

Reviews

The Value(s) of Oliver Wendell Holmes, Jr.

THROUGH A MAGIC MIRROR DARKLY

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LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES
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“JUDGES,” Oliver Wendell Holmes, Jr. once said, “are apt to be [naive], simpleminded men, and they need something of Mephistopheles.” They “need education in the obvious – to learn to transcend our own convictions and to leave room for much that we hold dear to be done away with ... by the orderly change of law.”¹ Albert W. Alschuler, in his important book *Law Without Values: The Life, Work, and Legacy of Justice Holmes*, argues that Holmes indeed had a devilish side, and goes so far as to suggest that accepting almost any of the Holmes legacy is a Faustian bargain. As for transcending personal judicial convictions – well, one gets the feeling Alschuler is glad Holmes transcended Holmes’s own convictions, but not because such transcendence is a good idea in its own right. Rather, Alschuler seems to argue that judges should have

convictions, just not the Holmesian sort, although how and what they should do with those convictions is less clear.

Alschuler’s thesis, according to the best source, the dust jacket, is that, “[c]ontrary to the perception of many modern lawyers and scholars, Holmes’s legacy was not a revolt against formalism or against *a priori* reasoning; it was a revolt against the objective concepts of right and wrong – against values.” Admittedly, I am myself a naive, simpleminded judge. But to me, Alschuler has overplayed his hand in this clearly important book. Seeking to essentially limit the protean figure of Holmes to a single overarching legacy is the first mistake. (William James noted that Holmes was “composed of at least two and a half different people rolled into one”).² Understating the importance of Holmes’s non-judicial

Robert Henry sits on the United States Court of Appeals for the Tenth Circuit. See Oliver Wendell Holmes, Jr., *The Law* (1913), in *THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES* 20, 21 (Mark DeWolfe Howe ed., 1962) (“[The] law, wherein, as in a magic mirror, we see reflected, not only our own lives, but the lives of all men that have been! When I think on this magic theme, my eyes dazzle.”).

¹ Quoted in Bernard Schwartz, *MAIN CURRENTS IN AMERICAN LEGAL THOUGHT* 394 (1993).

² Any faults I find with Professor Alschuler do not include paucity of quotation. Most of the

legal writing, particularly *The* [“mercifully unread”] *Common Law*, is another. [p. 131]³ Similarly, suggesting that Holmes’s doctrine of judicial restraint rests on shaky foundations doesn’t diminish the power, legacy, or usefulness of Holmes’s selectively applied concept. And failing to grant Holmes at least some credit for the Brandeis/Holmes view of the First Amendment seems downright stingy by the time we get to it.

But Alschuler makes a great and singular contribution, even as he minimizes those of Holmes. His knowledge of Holmes is encyclopedic. He knows and reveals the location of all the major warts, and does so better than any Holmes critic I have encountered. Further, Alschuler’s book reminds us of our great natural law heritage and suggests, as a wonderful foil to Holmes’s famous “bad man” approach to the law, that good people need law too. Finally, although Alschuler only hints at

an answer – or perhaps a methodology – in his brief closing chapter, he offers a useful, and dare I say pragmatic (given Alschuler’s own hostility toward pragmatism), way to deal with a question at least as old as Plato: Is justice nothing else than the interest of the stronger? Or, as Lord Russell rephrases it before terming it still an open question in philosophy: “Is there any standard of ‘good’ and ‘bad,’ except what the man using these words desires?”⁴ Alschuler knows that serious lawyers – and citizens – need an answer, and that Holmes’s does not satisfy.

I. GIVING THE DEVIL HIS DUE

Holmes had his own heroes: “If American law were to be represented by a single figure,” he said, “skeptical and worshipper alike would agree that the figure could be one alone, and that one, John Marshall.”⁵ That encomium

quotations I summarize or use come from his book, like this one from William James. [see p. 15]

Unlike our worthy author, I shall try to keep footnotes to a minimum, notwithstanding the appearance of this page. He should have listened to his editors, who advised him that he had too many. [see p. 10] What is worse, they are endnotes. (Shame on the University of Chicago’s noble press, which doesn’t have to do it that way. Compare Judge Posner’s excellent *THE ESSENTIAL HOLMES* (1992).) My guess is that Alschuler’s book is almost equally divided between text and endnotes (112 small print pages of notes to 194 larger print pages of text). This excessive and inconvenient placement of authorities and tangential thoughts makes reading unnecessarily difficult, and as much of my reading time is on bumpy airplanes, the process was even worse. I would advise readers of this book that ticket seating stubs make excellent book marks, reminding you of where you were in at least two ways.

