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Justice Oliver Wendell Holmes: The Shaping Years, 1840-1870, by Mark DeWolfe Howe

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BOOK REVIEWS

JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS, 1841-1870. By Mark DeWolfe Howe. Cambridge: The Belknap Press of Harvard University Press, 1957. Pp. xii, 330. \$5.00.

Professor Howe's first volume of his Holmes biography covers the formative years. These include influence of family, education and the war years, and end with an eventful three years' apprenticeship in law when Holmes is a promising young lawyer age twenty-nine. The essential greatness of this outstanding book is the author's asking the right questions of events and circumstances: What influences played the larger and more significant role in molding the mind and temperament—in making the man and his intellect—of Holmes, the author of that great perspective, *The Common Law*, of Holmes, the outstanding jurist of his day and century and, of Holmes, the seminal thinker in law and on life in general. Holmes' felicity in expression, though an acquired gift, is perhaps beyond descriptive measurement. But Howe provides background and foundation to the reflections of Holmes that remain so enticing and satisfying in quotation. The maturing years, when "his convictions and his doubts took their permanent shape,"¹ were the more complex to portray and required the sensitive and limiting hand of the real scholar the book shows the author to be, and the depth of the record used to portray those years makes the volume a significant essay in intellectual history.

The exciting aspect of Howe's portrayal of *The Shaping Years* is the intellectual struggles Holmes had with his environment and experience. It would have been unthinkable for Holmes to have allowed himself the tempting pleasure of submission and submergence of the man and his intellect in his environment and experience. Howe's portrayal presents Holmes as the antithesis of the "institutional" and "other directed" man dominant in the literature of present-day America.² The struggles he initiated were in living the puritan creed of seeking Truth. But Truth for the struggling young mind of nineteenth-century New England was not doctrine and belief handed down as knowledge and wisdom. Truth was to be secured in the manner of Emerson by reason

1. Pp. v, vi.

2. See WHYTE, *THE ORGANIZATION MAN* (1956); and RIESMAN, *THE LONELY CROWD* (1951).

and rational thought. But the greater the demands Holmes made upon his maturing intellect the more his intellectual focus extended beyond the confines of the New England mind and even farther beyond the confines of the century in which he lived. His intellectual struggles for perception and understanding out of environment and experience were so intense he began probing the universality of mind and matter. Truth then lost its significance and he became the American Socrates probing the meanings in man's experience.³ The skepticism of his mind in maturity caused him to withhold his complete acceptance of, but without rejecting, the living doctrines of any age.

The first apparent conflict was between father and son. It is reported that "Dr. Holmes asked Henry James, Senior, whether he did not find that his sons despised him."⁴ The conflict reflected in the father's question was more a matter of temperament between father and son than of major differences in ideas and approach to life. As an undisputed leader of his life and times, the delightful *Autocrat* contributed greatly to the intellectual life of Boston. His son, Wendell, gained much from the associations of which his father was so dominantly a part, but the son strove mightily "to free himself from (what he considered) the rigidities of his father's precepts and inheritance."⁵ And the son's estimate of his father reflected a contrast in intensity of life, as suggested in a letter from his mother written while Holmes was on a European tour in 1866 in which she urged him "not to feel 'as you did at home that you must accomplish just so much each 24 hours.'"⁶ For the son, driving one's faculties to their maximum was a personal duty and a moral responsibility, and he was critical of his father's "life and times" dissipations from his main goal as a writer. But there were those of Holmes' early friends who thought his intensity of life connoted self-centered ambition which they considered unbecoming. William James wrote his brother Henry on the subject of his friend's characteristic which troubled him, saying on one occasion, Holmes is "a powerful battery, formed like a planing machine to gouge a deep self-beneficial groove through life. . . ."⁷ Notwithstanding differences in temperament, father and son had much in common. Both thought big thoughts and their emanci-

3. Holmes once wrote that "all I mean by truth is what I can't help thinking." Morality for him was a way of living, not as "the saints make it an end in itself." See ROVERE, *THE NEW YORKER* 149, April 6, 1957.

