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BOOK REVIEW OF: THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.


Reviewed by Jeffrey O'Connell and Thomas E. O'Connell

I. GENERAL COMMENTS

Richard Posner has performed an enormously useful service in pulling together in one volume a selection of the writings of America's most famous judge, Supreme Court Justice Oliver Wendell Holmes, Jr. It is indeed a most worthy collection and proves Holmes to be the superb writer Posner describes in his sterling introduction.

Judge Posner's introduction is chock full of provocative "aperçus" (to use one of Holmes's favorite words). It amounts to a kind of polemical essay on why Holmes was important and why he still has something to say to us nearly a century after he was appointed to our highest court. By "us" Posner would include not only legal scholars, lawyers and law students. This book is for anyone interested in American history, American literature or American studies. Posner rightly sees Holmes as a quintessential American. The book is also for those who appreciate carefully wrought, vivid prose. Holmes's writing style has an additional dimension: his poet's gift of metaphor often transforms his prose into poetry, even when he is discussing mundane or pragmatic subjects.

1. Judge, United States Court of Appeals for the Seventh Circuit.
2. Samuel H. McCoy II. Professor of Law, University of Virginia; B.A., Dartmouth College, 1951; J.D., Harvard University, 1954.

The authors are very grateful to Bradley Miliauskas, University of Virginia Law School Class of 1996, for his thorough and sophisticated research assistance and suggestions.

4. See infra notes 6-8 and accompanying text (discussing Holmes as such).
But of course Holmes devoted the professional side of his long and productive life to the law ("our mistress the law," he liked to say), and it is probably to lawyers and law students that the book will have the greatest appeal. For them Posner's introductory essay alone is well worth the price of admission, for it sets a great legal thinker and activist in the perspective of his time. Through the prism of Holmes's ninety-four year lifetime, one learns an astonishing amount about the development of American legal thought. In twenty pages, Posner's introduction sets the reader off on the right path to explore Holmes's ranging mind as it brings to bear on legal matters, worlds of information, and a lively curiosity about myriad other fields. Posner several times resorts to lists to try to summarize his subject's remarkable variety. For example, Posner states: "[T]he published letters reveal that Holmes was a voracious, indeed obsessive, reader, of extraordinarily eclectic tastes, in five languages; a loving collector of prints; an astute student of human nature — in short a versatile, cultivated intellectual." (p. xiv).

Further referring to Holmes's letters and using two to Harold Laski, a friend and militant socialist, and Lewis Einstein, an American diplomat, as examples, Posner says, "[T]he letters hop around in the liveliest possible fashion from topic to topic (the two letters just quoted and not in their entirety, either touch on character, personalities, philosophy, religion, law, literature, and the nature of originality) . . . ." (p. xxvi).

Then again,

The filaments of his thought are astonishing in their variety. . . . One can find pragmatism, atheism, (nineteenth-century) liberalism, materialism, aestheticism, utilitarianism, militarism, biological, social, and historical Darwinism, skepticism, nihilism, Nietzschean vitalism and "will to power", Calvinism, logical positivism, stoicism, behaviorism, and existentialism, together with the explicit rejection of most of these "isms" and a sheer zest for living that may be the central plank in the Holmesian platform. (pp. xix-xx).

And again, "Atheist, Darwinian, eugenicist, moral relativist, aesthete, and man of the world . . . ." (p. xvi).

No hagiographer, Posner even uses lists to describe frankly Holmes's faults,

He was catty about prominent contemporaries of his, notably the James brothers (who reciprocated) and Charles Sanders Peirce; he exaggerated the originality of his ideas; in this and other ways he was rather unscrupulously ambitious in his youth; he was susceptible to flattery; he wrote judicial opinions too quickly, and with insufficient research; in his later years especially,
he leaned too heavily on Brandeis for guidance in technical cases; a related point is that he overstayed his welcome on the Supreme Court by at least three years . . . (p. xxx). 5

Though he does not confront the question directly in his essay, Posner suggests several answers to a question that has sometimes occurred to the authors of this review: Why is Holmes not much taught in American law schools today? Posner points out that "while most of the opinions that he wrote either have been overtaken by events or engage the interest only of legal specialists, a number of them made a durable contribution at a more general level." (p. x).

Further, after explaining why Holmes fails to appeal now to either liberals or conservatives, he says:

Although still a deeply respected and even venerated figure, Holmes today lacks a natural constituency among lawyers and others interested in legal and pubic policy, while to the broader public he is only a name.

It is natural to suppose that Holmes's place in history depends on the magnitude, soundness, and durability of his contributions to law and to thinking about law. Perhaps it does, but this volume has been constructed on a different premise, or rather premises: that Holmes's true greatness is not as a lawyer, judge, or legal theorist in a narrowly professional sense of these words, but as a writer and, in a loose sense that I shall try to make clear, as a philosopher in fact as a "writer-philosopher"; and that his distinction as a lawyer, judge, and legal theorist lies precisely in the infusion of literary skill and philosophical insight into his legal work. (p. xvi).

This would suggest that Holmes's legal contributions, in addition to being seen as somewhat out of date, may be perceived as insufficiently germane for broader reasons. But, is that the way it ought to be? Ought our greatest and most eloquent judge be so relatively

5. Posner is by no means the first to use lists to try to capture Holmes. Here are two other examples: "The 'nutshell' words for Holmes abound: positivist, Darwinist, skeptic, cynic, idealist, romanticist, mystic, progressive, patriot. Each suggests an aspect of his thought, but no one word can accurately describe the whole." G. Edward White, The Rise and Fall of Justice Holmes, 39 U. CHI. L. REV. 51, 53 (1971) (citations omitted). It is noteworthy that these words were culled from seven different commentators, attesting to Holmes's protean character.

The Irish blood, the American spirit of liberty and magnanimity, the vitality of his father, the practical common sense of his mother, the cynical humor of his uncle John, the stoical firmness of his grandfather, Rev. Abiel Holmes, the cheerfulness of his grandmother, the lively wit of his wife, the New England cultural tradition, the Emersonian transcendentalism, the immense heritage of the common law, the personality of Lincoln, the active participation in the Civil War and innumerable other factors must have conspired to produce a genuine man like Holmes.

John C. H. Wu, Two Types of Skeptics, AMERICA, Apr. 18, 1953, at 82 (reviewing Mark DeWolfe Howe, HOLMES-LASKI LETTERS (1953)).
absent from our law schools? One hopes that Posner’s book may help to cause a reassessment of Holmes’s relevance to today’s education of lawyers.

As to Holmes’s quintessential Americanness, it stems in part from his openness and acceptance of others. Posner points out:

It is true that he held basically conventional views today—regarded by some as vicious—of women, and in particular that he sometimes belittled their intellectual capacities; yet he also valued their conversation to a degree unusual in his day. Nor can it all have been flirtation or small talk because a number of his letters to women have the same intellectual content as his letters to men, as the letters to Alice Stopford Green that I reprint in this volume show. It is true that after his youthful abolitionist phase he displayed no marked sympathy for black people; but he was remarkably unprejudiced for his time. He had none of the snobbism, the anti-Semitism, and the contempt for American culture and institutions held by his childhood friends Henry James and Henry Adams; it is impossible to think of him as an expatriate. . . . [He] abhorred “red scares,” had a soft spot for unions, and cultivated the friendship of Jewish radicals (as they appeared to proper Bostonians) such as Brandeis, Frankfurter, and Laski. Tolerance, largeness of spirit, scientific curiosity, and liberalism in its most cosmopolitan form: these are the abiding characteristics of Holmes’s thought . . . .

(p. xxviii-xxix).

A 1927 letter to Laski shows his astuteness on selective outrage about perceived injustice,

Your last letter shows you stirred up like the rest of the world on the Sacco Vanzetti case. I cannot but ask myself why this so much greater interest in red than black. A thousand-fold worse cases of negroes come up from time to time, but the world does not worry over them. (p. 329).

He wrote to his friend, Canon Sheehan, in Ireland (in a letter not included by Posner):

I think your fashionable people and men of the world are not quite so real as your peasants, and I wonder if there is not implied too wholesale a condemnation of the fashionable world. And yet . . . I was saying to some one that I rather thought that if the fashionable world of America (excluding those people of power who happen to belong to it but do not derive their distinction from belonging to it) was destroyed by pestilence, the world would be better off on the whole, and that I surmised the same of England.

