

“Get Down You Fool!”: Holmes on Lincoln, the Union, and the War

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Let me begin by describing what this essay is not and does not do. This essay is not an endorsement of the political views and jurisprudence of Oliver Wendell Holmes, whatever those might have been. This essay is not a celebration of Holmes's life and worldview. This essay is not an apology for Holmes's metaphysics, epistemology, or pragmatism. This essay does not suggest that Holmes was pro-Confederate, or that he hoped the Union would dissolve. Nor does this essay suggest that Holmes's notions about life, law, and politics were fixed or reliable or even easily discernible. Rather, this essay is narrow in scope and focuses specifically on Holmes's views about Lincoln, the Union, and the War. These views changed over time as Holmes matured, grew disenchanted with the ideology of Unionism, and liberated his mind from the misguided zeal and habits of thinking that too often accompany youth.

As a young man, Holmes was an idealist of the Emersonian variety, and he associated with such radical abolitionists as Wendell Phillips, for whom Holmes, still a student at Harvard, served as a bodyguard one evening. Phillips is an interesting figure in his own right. Of the compact of states of the North and the South, he once said, “To continue this disastrous alliance longer is madness. The trial of fifty years only proves it is impossible for free and slave States to unite on any terms.”¹ Phillips also referred to Lincoln as “a more unlimited despot than the world knows this side of China.”² Holmes and Phillips

¹ Wendell Phillips, *The Constitution a Pro-Slavery Compact: or, Excerpts from the Madison Papers, Etc.*, 3rd Ed. (New York: American Antislavery Society, 1856), 9.

² See James Ford Rhodes, *History of the United States from the Compromise of 1850 to the Final Restoration of Home Rule at the*

may not have seen eye to eye, but Holmes eventually saw the logic of a system of government rooted in region and locality instead of in a centralized power operating to subsume disparate cultural practices and traditions under a single, national standard.

A few preliminary words are in order concerning Holmes's beliefs, in particular his eventual beliefs in unbelief. Holmes—once dubbed the Yankee from Olympus—has always been an elusive man because he has been so misunderstood by even the greatest legal minds, and few philosophers have taken the time to seriously consider his idiosyncratic thought. Many commentators mistakenly refer to Holmes as a progressive, and some mistakenly refer to him as a conservative. Really, Holmes was a pragmatist; he was not interested in political causes as much as in methods and ways of thinking. The War Between the States left its mark on him and pushed him in the direction of pragmatism because it demonstrated to him that imposition of force by one society or group upon another can result in mass, unnecessary death.

In his Pulitzer Prize winning book, *The Metaphysical Club*, Louis Menand explains that the “lesson Holmes took from the war can be put in a sentence. It is that certitude leads to violence.”³ This was the idea that drove Holmes to distrust Lincoln and the Republicans and to disassociate from any radicals he knew before enlisting in the Union army. Holmes did not appreciate those who were cocksure about the aims and causes of the war because Holmes himself came to think that what people said the war was about was not, in fact, what the war was about.

Most of the troops he knew wanted nothing to do with the ideals of the abolitionists; nor, for that matter, were they enthralled with Lincoln and the Republicans. Captain

South in 1877, vol. III, (New York and London: MacMillan and Co., 1910), 558.

³ Louis Menand, *The Metaphysical Club*, (New York: Farrar, Straus and Giroux, 2001), 61-62.

William F. Bartlett, who served alongside Holmes, had written in his diary before his first day of battle that the "Battalion has not been ordered out yet. I don't know what I shall do if it is. It w[ould] be fighting rather against my principles, since I have stuck up for the South all along."⁴ The mystery of Holmes and many men in his regiment is how they could fight for the Union despite their disdain for Lincoln, their respect for the Southern cause and the Southern soldier, and their revulsion at the idea that Southern slaves should be set upon equal political footing with whites.