4. P. 11.

5. P. 15. Considering the time and place in which he lived it is difficult for this reader to ascertain the rigidities of Dr. Holmes' precepts. Possibly his son clashed with rigidities he felt in his life and times through his father.

6. P. 21.

7. P. 282.

pation from religious and intellectual inheritance allowed them to ask questions and to struggle with problems their contemporaries were reluctant to tussle with for fear of opening gaps in their faith. Holmes credited his father's training in "the scientific way of looking at the world" with having a predominant influence in his basic skepticism.⁸ Each sought out problems on morality and philosophy with the detached spirit of the scientist. In mode of thought they were essentially radical, yet they left values intact and did not repudiate the traditions of time and place. And neither had feeling or sympathy for causes and reforms. Holmes had begun the war years with a somewhat equivocal attachment to the abolitionist cause but the experience of battle deepened his thinking beyond the mundane ideas and movements of time and place.⁹ Later he could twit his young friends about their ideologies and their ideas for making and re-making the society and history in which they lived.

Holmes attended Harvard College, 1857-1861, the four years immediately preceding the war. Howe accurately describes the College of that age as "a world dominated by tradition of oppressive stuffiness."¹⁰ The faculty's responsibility to impart knowledge was treated more as an obligation to enforce standards of Christian morality. Faculty meetings corresponded to the faculty sitting as a police court to determine penalties meted out to students for breaking windows or for being disrespectful in class recitation, the latter offense often committed in honest questioning of doctrine and dogma the teacher thought requisite to knowledge. Measurement of academic progress then in vogue at Harvard was by a point system, eight points for an oral recitation and twenty-four for a written assignment. While Holmes graduated with 20,192 recitation points, a substantial number of points recorded for academic progress had been subtracted as a result of penalties the Harvard faculty had imposed against him. One example of such penalties was reported in the minutes of the Harvard Faculty for April 21, 1861: "Voted that Hackett and Holmes, Seniors, be publicly admonished for repeated and gross indecorum in the recitation of Professor Bowen."¹¹ In his senior year Holmes studied under Professor Francis Bowen, who had published a dogma-ridden volume under the imposing title, *The Principles of Metaphysical and Ethical Science Applied to the Evidences of Religion*. Bowen's thesis was pure orthodoxy; he was as opposed to Emerson's ra-

8. P. 17.

9. In 1928 Holmes wrote Arthur Garfield Hays, "I can remember the time before the Civil War when I was deeply moved by the Abolition cause—so deeply that a Negro minstrel show shocked me and the morality of Pickwick seemed to me painfully blunt." P. 49.

10. P. 35.

11. P. 62.

tionalism as he was to the scientific way of looking at things. Holmes had previously conflicted student and faculty orthodoxy, when, as a student editor of *The Harvard Magazine*, he published an anonymous essay on Albert Dürer in which he stated "it is clear that a noble philosophy will suffice to teach us our duties to ourselves and our neighbors, and some may think also to our God."¹² Very soon thereafter President Fenton of the College sent a letter to Dr. Holmes pleading that "he should use his parental authority to prevent his son and his associates on the board of *The Harvard Magazine* from speaking too freely. . . ."¹³ It was a "noble philosophy" which Holmes sought from his college experience but the only philosophy the College recognized was inherited Christian morality which was anything but noble. But let us be fair to the college of the 1850's; it may be more difficult to secure an essential education in today's college when enforced Christian morality is replaced by the social fraternity and social club, the football extravaganza, and rampant academic vocationalism. On the day after Fort Sumter surrendered, April 14, 1861, Holmes enlisted as a private in the Massachusetts Fourth Battalion of Infantry and left Harvard College for Fort Independence. Later, when it became clear that the Fourth Battalion was not to be called up, he returned to the College subject to the faculty's penalty of loss in academic points for accumulated absences. In the class day exercises on June 21, 1861 he was honored in being chosen the class poet.