But if it is true, I don’t hold that opinion from any particular radicalism, but rather because the function of fashion is to furnish standards, and I do

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6. Others see Holmes differently. Yosal Rogat saw Holmes as joining his friends Henry James and Henry Adams in turning away from Boston and America. Rogat states that Mark De Wolfe Howe has “helped us to appreciate the ways in which Holmes ‘was . . . in many respects, an Englishman. . . .’” using Mark DeWolfe Howe’s words. Yosal Rogat, The Judge as Spectator, 31 U. CHI. L. REV. 213, 235 (1963) (citation omitted).
not see that it performs that function in very valuable ways in your country or mine.\(^7\)

Holmes praised "that instinct that makes the American unable to meet his fellow man otherwise than simply as a man."\(^8\) Posner quotes Holmes as suggesting that his army experiences made him a more tolerant person:

> The army taught me some great lessons — to be prepared for a catastrophe — to endure being bored — and to know however fine [a] fellow I thought myself in my usual routine there were other situations alongside and many more in which I was inferior to men that I might have looked down upon had not experience taught me to look up. (p. 77).

On the other hand, Holmes occasionally lectured Laski on the latter's scorn of pomp.

> It is like the justifications of conventions—I respect a tall hat or the cult of monogamy not from the internal self-justification of the accidents of space and time but from the consideration that the inward necessity of man to idealize must express itself in inadequate and transitory symbols of no value in themselves but reverent for the eternal movement of which they are the momentary form.\(^9\)

Although he was often accused of not suffering fools gladly, Holmes found virtues in some men others found difficult to like. In the biographical index to the Holmes-Laski Letters, for example, one finds this reference to Holmes's colleague, James C. McReynolds: "Appointed to the Supreme Court of the United States by Wilson in 1914, he contributed little wisdom, much conservatism, and unparalleled ill temper to the deliberations of the court. Holmes, however, found loveable qualities behind the jagged and irascible surface."\(^10\)

Nor did Holmes share the usual intellectual's prejudice against businessmen. He wrote to Frederick Pollock,

> I regard a man like [railroad magnate James J.] Hill as representing one of

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10. 1 Holmes-Laski Letters, supra note 9, at 1510 app. One of the "lovable qualities" referred to was probably McReynolds' generosity. For example, he adopted thirty-three child victims of the 1940 Nazi blitzkrieg. Holmes wrote of him, "Poor McReynolds ... is, I think, a man of feeling and of more secret kindliness than he would get the credit for." David Burner, James C. McReynolds, in 3 The Justices of the United States Supreme Court 1789-1969, 2024 (Leon Friedman & Fred. L. Israel eds., 1969).
the greatest forms of human power, an immense mastery of economic de-
tails, an equal grasp of general principles, and ability and courage to put his
conclusions into practice with brilliant success when all the knowing ones
said he would fail. Yet the intense external activity that calls for such pow-
ers does not especially delight me."

Perhaps Holmes's most pragmatic statement on matters of pride,
tolerance and prejudice was his note to Laski of January 11, 1929.

Also I see no reasons for attributing cosmic importance to man, other than
that attaching to whatever is, I regard him as I do the other species (except
that my private interests are with his) having for his main business to live
and propagate, and for his main interest food and sex. A few get a little
further along and get pleasure in it, but are fools if they are proud . . . .
(pp. 107-08) (ellipsis in original).

Posner dutifully and succinctly explains Holmes's "great dis-
senter" role in seeing future directions of the law further and more
clearly than his contemporaries. (pp. xii-xiii). But it is Posner's ex-
plorations of Holmes's mind as it focussed on non-legal matters that
may impress reflective readers most. For example, in referring to
Holmes's "steadfast belief in capitalism," Posner comments
parenthetically that this was "a belief that is seeming rather pre-
scient at the moment . . . ." (p. xxviii). Holmes was arguably far-
sighted, too, in his skepticism about redistribution of wealth in a
democratic/capitalist system like ours. Posner quotes an October
1912 letter to Lewis Einstein in which Holmes sweepingly refutes
what he sees as Teddy Roosevelt's Bull Moose campaign manifestos:

For they touch and irritate the sensitive points of the social consciousness
and suggest in a vague and shocking way that something would happen if
only they got in; whereas I should like to see the truth told, that legislation
can't cure things, that the crowd now has substantially all there is, that the
sooner they make up their mind to it the better, and that the fights against
capital are simply fights between the different bands of producers only prop-
erly to be settled by the equilibrium of social desires. (p. 141).

Particularly with respect to the assertion that "the crowd now has
substantially all there is," Holmes will seem to some at least to have
been substantially correct. According to one view anyway, eighty
years of governmental tinkering since 1912 have resulted in only a
minimal redistribution of wealth in the U.S., and that part has been
restricted to one specific group: older citizens. They get more,

11. Letter from Holmes to Frederick Pollock (Sept. 1, 1910), in 1 HOLMES-POLLOCK LETTERS,
chiefly through Social Security.

Related to Holmes's view on wealth distribution was his prescient attitude on the limitations and ultimate failure of the extreme left. He wrote to the socialist Laski, "I never read a socialist yet from Karl Marx down . . . that I didn’t think talked drool."\(^{12}\)

Posner refers later to Holmes on the matter of eugenics, where his famous phrase, "Three generations of imbeciles are enough" (p. 104) has brought him under unremitting and heavy attack from latter-day liberals. "We may find Holmes’s eugenic enthusiasms shocking, although with the renewed interest (stimulated by modern medicine’s ability to keep people alive in a vegetative state) in euthanasia, and with the rise of genetic engineering, we may yet find those enthusiasms prescient rather than depraved." (p. xxix).

Holmes was, as suggested above, far seeing and astute in many other ways not directly associated with the law. For example, while Posner describes Holmes as an "aesthete" (p. xvi) and refers, as we have seen, to his sophisticated print collecting (p. xiv), perhaps he does not do justice in his introduction to Holmes’s lifelong interest in the arts. Holmes’s writing, both included and not included in Posner’s selections, amply demonstrates his sound judgment and extraordinary perceptiveness in analyzing artists and their work.

As to literature, a reading of Holmes’s letters reveals his prescient appreciation of relatively unknown writers. In 1921, very early to recognize the long-neglected *Moby Dick*, he writes to Laski:

> Did I mention my revelation . . . ? Herman Melville and *Moby Dick* — an account of sperm whaling with a story superadded. Anyhow I have finished it now and can say more certainly than ever that, with longueurs, it is, yet, I think, a mighty book. Not Shakespeare had more feeling of the mystery of the world and of life. There are mountain peaks and chasms and — the whole is as thick with life at first hand now as the day it was written — as Hawthorne’s *Scarlet Letter* seemed to me thin, 20 years ago. (W. James replied to me when I said so, Because it is an original book.) Incidentally, it pleases me that he takes his fellow-sailors, a cannibal, an Indian, a negro and old Nantucket mates and captain with the same unconscious seriousness that common men would reserve for Presidents and Prime Ministers. And my, but he nobly exalts the Nantucket Whalemen, the Macys, the Coffins and the rest. I don’t want to say too much but if you like George Borrow as I do I think this is a bigger man. (pp. 61-62) (ellipsis in original).

Again, as early as 1928 in a letter not included by Posner, he com-

\(^{12}\) Letter from Holmes to Harold Laski (Aug. 6, 1917), in 1 *HOLMES-LASKI LETTERS*, supra note 9, at 96.
mented perceptively on Ernest Hemingway's *The Sun Also Rises*.

