ON DATING MR. JUSTICE HOLMES

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It has taken a decade to elevate Mr. Justice Holmes from deity to mortality. When he left the bench in 1932, he was an Olympian who in judgment could do no wrong. His opinions were norms by which to measure the departures of his Court from the true path of the law. A distinguished scholar, now in apostolic succession, reviewed his career upon the bench with but a single word of mild criticism. And the specialist, inclined to find technical fault or confusion, was careful to be soft-spoken. Questions about the breadth of Holmes' reach, the factual foundations of his views, the stuff of time and place out of which his opinions were fashioned were not raised. The neat phrase, the deft thrust, the quotable line were ultimates; and beauty of form was commuted into wisdom of utterance. For the Court, but especially in dissent, thus spake Holmes and the subject was closed.

After ten years it is no longer so. As months pass, the immediate recedes, the body of opinions takes on perspective. The leads he proffered are no longer new; utterances once fresh bear the taint of the antique; later jurists have taken trails on which his feet were never set. The course of events, with its vision from after the facts, has applied its discount to his prophetic vision. And as a liberalism—which he was far from professing—changes character and elaborates a new program, the Holmes of the law reports is remade. His Court divides on an issue he never raised; he is rescued from an aloofness in the skies, becomes a creature of his own circumstance, takes a human role in the blindly moving affairs of his own age. The myth becomes the man.²

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² The classic account of the myth is Felix Frankfurter, Mr. Justice Holmes and the Supreme Court (1938). Personal admiration does not betoken intellectual or spiritual kinship. Holmes himself is singularly devoid of the streak which leads Felix Frankfurter to record, to approve, to rejoice, but not to question or to qualify. As men and as jurists—as the reports have already made clear—their universes are radically different.
As man and as jurist, Holmes stands most fully revealed in the law reports. Other writings explain, underline, corroborate; even the *Holmes-Pollock Letters*, recently published, add only a scant gloss to a rather full text. A correspondence kept up for nearly sixty years, now presented in two attractive volumes, looks like a find. The wonder rather is that there is so little of it. The letters are usually short; weeks and even months pass between exchanges; the annual vintage rarely exceeds twenty lightly freighted pages. Whether or not the two worthies played for the record, the detail is clever rather than intimate; cosmic ideas and dooms upon books loom large. Save for the downright—if not the lowdown—upon contemporaries, there is little that is confidential. It is a give-and-take between civilized men, who have never quite escaped their academic environment into the wide, wide world. It is communion between Cambridge, Massachusetts, and Cambridge, England.

They belong alike to the congregation of the cultured; but it is hard to discover a more personal bond. It was a common concern with neat puzzles of the law which provoked a contact between persons nourished upon the intellectual process. Pollock was the omniscient amateur, who forever dabbled in all sorts of strange things—and Holmes gazed in admiration at his devilish readiness for any idea in any language. He was intrigued with Pollock's ability "to allude to more things I don’t know on a sheet of paper than I can find in the Bible." Holmes could toss out an idea, open a new lead, reduce a philosophic system to a stinging phrase—even if Pollock thought his work at times a little too finely edged. He represented the flower of New England, had fought in the wars with David, was sitting in the judgment seat of Solomon. Holmes was a kind of American agent to Pollock's reputation; Pollock, in true reciprocity, took care of Holmes' fame in England. But the mild attraction created no modern Damon and Pythias.

The correspondence never becomes riotous; at times it has hard going. Pollock suggests a book; Holmes does his best to play up, but often does

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3 In a piece like this, where the intent is to make Holmes himself tell what manner of man he is, quotation marks should obey the rule of economy. The verbal coinage of Holmes is too unmistakable to require marks of identification. Inverted commas are used here only to give emphasis or as an occasional reminder that Holmes’ phrases are continuously caught up in this account. The Letters have an excellent index, and the inquisitive reader can easily ascertain the exact words of the original.
not like it or comes across with the wrong reasons. Holmes is tickled with his own essay on natural law; its meaning eludes Pollock. Holmes sends along opinions in leading cases; Pollock misses the jugular and comments as if King’s Bench were wrestling with an intricacy of tort law. Pollock remains true to the rule, the concept, the legal norm; Holmes becomes more and more intent upon the lawful frontiers of government. Pollock seems never to get a realistic conception of the American judicial system; even Holmes’ lucid exposition cannot make clear to him what certiorari is. Holmes, in an unguarded moment accuses Pollock of “opening chasms between us that reach to the middle of the earth.” Pollock has to assure Holmes that he doesn’t think we really differ in principle. Even when they employ the make-believe of being one in faith and doctrine, Holmes at least cannot escape the suspicion that they do not agree upon the fundamental nature of the universe.

In the letters Pollock stands out as the lesser man. A common notion that he is a stuffed shirt or an erudite old duffer is dispelled. Although he spreads himself thin and leaves no lasting impress upon his age or the law, he deserves recognition in his own right. Without coming to close grips, Holmes could admire his diabolical allroundedness. The concern with Asiatic poetry and the Russian language, with Spinoza and Persian grammar, with the history of masonry and mountain climbing, with the germs of what French philologists call semantics could—as things remote—stir in Holmes an interest untroubled by the need of analysis. Holmes would not be surprised to receive from him a drama, a lawbook, a symphony, or a system of philosophy—each of which would provoke the I-never-know-what-to-expect-next of admiration rather than the critical detail of understanding. Such omnicompetence aside, Pollock is clearly the kind of person his environment would create. He refers to such a love of nature as Virgil would have had, had he lived in English country; his cosmos clearly is divided into England and the rest of the world. Germany, however, or a Germany at war, is obviously outside Christendom. The World War is of its making; its purposes are evil; individuality has been drilled out of its people; it has made a system out of lying. The Kaiser should be tried and Tirpitz hanged; even dear old Gierke, in verbal defense of his country, can spout only the official piffle about German culture. A cable to Holmes—a very unusual luxury—he had quarreled over having to pay a deficit in

Note, for example, the pathos which attends the exchange upon Robert Bridges’ Testament of Youth. To Pollock it is the only great philosophic poem in the English language. But its rhythms and forms of speech do not charm Holmes’ ear, maybe because he cannot get the hang of the thing. Pollock banks on the judgment of posterity; Holmes bets that posterity will let the book calmly die.
postage on some opinions sent first class—welcomes him as an ally upon America’s entrance into the war. But he finds it presumptuous for American soldiers to say that they had come over to finish the war. England über alles has no qualification in his creed.

His general views follow the prevailing fashions. War’s incidence lies, not in the destruction of tangible wealth, but in great damage to the capital of the humanities which make civilized life worth living. The catastrophe has left mankind no better or wiser than it found them. It doesn’t occur to the critics of the notorious *Taff Vale* decision⁵ that “any court should really try to determine cases according to law.” The general strike, which for nine days had paralyzed the English economy, might be worth the price if the result were to discredit the extremist trade union bosses. The Labor Party’s stock in trade is its frank and blatant plunder as a bait to the have-nots. President Lowell, a kindred soul, had sent along his report on Sacco-Vanzetti. Pollock is persuaded, knows that the defense, financed by the Moscow gang, has not been honestly conducted; finds it “monstrous that you should have had to listen to a perfectly idle argument” in behalf of an appeal.

