

# **The Disappearance of Moral Knowledge in Law**

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“Morality [is] truth; and truth [has] been revealed to man in an unbroken, continuous, and consistent flow by the great prophets and poets of all time.”

Louis Brandeis<sup>1</sup>

Moral preferences are “more or less arbitrary... Do you like sugar in your coffee or don't you?... So as to truth.”

Oliver Wendell Holmes<sup>2</sup>

When I was a law student at the University of Virginia in the mid-1970s, my jurisprudence professor Calvin Woodard used the law school's architecture to illustrate the twentieth century's major jurisprudential shift—a shift mirrored in society generally as described by Dallas Willard as the twentieth century's loss of moral knowledge. Above the columns at the entrance to Clark Hall, where I spent my first year of law school, carved in stone was the statement: “That those alone may be servants of the law who labor with learning, courage, and devotion to preserve liberty and promote justice.” From the front, we walked into a massive entry hall, adorned on either side with murals. On one side was Moses presenting the Ten Commandments to the Israelites. On the other was what appeared to be a debate in a Greek public square. As we gazed up at the larger-than-life figures, they seemed to represent the higher aspirations of the law.

During my second year in law school, we moved to a much more modern, efficient building known then as “no-name hall,” some distance from the rest of the University. The statement that had been above the entrance to Clark Hall was placed on a modest plaque at the entrance to the new building. Small pictures of the murals were placed in the lobby. [A new addition to the law school includes somewhat larger copies of the statement and the mural.]

Mr. Woodard (we always used “Mr.” at the University of Virginia) noted wistfully that few contemporary legal philosophers would have thought that the aspirations for law or lawyers conveyed in the motto above the entrance and reinforced by the murals made sense any longer. Such claims were nostalgic remnants of Blackstone's era. Legal philosophy had followed Oliver Wendell Holmes, who defined law as merely “prophesies of what the courts will do in fact”<sup>3</sup> and

said, “I hate justice, which means that I know that if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms.”<sup>4</sup> Holmes argued that there is no higher law. Law is merely the assertion of power down here. Despite changing views of law, I don’t believe that any Twentieth-Century law school has chosen to place Justice Holmes’s “I hate justice” above its entryway.

Though Holmes and Louis Brandeis were on the Supreme Court during approximately the same period (and were the closest of friends), I think their philosophies of law illustrate the great divide in law, illustrating the loss of moral knowledge described by Professor Willard. I will give an introduction to each, describe the ways in which legal theory has followed Holmes (unfortunately), rather than Brandeis. Next, I will point out how these theories are manifested in legal ethics, lawyer counseling, law school, and law practice. Finally, I will consider the possibility of the reintroduction of moral knowledge in law.

## **Law Founded on Moral Knowledge**

For eighteenth and nineteenth century English and American lawyers, the notion that there was such a thing as moral knowledge is most clearly illustrated in William Blackstone’s *Commentaries*, the legal Bible for English-speaking lawyers of that era.<sup>5</sup> As law professor Albert Alschuler has argued, Blackstone taught that “[t]he study of God and the study of human nature led to the same understanding [of natural law]”—“You can discover natural law by reading your Bible [or] by asking whether an action tends to man’s real happiness.”<sup>6</sup> However, Blackstone recognized that people have a tendency to “mistake for nature what we find established by long and inveterate custom” and argued that the law maker should resist that tendency.<sup>7</sup> (Blackstone himself was slow coming to the conclusion that slavery was illegal in England.)

In the late nineteenth and early twentieth centuries, Louis Brandeis reflected this traditional notion that law is grounded in moral knowledge. In the words of Brandeis biographer, Melvin Urofsky, through all sorts of social and political changes in his life, “Brandeis clung to a belief in essential, immutable values.”<sup>8</sup> Brandeis drew those values from a variety of classical sources. His speeches quoted Shakespeare, Goethe, and the Greeks.<sup>9</sup> He argued that: “Morality [is] truth; and truth [has] been revealed to man in an unbroken, continuous, and consistent flow by the great prophets and poets of all time.”