- 3 Alschuler criticizes Holmes biographer Sheldon Novick for a schizophrenic evaluation of this tome. Yet Alschuler also admits that the first five paragraphs of *The Common Law*, as well as Holmes’s other extrajudicial writings, “have influenced ... the way in which virtually all American lawyers now think about law.” [p. 85] That Holmes can do that while being “mercifully unread” underscores my view of his enormous influence.

Richard Posner reports that:

[B]etween 1966 (the first year of the Social Sciences Citation Index) and 1988 [Cardozo’s *The Nature of the Legal Process*] was cited an average of 28.4 times a year. ... This compares with an average of 41.6 citations for Holmes’s *The Common Law* (1881) – widely considered the best book on law ever written by an American – over the same period. No works of jurisprudence earlier than H.L.A. Hart’s *The Concept of Law* (1960) are cited with comparable frequency except Holmes’s article “The Path of the Law,” which, however, is cited even more frequently than *The Common Law*.

Richard A. Posner, *CARDOZO: A STUDY IN REPUTATION* 90 (1990).

4 Bertrand Russell, *THE HISTORY OF WESTERN PHILOSOPHY* 118 (1945).

5 Quoted in Schwartz, *MAIN CURRENTS IN AMERICAN LEGAL THOUGHT* at 112.

has certainly stood the test of time, and all but the very most antifederalist members of the Federalist Society would have to admit that Holmes's evaluation, when uttered, had as near universal acceptance as any statement could have, and is still correct today, with one possible exception.

That exception would unquestionably be Holmes himself. He is the father of modern free speech law; the most famous architect of judicial restraint; the author of two famous – indeed the two *most* famous books of American law; the epigrammatic writer of over two thousand opinions.⁶ Judge Richard Posner, who can in many ways be thought of as Justice Holmes's modern successor (if you can imagine a kinder, gentler, much less restrained, and even more widely educated Holmes), called him “the most illustrious figure in the history of American law.” Though also critical (as of course literary critics should be), Edmund Wilson said that Holmes's “speeches and non-legal essays ... ought to be read by everyone.” Holmes's protégé and first would-be-Boswell, Justice Felix Frankfurter, waxed that to read “Holmes's writings is to string pearls.”

Alschuler admits this fame in some detail, but it is worth recounting some of Alschuler's and others' words to set the stage. Holmes was “The Yankee from Olympus” in Catherine Drinker Bowen's paean of the same title; he was the “Magnificent Yankee” of stage and later television and film; the Boston Brahmin son of the original Boston Brahmin, Oliver Wendell Holmes, Sr. (the celebrated paradigm-shifting physician/poet/essayist described by the great physician Sir William Osler as “the most successful combination the world has ever seen, of physician

and man of letters”⁷). “He [Holmes, Jr.] is indeed the philosopher become king,” declared Frankfurter (perhaps hoping that Learned Hand would accept in one man what he wouldn't accept in a bevy). Professor Karl Llewellyn described him simply as, “America's most distinguished citizen.” A Lord Chief Justice of England called him the greatest judge in the English-speaking world.⁸ Chief Justice Charles Evans Hughes named his “a complete human life,” Holmes being “blessed by great talent, with a deserved fame never dimmed and always growing.”

Stringing some of Justice Frankfurter's pearls summarizes the case: “a clear and present danger”; “falsely shouting fire in a theater”; “[t]he life of the law has not been logic: it has been experience”; “[u]pon this point a page of history is worth a volume of logic”; “[f]or my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.”

