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Heresy in the Temple: Holmes Desanctified

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Everybody talks about Oliver Wendell Holmes, Jr. (1841-1935), but nobody does anything much about him. He remains "the most illustrious figure in the history of American law," "America's only authentic legal sage," our only "adult jurist," and all the other wonderful things people have said about him, ritually praising him to the skies. Very quickly in law school the novice learns that what Holmes thought was right, and that we haven't much improved on his ideas since. He is the father of legal realism, the father of legal liberalism, and the father of legal pragmatism. It seems that every current strand of legal theory traces its lineage back to Holmes. Invoking Holmes serves the same purpose for a modern law professor as a Christian's invoking Jesus or a Marxist's invoking Marx.

Even so, there have always been a few dissenters from the deification of Holmes. At least one of his biographers grew so nauseated by the man that he gave up on writing his life. H. L. Mencken and some others thought that Holmes's liberalism was a fabrication by some of his academic admirers (Felix Frankfurter and Harold J. Laski are the usually designated sycophantic villains), and that really Holmes would allow any governmental assertion of force whatsoever. The key quality of Holmes that these people fingered was that Holmes's war wound in the civil war somehow turned him into a "good soldier," always ready to further sacrifice innocents in the service of some national goal, whatever it was. This was certainly supported by Holmes's aphorism that "[I]f my fellow citizens want to go to Hell I will help them. It's my job." Holmes's famous opinion upholding compulsory sterilization in *Buck v. Bell*,[1] on the ground that "three generations of imbeciles is enough," has never been exactly beloved of civil libertarians, and was reportedly cited by those seeking to build a German master race in the 1930s.

But still, there were the facts that Holmes served longer than almost anyone as a judge (twenty years on the Supreme Judicial Court of Massachusetts, and thirty on the United States Supreme Court), that he hobnobbed with all the great and near great, that he towered over most at 6'3", and that he was probably the Platonic form of a Boston Brahmin. And, if that was not enough, he wrote a volume, *The Common Law* (1881),[2] that some have described as the greatest American law book ever written, and he gave a speech, "The Path of the Law," turned into an article in the *Harvard Law Review*,[3] which was said to have done nothing less than begin the modern age of the law.[4] My guess would be that if we polled current American law students and their professors there would be only two figures whom they would virtually all rate as indisputably great–Holmes and John Marshall.

Albert Alschuler, the Wilson-Dickinson Professor of Law at the University of Chicago Law School, has nothing to say about Marshall, but in *Law without Values*, he comes very near to destroying Holmes. Alschuler's Holmes, though not short, and too cultivated to be nasty, is certainly brutish. He takes credit for others' work, has boundless ambition, fails to come up with a single original idea, writes utterly incomprehensibly, is possibly perverted, delights in eugenics, is probably a racist and maybe an anti-Semite, allows legislatures *carte blanche*, and believes that law students can only come to appreciate law if they think about it the way a "bad man" would. Alschuler asks, as the title for his chapter 3, "Would You Have Wanted Holmes as a Friend?" and his answer is a resounding, "No!"

This is refreshing, to say the least. It's also pretty convincing. With great gusto, a sparkling style, and prodigious learning, Alschuler picks apart Holmes and what he wrote, until at last it seems that all that is left is a gangly, repulsive carcass. But debunking for the sake of

debunking is too easy; after all, any young law professor learns that any appointments candidate can pretty easily be destroyed by quoting his or her scholarship out of context, complaining that it is too empirical, or too theoretical, or fails to take into account any of a hundred ephemeral legal academic schools of thought. So what makes Alschuler's excoriation of particular interest?

It is that he believes that Holmesianism, a disease with which most of us are infected, is, in some part, responsible for the evils we in America now suffer as a thoroughly hedonistic, thoroughly irresponsible society. For Alschuler, what Holmes really managed to accomplish–especially with his ideas in *The Common Law* and "The Path of the Law" that "the life of the law has not been logic, it has been experience," that "the substance of the law pretty nearly corresponds, at any given time, so far as it goes, to what is then regarded as convenient," and that one ought to view the law the way a "bad man" would–was to separate law totally from values, or, if you like, to separate law from morality.