In a series of lectures given at MIT in the early 1880s, Brandeis argued that the bulk of the law is developed by common law judges “in the cases as they arose; that the law was to be found, not that the judges make the law; that they have no power to do.”<sup>10</sup> He argued that “The basis of all these rules are justice[,] morality and public convenience, the whole system is a product of the sense of natural justice, experience and cultivated reason.”<sup>11</sup> Dean Acheson, one of Brandeis’s law clerks and later U.S. Secretary of State said of Brandeis:

“[We] saw his burning faith that the verities to which men had clung through the ages were verities; that evil never could be good; that falsehood was not truth, not even if all the ingenuity of science reiterated it in waves that encircled the earth.”<sup>12</sup>

But Brandeis had a realistic view of human ability to discern the truth. One of his favorite statements (based on a line from Euripides)<sup>13</sup> was “The worldly wise are not wise, claiming more than mortals know.”<sup>14</sup>

Note that Brandeis, like other lawyers from the nineteenth century referred to judges “finding law.” Albert Alschuler has argued, in using the terms “judge-discovered law, rather than judge made law” natural lawyers, “with a wink and a nod” made the point that they look for higher ideals as the basis of law. But, as noted below, such language was the subject of derision by Oliver Wendell Holmes.

## Holmes and Legal Theory

Holmes argued, “[I] hate justice, which means that I know that if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms.”<sup>15</sup> Holmes rejected natural law as “a brooding omnipresence in the sky.”<sup>16</sup> According to Albert Alschuler, Holmes and his twentieth century followers generated a legal revolution by removing from the traditional conception of law “the idea that, even as law adapts to changing circumstances, it can adhere at its core to immutable principles of justice.”<sup>17</sup> Holmes “revolt[ed] against natural law or objective concepts of right and wrong.”<sup>18</sup> Without such principles, Holmes identified his “starting point for an ideal for law” as “taking in hand life and trying to build a race,”<sup>19</sup> “restricting propagation by the undesirables and putting to death infants that didn’t pass the examination, etc. etc.”<sup>20</sup> Holmes did not leave such arguments at a theoretical level. Holmes was able to put into action his legal ideal of “build[ing] a race” in *Buck v. Bell*, which approved of Virginia sterilizing women who suffered from “hereditary forms of insanity [or] imbecility.” In possibly the cruelest Supreme Court phrase ever uttered, Holmes held that “Three generations of imbeciles is enough.”<sup>21</sup>

Though hailed as a hero through the 1930s, beginning in 1940, scholars and others came to question his reverence for power, his support for eugenics, and his attitudes toward race. His theories seemed bold and refreshing in the early part of the century, but his brave new world was less appealing in the face of Nazism in the 1940s and the growing race consciousness of the 1950s and 60s. In the early part of the century, his bold challenge to natural law and conventional morality was freeing, but a closer look at the implications of his theories for law and for society has found his theories wanting. His notion that, “[W]ise or not, the proximate test of a good government is that the dominant power has its way”<sup>22</sup> or that “[A] law should be called good if it reflects the will of the dominant forces of the community even if it will take us to hell,”<sup>23</sup> are chilling in the face of the Nazi forces.

But legal theorists have been unable to get away from Holmes. If we are to leave natural law and objective morality, there may be little alternative to Holmes’s prescription. Holmes led the way for the critical legal studies and the law and economics movements of the later decades of the twentieth century. Those movements trace their roots to Holmes’s 1897 address, later published in the *Harvard Law Review*, “The Path of the Law.” In it, he defined the law in a manner that has emerged as the standard at least for lawyers: “[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by a judgment of the court. . .”<sup>24</sup> “For my part, I often doubt whether it would not be gain if every word of moral significance could be banished from the law altogether. . .”<sup>25</sup>

Laying the groundwork for law and economics' scholars notion of "efficient breach" Holmes said, "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else."<sup>26</sup> There is no difference between a fine and a tax. Both merely create incentives. Tort law is not a question of fault, but the extent to which the public should pay (through higher prices) to compensate for those injured by various enterprises. The question of liability should be "how far it is desirable that the public should insure the safety of those whose work it uses."<sup>27</sup>

"If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."

### *Critical Legal Studies and its Progeny*

Holmes's notion that law is nothing but power became the standard dogma on the left among the critical legal studies (CLS) movement and its feminist and critical race theory progeny. They brought the tools of postmodern literary criticism and neo-Marxist social thought to the legal academy in the 1970s and 80s.<sup>28</sup> They argued that law is merely power; the legal system denies the poor, racial and other minorities, and women power; and these groups should seize it. Legal analysis is, in Roberto Unger's terms, merely 'one more variant of the perennial effort to restate power and preconception as right.'<sup>29</sup>

While CLS advocates sought to tear down the existing legal structures, it was not (and is not) clear what they would erect in their place. If law is merely power, there is no reason for the powerful to change the status quo. In my view, many of the best legal actions of the twentieth century were done in the name of a higher law—Nazi war prosecutions, the civil rights movement, the fall of the Soviet Union. It is difficult to imagine Martin Luther King, Jr., John Paul II, and their followers standing up to evil without a belief in absolute truth.

