

1947

Jurisprudence of Oliver Wendell Holmes

C.Perry Patterson

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Patterson, C.Perry, "Jurisprudence of Oliver Wendell Holmes" (1947). *Minnesota Law Review*. 933.
<https://scholarship.law.umn.edu/mlr/933>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

JURISPRUDENCE OF OLIVER WENDELL HOLMES

By C. PERRY PATTERSON*

Philosophy of the Law

Law to Justice Holmes in its highest form assumed the character of a science. No jurist ever labored harder or contributed more to give it this character. This is a phase of his work in which he is set apart from the ordinary judge. He was especially interested in the philosophy of the law. He disliked meticulousness and constantly sought universalism. He was always looking for rules and principles which were susceptible of general application. He realized that as a rule judges are not by nature or training systematic philosophers and as a result are usually searching for particulars.¹ Whether it was common law or constitutional law he was interpreting, he tried to relate it to the general truths of life. "Justice Holmes," said Wigmore, "seems to me the only one who has framed for himself a system of legal ideas and general truths of life, and composed his opinions in harmony with the system already framed."² "Above all others," says Pound, "he has shaped the methods and ideas that are characteristic of the present as distinguished from the immediate past."³ "His ideas," says Pound, "have so thoroughly entered into the substance of our legal thought, and the papers and addresses in which they were set forth are so buried in the periodical literature of the law that the epigoni could easily forget whose armor they are wearing and whose weapons they were wielding."⁴ Indicating his dislike for petty and transitory matters, Justice Holmes spoke of the thousand opinions that he had written by 1900, "Many of them upon trifling or transitory matters," saying, "A thousand cases, when one would have liked to study *to the bottom* and to say his say on every question which the law has ever presented, and then to go on and invent new problems which should be the test of doctrine, then *to generalize* it all and *write it in continuous, logical, philosophical exposition, setting*

*Professor of Government, The University of Texas.

¹See Harold J. Laski, *The Political Philosophy of Mr. Justice Holmes*, (1931) 40 *Yale Law Journal*, 683-695.

²John H. Wigmore, *Justice Holmes and the Law of Torts*, (1916) 29 *Har. L. Rev.*, 601-616.

³Roscoe Pound, *Judge Holmes' Contribution to the Science of Law*, (1921) 34 *Har. L. Rev.*, 449-453.

⁴*Ibid.*, 449.

forth the whole corpus with its roots in history and its justifications of expedience real or supposed!"⁵

He enjoyed the pursuit of truth. "One begins," he said, "with a search for a general point of view. After a time he finds one, and then for a while he is absorbed in testing it, in trying to satisfy himself whether it is true. But after many experiments or investigations all have come out one way, and his theory is confirmed and settled in his mind. He knows in advance that the next case will be but another verification, and the stimulus of anxious curiosity is gone. He realizes that his branch of knowledge only presents more illustrations of the *universal principle*; he sees it all as another case of the same old ennui, or the same sublime mystery,—for it does not say what epithets you apply to the whole of things, they are merely judgments of yourself. At this stage the pleasure is no less, perhaps, but it is pure pleasure of doing the work, irrespective of further aims, and when you reach that stage you reach, as it seems to me, the true formula of the joy—the duty and the end of life."⁷

"It was of this," he said, "that Malebranche was thinking when he said that, if God held in one hand truth, and in the other the pursuit of truth, he would say 'Lord, the truth is for thee alone, give me the pursuit.'"

This attitude of Justice Holmes to give a generalization or a philosophy to the law was undoubtedly created by the nature of the law as he found it when he began the task of mastering it. "My way," he said, "has been by the ocean of the law. On that I have learned a part of the great lesson, the lesson not of law, but of life. *There were few of the charts and lights for which one longed when I began.* One found oneself plunged in a *thick fog of details—in a black and frozen night, in which were no flowers, no spring, no easy joys. Voices of authority warned that in the crush of that ice any craft might sink.* One heard Burke saying that law sharpens the mind by narrowing it. One heard in Thackeray of a lawyer bending all the powers of a great mind to a mean profession. One saw that artists and poets shrank from it as from an alien world. One doubted oneself how it could be worthy of the interest of an intelligent mind. *And yet one said to oneself, law is human—it is a part of man, and of one world with all the rest.*"⁸ Again he said

⁵Speeches (1934) 83. Italics are mine.

