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Comments

## The Mystery of Justice Holmes

Perlie P. Fallon\*

We have lived in an era of crusades, ideologies and causes. We whose lives extend into a second generation look back on causes and leaders of causes which were with us but not with those of the second generation. Such is not the fate of Justice Holmes. He continues, if only a subject of controversy. Two reasons for the continuity are apparent at once. He wrote well: "Worships language and forgives . . . Everyone by whom it lives,"<sup>1</sup> and he wrote on law and justice—universals which interest everyone and which have inspired teachers from a time extending back through Aristotle and Plato.

There is another reason for a continuing interest in Justice Holmes. It is not so apparent in our era. Time may develop it clear and sharp. We are conscious of it, though, through our inability to classify Justice Holmes. Some regarded him as a liberal, others have been sure that the Justice was a radical, and still others treated the Justice as a source of social and political mischief. This irritation may have found its source in the difficulty that arises when we look for a category that fits. What later generations may see clear and sharp is an objectiveness of mind that became notable in the *Northern Securities* litigation, and which leaves Justice Holmes in our era as a man without a cause. I propose to develop this thought by comparisons and contrasts with men who were working during that period; then I shall refer to the quality in the Justice's work.

There is a uniqueness in every personality, but the men whom we select here for comparison and contrast have a common quality aside from the varieties in their personalities. That common quality is a desire to see things as they are, to probe into reality and give it meaning: "the facts in their actual relations," the desire

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<sup>1</sup> Auden, In Memory of W. B. Yeats (a poem), in *Another Time* (1940). By permission of Random House, New York.

“to select from this reality what is pertinent to ultimate interests and can speak eloquently to the soul.”<sup>2</sup>

The definition is broad enough to include men who work in other fields than the law. It leads to the observer, to those of intellectual curiosity. The first who comes to mind is Henry James, a superb observer of life. We will need Benedetto Croce and George Santayana in the field of philosophical thought. Since the age is one of rapid technological development, Thorstein Veblen will be necessary. In the field of the law there are Louis Brandeis and Harlan Stone; the former once submitted a brief of the facts alone; the latter, along with Justice Holmes, is a master of the common law.

We are not concerned here with the opinions which these men held. They are not “just like” Justice Holmes. Their natures alone interest us.

Henry James was a boyhood friend of Justice Holmes. The quality in James that brings him close to Justice Holmes is that aforementioned power to select from reality what is pertinent. *The American Scene* is an example. James wrote it after revisiting America only a few months. It is the power of factual notice and factual co-relation at its best. When James summed up the novelist’s art, he wrote that the writer draws from experience, that experience is immense sensibility, a power to catch the whole from the pattern. James has a greater sensibility than Justice Holmes. James’ is the poet’s sensibility. Reason may play a larger part with Justice Holmes. The approach to life over experience is, however, there. We find in the opinions a statement of the facts which lead to the conclusion; the conclusion and then the reasoning. Holmes tells us an ounce of experience is worth a volume of logic. James is the meditative observer, he does not need to act; Justice Holmes is a participant in the passing scene of life. Both of these men are teachers; their zeal spent itself in exposition.

Chief Justice Stone, a teacher and jurist, said: “Holmes was one of the rare judges who never wrote anything that did not have its value to the student of the law.”<sup>3</sup> He spoke of “the work of an artist like Holmes.” Those prior quotations that I have used in my definitions of a “common quality” are from Santayana. There are some lines in *Reason In Art* which throw a light on Chief Justice Stone’s comment and bring to us a quality that was common to Santayana and Justice Holmes: “A real thing, when all its pertinent

<sup>2</sup> Santayana, *Reason in Art*. Charles Scribner’s Sons, New York.

<sup>3</sup> Letter from Chief Justice Stone to the author, March 24, 1939, by permission of Mrs. Harlan Fisk Stone.

natural associates are discerned, touches wonder, pathos, and beauty on every side; the rational poet is one who, without feigning anything unreal, perceives these momentous ties, and presents his subject loaded with its whole fate, missing no source of worth which is in it, no ideal influence which it may have."<sup>4</sup> Justice Holmes could see "these momentous ties." He described this quality, in the terms of his own art, as the contemplative vision of the lawyer.

