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Review of “The Judicial Opinions of Oliver Wendell Holmes,” By Harry C. Shriver

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THE JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES. By Harry C. Shriver. Buffalo: Dennis & Co., Inc., 1940. Pp. xvi, 360. \$3.50.

The title of this book is somewhat misleading, for it is not a compilation of, nor even a selection from, the whole body of the judicial opinions of Mr. Justice Holmes. Rather is it a compilation only of his constitutional opinions in the Supreme Judicial Court of Massachusetts, together with excerpts and epigrams from certain others of his opinions in that court. Even so limited, however, it is a valuable addition to the slender sum of Holmesiana thus far available outside the forbidding covers of musty law-books. As Mr. Shriver points out in his preface, Holmes' tenure on the Massachusetts court covers forty-nine volumes of the official reports of that state. It would be nearly impossible for the average reader to track through those dreary wastes the elusive vein of quartz. Even a lawyer, practiced in his craft and well used to the rigors of research, would quail at such prospecting. Thus it is that among the brotherhood Holmes' opinions are found and read, not for the light they shed on Holmes, but merely as grist for "points and authorities"; and, among the laity, for the most part they are not read at all. Since Holmes, man and jurist, is one of the titans of our time, any book is welcome which makes him and his work easier of access.

Holmes came to the highest court of his state in 1883, at the age of forty-two. He had behind him already a series of successes as soldier, advocate, editor, scholar, and teacher. For a man of Holmes' temperament and talents, however, no post within his chosen field offered so great a reward for the expenditure of creative effort as did the bench. As a judge he could stamp upon his world the character of his thought. He brought to the bench a philosophic cast of mind, a keenly pragmatic sense of life and society, and a wide and deep knowledge of the law. He moves through the pages of this book a consummate master of his craft, skilled in the use of its tools and equipped with incisive insight into the problems to be solved. He had to an extraordinary degree the power to divine behind the fog of what he would have called "dramatic facts" the essential legal facts which set the case in its frame of reference in the body of the law. To an unusual degree, also, he had a sense of the interrelation of part with part within that body, so that the reader is continually brought up short by analogies that are seen to be sound only after some effort at analysis of the legal elements of the members.

His studies in the common law had endowed him with a profound understanding of the processes of growth and change characteristic of it. He seems early to have adumbrated what has since been styled the "principle of polarity"—the clustering of cases round antithetic principles, until in varied shadings and gradations they extend toward each other and finally achieve contact. He was well aware that the precise line of contact, and the place of a particular case on the one or the other side of it, was more or less an arbitrary matter that, since it had to be decided one way or the other, might be decided as well upon grounds of conscious policy as by resort to technicalities or futile logic-chopping. It was just at this point

in the judicial process that the judge must indulge in that interstitial legislation to which he referred elsewhere, and if the function could be recognized and consciously executed on grounds of considered policy, the result was better for all concerned.

As one reads these opinions, one is impressed not only with the philosophic sweep with which he views the problems confronting him, but with the toughmindedness he displays in solving them. Never does he seek refuge in generality to shirk the onus of thinking to the bone. His method is to reduce to its naked legal essentials a diffusion of "facts" before him, and then to relate the legal situation that results to the *corpus juris*. Not infrequently the process is left implicit, and from this proceed the difficulties encountered by the reader in following the logic of Holmes' opinions. When he sums up the results of the process in a flashing epigram, its function is not to blind by form to a lack of substance, but rather to light up the path by which he has come without requiring the reader to sweat with him up its rocky acclivity. It is, in brief, a true epigram.

The same toughmindedness Holmes displays in declining to be taken in by shams in law, he displays also toward shams in life. If Holmes is to be denominated a "liberal," it will be necessary to excise from that term its baggage of fuzzy humanitarianism, for there is none of that in Holmes. He was not much impressed with the sacred dignity of man, having himself experienced Antietam and Fredericksburg, as well as a strong dose of Malthus. His view of man in his social relations was as a participant in a "free struggle for life." It was the function of the courts to act as referee in the struggle, to see that each man got his chance and no more than his chance. It can easily be seen that the corollaries of this view, when applied to control of business and the rights of property, are scarcely consonant with what has come to be known as the liberal position. Holmes' "liberalism" seems to follow largely from his views concerning purely legal matters. First, his realistic view of the processes of the law enabled him to cut through the mummery and technicality with which the law had become cobwebbed, and to decide cases in a spirit of enlightened legal pragmatism. Secondly, his tenet of judicial self-restraint placed him on the side of the angels in sustaining the spate of social legislation that the times brought forth. The precise source of this tenet in Holmes' judicial philosophy is surrounded with some uncertainty. Whether it is an historical accident that the legislation it went to sustain was liberal in character, or whether it was adopted deliberately as an apt judicial technique for allowing legislation to whose principles Holmes subscribed, are also questions to which there has been no satisfactory answer.

Even within the law, however, Holmes was in many ways a conservative. Recurring throughout the opinions in this book are expressions of homage to precedent, refusals to encroach upon the authority of established principles, without reference to any other reason for refusing than that they were established. (It must be confessed that in most cases the reasons advanced for the encroachment were none too compelling.) Perhaps akin to this respect for *stare decisis* are the expressions of regret at being forced to dissent. Of almost 1300 opinions written by Holmes in his twenty-year

tenure, only twelve, or less than 1 per cent, were dissents. Of the vast number of cases in which he wrote no opinions, only eleven drew a dissenting vote from him. This is an odd record for one who was later to earn the epithet, "the great dissenter."

Twenty years on the Massachusetts bench would be a life's work for many a man. That is was for Holmes merely a training ground for his real life's work is an indication of the almost incredible qualities of the man. Take him for all in all, we shall not look upon his like again for many a long year.

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