



ST. MARY'S
UNIVERSITY

Digital Commons at St. Mary's University

Faculty Articles

School of Law Faculty Scholarship

1991

Dutiful Justice (book review)

Michael S. Ariens

St. Mary's University School of Law, mariens@stmarytx.edu

Follow this and additional works at: <https://commons.stmarytx.edu/facarticles>



Part of the [Supreme Court of the United States Commons](#)

Recommended Citation

Michael S. Ariens, *Dutiful Justice* (book review), 22 *St. Mary's L.J.* 1019 (1991).

This Article is brought to you for free and open access by the School of Law Faculty Scholarship at Digital Commons at St. Mary's University. It has been accepted for inclusion in Faculty Articles by an authorized administrator of Digital Commons at St. Mary's University. For more information, please contact sfowler@stmarytx.edu, egoode@stmarytx.edu.

BOOK REVIEW

DUTIFUL JUSTICE

MICHAEL S. ARIENS*

Review of *Honorable Justice: The Life of Oliver Wendell Holmes* by Sheldon Novick. (Little, Brown and Co. 1989)

I.

Sheldon Novick's biography, *Honorable Justice: The Life of Oliver Wendell Holmes*,¹ is an exceptionally researched, traditional biography² of one of the most important public figures in the United States since the Civil War. Although he disclaims it, stating in the Preface that "I have tried to tell Holmes's story with sympathy, but without apology,"³ *Honorable Justice* is a defense of Holmes. Novick tells us of some of Holmes's faults, but too often Holmes's human imperfections are defended as strengths. While reading *Honorable Justice*, I had the nagging thought that, despite his protestations to the contrary, Novick was trying too hard to defend Holmes from late twentieth century critiques. First, it is clear from this biography that Holmes would have disdained any assistance in his behalf, and second, the

* Associate Professor of Law, St. Mary's University School of Law, San Antonio, Texas. B.A. 1979, St. Norbert College; J.D. 1982, Marquette University; LL.M. 1987, Harvard University. My thanks to my colleague Laura Burney for her comments and suggestions on a previous draft.

1. S. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* (1989) [hereinafter *HONORABLE JUSTICE*].

2. In Appendix B, A Note on Sources, Novick states, "In his letters, Holmes spoke freely of his thoughts and feelings; whenever in the text I attribute thoughts or feelings to Holmes, it is on the basis of his own accounts." *Id.* at 383-84. In other words, this is not a psycho-biography. In some respects, the style of this biography is very Victorian, which may be appropriate for a biography of Holmes.

3. S. NOVICK, *HONORABLE JUSTICE*, xvii.

defense of Holmes seems a misguided attempt to re(de)ify Holmes to a group of readers which will likely include a large proportion of skeptical, professional ironists.

II.

I teach Constitutional Law to first year law students. One of my goals is to teach them how to understand and use accepted techniques of legal reasoning.⁴ One popular form of legal reasoning (or persuasion) is what I call the rhetorical argument. Within this form are several specific arguments, including the speculation argument (also called the slippery slope or parade of horrors argument) and what I call the "Famous Dead Person" argument. This latter technique asks a reader or listener to accept the argument and conclusion of the writer or speaker because the same (or at least a similar) argument and conclusion was made by a famous person, whose fame and erudition is supposed to lend credibility to the writer's argument. At the same time, it is crucial that the famous person be dead, so that the speaker's argument cannot be contradicted by the famous person.⁵ While Supreme Court Justices John Marshall, Joseph Story, Benjamin Cardozo and Louis D. Brandeis, as well as Presidents Thomas Jefferson, Abraham Lincoln and Franklin Delano Roosevelt are regularly cited in judicial opinions and legal scholarship, Oliver Wendell Holmes, Jr., is the predominant Famous Dead Person in Supreme Court opinions. In a Lexis search for citations to Holmes in Supreme Court opinions from 1980 through the October 1989 Term, Holmes' name is cited 391 times. All of the Justices sitting on the bench since 1980 have cited to Holmes.⁶ Occasionally, the Justices writing the majority and dissenting opinions in the same case will cite to Holmes to

4. Examples in the legal literature which describe the teaching of legal reasoning include Boyle, *The Anatomy of a Torts Class*, 34 AM. U.L. REV. 1003 (1985) and Paul, *A Bedtime Story*, 74 VA. L. REV. 915 (1988). See also S. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING (1985); P. SCHLAG & D. SKOVER, TACTICS OF LEGAL REASONING (1986).

5. In Woody Allen's movie *Annie Hall*, there is a scene in which Allen's character fantasizes that a boor standing in line next to him and expounding on the theories of Marshall McLuhan is suddenly confronted by McLuhan himself, who then commences to denigrate the intelligence of the boor. That is why the famous person has to be dead.

6. The tally was as follows:
Blackmun 41; Brennan 59; Burger 20; Kennedy 4; Marshall 28; O'Connor 35; Powell 29; Rehnquist 49; Scalia 13; Stevens 75; Stewart 5; White 37.

In a related note, Chief Justice Rehnquist recently called for more postage stamps featuring former Supreme Court justices. John Marshall has just made his fourth appearance on a postage stamp, thereby giving at least some credence in popular culture to the Famous Dead Person argument. According to the Chief Justice, "[w]hen it comes to members of the court who aren't John Marshall, the [stamp] pickings are pretty slim." *Wall St. J.*, April 13, 1990, at B1, col. 2. I am unaware whether Holmes has been featured on a stamp.

persuade readers of the correctness of opposite legal conclusions.⁷

One of the other goals of my constitutional law course is to give the students a sense of the change in American legal thought, particularly formalism and the revolt against it.⁸ Understanding well the battle between legal realism and legal formalism will assist the student in understanding, specifically, the development of commerce clause and substantive due process jurisprudence and generally, the evolution of legal and constitutional theory. Here, too, Holmes is the linchpin in understanding the move both generally and in the Supreme Court away from legal formalism.

