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L'Esprit De Holmes

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L'Esprit de Holmes

STEPHEN A. CONRAD*

Sheldon M. Novick, *Honorable Justice: The Life of Oliver Wendell Holmes* (Boston: Little, Brown and Company, 1989), xxi + 522 pp.; \$24.95. Paperback ed. (New York: Dell Publishing, 1990), xxi + 522 pp.; \$12.95.

Liva Baker, *The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes* (New York: HarperCollins Publishers, 1991), xiv + 783 pp.; \$29.95.

"To read his opinions as a whole is to know what Montesquieu would have been like had he presided over a modern court."

—Harold Laski¹

I. "[H]IS OWN WORDS WITH A DIFFERENT APPLICATION. . . ."

In 1900 Holmes published a short essay on Montesquieu as the introduction to a revised version of the standard English translation of Montesquieu's *L'Esprit des lois*.² Neither Sheldon Novick nor Liva Baker makes much of the essay; nor should they be faulted for that. After all, they are the first to succeed where Felix Frankfurter, Mark DeWolfe Howe, and Grant Gilmore either turned back or fell short—in delivering "full lives" of Holmes that draw assiduously on the wealth of unpublished as well as published sources.³ Novick's book has received a number of favorable reviews, especially in the popular press, not to mention the 1990 Scribes Book Award

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1. Laski, *Mr. Justice Holmes: For His Eighty-Ninth Birthday*, in *MR. JUSTICE HOLMES* 148 (F. Frankfurter ed. 1931).

2. O.W. Holmes, *Montesquieu*, in *1 BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS* iii (T. Nugent trans., J. Prichard rev. 1900).

3. Under contract with the publisher Houghton Mifflin, G. Edward White is currently working on yet another extensively researched full life of Holmes. Cf. his substantial recent article *Holmes's "Life Plan": Confronting Ambition, Passion, and Powerlessness*, 65 *N.Y.U. L. REV.* 1409 (1990). For a work of much smaller scope, but highly personal in its focus, and often informed by primary sources (including not only Holmes's private papers but also interviews with people who knew Holmes intimately), see J. MONAGAN, *THE GRAND PANJANDRUM: MELLOW YEARS OF JUSTICE HOLMES* (1988). Cf. the recent 212-page biography that relies entirely, however effectively, on published material: G. AICHELE, *OLIVER WENDELL HOLMES JR.: SOLDIER, SCHOLAR, JUDGE* (1989) (a volume in the *Twayne's Twentieth-Century American Biography Series*); see also in the *Twayne's United States Authors Series*, D. BURTON, *OLIVER WENDELL HOLMES, JR.* (1980).

from the American Society of Writers on Legal Subjects. Baker's newer and fuller biography—promising, as Novick's does not, to be both "life" and "times"—may gather even more praise: On the dust jacket the doyen of Holmes scholarship Max Lerner applauds, "Finally a true Holmes has found his true and definitive biographer."⁴

As far as I know, Lerner is the only one yet to have offered substantial comments in print on Holmes's Montesquieu essay. And now I learn from Novick and Baker that there are good biographical grounds, particular and general, for deeming this essay on Montesquieu significant, even if—nay, because—it might well be deemed just one more occasional piece from Holmes's facile pen.

In particular: The essay was included in the handsome but highly selective volume of Holmes's *Collected Legal Papers* that was published in 1920.⁵ And, to Holmes's delight, the appearance of the collection was prominently noticed.⁶ Moreover, Novick surmises that of all the brilliant young admirers who surrounded Holmes by 1920, it was the one who put together the volume, Harold Laski, who "came closest to Holmes's heart."⁷ Perhaps most particularly significant, it happened that despite appearances to the contrary in the casual, two-paragraph preface that Holmes wrote for the volume, behind the scenes he took a considerable hand in the project, "fuss[ing] over the preparation of the *Collected Legal Papers*, peppering Laski with suggestions and doubts, hesitating whether this piece or that should be included."⁸

