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Reinventing Holmes: The Hidden, Inner, Life of a Cynical, Ambitious, Detached, and Fascistic Old Judge without Values

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BOOK REVIEW

REINVENTING HOLMES: THE HIDDEN,¹ INNER,² LIFE OF A CYNICAL,³ AMBITIOUS,⁴ DETACHED,⁵ AND FASCISTIC⁶ OLD JUDGE⁷ WITHOUT VALUES⁸

Catharine Pierce Wells*

Law Without Values: The Life, Work and Legacy of Justice Holmes. By Albert W. Alschuler. University of Chicago Press, 2000. Pp. 332. \$30.

I. INTRODUCTION: CELEBRATING HOLMES

Holmes is perhaps the only Supreme Court Justice that could truly be called a celebrity. He is the best known, most written about figure in American law. He served on the Massachusetts Supreme Judicial Court and the United State Supreme Court for more than fifty years. Seventy years after his death, many of his opinions are still well known and frequently quoted. His collected papers remain in print and they are still publishing collections from his extensive correspondence.⁹ Two of his

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1. See David Rosenberg, *The Hidden Holmes: His Theory of Torts in History* (Harv. U. Press 1995).

2. See G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (Oxford U. Press 1993); Saul Touster, *In Search of Holmes from Within*, 18 Vand. L. Rev. 437 (1965).

3. See Yosai Rogat, *The Judge as Spectator*, 31 U. Chi. L. Rev. 213, 249-50 (1964); Edmund Wilson, *Patriotic Gore: Studies in the Literature of the American Civil War* (Oxford U. Press 1962).

4. Mark DeWolfe Howe, *Justice Oliver Wendell: The Shaping Years, 1841-1870* 281-83 (Harv. U. Press 1957).

5. Rogat, *supra* n. 3, at 243.

6. See Ben W. Palmer, *Holmes, Hobbes and Hitler*, 31 ABA J. 569 (1945).

7. Holmes was 90 years old when he resigned from the United States Supreme Court. See generally Sheldon M. Novick, *Honorable Justice* 379-82 (Little, Brown & Co. 1989).

8. See Albert W. Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* (U. Chi. Press 2000).

9. *Holmes-Sheehan Correspondence: Letters of Justice Oliver Wendell Holmes, Jr., and*

scholarly contributions—*The Common Law* and *The Path of the Law*—are classics of American jurisprudence. Indeed, one hundred years after *The Path of the Law* was published, four law reviews celebrated the occasion by holding symposia in his honor.¹⁰ In addition to professional fame, his private life has been a subject of continuing interest. As a boy, his father used him as the basis for one of his characters in “The Autocrat of the Breakfast Table”—a regular column that appeared in the *Atlantic Monthly*. As a soldier, his heroic exploits were well known. And as a Supreme Court Justice, he was known for his quotable opinions and his striking appearance. He was extremely tall, stood very straight, had thick white hair, and sported a military mustache. It is no wonder that he captured the public imagination when he was portrayed as *The Yankee from Olympus* in a popular biography,¹¹ and as *The Magnificent Yankee* in a Broadway play, a general release motion picture, and a “Hallmark Hall of Fame” television broadcast.¹²

For Holmes, the price of celebrity has been high. American celebrities are not just famous. Their image is fabricated by those who write and talk about them; they represent fantasies and projections rather than the more solid world of flesh and blood. Since his death, Holmes’s persona has survived many incarnations. As the “Yankee From Olympus,” he has stood for the triumph of old fashioned American values over the creeping mediocrity of the industrial age.¹³ As a truly “mature” jurist, he has represented the law’s ability to be decisive in confusing times.¹⁴ As a childless man, he has become a symbol of the failure of American fatherhood—his direct and unemotional manner taken as a symptom of a father’s inability to love and nurture a new generation.¹⁵ Praise or condemnation, the story is the same: Holmes

Patrick Augustine Sheehan (David H. Burton ed., Fordham U. Press 1993); *Holmes and Frankfurter: Their Correspondence 1912-1932* (Robert M. Mennel & Christine L. Compston eds., U. Press of New England 1996).

10. There were symposia at the University of Iowa School of Law, papers published in *The Path of Law and Its Influence: The Legacy of Oliver Wendell Holmes, Jr.* (Steven J. Burton ed., Cambridge U. Press 2000); Brooklyn Law School, papers published in *The Path of the Law 100 Years Later: Holmes’ Influence on Modern Jurisprudence*, 63 *Brook. L. Rev.* 1 (1997); Boston University Law School, papers published in *The Path of the Law Today*, 78 *B.U. L. Rev.* 699 (1998); and a collection of papers published in *The Path of the Law After One Hundred Years*, 110 *Harv. L. Rev.* 991 (1997).

11. Catherine Drinker Bowen, *The Yankee from Olympus* (Little, Brown & Co. 1944).

12. All three were based on a play written by Emmet Lavery. For a description of these productions, see Laura Krugman Ray, *Judicial Fictions: Images of Supreme Court Justices in the Novel, Drama, and Film*, 39 *Ariz. L. Rev.* 151, 153-66 (1997).

13. See Bowen, *supra* n. 11.

14. One author offers a Freudian account of judging and praises Holmes as the fully adult jurist. See Jerome Frank, *Law and the Modern Mind* 270-77 (Brentano’s 1930).

