

Part I On Life and War

Today it is easy to have striking assessments of Oliver Wendell Holmes Jr. But could one have sensed such things by tracing back to the early arc of his life? I think so. There were many signs that a mantle of greatness would one day be reserved for this grandson of a revered minister on his father's side and the chief justice of the Massachusetts Supreme Judicial Court on his mother's side. Born into Boston's upper-crust society on March 8, 1841, young Wendell was the son of Dr. Oliver Wendell Holmes Sr. (an outgoing physician, Harvard professor, inventor, rhetorician, poet, and famed writer) and Amelia Jackson Holmes (a self-effacing affectionate woman, also an abolitionist).¹ Ever since his Boston birth, young Holmes showed signs of pursuing the Puritan concept (he was of Calvinist heritage) of a calling. After studying Greek, Latin, German, French, ancient history, and math in

¹ The senior Holmes was one of the founders of *Atlantic Monthly*. His published works included *The Autocrat at the Breakfast Table* (1858) and a biography of Ralph Waldo Emerson (1885). Such writings, including his essays and poems, made him one of the most famous writers of his time. See G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York: Oxford University Press, 1991), at 9–14. He was also a famous physician. See *Oliver Wendell Holmes: Physician and Man of Letters*, eds. Scott H. Podolsky and Charles S. Bryan (Sagamore Beach, MA: Science History Publications, 2009). For a thoughtful account of the relationship between Dr. Holmes and his son, see G. Edward White, “Holmes’s ‘Life Plan’: Confronting Ambition, Passion, and Powerlessness,” 65 *New York University Law Review* 1409, 1410–29 (1990). In contrast to his rather assertive and loquacious father, Holmes’s mother was a quiet and mild-mannered woman best known for being a devoted mother and wife. See *Justice Oliver Wendell Holmes: Law and the Inner Self*, *supra*, at 14–17. Holmes had a younger sister (Amelia) and brother (Edward) who died at comparatively young ages (thirty-eight and forty-six, respectively) and who didn’t seem to figure much in his life.

a private school, the scholastic lad entered Harvard College in the autumn of 1857 – this was the college of his father and his ancestors.²

It was in that peculiar atmosphere, the world of the Boston Brahmin as his father coined it, that Holmes was exposed to great men and great ideas. One of those men was Ralph Waldo Emerson (1803–82), the famed essayist, philosopher, poet, and Harvard professor. During Holmes's first year at college, his parents gave him a gift of five volumes of Emerson's works. In Emerson, Holmes found an inspirational and rebellious sentiment then to his intellectual liking: "Whoso would be a man," Emerson wrote, "must be a nonconformist."³ The man and his work impressed the young Holmes, so much so that he published a piece in *Harvard Magazine* in 1858 that tracked one of Emerson's essays. A few years later, Holmes wrote another essay, this one on Plato.⁴ What intrigued Wendell most about the great Greek philosopher was his teacher – Socrates. The ever-skeptical, pipe-smoking young Holmes was drawn to this man whose "peculiar power lay not so much in a profound perception of truth as in a natural spirit of argumentative questioning," a man who was likewise incredulous toward "the unscientific use of language," and a man who to his dying moments had "no clear idea" of any categorical truth. Holmes admired Socrates and his "keen and caustic spirit of enquiry," a trait he found missing in Plato.⁵ Although he found some admirable traits in the great Greek, Holmes's newfound love for science and scientific methods made him rather critical of the "unscientific" philosopher who in his view was unduly charmed by "immutable ideas" and thus unmindful of the importance of "mutable matters." When the proud student shared his essay with Emerson, the dedicated Platonist replied: "When you strike at a king, you must *kill* him."⁶

² Not long before that, on March 6, 1857, the Supreme Court rendered its decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

³ Ralph Waldo Emerson, "Self-Reliance," in *Essays, Orations and Lectures* (London: William Tegg, 1848), at 28. On Emerson's influence on Holmes, see Louis Menand, *The Metaphysical Club: A Story of Ideas in America* (New York: Farrar, Straus & Giroux, 2001), at 24–26.