Holmes is not only a "brooding omnipresence"⁹ in constitutional law,¹⁰ but his mark is left on much of the common law. Holmes is a central character in recent books tracing the historical development of torts¹¹ and con-

7. See, e.g., *Texas v. Johnson*, ___ U.S. ___, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989). In the majority opinion, Justice Brennan cites to Holmes for the proposition that "nobody can suppose that this one gesture of an unknown man will change our Nation's attitude towards its flag." ___ U.S. at ___, 109 S. Ct. at 2547, 105 L. Ed. 2d at 363. In dissent, Chief Justice Rehnquist states, "the Court ignores Justice Holmes' familiar aphorism that 'a page of history is worth a volume of logic.'" ___ U.S. at ___, 109 S. Ct. at 2548, 105 L. Ed. 2d at 365.

8. M. WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* 13 (1949) (studying the revolt by late nineteenth and early twentieth century intellectuals in history, political science, philosophy, economics and law against what White calls "abstractionism") In White's book, Holmes represents the revolt in law.

9. See *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917)(Holmes, J., dissenting).

10. Holmes is presented often as the first great defender of freedom of speech. See S. NOVICK, *HONORABLE JUSTICE* 324-32, 473-74 n.87. Compare *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.") with *Schenck v. United States*, 249 U.S. 47, 52 (1919), *Frohwerk v. United States*, 249 U.S. 204, 207-08 (1919) and *Debs v. United States*, 249 U.S. 211, 215-16 (1919). Of particular interest to me is Holmes's analogy in *Schenck*. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Schenck*, 249 U.S. at 52. Given that the convictions of *Schenck*, et al. were for stating their objections to the draft and the entry of the United States into World War I, this analogy is triply misleading; the analogy assumes that the speaker intentionally misstated a "fact" (as opposed to the defendants in the case at bar stating their opinions), the speaker shouting fire was not engaged in political speech and the effect of the speaker shouting fire was to cause a panic (in the *Schenck* case a "harm" to the United States was assumed but not proven). Cf. S. NOVICK, *HONORABLE JUSTICE* 474 n.87 (citing the late Professor Harry Kalven to the effect that one problem may be that "Holmes washed out the political element entirely," and then suggesting that that was not necessarily a problem.) See generally Rogat & O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion-The Free Speech Cases*, 36 STAN. L. REV. 1349 (1984).

Holmes' dissents in a number of other cases, including *Lochner v. New York*, 198 U.S. 45, 74 (1905), and *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918), have subsequently become underpinnings of our current constitutional law.

11. G. E. WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* (1980).

tracts.¹² Holmes was also influential in restructuring legal thought concerning the relationship among the law of property, competition and government regulation.¹³ His famous Lowell Institute lectures were, after all, published under the title *The Common Law*.¹⁴

Holmes is also remembered for his many pithy comments on the nature of law and legal reasoning. "The life of the law has not been logic: it has been experience."¹⁵ "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."¹⁶ "[A] page of history is worth a volume of logic."¹⁷ "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified."¹⁸ "Great cases like hard cases make bad law."¹⁹ "The fourteenth amendment does not enact Mr. Herbert Spencer's Social Statics."²⁰ "General propositions do not decide concrete cases."²¹ "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."²² "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict."²³ Through "the remoter and more general aspects of the law, you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of

12. G. GILMORE, *THE DEATH OF CONTRACT* (1974).

13. See generally Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894). For example, see *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."); *International News Service v. Assoc. Press*, 248 U.S. 215, 246 (1918) (Holmes, J., concurring) and *Northern Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

14. O.W. HOLMES, *THE COMMON LAW* iv (1881). While Holmes confesses that he is unable to discuss the entirety of the law in the book, *id.* at iv, among the topics in the book is a treatise on criminal law. *Id.* at 39-76.

About *The Common Law*, Grant Gilmore wrote, "The lectures have long since become unreadable unless the reader is prepared to put forward an almost superhuman effort of will to keep his attention from flagging and his interest from wandering." G. GILMORE, *THE AGES OF AMERICAN LAW* 52 (1977).

15. O. W. HOLMES, *THE COMMON LAW* 1.

16. *Id.*

17. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

18. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

19. *Northern Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

20. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

21. *Id.* at 76.

22. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

23. *Id.* at 459.

its unfathomable process, a hint of the universal law."²⁴

The picture of Holmes obtained in a legal education is thus that of the public Holmes, the master wordsmith and great dissenter whose lonely dissents became law a generation later. He comes to the law student as a god-like figure, whose prescience is fabled in American legal culture. This impression of Holmes is fostered by the repeated citations to Holmes in Supreme Court opinions. Holmes's daily work as a justice and his private life are not open for view. For that reason alone, this biography is valuable.

As a dominant figure in the history of American law, Holmes attracted several highly accomplished law professors as would-be biographers, including his friend Felix Frankfurter²⁵ and former law clerk Mark DeWolfe Howe of Harvard Law School²⁶ and Grant Gilmore of Yale Law School. Frankfurter's project ended when he was appointed to the Supreme Court, and Howe and Gilmore died before completing their works. The historian Catherine Drinker Bowen wrote a fictionalized treatment of the Holmes family entitled *The Yankee from Olympus*,²⁷ but *Honorable Justice: The Life of Oliver Wendell Holmes, Jr.* by Sheldon Novick, Scholar-in-Residence at Vermont Law School, is the first completed biography of Holmes.²⁸

This biography creates the opportunity to discuss the relationship of Holmes's life to two other statements made by Holmes: "[t]hree generations of imbeciles are enough,"²⁹ and his response to Learned Hand's parting statement to Holmes to "[d]o justice," to which Holmes is said to have replied, "[t]hat is not my job. My job is to play the game according to the rules."³⁰

24. *Id.* at 478.