II. MUD IN THE MORTAR HOLDING THE TEMPLE'S STONES TOGETHER?

Yet, as Professor Alschuler clearly shows, there is a dark side to the Holmesian aura. Despite Holmes's remarkable fame and prolific and prodigious prose, Alschuler suggests that “the Great Dissenter” is responsible for a host of sins, from fathering both Critical Legal Studies and Law and Economics to the murder conviction of Louise Woodward, the young English *au pair*, by the legacy of his misplaced criminal law precedents; from plagiarizing legal concepts to popularizing moral

6 Posner, *THE ESSENTIAL HOLMES* at xxvi. “The Path of the Law” was originally a *Harvard Law Review* article, but has since been republished as a small book.

7 See Jacques Barzun, *FROM DAWN TO DECADENCE* 585-86 (2000). The senior Holmes proved the contagiousness of puerperal fever, a major killer in hospitals, before Semmelweis addressed the same issue in Vienna.

8 Sheldon M. Novick, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* xv (1989).

relativism; from sliding away from Socrates to drifting toward Darwin. Alschuler seems to want to do to Holmes what Allan Bloom sought to do to modern “elite” American higher education.⁹

True, Alschuler is not the first, nor is he alone in his criticism of Holmes. “Put out of your mind the picture of the tolerant aristocrat, the eloquent defender of our liberties, the Yankee from Olympus,” said Grant Gilmore, a would-be authorized biographer who essentially gave up the task. The real Holmes was a “bitter and lifelong pessimist” who was “savage, harsh, and cruel”: the celebrator of a “bleak and terrifying universe.” The late Mortimer Adler warned that it was necessary to separate “the greatness of Holmes as a judge and a person” from his “highly questionable jurisprudential doctrines.” Jacques Barzun, in his bracing summation of the entire modern era, *From Dawn to Decadence*, has much praise for Holmes, but it is praise for the elder, and not the Justice:

[Oliver Wendell Holmes, Sr.] is the man of thought and science, the poet and humorist, not his son the justice of the Supreme Court.

...

The justice had an enormous and beneficial influence on the law and he deserves well of his country on constitutional issues. But he can show nothing to justify attributing to him the same power in philosophy or literary art. He adopted early the shallow materialism that marked the mid-century, and with it a routine cynicism that often spoils the pleasure of reading his vigorous correspondence. No two temperaments could be imagined more opposite than that of father and the son.¹⁰

Alschuler finds further support for his opening brief in opposition to the beatification of Holmes in the words of OWH himself. Reading some of his less known selections

reveals the misogyny, misanthropy, cynicism, and nihilism of Holmes in ways that few critics could surpass. De-stringing the pearls gives us pause: “Three generations of imbeciles is enough”; “[E]stablishing the constitutionality of a law permitting the sterilization of imbeciles...gave me pleasure”; “One accepts the union of ... black and white, because one has been so accustomed to it. Otherwise it would disgust most of us”; “[M]y bet is that we have not the kind of cosmic importance that the parsons and philosophers teach. I doubt if a shudder would go through the spheres if the whole ant heap were kerosened.”

Late in life, and at least somewhat inappropriately, Holmes was lionized as a great liberal. But as Alschuler points out, Holmes’s oft-restrained personal views were not progressive. Holmes opposed the vote for women at a time when most intellectuals approved it, writing: “[I]f I were sincere and were asked certain *whys* by a woman [I] should reply, ‘Because Ma’am I am the bull.’” Dissenting from the majority of the Court’s conclusion that gender differences were vanishing in political contexts, he opined that it would take “more than the Nineteenth Amendment to convince me that there are no differences between men and women.” He suggested that states could grant a tax break to launderers so that women would be encouraged to choose “an employment that our people commonly regard as more appropriate.” And, in a letter to a friend, the great Darwinist would even admit that his own racial views had not evolved: “[W]hen I was a sophomore, I didn’t like the nigger minstrels because they seemed to belittle the race. ... [Now] I fear you would shudder ... at the low level of some of my social beliefs.”