Such observations savor more of the Tory mind than of reason. James Bryce will keep an open mind to the end; Dicey ought to know more history and is cursed with the damnable heresies of Austin; Einstein—whose theories threaten havoc, not to the status quo, but only to real time and space—is no revolutionist. Asquith, who has polish without backbone, never had an idea in his life; Lloyd George has capacity to take advice anywhere except in the right quarters. As for William Randolph Hearst, his ignorance is enormous and his information very odd. Pollock will print Theodore Roosevelt’s article in the *Law Quarterly Review*—not that there is much law in it, but for the law of nations it will pass muster. Woodrow Wilson is a damned schoolmaster, a doctrinaire; but detail is lacking, since he cannot find language fit for the eye of a Supreme Court Justice. It is hard for Pollock to think of public officials who do not threaten to break the speed limit. Our ignorant Labor men, with their reckless spending, are not to be entrusted with responsibility and Liberal ministers are in a hurry to do too much all at once. But the worst of the lot is the feeble and futile opportunist, Ramsay MacDonald, whose principles cannot rise above watching the jumping cat. “Doubtless God could have made a more contemptible man, but doubtless God never did.” It was only when, waving a faded red flag, MacDonald found himself at the head of a Con-

servative government that Pollock discovered that he had somehow grown a backbone.\textsuperscript{6}

But, if his views were those which passed current in the chosen circle, Pollock imposed his own stamp upon them. A lot of false history has been written by assuming that the ordinary rules of evidence hold in an atmosphere of credulity. He recognizes in the abstract that the business of ideas is to devour formula. And for the Absolute as an article of faith Pollock has as little use as Holmes; it is only in his legal writing that he finds it an indispensable concept. It is "idle to censurate the Creator as wasteful" when he had "unlimited stuff with which to play." No system of the universe can be proved, for there is nothing to prove it by. And, to sum up, it is difficult to believe that the universe is rational and impossible to believe that it is not.

But such speculation is a single aspect of personal habit. It belongs to a round of polite living rather than a burning quest for truth. It can hardly be elevated above other delights which a life of intellectual leisure affords—exploring primaeval forests, keeping bad English out of the law reports, sketching Sir Frederic in the Cubist manner, strolling through the sham European city of Calcutta, damning prolixity in speech and starch in shirts, joining the pilgrimage to Wagner's Beyreuth, admiring a great yew tree or a Brahmin ascetic, donning ceremonial togs and going forth to garner an honor, slaying in a dream a couple of ruffians with an umbrella, adoring Dionysus who will surely survive all the attacks of Carrie Nation, reducing spiritualism to a queer tangle of things, laughing over Wodehouse's \textit{Leave It to Psmith}, hurling at Holmes "the unknowable $\sqrt{-1 \cdot x}$ of Kantian orthodoxy," giving free play to a mind content to move within conventional grooves. All is illumined by wit, learning, individuality; yet all remains the common opinion of his age, country, and class.

To such a person Holmes is less an alien than "the great liberal justice" would have been. If he is freer from bondage to respectability, he was enough its product to be tolerant of Pollock. For Boston, as well as Britain, could confuse the local with the cosmic, create man in its own likeness, drive barriers between reputable belief and the facts of life. As he went through life, Holmes never had to be introduced. By birth and breeding he was somebody. His family line stretched away back into the seventeenth century—that is, almost to the beginning of time. His father's repute was mighty in the land; his grandfather Jackson had been a distinguished judge; his wife's grandfather Bowditch had done the classic

\textsuperscript{6} From the Labor side, the same incident has been described as a loss of guts and selling his own party down the river.
work on navigation, a mighty name in a state whose glory had come by way of black cargo, the clipper ship, and the China trade. The Adamses and the James brothers were very close; the Cabots and the Lowells hardly as remote as God. Leslie Stephen is an old and dear friend; Mrs. John Richard Green is staying at the house; Bryce, Dicey and their ilk are in his circle.\textsuperscript{7} Such contacts added prestige from abroad, a mighty currency in a Boston gone British.\textsuperscript{8} Among a folk to whom name, family, connections are the greater part of competence, his credentials were never called for. Status opened doors, set presumptions in his favor, saved embarrassment and bother.

As the years passed, their events beat upon him almost without accent. Into his life the Civil War came—as a break with all to which he was accustomed and to exhibit mankind in the rough. He didn’t like it, he didn’t want to read about it; Pollock rubs a sore spot when he refers to his father’s piece \textit{My Search for the Captain}. Yet its discipline and exposures brought a maturity which otherwise he might have missed. The Venezuela affair stirs memories, reminds that peace between nations may be broken, provokes \textit{A Soldier’s Faith}.\textsuperscript{9} As 1914 ends a lull in history, Holmes knows without research where right lies, damns the Germans, prays for the success of British arms. But, as one who has been to the wars, he refuses to pass moral judgments—least of all on nations, receives the atrocity stories with doubts, feels about casualties “much as I should if the same deaths had occurred by shipwreck or earthquake,” regrets the hysteria to which in wartime even judges succumb. But such events are few; the impacts from the world without, quickly spent.

Life moves between Beverly and Boston, between Washington and Beverly. Cases on his docket yield glimpses of a culture in balance and unrest. But for the most part the avenues which connect his personal life with the great society are books. Even personal losses leave no indelible impress. He scribbles to Pollock a paragraph on the death of his father—a tug that goes down to the roots—and a second on a point of law. The passing of his wife who for sixty years had made life “poetry for me” was a blow from which he never recovered. Yet he was resolved to keep at work

\textsuperscript{7} The reviewer remembers the startled shock when, one afternoon at tea, Mr. Justice Holmes casually referred to “the last time I had dinner with John Stuart Mill.”

\textsuperscript{8} For an account of Boston turning its back on America and going British in the decades following the Civil War, consult Van Wyck Brooks, \textit{New England: Indian Summer}, especially c. 7 (1940).

\textsuperscript{9} Over President Cleveland’s blustering attitude towards Great Britain, Holmes boils a bit. “It makes me indignant to have an attitude assumed on a public question and to be told that patriotism requires me to back it up, before I have had a chance to consider the matter at all.” As a citizen of the Platonic state, Holmes will have none of docile obedience.
and interested and returned from the funeral to scribble his immortal dis-
sent in the Schwimmer case.\(^{10}\) Aloof from it all, secure in income, position,
interest, he gets the course of human events by hearsay—and carries on.

Early he discovered his way of life; as the years passed, it needed little
revision. Unlike Pollock he could not live upon funded income; a decent
support demanded a job. His father had not permitted him to leave his
lessons undone; and as a man he was too conscientious to neglect his cases.
He rather liked to think of himself as taking his tasks more seriously than
the evidence seems to warrant. He is constantly under “a high pressure of
work” or subject to “much strenuous toil.” He has only a minute and a
half to write to Pollock before doing something else but it is ever thus.
The *Common Law* has cost him hundreds of hours of sleep which he never
expects to recover—though he did try to get a little installment back now
and then, before his brethren or other friends came to dinner. Forever he
envied the leisure which other men seemed to possess.

And there was vanity to hold him to his vocation. Whether it was the
goald of the law, the bite of his art, or sheer concern over his own ego,
Holmes had enormous pride. The immortal who left the bench in 1932
seemed aloof from the judgment of mortals; the individual who stalks
through these pages is greedy for praise and extremely sensitive to adverse
opinion. As a young man, he wanted a federal judgeship and his *Common
Law* noted in England—and said so. When he was appointed to the Su-
preme Court, the newspaper talk made him unhappy and he had to
unpack his heart to Pollock. He was shocked at the flabbiness of American
ignorance and at duffers talking with the sanctity of print. Some at least
of the money powers thought of him as “dangerous”—they were wrong;\(^{11}\)
even the *New York Post* insisted he was “not a great judge, being brilliant
rather than sound.” When Fuller retired, Holmes seems to have cast en-
vvious eyes upon the Chief Justiceship; he would make a “better adminis-
trator than White.” Still he didn’t allow himself to get too excited; the
President’s inclination seems to be “towards a type for which I have but a
limited admiration.” Its mention of Holmes’ name makes of Webster’s
*The Real Adventure* a great novel. His portrait at the Harvard Law School,
an admirable and vivid likeness, “pleased me mightily”—especially as it
was hung opposite to Marshall’s. The chorus of praise which eventually
came to him, “I would almost willingly have died for ten years ago.” It
almost made him—not quite, for his sense of humor forbade—accept him-
self as Sir Oracle. Apropos of an article by Harold Laski in *Harpers*, Pol-

\(^{10}\) United States v. Schwimmer, 279 U.S. 644 (1929).

\(^{11}\) He had taken the side of labor in Vegelahn v. Gunther, 167 Mass. 92, 104 (1896).
lock quotes "the butter's spread too thick." But not for Holmes, who is touched and moved and made so shy that he "should hardly like to speak about it and could not criticize." A truly Back Bay vanity.