⁶*Ibid.*, 84.

⁷*Ibid.*, 84.

⁸Collected Legal Papers (1920) 164-165

"I can but envy the felicity of the generation to whom it is made so easy to see their subject as a whole. *When I began*, the law presented itself as a rag bag of details. The best approach that I found to general views on the historical side was the first volume of Spencer's *Equitable Jurisdiction*, and, on the political, Walker's *American Law*."⁹

He determined to give organic form to the law which he called "a finite body of dogma." He regarded the law as a body of predictions as to what the courts would say. "The number of our predictions *when generalized and reduced to a system*," he said, "is not unmanageably large."¹⁰ "I wish, if I can," he said, "to lay down some first principles¹¹ for the study of this body of dogma or systematized prediction which we call the law, for men who want to use it as the instrument of their business to enable them to prophesy in their turn, and, as bearing upon the study, I wish to point out an ideal which as yet our law has not attained."¹²

Justice Holmes was not so much interested in the law *per se* as he was in the science of the law. He was more concerned with jurisprudence. He said that "science and philosophy are themselves necessities of life."¹³ "Of course," he said, "the law is the calling of thinkers."¹⁴ He said "the law will furnish philosophical food to philosophical minds."¹⁵ "For every fact," he said, "leads to every other by the path of the air. Only men do not yet see how, always. And your business as *thinkers* is to make plainer the way from something to *the whole of things: to show the rational connection between your fact and the frame of the universe*. If your subject is law, the roads are plain to anthropology, the science of man, to political economy, the theory of legislation, ethics, and thus by several paths to your final view of life."¹⁵

He had a grand conception of the law and believed that in its scientific character it rose to the heights of the cosmic, and became man's greatest achievement. In this form it became jurisprudence, which he said, "is simply law in its most generalized part."¹⁶ "Every effort," he said, "to reduce a case to a rule is an effort of

⁹*Ibid.*, 301.

¹⁰*Ibid.*, 169.

¹¹By general principles, he said, he did not mean "a throng of glittering generalities, like a swarm of little bodiless cherubs fluttering at the top of one of Carrigio's pictures," *Ibid.*, 42.

¹²*Ibid.*, 169.

¹³Speeches (1934), 50.

¹⁴Collected Legal Papers (1920), 300.

¹⁵Speeches (1934), 23.

¹⁶Collected Legal Papers (1920), 195.

jurisprudence."¹⁷ He spoke of jurisprudence as "that cenotaph shaped by the genius of our race, and by powers greater than the greatest individual, yet to which the least may make their contribution and inscribe it with their names. The glory of lawyers, like that of men of science, is more corporate than individual. Our labor is an endless organic process. The organism whose being is recorded and protected by the law is the undying body of society"¹⁸ According to this view of the law, a great lawyer, he said, could connect himself "with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal."¹⁹

This grand conception of the law was painted by Holmes in inimitable style and with impressive eloquence. "What a subject is this in which we united," he exclaimed, "—this abstraction called the Law, wherein, as in a magic mirror, we see reflected, not only our own lives, but the lives of all men that have been! When I think on this majestic theme, my eyes dazzle. If we are to speak of the law as our mistress, we who are here know that she is a mistress only to be wooed with sustained and lovely passion,—only to be won by straining all the faculties by which man is likest to a god. Those who, having begun the pursuit, turn away uncharmed, do so either because they have not been vouchsafed the sight of her divine figure, or because they have not the heart for so great struggle. To the lover of the law, how small a thing seem the novelist's tales of the loves and fates of Daphoris and Chloe! How pale a phantom even the circe of poetry, transforming mankind with intoxicating dreams of fiery ether, and the foam of summer seas, and glowing greensward, and the white arms of women! when I think thus of the law, I see a princess mightier than she who once wrought at Bayeux, eternally weaving into her web dim figures of the ever-lengthening past,—figures too dim to be noticed by the idle, too symbolic to be interpreted except by her pupils, but to the discerning eye disclosing every painful step and every world-shaking contest by which mankind has worked and fought its way from savage isolation to organic social life."

"When I think of the Law as we know her in the courthouse and the market, she seems to be a woman sitting by the wayside, beneath whose overshadowing hood every man shall see countenance of his deserts or needs. The timid and overborne gain heart from her protecting smile. Fair combatants, manfully standing to

¹⁷*Ibid.*, 195.