25. Frankfurter wrote the biography of Holmes in the *DICTIONARY OF AMERICAN BIOGRAPHY*, vol. XXI at 418 (Supp. One, 1944).

26. M. HOWE, *JUSTICE OLIVER WENDELL HOLMES, JR.: THE SHAPING YEARS, 1841-70* (1957); M. HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1882* (1963).

27. C. BOWEN, *THE YANKEE FROM OLYMPUS* (1944).

28. See *HONORABLE JUSTICE* xv-xviii. Another biography of Holmes was published in 1989. G. AICHELE, *OLIVER WENDELL HOLMES, JR.: SOLDIER, SCHOLAR, JUDGE* (1989). I have paged through but not read Aichele's biography. It is a much shorter biography than Novick's. According to the Winter 1991 issue of the *Harvard Law Bulletin*, Massachusetts Superior Court Justice Hiller Zobel is also preparing a biography of Holmes.

29. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

30. *JUSTICE HOLMES EX CATHEDRA* 229 (E. Bander ed. 1966) (citing L. Hand, *THE SPIRIT OF LIBERTY* 306 (1960 ed.)). Hand begins this anecdote by stating that Holmes said, "I hate justice," but Hand concludes that Holmes really didn't mean it. *Id.*; see also *id.* at 213, (citing C. BUTLER, *A CENTURY AT THE BAR OF THE SUPREME COURT OF THE UNITED STATES* 50-51 (1942)). In another version Holmes, upon leaving a farewell banquet in Boston to take his seat at the Supreme Court, hears the anonymous cry, "[n]ow justice will be admin-

III.

Honorable Justice, according to its author, is the story of Holmes's life, not his influence upon law. The text, with a few necessary exceptions, is a chronological tale. The footnotes contain a number of interesting and valuable insights³¹ into the legal thought of Holmes, but are cabined there, for Novick writes "[a]s to Holmes's work as a judge and Supreme Court justice, the daunting task remains to be done."³² The reason for this categorization is,

If Holmes is of interest today to any but scholars, it is for his character, which shines through his writings even from the distance of a century or more. This book is the story of Holmes's life as a man, a life that he labored to make a work of art in itself. Perhaps the life, even beyond its intrinsic interest, will help others to understand better Holmes's elusive, tantalizing ideas.³³

There are two aspects of Holmes's character which shine through in *Honorable Justice*: first, his devotion to duty; and second, his independently generated will.³⁴ Time and again, Novick tells us Holmes undertook certain

istered in Washington" and replies "[d]on't be too sure. I am going there to administer the law." *Id.*

As indicated by this footnote, this exchange between Hand and Holmes is not referred to by Novick in *Honorable Justice*. Neither is the statement allegedly made by President Theodore Roosevelt about Holmes. "Out of a banana I could have carved a Justice with more backbone than that." W. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 244 (1987).

31. See, e.g., S. NOVICK, *HONORABLE JUSTICE* 423 n.11 (discussing Holmes's reaction to Blackstone).

32. *Id.* at xviii.

33. *Id.* at xviii. I am uncertain whether Holmes's name is known, much less whether his life is of interest in popular culture. Further, if Holmes is the product of his culture that Novick says, then his work must be an intrinsic part of his life. My review may be unfair, since I am interested in viewing Holmes as both person and judge. On the other hand, the title itself assumes the reader should honor Holmes explicitly as a justice and implicitly as a person.

34. I am not going to discuss in this essay Holmes's independently generated will. It may suffice to point out several instances in which Novick suggests Holmes's will was independently generated. In at least three instances, Novick brushes aside any suggestion that Holmes's thinking was affected by anyone else. The possibility that William James and Charles Sanders Peirce, founders of the Metaphysical Club in Cambridge in 1870, influenced Holmes's pragmatism is dismissed. *Id.* at 426-27 n.4; cf. Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. L. REV. 541, 545 (1988). Novick dismisses the suggestion of Gerald Gunther that Learned Hand influenced Holmes's thinking about free speech. S. NOVICK, *HONORABLE JUSTICE* 473 n.87. Novick suggests that Gunther is biased because he is Learned Hand's authorized biographer. Lastly, Novick dismisses Brandeis's influence upon Holmes's judging. Novick writes, "I have found no evidence at all that Holmes's substantive thought was affected by Brandeis, who was very much his junior in age and judicial experience." *Id.* at 476 n.36. Why this non sequitur proves the point is beyond me.

actions and made certain decisions because of his devotion to duty. There are literally several dozen references to Holmes undertaking duties owed his country, his wife, his law partner and the legal system. Novick makes much of Holmes's acquaintanceship with several Japanese men, suggesting that Holmes understood and in some sense was a follower of the duty-laden requirements of *bushido*, the code of the samurai.³⁵ He entitles the penultimate chapter of the book, "Final Duty."

The biography makes clear that Holmes undertook duties for no other reason than he was compelled by his self-created system. When his code required the fulfillment of a duty, that duty was fulfilled. When there existed no duty within this system, none was forthcoming. The ability to create and live by one's own code of behavior is an astonishing feat; it seems even more astonishing from the perspective of today. This notion of duty is the only aspect of his character which appears to shine through. Neither kindness, nor love, nor generosity shone through; whether Holmes possessed these traits is unknown (and probably unknowing). The clearest trait found in this biography is a literal devotion to duty.

