appears to be a conventional reaction from a person who is approaching seventy but still functioning. But the next letter complicates matters:

Oh my dear Canon you are lonely, but so am I although I am in the world and surrounded by able men—none of those whom I meet has the same interests and emphasis that I do. . . . When I say I am lonely, I feel bound to confess that it is egotism—the feeling thrown back on oneself when one sees little attention given to what one thinks most important.

Recalling Holmes's address to the Harvard undergraduates, the two letters present a composite portrait of a person for whom the loneliness of original work has not generated "the secret isolated joy" of the thinker, nor the "subtile rapture of a postponed power," because any expectation that people would "be moving to the measure of his thought" has been blurred by the apparent lack of attention in the present "to what one thinks most important." In the first letter it is recognition (work being valued "as I should like it to be") that drives Holmes to continue his work; in the second letter he confesses that the unique interest and emphasis of that work remain misunderstood or ignored. The loneliness of Holmes's later years is thus not a self-enforced isolation in the pursuit of secret yet exalted goals, but rather the beginnings of a doubt that "able men" will ever afford one the recognition one covets.

It was at about this time that Holmes struck up a friendship with Felix Frankfurter. Frankfurter had come to Washington in 1911 at the age of 28, taking a position as legal adviser to the Bureau of Insular Affairs in the War Department. Soon after his arrival, Frankfurter, making use of an introduction to Holmes by Holmes's old friend John Chipman Gray, managed to ingratiate himself with the Justice.

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304 Letter from Oliver W. Holmes, Jr. to Canon Patrick Sheehan (Sept. 3, 1910), reprinted in Holmes-Sheehan Correspondence, supra note 302, at 36-37.
305 Letter from Oliver W. Holmes, Jr. to Canon Patrick Sheehan (Apr. 1, 1911), supra note 303.
306 See text accompanying note 125 supra.
step in the ingratiation process was Frankfurter's recognition of Holmes's birthdays, beginning with Holmes's seventy-first birthday in 1912.\textsuperscript{309} Holmes responded to Frankfurter's birthday wishes as follows:

\begin{quote}
It will be many years before you have occasion to know the happiness and encouragement that comes to an old man from the sympathy of the young. That, perhaps more than anything else, makes one feel as if one had not lived in vain, and counteracts the eternal gravitation toward melancholy and doubt. I am quite sincere in saying that you have done a great deal for me in that way and I send you my gratitude and thanks.\textsuperscript{310}
\end{quote}

Given Frankfurter's age, ambition, and tendency to flatter older persons whose sponsorship he coveted,\textsuperscript{311} one can easily understand his cultivation of Holmes. The enthusiasm with which Holmes responded to Frankfurter's efforts is less easily understood, at least superficially. But the letter quoted above provides some clues. Holmes speaks of Frankfurter's "encouragement" and "sympathy"; less than a year before he had spoken to Sheehan of "able men" giving "little attention . . . to what one thinks most important."\textsuperscript{312} He also speaks of "the eternal gravitation toward melancholy and doubt" that accompanies old age, and identifies the encouragement and sympathy of young people with "mak[ing] one feel as if one has not lived in vain." The attention of Frankfurter and his contemporaries thus raised for Holmes the possibility that recognition of his contributions might be prolonged; that he had an added incentive to focus his energies on his work.

Given the ambiguities in Holmes's conception of recognition,\textsuperscript{313} however, Frankfurter's importance to him was not merely that of the ordinary young acolyte. Holmes's splenetic reaction to the commentary on his nomination to the Court in 1902\textsuperscript{314} had illustrated that his standards for recognition were not precisely those that he claimed. While he had repeatedly suggested to others that he was only interested in the praise of elite cognoscenti, the comments that had irked him the most had been those of newspaper editorials. While he claimed to have eschewed popular success for the isolated path of the thinker, he had "broken his heart trying to make every word" of his opinions "living and

\textsuperscript{309} See, e.g., Letter from Felix Frankfurter to Oliver W. Holmes, Jr. (Mar. 8, 1912), in Holmes Papers, supra note 3.