But, although a working man, Holmes remains the gentleman. His vocation gives scope to a fine art, but it does not absorb or command his life. He listens to argument only to get the point; usually he has his hunch long before the lawyers are through. He confesses to playing hookey by writing letters while sitting in solemn judgment. In time he came to be master of all sorts of labor-saving devices. He avoided the long sermon so popular with many of his colleagues, made a sentence do duty for half a dozen paragraphs, wrote no prolix gloss to his own scant text. His opinions, cut to a definite form, are more nearly of a length than those of any of his associates. He never stayed up nights following the price-curves of shingles or relating fatigue to hours of labor according to the official statistics of forty-three separate countries; he left all such time-consuming tasks to my good Brother Brandeis. Instead, as a good lawyer, he knew how to make presumption do the work of research. He could assume that members of the legislature were reasonable men; ergo the burden of proof was upon those who would challenge their statutes. He was not going to say that an act of Congress—or of the law-making body of a state—was constitutional. A statute concerns technical matters; and, in his ignorance, that would be presumptuous. He could only say that he was not prepared to call it unconstitutional. The double negative was extremely handy to one who didn't easily get excited over fact. Even if the law gave bother, the inarticulate major premise, with its meaning at large, was a present help. Thus Holmes contrived a technology to speed his work and to leave himself master of his own time.

An appeal court—even the Supreme Court—is not an exacting master. As from time to time the volume of its work has increased, a revised judicial code has thinned the stream. The neat invention of certiorari has enabled the justices to take their docket to a pace which befits the dignified stride of justice. As Holmes came to Washington, his colleagues were still engaged in extra-curricular activities. Brewer for a fee cried down Karl Marx in popular lectures; White, at the Georgetown Law School, with polysyllables made the simple lines of the Constitution unintelligible. As the Court has imposed its own ban upon useful employment, restless

22 The average stint of writing runs to less than 150 of the small, large-type pages of the U.S. Reports per man per year. Any law teacher would regard this as meager and the journalist would view it as nonexistent. Add sessions of the court 20 hours per week for 17 or 18 weeks. Add executive sessions. Add time spent in examining petitions for review. Still it all falls far short of a formula for driving work.
souls have been hard put to it to keep themselves fully occupied. A shock has attended the exchange of a driving job for a leisurely docket. The veto on the book, the public service, the lecture platform has made the opinion—the conventional outlet for surplus energy—a personal necessity. Harlan could not stop writing until he had et down all that was on his mind. Brandeis, developing a distinctive form of dissenting opinion, made leading cases out of what might have become forgotten causes. Men to whom their work is their life have always faced the problem of what to do with leisure.

Not so Holmes. His problem was not how to fill the hours, but how to save as many of them as possible from the toil of the day. The Puritan notion that man is an instrument of Providence is no part of his outlook. Every minute does not have to be justified by reference to something beyond; instead, the joys of life are not to be frustrated by the inbite of moral agency. It is God's business, not his own, to keep the universe in order. So without pangs of conscience he could hate anything which disturbed his quiet before eleven in the morning, think of himself as a recluse, refuse to read the newspapers. To go to the juggler's tonight; to listen to Bull Dog Drummond; to delight in the Japanese cherries in full flower around Tidal Basin; to drive through Rock Creek Park and linger long at the zoo; to beat the great drought by going in person to the express office for some whiskey; to spend a couple of hours in steady jaw; to refresh his recollections of Pittsfield girls in Civil War days; to recall the English girl “with a roving eye who seemed to take more notice than the usual tame bird”; to become a mighty bicyclist before the Lord; to see Sarah Bernhardt and to be a wreck next day; to roar out loud over Mark Twain or Stephen Leacock; to recite in concert with comrade Pollock, “Punch, brothers, punch with care, Punch in the presence of the pas-

13 The classic example is New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

14 Witness this passage between Carl Becker and “the great liberal justice.” “Becker, do you love the human race?” “I've never discovered anything within myself which you, Mr. Justice, would define as a heart overflowing with loving kindness, but I wish them well.” “I don't, Becker. God damn them all, I say.”

15 Note, for example, his willingness in Bailey v. Alabama, 211 U.S. 452 (1908), to leave a question of peonage to such men of the world as make up an Alabama jury.
but as an ingredient of pleasure and a stimulus to clever phrases. There is
much about improving his mind; but improvement must not give pain and
nothing a utilitarian would call design guides the meandering literary
journeys. He has to get away from the job to civilize up a bit; yet it is a
sense of achievement on the job that sanctifies a life devoted largely to
leisure.

A growing older—Holmes never forgets his advancing age—is an at-
mospheric part of it all. As the shadows lengthen, he feels as keen an in-
terest in life as ever. He has had his share of action and of passion; he can
even contemplate retirement with equanimity, so long as it remains just
ten years ahead. He gets a kick out of outlasting Taney to become the
oldest man who ever sat on his bench; and he refuses to be paragraphed
out of office. He deplores war because to die young is to miss your chance;
whereas to die old is only to lose pleasure, not to miss the point of being.
And, as he fades from the law reports and becomes “conscious of eating
dandelions by the roots,” he remains the soldier. His was a life with a
slowly changing accent, but without a break; a life subject to his own
command but justified by an activity in society.

One who takes the universe to observe, becomes like a god. But since
Holmes does it off the job, his cosmos is a place to watch and remark, not
to judge or interfere with. He thinks of man as a cosmic ganglion, who
with the burden of proof set against him could hardly be convicted of
omniscience. As most ultimates bear the mark of time and place, civiliza-
tion is only the process of reducing the infinite to the finite. He may con-
cede himself to be an intelligible instrument of the unintelligible, but to
the charge of private conversation with God he pleads not guilty. At this
stage in our ignorance, we have neither the facts nor the norms for real
judgment, so we can do no more than “bet on the universe in its contact
with us.” Thus he becomes suspicious of words like good and evil, wise
and foolish, and thinks it would be well if the intelligent classes could
forget the word sin. It is life, not the parson, who teaches conduct; and
“life is like an artichoke; each day, month, week, year, gives you one little
bit which you nibble off, but precious little compared with what you throw
away.” As for the end, life provides its own reference and “functioning is
all there is.” The form of activity does not matter; the great thing for a
man is “to believe when the end comes that he has reached the superla-
tive.” A single life was not enough for his roving spirit; in its place he
demanded three eternities which he might devote respectively “1) to
mathematics, 2) to my great work on anthropology, and 3) to belles let-
tres.”
Thus an English highbrow and an American intellectual trade ideas, opinions, suggestions, judgments over the years. In view of the bonds and barriers between their minds, it is natural that many a lead should spring from the circle of friends in which they moved. Maitland, Gertrude Bell, Leslie Stephen's brilliant but erratic daughter Virginia Woolf, Nevinson of the *Manchester Guardian* "in whom I delight," Charles Eliot Norton a flat but a very cultivated one, George Meredith, pass through these pages. Holmes has no reservations about Haldane, rejoices to be praised by Scrutton, remembers John Morley's regard for Harriet Martineau as the Virgin Mary of the intellectuals. You can be quite friendly with President Eliot if he has no power over you. Henry Cabot Lodge is a young rich who has decided to mix politics with serious attention to American history. Benjamin F. Butler is a remarkable man whatever you may think of him; Benjamin Jowett, a retail dealer in notions; the Emperor Francis Joseph, a real gentleman.

It is, however, only when friends break into print that the lines get really excited. Pollock can delight in seditious ideas provided they are exotic; Holmes doesn't care how blasphemous they come or at what Rock of Ages they are levelled. Pollock can only call Brooks Adams a clever young man and wonder whether he is a socialist or a champion of free silver or both. But to the mind of an explorer like Holmes the bad boy of the Adams family is a challenge and joy. The godless pages of the *Law of Civilization and Decay* are about the most interesting history he has ever read. Adams insists to Holmes' glee that a philosopher is a fellow hired by the comfortable class to prove that all is right. Still "a destructive animal governed by greed and fear" is too simple a summary for man; and the talk about the world being slaves to the man who commands is rot. On the street and at home Henry Adams is delightful; but he loves to pose himself as "the old cardinal." And, like his brother Charles Francis, great talents avail not against a gift for turning all life to ashes.

