

Consistently Inconsistent: On Oliver Wendell Holmes Jr.

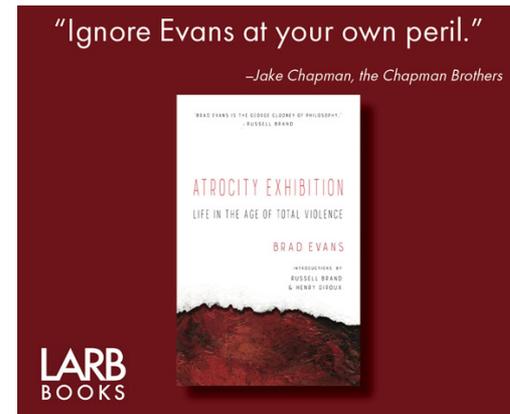
By Allen Mendenhall

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AUGUST 27, 2019

DO WE NEED another biography of Oliver Wendell Holmes Jr., who served nearly 30 years as an Associate Justice of the United States Supreme Court and nearly 20 years before that on the



Massachusetts Supreme Judicial Court? He has been the subject of numerous biographies since his death in 1935. We have not discovered new details about him since Harvard made his papers available to researchers in 1985, so why has Stephen Budiansky chosen to tell his story?

The answer may have to do with something Holmes said in *The Common Law*, his only book: “If truth were not often suggested by error, if old implements could not be adjusted to new uses, human progress would be slow. But scrutiny and revision are justified.”

Indeed, they are — both in the law and in the transmission of history. Holmes has been so singularly misunderstood by jurists and scholars that his life and thought require scrutiny and revision. Because his story is bound up with judicial methods and tenets — his opinions still cited regularly, by no less than the US Supreme Court as recently as this past term — we need to get him right, or at least “righter,” lest we fall into error, sending the path of the law in the wrong direction.

A veritable cottage industry of anti-Holmes invective has arisen on both the left and the right side of the political spectrum. No one, it seems, of any political persuasion, wants to adopt Holmes. He’s a giant of the law with no champions or defenders.

For some critics, Holmes is the paragon of states’ rights and judicial restraint who upheld local laws authorizing the disenfranchisement of blacks (*Giles v. Harris*, 1903) and the compulsory sterilization of individuals whom the state deemed unfit (*Buck v. Bell*, 1927). This latter decision he announced with

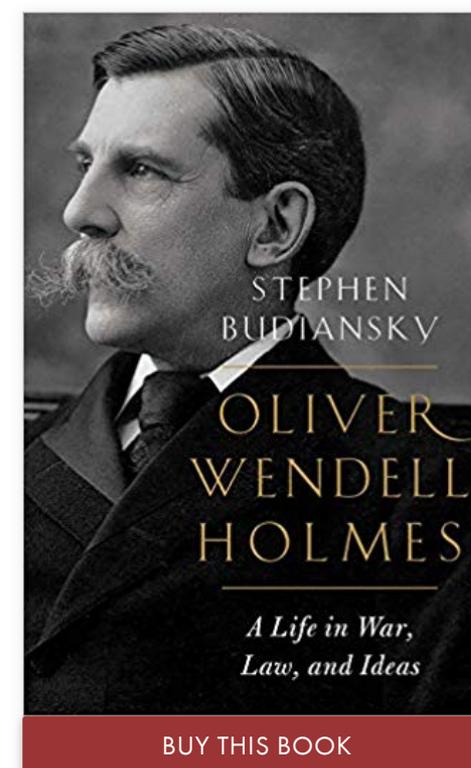
Oliver Wendell Holmes: A Life in War, Law, and Ideas

By Stephen Budiansky

Published 05.28.2019

W. W. Norton & Company

592 Pages



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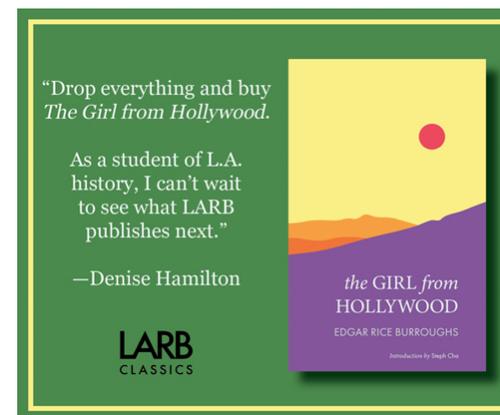


horrifying enthusiasm: “Three generations of imbeciles are enough.” For other critics, he’s the prototypical progressive, decrying natural law, deferring to legislation that regulated economic activity, embracing an evolutionary view of law akin to living constitutionalism, and bequeathing most of his estate to the federal government.

