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## Horrible Holmes

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# HORRIBLE HOLMES

*Mathias Reimann\**

LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES. By *Albert W. Alschuler*. Chicago: University of Chicago Press. 2000. Pp. x, 326. Cloth, \$30; paper, \$18.

“More, more, I’m still not satisfied!”<sup>1</sup>

Holmes has kept scholars busy for most of a century, and the resulting volume of literature about him is staggering. In the last twenty years alone, we have been blessed with four biographies,<sup>2</sup> four symposia,<sup>3</sup> three new collections of his works,<sup>4</sup> two volumes of essays,<sup>5</sup> and various monographs,<sup>6</sup> not to mention a multitude of free-standing law

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\* Hessel E. Yntema Professor of Law, University of Michigan. Dr. iur. utr. 1982, University of Freiburg; LL.M. 1983, University of Michigan. — Ed.

1. I thought this quote came from William Shakespeare’s *Macbeth*, but closer scrutiny revealed that it doesn’t. The only source I can cite to is therefore, TOM LEHRER, SMUT (1965) (no pun intended).

2. GARY J. AICHELE, OLIVER WENDELL HOLMES JR.: SOLDIER, SCHOLAR, JUDGE (1989); LIVA BAKER, THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES (1991); SHELDON NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES (1989); G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF (1993). To be sure, no complete biography of Holmes existed before 1989. Two of Holmes’s official biographers, Felix Frankfurter and Grant Gilmore, never published the fruits of their research (if any); the third completed at least two volumes, see MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS 1841-1870 (1957); MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 1870-1882 (1963). On Holmes and his biographers, see pp. 31-33. Alschuler suspects that the failure of the official biography projects was in part due to the frustration of the potential authors about Holmes’s essentially bleak character. *Id.*

3. Robert W. Gordon, *Holmes’ Common Law as Legal and Social Science*, 10 HOFSTRA L. REV. 719 (1982); Symposium, *The Path of the Law after One Hundred Years*, 110 HARV. L. REV. 989 (1997); Symposium, *The Path of the Law 100 Years Later: Holmes’s Influence on Modern Jurisprudence*, 63 BROOK. L. REV. 1 (1997); Symposium, *The Path of the Law Today*, 78 B.U. L. REV. 691 (1998).

4. 1-3 THE COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES (Sheldon M. Novick ed., 1995); THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. (Richard A. Posner ed., 1992); THE FORMATIVE ESSAYS OF JUSTICE HOLMES: THE MAKING OF AN AMERICAN LEGAL PHILOSOPHY (Frederic R. Kellogg ed., 1984).

5. THE LEGACY OF OLIVER WENDELL HOLMES, JR. (Robert W. Gordon ed., 1992); “THE PATH OF THE LAW” AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES (Steven J. Burton ed., 2000).

6. MICHAEL H. HOFFHEIMER, JUSTICE HOLMES AND NATURAL LAW (1992); H.L. POHLMANN, JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE

review articles.<sup>7</sup> Since life is short, everyone who adds to the deluge, including Albert Alschuler<sup>8</sup> with his new book, bears a heavy responsibility to make the expenditure of trees, library space, and reading time worthwhile. Does *Law Without Values* fulfill that responsibility? Despite the book's considerable weaknesses the answer is yes, but it is a close call.

The book presents such a multitude of theses, theories, and ideas about Holmes, his work, and jurisprudence more generally, it is easy for the reader to get lost. As best I can see, it basically pursues three agendas. First, *Law Without Values* attacks Holmes as a person, judge, and scholar. While much of Alschuler's critique, depicting the man as a harsh nihilist and his work as deeply flawed, hits home, most of these attacks are not new but reiterate existing scholarship. Second, Alschuler seeks to explain Holmes by looking at him as an existentialist and positivist. The author's claim that this brings to light the consistency between Holmes's character, philosophy, and work is interesting, but the attempt to explain away the contradictions and tensions within Holmes is as time-honored as it is questionable. Third, the book blames Holmes for having corrupted modern American jurisprudence. The thesis that Holmes's bleak positivism made a crucial contribution to the demise of values in modern legal thought is intriguing, but Alschuler fails to substantiate it.

Alschuler does not clearly define or distinguish between these three agendas, and he constantly shifts back and forth among them, often, one suspects, unconsciously. While the execution of all three agendas leaves something to be desired, the book as a whole conveys an important message. It illuminates the troublesome implications of a jurisprudence so skeptical of moral values that it reduces law to its instrumental function — a jurisprudence shared by Holmes and major currents of our own age.