Yet the book does not replace the man; it is only evidence of individual character. To Holmes the ideas of William James are no more than the qualities and foibles of personality. Bill James was Irish, addicted to sentiment and mysticism, inclined to belles lettres rather than philosophy, and filled with queer traits. He was not strong in logic, allowed spiritualism to seep through his intellectual foundations, held that an automatic universe won't work or not so well as one that has a warm god back of it. His belief that five minutes equals eternity is all bosh; his will-to-believe postulates an I-should-agree-with-him; his pragmatism is an amusing humbug. His reason made him skeptical; his wishes led him to turn down the lights
to give miracle a chance. Still in his degradation of logic and his damnation of the absolute, he was closer in mind than Holmes will admit. In a sense both derived from Emerson, "the only firebrand of my youth which burns as brightly as ever," and whose influence Holmes was more ready to concede than to specify.

As old friends pass, Holmes complains of increasing loneliness—and finds solace in new ones. First among these—if we are not to go beyond the record—is Harold Laski, "an astonishing young Jew whom Frankfurter brought over here the other day." The stranger is an agreeable chap, travels with the New Republic lot, has beaten the American champion at tennis, and while an unbeliever makes church history his specialty. Although the men of Boston call him a dangerous man, he is all but omniscient, has the gift of swiftly assimilating dull books, and—not the least among his accomplishments—"makes much of your venerable uncle." Pollock is skeptical of Laski, deplores the influence of Figgis, rails at his doctrine of political disobedience, finds his notion of the divisibility of sovereignty anathema. Holmes is soothing and makes rhetorical concessions; he professes to regret the influence of Figgis who has given "an unfortunate turn" to Laski's speculation; and, rising to the attack, insists that, apart from theory, sovereignty—like most matters at law—is a question of strength and degree. Holmes concedes that Laski has the fault of referring easily to books and persons not generally known. Pollock gets in a back-handed lick with "people say Laski is a communist, which I can scarcely believe considering his historical learning." But Holmes refuses to give him up, for Laski "spots a book as my wife would a flower"; and although off to London to be a professor in an economic thing—"I forget the name"—continues putting Holmes onto what he wants to read.

It was in fact books which kept the correspondence going; it was diversity of taste in respect to books which kept it from becoming intimate. Holmes read—or at least exposed himself—to everything, and the range is as staggering as the sheer bulk. His inhibitions were few. "A picture of a squalid and worthless life is a kind of art in which I take little pleasure." He avoided the Civil War, passed up biography, shied at mathematics and government reports, regarded polysyllabic erudition as not for him. For general information he went to the encyclopedias, the volumes of Everyman's Library, the books of the Home University which generally gave a fillip or a fact. He roamed through the classics, literature and philosophy, the current social scene, the exploration of strange lands, the nature of the

Pollock exhibits no grasp of William James or of pragmatism. To him it was enough that James seemed "to confuse truth of fact with truth of concept or formula."
physical universe. He delighted in Fabre's insects told about in "truly
golden books"; was carried away by Nansen's *Farthest North*; got only "a
very blurry impression" of Whitehead's *Science and the Modern World*—
but hoped he had the general drift. He found great cisterns of delight in
Reinach's *Cults* and drew his ration of gloom from the *New Republic*. But
as his eye moved down the page, interest had to go along; and the idea
that he read to elevate he met with scorn. His "Thank God, I am a man
of low taste" applies in the library as well as at burlesque. He always kept
Balzac at hand and on occasion "alleviated my serious reading in Rabelais
with McKechnie's *Magna Carta*." He did not mind a book which would
call a blush to "the cheek of my innocence" and rather delighted in one
which described "unspeakable practices on the part of the heroine." He
loved to have on his shelves books hot from the press and books that were
old before America was discovered; books that show the same human
feelings we have today and books that lead into the great unknown. It
is as absurd to be afraid of any book as it is to be afraid of any case.

In Holmes there is little dualism between man and judge; books and
cases provoke kindred hunches. His opinion about Roman or Saxon law
goes with little qualification for all the classics. Not only is the ancient
law set down in a foreign tongue; but it comes in an alien idiom from an
alien age, reflecting alien circumstance. To read demands a knowledge
and an understanding which the novice does not possess and which taxes
to the limit the resources of the mature student. It is a *humbug*\(^7\) to bother
boys with the great works of the past; they should begin with books which
have our own slant. A great deal of what even the adult gets is either
platitude or something the old bird never meant to say; and the inexperi-
enced are likely to dilate the wrong emotion. But Holmes can except him-
self and on occasion renew contact with the very great. Pollock protests
at editorial stupidity which has made the Bible the hardest of all books
for the general reader. Holmes is less bothered by errors of translation and
truncation into chapter and verse; when he doesn't know what the old
Jew is driving at, he has a general notion it was something splendid. But
he gets only a moderate pleasure out of the *Odyssey*; finds Plato's *Laws*
operating in an unreal world where citizens never have to think of making
a living; discovers the simplicity of the ancients to be the bite of a dog, not
that of art. Thucydides is all right, but the reader can get far more for his
money in a modern book; Virgil gives rather more than the recollections of
boyhood lead one to expect; Horace sums up the man about town and

\(^7\) *Humbug* is a favorite word with Holmes. It is with him an epithet of exuberant disap-
probation.
shows that from ancient Rome to New York the clubman is an unchanging type. Seneca, Plutarch, Tacitus—the literature of the past is a bore; texts have come down to us smeared with a later erudition; what once upon a time it took a man of genius to say is obvious to us. Holmes would rather read Livingston's book about The Greek Genius and Its Meaning for Us than to pore over ancient works which have been floated down from an alien culture.

In lesser degree all of this applies to the great books nearer to us in time. Dante is not for the schoolboy or the general reader. He assumes that you have read Thomas Aquinas and know all the gossip of Northern Italy; and no translation is the Divine Comedy. Still, archaic Italian is easier than modern; and with Latin and a trot Holmes found it very easy. He loved Dante's bright, clear-colored mediaval pictures and not the Adamic sin stuff. And, in judging Dante the greatest singer ever, he was probably closer to Pollock than anywhere else in the letters. The reading is one of the emotions of a lifetime; he doubts that ever again he will get such a sensation from literature. But ecstasy must have its antidote, and Holmes cannot restrain the imp within from the remark that it comes in equal parts from the heart and through the hat—which Pollock lets pass without comment. Pollock takes the bard of Avon solemnly enough to draw up "the articles of my Shakespearian faith"; but admits that old plays were hurriedly patched up and that there are some dull—but "not gratuitously dull"—lives there. Holmes wonders how much of the pristine meaning escapes us; admits that there is magnificent tall talk about life and the ultimate mysteries, fired off with a bang; remarks how a few golden sentences will float a lot of quibble and drivel for centuries. Burton's Anatomy of Melancholy belongs to an age in which men do not mind being bored; Faust is Faust, so Holmes labors through it in German; Isaac Walton leaves the withers of the cosmos unwrung. Moby Dick is a great book; maybe he should be ashamed to read The Talisman, but "what do I care for impossibles if the author can fire my emotions." And so Dryden, Jane Austen, Tristram Shandy and all the worthies. But everything is dead in twenty-five years. So on to Anatole France's Procurator of Judea, modern yet true to the atmosphere of the times. And away to detective stories "for which I have an ignoble liking."

But with books the idiom of mind, rather than the date, is the thing. 

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18 Both Holmes and Pollock had a classical education, yet its incidence is as different as their minds. Pollock politely confesses "the trouble of finding out what the man is talking about." Yet to all that Holmes said, he must have felt far more dissent than ever he voiced. Note, e.g., a comment of a page and a half on an Ode of Horace. Or his line, "Touch the patriot in Horace and the true Roman speaks."
Time alone does not bring the alien note; a work may be up-to-date and yet remote. To Holmes the real norm is whether the book is for me. A book—an opinion too—may violate all the rules, be technically incompetent, and still come off. Thus Dickens' *Our Mutual Friend* is mawkish, sentimental; a vehicle for unreal impossible discourses; filled with a thousand artistic errors—and withal a splendid thing. *Tom Jones* is great stuff, but life is too short for such voluminous work. As for the moderns, the paths of Holmes and of Pollock diverge. Pollock writes of Byron, of the dolls which are Thackeray's women, of a contemptible creature called Huysmans whom even the war couldn't turn into a man, of the stereotypes who populate Galsworthy's pages. Holmes scribbles of *Vanity Fair* and the *Romany Rye*; of Owen Wister and Hugh Walpole, whom one can read indefinitely without fatigue; of Willa Cather and Hemingway who exhibits "great promise when he gets away from garbage." Pollock can't take the artificial psychology of the *Red Badge of Courage*; sets Holmes straight on the spelling of Tchekov and the proper judgment on his work; talks of the common sense and the ignorance of George Bernard Shaw. Holmes, in Ade's *Fables in Slang*, the cultivated fun of Stephen Leacock, Mark Twain's *Connecticut Yankee*, takes an avenue forever closed to his correspondent. Pollock would like to think the right thing about Proust; Holmes thinks he takes too much time about things and people.

