

## Book Review

### OLIVER WENDELL HOLMES: A LIFE IN WAR, LAW, AND IDEAS<sup>1</sup>

By Stephen Budiansky

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The life of the law has not been logic; it has been experience.<sup>[2]</sup>

1 Oliver Wendell Holmes is indubitably one of the most prominent American jurists. His colourful life and career have been amply covered in several biographies; and it is hard to disentangle legend from the man. Some, like Justice McKenna, may be envious of him, but the description by G E White sums it best when he wrote:<sup>3</sup>

Holmes was also an enticing personality. He was exceptionally attractive, especially as he aged and his countenance, with its piercing eyes, shock of white hair, and prominent moustache, seemed to reflect the roles of soldier and jurist that had been so important in his life. He was by all accounts a memorable companion and conversationalist, and his letters, in contradistinction to those of his colleagues, rival those of the most celebrated correspondents in their stylistic facility and substantive interest.

2 Budiansky arranges this biography (“*OWH*”) in a structure that enables the reader to fully understand the man behind Holmes’ famous “The life of the law [is not] logic” quotation. Holmes was no closeted academic although he clearly had an academic bent and was briefly the Weld Professor of Jurisprudence at Harvard University. He had been a man of physical as well as intellectual action. His stint in the Union Army brought him to the brink of death when he was shot through the chest and neck.

3 This book covers the entirety of Holmes’ life – his childhood, his time in Boston, his participation in the American Civil War, his early career in legal practice, and his stint as an academic professor at Harvard University. Although it was during his years as a commercial and shipping

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1 W W Norton & Co, 2019.

2 Oliver Wendell Holmes Jr, *The Common Law* (Belknap Press, 2009) at p 3.

3 G Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (Oxford University Press, 1993) at p 3.

lawyer in Boston that Holmes produced *The Common Law*<sup>4</sup> – “the single most important book in the history of American legal scholarship”<sup>5</sup> – it was the time he served with the Twentieth Massachusetts Regiment, also known as “The Harvard Regiment”, that ingrained in him the deep lessons that only experience can impart. Budiansky covers briefly, but adequately, Holmes’ childhood in Boston and the relationship he had with his famous doctor father, the senior Oliver Wendell Holmes, whose intellectual quotes were sometimes mistakenly attributed to Oliver Wendell Holmes Jr.

4 Holmes married Fanny Dixwell in 1872, a woman he had known for 20 years before they married each other. She was the daughter of Holmes’ old schoolmaster. Most biographies have little to mention of Fanny, whom White described as the opposite of Holmes in many respects: “He liked socializing, exchanging ideas, and flirting with women. She was a relatively solitary person who grew more reclusive as she aged.”<sup>6</sup> It is in *OWH* that we find the story of how William James, the philosopher (and brother of Henry James the novelist), who also had an infatuation for Fanny, tried to take advantage of Holmes’ absence. William had written to his brother, complaining, “That villain Wendell Holmes has been keeping her all to himself out at Cambridge for the last 8 years; but I hope I may enjoy her acquaintance now.”<sup>7</sup> Holmes’ mother promptly wrote to him, warning him that William James was taking advantage of his absence, and suggested that he write to Fanny, which Holmes promptly did.

5 It was Holmes’ friendship with other women that received much more attention, but that was because Holmes, an avid writer of letters, wrote more to his women friends than he did to Fanny. The most notable of his women companions was Clare Castletown, whose husband, Lord Castletown, Budiansky describes as one who “had all the air of the none-too-bright-British aristocrat.”<sup>8</sup> Though they corresponded often, and Holmes addressed her affectionately as “My beloved Hibernia,”<sup>9</sup> few of Clare’s letters to Holmes survived. Budiansky was quick to surmise that the Holmes–Clare Castletown association was not a sexual one – “for one

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4 Belknap Press, 2009.