At the outset, a note of disclosure is in order. On several occasions, Alschuler counts me among the Holmes enthusiasts whose (positive) views he then proceeds to attack.<sup>9</sup> I have always considered myself more critical of, than enthusiastic about, Holmes,<sup>10</sup> but I have no ax to grind and no position to defend. Moreover, I agree with most of

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(1984); DAVID ROSENBERG, *THE HIDDEN HOLMES — HIS THEORY OF TORTS IN HISTORY* (1995).

7. For a selection of most recent works, see pp. 201-02 n.61.

8. Wilson-Dickinson Professor of Law, University of Chicago Law School.

9. See pp. 10, 200 n.61 (listing my review essay, *Why Holmes?* 88 MICH. L. REV. 1908 (1990) among the "laudatory" writings on Holmes); pp. 14-15 (counting my characterization of Holmes as the cultural idol of American law among the "hosannas," p. 16); p. 15 (reading my characterization of Holmes as having "praised Holmes at length").

10. While I thus feel somewhat misunderstood as a Holmes fan, I am not claiming that this is Alschuler's fault rather than my own. On the whole, Alschuler's use of other scholarly work, including mine, strikes me as balanced and appropriate.

Alschuler's perceptions of the man and the work, and even with many of his views on the current state of American legal scholarship, my critique of *Law Without Values* notwithstanding.

### I. ATTACKING HOLMES

Perhaps the most pervasive theme of *Law Without Values* is a no-holds-barred attack on Holmes. The book is not a biography but mostly a long essay in pursuit of Holmes's dark side. In a nutshell, the critique proceeds as follows.

Holmes, the perceived "hero of American law" (p. 14), subscribed to a bleak "power-focused philosophy" (pp. 14-30). He was unable to embrace any substantive values or causes (chillingly, the only cause he ever believed in as an adult was eugenics). He was neither a utilitarian nor a true pragmatist but rather an existentialist. Sharing important characteristics with his contemporary Nietzsche (p. 19), he embraced a "noble nihilism" (p. 20) and revered "struggle, violence, death, and the unknown" (p. 29). Personally, Holmes was self-absorbed and indifferent to others, ambitious and egotistical (pp. 31-40). He had many acquaintances, especially among the famous, but few, if any, real friends. "He lacked (and resisted) familiar forms of love and support" (p. 40) — witness his professed relief about having remained childless (pp. 35-36) — and as a human being he was cold, harsh, and lonely. Both his power-focused philosophy and his personal character traits largely resulted from his civil war experience (pp. 41-51). Whatever pre-war beliefs he had held (e.g., in abolitionism) completely collapsed in the horrors of Balls Bluff, Antietam, and Chancellorsville. Amidst senseless death and destruction, Holmes lost the ability to believe in any causes and values — with the exception of the soldier's faith in blindly throwing away his life. From then on he sneered at human values and considered war the height of human experience.

Holmes's judicial opinions evince his harsh personality and power-focused philosophy (pp. 53-83). His work on the Supreme Court demonstrates his inclination to validate the outcomes of power struggles. His deference to legislative decisions was not an expression of a socially progressive attitude but of letting the elected majority have its way; consequently, he upheld progressive and repressive legislation alike (p. 63). Thus, Holmes was not at all a great liberal and defender of individual rights for their own sake. Only late in life, probably under the influence of Brandeis, did he veer somewhat in that direction (pp. 82-83).

Holmes scholarship does not justify his reputation as America's greatest legal thinker. His book, *The Common Law*, has mostly been overrated (pp. 84-131). Its truly remarkable (and well-known) part is very small — it consists of "five great paragraphs" (p. 85) and these paragraphs were not nearly as pathbreaking as their reputation sug-

gests (pp. 86-103). The ideas expressed here had long since been developed by others and were widely shared at the time — many of them even by Holmes's jurisprudential target, Christopher Columbus Langdell. In fact, the opposition between the formalist Langdell and anti-formalist Holmes is largely an invention of later generations. The huge, “mercifully unread” (p. 131) remainder of *The Common Law* — i.e., Holmes's lengthy search for fundamental principles of liability — was by and large a scholarly disaster (pp. 104-25). The attempt to distill all-encompassing principles from the multitude of cases was a thoroughly formalist enterprise and worse than anything Langdell ever attempted. Holmes's arguments and analyses were confused and contradictory and most of his results implausible, if not patently absurd. All in all, the book was a “clear failure.”<sup>11</sup> Holmes's most famous essay, *The Path of the Law*,<sup>12</sup> does not fare much better (pp. 133-180). While the piece has frequently been praised as one of the best essays ever written about law, closer inspection reveals fundamental flaws. This is true for all four elements of the “Holmesian positivism” the article expresses (p. 133) — i.e., Holmes's prediction theory, his “bad man” test, his attempt to separate law and morals in general, and his idiosyncratic theory of contract in particular.<sup>13</sup> The whole piece is full of ill-considered and implausible statements, and Alschuler finds virtually nothing to be said in its favor.