The law, as well as the pursuit of knowledge, drove in the direction of philosophy. Holmes delighted to occupy a solitary reviewing stand while cosmos followed cosmos in endless parade. Marcus Aurelius—Karl Pearson spoiled by fads—Windelband's dull tome—Merz's *History in the Nineteenth Century*—Weigall's *The Paganism in Our Christianity*, it will take a bold man to carry it to Tennessee—Vaihinger's *The Philosophy of As If*, destined to leave an indelible mark upon legal education—Broad's *Mind and Its Place in Nature*, no substitute for Sherlock Holmes—Fichte—and metaphysical works of men seeking to lift themselves by the slack of their own breeches. It was out of the question to receive, assort, understand all this and win through it all to a philosophy of his own. There is little evidence that in conflict, trial and error, heroic search, Holmes won his convictions. Instead his values, like his idiom and his language, came out of a life singularly unmarked by struggle. Here and there he picked up an idea for keeps, but reading such books was usually watching a moving show and shouting comments from the side lines. Hegel has proved a blight wherever he has passed; he "can't persuade me that a syllogism can wag its tail"; F. H. Bradley is right on the inseparability of the individual and the cosmos—only his cosmos has got its tail in
its mouth. Bergson, a humbug, presents the universe as taking an irrational pleasure in a moment of rational sequence. Pollock damns Bertrand Russell as an angel who has fallen from mathematics and is now engaged in throwing stones at God Almighty's windows; he guesses John Dewey holds reason to be the order of nature—or else doesn't know what he is driving at. Holmes finds Santayana's premises much like his own, that he expresses the world as I should express it; and that John Dewey speaks "as methought God would have spoken had he been inarticulate but determined to tell you how it all was." And so it goes; each judgment is delightful; yet it seems impossible to discover criteria of criticism which will unlock the whole.

The pity is that Holmes takes this amused aloofness over to reading which should reveal the dynamic culture within which he lived. As playboy and letterwriter it is all right "to be on the side of the unregenerate," who make the worth of life an end in itself. But such a value demands expression in the light of a particular stage of culture—and this Holmes could not give it. He could move from one age to another and take the centuries in an easy stride, but the meanderings lacked a point of destination. Zimmern's Greek Commonwealth, Rhodes' History of the Civil War, Taylor's Mediaeval Mind, Morrison's Maritime History of Massachusetts, Strachey's Queen Victoria alike fascinate him. He delves into the stirring preachment of Thomas Carlyle, more poet than philosopher; discovers Macaulay to have been a big fellow; plunges into Trotsky's Autobiography to wish that he were at the devil. He rebuts Beard's Economic Interpretation of the Constitution with an it-ain't-so and a what-if-it-is. He delights in Patten's Development of English Thought—a surprise in every package; finds Parrington interesting, in spite of a thesis borrowed from Beard; is taken in by the phony stuff which James Truslow Adams serves up as history; can't believe in the triumph of the money power over democracy. Even with Spengler the book is the thing. Pollock calls the erudite German a damned rather than a natural fool; Holmes concedes him to be "an odious animal who must be read." Yet the sum of it all is to make him realize more fully what he has believed before. One doesn't expect to find Holmes sharing the current apotheosis of evolution into sheer mutation; yet there is surprise at how pre-Darwinian it all is. There is no sweep of social change down the ages, no use of history as tool of cultural analysis, no purposive curiosity as to how things got that way. The timelessness is almost Gibbon.

The same detachment attends the books which seek to explain contemporary culture. Holmes has found all the leads and explores them assidu-
ously. No university could suggest a more comprehensive course of reading than that which he pursues; and, if the pieces never become more than a vague picture of society-in-action, it is because his mental habits forbid. There is the groundwork in anthropology—Sumner’s *Folkways*, Fraser’s *Golden Bough*, Lowie’s *Primitive Society* testify to that—though he would like to put off a part of Fraser to the Day of Judgment. There is the usual course in the political classics; Machiavelli, Hobbes, Locke, Montesquieu, Burke—who is marvellously great—are all there. And there is Herbert Spencer with the ideas of the lower middle class British Philistine and a capacity to affect our way of thinking about the universe to give—or perhaps to deny—perspective to it all. Political economy belongs to such a curriculum; and, although his taste does not run that way, Holmes does fairly well by it. He had to excuse himself from reading Alfred Marshall, and he couldn’t discover in Ely’s *Principles of Economics* “much more than the refutation of fallacies in which I don’t believe.” But he had a try at Carver’s pleasure-and-pain, but mostly pain, economy; found solace in Adam Smith, from whom he extracted “general views of life”; and was pleased immensely by Malthus, who more than one hundred years ago “busted fallacies that politicians and labor leaders still live on.”

Gallantly he exposed himself to the current stream of liberal thought. At its inception he subscribed to the *New Republic* with hope; found the Webbs’ *Trade Unionism* a mighty solid piece of work but inspired by sentimental economics; thought Cole’s *Social Theory* took a good deal for granted which he would never grant; was far from convinced by the polemics which show up laissez-faire. He is no more than half taken in by the arid profundities of Walter Lippmann; “these young men are so damn solemn and their books don’t get anywhere.” And to round out his education, he accords to the champions of reform—square dealers, muck-rakers, radicals—their full day in court. A host of lesser fry rub elbows with the great Karl Marx himself, a plagiarist, a humbug, and a bully; “I cannot imagine a combination less to my taste than Hegel and political economy.” Holmes reads things of that sort a good deal just to get all sides, even if now and then he encounters “a frame of mind that makes me

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39 The longest of Pollock’s critiques—three pages—is of the Folkways. It is “a vast amount of roughly classified material” from “the workshop of a man so much overweighted by book-learning” that his critical faculties are blunted and he cannot keep his eyes open. It is the work of a not very human man, “digging in savage muck-heaps.” And why go so far, when the same question can be asked about “what is happening right under his nose.” Pollock is at his critical best here.

40 Holmes could scoff at Wilberforce, that saint who tilted against human slavery yet opposed bitterly a mitigation of the laws against the combination of workingmen.
puke.” But ever the mood is of entertainment rather than analysis; the
interest in a theory exposed rather than an institution at work.

Thus Holmes exhibits more concern with the nature of the cosmos than
with the operations of the economy. As a result his social views have back
of them somewhat less than a life dedicated to an attempt at understand-
ing. They come far more from family, insulation against shock, the quiet
events of the years than from experience distilled into ripened judgment.
He finds arguments on bimetallism confusing; talks at length with a labor
leader to find out what he wants; reads with pleasure a leaflet which pro-
claims that labor and capital are now talking the same language, that of
the “informed economist.” Holmes has an admiration for the captain of
industry, who by a mastery over detail could put his conclusions into
practice with brilliant success; yet “such intense external activity does not
move me.”

In all his talk there is scarcely a hint of the emerging national economy
or of the enlarging role of public authority in its government. Wastes,
even great wastes, he admits; but they are due to competition and are the
very things the trusts get rid of. “I do not disguise my belief that the
Sherman Act is a humbug based on economic ignorance and incompe-
tence.” Holmes didn’t understand why the government pressed anti-
trust suits and viewed the activities of the Interstate Commerce Commis-
sion with a suspicious eye. Still his task was to “enforce whatever Consti-
tutional laws Congress or anybody else sees fit to pass.” As to industrial
relations, he admits that the advantage has been on the side of capital; yet
labor has the votes and is inclined to destroy as an antagonist what is
really its most powerful cooperative force. As to strikes, “inasmuch as
capital only means society buying and all such wars are contests between
different bodies of producers, I possess my soul in patience.” The working-
man is “groaning and grunting,” yet he is “in the saddle.” Ameliorative
measures may be called for here and there, but there is no call for drastic
change.