Much earlier, Holmes had demonstrated his sound evaluation of two important contemporary writers as well as a distinction he saw and later frequently expressed between poets and thinkers. In an early letter to Father Sheehan he wrote,

You put it much too strongly when you say that I had no sympathy with Emerson. When he was breaking and I was still young, I saw him on the other side of the street and ran over and said to him: "If I ever do anything, I shall owe a great deal of it to you," which was true. He was one of those who set one on fire — to impart a [thought] was the gift of genius. My qualification is that I don't regard either him or Carlyle as thinkers. They are at the opposite pole — poets — whose function is not to discern but to make us realize truth. My father once asked me what book I would take to a desert island if I could have but one. I said *The French Revolution*. I should not say so now, but that wish indicated my appreciation of his [Carlyle's] imaginative power and his humor. And I should be inclined to add that he reached the highest point in the language in the magnificence of his prose. I don't care what he thinks — because I don't regard thinking as his job. (p. 64).

In another letter to Sheehan (not included by Posner), Holmes talked about Dante, demonstrating his own laborious and lifelong work in other languages:

I forget whether I told you of my experience last winter with Dante. I found that Latin and French enabled me to construe the Italian easily with the help of a translation and I read him through the great poem that is and had the greatest literary sensation of my life much to my surprize.

A comment to Laski respecting Balzac demonstrates the catholicity of Holmes's literary interests: "[Y]esterdays I was rereading (I have only a translation here) the *Père Goriot*—not quite finished. It makes me rather sick for the wholesome English air — but even in a translation it goes to great heights. The old man's talk about his

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13. Letter from Holmes to Harold Laski (July 20, 1928), in 2 HOLMES-LASKI LETTERS, at 1075 (Mark DeWolfe Howe, ed., 1953) (commenting on his attraction to Hemingway's work despite it not being the usual type of writing that would inspire him to continue reading).


love for his daughters is superlative . . . .”\textsuperscript{17}

Holmes comfortably slips in references to literature such as this echo of Whitman’s *Song of Myself*: “Of course I agree with you as to morality and have uttered my barbaric yawp on the subject from time to time.”\textsuperscript{18} (p. 52).

Holmes also took a great interest in drama and frequently wrote about it, often provocatively, in his letters. Here he is to Laski on September 14, 1930 in a letter not selected by Posner:

I have on hand the second part of *Faust* with Bayard Taylor’s translation for another try at that. I am prejudiced against it. If a man chooses the form of a play, it seems to me that his first duty is to make it good in the external sense \textit{i.e.} to give it a coherent, interesting, easily intelligible movement. If it doesn’t have that I don’t care for inner meanings. Let the author put them in a treatise but a play must in the first place be a play — not be a lord among wits and a wit among lords.\textsuperscript{19}

Holmes loved Shakespeare, and at one point he tells Laski that he has just finished rereading all of Shakespeare’s plays. (p. 61). During his trip to England in 1866, he visited Stratford-upon-Avon. Once there, one account described Holmes as he “gazed long at Shakespeare’s bust, got up on the tomb to see it nearer, eyes hazel, head rising toward crown like Sir W. Scott, mouth feminine and vinous.” He had much of the artist’s eye for detail.\textsuperscript{20}

Indeed, Holmes always appreciated fine sculpture. In a letter not included by Posner, he wrote to Laski in August of 1925,

On Monday last we went to Gloucester to see a statue unveiled the day before. It stands on the edge of the water just beyond the bridge that you face coming from B.F. [Beverly Farms, Holmes’s summer home]. On the Pedestal is “[t]hey that go down to the sea in ships.” The figure suitably above life size is a sailor bending to his wheel, upon a slanting deck, his eyes fixed on the sea ahead. He embodies all the men that ever died on the Banks yet without melodrama. It simply is The Man. I don’t remember any American work, unless perhaps the Confederate of the lost cause in Alexandria (which moved my wife more than it did me but made men weep) that has moved me so much. I cried when I saw it. My wife and I inquired about the artist, Leonard Craske, whose name I had never heard, at the City Hall, and found he had a studio on one of the wharves (headquarters in Boston)

\textsuperscript{17}. Letter from Holmes to Harold Laski (Aug. 27, 1921), \textit{in 1 Holmes-Laski Letters, supra} note 9, at 364.

\textsuperscript{18}. A famous line from *Song of Myself* is “I sound my barbaric yawp over the roofs of the world.” \textsc{Walt Whitman}, *Leaves of Grass* 52 (Modern Library, 1982) (1855).

\textsuperscript{19}. Letter from Holmes to Harold Laski (Sept. 14, 1930), \textit{in 2 Holmes-Laski Letters, supra} note 13, at 1283.

so I left a card to express my admiration of his feeling work and have re-
ceived a nice letter from him this morning.\textsuperscript{31}

Holmes was also a great admirer of painting and particularly of
drawing and etching. In her biography of Holmes, \textit{Yankee from}
\textit{Olympus}, Catherine Drinker Bowen wrote:

For a long time, Wendell had been a passionate admirer of Albrecht Dürer;
in his last year at Dixwell's [elementary and secondary school] he had even
bought an etching set and taught himself the process. Now he had a chance
to talk about it [as an editor of Harvard Magazine and with an obligation to
produce an article on art] and did, with an enthusiasm that was almost bel-
ligerent. "Dürer's works," he wrote, "are dearer to me, and more valued
instructors than any book and any other art."\textsuperscript{22}

Later in his life, during World War I, Holmes justified to Laski the
purchase of an engraving during wartime as follows: "I wrote to
some one, I think in England, in apology for buying an engraving
the other day, that if we ceased to be interested in philosophy and
art the war became a fight of swine for swill."\textsuperscript{23}

For all his interest in other arts, however, Holmes spent much
more time reading literature than he did admiring sculpture or etch-
ing. And with literature, he was a practitioner. Posner is not alone
among contemporary critics in praising Holmes as a creative writer
whose works have lasted and will continue to last, the best test as to
whether or not writing may be termed literature. For example, G.
Edward White, in his recently published biography of Holmes,
writes: "[N]o judge in American history has written with such liter-
ary flair . . . . To the extent that 'good writing' is an intelligible
concept, Holmes was about as good a writer, judges and nonjudges
included, as America has produced."\textsuperscript{24}

\section*{II. \textbf{The Holmes Writing Style}}

\textit{Why} was Holmes such a resonant writer? Can we profitably ana-
lyze his style, his techniques, his theories about writing? If, as Posner persuasively argues, Holmes's legacy is substantially as a "writer-philosopher," and if the "philosopher" side has been extensively examined by Posner and many others, then it follows that his writing style may itself deserve closer analysis than it has often received.25

Posner himself sums up many of the virtues of Holmes's style in his Introduction:

His majority and dissenting opinions alike are remarkable not only for the poet's gift of metaphor that is their principal stylistic distinction, but also for their brevity, freshness and freedom from legal jargon; a directness bordering on the colloquial; a lightness of touch foreign to the legal temperament; and an insistence on being concrete rather than legalistic on identifying values and policies rather than intoning formulas. The content is sometimes formalistic, the form invariably realistic, practical. (p.xiii).

In searching for the most effective way to approach an analysis of Holmes's writing style, we pursued an analogy. That analogy then led to two further ones.

A. Holmes and Samuel Johnson

Our first analogy to Holmes is with Samuel Johnson, the great eighteenth century writer-philosopher.26 The high respect in which the two men, Holmes and Johnson, were held in their own times came in large part from their writing. In a measure their success as writers and their continuing popular esteem have resulted from their effective writing styles as well as from the content of their writing.27

25. This is not meant to imply that Holmes's style has gone unexamined up to now; rather that his substance has been scrutinized much more extensively than his style. For some comments on his style, see, among others, Peter Gibian, Opening and Closing the Conversation: Style and Stance from Holmes Senior to Holmes Junior, in The Legacy of Oliver Wendell Holmes, Jr. 186 (Robert W. Gordon ed., 1992) (discussing Holmes Jr.'s relationship with his father as the source of his literary style); Rogat, supra note 6, at 247, 249 (explaining Holmes's ability to capture issues); White, supra note 5, at 54, 56, 61 (describing the clarity and absence of technicalities in Holmes's writing). The authors of this review have also commented elsewhere on Holmes's style. See Jeffrey O'Connell & Thomas E. O'Connell, Book Review, 67 Notre Dame L. Rev. 167, 168, 170, 179, 181-82 (1990) (reviewing Sheldon M. Novick, Honorable Justice: The Life of Oliver Wendell Holmes (1989) and Gary J. Aichele, Oliver Wendell Holmes, Jr.: Soldier, Scholar, Judge (1989)).