Benedetto Croce, in reflecting upon the relation between history and liberty, gave a practical result to this contemplative vision, marking the distinction between knowing man and knowing how to manage men: "The poet, the philosopher, and the historian really know man, and from what they have seen in moments of inspiration and in the peace of meditation, those ideals are born which warm the heart and point the way of action."<sup>5</sup>

There is another man working in the period whom we must consider, Thorstein Veblen. In an early Massachusetts dissent by Justice Holmes we find this: "It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination. . . ."<sup>6</sup> There we find objectivity of mind, the power to see things as they are. We find many examples of the power as Justice Holmes considers in his judicial work the economic expansion that marks the period. Thorstein Veblen had a vast knowledge of social and economic evolution. His special knowledge extended into the fields and sources from which the technology developed. His greatest insight was perhaps in the possible productivity of the machine and the unbounded possibilities that science possessed. To him science was alive. In his thought he related the handicraft era where nothing appeared in the product of the handicraft but what was present in the skill of the worker to the new technology where nothing appeared in the effect but what was contained in the cause. He abandoned abstract reasoning; he sought to understand the changes that science was creating by the observation of causes. There is in Justice Holmes the factual approach which Veblen used; there is the relation of effects to causes. Both men rested on the instinct of workmanship and impersonal usefulness. There is a distinction, however, between Veblen and Justice Holmes. Veblen is a man with a cause. He is the advocate of the industrial arts.

<sup>4</sup> Santayana, *Reason in Art*. Charles Scribner's Sons, New York.

<sup>5</sup> Croce, *History as the Story of Liberty*, translated from the Italian by Sylvia Sprigge, George Allen & Unwin, Ltd., London.

<sup>6</sup> *Vegehlahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077, 1081 (1896) (dissent).

The two men are different in their natures in that one is in a cause, the other is outside it. "Only the free divine the laws. . . . The causeless only know the cause."

The comparisons and contrasts with men who were working in varied and different fields leaves us with the impression of a quality of mind that was something more than objective. We may say that there was "mastery to see things as they are." Now we turn to consider Justice Holmes' work as a jurist. We turn to signification: "Idealization, to select from this reality what is pertinent." Justice Holmes' skill in the law was complete. We need only refer back to Chief Justice Stone's comment that all might learn from anything which Justice Holmes wrote. I have analyzed the professional part of the work elsewhere. Now there is a different task: namely, to find the spirit which animated the work.

The spirit that I find there leads me to a comparison with William Blake. S. Foster Damon once summed up Blake's thought: "To acquire Truth, one must cast out Error. Error consists of all Illusions, Prohibitions, and Negations, which of their very nature have no real existence. A Contrary, as Blake warns us, is not a Negation, but a positive thing. Contraries must be reconciled; for if one Contrary is rejected, the domination of its fellow ensues, and Truth is divided."<sup>7</sup> The reconciliation of contradictories is the mission of the law and the basis of jurisprudence. Chief Justice White makes the relation clear in the memorial to Justice Lamar: ". . . society . . . which in its very essence embodies the complex resultants of all the activities of human life, giving rise to the corresponding duty to harmonize and adjust them to each other so that they all might live and develop for the blessing and advancement of mankind."<sup>8</sup>

The point that interests us in respect to Justice Holmes is the application which he made of this thought in his judicial work. We will be able to find the reflection of this thought best if we first look at the opinions for examples of the thought in its larger application; then we may turn to discussions of the economic life of our country and finally to the relations between the individual and the state.

We will take first, therefore, some excerpts from his opinions:

It constantly is necessary to reconcile and to adjust different constitutional principles, each of which would be entitled to

<sup>7</sup> Damon, William Blake, His Philosophy and Symbols. Constable & Co., Ltd., London.

<sup>8</sup> 241 U.S. XVI, XVIII (1916).

possession of the disputed ground but for the presence of the others, as we already have said that it is necessary to reconcile and to adjust different principles of the common law.<sup>9</sup>

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of the principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.<sup>10</sup>

When, as in this matter, the Constitution takes from the States only a portion of their otherwise absolute control, there may be expected difficulties in drawing the dividing line, because where it shall be put is a question of more or less. The trouble is inherent in the situation, but it is the same in kind that meets us everywhere else in the law.<sup>11</sup>

I do not think we need trouble ourselves with the thought that my view depends upon differences of degree. The whole law does so as soon as it is civilized . . . and between the variations according to distance that I suppose to exist and the simple universality of the rules in the Twelve Tables or the *Leges Barbarorum*, there lies the culture of two thousand years.<sup>12</sup>

These sentences are far beyond subtlety and expediency. They reflect the law as a spirit of reconciliation. Thorstein Veblen referred to "those quasi-scientific articles of metaphysics that lie at the root of the legal system." These sentences which I have taken from Holmes' opinions rise above technical distinctions to a reconciling and understanding wisdom and we find there a reflection of the law of nations of the Eighteenth Century: "Less of the juridical, in the strict sense of the word, than a moral aspiring after an era of wisdom, of justice, of humanity . . . a religion almost, which at certain times was capable of being transformed into ecstasy, into a courage, and into prophetic vision. . . ."<sup>13</sup> Here also is Goethe's "principle of reasonable order that we hear within ourselves and could impress as the seal of our power upon everything that we touch."