What is unclear is why Holmes was so devoted to fulfilling duties. My reading is that Holmes's notion of duty seemed less an aspect of *noblesse oblige* and more a way of creating a complete self. That is, the nineteenth century self of Oliver Wendell Holmes was created by undertaking and completing those duties required of him by his code. For example, when Holmes began studying law, he was crestfallen, thinking, "[w]hat is this to my soul?"³⁶ Yet he continued his study, for in some sense it was his duty to become a lawyer.³⁷ My thesis is that the condition of humankind in the modern era³⁸ is fraught with doubt, and Holmes's desire to banish doubt led him to this slavish devotion to duty. In other words, Holmes created a Victorian, dutiful self to avoid facing or becoming a modern, doubtful self.

A.

Oliver Wendell Holmes, Jr., was born in 1841 in Boston, Massachusetts, the eldest child of Dr. Oliver Wendell Holmes, Sr., and Amelia Lee (Jackson) Holmes. He died on March 5, 1935, two days short of his 94th birthday. Holmes served three years as an officer in the Union Army during the Civil War, and was thrice wounded. He graduated from Harvard Law

35. S. NOVICK, *HONORABLE JUSTICE* 274-75. Novick writes that when Holmes and Kaneko Kentaro talked, "[p]erhaps they also talked about bushido and chivalry." *Id.* at 148. I am uncertain of the reason for Novick's so speculating.

36. *Id.* at 98.

37. *Id.* at 96.

38. My use of "modern era" is the period from approximately World War I to the present, rather than modernism as dating from the Enlightenment.

School in 1866, began practicing law in Boston and married Fanny Dixwell in 1872. They were married for nearly 57 years, until her death in 1929. They had no children. Holmes was a Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts for approximately 20 years and a Justice of the Supreme Court of the United States for 29 years.

Not only was Holmes a judge for more years than many persons lived at that time, he was an exceptional judge, writing incisive, lucid opinions which changed the course of common law and constitutional law doctrine and thought. Before being appointed to the bench, he was also responsible for revising Kent's *Commentaries*,³⁹ and writing *The Common Law*, called "the most important book on law ever written by an American."⁴⁰ His accomplishments as a lawyer, judge and legal thinker are unlikely ever to be matched.⁴¹

In April 1861, barely 20 years old, Holmes joined the 20th Massachusetts Voluntary Military Regiment.⁴² He remained an officer in the Union Army for three years. Upon the expiration of his commitment, he resigned his commission. He did so, he told his father, because:

I can do a disagreeable thing or face a great danger coolly enough when I know it is a duty-but a doubt demoralizes me as it does any nervous man-and now I honestly think the duty of fighting has ceased for me-ceased because I have laboriously and with much suffering of mind and body earned the right . . . to decide for myself how I can best do my duty to myself, to the country, and, if you choose, to God.⁴³

It appears that this statement guided Holmes's thinking for the rest of his life. In most instances, Holmes found a duty awaiting him, and fulfilled it. On occasion, however, doubt apparently demoralized him, although the degree to which it did so is difficult to ascertain from Novick.

Holmes's post-military duty turned from defending the Union⁴⁴ to the Law. His early experience practicing law required the sacrifice of interests in

39. S. NOVICK, HONORABLE JUSTICE 121, 137-39.

40. *Id.* at 437 n.97 (citing Rosat, *The Judge As Spectator*, 31 U. CHI. L. REV. 214 (1964)).

41. The only living legal scholar and judge who may approach Holmes's accomplishments is Judge Richard Posner.

42. S. NOVICK, HONORABLE JUSTICE 35. Holmes actually joined the Massachusetts militia's Fourth Battalion, which was disbanded after one month of drilling. *Id.* at 36-37.

43. *Id.* at 87. In an earlier letter to his parents, Holmes wrote:

I have made up my mind to stay on the staff if possible till the end of the campaign & then if I am alive, I shall resign-I have felt for some time that I didn't any longer believe in this being a duty & so I mean to leave at the end of the campaign as I said if I'm not killed before.

Id. at 84.

44. Sometime after the end of the Civil War Holmes stated that his duty lay "in the principle that the Union is indissoluble." *Id.* at 34.

philosophy and literature,⁴⁵ but it was only upon his being hired to revise Kent's *Commentaries* that law consumed his time and energy.⁴⁶

In early 1872 Holmes was nearly finished with the revision of Kent's *Commentaries*. Novick writes: "Holmes struggled, paradoxically, to be at peace. He did not, could not, give up his ambition for the solitary power of the thinker, but he turned nevertheless to work and to marriage, which would be the two pillars of his life."⁴⁷ The struggle between the autonomous self and the duty-bound self was settled in favor of the latter.

While Novick calls Holmes's marriage one of the two pillars of his life, it is difficult to appreciate the effect upon his life of Holmes's marriage to Fanny Dixwell in *Honorable Justice*. In part this is due to Novick's decision to limit his study of Holmes's life to external evidence. It may also be due to the manner in which husband and wife left unstated their affection for each other.

Because Novick has imputed thoughts and feelings to Holmes only where there is evidence of such feelings, we are faced with interpreting footnote 49 at page 433, which discusses the childlessness of the Holmeses:

The cause of their childlessness, if there was a single cause, is not known with certainty. Mark Howe speculated that Holmes wished not to have children because they would have interfered with his work, and that Fanny accepted his choice, with some sorrow. [MARK HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-82, 99-100* (Cambridge, Mass. 1963)] However, Howe was not aware of Fanny's prolonged illness following her marriage.

The Holmeses' childlessness seems adequately accounted for by Fanny's age and ill health. Fanny deeply regretted her childlessness. Holmes's feelings are not known. In such circumstances divorce would have been possible, and so Holmes in a certain sense did choose not to be a father. Remarks scattered through Holmes's correspondence suggest that he was torn but remained loyal to Fanny. Fanny's selfless devotion to Holmes was perhaps not so one-sided as it appeared on the surface.⁴⁸

Novick is to be commended for discovering that Fanny Dixwell suffered from a serious illness shortly after her marriage to Holmes in June 1872. It seems speculative, however, to conclude that her age (31 when married) and this illness were the only causes for their childlessness. If divorce was a possible avenue for Holmes, what about adoption? If I were to speculate

45. *Id.* at 115.