Howe's chapters on the war years constitute an artistic and exciting portrayal of Holmes' war experiences. The war years cut most deeply of all on the man and his intellect.¹⁴ After he had experienced battle "his greatest loyalty and his greatest admiration were given to those associates who made gallantry their ideal and who cared little for the constitutional and moral cause for which they fought."¹⁵ This should be read by those who concern themselves with attempted indoctrination of men in uniform with collective idealism and the causes for which wars are

12. P. 57. Wolfgang Stechow, distinguished critic and historian of art, has recently stated in his *Justice Holmes' Notes on Albert Dürer*, 8 J. OF AESTHETICS AND ART CRITICISM 119, 120 (1949), that "Ruskin's comments on Dürer 'sound hazy and ephemeral when compared with Holmes' sure and methodical approach, his conciseness, deep understanding and modest restraint.'"

13. P. 59.

14. FRANKFURTER, OF LAW AND MEN 161 (1956): ". . . the Civil War probably cut more deeply than any other influence in his life."

15. P. 84. His close associations were the "Copperheads," those officers who served Massachusetts and the Union with no share of the crusading zeal for the abolitionist cause, with no admiration for Lincoln, and with no faith in the emancipation of slaves. See *The Problematical Justice Holmes*, THE LONDON TIMES LITERARY SUPPLEMENT 207, April 5, 1957.

fought.¹⁶ Holmes was commissioned in the Massachusetts Twentieth Regiment in July 1861 and left for the battlefields in the following September. The "storm of war broke with fury upon the Twentieth" in the battle of Ball's Bluff in late October. This was a disastrous encounter with the Confederate forces along the Potomac between Washington and Leesburg. Holmes' Company A was in the front rank of the battle and after an hour of combat he received a severe wound in the breast that came very close to being fatal. From the Twentieth Regiment Hospital Holmes wrote his mother that "The first night I made up my mind to die & was going to take that little bottle of laudanum as soon as I was sure of dying with any pain—but the doctors told me not to take it, and now seem to think I have a fair *chance*. . . . Only 8 officers out of 22 in our Regt got home unhurt."¹⁷ He recounted his feelings in his diary which Howe summarizes as follows: "Thus the boy (of 20) had discovered that he had within his spirit resources of courage and within his philosophy resources of doctrine sufficient to carry him, without flinching, to the precipice of life. No discovery, in youth or in maturity, had larger moment than that."¹⁸ His chief concern had been that he had done his duty and had shown a soldier's fortitude. He reflected a measure of himself in his diary: "Of course when I thought I was dying the reflection that the majority vote of the civilized world declared that with my opinions I was *en route* for Hell came up with painful distinctness. Perhaps the first impulse was tremulous—but then I said—by Jove, I die like a soldier anyhow—I was shot in the breast doing my duty up to the hub. . . ."¹⁹ From November 9th of 1861 to the following March Holmes convalesced in Boston. In May and early June of 1862 the Massachusetts Twentieth Regiment was engaged in the Battle of Fair Oaks near Richmond and late in June in the Seven Days' Battles. In early September the Union army received its second defeat at Bull Run which brought the Confederate attack in the Battle of Antietam. In this battle Holmes received his second wound, a bullet through the neck, a wound so serious that the "gravest alarm (for his life) was justified."²⁰ General Sumner had permitted Sedgwick's Division, of which the Massachusetts Twentieth Regiment was a part, to march into an ambush. The Division had suffered losses of staggering dimensions

16. P. 145. In his speech of May 30, 1895, "The Soldier's Faith," Holmes said, "The faith is true and adorable which leads a soldier to throw away his life in obedience to a cause which he little understands, in a plan of a campaign of which he has no notion, under tactics of which he does not see the use." HOLMES, SPEECHES 59 (1913).

