

Laughing at the Gods

Any effort to understand how law works has to take seriously its main players – judges. Like any performance, judging should be evaluated by reference to those who are its best exponents. Not surprisingly, the debate about what makes a great judge is as heated and inconclusive as the debate about the purpose and nature of law itself. History shows that those who are generally considered to be candidates for a judicial hall of fame are game changers who oblige us to rethink what it is to be a good judge. So the best of judges must tread a thin line between modesty and hubris; they must be neither mere umpires nor demigods. The eight judges showcased in this book demonstrate that if the test of good judging is not about getting it right but about doing it well, then the measure of great judging is about setting new standards for what counts as judging well.

Allan C. Hutchinson is a Distinguished Research Professor at Osgoode Hall Law School at York University, Toronto, and a widely recognized leading law scholar. He is presently Dean and Associate Vice President (Graduate Studies) at York. In 2004, he was elected to the Royal Society of Canada. Hutchinson has authored or edited eighteen books, including *Is Eating People Wrong? Great Legal Cases and How They Shaped the World* (2011), *The Province of Jurisprudence Democratized* (2008), and *Evolution and the Common Law* (2005).

Cambridge University Press & Assessment
978-1-107-01726-9 — Laughing at the Gods
Allan C. Hutchinson
Excerpt
[More Information](#)

Laughing at the Gods

Great Judges and How They Made the Common Law

ALLAN C. HUTCHINSON

Osgoode Hall Law School, York University



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press & Assessment
 978-1-107-01726-9 — Laughing at the Gods
 Allan C. Hutchinson
 Excerpt
[More Information](#)



CAMBRIDGE
 UNIVERSITY PRESS

Shaftesbury Road, Cambridge CB2 8EA, United Kingdom
 One Liberty Plaza, 20th Floor, New York, NY 10006, USA
 477 Williamstown Road, Port Melbourne, VIC 3207, Australia
 314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India
 103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of Cambridge University Press & Assessment, a department of the University of Cambridge.

We share the University's mission to contribute to society through the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org
 Information on this title: www.cambridge.org/9781107017269

© Allan C. Hutchinson 2012

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press & Assessment.

First published 2012

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging-in-Publication data

Hutchinson, Allan C., 1951–

Laughing at the gods : great judges and how they made the common law /
 Allan C. Hutchinson.

p. cm.

Includes bibliographical references and index.

ISBN 978-1-107-01726-9 (hardback) – ISBN 978-1-107-66276-6 (pbk.)

1. Judges – Biography. 2. Common law – History. 3. Judge-made law – History. I. Title.

K170.H88 2012

347'.0140922 – dc23 2011030607

ISBN 978-1-107-01726-9 Hardback

ISBN 978-1-107-66276-6 Paperback

Cambridge University Press & Assessment has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Cambridge University Press & Assessment
978-1-107-01726-9 — Laughing at the Gods
Allan C. Hutchinson
Excerpt
[More Information](#)

*This book is dedicated to the memory of my great
friend and collaborator Derek Morgan (1954–2011).*

Cambridge University Press & Assessment
978-1-107-01726-9 — Laughing at the Gods
Allan C. Hutchinson
Excerpt
[More Information](#)

Contents

<i>Preface</i>	<i>page ix</i>
1 In Search of Great Judges: Playing by Their Own Rules	1
2 Lord Mansfield: A Long Journey	21
3 John Marshall: A Founding Judge	51
4 Oliver Wendell Holmes Jr.: The Magnificent Yankee	81
5 James Atkin: An Ordinary Person	111
6 Tom Denning: An English Gardener	141
7 Thurgood Marshall: A Man on a Mission	173
8 Bertha Wilson: Making the Difference	207

Contents

9	Albie Sachs: Of Struggles and Lies	237
10	Judging the Future: A Leap in the Dark	267
	<i>References</i>	279
	<i>Index</i>	301

Preface

This book is intended to be a loose companion to my earlier book, *Is Eating People Wrong? Great Legal Cases and How They Shaped the World* (2011). It takes a closer look at some of the main characters who have stood out among the judicial ranks and who have thereby helped to shape the world. It is not intended as a hymn of praise for these memorable figures or the judicial function generally. Instead, it examines the common law enterprise and seeks to identify what it is that makes some of its judicial practitioners leaders in their field. Whether the influence of these so-called great judges is considered good or bad remains a question for continuing debate. As such, this book is intended to open a conversation about some judges and their supposed greatness.

In researching and writing this book, I have relied extensively on the fine body of research that has developed over the years about these individuals and the law. I have done little original or primary research myself, and I have been

Preface

as comprehensive as possible in listing those sources that I have relied upon at the end of the book. I am extremely grateful to those historians and commentators.

As usual, many people have played important parts in helping me to complete this book. I have benefited from a host of critics and colleagues, mostly friendly, who have shared their time and insights. In particular, I am grateful to Rosalie Abella, Jamie Cameron, Pam Marshall, Beverly Myhal, Marilyn Pilkington, Mark Tushnet, and especially Amanda Tyler for reading earlier drafts of chapters and for preventing me from making even more startling errors and omissions. Jeannie Thomas and Albie Sachs generously allowed me to use some private photographs. However, my greatest debt is to my research assistants – Cynthia Hill set the gold standard, Jessica Diab met it with style and substance, and Ian Langlois left his own personal mark of the highest quality all over the final product.

While completing this book, I lost my longtime friend Derek Morgan. We had some of the best fun that any academic collaborators could have. Our laughter, of course, was usually at each other's expense, but it was filled with respect and affection. Although he was one of life's great contrarians, he was also at heart a simple man who wanted to be loved and cherished. I will always treasure our times together – *Thank you, my boy!*

Allan C. Hutchinson
August 2011