15. The “fatherhood” image is made all the more poignant by the fact that fictional depictions of him stressed the fatherly aspect of his relation to his secretaries. It would appear, however, that this aspect was more fictional than real. One secretary is quoted as saying: “[T]here was a human warmth that one felt about him . . . but not to the extent that he considered us ‘sons by adoption’ or ‘substitute sons.’” Ray, *supra* n. 12, at 159.

reminds us of our deepest yearnings and our deepest fears—and because of this—most of what is written about him tells us more about ourselves than about the man himself.

In this vein, there has been a strand of Holmes's scholarship that has focused on debunking the myth of Justice Holmes as the great figure of American law. This has taken the form of showing: (1) that his legal opinions were never as progressive as they seemed;¹⁶ (2) that his experience in the civil war made him detached, ambitious, self centered, and mean spirited;¹⁷ (3) that he held despicable views on eugenics;¹⁸ and (4) that he had a poor record on civil rights.¹⁹ Inevitably, the conclusion is that Holmes has been a less than salutary influence on American law.²⁰ Albert Alschuler's book, *Law Without Values: The Life, Work, and Legacy of Justice Holmes*, is one more contribution to this genre. It is an interesting and engaging book—easy to read and rippling with conviction, but like other attempts to deal with celebrity, it sacrifices a balanced judgment about the historical figure to the development of a larger point about the legal culture.

II. LAW WITHOUT VALUES: DEMONIZING HOLMES

Alschuler begins his book by offering his own diagnosis of contemporary legal theory and ends it by prescribing a cure. Alschuler buttresses (first and last chapter) his book with his own diagnosis of contemporary legal theory. The title of the book, *Law Without Values*, is meant to describe his complaint. Alschuler believes that twentieth century law has been corrupted by a particular kind of moral skepticism. This skepticism, he argues, is found both on the left among those who embrace Critical Legal Studies, Critical Race Theory, and Feminist Legal Theory, and on the right among those who espouse Law and Economics. All of these theories—both left and right—he traces to Holmes's influence.²¹ According to Alschuler, Holmes and his "bad man" theory of jurisprudence washed the law with "cynical acid,"²² and left it

16. See Alschuler, *supra* n. 8, at 62-67; White, *supra* n. 2, at 327-30.

17. See Alschuler, *supra* n. 8, at 46-51; White, *supra* n. 2, at 476-79.

18. Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 Iowa L. Rev. 833 (1986).

19. Alexander M. Bickel & Benno C. Schmidt, Jr., *The Judiciary and Responsible Government* vol. 9, 820-907 (MacMillan 1984).

20. See Alschuler, *supra* n. 8, at 7-8, 12, 187. For an extensive discussion of this point, see Mark DeWolfe Howe, *The Positivism of Mr. Justice Holmes*, 64 Harv. L. Rev. 529 (1951); Mark DeWolfe Howe, *Holmes' Positivism—A Brief Rejoinder*, 64 Harv. L. Rev. 937 (1951); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630 (1958); but see H. L. A. Hart, *Holmes' Positivism—An Addendum*, 64 Harv. L. Rev. 929 (1951); H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593 (1958).

21. Alschuler, *supra* n. 8, at 1.

22. The phrase is Holmes's and comes from *The Path of the Law*, 10 Harv. L. Rev. 457, 462 (1987).

vulnerable to misunderstanding and devaluation by those who would pursue their own political agenda.

Alschuler would like us to consider an alternative—the idea that law should be grounded in an abstract theory of justice. One main focus for contemporary legal theory has been its reliance on increasingly abstract arguments about justice and efficiency. Those who write about efficiency have coalesced into a well-defined movement. Relying heavily on technical economic arguments, they have developed a sophisticated methodology that purports to increase our insights about legal policy. By contrast, those who write about justice form a much less cohesive group. There is no single methodology and no unitary vision of justice. Lacking these things, the group can only achieve unity by condemning those who do not at least embrace some form of moral theory as a touchstone for legal decision-making. The fact that Holmes has become a focal point for such criticism is not surprising. If there is one thing that he stood for, it is the proposition that legal questions cannot be answered by the dictates of an abstract moral theory.

In this section, I will examine Alschuler's criticism of Holmes by focusing on the four points mentioned above. In the final section, I will step back and offer a more general sense of what I take to be the philosophical issues that divide them.

A. *Holmes's Legal Opinions were not as Progressive as they Seemed*

Part of the ambiguity in Holmes's legacy is the contrast between the high opinion of Holmes held during his lifetime and the lower opinion of him formed after World War II. The former opinion characterized him as a progressive; the latter as cynical and inhumane. In this connection, it is important to note that the word "progressive" is somewhat ambiguous. To a contemporary audience, it means liberal, humanistic, and open hearted. At the height of Holmes's career, however, it meant something quite different. The progressives of that era believed that human nature was constantly improving,²³ and that enlightened leadership could provide the basis for a kinder and gentler future. In this context, lawyers were understood to have an important role. As educated people, they should not be bound by the categories of the past. Instead, they should lead the efforts of society to facilitate change.²⁴ It was during this period that Holmes was consistently praised for his progressivism.²⁵

23. Thus, for example, when Brandeis argued for the right of privacy, he drew a contrast between the bad old days when one's right to be let alone was limited to physical invasions and his own time when it was better understood that such a right should extend to the personal and emotional. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193 (1890).

24. Roscoe Pound, *The Need for a Sociological Jurisprudence*, 19 Green Bag 607 (1907).

25. To me, it is obvious that Holmes was not a progressive in the same sense as Pound and Brandeis. Progressivism embraces an optimistic view of human society and this was hardly Holmes's attitude. Nevertheless, as I argue in the text, his opinions have a progressive cast.