17. Pp. 99-100.

18. P. 110.

19. P. 105.

20. P. 125.

and had left the battlefield in disorder. After his recovery Holmes returned to his regiment in November of 1862 and found the Union army demoralized under the command of General Burnside. In the battle of Marye's Heights near Fredericksburg on May 3, 1863, Holmes received his third and last wound, this time a bullet in the heel.²¹

When Captain Holmes returned to duty he was attached to the staff at the headquarters of General Horatio G. Wright. He served in this capacity in the closing months of his military service. This service included the famous Battle of the Wilderness in May of 1864. After this battle Holmes wrote his parents of his decision to withdraw from the army when his enlistment was up in July and not to return to his regiment. There was evidence of his near physical and nervous exhaustion. In later years Holmes regretted his decision and wished he had stayed on "touched with fire" until the end. In a Memorial Day address in 1895 Holmes reflected that "War, when you are at it, is horrible and dull. It is only when time has passed that you see its message was divine." Its teachings were needed, he thought, "that we may realize that our comfortable routine is no eternal necessity of things, but merely a little space of calm in the midst of the tempestuous untamed streaming of the world, and in order that we may be ready for danger."²² These reflections show the influence of the war years on his later thinking about life and the destiny of man. His faith was a "soldier's faith," the title he gave to his address.

Holmes entered the Harvard Law School in the fall of 1864. Later he reported he had been kicked into law by his father. His misgivings about law were later quieted when in 1886, following publication of *The Common Law*, he was able to say "no longer with any doubt—that a man may live greatly in the law as well as elsewhere; that there as well as elsewhere his thought may find unity in an infinite perspective; that there as well as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable."²³ Philosophy was the magnetic opposition to law until philosophy and law could be joined and brought into the focus of Holmes' theory about law. The Harvard Law School faculty of the 1860's consisted of three professors. The administrative head of the faculty was Joel Parker, one-time chief justice of the Supreme Court of New Hampshire; the other two were Theophilus Parsons, the author of numerous treatises, and Emory Washburn, one-time governor of Massachusetts. Howe describes

21. Pp. 154-5.

22. HOLMES, SPEECHES 62-3 (1913).

23. HOLMES, COLLECTED LEGAL PAPERS 30 (1920).

the faculty as "not concerned with horizons but with traditions" and their approach as fitting Maitland's aphorism on legal education in the later Middle Ages: "it was not academic; it was scholastic."²⁴ In 1930 Holmes wrote that when he was a law student "a rational and philosophic education in the law were out of reach or did not exist."²⁵ Legal education made the law unduly discouraging to students sensitive and speculative by nature. The law, Holmes said, "presented itself as a ragbag of details. . . . It was not without anguish that one asked oneself whether the subject was worthy of the interest of an intelligent man. One saw people whom one respected and admired leaving the study because they thought it narrowed the mind; for which they had the authority of Burke. It required blind faith—faith that could not yet find the formula of justification. . . ."²⁶ Holmes attended the Harvard Law School during the academic year, 1864-1865, and returned for the second year. But in December of 1865 he withdrew from law classes and entered the law office of Robert M. Morse, a young member of the Boston bar. In 1870, when Christopher Columbus Langdell joined the law faculty as dean, an anonymous note appeared in the *American Law Review* commending the appointment and noting with satisfaction the announcement that written examinations hereafter would be required for the LL.B. degree. "For a long time," the Note opined, "the condition of the Harvard Law School has been almost a disgrace to the Commonwealth of Massachusetts."²⁷ The Note ended with a quotation from Dr. E. O. Haven of Northwestern that "The object of a law department is not precisely and only to educate young men to be practising lawyers, though it will be largely used for that purpose. It is to furnish all students who desire it the same facilities to investigate the science of human law, theoretically, historically, and thoroughly, as they have to investigate mathematics, natural sciences, or any other branch of thought."²⁸

In September 1866, following a tour of Europe, Holmes began his apprenticeship in earnest in one of Boston's leading firms, Chandler, Shattuck and Thayer. The junior partner, James Bradley Thayer, later became the distinguished Royall Professor of Law at Harvard and in 1898 published his famous *Preliminary Treatise on Evidence at the Common Law*. Thayer was distinguished too in constitutional law for his influential article, *The Origin and Scope of the American Doctrine of Con-*