¹⁸Speeches (1934), 47

¹⁹Collected Legal Papers (1920), 202.

their rights, see her keeping the lists with the stern and discriminating eye of even justice. The wretch who has defied her most sacred commands, and has thought to creep through ways where she was not, finds that his path ends with her, and beholds beneath her hood the inexorable face of death."²⁰

HIS THEORY OF JUDICIAL REVIEW

The generalization of the law as a means of giving it a scientific and almost universal character was the controlling principle of Holmes' jurisprudence. This doctrine was especially applicable to the constitution which is admittedly a document of general principles. This is what the supreme court meant when in *McCulloch v. Maryland*,²¹ speaking through Chief Justice John Marshall, it said "we must never forget it is a constitution we are expounding." The constitution said the court is not "*a legal code*," is not a set of "*immutable rules*," but contains only "*great outlines*" and designates only "*important objects*." It was "intended to endure for ages to come, and, consequently, to be *adapted* to the various crises of human affairs." The court also said that the nature of the constitution was to be "*deduced*." Here is definitely announced the doctrine that the constitution is a body of general principles and that it was intended to endure for ages by means of *adaptation*.

The question arises—who is to do the *adapting*? Are there any limitations on the scope of adaptation? What is the difference between an adaptation and an amendment? If an adaptation proves to be inadequate for its intended purpose, may its scope be extended by another adaptation? The court did not answer any of these questions directly, but one is driven to the conclusion that it meant to say that it is the adapting agency and that the power of adaptation is equal in scope to the requirements of the crisis. Adaptation was to be a judicial means of giving immortality to the constitution—the ordinary means in contrast with the extraordinary process of amendment. It is not my opinion that the court in this case meant to substitute adaptation for the amendment process but it announced a doctrine susceptible of such interpretation and of becoming the basis of judicial supremacy. The general tendency is for doctrines once announced to be broadened by later interpretation.

Justice Holmes was a great admirer of John Marshall. He once said "that if American law were to be represented by a single

²⁰Speeches (1934), 17-18.

²¹(1819) 4 Wheat. 316, 4 L. Ed. 579.

figure, sceptic and worshipper alike would agree without dispute that the figure could be but one alone, and that one John Marshall."²² Holmes was more nearly the duplicate of Marshall than any other American judge. They were both great philosophers and logicians, Holmes, however, was a much greater scholar. Both were nationalistic in constitutional theories, Holmes more so than Marshall. Marshall said, "no political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass."²³ Holmes, however, was willing to give the congress supremacy "I do not think," he said, "the United States would come to an end if we lost our power to declare an act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states."²⁴

Holmes believed in national unity. He not only fought and nearly died for it, but constantly held for it on the bench. Speaking of Marshall, he said "that the theory for which Hamilton argued, and he (Marshall) decided, and Webster spoke, and Grant fought, and Lincoln died, is now our corner-stone."²⁵ He helped lay this corner-stone and founded a school of jurists who have about completed the super structure of a totalitarian nationalism.

The creative agency of this nationalism were the economic forces of the nation, but it was judicial supremacy that constitutionalized it. Beveridge said that in *McCulloch v. Maryland* "In effect John Marshall thus rewrote the fundamental law."²⁶ Beveridge, of course, was by no means a critic of Marshall. Woodrow Wilson said that at the hands of the supreme court "the constitution has received an *adaptation and elaboration* which would fill its framers of the simple days of 1787 with nothing less than amazement."²⁷ While according to good authority²⁸ the Marshall court exercised the power of judicial supremacy, it was never bold enough to say so. It remained for Holmes and his disciples frankly to assume this responsibility. He said that a judicial decision involves at every step "*the sovereign prerogative of choice.*"²⁹ Further elaborating, he said "It must be remembered, as is clear

²²Speeches (1934)

²³*McCulloch v. Maryland*, (1819) 4 Wheat. 316, 4 L. Ed. 579.

²⁴Collected Legal Papers (1920), 295-296.

²⁵Speeches (1934), 90-91.

²⁶Albert J. Beveridge, *The Life of John Marshall* (4 vols.) IV, 308.

²⁷*Constitutional Government in the United States* (1908), 157-158.

