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From the Selected Works of Catharine P. Wells

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Review of *The Hidden Holmes: His Theory of Torts in History*, by David Rosenberg, and *Holmes and Frankfurter: Their Correspondence, 1912-1934*, edited by Robert M. Mennel and Christine L. Compston

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torical and sociological studies on the history of punishment to his students in a coherent and manageable way (p. ix). Colvin has brought together an impressive amount of historiographical and sociological material in a search for that coherence. His work clarifies issues that need to be confronted if a compelling historical sociology of punishment is to be written. But such a historical sociology still awaits us.

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David Rosenberg, *The Hidden Holmes: His Theory of Torts in History*, Cambridge: Harvard University Press, 1995. Pp. ix + 280. \$46.95 (ISBN 0-674-39002-4).

Robert M. Menkel and Christine L. Compston, eds., *Holmes and Frankfurter: Their Correspondence, 1912-1934*, Hanover: University Press of New England, 1996. Pp. xlii + 302. \$45.00 (ISBN 0-87451-758-3).

The last decade has brought a remarkable resurgence of interest in the life and work of Oliver Wendell Holmes, Jr. There have been several new collections of Holmes's writings, four biographies, and numerous studies of his judicial philosophy. In 1997, three separate law schools (Boston University, Brooklyn, and Iowa) sponsored symposia to commemorate the hundredth anniversary of his most famous essay, *The Path of the Law*. No doubt some of this interest is attributable to the fact that Holmes's long and distinguished career makes him a central figure in American jurisprudence. Nevertheless the depth and quality of these studies suggest that the substance of Holmes's views still has meaning and vitality in the contemporary legal environment.

The two books that are the subject of this review present highly divergent pictures of Holmes. The first is David Rosenberg's study of Holmes's early work in tort theory. His book portrays a young scholar struggling with the seemingly pedestrian history of Anglo-American law. The second is a collection of correspondence between Holmes and Felix Frankfurter for which the editors Robert Menkel and Christine Compston have supplied an informative introduction and helpful annotations.

Nearly every study of Holmes (my own are no exception) begins with the proposition that Holmes's views have been fundamentally misunderstood. In Rosenberg's case, the alleged error is contained in attributing to Holmes what Rosenberg calls the "negligence-dogma theory" of tort liability, namely the idea that all tort liability must be based upon a negligence principle. To the contrary, Rosenberg argues, Holmes should be seen as advocating a kind of "foresight-based strict liability." This is the more liberal view that a defendant "particularly a commercial or industrial defendant" should be liable for all accidents that are foreseeable risks of its activity whether or not a reasonable person would have refrained from so acting. Rosenberg's interpretation is based upon a careful reading of *The Common Law* (Lecture IV, 1881) and "Privilege, Malice, and Intent" (1894). His ex-

amination of these texts is thorough and thoughtful. The result could have been an engaging and persuasive commentary—one that sheds light on an interesting if somewhat narrow question of Holmesian interpretation. Unfortunately, however, the merit of Rosenberg's argument is undercut by its extremely polemical tone. Not content with the boundaries of his interpretive task, Rosenberg insists upon treating the fact that some writers disagree with him as a "case study" in the deplorable state of contemporary legal scholarship. Modern writers, he argues, display a shocking lack of professional skill:

The deficiencies (of the negligence-dogma theory) go well beyond matters of misplaced weight and judgment, or errors of research or logic. This thesis displays scholarly defects of the most elementary kind: assertion of major points without supporting or specified references; begging of central and hotly contested questions of fact; anachronistic and oversimplified treatment of key terms, concepts and ideas; selective quotation; uncritical reliance on secondary sources; and disregard of important aspects of social context. (164)

And, he continues, this lack of skill is compounded by the corrupting effect of political ideology. Rosenberg believes that Holmes has been misunderstood in the service of two quite different objectives: first, a generation of postwar writers has used the "negligence-dogma theory" as part of a campaign to preserve Holmes's progressive reputation and second, more contemporary scholars have used it as a way of attacking Holmes and through him "the institutions and elders of the legal establishment" (165). Unfortunately, the fervor of Rosenberg's cause leads him into several errors of his own: he overstates the obviousness of his interpretation; he overlooks contrary evidence; and he is excessively critical of those who disagree with him while minimizing or ignoring those who hold views similar to his own.