It is difficult today to relate to the motivations and the mindset of these mid-nineteenth century Northern men. Holmes's earliest biographer wrote that "[T]he Regulars did not serve in order that they might contribute to the achievement of certain defined objectives, whether political or humane, but because they were professional soldiers who had chosen the career of arms."⁵ This biographer assures us that it "is not surprising that young men who joined the Union forces as volunteers without a burning hatred of slavery, without confidence in Lincoln, and uncertain whether or not secession was lawful, should make the standards of the professional soldier their own."⁶ In quoting this line, I do mean to impute the purposes of others to Holmes, but to suggest that Holmes was surrounded by men whose views about the War Between the States probably impacted him to varying degrees.

Gary Gallagher has pointed out in his recent book, *The Union War*, that many if not most of the Union soldiers fought on behalf of an ideology of Unionism rather than ideals about race or slavery; but a few soldiers fought in pursuit of a soldierly career or even a sense of duty. A sense of duty is likely what led many young men in Holmes's regiment to enter the war and that led them to

⁴ Liva Baker, *The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes*, (New York: Harper Collins, 1991), 114.

⁵ Mark DeWolfe Howe, *Justice Oliver Wendell Holmes: The Shaping Years, 1841-1870*, (Cambridge Mass.: The Belknap Press of Harvard University, 1957), 83.

⁶ Howe, 83.

respect and admire the Confederates, whose soldiers were courageous in battle and whose generals were heroic in stature and reputation.

According to Gallagher, few Union soldiers cared if Southern slaves remained in bondage.⁷ Holmes was no exception. Even if it is hard to say what led Holmes to fight, it is easy to say that he later regretted the War and the preventable carnage that it brought about. "The longer he was in the war," explains one biographer, "the more [he] was convinced that not death was the horror, but the loss of a young man's chance to live."⁸

After the War, Holmes was a changed man. He never again wanted to be part of a movement that sought to compel one culture to conform to another, or to transform by force the traditions and institutions of a different place with distinct allegiances, priorities, and ways of living and thinking.

Lincoln

⁷ "Issues related to the institution of slavery precipitated secession and the outbreak of fighting, but the loyal citizenry initially gave little thought to emancipation in their quest to save the Union. By the early summer of 1862, long before black men donned blue uniforms in large numbers, victorious Union armies stood poised to win the war with slavery largely intact. Setbacks on battlefields in Virginia dictated that the bloodletting would continue, however, and as months went by, casualties mounted, and a shortage of manpower loomed, emancipation and African American military service assumed increasing importance. Eventually, most loyal citizens, though profoundly prejudiced by twenty-first-century standards and largely indifferent toward enslaved black people, embraced emancipation as a tool to punish slaveholders, weaken the Confederacy, and protect the Union from future internal strife. A minority of the white populace invoked moral grounds to attack slavery, though their arguments carried less weight than those presenting emancipation as a military measure necessary to defeat the Rebels and restore the Union. African American freedom still seemed problematic in the bloody summer of 1864, when Union armies bogged down in Georgia and Virginia and antiemancipation Democrats looked hopefully toward the November elections." Gary W. Gallagher, *The Union War* (Cambridge: Harvard University Press), 2-3.

⁸ Catherine Drinker Bowen, *Yankee from Olympus*, (Boston: Houghton Company, 1962), 166-67.

Holmes joined a regiment—the Twentieth Massachusetts—that “was by no means abolitionist, or even Republican.”⁹ Nor were his Harvard classmates and the Harvard faculty, whom he left behind, uniformly supportive of Lincoln. President Feilton supported slavery, as did mathematics professor Benjamin Peirce, who maintained ties with Southern planters whose children had enlisted at Harvard.¹⁰ “Many of Holmes’s comrades in the Twentieth despised the abolitionists and thought the war was a mistake.”¹¹ The leader of the regiment, General Stone, had, after the battle at Ball’s Bluff, ordered his men to collect the escaped slaves who had sought safety with the Union Army and to return those slaves to their masters. Menand explains that Holmes, like the other members of his regiment, “had little respect for Lincoln” and that “this was a common enough Northern attitude early in the war.”¹² Some Northerners considered Lincoln “incompetent and without a plan,”¹³ and some considered him “an extremist,” so much so that “Holmes once recalled a conversation in the trenches with some of his Harvard classmates about whether the ... war had produced a great man. Someone timidly suggested Lincoln, and the others laughed him down.”¹⁴

Holmes’s closest friend in the regiment was Henry Abbott. If there was such a thing as a Copperhead, Abbott was that. He has indeed been called “Abbott the copperhead,” as well as a man “who didn’t even believe in the goals of this war, yet died for them.”¹⁵ He was an open admirer of General McClellan as against Lincoln, a vocal

⁹ Menand, 39.