²⁸See Charles Gove Haines, *The Role of the Supreme Court in American Government and Politics* (1944), 331-377

²⁹Edward S. Corwin, *The Twilight of the Supreme Court* (1934) 115.

from numerous instances of *judicial interpretation of statutes in England and of constitutions in this country*, that in a civilized state it is not the will of the sovereign that makes lawyer's law, even when that is its source, but what a body of subjects, namely, *the judges*, by whom it is enforced, say is his will."³⁰ In other words the constitution of the United States as the will of the sovereign American people is what the judges say it is. In his dissenting opinion in *Lochner v. New York*, Justice Holmes frankly spoke of "judicial legislation."³¹

Charles Evans Hughes, when he was governor of New York, said "we are under a constitution, but the constitution is what the judges say it is."³² When he became a member of the supreme court, he did not change his mind. While he was associate justice of the supreme court he wrote the opinions in the *Minnesota Rate case*³³ and the *Shreveport Rate case*³⁴ which practically abolished intrastate commerce.

Associate Justice Stone, later Chief Justice and now the late Chief Justice, said in a dissenting opinion that "while unconstitutional exercise of power by the executive and legislative branches is subject to judicial restraint, the only check on our exercise of power is our *own sense of self-restraint*."³⁵

Speaking of the relation of our economic problems to constitutional law and the necessary readjustments between national and state authorities, Justice Frankfurter said. "the words of the constitution on which their solution is based are *so unrestrained by their intrinsic meaning, or by their history, or by tradition, or by prior decision*, that they leave the individual Justice *free*, if indeed they do not *compel him to gather meaning not from reading the constitution but from reading life*."³⁶ He recommended to his colleagues on the court to substitute the reading of life for "the neutral language of the constitution"³⁷ because he said "the judges of the supreme court are in fact arbiters of social policy. They are so because their duties make them so." He finally concludes that the forefathers who wrote the document did not understand it or they would not have provided it with an amendment process because

³⁰Oliver Wendell Holmes, VI Am. Law Rev. (1872), 723-24.

³¹(1905) 198 U. S. 45, 25 S. Ct. 539, 49 L. Ed. 937

³²Addresses (1908), 139.

³³(1913) 230 U. S. 352, 33 S. Ct. 729, 57 L. Ed. 1511.

³⁴(1914) 234 U. S. 342, 34 S. Ct. 833, 58 L. Ed. 1341.

³⁵United States v. Butler, (1936) 297 U. S. 1, 56 S. Ct. 312, 80 L. Ed. 477

³⁶Felix Frankfurter and James Landis, (1927) The Business of the Supreme Court, 310.

³⁷Roscoe Pound, The Theory of Judicial Decision, (1923) 36 Har. L. Rev., 641, 651, *et. seq.*

he says "*The constitution has ample means within itself to meet the changing needs of successive generations, for it was made for an undefined and expanding future, and for a people gathered from many nations and of many tongues.*"

"If the court, aided by an alert and public-spirited bar, has access to the facts and follows them, *the constitution is flexible enough to meet all the new needs of our society.*"³⁸ All that is needed to give the constitution immortality is "an alert and public-spirited bar" to persuade the court to use its power of judicial supremacy in accordance with the trends of American life. This is the logical conclusion of the Holmes' doctrine of judicial review which with the aid of his epigoni became the means of overthrowing one hundred and fifty years of judicial precedent which had given a considerable degree of certainty to the constitution and of projecting a new constitutional development which has practically created a congressional supremacy which by means of political processes ends in presidential hegemony. This process is not adequately described in terms of judicial legislation. It makes the court a constituent body exercising the power reserved to the American people by the amendment process, and we are told by one of the more conservative of its members that if it is properly advised by the American bar it will make the constitution adequate for the free expression of the unrestricted life of the nation for ages to come. This is the logical *denouement* to which the Holmes' conception of judicial review and of the constitutional lead.