Alschuler's explanation of why such a brutalized man holding such flawed views became the hero of modern American law is threefold (pp. 181-86). First, Holmes actually had several impressive qualities (such as brilliance, powerful prose, prestigious pedigree, striking appearance, charm, and longevity), and his views on the crucial constitutional issues of the time ultimately carried the day (p. 181). Second, the promotion of Holmes by Felix Frankfurter, Harold Laski, and

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11. P. 125 (citing Saul Touster, *Holmes a Hundred Years Ago: The Common Law and Legal Theory*, 10 HOFSTRA L. REV. 673, 685 (1982)). Holmes's decisions on the Massachusetts Supreme Judicial Court also show that his thinking about the common law was “mechanistic,” “undistinguished,” and “at least as callous and pedestrian as those of most other jurists of his time.” Pp. 130-31.

12. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

13. Holmes's prediction theory “neither corresponds to the ordinary meaning of the word [law] in our language nor to the meaning of law in our lives.” P. 139. Its focus merely on courts and merely on sanctions is much too narrow, pp. 145-46, and leaves law devoid of any substantive content. Pp. 170-71. His “bad man” test misses the mark because a bad man would worry much less about what the courts do than about what those executing their judgments (i.e., sheriffs) do. P. 145. More importantly, the test is woefully incomplete because people obey legal rules not only for fear of sanctions but also because of their conscience and a “sense of reciprocity.” P. 149. Holmes's crusade against the use of moral terminology in law is ultimately pointless because a complete separation of the Is and the Ought is impossible. “In one sense . . . law plainly is separate from morals, and in another sense, it plainly is not. Moral sentiments shape law, but law can be immoral.” P. 151. Finally, his theory of contract as simply an obligation to pay damages for nonperformance is “a hopeless jumble of ill-considered prescriptive and descriptive ideas.” P. 176.

other influential disciples created a powerful myth about him to which he contributed by telling “tales, true and false” (p. 184) about himself. Third, Holmes formulated and promoted the ideas that came to determine the character of twentieth century American jurisprudence.<sup>14</sup>

What is the reader to make of this diatribe against the most revered figure in American law? Alschuler’s attack on Holmes is terribly one-sided, but I do not consider that a flaw. I take it to be Alschuler’s very purpose to present the case *against* Holmes in order to provide an antidote to all the lavish praise Holmes has received from others.<sup>15</sup> In current American legal scholarship, deconstruction is a widely respected agenda, and “[w]hen you strike at a king, you must *kill* him.”<sup>16</sup> Moreover, Alschuler recognizes that Holmes had attractive sides and emphasizes that the “book does not deny his greatness” (p. 181). Alschuler just does not make Holmes’s positive sides his concern.

The real problem with his attack is that too little of it is new. Anyone who is conversant with the literature about Holmes — and Alschuler does not seem to write for the uninitiated — will find most of his points quite familiar. Holmes’s nihilist and Darwinian outlook; his cold and harsh personality; his war experience underlying both phenomena; the error of reading his Supreme Court opinions as expressions of liberalism; the limited originality of his ideas expressed in *The Common Law*; the formalism, confusion, and ultimate failure of the book; the pedestrian character of his common law decisions; the fundamental problems with his positivist claims advanced in *The Path of the Law*; the creation of the Holmes-myth by his fans and disciples; and many other aspects, facts, and stories have already been explored by others and even by Alschuler himself.<sup>17</sup> There is no need to support this statement here, because Alschuler provides all the evidence. He duly quotes and cites those who have made the respective observa-

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14. Pp. 184-86. See *infra* Part III.

15. On the very first page, the author declares that his book “presents a critical review of the life and work of Justice Holmes.” P. 1. On several occasions, Alschuler begins his argument by citing those praising Holmes and then proceeds from there. See, e.g., pp. 14-15, 132. My understanding that he purported to write an indictment may be too generous, because in other instances he sounds as if he wanted to engage in a more balanced analysis. See, e.g., p. 10 (“[T]his book reviews the evidence . . .”).

16. This was the advice Holmes received from Ralph Waldo Emerson when he showed him an essay criticizing Plato. The story is well-known and recounted by Alschuler as well. P. 41.

17. Perhaps the most original part of the book, i.e. the critique of the positivism Holmes expressed in *The Path of the Law*, had previously been published as a law review article. See Albert Alschuler, *The Descending Trail: Holmes’ Path of the Law One Hundred Years Later*, 49 FLA. L. REV. 353 (1997).

tions and arguments on hundreds of occasions.<sup>18</sup> Alschuler is not plagiarizing, but he is repeating.