No wonder Holmes asked many of his correspondents to burn his letters upon his

9 Allan Bloom, *THE CLOSING OF THE AMERICAN MIND* (1987).

10 *Supra* note 7.

death. However, despite his evident desire that his correspondence not darken his legacy, this correspondence may reveal a fairer picture of his humanity and a more flattering portrait of his judging. Admitting demons is often the first step to conquering them. "I loathed most of the things I decided in favor of," he wrote. (I know the feeling.) The fact that Holmes had many of these views, and did not give vent to them as a judge, seems to indicate character often appropriate and even desirable for a judge. A famous Holmesism is: "[I]f my fellow citizens want to go to Hell I will help them. It's my job." Where Holmes and I are at odds with respect to our attitudes about this judging business is that while I may occasionally be unable to prevent my fellow citizens from heading on their way to perdition, I feel unable to celebrate the task.¹¹

Admittedly, as Posner has written, the revisionist criticisms from today's hindsight make Holmes look worse than he was: "[I]t is easy to find many instances in which, particularly on matters of race and sex, [Holmes] failed to display a 1990s sensibility, ... [but,] on the whole[,] his outlook was remarkably tolerant and indeed cosmopolitan by the standards of his generation." If it is so, it seems damning with faint praise. Alschuler nicely catalogues some of Holmes's biographers, who, while seeing Holmes's great judicial attributes, have chilling personal evaluations. Sheldon Novick described the Olympian in truly Olympian terms: "a violent, combative, womanizing aristocrat." When the Harvard Law School prepared an exhibit to mark the fortieth anniversary of Holmes's death, the catalogue that Grant Gilmore submitted was so critical that the

school refused to publish it. G. Edward White remarked that Holmes "was remarkably detached, not only from those whose lives his decisions affected, but from the judges who joined those decisions, the lower courts who sought guidance from his opinions, the lawyers who argued the cases, and the public who reacted to the issues he resolved." Summing up Holmes's central personal characteristics, White said: "[T]he quality that first comes to mind is his vast and driving ambition." White noted that Holmes's ambition "fostered [his] singular competitiveness, his extreme sensitivity to criticism, his thirst for recognition, even the perverse glumness with which he accepted praise and his insatiable desire for an even higher level of accomplishment." Judge Posner, who is unabashedly a Holmes partisan, says much when he describes Holmes's world view as "Calvinism without God."

Yet Posner makes a point in his challenge to revisionist acontextual carping. Pulling Holmes from his time – from the character-shaping brutality of his Civil War experiences and the dramatic social changes that followed the war – is unfair. As Michael Knox Beran has observed, "[Holmes] was born into the old New England tradition but both the certainties and the hopes of that tradition had faded by the time he reached manhood. The lights had gone out; and in the darkness Holmes, like his contemporary Henry Adams, was able to produce only beautifully phrased doubt." Beran also states: "Holmes's ideas retain their value even though the thinking that got him there was a symptom of darkening – the darkening in the American character that occurred in the decades after the Civil War."

¹¹ It's not that judges necessarily know better than legislators, though sometimes they have more experience and have had more time to reflect, and have an opinion worth voicing. That's what concurring opinions are for, and sometimes, just sometimes, a little dicta is called for. See, e.g., *Zimomra v. Alamo Rent-A-Car*, 111 F.3d 1495, 1504-06 (10th Cir. 1997) (Henry, J., concurring).

III. HOLMES ON THE FIRING RANGE

Perhaps in attempting to prove his thesis, Alschuler recalled Emerson's advice given to the young Holmes after reading his Harvard paper attacking Plato. The great Transcendentalist warned Holmes, "If you shoot at the king you must kill him." Alschuler fires repeatedly and often with good reason, yet, in seeking to kill the king, he overstates his case. He neglects to admit that whether some of Holmes's concepts were borrowed or not, his placement and timing of their issuance had major impact upon the legal world, and that whatever the source of his model of judicial restraint, it had a profound impact on the industrializing America, allowing the development of the regulatory state so popular with the liberals of his time.

In his first chapter, "Moral Skepticism in Twentieth-Century American Law," Alschuler argues that two forms of skepticism dominate current legal thinking. The first form, which is "dominant" in law schools, courts, and, "especially," the Supreme Court, he terms "utilitarian pragmatism." The second and more "piquant" form he calls "law as power." The difference is that the former seeks the greatest attainable satisfaction of everyone's wants, while the latter is the self-interested exercise of power. It is law seen as Harold Lasswell saw political science: "Who Gets What, When, How."