Lerner has also reprinted the Montesquieu essay in his classic edition of *Holmesiana*, first published in 1943 and lately republished with a new preface and afterword.⁹ His brief editorial comments on the essay have a tone of disappointment, disappointment that in introducing Montesquieu's historic book—arguably the wellspring of the European Enlightenment and demonstrably the modern authority invoked more often than any other in the American Founding—Holmes wrote "without political depth" about Montesquieu's ideas, in a way that "does not add much to scholarship," that is calculated merely for "the lay reader." "Holmes seems more interested in Montesquieu the *littérateur* and the man of the world than in

4. For Lerner's review of Novick, see *The Spirit and the Laws* (Book Review), NEW REPUBLIC, Apr. 2, 1990, at 34.

5. O.W. HOLMES, *COLLECTED LEGAL PAPERS* (1920).

6. L. BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 551-52 (1991); S. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* 337 (1989). But, to judge from the reviews to which Novick and Baker direct me, the Montesquieu essay itself does not seem to have prompted much comment.

7. S. NOVICK, *supra* note 6, at 320.

8. *Id.* at 337.

9. Holmes, *Montesquieu*, in *THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS, AND JUDICIAL OPINIONS* 373 (M. Lerner ed. 1989) [hereinafter *MIND AND FAITH OF HOLMES*].

Montesquieu the thinker, more interested in his love affairs and his *Persian Letters* than in the *Spirit of the Laws*."¹⁰

Some reviewers have had similar reactions to Novick's biography of Holmes—questioning Novick's concentration on Holmes "the man" to the neglect of Holmes's ideas and their significance, which are matters that Novick tends to relegate to his endnotes. And while in Baker's longer book there is more intellectual and jurisprudential history than in Novick's, even so, Baker remains concerned more with representing the circumstances and the context of Holmes's thought than with trying to reach any new understanding of what Holmes contributed to American law and legal theory, or to American letters in general.¹¹

Not necessarily to gainsay Lerner or any disappointed reviewer of either of these first two "full biographies" of Holmes, there is still, I believe, much worthy of consideration, even by scholars, in Holmes on Montesquieu, and in Novick and Baker on Holmes. In any case, here I want to try to suggest that there is also something worthy of consideration in viewing Novick's and Baker's Holmes through the lense of Holmes's little essay. For one thing, in such an approach to reviewing the two most comprehensive Holmes biographies to date, there is occasion to take account of some of Holmes's own notably apt principles and predilections. There is even perhaps a certain belletristic, if not poetic, justice in this Montesquieuian perspective on Holmes, which (quite aside from whatever Holmes would have liked from his biographers and their reviewers) might go to some of the essence of the subject himself. Most of all, though, I hope that this approach might intimate something of the intractability of *The Problem of Holmes*, as I try to convey what has most impressed me in reading and comparing two ambitious Holmes biographies that commendably reach beyond their grasp.

For, to turn now to just some of the *general* biographical grounds for viewing the vast Holmes through the narrow lense of his Montesquieu essay: In principle, Holmes was ambivalent at best about the modish genre of the revealing personal biography. Although his closest childhood friend, and a close friend until Holmes's death, his cousin John Morse, eventually made a career of writing biographies, Holmes hardly concealed his lack of enthusiasm for most such enterprises. Baker tells us, for example, that Holmes found even Morse's pious two-volume biography of Holmes's father—the arch-tattling author of *The Autocrat of the Breakfast Table*—"perhaps a little indiscreet at times in its use of personal names."¹² And

10. Lerner, *Men and Ideas*, in *MIND AND FAITH OF HOLMES*, *supra* note 9, at 369-70.

11. For some original approaches to understanding Holmes's ideas and their enduring significance, there is much to be expected from the forthcoming volume of essays, by various authors, to be published by Stanford University Press in early 1992: *THE LEGACY OF OLIVER WENDELL HOLMES, JR.* (Robert W. Gordon ed.).

12. L. BAKER, *supra* note 6, at 420.

when Holmes was freer to be more candid about the principle at issue, he could be almost vehement: "When someone mentioned John Ruskin, Holmes remembered with dislike Ruskin's having written about his childhood: 'Why he should think it important to the world whether something about him happened at seven or nine is beyond me; that he should think his puny personality mattered.'"¹³

Disdaining to write his own autobiography, Holmes urged partners in correspondence to destroy their letters from him, even though many of the letters he wrote were so impersonal as to be almost interchangeable from one correspondent to the next. For his part, Holmes sooner or later burned many of the letters he had received, just as he burned many of his other personal papers. In sum, as he made a point of saying, he wanted to be remembered by posterity *only* for what he himself had written for publication.

