

**THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS, AND JUDICIAL OPINIONS.** By Max Lerner.<sup>1</sup> New Brunswick, N.J.: Transaction Publishers. 1989. Pp. xlviii, 500. Paper, \$21.95.

**HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES.** By Sheldon M. Novick.<sup>2</sup> Boston, Massachusetts: Little, Brown and Company. 1989. Pp. xxi, 522. Cloth, \$24.95.

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Max Lerner's classic book, reprinted with a new concluding essay, contains some commentary about Holmes's life, but it is mainly a collection of the judge's writings; Sheldon Novick's book contains many quotations from Holmes, but is chiefly a narrative biography. The two books usefully complement one another. Together they provide an internal view of the man's thoughts and an external view of the events of his life. In their different ways, these are both admirable books, but even in combination they do not prevent Holmes from eluding us. This is not a criticism, for it means only that the books are faithful to Holmes's mysterious character and intellect. Oliver Wendell Holmes continues to dominate our image of the American judge, not because his ideas are especially attractive today, but because his thought and life were so complex and rich. He was large enough to be emblematic of much of American history and virtually all of our legal traditions.

Aside from his effort to describe and to make sense of Holmes's jurisprudence,<sup>4</sup> Novick for the most part lets the daily events of life speak for themselves. He mentions the great philosophers Holmes read in much the same way that he identifies Holmes's dinner guests. If there are over-arching explanations or theories or themes in *Honorable Justice*, they remain largely implicit—subordinate to discrete and colorful accounts of war experiences, social life, hard work, stately summers in the country, an odd but touching marriage, the massing of life in thousands of specifics and then its grad-

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4. Especially in his footnotes, Novick discusses various disputes about Holmes's jurisprudence, including its relationship to utilitarianism (p. 432), the place of duty in his tort liability scheme (pp. 434-35), the constitutional principle behind his philosophy of deference (p. 444), the malice standard and judicial legislation (p. 447), and the extent to which Holmes's opinions were protective of freedom of speech (pp. 473-74).

ual falling away. The book does not provide a strong structure, but it does provide a believable, arresting description of Holmes's world.

That world was, of course, vastly different from our own. Holmes was something close to the opposite of what Fred Siegel has termed the "bureaucratic individualist"—that egalitarian, unrooted, intellectual absolutist so common among the Vietnam War generation that now dominates much of the academic culture.<sup>5</sup> Judged against up-to-date standards, Holmes comes off (as Novick says in one of his few direct assessments) as "a violent, combative, womanizing aristocrat . . ."<sup>6</sup>

Lerner's collection of Holmes's writings, on the other hand, was first published in 1943, a time when much of the substance of those writings seemed less foreign and sinister than it does now. Although a few reviewers saw Holmes as an irrationalist and even a potential totalitarian<sup>7</sup> and although Lerner himself was aware of the untamed aspects of Holmes's thought, *The Mind and Faith of Justice Holmes* conceives of Holmes essentially as a cultivated philosopher, an aristocratic conservative whose dispassionate application of majoritarian principles upheld progressive legislation against constitutional attacks.

The choice between the good and the bad Holmes may be particularly urgent today. For contemporary lawyers, still entranced by decades of congenial politics from the federal courts, but suddenly sobered by the prospect of a Rehnquist Court without Justice Brennan, Holmes is a rather frightening role model. His major heresy, an extreme belief in deference to the political branches, was once his major virtue. Indeed, Holmes said that if his fellow citizens wanted "to go to hell," he would help them get there. This was, he explained, "my job."<sup>8</sup> (The mind boggles at the thought of a modern-day confirmation hearing.) For a generation that came to professional maturity defending court-ordered school busing, procedural due process for school students, and the constitutional right to condoms, it is important that this Holmes remain beyond redemption. Yet as the Court moves to the right, liberal commentators may have as much cause to fear conservative activism as to

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5. Siegel, *Is Archie Bunker Fit to Rule? Or: How Emmanuel Kant Became One of the Founding Fathers*, 69 *TELOS* 9, 27 (1986).

6. For an excellent discussion of Holmes from a contemporary perspective, see Luban, *Justice Holmes and Judicial Virtue*, in CHAPMAN & GALSTON, *NOMOS, Virtue* (forthcoming).