¹⁰ Bowen, 134. See also Silas Bent, *Justice Oliver Wendell Holmes* (Garden City, New York: Garden City Publishing Company, 1952), 70: “Of the eighty-one men in the Class of 1861 at Harvard, forty-seven fought for the Union, three for the Confederacy, of the non-graduates, twelve for the Union, two for the Confederacy. Eight were killed or died of their wounds; two died of disease contracted in the service.”

¹¹ Menand, 39.

¹² Menand, 39.

¹³ Bowen, 161.

¹⁴ Menand, 39.

¹⁵ Baker, 147.

critic of the Lincoln administration, a Southern sympathizer, and a staunch Democrat. When he heard that Lincoln had issued the Emancipation Proclamation, Abbott wrote that the “president’s proclamation is of course received with universal disgust, particularly the part which enjoins the officers to see that it is carried out. You may be sure that we shan’t see to any thing of the kind, having decidedly too much reverence for the constitution.”¹⁶

Abbott’s father Josiah also protested against the Emancipation Proclamation by helping to organize the People’s Convention, a group devoted to unseating Massachusetts’ Republican governor. Abbott and men like him were worried about Lincoln’s treatment of, and disregard for, the Constitution. Mark DeWolfe Howe submits that it “was not surprising...that Union officers did not look upon Lincoln as the great and heroic figure of the war.”¹⁷ After all, Lincoln had, against their wishes, unseated General McClellan and issued the Emancipation Proclamation, which appalled many soldiers who had sworn loyalty to the Constitution and who had not considered slavery to be their sole purpose in fighting. Holmes himself suggested that the Union Army was “only willing to trust its life and reputation to one man,” General McClellan.¹⁸ Holmes was not willing to put his life in the hands of Lincoln.

Nearly every biography of Holmes tells the following story about Holmes and Lincoln while conceding that the details are probably more legend than fact. Lincoln is said to have stood up on a parapet, during his visit to Fort Stevens, to secure a panoramic view of the battlefield, when all of a sudden Confederate bullets began to spray into Union lines. Young Holmes, then a captain, alarmed by the idiocy of the tall, gaunt man who seemed not to know what to do in the heat of battle, hollered, “Get down, you damn fool, before you get shot,” at which point the President of the United States got down. Some accounts

¹⁶ Menand, 40.

¹⁷ Howe, 137.

¹⁸ Howe, 148-149.

maintain that Holmes did not know he was speaking to the President. Others maintain that Holmes knew quite well that he was speaking to the President, and that that was precisely the point. As Howe puts it, "the Captain [Holmes] seems to have treated the Commander-in-Chief with some impetuosity and in doing so, incidentally, to have expressed the conviction that the fighting of wars was something more serious than a spectacle produced for the benefit of civilians."¹⁹

This story is considered legend by some, myth by others. It is all the more important if it pertains to myth. At a meeting of the Philadelphia Society, the late Dr. Tom Landess described "myth" as a commonly held belief of a people that helps them to define themselves to themselves and to others. It is worth asking why northerners and southerners alike continue to retell this story about Holmes and Lincoln that, in its rendering of the President as an ignorant bystander with no sense of leadership, common sense, or bravery, sustains what would seem to be an important challenge, or perhaps counter-myth, to the myth of Lincoln as a wise and courageous and principled leader.

Later in life, Holmes would at times contradict himself on Lincoln, writing favorably of the sixteenth President, for instance, in letters to Harold Laski. Holmes, however, appears to have remained decidedly opposed to Lincoln's leadership and skeptical about Lincoln's reputation. His ideas about Lincoln, if they could ever have been called favorable—one could argue that they could not have been—represented a sad acquiescence to the prevailing currents of public opinion. "[U]ntil I was middle aged," Holmes wrote in a 1926 letter to Albert Beveridge, "I never doubted that I was witnessing the growth of a myth. Then the revelation of some facts and the greatness of some of his speeches—helped perhaps by the envying conviction of the later world—led me to accept the popular judgment—which I do, without a great deal of ardor or very great interest in the man."²⁰ In other words, Holmes came

¹⁹ Howe, 169.