27. With respect to content, in one field — the law — their ideas and their writings were often strikingly similar. For example, as to substance, compare Holmes's seminal and revolutionary sentence from his magnum opus, The Common Law: "The life of the law has not been logic: it has been experience," with Johnson's, "The methods of government and processes of jurisdiction have not been devised at once, or described and established by any positive law, but have grown up by
Paul Freund described Holmes’s “elegantly sparkling pen (forty specimens are included in the fourteenth edition of Bartlett’s Familiar Quotations), and insights that have been vindicated by time . . . .”28 As for Johnson, no Englishman except Shakespeare has been more frequently quoted.

Furthermore, there is a similarity in the writing styles of Holmes and Johnson. Jackson Bate, perhaps the most prestigious of 20th century Johnson scholars, examined Johnson’s writing techniques with great care to uncover his effective style.29 It is instructive to observe precisely the same techniques used by Holmes, though there is no evidence that Holmes ever consciously imitated Johnson or was ever directly influenced by Johnson’s style. He was evidently not even much of a reader of Johnson’s prose.30

slow and imperceptible degrees, as experience improved and necessity enforced them.” Oliver Wendell Holmes, Jr., The Common Law 5 (1963); Sir Robert Chambers in 2 A Course of Lectures on the English Law 228 (Thomas M. Curley ed., 1986). E. L. McAdam wrote of Johnson: “[He is] insistent on the changing character of law—and this is sufficiently surprising in this crusty old Tory: ‘Laws are formed by the manners and exigencies of particular times, and it is but accidental that they last longer than their causes.’” E.L. McAdam, Dr. Johnson and the English Law 148 (1951).

Both men were fascinated by the origin of our system of law, by the relationship of religion and law, and by feudal law. Both commented repeatedly on the importance of certainty in the law and its need to promote trust and on the fact that law is based on power.

Nor is the similarity in their trend of thought confined exclusively to the law. One can find many examples of comparable reflections on a wide variety of matters, such as the following: Holmes: “The present time is experimenting in negations — an amusing sport if it is remembered that while it takes a few minutes to cut down a tree it takes a century for a tree to grow.” Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers 139 (Harry C. Shriver ed., 1936).

Johnson:
But there is a frightful interval between the seed and timber.
He that calculates the growth of trees, has the unwelcome remembrance of the shortness of life driven hard upon him. He knows that he is doing what will never benefit himself; and when he rejoices to see the stem rise, is disposed to repine that another shall cut it down.


29. Bate, supra note 26, at 399-400, 542-44.
30. Holmes did, however, make several pithy observations on Johnson: describing the famously ugly Johnson, he once wrote to Laski,
If I get into bed 10 or 15 minutes before 12 I allow myself to read until midnight and in that way have reread Mrs. Piozzi’s Anecdotes of Johnson, which again I found well worth reading. I flatter myself that our times wouldn’t stand his boorish bullying, however great it might think him — and so often wrong — in our views. There was something beautiful in the old man, of course.

Letter from Holmes to Harold Laski (July 27, 1930), in 2 Holmes-Laski Letters, supra note 13,
Bate lists five characteristics of Johnson’s writing style: (1) short clauses; (2) a high percentage of verbs; (3) simple, concrete direct language, used with conversational ease; (4) “tamped down finality” of statements through balance and antithesis and; (5) progressive assimilation: starting a thought, and then expanding or qualifying it and then re-expanding and re-qualifying.31 Readers of Posner’s selections of Holmes’s writing will find all these characteristics familiar.

Consider first Bate’s examples from Johnson’s works and then compare them with Holmes’s book, The Common Law, his most ambitious literary effort. (Examples from Holmes’s legal opinions or letters could be cited with similar results.)

First, “short clauses”: Bate cites the passage in The Life of Edmund Smith where Johnson pays tribute to his old mentor Gilbert Walmesley: “I knew him very early; he was one of the first friends that literature procured me . . . . He was of advanced age, and I was only not a boy; yet he never received my notions with contempt . . . . I honoured him, and he endured me.”32

Holmes too used short, forceful phrases at the very beginning of The Common Law, in the book’s most famous words: “The life of the law has not been logic; it has been experience. . . . In order to know what [the law] is, we must know what it has been, and what it tends to become.”33

Second, “high percentage of verbs”: Bate cites the high percentage of verbs which gives a sense of energy to Johnson’s writing.34 Bate mentions that 10 to 14% of verbs in the total of words used is about the average range in English prose.35 He writes that in Johnson’s early work his number of verbs was “fairly high (13%) and in
the later work we find, for pages at a time, the highest sustained average in English — about 17%.” 16 This is about the average Holmes achieved in several representative passages.

Here is a brief example from Holmes where the percentage of verbs is 18%:

The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow. 17

A further example from The Common Law demonstrates Holmes’s use of many verbs (17%) to make his rather abstruse points vivid. He is referring to the fact that ancient law often held that slaves, animals and even inanimate objects could be found guilty if they caused injury to persons:

A consideration of the earliest instances will show, as might have been expected, that vengeance, not compensation, and vengeance on the offending thing, was the original object. The ox in Exodus was to be stoned. The axe in the Athenian law was to be banished. The tree, in Mr. Tylor’s instance, was to be chopped to pieces. The slave under all the systems was to be surrendered to the relatives of the slain man, that they might do with him what they liked. The deodand was an accursed thing. The original limitation of liability to surrender, when the owner was before the court, could not be accounted for if it was his liability, and not that of his property, which was in question. 18

Finally, consider 16% verbs in a more sustained Holmes passage:

It has been assumed that conduct which the man of ordinary intelligence would perceive to be dangerous under the circumstances, would be blameworthy if pursued by him. It might not be so, however. Suppose that, acting under the threats of twelve armed men, which put him in fear of his life, a man enters another’s close and takes a horse. In such a case, he actually contemplates and chooses harm to another as the consequence of his act. Yet the act is neither blameworthy nor punishable. But it might be actionable, and Rolle, C. J. ruled that it was so in Gilbert v. Stone. If this be law, it goes the full length of deciding that it is enough if the defendant has had a chance to avoid inflicting the harm complained of. And it may well be argued that, although he does wisely to ransom his life as he best may, there is no reason why he should be allowed to intentionally and permanently transfer his misfortunes to the shoulders of his neighbors. 19

36. Id.
37. HOLMES, THE COMMON LAW supra note 27, at 32.
38. Id. at 31 (footnote omitted).
39. Id. at 117-18 (footnote omitted).
Third, "conversational ease": Bate refers to Johnson's concrete, simple, direct language as a late characteristic which resulted from his experience both in writing and in talking.

Holmes, too, refined his prose to resemble conversation. He liked simple, direct language with concrete examples. Here he returns to the theme of vengeance:

But when our neighbors do wrong, we sometimes feel the fitness of making them smart for it, whether they have repented or not. The feeling of fitness seems to me to be only vengeance in disguise, and I have already admitted that vengeance was an element, though not the chief element, of punishment.  

And again:

A man who walks knows that he is moving over the surface of the earth, he knows that he is surrounded by private estates which he has no right to enter, and he knows that his motion, unless properly guided, will carry him into those estates. He is thus warned, and the burden of his conduct is thrown upon himself.

But the act of walking does not throw the peril of all possible consequences upon him. He may run a man down in the street, but he is not liable for that unless he does it negligently. Confused as the law is with cross-lights of tradition, and hard as we may find it to arrive at any perfectly satisfactory general theory, it does distinguish in a pretty sensible way, according to the nature and degree of the different perils incident to a given situation.

From the simple case of walking we may proceed to the more complex cases of dealings with tangible objects of property. It may be said that, generally speaking, a man meddles with such things at his own risk. It does not matter how honestly he may believe that they belong to himself, or are free to the public, or that he has a license from the owner, or that the case is one in which the law has limited the rights of ownership; he takes the chance of how the fact may turn out, and if the fact is otherwise than as he supposes, he must answer for his conduct.

Fourth, "tamped-down finality": Johnson's fourth stylistic characteristic is the tamped-down finality of the statement through balance and antithesis. Bate uses examples describing Pope's carefulness from Johnson's masterful Life of Pope breaks down the prose into poetic form.