⁴ "Plato," in *The Collected Works of Justice Holmes*, ed. Sheldon M. Novick (Chicago: University of Chicago Press, 1995), at 1:145–53.

⁵ *Ibid.* at 146, 147. Holmes also translated and published the final portion of *The Apology of Socrates*. See *ibid.* at 142.

⁶ See *Justice Oliver Wendell Holmes*, *supra* note 1, at 35–43 (italics in original). See also Liva Baker, *The Justice from Beacon Hill* (New York: HarperCollins, 1991), at 89–90. From Emerson, Holmes learned other lessons, including the idea of the "power of the self to shape and even transcend experience." *Justice Oliver Wendell Holmes*, *supra* note 1, at 43.

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Such admonitions, though duly noted, did not stop Wendell from brandishing his editorial sword while he served as editor of the *Harvard Magazine*. There were, for example, editorials insisting on “free will in matters of religion.” To that end, Holmes lent his name to the following line, one that drew disfavor among a faculty already fed up with his disrespectful ways: “A hundred years ago we burnt men’s bodies for not agreeing with our religious tenets; we still burn their souls.”⁷ These kinds of statements, along with others on everything from women in college to abolition, further tested the patience of the faculty and college president, who finally contacted Dr. Holmes in an attempt to reign in the freethinking young editor.

Despite the cerebral joys experienced at the feet of a few men like Emerson, Holmes found relatively little at Harvard to stimulate his inquisitive mind. By and large, the college and its faculty were too staid in tradition, dogma, and Christian truth. At a time when the whole world seemed up for grabs, and when all previous “human understanding of the universe was changing as scientists jettison[ed] centuries-old traditions and expos[ed] the futility of metaphysical speculation,”⁸ most of Wendell’s professors championed formalism, dogmatism, and Christian truths. When Charles Darwin’s *The Origin of Species* (1859) was released, it was seen more as heresy than science in many Harvard quarters.⁹ Holmes’s philosophy professor dismissed it outright; his chemistry professor lamented its likely impact on undergraduate morals; and the eminent paleontologist and glaciologist Louis Agassiz, who oversaw the Lawrence Scientific School, “publicly disavowed Darwin’s disturbing conclusions.” Only Holmes’s botany professor, Asa Gray, sided with Darwin.¹⁰ For someone who was invigorated by the intellectual freedom endorsed by Emerson and the skepticism practiced by Socrates, science’s new day was an exciting time – but it was not a time then in sync with Harvard’s curriculum and culture. And Holmes knew it.

⁷ Quoted in *Justice from Beacon Hill*, *supra* note 6, at 88. Decades later a similar passage found its way into an opinion written by Justice Louis Brandeis and joined in by Holmes: “Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.” *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

⁸ *Justice from Beacon Hill*, *supra* note 6, at 83.

⁹ See *Justice Oliver Wendell Holmes*, *supra* note 1, at 41 (discussing traditional versus new sciences). In later years, Professor White notes, “Holmes would continue to employ ‘science’ in both its [traditional] systematic and its [modern] empiricist guises in his mature scholarship. He would also merge it with historicism.” *Ibid.* at 42.

¹⁰ See *Justice from Beacon Hill*, *supra* note 6, at 83.

“After three years of uneven attention to his studies and occasional disciplinary problems . . . , Holmes finally, in the spring of his senior year, found a subject that inspired him. Unfortunately, from the perspective of his father, the subject had nothing to do with his education. It was the issue of slavery and the coming of the Civil War that captured Holmes’s attention.”¹¹ Both in public conversation and in his writings for the *Harvard Magazine*, Wendell became more outspoken. “Do men own other men by God’s law?” he asked in one article. In more and more ways, he was becoming not only an abolitionist but also an Emersonian abolitionist.¹² By his senior year he had already participated in antislavery discussion groups and had joined in antislavery rallies.