Not surprisingly, the letters between Holmes and Frankfurter have a far more genial tone. Holmes is a courteous and considerate friend; he is also clearly touched by the devotion shown to him by Frankfurter and the steady stream of bright young men that Frankfurter had selected as Holmes's law clerks. The correspondence began in 1912 when Holmes was already seventy-one years old, had spent thirty years on the bench and ten years on the Supreme Court of the United States. It ended with his death in 1935. By contrast, Frankfurter's career was on the rise—in 1912, he was full of promise and ambition; by 1935, he was a man of many accomplishments and could lay a serious claim to being a full-fledged member of the establishment.

The correspondence, as it exists today, is somewhat one-sided; it reveals a great deal more about Holmes than it does about Frankfurter. One reason for this is that many of the letters written by Frankfurter are now missing from the collection. Another is that Frankfurter's letters are mostly predictable expressions of affection and respect; his few substantive comments on Holmes's Supreme Court opinions are so deferential that we only learn what most of us already knew: Frankfurter was a great admirer of Holmes's judicial decision making. While Holmes's letters are more revealing, they contain no significant surprises. Those who have read previously published volumes of Holmes's correspondence will recognize the

collection of personal and philosophical reflections that are liberally strewn throughout. Rather, the richness of this collection is in the details it conveys about Holmes's responses to vicissitudes of daily life. The letters are interesting precisely because there is such a strong contrast between the quietly ordered nature of Holmes's daily life and the dramatic scale of his professional career.

While Holmes stood at the center of legal controversy, he spent most of his free time reading (and rereading) the great works of literature, history, and philosophy. Some of his comments on these books are provocative and suggest the complexity of his worldview. About Spinoza, he writes: "His theological machinery and arguments of course leave me unmoved and even bored, but behind that is a conception of the Universe that I share" (215). The reader is left to ponder what Spinoza's world would look like in the absence of his "theological machinery and arguments." Other passages simply shine in their lucidity. For example, in speaking of Jerome Frank's *Law and the Modern Mind*, he distinguishes his own views from those of the legal realists in a particularly memorable way: "It (Frank's book) has ideas but too many words . . . and seems to show some confusion about the emotional reaction of judges as if it were all to be set against the rules. Whereas the greater part of such reactions are in aid of them" (258–59).

As someone who believes that Holmes should be understood in the context of American pragmatism, I was particularly cheered by the warmth of his feelings for William James, his enthusiasm for Santayana, and his admiration for Chauncey Wright. I also found comfort in his repeated emphasis of the close connection of theory and fact: "The only interest of a fact is that it leads to a theory and the only good of a theory is that it sums up the facts" (94).

My pleasure in reading the correspondence was only slightly lessened by the feeling that I was, at least with respect to Holmes, an unwelcome voyeur. On a number of occasions, Holmes indicated a strong desire that the correspondence remain private. In November, 1921, for example, he writes to Frankfurter: "I forget what I have written to you about my letters, but if you have not burned them, I should feel easier if you would assure me that none of them should be published after my death. I print what I want printed and write to you with a feeling of absolute freedom which could not be if there were such a possibility" (129).

To which Frankfurter responds: "Of course any wish of yours is sacred to me. So far as I am concerned what you write me is buried." But he adds: "I do hope you will let me talk to you about your general attitude towards your correspondence when next we meet" (131). Whether Frankfurter changed Holmes's mind we will never know. What we do know is that Frankfurter turned the letters over to the Holmes collection and thereby made them available for the world to see. This is probably a fortunate thing. Given Holmes's instinctive Yankee reserve, there is little in the volume that we would consider "private" today. On the other hand, the letters provide a valuable opportunity to share the intellectual companionship of a fine mind and a great judge.

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