HIS CONSTITUTIONAL PHILOSOPHY

To Holmes the constitution was neither the beginning nor the ending of our constitutional development. Its drafting and adoption merely mark a strategic point in our political evolution and its meaning is not to be discovered from its words but from its life-giving qualities. Its interpretation, therefore, should not tend toward definiteness but toward an indefiniteness. "The provisions of the constitution," he said, "are not mathematical formulas having their essence in their form, they are *organic, living institutions* transplanted from English soil. *Their significance is vital, not formal*, it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth."³⁹ "Great constitutional provisions," he said, "must be administered with caution. Some *plav* must be allowed for the

³⁸Quoted in (1939) 25 Am. Bar Assn. Jour., 167

³⁹*Gompers v. United States*, (1914) 233 U. S. 604, 610, 34 S. Ct. 693, 58 L. Ed. 1115.

joints of the machine, and it must be remembered that legislatures are *ultimate guardians* of the liberties and welfare of the people in quite as great a degree as the courts."⁴⁰ Here is an expression of looseness of constitutional construction and as a consequence a substitution of legislative bodies to a large degree as the ultimate guardians of the liberties and welfare of the people for the constitution itself.⁴¹ "I recognize without hesitation," he said, "that judges do and must legislate,"⁴² but "the legislatures should be hampered by limitations only if they are found in the plain words of the constitution."⁴³

Justice Holmes was not in sympathy with the demarcation of authority by the constitution nor with the lines drawn by the court. He thought the constitution should be made into a judicial document by interpretation. He maintained that all such lines could always "have been drawn a *little further to one side or to the other*"⁴⁴ "The constitution," he said, "is not a pedagogical requirement of the impracticable."⁴⁵ "It is a sufficient answer," he said, "to say that you cannot carry a constitution out with *mathematical nicety to logical extremes*."⁴⁶ He constantly sought for reasonableness and simplicity. Why should interpretation of the constitution open a Pandora's box of difficulties? He frequently referred to "common understanding," "common sense," "fair play," "rational and fair man," "the reasonable man," "the man in the street," a "civilized society," and "invisible radiation." Why attempt to distinguish between "direct and indirect," "immediate and remote," "substantial and insubstantial" and "material and immaterial." This was to him the mere fulminations of a petty judicial mind.

He was in favor of experimentation⁴⁷ and was more interested

⁴⁰Missouri, Texas & Kansas Ry. Co. v. May, (1904) 194 U. S. 267, 270, 24 S. Ct. 638, 48 L. Ed. 971.

⁴¹Felix Frankfurter, Constitutional Opinions of Justice Holmes, (1916) 29 Har. L. Rev. 683.

⁴²Southern Pacific Co. v. Jensen, (1917) 244 U. S. 205, 221, 37 S. Ct. 524, 61 L. Ed. 1086.

⁴³Louisville & Nashville R. R. Co. v. Barker Asphalt Paving Co., (1905) 197 U. S. 430, 25 S. Ct. 466, 49 L. Ed. 819.

⁴⁴The Common Law (1881), 127

⁴⁵Dominion Hotel Company v. Arizona (1919) 249 U. S. 265, 39 S. Ct. 273, 63 L. Ed. 597

⁴⁶Paddell v. New York, (1908) 211 U. S. 446, 29 S. Ct. 139, 53 L. Ed. 275.

⁴⁷"There is nothing I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even Marxian to me and to those whose judgment I most respect." Truax v. Corrigan, (1921) 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254.

in the means of achieving ends than in the ends themselves. "While the courts must exercise a *judgment of their own*," he said, "it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economic opinions, which by no means are held *semper unque et ab omnibus*."⁴⁸ "The Fourteenth Amendment," he said, "does not enact Mr Herbert Spencer's Social Statics."⁴⁹ "The traditions and habits of centuries," he said, "were not intended to be overthrown when that amendment was passed."⁵⁰ He believed the states should be allowed to perform social experiments even though they interfered with commerce and contractual rights. He said once that "when the states want to do something and I cannot find something in the constitution to prevent it, 'God dammit, I let them do it.'"

While he was a bold experimentalist almost to the point of complete indifference as to results, he was a collectivist, believing that the court should follow "*dominant opinion*." His check on innovation was not a constitutional one but the cost of the experiment. Get the facts and estimate the cost. "Personally," he said, "I like to know what the bill is going to be before I order a luxury"⁵¹ He did not believe in panaceas,⁵² but he thought that man had a right to seek the realization of his desires, and he was willing to tolerate experiments in which he had no faith.⁵³ *The might of the community was controlling*. Like Spinoza he believed that *night gave the letters of credit to right*. "Constitutions, like any other mortal contrivance," he said, "have to take some chances."⁵⁴ "In modern societies," he said, "*every part is related*

⁴⁸*Otis v. Parker*, (1903) 187 U. S. 606, 608-9, 23 S. Ct. 168, 47 L. Ed. 323.