24. P. 191.

25. P. 192, n. 40.

26. P. 192, HOLMES, COLLECTED LEGAL PAPERS 301-2 (1920).

27. P. 205. Holmes and Arthur G. Sedgwick were then the editors of the *American Law Review*.

28. Note, *Harvard University, The Law School*, 5 AM. L. REV. 177 (1870).

stitutional Law,²⁹ in which he espoused the thesis that the judges on state and federal courts had exercised the power of judicial review "with an almost reckless enthusiasm."³⁰ Holmes agreed with Thayer, for at the bottom of many of his dissents on the Supreme Court was the assumption "that American judges were abusing their powers at the expense of the nation." Holmes worked the greater part of his apprenticeship with George Otis Shattuck, a noted trial lawyer. Later he was to say that he owed to "Mr. Shattuck more than I have ever owed to anyone else in the world, outside my immediate family."³¹ Shattuck's contribution to Holmes was training the fledgling lawyer in the ways of the practice of law. Holmes thought Shattuck the greatest advocate he had ever known: "He was profound and far-reaching in plan. He was vehement in attack and stubborn in defense. He was fertile in resources and very quick in seeing all the bearing of a fact or a piece of testimony, a matter in which most men, of weighty ability are slow."³² Lawyers of that day, as lawyers of the present, had great admiration for the able advocate. But in the growing complexities of law the advocate of today must rely to a larger extent on legal research and on the weary hours of studying the legal and social facets of his case if he is to succeed in securing his case *on the record* by the piercing analysis of today's appellate courts. Today's facts involve cost-of-living indices as well as contract law. Shattuck had conveyed to Holmes the zeal "that the lawyer's most important talent is that of dealing with the actualities of daily life, the capacity "to think under fire—to think for action upon which great interests depend."³³ Like many young men and women of high intellectual attainments, there was no question but that Holmes had the capacity for law; the question was whether his temperament was suited to high professional attainment. After he had been in the office about a month he made a significant entry in his diary. "This week," he wrote, "I haven't felt very well and debauched on Mill accordingly, by way of removing an old incubus before endeavoring to immerse myself in law completely—which Shattuck says a man must at some period of his career if he would be a first rate lawyer—though of being that I despair."³⁴ In those apprenticeship years Holmes' law work ran the gamut of private-law counseling. His first assigned case to research was interesting and exciting enough. The question involved a precatory trust; a mother's will had

29. 7 HARV. L. REV. 129 (1893).

30. P. 247.

31. P. 248. HOLMES, SPEECHES 73 (1913).

32. P. 250.

33. *Ibid.*

34. P. 260.

left property to her second husband "in the full confidence that . . . he will . . . continue to afford my children such . . . support as they . . . may stand in need of."³⁵ The English courts had enforced legal obligations on gentle words of expectation. Holmes' firm represented the needy children and the Massachusetts court created an enforceable trust in their favor.³⁶ Other law questions during those apprentice years included admiralty and maritime law,³⁷ Massachusetts law in stock transfers, admissibility of a ledger on proof of handwriting when the clerk is dead, the appropriate damages when a common carrier fails to deliver flour with reasonable speed and the market value of the flour has fallen between contract delivery date and the actual delivery date,³⁸ whether holders of guaranteed preferred stock have a right to a dividend when a corporation has "net earnings" without "net profits,"³⁹ whether the driver of an unlicensed cart had a right of action for personal injuries suffered as a result of the negligence of a licensed driver, and whether a corporation could be indicted for its "misfeasance" as for its "non-feasance."⁴⁰ Questions such as these (from which law is made and administered) were more than sufficient to test the fortitude of the young lawyer.

Young lawyers in their apprenticeship may note that Holmes found time for reading extensively in legal theory, writing in law, attending lectures and socializing. Some of his readings in this period of his career included Mill's *Political Economy*, Locke's *Essays on Human Understanding*, Humbolt's *Government*, Stirling's *Secret of Hegel*, Tyndall's *Radiation*, Kant's *Critique of Pure Reason*, and Schultz's *Eclaircissements sur la Critique*. He read law books too: Kent's *Commentaries*, Howe's *Practice in Civil Actions and Proceeding at Law in Massachusetts*, Parson's *Maritime Law*, Metcalf's *Essays on Contracts*, Fearn's *Contingent Remainders*, Adams' *Equity*, Wallace and Hare's *American Leading Cases*, and Smith's *Leading Cases*. Holmes interrelated the reading of books on the broad contours of life and history with his professional work in law. He had to reach the height of his profession. Once he wrote to Mrs. John Chipman Gray and spoke of the envy he had felt for her husband "when he said he had given up reading books

35. P. 258.

36. Warner v. Bates, 98 Mass. 274 (1867). See, anonymous note on *Precatory Trusts in Wills*, 4 Am. L. Rev. 617 (1870). Howe states the author is identified as James B. Thayer on John Chipman Gray's copy of the *Review* in the Harvard Law Library. P. 259, n. 48.

