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Complex, My Dear Holmes by Peter Berkowitz

A review of *Law without Values: The Life, Work, and Legacy of Justice Holmes* by Albert W. Alschuler. A New University of Chicago Press. 325 pp. \$30.00.

Albert W. Alschuler deplores the moral relativism that he believes increasingly dominates the outlook of American law schools, and in his stimulating book, *Law without Values*, he boldly blames Oliver Wendell Holmes, Jr., perhaps America's most famous jurist and revered legal mind, for laying the groundwork. Inclining to a gentle liberalism, which favors rational deliberation among free and equal citizens, and energetic government action on behalf of the disadvantaged and downtrodden, Professor Alschuler doggedly hunts Holmes to all corners of his public and private life to accumulate evidence of arrogance, misanthropy, and nihilism. But, as in *Les Misérables*, where Javert's fanatical pursuit of Jean Valjean dramatizes a dark tendency latent in the rule of law, so too Alschuler's relentless debunking and discrediting of Holmes reveals a disturbing proclivity residing in the contemporary liberal spirit.

To establish Holmes's villainy, Alschuler must strip away the legend that surrounds him. And legendary Holmes became, celebrated as the "Yankee from Olympus" in Catherine Drinker Bowen's 1944 novel and then as "The Magnificent Yankee" in the Broadway play and Hollywood film. According to the version of the legend that still prevails in the legal academy, Holmes was a ground-breaking scholar who, at the end of the 19th century, emancipated American legal thought from the arid idea that law was a system of deductive propositions. "The life of the law," Holmes famously declared in the opening paragraph of his masterwork *The Common Law* (1881), "has not been logic: it has been experience."

Moreover, in "The Path of the Law" (1897), widely regarded as the most influential law review article ever written, Holmes set the stage for many of the major developments in American jurisprudence. In it, one can find provocative formulations of the thesis of legal realism, that law is what judges say it is; the thesis of law and economics, that judges tend to make decisions based on social advantage and should do so more consistently and systematically; and the thesis of critical legal studies, that law is an expression of power that formalizes and advances the interests of the ruling class. And overshadowing his scholarly achievements is the status Holmes acquired as a liberal icon during the first third of the twentieth century, penning eloquent dissents as Justice of the United States Supreme Court on behalf of the constitutionality of social welfare legislation and in defense of freedom of speech.

According to Alschuler, however, the legend, particularly that part which crowns Holmes a hero of the liberal spirit, has no basis in reality. In a peevish chapter entitled "Would You Have Wanted Justice Holmes as a Friend?" Alschuler argues that Holmes was a bad human being, aloof and cold-hearted toward his friends and contemptuous of the common man and woman. In chapters on "The Common Law" and "The Path of the Law" that frequently veer between picayune complaints and puffed-up charges, Alschuler seeks to demonstrate that Holmes was an ill-informed and unoriginal scholar whose claims about the history and structure of law were either grotesquely wrong or pithy restatements of classical ideas well-known to all serious students. And, in a churlish analysis of Holmes's judicial opinions, Alschuler contends that Holmes was an overrated jurist, whose grasp of constitutional law was shaky, whose most admired dissents deserve much less admiration because they reach liberal outcomes on illiberal and non-democratic grounds, and whose notorious decision in *Buck v. Bell* (1927), which held that the constitution permitted the forced sterilization of "imbeciles" revealed the true Holmes in all his cold, dark inhumanity.

Why, according to Alschuler, did Holmes go wrong? The son of a distinguished father, a physician and writer who helped found *The Atlantic Monthly*, Oliver Wendell Holmes, Jr., was as a young man a romantic, an idealist and a proponent of liberal toleration. "Deeply moved," in his own words, "by the Abolition cause" Holmes left Harvard in 1861, two months before the conclusion of his studies, to join the Union forces. There is little reason to doubt Alschuler's contention that after enduring three years of fighting, incurring three serious injuries, and witnessing untold battlefield horrors, Holmes returned home a changed man. But Alschuler's implicit followup claim that Holmes's Darwinism, ethical skepticism, and aristocratic convictions can be rejected because of the experiences that inspired them is doubtful in the extreme.

Surely Alschuler is not so bold as to believe that nothing can be said on behalf of the Darwinian or social Darwinian thesis that human life should be understood in terms of the struggle for survival, or to think that the modern world provides no grounds for far-reaching skeptical doubt, or to contend that Holmes's sense of his own superiority had no foundation in fact?

The truth in Alschuler's grim assault on Holmes is that liberals must resist the lure of biological reductionism, and the equation of truth and justice with power, and the judgment that some human lives count for nothing and most are of little significance. But what Alschuler does not see is that liberalism's capacity to resist beliefs and values at war with its fundamental premise --- the natural freedom and equality of all --- is fortified by the encounter with hostile doctrines put forward in bold and compelling terms. Nor does Alschuler really appreciate that there is more than one way to be a liberal, and that, while it is useful to be reminded that Holmes's perspective is not that of today's academic moral philosophers and progressive, left-wing liberals, his pragmatism, skepticism, devotion to free speech, belief in science and the discipline of the intellect, and commitment to toleration are rightly honored by those who take their bearings from Enlightenment liberalism. Nor for that

matter does Alschuler recognize the lessons --- such as judicial restraint in the face of laws one finds misguided or flawed --- that the Darwinian, skeptical, and aristocratic Holmes can teach about the role of a judge in a constitutional democracy.

Alschuler's readiness to dismiss the illiberal and non-liberal, indeed the differently or partly liberal, as irrelevant or inimical to liberalism receives especially clear and crude expression in his tendency to proceed as if Holmes's ideas can be summarily dismissed once he notes certain affinities they have with those of Nietzsche. Yet while Nietzsche was no liberal, it does not follow that everything --- or, for that matter, anything --- that he said was untrue, or irrelevant, or inimical to liberalism. Take, for example, his conviction that "the errors of great men are venerable because they are more fruitful than the truths of little men." In fact, this conviction has powerful affinities not only with Mill's defense of liberty of thought and discussion in *On Liberty*, but also with his insistence that liberals learn to learn from the romantic conservative Samuel Taylor Coleridge. And the same spirit lives in Lionel Trilling's exhortation to study T.S. Eliot's opinions on a Christian politics as well as in Isaiah Berlin's respectful and penetrating portraits of outstanding counter-Enlightenment figures. This spirit encourages an appreciation of Holmes precisely because of the challenges he poses to truths today's liberals are prone to take for granted, and also because of the case he makes for opinions to which they are disinclined to give a fair hearing. Indeed the spirit of Mill, Trilling and Berlin could very well lead to the conclusion that one Holmes is worth more today to the well-being of the liberal tradition than a thousand academic moralists piously declaiming liberal platitudes.

It is handy to set out some of the reasons why Holmes contemporary moral philosophers and progressive, left-wing liberals may find it a challenge to look up to Holmes as a hero. But the failure to recognize him as an extraordinary specimen of the human spirit dishonors the liberal imperative to respect the variety of human types, an imperative that has roots in what is generous as well as in what is necessary for the liberal spirit.

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