⁴⁹*Lochner v. New York*, (1905) 198 U. S. 45, 25 S. Ct. 539, 49 L. Ed. 937

⁵⁰*Interstate Consol. Street Ry. Co. v. Massachusetts*, (1907) 207 U. S. 79, 87, 28 S. Ct. 26, 52 L. Ed. 111.

⁵¹Collected Legal Papers (1920) 307

⁵²Speeches (1934) 102. "I have no belief in panaceas and almost none in sudden ruin."

⁵³"The notion that with socialized property we should have women free and a piano for everybody seems to me an empty humbug." *Ideals and Doubts*, (1915) 10 Ill. L. Rev. 1.

⁵⁴*Blinn v. Nelson*, (1911) 222 U. S. 1, 7, 32 S. Ct. 1, 56 L. Ed. 65.

so organically to every other, that what affects any portion must be felt more or less by all the rest. Therefore, unless everything is to be forbidden and legislation is to come to a stop, it is not enough to show that, in the working of a statute, there is some tendency, logically discernible, to interfere with commerce or existing contracts."⁵⁵ In other words, there was no check on the power of the community. He believed in the man of action. He regarded life as the use of one's powers in an endless struggle of interests.⁵⁶

HIS THEORY OF THE STATE

Recently there has been considerable controversy over Holmes' theory of the state.⁵⁷ It is difficult to believe that Holmes was totalitarian in his philosophy, despite the fact that he was because we do not want to think of him in that light. It is almost unthinkable that an American who achieved the distinction of being the greatest jurist of his day according to many eminent authorities could support the doctrine of the unlimited state. One has a feeling for Justice Holmes and a pride in his distinction that causes him to resist reaching such a conclusion. Doubtless no man ever meant more thoroughly what he said than Justice Holmes.

There is no doubt about his opposition to natural law "The jurists," he said, "who believe in natural law seem to me to be in that *narrow state of mind* that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."⁵⁸ He frankly states here that it requires simplicity of mind to accept the doctrine of natural law and makes it clear that he was not subject to this classification. He proposes no substitute. Is there any substitute?

He was recognized as a totalitarian by other distinguished totalitarians. Professor Harold J. Laski of the University of London, the leading radical of his country and a distinguished totalitarian political scientist, a great admirer of Justice Holmes, in discussing Holmes' political philosophy said that he rejected all absolute concepts and held that "the individual is not a subject of rights

⁵⁵*Diamond Glue Co. v. United States Glue Co.*, (1903) 187 U. S. 611, 616, 23 S. Ct. 206, 47 L. Ed. 328. Italics are mine.

⁵⁶Wigmore, *Justice Holmes and the Law of Torts*, (1916) 29 Har. L. Rev. 601, 603-604.

⁵⁷See Ben W. Palmer, *Hobbs, Holmes and Hitler*, (1945) 31 Am. Bar Assn. Jour., 509; *Ibid.*, *Defense against Leviathan*, (1946) 32 Am. Bar. Asso. Jour., 328, Charles W. Briggs, *Justice Holmes was not on a Ladder to Hitler*, (1946) 32 Am. Bar Assn. Jour. 631, Ben W. Palmer, *Reply to Charles W. Briggs*, (1946) 32 Am. Bar Assn. Jour., 635.

⁵⁸*Collected Legal Papers* (1920), 312.

which the state is not entitled to invade."⁵⁹ He further said that Holmes was a Spinoza and believed "that *might* gives the letters of credit to right" and that "*Rights are the products of law and not a framework in which law must work.*"⁶⁰ It is clear that Laski thinks that Holmes believed that might creates law and law creates rights and that there is no limitation on this process.