Alschuler was apparently conscious of this problem, because he offers something of a justification. He considers the more recent literature on Holmes overwhelmingly laudatory and the older, more critical, views largely forgotten (p. 10), implying that the older views need to be revisited in order to avoid too rosy a picture of Holmes. Yet, the recent Holmes scholarship is not overwhelmingly positive (in fact, most of the older views were).<sup>19</sup> Much of it is quite critical<sup>20</sup> or, like the modern biographies, at least fairly balanced.<sup>21</sup> Alschuler belies his own characterization of the modern scholarship because he cites much of it throughout the book in support of his own highly negative views.

To be sure, Alschuler's critique is not just a mindless collection of old hats. Some of its elements are new: some of the well-known views are worked out in greater detail than before, supported by better evidence, and expressed more persuasively, and Alschuler assembles the multitude of prior criticisms in one book. But novelty is the exception; elaboration does not always lead to new insight, and I wonder whether the whole of the book's critique really amounts to more than the sum of its parts.<sup>22</sup>

Alschuler's bleak personal portrait of Holmes is also quite unsympathetic. At least today, we might consider Holmes a victim of war, haunted by nightmarish images and scarred by extensive emotional damage. To be sure, it is difficult to feel sorry for someone who had a brilliant career, succeeded in fulfilling his highest ambitions, and on the whole appeared to be content rather than tragically unhappy. But perhaps a lonely and childless man with few, if any, real friends deserves more pity than condemnation.

Alschuler's attack on Holmes is mainly a collection and elaboration of arguments that have been made against Holmes over the years with occasional new insights sprinkled throughout. Judged by the

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18. See also the collection of critical writings about Holmes by David Dolinko, *Alschuler's "Path,"* 49 FLA. L. REV. 421, 422 (1997). For a summary of the older literature, see G. Edward White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51 (1971).

19. This is particularly true in the early to mid 1930s. See, e.g., Felix Frankfurter, *Mr. Justice Holmes*, 48 HARV. L. REV. 1279 (1935); Learned Hand, *Mr. Justice Holmes*, 43 HARV. L. REV. 857 (1930); Frederick Pollock, *Mr. Justice Holmes*, 48 HARV. L. REV. 1277 (1935).

20. See, e.g., GRANT GILMORE, *THE AGES OF AMERICAN LAW* 48-50 (1977); Gordon, *supra* note 3; David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449 (1994); David Luban, *The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's The Path of the Law*, 72 N.Y.U. L. REV. 1547 (1997); Touster, *supra* note 11; Louise Weinberg, *Holmes' Failure*, 96 MICH. L. REV. 691 (1997). As mentioned, I also do not consider my own writing about Holmes "laudatory." See, e.g., Mathias Reimann, *Why Holmes?*, 88 MICH. L. REV. 1908, 1922-24 (1990).

21. See *supra* note 2.

22. See *infra* Part IV.

standards of modern American legal scholarship, which prizes novelty above almost anything else,<sup>23</sup> this cannot count as a great accomplishment. And given the existing mass of Holmes scholarship, one may doubt whether the book's critique, in and of itself, sufficiently advances our understanding of the man and his work to justify the effort. Yet, while this critique takes up most of the book's pages, it is only one of its agendas.

## II. EXPLAINING HOLMES

While much of Alschuler's attack simply purports to demonstrate that Holmes's greatness was a lot smaller than is commonly believed, the book also seeks to prove a larger thesis. Looking at Holmes as a nihilist, Darwinist, and positivist shows that the contradictions and tensions that many scholars have found in Holmes are more apparent than real. According to Alschuler, such a perspective reveals that "the extent to which Holmes's worldview, politics, legal work, and personality all matched one another is remarkable. There is a unity to his epistemology . . . jurisprudence . . . and personal ethics" (p. 11) because a "glorification of war, power, and struggle became the centerpiece of Holmes's approach to just about everything" (p. 49).

The thesis is intriguing, and its development in such detail is new. On the whole, Alschuler's effort to support it is quite successful. Yet, I wonder whether the endeavor as such makes much sense.

Alschuler's effort succeeds not because he proves his case beyond a reasonable doubt, but because he makes it plausible enough to merit careful consideration. Of course, both his overall thesis and most of his evidence are debatable. The overall thesis that Holmes's harshness, nihilism, and positivism determined virtually all his adult life and legal work is open to dispute simply because during his long career, Holmes did, said, and wrote many things that seem contradictory (and because personally, he never seems to have been intentionally nasty to anyone). It is no wonder, therefore, that other scholars have proffered very different explanations of Holmes and have emphasized other features of his thought.<sup>24</sup> Individual pieces of proof are subject to doubt because much of what Holmes said and wrote was enigmatic and invites different readings.<sup>25</sup> Thus one can quarrel with many of Alschuler's interpretations (although most of the responses would require a full-fledged law review article), and some scholars have done

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23. Personally, I find this infatuation with novelty at the expense of other values, such as the integration, orderly presentation, or updating of existing knowledge misguided and silly, but that is besides the point here.

