Allen Mendenhall, *Oliver Wendell Holmes Jr., Pragmatism, and the Jurisprudence of Agon: Aesthetic Dissent and the Common Law* (Lewisburg: Bucknell University Press, 2017), 171 pp.

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This is a curious little book. Allen Mendenhall, a legal academic with a Ph.D. in English, argues that the Emersonian style of Judge Oliver Wendell Holmes's dissents helps to contribute to their eventual "vindication." Consider the famous dissent in *Lochner v. New York* (1905). The Supreme Court's majority opinion struck down a New York labor statute prohibiting bakers from working more than 60 hours per week and 10 hours per day. The labor statute, says the Court, interfered with the constitutionally protected freedom of contract between bakery employees and employers. Holmes disagrees, "This case is decided upon an economic theory which a large part of the country does not entertain." He distills this objection into an aphoristic statement that would become iconic: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics," a line quoted, as Mendenhall points out, by a wide variety of people representing different political perspectives, arguing against instances of judicial activism. Years later, Holmes's position is "vindicated" by cases, like *West Coast Hotel v. Parrish* (1937), which reject the doctrinal position of the *Lochner* majority. Arguing that "the aesthetic qualities of his dissent gave his argument lasting power," Mendenhall contends that jurists "were drawn to Holmes's dissent less for its logic than for its style and sound" (61). The assumption guiding Mendenhall's focus on Holmes's dissents is that certain overt literary effects and experiments are less problematic in a dissent that is not law, but rather a contradictory opinion aspiring to become law. By their "agonistic" nature, "push[ing] back against established precedents," dissenting opinions are "productive sites for aesthetic and theoretical experimentation" (xv).

Although intellectual boundary-crossing has become routine, this book is striking for a number of reasons. For instance, one may reasonably object that the very notion of law—a system in which logical reasoning works with rules and facts to shape and reshape doctrine—depends for its predictability and putative neutrality on the exclusion of matters of affect, such as style and aesthetics. We may indeed wonder whether the content of Holmes's dissents sometimes become law because of Holmes's catchy style, his rhetorical bravura. For the litigant, the prospect of facing an adverse legal rule adopted, in part, by virtue of its manner of presentation may seem like a cruel joke or a mockery of a legal process supposedly focused on substance rather than form. Also, it may seem particularly odd for the nonlawyer to hear such a claim from a legal academic. Doesn't the authority of the legal expert depend on her mastery of a highly technical and self-contained discourse? Any profession that calmly uses the term "brief" to name

voluminous, even encyclopedic legal arguments clearly has its own language, a language and normative system walled off to some extent from the idioms and fashions of the everyday world.

Mendenhall's argument is made more striking by his use of Emerson to characterize Holmes's style. Mendenhall's Emerson is the fluid, proto-pragmatist, proto-postmodern Emerson of Richard Poirier and Jonathan Levin. Of course, it's not particularly odd or challenging to connect Emerson's notion in "Circles" that "[t]here is no virtue which is final; all are initial" with William James's description in *Pragmatism* of how new truth is fashioned from the collision of old truths and new facts. Clearly, Holmes can be plausibly placed in this intellectual genealogy. Consider his well-known statements in "The Path of the Law," that "[t]he language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man." Holmes's acceptance of the transitive or evolving nature of legal doctrine obviously accords on a general conceptual level with Emerson's and James's various endorsements of fluidity and change. But to turn to the overtly provocative style of Emerson (much admired by Nietzsche) as a model for the famous jurist's rhetorical mode is itself provocative and distinctive.

Judges may privately accept that any number of things, including hunches, taste, and feelings, shape their interpretations of doctrine, but generally such things remain unstated, hidden beneath a staid, rule-driven style that presents any doctrinal innovation as though it were predetermined by precedent and tradition. For Holmes, "the language of judicial decision is mainly the language of logic," not that of the philosophical and poetic iconoclast. Holmes's statement about the anti- or nonliterary form of judicial reasoning expresses a fairly common expectation about judicial style that Mendenhall's account must surmount. Through a novel, detailed literary approach to Holmes's dissents, Mendenhall makes a compelling case for the jurist's penchant for superfluity, obscurity, ambiguity, poetic sound effects, and poetic expression more generally.