37. P. 261. Richardson v. Winsor, 2 Fed. Cas. 726, No. 11,795 (C.C.D. Mass. 1871).

38. Cutting v. Grand Trunk Ry. Co., 13 Allen 381 (Mass. 1866).

39. Williston v. Michigan Southern & Northern Indiana Road Co., 13 Allen 400 (Mass. 1866).

40. Pp. 261-2.

for improvement—although he happens to like improving books. I read and hate—and think, ‘Oh, could I grind this man into fish bait. . . .’”⁴¹ In another letter he insisted that “I don’t enjoy [reading] but feel the necessity of sticking in fuel.”⁴² Holmes’ readings did not serve the fleeting inspiration of a moment. They became his intellectual depository to which he returned from time to time. This review is not the place to consider Holmes’ philosophy of law, which he created out of his readings and his experience, except to observe that his positivism in law, however defined, and his skepticism of thought were one and the same. They freed him from the subjugating influence of “playing God” with his intellect and from the subjective beliefs and assumptions of those who bend to a faith, a theory, an axiom or a construct. He accepted judicial enforcement of freedom of speech without its acceptance on faith and without belief in its fundamental content. But this provides no basis whatever for charging him with authoritarianism or with omitting ethics and morality from his life and his works in law. Holmes strove mightily to the heights of an uncluttered intellect. This was his ethical standard, and for him it was an essential standard of intellectual conduct; and when we criticize with labels Holmes’ skepticism of thought and legal philosophy we are attempting to impose on him a personal or a collective ethical standard of intellectual conduct.⁴³

Holmes had a most exciting time with the *American Law Review*. Writing for the *Review* provided an outlet for his developing intellect. He found the practical affairs of the law lacking in fulfillment. The *American Law Review* was inaugurated in 1866 by Holmes’ close friends, John C. Roper and John Chipman Gray. Gray, like Holmes, was a Civil War veteran and, like James B. Thayer, was destined to achieve fame as a Professor of Law at the Harvard Law School. Under the editorship of Roper and Gray, followed by Arthur G. Sedgwick and Holmes, the *American Law Review* became the most significant review in America. Its aims were higher than other law reviews of its day and because of this its pages were hospitable to theoretical essays on law and the editors were as concerned with English law as with American. In 1871, when Sedgwick and Holmes were the editors, the *United States Jurist* protested that “the new editors . . . were inclined to play the fop

41. P. 252.

42. *Ibid.*

43. See Howe, *Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529, 937 (1951). Often Holmes is criticized by those who accept “freedom to believe” but reject “freedom to disbelieve.” See, e.g., Palmer, *Hobbes, Holmes and Hitler*, 31 A.B.A.J. 569 (1945); Palmer, *Defense Against Leviathan*, 32 A.B.A.J. 328 (1946); Lucey, *Natural Law and American Realism*, 30 GEO. L. J. 493 (1942); and Ford, *The Fundamentals of Holmes’ Juristic Philosophy*, in PHRASES OF AMERICAN CULTURE 51 (1942).