He never passed a fault unamended by indifference, nor quitted it

40. Id. at 39.
41. Id. at 122.
by despair.
He laboured his works
first to gain reputation,
and afterwards to keep it.
He saw immediately of his own conceptions
what was to be chosen, and what was to be
rejected;
and, in the works of others,
what was to be shunned, and what was to be
copied.  

For the Holmesian example of balance and antithesis, consider again his most famous passage at the beginning of *The Common Law*, with a similar breakdown into poetic form:

The life of the law has not been logic:
it has been experience.
The felt necessities of the time,
the prevalent moral and political theories,
intuitions of public policy, avowed or unconscious,
even the prejudices which judges share with their fellow men,

have had a good deal more to do than the syllogism
in determining the rules by which men should be governed.

In order to know what [the law] is,
we must know what it has been,
and what it tends to become.
We must alternately consult history and existing theories of legislation.

But the most difficult labor will be to understand the combination of the two into new products at every stage. 

Fifth, "progressive assimilation": Johnson's last style characteristic, as cited and again reworked into poetic form by Bate, is progressive assimilation: state a thing, then expand or qualify it and then reexpand and requalify. From Johnson:

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42. BATE, supra note 26, at 542-43.
43. HOLMES, THE COMMON LAW supra note 27, at 5.
The great contention of criticism is to find the faults of the moderns, and the beauties of the ancients. . . . To works, however, of which the excellence is not absolute and definite, but gradual and comparative; to works not raised upon principles demonstrative and scientifick but appealing wholly to observation and experience, no other test can be applied than length of duration and continuance of esteem."

Replicating Johnson's progressive use of assimilation in treating criticism, here is Holmes on criminal law:

All law is directed to conditions of things manifest to the senses.

And whether it brings those conditions to pass immediately by the use of force, as when it protects a house from a mob by soldiers, or appropriates private property to public use, or hangs a man in pursuance of a judicial sentence, or whether it brings them about mediatly through men's fears, its object is equally an external result. In directing itself against robbery or murder, for instance, its purpose is to put a stop to the actual physical taking and keeping of other men's goods or the actual poisoning, shooting, stabbing and otherwise putting to death of
B. Two Other Stylistic Comparisons

In addition to Samuel Johnson there are two other writers who came after rather than before Holmes whose styles can shed light on Holmes's literary techniques.

The first is Winston Churchill, although his style, strongly influenced as it was by Macaulay, was far more elaborate and even fustian compared with Holmes's. Holmes's writing, as we have suggested, was strikingly stripped and bare for someone writing so much in the nineteenth century (except for his war memorial speeches). But our point here is that Churchill's writing style, like Johnson's and Holmes's, resonates with imaginative metaphors and a high percentage of verbs. Using Jackson Bate's test referred to earlier with respect to Samuel Johnson, consider Churchill's most famous words, uttered in 1940:

[The] whole fury and might . . . of the enemy must very soon be turned on us. Hitler knows that he will have to break us in this Island or lose the war . . . . Let us therefore brace ourselves to our duties, and so bear ourselves that, if the British Empire and its Commonwealth last for a thousand years, men will still say: "This was their finest hour."

This passage has nearly 21% verbs.

On the subject of war speeches, Posner includes a number of Holmes's best ones. One is struck by their continuing power. And if Holmes's post civil war battle orations were often perceived by peacetime listeners and readers as tiresomely romantic and even bombastic, Churchill suffered the same reactions in peacetime. But not in wartime. A recent commentator on Churchill has written,

Churchill's . . . great contribution that summer [of 1940], in the words of Edward R. Murrow, was that he "mobilized the English language and sent

49. For a list of Holmes's favorite battle words, see Rogat, supra note 6, at 235 (discussing the reaction to Holmes's battle speeches after the Civil War).
it into battle.” In the past his carefully wrought speeches had often seemed ponderous, even pompous, ill-timed for the national mood, as over India and the abdication in the 1930s. But in 1940, to borrow the metaphor of biographer Piers Brendon, “The nation changed and Churchill stayed the same. For a short time, indeed, he created a new Britain in his own heroic image.” Language that had previously sounded archaic now struck a chord. The writer Vita Sackville-West told her husband: “I think that one of the reasons why one is stirred by his Elizabethan phrases is that one feels the whole massive backing of power and resolve behind them, like a great fortress.”

Much the same could be said of Holmes. In peacetime, his military talks, like “The Fraternity of Arms” (p. 73) or “The Soldier’s Faith” (p. 87) are ignored except for an occasional quote used by a Memorial Day speaker. When war came, they were pulled out and their rolling, poetic phrases served to inspire as they were meant to.

A third writer whose style illuminates Holmes’s is Robert Frost. Like the poet, Holmes several times commented on the similarities he saw between the written and the spoken word. Posner includes a 1931 letter to Lewis Einstein where Holmes discusses Thackeray’s style in which Holmes comments, “Style, I think, is sound, a matter of ear.” (p. 18). Earlier, in 1927, he had written more fully in a similar vein to Laski:

Why is it that the literary style is so different from that of talk? I am apt to hear the words as I read (which shows, I should think, that I am a slower reader than you) and the literary style makes them seem unreal. I don’t see why men should not write in the same rhythm as they talk. Owen Wister once told me that a sentence of mine puzzled him until he read it aloud as he thought I should and then he understood it. Which I am far from quoting to my credit but my prejudice remains.

Indeed, Holmes did write as he spoke, particularly in his letters, and that is part of the charm of his writing. In his speeches, and even more particularly in his judicial opinions, he often used a somewhat more formal approach than his yeasty speaking style. But part of his attention-holding capacity, whatever the nature of his writing, is that we can so often hear the words as we read them. In all this, Holmes’s theories and practice resembles those of Frost,


51. Holmes’s assertion that style is “a matter of ear” is also one of William Strunk, Jr. and E. B. White’s maxims in their classic writing primer The Elements of Style 78 (1979).

52. Letter from Holmes to Harold Laski (June 16, 1927), in 2 Holmes-Laski Letters, supra note 13, at 955.
America's most popular, and perhaps best, 20th century poet. Shortly before Holmes wrote to his young friends Einstein and Laski, Frost was writing to his own friend John Bartlett: "The ear does it. The ear is the only true writer and the only true reader."83 "What I would like is to get so I would never use a word or combination of words that I hadn't heard used in running speech. I bar words and expressions I have merely seen. You do it on your ear."84 Frost went on to develop for Bartlett an entire theory about "sentence sounds" and it served as the basis of his evocative poetic style. Frost wrote to Bartlett:

A sentence is a sound in itself on which other sounds called words may be strung. . . . [Sentence sounds] are apprehended by the ear. They are gathered by the ear from the vernacular and brought into books. Many of them are already familiar to us in books. I think no writer invents them. The most original writer only catches them fresh from talk, where they grow spontaneously.

A man is all a writer if all his words are strung on definite recognizable sentence sounds. The voice of the imagination, the speaking voice must know certainly how to behave how to posture in every sentence he offers.

A man is a marked writer if his words are largely strung on the more striking sentence sounds.86

As with Holmes and Johnson, then, we see in both Churchill and Frost some instructive similarities to Holmes's style. For all four men, their often similar techniques led not only to their contemporary success but to the continuing impact of their writing.