CLS advocates are correct that law is too often just a matter of the exercise of power, used at the expense of the poor and powerless. At their best, CLS advocates are modern-day prophets, pointing to injustice in our society. However, they then proceed to disclaim the very values—justice and a higher morality--that would give meaning to their words and provide the basis for building a society that does more than reinforce the power of the powerful. If law is merely power, it will continue to benefit the powerful. Those who are disenfranchised should not merely seek power. Both they and those in power should seek justice.

Moral skepticism is likely to lead ultimately to protection of one's own interests. There is nothing to which a prophet can appeal. It is a mystery why recognition of objective truth has been taken as a conservative value. Belief in a higher law is neither a conservative nor a liberal value. It merely raises the question whether the status quo is consistent with the higher law or not. If so, it gives reason to support the status quo; if not, it gives reason to oppose it. Without a higher law to appeal to, the strong are likely to gain more power at the expense of the weak.

## ***Law and Economics and its Progeny***

On the other end of the political spectrum is law and economics. Holmes predicted the rise of the law and economics movement: “For the rational study of the law . . . the man of the future is the man of statistics and the master of economics.”

The law and economics school of legal thought developed great influence among law schools in the 1970s.<sup>30</sup> It brought to law the tools of economic analysis. For some, law and economics is merely descriptive—it identifies the economic costs and benefits of various rules of law. But for others, the discipline is normative—it holds that courts *should* always adopt the most efficient rule; law *should be* utilitarian, providing greater goods for all to enjoy. Some law and economics scholars have applied efficiency theories to matters not normally associated with economics—to the allocation of adopted children and human organs and to the efficiency of criminal punishment and suicide.

There is value to efficiency—we are stewards of all that God gives us and should not waste it—but justice and human dignity are higher values. Some rules and means of analysis advocated by law and economics scholars are inconsistent with human dignity. Humans are more than producers and consumers. Efficiency can enable us to have more goods for all to enjoy, but under the rules that law and economics scholars favor, it is generally those who already have who get to do the enjoying. The higher law would suggest that people are valuable, not because of what they produce, but because they are created in God’s image.

In the end, the problem with CLS and law and economics is not that they are completely wrong, but that each conveys a limited understanding of law. Each is reductionistic. There is more to human functioning than power or efficiency. These schools of legal thought have failed to provide a satisfactory basis for law.

## **Rays of Hope**

In fact, a higher/moral law has been more in evidence in law in the Twentieth Century than the previous analysis might suggest. As Stephen Smith, my co-law presenter at this conference, has noted elsewhere, in spite of all of the talk of law as efficiency and law as power, lawyers and law professors go on critiquing precedents and assuming that there is something out there called ‘law,’<sup>31</sup> which seems to me to be often grounded in morality. The twentieth century witnessed a few memorable higher law assertions, including the Nuremberg Trials and Martin Luther King, Jr.’s “Letter From a Birmingham Jail” (quoting Augustine, “An unjust law is no law at all”).

Moreover, an important school of legal thought, sharing much in common with Professor Willard’s “good person” theory, has had some influence in law.

## ***New Natural Law***

A third school of legal thought which emerged in the late twentieth century, especially strong at a few Catholic law schools, is new natural law. It emerged primarily through the

influence of French-American philosopher Germain Grisez and Oxford and Notre Dame law professor/philosopher John Finnis.<sup>32</sup>

Like Dallas Willard's moral knowledge theory, grounded in the notion of the "good person," proponents of the New Natural Law believe that there are human 'goods'—things that humans universally value, such as life, knowledge, recreation, beauty, and friendship. These advance human flourishing. With the virtue of practical reason, we can discern how to increase those goods. Legislators and judges can discern what sorts of laws will maximize those goods. Importantly, the new natural law can be expressed and justified on a basis that is accessible to all. In a pluralistic culture, it can serve as a common basis for law.