\textsuperscript{310} Letter from Oliver W. Holmes, Jr. to Felix Frankfurter (Mar. 8, 1912), in Holmes Papers, supra note 3.

\textsuperscript{311} There is abundant evidence of Frankfurter's comparable cultivation of a relationship with President Franklin D. Roosevelt. See, e.g., Roosevelt and Frankfurter: Their Correspondence 1928-1945 (M. Freedman ed. 1967).

\textsuperscript{312} See note 305 and accompanying text supra.

\textsuperscript{313} See text accompanying notes 258-63 supra.

\textsuperscript{314} See text accompanying notes 257-59 supra.
real." While he had self-consciously departed from his father's example by immersing himself in his profession to the exclusion of any success as a popular writer, he continued to chafe at being identified as a "literary feller" in newspaper notices on his Court nomination. It was thus perhaps less important to Holmes that Frankfurter was a distinguished graduate of Harvard Law School with a potentially bright future in the upper strata of the legal profession than that Frankfurter's special talent in his early professional career, as he himself described it, was "personalia"—the publicizing of the accomplishments of eminent or powerful people to others.

As Holmes's friendship with Frankfurter progressed over time, Holmes's career on the Court entered into a discernibly more visible phase. In 1911, he had spoken of his desire "to hammer out as compact and solid a piece of work as one can, to try to make it first rate, and to leave it unadvertised"; he had also spoken to friends about retiring when the combination of his age and ten years of service would make him eligible to receive a full pension. But in December of 1912, when his eligibility for retirement arrived, he wrote Sir Frederick Pollock that "I am working for nothing, so to speak, as my pension would equal my salary," but "I don't intend to hop off while I feel all right and believe that I am as good as ever."

Holmes's judgment that he was "as good as ever" was shared by the circle of younger intellectuals which Frankfurter frequented; in their opinion, in the early decades of the twentieth century Holmes was better than ever. He was on the right side of the issues, as far as they were concerned. Holmes's *Lochner* and *Abrams* dissents adopted precisely the sort of judicial stance—deference to legislative efforts at social welfare legislation, solicitude for unpopular but ultimately harmless radical speech—that they equated with "progressive"-minded judges. Frankfurter's and his contemporaries' image of Holmes contained a large

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315 See note 259 and accompanying text supra.
316 See note 263 and accompanying text supra.
318 Address by Oliver W. Holmes, Jr., Harvard University Graduation (June 28, 1911), reprinted in Occasional Speeches, supra note 42, at 160-61.
319 See, e.g., Letter from Oliver W. Holmes, Jr. to Sir Frederick Pollock (Dec. 31, 1911), reprinted in Holmes-Pollock Letters, supra note 42, at 188; Letter from Oliver W. Holmes, Jr. to Baroness Charlotte Moncheur (Aug. 28, 1911), in Holmes Papers, supra note 3; see also Letter from Oliver W. Holmes, Jr. to Sir Frederick Pollock (Sept. 1, 1910) ("as recognition gradually comes one should take it as a warning that the end is near"), reprinted in Holmes-Pollock Letters, supra note 23, at 167.
320 Letter from Oliver W. Holmes, Jr. to Sir Frederick Pollock (Dec. 15, 1912), reprinted in Holmes-Pollock Letters, supra note 23, at 205.
dimension of wish-fulfillment: Holmes did not share many of their substantive views, and they politely or credulously ignored a number of his opinions demonstrating an apparent lack of sympathy for the values or constituencies of progressive reform. Nonetheless, the image was strongly in place by the years after the First World War.