24. See, e.g., HOFFHEIMER, *supra* note 6; POHLMAN, *supra* note 6.

25. See *infra* notes 28-32 and accompanying text.



so with considerable success.<sup>26</sup> One can also think of evidence openly conflicting with Alschuler's thesis but such instances are rare.<sup>27</sup> Yet, ultimately all one can ask of any interpretation of Holmes is that it be debatable in the positive sense of deserving serious attention. Alschuler's thesis passes this test with flying colors.

Still, I wonder whether *any* search for the single key that unlocks all the mystery in Holmes makes any deeper sense. I doubt it, but not because such a search is necessarily doomed to failure — it may or may not be.<sup>28</sup> Instead, such an endeavor strikes me as questionable because consistency is not what Holmes himself was all about nor what makes our engagement with him rewarding. Holmes himself did not deeply care for consistency, at least most of the time, as Alschuler demonstrates so vividly with regard to so much of Holmes's scholarship.<sup>29</sup> He liked to play Mephistopheles,<sup>30</sup> i.e., to provoke, dazzle, and puzzle. He fought the human desire to reconcile all contradictions because he believed that “repose is not the destiny of man,”<sup>31</sup> although he himself often yielded to this temptation. Perhaps even more importantly, the scholarly discussion of Holmes and his work over the past century has been fueled largely by the perceived contradictions and tensions in his ideas. He stood at so many crossroads that he wove together a multitude of diverse strands — historicism and modern law-making, formalism and instrumentalism, scholarship and judging, narrowminded reasoning and grand ideas, liberalism and totalitarianism, to name just the obvious. This coexistence of conflicting ideas — not

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26. See the responses to an earlier version of one central chapter, Albert Alschuler, *The Descending Trail: Holmes' Path of the Law One Hundred Years Later*, 49 FLA. L. REV. 353 (1997), by David Dolinko, *Alschuler's "Path,"* 49 FLA. L. REV. 421 (1997), and James Gordley, *When Paths Diverge: A Response to Albert Alschuler on Oliver Wendell Holmes*, 49 FLA. L. REV. 441 (1997).

27. It may be possible to find consistency even between Holmes's First Amendment majority opinions and his famous dissent in *Abrams v. United States*, 250 U.S. 616, 624 (1919), a year later, because all of them are ultimately based on deference to the results of power struggles: the former in the legislature, the latter on the marketplace of ideas. Pp. 71-81. But I cannot read Holmes's almost contemporaneous dissent in *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918), as the product of a harsh nihilist who believed in and cared about nothing. It is true that Holmes wanted to defer to the outcome of the legislative process here as well but he also chastised child labor as an “evil” which all civilized countries have condemned and he viewed legislative prohibitions as a measure to prevent “ruined lives.” *Id.* at 280.

28. Of course, every interpretation of Holmes will be somewhat imperfect. On a few occasions, Alschuler admits as much, most importantly with regard to Holmes's judicial opinions. See pp. 11, 52-53.

29. See *supra* notes 11-13 and accompanying text.

30. OLIVER WENDELL HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 295 (1920).

31. Holmes, *supra* note 12, at 466.

any kind of real or imagined consistency — is what makes his jurisprudence so intriguing that we cannot let go of him.<sup>32</sup>

Alschuler is right that it is too simple to divide the phenomenon of Holmes into “Jekyll Holmes and Hyde Holmes” (p. 15), but it is also too simple to see, this multifaceted jurist only as an internally coherent thinker, as “just Holmes” (p. 20). Instead, Holmes’s ideas turn out to be both — contradictory on one level and coherent on another, complex in some contexts and simple in others, crystal clear on a few occasions and maddeningly vague in most other instances. It all depends on who looks at these ideas, when, where, and for what purpose. In this regard, Holmes’s thinking was like the law itself. This is why Holmes is justly considered the law’s most prominent symbol in the United States, and why explaining away his contradictions and tensions strikes me as strangely besides the point. Yes, there is the harsh, nihilist, and positivist Holmes Alschuler portrays, and it is quite plausible to see this side of him as internally consistent. But there is also his tension-ridden alter ego, and on the whole, the contradictory Holmes is the more interesting, as well as the more significant.