New natural law theorists claim to rely solely on reason, though the legal rules they advocate are generally very similar to the rules that might be drawn from scripture. I conclude with a caution from an "old natural law" proponent. Blackstone argued that:

[U]ndoubtedly the revealed law is (humanly speaking) of infinitely more authority than what we generally call the natural law. Because one [the revealed law] is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority; but, till then, they can never be put in any competition together.<sup>33</sup>

## **Legal Ethics and Client Counseling**

In the field of legal ethics, there is again a divide between the nineteenth and twentieth century, reflected in Brandeis and Holmes. The early American gentleman-lawyers (reflected in Brandeis) assumed there was an objective moral order and counseled clients in light of it. "It is the duty of counsel," George Sharswood said, "to be the keeper of the conscience of the client; not to suffer him through the influence of his feelings or interest to do or say anything wrong."<sup>34</sup> David Hoffman disapproved of lawyers who invoked statutes of limitation or the law of infancy to defeat otherwise valid claims. He said of his client who wanted him to make such a claim, "He shall never make me a partner in his knavery."<sup>35</sup>

### **Brandeis on Lawyers**

Brandeis practiced law for almost 40 years before he was appointed to the Supreme Court. His law practice was marked by a passion for justice. Brandeis had a large pro bono practice, which earned him the title, "The People's Lawyer." Brandeis's work for justice as a lawyer extended to his very successful corporate practice. Though he was a passionate and effective advocate, he had the moral authority to question his clients' ends. When Brandeis was nominated to the Supreme Court, "A banker testified that Brandeis, as a lawyer, had required satisfaction of the justness of the banker's cause before deciding to take it on."<sup>36</sup> Austen Fox, a former ABA president, testified: "The trouble with Mr. Brandeis is that he never loses his judicial attitude toward his clients. He always acts the part of a judge toward his clients instead of being his clients' lawyer, which is against the practices of the bar."<sup>37</sup> (With that sort of

criticism, it is not surprising that Brandeis was confirmed. With enemies like that, who needs friends?) In an interview, Brandeis said:

“[Lawyers] need to be educated. Many of the best men of the profession recognize no ethical standard above that of loyalty to clients and prudent honesty with the court. They fail to realize their responsibility to the community and to others than their clients for the proper use of the tools which their professional training and ability have forged for them.”<sup>38</sup>

Whereas even in Brandeis’s day, the movement of the legal profession was from a profession to a business, Brandeis advocated the movement in the opposite direction; business itself should become a profession. In 1912, (in a speech much loved by Dallas Willard) Brandeis argued that business “worthily pursued” would include characteristics of a profession. It would be “pursued largely for others and not merely for one’s self” and it would be “an occupation in which the amount of financial return is not the accepted measure of success.”<sup>39</sup>

### **Holmes on Lawyers**

Holmes’s speech and article, “The Path of the Law” influenced lawyers, as well as legal theorists. He believed that “in the last resort, a man rightly prefers his own interest to that of his neighbors. . .”<sup>40</sup>

“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside it, in the vaguer sanctions of conscience.” [176]

As Henry M. Hart has argued: the “bad man” view helped lawyers become more effective “counselors of evil.”<sup>41</sup> Under the “bad man” theory, lawyers learn to work as close to the line as possible—that is what the bad man would do. Under Holmes’s theory, maybe the best lawyer will be the one who can most easily think like a bad man; the ability to think like a good man will just muddle the case. The best lawyer will be able to get his client as close to the line as possible.

In the twentieth century, partly, I think, through the influence of Holmes, the primary movement of legal ethics has been toward lawyer advocacy in the service of client autonomy. Whereas the earlier lawyer codes emphasized the moral responsibility of clients to the broader culture, more recent codes have merely regulated the advocacy system. Noted legal ethicist and “client-centered lawyer” Monroe Freedman says:

[T]he attorney acts both professionally and morally in assisting clients to maximize their autonomy.... [T]he attorney acts unprofessionally and immorally by depriving clients of their autonomy, that is, by denying them information regarding their legal rights, by otherwise preempting their moral decisions, or by depriving them of the ability to carry out their lawful decisions.

Under this view of lawyering, the lawyer's moral task is to protect clients from the influence of others, so that clients will make their own rules, be their own rulers. What I have labeled “liberal

lawyering” reinforces liberal culture, a culture where we live in what Alasdair MacIntyre describes as a society of strangers.