The genesis of Holmes’s friendship with Frankfurter thus paralleled the genesis of his lionization as a “great” Supreme Court justice. The two developments were not in the least coincidental: Frankfurter was the single most important presence in that lionization process. He introduced Holmes to other “progressive” intellectuals, such as Herbert Croly, Walter Lippmann, and Harold Laski, who subsequently wrote glowingly of Holmes’s work. He arranged a symposium at the Harvard Law Review in honor of Holmes’s seventy-fifth birthday and took the occasion to announce that Holmes’s opinions had “form[ed] a coherent body of constitutional law.” As Holmes, increasingly supported and guided by Justice Louis Brandeis, contributed an occasional moving dissent in first amendment cases and identified himself as consistently opposed to substantive readings of the due process clause invalidating social welfare legislation, Frankfurter consistently voiced his “encouragement” and continued to publicize Holmes’s accomplishments. And, as Holmes stayed on the Court into his eighties, the chorus of approval increased, so that by 1931, in another celebratory issue of the Harvard Law Review marking Holmes’s ninetieth birthday, Judge Benjamin Cardozo called Holmes “the greatest of our age in the domain of jurisprudence, and one of the greatest of the ages.”

When lionization and eminence at last arrived, however, Holmes did not receive them with unalloyed enthusiasm. Instead, the dimensions of irony and ambiguity that had marked his response to prior recognitions of his professional achievements resurfaced. Just as his honorary degree from Harvard Law School had come “too late for me to care much for it

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323 Before his dissent in Abrams, Holmes had been prominent in Supreme Court decisions restricting free speech. See, e.g., Schenck v. United States, 249 U.S. 47, 51-52 (1919); Patterson v. Colorado, 205 U.S. 454, 461-63 (1907). He was also the author of Buck v. Bell, 274 U.S. 200 (1927), which upheld the compulsory sterilization of certain alleged mental defectives. See id. at 207. See generally Rogat, Mr. Justice Holmes—A Dissenting Opinion, 15 Stan. L. Rev. 3 (1963) (arguing Holmes was often indifferent to claims of civil liberties).
324 See, e.g., Lippmann, To Justice Holmes, 6 New Republic 156, 156 (1916) (“A sage with the bearing of a cavalier. . . . He wears wisdom like a gorgeous plume.”).
326 Id. at 683-84.
327 See, e.g., Frankfurter, Twenty Years of Mr. Justice Holmes’s Constitutional Opinions, 36 Harv. L. Rev. 909 (1923).
328 Cardozo, Mr. Justice Holmes, 44 Harv. L. Rev. 682, 684 (1931).
except negatively," except negatively,\textsuperscript{329} and as his 1909 Oxford degree had prompted him to say "I don't care for it as much as I should have twenty-five years ago,"\textsuperscript{330} the celebratory tributes he received in his seventies and eighties appeared to him to amount to, as he put it to Pollock, "a warning that the end [was] near."\textsuperscript{331}

In Holmes's correspondence with Frankfurter, one can see this overlay of apprehensiveness, not only about his increasing age but also about the nature of his friendships with people of Frankfurter's generation. The appearance of this element in the correspondence, given Frankfurter's consistently deferential and flattering stance in his letters to Holmes, might at first blush seem inexplicable and perhaps even disingenuous; the false modesty of a person with quite a high opinion of himself. But upon closer examination the apprehensiveness Holmes exhibited toward his new friendships emerges as genuine and serves to illuminate the ambiguities inherent in his life plan.

It is clear that Holmes's friendships with Frankfurter and his contemporaries became one of the central foci of his life during his years on the Court after 1912. In the first place, they served as a surrogate for the loss of his own close contemporaries, such as John Chipman Gray, William James, Henry Adams, and Edward White, all of whom died between 1910 and 1921.\textsuperscript{332} The energy and activity of younger persons may also have helped replace the figures of romance from his middle age, such as Clare Castletown and members of the "Souls" circle, who had grown older and less adventurous.\textsuperscript{333} Indeed, the interest and appreciation Frankfurter and his contemporaries showed toward Holmes's work may have implicitly provided a catalyst, and perhaps even a justification, for his devotion to work on the Court at a time in his life when other outlets for those energies seemed less attractive or less available to him. Finally, Holmes was obviously aware, from the first public tributes he received from Frankfurter and his contemporaries, that his friendships with them contained the possibility of securing him recognition on a wider scale than he had previously achieved.