In which group does our anti-hero "prophet" belong? Well, the categories expand: "Was Holmes a pragmatist or a utilitarian, or was he a Nietzschean, a social Darwinist, or a nihilist? Although elements of both brands of skepticism appear in Holmes's work, this book maintains that the more thorough-going skeptics have by far the stronger claim to his mantle." After discussion of the various grad-

tions of utilitarianism, Alschuler states that there simply has to be a first principal, a value, an "external justification," in order to make any philosophy coherent. "In the absence of external justification, the desire that everyone's desires be satisfied is just another desire, and utilitarianism can be no more than a taste. Jeremy Bentham and his followers hoped to maximize happiness; Richard Posner and his followers seek to maximize wealth; and Adolf Hitler and his followers preferred building a master race. Different strokes for different folks."

Alschuler is correct. This brand of defeatist relativism is alive and well in the academy. As a retired president of a fine liberal arts college recently confided to me: "Students say, 'Aquinas was brilliant, Marx was brilliant, Nietzsche was brilliant – if they couldn't figure it out, how can I?'" Alschuler's response, appropriately, comes from the old school, but inappropriately, it seems incomplete.¹² Referring to the great ancients in the natural law camp, he invokes Socrates (or at least Plato, through Socrates in *The Republic*) for the notion that justice is an end in itself, something to be desired for its own sake. Next, Cicero, who refers to justice as "right reason in agreement with nature." We do not receive greater elaboration, but we do receive the names of advocates of this not so clearly defined position, and they include many luminaries of the law: Aristotle, Aquinas, Grotius, Coke, Locke, Blackstone, Jefferson, and Lincoln.

Alschuler suggests that the final third of the nineteenth century brought an end to the natural law of Jefferson and Lincoln and their forbears in this country. Legal scholars who wrote after the Civil War – scholars like Holmes, Christopher Langdell, James C. Carter, and Roscoe Pound – had little use for natural law. Darwinism, the intellectual and scientific rage of the day (and maybe this day,

¹² It gets better in the last chapter.

too), furthered the slide. Coming to his own statement of thesis, Alschuler says:

Contrary to the currently prevalent myth, Holmes and those who joined him did not bring something bold or new to law by proclaiming that it is evolutionary and adaptive and can further human needs. As this book will show, those ideas were a source of pride for Americans from the beginning. Instead, Holmes and his twentieth-century followers joined the late-nineteenth century formalists in taking something away from law – the sense that law can further objectives beyond internal coherency, personal tastes, and selfish interests. This revolution was not a ‘revolt against formalism’ but a revolt against objective concepts of right and wrong—a revolt against natural law. [p.9-10]

IV. HOBBS, HITLER, HOLMES, & HYDE

Alschuler proceeds to make his case in the eight chapters that follow. In his second chapter, entitled “A Power-Focused Philosophy,” Alschuler challenges the conventional wisdom that the hero of American law was a “Dr. Jekyll and Mr. Hyde” whose extraordinary and unpredictable mind could at turns produce great good or great evil. To the contrary, claims Alschuler, Holmes was quite consistent: he was a total skeptic, not believing in belief, possessing at best a “noble nihilism,” but at least, “[u]nlike many of his intellectual heirs later in the Century, Holmes had the courage of his non-convictions.” Chapter Three,

“Would You Have Wanted Justice Holmes as a Friend,” certainly makes the case that you wouldn’t want to buy a used car from the man, either. We are, mercifully, largely spared investigations into Holmes’s romantic life. But we are reminded that he was self-absorbed and had few friends, and are left to speculate that his act of kindness to a demented law student who lost his hand somehow resulted from the accident being a “grotesque malady.” The level of criticism does not reach the belittlement of a 1945 article “Hobbes, Holmes and Hitler,” but it does seem overstated, at times harshly so.