5 Stephen Budiansky, *Oliver Wendell Holmes: A Life in War, Law, and Ideas* (W W Norton & Co, 2019) at p 10.

6 G Edward White, *Oliver Wendell Holmes Jr* (Oxford University Press, 2006) at p 33.

7 Stephen Budiansky, *Oliver Wendell Holmes: A Life in War, Law, and Ideas* (W W Norton & Co, 2019) at p 144.

8 Stephen Budiansky, *Oliver Wendell Holmes: A Life in War, Law, and Ideas* (W W Norton & Co, 2019) at p 235.

9 Stephen Budiansky, *Oliver Wendell Holmes: A Life in War, Law, and Ideas* (W W Norton & Co, 2019) at p 238.

thing, she already had a lover, a fellow foxhunter and equestrian named Percy la Touche”.<sup>10</sup>

6 The major aspects of Holmes’ life that intrigue readers more than his flirtations with women, concern Holmes’ life in the law, and the breadth and depth of his jurisprudence. Strangely, Holmes’ opinions during his tenure in the Massachusetts Supreme Court including three years as the Chief Justice did not elicit much attention, let alone commentary. His major jurisprudential fame accrued through his judicial opinions came after his appointment to the US Supreme Court at the age of 61.

7 Not content with writing just judicial opinions, Holmes was a prolific letter writer, speech writer, and a writer of book reviews. His reviews and speeches can be found in *Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers*.<sup>11</sup> Holmes had a distinctive writing style. It was concise and precise. He rarely employed words with no utility, and he scorned the cliché. In a speech to the Chicago Bar Association, Holmes said, “The minute a phrase becomes current it becomes an apology for not thinking accurately to the end of the sentence.”<sup>12</sup> Budiansky wrote that Holmes never feared leaving out an essential point because he adhered to his own advice “to strike the jugular and let the rest go”.<sup>13</sup> Holmes had proved himself a witty grammar policeman. He once wrote to his judicial colleagues: “I dissent. ‘Loan’ is not a verb.”<sup>14</sup>

8 The following passage from Budiansky encapsulates the Holmesian writing style:<sup>15</sup>

No one knew how to strip off excess judicial verbal poundage better than Holmes. Even in his day he stood out as unusual for the economy and brevity of his decisions. Nowadays, when judges think nothing of issuing a sixty-page ruling on a procedural motion, he would be in a minority of one. The standard model for judicial opinions today is the law review article – unsurprising, given that nearly all appellate opinions are now ghostwritten by law clerks fresh from law school – its style summarized by one law professor with depressing accuracy

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10 Stephen Budiansky, *Oliver Wendell Holmes: A Life in War, Law, and Ideas* (W W Norton & Co, 2019) at p 239.

11 Harry C Shriver, ed (Central Book Co, 1936).

12 *Collected Works* (21 October 1902), cited in Stephen Budiansky, *Oliver Wendell Holmes: A Life in War, Law, And Ideas* (W W Norton & Co, 2019) at p 12.

13 Stephen Budiansky, *Oliver Wendell Holmes: A Life in War, Law, and Ideas* (W W Norton & Co, 2019) at p 13.

14 Stephen Budiansky, *Oliver Wendell Holmes: A Life in War, Law, and Ideas* (W W Norton & Co, 2019) at p 206.

15 Stephen Budiansky, *Oliver Wendell Holmes: A Life in War, Law, and Ideas* (W W Norton & Co, 2019) at p 13.

as ‘colorless, prolix, platitudinous, always erring on the side of inclusion, full of lengthy citations and footnotes – and above all dull.

9 Holmes’ jurisprudence was very much influenced by legal positivism although he has his reservations about the Austinian version.<sup>16</sup> Labels do not attach easily to Holmes’ jurisprudence because his opinions, often lauded by liberals, also often astonish them for their illiberal and conservative stance. Yet it is clear that Holmes took a patient view of the development of the law. “Law”, he said, “is a plant that lives long before it throws out bulbs.”<sup>17</sup>

10 When it came to the Constitution, Holmes was neither a “textualist” nor an “originalist”. He was enamoured by neither “strict construction” nor “judicial activism”. It is perhaps his lack of professional ambition or a desire to fame that enabled him to be one of the more consistent practitioners of American Realism. Budiansky wrote, “Holmes disavowed any ambition in the position [of Chief Justice], or disappointment that he was not selected”, reporting Holmes’ letter to Ana Gray, “My ambitions as you know are internal. An appointment as Chief Justice would do nothing towards satisfying them and I never thought of it for an instant as a possibility for myself ...”<sup>18</sup> His dissent in *Lochner v New York*<sup>19</sup> was described by Richard Posner as “consistent with his ‘realist’ belief that the decision of a closely balanced case is a policy judgment that is often little better than a guess because of lack of critical information, rather than the end of a logical chain of verified facts and cogent reasons.”<sup>20</sup> As Budiansky wrote, “Holmes’ dissent in *Lochner* was extraordinarily brief, barely six hundred words long: it was completely free from jargon.”<sup>21</sup>