7. E.g., Lucey, Book Review, 32 *GEO. L.J.* 206 (1944); Ford, Book Review, 12 *FORDHAM L. REV.* 303 (1943).

8. Letter of March 4, 1920 to Harold Laski, *HOLMES-LASKI LETTERS 1916-1935* (1953) at 248-49.

mourn the passing of liberal activism. If so, Holmes's majoritarianism may become respectable again;<sup>9</sup> if he seemed outmoded compared to Brennan, he may seem wise compared to Scalia.

While Novick's historical narrative provides much grist for those who want to see Holmes as a villain, it also helps in small but interesting ways to put his various heresies in perspective. Novick notes, for example, that *Dred Scott v. Sandford* was decided a day before Holmes's sixteenth birthday, leaving it to the reader to recognize how closely this corresponds to the age many of our generation of lawyers had attained when *Brown v. Board of Education* was handed down. From Novick we learn how chivalric idealism and New England moralism were transformed in Holmes by the brutal realities of the Civil War. (Apparently, Holmes's mother was the strong abolitionist in the family and the one who pushed him toward his grisly experiences as a soldier in the cause.) Novick reminds us how massively constitutional niceties were ignored during that war, but the teacher of expediency then was not Nixon but Lincoln.

In Holmes's case, judicial restraint was only the jurisprudential surface of what are today deeper philosophical and political heresies. Holmes's writings, for example, reveal him to have been content, even pleased, with a vision of politics (and law, too) as a contest where self-interest is natural and power the ultimate guide. He pronounced himself to be behind his country "right or wrong," and he thought the world needed more widespread obedience to government. He believed that the state must sacrifice individuals to the general good, and, therefore, he approved of compulsory sterilization of the retarded and detention without probable cause during civil unrest. He declared that he had "no sympathy at all" for equality. And about "this squashy sentimentality. . . of pacifists—of people who believe there is an onward and upward—who talk of uplift," Holmes said, "Oh bring in a basin." All the while, he insisted that he doubted his own beliefs.

These are not the views of a properly sensitive modern intellec-

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9. In the 1989 edition, Lerner adds an "afterword essay" that suggests one direction such a revival might take. While reasserting the democratic value of judicial deference, Lerner adds that "Holmes never turned his doctrine rigid, never carried it into historical excursions in search of 'original intent,' never read the Constitution with a literalism that would leach out its meaning . . ." Thus he sets the stage for a possible middle-way that would "give judges a direction for meeting the strong social urgencies of the time, and for adding a measure of statesmanship to the Holmes legacy of judicial deference." And, indeed, a modified emphasis on deference may well be making a comeback. See, e.g., Sunstein, *The Future of Constitutional Politics*, THE AMERICAN PROSPECT 51, Spring 1990. For other straws in the wind, see West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641 (1990); Tushnet, *Principles, Politics, and Constitutional Law*, 88 MICH. L. REV. 99 (1990).

tual, but Novick's history reminds us how different Holmes's circumstances were. The Civil War, unlike the Vietnam War, was plainly and intensely a conflict of regional and cultural interests. Fastidious reservations about the central importance of naked preferences would have been surreal to a man who had seen many die in such a war and who had himself felt so keenly the desire for self-preservation. Indeed, when the clash of interests appeared in the infinitely more civilized forms of legislation and litigation, the battle would naturally have seemed benign rather than problematic. Moreover, according to Novick, Holmes was rooted not only in the destruction and danger of his war experiences but also in the serenity and provincial sophistication of nineteenth century Boston. When Holmes first went into battle, he took along his personal servant. His world was both comfortable and small. He grew up near the Cabots and the Lodges, near Henry Melville and Nathaniel Hawthorne and Ralph Waldo Emerson ("Uncle Waldo" to young Holmes). Criss-crossing the Atlantic in his middle years, he would run into William James and others from his social set; Henry Cabot Lodge proposed Holmes to Theodore Roosevelt for the Court, and when Holmes moved to Washington at sixty years of age, he dined regularly with the President (for a while).