III. Holmes As Talker

As the foregoing suggests, it is perhaps no coincidence that, like Johnson, Churchill and Frost, Holmes was as fine a talker as he was a writer. But while Johnson was and is the most renowned of all talkers in our language, and Churchill and Frost were also famous talkers, Holmes's oral abilities are much less well known. Yet Holmes, too, could be a dominant and mesmerizing conversationalist. As a young man he argued often, loudly and long, with his contemporary, William James, as James' biographer Gay Wilson Allen

notes:

One of William's most stimulating experiences was to visit Wendell at night in his white upstairs room, illuminated by a gas lamp that sputtered and flickered, the whole room reeking with cigar smoke. Wendell found whiskey a helpful stimulant for his tongue, and many a night the two young men sipped Wendell's whiskey and tried to talk each other down, shouting, gesticulating, and pacing the floor in the bright, smelly room.58

Mark De Wolfe Howe, Holmes's biographer, speaks of Holmes's finding "refreshment in a display of conventional excellence in stylishly serving a bottle of spiritedness and wit."57 Holmes's younger intimate, Felix Frankfurter, said of the older Holmes:

[Being a] regular visitor at [Holmes's] house meant that you sat in front of the fire when there was a fire, and sat in his study when there wasn't a fire, and he did practically all of the talking. He was probably the best talker—not the greatest talking in volume, but you just didn't think of talking when he talked because it was such a wonderful stream of exciting flow of ideas in words.68

Further, Mark De Wolfe Howe writes:

Much evidence supports the thesis of Sir John Pollock, son of Holmes's close friend, that Holmes was enormously gifted as a conversationalist. Sir John, who had been an attentive listener to the talk of some of the most notable conversationalists in his time — Meredith, Arthur Salter, John Morley — has testified that:

Of all that I have heard it seems to me that the talk of Oliver Wendell Holmes was on the whole the best . . . . [H]e would catch a subject, toss it into the air, make it dance, and play a hundred tricks and bring it to solid earth again. There was no trace of flippancy, but a spice of enjoyment even in the serious treatment of a serious subject. . . . As he talked he drew inspiration from his company; he challenged and desired response, contradiction and development . . . . Talk was a means of clarifying ideas, of moving toward the truth, but it was a great game too.69

Later in life, Holmes preferred one-on-one conversations to those with three or more. This was understandable: As a Justice of the U.S. Supreme Court he worked in a group much of the time with the other Justices and in oral arguments with appellate lawyers as well. He wrote to Laski in 1922, "I frequently remark that I am paid to listen to people, and that the notion of gratuitously going in

56. GAY W. ALLEN, WILLIAM JAMES: A BIOGRAPHY 125 (1967).
59. HOWE, supra note 57, at 101.
search of that kind of trouble is against my grain.”

Holmes sought out younger men in order to stay current with the world. His one-on-one conversations were usually with men a half or a third of his age or younger. Laski was typical. Holmes also enjoyed conversations with men of action, like General “Black Jack” Pershing (whom he was discussing with Laski earlier in the 1922 letter just referred to), in preference to academicians whose conversation was apt to seem to him precious.

Part of Holmes’s appeal as a talker was his striking appearance. Posner states, “A tall, commanding figure, his looks flawed only (and slightly) by his too-long neck (for which his father liked nastily to tease him), Holmes had the unusual good fortune to grow more handsome with age, becoming a magnificent octagenerian.” (p. xiv).

Paul Freund describes him as follows: “Holmes’s jaunty, challenging spirit was matched by his physical endowment. Tall, spare, fair-skinned, straight-backed until very old age, his strongly aquiline features were set off by cavalryman’s moustachios and crested by an abundance of silvery hair. He cut, as the phrase goes, a very dashing figure.”

Henry James once described Holmes as moving through age “like a full glass carried without spilling a drop.” And Catharine Drinker Bowen said that toward the very end of Holmes’s life, “there was a singular and striking beauty now to Holmes’s face, a quality almost luminous.”

Considering Holmes’s speaking style, what did he actually sound like? In listening to his one phonograph record, a response to the celebration of his 90th birthday, one is struck at how very English he sounded, rather like a denizen of Oxbridge. Bostonians tend to sound vaguely English to outsiders, but Holmes sounded much more that way than even the most aristocratic present-day Bostonian.

Posner pays due attention to Holmes’s colorful personality as reflected in his writing and talking. He writes:

To avoid solemnizing the man, I have included some selections for their charm and zip rather than for their depth and have rather loaded them

60. Letter from Holmes to Harold Laski (Feb. 7, 1922), in 1 Holmes-Laski Letters, supra note 9, at 406.
61. Freund, supra note 28, at 1761.
63. Bowen, supra note 22, at 413.
64. For a discussion concerning the broadcast, see White, supra note 24, at 462-64. See also supra note 6 and accompanying text.
toward the front of the volume, under such headings as “Joie de Vivre” and “Aging and Death” (an exhilarating bunch of letters — don’t be put off by my chapter title!). (pp. xxiii-xxiv).

Indeed not to have included some of these selections would have been to distort the picture of the true Holmes. Posner includes many of Holmes’s humorous sallies, particularly from the correspondence with Laski, with whom Holmes loved to swap stories, yarns, jokes and gossip. For example, in a 1921 letter to Laski, Holmes reminisced of a fellow civil war officer and Massachusetts judge, “Devens used to recite: ‘Merely to fix a date, your Honôr was this before or after you were burnt in effigy by your neighbors?’ ” (p. 35)

But Posner does skip some of our favorite Holmes jokes and quips. For example, he quotes part of a lovely letter to Laski in 1917 (p. 67), but leaves out a little joke at the end (and, inexplicably, fails to list the letter in the index entry on Laski on p. 340): “Two old friends meet ‘What are you doing now?’ ‘I’m in the legislature but don’t tell my dear old mother. She thinks I’m a bartender.’ ”66 Posner does leave in a whimsical closing of another letter to Laski, in 1925: “Adieu pour le momong.” (p. 41)

Holmes liked to pass on his bons mots for Pollock’s pleasure: “I made a little jest yesterday that pleased me. My brother Clarke was saying that knocking off wine and spirits had made it necessary for the clubs to raise their annual charges. I said they used to raise the Devil and now they raise the dues . . . .”67

Much of Holmes’s humor was aphoristic. To Pollock: “Good intentions are no excuse for spreading slanders.”68 “Also to finish my affairs I have lately received a German translation of my book—a very respectable looking volume that I never shall read. All books are dead in 25 years, but luckily the public does not always it find

65. Letter from Holmes to Harold Laski (Dec. 15, 1917), in 1 HOLMES-LASKI LETTERS, supra note 9, at 119.

66. In Holmes’s time, and even later, this French-with-American-pronunciation was part of an apocryphal exchange between two Americans:
“Avez vous besoing de pang ce matang?”
“Nong, nong, mong bong garçong.”
“Bong, adieu pour le momong.”
Etc., etc.


68. John G. Palfrey & Sir John Pollock, Bart., Introduction to 1 HOLMES-POLLOCK LETTERS, supra note 11, at xxxiii.
He wrote to Laski, "Fresh air and innocence are good if you don't take too much of them but I always remember that most of the achievements and pleasures of life are in bad air."70

Sometimes Holmes liked to play on the classics. On *Hamlet* for example: "I have grown stout during the vacation and the breeches that I have donned for Sunday and the ensuing days are rather a torture around the equator, but I will smile and smile and be a villain."71

As Posner's word "zip" indicates, Holmes had an engaging gusto. When he emphatically approved of an opinion he would write, "'[Y]es, sirree!' on it".72 He loved to roar with laughter. He tells Laski, "[P.G. Wodehouse's] *Leave It to Psmith* ('the P is silent' the hero remarks) made me roar. In fact Wodehouse is unsurpassed if equaled by anybody in power to make me guffaw."73 As Posner points out, Holmes was always open to the positive— in life. With Yankee reticence he might have been reluctant to speak often of this philosophy, yet he lived it. In one comment he made on it (and it is curious that Posner would not include it in his section entitled "Joie de Vivre"), Holmes wrote:

A platitude has come home to me with quasi religious force. I was repining at the thought of my slow progress — how few new ideas I had or picked up — when it occurred to me to think of the total of life and how the greater part was wholly absorbed in living and continuing life — victuals — procreation — rest and eternal terror. And I bid myself accept the common lot; an adequate vitality would say daily: "God what a good sleep I've had." "My eye, that was a dinner." "Now for a rattling walk — " in short realize life as an end in itself. Functioning is all there is — only our keenest pleasure is in what we call the higher sort. I wonder if cosmically an idea is any more important than the bowels.74

Holmes's young friend and correspondent, John Wu, refuted the

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69. Letter from Holmes to Frederick Pollock (July 9, 1912), in 1 HOLMES-POLLOCK LETTERS, supra note 11, at 194-95 (footnote omitted).