Holmes’s abolitionist enthusiasm and that of his colleagues was not, however, then the norm at Harvard. For one thing, Louis Agassiz’s public statements about the inferiority of blacks were being used, particularly in the South, as a defense of pro-slavery positions. And though Dr. Holmes was not a defender of slavery, he both knew and befriended Agassiz and welcomed compromise with the South.¹³ Moreover, the elder Holmes was “not particularly supportive of the abolitionist movement to outlaw slavery, which had sprung up in the Boston area in the late 1850s and early 1860s. Holmes Sr. felt no particular outrage at those southern states that practiced slavery, but Amelia Jackson did, and abolitionism became an important cause for Wendell Holmes and his mother.”¹⁴ So, in April 1861, Holmes and some of his Harvard classmates joined the Fourth Battalion of the Massachusetts Volunteer Infantry without bothering to notify Harvard. His father was unhappy. When the Fourth Battalion dismantled not long afterward, Holmes sought to return to Harvard.¹⁵ To that end, Dr. Holmes

¹¹ G. Edward White, *Oliver Wendell Holmes, Jr.* (New York: Oxford University Press, 2006), at 10.

¹² Oliver Wendell Holmes, “Books,” 4 *Harvard Magazine* 408, 410 (1858). See also *Metaphysical Club*, *supra* note 3, at 25. According to Menand, Holmes was, “in the context of his times, a student radical.” *Ibid.* at 26. Then there was Holmes’s personal defense of Wendell Phillips, the fiery abolitionist who was Dr. Holmes’s cousin. See Irving H. Bartlett, *Wendell Phillips: Brahmin Radical* (Boston: Beacon Press, 1961), at 225–35; James Brewer Stewart, *Wendell Phillips: Liberty’s Hero* (Baton Rouge: Louisiana State University Press, 1986), at 209–24.

¹³ See *Justice from Beacon Hill*, *supra* note 6, at 94; Edward Lurie, *Louis Agassiz: A Life in Science* (Baltimore: Johns Hopkins University Press, 1988), at 194, 202–03, 204, 227–28, 235, 305–06. His views on the inequality of the races notwithstanding, Agassiz was a committed defender of the Union.

¹⁴ *Oliver Wendell Holmes, Jr.* *supra* note 11, at 10.

¹⁵ See M. A. DeWolfe Howe, *Holmes of the Breakfast-Table* (New York: Oxford University Press, 1939), at 101–04 (quoting and discussing letter from Harvard President Cornelius Fenton to Dr. Holmes on the need of Wendell to satisfy his examination requirements). (The author of this book was Mark DeWolfe’s father.)

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“helped persuade the Harvard authorities to allow Wendell and several of his volunteer classmates – who had found, to their dismay, that the Fourth Battalion was not going to see any military action outside of Boston – to return to Harvard and take their examinations.”¹⁶

In July 1861, Holmes and his colleagues received their diplomas from Harvard.¹⁷ In an autobiographical sketch for the college album, Holmes wrote: “[A]t present I am trying for a commission in one of the Massachusetts regiments . . . and hope to go south before very long. If I survive the war I expect to study law as my profession or at least for a starting point.”¹⁸ Shortly afterward, the skinny, long-bodied, and bookish young man enlisted for a three-year commission in the Twentieth Regiment of the Massachusetts Volunteer Infantry.¹⁹ “[I]n my day,” Holmes recalled sixty-five years later, “I was a pretty convinced abolitionist.” While his father wrote poems of peace and sought compromise,²⁰ a far more resolute Wendell went off to war to fight the good fight. His life would never be the same.



