OLIVER WENDELL HOLMES, JR.: THE JUDGE AS CELEBRITY

By David J. Seipp *

Note: In March 2006 the Supreme Court Fellows Program hosted a panel discussion at Boston University School of Law entitled The Path of the Law in 2006 - Reflections on Justice Oliver Wendell Holmes. The evening began with BU Law Professor Gerry Leonard reading aloud key excerpts from The Path of the Law. The venue was ideal; prior to its publication in the Harvard Law Review, The Path of the Law was first delivered as a speech at BU Law in 1897 to dedicate the law school’s new building, Isaac Rich Hall.

Professor Leonard’s reading was followed by prepared remarks on the relevance of Justice Holmes’s seminal writing for lawyers, judges and scholars today. The judicial perspective was provided by Justice Gary Katzmann of the Massachusetts Appeals Court. Professor David Seipp, who has written extensively on Holmes, offered additional insights, which are reproduced below. The presentations led to a lively audience Q&A with the panelists.

The event was one of several in Boston in which the 2005-06 Supreme Court Fellows participated. Other highlights included a series of substantive meetings on judicial management and related issues with 11 members of the state and federal judiciary. The fellows also were provided with guided tours of the John Joseph Moakley federal courthouse and the newly-restored John Adams state courthouse, courtesy of the Discovering Justice educational program.

Note written by Dr. David L. Nersessian, Fellow - Supreme Court of the United States (2005-06)

Oliver Wendell Holmes, Jr., whom we remember at this event as the author of “The Path of the Law,” was asked to give that speech here at Boston University in 1897 not because he was a state appellate judge of 14 years’ standing, but because he was famous. Oliver Wendell Holmes, Jr., couldn’t help it. He was born famous. He was the son and namesake of his famous father, and all through our Holmes’s long and illustrious life he was not as well known as his father was. Holmes Senior was a medical doctor, public health reformer, and one-third of the Harvard Medical School faculty, and was much more widely known for his literary merits as a comic poet, droll essayist, and humorous columnist in the pages of the Atlantic Monthly. Everybody knew “The Wonderful One-Hoss Shay,” that savage parody on the collapse of Calvinism. Everybody read “The Autocrat of the Breakfast
A Letter from the President

This past December marked not only the calendar year but also the end of "era" in Supreme Court research. I hasten to assure you that many scholars are still pursuing research on various topics relating to Supreme Court history. What I allude to is the successful completion of the Society's Documentary History Project. The manuscript for the eighth and final volume of the series published as the Documentary History of the Supreme Court: 1789-1800 was submitted to the printer in December 2006.

This hard work Project was undertaken by the Society — then a fledgling historical organization — in the third year of its existence and it became a principal area of focus and the premier research arm of the Society for 30 years. Dr. Maeva Marcus, who has been the project's director and principal editor during the entire period, received permission to retire last December.

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The development of the Documentary History Project involved the acquisition of artifacts, memorabilia, and other materials related to the history of the Supreme Court and its members. These items are often used in exhibits by the Court.

The Society accepts a life of classroom teaching and authorship of articles and treatises. Ask yourself how much impact Holmes would have had if he had kept his professorialism, if his ideas had sparked from the academy rather than from the bench. (Christopher Tiedeman, the law teacher who put him in the Civil War hospital as "My Hunt of the War," 1861-1865.)

Consider his situation in 1882. The big book, The Common Law, has been out for a year. Harvard Law School had offered Holmes a professorship (just like dad's). Holmes accepted a life of classroom teaching and authorship of articles and treatises. Ask yourself how much impact Holmes would have had if he had kept his professorialism, if his ideas had sparked from the academy rather than from the bench. (Christopher Tiedeman, the law teacher who put him in the Civil War hospital as "My Hunt of the War," 1861-1865.)

I think I can demonstrate that Holmes saw the role of a state appellate judge, a role that would make him a leading historian and scholar of the law in the England.

The volume is available for purchase from the Society at www.supremecourthistory.org.
Oliver Wendell Holmes—continued from page 3

tive enterprise, destined soon to be forgotten in name, and having an effect only in the incremental improvement of judicial reasoning that he would add to what judges had done before.

Here are Holmes’s words in speeches given to lawyers and about laws between 1884 and 1890. See if you don’t may drink the bitter cup you have worked alone — when you have felt around you a of heroism, may wear his the dying man, and in hope and in despair have trusted to prison — the subtle rapture of a postponed power, which to his prophetic vision is more real than that which

Holmes was a state supreme court associate justice. He was the sort of state court judge who kept a stock of studio photographs of himself to present to callers, and court. He was the sort of state court judge who kept a stock
did not ask but I think of the mighty whole, and say to myself. He has done his part to help the mysterious growth of the world along its inevitable lines toward its unknown end.” (Daniel S. Richard, personal address, Oct. 7, 1896).