70. Letter from Holmes to Harold Laski (Sept. 17, 1920), in 1 HOLMES-LASKI LETTERS, supra note 9, at 280.

71. Letter from Laski to Holmes (Nov. 10, 1923) in 1 Holmes-Laski Letters, supra note 9, at 561. See WILLIAM SHAKESPEARE, HAMLET act 1, sc. 5, ln. 108 (Harcourt Brace Jovanovich, Inc., 1972) (circa 1600) ("That one may smile, and smile, and be a villain.").

72. Letter from Harold Laski to Holmes (July 29, 1924), in 1 HOLMES-LASKI LETTERS, supra note 9, at 638 (quoting Holmes's brother Sanford in a speech to Harvard lawyers on the work of the Supreme Court).

73. Letter from Harold Laski to Holmes (Jan. 18, 1927), in 1 HOLMES-LASKI LETTERS, supra note 9, at 913.

74. Letter from Holmes to Frederick Pollock (Aug. 21, 1919), in 2 HOLMES-POLLOCK LETTERS, supra note 67, at 22.
conventional image of the Justice as a stiff-necked Yankee:

One of the greatest qualities that made Holmes such a genuine personality is his spirit of gaiety together with a complete lack of conventional respectability. In this he was a typically American sage. At the age of fifty-four he began to learn to bicycle, and he wrote to Lady Pollock about his new adventure, ‘I haven’t had such a gleam of boyish joy for years as I get from my little runs of 5 miles or so, all that I have ventured as yet. Even tumbling off was a pleasure to find that I could do it and not break!’

John Pollock describes a weekend with Holmes at about the same time (Holmes was then fifty-five) in similar terms:

[When I was an undergraduate, Holmes came up to spend a week-end with me at Cambridge. He stayed in a set of the less good undergraduate rooms in college empty for the moment, took his meals with me, walked with me, met my friends, smoked and talked as only undergraduates can, enjoyed himself, to all appearance, hugely, and left, without, I believe, the Master and Fellows having an idea that they had had a man of note within the gates of Trinity. Holmes was then Chief Justice of one of the most famous states in the Union. Could, say, Lord Russell, Lord Reading, or Lord Hewart be imagined indulging in such simple enjoyments?

IV. HAROLD LASKI AS HOLMES’S BOSWELL

In praising Holmes’s charm and “considerable wit,” Posner goes on to say “although he had no Boswell to memorialize his table talk, a number of his best sallies appear to be have been repeated in the letters; . . .” (p. xiv).

In a real sense Harold Laski served as Holmes’s Boswell. We have no biography of Holmes by Laski or anyone else which captures the flavor of Holmes’s social prowess like that which the young Boswell provided for the conversation of the senior Johnson. How-

76. John G. Palfrey & Sir John Pollock, Bart., Introduction to 1 HOLMES-POLLOCK LETTERS, supra note 11, at xxxi.
77. The friendship between Holmes and Laski indeed, had many of the characteristics of Johnson’s lovely friendship with his much younger intimate, James Boswell. Like Boswell, Laski was an outcast of sorts: Laski the Jew, Boswell the Scot. Each befriended an Olympian figure, the great figure of his age, and carried on for twenty years a warm, symbiotic relationship that was partly junior to mentor, partly son to father, partly stimulating mind to stimulating mind. Jeffrey O’Connell & Thomas E. O’Connell, From Doctor Johnson to Justice Holmes to Professor Laski, 46 Md. L. Rev. 320, 333-34 (1987); see also Tony Weir, Friendships in the Law, 6 Tul. Civ. L. F. 61, 70, 75 (1991) (commenting that the friendship between Holmes and Laski resembled Johnson’s and Boswell’s friendship).
ever, since a great deal of Holmes's best "talk" is indeed captured in his letters and as Posner indicates, especially in letters to Laski even without a Laski biography of Holmes, one can justifiably compare Laski's role with Boswell's. For sixteen years, the much younger Laski brought out the very best in the much older Holmes. (The correspondence started when Holmes was 75 and Laski 23.) Laski brought out more than just Holmes's wit, of which Posner gives us so many examples, but other qualities and sides as well. Affection is an example. Holmes starts a 1917 letter to Laski with "Beloved lad" (p. 36), and says in another, after Laski tells him in 1920 that he is leaving the U.S. to return to England, "But, oh, my dear lad, I shall miss you sadly." (p. 8).

We see, too, the joy in Holmes. Posner significantly includes parts of no less than 14 letters from Holmes to Laski in his chapter entitled "Joie de Vivre." One starts, "You are a dear and your letters give me great pleasure . . . ." (p. 30). Another starts, "You are a splendid young enthusiast and make me feel more alive." (p. 30). A third starts, "An even more than usually delightful letter from you came yesterday . . . ." (p. 35).

Another noteworthy side one sees in the letters to Laski: Holmes as the bludgeoning Johnsonian polemicist. (Posner includes none of the following three letters.) In a letter to Laski dated April 2, 1929, Holmes growls, "[S]ome of your yearnings I don't sympathize with and almost believe noxious . . . ." 78 Again, Holmes snaps at Laski on June 1, 1927:

You respect the rights of man — I don't, except those things a given crowd will fight for — which vary from religion to the price of a glass of beer. I also would fight for some things — but instead of saying that they ought to be I merely say they are part of the kind of a world that I like — or should like. 79

And on July 8, 1928:

Perhaps it comes down to the question, as so many things do — of what kind of world you want. Personally I do not prefer a world with a hundred million bores in it to one with ten. The fewer the people who do not contribute beauty or thought, the better to my fancy. I perfectly realize that the other fellers feel otherwise and very likely would prefer to get rid of me and all my kind. Perhaps they will, and if they do I have nothing to say, except

79. Letter from Holmes to Harold Laski (June 1, 1927), in 2 HOLMES-LASKI LETTERS, supra note 13, at 948.
that our tastes differ. That is the justification of war — if people vehemently want to make different kinds of worlds I don’t see what there is to do except for the most powerful to kill the others... 

Holmes, in short, is more uninhibited with Laski, more free-wheeling, more jocular, more irreverent — in a word, more fun, than with any other of his many correspondents, although his letters to everyone are absorbing. Some of the most colorful passages chosen by Posner from Holmes’s letters to Laski come directly in response to Laski’s provocative questions and observations. Just as Boswell when face-to-face with Johnson would play upon his senior friend almost as a bullfighter plays his bull (often getting gored in the process), so Laski would play with Holmes in letters, cajoling, leading on, making outrageous statements — some accepted by Holmes, some roundly refuted or good naturedly scoffed at — always in the spirit of a good “jaw,” to use one of Holmes’s favorite terms for his very favorite activity. It was the best kind of symbiotic friendship — both benefitted. For Laski, Holmes was his Olympian American friend. For Holmes, the youthful Laski was his eyes and ears not only on England and continental Europe but on contemporary life generally. For more than two years after Holmes in his nineties became too old to write back, Laski loyally wrote long, cheery, newsy letters — a total of 32 of them to Holmes’s continuing and grateful delight until his death in 1935 at ninety-four.

How unfortunate that an epistolary friendship like theirs is so unlikely in our own wired era. But how fortunate we are to have the captivating letters Holmes wrote in a long lifetime as well as so many other penned riches from which a superb compilation like Judge Posner’s can be taken. Posner is right: “Not only was Holmes a great jurist, a great prosodist, a great intellectual; he was a great persona, a great American, a great life.” (p. xv).

V. SOME EDITING PROBLEMS

Our principal criticism of this book — and it is a serious one,

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80. Letter from Holmes to Harold Laski (July 8, 1928), in 2 HOLMEs-LASKI LETTERS, supra note 13, at 1071.