Before a for-God’s-saker has any right to howl over the world follies,
he should get a close-up view. For this Holmes’ recipe is “to consider the
stream of products, to omit all talk about ownership, and just to consider
who eats the wheat, wears the clothes, uses the railroads and lives in the
houses.” That done, it will be manifest that the crowd has substantially
all there is; that not one per cent is withdrawn from the comforts of the

2r Pollock thought the Sherman Act “a queer piece of drafting”; he went on to remark that
monopolies were odious at common law, that necessity decreed their control, and that intelli-
gence could not be warranted in monopolists.
many to support the luxuries of the few. But the public reasons dramatically, wants pictures rather than statistics, presents the inevitable to itself as the fiat of some great man and hates him. Thus by a presumption and a logical exercise, Holmes waves away all the to-do over waste and efficiency in production, why so few goods emerge in quantities large enough and at prices low enough to take their places in the standard of life, why with an abundance of resources we persist in an economy of scarcity. To the end he remains true to the iron law and the wage-fund theory.

Such a scheme of values cannot prompt Holmes' great opinions. One cannot as with Field, McReynolds, Butler discover an economic credo carried across the legal frontier. Instead, with Holmes the dominant impulses lie upon the level of form or procedure; and—the manner of the man aside—the search for the proximate cause runs back to his conception of the law. In the sleep which he lost over his *Common Law*, he was formulating what came later to be his constitutional views. He saw a doctrine slowly fashioned by a diverse lot of judges out of a medley of cases. Its norm of conduct is a flexible yardstick which varies from community to community and from period to period, in accordance with the common sense of the reasonable man. Holmes' aversion to great cases was an insistence that questions of public policy were not for the court. Whether it was the tolerance of the man-of-the-world-of-books, or the indifference to it all of one who did not want to be bothered, he understood the distinction between appearance and reality well enough not to barge in when he was not fully informed. He performed his office within the usages of the judicial mores; and where its ordinary procedures could not capture the essential materials he concluded that judgment was for someone else. Thus the genius of the common law conspired with a sense of the intricacy of the universe to create a reluctance to assume discretion where he could not command facts. In a word his attitude towards the legislature, and later towards administrative bodies, was laissez-faire. If the net result seemed to be liberalism, it was because his stay on the bench coincided with an era of reform. Had his tenure come later, when privilege sought to become entrenched behind sanctions from the government, the same attitude would have led to service to quite a different cause.

How much of a dent was made upon these views after Brandeis came to the bench, it would require a critical review of the opinions to discover. Yet it takes little reading in the reports to reveal the impact of Brandeis' personality.

In these days when iniquity is heaped upon the legalism of the law, one may retort that it is economic faith which enslaves and the law which liberates. And Holmes is just the case to prove it by.

Note the tragic irony of *Nebbia v. New York*, 291 U.S. 502 (1934). It was in behalf of the minimum wage that the legislative power to fix prices had been fought. When at last it
The genius of the common law broods over Holmes’ world. Pollock thought that in its early stages, a system of law had no capacity for anything like big generalizations—ditto for Holmes. Pollock looked upon codes as a kind of brutal interference with the natural process of legal reason; although he was not sure about that “natural process,” Holmes didn’t attach much importance to the codifying furor. But while Pollock remained content with petty problems and formal perspective, it was the feel of the thing which animated Holmes’ judgment. The common law comes from the age of the village common, the common carrier, the common scold, the book of common prayer, the communion—and, against the severities thrown about private property Holmes could revivify enough of its quality to be tolerant of peaceful picketing,25 the legislative referendum,26 and municipal wood and coal yards.27 At the common law there were limits within which property was pent; a “patent is a property carried to the highest degree of abstraction”; that “copyright could exist at common law” or be juggled out of it “seems to me imbecility.” He fears lest the right to the exclusive use of a collocation of words for advertising purposes be erected into “a new species of property far superior to that of the poets in their verses.” Pollock rebels—or thinks he rebels—at reducing law to rigorous chess problems—and Holmes makes judgment a matter of human experience in drawing lines and assessing degrees. For that reason he is distrustful of hypostatics, the severities of rigorous pedagogy, the polemics of austere scholars. Acumen and attention to detail cannot compensate for a want of vision and horse sense. Langdell, who is all for logic and hates any reference to anything outside it, typifies the powers of darkness.28 One would think that in all the annals of the law Ames saw nothing but error. Hohfeld is a reminder that many rational beings believe that ultimate truths can be reduced to patterns on a blackboard. Pound—with his botany, Civil War battles, and baseball scores—brought vast learning to a less than profound understanding of the law. Its doctrines might grow rusty; it had been half a century since to Holmes covenants which run with the land had been a burning question. But he lived and breathed

was recognized, labor gained something; but it was the mercantile interests—who sought to protect their price structures at the expense of the public—who became the principal beneficiaries. Nebbia v. New York is the turning point.

27 Opinions of the Justices, 155 Mass. 598, 607 (1892).
28 In one of his best judgments Pollock refers to “the Langdellian ether of a super-terrestrial Common Law” where “authority does not exist at all.”
and wrought in the atmosphere of the Common Law. The case-by-case method leads to the most accurate generalizations; its empirical accomplishments need not fear comparison with the systems of the continentals. Again and again "the life of the law has not been logic," its purpose has been to fix a line of minimum social conduct required of all men at their peril. He idly contemplates a little book embodying his views on the utilities of the law—a book which will "get rid of all of this talk about duties and rights, state the circumstances under which the public force will be brought to bear, and make a system out of some of my old chestnuts." But, of course "I don't mean to do it."

In his head, however, he did carry this little book to the Supreme Court. Although his appointment sharpened his perspective, he had heretofore not thought too highly of that solemn tribunal. It was all for the general; on "any question involving the differential calculus I shouldn't expect much from them." And he had himself been reversed from Washington. On that occasion he had carried the courts of Maine and New York; everything but the weight of technical authority was on his side; besides he could have written the case the other way. As a member of the bench, he wasn't sure he liked the Court's work too well. He doesn't seem to get any cases of special interest; his assignments do not really call out his full capacities; he is bored and worried with conferences; he wishes that "the sitting of our Court were at the devil." Back in Massachusetts he had had trouble; here in Washington his phrasing was a constant target for brotherly criticism. In the name of solemn flabby speech Taft objected to "stop rat holes"; Brandeis might reach for his juciest plums; in the end the boys usually "cut the genitals" out of his opinions. The Court did not shut up bores the way it ought to; his mind was made up in ten minutes and they "jawed on for an hour and a half." Litigants had the habit of asking to be reheard; the fact that Holmes fired his opinions off at once made him distinctly vulnerable. If a man kept a case for six months, it was supposed to show profound deliberation, while a speedy disposition was evidence of inadequate consideration. Yet, against the humbug of prevailing opinion, it was useless to argue that "a day's impact is better than a month of dead pull." There was the Sunday call on the Chief Justice to keep everything nice and brotherly; and a new secretary every year from Harvard occupied a one-man grandstand. To hear him tell it, he was forever bored, overworked and misunderstood. But he liked it more than ever he would ad-

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29 Brandeis states that Holmes was in the habit of putting phrases in for trading purposes and that in the end the diction was just about what he wished.
and as a faint trickle of appreciation swelled into a mighty volume, he resolved to hold on until something gave way.

It was as interesting a workshop as he could have found. In spite of his complaints, it gave ample scope to all his talents; there was hardly a technique of judgment for which it did not provide exercise. His notes, memoranda, opinions, all went down in longhand; he never employed a stenographer. He disregarded orthodox rules of punctuation and had the old Roman's contempt for the comma. He took pains—rather painless pains—in getting the right word, and to hit upon a clever phrase pleased him mightily. He allows Fowler, in the *King's English*, to frighten him; but Pollock cheers by insisting that the King's English is no more than the usage of good writing and that the pair of them know as much about it as Fowler. The meanings of words—which were not to be thought of as mathematical figures—continued to torture Holmes with their bitter sweet. His reach was magnificent; to him profanity was vitriol, slang vinegar, and he put the passion of life into his phrase. He rebelled at the morally tainted words of the trade which he had to employ; but, since the craft had become accustomed to its vocabulary, "legalese" had to be used. Still he would like to clear it all up in that first book of the law, "keeping to hard fact and using no images."