None of this is to conclude, however, that Holmes was an intensely private person, at least not in the conventional sense. A pervasive motif in Novick's and Baker's accounts is that, whether in conversation, or speaking before an audience, or writing to an intimate or for the public, even as he was treating whatever the topic at hand, at the same time "Holmes himself was the subject."¹⁴ Yet this pattern, so well documented by Novick and Baker, bespeaks no solipsism, much less *amour propre*. Rather, after reading Novick and Baker, I am inclined to look on Holmes's practice of articulately indirect self-regard as a matter of virtually phenomenological integrity, an integrity that might put moral approval and disapproval beside the point. Calling to mind Plato's Socrates, where the man, his philosophy, and his *daemon* become indistinguishable, Novick's and Baker's Holmes is often—whether as son, student, soldier, husband, scholar, friend, or judge—a phenomenon of discursive, simultaneous, and mutually informing consciousness and self-consciousness, such that Holmes enhances (as he economizes on) both.¹⁵

I offer this not as a proposition I want to try to prove, but merely as an impression I want to try to illustrate. To the extent that my impression is informed by what Novick and Baker have so diligently uncovered and assembled, then any number of texts by Holmes could serve as devices of illustration. If for no other reason, however, one might pick the Montesquieu essay as a device because there Holmes himself does not hesitate to quote Montesquieu for his own purposes, in express disregard of Montesquieu's.¹⁶

13. S. Novick, *supra* note 6, at 376.

14. *Id.* at 176; *cf. id.* at 186.

15. *Cf. Rovere, Sage* (Book Review), *THE NEW YORKER*, April 6, 1957, at 145 (Holmes as an American Dr. Johnson).

16. For another, more noted instance of Holmes's quoting freely, see the letter from Oliver

And Holmes does so to make a point that Mark DeWolfe Howe, for one, would seem to take to be at least as indicative of Holmes's accomplishments *and aspirations* as of Montesquieu's:¹⁷ Holmes says, "Montesquieu is buried under his own triumphs, *to use his own words with a different application.*"¹⁸ Whether this assessment applies as much to Holmes as to Montesquieu is an interesting question, but it is not one I mean to resolve here. For the most part, I mean only to touch on a few of the ways in which Novick and Baker on Holmes resonate with Holmes on Montesquieu.

II. NOT "WISER," BUT "BETTER DRESSED," AND WITH "A DANGEROUS GIFT . . . OF A SORT OF PATHETIC CHARM"?

As Thomas Grey has recently observed, "One of the few points on which all commentators agree is Holmes' greatness as a prose stylist."¹⁹ Grey makes this summary observation in a long and closely reasoned article that returns to the question of the relationship between Holmes's thought and the American Pragmatist movement, in order to reconsider afresh the complexity of that relationship. With all we have now in the way of accrued commentary on Holmes, the state of the art would seem to call for any commentator seeking to characterize, much less to categorize, Holmes's legal thought to pursue the endeavor with fresh and sustained analysis.²⁰ As a contribution to commentary on Holmes, then, Novick's book can be counted not only disappointing but frustrating. Novick, more contentiously

Wendell Holmes, Jr. to Sir Frederick Pollock (May 15, 1931), *reprinted in HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932*, 285-86 (M. Howe ed. 1941). *Cf. Novick, supra* note 6, at 482 n.45.

17. There Howe says:

The Common Law should be seen as a milestone on the path of the law. "[W]hen innocents still read Montesquieu for information and not merely for the history of ideas I may hope to be read as long as I last"—surely in that reflection [from Holmes in 1908] was revealed the hope that after the innocents, who in 1908 still supposed that the insights of 1881 were timely, would come other generations who would see his achievement in the perspective of intellectual history.

Howe, *Introduction to O.W. HOLMES, THE COMMON LAW* xii (M. Howe ed. 1963).