81. Will E-mail foster the rebirth of written personal exchanges? And if so, will these exchanges signal the return of the well-crafted letter to everyday communication? See generally John Seabrook, E-mail from Bill, NEW YORKER, Jan. 10, 1994, at 48 (detailing a series of interviews with computer software magnate Bill Gates conducted largely via E-mail). For a skeptical view of the continuing importance of E-mail given the potential of video communications, see John Markoff, The Rise and Swift Fall of Cyber Literacy, N.Y. TIMES, Mar. 13, 1994, § 4; at 1.
especially for a book produced by a leading university press — is the paucity of footnotes. Except for the excellent introduction and the selection of writings to be included, the editor seems for the most part to absent himself. For page after page of often complex commentary and sometimes obscure legal terminology and names, he remains silent. True, the serious scholar can without difficulty locate the source of Holmes's writings. Admittedly, too, the book is not a researcher's tool as much as a full introduction for practicing lawyers, law students and general readers. Nevertheless, the reader, almost no matter how well informed, is left to wonder why an occasional helping hand is not offered as one tries to figure out whom Holmes is referring to or what an esoteric legal expression means.

A few examples may suffice. First with respect to legal expressions, Posner has seen the need on page 193 to define a "bailee" in a footnote as "someone to whom another entrusts goods for transportation or storage." On occasion, he provides similar definitions. But why no similar footnote for "rusticum judicium" (p. 256), or "action on the case" (p. 190), or "fides facto" of the Salic law (p. 187)? One could cite dozens of other such omissions.

Posner also very occasionally gives a purely explanatory footnote when it is needed by the reader to see Holmes's words in context. For example, on page 128, Posner explains that Holmes's words are in response to a magazine's request to prominent men. But in many other cases he fails in this regard. On page 158, we are plunged into a discussion of a case famous to lawyers (Olmstead v. U.S.) but about which many readers will know nothing and about which Holmes wants to "add a few words" to the majority opinion. Most readers will be left wondering what the issue Holmes addresses might be. Holmes makes many mentions of the Chief Justice under whom he was then serving. (He served under four — Melville Fuller, Edward Douglass White, William Howard Taft, and Charles Evans Hughes.) On some occasions we are told who "the C.J.," as Holmes usually referred to them, was, as on page 32 (Taft). But more frequently we are left in the dark. Among the many other names which should be identified, at least for non-legal readers, are "Maitland" (p. 56), "Hohfeld" (p. 65) and "George Otis Shattuck" (p. 97).

It may be that Posner found himself rushed as he worked on this

82. 277 U.S. 438 (1928).
book. After all, he is one of our most prolific of legal scholars these days, in addition to serving as an appeals court judge. Still, one wonders if the footnoting task might not have been delegated.

Or one might rationalize that Judge Posner wished above all to avoid interposing himself between his reader and Holmes's words. His stated effort as editor is to let readers discover for themselves the wonderfully soaring and provocative writings of his subject. Too much scholarly paraphernalia might be seen as off-putting to general readers or even law students. But surely there is a happy medium between getting in the reader's way and abandoning the reader almost entirely. Indeed, editor Posner had before him as he worked a perfect model — or rather two perfect models — of unobtrusive but helpful referencing. Samplings of letters from Holmes to Frederick Pollock and Harold Laski comprise about one third of Posner's book. Both collections of correspondence were assembled and edited by Mark de Wolfe Howe in an exemplary style that has served all kinds of readers for decades. Howe's footnotes are learned, crisp, lucid and to the point and they are always there when you need them.

It becomes clear how much references can help if one reads a bare letter in Posner's book and then reads the same letter in the original collection with Howe's footnotes. The first paragraph from a letter Holmes wrote to Laski early in their friendship on March 15, 1917, reads:

The book arrived yesterday and your letter this morning. I read the first chapter last night with very great pleasure and of course with substantial agreement. Possibly there is an implication of a slightly different emphasis from my own. I am reminded of what I said at Langdell's dinner that continuity with the past is not a duty, it is only a necessity. It seems to me rather a necessity than a duty for sovereignty to recognize its limits — its own limits. It very well may recognize the limits of another sovereignty. I forget whether I ever called your attention to Cariño v. Insular Govt., 212 U.S. 449, 458. Probably I did. I hardly need to tell you how pleased and flattered I feel at your preface and quotation. I suppose that I see from what I have read and the titles of the other chapters the scope of your understanding and I have no doubt that the book deserves and will bring you great credit (p. 36).

A reader might well ask, what was the book that arrived from Laski? And what was in that first chapter with which Holmes agreed? Howe presents us with pertinent information: The book was
Studies in the Problems of Sovereignty (1917). The first chapter, ‘The Sovereignty of the State,’ developed Laski’s theory of pluralism, and criticized the monistic theory of the State. Further on, exactly what did Holmes say at Langdell’s dinner which he so provocatively summarizes in this paragraph? Howe succinctly tells us where to find it: ‘Learning and Science,’ Speeches (1913), 67, 68; Collected Legal Papers (1920) 138, 139. (Howe also provides a biographical index or glossary which includes Christopher Columbus Langdell, the seminally important nineteenth century Dean of the Harvard Law School.)

Finally, what did Laski say in the preface to his book which pleased his new friend so much? Which Holmes’s quote did Laski use in that preface? Howe tells us:

In Laski’s Preface he expressed the hope that he had learned “the lesson to be learned from the constitutional opinions with which Mr. Justice Holmes has enriched this generation.” From Holmes’s Speeches (1913) he had quoted this passage: “Your business as thinkers is to make plainer the way from something to the whole of things, to show the rational connection between your fact and the frame of the universe.”

If it be argued that it is not per se germane to know about Laski’s book which arrived in Holmes’s hands that March morning, Holmes did after all react to it. Admittedly the focus of Posner’s book is on Holmes while Howe’s focus was on both correspondents. But Howe’s footnotes to this paragraph help us understand Holmes better in the early days of that fascinating friendship which resulted in what Posner labels (no doubt correctly) “the best of the [Holmes] letters.” (p. xxvi, n.27) To forbear from such footnotes seems a waste. More generally, the failure to add similar references — the superb model of which was readily available — throughout Posner’s volume seriously mars an otherwise fine book.

At the very least, a glossary of names or biographical index should have been placed at the rear of the book as a kind of scorecard to tell who all the players were — once again following the

83. Letter from Harold Laski to Holmes (Mar. 6, 1917), in 1 Holmes-Laski Letters, supra note 9, at 65 n.2.
84. Letter from Harold Laski to Holmes (Mar. 17, 1917), in 1 Holmes-Laski Letters, supra note 9, at 67 n.1.
85. Letter from Harold Laski to Holmes (Mar. 17, 1917), in 1 Holmes-Laski Letters, supra note 9, at 67 n.2.
86. 1 Holmes-Laski Letters, supra note 9, at 1508 app.
87. Letter from Holmes to Laski (Mar. 17, 1917), in 1 Holmes-Laski Letters, supra note 9, at 67 n.3.
Howe model.\textsuperscript{88}

Related to our criticism on the paucity of footnotes is the index. It is not as helpful as it should be. Inexplicably many key people, places and events referred to in Holmes's writings are absent. Just one example may suffice: On page 48 we have an excerpt from a Holmes tribute to a Doctor S. Weir Mitchell, but there is no identifying footnote, nor any reference to Mitchell in the index. One is not given a clue as to who he was,\textsuperscript{89} how Holmes knew him, nor why he sparked Holmes's provocative remarks on the arts (e.g., this lovely aperçu: “The end of art is to pull the trigger on an emotion”.) Especially since the man's name is the title of the speech, why not at least show it in the index? Dozens of similar examples could be cited.

Having been so definite in our criticism of editor Posner for failing to provide the references we feel his readers need, we reiterate that perhaps one can understand what may be his chief reason: Let Holmes's thrusting words resonate: Let them not be hemmed in by thick interwebbings of scholarly entanglements. Our final words on this point are simple — let there be balance.

\textsuperscript{88} The authors of this review were asked to read and evaluate the manuscript of Posner's Holmes anthology by the editors of the University of Chicago Press. After complying, we warmly recommended publication but also strongly suggested adding many more footnotes and a glossary. We made many specific suggestions, including those mentioned here. A few of them were followed, but the basic one related to a need for many more helpful references was not.

\textsuperscript{89} S. Weir Mitchell, M.D. (1829-1914), a pioneering neurologist. See Martha Chamallas & Linda K. Kerber, Women, Mothers, and the Law of Fright: A History, 88 Mich L. Rev. 814, 824 (1990) (referring to Mitchell as a pioneering neurologist who established a connection between mind and body, specifically that mental and emotional problems may produce physical manifestations).