[3] Someone that a lawyer has to remember is that if he greater part of the work of the world is anonymous... We owe vastly more to the forgotten than to the remembered. [4] On every side we live in a world of great minds, work a thousand-fold more important and better remembered as we take it for granted every day, than all the books that were ever written. Yet the names of those who did this work are forgotten. Who invented the wheel, or ships, or the first used a future tense or spoke of conscience or the sinsfold more important

He knew that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his isolation. I have felt horribly alone. . . . [T]he real danger is that when one has been for a moment in the lead, he may not be famous for anything in particular. The sense of belonging to a great law school, a way out, at least according to my students. Holmes did not say how to frame the law or how to do anything he wrote as a state appellate judge, what seems so clear to us today, that politics might be a quaint old half-remembered or unremembered name. Here are Holmes’s words in speeches given to lawyers — "You argue a case in Essex. And what has the world outside to do with that, you say. Yet you have confirmed or modified or perhaps have suggested for the first time a principle which will find its way into the text-books and so into the thought of the common law, and so into its share in governing the conduct of civilized men. Our every act rings through the whole world of being. I think that we need to bear in mind this high, universal significance of our work. . . .

The thought of it is our highest inspiration. For it bids us count for as much as we can in shaping what is to come. It is also our severest criticism.” (Remarks to the Essex Bar, undated, perhaps December 1884 or later)

“Of course, the law is not the place for the artist or the poet. The poet. The law has the calling of thinkers. . . . I say — and I say no longer with any doubt — that a man may live in the law as well as elsewhere . . . that there as well as elsewhere he may wreak himself upon his work, become the bitter cup of & heroism, may wear his

when he wrote "The Path of the Law." (1) His rapturous romantic infatuation with the summer of 1896, even (8) an 1896, the rapturous romantic infatuation with Elinor who never heard of him. Who invented the wheel, or ships, or the first used a future tense or spoke of conscience or the sinsfold more important

... [T]he makers of the very framework and tissue of our life are unknown. . . . A great many of the original contracts at the beginning of a century put his finger upon an electric button and at its closing a hundred years later, his thoughts become a force and men who never heard of him begin to move according to his command. . . . [O]ur influence is upon those who have no law before us is not measured by their familiarity with our names. We lawyers may take courage then. We are shaping the future . . . .

[5] (Anonymity and Achievement, a speech to the alumni of Boston University Law School, June 3, 1896)

"The glory of lawyers ... is more corporate than individual. Our labor is an endless organic process. . . . When you hear that one of the builders has ceased his toil, I do not ask "[5] (Anonymity and Achievement, a speech to the alumni of Boston University Law School, June 3, 1896)

The writer of these passages was desperate to convince himself that it did not matter that his name was going to be forgotten. He was a state supreme court associate justice. The world would no longer be in the Massachusetts Reports for his years on the bench. "Holmes, J. sat at the beginning of one thousand thirty state judicial opinions. But he knew that his opinions would be replaced by a new generation ofsimilarly unsympathetic judges. He lived for 30 years, and just like every one of his colleagues on the state bench he would be a quaint old half-remembered or unremembered name. So Holmes set out to be famous in his spare time, outside of court. He was the sort of state court judge who kept a stock of studio photographs of himself to present to callers, and had Little Brown & Co. publish a slim volume of his selected speeches, and accepted invitations to speak at dedications of new law school buildings. Today, he would have had a personal publicist and would charge a speaker’s fee.

I wrote in 1997, for the centenary of Holmes’s speeches, that Holmes was in the throes of what we would now call a classic “mid-life crisis” when he wrote “The Path of the Law.” (1) His rapturous romantic infatuation with Elinor who never heard of him. Who invented the wheel, or ships, or the first used a future tense or spoke of conscience or the sinsfold more important

[6] Id. at 28, 29-30, 30:31
[7] Id. at 25, 27-29
[8] Id. at 39, 10:5-6

... [T]he real danger is that when one has been for a moment in the lead, he may not be famous for anything in particular. The sense of belonging to a great law school, a way out, at least according to my students. Holmes did not say how to frame the law or how to do anything he wrote as a state appellate judge, what seems so clear to us today, that politics might be a quaint old half-remembered or unremembered name. Here are Holmes’s words in speeches given to lawyers — "You argue a case in Essex. And what has the world outside to do with that, you say. Yet you have confirmed or modified or perhaps have suggested for the first time a principle which will find its way into the text-books and so into the thought of the common law, and so into its share in governing the conduct of civilized men. Our every act rings through the whole world of being. I think that we need to bear in mind this high, universal significance of our work. . . .

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President Theodore Roosevelt was reluctant to appoint Holmes because of Holmes' critical assessment of Chief Justice John Marshall.