18. Holmes, *Montesquieu*, in *MIND AND FAITH OF HOLMES*, *supra* note 9, at 374 (emphasis added).

19. Grey, *Holmes and Legal Pragmatism*, 41 *STAN. L. REV.* 787, 787 (1989).

20. See, for example, the ongoing project in which Patrick J. Kelley seeks to identify Holmes's legal thought with "positivism," most recently in a review of Novick, *The Life of Oliver Wendell Holmes, Jr.*, 68 *WASH. U.L.Q.* 429 (1990), and in a substantial reply to Grey, *Was Holmes a Pragmatist? Reflections on a New Twist to an Old Argument*, 14 *S. ILL. U.L.J.* 427 (1990). *Cf. H.L. POHLMAN, JUSTICE OLIVER WENDELL HOLMES & UTILITARIAN JURISPRUDENCE* (1984); Kelley, *Oliver Wendell Holmes, Utilitarian Jurisprudence and the Positivism of John Stuart Mill* (Book Review), 30 *AM. J. JURIS.* 189 (1985); Kelley, *A Critical Analysis of Holmes's Theory of Torts*, 61 *WASH. U.L.Q.* 681 (1983).

than Baker, enters into most of the perennial debates in legal scholarship on Holmes, but, as I say, typically in the endnotes, where a brief aside on a much mooted issue can often seem less than nothing at all. For example, we are told in short order that Holmes was not a "Pragmatist,"²¹ or a "Utilitarian";²² rather, "Holmes, in short, was a structuralist."²³

Nevertheless, on the uncontroverted matter of Holmes the stylist, Novick's substantive endnotes are not only stimulating, they also offer some generalizations amply justified by evidence scattered throughout the book. And there is no better justified generalization from Novick than this: "It is interesting to watch the movement of characteristic expressions from conversations to letters, and then to opinions and speeches. Holmes was able to write so quickly in part because he had a fund of well-polished conversation from which to draw."²⁴

A reader of much that Holmes wrote for publication, or of any of the volumes of his published speeches or correspondence, soon notices that Holmes routinely cribbed from his "favorite author"—himself. Nearly every characteristic paragraph by Holmes evinces the diction and rhythms of conversation. Holmes could deprecate "polite conversation" *without more*,²⁵ but the qualification was as important as the deprecation. The polite conversation of the salon, so to speak—and best of all, perhaps, conversation with intelligent, convivial, and attractive women—was for him, I infer, not only a school of style, but also a source of authority that in its way rivalled even the authority of modern "science." Certainly Novick and Baker offer abundant evidence that, for Holmes, his conversational style epitomized as much as anything else what he was about, from his teens into his nineties.²⁶

These are impressions reinforced for me by the presumably deliberate—and to Lerner, disappointing if not perverse—choice Holmes made to attend as much to Montesquieu the "man of the world" as to the other Montesquieu that Holmes highlights, Montesquieu the "man of science."²⁷ For with that distinction made, Holmes immediately moves beyond it to suggest that at his best Montesquieu was both at the same time.²⁸ The "scientific" scholar Montesquieu who, at age fifty-nine, published *L'Esprit des lois*

21. S. NOVICK, *supra* note 6, at 426 n.4.

22. *Id.* at 431 n.23.

23. *Id.* at 434 n.59.

24. *Id.* at 475 n.15.

25. L. BAKER, *supra* note 6, at 373.

26. Since I offer this as little more than a hypothesis, I note with special curiosity one of the items in the draft table of contents that Professor Gordon has kindly shared with me from the volume he is editing: an essay entitled *Opening and Closing the Conversation: Style and Stance from Holmes Senior to Holmes Junior*, by Peter Gibian. See *supra* note 11.

27. Holmes, *Montesquieu*, in MIND AND FAITH OF HOLMES, *supra* note 9, at 374.

28. *Id.*

remained essentially as much a man of the world as he had been in his first book, the witty, scandalizing, liberating *Persian Letters*, published more than twenty-five years earlier. And Montesquieu's masterpiece was the man himself, the whole man:

Montesquieu the ladies' man, Montesquieu the student of science, Montesquieu the lover of travel both real and fictitious, Montesquieu the learned in the classics and admirer of that conventional antiquity that passed so long for the real thing in France—all these Montesquieus unite in the *Esprit des Lois*, as is pointed out most happily by [Emile] Faguet. . . . The book, he says, is called *Esprit des Lois*; it should have been called simply *Montesquieu*.²⁹