Novick recounts how, as society churned with labor unrest in 1892, the aristocratic Holmes visited a local labor leader whom he had never met. Novick quotes Holmes's explanation:

I made a pilgrimage to his very humble shrine & bid him sit & deliver his sentiments . . . "Sir," I said, "I am Judge H. of the Supreme Judicial Court—I have no ulterior motives & no particular questions to ask . . . but I thought in the recently published interviews you talked like a man of more sense than the rest & as a judge & as a good citizen I like to understand all phases of economic opinion—what would you like if you could have it?"

This charming incident may seem to reinforce Lerner's conception of Holmes as the patrician democrat and civil libertarian. But Novick's careful eye catches in small facts some of what lay behind such pleasing pictures. In another revealing episode, for instance, when the great Justice finally retired from the Court, the parlor maid "came into the room weeping, and knelt at Holmes's feet . . . ." He was a man securely anchored on the high ground who could afford to believe that in unknowable ways the rough world was working itself into better shape, who could afford the great luxuries of skepticism and self-doubt and open-mindedness.

There is, in short, not much reason to try to choose between Lerner's Holmes and Novick's. Holmes's words and his life both point to the conclusion that the unparalleled American fascination with this judge is traceable to his complexity. He is so large a figure

that he can be used for just about any purpose and, more importantly, he is large enough to be evocative—even representative—of a national identity.

Holmes's life straddled the two centuries of our national existence. When he was a boy in Boston during the 1840s and 1850s, Novick tells us he fished in the Back Bay, and, "The air was fresh and smelled of the sea."

Indoors, in the winter evenings, there were candles, warm firelight, and whale oil lamps that were lighted by holding a glowing coal against the wick. . . The furniture was stately, solid, and expensive.

By the time he was nearing the end of his life, World War I was over, the Court faced the issue of wiretapping, and Franklin D. Roosevelt was President. The particulars of Holmes's life continually bridged this chasm between nostalgic, stable innocence and forbidding, disintegrative modernism. He spent polite summers socializing on English estates and pleasant country evenings in carriage rides with his wife. At first viewing war as a gentleman's obligation, he was wounded several times and eventually saw the Civil War as intensely frightening and profoundly incomprehensible. He read Darwin and Hegel, approved of euthanasia, and eventually wrote serenely about the possibility of a proletarian dictatorship in the United States.

Especially in law, Holmes seems to represent everything American, embodying at once both the past and the future. He was the detached, impersonal legalist who could rise above class and personal preferences to apply principle. But he wrote his opinions in a highly personal style (the pronoun "I" was everywhere) with unconstrained assessments often bluntly at the core of his judgments.<sup>10</sup> He was the particularist, the rigorous common law judge, the nemesis of formality and doctrine. But he had little interest in facts, and his maxims and common law principles verged on being simplistic formulae.<sup>11</sup> Holmes was a plain-meaning textualist, but, conceiving of law as being embedded in tradition and behavior and interests,

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10. Consider, for example, Holmes on the legality of wire-tapping:

. . . I think. . . apart from the Constitution the government ought not to use evidence obtained . . . by a criminal act. There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules. Therefore, we must consider the two objects of desire both of which we cannot have and make up our minds which to choose. . . . [F]or my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.

Lerner, pp. 361-62.

11. He did not care, for instance, what the legislators' motives actually were (Lerner, p. 253-54) or what specific justifications might exist for a statute (Lerner, pp. 256-59). He established a simplistic standard of care for railroad-crossing cases (pp. 207-08), and his clear and present danger "test" (p. 324) was in form and fact a precursor to elaborate modern doctrine.

he would disregard both intent and literal meaning.<sup>12</sup> He was a deferential majoritarian. But he was scornful of the people's wisdom and on occasion would thwart the popular will on the basis of his own superior moral sensibility.<sup>13</sup> He was a cautious, high-minded civil libertarian. But some of his constitutional judgments, rendered with supreme self-assurance, had vast, almost totalitarian implications.<sup>14</sup>

Holmes's jurisprudence was romantic, literary, and communitarian. It was also scientific, rationalistic, and individualistic. He claimed only to be a lawyer, and he was the contemporary of James Thayer, John Chapman Gray, and Christopher Langdell; but he tried to be a poet, philosopher, and economist, and his writing presages the work of James B. White, Ronald Dworkin, and Richard Posner.<sup>15</sup> He could be reassuring and commonsensical; he could be destabilizing and highfalutin. He was a practitioner and an academic, an aristocrat and a democrat. He was a highly cultivated man who wrote gracefully about primitive instincts. He was a pragmatic realist who was skeptical of reform. No one took law more seriously, but no one came closer to merging law with policy, power, and personal choice.