Holmes was nearly done in by his need to be famous. His next big speech after "The Path of the Law," one for the centenary of John Marshall's appointment as Chief Justice of the United States, was as irreverent and shocking in its own way as "The Path." Holmes suggested that Marshall was no genius, just an ordinary man who was at the right place at the right time. Theodore Roosevelt was so shocked by Holmes' irreverence that he was disposed to ignore his friend Henry Cabot Lodge's determined insistence to get Holmes onto the U.S. Supreme Court. The chair of the Senate Judiciary Committee, who was also the senior senator from Massachusetts, wanted his own nephew for the seat. Senator Hoar agreed with what some of the newspapers were saying, that Holmes was more literary than legal, more ornamental than solid. But Holmes made it to Washington. Maybe there on the U.S. Supreme Court Holmes's need to be famous, to live up to his father's name, provoked him to dissent a bit more frequently and a lot more brilliantly than he otherwise would have done. It is odd to say that Holmes could be wrong about something, but I think that his name will be remembered long after we stop marveling to the measure of his thought.

*David Seipp is a Professor of Law at Boston University School of Law, where he has taught American and English legal history, property, copyright, intellectual property and other courses. He is currently compiling an extensive computer database indexing more than 20,000 records and paraphrases of English law from 1268-1535.

**BELLE MEADE PLANTATION AND HOWELL JACKSON**

By Kathleen Shurtleff*

The estate grew from the modest tract purchased by John Harding. Initially, Harding farmed the property and boarded horses for his neighbors, including Colonel Andrew Jackson, who later attained fame as the successful General of the Battle of New Orleans and President of the United States. By 1816, Harding was successful enough to venture into the profitable, but sometimes risky, occupation of breeding thoroughbreds. A good businessman, Harding's expanded his property holdings to include large tracts of land in Arkansas and Louisiana. His son, William Giles Harding, inherited the property. Reflecting the affluence of the vastly expanded estate and dramatically improved financial situation, he designed and built a grand and stately house. Completed in 1853, the mansion is a classic example of Southern Greek Revival Ante-Bellum architecture. The new house was twice the size of the previous residence and included a front porch with columns of limestone. The property contained a number of dependencies, including the original log cabin built in 1790 as well as stables, a carriage house and housing for the slaves.

The younger Harding was extremely successful. He was a champion of Southern secession to which he contributed $500,000. In terms of the relative value of money in 1860, that $500,000 was an enormous sum. After the war broke out, Union troops occupied Nashville in February 1862. In retaliation for his support of the Confederacy, Harding was arrested and imprisoned at Fort Mackinac, Michigan, where he remained until his wife Elizabeth could win his release in September of that year. Belle Meade became the headquarters of the Confederacy General James R. Chalmers. In 1864, Union forces attacked Belle Meade and a skirmish ensued.

Harding had two daughters who married the two Jackson brothers, Howell, and William Hicks. After the War, William

Continued on page 8

By the end of the 19th century, the 600-acre deer park at Belle Meade was a favorite destination for Society hunting parties and excursions.

Continued on page 10
Belle Meade—continued from page 9

in 1859. An ardent supporter of the Confederacy, he served the Confederate government as a receiver of sequestered property until the fall of Memphis in 1862 caused him to flee to Georgia with his family. He remained there for the duration of the war, returning to Tennessee after securing a pardon from President Andrew Johnson in 1866. Howell and Sophia were the parents of six children, two of whom died in infancy.

Sophia died in 1873 during an epidemic of yellow fever. Thirteen months later, Howell Jackson married Mary Elizabeth Harding of Belle Meade. Jackson’s fortunes changed forever because of his association with the Harding family, not only monetarily, but also politically, and Jackson’s subsequent career became politically oriented. He was appointed to the court of arbitration for west Tennessee on two occasions. He was elected to the state legislature and was serving there in 1881 when he was elected to serve in the U.S. Senate. Jackson served in the Senate from 1881 to 1886, focusing on measures to restrict Chinese immigration, civil service reforms, and the creation of the Interstate Commerce Commission. He served on several Senate Committees, including Pensions and the Judiciary. While a Senator, he introduced a bill to amend the federal judiciary. His bill outlined “the appointment of two additional circuit judges in each circuit, established a Court of appeals, to consist of three circuit judges, and abolished the Circuit Courts, transferring all their jurisdiction and pending business to the existing District Courts.”

Jackson died in 1886 before his proposed judicial reform bill could be passed, he resigned his appointment to the Senate to accept an appointment from President Grover Cleveland to serve as a judge on the 6th federal Circuit Court. The appointment to the Circuit Court coincided with the completion of a mansion designed for Howell and Mary built on the grounds of the Belle Meade estate. The new home, also an imposing mansion, featured handmade interior brick walls 12 to 14 inches thick and was built in the more current Victorian style. It was named West Meade.