*As you go through the woods you stumble constantly,
 and, if after dark, as last night on picket, perhaps
 tread on the swollen bodies already fly blown
 and decaying, of men shot in the head,
 back or bowels – many of the wounds
 are terrible to look at . . .*

– Oliver Wendell Holmes Jr.²¹

¹⁶ Oliver Wendell Holmes, Jr., *supra* note 11, at 11; *Justice Oliver Wendell Holmes: Law and the Inner Self*, *supra* note 1, at 44.

¹⁷ See *Justice Oliver Wendell Holmes: Law and the Inner Self*, *supra* note 1, at 4, 491, n. 1 (noting that the Harvard commencement was in July, not in June as commonly thought); accord, Mark DeWolfe Howe, *Justice Holmes: The Shaping Years – 1841–1870* (Cambridge, MA: Harvard University Press, 1957), at 77.

¹⁸ *Class Book of 1861 Album*, at 329 (Harvard Archives). The sketch is reproduced in full in Frederick C. Fiechter Jr., “The Preparation of an American Aristocrat,” 6 *New England Quarterly* 3 (1933).

¹⁹ See George A. Bruce, *The Twentieth Regiment of Massachusetts Volunteer Infantry, 1861–1865* (Boston: Houghton, Mifflin, 1906); Richard F. Miller, *Harvard’s Civil War: A History of the Twentieth Massachusetts Volunteer Army* (Hanover, NH: University Press of New England, 2005).

²⁰ Letter from OWH to Harold Laski, November 5, 1926, in *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski*, ed. Mark DeWolfe Howe (Cambridge, MA: Harvard University Press, 1953), at 2:893. On Dr. Holmes, see Edwin P. Hoyt, *The Improper Bostonian: Dr. Oliver Wendell Holmes* (New York: William Morrow, 1979), at 143–51; Oliver Wendell Holmes, “The Flower of Liberty,” 8 *Atlantic Monthly* 550 (November 1861).

²¹ Letter from OWH to parents, June 2, 1862 (“written on field of battle”), reproduced in Mark DeWolfe Howe, ed., *Touched with Fire: Civil War Letters and Diary of Oliver Wendell Holmes, Jr.* (New York: Fordham University Press, 2000), at 51.

To get a sense of how the Civil War influenced Holmes, both personally and philosophically, one must have some idea of the enormity of that war. First, there is its numerical toll, which is hard for a modern mind to comprehend. Professor Drew Gilpin Faust offers a poignant summary:

In the middle of the nineteenth century, the United States embarked on a new relationship with death, entering into a civil war that proved bloodier than any other conflict in American history, a war that presaged the slaughter of World War I's Western Front and the global carnage of the twentieth century. The number of soldiers who died between 1861 and 1865, an estimated 620,000, is approximately equal to the total American fatalities in the Revolution, the War of 1812, World War I, World War II, and the Korean War combined. The Civil War's rate of death, its incidence in comparison with the size of the American population, was six times that of World War II. A similar rate, about 2 percent, in the United States today would mean six million fatalities.²²

Beyond the staggering body count, there was the horrifying spectacle of death that Holmes and other Civil War soldiers experienced firsthand. Ambrose Bierce, who endured four years of combat as a Union soldier, offered a moving account of what his eyes beheld on a battlefield similar to the ones on which Holmes fought:

Men? There were enough; all dead, apparently, except one, who lay near where I had halted my platoon . . . a Federal sergeant, variously hurt, who had been a fine giant in his time. He lay face upward, taking his breath in convulsive, rattling snorts, and blowing it out in sputters of froth which crawled creamily down his cheeks, piling itself alongside his neck and ears. A bullet had clipped a groove in his skull, above the temple; from this the brain protruded in bosses, dropping off in flakes and strings. . . . One of my men, whom I knew for a womanish fellow, asked if he should put his bayonet through him. Inexpressibly shocked by the cold-blooded proposal, I told him I thought not; it was unusual, and too many were looking.²³

From October 1861 through July 1864, Holmes lived through this “harvest of death,” as it was called. He saw not only musket bullets and cannon shrapnel tear into his friends’ flesh, but he also witnessed piles of

²² Drew Gilpin Faust, *This Republic of Suffering: Death and the American Civil War* (New York: Vintage Books, 2008), at xi.