This is not surprising. His dissenting opinion in *Lochner*²⁶ seemed to be a model of progressive thought. It began by criticizing the majority for their rigid adherence to nineteenth century social theory; continued by noting that state experiments in social welfare legislation were increasingly common, and finished by arguing that these experiments were appropriate given the changing social circumstances. Indeed, many of Holmes's opinions are progressive in this sense—these include some of his best opinions and, at the same time, one that is widely regarded as one of his worst. In *Buck v. Bell*,²⁷ Holmes wrote for a majority that upheld Virginia's effort to compel the mentally retarded to undergo sterilization. The opinion is shocking first for its tone,²⁸ and second for its enthusiasm.²⁹ Nevertheless, its structure conforms to a progressive view of the law. Holmes begins with the premise that those who are mentally deficient are the cause of much suffering both for themselves and for others. He then notes that science has made progress in detecting and predicting who may be afflicted. Therefore, he concludes, it is reasonable for the state to seek to avoid this suffering by forced sterilization. The "progressive" structure of *Buck* illustrates an important point—what might have been "progressive" in the prewar sense of the term may be entirely the opposite when judged by the postwar concept.

With this in the background, we come to Alschuler's argument that Holmes's opinions are not as progressive as they are reputed to be. In the postwar liberal meaning of "progressive," this is surely true. Holmes was born in 1843. Surely, it is understandable that his views are not "liberal" when judged by standards of the Warren Court. But this is not Alschuler's complaint. The trouble with Holmes is not his politics, but the ruthlessness of his "Darwinian" worldview. Unlike Alschuler, Holmes does not believe that law is one of the highest aspirations of humankind. Rather, for Holmes, it represents a practical bargain that has succeeded—at least temporarily—in shifting the means of domination from physical force to political power. Thus, for Holmes, the role of the judge is not to enforce moral norms but rather to act as a referee in insuring that the political victor leaves the field with the fruits of his victory intact. To explain his disagreement with Holmes, Alschuler recalls the classic argument between Socrates and Thrasymachus.³⁰

26. *Lochner v. N.Y.*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

27. *Buck v. Bell*, 274 U.S. 200 (1927) (Holmes, J.).

28. The opinion sounds ruthless—"We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices . . ." *Id.* at 207. And disrespectful—"Three generations of imbeciles is enough." *Id.*

29. Holmes does not simply uphold sterilization as being within the states power; he seems enthusiastic about the prospect. Holmes's eugenic views have been well documented. See Dudziak, *supra* n. 18.

30. Alschuler, *supra* n. 8, at 59 n. 44 (citing Plato, *The Republic* 19 (rev. ed., Benjamin

Thrasymachus, he reminds us, holds the view that might makes right. Therefore, he might be expected to agree with Holmes that the job of the judge is to enforce the will of the stronger as it is expressed through the political process.³¹ Alschuler finds this view incoherent and abhorrent, agreeing with Socrates that justice is “a good of the highest order—an end and a means, a good to be valued for itself and its consequences.”³²

For Alschuler, the judge is an expert—one whose expertise consists of knowing what the good requires in individual cases. In agreeing with the Socratic position, Alschuler never acknowledges its troubling aspects. He seems to overlook the fact that this concept of the good is inconsistent with democratic principles. Socrates himself recognized this fact when he provided that his Republic should be governed by a self-perpetuating elite. Thus, if Holmes is wrong to agree with Thrasymachus, what follows? Is democracy wrong? Are judges wrong when they give deference to the democratic process? This is a question upon which judges and commentators have differed. Some, like Alschuler, believe that judges should apply their normative insights to the case at hand. Others, like Holmes, believe that democracy rules even in the courts. And, of course, some, including myself, have hybrid views.³³ But, whether or not Holmes is mistaken in this regard, it is hard to imagine that this view of judging represents a true flaw in his character. Democracy may not be the most moral form of government but, as Winston Churchill used to say, it may well be the best we can do.

B. As a Result of his Experience in the Civil War, Holmes was Bitter, Detached, Self-centered, and Mean Spirited

In a chapter entitled “Beatification,” Alschuler addresses the question of “how and why a man brutalized by war became the great oracle of American law[?]”³⁴ In asking this question Alschuler is not wondering how Holmes rose to the challenge. Rather, the question assumes that Holmes was so badly damaged by his Civil War experience that he was an inappropriate candidate for high office and public esteem.³⁵ It seems to me, however, that this is a very odd assumption.

Jowett trans., Collier 1901).

31. I think that this view of Holmes is somewhat simplistic. Nevertheless it derives some support from Holmes’s own rhetoric and from his frequent denunciations of natural law. See Holmes, *supra* n. 22; Catharine Wells Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 *Nw. U. L. Rev.* 541 (1988) (discussing in part, Justice Holmes’s opinions that criticize natural law principles). Whether or not this is Holmes’s view, Alschuler’s discussion of it is quite revealing.

32. See Alschuler, *supra* n. 8, at 8.

33. See *e.g.* Catharine Pierce Wells, *Situated Decisionmaking*, 63 *S. Calif. L. Rev.* 1728 (1990).

34. Alschuler, *supra* n. 8, at 181.

35. That this is the nature of his question is evident in the answers he gives. According to Alschuler, Holmes has an undeservedly good reputation because of: (1) “his height (six foot three), his eyes, his bearing, and his mustache;” (2) “the lack of plausible liberal heroes

Why should we be skeptical about the success of someone who has been tested by a brutal war? Whatever one thinks of Holmes as a jurist, shouldn't we give him his due? Shouldn't we recognize that his military service took great strength and courage? Shouldn't we acknowledge that beneath the apparent cynicism Holmes was a man who took both his military and his judicial duties seriously—performing each with great dedication and ability?

