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JUSTICE HOLMES AND HIS HECKLERS*

FRED RODELL†

WESTBROOK Pegler, the only man who ever made a living out of the sort of stuff that small boys scrawl on back walls and fences, has recently turned his dirty-name attack against Supreme Court Justice Oliver Wendell Holmes. Holmes, of course, has been dead these sixteen years and so Pegler, with his customary gallantry and courage, feels free to spit at the Justice's memory some of the choicer epithets in his vocabulary of vulgar invective. As Pegler puts it, Holmes was a "cynical and senile brutalitarian"; he was "the God of an evil cult"; he was "a brutal old faker"; and he "had no more morals than a pig."

The owner of these lovable traits was responsible, according to the limpид Peglerian logic of guilt-by-association run backwards, for the subsequent sins of Alger Hiss, Lee Pressman, and scores of unnamed others who made up the "maze of perfidy which developed in the bureaucracy soon after Roosevelt came to power"—all this by direct pipe-line, through the Harvard Law Review and Felix Frankfurter, straight back to the arch-villain, Holmes. (Does Westbrook, I wonder, lie awake nights wishing Franklin Roosevelt had gone to Harvard Law School instead of Columbia?)

Taken by itself, the picture of Pegler trying to "bring Holmes down" (the phrase is Pegler's) is essentially a comic picture. It is as though a worm with delusions of grandeur were to pick on a giant. For Holmes was one of the finest minds and greatest spirits that American civilization has produced. And only a man so bumpkin-ignorant that he thinks he need pretend ignorance in his writings could fail to recognize Holmes' stature and be a little humble before it. Indeed, no one would have laughed more heartily and unmaliciously than Holmes himself at Pegler's temper tantrum in print, despite its distribution to the millions of comic-book lip-readers who make up Pegler's audience and who probably confused his target-for-the-day with an outfielder, also named Holmes, formerly on the Boston Braves.

But Pegler's attack on Holmes unfortunately cannot be taken by itself and therefore cannot be laughed off and forgotten. Pegler, who probably never read a word Holmes wrote in his life, got his lead elsewhere. He got his lead from a group of men more responsible and thoughtful than he, most of whom would doubtless deplore Pegler's blast for its vulgarity and its vicious stupidity—but most of whom should recognize in what Pegler wrote a reaffirmation, however offensively phrased, of their own ideas about Holmes and his philosophy of law and life.

*The Editors are indebted to the Progressive Magazine for permission to publish this article.

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Thus Pegler makes extensive use in his column of a politely scholarly piece on "The Secret of Mr. Justice Holmes" which was written by a respectable San Francisco lawyer named Harold McKinnon, was published last year in the eminently proper American Bar Association Journal, and was later reprinted as a pamphlet with a laudatory foreword by Professor Mortimer Adler of Chicago who also believes in *The Great Books*.

According to Mr. McKinnon, the "secret" of Holmes was that, though he had "a very bad philosophy . . . fundamentally indistinguishable from the amoral realism of those regimes of force and power that are the scandal of the century" (which is a long-winded way of calling Holmes either a fascist or a communist), he nevertheless attained great fame because of "the simple fact that in the high realm of the intellect we have lost our principles." Hence Holmes' "philosophy is a symbol of our intellectual wretchedness, a conspicuous example of our abandonment of those spiritual, philosophical and moral truths that have been the life of" etc. And Professor Adler of *The Great Books* says, in introducing McKinnon, "his diagnosis is deadly accurate." Just how far are McKinnon and Adler away from Pegler?

Nor did the more erudite efforts to disparage Holmes' reputation and undermine his influence begin with McKinnon and Adler. For roughly ten years, the assault on Holmes and what he stood for has been out in the open—certainly since Fathers John Ford and Francis Lucey published separate attacks on the Justice back in 1942. The bluntness of Holmes' pre-Peglerian belittlers is perhaps best illustrated by the title of a 1945 article written by Ben Palmer, a Minneapolis lawyer, and printed, like the McKinnon piece, in the American Bar Association Journal; it was called "Hobbes, Holmes, and Hitler." And among those who have taken more restrained potshots at the Holmes prestige and philosophy is Professor Lon Fuller from—of all places—the Harvard Law School.