²³ Ambrose Bierce, “What I Saw at Shiloh,” in *Phantoms of a Blood-Stained Period: The Complete Civil War Writings of Ambrose Bierce*, eds. Russell Duncan and David J. Klooster (Amherst: University of Massachusetts Press, 2002), at 103.

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limbs stacked next to surgeons' tables and beheld the specter of numerous corpses dumped and piled into trenches. And then there was the crisis of meaning – what grand principle (divine, philosophical, or political) could begin to justify the carnage of war? What conceivable purpose could explain the staggering costs of war? It is against that backdrop that we come to the Holmes who donned a soldier's uniform before he donned a judge's robe. The soldier's experience would shape the judge's jurisprudence.

In his book *The Mind and Faith of Justice Holmes*, Max Lerner made several telling points about the impact the Civil War had on the mind of Holmes. "The experience of the Civil War was the maturing force in Holmes's life," wrote Lerner. "From it derive four of the great elements in his thinking." They were the following:

- That "life is risk, that our fates depend often on a throw of dice, and that law must embody this aleatory quality,"
- That "life is battle, and the best meaning of effort comes out under fire,"
- That "one must be a good soldier with 'a splendid carelessness for life' in a cause," and
- That "one must have a fighting faith – that 'to act with enthusiasm and faith' is the condition of acting greatly."²⁴

These elements, as we will see, play out time and again in Holmes's writings – letters, articles, books, and judicial opinions – in ways at once rhetorically powerful and analytically forceful. The idea of struggle, rooted in the blood-soaked fields of battlegrounds seeded by human casualties, became central to his thought, including his thoughts on freedom of expression. At first, the struggle was seen through a romantic lens – the rush of going off to war with friends to fight for a noble cause and to do one's duty proudly. "Our hearts were touched by fire," Holmes later recalled. And then he altered the metaphor but to the same effect: "[W]e have seen with our own eyes . . . the snowy heights of honor. . . ." ²⁵ It was akin to a holy crusade or, as Holmes labeled it, "the Christian Crusade" in defense of "the cause of the whole civilized world."²⁶ That was their creed, and theirs was a noble war fought by honorable and brave men wed to the

²⁴ Max Lerner, *The Mind and Faith of Justice Holmes* (New Brunswick, NJ: Transaction Publishers, 1989), at 5 (bullets added).

²⁵ An address delivered for Memorial Day, May 30, 1884, at Keene, New Hampshire, before John Sedgwick, Post No. 4, Grand Army of the Republic, in *Collected Works of Justice Holmes*, *supra* note 4, at 3:467.

²⁶ Letter from Holmes to Charles Eliot Norton, April 17, 1864, reproduced in part in *Touched with Fire*, *supra* note 21, at 122 n. 1.

highest of principles. It was that faith that made hellish fighting possible. “If one didn’t believe that this was such a crusade,” Holmes wrote, “it would be hard to keep the hand to the sword. . . .”²⁷

And so Wendell, at the age of twenty, went into battle. It began in earnest in October 1861 at a place called Ball’s Bluff,²⁸ where a Confederate ambush took a heavy toll of the 1,700 Union soldiers who faced a barrage of musketry and cannon fire in front of them and a deadly body of bullet-hailed water (the Potomac River) behind them, which made retreating near impossible. Holmes was one of those wounded. The first shot, a spent ball, hit him just below his rib cage, on his belly. “I felt as if a horse had kicked me,” he wrote in his pocketbook diary.²⁹ A second shot struck him, entering his left side and then came out behind the right breast. He thought this was the end, and he was prepared for it. And all of this after but an hour of battle. This time death passed him by – one of his fellow soldiers squeezed the bullet ball from his chest and gave it to him as a battle souvenir. With that spent bullet in his pocket, he returned home to Boston (to 21 Charles Street) to convalesce.