Alschuler's attitude in this regard is not without precedent. Since the publication of Holmes's war diaries in 1946,³⁶ there has been a notable ambivalence about the effect of Holmes's war experience. The first extended treatment was contained in the first volume of the Howe biography.³⁷ Howe recognized that the war had made Holmes less idealistic and more detached, but he also noted that it had made Holmes more tolerant.³⁸ Later writers amplified this theme. For example, Edmund Wilson, in *Patriotic Gore*,³⁹ argued that many of Holmes's least appealing characteristics—his detachment, his cynicism, and the single-mindedness of his ambition—were products of the war experience.⁴⁰ He also added depth by explaining how the war experience had caused Holmes to renounce conventional religion as well as his youthful idealism. A later psychological study by Saul Touster added yet another level of understanding. Touster argued that Holmes's wartime experience had not only been difficult, but that it had been deeply traumatizing.⁴¹ He described its effect on Holmes in a way that makes the underlying pain readily apparent:

I have tried to trace some of the psychological sources of Holmes's life-style in his Civil War experience, especially in that traumatic concentration of emotion experienced at Fredericksburg. The deadening of sympathetic feelings, the Olympian aloofness, the spectator view, books to calm the nerves, the sentiment of honor, the belief in heroic action, the disbelief in causes—all these, by which he can somehow gain distance from the world, can be seen in him by the end of the war⁴²

on the bench of the U.S. Supreme Court;" and (3) "the public relations efforts on Holmes's behalf . . . by Felix Frankfurter and other young admirers of Holmes." *Id.* at 181-82.

36. *Touched With Fire: Civil War Letters and Diary of Oliver Wendell Holmes, Jr., 1861-1864* (Mark DeWolfe Howe ed., Fordham U. Press 2000).

37. Howe, *supra* n. 4.

38. *Id.* at 285. He explained Holmes's attitude this way:

He had seen a number of his own convictions crumble when they felt the impact of reality. He had seen opposing opinions withstand the strain of war. It would always be hard for one who had been sensitive to this experience to consider that his own principles of morality were sanctioned by a cosmic or universal authority.

Id.

39. Wilson, *supra* n. 3.

40. *Id.*

41. Touster, *supra* n. 2, at 470.

42. *Id.*

While none of these accounts could be described as flattering, they are nonetheless balanced and fair.⁴³ Wilson is quick to recognize that war had given rise to strengths of character as well as shortcomings.⁴⁴ Similarly, Touster's work depicts a complicated man. On the one hand, Holmes was a man who deserved respect; on the other, he was a difficult man who could be hard, ambitious, cynical, and aloof.

The recent biography by G. Edward White has changed the tone of the discussion significantly. White describes Holmes's war experience in a way that is unambiguously condemnatory. For White, Holmes is not a hero injured by things beyond his control. Rather, he is a coward whose lack of character is amplified by his wartime trauma. White, for example, draws a sharp contrast between Holmes and his friend, Henry L. Abbott:

The one, Abbott, the very personification of soldierly duty and honor. The other, Holmes, a soldier who after being shot in the heel had hoped his foot might be amputated so that he could avoid returning to war, who had chosen to leave service before Union victory was certain, who had admitted to his parents that he could no longer endure the blows and hardships of being a line officer, [and] who had reproached himself for missing the battle that produced Abbott's legendary bravery.⁴⁵

Thus, what earlier writers had seen as "survivor's guilt,"⁴⁶ becomes, for White, "real" guilt caused by real failures of spirit. Holmes had not just lost his idealism, White suggests, he had become an immoral egoist who thought only of himself.⁴⁷

With White's biography, the story of Holmes's military career has come full circle. In the space of forty years and without the discovery of any new evidence,⁴⁸ it has gone from a tale of heroism to one of cowardice and moral insensitivity.

Against this background, Alschuler's attitude towards Holmes as a soldier is not so surprising. Noting that a negative interpretation of Holmes's war experience "now seems conventional,"⁴⁹ he restates many

43. The same cannot be said of an article by Yosai Rogat, which describes nothing that is positive about Holmes's character. Rogat's assessment was that the war had left Holmes with certain moral weaknesses that made him unappealing both as a judge and as a human being. Rogat, *supra* n. 3, at 253-56.

44. For example, he recognizes the ambiguities of Holmes's character: "The young Holmes had brought out of the war a tough character, purposive, disciplined and not a little hard, a clearly defined personality, of which his humor and affable manners . . . could never quite embellish the bleakness." Wilson, *supra* n. 3, at 754.

45. White, *supra* n. 2, at 79.

46. See e.g. Touster, *supra* n. 2, at 472.

47. White, *supra* n. 2, at 70. ("His concept of duty had thus progressed from the idea of fidelity to a cause to that of loyalty to a regiment and finally to that of loyalty to oneself.")

48. It is important to note that the incidents that White describes are all contained in the letters published in 1946. White has simply pulled together the worst admissions from Holmes's letters home and recited them out of context.