46. S. NOVICK, *HONORABLE JUSTICE* 127-28.

47. *Id.* at 131.

48. *Id.* at 433 n.49 (citations omitted).

about the causes of their childlessness, I would not completely discount the feeling that Holmes was so dedicated to his work that children would not fit in. Further, the note suggests again that his notion of duty to Fanny kept their marriage together, and not the other way around. I think this seriously misleads the reader.

Another reason why their marriage is difficult to appreciate is Novick's elliptical and evasive handling of Holmes's relationship with Lady Castletown.⁴⁹ In Summer 1896, Holmes travelled alone to the British Isles and met Clare Castletown. He travelled to her estate in Ireland where "Lady Castletown showed Holmes the conservatory, which in a chilly house filled with servants was a warm and private place."⁵⁰ During another trip, two years later, "[o]n August 22, Holmes and Clare Castletown walked in the gardens together in the morning, wandered on the lime walk, and spent an hour and a half together in the conservatory. Holmes drew a little plan of the conservatory in his memorandum book, and marked the place."⁵¹ In 1901, Holmes spent three weeks at Doneraile, the estate of Lord and Lady Castletown, during which time he and Lady Castletown took long walks. "They were old friends, and now perhaps no more than that."⁵² While I don't think it crucial to know whether they really were or weren't, I think it is important to more completely examine their relationship if one is going to completely examine Holmes's life (and work). Holmes's last attempt at expounding on the philosophy of law took place only six months after his first trip, when he gave the dedicatory speech on "The Path of the Law" at the Boston University Law School ceremonies in January 1897.⁵³ It seems even more important given Holmes's apparent unhappiness shortly before meeting Lady Castletown.

In late 1895, after the death of his father, Holmes's long-standing belief in the predictions of Malthus⁵⁴ seemed borne out by events in American life. Novick writes:

He would have no children of his own, bound as he was by duty to a

49. See *id.* at 207-220, 226-27, 229-30, 264.

50. *Id.* at 211.

51. *Id.* at 227.

52. *Id.* at 234.

53. See Holmes, *The Path of Law*, 10 HARV. L. REV. 457 (1897). Novick makes two interesting points about *The Path of the Law*. First, he concludes that Holmes was saying nothing new concerning his legal philosophy in this speech. Second, he suggests that the title was "probably a conscious reference to the Tao, a term that connotes both a path to understanding and a way of life; as in Bushido, the Way of the Warrior, a term Holmes almost certainly knew." S. NOVICK, HONORABLE JUSTICE 451 n.9. The first point practically eliminates any speculation that Holmes's personal life affected his work, and the second point underscores the relationship between Holmes's work and his notions of duty.

54. S. NOVICK, HONORABLE JUSTICE 202.

childless marriage. In the heart of his unhappiness Holmes evolved a logical, brutal Malthusianism. He imagined that science might advance so as to permit merciful euthanasia of the unfit, who otherwise would breed irresponsibly, and whose children would otherwise starve or come to the prisons or the gallows. The survival of his nation, he believed, depended upon weeding out the unfit in this way and breeding a race of warriors.⁵⁵

Possibly Holmes's relationship with Lady Castletown was a way of attempting to avoid his husbandly "duty." Possibly it was Holmes's way of finding "happiness," or banishing doubt about his life as he entered his mid-fifties. It may even have been Holmes's way of escaping American class divisions in the hopes of finding more congenial class cohorts in England.⁵⁶ Not only does the author refrain from illuminating this relationship in the context of its importance in Holmes's life, but his manner of describing their relationship limits greatly the reader's attempts at making (speculative) connections explaining the effect of Lady Castletown upon Holmes's work and marital life during this period. If Holmes were having an affair with Lady Castletown, it would seem important to explore and delineate this affair in assessing his life and his work. If Novick is willing to speculate about the reasons for the childlessness of the Holmes's, why is he so reticent to put forth suggestions about Holmes's passion for Lady Castletown?

A year after the apparent end of any sexual relationship with Clare Castletown, Holmes was nominated and confirmed as an Associate Justice of the Supreme Court of the United States, where he remained for 29 years. The duties of the Court kept Holmes away from Lady Castletown, and with one exception, apparently kept doubt away as well. In early 1910, Holmes was reading Dante's *Divine Comedy*, which contained the sentence, "I am Arnaut, who weeps and goes singing."⁵⁷ This line echoed in Holmes's thoughts for a week, according to Novick. Just as doubt befell him unexpectedly, however, it apparently left, for the impact of this line is not again mentioned in *Honorable Justice*. Near the end of his term of service, Fanny slipped and fell in the bathtub, breaking her hip. Her injuries did not heal, and she died on April 30, 1929. Holmes himself lived for three years after retiring from the Court in January 1932.

55. *Id.* at 202 (footnote omitted).

56. *Id.* According to Novick, at about this time Holmes began reading more political theory in order to better understand class conflict and the conflict between labor and capital. In 1896, Holmes decided *Vegeahn v. Guntner*, in which he enjoined a union from blocking a factory door, but refused to bar the union from peacefully picketing the employer. On review by the full Supreme Judicial Court, the striking employees were barred from peaceful picketing. Holmes dissented. *Vegeahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077 (1896).

57. S. NOVICK, *HONORABLE JUSTICE* 299. This is from verse 142 of Purgatory.

B.