²⁰ Howe, 137.

to agree that Lincoln was a brilliant rhetorician, but Holmes found it difficult to get excited about Lincoln the man. Holmes most certainly did not buy into Lincoln the myth.

The Union

Dr. Oliver Wendell Holmes Sr., the father of Oliver Wendell Holmes, was, for a long time, a Unionist. He and Emerson had a falling out of sorts once Emerson discovered that Holmes had been criticizing the abolitionists for threatening to sever the United States into factions and multiple governments. Holmes, Jr. did not agree with his father about preserving the alleged integrity and coercive uniformity of the nation. He did, however, agree with his father in thinking that slavery was only an ancillary issue dividing the North and the South. When young Holmes dropped out of Harvard to enlist in the Union Army, he did so in part, one suspects, to rebel against his father, who wanted his son to finish school, and in part to rebel against the Harvard authorities, whom he considered stuffy, pedantic, and self-important, and who had clashed with the insubordinate Holmes on several occasions. Freeing the slaves hardly crossed Holmes's mind, and preserving the Union struck Holmes as quixotic and dangerous. Why exactly Holmes enlisted, in light of his ambivalence about the war, remains unclear, but his reasons must, it seems, have pertained to forces not totally under his control: the time and space in which he, through no fault or agency of his own, was situated. He himself once declared that he had been forced to "share the passion and action of his time at peril of being judged not to have lived."²¹

The last thing Holmes was fighting for was racial equality, or any such racial purpose. Holmes was rather open in his belief that Negro soldiers were a disgrace. When asked in 1863 to serve as an officer in a black regiment, Holmes was offended, and refused. He and most of the fellow soldiers in the Twentieth Massachusetts were

²¹ G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self*, (NY: Oxford University Press, 1993), 75-76.

not interested in bettering the relations between whites and blacks, and they might have dropped their weapons and returned home had they been informed that the cause they were fighting for was the emancipation of black slaves. After learning of Holmes's decision not to join the black regiment but instead to reenter the Twentieth Massachusetts, Abbott wrote Holmes to say, "I haven't time to tell you how much I am delighted at your decision to stick to the old mother," adding, "I believe you have done not only what is proper, instead of absurdly wasting yourself before the shrine of the great nigger."²² This comment signals a growing animosity within Holmes's regiment toward soldiers in other regiments who had suggested that the causes of the war included racial issues.

For Abbott, as for Holmes, race did not play a significant role in the decision to join or to remain in the war effort, and neither man wanted to think that he was fighting on behalf of a race that he felt vastly superior to. To have fought for slaves would have seemed degrading to Holmes's and Abbott's personal sense of valor and honor. These were the men who sought to return runaway slaves to their former masters at the close of battle, not who sought to recreate the South in terms of racial equality. All of this is not to condone Holmes's and Abbott's views on race, but to suggest that contemporary understandings of the racial motivations of soldiers *like* Holmes and Abbott have been distorted by recycled clichés and stereotypes, as well as by general misunderstanding. In truth, Holmes's regiment was filled with self-proclaimed Copperheads toward whom Holmes gravitated because they "made gallantry their ideal" and "cared little for the constitutional or moral cause for which they fought."²³ Holmes's "personal affection for the Copperheads Henry Abbott and Charles Whittier," proclaims Howe, "must have been founded on some basic

²² Menand, 48.

²³ Howe, 84.

sympathy,²⁴ and of all the soldiers Holmes fought with, the Copperheads Abbott and Whittier earned his highest praise.