49. Alschuler, *supra* n. 8, at 50. The conventional view to which he refers is not White's harsh judgment but the milder one by Robert Gordon:

of the negative assessments without analysis or criticism. For example, he portrays Holmes as a man obsessed with “war, power, and struggle[.]”⁵⁰ He also notes in Holmes “[an] attraction to morbidity[.]”⁵¹ But, for Alschuler, Holmes is not just a coward, he is also a crank. To help us understand Holmes, he offers the following analogy:

Young men sent to war may return damaged in body and spirit. As a thought experiment, imagine that your Uncle Bob is a postal clerk whose career has never been interrupted by military service, and imagine that Bob begins one day to voice the thoughts once voiced by Oliver Wendell Holmes. For example, at the dinner table one evening, Bob announces, ‘[W]hen men differ in taste as to the kind of world they want the only thing to do is to go to work killing.’ The next day, Bob praises suicide as a more ‘uneconomic’ form of expression than charity to the poor. You and other family members are likely to consider whether Bob needs help.⁵²

What is remarkable about this “thought experiment” is not its lack of sympathy, but Alschuler’s utter lack of respect for the solemnity of life and death struggles. Compare, for example, Alschuler’s analysis with Touster’s:

Holmes was, it seems to me, a profoundly injured spirit, and his greatness as a human being can be justly viewed only in the light of this fact. And that fact will, as well, go far toward explaining the impact he made on other people, and the reverence done him, and the mythos his *person* seemed to create. He had been there and come back! We are all in awe of such spirits.⁵³

One way to understand the difference between Touster and Alschuler is in terms of the intervening Vietnam War. That war taught us many things. It taught us that the traumas of war make reentry into civilian life very difficult. It filled our streets and shelters with men who had been devastated by combat and they have forced us to see that the psychological wounds of battle are often worse than the physical ones. Alschuler’s Uncle Bob seems to be one of these men and, for Alschuler, this means that he deserves sympathy, but not respect.⁵⁴ Like Socrates,

The war experience may have laid the foundations of Holmes’s aloof detachment, his disengagement from causes and distrust of enthusiasms, and the bleakly skeptical foundations of his general outlook, according to which law and rights were only the systems imposed by force by whatever social groups emerged as dominant in the struggle for existence.

Robert W. Gordon, *Introduction: Holmes’s Shadow*, in *The Legacy of Oliver Wendell Holmes, Jr.* 1 (Robert W. Gordon ed., Stan. U. Press 1992).

50. Alschuler, *supra* n. 8, at 49.

51. *Id.*

52. *Id.* at 50. The quotes from Holmes are obviously taken out of context. Neither statement was casually made at a dinner table. The first, for example, comes from a letter in which he was explaining why he found Jane Austen dull. See Wilson, *supra* n. 3, at 762-63.

53. Touster, *supra* n. 2, at 471.

54. In fact, Alschuler sympathy seems a little ambivalent: “If Bob were a war hero,

Alschuler believes that discussions of the good require clear minds affected only by reason. Experience, particularly experience that is deeply felt, can distort moral insight. While Alschuler has some sympathy for those who have suffered, he is not likely to engage them in a conversation about moral values. Holmes's suffering, he seems to suggest, is disqualifying. It clouds the issue and leads to moral error and confusion.

C. *Holmes held Desplicable Views on Eugenics*

Eugenics is a provocative term that covers a wide array of practices. Some, like birth control, are widely accepted. Others, like forced sterilization, are controversial. Its extreme forms—the racial policies of Nazi Germany for example—are widely and justly deplored. Thus, identifying Holmes as a eugenicist involves a certain vagueness as well as a certain stench. It is clear that Holmes's belief in eugenics went far beyond voluntary measures.⁵⁵ One cannot read *Buck v. Bell* and think that this is just one more case where Holmes is deferring to the legislature. Indeed, the wording of the opinion suggests that Holmes could barely contain his enthusiasm,⁵⁶ and there are many reasons why commentators have found it distasteful. First, there is its alarming tone.⁵⁷ Second, there are many who feel that it is wrong under any circumstances to interfere with human procreation.⁵⁸ Still others have felt that it is wrong to interfere on the basis of genetic "improvement."⁵⁹ And, finally, there are reasons to worry that a more careful review would have indicated that Carrie Buck herself was not a particularly good candidate for the procedure.⁶⁰

If Alschuler had simply chosen to criticize Holmes for his opinion in *Buck*, he would have had ample justification and plenty of company. We must remember, however, that the thesis of Alschuler's book is that Holmes represents the worst tendencies in American law. Thus, Alschuler is not satisfied with the notion that Holmes was simply wrong.

however, your response might be somewhat different. The crusty talk of soldiers is part of their charm. This talk may be a way of reminding an audience of an old soldier's history without quite boasting." Alschuler, *supra* n. 8, at 50.

55. See Dudziak, *supra* n. 18.

56. In addition, Holmes wrote to Lewis Einstein that the decision in *Buck v. Bell* gave him "pleasure." *Id.* at 859.

57. In addition to the "Three generations of imbeciles" line, *supra* n. 28, Holmes is defiantly graphic in describing the procedure—"cutting the Fallopian tubes"—and deprecating in describing potential offspring—calling them "inadequate" and "degenerate." *Buck*, 274 U.S. at 207.

58. This is, for example, the position of the Roman Catholic Church.

59. The notion of genetic improvement is somewhat ambiguous. One could favor forced sterilization even if one had no interest in genetic improvement. For many who work with the severely retarded the issue is one of protecting the individual from what would be a painful set of unknown consequences from what merely seems to be a pleasurable act.