This insight may or may not be just (although I would be in good company in saying it is).³⁰ My point is that, in revisiting³¹ the Montesquieu of *The Spirit of the Laws* in order to introduce the book to general readers, Holmes apparently saw palpably before him the same Montesquieu who, in his early thirties, had contracted the "disease of book-making,"³² with the big splash of the *Persian Letters*. And this imagination of an integral Montesquieu, with youth and age and publications and personality all of a piece, takes on additional meaning for me in light of Baker's retailing, from Holmes's table talk, that Holmes customarily "tried to treat a 'great author like a friend.'"³³

Given the record that Novick and Baker have amassed of the life-absorbing significance of conversation for Holmes, his own ambivalence about what he saw as a problematic relationship between Montesquieu's eloquence and Montesquieu's depth might give pause to anyone otherwise inclined to pass over questions about the true measure of Holmes's own profundity, especially in Holmes's own estimation:

That wit which . . . offers trenchant solutions in two or three lines is a dangerous gift. It hardly is compatible with great art It is no less dangerous to great thinking When one runs through the *Lettres Persanes* one feels as he does after reading Swift's *Polite Conversation*, struck with a wondering shame at the number of things he has been capable of feeling pleased with himself for saying Montesquieu was a good deal more than a man of the world, but there is this also³⁴

29. *Id.* at 380.

30. See, e.g., R. SHACKLETON, *MONTESQUIEU: A CRITICAL BIOGRAPHY* vii (1961); J. SHKLAR, *MONTESQUIEU* 67 (1987).

31. Catherine Drinker Bowen assumes that Holmes first read the book (because records show that he charged it out of the library of The Athenaeum) in the autumn of 1866, at age 25, just as he was beginning law practice. C. BOWEN, *YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY* 235 (1944).

32. Holmes, *Montesquieu*, in *MIND AND FAITH OF HOLMES*, *supra* note 9, at 376.

33. L. BAKER, *supra* note 6, at 375.

34. Holmes, *Montesquieu*, in *MIND AND FAITH OF HOLMES*, *supra* note 9, at 374-75. (For the record, let no one think I join Holmes in his "wondering shame" as to either the *Persian Letters* or *Polite Conversation*.)

Baker reports to us that some years after Holmes wrote these lines for publication about his friend Montesquieu, he wrote something similar to an unnamed correspondent about his own father, whom Holmes felt had "contented himself too much with sporadic *aperçus*" and had fallen short of greatness more because of than despite his cleverness.³⁵

As Holmes wrote in a 1920 letter to Frankfurter, he subscribed to the tenet of developmental psychology that "whatever atmosphere men are brought up in persists."³⁶ At the table of *The Autocrat*, Holmes and his brother and sister were brought up in an atmosphere of "conversational free-for-alls," with brother Ned complaining, "Wendell ends every sentence with a but so as to hold the floor till he can think of something else to say."³⁷ Nor did the conversational *daemon* abate over the years: Shortly after Holmes resigned from the United States Supreme Court, in 1932, he avowed that, "if he lost both arms and both legs and had to be carried every day into the marketplace and [was] allowed to talk, he 'would have all that [he] wanted of life.'"³⁸ Although the remark was no doubt offered as a graceful bow to the limitations of old age, it seems quite plausible, from what Novick and Baker recount, that "talking" was what Holmes really had cared about most, or at least as much as anything else, his whole life.

The heady atmosphere of polite intellectual conversation in the households of his youth—with Emerson the most magnetic but far from the only celebrated interlocutor—left Holmes dismayed at the frivolous talk he too commonly encountered among his classmates when he became an undergraduate at Harvard. He said as much in the first piece he ever wrote for publication, an essay for a college magazine. When he moved on from college to the army, even the horrors of the Civil War, so many of which he saw and felt in the flesh, did not overawe his *daemon*: he was nicknamed by his fellow soldiers "Chain-Pump" because he was "continuously talkative, as the chain on a pump was continuously rattling";³⁹ and he seems to have impressed at least one of his commanding officers above all on account of his charming conversation.⁴⁰

His marriage, too, was mostly talk. At age thirty-one he married Fanny Dixwell, a childhood friend, indeed, the daughter of one of his former schoolmasters; and he remained a devoted if not completely faithful husband to Fanny for well over fifty years. Serious conversation, teasing banter, dinner parties, and reading aloud and discussing books were the observable

35. L. BAKER, *supra* note 6, at 62-63.

36. *Id.* at 66.