The truth, as always, is more complicated than tendentious caricatures. Budiansky follows Frederic R. Kellogg — whose *Oliver Wendell Holmes Jr. and Legal Logic* appeared last year — in reconsidering this irreducible man who came to be known as the Yankee from Olympus.

Not since Mark DeWolfe Howe’s two-volume (but unfinished) biography, *The Proving Years* and *The Shaping Years*, has any author so ably rendered Holmes’s wartime service. Budiansky devotes considerable attention to this period perhaps because it fundamentally changed Holmes. Before the war, Holmes, an admirer of Ralph Waldo Emerson, gravitated toward abolitionism and volunteered to serve as a bodyguard for Wendell Phillips. He was appalled by a minstrel show he witnessed as a student. During the war, however, he “grew disdainful of the high-minded talk of people at home who did not grasp that any good the war might still accomplish was being threatened by the evil it had itself become.”

Holmes had “daddy issues” — who wouldn’t with a father like Oliver Wendell Holmes Sr., the diminutive, gregarious, vainglorious, and sometimes obnoxious celebrity, physician, and author of the popular “Breakfast Table” series in *The Atlantic Monthly*? — that were exacerbated by the elder Holmes’s



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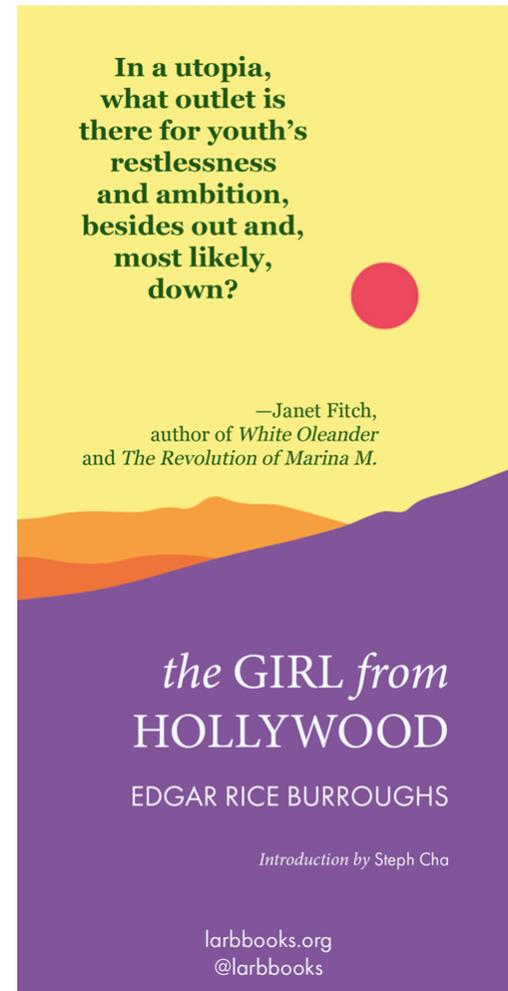
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sanctimonious grandstanding about his noble, valiant son. For the aloof father, the son's military service was a status marker. For the son, war was gruesome, fearsome, and real. The son despised the father's flighty ignorance of the on-the-ground realities of bloody conflict.

Holmes fought alongside Copperheads as well, a fact that might have contributed to his skepticism about the motives of the war and the patriotic fervor in Boston. His friend and courageous comrade Henry Abbott — no fan of Lincoln — died at the Battle of the Wilderness in a manner that Budiansky calls “suicidal” rather than bold. The war and its carnage raised Holmes's doubts regarding “the morally superior certainty that often went hand in hand with belief: he grew to distrust, and to detest, zealotry and causes of all kinds.”

This distrust — this cynicism about the human ability to know anything with absolute certainty — led Holmes as a judge to favor decentralization. He did not presume to understand from afar which rules and practices optimally regulated distant communities. Whatever legislation they enacted was for him presumptively valid, and he would not impose his preferences on their government. His disdain for his father's moralizing, moreover, may have contributed to his formulation of the “bad man” theory of the law. “If you want to know the law and nothing else,” he wrote, “you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”



Budiansky's treatment of Holmes's experience as a trial judge — the Justices on the Massachusetts Supreme Judicial Court in those days presided over trials of first instance — is distinctive among the biographies. Budiansky avers,

[I]n his role as a trial justice, Holmes was on the sharp edge of the law, seeing and hearing firsthand all of the tangled dramas of the courtroom, sizing up the honesty of often conflicting witnesses, rendering decisions that had immediate and dramatic consequences — the breakup of families, financial ruin, even death — to the people standing right before him.