Words, however, were only a device for turning cases into the literary output called opinions. He was as much concerned as a poet over his immortal lines. He was forever looking ahead to see what chances the docket was likely to afford. At one moment he has already done over one hundred applications for certiorari. He did abhor, loathe and despise long opinions; "the man who takes a page to say what can be said in a sentence will be damned." He was never at peace in mind until he had retrieved his opinions, preferably with the approval of his colleagues. When in one day five opinions were returned, bearing no marks of serious violence, he felt like a terrier that had killed a cat. He could, however, if need be, get along without the imprimatur of the Court; in one session he took the chance to say things "which I thought needed saying," fired off a trio of dissents, and left the issues to posterity. He even prepared dissenting opinions subject

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30 Van Wyck Brooks reports that when Holmes was a small boy his father rewarded every bright saying with a spoonful of jam. New England: Indian Summer 259 (1940). In late life the jam had been replaced by his secretary's shout of approval.

31 It is a joy to us lesser mortals to hear Holmes confess that he never knew when to use "which" and when to use "that."

32 The day was May 14, 1928; the cases, Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U.S. 218, 222; Long v. Rockwood, 277 U.S. 143, 148; Springer v. Philippine Islands, 277 U.S. 189, 209. It need hardly be added that posterity has concurred in the Holmes opinions.
to what might happen. At times he regards himself as a law machine that turns out answers when you put questions into the hopper. But in the practice of the jurist’s art, the general is of small account; the work is more in the way of untying knots than of high philosophy. All you do is to back an opinion as to where you are going to draw the line. But as you work you are subject to the dominion of the thesis; and, where the whole is technical and details must be dovetailed together, it is a heartbreaking task to give an appearance of freedom, elegance and variety. “In a word it is the devil of a task to write an opinion and remain a man of letters.”

In this gallant endeavor, Holmes could not choose his companions; nor was the environment created by his brethren peculiarly adapted to the flowering of his genius. He was a friendly, even if critical, sort of person and sheer hate did not flare easily. The letters contain scantier references to his colleagues than the reader would expect, but scattered items make it clear that few of them came within his chosen circle. In respect to Brewer he had to remind himself that “one should not allow taste to blind one to great qualities.” He rebelled at Brewer’s itch for public speaking and writing, especially when it became indiscreet. And when the end came, he was “glad of Brewer’s death on his own account as well as otherwise.” Harlan did not shine either at analysis or at generalization; and Holmes did not bother himself over “what that sage said.” White was a man of power, but his writing could hardly be called felicitous. Holmes records the Court as awaiting the oscillations of McKenna’s mind; McKenna and Day are the severest of his legal critics—he finds it quite possible to reconcile himself to their going. Thirst for the Presidency aside, Hughes was wise, funny, experienced, a good fellow, with “doubts which open vistas through the wall of non-conformist conscience.” The way in which McReynolds took time to make up his mind got on Holmes’ nerves. Pitney had not wings and was not a thunderbolt and talked too much when he first came on. But he was honest, industrious, faithful to duty; and integrity scored an incomplete triumph over “prejudice and first judgments.” Day, Pitney, Clarke left a good deal to be desired in point of manners and regarded a difference in opinion as a cock-fight. At first Sutherland, Butler, Sanford impressed him favorably; still he didn’t expect to be astonished—he little knew what was coming. Holmes did his best to admire the Chief—whoever he might be—but could never quite go it. Fuller was at least amiable, if no paragon at administration. He knew that he ought to look up to White far more than he ever found possible. Taft was good-natured and “kept things moving pleasantly.” Judges went, judges came, and Holmes could not restrain the look askance.
There was for him less comradeship than the law of chance should yield. Soon after Holmes came to the bench, Moody gave promise of more than a casual bond. There was in him at least not the certainty of the second rate. But presently Moody passed on, and Holmes had to await the coming of my good Brother Brandeis. The man of the sheltered life joined forces with the man whose views had emerged from the heat of conflict. The Olympian, to whom moral words were anathema, discovered a fellow of the craft in a man whose burning passion was for social righteousness. Brandeis thought it good for Holmes’ immortal soul to go to Lawrence, Massachusetts, read the reports, master the textile industry. But Holmes shrank from the bore and discovered what he knew before, that he hated facts. So likely were the two to stand together that Holmes rejoices over a Brandeis dissent to one of his opinions; “it indicates that there is no pre-established harmony between us.” In course of time Stone came along as a third member of the trinity who in dissent were making more law than ever they knew. Cardozo was a good and able man with a beautiful face; Holmes would like to see him—as well as Learned Hand—on our bench. But Hand was not called and Cardozo came too late. A President can choose the men about him; even a law teacher is usually surrounded by a few kindred souls. Holmes had to accept the associates fortune offered; they were in general not men to draw him away from books and his cosmos.

The opinions which give Holmes enduring fame rest secure in the reports. Had there been genuine intimacy he might have written at length to Pollock about what lay back of them. As it is he affords only passing glimpses, hardly ever enough for his English friend to know what the cause is about. But, brief as they are, they help to reveal the man as he works at his trade. To the run-of-mine docket Holmes makes appropriate response, his views often standing out the sharper against Pollock’s comments from the side lines. Holmes was with the majority in denying the mails to lottery tickets; Pollock could not understand interference with so respectable an institution. Holmes is impressed by the tremendous stake in a water-rights case; Colorado needs the irrigation; Kansas insists the river is drying up; half of the United States is concerned. In invoking the treaty-making power to sanction a Congressional control over migratory birds, Holmes gives “a light touch to fundamentals.” In the quarrel between the Virginias Holmes inserts in his opinion “a summary of the

33 Champion v. Ames (Lottery Case), 188 U.S. 321 (1903).
34 Kansas v. Colorado, 206 U.S. 46 (1907).
bill and answer” to satisfy the wish of the Chief Justice for superfluous long-windedness. In the *Hyde* case Chief Justice White—who in judgment usually looked to the consequence and always paraded legalisms as reasons—took a stand, hobbled to and fro, eventually lit on the other side. So Holmes was driven to dissent and managed to fire off one or two phrases that tickled him a bit. In the poisoned pool case, Holmes elevated trespass above human life, accused Clarke who dissented of “more sentiment than reason,” set down a most reactionary opinion, and won verbal flowers from Pollock. In the *Mahon* case, he cried up due process as lustily as his stalwart colleagues; the dissent of Brandeis makes it clear that for the moment he is quite off his orbit. In the *Fairmont Coal* dissent, he had taken a lusty shot at *Swift v. Tyson* and thinks he punched a hole in their bottom, against “old Harlan who simply rolled off the cases”; and in the matter of the rival taxicabs returns to the attack to declare that the law is not a brooding omnipresence in the sky. Pollock, in an oblique comment insists that “the proper law may not be the law of any state at all, but by contract what the parties make it.” He adds that if some western states lay down rules contrary to natural justice, the federal courts might disregard them. And in Holmes’ last great dissent, he complains of McReynolds overruling decisions by me and others, which were firmly established upon authority, logic, and settled practice. There is love between him and his brethren; but he suspects that if he should be gathered to Abraham’s bosom some of them would think it an advantage to the law.

36 Virginia v. West Virginia, 220 U.S. 1 (1911).
37 Hyde and Schneider v. United States, 225 U.S. 347 (1912).
38 He hopes his opinion in *Keokee Consolidated Coke Co. v. Taylor*, 234 U.S. 224 (1914), “will go through without much objection, though I have put in a phrase or two that I have some hope will give pain.”
40 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). A student of pathology would note that Holmes returned to the Court from a serious operation to write the opinion.
42 76 Pet. (U.S.) 1 (1842).