What lies at the bottom of all this desperate effort to discredit the almost legendary figure who at his death, and long before it, was hailed as the grand old man of U. S. law and as one of the great Americans of all time? Max Lerner, writing in the *New York Post* about the Pegler piece but apparently oblivious of the respectable soil from which it sprouted, opines that "in order to destroy the democratic idea you have to destroy democracy's dead heroes even more than its living champions." The explanation is too pat and too narrow; there is more behind even Pegler than this.

Says the Madison, Wisconsin, *Capital Times*, in an editorial typical of many throughout the country: "Pegler and his pack are currently out to destroy the name of . . . Holmes: The reason is obvious. Holmes was for many years the great champion of individual liberties on the court." That is getting a little closer, but only a little; too many of the Holmes critics believe, whether or not Pegler does, in the individual liberties that Holmes, as a judge, upheld.

In a recent issue of the *Harvard Law Review* (if Pegler will forgive my mentioning it) is an article by Professor Mark Howe, defending Holmes

against his critics including Howe's colleague, Professor Fuller. Early in the article Howe states: "The criticism of Fathers Ford and Lucey, popularized by Mr. Palmer and perverted by Mr. Pegler, is . . . firmly grounded in the Catholic philosophy of law" because "Holmes not only proclaimed himself a skeptic in matters of religion and denounced man's relentless effort to give human values a more than human significance, but he denied the existence of that law of nature upon which the Catholic philosophy of law is based."

Now the real roots of the assault on Holmes begin to show. There is no doubt that Catholic, and especially Jesuit, scholars plus Catholic laymen have been in the forefront of that assault. But to say this is by no means to say—nor does Professor Howe imply or say it—that the whole shebang is a Catholic conspiracy against the name of Holmes. Indeed, one of the most devastating denunciations of Pegler's column appeared in a Catholic publication, the *Commonweal*. And, much more significantly, just as all Catholics are not joined in the onslaught on Holmes (the late Justice Murphy, for one, bitterly resented it) so that onslaught has a far broader base than its sometimes militant Catholic participants.

The single trait that binds together the critics of Mr. Justice Holmes—be they Catholics, Protestants or Jews—is a belief in some sort of Absolute, outside and beyond the minds of men. That Absolute may be strictly religious, or philosophical or jurisprudential or, more often, a combination of all three—and to those who believe, there is presumably comfort in believing. But with the comfort, also presumably, there goes a lurking fear, that the faith in something certain and superhuman may be shaken or shattered. It was that sort of fear that Holmes instilled, and still instills, in the faithful.

Holmes would have nothing of Absolutes. In religion he was an agnostic, in philosophy a skeptic, in law a realist. The notion of any sort of ultimate truth, above the capacity of the human mind to create or affect, was abhorrent to him. He was expressing far more than liberal legal doctrine when he wrote: "When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market and that truth is the only ground upon which their wishes can safely be carried out."

By "competition of the market" he meant, of course, competition with other ideas in the minds of men. And this "best test of truth" was his answer to all the absolutes of authoritarianism, to having the answers handed down from somewhere on high. It was also his tribute to the essential dignity and decency of human beings.

This deeply democratic faith in man's power of reason is what Holmes' detractors slur over or ignore when they denounce his philosophy, whether politely or otherwise, as totalitarian-tended and hence unAmerican. Such denunciations stem in part from the denouncers' own emotional need to feel

that their personal dependence on some sort of safe-and-sound cosmic morality—call it God or Ultimate Truth or Natural Law—must be a part of every patriot's creed, that skepticism and Americanism are antithetical (a notion that would have amused some of our best-known patriots of the past). But these denunciations also stem from a complete misunderstanding, so stark as almost to seem deliberate, of the realism about law and life that was the touchstone of all Holmes' thinking.