Even as the Northern war effort gained successes and momentum, Holmes and his companions were becoming increasingly disenchanted with the ideology of Unionism that had once carried such purchase. In the fall of 1863, Whittier, who served with Holmes in the Twentieth and, later, in the Sixth Corps Headquarters, wrote that "[W]e have but two parties, Union (Republicans, abolitionists, contractors and liberal generals promoted for merit) and Copperheads (democrats, opposers of the war, all McClellan men, commanders of departments like Schenck, Milroy & Fremont & many others Whose recommendations for promotion & high places like in military ability). I am a Copperhead."²⁵ It was not just disenchantment with Unionism that was the problem. It was that the war was taking on a new meaning in many regions and circles in the North and that the justification for the war was being couched in new vocabularies and rhetoric. Holmes, with many of his fellow soldiers, did not think he owed a duty to defend the ideals that were now being put forth as among the causes for war.

Shortly before Holmes quit the service altogether, he wrote that "I have felt for some time that I didn't any longer believe in this being a duty & so I mean to leave."²⁶ Even more pointedly, he wrote that "I was not demoralized when I announced my intention to leave the service next winter if I lived so long. I started this thing as a boy. I am now a man and I have been coming to the conclusion for the last six months that my duty has changed. 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."²⁷

²⁴ Howe, 85.

²⁵ Howe, 83.

²⁶ Howe, 170.

²⁷ Howe, 172.

Before the war, Holmes had been a poet and an idealist; after the war, he turned from those Emersonian fancies and pursuits to the more hard and mechanical instruments and technicalities of the law. The wartime disillusionment Holmes experienced had something to do with his association with Copperheads, and it led him to fall into skepticism and away from transcendentalism. Holmes feared and deplored avoidable death, and the war left him bitter towards any ideology attempting to validate the takeover and destruction of a cultural, intellectual, and political rival.

The War

Menand opens *The Metaphysical Club* by saying, "Holmes hated the war,"²⁸ and Menand later says that Holmes considered the war "a hideous human waste."²⁹ There were several reasons for Holmes's antipathy toward the war effort, the most notable of which was his abhorrence of the carnage and killing that he witnessed firsthand. He also could not understand why so many of his parents' generation despised Southerners, especially Southern soldiers, whom he had grown to respect. In 1862, he wrote that "I've pretty much made up my mind that the South have achieved their independence & I am almost ready to hope spring will see an end," and he remarked, too, that "I think before the long the majority will say that we are vainly working to effect what never happens—the subjugation (for that is it) of a great civilized nation. We shan't do it—at least the Army can't."³⁰ This great civilized nation was the South, the Confederacy.

Of the South, Holmes, still a soldier, wrote to his father, referring to some conviction that his father shared with an historian named John Lothrop Motley, that "I don't think either of you realize the unity or the determination of the South. I think you are hopeful because (excuse me) you are ignorant. But if it is true that we represent

²⁸ Menand, 3.

²⁹ Menand, 43.

³⁰ Menand, 42.

civilization wh[ic]h] is in nature, as well as slavery, diffusive & aggressive, and if [civilization] & progress are the better things why they will conquer in the long run, we may be sure, and will stand a better chance in their proper province—peace—than in war, the brother of slavery—brother—it is slavery's parent, child and sustainer at once."³¹ Holmes here makes clear that he viewed war itself as, if not worse than slavery, then at least on par with it. War is more than the brother of slavery, he says—it is the parent, child and sustainer of slavery. The irony, as Holmes seems to imply, is that some Northerners decried slavery in the South even as the Union Army sought to enslave Southerners. That is a big claim, but one Holmes was on the verge of making.

Holmes first enlisted in the infantry before he joined the Twentieth Massachusetts, a regiment that lost five eighths of its men.³² Before completing his training with the Twentieth, Holmes was made a First Lieutenant. He was wounded at the Battle of Ball's Bluff in October 1861, when he took a bullet to his chest; the bullet passed through his body without touching his heart or lungs. In September of 1862, Holmes, now a captain, was wounded at the Battle of Antietam, a bullet having passed through his neck. In May of 1863, at Marye's Hill, close to where the battle of Fredericksburg had taken place six months earlier, Holmes was shot and wounded a third time, a bullet having struck him in the heel, splintering his bone and tearing his ligaments so that his doctors were convinced that he would lose his leg. Holmes never lost the leg, but he limped for the rest of his life.