60. See Dudziak, *supra* n. 18, at 849-52.

Rather, he wishes to show that Holmes's views went way beyond anything considered decent even in his own time. Alschuler writes:

Support for forced sterilization marked the outer limits of the eugenics movement in America—apart . . . from the remarks of Justice Holmes and a very few others. . . .

One discovers many familiar names on the list of twentieth-century eugenicists. . . . No one of note, however, joined Holmes in writing approvingly of killing 'everyone below standard' and 'putting to death infants that didn't pass the examination.'⁶¹

If these were Holmes's views, it would truly be shocking, but of course, they are not. Note that he quotes Holmes only partially. The full quotations reveal that when Holmes made remarks about killing "people below the standard," he was generally taunting the socialists.⁶² Thus, for example, Holmes writes:

I believe that the wholesale social regeneration which so many now seem to expect, if it can be helped by conscious, coordinated human effort, cannot be affected appreciably by tinkering with the institution of property, but only by taking in hand life and trying to build a race. That would be my starting point for an ideal theory of law.⁶³

In order to see that Holmes is not endorsing race building, we have only remember that Holmes rejected all forms of "ideal" theory. If *The Path of the Law* makes one thing clear, it is that the law reflects the practical exigencies of human life rather than the idle demands of abstract theory. For Holmes, the idea of race building, like the idea of socialism, would seem to be grandiose and overreaching.

Not content with overstating the case against Holmes, Alschuler goes further by using rhetorical devices to inflame the reader. For example, the title he gives to the section that describes Holmes's eugenicism is "Exterminating the Inadequate."⁶⁴ He also links Holmes's views with the racial policies of Nazi Germany by repeating an insinuation made sixty years ago:

In 1941, Father Francis E. Lucey noted one of Holmes's statements concerning eugenics—"I shall think socialism begins to be entitled to serious consideration when and not before it takes life in hand and prevents continuance of the unfit." Lucey remarked that 'if recent reports are true' the socialist state in Germany appears to satisfy Holmes's standard for serious treatment.⁶⁵

61. Alschuler, *supra* n. 8, at 28-29 (quoting Holmes).

62. The phrase, "kill everyone below standard," occurs as he expresses "contempt for socialisms not prepared . . . to kill everyone below standard." *Id.* at 27. The phrase, "putting to death infants that didn't pass the examination," is used to explain what he meant by the statement "I don't think you can do much by tinkering with property without taking in hand life." *Id.* at 28.

63. *Id.* at 27 (quoting one of Holmes's letters to Harold Laski).

64. *Id.* at 27-30.

65. *Id.* at 28.

This small paragraph is simply dropped in the text without comment or elaboration, and while Alschuler stops short of endorsing Lucey's conclusions, its repetition effectively leaves the impression that there was something truly depraved about Holmes's interest in eugenics.

D. Holmes had a Poor Record on Civil Rights and may have held Racist Views

Before the Civil War, Holmes was sympathetic to the abolitionist cause.⁶⁶ In volunteering for the Union Army, he did what very few white people in our generation have done—he made a sustained and costly sacrifice in the name of racial justice. There is no doubt, however, that by the end of the war that his commitment had been exhausted. Holmes emerged from the war with a clear sense that those who try to do good would do better to mind their own business. Certainly, as a Supreme Court Justice, this latter sentiment seemed to be his mantra. He showed little interest in ending the various forms of racial oppression that marked the Jim Crow era in the South. One by one, he passed over opportunities to limit segregation,⁶⁷ strike down peonage statutes,⁶⁸ and enforce voting rights for Black citizens.⁶⁹ Indeed, in the one case where he writes against peonage, his opinion rests upon a negative stereotype—the peonage statute must fall because its African American victims are “impulsive people with little intelligence or foresight” who were anxious to lay hold of “anything that affords a relief from present pain even though it will cause greater trouble by and by.”⁷⁰

There can be no question that by modern standards, Holmes's post-Civil War record on race issues is very poor. For a jurist who is often swayed by the practical dimensions of a case,⁷¹ he is remarkably blind to the realities of Southern racism. For example, he never notices the deplorable conditions that surround the peonage system. Here is how one federal district court describes these conditions:

The sufferers wear the typical striped clothing of the penitentiary convict. Iron manacles are riveted upon their legs. These can be removed only by the use of the cold chisel. The irons on each leg are connected by chains. The course stripes, thick with the dust and grime of long torrid days of a

66. White, *supra* n. 2, at 32.

67. See e.g. *Berea College v. Ky.*, 211 U.S. 45 (1908) (Holmes, J., concurring without opinion). It appears that Holmes had some ambivalence on this subject. His record in this area is studded with stories of dissents that were threatened but never given. See Bickel & Schmidt, *supra* n. 19, at 772, 780-81, 798.

68. See Bickel & Schmidt, *supra* n. 19, at 866-71.

69. See *Giles v. Harris*, 189 U.S. 475 (1903) (Holmes, J.).

70. *U.S. v. Reynolds*, 235 US 133, 150 (1914) (Holmes, J., concurring) (quoted in Alschuler, *supra* n. 8, at 57).