Holmes hated humbug. He was not one to confuse words with things. The conventional way of scholarship, especially in the law, with its concentration on abstract principles and concepts and rules to the disregard of down-to-earth facts, was anathema to Holmes. And so a large part of his work was devoted to digging beneath the deceptive claptrap of word-thinking and to finding and stating the realities of living law.

His insistent realism led Holmes to proclaim many unpleasant truths about the way law works, truths which the word believers, complacent in their conceptual clouds, found hard to face. One of his most-quoted shockers went to the effect that all that law really amounts to is what a bad man cannot get away with—that is, what an utterly lawless and immoral person cannot do without being legally punished for it. And much of Holmes' stuff, in and out of the field of law, stresses force—whether of police or armies—as the ultimate arbiter today of men's affairs.

It is to this sort of unpalatable realism—the truth of which could be bitterly attested by most of the world's peoples today (and why should the U. S. bother to build atom bombs if right makes might?)—that Holmes' attackers point when they call him totalitarian or worse. What they conveniently overlook, as even the most scholarly of them quote Holmes out of context, is that Holmes here was merely describing what *is*; he was not purporting to say what *ought to be*. Indeed, in the very speeches and articles most commonly cited against him, Holmes took pains to make clear that he was not defending the *status quo* which he described, that his realistic analyses were meant as a basis from which intelligent improvement might spring, that his skepticism had never bred in him the cynicism of defeat and despair, and that, in the realm of *ought-to-be*, he held strong moral and ethical views concerning decency and justice among mankind.

The reason why his disparagers persist in confusing Holmes' *is* with his *ought-to-be* and in closing their eyes to his clear moral sense of the good, the decent, the desirable, goes straight back to Holmes' impatience with Absolutes. His critics, authoritarians all, will accept no moral code as truly moral that does not embody a set of timeless superhuman principles; to them, a system of ethics which finds its sole source and its outer limits in the minds of men is a contradiction in terms. To Holmes, who asked for no ultimate answers, morality was no less moral—and perhaps a little more moral—because it was the product of the innate decency of human beings.

When Holmes enraged the legal authoritarians by scoffing at their concept of Natural Law—a supposed body of absolutes by which all manmade laws should be tested—he did not mean that all manmade laws were good, nor that manmade laws should not be judged in the light of ethical values, nor that manmade laws should not constantly be changed to better achieve the ethical ends of fairness and justice. He meant only that any ethical values or ends to which laws could and should be related would always have to come out of mortal minds rather than out of some jurisprudential heaven.

A couple of Holmes' best-known epigrams are aimed at the authoritarianism implicit in Natural Law: "The common law is not a brooding omnipresence in the sky." "The life of the law has not been logic; it has been experience." For Holmes saw that those who claimed for their ideas, as he never did, a validity apart from the facts of life, a validity said to be grounded in the abstractions of logic or the absolutes of Natural Law, were in essence trying to raise those ideas to a stature not inherent in the ideas themselves and so scare away any irreverent skeptics who might want to ask *Why*.

Small wonder, then, that the boys who know all the answers, be they columnists or scholars, have been trying to "bring Holmes down." They know him, even sixteen years dead, as their mortal—or maybe immortal—enemy. So long as his words can still be read, their philosophy and their teachings are insecure.

For so long as Holmes' words can still be read, they will penetrate and influence the minds of the men who read them—those human minds to which Holmes' whole credo paid such respect. And if the men who read Holmes read his detractors too, they will see which of the two conflicting views of life is more nearly fascist (authoritarianism is the essence of fascism) and which is more deeply democratic (democracy postulates the intelligence of each individual man). Perhaps they will also come to see some element of moral cowardice in him who turns to Absolutes for solace and some touch of intellectual arrogance in him who tries to impose his Absolutes on others.

Justice Holmes had the moral courage to accept uncertainty and the intellectual humility to know that he could not know—This is Truth.

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