Liberal lawyering theory yields its own school of client counseling the "client-centered" school.<sup>142</sup> As one client-centered lawyer text described the theory:

"Because client autonomy is of paramount importance, decisions should be made on the basis of what choice is most likely to *provide a client with maximum satisfaction.*"<sup>143</sup>

When a decision is to be made in legal representation, the client-centered lawyer and the client list on a sheet of paper all of the alternative courses of action and the "consequences to the client" of each.<sup>144</sup> The client makes choices in that light. The client-centered counselors claim to be neutral, but in fact, their decision-making framework steers the client toward making self-serving choices. It imposes a regime of client autonomy--clients are directed to make choices based on consequences to themselves. Clients are a bundle of rights and liberal theory suggests that the lawyer should enable them to become more and more independent of others. In my view, the Enlightenment liberal ideal is C.S. Lewis's picture of hell from *The Great Divorce*: autonomous people on the outskirts of a city who continually move further and further away from one another.<sup>145</sup>

The underlying moral assumptions of client-centered counselors are not always clear. At times, they seem based in Kantian/Enlightenment Liberal/Rogerian notions that autonomous clients will automatically make moral choices. At other times, client-centered lawyering seems to be grounded in post-modern skepticism. The moral skepticism of client-centered counselors emerges in a section from one of the client-centered casebooks entitled "A Client's Arguably 'Immoral' Preferences."<sup>146</sup> (scare quote marks in the original). "You may explicitly tell [a client who mispredicts the consequences of a decision] that he or she is probably 'wrong.' But since a client whose values differ from yours is not 'wrong,' you often must use language that recognizes rather than denigrates a client's values."<sup>147</sup>

In my view, there is danger in both the traditional and the client-centered models of counseling. In the traditional model, as in the nineteenth century ethics lawyers quoted earlier, there is no place in the lawyer's office for the morals of the client. They start off with the assumption that the client will be a moral problem for the client. They assume that they can be a source of moral wisdom for the client. Such lawyers show admirable concern for others and for client rectitude, but they show little respect for the client and little recognition that clients can be a source of moral wisdom for the lawyer. Humility is justified when approaching the moral issues that arise in the law office. These issues are likely to be difficult. People disagree over what sound ethics require. Even if we recognize that there is such a thing as moral knowledge, none of us has perfect ability to discern those standards or to determine how they should apply. There is a danger that lawyers will be confident of their moral judgment when confidence is not justified. But I am also troubled by the client-centered counselors. They steer clients toward selfishness. There seems to be no place in the law office for the morals of the client or the lawyer.

In my view, the relationship between lawyer and client should be a collaborative one.<sup>48</sup> They should seek the good together. This presumes the existence of moral knowledge. Thomas Shaffer and I have used an analogy to friendship as a model of how lawyers should counsel clients. Lawyers should advise clients about moral issues that arise in representation in the way that friends advise friends, raising such issues for serious discussion, but not imposing their will on the client.<sup>49</sup> This model is based on Aristotle's notion that friendship includes a concern for the goodness of the friend. He argued that friends collaborate in the good.<sup>50</sup>

## **The Challenge to Moral Knowledge of the Adversary System and the Case Method**

Finally, I will just note two factors that reinforce moral skepticism among lawyers: the lawyer adversary system and law school's case method. Anglo-American law's method of resolving conflicts is an adversary system. An aggressive advocate who argues her client's case represents each side. In theory, the judge or jury hears the best argument each side can make and from that is able to determine truth and justice. That system could reinforce the notion of moral knowledge—truth is determined by considering the strongest arguments on each side. However, I fear that constantly arguing one side often leads to or reinforces cynicism. It may be that the experience of practicing law—constantly arguing positions that one does not necessarily believe—can weaken one's commitment to the truth of any position.

Law school's case method—the primary means of training law students to think like lawyers is the law student's introduction to the adversary system. Former Yale Law School Dean Anthony Kronman thoughtfully describes the case method and its effects:

The case method of law teaching presents students with a series of concrete disputes and compels them to reenact these disputes by playing the roles of the original contestants or their lawyers. It thus forces them to see things from a range of different points of view and to entertain the claims associated with each, broadening their capacity of sympathy by taxing it in unexpected ways... [T]he case method serves as a forcing ground for the moral imagination by cultivating that peculiar bifocality that [is] its most essential property.

One aim of this complex exercise in advocacy and detachment is the cultivation of those perceptual habits that lawyers need in practice.... The student who is put in [the position of defending a position he does not believe in or finds morally offensive] must strain to see the claim he has been given to defend in its most attractive light... [S]tudents get used to looking with friendly eye even at those positions they personally reject...