Holmes's dissent in *Lochner v. New York*⁵⁸ has been celebrated and venerated since its publication as a paradigmatic example of properly carrying out the judge's duty to law, not his or her personal predilections, in a democratic society.⁵⁹ Holmes's opinion in *Buck v. Bell*, however, has been roundly criticized nearly since its publication in 1927. It is also a decision which in several respects epitomizes the responsibilities of the impersonal, duty-bound judge. This is the Holmes who, in response to Learned Hand's parting statement, "[d]o justice," replied, "[t]hat is not my job. My job is to play the game according to the rules."⁶⁰

One reason why Holmes's opinion in *Buck v. Bell* remains of interest today is because Holmes's forceful judicial rhetoric in regard to the justices' duty to permit Carrie Buck's sterilization, and Carrie Buck's duty to sacrifice for society's sake, echoes in present American society. Is it always the duty of a judge never to see the parties before the court as persons? To what extent in the last decade of the twentieth century is it the duty of an American citizen to sacrifice herself for society?

Holmes accepts the factual judgment that Carrie Buck, if not sterilized, will probably bear another "socially inadequate offspring."⁶¹ Since society may call on the best citizens to sacrifice their lives for their country, the lesser included duty of undergoing sterilization is a duty the state may require a socially and economically burdensome person to undertake.⁶² After all, Holmes continues, this is more humane than the alternative of someday executing their "degenerate offspring for crime,"⁶³ or letting them starve. Holmes then analogizes, without explanation, compulsory sterilization to the constitutionally permissible state-enforced duty of compulsory vaccination. He completes the paragraph with the rhetorical flourish, "[t]hree generations of imbeciles are enough."⁶⁴ The final argument, that the equal protection clause of the fourteenth amendment is violated because the statute permits sterilizing only those who are confined to state mental institutions, is unavailing because it "is the usual last resort of constitutional

58. 198 U.S. 45, 74 (1905).

59. See Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987) (re-evaluating the meaning and understanding of the *Lochner* court).

60. See *supra* footnote 28.

61. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

62. This, of course, is one theory which justified slavery. "Roman law justified slavery on the [ground] that a captive in war was spared" death, and therefore the captor had a lesser included right to enslave the captive. R. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 11 (1975).

63. *Buck*, 274 U.S. at 207.

64. *Id.*

arguments."⁶⁵ Holmes's certainty, his freedom from doubt, overwhelms the reader. The effect is heightened by Holmes's ability to state his opinion in less than four pages of the United States Reports. This sense of duty leaves *no* room for moral considerations, no room for doubt. It makes a society uncomfortable, because only a few persons can look into the abyss and return to society. Like Judge Ruffin in *State v. Mann*,⁶⁶ Holmes in *Buck v. Bell* reminds us both that he is one of those few persons and that we are not.

Novick attempts to defend Holmes's decision on several grounds: "Holmes's language was always particularly harsh when he wrote against ordinary instincts, and in this case I suppose his own childlessness added some edge to his language. The regular reappearance in his writings of the theme of necessary sacrifice of children, and the link he makes to the sacrifices made in war, suggests that Holmes unconsciously was repeating his parents' having sent him to war."⁶⁷

It is interesting also to note that Novick, contrary to his stated intent, psychoanalyzes Holmes in order to defend the apparently indefensible.⁶⁸ Suddenly, Holmes's childlessness is the reason for the brutal language. Further, his call to Carrie Buck to sacrifice her reproductive system was "unconsciously" related to the sacrifice his parents made him undergo when they sent him to war.⁶⁹ This is unconvincing both because the analysis is out of place in this biography and because it reduces Holmes to the most behavioristic of persons.

After presenting psychological reasons justifying, or at least excusing, Holmes's opinion, Novick argues that Holmes was legally bound to deny Carrie Buck's claim. Novick asserts that the fourteenth amendment could

65. *Id.* at 208.

66. The opinion of Holmes in *Buck v. Bell* reminds one of the opinion by antebellum North Carolina Supreme Court Judge Thomas Ruffin in *State v. Mann*, 13 N.C. (2 Dev.) 229 (1829). In the *Mann* case, Judge Ruffin held that a master could not be held criminally liable for battering a slave named Lydia:

The power of the master must be absolute to render the submission of the slave perfect. I most freely confess my sense of the harshness of this proposition; I feel it as deeply as any man can; and as a principle of moral right every person in his retirement must repudiate it. But in the actual condition of things it must be so. There is no remedy. This discipline belongs to the state of slavery.

Id. at 231-32. Ruffin's opinion in *Mann*, like Holmes's opinion in *Buck v. Bell*, has been the object of a great deal of interest and commentary. See R. COVER, *JUSTICE ACCUSED* 77-78.

67. S. NOVICK, *HONORABLE JUSTICE* 478 n.65.

68. Interestingly enough, discussion of *Buck v. Bell* occurs in the chapter entitled "Olympus." *Id.* at 332.

69. This is contradictory to Novick's discussion of Holmes's volunteering for service in the Civil War. *Id.* at 34-38. Novick states that, "[h]e talked with his parents before enlisting. The doctor thought it would be better for Wendell to finish school before going into the army, but Wendell had little patience for such calculation, and his mother thought it right to go immediately." *Id.* at 34-35.

not be used to declare the law unconstitutional, in part because of the absence of a right to privacy, which seems misleading given the Supreme Court's decision two years earlier in *Pierce v. Society of Sisters*.⁷⁰ Additionally, an assessment whether the law was even rationally based certainly *could* have resulted in its being held unconstitutional; indeed, Justice Butler dissented.