Holmes completely rejected the Kantian idea that man is an end and contended that he is only a means of the state. "If we want conscripts," he said, "we march them up to the front with bayonets in their rear to die for a cause in which perhaps they do not believe. The enemy we treat not even as a means but as an obstacle to be abolished, if so it may be. *I feel no pangs of conscience over either step, and naturally am slow to accept a theory that seems to be contradicted by practices that I approve.*"⁶¹ He believed that "the predominant power in the community" had the right to take the life and the property of the individual whenever in its opinion the interest of society demands it. This is the essence of statism. Again he said "When it comes to a decision by the head of the state upon a matter involving its life, *the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process.*"⁶² How much do these quotations leave to doubt as to his authoritarianism? How close does it approach the philosophy of Treitschke? "The dominant idea in Treitschke's *Politik*," says Coker, "is that power is the most distinctive attribute of the state and that the state is morally justified in applying its power without concern for individual aims and interests."⁶³ Of course, Treitschke's *Politik* was Hitler's bible.

Justice Holmes believed in the biological theory of the state which was the controlling basis of recent German juristic thought. He frequently spoke of the organic character of the constitution and of Society. Of course, the contract theory of the state was a part of the baggage of the doctrine of natural law and though basic in the establishment of the limited state had to be eliminated as a barrier to totalitarianism. Man as a mere grain of sand could have nothing to do with the establishment of his political institutions. The entire philosophy of the Declaration of Independence is only

⁵⁹(1931) 40 Yale Law Jour., 683, 685.

⁶⁰Ibid., 685.

⁶¹Collected Legal Papers (1920), 304. Italics are mine.

⁶²Moyer v. Peabody, (1909) 212 U. S. 78, 85, 29 S. Ct. 235, 53 L. Ed. 410.

⁶³Francis W. Coker, Recent Political Thought (1934), 440.

for the simple minded. In *Missouri v. Holland*, speaking for the Supreme Court, Justice Holmes said "that when we are dealing with words that also are constituent act, like the constitution of the United States, we must realize that *they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters*. It was enough for them to realize or to hope that they had created an *organism*, it has taken a century and has cost their successors much sweat and blood to prove that they created a nation."⁶⁴

Finally Justice Holmes ranks as a great dissenter, second only to Justice Harlan who registered 316 dissenting opinions. However, in the case of Holmes, his dissents later became the law of the land. Whether his contribution to constitutional law will ultimately bulk larger than that of Chief Justice Marshall may depend to some extent on the future course of American politics. At the present time we are living under a constitution which has substantially resulted from his influence and is far less in harmony with the original than that of Marshall's.

Holmes was true to his philosophy. He was a nonconformist only to be a conformist in a higher and universal sense. He was an exponent of the cosmic philosophy of John Fiske. Everything had its true value and highest significance in terms of the cosmos. He was always searching for generalities and principles as a means of giving a scientific character to the law and thus to harmonize it with the universal. This was his grand conception of the law. He regarded the law as only "a gale confederate with the current of the soul."⁶⁵ It is only a part of the music of the spheres. By becoming a master of the law, he said, you could "connect yourself with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal."⁶⁶ In this sense law became a science and its master could get a perspective of infinity.

Man like the law assumed his greatest importance as a part of the cosmos. "It is enough for us," he said, "that the universe has produced us and has within it, as less than it, all that we believe and love. If we think of our existence not as that of a little god outside, but as that of a ganglion within, we have the infinite behind us. It gives us our only but our adequate significance. A grain of sand has the same, but what competent person supposes that he

⁶⁴(1920) 252 U. S. 416, 40 S. Ct. 382, 64 L. Ed. 641.

⁶⁵Quoted from Wordsworth by S. A. Brooke, *Naturalism in English Poetry* (1920), 158.

⁶⁶Collected Legal Papers (1920), 202.

understands a grain of sand? That is as much beyond our grasp as man."⁶⁷ He believed "that man may have cosmic destinies that he does not understand."⁶⁸ "Why," he said, "should we employ the energy that is furnished to us by the cosmos to defy it and shake our fist at the sky? It seems to me silly."⁶⁹

This doctrine of unity was the law of organization to Justice Holmes. Everything regardless of its nature was a part of an organism. "All that life offers any man from which to start his thinking or his striving," he said, "is a fact. And if this universe is one universe, if it is so far thinkable that you can pass in reason from one part of it to another, it does not matter very much what that fact is. For every fact leads to every other by the path of the air. Only men do not yet see how, always. And your business as thinkers is to make plainer the way from some thing to the whole of things, to show the rational connection between your fact and the frame of the universe. If your subject is law, the roads are plain to anthropology, the science of man, to political economy, the theory of legislation, ethics, and thus by several paths to your final view of life. It would be equally true of any subject. The only difference is in the ease of seeing the way. To be master of any branch of knowledge, you must master those which lie next to it, and thus to know anything you must know all."⁷⁰