Once Holmes became a soldier, he despised bloodshed on account of a cause he could not identify, and so could not identify with. The war eventually seemed, for him, like a lot of fighting over nothing—at least over nothing clear-cut or certain.

³¹ Menand, 44-45.

³² Max Lerner, *The Mind and Faith of Justice Holmes* (Boston: Little, Brown and Company, 1946), xxiii.

Nobody was able to convince him of the reasons for the war, and he grew to believe that there were no definite causes, and that the Republicans were going to great lengths to try to find a legitimizing narrative of war that the ingenuous Northern public would both respect and believe. One biographer describes the trajectory of Holmes's war experience this way: "[H] had begun for him as a buoyant crusade, quickly became a reminder of his own mortality with Ball's Bluff, evolved into a dispiriting quagmire with the Peninsula campaign, and became a source of sardonic humor after Antietam. By Fredericksburg Holmes... was undoubtedly relieved not to be participating."³³ The war and all of the arguments in support of it gradually lost their allure for Holmes, and he eventually gave up on them entirely. He dismissed all putative reasons for the cause of the war and lamented the many deaths of his friends and even the deaths of his enemies.

Holmes never went back on his admiration for the skills and bravery of the Southern soldier. In fact, he treated both Northern and Southern soldiers as being in a class of their own, apart from the bureaucrats and politicians and privileged sons of privileged people who had avoided fighting altogether by paying substitutes to fight in their place.

Holmes believed that the Union soldier and the Confederate soldier understood each other in a way that was not possible for those who did not participate in the war effort. Consider the following commentary by Holmes: The soldiers who were doing their very best to kill one another felt less of personal hostility, I am very certain, than some who were not imperiled by their mutual endeavors. I have heard more than one of those who had been gallant and distinguished officers on the Confederate side say that they had no such feeling. I know that I and those whom I knew best had not. We believed that it was most desirable that the North should win; we believed in the principle that the Union is indissoluble; we, or many of us at least, also believed

³³ White, 67.

that the conflict was inevitable, and that slavery had lasted long enough. But we equally believed that those who stood against us held just as sacred convictions that were the opposite of ours, and we respected them as every man with a heart must respect those who give all for their belief. The experience of battle soon taught its lesson even to those who came into the field more bitterly disposed. You could not stand up day after day in those indecisive, contests where overwhelming victory was impossible because neither side would run as they ought. When beaten, Without getting at last something of the same brotherhood for the enemy that the north pole of a magnet has for the south—each working in an opposite sense to the other, but each unable to get along Without the other. As it was then, it is now. The soldiers of the war need no explanations; they can join in commemorating a soldier's death with feelings not different in kind, whether he fell toward them or by their side.³⁴

Although Holmes misleadingly mentions Unionism as a reason that he went to war, and although he suggests that slavery was an important issue for Northern soldiers—both claims he would not have made earlier in his life—he takes pains to portray soldiers, both Union and Confederate, as sharing in a fraternal bond. Nevertheless, Holmes's war "had few heroes," and Holmes "made no pretensions to heroism himself" just as "there is nothing particularly heroic about his [war] letters."³⁵

Recently many of Holmes's writings were released to the public for the first time. Scores of potential biographers were disappointed to discover that Holmes was not the type of person who could be made into a war hero, a champion of racial equality and progress, or a supporter of Lincoln. They had been hoping, one presumes, to find that Holmes was instead a hater of Southerners, a partisan of Lincoln's Unionism, and a

³⁴ Speech available as "Memorial Day" in *The Essential Holmes*, Richard Posner, ed., (Chicago: The University of Chicago Press, 1993), 80-87.