37. *Id.* at 51.

38. *Id.* at 235.

39. S. NOVICK, *supra* note 6, at 81.

40. *Id.* at 74.

materia of this companionable and childless union—whether or not his cousin John Morse was right when he insisted after Holmes's death that Holmes had been sexually impotent all along.⁴¹ With that testimony now put into wider currency by Baker, some students of Holmes may come to look somewhat differently on the tension among “ambition, passion, and powerlessness”⁴² that can be detected in Holmes.

Sexually impotent or not, Holmes was by all accounts an inveterate flirt. The lifelong importance to him of captivating women with his conversation might be for me one of the most innocently charming themes of Novick's and Baker's biographies—but for what I read in the Montesquieu essay, where Holmes wanders into this less than innocent suspicion about his subject: “Whether or not he would have said that the society of women makes us ‘subtle and insincere,’ he did say that it spoils our morals and forms our taste. I suspect also that it added a poignancy to his phrase when he came to write”⁴³ To the extent that Holmes meant (or was, in any event, right about) what he said of “talk” as a sufficient end in itself for him, it is tempting to join him in his apparent if oblique suspicions about the intellectual, and moral, and even jurisprudential ramifications of his own essentially conversational style.

I hazard that there would not be much dispute among Holmes commentators today that this from Holmes on Montesquieu describes Holmes the judge and jurist as well: that “he affects no august sovereignty, but even gives us one or two discreet personal touches full of a sort of pathetic charm.”⁴⁴ Among other things, it is the significance of Holmes's “pathetic charm” that the current wave of highly personal studies of Holmes is bringing more and more into question. I cannot help but wonder whether Holmes himself, ever self-consciously stylish, is not raising questions for us about himself when he says of the personifying remarks of Montesquieu in the *Persian Letters*, “They readily will admit that other people are wiser . . . if you grant them that they are better dressed.”⁴⁵ One of the questions, for me, is how the charm of Holmes's nervous prose might serve to disguise the authority he is really assuming. But more important than such matters of “mere” rhetoric is the nagging question whether and how discursiveness in and of itself functions as substantive authority in Holmes's utterances, on and off the bench.

As a young man, Holmes's concern to achieve a charming effect was so predominant that Fanny jibed, had it not been for his experiences in the

41. L. BAKER, *supra* note 6, at 228-30.

42. White, *supra* note 3, at 1409.

43. Holmes, *Montesquieu*, in MIND AND FAITH OF HOLMES, *supra* note 9, at 376.

44. *Id.* at 382.

45. *Id.* at 378.

Civil War, he would have become a "coxcomb."⁴⁶ In Novick's and Baker's pages, however, there is evidence that in this regard those experiences did not make all that much difference. The Civil War may well have convinced Holmes that "Life is War," as Baker reminds us in a chapter with that title.⁴⁷ But Novick and Baker document how much Holmes promptly and enduringly romanticized his war experiences and (as was, arguably, his privilege) turned even them into fodder for his conversation, letters, and speeches.

III. "[A] GOOD DEAL MORE THAN A MAN OF THE WORLD. . . .
A LONELY SCHOLAR SITTING IN THE LIBRARY"

If there was about Holmes something of the coxcomb, as his wife averred, and something of the blowhard, as he himself acknowledged, he was and is no more reducible to all that than Montesquieu was and is. Nor is Holmes's legacy, any more than Montesquieu's, to be estimated by how often he has been quoted.⁴⁸ But with this mildly facetious remark I veer too far from biography into the more disputed terrain of Holmes commentary. To recur to the Montesquieu essay, in fact, to its conclusion, there is this, with its nearly confessed pathetic charm, but with a good deal more:

above all the preface [to *The Spirit of the Laws*], that immortal cheer to other lonely spirits. It is the great sigh of a great man when he has done a great thing. The last words of that are the words with which this introduction should end. "If this work meets with success, I shall owe it largely to the majesty of my subject. However, I do not think that I have been wholly wanting in genius. When I have seen what so many great men in France, England, and Germany have written before me, I have been lost in admiration, but I have not lost my courage. 'And I too am a painter,' I have said with Correggio."⁴⁹