\textsuperscript{329} See note 187 and accompanying text supra.
\textsuperscript{330} Letter from Oliver W. Holmes, Jr. to Baroness Charlotte Moncheur (Sept. 15, 1909), in Holmes Papers, supra note 3.
\textsuperscript{331} Letter from Oliver W. Holmes, Jr. to Sir Frederick Pollock (Sept. 1, 1910), supra note 319.
\textsuperscript{332} Holmes wrote Frankfurter in 1916 that he "look[ed] forward to the inspiring continuance of a friendship that has stepped in just when those of my youth have disappeared in death." Letter from Oliver W. Holmes, Jr. to Felix Frankfurter (Mar. 8, 1916), in Holmes Papers, supra note 3.
\textsuperscript{333} Holmes wrote to Nina Gray from England in 1907: "My ladies for the most part are growing older (along with me)." Letter from Oliver W. Holmes, Jr. to Nina Gray (Sept. 15, 1907), in Holmes Papers, supra note 3.
Still, one must be careful to recall Holmes's ambivalent reception of his canonization. If anything, his friendships with the next generation amounted not to the fulfillment of Holmes's life plan, but to a realization of its inherent limits. One could argue that Holmes's friendships with a younger generation of intellectuals had made possible the channeling of his passion away from its previous outlets toward the goals of a resurgent professional ambition. These goals precipitated judicial contributions that, thanks to the approval of his new friends, eventually secured Holmes the level of recognition to which he had always aspired. Holmes consequently achieved eminence during his lifetime, as was prescribed by his life plan: he had successfully channeled the passionate and ambitious elements of his being into a gloriously accomplished life, ratified by Jerome Frank's 1930 characterization of Holmes as "the completely adult jurist."[^334]

But this argument would be simplistic. It does not explain the apprehension Holmes continued to feel about his friendships with the younger generation of scholars. Comments from Holmes to Frankfurter such as "I get quite as much from the affectionate companionship of men like you... as you possibly can get from me,"[^335] could conceivably be treated as examples of false modesty or as implicit acknowledgements by Holmes that Frankfurter's friendship might enhance his public reputation. When such comments are reconciled with ones expressing apprehension, however, they take on a different meaning. In one letter to Frankfurter, for example, Holmes noted his "rather fearful hope that I may never fall from the place you have given me," and "my expectation that always while I live... I shall have great cause to be proud of having counted for something in your life."[^336] Two features of these comments are noteworthy: Holmes's description of his hope that he would never fall from the place ascribed to him by people such as Frankfurter as "rather fearful," and his recognition that his exalted status might not survive him.

By this point, a pattern of the Holmes-Frankfurter correspondence is discernible. Alongside the consistency of Frankfurter's "encouragement" is the consistency of Holmes's fear that his increasing age and Frankfurter's increasing experience and prominence in his own right would cause him to fall from his exalted place and perhaps to lose his opportunity to have men move to the measure of his thought a hundred years after his death. In a September 1919 letter to Frankfurter, who had

[^335]: Letter from Oliver W. Holmes, Jr. to Felix Frankfurter (Dec. 26, 1912), in Holmes Papers, supra note 3.
[^336]: Letter from Oliver W. Holmes, Jr. to Felix Frankfurter (Mar. 9, 1915), in Holmes Papers, supra note 3.
written to him while participating at the Paris Peace Conference after the First World War, Holmes wrote:

Your letter brings joy to my heart. For I do believe that your kindness for me has not been shaken by the sight you have had of so many impressive personalities in the old world. . . . You have brought a great deal of comfort and companionship to the natural loneliness of old age and I ask nothing better than that it may continue while I last.337