There can be no denying that law used to be different in America. My own view (similar to Alschuler's) is that, at least in the founding era, there was a consensus that it was impossible to have order without law, that it was impossible to have law without morality, and that it was impossible to have morality without religion.[5] Holmes would have denied all but the first proposition, for he had great respect for the power of the law to enforce the will of society (indeed his theory of justice, according to Alschuler, was Thrasymachian), but Holmes thought all morality and all religion various species of bunk. And thus the heirs of Holmes have come to rule in the rigidly secular America of the late twentieth and early twenty-first centuries, where no one is permitted to judge the morals of anyone else, and where religion must forcibly be driven from the public square.

Most subscribers to H-Law may not find our current situation as tragic as does Alschuler, and he does go a bit overboard when he condemns such intriguing manifestations of popular culture as *Beavis and Butthead* and *South Park*. Moreover, Alschuler's attempts to support a definition of law as "those societal settlements that a good person should regard as obligatory," and to suggest that the currently trendy and jargonistic notions of "reflective equilibrium, coherency, and inference to the best explanation" offer much hope of resolving jurisprudential dilemmas may not be convincing. Still, Alschuler is on to something. Even those on the left, who seemed undisturbed when the Warren, Burger, and Rehnquist Courts essentially rewrote the First and Fourteenth Amendments, if not the rest of the Constitution, began to wonder about the wisdom of judicial legislation following the decision in *Bush v. Gore* (2000).[6] We are, it would seem, in the midst of another effort to determine whether there really might be–out there somewhere–Wechslerian neutral principles[7] (dare one call them "moral" principles? Lon Fuller did[8] and Alschuler does) that can serve to guide courts and give some deeper meaning to the judicial task.

Even Holmes probably believed that there were such over-arching principles. He made fun of the notion when he excoriated others for believing in a "brooding omnipresence"[9] of content for the law, but in his famous "Path of the Law," even Holmes promised that study of the law could reveal "echoes of the infinite." Alschuler tends to dismiss Holmes's "echoes" as mere bombast, and argues that Holmes did really live a life without values, and perhaps he did. Still, Holmes's life, as Alschuler quite nicely demonstrates, was not a particularly happy one–except, as Alschuler indicates, quoting H. L. Mencken: "After Holmes reached the age of seventy-eight, a strange amiability sometimes overcame him." And Alschuler's thesis that a society with a jurisprudence without values will be as unhappy as a person without them seems intuitively correct. Or, to be more precise, Alschuler is probably arguing that those who believe, like Holmes, that the only realities in the world are the exercise of self-interested power by strong individuals at the expense of the weak and infirm, are bound to build themselves a Hell on earth.

This is the sort of timeless message that it is always good to hear, and to have it delivered through an absorbing examination of biography, philosophy, constitutional law, torts, contracts, and currently practicing legal academics is a rare treat indeed. Not all readers will leave Alschuler convinced that Holmes was a ghoul or at least a monster, though most should. Some will still hold on to the notion that the author of the dissent in *Lochner v. New York*,[10] the dissent in *Abrams v. United States*,[11] *The Common Law*, and "The Path of the Law" was a giant, and perhaps even a fit hero for liberals. And even Alschuler concedes that whatever else one may say about Holmes he wrote "five great paragraphs"[12] and that's more than most of us manage. Alschuler has managed considerably more than that. With this book he marks himself out as one of our most provocative legal thinkers, and as indispensable for anyone who seeks to understand what went wrong with Holmes and with us.

Notes

[1.] *Buck v. Bell*, 274 U.S. 200 (1927).

[2.] Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown, 1881; edited by Mark DeWolfe Howe, Boston: Little, Brown, 1963).

[3.] Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review*, 10 (1897): 457.

[4.] "Morton Horwitz declared, 'With "The Path of the Law," Holmes pushed American legal thought into the twentieth century"' (p. 132).

[5.] For the details, *see* Stephen B. Presser, *Recapturing the Constitution: Race Religion and Abortion Reconsidered* (Chicago: Regnery, 1994).

[6.] *Bush v. Gore*, 531 U.S. 98 (2000).

[7.] Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73 (1959): 1.

[8.] Lon L. Fuller, *The Morality of Law*, revised edition (New Haven: Yale University Press, 1965).

[9.] *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J.,dissenting).

[10.] *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J. dissenting).

[11.] *Abrams v. United States*, 250 U.S. 613, 630 (1919) (Holmes, J. dissenting).

[12.] At the beginning and end of chapter 1, the lecture on torts, in *The Common Law* (1881) (*see* pp. 131, 272 n. 298).

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