Jackson served on the Circuit Court from 1886-1893 at which time he was appointed to the Supreme Court of the United States to fill the vacancy created by the death of Jacob C. Larnan, another former Confederate. He took his seat on March 4, 1881. At the time of his appointment to the Supreme Court, a biography of his life was published. In it, his father, Dr. Alexander Jackson, who had died in 1879 was quoted as saying “I will die happy if I could see Howell upon the Supreme Bench. He was born for it. He will get on and do well anywhere, but that is the place he was born for.” So while Jackson did not live to see it, his fondest wish did come true.

However much Howell Jackson might have been suited to the Supreme Court, his active service lasted little more than fifteen months, cut short by his ill health and subsequent death in 1895. During that time, however, he wrote sixty-four majority opinions, many dealing with patent problems. He also authored four dissents.

Despite the brevity of his service, he participated in three of the most important cases of the late 19th century. In two, United States v. E. C. Knight and In Re Debs, Jackson voted with the majority. The Knight case involved the first attempt by the federal government to enforce the Sherman Anti-Trust Act. The Court’s decision read the act narrowly and prohibited the prosecution of the Knight Company, a major sugar producer. The Debs case involved the contempt of Court trial of labor leader Eugene Debs who had raised habeas corpus issues regarding the legality of his sentence. The Court’s action permitted the six-month sentence to stand.

The third major case was Pollock v. Farmers’ Loan & Trust Co., which involved issues concerning the constitutionality of the income tax. Jackson had exercised a majority opinion in favor of the tax, voting with the majority. The case was heard twice, it is generally referred to as the Income Tax Cases.

Jackson had contracted tuberculosis shortly after he was appointed to the Court. This prevented his participation in the first hearing of the Pollock case. The issues presented in Pollock were legally complex, and the Court divided them into three parts. On part three—whether an income tax was an unconstitutional tax—the Court deadlocked 4-4. It was this tie vote that necessitated a rehearing. Jackson, though severely ill, traveled to Washington in May, 1895, to participate in the case. Great attention was focused on him and his probable inclusion in the case.

On the day the opinion was handed down, the Court ruled in a 5-4 decision against the constitutionality of the tax. A contemporary observed that Jackson “… with hollowed cheeks and sunken eyes, put his shoulders barely visible above the massive bench behind which he sat …” delivered his dissenting opinion over a forty-five minute period, punctuated by bouts of coughing. Jackson’s comments were very pointed, characterizing the Court’s judgment as “the most disastrous blow ever struck at the constitutional powers of Congress.” Henry Billings Brown, John Marshall Harlan and Edward Douglass White also dissented in the case. Since Jackson who had not participated in the earlier hearing, was a dissenter in the second, it is clear that one of the earlier dissenting Justices had changed his vote. The record does not delineate whose vote was changed and scholars have speculated about this ever since.

Less than three months after the opinion was handed down, Jackson died at West Meade, leaving his widow and children to probate the will he had written only that year. Shortly before he joined the Supreme Court, Jackson sold his share of the prosperous enterprise to his brother. But Howell Jackson died possessed of extensive assets extending beyond the 3,000 acre West Meade estate (Howell had received 2600 of those acres from his father-in-law at the time of his marriage in 1879). By the time of his death, he owned a residence in Washington, DC at 1311 K Street, NW, just a few blocks from the White House, valued at $50,000. Further real property included a farm in Jackson, Tennessee where he also had an interest in a wool mill. In addition, he owned a residence in Memphis. Other assets included stock in Nashville’s Richland Turnpike Co., and enough cash to leave each of his three children by his second marriage $5,000 in cash.

Jackson was buried at West Meade until his death in 1913. She bequeathed the estate to their three children and it remained in the hands of descendants until its sale along with 1,750 acres.

Famous guests entertained in the West Belle Meade included presidents Grover Cleveland in 1887, Theodore Roosevelt and William Howard Taft.

*Kathleen Shurtleff is the Assistant Director of the Supreme Court Historical Society, and the managing editor of the Quarterly newsletter. Note: The Society would like to thank John Lamb, Curator of Belle Meade Plantation, for providing the photos used in this article.
New Members—continued from page 11
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Patrick Holden, Salt Lake City
Daniel G. Worthington, Draper

VERMONT
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David Gartenstein, Brattleboro
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VIRGINIA
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William Crawford, Fairfax
Thomas Demharter, Lorton
Amy Devine, Alexandria
Gil Fegley, Vienna
Kristina Frank, Ashburn
Jetti Gibson, Richmond

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Elder Granger, Fort Belvoir
JOANNE GRIMES, Alexandria
LINDSAY C. HARRISON, Arlington
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Camille Hodges, Clifton
Douglas Jordan, Alexandria
Jefferson & Alison Kaster, Alexandria
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