The Emersonian Jurisprudence of Oliver Wendell Holmes

By Mark Pulliam

Legal scholars are endlessly fascinated by Oliver Wendell Holmes, Jr. (1841-1935). To some, he is “the great dissenter,” whose frequently quoted opinions were a harbinger of Legal Realism. Sympathetic biographers and playwrights have described him as the “Magnificent Yankee” and the “Yankee from Olympus.” To many libertarians, Holmes was an avatar of Progressivism, and the architect of the reviled notion of “judicial restraint.” Richard Posner celebrates Holmes, whom he regards as “the most illustrious figure in the history of American law,” as a pioneering legal pragmatist. Felix Frankfurter deemed him a “genius,” and Holmes’ 1881 book, *The Common Law*, has been called the greatest American law book ever written.

In contrast, Albert Alschuler portrays Holmes as a moral skeptic and Social Darwinist, and—even worse—overrated, dismissing *The Common Law* as nearly unreadable. Whether dyspeptic or merely cynical, the thrice-wounded Civil War veteran had a pungent contempt for democracy, once opining that “if my fellow citizens want to go to Hell I will help them. It’s my job.” Love him or hate him, Holmes’ pithy aphorisms have made him one of the best-known and most influential justices ever to serve on the U.S. Supreme Court.

Into the crowded fray of Holmes scholarship wades Allen Mendenhall, to explore the literary style of the justice’s opinions for the Court. *Oliver Wendell Holmes Jr., Pragmatism, and the Jurisprudence of Agon: Aesthetic Dissent and the Common Law* is an enlightening if sometimes jargon-heavy look at the dissents “as an aesthetic genre.” Mendenhall, associate dean of Faulkner University’s law school, views these legal writings through an “Emersonian lens.”

Readers might have to consult a dictionary to appreciate fully the author’s dense technical analysis. But for starters, the *Agon* of this book’s title is an ancient Greek term meaning “contest” or “struggle,” which inspires a literary theory “whereby aesthetic competition generates creativity,” says Mendenhall. Using the tools of literary criticism and linguistics, and drawing on the work of Richard Poirier, he contends that Holmes’ enduring influence owes to the rhetorical “superfluity” of his dissents, which “sought to overcome and surpass the stasis resulting from the institutional restraints imposed by case precedents and majority opinions.”

Mendenhall is a libertarian legal scholar who specializes in the common law tradition, but he also has a Ph.D. in English and serves as managing editor of the *Southern Literary Review*. His book draws from both disciplines but is written in an academic style more familiar to students of philosophy or literary criticism than to lawyers.

While he professes to have “avoided the kind of disciplinary jargon and specialized subject matter that might divide or distract readers,” he at times lapses. A random example:

Creative struggles in judicial opinions and dissents in the United States develop into a dynamic canon of legal theories and principles. This canon balances contradictory ideas and sustains multiple dialectics. The dialectics do not solidify as a single compromise; nor do they synthesize. Rather, they preserve competing binaries and gradually wear away theories that are no longer suitable for the social and technological environment.

The book’s thesis is that Holmes’ uncanny influence is due to the quality, not the quantity, of his dissents, and the statistics bear this out. Mendenhall usefully tabulates all of the published dissenting opinions that Holmes authored (73) or joined (25) during his nearly three decades of service on the Court (from 1902 to1932). The justice whose dissenting opinions Holmes most frequently joined was, interestingly, Louis Brandeis. Another interesting thing that Mendenhall highlights is that, notwithstanding his reputation as a dissenter, Holmes wrote far more majority opinions (890) than dissents, and during several terms never dissented.

By modern Supreme Court standards Holmes was a shrinking violet but, as the author points out, comparisons are inapt because the Court's caseload was much lighter in Holmes' era, and justices worked without the assistance of law clerks. A century ago, opinions tended to be shorter, fewer in number, and more reflective of the justices' personal efforts.

That Holmes did his own research and writing makes the extraordinary quality of his dissents all the more noteworthy. Mendenhall reminds us that Holmes, the son of a polymath writer and poet, was himself the class poet at Harvard and a voracious reader of prose and poetry, perhaps explaining his "uncommon facility with metaphor, sound, rhythm, and figurative language." Mendenhall even casts some of Holmes' dissents in verse form, comparing the resulting "poems"—complete with alliteration, iambic phrasing, and "Emersonian superfluity"—to the work of Wallace Stevens and Emily Dickinson.

But do the literary qualities of Holmes' dissents alone explain their persuasive force? Mendenhall thinks so. He adduces the opinion in the 1925 case of *Gitlow v. New York* as an example. He argues that "If Holmes had not aestheticized his dissent, it might not have been canonized."

An alternative explanation is that Holmes' dissents, in addition to being "stylistically memorable," were in many cases logically sound, clearly reasoned, and self-evidently true. Mendenhall concedes, for example, that other notable "redeemed dissents," such as Justice Harlan's in *Plessy v. Ferguson* (1896), "are hardly literary *tours de force*." The timeless line from Holmes' 1881 book—"The life of the law has not been logic: it has been experience"—resonates, not because of its cadence, rhythm, or meter, but because it offers breathtaking insight. Holmes' point of view was a refreshing break from much of the formalistic cant that preceded him. Maybe he was just a glib skeptic and clever wordsmith who happened to be in the right place at the right time.

Was Holmes a "seer" or "prophet," as some of his biographers insist? Mendenhall has written an entire book that lauds Holmes' writing style, yet he offers few clues to how he assesses Holmes' jurisprudence. He does show how it was derived from various 20th century pragmatist thinkers but that's about it.

The usual tendency is to either deify or demonize Holmes, with some scholars attempting to pigeonhole him based on the policy outcomes of his decisions. In contrast, Mendenhall (who in a previous work elsewhere described Holmes as "enigmatic," neither conservative nor Progressive) notes that Holmes' voting record reflects a consistent judicial philosophy that was based on deference to the political branches (and the states), at least absent clear constitutional limits. Thus he ultimately defends Holmes' exercise of judicial restraint—even his notorious majority opinion in *Buck v. Bell* (1927), which upheld the state of Virginia's compulsory sterilization law for the disabled.

Aesthetics aside, Mendenhall is correct to observe that Holmes "did not view judges as Platonic guardians and was loath to intrude upon the local intelligence of distant communities."

A few nits. This slim book (143 pages of text and notes, not including the lengthy introduction, bibliography, and index) consists of four chapters, drawn from previously published articles. Despite its brevity, the content is poorly organized and occasionally repetitive. The text would have benefited from more rigorous editing (or at least proofreading). One error in particular stands out. In his discussion of Holmes' famous dissent in *Lochner v. New York* (1905), Mendenhall misquotes the most celebrated sentence as "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statistics." Of course, Spencer's controversial 1851 libertarian manifesto was titled *Social Statics*.