Some students find this experience disturbing and complain that the case method, which makes every position respectable, undermines their sense of integrity and personal self-worth. It is easy to understand why. For the discovery in oneself of a developing capacity to see the point of positions that previously seemed thoughtless or unfair is often accompanied by a corresponding sense of more critical detachment from one's earlier

commitments, and this can lead to the feeling of being unmoored with no secure convictions and hence no identity at all.

Kronman notes that some students describe this experience “not inappropriately” as “losing one’s soul.”<sup>51</sup>

I don’t think the adversary system or the case method should necessarily lead to cynicism. Indeed, I believe they are methods of discovering truth and that the experience should reinforce one’s belief in moral knowledge. That being said, the experience of many is as suggested by Dean Kronman. If law is to be based on moral knowledge, I think lawyer’s perception and experience of the adversary system and the case method will need some adjustment.

## Possibilities Going Forward?

I fear that I am not very confident about the prospects of “moral knowledge” re-entering the legal field. Legal education and law practice are now embroiled in the familiar conflict between competing ethnic and political groups. Law is commonly seen by lawyers and law students as mere power. It may be that things will have to get worse before they get better. Conflict may rise to such a level that people will search for a better way.

I think the path charted in philosophy by Dallas Willard and, relatedly in law by John Finnis and New Natural Law, is a promising foundation for a different route. One encouraging fact is that one of the newest Supreme Court members, Neil Gorsuch, was a graduate student of John Finnis at Oxford. (The implications of this were never mentioned at his appointment or confirmation.) He represents a fair number of very smart young lawyers who see and seek moral foundations for law. Maybe they will find a way forward.

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<sup>1</sup>Former Brandeis law clerk Dean Acheson, quoting Brandeis in *ACHESON, MORNING AND NOON* 95-96 (1965).

<sup>2</sup> ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 1 (2000).

<sup>3</sup>Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *HARV. L. REV.* 457, 461 (1897).

<sup>4</sup>ALSCHULER, *LAW WITHOUT VALUES*, 89.

<sup>5</sup>Albert W. Alschuler, *From Blackstone to Holmes: The Revolt Against Natural Law*, 36 *PEPP. L. REV.* 101 (2009) [hereinafter Alschuler, *From Blackstone to Holmes*].

<sup>6</sup>*Id.* at 103.

<sup>7</sup>Alschuler, *From Blackstone to Holmes*, at 104 (quoting WILLIAM BLACKSTONE, 2 *COMMENTARIES* \*11).

<sup>8</sup> *Id.* at 1.

<sup>9</sup>UROFSKY, at 91.

<sup>10</sup> LOUIS D. BRANDEIS’S MIT LECTURES ON LAW 201 (Carolina Academic Press, 2012) (Edited by Robert F. Cochran, Jr.).

<sup>11</sup> *Id.*

<sup>12</sup> BASKERVILLE, 335

<sup>13</sup> BASKERVILLE, at 341 n.10.

<sup>14</sup> *Id.* at 24.

<sup>15</sup> ALSCHULER, at 89.

<sup>16</sup> *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes dissenting).

<sup>17</sup> ALSCHULER, at 107.

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<sup>18</sup> ALSCHULER, at 94.

<sup>19</sup> *Id.* at 112 (quoting Oliver Wendell Holmes, Jr., *Ideals and Doubts*, 10 U. ILL. L. REV. 1, 4 (1915), reprinted in 3 THE COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES 443 (Sheldon M. Novick ed., 1995)).

<sup>20</sup> Letter from Oliver Wendell Holmes, Jr. to Felix Frankfurter (Sept. 3, 1921), in HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912–1934 125 (Robert M. Mennel & Christine L. Compston eds., 1996).

<sup>21</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927). The lone dissenter without opinion was Pierce Butler, the sole Catholic on the court and a conservative. Brandeis was also a member of the majority in *Buck*. Had he written the majority opinion, he might have based it, as he did many other decisions, on the limited jurisdiction of the court and the prerogatives of legislatures. “*Buck v. Bell* posed no particular problems for progressives: the eugenics movement, after all, was thought to be another of the social ‘experiments’ responsive to a modernizing America.” White, 408, but social experimentation from Nazi Germany to Tuskegee, Alabama revealed the inhumanity of using individuals for social purposes. “Three generations of idiots is enough” might be seen as the battle cry of twentieth century law—as well as science—since that time. Law is for the living; progress is all; quality of life is all that matters. As the ability to pick our offspring grows, this will be a continuing challenge for law.