Holmes's opinions as a US Supreme Court Justice have received much attention, but more interesting — perhaps because less known — are the salacious divorce cases and shocking murder trials he handled with acute sensitivity to evidence and testimony.

Budiansky skillfully summarizes Holmes's almost 30-year tenure on the US Supreme Court, the era for which he is best known. He highlights Holmes's dissenting opinions and his friendship with Justice Louis Brandeis, who was also willing to dissent from majority opinions — and with flair. For those looking for more detailed narratives about opinions Holmes authored as a Supreme Court Justice, other resources are available. Thomas Healy's *The Great Dissent*, for example, dives more deeply into Holmes's shifting positions on freedom of speech. Healy spends a whole book describing this jurisprudential development that Budiansky clears in one chapter.

Contemptuous of academics, Budiansky irrelevantly claims that “humorless moralizing is the predominant mode of thought in

much of academia today.” He adds, “A more enduring fact about academic life is that taking on the great is the most reliable way for those who will never attain greatness themselves to gain attention for themselves.” Harsh words! Budiansky accuses the French historian Jules Michelet of rambling “on for pages, as only a French intellectual can.” Is this playful wit or spiteful animus? Is it even necessary?

Budiansky might have avoided occasional lapses had he consulted the academics he seems to despise. For instance, he asserts that the “common law in America traces its origins to the Middle Ages in England [...] following the Norman invasion in 1066,” and that the “Normans brought with them a body of customary law that, under Henry II, was extended across England by judges of the King’s Bench who traveled on circuit to hold court.” This isn’t so. Writing in *The Genius of the Common Law*, Sir Frederick Pollock — “an English jurist,” in Budiansky’s words, “whose friendship with Holmes spanned sixty years” — mapped the roots of the common law “as far back as the customs of the Germanic tribes who confronted the Roman legions when Britain was still a Roman province and Celtic.” In other words, Budiansky is approximately one thousand years off. Rather than supplanting British customs, the Normans instituted new practices that complemented, absorbed, and blended with British customs.

The fact that Budiansky never mentions some of the most interesting researchers working on Holmes — Susan Haack, Seth Vannatta, and Catharine Wells come to mind — suggests willful ignorance, the deliberate avoidance of the latest scholarship. But to what end? For what reason?

It takes years of study to truly understand Holmes. The epigraph to Vannatta's new edition, *The Pragmatism and Prejudice of Oliver Wendell Holmes Jr.*, aptly encapsulates the complexity of Holmes's thought with lines from Whitman's *Song of Myself*: "Do I contradict myself? / Very well then I contradict myself, / (I am large, I contain multitudes.)" Budiansky recognizes, as others haven't, that Holmes was large and contained multitudes. Holmes's contradictions, if they *are* contradictions, might be explained by the famous dictum of his childhood hero, Emerson: "A foolish consistency is the hobgoblin of little minds."

Holmes was consistently inconsistent. His mind was expansive, his reading habits extraordinary. How to categorize such a wide-ranging man? What were the defining features of his belief? Or did he, as Louis Menand has alleged, "lose his belief in beliefs"? Budiansky condenses Holmes's philosophy into this helpful principle: "[T]hat none of us has all the answers; that perfection will never be found in the law as it is not to be found in life; but that its pursuit is still worth the effort, if only for the sake of giving our lives meaning."

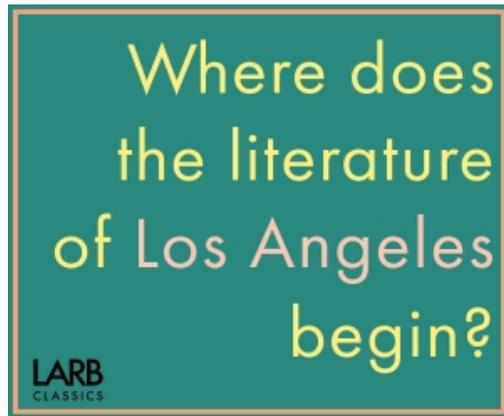
Holmes was intellectually humble, warning us against the complacency that attends certainty. Driving his methods was the sober awareness that he, or anyone for that matter, might be incorrect about some deep-seated conviction. During this time of polarized politics, self-righteous indignation, widespread incivility, and rancorous public discourse, we could learn from Holmes. How civil and respectful we could be if we all recognized that our cherished ideas and working paradigms might, at some level, be erroneous, if we were constantly mindful of our



inevitable limitations, if we were searchers and seekers who refuse to accept, with utter finality, that we've figured it all out?

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