Here again the element of apprehension is noticeable: Frankfurter's engagement with "impressive personalities" might shake his belief in Holmes's impressiveness. Moreover, Holmes depicts Frankfurter's friendship as an antidote to his chronic "loneliness," now characterized as "natural" for one Holmes's age. Holmes suggests that the antidote may be finite in duration, continuing only "while I last." Having previously described loneliness to Sheehan as the equivalent of being not sufficiently appreciated,338 the phrase "the natural loneliness of old age" may thus be a way of expressing a belief that the aged will soon be powerless to affect how others perceive them and their contributions.

The decade of the 1920s, which began shortly after Holmes wrote that letter to Frankfurter, was arguably the most visible and successful decade of his professional life. At an age at which most of his contemporaries had retired or died, Holmes retained his health and his ability to perform the duties of an associate justice of the Supreme Court of the United States. He also received the clearest and most immediate recognition of his accomplishments of any time in his career. While nearly all the persons with whom he had formed close relationships in his youth and middle age, including Clare Castletown and Fanny Dixwell, had died by the close of that decade, he was still able to say, in a nationwide radio address celebrating his continued service on the Court at the age of ninety, that "the work is never done while the power to work remains."339 He was also surrounded and supported, as one commentator put it, by "an increasing circle of younger men who feel toward him an affection and respect impossible to put into mere words."340

Nonetheless, the words Holmes used to describe his gratitude for Frankfurter's friendship in that decade emphasized his perceived vulner-

337 Letter from Oliver W. Holmes, Jr. to Felix Frankfurter (Sept. 25, 1919), in Holmes Papers, supra note 3.  
338 See note 305 and accompanying text supra.  
339 Radio Address by Oliver W. Holmes, Jr., The Race Is Over (Mar. 8, 1931) [hereinafter Holmes Radio Address], reprinted in Occasional Speeches, supra note 42, at 178. The moving force behind the commemoration of Holmes's ninetieth birthday through a nationwide radio address was Felix Frankfurter.  
abilities. In a 1925 letter, Holmes spoke of the friendship as "add[ing] so much" to his "confidence" and described Frankfurter as having "encouraged me when I needed encouragement."\(^{341}\) In one 1927 letter he spoke again of "the never failing encouragement"\(^ {342}\) that Frankfurter supplied, and in another of "[h]ow many times you [Frankfurter] have . . . given me courage when I drooped."\(^ {343}\) One in 1930 began, "[A]s usual, when I was feeling sad and finished, there came a letter from you putting new heart into me,"\(^ {344}\) and a second, "[y]our letter, as always, makes life seem worth living—a matter on which I am capable of doubt, for myself."\(^ {345}\)

These comments suggest that, in the most celebrated decade of his long career, Holmes was putting a great deal of his energies into remaining in a position that was securing him prestige and recognition while at the same time finding that process increasingly difficult and even discouraging. His enjoyment of the recognition, his pride in his longevity, and, as his ninetieth-birthday address revealed, his equation of living with "the power to work,"\(^ {346}\) are the immediately apparent reasons why he remained a justice throughout his eighties. But there was another reason. Holmes believed that when he left the Court he would surrender not only the power to work but the power of place; that he would then be subject to the vicissitudes of fame or obscurity; that others would determine his fate. After Holmes's retirement, Frankfurter reported a conversation with him in which he said, "I'm like a ghost on the battlefield with bullets flying through me."\(^ {347}\) In one of the last letters Holmes wrote to Frankfurter in November of 1932, he began, "You are now a high light and I have dropped into the final obscurity."\(^ {348}\)

Powerlessness and power-seeking thus became the final, and perhaps the organizing, themes of Holmes's life plan. He had recognized his passionate nature and his exalted ambition; he had witnessed the example by

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\(^{341}\) Letter from Oliver W. Holmes, Jr. to Felix Frankfurter (Mar. 8, 1925), in Holmes Papers, supra note 3.