So, like American law itself, we can make of Holmes what we will. To me, at least, the important question is not which Holmes is the real one, but which contradiction is the most instructive. From reading these two books, my choice is this: Holmes's ego was enormous, but he saw himself as peripheral and miniscule in the vast scale of human and cosmic events.<sup>16</sup> This paradox lay behind both his deference and his tolerance; it also lay behind what those doc-

12. Holmes often said that legal provisions should be read according to their "obvious" meaning (Lerner, pp. 192, 223, 332), but he also thought that text must be understood "in the light of our whole experience. . ." (pp. 44-47, 277).

13. See, e.g., note 10, *supra*.

14. The most famous instance, of course, is Holmes's suggestion that the "only meaning of free speech" is that a proletarian dictatorship be established if "the dominant forces of the community" so desire (Lerner, p. 325). Other disquieting examples include his opinions on peonage (p. 336), sterilization (p. 356), and martial law (p. 268).

15. Holmes, like White, had an elevated and romantic view of the legal profession: "And what a profession it is! . . . [W]hat other [calling] gives such scope to realize the spontaneous energy of one's soul? In what other does one plunge so deep in the stream of life . . . ? (Lerner, p. 29)." As is well known, his literary powers, as applied in judicial opinions, were truly remarkable. Moreover, Holmes's claims about the place of theory and philosophy in law—the working of cultural patterns into consciously understood and more coherent forms (pp. 53, 57, 88)—bear an uncanny resemblance to much of Dworkin's thought. His economic analysis was more rudimentary than Posner's but equally explicit (pp. 239-46).

16. He had contempt for reformers who "criticiz[e] the order of the universe as if they were little gods outside it" (Lerner, p. 400). He wrote that "the universe has in it more than we understand," that "we want to live, some at least, because we want to realize our spontaneity and prove our powers, for the joy of it, and we may leave to the unknown the supposed final valuation of that which in any event has value to us." (p. 398).

trines rested on—his fatalism, his vitality, his curiosity, his security. He could delight in trying to understand while acknowledging his profound uncertainty; he could struggle to contribute while admitting that he was not in control. He knew enough to know how limited he was, and in this he seems to me to have surpassed the American legal heritage that he personifies.

**STATE AND SALVATION: THE JEHOVAH'S WITNESSES AND THEIR FIGHT FOR CIVIL RIGHTS.** By William Kaplan.<sup>1</sup> Toronto, Ontario: University of Toronto Press. 1989. Pp. xii, 340. Cloth, \$35.00.

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William Kaplan has written a valuable book, which is far more than a study of the Canadian response to the practices of the Jehovah's Witnesses. *State and Salvation* is an excellent brief history of the protection of civil liberties in modern Canada. It should be required reading for anyone seeking to understand the torturous progress of Canada toward a written bill of rights or the agonizing difficulties of integrating Quebec into the Canadian constitutional order.

But Kaplan's principal subject is the treatment of a disagreeable religious minority within Canada in the 1930s and 1940s, and the significance of this experience for the development of Canadian constitutionalism. South of the border, of course, we went through a roughly parallel experience with the same sect. Canadians, seized by the same animosities, annoyances, and patriotic enthusiasms as animated their brothers to the south in the same period, engaged in actual acts of suppression directed against the Witnesses. These were initially carried out in Quebec under that province's "Padlock Act" which provided for the closing down for twelve months of any building used for "the composition or dissemination of communist or Bolshevik propaganda." Later the federal War Measures Act, and the Defense of Canada Regulations adopted pursuant to it, resulted in a "ban" on the Jehovah's Witnesses. In fact, the Witnesses remained largely free to proselytize. But certain of their properties were "padlocked" and in some cases children were placed under state supervision or excluded from school for refusal to sing the national anthem and perform other "patriotic duties." Pressure from

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