Blake's thought, the reconciliation of contradictories, is also present in Justice Holmes' discussions of the economic processes of our country. He lifts us there from conflict to reconciliation. There we find more than objectiveness in the presence of the emerging

<sup>9</sup> *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908).

<sup>10</sup> *Id.* at 355.

<sup>11</sup> *Engel v. O'Malley*, 219 U.S. 128, 138 (1911).

<sup>12</sup> *Le Roy Fibre Co. v. Chicago Mil. & St. P. Ry.*, 232 U.S. 340, 354 (1914) (concurring opinion).

<sup>13</sup> Ferrero, *The Reconstruction of Europe, Talleyrand and the Congress of Vienna, 1814-1815* (1941). G. P. Putnam's Sons.

problems; there we find the understanding of the factors which are at work. Early he pointed out that competition meant combination; later he noted the rising tide of the police power. The Blake thought is present in the opinion where Justice Holmes wrote that the economic life of the country could not proceed as a war of every man against every other man;<sup>14</sup> it is present in the calm belief in the capacity of our people for self-discipline that underlies all of the opinions; it is present in those opinions which defended the free exchange of knowledge in affairs. Santayana stood apart from the field of economics, yet he stated the philosophic basis of economic success. “. . . [A]nd it is no accident that the Anglo-Saxon race excels in commerce and in the commercial as distinguished from the artistic side of industry, and that having policed itself successfully it is beginning to police the world at large. It is all an eminence in temper, good-will, reliability, accommodation.”<sup>15</sup> Walter Bagehot stated the difference that “accommodation” makes between brisk trade and stagnant trade: “Our current political economy does not sufficiently take account of *time* as an element in trade operations; but as soon as the division of labor has once established itself in the community, two principles at once begin to be important, of which time is the very essence. These are:

*First:* That as goods are produced to be exchanged, it is good that they should be exchanged as quickly as possible.

*Second:* That as every producer is mainly occupied in producing what others want, and not what he wants himself, it is desirable that he should always be able to find, without effort, without delay, and without uncertainty, others who want what he can produce.<sup>16</sup>

The reconciliation of the contradictories which arise between the individual and the state presented a different task. Justice Holmes' approach to it is therefore different. Justice Holmes rests thereon on unperturbed, independent, enlightened judiciary acting in the tradition of a clear doctrine of justice. Justice Holmes knew his history; he knew the story of the Roman Republic. In these opinions, there is calm confidence in the people and in the Government: “. . . the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is

<sup>14</sup> Northern Securities Co. v. United States, 193 U.S. 197 (1904) (dissent).

<sup>15</sup> Santayana, *Character and Opinion in the United States*. Charles Scribner's Sons, New York.

<sup>16</sup> Bagehot, *Lombard Street, A Description of the Money Market*, in *The Works of Walter Bagehot*, assembled by James B. Batterson, The Travelers Ins. Co.

the only ground upon which their wishes safely can be carried out."<sup>17</sup> Emerson had written in *The Sovereignty of Ethics*: "The idea of right exists in the human mind and lays itself out in the equilibrium of nature, in the equalities and periods of our system, in the level of the seas, in the action and reaction of forces."<sup>18</sup> Emerson tells us that this was an early discovery of the mind; he refers to it as a doctrine of unspeakable comfort.

Estimates can never reflect Justice Holmes. There is a residuum that is beyond reflective appreciation. It rests in the relation which he had to us, to our law, to our Government. He is somebody in and of himself. That is perhaps why all attempts to classify him fail. I have singled out of the residuum the application of the spirit of reconciliation in the law, which means in life. Our democracy, our people are young. They are, therefore, capable of development and growth. In the maturer forms which that growth may reach the law may emerge as something far beyond the litigious. If so, the memory of Justice Holmes will remain in that world which will at times stir the ashes of his work and find a glow.

<sup>17</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissent).

<sup>18</sup> Emerson, *The Sovereignty of Ethics*, in *The Complete Works of Ralph Waldo Emerson*. Houghton, Mifflin, Boston.