<sup>22</sup> OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 258 (1920).

<sup>23</sup> ALSCHULER, at 59.

<sup>24</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

<sup>25</sup> *Id.* at 464.

<sup>26</sup> *Id.* at 462.

<sup>27</sup> *Id.* at 467.

<sup>28</sup> For background to the CLS movement, see Unger, *The Critical Legal Studies Movement*; Tushnet, ‘Critical Legal Studies: A Political History’, 100, 1515; Hutchinson, ‘Law, Politics, and the Critical Legal Scholars’, 36, 199; Unger, *Knowledge and Politics*; Kennedy, ‘Form and Substance’, 89, 1685; and the works included in Boyle, *Critical Legal Studies*. For essays critiquing critical legal studies and related schools of thought from a Christian perspective, see McConnell, Cochran & Carmella, eds., *Christian Perspectives on Legal Thought*, 107-205.

<sup>29</sup> Unger, *The Critical Legal Studies Movement*, 8.

<sup>30</sup> Important law and economics texts include Coase, ‘The Problem of Social Cost’, 1; Posner, ‘The Economic Approach to Law’, 757; Calabresi, *The Cost of Accidents*; Epstein, ‘Unconscionability,’ 18. For essays critiquing law and economics theory from a Christian perspective, see McConnell, Cochran & Carmella, eds., *Christian Perspectives on Legal Thought*, 207-40.

<sup>31</sup> Stephen A. Smith, *Law’s Quandary*.

<sup>32</sup> For background to natural law theory, see Finnis, *Natural Law*; Hittinger, *The First Grace*; and Bradley, ‘Natural Law’, 277-92.

<sup>33</sup> Blackstone, ‘Of the Nature and Laws in General’, Bk. 1, Sec. 2, 43.

<sup>34</sup> GEORGE SHARSWOOD, ESSAY ON PROFESSIONAL ETHICS (1854); 32 GEORGE SHARSWOOD, REPORTS OF THE AMERICAN BAR ASS’N (1907), quoted in THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS (1985).

<sup>35</sup> David Hoffman, *Resolutions on Professional Deportment*, in 1 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 752-75 (2d ed. 1836), quoted in SHAFFER, *supra* note 13.

<sup>36</sup> Thomas Shaffer, 242

<sup>37</sup> *Id.*

<sup>38</sup> BASKERVILLE, 144

<sup>39</sup> LOUIS D. BRANDEIS WITH A FOREWORD BY ERNEST POOLE, BUSINESS -- A PROFESSION PINCITE (1914).

<sup>40</sup> ALSCHULER, *supra* at 17.

<sup>41</sup> Henry M. Hart, Jr., Holmes’ Positivism—An Addendum, 64 Harvard L Rev 929, 932 (1951), quoted in Alschuler at 140

<sup>42</sup> BINDER & PRICE, LEGAL COUNSELING: A CLIENT-CENTERED APPROACH (1977); ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION (1990).

<sup>43</sup> BINDER ET AL., at 261; see also BASTRESS & HARBAUGH, at 256.

<sup>44</sup> BINDER & PRICE, at 184; BASTRESS & HARBAUGH, at 246-49; BINDER ET AL., at 307.

<sup>45</sup> C.S. LEWIS, THE GREAT DIVORCE 18-19 (1946)

<sup>46</sup> BINDER ET AL., at 282.

<sup>47</sup> *Id.* at 285.

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<sup>48</sup> See, e.g., JAMES E. MOLITERNO & JOHN M. LEVY, *ETHICS OF THE LAWYER'S WORK* 86 (1993); ROBERT F. COCHRAN, JR., ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO LEGAL INTERVIEWING AND COUNSELING* (2d ed. 2006).

<sup>49</sup> See Thomas L. Shaffer, *A Lesson From Trollope*, 35 WASH. & LEE L. REV. 727 (1978); SHAFER & COCHRAN, *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY*, at 42-65; ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 131-32 (1993).

<sup>50</sup> ARISTOTLE, *NICOMACHEAN ETHICS* bk. VIII (Martin Oswald trans., Bobbs-Merrill Co. 1962).

<sup>51</sup> KRONMAN, *THE LOST LAWYER*, at 113-115.