By March 1862, the young man was back in action, now as a captain. He was in Washington for a short while, awaiting his orders. When those orders came, Holmes and his regiment boarded steamers to Hampton Roads, Virginia. There they would join General George McClellan’s army. In the months ahead, Holmes saw more battles, including one at Fair Oaks. It was there that Captain Holmes led his troops into battle with sword and pistol flying. “If I am killed,” he wrote to his parents, “you will find a memorandum on the back of a picture I carry.”³⁰ Once again, there were heavy casualties on both sides, though Holmes survived to fight another day. Shortly afterward, there was an effort to take Richmond, the Confederacy’s capital. The campaign produced more miserable face-to-face fighting and

²⁷ *Ibid.* For one account of Holmes’s civil war years, see Hiller B. Sobel, “The Three Civil Wars of Oliver Wendell Holmes: Notes for an Odyssey,” *Boston Bar Journal*, December 1982, at 13–22; “Part II,” *Boston Bar Journal*, January 1983, at 18–23; “Part III,” *Boston Bar Journal*, February 1983, at 18–25.

²⁸ See Byron Farwell, *Ball’s Bluff: A Small Battle and its Long Shadow* (McLean, VA: EPM, 1990); Joseph Dorst Patch, *The Battle of Ball’s Bluff* (Leesburg, VA: Potomac Press, 1958); *Twentieth Regiment of Massachusetts Volunteer Infantry*, *supra* note 19, at 16–77; *Harvard’s Civil War*, *supra* note 19, at 51–83; Louis-Philippe-Albert d’Orléans, Comte de Paris, *History of the Civil War in America*, ed. Henry Coppée, trans. Louis Fitzgerald Tasistro (Philadelphia: Porter & Coates, 1875), at 1:367–421.

²⁹ Qtd. in *Touched with Fire*, *supra* note 21, at 23. Holmes destroyed the diary, leaving only a few pages and passages.

³⁰ Letter of June 2, 1862, to parents, qtd. in *Justice Holmes: The Shaping Years*, *supra* note 18, at 1:119.

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the specter of soldiers armed with sabers, bayonets, muskets, and cannon, all charging at one another. There was the damp and cold land caked with mud and polluted water, and then there was that “spasmodic pain” caused by dysentery. If a bullet or shell didn’t claim a man’s life, sickness was always there to demand its fatal share. The “immense anxiety,” the unimaginable “hardships,” and the “hard fighting” weighed heavily on the young soldier.³¹ The romance of war faded, particularly when victory eluded them. Try as they did, the Union forces could still not conquer Richmond.

In August, the Peninsula Campaign headed north to defend Washington against Confederate attacks planned by General Stonewall Jackson, or so it was feared. When that threat failed to materialize, Union forces regrouped. At about that time, when he was out on a short leave, Holmes stayed at the National Hotel in Washington, this as the Army of the Potomac prepared for new engagements. On September 7, 1862, Union troops left Washington en masse under the leadership of General McClellan. As the troops moved northward, they were greeted with excited jubilation in some Maryland towns – it invigorated them at a time when defeat seemed entirely possible. Victory was on the Union side as corps commanders like “Fighting Joe” Hooker prevailed, leaving behind a cornfield spotted with dead bodies. “Hooker licked the Rebs nicely,” Holmes wrote home. Hell, however, awaited them. It came in a conflict near Sharpsburg, Maryland. This clash, known as the Battle of Antietam, was fought on September 17, 1862, the anniversary of the signing of the federal Constitution.³²

At first, the assault on the Confederate position seemed successful as Rebel troops began to fall back, but then – as if out of nowhere – Union forces were attacked from the rear. They had walked into an ambush. “Four hours of action . . . left a carpet of blue-clad corpses strewn across the fields” along with a “carpet of butternut and gray-clad corpses in the appropriately named Blood Lane.”³³ The hand of tragedy was a heavy one – the combined casualties for the blue and gray, not counting the missing, for the “twelve

³¹ Letter from OWH to his mother, July 4, 1862, reproduced in *Touched with Fire*, *supra* note 21, at 57.