In Chapter Four, “Battlefield Conversion,” Alschuler discusses the negative transformation wrought by the Civil War on the young Holmes. Despite Holmes’s severe wounds and close encounters with death, and despite the fact that Holmes left after his first enlistment and before the War was decided, Holmes seemed to emerge with a glorification of war and jingoistic heroism.¹³ Indeed it was Holmes’s famous speech “The Soldier’s Faith” that attracted the attention of Teddy Roosevelt, who would later appoint Holmes to the Supreme Court:

In the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, that no man who lives in the same world with most of us can doubt, and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the use. [p.48]

13 The senior Holmes’s response to his son’s war experiences must have played some part in the deep skepticism that sprang from this chapter in the life of Holmes, Jr. While Dr. Holmes could write the deeply touching *My Hunt after “the Captain”* in the *Atlantic Monthly* about his search for his son after the battle of Antietam (where young Holmes received a bullet through his neck), biographers Novick and Liva Baker suggest that Holmes’s parents encouraged him to reenlist even though Holmes believed it meant certain death. [see p. 223, n. 50]

I recall that my father was also wounded three times – in World War II – and returned to the front each time. But fighting Robert E. Lee and one’s national brethren is different from fighting Hitler and company. Holmes’s parents’ lack of support must have furthered his pain. Alschuler questions how Holmes could come from these and other war experiences to his later views glorifying a soldier’s “throwing his life away” for a little understood cause. I wonder, too. Was it only unfortunate chance that Holmes the younger never had children of his own?

Contrasting this and other views with General William Tecumseh Sherman's famous aphorism "War is hell," Alschuler replies: "For Holmes, war was not life gone awry. It was life at its most meaningful."

In chapters that follow, Alschuler criticizes Holmes's doctrine of judicial restraint as unfounded, his opinions as Darwinist, and his scholarship as borrowed without attribution and either incorrect or tautological. He makes the case aggressively, and a bit unfairly. But it is difficult indeed to shoot at the king, even when the king provides so much of the ammunition.

Alschuler makes the mistake of which he so often accuses Holmes, confusing an "ought" with an "is." It may be that Holmes's extreme cynicism – born perhaps of a difficult relationship with his towering father, nurtured in the morally confusing Civil War, and finalized by fealty to the Darwinism and Social Darwinism that dominated the intelligentsia of the age – manifested itself as an absence, or even a condemnation, of values. Certainly Holmes did not seem to have many himself. Perhaps people should think of Holmes in this way, as an advocate for nothing, a Nietzsche for his noble nihilism. But Holmes didn't advocate his philosophy, he didn't seek converts. He didn't seem to care that much.¹⁴

Likewise, his non-opinion legal writings may be partially borrowed, and less than a total paradigm shift. But his contributions to analyzing the law from historical perspectives, and free of the values that dominated his day even when he shared them, did much for legal scholarship. Although Alschuler correctly points out that the law before

Holmes was often described as that of "The Gilded Age," he omits some time and tarnish. A footnote does admit that eminent legal historian Morton Horwitz spoke of a paradigm shift from an "instrumental" to a "formalist" or "Classical" mode of reasoning. Rather than reflecting the instrumental grandeur of John Marshall, the law was concerned with preservation of the status quo from statutory or any other kind of interference. The paradigm was not *McCulloch v. Maryland*, a constitution that was, to use a Holmesian phrase "flexible in the joints"; rather, the paradigm was *Dred Scott*. As Bernard Schwartz has written of the period before 1880:

The Grand Style that had characterized American law became a thing of the past. Opinions and other legal writings were now characterized by what Llewellyn called the Formal Style. The law was characterized by dry, arid logic, divorced from society and life. The pattern was that described by Llewellyn: the rules of law are to decide the cases; policy is ... not for the courts, and [neither] is change even in pure common law.

...

Above all, jurists of the Carter ilk had set their faces against change. The law had become the great guardian of the economic status quo. Its dominant tone had become defensive rather than expansive, favoring stability instead of change, and emphasizing the security of acquired interests. Security, even more than opportunity, became the dominant end of law."

In response to this, Holmes's *The Common Law* seemed fresh and new and was widely praised by critics abroad and at home. It

14 Keeping clear of "hear" was far easier for Holmes than for [Learned] Hand. While Holmes read widely and engaged fully in the intellectual life of his times, his was an attitude of remote, Olympian detachment: he was rarely interested in contemporary political battles or concerned with their outcome. Hand, like Holmes, was a skeptic, increasingly committed to judicial detachment in the interest of an independent judiciary, but he cared deeply about the progress and outcomes of political skirmishes ...