### III. BLAMING HOLMES

Alschuler focuses on the coherent — i.e., consistently nihilist and positivist — Holmes because he casts him as the principal “villain,” (p. x), in the book’s larger morality play. On its stage, Holmes appears as the leading forerunner of the very skepticism and nihilism Alschuler deplors in twentieth century jurisprudence. The plot is difficult to follow because the book presents the play in bits and pieces at its beginning and end (pp. 1-10, 184-186, 187-190) and without regard to chronological order. The story is roughly this:

The first act describes the early period. Since the time of Socrates and Cicero and through the age of the great natural law thinkers, Western culture was committed to substantive ethical values as the foundation of jurisprudence. In the common law realm, this natural law tradition was evident in the works of Locke, Blackstone, Jefferson, Marshall, Kent, Story, etc. (p. 9), and it lasted until the time of the Civil War. In the second act, beginning in circa 1870, Darwin entered the stage and, in his wake, positivism and moral skepticism came to the fore. A revolution occurred during which Holmes, as well as Langdell, Beale, Pound, and many lesser lights, took over American jurisprudence. They pushed natural law out of the picture and replaced it with positivism and value skepticism. They were so successful, that, subsequently, “moral relativism [had] its longest sustained

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32. Even if Alschuler is right that Holmes’s “Nietzschean-Darwinian” worldview can hold all the parts of *The Path of the Law* together, p. 135, that hardly means that we will stop struggling with the essay.

run in Western history” (p. 19). In the final act, we see how this new thinking dominates modern American law. Value skepticism appears in two versions: mild and piquant. The milder version (pp. 2-6) is a “murky utilitarian pragmatism” (p. 2) that prevails in legal education, scholarship, and judging. Embracing no substantive ethical principles of right and wrong, it is consequentialist and instrumentalist, though ultimately utilitarian. The prime example is law and economics, which, on Alschuler’s stage, is represented by his colleague on the Chicago faculty, Judge Richard Posner. In the “more piquant” version (pp. 6-8), value skepticism goes all the way and sees law only as “the self-interested exercise of power” (p. 2). On the political right, the main example is public choice theory, on the left, it appears in the garb of critical legal studies, critical race theory, and feminist jurisprudence. The overall result is an appalling lack of ethical values in law shared by the left and right.

To the extent it relates to Holmes, this morality play consists of three elements: a new and valuable interpretation of Holmes’s jurisprudential significance, an interesting but poorly documented thesis that both the right and left in American jurisprudence are his heirs, and an amazing claim that following Holmes’s path has steered us towards the crisis of modern American society at large.

The most valuable aspect is the interpretation of Holmes’s role in the development of American jurisprudence. The book depicts him as a destroyer not so much of formalism but of the natural law tradition. It correctly states that in the nineteenth century formalism was not nearly as prevalent as commonly assumed, and that Holmes’s evolutionary, policy-oriented, and adaptive view of law was not nearly as novel (pp. 91-101). According to Alschuler, the crucial change lay somewhere else: Holmes and those who joined him (including the “formalist” Langdell) abandoned the idea that jurisprudence must rest on ethical foundations, i.e., that it must be guided by substantive notions of justice. Thus, Holmes’s main contribution was not that he added something to, but that he took something away from, American legal thought, namely “the sense that law can further objectives beyond internal coherence, personal tastes, and selfish interests” (p. 10). In short, “Holmes was at the forefront of a revolution whose achievements were mainly negative. This revolution was not a ‘revolt against formalism’ but a revolt against objective concepts of right and wrong — a revolt against natural law” (p. 10).

Alschuler’s new interpretation is both important and convincing. To be sure, the claim that the revolution Holmes led was *not* a revolt against formalism is difficult to defend,<sup>33</sup> just as we may doubt the ex-

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33. Even Alschuler admits, though just in passing, that Holmes was “a needed corrective for the mechanistic legal thought of turn-of-the-century America.” P. 181.

tent to which Holmes rejected natural law ideas.<sup>34</sup> But we can leave that to one side. The insight remains that Holmes's agenda was also, and perhaps even primarily, a revolt against the belief in substantive values in jurisprudence. This sheds new light on Holmes and on the changes that occurred in American legal thought after the Civil War. It also helps us understand the relationship between Holmes and Langdell (and other formalists), i.e., their shared positivism that differed so markedly from the antebellum period and that became so dominant from 1870 onward.