This organic philosophy which gave an indissoluble character to the facts of life and which inevitably ended in unity could give but one answer to the doctrines of federalism, separation of powers and checks and balances. It could not logically stop short of national sovereignty, the unitary state, absolute sovereignty, law as the command of the sovereign or the will of the majority and finally the totalitarian state. This then is the process by which the great jurist thought that he had discovered the route that man is destined to follow to his mysterious goal. It was the dominant philosophy of his time but it is not the philosophy that gave birth to the nation, that is the foundation of its constitutional system of government and that it has spent much of its life and resources to give to the rest of mankind.

According to Holmes there could be no rights against the command of the dominant social group, the constitution of the United States to the contrary notwithstanding. To him the binding character of law was physical force. "Law," he said, is "a statement of

⁶⁷Ibid., 316.

⁶⁸Ibid., 296.

⁶⁹Ibid., 315.

⁷⁰Ibid., 29-30.

the circumstances in which the public force will be brought to bear upon men through the courts."⁷¹ "Sovereignty," he said, "is a form of power, and the will of the sovereign is law because he has power to compel obedience or punish disobedience and for no other reason. The limits within which his will is law, then, are those within which he has or is believed to have power to compel or punish." "I think," he said, "that the sacredness of human life is a purely municipal ideal of no validity outside the jurisdiction. I believe that force, mitigated so far as may be by good manners, is the *ultima ratio*." "Just so far as the aid of the public force is given a man he has a legal right, and this right is the same whether his claim is founded in righteousness or inequity." So-called rights were, to Holmes, withdrawable privileges at the pleasure of the sovereign—the organized majority. "I am so skeptical as to our knowledge about the goodness or badness of laws," he said, "that I have no practical criticism except what *the crowd wants*." This philosophy is certainly totalitarian in character.

Of course, Holmes as well as all other authoritarian liberals would use this unlimited power for humanitarian purposes. This does not change its totalitarian character or guarantee that such power will always be used for such benevolent purposes. Humanitarian totalitarianism is not liberalism or sociological jurisprudence. The naked fact is it is unlimited power to be used by the crowd that gets possession of it as it sees fit. We have been told that such power in the hands of a "Peoples Government" is safe, but in the hands of "economic puppets" unsafe. This is a significant statement with which advocates of constitutional government would agree. Its use is not limited by the constitution but subject only to the mandate of the ballot box.

By way of summary, it may be said that Justice Holmes had no economic blueprint for the future, or a legal chart for the law, or a constitutional straightjacket for the nation. He did not believe in any of them. He was creedless and codeless. He wanted the facts and felt that they should control. He believed that law should be guided by experience rather than by logic. Law should have its feet on the ground rather than on Olympus.

While Justice Holmes was generally classified a sociological jurist, he did not hesitate to use the whole range of the social sciences as a basis of understanding and of applying the law. He accepted those portions of the historical and analytical doctrines

⁷¹American Banana Co. v. United Fruit Co., (1909) 213 U. S. 347, 356, 29 S. Ct. 511, 53 L. Ed. 826.

as suited his purposes and rejected their dogmas. He considered precedents as only suggestive and prophetic, but, in no sense, definitive. He excluded natural law from the juristic world and did not believe that the rights of man were engraved on stone for all time. He rejected the doctrine of absolute truth. He saw lines of growth in the past, considered the experience around him, and warned against rigid formulas for the future. He knew that the tender roots of the oak could split the foundation of the substantial structure.

Fortunately for the world, Justice Holmes touched life as well as the law. To him, man was a part of the law and the law was a part of man—his greatest achievement—largely a response to his desire for certainty and repose though both were unattainable and undesirable to Holmes, both meant death. The destiny of man was not repose but life. Life to Justice Holmes meant more life. It meant functioning till the bell rings. He loved life and lived it in the highest and fullest sense. His influence will never end. It will follow both man and the law indefinitely. His place is fixed in the annals of jurisprudence as one of the greatest jurists of all time. Only the arcana of futurity can tell the full story. However, the most adequate description of him will always be that he was Oliver Wendell Holmes, Jr.