Further, according to Novick, the law review articles attacking *Buck v. Bell* "are really directed to the statute it upheld or are based on evidence not then available. The brutal administration of the statute in later cases was not before the Court, [and] the legislative judgment that I.Q. was an adequate indicator of heritable defects could not properly have been reversed as a matter of constitutional law."⁷¹ In concluding his textual discussion of *Buck v. Bell*, Novick writes, "[a]nd so the Court did its duty, and allowed social experiments to proceed, the immense and violent experiments of Prohibition and racial improvement, so long as Constitutional guarantees of fairness were observed."⁷² Finally, Novick explicitly mentions that Justice Brandeis concurred in this opinion. It seems a shabby tactic to excuse Holmes's thinking by pointing out that Brandeis, a noted civil libertarian, joined in the opinion.

Holmes's unremitting legal positivism, especially in an age of anxiety,⁷³ gives a reader pause. Novick, while defending Holmes's opinion in *Buck v. Bell*, ignores another case⁷⁴ in which notions of duty and justice apparently led him to a curious decision. Holmes dissented in *Bailey v. Alabama*,⁷⁵ a case assessing the constitutionality of an Alabama statute defining as criminal fraud the taking of money by a laborer who contracted to perform services and then refused to continue to perform those services and failed to refund the money given him. If convicted, the punishment was a fine double the amount of damages suffered by the employer. The state and the em-

70. 268 U.S. 510 (1925). In *Pierce*, the Court held violative of the fourteenth amendment an Oregon statute which forbade parents from sending their children to nonpublic schools. Holmes joined in the majority's opinion.

71. S. NOVICK, *HONORABLE JUSTICE* 478 n.65. But aren't gods supposed to be able to divine some of that?

72. *Id.* at 352. It is intriguing that Novick analogizes the "experiments" of Prohibition and "racial improvement." In my view they are not comparable, because the good faith found in the temperance movement seems missing from these efforts to sterilize society's "misfits".

73. Or would Gilmore in *THE AGES OF AMERICAN LAW* have better characterized the present as the Age of Doubt? Cf. H. COMMAGER, *THE AMERICAN MIND* 160 (1950)("[D]oubt requires the existence of belief.").

74. *Bailey v. Alabama*, 219 U.S. 219 (1911). I realize that Novick could not include every case, or even every important case decided by Holmes, particularly given Novick's primary concern with the life, not the work, of Holmes. After reading *Honorable Justice* I was struck by the possible connection between Holmes' life and work.

75. S. NOVICK, *HONORABLE JUSTICE* 227.

ployer each received half of the fine imposed. The state thus criminally enforced breaches of contract by employees.

In the *Bailey* case, the defendant Alonzo Bailey, a black man, had signed a contract agreeing to work as a field hand for one year at wages of \$12 per month. The evidence showed that Bailey was given a \$15 advance upon signing the contract and was to be paid at the rate of \$10.75 per month.⁷⁶ He quit after working for almost two months, and when he did not repay the \$15 advance,⁷⁷ he was charged with fraud. An Alabama rule of evidence forbade Bailey from defending himself by introducing evidence any "uncommunicated motives, purpose, or intention,"⁷⁸ which could negate the state of mind required for conviction. The taking of the advance indicated a fraudulent intent.

Bailey was convicted and fined \$30. He was sentenced to 136 days of imprisonment at hard labor upon default of the payment of the fine. In reversing *Bailey*, the Supreme Court refused to consider whether the purpose of the statute was to oppress blacks in this post-Reconstruction era,⁷⁹ and instead it simply held the statute violative of the thirteenth amendment.

Holmes's dissent, joined by Justice Lurton, is a masterpiece of elision and formalism. He begins by asserting the readily accepted: the thirteenth amendment does not outlaw contracts for labor and if it did so, the working man would be more greatly harmed than the employer. Further, legal liability for breach of contract will aid in the performance of that contract.⁸⁰ Holmes then equates criminal and civil liability, asserting that liability in the form of a fine is the same kind of liability as civil damages. If a fine is permissible, then imprisonment for failure to pay the fine is permissible. Holmes then follows with the non sequitur that, consequently, imprisonment at hard labor is not peonage. Holmes explicitly assumes that because the contract is legal it is fair, and therefore the state has every reason to force performance of the contract.⁸¹

He then states that his analysis of the state's interests is unnecessary to

76. In other words, he was to earn that \$15 advance at the rate of \$1.25 per month.

77. It seems to me that he should have been required to pay approximately \$12.50, since the two months of work should have been credited against the \$15 "bonus." However, the doctrine of partial performance may not yet have reached Alabama.

78. 219 U.S. at 228 (quoting *Bailey v. State*, 161 Ala. 77, 49 So. 886 (1909)).

79. Holmes opened his dissent by reiterating this point, concluding that "the fact that in Alabama [the statute] mainly concerns the blacks does not matter." *Id.* at 246. Curiously, Holmes identified Carrie Buck in *Buck v. Bell* by describing her as "a feeble minded white woman . . ." 274 U.S. at 205. Novick does not discuss Holmes's reason for discussing her race. It may have been to eliminate any challenge of racial discrimination, or for some other reason.

80. This was consistent with Holmes' "bad man" theory of contractual liability.

81. 219 U.S. at 246-47.

decide the case, for Bailey can overcome the presumption of fraud by a) external evidence, which is left unspecified, and b) faith in the jury, which has the naked power to acquit the defendant (but no evidence and little inclination in the post-Reconstruction South which might incline them to so do). Holmes concludes by appealing to a sense of morality, while re-formulating the case before the court. Fraud can be criminally punished; a false representation that one will perform services is evidence of fraud; and an unjustified failure to perform coupled with a failure to repay the advance "may be declared a sufficient case to go to the jury for their judgment."⁸² Who could doubt any of those propositions?