\(^{342}\) Letter from Oliver W. Holmes, Jr. to Felix Frankfurter (June 7, 1927), in Holmes Papers, supra note 3.

\(^{343}\) Letter from Oliver W. Holmes, Jr. to Felix Frankfurter (Nov. 11, 1927), in Holmes Papers, supra note 3.

\(^{344}\) Letter from Oliver W. Holmes, Jr. to Felix Frankfurter (May 29, 1930), in Holmes Papers, supra note 3.

\(^{345}\) Letter from Oliver W. Holmes, Jr. to Felix Frankfurter (Oct. 7, 1930), in Holmes Papers, supra note 3.

\(^{346}\) "For to live is to function. That is all there is in living." Holmes Radio Address, supra note 339.


\(^{348}\) Letter from Oliver W. Holmes, Jr. to Felix Frankfurter (Nov. 26, 1932), in Holmes Papers, supra note 3.
which his father—with a different temperament, but perhaps with a comparable sense that he was a specially favored and talented person—had secured fame. He had struck out on his own path of intellectual ambition, implicitly disdaining that of his father. He had wanted a comparable and even a vaster degree of fame, the “spiritual reign” and “postponed power” of the “thinker.” But such fame had never seemed to come. He finished *The Common Law* before his fortieth birthday, but few American journals noticed it. He left the “half-life” of Harvard Law School to join the Supreme Judicial Court of Massachusetts, following the career of his maternal grandfather rather than that of his father. Harvard responded by declining to recognize his judicial and scholarly achievements until fourteen years after *The Common Law* appeared.

He enjoyed convivial society and especially the opportunity to “be on as intimate terms with as many [women] as I can.” After an effort in his mid- and late twenties to counterbalance his singleminded pursuit of legal scholarship with occasional encounters with “a girl of some trivial sort,” he had married a person who was hardly trivial but also hardly convivial, and who very shortly became an invalid and a recluse. He continued to seek the sort of structured intimacy with women he had sought as a schoolboy, and, when he came to believe that he might center that sort of intimacy in someone other than his wife, he found that his version of intimacy prevented him from really understanding the object of his interest.

He wrote and published his extrajudicial speeches as an antidote to the “externally dull routine” of a Massachusetts judge, and virtually no one reviewed them. However, the content of one of those speeches, “The Soldier’s Faith,” eventually impressed someone who fortuitously came to have the power to make him a Supreme Court justice. The public comments on his nomination to the Court mainly spoke of his inherited literary talents and his “brilliance”; few had noticed the reasoning of his decisions or the ideas he had expressed as a legal scholar. By the time he reached the Supreme Court he was nearly sixty-one: he and commentators wondered if he would have time to make an impact. He immersed himself in the work of the Court, reaffirmed his intimacy with Fanny, shifted the nature and focus of his social relationships, and hoped for

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349 Cf. Letter from Oliver W. Holmes, Jr. to Felix Frankfurter (July 15, 1913) (“Academic life is but half-life.”), in Holmes Papers, supra note 3.
350 See note 135 and accompanying text supra.
351 See Letter from Theodore Roosevelt to Henry Cabot Lodge (June 5, 1895) (“By Jove, that speech of Holmes’s was fine.”), reprinted in 1 Selections from the Correspondence of Theodore Roosevelt and Henry Cabot Lodge 146 (H.C. Lodge ed. 1925).
352 See S. Novick, supra note 2, at 237 (citing suggestion by * McClure's Magazine* that Holmes might last at least 15 years on the Court).
greater recognition. For a decade it did not appear imminent. When Oxford awarded him an honorary degree in 1909, it was for his work as a legal historian, not for his work as a judge, and he felt it was twenty-five years too late.