³² See James M. McPherson, *Crossroads of Freedom: Antietam* (New York: Oxford University Press, 2002), at 102, 104–05; Letters from OWH to parents, September 5 and 17, 1862, in *Touched with Fire*, *supra* note 21, at 61–62.

³³ *Crossroads of Freedom*, *supra* note 32, at 122. See also Francis Winthrop Palfrey, *The Antietam and Fredericksburg* (New York: Charles Scribner’s Sons, 1882), at 82–90; Stephen W. Sears, *George B. McClellan: The Young Napoleon* (New York: Da Capo Press, 1999), at 305–11.

hours of combat came to 22,719.”³⁴ In this maelstrom of agony, Holmes was wounded, this time in the back of his neck: “Unusual luck,” he wrote to his parents the following day, “ball entered at the rear, passing straight through the central seam of [my] coat and waistcoat collar coming out [toward] the front on the left hand side – yet it don’t seem to have smashed my spine or I suppose I should be dead or paralysed or something. . . .”³⁵ Thereafter, he was left for dead, though he was found that evening wandering aimlessly, having faded in and out of consciousness. His life had been spared – again. Miraculously, he survived another close call when shortly afterward he was taken to a farmhouse to recuperate temporarily, this as Rebels shelled the space around it.

Meanwhile, word of his injury was telegraphed to his parents. “[M]y household was startled from its slumbers by the loud summons of a telegraphic messenger,” Dr. Holmes recalled. “Capt. Holmes wounded shot through the neck thought not mortal,” was the message. Hurriedly, the elder Holmes left Boston in search of his wounded son. Looking for the place where his son had been transported, he went to Philadelphia, Baltimore, Frederick, Antietam, Middletown, Keedysville, Harrisburg, and then to Hagerstown, where on September 25 he boarded a railroad car filled with wounded soldiers. Then it happened: “In the first car, on the fourth seat to the right, I saw my Captain; there I saw him, . . . my first-born. . . . ‘How are you boy?’ / ‘How are you dad?’”³⁶

Holmes returned to Boston to recover, and, after some convalescence, it was back to duty, this time in the Fredericksburg area of Virginia. Here, too, the fighting was fierce, both close up and as far as a brass telescope could carry an eye’s sight. “For the Twentieth Massachusetts the ninety days after Antietam were among the most tumultuous of its existence.”³⁷ When December arrived, it brought not only a bitter cold but also bitter

³⁴ Stephen W. Sears, *Landscape Turned Red: The Battle of Antietam* (New York: Houghton Mifflin Co., 1983), at 296. Cf. Justice Oliver Wendell Holmes: Law and the Inner Self, *supra* note 1, at 57.

³⁵ Letter from OWH to parents, September 18, 1862, reproduced in *Touched with Fire*, *supra* note 21, at 64.

³⁶ *Harvard’s Civil War*, *supra* note 19, at 179–80 (quoting Oliver Wendell Holmes, *Pages from an Old Volume of Life: A Collection of Essays, 1857–1881* (Boston: Houghton Mifflin, 1883), at 67). Apparently, young Holmes disfavored such visits. See his letter to his parents, September 22, 1862, reproduced in *Touched with Fire*, *supra* note 21, at 67 (not wanting to “meet any affectionate parent half way”).

³⁷ *Harvard’s Civil War*, *supra* note 19, at 181. See also James Ford Rhodes, *History of the Civil War* (New York: Macmillan, 1917), at 68 (quoting Dr. Holmes on OWH’s battle injuries).