in legal matters."⁴⁴ Holmes' writing for the *American Law Review* began with the issue of January 1867. His first was a review of Roscoe's *Digest of the Law of Evidence in Criminal Cases*. His essay shows the imprint of James Fitzjames Stephen's famous Chapter Seven of his *General View of the Criminal Law of England*.⁴⁵ Holmes built on Stephen's penetrating analysis of the pragmatic nature of the Anglo-American law of evidence. The object of evidence in English and American courts, Holmes wrote, is "to enable ordinary men to arrive at a working belief,—to come to a conclusion such as they would feel justified on a business matter of their own."⁴⁶ Stephen in considering the relationship between truth and belief had developed the pragmatic thesis that "the ultimate reason for believing is, that without belief men cannot act," and "the reason for believing what is true is, that without true belief [men] cannot act successfully." And he thought the merits of particular rules of evidence should be determined "by considering whether they are well fitted to confine eager disputants within such limits as will enable a jury to deal with the subjects before them . . . [and] above all things, whether they provide a security that no one shall be punished till his guilt is proved by solid reasons, such as experienced men act upon in important affairs of their own."⁴⁷ In volume one of the *American Law Review* two other anonymous reviews by Holmes were published, on Taylor's *Manual of Medical Jurisprudence* and Bennett and Heard's *Leading Criminal Cases*. Of the other articles during those apprenticeship years he reviewed Judge Redfield's edition of Justice Story's *Commentaries on Equity Jurisprudence* and Benjamin *On Sales*, and for the issue of April 1868 he drafted a long descriptive account of the impeachment proceedings against President Andrew Johnson. The note on the Johnson proceedings was in the nature of a report, not an editorializing essay. But Holmes expressed dissent to Chief Justice Chase's apparent indication that the President could be impeached for his refusal to observe the provisions of a statute the Supreme Court had determined unconstitutional. Holmes wrote that "when the Supreme Court of the United States had declared an act unconstitutional, every department of government was bound to respect their decisions."⁴⁸

44. P. 264.

45. Stephen's famous book, *A General View of the Criminal Law*, was published originally in 1863.

46. 1 AM. L. REV. 375, 376 (1867). That January 1867 issue of the *American Law Review* contains among its pages a long essay on *Theories of Reconstruction* and a biographical note on the famous Luther Martin of Baltimore. *Id.* at 238, 273.

47. P. 268.

48. Pp. 279-80. 2 AM. L. REV. 547, 565 (1868). Holmes returned to the Johnson proceedings in the next issue. *Id.* at 747.

Howe's first volume ends in 1870, when Holmes has opened his own law office with his younger brother as his associate, when he has assumed the co-editorship of the *American Law Review*, when he has been named University Lecturer on constitutional law in the Harvard College, and he has begun his work as editor of the twelfth edition of Kent's *Commentaries*. Understandably his friend, John C. Roper, wrote their mutual friend William James that "he had never known of anyone in law who studied anything as hard as Wendell" to which James made the laconic reply that "such devoted energy 'must lead to Chief Justice, U. S. Supreme Court.'"⁴⁹

W. HOWARD MANN†

THREE HUMAN RIGHTS IN THE CONSTITUTION. By Zechariah Chafee, Jr. Lawrence, Kansas: University of Kansas Press, 1956. Pp. 245. \$4.00.

Zechariah Chafee died on February 8, 1957. His long and rich life had been dedicated to the promotion of human freedom. Beginning with *Freedom of Speech*, published in 1920, a long series of expositions as well as exhortations on the subject of civil liberty had issued from his pen. In more recent years, his tenure as University Professor at Harvard University permitted him to focus his entire efforts and energies on the topic he considered so supremely important. We owe to this period the three-volume collection of *Documents on Fundamental Human Rights*¹ and the sensitive evaluation of *The Blessings of Liberty*.²

Chafee had increasingly concerned himself with the historic roots of human rights and in 1951-52 he availed himself of two lectureships to expound some of the features of the past which he believed to be meaningful to the present. The first of these two series of talks was delivered at Boston University and has been published under the title *How Human Rights Got Into the Constitution*.³ The present volume is an expansion of the Judge Nelson Timothy Stephens Lectures, delivered at the University of Kansas in 1952. Taken together, the two volumes cast a significant light on the human rights aspects of the Federal Constitution itself.

49. Pp. 273-4.

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1. Harvard University Press, 1951, 1952.

2. J. B. Lippincott Co., 1956.

3. Boston University Press, 1952. See 6 WESTERN POLITICAL QUARTERLY 835 (1953).