³⁵ Baker, 106.

supporter of Northern aggression. Many of these potential biographers abandoned their projects on Holmes when they realized that the man who was wounded three times during the war nevertheless did not hold grudges, nor stick to any of the convictions that some historians have assigned to other Northern figures of the time. As an adult—which is what the war made him—Holmes befriended former Confederate soldiers, with whom he dined on several occasions. He wrote to Canon Patrick Augustine Sheehan of “a friend of mine, an old Confederate officer,” and he wrote of “our brethren of the South.”³⁶ He believed that the greatest soldiers of the Union and the Confederacy shared a bond in manliness, even if they disagreed about everything else. “The greatest qualities,” he once said, “are those of a man...and neither North nor South needed colleges to learn them.”³⁷

For someone who was critically wounded by Confederates, not just once, but three times, Holmes had surprisingly little bad to say about Confederate soldiers or Southerners. In fact, Holmes spoke of the Confederates mostly in tones of awe and approval. It seems that Holmes believed that both Union and Confederate soldiers, as he put it in an address in 1884, “felt so deeply...that a man ought to take part in the war unless some conscientious scruple or strong practical reason made it impossible.” He made sure to add that “I think this feeling was right—in the South as in the North.”³⁸

Conclusion

Holmes is known mostly for his life after the war and for his career as a judge, first on the Massachusetts Supreme Court and later on the Supreme Court of the United States. Yet this older Holmes was defined by his experiences as a young soldier. Most academics outside the legal academy consider Holmes to be a champion of

³⁶ David H. Burton, editor, *The Holmes-Sheehan Correspondence: Letters of Justice Oliver Wendell Holmes, and Canon Patrick Augustine Sheehan* (Fordham University Press, 1993), 73.

³⁷ Lerner, 17.

³⁸ *The Essential Holmes*, 81-82.

progressivism, but he was not. Some commentators have referred to Holmes as a conservative, but that is not right either. Richard Posner says this about Holmes:

Holmes's reputation has fluctuated with political fashion, though never enough to dim his renown. Although many of his opinions took the liberal side of issues, the publication of his correspondence revealed—What should have been but was not apparent from his judicial opinions and occasional speeches—that, so far as his personal views were concerned, he was liberal only in the nineteenth-century libertarian sense, the sense of John Stuart Mill and, even more, because more laissez-faire, of Herbert Spencer. He was not a New Deal welfare state liberal, and thought the social experiments that he conceived it to be his judicial duty to uphold were manifestations of envy and ignorance and were doomed to fail. Hostile to antitrust policy, skeptical about unions, admiring of big businessmen, Holmes was a lifelong rock-ribbed Republican who did not balk even at Warren Harding.³⁹

Posner exaggerates Holmes's classical liberalism; but the point in quoting Posner is to suggest that the stereotype of Holmes as a progressive is wrong. That is not to say, however, that Holmes was ever a conservative, despite what some biographers, Max Lerner among them, have claimed.

In a way, all labels for Holmes miss the mark. Holmes floated outside labels. He defies categorization, which is a lazy way of affixing a name to something to avoid considering the complexity and nuances and even contradictions inherent in that something. Holmes's position regarding the Fourteenth Amendment—one of the so called Civil War amendments—was put best in his dissent in *Truax v. Corrigan*: “There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by

³⁹ Richard Posner, “Introduction” in *The Essential Holmes*, xv.

the several states.⁴⁰ Or as he put it elsewhere: "I have not yet adequately expressed the more than anxiety I feel at the ever increasing scope given to the Fourteenth Amendment in writing down what I believe to be the constitutional rights of states. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable."⁴¹ Holmes was careful to qualify that he would maintain this position on the Fourteenth Amendment "even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect."⁴² In other words, Holmes would leave most matters to the states and their legislators. His judicial practice of leaving local legislatures alone came most probably from his convictions that moral and cultural imperialism were rarely justified and could often lead to unnecessary violence.

Holmes was not a relativist; he simply thought that his position on the Supreme Court did not give him license to prescribe moral beliefs for the rest of the country. This view, I suspect, he picked up during the War Between the States, when he saw and came to appreciate the Confederates' commitment to their cause and willingness to die for their region, family, and way of life. Holmes the soldier began to wonder why it was that those on the other side could hold to their view of the war with such conviction, and how they could die for their views, and how any Northerner could call such Southerners immoral or wrong. Was it not just that the Southerners' cultures, customs, and institutions were different? Was it not wrong to try to, in effect, colonize the South, for whatever reason, be it industrial interests or the imposition of taxes and tariffs?

Justice Holmes assumed that a judge should not impose his personal ideology onto a populace. He believed

⁴⁰ See Holmes's dissenting opinion in *Truax v. Corrigan*, 257 U.S. 312, 344 (1921).