71. For example, in *Abrams v. U.S.*, 250 U.S. 616 (1919) (Holmes, J., dissenting), Holmes declines to apply the rule adopted in *Schenk v. U.S.*, 249 U.S. 47 (1919) (Holmes, J.), on the basis of a practical consideration. He stated: “Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government” *Abrams*, 250 U.S. at 628.

semitropical summer, or encrusted with the icy mud of winter are their sleeping clothes when they throw themselves on their pallets of straw in the common stockades at night. They wake, toil, rest, eat, and sleep, to the never ceasing clanking of the manacles and chains of this involuntary slavery. . . . If the guards would hesitate to promptly kill one sentenced for petty violations of city law should he attempt to escape, the evidence does not disclose this fact. And the fact more baleful and more ignominious than all—with each gang stands the whipping boss with the badge of his authority. This the evidence discloses to be a heavy leathern strap, about 2½ or 3 feet long, with solid hand grasp and with broad, heavy, and flexible lash. . . . They are called to the stable door, made to lie face downward across the sill, a strong convict holds down the head and shoulders, and the boss lays on the lash on the naked body until he thinks the sufferer has been whipped enough.⁷²

Surely, even the most intelligent and least impulsive among us would not choose this “present pain” in order to avoid a “greater trouble by and by.” Holmes’s blindness on this point is inexcusable and even those who admire Holmes must be deeply distressed by his record in this area.

Even though we condemn Holmes for his unwillingness to take a stand for racial justice, it is nevertheless important to think about historical factors that shaped this era of Supreme Court history. After all, there are only a few individuals who rise above the prejudices of their time and aggressively confront its central injustices. Alschuler seems to recognize this when he writes:

Some one who criticizes a historic figure like Holmes risks the charge of measuring him against the standards of a later age. [In this] chapter, [I emphasize] the extent to which other members of his Court shared or rejected his legal positions. When one or more justices (and especially when a majority of the Supreme Court) disagreed with Holmes, he cannot fairly be viewed as a passive mirror of his times.⁷³

In one sense, Alschuler is correct. It would be ludicrous to suppose that Holmes was a “passive mirror” to anything. But it is also cavalier to suggest that Holmes was an isolated phenomenon merely because other members of the court would decide these cases differently. The progressive era was awash with racism in all its forms. The interest in evolutionary theory had prompted many people to revisit old questions of racial superiority,⁷⁴ just as the rise of large-scale immigration had fed Anglo-Saxon fears about the loss of cultural control. There were

72. *Jamison v. Wimbish*, 130 F. 351, 355-56 (S.D. Ga. 1904) (quoted in Bickel & Schmidt, *supra* n. 19, at 827-28).

73. Alschuler, *supra* n. 8, at 53.

74. Bickel and Schmidt sum it up this way: “The intellectual currents loosed by Darwin tended to galvanize the mishmash of romantic, superstitious, and crassly exploitative modes of racist thought into a rationalized unsentimental pseudo-scientific ideology positing the gross and innate inferiority of black people.” Bickel & Schmidt, *supra* n. 19, at 737.

psychological factors as well. Bickel and Schmidt describe them as follows:

[T]he psychology of mass paranoia that feeds the scapegoating function of racism was amply nurtured around the turn of the century, especially in the South, by the unsettling effects of rapid industrialization, and urbanization, (and) the emergence of bitter class conflicts. . . . An awful sense of social disintegration and chaos that gripped many Americans in the late nineteenth century was fertile ground for the growth of the most hideous [forms] . . . of racial thinking⁷⁵

Alschuler never considers any of these factors. Yet they are important to assessing the truth of his claim that Holmes was exceptional in his racial views.

The point here is not that any of this should lessen our critical dissatisfaction with Holmes. It is rather that we ignore this context at our peril. To think of racism as simply a bad attitude held by a discrete group of bad people is to misunderstand our history. Racial oppression has been a fact of our collective life for centuries. It arises from self-interest and feeds on ignorance. Modern white culture facilitates this ignorance by treating racism as something that was practiced by bad people long ago. This view blinds us to the ways in which long-standing racial policies have followed us into the here and now.⁷⁶

III. CONCLUSION: HOLMES AND THE DEVALUATION OF AMERICAN LAW

We have seen that Alschuler embraces a form of neo-Platonism as a guide to legal decisionmaking. His theory presupposes that there is an abstract form of justice that can be objectively grasped through a kind of moral intuition. He calls the method for exercising this intuition, "The New Epistemology," and describes it as follows:

In trying to make sense of our experience, we use all the tools at our command—including tacit knowledge, emotional knowledge, empirical generalization, normative generalization, and the testing of normative and empirical hypotheses against new experience. Both consciously and unconsciously, we generalize, test generalization against experience, and generalize again. We collapse analogy, induction, and deduction into a single continuous process. We seek patterns in complex, holistic, and provisional ways, continuously updating our understanding of those patterns as we observe the world more closely.⁷⁷

Thus, Alschuler's conception of the new epistemology is similar to an

75. *Id.* at 738.

76. For example, during Holmes's time, ideas about evolutionary racism were closely connected to the development of standardized IQ testing. See generally Stephen Jay Gould, *The Mismeasure of Man* (Norton 1981). Since we now rely heavily upon the descendants of these tests for law school admissions, their history should be important to us. In order to evaluate claims that these tests are racially discriminatory it is necessary to understand what they have in common with earlier tests that "proved" the greater intelligence of northern Europeans.

77. Alschuler, *supra* n. 8, at 190 (footnotes omitted).

informal conception of the scientific method as it might have been described by the old epistemology. It differs chiefly in the fact that the methods of science are extended to the normative realm. Thus, Alschuler believes that “tacit knowledge” and “emotional knowledge” are a part of experience and that when these elements are theorized, they lead to general moral truths that can guide legal decision making.