Gerald Gunther, *LEARNED HAND: THE MAN AND THE JUDGE* 345 (1994).

offered another more open approach, one that, as Schwartz continued, “viewed law as anthropologists might view it – as an organic part of the culture within which it grew up.” *The London Spectator* described Holmes’s book as, “the most original work of legal speculation which has appeared in English since the publication of Sir Henry Maine’s *Ancient Law*.” I doubt that this source, and other continental sources of praise, missed the target completely.¹⁵

Holmes’s judicial restraint probably did have strange foundations. Edmund Wilson noted: “Having lost in the war the high hopes of the Northern crusade and fallen back on a Calvinist position which will not admit the realization of the Kingdom of God on earth – [he] must simply, as a jurist . . ., submit to the dominant will of the society he has sworn to serve.” Yet whatever its source, judicial restraint led to the dismantling of the rigid right to contract jurisprudence epitomized by *Lochner*. Although as Alschuler points out, the only Social Darwinist on the *Lochner* court was Holmes, it was his dissent that opened the door for later courts to make changes that most of us would admit were long overdue. In 1909, Roscoe Pound had summarized legislation invalidated by the freedom of contract courts in the era Alschuler refers to as “Gilded.” Stricken laws included: laws prohibiting imposition of fines on employees, laws requiring payment of wages in money, laws regulating hours of labor, laws prohibiting contracts by railway employees releasing their employers in advance from liability for personal injuries, laws forbidding employers

from interfering with union membership, and laws providing for the mode of weighing coal in fixing miners’ compensation.¹⁶

The penultimate chapter seeks to explain the beatification of Holmes. I think Alschuler is correct in arguing, among other points, that the Civil War and Darwin, with their resultant skepticism, created an audience receptive to Holmes’s bleak philosophy. Maybe that explains the power of Holmes’s views in our own relativistic age.

V. DON’T KEROSENE THE ANT HEAP YET!

I have found fault with much of Alschuler’s book, but I consider it of singular importance. Although natural law theorists have criticized Holmes before, to my knowledge no one has approached the depth and verve of *Law Without Values*. Alschuler does significant damage to the icon that is Holmes, and the fact that Holmes himself would probably say “So what?” (at least in public) doesn’t rehabilitate the Olympian. Alschuler is at his most convincing when he shows Holmes to be a true believer in Herbert Spencer’s capsulation of Darwin as “survival of the fittest” and a devotee of the proposition that the rest of the morally complex world of human struggle and achievement is simply about blind assertion of preference. Holmes’s answer to Lord Russell’s question does indeed seem to be that might makes right. And to Holmes, preferences are useful and actionable simply because they belong to the beholder. Some like beer, some like wine, some like methamphetamine – if you have the resources

¹⁵ Holmes defended his book to Harold Laski, who also seemed to have a high opinion of the book: I think the material thing to be that I gathered the flax, made the thread, spun the cloth, and cut the garment – and started all the inquiries that since have gone over many matters therein. Every original book has the seeds of its own death in it, by provoking further investigation and clearer restatement, but it remains the original and I think it already is forgotten how far that is true of the *C.L.*

Quoted in Posner, *THE ESSENTIAL HOLMES* at 265.

¹⁶ Schwartz, *supra* note 1 at 376.

to do it and get away with it, fine.

Alschuler, unlike Holmes's typical judge, is not simple-minded, and he does have a little of Mephisto in him. But he is naive to take on Holmes's vast, rich, and disparate legacy and try to condemn the entire corpus as a deal with the devil. Holmes certainly was no saint, but there is plenty of running room between sainthood and satanhood, as all of us know from personal experience, since all of us live in that space.

If, as Alschuler plausibly claims, Holmes fathered Law and Economics as well as its oft-times enemy, Critical Legal Studies, so much the better. One need not adopt these disciplines to see that they have added to jurisprudence. Public Choice Theory, for example, clearly underestimates the disruptive power of civic republicanism – or even of plain old “getting even.” (I'm not sure Mancur Olson could have predicted the Jeffords switch!) But it is remarkably predictive and useful for figuring out how legislatures work and don't work. Some of the Crits are even harder to take, but their questioning has revealed a dark side of public policy choices that ought to be brought to light.