Mendenhall's general comments about how a form of legal pragmatism can be seen as growing out of Holmes's life story and his C. S. Peirce describe familiar ground well-covered by many scholars (109-34). By contrast philosophical kinship with such figures as Emerson, Charles Darwin, William James, John Dewey,, Mendenhall's prosodical readings of Holmes's dissents are, to my knowledge, unique. For instance, to highlight the Emersonian aesthetics of Holmes's writing, Mendenhall reformats portions of dissents as poems. Turning a part of Holmes's dissent in the 1928 case, *Black & White Taxi,* into a "poem," Mendenhall finds that the line breaks he has created bring into focus a set of abstract statements reminiscent of Wallace Stevens (15). Mendenhall's reformatting of

a passage from Holmes's famous dissent in *Gitlow v. New York* (1925) is both revealing and fun:

> Every idea
> is an incitement.
> It offers itself for belief
> and if believed
> it is acted upon
> unless some other belief
> outweighs it
> or some failure of energy
> stifles the movement
> at its birth. (19)

To be tempted, as I am, to rearrange Mendenhall's rearrangement, thereby creating subsequent new versions of the poem, is to be lured toward accepting his account of the literary, even poetic nature of Holmes's writing.

Of course, by pointing out that the texts here are judicial opinions and not poems, one could simply reject Mendenhall's imaginative rearrangement in a manner reminiscent of Samuel Johnson's refutation of Berkeley's idealism by "kicking the stone." Yet when one plays with such reformulations and pays close attention to the distinctive sounds of Holmes's dissenting opinions—his use of alliteration, assonance, metaphor, and aphorism instead of logical reasoning and the citation of authorities—one comes nearer to the aural and other qualities characterizing his singular judicial voice (16-18, 56-69). In other words, in response to the objection that any prose can be reconfigured into poems, one can point to the sound effects, the philosophical abstractions, and ambiguities of Holmes's prose to distinguish his writing from that of his judicial brethren, thus suggesting why reformatting their writing as poems seems so much less enticing and worthwhile.

Holmes's many comments about writing in his correspondence indicate the seriousness of his own literary ambitions as well as the nature of his literary sensibility. "Great works survive by sound," and "Style seems to me fundamentally sound," says Holmes (57). There is more to say, I think, about the exact nature of the relation between sound and sense for Holmes. The extent to which captivating or striking sound effects act as a warrant for the sense of an utterance in Holmes's view could be spelled out with greater precision and then positioned in relation to the other writers mentioned here. To risk an obvious point, I doubt that even in his most literary moments, Holmes, the jurist, had the same degree of freedom to play with sound and sense as that possessed by Emily

Dickinson or Stevens. A more precise charting of the degrees of "literariness" would be revelatory and useful both for the field and for our understanding of these figures.

Finally, Mendenhall does not (and, perhaps, cannot) *prove* that any of the literary effects he locates in Holmes's dissents actually caused a shift in doctrine. What would such proof look like? Would it require reliable, comprehensive accounts of the lawmakers' states of mind as they changed the course of the law? Clearly, many factors are involved when the doctrinal view announced in a Holmes dissent later becomes the majority position. It would seem very difficult, even impossible to find dispositive evidence that certain stylistic devices played a crucial role in bringing that change about. Perhaps with this in mind, Mendenhall is careful not to overstep the bounds of what he can show. He claims that Holmes's "rhetorical flair and colorful style" "*contributed* to the vindication of many of his dissents" (xv). "Contributed" is perfect for Mendenhall's purposes, a hedge word, neither claiming too much nor too little. Looking at Holmes's *Lochner* dissent, Mendenhall acknowledges that "there is no empirical way to measure" the doctrinal efficacy of Holmes's "literary devices and memorable language" (61). Yet it also seems reasonable to believe that the vividness of Holmes's expression may have helped to keep his point of view before other jurists and may have penetrated their reasoning in ways not altogether apparent, ultimately leading to doctrinal change.