Thankful for his own "low tastes" for "naughty French novels" and the burlesque house, Holmes was drawn to that side of Montesquieu that led the father of the Enlightenment to "[make] a reasonable amount of love in his day," and even to compose erotica "to please the ladies."⁵⁰ But Holmes was also drawn to that "other" side of Montesquieu: his capacity for withdrawal, his sense of fulfillment, even exultation, as "a lonely scholar sitting in a library."⁵¹ This withdrawn Montesquieu is Holmes's "man of

46. L. BAKER, *supra* note 6, at 105.

47. *Id.* at 154-60.

48. Cf. Margolick, *At the Bar*, N.Y. Times, Oct. 26, 1990, at B10, col. 1; Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189 (1984).

49. Holmes, *Montesquieu*, in MIND AND FAITH OF HOLMES, *supra* note 9, at 382.

50. In the order quoted here: S. NOVICK, *supra* note 6, at 311; L. BAKER, *supra* note 6, at 373; Lerner, *Men and Ideas*, in MIND AND FAITH OF HOLMES, *supra* note 9, at 376, 379.

51. Holmes, *Montesquieu*, in MIND AND FAITH OF HOLMES, *supra* note 9, at 382.

science," a man who, like Holmes, travelled and socialized, but avoided newspapers and magazines as jejune diversions. Holmes means to double, not diminish, his praise when he remarks on "the shortness of [Montesquieu's] outward and the reach of his inward sight"52

Holmes is not unpersuasive when he claims he himself could be happy just talking, although in Baker's pages he appears still more authentic when he is "fairly pulsat[ing] with joy" as he arranges the large collection of his home library and pronounces it "*fecundissimus*."53 Information about his relationship with books—what he read and when, how he approached reading in general, and something of what he thought of particular books—could well amount to some of the most useful data that Novick and Baker have now made so handily available to Holmes's interpreters. Baker brings the theme of Holmes, books, and withdrawal squarely to the fore at the outset:

Beginning on his return from Europe in 1866 [at age twenty-five], he listed, as if he were to be graded at the end of the year, every book he read—for the first years in the back of old diaries; later, beginning in 1876, in a special folio-sized volume of 159 pages which he called the Black Book. . . . He lived largely inside himself, where he followed a routine of reading, thinking, and philosophizing.⁵⁴

Into his last years Holmes continued with purposefully strenuous reading projects, for example, Thucydides, partly in the original Greek. According to Novick, Holmes professed in these projects "a sense of duty": "He liked to tell his secretaries [that is, his young law clerks] that he expected to be examined on the Day of Judgment. He was sure that somewhere in heaven a great book of records was kept, where he got credit for dull but worthy books."⁵⁵

That first piece Holmes published, in the student-edited *Harvard Magazine*, was entitled simply *Books*, echoing the title of an earlier essay by Emerson. Not long afterwards, while still an undergraduate, Holmes published an essay in which he wrestled with Plato, no less. Michael Hoffheimer, in an interesting recent article, has brought together these and other Holmesian juvenilia. In addition to giving us the texts of Holmes's own annotated manuscripts, Hoffheimer has also made a case for the importance of this early work in Holmes's full corpus.⁵⁶ Holmes himself gives this autobiographical hint when he advises, somewhat gratuitously, in the Montesquieu essay:

52. *Id.* at 376.

53. L. BAKER, *supra* note 6, at 373.

54. *Id.* at 6-7.

55. S. NOVICK, *supra* note 6, at 366.

56. Hoffheimer, *The Early Critical and Philosophical Writings of Justice Holmes*, 30 B.C.L. REV. 1221 (1989).

For a beginner to read Montesquieu with the expectation that there he is to find his understanding of the laws of social being, would be as ingenuous as to read Plato at eighteen expecting to find in him the answers to the riddles of life when they begin to perplex and sadden the mind of youth.⁵⁷

Novick and Baker portray a mature Holmes who remained perplexed, if not saddened, by those riddles, a Holmes who continually turned to books in a "hopeless[. . .] quest . . . to discover the secrets of the universe," as Baker puts it.⁵⁸ But she also points out that in Holmes's case the dialectic between the "man of science" and the "man of the world" made for a pattern if not a plan of alternation: periods of "intense intellectual expenditure" followed by periods of "intensely . . . nonintellectual diversions."⁵⁹

It is hardly surprising that a man like Holmes, with his background and in his circumstances, should have divided his life largely between the study and the salon or that he should have cultivated in his personal life the aristocratic detachment so often perceived in what he said and wrote. But now that biographers like Novick and Baker are rendering the personal face of that detachment in such detail, cradle to grave, legal scholarship on Holmes is bound to respond—albeit in ways I would not presume to predict.