Alschuler's thesis that both the right and left in modern American jurisprudence, especially of the "piquant" variety, are the heirs of Holmes, is more difficult to assess. To begin with, one must be clear exactly what he says. His thesis is *not* that, with Holmes, we have all become policy-oriented pragmatists and realists; that would be banal. Instead, Alschuler maintains that we have succumbed to Holmes's rejection of ultimate truth, to his fundamental value skepticism, and to his belief that law is merely the result of power struggles. Alschuler does not claim Holmes as the only cause of this development,<sup>35</sup> but he does see him as the leading figure who sent us down the path toward a loss of substantive values. This thesis is intriguing, and it is perhaps to a considerable extent correct. But it is problematic in two respects. First, Alschuler's claim is questionable because moral elements and the pursuit of substantive values are not lacking from American law at large. Just think of antidiscrimination policies and affirmative action, feminist equality claims or human rights. Or consider the prominent role of Ronald Dworkin in current American legal philosophy. In fact, regarding many issues, there may very well be too little, rather than too much, moral skepticism — witness the morally charged debates about abortion, gay rights, and the death penalty. Thus, Alschuler's claim that moral skepticism is rife and exaggerated in modern American law is true with regard to some areas, but not across the board. Second, even with regard to the particular strands of American jurisprudence he has in mind, especially the economic analysis of law and some radical left-wing agendas, Alschuler fails to substantiate the connection he sees between Holmes and present-day value skepticism. One would expect him to demonstrate how, when, and where Holmes's ideas came to dominate modern American legal thought, perhaps through Pound or the Realists, but Alschuler does nothing of that sort. Except for the fact that Richard Posner is a Holmes fan,

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34. See HOFFHEIMER, *supra* note 6 (arguing that Holmes's thought contained significant natural law elements). Alschuler does not address Hoffheimer's argument but seems to have overlooked his book.

35. In fact, Alschuler writes that the "revolution" would have happened even without Holmes. P. 185.

Alschuler offers no proof that the moral relativism or power-based views of law in modern jurisprudence are primarily due to Holmes.<sup>36</sup>

The upshot of Alschuler's morality play is that the value skepticism we have embraced since Holmes has led to the disintegration of American society as a whole (pp. 187-90). According to the book, this society is in a horrible condition. It has the "vices of atomism, alienation, ambivalence, self-centeredness, and vacuity of commitment" (p. 187), and its members are "indolent, cynical, and bitter — envious of those above, reproachful of those below, and mistrustful of those around them" (p. 187). Its evils range from "selfish-consumerism" and "electronic junk" (p. 188) to crime, child-abuse, guns in school, and overweight teenagers (pp. 187-89).

All this is true, but one wonders what it has to do with Holmes. Alschuler himself is not sure. On the one hand, he claims that "[w]e have walked Holmes's path and have lost our way" (p. 187), on the other hand he realizes that one "cannot blame teen pregnancies on Oliver Wendell Holmes" (p. 189). Thus, he vaguely speaks of "affinities, symbols, parables, and paradigms" (p. 189). Apparently, the deplorable state of modern American society isn't really due to Holmes, although it sort of is. This part of the book does not further our understanding of Holmes nor, for that matter, of modern jurisprudence. It is not even a useful educational message. Alschuler wishes to "prompt some reconsideration of where Holmesian skepticism is likely to lead" (p. 194), but he fails to show how it leads to doubling homicide rates (p. 189) or passive and solitary consumption (p. 188), not to mention "blunt, ugly, angry and dissociative art" (p. 188). Like many doomsayers<sup>37</sup> and cultural pessimists before him,<sup>38</sup> Alschuler apparently believes that America will go to hell in a handbasket unless we forsake our evil ways and restore morality in society, and he may very well be right. But his jeremiad is so tenuously connected with Holmes and so overblown that it provides a sorry finale for the book.

#### IV. A LAW WITHOUT VALUES

If the reader takes a step back from the particular agendas and looks at the book as a whole, he or she may note two things. On the

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36. Alschuler does hint at a connection between Holmes's bad-man theory, which turns law "into a system" of prices, p. 174, as well as his theory of contract, and modern economic analysis of law. Pp. 172-79. But even here, it remains unclear what exactly the connection is. If the fathers of law and economics, such as Richard Posner and Guido Calabresi, adopted Holmes's bleak views of life and law, *Law Without Values* does not tell us when, or how, or why.

37. Alschuler realizes that his views are "reminiscent of doomsayers since Plato." P. 189.

38. Perhaps the best known modern American examples are ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987), and ROBERT BORK, *SLOUCHING TOWARD GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* (1996).

one hand, the work lacks internal coherence so that its overall accomplishment is difficult to assess. On the other hand, *Law Without Values* manages to illuminate an important, and disturbing, aspect of modern legal thought by linking it to Holmes's ideas.