When a new circle of friendships rejuvenated him and paved the way for expanded recognition, he was already of the age where he could retire at a full pension. One by one his friends and contemporaries died; every year he contemplated the prospect that retirement, death, and obscurity were around the corner. While he could rejoice in his continued ability to work and the recognition that his work was at last receiving, at the same time he wondered whether that recognition was itself a function of his age, a signal that the end was near. Notwithstanding his earlier testament to the “postponed power” of he who “thinks great thoughts,” at the very end of his career he expressed the view that the only meaningful dimension of life was work and that since he was no longer able to work he had become a living ghost.

CONCLUSION

One could account for the paradoxical conjunction of Holmes’s consistent and growing success with his equally persistent sense of unfulfillment by stressing the “perversity” of his temperament or by attributing to him an inordinate and insatiable egotism. It seems to me, however, that Holmes was genuinely serious in concluding that his life illustrated the paradoxical relationship between power-seeking and powerlessness in human existence. One such as he, through a combination of talent, good fortune, self-preoccupation, conscious structuring of relationships with others, and above all self-knowledge, could fashion a plan for his life and thereby channel the driving forces of his being: ambition and passion. He was also ultimately powerless to implement that plan. He could funnel his ambition and perhaps control the end results of that ambition, but he could not ensure that others would appreciate the quality of those results.

He could release his passions in the “high and dangerous action” of a war fought for a noble cause, or in intimate relationships with persons of the opposite sex. But he could not avoid the prosaic, debilitating, and dangerous features of war, nor could he surmount the finite and illusory quality of even the most romantic of intimate attachments. He could achieve recognition and even eminence in his profession, but could not avoid the fact that professional recognition and eminence were determined by others. He could adopt a strategy of conserving his physical and emotional health so as to survive beyond the ordinary lifespan, but death, not survival, would be the inevitable result of that strategy. In
sum, he could plan his life so as to best facilitate a search for power—power to work and to live in a self-fulfilling fashion—but powerlessness was the essential human condition.

This interpretation is suggestive of the sort of framework needed to connect fully Holmes’s personal life with the jurisprudential and philosophical positions with which he has been identified. For example, the evolution of his conception of law as a comprehensive science in *The Common Law* to a conception of law as the “prophecies of what the courts will do in fact” in his 1897 “Path of the Law” essay can be seen as a progressive recognition that the course and content of law is being driven not by Holmes, the systematic thinker, but by the infamous “bad man,” who plays no part in formulating legal thought but who only wants to know what he can get away with in the courts. Likewise, the apparent dissonance between the ambitious revisionist principles Holmes sketched out for common law subjects in *The Common Law* and the often perfunctory, fact-bound, conclusory quality of Holmes’s common law opinions on the Supreme Judicial Court of Massachusetts can be seen as representing a fatalistic response to the ultimate powerlessness of comprehensive ideas. Even the oft-noted inconsistency between Holmes’s deferential posture to legislation when challenged under the fourteenth amendment’s due process clause, and his adoption of a more stringent standard of review when challenges were based on first amendment grounds, can be seen as potentially dissolving when one considers that the ultimate justification Holmes advanced for the former position was that legislatures, as well as judges, were powerless to prevent beliefs from being accepted, or rejected, in the marketplace of ideas by the currently “dominant forces of the community.”

When one places Holmes’s quite exalted sense of his own personal and intellectual powers alongside his recognition of powerlessness as an essential component of the human condition, some of his apparently eccentric philosophical homilies take on an enhanced meaning. Holmes regularly said in conversation and in correspondence that truth was the system of his intellectual limitations and that truth was the aggregate