11 Yet another example can be found in Holmes’ view of contract law as he expounded in “The Path of the Law”:<sup>22</sup>

In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood

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16 Oliver Wendell Holmes, Jr, “Holmes on Austin’s Theory of Law” in *Collected Legal Papers* (Peter Smith, 1952) at p 36.

17 Oliver Wendell Holmes, Jr, “Law and the Social Factor” in *Collected Legal Papers* (Peter Smith, 1952) at p 138.

18 Stephen Budiansky, *Oliver Wendell Holmes: A Life in War, Law, and Ideas* (W W Norton & Co, 2019) at p 323.

19 198 US 45 (1905).

20 Richard Posner, *Law & Literature* (Harvard University Press, 3rd Ed, 2009) at pp 347–348.

21 Stephen Budiansky, *Oliver Wendell Holmes: A Life in War, Law, and Ideas* (W W Norton & Co, 2019) at p 294.

22 Oliver Wendell Holmes, Jr, “The Path of the Law” in *Collected Legal Papers* (Peter Smith, 1952) at p 178.

that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs – not on the parties having *meant* the same thing but on their having *said* the same thing. [emphasis added]

12 Though ever the pragmatist, Holmes was first and foremost an intellectual. He had a kernel of idealism buried deep within him, and on occasions, he would let the world glimpse the light from that source – as he did when addressing Harvard Law students on 17 February 1886 – when he declared:<sup>23</sup>

No man has earned the right to intellectual ambition until he has learned to lay his course by a star he has never seen – to dig by the divining rod for springs which he may never reach ... Only when you have worked alone – when you have felt around you a black gulf of solitude more isolating than that which surrounds the dying man, and in hope and in despair have trusted to your own unshaken will – then only will you have achieved.

In speeches like this, Holmes revealed what White called “the passionate elements in his temperament”,<sup>24</sup> and that Holmes “enjoyed convivial society and especially the opportunity to be on intimate terms with as many [women] as [he] can”.<sup>25</sup> White attempted to find sense and structure in a man who was, paradoxically, cold and pragmatic, and yet had *joie de vivre*.

13 In *OWH*, Budiansky portrayed in equal parts the intellectual Holmes who loved reading, and the convivial, cigar-loving, chatty *bon vivant*, who kept a little black book noting the books he read and other miscellaneous stuff of his life. This awkward combination perplexed Budiansky. G Edward White, however, made a gallant attempt to reconcile Holmes’ public intellect with his private life in his long article, “Holmes’s ‘Life Plan’: Confronting Ambition, Passion, and Powerlessness”.<sup>26</sup>

14 Oliver Wendell Holmes Jr’s life and his works form a near perfect manifesto for all lawyers and jurists. And as he said in his dissent in *Gitlow v New York*,<sup>27</sup> “It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement.”<sup>28</sup> How inciting. White

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23 Reprinted in *The Occasional Speeches of Justice Oliver Wendell Holmes* (Mark DeWolfe Howe ed) (Harvard University Press, 1962).

24 G Edward White, “Holmes’s ‘Life Plan’: Confronting Ambition, Passion, and Powerlessness” (1990) 65 NYU L Rev 1409 at 1436.

25 G Edward White, “Holmes’s ‘Life Plan’: Confronting Ambition, Passion, and Powerlessness” (1990) 65 NYU L Rev 1409 at 1475.

26 (1990) 65 NYU L Rev 1409.

27 268 US 652 (1925).

28 *Gitlow v New York* 268 US 652 at 673 (1925).

reaffirms what other biographers had already noted, that one of Holmes most admirable traits as a jurist is the courtesy and respect he shows for his fellow judges.

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