44 Pollock’s greatest competence was not knowledge of federal jurisdiction—or of American constitutional law. Note his line, “if the Fathers had foreseen the growth of international and internal business, they would have made some things in the Constitution more explicit.”
It is a personal value rather than human sympathy which prompts Holmes' attitude towards civil liberties. The persons whose cases came to his Court seemed to Holmes "poor fools." He doesn't respect or even love the devils he had to write opinions concerning. Nor was he an extremist in freedom of speech—"I have no enthusiastic belief, though I hope I would die for it." Yet the ancient liberties were essential to the operation of republican government; and, although a nation was bound to defend its own existence, it had no business making sacrifices of the ignorant and stupid. He could not understand, even under war hysteria, how cases which made his blood boil left the public and his colleagues apathetic. He wondered that the government should press the case against Debs for "obstructing the recruiting service" with the inevitable result that fools, knaves and ignorant persons are bound to say he was convicted because he was a dangerous agitator. In the Schenck case there was "a lot of jaw" about free speech which I dealt with somewhat summarily; in the Toledo Newspaper case the entire performance was wholly unwarranted and the "last thing that could maintain respect for the courts"; in the Abrams case he was hot under the collar and had a dissent ready as soon as the opinion was circulated. He insisted that "an actual intent to hinder the United States in war must be proved"; and wished, after the opinion had left his hand, that he had rubbed it in that the matter concerned our interference in Russia. The majority may be prepared to shut him up, but he doesn't expect it. And in the Gitlow case the essence of his opinion is to defend "the right of an anarchist to talk drivel in favor of the proletarian dictatorship."

As the personal note recedes, the damn-them-all-I-say attitude is less obtrusive. He has little concern one way or another for Emma Jensen, whose husband lost his head on a gang-plank which linked ship and shore. His intent is to keep admiralty law flexible enough to serve as an instrument of justice. In the first child labor case, Holmes' dissent served a worthy cause, asserted the claim of interstate commerce to its broad province; and "flayed the majority with a lot of precedent and also

48 Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).
49 Abrams v. United States, 250 U.S. 616 (1919). Pollock is horrified at a sentence of twenty years; twelve months strikes him as more than enough.
51 Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).
ON DATING MR. JUSTICE HOLMES

grounds in reason." It is news to learn that Holmes wrote a dissent in the Hitchman case which for some reason he never delivered. When Holmes had just come to Washington, he had insisted that "an agreement not enforceable at contract was not on its face a violation of the Sherman Act." The abstract line collided with Theodore Roosevelt's trust-busting program and wrecked a beautiful friendship. It was never the same after that; "the President would have made a fool of himself and excluded me from the White House—I never cared whether I went there or not."

An occasional item indicates quite a to-do behind the scenes. In the Dick case, Lurton read liberty of contract into the patent law and extended its protection to unpatented goods used with the invention. The holding had been the rule of the circuits for a decade; yet the decision touched off a great furor. And Holmes, who in Christian charity went along, sets it down that, were the recall of judges in operation, the majority might get the benefit of it. But he finds in bad taste the dissent of White—a stump speech by a politician whose Irish was up. The printed piece was poor work, but it had been toned down and gave "no idea of the oral discourse." As for Holmes, he "didn't care about the case one way or another"; still he could have written a better opinion on either side. In the Dr. Miles case, it is Pollock who grows discursive. He doesn't see that any sound doctrine of public policy requires the Supreme Court to favor the cheapening of such cure-alls as bear Dr. Miles' name. As against the larger considerations which move Hughes and his brethren, he is inclined to dispose of the matter by invoking privity of contract. Pollock remained to the end the man who had done the book on torts, while Holmes moves on to transmute his common into terms of public law. It was the great cases which he affected to despise which gave Holmes his chance. It was the law of the Constitution, for which he professed no passion, which awarded him an enduring place as a jurist.

It is perhaps idle to probe beneath all this for the ultimates of Holmes'...

53 Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917). The dictum from the unpublished dissent preserved here would have enriched the reports, "when powers of either capital or labor attack the life of the community, those who seek private interest at such a cost are public enemies."

54 A personal censorship, with his brethren putting on the heat, seems almost omnipresent. In Internat'l Harvester Co. v. Kentucky, 234 U.S. 216 (1914), his opinion "in its original form was received with silent loathing." As "rewritten I doubt that the boys will like it much better."

55 Northern Securities Co. v. United States, 193 U.S. 197 (1904).


57 Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1917).
values. He hated ultimates and it is unfair to turn upon him an inquiry which he refused to address to the cosmos. If the question must be put, the ultimate lies in the very absence of the absolute. He could accept the universe in some unpredictable sense, but found the chances running heavily against humanity being at the center of it. Nor could man know more about it than how to arrange things according to his own necessary order. Whether there is an objective reality by which to measure it, or whether like coffee, truth is a matter of taste, he left—as a kind of irrelevance—to the professional philosophers. All that he can mean by truth is what he can’t help thinking; and he has no means for deciding whether his “can’t help’s” have any cosmic worth. Nor does he profess to be able to untangle the cumulative course of events; as to historical causes, you can never say how much was necessary to produce how much effect or even how much cause there was. There are fundamental differences which make one man’s truth another’s falsehood; and the business of philosophy is to show that we are not fools for doing what we want to do. To be civilized, therefore, means to be master of all possible ideas and to have become proof against being shocked. One has, of course, his preferences which must not become standards by which to measure the conduct of others. And he who would administer constitutional law must multiply his skepticisms; for it is his duty to enforce laws which he believes to embody economic mistakes. A man who had been blown upon by every kind of doctrine could not cling to a single simple faith; one who had entertained all sorts of ideas could not measure statutes by a truth which was alike his own and eternal. He had, at least in his study, observed man’s little system rise, flourish and pass. As he demanded freedom for himself, so was he willing to accord to others the right to choose their own paths to the everlasting bonfire.

It is thus difficult to date Mr. Justice Holmes. As the son of his father, the student forever improving his mind, the man of the world of books, he belongs to an older Boston. His social and economic views accord with those of men of substance who lived before the turn of the century. Taney would generally have concurred in his constitutional views, even though he stumbled a bit over queer terms and found Holmes’ idiom rather alien. Holmes’ rhetoric, with its impressionistic beat of unforgettable phrase, is alike in the classic and the modern manner. His opinions, insulated against the seething world just outside his study, are dateless. As a jurist he is not to be explained by any formula, whether of Horatio Alger or of Karl Marx. It is easy to quarrel, to discover inconsistency, to make a long list of shortcomings. Yet human frailties seem to signify less
than they would with another man. Change there was, as for example; the accommodation which marked the transfer from common to constitutional law; but of development there is little. In his quiet province, little disturbed by the roar of history in the making, he attained the superlative. The youth of twenty-nine—his picture might bear the caption "the artist as a young man"—and the distinguished jurist of ninety differ only as Olympian in posse and Olympian in esse.

In spite of a partial recovery of his humanity, it is still too early to place Holmes. It is most certain that as man-of-letters he must rank with the greatest on the bench. As Marshall’s prose loses its power to move, and Cardozo’s takes on a touch of the precious, he may be moved to the top of the class. In breaking doors and bringing reality into the courtroom, his contribution ranks far below that of Taney or my good Brother Brandeis. The strength and the weakness of his work alike in its want of fighting faith. The great things of earth are not done by men who say look on this picture and on that. It was a crusade for nationalism which brought passion to Marshall’s pen; it was zeal for social reform which made the Brandeis barrage of fact and argument invincible. Were it not for the convictions which drive them, the utterances of lesser men like Field and Harlan would be little more than empty words. But the things for which men die and write pass away, and Holmes’ repute has its measure of security in its aloofness from causes which have gone. If he served a liberalism, glorious in his day but already on the way out, it was by adventitious circumstance. His presence survives in an attitude of negation which makes the current Court critical of its place in the commonwealth and in a body of opinion, which whether for the majority or in dissent, still compels. But as the attitude fades and the precedents lose their strength, discount will get in its work. Rhetoric will remain, but rhetoric alone cannot sustain distinction. Then the lasting repute of Holmes must be rested upon a more enduring foundation. As perspective comes, he seems destined to stand in the annals of the law as the great representative of a civilized tolerance which rises above personal conviction.

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58 I Holmes-Pollock Letters, opposite 70 (1941).