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354 Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting). I am not suggesting that Holmes treated fourteenth amendment due process cases and first amendment cases as conceptually indistinguishable. But it is worth noting that, in discussing the question as to whether the first amendment should be incorporated against the states under the due process clause of the fourteenth amendment, he said in *Gitlow* that “[t]he general principle of free speech . . . must be taken to be included in the fourteenth amendment in view of the scope that has been given to the word ‘liberty’ as there used.” Id. (emphasis added). Holmes had himself protested against that “scope” in decisions such as *Lochner v. New York*, but a majority of the Court had not acceded to his views at the time of the *Gitlow* opinion.
355 Letter from Oliver W. Holmes, Jr. to Harold Laski (Jan. 11, 1929), reprinted in 2
of his “can’t helps”—what he couldn’t help believing. At the age of eighty-eight, he integrated those comments in a letter to Harold Laski:

I assume that I am [not] dreaming, although I can’t prove it—that you exist in the same sense that I do—and that gives me an outside world of some sort . . . —so I assume that I am in the world not it in me. Next when I say a thing is true I only mean I can’t help believing it—but I have no grounds for assuming that my can’t helps are cosmic can’t helps—and some reasons for thinking otherwise. I therefore define the truth as the system of my intellectual limitations—there being a tacit reference to what I bet is or will be the prevailing can’t help of the majority of that part of the world that I count. The ultimate—even humanly speaking, is a mystery. . . . Absolute truth is a mirage. . . . Also as I see no reasons for attributing cosmic importance to man . . . I regard him as I do the other species . . . having for his main business to live and propagate, and for his main interest food and sex. A few get a little further along and get pleasure in it, but are fools if they are proud.

The striking feature of this paragraph is not so much the fatalism it expresses, but the juxtaposition of that fatalism with the potentially exalted status of the self, the “I.” It is the self that creates the outside world, that defines truth (and defines it with reference to the self), that “bets” on what will be “the prevailing can’t help of the majority,” that decides what “part of the world” to “count” in that “bet.” The self, then, is a potentially powerful entity in its capacity to shape the world around it. This makes all the more arresting Holmes’s conclusions that “the ultimate—even humanly speaking—is a mystery,” that man has no cosmic importance, that mankind is indistinguishable in its “main business” from other animal species, and that any human who takes pride in getting beyond living, eating, and propagating is a fool. Only a vast and comprehensive condition of powerlessness could reduce so exalted a self to so prosaic and insignificant a state.

At this point one can understand Holmes’s great affinity for Emerson in his youth. He could well have seen his life plan as an effort by a particularly favored and talented self to shape the “other” about him. To an important extent he did shape his existence: in his decision to leave Harvard to fight in the Civil War, and then to leave military service to come back to Harvard; in his decision to abandon literature and philoso-

Holmes-Laski Letters, supra note 39, at 1124.
356 E.g., Letter from Oliver W. Holmes, Jr. to Lady Pollock (Oct. 27, 1901), reprinted in 1 Holmes-Pollock Letters, supra note 23, at 100.
357 Letter from Oliver W. Holmes, Jr. to Harold Laski (June 16, 1919), reprinted in 1 Holmes-Laski Letters, supra note 39, at 211.
phy for law and to make himself known through a form of legal scholarship whose originality he cherished; in his decision to abandon academic life for a judgeship; in his decision to change the emphasis of his extrajudicial life after being appointed to the Supreme Court. His extraordinarily successful effort to control the external world only confirmed to Holmes his ultimate powerlessness to determine his destiny.

In one sentence defining his philosophical creed to Lady Pollock, written the year before he became a Supreme Court justice, Holmes said that “[p]erhaps the universe, if there is one, has no truth outside the finiteness of man.” The first part of the sentence claimed the power of the self even to decide whether or not there was a universe. The second part of the sentence suggested that that same self was “finite”: the universe persisted, but its interpreters died. In this paradox of the exultingly powerful and ultimately powerless self one can find the enduring fascination of Holmes’s life and career. In observing the simultaneous realization and frustration of Holmes’s life plan, one senses that something fundamental is going on.

359 Letter from Oliver W. Holmes, Jr. to Lady Pollock (Oct. 27, 1901), supra note 356.