If Holmes was a skeptical Darwinian-Spencerian relativist, then aren't we all the more indebted to him for his abstention from active movements, and for his decisions contrary to his personal views? After all, he certainly personally disagreed with the bakers he tried to help in *Lochner*. Further, in the free speech area where Holmes did reject his own doctrine of judicial restraint, the Darwinian metaphor of survival of the fittest in the marketplace of ideas is still in the ascendancy.

Holmes was a troubled genius, himself a sort of brooding omnipresence in the legal sky. His vast body of work lends itself to many disparate causes. Alschuler's main contribution is a frontal attack on the moral skepticism at its core. Good people do need law, too, and they need good law. External justifications,

equilibriums, coherences, and even “can't help” – all these, in that generic class known as “values,” can help produce that law, and maybe even encourage judges and legislators not to happily pilot the ferry over the river Styx.

In closing, in “Ending the Slide from Socrates,” Alschuler only hints at this better, value-based answer. He argues that Holmes and his followers make what amounts to the most basic mistake of the novice trial lawyer: They apply the wrong burden of proof. Modern skeptics and utilitarians demand “hogchoker” proof of every belief; they insist on mathematically precise evidence, axiomatically unassailable logic, and universally applicable and invariably optimal results before they will concede that a belief just might be right, let alone good. In current judicial parlance it's the “dead bang winner” they are after.

But strangely, Alschuler points out, many human beings do not want to go to Hell, even if Holmes's heirs are as eager to help them down that path as was Holmes himself. Instead, these citizens pursue other, less extravagant and destructive goals, muddling their way through based on best guesses and good intentions. As Alschuler explains, “although there may not be precisely correct answers” to where along a given spectrum of belief we may belong, “there are plainly wrong” answers. A philosophy that just seeks predictions of the future (like Holmes's theory of law being what a bad man will respect, or law being just what judges say it is) and ignores the intrinsic value of “mak[ing] the world more comprehensible . . . , puts second things first.”

In one of the brightest and most hopeful polemics I have read in the last decade, Alschuler argues that there are first principles, or at least things close enough for government work, that can enable us to function coherently in – and even improve – a complex, often frightening world. We do at least sort of know some things, in large part

because we have the ability to triangulate and constantly adjust – from the wisdom of our grandmothers, our neighbors, our children, ourselves, and everyone and everything else we know – a course in life that fits both the specifics of experience and the generalities of belief. Rules, inferences, patterns, our experiences, others' experiences, Robert Hutchins's "Great Conversation" that is a Western tradition, all of these offer some utility in constructing coherent world views that might even reach and not just grasp. For Alschuler:

The name of the game at the outset of the twenty-first century is neither hogchoker proof nor blind "can't helps." It is reflective equilibrium, coherency, and inference to the best explanation. The failure of clear Euclidean proof justifies neither despair nor blind assertions of personal will. There is a world between.

I would like to think that Alschuler's conclusion is, at bottom, an expression of faith in the capacity of human beings to figure out what is right, and to act on that basis. He does not specify whether it is faith in the Five Pillars of Islam, in the wisdom of the ages collected in the Talmud, in St. Paul's "more excellent way," in

something akin to Lewis Thomas's gene for altruism, or in some other font of truth and dignity on which we can draw and upon which we can build. Regardless, he is on the right track. As Einstein said, "Everything should be made as simple as possible, but not more so." And even Euclid made assumptions.



Perhaps the troubled genius that was Holmes would not have been the genius without the trouble. Perhaps if he had acquired God, Holmes would have lost his Calvinism – for him, commitment to incessant, grueling work. Alschuler, in my view, correctly bemoans the moral relativism that Holmes espoused, but basically tried to keep to himself. While actively seeking fans, Holmes – to his credit – believed in nothing so strongly that he actively sought no converts to his nihilism.

Certainly Holmes is not the only historical figure whose value exceeds his values. But one does wonder, especially after reading this troubling book, what dazzling image Holmes's magic mirror would have shown if he had looked beyond his own reflection. 