⁴¹ See Holmes's dissenting opinion in *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930).

⁴² *Truax v. Corrigan*, 344.

that in general a state legislature knew better than a federal judge—let alone a Supreme Court Justice—what was best for the local community. A common mistake is to take Holmes's deference to the mores and traditions of states and localities as evidence of his shared belief in those mores and traditions; for example, his *Lochner* dissent seems to fly in the face of his pronouncements of admiration for titans of industry and economic reasoning. But Holmes did not have to agree with states and localities to say that federal judges and Supreme Court justices should not inject their worldview into the life of a community with a different worldview.

Holmes's position on judging is analogous to William James's suggestion in "Varieties of Religious Experience" that a person is entitled to believe what he wants so long as the practice of his religious belief cannot be disproven and does not infringe upon the religious practices of others. The progressive reading of Holmes's deference to state legislatures may have something to do with the majoritarianism of John Dewey, and the conservative reading may have something to do with his hesitance to encroach upon the sovereignty of localities. Either way, Holmes resisted the temptation to command faraway people on the grounds of rights and liberties about which there was much disagreement. His was a jurisprudence of restraint.

One may reasonably disagree with Holmes about many things, but we would do well to recognize and appreciate his consistent reluctance to interfere with state law and local political matters. Some have speculated that Holmes's position toward state legislatures was a result of his witnessing firsthand the wartime consequences of federal impositions upon resistant localities. In light of the aforesaid, however, how could people not acknowledge the influence of the war upon Holmes's judicial outlook? How could people not at least see that Holmes's rejection of attempts to "reconstruct society," as he put it in his *Northern Securities Company v. U.S.* (1904) dissent, which criticized an expansive interpretation of federal power under the Commerce Clause, was bound up in his

experiences as a soldier? In 1904, it is worth noting, the phrase "reconstruct society" would still have resonated as a criticism of the Reconstruction Era and all of its cultural and political transformation projects.

Holmes is difficult to pin down. His actions often do not align with his purported ideas, to the extent that his ideas are discernible at all. One thing about him, though, is certain: his life was forever marked by the War Between the States. "I do not know what is true," he once said. "I do not know the meaning of the universe. But in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, that no man who lives in the same world with most of us can doubt, and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see."⁴³ Holmes may well have been speaking for many Union soldiers who had little in common with Lincoln and the Republicans, who cared little whether the South seceded from the Union, and who had no ambitions to liberate slaves or even to stop the spread of slavery westward.

The Avenger without Mercy: Delaware under the Federal Heel

Brion McClanahan

In 1861, and optimistic Confederate Secretary of State Robert Toombs stated "all fifteen states of the South will have severed the bonds which have bound them to the late Federal Union and will have joined the Confederate States."¹ This statement is remarkable for two reasons. First, Toombs expected, as did many Southerners, that every slave state would bond itself to the new Southern Confederacy. Second, Delaware was included in Toombs' fifteen states of the South. Most Southerners do not view Delaware in this light, but based on the historical evidence, Delaware was actually more Southern than middle, and positively more Southern than Northern. By 1860, this was apparent, and remained so through Reconstruction.

Delaware, then, is the perfect case study for what Abraham Lincoln called "the fire in the rear." She had a large pro-Southern population, a congressional delegation that favored at minimum peaceful separation if not secession, a State government that was split between pro-War Republicans and pro-South Democrats, and Delaware was occupied by the Union army several times during the War. It would be no stretch to say that if not for military occupation and the inability of Maryland to secede, Delaware may have endeavored to cast its lot with the South. Republicans in the State understood the political climate, as did the Lincoln administration, and though both publically praised Delaware as a Union stronghold firmly dedicated to the cause, their actions betrayed them.

Delaware could best be described as traditional, Anglo-dominated, and resistant to the fanaticism of Northern reformers. Like the South, Delaware was

¹ James D. Richardson, ed., *The Messages and Papers of Jefferson Davis and the Confederacy Including Diplomatic Correspondence 1861-1865*, (New York: Chelsea House, 1966), II: p. 18.