The book lacks a coherent internal structure mainly because it does not clarify how the various agendas relate to each other. Are they coequal themes, tacked together because they are, in a sense, all about Holmes? In that case, we really have three law review articles, mixed up in a rather jumbled fashion and published in one volume. Or is there one dominant theme — perhaps Holmes's pernicious influence on modern legal thought — with the other two assisting in its development? If so, it remains unclear what, if anything, many of the bits and pieces contribute to that larger effort. Either Alschuler never pondered these questions or he simply did not care much about the answers. Moreover, the flow of the argument is seriously interrupted by various lengthy discourses that do not really advance any of the book's principal agendas. These digressions go off on all sorts of tangents, from general jurisprudential issues to particular critiques of law and economics doctrines.<sup>39</sup> In and of themselves, many of these mini-essays are extremely perceptive and highly valuable, and it is understandable that Alschuler could not resist the temptation to include them. But using a book on Holmes as a launching platform for lengthy and abstract discussions of the meaning of law or for voicing deep frustration with modern social decline is distracting and confusing.<sup>40</sup> Since *Law Without Values* fails to integrate its many parts into a coherent whole, the book remains a loosely organized collection of provocative theses and interesting ideas about Holmes in particular and American jurisprudence in general. Ironically, Alschuler's work on Holmes is much like Holmes's work itself — less original than it seems, rhapsodic, and plagued by digressions but also intriguing, penetrating, and occasionally brilliant.

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39. The clearest illustration of this problem is the lengthy chapter 7 on *The Path of the Law*. Pp. 132-80. More than half of it is not about Holmes or his essay at all. Alschuler discusses the relationship between law and morality in the abstract (including the Hart-Fuller debate), pp. 150-58, pursues such general questions as "Why Define Law?" pp. 158-61, and "What is Law?" pp. 161-72, and criticizes law and economics, especially the theory of efficient breach. Pp. 177-79. Note that these are not minor digressions but major detours which take up dozens and dozens of pages. At times, Alschuler shows an awareness of the problem when he admits that the discussion "will carry this chapter some distance from *Path of the Law*." P. 161. Still, when he admonishes the reader that "it's about Holmes, remember," p. 291 n.159, one is tempted to respond: "No, it isn't."

40. The readability of the book is also impaired by Alschuler's eschewal of footnotes in favor of endnotes, the consultation of which is notoriously inconvenient. In the case of *Law Without Values*, the problem is aggravated by the sheer volume of the notes, which cover over a hundred pages, pp. 195-306 — more than half as much space as the text. To be sure, endnotes are not the author's fault, but the terrible habit of most university presses. I suggest that we reintroduce tarring and feathering as a punishment especially reserved for those responsible for this utter nonsense.

Despite this lack of integration, and despite its occasional hyperbole, *Law Without Values* sheds an interesting, though somewhat diffuse, light on modern American jurisprudence: it links the modern moral skepticism and utilitarian pragmatism to the dark side of Holmes and thereby elucidates the disturbing implications of these phenomena. In this context, it does not really matter whether Holmes is responsible for the current prominence of skepticism and consequentialism in American law, or whether these features are in turn responsible for our real or perceived social malaise. Be that as it may, Alschuler is right that there is an important, and undeniable, affinity between important elements in modern American legal thought on the one hand, and Holmes's jurisprudence on the other: sharing a commitment to moral skepticism and legal instrumentalism, they both consider law primarily a result of political struggles and an instrument of social policy rather than an expression of moral values or a pursuit of natural justice.<sup>41</sup> The harsh and nihilistic Holmes that Alschuler portrays presents skepticism and consequentialism in extreme form so that Holmes can help us, as a caricature so to speak, to recognize the dangers implicit in these attitudes. His jurisprudence shows us how nicely much of modern mainstream American legal thought jives with the attitude that might makes right and that the law does not care if the devil takes the hindmost. In other words, by looking at Holmes, we can recognize how an infatuation with moral skepticism and with law as a means of social engineering marginalizes ethical concerns and comes perilously close to moral indifference, deference to the victors, and contempt for the losers.

Thus the ultimate importance of the book lies neither in its elaborate but largely familiar critique of Holmes, nor in its questionable attempt at a consistent interpretation of the man and his work, nor in its unsubstantiated claim that Holmes is to blame for the status quo of our jurisprudence and society. Instead, its main importance lies in a simple but valuable reminder: if American legal culture continues to revere a Nietzschean nihilist, a power-addicted war enthusiast, and an emotional cripple without sympathy for the underdog, it is flirting with moral bankruptcy.

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41. Another affinity between Holmes and much, though by no means all, modern legal scholarship is stylistic. Holmes understood that in order to style yourself as a guru, you have to sell your ideas appropriately. You have to exaggerate in order to get attention, to simplify in order to make your ideas attractive to the shallow thinker (as well as easy to remember), but also to remain sufficiently obscure and contradictory in order to provide a long-term challenge for the more profound reader. All of these techniques are frequently employed (consciously or not) by many modern scholars as well, often with amazing success. Since this style is so obviously at odds with careful scholarship, which calls for moderation, differentiation, and clarity, one wonders whether it has become so widely accepted because Holmes made it respectable. This might be a topic for a study in its own right.