Why did Holmes dissent in this case? After all, Chief Justice Edward White of Louisiana, no friend of Southern (or Northern) blacks, concurred in the majority opinion. The United States filed an amicus brief and argued that the Alabama law violated the fourteenth amendment. Finally, dissenting from a decision which restricted the ability of a state to criminalize an employee's breach of contract seems much less important than dissenting from a decision which restricts the state's ability to regulate the bargaining power of an employer.⁸³

Just as interestingly, why did Holmes write an opinion? It was commonplace in the Supreme Court at that time to dissent without writing an opinion. Holmes the dissenter, with several notable exceptions, was not to arrive until after the end of World War I.⁸⁴

Holmes's dissent in *Bailey v. Alabama* is intriguing for two other reasons. The case was argued approximately nine months after Holmes's reading of Dante's *Divine Comedy*, in which Holmes apparently was affected by the line, "I am Arnaut, who weeps and goes singing."⁸⁵ Was Holmes's exceedingly formalistic opinion in *Bailey* a way in which to excise doubt? It seems manifestly possible that the manner in which Holmes decided cases and wrote opinions was markedly affected by his life, by his fear of doubt, and his consequent embrace of duty. The resurfacing of doubt when Holmes read Dante may have been best covered by returning to the mask of the duty-bound, impersonal judge. *Bailey* is an example of wearing the judicial blind-

82. *Id.* at 249. It is interesting to note that Holmes the positivist writes earlier in the opinion that "[b]reach of a legal contract without excuse is wrong conduct, even if the contract is for labor, and if a State adds to civil liability a criminal liability to fine, it simply intensifies the legal motive for doing right, it does not make the laborer a slave." *Id.* at 246.

83. One of the lessons learned in a legal education drawn from Holmes's dissent in *Lochner v. New York*, 198 U.S. 45 (1905), is the avoidance of simple formalism, and if *Bailey* stands analogous to *Lochner*, then Holmes may have been sending a different message than the one received.

84. S. NOVICK, HONORABLE JUSTICE 353.

85. *Id.* at 299.

ers too tightly; Holmes may have done so as much for reasons of preservation of "self" as for reasons of duty to law.

My surmise is that Holmes's attraction to science, which permitted the excision of doubt, greatly affected his approach to legal decisionmaking. Holmes's formal reasoning in *Bailey* is a return to a reliance upon legal science, as his decision in *Buck v. Bell* was based in part on his uncritical acceptance of state-endorsed "science."

The other intriguing aspect of the dissent in *Bailey* is Holmes's view of blacks in American society and law. While for the most part curiously silent about Holmes's feelings about blacks, Novick occasionally throws tidbits our way. It is unclear to me whether the twenty-year old Holmes volunteered for Civil War service in order to free slaves, save the Union or fulfill the desires of his father or self or others. We don't know whether Holmes twice declined to become an officer of an all-black Massachusetts regiment because he had tired of his military duty or because he did not wish, like some of his friends,⁸⁶ to be involved with this unit. Novick notes that Holmes viewed the events of Reconstruction with a dispassionate, detached tone,⁸⁷ apparently caring little about the creation of the Ku Klux Klan or other events shaping the South. During his discussion of *Giles v. Harris*,⁸⁸ in which Holmes concluded that the courts, including the Supreme Court, had no power to prevent the state of Alabama from denying its black citizens the right to vote, Novick suggests that Holmes's opinion (and duty) was affected by his experience as a Civil War veteran.⁸⁹ The acknowledgment that Holmes's experiences shaped his thinking about law is necessarily a by-product of writing a biography of the first legal pragmatist, but is not often integrated into Novick's work. We can speculate that Holmes may have been similarly affected by his Civil War experiences, or his feelings about blacks in dissenting in *Bailey v. Alabama*. That will remain sheer speculation, since there is nothing beyond those shards in *Honorable Justice* which investigates Holmes's attitudes concerning blacks.

Bailey v. Alabama may be emblematic of Holmes's notion of playing the game by the rules, but to us today it appears that the rules were his to create, and his to apply. Our heroes must be concerned about justice; and Holmes was ill-served by his early champions Frankfurter, Laski and others, because Holmes could be appreciated only if he was removed from the pedestal upon which he was placed. Holmes was not a prophet, and not a god. Novick has

86. Henry "Little" Abbott congratulated Holmes on his decision, and wrote, "I believe you have done . . . what is thoroughly right & proper, instead of absurdly wasting yourself before the shrine of the great nigger." *Id.* at 80.

87. *Id.* at 127.

88. 189 U.S. 475 (1903).

89. S. NOVICK, *HONORABLE JUSTICE* 257-59.

created a more complex Holmes, but one who remains, in many respects, deified, which disserves the readers and Holmes.

IV.

Holmes may be impervious to interpretation. Any attempt to psychoanalyze Holmes, or to attempt to delve more deeply, as I have, may be misguided. We need heroes in our society, and it may be necessary for (largely conservative) lawyers to continue to place Holmes on a pedestal, for Holmes showed that conservative judging was often valuable. Holmes also showed that conservative judging was occasionally inhumane.

While Novick's biography suggests that heroes in law should be seen as something more than either saints or sinners, I was left with the sense that I was still to view Holmes as both a great person and a good person. I am willing to use the honorific title "Honorable" for those whom society has created that designation. I am not willing to honor them simply based on that title. Holmes was a complex man, whose life is worth the effort Novick clearly expended in this biography. I am uncertain whether he was an honorable man, or an Honorable Justice. The complexity of Holmes is pursued in enough occasions that the book is worthwhile reading, and for that Novick should be commended. But while Holmes is no longer one-dimensional, he is not yet three-dimensional.

We can, however, ponder for ourselves these thoughts of Holmes given to his nephew:

I told him that there was philosophy in the substance of the Christian notion of losing oneself to find oneself. Although an old wife's tale in that form. The happiest or best gifted reach it emotionally in religion or in disinterested love or their kind-but I told him the result of salvation could be reached through the intellect-in the irony of Sunday afternoon.⁹⁰

90. *Id.* at 216.