IV. THE PROBLEM OF HOLMES

Holmes himself might be taken to have imposed some of the obligation in the matter, by putting himself so much into his work, in the ways I have tried to illustrate here, and many more besides. Indeed, the more I see of his virtuosity at this putting of self in work, and work in self, the more his virtuosity looks so astonishing, so dazzling, and perhaps even distracting if not blinding, that the current accumulation of details in bringing it to life threatens to preclude rather than promote any settled understanding of Holmes at all.

It is long now trite to warn that Holmes presents a daunting figure because he lived so long and did and said and wrote so much—and much of it of historic "consequence," at that. But The Problem of Holmes is surely more than a problem of superabundance and consequence: It is also a problem of complexity compounded by concealment, mostly because of Holmes's extraordinary way of crossing and covering his tracks.

Although Novick's and Baker's books have their admirable features, I come away from reading the two in tandem with the opinion that Baker's amounts to the better effort to cope—both with the problem of superabundance and consequence, and with the problem of complexity and conceal-

57. Holmes, *Montesquieu*, in *MIND AND FAITH OF HOLMES*, *supra* note 9, at 374.

58. L. BAKER, *supra* note 6, at 375.

59. *Id.* at 178.

ment. Not only does Baker much more than Novick place Holmes in the setting of his times, and give us more (if only with orthodox summaries) about the content and impact of some of Holmes's most important judicial opinions and other writings; Baker also carries forward many of the old but still necessary questions about Holmes, for example, the questions she raises about "the contradictions in his nature"⁶⁰ and the distortions of the "man" by the "myth."⁶¹ Novick sets out to avoid such questions, but then cannot resist treating them in the margins.

Novick's book could be taken to be the more scrupulous, especially in its extreme cautiousness of interpretation and in the painstaking specificity that distinguishes both text and endnotes. But Baker's book is ultimately the more gratifying, especially upon repeated consultation, and not only because it is more provocative, better indexed, and more fully researched (if only to judge from the critical apparatus, which mentions Novick's book so little as to dismiss it entirely). Baker also has a knack for exposition and an ear for Holmes's overtones that many a legal scholar should envy.

Yet for all that Novick and Baker have variously accomplished, neither of them ever comes to terms with that important part of *The Problem of Holmes I* see in his words and in theirs: what I have called here Holmes's phenomenological integrity, which challenges interpretation and even representation. This is not an integrity that calls for praise or blame. It is an integrity more Homeric than Olympian, and more Delphic than Homeric. It is an integrity evident, for example, in a noteworthy passage in John Monagan's recent partial sketch of Holmes. In fact, I am inclined to conclude that Monagan is the most insightful recent student of the problematics of the private/public Holmes precisely because Monagan eschews a comprehensive, comprehending approach. Quoting from an unpublished diary of Mark DeWolfe Howe, Monagan relates:

[Holmes] said that he was once in the lavatory in the Boston Court House and talked to the lawyer who was next to him who didn't seem to be too impressed by the simile, but Holmes always thought it a good one. That is that solving some problem in law is a good deal like pissing. When you piss, you don't do as you do when you move a finger—look at it, will its motion and understand its moving. You simply exert a pressure generally you don't know where—and you piss. To do it is as with reaching many solutions—you exert a dim pressure—you don't quite know where—and the solution appears.⁶²

*There is an integral personality-cum-jurisprudence that poses the sort of problem for Holmes biography and interpretation that the translators of Montesquieu must face in the intractable word *esprit*.*

60. *Id.* at 9.

61. *Id.* at 11.

62. J. MONAGAN, *supra* note 3, at 31.