It is ironic that Alschuler touts this as an anti-Holmesian, anti-pragmatic philosophy. In American philosophy, it has been the pragmatists who have argued that facts and values are subject to scientific investigation.⁷⁸ While some modern pragmatists have phrased their theory in terms of the abolition of epistemology, others have been quite explicit in endorsing the kind of ongoing informal process of knowledge acquisition that Alschuler describes. Furthermore, Alschuler’s new epistemology has a great deal in common with Holmes’s own description of legal method. Holmes believed that a person comes to understand legal decisionmaking by (1) examining the common law cases; (2) generalizing from them; (3) forming hypotheses about new cases; (4) predicting outcomes for hypothetical cases; and (5) comparing these with the outcomes of actual cases.⁷⁹ The similarities between Holmes’s account of legal method and Alschuler’s “new epistemology” suggest that they have more in common than Alschuler’s scathing account of Holmes would suggest. It is therefore essential to be more precise in articulating the difference between them.

One place to start formulating the difference is with Alschuler’s complaints about what he describes as Holmes’s social Darwinism. These complaints center around two aspects of Holmes’s jurisprudence. One is his absorption with questions of power and the second is his inclination to defer to the majoritarian voice of the legislature. These views, Alschuler argues, suggest that Holmes is fundamentally indifferent to the requirements of morality. In making this argument, Alschuler overlooks the possibility that Holmes’s has different ideas about the relationship between law and morality. Perhaps, Holmes’s lack of interest in abstract notions of justice does not indicate that he is immoral. Let us consider this alternative.

It seems to me that Holmes should be commended for his ongoing recognition that coercion lies at the heart of judicial decision-making.⁸⁰ His recognition of the coercive nature of law does not imply a cynical view. It is simply a realistic understanding of the fact that law forces

78. See e.g. Catharine Wells, *Pragmatism, Feminism, and the Problem of Bad Coherence*, 93 Mich. L. Rev. 1645, 1652-56 (1995) (discussing what it means to deny the fact value distinction). There are other similarities as well. Alschuler uses the concept of “fit” as a way of determining whether a given hypothesis is true. This too is borrowed from pragmatism. See e.g. W. V. O. Quine, *Main Trends in Recent Philosophy: Two Dogmas of Empiricism*, 60 Phil. Rev. 20, 39-40 (1951).

79. See Catharine Wells, *Holmes on Legal Method: The Predictive Theory of Law as an Instance of Scientific Method*, 18 S. Ill. U. L.J. 329, 339-42 (1994).

80. Some have argued that the law is not only coercive, but violently so. See e.g. Robert M. Cover, *The Supreme Court, 1982 Term: Foreword: Nomos And Narrative*, 97 Harv. L. Rev. 4 (1983).

people to do what they otherwise would not do. If, like Holmes, we begin with this fact, then one proper question is: Since law is coercive, how can it be justified? Alschuler represents one kind of answer to this question—coercion is justified only if law conforms to an objective moral reality. Holmes represents another. His experience in the Civil War had made him less sanguine about the wisdom of imposing one's own moral viewpoint on others. Consequently, he did not search for the legitimacy of law in the depths of his own conscience. American law, he believed, was not the result of individual moral insight. Instead, it was a social creation that resulted from democratic collaboration. Seeing law as a collection of socially based normative practices, Holmes was not willing to grant it a presumed legitimacy. Rather it was something that would itself be judged in the pages of history. Ultimately, law is the measure of the society that authored it. This is what Holmes meant when he said: "The law is the witness and external deposit of our moral life."⁸¹ Societies are judged by their actions and not their words. We count on our judges to insure that our legal actions truly represent the nature of our social collaboration. Thus, Holmes's dispute with Alschuler revolves around the relationship between the judge and the rest of society. Alschuler believes that judges should apply their individual—and, he hopes, enlightened—moral views in their decision-making. Holmes, on the other hand, believes that judges speak for the community and that they are bound by its normative practices. We can see the difference more clearly if we consider what each might say about the Supreme Court's decision in *Brown v. Board of Education*.⁸² Alschuler would say that *Brown* was a great decision because it recognized the moral imperative of abolishing racial segregation. We have seen that Holmes, to the contrary, would regard it as wrong for the Court to impose its private moral views on a recalcitrant South. Nevertheless, I believe, that he would still approve of the Court's decision. For Holmes, the correctness of the *Brown* decision would follow from the fact that the Warren Court correctly understood that in 1954—after Auschwitz and Nuremberg—American society could no longer tolerate racial segregation. Thus, for Holmes, it would have been history rather than moral theory that justified the Court's decision.

There is an arrogance in Alschuler's treatment of Holmes. In criticizing Holmes, he seems to suggest that his disagreements with contemporary moral theory are not merely disagreements but signs of moral failure. As a result, he demonizes Holmes as source of evil in American law. Because Holmes is "evil," Alschuler never really considers whether Holmes might be right. Does Holmes have something to teach us about the use and misuse of morality in legal decisionmaking? Could it be that Alschuler's own account is elitist and wrong? Could Alschuler's morality end up, as so many forms of idealism do, with great suffering for many people? These do not seem to be questions that

81. Holmes, *supra* n. 22, at 459.

82. 347 U.S. 483 (1954).

trouble Alschuler. Like so many American commentators, he is too easily satisfied with the perceived rectitude of his own moral view. I believe that, at least on this point, Holmes represents a better alternative. When we force others to conform to our views, skepticism should be seen as healthy and humility should be considered desirable.

